

## THE HIGH COURT

[2009 No. 4127 P]

BETWEEN

PATRICK ROCHE AND JAMES ROCHE

PLAINTIFFS

AND

PHILIP LEACY

DEFENDANT

**JUDGMENT of Miss Justice Laffoy delivered on the 29th day of February, 2012.**

## 1. Factual background

1.1 These proceedings arise out of an agreement for sale dated 25th September, 2007, made between the plaintiffs, as vendors, of the one part, and the defendant, as purchaser, of the other part (the contract) whereby the plaintiffs agreed to sell to the defendant certain lands at Ballyrea, County Wexford, containing 28.309 acres statute measure, being part of the lands registered on Folio 23035 of the Register of Freeholders, County Wexford at the price of €620,000. A deposit of €62,000 was paid by the defendant to the plaintiffs on the execution of the contract. The contract incorporated the Law Society of Ireland General Conditions of Sale 2001 (revised) edition. Although this is not expressly stated in the contract, it is implicit that the plaintiffs were selling as personal representatives of their father, James Roche, who died testate on 19th July, 1998 and probate of whose will was granted to them on 10th December, 1998. The said James Roche had devised and bequeathed his residuary estate, which included the lands registered on Folio 23035, to his widow for life, with the remainder to the first named plaintiff absolutely, although prior to the sale there was a family dispute, the details of which are irrelevant for present purposes, as part of the resolution of which the lands registered on Folio 23035 were put up for sale. The lands the subject of the contract comprised one of four lots which were put up for sale by the plaintiffs, as such personal representatives, at the same time.

1.2 Following the execution of the contract, there was a dispute between the defendant and the plaintiffs as to the extent of the land included in the contract. Proceedings by way of vendor and purchaser summons in this Court were initiated by the defendant. The dispute was resolved and the proceedings were compromised at the beginning of November 2008, when the boundaries of the land to be transferred to the defendant were agreed and the purchase price was reduced by €85,000, in consequence of which the purchase price payable by the defendant was €535,000.

1.3 Following the compromise, correspondence recommenced between the defendant's solicitors and the plaintiffs' solicitors on title issues in relation to the completion of the sale. An engrossed deed of transfer was furnished by the defendant's solicitors to the plaintiffs' solicitors, together with various documents for re-execution and re-dating with their covering letter dated 26th November, 2008 and the plaintiffs' solicitors responded on 3rd December, 2008. The transaction seemed to be progressing towards completion and it was the evidence of Mr. Michael Cullen, the principal in the firm Lombard & Cullen, the solicitors acting for the plaintiffs, that he anticipated completing around 16th December, 2008. However, by letter dated 16th December, 2008, which he received on that day, the defendant's solicitors raised the fact that a *lis pendens* had appeared on a judgment search which they had carried out. The *lis pendens* had been registered in the Central Office of the High Court on 10th November, 2008 and it related to family law proceedings in the Circuit Court between Ann Roche (Mrs. Roche), the wife of the first plaintiff, as applicant, and the first named plaintiff, as respondent, which were entitled to the benefit of the *in camera* rule, but the existence of which Mrs. Roche made public by the registration of the *lis pendens*. In the letter of 16th December, 2008 the defendant's solicitors stated that they would require the *lis pendens* "to be released" and indicated that the "release" required an application to the Master of the High Court. It was also stated in that letter that the defendant's solicitors were in funds to complete the transaction, that they had a bank draft for the balance of the purchase monies available as of 15th December, 2008. They requested that the sale be completed immediately and threatened the service of a notice to complete. Mr. Cullen's evidence that he first knew of the registration of the *lis pendens* was when he received the letter of 16th December, 2008, although he was acting for the first named plaintiff in the family law proceedings and he had entered an appearance to those proceedings in the Circuit Court in September 2008.

