



THE COURT OF APPEAL

CIVIL

Record Number: 2021/288 and 2022/15

Costello J.

Neutral Citation Number [2022] IECA 55

Pilkington J.
Barniville J.

BETWEEN:

JOHN M. HARRINGTON

**PLAINTIFF/
APPELLANT**

- AND -

**GREENWAY PROPERTIES LIMITED, GREENWAY HOLDINGS LIMITED AND
OTHERS, LIMBAL LIMITED, YOU'RE SECURE SOLUTIONS LIMITED,
PETER FITZGERALD, JOHN CARMODY, JAMES BARRETT AND MARTIN
BARRETT**

**DEFENDANTS/
RESPONDENTS**

JUDGMENT of Mr. Justice Barniville delivered on the 10th day of March 2022

Introduction

1. This is my judgment in two appeals brought by the plaintiff/appellant (referred to here as the “plaintiff”). Following the hearing of the appeals on 7 March 2022, the Court indicated that it was dismissing both appeals and would set out its reasons in a written judgment later in the week. This judgment sets out those reasons.
2. The plaintiff has appealed against two orders made by McDonald J. in the High Court, sitting as the judge of the Commercial List, which were made on 1 November 2021

and 20 December 2021. Those orders were made in the course of proceedings commenced by the plaintiff in the High Court on 11 August 2021.

3. In the order of 1 November 2021, the judge entered the proceedings in the Commercial List of the High Court, on the application of the defendants/respondents (referred to here throughout as the “defendants”) and made certain directions which included a direction that the plaintiff deliver a statement of claim in the proceedings within fourteen days from the date of service of the order. The judge also gave the defendants liberty to issue a motion returnable on 29 November 2021 to dismiss the proceedings in the event of the plaintiff’s failure to comply with the directions made in that order. The plaintiff failed to comply with those directions.

4. The defendants then brought a further motion seeking to have the proceedings dismissed for failure to comply with the directions contained in the order of 1 November 2021. On 6 December 2021, the judge made an order that unless the plaintiff delivered a statement of claim within ten days of the posting of that order the proceedings would stand dismissed (the “*unless order*”). The plaintiff has not appealed the order of 6 December 2021. He did not deliver a statement of claim.

5. On 20 December 2021, the judge held that the *unless order* had taken effect and that the proceedings, therefore, stood dismissed on foot of that order. A further order was made on that date that the proceedings would be and were dismissed for failure to deliver a statement of claim within the time required in the order of 6 December 2021. The plaintiff has appealed from the order of 20 December 2021.

6. The plaintiff did not appear before the High Court on any of the dates on which the orders just referred to were made. He did, however, appear on each of the occasions on which his appeals were listed for directions in the Court of Appeal and for the hearing of the appeals on 7 March 2022.

The Proceedings

7. The plaintiff commenced these proceedings by a plenary summons which was issued on 11 August 2021. In the plenary summons the plaintiff claims to have a legal right and claim to certain lands in Galway which are comprised in Folio GY21319 (the “lands”). The plaintiff claims that he has a “*legal right and legal claim*” over the lands (para. 8). The plaintiff disputes the defendants’ title to the lands and pleads that the defendants’ title is not absolute (paras. 24 and 40). The plaintiff asserts an entitlement to remain on and to occupy the lands under a lease (paras. 9, 28 and 29). The plaintiff claims that in May 2021 the defendants and/or their agents unlawfully entered onto the lands and removed the plaintiff’s property, animals and livestock and caused damage to his property. Various reliefs were sought including orders directing the defendants and/or their agents or others to keep away from the lands, preventing the defendants and/or their agents and others from carrying out any surveys on the lands, preventing them from applying for planning permission in respect of the lands and preventing them from building any houses on the lands, all “*until the plaintiff’s contract has expired*”. The plaintiff confirmed at the hearing that the contract to which he was referring in the plenary summons was a lease entered into with a previous owner of the lands, a Mr. Burke, although he was not keen on providing much in the way of detail about that alleged lease in case it might in some way prejudice another case which the plaintiff has commenced in the High Court (referred to below). In any event, the plaintiff contended that his appeals were not concerned with the merits of his cause of action against the defendants but rather with the procedural matters dealt with in the two orders which he has appealed to this Court. The plaintiff also seeks damages on various grounds.

8. The defendants’ position is that the lands were purchased by a company called Corestone 16 Limited (“Corestone”) in April 2021 for €5.3m under a contract dated 29

April 2021 which Corestone entered into with the Receiver appointed over certain assets of Mr. Burke. The sale was completed on or about 6 May 2021.

9. While Corestone is not a party to these proceedings, the plaintiff has commenced another set of High Court proceedings against Corestone and others which he has not yet served (they bear Record Number 2021 No. 411P). Those proceedings were commenced by a plenary summons which was issued on 12 July 2021. The plaintiff has taken the position that he is not required to serve those proceedings as he has 12 months in which to do so. It is not clear why the plaintiff chose to issue two sets of proceedings, one month apart or why he served these proceedings but not those against Corestone, the actual purchaser of the lands.

10. The defendants were concerned at the reliefs being sought in the proceedings with which these appeals are concerned in light of plans for the development of the lands by Corestone. In the course of these proceedings the defendants sought an order joining Corestone as a co-defendant to the proceedings. In light of the subsequent dismissal of the proceedings it was never necessary for an order in those terms to be made. I will refer in more detail later to the concerns held by the defendants/Corestone in relation to the potential impact of the claims made by the plaintiff in the proceedings on the plans for the development of the lands.

11. On the same date as the proceedings were commenced (11 August 2021), the plaintiff issued a notice of motion in the High Court seeking certain interlocutory reliefs including orders restraining the defendants and/or their agents from entering onto the lands and directing them to keep away from the lands pending the determination of the proceedings. That motion was given a return date in the High Court of 6 December 2021. It appears that while the plenary summons together with certain other documents comprising an *ex parte* docket, a notice of motion and some or all of the exhibits

comprised in exhibit “JMHI” to the plaintiff’s grounding affidavit were served on some or all of the defendants on 12 August 2021, the defendants were maintaining that the plaintiff’s grounding affidavit itself was not served. A copy was requested by the defendants’ solicitors on 11 October 2021. When asked at the hearing about the letter of 11 October 2021, the plaintiff did not admit that he had received it and said that, even if he had, his position was that he already served the relevant affidavit together with the other documents which were served on the defendants in August 2021. He referred to an affidavit of service which he swore on 24 November 2021 to demonstrate such service. The plaintiff confirmed that, even if he had received the letter of 11 October 2021, he was entitled to stand on his position that he had already served the affidavit and was not prepared to send a copy to the defendant’s solicitors. That was a regrettable and unattractive decision on his part.

12. An appearance was entered on behalf of the defendants on 13 October 2021. Although the appearance requested the delivery of a statement of claim and although he was required to deliver a statement of claim within 21 days from receipt of the appearance (O. 20, r. 3), no statement of claim was delivered.

Application to enter proceedings in Commercial List/Directions

13. On 13 October 2021, a motion was issued on behalf of the defendants to enter the proceedings in the Commercial List. Various other reliefs were sought in that motion including initial directions, an order pursuant to O.15, r.13 joining Corestone as a co-defendant, an order pursuant to O.49, r.6 consolidating the proceedings with the other proceedings brought by the plaintiff against Corestone and others as well as certain other directions.

