THE HIGH COURT

Record no. 2018/8404 P

[2025] IEHC 21

Between:

CONOR MARTIN

Plaintiff

- And -

RAY O'KEEFFE and ETNA O'KEEFFE

Defendants

JUDGMENT of Ms Justice Nessa Cahill delivered on 20 January 2025

Overview

1. These proceedings concern a property known as "*the Beach Tavern*" which is located at 7/9, Bath Street, Irishtown, in the County of Dublin ("*the Property*"). The Property was originally operated as a licensed premises with residential occupants in the upper two floors, but it has not functioned as a licensed business for some time.

2. In very broad terms, the Plaintiff issued these Proceedings seeking specific performance of an alleged contract for the purchase of the Property for the price of €625,000, which he asserted was binding on the Defendants by virtue of an option to purchase which was conferred on the Plaintiff by a tenancy agreement entered by the parties on 24 August 2015 ("*the 2015 Agreement*").

3. The Proceedings were heard by the High Court (Pilkington J.) in February and October 2020 (the completion of the hearing having been delayed by the onset of the Covid pandemic). In the judgement delivered on 21 March 2021 ("*the 2021 Judgment*"), Pilkington J. found that the Plaintiff had exercised an option for the purchase of the Property for the consideration of €725,000 and not €625,000 as the Plaintiff claimed.

4. On 21 January 2022, the High Court ordered that the Plaintiff was entitled to rely on the Option conferred on the Plaintiff by the 2015 Agreement to purchase the Property for the sum of €725,000 ("*the 2022 Order*"). The Order was perfected on 3 February 2022.

5. As of the date of this Judgment, the contract for the sale of the Property has not been completed and the Plaintiff has not transferred the purchase monies to the Defendants.

6. The Defendants issued this Motion on 22 March 2024 seeking the following reliefs:

    a. An order pursuant to the inherent jurisdiction of the court for directions to the mode, means and any ancillary issues relating to the within application, including, if necessary, re-entry to the Chancery list.

    b. An order dissolving the order of 21 January 2022.

c. An order varying the terms of the order of 21 January 2022.

d. A declaration that the parties are bound by a contract governed by the General Conditions of Sale as promulgated by the Law Society of Ireland.

e. Costs.

7. The Motion came on for hearing before me on 29 October 2024. Submissions were made at that hearing by counsel for the Defendants and by the Plaintiff as a litigant in person. It was plain from the submissions made that the relief being pursued by the Defendants was an order dissolving or varying the 2022 Order.

8. The 2021 Judgment is central to the issue I have been asked to decide. However, it is important to emphasise at the outset that there is and can be no attempt by any party to these Proceedings to challenge, contest or undermine the 2021 Judgment or to re-open or re-visit any of the findings made in that Judgment. It is a final judgment of the High Court against which there has been no appeal and there is and can be no interference with that Judgment.

9. The only question I have to determine is whether, owing to the events that have occurred (or not occurred) since the delivery of the 2021 Judgment and the facts as they pertain at this point in time, I have jurisdiction to dissolve or vary the 2022 Order and that the criteria for the exercise of that jurisdiction are met.

10. For the reasons set out in this Judgment, which are based on an assessment of the motion papers, the affidavits, the submissions and the terms of the 2021 Judgment and the 2022 Order, I am not persuaded that such a jurisdiction does arise or can properly be exercised. The primary reason for this decision is that, by the 2022 Order, Pilkington J. did not make an order of specific performance or other forward-looking order, but rather declared that the Plaintiff had exercised the option to purchase the Property.

11. In making that Order, the Court did not specifically prescribe what was to occur in the future. In fact, there was nothing in the 2021 Judgment concerning what was to happen after the delivery of the Judgment and no submissions appear from the Judgment to have been made on this point. In these circumstances, the jurisdiction to vary or dissolve an order of specific performance on which the Defendants rely does not properly arise.

12. However, as will be explained below, this is not a determination that the Defendants are incorrect as a matter of fact or of law in their view that they should no longer be constrained by the option that was exercised by the Plaintiff over six years ago or that the Defendants are not now entitled to take such steps as they deem fit with regard to the Property. Rather, it is a decision that the situation that now pertains is simply not addressed by the 2022 Order.

13. This judgment will begin with a summary of the relevant findings in the 2021 Judgment and will then address the positions advanced by the parties; the factual issues that arise; and the reliefs now sought by the Defendants.

