THE HIGH COURT

COMMERCIAL

[No. 2009/10863 P.]

BETWEEN

SOLICITORS MUTUAL DEFENCE FUND LIMITED

PLAINTIFF

AND

PETER COSTIGAN, RAYMOND DEASY, PATRICK DEMPSEY, PATRICK FINNEGAN, PRAMIT GHOSE, TADHG GUNNELL, DAVID HARLOWE, ANGUS MCDONNELL, JOHN MAGUIRE, ARTHUR QUINLAN, NIALL TINNEY, AIDAN SHEERIN, ANNE BARRETT, MARTIN HARTE AND FBD SECURITIES LIMITED PRACTISING UNDER THE STYLE AND TITLE OF BLOXHAM

DEFENDANTS

AND

MORGAN STANLEY & CO. INTERNATIONAL PLC SATURNS INVESTMENTS EUROPE PLC, MORGAN STANLEY CAPITAL SERVICES INC AND DEUTSCHE TRUSTEE COMPANY LIMITED

THIRD PARTIES

JUDGMENT of Mr. Justice Denis McDonald delivered on 14th May, 2020

The issue which I am required to decide

1. The only issue which I am required to decide, at this point, is whether the court is *functus officio* in these proceedings as a consequence of an order made by Finlay Geoghegan J. on 31st January, 2011. Under that order, the proceedings as against the first to fourteenth named defendants were struck out with liberty to re-enter. That order was made following a written settlement agreement entered into on 28th January, 2011 between the plaintiff and the first to sixth, the eight, the tenth to eleventh and the thirteenth to fourteenth named defendants. Under the settlement agreement, a number of payments were to be made by those defendants including a sum of €6m payable in six instalments of €1m each on dates running between 1st October, 2011 and 1st March, 2016.

2. Pursuant to a notice of motion issued in June 2019, the plaintiff has now sought to re-enter these proceedings as against the defendants who are parties to the settlement agreement and has sought an order granting judgment against those defendants for the sum of €4,921,276.59 being the balance alleged to be outstanding on foot of the settlement agreement.

3. The application to re-enter the proceedings is opposed by the fifth, eighth, tenth, thirteenth and fourteenth named defendants. They argue that the effect of the order made on 31st January, 2011 striking out these proceedings was to make the court *functus officio* thereafter. Accordingly, they contend that the only mechanism available to the plaintiff to enforce the settlement agreement of 28th January, 2011 is for the plaintiff to commence fresh proceedings on foot of that agreement.

4. While a number of issues arose in the course of the lengthy exchange of affidavits which took place between the participating parties, the only issue which I am required to resolve, at this stage, is the issue as to whether the court is or is not

functus officio. The matter comes before me pursuant to a direction made by Barniville J. A hearing in relation to that issue subsequently took place on 4th March, 2020 at which I heard submissions from counsel for the plaintiff, counsel for the eighth and tenth named defendants, counsel for the fifth and fourteenth named defendants and counsel for the thirteenth named defendant.

5. Before proceeding further, it is necessary to summarise the relevant underlying facts.

Relevant facts

6. The plaintiff is a company limited by guarantee which, for some time, provided indemnity cover in respect of professional risks for solicitors in Ireland. According to the plaintiff, the defendant stockbrokers were retained by it to provide stock-broking and investment advisory services. On 20th January, 2005, the plaintiff invested €8.4m in a bond which it contends was recommended to it by the defendants as an appropriate and suitable investment. The plaintiff alleges that the bond subsequently lost 97% of its value.

7. Arising out of the performance of the bond and the advice allegedly given by the defendants, the plaintiff commenced proceedings against the defendants in December 2009 in which it claimed damages for breach of contract, negligence, breach of duty and other alleged wrongs. A compromise of the plaintiff's claim as against the defendants was subsequently reached on the terms set out in the settlement agreement of 28th January, 2011. Under Clause 1 of the settlement agreement, the plaintiff agreed to accept payment of €7.3m in full and final settlement of all claims arising out of the purchase of the bond. Under Clause 2, the defendants who were parties to that agreement agreed to pay to the plaintiff €1.3m by 1st March, 2011 and by Clause 7, the balance was to be paid, as noted above, by six instalments of €1m

each payable on 1st October, 2011, 1st March, 2012, 1st March, 2013, 1st March, 2014, 1st March, 2015 and 1st March, 2016.

8. Clause 15 of the settlement agreement dealt with what was to happen if there was any default in payments of any of the instalments of €1m: -

> *"15. In default of payment of any instalment…within seven days of the due date, SMDF shall be entitled to apply to re-enter these proceedings before the Commercial Court and obtain Judgment against Bloxham jointly and severally for the sum of €8,400,000.00…less any payments made in accordance with the schedule…"*

9. Clause 19 provided that the proceedings were to be struck out with no order as against the fifteenth named defendant. Clause 21 was in the following terms: -

> *"21. At the first opportunity after the execution of these Terms of Settlement, the Parties will jointly mention this matter to the Judge of the High Court having charge of the Commercial List for the purpose of obtaining the following orders: -*
>
> *(a) These proceedings are to be struck out.*
>
> *(b) No Order as to costs.*
>
> *(c) Liberty to both parties to re-enter".*

10. It should be noted that the settlement agreement also dealt with a number of other matters including: -

(a) A requirement that Bloxham should itself provide a sworn statement of affairs to be made available on a confidential basis to certain named parties on behalf of the plaintiff;

(b) the plaintiff was required to assign its interest in the bond to the partners of Bloxham within fourteen days of payment of the first instalment of €1.3m due on 1st March, 2011;

(c) the plaintiff agreed to join as a co-plaintiff in proceedings to be issued in England subject to the plaintiff obtaining, at Bloxham's expense, the benefit of adverse costs insurance;

(d) Bloxham and the individual defendants who are parties to the settlement agreement agreed to indemnify the plaintiff in respect of any award of costs or damages made against the plaintiff in the English proceedings;

(e) in the event that any monies recovered by the plaintiff in the English proceedings exceeded the amount of the settlement sum, Bloxham was to be repaid from the excess;

(f) the settlement also dealt with the continuing pursuit of the third party proceedings by the defendants against the third parties;

(g) Bloxham consented to the plaintiff re-entering the proceedings before the Commercial Court for the purpose of enforcing the obligation to provide the statement of affairs.

11. The payments of €1.3m due on 1st March, 2011 together with the payment of the first two instalments of €1m were all made to the plaintiff. However, no payment was made in respect of the instalment due on 1st March, 2013 or any of the three subsequent payment dates. The present application to re-enter the proceedings and to seek judgment in respect of the balance now due was not made, as noted above, until June 2019. The defendants who participated in the hearing of 4th March, 2020 have all raised issues in relation to the delay in re-entering the proceedings. In

circumstances where the only issue directed to be tried by Barniville J. at this point is the *functus officio* question, delay is not an issue which I am required to address in this judgment.

