Neutral Citation Number: [2010] IEHC 216

THE HIGH COURT

2005 1657 P

BETWEEN

MOUNT KENNETT INVESTMENT COMPANY

AND

BY ORDER OF THIS HONOURABLE COURT

GREENBAND INVESTMENTS

PLAINTIFFS

AND

PATRICK O'MEARA, ANTHONY J. FITZPATRICK AND JOHN A. TOBIN

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 1st June, 2010

1. Introduction

1.1 These proceedings have a long and complex history. So far as relevant to the issue to which this judgment is directed, I will set out that procedural history in some detail in early course. However, in general terms it is important to note that there has already been a full hearing of substantial issues in this case before Smyth J., in which an order for specific performance of a contract for the sale of property was made in favour of the first named plaintiff ("Mount Kennett") against the defendants ("the Owners"). That order for specific performance was not complied with. Mount Kennett then successfully brought an application to re-enter the proceedings for the purposes of the assessment of damages. At that stage, the second named plaintiff ("Greenband") was joined because some of the consequential losses alleged to result from the actions of the Owners were said to have caused loss to that company. Nothing turns on that specific matter at this stage.

1.2 In any event, pre-trial procedures followed and the question of the assessment of the damages to which Mount Kennett and/or Greenband might be entitled was listed for hearing. When counsel for Mount Kennett and Greenband had completed opening the case, an application was made by counsel on behalf of the second named defendant ("Mr. Fitzpatrick") in which it was said that both Mount Kennett and Greenband were debarred from pursuing the claim in damages which was before the court. It should be noted that the claim which was before the court was, in substance, in two parts. Part of the alleged damages claimed related to the failure of the Owners to comply with the order of specific performance. However, another part of the damages claimed related to an allegation of delay on the part of the Owners in complying with the original contract of sale, as a result of which it was said on behalf of Mount Kennett and Greenband that further actions had to be taken to enable a significant commercial development then contemplated to actually take place. That claim for damages for delay was part of the case as had originally been pleaded and was before Smyth J. when the original trial of the action in these proceedings took place. The order made by Smyth J. on the occasion in question simply provided for specific performance. There is no mention of what was to happen to the claim in damages for delay which was already before the court.

1.3 Having considered the application made by counsel for Mr. Fitzpatrick, I ruled that the application in relation to that portion of the damages which resulted from the failure to make specific performance was premature and that there was no basis for dismissing that portion of the action on the opening. However, certain factual issues having arisen as to what, in fact, happened before Smyth J. during the original trial, I directed that an issue be tried as to whether the damages for delay in completion which formed part of the original action, were capable of being pursued at this stage.

1.4 In substance, the argument made on behalf of Mr. Fitzpatrick (and supported by the other defendants) was that the claim for damages for delay, having been before Smyth J., and not having been the subject of an order of the court, must be taken to have now been dealt with, such that it would amount to an abuse of process or a breach of the *res judicata* rule to now proceed with it. That preliminary issue having been heard, I ruled, some short number of days later, that Mount Kennett and Greenband were not debarred from pursuing the claim in question. I indicated that I would give reasons for coming to that view at a later stage. The purpose of this judgment is to deal with the questions which arose for consideration and to set out reasons for the conclusion reached. I turn first to the procedural history.

2. Procedural History

2.1 The original hearing commenced before Smyth J. on the 17th April, 2007, and continued on the 15th and 16th May of that year. It will be necessary to turn to the events of that hearing in due course. Smyth J. reserved judgment which he delivered on the 21st November, 2007. See *Mount Kennett Investments Limited v. O'Meara & Ors* [2007] IEHC 420. As appears from that judgment, Smyth J. rejected the arguments put forward on behalf of the Owners, both to the effect that the relevant contract of sale had been frustrated or was impossible of performance and also found that, in his discretion, he would order specific performance rather than damages in lieu.

