THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED
Court of Appeal Record Number: 2024/23
Neutral Citation Number [2025] IECA 14

Whelan J.
Pilkington J.
Meenan J.

BETWEEN/

JOHN BOWE

PLAINTIFF/ APPELLANT

- AND –

RORY SHERRIFF, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/ RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 30th day of January 2025

1. This is an appeal against an order of Mr. Justice O'Connor made in the High Court on 19th December 2023 (perfected on 8th January 2024) setting aside (for recited special circumstances) an order made by the Deputy Master of the High Court on 3rd May 2022 which struck out the Defendant's defence for failure to comply with an Order for Discovery made on 25th January 2021.

2. There had been no appearance by or on behalf of the defendants at the hearing of the said discovery motion. It is not in dispute that the order had been properly served on them. The discovery order not being complied with by the defendants within the time allowed, the plaintiff issued a motion to strike out the defence, at the hearing of which counsel on behalf

of the Defendants attended court where time was extended for compliance with discovery to 25th January 2022.

3. That deadline not being met, a further motion to strike out the defence issued which was returnable before the Deputy Master on 3rd May 2022. There was no appearance by or on behalf of the Defendants at the hearing of same and the orders sought were granted. The said order was served on the Defendants on 1st June 2022. On 5th October 2022 the Defendants issued a notice of motion seeking, *inter alia,* an order pursuant to O. 27 RSC setting aside the order of the Deputy Master. Additionally, orders were sought pursuant to O. 122, r. 7 RSC, as amended, to extend time to appeal the Deputy Master's order and to extend time to comply with same.

Background

4. The within proceedings were instituted by personal injury summons on 26th January 2017. The reliefs claimed include damages for personal injury loss and damage arising from alleged battery, negligence and breach of duty by the first defendant and *"other unknown members of an Garda Síochána"* on 5th December 2014 and negligence, breach of duty and vicarious liability on the part of the second and third named defendants. The matter is to be tried by jury. Prior to the institution of proceedings, the Personal Injuries Assessment Board issued an authorisation on 17th February 2016. The personal injury summons was served almost a year later. Appearances were entered on behalf of all defendants in early 2017. A notice for particulars was served on 6th March 2017 and the defendants' defence was delivered in the first instance on 5th May 2017.

5. It appears that the plaintiff was convicted on fourteen counts of dangerous driving before the District Court on 5th December 2018 arising from the events in question. The issue of severity of sentence alone was appealed to the Circuit Criminal court and concluded on 12th February 2019.

***Ex tempore* judgment**

6. The Defendants' motion to reinstate their defence issued on 5th October 2022 and was adjourned from time to time by Mr. Justice Ferriter in the High Court to await the outcome of a pending interlocutory application of relevance which ultimately resulted in the judgment *De Souza v. Liffey Meats* [2023] IEHC 402 ("*De Souza*"). The Defendants' motion was ultimately heard by O'Connor J. on 19th December 2022. He delivered his judgment *ex tempore* and subsequently a written copy of same was furnished. He observed *"it is in the interest of justice and good court management to make orders on foot of this outstanding motion today with a summary of my reasons."* He set out the terms of the order he proposed to make, indicating *"I will hear further submissions from counsel after they have considered the reasons."* (para. 5) He granted an order pursuant to O. 27, r. 15(2) RSC setting aside *"what is effectively the judgment by default granted by the Deputy Master on 3 May 2022 due to the following special circumstances:*

(i) the plaintiff was aware from at least the delivery of the defence on 5 May 2017…up to the 3 May 2022…and from at least a date in October 2022 to date, that the defendants intended to keep liability in issue in these proceedings at the trial before a jury;

(ii) the solicitor designated by the Chief State Solicitor to take instructions and to act as solicitor for the defendants in these proceedings in his affidavit sworn on 26th June 2023 has outlined without challenge on behalf of the plaintiff the following facts, inter alia:

(a) the connectivity difficulties which had impacted the file management after the imposition of restrictions to combat Covid-19 from March 2020 up to September 2020;"

"(b) the continuing ICT issues and inability to monitor incoming post during the Level 4 and 5 Covid-19 lockdown periods."

The judge identified a third "special circumstance" as -

> *"(c) the inability of the said solicitor due to challenges without the day-to-day structure of his previous office structure to care for his files coupled with the facts deposed to about his health and hospitalisations."*

7. The substance of these affidavits will be considered hereafter. The Plaintiff did not contest the said affidavits particularly the final affidavit of the solicitor and same was admitted ultimately without challenge or cross-examination.

Of the defendants' conduct the judge had regard to:

> *"(d) the efforts made by the defendants and the said solicitor to collate the documents for discovery and the ultimate making of an affidavit as to documents sworn on 10 October 2022 (albeit only served on 15 June 2023);*
>
> *(e) the handing over of a folder containing copies of all those documents discovered on 19 December 2023;*
>
> *(f) the appointment of a new solicitor by the Chief State Solicitor since early June 2023 to replace the said solicitor to advise, take instructions, brief counsel, and do for a solicitor does for his/her clients in respect of these proceedings.*
>
> *(g) It is in the interests of justice that the defendants and particularly the first named defendant, a member of an Garda Síochána, be afforded the opportunity to vindicate his reputation before a jury."*

He set aside the order of the Deputy Master of 3rd May 2022 and extended time, *inter alia*, to comply with the order for discovery made by the High Court (Cross J., 25th January 2021).

<u>The appeal</u>

8. The Plaintiff contends that the trial judge erred in granting the orders and, in particular, in finding that "*special circumstances*" existed within the meaning of O.27, r. 15(2) RSC. It is contended that he erred in fact and law in determining that factors (a) to (f)

inclusive (cited above) constitute "*special circumstances*"…*"as they concerned the said solicitor with responsibility for the file on behalf of the respondent."*

9. Grounds 1-7 of the notice of appeal are directed towards the contention that the trial judge erred in making an order pursuant to O. 122, r. 7 RSC extending time to appeal from the order of the Deputy Master made 3rd May 2022 striking out the defence. However, in the course of the appeal hearing the vast bulk of time and argument were directed towards the basis on which the order was made and whether the judge could have been satisfied that at the time the default occurred the "*special circumstances*" cited in the order of the High Court existed to explain and justify same. Thus, the operation of O. 27, r. 15(2) is the primary issue under consideration in this appeal, however, for completeness the well-established principles governing extensions of time pursuant to O. 122, r. 7 will also be briefly considered.

Standard of review

10. This is an appeal from an order of the High Court made within an interlocutory application wherein the trial judge exercised his discretion in reaching his determination. Guiding principles on appellate review of the exercise of discretion by a High Court judge is found in the decision of the Supreme Court in *In Bonis Morelli, Vella v. Morelli* [1968] I.R. 11("*Morelli")*. It is a long-standing authority for the proposition that where an order is made by a trial judge which involves the exercise of discretion, it ought not generally to be interfered with on appeal unless the appellant demonstrates that the trial judge erred in principle in some manner in the way in which that discretion was exercised.

11. Subsequent jurisprudence such as *Collins v. The Minister for Justice* [2015] IECA 27 ("*Collins*") Irvine J. (as she then was) (with whom Peart and Hogan JJ. concurred) characterised this as *"the error in principle approach"* (para. 49). The judgments in *Vella,* particularly those of Walsh and Budd JJ., outline the historical origins of the "*error in principle*" approach to appeals which evolved following the coming into force of s. 52 of the

Supreme Court of Judicature (Ireland) Act, 1877. The jurisprudence subsequent to 1877, as reviewed by the Supreme Court in *Vella,* makes clear that appeals were in practice entertained against discretionary orders even where leave to appeal had not been obtained as s.52 of the 1877 Act required and orders were reversed on appeal whenever a judge was found to have *"gone wrong in principle"* but an appellate court would not otherwise interfere with the exercise of discretion by the original judge.