14. The defendants’ motion was returnable for 18 October 2021. It was grounded on affidavits sworn by Peter Fitzgerald (who is the fifth defendant and a director of the first

and second defendants) and by Ray Wheatley (who is a director of Corestone) on 13 October 2021. The defendants' entry application was also supported by a certificate of their solicitor, Gavin Simons of AMOSS Solicitors. Mr. Fitzgerald's affidavit and Mr. Simmons's certificate set out the basis on which the defendants contended that the proceedings were "*commercial proceedings*" within the meaning of that term in O.63A, r.1 and why the proceedings ought to be entered in the Commercial List.

15. With respect to service of that motion, Jerry Burke, a solicitor in AMOSS Solicitors, the defendants' solicitors, swore an affidavit on 15 October 2021 explaining how the motion papers in respect of the motion were served. At para. 2 of that affidavit he stated that he served the notice of motion, Mr. Fitzgerald's affidavit and exhibits, Mr. Wheatley's affidavit, the defendants' appearance and Mr. Simons' certificate on the plaintiff by certified post and registered post on 14 October 2021 at two addresses. The first address was the address stated by the plaintiff in the plenary summons, namely, Gurrane South, Oranmore, County Galway. The second was an address in Nenagh which was apparently also used by the plaintiff. Mr. Burke exhibited copies of the relevant cover letters serving those documents and the certified post slips and registered post slips. Mr. Burke stated that he also served those papers on the plaintiff by email at a particular email address on 13 October 2021. The email address was taken from signs which the defendants stated were placed by the plaintiff on the gates to the lands. The cover letter dated 14 October 2021 enclosing the documents in respect of the motion informed the plaintiff that the motion was returnable for Monday 18 October 2021, that the motion would be heard remotely and that details for accessing the hearing were available on the Courts Service website. The letter also stated that if the plaintiff had any difficulty, he could contact the defendants' solicitors and they would attempt to assist him.

16. The defendants' motion was listed for remote hearing in the Commercial Motion List on 18 October 2021. There was no appearance by the plaintiff. However, since there were not four clear days between service and the return date of the motion, the judge adjourned the motion for two weeks to Monday, 1 November 2021. The judge directed the defendants' solicitors to write to the plaintiff to inform him of the adjourned date. The defendants' solicitors did so by letter dated 19 October 2021. That letter was posted by certified post on 20 October 2021.

17. Mr. Burke swore another affidavit of service on 1 November 2021. At para. 2 of that affidavit he referred back to service of the motion papers for the defendants' motion dated 13 October 2021. He confirmed that the papers in respect of that motion were signed for by the plaintiff at 08.22 a.m. on 18 October 2021 (being the first return date for his motion) at his Oranmore address. Mr. Burke exhibited a copy of the An Post proof of delivery showing that the documents were signed for by "*John*". It should be noted that the plaintiff maintains that he was not the person who signed as "*John*" at his address in Oranmore that morning. He did not explain how a person signing their name as John could receive post sent to him by registered post at that address. He asked the court to infer that "*John*" did not notify him of the delivery nor give him the packet for which he signed.

18. With respect to the judge's direction that the plaintiff be informed of the adjourned date for the defendants' motion of 1 November 2021, Mr. Burke exhibited a copy of the letter dated 19 October 2021 sent by certified post to the plaintiff at his Oranmore address on 20 October 2021 and exhibited the certified post slip. The letter of 19 October 2021 was also sent to the plaintiff by email to the same email address as before on 27 October 2021. The letter informed the plaintiff of the fact that the motion stood adjourned to Monday 1 November 2021 at 11 a.m. and that it would be heard remotely on that date. The link to access the remote hearing was provided in the letter.

Orders of 1 November 2021

19. The defendants' motion appeared again in the Commercial Motion List on 1 November 2021. There is a DAR transcript available in respect of the hearing that day. The motion was heard remotely. There was no appearance by the plaintiff when the motion was called. The judge was satisfied with service of the motion and referred to Mr. Burke's affidavit of service. The judge then proceeded to deal with the defendants' application to enter the proceedings in the Commercial List. As is the practice in the Commercial List, the judge had read all of the papers in advance, so it was unnecessary for the papers to be opened to him.

20. Having heard a brief outline of the application from the defendants' senior counsel, the judge ruled on the application. He was satisfied on the basis of the papers before him that the proceedings should be entered in the Commercial List. He stated that they were "*undoubtedly commercial proceedings*" and noted that they concerned a significant land transaction valued at approximately €3.5m (in fact, as we have seen, the lands were actually purchased for €5.3m). He held that they were "*commercial proceedings*" within the meaning of that term in O.63A, r.1(a)(i) and (b).

21. Having decided that the proceedings should be entered in the Commercial List, the judge then treated the hearing as the initial directions hearing (in accordance with O.63A, r.4(5)(b)). He then made the following further directions that:

- (1) The order be served on the plaintiff within two days of perfection;
- (2) The plaintiff deliver to the defendants' solicitors a statement of claim within fourteen days from the date of service of the order;
- (3) Within fourteen days from the date of service of the order, the plaintiff serve on the defendants' solicitors all papers relating to the motion issued by the

plaintiff on 11 August 2021 which was made returnable to the Common Law list of the High Court on 6 December 2021;

- (4) The balance of the motion be adjourned to Monday, 29 November 2021; and
- (5) The defendants have liberty to issue a motion returnable for 29 November 2021 to dismiss the proceedings in the event of a failure on the part of the plaintiff to comply with the directions.

22. The Order of 1 November 2021 was perfected on 2 November 2021.

Subsequent Correspondence and Applications

23. As directed by the judge, the defendants' solicitors wrote to the plaintiff on 2 November 2021 informing him of the terms of the order made on 1 November 2021 setting out the directions made by the court in that order. The letter informed the plaintiff that the hearing on 29 November 2021 would be a remote hearing and the link for that hearing was furnished to the plaintiff. As explained in an affidavit sworn by Jerry Burke on 19 November 2021, the letter of 2 November 2021 enclosing a copy of the order of 1 November 2021 was served on the plaintiff by express post sent on 2 November 2021. An Post confirmed that the letter was delivered on 3 November 2021. Mr. Burke exhibited a copy of the letter, the express post certificate, the An Post delivery confirmation and a copy of the letter sent by email to the plaintiff on 6 November 2021 to his affidavit (see para. 11 of that affidavit).

24. There was no response at all from the plaintiff to the defendants' solicitors' letter of 2 November 2021. The plaintiff did not deliver a statement of claim within the period directed in the order of 1 November 2021. The plaintiff did not provide copies of the papers in respect of his motion as directed. In those circumstances, the defendants then issued a further motion on 19 November 2021 seeking an order dismissing the plaintiff's proceedings for failure to comply with the directions contained in the order of 1 November

2021. That motion was returnable for Monday 29 November 2021 at 11 a.m. and was grounded on Mr. Burke's affidavit of 19 November 2021 to which I have just referred.

25. Mr. Burke swore a further affidavit of service on 24 November 2021 in respect of service of that motion. In para. 2 of that affidavit, he explained that he served the notice of motion, his grounding affidavit and the exhibits together with the covering letter dated 19 November 2021 on the plaintiff by express post on 19 November 2021 and by email on the same date. He exhibited copies of the relevant documents including the letter of 19 November 2021 and an An Post delivery confirmation showing that the documents were delivered on 22 November 2021.

