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THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2022] IECA 245

Court of Appeal Record No 2021/251

Ní Raifeartaigh J.

Collins J.

Pilkington J.

BETWEEN

CAVE PROJECTS LIMITED

Plaintiff/Respondent

AND

PETER GILHOOLEY, JOHN KELLY, JOHN MORONEY,

RORY O'BRIEN AND JOSEPH O'HARA

Defendants

JUDGMENT of Mr Justice Maurice Collins delivered on 28 October 2022

PRELIMINARY

1. This is the appeal of the Second Defendant (hereafter "*Mr Kelly*") from the decision of the High Court (Meenan J) given on 20 January 2021 ([2021] IEHC 181) refusing his application to dismiss the proceedings against him for want of prosecution and delay on the part of the Plaintiff/Respondent (hereafter "*Cave*").

2. The appeal was heard in late June 2022. At that stage, the action had been listed for hearing for 6 days, commencing on the 29 November 2022. There was therefore an obvious urgency about the determination of the appeal. The parties needed to know whether or not the trial would be proceeding so that the necessary preparations for it could be undertaken with confidence.

3. In the event, by the conclusion of the appeal hearing the Court had reached a clear view that the appeal should be dismissed. In the circumstances, it communicated that position to the parties, indicating that the Court would give its reasons later. This judgment sets out my reasons for the decision to dismiss the appeal.

THE PROCEEDINGS

4. The proceedings involve a claim for the recovery of a liquidated debt arising from facilities advanced by the Bank of Ireland (hereinafter *"the Bank*"**)** to the Defendants (who were in partnership for the purpose of acquiring land) pursuant to a number of letters of loan offer issued between 2005 and 2007. The sums advanced by the Bank became repayable on demand after the 31 January 2008. The Bank made a demand for repayment on the 5 January 2011 and, the debt not having been repaid, it commenced proceedings by way of summary summons on the 24 February 2011, seeking judgment in the sum of €11,785,543. Subsequently National Asset Loan Management Limited (NALM) acquired the facilities and the associated security from the Bank pursuant to the National Asset Management Agency Act 2009. In January 2013, Cave acquired the loans and associated security from NALM.

5. Cave now pursues Mr Kelly for payment. It also sues the Fifth Defendant (*"Mr O' Hara*") but he is not a party to this appeal. The proceedings as against the First, Third and Fourth Defendants have been compromised.

6. Given the nature of the application at issue, it is necessary to set out in some detail the chronology of the litigation prior to the issue of the motion. The events range from 2011 to 2019, when Mr Kelly's motion to dismiss issued.

2011 - On 5 January 2011, the Bank demanded repayment of the debt due under the loan facilities. The proceedings were issued by summary summons on 24 February

2011, less than two months later. An appearance was entered by Mr Kelly on 28 April 2011. On 9 September 2011, the Bank issued a motion for summary judgment. On 22 November 2011, Mr Kelly and the Fifth Defendant secured an adjournment to file replying affidavits. On 7 December 2011, NALM acquired the facilities from the Bank.

2012 - From January to March 2012, the motion for summary judgment was adjourned to enable Mr Kelly to file a replying affidavit. His affidavit was sworn on 15 May 2012. From May 2012 to December 2012, the proceedings were adjourned as NALM were engaged in the sale of the facilities.

2013 - On 22 January 2013 Cave purchased the facilities from NALM, and on 6 February 2013, it was substituted as plaintiff in the summary proceedings. In March 2013, the motion was adjourned to allow Cave to file a replying affidavit. On 27 May 2013, the proceedings were discontinued against the First, Third and Fourth Defendants. There were adjournments in May - June 2013 to allow further affidavits to be filed.

On 21 July 2013, Mr O' Hara issued a motion for security for costs. That was listed for hearing on 26 July 2013 but was not reached in the list that day and was adjourned to 12 December 2013. Mr Kelly was given liberty to issue a similar motion but did not do so. Cave's motion for judgment against Mr Kelly was listed on 11 November 2013 and on that date, he applied to adjourn the motion until the resolution of Mr O Hara's security for costs application. On 2 December 2013 Mr Kelly filed a further

affidavit raising new grounds in defence of the claim against him. On 12 December 2013 Mr O' Hara's motion for security for costs was compromised. It was only after this, on the 6 January 2014, that Mr Kelly issued his own motion for security for costs.

2014 - As noted above, on 6 January 2014 Mr Kelly issued a motion for security for costs. On the 28 April 2014, his application was refused. The summary judgment proceedings then proceeded to hearing before Noonan J on the 14 November 2014.

2015 - On 16 January 2015 Noonan J gave judgment on the motion for summary judgment. For the reasons set out in some detail in that judgment ([2015] IEHC 14), the motion was refused and the proceedings were remitted for plenary hearing. Noonan J observed in his judgment that there was a multiplicity of issues potentially arising for determination at the hearing, though he also noted that there was little dispute on the facts and that most of the debate had centred on questions of law (at para 30).

7. One of the issues raised by Mr Kelly in the course of the summary judgment application was Cave's settlement with the First, Third and Fourth Defendants. In an affidavit sworn in support of Cave's motion by its solicitor, Mr Thomas Kelly, on 29 November 2013, he gave the following information about the settlement:

> *"I further say with regard to the settlement with Mr. Gilhooley, Mr. O'Brien, and Mr. Moroney that Cave Projects Limited settled with them for a monetary*

payment of €100,000 each. I say as part of the settlement those Borrowers also agreed to transfer their interest in the following lands into the name of Cave Projects Limited:- [Mr. Kelly then refers to ten identified folios of land] I say that as part of the agreement to discontinue proceedings against those three Borrowers Cave Projects Limited reserved Its right to continue proceedings against the other two Borrowers. I beg to refer to the settlement agreements upon which marked with the letter 'K1' I have endorsed by named prior to the swearing hereof."

The documents exhibited at "*K1*" set out terms of the settlement entered into by Cave with the relevant Defendants.

8. Cave initially brought an appeal against the refusal of summary judgment but that appeal was withdrawn in March 2015. On the 29 May 2015, Cave delivered a Statement of Claim. On 3 June 2015 Mr Kelly served a notice for particulars, which went unanswered for a considerable period (replies were only delivered in November 2018). On 19 November 2015, Mr Kelly delivered a Defence and Counterclaim.

9. Mr Kelly's Defence and Counterclaim requires proof of the loans and their terms. It does not admit any breach or default by Mr Kelly in observing the terms of any facility letters and pleads that he was a stranger to the allegation that the Defendants had failed to pay interest when due and denies that he was guilty of any event of default as alleged. It denies that the Bank was entitled to issue a demand to Mr Kelly. It pleads that in February 2008 the Bank granted charges to the Central Bank of

Ireland over all of its "*Eligible Securities*" as part of a process of recapitalisation and reference is also made to alleged arrangements entered by the Bank with the European Central Bank. As a result - so it is said - all loans advanced by the Bank (including, it appears, the loans to the Defendants) were vested in the Central Bank as of December 2011 and thus were not capable of being acquired by NALM. As for the transfer from NALM to Cave, Mr Kelly pleads that he is a stranger to any such transfer and says that he was never given notice of it. Further light is thrown on Mr Kelly's defence by the pleading in his counterclaim, from which it appears that he disputes (a) that he had any obligation other than *qua* partner; (b) that he had any obligation that allowed recourse to property held by him in his *"personal capacity"* and/or (c) that any such obligation had been transferred to/or acquired by Cave. The counterclaim goes on to assert that, to the extent that any facility entered into between the Bank and Mr Kelly permitted the Bank (and now permits Cave) to have recourse to all of Mr Kelly's assets (as opposed to the assets held by the partnership) it is vitiated by common/mutual/unilateral mistake. It is also said that the Bank (and Cave) is estopped from contending that its recourse to Mr Kelly is not so limited. The counterclaim goes on to plead that the Bank had represented to the Defendants that no recourse would be had to assets other than those referred to in the facility letters or in the alternative had failed to warn them its recourse was not so limited. The relief sought on the counterclaim include a declaration that "*the Plaintiff is limited in its recourse",* rectification if necessary of the facility letters and damages.

10. Continuing with the timeline of the litigation:

2016 – In October/November 2016 Cave delivered a reply to both Mr Kelly's Defence and Counterclaim and the Defence and Counterclaim that had been delivered by Mr O' Hara, together with a notice for particulars arising out of each defence.

Mr Kelly did not reply to Cave's notice for particulars until February 2022. The notice for particulars was directed to the Bank's alleged communications with Mr Kelly regarding the terms of the facilities. In his replies of 4 February 2022, Mr Kelly made it clear that the Bank had not addressed *any* communications to him; all such communications had been addressed to the Third Defendant, by persons in the Bank that Mr Kelly was not in a position to identify. It was (so Mr Kelly said) the Third Defendant who had told him that the facilities "*would be satisfied by recourse to the assets in question."*

It may be noted that the first period of delay (or, as he characterised it, a period of "inactivity") identified by the High Court Judge was the period between November 2015 and October 2016.

On 7 November 2016, Cave served notice of trial. On 14 November 2016, Mr Kelly's solicitors objected to service of a notice of trial because of the absence of a replies to particulars and discovery, and on 15 November 2016, Mr Kelly issued a motion to compel replies to particulars, which resulted in an order extending the time for delivery of replies to 5 December 2016.

2017 - In February 2017 Cave sought an advice on proofs from counsel and in April 2017 was advised by counsel that a number of witnesses previously employed by the Bank would be required to give evidence at trial. Cave was unable to locate one particular witness (a former officer of the Bank) until November 2018.

The High Court Judge identified a second period of delay as that between April 2017 and February 2018.

2018 - On 26 March 2018 Cave served a notice of intention to proceed. On 2 November 2018, its solicitor served replies to particulars raised by Mr Kelly and requested a reply to the notice for particulars that had been served by Cave in October 2016.

The High Court Judge identified a third period of delay as that between November 2018 and February 2019.

2019- On 19 February 2019, solicitors for Cave wrote to solicitors for the appellant seeking replies to notice for particulars within 14 days, and on 13 March 2019 issued a motion to compel replies. On the same date, the 13 March 2019, Mr Kelly issued the motion to dismiss for want of prosecution/delay.