12. Later authorities of the Supreme Court suggest that appeals from discretionary orders were not confined to matters mentioned in s52 but could be brought whenever the Supreme Court was satisfied that the trial judge *"had erred in principle* that it *"has a right and an obligation to substitute its discretion for that of the learned High Court judge, if is satisfied that it should do so"* (*per* Finlay C.J. *Jack O'Toole Ltd. v. MacEoin Kelly Associates* [1986] I.R. 277 at 283.

13. Barron J. in *Lismore Homes Ltd. v. Bank of Ireland* [1999] 1 I.R. 501 at 529 emphasised that an appellate court enjoys a discretion which *"…must be exercised independently of the manner in which the discretion has been exercised in the court below."*

14. In *Martin v. Moy Contractors Ltd.* [1999] IESC 26 Lynch J. emphasised the parameters of appellate discretion, observing:

> *"The High Court has a measure of discretion in these applications to dismiss actions for want of prosecution. Provided that the High Court decision is within the limits of reasonable discretion this court should not interfere with it. In this case the learned President gave a reasoned judgment and his reasoning is clearly valid. His decision naturally follows from such reasoning and is also therefore clearly valid. There is, accordingly, no basis on which this court should interfere with the judgment of the learned President…"*

15. A line of authorities thereafter held that an appeal from an interlocutory or discretionary order was not to be approached either by the parties or the appellate court as a *de novo* hearing of the original application. Kearns J. (as he then was) emphasised as much in *Stephens v. Paul Flynn Ltd* [2008] IESC 4, [2008] 4 I.R. 31 where he remarked:

> *"…counsel for the plaintiff has urged this Court to treat this appeal as a completely fresh hearing of the original application, I am satisfied that this is not a correct approach where a discretionary order of the High Court is under review by this Court. Where, as in this case, a judge of the High Court makes a discretionary order, I am firmly of the view that this Court should not interfere with such order unless it is clear that the discretion has not been exercised within the parameters of what might be described as a reasonable exercise of that discretion."*

The decision in *Stephens,* with which the other members of the court concurred, appeared to indicate a requirement on the part of the Plaintiff to demonstrate to the appellate court that the High Court's discretion was not reasonably exercised. It does not now reflect the current view of the Supreme Court.

16. The majority of the Supreme Court in *Desmond v. MGN Ltd.* [2008] IESC 56, [2009] 1 I.R. 737, ("*Desmond*") characterised the *Vella* decision in the context of it having identified that the historic common law and statutory restraints on the general right to appeal against discretionary orders did not accord with *Bunreacht na hÉireann*. Geoghegan J. observed: *"… in [the Morelli case] as Kearns J. points out, Budd J. indicated that the court would have to give 'great weight to the views of the trial judge'. I think that that is the true legal principle in the light of the Constitution now."*

17. Turning then to the ambit of an appellate court's entitlement to review on appeal discretionary orders of a lower court, Geoghegan J. observed:

"The expression 'discretionary order' can cover a huge variety of orders, some of them involving substantive rights and others being merely procedural in nature including mundane day to day procedural orders such as orders for adjournments etc. I think that in reality over the years since [Morelli] this court has exercised common sense in relation to that issue. The court would be very slow indeed to interfere with the High Court judge's management of his or her list, but in a case such as this particular case where much more substantial issues are at stake the court, while having respect for the view of the High Court judge, must seriously consider whether in all the circumstances and in the interests of justice it should re-exercise the discretion in a different direction."

18. MacMenamin J. in *Lismore Builders Ltd.(in receivership) v. Bank of Ireland Finance Ltd.* [2013] IESC 6 ("*Lismore Builders*") remarked as to the circumstances in which an appellate court is entitled to review an order made by a High Court judge in the exercise of his discretion that:

"Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interest of justice are fundamental. This is clear from the judgment of Geoghegan J. in Desmond v. MGN…"

19. Having carried out a comprehensive review of the various strands of jurisprudence in connection with an appellate court's review of the exercise of discretion by a High Court judge, Irvine J. in *Collins* observed:

"Whatever doubts and differences might have existed on this point prior to the judgment in Lismore Homes have really been dispelled by that decision. In any event,

we consider that the views expressed by MacMenamin J. are those which best accord with the balance of authority and, indeed, with first principles."

Irvine J. further observed:

"So far as the balance of authority is concerned, it must be noted that neither judgments in Martin or Stephens had referred to the earlier judgment of a five member Supreme Court in Vella where the point had been examined in almost exhaustive detail. Nor was there any reference to Jack O'Toole Ltd., another judgment of a five member Supreme Court where the issue received extensive consideration."

20. Irvine J. in *Collins* considered that it was not easy to see how the *dictum* of Lynch J. in *Martin* could be *"satisfactorily aligned with these earlier decisions. While different views were expressed in Desmond, the approach of Geoghegan J. was approved in unequivocal terms by the Supreme Court's most recent decision in Lismore Homes."* Such an approach was supported by first principles:

"First, while the scope of the right of appeal conferred by the Constitution from decisions of the High Court to the Supreme Court prior to the establishment of this Court in October 2014 was not defined by Article 34.4.3, it may be assumed that it was intended that this right of appeal would be an effective one." (para. 73)

Irvine J. continued:

"74. If, however, the scope of appellate review was to be confined to demonstrating that there had been an error of principle on the part of the trial judge, then, as was pointed out in Lismore Homes, this might have compromised the ability of the Supreme Court to do justice or to provide an effective remedy in any given case.

75. Second, the very structure and language of Article 34.4.3 pre-supposed that the right of appeal from the High Court to the Supreme Court would be a full appeal, subject only to limitations necessarily inherent in the appellate process. If it were

thought desirable that the scope of that appeal should be restricted in some fashion then, as both Walsh and Budd JJ. pointed out in Vella, this would have to be done by means of legislation to this effect enacted by the Oireachtas which sought to 'regulate' the jurisdiction in the manner expressly permitted by Article 34.4.3. An ex-ante limitation on the scope of that jurisdiction of the kind suggested in Martin requires to be imposed by legislation and not by judicial decision.

76. Third, …as Geoghegan J. pointed out in Desmond, the decision to strike out proceedings could not properly be described as a discretionary decision in this sense. Questions such as whether, for example, the delay had been inordinate or inexcusable or whether the delay has been prejudicial to the defendant are mixed questions of law and fact, not presenting discretionary questions as such." (emphasis in original)

21. Irvine J. further observed in *Collins*:

"It is, of course, entirely accepted that the views of the trial judge will carry great weight. Yet if the interests of justice require that a different conclusion should be reached on appeal, it would be wrong and purely formalistic to suggest that that first instance decision should remain invulnerable to appeal simply because no error of principle was disclosed."

She concluded that whilst an appellate court will accord great weight to the views of the trial judge:

"The ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."

