COURT OF APPEAL

UNAPPROVED

Neutral Citation Number: [2022] IECA 154
Appeal Number: 2021/73

Whelan J.
Faherty J.
Binchy J.

BETWEEN/

GREENWICH PROJECT HOLDINGS LIMITED

APPELLANT/PLAINTIFF

- AND –

CON CRONIN

RESPONDENT/DEFENDANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 6th day of July 2022

Introduction

1. This is an appeal by Greenwich Project Holdings Limited ("Greenwich") against orders dismissing the proceedings and refusing to re-open same, perfected on 8 March 2021 by Hyland J. in the High Court on foot of two judgments delivered on 20 January 2021 (the "Dismissal Judgment") and 3 March 2021 (the "Revisit Judgment") respectively in the above entitled proceedings. The Court held, relying on the *Tracey v. McDowell* [2016] IESC 44 jurisprudence, that the appellant's claim be dismissed for want of prosecution for failure to comply with an order made by Mr. Justice Jordan in the High Court on 8 July 2019 (the "Directions Order"). The trial judge refused an application on the part of the appellant to revisit the Dismissal Judgment of 20 January 2021. The application to revisit the Dismissal Judgment was brought on the basis that certain correspondence not been opened to the Court

in the course of the hearing of the respondent's motion ought to have been considered. That material had previously been exhibited to an affidavit sworn on behalf of the appellant in the context of a Motion which the respondent had issued on 7 September 2018 seeking to vacate a *lis pendens* registered by the appellant against the subject property in September 2014. The disposal of that motion by the High Court had resulted in the *lis pendens* being vacated. Hyland J. refused the application to reopen the proceedings and further ordered the appellant to pay costs.

2. The appellant (hereinafter "Greenwich") appeals the entire decision and seeks to set aside the orders of the High Court.

Background and Context

3. The respondent ("the Statutory Receiver") was appointed on 24 September 2012 as the Statutory Receiver of one Anthony Boushel. He was appointed by National Asset Management Agency ("NAMA") in the context of the discharge of its statutory functions in the resolution of the entity then known as Anglo Irish Bank Corporation Limited. NAMA, which had appointed the Statutory Receiver, was the statutory "bad bank" which had acquired the debts of participating insolvent banking institutions participating under the terms of the 2009 National Assets Management Act, as amended.

4. In the course of the said Statutory Receivership, certain hereditaments and premises situated at Greenwich Court, Rathmines, Dublin 6 ("the property") were offered for sale by public auction. The property was purchased in trust for Greenwich at auction on 7 May 2014. The purchase price was €1,025,000 and a deposit of €102,500 was paid on the said date. Significantly, in the overall context of this application and the issue of delay, the closing date was identified on the face of the contract as "three weeks from the date hereof". Special Condition 11(l) provided that General Condition 36 did not to apply to the sale and

"is hereby deleted". The said General Condition contained certain warranties on the part of the vendor in the context of development and planning. Special Condition 5 became a point of contention between the parties subsequent to the entering into the contract for sale. It appears to fall into two sub-sections. 5.1 pertained to steps to be taking by the vendor post-execution of the contract but prior to its conclusion: "[o]n or prior to the Completion Date the Vendor shall procure that the opening in the gable wall of No. 4 Greenwich Court at first floor level, adjoining the Subject Property shall be closed up so that there shall not be any access from No. 4 Greenwich Court onto any part of the Subject Property". Special Condition 5.2 pertained to certain matters and works to be carried out "[w]ithin 4 weeks of the Completion Date (or such other date as may be agreed between the Vendor and the Purchaser)" in respect of the gable wall adjoining the property and is directed to the post-completion period of time.

5. Subsequent to the execution of the contract particularly in the months of June and early July 2014, there was ongoing correspondence between the parties with particular reference to Special Condition 5. No agreement was reached between the parties as to how concerns raised by the appellant might be addressed or indeed whether there was any obligation on the part of the Statutory Receiver to address them in the manner contended for by the appellant in the first place.

6. On 17 July 2014, approximately two months following execution of the contract, the Statutory Receiver caused a Notice of Intention to Rescind to be served on the appellant. On 30 July 2014, a further Notice of Rescission invoking General Condition 18 of the contract for sale was also served. It is significant that neither party ever served a Completion Notice on the other. If the Notice of Rescission were valid, the contract was potentially at an end and the Statutory Receiver was once more free to place the property on the market and secure a buyer.

7. On 1 September 2014, Greenwich issued a Plenary Summons against the Statutory Receiver. The writ by its General Endorsement of Claim pleads the contract and at paras. 5, 6, 7 and 8 places particular reliance on Special Condition 5.1. The Notice of Rescission is not pleaded nor is its validity or otherwise put in issue. The primary claim in the writ is that the Statutory Receiver/vendor had not discharged his obligations under Special Condition 5.1 and had not obtained and/or secured confirmation "from the relevant authorities that any or all works were completed legally and with the proper permission" (para. 8). Relief sought included damages for breach of contract together with an order directing the Statutory Receiver to produce documentation confirming compliance "with any and all planning requirements". An order was sought requiring the Statutory Receiver to produce to the appellant "documentation confirming planning permission is not required". A decree of specific performance is not sought.

8. Since the coming into operation of the Judicature (Ireland) Act 1877, the courts enjoy jurisdiction to make an award of damages where hitherto such award could have been made pursuant to the principles of the common law. In the context of conveyancing such an award could arise where, for instance, an evaluation was made that a decree of specific performance was not an appropriate remedy in all the circumstances of the case. The claimant also retained a right to advance a claim for damages in accordance with the principles of the common law. Nowadays such distinctions are largely without a difference particularly in light of the decision of the House of Lords in *Johnson v. Agnew* [1980] A.C. 367 which suggested that damages under either route should be assessed broadly on the same basis aligning the exercise with the principles which historically applied to each.

9. A Statement of Claim was delivered on the 5 May 2015. The substantive remedy sought was damages. The appellant registered a *lis pendens* against the subject property on 1 September 2014 – a step indicative of a claim being asserted which affected the subject

property. The Statutory Receiver raised a notice for particulars on the 16 June 2015 which was responded to almost four months later on the 7 October 2015. The replies encompassed a schedule of damages claimed by Greenwich, *inter alia,* for profit foregone in the sum of €880,075. Two weeks later on the 22 October 2015, the Statutory Receiver's defence was delivered. Significantly, at para. 9 of the defence the Statutory Receiver pleads that the contract of sale had been lawfully rescinded pursuant to General Condition 18 in or about the 30 July 2014. The sequence of events leading to service of the notice of rescission are pleaded.

10. Once in possession of the respondent's Defence, it was manifestly clear to Greenwich that the position being advanced by the respondent was that the contract was at an end. That ought to have been self-evident from the moment of receipt of service of the 30 July 2014 notice of rescission in any event. Given the equitable nature of the remedy of specific performance, one would have expected the defence to have galvanized Greenwich into action to put in issue and have expeditiously determined the question as to whether a valid contract for sale subsisted or not. That was not done. Indeed, a notice for particulars arising from this defence was not served by Greenwich until the 23 January 2020, four years and three months subsequent to delivery of the defence.

11. No Reply advancing any material facts directed towards defeating the claim of rescission in the Defence has yet been served. O.23 r.1 provides that no Reply is necessary where "all the material statements of fact in the relevant pleadings are merely denied and put in issue". As the authors Delany & McGrath on *Civil Procedure* (4th Ed., Round Hall, 2018) observe at 5.68;

> "…a reply will generally only be delivered where a plaintiff wishes to plead material facts to defeat a defence raised by the defendant as, for example, where the plaintiff

pleads facts to defeat a plea that the proceedings are statute barred or where the plaintiff wishes to admit matters pleaded in the defence."

Motion to vacate the *lis pendens*

12. Unsurprisingly, in light of the tenor of the Defence, on the 7 September 2018 a motion was issued on behalf of the Statutory Receiver seeking to vacate the *lis pendens.* This step should have brought the issue of specific performance of the contract into focus for Greenwich and its principal. Registration of the *lis pendens* potentially impacted marketability signifying that the outcome of the litigation might materially affect the property. On the 26 November 2018, an order was made in the High Court vacating the *lis pendens.* At that point four and a half years had elapsed since the contract for sale was entered into and over four years had passed since the institution of the appellant's proceedings. Nonetheless, Greenwich continued to refrain from seeking a decree of specific performance whether by the institution of fresh proceedings in that behalf, amending the existing proceedings or the delivery of a reply.

First Motion to Strike Out & Directions Order of Jordan J. 8 July 2019

13. The Statutory Receiver caused a Notice of Motion to issue on the 6 February 2019 seeking, *inter alia,* to strike out Greenwich's claim pursuant to the inherent jurisdiction of the Court on grounds of inordinate and/or inexcusable delay in the prosecution of the proceedings or, alternatively, for want of prosecution. That motion came on for hearing on the 8 July 2019 and at the conclusion of argument the High Court judge refused to strike out the proceedings but made a specific direction that Greenwich "… do within four calendar months of the date hereof take all steps necessary to apply to have the matter listed for hearing." The Court further ordered Greenwich to pay the costs of the Statutory Receiver in connection with the motion. The Statutory Receiver did not appeal the said order of the

High Court. Given the wide margin of discretion accorded to the trial judge in an interlocutory application of this kind which necessarily involves an exercise of discretion which will not generally be interfered with on appeal provided they fall within the range of views reasonably open to the trial judge, that decision was reasonable.

14. By the 9 November 2019, when the time afforded by the directions order had elapsed, Greenwich had not "taken all steps necessary to apply to have the matter listed for hearing". Various reasons were advanced both before the trial judge and in the course of this appeal for that omission. Primary amongst them was a "misunderstanding" on the part of Greenwich which caused it to consider that time did not run during the long vacation/August/September of 2019 and further that the 2019 Christmas Vacation was excluded from the calculation of "four calendar months" specified in the Directions Order. In the course of the appeal hearing, it appeared to be acknowledged on behalf of Greenwich that there was no valid basis for the said assumption in the context of the calculation of time within which the directions of the High Court were to be complied with.

15. On 23 January 2020, two and a half months after the time allowed by the Directions Order for compliance, Greenwich raised a notice for particulars on foot of matters pleaded in the defence delivered on the 22 October 2015. The Statutory Receiver responded by issuing the within motion to strike out/dismiss for non-compliance with the Directions Orders. It invoked the *Tracey v. McDowell* jurisprudence and further relying on the grounds of delay. Having heard the said motion, the trial judge delivered the Dismissal Judgment on the 20 January 2021. Following delivery of the same, Greenwich requisitioned the judge to revisit her judgment contending that correspondence exhibited in the context of the 2018 motion to vacate the *lis pendens* had not been opened in the hearing of the Dismissal Motion or adequately considered by the trial judge in reaching her decision in the Dismissal Judgment. The trial judge refused the application to revisit her dismissal, contending that

the correspondence in question when duly considered by her "simply confirms the factual position that had already averted (*sic*) to in the judgment. Therefore, its introduction would simply confirm existing findings and could have no influence on the result of the case." (para. 2) The Revisit Judgment was delivered on the 3 March 2021.

