[2025] IEHC 108

THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2024/609JR]

BETWEEN

THIEBAULT ENTERPRISE LIMITED AND JOHN TWOMEY

APPLICANTS

-AND-

COUNTY REGISTRAR FOR GALWAY

RESPONDENT

AND

MARK BUNDSCHU

NOTICE PARTY

JUDGMENT of Mr. Justice Mark Heslin delivered on the 21st day of February 2025

Introduction

1. By order made on 7 May 2024 (Hyland J.), the applicants were granted leave to seek judicial review by way of an order of prohibition preventing the respondent from continuing with the taxation of costs arising out of Circuit Court proceedings between the applicants and the notice party. A stay on the taxation process was also sought but that issue is moot, in circumstances where the respondent agreed to adjourn the taxation, pending this Court's decision. The respondent did not participate in the judicial review proceedings which were heard before me on 23 January 2025.

2. Before proceeding further, I want to record my thanks to Ms. Quigley S.C., who represented the applicants and to the notice party, who represented himself, for the clarity of their submissions, written and oral. During the course of this judgment, I will refer to the principal submissions made, and the principal authorities relied upon.

3. As will presently be discussed, I will also touch on a number of issues which appear to arise in this application, but which were not the subject of any submissions during the hearing. This is certainly not a criticism of anyone, but would seems to reflect the fact that the notice party, whilst he represented himself very ably, is not a legal professional. Thus, this Court has not had the benefit of arguments on a range of issues which would seem to me to arise, given the very particular facts in the present case. Nor did it seem at all fair to me to raise issues of law during the application in which only one side had legal representation. It is to the particular facts I now turn and, for ease of reference, I will set them out chronologically.

Certain facts

4. In 2008, the applicants (as plaintiffs) sought possession of certain premises from the notice party (as defendant), together with damages for mesne rates, in legal proceedings bearing record no. 239/08.

5. The Circuit Court granted possession but refused the applicants' claim for damages and mesne rates and made an order for costs in favour of the notice party.

2009 Circuit Court order for costs against the applicants

6. A copy of the 19 June 2009 order made by the Circuit Court (her Honour Judge McDonnell) was exhibited in the present application and states, in relevant part: *"THE COURT DOTH ORDER:…3. That the defendant do recover from the plaintiff the costs of the proceedings when taxed and ascertained."* ("the circuit court order").

7. On 22 February 2008, the applicants (as plaintiffs) issued separate proceedings in this Court against the notice party (as defendant) by way of a summary summons, claiming €92,039.63 relating to arrears of rent, insurance and service charges (bearing record no. 2008/393S).

High Court order for costs against the notice party

8. On 21 July 2008, this Court (Lavan J.) ordered *"…that the plaintiff do recover against the defendant the sum of €21,813.79 and the costs of these proceedings when taxed and ascertained* ("the High Court order").

May 2009 judgment mortgage

9. On 29 May 2009, the applicants registered a judgment mortgage against the notice party's property, comprised in Folio 2623L County Donegal.

10. It is common case that the applicants did not seek to pursue the High Court order for costs. Thus, they nether served any bill of costs on the notice party, nor took any step to commence the process of taxation of the said costs.

11. Similar comments apply to the notice party in respect of the Circuit Court order in that, from June 2009 to June 2023, inclusive, the notice party took no step against the applicants on foot of the Circuit Court costs order. No bill of costs was served, and the notice party took no step to commence the taxation process.

Mutual decision to set-off

12. The reason why neither the notice party, nor the applicants, took any step whatsoever in relation to the taxation of the costs due on foot of either order is clear from para. 8 of the affidavit sworn, on 2 May 2024, by Ms. Ciara Quinlan, solicitor for the applicants, wherein the following is averred:-

> *"The applicants did not however seek to pursue the order for costs made in the High Court and/or serve a bill of costs on the notice party and it was my belief that the matter of costs had been resolved by mutual decision to set-off the notice party's entitlement to Circuit Court costs, as against the applicant's entitlement to High Court costs."* (emphasis added).

13. At para. 21 of her 17 September 2024 affidavit, Ms. Quinlan avers that the applicants:

> "*…have never taken steps to recover their costs of the High Court proceedings. No such steps were ever taken, as it was my understanding that the matter of costs had been resolved by mutual decision to set-off the notice party's entitlement to Circuit Court costs as against the applicants' entitlement to High Court costs".*

The applicants' solicitor went on to make the following averments:

> *"22. My understanding that the matter of costs had been resolved by mutual decision to set off is borne out by the fact that for more than 14 years after the Orders were made in both the High Court proceedings and the Circuit Court proceedings, neither the applicants nor the notice party took any action to recover their respective costs."* (emphasis added).

14. It is clear from the evidence that the notice party also believed that both costs orders were the subject of a mutual decision to set-off. The notice party expressed this in the following manner at para. 13 of his affidavit sworn on 7 October 2024:-

> "*The chronology of these matters is fairly simple. No party made any attempt to enforce any of the orders by the courts between 2009 and 2022. This is because the figures largely cancelled each other out."* (emphasis added).

August 2022

15. In August 2022, the applicants received a letter from the Property Registration Authority indicating that the notice party had applied to have the aforesaid judgment mortgage cancelled.

January 2023

16. On 6 January 2023, the applicants issued a civil bill seeking 'well-charging' relief and a declaration that the judgment mortgage was well-charged upon the relevant lands.

17. Whilst it is clear that for some 14 years *both* sides understood that a set-off applied and, as a consequence of this shared understanding neither side took any action to pursue costs from the other, there was, unknown until circa 2023, a difference between the parties as to what each understood the set-off to cover.

Different understandings of what was covered by the set-off

18. At para. 20 of an affidavit sworn on 17 September 2024, the applicants' solicitor averred *inter alia* that the Circuit Court proceeding for well-charging relief "*…were in respect of the High Court award of €21,813.79 in favour of the applicants and do not relate to any attempt by the applicants to secure payment of their High Court costs from those same proceedings"* (emphasis added).

19. At para. 8 of his affidavit, sworn on 14 August 2024, the notice party averred:-

> "*The High Court costs notified to myself were €17,546.45 and the Award was €21,813.79. My Circuit Court costs came to €36,422.70. This would have left me owing €2,937.54. As no action was taken by either party between 2009 and 2022, it was my understanding that all parties had, in effect, decided to 'Let Sleeping Dogs Lie' on all of these matters, although the charges were still in place on the properties."* (emphasis added).

Stand - off

20. Careful consideration of the evidence discloses that there was, without doubt, what might be called a 'stand-off' between the parties for some 14 years, during which neither side pursued their respective entitlement to costs because of as *shared* belief that each side's entitlement to costs was covered by a set off. However, it belatedly emerged that both sides had a different

understanding of what, apart from costs, was covered by the 'set-off' (which gave rise to the 'stand-off').

21. As averred at para. 8 of his 14 August 2024 affidavit, the notice party believed that both sides "*had, in effect, decided to 'Let Sleeping Dogs Lie' on all*" matters, namely, his entitlement to costs and the applicant's entitlement to costs *and* the judgment sum. The applicants believed that the set-off concerned *only* each side's liability to the other for costs (i.e. excluding the High Court judgment sum). However, this difference did not emerge until after the notice party sought to have the judgment mortgage cancelled and the applicants issued a civil bill seeking well-charging relief, in response.

22. The foregoing facts are reflected in the submissions made by the parties. In oral submissions, Counsel for the applicants referred to an "*informal understanding"* between the parties, making it clear that the following was covered by that understanding insofar as her clients were concerned, namely, *"that the issue of costs would not be pursued by either side"* (emphasis added).

23. By contrast, in para. 5 of his written legal submissions, the notice party stated *inter alia* that: "*The applicants' High Court costs of €17,546.45 against their award of €21,813.79, compared to my Circuit Court costs of €36,422.70, left a minimal balance, discouraging action until recent developments necessitated reconsideration."* (emphasis added).

March 2023

24. Returning to the chronology of relevant events, the applicants 'well-charging' proceedings, issued on 6 January 2023, were returnable before Donegal Circuit Court on 14 March 2023.

