APPROVED

FOR ELECTRONIC DELIVERY

THE COURT OF APPEAL

Record No. 616/2014

Edwards J.

Faherty J.

Binchy J.

Neutral Citation Number [2023] IECA 274

FRAMUS LIMITED,

AMANTISS ENTERPRISES LIMITED (IN VOLUNTARY LIQUIDATION) AND

WILBURY LIMITED (IN VOLUNTARY LIQUIDATION)

Appellants

V

CRH PLC, IRISH CEMENT LIMITED, ROADSTONE PROVINCES LIMITED,

ROADSTONE DUBLIN LIMITED, TRADBURN LIMITED, READYMIX PLC,

KILSARAN CONCRETE PRODUCTS LIMITED AND CPI LIMITED

Respondents

JUDGMENT delivered by Mr. Justice Edwards on the 10th of November 2023.

Introduction

1. The primary applications before this Court are four motions brought by the first to fifth named respondents, the sixth named respondent, the seventh named respondent and the

eighth named respondent, respectively, seeking to have the appeal of the appellant companies struck out in the interests of justice on the grounds of inordinate and/or inexcusable delay and/or want of prosecution on the part of the appellants; alternatively pursuant to the inherent jurisdiction of the Court for contravention of the principles of basic fairness of procedures required under Bunreacht na hÉireann. The appeal in question, one of the so-called "Article 64 appeals", arose out of the dismissal by the High Court (Cooke J.) in 2012 of the appellants' proceedings on grounds of inordinate and inexcusable delay. These proceedings were founded upon claims of alleged anti-competitive and cartel activity going back some thirty or so years.

2. Separate to these motions, which constitute the principal focus of this judgment, also before this Court is an application of preliminary importance brought by a director and creditor of the named appellant companies, a Mr. Seamus Maye, seeking leave from this Court to independently represent the named appellant companies in the proceedings in circumstances where the appellants' former solicitors came off record in June 2021. This preliminary matter was disposed of at a hearing before this Court on the 16th of December 2021, on which date this Court refused Mr. Maye leave to represent the appellant companies with short reasons provided at the time, and with more detailed reasons to be provided later. It is now proposed, and as part of this judgment dealing primarily with the motions for strike out, to set out the Court's reasons for refusing Mr. Maye's application.

Background

3. There is a considerable procedural history behind the present applications which is difficult to succinctly describe but which, for the purposes of the present applications, ought to be outlined to some extent if only to, at the very least, frame the context in which the present applications must now be considered.

The Parties

4. Before embarking on a recounting of this history, however, it would be helpful to outline who the parties to the present proceedings are.

5. The first named appellant company Framus Limited (i.e. "Framus") formerly traded as "Dublin Concrete Products Limited" until April 1994 and had, up until it ceased trading, engaged in the importation of cement into Ireland and in the manufacture and supply of certain concrete products, but principally readymix concrete.

6. The second named appellant company Amantiss Enterprises Limited (i.e. "Amantiss") has been in voluntary liquidation since the 1st of April 1994 and was previously engaged, much like the first appellant company, in the importation and sale of cement in Ireland, sourcing most of its material from an undertaking called "Lagan Cement" which sourced that material from Germany.

7. The third named appellant company Wilbury Limited (i.e. "Wilbury") has also been in voluntary liquidation since the 1st of April 1994 and had shared, up until the 25th of February 2020, the same liquidator as Amantiss. Wilbury was formerly engaged in the business of manufacturing and supplying certain concrete products, in particular readymix concrete and concrete blocks, and formerly traded under the commercial pseudonyms of "Galway Readymix" and "National Concrete", respectively, until March 1991.

8. The first named respondent company, CRH plc, is the holding company of a large number of subsidiary companies, which subsidiaries include amongst their number the second to fifth named respondent companies inclusive. For the purposes of this judgment, these five respondents may collectively be referred to as "CRH" or "the CRH respondents". These companies are engaged in the manufacture and supply of cement and concrete materials and products to the construction sector in Ireland, the wider European Union, and further afield.

9. The sixth named respondent company, Readymix Plc (i.e. "Readymix"), is engaged in the manufacture and supply of building materials to the construction sector in Ireland including *inter alia* readymix concrete and mortar, sand, gravel, pipes, and masonry blocks. In 2012, Readymix Ltd, as it then was, was acquired by a large Mexican multinational, CEMEX S.A.B. de C.V., and ceased to be a private limited company.

10. The seventh named respondent company, Kilsaran Concrete Products Ltd. (i.e. "Kilsaran") is similarly engaged in the manufacture and supply of building materials including *inter alia* gravel, aggregates, readymix concrete and concrete products.

11. Finally, the eighth named respondent company, CPI Ltd. (i.e. "CPI"), also engages in the manufacture and supply of readymix concrete and mortar, aggregates, and concrete blocks.

High Court Proceedings (1996 – 2012)

12. The procedural pedigree of the present applications can be traced back to the 4th of December 1996 on which date the appellant companies issued their Plenary Summons, thereby commencing proceedings against the respondents. These proceedings were founded upon certain claims which alleged *inter alia* that the respondents had infringed certain competition law rules, namely former competition law rules under s. 4 of the Competition Act 1991 / Article 85 of the Treaty establishing the European Economic Community (as amended), and s. 5 of the Competition Act 1991 / Article 86 of the Treaty establishing the European Economic Community (as amended). It was claimed that the respondents colluded together as a cartel to direct and influence commercial activity in the construction sector relating to the importation, manufacture and supply of cement, aggregates, readymix concrete, certain concrete products and speciality concrete products to local markets across Ireland, in particular the markets in the Dublin and Galway regions; and it was further alleged

that the respondents abused their dominant position in these markets to the commercial detriment of the appellant companies.

13. It was specifically pleaded that this cartel activity by the respondents (in particular occurring in the currency of the period 1990 to 1993) adversely affected the appellant companies' businesses to such an extent that they were forced, and indeed their directors Messrs. Seamus Maye and Francis Maye were forced, to enter into certain goodwill and asset purchase agreements in February 1994 with three of the CRH respondents, which such agreements allegedly included non-competition clauses that effectively restrained the appellant companies (and the two aforenamed directors) from engaging in the importation, manufacture and supply of cement / concrete (and those materials' derivative products) for a defined period of ten years. The two aforenamed directors further averred that they were made to verbally undertake to abide by these restrictive covenants for life, a fact which was contested by the respondents.

14. While the commencement of these proceedings in late 1996 was followed by an initial nine-year course of intermittent activity, in which the parties exchanged *inter alia* an amended Statement of Claim, Requests for Particulars, Replies to Particulars, Defences, and so forth, the progress of proceedings abruptly, and seemingly inexplicably, stalled after December 2005. For a further approximately six years, no efforts were made by either side to progress the proceedings (save for the furnishing by the appellants of an affidavit of discovery to Readymix on the 29th of March 2011) until the appellant companies issued a Notice of Intention to Proceed in June 2011, which development subsequently prompted the respondent companies to issue of a series of Notices of Motion in which they applied to the High Court seeking *inter alia* an order dismissing the proceedings on grounds of inordinate and inexcusable delay.

15. As is customary in judgments dealing with applications of this variety, at this juncture I now provide the following chronology which illustrates the events marking the progress of proceedings before the High Court up until that court dismissed the appellants' action:

4th of December 1996	Appellants issue Plenary Summons.
10th of December 1996 to 15th of January 1997	Respondents enter appearances.
3rd of February 1998	Delivery of Statement of Claim.
13th of January 1998 to 29th of June 1998	Respondents' Request for Particulars.
9th of October 1998	Appellants' motion for judgment in default (against Readymix).
20th of November 1998	Defence of Readymix.
18th of December 1998	Appellants' Replies to Particulars to CRH respondents and CPI.
25th of January 1999	Appellants' Replies to Particulars to Kilsaran.
8th of June 1999	Appellants' motion for judgment in default (against CPI).
2nd of July 1999	Defence of CPI.
18th of August 1999	Affidavit of discovery (Readymix).
23rd of March 2000	Defence of Kilsaran.
19th of May 2000	Appellants' motion for judgment in default (against the CRH respondents).

20th of June 2000	Defence of the CRH respondents.
29th of June 2000	Appellants' motion for discovery.
21st of November 2000	Delivery of amended Statement of Claim.
19th of June 2002	CRH respondents' motion for security for costs.
10th of December 2002	Judgment of Herbert J. (High Court - [2003] 1 I.L.R.M. 462) on discovery and security for costs for discovery.
20th of December 2002	Notice of Appeal against orders for discovery and security for costs for discovery.
5th of June 2003	Appellants ordered to make discovery to Kilsaran.
22nd of April 2004	Supreme Court judgment on security for costs and discovery ([2004] 2 I.R. 20), security fixed at €27,000.
21st of June 2004	Amount of security lodged.
15th of July 2004	Master of the High Court orders appellants to make discovery to the CRH respondents.
31st of May 2005	Appellants' motion to strike out defence of the CRH respondents

		for non-compliance with discovery order.
15th of December 2005		Appellants' affidavit of discovery furnished to the CRH respondents.
29th of March 2011		Appellants' affidavit of discovery furnished to Readymix.
1st of June 2011		Appellants issue Notice of Intention to Proceed.
29th of July 2011	**}**	
2nd of August 2011	**}**	Notices of Motion (application
3rd of October 2011	**}**	to dismiss proceedings).
26th of October 2011	**}**	
17th of February 2012		Hearing of the motion to dismiss, Cooke J. reserves judgment.
19th of July 2012		Judgment of Cooke J., proceedings dismissed.
26th of July 2012		High Court Order.

Judgment of the High Court (Cooke J.)

16. In his judgment delivered on the 19th of July 2012, Cooke J. in the High Court dismissed the appellants' action against the respondents on grounds of inordinate and inexcusable delay (*Framus Ltd & Ors v. CRH plc & Ors* [2012] IEHC 316). The late High Court judge, having regard to the chronology of the proceedings, noted that in circumstances where the respondents' alleged anti-competitive conduct had occurred mainly in the period 1990-1993 and where the appellants' action had not commenced until 1996, the effective

abandonment of the action between December 2005 and June 2011 could not be described as anything other than "*excessive, irregular and inordinate*."

17. Cooke J. considered *inter alia* the following authorities, *Desmond v. MGN Ltd.* [2009] 1 I.R. 737, *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510, *Stephens v. Flynn Ltd.* [2005] IEHC 148, and *O'Connor v. John Player* [High Court Record No. 1997 15903P], and observed, in the first place, that the delay on the part of the appellant companies since 2005 was analogous to the delay considered in those cases, and; in the second place, that the overall delay or lapse of time between the various contracts, events, meetings and conversations at the heart of the appellants' action and the then earliest likely date for a trial of the action (comprising a delay of approximately twenty years) exceeded any period of delay "*which has been considered tolerable or excusable in any commercial litigation dependent upon witness testimony in modern times*".

18. Moreover, Cooke J. opined that the inordinate character of the delay between the years 2005 and 2011 was "*all the more pronounced*" because both sides had proactively engaged in progressing the matter up until December 2005 after which point nothing occurred until the appellant companies issued the Notice of Intention to Proceed in June 2011. In this context, the High Court judge remarked, "*[h]aving gone to such lengths* [...] *there was in the view of the Court a clear obligation on the plaintiffs then to prosecute the action without any further delay*."

19. Cooke J. was not satisfied that the inordinate delay could be excused in the circumstances. While Messrs. Maye had averred that their financial issues and ill-health had a dilatory effect on progressing the action towards trial, the directors were not joined as co-plaintiffs to the action and, in any event, their personal financial woes could not be conflated with the state of the appellant companies' respective finances (which company finances were not so acute as to prevent the prosecution of the action throughout the period 1998 to 2005).

Moreover, the appellant companies, as non-natural persons, were incapable of suffering from ill-health. These two excuses advanced by the directors were therefore not applicable.

20. Thus, there only remained an excuse that the dilatory progress of the proceedings was caused by an alleged evidential deficit. However, Cooke J. was not convinced. In the first place, the claims pleaded were not *prima facie* inhibited by an evidential deficit in that they turned entirely on the contents of the agreements between the parties, an analysis of the relevant markets at the time, the effects of the alleged restraints on the appellant companies, and the testimony of the two directors.

21. Second, the High Court judge noted that the self-evident proposition relied upon by the appellants (i.e. that cartels operate in secret and that the best evidence is invariably that of "*a dissident cartel member willing to "blow the whistle"*") was a problem that, at the very least, ought to have been known and appreciated by the appellant companies and their directors at the outset. Moreover, this self-evident proposition was irreconcilable with the specificity of the claims pleaded, the particulars of which detailed allegations with references to named individuals, specific meetings on given dates, and quoted statements and threats.

22. Third, the High Court judge held that "*the real incentive*" provoking the reactivation of the proceedings in 2011 by the appellant companies was the emergence of a potential witness, a Mr. Tom Goode, who had then recently commenced proceedings against some (but not all) of the respondent companies relating to alleged infringements of competition law rules (contentious litigation under High Court Record No. 2010/10685P leading, *inter alia*, to judgments bearing neutral citations [2011] IEHC 15, [2012] IEHC 116, and [2012] IEHC 198 and the subsequent appeal from these judgments *Goode Concrete v. CRH Plc* [2015] 3 I.R. 493). However, while the High Court judge recognised that Mr. Seamus Maye viewed the contribution of this potential witness as remedial to the difficulties faced by the appellant companies in the proceedings, the emergence of Mr. Goode as a potential witness was not

sufficient to tip the balance of justice in favour of the appellant companies. While Mr. Goode's proceedings related to alleged infringements of the same competition law rules, they occurred during a period which post-dated the infringements alleged by the appellant companies in the present action. Furthermore, the membership of the cartel impugned in Mr. Goode's action varied with that impugned in the appellants' action, in that CPI was not named as a defendant in Mr. Goode's proceedings. The High Court judge was therefore not satisfied that the availability of evidence of similar alleged infringements of competition law rules, which appeared to have commenced not only after the appellant companies had ceased trading but after the stalling of the prosecution of the appellants' action, provided sufficient justification for allowing the appellants to resume pursuing their claims.

23. Further, in considering where the balance of justice fell, Cooke J. observed that there was a certain redundancy to prosecuting the part of the claims that related to the agreements between the parties as the period of non-competition restraint provided in those agreements had long since expired and there was no evidence that any of the appellant companies intended to re-enter the markets at any point during the period in which they were restrained from so doing. Moreover, insofar as complaint was made of restraint imposed on the two directors, Messrs. Maye neglected to pursue any remedy by joining the litigation as co-plaintiffs. Third, the viability of the claims was "*highly doubtful*": the High Court judge observed that the appellant companies had received "*substantial consideration*" from the sales of the assets and goodwill pursuant to the agreements between the parties entered into in February 1994 and that this compensation had presumably been disbursed to creditors to the benefit of the appellant companies and the indirect benefit of directors and shareholders. In such circumstances, it was "*questionable*" whether the appellant companies were entitled, when proceedings were commenced in 1996, to resile from the undertakings given in those agreements and to seek to repudiate those agreements as "*unlawful*".