16. It was suggested in the course of the hearing of this appeal that in or about May 2020, Greenwich had instituted fresh proceedings seeking a decree of specific performance of the contract of the 7 May 2014. This court did not have sight of any such pleadings nor did the High Court. The relevance - or otherwise - of such pleadings will be considered hereafter.

Dismissal Judgment of the High Court delivered on the 20 January 2021

17. The Statutory Receiver sought dismissal of the proceedings on the basis of alleged procedural non-compliances with the Directions Order by Greenwich. The trial judge placed reliance on the *dicta* of Clarke J. in *Tracey v. McDowell* [2016] IESC 44. That judgment identifies the factors to be taken into account in such an application, the complex balancing exercise which the trial judge must engage in, giving due regard to the interests of all parties, and the imperative requirement of evaluating the full range of proportionate responses to achieve justice in the particular case before a Court is entitled to dismiss a substantive action for procedural failure and non-compliance with a direction of a Court.

18. Having reviewed the factual background and the history of the litigation, she noted (para. 12) that no relief in the statement of claim sought to challenge the Statutory Receiver's rescission of the contract or to enforce the contract by way of specific performance. She reviewed the sequence of events throughout the litigation from the date of its institution in September 2014.

19. Whilst there was no transcript forthcoming in regard to the hearing of the first motion to strike out the appellant's claim for delay or the *ex tempore* judgment given on the 8 July

2019 by Judge Jordan, there was an attendance note of the respondent's solicitor which the Court considered. At para. 15 of the Dismissal Judgment, the judge noted that

> "… there is some measure of agreement between the parties that [Judge Jordan] … had doubts as to whether the delay was inordinate, tending to consider that it was not. I am told that the attendance note of the defendant's solicitor … records that he observed that even if he had concluded the delay was inordinate, he would not have considered that the balance of justice test was met."

20. Hyland J. inferred that Judge Jordan "clearly considered that there was some delay". (para. 16) She based that assessment on two factors, firstly that he had awarded costs of the motion against Greenwich and secondly, that he had made a direction that Greenwich "within four calendar months of the date hereof take all steps necessary to apply to have the matter listed for hearing". She proceeded to applying the legal principles and the test in *Tracey*. The appellant is critical of the manner in which that exercise was carried out. The judge observed at para. 35 that she was "struck by the fact that there are no exhibits in the affidavit of Mr Moloughney evidencing any of the matters he avers to." In the context of applying the test in *Tracey v. McDowell* to the facts before her, the trial judge entered into an exercise of analysing the conduct of Greenwich, concluding at para. 36:

> "… having regard to the events surrounding the breach of the Order and the reasons provided for non-compliance, I find the plaintiff has committed both a sufficiently serious and a persistent breach and there is no legitimate explanation for the failure. Accordingly, following *Tracey*, I must now determine what sanction or consequence is proportionate."

21. The trial judge considered two matters particularly relevant to the issue of proportionality and the balance of justice in the context of the case; "the further steps

intended to be taken" and "the question of prejudice". The Court attached great weight to the fact that Greenwich intended to alter the pleaded case it was making and that the appellant's principal, Mr. Moloughney at para. 7 of his affidavit avers that it was intended to file a Reply to the Defence in which the purported rescission by the Statutory Receiver of the 30 July 2014 and which had been asserted and relied on at para. 9 of the Defence delivered on the 22 October 2014 would now be challenged. Further, the Court noted that Greenwich intended to seek discovery. The Court further noted that "… there may be an attempt to consolidate these proceedings with other proceedings seeking specific performance of the very same contract …" (para. 41)

22. The judge held that these further intended steps had three important implications for the motion to strike out; firstly, at para. 43 she noted that if a reformulation of Greenwich's claim is permitted "a very significant period of time would elapse before the case be set down". Secondly, no reason had been identified as to why this approach had not been adopted in 2014/2015 "…when the plenary summons and/or statement of claim were drafted" (para. 31). Thirdly, the plan to reformulate the claim and extend it to challenge the validity of the rescission and to seek a decree of specific performance had not been brought to the attention of Jordan J. in July 2019.

23. At para. 45 of her judgment she noted "had they been, he would presumably not have directed the appellant to '*take steps necessary to apply to have the matter listed for hearing'.* No explanation is given for this failure." (italics in original) The trial judge then proceeded to analyse relative prejudice as might be suffered were the appellant's proposed course of action of reformulating the claim and pursuing discovery to be permitted. She gave consideration to prejudice primarily at paragraphs 46 to 50 of her judgment. She concluded, having analysed various aspects including that "… the secured creditor is prejudiced in his capacity to realise the secured property and to market and sell same in discharge of the debts

owing to him as the property remains unsold." (para. 49) She concluded that she was "... satisfied there is considerable prejudice to the defendant in the failure of the plaintiff to abide by the order of July 2019." (para. 50)

24. The trial judge considered the principle of proportionality and carried out a proportionality review. In the first instance she considered proportionality through the prism of the balance of justice and the question of prejudice from para. 37 onward of the judgment placing particular reference on the further steps said by the appellant it intended to take. She adumbrated her views on the nature of a proportionality test from paras. 51 to 53 inclusive concluding "… the balance of justice clearly favours dismissal and it is a proportionate response." (para. 53). Noting that the Statutory Receiver's notice of motion had separately sought dismissal of the proceedings for inexcusable and inordinate delay and for want of prosecution pursuant to the inherent jurisdiction of the Court she was of the view that the granting of such relief was unnecessary "as I have granted the first relief". (para. 54) She noted:

> "… for the sake of completeness, if it was necessary to adjudicate on this ground, I would have concluded that the delay, measured from the issuing of the plenary summons on the 1 September 2014 to the issue of the motion on the 21 February 2020 was in all the circumstances inordinate. Further, given my rejection of the reasons for that delay, I would have treated the delay as inexcusable. Finally, for the reasons set out above in the context of the first relief, the balance of justice would have required dismissal."

Revisit Judgment

25. In light of the Dismissal Judgment including, *inter alia*, at para. 30 thereof where the trial judge considered averments in an affidavit sworn by Mr. Moloughney on behalf of

Greenwich opposing the application to strike out its claim, the judge was requisitioned by Greenwich to revisit her Dismissal Judgment particularly in a context where at para. 30 of the latter judgment she had observed:

> "… Mr Moloughney says he had *'sought to clarify the position from the outset'* [regarding Special Condition 5] and at para. 13 that *'it is evident from the outset that the plaintiff has been actively seeking such clarification'*. Those averments suggest that he was always concerned about this issue. If so, it is hard to understand why he waited until 2020 to consider the implications of Special Condition 5 for his proceedings. He refers in paragraph 4 to an issue that came to light concerning a strip of land sold with the property that may not have been in the vendor's ownership, but exhibits no correspondence seeking information in that regard nor identifies the nature of the concern, the location of the land in question or the identity of the third party referred to. Nor does he in any way identify why that is relevant to the instant proceedings. Even taking this averment at its height (as I have done with all the averments of Mr. Moloughney), his failure to explain its relevance to the proceedings means it cannot be used to justify delay." (italics in original)

Greenwich's concerns centred on paras. 26 to 31 inclusive of the January 2021 judgment.

26. In considering and refusing to revisit her judgment of the 20 January 2021 the trial judge had regard to the decision in *Re. McInerney Homes Limited* [2011] IEHC 25 of Clarke J.

27. The fundamental complaint on the part of Greenwich was that the issues with regard to Planning Permission and Special Condition 5 under the contract for sale being raised by it had been raised by Greenwich in 2014 correspondence. Said correspondence had been exhibited to an affidavit in the context of the successful application by the Statutory Receiver

to set aside the *lis pendens* in 2018. Issues raised included the obligation on the part of the vendor to close an opening into the adjoining property as referenced in the terms of Special Condition 5 and the planning permission position in regard to same. The judge further noted at para. 7 of her Revisit Judgment that in written submissions Greenwich *"*refers to material sought to be introduced, being correspondence dating from May to July of 2014 (the proceedings having been issued on the 1 September, 2014). That correspondence, it is said, identifies the plaintiff's concerns about Special Condition 5/planning permission." The judge observed that it had been accepted by Greenwich that the said correspondence had only been exhibited in the context of the motion to vacate the *lis pendens* which had been vacated by order of the High Court some years previously on the 26 November 2018.

28. The judgment noted that Greenwich accepted that her attention was not drawn to that correspondence until the revisit application hearing. "… it is said that this failure is now deeply regretted". The judge continued at para. 8:

> " … Reference is made to such evidence positively affirming the plaintiff's position in respect of his concerns from the outset and the rejection by him of any attempted rescission by the defendant, which included returning to the defendant the deposit, which the defendant had sought to return (although it is accepted that the sequence of events in respect of the rescission was made clear at the hearing, in fact in response to questions raised by me)."

Having reviewed aspects of the written submissions filed in support of the application to revisit the January 2021 judgment, the judge observed:

> "This application is based on a fundamental misunderstanding of the findings in the judgment. … the material now sought to be introduced by the plaintiff confirms precisely the findings in the judgment. I did not find the plaintiff first knew of certain

> matters after the decision of Jordan J. Rather, the criticism I made … was that the plaintiff knew of the issues in relation to special condition 5 and the planning permission from 2014 but that he did not address them in the proceedings until 2020, after Jordan J. directed the case to be expedited. Only at that stage did the plaintiff identify them as issues that would require to be attended to by discovery, particulars, and possible amendment of pleadings." (para. 11)

She further reiterates, having cited extracts from her January 2021 judgment:

> " … The above quotes from the judgment demonstrate that I understood perfectly well that the plaintiff was concerned about the issues from 2014. In short, I find fault with the plaintiff precisely because he had concerns in 2014 but took no step to introduce them into the proceedings till 2020." (para. 15)

The above comprises a brief outline of key aspects of both judgments under appeal.

Grounds of appeal

29. The key grounds of appeal, briefly put, are as follows:

(1) That the trial judge erred in dismissing Greenwich's proceedings for failure to comply with the Directions Order and in her interpretation and application of the principles in *Tracey v. McDowell* [2016] IESC 44.

(2) She erred in finding that the time/delay from the issuing of the plenary summons in 2014 to the issuing of the Statutory Receiver's second motion to strike out for non-compliance on the 21 February 2020 was inordinate and inexcusable and that the balance of justice required dismissal.

(3) That the judge erred in determining that there was considerable prejudice to the respondent arising from the said delay "in the absence of evidence thereof and/or the nature of the case and/or was speculative".

(4) The judge erred in "ascribing undue adverse consequences to the appellant for failing to challenge the rejected attempted rescission by the defendant *ab initio*, by way of its inclusion in its statement of claim."

