THE HIGH COURT

[2021] IEHC 145

RECORD NUMBER: 2014/7709P

BETWEEN

GREENWICH PROJECT HOLDINGS LIMITED

PLAINTIFF

AND

CON CRONIN

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 3 March 2021

Application that judgment of 20 January 2021 be revisited

1. The applicant asks me to revisit my judgment (*Greenwich Project Holdings Ltd. v. Cronin* [2021] IEHC 33), having regard to correspondence that was not opened to me at the hearing but was exhibited to a motion brought on 7 September 2018 by the defendant to vacate the *lis pendens* the plaintiff had registered on the property the subject of these proceedings. On 26 November 2018, Cross J. granted the relief sought and vacated the *lis pendens*.

2. I refuse the application because that correspondence simply confirms a factual position that I had already averted to in the judgment. Therefore, its introduction would simply confirm existing findings and could have no influence on the result of the case.

McInerney Homes

3. In support of its application that I revisit my judgment, the plaintiff relies upon the decision in *Re McInerney Homes Ltd*. [2011] IEHC 25 where Clarke J. agreed to revisit a decision he had made refusing to confirm a scheme of arrangement in circumstances where, after the written judgment but before the Order had been made, a very significant change occurred, whereby the interest of two members of the banking syndicate in the loans advanced to McInerney were to be transferred to NAMA. This would have had the result that the long-term receivership model put forward by the banking syndicate, who had objected to the scheme of arrangement in favour of the receivership, would not in fact be put in place.

4. Clarke J. identified that, when such an application is made, the court must decide if there are strong reasons for so doing. He said it would be a recipe for procedural chaos if a party were entitled to seek to introduce new evidence or arguments simply because the relevant matters were not advanced during the hearing. Where such material was sought to be advanced the court must consider whether the new materials were such as would probably have an important influence on the result of the case, even if not decisive, and were credible. In addition, such new evidence would not ordinarily be permitted to be relied upon if the relevant evidence could with reasonable diligence have been put before the court at the trial.

5. On the facts of the case, Clarke J. identified that the new material, had it been put before the court, would potentially have been a highly material factor in the court's consideration. He concluded that both McInerney and the banking syndicate bore some

responsibility for the fact that the material was not before the court. He concluded that in all the circumstances the balance of justice required that the matter be reopened.

Application of *McInerney* principles

6. In this case, it is said that the findings at paragraphs 26-31 of the judgment that the plaintiff only raised the issue of planning permission/special condition 5 and its connection to the proceedings in 2020 is incorrect, given that those matters were raised in 2014 by the plaintiff, in particular the obligation to close an opening in the adjoining property set out in special condition 5 and the planning permission position in respect thereof.

7. At paragraph 4 of the written submissions in support of this application, the plaintiff refers to material sought to be introduced, being correspondence dating from May to July of 2014 (the proceedings having been issued on 1 September 2014). That correspondence, it is said, identifies the plaintiff's concerns about special condition 5/planning permission.

8. It is accepted in the submissions that the correspondence sought to be relied upon was only exhibited in the context of the completed *lis pendens* motion and that the attention of the court was not drawn to it. However, it is said that this failure is now deeply regretted. 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).

9. The submissions refer to paragraphs 26, 27, 30, 31 and 39 of the judgment where I examine the plaintiff's explanations in respect of delay.

10. In the conclusion section of its submissions, it is stated:

> *"The judgment of the court indicates that it has come to hold an incorrect belief that the plaintiff first considered certain material matters only after the Order of Jordan J was made, the breach of which the Defendant confirmed was the primary challenge underlying the motion, with no explanation as to why they were not considered sooner. Where such matters were in fact considered from the outset, in advance of the litigation, it is respectfully submitted such belief is mistaken …"*

11. This application is based on a fundamental misunderstanding of the findings in the judgment. In fact, 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 at paragraph 26 onwards 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.

12. My point was that this could – and should - have been done from 2014 onwards, given his identified concerns at that point in time. At paragraph 27, I observe – *"there is no explanation why those concerns are only raised in 2020 when the matters giving rise to the concern were known since 2014".*

13. At paragraph 30 I say in respect of the concerns over special condition 5*, "they could not justify the delay because Special Condition 5 is not new … Those averments suggest that he was always concerned about this issue (my emphasis). If so, it is hard to understand why he waited until 2020 to consider the implications of Special Condition 5 for his proceedings".*

14. At paragraph 31 I observe "…*there is no explanation why the concerns now raised were not addressed when the plenary summons and/or the statement of claim were drafted in 2014/2015".*

15. The correspondence is sought to be introduced at this point to show the plaintiff's concern about planning permission and special condition 5 from 2014, in circumstances where it is said that I incorrectly believed that the "*plaintiff first considered certain material matters only after the Order of Jordan J".* But this is not what the judgment finds. 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 steps to introduce them into the proceedings till 2020.

16. Therefore, the material that the plaintiff asks me to now consider – correspondence identifying his concerns in 2014 - serves only to confirm the findings in the judgment to the effect that the plaintiff ought to have acted on foot of his concerns in respect of the conduct of the litigation much earlier. The material would therefore not change my (correct) understanding of the factual position and its introduction would not have any influence on my decision. Accordingly, the plaintiff has failed to meet the first part of the test in *McInerney*.

17. Even if this had not been the case, given that the relevant evidence was before the court only in the context of a motion that had been resolved and was not opened or relied upon by the plaintiff, it might have been difficult for the plaintiff to persuade me that it should be introduced.

18. However, since the application so clearly fails to meet the first part of the test identified by Clarke J., I do not need to decide this issue.

Costs

19. The solicitors for the defendant wrote to the Court on 12 February 2021 setting out his position in relation to costs and form of Order and enclosed a copy of a draft Order. This letter read in part:

"We believe the appropriate order is a straightforward order striking out the proceedings together with an order for costs. We enclose herewith, a form of the suggested order."

20. That draft Order suggested that the plaintiff pay the costs of the defendant's motion and the proceedings.

21. On the same date, the solicitor for the plaintiff wrote to the Court and suggested that it would not oppose such an Order, including in relation to costs:

"…The Plaintiff is not intending to put in submissions opposing what it expects will be the usual order on the motion, including costs but is seeking the usual order of a stay in the event of an appeal. If any change in the judgment arises this may need to be revised"

22. Subsequently, the solicitor for the plaintiff again wrote to the Court on 15 February 2021 and did not cavil with the defendant's proposed draft Order. The plaintiff's only observation was as follows:

"Further to our previous email of Friday the 12th.

Please note if there is any opposition to our request for a stay on orders of the Court pending an appeal, you might contact us immediately.

We will then on behalf of our client file written submissions within 48 hours of receipt of any determination by the Court on written submissions already submitted on the Judgement in advance of the Order being perfected."

23. Given the plaintiff has not made any submissions explaining why a costs order should not be made against him, and the defendant has been wholly successful in its motion to strike out the proceedings, it is appropriate to make an Order in the draft terms submitted by the defendant. In relation to the stay, I will stay the entirety of the Order, including in relation to costs, for four weeks, to allow the plaintiff an opportunity to bring any appeal and apply to the Court of Appeal to extend the stay pending a determination of the appeal.

Form of Order

I refuse the application to re-open the proceedings for the reasons set out above.

The proceedings are to be struck out and the defendant is entitled to an Order that the plaintiff bear the costs of the proceedings, to include reserved costs, the costs of the motion to strike out, and the costs of the application to re-open, to be adjudicated upon in default of agreement.

I will place a stay on the entirety of the Order for four weeks from the date of perfection of the Order.