22. It is for the appellate court in carrying out a review to evaluate whether the trial judge fell into error in any respect in the manner in which he approached the exercise of his

discretion in the interlocutory application he was called upon to consider. Thus, albeit that great deference ought to be accorded to the views of the trial judge, it is open to an appellate court to substitute its own discretion for that of the High Court, as is clear from *Lismore Builders* and in light of the expositions of the law as set forth in *Vella.* It is well established in the jurisprudence of the Court of Appeal that it *"retains the jurisdiction of exercising its discretion in a different manner in an appropriate case."*, in particular, where errors are established in the approach adopted in the trial judge. (*Lismore Builders* at para. 4*)*

23. The issue has been revisited on a number of key occasions subsequent to *Collins*, notably in *McCoy v. Shillelagh Quarries Ltd.* [2017] IECA 185, ("*McCoy*") where Finlay Geoghegan J. indicated:

> *"...this Court will be slow to intervene to allow an appeal against a discretionary order made by the High Court unless the Plaintiff establishes either that there was an incorrect application of principles by a High Court judge or that the resultant decision is one which is unjust as between the parties having regard to the particular circumstances."*

This exemplifies the functional application of the principles in *Vella* and *Lismore Homes.*

24. Laterally, Collins J. in *Betty Martin Financial Services Ltd. v. ESB DAC* [2019] IECA 327 ("*Betty Martin*") succinctly adumbrated the governing principles that inform this Court where an appeal is brought against an order made in the exercise of discretion by a High Court judge. Noting the importance of paying great weight to the views expressed by the trial judge, Collins J. nonetheless emphasised that the ultimate decision is one for the appellate court untrammelled by any *a priori* rule as would restrict the scope of the appeal by permitting the appellate court to interfere with the decision of the High Court only in those cases where an error of principle was established, reiterating para. 79 of *Collins.* As *Collins* emphasised, an Plaintiff is not obliged to establish an error of principle as a

prerequisite to the Court of Appeal reaching a different conclusion to that arrived at by the High Court.

25. Beyond establishing "*special circumstances"* which warrant the granting of the discretionary order sought, in light of *Lawless v. Aer Lingus* [2016] IECA 235 and *McCoy*, where the order under appeal was made in the exercise of a discretionary jurisdiction before it is to be displaced by this Court, the appellant should establish that a real injustice will be done unless the order under appeal is set aside. A Plaintiff will not succeed in reversing the order merely by establishing that there was a better or more suitable order that might have been made by the High Court.

26. It is incumbent on the High Court to clearly articulate a reasoned basis for the view it takes of the evidence and particularly in respect of contested issues. Where the trial judge fails to engage appropriately with the key arguments made and explain the basis for the conclusions arrived at or if the judgment generally fails to sufficiently identify the basis for conclusions reached (in light of *Doyle v. Banville* [2012] IESC 25 [2018] 1 I.R. 505), these factors will affect the weight to be attached by the appellate court to the trial judge's analysis and views in respect of the issues in contention.

27. Where insufficient reasons are identified by a judge for arriving at his decision such that the parties can reasonably understand the basis and reasoning upon which the High Court judge exercised his or her discretion, the greater the entitlement of the appellate court to intervene and revisit the exercise of the discretion by the High Court.

Order 27, r. 15 (2)

28. The current iteration of O. 27, r. 15(2), introduced pursuant to SI 454/2022. It provides:

> *"Any judgment by default, whether under this Order or any other Order of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that at the time of the default special*

circumstances (to be recited in the order) existed which explain and justify the failure, and any necessary consequential order may be made where an action has been set down under rule 9."

29. A review of the prior analogous relevant rule was carried out by Murray J. in *McGuinn v. The Commissioner & Others* [2011] IESC 33 ("*McGuinn*") wherein he observed:

"Order 27 Rule 14(2) of the Rules of the Superior Courts (cited in full above) provides that 'Any judgment by default, whether under this Order or any other of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court might think fit…"

Murray J. noted that until the rule was amended in 2004 that was the basis upon which a judgment might be set aside in the exercise of the court's discretion. The terms of the rule had remained essentially the same as that in Order 27, rule 17 of the Rules of the Superior Courts (Ireland) 1905. (See *Wylie's Judicature Acts* (1906)).

The earlier rule was amended by S.I. 63/2004 by the insertion after the foregoing text of the phrase *"if the Court is satisfied that at the time of the default special circumstances… existed which explain and justify the failure, …".*

As Murray J. noted in *McGuinn*:

"The amendment to the longstanding Order 27 Rule 4 is specific and narrowly focused. For an applicant to succeed under the terms of the Rule he must first of all demonstrate that there were 'special circumstances' explaining and justifying the failure at the time when the judgment was obtained.

Strikingly, although the amendment introduced a new, and stricter, criterion which an applicant must satisfy before he or she can rely on the Court exercising its discretion in his or her failure, it did not introduce any time limit within which an application to set aside a judgment in default must be made. Any delay in bringing an application to set aside remains, as it always has been, a matter to be taken into

account by the Court when exercising its discretion under the Rule. Contrary to what counsel for the plaintiff submitted I do not think that subsequent delay of an inordinate nature in bringing an application to set aside a judgment can affect the question as to whether there were 'special circumstances' at the time the judgment in default was obtained."

30. The rule is engaged where a failure is established which has led to the other party obtaining a judgment or other order by default. It is incumbent on the party who seeks to have an order set aside to satisfy the court that at the relevant time (i.e. the time of the default) special circumstances existed which both explain and justify the defalcation in question as was explained by Murray J. in *McGuinn. Delany and McGrath on Civil Procedure* (5th ed., 2023, Round Hall) at 5.181 notes concerning Murray J.'s decision in *McGuinn*:

"He regarded it as striking that the amended rule did not introduce any time limit within which an application to set aside a default judgment must be brought and emphasised that what an applicant was required to demonstrate that there were 'special circumstances' explaining and justifying the failure at the time when the judgment was obtained. He therefore rejected the contention that a delay of an inordinate nature in bringing the application to set aside the default judgment could affect the question of whether there were 'special circumstances' at the time that the default judgment was obtained."

31. Those observations are particularly apposite in the instant case. It is noteworthy that the Plaintiff placed reliance on delays on the part of the Defendants strongly contending that delays on the Plaintiff's part are not relevant. Nevertheless such delays can be weighed and taken into account in assessing the balance and interests of justice as can other material considerations including the gravity of the claim and the consequence of dismissal for the claimant Murray J. observed in *McGuinn*:

"…delay which is inordinate and inexcusable, even if it would not prejudice a fair hearing of a case on its merits, must always be a material factor in deciding whether or not to grant the party guilty of delay discretionary relief, particularly if that relief would cause further undue delay to the other party." (p. 2 of the judgment).

32. It is of note in the instant case that no affidavit was sworn by the Plaintiff in regard to any matter such as asserting any particular prejudice were an order made setting aside the Deputy Master's order and extending time for the defendants to deliver the affidavit of discovery.

Special circumstances

33. The meaning to be ascribed to "*special circumstances*" in the context of O. 27, r. 15(2) is not clarified within the rule itself. This Court considered the concept in *Murphy v. Health Service Executive* [2021] IECA 3 ("*Murphy")* in the context of O. 8, r. 1(4) which provides for the renewal of a summons. Haughton J. in *Murphy* observed at para. 69 that O. 8, r. 1(4) did not assist in identifying what may amount to "*special circumstances"* to justify an extension of time. However, he considered that some general observations might be made:

"70. Firstly, whether special circumstances arise must be decided on the facts of a particular case, and it would be unwise to lay down any hard and fast rule.

71 . Secondly it is generally accepted that it is a higher test than that of 'good reason'. This would seem to follow from the fact that the application to the Master is made before the summons lapses, and O. 8 does not require the Master to state the 'good reason' in the order.

72 . It also follows from the use of the word 'special'. While this does not raise the bar to 'extraordinary', it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present.

73. Hyland J. in Brereton usefully points by way of analogy to the test of 'special circumstances' as it applies resisting a claim for security for costs."

