[2020] IEHC 679

THE HIGH COURT

[2018 No. 8925P.]

BETWEEN

MYLES KIRBY

PLAINTIFF

AND

JOHN ALEX KANE, SEAMUS KANE AND JEROME KANE

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 18th day of December, 2020

1. By order of the High Court (Kelly P.) made on 16th October, 2018 the third defendant, Mr. Jerome Kane, was directed to remove any and all vehicles, machinery, equipment, bulls, cattle, sheep, livestock and other animals from the lands comprised in six folios at Willsbrook and Cranleybeg, County Longford, and to pay to the plaintiff, Mr. Myles Kirby, the costs of the motion on foot of which the order was made, when taxed and ascertained. The order also restrained Mr. Kane from making contact with any prospective purchaser or otherwise interfering with the sale of the lands.

2. Mr. Kane was notified of the making of the order that evening and, by his solicitors, by letter dated 17th October, 2017 indicated that he would remove any animals he had on the land later that day. Mr. Kane now applies to the court to set aside the order of 16th October, 2018 and in particular the order for costs. In truth, the application is simply to set aside the order for costs.

3. The motion which was heard by the High Court on 16th October, 2018 was at that time the most recent battle in what the President characterised as a war of litigation between the Revenue Commissioners and receivers appointed by the High Court on the application of the Revenue Commissioners, and the first defendant, Mr. John Alex Kane and various members of his family. In 2009 Mr. John Alex Kane was decreed for €4.9 million on foot of a number of assessments for tax. Later, on the application of the Revenue Commissioners, Mr. Myles Kirby was appointed as receiver over a number of properties owned by Mr. John Alex Kane. One of the myriad difficulties encountered by Mr. Kirby in realising the properties was that in the Autumn of 2018 someone placed cattle on the lands. By enquiries with the Department of Agriculture Mr. Kirby established that the cattle which were on the lands comprised in one of the folios, Folio 6384, County Longford, were tagged with a herd number that belonged to Mr. Kane, who is a brother of Mr. John Alex Kane, and it appears to have been for that reason that he was named as a defendant in these proceedings and was made a respondent to the application heard by the President on 16th October, 2018.

4. When the motion was called on 16th October, 2018 Mr. John Alex Kane was present in court and was represented by a solicitor. There was no appearance by or on behalf of Mr. Jerome Kane, but the President was satisfied that he had been served and proceeded to make the orders sought.

5. In his affidavit sworn on 29th May, 2020 in support of this application, Mr. Kane deposes that he first became aware of Mr. Kirby's motion on the evening of 16th October, 2018.

He says that he had just that evening returned from a holiday in Galway. Mr. Kane deposes that he took no part in the events described in Mr. Kirby's affidavit of 11th October, 2018 and that as far as he is aware all of the cattle on "*the subject lands*" belonged to his brother Mr. Seamus Kane. Mr. Kane acknowledges the existence of the Department of Agriculture information obtained by Mr. Kirby and suggests that "*the only*" basis for Mr. Kirby's belief that the cattle on the lands in Folio 6384 were his was that they were registered to his herd number and that he had been in receipt of Department of Agriculture grant payments for the year ending 31st October, 2017. I pause here to say that Mr. Kane's evidence as to what cattle were where is at best ambiguous. He appears to confine himself to the identity and ownership of the cattle found by Mr. Kirby to be on one only of the six folios the subject of the order. That said, he does not dispute that the cattle had his herd number or that he was in receipt of Department of Agriculture grants.

6. Immediately upon being apprised of the making of the order Mr. Kane made an appointment to see his solicitor and on the following day his solicitors wrote to Mr. Kirby's solicitors to say that on the previous evening he had found a letter of 12th October, 2018 enclosing the motion papers inside the patio door of his home. Mr. Kane, it was said, had instructed his solicitors to advise the plaintiff's solicitors "... *that any animals he has on the lands will be removed today*." Mr. Kane now says that he did not then believe that he had cattle on the lands but wanted to make it clear that if any of the cattle on the lands transpired to be his, they would be removed in compliance with the order. He says that on an unspecified date after that letter was written he ascertained by unspecified means that none of the cattle on the lands were his but belonged to his brother Seamus. He does not attempt to explain how or when cattle with tags bearing his herd number came to belong to his brother.

