Neutral Citation No: [2026] NICA 28 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McB13056** *ICOS No:* **20/024661/A01** *Delivered:* **03/06/2026**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Between:

NIGEL KIRKPATRICK and SUSAN MARY DENISE KIRKPATRICK
Plaintiffs/Appellants
and

HUGH O'BOYLE and SIOBHAN O'BOYLE
Defendants/Respondents

Anthony Brennan (instructed by Jim Rafferty & Co Solicitors) for the Plaintiffs/Appellants
William Gowdy KC with Laura King (instructed by Worthington Solicitors) for the Defendants/Respondents

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Before: Treacy LJ, McBride J and Humphreys J

McBRIDE J (*delivering the judgment of the court*)

Applications before the court

[1] The plaintiffs/appellants ("the Kirkpatricks") seek to appeal Huddleston J's order dated 24 November 2025, in which he ordered, *inter alia*, that the defendants/respondents ("the O'Boyles") were the true and lawful owners of 73 Bann Road, Ballymoney as comprised in Folio AN12881 and 5966 Co Antrim ("the property") and ordered the Kirkpatricks to deliver up possession and pay damages for trespass.

[2] The Kirkpatricks lodged a notice of appeal in the Court of Appeal on 23 December 2025. The case was listed for review on 18 February 2026. This review precipitated a notice of motion, dated 16 February 2026, by the O'Boyles seeking the following relief:

> "(i) An order pursuant to Order 59 rule 10 of the Rules of the Court of Judicature (Northern Ireland) 1980

("the Rules") striking out or dismissing the appeal because it was not served within the time required, being six weeks from the date on which judgment or order of the court below was filed.

(ii) An order pursuant to Order 59 rule 10 and Order 18 rule 19(1), striking out the appellant's notice of appeal because it is frivolous or vexatious and or discloses no reasonable cause of action.

(iii) In the alternative, an order pursuant to Order 59 rule 10, that the appellant provide security for the respondents' costs of this appeal in such manner as this court shall think fit."

[3] In response the Kirkpatricks served a cross-application, dated 9 March 2026 seeking the following relief:

"(i) An order pursuant to Order 3 rule 5, extending the time for service of the notice of appeal on the respondents, such that the service effected on 27 January 2026, be deemed good and sufficient service;

(ii) In the alternative, an order that the notice of appeal be treated as having been duly served on the respondents on 27 January 2026."

Background

[4] The Kirkpatricks, as legal owners of the property, lodged the land certificates in May 2012, with the Presbyterian Mutual Society, as security for a loan.

[5] On 19 May 2016, arising from their default in payment of the security, Master Hardstaff made an order confirming that the sum of £393,000 (approximately) was validly charged against the property, in favour of the Presbyterian Mutual Society.

[6] The Kirkpatricks thereafter entered into an agreement ("the agreement") with the O'Boyles regarding the sale of the property. The exact terms of the agreement is in dispute, but both parties agree that the O'Boyles were to purchase the property from the Presbyterian Mutual Society in the sum of £140,000; pay £10,000 to the Kirkpatricks and permit the Kirkpatricks to remain in occupation of the property, rent free for 12 months.

[7] On 28 January 2019, Master Hardstaff, made an order for sale, which reflected the terms of the agreement. He ordered that the property be sold for £140,000, stating that this was "in the best interests of all the parties without the need for a full exposure to the open market."

[8] The property was legally transferred by the Presbyterian Mutual Society to the O'Boyles in February 2019.

[9] In or around 7 February 2020, the Kirkpatricks aver that when they approached the O'Boyles seeking a "final account" of the monies due in respect of the buy-back option the O'Boyles refused to transfer the property back to them.

[10] Thereafter, the Kirkpatricks issued a specially endorsed writ seeking specific performance of the agreement and in the alternative a declaration as to their beneficial interest in the property based on an estoppel claim.