2.2 The matter was put in for mention before Smyth J. on the 11th December, 2007, at which stage a formal order was made directing specific performance of the relevant contract of sale by the 31st March, 2008. There is no mention of damages in that order. It should be noted in passing that the reason, as appears from that order, for the time lapse between the conclusion of the proceedings and the judgment of Smyth J., was that Smyth J. had been informed that there was a possibility of the parties resolving their differences and he afforded them a reasonable opportunity so to do.

2.3 Likewise, it is clear that the problem which was at the heart of the proceedings was that the Owners had contracted to sell a

freehold interest in the relevant property at a time when they did not own that freehold interest, but had contracted to acquire same subject to the consent of the Charity Commissioners. The problem was that the Charity Commissioners were not happy with the purchase price. The reason for the relatively lengthy period for completion specified in the order of Smyth J. was to afford the Owners an opportunity to complete the task of getting in the freehold so as to be in a position to sell it on to Mount Kennett. At the heart of the issues which Smyth J. had to decide was the question of whether the Owners were in a position to acquire that freehold. Smyth J. held that they were, provided that they were prepared to pay an appropriate price, such as would satisfy the Charity Commissioners.

2.4 In any event, the matter next came before the court on the 2nd March, 2009, when Mount Kennett brought an application seeking to have the proceedings re-entered "for the purposes of the assessment of damages for breach of contract and/or damages in lieu of specific performance". An order seeking to have Greenband joined was also sought, together with an order giving liberty to deliver an amended statement of claim.

2.5 As it happens I had, at around that time, been dealing with a separate case brought by Greenband relating to neighbouring property. In those circumstances it was felt appropriate that I should take seisin of this case (Smyth J. having retired in the intervening period). While not on consent, no significant opposition was put forward on behalf of the Owners to the re-entry application. Certainly no significant argument was addressed as to why the application should not be acceded to. It is worthy of some note that, in the grounding affidavit (being an affidavit of Thomas Dowling), it is said, at para. 3, that "all issues relating to the plaintiff's claim for damages were left over for further hearing". No issue was taken at the hearing before me, at which the re-entry of these proceedings was sought, as to the veracity of that averment. In addition, a draft amended statement of claim was exhibited to the affidavit of Mr. Dowling. Leave to amend in the terms of the relevant draft was given. It was clear from that draft that the damages sought to be recovered included both damages for delay in completing the original contract, and damages arising out of the fact that specific performance had not been complied with.

2.6 Thereafter, at the request of the parties, I case managed these proceedings. Particulars of the damages were sought and supplied. Significant and hotly disputed discovery issues arose which included issues relating to documents relevant to the claim for damages for delay. During all of this period no question was raised on behalf of the Owners as to the propriety of Mount Kennett and/or Greenband maintaining a claim for delay damages.

2.7 It should also be noted that there appeared to be something of a falling out as and between the various defendants such that, by the time the case came on for hearing before me, each was separately represented. Indeed, there appears to be separate litigation as and between the defendants which is not, of itself, material to the issue which I had to decide.

2.8 In particular it should be noted that the defences filed on behalf of the Owners makes no reference to a contention that any aspect of the claim is not maintainable in principle, save that that there is reference to an allegation that an agreement was reached whereby certain damages would be waived.

2.9 It would appear that, in the period immediately prior to the action coming on for hearing before me in early March, there was correspondence on behalf of Mr. Fitzpatrick which gave some indication that contemplation was being given to an application of the type with which I was concerned. However, no formal application was made to amend the pleadings or bring that issue before the court by way of motion or otherwise. It was, therefore, with some surprise that I learned of the application to be made on behalf of Mr. Fitzpatrick for the first time when its nature was outlined to me by counsel for Mr. Fitzpatrick after counsel for Mount Kennett and Greenband had concluded his opening.

2.10 Against that background, it is appropriate to turn to the specific issues which arise.

3. The Issues

3.1 There was some debate between counsel as to the appropriate order in which the relevant issues logically arise. Without indicating any concluded view as to that order, I simply set out the issues.