7. Mr. Kirby's solicitors replied to Mr. Kane's solicitors by letter dated 18th October, 2018 enclosing a copy of the order with a penal endorsement and asking for confirmation that Mr. Kane's solicitors intended to enter an appearance and had instructions to accept service of the order. For completeness, they added, Mr. Kane had been ordered to pay the costs of the motion "*and we are instructed to pursue your client for the said costs. This will be the subject of separate correspondence in early course*." Mr. Kane's solicitors replied on the following day to say that they did not have instructions to come on record but were seeking instructions in relation to the contents of the plaintiff's solicitors' letter. They continued:-

> *"As advised our client only received your correspondence enclosing proceedings on the evening of 16th of October last (after the matter was heard before the President). Therefore, an issue arises in relation to service of these proceedings on our client which would impact upon any issue in relation to costs."*

8. Mr. Kane now acknowledges that his solicitors then sought further instructions and that he did not then give them any further instructions. He says that he did not believe that it was necessary to do so because he had no hand, act or part in the events complained of, and that the court had already dealt with the matter, albeit, he says, in his absence. He

says that he did not then fully grasp the gravity of the situation and in particular the possibility that the plaintiff might pursue him for the costs. He says that he did not then consider that he would be pursued for the costs because he had had no knowledge of the proceedings and he did not consider that he could possibly have any liability for the costs in the circumstances.

9. Mr. Kane was before the court again on 18th November, 2019 as the respondent to a motion brought by Mr. Kirby to have him attached and committed for breach of the order of 16th October, 2018. Mr. Kane acknowledges that he was served with that application and he appeared and was represented by his solicitor. That application was also heard by the President. The motion was dismissed, and Mr. Kirby was ordered to pay Mr. Kane's costs. Mr. Kane now says that the President accepted that he had no involvement in the alleged acts of contempt and that he believed and understood that this was now the end of the matter and that he would not be subject to any further legal proceedings *",,, as the President had found that [he] had no involvement in the matters complained of by the plaintiff*." There is some ambiguity in this in that Mr. Kane conflates the alleged acts of contempt – which were the subject of the motion to attach – and the matters complained of by the plaintiff – which may have encompassed the matters which were the subject of the motion for the interlocutory injunction.

10. The affidavit of Mr. Kane does not identify the allegations of contempt which were the subject of the motion which was heard on 18th November, 2019 but the affidavit of Mr. Michael Commons, the plaintiff's solicitor, does. At some time in 2019 Mr. Kirby seized some cattle from the lands over which he had been appointed and had them sold. A threatening telephone call was made to the cattle dealer who bought those cattle by someone who identified himself as Mr. Jerome Kane. The allegation of contempt against Mr. Kane was that it was he who had made the telephone call. Mr. Kane denied that and the motion to have him attached was dismissed with costs. Mr. Commons has averred – and his evidence is uncontested – that the question of who owned the cattle which had been placed on the lands in Autumn 2018 was not an issue that was before the President on 18th November, 2019.

11. On 18th March, 2020 Mr. Kane was shocked to receive a letter from his solicitors enclosing a bill of costs drawn by Lowe Legal Cost Accountants and a notice that a hearing date for adjudication on legal costs had been fixed for 2nd April, 2020, which (presumably on the basis that an appearance had been entered in the action for the purposes of dealing with the motion to attach) had been served on his solicitors. The sum claimed for the plaintiff's costs of the motion and order of 18th October, 2018 was for €53,749. Mr. Kane says that the bill appears to him to be excessive. Subject to the outcome of this application, the question as to whether the amount claimed is or is not excessive will be a matter for the adjudicator, but it cannot be gainsaid that it is a lot.

12. On 30th March, 2020 Mr. Kane's solicitors wrote to Mr. Kirby's solicitors rehearsing what they had written on 17th October, 2018 and threatening an application to set aside "*the order for costs made against him on the 16th October, 2018*" unless there was

confirmation that Mr. Kirby would not proceed with the order for costs. On 14th April, 2020 Mr. Kirby's solicitors replied. Inevitably, they insisted that the order for costs against Mr. Kane had been properly obtained. They went on to point to the very considerable lapse of time between 19th October, 2018 – when Mr. Kane had been told that Mr. Kirby intended to enforce the order – and the threatened application to set it aside. Mr. Kirby's solicitors invited an offer in respect of the costs of the motion of 16th October, 2018, which would take account of the costs of the motion of 18th November, 2019, which had been awarded the other way.