[11] As appears from the endorsement on the writ, the Kirkpatricks accept they deposited their land certificates with the Presbyterian Mutual Society as security and that subsequently the court made an order for sale of the property on 28 January 2019. The property was thereafter sold to the O'Boyles. At the time of sale they claim that they entered into an agreement with the O'Boyles, in which it was agreed that after a period of 12 months the property would be transferred back to them upon payment by them of the purchase price and outlays together with a 20% uplift. They claim that the O'Boyles have reneged on the agreement as they have failed to provide an itemised account and failed to convey the property back to them and further claim that they have acted to their detriment in reliance on the agreement by expending money on the property.

[12] The O'Boyles in defence claim that the buy-back option had to be exercised on or before 1 February 2020 and at no time on or before 1 February 2020 did the Kirkpatricks indicate an intention to exercise the buy-back option or demonstrate their ability to repurchase the property by that date. They further counter-claimed for a declaration that they were the lawful owners of the property; that the Kirkpatricks' occupation after 1 February 2020 constituted unlawful trespass; and sought an order for possession and damages.

Proceedings before Huddleston J

[13] Following a two-day trial, the trial judge dismissed the claim and made a declaration that the O'Boyles are the true and lawful owners of the property and further ordered that the Kirkpatricks deliver up possession and pay damages for trespass.

Notice of appeal

[14] The notice of appeal sets out nine grounds of appeal. These can be summarised as follows:

(i) Grounds 1-4, 6 and 8 challenge the powers of the Presbyterian Mutual Society to sell the property, on the ground that it did not have regulatory authority to carry on a deposit taking business and was operating in fundamental breach of section 19 of the Financial Services and Markets Act 2000 ("the 2000 Act"), thereby rendering all of its activities, including the loan and security *ultra vires* and void *ab initio* with the result that the Kirkpatricks acquired no valid title to the property.

(ii) Ground 5 challenges the notice of deposit on the basis that it was not signed by Mrs Kirkpatrick.

(iii) Ground 7 avers that the trial judge erred in law and, in fact, by failing to consider the rights of six adult children who had been in continuous occupation of the property since 2011 and whose rights constituted an overriding interest under the Land Registration Act (Northern Ireland) 1970.

(iv) Ground 9 challenges the trial judge's decision on the basis that he failed to consider the Kirkpatricks' article 8 ECHR rights.

Affidavit evidence before the court

[15] The notice of motion filed by the O'Boyles was supported by the affidavit of Ciaran McConnell, sworn on 13 February 2026. The notice of motion filed by the Kirkpatricks was supported by the affidavit of Christopher Rafferty, Solicitor, sworn on 9 March 2026.

Issues before the court

[16] The questions which arise for determination by this court are as follows:

(i) Was the notice of appeal served out of time?

(ii) If not, should the court extend time for service of the notice of appeal?

(iii) Is the appeal frivolous, vexatious or does it disclose no reasonable cause of action?

[17] The question whether the Kirkpatricks should provide security for costs was, by the agreement of the parties, not to be adjudicated upon by the court at this stage.

Consideration

Question 1 – Was the notice of appeal served within time?

Time for appeal - The Rules

[18] In accordance with Order 59 rule 4, the Kirkpatricks' notice of appeal was required to be served within six weeks from the date on which Huddleston J gave judgment or his order was filed. Huddleston J gave judgment on 24 November 2025 and his order was filed on 25 November 2025. The six-week period therefore commenced on 25 November 2025. Accordingly, the time for service of the notice of appeal expired on 6 January 2026.

When was the notice of appeal served?

[19] The Court of Appeal in *Magill v Ulster Independent Clinic* [2010] NICA 33, set out at paras [9] and [10] when a notice of appeal is served. It stated as follows:

> "[9] A notice of appeal does not have to be stamped, sealed or in any way authenticated by the Court of Appeal (or any other court) prior to service. There is no such process as issue of a notice of appeal, in the case of an appeal to the Court of Appeal … The order of events is, first service of the notice of appeal on the parties required to be served, then second, setting down the appeal in Civil Appeals Office ...
>
> [10] As this passage makes clear, it is the service of the notice of appeal which effectively commences the appeal not the purported lodgment of a notice of appeal lodgment in the court." [emphasis added]

[20] The Kirkpatricks' notice of appeal was dated 22 December 2025 and lodged with the Court of Appeal on 23 December 2025. It was not, however, served on the O'Boyles until 27 January 2026 when an email enclosing the notice was sent to the O'Boyles' solicitors. The O'Boyles take no issue with the mode of service.