1.4 In any event, the steps taken by the plaintiffs' solicitors to address the existence of the *lis pendens* with a view to completing the sale and their interaction with the defendant's solicitors were as follows:

- By letter dated 17th December, 2008 the plaintiffs' solicitors informed the defendant's solicitors that they had been in touch with the solicitors for Mrs. Roche and had suggested that funds be retained, presumably by the plaintiffs' solicitors out of the proceeds of sale, pending the resolution of the family law proceedings and that, in consideration of the funds being retained on agreed terms, the *lis pendens* be vacated by Mrs. Roche's solicitors. In addition, it was suggested to the defendant's solicitors that, having regard to the fact that they were in funds and that they had the closing documents, the sale be completed on the plaintiffs' solicitors undertaking, which they gave in the letter, to hold the entire purchase monies in trust for the defendant's solicitors and the defendant in an interest bearing account until such time as the *lis pendens* would be removed and evidence of that furnished to the defendant's solicitors. The Christmas vacation then intervened and the plaintiffs' solicitors made very little progress with Mrs. Roche's solicitors until approximately mid-January 2009.
- There was no response whatsoever from the defendant's solicitors to the letter of 17th December, 2008. The next step taken by them was to serve a notice to complete on 28th January, 2009 on the plaintiffs' solicitors by registered post. That notice called on the plaintiffs to complete the sale in accordance with general condition 40 of the contract and stated that, in default of completion, the defendant would rely on general condition 40 and all other rights and remedies

available to him. Issues arose at the hearing as to the validity of that notice to which I will return later.

- The response of the plaintiffs' solicitors was contained in a letter of 5th February, 2009. Two points were made in that letter which require to be recorded. The first was that the defendant would be adequately protected by the undertaking given by the plaintiffs' solicitors in their letter of 17th December, 2008 and that there was no reason why the sale could not be completed. Further, it was denied that the defendant had any entitlement to seek payment of interest charges from the plaintiffs. Secondly, it was stated that, in any event, the plaintiffs' solicitors had reached agreement with the solicitors for Mrs. Roche and that they had given certain undertakings on the first plaintiff's behalf. They enclosed a copy of a letter dated 4th February, 2009 from Mrs. Roche's solicitors, Redmond and Co., which stated:

"We confirm that our client will be relying on your undertaking and on that basis an application will be made to remove the *lis pendens* as a matter of urgency".

- The defendant's solicitors replied by letter dated 10th February, 2009. They took the position that the *lis pendens* was still in existence and that the plaintiffs were not in a position to give "a clear unencumbered title to our client". The defendant was not contractually obliged "to rely on any letter from a third party Solicitor not connected with the transaction". In the circumstances, the defendant would not complete the transaction due to the plaintiffs' failure "to furnish clear title".

- There followed four successive letters from the plaintiffs' solicitors to the defendant's solicitors which elicited no response. The first was dated 12th February, 2009 and it reiterated that steps were being taken to remove the *lis pendens* by arrangement with Mrs. Roche's solicitors. The second was dated 18th February, 2009 and it updated the defendant's solicitors on the situation, stating that they had ascertained that the application to vacate the *lis pendens* required to be made to the County Registrar in Wexford by virtue of s. 34 of the Courts and Court Officers Act 1995 (the Act of 1995). It continued:

"We have therefore, in conjunction with Redmond & Co., Solicitors for the Applicant for registration of the *lis pendens*, filed an *Ex-Parte* Application for next Monday at which time an order will be made for the removal of the *lis pendens*."

The third was a letter of 24th February, 2009 in which it was stated:

"The County Registrar ordered at her court on the 23rd of February that the *lis pendens* herein be vacated. We have sent a draft Order to the County Registrar for execution/amendment and we will be filing this in the Central Office in due course."

Service of a completion notice was threatened, if the defendant's solicitors did not confirm by return that they were in funds to complete the purchase. The fourth was a letter dated 2nd March, 2009, which was sent by fax and which referred to the previous correspondence and to telephone calls to the offices of the defendant's solicitors on 25th, 26th and 27th February to which they had received no adequate response. A notice to complete, which was also dated 2nd March, 2009, was enclosed with that letter. That notice has no bearing on the issues the Court has to determine.