The 2021 Judgment

14. As set out in the 2021 Judgment, the Plaintiff's claim was that clause 10 of the 2015 Agreement conferred on him an option to purchase the Property within the first year of the tenancy for the sum of €625,000 and within the second year of the tenancy for the sum of €725,000. Increasing sums became payable if the option was exercised in the third or fourth years of the lease. His case was that he had exercised the option orally on 25 May 2016, and that it was evidenced by an email from the Defendants' estate agent sent on 20 May 2016, and that it was therefore exercised in the first year of the lease, giving rise to an agreement for the purchase of the Property for the consideration of €625,000.

15. The Plaintiff asserted that the Defendants thwarted his efforts to complete the contract and frustrated that contract. An order of specific performance was sought.

16. The 2021 Judgment records the Defendants' case that the contract was unenforceable; that its enforcement was inequitable and barred by delay; and that the option was rendered void by virtue of non-compliance with the tenancy agreement (among other objections and defences).

17. On the basis of the evidence presented, the Court found that the option was exercised by the Plaintiff, not orally in May 2016, as asserted by the Plaintiff, but rather *via* a solicitor's letter sent on 17 October 2016.

18. The Court concluded that the "*kernel*" of the case was that "*the valid exercise of an option automatically creates the relationship of vendor and purchaser by bringing into effect a binding contract of sale*" (¶126) and that, **"…** *the grant of the option is clear (clause 10), its exercise more difficult to discern, and its completion is yet to occur*" (¶127).

19. The Court explained the orders that were made as follows:

> **"***In terms of the reliefs sought within the statement of claim I refuse the reliefs sought within paragraphs 2, 3 and 4. Paragraphs 5 and 6 do not arise and the question of costs is yet to be determined. With regard to paragraph 1, I do not believe it appropriate to grant the relief of specific performance" (¶130.* emphasis added).

20. Among the relevant findings in the 2021 Judgment are the findings that,

> (a) there are three stages to an option to purchase land, namely the grant of the option; the exercise of the option; and the completion of the contract (citing *Knockacummer Limited v. Cremins* [2018] IECA 252, per Whelan J. at ¶39);
>
> (b) when the option is exercised, a binding contract is created, which the parties are under an obligation to perform (relying on *Spiro v. Glencrown Properties Limited* [1991] 1 All ER 600);

(c) in this case the option was exercised in 2016 (not 2015, as asserted by the Plaintiff) and the option was accordingly not on the terms alleged by the Plaintiff; and

(d) the completion of the contract was "*yet to occur*" (¶127).

21. Notably, the contract which the Court found had been entered was not the same contract of which the Plaintiff sought specific performance. The Court rejected the Plaintiff's evidence in support of the existence of that alleged contract and refused to make an order of specific performance.

22. The specific order made was in the following terms:

> *"A Declaration that pursuant to clause 10 of an Agreement dated 24 August 2015, the plaintiff exercised an option, by letter from his solicitor Peter Morrissey & Co to the defendants' solicitor Kelly Kennedy & Co dated 17 October 2016, to acquire the premises known as ALL THAT AND THOSE the premises known as the Beach Tavern situate at 7/9, Bath Street, Irishtown, in the County of Dublin for the price or consideration of €725,000."*

23. Another aspect of the Judgment which is notable is the recognition of the Defendants' indebtedness and the importance of the sale of the Property to them:

> "*The second named defendant in her evidence made it clear that, she and her husband had certain ongoing financial difficulties. They purchased the premises in 2004 for a sum of €1.2m. They took a significant mortgage of some €900,000 with Ulster Bank charged against that public house as well as re-mortgaging their private home. Accordingly, at about the time of this litigation the defendants had significant financial concerns, in respect of their outstanding liabilities to Ulster Bank. In her evidence she confirmed that there had been discussions with Ulster Bank as to the sale of the Beach Tavern premises in order to deal with that indebtedness. The second named defendant held a responsible position within a Dublin university and her evidence was clear and cogent throughout*" (¶68).

24. This is repeated later in the Judgment:

> **"***These defendants had two assets; their family home and the public house. They were seriously indebted. This was a significant transaction for them*" (¶117)

The Defendants' Position

25. This Motion is grounded on the affidavit of the First Defendant (Mr. Ray O'Keeffe) sworn on 22 March 2024 on behalf of both Defendants.

26. According to Mr O'Keeffe's affidavit there are three factors to be considered, namely the financial position of the Defendants; any loss or damage to the Plaintiff; and the approach of the Plaintiff.