25. Realising that the applicants did not share his belief that the set-off covered both costs *and* the High Court award, the notice party's response is averred to at para. 6 of his 14 August 2024 affidavit: *"In response to this, I looked to enforce my costs order in the Circuit Court and to have it offset against any award in relation to the well-charging proceeding."*

21 July 2023

26. By letter dated 21 July 2023, Kennedy Fitzgerald LLP, solicitors for the notice party, wrote to the applicants' solicitors stating: *"We are taking up the Circuit Court order in this matter. Our client intends to proceed with taxation under the costs order. Herewith letter which we have furnished to the County Registrar together with a copy of the draft order."* (emphasis added).

First step in the taxation process

27. It is a statement of the obvious that this case does *not* concern legal proceedings, in which the first 'step' is to issue a formal writ on a specific and identifiable date, from which alleged delay can be measured. That being so, it seems to me that *if* giving notice of an intention to

proceed with taxation can be considered to be a 'step' in the taxation process, the very *first* step in the taxation process was, as a matter of fact, taken by the notice party on 21 July 2023.

28. As Counsel for the applicants pointed out during the hearing, there are errors in the draft order referred to in the said letter dated 21 July 2023, including the title to the proceedings and the dates when the proceedings were heard before her Honour Judge McDonnell (18 and 19 June, rather than 18 and 19 January as appears in the draft). Furthermore, the draft order does not refer to the order for possession made by the Circuit Court. However, nothing would appear to turn on this for the purposes of my decision. Nor is there evidence of anything sinister in these errors, particularly bearing in mind that the relevant aspect of the order, insofar as the notice party's solicitors were concerned, was the question of costs in their client's favour.

Bill of costs

29. The evidence makes clear that, in addition to retaining solicitors, the notice party instructed legal costs accountants, namely, Messrs Hughes Flynn who prepared a bill of costs which was ready by mid-September 2023. Self-evidently, it will have taken some time for the legal costs accountants to review the relevant pleadings and file in order to prepare the bill question. Three comments seem appropriate. First, if giving written notice of the intention to have the costs taxed was *not* the first step taken in the taxation process at issue, the preparation of a bill of costs by legal costs accountants and the service of same undoubtedly *was*. Second, it is important to note that the applicants do not assert that any delay arose *after* the notice party activated the taxation process (their case relates to the previous 14 years). Third, even if it was asserted (and it is not) that the notice party delayed *after* commencing the taxation process, the evidence does not support any such finding. In other words, in the particular facts of this case, there has been no 'post-commencement' delay by the notice party in relation to the taxation process.

19 September 2023

30. By letter dated 19 September 2023, Hughes Flynn legal costs accountants, acting on behalf of the notice party, wrote to the applicants' solicitors in the following terms: -

> *"On behalf of our principals <u>we enclose</u> herewith the* [the defendant's] *<u>party and party bill of costs along with vouchers</u>. It occurs that in order to avoid the expense of taxation you may be interested in discussing settlement and on this basis you might please let us have your settlement proposals, any settlement negotiated will be strictly subject to our principals approval. Failing to hear from you within fourteen days we will have no choice but to set the matter down for taxation."* (emphasis added).

3 October 2023

31. By letter dated 3 October 2023, the applicants' solicitors wrote to Hughes Flynn, advising that this was *"…<u>the first time</u> we have heard from anyone in relation to these costs since the Circuit Court proceedings were concluded back in 2009."* (emphasis added). The letter gave notice that if the notice party issued a Summons to Tax, the applicants would seek leave to apply for

judicial review: *"…seeking a prohibition on the continuation of the taxation process. Our client will ground their complaint on the lack of procedural fairness by virtue of the inordinate and inexcusable delay that has occurred and the consequent prejudice to our client. Our client will be relying on the High Court cases for Harte v Horan [2013] 2 I.R. 291 and Power v Kavanagh [2019] IEHC 495."* I will presently look at both of those authorities.

8 February 2024

32. On 8 February 2024, Hughes Flynn confirmed that they had instructions to set the matter down for taxation.

23 April 2024

33. A Summons to Tax issued, on 23 April 2024, which required attendance before the respondent on 9 May 2024. There is a typographical error in the Summons to Tax, in that it refers to an order dated 19 June "2019", instead of 19 June "2009". Nothing turns on this, in my view.

24 April 2024

34. On 24 April 2024, Hughes Flynn served a copy of the Summons to Tax on the applicants' solicitors.

7 May 2024

35. As noted earlier, leave to seek judicial review was given on 7 May 2024 and the taxation has, in effect, been stayed pending the outcome of the present proceedings.

Delayed proceedings – relevant principles

36. The principles applicable to an application to dismiss *legal proceedings* on the basis of delay are very well known, and no useful purpose would be served by an exhaustive setting out of same in this judgment. The following comments seem to me to be sufficient. Two overlapping streams of jurisprudence emerge from two decisions by the Supreme Court. The first, in time, is the decision in *O'Domhnaill v Merrick* [1984] IR 151 ("*O'Domhnaill*"). The second is the oft-cited decision in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459 ("*Primor*"). In these proceedings, the applicants rely on both.

Primor

37. It is fair to say that *Primor* lays down a 3-part test, in that the court should ask:-

(1) Is the delay inordinate?

(2) Is the delay inexcusable?

(3) If the delay is both inordinate and inexcusable, is the balance of justice in favour of, or against, the case being allowed to proceed?

O'Domhnaill

38. Whereas the *Primor* test begins with a focus on the plaintiff's conduct of the proceedings, the *O'Domhnaill* approach stems from this Court's inherent jurisdiction to dismiss proceedings in the interests of justice. Thus, *O'Domhnaill* is concerned with whether a defendant would suffer a patent injustice or unfair burden if required to meet the delayed claim, the focus being on the consequences of delay.

39. At para. 40 of his judgment in *Comcast International Holdings Ltd. v Minister for Public Enterprise* [2012] IESC 50, Mr. Justice McKechnie looked at the court's jurisdiction to dismiss on delay grounds, stating:-

> "*That the courts have such an inherent jurisdiction cannot be doubted. It surfaced in O'Domhnaill, was further established in Toal (No. 1) and Toal (No. 2), and since then, in several cases, has been accepted without question. It has a somewhat distinct basis and separate existence from Primor, but many of the matters relevant for its application are common to both. The test to be applied has been described variously such as, by reason of lapse of time or delay:*
> *(i) is there a real and serious risk of an unfair trial, and/or of an unjust result;*
> *(ii) is there a clear and patent injustice in asking the defendant to defend; or*
> *(iii) does it place an inexcusable and unfair burden on such defendant to so defend?"*

40. In her decision in this Court in *Manning v Benson & Hedges Ltd.* [2004] 3 IR 556, Ms. Justice Finlay Geoghegan noted (at para. 31) the:-

> "…*same two fundamental questions which appear to be raised by the judgments of the Supreme Court in Toal v. Duignan (No. 1), Toal v. Duignan (No. 2) and O'Domhnaill v. Merrick. These are:*
> *(1) is there, by reason of the lapse of time (or delay) a real and serious risk of an unfair trial; and*
> *(2) is there by reason of the lapse of time (or delay) a clear and patent unfairness in asking the defendant to defend the action."*

Cave Projects

41. The primary approach which the court should take to an application to dismiss proceedings on the basis of delay is the *Primor* 'test'. In this regard, para. 36 of the Court of Appeal's decision in *Cave Projects Limited v Kelly & Ors.* [2022] IECA 245 ("*Cave Projects*") draws together numerous principles derived from the jurisprudence. Certain of these were summarised by Mr. Justice Barr in a more recent decision by this Court in *McGivern v Fitzpatrick & Ors*. [2024] IEHC 365 ("*McGivern*"), para. 41 of which judgment includes the following:-

> " • The onus is on the defendant to establish all three limbs of the *Primor* test i.e., that there has been inordinate delay in the prosecution of the claim, that such delay is inexcusable and that the balance of justice weighs in favour of dismissing the claim.