(5) The trial judge, *inter alia*, erred in determining that Greenwich had "elected to pursue a damages claim only to the exclusion of specific performance or any other relief or action as may be appropriate and/or in determining that the appellant was too late to take further action and/or that the appellant had concerns in 2014 which he did not address at the time or on which he failed to take any steps to introduce into the proceedings until 2020."

(6) That the judge had erred in failing "… to take the appellant's case at its height and/or determined key issues of fact against the appellant at interlocutory stage when such matters are significantly in issue between the parties and are appropriate for such determination at substantive hearing."

(7) That the judge erred in drawing adverse inferences from "the perceived absence of exhibits referable to positive averments in the affidavit of Pat Moloughney sworn on the 2nd July, 2020 when such averments were not contradicted by the respondent and/or relevant documentation was before the Court in earlier affidavits and where such earlier affidavits were considered by the trial judge and/or contrary to express invitation to so consider, by way of supplemental submission."

The Issue of Specific Performance

Context

30. A significant feature of this case is that, whereas proceedings were instituted on the 1 September 2014 and pertain to the property in sale, Greenwich did not invoke the equitable

jurisdiction of the Court. The writ and statement of claim delivered disclose a claim that sounds in damages only. A proposal underpinning Greenwich's stance, as argued in the High Court and in the course of this appeal, is that as of 2021 it was entitled to alter its position to seek a decree of specific performance of the contract for sale. It is not disputed that the trial judge was correct in her finding at para. 12 of her Dismissal Judgment that the statement of claim delivered on behalf of Greenwich made no reference to rescission nor was any relief being sought to enforce the contract by way of specific performance. As the trial judge noted, in January 2021 for the first time Greenwich indicated that they contemplated an application to consolidate the damages claim with "other proceedings seeking specific performance of the very same contract, which were apparently recently issued, although those proceedings have not been notified to, or served on, the defendant." (para. 41 of the judgment).

31. In my view, such a proposed course of action engages the principles of equity and the doctrine of *laches*. That such an equitable action could be launched and pursued over six years after the institution of the initial proceedings on the 1 September 2014 is highly unorthodox though not unheard of. An explanation for such a delay was called for. As is observed by Hilary Biehler in *Equity and the Law of Trusts in Ireland* (7th Ed., Round Hall, 2020), *laches* "is always relevant where equitable relief is sought and that no distinction should be made between cases where such relief is sought to give effect to a legal as opposed to equitable right." (p. 39)

32. The authors Woods and Wylie in their text *Irish Conveyancing Law* (4th Ed., Bloomsbury Professional, 2019) observe at 16.51:

> "The doctrine of laches applies to specific performance as it applies to other equitable remedies – 'delay defeats equity'. Thus in *Moore v Blake* (1808) 1 BA and B 62 Manners LC stated:

> 'A Bill of this Description (that is, for the specific Performance of an Agreement) is an Application to the Discretion, or rather to the extraordinary Jurisdiction of this Court, which I apprehend cannot be exercised in Favour of Persons, who have so long slept on their rights, and acquiesced in a Title and Possession adverse to their claim. Due Diligence is necessary to call this Court into Activity, and where it does not exist, a Court of Equity will not lend its Assistance, it always discountenances Laches and Neglect.'"

The said authors further referenced the decision in *Murphy v. AG* [1982] I.R. 241 and *Van Van Nierop v. Commissioners of Public Works* [1990] 2 I.R. 189 in support of that proposition.

33. Woods and Wylie further observe –

> "Clearly it is a matter for the Court in each case as to whether the plaintiff has 'slept too long' on his right to apply for specific performance. Thus, in *Haire – Foster v McIntee* (1889) 23 LRIR 529 Munroe J. stated:
>
> > 'I know of no case in which a plaintiff has ever succeeded in getting a decree for specific performance of an agreement six years and a half after it is allege to have been entered into, four years after it has been repudiated in open court, and nearly two years after the defendant had himself instituted proceedings entirely inconsistent with the existence of such a contract'" (para. 16.51) (footnotes included)

34. The trial judge noted that "no copy of the plenary summons had been provided to me or the defendant." (para. 41) Having said that, the fundamental difficulty presenting in this case in light of *Tracey v. McDowell*, is that although neither the specific performance

pleadings nor any application concerning same was before the High Court judge, the substantive strike-out order and Dismissal Judgment were substantively premised on the existence and perceived implications of same but the orders made were not directed to and did not and indeed could not affect the equity suit. For the reasons stated hereafter I conclude that the trial judge fell into error in not keeping distinct the two sets of proceedings.

The standard of review

35. The dismissal application proceeded before the High Court judge based on affidavit evidence, the written legal submissions and oral arguments of learned senior counsel. In such circumstances having due regard to the jurisprudence and including *Ryanair Limited v. Billigfluege.de GmbH* [2015] IESC 11 (Unreported, Supreme Court, Charleton J., 19 February 2015) and *McDonagh v. Sunday Newspapers Limited* [2017] IESC 46, [2018] 2 I.R. 1, a somewhat deferential approach ought to be taken by this Court to the exercise engaged in by the trial judge albeit however it is to be recognised that this Court is not in any less position than the trial judge to evaluate the affidavits and to form its own view after having afforded due weight to the views of the trial judge.

36. As is clear from the decision of the Supreme Court in *Lismore Builders Limited (in Receivership) v. Bank of Ireland Finance Limited* [2013] IESC 6, this Court when requested to set aside an order made by a High Court judge in the due exercise of his or her discretion in relation to mixed questions of fact and law ought to do so only where it is considered necessary in order to avoid a serious injustice being visited upon the appellant. It will be recalled that MacMenamin J. in *Lismore Builders* considered the circumstances in which an appellate court might review an order made by the trial judge in the exercise of such discretion and observed:

> "Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental." (para. 4)

37. That jurisprudence has been further refined over time by subsequent judgments of this Court, some of which were reviewed in *Byrne & Anor. v. Bank of Scotland plc. & Anor.* [2021] IECA 228. Of particular note is the judgment of Collins J. in *Betty Martin Financial Services Limited v. EBS DAC* [2019] IECA 327 where he cautioned at para. 39:

> "… while as a matter of principle, *'great weight'* is to be given to the views of the High Court Judge, the ultimate decision on this appeal is for this Court."

At paras. 40 and 41 of his judgment Collins J. laid particular emphasis on the importance of the High Court giving an explanation to identify the basis for the view it takes particularly in a contested matter or where it fails to engage appropriately with the arguments advanced by one or other of the parties on a core issue and in observing "that will necessarily affect the weight to be attached to the Court's view on appeal." (para. 40)

***Tracey v McDowell* – major procedural non-compliance**

38. The parameters for acceding to an application to dismiss proceedings by virtue of major procedural failure on the part of a litigant were considered in detail in the judgment of Clarke J. in *Tracey v. McDowell* [2016] IESC 44. Having alluded to the jurisprudence concerning dismissal of proceedings for want of prosecution, Clarke J. observed at 5.1:

> "… it is, in my view, important to identify a distinction which can properly be made between a general failure of a party to progress their proceedings in a timely manner, on the one hand, and the consequences which it may be appropriate to apply to a

> specific failure on the part of a litigant to comply with a direction or order of the Court, on the other hand."

Noting that general failure to progress proceedings had been the subject of much litigation since at least *Lismore Homes Limited v. Bank of Ireland Finance Limited (No. 2)* [1999] 1 I.R. 501, Clarke J. observed –

> "… in my view, somewhat different considerations apply where a court is concerned with a specific failure on the part of a litigant to take a step which has been expressly directed by the Court, most particularly where the failure concerned is either itself significant and highly material to the litigation or, indeed, where the relevant failure or failures are persistent."

39. He noted at 5.2:

> "It must, of course, be recognised that the response of a court to any procedural failure must be proportionate. Dismissing a claim or, indeed, striking out a defence or otherwise taking significant action which would diminish or extinguish the entitlement of a party to put its case forward at a full trial is a step which should not lightly be taken and should only be taken in response to procedural failure where, in all the circumstances, that failure is sufficiently serious or persistent to justify the action concerned."

He went on to caution that there will be cases "… where it will be proportionate to take very serious action, such as striking out a claim, if the relevant procedural failure is sufficiently serious or persistent." (para. 5.3) The basis for this distinct procedural ground to strike out proceedings was traced to the jurisprudence of the European Court of Human Rights, the judge noting that merely because "the primary drivers of litigation in a common law system are the parties themselves does not absolve the State from the obligation of ensuring that

litigation is conducted in a timely fashion." (para. 5.5) He recalled that the said obligation "… lies on the State as a whole including all of its organs of governance such as the courts." (para. 5.6)

40. He observed that at para. 5.7:

> "It … follows that there must be significant sanctions available to meet significant material or persistent procedural failure and that, in an appropriate case where it is a proportionate response, those sanctions can include the dismissal of a plaintiff's claim. In those circumstances it seems to me that somewhat different considerations apply when a court is faced with a failure to comply with a specific procedural direction as compared with the general considerations which a court has to take into account when assessing whether a plaintiff has progressed their case in a sufficiently timely way to avoid a finding of inordinate and inexcusable delay. Where there is a specific failure to comply with a court direction, the Court must assess how serious and significant the failure is, whether it is persistent and whether there is any legitimate explanation for the failure concerned. In the light of those and any other relevant factors, the Court must then determine what sanction or consequence is proportionate." (emphasis added)

He further noted that -

> "… there may well be cases where, while the overall delay would not warrant the dismissal of proceedings for inordinate and inexcusable delay in accordance with the established jurisprudence, nonetheless a significant or persistent failure to comply with express court orders or directions might justify dismissal as a proportionate consequence of major procedural non-compliance". (para. 5.8)

He noted that case management can only work if the directions given by a case management judge are complied with in a timely manner. "Case management as a whole would be redundant or at least significantly diminished if parties were able to ignore the directions of the Court without significant sanction." (para. 5.8)

Delay

41. Delay is particularly significant in the context of an application to dismiss based on alleged procedural failure. Clarke J. in *Tracey* emphasised as much at paras. 5.6, 5.7, 5.8, 6.5 and 7.7 of his judgment. It will be recalled that in the instant case the Statutory Receiver had brought the second motion to strike out, relying not alone on a failure to comply with the specific direction of the High Court encompassed in the Directions Order but also in respect of the general delay overall in the conduct of the litigation from its inception, albeit that the trial judge's Dismissal Judgment of January 2021 was based on a finding of specific procedural failure referable to non-compliance with the Directions Order. The appellant contends that the judge erred in also considering that the delay from the issue of the plenary summons was inordinate and inexcusable and that the balance of justice required dismissal.

Prejudice

42. Prejudice in the context of an application to dismiss for procedural failure under *Tracey v. McDowell* calls for the moving party to demonstrate specific prejudice. In *Tracey,* Clarke J. attached significant weight to the additional factor concerning a specific element of prejudice arising from a lengthy period which had elapsed since the events the subject matter of the principal proceedings were instituted which fell to be weighed on the balance.

