



2012 No. 346 SP

Between

PEPPER FINANCE CORPORATION (IRELAND) DAC

Plaintiff

and

**SEAN SHEEHAN PRACTISING UNDER THE STYLE AND TITLE OF AARON
KELLY & COMPANY SOLICITORS**

Defendant

JUDGMENT of Mr Justice Micheál O’Connell delivered on 29 September 2026

Introduction

1. This judgment relates to a motion to strike out proceedings for want of prosecution. It is brought by the Defendant, a solicitor sued by the Plaintiff, Pepper Finance Corporation (Ireland) DAC (“*Pepper*”), for non-performance of an undertaking given to its predecessor in title, IIB Homeloans Limited (“*IIB*”), in the context of the completion of a loan transaction between IIB and the Defendant’s then clients.

2. Counsel for the Defendant understandably confirmed that his application was not made by reference to the principles in *Ó Domhnaill v Merrick* [1984] IR 151. The application therefore falls to be determined within the framework laid down in *Kirwan v Connors* [2025] IESC 21 as applied in case law since.

Facts

3. On 13 May 2003, IIB issued a letter of loan offer to two clients of the Defendant (*“the Borrowers”*). The amount of the facility was €700,000 and the loan was to be secured on four properties, identified in the loan offer as:

- (a) *“226 Main Street, Rush, Co. Dublin”*;
- (b) *“New Property (Address to be Confirmed), Rogerstown, Rush, Co. Dublin”*;
- (c) *“The Camelot, Coast Road, Rogerstown, Rush, Co. Dublin”*; and
- (d) *“The Admiral, Coast Road, Rogerstown, Rush, Co. Dublin”*.

4. Of relevance to the substantive dispute between the parties, Special Condition 20 of the loan offer provided: *“€50,000 will be retained from the advance pending satisfactory completion and inspection of the required works on the property being built at Rogerstown, Rush, Co. Dublin”* (the parties agreed that this referred to the *“New Property”* at Rogerstown)

5. The loan offer was accepted by the Borrowers on 27 May 2003. On the same date, the Defendant gave a solicitor’s undertaking (*“the Undertaking”*) in the Law Society-approved form (1999 Edition). The Undertaking identified the following properties:

“226 Main Street Rush, Co. Dublin

New Property (address to be confirmed) Rogerstown Rush Co. Dublin

The Camelot, Coast Road, Rogerstown, Rush, Co. Dublin

The Admiral, Coast Road, Rogerstown, Rush, Co. Dublin”

6. In the Undertaking, the Defendant undertook *inter alia* that the Borrowers had or would acquire good marketable title to the properties, and that, prior to negotiating the loan cheques or releasing the proceeds thereof, he would ensure that the Borrowers had executed the relevant mortgage documentation and that various other requisite conveyancing steps had been completed. Subsequently, on 29 May 2003, IIB wrote to the Defendant's firm in connection with the transaction, *inter alia* identifying documents that were required in relation to one of the properties identified as "*Site at Coast Road*" and it was common case that this was a reference to the "*New Property*" at Rogerstown.

7. It appears that only €650,000 of the loan facility was actually drawn down, and that occurred in November 2003. The Defendant attributes both the delay in negotiating the loan cheque and the omission to draw down the last €50,000 of the facility to the difficulty with the description of the "*New Property*" in the loan offer and Undertaking. He asserts that, in a telephone call with a representative of IIB prior to drawdown of the loan, he was released from the Undertaking insofar as it related to that property. Pepper and its predecessors dispute this.

8. At all events, by 2007, when the Borrowers first went into default, none of the first legal mortgages provided for in the Undertaking had been put in place over any of the four properties. Thereafter, IIB wrote to the Defendant demanding compliance with the Undertaking.

9. On 5 February 2009, IIB made a complaint to the Law Society of Ireland in respect of the Defendant's non-compliance with the Undertaking. A subsequent letter from IIB dated 6 March 2009 noted that the loan in respect of *The Admiral* had been redeemed but that no security was in place over the other three properties.

10. On 30 March 2009, the Defendant gave an update to IIB regarding compliance with the Undertaking. In relation to what he referred to as "*Site at Coast Road*", the Defendant stated as follows:

“Monies for this Property were never drawn down as this property was not purchased. Property known as The Camelot was constructed on Sites 2 & 3”

11. IIB’s title to the loan agreement and related rights and interests vested in KBC Bank plc (“KBC”) in June 2009.

12. On 30 June 2009, Solicitors on behalf of KBC wrote to the Defendant, taking issue with what he had said about the “*Site at Coast Road*” (as quoted above). They insisted that the Defendant was obliged to ensure security was created over the site in question.

