THE HIGH COURT

COMMERCIAL

[2017/7016 P.]

BETWEEN

ANTHONY SHEEDY

PLAINTIFF

AND

ALASTAIR JACKSON

DEFENDANT

JUDGMENT of Mr. Justice Quinn delivered on the 12th day of April, 2019

1. This is an action for specific performance of a contract for the sale of lands of Whitfield Court, Kilmeadan, Co. Waterford made on 7th August 2015 between the plaintiff and the defendant, the latter acting by his duly appointed receiver Mr. Peter Stapleton, a chartered surveyor and director of Lisney, Dublin.

2. There is no dispute as to the due execution of the contract and its enforceability as entered into, but central to the defence in the action is the assertion by the receiver that he was entitled to and did validly and reasonably rescind the contract on 7th September, 2017 in circumstances expressly provided for by General Condition 18 of the contract.

3. The contract was in the standard form issued by the Law Society of Ireland, being General Conditions of Sale — 2009 Edition, with Special Conditions. General Condition 18 provides as follows:

> *"If the Purchaser shall make and insist on any Objection or Requisition as to the title, the Assurance to him or any other matter relating to or incidental to the Sale, which the Vendor shall on the grounds of unreasonable delay or expense or other reasonable ground be unable or unwilling to comply with, the Vendor shall be at liberty (notwithstanding any intermediate negotiation or litigation or attempts to remove or comply with the same) by giving to the Purchaser or his Solicitor not less than 5 Working Days ' notice to rescind the Sale. In that case, unless the Objection or Requisition in question shall in the meantime have been withdrawn, the sale shall be rescinded at the expiration of such notice."*

I shall consider later the other relevant provisions of the contract. In the meantime, to determine whether the defendant had reasonable ground for issuing the notice of rescission, it is necessary to consider the historic chronology of the matter in detail.

Pre-Contract

4. The defendant was the owner of the house known as Whitfield Manor, Whitfield Court, Kilmeaden, Co. Waterford and related lands comprising approximately 230 acres. On 4th March, 2005 the defendant mortgaged the property to Irish Nationwide Building Society.

5. On 8th February, 2012 Mr. Stapleton was appointed receiver of the property by the National Asset Management Agency (NAMA having acquired the relevant loans and security from Irish Nationwide Building Society).

6. By a Loan Sale and Global Assignment Agreement on 20th June, 2014 and a Deed of Assurance of Mortgage dated 23rd June 2014 Promontoria Eagle Limited ("PEL") acquired the mortgage and obligations thereby secured.

7. On 21st May, 2015 Mr. Stapleton was appointed as receiver by PEL.

8. The receiver gave evidence that following his first appointment in 2012 he found the property to be in a poor state of repair as a result of neglect and vandalism over many years.

The lands were also in poor condition having been neglected and much overgrown. He found also that the boundaries were poorly defined and he encountered at the outset issues of encroachment by known and unknown parties whose stock were roaming in the lands.

9. The receiver reported the encroachment issues to the Gardaí, to Waterford County Council and to the Department of Agriculture in August 2012. He said that he had initially cleared the lands of stock, in some cases having had to initiate legal proceedings against the owners of such stock and adjoining landowners. He gave evidence that there were some recurrences of the encroachments which he said did not last particularly long.

10. Mr. Stapleton also gave evidence that in his experience as receiver of a number of assets comprising extensive acreage in rural areas it is common to encounter poorly defined boundaries and encroachment by animals and others, particularly where the owner of the lands is no longer present. He said that it was difficult to police boundaries and keep stock off land no matter what level of security is deployed.

11. In relation to the Manor House itself Mr. Stapleton said that he was aware that as the building was a listed building Waterford County Council had an interest and he had consulted with them when arranging to carry out works to prevent the further deterioration of the house including roof repairs, propping up dangerous elements to arrest structural movement, boarding windows, fencing off dangerous areas, erecting steel shuttering and the like.

12. In November 2013 Mr. Stapleton commenced the marketing of the property through Sherry Fitzgerald who arranged a number of viewings by interested parties.

13. The receiver said that in April 2014 he received through Sherry Fitzgerald a first offer from the plaintiff to purchase the property for a sum of €1.375m with a 120-day closing. The long closing date was unacceptable and the offer was rejected.

14. Sherry Fitzgerald continued their marketing efforts. The plaintiff renewed his proposal. Ultimately in January 2015 Sherry Fitzgerald

confirmed that they had agreed sale terms to the plaintiff, again at €1.375m subject to contract, with a proposed closing date of 17th February, 2015. They received a booking deposit of €50,000.

15. Messrs Gartlan Furey Solicitors were instructed by the receiver to prepare conditions of sale and ultimately the contract was executed on 7th August, 2015. I shall return later to the events around the signing of the contract.

16. The plaintiff outlined his various business interests and he said that he conducts business mainly in the US and travels back and forth from there. His principle interest is in mining, "waste to energy" and he has some interests in Ireland including farming. He is the owner of a property at Slievenamon near Clonmel, Co. Tipperary comprising an estate of 5,200 acres. When he is in Ireland he lives at Slievenamon but otherwise at Carson City, Nevada.

17. The plaintiff gave evidence that his principle interest in the property was to downsize from Slievenamon. He said that he had in mind that this would be his last home and a final location for him and his wife to settle.

18. The plaintiff said that apart from the property serving as a residence he had other plans for the estate which included the development of a Christmas tree farm, an all-weather ski training school, a distillery, and a tourist project generally.

19. The plaintiff said that one of the principle attractions was the connection of the estate with Christmas trees. Apparently the estate had been granted in the 1660's to William

Christmas and he considered that this presented a unique marketing opportunity in that Christmas trees could be sold which had been grown on the original "Christmas estate". He showed to the court brochures of his plans in this regard.

20. A separate connection mentioned by the plaintiff was that it appeared that originally William Christmas had owned some 2,000 of the 5,200 acres now owned by the plaintiff at Slievenamon.

21. The plaintiff said that he initially became interested in the estate in early 2014 and had engaged with Mr. Guckian of Sherry Fitzgerald. He visited the estate and walked the boundaries and inspected the house.

22. The plaintiff received from Sherry Fitzgerald an order of magnitude report which had shown that repairs to the house alone could cost in the order of €2.2m. The plaintiff had initially indicated his view that he considered at that time and based on the state of deterioration of the house at the time he first inspected it that the repairs could in fact be done for much less namely a sum in the region of €1.5/€1.75m.

23. The plaintiff said that at that stage no good maps were provided for the property and he consulted an engineer Mr. Ben Harte who advised that he request proper boundary maps.

Contract Negotiations
24. On 27th January, 2015 Lohan & Company Solicitors of Athlone, Co. Westmeath wrote to Gartlan Furey confirming that they are instructed in connection with the purchase of the property and indicated that they were awaiting hearing from Gartlan Furey with contracts for sale together with copy title documentation. On 4th March, 2015 Gartlan Furey replied enclosing draft contract for sale and "copy title to vouch".

25. Each of these letters and subsequent correspondence prior to the exchange of the contracts itself contained the usual caveat that the correspondence was subject to contract and that no contract should be deemed to be in existence for the purpose of s.51 of the Land and Conveyancing Law Reform Act 2009 unless and until signed contracts were exchanged and deposit paid. Over the next number of weeks a number of exchanges took place concerning mapping matters including an email from the plaintiff to Mr. Guckian again complaining about mapping matters referring to encroachments by two neighbours, potential rights of way and related matters.

26. On 25th May, 2015 Gartlan Furey wrote again to Lohan and Company enclosing the following:

> *(1) "Amended contracts for sale in duplicate.*
>
> *(2) The following additional documentation that was not furnished under cover of our letter dated 4th March, 2015.*
>
> *(a) Copy folio 21S County Waterford.*
>
> *(b) Copy High Court Order no. 9982P. dated 21st October 2013.*
>
> *(c) Copy deed of Assurance of Mortgage dated 23rd June 2014 between National Asset Loan Management Limited and Promontoria Eagle Limited in respect of the Mortgage and Charge dated 4th March, 2005 between Alastair Jackson and Irish Nationwide Building Society.*
>
> *(d) Copy Deed of Appointment of Receiver dated 21st May, 2015 between*
>
> *Promontoria Eagle Limited and Peter Stapleton."*

27. On 3rd June, 2015 Gartlan Furey wrote to Lohan & Company enclosing Property Registration Authority compliant maps (three) relating to the portions of the property in respect of which title was unregistered.

28. On 11th June, 2015 Gartlan Furey wrote again to Lohan & Company referring to previous correspondence and requesting a reply.

29. On 12th June, 2015 Lohan & Company wrote to Gartlan Furey acknowledging the letters enclosing maps and stating as follows:

> *"As you are well aware we only received original maps from you yesterday. These maps have been furnished to our client's engineer who will once again carry out a proper survey on the boundaries.*
>
> *The initial maps furnished to us with the contracts for sale were, in the opinion of our client 's engineer, not up to the standard required to carry out a proper and full survey of the extensive boundaries contained in the property for sale.*

Once our client 's engineer has carried out a full comprehensive survey of the boundaries, as per the maps you have furnished to us, we shall revert with our client's engineer 's report for comment."

30. On 18th June, 2015 Lohan & Company wrote again to Gartlan Furey stating as follows:

"We refer to the above mentioned matter and enclose herewith map received from our client's engineer showing the property in sale.

We confirm that we shall furnish you with our pre-contract queries under separate cover

31. On 24th June, 2015 Gartlan Furey replied to Messrs Lohan indicating that they look forward to hearing from them with their pre-contract enquiries under separate cover.

32. On 8th July, 2015 Lohan & Company wrote to Gartlan Furey in the following terms:

"Dear Sirs,

We refer to our recent correspondence enclosing original OS map prepared by our client 's engineer. We requested you to confirm if that map could be treated as the current map. You have not replied to this correspondence to date.

As you can see from the original map furnished to you two sections of the map are hatched and marked with the letters A&B. The aforesaid areas of the estate being sold are and have been in adverse occupation by two different third parties for some time (we have no instructions as to when such occupation commenced), The southern tip of the map is also marked and refers to a right of way to a public road, which appears to be blocked off/used by a third party.

Can you please revert and deal with the above queries prior to any further queries we may raise. Obviously the map is of the utmost importance and we require the issues surrounding same to be rectified as soon as possible.