26. The defendants also served the motion papers with a cover letter dated 26 November 2021 by registered post on 26 November 2021. In the letter of 26 November 2021, they pointed out to the plaintiff that they had not served the motion papers previously by registered post as was required under the Rules of the Superior Courts (the "RSC"). They were, therefore, serving them again, that time by registered post. They stated in the letter that, if the plaintiff did not appear at the remote hearing on 29 November 2021, they would apply to put the matter back for remote hearing to 6 December 2021. They also enclosed the link for the hearing.

27. Mr. Burke swore a further affidavit on 2 December 2021 referring to the service by registered post and the correspondence to which I have just referred at para. 2. At para. 3, Mr. Burke stated that the documents were not delivered to the plaintiff as An Post noted that there was no answer at the address. Mr. Burke made further enquiries of An Post and it confirmed that a docket was left at the address advising the plaintiff that an item requiring his signature was been held for him at the local post office. The documents had, however, been served by express post and An Post had confirmed delivery of the documents on 22 November 2021.

Plaintiff's Appeal from Order of 1 November 2021

28. Before coming to the hearing before the High Court on 29 November 2021, I should note that on 24 November 2021, the plaintiff appealed to the Court of Appeal from the order of 1 November 2021. It is clear from the plaintiff's notice of appeal dated 24 November 2021 (the "first notice of appeal") that the plaintiff had in fact received a copy of the order of 1 November 2021. He made various points in the first notice of appeal which I will come to shortly. Among the grounds of appeal which he put forward in that notice were that the proceedings were not commercial proceedings and did not involve a "commercial matter" (as he put it), that the judge had not given proper weight to his proceedings in the High Court and to his pending application for interlocutory relief, that his case had been "*hijacked*" from the High Court to the "Commercial Court", that the hearing in the High Court on 1 November 2021 was unfair, that he had not been served and that the hearing proceeded in his absence in breach of natural justice. He also claimed that the judge was biased against him on various grounds.

29. On the same date (24 November 2021), the plaintiff also issued a motion in the Court of Appeal seeking a stay on the order of 1 November 2021 pending the determination of his appeal together with various interim and interlocutory reliefs (which were almost identical to the reliefs which were being sought by the plaintiff in the motion he had issued in the High Court on 11 August 2021 which was returnable for 6 December 2021). The plaintiff's application to the Court of Appeal was grounded on an affidavit which he swore on 24 November 2021. The first directions hearing in the Court of Appeal in respect of the plaintiff's appeal from the order of 1 November 2021 and the return date for his motion was Friday, 10 December 2021.

Hearing of Defendants' Motion in the Commercial List on 29 November 2021

30. In the meantime, the defendants' motion to dismiss the proceedings was listed for a remote hearing in the High Court before the judge of the Commercial list on 29 November 2021. There was again no appearance by the plaintiff at that remote hearing (notwithstanding that the plaintiff was undoubtedly aware that the motion was before the court that day as that was stated in the order of 1 November 2021 which the plaintiff had by that stage appealed to this Court). The defendants' motion was adjourned to Monday, 6 December 2021. The judge requested the defendants' solicitors to write to the plaintiff to inform him of that fact and to address certain other matters.

31. First, the judge requested the defendants' solicitors to provide the plaintiff with a copy of the judgment of Clarke J. in the Supreme Court in *Tracey v. McDowell & Ors.* [2016] IESC 44 ("*Tracey*") which the defendants were relying on in support of their application to dismiss the proceedings. Second, the judge informed the defendants' solicitors that the plaintiff had appealed to the Court of Appeal from the order of 1 November 2021. The defendants had not by that stage been served with the notice of appeal and did not appear to have been aware of the fact that the plaintiff had appealed. The judge requested the defendants' solicitors to inform the plaintiff that the fact that an appeal had been brought did not operate as a stay on the order and that the plaintiff was obliged and required to comply with the order, failing which the proceedings could be dismissed. The defendants' solicitors wrote to the plaintiff on 30 November 2021, as directed by the judge. The letter was sent by express post and email. In their letter, the defendants' solicitors strongly recommended to the plaintiff that he attend on 6 December 2021 and engage with the court. They sent the link for the remote hearing.

Order of 6 December 2021: Unless Order

32. There was no appearance by the plaintiff on 6 December 2021 for either (a) the hearing of his own motion seeking interlocutory relief which was listed in the Common Law Motion List 2 (although the proceedings had by that stage been entered in the Commercial List) or (b) the defendants' motion to dismiss the proceedings which was listed in the Commercial Motion List (having been adjourned from 29 November 2021). The defendants proceeded with their motion to dismiss by reason particularly of the failure by the plaintiff to deliver a statement of claim. However, rather than seeking the immediate dismissal of the proceedings, they reasonably proposed to the court that, in the circumstances, it might be more appropriate to make an *unless order* giving the plaintiff a further opportunity to deliver a statement of claim in order to avoid the proceedings being dismissed.

33. The judge was satisfied with service of the motion having regard to the matters set out in Mr. Burke's affidavit of 19 November 2021 and his affidavits of service of 24 November 2021 and 2 December 2021. The judge was satisfied that the service effected should be deemed good and sufficient service of the motion on the plaintiff having regard to the terms of O.121, r.3.

34. Having satisfied himself with service and having considered the papers, the judge made an order that unless the plaintiff delivered a statement of claim within ten days of the posting of the order by registered post and express post and the sending of the order by email (all of which was be effected on the same day), the proceedings "*shall stand dismissed*". He adjourned the proceedings for mention only to Monday 20 December 2021 at 11 a.m. The order of 6 December 2021 was perfected on 7 December 2021.

Service of the Order of 6 December 2021

35. As explained in a further affidavit of service sworn by Mr. Burke on 17 December 2021, he posted the order of 6 December 2021 to the plaintiff as directed by the judge, on 7 December 2021 by registered post and by express post and sent a copy by email (also on 7 December 2021). Mr. Burke exhibited the certificates of posting by registered post and by express post. He also exhibited confirmation from An Post that the documents had been delivered by express post on 8 December 2021. However, he explained that the order was not delivered to the plaintiff by registered post as An Post returned the registered post letter marked “*not called for*” and he exhibited the relevant documents. Those documents were sent under cover of a letter from the defendants’ solicitors dated 7 December 2021. In that letter they informed the plaintiff what had occurred in the Commercial Motion List on 6 December 2021 and of the terms of the order made on that date. They informed him that the matter stood adjourned to 20 December 2021 and gave him the remote hearing link for the hearing that day. Before turning to what occurred before the judge on 20 December 2021, I must refer to what happened in the Court of Appeal on 10 December 2021.

Directions Hearing/Stay Application in Court of Appeal on 10 December 2021

36. The plaintiff’s appeal from the order of 1 November 2021 was listed for directions along with his stay application before Haughton J. in the Court of Appeal on 10 December 2021. There is a transcript of the hearing that day. The plaintiff appeared in person before the Court of Appeal and the defendants were represented by solicitors and counsel. Haughton J. refused the plaintiffs’ stay application and his application for interim/interlocutory relief. He concluded that those applications ought to have been made in the first instance in the High Court and noted that the plaintiff’s application for interlocutory relief had in fact been made to the High Court (but not pursued). Haughton J. stated that it was not appropriate to pursue those applications in the first instance in the

Court of Appeal. There was some discussion before the court as to the significance of the *unless order* made by the judge on 6 December 2021 which the plaintiff admitted he had received (Transcript p. 15 line 25). Haughton J. pointed out to the plaintiff that in the event of a failure to comply with the *unless order*, the proceedings would stand dismissed. The plaintiff informed the court that he was not appealing the *unless order* (Transcript p. 19 lines 24-25). Haughton J. adjourned the directions hearing to 14 January 2022 and awarded the defendants their costs of the stay application/application for interlocutory relief.