11. In the affidavits grounding his motion, Mr Kelly identified a number of grounds of prejudice said to have arisen by reason of Cave's delay in prosecuting its claim against him. One was the stress that the proceedings had caused him. Mr Kelly also

said that his financial position was wholly different to that which it had been and complained that the long-drawn out nature of the proceedings had rendered the proceedings "*much more difficult and expensive to deal with."* He complained that many of the employees of NAMA were no longer with the agency and that, even if they could be located, the passage of time meant that "*their memory of events after such a long period of time will be impugned*". He also referred to the fact that, if the proceedings were to go ahead, discovery would have to be made by Cave (discovery has since been made by Cave insofar as it has provided to Mr Kelly the discovery which it agreed to make to Mr O' Hara; there appear to be no outstanding issues regarding discovery as between Mr Kelly and Cave). In addition to these complaints, Mr Kelly articulated the following complaint arising from the fact that Cave had settled with the First, Third and Fourth Defendants:

> *" 19. It appears that my co-defendants (and in particular the First, Third and Fourth named Defendants) have been offered settlement terms. What these terms are, I am not in a position to say at the time of swearing. I have never been told the terms and have not been offered any explanation as to why matters were settled with them without any like offer being made either to myself or the Fifth-named Defendant. Prior to this settlement, the co-defendants would have had to give evidence and be available for cross-examination. That is no longer the case since, if the co-defendants are to give evidence, I will at the very least have to call them and forfeit the right to cross-examine them."* (my emphasis)

12. The motion proceeded to hearing in the High Court on 22 September 2020. Cave's motion to compel replies to particulars was listed at the same time. Before saying anything further about that hearing, it should be noted that Mr O' Hara did not bring any similar motion in respect of the claim against him. He had, however, instituted proceedings to partition lands charged to Cave as security for the loans, the legal title to which Mr O' Hara and Mr Kelly held in partnership. As part of those partition proceedings, Mr O' Hara asserted that the loan facilities and related security were void. As Mr Thomas Kelly observed in an affidavit sworn by him on Cave's behalf in opposition to the application, the partition proceedings required the lawfulness of the loan facilities to be determined in any event and (so he suggested) it was in Mr Kelly's interest that that issue would be determined in proceedings to which he was a party.

THE HIGH COURT HEARING

13. At the hearing on 22 September 2022 counsel for Mr Kelly, Mr Ó Floinn SC, made submissions in support of the motion. In accordance with the jurisprudence, he submitted that there had been inordinate and inexcusable delay and argued that the balance of justice favoured the dismissal of the claim against his client. In that context he referred to what had been stated by his client on affidavit. Asked by the Judge whether Mr Kelly had identified any witnesses who would have been available back in 2017/2018 but who were no longer available, Mr Ó Floinn indicated that two categories of witness had been identified, namely officers of the Bank and of NALM. Witnesses from the Bank would be required, counsel explained, because Mr Kelly

was making the case that the loans were non-recourse. Witnesses from NALM were necessary because Mr Kelly was saying that the transfer to NALM was "*deficient*". Asked by the Judge whether the transfer issue was not exclusively documentary, Mr Ó Floinn indicated that it was not (in the course of reply, Mr Ó Floinn referred to the probability that a certificate would be produced pursuant to section 108 of the National Asset Management Agency Act 2009 to prove the transfer and complained that he would have to forfeit the right to cross-examine the officer who signed any such certificate). Nothing further was said about the identity or availability of such witnesses or the steps (if any) that Mr Kelly had taken to secure their attendance at trial. Mr Ó Floinn also referred to the settlement with the other Defendants, repeating Mr Kelly's complaint that, if they were to give evidence, they would have to be called by Mr Kelly and would not be available for cross-examination. Counsel did not identify any conflict or dispute as between Mr Kelly and the other Defendants.

14. Counsel for Cave, Mr Delaney SC, then commenced his submissions. He made reference to what he characterised as Mr Kelly's lack of candour in his application. Mr Kelly had, he said, failed to refer to the fact that he himself had been in default in failing to reply to Cave's notice for particulars dating from October 2016 which had resulted in Cave having to issue a motion to compel a reply. A second and "*more concerning"* issue, counsel went on, was that Mr Kelly had asserted ignorance of the settlement between Cave and the First, Third and Fourth Defendants. Counsel brought the Judge to the relevant averments in the affidavits of Mr Kelly and of Thomas Kelly which have been set out above and suggested that Mr Kelly's assertions of ignorance as regards the terms of the settlement could only be

characterised as deliberately misleading and that Mr Kelly had not come to court with clean hands.

15. Meenan J was clearly exercised by Mr Kelly's averment and asked whether he could be produced so as to explain it. Mr Ó Floinn protested at the lack of any prior notice that any point was going to be taken about his client's affidavit, suggesting that it ought at least have been flagged in an affidavit, and also questioned how it was relevant to the issues in the motion. He did, however, accept that there was a matter requiring explanation and ultimately indicated that (as he put it) he would not "*stand in the way*" of the court requiring his client to give evidence, though maintaining his protest "*in very strong terms*" at the manner in which events had unfolded. The Judge then indicated that he would rise in order to give Mr Kelly an opportunity to obtain counsel's advice.

16. When the hearing resumed, Mr Kelly was sworn in. The Judge explained briefly why he had been called and also advised him that he did not have to answer any of the questions he was asked, referring to his right not to incriminate himself. The Judge then asked Mr Kelly to explain his averment that he was unaware of the terms of the settlement in circumstances where those terms had been explained and exhibited in an earlier affidavit. He again made it clear that Mr Kelly was not obliged to reply. Mr Kelly indicated that he wished to address the question and expressed his thanks for being given the opportunity to do so. He then explained that he had thought very carefully and that he was "*still confused*" as to the overall settlement because he did not know the value of the lands referred to in the settlements because they had

fluctuated since the proceedings had been initiated by the Bank. It was because he did not know the value of the assets that he could honestly say that he did not know exactly what the settlement was with Cave. Mr Kelly apologised if the court felt misled in any way. In the course of his brief evidence, Mr Kelly also made the point that he had never offered the same settlement terms and suggested that he had never been given any "*proof*" of those terms (apparently overlooking the fact that the terms had been exhibited by Thomas Kelly in his 2013 affidavit). He also asked why Cave had not raised any issue about his affidavit and said that he was "*taken aback*" that the matter had been raised as it had. Neither Mr Delaney nor Mr Ó Floinn questioned Mr Kelly (the Judge did ask Mr Delaney whether he had questions for Mr Kelly but before he had an opportunity to indicate his position Mr Ó Floinn intervened to object to any cross-examination of his client and the issue was not pursued).

17. Mr Delaney then resumed his submissions. He took issue with a suggestion made by Mr Ó Floinn that the cause of action had accrued in 2008, submitted that the cause of action had only accrued when the Bank had demanded repayment in January 2011. He acknowledged that there had been some periods of delay but suggested that they did not involve the continuous and lengthy delays that generally characterised cases which had been dismissed. Addressing the balance of justice, he emphasised that the claim was for repayment of facilities of almost €12 million which had been advanced to a partnership of which Mr Kelly was a member and suggested that essential fact was not in dispute. He noted that the non-recourse defence had not been relied on in defence of the summary judgment application. He referred to the partition proceedings and observed that those proceedings would involve the determination of

whether Mr Kelly (and Mr O' Hara) were indebted to Cave and so the issue would have to be determined in any event. The proceedings were, he said, very close to being ready for hearing (in fact it transpired that a request for discovery was outstanding but that has since been addressed).

HIGH COURT JUDGMENT

18. In his judgment of 20 January 2021, the Judge began by setting out a chronology of events relating to the proceedings. He then identified three periods of inactivity/delay on the part of Cave: (1) November 2015 - October 2016; (2) April 2017 - February 2018 and ("*to a lesser extent*") (3) November 2018 - February 2019

19. The Judge identified the applicable framework of analysis as that set out in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459 ("*Primor*") namely, whether:-

> (1) There was an inordinate delay
>
> (2) If there was an inordinate delay, whether such delay was excusable; and
>
> (3) If the delay was inordinate and inexcusable, whether, on the balance of justice, the proceedings ought to be dismissed.

20. The Judge also referred to a passage from *Anglo Irish Beef Processors v. Montgomery* [2002] 3 IR 510, where Fennelly J. stated that the burden was on a defendant/applicant to show inordinate and inexcusable delay, but that the court should engage in a "*global appreciation of the interests of justice*" and try to balance all the considerations in order to reach the central decision as to what was just.

21. The Judge accepted that the delay in prosecuting the proceedings was inordinate. However, following a detailed analysis of the periods of delay identified by him,

the Judge concluded that it was either excusable or acquiesced in by Mr Kelly (Judgment, para 12). He nevertheless went on to consider the balance of justice. Under that heading the Judge referred to the affidavit evidence regarding Cave's settlement with the First, Third and Fourth Defendants and expressed the view that Mr Kelly's statement that he was unaware of the terms of settlement was untruthful and that the explanation given for it in his evidence fell "*well short of being credible*" (Judgment, para 16). Given that Mr Kelly had been untruthful in his grounding affidavit, the balance of justice could not lie in granting the reliefs sought (Judgment, para 16).

APPEAL

22. Mr Kelly appeals from that Judgment. He says that the Judge misapplied the relevant principles and did not have sufficient regard to the extent of the delay involved and/or the balance of justice. A number of Mr Kelly's grounds of appeal are directed to the Judge's findings about his credibility. It is said that those findings were made in error and that they were irrelevant to the application in any event. Complaint is also made about the procedures followed by the Judge. The grounds of appeal do not squarely challenge the Judge's entitlement to direct that Mr Kelly be called to give oral evidence.