34. Hyland J. in *Brereton v The Governors of the National Maternity Hospital & Ors* [2020] IEHC 172 had considered that certain aspects of the test governing an application for security for costs were analogous to the test for "special circumstances" notwithstanding that O. 29 RSC does not use that phrase in the context of applications for security for costs. Hyland J. also noted:

"In West Donegal Land League v Udaras Na Gaeltachta [2006] IESC 29 Denham J., as she then was, noted that in considering the concept of special circumstances it should be remembered that the essence of the order for security for costs is to advance the interests of justice and not hinder them, and that it is for a court on such an application to consider and balance the interests of the plaintiff company and those of the defendant in a fair and proportionate manner."

35. Haughton J. in *Murphy* concurred with that analysis, observing at para. 74:

"[T]his applies by analogy to a court deciding whether 'special circumstances …justify an extension'. The court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused."

36. In construing the meaning of the phrase "*special circumstances*", Ferriter J. in *De Souza* adopted the approach of Haughton J. in this court in *Murphy* which viewed the term and its meaning through the prism of O. 8, r. 1(4). Ferriter J. concluded that the test for "*special circumstances*" is a higher test than "*good reason*", observing at para. 52 that *"while this does not raise the bar to 'extraordinary', it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present"*. The approach

of Ferriter J. in *De Souza* has much to commend it. His view that each case will need to be considered on its own individual facts is pragmatic and accords with earlier authorities. Ferriter J. observed that in the ordinary course, mistake or inadvertence by a solicitor will not amount to "*special circumstances*" within the meaning of the rule. Applying the test to the facts presenting in *De Souza*, he set aside the judgment obtained against the defendant as a result of non-compliance with an "*unless order*".

Relevant factors in this case

37. Turning then to the matters deposed to in the affidavits supporting the application, the question arises as to whether they establish facts or a set of circumstances that lie beyond the quotidian and whether the cumulative impact of the series of events deposed to on behalf of the defendants takes the case beyond ordinary or normally occurring events. The "*special circumstances*" contended for include; (i) the acute medical condition of the CSSO solicitor having carriage of the file. (ii) Medical and logistical issues relevant to the Covid 19 pandemic and (iii) logistical difficulties arising from lack of electronic connectivity when the solicitor was working remotely during lockdown.

38. In the first instance, the key relevant period of delay arose from the date the Defendants failed to comply with the order for discovery made in the High Court on 25th January 2021 by Cross J. It will be recalled that there was no appearance by or on their behalf at that hearing. Nonetheless it is not in dispute that notice of the making of the order was served on the Defendants. The order on its face afforded the Defendants eight weeks to comply with its terms. That period expired circa 22nd March 2021. Ultimately, it appears that the delay on the part of the Defendants effectively continued until 5th October 2022 when the motion to reinstate the Defence issued in the present application. Thus, the key period of operative delay extends to approximately 18 months. The Plaintiff contended in argument before this court that the respondent's delay ought to be viewed as encompassing a period

of four years. However, that is not a reasonable proposition and indeed appears to overlay with periods of admitted delay on the part of the Plaintiff himself between March 2017 and September 2019, a factor which in the context of this application is more properly to be considered in the context of assessing the interests and balance of justice as between the parties should "*special circumstances*" within the meaning of O.27r.15(2) be established.

Health issues

39. In an affidavit sworn on 26th June 2023, the solicitor, the file holder in CSSO, deposes to serious psychiatric and other health issues afflicting him including:

(a) Having intermittently suffered with severe depression for the previous ten years.

(b) Recently hospitalisations for two separate periods each of six weeks duration.

(c) That the Covid-19 pandemic and the requirement to work from home had a particularly adverse impact on his mental health.

(d) That the Covid-19 *"exacerbated the situation"… "During the pandemic, CSSO staff were required to work from home via a laptop and a mobile phone."… "As a result, my mental health deteriorated and this caused my work to suffer and me to overlook matters which I would normally attend to."*

(e) He deposes that following his second six week hospitalisation in 2018, he was clear to return to work but in hindsight expresses the view that he *"… had not fully recovered and was not equipped to deal with the pressures of my job during the Covid period."*

(f) He deposes (para. 6) *"I found it especially challenging without the day to day structure of the office and the support available to me when working alongside colleagues. As a result, I struggled with my health throughout much of Covid with an adverse knock-on effect on my work. Because of our remote working arrangements, my health difficulties were not readily apparent to my colleagues nor did I inform my*

line manager or colleagues, and the extent of my difficulties were not realised until much later."

40. Notice can be taken of the fact that Covid-19 related lockdowns in this jurisdiction were amongst the longest in the world. Now, with the benefit of hindsight, it is evident that the strictness and duration of the lockdowns had a deleterious impact on certain cohorts of the population and was particularly challenging to individuals, such as the solicitor, who already had underlying psychiatric or allied health issues.

41. I note that a Level 4 lockdown was ordered in September 2020 for a period of one month. A Level 5 lockdown was ordered on or about 21st October 2020 for six weeks and a further level 5 lockdown was ordered on 31st December 2020 for a period of four weeks which expired at the end of January 2021. The latter Level 5 lockdown appears to have been in operation on the return date on the motion for discovery on 25th January 2021.

42. It is evident that the non-appearance by counsel or solicitor for the Defendants at the hearing of that motion set in train the series of untoward events culminating in the Deputy Master making the strike-out order on 3rd May 2022 when the Plaintiff's second motion came on for hearing, there being no appearance by or on behalf of the Defendants.

43. Returning then to the solicitor's affidavit, at para. 7 he confirms that at the date when the discovery motion was returnable before the High Court (Cross J.) on 25th January 2021 *"The office was open at that time but staff were still encouraged to work remotely and only to come in to carry out essential work."* The solicitor candidly admits that he was not in a good psychiatric state and asserts *"that was by far my greatest challenge."*

IT Connectivity issues

44. Apart from his mental health issues and the significant impact of the overlay of Covid-19 on that condition at para. 7 he identifies that *"At the start of Covid in March 2020, staff*

experienced connectivity issues which impacted on their file management. It was September 2020 before office staff received the necessary IT resources to work remotely." The solicitor deposes that *"While occasional ICT issues arose during subsequent Level 4 & 5 lockdowns, generally CSSO staff were able to carry out their work and attend remote to hearings/motions as and when necessary. However, a number of staff, including this deponent, were less successfully in maintaining connectivity with the office IT systems. This affected my ability to work effectively on my files and in particular to monitor incoming post."*

45. The Covid-19 pandemic commenced *circa* March 2020. It is noteworthy that the request for voluntary discovery was sent to the defendants on 18th June 2020, the second request was sent on 27th July 2020 and the motion for discovery issued on 26th August 2020. Those events occurred within the first 5 months of the pandemic. It would appear that a Level 4 lockdown was declared on foot of an order of September 2020. Level 5 lockdowns were imposed, *inter alia,* by order of 21st October 2020 for a period of one month and from 31st December 2020 for a period of one month. Those timeframes encompass, *inter alia*, the return date of the Plaintiff's motion for discovery which came before Cross J. on 25th January 2021. There was no appearance by or on behalf of the Defendants at the hearing of that motion and the order was made in their absence.

46. It appears that as of the 16th February 2021 the solicitor was aware of the order for discovery made by Cross J. on 25th January 2021 when he received notice from the plaintiff's solicitors enclosing a copy of the order. He deposes that he notified the clients of the fact requesting they compile the necessary documentation. He deposes at para. 9:

> *"They did so and the discovery documentation was forwarded to me on 25 February 2021. Even though I had what I needed from the client, for all of the foregoing reasons, the further huge challenge for me of further Covid restrictions and the*

ongoing impact on my poor mental state which persisted, meant I did not do what was required to progress the file. This was not inadvertence or oversight; it was more fundamental in that I just was unable to do what was required of me mentally." (emphasis added)

47. Notwithstanding the further motion having issued, the solicitor failed to notify the client and did not brief counsel either to draft the affidavit of discovery in light of the material having been supplied or to attend in court before the Deputy Master in connection with the motion to strike out the defence which was returnable for 3rd May 2022. Of that state of affairs the solicitor deposes at para. 10:

" I appreciate that the above is a catalogue of failures to act and take necessary steps, but all of them stem from my mental health problems, which problems were compounded by Covid enforced isolation with a terrible knock on effect on my professional work as I was then without the support structures of the office and my colleagues and my division head."