Litigation decisions

43. It is clear from the Dismissal Judgment and having due regard to the pleadings that a series of significant and difficult to understand litigation decisions were made by Greenwich in the course of the within proceedings. Following a notice of rescission being formally served pursuant to General Condition 18 of the contract for sale purporting to bring the said contract to an end between the parties, on the 30 July 2014 the appellant responded by issuing and serving a plenary summons on the 1 September 2014.

44. If it be the case, as I understand it to be, that the purpose of pleadings is to identify all relevant points and issues arising as between the parties at the earliest reasonable opportunity and within the same set of proceedings, the stance of Greenwich leaves much to be desired. A significant corpus of jurisprudence has developed in connection with the so-called rule in *Henderson v. Henderson* (1843) 3 Hare 100 to the effect that where an issue either could or should have been raised in earlier proceedings it may be an abuse of process to allow a litigant launch fresh proceedings agitating such issues and claims which the Court determines could and should have been brought forward in the previous proceedings. The *Henderson* principle did not arise in this application however and there was no application before the trial judge to amend the pleadings.

Ground 1 of the appeal

45. In Ground 1, the appellant contends that the judge erred in dismissing Greenwich's proceedings for a failure to comply with the Directions Order and in her interpretation and application of the principles in *Tracey v. McDowell* in several distinct respects, including, *inter alia:*

(i) In concluding there was both a sufficiently serious and a persistent breach of the prior order.

46. It will be recalled that the Directions Order afforded Greenwich until the 9 November 2019 to "take all steps necessary to apply to have the matter listed for hearing". The order represented a generous exercise of his judicial discretion by Jordan J. The order was made in a context where proceedings seeking damages were in being, but no equitable remedy had been invoked or sought. The defence delivered raised no counterclaim. Therefore, procedurally, albeit that no reply was delivered as of that date – close to four years after delivery of the defence – no defence to counterclaim would arise and it is not apparent that any equitable claim could or would have been pursued in the context of any reply Greenwich might deliver.

47. No motion to amend either the plenary summons or the statement of claim was ever brought by Greenwich. The trial judge at para. 23 of her judgment correctly notes that "sufficiently serious" and "persistent" procedural failures are alternatives. She observed "the judgment in Tracey makes it clear that a persistent failure is an alternative to a sufficiently serious failure and that they are not cumulative requirements." In arriving at an assessment as to whether either a "persistent" or "sufficiently serious breach" had been established, it was open to the trial judge to review the relevant events as identified by her at para. 24 *et sequitur* of the Dismissal Judgment. She considered both the events, the assertions surrounding the events and the reasons given for each relevant event. She properly declined to entertain speculation advanced on behalf of the Statutory Receiver as to the motive of the appellant, stating "I have insufficient evidence to make any determination in relation to the motivation for the delay and nor do I need to decide on this issue, since the matter can be decided without a consideration of motivation. I therefore treat as irrelevant all averments in relation to motivation." (para. 24)

48. In my view, there was evidence before her on which the trial judge was entitled to rely which satisfied her that there had been both a "sufficiently serious" and also a "persistent

breach" of the prior order on the part of Greenwich and the basis for each respective aspect is more fully set out hereafter.

(ii) The finding that there was "no legitimate explanation provided".

49. The importance of the Court taking into account any legitimate explanation advanced on the part of a defaulting party was emphasised by Clarke J. at 5.7 of the *Tracey* judgment as was noted by the trial judge at para. 5 of the Dismissal Judgment. As the Court found, a key explanation advanced on behalf of Greenwich was that "… given the issues which arose during the above period [following the order], it was not possible to have the matter certified for hearing." (para. 26) As the trial judge noted, the affidavit of Mr. Moloughney identified a number of legal issues which Greenwich had never previously agitated or raised at any point subsequent to the institution of the proceedings in 2014.

50. It need hardly be stated that there is a fundamental distinction between the raising of issues in connection with Special Condition 5 in correspondence up to 30 July 2014 in the context of a duly executed contract for sale with a completion date specified within three weeks of the date of execution of same on the one hand, and subsequent engagement alleging non-compliance with Special Condition 5 in the period after service of the notice of rescission on 30 July 2014 on the other. This distinction applies with greater force subsequent to the institution of the proceedings on the 1 September 2014. The "concerns" expressed by Greenwich pertaining to Special Condition 5 cannot be said to have been relevant to the proceedings beyond the context of a claim for damages in circumstances where the pleadings do not; (a) seek an order compelling compliance with either subsection of Special Condition 5, (b) fail to contest or dispute the validity of the rescission notice of the 30 July 2014 whereby the Statutory Receiver sought to bring to an end the contractual relationship that had arisen on foot of the contract for sale of the 7 May 2014 and (c) where

a decree of specific performance is not sought in the face of Greenwich having been served with a notice of rescission purporting to terminate the contract.

51. The judge had to take the pleadings as she found them. Those pleadings sought a substantive remedy in damages. Thus, the ambit of "various legal issues that had not previously been considered" referred to by the trial judge at para. 26 of the Dismissal Judgment had to be confined primarily to the pleaded claim in the case before the Court.

Explanations for delay

52. Mr. Moloughney's affidavit of the 2 July 2020 offers at para. 4 explanations for non-compliance with the Directions Order, "… with the legal year ending by the end of the month it was not possible to take steps at that time which would have enabled a hearing date to be applied for. The summer vacation then intervened." This is not a satisfactory explanation. Greenwich was represented in court at the hearing of the motion, and it was self-evident from the 8 July 2019 what timeframe was being afforded and the conditionality attached to the direction of the High Court judge.

53. With the greatest respect to Mr. Moloughney, the following observations can be made in the context of these proceedings. Firstly, impediments to taking any step whatsoever from the 8 July 2019 to immediately prior to the beginning of the "new legal year" in October 2019 is not the subject of any cogent explanation. The contention that "the summer vacation" intervened does not amount to a legitimate explanation for the delay. It is clear that nothing was done prior to a consultation having taken place. That consultation took place, one infers, either in late September or early October of 2019. Separately, the deponent's reported concern "… that in complying with Special Condition 5 the Vendor could then invalidate such planning permission and have sought to clarify the position from the outset." (para. 4) Such concern is difficult to understand in circumstances where the

vendor/respondent had served notice of rescission of the entire contract on the 30 July 2014 and Greenwich took no step in the ensuing litigation to contest or dispute the validity of same. Further a *lis pendens* was set aside in 2018 - yet Greenwich neither appealed that decision nor instituted proceedings at the time consistent with it maintaining an entitlement to enforce the contract for sale.

54. In such circumstances, arguably, any concerns with regard to the compliance or non-compliance with the terms of Special Condition 5 would firstly have to be the subject matter of litigation to determine either (a) the validity or otherwise of the notice of rescission and/or (b) the entitlement of the appellant to specific performance of the 7 May 2014 contract, neither issue having ever been raised or pleaded by Greenwich within these proceedings.

55. A further point raised in para. 5 of his said affidavit concerns possible issues around title to a strip of land said to be part of the sale. This is not germane to the pleaded claim for damages made and does not amount to a legitimate explanation for any delay. Mr Moloughney knew that the Statutory Receiver had purported to rescind the contract since the 30 July 2014. There could have been no doubt as to this fact with effect from the 22 October 2015 when the defence was delivered. Yet Greenwich had taken no step to contest or impugn the purported rescission. Any disputes with regard to the title to the strip of ground ought to have been raised expeditiously within the three weeks from the execution of the contract for sale on the 7 May 2014 in light of the completion date in the said contract. No explanation is advanced for any omission in that regard. Issues concerning the strip of land in question are at their height characterised by Greenwich in para. 5 of the affidavit of Mr. Moloughney as amounting to a “suspicion”.

56. In essence, the reasoning advanced in the affidavit bears little material relationship to the actual nature of the proceedings in being before the Court and in particular appear to engage with and concern issues which were not, on the basis of the pleadings, at issue or

falling to be determined at trial. The trial judge was entirely correct in her evaluation of the facts and in her conclusion particularly at paras. 31 and 33 of the judgment where she held that there is no explanation why the concerns now raised were not addressed when the plenary summons and statement of claim were drafted in 2014/2015.

57. With regard to the argument advanced that a mix up or misunderstanding as to time occurred, that was readily resolvable had a copy of the order perfected on the 10 July 2019) been procured, as the judge held at para 33. When Mr. Moloughney avers at para. 6 that "given the issues which arose during the above period it was not possible to have the matter certified for hearing" he does so in a context where none of the reasons advanced by him pertain directly or materially to the ambit of the pleadings that were before the Court. As such they were not relevant considerations. With regard to the "delays" and "misunderstanding" as to the running of time, as the judge correctly pointed out "… the obligation was to take the necessary steps to apply to set the case down for hearing". (para. 34) No reason advanced or explanation articulated in the said affidavit amounts to a legitimate explanation for the failures and omissions in question.

Ground 1 (iii) – Proportionality

58. The striking out of proceedings on any basis results in a significant adverse impact for the affected litigant. Therefore, an order made in exercise of the *Tracey v. McDowell* jurisprudence must fall within the range of proportionate responses to the circumstances which have been established to have arisen in the litigation. The consequence in the instant case is that the entitlement of Greenwich to pursue its claim in damages is extinguished and it is precluded from advancing to a full trial. As Clarke J. observed at 5.2 of the *Tracey* decision this is a measure which "should not likely be taken and should only be taken in response to procedural failure where, in all the circumstances, that failure is sufficiently serious or persistent to justify the action concerned."

59. Analysing the *Tracey v. McDowell* principles, in *Tracey v. Irish Times* [2019] IESC 62, MacMenamin J. observed at para. 21;

> "Thus, the Chief Justice pointed out, there may well be cases where a significant or persistent failure to comply with express court orders, or directions, might justify dismissal as a proportionate consequence, as a result of major procedural non-compliance. (See paras. 5.5, 5.6 and 5.8 of *Tracey v. McDowell* [2016]). The Chief Justice went on to point out that, in considering applications such as these, the duty of a court is to take into account the rights and interests of *all* parties, rather than one party, and that to adjourn a case as a result of one party's nonattendance has the potential to affect the rights of other parties well beyond the individual on whose health status a doctor may be required to report. The judgment emphasises that a court is required to balance all the rights involved, and that, in order to achieve this end, a court will often require more information than is sometimes proffered in order to enable it to carry out that task properly. (para. 6.4)" (emphasis in original)

At para. 24, MacMenamin J. noted;

> " Clarke C.J. then went on to pose the rhetorical question, as to whether a *dismissal* of each of the relevant proceedings, rather than some lesser measure, was within the range of proportionate responses which it was open to the Court to take in all the circumstances? He pointed out that, in all such cases, the Court is required to determine where the balance of justice lies. The factors which may be relevant to such a consideration may vary from one type of case to another. In doing so, a court will bear in mind whether there is prejudice to any particular party. (paras. 7.6 and 7.7)" (emphasis in original)

He further recalled that in *Tracey v. McDowell* the Supreme Court had "…determined that the appeals should be allowed, on the basis that the High Court order had not considered the issue of proportionality of the order, which was disproportionate in effect…" (para. 24)

60. In the instant case, the trial judge considered the proportionality of the application to dismiss Greenwich's entire proceedings by particular reference to two distinct factors, firstly, in light of the further pleading steps that the Court had been advised were intended to be taken by Greenwich and secondly, having due regard to the issue of prejudice. In the context of the proportionality assessment the judge considered that this is not a case where Greenwich had inadvertently breached the Directions Order, neither, in the judge's view, did the facts disclose that the case could not be set down for a significant period of time by reason of a requirement for further pleadings in a context where "there is a very good reason for those steps". She gave the example of "the discovery of a highly relevant fact that could not have been discovered earlier." (para. 51).