23. Mr Kelly's written submissions advance a series of criticisms of the Judge's analysis of whether the delay was inordinate (it is said, in essence, that the period of delay is much greater than was identified by the Judge) and whether it was excusable (it is said that the Judge erred in considering the question of acquiescence in that context and that acquiescence is relevant only to the balance of justice; it is also said that the Judge erred in any event in finding that Mr Kelly had acquiesced in the delay). As regards the "*balance of convenience*", reference is made to *Anglo-Irish Beef Processors v Montgomery* as authority for the proposition that, where there has been inordinate and inexcusable delay on the part of a plaintiff, "*weighty factors"* would be required before the plaintiff would be absolved of such delay. The Judge, it is said, had failed to carry out "*a global appreciation of the interests of justice*" and, in particular, had failed to evaluate the prejudice that Mr Kelly would suffer in the event that the proceedings were permitted to proceed. Instead, the Judge had focussed on

one aspect only, the "*untruthfulness*" of Mr Kelly's affidavit. As to that finding, it is noted that the Rules provide that motions are to be determined on affidavit and that no application had been made by Cave to cross-examine Mr Kelly. He had not been tendered but had instead been summoned by the Judge. Even if the issue of Mr Kelly's untruthfulness was determinative of the motion (and in that context Mr Kelly reiterated that the balance of justice involves the evaluation of a number of factors), it would (so it is said) have been sufficient for the Court to have noted the "*divergence*" and to have refused the application, without proceeding to make findings in an interlocutory application, without evidence being led or re-examined.

24. Cave cross-appeals from the Judge's finding of inordinate delay. It also seeks to uphold the Judge's decision on additional grounds, namely that Mr Kelly had caused significant delay in the progression of the proceedings and that no material prejudice had been caused to him by reason of any delay on the part of Cave, Cave also relies on the fact that its claim is for a substantial liquidated sum on foot of loan facilities provided to the Defendants. In its written submissions, it takes issue with Mr Kelly's criticisms of the Judge's analysis and conclusions. It suggests that Mr Kelly has been guilty of a "*fundamental error*" in suggesting that the cause of action had accrued in 2008.[1] As to oral evidence of Mr Kelly and the finding of untruthfulness, reference is made to *Yianni v Yianni* [1966] 1 WLR 120 as authority for the principle that the High Court has power to call a witness in matters relating to contempt and it is said

[1] The facility letters were not produced in evidence on the motion but, during the hearing of the appeal, Mr McGarry SC (for Mr Kelly) expressed his understanding that the facilities became payable only upon demand. If that is so, then the Bank's cause of action only accrued upon demand: *Bank of Ireland v O' Keefe* [1987] IR 47

that, by analogy, that power is exercisable where it appeared that a false averment has been made in an affidavit. Cave says that Mr Kelly's deliberately untruthful averment was clearly material in considering the balance of justice, citing *Oboh v Minister for Justice* [2011] IEHC 102. Even if not determinative, Cave says that Mr Kelly's untruthful evidence was a relevant factor and that there were many other additional factors pointing to the balance of justice being in favour of refusing the relief. Finally, Cave notes the proceedings have now been listed for hearing and says that is a relevant factor in considering whether the balance of justice would be "*unfairly tipped*" against it by the dismissal of the proceedings, citing *Power v Creed* [2018] IEHC 688.

25. Mr McGarry SC argued the appeal on behalf of Mr Kelly. He focussed on two points. First, citing *Yianni v Yianni* as well as a decision of this Court, *AMQ v KJ (otherwise KA)* [2018] IECA 97, Mr McGarry submitted that the Judge was not entitled to direct Mr Kelly's attendance to give evidence. The decision to call Mr Kelly, and what happened afterwards, was, Mr McGarry submitted, fundamentally unfair and had infected the Judge's whole approach to, and assessment, of his client's application. Mr McGarry also expressed concern about the potential prejudicial effect of the Judge's findings on the trial of the proceedings and the trial judge's assessment of the credibility of Mr Kelly (Mr McGarry made it clear that there could be no objection to Mr Kelly being cross-examined on the affidavit he had sworn – his concern was about the finding made by the Judge).

26. Mr McGarry's criticism was directed to the Judge's decision to call Mr Kelly. He accepted that if Mr Kelly had sworn a misleading affidavit, that was material, and potentially significant, in assessing the balance of justice. He also accepted that, on its face, what Mr Kelly had said in his affidavit was contradicted by the earlier Thomas Kelly affidavit; indeed, in the course of his submissions Mr McGarry appeared to accept that the Judge could properly have made an adverse finding on the basis of the affidavits alone; this was in response to a question from the Court as to whether, in the event that the Judge had made a finding of untruthfulness/lack of candour *without* giving Mr Kelly an opportunity to explain himself in the witness box, that finding might have been impugned on the basis that it was unfair. In any event, he said, it was open to Cave to apply to cross-examine his client pursuant to Order 42 RSC but it had not done so.

27. The second principal point made by Mr McGarry was that the Judge had erred in considering the conduct of Mr Kelly, and in particular whether he had contributed to and/or acquiesced in the delay, in assessing whether the delay was excusable. The authorities made it clear, he said, that such issues ought to be considered in the court's assessment of the balance of justice. As to what was the period of inordinate and inexcusable delay here, Mr McGarry identified the period of November 2016 – November 2018, though he accepted that some parts of that period of delay were excusable. Mr McGarry fairly acknowledged that such a period of delay was "*at the lower end"* and also accepted that that fact was relevant when one came to look at the balance of justice. Asked about the prejudice relied on by Mr Kelly, Mr McGarry referred to general prejudice and acknowledged that it was not suggested that there

was a problem with any particular witness. While the prejudice could not be characterised as serious or significant, it met the threshold of "*marginal*" or "*moderate*" prejudice identified in cases such as *Millerick v Minister for Finance* [2016] IECA 206.

28. Mr McGarry did not go so far as to invite the Court to dismiss the proceedings. Rather, he asked us to set aside the judgment and order of the High Court and to remit the dismissal application to the trial of the action in November. Mr McGarry did not immediately seek to identify what purpose would be served by such an order but it was the subject of discussion during his reply and will be referred to further in that context. Mr McGarry also made it clear that, in the event that the trial judge decided to dismiss Cave's claim against Mr Kelly, he would withdraw his counterclaim against Cave.

29. In response, Mr Delaney submitted that the Judge's conclusion that there was no inordinate and inexcusable delay was correct, though he accepted that, in addressing that issue, the Judge had had regard to some factors that ought properly have been addressed in considering the wider balance of justice. He addressed in some detail the periods of delay identified by the Judge, referring in each case to factors which, he argued, excused the delay and/or pointed to Mr Kelly as being the person responsible for it. At worst, he said, there was a period of no more than18 months that was not explained or excused and that limited period was a factor to be considered in the balance of justice, as Mr McGarry had accepted. There were, Mr Delaney said, multiple factors weighing against the dismissal of the proceedings.

Specific factors addressed by him were (i) Mr Kelly's own conduct (including the delay arising from the manner in which he had sought security for costs and the "*culpable delay*" on his part in replying to Cave's notice for particulars from October 2015 as well as Mr Kelly's belated reliance on the non-recourse defence); (ii) the absence of any concrete prejudice (he characterised the case being made about prejudice as "*hollow*"); (iii) the nature of the claim (it was, he said, unusual that debt proceedings would be dismissed on grounds of delay and it was a relevant factor that it had been accepted in the High Court that Mr Kelly had received part of the facilities provided by the Bank, even though he had declined to identify how much he had received)[2] and (iv) the fact that the proceedings were now ready for hearing and were in fact listed for hearing in November.

30. As regards the Judge's decision to direct the calling of Mr Kelly, Mr Delaney made a number of points. First, he said that the Judge was entitled to call Mr Kelly; the court had power to do so "*in order to find out the truth of the matter*", citing the observations of Cross J in *Yianni* at page 124 D-E. Mr Delaney noted that no argument had been made to the High Court that it had no power to call Mr Kelly. The Judge had given Mr Kelly an opportunity to get legal advice (though, for whatever reason, it seemed that he had not got any advice). The possibility of an adjournment could have been canvassed but it was not. The relevant averment by Mr Kelly was clearly intended to influence the court's view of the balance of justice. Mr Delaney acknowledged that the High Court had given decisive weight to this factor and said that it did not have to go that far. Indeed, Mr Delaney submitted, even if any lack of

[2] Transcript of the High Court hearing, at pages 29-30.

candour was taken out of the case, the balance of justice clearly favoured allowing Cave's claim to proceed.

31. Mr Delaney accepted that Cave could have sought to cross-examine Mr Kelly on his affidavit but frankly acknowledged that the discrepancy between his averment and the earlier affidavit sworn by Mr Thomas Kelly had not been spotted "*until late in the day*" and if an application for leave to cross-examine had been made at that stage it could have impacted on the hearing of the motion to dismiss (which had already been delayed because of the Covid-19 pandemic).

32. Mr Delaney opposed any remittal of Mr Kelly's motion to the hearing of the action. Even if this Court had any concern about the High Court's finding that Mr Kelly's evidence had been untruthful, he submitted that there were ample other grounds for dismissing the appeal and the Court could do so without placing any reliance on the finding of untruthfulness.

33. This prompted a discussion of the status and effect of the High Court's finding during Mr McGarry's reply, from which it became evident that the principal benefit of the order that he was seeking on Mr Kelly's behalf was that it would preclude any reliance being placed on that finding at the hearing, including it being put to Mr Kelly in cross-examination. The Court heard Mr Delaney on this issue. He made it clear that, in his view, the rules of evidence would not permit the Judge's finding (which he characterised as the opinion of a different tribunal) to be put to Mr Kelly or relied on at the hearing. Cave could, he said, rely on the inconsistency between Mr Kelly's

averments and the contents of Mr Thomas Kelly's earlier affidavit in cross-examining Mr Kelly (a proposition that Mr McGarry did not dispute at any stage) but could not go further than that. He accepted that there was some risk that the trial judge might come across the Judge's Judgment and thus become aware of the finding of untruthfulness he made but, in his submission, that could not justify setting aside the High Court order. Mr Delaney also accepted that this Court could, as a condition of dismissing the appeal, stipulate that no reliance should be placed at trial on the disputed finding.

ANALYSIS

Scope of Review

34. In an appeal such as this, while this Court is bound to give due consideration to the conclusions of the High Court, *"it is nonetheless free to exercise its own discretion as to whether or not the claim should be dismissed, if satisfied that the interests of justice dictate such an approach*": *Cassidy v The Provincialate* [2015] IECA 74, per Irvine J (Peart and Mahon JJ agreeing) at para 27, applied by this Court in *Gibbons v N6 (Construction) Limited* [2022] IECA 112, per Barniville J (as he then was) (Faherty and Ní Raifeartaigh JJ agreeing). Errors of assessment may justify appellate intervention, even in the absence of any error of principle by the High Court.

