THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 237

Record nos. 2019/163

2019/164

2019/165

2019/166

2019/167

2019/168

2019/169

Peart J.
Baker J.
Costello J.

2012 No. 9537 P
BETWEEN

CARLOS MANUEL MIRANDA, ALFREDO MARTINS RODRIGUES FERNANDES, VICTOR MANUEL MARQUES DE OLIVEIRA, MARIA PIEDOSA RIBEIRO CARDOSA GASTALHO, FRANCISCO PEREIRA MARTINS, JOSE MARIA COELHO BARBOSA AND CARLOS JOSE LONGA

PLAINTIFFS

-AND-

ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

CONSTRUCOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

AND EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

DEFENDANTS

2012 No. 9538 P
BETWEEN

ARMANDO AGOSTINHO ALVES DA SILVA, ALVARO ABILIO QUEIROS COELHO, HELDER FIGUEIREDO, MARIO AUGUSTO RAMALHO GASTALHO, SAMUEL FILIPE DA SILVA OLIVERIA, JOSE ANTONIO FONSECA RIBEIRO, ALBERTO BESSA LEITE, LUIS RODRIGUES DIAS MOURATO, JOSE DUARTE MAGALHAES, JOSE MARIA MARTINS VELOSO

PLAINTIFFS

-AND-

ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

CONSTRUCOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

AND EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

DEFENDANTS

2012 No. 9535 P
BETWEEN

JOSE MONTEIRO DA SILVA, NUNO PEDRO GONCALVES LOPES, DAVID SARAIVA MATIAS, ANTONIO BARBOSA MOREIRA, JOSE FRANCISCO OLIVIERA DA SILVA, JORGE DA SILVA LUIS, JOSE TEIXEIRA GONCALVES, ANTONIO JORGE OLIVEIRA BESSA, FRANCISCO DA COSTA FERRIERA, JOSE LUIS FREITAS LIMA

PLAINTIFFS

-AND-

ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

CONSTRUCOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

AND EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

DEFENDANTS

2013 No. 12219 P
BETWEEN

CARLOS MANUEL OLIVEIRA, CARLOS ALBERTO OLIVEIRA MATOS, RUI MIGUEL DOS REIS SERPA CORTE REAL, MANUEL JOAQUIM ALVES MACHADO FERREIRA, HELDER FILIPE BARBOSA GONCALVES, JORGE ALEXANDRE UMBELINO, AGOSTINHO DE SILVA SAMPAIO, JOSE ALFREDO QUINTANS MAGALHAES, VICTOR MANUEL CARDOSA ALMEIDA

PLAINTIFFS

-AND-

ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

CONSTRUCOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

AND EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

DEFENDANTS

2014 No. 9212 P
BETWEEN

ANTONIO GERMANO ALVES GUEDES MONTEIRO, ANTONIO GUEDES MONTEIRO, ARTUR JOAO ALONSO MOREIRA

PLAINTIFFS

-AND-

ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

CONSTRUCOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

AND EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

DEFENDANTS

2014 No. 2244 P
BETWEEN

JOSE MANUEL RIBEIRO DE ALMEIDA, CARLOS MANUEL MONTEIRO, ALBERTO DA CRUZ COEHLO, MANUEL ALBERTO PEREIRA DUARTE, JOAO PAULO RODRIGUES LEMOS, SERGIO ANTONIO CARVALHO, JOAO FILIPE OLIVEIRA GONCALVES, VITOR MANUEL FORMOSO PEREIRA

PLAINTIFFS

-AND-

ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

CONSTRUCOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

AND EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

DEFENDANTS

2014 No. 3319 P
BETWEEN

RAMIRO ABRANTES DO CARMOS, MANUEL SEBATIAO BRAS DE OLIVEIRA, JOSE FERNANDO MAGALHAES DA SILVA
PLAINTIFFS

-AND-

ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

CONSTRUCOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

AND EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 29th day of July, 2019.

1. By order of 24th January, 2019 Stewart J. in the High Court ordered the defendants to pay damages to the plaintiffs in seven related proceedings, being her assessment of the damages to be awarded to the individual plaintiffs for breach of their respective contracts of employment by the defendants including damages for inconvenience, stress and general loss of enjoyment by reason of the substandard accommodation provided to the plaintiffs by the defendants. The court also ordered the defendants to pay to the plaintiffs the sum of €56,417.26 on account in respect of the plaintiffs' costs which were to be taxed in default of agreement.

2. On the 5th April, 2019 the defendants ("the appellants") appealed and sought to have the judgment and order of the High Court set aside and to have the matter remitted to the High Court for reconsideration. The appellants sought an order for the costs of the appeal and of the hearing before the High Court.

3. The appeals are listed for hearing on 1st July, 2021.

4. It is against this background that the plaintiffs/respondents issued a motion to this court seeking an order pursuant to the inherent jurisdiction of the court dismissing and/or striking out the appellants' appeal as an abuse of process. They allege that the appeal is pursued for an improper ulterior motive, namely to delay paying the plaintiffs the sums due to them both by way of damages and by way of legal costs in circumstances where liability is not in issue and where they had repeatedly failed either to abide by orders of the court, failed to participate in the hearing before the High Court and have generally sought to conduct the litigation in a fashion to delay its progress as far as possible.

5. Before considering the detail of the history of the litigation and the conduct of the appellants, I will first consider the principles of law governing the dismissal of proceedings, including defences and appeals, on the grounds that the continuance of the litigation would amount to an abuse of the process of the court.