13. Mr. Kirby's solicitors' letter of 14th April, 2020 set out in some detail the efforts which had been made by the summons server to serve the motion papers and also referred to a letter of 4th October, 2018 said to have been sent to Mr. Kane calling on him to remove the cattle then on the Willsbrook lands, failing which an application would be made to the High Court permitting Mr. Kirby to do so. In his affidavit grounding this application Mr. Kane dealt with the contents of that letter. He swore that he did not receive the letter of 4th October, 2018 which, he said, had been sent to an address which was not his. The summons server had reported to the plaintiff's solicitors that he had been directed by the Gardaí in Longford to an address at Longford Road, Drumlish, which turned out to be Mr. Kane's mother's address, and by Mrs. Kane to Mr. Kane's correct address at Cloonagh, Drumlish, where the motion papers were left. The summons server had reported that when he called to Mrs. Kane's house on 13th October, 2018, Mrs. Kane told him that Mr. Kane was in Northern Ireland and, in his presence, had telephoned Mr. Kane and told him that there was a summons server at the house. In his affidavit sworn on 29th May, 2020 Mr. Kane swore that he had "… *no recollection of ever having a telephone conversation with [his] mother* ..." and that he had not been informed by telephone or otherwise that there was a summons server looking for him. He swore that he was not in Northern Ireland at that time but in Galway, and that he first received the papers on the evening of 16th October, 2018.

14. In support of his application and his contention that he was not the owner of any cattle on the Willsbrook lands, Mr. Kane relies on the fact that his brother Seamus was attached and committed by order of the President of 22nd November, 2018 for his, Seamus's, failure to remove the cattle from the lands. That, it is said, goes to show that Seamus was the owner of the offending cattle.

15. Mr. Kane has exhibited the transcript of the DAR of the hearing before the President on 22nd November, 2018. The transcript shows that the motion had been before the court a week previously when Mr. Seamus Kane had asked for an adjournment to allow him to take legal advice but that when it came back Mr. Seamus Kane appeared pro se. The evidence on that motion was that the order of 16th October, 2018 had been duly served on Mr. Seamus Kane but returned to a number of persons, including the President, marked "*void*". The cattle and a 40 foot trailer were still on the lands, on which a number of notices had been put up warning the world to "*Keep Out*" and that "*For the trespass on this property is with the fine of €100,000 one hundred thousand euro per minute per man, woman, or corporation and for any incursion whatsoever*". On the morning of 22nd

November, 2020 Mr. Seamus Kane – who gave his name to the court as Seamus Kane Man – told the President that the cattle had been moved off the land that morning. The President put the case back until after lunch at which stage Mr. Seamus Kane was forced to acknowledge that, contrary to what he had said in the morning, the cattle had not been moved, nor the signs taken down. The President was satisfied that Mr. Seamus Kane had acted in a number of ways to try to frustrate the order of the court and ordered that he be committed to prison until he should have purged his contempt.

16. As I will explain, I am not to treat this motion as a re-hearing of the motion which led to the order of 16th October, 2018, nor am I in a position to resolve contested issues of fact, but the transcript of the hearing on 22nd November, 2018 does not show what Mr. Kane contends it shows. Mr. Seamus Kane was adjudged to be guilty of manifold contempt of court, one element of which was his failure to remove the cattle from the lands. As far as cattle were concerned, the exclusive focus of the hearing was on the presence of cattle on the lands and not the ownership of those cattle and so for present purposes the committal of Mr. Seamus Kane can be discounted entirely.

17. By the notice of motion now before the court Mr. Kane seeks an order pursuant to O. 122, r. 7 of the Rules of the Superior Courts extending the time within which to bring an application pursuant to O. 36, r. 33 setting aside the order of 16th October, 2018; alternatively an order pursuant to the inherent jurisdiction of the court and in the interests of justice setting aside the order and in particular that part which awarded costs to the plaintiff.