24. Cooke J. also had regard to the advanced age of the respondents' witnesses, noting that many were retired, many suffered from health complications, many had deteriorated / unreliable memory, and that some were deceased. In such circumstances, the respondents would be placed at "*an obvious disadvantage*" as the evidence was likely to be "*dangerously defective*" and "*materially prejudicial*". The High Court judge was firmly of the view that the trial of the appellants' action therefore ran the "*significant risk of being unfair*" as, in circumstances involving the limited availability of reliable testimonial evidence and the extensive lapse of time since the period in which the events complained of were alleged to have occurred, it was "*highly probable*" that the respondents would be "*so disadvantaged as to deprive them of a reasonable prospect of a fair trial*."

25. Moreover, Cooke J. was not confident that it was possible for the High Court to reliably adjudicate on the economic elements of the appellants' claims because of the extensive period of time which had elapsed since the events complained of and because of the vicissitudes of the construction sector in that intervening period.

26. In further considering the balance of justice between the parties, Cooke J. noted that several of the facts, contracts and events relied upon by the appellant companies pre-dated the initiation of proceedings in December 1996 by more than six years, and also pre-dated the commencement of the Competition Act 1991. The High Court judge was therefore of the view that those facts, contracts and events were statute barred and/or fell outside the scope of the statutory provisions that the appellants sought to rely upon in their proceedings.

27. Finally, Cooke J. was not satisfied that there was any culpable acquiescence in the delay on the part of the respondent companies. In circumstances where the appellants had provided security for discovery in June 2004 and all defences had been delivered, the initiative lay with the appellants. The respondents were therefore entitled to assume that the

appellants had decided not to proceed when the appellants did not follow up by examining the available discovered documentation.

28. Accordingly, the High Court judge ordered that the proceedings be dismissed.

Supreme Court Proceedings (2012 – 2014)

29. In Notice of Appeal dated the 26th of September 2012, the appellant companies appealed the judgment and orders of Cooke J. For the purposes of the present applications, it is not necessary to rehearse in great detail the twenty-nine grounds upon which the appellant companies rely, suffice to describe the following six principal grounds that they advance:

1. That the High Court judge erred in law in hearing and determining the application to dismiss the proceedings for delay in circumstances where there was or could have been a perception of bias on his part accruing from his shareholding in the first named respondent and his previous role as counsel for the second named respondent in proceedings before the CJEU (Ground 1);

2. that the High Court judge erred in fact and law in characterising the delay as inordinate (Grounds 4 and 5);

3. that the High Court judge erred in fact and law in concluding that the excuses applicable to the directors of the appellant companies were not excuses for delay on the part of the appellant companies which are reliant upon the actions of its directors and other company officers (Grounds, 6, 10, 12);

4. that the High Court judge erred in fact and law in concluding that a) evidence from Messrs. Maye along with particular procedural steps would have been sufficient to establish a *prima facie* case in respect of alleged infringements of cartel rules (Grounds 15, 16 and 17), and b) that the evidence of Mr. Goode

was not sufficient to tip the balance of justice between the parties (Grounds 18 and 19);

5. that the High Court judge erred in fact and law in concluding that the preponderance of prejudice lay with the respondents in respect of the availability of reliable evidence and that the trial of the action ran a significant risk of being unfair (Grounds 20, 21, 22 and 29), and;

6. That the High Court judge erred in finding that there had been no culpable acquiescence on the part of the respondents in circumstances where none of the respondents had advanced steps from 2005 until the bringing of the motion to dismiss proceedings in 2011 (Ground 28).

30. Following the issuance of this Notice of Appeal, the respondents filed a series of Notices of Motion on the 30th of November 2012 in which they applied to the Supreme Court to have the appeals of Amantiss and Wilbury struck out. This application was made in circumstances where it was not clear on the facts whether the directors of Amantiss and Wilbury had been given authorisation by the liquidator, a Mr. Des Donegan, to lodge the Notice of Appeal in those companies' names. Indeed, Mr. Donegan only became aware of the appeal action after Mr. Seamus Maye had furnished him with a soft copy of the Notice of Appeal in an email dated the 4th of October 2012, in response to which correspondence Mr. Donegan on the 17th of October 2012 wrote to Mr. Maye querying why the appeal action had taken place without having first sought his approval and consent and further stating that he was not in favour of the appeal proceeding. The following day on the 18th of October 2012, Mr. Donegan confirmed by way of email addressed to Mr. Maye that he had not given consent to the appeal being brought. These facts did not come to the respondents' attention until after the CRH respondents had issued a security for costs motion on the 26th of October

2012 and the appellants had issued a motion to adduce additional evidence on the 20th of November 2012. On the 21st of November 2012, Mr. Donegan's solicitors wrote to the respondents' solicitors informing them that he had not authorised the service of the Notice of Appeal or the prosecution of the appeal. Framus and Mr. Seamus Maye disputed this, however. They pointed to correspondence detailing that, since 1996, Framus was to be afforded carriage of court proceedings. Further to this, and pursuant to an Order of the High Court (Laffoy J.) dated the 22nd of January 2013 (which order will be briefly discussed shortly), a creditors' meeting was convened to obtain the views of the creditors as to the appeal, and from that meeting (held on the 24th of January 2013) it appeared that the creditors were supportive of the appeal proceedings.

31. In judgments delivered on the 14th of May 2013, the Supreme Court (Denham C.J., Clarke and MacMenamin J.J. concurring) granted the respondents' application and ordered that the appeal, inasmuch as it related to Amantiss and Wilbury, be struck out (*Framus Ltd. & Ors v. CRH plc & Ors* [2013] IESC 23). However, the Supreme Court stayed the execution of that order for a period of three months (which period could be renewed upon the issuance and service of a motion, grounded upon affidavit, applying for an extension of time within that period) to both afford the appellants an opportunity to take any measures open to them to regularise the appeal and to preserve the position of the liquidator. This Order was dated the 14th of May 2013.

32. Mr. Seamus Maye made several applications to extend the stay of the Order, issuing Notices of Motion to that effect on the 18th of July 2013 (seeking a two-month extension), the 9th of October 2013 (seeking a further two-month extension), the 3rd of December 2013 (seeking a further three-month extension), and the 28th of February 2014 (seeking a further two-month extension), respectively. It would appear thus that, and accounting for the various extensions of time, the resulting date upon which the Order striking out the appeal, inasmuch

as it related to Amantiss and Wilbury, was due to be finally executed was the 14th of May 2014. In the context of a case-management list conducted on the 2nd of April 2014, the Supreme Court extended this stay to the 9th of July 2014. It would appear that no further extension of stay was granted beyond this date. Thus, the respondents have observed, in their written submissions to this Court in support of the present motion for strike out, that the appeals of Amantiss and Wilbury, respectively, stand struck out as of that date. However, this would appear to be contested by the appellants. For completeness, the respondents have therefore framed the present application as affecting not just the appeal of Framus, but of Amantiss and Wilbury also.

Companies Acts 1963 – 2012 Proceedings (2012 – 2014)

33. As alluded to earlier, against the backdrop of the uncertainty as to whether the appellant companies Amantiss and Wilbury had authorisation from the liquidator to lodge a Notice of Appeal against Cooke J.'s judgment and Order, and preceding the determination by the Supreme Court of the motion to strike out the appeal inasmuch as it related to those two appellant companies, the directors issued an originating Notice of Motion on the 18th of December 2012 applying to the High Court seeking *inter alia* an Order pursuant to s. 309 of the Companies Act 1963 directing that separate meetings of the respective creditors of Amantiss and Wilbury be called, held and conducted for the purposes of ascertaining their views on the appeal.

34. On the 16th of January 2013, the liquidator gave notice of the summoning of a meeting of the creditors of Amantiss and of the summoning of a meeting of the creditors of Wilbury. However, questions arose as to whether the respondent companies stood as creditors in the liquidation of both Amantiss and Wilbury and whether their representatives were therefore entitled to attend and vote at any creditors' meeting. A hearing of this issue in the High Court was fixed for the 18th of January 2013, and on the 22nd of January 2013 the High

Court (Laffoy J.) delivered judgment in which it was ordered *inter alia* that for the purposes of the conduct of each creditors' meeting the respondents should not be included as voting participants, but that representatives of the CRH respondents could attend as mere observers (*Re Amantiss Enterprises Ltd (In Voluntary Liquidation) & Wilbury Ltd (In Voluntary Liquidation)* [2013] IEHC 21). The Order was perfected on the 23rd of January 2013 and the meetings were held on the 24th of January 2013 whereupon it was established that the respective creditors of Amantiss and Wilbury were in favour of the appeal proceeding.

35. It should be noted that by Notice of Appeal (Supreme Court Record No. 696 COS 2012), lodged the 6th of February 2013, the respondent companies appealed against this particular Order of the High Court. For completeness, the status of this appeal will be briefly touched upon later in this judgment. It suffices to state at this juncture that this matter remained undetermined as of the date of the hearing of the present applications.

36. On the 15th of July 2013, Laffoy J. in a judgment delivered on that date (*Re Amantiss Enterprises Ltd (In Voluntary Liquidation) & Wilbury Ltd (In Voluntary Liquidation)* [2013] IEHC 332) outlined the balance of issues to be considered on an originating Notice of Motion issued on the 11th of June 2013. *Inter alia*, these included whether the High Court had jurisdiction to sanction the resignation of the liquidator in circumstances where he had indicated in an affidavit sworn on the 8th of July 2013 that he was willing to resign but only upon the sanction of the High Court. Having ordered the proceedings to be re-entered in the Chancery list on the 20th of June 2013, the High Court listed the matter for hearing on the 30th and 31st of July 2013, and judgment was finally delivered on the 9th of May 2014 (*Re Amantiss Enterprises Ltd (In Voluntary Liquidation) & Wilbury Ltd (In Voluntary Liquidation)* [2014] IEHC 273). Therein, Laffoy J. held that Mr. Seamus Maye had the authority to issue the appeal proceedings on behalf of both Amantiss and Wilbury in circumstances where the liquidator had not exercised his unfettered right to discontinue the

appeal. Further to this, and notwithstanding the ability of the liquidator in a voluntary winding up to resign of his own volition, the High Court judge made a Declaration to the effect that it was appropriate for Mr. Donegan to resign as liquidator, which Order (dated the 26th of May 2014) was perfected on the 15th of July 2014.

37. However, and notwithstanding the making of this High Court Declaration, Mr. Donegan's resignation as liquidator for both Amantiss and Wilbury did not take effect until 25th of February 2020. It does not appear from a reading of the papers provided to this Court that a replacement liquidator has been appointed.

Transfer to the Court of Appeal (2014 – 2020)

38. Following the establishment of the Court of Appeal on the 28th of October 2014, the herein appeal proceedings (formerly Supreme Court Record No. 455/2015) were subsequently inherited by the Court of Appeal (now Appeal No. 616/2014) as one of the so-called "Article 64 appeals". Also included in this transfer was the previously alluded-to appeal proceedings initiated by the respondents against the judgment and Order of Laffoy J. of the 22nd of January 2013 (formerly Supreme Court Record No. 696 COS 2012, now Appeal No. 738/2014). These two matters, since their transfer to the Court of Appeal, have travelled together, and have been adjourned on several occasions between the 1st of May 2018 and the date of the hearing of the present applications (the 16th of December 2021). The respondents' appeal against the Order of Laffoy J. stands "*adjourned*" as of the 16th of December 2021.

39. While the Covid-19 pandemic contributed, to an extent, to the dilatory progress of the appeal during this intervening period (adjourned on the 27th of March 2020 with consent by the parties), it must be noted that by the time the impact of the pandemic had begun to be felt, the appellants had already applied to the Supreme Court on the 14th of February 2020 pursuant to Article 64.3.3° of the Constitution seeking an order by which, ultimately, the

herein proceedings transferred to the Court of Appeal would be returned to the Supreme Court for determination. This application was in essence grounded in a belief that as the Supreme Court had previously decided in *Goode Concrete v CRH Plc* [2015] 3 I.R. 493, which case involved allegations of objective bias on the part of Cooke J. due to his holding of interests in the shares of one of the respondents, the Supreme Court was more appropriately placed to decide on the present appeal.

40. By Determination dated the 7th of April 2020 (bearing neutral citation [2020] IESCDET 49**)**, the Supreme Court refused to make an order cancelling the direction made in 2014 to transfer the herein appeal to this Court. The Supreme Court indicated that it had afforded parties to Article 64 appeals a five-year window in which to make applications pursuant to Article 64.3.3° but that this window to so apply closed following the clearance of this Court's backlog of Article 64 appeals. In circumstances where the appellants had not availed of this five-year window in the period since the herein appeals were transferred to this Court, the Supreme Court was not disposed to grant the order sought by the appellants. The extent to which the herein appeals are connected to the *Goode Concrete* proceedings did not, in the Supreme Court's view, "*provide any sufficient reason for now returning these appeals*" to the Supreme Court.

Chronology of Appeal Proceedings

41. Having now detailed the procedural history to the present applications, a chronology of the progress of Appeal No. 616/2014, up until the hearing of the present applications, may be provided:

19th of July 2012	Judgment of Cooke J.
26th of July 2012	Order of Cooke J.

26th of September 2012	Notice of Appeal (formerly Record No. 455/2012, now Appeal No. 616/2014).
22nd of October 2012	Notice of Motion, appellants apply for the execution of Cooke J.'s Order to be stayed pending the appeal.
26th of October 2012	Respondents file series of Notices of Motion applying for security for costs.
20th of November 2012	Notice of Motion, appellants apply to adduce new evidence.
30th of November 2012	Notice of Motion, respondents' application to strike out the appeals of Amantiss and Wilbury.
18th of December 2012	Originating Notice of Motion, commencement of Companies Acts proceedings before the High Court (Laffoy J.).
10th of January 2013	CRH respondents file Notice of Motion for discovery / leave to cross-examine.
22nd of January 2013	Judgment of Laffoy J. ordering the convening of a creditors'

	meeting to be conducted in a specified manner.
23rd of January 2013	Order of Laffoy J. perfected.
6th of February 2013	Notice of Appeal (formerly Record No. 696 COS 2012, now Appeal No. 738/2014).
14th of May 2013	Judgment of Supreme Court striking out appeals of Amantiss and Wilbury (Order stayed).
11th of June 2013	Originating Notice of Motion (Competition Act proceedings before Laffoy J.).
20th of June 2013	Proceedings re-entered.
15th of July 2013	Judgment of Laffoy J. (outlining balance of issues to be considered on the originating Notice of Motion).
9th of May 2014	Judgment of Laffoy J. (held that Mr. Seamus Maye had authority to issue the Notice of Appeal and declared that it was appropriate for Mr. Donegan to resign as liquidator).
9th of July 2014	Order of Supreme Court striking out appeals of Amantiss and

		Wilbury comes into effect (contested).
15th of July 2014		Order of Laffoy J. perfected.
28th of October 2014		Establishment of Court of Appeal.
17th of December 2014		Appeal Nos. 616/2014 and 738/2014 transferred to Court of Appeal.
20th of February 2020		Article 64.3.3° application.
25th of February 2020		Liquidator's resignation comes into effect.
7th of April 2020		Supreme Court Determination, Article 64.3.3° application refused.
12th of May 2020	**}**	Respondents file series of Notices
20th of May 2020	**}**	of Motion seeking to have
4th of June 2020	**}**	Appeal No. 616/2014 struck
3rd of July 2020	**}**	out.
8th of June 2021		Appellants' solicitors come off record.
10th of December 2021		Mr. Maye files Notice of Motion seeking leave to independently represent appellant companies.
16th December 2021		Present applications heard remotely due to Covid 19,

following which judgment was reserved.