• An order dismissing a claim is a far reaching one; such order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed.
• Case law has emphasised that defendants also bear a responsibility in terms of ensuring the timely progress of litigation; while the contours of that responsibility have yet to be definitively mapped out, it is clear that any culpable delay on the part of the defendant will weigh against the dismissal of the action.
• The issue of prejudice is a complex and evolving one. It is central to the determination of the balance of justice. It is clear from the authorities that absence of evidence of specific prejudice, does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice.
• The authorities suggest that even moderate prejudice may suffice where the defendant has established that there was inordinate and inexcusable delay on the part of the plaintiff. However, Collins J. stated that marginal prejudice, if interpreted as being of a lesser standard than moderate prejudice, would not be sufficient.
• Collins J. noted that notwithstanding certain dicta in the *Millerick* case, which suggested that even in the absence of proof of prejudice, it may still be appropriate to dismiss an action, it had to be remembered that the jurisdiction was not punitive or disciplinary in character and the issue of prejudice had been acknowledged as being central to the court's consideration of the balance of justice."

The dispute

42. The applicants contend that they are entitled to an order of prohibition under both the *Primor* and *O'Domhnaill* approaches. It is submitted that all 3 'limbs' of the *Primor* test are met and that, with regard to the *O'Domhnaill* approach, there is a clear and patent injustice in permitting the taxation to proceed. The notice party disputes this.

The County Registrar and the taxation of costs

43. Having touched on certain fundamental principles concerning delay in legal proceedings, it is useful to understand the relevant functions and powers of the County Registrar, with regard to the process at issue in the present case, namely, taxation of costs.

Order 18, rule 6 and 7

44. O.18, rules (6) and (7) of the Circuit Court Rules ("CCR") states:-

"6. The County Registrar shall have power, when directed by the Judge or empowered by these Rules, to tax all Bills of Costs, including costs as between solicitor and client, and shall certify the amount properly due thereon. In every case he shall measure the costs by fixing a reasonable sum in respect of the entire Bill or any particular item therein.

7. Any party dissatisfied with any certificate, ruling or decision of the County Registrar, may, within ten days from the date of such certificate or within ten days from the date of perfection of such ruling or decision, apply to the Judge by motion on notice to review such certificate, ruling or decision, and the Judge may thereupon make such order as he thinks fit" (emphasis added).

Order 66, r. 6

45. The question of costs is also dealt with, in O.66 of the CCR, r. 6 of which provides:

"6. All costs directed to be taxed shall be taxed by the County Registrar (who for that purpose shall have all the powers of a Taxing Master of the High Court) subject, as to every item, including outlay and Counsel's fees, to an appeal to the Court notice of which shall be given within ten days from the conclusion of the taxation." (emphasis added).

Order 66, r. 8

46. Order 66, r.8 goes on to provide that:

"the party to whom such costs or expenses have been awarded shall deliver a bill of such costs or expenses, and give at least seven days' notice of taxation for a day and hour to be fixed (generally or specially) by the County Registrar, and such party may include in such bill all such payments as have been necessarily and properly made by him and all such reasonable charges and expenses as appear to have been properly incurred in procuring evidence, provided that the party to whom such bill has been furnished may tender a sum of money in discharge of such bill, and if such tender is refused and the amount of such bill when taxed shall not exceed the sum tendered, the costs of taxation shall be borne by the party claiming on foot of such bill. …" (emphasis added).

Order 66, r. 9

47. Order 66 r.9 goes on to provide *inter alia* that:

"9. In any taxation of costs, wherever any items appear for disbursements, the same shall be properly vouched before the County Registrar, save that this Rule shall not be construed so as to prevent the taxation of items in respect of costs and charges which have been incurred but which remain unpaid.
In any taxation of costs, wherever items appear for disbursements or expenses, the same shall be properly vouched before the County Registrar and every voucher that includes a claim in respect of value added tax shall contain the registered number allocated by the Revenue Commissioners to the person to whom such value added tax is payable."
(emphasis added).

Order 66, rule 25

48. Order 66, r.22 provides that: "*Where under Statute a special scale of costs is prescribed, such special scale shall apply*", O.66, r.25 goes on to state:

> *25. Where the Judge or the County Registrar is of opinion that there is no appropriate scale of costs, the Judge or the County Registrar may measure such sum for costs as is considered reasonable. An appeal shall lie to the Court from any decision of the County Registrar under this Rule."* (emphasis added).

The question of alternative remedies?

49. Whilst it is perfectly understandable why the notice party, who represented himself, did not raise the matter, it seems to me that questions arise, including (i) whether it can be said that, on the state of the evidence, the applicants have suitable alternative remedies available to them; (ii) if so, whether the applicants can be said to have failed to exhaust such; and (iii) if so, the significance of same for the discretionary remedy of judicial review which the applicants seek. I say this in light of the following.

Guardrails

50. In light of the provisions of O. 66, the County Registrar is by no means 'at large' in relation to the taxation of costs. Whilst having the powers of a Taxing Master, the County Registrar operates within the 'guardrails' of the process set out in the CCR.

Reasonable fee

51. Thus, the County Registrar is not only empowered, but required, to fix a *"reasonable sum"* (the word *"shall"* is used in O.18, r.(6)). That obligation on the County Registrar would seem to me to exist, irrespective of whether or not the party subject to the costs order even participates in the taxation process. Furthermore, regardless of input, or not, by the party liable to meet the costs, disbursements and expenses must be "*properly vouched"* further underlining that the County Registrar's powers and duties are directed towards determining a sum which is reasonable in the objective sense (regardless of the sum claimed in any particular case).

Expertise

52. In discharging the role, the County Registrar will very obviously deploy their own experience and expertise, having regard to taxations generally and cases with similarities to the one at issue. No expert evidence is needed for this Court to say that proceedings in which possession of property and mesne rates are sought are not uncommon. Furthermore, there is nothing in the evidence to suggest that the Circuit Court proceedings which gave rise to the costs order were in any way unusual.

Appeal

53. In addition to the guardrails governing the process itself, taxation by the County Registrar is subject to an appeal to court on every aspect of the sum determined (including outlay and Counsel's fees). In the manner presently discussed, the process (with what appear to be 'checks and balances' aimed at securing a just result as to the quantum of costs) is one which these applicants are determined not to see progressed.

No tender made

54. The applicants did not make any "*tender",* despite their right to do so, *per* O.66, r.8. However, it is not averred on behalf of the applicants that, due to the passage of time, it was not possible for them to assess the reasonableness of the sum claimed in the Bill of Costs prepared by Hughes Flynn, legal costs accountants, and to make such a tender (bearing in mind that the applicants' liability to pay costs is not in doubt, the only question being the quantum of same).

No evidence from legal costs accountants

55. Keeping in mind that legal costs accountants routinely advise and act for parties in taxations, and, in the present case, the applicants' solicitors received a bill of costs from such a firm, the applicants have not provided evidence in which their legal costs accountants suggest that it is impossible (or even difficult) to assess the reasonableness of the sum arrived at by Hughes Flynn, having regard to the documentation and information which is available.

No view by the County Registrar

56. Because the applicants chose to bring these proceedings, the effect of which has been to prevent the taxation proceeding, this Court is not dealing with a situation where the County Registrar has indicated that she, or he, cannot properly discharge the powers and duties conferred on them by the CCR, in particular, to determine a *reasonable sum.* Indeed, this Court does not know whether, as a matter of fact, the County Registrar has any concerns whatsoever about her or his ability to fix a reasonable sum, having regard to the material which is available to them.

No appeal

57. For the same reason, this is obviously not a situation where the process has 'run its course' before the County Registrar and one or other party believes it appropriate to exercise the right to an appeal, nor is the outcome of any appeal known.

58. Whilst, for the foregoing reasons, it seems to me that questions arise around the issue of 'appropriate alternative remedies', it would not seem fair or appropriate to determine them in the present case. This is in circumstances where I have not had the benefit of legal argument on the issue.

Primary issue

59. At para. 14 of the applicants' written legal submissions, the principal issue in this case is described as follows:-

> *"14. The primary issue in this case is whether the delay by the notice party in activating the taxation process was inordinate and inexcusable, and whether in the context of such a delay, it is unfair and unjust to require the applicants to submit to taxation."* (emphasis added).