On a more general note our client has been attempting to purchase this property for more than 12 months now. The only substantial delay in dealing with matters herein has been on the part of the receiver/NAMA. We appreciate that the receiver was reappointed on 21st May, 2015 and this may have delayed the decision making process. However, it must be underlined that we only received formal contracts at the end of May, our client immediately instructed the services of an engineer to survey the property/boundary. As you are aware the map furnished to us with the contracts was deficient and indecipherable. As a result our client instructed his engineer to create a new map which was furnished to you on 18h June, 2015 and we have still not heard from you regarding same. As stated above once the mapping issue was resolved to our client 's satisfaction we shall then raise further pre-contract queries."

33. On 10th July, 2015, Gartlan Furey replied to Lohan & Company as follows:-

"The only letter that we have received from you to date is that of 18th June, 2015, where you enclosed maps received from your client's engineer showing the property in sale and advising that you would furnish us with your pre-contract inquiries under separate cover. It would appear that we have not received your letter where you requested us to confirm that if the map could be treated as a contract map, and you might please furnish us with a company of the said correspondence."

34. On 14th July, 2015, Gartlan Furey wrote again to Lohan & Company following up this correspondence and requesting that any title queries be submitted, and stating that their client was anxious to progress the sale of the property and, therefore, that Messrs. Lohan should "*please furnish your mapping and title queries at your earliest convenience*". In reply to this, Messrs. Lohan & Company sent a further copy of their letter dated 8th July, 2015, and on 30th July, 2015, Gartlan Furey replied as follows:-

"With regard to the alleged encroachment over the areas hatched and marked with the letters A and B on the map prepared by your client 's engineer, we would refer you to special condition of the Contract for Sale which provides as follows:

The Vendor gives no warranty and makes no representations as to:

(a) The coincidence of actual boundaries in the vicinity of the Subject Property and the boundaries of the Subject Property shown by the title furnished.

(b) Encroachments made by third parties on the subject property. The Purchaser is placed on its own inquiry in this respect to satisfy himself prior to the signing hereof of any discrepancy in relation to the size and dimensions of the Subject Property as described in the documents of title and maps and the position on the ground.

We look forward to hearing from you"

This letter was sent by email.

35. On 31st July, 2015, Lohan & Company replied as follows:-

"We enclose herewith contracts for sale duly executed together with deposit cheque in the sum of €70, 000.

We confirm that the closing date of this transaction will be 30 days from receipt by this office of one-part contract duly executed by your client. Please note that we have also amended the interest rate from 12% to 5%. "

36. It appears that Gartlan Furey never confirmed that the map enclosed with Lohan's letter dated 18th June, 2015 could be treated as the contract map. The portion of the lands which are registered is defined exclusively by reference to the Folios.

37. On 5th August, 2015, Gartlan Furey replied to Lohan & Company acknowledging receipt of the contracts duly executed by the plaintiff and deposit cheque in the sum of €70,000. Gartlan Furey pointed out that the deposit provided for under the contract was

€137,500 and that this payment of €70,000 brought to only €120,000, the amount paid meaning that a balance of €17,500 was still due by way of deposit. They also referred to the proposed amendment of the interest rate in the contract from 12% to 5% and indicated that the Vendor was willing to reduce the rate to 10%.

38. A telephone conversation took place between Messrs. Gartlan Furey and Lohan & Company on 7th August, 2015, after which Gartlan Furey wrote to Lohan & Company as follows:-

> *"I refer to the above matter and our conversation on 7th August, 2015.*
>
> *As discussed, I enclose herewith one-part Contract for Sale duly executed by our client with the following pre-agreed amendments:*
>
> *(i) A closing date of 30 days from the date of the Contract for Sale which is today's date.*
>
> *(ii) An amended interest rate of 10%,*
>
> *(iii) An amended deposit in the amount of €120, 000 leaving the total payable balance on closing of €1,255, 000.*
>
> *I look forward to hearing from you with your requisitions on title and draft deed of assurance for approval."*

41. On 20th August, 2015, 27th August, 2015, and 2nd September, 2015, Gartlan Furey wrote again to Lohan & Company requesting the draft deed of assurance for approval.

42. On 3rd September, 2015, Lohan & Company wrote to Gartlan Furey enclosing the following:-

> i. Objections and Requisitions on title;
>
> ii. Draft deed of transfer;
>
> iii. Draft deed of conveyance;
>
> iv. Apportionment form for completion by your client.

43. On 4th September, 2015, Gartlan Furey, not by that stage having received the letter from Lohan & Company dated 3rd September, 2015, wrote to Lohan & Company enclosing a draft deed of transfer and "replies to requisition 44".

44. On 7th September, 2015, Lohan & Company sent a reminder with reference to the outstanding replies to Objections and Requisitions on title.

45. On the same day, 7th September, 2015, Gartlan Furey furnished their replies to the requisitions on title and Mr. Lohan replied again as follows:-

> *"Thank you for that. I have a few queries for you in respect of your replies to requisitions, which I shall furnish as soon as possible."*

46. Further short exchanges took place between the parties and on 12th November, 2015, Gartlan Furey served on Lohan & Company by registered post a Completion Notice pursuant to General Condition 40 of the contract, calling on the plaintiff to complete the purchase of the property within 28 days and confirming that the Vendor is ready, willing and able to complete the sale in accordance with the terms and conditions of the contract.

47. On 8th December, 2015, Lohan & Company replied to Gartlan Furey stating that they are instructed that the Completion Notice is defective. They referred to:

> (1) Encroachment by two neighbours which they said arose subsequent to the execution of the contract and would therefore would not be covered in their view by Special Condition 7.5,
>
> (2) The presence of horses on different parts of the estate,
>
> (3) The estate house having suffered extreme deterioration since the receiver's appointment, and
>
> (4) The Completion Notice not having been executed by PEL.

42. On 10th December, 2015, Gartlan Furey replied to Lohan & Company rejecting the various claims made by them.

43. Ultimately, the Completion Notice was waived, although the defendant still maintains that it was entitled to invoke General Condition 40. This exchange led to further correspondence, in the course of which Gartlan Furey indicated that it was progressing a number of the matters raised in the correspondence and confirmed that, on receipt of certain further information, it intended to finalise matters as follows:-

> *"(i) agree an amended Land Registry compliant map of the unregistered title to the*
>
> *Property to exclude the area claimed by Mr. Power;*
>
> *(ii) to stake the area claimed by Mr. Power on the ground by agreement with Mr.*
>
> *Power; and to write to the owner of e adjoining farm, Mr. Dowley, as requested by your client."*

44. On 26th February, 2016, Gartlan Furey wrote to Lohan & Company stating that they had been instructed to update Lohan & Company on the following matters:-

"(1) Our client's surveyor has been instructed to meet with Mr. Power on site to agree the revised boundaries to the property to exclude the area claimed by Mr. Power.

(2) The horses located on the property are being removed on Monday, 29th February, 2016.

(3) We have written to Mr. Ivan Dowley, owner of the farm adjoining the property requesting that he and his tenant, Mr. Keane, immediately ceases any encroachment on the property.

As requested we would be obliged if you would please provide us with proof of funds to complete the sale of the property and you might also please confirm the name of the entity purchasing the property which is to be inserted into the deed of transfer and conveyance in respect of the property."

45. On 19th April, 2016, Gartlan Furey wrote to Lohan & Company in the following terms:-

"We refer to the above matter resting with our letter of 26th February, 2016.

Further to your client 's observations in relation to the boundaries and possession of certain parts of the property, we confirm that our client's engineer has met both Mr. Power and Mr. Keane on the property in recent weeks and we enclose herewith revised composite map of the property prepared by our client's engineer for identification purposes only.

The areas coloured green on the composite map of the property are those alleged to be in the possession of Mr. Power and comprise part of the unregistered title to the property. The areas coloured red on the composite map of the property are those alleged to be in the possession of Mr. Keane and comprise part of folio

33848F Co, Waterford.

Without prejudice to special condition 7.5 and 7.6 of the Contract for Sale and the Completion Notice dated 12th November, 2015, our clients would propose completing the transaction on the basis that the areas coloured green and red on the composite map are excluded from the sale of the Property.

You might please confirm if your client is in agreement with same and we will issue you with amended Land Registry compliant maps of the Property to exclude the areas coloured green and the areas coloured red on the composite map of the

Property."

50. On 26th April, 2016, Gartlan Furey sent a reminder to Lohan & Company. Although the Plaintiff suggests in evidence that he believed he was waiting for progress in relation to mapping and encroachment matters, no reply was received to the letter of 19th April, 2016.

First General Condition 18 Notice
51. On 13th November, 2016, Mason Hayes & Curran wrote to Lohan & Company. They informed Lohan & Company and they had been instructed and to take this matter over from

Gartlan Furey and that they are now acting on behalf of the Vendor. They continued as follows:-

"Pursuant to General Condition 18 of the Contract for Sale dated 7th August 2015, ("the Contract"), the Vendor hereby gives notice to the Purchaser that the Vendor shall rescind the Contract after the expiry of five Working Days (as defined in the Contract) from the delivery of this notice, unless the Purchaser's requisitions in relation to:

(i) encroachment by Mr. Power and Mr. Kelly;

(ii) presence of horses of owners unknown; and

(iii) condition of the Subject Property under the Contract are withdrawn prior to the expiry of the said five Working Days,

The Vendor denies that the Vendor has any contractual duty associated with the aforementioned requisitions and further denies that the Purchaser is entitled to delay completion or claim compensation arising therefrom.

In the event that the said requisitions are not withdrawn by the Purchaser within the time periods stated above, the contract shall be rescinded on 7th December, 2016, and in such event, the Vendor shall return the contract deposit to the Purchaser and the contract shall be at an end. Thereafter, the Purchaser shall have no further interest in the premises and the Vendor shall be entitled to sell the premises to any party."

52. On 6th December, 2016, Lohan & Company wrote two letters to Mason Hayes & Curran. One was a letter rejecting the General Condition 18 Notice and asserting that the Vendor did not have any right contractual or otherwise to rescind the contract. It claimed that the receiver had "ignored all basic contractual obligations in this matter from the commencement of engagement on this purchase".

53. They continued:-

"We have not heard from your client for several months and you are in no position and possess no legal grounds to rescind the contract or indeed claim time is of the essence, given the abrogation of your client's responsibility as receiver to ensure a sale proceeds with all essential ingredients, such as a proper identifiable map, no boundary disputes, no adverse possession claims etc. In that regard your client's refusal to properly address these issues has allowed matters to drift and has also allowed those attempting to adversely possess property, further time to solidify their position."

54. The second letter of 6th December, 2016 was headed "strictly without prejudice/off the record" and proposed that a "round table meeting take place with respective engineers to finalise a map and hopefully a solution to the continuous encroachment."