18. Order 36, r. 33 of the Rules provides that:-

> *"Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the court, upon such terms as may seem fit, upon an application made within six days after trial."*

19. The judgment of the Court of Appeal in *Danske Bank A.S. v. Macken* [2017] IECA 117 suggests that O. 36, r. 33 might be invoked to set aside an order for possession made on an application by special summons but the judgment in *Allied Irish Banks plc v. Forde* [2020] IECA 133 endorsed the analysis of Barrett J. in *Bank of Scotland plc v. McDermott* [2017] IEHC 77 which concluded that the power conferred by O. 36, r. 33 was limited to judgments obtained after the trial of plenary proceedings. If, as was held in *Forde*, O. 36, r. 33 is not available to set aside a summary judgment obtained in proceedings with under O. 37, neither, it seems to me, can it be available in the case of a judgment obtained in proceedings commenced by special summons and dealt with under Order 38, or any other judgment or order.

20. While the notice of motion invoked O. 36, r. 33 as well as the inherent jurisdiction of the court, the application was moved by reference to the inherent jurisdiction of the court.

21. Mr. William Cleary, for Mr. Kane, referred to the judgment of Humphreys J. in *Onyenmezu v. Firstcare Ireland Ltd*. [2019] IEHC 697 and relied in particular on the judgment of Barrett J. in *Bank of Scotland plc v. McDermott* where, at para 11, it was said:-

> *"11. The shorthand phrase 'inherent jurisdiction' is used to refer to residual powers that the court may draw upon, when it is just or equitable to do so, in order, for example, to achieve such ends as ensuring due process, preventing oppression and doing justice between parties. It has perhaps five key features: it is procedural, not substantive; it is exercised by way of summary process, not trial; it can be exercised against anyone; it is distinguishable from judicial discretion; and, most significantly in the context of the within application, it has traditionally been perceived as conferring powers to which those contained in the Rules of the Superior Courts are additional, not substitutive. This last dimension of the inherent jurisdiction perhaps finds at least partial expression in the oft-quoted maxim that 'the rules of court are the servants of Justice, not her master'. Sometimes conflated are the notions of inherent jurisdiction and inherent powers, but the two are not the same; the court's inherent jurisdiction involves a substantive competence to hear and determine matters; an inherent power, by contrast, is an incidental device whereby the court gives practical effect to its jurisdiction. What constraints exist as regards the exercise of inherent jurisdiction? Perhaps two key principles apply, viz. that it is exercised only where necessary and that it has the overriding objective of avoiding injustice. What protections exist to prevent its abuse? It seems to the court that the protections arising are essentially two-fold: the exercise of inherent jurisdiction must conform with established constitutional and other fundamental legal norms; and the prospect of appeal curtails the possibility of undesirable jurisdictional innovation, at least on the part of courts that are subject to appeal."*

22. Mr. John Donnelly S.C., for Mr. Kirby, did not contest that the court has the jurisdiction contended for, or that that jurisdiction was engaged. He submitted, however, that *Bank of Scotland plc v. McDermott* was an entirely different case. Mr. Donnelly argued that it was implausible for Mr. Kane to say that he did not immediately appreciate the gravity of the situation. The fact that Mr. Kane was well aware of the nature of a costs order was, it was said, plain from the fact that when he won the contempt motion on 18th November, 2019 he asked for such an order. While acknowledging that the court ought not approach this motion as a re-rearing of the motion heard by the President on 16th October, 2018, Mr. Donnelly submitted that it was not clear that Mr. Kane had not been served with the motion papers. While Mr. Kane had sworn that he first saw the papers after the motion had been decided, there was no corroborative evidence, nor, beyond a bare or sparse averment, was there persuasive evidence before the court that the cattle on the land were not Mr. Kane's property. If Mr. Kane wanted to persuade the court to re-open the issues previously decided by the President he should, it was submitted, have clearly set out the basis on which he contended that that should be done.

23. Mr. Donnelly referred to the decision of the Supreme Court in *Re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514 in which Denham J. (as she then was) emphasised that an

applicant for an order setting aside a final order carries a very heavy onus, and that a case will not be re-opened save in very exceptional circumstances where, through no fault of the applicant, he or she has been the subject of a breach of constitutional rights and where there is no other available remedy, such as an appeal.

24. While there was agreement between counsel that the inherent jurisdiction to set aside the order existed, and was engaged, there was not a comprehensive argument as to the basis on which it should be exercised.