Relevant legal principles
6. It has long been recognised that the courts have an inherent jurisdiction to control their own processes and that the court will not permit abuses of its processes. In *Tracey v. Burton* [2016] IESC 16 at para. 47 MacMenamin J. in the Supreme Court stated:-

> *"[A] court is entitled to generally have regard to the manner in which proceedings are conducted. While the jurisdiction to strike out proceedings for abuse of process, in one form or another, is to be exercised sparingly, it is a sanction which cannot be ignored. Similarly, while parties have a right to defend proceedings, it may be necessary to identify the manner in which the defendants' rights are best vindicated. A court may, under the Constitution, take whatever proportionate steps are necessary to protect the integrity of its own processes and procedures, and the inherent right of courts, themselves, to manage their own procedures in a manner which balances the rights of litigants with the rights of the public, and other litigants."*

7. This clear statement encapsulates many of the principles which have been developed over time since the seminal case of *Barry v. Buckley* [1981] IR 306. The jurisdiction is the inherent jurisdiction of the court to control its own processes. The jurisdiction must be exercised sparingly and in clear cases only. The court has a duty to uphold the integrity of the judicial system. The jurisdiction applies to defendants as well as to plaintiffs. The court is concerned with the rights of the litigants in the cause before it, the rights of the public and the rights of other litigants. The court is entitled to have regard to the fact that the resources of the courts are limited and that the courts are there to resolve genuine disputes between parties. The court should have regard to the interests of *bona fide* litigants who require access to the courts to resolve their disputes and the court also may have regard to the fact that there is a public interest in ensuring finality in litigation.

8. It has long been recognised that abuse of process may take many forms. Specifically, it is wider than the familiar test of whether the proceedings are frivolous, vexatious or bound to fail. Proceedings which are in proper form but in substance have been brought for a purpose that is ulterior and extraneous constitute an abuse of process (see *O'Connor v Bus Atha Cliath* [2003] 4 IR 459; *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 716). Thus, the motive of the litigant in pursuing what might otherwise appear to be a lawful exercise of his or her right of access to the courts may be relevant to the determination whether there has been, or continues to be, an abuse of process.

9. The manner in which proceedings are conducted may also constitute an abuse of process. Access to the courts entitles litigants to certain privileges but the privileges come with certain obligations. For example, litigants are required to abide by the rules of court and to comply with orders of the court, including orders governing the conduct of the proceedings. The courts will not permit an abuse of process by breaches of those obligations as to do so would bring the system of justice into disrepute (*Doherty v. Minister for Justice, Equality and Law Reform and Ors*. [2009] IEHC 246). One form of impropriety in the conduct of proceedings is the blatant and

persistent refusal to comply with orders of the court. Conduct of the proceedings themselves, including the bringing of multiple appeals, and the conduct of those appeals, may also amount to an abuse of the process of the court. In this regard it is useful to consider the decisions of the Supreme Court in the case of *Angela Farrell v. The Bank of Ireland; Freeley and Another v. The Judge of the District Court No. 9 and Another* [2012] IESC 42 and subsequently [2015] IESC 71.

10. These cases concerned ten appeals which had been brought by the appellant, Ms. Farrell, in relation to plenary proceedings, special summons proceedings and three judicial review proceedings. The Bank of Ireland brought a motion to the Supreme Court seeking security for costs in respect of the costs of the appeals on the basis that the conduct of the proceedings on the part of Ms. Farrell had been vexatious and oppressive. It asserted that there had been a repeated failure on the part of Ms. Farrell to comply with procedural directions and orders of the court. It was argued secondly that she had adopted a range of measures including the late service of detailed documents necessitating adjournments, the making of repeat applications for adjournments and the like, such that the hearing in the Supreme Court of the motions amounted to the fifteenth separate occasion on which some aspect of these connected proceedings were before it. It also complained that during the course of the proceedings Ms. Farrell sought to institute private criminal prosecutions against certain officers of the Bank of Ireland and their solicitor which it said was oppressive and vexatious and that correspondence written by her to amongst others, counsel for the Bank of Ireland, was designed to attempt to intimidate those involved in the conduct of the litigation and to dissuade them from carrying out their duties in a professional manner.

11. Clarke J. addressed the issue of the right of access to the courts and the right of appeal to the Supreme Court. At para. 4.5 he said:-

> *"It must be recalled that the right of access to the court does not carry with it an entitlement to have all issues decided at a full trial or to conduct the relevant litigation in whatever way the party concerned wishes. A distinction needs to be drawn between, on the one hand, restrictions imposed by law on the right of access to the courts as such and decisions made as part of the administration of justice which may have an effect on how litigation is to progress on the other."*

12. He stated that where decisions are taken by the court which affect a party's ability to pursue the litigation those questions ought more properly to be viewed in the context of the right to have litigation fairly conducted, rather than on the basis of a right of access to the court *per se*. In that regard the court is required to balance the right of all the parties to the litigation in a fair, balanced and proportionate way. At para. 4.8 of the judgment he held:-

> *"Where a party is guilty of extremely serious or significantly persistent procedural failure it is open to the court to dismiss that party's claim or defence, as the case may be, on the basis of procedural failure. However, again, such a dismissal will only occur after a full hearing at which the party concerned will be able to defend itself against the allegations made and also be heard as to whether dismissal is a proportionate response to any allegations admitted or established."*

He went on to observe in the following paragraph that the court is required to act in a proportionate way so as to ensure that the rights of all litigants are balanced and are, so far as practicable, preserved. The court is required to ensure that "*any procedural measures imposed do not disproportionately and inappropriately affect the rights of that party.*"