3.2 Mr. Fitzpatrick (backed up by the other defendants) asserts that it is an abuse of process for Mount Kennett and Greenband to now maintain the claim for damages for delay on the basis, it is said, that that claim was before Smyth J., did not form part of Smyth J.'s order, whether by ruling on it or deferring it to further hearing, and that that claim must now be taken to have been dealt with so as to render it an abuse of process to attempt to reactivate it.

3.3 The first significant issue that arises is as to what in fact happened before Smyth J. It is said, on behalf of Mount Kennett and Greenband, that a proposal was put to Smyth J., to which he assented, which amounted in substance to an agreement that there be a split or modular trial. On that basis it is said that it was accepted that the proper course to adopt was that the question of the entitlement in principle of Mount Kennett (who were, of course, at that time the only plaintiff) to a decree of specific performance should be dealt with first. In the light of the decision of the court on that matter then, it is suggested, it was accepted that all questions of damage would be deferred. Damages could, in those circumstances, arise in a variety of ways. First, there were the damages which Mount Kennett claimed in any event for delay in completing the contract. However, in that context, it should be noted that, until the end of the first day of the hearing, the Owners had maintained that the relevant contract was conditional. If that plea had been successful it would, of course, have meant that Mount Kennett would have had no case either for specific performance or for damages. In the event that that defence failed it was, however, suggested on behalf of the Owners that the court should nonetheless decline specific performance because of the difficulties (or impossibility) which the Owners had encountered in getting in the freehold interest. There were, therefore, a variety of possibilities. The court might order full specific performance. The court might order damages in lieu. The court might order partial specific performance (in the sense of requiring the Owners to procure a transfer of a leasehold interest), but also award damages deriving from the fact that the full interest in the property contracted to be sold was not being transferred.

3.4 The problem is that there is no court order either indicating that questions of damages had been deferred or that such damages were to be assessed, which damages would have arisen in any event if, as the court did find, the contract was enforceable. Two sets of questions, therefore, arise. First, what is the proper characterisation of the events that occurred at the hearing before Smyth J.? In the light of that characterisation and in the light of the fact that the court order made by Smyth J. does not make any reference to damages, it is necessary to consider the status of the damages for delay claim which was undoubtedly before Smyth J. In substance, both of those questions are part of the overall question of whether it would now be an abuse of process for Mount Kennett and/or Greenband to seek to claim delay damages.

3.5 The second set of questions concern what has happened since. There is no doubt but that the Owners did not demur from the proposition that the proceedings should be re-entered at a time when it was clear that the basis for that re-entry was that it was

said that Smyth J. had agreed to defer damages. This is clear, both from the grounding affidavit and the draft statement of claim to which I have referred. Second, it is equally clear that the issues sought to be relied on, on behalf of Mr. Fitzpatrick and the other Owners, were not raised in any of the defences filed. It was said, on behalf of Mount Kennett, that, in the absence of an amendment to the defence, it was not open to the Owners to raise this issue. There is, therefore, an issue as to whether a defence of type now put forward can be raised although not pleaded. As a fall back position, counsel for the Owners suggested that, if I was against him on that point, he would invite me to amend the defence. Counsel for Mount Kennett and Greenband argued that it is far too late to do that, and that in any event, any such application ought to be refused.

3.6 Having regard to those issues, it seemed that it is appropriate to start with the question of whether Mount Kennett and/or Greenband pursuing a claim for delay damages would, in all the circumstances, amount to an abuse of process. As pointed out earlier, the first question under this heading relates to what actually happened before Smyth J. I, therefore, turn to that question.

4. The Hearing before Smyth J.

4.1 When the issue was first raised in March, there was some question as to whether comments might have been made by counsel in the course of a very brief portion of the hearing before Smyth J., which took place before lunch on the first day, at a time when no stenographer was present. In considering what happened next, it is important to note that the issue was, to a significant extent, sprung on the parties. Counsel who acted for Mr. Fitzpatrick was not, of course, present at the original trial. Some of the other counsel who continued with the case did their best to give me their recollections, but it is entirely understandable that, with the benefit of more time and an opportunity to review the transcripts, counsel now have a clearer recollection of the events that occurred.