[21] The notice of appeal was therefore served, out of time, by some three weeks.

Did the O'Boyles waive the time point by "taking fresh steps" in the appeal?

[22] Mr Brennan, submitted that failure to comply with Order 59 rule 4 is an irregularity which can be and was waived because the O'Boyles took a fresh step in the proceedings, namely issuing the notice of motion in which they sought security for costs.

[23] The test whether a fresh step is taken which constitutes a waiver was set out in *Rein v Stein* (1892) 66 LT 469 by Cave J, at page 471 as follows:

> "In order to establish a waiver you must show that the party has taken some step which is only necessary or only useful if the objection has been actually waived or has never been entertained."

[24] The key authorities identify several categories of conduct which constitute fresh steps. These includes a step taken with a view to defending the case on the merits and steps taken to obtain an advantage in the proceedings such as an application for security for costs – see the *Assunta* [1902] P 150.

[25] The Kirkpatricks submit that the O'Boyles have taken both steps and have accordingly waived any objection to the time point. They aver that filing a 59-page skeleton argument, which engages fully with the merits of all three grounds of appeal amounts to defending the case on the merits and filing an application for security for costs are fresh steps which constitute waiver of the time point and therefore preclude the O'Boyles' application to set aside the notice of appeal on the basis of this irregularity.

[26] Mr Gowdy KC submitted that the O'Boyles' actions do not amount to waiver as the first and only step they have taken is to file a notice of motion in which the first head of relief seeks an order striking out the notice of appeal on the basis it is out of time.

[27] We are satisfied that there has been no waiver by the O'Boyles. The only action taken by them was to file a notice of motion seeking an order that the appeal be struck out on the basis it was out of time. We do not consider that seeking other relief in the same notice of motion constitutes a waiver as the additional relief was sought sequentially and in the alternative. The skeleton argument filed on behalf of the O'Boyles does not accept that the appeal was served within time and otherwise does not expressly or impliedly waive the time point. The skeleton engages with the merits of the appeal only insofar as it is required to do so to address the Kirkpatricks' application for an extension of time to file the notice of appeal. Accordingly, we do not consider the skeleton argument can amount to a waiver of the time point.

[28] In all the circumstances we find the notice of appeal was not served within the time set out in the Rules and the time point was not waived by the O'Boyles. Accordingly, the Kirkpatricks require an extension of time to serve the notice of appeal.

Question 2 – Should the court extend time for service of the notice of appeal?

[29] Under Order 3 rule 5 the court has power to extend time. The criteria for the exercise of this discretion were set out by Lord Lowry LCJ in *Davis v Northern Ireland Carriers* [1979] NI 19 as follows:

> "(a) Whether the time is already sped: a court will look more favourably on an application made before the time is up;
>
> (b) When the time limit has expired, the extent to which the party applying is in default;
>
> (c) The effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs;
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> (d) Whether a hearing on the merits has taken place, or would be denied by refusing an extension;
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> (e) Whether there is a point of substance to be made which could not otherwise be put forward;
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> (f) Whether the point is of general and not merely particular significance; and
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> (g) That the rules of the court are there to be observed."