Order of 20 December 2021

37. The proceedings were listed again for mention before the judge of the Commercial List in the High Court on 20 December 2021 by way of a remote hearing. There is a DAR transcript of that hearing. The plaintiff did not appear either remotely or physically in Court 2 and the matter was put back to be heard at second call. The court had before it another affidavit of service of Gerry Burke sworn on 17 December 2021. That affidavit exhibited a copy of the defendants' solicitors' letter of 7 December 2021 under cover of which the order was sent by registered post and by express post and pointed out that while there was confirmation of delivery by express post, the order was not delivered by registered post as it was returned by An Post marked "*not called for*", as already noted. The judge was again satisfied with service of the order of 6 December 2021 (which, as noted above, the plaintiff acknowledged, in the Court of Appeal, he had received) and stated:

"So, the unless order then obviously has taken effect in circumstances where [the plaintiff] has not delivered a statement of claim and therefore the only issue is the costs of the proceedings, the proceedings now stand dismissed as a consequence of the order made on the last occasion."

38. The judge held that the proceedings having been dismissed, the only order which could properly be made was an order that the plaintiff pay the defendants' costs and he made that order. The order of 20 December 2021 was perfected on 23 December 2021. It was subsequently appealed by the plaintiff by a notice of appeal dated 20 January 2022 (the "second notice of appeal").

Adjourned Directions Hearing in Court of Appeal on 14 January 2022

39. Before coming to the second notice of appeal, I must refer to the adjourned directions hearing in the Court of Appeal in respect of the plaintiff's first notice of appeal. That appeal came back before Costello J. for directions in the Court of Appeal on 14 January 2022. There is a transcript of the hearing that day. Costello J. observed that while the plaintiff had appealed the order of 1 November 2021 entering the proceedings in the Commercial List, he had not appealed the subsequent order of 6 December 2021 (the *unless order*) which had led to the proceedings standing dismissed. Although the plaintiff intimated that he would also now be appealing the *unless order* (Transcript pp. 5, 6 and 9), ultimately, he did not do so. Costello J. put the matter back for mention to 1 April 2022 pending a decision by the plaintiff as to whether he would be appealing the orders of 6 December 2021 and 20 December 2021.

Plaintiff's Appeal from the Order of 20 December 2021

40. The plaintiff did appeal the order of 20 December 2021 on 20 January 2022 by the second notice of appeal. That notice of appeal advanced many of the same grounds as were advanced in the first notice of appeal and sought to apply those grounds to the subsequent orders made on 6 December 2021 and 20 December 2021. Although the plaintiff sought to advance grounds of appeal in respect of the order of 6 December 2021, he did not bring any appeal against that order.

41. Both appeals were back before Costello J. for directions in the Court of Appeal on 11 February 2022. The plaintiff appeared and the defendants were represented by solicitors and counsel. There was a further discussion as to the consequences of the *unless order*. The defendants maintained that the fact that the *unless order* had not been appealed and that, as a consequence, the proceedings stood dismissed meant that both of the appeals before the court were effectively moot. The plaintiff did not agree. The plaintiff also confirmed to the court that he was not appealing from the order of 6 December 2021. Costello J. listed the appeals for hearing earlier this week, on 7 March 2022.

Fundamental Problem for the Plaintiff

42. It is clear from the account I have just given of the procedural history of the proceedings that the plaintiff has chosen to appeal to this Court only from the orders of 1 November 2021 and 20 December 2021 and not from the order of 6 December. Unfortunately for the plaintiff, his failure to appeal from the order of 6 December 2021 creates a major and, in my view, an insurmountable problem for the plaintiff in pursuing his appeals from the two other orders.

43. On 6 December 2021 the judge of the Commercial List of the High Court ordered that unless the plaintiff delivered a statement of claim within ten days of the posting of the order, the proceedings would stand dismissed. The defendants complied with the requirements in respect of service of that order. The plaintiff received a copy of the order and it was the subject of discussion before Haughton J. in the Court of Appeal on 10 December 2021. The plaintiff chose not to deliver a statement of claim notwithstanding the terms of the order of 6 December 2021. As a consequence of his failure to do so, the proceedings were dismissed without the need for any further order.

44. Despite being informed by the defendants and by two judges of this Court (Haughton J. and Costello J.) that if he failed to deliver a statement of claim within the time required

under the order of 6 December 2021 or appealed that order to this court, the order would take effect and the proceedings would stand dismissed. His failure to comply with the terms of the *unless order* and to deliver a statement of claim within the required period or to appeal from that order and to obtain a stay on the order means that the order has taken effect and that the proceedings were dismissed on foot of it.

45. The inevitable consequence of all of that is that the proceedings remain dismissed, rendering both of the pending appeals futile. It is not possible to maintain an appeal in proceedings which have been dismissed on foot of an *unless order* without appealing that order and obtaining a stay on the order from the High Court or, on appeal, from the Court of Appeal. Merely appealing the orders of 1 November 2021 and 20 December 2021 gets the plaintiff nowhere in circumstances where the *unless order* took effect. In my view, therefore, the plaintiff's failure to appeal the order of 6 December 2021 is fatal to his attempts to appeal the other two orders. However, lest I am wrong about that, I propose to deal with the plaintiff's appeals in respect of those two other orders.

Misunderstandings/Misapprehensions of the Plaintiff

46. Before considering the plaintiff's appeals in respect of the orders of 1 November 2021 and 20 December 2021, I want to address a number of fundamental misunderstandings under which the plaintiff appears to be labouring which are relevant to both his appeals.

47. The first is the plaintiff's apparent failure to appreciate that the judge in charge of the Commercial List of the High Court is a judge of the High Court. That judge has all the powers and jurisdiction of the High Court. Judgments and orders of a judge hearing a case or an application in the Commercial List are judgments and orders of the High Court which can be appealed to this Court or, in certain exceptional circumstances, directly to the Supreme Court. The plaintiff appeared to accept that this was the case in the course of the

hearing of his appeals. Nonetheless, he persisted with the rather outlandish claims made in his notices of appeal and in his submissions that his proceedings in the High Court had been “*hijacked*” by the entry of those proceedings in the “*Commercial Court*”. He is simply wrong about that.

48. The entry of the proceedings in the Commercial List of the High Court is simply the transfer of the proceedings from one list or division of the High Court to another. It is evident from the stance he has taken, by resolutely refusing to appear for any of the motions in the High Court that the plaintiff has a kind of philosophical objection to the jurisdiction of the judge of the Commercial List dealing with these proceedings. He told us that he “*took a stand*” and adopted an approach taken historically by other organisations in the State, in effect, refusing to recognise the jurisdiction of the judge of the Commercial List to deal with the case.