13. On 6 August 2009, solicitors acting on behalf of KBC issued a Plenary Summons against the Defendant in respect of his non-compliance with the Undertaking, but it was not served within a year or at all.

14. In correspondence exchanged in the period 2009 to 2012, the then solicitors for KBC sought to procure compliance by the Defendant with the Undertaking insofar as it related to the properties other than *The Admiral*.

15. On 20 June 2012, these proceedings were commenced by Special Summons. On that date, it appears that the Undertaking remained outstanding as regards No. 226 Lower Main Street, Rush, and *Camelot*. However, legal mortgages were put in place by 2 July 2012, on which date KBC wrote confirming that the Defendant was released from the Undertaking as it related to each of those properties. The parties remained in dispute in relation to the site at Coast Road, Rogerstown, Rush, Co. Dublin, which was described in the Special Summons as “*Lands then [i.e. at the date of the Undertaking] comprising of a development site at Coast Road, Rogerstown, County Dublin contained in Folio No. 168463F and upon which a property now known as “Atlantis” has been constructed.*” Later, issues arose in respect of both *Camelot* and No. 226 Lower Main Street, Rush, as will be described further below.

16. From the issuance of the Special Summons in June 2012 to March 2014, the action progressed at a conventional pace. Affidavits were exchanged, notices to produce and inspect respectively were served, and a motion for inspection of documents was brought. It is not entirely clear when the Special Summons was transferred from the Master's Court to the Judge's List, but at any rate, it was in the Judge's List from late 2013. Several adjournments (eleven in all) were granted between 11 March 2014 (the date on which a Notice to Cross-Examine was filed following the close of affidavits) and 26 July 2018, when the action was remitted to plenary hearing. Each of those eleven adjournments was granted on consent, and the remittal to plenary hearing was likewise ordered on consent.

17. A Statement of Claim was delivered by KBC on 30 November 2018. It seems that on the same date, KBC transferred its interest in the loan and security to Beltany Property Finance DAC ("*Beltany*"), although it was not until 4 November 2019 that an application was made to substitute Beltany as Plaintiff (*ex parte* and pursuant to Order 17 rule 4). That order was made on 4 November 2019, and a Notice of Change of Solicitor was filed on 21 November 2019.

18. The disruption to litigation caused by the Covid-19 pandemic from March 2020 is well documented in the authorities. Although a general moratorium on pursuing debt collection and repossession actions was observed by lending institutions from March 2020 to October 2021, it does not appear that this was a legal prohibition. In any case, it is doubtful that it would have operated as a prohibition on the prosecution of a case against a solicitor in respect of an unfulfilled undertaking. Nevertheless, as I will discuss further, a certain amount of delay in the prosecution of actions during this period is excusable.

19. In August 2020, Beltany transferred its interest in the loan and security to Pepper. On 28 July 2021, an application was made *ex parte* pursuant to Order 17 rule 4 to substitute Pepper as Plaintiff, and an order in the terms applied for was made on that date.

20. Evidence was given that *without prejudice* negotiations between Pepper and the Defendant occurred between September and November 2021. The parties accepted that evidence of the fact of such negotiations (though not their content) is admissible to explain delay, notwithstanding the privilege attendant upon them (see *Walker v Wilsher* (1889) 23 QBD 335 and *Unilever plc v Procter & Gamble* [2000] 1 WLR 2436).

21. No other procedural steps or progressive activity in the action itself are discernible from late 2021 until this motion was brought on 31 March 2025.

22. Outside the four walls of the action, however, other matters were being attended to. These related to two of the properties in respect of which the Defendant had been advised, shortly after the proceedings commenced, that he had been released from the Undertaking.

23. The first property affected was No. 226 Lower Main Street, Rush, Co. Dublin. The problem related to the description of the property in the mortgage (and perhaps the underlying title deeds), arising from a renumbering of properties on Lower Main Street, Rush. It came to light in the course of Circuit Court possession proceedings taken by KBC against the Borrowers in April 2014. The result of the error was that the mortgage granted by the Borrowers through the offices of the Defendant related on its face to an unrelated neighbouring property. An attempt to amend the Circuit Court proceedings in July 2016 was unsuccessful, and they had to be withdrawn. In September 2021, fresh well-charging proceedings were commenced (presumably on the basis that the agreement to provide security over the correct property created an equitable mortgage: the papers were not in evidence before me), and those proceedings – which it appears are being vigorously defended – have not yet concluded. In an affidavit filed on behalf of Pepper on 28 November 2025, Caroline Shanahan, a solicitor in the firm representing Pepper, averred that “[at] various points during the course of these proceedings in my discussions with [the Defendant’s former solicitor until 31 March 2025], he

advised and encouraged [Pepper] to pursue the well charging proceedings in respect of 226 Main Street instead of these proceedings” and went on to say that the pursuit of those proceedings in priority to this action was based on “the Defendant’s encouragement and assurances that a successful outcome in those proceedings would mitigate the Plaintiff’s losses.”