[30] The list of factors set out by Lord Lowry is not exhaustive and as noted by Gillen J in *Benson v Morrow Retail Ltd* [2010] NIQB 140, the *Davis* criteria should not be approached artificially:

> "as a series of hurdles to be negotiated in succession by an appellant with loss of the right to obtain an extension if he cannot pass any one or more of them. To do so would be to focus too closely on appearance rather than substance. Courts must not fall into the trap of missing the wood for the trees. The central underlying question is always whether in the particular circumstances and in accordance with an overall desire to achieve justice, the discretion ought to be exercised in favour of the appellant." [para [19]]

[31] Before turning to consider the overarching requirement to determine whether the overall desire to achieve justice requires the discretionary exercise, it is instructive to consider each of the *Davis* criteria individually.

(a) Whether the time is already sped

[32] It is agreed by all the parties that the time limit has already elapsed.

(b) *When the time limit has expired, the extent to which the party applying is in default*

[33] The default is three weeks. Whilst this is not trivial, it is not the most egregious breach. The explanation for the default is set out at para [7] of Mr Rafferty's affidavit as follows:

> "Following lodgment of the notice of appeal on 23 December 2025, I was engaged in obtaining final instructions from the appellants and in settling documentation arising in the appeal, including consultation with counsel. This period coincided with the Christmas court vacation, during which both the appellants' availability and office operation were materially restricted. As a result, service of the notice of appeal was not effected within the seven day period prescribed. The delay was not deliberate but arose from the combination of the court vacation, and the process of obtaining final instructions, and the practical arrangements required to progress the matter.
>
> [8] As soon as the oversight was identified, the notice of appeal was served upon Worthington Solicitors without further delay on 27 January 2026. The total period of delay beyond the seven day requirement was accordingly 28 days."

[34] It is unclear how the matters set out by Mr Rafferty at para [7] of his affidavit prevented service of the notice of appeal upon the O'Boyles within the time limits set out in the Rules as the notice of appeal served upon the solicitors for the O'Boyles is identical to the one lodged in the court office on 23 December 2025. Accordingly, we find that no good reason has been proffered for failure to serve the notice of appeal in accordance with the time limits set out in the Rules. The Kirkpatricks are wholly responsible for the default and no reasonable excuse for the default has been proffered.

(c) The effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs

[35] The effect of granting the application is that the O'Boyles will be denied use and enjoyment of their property and the Kirkpatricks will remain in occupation without paying rent. Whilst the loss of use of property can be compensated by an order for mesne profits, we consider there is a real doubt such an order would be complied with as the Kirkpatricks defaulted in the loan with the Presbyterian Mutual Society; later entered into an agreement with the O'Boyles under which they were paid £10,000 directly and since that time have not paid rent. We therefore conclude that any order the court might make for mesne profits would probably not be satisfied and the O'Boyles would not therefore be compensated.

(d) Whether a hearing on the merits has taken place, or would be denied by refusing an extension?

[36] The Kirkpatricks have already had a hearing on the merits in respect of their pleaded case set out in the writ. The notice of appeal, however, raises new points, not pleaded in the writ and which were not therefore the subject of argument before the trial judge. Accordingly, the question is whether refusal of the extension would deny the Kirkpatricks a hearing on the case they now seek to advance, particularly in respect of the arguments under the 2000 Act, whether Mrs Kirkpatrick signed the deposit of the title documentation; whether the adult children have an overriding interest and the applicability of article 8 ECHR and article 1 of Protocol No. 1 to the ECHR.

[37] At first instance, the Kirkpatricks sought specific enforcement of an agreement which gave them an option to buy back the property from them. In so doing they acknowledged the O'Boyles held legal title to the property. In contrast, the notice of appeal now challenges whether the Presbyterian Mutual Society held title in the property to pass to the O'Boyles. The grounds of appeal set out at grounds 1-6 and 8 therefore entirely contradict the case pleaded in the writ and argued by the Kirkpatricks before the trial judge.

[38] In these circumstances, would a hearing on the merits of the new case be denied by refusing an extension of time or would the new case not be entertained by the Court of Appeal in any event?

[39] If time was extended, the Court of Appeal would have to decide at the outset whether it would allow the new points to be raised on appeal, given that were not raised before the court at first instance and which contradict entirely the case pleaded and argued before the trial judge.