61. The "further steps proposed" (para. 38) by the appellant involved seeking replies to a notice for particulars, delivery of a reply to the defence disputing the validity of the purported rescission and seeking discovery. On balance were they to be strictly time managed, I do not see that such steps would necessarily cause disproportionate further delay.

62. At para. 41 the judge further noted "that there may be an attempt to consolidate these proceedings with other proceedings seeking specific performance of the very same contract, which were apparently recently issued…" At para 42 she noted; "…it appears that is intended to very significantly reformulate the present case and that it cannot be set down for hearing until that is done." Thus, it was the institution of the separate equity proceedings, and suggestions around consolidation of same with the within proceedings that caused the judge to conclude that the consequent delays rendered the striking out of the proceedings a proportionate order.

Delay

63. The trial judge was entitled to have regard to the delays to date and the risk of relevant further delays. Clarke J. in *Tracey* emphasised the importance of litigation being conducted in a "timely fashion". (para. 5.5) Paragraph 52 of the Dismissal Judgment is relevant to the proportionality assessment exercise she engaged in. She correctly construed the direction of Jordan J. as addressing delay by the imposition of a requirement "intended to permit the case to be heard in early course". That is undoubtedly so. The trial judge, understandably, had concerns regarding the *bona fides* of Greenwich. Her assessment based on a perusal of the papers was that Greenwich had taken "a step designed to ensure the matter would not get on in early course." (para. 52)

64. I am satisfied that the proposed future course of action contemplated by the appellant, as presented to the Court, understandably caused concern to the judge. However, given that she was satisfied that the pleaded case before her gave rise to no more than "moderate risk" of prejudice to the respondent, the trial judge fell into error in treating the unseen pleadings as tipping the balance in favour of striking out the proceedings which were before her under the procedural delay jurisprudence. Other orders were available to the Court to forestall and foreclose the capacity of the appellant to further delay the determination of the within proceedings. The proportionate response mandated by the Supreme Court jurisprudence called for other options falling short of strike-out being explored more fully and discounted before such an irrevocable order was made. This was especially so since the order made had no impact on the specific performance suit which had primarily precipitated the making of the dismissal order in the first place. Therefore, the orders made did not dispose of the equity litigation concerning the property, which, presumably continues before the High Court. As a result, her assessment of the evidence and conclusions fell outside the range of views which were reasonably open to her on the issue of proportionality.

Grounds 1(v) and 1(vi) - The ambit of time considered by the judge

65. It is contended that since Jordan J. in July 2019 had considered the delays that had accrued as of that date to be neither inordinate nor inexcusable the trial judge in the Dismissal Judgment was precluded from revisiting that exercise or reaching adverse conclusions or from taking into account any delays that occurred prior to the 8 July 2019.

66. In each application where delay is a salient factor to be taken into account by a court, it is appropriate that it is at liberty to consider the entirety of the delays it considers relevant as have aggregated and the cumulative impact of same from the date of institution of the proceedings onward, irrespective of whether there has been a previous application before the Court on the issue of delay. Each application which engages with the issue of delay must be considered in its own context. That context necessarily encompasses the ambit of time that elapsed from the commencement of the proceedings. Any other approach is entirely artificial and could potentially give rise to injustice.

67. I find Greenwich's arguments on this ground entirely unconvincing. Several material events had occurred subsequent to the Directions Order that rendered it essential for the judge to review the totality of the conduct of the litigation from its inception. The exercise by Judge Hyland was materially different from that which resulted in the Directions Order. The trial judge's approach included an assessment of the litigation decisions made from 2014 onwards since she was confronted with the fact that no issue had been raised by Greenwich at the time the directions order was made in July 2019 that compliance with its terms presented any difficulty, nor did it apply to the High Court for an extension of time under the directions order at any time. The scenario confronting the trial judge was therefore materially different than the position obtaining at the time the Directions Order was made. This ground of appeal is not made out.

Ground 1(vi) – Failure to canvass or consider alternative measure short of dismissal

68. In light of *Tracey v. McDowell*, as further elaborated upon in *Tracey v. Irish Times*, the High Court is required to carry out a balancing exercise, involving an assessment of two key factors: first, the prior conduct of the litigant, and, second, the explanations advanced for the major procedural non-compliance in question. Based on her assessment of those factors, I am satisfied that the trial judge was entitled to conclude that there had been a failure by Greenwich to comply with the previous directions of the Court.

69. At that point the Court must consider whether a dismissal of the proceedings, rather than some lesser measure, constitutes the appropriate response to the defalcation identified by the Court. On appeal this court must evaluate whether the measure opted for was within the range of proportionate responses open to the trial judge in all the circumstances.

A just order

70. The decision of the Supreme Court in *Tracey v. Minister for Justice* [2018] IESC 45 offers some insights. The Court had to determine whether the High Court judge had erred in striking out Mr. Tracey's proceedings against two individual defendants. The application had been brought pursuant to O.19, r. 28 RSC 1986. The judgment of the Supreme Court illustrates that, in order to make a just order, an appeal court, as well as looking at the facts relied on to support such an application, is also entitled to consider the substance of the case which has been struck out by the High Court. MacMenamin J. observed at para 26:

> "… Courts are entitled to identify what is material and immaterial to the issues to be considered, so as to achieve a just and expeditious resolution of the substance of that issue between the parties to litigation. Parties must be ready to take what steps are necessary to ensure their case is prosecuted effectively. Appeal courts will often be slow to interfere with case management orders or directions."

In his later judgment *Tracey v. Irish Times Ltd*, MacMenamin J. observed concerning his earlier decision in *Tracey v. Minister for Justice* [2018] IESC 45 that:

> "… it shows that, in order to make a just order, an appeal court, as well as looking at the fact of an adjournment, is also entitled to consider the substance or merits of the case which has been struck out." (para. 27)

He strongly emphasised the importance of a trial judge evaluating the range of options available to the Court to ensure that the order made is appropriate noting at para. 32:

> "In an extreme case, a court will be justified in dismissing a case… But, as alternatives, a court may also wish to consider whether a case will stand dismissed, unless a party complies with orders made by a court, or direct that an order be stayed until a particular date. Ancillary orders might comprise directions which are strictly time limited, or a striking out, or adjourning generally, with any application for re-entry to be entered by way of a notice of motion brought on cogent affidavit evidence with exhibits justifying what non-attendance and showing the case is at least arguable."

71. A further excerpt from the judgment of MacMenamin J. is apposite where he notes:

> "34. As a second consideration, in situations such as this, a court may also consider the case itself with a view to determining whether or not the case can succeed? If a case simply cannot succeed, then, even if there is unexplained, or inadequately explained, nonattendance, a court may be justified in making whatever order is just; but should still bear in mind the principle of proportionality, that is, whether a more limited or nuanced order, rather than outright dismissal, might be justified. But, if a court does conclude that there is at least an *'arguable'* case, does not, of course, mean that an application to strike out in the absence of a litigant should be simply refused;

> rather, the duty is to assess what appropriate order should be made, having regard to the circumstances of the case. But it must be remembered that, at the extreme end of the spectrum, a court will retain the power to strike out or dismiss a claim outright for a failure of compliance, or unexplained non-attendance."

Nature of the case as pleaded

72. The pleadings before the Court concerned a claim for monetary sum/damages. It could not confidently be stated that Greenwich had no prospect of succeeding in its claim as pleaded. Given the irrevocable and serious nature of the order made, prior to taking that step it called for a clear evaluation and confident rejection of all the alternative options available – particularly where the Directions Order was not framed as an "unless order" nor was its terms expressed to be peremptory against Greenwich.

73. Notwithstanding the nature of the delays and procedural failure and the lack of an entirely cogent explanation for same it was not established to the requisite standard that that the appellant was likely to effectively disregard further directions of the Court. Clarke J. observed in *Tracey* at 5.8:

> "… it is particularly important to note that modern case management can only work if the case management directions given by a case management judge are complied with in a manner which is both timely and conforms substantially to the orders or directions made."

74. That "significant sanction" in a case such as the present might be satisfied proportionately by virtue of a directions order with clear time limits and the consequences of non-compliance unequivocally spelled out. Bearing in mind that the appellants have an arguable case as claimed, the principle of proportionality required that alternative measures be properly evaluated particularly since the non-compliance on the part of Greenwich were

not proven to fall at the extreme end of the spectrum. The trial judge's assessment of the evidence did not adequately consider the range of appropriate alternative options open to her short of striking out the appellant's proceedings and thereby fell into error.

Grounds (vii) and (viii)

75. This pertains to the treatment by the judge of delays in the period of time to January 2020 and beyond February 2020 respectively as constituting a sufficiently serious or persistent breach. I am satisfied that these arguments are substantially unstateable. The defence was delivered on the 22 October 2015. No reply had been delivered in relation to same as of the 8 July 2019. It must have been clear to the appellant meeting with counsel in late September or early October 2019 that the time for delivery of a reply pursuant to the Rules of the Superior Courts had expired years before. No single credible reason was identified for the continuing failure to deliver the reply within the four months which ran from the 9 July 2019. The statement "… the evidence before the Court confirmed the plaintiff was to deliver its reply*"* is unsatisfactory. This ground is not sustainable.

Ground 1(ix) – Proportionality and the balance of justice

76. The trial judge did consider the aspect of the balance of justice in the context of the evaluation being made. Paragraphs 37 to 54 inclusive could be said to encompass an evaluation in which consideration of the balance of justice was engaged with. However, as stated above, in light of the decisions of MacMenamin J. in *Tracey v. Irish Times Ltd* and in *Tracey v. Minister for Justice* as to the importance of a trial judge properly evaluating the range of orders and options available to the Court to ensure that the order made is appropriate, given the existential implications for the appellant of the order being sought, I find that insufficient consideration was given by the trial judge to the range of alternative

orders available. The pleadings in the specific performance suit were not formally served at that stage and not before the Court.