49. So far as we could establish at the hearing, there appeared to be two factors underlying his objection to the Commercial List. The first was cost (although, in this case, the defendants incurred the cost of the application to have the proceedings entered in the Commercial List). The second was the publicity which he felt was attendant on proceedings entered into the Commercial List (although it was pointed out to him by members of the Court that proceedings in any list of the High Court, with limited exceptions, are required by Article 34 of the Constitution to be heard in public). The extent of the “*stand*” taken by the plaintiff is evident from his deliberate decision not to deliver a statement of claim notwithstanding the terms of the order of 1 November 2021 and the *unless order* of 6 December 2021. The plaintiff maintained at the hearing that, if his proceedings had not been entered in the Commercial List, he would have delivered a statement of claim. As noted earlier, the plaintiff was, in any event, irrespective of the entry of the proceedings in the Commercial List, required by O. 20, r. 3 to deliver a

statement of claim. However, he chose not to do so, despite the existence of the two orders requiring that that be done. In my view, the plaintiff is very much the author of his own misfortune here.

50. Second, contrary to the plaintiff's apparent belief and understanding, a plaintiff does not have complete control over what happens to his or her proceedings in the High Court. It is open to a defendant to apply to have those proceedings entered in a different list or division of the High Court, such as the Commercial List (Order 63A) or the Competition List (Order 63B). A defendant may take the view that for various reasons the proceedings can be more effectively case managed and can obtain a more expeditious hearing in another list and can apply to have the proceedings entered in or transferred to that list. It is, of course, also open to a plaintiff to apply to have the proceedings entered in or transferred to another list for similar reasons. When such an application is made, it is a matter for the judge in charge of that list to grant the application to enter the proceedings in the list or not. While a party may oppose the application, neither a plaintiff nor a defendant has a veto over that decision. It is a matter for the judge to decide whether entry of the proceedings in the particular list is appropriate.

51. Third, the fact that a judge decides a case against a party does not, of course, mean that the judge is biased against that party. It means that the other party has persuaded the judge that it has the better of the case or the application and should succeed. The grounds of appeal set out in the plaintiff's first and second notices of appeal are replete with references to the judge being biased against the plaintiff on the basis that he made certain orders or gave certain directions which were adverse to the plaintiff. The fact that the judge made those decisions in favour of the defendants (it should be said in the absence of any appearance or participation by the plaintiff notwithstanding service of the relevant applications on him) does not mean that the judge was biased against the plaintiff. In fact,

having read the DAR transcripts of the hearings which led to the orders of 1 November 2021 and 20 December 2021 and having read all of the other material for these appeals, it is quite clear that, far from being biased against the plaintiff, the judge was most careful to ensure at all times that the plaintiff had been properly served with the various motions and that the plaintiff was made aware of relevant case law and of procedural matters arising in the various applications. There is no question whatsoever on the evidence of the judge been biased against the plaintiff.

52. Fourth, the plaintiff is under a fundamental misunderstanding that there is some legal infirmity with remote hearings and that orders made at remote hearings are a nullity in law. That, of course, is not so. The arrival of the Covid-19 pandemic in March 2020 meant that the hearing of cases in many court lists had to be conducted remotely. While courts operated initially on the basis that they had an inherent jurisdiction to conduct hearings remotely, the jurisdiction was put on a statutory basis in the summer of 2020 by the Oireachtas by means of s.11(1) and (2) of the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020 (the “2020 Act”) which made express provision for remote hearings in civil proceedings.

53. Section 11(1) states:

“Subject to this section, a court before which civil proceedings may be heard may direct that any category or type of such proceedings shall proceed by remote hearing.”

54. Section 11(2) states:

“Without prejudice to the power of a court under subsection (1), and subject to this section, in any civil proceedings before it, a court may, of its own motion or on the application of any of the parties, direct that the proceedings concerned shall proceed by remote hearing.”

55. Much of the business of the Commercial List was conducted remotely from April 2020 onwards. A Revised Practice Direction was issued by the President of the High Court on 15 July 2020 to reflect this: *Practice Direction HC93: Commercial List Revised Practice Direction*. The Commercial Motion List, in particular, has been held remotely since April 2020.

56. Fifth, the purpose of the requirement under the RSC to demonstrate that an application to the court has been served is to ensure that the other party is aware of the application and when and how it is to be heard, so that the hearing of the application does not proceed without that other party being aware of it. That party can choose not to appear at the hearing but, if it has been served with the relevant application, the court can proceed to deal with it in its absence. The plaintiff did decide for the reasons touched on earlier, not to appear at the hearing of the various applications in the High Court, including those which led to the orders of 1 November 2021, 6 December 2021 and 20 December 2021, notwithstanding that he had been served with the relevant papers for those applications and was well aware of what they were and when and how they were to be heard. The absence of the plaintiff from the hearings which led to the orders which he has appealed to this court does not undermine the validity and effectiveness of those orders.

The Appellate Jurisdiction of the Court of Appeal

57. It is next necessary to say something about the appellate jurisdiction of this Court when considering appeals such as those brought by the plaintiff.

58. It is well established that an appellate court should be slow to interfere with case management type orders made by a judge in the Commercial List of the High Court or in any other list save in very limited cases, such as where there is a clear error of law or where the judge has not exercised a discretion correctly.

59. In *PJ Carroll & Co. Ltd. v. Minister for Health and Children* [2005] 1 IR 294, Geoghegan J. in the Supreme Court said:

“Most orders by way of case management in the Commercial Court are, to some extent, of a discretionary nature and in practice most of them would be unappealable. I would take the view that as a general rule this court should be slow to interfere with case management type orders in the Commercial Court unless there is a clear error of law involved or the managing judge has clearly not exercised his discretion correctly.” (at p.314)

60. Those observations were approved by Clarke J. in the Supreme Court in *Dowling and Ors. v. Minister for Finance* [2012] IESC 32. At para. 3.1, Clarke J. stated:

“Both the Minister and ILP placed reliance on the undoubted jurisprudence of this Court to the effect that an appellate court should be slow to interfere with case management directions made by the court of first instance. See for example P.J. Carroll & Co. Ltd. v. Minister for Health and Children [2005] 1 I.R. 294 and Dome Telecom Ltd. v. Eircom Ltd. [2008] 2 I.R. 726. While P. J. Carroll concerned case management in the Commercial List and Dome Telecom related to case management in the Competition List it seems to me that the general point made in both of those cases applies to any case which is being case managed either on a formal or informal basis. Case management only works if there is broad adherence to the directions given by the Court. The trial court must retain a very large measure of discretion over the directions which are appropriate and the measures to be adopted in the event of failure to comply. There would be no reality to the achievement of the undoubted advantages which flow from case management if this Court were, on anything remotely resembling a regular basis, to entertain appeals from parties who

were dissatisfied with either the precise directions given or orders made by the Court arising out of failure to comply.”

61. At para. 3.2, Clarke J. stated that the test which the Supreme Court (and, therefore, also this Court) should apply in deciding whether to entertain an appeal against directions concerning the timing of the filing of documents “*must involve a high threshold*”. He continued:

“Ordinarily it would seem to me that it would be necessary for this Court to be satisfied that the relevant measures under appeal created a substantial risk of significant procedural unfairness coupled with the likelihood that no remedial action could be put in place either by the trial judge or by this Court on appeal which would have the effect of significantly remedying any unfairness which might be demonstrated to have occurred. “

62. Finally, at para. 3.5, Clarke J. referred to the need to demonstrate “*a degree of irremediable prejudice created by the relevant case management directions*”.

63. The orders of 1 November 2021 and 20 December 2021 (and the order of 6 December 2021) could all be described as case management type orders starting with the entry of the proceedings in the Commercial List, the directions made for the delivery of documents (including the statement of claim), the *unless order* requiring the statement of claim to be delivered and the effect of the failure to comply with that *unless order* then being confirmed by the court in the order of 20 December 2021. The Court should be slow to interfere with orders of that kind but can do so if satisfied that there was a clear error of law involved or an incorrect exercise of discretion which led to an injustice to the plaintiff.