13. At para. 4.33 he addressed a further factor which is of relevance to this case, namely:-

> *"…where the conduct of the litigation up to the point of the consideration of the application for security [for costs] demonstrates that, whether deliberately or due to the inability of the appellant to understand and properly comply with their obligations as a litigant, it is reasonable for the Court to infer that the respondent will not just be put to the ordinary costs of the appeal but will be put to larger costs than might reasonably arise by virtue of the likely continuing failure of the appellant to progress the appeal in an appropriate, focussed and reasonable manner in accordance with procedural law."*

At para. 4.36 Clarke J. held that:-

> *"…improper behaviour on the part of a litigant, if sufficiently serious, can be a factor properly taken into account by the court in deciding whether to order security against the party guilty of that behaviour. It is, perhaps, appropriate to characterise improper behaviour as part of the general theme whereby a party may be found to have failed in their obligation to conduct litigation in a reasonable fashion in accordance with procedural law and proper practice. Where there is a significant failure in that regard it is reasonable to infer that a party is likely to expose its opponent to additional and unreasonable costs of defending an appeal…".*

14. He also observed that the bringing of very many appeals against procedural directions of the High Court is itself, potentially, an oppressive means of conducting litigation and is a factor which could be taken into account by a court on a motion such as the one before this court to provide security for costs of the appeals. Likewise, the persistent failure to comply with procedural directions as to timing and filing of documents can lead to an unnecessary prolongation of proceedings and a significant increase in costs and is also a factor which the court must take into account.

15. The Supreme Court directed Ms. Farrell to provide security for the costs of the ten appeals before it. She failed to do so and on a subsequent motion brought by the Bank of Ireland, the Supreme Court dismissed all ten appeals. On that occasion the judgment was delivered by Denham C.J. and at para. 29 of her judgment she held:-

> *"At a certain point in time the level of actual abuse of process already committed together with the reasonable apprehension that such conduct will continue creates a sufficient level of prejudice to other parties and detriment to the proper conduct of court business, that it may become proportionate to respond to that abuse of process not simply by addressing each specific item of abuse but in bringing the proceedings (or in the case of an appeal to this court, the appeal) to an end. It is an action which the courts will not lightly take. It is an action which should only be taken when the level of established abuse and the reasonable inference of the continuance of that abuse is such that it would be manifestly unfair to the other parties to the relevant litigation or appeal to require them to be the victim of the continuing misconduct of proceedings."*

16. Thus, a party who fails to conduct litigation in a reasonable fashion in accordance with procedural law and proper practice, may be found to have been or to be abusing the processes of the court, if the failure is sufficiently serious. If the actual level of established abuse and the inference of the continuance of that abuse is such that it is "*manifestly unfair*" to permit the proceedings or appeal to continue, then it is open to the court to dismiss the proceedings or appeal rather than to attempt to address each

specific item of abusive conduct.

17. In *AA v. The Medical Council* [2003] 4 IR 302, the Supreme Court heard an appeal where proceedings had been struck out on the principles in *Henderson v. Henderson* (1843) 3 Hare 100. Hardiman J. referred to *Henderson v. Henderson* and to the decision of Pallas C.B. in *Cox v. Dublin City Distillery (No. 2)* [1915] 1 IR 345 where the Chief Baron held that a party to previous litigation as against the other party in that action, was bound "*not only [by] any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein*". Hardiman J. then quoted with approval from the decision of Lord Bingham in *Johnson v. Gore Wood & Co*. [2002] 2 AC 1 as follows:-

> *"The underlying public interest is…that there should be finality in litigation and that a party should not twice be vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."*

Lord Bingham said that the approach should be:-

> *"A broad, merit based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue, which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."*

18. Thus, the essential question for the court is whether it is proportionate in all the circumstances to dismiss the proceedings or appeal, or strike out the defence, in response to established and apprehended abuse of the process of the court. In reaching that decision the court makes a broad merits-based judgment which takes account of the public and private interests involved. As there are many different ways in which parties may abuse the process of the court, as Lord Bingham advises, hard and fast rules may not be formulated. Each case must be subject to the individual assessment by the court to whom the application to dismiss the proceedings or appeal or to strike out the defence is made. In each case the court must consider (a) whether there has been and (b) whether there is likely to continue to be, abuse of process and, if the answer to (a) and (b) is yes, then, (c) what is the proportionate response to that abuse?

The history of the litigation to date

19. The respondents in these cases are Portuguese nationals who came to Ireland as construction workers in or around 2007 and 2008 to carry out construction work on the N7 Nenagh to Limerick dual carriageway. In excess of one hundred and fifty workers came to work on this project. The appellants are three Portuguese companies who formed a partnership, "RAC Eire Partnership", for the purposes of the N7 project. The appellants employed the respondents to work on the project.

20. The National Employment Rights Authority inspected the premises of the appellants on a number of occasions and concluded that they were in breach of numerous employment regulations and in particular that they maintained false and misleading records of the hours worked by the respondents. On foot of the inspection the Minister for Enterprise, Trade and Employment prosecuted the appellants for maintaining false and misleading records of the hours worked by the respondents in the District Court. The appellants were convicted. They then appealed and the appeal was upheld by the Circuit Court in 2011. The Probation of Offences Act 1907 was applied in the Circuit Court.