60. The evidence makes clear when the taxation process was *activated.* In the manner examined earlier, by letter dated 21 July 2023 the notice party's solicitors, Kennedy Fitzgerald LLP, gave notice that their client intended to "proceed *with taxation under the costs order"* and by letter dated 19 September 2023, Hughes Flynn legal costs accountants, served a bill of costs.

Prior delay

61. The applicants in this case do not argue that the taxation process commenced *before* 2023. As para. 14 of the applicants' legal submissions makes clear, their case does not concern alleged delay *after* July 2023, but the passage of time *prior* to the activation of the taxation process (i.e. the 14 year period between 2009 – 2033).

62. Thus, this is not a situation where the notice party activated or commenced a taxation process and, at some point thereafter, 'went to sleep' and failed to progress the taxation process to its conclusion. As noted earlier, the evidence does not support a finding that the notice party is guilty of any delay *after* the taxation process was commenced. In the manner presently discussed, this seems to me to be an issue of some significance, in particular, for the first 'limb' of the *Primor* test.

Power v Kavanagh

63. It will be recalled that the letter, dated 03 October 2023, which was sent by the applicants' solicitors to Hughes Flynn, legal costs accountants, referred to the decision of this Court (Noonan J.) in *Power v Kavanagh* [2019] IEHC 495 ("*Power*"). In *Power*, the defendant brought a motion for an order dismissing a summons to tax, dated 23 October 2017, on the grounds of delay. The underlying proceedings concerned a road traffic accident which occurred on 17 February 1998, in which the plaintiff suffered personal injuries. The proceedings were settled on 14 November 2005 by the defendant's insurers and a final order was made on that date. By consent, it was ordered that the defendant pay the plaintiff's costs *"when taxed and ascertained"*. Whilst the order for costs was made on 14 November 2005, the plaintiff's solicitors did not deliver a bill of costs until almost 12 years later, on 27 September 2017, and followed this up with a summons to tax, dated 23 October 2017.

Final order

64. Relying on the *Primor* principles, the defendant sought to have the taxation struck out on the grounds of delay. In opposing the motion, the plaintiff contended that the court did not have jurisdiction to entertain the application as it was *functus officio* following the final order of 14 November 2005 and the only basis upon which the court could intervene was by the defendant

applying for prohibition by way of judicial review. In dismissing the application, Mr. Justice Noonan stated:-

> *"19. In the present case, the proceedings were brought to a conclusion by the making of a final order on the 14th November, 2005. Thereafter it seems to me that the court's jurisdiction was spent save and insofar as legislation and the RSC provide for a limited supervisory jurisdiction to review a decision of the Taxing Master. Section 27 (3) of the Courts and Courts Officers Act, 1995 expressly empowers the High Court to review the decision of the Taxing Master. However, that power is limited in nature and is confined to situations where the court is satisfied that the Taxing Master has erred as to the amount of the allowance or disallowance of any item of costs so that the decision is unjust.*
>
> *22. The essential complaint of the defendant here is that there is a want of procedural fairness in the taxation process by virtue of the delay that has occurred and the consequent alleged prejudice to the defendant. These are of course classic judicial review grounds for seeking to prohibit the continuation of the process. The court is routinely concerned with the prohibition of both civil and criminal processes on grounds of unfairness arising from delay. It would have been open to the defendant, and might still possibly be open, to apply for an order of prohibition against the Taxing Master in circumstances such as these.*
>
> *23. The court's judicial review jurisdiction is of course more than ample to deal with the complaints made by the defendant in this case."*

Harte v Horan

65. The principal authority relied on by the applicants (and the second of the cases quoted in their solicitor's letter, dated 03 October 2023) is the earlier decision of this Court (Hogan J.) is *Harte v Horan* [2013] 2 IR 291. As to the facts, the plaintiff was a minor who sustained injuries in a road traffic accident on 21 October 1994. Proceedings were issued in 1998, which were settled by means of a consent order, made on 11 July 2001, which order provided for the taxation of the plaintiff's costs as part of the settlement. The settlement was one of two (involving different parties) arising from the same accident. The plaintiff's solicitor delivered a detailed bill of costs in each case on a "without prejudice" basis in August 2001. On 12 December 2001, the defendant's solicitor raised queries regarding the bill of costs, following correspondence with their loss adjusters. The correspondence appears to have petered out at that point. On 01 August 2002, the defendant's solicitor forwarded a cheque to the plaintiff's solicitor in the sum of just under €13,000, by way of an attempt to settle the costs issue, and a similar cheque was sent on the same day in the related matter. The plaintiff's solicitor returned the cheque in the related matter, on 4 March 2003, stating in correspondence that the reductions proposed were unacceptable. At that point, the plaintiff's solicitor obtained the 22 July 2003 as the date for taxation of the costs in the related action. These costs were settled following an improved offer by the defendants and a cheque for same was obtained on 01 August 2003. The plaintiff's solicitor averred that it was

intended to pursue the same strategy in respect of the costs in *Harte*. However, due to an administrative oversight in his office, no steps were actually taken.

66. The matter next came to the attention of the plaintiff's solicitor in September 2010 when files in storage were being reviewed in his office, prior to being sent for shredding. On 29 September 2010, the cheque which had been sent in August 2002 was returned by the plaintiff's solicitor, who confirmed that he would be proceeding to have the costs taxed. On 02 March 2011, the defendant's solicitors stated in correspondence that an application for taxation would be opposed on the grounds that the application was either 'statute-barred', or by reason of undue delay. A summons to tax issued on 20 January 2012 and a fresh of bill of costs was served. The matter came before the Taxing Master and was adjourned on a number of occasions. Ultimately, the defendant issued the relevant motion seeking an order pursuant to the court's inherent jurisdiction to strike out the taxation of the bill of costs.

Statue barred?

67. At para. 12 of the *Harte* decision, Mr. Justice Hogan made clear that "…*a judgement for costs is not enforceable until the sum in question is ascertained*". He went on to state (at para. 13) that "*a general order for costs… is really a determination of the question of liability, with the amount to be paid to be ascertained - when not otherwise agreed -through the taxation process*". Given that the sum due had not yet been ascertained, the learned judge made clear (at para. 16) *"It follows, therefore, that the taxation of the plaintiff's costs is not statute barred. In fact, time has not yet even begun to run for the purposes of the statute, since the judgement for costs is not yet enforceable. It will only become enforceable when the precise amount of the liability for costs is actually ascertained and determined. It is only at that point that the twelve year time period specified by s.11(6)(a) of the Act of 1957 will commence*."

68. Hogan J. also held that the taxation of costs is not part of the process of execution of a judgment. The foregoing also applies in the present case. No sum having been ascertained, the taxation of the costs due to the notice party is not statute barred.

Jurisdiction

69. For the sake of completeness, it should be noted that, in *Power*, Mr. Justice Noonan observed (at para. 6) that neither party in *Harte* raised the issue of the court's jurisdiction to entertain the application. Noonan J. noted that:-

> *"…the court had a concern that the application might in substance amount to an application for an order of prohibition against the Taxing Master. However, the court's concern appears to have been that, in that event, it was appropriate that the Taxing Master should be put on notice of the application which was done and the Taxing Master indicated that he would abide by the decision of the court."*

Noonan J. proceeded to state in *Power* (at para. 8):-

> *"It seems to me therefore that the issue of whether or not the court had jurisdiction to entertain the application was one that was neither raised nor argued by the parties or the court nor was it determined by the court. The case therefore effectively proceeded on the basis that it was assumed on all sides that the court did have such jurisdiction."*

Re-activated

70. Jurisdictional issue aside, it will immediately obvious that the facts in *Harte* are materially different to those in the present case. In *Harte*, the taxation process commenced in August 2001 and there was engagement by both sides followed by significant delay on the part of the moving party, from 2002 to 2010. To quote from para. 25 of the reported decision in *Harte*) "*…the taxation process was re-activated"* (emphasis added) in 2010.