Meeting of 20th December, 2016

55. By arrangement between Lohan and Company and Mason Hayes & Curran a meeting was scheduled for 20th December, 2016, The meeting took place at the premises of Cerberus European Servicing Advisors Ireland Limited ("CES") and was attended by the plaintiff and his solicitor Mr. Lohan and Mr. Brian Berg and Mr. Alan Mitchell, both employees of CES. There was extensive debate and controversy in later correspondence and at the hearing of the action as to the status of the meeting, the status and authority of Mr. Berg and Mr. Mitchell, and as to the outcome of the meeting.

56. In evidence Mr. Berg said that he is an employee of CES. He is described as a "Managing Director" of CES and Mr. Mitchell is also an employee of CES, Mr. Berg said that CES is "affiliate" of PEL and that it acts in an advisory capacity overseeing the activities of service providers appointed on behalf PEL such as Link Asi Limited ("Link") the loan servicer appointed in relation to the loan secured on the property.

57. Mr. Berg gave evidence that neither CES or Link or he or Mr. Mitchell or any other employees of those entities have capacity to bind PEL but only to advise it and to make recommendations. He also said that in cases where PEL has appointed a receiver it is that receiver who takes decisions in relation to the asset, with the benefit of recommendations from CES and service providers, and in relation to transactions such as sales subject to obtaining the consent of PEL as mortgagee. His evidence was that he had made this clear at the meeting.

58. Although the meeting was arranged arising from communications between Mason Hayes and Curran and Lohan and Company neither the receiver or representatives of Mason

Hayes and Curran were in attendance.

59. The Plaintiff and Mr. Lohan gave evidence that Mr. Berg held himself out as a person with clear authority to act and make decisions in relation to the property. They said that any distinctions between CES and PEL and even the receiver were not made clear and that Mr. Berg acted as a person representing the owner of the loan secured on the property and therefore having authority in relation to the asset.

60. The evidence of Mr. Berg and of Mr. Stapleton was that the meeting was being held for the purposes of establishing simply what was delaying completion of the matter and what needed to be done in order to advance it.

61. There was also a conflict of evidence as to whether the meeting was on a "without prejudice" basis. It is said by the defendants that the meeting had been convened pursuant to Mr. Lohan's letter of 6th December, 2016 stated to be without prejudice and they regarded the meeting at all times as having been conducted on this basis. Mr. Berg said that this was restated at the outset of the meeting. The plaintiff and Mr. Lohan each gave evidence that there was no statement made at the meeting itself to the effect that it would be without prejudice.

62. The import of this meeting is best understood by reciting the reliance placed on it in the Statement of Claim.

63. In the Statement of Claim the plaintiff pleads that at this meeting "*by oral agreement between the parties in furtherance of the common pursuit between the parties to resolve the outstanding issues it was agreed that prior to completion of the Contract for Sale the below matters would be resolved by the Vendor:*

> *(a) A finalised map was required before completion of the sale, but contact with Ben Harte engineer for the plaintiff would be made to complete this.*
>
> *(b) Once the Map is agreed that the boundary disputes and incursions in the property must be resolved. That the receiver would at the at the very least issue solicitors letter to Mr. Power and issue proceedings against Mr. Kelly and Mr. Dowley (landlord of Mr. Kelly) in respect of their purported annexations.*
>
> *(c) That all correspondence and files in respect of the estate house between Receiver (and previous owner) and Waterford County Council generally and specifically in respect of the vandalism/damage to the proposed structure and the application of the Heritage restrictions.*
>
> *(d) Absolute vacant possession of the property on closing, including the regular trespass of live/equine stock.*
>
> *The above meeting and agreement was not privileged or on a without prejudice*
>
> *basis".*

64. It is then pleaded that the agreement was reduced to writing in subsequent emails to which I will return below.

65. In the defence it is pleaded as follows:

> *"15. No admission is made as to any matters discussed or less agreed at a meeting held on 20th December, 2016 other than that the said meeting occurred The said meeting was agreed to be held and was held on a "without prejudice " basis and in any event was not a meeting to vary the Contract for Sale and no agreement and any in any event and no enforceable agreement was made for the variation of the Contract for Sale."*

66. It is further pleaded at paragraph 16 as follows:

> *"If, which it is not admitted, any matters were discussed or agreed between the parties to the said meeting of 20th December, 2016:*
>
> > *(a) The purpose of any such discussions or agreements was to facilitate the completion of the Contract for Sale and not to vary the Contract for Sale and no such discussions or agreements are expressed or agreed to be and are not pleaded to have been, any variation of the Contract for Sale.*

(b) Even as pleaded the matters alleged to have been agreed are vague and uncertain, to the point of being incapable of construction and enforcement as contractual obligations.

(c) Any such discussions or agreements were between the plaintiff his servants and/or agents and the servants and/or agents of the secured lender of the property and/or Deloitte, neither of whom was acting as agent on behalf of the Defendant and certainly neither of which had authority to vary the Contract for Sale.

(d) Further and without prejudice to the foregoing the said meeting was attended by representatives of Deloitte [subsequently corrected to CES] in circumstances where the secured lender intended to replace the receiver with a new receiver Ken Fennell of Deloitte by deed of novation. In the circumstances without prejudice to the other matters herein before pleaded, the execution of the said deed of novation was a condition precedent to the enforceability of any agreements made or discussed Further and/or in the alternative, in circumstances where the plaintiff expressly or subsequently refused to execute any such deed of novation, the plaintiff is not entitled in these proceedings to rely on any discussions or agreements involving Deloitte, whether as pre-contract negotiations or agreements, still less variations as to Contract for Sale."

67. The defendant also pleads that the emails subsequent to the meeting and referring to what was discussed at the meeting could not of themselves effect any variation in the

Contract for Sale.

68. The plaintiff gave evidence that at the meeting he was informed by the representatives of CES that they were unhappy with the performance of the receiver Mr. Stapleton and that it was intended to replace Mr. Stapleton with a Mr. Ken Fennell of Deloitte.

69. Mr. Berg in his evidence says that he did not make such criticism of Mr. Stapleton but that he did say it was their intention to replace Mr. Stapleton with Mr. Fennell because

Deloitte were on the PEL panel, which Lisney are not.

70. Both the plaintiff and Mr. Lohan also gave evidence that as part of the discussion the CES representatives inquired if the plaintiff would take a discount on the price. Mr. Lohan's evidence was that a figure was specifically mentioned by Mr. Berg and he referenced figures between €50,000 and €90,000. This is denied by Mr. Berg although he acknowledges that he did at the outset inquire of the plaintiff if he was in effect seeking a payment to "walk away". Either way, it is clear that no agreement was reached as to any such payment or discount.

Events after December 2016 Meeting
71. It appears that very little happened during the month of January, 2017. On 25th January, 2017, Simon Morris, an Assistant Manager Corporate Finance/Restructuring

Services in Deloitte emailed Mr. Lohan in the following terms:

"Hi Cormac,

Hope you are well. I refer to our conversation last week. As discussed can you please advise what is required from your end in order to complete this sale.

I await your response."

72. The next day Mr. Lohan replied with his apologies stating that his client was in the United States and would be back at the weekend. He said that he would confirm all matters before reverting and would email a list next week after reviewing the matter.

73. Also on 26th January, 2017, Mr. Mitchell of CES emailed the plaintiff in the following terms:

"Tony, further to our meeting in Dublin on 20th December with Cormac Lohan and Brian Berg, Deloitte were appointed as FCR (replacing Lisney) and ready to progress

as we discussed We agreed that:

(1) You remain committed to the purchase.

(2) Price agreed at €1.375m and you will provide the required anti-money laundering information including proof of D, source of funds etc, in the usual way.

(3) You are aware of the impending enforcement action [this apparently is a reference to a threat by Waterford County Council to bring enforcement proceedings relating to the condition of the property].

(4) You required your mapper to meet Deloitte 's mapper on site ASAP to agree the boundaries.

(5) You wanted action taken ref the two encroachment issues from neighbours and see proper security in place over both the house itself and the boundary.

Deloitte are not getting satisfactory engagement from Cormac on a number of the above points so please contact me directly to progress"

74. After a further exchange of short emails Mr. Lohan emailed Mr. Morris on 10 February, 2017, in the following terms:

"Dear Simon,

Apologies for not reverting earlier. Just to emphasise what was discussed in our meeting with Alan and Brian before

Christmas, our client wishes to proceed to finalise the contract as quickly as possible but subject to the issues being resolved which we have sought for some time. In any event those issues are without prejudice to our legal remedies and the contract/correspondence to date;

(1) The mapping issue. Your client needs to make contact with our client's engineer Ben Harte (phone numbers provided) to finalise a map for the property in sale.

(2) Boundary disputes: Once the map is agreed, the incursions on the property in sale must be resolved. The offending neighbours are J. Power and Dowley (his tenant is Kelly). I understand from my client that we would require you at the very least issue a solicitor 's letter to Mr. Power; and

(3) Issue proceedings against Dowley and Kelly in respect of their annexations.

(4) We need to be furnished with all correspondence/files in respect of the estate house between receivers (and previous owners) and Waterford County Council generally and specifically in respect of the vandalism/damage to the protected structure and the application of the heritage restrictions.

(5) Also should refer to any outstanding issues in the correspondence between solicitors to date and specifically that we shall require absolute vacant possession on closing This speaks to the regular trespass of live/equine stock.

(6) If I have omitted anything, in this email, the contract and previous correspondence applies in any event. Obviously if there any other matters which you should place on notice to us they should be communicated;

The best way forward is for you to make contact with Mr. Harte and take matters from there. If you have any queries please revert.

Yours sincerely."

75. Although neither party pleads or claims in submissions that there has ever been any binding variation of the contract the plaintiff asserted that it had an entitlement to "absolute vacant possession" at completion and central to this is his claim that at the meeting on 20th December, 2016, certain binding commitments were made on behalf of the defendant on which it has not delivered.

76. It is clear that those attending the meeting discussed at least the following:-

(a) The proposal by PEL to replace Mr. Stapleton with a new receiver Mr. Ken Fennell of Deloitte.

(b) That the plaintiff still wishes to proceed at the original contract price.

(c) The necessity to finalise outstanding mapping issues.

(d) The question of how to deal with any encroachments.

(e) The condition of the property.