[40] In *Singh v Dass* [2019] EWCA Civ 360, the Court of Appeal summarised the law in allowing new points to be raised on appeal and set out the relevant considerations as follows:

"(a) An appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court;

(b) an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either

(i) It would necessitate new evidence; or

(ii) Had it been run below, it would have resulted in the trial being conducted different with regards to the evidence at the trial;

(c) Even where the point might be considered a "pure point of law", the appellate court will only allow it to be raised if three criteria are satisfied that:

(i) The other party had adequate time to deal with the point;

(ii) The other party had not acted to its detriment on the faith of the earlier omission to raise it; and

(iii) The other party can be adequately protected in costs."

[41] On behalf of the O'Boyles, it was submitted that the Court of Appeal would not entertain the new points raised in the appeal notice because they are not pure points of law; they would necessitate new evidence and had these points been run below, it would have resulted in the trial being conducted very differently with regard to the evidence as well as the identity of the necessary parties at the original trial.

[42] Mr Gowdy submitted that the Court of Appeal is cautious about allowing new points to be raised on appeal and would be particularly cautious where they contradicted the case made at first instance. Secondly, he submitted the issues now raised in the notice of appeal were not pure points of fact but raised issues of mixed law and fact necessitating new evidence. To establish whether there had been a breach of the 2000 Act and, if so what remedy, if any, should be given, he submitted, would require evidence about whether the mortgage was a "regulated activity" and a detailed account between the Kirkpatricks and the Presbyterian Mutual Society. To determine whether Mrs Kirkpatrick did not sign for the deposit of the title deeds,

evidence would be needed from the solicitor who acted in the transaction and who gave undertakings to the Presbyterian Mutual Society. Further, the claim that the adult children have an overriding interest, would require new evidence to be given setting out the basis on which they have such an interest. He further submitted that had these arguments been run below it would have resulted in very different evidence being given and would have necessitated the Presbyterian Mutual Society being joined as a party.

[43] In contrast, Mr Brennan submitted that the 2000 Act argument is a pure point of law and accordingly no further factual enquiry would be needed. He submitted that the regulatory status of the Presbyterian Mutual Society under the 2000 Act was a matter of statutory construction and referenced the Financial Services Authority's formal determination of 9 April 2009, a publicly available document, which concluded that the Presbyterian Mutual Society "was conducting regulated activities without the necessary authorisation or exemption." He submitted that the issues raised on appeal were matters of public importance which had never previously been the subject of judicial adjudication.

[44] We are satisfied that the grounds of appeal raise grounds which entirely contradict the case made before the trial judge. We are further satisfied that the dispute is not a pure point of law. Rather the 2000 Act appeal ground raises mixed questions of law and fact about whether the mortgage was a regulated activity and what remedy, if any, should be granted. Consideration of both these questions would require new evidence including the need for an account between the Presbyterian Mutual Society and the Kirkpatricks and evidence about their ability to repay sums advanced. It would additionally require the Presbyterian Mutal Society to be added as a party to the proceedings. The appeal ground that Mrs Kirkpatrick did not sign the mortgage is also a question of law and fact requiring evidence from Mrs Kirkpatrick and the solicitor about the circumstances surrounding the deposit of the land certificates. The appeal ground that the adult children have an overriding interest is also a mixed question of law and fact requiring evidence from the children. None of this evidence was given at the lower court and the Presbyterian Mutual Society was not a party in the lower court proceedings.

[45] We are satisfied that the new points raised on appeal would not be entertained by the Court of Appeal because they entirely contradict the case made in the lower court; they require the admission of new evidence; had they been run below, they would have resulted in the trial being conducted very differently with regard to the evidence at that trial; and they do not raise a pure point of law. Even if they do raise a pure point of law we consider the other parties have acted to their detriment and cannot be adequately protected in costs due to the impecuniosity of the Kirkpatricks. We therefore conclude that a hearing on the merits would not be denied by the refusal of an extension but rather because the Court of Appeal would not entertain this appeal in any event.