Ground 1(x)

77. Some consultations and meetings apparently did take place. However, the direction of the High Court was that "the Plaintiff do within four calendar months of the date hereof take all steps necessary to apply to have the matter listed for hearing." The activities of the appellant fell short of compliance with the direction of the Court as the trial judge was entitled to find.

Ground 1(xi) – The absence of exhibits

78. This ground of appeal is not made out, particularly as the Revisit Judgment at paras. 1 and 8 makes clear. As the judge further sets out at para. 11 of that judgment, whilst the appellant knew of the issues in relation to Special Condition 5 in the contract for sale and the planning permission from the time of the contract and indeed prior to the institution of the proceedings in 2014, these matters were not addressed in the within proceedings until 2020 after the directions given by Judge Jordan. "Only at that stage did the plaintiff identify them as issues that would require to be attended to by discovery, particulars and possible amendment of pleadings." (para. 11)

Grounds 1(xii), and (xiii)

79. The trial judge's determinations are premised, *inter alia*, on not alone the pleadings which were before the Court but also other proceedings reported to have been instituted seeking specific performance of the contract for sale but which had not yet been served on the respondents and no copies of which had been put before the Court (para. 41 of Dismissal Judgment). There are inherent dangers in making orders striking out proceedings based on an evaluation of factors arising in other proceedings which are not before the Court and

where no application stands before the Court relevant to same. Where such circumstances arise and it is evident that both sets of proceedings derive from the same facts it is preferable in the interests of justice that the matter be put back so that all relevant issues can be put before the Court together or, should that not be an option, the issue ought to be determined based on the case before the Court alone.

80. The trial judge fell into error in finding at para. 44;

> "…an election was made in the proceedings in 2014 that an action for damages would be brought rather than specific performance. It is too late for the plaintiff to do an about turn in 2020 and decide that, after a court has ordered it to apply to set the case down within four months, it will instead ignore the Order and substantially recast its case."

The said observations concerned proceedings which were not before the Court. There was no motion before her to amend the within proceedings. The orders made by the trial judge did not extend to or affect the later proceedings. The application fell primarily to be considered in the light of the pleadings before her. The practical consequences of striking out the first claim whilst the later proceedings remained intact was not adequately considered.

Ground 1(xiv)

81. The judgment of the Court cannot be faulted by reason that the judge alludes to the Review of the Administration of Civil Justice of October 2020. Legal representatives of litigants would do well to be alive to evolutions and developments in the context of reports and recommendations aimed at addressing excessive delays in litigation. Further, the Review of the Administration of Civil Justice in and of itself was not a sole ground for any determination on the part of the judge. This ground of appeal is without merit.

Ground 1(xv)

82. To assert, as the appellant does, that discovery could not be sought because it would have been premature "in the absence of pleadings being closed" is profoundly unsatisfactory. The Defence was delivered on the 22 October 2015; the time ran therefrom for the delivery of a Reply. It was a matter for the appellant to decide whether a Reply was warranted or not in light of Order 23 RSC. This ground of appeal is not established.

Ground 2 – Delays

83. Delays from issue of plenary summons in September 2014 to the issuing of motion on 21 February 2020, were not either inordinate and inexcusable contrary to the trial judge's findings whether for the reasons given for the breach of the prior order or otherwise and the trial judge erred in so finding.

84. This ground of appeal is directed to para. 54 of the judgment which states:

> "The notice of motion also seeks dismissal for inexcusable and inordinate delay and want of prosecution pursuant to the inherent jurisdiction of the Court … That relief is unnecessary as I have granted the first relief. … if it was necessary to adjudicate on this ground, I would have concluded that the delay, measured from the issuing of the plenary summons on 1 September 2014 to the issuing of this motion on 21 February 2020, was in all the circumstances inordinate. Further, given my rejection of the reasons for that delay, I would have treated the delay as inexcusable. Finally, for the reasons set out above in the context of the first relief, the balance of justice would have required dismissal."

85. The appropriate principles to be applied where proceedings are sought to be struck out on grounds of inordinate and inexcusable delay are set out in the case-law including *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, *Anglo Irish Beef Processors Ltd v.*

Montgomery [2002] IESC 60, [2002] 3 I.R. 510**,** and *McNamee v. Boyce* [2017] IESC 24. Where it is established that the delays in prosecuting a claim are both inordinate and inexcusable the balance of justice lies in favour of dismissing the proceedings as was held in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, *O'Domhnaill v. Merrick* [1984] I.R. 151 and more recently clarified by McKechnie J. in *Mangan v. Dockeray* [2020] IESC 67. At para. 105, he distilled the key principles from the decision of Hamilton C.J. in *Primor as* follows*;*

> "As the relevant passages from the judgment of the Chief Justice are well known, it will be sufficient to simply indicate the following:-
>
> - The delay complained of must be both inordinate and inexcusable: it is for the moving party to so prove.
> - Even where such is established, the balance of justice test must be applied: does it favour the continuation or termination of the proceedings?
> - In considering the latter, there may be several diverse factors at play, but in essence all lead to an assessment of whether it is unfair to allow the action to proceed or is unjust to strike the action out.
> - The individual circumstances of every case and the conduct of each party feeds into this assessment."

86. At para. 128 McKechnie J. observed;

> "In order for this Court to be satisfied that a dismissal of the proceedings is warranted on delay/prejudice grounds, it must first be established that the delay is both inordinate and inexcusable. If it is not so established, that is an end to the matter. If however it is so satisfied, then it must embark on the balance of justice test. What that entails has been expressed in *Primor* (pp. 475 and 476). In addition, however,

> regard must be had to the parallel or perhaps more accurately the overlapping jurisprudence set out in *O'Domhnaill* and in later cases such as *Toal No.1* and *Toal No.2.* In this regard, the court must ask whether, in all the circumstances, even where the plaintiff is entirely exonerated from blame and even where the statute cannot be successfully pleaded, nonetheless it would still be patently unjust to require a defendant to defend such proceedings in light of the period of delay and the intervening circumstances so adjudged to have occurred."

87. In my view, the assessment falls to be carried out in the context of the proceedings that were before the judge namely a claim in damages rather than one anticipated to encompass an application for equitable relief such as a decree of specific performance.

88. The approach of the Court of Appeal when considering an appeal from a decision of the High Court on an application to dismiss an action on the basis of inordinate and inexcusable delay is well settled and is exemplified in decisions such as *Collins v. The Minister for Justice, Equality and Law Reform* [2015] IECA 27 of Irvine J. which adopted in turn the approach of the Supreme Court adumbrated by MacMenamin J. in *Lismore Builders Limited (in Receivership) v. Bank of Ireland Finance Limited* [2013] IESC 6. Irvine J. observed at para. 79: -

> "... while the Court of Appeal … will pay great weight to the views of the trial judge, the ultimate decision is one for the Appellate Court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting the Court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."

In *Cassidy v. The Provincialate* [2015] IECA 74 Irvine J. observed at para. 27 –

> "In *Collins* the Court considered the nature of an application to dismiss proceedings on the grounds of inordinate and inexcusable delay and concluded that such applications require the presiding judge to decide mixed questions of law and fact rather than questions which might be considered to be of a truly discretionary nature. It also expressed itself satisfied that, given that applications of this type are resolved by reference to facts which are fully set out on affidavit, it is difficult to advance any valid reason as to why the merits of the High Court decision on such an issue should not be fully reconsidered on an appeal, should the interests of justice so require."

She further stated –

> "while this Court must give due consideration to the conclusions of the High Court judge, it is nonetheless free to exercise its own discretion as to whether or not the claim should be dismissed, if satisfied that the interests of justice dictate such an approach." (para. 28)

89. Where the delay established is both inordinate and inexcusable on the part of the appellant, it will be recalled that the Supreme Court in *Primor* has mandated that "… the court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the proceeding of the case." (*per* Hamilton C.J., p. 475). It was incumbent on the respondent as the moving party in this second motion to dismiss to discharge the burden of proving that the balance of justice favoured the dismissal of the appellant's claim. This is a separate and distinct limb or hurdle to be met and discharged by the moving party. This case involved a defendant seeking to have the proceedings struck out for, *inter alia*, inordinate and inexcusable delay.

90. The difficulty presented is that it is unclear as to which strands of jurisprudence the trial judge was relying upon at para. 54 of her judgment in determining that the balance of

justice required the dismissal of the proceedings. Of particular concern is the process and methodology whereby prejudice and the nature and extent of same was considered to be likely to be suffered by the respondent. Implicitly, the judge's observations with regard to the likely "moderate prejudice" she considered might be suffered by the respondent is reflective of the jurisprudence of this Court and in particular *McNamee v. Boyce* [2016] IECA 19 where it was held that once a plaintiff has been shown to be guilty of inordinate and inexcusable delay in the prosecution of its claim the defendant merely has to prove "moderate" prejudice arising from the said delay in order to be entitled to an order dismissing the proceedings pursuant to the *Primor* principles. In my view, the application before the Court was directed to the proceedings in being which had been served on the defendant/applicant and accordingly a consideration of prejudice in the context of potential future proceedings or other distinct proceedings in being or the possibility of a possible consolidation of such proceedings, which clearly had not been seen either by the respondent or the judge was inappropriate and injected a factor into the prejudice evaluation that was not warranted in all the circumstances.

91. The starting point in connection with prejudice was that this was a claim in damages. It was likely to be a documents case. There was no reason why stringent case management could not bring the case to trial within a reasonable period of time. I am not satisfied accordingly in all the circumstances that the trial judge entered into a sufficient assessment as to whether the respondent had demonstrated sufficient prejudice to shift the balance of justice in favour of dismissing the appellant's claim. Accordingly, I am satisfied that the proceedings ought not to be struck out notwithstanding that the delays on the part of the appellant are both inordinate and inexcusable by reason that the respondent did not establish to the appropriate standard that the balance of justice required such dismissal in all the

circumstances of this case of the suit actually before the Court and under consideration by the trial judge.

92. The general delays in this case must be viewed in a number of respects specific to the context and factual matrix obtaining in the litigation. This was litigation involving a Statutory Receiver appointed pursuant to the provisions of the NAMA Act, 2009. The Act came into operation on the 20 December 2009; the respondent was a Statutory Receiver appointed pursuant to Chapter 3 of the said Act. The sale by the Statutory Receiver was in the context of the realisation of the securities and assets of the failed institution formerly known as Anglo Irish Bank. The Contract of the 7 May 2014 specified on its face that the closing date for the sale of the property in question was three weeks from the date of the contract. As of January 2021, when this second motion seeking, *inter alia*, an order striking out the proceedings by reason that the delays were said to be inordinate and inexcusable the position disclosed to the trial judge was that the appellant contemplated serving other proceedings on the respondent seeking specific performance.

93. Balanced against that was the fact that the case in front of the judge sounded in damages and furthermore was a documents case where the dispute concerned the legal implications meaning and effect of the terms of a contract for sale, the legal effect of steps taken and the import of a notice to rescind served in 2014.