64. As I explain below when dealing with each of the two appeals, I am quite satisfied that there was no error of law or incorrect exercise of discretion by the court in making either of the two orders the subject of these appeals and no injustice whatsoever to the

plaintiff. On the contrary, the judge was correct in the decisions, directions and orders he made.

Decision on Appeal from Order of 1 November 2021

65. I have set out in some detail earlier the circumstances in which the judge made the order of 1 November 2021 on foot of the defendants' motion. Insofar as I can ascertain from the first notice of appeal and from the plaintiffs' written and oral submissions, the grounds of appeal advanced by the plaintiff in respect of the order of 1 November 2021 can broadly be summarised as follows:

- (1) The defendants' motion was not properly served on the plaintiff. It was therefore in effect an *ex parte* application. The defendants and the court proceeded in the absence of proper service on the plaintiff.
- (2) The defendants "*hijacked*" the plaintiffs' action in the High Court by applying to have it heard in the "Commercial Court".
- (3) The proceedings were not properly regarded as "*commercial proceedings*". The defendants and the judge were wrong in contending and deciding that they were.
- (4) The judge displayed bias towards the plaintiff by proceeding to make the order he made on 1 November 2021 and by giving the defendants liberty to bring a motion to dismiss the proceedings in the event of a failure by the plaintiff to comply with the directions.
- (5) The order was made at a remote hearing and was, therefore, a nullity.

66. In my view the plaintiffs' appeal from the order of 1 October 2021 is entirely misconceived. While I have already touched on many of the issues relevant to this appeal earlier in this judgment, I will now deal separately with each of them with specific reference to the order of 1 November 2021.

(1) Service

67. I have dealt with the question of service of the defendants' motion earlier in this judgment. As appears from the affidavits of service of Jerry Burke of 15 October 2021 and 1 November 2021, the motion papers were served by certified post and by registered post on 14 October 2021 at the two addresses referred to earlier and also by email. Service was not effected four clear days before the return date of 18 October 2021 and the motion was, therefore, adjourned to 1 November 2021 in the absence of any appearance by the plaintiff. As it happens, service by registered post was not effected until early in the morning on 18 October 2021 when a person called "John" signed for the papers (para. 2 of affidavit of Mr. Burke of 1 November 2021). When adjourning it, the judge gave directions to the defendants' solicitors to write to the plaintiff to inform him of the adjournment. They did so by certified post on 20 October 2021 and by email on 27 October 2021 (para. 3 of Mr. Burke's affidavit of 1 November 2021). When the matter was back before the court on 1 November 2021, the judge was satisfied that the motion papers had been properly served and that the plaintiff was aware of the adjournment to that date. I am satisfied that the judge was absolutely correct in so concluding. There was clear evidence before him to support his conclusion. Even if the plaintiff was not the person ("John") who signed for the papers served by registered post on 18 October 2021, as he maintains, there was no doubt but that the motion papers and the letter informing the plaintiff of the adjourned date were in fact served by certified post and were received by the plaintiff. The plaintiff is, in my view, therefore, quite wrong in contending that the papers were not properly served and that the motion was heard on an *ex parte* basis. The application was on notice to the plaintiff. The judge correctly concluded that the plaintiff had been properly served and was aware of the adjournment of the motion to 1 November 2021. He was entitled to proceed to deal with the application on that day and did so perfectly properly in the

circumstances. The plaintiffs' complaints about service in respect of the motion leading to the order of 1 November 2021 are completely unfounded.

(2) "Hijacking" of Proceedings

68. As I explained earlier, the plaintiff is under a misapprehension as to the rights and entitlements of the defendants in the proceedings. While the plaintiff was entitled to issue his proceedings in the High Court and to bring a motion returnable to whatever list was directed by the Central Office of the High Court, the defendants were entitled to apply to have the proceedings entered or transferred to another list or division of the High Court, such as the Commercial List. They made such an application and it was then a matter for the judge to be satisfied that the appropriate test for entry into the Commercial List was met. There was no question of the plaintiff's action being "*hijacked*". As noted earlier, the plaintiff's real complaint appears to be that an application to enter proceedings in the commercial list attracts court fees of €5,000. That is true. The defendants discharged those fees in the first instance when issuing their motion. His concerns about publicity are misplaced in light of the Constitutional imperative that proceedings (no matter what list they are in) be heard in public, save in very limited circumstances, which do not apply here.

69. Since the judge agreed with the defendants that the proceedings were "*commercial proceedings*" (as do I), the defendants were clearly entitled to apply to have the proceedings entered in the Commercial List.

(3) Commercial Proceedings

70. Order 63A, r.1 describes the types of cases encompassed by the term "*commercial proceedings*". The description is quite broad. The sort of proceedings covered by the term are proceedings which have serious commercial implications for one or more of the parties. It is not necessary that the proceedings have commercial implications for all of the parties:

see, for example, *Mulholland v. An Bord Pleanála* [2005] 3 IR 1; *Kinsella v. Revenue Commissioners*, Unreported High Court (Kelly J.) 19 June 2006; *PJ Carroll & Co. Ltd. v. Minister for Health and Children* [2005] 1 IR 294; *PJ Carroll & Co. Ltd. v. Minister for Health and Children* [2005] 3 IR 457 and *PJ Carroll & Co. Ltd. v. Minister for Health and Children (No. 3)* [2006] 3 IR 431.

71. In *Mulholland*, Kelly J stated (at p.5):

“By defining ‘commercial proceedings’ as it did the Superior Court Rules Committee appeared to wish to give a wide measure of discretion to the judge in charge so as to enable the speedy resolution of commercial disputes using that term in a broad way. The committee did not attempt to tie the judge down to a technical or narrow view of what might be appropriate to be admitted to the list.”

72. With particular reference to O.63A, r.1(b) (which was one of the provisions on the basis of which the judge entered these proceedings into the Commercial List), Kelly J. stated that there is:

“...a wide discretion upon the judge in charge to enter into the list cases which do not fall within what is described in any other part of the definition but which may nonetheless have commercial or other aspects which in the discretion of that judge make them suitable for entry into the list.” (at p.4)

73. Kelly J. did, however, observe that there were limits to the discretion and that a judge would not be justified in admitting a case into the Commercial List unless there was evidence of the matters referred to in the relevant rule (*per* Kelly J. at p.8).

74. The plaintiff’s position is that his proceedings are not “*commercial proceedings*” and that they do not concern commercial matters. On the other hand, the defendants maintain that the proceedings had serious commercial implications for the defendants and,

more particularly, for Corestone (the party which purchased the lands for €5.3m. which the defendants were seeking to join as co-defendant to the proceedings with its agreement).

75. In support of their motion to enter the proceedings in the Commercial List, the defendants relied on the evidence contained in the affidavits of Peter Fitzgerald and Ray Wheatley sworn on 13 October 2021 and on the certificate of their solicitor, Mr. Simons. The judge had all of that evidence before him when dealing with the defendants' motion. The judge had no contrary evidence from the plaintiff.