25. In *Bank of Scotland plc v. McDermott* Barrett J. observed, in passing, by reference to the judgment of Dunne J. in *Nolan v. Carrick; O'Toole v. Carrick* [2013] IEHC 523, that the principles applicable to an application under O. 36, r. 33 are distinct from, and apparently somewhat less stringent than, the principles applicable to an application to set aside a judgment pursuant to the inherent jurisdiction of the court. The consequence of that, he said, appeared to be that a more stringent burden applies to a person seeking to set aside a summary judgment than a judgment obtained at plenary hearing which, if legally correct, appears to be logically flawed. As in this case, Barrett J. does not appear to have had detailed legal argument as to the principles by reference to which the court should exercise the jurisdiction the existence of which was acknowledged.

26. If it is the case that the burden on an applicant for an order setting aside a summary judgment or an order made on a special summons is heavier than that on an applicant for an order setting aside a judgment obtained after a plenary hearing, I respectfully agree that it is logically flawed: but I am by no means convinced that the proposition is legally correct.

27. *Greendale* was an application to set aside a judgment of the Supreme Court following a hearing over four days at which both parties had been represented by solicitors and counsel.

28. *Nolan and O'Toole* was an application made upwards of four months after judgment had been entered following a two day jury trial. Shortly before the trial an application on behalf of the defendant to take the case out of the list had been refused and the defendant had consented to his solicitors coming off record. Dunne J. (without deciding whether the time for such an application should be extended) dismissed an application pursuant to O. 36, r. 33; declined to exercise the inherent jurisdiction of the court to set aside the judgment on the grounds of the alleged incapacity of the defendant, on the ground that he had an alternative remedy by way of appeal; and, following an exhaustive review of the extensive medical evidence which had been adduced, went on to find that the defendant had not established as a matter of probability that he lacked the necessary capacity to have defended the actions.

29. *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412 was an application to set aside a judgment of the Supreme Court on the grounds of alleged objective bias on the part of two of the judges who had heard the appeal.

30. It seems to me that these cases are all very different to an application to set aside an order made *in absentia* and that the judgments must be read in context.

31. A case closer to this is on the facts is *Onyenmezu v. Firstcare Ireland Ltd*. [2019] IEHC 697. That was an application to set aside a summary judgment. The defendant's solicitor had appeared before the Master on a number of occasions as the motion for summary judgment wended its way to the judge's list but by inadvertence failed to appear at the hearing of the motion. Immediately upon the defendant becoming aware of the judgment, a motion was issued to set it aside. Humphreys J. briefly looked at the authorities but did not dwell on the legal niceties. Having identified the significant difference between a tactical decision not to attend court compared to a failure to do so by reason of inadvertence, Humphreys J. referred to the judgment of Denning L.J. (as he then was) in *Hayman v. Rowlands* [1957] 1 All E.R. 321 at p. 323:-

> *"I have always understood that if, by some oversight or mistake, a party does not appear at the court on the day fixed for the hearing, and judgment goes against him, but justice can be done by compensating the other side for any costs and trouble which he has incurred, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but so long as he does so, the strength or weakness of it does not matter. I think it plain in this case that the tenant had a defence on the merits. He had a defence as to whether it was reasonable to make an order for possession against him."*

32. Humphreys J. went on to say that the extraordinary and unusual jurisdiction to set aside a final judgment as discussed in *Nolan* – where a very high threshold applies – is more relevant to a different situation in which the absence was as a result of a deliberate decision. "*A much lower threshold*", he said, "*applies where the absence is inadvertent*."

33. That *dictum* of Denning L.J. in *Hayman v. Rowlands* was cited with approval by Dunne J. in *Nolan* and more recently by Whelan J. in *Forde*, where she said, at para. 47:-

> *"In circumstances where the absence of the defendant is not referable to any contumacious conduct, where no prior intention not to attend has been communicated, and where in substance something akin to a mistake is identified, the jurisprudence suggests that a greater flexibility exists to set aside the judgment in the interests of justice and fairness."*

34. *Forde*, of course, was a case in which the defendant had elected to appeal, and the appeal was allowed on the basis that the conduct of the hearing before the High Court had been unsatisfactory, but the Court of Appeal made it clear that the appellant might have invoked the inherent jurisdiction of the High Court.