94. The fate of the equity suit fell to be determined on a different date. The existence of that claim *per se* did not warrant striking out the proceedings on the grounds of inordinate and inexcusable delay.

95. There was evidence before the trial judge supporting her assessment in relation to the inordinate nature of the delay and its inexcusability. However, there was insufficient

evidence before her to entitle her to conclude that the balance of justice required the proceedings seeking damages should be struck out in light of the jurisprudence in that regard.

Ground 3 – Finding of considerable prejudice to the respondent

96. As the respondent accepted and the trial judge noted at para. 46:

> "The defendant alleges prejudice in having to run a case where a significant period of time will have elapsed, while acknowledging that this is a case where documents will be at least as important as oral evidence if not more so. There is always prejudice by virtue of significant delay where a case requires recollection from witnesses of events long past. The extent of the prejudice will depend on the extent to which recollection is an important feature of the case."

97. The trial judge then observed at para. 47:

> "Here, as pleaded, it appears there would be moderate prejudice since recollection will not feature particularly strongly. However, the contours of the case, should it be altered in the way now suggested by the plaintiff and particularly if it is consolidated with the proceedings seeking specific performance, are now most uncertain. The prejudice to the defendant may well increase. The particulars served in 2020 suggest that the plaintiff is intending to broaden the case in a way that may increase the relevance of recollection by witnesses of past events. I am satisfied the proposed approach of the plaintiff is likely to increase the prejudice beyond a moderate level."

98. Her finding of increased prejudice to the respondent was based on speculation as to the anticipated fate of the separate proceedings/specific performance claims which were not before the Court. Such prejudice falls outside the ambit of what could reasonably and relevantly have been taken account of and fell rather to be considered in the context of any

possible future application either by Greenwich or the Special Receiver concerning same. The specific performance suit was not the subject of any order made by the trial judge.

Ground 4 – The "attempted rescission"

99. This ground represents a substantially unorthodox approach on the part of the appellant. In circumstances where on the 30 July 2014 the vendor had served a notice of rescission purporting to bring all dealings to an end and terminating the contract for sale, one would have expected that in the context of the institution of proceedings against the vendor the validity of the notice of rescission which is *prima facie* valid and ostensibly in compliance with General Condition 18 would be put in issue front and centre. This was necessary for, should it transpire that the notice of rescission was valid or that the appellant by reason of their conduct were to be found estopped from impugning the validity of the notice, then all rights and claims pursuant to the contract for sale as enured for the benefit of the appellant would have come to an end on the 30 July 2014 with ensuing consequences including, potentially, to the ambit of any claim with regard to damages.

100. These aspects are not in issue at the proceedings but stem from a perusal of the General Conditions and the Special Conditions in the contract for sale which have been exhibited in the proceedings. That being so, it is a matter of no little surprise that neither in the context of the plenary summons of September 2014, the statement of claim of May 2015 or a reply which has not yet, so far as one can ascertain, been served at all, have the specific enforceability of the contract for sale and/or validity of the notice of rescission been put in issue. The failure of the appellant to impugn or challenge the validity of the notice of rescission may possibly have significant consequences in an equity suit had one existed.

101. Whilst the appellant is correct that "the purported rescission was an (*sic*) unilateral act of the respondent" (para. 23), as a matter of law its import was not unilateral for if it were

valid, it terminated the contractual relationship between the parties and brought to an end the rights and entitlements of the appellant under the contract. A bare "immediate rejection" by the appellant does not resolve the important issue as to the validity or otherwise of the notice of rescission. Merely because the appellant rejected the notice of rescission served upon it does not have a bearing on its validity. Were it to be valid there was no contract. It follows that Ground 4 is not made out.

Ground 5

102. This states, *inter alia*,

> "The failure of the respondent to furnish requested clarifications pertaining directly to the contract was damaging to the appellant's ability to make further decisions thereon, including on specific performance thereof in order to progress the development of the property. The …. judge erred …. in conflating such detriment with the case as made and/or in determining that the appellant had elected to pursue a damages claim only to the exclusion of specific performance … and/or in determining the appellant was too late to take further action and/or that the appellant had concerns in 2014 which he did not address at the time or on which he failed to take any steps to introduce into the proceedings until 2020."

103. The rolled-up nature of this ground of appeal is unsatisfactory. A review of the pleadings and proceedings suggest that on the 23 January 2020, over half a year following the Directions Order, Greenwich raised a notice for particulars arising from the Defence which had been delivered on the 22 October 2015. Ground 5 implicitly acknowledges that as of the date of service of the said notice there were no proceedings in being seeking specific performance of the contract of the 7 May 2014. It is suggested that the failure of the respondent to furnish the said replies was "damaging to the appellant's ability to make

further decisions … including on specific performance …". The basis for that contention is not understood.

104. A litigation decision regarding whether to seek a decree of specific performance ought to have been made in a timely fashion. That such a significant and central decision had not been made over five and a half years following the institution of the proceedings is nowhere explained and calls for a coherent explanation – not in these proceedings but in the equity proceedings themselves. The pleadings being the writ and the statement of claim in the above entitled proceedings as they stood, un-amended, both on the 8 July 2019 and on the 20 January 2021 were such that the primary remedy being sought amounted to contractual and other damages in proceedings instituted consequent upon the service of a rescission notice pursuant to the contract for sale General Condition 18.

105. On the face of it, the pleaded claim appears to engage s. 53 of the Land and Conveyancing Law Reform Act, 2009. Historically, such a cause of action was not available until the passing of the Land and Conveyancing Law Reform Act, 2009 and the coming into operation of s. 53 which abolished the rule in *Bain v Fothergill* [1874] L.R. 7 H.L. 158. As Wylie & Woods in *Irish Conveyancing Law* (4th Ed., Bloomsbury Professional, 2019) observe at 16.81: -

> "The recovery of damages by the purchaser for breach of contract by the vendor is also governed by the general law of contract ... Until recently, this was subject to one major restriction, usually known as the rule in *Bain v Fothergill* (1874) LR 7 HL 158. This rule stated that, where the breach of contract relied upon by the purchaser was the vendor's failure to show good title to the property in question, then, provided the vendor was not fraudulent and did not act otherwise in bad faith, the purchaser was not entitled to recover damages for loss of bargain but was limited to recovery of his deposit with interest and any expenses incurred in investigation of the title. This

controversial rule has been abolished by s 53 of the Land and Conveyancing Law Reform Act 2009 in respect of contracts made after 1 December 2009." (footnotes included)

106. The failure to plead the remedy of specific performance is unlikely to have been an oversight. The ambit of the pleadings must be deemed to have been known and understood by the appellant. The delivery of the defence on the 22 October 2015 afforded a fresh opportunity to consider the matters put at issue in the litigation. It is significant also that on the 7 September 2018 the respondent issued a motion seeking to vacate the *lis pendens*. That was grounded on an affidavit sworn by the respondent. At para. 13 he deposes: -

"The reliefs seek no interest in the property.

Instead they seek

(i) [D]amages for breach of contract;

(ii) Orders directing the production of certain planning documentation;

(iii) Alternative orders directing production of documentation confirming planning permission is not required.

They do not advance a claim to an estate or interest in land. Accordingly, I believe and am advised by solicitor and counsel that this action which does not fall within the class of actions under s.121(2) of the Land and Conveyancing Law Reform Act, 2009 which may be registered as a *lis pendens*." (emphasis added)

107. In a replying affidavit sworn on the 21 November 2018, Mr. Moloughney deposed at para. 12: -

"… in light of the attempts of the Vendor to rescind the Contract for Sale, which was a completed contract and for which a deposit of €102,500.00 has been paid, the

> Purchaser was left with no option but to register the within *lis pendens* in order to protect their interest in the subject property. Further, as can be seen from para. 4 of the Indorsement of Claim, the Plaintiff is clearly advancing an interest in the property by virtue of, not only the deposit paid, but also by virtue of the binding contract of sale which was entered into by the parties, and I beg to refer to the said Indorsement of Claim when produced."

It appears there were mutual misunderstandings between the parties as to the import of the appellant's pleaded claim. But these are issues for the substantive hearing not this motion.

108. At paragraph 13 of the said affidavit Mr. Moloughney indicates; -

> "… the Plaintiff has, at all times, wished to continue with and complete the binding contract of sale as between the parties. It is the Vendor's unwillingness to comply with Special Condition 5 of the Contract for Sale in an appropriate and/or lawful and/or proper manner and/or at all that has resulted in the within proceedings being necessitated."

He further deposed at para. 14 –

> "If the reliefs sought on the Notice of Motion are granted the substantive reliefs as sought by the Plaintiff would become moot."

109. The order vacating the *lis pendens* was made on 26 November 2018 by Cross J. It was not appealed. In that eventuality neither prior to the hearing of the said motion or thereafter was an application at any time brought to amend the pleadings to seek a decree of specific performance.

110. Indication was given in the course of the hearing of the appeal that proceedings were commenced by the appellant in May 2020 by way of plenary proceedings seeking specific performance. In the context of the within proceedings and the state of those pleadings at the

date of the hearing of the motion in January 2021, the trial judge was entitled to have some regard to that litigation event. But the orders made by the Court terminated the within proceedings which seek only damages and where the risk of prejudice to the respondent from allowing them to continue in their current iteration was considered by the trial judge to be "moderate" (para. 47). The balance of justice did not warrant the said proceedings being struck out, in the circumstances. Different considerations might arise were the litigation at issue seeking equitable remedies such as specific performance. I conclude that this ground is established in part only.

Ground 6

111. It is contended that the Court erred in failing to take the appellant's case at its height and in determining key issues of fact against the appellant at the interlocutory stage. I find some force in that argument for the following reasons:

(a) Irrespective of what the appellant asserted it intended or contemplated doing, the primary matters for consideration lay within the four corners of the pleaded action of the appellant.

(b) That pleaded case was confined to damages for breach of contract and the production of certain documentation.

(c) The pleadings in regard to specific performance were not before the Court though of course they were alluded to.

(d) A number of options were available to the respondent in regard to the latter proceedings, including the bringing of a motion to strike out same on a number of alternative bases.

(e) No such motion was before the Court however, and

(f) accordingly in my view it was a disproportionate measure on the part of the trial judge to strike out the proceedings seeking damages for breach of contract which I understand to be proceedings brought in the context of the abolition of the rule in *Bain v. Fothergill* in section 53 of the 2009 Land and Conveyancing Law Reform Act or otherwise a claim in damages.

(g) It could not be said with confidence that the appellant's claim was doomed in its prospects in that regard.

(h) To reach such a determination it would involve an analysis of the special conditions, the relevant general conditions and the context and circumstances surrounding the purported service of the rescission notice in July 2014 – all steps best left to the trial judge in all the circumstances.

Ground 7

112. The complaints of the appellant regarding "the perceived absence of exhibits" referable to positive averments in the affidavit of Pat Moloughney sworn 2 July 2020 are unpersuasive.