- By letter dated 4th March, 2009 from the defendant's solicitors, which was received by the plaintiffs' solicitors on the same day, the defendant's solicitors referred to the notice to complete which they had served pursuant to condition 40 of the general conditions of sale on 28th January, 2009, which it was acknowledged had been received by the plaintiffs' solicitors on 29th January, 2009, and stated that the twenty eight day period stipulated therein had expired on 2nd March, 2009. They further stated that, as the plaintiffs had not furnished "clear unencumbered title" to the property in sale, the contract was rescinded. They requested immediate return of the deposit of €62,000. They threatened that, if the deposit was not returned within five working days from the date of the letter, the defendant would be seeking interest thereon at the rate stipulated in the contract, namely 12% per annum.

1.5 The order of the County Registrar vacating the *lis pendens* was perfected on 6th March, 2009. It recorded that an order was made on 23rd February, 2009, on an *ex parte* application by Mrs. Roche, that the *lis pendens* registered by her in the Central Office of the High Court on 10th November, 2008 be vacated. The relevant form to procure a memorandum of vacate to be subscribed pursuant to s. 21 of the Judgments Registry (Ireland) Act 1871 (the Act of 1871) was signed on behalf of the County Registrar on 16th March, 2009. It was lodged in the Central Office and it was recorded there as having been received on 25th March, 2009. However, the defendant's solicitors persisted in their refusal to complete, having procured a judgment search which had been carried out on their behalf by Lawlink on 23rd March, 2009, which disclosed the existence of the *lis pendens* in the Central Office against the first named plaintiff.

1.6 While I consider that the issues which arise in these proceedings fall to be determined primarily by reference to the facts which I have outlined above, which are reflected in contemporaneous documentation, the factual basis of one of the issues raised on behalf of the plaintiffs turns on the oral evidence of the defendant and his solicitor. It was submitted on behalf of the plaintiffs that the defendant was neither ready, willing nor able to complete the purchase at the time the notice to complete was served on his behalf on 28th January, 2009 and that the notice was served in the hope of trumping the plaintiffs' efforts to have the *lis pendens* removed. The evidence of Mrs. Maeve Breen, of the firm of M. T. O'Donoghue & Co., the defendant's solicitors, was that the defendant told her on 30th January, 2009 that he was not going to go ahead with the transaction and that his instructions to her were that he did not want to complete the purchase. The evidence of the defendant was that he decided in December 2008 that he did not want to go ahead with the purchase, but he emphasised that he was an honest man and that he would have completed the purchase if he had been advised that there was a clean title furnished within the twenty eight day period of the notice to complete. The defendant expressed extreme frustration and annoyance with the course of the transaction. However, it emerged at the hearing that he had purchased the land at auction before seeking the advice of a solicitor. Although the first dispute in relation to the extent of the land included in the sale was resolved by agreement, the defendant continued to harbour a grievance against the auctioneer who conducted the sale, the plaintiffs' solicitors and the purchaser of another lot, although strangely not against the plaintiffs. Around the time the defendant's defence and counterclaim was delivered in these proceedings in January 2010, the defendant distributed five hundred leaflets in Gorey, County Wexford alleging "underhand work" by those parties in connection with the auction. Notwithstanding that very inappropriate behaviour, I do not think it would be correct to infer that the defendant was not "willing" to complete the purchase, in the sense in which that expression is used in paragraph (a) of condition 40 of the general conditions of sale, when the notice to complete was served on 28th January, 2009.

1.7 These proceedings were initiated by plenary summons which issued on 11th May, 2009.

## **2. The case as pleaded and the response thereto**

2.1 In their statement of claim delivered on 7th August, 2009, the plaintiffs, having pleaded, *inter alia*, the contract and variation of

the terms thereof, the defendants' requirement that the *lis pendens* be vacated, the fact that the County Registrar made an order on 23rd February, 2009 vacating it and that by letter of 24th February, 2009 the defendant was called upon to complete the purchase and refused to do so, it was alleged that the defendant, in continuing to refuse to complete, was in breach of contract, as a consequence of which the plaintiffs had suffered loss, damage and expense which was ongoing. The primary relief sought by the plaintiffs was specific performance. They also claimed alternative and ancillary reliefs, including interest at the contract rate.