76. In his affidavit, Mr. Fitzgerald explained in some detail how the plaintiff's claim impacted upon the development plans for the lands. Mr. Fitzgerald referred to various of the reliefs sought by the plaintiff including the orders seeking to prevent the defendants from entering onto or using the lands until the plaintiff's alleged contractual entitlement to occupy them expired and to prevent the defendants from applying for planning permission for or developing the lands. While making the point that the plaintiff was really taking issue with Corestone and not with the defendants to the proceedings (and that was why the defendant sought to join Corestone), nonetheless Mr. Fitzgerald outlined the serious commercial implications to which the plaintiff's proceedings gave rise at paras. 13-24 of his affidavit. He explained at para. 33 the potential implications of the plaintiff's claim that the defendants' title to the lands was not absolute and was subject to the plaintiff's alleged legal right and claim to the lands. While noting that the plaintiff's claim was misconceived in that the title to the lands is held by Corestone and not by any of the defendants, Mr. Fitzgerald made the point that, in considering the claim advanced by the plaintiff, the court would have to determine whether or not the plaintiff held a legal interest in the lands to which the prevailing freehold title was subject. The determination of that issue, therefore, would require the determination of questions of construction arising in respect of the contract of sale on foot of which the lands were acquired for the purchase

price of €5.3m. It was said, therefore, that questions of construction arose in the proceedings in respect of a business contract where the value of the transaction was not less than €1m. and that the proceedings, therefore, came within the scope of O.63A, r.1(a)(ii).

77. In addition, Mr. Fitzgerald explained the basis on which it was said that the proceedings were appropriate for admission to the Commercial List under O.63A, r.1(b). He referred to the commercial aspects of the proceedings at paras. 35.1 to 35.6 of his affidavit Mr. Fitzgerald explained that he was a director of Green Way Construction Limited which is a shareholder in Corestone and was, therefore, familiar with Corestone's commercial strategy for the lands. He made the point that Corestone acquired the lands for the purpose of developing them by residential development and that the lands were purchased solely for the commercial purpose of developing them. He stated that time was of the essence in developing the lands so as to enable Corestone to generate a return and that Corestone was in the process of preparing an application for planning permission for the development of 90 residential units and a creche on part of the lands. It was anticipated that that application would be lodged in December 2021. It was further envisaged, subject to rezoning, that Corestone would apply for planning permission to develop the lands further and that it anticipated being in a position to build at least 200 residential units on the lands. Mr. Fitzgerald referred to the construction timelines involved and to the concern on the part of Corestone that the timeline would be unduly delayed by the proceedings. He also referred to the strategic importance to the local area of the development of the lands in the context of the prevailing national housing crisis.

78. The essential point made by Mr. Fitzgerald was that the acquisition of the lands was part of a commercial project which ran the risk of being unduly delayed by reason of the proceedings, particularly if the plaintiff did not progress the proceedings in an expeditious

manner. Having referred to those commercial aspects, Mr. Fitzgerald contended that the proceedings would benefit from an expeditious determination in the Commercial List.

79. In his affidavit, Mr. Wheatley (on behalf of Corestone) agreed with Mr. Fitzgerald with respect to the commercial imperatives of the proceedings from the perspective of Corestone and the defendants. In addition to the affidavits, Mr. Simons certified that the proceedings were appropriate for entry in the Commercial and explained why that was so in his certificate.

80. The judge had all of that material before him when deciding on the defendants' application to enter the proceedings in the Commercial List. The defendants did not have an entitlement to have their proceedings entered in the list. They did, however, have an entitlement to make the application and it was a matter for the judge, in the exercise of his discretion, to decide whether or not the proceedings should be entered in the list. The judge was of the view that the proceedings were "*undoubtedly commercial proceedings*" (DAR Transcript, Page 3). On the basis of the evidence before him, not only was he entitled to take that view but he was also obviously correct in doing so. The failure of the plaintiff to join Corestone to these proceedings but instead to issue separate proceedings against them, and the fact that Corestone had not by that stage been joined as co-defendants to the proceedings, does not, in my view, affect the judge's entitlement to conclude on the evidence that the proceedings were "*commercial proceedings*".

81. While the judge decided that the proceedings fell within O.63A, r.1(a)(i) rather than (ii), as the defendants had contended, I do not believe that that is significant in terms of the overall decision that the proceedings were "*commercially proceedings*". I suspect that the reference to para. (i) rather than (ii) may be due to a typographical error, but, in my view, the judge was in any event correct to decide that the proceedings came within para. (i). However, irrespective of that, and perhaps more significantly for present purposes, the

judge was perfectly entitled to take the view on the evidence before him that the proceedings fell under O.63A, r.1(b) and that, having regard to the commercial aspects of the case (as set out in the evidence before him), the proceedings were appropriate for entry in the Commercial List. In so concluding, I am satisfied that the judge made no error of law and correctly exercised his discretion in a manner which caused no injustice whatsoever to the plaintiff.

(4) Bias

82. I reiterate what I said earlier, namely, the fact that the judge made a decision adverse to the plaintiff (in circumstances where the plaintiff did not attend on any of the dates on which the proceedings were listed before him) does not mean that the judge was biased against the plaintiff. On the contrary, in dealing with the defendants' entry motion on its initial return date of 18 October 2021 and on the date to which it was adjourned (1 November 2021), and on every subsequent occasion on which motions in the proceedings were before him, the judge was extremely careful in ensuring that the relevant papers had been properly served on the plaintiff, and that the plaintiff was provided with relevant case law (in particular, the decision of the Supreme Court in *Tracey*) and was informed by the defendants' solicitors of certain important matters including the fact that there was no stay on the order of 1 November 2021. I can discern absolutely nothing in the papers which discloses any material supporting the allegations of bias against the judge with respect to the order of 1 November 2021 or indeed any of the orders which he made in the proceedings. The true position is quite the opposite. The material before the court discloses that the judge was extremely fair to the plaintiff in dealing with all aspects of the proceedings before him. There is, therefore, no basis whatsoever for the allegation of bias made by the plaintiff.

(5) Remote Hearing

83. As I mentioned earlier, the plaintiff is simply wrong in his belief that the court was not entitled to proceed remotely with the application on 1 November 2021 and that the order made by the Court on that date was invalid having been made in the course of a remote hearing. The Commercial Motion List has proceeded remotely since around April 2020. It did so initially in the exercise of the court's inherent jurisdiction. Following the enactment of the 2020 Act, it did so in accordance with the provisions of ss.11(1) and (2) of that Act. This ground of appeal, therefore, has no merit whatsoever.

84. It is worth repeating here that notwithstanding that the plaintiff filed the first notice of appeal seeking to appeal from the order of 1 November 2021, the plaintiff did not apply to the judge for a stay on the order. He did bring an application to the Court of Appeal for a stay by a motion issued on 24 November 2021. However, the bringing of that application did not operate as a stay on the order of 1 November 2021. Haughton J. in the Court of Appeal ultimately refused the stay application on 10 December 2021. By that stage the time for the delivery by the plaintiff of a statement of claim on foot of the order of 1 November 2021 had expired and the defendants had sought, and the judge had granted, the *unless order* on 6 December 2021.

Decision on Appeal from Order of 20 December 2021

85. The plaintiff advances many of the same grounds of appeal in his second notice of appeal in respect of the order of 20 December 2021 as he does with respect to the order of 1 November 2021. For example, the plaintiff continues to contend that the proceedings are not "*commercial proceedings*" and ought not to have been entered in the Commercial List on 1 November 2021 and that the defendants' application to enter the proceedings in the Commercial List was designed to "*hijack*" the plaintiff's case. I have dealt with those

grounds when dealing with the order of 1 November 2021. They are equally misconceived when relied on in support of his appeal from the order of 20 December 2021.