24. The second affected property was *Camelot*, and the issue arose because, prior to the registration in the Land Registry of the legal mortgage in favour of KBC by the Defendant in 2009, a judgment mortgage arising from a judgment granted in 2007 was registered by unrelated creditors of one of the Borrowers. That judgment mortgage therefore presented as a burden on the relevant Folio in priority to the legal mortgage. A judgment mortgagee’s interest is, however, subject to prior equities (see section 117(3) of the Land and Conveyancing Law Reform Act 2009), and the advance of monies on foot of an agreement to provide security will usually generate such an equity in priority to a later judgment mortgage.

25. In 2014, Circuit Court possession proceedings issued in respect of *Camelot* and an order for possession was made in 2016. It seems that, rather than seek to establish the priority of the legal mortgage over the judgment mortgage by means of negotiations with the judgment creditors or through any procedural application, KBC instead waited until 2019 to progress the enforcement of its security (on the assumption that any action on the judgment would be statute-barred) and then applied to the Property Registration Authority to cancel the judgment mortgage. However, this application was unsuccessful, as it was ruled that KBC – unlike the Borrowers – did not have the means of knowledge to aver that an action on the judgment was statute-barred (for example, the judgment debtor might have made a part-payment or given an acknowledgement that would have extended the limitation period).

26. An application was then made to the Property Registration Authority in June 2022 to record the priority of the legal mortgage over the judgment mortgage; however, in circumstances where the judgment creditors opposed the application, Tailte Éireann (into which the Property Registration Authority had by then been subsumed) issued a ruling in January 2024, advising that, without the consent of the judgment creditors or a court order, the application would be refused.

27. Parenthetically, refusal is how Tailte Éireann deals in practice with disputed applications involving equitable claims. The refusal allows the unsuccessful applicant either to appeal under section 19(1) of the 1964 Act (which appeal would generally be contested by the opposing party rather than Tailte Éireann) or to simply issue court proceedings against the opposing party. Tailte Éireann is entitled, in the alternative, to refer such questions to the court under section 19(2) of the Registration of Title Act 1964 (“1964 Act”), rather than to refuse them; however, the power tends not to be exercised in practice.

28. Following the Property Registration Authority’s ruling, the judgment creditors were then requested by Pepper to consent to the application, but they refused. In August 2024, Pepper applied by motion to the High Court for the requisite relief, which was granted by order pronounced on 28 November 2024 and perfected on 3 December 2024. Pepper sold Camelot by auction in March 2025.

Jurisdiction to dismiss and analysis of delay

29. It is clear that the jurisdiction to dismiss under Order 122 rule 11 of the Rules of the Superior Courts has been triggered in the absence of any “*proceeding*” in the action for a period in excess of two years prior to the present application being brought. That period runs from 28 July 2021 (when Pepper was substituted as Plaintiff) to the bringing of this motion on 31 March 2025 and amounts to just over three years and eight months.

30. However, in order to apply the test, one must next identify the aggregate period of inactivity in the broader sense, so as to classify the case within the framework laid down in *Kirwan* (acknowledging of course the Supreme Court’s caution against a rigid over-mechanical application of those categories).

2009 – 2012

31. The first period emphasised by the Defendant is the period from 2009 (when security was put in place in respect of some of the properties and when the unserved plenary summons was issued) to the commencement of the proceedings in 2012. This precedes commencement of the action and is not to be reckoned for the purpose of calculating the period of prosecutorial delay. Moreover, both parties were working to obviate the need for proceedings by having the security put in place, which was a good use of time inasmuch as two of the required mortgages were indeed put in place.

2012 – 2014

32. Understandably, no case is made that there was any inordinate delay in the prosecution of the action in the period from its commencement in 2012 to the filing of the Notice to Cross-Examine in March 2014.

2014 – 2018

33. The next relevant period runs from 11 March 2014 (when a Notice to Cross-Examine was filed on behalf of the Defendant) to 26 July 2018 (when the action was remitted to plenary hearing). The only events relating to this action that could be identified as a “*proceeding*” in this period were the eleven adjournments. Pepper submits that these were granted with the consent of the Defendant and this is not contested. Although the precise circumstances of each

adjournment were not in evidence, the evidence that the Defendant consented tends to suggest that the request to adjourn originated with the KBC and not the Defendant.