4.2 Suffice it to say that, when the matter originally came up, there appeared to be a possibility that comments were made to Smyth J. prior to lunch at a time when no stenographer's note was taken, which might be material to the issues which I have to decide. However, by the time the issue came to be fully heard it was agreed on all sides that that was not so. Insofar as material to the issues which I have to decide, what happened occurred after lunch and at a time when a stenographer was present.

4.3 The case before Smyth J. was opened by Mr. Ian Finlay S.C., on behalf of Mount Kennett. At p. 13 of the transcript Mr. Finlay turns to the pleadings and, in particular, the statement of claim. He draws attention to the fact that Mount Kennett "is also seeking damages for breach of contract in lieu or in addition to specific performance" (my emphasis). There is then a reference to what is described as a recent judgment of Finlay Geoghegan J. (which while not mentioned by name is clearly a reference to *Duffy v. Ridley Properties & Anor* reported as to the Supreme Court Appeal in same at [2008] 4 I.R. 282). On that basis, Mr. Finlay suggests that the court should approach the claim by first determining an entitlement or otherwise to specific performance and then, at a second stage, deal with damages. I will return to that passage in due course.

4.4 At p. 22, Mr. Finlay turns to opening the particulars and especially particulars of the damages claimed for breach of contract. Reference is made to p. 97 of the Book of Pleadings which contained details of Mount Kennett's claim for damages. On reading those particulars (which, while not read into the record of the court, were before the judge and had been read by the judge), it is clear that the range of bases on which damages might be calculated was highly dependent on the view the court took as to specific performance. A number of different models are set out in the relevant replies to particulars. In that context, Mr. Finlay went on to say the following:-

> "I do not think there is very much need to open those today in the sense that I am not pursuing the damages issue at this point in the proceedings. But that may or may not be relevant at a later stage depending on what happens."

4.5 The next matter of some materiality arose at the end of the opening. It should be recalled that there was a gap between the first and second days of the hearing of over a month. The opening continued on that latter occasion. Prior to that, however, at the end of business on the first day, counsel for the Owners had conceded that the contract was not conditional. On that basis, Mr. Finlay's argument was that, it being accepted that there was an unconditional contract and that it had not been complied with, the onus rested on the Owners to establish any case which they might have as to frustration or impossibility of performance or the like. Clearly this would not have been a correct proposition if damages were to be proceeded with on that occasion for the onus would nonetheless have remained on Mount Kennett to establish damages. Both the judge and counsel for the Owners accepted Mr. Finlay's argument, such that the Owners went into evidence and, indeed, the only evidence tendered was from witnesses called by the Owners.

4.6 Finally, it should be noted that in the course of the closing addresses, Mr. Simon Boyle, S.C., on behalf of the Owners, made reference to the fact that there had been no evidence as to damages. However, it seemed to me that that debate, and Mr. Finlay's reply to it, was clearly in the context of the possibility that the court might be persuaded (as the Owners sought) to take the view that damages in lieu of specific performance might be a more appropriate form of remedy than specific performance itself. It did not seem to me that that debate touched in any way on the question of damages for delay.

4.7 Mr. Finlay, Mr. Boyle and Mr. Peter Clein B.L. (who was Mr. Finlay's junior), gave evidence before me. I have to commend each of those witnesses for the way in which their evidence was given, notwithstanding the undoubtedly difficult circumstances which had arisen. Mr. Boyle accepted that, at the beginning of Mr. Finlay's opening, the suggestion made by Mr. Finlay that questions of damages ought to be deferred, applied not just to those damages that might arise in lieu of specific performance, but also related to delay damages which would have arisen in any event. Mr. Boyle also accepted that, although there is no note in the transcript of Smyth J. formally accepting Mr. Finlay's proposal, it was his understanding that Smyth J. had acceded to Mr. Finlay's suggestion. There is one point on which Mr. Boyle has a different perspective to that of the counsel who appeared for Mount Kennett. I will shortly return to that point. However, Mr. Boyle's impression, to which I have referred, is confirmed by Mr. Clein's careful evidence. Mr. Clein indicated that he believed that Smyth J. had said something which indicated acceptance, even though nothing to that effect appears on the transcript. All familiar with court proceedings will be well aware that a transcript does not necessarily convey every nuance that occurs in court. Relevant personnel, including judges, can nod their heads or otherwise act in a way that indicates agreement where nothing is recorded on the transcript.