77. I have considered the evidence given by the plaintiff and Mr. Lohan and by Mr. Berg. There is no doubt that all of the matters referred to above were discussed at the meeting and the email from Mr. Mitchell to the plaintiff on 26 January, 2017, and from Mr. Lohan to Mr. Maurice on 10 February, 2017, reflect that fact. The Plaintiff places particular reliance on Mr. Mitchell's email. Taken in conjunction with the oral evidence and subsequent correspondence, I do not consider either of these emails to constitute evidence of a binding agreement. In particular, Mr. Lohan's email of 10 February, 2017, insists that the communications are "without prejudice" to our legal remedies and the contract/correspondence to date" and that the contract and previous correspondence applies in any event."

I have concluded that this meeting was convened and held in a combined endeavour to progress practical matters towards completion of the transaction, but no binding variation was made to the contract itself and no new binding commitments were entered into on the part of either party to the contract, let alone in the terms contended for in the statement of claim,

78. On 23rd February, 2017, a meeting took place at the property attended by the plaintiff and his engineer, Ben Harte, and Mr. Liam Cullen, a mapping expert retained by Deloitte. There was some controversy as to what the conclusion and output of this meeting was, to which I shall return later. However, it appears that progress was made in relation to mapping and arising from that meeting Mr. Cullen issued maps to the plaintiff directly showing certain encroachments. The plaintiff reverted to Mr. Cullen with his observation on the map. Mr. Cullen than sent a revised version of the map to the plaintiff requesting confirmation of agreement or otherwise, but received no reply.

79. On 30th March, 2017 Mason Hayes & Curran emailed Mr. Lohan in the following terms:

"Subject to agreement/agreement denied

Dear Cormac,

We refer to the contract dated 7th August, 2015 made between Peter Stapleton as receiver appointed over certain assets of Alistair Jackson and your client, Tony Sheedy as Purchaser of property known as Whitfield Court (the existing contract). It is intended that Mr. Stapleton will step down as receiver and that Ken Fennell of Deloitte will be appointed as the new receiver. As the existing contract has already been executed, it is intended that the existing contract is novated and we attach a draft Novation Agreement in this respect for your review.

On the execution of the Novation Agreement by all parties it is intended that Gartlan Furey will release the deposit of €120, 000 to Mason Hayes & Curran as we will then act for Ken Fennell as receiver. As such Gartlan Furey, who acted on behalf of Peter Stapleton as receiver has requested that your firm and your client release Gartlan Furey from all

obligations. Also attached is a draft letter for a review which we have been asked to have executed before the funds are released.

We would be grateful if you would review the attached documents and let me know if you have any comments,

Kind regards,

Rachel Carney, Partner Mason Hayes and Curran. "

80. Attached to this email were two draft documents one being a draft letter of release to Gartlan Furey in respect of the deposit and the second being a draft Novation Agreement. The proposed effect of the Novation Agreement was that Mr. Stapleton would novate to Mr.

Fennell all of his rights title and interest to the contract and all of the corresponding covenants undertakings duties and liabilities pursuant to the contract. Mr. Fennell of Deloitte would then assume all the rights title and interest and obligations of Mr. Stapleton in the contract. Mr. Fennell would be substituted for Mr. Stapleton and the contract would be construed and treated in all respects as if Mr. Fennell had been named as the party instead of Mr. Stapleton.

81. Thereafter a number of further emails were exchanged by way of follow-up and some direct contact was made between the clients as regards mapping. On 18th May, 2017, Mason Hayes & Curran sent a new draft of the Novation Agreement to Lohan & Company, with a further amendment to include a provision amending the description of the property in the sale to exclude an area marked green on a map attached to the draft Novation Agreement. The map was the map prepared by Mr. Cullen following the meeting in February 2017. The letter was in the following terms:

"Dear Sirs,

We understand that your client has agreed to amend the description of the property in sale as referred to in the contract dated 7th August, 2015. For ease of reference we attach a copy map showing the two plots of land coloured green which will be transferred to the transferee. (The transferee in this case was Mr. Power the owner of adjoining lands). On the basis that your client is in agreement we propose sending a deed of assurance to the solicitor acting for the transferee for review which will transfer these portions.

In addition, we attach a Deed of Novation of the contract which deals with the following:

(1) Amendment to the description of the property in the contract.

(2) Confirmation that your client will provide AML documentation to our client prior to completion and

(3) Confirmation that your client has no objection to the current receiver, Peter Stapleton stepping down and a new receiver Ken Fennell being appointed

Please let me know if you have any comments by close of business 24th May, 2017."

82. Nowhere in this correspondence was reference made to the fact that Mr. Fennell had in fact already been appointed, albeit only to the unregistered lands, on 11 January, 2017.

Second General Condition 18 Notice

83. On 13 June, 2017 Messrs Mason Hayes & Curran wrote to Messrs Lohan in the following terms:

"Dear Sirs,

We refer to previous correspondence in respect of the above matter.

Pursuant to General Condition 18 of the Contract for Sale dated 7th August, 2015 ("Contract") the Vendor hereby gives notice to the Purchaser that the Vendor shall rescind the Contract after the expiry of five Working Days (as defined in the Contract) from the delivery of this notice, unless the Purchaser 's requisitions in relation to:

(l) Encroachment by Mr. Power and Mr. Kelly,

(2) The presence of horses with owners unknown.

(3) Condition of the Subject Property under the contract are withdrawn prior to the expiry of the said five working days,

The Vendor denies that the Vendor has any contractual duty associated with the aforementioned requisitions and further denies that the Purchaser is entitled to delay completion or claim compensation arising therefrom.

In the event that the said requisitions are not withdrawn by the Purchaser within the time period stated above, the Contract shall be rescinded on 21st June, 2017, and in such event the Vendor shall return the contract deposit to the Purchaser and the Contract shall be at an end. Thereafter the Purchaser shall have no further interest in the premises and the Vendor shall be entitled to sell the premises to any party.

We await hearing from you."

84. On 20th June, 2017 Lohan & Company replied as follows:

"We refer to your letter of 13th June and to previous correspondence and to our client's meeting with Cerberus in December, 2016. We also specifically refer to your letter of 30th November, 2016 our reply of 6th December and subsequent engagement between the parties.

Your client has previously attempted to resile from the contract herein but decided not to proceed for obvious reasons. You now reissue the same threat despite your client having agreed to deal with and ultimately properly address the outstanding matters, such as the mapping the encroachment and the condition of the property as set out in previous correspondence. As part of that agreement your client's engineer was to make contact with our client 's engineer to deal with the mapping and to assess the extent of the encroachment onto the property in sale. Your client's engineer did liaise with our client's engineer and met on site to assess the situation. As part of the agreement your client was to issue proceedings against those third parties responsible for the encroachment. We are not aware of your client taking such steps to date, notwithstanding any other outstanding matters. We understand the encroachment is significant.

For you to write to us in the terms set out in your letter is surprising to say the least. The issues surrounding this purchase are extant for over two years, apart from our mutual client's agreement to deal with them in a certain way last December, as evidenced by emails/letters between clients and their respective offices since then. As part of that agreement you were to change receiver as the owners of the debt attaching to the property expressed their dissatisfaction with your client.

Correspondence from your office and indeed direct email correspondence from your clients (Cerberus) to our client and this office evidence same.

In these circumstances if you attempt to rescind the contract between our respective clients, we will have no choice but to issue the appropriate (injunctive) proceedings and to use this and previous correspondence to fix you with the costs of same inter alia compelling you to deal with the outstanding issues as agreed, in addition to any other contractual obligations. "

85. On 24 July, 2017, Messrs Lohan sent a reminder following their letter of 20 June and on 21 August, 2017, Mason Hayes & Curran replied at length. This letter is of some importance and in it Mason Hayes & Curran reject the contents of the letter from Mr. Lohan dated 20 June. Firstly, they repeated their assertion that the meeting on 20 December, 2016, had been held on a without prejudice basis. They asserted also that the parties' rights under the contract remained unaltered but they addressed what they described as the four outstanding issues which had been raised by Mr. Lohan as follows:

(l) Proposed novation of the Contract for Sale
Mason Hayes & Curran acknowledged that it was intended that Mr. Stapleton would be replaced by Mr. Fennell, but pointed out that this change necessitated the consent of the Purchaser by way of the novation of the contract and that this had not been forthcoming, They stated that in the absence of any such novation agreement the arrangements discussed at the meeting of 20th December, 2016, would have no relevance at all and pointed out that the Purchaser had stated no grounds for not agreeing and executing the novation agreement.

(2) Mapping
Mason Hayes & Curran referred to the fact that it had been agreed that the parties' respective engineers would meet on the site and that such a meeting had taken place. They referred to the map having been sent by Mr. Cullen to the plaintiff and sent also to Mr. Lohan with their letter of 18th May, 2017, to which no response had been received.

(3) Alleged encroachment
Mason Hayes & Curran asserted that no agreement had been reached to the effect that proceedings would be issued against individuals in question. They indicated however that although Mr. Fennell was willing to facilitate the issuance of letters to the alleged trespassers, no such letters had been issued in circumstances where the map had not been agreed and the Novation Agreement had not been agreed.

(4) Condition of the property
Again Mason Hayes & Curran insisted that no assurances had been given either at the meeting or otherwise in relation to the condition of the property but indicated that in order to assist the plaintiff in the event that he would proceed with the purchase they were willing to provide a copy of a conservation report prepared by Noel Larkin & Associates and of the latest correspondence between Deloitte and Waterford City Council in respect of the property They stated also that any costs incurred by the receiver in respect of the condition of the property would be for the account of the Purchaser.

86. Mason Hayes & Curran pointed out that in their view the contract did not require their client to take any of the steps which the plaintiff was calling on him to take. They insisted that they were entitled to issue their notice under General Condition 18 in November, 2016, and again in June, 2017. The letter continued:-

"However in light of what appears to be a misunderstanding on your client's part as to his rights and obligations and in a final effort to resolve this matter without dispute our client:

(a) Hereby waives the notice served under General Condition 18 of the Contract of Sale on 13th June, 2017 and

(b) Hereby calls upon your client to, no later than 7 days of the date of this letter, confirm your client 's agreement to the following documents sent to you in our letter of 18th May, 2017, being

- *the map*
- *the Novation Agreement*

If your client agrees the map and Novation Agreement letters will be sent to the alleged trespassers notifying them of the trespass and calling upon them to cease such trespass, Your client will then be obliged to complete the sale of the property.

In the event that your client does not agree to the above documents within 7 days of the date of this letter our client will proceed as he deems appropriate. In this regard please note that the foregoing is suggested as a way forward to resolve the current impasse and, in the meantime, our client continues to reserve all his rights at law and on foot of the

contract (including his right to serve a further notice under General Condition 18 or a Completion Notice pursuant to General Condition 40 or to commence such proceedings as he may be advised).”