34. A consent adjournment cannot in itself be characterised as progress in litigation, even though it might create an opportunity for progress through the filing of affidavits, the conduct of negotiations or otherwise. Nevertheless, it seems to me that a listing before the court, even if it merely results in an adjournment (whether contested or by consent), must be considered a “*proceeding*” for the purpose of Order 122 rule 11 of the Rules. It involves a listing before a judge and requires an appearance in court, and the consequences of non-appearance might have been significant. If consent is not reached, it may become a contested hearing and if consent is reached, that is a formal agreement between the parties in relation to the outcome of a court listing. For that reason, I am satisfied that a court listing disposed of by means of a consent adjournment satisfies the requirements for formality and significance identified by Murray J in paragraph 43 of his judgment in *Kirwan*. That means that the period of delay in the litigation from 2014 to July 2018 – inasmuch as it did not involve a period in excess of two years without a proceeding – is not reckonable as triggering the jurisdiction to dismiss under Order 122 rule 11.

35. The mere fact that an adjournment may be a “*proceeding*” does not of course mean that inactivity in litigation resulting from such adjournments is irrelevant. Where, as here, there is a subsequent period of more than two years without a proceeding, and an application is brought to dismiss an action for want of prosecution, the Court may have regard to earlier periods in which the action was inactive in deciding whether to dismiss it under the *Kirwan* framework. While the courts should not, as Murray J put it in *Kirwan*, isolate and then add together relatively short periods of time to identify aggregate delays, and should instead generally ignore periods of inactivity of less than 6 months, a series of adjournments for periods each a little

less than 6 months might well be aggregated where nothing was happening in the case other than the adjournments. In this case, however, there are two factors that weigh against such an approach, being the Defendant's consent to the adjournments and activity outside the scope of the proceedings. These must be taken into consideration in deciding whether to aggregate the periods between adjournments and to treat them as a period of inactivity in the litigation.

36. When agreeing to a plaintiff's request for an adjournment, a defendant might make that agreement conditional, for example by reserving their position on the delay arising from the adjournment, in the context of the action generally or any applications within it. There is no evidence that the Defendant's consent to any of these adjournments was conditional in this or any other sense. That may be regarded as generous on the part of the Defendant, but it also constituted a signal, perhaps a weak one but a signal nonetheless, that issue would not be taken in relation to the delay arising from each adjournment concerned. To attach relevance to the Defendant's consent to these adjournment applications is not to revive the proposition, rejected by the majority of the Supreme Court in *Kirwan*, that the Defendant bears a responsibility for progressing the action: there is a material distinction, in my view, between mere inactivity in the face of a plaintiff's inactivity, and positively consenting to the adjournment of an action that is listed before a court. That positive expression of consent communicates an element of acquiescence that is not to be inferred from mere inactivity.

37. This reflects the position before *Kirwan*, in that consenting to an adjournment application in that case was treated as rendering the resulting delay excusable under the *Primor* test: see *Pepper Finance Corporation (Ireland) DAC v Roche* [2024] IEHC 567 (per Bolger J at para. 10).

38. It might be suggested that the facts of this case, which involve an accumulation of adjournments amounting in aggregate to a long period of time, warrant a different conclusion

from what might follow in a case involving consent to one or two adjournments (or an adjournment *sine die*). However, each request for an adjournment and each instance of consent being given represented a new occasion on which it was open to the Defendant and his legal representatives to consider the circumstances and decide whether or not to consent. The Defendant did consent, not only on the first and second occasions, but also each of the ensuing nine occasions, when the increasing aggregate delay was known.

39. Accordingly, I am satisfied that it should not be aggregated with other periods of inactivity in the case for the purpose of the *Kirwan* test. In the circumstances, the issue whether the pursuit of alternative remedies in respect of No. 226 Lower Main Street, Rush, and Camelot justified or excused delay in this period does not need to be considered.

2018 – 2021

40. The next period of delay dates from 30 November 2018 (i.e. the date of delivery of the Statement of Claim, being a reasonably short period after the case was remitted to plenary hearing) to 28 July 2021 (i.e. the date of substitution of Pepper as Plaintiff in the action). Within that period, KBC’s interest in the loan and security was transferred to Beltany, and then to Pepper, and successive applications were made to substitute those respective transferees as Plaintiff.

41. Although they might not progress an action towards its ultimate conclusion at trial, applications to substitute a party have several attributes of formal procedural steps, in that they require the swearing and filing of an affidavit, the filing of an *ex parte* docket, the making of an *ex parte* application and ultimately the pronouncement and perfection of a court order. Being *ex parte* applications, they lack the bilateral character of a consent adjournment; nevertheless, unilaterality is not a bar to an event constituting a “*proceeding*” in this context, since acts such as the entry of an Appearance, the delivery of pleadings and the service of a

Notice of Trial are all squarely within the established understanding of the expression. In any case, the making of a substitution order *ex parte* entitles the opposing party to bring an application to set aside that order. If authority is required, in *Roche*, Bolger J held that a substitution order was a “*proceeding*”.