113. Proper care and attention to detail would have ensured that all exhibits being relied upon by the appellant in the context of a very significant motion brought to strike out the proceedings for non-compliance with the directions of the High Court made on the 8 July 2019 would have been included - whether or not they had been put before the Court by way of exhibit or otherwise in the context of one of the earlier motions or otherwise. The complaints regarding "the perceived absence of exhibits" referable to positive averments in the affidavit of Pat Moloughney sworn 2 July 2020 are unpersuasive. I am satisfied that the judge had regard to all relevant exhibits and material before her – as her judgments clearly

demonstrate. This ground of appeal is not made out. Her conclusions were reasonably open to her on the issue in light of the totality of the evidence.

114. Further I am satisfied that the trial judge was entirely correct in the Revisit Judgment. No valid basis for the review sought was made out or established. She was entirely correct in refusing to re-open the proceedings and no basis has been established for this court disturbing same. This ground of appeal entirely fails.

Conclusions

115. This appellant has exhibited a degree of lassitude in progressing this claim from the 1 September 2014 onward. The pleadings in themselves are opaque insofar as in the context of a conveyancing transaction where the contract is pleaded, the appellant refrains from disclosing in the pleadings that a notice of rescission had been served purporting to be so served pursuant to General Condition 18 purporting to bring the contract to an end. In such a context, it is relevant that no completion notice had been served and a decree of specific performance had not been sought. At the date of the hearing of the motion in January 2021 before Hyland J., a fresh set of proceedings seeking a decree of specific performance had been instituted but not served on the respondent. It appears that same was served in or about May 2021 after the conclusion of the proceedings when both judgments of Hyland J. had been delivered.

Proportionality

116. Taking account of the test in *Tracey v. McDowell*, it is clear that a claim of specific failure to comply with a court direction was made out against the appellant. It was serious. It was significant. It was persistent insofar as a time frame given was not complied with, and in the window of opportunity presented between the institution of the further motion on the 21 February 2020 and the hearing of that motion almost a year later on the 20 January

2021 the failures persisted. The appellant was in no position to identify when compliance could be achieved. The judge for the reasons stated was entitled to conclude that there was no legitimate explanation for the failures concerned. The conduct of the appellant did warrant a sanction. Such a sanction could be significant as the facts warranted but was required to be proportionate in its effect as the Supreme Court has repeatedly stated.

117. As was observed by Clarke J. in *Tracey v. McDowell* at 1.4:

> "In simple terms the core issue which this Court has to decide is whether the dismissal … the ... proceedings was within the range of proportionate responses to the circumstances which had arisen …"

Clarke J. observed that dismissing or striking out a pleading which would diminish or extinguish the entitlement of a party to put his case forward at a full trial is a step which should not likely be taken. Further, he emphasised that such a step should only be taken "… in response to procedural failure where, in all the circumstances that failure is sufficiently serious or persistent to justify the action concerned." (para. 5.2) *Accordingly*, the degree of seriousness or persistence must reach a threshold such that the Court is satisfied that striking out or dismissal is a proportionate response. It is clear from the judgment of Clarke J. that delays can form an important factor to be taken into account.

118. Once the trial judge had, quite correctly, determined as she did at para. 29 of the judgment that she could only evaluate the motion "based on the pleadings before me"; a proportionate exercise of the *Tracey v. McDowell* jurisdiction warranted an evaluation of the proceedings and a determination as to the appropriate sanction and an application of the principles of proportionality on that basis alone and not encompassing extraneous (though related) litigation or like measures being taken or in the contemplation of the appellant and in particular the existence of the specific performance suit.

119. The delays subsequent to the 8 July 2019 in the instant case appeared to have derived from a mixture of unwarranted inertia by reason of miscalculation as to the relevant period of time afforded to comply with directions coupled with a misplaced strategy towards incorporating into the proceedings, or running in parallel therewith, an equity suit seeking specific performance of the contract.

120. It appears to me that a less draconian option was available to the trial judge which better met the justice of the case, balanced the respective rights and interests of the parties and was proportionate in light of the fact that the pleaded case was clearly arguable.

121. The balance of justice required that the appellant ought to be permitted to pursue the claim in the proceedings where it would appear that in effect such will amount to a documents case and directions can be given to expedite the hearing of the action. A strike out gave rise to a significant risk of a serious injustice being visited upon Greenwich. Insofar as the basis for striking out the proceedings extended to and encompassed a possibility that "the plaintiff may be intending to radically alter the relief sought so as to claim specific performance" the trial judge fell into error. The trial judge correctly identified at para. 29 that she could only evaluate the motion based on the pleadings before her. She noted that the plaintiff "may be intending to radically alter the relief sought so as to claim specific performance." She returns to the issue of the separate proceedings seeking specific performance at para. 41 of the judgment where she observes that:

> "There may be an attempt to consolidate these proceedings with other proceedings seeking specific performance of the very same contract …"

122. Undoubtedly, the existence of the specific performance writ had a significant and disproportionate influence on the judge's conclusion with regard to the assessment of proportionality of response particularly when considered in the context of para. 42 of the

judgment; "[i]n short it appears that it is intended to very significantly reformulate the present case and that it cannot be set down for hearing until that is done". Those observations are noteworthy in light of para. 44 of the judgment where the judge considers the absence of an explanation for why either rescission or specific performance was not pleaded in 2014, "… as opposed to by way of separate proceedings, apparently issued in 2020." The judge concluded, "It is too late for the plaintiff to do an about turn in 2020 and decide that, after a Court has ordered it to apply to set the case down within four months, it will instead ignore the order and substantially recast the case".

123. A proportionate response that balanced the respective rights of the parties in all the circumstances lay in disaggregating the specific performance suit – which was not before the Court at all – from the damages suit. The striking out of the within proceedings was a draconian measure which was not commensurate with the interests of justice in light of the relevant facts. It brought to an end for all time the *prima facie* right of the plaintiff to have the damages claim determined. No observation can be made with regard to its prospects for success but in light of the repeal of the rule in *Bain v. Fothergill* by s. 53 of the 2009 Land and Conveyancing Act, that claim is stateable. The justice of the case required that the appropriate course of action was for the Court to actively case manage the litigation to ensure an early trial.

124. No motion to strike out the specific performance proceedings on any basis was before the judge. Indeed, it would appear that no such motion could have been before the judge for the proceedings had not then even been served on the respondent. Nevertheless, by unduly taking into account the existence of the proceedings and entering into a conjecture that envisaged the continuance of the said proceedings and indeed the possibility that the same would remain extant and would result in the litigation before her being "substantially recast" resulted in the trial judge falling into error in the proportionality exercise.

125. Accordingly, the order made in all the circumstances was not proportionate and failed to balance the rights and interests of the parties as the *Tracey v. McDowell* jurisprudence requires. Further though the delays of Greenwich were both inordinate and inexcusable the balance of justice favoured allowing the proceedings continue to trial where the case was arguable and this was primarily a documents case.

126. In my view in all the circumstances, the appeal should be allowed insofar as the order dismissing the appellant's claim for want of prosecution for failure to comply with the Directions Order is concerned only. The Order refusing to re-open the proceedings was correctly made and should not be disturbed.

127. Given that the suit involved a damages claim, the balance of justice requires the case to proceed – but since the attitude of the appellant towards the times provided in the Rules of the Superior Courts and the directions order has been somewhat cavalier it is proposed that the case proceed provided the following time frame be adhered to: -

(a) 14 days from the date of this judgment for the respondent to reply to the appellant's notice for particulars dated the 23 January 2020.

(b) 21 days from the date of this judgment for the appellant to serve on the respondent any request for discovery.

(c) 21 days from the date of this judgment for the respondent to serve on the appellant any request for discovery.

(d) 21 days from the perfecting of the order herein for the delivery of any Reply in accordance with Order 23 RSC to the Defence delivered on the 22 October 2015.

(e) Time is to run during the long vacation in respect of (a) – (d) inclusive above.

(f) Thereafter the matter to be listed in the Chancery List for further case management.

Costs

128. Many grounds of appeal were not successful. The appellant has failed to establish that the decision of the trial judge erred in her refusal to re-open the proceedings. In that regard the respondent is entitled to his costs in the High Court and in this court in relation to the appellant's application to re-open the proceedings which culminated in the judgment of Hyland J. dated 3 March 2021. Payment of the said costs to be stayed pending the conclusion of the within proceedings.

129. Otherwise, the appellant is not entitled to its costs in respect of the aspects of the appeal wherein it has succeeded. I am satisfied that the appropriate order, both in the High Court and this Court, is that there be no order as to costs (save as provided at para. 128 above in relation to the Revisit Judgment) in circumstances where the appellant pursued a whole variety of grounds which were clearly not maintainable and has succeeded on a limited basis principally in regard to the issue of proportionality. Further additional reasons for the purposes of s. 169(1) of the Legal Services Regulation Act 2015 as to why no order as to costs should be made in favour of the appellant include: the conduct of the appellant has not been satisfactory in the context of the pursuance of the proceedings from the date of their institution to date. The delays are exceptional and for the most part unwarranted and were both inordinate and inexcusable. Having instituted the proceedings and effected the sterilisation of the property by the registration of a *lis pendens* which was kept in place for over four years, the appellant exhibited no enthusiasm in pursuing its damages claim. I am satisfied it was not reasonable for the appellant to raise, pursue and contest a whole variety of issues in this appeal, including the nature and extent of the failures to comply with the relevant Court order and contending that its omissions were not serious or significant in that

regard. Greenwich denied the significance of its own failures and conveyed a cavalier approach to the Rules of the Superior Court. Arguing that its failure to comply with the Directions Order was not *persistent* notwithstanding that same continued for many months beyond the deadline specified on the face of the order - and asserting that its explanations were legitimate for the failures when clearly, they were not, was sub-optimal and wasteful.

130. The appellant's conduct was also unsatisfactory in its approach to the proceedings particularly before the High Court where it was disclosed that there was in existence a plenary summons which had issued seeking a decree of specific performance of the contract in question, yet any such pleadings were only served after the Revisit Judgment of the High Court was delivered in March 2021. They should have been put before the Court.

131. Insofar as the appellants sought to place oblique reliance on the specific performance proceedings in the context of the motion being heard by the trial judge as a basis for opposing same, this may well have contributed to confusion in the overall assessment of the proportionality principle.

132. Furthermore, the process of concluding of the receivership has been delayed by the litigation and the conduct of the appellant.

133. Accordingly, each side should bear their own costs in this Court in respect of the Dismissal Motion and also in respect of the High Court hearing of same. If either party contends for a different order as to costs written submissions to be filed with the Court of Appeal office and exchanged between the parties within 14 days of delivery of the within judgment as to the basis on which it is contended that a different order ought to be made as regards costs. If necessary, the Court will thereafter fix a date for the hearing of any such application.

134. As this judgment is being delivered electronically Faherty and Binchy JJ. have authorised me to hereby record their agreement with same.