12. For completeness, it should be noted that, in the supplemental affidavit sworn by Patrick Dorgan on behalf of the plaintiff on 15th January, 2020, Mr. Dorgan has sought to explain the delay. For present purposes, it is unnecessary to address the detail of Mr. Dorgan's affidavit. In the event that I determine that the court is not *functus officio*, the issue of delay will have to be considered in due course, to the extent that it is relevant.

The terms of the order of 31st January 2011

13. The order made on 31st January, 2011 reflects the terms of clause 19 of the settlement agreement of 28th January (quoted in para. 9 above). It also records that the trial of the proceedings had been fixed for the following day (1st February, 2011) before Finlay Geoghegan J. and that the proceedings were mentioned to the court by counsel for the plaintiff and counsel for the defendants. The curial terms of the order provide that, on hearing counsel: -

> *"By consent **IT IS ORDERED** that these proceedings be struck out as against the First to Fourteenth Named Defendants with liberty to re-enter.*
>
> *And By Consent **IT IS ORDERED** that these proceedings be struck out as against the Fifteenth Named Defendant with no order".*

14. The order does not refer to the terms of settlement. As summarised in para. 10 above, the settlement agreement addressed issues which did not fall within the four corners of the proceedings. It therefore could not have been made a rule of court even if the parties so wished. Furthermore, the terms of settlement were not received and filed. Nor was an order made in classic Tomlin style under which, as formulated by

Tomlin J. in *Dashwood v. Dashwood* [1927] W. N. 276, the proceedings would be stayed on terms agreed between the parties (and usually scheduled to the order) with liberty to apply to the court for the purposes of enforcing the terms of settlement. There is no evidence that the court was provided with a copy of the settlement agreement. As the emails summarised in para. 15 below clearly demonstrate, the parties had agreed that the terms of settlement should be kept confidential.

15. Prior to the making of the order on 31st January, 2011 there was an exchange of emails between the solicitors for the parties from which it is clear that the parties wished to ensure that there would be no media presence when the matter was mentioned to the court. The emails record that the original intention had been to mention the matter to Finlay Geoghegan J. at 2pm but that it was not possible to do so as a journalist from the Irish Independent was in court at that stage. The email records that the court reporter for the Irish Times was in a different court room at that time and that the solicitors for the parties were *"currently staking out both courts to see if an opportunity to discreetly mention the matter to the Court will present itself".*

16. It appears that, thereafter, such an opportunity must have presented itself. As noted above, the order of Finlay Geoghegan J. was subsequently made on the same day.

The submissions of the parties

17. In the course of the hearing on 4th March, 2020, I was referred to a significant number of authorities. Senior counsel for the plaintiff argued that, in circumstances where the order expressly gives liberty to re-enter the proceedings, it is clear, on the authorities, that the court is not *functus officio* and that the plaintiff is accordingly entitled to re-enter the proceedings. Counsel argued that an examination of the authorities demonstrated that there is no legal basis for the proposition advanced by

the defendants that, under an order of the kind made on 31st January, 2011, the court is *functus officio* and that, accordingly, the only remedy available to the plaintiff is to sue on foot of the settlement. In making this submission, counsel for the plaintiff drew attention to a number of decisions of Finlay Geoghegan J. in which she had expressly permitted proceedings to be re-entered in circumstances where liberty to that effect was given in previous orders made by the court striking out the proceedings. For example, in *A.S. v. M.S.* [2007] IEHC 412, in proceedings under The Hague Convention on Child Abduction, Finlay Geoghegan J. recorded in her judgment that the proceedings in question had previously been struck out with liberty to re-enter and were subsequently re-entered in the following year after the respondent had been located.

18. Counsel for the plaintiff also referred to the decision of Finlay Geoghegan J. in *M.M. v. R.R.* [2012] IEHC 171 which again related to proceedings under The Hague Convention. In that case, Finlay Geoghegan J. explained at para. 19 of her judgment that, at an earlier stage of the proceedings, she had been asked to adjourn the proceedings generally with liberty to re-enter but she was unwilling to do so and indicated instead that she would strike out the proceedings with liberty to re-enter. This was in circumstances where the whereabouts of the respondent could not be ascertained. At para. 21 of her judgment, Finlay Geoghegan J. explained why she refused to make an order to adjourn the proceedings generally with liberty to re-enter. She said:-

> *"21. ...The reason for which I refused to make an order to adjourn generally, with liberty to re-enter and, rather, made an order striking out the proceedings with liberty to re-enter, is that by reason of the obligations on the Court to deal with applications under The Hague Convention and Regulation*

> *2201/2003 in an expeditious manner, it does not appear to me appropriate that proceedings be adjourned generally, and thus remain in being but not under management by the Court. Rather, it appears to me that in such circumstances, the appropriate order is to strike out the proceedings but with liberty to re-enter.* ***The purpose of giving liberty to re-enter is that, if the respondent and children are found to be continuing to reside in Ireland, the proceedings could be re-entered and continued against the respondent."*** (emphasis added).

19. Counsel for the plaintiff highlighted that the order made on 31st January, 2011 in this case was in precisely similar terms providing for a striking out of the proceedings with liberty to re-enter. Counsel submitted that the decision in *M.M.* very clearly illustrates that an order of this kind does not prevent proceedings which had previously been struck out on those terms from being re-entered and resuming their previous existence.

20. In his submissions, counsel for the plaintiff also analysed each of the authorities on which the defendants relied and submitted that each of them could be distinguished. Counsel accepted that both Delany & McGrath in *Civil Procedure* (4th ed., 2018) and David Hardiman S.C. (in an article published in the *Commercial Law Practitioner* in 1998) suggest that an order striking out proceedings renders the court *functus officio*. However, counsel submitted that, in making that suggestion, the authors go too far. Counsel urged that one has to have regard to the language used in the order as a whole and consider whether or not the court has made it clear that the court is to have a future role. Counsel submitted that, where an order provides for liberty to re-enter, this very clearly indicates that both the court and the parties envisage that the court would have a role. Counsel submitted that no decision of the

court has been identified by the defendants to support the proposition that, where, in an order striking out proceedings, the court also gives liberty to re-enter, the court no longer has any function in those proceedings.