2.2 The defendant's defence and counterclaim was delivered on 8th January, 2010. The defendant pleaded the service of the notice to complete dated 28th January, 2009 and that the time limited therein expired on 2nd March, 2009, at which time the *lis pendens* had not been vacated and then still appeared on the folio and was still on the folio. It is of particular significance that that plea was factually incorrect. The *lis pendens* was never registered as a burden on Folio 23035, County Wexford, nor was there ever an application to the Property Registration Authority to register the *lis pendens* as a burden on the folio. It was pleaded that, in accordance with his rights under the contract, the defendant had duly rescinded the contract and had required return of his deposit. It was denied that the defendant had wrongfully refused to complete the contract at any time. In the counterclaim, it was pleaded that the defendant had drawn down the monies to complete the purchase on two occasions from his lending institution and on both occasions the plaintiffs had not been ready, willing and able to complete in accordance with the contract, in consequence of which the defendant had to refund the monies to the lending institution and, in so doing, he had suffered loss and damage, the particulars of which were given as expenses, bank charges and legal fees amounting to €30,000. The defendant counterclaimed for the return of the deposit of €62,000 together with interest thereon from 16th November, 2007 and damages for breach of contract.

2.3 In their reply and defence to counterclaim delivered on 12th July, 2010, the plaintiffs joined issue on all of the matters pleaded by the defendant, save insofar as they comprised admissions. I consider that it is not necessary to address the specific pleas made by the plaintiffs save in relation to one matter. It was denied that the contract had been rescinded and that denial was based on the proposition that the "purported" completion notice dated 28th January, 2009 was invalid on two grounds: that it was not addressed to the plaintiffs; and that it failed to specify the appropriate time for completion and/or was not delivered to the plaintiffs' solicitors until 29th January, 2009.

### 3. The issues

3.1 The various arguments advanced on behalf of the parties can, in my view, be subsumed into the following two issues:

- (a) whether the notice to complete dated 28th January, 2009 issued by the defendant's solicitors was a valid notice to complete in accordance with condition 40 of the general conditions of sale in the contract; and
- (b) if it was, whether the plaintiffs had complied with their contractual obligations in relation to the title to the lands the subject of the contract by 2nd March, 2009.

### 4. Validity of notice to complete

4.1 I have outlined the two grounds on which the plaintiffs pleaded that the notice to complete was not a valid notice to complete at para. 2.3 above.

4.2 As regards the first ground, that the notice to complete was not addressed to the plaintiffs, as counsel for the defendant pointed out a similar point was dealt with in the High Court by Finnegan P. in *Haldane v. Rooney* [2004] 3 I.R. 581. Finnegan P. stated (at p. 590):

"Finally, objection is taken to the notice upon the basis that condition 40(a) requires the completion notice to be given to the other party, whereas the notice in this case was addressed to and served upon the plaintiffs' solicitor. Condition 49(b) provides that a notice may be given or served by directing it to the intended recipient and delivering it by hand or sending by pre-paid-post to the office of the solicitor representing the intended recipient in the sale. This leaves, however, the issue as to whether completion notices, required by condition 40 to be given to the other party, must be addressed to that party and not to his solicitor. There is no denial of the plaintiffs' solicitor's general authority to act in the transaction and in these circumstances the general rule is that notice to a solicitor is actual notice to his client: *Espin v. Pemberton* (1859) 3 DeG. & J. 547. Further, the notice to complete was sent under cover of a letter addressed to the plaintiffs' solicitor which clearly set out that solicitor's clients were the plaintiffs. I am satisfied that it is appropriate to read the letter together with the notice and, doing so, I am satisfied that this complies with the requirements of condition 40."