87. No reply was received to this letter and on 30th August, 2017 Mason Hayes & Curran wrote to Mr. Lohan, noting that he had been on leave, and extending the time period for a response to 1st September, 2017.

Third General Condition 18 Notice
88. On 7th September, 2018, Mason Hayes & Curran issued the notice which is relied on by the defendant in these proceedings. The letter was in the following terms:

"Dear Sirs,

We refer to previous correspondence in respect of the above matter, resting with our letter of 30th August.

We note that the Purchaser has made and insists on the following objections.

(i) That vacant possession of the entire lands in sale be provided, despite the clear terms of Special Condition 7.6 of the Contract for Sale dated 7th August, 2015, ("the Contract") to include the taking by our client of proceedings to remove certain trespassers (known and unknown) on part of the lands in sale.

(ii) That a new map of the property be agreed when — having been (without obligation) provided with that map in May of this year — he has failed to either confirm or dispute the accuracy thereof; and

(iii) That he be furnished with all correspondence/files in respect of the estate house between the Vendor and previous owners and Waterford County

Council despite the absence of any legal obligation to do so and despite clear terms of Special Condition 7.1, 7.3 and 7.10 of the contract.

Notwithstanding the terms of the contract and the fact that these matters were raised outside the time prescribed by the contract for delivery of Objections and

Requisitions the Vendor has made extensive intermediate efforts, to seek to resolve these objections raised by your client. Moreover the Vendor has withdrawn two earlier notices served under General Condition 18 of the contract in further efforts to seek to facilitate your client, Notwithstanding this and notwithstanding that two years has now elapsed since the date of the contract, your client has failed, refused and/or neglected to close the sale of the property or withdraw the said objections. The Vendor is not in a position to comply with these objections and/or further attempts to comply therewith will involve unreasonable delay and/or expense.

Accordingly please note that pursuant to General Condition 18 Contract the Vendor hereby gives notice to the Purchaser that the Vendor shall rescind the contract after the expiry of 5 Working Days (as defined in the Contract) from the service of this notice (as defined in the Contract) unless the Purchaser's said objections are withdrawn prior to the expiry of the said 5 Working Days.

For the avoidance of any doubt the Vendor denies that the Vendor has any contractual duty associated with the aforementioned objections and further denies that the Purchaser is entitled to delay completion or claim compensation arising therefrom. Accordingly, please note that in the alternative to reliance upon General Condition 18 the Vendor will rely on the Purchaser's insistence on the above matters (which are not required under the Contract) as a repudiation of the contract, which repudiation will be accepted on the expiration of the 5-day period stated above. In the event that the said objections are not withdrawn by the Purchaser within the time period stated above, the Contract shall thereupon be rescinded and in such event the Vendor shall return the contract deposit to the Purchaser and the contract shall be at an end. Thereafter the Purchaser shall have no further interest in the premises and the Vendor shall be entitled to sell the premises to any party”.

89. On 18th September, 2017, Mason Hayes & Curran wrote again to Messrs Lohan noting that the objections had not been withdrawn and confirming that the receiver was in the process of making arrangements for the return of the deposit.

90. On 19th September, 2017, Mr. Lohan replied to Mason Hayes as follows:

"Your client has no grounds whatsoever to terminate and/or otherwise forfeit the contract between respective clients and/or renege on all matters it agreed to carry out prior to completion. Your clients agreed to carry out and/or complete certain matters as set out in previous correspondence between them and/or agents to address the serious issues which have arisen. You have ignored all said correspondence and agreements. Your client Cerberus called a meeting last December and agreed a way forward with our client and they have failed to adhere to same. Brian Berg, at one stage during the meeting, offered our client €50,000 to walk away.

In addition your client has failed to file an appearance to our proceedings seeking specific performance since it was served on your client in August. We attach copy for your file as your client appears not to have instructed you on same. We also attach copy letter dated 20th June, 2017 which speaks for itself, a letter which was ignored and never responded to.”

91. Further letters were exchanged between the parties each rejecting the other's position, and on 4th October, 2017, Mason Hayes & Curran returned the deposit to Mr. Lohan. On 5th October, 2017, Mr. Lohan returned the deposit cheques to Mason Hayes & Curran noting

"that this contract is not at an end, and we call on you now to comply with the terms and conditions of same."

92. In a letter of 3rd October, 2017, Mason Hayes & Curran referred also to the reference to the existence of proceedings for specific performance referred to by Mr. Lohan and stated that no such proceedings had been served They requested details of the service of

the proceedings, but Messrs Lohan did not respond to that request or provide any details of the service of the proceedings. At the trial Mr. Lohan said that he had instructed his secretary to serve the Summons.

93. On 20th October, 2017, Mr. Lohan enclosed by way of service a certified copy of the plenary summons in these proceedings.

94. In the absence of any evidence of service of the proceedings at such an earlier date, I can only conclude that the proceedings, which were issued on 31st August, 2017, were not served before Mr. Lohan's letter of 17th September, 2017.

The Contract
95. Given that reliance has been placed by both parties on so many of the provisions of the contract it is necessary to set these out in some detail and in this section of the judgment rather than interspersing them in different parts of the narrative.

96. At the outset it should be noted that neither party in pleadings or submissions has contended that the contract has been varied or amended.

97. The contract is the standard form of the Law Society of Ireland General Conditions of Sale — 2009 Edition. It was signed first by the Plaintiff and then on 7th August, 2015, on behalf of the Vendor, by his duly appointed receiver Mr. Stapleton. In exchanges leading to its execution by the receiver the original closing date was amended to 30 days from signing and the interest rate was amended to 10% per annum. The purchase price was €1,375,000 and the deposit, having been amended, was €120,000.

98. The particulars and tenure are as follows: -

> *"All that and those the dwelling house, premises, out offices and lands situate at and known as Whitfield Manor, Whitfield Court, Kilmeaden, in the County of Waterford together with part of the pleasure grounds park and lands formally (sic) occupied or held with the mansion house of Whitfield now called Whitfield Court which same lands consist of part of the land of Dooneen together with part of the lands at Powersknock which said land are situate in the Barony of Middle third and County of Waterford, all of which said lands are more particularly outlined and hatched in pink and the map attached to Indenture of Conveyance dated the 4th day of March, 2005 between Major Hugh Danway (sic) (otherwise known as Hugh Danway) (sic) of the one part and Alistair Jackson of the other part as more particularly delineated in red on the map attached hereto for identification purposes only and all that and those the lands comprised in Folios 7914F and 33848F of the Register of Freeholders in the County of Waterford (together referred to as the "Subject Property)".*

99. Important to the definition of the property and in particular the map referred to is

Special Condition 4.3 which reads as follows: -

> *"The Deed of Conveyance dated 4th March, 2005 ("the Deed of Conveyance") made between Major Hugh Dawnay of the one part and Alistair Jackson of the other part refers to a map annexed thereto. The map furnished herewith was held with the title deeds to the Subject Property but said map was not actually attached to the deed of conveyance. It appears that the said map became detached from the Deed of Conveyance but the Vendor cannot conclusively confirm the position. No further documentation shall be furnished and no objection, requisition or enquiry shall be raised in relation thereto."*

100. It appears that when the draft contract and copy title was first provided by Gartlan Furey to the plaintiff's solicitors, it was accompanied by a large map acknowledged by all parties to be of poor quality. It showed the entire area of the property delineated in red, and within that was an area shaded or "hatched" in pink comprising the unregistered portion of the property. During the cross-examination of Mr. Lohan there was heated debate as to whether this was the map referred to in the particulars as the map attached to the Deed of 2005 or a "contract map". The only conclusion which can be made is that it was not a map prepared for the specific purpose of being annexed to the contract, and this was in accordance with the evidence given by Ms, Higgins of Gartlan Furey. Therefore, it was the 2005 Deed Map which was subject to the qualification in this respect in Special Condition 4.3.

Relevant Special Conditions
101. "2. The General Conditions shall (a) apply to the Sale insofar as the same are not hereby altered or varied, and these Special Conditions shall prevail in case of any

> *conflict between them and the General Conditions (b) be read and construed without regard to any amendment therein unless such amendment shall be referred to specifically in these Special Conditions…*
>
> *6.1 contains the standard special condition excluding any personal liability on the part of the receiver.*
>
> *6.2 The Purchaser shall accept that the Deed of Assurance shall at the option of the receiver, be executed either (a) by the receiver as agent of the Vendor pursuant to the Mortgage in Charge or (b) by PEL as mortgagee in exercise of its statutory powers,*
>
> *7.0 The Purchaser agrees and accepts that any buildings located on the Subject Property are not habitable and accordingly do not fall within the definition of a residential property under the Finance (Local Property Tax) Act, 2012 (as amended) [or related legislation]. No further documentation shall be called for or furnished in this regard No objection requisition or enquiry shall be raised in relation thereto,*
>
> *7.1 The Purchaser agrees and accepts that no information statement description quantity or measurement contained in any advertisements or given orally or contained in any brochure letter report or handout issued by or on behalf of the Vendor, the receiver Mr. Peter Stapleton or any agent acting on his behalf in respect of the Subject Property (whether or not in the course of any representation or negotiations leading to the Sale) shall constitute a representation inducing the*
>
> *Purchaser to enter into the Sale or a condition or warranty forming part of this Contract ...Any statement, representation or warranty whatsoever made by the Vendor, the Receiver, Peter Stapleton or any of their agents or employees during the course of negotiations leading to the sale which are not herein contained and set forth are hereby treated as having been withdrawn and will have no force or effect at law whatsoever. General Condition No. 33 (which concerns differences/errors affecting the description of the property in sale) shall be read subject to this condition.*

7.3 The Purchaser hereby acknowledges that the Subject Property is "sold as seen and the Vendor shall be under no obligation to remove debris or carry out any of the clean-up of the Subject Property. General Condition 21 [which concerns vacant possession and is discussed later in this judgment] is hereby deleted accordingly."

7.4 The Subject Property is a protected structure and accordingly a BER Certificate and Advisory Report will not be furnished in respect of same. No objection requisition or enquiry shall be raised in this regard.

7.5 The Purchaser shall be deemed to have satisfied itself in relation to all matters pertaining to the identity of the Subject Property including the boundaries thereof and shall raise no objection requisition or enquiry in this regard The Vendor shall not be required to furnish a declaration of identity or separately identify parts of the Subject Property held under a different title or to specify what boundaries are of a party nature. General Conditions 14 (which concerns evidence of identity of the property in sale) is hereby deleted.