21. In response, senior counsel for the eighth and tenth defendants argued that the effect of an order striking out proceedings is to render the court *functus officio.* He placed significant emphasis on the article by Hardiman noted above and on what is said by Delany & McGrath. In particular, he drew attention to what is said by Delany & McGrath in para. 20-21 namely:-

> *"Perhaps the simplest course … is for the proceedings to be struck out ….. This course may be attractive where the parties wish to keep the terms of settlement confidential but it does suffer from the marked disadvantage that the compromise retains its contractual character and cannot be enforced without the issue of fresh proceedings. In Green v. Rozen, an action for the recovery of certain sums of money was compromised on terms endorsed on counsel's briefs which involved the payment of monies in instalments. Although it was agreed that the proceedings would be stayed and that each side should have liberty to apply, no order to that effect was made. The defendants defaulted … and the plaintiff applied for judgment in the sum of the outstanding amount due. This application was … refused on the basis that the agreement compromising the action completely superseded the original cause of action and, in circumstances where the court had not made an order in the action, it had no further jurisdiction in respect of the original cause of action and the plaintiff's only remedy was to bring proceedings to enforce the compromise. If the order made is one striking out the proceedings, then it would appear that the addition of a provision in the order that the parties have*

> *'liberty to apply' does not alter the situation. In Ascough v. Roe, proceedings were settled and an order was made by consent … 'strike out with liberty to apply'. It was held that the order striking out the proceedings disposed of the case in its entirety and did not merely remove it from the list. The court was, therefore, functus officio and could not take steps to enforce the settlement".*

22. Counsel for the eighth and tenth defendants also relied on the decisions in *Green v. Rozen* and *Ascough v. Roe* mentioned by Delany & McGrath. Those decisions are examined in more detail below and, for that reason, I do not propose, at this point, to rehearse the arguments of counsel in relation to them. Furthermore, since the passage from Delany & McGrath is based on the approach taken in those two decisions, I do not believe that it is necessary to separately address the views expressed by those distinguished authors.

23. Counsel submitted that there was good reason why the parties, in this case, asked the court to strike the proceedings out rather than to make the settlement a rule of court or to schedule the settlement to a Tomlin style order. He drew attention, in this context, to what was said by Mr. Dorgan in para. 8 of his affidavit sworn on 15th January, 2020 in which he said that:-

> "*8…. the reason the Settlement Agreement was not made a Rule of Court was for the benefit of … some or all of the Remaining Defendants who wished its terms to remain confidential to avoid adverse publicity".*

24. In that affidavit, Mr. Dorgan exhibited the exchange of emails (summarised in para. 15 above) which demonstrated the lengths to which the legal representatives of certain of the defendants sought to ensure that no media were present when the matter was mentioned to Finlay Geoghegan J.

25. Counsel submitted that it was clear from the passage (quoted in para. 21 above) from Delany & McGrath that it is essential that any future role for the court should be embodied in the court order made following settlement of proceedings. It was not enough for the parties to agree among themselves that the court should have a future role in the event that any element of the settlement needed to be enforced. Counsel submitted that the most appropriate way in which to ensure that the court would have a future role is by the making of a Tomlin order. In the absence of such an order, counsel urged that fresh proceedings are required to enforce the settlement.

26. With regard to the use of the words "*liberty to re-enter"* in the order made by Finlay Geoghegan J., counsel suggested that this formula had no effect unless the parties have expressly, in the terms of the order, given the court a role. Counsel referred to Collins *"Enforcement of Judgments"*, 2nd ed., 2019 at para. 1-12 in support of this proposition. He also referred to *Foskett on Compromise,* 9th ed. at paras. 9-22 to 9-23 where the author states:-

> *"9-22. A variety of means exist by which terms of an agreement that cannot be effected as an order … within the normal jurisdiction of the court can be made amenable to the jurisdiction of the court for the purposes of enforcement…. Reference has already been made to the procedure by which an agreement may be filed and made a rule of court, although it should be noted that this approach is now rarely, if ever, adopted.*
>
> *9-23. The method most commonly adopted to effectuate a compromise involving terms going beyond the court's normal jurisdiction is to incorporate the agreement into a 'Tomlin order'. This provides for a consensual stay of the proceedings on the agreed terms save for the purposes of carrying the agreed terms into effect, permission to apply to the court for this purpose*

being reserved. The terms are usually incorporated into a schedule to the order or are recorded in a separate document which is identified clearly on the face of the order. The great advantage of this procedure is that it enables the enforcement of the terms of the settlement ***within the existing action*** *by a summary procedure…."* (emphasis in original)

27. It should be noted that, although Foskett highlights the use of a Tomlin order, the passage quoted in para. 26 above does not go so far as to suggest that a Tomlin order is the only mechanism that can be adopted to enable the enforcement of the terms of settlement within an existing action. That said, it cannot be denied that a Tomlin order provides a safe and well-established mechanism to achieve this purpose.

28. Counsel for the eighth and tenth named defendants also drew attention to para. 9-24 of Foskett where the author states:-

"9-24. Regular use has been made of the Tomlin form of order for many years. The structure of the Tomlin order itself represents something of a compromise between competing legal and practical considerations. It is well established that once a compromise has been concluded a new legal relationship between the parties comes into existence replacing the previous relationship of disputation. In the event of a failure by one of the parties to honour the agreement, the position in law is that the innocent party will have a cause of action represented by an action for damages, for specific performance or for an injunction or other relief depending upon the circumstances. In the ordinary way, a cause of action is pursued procedurally by means of a new action. However, it would be something of a perversion of the whole idea of compromise if the full procedural panoply arising from the institution of new proceedings was necessary in this situation. New proceedings in the form of a

fresh action would be cumbersome and would, in most cases, result in unjustified delay in the implementation of the agreement. But for the machinery afforded by a Tomlin order, parties to an agreement containing provisions which could not be made the subject of direct provision within a consent order would be forced to institute fresh proceedings for the purposes of enforcement".

29. Again, this passage clearly describes the significant utility of a Tomlin order but I do not believe that it goes so far as to suggest that a Tomlin order is the only means by which parties to a settlement agreement can secure the intervention of the court for the purposes of enforcing a settlement without the need to commence fresh proceedings for that purpose. I acknowledge, however, that, in the absence of some mechanism which achieves that purpose, the only method by which a settlement can be enforced is to commence fresh proceedings to enforce the terms of settlement.

30. Counsel for the eighth and tenth named defendants suggested that, having regard to the nature of the order made in this case, the sole mechanism available to the plaintiff to enforce the terms of the Settlement Agreement reached in January 2011 is to institute fresh proceedings for the purposes of enforcing that agreement.

31. With regard to the reliance by the plaintiff on the decisions of Finlay Geoghegan J. in *M.M. v. R.R.* and *A.S. v. M.S.,* counsel submitted that no issue was raised in those proceedings as to the jurisdiction of the court to re-enter the matter. Counsel urged that, since the point was never argued in those cases, those cases cannot be treated as authority for the proposition advanced by the plaintiff here. Counsel concluded by saying that, in circumstances where the alleged breaches occurred as long ago as 2013, there would be no injustice to the plaintiff if it has to commence new proceedings rather than attempting to re-enter the proceedings.