Similarly, I am satisfied that it is appropriate to read the letter dated 28th January, 2009 to the plaintiffs' solicitors, which identifies their clients as the plaintiffs, together with the notice to complete of the same date, which was stated to be enclosed by way of service. While in format the notice was only addressed to the plaintiffs' solicitors at the end, it stated expressly in clear and unequivocal terms that the purchaser, namely, the defendant, was thereby giving notice to the vendors, namely, the plaintiffs, to complete the sale in accordance with general condition 40 of the contract. That is all that was required, in my view. Accordingly, I am satisfied that the manner in which the notice was given complied with the requirements of general condition 40.

4.3 In relation to the second ground of objection, that the notice failed to specify the appropriate time, that can also be readily disposed of by reference to the decision of Finnegan P. in *Haldane v. Rooney*. Paragraph (a) of condition 40 of the general conditions of sale in the contract provided that either party might give the other party "notice to complete the sale in accordance with this condition". Paragraph (b) provided that upon service of such notice the party on whom it was served should "complete the sale within a period of twenty-eight days after the date of such service (as defined in Condition 49 and excluding the date of service)". The notice to complete dated 28th January, 2009 gave notice to the plaintiffs "to complete the sale in accordance with General Condition 40 of the Contract". It further stipulated that the plaintiffs were required to complete the transaction "within a period of twenty-eight days after the date of service hereof". It was not expressly provided that the date of service was excluded from the calculation of the twenty-eight day period. However, in my view, that was clearly implicit, as it was made clear that the notice was being served in accordance with general condition 40. Apart from that, as Finnegan P. pointed out in *Haldane v. Rooney* at p. 590, the general rule of construction which applies where a period is allowed within which an act must be done is that the first day is excluded: *Goldsmiths' Company v West Metropolitan Railway* [1904] 1 K.B. 1.

4.4. Accordingly, in my view, the notice to complete served by the defendant was not invalid on either of the grounds alleged. As I have stated earlier, I am satisfied that on 28th January, 2009 the defendant was "willing" to complete, in the sense in which para. (a) of general condition 40 requires the party serving notice under that condition to be "able, ready and willing to complete". Having regard to the evidence, which I am of the view was strong on this point, I consider that it is appropriate to find that the defendant

was able to complete on that date, in the sense that he could have drawn down the finance from his lending institution for the purposes of completing at any time up to 2nd March, 2009.

## 5. The plaintiffs' compliance with contractual obligations in relation to title

5.1 Having regard to the nature of the title to the land the subject of the contract, it is possible to state with absolute confidence that, if the defendant had completed the purchase of the lands the subject of the contract on the 1st or 2nd March, 2009, the defendant would have acquired title to the lands free from all claims by Mrs. Roche as the applicant in the proceedings in the Circuit Court the subject of the *lis pendens* which had been registered by her. The crucial factors were that the property the subject of the contract was registered land and, notwithstanding what was pleaded in the defence, the *lis pendens* was not registered as a burden on the relevant folio.

5.2 The system of registration of *lis pendens* was introduced in this jurisdiction in the Judgments (Ireland) Act 1844 at a time when the title to all of the land in Ireland was unregistered title. Section 10 of that Act provided that no *lis pendens* could bind or affect a purchaser or a mortgagee who had no express notice of it, unless and until a memorandum containing the requisite details concerning the suit was registered in court, latterly meaning in the Central Office of the High Court. Under s. 5 of the Judgment Mortgage (Ireland) Act 1850 it was provided that no *lis pendens* should bind or affect a purchaser or a mortgagee without express notice thereof unless relevant memorandum had been registered in the Central Office within five years before the execution of the conveyance to the purchaser. Section 2 of the Lis Pendens Act 1867, which was held by the Supreme Court in *Flynn v. Buckley* [1980] I.R. 423 as having applied to Ireland, was the provision which empowered the court in which the litigation was pending to vacate the *lis pendens*, without the consent of the party who registered it "upon the determination of the *lis pendens*, or during the pendency thereof, where the court shall be satisfied that the litigation is not prosecuted *bona fide*". Finally, s. 21 of the Act of 1871 remedied a *lacuna*, in that it made provision for the registration of a vacate in what is now the Central Office, the object being to cancel the registration in the Central Office, which would appear on a judgment search. All of those provisions affected land the title to which was unregistered. There are corresponding provisions to be found now in Part XII of the Land and Conveyancing Law Reform Act 2009, which operate prospectively, including a provision which recognises that since the Act of 1995 a County Registrar has power to vacate a *lis pendens* on the application of the person who originally registered it (s. 126).