21. A number of sets of proceedings were instituted by the individual plaintiffs claiming damages for breach of their contracts of employment. This was necessary as there is no provision in our procedural law for class actions. They alleged that they were underpaid, that unlawful deductions were made from their wages, and sought Courts Act interest on the sums due. Three of the cases were heard by Keane J. in the High Court in 2016. He made a number of findings of fact which were not appealed by the appellants:-

> (1) The appellants engaged in the systematic and deliberate under recording of the hours of work, leading to the underpayment of wages in breach of contract of employment of each of the plaintiffs (the underpayment of wages was in the order of 40% or thereabouts).
>
> (2) Each plaintiff was entitled to recover as damages for breach of contract the full amount of the underpayment of his or her wages as calculated by the plaintiffs' expert accountant, Mr. McGuinness.
>
> (3) Deductions made by the appellants from the wages for benefit-in-kind were wrongly made in breach of the relevant contracts of employment and the plaintiffs were entitled to the repayment of those sums in full.
>
> (4) The accommodation provided by the appellants, for which the plaintiffs were required to pay €520 approximately per month which was deducted directly from their wages, was of a deplorable – even a dangerous – standard.

22. On the 16th April, 2016 Keane J. awarded damages to the respondents in the three proceedings bearing Record Numbers 2012/9535P, 2012/9537P and 2012/9538P. He also made an order for costs in favour of the respondents in those three cases. He ordered the appellants to make an interim payment to the respondents in the event of the appellants appealing his decision in the sum of €417,775.33 net of PAYE and PRSI.

23. The appellants appealed the decision of Keane J. in respect of the awards of damages for failing to provide accommodation, for charging for laundry services and awarding interest on the judgment sums pursuant to the Courts Act. The appeal was heard by the Court of Appeal in July, 2017 and judgment was delivered on the 4th October, 2017. The Court of Appeal dismissed the appeal in respect of the claim for reimbursement of the deductions made for laundry services and against the award of Courts Act interest. The court allowed the appeal in relation to the charge for accommodation on the basis that there had not been a total failure of consideration. In light of very significant deficiencies in the accommodation provided to the respondents, the court directed that the matter be remitted to the High Court for a retrial to assess quantum of damages in respect of this head of claim.

24. Following the judgment of the 4th October, 2017 the claims of all of the former employees of the appellants – not just the plaintiffs in those three actions - were assessments only. The appellants agreed the final amount due and owing to the respondents in those particular cases in respect of which the order of the High Court had been affirmed was in the amount of €292,761.84. Despite the fact that this sum was agreed and formed part of the order of the Court of Appeal, no damages have been paid to the

respondents on foot of the order of the Court of Appeal of October, 2017.

25. The three cases which were referred back to the High Court for reassessment of the quantum of damages in respect of the claim arising out of the deficiencies in the accommodation provided to the respondents, were linked with the four cases which were required to be heard in full, that is proceedings bearing Record Numbers 2013/12219P, 2014/9212P, 2014/2244P and 2014/3319P. Shortly before the linked seven sets of proceedings were to be heard in the High Court towards the end of 2017, the solicitors on record for the appellants (the third firm of solicitors to represent the appellants (Messrs O'Mara Geraghy McCourt)) came off record on the 28th November, 2017. Consequently, the appellants made three applications to adjourn the trial which was listed for the 11th January, 2018 and which involved the plaintiffs' travelling to Dublin from Portugal. Each application for an adjournment was refused. During the trial there were three further applications for adjournments by the appellants which also were refused.

26. The trial commenced on the 11th January, 2018 in the absence of any representation for the appellants. On the afternoon of the 16th January, 2018, the third day of the hearing, a team instructed by Lavelle Solicitors came on record for the appellants. The trial judge, Stewart J., noted in her judgment of the 18th December, 2018 that this late arrival raised a number of complications. Firstly, that the respondents' motion to strike out the defence of the appellants could not be heard earlier because there was no firm of solicitors on record for the appellants. More importantly, as she identified, over two days of evidence had been heard in the absence of legal representatives for the appellants. In para. 18 of her judgment she states:-

> *"Notwithstanding this change in circumstances, I considered it appropriate to continue the hearing without any adjournment or delay. I cannot speculate as to why the [appellants] have behaved in the manner that they have. But it is clear to me that their every action has stymied and undermined the [respondents'] cause, both as employees of the partnership and as co-litigators in these actions. The [respondents] are entitled to have their case dealt with promptly and efficiently. It is not open to the [appellants] to frustrate those entitlements, least of all by abusing court processes. Lavelle Solicitors came off record on the morning of 26th January, 2018, which was the seventh day of the hearing. The hearing then proceeded to conclusion in the absence of any legal representation for the [appellants]. A new legal team, instructed by Christie & Gargan Solicitors, became involved in the period between the reserving of this judgment on 30th January, 2018, and the re-listing of these matters. An application was made by this new legal team on 20th February, 2018, to adjourn the re-listing until they had an opportunity to come on record and read themselves into events up until that point. That application was also refused."*

27. At para. 26 of her judgment the trial judge regretted the absence of any submissions on behalf of the appellants, indicating that such submissions would have been possible and would have been beneficial for the court's purposes:-

> *"…had the [appellants] provided a legal team with the necessary instructions. They did not do so. Instead, their conduct has impeded the proper advancement of this litigation. It is idle to speculate as to the [appellants'] motivation for behaving in this manner. Whatever their reasons are, they must live with the consequences of their actions. The Court cannot permit them to derail these proceedings to serve their own ends."*

28. The judgment of the trial judge delivered on the 18th December, 2018 held substantially in favour of the respondents. The total awards in favour of all of the respondents in all seven actions came to €1,200,054.73. The court ordered the appellants to pay to the respondents the costs of the trial to include all reserved costs and costs of discovery to be taxed in default of agreement and ordered pursuant to Ord. 99, r. 1B(5) that the appellants pay to the respondents the sum of €56,417.26 on account of the costs pending agreement or taxation.