32. Counsel for the fifth and fourteenth named defendants adopted the submissions made by counsel for the eighth and tenth named defendants. He submitted that the first issue to be considered is the meaning and effect of the words *"struck out".* He suggested that the authorities make it clear that the effect of those words is to terminate the proceedings. He referred, in this context, to the decision of O'Neill J. in *Sweeney v. Bus Átha Cliath* (High Court, unreported, 30th January, 2004) where O'Neill J. said, at p. 8:-

> *"Where … the proceedings are brought to a conclusion by an order simply striking out the proceedings, it cannot in my view be said that any judgment is given or that any judicial decision is made. The essence of a strike out of the proceedings is to terminate the proceedings without any recourse to a judicial decision on the claims made in the proceedings…."*

33. Counsel also relied on the decision of Barron J. in *Ascough* (discussed further below). He contrasted the effect of an order striking out proceedings with the effect of an order providing for a stay of proceedings or an order adjourning the proceedings generally with liberty to re-enter. While a stay or an adjournment of the latter kind keeps the proceedings alive, the position is different where an order is made striking out the proceedings. The proceedings are brought to an end where the court makes an order striking out the proceedings. He submitted that, if the parties intended that the court should have an enforcement role, then the appropriate order that should have been made was a Tomlin order or an order of a similar nature. He suggested that, under a Tomlin order, the court accepts the invitation of the parties to have a future role in the enforcement of the private settlement reached between the parties.

34. With regard to the use of the words "*liberty to re-enter"* in the order, counsel submitted that these words were of no effect in circumstances where the order striking

out the proceedings terminated the proceedings. Moreover, he submitted that, on the basis of the approach taken in *McMullen v. Carty*, re-entry of proceedings allows the parties to deal with the original dispute. It is not suitable for the purposes of enforcing a settlement of the claims made in the original proceedings. Counsel's reference to *McMullen v. Carty* relates to a series of decisions in the High Court and Supreme Court including the judgments in *McMullen v. Carty* (Supreme Court), unreported, 27th January, 1998 and to the decisions of both the High Court and Supreme Court in *McMullen v. Clancy (No. 2)* [2005] 2 I.R. 445. These decisions show that, in contrast to liberty to re-enter, liberty to apply (given in an order disposing of the proceedings) does not entitle a party to return to court in the same proceedings to litigate the original claim.

35. In support of his argument that *"liberty to re-enter"* enables the original claim to be litigated (rather than a settlement to be enforced), counsel also referred to the decision of O'Neill J. in *O'Mahony (a Minor) v. Minister for Education and Science* [2005] IEHC 211 where, at p.p. 9-10 of his judgment, O'Neill J. said:-

> *"In my view the phrase 'liberty to re-enter' coupled with 'adjourned generally' in this context can only mean that in the event of a failure to fulfil the commitments made by the Respondent … the Applicant would have the right to litigate the original claims in that proceedings unless it could be said that the proceedings had been brought to termination by a settlement, which was approved by the Court, this would be necessary because the Applicant was a minor at the time."*

36. With regard to the decisions of Finlay Geoghegan J. in *M.M. v. R.R.* and *A.S. v. M.S.*, counsel highlighted that, in both of those cases, the purpose of re-entering the proceedings was to re-enter the original claim. It was not to enforce a settlement of

the original claim in a summary manner which is what is proposed here. Accordingly, he argued that the plaintiff's reliance on these decisions is misplaced.

37. Counsel also cautioned that, if a party is entitled to apply to the court to enforce the terms of a settlement in circumstances such as those which exist in the present case, this would have the potential to defeat the counter-party's right to rely on the Statute of Limitations. That said, counsel very helpfully drew attention to the recent decision of Jacobs J. in *Bostani v. Pieper* [2019] 4 WLR 44 where, even in the case of a Tomlin order, it was held that an application to enforce a settlement was subject to the same six-year limitation period as an action to enforce a contract. At paras. 54-56 of his judgment in that case, Jacobs J. said:-

> *"54. It is true that when an order is sought for the enforcement of terms contained in a Tomlin Order, that can be described as the enforcement of the court's own orders …. In that sense, it could be said that proceedings to enforce the terms scheduled to a Tomlin Order is something different to an action 'founded on a simple contract'. However, the substance of such an application is to enforce contractual rights, and it would be surprising if the consequence of scheduling those rights to a Tomlin Order was to insulate a claim for breach of contract from the statute of limitation.*
>
> *55. ….*
>
> *56. In the light of these conclusions, it seems to me that the entitlement given to the Claimants, under Clause 3 of the settlement agreement, to enter judgment in consequence of a breach of contract is also subject to a six-year limitation period. That entitlement is simply the consequence of breach, and I can see no reason why the limitation period should not apply to the exercise of that right arising in consequence of breach. …."*

38. Thus, in the present case, if I determine that the proceedings can be re-entered for the purposes of enforcing clause 15 of the settlement agreement, the defendants may be entitled to argue that the Statute of Limitations applies to the enforcement of that agreement. If so, that is an issue to be decided in due course.

39. In his submissions, counsel for the thirteenth named defendant also relied on the judgment of Barron J. in *Ascough.* He submitted that the decision in *Ascough* is *"fatal"* to the plaintiff's application. Counsel stressed that, quite apart from the issue which arises as a consequence of *Ascough*, the order here makes no reference whatever to the settlement terms and provides no indication as to what is to be re-entered. He suggested, in particular, that there was nothing on the face of the order to indicate that the proceedings could be re-entered for the purposes of enforcing any settlement agreement. Counsel highlighted that there is no reference to the settlement agreement in the order.

40. Like counsel for the fifth and fourteenth named defendants, counsel for the thirteenth named defendant argued that the decisions of Finlay Geoghegan J. in *M.M. v. R.R.* and *A.S. v. M. S.* are not authority for the proposition that proceedings can be re-entered for the purposes of enforcing a settlement. In both of those proceedings, it was the original claim that was re-entered. Counsel referred, in this context, to the following observations made by Delany & McGrath in para. 20-19 where they say:-

> *"20-19. The inclusion of 'liberty to apply' in a consent order does not … entitle a party to re-commence the prosecution of the proceedings as is the case where liberty to re-enter is reserved. A fortiori, it does not permit new claims to be made in the proceedings. By way of contrast, where the phrase "liberty to re-enter" is used, a party may seek to re-litigate the claims originally made in the proceedings, unless they have been brought to a*

> *conclusion by a court approved settlement. This distinction between 'liberty to apply' and 'liberty to re-enter' is, thus, very important because it is only in the case of the latter that continued prosecution of the underlying proceedings is possible".*

In this case, counsel submitted that the purpose of the plaintiff in re-entering the proceedings is clearly not for the purposes of litigating the original claim but to enforce the settlement agreement. Counsel suggested that this was not permissible in that it does not come within the well-established meaning of the words *"liberty to re-enter".*

41. In his reply, counsel for the plaintiff emphasised that the words of the order need to be read as a whole. One cannot therefore read the words striking out the proceedings without also having regard to the very clear statement within the order that there is liberty to re-enter.