Present Applications to the Court of Appeal

42. In various Notices of Motion dated the 12th of May 2020, the 20th of May 2020, the 4th of June 2020, and the 3rd of July 2020, the respondents now apply to this Court seeking an order dismissing the appeal proceedings on the ground of inordinate and inexcusable delay / want of prosecution on the part of the appellants. While the respondents submit that the appeals of Amantiss and Wilbury technically stand struck out as of July 2014, for completeness they bring this application against the appeals of all three named appellants. This application, for the purposes of this judgment, may be referred to as "the substantive issue" or "the delay issue".

43. The hearing of these motions had been adjourned on several occasions throughout 2020 and the first half of 2021 before finally being listed on Friday the 11th of June 2021. However, in the meantime, the solicitors on record for the appellant companies in a Notice of Motion dated the 1st of June 2021 had applied to this Court seeking an order pursuant to Order 7, rule 3 of the Rules of the Superior Courts to come off record. This application was heard on Tuesday the 8th of June 2021, on which date this Court (Whelan J.) in an *ex-tempore* ruling acceded to the solicitors' application, thereby permitting them to come off record. This Court then vacated that week's listing of the hearing of the motions, which hearing was finally relisted on the 16th of December 2021. This adjournment was afforded, as Whelan J. variously stated in her ruling (which has been made available to this Court in the form of a transcript from the 8th of June 2021), on the basis that Mr. Seamus Maye, director and shareholder of each the appellant companies, retained legal representation for the companies:

> "[...] *strictly on the basis that Mr. Maye would take all steps and do all things necessary to retain legal representation* [...].

[...]

[A]ny fixing of a date at this point is strictly contingent on Mr. Maye retaining a firm of solicitors to act in respect of the companies. [...]

[...]

And it is incumbent on Mr. Maye to take all steps expeditiously to retain a firm of solicitors. [...]"

44. However, on the date of the hearing of the motions, it transpired that the appellant companies were still without legal representation. Seeking to remedy this lacuna and ensure representation for the appellant companies, Mr. Maye in a Notice of Motion dated the 10th of December 2021 made an application to this Court seeking leave to independently represent the appellant companies in these proceedings. This application, for the purposes of this judgment, shall be referred to as "the preliminary issue".

The Preliminary Issue

Submissions of Mr. Maye

45. At the hearing of the 16th of December 2021, the Court queried why Mr. Maye had not retained legal representation in the intervening six-month period since Whelan J.'s ruling of the 8th of June 2021, noting that the Court had adjourned the hearing of the motions contingent on Mr. Maye retaining legal representation in the intervening period. Mr. Maye submitted in response that his inability to retain legal representation for the appellant companies was a consequence of his poor health during this period, described by Mr. Maye as arising from his recovery from a surgical procedure he underwent in July 2021 and from bouts of mental health issues he had experienced; and he further stated that his inability to retain legal representation was also a consequence of his impecuniosity which was of such a magnitude that neither he nor his family were capable of mustering the needed funds to

finance legal representation for the appellant companies. Mr. Maye also claimed that the immense complexity of the herein appeal proceedings has had a deterrent effect, such that "*lawyers in this country are running away*" from any involvement in these proceedings, and that Mr. Maye's family had been "*blacklisted*".

46. Mr. Maye further submitted that he has had difficulties in accessing justice, which difficulties were related to his status as a layperson and the associated unfamiliarity with the intricacies of civil procedure (which, Mr. Maye claimed, was why he had failed to detail his efforts to retain legal representation on affidavit), and his inability to access third-party funding. In respect of this second difficulty, access to third-party funding, Mr. Maye criticised the Maintenance and Embracery Act 1634 as being incompatible with EU law and, in this regard, applied to this Court seeking a preliminary reference to the Court of Justice of the European Union (CJEU) pursuant to Article 267 TFEU.

47. Mr. Maye also made assertions that the named respondents had frustrated his efforts to progress the appeal, that they had employed "*every procedural trick in the book*" to stymie those efforts. Beyond specifying the respondents' security for costs, he did not identify the "*procedural tricks*" he asserted were used against him.

Submissions of the CRH respondents

48. Mr. Paul Sreenan S.C., on behalf of the CRH respondents, in his oral submissions at the hearing of the 16th of December 2021 drew this Court's attention to the dicta of Finlay Geoghegan J. in *Allied Irish Bank Plc v. Aqua Fresh Fish Ltd.* [2019] 1 I.R. 517 at para. 43:

> "*As has been stated in a number of decisions, unfortunately the impecuniosity of a company or the lack of available funds in a company to procure legal representation is not in any sense exceptional or even unusual. It is a circumstance which in commercial life often occurs. Hence, that in itself cannot constitute exceptional circumstances. Similarly, a view expressed on behalf of a company that it has a good*

arguable defence or even the putting up of facts which objectively suggest an arguable defence is not of itself an exceptional set of circumstances."

49. Mr. Sreenan submitted that what was at issue in this application was "*exceptional circumstances*" and that Mr. Maye could not rely upon his impecuniosity in support of his application for leave to independently represent the appellant companies. Counsel further submitted that Mr. Maye had failed to set out in an affidavit the steps he took to procure legal representation. Counsel submitted that while circumstances must be exceptional to warrant a court granting leave to a director to independently represent a corporate entity, such circumstances cannot "*undermine the general rule*" and he submitted that if one chooses to conduct business through a corporation then there are consequences to that decision which one must accept, otherwise every insolvent company could come to court represented by its directors. Counsel also submitted that what constitutes exceptional circumstances will turn on the context of an individual case and he posited a hypothetical scenario whereby a company has parted ways with a firm of solicitors following a dispute, which firm is responsible for the delay, and that hypothetical company has retained a new firm of solicitors who require several months to read themselves into the case. Counsel submitted that exceptional circumstances would arise in such a scenario, but that such a scenario was not at play here.

50. In response to Mr. Maye's submissions that he has not been able to access justice and that his efforts to progress the case had been frustrated by procedural "*tricks*" employed by the respondents, counsel submitted that the appellant companies had been represented for twenty-five years by a competent firm of solicitors with a "*solid and respectable reputation as experts in the area of competition law*". This fact is demonstrative, counsel submitted, of the appellant companies having had "*more than adequate opportunity to access to class legal services*".

51. Counsel further submitted that there was nothing improper in nature as regards steps which the respondents had taken, noting *inter alia* that: the respondents had brought a motion to compel Particulars in circumstances where the Replies to Particulars were "*inadequate*"; the respondents had sought discovery and security for costs of discovery in circumstances where the three appellant companies are insolvent, and; the respondents had, before the High Court, brought a motion to dismiss proceedings on grounds of inordinate and inexcusable delay in circumstances where between December 2005 and the bringing of this motion in 2012, the appellants had done nothing to progress their case. Counsel submitted that the allegations made against the respondents are "*scurrilous*" and that they have been made against real people, many of whom are retired, who are entitled to come into court after the appellant companies had an adequate opportunity to progress their case and seek to have the proceedings dismissed on grounds of delay.

52. Counsel finally submitted that the Court did not have jurisdiction to make a preliminary reference to the CJEU relating to the compatibility or otherwise of the Maintenance and Embracery Act 1634: Mr. Maye had not commenced appropriately framed independent proceedings and, in any event, it was too late in the day to seek third-party funding as proceedings had been allowed to "*drift*" for some twenty-five years.

Submissions of Readymix

53. Mr. Brian Kennedy S.C., on behalf of Readymix, adopted Mr. Sreenan's submissions in full.

Submissions of Kilsaran

54. Ms. Bernadette Quigley S.C., on behalf of Kilsaran, adopted Mr. Sreenan's submissions. Counsel further added that the Supreme Court (O'Donnell J., as he then was) in *Gaultier v. Registrar of Companies, Gaultier v. Allied Irish Banks Public Ltd. Company* [2019] IESC 89 reaffirmed the principle in *Aqua Fresh*, however, she submitted that the term

"*exceptional circumstances*" remains a term "*which is defined in terms of what it is not as opposed to what it is*."

Submissions of CPI

55. Mr. Cormac McNamara S.C., on behalf of CPI, also adopted Mr. Sreenan's submissions. Counsel further added that it is not merely the case that Mr. Maye does not even come close to demonstrating exceptional circumstances, it is the case that he is entirely the author of the appellant companies' lack of legal representation and that he had precipitated the coming off record by the appellant companies' former firm of solicitors. Counsel drew the Court's attention to the sworn affidavit of Mr. Maye dated the 4th of August 2020 in which Mr. Maye had previously averred that notwithstanding the financial constraints the appellant companies were under, they had managed to secure "*the agreement of their solicitors to defend the within applications*".

Decision on the Preliminary Issue and Reasons therefor

56. As previously intimated, the Court was not disposed to allow Mr. Seamus Maye to independently represent the appellant companies in these proceedings. I am satisfied that the law in regard to the issue is clear and is governed by the decisions in *Battle v. Irish Art Promotion Centre Ltd.* [1968] I.R. 252 and *Allied Irish Banks v. Aqua Fresh Fish Ltd.* [2019] 1 I.R. 517. A company can only be represented in court proceedings by a qualified lawyer unless the court is satisfied to permit representation by a non-lawyer in exceptional circumstances. It has been held that the impecuniosity of the company or lack of available funds to procure legal representation does not represent exceptional circumstances in and of itself. Neither does the fact that a company may have a good claim, or where it is a good defence to a claim.

57. I should say that before the hearing of this case, this Court had relatively recently applied the jurisprudence mentioned above in two other cases, namely in *Microsoft Ireland*

Operations Ltd. v. Moneer Omar Thabit Trading Est. [2020] IECA 217, and in *Munster Wireless Ltd. v. A Judge of the District Court* [2019] IECA 286. In respect of the *Munster Wireless Ltd.* decision, it should be stated that the director therein subsequently sought leave to appeal to the Supreme Court and was unsuccessful in his application to that Court (see, [2020] IESCDET 103), the Supreme Court stating at para. 6 in its determination refusing leave that the Court of Appeal had applied "*settled law*".

58. For completeness, as already mentioned above, a further case in which the Supreme Court has had cause to consider the law on independent representation of companies by a non-lawyer is *Gaultier v. Registrar of Companies, Gaultier v. Allied Irish Banks Plc* [2019] IESC 89 (see judgment of O'Donnell J. paras. 54 to 71). There was no departure from the rule in *Battle* and *Aqua Fresh* in that case.

59. In arriving at my decision, I considered the grounds put forward by Mr. Maye on affidavit in support of his application. In addition, I considered the nature of the claim, the type of proceedings, and the representation for which approval was being sought. I did not find the existence of exceptional circumstances such as would justify this Court in exercising its inherent jurisdiction to permit that which was being sought. I do not consider that Mr. Maye's poor health sufficiently explains the non-retention of legal representation. The claimed impecuniosity, even if true, does not demonstrate exceptional circumstances. Neither do the other circumstances pointed to by Mr. Maye, notwithstanding the somewhat emotive nature of the claims being made by him, such as: that the respondents have employed "*every procedural trick in the book*" to stymie his efforts to progress these proceedings; that due to the complexity of the proceedings "*lawyers in this country running away*" from getting involved, and; the suggestion that Mr. Maye and his family have been "*blacklisted*" by various credit institutions acting under the direct influence of the defendants. These are assertions in support of which little or no concrete evidence has been provided, and such

assertions are insufficient, in my assessment, to support the suggestion that exceptional circumstances exist in this case.

60. The Court's refusal of leave to Mr. Maye to independently represent the appellant companies in these proceedings represents the application of settled law in the absence of demonstrated exceptional circumstances such as might have justified the Court in permitting such representation in the exercise of its inherent jurisdiction.

The Substantive Issue / The Delay Issue

The Affidavit Evidence in Support of the Motions

61. Before the Court are affidavits of a Mr. James Andrew Lenny, sworn on the 12th of May 2020 and on the 25th of September 2020, on behalf of the CRH respondents. The Court also has affidavits of a Mr. Thomas Healy, sworn on the 9th of June 2020 and on the 24th of September 2020, also on behalf of the CRH respondents. In addition, the Court has affidavits of a Ms. Rosaleen Byrne, sworn on the 3rd of July 2020 and on the 8th of October 2020, on behalf of Readymix. It also has affidavits of a Ms. Laura Murdock, sworn on the 20th of May 2020 and the 30th of September 2020, as well as an affidavit of a Mr. Dermot McKeown, sworn on the 30th of September 2020, on behalf of Kilsaran; and finally, an affidavit of a Mr. Ryan Ferry sworn on the 4th of June 2020 on behalf of CPI.

62. The following matters in common are pointed to by the various deponents on behalf of the respondents. The procedural history of the underlying proceedings is rehearsed, with emphasis on the delays that had precipitated the original 2012 motions to dismiss the proceedings for want of prosecution, and further emphasis on the findings of Cooke J. in his judgment of the 19th of July 2012 that there had been inordinate delay, that that delay was inexcusable and that the balance of justice favoured the dismissal of the proceedings, which had occurred by Order dated the 26th of July 2012.

63. The Notice of Appeal is in each case referred to, with all of the respondents pointing to the claim of objective bias introduced as a novel matter in addition to claims that the trial judge at first instance had erred both in law and in fact in arriving at his conclusion that the proceedings should be dismissed. The Supreme Court's decision in *Goode Concrete v. CRH Plc & Ors* [2015] 3 I.R. 493 is specifically referenced by all, except CPI.