29. The appellants appealed the entire order of the High Court and sought to have the entire matter remitted to the High Court for reconsideration in respect of each of the seven cases. The notice of appeal was signed by counsel and filed by solicitors who came into the case as the sixth firm of solicitors on record and who had no previous involvement in the conduct of the litigation. The grounds of appeal were that the trial judge had failed to make findings of fact in respect of each and every individual plaintiff and to assess awards of damages by reference to specific findings of fact in respect of each individual plaintiff; that the trial judge erred in making awards in favour of plaintiffs who did not give evidence before her or where plaintiffs did not give evidence of their mental state and personal experience; the trial judge erred in calculating the plaintiffs general damages for mental distress and inconvenience based purely on the length and stay of each plaintiff in the housing facilities in question combined with an arbitrary amount of damages per month; the trial judge erred in determining the length of each plaintiffs' stay in the housing facility by reference to what they say were inadequate proofs or documentation which had not been proved and that the trial judge erred by failing to reduce the awards in respect of the amount of tax owed which would have applied on their respective employment emoluments. They also appealed the making of an order pursuant to Ord. 99, r. 1B(5) as being made without jurisdiction.

30. In relation to the two last grounds of appeal, the failure properly to account for tax and the want of jurisdiction to make an order pursuant to Ord. 99, r. 1B(5), Mr. Tom O'Regan, solicitor for the respondents, avers in his affidavit grounding the motion to dismiss the appeals, that when the trial judge delivered her judgment the matter was adjourned to allow the respondents' expert to calculate the amount of tax which would have been payable by each of the respondents. The appellants, who were now represented by Messrs Christie & Gargan Solicitors were granted three adjournments to allow them time to consider the calculations in respect of the deductions made to the award for tax. Notwithstanding the adjournments, the appellants did not engage their own expert nor provide their own calculations to the court. Further, they were present in court when the respondents' accountant gave evidence in relation to the calculation of the amount of tax deductible from the award. They did not cross-examine the respondents' accountant nor did they take any objection to the figures put forward by the respondents. In relation to the award for the payment of costs on account, he avers that at no stage did the appellants challenge the court's jurisdiction to make the order in the proceedings.

31. The appellants applied for a stay on the respective awards of damages and the respondents applied for security for costs in respect of the appeals. On the 31st May, 2019 Irvine J. in the Court of Appeal granted a stay on the execution of the awards of damages in each of the cases pending the determination of the appeals on condition that the appellants paid into court the entire sum awarded, being €1,200,054.73, within eight weeks of the 31st May, 2019, *i.e.* by 26th July, 2019. This condition was not complied with and the stay lapsed accordingly. Irvine J. also ordered that the appellants furnish the respondents security for costs of the appeals in the sum of €278,288 within four weeks of the date of the order. The appellants did not lodge the security within the timeframe allowed by the order but instead made an application for leave to appeal to the Supreme Court. This had the effect that, pending the determination of that application, the order to provide security for costs is to be further stayed pending the determination of the application for leave to appeal and, if applicable, the appeal to the Supreme Court.

32. Mr. O'Regan gives details of the history of the litigation in general. At para. 41 of his affidavits he lists fourteen appeals which have been brought by the appellants in the last three years. The first three were the appeals from the decision of Keane J. to the Court of Appeal which were determined in October, 2017. He reiterates that the agreed amount due to the respondents specified in

the order dated the 13th October, 2017 remains outstanding. The fourth appeal arose in a separate, eighth, set of proceedings, record number 2012/9536P. Costs were awarded in favour of the plaintiffs in that case and costs were taxed in the sum of €113,655.27 on the 30th July, 2015. The costs were not discharged. The respondents obtained a European Enforcement Order in respect of the unpaid costs. The appellants challenged the EEO before the High Court. O'Connor J. refused to withdraw the EEO and the appellants appealed that decision to the Court of Appeal. Irvine J. ordered the appellants to provide security for costs for the appeal. They failed to do so and the appeal was dismissed for failure to provide the security ordered. Mr. O'Regan observed that the appellants have proceedings extant before the Portuguese courts challenging the EEO. To date, the monies held on foot of the EEO in respect of costs taxed on the 30th July, 2015 have yet to be released to the respondents.

33. The fifth, sixth and seventh appeals refer to the Taxing Master's final ruling in respect of costs awarded to the respondents by Keane J. in 2016. The final ruling was given on the 26th January, 2018. The Taxing Master enlarged time on two occasions for the appellants to raise objections. They failed to do so and the Taxing Master refused to grant a further extension of time. The appellants appealed the Taxing Master's refusal to extend time to the High Court. Barniville J. granted part of the relief sought by the appellants on the 30th April, 2018 on condition that the appellants pay on account the sum of €500,000 in respect of the respondents' costs. The order of Barniville J. was appealed to the Court of Appeal. On the 22nd October, 2018 Irvine J. ordered the appellants to provide security for costs in respect of the appeal. The appellants failed to do so and accordingly the appeal against the order of Barniville J. was dismissed. Neither the sum ordered to be paid on account (€500,000) nor the figure ordered to be paid by the Taxing Master in his final ruling (€775,025.29) have been paid by the appellants to the respondents.