42. With regard to the meaning of the words *"liberty to re-enter",* counsel for the plaintiff suggested that it was inconceivable that Finlay Geoghegan J., in giving liberty to re-enter on 31st January, 2011, had in mind that the original claim made in the proceedings could be recommenced or re-litigated. It was important to bear in mind that, as the order itself recorded, the hearing of the action was due to commence on the following day namely 1st February, 2011. Against that background, counsel said that it was unthinkable that the court would have given liberty to re-enter for the purposes of re-instating the claim at some future time and that it was plain that the court, in making the order of 31st January, 2011, was acting on the clear understanding that the original claim had been resolved.

43. With regard to the decision of O'Neill J. in *O'Mahony (a Minor),* counsel suggested that it must be seen in context. Counsel submitted that there was nothing in

the judgment of O'Neill J. in that case to suggest that the only mode of re-entry was for the purposes of re-litigating the original claim.

44. In response to the argument that the court is not entitled, in its interpretation of the order of 31st January, 2011, to consider the settlement agreement, counsel for the plaintiff referred to the decision of Barron J. in *Ascough* where Barron J. considered the relevant terms of settlement. Counsel submitted that it was unlikely that Finlay Geoghegan J. had given liberty to re-enter the proceedings for no purpose and that it was therefore permissible to have regard to the terms of settlement in order to determine the purpose for which liberty to re-enter was given.

Discussion and analysis

45. All three teams of counsel who appeared on behalf of the defendants who participated in the hearing of the present application placed significant reliance on the decision of Barron J. in *Ascough v. Roe* (High Court, unreported, 21st May, 1992). For that reason, it is necessary to consider that decision in some detail. In that case, the decision of the respondent (a judge of the Circuit Court) was challenged in judicial review proceedings on the ground that he had acted without jurisdiction in purporting to re-enter and rehear a case taken by Peter Carroll against the applicant, Matthew Ascough. In those proceedings before the Circuit Court, Mr. Carroll had alleged that he was entitled to a right of way over the lands of Mr. Ascough. Proceedings were commenced in 1980 and came on for hearing before Judge Roe (as he then was) in November 1980 in Wicklow Circuit Court. In the course of that hearing, the case was compromised on terms which envisaged that Mr. Ascough would transfer to Mr. Carroll a plot of ground to form a carriageway. The settlement agreement also provided that the proceedings should be *"struck out by consent with no order as to costs save as herein provided".* The settlement agreement also stated: *"liberty to both*

parties to apply at any Court on the Eastern Circuit". Judge Roe was informed that the action was settled by consent and he made an order that the proceedings should be struck out and that the settlement agreement should be received and placed on the court file. Thereafter a dispute arose as to the implementation of the settlement agreement. The solicitors acting for Mr. Carroll re-entered the proceedings before Judge Roe and applied to set the settlement aside on the basis that its terms could not be implemented as envisaged. Counsel for Mr. Ascough opposed the application on the ground that the settlement agreement was a fully binding and conclusive settlement of the original claim in the proceedings. However, Judge Roe ruled against that submission and indicated that he was not bound by the settlement. He subsequently proceeded to hear the case and made an award in Mr. Carroll's favour. Judicial review proceedings were then commenced by Mr. Ascough seeking to set aside that decision on the grounds that, in light of the earlier settlement agreement and the subsequent striking out of the proceedings, Judge Roe was *functus officio* and had no jurisdiction to set aside the settlement agreement, re-hear the case and give judgment in Mr. Carroll's favour. In the course of the High Court judicial review proceedings it was argued that the fact that the order of November 1980 gave liberty to apply entitled Judge Roe to proceed in the way in which he had. This submission was rejected by Barron J. who said at p.p. 10-13:-

> *"In my view, liberty to apply in the present case cannot be interpreted as meaning that the arrangement made between the parties is to be subject to review. The reference to any Court on the Eastern Circuit is merely to enable the parties, if any matter arose which could properly be dealt with under the liberty to apply provision, to mention it to the Court so soon as it arose rather than to wait until the Court was again sitting in Wicklow. The significant*

matter in the present case is the form of the order …. Strike-out is a form of order which disposes of the case. It does not merely take it out of the list. It is not the same as adjourned generally with liberty to re-enter. In the latter case, the matter is taken out of the list, but can be replaced in the list on the application of either party. The order of … 17th November 1980 disposes of the case and shows that the parties were content to rely on their rights as contained in the agreement. …. Once the case was disposed of, the Respondent was functus officio. In the State (Michael Dunne). v. Judge Martin, …, the Supreme Court was dealing with the validity of orders made by a Circuit Court Judge on a District Court Criminal Appeal. In that case, the appeals had been dismissed because of the non-attendance of the Appellant. Subsequently, the learned Circuit Court Judge allowed the matter to be re-entered and made certain orders. It was these latter orders which were being challenged. The Supreme Court held that the jurisdiction of the … Circuit Court Judge was spent when he finally disposed of the appeals and that he had no jurisdiction to re-enter them. In the course of his judgment Henchy, J. said dealing with the question of jurisdiction:-

> *'It was spent because the Judge had validly and finally disposed of the appeal…. In my opinion, the orders he made on that date should stand'.*

Although the present case is a civil case, I can see no reason why the same principle should not be adopted.

When the plaintiff brought the matter back into the list on the 23rd February 1981 the Respondent was functus officio in relation to the original cause of action. As regards the agreement, it is like any other contract. The rights of

the parties depend upon the intention of the parties as expressed by the words used. Whether or not the parties intend the construction of the agreement towards (sic) enforceability or any other matter relating to it to be controlled by the Court depends upon the terms of the contract itself and, in so far as any of these terms are embodied in a Court order, by the terms of such order. The various forms of order which may be made following a consent between the parties were fully discussed by Slade, J., in Greene v. Rozen, ….. If the Court is intended to be involved in the enforcement of the Consent, then the order should be sought and made in the form known as a Tomlin order. Such an Order reserves jurisdiction to the Court in so far as it may be required to give effect to the terms of the order.

In the present case, the parties did not do this. The rights of the parties were then governed by the consent. If a problem arose as to the implementation of the Consent, this was a matter for further agreement between the parties, if possible, and, if not, for either party to take such legal steps as might be appropriate based on his rights as contained in the agreement. This meant that the Respondent had no function in relation to the implementation of the agreement. ….”

46. I believe that the judgment of Barron J. requires careful analysis. In my view, a number of points arise from the judgment:-

(a) In the first place, as noted by counsel for the plaintiff, Barron J., in considering the issue before him, had regard to the terms of the settlement agreement executed between the parties. He specifically held that, whether or not parties intend enforceability of the agreement to be controlled by the court depends upon the terms of the agreement

reached between them and, insofar as any of those terms are embodied in the court order, by the terms of that order.

(b) Secondly, in contrast to Clause 15 of the settlement agreement in this case, the terms of the compromise entered into between the parties in *Ascough* did not contain any provision which envisaged that the proceedings could be re-entered for the purposes of enforcing the settlement agreement.