42. Accordingly, the applications for the substitution of successively, Beltany (on 4 November 2019) and Pepper (on 28 July 2021), were each a “*proceeding*” within the meaning of Order 122 rule 11.

43. However, while the applications to substitute Beltany and Pepper respectively as Plaintiff restarted the two-year period for the purpose of Order 122 rule 11, it may still be the case that the periods of inactivity between those applications can be included in an aggregation of the overall period of inactivity in the action.

44. In this case, the gaps that require examination measure approximately 11 months (from the delivery of the Statement of Claim to the substitution of Beltany as Plaintiff on 4 November 2019), and a little over 21 months (from 4 November 2019 to the substitution of Pepper as Plaintiff on 28 July 2021: I am not deducting the one-week period between the filing of the *ex parte* docket and the making of the substitution application).

45. The first of these periods commences with the delivery of the Statement of Claim and it is reasonable to discount a period of two months after that date, since a plaintiff may ordinarily be expected to allow a defendant some time to consider a Statement of Claim before progressing the action further.

46. Although it was lawful to proceed with the action during the Covid-19 pandemic, it is clear that a degree of inactivity in litigation is excusable in the context of that disruption. In *Bank of Ireland Mortgage Bank v Lawlor* [2025] IEHC 617, Nolan J (in the context of a case

by a bank against a borrower) considered that inactivity in the period from March to December 2020 could be excused by reference to the general disruption caused by the pandemic, and I would allow equivalent latitude here.

47. The issue of pursuing alternative remedies must also be considered in the analysis of this period of time. While a step taken outside the scope of the litigation in question, even if concerned with the same substantive issues, does not constitute a “*proceeding*” for the purpose of Order 122 rule 11, it may nevertheless have relevance in the context of assessing the broader concept of inactivity.

48. In *Comcast International Holdings Inc v Minister for Public Enterprise* [2012] IESC 50, the Supreme Court, in allowing an appeal against the dismissal for want of prosecution of proceedings arising out of the grant of the second GSM mobile telephone licence in 1995, considered that – on the particular facts of that case – awaiting the outcome of the work of the Moriarty Tribunal was to be taken into account. It is relevant whether the defendant was aware that the plaintiff was pursuing alternative remedies or courses of action in priority to progressing the subject proceedings and, in *Comcast*, Clarke J (as he then was) noted (at paragraph 5.29 of his judgment) that the defendant in that case must have been aware that the plaintiffs were awaiting developments at the Moriarty Tribunal before progressing their claim. It was also considered relevant that the Tribunal’s work had been forecast to take less time than it ultimately did, which identifies the logical proposition that an external act or event might justify some delay but not a long or open-ended pause in the prosecution of an action.

49. In *Doyle v Commissioner of An Garda Síochána* [2025] IEHC 591, Dignam J distinguished this aspect of *Comcast* on the basis that, in the case before him, which had been delayed *inter alia* pending complaints made to the Garda Síochána Ombudsman Commission and to the Minister for Justice, as well as an application to participate in the Disclosures

Tribunal, the plaintiff's claim was about the termination of his employment whereas the other complaints related to allegations of wrongful conduct by the Gardaí in conducting undercover operations. In *Comcast*, as Dignam J put it, "*the relief sought was based on the very allegations of corruption and wrongdoing which were being investigated by the Tribunal.*" He noted in particular that the outcome of the complaints in the case before him was not necessary to the prosecution of that action.

50. In the present case, the pursuit of alternative remedies in respect of the properties in respect of which the security was impaired was conduct meaningfully connected with the issues to be determined in this action, in that the achievement of those remedies would likely have affected both the quantum of the claim and the applicable heads of loss. As such, the pursuit of those alternative remedies is a relevant factor in explaining delay on the facts of this case.

51. However, the delays in the pursuit of those alternative remedies (both unexplained delays and delays attributable to procedural errors), and the extent to which the Defendant was aware of, and encouraged or acquiesced in, the pursuit of those alternative remedies, are factors that must be weighed in assessing whether those extraneous acts and events excuse inactivity in the prosecution of this action.

52. I do not think that any adequate excuse for delay in this period is shown by reference to the efforts to enforce the security held over *Camelot* to a conclusion. The only step taken between November 2018 and July 2021 to resolve the difficulty created by the judgment mortgage was the preparation and lodging on 23 August 2019 of an application to cancel the judgment mortgage in reliance on the Statute of Limitations, which was refused on 4 October 2019. The existence of the judgment mortgage was obvious from the very beginning of the enforcement process. Waiting for twelve years to elapse from the date of judgment was highly

unlikely to be a successful strategy here, since the difficulty with that approach, as subsequently identified by the Property Registration Authority, was foreseeable.