4.8 I was satisfied that Mr. Finlay put forward a proposition on behalf of Mount Kennett, which was accepted by the judge however indicated, and not demurred from on behalf of the Owners, to the effect that all issues of damages would be deferred. The fact that Mr. Finlay specifically referred to the particulars of damage (which included particulars of damage for delay) but indicated that those issues were not being pursued at that point but might or might not be relevant later seemed to me to give rise to no other interpretation.

4.9 However, it is necessary to return to the point on which Mr. Boyle differs. Mr. Boyle's evidence before me was to the effect that, by the close of the case, he had felt that the only question of damages which was being deferred was damages *in lieu*. It was, in my

view, understandable that Mr. Boyle might have come to that view. First, it is necessary to return to the initial passage from the opening to which I have already referred. The reference to *Duffy* is a reference to a case where Finlay Geoghegan J. determined that, where the court directed damages in lieu of specific performance, the court could return to that issue and assess the damages at a second stage. That case had nothing to do with damages for delay which could arise as well as, as opposed to instead of, specific performance. Likewise, the references during closing speeches on the part of counsel were all references to the type of division which occurs when a court decides the question in principle as to whether specific performance lies, but leaves over the question of the calculation of damages *in lieu* (in the event that such damages are claimed and are considered appropriate) to a later stage. I can well see that the emphasis placed by Mr. Finlay could well have led Mr. Boyle to take the view which he did. Indeed, it seemed to me that Mr. Boyle said as much towards the close of his evidence.

4.10 However, I was not satisfied that anything occurred in the course of the hearing which could reasonably be taken to amount to an abandonment by Mr. Finlay, on behalf of Mount Kennett, of its delay damages claim. Rather, I was satisfied that Smyth J. went along with a proposal for a split trial (which obviously made sense in all the circumstances) where an initial decision would be made as to whether Mount Kennett was entitled to specific performance and all questions of damages, whether they be damages for delay or damages which might arise in lieu or in default of specific performance, being postponed to a further date.

4.11 It is unfortunate that the court order did not reflect that fact. It does seem to me that Mount Kennett must accept responsibility for that fact. Smyth J. had delivered his judgment in November. The matter was back in, in December, for the purposes of making the order. It would have been appropriate at that stage for Mount Kennett to have reminded Smyth J. of the fact that all questions of damages had been left over so that the order could have included some reference to that fact. What the consequences of that failure and how it is proper to characterise it, is a matter to which I will have to return. I should not leave the question of the events which occurred before Smyth J. without noting that it would, of course, normally be the case that any such issues would come back before the judge who had originally dealt with the case in question. It was only in circumstances where that judge had retired that I felt it appropriate to hear evidence as to what had transpired at a previous hearing before another judge. Having reviewed what happened at the hearing before Smyth J., I now turn to the main issue in this application.

5. Abuse of Process

5.1 The central issue which I have to decide is as to whether it is now an abuse of process on the part of Mount Kennett to seek to have delay damages assessed.

5.2 There can be a number of reasons why an issue which arises on the pleadings is not dealt with in a judge's judgment or a judge's order. Sometimes the proper inference may be that a particular aspect of a claim has been abandoned such that the judge does not have to deal with it. For example, no evidence may be tendered and no argument addressed at the hearing on the issue in question. On other occasions a party may put forward a range of items of (say) special damage, some but not all of which the judge allows in a judgment. Where rejecting an item of such damage a judge is likely to expressly disallow the particular item and give specific reasons for so doing. However, an item that is not included in the judgment may be subject to an appropriate inference to the effect that the judge did not allow it for some reason or other. Thus, in certain other cases, the reason why a matter is not dealt with in a judgment or order may, by inference, be that it was rejected.