64. The procedural history of the appeal before the Supreme Court, in the related High Court proceedings, and before this Court are all referenced. Specifically, it is outlined by the various deponents on behalf of the respondents that on the 2nd of October 2012 the appellants issued a motion seeking an Order extending the stay on the High Court Order pending determination of the appeal; that this was followed on the 26th of October 2012 by motions issued by the respondents seeking security for the costs of the appeal from the appellants; that on 20th of November 2012 the appellants issued a motion seeking leave to admit new evidence in respect of the shareholding held by Cooke J. in CRH plc; that on the 30th of November 2012 the respondents, with the exception of Kilsaran, issued motions to strike out the appeal of the second and third named appellant companies on the basis it was brought without the authority or consent of the liquidator (Kilsaran supported the motions issued by the other respondents); and that on the 10th of January 2013, a motion was issued by the CRH respondents seeking discovery of four categories of documents and leave to cross-examine Mr. Seamus Maye on his affidavits.

65. The history of the proceedings before the Supreme Court in respect of the motion to strike out the appeal of the second and third named appellants is set out, as is the ultimate rejection of that motion by the Supreme Court in its judgments delivered on 14th of May 2013. The deponents had variously quoted at length from that judgment to emphasise that while the Supreme Court had concluded that, in circumstances where the creditors of the second and third named appellants had taken steps to invoke the jurisdiction of the High

Court and had procured orders which provided for the convening of creditors meetings, which had been conducted, the balance of justice required that the creditors be given an opportunity to seek from the High Court such orders or directions as might allow the appeal to go ahead in a lawful fashion. It was envisaged that such an opportunity should be "*short and tightly controlled*", and that the required steps should be taken "*in a short timeframe*".

66. It was pointed out that to give effect to its intentions the Supreme Court had made an order striking out the appeal of the second and third named appellants but with a stay on that Order for a period of three months, within which the jurisdiction of the High Court might be invoked, and any Order which the High Court might be persuaded to make, be implemented.

67. The deponents variously point out that a series of applications were made by the appellants to extend the said stay for periods of two and three months at the time, the final such application being by motion issued on the 28th of February 2014, returnable for the 7th of March 2014, seeking to extend the stay for a period of two months. This was acceded to, and the stay was extended until the 9th of July of 2014. However, no further steps were taken by any of the appellants to progress the appeals after this date, and the respondents all contend that the stay on the Order made by the Supreme Court on the 14th of May 2013 has lapsed such that the appeals of the second and third named appellant companies stand struck out.

68. The various deponents on behalf of the respondents also referred to the related High Court proceedings in which Laffoy J., in a judgment delivered on 9th of May 2014, held that Mr. Maye had the necessary authority from the liquidator to authorise the issue and service of the Notice of Appeal in the Supreme Court on behalf of the second and third named appellant companies. This was subject to the unfettered right of the liquidator to discontinue the appeal, which right had not been exercised. They noted that Laffoy J. had also made a Declaration that it was appropriate for the liquidator to resign. The rulings in the judgment of the 9th of May 2014 were given effect to in a court order dated the 26th of May 2014.

69. The deponents for the respondents allude to the notification to the parties on the 27th of November 2014 that the appeal had been transferred by the Supreme Court to the Court of Appeal in accordance with Article 64.3.1° of the Constitution. They have each deposed that the appeal lay dormant thereafter until the 1st of May 2018 when it was listed for mention in a call over in the Court of Appeal. On that occasion, Peart J. had directed that, within a period of four weeks, the appeal was to be mentioned in the Supreme Court for the purpose of requesting that it be transferred back to the Supreme Court. On the same day, a letter was sent by the solicitors for the appellants to the Supreme Court office, and copied to the respondents, requesting that the matter be listed before the Supreme Court for mention. The Supreme Court office replied to the appellants' solicitors on the 9th of May 2018 directing the appellants to file a Form 4 seeking the transfer of the appeal back to the Supreme Court as soon as possible. There was evidence that the solicitors for the appellants failed to advise the solicitors for the respondent that they had received these instructions. There it was further evidenced that no Form 4 was filed in immediate response to the instruction from the Supreme Court office and that the matter lay dormant again until Monday, the 3rd of February 2020 when it was listed by the Court of Appeal in a call-over list.

70. There was evidence that on 31st of January 2020, just prior to that call-over, the solicitors for the appellant wrote to the respondents and disclosed for the first time the letter from the Supreme Court office dated the 9th of May 2018. On the 4th of February 2020, Costello J. in the Court of Appeal adjourned the matter for further mention before that court on the 27th of March 2020, in circumstances where counsel for the appellants had indicated at the call-over that an application would be made to transfer the proceedings to the Supreme Court within a period of two weeks.

71. There was evidence in the affidavits filed on behalf of the respondents that on the 14th of February 2020, a Form 4 was filed in the Supreme Court by the first named appellant, and

by Mr. Seamus Maye as a creditor on behalf of the second and third named appellants. It was grounded on an affidavit sworn by Seamus Maye on the 14th of February 2020 stating that the purpose of the application was to ask the Supreme Court to consider taking back the appeal from the Court of Appeal in accordance with Article 64.3.3° of the Constitution. The application was ultimately unsuccessful, and the appeal remains before the Court of Appeal.

72. The respondents all contend in their respective affidavits that the procedural history as just recounted demonstrates that from the 9th of July 2014 until the 14th of February 2020 no steps were taken by the appellants to progress the appeals. That this is so is, in fact, acknowledged by Mr. Seamus Maye in his said affidavit of the 14th of February 2020, although he maintains that the delay was excusable, firstly on the basis that the creditors of the second and third named appellants had encountered difficulty in identifying a replacement liquidator, and secondly on the basis that the appellants were in straightened financial circumstances which had precluded them from advancing matters.

73. The deponents for the respondents have all, with greater or lesser levels of detail, sought to engage with the putative excusatory circumstances put forward by Mr. Maye, and ask this Court to reject them. It is emphasised that, per the judgement of Clarke J (as he then was) of the 14th of May 2013, neither the first named appellant nor Mr. Maye have the authority or standing to take any steps to progress the appeal on behalf of the second and third named appellants. Without prejudice to that, the point is made that Mr. Maye's information as to the efforts made to source an alternative liquidator is vague in the extreme. Further, it is rejected that the appellants claimed difficulty in resorting the proceedings provides them with a valid excuse. The point is further made that Mr. Maye does not disclose in his said affidavit whether the liquidator of the second and third named appellants was informed that the appeal was listed before the Court of Appeal on the 1st of May 2018, or indeed if he was aware of the letter sent to the Supreme Court and the date of same. Further,

no explanation was provided by Mr. Maye for not drawing the letter from Registrar of the Supreme Court dated the 9th of May 2018 to the attention of the respondents. It is also pointed out that Mr. Maye did not state whether that letter was drawn to the attention of the liquidator of the second and third named appellants.

74. Emphasis was laid on the fact that there had been a further 22-month delay from the 1st of May 2018 until the 3rd of February 2020 during which nothing was done. It was deposed that following the Court of Appeal's directions on 3rd of February 2020, it had emerged that the liquidator of the second and third named appellants, a Mr. Donegan, had not yet resigned, notwithstanding the Declaration made by the High Court that he should do so. A letter subsequently received and dated the 5th of March 2020, from solicitors representing the liquidator, was exhibited, advising that the liquidator had resigned from acting in the liquidations of the second and third named appellant companies with effect from the 25th of February 2020. It was deposed by the solicitor for the CRH respondents that notwithstanding the statement by the retiring liquidator that the appointment of his replacement should take place at a meeting of the creditors of the companies concerned to be convened under s. 270 of the Companies Act 1963 (now comprised in chapter 8 of the Companies Act 2014) no steps had been taken as of the date of the swearing of his first affidavit.

75. Each of the respondents' deponents go on to address the specific prejudices that would inure to their clients if the proceedings were not dismissed. The position of each respondent is slightly different, both in terms of the extent of the anti-competitive practices alleged against them, and with regard to the claims of abuse of a dominant position, and the Court has taken full account of the evidence of alleged prejudice that has been adduced specific to the case of each respondent. However, what they have in common is the contention that any trial of this action would require a reconstruction of the economic characteristics of the relevant markets at the material time, being close to three decades ago at

this point; a determination of whether the respondents were dominant in the relevant markets (including whether the respondents, or some of them, held a position of collective dominance); whether from the late 1980s to the 1990s, a cartel had operated in the markets for the relevant products under the effective control of the CRH respondents; whether the respondents, or some of them, had abused a dominant position and whether the plaintiffs (the appellants) were forced out of business between 1993 and 1994 because of the operation of a cartel by the defendants (the respondents) in the relevant markets; and whether the plaintiffs and the directors of those companies, Messrs. Seamus Maye and Francis Maye, were compelled to enter into restrictive covenants contained in four agreements entered into with companies in the CRH group.

76. The respondent's deponents further contend that it will be difficult for their clients to get a fair trial in circumstances where so many of the appellants' claims will involve the recollection of witnesses regarding matters alleged to have taken place between two and three decades ago. In some instances witnesses are dead, in other instances witnesses are in poor health and/or have little or no recall at this remove. It is universally contended by the respondents that this is not a documents case.

77. The later affidavits in time sworn by deponents on behalf of the respondents, and referenced at para. 61 above, were filed in rejoinder to the replying affidavits of Mr. Maye sworn by him on the the 5th of November 2021 and the 15th of December 2021, respectively. Before briefly reviewing these later affidavits on behalf of the respondents, it is appropriate to first review the affidavit evidence of Mr. Seamus Maye.

The affidavit evidence of Mr. Maye

78. We have considered in detail the affidavit evidence of Mr. Seamus Maye. In his various affidavits dated the 4th of August 2020, the 5th of November 2021 and the 15th of December 2021, respectively, Mr. Maye in essence has suggested that the impecuniosity of

the appellant companies and of his family are a direct consequence of the conduct of the respondent companies; and he posited this impecuniosity (and its cause), *inter alia*, as an excuse for the dilatory progress of these appeal proceedings. His various affidavits describe a long-running saga of alleged interference by the respondent companies with the appellants' access to credit. He alleged in the first place that following unsuccessful talks to "*buy-in*" to the appellant companies in 1992, and the later commencement of proceedings against the respondent companies in 1996, the respondent companies (particularly the CRH respondents) had wielded considerable influence and control over various credit institutions in such a way as to deprive the appellant companies of access to credit and to financially hurt the Maye family. Reference is made *inter alia* to an eviction from the Maye family home in 1993 and to various arrest and imprisonment orders, all of which Mr. Maye attributed to the "*defendants' direct influence over banks*". Describing these various orders as a "*myriad of procedural tactics*", Mr. Maye contends that their purpose "*was to exhaust any resources that my family had, both mentally and financially)* (sic) *and those of my former legal advisors*" and that they effectively posed "*insurmountable*" legal obstacles given the appellants', and the Maye family's, impecuniosity. Such accusations relating the respondents' conduct in the proceedings are maintained in Mr. Maye's sworn affidavit dated the 15th of December 2021; Mr. Maye going so far as to describe the respondents as "*the authors of the* [appellants'] *destruction*", alleging intimidation by the respondents towards the second and third appellant companies' liquidator, and claiming that the respondents had forced him into a "*strait jacket*" in pursuit of having these proceedings struck out.

79. As regards the impact of the respondents' purported direct influence over the banks upon the progress of the proceedings, Mr. Maye averred that the financial difficulties of the appellant companies and of the Maye family were "*exacerbated*" by the necessity to pursue Companies Acts proceedings over the period 2012 to 2014, and that these proceedings had

their origins in a threat made by the CRH respondents to Mr. Donegan in a letter to him dated the 4th of October 2012. In that letter, solicitors on behalf of the CRH respondents had written:

> "[...]
>
> [...] *please confirm by return whether you continue to authorise the progression of these proceedings and in particular whether you authorised the service of the Notice of Appeal and continue to authorise the prosecution of the appeal to the Supreme Court on the part of the Second and Third Named Plaintiffs.*
>
> *We must advise you that it is our clients' intention to apply for security for the costs of defending the Appeal. In the event that there is any shortfall in any costs in relation to the Appeal, our clients will be seeking an Order from the Court that will entitle our clients to hold any third party funder of the litigation responsible for any shortfall in costs to our clients.* ***Our clients will also seek to hold you personally liable for any shortfall in any costs in relation to the Appeal that are no recovered*** **(sic)** ***from the Plaintiff companies insofar as you are liquidator*** **(sic)** ***and authorise the prosecution of these proceedings. .***
>
> ***This letter is without prejudice to our clients rights*** **(sic)** ***to pursue you personally in respect of costs awarded in the High Court against the Second and Third Named Plaintiffs (in liquidation).***
>
> [...]"
>
> [Emphasis added to identify the part complained of as a "*threat*" by the appellants.]

80. Mr. Maye further stated in his affidavit sworn on the 5th of November 2021:

> "*9. I say that the chasm between my family's financial position and that of all the defendants could not be more pronounced and I further say that the financial position of both plaintiffs and my family is a direct and ongoing consequence of the actions of defendants. For the avoidance of doubt, I say that my family has been rendered impecunious by the actions of defendants and my family has also been blacklisted by Irish credit institutions for many years, again, directly as a result of the defendant's influence.*"

81. At para. 100 of his affidavit sworn on the 4th of August 2020 Mr. Maye deposed to the fact that a replacement liquidator, a Mr. Michael Butler, had been willing to accept appointment but had subsequently withdrawn his willingness in that respect. It was again asserted that this change of position was the direct result of concerns on the part of Mr. Butler that, like Mr. Donegan, he too might find himself being the subject of an application by the CRH respondents seeking an order making him personally liable for some or all of the costs of the respondents to the herein appeal, and that having reflected on matters he was simply not willing to assume that risk.

82. Mr. Maye also deposed to the fact that there were discussions with a Mr. Rory O'Beirne of Keogh Accountancy Group in an effort to persuade him to accept appointment as liquidator, subject to the view of the creditors. He asserts that Mr. O'Beirne's nomination did not proceed because Mr. O'Beirne recognised that any such appointment would be accompanied by significant personal risk, rendering any appointment untenable from his perspective.

83. Mr. Maye goes on to claim that the effect of the financial woes of the appellant companies and of his family, combined with the so-described "*myriad of procedural tactics*" employed by the respondent companies as well as the considerable amount of paperwork involved in the within proceedings, is such that "*it has proved impossible to obtain legal*

representation for the companies". Mr. Maye argued that to allow the within appeal proceedings to be struck out in circumstances where the appellant companies have no legal representation and little prospect of retaining new solicitors "*would amount to a profound miscarriage of justice*".

84. Separately, Mr. Maye also referred in his affidavit of the 4th of August 2020 to adverse health consequences experienced by him and his brother, Mr. Francis Maye (since deceased), arising from "*the extraordinarily high stress levels associated with the situation in which the Appellants found themselves*". He deposed to the fact that his brother Mr. Francis Maye had passed away in December 2017. Personal health difficulties of which Mr. Maye complains were also cited as an excuse for the dilatory progress of the appeal.