(e) Whether there is a point of substance to be made which could not otherwise be put forward?

[46] Mr Gowdy, submitted there was no point of substance to be made. Firstly, regardless of any challenges under the 2000 Act regarding the validity of any title held by the Presbyterian Mutual Society given its unregulated status, the O'Boyles were bona fide purchasers for value and, thus, the equitable doctrine of bona fide purchasers defeated any prior equitable interest retained in the property by the Kirkpatricks. Secondly, the rights of six adult children could not advance the Kirkpatricks' claim but rather hindered the relief sought as the children's rights would exist as burdens on the property. Thirdly, in respect of the article 8 argument, Mr Gowdy relied on the case *McDonald v McDonald* [2016] UKSC 28, in which the Supreme Court determined that human rights cannot be used to alter the contractual rights of parties. The Supreme Court explained at para [41] as follows:

> "[41] To hold otherwise would involve the Convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is, as we have mentioned, to protect citizens from having their rights infringed by the state. To hold otherwise would also mean that the Convention could be invoked to interfere with the A1P1 rights of the landlord, and in a way which was unpredictable. Indeed, if article 8 permitted the court to postpone the execution of an order for possession for a significant period, it could well result in financial loss without compensation ..."

Fourthly, he submitted the case now made by the Kirkpatricks would necessitate the orders of Master Hardstaff being successfully appealed something the Kirkpatricks had not done and something which would be difficult due to delay and the fact they had consented to the 2019 Order and had relied on these orders in making their original case.

[47] In reply, Mr Brennan submitted that there was a point of substance of public importance which could not otherwise be made. He submitted that the Court of Appeal had never determined the legal question whether the Presbyterian Mutual's exercise of enforcement powers was void or unenforceable by reason of its unregulated status, something which could affect the validity of every order for possession, and he submitted that the orders of Master Hardstaff were therefore void or voidable. When questioned by the court he was unable to point to any authority for such a proposition.

[48] We consider that there is no basis upon which Master Hardstaff's order can be considered to be void or voidable. They remain valid and binding until overturned

or set aside. Accordingly, to advance their case the Kirkpatricks would need to set aside or successfully appeal the 2016 and 2019 orders made by Master Hardstaff. At no stage have they sought to appeal these orders. They have not put forward any basis upon which they could seek to have the orders set aside and we are satisfied that it would be incredibly difficult for them to do so at this remove and in circumstances where they consented to the making of the 2019 order.

[49] By reason of the court orders, the Presbyterian Mutual Society had legal title to sell the property. The O'Boyles were bona fide purchasers for value, and, in those circumstances, the equitable doctrine of bona fide purchasers defeats any prior equitable interest that the Kirkpatricks may have retained in the property. Further, the claims by the adult children does not assist the Kirkpatricks and the claim under the ECHR has already been the subject of determination by the Supreme Court. We therefore conclude that there is no point of substance to be made in this appeal.

(f) Whether the point is of general and not merely particular significance?

[50] For the reasons already outlined, we consider that there is no point of substance to be made.

(g) That the rules of the court are there to be observed

[51] The Kirkpatricks did not attempt to follow or comply with Order 59 rule 4 and did not seek an extension of time until the O'Boyles applied to strike out their appeal. This may have arisen because their solicitor misunderstood the applicable rules for service as appears from his affidavit.

[52] Having considered individually each of the *Davis* criteria, we are satisfied that none of them points to the need to exercise the discretion to extend time in the interests of justice. Looking at the case in the round, we do not consider that there are any reasons why in the interests of justice it would be necessary to exercise the discretion to extend time to serve the notice of appeal.

[53] Accordingly, we do not have to consider the third question - whether the appeal should be struck out on the basis that it is frivolous or vexatious or otherwise discloses no reasonable cause of action.

[54] The court concludes that the appeal is out of time and finds no good reason to extend time. The court therefore grants the O'Boyles' application and dismisses the cross-application by the Kirkpatricks, with costs.