The Primor jurisdiction

35. The principles applicable in applications to dismiss proceedings by reason of delay/want of prosecution have been considered in a number of recent decisions of this Court, including *Gibbons v N6 (Construction) Limited, Pringle v Ireland* [2022] IECA 113, *Barry v Renaissance Security Services Limited* [2022] IECA 115, *Greenwich Project Holdings Limited v Cronin* [2022] IECA 154, and *Doyle v Foley* [2022] IECA 193, in which the jurisprudence going back to the foundational decision of the Supreme Court in *Primor,* as well as a number of earlier decisions referred to in *Primor,* is comprehensively surveyed.

36. Without attempting to undertake any similar exercise here, there are a number of points arising from the jurisprudence which, in my view, warrant emphasis:

- The onus is on the defendant to establish all three limbs of the *Primor* test i.e. that there has been inordinate delay in the prosecution of the claim, that such delay is inexcusable *and* that the balance of justice weighs in favour of dismissing the claim: see, e.g. *Gibbons v N6 (Construction) Limited*, para 80, *Barry v Renaissance Security Services Limited*, para 48 and *Greenwich Project Holdings Limited v Cronin*, para 89.

- An order dismissing a claim is on any view a far-reaching one. In *Barry v Renaissance Security Services Limited*, Faherty J endorsed the High Court's characterisation of such an order as a "*very serious remedy*". In *Granahan t/a CG Roofing and General Builders v Mercury Engineering* [2015] IECA 58, Irvine J (Peart and Mahon JJ agreeing) referred to the "*terminal prejudice*" to the plaintiff whose claim is dismissed (at para 46). Similarly, in *Mangan v Dockeray* [2020] IESC 67, McKechnie J (Clarke CJ, MacMenamin, Dunne and Baker JJ agreeing) referred to the "*enormous*" prejudice to the plaintiff in those proceedings should his claim be dismissed (at para 146). That being so, it would seem to follow that such an order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed. Adapting slightly what was said

by Barniville J in *Gibbons v N6 (Construction) Limited*, the court must be satisfied that the "*the hardship of denying the plaintiff access to a trial of his claim would, in all the circumstances, be [.]proportionate and [.]just"* (at para 86).

- The court's assessment of the balance of justice does not involve a free-floating inquiry divorced from the delay that has been established. The nature and extent of the delay is a critical consideration in the balance of justice. Where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between *that* delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim. A defendant cannot rely on matters which do not result from the plaintiff's delay. [The line of jurisprudence starting with *O' Domhnaill v Merrick* [1984] IR 151 allows the dismissal of a claim even in the absence of culpable delay on the part of the plaintiff where, by reason of the lapse of time, there is a real or substantial risk that a fair trial cannot take place. This appeal is not concerned with the *O' Domhnaill v Merrick* jurisprudence.]

- Each case will turn on its own facts and circumstances: *"[e]very case is different. Factual resemblances are only of limited value*": per Geoghegan J (Murray CJ, Denham, Hardiman and Fennelly JJ agreeing) in *McBrearty v North Western Health Board* [2010] IESC 27, at page 36. A period of delay that is considered inordinate in one case may not be regarded as such in another. Factors which excuse delay in one case may be ineffective in another.

For that reason, the citation of previous decisions for the purpose of demonstrating that a particular period of delay was (or was not) found to be inordinate and/or inexcusable in another case involving other circumstances will rarely be helpful. Similarly, a court's assessment of the balance of justice in one case will rarely provide a useful blueprint for any other.

- The authorities increasingly emphasise that defendants also bear a responsibility in terms of ensuring the timely progress of litigation: see, for instance, the decision of the Supreme Court in *Comcast International Holdings Incorporated v Minister for Public Enterprise* [2012] IESC 50. The precise contours of that responsibility have yet to be definitively mapped but, it is clear at least that any "*culpable delay*" on the part of a defendant – delay arising from procedural default on its part – will weigh against dismissal.

- The issue of prejudice is a complex and evolving one. There are many statements in the authorities to the effect that, in the exercise of the *Primor* jurisdiction, the question of prejudice is central. In *Primor* itself, Hamilton CJ identified as one of the factors to which regard was to be had in assessing the balance of justice *"whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action"* (at 475). Both Hamilton CJ (with whom Denham J agreed) and O' Flaherty J (who wrote separately) concluded that the defendants were so prejudiced by the delay that had occurred, both in terms of the unavailability of witnesses

and otherwise, that they could not fairly be expected to defend the claims against them. In *Keogh v Wyeth Laboratories Incorporated* [2005] IESC 46, [2006] 1 IR 345 – which post-dates the Supreme Court's decision in *Anglo-Irish Beef Processors Limited v Montgomery* [2002] 3 IR 510 - McCracken J (Geoghegan and Kearns JJ agreeing) observed that the tests laid down in *Primor* were of their nature very general but noted that *"the central thread running through those principles are the concepts of fairness and prejudice, which should be at the forefront of the court's consideration as to where the balance of justice lies"* (at para 10). In this context, it should not be overlooked that *Anglo-Irish Beef Processors Limited v Montgomery* itself was a case where the plaintiff's delay had deprived the defendants of *"a witness of critical importance*" (per Keane CJ at page 515). The issue of prejudice was also characterised as "*central*" by Ryan J (as the former President then was) in *Cassidy v Butterly* [2014] IEHC 203 (at para 3.5). Similarly, in *O' Riordan v Maher* [2012] IEHC 274 (at para 32) Birmingham J (as he then was) observed that *"[c]entral to determining where the balance of justice lies is to determine whether and to what extent the ability of the defendants to defend the case has been impaired."* In *Comcast*, Clarke J suggested that where the balance of justice comes to be considered "*the extent of any prejudice to the defendant caused by delay needs to be assessed*" (at para 6.2). In *Granahan t/a CG Roofing and General Builders v Mercury Engineering* Irvine J observed that *"[o]ne of the principal questions that the Court is obliged to consider when dealing with the balance of justice, as per the decision of the Supreme Court in Primor, is whether or not the defendant has*

been prejudiced as a consequence of the delay complained of" (at para 35). In *Bank of Ireland v Kelly* [2017] IECA 288, Peart J (Irvine and Hedigan JJ agreeing) identified the purpose of the jurisdiction to strike out proceedings on grounds of delay as being "*to prevent injustice in the form of an unfair trial arising from culpable and unexcused delay by the plaintiff, and as a deterrent to culpable delay by a plaintiff leading to injustice to the defendant"* (at para 52). That again appears to place the issue of prejudice – specifically in the form of "*fair trial*" prejudice - centre-stage.

- Prejudice is not, however, confined to "*fair trial*" prejudice. It may include damage to a defendant's reputation and business: see, for example, the observations of Barniville J in *Gibbons v N6 Construction Limited*, at para 98. No such prejudice is asserted here. It is, perhaps, an issue that should be approached with a degree of caution, lest it appear that the law confers on certain categories of defendant – and in particular professional defendants – some form of privileged status. In any event it may be observed that in both of the authorities referred to by Barniville J – the *ex tempore* judgment of Noonan J (Edwards and Costello JJ agreeing) in this Court in *McGuinness v Wilkie and Flanagan Solicitors* [2020] IECA 111 and the decision of the High Court (MacGrath J) in *Myrmidon CMBS (Propco) Limited v Joy Clothing Limited* [2020] IEHC 246, there was significant and unexplained delay *and* significant "*fair trial*" prejudice. In *McGuinness v Wilkie and Flanagan Solicitors*, Noonan J considered that the case "*was very close to, if not actually within, the O' Domhnaill v Merrick strand of jurisprudence, where a fair trial*

is manifestly no longer possible" and noted that it was "*uncontroverted that very significant prejudice had been and will be suffered*" by the defendant firm as a result of the delays (at para 23). That prejudice included the fact that an important witness had died at a time when, if the claim had been commenced and prosecuted "*with any degree of diligence*", it should have been long since concluded (para 24). The impact of the delays on the business of the defendants had also manifested itself in a concrete and quantifiable way, in that the cost of its professional indemnity insurance had increased significantly on an annual basis (the impact of unresolved litigation on a corporate defendant's financial accounts provides another example of how delay may produce concrete adverse impacts beyond any "*fair trial*" prejudice: see the observations of Fennelly J in *Anglo-Irish Beef Processors Limited v Montgomery*, at page 520). The facts in *Myrmidon CMBS (Propco) Limited v Joy Clothing Limited* were perhaps not as stark but MacGrath J was nonetheless satisfied that "*at minimum*" there was likely to be general prejudice to the defendants as regards their ability to defend the claim, particularly in light of the fact that it was likely to be some further time before the proceedings came on for hearing (at para 50). While the "*oppressiveness*" of a claim hanging over the defendants was identified by the judge as an aspect of further general prejudice to them, it is not evident what weight he attached to it nor is there any suggestion in the judgment that, if that factor stood alone, it could have justified the dismissal of the claim.