5.3 The position in relation to registered land is different, as is stated in the following passage in McAllister on *Registration of Title* (at p. 215):

"As regards registered land, the *lis pendens*, in order to affect a purchaser must be registered as a burden on the register of the lands affected, and not in the Registry of Judgments. Its re-registration every five years is unnecessary. So long as the *lis pendens* remains undischarged it remains on the register and binds any purchaser."

Similarly, in Fitzgerald on *Land Registry Practice* (2nd Ed.) it is stated (at p. 210) that to affect registered land a *lis pendens* must be registered as a burden on the folio.

5.4 An analysis of the statutory basis of the foregoing propositions in relation to registered land must start with s. 69 of the Registration of Title Act 1964 (the Act of 1964). By virtue of subs. (1)(i) of that section a *lis pendens* may be registered as affecting registered land. The effect of a transfer of freehold land is set out in s. 52(1) of the Act of 1964 which provides:

"On the registration of a transferee of freehold land as full owner with an absolute title, the instrument of transfer shall operate as a conveyance by deed . . . and there shall be vested in the registered transferee an estate in fee simple in the land transferred. . . subject to –

(a) the burdens, if any, registered as affecting the land, and

(b) the burdens to which, though not so registered, the land is subject by virtue of section 72,

but shall be free from all other rights, including rights of the State."

While unregistered rights may be created over registered land, s. 68(2) of the Act of 1964, provides that all such rights shall be subject to the provisions of the Act of 1964 with respect to registered transfers of land or charges for valuable consideration. This is consistent with subs. (2) of s. 52, which provides that where the transfer is made "without valuable consideration" it shall be subject to all unregistered rights subject to which the transferor had held the lands transferred.

5.5 Applying the foregoing provisions to the contractual position of the defendant, if he had completed the purchase on, say, 1st March, 2009, at that time no *lis pendens* in relation to the proceedings brought by Mrs. Roche, or indeed any proceedings, was registered as a s. 69 burden against the lands the subject of the contract on Folio 23035, County Wexford. It is true that the defendant was on notice that Mrs. Roche had registered a *lis pendens* against the first named plaintiff in the Central Office some months previously, although how the *lis* could have affected the part of the lands registered on Folio 23035 the subject of the contract was not clear. Even if it did affect the lands the subject of the contract, the defendant's solicitors had been furnished with a copy of the letter of 4th February, 2009 from Redmond & Co., who identified Mrs. Roche as their client, which stated that an application would be made to remove the *lis pendens* as a matter of urgency. Further, the defendant's solicitors had been informed by the plaintiff's solicitors in the letter of 18th February, 2009 that, in conjunction with Redmond & Co., as solicitors for the applicant, that is to say, Mrs. Roche, they had filed an *ex parte* application for the following Monday for the removal of the *lis pendens*. Finally, by the letter dated 24th February, 2009 the defendant's solicitors were informed that the County Registrar had made the order in Court on 23rd February, 2009 that the *lis pendens* be vacated and that they would be filing the order of the County Registrar in the Central Office in due course. The order of the County Registrar was effective from the moment it was pronounced in court. Mr. Cullen who conveyed the information that the order had been made, as a solicitor, is an officer of the Court. Irrespective of the fact that the vacation of the *lis pendens* had not been noted on the index in the Central Office, in my view, the defendant was no longer on notice that there was a *lis pendens* affecting the property, because he had been informed that it had been vacated. If he had completed the purchase on 1st March, 2009, in my view, he would have obtained good marketable title to the lands the subject of the contract free from any rights of Mrs. Roche.