71. Wholly unlike *Harte*, the present case does not concern a taxation process which was "*re-activated*" following delay in the taxation process. The facts in the present case are entirely different. Here, the taxation process was activated for the first time in 2023 and there has been no delay whatsoever on behalf of the notice party following the activation of the process. Rather, the delay complained of by the applicants relates to the passage of time *prior* to the commencement of the taxation process. This factual distinction seems to me to be important, particularly when one bears the following in mind.

Pre-commencement / post-commencement

72. The jurisprudence in relation to dismissal on grounds of delay had developed in respect of legal proceedings. Typically, a plaintiff will have issued legal proceedings but, at some point thereafter, neglected to prosecute them. A defendant who has legal proceedings 'hanging over them' will continue to face the risk of an adverse decision on liability until such time as those proceedings are determined, one way or another. The position is entirely different in relation to the taxation of costs, where the question of liability to pay those costs has already been determined. When it comes to the first 'limb' of the *Primor* test, namely, determining whether *inordinate* delay has been established, the focus will be on such delay as has occurred *after* the commencement of legal proceedings (i.e. "post-commencement" delay). That is not to say that delay prior to the issuing of legal proceedings ("pre-commencement" delay) is irrelevant to the analysis under *Primor*. Under the third 'limb' of *Primor*, the court is entitled, in the context of a consideration of the balance of justice, to have regard *inter alia* to all matters, including pre-commencement delay. As Baker J. stated at para. 33 of her decision in this Court in *McGrath v Reddy Charlton McKnight* [2017] IEHC 210

> "*For the purposes of considering whether delay has been inordinate and inexcusable, the court examines the period that has elapsed subsequent to the commencement of proceedings. The assessment of the balance of justice engages a wider discretion and can take into account pre-commencement delay, and the interests of justice come to be examined only if a delay is held to be inordinate and inexcusable."* (emphasis added)

Entitlement / commencement

73. As touched on earlier, legal proceedings commence on a specific date, with the issuing of the relevant writ. However, the *entitlement* to bring the proceedings (i.e. the alleged 'cause of action') may well be much earlier, sometimes several years earlier. That said, there is no doubt that the process of legal proceedings begins with the issuing of a formal writ. It seems to me that no *direct* comparison can be drawn in the very different process of taxation. However, on the facts of the present case, this taxation process commenced when the notice party's solicitors gave written notice of the intention to have the costs taxed and the notice party's legal costs accountants 'followed this up' by serving a formal bill of costs (even though the *entitlement* to commence the taxation process went back years, to the date of the costs order).

74. It seems to me that the application of principles developed in respect of a materially different process, has 'thrown up' a fundamental issue arising from the distinction between 'pre' and 'post' commencement delay. When the facts in the present case are analysed, it seems to me that the delay complained of by the applicants could fairly be called 'pre-commencement' delay only, whereas the first limb of the *Primor* test concerns only post-commencement delay.

75. I ask, rhetorically, how can this court hold that the notice party is guilty of any post-commencement delay, given the fact that there has been no delay whatsoever post the activation of the taxation process (nor do the applicants assert any)? What, it must also be asked, is the significance of this for the proper application of the *Primor* principles?

76. The decisions in *Power* and *Harte* make clear that it is appropriate to look at delay with respect to a taxation process through the 'lens' of the *Primor* and *O'Domhnaill* jurisprudence. However, the issue I have highlighted did not arise on the facts in *Harte* and, therefore, was not engaged with in the learned judge' decision. Nor is there anything in *Power* which provides guidance.

77. Furthermore, this issue was not addressed in any of the submissions, written or oral, during the hearing before me. This is certainly not a criticism but, once again, reflects the reality that this Court has not had the benefit of argument from two sets of legal professionals on all of the issues which would appear to be relevant, given the particular facts of this case.

Assumption

78. Given the foregoing, it does not seem to me that I can fairly determine whether 'delay', <u>all</u> of which relates to the period *before* the taxation process was commenced, constitutes 'inordinate delay' on the proper application of the first limb of the *Primor* test.

79. When dealing with an application based on alleged delay, this Court must provide a 'bespoke' response which meets the interests of justice. With this in mind, I do not think it would be satisfactory for this Court to hold that, because all delay complained of is 'pre-' commencement in nature, the application must be dismissed without any further analysis.

80. Instead, I propose to assume, for the purpose of the following analysis, that such an outcome is possible and, having made that assumption, I propose to apply the *Primor* test to the specific facts in this case.

81. The alternative would be for this Court to hold that, because the passage of time complained of is all 'pre-', not 'post-' commencement delay, the first limb of *Primor* cannot be satisfied and the analysis through the 'lens' of *Primor* can go no further. That would seem to me to be an overly mechanistic or 'slavish' application of the *Primor* principles without recognising the difference between the two processes in question (legal proceedings v. taxation).

Inordinate delay?

82. Turning, then, to the first limb of the *Primor* test, the key question is whether the applicants have established *inordinate* delay by the notice party. To address this question it seems to me to be important to recall the applicants' position, which is as follows:-

> *"The applicants did not… seek to pursue the order for costs made in the High Court and/or serve a bill of costs on the notice party and it was my belief that the matter of costs had been resolved by mutual decision to set-off the notice party's entitlement to Circuit Court costs, as against the applicant's entitlement to High Court costs."*
>
> (para. 8 of the 02 May 2024 affidavit sworn on behalf of the applicant's).

> *"No such steps were ever taken, as it was my understanding that the matter of costs had been resolved by mutual decision to set-off the notice party's entitlement to Circuit Court costs as against the applicants' entitlement to High Court costs.*
>
> *My understanding that the matter of costs had been resolved by mutual decision to set-off is borne out by the fact that for more than 14 years after the Orders were made in both the High Court proceedings and the Circuit Court proceedings, neither the applicants nor the notice party took any action to recover their respective costs."*
>
> (paras. 21 and 22 of the affidavit filed on 18 September 2024 on behalf of the applicant's).

> *"It is submitted on behalf of the applicants that the delay in activating the taxation proceed is inordinate and inexcusable, and that applicants are prejudiced by the notice party's delay…"*
>
> (para. 3 of the applicants' written legal submissions).

The applicants' position

83. In the foregoing manner, the applicants (i) make clear that there was a shared understanding between themselves and the notice party not to pursue their respective entitlements to costs; and (ii) simultaneously criticize the notice party for failing to pursue costs (i.e. what both what both sides agreed not to do).

84. Not only that, the applicants point to the 14 years (2009 to 2023) when *"neither the applicants nor the notice party took any action to recover their respective costs"* as supporting the applicants' belief *"that the matter of costs had been resolved by mutual decision to set-off".*

Delay *in* doing what both sides agreed *not* to do?

85. I ask, rhetorically, how can this Court say that the notice party is guilty of delay (i.e. failing to take action to recover costs) when the shared understanding during the relevant period (of 14 years) is that neither party would take any such action?

86. It seems to me that, on the very particular facts of this case, the 14 year period, all of which was covered by the shared understanding of the parties that both sides would not take any action to pursue costs, cannot be considered to be delay in pursuing costs. Thus, in these unique circumstances it cannot be inordinate delay.

Inexcusable delay?

87. Lest I be entirely wrong in that view, and turning to the second question in the *Primor* test, I am very satisfied that the notice party's delay is excusable (if it can truly be said to be inordinate). It is excusable by virtue of the shared understanding of the parties that neither side would pursue costs, which understanding both sides relied upon during the 14 years in question.

88. As averred, the applicants understood that the costs question had been resolved by mutual decision to set-off, a belief borne out by the fact that for the period in question (i.e. 14 years from 2009 to 2023) neither they, nor the notice party, took any action on foot of their respective costs' entitlements. The notice party also believed that a set off applied, in the manner he has averred.

89. This is the reason, and is a rational excuse, for the passage of 14 years during which the notice party did not commence the taxation process (and the same reason the applicants did not seek costs from the notice party during that period).

Balance of justice?