5.3 However, there may also be cases where it is clear from what the judge said in court that the formal order ought to have included a reference to certain matters which do not, for whatever reason, find their way into the written order of the court as perfected. There is ample authority (see *Ainsworth v. Wilding* [1896] 1 Ch. 673 and *Bula Ltd. (in receivership) & Ors. v. Crowley & Anor.* [2003] IESC 28) that in such circumstances the court can amend its order so as bring the written order into conformity with what the judge said or intended. For example, if it is clear that the judge awarded damages under five headings, but only four of them appear in the written order, then it could hardly be said that a party would not be entitled to apply to have the order amended to have the fifth and omitted category included. Such cases are not cases where the judge is being invited to re-open a matter finally decided, but rather cases where the judge is being invited to ensure that the written order as perfected conforms with what the judge actually intended on the occasion when the spoken order was made.

5.4 Of course, in the ordinary way, any absence of conformity between what the judge intended and the written order should be brought back before the same judge who will be in by far the best position to determine whether the order correctly conforms with his or her intention. It does not seem to me that it would be just, however, to deprive a party of the opportunity to have a written order corrected because the relevant judge was no longer serving or was otherwise unavailable. For the reasons which I have set out, I was satisfied that it was the intent of Smyth J. that there be a split trial. I was satisfied that part of that intention was that all questions of damages, including questions concerning the assessment of damages for delay which could arise in addition to specific performance, were to be left over to a subsequent hearing. In those circumstances, it seemed to me that, if necessary, it would be open to Mount Kennett to seek and obtain an amendment to the order of Smyth J. of the 11th December, 2007, to provide for an order directing the assessment of all damages on a subsequent occasion.

5.5 Against that finding it is necessary to turn to the central question as to whether the maintenance of the claim by Mount Kennett and Greenband in relation to delay damages is an abuse of process. It was argued on behalf of Mr. Fitzpatrick that this was a case of *res judicata.* As pointed out in *Moffitt v. ACC* [2007] IEHC 245 at paras. 3.7 to 3.10, there is a distinction between two types of *res judicata*. Where an issue has actually been decided by a court of competent jurisdiction in proceedings between the same or necessarily connected parties, no new proceedings can be brought, except in the limited circumstances where the original order can be set aside on the grounds of fraud or the like. This might be described as strict *res judicata*. However, the rule in *Henderson v. Henderson* [1843] Hare 100, covers the analogous circumstances where an issue was not advanced in the original proceedings, but where it amounts to an abuse of process to subsequently maintain a claim which should have been brought in the original proceedings. As pointed out by the Supreme Court in *A.A. v. The Medical Council* [2003] 4 I.R. 302, the court retains a discretion in such cases to take into account any relevant circumstances necessary for the purposes of assessing whether it truly is an abuse of process to maintain the relevant claim. There is, therefore, a material difference between strict *res judicata* where the court has no discretion and *Henderson v. Henderson* abuse where the court has some discretion.

5.6 A claim which was before a court and is not dealt with in the court's order, needs careful consideration before it is placed in one or other category. If the appropriate inference in all the circumstances of the case is that the issue was considered by the judge and found against the relevant party (even, perhaps, in the absence of an express statement in the judgment or order to that effect), then it seems to me that it would be appropriate to place such a claim in the strict *res judicata* box. The claim has, by inference, been considered and rejected by a court of competent jurisdiction. It cannot be reactivated without setting aside the original order in material part and that can only be done on the basis of fraud or other similar serious wrongdoing.

5.7 On the other hand, where an aspect of a case is before the court and is not dealt with, it may be appropriate to infer that the relevant party had abandoned that aspect of their claim. In those circumstances it seems to me that, strictly speaking, it is not

appropriate to consider an attempt to re-litigate that aspect of the case under the heading of strict *res judicata*. It would, however, fall under very careful scrutiny under *Henderson v. Henderson*. The fact that the case had been brought and abandoned would be a very significant consideration leaning heavily against the court exercising any discretion it might have to allow it to be re-litigated. In those circumstances it would seem to me that a case brought and abandoned would face an even greater struggle than a case not brought in the first place.