- In many (if not most) applications to dismiss based on the *Primor* principles, the defendant will assert that some specific prejudice has arisen from the delay of the plaintiff. As McKechnie J observed in *Mangan v Dockeray*, *"the existence of significant and irremediable prejudice to a defendant"*, such as by reason of the unavailability of witnesses, the fallibility of memory recall, loss of documentary records such as medical records (*Mangan* involved a claim for medical negligence) "*usually feature strongly*" (at para 109 (iv)). The absence of any specific prejudice (or, as it is often referred to in the caselaw, *"concrete prejudice*") may be a material factor in the court's assessment. However, it is clear from the authorities that absence of evidence of specific/concrete prejudice does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice. The caselaw suggests that the form of general prejudice most commonly relied on in this context is the difficulty that witnesses may have in giving evidence – and the difficulty that courts may have in resolving conflicts of evidence – relating to events that may have taken place many years before an action gets to trial. That such difficulties may arise cannot be gainsaid. But it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis. As a matter of first principle, only such prejudice as is properly attributable to the period of inordinate and inexcusable delay for which the plaintiff is responsible ought to be taken into account in this context. Many of the cases appear to proceed on the basis that, once there is *any* period of inordinate and inexcusable delay, general prejudice should be

assessed by reference to the *entire* period between the events giving rise to the claim and the date of trial. That does not appear to me to be the appropriate approach. Furthermore, as Irvine J noted in *Granahan v Mercury Engineering*, *"many cases of great complexity are, for reasons unconnected with any default on the part of the parties, heard at a significant remove from the events concerned and the Court is left with the task of trying to achieve a just result"* (at para 46). Perfect justice is rarely, if ever, achievable. As Cross J observed in *Calvert v Stollznow* [1980] 2 NSWLR 749, "*[o]f course justice is best done if an action is brought on whilst the memory of the witnesses is fresh. But surely imperfect justice is better than no justice."* Those observations have been cited with evident approval in this jurisdiction, including by Murphy J in *Hogan v Jones* [1994] 1 ILRM 512 (at page 519) and, more recently, by Geoghegan J in *McBrearty v North Western Health Board* (at page 41) and by McKechnie J in *Mangan v Dockeray*, at para 110. To this it may be said that where a plaintiff has been guilty of significant default in the prosecution of a claim, it is that plaintiff – and not the defendant – that should bear the consequences of such default. No doubt that is correct at the level of general principle. Nevertheless, the observations of Cross J in *Calvert v Stollznow* provide a salutary warning against the application of unduly elevated and unrealistic standards of justice in this context, such that, in effect, an immediate presumption of prejudice arises whenever there is any material default on the part of a plaintiff in prosecuting a claim. Prejudice is not to be presumed: *AIG Europe Limited v Fitzpatrick* [2020] IECA 99, per Whelan J (Donnelly and Power JJ agreeing).

- As to the threshold of prejudice that applies, the authorities suggest that even "*moderate prejudice*" may suffice: "*even moderate prejudice against a backdrop of inordinate and inexcusable delay may be deemed sufficient to tip the scales of justice in favour of dismissing the proceedings"* (per Irvine J in in *Cassidy v The Provincialate*, at para 60 (emphasis added), citing *Stephens v John Paul Limited* [2008] 4 IR 31). *Cassidy* does not, it seems clear, purport to establish a universally applicable standard of prejudice. Rather, whether "*moderate prejudice*" will warrant the dismissal of a given claim, or whether something more serious must be established, will depend on *all* of the circumstances, including the nature and extent of the delay involved, the nature of the claim and of the defence to it and the conduct of the defendant.

- In *Millerick v Minister for Finance* [2016] IECA 206, Irvine J (Ryan P and Peart J agreeing) seems to formulate the threshold in different terms, suggesting (at para 32) that where inordinate and inexcusable delay is established, *"even marginal prejudice may justify the dismissal of the proceedings"* (emphasis added). *Cassidy* is cited for that statement, which suggests that Irvine J regarded "*moderate*" and "*marginal*" as synonymous in this context, even though the two adjectives seem to me to convey materially different meanings. "*Marginal*" conveys insignificant or negligible. On that basis, *"marginal prejudice*" could involve something less than "*moderate prejudice"*. However, nothing in *Millerick* more generally indicates that Irvine J intended to adopt any lower threshold than had been identified in

Cassidy and no rationale for doing so is to be found in her judgment. In the circumstances, it would seem wiser to continue to refer to "*moderate prejudice*" in this context.

- *Millerick* is also notable for the suggestion that proceedings may be dismissed even in the absence of any proof of prejudice: see, again, at para 31 ("*That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed"*). The suggestion that a defendant might succeed in having a claim against them dismissed in the absence of evidence of prejudice is a far-reaching one which raises significant issues that are perhaps best explored in a case where the point is actually pressed in argument. However, it would appear to represent a significant development of (or, perhaps more correctly, departure from) existing jurisprudence, in which, as already discussed, the issue of prejudice has been acknowledged to be central. In addition, any suggestion that proceedings might be dismissed in the absence of prejudice to the defendant would appear difficult to reconcile with the consistent emphasis in the authorities that the jurisdiction is not punitive or disciplinary in character: the *"jurisdiction does not exist so that form of punishment can be inflicted upon a dilatory plaintiff as a mark of the Court's displeasure"* (per Peart J in *Bank of Ireland v Kelly*, at para 52).

37. It is entirely appropriate that the culture of "*endless indulgence*" of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction. The dismissal of a claim is, and should be seen as, an option of last resort. If the *Primor* test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant.

The Application Here

(i) Inordinate Delay?

38. As already noted, the Judge concluded that Cave had been guilty of inordinate delay in prosecuting its claim. He identified three *"lengthy periods of inactivity*" (though one "*to a lesser extent*") amounting in total to some 27/28 months. As also noted above, in his submissions Mr McGarry identified the period of November 2016 –

November 2018 as being the period of delay that he was relying on, while accepting that parts of that period of delay were excusable.

39. For the purposes of considering the issue of inordinate delay, I am prepared to proceed on the basis suggested by Mr McGarry. Thus, for the purposes of applying *Primor*, the period of inordinate delay is to be taken as 2 years. Even if entirely inexcusable – and I address that issue next – such a period of delay is certainly (as Mr McGarry fairly acknowledged) at the *"lower end"* of the spectrum in this context. It is, in fact, a much shorter period of delay than would normally feature in an application to dismiss.

(ii) Inexcusable Delay?

40. As to whether any part of this period was excusable, I accept Mr McGarry's submission that, in addressing this issue, the conduct of Mr Kelly, and in particular any question of whether he contributed to and/or acquiesced in the delay, is not relevant. To that extent, the Judge erred in his analysis, though as will become apparent that error has no material impact on the resolution of this appeal. Mr Kelly's conduct is, of course, relevant to the balance of justice and I will address it in that context.

41. In my view, the need to obtain an advice of proofs, and the difficulties which then arose in locating one of the witnesses that counsel had identified as required and confirming his availability to give evidence, partially excuses this period of delay.

Quantifying the impact of that issue is more art than science but, in my view, it appears reasonable to attribute 6 months to the exercise and, accordingly, I would assess the period of inordinate and inexcusable delay here at 18 months. Some of that period also appears to have been spent in preparing replies to Mr Kelly's notice of particular of June 2015 (which replies were delivered in early November 2018). However, those replies should have been delivered by 5 December 2016 (as directed by the High Court) and it does not appear appropriate to make any additional deduction on that account.

(iii) The Balance of Justice

42. Only one factor was considered by the Judge in assessing the balance of justice, namely his finding that Mr Kelly had been untruthful in his affidavit grounding the dismiss application. Mr McGarry says that, even if the Judge was entitled to have regard to that factor, his approach was too restricted. I agree. *Primor* and the cases that have come after it clearly indicate that the assessment of the balance of justice in this context requires a broad assessment of a variety of different factors (involving, in the words of Fennelly J in *Anglo-Irish Beef Processors Ltd v Montgomery*, *"a global appreciation of the interests of justice*" that seeks to "*balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation*").

43. In my view, however, had the Judge undertaken that broader assessment, and even if he had disregarded completely the affidavit evidence of Mr Kelly regarding his

awareness (or lack of awareness) of the settlement that Cave had made with the First, Third and Fourth Defendants, only one conclusion would properly have been open to him, namely that the balance of justice clearly favoured allowing the claim to proceed. Any contrary conclusion would inevitably have been overturned by this Court on appeal.

44. I reach that view by reference to the following factors in particular:

- The operative period of delay here is a very limited one.

- Mr Kelly has failed to make out any concrete prejudice arising from that delay. There is no evidence that any relevant witness is unavailable, still less any evidence that such unavailability can fairly be attributed to Cave's delay. The fact – if fact it be – that potential witnesses previously in the employment of the Bank or of NAMA/NALM are no longer in such employment - and not a single such person has actually been identified by Mr Kelly either in the High Court or in this Court – does not, in itself, establish prejudice arising from the delay properly attributable to Cave. In this regard, it is also notable (and a striking feature of the application in my view) that Mr Kelly is entirely silent as to the steps (if any) which he has taken to identify and secure the attendance of witnesses at trial.

- Equally, there is no evidence that the delay at issue has resulted in the loss of documentary evidence that would otherwise have been available to Mr Kelly.

- As regards to the point made by Mr Kelly regarding Cave's settlement with the First, Third and Fourth Defendants, the settlement agreements have in fact been provided to him. Furthermore, as Mr McGarry accepted in argument, Cave's claims against those Defendants could have been settled at any point (they were, in fact, settled as far back as 2013). That he may have to call those Defendants to give evidence in support of his defence and counterclaim gives him no legitimate complaint.

- As regards the issue of general prejudice, the evidence does not provide any basis on which the High Court, or this Court on appeal, could properly conclude that any material prejudice arises. All that has been put before the Court is a vague and unsubstantiated assertion of prejudice, without any attempt being made to identify the factual controversies that require resolution in the case, the persons whose evidence is or may be relevant to those issues or how, in fact, the resolution of those issues would be materially adversely impacted by Cave's delay.

- The fact that the proceedings are to recover very substantial facilities previously advanced to (*inter alia*) Mr Kelly by Cave's predecessor in title is also relevant. The facilities are documented. That the facilities were advanced does not appear to be seriously disputed by Mr Kelly (though he appears to suggest that they were, in part, diverted away from the partnership, though whether that is a complaint sounding against the Bank or against his former

partners is unclear from the material before us) and it is also relevant that, as Mr Delaney observed in argument, Mr Kelly, through his counsel in the High Court, seemed to accept that he received some – unspecified - part of the facilities.

- The hearing in November is, as matters stand, going to proceed in any event as against Mr O' Hara. Furthermore, it appears that the issues as between Cave and Mr Kelly will have to be resolved in any event given Cave's security interests over the relevant folios and the partition proceedings that have been brought by Mr O' Hara.