85. On the issue of evidential difficulties said to have been experienced by the appellants, Mr. Maye reiterated claims made at an earlier stage by him that the primary reason for the unwillingness of witnesses to make themselves available to give evidence in support of the appellants' claims is that they do not wish to get into a dispute with the respondents given the respondents' acknowledged market strength. He also complains of the absence of any effective structural machinery to support private enforcement actions taken by victims of anti-competitive conduct in Ireland. Despite claiming to have been faced generally with these alleged disadvantages and adversities, Mr. Maye points to the emergence of Mr. Tom Goode as a potential witness early in 2011 and states that it was this development that led to the service by the appellants of the Notice of Intention to Proceed on the 1st of June 2011.

86. Mr. Maye also contends that the prejudice alleged by the respondents is not a factor to be taken into account in the present context in circumstances where, if the appellant's position is upheld, it is reasonable to consider that the next step in the proceedings would be for this Court to consider whether to set aside the judgment and Order of Cooke J. and remit the matter to the High Court for a re-hearing. He says that in the context of any re-hearing it

will be open to the respondents to advance arguments and evidence relating to prejudice on the particular terms now contended for.

87. Mr. Maye also deposed on affidavit to a belief that the CRH respondents had sought to deploy the judgment of Hardiman J. in the Supreme Court in *Goode Concrete v CRH plc*, (previously cited) for the purposes of seeking to colour this Court's view of him in an entirely opportunistic and unfair way, and, in para. 94 of his affidavit of the 4th of August 2020, asked this Court to take account of thirteen discrete points of disputation with the affidavit of Mr. Lenny sworn on behalf of the CRH respondents on the 11th of May 2020.

Affidavits in rejoinder on behalf of the respondents

88. It is contended in rejoinder on behalf of the CRH respondents that there was a complete failure on the part of Mr. Maye to engage with an important aspect of the judgment of Laffoy J. delivered on the 9th of May 2014, namely that any necessary application to reinstate or regularise the appeal would have to be made by the replacement liquidator in the Supreme Court. No application was made by the liquidator to the Supreme Court to regularise the appeals of the second and third named appellants. Further, it is emphasised that Mr. Maye did not have standing to take any substantive steps in this matter on behalf of the second and third named appellants.

89. Further, the contention by Mr. Maye that the CRH respondents had acted in some manner inappropriately in their interactions with the liquidator is replied to at length and is rejected by the CRH respondents as having no basis. It was submitted that where, in the ordinary course, a liquidator embarks on litigation, an order for costs may be sought against the liquidator, who is in turn entitled to an indemnity from the assets of the company. In this instance the proceedings were commenced by the directors of the second and third named appellants rather than the liquidator. As Cooke J. had pointed out, Messrs. Maye were not, however, co-plaintiffs in the action, and that "*the carriage of these proceedings is or should*

be, strictly speaking, in the hands of Mr Donegan as their [i.e., the second and third named appellant companies'] *liquidator*". The respondents assert that the status of the second and third named appellant companies, and the position of the liquidator in relation to the continued prosecution of the proceedings, was a live issue in the hearing of the initial motion to strike out in the High Court. This issue was the subject of queries by the High Court judge and, in particular, a query had been raised in relation to the arrangements in place in respect of the costs of the proceedings as between the liquidator and the creditors. There was no evidence that the liquidator had been advised of his potential liability for costs, as liquidator of the second and third named appellants, in the event that these companies were ultimately unsuccessful in the proceedings. It was entirely proper therefore for the CRH respondents to seek confirmation that the service of a Notice of Appeal on behalf of the second and third named appellants was authorised by the liquidator, and there was nothing in any way inappropriate in taking that step. Further, it was appropriate to advise the liquidator as to the CRH respondents' intentions with respect to seeking the costs of the proceedings in the event that the second and third named appellants were unsuccessful in the appeal; and while the letter of the 4th of October 2012 had been repeatedly portrayed by Mr. Maye as a "*threat*", it was in reality a third party funder letter, stating that they would seek recovery of costs from any such third parties as well as the liquidator. It was contended that to issue such a letter was a reasonable step for the CRH respondents to take in order to protect themselves from the obvious costs risk posed by speculative proceedings alleging breaches of competition law instituted by insolvent companies in liquidation, and in order to put the liquidator on notice of the costs risk to which he was exposed and in respect of which there was concern that he had not been so advised.

90. It was further deposed to on behalf of the CRH respondents that while Mr. Maye had sought to portray the controversy concerning the authorisation of the liquidator as a dispute

between himself and the CRH respondents, it was in reality a dispute between Mr. Maye and the liquidator. The Court was referred to the fact that, in her judgment, Laffoy J. had found that Mr. Maye only informed the liquidator that a Notice of Appeal had been issued and served on behalf of the second and third named appellants after the fact. However, she concluded that Mr. Maye had a general authority to progress proceedings in accordance with an agreement concluded between the liquidator and Mr. Maye prior to the commencement of the proceedings in 1996.

91. The CRH respondents rejected any suggestion that they had brought about a situation whereby the appellants had to take on significant costs risks in the Companies Acts proceedings. The reason for Laffoy J.'s ruling on costs was fully set out in her written judgment in regard to costs dated the 26th of May 2014.

92. It was pointed out that Mr. Maye had repeated assertions which had earlier been made in an affidavit sworn by him on the 20th of November 2012 to ground the appellants' application to admit new evidence in this appeal, notwithstanding that his account had been found by Hardiman J. in his judgment in the Supreme Court in the *Goode Concrete* case (previously cited) to be "*highly improbable*". Mr. Lenny, the deponent for the CRH respondents, characterised Mr. Maye's account as containing several "*deficiencies*" which he had previously identified in an affidavit sworn by him on the 30th of November 2012 in the motion to admit new evidence and which he reiterated. In direct engagement with para. 94 of Mr. Maye's replying affidavit, and the thirteen points of disputation mentioned therein, at para. 37 of his affidavit sworn in rejoinder Mr. Lenny characterises Mr. Maye's account as vague, incomplete and as containing a number of errors, and sets these out in itemised fashion from (a) to (f). He concludes by saying that while Mr. Maye's account in relation to the manner in which he obtained information in relation to Cooke J.'s personal shareholdings is incomplete, this is not a dispute which is relevant to the issues which arise for

determination in this application. The point is made, however, that a striking feature of Mr. Maye's affidavit is the absence of any explanation as to why, after the judgement in *Goode Concrete* was handed down, the appellants did not take any steps to re-enter and progress the appeal.

93. There is further engagement in the affidavits filed in rejoinder with the justifications offered by Mr. Maye for the delay in progressing the appeals. In relation to the asserted difficulties in identifying a replacement liquidator, the point is made that the assertions made by Mr. Maye in relation to the change of position by Mr. Butler, and the unwillingness of Mr. O'Beirne to accept appointment, are entirely hearsay and unsubstantiated by any evidence from either Mr. Butler or Mr. O'Beirne. It was asserted by Mr. Lenny that a far more likely reason for the difficulty in identifying replacement liquidator was the absence of any assets or funds from which the costs incurred in the liquidation (including the liquidator's fees) could be discharged.

94. The point was also made that the alleged difficulties in identifying a replacement liquidator for the second and third named appellants in no way explained the failure by the first named appellant to progress its appeal.

95. The appellants claimed inability to pay costs, and to progress the appeal for financial reasons is further addressed by the affidavits of the respondents filed in rejoinder. The point is made that Mr. Maye appeared to be reiterating similar arguments in his replying affidavit to those that he had made at an earlier stage in the proceedings. However, Mr. Lenny on behalf of the CRH respondents rejected any contention that the inability of the appellants to fund the progress of these proceedings was in some way attributable to the conduct of the CRH respondents. It was asserted that the inability of the appellants to fund the progress of the litigation was because they are insolvent companies.

96. The affidavit on behalf of the CRH respondents filed in rejoinder also addresses the failure by the appellants to disclose to the respondents the letter from the Supreme Court dated the 9th of May 2018. The point is made that no explanation has been offered by Mr. Maye for this failure, and it is asserted that the failure to comply with the directions made by Peart J., and the procedure directed by the registrar of the Supreme Court, was the result of a deliberate decision by the appellants to ignore those directions. Ms. Murdock, on behalf of Kilsaran, contends that it is striking that although references were made to substantial personal debts amassed by Mr. Maye and an inability to access finance, Mr. Maye does not suggest that there has been any improvement in his or the appellant's financial circumstances such that the financial difficulties which have apparently heretofore prevented the appeal from being progressed are no longer an obstacle to the timely and efficient determination of the proceedings.

97. The respondents further join issue in their affidavits filed in rejoinder with two specific assertions on Mr. Maye's part. First, they dispute his contention that the prejudice to the respondents is not a factor to be taken into account in deciding on the present motions to strike out the appeal for want of prosecution. Secondly, they also dispute his assertions that the testimony of various witnesses that the respondents might have had available to them, but for the appellants' delays, would not been necessary to enable the respondents to defend the appellants' claims.

Submissions of the CRH respondents

98. At the hearing of the motion the CRH respondents submitted that at issue before the Court was "*a case of nine-year delay at appellate level and 16-year delay at High Court level*". Counsel submitted that the nature of the case, as one pertaining to alleged events occurring up to fourteen years prior to the commencement of proceedings, "*demanded to be progressed expeditiously*", notwithstanding that such claims prior to December 1990 were

statute-barred. He then noted the various delays in the chronology and emphasised that by the time the matter came before the High Court on the motion to dismiss "*there had been no movement whatsoever in the case since 2006*".

99. Counsel then turned his focus to the appeal proceedings at hand, and submitted that the Supreme Court had stayed the execution of its Order to strike out the appeals of Amantiss and Wilbury (which stay was extended on several occasions) for the purposes of affording the appellants an opportunity to take steps to regularise those appeals, but that this opportunity was not properly availed of as ultimately the appellants allowed the stay to lapse without taking any such steps. Counsel submitted at the hearing of the motion that nine years after the appeal had been brought, twenty-five years after the proceedings before the High Court had been commenced, and some thirty-nine years after the earliest factual matters complained of had occurred, there had been nothing done to progress the appeal.

100. Particularly, counsel drew the Court's attention to a Notice of Motion of the 20th of November 2020, grounded upon an affidavit of Mr. Maye, in which the appellants sought *inter alia* an Order from the Supreme Court granting leave to admit further evidence in respect of the shareholdings held by the High Court judge who dismissed the proceedings. Counsel submitted that nothing was done to progress this motion. Counsel further submitted that on the 1st of May 2018 at a call-over in this Court (Peart J.), the appellants were directed, within a period of four weeks, to mention the appeal to the Supreme Court for the purposes of requesting the transfer of the appeal back to that court. The appellants' solicitors were informed by the Supreme Court Office in correspondence dated the 9th of May 2018 that a Form 4 needed to be completed in order to bring the matter before the Supreme Court. This correspondence was not forwarded to the respondents, and the Form 4 was not completed or submitted to the Supreme Court, despite the directions of Peart J. to do so within four weeks. Ultimately, the matter was not mentioned to the Supreme Court until the 3rd of February

2020, and this was spurred by the matter's listing at a call-over of this Court (Costello J.). The Article 64.3.3° application was not made until the 14th of February 2020 and was ultimately refused by the Supreme Court on the 7th of April 2020 "*on the basis of delay*", as counsel emphasised. In sum, counsel submitted that "*essentially*" five and a half years of this appeal were lost by the appellants not making their Article 64.3.3° application, despite saying that it was what they wanted to do, when the original transfer from the Supreme Court was made.

101. Counsel submitted that the judgment of Cooke J. in the High Court was "*instructive*" in the context of the dilatory progress of the appeal. He submitted that the nine-year delay in progressing the appeal "*is simply not ordinary*", in that it involved non-compliance with an order of this Court and further involved a finding by the Supreme Court that there was a delay in pursuing the Article 64.3.3° application.

102. There was no "*good excuse put forward*" to pardon the inordinate delay, counsel said. He referred the Court to the judgment of Costello J. in *Gallagher v. Letterkenny General Hospital & Ors* [2019] IECA 156, in particular para. 40 thereof, in which the learned Court of Appeal judge distinguished between inordinate delay that is understandable and inordinate delay that is excusable. Turning to the impecuniosity excuse that the appellants purported to rely upon, counsel submitted that in the present case impecuniosity might make the inordinate delay understandable but that is not the same as making it excusable. Counsel emphasised that impecuniosity did not impact on the case, as in any event the appellants were able "*to assemble a top class team of solicitors and counsel from the beginning*" and pointed to the names of lawyers featured on the amended Statement of Claim as indicative of this. Further, counsel stressed that the appellants were represented by "*very able and competent counsel and solicitors*" up until the appellants' former solicitors came off record in June 2021.

103. As regards the question of prejudice and the balance of justice, counsel submitted that in circumstances where the case at hand is one "*replete with allegations of what is supposed to have been said at various meetings*", the outcome of the action, were it to be tried, would turn on a determination of the truth of those allegations made, and on an economic analysis of markets that existed some thirty to forty years ago. Counsel submitted that this difficulty was recognised by Cooke J. in his judgment, and he stressed that the sentiments expressed by the late High Court judge were entirely consistent with the approach of other judges in cases such as this.

104. Counsel then drew the Court's attention to *Millerick v. Minister for Finance* [2016] IECA 206 as authority for the proposition that prejudice is not necessary in order to dismiss proceedings for delay, but that even if it comes to a consideration of prejudice, moderate prejudice will suffice. Counsel submitted that prejudice will be presumed where there is significant delay, and that this is especially so in a case such as the one at hand which turns on the recollection of witnesses. Counsel sought to emphasise that the individuals directly involved in the ongoing litigation were elderly and retired for periods of between nine and twenty-nine years at the time of the hearing of the motion, and that the matter was still nowhere near coming to trial. Counsel then pointed to various judgments which illustrate that periods of delay vitiate the potential of witnesses to give meaningful assistance and thereby give rise to prejudice: *Manning v. Benson and Hedges Ltd.* [2004] IEHC 316 (four to five-year delay); *Gorman v. Minister for Justice* [2015] IECA 41 (twelve-year delay); *Clare Manor Hotel v. Dublin City Council* [2018] IESC 41 (twenty-four-year delay), and; *Gallagher*, previously cited at para. 102, (delay of eight years and seven months). At the hearing of the motion, counsel submitted in this regard, "*There is, of course, a constitutional imperative to end stale claims so as to ensure the effective administration of justice and basic fairness of procedures*", and he further stressed that Article 6 of the ECHR also finds

application in this context. The balance of justice lay with the respondents, counsel submitted. He emphasised that they had businesses to run and that the present proceedings had been "*hanging over them*" for some twenty-five years, and that the same was true for those individuals implicated in the allegations made by the appellants.