48. It is significant that the Plaintiff neither disputes nor contradicts the averments in the affidavit of the solicitor sworn on 26th June 2023 and neither was it sought to cross-examine him on foot of same at the hearing of the motion before the High Court in December 2023. As noted above, the Plaintiff himself filed no affidavit opposing this application.

Assessment

49. The evidence in its totality points to an exceptional cluster of unusual and extreme circumstances which merged and combined to create a perfect storm whereby the evidently reasonably well managed psychiatric disability of the solicitor did not impinge on the discharge of his functions as the solicitor handling this file up until the onset of the Covid-19 pandemic in March 2020. He clearly benefitted from collegiality and ongoing support in the workplace which assisted and enabled him to discharge his functions notwithstanding

his vulnerabilities and disabilities. The harsh and protracted lockdowns attendant on the Covid-19 pandemic, coupled with the requirement that solicitors – such as him - working at the CSSO should work remotely from home resulted in his sudden isolation and appears to have precipitated his personal crisis which incapacitated him in discharging his functions. Added to this were the significant difficulties with connectivity deposed to and not disputed that were experienced by the solicitor in the early months of the Covid-19 pandemic up to the end of September 2020 in particular and additionally arising occasionally during the subsequent Level 4 and Level 5 lockdowns in 2020 and 2021 during which this solicitor encountered difficulties in maintaining connectivity with the office IT system. The totality of those events in combination gave rise to a degree of exceptionality which on any reasonable view of the events constituted "*special circumstances*" as events and factors one overlaid upon another the cumulative impact of which brought the solicitor into a realm beyond the ordinary or the usual aspects of inadvertence, oversight or mistake that conventionally have been rejected by the courts as a basis to set aside an order obtained in default. On the evidence before him, the trial judge was entitled to conclude that the Defendants had established "s*pecial circumstances*" as he identified.

50. The Plaintiff's proposition that blame must rest with the Chief State Solicitor is deeply unattractive. It is freighted with an imputation that the Chief State Solicitor was herself personally obliged in the context of the Covid-19 pandemic to anticipate and pre-empt the psychological and psychiatric impact of the Covid-19 pandemic lockdown regime mandated by Government on the advice of the HSE and those held out to have expertise on the matter. This is an entirely unrealistic proposition.

51. Further it suggests that the Chief State Solicitor was during that exceptional period of time, when she herself was presumably subject to like restraints including remote working during the various Level 4 and Level 5 lockdowns, to assume, in the absence of any

immediate evidence, that there were psychiatric deficits in a member of her staff previously confirmed by professional experts as being fit to return to work. Such an approach risks penalising employers, such as the Chief State Solicitor, who employ persons with disabilities and would have a chilling impact on enabling access to work for such individuals.

52. The Plaintiff's asserts a fundamental failure to properly and adequately supervise the work of the solicitor. This approach decontextualises from the circumstances deposed to as outlined above and not disputed. It is to impose a standard on the Chief State Solicitor informed with the benefit of hindsight in light of the insights and understandings gleaned from the Covid-19 pandemic and its deleterious impact on the mental health of vulnerable individuals particularly those ill suited to remote working or any form of social isolation. With respect to the Plaintiff, no evidence was adduced to support the proposition that the Chief State Solicitor could reasonably have known of the various adverse psychological phenomena now understood to be associated with isolation and remote working and its adverse impact on certain cohorts of workers such as the file handler in this case. Such an argument contends for a counsel of perfection, is unrealistic and not supported by any authority in the context of the exceptional circumstances that obtained in this case.

53. It is clear that the solicitor's condition was very serious and sustained and continued for an appreciable period of time beyond the lockdowns. Contrary to the Plaintiff's contention, the factual matrix outlined in the solicitor's affidavits did justify the trial judge's finding on the evidence before him that "*special circumstances*" were established which entitled him to exercise his discretion as he did. Further, the Plaintiff's contention that the affidavit evidence from the solicitor, particularly the third affidavit, did not in point of fact or law constitute special circumstances is not correct in light of the authorities including *Murphy, Collins and Betty Martin*. Neither can it fairly be said that the matters referred to by the solicitor were *"broad and unspecific in nature"*. Further, if the Plaintiff had an issue

with any averment contained in the affidavit of the solicitor, it was open to him to cause the solicitor to be cross-examined on foot of same.

54. The focus of the Plaintiff's argument was directed in particular towards alleged deficits on the part of the Chief State Solicitor. There was ample evidence entitling the trial judge to conclude that he could not criticise the professionalism of the particular solicitor or the Chief State Solicitor in view of the gravity of the facts outlined on affidavit. I conclude that the Defendants did adduce evidence of matters of such exceptionality as entitled the trial judge to consider same "*special circumstances*" explaining the Defendants' failure to contest the default motion before the Deputy Master in May 2022.

55. Albeit that there were delays, the evidence in the affidavits demonstrate the combined series of exceptional, unusual and extraordinary occurrences for the solicitor who had a history of significant psychiatric disability all outlined in his affidavits. It was the cumulative impact of all those aspects identified in the affidavit and not disputed or contested by the Plaintiff that gives rise to the exceptionality in the instant case which in substance amounted to the "*special circumstances*" identified by the High Court judge. Thus, when the judge turned to consider the "*interest of justice*" he was entitled to do so bearing in mind the special circumstances he had correctly determined to have existed at the relevant time. The fact that the "*special circumstances*" in this case extended beyond days or weeks logically follows from the nature of the mental health issues outlined by the solicitor and to which he deposed he was afflicted throughout the relevant period of time. It would be capricious to discount some of the period of time in circumstances where the solicitor unequivocally deposes *"I just was unable to do was required of me mentally"* and where he acknowledges that notwithstanding the series of failures involved in taking necessary steps *"... all of them stem from my mental health problems which problems were compounded by Covid enforced isolation"*. It is evident that his condition was further exacerbated by the absence of the

scaffolding of collegiality and support structures operated by the CSSO to which he deposed and the lack of electronic connectivity with the office that was encountered during that time period.

The interests of justice

56. A useful starting point is the oft-cited *dictum* of Bowen L.J. in *Cropper v. Smith* (1884) 2 Ch. D. 700 where he observed:

> *"It is a well established principle that the object of the court is to decide the rights of the parties not to punish them for mistakes they made in the conduct of their case, by deciding otherwise than in accordance with their rights… I know of no kind of error or mistake which if not fraudulent or intended to overreach, the court ought not to correct if it can be done without prejudice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of grace or favour…"*

That *dictum* has been cited with approval by the Supreme Court in decisions such as *Croke v. Waterford Crystal Limited and Anor* [2004] IESC 97, [2005] 2 I.R. 383, *Allen v. Irish Holemasters* [2007] IESC 33, *McGuinn,* and *Moorehouse v. Governor of Wheatfield Prison and Others* [2015] IESC 21.