53. Similar concerns arise in relation to the pursuit of alternative remedies in respect of No. 226 Lower Main Street, Rush. Since 2016, if not earlier, it was known to KBC, or reasonably ascertainable with legal advice, that well-charging proceedings were necessary in order to enforce the security over that property, yet for reasons that have not been adequately explained, those proceedings were not issued until September 2021. Absent other considerations, that inaction would rule out reliance on the remedial proceedings in relation to No. 226 Lower Main Street, Rush, as an excuse for delay during the period up to 2021. However, the encouragement by the Defendant to pursue these well-charging proceedings in priority to this action is a weighty countervailing factor to be considered in the context of this property, which arises and will be discussed in the assessment of the next relevant period in the litigation.

54. Leaving aside that countervailing factor for the moment, I am of the view that two months after delivery of the Statement of Claim and eight months during the Covid-19 disruption may be considered excusable periods of inactivity.

2021 – 2025

55. The final period under consideration, from 28 July 2021 to 31 March 2025, featured no “*proceeding*” within the meaning of Order 122 rule 11. However, during that time, the parties engaged in *without prejudice* negotiations (between September and November 2021), Pepper pursued the well-charging proceedings in respect of No. 226 Lower Main Street, Rush (these have not yet concluded), Pepper made and pursued to an unsuccessful conclusion the application to the Property Registration Authority for priority of its mortgage on *Camelot* (between June 2022 and March 2024), Pepper made and pursued to a successful conclusion the

application to court for priority of its mortgage on *Camelot* (between August 2024 and November 2024), and Pepper concluded the sale of *Camelot* (in March 2025).

56. I am satisfied that the time during which negotiations were taking place from September to November 2021 should be treated as excusable delay for the purpose of this application.

57. As regards the enforcement of security over *Camelot*, the activity during this period followed on from the failed strategy of seeking to defeat the judgment mortgage by statute-bar. The decision to apply to the Property Registration Authority for a ruling on priorities and to persist with that application for some two years, without first ascertaining whether the judgment creditors would consent to the application, was an unwise one, since it was foreseeable that the Property Registration Authority/Tailte Éireann was unlikely to resolve a dispute regarding competing equities. In the circumstances, fault for any delay associated with this must rest with Pepper itself. When the correct approach was finally taken, the difficulty was resolved within a comparatively short period of time after Pepper made application to court. While it should perhaps have been resolved earlier, some credit should be allowed in respect of the time taken to prepare for and pursue the matter in court, and, taking into consideration the time required for advice and preparation, I propose to exclude the period from July 2024 to March 2025 from any aggregation of prosecutorial delay, at least as far as the claim in relation to *Camelot* is concerned.

58. Having regard to the delay in commencing the well-charging proceedings in respect of No. 226 Lower Main Street, Rush, I would not in the ordinary course treat the belated pursuit of those proceedings from September 2021 onwards as an active period, since the problem had been known to KBC and its successors at least five years before the proceedings issued.

59. However, there is the additional factor in this case that the Defendant, through his solicitor, appears to have encouraged the pursuit of the well-charging proceedings in respect of

that property in priority to the progress of this action (while it has not been expressly admitted that that encouragement was given, the averment was not denied so, for the purposes of this application, I must take it as uncontradicted). This has considerable significance, not only in respect of the quantification of delay, but also for the treatment of prior delay.

60. If consenting to adjournments can be treated as excusing the resulting delay, then encouraging the pursuit of alternative litigation in priority to the subject action must generally be treated likewise. Moreover, in a context where that encouragement was given against a background of the delays that had already arisen (in this regard I am assuming that the encouragement was given when the well-charging proceedings were in being), it would be illogical and unfair to permit the Defendant, having given that encouragement, to seek at a later date to have the action dismissed based on earlier delay. If Pepper had not acted promptly in response to that encouragement by progressing the well-charging proceedings, it might not be allowed to rely on the encouragement given as an excuse for inaction in this action, but the database of the Central Office shows that the well-charging proceedings have been diligently pursued since they were commenced, and presumably at some expense.

61. Accordingly, as regards the claim concerning No. 226 Lower Main Street, Rush, the Defendant's encouragement of the well-charging proceedings in priority to this action weighs decisively against treating the delay resulting from that prioritisation as a basis for dismissal.

62. A question arises whether that conclusion means that all delay in the action was excused, and I will return to that question presently.