90. Lest I be entirely wrong in relation to all the foregoing, I now turn to the third aspect of *Primor*, being the assessment of the balance of justice. In addition to the principles so helpfully summarised in *McGivern*, it seems useful to recall the following *dicta* from the Courts of Appeal's decision in *Cave Projects*:-

> *"Where inordinate and inexcusable delay is demonstrated, there has to be causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim. A defendant cannot rely on matters which do not result from the plaintiff's delay.";*
>
> *"Each case will turn on its own facts and circumstances";*

> *"…in the exercise of the Primor jurisdiction, the question of prejudice is central";*
>
> *"…it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis";*
>
> *"Prejudice is not to be presumed."*

Whilst obviously in the context of a decision to dismiss legal proceedings, Mr. Justice Collins also stressed in *Cave Projects* that the court must be satisfied that the hardship visited on a plaintiff by a decision to dismiss would *"in all the circumstances"* be both *"proportionate"* and *"just"*.

Alleged prejudice

91. Bearing the foregoing in mind, the evidence proffered on behalf of the applicants as regards alleged prejudice begins as follows:

> *"I say and believe that there is a want of procedural fairness in the taxation process at this stage, and that the applicants are inherently prejudiced by the notice party's delay in activating the taxation process. In particular, I say that I am not confident that the files retained by Whelan Solicitors LLP, recently retrieved from storage, are complete, and that as a result, we are prejudiced in terms of our ability to confirm and/or reference work carried out on the case..."*

Storage

92. No expert evidence is needed for this court to know that, as regulated professionals, solicitors typically store files for a period of years, often many years, having regard to 'statute of limitations' and 'professional indemnity insurance' issues. The foregoing averments which explicitly refer to *"storage"* make clear that the applicants' solicitors did in fact store relevant files. This court is entitled to assume that even the most basic of file storage processes involves records of *what* went into storage and *when.* Whist reference is made to "…*the files retained by…*" the applicants' solicitors "…*recently received from storage…*" it is not suggested that the files taken <u>from</u> storage do not correspond exactly with the files put <u>in</u> to storage.

93. The applicants' solicitor goes no further than saying that she is not confident that the files are complete. However, the basis for this lack of confidence is not explained at all and the averments do not support a finding that the applicants' files are, in fact, incomplete.

94. To take a purely theoretical example, it is not averred that, when the files were recovered from storage, only files numbered "1" and "3" were located (giving rise to the inference that a file numbered "2" may be missing). Nor is it averred that, say, documentation between certain dates <u>is</u> on the file but there are 'gaps' in the chronology (causing a concern that certain documentation is <u>not</u> on file). In other words, it is not averred that, having carefully examined the

material which *is* on the files, there is any particular *reason* for a fear that the files are other than complete. Yet it is a lack of *confidence* that the files are complete which forms the basis for the assertion that the applicants are prejudiced in terms of their ability to confirm and/or reference work which was carried out on the case. The factual basis for the asserted prejudice is not all clear.

Link

95. Furthermore, there is no evidence proffered which establishes any causal 'link' between the 14 year period (2009 – 2023) and any documentation being lost. It is not, for example, suggested that certain files were taken from storage and destroyed prior to 2023, in accordance with the firm's document retention policy. Indeed, it is not asserted that anything was destroyed or that anything has, in fact, been lost between 2009 and 2023.

96. As well as failing to engage with the documentation which is on the files maintained by the applicants' solicitors, the averments made on behalf of the applicants do not engage with either (i) the fact that a full copy of the pleadings is available; and (ii) the documentation available from the files maintained by the solicitors who acted for the notice party.

Filling 'gaps'

97. As to this latter point, no expert evidence is needed for this Court to say that where two firms of solicitors are in correspondence, an original letter will typically appear on the recipient's file, whereas a copy of the same letter will appear on the sender's (each file being a 'mirror image' of the other insofar as inter partes correspondence is concerned). Similarly, the fact of, date of, and nature of a phone call between two solicitors acting for their respective clients would typically give rise to an attendance note on both files. I mention the foregoing because, whilst a fear is expressed that documents *may* be missing, there is no engagement with the extent to which any alleged 'gaps' may be 'filled' by means of documentation on the file maintained by the notice party's solicitors. Not only have no gaps been identified, there is no evidence of efforts to fill any which might conceivably exist.

98. Solicitors are, of course, officers of the court as well as regulated professionals. Thus, I am entitled to take it that documentation on a the file(s) maintained by the solicitors representing the notice party accurately reflects their engagement with the applicants' solicitors in respect of the work done on the relevant case at the time. I should also emphasise that there is no assertion to the contrary made on behalf of the applicants. In short, there is no suggestion that documentation on the file maintained by the notice party's solicitors is either unavailable or unreliable, yet these realities have not been engaged with in the applicants' evidence which asserts prejudice and unfairness.

Nature and extent

99. Paragraph 15 of the applicants' 02 May 2024 affidavit continues:-

"Moreover, I believe that due to the lapse of time since the proceedings were issued, it will be difficult to give instructions regarding the nature and extent of the work carried out in the Circuit Court proceedings."

100. The state of the evidence is that (i) there is a file maintained by the applicants' solicitors; and (ii) a file maintained by the notice party's solicitors; as well as (iii) a full set of pleadings. That being so, I cannot understand what difficulty is said to arise in relation to identifying either the nature or the extent of the work. Nor is this supposed "*difficulty*" explained. This is in circumstances where, as touched on earlier, it is not suggested that the proceedings were in any way unusual.

Memory

101. The same paragraph continues, with the following averment:-

"Moreover, I am not confident that I have a complete and accurate memory of the proceedings, fifteen years on from when same issued."

102. It is completely understandable that a solicitor might not have a complete and accurate memory of proceedings conducted 15 years before. However, there is no evidence before me that *any* issue in this taxation 'hinges' on the memory of the applicants' solicitor. Indeed, the role of memory in this taxation process, or in taxation generally, is simply not explained. This seems to me to be a fundamental 'gap' in the evidence upon which prejudice is alleged.

Findings of fact / liability

103. In *legal proceedings* which have yet to come to trial, questions of fact which are relevant to liability may fall to be determined on the basis of oral testimony of a witness, or witnesses, relying on memory of past events. As a general concept, the greater the lapse of time between the relevant events and oral testimony concerning same, the greater the scope for the degrading and failure of memory and the ability of a witness to assist the trial court. This highlights a fundamentally difference between (i) extant legal proceedings, where liability is yet to be determined and individual memory may be crucial to that determination; and (ii) the taxation process, where there is simply no question of witness memory determining the issue of liability to pay costs. The applicants' liability for costs was determined by the court in 2009 following the outcome of the legal action.

104. Without intending any criticism, if it is contended that in this particular taxation process *any* issue whatsoever will fall to be determined on the basis of the memory of the applicants' solicitor, the applicants have not established this in evidence, nor have they even identified such an issue.

105. Having received a bill of costs (prepared by the notice party's legal costs accountants) the applicants have chosen to prevent the taxation process from continuing but without proffering

any evidence, (e.g. from their legal cost's accountant) that *any* question or issue in the taxation will 'turn' on memory, as opposed to the documentation which is available.

Cannot say what may be missing

106. Para. 15 continues, as follows:

> *"While I believe that it should be possible to reconstruct a full copy of the pleadings, I cannot say with certainty what other documentation may be missing from the file pertaining to the Circuit Court proceedings, for example, contemporaneous notes, that would assist the applicants in the taxation process."* (emphasis added).

107. Without intending any disrespect, the statement *"I cannot say with certainty what other documentation may be missing"* is certainly not evidence that *any* document is missing. In substance, it is to say *'I do not know what may not be there'*, which could be said regarding any and every file, regardless of how complete. More importantly, there is no evidence that anything is in fact missing. None of this is to criticise. Rather, it is to engage the evidence, as this Court must, in order to see what facts are and are not established.