57. It is clear in light of decisions such as the Supreme Court in *Desmond* that the court in assessing the interests of justice is bound to have regard to the substance of what is at stake for either party if the order sought is granted or refused. *Desmond* concerned an application to strike out a libel suit on grounds of undue delay. The disputed article had been published over nine years previously in January of 1999. However, the plaintiff had elected to await the deliberations of the Moriarty Tribunal before deciding whether to advance the suit to trial. Due to the importance of the issue for the plaintiff, the Supreme Court upheld the decision of the High Court refusing to strike out the proceedings despite the defendants

having established on the facts that the delay in question was in all the circumstances both inordinate and inexcusable.

58. The claims the instant case include grave allegation of battery against the first-named respondent, a serving Garda Sergeant, and other unidentified gardai. In the language of the Plaintiff's solicitor in a replying affidavit sworn on 11th November 2022, at para. 5:

> *"The principal cause of action is of the intentional tort of assault and battery of the Plaintiff by the First Named Defendant and by other members of An Garda Síochána whose identity is not known to the Plaintiff." "... That is the primary basis of the wrongs alleged against the Defendants. It is the plea which entitled the Plaintiff to have these proceedings set down for determination before a Judge sitting with a Jury."*

In addition, there are pleas of negligence, breach of duty of care as against the first, second and third named defendants and of vicarious liability as against the two latter named defendants.

59. It is evident from the affidavits sworn on behalf of the Plaintiff in the context of this application that the defendants, particularly the first named defendant fully contested all allegations. They were contested in the context of criminal prosecutions of the Plaintiff in respect of fourteen charges tried before the District Court which resulted in convictions. The Plaintiff appealed against severity only. It appears that the allegations were the subject of an unsuccessful complaint by the Plaintiff to the Garda Síochána Ombudsman (GSOC).

60. Mr. O' Flynn, solicitor for the Plaintiff deposes at para. 5(c):

> *"I am advised by Counsel that at its most basic level, the Defence states that there was no force used by members of An Garda Síochána in arresting the Plaintiff. Such Defence directly contradicts the version of events given by the first named Defendant*

and another member of An Garda Síochána when giving evidence in the District Court in Gorey, Co. Wexford in November and December, 2018."

He asserts that the defence *"... is significantly less than 'a full defence'."* However, I am satisfied that the Defendants have always fully contested these claims.

Delays by Plaintiff

61. In the context of the overall conduct of these proceedings, it is important to have regard to the fact that the incidents the subject matter of these proceedings occurred on 5th December 2014. A personal injury summons was issued on 26th January 2017, approximately two years and two months after the incident the subject matter of the proceedings occurred. It is to be inferred from the terms of the personal injury summons that PIAB gave a written authorisation for the institution of proceedings circa 17th February 2016. Nonetheless, the Plaintiff delayed a further period of over eleven months before the summons issued. A separate period of inaction on the part of the plaintiff can be identified between the date of delivery of the Notice for Particulars on 6th March 2017 and the delivery of replies to particulars on 23rd September 2019 some two and a half years later. The solicitor for the plaintiff explains delay by reason of the indisposition of his counsel and of note in particular is the affidavit sworn on 11th January 2023 by John G. Flynn wherein he deposes at para. 7 that there was a rational explanation for the said delay (albeit it was asserted it did not require any explanation):

"The plaintiff was advised that where there were both civil and criminal proceedings in being, the criminal proceedings ought to have precedence and that accordingly he should await the conclusion of the criminal proceedings before advancing his civil claim beyond the institution and service of the proceedings."

This affidavit identifies that the district criminal proceedings took place in November and early December 2018 and that the appeal was heard on 12th February 2019. The illness and

death of the Plaintiff's former Senior counsel on 10th July 2019 is deposed to. Replies to particulars were ultimately delivered on 23rd September 2019. No clarity was offered as to which of the 40 particulars were considered to engage such privilege.

62. There were significant delays on the part of the plaintiff in instituting and pursuing the within proceedings. For instance, a notice for particulars served by the defendants on 6th March 2017 but was not replied to for two and a half years. Ultimately replies were delivered on 23rd September 2019. Counsel for the Plaintiff contended that such delay was not material to any issue arising in the within appeal. He asserted that his client enjoyed privilege against self-incrimination, thereby suggesting an entitlement not to reply to the notice for particulars of 6th March 2017 until after the conclusion of the criminal proceedings on 12th February 2019. No effort was made to identify specific particulars replies to which gave rise to such privilege. The Notice for Particulars specified on its face that the particulars were to be furnished within a period of 21 days from 6th March 2017 and accordingly, strictly ought to have been delivered by 28th March 2017.

63. In an affidavit sworn on 11th January 2023, Mr. Flynn, solicitor for the Plaintiff, posited that the delay of two and a half years on the plaintiff's part in delivering the replies did *"not require any explanation on the basis that it is entirely irrelevant to the motion before the court."* It was asserted at para. 7:

> *"It is submitted on behalf of the Plaintiff that the effluxion of time in dealing with the Replies to Particulars; whether explained or not, is entirely irrelevant to the Motion before the Court; the Defendants do not claim any prejudice arising therefrom and in the circumstances the matter ought not to have been raised, at all."*

Replies continued to remain outstanding for over 8 months after conclusion of the criminal proceedings against the Plaintiff.

64. There is some equivalence between the exigencies that arose for the Plaintiff who is said to have taken a strategic litigation decision not to reply to the notice for particulars for two and a half years until the conclusion of the criminal proceedings extended by the untimely death of his counsel on the one hand and on the other hand the series of exigencies and severe mental health issues that arose during the Covid-19 pandemic outlined above which impinged on the capacity of the solicitor coupled with the other elements such as the electronic connectivity issues that arose until the Chief State Solicitor's Office became alive to the difficulty and the file was taken over by a colleague of the solicitor.

65. This Court in *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10 ("*Nolan*") Noonan J., (Faherty and Binchy JJ. concurring), endorsed the approach to assessing the interests of justice outlined in *Murphy* after the court has established "*special circumstances*" to justify the making of the order sought. In every case the balance of justice is facts specific.

66. It will be recalled that in *Murphy* Haughton J., in the context of an Order 8 application, the approach adopted by the High Court in *Chambers v. Kenefick* [2005] IEHC 402, 3 I.R. 526, wherein Finlay Geoghegan J. held that in determining whether the "*good reason*" criterion had been satisfied, a court should first consider if a good reason had been shown and if so satisfied, then move on to the second limb of considering whether because of the good reason it was in the interest of justice to renew. Haughton J., however, observed at para. 76 of his judgment in *Murphy*:

> *"In my view this is not a second tier or limb to the test. The need for the court to consider under sub-rule (4) the interests of justice, prejudice and the balancing or hardship is in my view encompassed by the phrase "special circumstances [which] justify renewal".*

In *Nolan* Noonan J. observed:

"25. Counsel for the plaintiff submitted that this meant that whether a special circumstance existed was to be considered in tandem with the question of prejudice, there being no second limb to the test, and that the law had 'moved on' since Chambers was decided. In my judgment, this is incorrect and a misinterpretation of Murphy. Haughton J. recognised that special circumstances alone are not enough and placed emphasis on the requirement for those circumstances to justify extension. His reference to there not being a second tier or limb to the test refers to the fact that special circumstances and the justification for renewal are not two separate and distinct matters, but fall to [be] considered together in the analysis of whether it is in the interest of justice to renew the summons. Prejudice is a component of that analysis. 26. However, before that analysis can be arrived at, it must be established that there are special circumstances. This follows from the court's approval of the Chambers approach and accords with common sense. The plaintiff's contention that the court is required to consider prejudice from the outset is to put the cart before the horse and would lead to a result diametrically opposed to the clear intent of the new rule."

That clearly represents the view of this Court in regard to the assessment of the interests of justice where a discretionary order is made, and I adopt same.