The periods of inactivity

63. On the basis of the analysis above, and leaving aside for the moment the consequences of the Defendant encouraging the prioritisation of the well-charging proceedings in respect of

No. 226 Lower Main Street, Rush, I calculate the periods of unexcused inactivity in the proceedings to be as follows:

- (a) In the period from November 2018 to July 2021, there is an aggregate period of approximately 22 months (i.e. discounting two months after delivery of the Statement of Claim and eight months during the Covid-19 disruption);
- (b) In the period from July 2021 to March 2025, there is an aggregate period of approximately 34 months (i.e. discounting three months during which negotiations were taking place and seven months when the correct remedial steps were pursued in respect of *Camelot*).

64. Putting those together, the aggregate period of delay (again leaving aside the issue of encouragement of the well-charging proceedings) amounts to approximately four and a half years. *Ex facie*, this puts the case into the third category identified by O'Donnell CJ in *Kirwan*, where “*the claim should be dismissed if it is dependent on oral evidence so that the defendant is exposed to the risk of failing recollections and witness reluctance that inevitably accompanies a long effluxion of time, unless the plaintiff persuades the court that there are compelling reasons why the claim should not be dismissed and can be properly allowed to go to trial.*”

Impact of inactivity and events

65. One of the difficulties with this case is that it consists of three elements (corresponding to each of the three properties: *Atlantis*, *Camelot*, and No. 226 Lower Main Street, Rush), and the consequences of delay and of the acts and omissions of the parties in the course of the proceedings are different in respect of each of those elements.

66. Broadly speaking, the three elements making up the action may be described as follows:

- (a) First, in respect of No. 226 Lower Main Street, Rush, there is a claim either (a) if the well-charging proceedings fail, for the loss of the security contracted for and any consequential expenses, or (b) if the well-charging proceedings succeed, for any loss associated with the delay in enforcement and the additional cost of well-charging proceedings and sale through the court compared with conventional possession proceedings and a mortgagee sale. The issues in this relate to the title to the property and the duties of a solicitor giving an undertaking such as the Undertaking here and are not heavily dependent on oral evidence. Quite apart from this, the encouragement given by the Defendant to prioritise the well-charging proceedings weighs heavily against Pepper being shut out from prosecuting it now. All else aside, there are compelling reasons why this element of the claim should be permitted to proceed to trial.
- (b) Secondly, in respect of *Camelot*, there is a claim for any loss associated with the delay in enforcement and in respect of the cost of securing priority over the judgment mortgage. Again, the ascertainment of facts is not likely to depend on oral evidence, and I am satisfied that Pepper has shown that the Defendant will not be impaired in his defence at trial, and that – while some of the loss and cost incurred by Pepper and its predecessors will likely not be recoverable even if liability is shown (since it was attributable to errors on the part of Pepper and its predecessors) – there are compelling reasons to permit this element of the claim to proceed to trial.
- (c) Thirdly, in respect of *Atlantis* (or “*Coast Road, Rogerstown, Rush*”), there is a claim for the loss of the security contracted for and all consequential expenses. The principal dispute relates to whether the Defendant was released from his

undertaking in a telephone conversation with a representative of IIB in 2003, and as such, oral evidence is central to the resolution of this aspect of the claim. The oral evidence relates to events dating back 23 years now, and it pertains to a telephone conversation between the Defendant and a representative of IIB at that time. That representative swore two affidavits in the action in 2012 and 2013, in which she averred that she had no recollection of the conversation alleged by the Defendant, and that IIB's files did not record any release of the Undertaking. Those affidavits are now 14 and 13 years old respectively. No evidence was given as to the current whereabouts or availability of IIB's representative, but either way, the passage of time will be a considerable obstacle to her having useful evidence to give, even about the circumstances surrounding the alleged telephone conversation. It would not be an answer to this impairment of evidence to say that she is "Pepper's witness", since a witness is not an advocate: her evidence (including on cross-examination) might be, or might have been, useful to the Defendant. The Defendant himself will also be prejudiced by the passage of time since – even if he is adamant as to what he was told in the telephone call in question – he may have difficulty under cross-examination in recollecting surrounding facts and circumstances (for example to explain why he never sought confirmation in writing of the release he alleges before receiving and releasing the loan funds) and so may suffer damage to his credibility.

67. Of course, one might say that the impairments affecting a trial as it relates to *Atlantis* existed as far back as 2018, before any of the delay assessed above. However, the test, as I understand it, does not have the effect that – once a certain point in time is reached after the key events the subject of the proceedings when it can fairly be said that recollections will be impaired – there will not be adverse consequences for subsequent prosecutorial delay of greater

than four years. All else aside, I am not satisfied that Pepper has shown that there are compelling reasons why this element of the claim should proceed notwithstanding the delay.

68. In saying all of the above, I am not commenting on the merits of the case, as that is not what is before me: if a defence is weak but rendered even weaker by virtue of the passage of time, that impairment is what is relevant to an application such as this.