Contemporaneous notes

108. No averment is made that "*contemporaneous notes",* or anything else, is in fact missing. To take a theoretical scenario in which a solicitor reviews a file with which they dealt many years earlier, it is possible that, upon close review, they notice that contemporaneous notes which appear on the file, month after month, cease to be found for particular months. In other words, following a review, the solicitor in this example could point to an identified inconsistency and explain, with reference to same, the *basis* for a belief that contemporaneous notes were missing. In the present case, no basis has been laid for any contention that anything at all is missing. It is not even made clear whether contemporaneous notes are, or are not, on file. To take another example, this is not a situation where a solicitor has explained that their normal practice is to put contemporaneous notes on file instead of, say, having an attendance note 'typed up' based on their notes and that, following review of their file, no contemporaneous notes can be found, indicating that documents may, in their view, be missing. Again, there is a simply a concern expressed that something may be missing, without, in my view, any evidential basis for the concern.

Assist the applicants

109. Without establishing that any documents *are* missing, and without explaining the basis for any belief that documents *may* be missing, contemporaneous notes or otherwise, no explanation is provided as to how such documents *"would assist the applicants in the taxation process"*.

Sources of and control over relevant documents

110. In the context of legal proceedings, it is conceivable that a myriad of documents from a range of sources may potentially be relevant to a determination of liability and the defendant may not have direct control over same. Thus, depending on the particular circumstances, inordinate and inexcusable delay may result in the loss or destruction of relevant documentation such as, for example, documents in the control of third parties. The position is materially different in relation to the taxation process, where liability to pay costs has already been determined and, thus, the scope of potentially relevant documentation is both narrow, and known at the point the costs order is made. It seems uncontroversial to say that the relevant documents for a future taxation by the County Registrar will be the pleadings in the case; and the documents which evidence the legal work done on the case.

111. It will be recalled that the solicitors representing the notice party instructed a firm of legal costs accountants who produced and served on the applicants a draft bill of costs, whereas the applicants' solicitor has made averments in relation to the files available to her. Thus, in the present case (as would hardly be unusual) the source of the documentation of potential relevance to the taxation is the file or files maintained by solicitors.

112. Bearing the foregoing in mind, it is also a matter of fact that the applicants were legally represented up to the point when they became the subject of the adverse costs order, and beyond. Thus, at all material times from 2009 onwards, the applicants knew that:

(i) they had a *liability* to pay the notice party's costs;
(ii) the sole question to be determined was the *quantum* of their liability to pay costs; and
(iii) had direct *control* of all documents of relevance to their participation in the taxation process; by which,
(iv) absent agreement, a reasonable sum in respect of their liability would be *determined.*

113. Given these factors, which seem to me to differ materially from those in ongoing litigation, it does not seem unfair to say that once the costs order was made against them, it was open to the applicants to ensure that *their* solicitors retained such documents as *they* regarded as necessary to any future taxation (at which the quantum of *their* previously-determined liability would be decided).

Efforts to preserve one's files

114. In the context of a balance of justice assessment, it does not seem unfair to suggest that a party subject to an adverse costs order who has all their files available must have some responsibility to preserve their own files. This issue did not arise during the hearing and, therefore, the foregoing is obiter only. Proceeding on the basis that I may be wrong in this view, it can certainly be said that there is no evidence given by the applicants (who have been aware, since 2009, of their liability to pay costs) of any *effort*s made by them to ensure that they could call upon such documents as they regarded as relevant to a taxation process to determine the quantum of their liability. The 'height' of what is made clear is that files were retrieved from

"*storage*". Given that this is all that is known about the storage process, it could well be the case that reasonable efforts were made to store all files of relevance and that all such files are in fact available. However, to the extent it is suggested that documents may be missing from storage (i.e. that documents which were placed in storage are no longer available), one would expect far more detail in relation to what efforts were made to store the relevant files properly.

115. The applicants' averments regarding prejudice conclude:

> *"As result, I say that we are prejudiced in terms of our ability to confirm and/or reference work carried out on the case. Moreover, I believe that due to the lapse of time since the proceedings were issued, it will be difficult to give instructions regarding the nature and extent of the work carried out in the Circuit Court proceedings."*

116. The asserted prejudice, in terms of an ability to confirm or reference work carried out on the case, seems to me to go no further than an assertion which is not adequately supported by evidence. Similarly, it has not been established, in evidence, that it will in fact be difficult to give instructions regarding the nature and extent of the work. The extent and nature of the asserted difficulty is not at all clear, given that the applicants' averments do not seem to me to engage in any meaningful manner with: (i) the documentation which is on the applicants' file; (ii) the second source of available documents, being the file maintained by the notice party's solicitor's; (iii) the availability of a full set of pleadings; and (iv) the independent role of the County Registrar tasked with determining a "*reasonable sum"* in the manner specified in O.66.

Legal costs accountants

117. Nor do the applicants' averments engage in any meaningful way with such assistance as their own legal costs accountants may provide. Bearing in mind the role which legal costs accountants routinely perform in taxation, the applicants have not provided any evidence that it would be impossible (or would even give rise to difficulty) for a legal costs accountant to:-

(i) assess the reasonableness of the sum calculated by Hughes Flynn legal costs accountants, for the purpose of advising the applicants on a tender;
(ii) to advise the applicants properly in the context of this taxation; or
(iii) to make appropriate and meaningful submissions to the County Registrar for the purpose of arguing for a lower sum, based on the documentation which <u>is</u> available.

Missing / essential

118. Similarly, no legal costs accountant has given evidence that there is any 'gap' or deficit in the documentation which would adversely impact on the proper taxation of these costs. I say this, bearing in mind that there is a difference between a document being *missing* from a file; and a missing document being *essential* to the taxation of costs. On the state of the evidence, the applicants have established neither of the foregoing. Nor has any legal costs accountant averred

that, to the extent any crucial 'gap' is identified (and none has been) it is incapable of being 'filled' by means of documentation from the file maintained by the notice party's solicitors.

Checks and balances

119. It is useful to recall at this juncture that the duty and power of the County Registrar, deploying their expertise, is to decide on a *"reasonable sum"*, with all disbursements or expenses "*properly vouched".* Given the provisions of Ord. 66. it seems to me that I am entitled to assume that, in any future taxation, the County Registrar shall not ascribe value to work which is not evidenced to their satisfaction by means of relevant documentation. Although I touched on this issue earlier in the context of 'appropriate alternative remedies', it also seems relevant to a balance of justice assessment. On the state of the evidence, this Court does not know whether, given the pleadings and documents which *are* available in this case, there are any valid concerns about ability of the Country Registrar to discharge their functions properly (i.e. to fix a reasonable sum, subject, of course, to an appeal against that determination). There is certainly no evidence from a firm of legal costs accountants to that effect that, as experts in taxation, they have such concerns. In short, the evidence proffered by the applicants as to alleged prejudice does not seem to me to engage at all with the nature , and the 'checks and balances' in, the taxation process.

Prejudice is not to be presumed

120. For the purpose of the balance of justice assessment in accordance with the third 'limb' of *Primor,* I have taken into account the entire period of 14 years of which the applicants complain (assuming, for the purposes of the assessment, that both inordinate and inexcusable delay were established). Having carefully considered the evidence proffered by the applicants in relation to the question of prejudice, it seem to me that matters can fairly be summarised as follows:

(i) this Court is being invited to make an assumption that documents are, or may be, missing and are not available from another source;

(ii) building on the foregoing assumptions, the Court is invited to make a second set of assumptions, namely, that these potentially 'missing' documents would both assist the applicants in the taxation process (in a manner which is not at all made clear) and are essential to the fair determination of the taxation process (in a manner not explained); and

(iii) relying on the foregoing, the Court is invited to assume that the applicants are prejudiced.

If this Court were to hold that the applicants had established prejudice on the basis of the evidence proffered in this case, it would be to *presume* prejudice, contrary to the guidance given by the Court of Appeal in *Cave Projects* (wherein Collins J. stated explicitly that "*Prejudice is not to be presumed*").

Acquiescence

121. The applicants never called upon the notice party to 'tax' the Circuit Court costs for which the former knew, at all material times, they were liable for. For some 14 years, neither side took

any action to pursue their respective costs entitlements as against each other. The reason for this was a shared belief that a set-off arose. The fact that neither side took any step to pursue their respective costs entitlements reflected this shared understanding. This seems to me to be akin to acquiescence by the applicants, insofar as the Circuit Court costs order against them was concerned (just as the notice party acquiesced in respect of the High Court costs for which he is liable).