35. In this case there was some debate as to whether, rather than applying to the High Court to set aside the earlier order, Mr. Kane ought to have appealed. On the one hand Mr Donnelly pointed to the availability of an appeal as an alternative remedy such as might go to the existence of an inherent jurisdiction, or if not the existence then the exercise of

the inherent jurisdiction, in the High Court. On the other, he acknowledged that Mr. Kane could probably not have identified any error in the decision of the President – either that service had been validly effected, or that he was justified in making the order which he did – which would have amounted to a good ground of appeal. This point too was touched upon by Humphreys J. in *Onyenmezu* where he characterised an argument that the defendant ought to have applied to the Court of Appeal for an extension of time within which to appeal (which in fact he had) as a pettifogging legalistic point. Again, with the greatest of respect, I would not share that characterisation of the argument, but I do respectfully agree with the analogy drawn by my colleague with an *ex parte* order which cannot be appealed by the respondent but can be the subject of an application to set aside. The proposition that the availability of an appeal is no bar to the invocation of the inherent jurisdiction of the High Court has since been approved by the Court of Appeal in *Forde*.

36. I am satisfied that the principles by reference to which the High Court should exercise its inherent jurisdiction to set aside a judgment depend on the circumstances of the case in which it is called upon to do so. It seems to me that the exercise of that jurisdiction on an application to set aside a judgment given or an order made in circumstances for which no provision is made by the rules should be informed by the rules applicable to cases for which provision is made.

37. Order 36, r. 33 prescribes a time limit of six days for an application to set aside a verdict or judgment obtained where one party does not appear. The court has express power by O. 122, r. 7 to enlarge the time within which such an application may be brought but the clear policy of the rule is that such applications must be brought promptly and as a matter of urgency. In the same way that it would not be not logical or consistent that the substantive onus on an applicant should vary depending on the procedure by which the judgment or order might have been obtained, neither would it be logical or consistent that the speed with which the applicant should be expected to move should vary.

38. In assessing the merits of an application to set aside a judgment or order, any interval of time which may have elapsed between the making of an order and the bringing of the motion will be an important consideration.

39. The clear policy of the law is that judgments are ordinarily to be treated as final. As Denham J. observed in *Talbot v. McCannFitzGerald* [2009] IESC 25:-

> *"In essence, the principle of finality in litigation is to underpin certainty in the administration of justice. It is a fundamental principle for the common good. It ensures that litigation comes to an end and that there is certainty in the situation."*

40. In a case where the judgment or order has been obtained by surprise or mistake, the court may later be persuaded to intervene if it is persuaded that the absence was due to accident or mistake and if the court is persuaded that on a re-hearing the applicant would have a real prospect of success. A material consideration will be whether the successful party would be prejudiced by the judgment or order sought to be set aside, particularly if

he could not be protected against the financial consequences. If a judgment or order is set aside, the party who obtained it will inevitably be prejudiced to some extent. Almost, if not absolutely, invariably that prejudice will increase as time passes. The authorities are clear that even a very long lapse of time will not necessarily preclude the setting aside of an order but a very significant factor in the exercise by the court of its discretion will be delay on the part of the applicant. Of course, the mere passage of time is not to be equated with delay. The subject of the judgment or order may for a variety of reasons be unaware of it for some time, perhaps quite a long time. In such a case account will be taken of the lapse of time but from the time at which the subject of the order becomes aware of it, any significant interval of time between notice and the bringing of the motion to set it aside will amount to delay, and that will weigh more heavily against the applicant.

41. In this case there was a delay of nineteen months between 16th October, 2018, when Mr. Kane was first made aware of the order of the President, and 29th May, 2020 when he issued his motion to set it aside. The explanation offered for that delay is not only unconvincing but makes matters worse. Mr. Kane now says that he did not fully grasp the gravity of the situation and in particular the possibility that Mr. Kirby might pursue him for the costs. As to the gravity of the situation, it seems to me that there are two elements: the first is the fact of the order, the second is the extent of the potential liability. I cannot see that Mr. Kane can ever have been in the slightest doubt as to the effect of the order. It says what it says, and on the day after it was made Mr. Kane had a consultation with his solicitor at which his solicitor could have spelled out in detail how and when and broadly the parameters within which it might come home to roost. As to the extent of the potential liability, Mr. Kane now knows that the claim is for €53,749. It is, as I have said, a lot of money but it strikes me that Mr. Kane should probably take advice rather than depend on his own impression as to whether it is excessive or not. As to the possibility that Mr. Kirby might pursue him, again I cannot see that he could have been in any doubt. Once the order was made, there was a possibility that it might be enforced. If there was any room for doubt as to whether Mr. Kirby would or would not enforce the order, that should have been dispelled by his solicitors' letter of 18th October, 2018 by which he said that he would.