105. Counsel's focus then turned to addressing the question of what should happen if the respondents' motion for strike out is unsuccessful. In the first instance, counsel noted that there are a number of interlocutory applications outstanding in the present appeal that would have to be heard and determined. Second, there was no certainty that the appeal against the judgment and Order of Cooke J. would be successful: whereas the *Goode Concrete* case, which the appellants regarded as significant, concerned security for costs, counsel submitted that the present case concerned dismissal on grounds of delay, and that the Court deciding on the appeal might well regard the outcome of the High Court's determination as inevitable, notwithstanding the issue of Cooke J.'s shareholding; alternatively, the outcome on appeal would be to remit the motion to dismiss for rehearing before the High Court where ultimately the outcome would inevitably be a repeat of what had occurred in 2012.

106. Counsel emphasised that the likelihood of progressing the matter towards trial was reduced in the light of the appellants' former solicitors coming off record and the appellants' lack of funding to retain legal representation; the striking out of the appeals of Amantiss and Wilbury; inability to find a replacement liquidator, and; lack of funding to provide expert evidence that will inevitably be needed to address issues of an economic character that are central to the proceedings. In such circumstances, counsel submitted that ultimately the Court would find itself considering a similar motion for strike out in future, stating that this will be spurred by the reality that "*absolutely nothing will happen to progress this appeal*". In conclusion, counsel described the reality of the dilatory progress of the herein appeal proceedings as "*an affront*" to the administration of justice.

Submissions of Readymix

107. Counsel on behalf of Readymix adopted the CRH respondents' submissions insofar as those submissions were referable to her client.

108. To this, counsel made a number of additional observations particularly relating to the application of the balance of justice limb of the test in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, and emphasised Mr. Sreenan's point there is no way forward for the case. Counsel described it as a case "*a long way from being ready for trial*"; a case afflicted by there being no solicitor on record for the appellants, by want of funding, by the fact that Amantiss and Wilbury do not have a liquidator who can steward or move matters on their behalf, and by there being no sign that these circumstances will improve in the near to medium term. Echoing the sentiment expressed by Cooke J. in the High Court, that it was necessary for the Court to know with some confidence that if delay motions were rejected that there was a reasonable prospect that the action would be proceeded with expeditiously to a conclusion and would not again stall in the future, counsel submitted that the Court in deciding on the present motion for strike out could not take such a comfort in the circumstances.

109. Turning to the evidential difficulties associated with lengthy periods of delay, counsel submitted that competition law proceedings are complex by virtue of the economic elements which must be explored. In circumstances where the delay at issue is in excess of thirty years, it was said that the present case would be "*doubly complex*". For instance, counsel expounded:

> "*If a court engaged in an assessment as to whether an entity has engaged in predatory pricing, it's involved in a very complex economic analysis based on a consideration of costs, fixed costs, variable costs, etc. And that's an exercise which is*

going to have to be replicated if these cases ever went to trial, by reference to markets in the early 1990s. And that's an impossible task, with respect, at this juncture."

Counsel further submitted that the concept of collective dominance would require a considerable degree of analysis that would be frustrated by the delay at hand.

110. It was counsel's submission that it had been open to the appellants to take various steps, steps which were not particularly complex nor expensive, to progress the matter towards trial, but that the appellants failed to do so; and that this failure was incapable of being explained away by reference to impecuniosity. The "*most telling*" of these such failures, counsel said, was the appellants' failure to engage with the Supreme Court in relation to their Article 64.3.3° application.

111. Echoing CRH's submissions that this is a case where there is a significant prejudice to the respondents brought about by the delay and the impact of such delay on the ability of witnesses to give evidence, counsel submitted that it would "*simply be contrary to basic fairness for the case to proceed further*".

112. As to the impact of the delay on Readymix, counsel described how the company had been acquired by Mexican multinational CEMEX S.A.V. de C.V. in 2012, and that it had since been reregistered as a private limited company. It was indicated to the Court that CEMEX's intention is to liquidate the company, and to exit the Irish market, but that it cannot do so until a number of outstanding issues, including the present appeal proceedings, are finalised. The effect of this, counsel submitted, is that CEMEX continues to incur costs associated with maintaining a presence in this jurisdiction.

113. Referring to the sworn affidavit of a Ms. Rosaleen Byrne, a partner in the solicitors firm on record for Readymix, dated the 3rd of July 2020, in which the particular claims against Readymix are identified, counsel noted that the allegations made were of predatory pricing and market fixing, cartel activity and price undercutting, and that Ms. Byrne averred

that such claims would require to be proved primarily by oral testimony rather than by documentary evidence and that there was a concern as to the possibility of witnesses with accurate recollections of the activities of Readymix at the material times being available. Insofar as Readymix was concerned, counsel submitted, there was no progress in respect of the action for number of years from 2004 onwards. Readymix were never afforded an opportunity to inspect the appellants' discovery (though this was disputed), and the memories of the managing director of Readymix at the material times, a Mr. John McNerney, and the general manager, a Mr. Fitzgerald, had been affected by the passage of time and neither had made/kept contemporaneous notes.

114. Counsel submitted that Readymix and Mr. McNerney were under the impression that the proceedings were "*dead*" or "*abandoned*". The continued existence of these proceedings is a source of ongoing prejudice to Readymix, counsel said, and she echoed the sentiments expressed by Ms. Byrne in her affidavit, that it is unfair to continue to maintain serious allegations against named individuals for such a long period of time without resolution or any realistic prospect of resolution.

Submissions of Kilsaran

115. Kilsaran largely adopted the foregoing submissions of CRH and Readymix. Counsel however, made a number of additional points. In the course of the hearing, the Court had queried the role that the respondents had played in the delay, and what action (if any) they had taken to progress matters towards trial. In the first place, it was submitted that the appellants had taken no "*unilateral action*" in the period since 2014 and that when the matter came before this Court in the context of an Article 64 appeals call-over, the respondents had indicated their dissatisfaction and their understanding that the delay was such that matters might not proceed. In this context, counsel referred the Court to the sworn affidavit of Mr. Maye dated the 4th of August 2020, replying to the Notices of Motion and associated

grounding affidavits bringing the present application, wherein Mr. Maye had averred that funding of the proceedings was frustrated by the various interlocutory appeal motions that required to be determined:

> "*In the event, that application was not made in circumstances where, as outlined above, the Appellants' capacity to advance the within proceedings was prejudiced, and where it will be recalled that, at this point, the Appellants were faced, not solely with an application to re-instate the appeals brought in the names of Wilbury and Amantiss, but also with a series of other procedural motions that remained live before the Court, to include the New Evidence Motion, the Security for Costs Motions and the CRH Respondents' motion for discovery and an order directing that your Deponent be cross-examined. In these circumstances* [...] *it was clear that, before the Appellants could be heard on the merits of their appeal* [...], *further significant costs would need to be incurred. As has been indicated, the Appellants were unable to advance the appeal in that context.*"

116. Counsel submitted that the above passage is indicative of the appellants' "*conscious decision*" not to advance the appeal in the light of their inability to fund further steps in the proceedings. Counsel drew the Court's attention to the judgment of Costello J. in *Gallagher* (cited at para. 102 above) and submitted that it was made clear therein that it is not open to any party to proceedings to leave them in abeyance so that they are neither concluded nor progressed, thereby leaving the opposing parties to wonder.

117. Second, it was submitted by Kilsaran that it was clear from *Millerick* (cited at para. 104 above) that there is no obligation or onus on defendants to proceedings (or on respondents to an appeal) to ensure that the appellant takes all the necessary steps to progress proceedings. Counsel submitted that there is no obligation or onus on the respondents to do anything other than to let "*sleeping dogs lie*" where they have a basis to believe that

appellants have abandoned proceedings. Counsel stated that in the light of events as they occurred since the call-over in May 2018 before Peart J., no steps were taken until 2020 when the matter was relisted by the Court of its own motion.

118. Counsel then repeated the concerns expressed by the CRH respondents and Readymix in respect of the likelihood of the matter progressing to trial in the event that the motion for strike out is unsuccessful, and the evidential difficulties the matter would face should it progress to trial.

119. In respect of the specific prejudice to Kilsaran, counsel drew the Court's attention to the sworn affidavit of a Ms. Laura Murdock, a solicitor from the firm on record for Kilsaran, dated the 20th of May 2020 in which she set out the specific difficulties which Kilsaran would have in defending the proceedings. One of the individuals against whom the appellants make allegations is a former executive director of Kilsaran, a Mr. Kevin McKeown, who is deceased since 1996. It goes without saying, in the circumstances, that Mr. McKeown cannot give evidence in relation to things that were said at an alleged meeting between representatives of the appellant companies and Kilsaran. Similarly, a Mr. Richard Adair, the individual at Kilsaran with responsibility for the supply of the concrete market in Dublin during the relevant period, is also deceased since 2001. Another individual, a Mr. Joe Doyle, operations manager at Kilsaran during the relevant period, retired in 1998 and has been suffering from "*extreme ill-health*" such that he is both unwilling and unable to provide evidence in relation to alleged events. Having regard to these circumstances, counsel submitted that there is "*a very specific prejudice*" to Kilsaran which arises in respect of the unavailability of witnesses. In this regard, counsel drew the Court's attention to the decision of the Supreme Court in *McNamee v. Boyce* [2017] 1 I.L.R.M. 168 in which it was held that a transcript of evidence given by the defendant's late wife in the course of criminal proceedings was insufficient in circumstances where her unavailability raised serious questions as to

whether or not there could be a fair trial, as her unavailability resulted in some material impairment in respect of the defendant's ability to put forward the defence which he might wish to advance. Also relied upon by counsel in this regard was the judgment of Irvine J., as she then was, in *Leech v. Independent Newspapers (Ireland) Ltd* [2017] IECA 8.

120. In respect of general prejudice, the Court was referred to its decision in *Kenny v. Motor Network Ltd. t/a Jennings Truck Centre & J Harris Assemblers* [2020] IECA 114 (judgment of Noonan J., Costello and Collins J.J. concurring), in which the appeal against dismissal by the High Court for delay was, itself, struck out for delay. The case involved a delay of fourteen years from the institution of the proceedings (which were founded upon claims relating to a defective product) to the matter coming before the Court of Appeal. In his judgment, Noonan J. held:

> "***19.*** *It is axiomatic that delay is prejudicial in litigation of any kind that is heard on oral evidence. Even if the trial judge had refused the respondent's application and directed the matter to proceed to trial, it would have taken more than likely a further year or so before a trial could be held towards the end of 2018, then 13 years after the purchase of the vehicle. Delays of very considerably less than this have been held in many cases to amount to prejudice sufficient to warrant the dismissal of proceedings, even in the absence of any other factor. Prejudice will be presumed where such delays have occurred even absent any specific identifiable prejudice. Moderate and even minimal prejudice have been held sufficient to tip the balance of justice in favour of dismissal.*
>
> ***20.*** *This is not a case where the determination of the issues can be largely made by reference to documentary evidence thereby reducing the potential for injustice arising from frailty of recollection. The determination of liability and quantum issues in this case will in large measure be dependant* (sic) *on the oral evidence of the*

parties' witnesses as to events now some 15 years in the distant past. I cannot see how that can be anything other than prejudicial to the respondent and as I have noted, even moderate prejudice such as this is sufficient to tip the balance in favour of the respondent.

21. *I should add that delays of the magnitude that occurred here cannot, on any view, be reconciled with the State's obligations under the ECHR and in particular Article 6 thereof.*

22. *In all the circumstances therefore, I am satisfied that the determination of the trial judge that the balance of justice lay in favour of dismissal cannot be impugned and I would accordingly dismiss the appeal.*"

121. In the light of the foregoing, counsel submitted that *Kenny* is on all fours with the position of Kilsaran, in that the magnitude of the delay in the circumstances of the present case is such that it would be impossible for the respondents to obtain a fair trial at the hearing should the appeal proceed, and, moreover, that there is a question in respect of the fairness issue arising under Article 6 ECHR.

Submissions of CPI

122. Counsel on behalf of CPI adopted the submissions of the foregoing respondents, but to these made a number of observations/points.

123. The first of these was a submission that there was an "*insurmountable procedural obstacle*" facing the Court in respect of the appeals of Amantiss and Wilbury. Concurring with the CRH respondents' observation that those appeals stand struck out as of July 2014, counsel submitted that there is no motion before this Court to revive or otherwise "*resurrect*" the stay of the Supreme Court's Order of the 14th of May 2013. Even if there was, such a revival would be subject to certain conditions set down by Denham C.J., at para. 39 in her judgment (cited at para. 31 above), in particular that the stay would only be revived where the

Court is satisfied that "[...] *there is a realistic possibility that suitable measures (which would allow the appeals to progress lawfully) may be achieved at the end of the day*". Counsel submitted that "*there's absolutely no evidence before the Court that the issue that's plagued this, the Amantiss and Wilbury proceedings since 2014, i.e. the status of the liquidator and their attitude to the appeal proceedings, that has not been resolved*". Accordingly, counsel stressed that there is no jurisdiction for the Court to do anything other than confirm that those appeals stand struck out.

124. The second observation advanced by CPI related to the call-over of May 2018. Recalling Mr. Maye's averment in his affidavit of the 4th of August 2020 that the appellants were plagued by impecuniosity and thus confronting a significant burden in litigation, and therefore could not advance matters further, counsel queried how relevant an excuse that is. The lodging of a Form 4 in the Supreme Court, for the purposes of making an Article 64.3.3° application, was "*an extraordinarily inexpensive step*", counsel submitted, which underscored the point that an excuse of impecuniosity in that regard can have no traction/lacks credibility when it took another two years following on from the call-over in May 2018 to actually make the application in question.

125. The third observation made by counsel was, in essence, a repetition of what had been advanced earlier by the preceding respondents, namely that there is an unreality to this litigation ever proceeding to trial. Counsel submitted that that reality "*must now be confronted*"; a reality that "*stands firm*" in the light of the "*enormous space and latitude*" afforded to the appellants by both the Supreme Court and this Court.

126. Turning his focus to the specific prejudice to CPI, counsel noted that there is only one pleaded particularised allegation as against CPI, namely that CPI did not bid for a contract to supply cement to a third party in 1990. Counsel noted that the CPI manager of that third party's account, a Mr. George Eyre, is now deceased and, therefore, the person who CPI

would principally rely upon to address the appellants' allegation, which has always been denied, is unavailable. Counsel submitted that this represented "*compelling prejudice*" and referred the Court to its decision in *Cassidy v. The Provincialate* [2015] IECA 74, wherein Irvine J., as she then was, stated at para. 52 of her judgment:

> "[...] *I am satisfied that it would be hard for a defendant to demonstrate greater prejudice than that which arises for the defendant in this case, by reason of the fact that PD* [i.e. a relevant individual] *is believed to be dead.*"

127. Moreover, counsel noted that the two other persons who were involved in the management of CPI at the relevant time, a Mr. Fergal Malone and a Mr. John Earley, were both retired and were of advanced age at the time of the hearing of the motion. Having regard to these foregoing circumstances, it was counsel's submission that his client fell into the "*very obvious category where there is a very stark and particular prejudice*" to CPI, and that where there is no wider claim being made against CPI in the proceedings, he could not see any basis upon which it would be just to allow the claim to proceed.