122. On the topic of acquiescence, it emerged during the hearing before me that the applicants had, in fact, served a notice of appeal in relation to the Circuit Court's order (the very order which granted the notice party their entitlement to costs). I accept entirely that no 'stay' was ever granted in relation to the pursuit of those costs, but it is also fair to say that the applicants were far from clear about the status of their own appeal. At my request, Counsel for the applicants very helpfully took instructions at the end of the hearing and provided such clarity as could be given. It appears that, whilst the notice of appeal was served on the notice party, who was entitled to believe that it remained 'live' and extant, no action was ever taken by the applicants to pursue the appeal. The best estimate is that "the appeal was probably struck out years ago", as far back as 2009. Little turns on the foregoing, but it fortifies me in the view that both sides acquiesced in relation to pursuing their respective costs entitlements.

123. Furthermore, once the notice party learned that what he understood to be covered by the set off (High Court costs, *plus* judgment sum) differed from the applicants' understanding of what the set of covered (High Court costs *only*) he did not delay in commencing the taxation process. This seems to me to add further weight in favour of the taxation being permitted to proceed.

Very different to the position in *Harte*

124. The gravamen of the applicants' submissions in the present case is to assert that their position is akin to the defendant in *Harte*. With respect, I cannot agree. The facts are utterly different.

125. As Mr. Justice Hogan noted at para. 31 of the reported judgment, the defendant's solicitor *"…averred that while the original file was retrieved from storage, it is incomplete".* There is no averment in the present case that the file *is* incomplete.

126. Furthermore, in *Harte: "…the claims management company which had been retained by the defendants in relation to costs have not retained any relevant papers in the matter. The papers in the related case have also been destroyed…".* Nothing of the sort is established in the present case.

127. In addition, in *Harte*: "*The solicitor who worked on the file is no longer employed by the defendant's solicitors and the principal in that firm is retired."* Again, this is very different to the factual position in the present case.

128. As Hogan J. stated (at para. 33) of the *Harte* decision: *"The passage of time has also rendered it unfair to force the defendants to submit to taxation. Once the cheque was tendered in August, 2002 and nothing further was heard about the matter for a further eight years, the defendants were lulled into believing that the matter had been resolved"* (emphasis added). Nothing of the sort occurred in the present case.

129. This, of course, highlights the fact that *Harte* dealt with delay which arose *after* the commencement of the taxation process, not the passage of time beforehand. After activating the taxation process in the present case, the notice party certainly did not *lull* the applicants into anything. The notice party did not delay. This is utterly different to the situation in *Harte* where, as Hogan J. put it at para. 25: *"the taxation process was re-activated only after an interval of eight years in which - by reason of an oversight - precisely nothing happened".*

Outcome of assessment

130. The outcome of the balance of justice assessment in this case did not come down to 'fine margins'. Rather, I take the view that the interests of justice weigh decidedly in favour of permitting the taxation proceed. The principal reason for my view is the failure of the applicants to establish any prejudice. Taking all facts and circumstances into account, and guided by the principles to summarised in *Cave Projects*, I am satisfied that to prohibit the taxation process from proceeding would not be proportionate or just in this particular instance.

Unfairness

131. Looking at matters through the lens of *O'Domhnaill*, for the reasons set out above I am not at all satisfied that the applicants are at serious risk of an unfair taxation, or that it would be a clear and patent unfairness to permit the taxation to proceed in the usual way.

Observations

132. Whilst involving some repetition, it seems appropriate to make the following observations at this stage. I stress that these are no more than observations, given that this Court has not had the benefit of argument on the issues.

133. It will be recalled that, whilst the County Registrar "*shall have the power*" to certify the amount properly due for costs, O.18, r.6 makes clear that the County Registrar "*shall measure the costs by fixing a reasonable sum in respect of the entire Bill or any particular item therein*". Thus, it might be said that the powers conferred on the County Registrar by the CCR extend as far, but no further than, determining a *reasonable sum*. If so, it might be said that is open to the County Registrar to decide, in a 'real world' instance, that they could not properly discharge their role, given the paucity of documentation.

134. If that view is correct, it would seem to follow that it is permissible for the County Registrar (having become familiar with the documentation proffered and with the benefit of such submissions as are made in a specific case, such as the present one) to form the view that there

are, in fact, deficiencies which prevent her or him from fixing a reasonable sum, in accordance with the County Registrar's power and duty to. If this view is correct, it would seem to argue strongly against this Court preventing a taxation process from proceeding, at least to the point where the party tasked with determining a reasonable sum for costs (i.e. the County Registrar, with experience in the matter, not this Court) takes a view that they cannot properly discharge their role. I would also tentatively suggest that there is no obvious impediment to an application for leave to seek judicial review being made during, as opposed to before, the taxation process (e.g. if it was contended that the process had gone so awry as to offend constitutional justice).

135. Again, I stress that these are observations made without the benefit of competing legal arguments. They are made simply because the issues did not seem to arise in either *Power* or in *Harte,* recalling that neither of those decisions comprised an application for judicial review. Whilst I may be entirely misguided in making the foregoing comments, it is perfectly clear that the facts in the present case are *very* different to those in either *Power* or *Harte*.

Conclusion

136. In the manner explained, this court has not had the benefit of considering any authority where judicial review was sought in relation to a taxation, still less in circumstances similar to those in this case. Therefore, an attempt has been made to apply, to the very different process of *taxation*, principles which have been developed in relation to delay in the prosecution of *legal proceedings.*

137. It seems to me that certain important questions (e.g. concerning the existence or not of 'appropriate alternative remedies'/whether an applicant for judicial review in these particular facts could be said to be premature; the distinction between pre-and post-commencement delay for the proper application of the first 'limb' of the *Primor* test; and the existence/extent of a duty to preserve one's own records) must await determination in a case where the court will have the benefit of legal argument from all parties.

138. In the present case, despite the undoubted skill with which legal submissions were made, a consideration of the facts which emerges from the evidence requires me to say that the applicants have fallen well short of establishing any entitlement to relief, be that under the *Primor* approach or pursuant to the *O'Domhnaill* principles. Whilst the following is no substitute for the analysis set out in this judgment, the outcome can be summarised as follows.

139. I am satisfied that, in view of the shared understanding which subsisted for 14 years that both side would *not* pursue costs, the notice party cannot simultaneously be said to have delayed *in* pursuing costs. No delay having been established, there was no inordinate delay and the first limb of the *Primor* test is not met.

140. Even if I am wrong in this view, I am satisfied that the applicants have not established inexcusable delay*, per* the second limb of the test, in circumstances where the shared understanding of the parties, not to pursue taxation of costs, was the reason for shared inaction.

141. Furthermore the balance of justice clearly favours permitting the taxation to proceed, in my view, in circumstances where the applicants have failed to establish any prejudice in permitting costs to be determined in accordance with the process laid down in the CCR.

142. The taxation process includes, *inter alia*: (i) the applicants' entitlement to make a tender; (ii) determination of a "reasonable sum" by the County Registrar; and (iii) a right of appeal. The evidence does not support a finding that the applicants are prejudiced in their ability to participate fully in this process and the facts do not support a view that it would be fundamentally unfair to require that the quantum of costs, for which they are liable, be determined in the normal manner. The applicants have not established, on the evidence before me, that there is a serious risk of an unfair taxation or that it would be a clear and patent unfairness to permit the taxation to proceed in the usual way.

143. Notwithstanding the great skill and commitment of the applicants' legal team, the outcome of this application for judicial review must be determined by a consideration of the facts in light of legal principles. For the reasons set out in this judgement the applicant's claim must be dismissed.

144. Having been entirely successful, the notice party is entitled to be reimbursed for any outlay but, because he was not legally represented, I propose to make no order as to costs. The parties are called upon to submit an agreed draft order by Friday 7 March, in default of which the matter will be listed before me on Friday 14 March at 10:30 am, for mention.