- Mr Kelly contributed to and/or acquiesced in the overall delay in bringing these proceedings to trial, including the particular period of delay identified above, including by (i) the approach he took to the issue of security for costs; (ii) his failure to raise the non-recourse defence prior to November 2015; (iii) his failure to reply to Cave's notice for particulars of October 2015 until February 2022. As to the latter point, I do not accept Mr McGarry's argument that his client's failure to provide replies to particulars should properly be regarded as mere "*inaction*" rather than any form of "*culpable delay".* The particulars sought were necessary and appropriate having regard to the matters pleaded in Mr Kelly's Defence and Counterclaim, Mr Kelly ought to have furnished replies in a timely way and his (unexplained) failure to do so can only be characterised as "*culpable*."

- The final factor is that the proceedings have now been listed for November next. It seems clear that, in the period since the Judge's Judgment, both parties have been engaged in getting the proceedings to the point where they could be listed for hearing. I agree with Baker J in *Power v Creed* [2018] IEHC 688 that the fact that the action is now listed for hearing is a significant factor in assessing where the balance of justice lies in this context. In my view, some very weighty factor would have to be present in order to justify the making of an order that would prevent that action proceeding as scheduled. There is no such factor here.

45. For these reasons, I am of the view that the Judge's conclusion that the balance of justice did not lie in favour of dismissing the claim was correct, albeit that I have reached that view as a result of a broader assessment than was undertaken by the Judge and without any reliance on the factor on which he relied.

46. I would add that, while I have not placed any reliance on the Judge's finding of untruthfulness here, any such finding is, in principle, a relevant consideration in an application of the kind with which this appeal is concerned. Lack of candour on the part of an applicant is a factor that may weigh – and, perhaps, weigh significantly - against the exercise of the court's jurisdiction in favour of that applicant. That was not disputed by Mr McGarry. The fact that, in the particular circumstances of this appeal, I have considered it appropriate to disregard it in my assessment of the balance of justice does not take away from that position.

47. It would appear to follow that Mr Kelly's appeal should be dismissed. However, before expressing a final view on that point, Mr Kelly's complaints arising from the Judge's finding of untruthfulness should be addressed.

The Calling of Mr Kelly

48. As the appeal was presented by Mr McGarry, the primary complaint advanced is that, as a matter of principle, the Judge lacked the power to do what he did, at least in the absence of consent from the parties. While in the High Court counsel certainly objected to his client being called, that ground of objection certainly does not appear to have been articulated at any point during the hearing. Rather, the fundamental complaint made in the High Court was as to lack of notice, as well as a suggestion that the controversial averment was not relevant to the determination of the motion in any event. As already noted, this issue was not squarely raised in the Notice of Appeal either (or for that matter in Mr Kelly's written submissions to this Court).

49. Nevertheless, the issue was debated at length in argument before the Court and, in light of its importance, it appears appropriate that it should be addressed.

50. *McGrath on Evidence* (3rd ed; 2020) provides a useful starting point. Under the heading "*Calling and Tendering of Witnesses",* the authors state that under our adversarial model of justice "*decisions as to the calling of witnesses, and the order in which to call them, are primarily for the parties themselves*." (para 3-41).

However, they note that there are qualifications to that general principle and suggest that, in that context, it is useful to distinguish between civil and criminal proceedings. As to the civil proceedings, the author states:

> *"3-42 In civil proceedings, each party is free to call any witnesses, in whatever order it wishes. In general, a judge has no right to call witnesses without the consent of the parties, although he or she may do so in cases of civil contempt or child care proceedings. A judge also has the power to recall a witness previously called by a party."* (footnotes omitted)

51. The authors cite a number of authorities in support of the proposition that a judge generally has no right to call witnesses without the consent of the parties, including two Irish cases, one of which is this Court's decision in *AMQ v KJ (otherwise KA)*. So far as relevant, *AMQ* involved a complaint by a party in family law proceedings that he had been unfairly restricted in his cross-examination of an expert assessor who had been appointed to prepare a report pursuant to section 47 of the Family Law Act 1995. Section 47 provides for the appointment of such an assessor by the court of its own motion or on the application of a party and he or she may be called as a witness by the court or by a party. In addressing that complaint, Hogan J (Peart and Whelan JJ agreeing) described the particular position of a section 47 assessor as witness in the following terms:

> *"64. It is true that the position of the s. 47 assessor qua witness is a slightly unusual one. Section 47(5) of the 1995 Act provides that 'the court or a party to*

the proceedings' may 'call as a witness to the proceedings a person who prepared a report under [s. 47(1)] pursuant to an order under that section in those proceedings.' The very fact that the High Court is given the statutory power to call such a witness of its motion is itself significant, because the traditional position at common law is that, given the adversarial nature of civil proceedings, a trial judge 'is not allowed in a civil case to call a witness whom he thinks might throw some light on the facts': see Jones v. National Coal Board [1957] 2 Q.B. 55, 63, per Denning L.J. To that extent, therefore, s. 47 represents something of a move away from a purely adversarial approach in civil cases involving child welfare issues."

52. It is not clear from Hogan J's judgment in *AMQ* whether the assessor had in fact been called by the court and, in any event, there was no issue as to the court's power to do so in light of the provisions of section 47. In the circumstances, the observations made by Hogan J as to the position at common law were arguably *obiter*. However, Mr McGarry understandably places significant reliance on this passage.

53. The other Irish authority referred to in *McGrath on Evidence* is a much earlier decision of the former Court of Appeal for Ireland, *Shea v Wilson & Co* (1916) 50 ILTR 73. It concerned a Workman's Compensation Act claim where the workman had died and was therefore not in a position to give evidence of how he had suffered injury. On appeal an issue arose as to whether the deceased's foreman, a Mr Brennan, who was in court for the trial, might have been called by the trial judge. In his judgment, the Lord Chancellor noted that the claimant (the wife of the deceased) did

not wish to be put in the position of calling Mr Brennan as her witness, adding that it "*seems to have been lost sight of that there might have been jurisdiction in the County Court Judge himself to call Brennan as a witness."* The issue was also addressed by Molony LJ (subsequently the last holder of the office of Lord Chief Justice of Ireland), who expressed the view that the Judge *"would have been entitled to examine Brennan on consent*", citing *Coulson v Disborough* [1894] 2 QB 316 and *In re Enoch and Zaretsky, Bock & Co's Arbitration* [1910] 1 KB 327.

54. *Coulson v Disborough* involved an action for false imprisonment and malicious prosecution which was heard before a judge and jury. The plaintiff had been found in possession of certain coins of the defendant and had been accused of their theft but said that he had been given the coins by the defendant's son in payment of a debt. The son was in court but had not been called by either party. The jury then expressed the wish that he be called to give evidence. The judge called the son and asked him whether he had taken the coins out of his father's bag (he answered no) and whether he had given any money to the plaintiff on the evening in question (to which, again, he answered no). The plaintiff's counsel then sought to cross-examine the witness but the judge refused to allow it. On the plaintiff's appeal, the Court of Appeal upheld the trial judge's right to proceed as he did, Lord Esher MR expressing the view that *"[i]f there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself entitled to call him; and I cannot agree that such a course has never been taken by a judge before*" (at page 318). Similarly AL Smith LJ observed that it is "*the function of the judge to try to find out the truth, whether he is hearing*

the case with or without a jury" (*ibid*). There was also agreement that neither party had any entitlement as of right to cross-examine a witness so called and – perhaps surprisingly - neither saw any frailty in the judge's refusal to allow cross-examination on the facts.

55. *In re Enoch & Zaretsky, Bock & Co's Arbitration* involved an application to remove an umpire for misconduct. It is apparent from the report that the umpire was guilty of serious misconduct and it well merits its description in a subsequent Australian decision, *Obacelo Pty Limited v Taveraft Pty Limited* [1986] FCA 241, 10 FCR 518 (another authority cited in *McGrath on Evidence*), as *"by any standards, an extraordinary case."* One of the many complaints made was that the umpire had insisted on calling a number of persons to give evidence that the parties had not chosen to call and without their consent (and who, it seems, had no relevant or reliable evidence to give). The application to remove was dismissed in the High Court but the Court of Appeal unanimously allowed the appeal. Cozens-Hardy MR professed himself unable to understand what right the umpire had to call a witness (at page 331). Fletcher Moulton LJ was of the view that an umpire *("a person in a judicial position*") had no power "*to call witnesses in a civil dispute, whom the parties do not either of them choose to call*" adding that a "*judge has nothing to do with the getting up of the case."* In his view, the *dictum* of Lord Esher in *Coulson v Disborough* (already set out above) should not be understood as suggesting that the judge could call a witness over the objection of either party. There was no suggestion in the report or the judgments in *Coulson v Disborough* that the witness had been called against the will of either party. If, however, Lord Esher MR meant to suggest that the judge

was entitled to call a witness when either side objected, Fletcher Moulton LJ was satisfied that there was no basis for such a suggestion (at page 332). The dictum did *"not lay down, and in my opinion it is certainly not the law, that a judge, or any person in a judicial position, such as an arbitrator, has any power himself to call witnesses to fact against the will of either of the parties"* (at page 333). Farwell LJ took a similar view.

56. In *Jones v National Coal Board* [1957] 2 QB 55 (which was cited by Hogan J in *AMQ*) the issue was whether the claimant had been deprived of a fair trial by reason of the nature and extent of the trial judge's interventions during the hearing. Giving the judgment of the Court of Appeal, Denning LJ stressed that the role of the judge was to hold the balance between the contending parties, without descending into the arena, before ultimately deciding which way the balance tilted. He went on:

> *"So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties: see In re Enoch & Zaretzky, Bock & Co. So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other: see Rex v. Cain, Rex v. Bateman, and Harris v. Harris, by Birkett L.J. especially. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost: see Reg. v. Clewer. The judge's part in all this is to hearken to the evidence, only himself asking*

questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that : "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal." (at page 64)

57. While there is some Australian authority which suggests that a less strict approach may be taken there and that a judge may indeed call a witness even against the objections of one of the parties, at least in exceptional circumstances – see the discussion in *Obacelo Pty Limited v Taveraft Pty Limited* – the orthodox view appears to prevail in England and Wales: *Lissack v Manhattan Loft Corporation Ltd* [2013] EWHC 128 (Ch), per Roth J at para 32.