67. I am satisfied that the trial judge was entirely correct in his approach to the balance of justice where he observed: *"Here, we are concerned with reputations and not just money. Lest there be any doubt, this Court is not treating the Chief State Solicitor any differently as it would consider defaults on the part of a private firm of solicitors."* Further, he cited the well-known and oft-cited *dictum* of Bowen L.J. in *Cropper v. Smith* and also the following observation of Murray J. in *McGuinn*:

"The Courts in the interests of justice, lean in favour of a determination of litigation on the merits of the issues between the parties rather than preventing a party from

having access to the Courts, when his or her rights or obligations are being determined, for procedural reasons including culpable delay. That is not to say that the Courts would not be more stringent in requiring adherence to time limits in particular when set by an order of a court in a particular case, for the reasons outlined by Hardiman J. and referred to above.

However, each case falls to be determined on its own particular facts and circumstances in order to do justice to the parties."

68. In light of the very serious allegations being levelled against the first named Defendant and other Gardai, it is in the public interest that such assertions be properly and cogently stress-tested so that an individual whose good name, livelihood and reputation are on the line is not reduced to being a mere spectator in the process of determination of facts and the respective rights and remedies of the parties, unless to do so is demonstrated to be justified to off-set a greater prejudice to the other party and also to be in the interest of justice.

69. It is significant that the Plaintiff did not swear any affidavit. He thus did not depose to any specific or unusual prejudice suffered by reason of permitting the order of the High Court to stand and the defendants to defend the proceedings. There was undoubtedly inordinate delay on the part of the solicitor, which is acknowledged. There were significant delays throughout on the part of the Plaintiff. The trial judge was correct that given the gravity of the issues alleged and pleaded concerning the reputation of a number of Gardaí, it was not open to him to ignore same. Further, I am satisfied that the trial judge engaged in a balancing exercise as between both sides. As he correctly noted, it was not in dispute that the issue of liability could be heard at the same time as the issue of damages (which has already been set down for trial) and without any necessity for undue further delays.

70. I am satisfied that the trial judge adopted the correct approach in identifying the existence of special circumstances which prevailed at the relevant time when the omissions

in question occurred. He also considered the specific facts germane to the Defendants' acknowledged delays and correctly identified the facts and evaluated the explanations and justifications offered in balancing of the competing interests of the parties in the exercise of his discretion and in determining to grant the order sought pursuant to O. 27, r. 15(2). As the trial judge observed, the suggestion on the part of the Plaintiff that the reputation of the gardaí concerned might be vindicated, even if the court refused to make the orders sought by the Defendants, by advancing some complaint against the Chief State Solicitor is not a sound proposition and was properly rejected by the trial judge as not amounting to a proportionate or fair response in light of the gravity of the issues pleaded against the defendants. As the trial judge pointed out, if they are denied access to the court for the purposes of defending the claim, they are deprived of the possibility of resisting the allegations and the plaintiff will have free rein *to "impugn the reputations of the defendants in open court"*. As the trial judge correctly noted, it was not open to him to determine whether the plaintiff had been robbed of his reputation as alleged: *"That is ultimately a matter for the jury. Any prejudice arising for the plaintiff from the delay in complying with the orders can be addressed at or before the trial.*

Extensions of time to comply with Order for Discovery O.122 r.7

71. The *ex tempore* decision of the High Court records the *"agreed approach"* of the parties to this issue, The judge noting: "*The court appreciates the approach taken by both counsel, i.e., resolve the substantive relief sought, which is set out in the long para. 2 of the proposed order…This avoided the necessity to explain the application of the commonly cited case law and particularly Seniors Money Mortgages (Ireland) DAC v. Gatley & Ors…"*

72. It is noteworthy that the Plaintiff did not challenge the said observations of the trial judge at the time. It is not now open to him (as he seeks to do) to vigorously raise and pursue

issues in respect of compliance with the *Eire Continental/Seniors Money* jurisprudence when such an approach was not adopted before the High Court in the first instance.

73. I am satisfied that the Defendants were entitled to the extensions of time sought , particularly in relation to filing the affidavit of discovery in light of the relevant jurisprudence including the decision in *Eire Continental Trading Co. Ltd. v. Clonmel Foods* [1955] I.R. 170 and laterally *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3 [2020] 2 I.R. 441. The judgment of O'Malley J. is significant notably where she observes:

> *"67. While bearing in mind, therefore, that the Eire Continental Trading Co. Ltd. v. Clonmel Foods Ltd. (1955 I.R.170) guidelines do not purport to constitute a checklist according to which a litigant will pass or fail, it is necessary to emphasise that the rationale that underpins them will apply in the great majority of cases.*
>
> *68. It should also be borne in mind that, depending on the circumstances, the three criteria referred to are not necessarily of equal importance inter se. As Clarke J. pointed out in Goode Concrete it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside the time if the Court is not satisfied that there are arguable grounds, even if the intention was formed and there was a very good reason for the delay. To extend time in the absence of an arguable ground would simply waste the time of the litigants and the court."*

74. It is to be recalled that in *Seniors Money* O'Malley J. had noted that in *Eire Continental* counsel resisting the application for an extension of time had made submissions to the effect that the rules were rigid *"prescribing the conditions in which time should be extended."* As O'Malley noted (para. 7):

> *"In so doing, counsel was, according to Lavery J., following the lines of a dissenting judgment by Fitzgibbon J. (in Moore v. Attorney General (No. 4) [1930] I.R. 560).*

> *Fitzgibbon J. had considered that it was necessary that an applicant should give some good reason to support the contention that the judgment to be appealed was wrong, and also show that a bona fide intention to appeal had been formed before the time expired."*

However, the majority had been of the view that such an approach had been superseded by a simplified version of the relevant rule and *"that the power was within the discretion of the court, to be exercised in the light of the facts and circumstances of the particular case."* Lavery J. in *Eire Continental* had preferred the latter approach. O'Malley J. recalled that in *Eire Continental* Lavery J. was satisfied that the applicant in a case either had the intention of appealing *"...'or at least the intention to consider whether an appeal would be justified' and that this was sufficient in the circumstances of the particular case."* O'Malley J. noted (para. 10):

> *"as to whether it was necessary to show the existence of an arguable ground of appeal, Lavery J. expressed the view that what needed to be shown was that the proposed appeal had 'substance' and was not merely intended to gain time and to postpone the day of reckoning."*

75. As with *Seniors Money* the central issue to be determined from a time perspective by the High Court in this case was whether it ought to have extended time to comply with the discovery order and was it entitled to be satisfied that there were arguable grounds of appeal against the Deputy Master's order. It is not in contest that this line of authority encapsulates the appropriate test in respect of appeals against an order of the Deputy Master of the High Court as is evident from *Judkins and Another v. McCoy and Another* [2013] IEHC 82.

76. O'Malley J. in *Seniors Money* adopted the observations of Clarke J. (as he then was) in *Goode Concrete v. CRH Plc* [2013] IESC 39:

"Firstly, Clarke J. identified the objective of the court when considering an application to extend time (at paragraph 3.3) -

'The underlying obligation of the Court (as identified in many of the relevant judgments) is to balance justice on all sides.'

65. He then went on to identify certain considerations that are likely to arise in all cases:

'Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice…The proper administration of justice in an orderly fashion is also a factor of high weight. Precisely how all of those matters will interact on the facts of an individual case may well require careful analysis. However, the specific Eire Continental criteria will meet those requirements in the vast majority of cases.'"

O'Malley J. continued:

"The rationale for holding parties to the stipulated time limits for appeals is, as Clarke J. observed, that in most cases a party to litigation will be aware of those limits and should not be allowed an extension unless the decision to appeal was made within the time, and there is some good reason for not filing within the time."