(c) Thirdly, although Barron J. clearly considered that a Tomlin order is the most appropriate route to take if parties wished to ensure a future role for the court in enforcing a settlement agreement, his judgment cannot be read, in my view, as suggesting that it is the only method which secures a future role for the court. It is important to keep in mind that, in this context, Barron J. cited the decision of Slade J. (as he then was) in *Green v. Rozen* [1955] 1 W.L.R. 741. In that case, while Slade J. expressly instanced five methods of disposing of an action following a compromise between the parties, he stressed that this list was not exhaustive. It is also noteworthy that Slade J. did not consider a Tomlin order to be the only mechanism that would work. For example, he also instanced cases where an order is made by consent staying all further proceedings in the action upon terms agreed and endorsed on counsels' briefs. In contrast, in *Green v. Rozen* itself, the terms of settlement had been endorsed on counsel's brief but, crucially, no order of any kind had been made. For that reason, Slade J. concluded, at p. 746:-

> *"The court has made no order of any kind whatsoever, and having considered such authorities as I have been able to find, I arrive at the conclusion that in those circumstances the court has no further jurisdiction in respect of the original cause of action, because it has been superseded by the new agreement between the parties to the action, and if the terms of the new agreement are not complied with the injured party must seek his remedy upon the new agreement".*

I believe it is clear from this extract from the judgment of Slade J. that he considered that it is always necessary to consider the form of the order made on foot of a compromise. I believe it is equally clear from his judgment as a whole that he did not consider that a Tomlin order (which is one of the five mechanisms specifically instanced by him) was the sole mechanism that could be used in order to secure a future role for the court;

(d) Fourthly, in *Ascough*, the settlement agreement had simply provided for "*liberty to apply*" without any explanation as to what was envisaged. As counsel for the plaintiff suggested, in the course of argument, there was nothing in the terms of settlement in that case to suggest what role the court was to have in the future. While Barron J. did not reach any final conclusion as to what might fall within the ambit of *"liberty to apply",* he was unsurprisingly of the view that *"liberty to apply"* was insufficient to give the court a power to set aside the settlement previously agreed between the parties and, instead, to proceed with a rehearing of the case.

(e) It is true, as counsel for the defendants have emphasised, that Barron J. expressed the view that the order previously made by Judge Roe striking out the proceedings rendered the Circuit Court *functus officio*. However, he reached that conclusion against the backdrop of the settlement agreement and, crucially, on the basis of the specific terms of the order made by Judge Roe in the Circuit Court in that case. In contrast, in the present case, the order does not simply strike out the proceedings with liberty to apply but also provides for liberty to re-enter. In my view, it is therefore necessary to consider the meaning of the order of 31st January, 2011 as a whole. I do not believe that one can properly glean its meaning and effect solely by reference to the direction that the proceedings be struck out.

47. Next, it is necessary to address the decisions of O'Neill J. in *Sweeney v. Bus Átha Cliath* and in *O'Mahony (a Minor) v. Minister for Education and Science.* In my view, both of those decisions must be read in context. In *Sweeney*, O'Neill J. was concerned with whether an order previously made by the Circuit Court striking out proceedings brought by Bus Átha Cliath against the plaintiff, Mr. Raymond Sweeney, gave rise to *res judicata* barring a subsequent claim for damages for personal injuries commenced by Mr. Sweeney against Bus Átha Cliath. O'Neill J. came to the conclusion that it did not give rise to *res judicata* in that it did not involve any judicial decision on the claims made in the proceedings taken by Bus Átha Cliath against Mr. Sweeney. It was in that context that he made the observation on which the defendants rely namely that:-

"The essence of a strike out of the proceedings is to terminate the proceedings without any recourse to a judicial decision on the claims made in the proceedings".

48. The order made in that case was quite different to the order made by Finlay Geoghegan J. in these proceedings in January 2011. The order in the *Sweeney* case simply struck out the proceedings. There was no liberty given to re-enter the proceedings. Nor was there liberty to apply. In those circumstances, I do not believe that any proper parallel can be drawn between this case and *Sweeney*.

49. In *O'Mahony (a Minor)*, an order was made by McGuinness J. in July 1999 in judicial review proceedings which recorded that a settlement had been reached with the approval of the court and directed the proceedings should *"stand adjourned generally with liberty to re-enter".* The approval of the court was necessary in circumstances where the applicant was a minor with significant intellectual difficulties. Some years later, the applicant sought to re-enter the proceedings against the respondent on the basis of a contention that the settlement agreement obliged the respondents to put in place particular facilities for the applicant in a special needs school. Although it was acknowledged by the respondent that a statement of intent had been made by the respondent contemporaneously with the settlement of the proceedings, the application was opposed by the respondent on the basis that (*inter alia)* the settlement previously entered into did not go so far as to require that these facilities should be put in place. It was argued in the alternative that, if the applicant could establish that the relevant statement of intent had contractual force, the appropriate remedy would be a new action suing for breach of the settlement and not a re-entry of the previous proceedings. Significantly, O'Neill J. had regard to the evidence in the case as to what was agreed between the parties. Like Barron J. in

Ascough, he did not look solely at the terms of the order previously made by McGuinness J.

50. O'Neill J. came to the conclusion, on the basis of the materials before him, that the respondent did not undertake, as part of the compromise of the proceedings, to provide the facilities now claimed by the applicant. He noted that the applicant had been paid a sum of €20,000 on an *ex gratia* basis and he concluded that this sum was paid in settlement of the claims previously made. Against that background, he then had to construe what was intended by the use of the phrase *"liberty to re-enter".* This is what he said at pp. 9-10 of his judgment:-

> *"In my view the phrase 'liberty to re-enter' coupled with 'adjourned generally' in this context can only mean that in the event of a failure to fulfil the commitments made by the Respondent that the Applicant would have the right to re-litigate the original claims in that proceedings unless it could be said that the proceedings had been brought* to *termination by a settlement, which was approved by the Court, this would be necessary because the Applicant was a minor at the time.*
>
> *Interpreting the phrase 'liberty to re-enter' as synonymous with the phrase 'liberty to apply' would make no sense in this context in that the assurance or statement of intent of the respondent was not legally binding and could not be amenable to clarification or ancillary relief to enable or enhance its legal effectiveness.*
>
> *It is quite clear that there was a settlement which was approved by the Court, the order makes that plain. It would seem to me that it is highly unlikely that the Court was not told of the €20,000 as part of that settlement. In my view such a conclusion is the only reasonable inference to be drawn from all of the*

evidence including the terms of the order itself. The order says that the Court approved the settlement. I cannot agree with the Applicant's submission that the €20,000 cannot be regarded as a payment in respect of damages for compensation because it was expressed to be ex gratia given that the sum was paid in the context of these proceedings and given that the costs were to be paid additionally.

In my view, this payment cannot be understood otherwise than as a payment which compromised the claim for damages …. Otherwise the payment has no meaning at all and no other reason for this payment has been advanced by the Applicant.