5.6 Moreover, that situation could not have changed after completion but before his registration on the relevant folio. Staying with the hypothetical situation in which the defendant had completed the purchase on 1st March, 2009, if Mrs. Roche were to change her mind and subsequently decide to register a *lis pendens* as a burden in the Land Registry as against Folio 23035 before the transfer from the plaintiffs, as personal representatives of James Roche, deceased, in favour of the defendant was registered by the Property Registration Authority and the defendant was registered on the relevant folio as full owner with absolute title so as to get the benefit

of s. 52(1) of the Act of 1964, on the authority of the decision of the Supreme Court in *Coffey v. Brunell Construction* [1983] I.R. 36, the defendant would have been able to procure an order directing the cancellation of the burden so registered. Therefore, the defendant would not have been at any risk of his title being subject to a claim by Mrs. Roche in completing the purchase on 1st March, 2009.

5.7 It was the contention of counsel for the defendant, referring to Wylie on *Irish Conveyancing Law* (3rd Ed.) at para. 14.06, that the duty of the plaintiffs to show good title was a duty which had two aspects, i.e. to show good title, in the sense of stating all matters essential to the title contracted to be sold, and to make good title, in the sense of proving by proper evidence those matters. Counsel also referred to the Irish authority cited by Wylie as demonstrating that distinction: *Higgins v. Irish Land Commission* [1960] I.R. 277. In that case, Teevan J. was hearing an appeal from the Taxing Master's taxation of costs. The costs issue arose in circumstances where the Land Commission had been given leave to resume the holding of John Higgins and the compensation payable to Mr. Higgins was fixed at IRE408, and the order also provided that he make good title to the tenancy. There was a provision that the Land Commission would pay, *inter alia*, the costs of "showing title".

5.8 In order to illustrate what the case was about, it is necessary to consider the title position in some detail. It had been found by an Examiner of Title in the Land Commission that Mr. Higgins was entitled to the land as personal representative of Mary Higgins, deceased. The title was traced from Patrick Higgins, who died in 1928. His widow, Mary Higgins, inherited under his will, which was proved in 1928. Mary Higgins died in 1940, having devised the land to her daughter, Margaret Higgins. Margaret Higgins died in 1952 intestate, but at that stage the will of Mary Higgins had not been proved. In fact, the existence of the will was obviously unknown and letters of administration intestate to the estate of Mary Higgins were granted to Mr. Higgins in 1956, after the death of Margaret Higgins. When the existence of the will of Mary Higgins was discovered, the grant of letters of administration intestate to her estate had to be revoked, which happened, and a grant of letters of administration with the will of Mary Higgins annexed were granted to Mr. Higgins, which was the evidence of his title. However, to get to that stage, he had to extract a grant of letters of administration intestate to the estate of Margaret Higgins.

5.9 The issue with which Teevan J. was concerned was whether Mr. Higgins was entitled to recover from the Land Commission the costs of extracting the grant of administration with the will of Mary Higgins annexed to replace the revoked grant and also the costs of extracting the grant of administration intestate to the estate of Margaret Higgins. An argument advanced on behalf of Mr. Higgins was that, on acquisition of lands under the Land Clauses Consolidation Act, the owners had been allowed costs against the acquiring authorities for work done in perfecting good holding titles to the requirements of the acquiring authorities, such as extracting grants of representation, which the owners would otherwise not have extracted and which were not requisite for other purposes. In the passage from the judgment of Teevan J. relied on by counsel for the defendant, he stated (at p. 279):

"A distinction is very clearly made in the resumption order between *making* title and *showing* title, a distinction which would be readily discerned by conveyancers. Whether I am correct in stating the existence of such a general discernment or not, I accept the judgment of Farwell L.J. in *In re Elementary Education Acts, 1870 and 1873* [[1909] 1 ch. 55] at p. 59: - 'The production of the probate would be evidence of the title, the procuring of probate would be the making of the title'. For 'production' and 'procuring' may be substituted, without change of significance, 'showing' and 'making title' respectively. This does not conflict with the Irish decisions cited in relation to costs under the Lands Clauses Consolidation Act."