77. Although the Plaintiff contends that no reason was given by the Defendants in relation to their failure to appeal the Deputy Master's order within the time allowed (six days) from receipt of notice of the order, for all the ample suite of reasons identified above and in particular in light of the affidavits of the respondent. I am satisfied that there was clear evidence before the Trial Judge that the failure to appeal the order of the Deputy Master within time arose for the reasons identified by the solicitor in the affidavit of 26th June 2023 – for psychiatric reasons he was unable to do what was required of him mentally at the

relevant time. Further I am satisfied that all of the relevant failures and omissions on the part of the Defendants were demonstrated to have stemmed from the said solicitor's mental health problems as compounded by the Covid-19 pandemic-enforced isolation and all the other factors outlined above which, it was not disputed before the High Court, resulted in him being *"... incapable of doing what was required ..."* (para. 10)

78. The solicitor became aware of the order of the Deputy Master by 3rd June 2022. I am satisfied that there was sufficient evidence put before the High Court in light of the all the circumstances and the gravity of the allegations being advanced in the proceedings, particularly as against the first and second named defendants, that were the solicitor operating at functional capacity when served with the Deputy Master's order, at the very least there would, as a matter of course, have been a consideration of whether an appeal would be justified. It would wholly defeat the clearly established "*special circumstances*" if the intention element of the *Eire Continental* test were to operate in the manner contended for by the Plaintiff and would be contrary to the analysis of Lavery J. in *Eire Continental* as subsequently adumbrated by O'Malley J. in *Seniors Money* and further would produce the practical consequence of preventing the Defendants from having access to the court. This would preclude this highly contentious litigation from being determined on the merits which runs counter to the approach commended by Murray J. in *McGuinn*. In the overall scheme of things, the delay in issuing the notice of motion in the within proceedings until the beginning of the Michaelmas Term on 5th October 2022 was not unreasonable given that the mental state of the solicitor as deposed which as a fact is not in contention. A letter was written to the Plaintiff's solicitors in mid-2022 outlining that the non-attendance was inadvertent and that there had been an intention to contest the motion. In all the circumstances of this case and in light of the mental state of the solicitor goes well beyond merely evidencing the solicitor's "*disquiet*", as the Plaintiff asserted.

Conclusion with regard to extending time to comply with an order for discovery.

79. Logically, it appears on the facts proven that once the court was satisfied to make the order pursuant to O.27, r.15(b) the court was entitled to proceed to extend time for delivery of the Affidavit of Discovery which it did. The Plaintiff disputes this however. It appears that the documents were collated, and the affidavit of discovery was sworn on behalf of the Defendants/Defendants on the 10th October 2022. A copy of the said affidavit was furnished to the Plaintiff on the 15th of June 2023 and a booklet or file containing the said documents was furnished to the Plaintiff on the 19th December 2023.

80. It was an entirely appropriate and a proportionate exercise of his discretion and in the interests of justice and well within the authorities for the trial judge to extend time in all the circumstances of this particular case. The authorities relied upon by the Plaintiff for a contrary proposition clearly illustrate that such an extension of time, insofar as required, was properly granted by the High Court. In that regard, one need only consider the *dictum* of Hamilton C.J. in *Mercantile Credit Corporation of Ireland v. Heelan* [1998] 1 I.R. 81 at p. 85 where he observed:

> *"The power given by the said rule to the Court to strike out the defence of a defendant who has failed to comply with an order for discovery is discretionary and not obligatory, and should not be exercised unless the Court is satisfied that the plaintiff is endeavouring to avoid giving the discovery, and not where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness.*
>
> *It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the court for an order to that effect."*

81. The factual matrix in this case as disclosed in the affidavits and exhibits fall entirely within *Mercantile Credit* dictum. There was no evidence that the defendants were

endeavouring to avoid giving the discovery. Indeed, the evidence was all the other way, as para. 9 of the Defendants' solicitor's affidavit of 26th June 2023 demonstrates where he states he received notice from the solicitor regarding the order of the High Court on 16th February and then notified the defendants of the fact and request that they compile the necessary documentation. *"They did so and the discovery documentation was forwarded to me on 25 February 2021."* This was not in contest and in and of itself is fundamentally inconsistent with the suggestion that the defendants were acting in a manner to avoid giving discovery or in and of themselves were guilty of neglect or omission.

82. Further, the judgment of *Murphy v. J. Donohue Limited* [1996] 1 I.R. 123 supports the approach of the High Court wherein Barrington J. noted that an order striking out a defence for failure to comply with discovery *"exists to ensure the parties to litigation comply with orders for discovery. It does not exist to punish a default but to facilitate the administration of justice by ensuring compliance with orders of the court."* There was no evidence of a failure on the part of the defendants individually to comply with the order. It appears that a high degree of expedition was exhibited in their effort to comply with the discovery order. The failure on the part of the solicitor was demonstrably not deliberate because of the mental incapacity as deposed to at paras. 9 and 10 in particular, and indeed as is self-evident from the affidavit of 26th June 2023 when considered in its entirety.

Conclusion

83. I am satisfied that no basis has been identified for interfering with the judgment and orders of the trial judge and his reasoning and conclusions on the facts as warranting the exercise of his discretion. With regard to the extension of time, in the context of how the hearing was conducted and the approach of the parties to the *Eire Continental/ Seniors Money* jurisprudence, as is evident from the judgment no valid basis has been identified for interfering with the approach of the judge. Further, if the Plaintiff had wished to cavil with

anything specifically stated in the judgment in regard to the "*agreed approach*" and the judge's observations at para. 6 of the judgment, then it was incumbent on the Plaintiff to make prompt submissions regarding same and concerning the terms of the order if it were the case that the judge was proceeding to make same in any respect under a fundamental misapprehension as to the position of the plaintiff as was belatedly contended in this appeal.

84. A proper analysis was carried out by the judge for the purposes of the exercise of a discretion pursuant to O. 27, r. 15(2) RSC. The judge correctly had regard to the analysis and *dicta* of Ferriter J. in *De Souza v. Liffey Meats* and the earlier decision of this Court in *Murphy*. The *dicta* of Murray J. in *McGuinn* were to an extent apposite in light of the sequence of events which had unfolded as outlined in detail above. Accordingly, the approach in this appeal is to assess whether or not the approach and conclusions of O'Connor J. in the High Court judge were reasonable in all of the circumstances. Further, insofar as an order was required extending time to comply with the order for discovery (which was validly set aside) authorities such as *Mercantile Credit Corporation of Ireland v. Heelan* demonstrate the correctness of the High Court's approach. No valid basis has been identified which would warrant interfering with the application of the rules, the exercising of the judge's discretion or said orders in light of the special circumstances and the interests of justice as reviewed above.

85. Accordingly, the appeal falls to be dismissed.

Costs

86. The Plaintiff has been wholly unsuccessful in his appeal. In the circumstances, having due regard to Order 99 and the provisions of the *Legal Services Regulations Act*, 2015, it follows the Defendants have been "*entirely successful*" in this appeal within the meaning of s. 169(1) of the 2015 Act and as such are entitled to an award of costs against the Plaintiff "… *a party who is not successful*…" within the meaning of s. 169(1). My

preliminary view is that the Defendants are entitled to an order for the costs in connection with this appeal, same to be adjudicated in default of agreement. The proposed costs order to be stayed pending the conclusion of the within proceedings before the High Court. If the Plaintiff contends for an alternative order, then a written submission (no longer than 1,500 words) to be filed and furnished to the other side within fourteen days of the date of delivery of this judgment and any like response to be filed by the Defendants and furnished to the Defendants within a further fourteen days thereafter.

87. Pilkington and Meenan JJ. confirm they concur with this judgment.