58. However, the position is somewhat different concerning a witness who has already given evidence. As is noted in *McGrath on Evidence*, there is authority that a judge is entitled to recall a witness previously called by a party, in the form of the decision of the Court of Appeal of England and Wales in *Fallon v Calvert* [1960] 1 All ER 281. The first paragraph of the headnote states that the *"court has not power to order a party to attend a civil action for the purpose of giving evidence, but if a party*

chooses to give evidence he submits himself to the court to be asked all such questions as justice requires until the case is concluded." The court rejected a challenge to a decision by the official referee (to whom the court had referred the proceedings for the purpose of the investigation of the defendant's earnings) to recall the defendant to be cross-examined by the plaintiff. The court was satisfied that the official referee had a discretion to recall the defendant and that, in circumstances where significant issues had arisen as to the veracity of evidence previously given by the defendant which "*call[ed] for some answer by him*", the discretion had not been wrongly exercised (page 284D). It would not be a wrong use of discretion *"if the court were to recall him in the hope of finding out the truth*" (284E).`

59. The same approach appears to be taken in Ontario: *French v McKendrick* [1931] 1 DLR 696 (also cited in *McGrath on Evidence*) at page 697.

60. *Yianni v Yianni* [1966] 1 WLR 120 must also be considered in this context, given the reliance placed on it by Cave. It concerned a motion for committal for contempt. The contempt alleged against the defendant was that he had continued to collect rent from a premises and otherwise had continued to be engaged in the management of that premises, in breach of an interim injunction. The key issue in the motion was whether the defendant had collected rents after he was on notice of the injunction. An affidavit from a third party P stated that he (P) had been told by a number of tenants, including M, that they had paid over rent to the defendant on a date after he accepted he was aware of the injunction. M had been asked to swear an affidavit but had refused to do so. The plaintiff did not seek to subpoena M. Affidavits were procured from the other

tenants and they were cross-examined but their evidence did not establish any breach by the defendant. At that stage the judge, Cross J, asked the official solicitor to serve a subpoena on M. The judge subsequently explained why he had taken that step in the following terms:

> *58. The rule is quite clear, that in civil proceedings the judge should not, call any evidence himself unless the parties consent or at least do not object. If I had thought that that rule applied to a committal motion, I might have hesitated to ask the defendant for his consent. A litigant in person is at some disadvantage, and it might be that he would think he was obliged to give a consent which, if he appeared by counsel, he would refrain from giving.*
>
> *59. I am satisfied however, that the general rule cannot apply to a committal motion. The contempt alleged here is a civil contempt, simply a breach of an order of the court obtained by the plaintiff, who, without reference to the court, could agree with the defendant that he need not obey the order. But if the party who has obtained the order not having released the other party from compliance with it, alleges that it has been broken, then the matter has a quasi-criminal aspect, and I do not doubt that the court has power, in order to find out the truth of the matter, to serve subpoenas."*(at page 124)

In the event, all of this was of no avail to the plaintiff as the evidence of M did not sustain the allegation of breach either.

61. There is one further authority to which it is necessary to refer, namely the important decision of the Supreme Court i*n RAS Medical Limited v Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 IR 63. The applicant, a private medical clinic, had brought judicial review proceedings challenging the refusal of the respondent to grant it CPD accreditation in respect of a master class in plastic surgery. There was a conflict on the affidavits as to which guidelines had been applied by the respondent in making its decision (the applicant asserted that the decision had been made by reference to new guidelines that had not been published at the time it made its application; the respondent averred that it had applied the old guidelines). Notwithstanding that conflict, neither party sought to cross-examine the other's deponents. The applicant obtained documents on discovery and exhibited certain of those documents on affidavit, without objection from the respondent. The High Court (Noonan J) refused the application for judicial review, accepting the evidence of the respondent. This Court allowed the applicant's appeal, holding that the discovered documents ought to have been taken into consideration and that they led to the conclusion that the new guidelines had in fact been applied. The respondent obtained leave to appeal to the Supreme Court.

62. A number of issues are addressed in the judgment of Clarke CJ (O' Donnell, MacMenamin, Dunne and Finlay-Geoghegan JJ agreeing). For present purposes, its significance lies in what is said as to the appropriate resolution of factual disputes arising as between affidavits and/or as between affidavits and other documentary evidence. Clarke J's analysis warrants extended citation:

"7. The resolution of factual disputes

[87] In cases heard on oral evidence the situation is, at least in most cases, relatively straightforward. Subject to questions of admissibility, the court is entitled to consider all of the evidence tendered and to reach conclusions of fact based on that evidence. In so doing, the court may have to consider, not least where there is conflicting evidence, which evidence to prefer, either on the basis of the credibility of witnesses or their reliability.

[88] Where a party wishes to assert that evidence tendered by an opponent lacks either credibility or reliability, then it is incumbent on that party to cross-examine the witness concerned and put to that witness the basis on which it is said that the witness's evidence should not be accepted at face value. It is an unfair procedure to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned. A party which presents evidence which goes unchallenged is entitled to assume that the evidence concerned is not contested. However, there may, of course, be legitimate debate about whether the evidence, even if accepted so far as it goes, is sufficient or appropriate to establish the facts necessary to resolve the case in favour of the party tendering the evidence in question.

[89] The application of that general approach to cases which are either heard on affidavit or where, despite oral evidence being tendered, documentary evidence is presented by agreement without formal proof, may be more

problematic. It is part of the role of a judge (when decider of fact) or a jury to assess the evidence and determine the facts having regard both to the onus and standard of proof required in the case in question. Where an assessment of oral evidence is required, then the decider of fact will have seen the witnesses giving evidence and can bring their own common sense to bear on assessing where the truth lies, having regard to the evidence given, the manner in which it is tendered, the extent to which there may be reasons put forward as to why the evidence should not be regarded as credible or reliable and, importantly, the manner in which the witness deals with any suggestion that their evidence should not be accepted.

[90] However, where reliance is placed on evidence to be found either in affidavits, in documents exhibited in affidavits, or in documents which are presented by agreement to the court, then a more difficult situation arises where it is suggested that there is a conflict of evidence whose resolution is necessary to the proper determination of the proceedings. Just as it is inappropriate to argue in a trial conducted on oral evidence that the evidence of a witness should not be accepted, either on grounds of lack of credibility or unreliability, without having given that witness a fair opportunity to answer any issues arising in that context, so also is it impermissible to ask a decider of fact (such as the trial judge in this case) to determine contested questions of fact on the basis of affidavit evidence or documentation alone.

[91] As an aside, it is important, in the context of the current discussion, to emphasise that the extent of the problem may depend on what exactly it is that

the judge has to decide. In some cases, the very fact of the existence of a document is itself material evidence. The fact that a particular letter was written making a specific allegation may itself, in certain types of cases, be important irrespective of the truth or otherwise of the allegation itself. The fact that a party was put on notice of a certain state of affairs may again itself be of some importance in, for example, questions concerning the calculation of damages. Even if there may be a dispute about aspects of the underlying events, it may be that the fact that a particular document existed or was sent to a relevant party is itself important and if there is no challenge to the fact that the document existed or was, in fact, sent and received, then the court is clearly entitled to make a finding that, for example, a certain allegation was made or a certain state of affairs communicated to another party. What consequences such a finding of fact might have on the proceedings generally is, of course, another matter.

[92] But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged.

Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.

[93] A similar principle applies where it is suggested that there is documentary evidence, properly before the court, which might cast doubt on the reliability of sworn testimony. It is not permissible to invite a court to reject sworn testimony either on the basis that there is sworn testimony to the contrary or that the testimony might be said to be either lacking in credibility or unreliable (on the basis of, for example, a documentary record) without giving the witness concerned an opportunity, under cross-examination, to explain, if that be possible, any matters which might go to credibility or reliability."

63. *RAS* was concerned with the substantive hearing of an application for judicial review. Here, of course, Meenan J was not hearing Cave's substantive claim against Mr Kelly. Rather, what was before him was Mr Kelly's application to dismiss Cave's proceedings. *RAS Medical Limited v Royal College of Surgeons in Ireland* does not suggest that conflicts of evidence in interlocutory matters should routinely give rise to orders for cross-examination. Cross-examination in interlocutory applications is - and ought to be - rare. It will normally be unnecessary because the court at interlocutory stage is not called upon to resolve conflicts of evidence or reach conclusions on the balance of probabilities: see the observations of Clarke J

(McKechnie and MacMenamin JJ agreeing) in *IBB Internet Services Ltd v Motorola Limited* [2013] IESC 53, at para 7.1 – 7.4. Here, however, the order sought by Mr Kelly would, if granted, have finally disposed of Cave's action (at least as against Mr Kelly) and, in the circumstances, it would not appear correct to regard the application as purely interlocutory in character: *Minister for Agriculture, Food and Forestry v Alte Leipziger Versicherung Aktiengesellschaft t/a Alte Leipziger* [2000] 4 IR 32, [2001] 1 ILRM 519. It would have been open to the Judge to make an order for the cross-examination of Mr Kelly had an application been made pursuant to Order 40, Rule 1 RSC and, it seems clear, he would in fact have made such an order if it had been applied for.

64. What is said by Mr Kelly is that the authorities discussed above precluded the Judge from directing Mr Kelly to be called in the manner he did. I am not persuaded that the authorities have that effect. As I read those authorities, they establish that, in ordinary civil proceedings, a judge has no power to call as a witness a person who has not been called (or, perhaps, identified as an appropriate witness) by the parties themselves, if either party objects. The rationale for that rule is (as it was put by Fletcher Moulton J in *In re Enoch & Zaretsky, Bock & Co's Arbitration*) is that a "*judge has nothing to do with the getting up of the case".* It is a matter for the parties and their advisors to decide what witnesses are to be called and the judge cannot second-guess their decisions without running the risk of being perceived to "*descend into the arena*" (*Jones v National Coal Board).*

65. I express no view as to whether *In re Enoch & Zaretsky, Bock & Co's Arbitration* is good law in this jurisdiction. That issue was not argued before us and it is not necessary to decide it in any event. In my view, the facts and circumstances here are wholly different in character to those in *In re Enoch & Zaretsky, Bock & Co's Arbitration.* Mr Kelly was and is a party to these proceedings. The Judge did not make the decision that he should give evidence in the dismissal application: it was *Mr Kelly* himself who made that decision when he swore the affidavit grounding that application. There is, in my view, no analogy whatever with what occurred in *In re Enoch & Zaretsky, Bock & Co's Arbitration*.