5.8 However, where, as here, the proper inference to draw is neither that the claim was dismissed or that it was abandoned but rather that the judge agreed that it be deferred, then it is hard to see how it would be an abuse of process to allow it to be reactivated. True it is to say that Mount Kennett should have ensured that the court order included a reference to that deferral and, perhaps, directed an assessment of damages. However, the absence of such a provision in a written court order, where it is nonetheless clear that the judge accepted that there should be a split trial, seems to me to give rise to an altogether separate set of circumstances. It is hard to see how it can properly be described as an abuse of process to reactivate a claim where the intention of the original trial judge was that that claim would be deferred to a further hearing. All that is now happening is that the original intention of the trial judge is being complied with.

5.9 The absence of a provision in the court order recording the judge's intention has, of course, created the problem. As Mr. Clein pithily put it in the course of his evidence, when speaking of what might have been in the court order:-

> "If it was there we would not be here".

That is true. It may be the fault of Mount Kennett that "it" was not there and that we were, therefore, here. However, that does not take away from the fact that it was Smyth J.'s intention that we be here. Mount Kennett bringing us here cannot, therefore, in my view, be an abuse of process.

5.10 I should deal, before concluding on this issue, with the case of *Ford-Hunt & Anor v. Singh* [1973] 1 W.L.R. 738 on which reliance was placed by Mr. Fitzpatrick. That case is clear authority for the proposition that a party who does not ask for an inquiry as to damages at a specific performance trial cannot subsequently reactivate a claim for delay damages or any other form of damages that do not depend on new facts occurring after the date of judgment. I have no doubt that had Mount Kennett simply ignored the question of delay damages at the hearing before Smyth J., then the consequences identified in *Ford-Hunt* would have applied equally to Mount Kennett. It would be too late to reactivate a claim for delay damages which was not pursued at the trial. The proper inference in those circumstances would be that the relevant claim had been abandoned and would be subject to the rule in *Henderson v. Henderson* so that same could not be reactivated save in wholly exceptional and unlikely circumstances. But this is not such a case. While it is true to say that Mount Kennett did not specifically raise the question of the inclusion in the written order of provision for an inquiry as to damages, that ignores the fact that, for the reasons which I have found, Smyth J. had already accepted that all question of damages were to be deferred to a second hearing. This is not, therefore, a case where the question of damages is simply ignored. It is a case where the judge went along with a suggestion that damages should be deferred. *Ford-Hunt* does not, therefore, seem to me to be of any relevance to this case.

5.11 I was, therefore, satisfied that no abuse of process such as would disentitle Mount Kennett and/or Greenband from pursuing a claim for delay damages had been established and I was, therefore, satisfied that these proceedings should continue on the merits. In those circumstances, it was unnecessary to deal with the questions which might otherwise have arisen deriving from the fact that the Owners, and in particular, Mr. Fitzpatrick, went along with this hearing through the application to re-enter, all pre-trial proceedings including defence and up to the trial itself, without seeking to raise the issue. Likewise, it was unnecessary to determine whether it is necessary to plead such a matter as an item of defence in order to be allowed to raise it.

6. Conclusions

6.1 For the reasons which I have sought to analyse, I was satisfied that the proper characterisation of what occurred before Smyth J., was that Smyth J. accepted that there should be a split trial with all issues of damages (including delay damages) being postponed to a further hearing. In those circumstances I was satisfied that, notwithstanding the absence of any reference to those matters in the order of Smyth J., it is not an abuse of process on the part of Mount Kennett to now prosecute a claim for such damages.

6.2 The trial of the damages issue will, therefore, go ahead and the claim for delay damages made on behalf of Mount Kennett and Greenband will be determined on its merits.