128. Finally, counsel submitted that quite apart from the jurisdiction arising under *Primor*, cited at para. 108 above, and on the test outlined in *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135, a simple examination of the length of the delay, and the range of issues (as have been explored by counsel) that would have to be dealt with if the matter proceeded to trial, make it clear that "*[i]t is inconceivable that a fair trial could be conducted in respect of this matter at this remove*." Therefore, it was counsel's submission that independent of whether the delay was excusable and where the balance of justice might lay, the interests of justice and the Constitution now demand that the appeal be struck out because a trial at this remove cannot be conducted in accordance with law.

Submissions of the appellants

129. In circumstances where the appellant companies had not retained legal representation, and where Mr. Maye had been refused leave by the Court to independently represent those companies, there was no one present at the hearing of the motions before this Court to make submissions in reply to the oral arguments advanced by counsel acting for the various respondents. However, and prior to their coming off record in June 2021, the appellants' former solicitors had filed written submissions in reply to the present motions on the 6th of November 2020. For completeness, it is intended to outline the main thrust of these in this section of the judgment.

130. In the first place, it was submitted that "*[a]n order dismissing proceedings for want of prosecution is recognised to be one of serious consequence that can potentially inflict significant hardship on a Appellant* (sic) *who may thereby be precluded from any means of seeking relief*". In this regard, the Court was referred to English authorities *Barratt Manchester Ltd. v. Bolton MBC* [1998] 1 W.L.R 1003 at p. 1011 (wherein Millet LJ. described dismissal of an action as "*a draconian measure*") and *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229 at p. 259 (wherein Diplock LJ. noted that the making of an order to dismiss proceedings is not one to be made "*lightly*"). It was thus submitted that the making of such an order should only be done "*where it is necessary to ensure that justice is done as between the parties to the proceedings and does not serve to punish a Appellant* (sic) *for any delay on their part*", and the Court was referred to the following authorities in this regard: *Hogan v. Jones* [1994] 1 I.L.R.M. 512 (Murphy J.) at p. 518; *Primor*, cited at para. 108 above, at p. 516; *Murphy v. Minister for Defence* [1991] 2 I.R. 161 (O'Flaherty J.), and; *Department of Transport v. Chris Smaller (Transport) Ltd.* [1989] A.C. 1197 at p. 1207.

131. It was submitted that the Court's approach to determining whether to order the appeal to be struck out should be made on the basis of striving to balance the interest of all parties to

the proceedings. In this regard, reliance was placed on *Primor*, in particular paras. 475 and 476 thereof, wherein Hamilton C.J. described principles applicable in the present case. Among these, and upon which the appellants in written submissions placed considerable emphasis, is the reference by Hamilton C.J. to whether, on the basis of a careful consideration of the particular facts of the case before it, the balance of justice is in favour of, or against, the case proceeding. The jurisdiction to strike out proceedings for want of prosecution cannot be exercised, it was submitted, unless the applicants demonstrate that (i) the delay in question is both inordinate and inexcusable, and (ii) that the balance of justice lies in favour of striking out the claim. In this regard, reference is made to *Desmond v. MGN*, cited at para. 17 above; *Primor*; *Keogh v. Wyeth Laboraties Incorporated* [2006] 1 I.R. 350 at para. 10, and; *Wolfe v. Wolfe* [2006] IEHC 106 (and also *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510 cited therein).

132. In the context of the particular proceedings before this Court, it was observed that the period of delay contended for by the respondents runs from the 9th of July 2014 up until the 3rd of February 2020. While it is accepted by the appellants that the delay in question is significant, that it is inordinate is nevertheless contested. Reliance is placed upon the affidavit of Mr. Maye dated the 4th of August 2020 setting out the reasons for the delay, which reasons, it was submitted, are excusable.

133. It was specifically submitted that the letter (dated the 4th of October 2012, and previously referred to at para. 79 above) (characterised by the appellants in their written submissions as a "*threat*") issued by solicitors on behalf of the CRH respondents and addressed to Mr. Donegan, the former liquidator of Amantiss and Wilbury, respectively, threatening to hold him personally liable for costs in relation both to the appeal and the underlying proceedings, had consequences such that the appellants had found themselves unable to take the next steps that would otherwise have been taken by them, such as applying

to the Supreme Court to reinstate the appeals of the second and third named appellants and, thereafter, advancing all other issues then pending before that court.

134. It was submitted that in response to the said "*threat*", Mr. Donegan sought to deny that he had ever authorised the appeals of Amantiss and Wilbury, and that in response to this denial, the respondents brought the series of Notices of Motion in which they applied to the Supreme Court to have those appeals struck out. It was argued that that court, concerned at the prospect that those appeals were defective, prioritised the hearing of these motions over the issue raised by the appellants concerning shareholding interests said to be held by Cooke J. in CRH from which the associated objective bias as alleged by the appellants arose. Moreover, it was said that the issuing of these Notices of Motion necessitated the institution of Companies Acts proceedings for the purposes of convening a creditors' meeting to ascertain their views on the appeals of the liquidated appellant companies; and it was further stated that these proceedings along with subsequent Companies Acts proceedings throughout 2013 and 2014 "*[i]n circumstances where both the Second and Third-Named Appellants were insolvent* [...] *compounded the Appellants' already precarious financial position, leaving the Appellants, and Mr. Maye, in a position where they face insurmountable challenges in trying to advance the within appeal, to include, most obviously, challenges in connection with the financing of the proceedings*". It was thus submitted that the respondents ultimately achieved their "*aim*" insofar as they had effectively brought about a state of affairs whereby the appellants capacity to advance the within appeal was prejudiced "*to a material and significant extent*". It was further suggested that this state of affairs was to blame for the lack of a replacement liquidator, as candidates had refused to assume the position in circumstances where they might be subject to the same "*threat*" as was Mr Donegan. For these reasons, it was explained, the appellants have been unable to advance matters / take steps that would otherwise have been taken by them to progress the appeal.

135. In relation to the issue of the balance of justice, the appellants made the following points. In the first place, it was submitted that the conduct of the respondents was a factor that the Court should take into consideration in its determination of the present application. In particular, it was submitted that the conduct of the respondents, specifically the CRH respondents, weighs heavily against an order for strike out. The following observations were made in the appellants' written submissions:

> "*a.* *The Second and Third-Named Appellants were required to bring an application to the High Court to secure a direction that the CRH Respondents were not entitled to vote at meetings of the creditors of those Appellants so as to ensure that those Respondents could not deploy the costs ordered against them by Mr. Justice Cooke (in his Order of 26 July 2012) to procure the winding up of those companies and, by extension, the termination of their involvement in these proceedings.*
>
> *b.* [...] *[T]he Appellants were forced to litigate to address the Respondents' allegation that the appeals brought by the Second and Third-Named Appellants were defective, that allegation having been found to be unsustainable and the basis for it having been found to have its origin in a costs threat communicated by or on behalf of the CRH Respondents to the then-liquidator.* [...] *If the Respondent's* (sic) *were concerned to ascertain whether the appeal had been properly authorised, they could have engaged with the Appellants or their representatives or, alternatively, they could have simply sought to elicit information from the liquidator. Instead, they chose to issue a threat.*"

136. It was reiterated in the submissions that the conduct so described precipitated the appellants' difficulties in progressing matters, and that it was to blame for why the Supreme

Court never reached the core issue in the appeal, namely that associated with the appellants' "*reasonable apprehension of objective bias*" point, which point the appellants confidently submitted would be likely to succeed having regard to the Supreme Court's decision in *Goode Concrete*, cited at para. 39 above. Thus, it was submitted that this state of affairs must weigh heavily in favour of the appellants in the Court's assessment of the balance of justice.

137. Second, in the written submissions it was argued that the CRH respondents' grounding affidavit (a sworn affidavit of a Mr. James Lenny, partner in the solicitors on record for those respondents, dated the 12th of May 2020) included extensive extracts from Hardiman J.'s dissenting judgment in *Goode Concrete* which were added for the purpose of "*seeking to colour this Court's view of Mr. Maye and to undermine his standing in the eyes of the Court.*" This material, it was argued, does not bear on the issues to be determined in the within application, and in this regard it was said that such inclusion is "*abusive of the court's process*" and thus should be taken into account as a factor weighing against the respondents in the consideration of the balance of justice.

138. In respect of the respondents' complaint of prejudice arising from the delay, it was said that the prejudice is tied not to the appeal, but to the trial of the appellants' claims. Should the orders under appeal be set aside, it was observed that the outcome would be to remit the applications to which they relate back to the High Court for a re-hearing whereupon the particular forms of prejudice alleged by the respondents can be addressed. Accordingly, it was submitted that prejudice should not be factored into the assessment of the balance of justice as part of this Court's determination of the motion for strike out, or alternatively (if the Court is to factor it in) it should merely be afforded no significant weight.

139. As regards, other factors to be weighed in the balanced, it was submitted that the following are of importance:

140. First, that when the Court comes to consider the merits of the within appeal, there are very strong grounds to believe the appeal would be allowed for the reasons set out by the Supreme Court in *Goode Concrete*. It was observed that this is a point of distinction from other appeal proceedings impugned in motions for strike out where the strength of the underlying appeal is speculative.

141. Second, while the appellants accepted in their written submissions that the applicable national law rules in respect of applications to strike out proceedings on grounds of delay are entirely consonant with EU law, it was argued that the application of those rules in the context of a given case must not, itself, render the implementation of EU law "*impossible or excessively difficult*". It was therefore submitted that because the effect of the strike out order would be to ultimately prevent a plaintiff from maintaining an action for damages, the importance of the effective implementation of Article 101 TFEU in the present case must be treated as an important consideration.

142. Finally, while the appellants in their written submissions acknowledged the respondents' reliance upon Article 6 ECHR, it was argued, however, that such reliance does not advance matters for the respondents as there is nothing in the jurisprudence of the ECtHR that suggests that the tests applied in this jurisdiction relating to motions to dismiss proceedings for delay/want of prosecution are inconsistent with the ECHR. Moreover, it was submitted that the ECHR does not impose an obligation that proceedings should be struck out on grounds of delay. In this regard, the dicta of Geoghegan J. in *Desmond v. MGM*, cited at para. 17 above, to the effect that it is neither necessary nor desirable that the principles established in Irish jurisprudence relating to delay should change or be revisited in the light of the ECHR, is referred to in the written submissions. Additionally, it is emphasised that the ECtHR's judgment in *McFarlane v. Ireland* App no. 31333/06 (10th of September 2010) makes clear that the reasonableness of the length of proceedings must be assessed in the light

of the circumstances (and relative complexity) of the case at hand, the conduct of the applicant and relevant actors/authorities, and what is at stake for the applicant.

The Court's Analysis and Decision

143. While the motions before the Court seek to have the appellant's appeals struck out for delay and/or want of prosecution, the appeals themselves have not been heard. Be that as it may, it is part of the factual matrix of the justiciable controversy that requires to be determined at this point that the appeals themselves are against orders of the High Court striking out the appellant's proceedings for delay and/or want of prosecution.

144. The nature and scope of the appeals is relevant in the context of the present motions. In striking out the proceedings the High Court judge, Cooke J., engaged in a most rigorous and detailed analysis of the evidence before him. Having done so, he made certain findings of fact. Amongst these were findings that the delay had been inordinate and inexcusable and that the balance of justice did not favour any disposal other than a striking out of the proceedings. The Notice of Appeal against the High Court judge's decision raises issues of alleged bias / perception of bias by an objective observer in full possession of the facts, on the part of the High Court judge, and also concerning what is said to have been an error of law on his part in failing to take account of the Supreme Court's decision in *Comcast International Holdings v. Minister for Public Enterprise* [2012] IESC 50. However, beyond the raising of those specific issues, the Notice of Appeal, while pleading that the High Court judge erred in law and in fact in arriving at the conclusions that he did, namely that there was both inordinate and inexcusable delay and that the balance of justice favoured a dismissal of the proceedings, does not plead with specificity how he is alleged to have erred in arriving at those conclusions. Nor does it appear to be contended that the trial judge's primary findings of fact were unsupported by evidence, or that if the appeal court was solely concerned with whether there was evidential support for the findings of fact, that the long-established principles set

out in *Hay v. O'Grady* [1992] 1 I.R. 210, which would preclude an appellate court from going behind primary findings of fact by a court at first instance, should not apply.

145. I consider that in addressing the motions presently before the Court, while the primary focus must be on any delay(s) between the issuance of the Notice of Appeal and issuance of the present motions, the Court is nonetheless entitled in any consideration of the balance of justice to have regard to the nature of the underlying action, the basis of the appeal, the conduct of the entire proceedings from their commencement and the overall lapse of time, including pre-commencement delay (if any).

146. Before doing so, however, it is necessary to address the issue that has been raised by all of the respondents as to the status of the appeals of second and third named appellants, Amantiss and Wilbury.

The status of the appeals of the second and third named appellants

147. In my determination, this issue can be dealt with *in limine*. There is an Order of the Supreme Court, dated the 14th of May 2013, which is in clear terms. It provided that the appeals of the second and third named appellants should be struck out, but with a stay of execution on that Order for a period of three months (which period could be renewed upon the issuance and service of a motion, grounded upon affidavit, applying for an extension of time within that period) to both afford the appellants an opportunity to take any measures open to them to regularise the appeal and to preserve the position of the liquidator. Several applications for renewal of the stay were made, and were granted. However, the final application for a stay was made in the context of a case-management listing conducted on the 2nd of April 2014, when the Supreme Court extended the stay until the 9th of July 2014. The evidence before the Court is that no further extension of the stay was sought or granted beyond this date. In the circumstances, it is pellucid that any stay granted by the Supreme

Court has lapsed and that the Order of that Court striking out the appeals of the second and third named appellants, Amantiss and Wilbury, is effective and stands unaltered.

148. In reality, therefore, the only motion which requires to be substantively addressed is that of the first named appellant, Framus Limited.

Delay in the context of the appeal – has it been inordinate?

149. The Notice of Appeal is dated the 26th of September 2012. The CRH respondents' motion to dismiss was issued on the 12th of May 2020; Readymix's motion to dismiss was issued on the 3rd of July 2020; Kilsaran's motion to dismiss was issued on the 20th of May 2020, and; CPI's motion was filed on the 4th of June 2020. Accordingly, the total relevant lapse of time in the context of the appeal proceedings was seven years and some seven and nine months (give or take some days either way in individual respondents' cases).