34. The remaining seven appeals are the appeals arising out of the decision of Stewart J. in December 2018.

35. For the sake of completeness, I should record that on 1st May, 2019 Stewart J. refused an application by the respondents for an EEO in respect of her order for measured costs from January, 2019. She refused the appellants the costs of that motion, notwithstanding the fact that they had successfully opposed the application. The appellants have appealed this order and seek the costs of their appeal and the costs of the motion in the High Court.

36. Mr. O'Regan avers that the appellants have persistently failed and/or refused to discharge sums due pursuant to numerous court orders throughout the litigation. He says they failed to pay orders of the High Court of the 1st July, 2014 of Gilligan J., of the 15th April, 2016 of Keane J., of the 15th July, 2017 of O'Connor J., of the Court of Appeal of the 13th October, 2017 in respect of the appeal against Keane J. and the orders of the Court of Appeal of Irvine J. of the 20th April, 2018 and the 22nd October, 2018. He says that the total due to the respondents with respect to the above, leaving aside the judgments of Stewart J. with respect to damages and costs, is in the order of €1,181,442 or thereabouts. He says that this "*evidences the contempt the appellants have shown for the courts in this jurisdiction*". He states that it is his firm belief that the appellants' participation throughout the litigation has been solely for the purposes of delay and to frustrate the respondents in prosecuting their claims. The protracted history of the proceedings illustrates the invidious position in which the respondents and their legal advisors are being placed due to the appellants abusing the court process in this jurisdiction. At para. 65 of his affidavit he avers:-

> *"It is my sincere belief that the within appeal has been brought for a purpose which is ulterior and extraneous to the grounds of appeal and are part of a wider strategy on the part of the appellants to delay and frustrate the respondents in prosecuting their claims and hindering [them] from enforcing any award of damages made by the courts in this jurisdiction. For the avoidance of doubt, I believe that this appeal is frivolous and vexatious and an abuse of process."*

37. Mr. O'Regan exhibits two affidavits to his grounding affidavit. These are affidavits sworn by former solicitors for the appellants grounding their respective applications to come off record. The first affidavit is the affidavit of Mr. Peter Murphy of O'Mara Geraghty McCourt sworn on the 22nd June, 2017. He says that Mason Hayes and Curran were instructed by the defendants in August, 2008 and that Mason Hayes and Curran applied for, and were granted, an order permitting them to come off record in December, 2013 "*due to difficulties they experienced in receiving instructions from the defendants and due to issues regarding the payment of fees*". McDowell Purcell Solicitors then came on record in all proceedings on behalf of the defendants on the 12th February, 2014. That firm was granted an order permitting it to come off record in October, 2014 "*due to difficulties in receiving instructions from the defendants/appellants and due to issues regarding the payment of fees*". Mr. Murphy's firm was the third firm of solicitors to come on record on behalf of the defendants/appellants. At para. 9 of his affidavit he averred:-

> *"I say that this firm has encountered certain difficulties with the defendants which has been a source of concern for the firm for a number of months. This firm has raised these issues with the defendants on each occasion and has outlined what this firm would require from the defendants with a view to maintaining the relationship and in order to continue to act professionally on behalf of the defendants. One issue is that this firm has had difficulty in securing detailed instructions, in a timely manner, from the defendants for the purpose of fulfilling our professional obligations as solicitors on record. In addition, the firm has also had problems with payment of fees/funding of the litigation."*

38. In para. 12 he avers:-

> *"…it is clear from the foregoing that the necessary relationship of trust and confidence between the defendants and your deponent and the firm of O'Mara Geraghty McCourt Solicitors has broken down. I say that extensive efforts on the part of your deponent and O'Mara Geraghty McCourt Solicitors to obtain instructions so as to ensure proper professional representation of the defendants have been unsuccessful. In addition, the defendants have breached numerous agreements reached in respect of fees/funding of the litigation. I say that the actions of the defendants make it no longer tenable for the firm to continue to represent them."*

39. The second affidavit exhibited by Mr. O'Regan is that of Mr. Marc Fitzgibbon, a solicitor of Lavelle Solicitors, sworn on the 25th January, 2018. It will be recalled that Lavelle solicitors came on record on the 16th January, 2018 on the third day of the trial before the High Court. Mr. Fitzgibbon avers:-

> *"5. Since coming on record this firm has encountered significant difficulties in securing the necessary instructions required in order to represent the defendants. Extensive communications have taken place by way of email, telephone and direct verbal communication which made this firm's position clear in relation to the necessity for such instructions to be provided. Those instructions are essential in order to allow this firm to fulfil its professional obligations as solicitors on record, including its obligations to the court.*
>
> *6. Unfortunately, notwithstanding extensive efforts on my part adequate instructions have not been provided as requested and as a result this firm is no longer in a position to represent the defendants in these proceedings.*

7. During a break in the proceedings at hearing on 24 January 2018 a number of matters were discussed which were of particular and acute concern to me. These issues have resulted in a significant breakdown in the relationship of trust and confidence between the defendants and their legal representatives. As a result, I informed Mr. Pinto [the Portuguese lawyer representing the defendants] that this firm would have no alternative but to come off record and that the necessary application would be made to court in that regard. Shortly thereafter Mr. Pinto left court to return to Portugal. Subsequent email communication has taken place which confirms my firm opinion that the relationship of trust and confidence between the parties has irrevocably broken and cannot be retrieved."