42. On receipt of Mr. Kirby's solicitors' letter of 18th October, 2018 Mr. Kane's solicitors wrote to him asking for his instructions. Mr. Kane did not give any such instructions but took the view that he could not possibly have any liability for the costs in the circumstances. That, if it is true, was irrational. On the face of the order Mr. Kane, with his brothers, was liable to pay the costs and that liability could only go away if he successfully appealed or if he applied to the High Court to set the order aside. Whatever he now says, all the appearances were that Mr. Kane would pursue him. It may very well be that Mr. Kane did not expect that Mr. Kirby would go to the trouble and expense of having the costs taxed, or that Mr. Kirby might have taken the view that Mr. Kane was no mark. In truth, this is not really a case of delay. The evidence is that in October, 2018 Mr. Kane decided not to do anything about the order but changed his mind nineteen months later when he saw the level of the demand. Whatever the reason or thinking may have been, if Mr. Kane

was taken by surprise by the making of the order of 16th October, 2018 he has since, and for a very long time, acquiesced in it and for that reason alone I would refuse this application.

43. The evidence, as I have said, is that Mr. Kane decided in October, 2018 not to try to do anything about the order of 16th October, 2018. Mr. Kane's evidence that he believed and understood that the order for costs which he obtained against Mr. Kirby on 18th November, 2019 "*was now the end of the matter*" sits rather uneasily with his evidence that thirteen months previously he did not believe that he could possibly have any liability for the costs. However, the objective significance of the order for costs made in favour of Mr. Kane is that his liability on foot of that order can be offset against his liability on the order against him. To the extent that Mr. Kane attaches any significance to the later order, it can only be that he recognised and recognises that it goes to the extent as opposed to the fact of his liability.

44. Moreover, the foundation of the motion for attachment and committal was the injunction, and so the foundation of the order for costs which Mr. Kane has against Mr. Kirby is the order which he now seeks to set aside. In principle, he may not approbate and reprobate.

45. As to whether Mr. Kane was taken by surprise, I am not satisfied that he was. He asserts that he did not receive Mr. Kirby's solicitors' letter of 4th October, 2018 and that he was unaware of the motion until after the order was made but does not engage with the evidence of Mr. Kirby's solicitor that the letter of 4th October, 2018 was not returned to his office undelivered, or with the detail of the summons server's report.

46. As Mr. Kane has deposed, the letter of 4th October, 2018 was not sent to his address at Cloonagh, Drumlish but rather to Longford Road, Drumlish. The report of the summons server, which was exhibited by Mr. Commons, shows that between 13th and 15th October, 2018 he made eight attempts to serve Mr. Kane. On his first attempt he was directed by local Gardaí to Mrs. Kane's house and was re-directed by Mrs. Kane to the correct house which was about one mile away but was also on the Longford Road. Mr. Kane makes much of the address to which the letter was sent and denies that he received it but does not go so far as to say that he did not know about it, or that he later asked his mother about it. Mr. Kane's evidence that he never had a telephone conversation with his mother can hardly be literally true but if I take it to be that he does not recall, or did not have, a telephone conversation at the time the summons server arrived at his mother's house on 13th October, 2018, he does not say that he was not told of the earlier letter.

47. Mr. Kane is consistent in his evidence that he returned from a holiday in Galway on the evening of 16th October, 2018 but nowhere says when he went there. He says only that he was away for an unspecified number of days. According to the report of the summons server, when he attended at Mr. Kane's property for the fifth time at 1:30 p.m. on 14th October, 2018 he saw a man in a Landcruiser. The summons server called out to this man who ignored him, went into the house, and would not answer the door. The summons server expressed the belief that this man was Mr. Jerome Kane. This was all

spelled out in Mr. Commons' affidavit which was sworn on 17th June, 2020 and was never contested.