66. In my view, the position here more closely resembles the position in *Fallon v Calvert*. Mr Kelly chose to give evidence in the dismiss application and by doing so he *"submit[ted] himself to the court to be asked all such questions as justice requires".* It is quite fanciful to suggest that, having moved the dismiss application in reliance on the evidence in his own affidavit, Mr Kelly (*qua* party) was in a position to veto Mr Kelly (*qua* witness) being called by the Judge so as to give further (oral) evidence addressing questions legitimately arising from his (sworn written) evidence he had elected to put before the Court and on which he relied.

67. That the Judge clearly could, in principle, have made an order for Mr Kelly's cross-examination under Order 40, Rule 1 RSC further illustrates the fallacy of the argument that Mr Kelly could not be called to give oral evidence without his consent, which is the logical consequence of Mr Kelly's argument that the "*rule*" in *In re Enoch & Zaretsky, Bock & Co's Arbitration* applied in the circumstances here.

68. Of course, Cave did not apply to cross-examine Mr Kelly here. In both the High Court and in this Court counsel for Mr Kelly placed significant reliance on that point. But the fact that Order 40, Rule 1 RSC provides a mechanism by which a party may seek to cross-examine the deponent of the other does not, in my opinion, determine the issue. The essential question is whether, in the absence of any application under Order 40, RSC 1, the Judge was, as a matter of principle, empowered to direct that Mr Kelly be called to give oral evidence (whether any such power was exercised appropriately requires separate consideration). I am firmly of the view that he was. As I have explained, the making of such an order was not inconsistent with the "*rule*" in *In re Enoch & Zaretsky, Bock & Co's Arbitration*. It was not inconsistent with the principle that parties to civil proceedings are entitled to decide whose evidence they wish to rely on. It did not involve the imposition of a witness to whom Mr Kelly had an objection. In my view, the Judge was entitled to be concerned by the evident - and significant - contradiction between what Mr Kelly had averred to regarding his awareness of the settlement Cave had reached with the other Defendants and what was disclosed by the affidavit that had previously been sworn by Mr Thomas Kelly, solicitor for Cave. The integrity of the evidence before the High Court was a matter of fundamental importance, not just to the parties but also to the Court itself. If the Judge had a concern that certain of Mr Kelly's affidavit evidence was or might be misleading - and he clearly and understandably had such a concern here – he was not powerless in face of that concern: he was entitled to seek an explanation from Mr Kelly and to direct that Mr Kelly be called to the witness box for that purpose. That was and is part – an important part – of the judicial power.

69. In light of that conclusion, it is unnecessary to express any view about *Yianni* or whether it is good law here insofar as it addresses the power of a judge hearing a motion for committal to direct the issue of a *subpoena* for the attendance of a witness that neither party to the motion has chosen to call.

70. Although I have concluded that the Judge had power to do as he did, the circumstances in which it will be appropriate to exercise such a power are likely to be rare. Here, it would not have been necessary for the Judge to proceed as he did if Cave had brought an application to cross-examine. Counsel has explained why no such application was brought but the explanation is hardly satisfactory. Furthermore, the approach that Cave adopted – bringing the affidavit material to the attention of the Judge and effectively inviting him to conclude that Mr Kelly's affidavit evidence was untruthful – was precisely that which, in *RAS Medical*, the Supreme Court had indicated was *"not permissible"*. That is no less the case in circumstances where Mr McGarry appeared to accept in argument that the Judge might properly have rejected his client's evidence as to his ignorance of the settlement terms solely on the basis of the affidavit material before the High Court. It would have been preferable if Cave had made an application to cross-examine Mr Kelly, however belatedly.

71. As it was, no application was made and the High Court Judge proceeded as he did. I have already concluded that he was, in principle, entitled to do so. There remains for consideration the complaint that the manner in which the Judge proceeded was unfair

to Mr Kelly. In my view, that complaint has not been made out. In this context, I note the following:

- The purpose of calling Mr Kelly was precisely to give him an opportunity to explain the evidence he had given. That was clearly conveyed to Mr Kelly and he understood the position. Although *RAS Medical* was not opened to the Court, the approach taken by the Judge was entirely consistent with it.

- Before he came to give his evidence, the issue that had caused the Judge concern had been clearly identified and the (very limited) evidential material relevant to that issue had also been identified for the benefit of Mr Kelly.

- Mr Kelly was afforded an opportunity to take legal advice before giving his evidence

- No application was made on Mr Kelly's behalf for an adjournment of the hearing

- Mr Kelly was clearly informed by the Judge that he was not obliged to answer any question if he considered that his answer might incriminate him (in terms reflecting the warning that Mr Ó Floinn had asked to be given)

- While it was repeatedly suggested in argument that the Judge had "*cross-examined*" Mr Kelly, it is clear from the transcript of the High Court hearing

that this characterisation is very wide of the mark. The Judge asked a single question of Mr Kelly – to explain the averment in para 19 of his affidavit in light of the earlier documentation. Mr Kelly gave an extended reply to that question and no further questions were directed to him, either by the Judge or by anyone else (Mr Ó Floinn successfully pre-empted any questioning by Mr Delaney and he did not seek to question Mr Kelly himself).

72. Having regard to these matters, the complaints of unfairness fall short. As to the substantive conclusion reached by the Judge (that Mr Kelly had been untruthful), Mr McGarry had to accept that such a finding was open to the Judge and that there was no basis for impugning its reliability having regard to the *Hay v O' Grady* principles (indeed, as already noted, Mr McGarry appeared to accept that, even without any oral evidence, the High Court would have been entitled to reach an adverse conclusion about Mr Kelly's candour). Even so, Mr McGarry says that it was not necessary or appropriate for the High Court to go as far as it did in terms of expressing its finding. As explained, his principal concern at this stage (as I understand the submissions made) relates to the potential adverse impact of that finding at trial. I will come back to that issue shortly.

CONCLUSIONS AND ORDER

73. I have already expressed the view that the Judge's conclusion that the balance of justice did not lie in favour of dismissing the claim was correct, albeit I reach that view as a result of a much broader assessment than was undertaken by the Judge and without any reliance on the factor relied on by him. As indicated, it would appear to follow that Mr Kelly's appeal should be dismissed. However, as I have also explained, I considered it appropriate to address Mr Kelly's complaints arising from the Judge's finding of untruthfulness before expressing a final view.

74. I have rejected Mr Kelly's contention that the Judge was not entitled to call him to give oral evidence and I have also rejected his complaints of procedural unfairness. Even if I had upheld one or other of these arguments, it would not follow that the appeal would have been allowed. Even if the issue of untruthfulness/lack of candour is disregarded entirely in terms of assessing where the balance of justice lies – as I have disregarded it for the purposes of my analysis – the balance of justice is, in my view, decisively in favour of permitting Cave's claim to proceed.

75. I come back to the concerns raised by Mr McGarry regarding the potentially prejudicial effect of the Judge's finding that Mr Kelly had been untruthful in his evidence. Mr Delaney does not assert any entitlement to rely on that finding at trial; to the contrary he has told this Court that his understanding is that evidence of that finding is inadmissible as a matter of law. He says of course that he can cross-examine

Mr Kelly about the averment in his affidavit and put it to him that it is misleading, having regard to the matters previously disclosed in the affidavit sworn by Thomas Kelly. So much is not in dispute: the sole issue is whether the Judge's finding may also be put to Mr Kelly and/or otherwise relied on at trial.

76. Given Mr Delaney's stated position it appears unlikely that Mr McGarry's fears will be realised. Nonetheless, his concerns are not without force. Even if the Judge's finding was admissible in evidence, I think that it would be highly undesirable that it would be referred to or relied upon at trial. Any evidential value such a finding would have is, in my view, much outweighed by its potential prejudicial effect. There is some force in Mr McGarry's criticism that the terms in which the Judge expressed himself went somewhat beyond what was necessary or appropriate in circumstances where the effect of the Judge's rejection of Mr Kelly's dismiss application was that the proceedings would proceed to trial, at which Mr Kelly would necessarily be a witness and in which his credibility was potentially a significant issue. I am sure that, if the Judge had considered the possibility that any finding he made about Mr Kelly's credibility might be relied on at trial, he would not have expressed himself in the manner he did.

77. Mr Delaney accepted in argument that, if the Court had any residual concerns on this issue, it could as part of its order on this appeal direct that no reliance can be placed at the trial of these proceedings on the Judge's finding. Without intending to cast any doubt on what Mr Delaney has told the Court as to the inadmissibility of that finding in any event, I am of the view that, for the sake of certainty and for the avoidance of

future dispute, this Court should expressly direct that the Judge's finding cannot be referred to or relied at trial. That, to be clear, does not in any way restrict Mr Delaney from cross-examining on the basis of Mr Kelly's affidavit.

78. The Court has already orally indicated its decision to dismiss the appeal. It has now given its reasons. The appeal is now formally dismissed and the High Court Order is affirmed.

79. As to costs, in light of the failure of the appeal it would seem to follow that Mr Kelly should pay the costs of the appeal. It would also seem to follow that the Court should not interfere with the order for costs made by the Judge. While the Court has approached the dismiss application somewhat differently to the High Court, Mr Kelly's appeal has nonetheless failed, and failed decisively. As regards Cave's cross-appeal, while Cave has not succeeded in persuading the Court that there was no inordinate and inexcusable delay, the cross-appeal did not add materially to the issues before the Court or to the length of the appeal hearing. The issue of delay was relevant to the balance of justice and would have had to have been considered in any event. In the circumstances, it would seem appropriate to make no order for costs in relation to the cross-appeal. However, these are provisional views only and, if either Mr Kelly or Cave wishes to contend for a different form of order in respect of costs, they may within 14 days make a request to the Office for a hearing. In that event, the Court will convene a short hearing at a date and time to be notified. The party seeking the hearing will be at risk of the costs of it in the event that the order ultimately made is as provisionally indicated above.

Ní Raifeartaigh and Pilkington JJ have authorised me to record their agreement with this judgment and with the orders proposed