40. Since Lavelle solicitors were permitted to come off record, Messrs Christie & Gargan Solicitors came on record and then came off record and now the appellants are represented by Adams solicitors.

41. The repeated failure to give instructions and the repeated breakdown of relationships with no less than five firms of solicitors during the course of this litigation is a remarkable and very disturbing testimony to the approach of the appellants to the conduct of litigation in this jurisdiction.

42. Quite remarkably there was no replying affidavit contesting any of the averments of Mr. O'Regan or denying any of the allegations as to improper motives alleged by Mr. O'Regan. The appellants made no attempt at all to explain their conduct and indeed in their written submissions and at the hearing of the application their new team of lawyers made no attempt to explain, never mind justify, the past conduct of the appellants in these various proceedings. They do not even address, never mind justify, the failure to pay sums due on foot of final orders in respect of which there are no stays, in some cases in respect of orders which have been outstanding for years.

The respondents' submissions
43. The respondents submit that the appeals are part of a wider strategy engaged in by the appellants to delay and frustrate all claims against them in this jurisdiction and amount to an abuse of process. If the appellants had a genuine or legitimate objective in resisting the respondents' claims, they should have participated in the hearing before the High Court in January, 2017. When the protracted history between the parties is considered the frequent applications for adjournments or extension of time, the many appeals, especially in relation to costs, and the failure by the appellants to abide by previous orders of the courts, it is apparent that the appellants' primary object is to delay the conclusion of the proceedings and avoid their obligations to the respondents for as long as possible.

The appellants' submissions
44. The appellants say that they have a legal right to appeal the decision of the High Court and the grounds of appeal they have advanced have been accepted as *bona fide* by Irvine J. when she granted a stay on execution of the judgment of the High Court on the 31st May, 2019, on terms. In their written submissions they set out why the ten grounds of appeal are *bona fide* and have merit. They deny that the appeals are a collateral attack on any other judgment other than the judgment appealed from and deny that they are brought for an improper purpose. They deny in their written submissions that the purpose of the appeals is to frustrate and obstruct the prosecution of the claims of the respondents. They say they had no ulterior motive in commencing the appeals and that the respondents have advanced no evidence to support this allegation; they say the appeals seek no collateral advantage beyond what the law allows, the appeals simply seek to challenge the decision of the High Court which is the subject of the appeal and they say that the appeals were instituted for a purpose recognised by law *i.e.* to overturn the decisions of the lower court. In those circumstances, the applications of the respondents should be dismissed.

Discussion
45. The question for the court is whether dismissal of the appeals is a proportionate response in light of the allegations admitted or established (see *Farrell v. Bank of Ireland*). The court must answer this question on the basis of a broad merits-based judgment, taking account of the public and private interests involved (*A.A. v. The Medical Council*).

46. The failure of the appellants to participate in any meaningful way in the eight-day trial in the High Court in January, 2017 on an assessment of damages and then appealing the result, where the only successful outcome of that appeal can be to order a rehearing before the High Court, in my opinion constitutes a serious waste of the court's time and resources, both at first instance and on appeal. This is particularly egregious in the case of the first three sets of proceedings which have already been remitted by the Court of Appeal in 2017 for rehearing in the High Court. In respect of those appeals, in effect the appellants are seeking a second appeal and a second remission for rehearing. This might not be so objectionable if the appellants had participated actively in the hearing in the High Court in January, 2017 and despite their engagement in that trial, nonetheless they had bona fide grounds upon which to appeal the judgment of the High Court. But, they did not. The trial judge was of the opinion that she was hindered by the absence of the appellants from the trial and she was of the opinion that they were trying to "*stymie*" the proper prosecution of the cases before her. Given the history outlined above, this court can have very little confidence that similar difficulties might not occur on any subsequent rehearing.

47. This conduct and the accusations levelled by the respondents against the appellants cries out for an explanation. In these circumstances, the complete absence of any explanation, never mind justification, of the conduct of the appellants is striking, not to say extraordinary. The appellants have chosen not to swear an affidavit denying the allegations as to their true intentions in advancing these appeals. In my judgment, it is insufficient in the circumstances for the appellant to advance their denials solely submitted on their behalf by their newly instructed barristers. In *Cavern Systems Dublin Limited v. Clontarf Residents Association* [1984] ILRM 24 Costello J. held, in the absence of reasonable cause to justify what happened – there being no explanation for the concealment of the fact in that case that proceedings had issued but not been served – it was open to the court to conclude that the conduct was an abuse of the process of the court and that the proceedings should be dismissed. The same reasoning applies here.

48. There is an obligation on litigants to act reasonably in the conduct of litigation. The right of access to the court entitles litigants to certain privileges but it also carries with it certain obligations (see *Doherty v. Minister for Justice, Equality and Law Reform* [2009] IEHC 246). A litigant is not entitled to conduct litigation in whatever way the party concerned wishes (see *Farrell v. Bank of Ireland*). Manifestly the appellants have repeatedly failed properly to instruct their solicitors on record such that no less than five firms of solicitors have felt obliged to apply for an order granting them leave to come off record. The result has been that the appellants engineered situations where they could not properly participate in the proceedings before the High Court in January, 2017 and they then used the absence of representation and the need to instruct new solicitors and counsel as the basis for seeking adjournments both before and during the trial. The need to instruct new solicitors and counsel so close to, or during, the trial arose entirely from their own actions and was a matter entirely within their own control. The failure of the appellants to participate properly in the trial hindered the trial judge in her assessment of the level of damages actually due to each respondent. This is particularly acute in relation to the question of the appropriate tax treatment of the proposed awards. The appellants were afforded ample opportunity to

engage with this issue, they chose not to and now one of the grounds of appeal is that the trial judge erred in the manner in which she dealt with this issue.