86. The additional grounds raised by the plaintiff in his second notice of appeal appear to include the following:

- (1) Alleged defects in service with respect to the defendants' motion which was heard on 6 December 2021;
- (2) The alleged failure by the judge to afford the plaintiff due process when making the orders on 6 December 2021, and 20 December 2021 notwithstanding that the plaintiff had appealed the earlier order of 1 November 2021 and had sought a stay in the Court of Appeal on 10 December 2021;
- (3) The judge was allegedly biased against the plaintiff in making the order on 20 December 2021 notwithstanding the plaintiff's appeal from the order of 1 November 2021 and his application for a stay in the Court of Appeal.

87. I am satisfied that none of these further grounds are even remotely stateable. I deal with them in turn below.

(1) Service

88. I referred earlier in some detail to the manner in which the defendants' motion to dismiss the proceedings which was issued on 19 November 2021 and returnable for 29 November 2021 was served on the plaintiff. As I explained earlier, in the absence of any appearance by the plaintiff on 29 November 2021, the defendants' motion was adjourned to 6 December 2021. I also referred earlier to the two relevant affidavits of service of Mr. Burke sworn on 24 November 2021 and 2 December 2021. The motion papers were originally served by express post on 19 November 2021 and by email on the same date. Leaving aside any issue with respect to the email address to which they were sent, Mr. Burke exhibited proof that the papers were served by express post in the form of the

express post certificate and the An Post delivery confirmation showing delivery of the papers on 22 November 2021. The defendants did not attempt to serve the motion papers by registered post until 26 November 2021, as appears from Mr. Burke's affidavit of service of 2 December 2021. As Mr. Burke explained, when An Post attempted to deliver the registered post, there was no answer at the plaintiff's address and a docket was left at the address advising the plaintiff that an item requiring his signature was been held for him at the local post office.

89. As directed by the court on 29 November 2021, the defendants' solicitors wrote again to the plaintiff on 30 November 2021 explaining the situation, enclosing the relevant Supreme Court decision and providing the other information referred to earlier. The order of 6 December 2021 recites that there was no attendance by the plaintiff at first call or second call either physically in Court 2 or remotely. It records the fact that the court considered the affidavit of service of Mr. Burke of 24 November 2021 and 2 December 2021 and had regard to the terms of O.121, r.3.

90. Order 121, r.3 states:

“The delivery or service by post of any document, which is authorised to be delivered or served by post, shall be deemed to have been served at the time at which it would be delivered in the ordinary course of post.”

91. In my view, the judge was perfectly entitled to take the view based on the evidence before him that it was appropriate to make an order deeming the actual service of the motion papers on the plaintiff be good and sufficient service of the motion. That was so in circumstances where the motion papers were certainly delivered to the plaintiff by express post on 22 November 2021 and where an attempt had been made to serve the papers by registered post on 26 November 2021 but An Post were unable to effect service on 29 November 2021 as there was no answer at the plaintiff's address. The judge was entitled to

conclude that the papers had in fact been served on the plaintiff in light of this evidence. There is, therefore, no substance to the plaintiff's complaint about service of the motion papers in respect of the motion dealt with by the judge on 6 December 2021.

92. Nor is there any basis for any complaint about service in respect of the relevant documents for the subsequent appearance before the judge on 20 December 2021. I have referred earlier to the further affidavit of service of Gerry Burke of 17 December 2021 and to the defendants' solicitors' letter of 7 December 2021 informing the plaintiff of the order made on 6 December 2021 and of the fact that the matter would next be before the court on 20 December 2021. The plaintiff can have no conceivable complaint about service of the papers either in respect of the order of 6 December 2021 or in respect of the order made on 20 December 2021.

93. It is also important to recall that the purpose for requiring proof of service is to ensure that an application is not moved in court without the respondent being made aware in advance of the intended application so that the respondent may, if it so wishes, attend in court and be heard. The appellant undoubtedly was aware of the fact that the matter was again listed before the judge in charge of the Commercial List on 20 December 2021 following the first directions hearing in this court, and yet again he elected not to attend or to apply to the judge for any relief. There is no merit in this ground of appeal.

(2) Due Process

94. The plaintiff appears to be under the misapprehension that the fact that he appealed to the Court of Appeal from the order of 1 November 2021 and sought a stay on that order in the Court of Appeal in some way precluded the judge from making the orders on 6 December 2021 and 20 December 2021. The position is very clear. There was no stay on the order of 1 November 2021. The fact that the plaintiff appealed that order to the Supreme Court did not operate as a stay: Order 86A, r.5. In any event Haughton J. in the

Court of Appeal on 10 December 2021 refused to grant any stay on the order of 1 November 2021.

95. There was nothing to prevent the judge from proceeding to deal with the defendants' motion on 6 December 2021. In ease of the plaintiff, rather than proceeding to dismiss the proceedings at that stage (as the judge would have been entitled to do), the judge made an *unless order* which afforded the plaintiff a further opportunity to deliver a statement of claim. Not having taken that opportunity, the proceedings were dismissed on foot of the order of 6 December 2021.

96. At the hearing on 20 December 2021, the judge confirmed that the order of 6 December 2021 had taken effect and that the proceedings stood dismissed as a consequence of that order (DAR Transcript, p.3). The effect of the order of 20 December 2021 was to confirm that fact.

97. At all times the plaintiff's rights to fair procedures and due process were complied with in the various applications before the judge. As I mentioned earlier, the judge was extremely careful to ensure that fair procedures were afforded to the plaintiff even going so far as to direct the defendants to send the plaintiff a copy of the relevant decision of the Supreme Court and to point out to the plaintiff the absence of any stay on the previous order. There is no basis therefore for the plaintiff's claim that he was not afforded due process with regard to the orders of 6 December 2021 or 20 December 2021.

(3) Bias

98. Again, for the same reasons as I have already outlined, there is absolutely no basis for the plaintiff's claim that the judge was biased against him in the way in which he dealt with the applications before him on 6 December 2021 and 20 December 2021. The plaintiff took a deliberate decision not to attend in court on any of the occasions in which the proceedings were before the judge. The judge would have been entitled to dismiss the

proceedings on 6 December 2021 without affording the plaintiff the opportunity of further time to deliver his statement of claim. However, in ease of the plaintiff, the judge afforded the plaintiff a further period to deliver his statement of claim. Far from disclosing bias against the plaintiff, that demonstrates how careful the judge was in ensuring that every opportunity was afforded to the plaintiff to deliver his statement of claim. The plaintiff must bear responsibility for failing to avail of that opportunity. The plaintiff's claims of bias with respect to the orders 6 December 2021 and 20 December 2021 are, therefore, completely unfounded and must be rejected.

Conclusion

99. In conclusion, as the Court indicated at the conclusion of the hearing on 7 March 2022, the plaintiff's two appeals are dismissed. The reasons for the Court's decision are set out in this judgment.

Costs

100. The Court indicated that it would afford the parties some time to consider this judgment and would hold a short hearing to deal with the question of costs and any other orders required. It is hoped that those matters can be dealt with in the near future. As the defendants have been entirely successful in the appeals, it is the provisional view of the members of the Court that they should get the cost of the appeals. However, that is not a concluded view and it will be open to the plaintiff to seek to persuade the Court to reach a different decision on the costs at the costs hearing.

101. Costello J. and Pilkington J. have confirmed their agreement to the terms of this judgment and to the next steps set out in the previous paragraph.