150. I accept and agree with the submissions made on behalf of the various respondents that, having regard to the history of these proceedings, and indeed the nature of the claims being made, that these appeal proceedings demanded to be progressed expeditiously. Indeed, the underlying proceeding had been commenced late in the day and it is well established there is an obligation on a party who starts late to progress with rapidity. That obligation continues beyond any proceedings at first instance into the appellate procedure where there is an appeal. Moreover, I am satisfied that the issues raised by the respondents concerning whether the liquidator was aware of, and had authorised, the initiation of the appeals of the second and third named appellants were issues that were legitimately and properly raised, and were required to be engaged with by the second and third named appellants. Of course, the first named appellant was not in liquidation and there was no reason in principle why its appeal could not have been separately progressed. However, some recognition must, I feel, be afforded to a reality that the then three appeals were, in effect, travelling together. Be that as it may, it is clear from both the judgment of the Supreme Court of 14th of May 2013, and the

subsequent judgement of the Laffoy J. of the 9th of May 2014 in the related proceedings under the Companies Acts, that it was envisaged (and regarded as imperative) that everything would be done thereafter to progress the appeals expeditiously. This did not happen.

151. No satisfactory explanation has been put forward for why nothing was done between the 9th of May 2014 and the 1st of May 2018, when the matters were listed in this Court at a call-over before Peart J. Focussing on the situation of the sole extant appellant, this represents a period of total inactivity on the part of that appellant (although it was true also in the case of the struck out appellants) of just under four years. Moreover, no satisfactory explanation has been put forward for why, having been advised by the Supreme Court office (via the Registrar's letter of the 9th of May 2018) of the required procedure for seeking to have a case returned to the Supreme Court, nothing was done in that regard until the matter reappeared in a Court of Appeal call-over list again on the 3rd of February 2020. This represents a period of yet further delay amounting to another twenty-two months. All this delay was against the previously mentioned background of required and expected expedition, of which I am satisfied the first named appellant, and indeed Mr. Maye, were fully aware.

152. Therefore, I have no hesitation in the circumstances in characterising the delay in progressing the appeals in this case as having been inordinate.

This Court having found inordinate delay in progressing the appeals – is it excusable?

153. I also have no hesitation in stating it to be my conclusion that the first named appellant's inordinate delay in progressing its appeal was also inexcusable. The excuses put forward involved: (i) difficulty in procuring evidence; (ii) financial difficulties in funding the litigation, and; (iii) health difficulties on the part of Mr. Seamus Maye (and also on the part of his late brother while he was alive).

154. Insofar as difficulty in procuring evidence is concerned, and as one counsel correctly put it in submissions before the High Court, it is not permissible for a litigant to put a case into a state of suspension in the hope that at some point in the distant future evidence which they believe ought to exist would crystallise and become available. This excuse was advanced in the court below and was rejected, and again in the context of this appeal. In the latter regard a motion was brought before the Supreme Court in 2012 seeking leave to adduce new evidence on the appeal, but that motion had not been dealt with by the Supreme Court when the case was transferred to this Court from the Supreme Court pursuant to Article 64.3.1° of the Constitution. Despite this, no step whatever was taken on behalf of the first named appellant to bring a similar motion before the Court of Appeal; instead there were four years of complete inactivity between the 9th of May 2014 and the 1st of May 2018, during which time there was ample opportunity to bring the requisite motion. I am further not impressed with the contention in the affidavits of Mr. Maye, and reiterated in the submissions filed on behalf of the appellants, that potential witnesses were unwilling to come forward due to the market strength of the CRH respondents, and the power that they purportedly wield. There is nothing to support this beyond Mr. Maye's bald assertion. Moreover, although it was contended that the liquidator of the second and third named appellants was threatened in some way by the solicitors for the respondents there is nothing in the evidence that establishes that the various respondents, or their agents, have conducted themselves improperly or inappropriately in how they have defended these proceedings to date. The appellants initiated this litigation and in doing so, if they hoped to succeed, they were required to discharge both the evidential burden of adducing evidence in support of their substantive claims and the legal burden of proving those claims to the required standard. They also initiated these appeals against the judgment and Order of Cooke J. in the High

Court, and insofar as new issues are raised, they bear an evidential burden in regard to those issues as well.

155. I am satisfied that asserted difficulty in procuring evidence cannot avail the first named appellant as an excuse for failing to progress its appeal against the Order of Cooke J.

156. I am also satisfied that the law is clear that financial difficulties in funding the litigation also cannot avail the first named appellant as an excuse for failing to progress its appeal. In *Meehan v. Walsh Western Holdings Ltd & Anor* [2009] IEHC 505, Hedigan J. expressly rejected the notion that lack of funds or impecuniosity can be put forward by a litigant as a legitimate excuse for not progressing litigation. More recently, in this Court, in *Gallagher v. Letterkenny General Hospital & Ors* [2019] IECA 156, Costello J., with whom Peart and Edwards J.J. concurred, stated at para. 41 of her judgment:

> "*If, unfortunately for the plaintiff, he is not in a position to progress his case due to lack of funds, then the case cannot continue indefinitely neither progressing nor concluding. The permitted continuance of a case which cannot be further progressed due to an inability to fund the essential steps required to bring the case to trial amounts, in my opinion, to an abuse of the processes of the court.*"

157. While Mr. Maye has sought to argue that the impecuniosity relied upon in this case has been directly and indirectly caused by inappropriate conduct and wrongful actions on the part of the CRH respondents, this must be treated as an unsupported assertion in circumstances where the evidence adduced falls well short of establishing that which is alleged by him.

158. As regards Mr. Seamus Maye's health difficulties, and those of his late brother when he was alive, the point must be made that neither of these gentlemen is or was a party to these appeal proceedings, and that the first named appellant is a limited liability company. Moreover, the evidence that has been adduced establishes that Mr. Seamus Maye was not

precluded by health difficulties in engaging in and promoting other business and commercial ventures, including being involved in the International Small Business Alliance, and in an entity known as Cartel Damage Claims, and doing consultancy work in Brussels and elsewhere, during the periods of inactivity in this litigation, a factor which is relied upon by the respondents. I therefore cannot accept that the health difficulties put forward provide the first named appellant with a legitimate excuse for failing to progress its appeal.

Consideration of the balance of justice

159. On the issue of the balance of justice, I have come to the conclusion that the justice of the case requires the striking out of the appeal of the first named appellant. The level of delay, the absence of legitimate excusing circumstances, and the position of the parties to this litigation all point coercively towards a requirement of strike out.

160. In arriving at this conclusion, I have considered the nature of the underlying action, the interests of each of the parties to the litigation, the conduct of the entire proceedings from their commencement and the overall lapse of time, including pre-commencement delay (proceedings here were not commenced until shortly before expiry of the limitation period in regard to some aspects of the claims, and in a situation where arguably other aspects may already have been statute barred), and the basis of the appeal.

161. Without prejudice to the merits of any appeal, a red flag was surely raised by how the motion to strike out had unfolded in the High Court, and by the analysis contained in the judgment of the High Court judge, sufficient to put the then appellants on notice at the commencement of their appeals that, already by that stage, cogent and serious arguments were capable of being advanced as to why the proceedings merited being struck out on the grounds of inordinate and inexcusable delay and want of prosecution. That was going to be the starting point should there be any further delay in the context of their appeals, regardless of whether or not the High Court's judgment could be impugned on any basis, and it called in

the loudest possible terms for the appeals to be progressed by the appellants expeditiously. Moreover, the drum in regard to the expectation that there would be expedition and urgent prosecution of the appeals by the appellants was beaten again by the Supreme Court on the 14th of May 2013, and by Laffoy J. in her judgment in the Companies Acts litigation, such that Mr. Maye and his companies could have been under no illusion but that, even if they might have had a good point of appeal against the judgment of Cooke J., they were going to be on even thinner ice than they were already on if they inexcusably delayed further.

162. In regard to the merits of the appeal, the substantive appeal is not before us; but suffice it to say that while it is true that the Supreme Court decided by a 4:1 majority in *Goode Concrete v. CRH Plc* [2015] 3 I.R. 493 to allow the appeal and set aside the interlocutory orders of the trial judge, on the grounds that a reasonable person in possession of all the relevant facts in all the circumstances of the case would have a reasonable apprehension that there would not be a fair trial from an impartial judge, it does not automatically follow that the appeal against the judgment and Order of Cooke J. in the present case would be successful. That having been said, there is no denying that serious issues are undoubtedly engaged in the present case by the grounds of appeal resting on bias / perception of bias. It was appropriate to take that into account in assessing the balance of justice, and I have done so.

163. However, it was also appropriate to take into account in that context the reality as to the likely subsequent course of the proceedings if the appeal were to succeed. The matter would, as a matter of likelihood, be remitted to the High Court for a re-hearing of the respondents' motions to strike out the first named appellant's proceedings for inordinate and inexcusable delay and want of prosecution. In that regard, the fundamental underlying circumstances remain unchanged, namely that serious arguments would again be capable of being advanced before the High Court as to why the proceedings should be struck out on the

grounds of inordinate and inexcusable delay and for want of prosecution, such that the first named appellant would at best, to reiterate the metaphor, be on "*thin ice*" on that issue, and there would still be a real prospect of the action being again dismissed consequent upon delay.

164. I reject as being untenable in the circumstances of this case the idea that the underlying proceedings are capable of being resolved substantially on the basis of documents. It seems to me that there is compelling force in the case put forward by all of the respondents that, were the action to proceed, witness testimony would be required for them to be able to fairly defend themselves against the first named appellant's claims. Specific prejudice in that regard is alleged by all of the respondents, for which I am satisfied there is cogent and unrebutted evidence. Moreover, taking an overview of the entire proceedings, I consider that general prejudice must also be deemed to have been established in circumstances where, as of the date of the hearing of the present motions for strike out, nine years have elapsed from the commencement of the appeal, twenty-five years have elapsed from the commencement of proceedings, and almost four decades have elapsed since the factual matters complained of were said to have occurred.

165. The conduct of the parties was also a relevant consideration in my conclusion as to where the balance of justice lies. The CRH respondents have submitted that the dilatory progress of this appeal, against the background of everything else that has occurred in these proceedings, represents an affront to the administration of justice. I consider that characterisation to be justified, and that it does not constitute hyperbole.

166. Further, although the first named appellant complains, in reliance on the affidavits of Mr. Maye, of alleged inappropriate conduct on the part of the respondents, I find that such evidence as has been adduced does not support that. Moreover, insofar as acquiescence on the part of the respondents is alleged, I am satisfied that that has not been established. There was

no obligation on the respondents, or any of them, to take any further steps (beyond their issuance of the present motions at the point at which they have felt it necessary to do so), to have this matter listed before this Court, or indeed the Supreme Court (before the case was returned to the Court of Appeal), arising out of delays by the first named appellant in prosecuting its appeal. There is abundant case law to the effect that silence or inactivity is not to be considered as amounting to positive acquiescence in the other side's delay. In that regard Irvine J. made the following observations in *Millerick v Minister for Finance* [2016] IECA 206:

> "*36.* […] *the judgment of Fennelly J. in Anglo Irish Beef Processors Limited makes clear that it is the conduct of the litigation by the plaintiff, that is the primary focus of attention. A defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the defendant that constitutes acquiescence in the delay, his silence or inactivity is not material. It is obviously not a consideration on the first question as to whether the delay is inordinate and inexcusable. The only way it can arise therefore is in the balance of justice. The question at that point is whether the defendant caused or contributed to the plaintiff's delay or in some manner gave the plaintiff to understand or led him to believe that the defendant was acquiescing in the delay. Mere silence or inactivity in itself is insufficient because that does not communicate acceptance to the plaintiff. This understanding of the law is also consistent with the later authorities of the Supreme Court and the High Court.*"

167. At para. 39 she concluded:-

> "*39. For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was*

culpable in causing part or all of the delay. In other words a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."

168. There is simply no evidence that the respondents were themselves responsible for any of the delays that have occurred in regard to the progression of the appeals in this case, and I am satisfied there has been no acquiescence by them in the first named appellant's delays.

169. In conclusion on the issue of the balance of justice, having weighed the argument in favour and against the proceedings continuing, I arrived at the clear view, already expressed at para. 159 above, that the justice of this case requires it to be dismissed. In all the circumstances of the case, including previously mentioned matters that I have alluded to with specificity, I do not consider that it would be possible to conduct a fair trial of this case that respects basic fairness of procedures having regard to the overall lapse of time that has occurred.

170. Finally, and for completeness, I see no basis on which to refer any question to the Court of Justice of the European Union (CJEU) for a preliminary ruling, using the procedure set forth in Article 267 TFEU. Mr Seamus Maye, in presenting his (unsuccessful) motion to be allowed to represent the appellant companies at the hearing of the appeal, relied in part on impecuniosity on the part of the appellants to explain why they were not still legally represented, and in that regard he referenced the non-availability of third party funding of litigation in Ireland and suggested that the Court might consider it necessary to refer a question to the CJEU concerning the compatibility with EU law of the Maintenance and

Embracery Act 1634 (which was retained as a matter of Irish Law by the Statute Law Revision Act 2007). However, no evidence was adduced as to the availability of any possible third-party funder. In the circumstances, I do not consider that a question of EU law was raised before us, a decision on which would be necessary to enable this Court to give judgment on the present motions, such as would have justified the Court of Appeal in availing of the preliminary reference procedure.

Conclusion

171. The respondents have established that the first named appellant is guilty of inordinate and inexcusable delay in the prosecution of its appeal.

172. Further, the justice of the case lies in favour of dismissing the appeal of the first named appellant pursuant to the inherent jurisdiction of the Court on the grounds of inordinate and inexcusable delay in prosecuting the proceedings. I therefore do so in application of the principles set out in *Primor plc v. Stokes Kennedy Crowley* (cited previously at para. 108).

173. The respondents are therefore entitled (subject to what is set out below with respect to costs) to the reliefs sought by them in their respective Notices of Motion (listed at para. 149 above) insofar as those reliefs relate to the first named appellant.

174. For the avoidance of any doubt, I am further prepared to grant a declaration that the appeals of the second and third named appellants stand struck out with effect from the 9th of July 2014 by Order of the Supreme Court.

Costs

175. The respondents have succeeded in their applications against the first named appellant. It follows that the respondents, to the extent that they are/were independently legal represented, should be entitled to the costs of their motions to dismiss. If, however, a party wishes to seek some different costs order to that proposed they should so indicate to the Court

of Appeal Office within 21 days of the receipt of the delivery of this judgment, and a costs hearing will be scheduled, if necessary. If no indication is received within the 21-day period, the Order of the Court, including the proposed costs order, will be drawn and perfected.

Faherty J.:

I agree.

Binchy J.:

I also agree.