49. It would have been perfectly possible to instruct solicitors to make submissions to the trial judge along the lines of the legal points which are now set out in the grounds of appeal without any difficulty. It is difficult to avoid the conclusion that the absence of the instructions to even this limited extent was as the result of a conscious and deliberate decision, in the absence of any plausible explanation.

50. The authorities make it clear that the court is entitled to have regard to the blatant and persistent failures by the appellants to comply with orders of the court. The award of damages from this court of October, 2017 remains outstanding and no explanation has been advanced to this court why these sums have not been paid. Many orders for costs from different judges, some of which have been taxed and ascertained, likewise remain outstanding. The total sums due by the appellants in these and related proceedings stand at €2,821,638.20. This figure does not include the awards of damages in excess of €1m appealed against, or the costs of the trial of January, 2017 and the costs of the motions to the Court of Appeal in relation to the appeals. It is to be borne in mind that the individual plaintiffs are former employees of the appellants who have suffered grievously at the hands of their employers and from whom monies have been wrongly withheld for more than a decade. These appeals will inevitably add still further years of delay. If unsuccessful, it may be two years, if successful, several years more, all in cases where liability is not in issue. The explanation is not that the appellants cannot pay but rather that they will not pay.

51. The appellants' behaviour is extremely serious and persistent. It is a calculated abuse of the court's process rather than a *bona fide* use of their right of access to the courts. Their conduct has been designed to delay and frustrate (a) the conduct of the cases of the respondents and (b) payment of any sums due on foot of court orders whether by way of awards of damages or costs orders. The respondents allege that the appeals have been lodged for the improper ulterior motive of delaying the final day of reckoning. It has to be borne in mind that liability is no longer an issue in these proceedings and all the cases amount to assessments only. At the end of the day the appellants will be obliged to pay to the respondents sums by way of compensation and in respect of orders for costs. In *Dunnes Stores v. An Bord Pleanála* Barrett J. noted that one of the indicia of whether litigation has been conducted as an abuse of process is whether the process is employed for a purpose other than the attainment of the claim in the action or, in this case, the appeal. The appellants say that it is, that the appeal is a legitimate exercise of their right to litigate and that the aim of the appeal is to minimise the award in respect of the individual plaintiff/respondent.

52. There might be some credibility in this submission had the appellants participated in the hearing in the High Court which, I will reiterate, was, in part, a hearing by way of rehearing on remission from this court in October, 2017. If the appellants had truly been concerned to ensure that the compensation awarded should not exceed their lawful liability, then they ought to have participated fully and properly in the trial before Stewart J. in January, 2017. They are now, in effect, misusing the process of the court by seeking to raise before a rehearing (or a second rehearing in some instances) of the High Court issues which they could – and ought to – have raised before Stewart J. in January, 2017. The fact that they did not, combined with the fact that they have not paid the award due under the order of this court of October, 2017 and have not filed a replying affidavit in response to the affidavit of Mr. O'Regan, to my mind shows that the quantum of the award/awards is not, in fact, the true concern of the appellants. I believe the respondents are correct to say that the true inference to be drawn from the conduct of the appellants is that they are primarily concerned with delaying the proceedings as much as possible. Given the past history in these proceedings, in these circumstances this is not a legitimate use of court time or procedures. In my judgment, it amounts to an abuse of the processes of the court and I so hold.

53. The next matter for consideration is what is a proportionate response to this conduct? The courts have tried the lesser sanctions of ordering security for costs against these appellants on three separate occasions or granting stays on orders on condition that sums are lodged in court. Two of those appeals were dismissed for failure to lodge the security for costs ordered. In respect of the order of the 31st May, 2019, the appellants again have not lodged the security ordered and, therefore, in effect this sanction has not provided any protection, as intended, to the respondents. Instead they have sought leave to appeal the order for security for costs to the Supreme Court. This will have an inevitable delay of several months even if leave is not given. Of course, if leave to appeal the order is granted by the Supreme Court there will be a further, inevitable delay before the appeal can be heard and determined. The net result is that the proportionate order balancing the rights of all parties to the litigation and the public interest in the efficient conduct of litigation has been circumvented.

54. The history of the litigation between the parties shows that the respondents cannot be compensated by appropriate awards of costs as, to date, not a Euro has been paid to the respondents on foot of orders for costs going back to July, 2015. It is reasonable for the court to infer that this pattern will not change.

55. In my judgment, the public interest in the proper administration of justice and upholding the integrity of that system, as well as the private interests of the respondents, requires that the abuse of process by the appellants which has been established by the respondents is met, not by addressing each specific item of abuse, but in bringing the appeals to an end.

56. As in the case of *Farrell v. The Bank of Ireland*, the conduct of the appellants means that the proportionate response at this stage in the proceedings is in fact to dismiss all of the appeals. The merits, or otherwise, of the grounds of appeal advanced by the appellants cannot outweigh the public interest in the due administration of justice, the proper allocation of scarce court resources and the fact that courts should be concerned in deciding *bona fide* disputes. The court should not condone unexplained, unreasonable behaviour of the appellants which has so clearly been established by the sorry history of their conduct of this litigation. There comes a point when there should be finality in litigation. In my opinion, that point has now been reached in these proceedings.

57. For these reasons, I would grant the relief sought on the notice of motion and dismiss all of the appeals.