7.6 The Vendor gives no warranty and makes no representation as to -

(a) the coincidence of actual boundaries in the vicinity of the Subject Property and the boundaries of the Subject Property shown by the title furnished;

(b) encroachments made by third parties on the subject property.

The Purchaser is placed on its own enquiry in these respects and shall satisfy himself prior to the signing here of any discrepancy in relation to the size and dimensions of the Subject Property as described in the documents of title and maps and the position on the ground.

7.7 The Purchaser shall be deemed to have satisfied itself in relation to the actual state and condition of the Subject Property including all easements rights reservations exceptions privileges covenants restrictions rents taxes and other liabilities affecting the Subject Property prior to the execution hereof and shall raise no objection requisition or enquiry in this regard. General Conditions 15 and 16 [which concern the rights and liabilities of the parties as regards the condition of the subject property] are hereby deleted…

7.10 It shall be a matter for the Purchaser to make its own enquiries and satisfy itself as to whether any notice has been served by a Competent Authority. No objection requisition or enquiry shall be raised in relation to any such notice, General Condition 35 [which provides for the power of a Purchaser to rescind a sale in circumstances where a notice has been served by a Competent Authority and not disclosed] is hereby deleted.

7.11 The Vendor's liability under General Condition 43 [which relates to the passing of risk between the date of sale and date of completion and is discussed below] is limited to the extent of the cover provided by the Vendor 's insurers (if applicable for the subject property)…

Relevant General Conditions

102. General Condition 18 provides as follows:

"If the Purchaser shall make and insist on any Objection or Requisition as to title, the Assurance to him or any other matter relating to or incidental to the sale, which the Vendor shall, on the grounds of unreasonable delay or expense or other reasonable grounds, be unable or unwilling to remove or comply with, the Vendor shall be at liberty, (notwithstanding any intermediate negotiation or litigation or attempts to remove or comply with the same) by giving to the Purchaser or his Solicitor not less than five working days' notice to rescind the sale. In that case, unless the Objection or Requisition in question shall in the meantime have been withdrawn, the sale shall be rescinded at the expiration of such notice."

103. Condition 21 regarding vacant possession is deleted by Special Condition 7.3. However, it is important to note its terms as follows:

"Subject to any provision to the contrary in the Particulars or in the Conditions or implied by the nature of the transaction, the Purchaser shall be entitled to vacant possession of the Subject Property on completion of the Sale."

104. General Condition 27 is entitled "Apportionment and Possession" and provides as follows:

"Subject to the stipulations contained in the Conditions, the Purchaser, on paying the Purchase Price shall be entitled to vacant possession of the Subject Property or (as the case may be) the rents and profits thereout with effect from the Apportionment Date. (The term "Conditions" is defined in General Condition I to mean "the attached Special Conditions and the General Conditions."

General Condition 29 provides:

"If all or any of the Subject Property is unregistered land, the registration of which shall become compulsory at or subsequent to the date of sale, the Vendor shall not be under any obligation to procure such registration but shall at/or prior to such completion furnish to the Purchaser a map of the Subject Property complying with the requirements of the Land Registry as then recognised..."

General Condition 33(c) provides:

"Nothing in the Memorandum, the Particulars or the Conditions shall

(1) entitle the Vendor to require the Purchaser to accept property which differs substantially from the property

agreed to be sold, whether in quantity, quality, tenure or otherwise, if the Purchaser would be prejudiced materially by reason of such difference or

(2) affect the right of the Purchaser to rescind or repudiate the Sale where compensation for a claim attributable to a material error made by on behalf of the Vendor cannot be reasonably assessed".

General Condition 43 provides:

"Subject as hereinafter provided the Vendor shall be liable for any loss or damage howsoever occasioned (other than by the Purchaser or his agent) to the Subject Property (and the purchased chattels) between 'the date of Sale and the actual completion of the Sale but any such liability (including liability for consequential or resulting loss shall not as to the amount thereof exceed the Purchase Price".

This provision was limited by Special Condition 1 1 to the amount of any cover provided by the Vendor's insurance.

General Condition 44 provides:

"The liability imposed on the Vendor by condition 43 shall not apply

(a) to inconsequential damage or insubstantial deterioration from reasonable wear and tear in the course of normal occupation and use and not materially affecting value".

General Condition 45 provides:

"Nothing in Conditions 43 and 44 shall affect

(a) The Purchaser's right to specific performance in an appropriate case.

(b) The Purchaser's right to rescind or repudiate the sale upon the Vendor 's failure to deliver the Subject Property substantially in its condition at the date of sale".

Objections and Requisitions on title and replies thereto

105. It is appropriate also to note a number of the replies made by the defendant to certain requisitions on title including the following:

Requisition 1.2. Which of the boundaries belong to the property and which are party.

Reply: see special condition 7.5.

Requisition 1.3. In relation to boundaries

(a) Furnish now any agreements as to repair maintenance or otherwise and

(b) Are there any disputes with any adjoining owner.

Reply: see special condition 7.5 of the Contract for Sale.

Requisition 8. Confirm that clear vacant possession of the entire property will be handed over at closing.

Reply: confirmed subject to special condition 7.3 of the Contract for Sale. (Clause 7.3 included the deletion of General Condition 21 regarding vacant possession).

Requisition 14.5. Is there any litigation pending or threatened or has any court order been made in relation to the property or any part of it or the use thereof or has any adverse claim thereto been made by any person.

Reply: yes. See Contract for Sale and documentation furnished.

Requisition 20.3. If all or any of the property is unregistered land the registration of which will become compulsory by virtue of the sale furnish now a map of the property duly marked complying with Land Registry mapping requirements.

Reply: already furnished.

Requisition 21. The identity of the property sold with that to which title is purported to be shown must be proved.

Reply: see documentation furnished.

Requisition 22.1 furnish now copies of the following:

(a) Copy of certified copy folio written up to date.

Reply: already furnished.

Requisition 22.1 (b). Land Registry map/file plan

Reply: already furnished.

Requisition 44. Hand over on closing the following documents:

4. Original map prepared by Purchaser's engineer held in trust by your office.

Reply: agreed.

Requisition 44.14. Hand over on closing the following documents:

14. Vacant possession.

Reply: agreed subject to special condition 7.3 of Contract for Sale.

Mapping
106. The map which was first tendered by the defendant when issuing the draft Contract for Sale was accepted by all parties to be imperfect. However Special Condition 4.3 made it clear that there was uncertainty regarding the map being provided in that it could not even be verified that this was the map attached to the Deed of Conveyance of 4th March, 2005, which was the key identifying document in relation to the unregistered portion of the property and the Condition precluded any objection, requisition or enquiry in relation thereto. As regards the unregistered land however it is clear that the defendant tendered Land Registry complaint maps. In the subsequent communications which took place in relation to mapping, the discussion regarding encroachments intervened at every stage. The meeting of the engineers on 23rd February, 2017, appeared to be a constructive meeting, and when maps were issued to the plaintiff thereafter he reverted to Mr. Cullen who made a revised map and reissued it at the Plaintiffs request and this appeared to be the mapping "result" of the meeting in February, 2017. However, the plaintiff later claimed that the inspection which occurred on that date was confined to identifying the extent of the encroachment by a Mr. Power, to whom it was agreed the relevant area would be transferred and excluded from the sale, and he did not accept that these represented definitive maps which could be used for the completion.

107. The map which resulted from these discussions was enclosed with the letter of 18th May, 2017, from Mason Hayes & Curran to Messrs Lohan but this resulted again in no concluded agreement. This was partly because of the plaintiff's protest that these maps did not address all encroachments which he claimed to have since witnessed.

108. I shall return later to the question of the map which the plaintiff himself offered in evidence at the hearing.

Encroachments
109. The plaintiff gave evidence of observing extensive encroachments on the lands. The defendant maintains that any obligation he had as regards vacant possession was modified by the Special Conditions, both as regards identity of the property and as regards encroachments. The receiver's evidence was that incursions of this nature were not unusual in such an asset and that none of them would have prevented him from handing over possession on completion to the extent that he was so obliged by the terms of the contract.

110. The plaintiff says that the incursions observed by him, particularly in the months after the execution of the contract were of a scale which were so much greater than any which were visible at the time of the signing of the contract. He gave evidence of various visits which he made thereafter and produced in court a map showing what he characterised as growing incursions from the second half of 2015 through 2016, 2017 and 2018.

111. In relation to encroachments on the eastern side, it appeared that there was a defined area which was being occupied by a Mr. Power, owner of the adjoining lands. Ultimately the parties appear to have reached an agreement that the portion of lands now occupied by Mr. Power would be excluded from the transaction and would be transferred to Mr. Power himself. However, more controversy concerned incursions from the western side. Mr. Cullen and Mr. Harte and the plaintiff all gave evidence regarding the inspection which occurred on 23rd February, 2017, when encroachments were observed. Mr. Cullen gave evidence that while the incursions were evident part of the problem was that the physical boundary was not delineated perfectly on this side of the lands and it was therefore difficult to assess the scale of the incursions.

112. Under cross-examination the plaintiff persisted with his claim that the encroachments, including such activity as grazing by cattle, had become a multiple of those visible to him on inspection prior to signing the contract. He acknowledged that on inspection he had seen horses and cattle even at the very outset, but asserted that the growth of regular incursions had now reached in the order of 50 acres.

113. Mr. Cullen on the other hand gave evidence that as far as he could ascertain the encroachments were more limited, to as little as 9 acres out of the total estate of 230 acres. 114. At the hearing it was said by both parties that this case is not a boundary dispute. That is correct. The parties also said that questions concerning definition of the boundaries of the property in sale, questions as to the extent and nature of encroachments, and whether the defendant had contracted to deliver "absolute vacant possession" where all separate questions to be determined. That is only partially correct. Despite the efforts by the parties to distinguish these questions they were continuously associated with each other during the hearing and the issues became intermingled.

115. When the plaintiff gave evidence of encroachments he did so by reference to a marked up map, which he presented in his evidence as having been created by his engineer Mr. Harte but later admitted under cross-examination to have been made by himself. That map, whilst showing boundaries, did not illustrate which portions of the lands were physically protected by fencing and which were not.

Appointment of Second Receiver
116. On 11th January, 2017, PEL appointed Ken Fennell of Deloitte, Dublin, to be receiver of part of the assets comprised in the mortgage dated 4th March, 2005, between Irish Nationwide Building Society and Alistair Jackson. It appears from the deed of his appointment that this appointment extended only to the unregistered portion of the property, but nothing turns on that particular question. Mr. Stapleton's appointment was not discharged.