48. I am acutely conscious that I should not on a motion heard on affidavit evidence without cross examination attempt to resolve contested issues of fact but by analogy with an application made under the rules to set aside a default judgment the onus is on Mr. Kane to show that he was taken by surprise. If he was not at home when the papers were left there on 15th October, 2018 he does not deny that he was there when the summons server called at lunchtime on the previous day. While for the reasons given I believe that the hurdle which Mr. Kane must cross is lower than very exceptional circumstances he does need to show that he was taken by surprise and I am not satisfied that he has done so.

49. There is one further issue in relation to service which I should deal with for completeness. When the motion was called on before the President on 16th October, 2018 Mr. John Alex Kane was in court with his solicitor, Mr. Creed. Messrs. Seamus Kane and Jerome Kane were formally called. Mr. Creed made it clear that he had no instructions on behalf of anyone other than John Alex Kane but advised the court that he understood from his client that they would not be appearing. Mr. Donnelly argued that this was something that could be taken into account in deciding whether Mr. Kane had been served, or at least was aware of the motion but I decline to do so not only on the basis that what Mr. Creed said was in the nature of hearsay but that it was rather vague.

50. The terms of the order now sought are rather peculiar. Mr. Kane asks that the court should set aside the order of 16th October, 2018 and in particular should set aside that part of it which awarded the costs against Mr. Kane. This, it seems to me, more or less acknowledges that Mr. Kirby was entitled to the substantive order, so that an order in the terms sought would leave Mr. Kirby with an order against Mr. Kane to which he was entitled, but no costs.

51. The long delay in moving to set aside the order of 18th October, 2018 also goes to the question of fairness. An order in the terms sought would not simply dissolve the order for costs but would lead to the re-hearing of the motion. The motion and order, as I have said, were not confined to the lands in Folio 6384 and were not confined to cattle owned by Mr. Kane but if, for the sake of argument, the central issue as far as Mr. Kane is concerned was the identity and ownership of the cattle which were observed on those lands, the uncontroverted evidence is that those cattle, or most of them, had ear tags with Mr. Kane's herd number and that neither Mr. John Alex Kane nor Mr. Seamus Kane had a registered herd number. It is clear from Mr. Kane's solicitors' letter of 17th October, 2018 that he accepted at that time the possibility, at least, that he had cattle on the lands. There is, as I have said, an assertion that on an unspecified date after 17th October, 2018 Mr. Kane ascertained by unspecified means that none of the cattle on the lands were his, but rather belonged to Seamus. Mr. Kane is not absolutely clear that his inquiry, whenever it was made, was directed to the position as it stood on the date the order was made or a later date but an earlier averment that the cattle belonged to

Seamus, which is specifically directed to Mr. Kirby's affidavit of 11th October, 2018, is qualified by the words "*so far as I am aware*". If the ear tags did not definitively show that the cattle found on the land then belonged to Mr. Kane, they certainly showed that they once had. While Mr. Kane now baldly asserts that they belonged to Seamus he makes no attempt to explain when and how they allegedly came to belong to Seamus.

52. To accede to the application now before the court would be to require Mr. Kirby to revisit issues and events of upwards of two years ago and to put on the hazard the work and expense which has been done and incurred in the meantime in doing precisely what Mr. Kirby unambiguously said at the time he would do. I am not satisfied that Mr. Kane has established that he would have a real prospect of success if the order were to be set aside and the motion re-heard. I am satisfied that Mr. Kirby would be seriously prejudiced if he were forced to revisit questions long ago decided and which he was entitled to believe had been finally disposed of. And I am satisfied that it would be against the public interest in the finality of litigation to allow an unsuccessful litigant long after the event to reopen an order which he has deliberately decided to ignore in the hope that it would go away.

53. For these reasons, I must refuse the motion.

54. The respondent to the motion, the plaintiff in the action, has been entirely successful on the motion. I can think of no reason why the costs should not follow the event, but I will allow the applicant a period of 21 days to file and serve any written submission he may wish to make as to what other order there should be, and why. In the event of the applicant filing such a submission, the respondent will have fourteen days to reply. Failing such submission, there will be an order that the third defendant pay to the plaintiff the costs of the motion and order when adjudicated. The costs of any issue as to the appropriate order for costs will be payable by the loser.