Teevan J. decided that the resumption order had been framed so as to shut out all costs incurred in procuring a good title and that it was confined to costs of submitting the evidence of title and on that basis he upheld the decision of the Taxing Master which disallowed the costs of extracting the two grants in issue. Frankly, I cannot see how that decision is of any relevance to the issues before the Court.

5.10 Counsel for the defendant submitted that, in order to "show" that they had a clear unencumbered title to the property the subject of the contract, the plaintiffs should have furnished to the defendant's solicitors either the written consent of Mrs. Roche to the vacating of the *lis pendens* or, alternatively, a copy of the perfected order of the County Registrar. The response of counsel for the plaintiffs to that proposition was that what the defendant's solicitors had expressly sought in their letter of 16th December, 2008, namely, the "release" of the *lis pendens*, had been procured and the defendant's solicitors had been informed of that fact in their letter of 24th February, 2009. It was further submitted by counsel for the plaintiffs that the defendant had gone "to ground" in early 2009 and that the defendant's solicitors had not indicated at any time what evidence they required of the release of the *lis pendens*.

5.11 In my view, the position as at, say, 1st March, 2009 was that an order had been made vacating the *lis pendens* registered by Mrs. Roche and it had been made on her application. The perfection of the order was a formality which remained to be completed, as was the lodging of the memorandum in the Central Office and the recording of the vacation of the *lis pendens* in the register of judgments. As regards the clearing of the *lis pendens* off the index in the Central Office, s. 21 of the Act of 1871 referred to at para. 5.2 above provides:

"... the said registrar shall, upon the lodgment with him of a certificate that any *lis pendens* which may have been registered in the said office has been duly vacated by an order of the Court in which *lis pendens* may be, signed by the proper officer in that behalf, and which certificate such officer is hereby authorised and required to give, cause a memorandum of such vacate to be subscribed to the entry of the registry of such *lis pendens* specifying the date of such order, and shall sign such memorandum and upon every search made in the said office subsequently to the entry of such memorandum as aforesaid whereupon such *lis pendens* shall appear the entry of such memorandum shall be stated."

In short, the County Registrar having made the order vacating the *lis pendens* on 23rd February, 2009, the entry of the memorandum of such vacate in the Central Office in accordance with s. 21 was mandatory. The written consent of Mrs. Roche was not necessary to perfect the plaintiffs' title. The perfected order of the County Registrar could be obtained at any time.

5.12 In summary, the *lis pendens* had never been registered as a burden on the folio against the lands the subject of the sale on Folio 23035. It had been vacated by order of the County Registrar which inevitably would have been noted in the Register of Judgments in the Central Office. Therefore, the plaintiffs were in a position to furnish title to the defendant free from any claims by Mrs. Roche and the defendant's solicitors had been so informed. Accordingly, the defendant was not entitled to rescind the contract, as he purported to do in the letter of 4th March, 2009 from the defendant's solicitors to the plaintiffs' solicitors. The contract still subsists and the plaintiffs are entitled to enforce it against the defendant.

5.13 In reaching the foregoing conclusion, I have not attached weight to some of the submissions made on behalf of the plaintiffs as demonstrating the plaintiffs' entitlement to an order for specific performance. I have not attached weight to the fact that the plaintiffs were selling as personal representatives of James Roche, deceased, or to the submission that the outcome of any action

pursued by Mrs. Roche against the first plaintiff could only attach to the proceeds of the sale of the lands the subject of the contract, as the defendant had a contractual right to insist on completion. Nor have I attached weight to the undertaking proffered by the plaintiffs' solicitors to the defendant in the letter of 17th December, 2008, and the submission that the defendant should have completed the purchase in reliance on it. While there may be some merit in those submissions, in my view, it is not necessary to resort to them.

## **6. Order**

6.1 Subject to hearing further submissions from the parties as to the appropriate form of order to be made, I would propose making an order against the defendant for specific performance of the contract.

6.2 The defendant's counterclaim will be dismissed.