117. It is clear from the discussions at the meeting on 20th December, 2016, and subsequent communications between the parties that it was intended by PEL that Mr. Fennell would be appointed to replace Mr. Stapleton. Whilst the discharge of a receiver and appointment of a replacement would be a matter only between the appointer and the receivers, accession to a contract with a third party is a different matter. Insofar as Mr. Fennell would be substituted for Mr. Stapleton as a party to the contract with the plaintiff, such a substitution would have required a novation which was never agreed. Therefore, Mr. Stapleton was never discharged or released from any obligations under the contract. Nor did Mr. Fennell assume any legal status in relation to that contract. It has been submitted on behalf of the plaintiff that the appointment of Mr. Fennell had the following effects:

> (1) That it was a repudiatory breach of the contract;
>
> (2) That the rescission notice issued by Mr. Stapleton had no effect since Mr. Fennell was not a party to it. That Mr. Stapleton, after-Mr. Fennell had been appointed, could not act alone and, therefore, the rescission notice issued by Mr. Stapleton had no legal effect; and
>
> (3) That the appointment of Mr. Fennell was a frustrating event which had the effect of "stalling the contract" and amounted to a wilful default by the Vendor in breach of the contract.

118. I have concluded that as regards (1) above, the appointment of Mr. Fennell was not an act of the defendant, and Mr. Fennell never acquired any legal status in relation to the

Contract for Sale of the lands. Therefore, this cannot be a repudiatory breach. The defendant, being the legal owner of the lands, was bound by virtue of the contract having been executed by the lawfully appointed receiver, Mr. Stapleton.

119. As regards (2) above, in as much as the contract would be enforceable against the Vendor, the subsequent appointment of Mr. Fennell could not have prevented its completion if a court were otherwise to order specific performance. Not being a party to the contract, Mr. Fennell could not have, by virtue of his appointment, sought to rescind the contract. Nor does a receiver have power to disclaim a pre-receivership contract. See *Freevale Limited v. Metro Store Holdings* [1984] 1 CH 199.

120. As regards (3) above, Mr. Fennell's role was always limited by the fact that the asset was subject to a "pre appointment" binding contract which on his appointment he could not disregard. There was no evidence that he even sought to do so.

121. During the hearing, the plaintiff complained that the first time he ever saw the deed of appointment of Mr. Fennell was when it was referred to in the evidence of the defendant and then produced at the trial. On the fifth day of the trial, the plaintiff applied to amend the statement of claim to include allegations of repudiatory breach of the contract by reason of the appointment and complained that the Deed of Appointment of Mr. Fennell had not been produced in discovery. This court refused the application to amend, largely by reason of the fact that it was evident from correspondence as early as 2017 that the plaintiff had been on notice of the fact of an appointment of Mr. Fennell and if this had been an issue of such importance, he ought to have pursued the matter further before this late stage of the hearing. I have concluded that the appointment of Mr. Fennell was in any event not an act of the defendant, and that fact was always clear. If the plaintiff had concerns that PEL, which is not a defendant in this action, by making this appointment, were in some manner "intermeddling" in the contract, he ought to have pursued that as an issue long before the trial commenced.

122. It was not helpful that on a number of occasions, commencing in particular with Mr. Mitchell 's email to the plaintiff on 26th January, 2017, reference was made to Mr. Fennell, and even to "Deloitte" having been appointed, whereas in subsequent correspondence from Mason Hayes & Curran, particularly their email of 30th March, 2017, reference is made to the intention that Mr. Fennell "will be appointed as the new receiver". This is surprising when in fact Mr. Fennell was appointed on 11th January, 2017, and Mr. Stapleton was never discharged. I am compelled to say that these facts and the contradicting communications relating to them all introduced an unnecessary measure of, at the very least, confusion to the matter.

123. The plaintiff was under no obligation to agree to the terms of the novation and was perfectly entitled to refuse to sign that agreement. However, that has the effect only that the contract remained extant as between the parties thereto.

124. Nonetheless, the fact of the appointment of Mr. Fennell and the extent of the engagement in the entire matter by his firm had the consequence at the very least that a disproportionate amount of the time in the trial was taken up with, what I can only describe as, the distraction of evidence and submissions regarding the effect of the appointment of Mr. Fennell.

General Condition 18

125. The central question is whether the defendant was entitled to and had reasonable cause to rescind the contract under General Condition 18, and acted reasonably in doing so.

126. The principles governing the right to invoke condition 18 have been discussed extensively by Farrell on the Irish Law of Specific Performance (Butterworths), p. 315, and Wylie's Irish Conveyancing Law (3rd Ed.), p. 510, and in the leading judgments of the Supreme Court in *Williams v. Kennedy* (unreported, 19th July, 1993), and *Kiely v. Delaney* (2012) IESC 41.

In *Kiely v, Delaney* Mr. Justice Fennelly cited with approval the following passage from Wylie:-

> *"This right of rescission constitutes a considerable restriction on the Purchaser 's rights and so it is not surprising that the courts have been alert to see that it is not abused. In fact, the courts have laid down a number of qualifications to the Vendor's rights of rescission. First it is settled that the Vendor must exercise it in a reasonable manner, or as is more usually put, he must not invoke it without reasonable cause. He must not act capriciously or arbitrarily and, if necessary, will have to convince the court that the objection or requisition which has caused him to invoke his right of rescission is one which will cause him substantial expense or involve him in litigation if he is to comply with it or remove it. Thus he cannot use the right as a convenient method of getting out of his contract with the Purchaser, e.g. in order to be able to accept a higher offer for the property from a third party. Condition 18 recognises this principle for it provides that the Vendor must be unable or unwilling "on the grounds of unreasonable delay or expense or other reasonable ground".*

127. Mr. Justice Fennelly also quoted with approval the observation by the author: "*the right to avail of Condition 18 is not limited to matters of title or conveyance but extends to any other matters relating to the sale e.g. objections as to descriptions of quantity*".

128. The Rescission Notice dated 7th September, 2015, was issued after extensive correspondence and communications recited in

detail earlier in this judgment On 21st August, 2017, Mason Hayes & Curran wrote to Lohan & Co. summarising the history of the matter. In that letter they waived the previous, being the Second Rescission Notice, and called on the plaintiff to confirm agreement to the map and the Novation Agreement sent with their letter of 18th May, 2017. They then confirmed that if the plaintiff agreed these items, letters would be sent to the alleged trespassers. The letter concluded by stating that

> *"the foregoing is suggested as a way forward to resolve the current impasse and, in the meantime, our client continues to reserve all of his rights at law and on foot of the Contract."*

I have already found that the plaintiff was under no obligation to agree to or sign the Novation Agreement. However, the plaintiff's refusal to sign same was not one of the matters relied on or cited in the Rescission Notice itself and the concept of novation of the contract, whilst featuring prominently in the communications during 2017, was in truth an unhelpful distraction from the due performance by the parties of their obligations under the contract. The letter of 2nd August, 2017, had not been replied to when Mason Hayes & Curran issued the Rescission Notice on 7th September, 2017.

129. In the notice of 7th September, 2017, the defendant noted that the plaintiff was insisting on the following objections:

> Objection (1): "That vacant possession of the entire lands in sale be provided, despite the clear terms of Special Condition 7.6 of the Contract for Sale dated 7th August, 2015, to include the taking by our client of proceedings to remove certain alleged trespassers (known and unknown on the part of the lands on sale)".
>
> Objection (2): That a new map of the property be agreed when – having been (without obligation) provided with that map in May of this year – he has failed to either confirm or dispute the accuracy thereof, and
>
> Objection (3): That he be furnished with all correspondence/files in respect of the estate house between the Vendor and previous owners and Waterford County Council despite the absence of any legal obligation to do so and despite the clear terms of Special Conditions 7.1, 7.3 and 7.10 of the Contract.
>
> The plaintiff's solicitor replied on 19th September, 2017, rejecting the General Condition 18 Notice. The plaintiff insisted that the defendant was "reneging on all matters it agreed to carry out prior to completion."

130. In light of Mr. Lohan's reply, it is necessary to consider each of the three objections referred to by Mason Hayes & Curran. In relation to Objection (1), regarding vacant possession, General Condition 21 (being the general obligation to deliver vacant possession on completion) was deleted by Special Condition 7.3. However, General Condition 27(a), headed "Appointment and Possession", was not deleted and must be considered. It provides "subject to the stipulations contained in the Conditions, the Purchaser, on paying the

Purchase Price shall be entitled to vacant possession of the Subject Property or as the case may be the rents and profits there out."

131. The defendant submitted that having regard to the title of General Condition 27, it only applies to such matters as apportionment and adjustment of balance of purchase price. I do not consider that to be so simple. Therefore, there is a need to reconcile the apparent inconsistency. Firstly, Special Condition 2 provides that in the case of any conflict between the Special Conditions and the General Conditions the Special Conditions shall prevail.

Secondly, it is clear that the obligation as regards vacant possession was expressly modified by the combined effect of Special Conditions 7.1 (regarding description of the property) 7.3 (concerning boundaries and deleting the obligation to give vacant possession) 7.6 (exclusion of warranties and representations regarding boundaries and encroachments).

132. Insofar as the defendant, acting through the receiver and with the assistance of Deloitte as recited earlier (even in the unhelpful circumstance that Mr. Fennell was never substituted in the contract for Mr. Stapleton) sought to address such matters as encroachments, mapping issues and boundary identification, none of those efforts amounted to any variation or waiver of the provisions of the contract and both parties from time to time repeated that they reserved their respective contractual rights. General Condition 18 expressly notes that the right may be invoked "notwithstanding any intermediate negotiation or litigation or attempt to remove or comply with same." I have concluded that the efforts and costs undertaken by the receiver were such "attempts".

133. Of particular note in relation to Objection (1) was the plaintiff's requirement that proceedings be issued against third parties allegedly trespassing. The proposition that a vendor should be required to take such steps is expressly noted by Fennelly J. in *Kiely v Delaney* (2012) IESC 41 as the type of requirement which would justify rescission.

134. I also accept the evidence of Mr. Stapleton that imperfect physical definition of boundaries and some measure of encroachments by third parties are common features of assets of this character. He gave evidence of previous experience of such assets, and that in this receivership he had secured the removal of incursions. Therefore, when it was said on his behalf that animals would be removed before the closing date, there was no reason for the plaintiff not to rely on this statement, instead of insisting that proceedings issue against such parties.