I, therefore, have come to the conclusion that the Applicant's claim for damages … has been compromised and settled and paid and no purpose can be served in re-entering the proceedings to enable the Applicant to pursue his claim for damages."

51. The approach taken by O'Neill J. in that case is very helpful for present purposes. In the first place, the approach taken by O'Neill J. is consistent with that previously taken by Barron J. in *Ascough*. Like Barron J., O'Neill J., in seeking to construe the meaning and effect of the order made, had regard to the underlying settlement. Secondly, O'Neill J. took the view that the phrase *"liberty to re-enter"* ordinarily means that there would be a right to litigate the original claims in the proceedings save in circumstances where the proceedings had been previously terminated by a settlement. The corollary of that conclusion is that the meaning of the words "*liberty to re-enter"* may vary depending on the circumstances. It is also clear from the approach taken by O'Neill J that, where the proceedings have previously been compromised, the words "*liberty to re-enter"* will not ordinarily mean that a

party in the position of a plaintiff will be at liberty to litigate the original claims made in those proceedings. O'Neill J. came to the conclusion that, because the claim originally made in the proceedings had been compromised, it was, therefore, not open to the applicant to attempt to re-open the proceedings before the court in the manner proposed in that case.

52. In my view, counsel for the fifth and fourteenth defendants and counsel for the thirteenth defendant are correct in their submission that the decisions of Finlay Geoghegan J. in *A.S. v. M.S.* and in *M.M. v. R.R.* are consistent with the approach taken by O'Neill J. in *O'Mahony.* In both cases, the original claims made in the proceedings were re-entered pursuant to the liberty previously given under orders made at an earlier time in the proceedings under which both sets of proceedings were struck out with liberty to re-enter. Equally, it seems to me that counsel for the plaintiff was correct in his submission that these decisions show that the striking out of proceedings does not, *ipso facto*, mean that a court is always *functus officio.* On the contrary, the fact that different conclusions have been drawn by courts, depending on the context, demonstrates that each case must be considered by reference to its own individual facts and by reference to the particular terms of the order under consideration. In this regard, I have not lost sight of the submission made by counsel for the eighth and tenth named defendants that the issue does not appear to have been argued in either of the two Hague Convention cases decided by Finlay Geoghegan J. While I, of course, bear that consideration in mind, I also have regard to the fact that, as counsel for the plaintiff stressed in the course of the hearing, Finlay Geoghegan J. is renowned as a careful and meticulous judge and as a master of practice and procedure. It is therefore inherently unlikely that she would have permitted parties to proceed in a manner which was in any way irregular**.**

53. More recently, a similar approach was taken by O'Connor J. in *Carthy v. Boylan* [2020] IEHC 166. In that case, an order was made, following the settlement of the proceedings, by consent, that the plaintiff's action be struck out with no order as to costs. It was also ordered that the settlement agreement *"be received and filed in court"* and the order expressly gave *"liberty to apply to all parties for the purposes of enforcing the said settlement".* The order was accordingly in more comprehensive terms than the order made by Finlay Geoghegan J. in this case on 31st January, 2011. Thereafter, a notice of motion was issued by the plaintiffs in the existing proceedings seeking to give effect to certain elements of the settlement agreement. Notwithstanding the express terms of the order in that case, it appears to have been argued on behalf of the defendants that, because the relevant order struck out the proceedings, this had the effect that the court was *functus officio* and that, accordingly, fresh proceedings were required to enforce the settlement agreement. In his judgment, O'Connor J. very carefully reviewed the relevant authorities (including a number of judgments that were not cited to me). In addition, like Barron J. in *Ascough* and O'Neill J. in *O'Mahony (a Minor),* O'Connor J. had regard to the terms of the settlement agreement in seeking to understand the meaning and effect of the order. At paras. 29-30 of his judgment, he rejected the suggestion that fresh proceedings were required. In particular, he said at para. 30:-

> *"30. … the above review of the more recent case law in this jurisdiction particularly, reveals the willingness of the courts and practitioners to administer justice effectively, without delay and with a view to minimise expense…."*.

54. In my view, the authorities discussed above demonstrate that, in each case, it is necessary to construe a court order, made by consent, by reference to its terms but

also by reference to the specific context in which the order was made. In this context, I bear in mind the observations of Clarke J. (as he then was) in *Rambaxy Laboratories Ltd v. Warner-Lambert Company* [2009] 4 I.R. 584. While that decision was reached in the specific context of the interpretation of a patent, Clarke J. emphasised that the construction of any document affecting legal rights or entitlements must always be construed in context. At pp. 599-600, Clarke J. said:-

> *"36. It seems to me that recent developments in a number of jurisdictions and in a number of areas of construction, all betray a common tendency. Very many different forms of document are designed to determine legal rights and obligations. At one end of the spectrum are the laws of the land to be found in the Constitution, Acts of the Oireachtas, and Instruments made with the authority of those Acts. A whole host of other forms of documents govern the legal relations between parties. Contracts are frequently in written form. Unincorporated bodies govern the relations of their members by means of rules, corporate bodies by their Articles of Association. A document such as a patent, as has been seen, defines the extent of the monopoly of the patentee.*
>
> *37. Where questions arise as to the proper construction of a document having legal effect, then it falls to a court to construe it and thus determine its effect on the legal rights and obligations involved. That construction may involve determining the law of the land, the nature of bilateral contractual relations, the obligations or entitlements of a member of unincorporated or corporate bodies or the boundaries of a patentee's monopoly. However, it seems to me that the overall principle behind the construction of any document which is intended or is likely to affect legal entitlements and obligations is that it must*

be construed in the context of its purpose and in a manner which those whose rights and obligations are likely to be affected by it, would understand it.

38. The most fundamental aspect of context is the nature of the document itself. One expects an Act of the Oireachtas to be drafted in a particular way and with a considerable amount of care. One would not likely assume there to have been a mistake. Similarly, significant commercial contracts, carefully negotiated with the assistance of experienced lawyers, must be assumed to have been properly worked out by those lawyers. A court will not likely assume a mistake in this regard either. However, where specialist or technical language is used, a court may require evidence to understand that language in context. In addition, a court may need to know the overall context of the circumstances leading to the negotiation of the contract in the first place. This is because the contract should be construed in the way in which a reasonable and informed person entering into a contract of that type would be likely to interpret it. That person will not come to the interpretation of the contract with a blank mind. The contractual negotiations will commence against a particular factual backdrop and the parties will be seeking to advance their commercial interests against that factual back drop".

55. It seems to me that, considering the meaning and effect of the order of 31st January, 2011 in the present case, I should bear similar principles in mind. Like O'Neill J. in *O'Mahony* and Barron J. in *Ascough*, I believe, for the reasons discussed in more detail in paras. 56 to 58 below, that a consent order of this kind cannot be construed in isolation. In circumstances where, by reference to the language used in the order, there is doubt as to its meaning and effect, it must be construed against the backdrop of the settlement agreement that was entered into on 28th January, 2011.