Severance

69. The final questions, therefore, are, first, whether there is jurisdiction to sever the elements of the claim so as to allow the claims in respect of No. 226 Lower Main Street, Rush, and *Camelot* to proceed while striking out the claim insofar as it relates to *Atlantis*, and, secondly, whether I should do that in the present circumstances.

70. On the jurisdictional question, Counsel were unaware of any authority on the question of severing parts of actions in the context of a motion to dismiss for want of prosecution, and neither was of the opinion that the court lacked jurisdiction to allow severable parts of an action to proceed while dismissing other parts. I likewise have found no authority in this jurisdiction on the question, but there are at least three points suggestive of such an entitlement. First, Order 122 rule 11 allows the court on the hearing of an application to dismiss for want of prosecution to “*order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just*” (emphasis added), which arguably captures partial dismissal in the context of that rule. Secondly, it has long been the case (*Primor* being an example) that an application brought by one of multiple defendants will (if successful) see the claim against that defendant severed from the others, so the concept of severance in that sense at least is part of the existing understanding of the jurisdiction. Thirdly, the inherent jurisdiction which (as held in *Kirwan*) survives the enactment of Order 122 rule 11 and its antecedents axiomatically contemplates a jurisdiction that is in some respects, at least, wider

than the rule. The dismissal of part of a claim would seem to serve the objective of flexibility emphasised by the Supreme Court in *Kirwan*, for example, when the Chief Justice (discussing the issue of Defendant inactivity at paragraph 73 of his judgment) said that it was “*important that courts retain a degree of flexibility and should remain astute to ensure that justice in its broadest sense is done.*”

71. The contrary argument is that, by providing for a power to dismiss “*the cause or matter*”, Order 122 rule 11 excluded a power to dismiss part of the cause or matter, and that, while the ensuing words are broad in scope, they do not extend to permitting a partial dismissal. In *Ryanair v Aer Rianta* [2004] 1 IR 506, it was held in the context of Order 19 rule 28 that the jurisdiction to strike out a “*pleading*” did not encapsulate a power to strike out part of a pleading (Order 19 has since been amended to expressly allow for part of a pleading to be struck out). However, under Order 122 rule 11, a wider array of options is articulated than in the former Order 19 rule 28. At any rate, even if the rule was thus narrowly construed, it does not follow that the Court’s inherent jurisdiction is likewise restrictive, so as to preclude partial dismissal. Although it has a superficial attraction, I would not proceed on the more formalistic argument that “*such order ... as to the Court may seem just*” enables the same outcome as dismissal by a different route (e.g. a permanent stay on part of a cause or matter).

72. In the circumstances, in a case like this, where parts of a case are readily severable from others (and a detailed “blue pencil” review of the pleadings is not required), I am satisfied that the court on an application such as this is entitled to dismiss certain elements or parts of an action for want of prosecution, while permitting others to proceed to trial.

73. The last issue then, if the jurisdiction is there to dismiss part of a cause or matter, is whether that should be done in this case. The main argument in favour of severance relates to the different effects of delay on the respective elements in the case, specifically the effects of

the encouragement given in respect of the well-charging proceedings pertaining to No. 226 Lower Main Street, Rush, as discussed above. The main argument against severance is that, in giving the encouragement to pursue the well-charging proceedings, the solicitor for the Defendant can be taken to know that prioritising the well-charging proceedings would becalm this action in its entirety, not just the claim in respect of No. 226 Lower Main Street, Rush. There is a logical attractiveness to this point; however while severance presents as less analytically correct, I am of the view that, on the particular facts of this case, severance allows for the justice in the case to be balanced in a way that would not be possible by taking by an “all or nothing” approach to dismissal. In this regard, I take into consideration the fact that the evidence regarding the conversations between the solicitors on this question of prioritisation is limited: it came in the last filed affidavit, to which no replying affidavit was filed, and consists of just one paragraph. That the encouragement given might impact the pace of the entire action is easy to see at this remove, but there is no evidence as to what, if anything, was said about those aspects of the case outside No. 226 Lower Main Street, Rush, at the time, and it is as likely as not that neither solicitor gave thought to the other aspects of the case one way or another.

Conclusion

74. In the result, therefore, I will grant the relief sought in part, by ordering that the action as far as it relates to the claims for losses arising from the alleged failure by the Defendant to fulfil his undertaking insofar as it pertained to the property known as *Atlantis* or “*Coast Road, Rogerstown, Rush*” be dismissed. As regards the claims for losses arising from the alleged failure by the Defendant to fulfil his undertaking insofar as it pertained to the properties known as *Camelot* and No. 226 Lower Main Street, Rush, I will refuse the relief sought.