135. The plaintiff was aware of uncertainty in relation to boundaries and of encroachments even at the time of signing the contract, and yet agreed to the contractual limitations imposed by the contract. I accept that after the date of the contract he observed encroachments exceeding those observed pre-contract, but not to the extent claimed by him, having regard also to the evidence as to a more limited scale of encroachments given by Mr. Cullen. The plaintiff never withdrew the requirement for the receiver to issue proceedings against alleged trespassers, and to the extent that there were additional or repeated episodes of encroachments after the signing of the contract, I have concluded that the plaintiff in substance was requiring that the receiver should "perfect" the physical boundaries and eliminate entirely any issues of encroachment, to a degree expressly excluded by the contract.

136. Objection (2) relied on in the Notice to Rescind was "that a new map of the property be agreed when having been (without obligation) provided with that map in May of this year —he has failed to either confirm or dispute the accuracy thereof." Special Condition 7.5 expressly excluded any "objection, requisition or enquiry" in relation to definition of boundaries and Special Condition 4.5 expressly qualified the reference to the only map in circulation for the entire property, namely (apart from Land Registry complaint maps returned by General Condition 29) the so-called "2005 Deed Map". Therefore, the engagement by the receiver with the plaintiff and his representatives regarding mapping matters was in excess of that which he was obliged to undertake under the contract.

137. Objection (3) cited in the Rescission Notice was that the Purchaser "be furnished with all correspondence/files in relation to the estate house between the Vendor and previous owners and Waterford County." Firstly, the defendant was correct in asserting that Special Conditions 7.1, 7.3 and 7.10 precluded the plaintiff from persisting in this requirement. Secondly, evidence was given that in

an early communication by the plaintiff, before the contract was signed, he did not attribute value to the manor house. It is revealing that in his original offer emailed on 21st April, 2014, to the defendant's agent Mr. Guckian, the plaintiff said:-

> *"It is not really possible to get exactly what you desire, but Whitfield is as close as we think we will find It is a great tragedy that it has been so vandalised as it makes the old house more of a burden than an asset. We are still unsure of just how much leeway we might get in relation to the Preservation Order etc …and a further mystery is the precise cost of renovation it is all somewhat daunting. Therefore, I have tried to value the entire property based on the Land as distinct from the house.*
>
> *In addition to all this — lam also in the middle of the acquisition of eight commercial properties so my cash juggling is getting to the point of spectacular ... 1 have to wait for some closures to release the cash I need."*

Although the Rescission Notice referred to the plaintiff's requirement to be given correspondence and files in relation to the estate house, the importance which the plaintiff claimed to attach to the condition of the house throughout the matter was in my conclusion, a feature introduced and persisted in by him in seeking to add credibility to his complaints.

138. I have come to the conclusion that the efforts which were made by and on behalf of the receiver to satisfy the varying and growing objections and requirements of the plaintiff were genuine efforts by the receiver to complete the contract and exceeded measures which he was obliged to undertake by the contract itself. The plaintiff was seeking to achieve a degree of perfection in relation to encroachments, boundaries, mapping and what was referred to as "absolute vacant possession", none of which the defendant was obliged to deliver having regard to the terms of the contract. In the circumstances I am satisfied that the receiver acted reasonably and properly in calling on the plaintiff to withdraw his objections and, when the plaintiff declined to do so, in rescinding the contract pursuant to General Condition 18.

Other Considerations

139. With the exception of a supplemental late witness statement of Mr. Lohan, none of the plaintiff's witness statements presented to the court or delivered in advance of the trial were signed as required by Order 63A Rule 22(1) of the Rules of the Superior Courts. There may be cases in which this requirement can be relaxed, even if only on an interim basis while statements are exchanged within certain deadlines. However, there is no excuse for not delivering signed witness statements at the very latest in advance of the commencement of the trial. In this particular case the absence of compliance with this requirement created a substantial issue at the trial in that it emerged during the taking of evidence that a number of the plaintiff's witness statements had been authored by the plaintiff himself, delivered to the defendant and included in books for the court, without having been verified by the witnesses. In particular, a witness statement had been proffered on behalf of a Mr. O'Brien. It was stated that Mr. O'Brien had given his version of events over the telephone to the plaintiff who typed it up and read it over to him on the phone. Mr. O'Brien apparently agreed with the summary read over to him on the telephone and the witness statement then formed part of the witness statements delivered in advance of the trial.

140. More seriously however was the disclosure that a witness statement which had been delivered in the name of a Mr. Harte, the plaintiff s engineer, had never even been seen, let alone verified, by him. During the course of the trial Mr. Harte confirmed that the witness statement submitted on his behalf and dated "July 2018" had never been seen by him, It was materially different from a "replacement statement", delivered only during the trial, and Mr. Harte confirmed that a number of the statements contained in that witness statement were inaccurate.

141. Witness statements had also been delivered on behalf of two witnesses who were never called, a Mr. O'Connell and a Mr. O'Keeffe. When the plaintiff was pressed for verification as to the authorship of those witness statements no explanation was offered.

142. In his evidence in chief, the plaintiff said that his objective in purchasing the property was to "downsize" from his estate at Slievenamon near Clonmel which was over 5,200 acres. Discovery had been made of limited information regarding the plaintiff's financial capacity to complete the transaction and this led to enquiries concerning his dealings with Allied Irish Banks plc. Mr. Connolly, an employee of AIB, was called under subpoena and it emerged, that in fact AIB had secured a judgment against the plaintiff for a sum in excess of €2.6m in 2017. An appeal had been initiated, but in the meantime, possession proceedings had been commenced against the plaintiff in the Circuit Court which had been settled as recently as 2nd October, 2018. The settlement agreement was produced to the court. It provided that the plaintiff consented to an order for possession of his property in Tipperary in favour of Allied Irish Banks plc subject to a stay provided amounts in excess of €2.8m were paid to the bank within 18 months of the settlement, together with interest and costs. The settlement also provided for the appeal of the High Court judgment to be struck out. Whilst this information was revealed in the context of testing the very sparse information provided by the plaintiff regarding his financial capacity to complete the purchase of the property, its significance for the court is that his evidence that he was buying the property principally in a desire to downsize from Slievenamon lacks credibility. This feature of the plaintiff's evidence, taken together with unsatisfactory evidence of the plaintiff in relation to the map he proffered in evidence and the questionable authorship of witness statements all lead the court to conclude that the plaintiff has lacked candour in the presentation of his case to the court and this is a factor which the court must take into account when the plaintiff is seeking to invoke an equitable remedy.

143. It also emerged through discovery and was referred to at the trial that in June 2017 the plaintiff was engaged in communications with Sotheby's International Realty regarding a possible sale of the property to a client of that firm at a price of €1.8m. Although ultimately that potential purchaser decide not to proceed, the plaintiffs email to Sotheby's of 22nd June, 2017, is informative. In it he says:-

> *"Further to your request for a price for Whitfield I have had some difficulty in trying to establish a base for finalising same. This probably stems from the fact that I really bought this place to live in it for myself and my wife. The disgraceful manner in which the Vendors have behaved took a lot of the good out of it for Margaret — so your approach was opportune. In fact she has gone completely "off' of it at present. That has left me in a quandary*
>
> *I have decided to kick on and bring the land up to scratch with New Fences, Gates, Ploughing/lining etc etc. This also to include upgrading internal roads and the boundary fence.*
>
> *I set at a PRICE and then deducted those renovations/upgrade costs and my figure comes out at 1.8 mil.*
>
> *So ... if your client wants to entice me into a sale… that is the price…"*

144. Of itself, the fact that the plaintiff was in discussion regarding a possible onward sale of the asset would not necessarily deprive him of the remedy of specific performance were he otherwise entitled to such a remedy. However, it is informative in understanding

where the plaintiff's attention was focused at that stage of the history.

Issues Identified in Submissions

145. In submissions both parties attempted to identify the issues in the proceedings. Whilst there was some overlap in their respective formulations of the issues they were not identical. The following is a summary of the court's conclusions in relation to the issues as seen by the court:-

> (1) The defendant contracted to sell the lands as described in the particulars of tenure contained in the contract. The only map referred to in the particulars of the property was the 2005 Deed Map, the provenance and the accuracy of which were not warranted. The registered lands were defined by reference to Property Registration Authority folio numbers.
>
> (2) The contract provided that on completion the plaintiffs entitlement to vacant possession was qualified by Special Conditions-7.3, 7.5, 7.6 and 7.7. The receiver's efforts to meet the plaintiffs changing and expanding demands, including a requirement that he commence proceedings against third parties, exceeded those contracted for and did not constitute any variation of the contract or establish newly binding commitments. There was no evidence that the receiver's confirmation that encroaching animals would be removed would not be honoured.
>
> (3) The defendant did not warrant the location of boundaries of the lands in sale or the coincidence of boundaries of the subject property as between the title maps describing them and on the ground and the receiver expressly excluded such warranties by Special Conditions 7.5 and 7.6.
>
> (4) The Special Conditions referred to above precluded the plaintiff from relying on any deterioration in the condition of the estate house after the date of the contract. The plaintiff himself had characterised the estate house itself as "more of a burden than an asset".
>
> (5) The meeting of 20th December, 2016, did not give rise to any separate rights or obligations from those in the contract of sale. Before and after this meeting the parties continued to reserve their rights under the contract. Whilst the meeting identified certain steps to be taken by both parties to facilitate completion of the sale, and certain actions were taken by the parties and others after that meeting in pursuance of that objective, no binding commitments were made by or on behalf of the defendant.
>
> (6) The appointment of Mr. Fennell was not an act of the defendant and did not constitute a repudiatory breach of the contract by him or Mr. Stapleton. No novation agreement having been entered into, Mr. Fennell had no legal standing in relation to the contract and the absence of joinder by him to the Notice of Rescission did not invalidate that Notice or render unreasonable the exercise by Mr. Stapleton of the rights of the Vendor under General Condition 18.
>
> (7) The reasons advanced by the plaintiff for not completing were objections as to the title, the assurance to him or other matters relating to or incidental to the sale. Although not stated as objections in the "Objections and Requisitions" raised by the plaintiff on 2nd September, 2015, they plainly were objections "relating to or incidental to the sale" and therefore capable of forming the basis of a General Condition 18 Notice.
>
> (8) The plaintiff's objections and requirements were matters which, taken together, had the combined effect that the plaintiff was persisting in requiring the defendant to deliver the property wholly free from encroachments and with physical boundaries defined to a degree of perfection for which the parties had not contracted. The receiver's efforts to accommodate certain of those requirements, were "attempts to remove or comply same" and at no point did he agree to vary the contract. The defendant had reasonable grounds to apply General Condition 18 and in doing so did not act capriciously or arbitrarily, and was not acting in breach of the contract.

146. For these reasons I have concluded that the plaintiffs claim should be dismissed.