56. That said, the first port of call must be the language used in the order itself. There are a number of features of the order which are noteworthy. In the first place, the order provides that the proceedings be struck out. Having regard to the approach taken in previous case law, those words, used on their own, would ordinarily mean that the proceedings were thereby terminated with the consequence that the court would, thereafter, be *functus officio*. However, those words are not found on their own. In the very same sentence, the order records that, by consent, there is liberty to re-enter. In my view, the order must be read as a whole. That is a basic rule of construction which is encountered in everything from the interpretation of statutes to the interpretation of contractual documents. This approach is so well-established that it is hardly necessary to cite authority for the proposition. If authority is necessary, it is to be found in the judgment of Walsh J. in the Supreme Court in *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317 at p. 341 (in the context of statutory interpretation) and in the judgment of O'Donnell J. in the Supreme Court in *Law Society of Ireland v. The Motor Insurers' Bureau of Ireland* [2017] IESC 31 at para. 6 (in the context of the interpretation of contractual documents). In my opinion, the same approach must also be taken in the interpretation of orders made by the court. It is therefore necessary to consider the meaning of the words providing for a strike out of the proceedings in combination with the words providing for their re-entry. Accordingly, it would be wrong to stop at the words providing for a strike out and to consider what those words mean in isolation without reference to the words which follow relating to re-entry. The use of the latter formula signalled that the court was to have a future role, such that the striking out of the proceedings cannot be said, in this case, to have rendered the court *functus officio* for all purposes.

57. Having regard to the case law discussed above, the words *"liberty to re-enter"* ordinarily mean that there is liberty, at some point in the future, to litigate the original action. However, in this context, it is necessary, in my view, to have regard to the fact that, as recorded on to the face of the order itself, the hearing of the action had been fixed to commence on the following day namely 1st February, 2011 before Finlay Geoghegan J. herself. This was a Commercial Court case and, accordingly, Finlay Geoghegan J. would have read the papers in advance and would have been aware of the likely length of the hearing. I agree with counsel for the plaintiff that it is unthinkable that Finlay Geoghegan J. would, in those circumstances, have contemplated that the original claim could be litigated at some point in the future. It must be borne in mind that court hearing time is a valuable commodity. Parties frequently have to wait for significant periods before a hearing date can be secured. For that reason, courts do not readily allow parties to abandon a hearing date and to reserve the right to re-litigate the matter at some time in the future. In my experience, a court would not do so without a convincing and comprehensive explanation and there is no evidence, in this case, of any such explanation having been given (which, in a Commercial Court case, would be likely to be recited, at least in summary, on the face of the order).

58. Having regard to the considerations outlined in paras. 56 to 57 above, I believe it is reasonable to conclude that:

(a) In the first place, the use of the words "*liberty to re-enter*" must mean that the striking out of the proceedings was not intended to terminate the proceedings entirely. Use of the words *"liberty to re-enter"* clearly envisaged a potential future role for the court;

(b) At the same time, it cannot have been intended that the proceedings would be re-entered with a view to allowing the original claim to be litigated. In my view, it would be inconceivable that the court would permit parties to proceed in that way in the absence of some detailed explanation. For example, in a case that was recently listed for hearing before me for 3 weeks, I insisted on being shown the terms of a confidential settlement before I was prepared, on the first day of the hearing, to adjourn the matter for mention to a later date. My concern was that the hearing of the action might have to be recommenced at some stage in the future notwithstanding that 3 weeks of valuable court time had already been allocated to it. In that case, a consideration of the confidential settlement terms showed that there was a good explanation for the proposed adjournment and also demonstrated that the case would not require a new hearing date in the future. Given the pressure on court lists, I believe that, similarly, in the present case, in the absence of some indication to the contrary, the granting of liberty to re-enter cannot have been intended to allow the parties to bring the original claim back before the court at some time in the future. The court can only have proceeded on the basis that liberty to re-enter was given for some other purpose. It is therefore necessary to discover what that purpose might be;

(c) Having regard to the approach taken by Barron J. in *Ascough* and O'Neill J. in *O'Mahony (a minor),* it is entirely legitimate, in these particular circumstances, to have regard to the underlying settlement agreement. A similar approach was taken by O'Connor J. in *Carthy v. Boylan.* This approach also appears to me to be consistent with the

general principles relating to the interpretation of documents having legal effect outlined by Clarke J. in *Ranbaxy* (quoted in para. 54 above). I appreciate that, in many cases, it should not be necessary, in order to divine its meaning, to go beyond the express terms of an order. However, in cases of doubt, a court will, for example, readily have regard to the pleadings and the previous proceedings in the action. Just as one would, in such cases, consider the terms of a court order against the backdrop of the pleadings and the previous proceedings in the action in which it was made, it seems to me to be appropriate, at least in cases where the order was made by consent following a settlement of the proceedings, to consider the terms of a settlement agreement entered into immediately prior to the court order. Where there is argument, in such cases, as to what is envisaged by a provision in a consent order giving liberty to re-enter, the settlement agreement, as a general rule, is likely to provide some objective evidence of what the parties had in mind.

(d) When one has regard to the terms of the underlying settlement agreement here, there can be no doubt what is meant by the words *"liberty to re-enter"* in the order of 31st January, 2011. They are plainly there to give effect to the provisions of clause 15 of the settlement agreement where, in clear and unmistakable terms, each of the parties to that agreement agreed that, in default of payment of any instalment within seven days of the due date, the plaintiff should be at liberty to apply to re-enter the proceedings before the Commercial Court and obtain judgment for the amount then outstanding. It is clear from clause 15 that the parties did not intend that the original claim should be re-

entered for hearing but, instead, they intended that the re-entry would be for the much more limited purpose set out in that clause.

(e) Thus, it seems to me that, when one reads its terms as a whole and in context, the order of 31st January, 2011 was not intended to render the court *functus officio* for all purposes but was, instead, intended to permit the re-entry of proceedings for the limited purpose set out in Clause 15.

Conclusion

59. Having regard to what I consider to be the clear meaning and effect of the order of 31st January, 2011 (as set out in para. 58 above) I believe that there is no basis to conclude that, under the terms of the order made by Finlay Geoghegan J. on 31st January, 2011, the court is now *functus officio* for all purposes. It must follow, therefore, that the plaintiff is entitled, subject to any defences that the defendants may legitimately raise, to re-enter these proceedings by way of notice of motion with a view to pursuing its entitlements under Clause 15 of the settlement agreement.

60. I invite the parties to confer with each other in relation to the issue of costs and to notify the registrar by email of any agreement they reach in relation to the issue. In the event that the parties are not in a position to agree on that issue, each party should set out their position in writing by email to the registrar not later than 14 days from the date of this judgment, following which I will rule on the matter in writing. In the event of any unforeseen difficulty, there is liberty to apply by email.