27. He averred that the Defendants are indebted to Pepper Finance Corporation (Ireland) DAC ("*Pepper")* in the sum of €1,180,000 together with interest and cannot reduce this without selling either the Property or their family home. He states:

> *"We find ourselves trapped in a situation where there is an Order requiring the Defendants to enter into the contract for sale of a realisable asset which the Defendants desperately desire to sell but where the Plaintiff has no desire to complete same"* (¶10).

28. Mr O'Keeffe averred that, as of March 2024 the value of the premises is in the region of €800,000 and that the Plaintiff has failed, neglected, omitted and/or refused to act upon the 2022 Order by paying the purchase price of €725,000 in exchange for a conveyance of the Property.

29. According to Mr O'Keeffe, there were letters sent to the Plaintiff on 11 July 2023 and 31 August 2023 calling on him to complete the contract, failing which the Defendant would apply to the High Court for relief.

30. By his response of 16 August 2024, the Plaintiff stated that the Defendants had frustrated the sale of the Property in July 2022 and also referred to a proposed '*joint sale*' of the Property. and asserted that a binding contract was in place. The letter also addressed the issue of costs.

31. The position of Mr O'Keeffe is that he does not believe that the Plaintiff can or wishes to purchase the Property and the Defendants now need to be free to sell it in order to reduce their debts.

32. In written and oral submissions, counsel for the Defendants rely on the judgment of Clarke J in *Mount Kennett Investment Company v Patrick O'Meara* [2011] IEHC 210 ("*Mount Kennett")* including the following passage from that Judgment:

> ***"…*** *where a party seeks an order for specific performance and it is granted, then the starting point has to be that that party has elected for specific performance rather than damages. However, it is equally clear that the court has a jurisdiction to discharge an order for specific performance and direct that damages in lieu should be assessed provided that it is, in all the circumstances, equitable so to do. As pointed out in Spry on "Equitable Remedies" (8 th Ed. (2010)) at pp 319-321:-*
>
> *'The Termination, Variation and Enforcement of Orders of Specific Performance*
>
> *An Order for specific performance may be dissolved or varied by the Court whenever it is just to do so. A number of circumstances may bring about this position, as may be seen from the following analysis.*
>
> *First, an event may occur, such as supervening impossibility of performance, which either renders the order entirely inappropriate or which requires its modification.*
>
> *Secondly, if the plaintiff has elected not to rescind in the light of the Defendant's breach, but has instead obtained an order of specific performance, a new or continued failure by the Defendant to carry out his obligations in an essential*

respect enables the Plaintiff to rescind the contract and to obtain a dissolution by the Courts of its order.

Thirdly, there may be laches or acquiescence on the part of the Plaintiff, or some other equitable consideration may arise which renders continuance of the order unjust or which requires its amendment. So it was said by O'Bryan J., 'but, in my opinion, the Court, in its equitable jurisdiction, would be as careful to preserve the equities between the parties as well after the decree as before it, and if the Plaintiff has been guilty after judgment of delays which now make it [in]equitable to make further orders for the purpose of specifically enforcing the contract, the Court, even after the decree, will refuse to aid her by making further ancillary orders.'

Different considerations arise in regard to hardship. Ordinarily the fact that after the making of an order circumstances arise in which performance will give rise to greater hardship than had been expected does not justify the dissolution or variation of the order. However, there is much to be said in principle for the view that if this greater hardship is such that the order would operate oppressively, the Court may in exceptional circumstances regard it as just that it be modified or dissolved, so that where appropriate the Plaintiff is confined to such other remedies as damages that are available.

Fourthly, different rules apply from time to time in different jurisdictions for the correction of orders made in error.

Fifthly, there is a general power in the Court to dissolve or vary an order of specific performance in accordance with equitable principles. So, for example, a modification or variation may be appropriate because the parties have subsequently terminated or varied their agreement. Again, an estoppel or other like consideration may have arisen, or some other circumstances may have occurred whereby the continuance of the order would give rise to injustice. Until an order of specific performance is dissolved or terminated in a material respect it must be complied with, and a failure to comply may constitute contempt of Court. The order will where appropriate be enforced by

the Court and here reference should be made to the procedures that are discussed hereunder in relation to the enforcement and injunctions'."(¶4.1)

33. While *Mount Kennett* concerned specific performance and not a declaration regarding an option (as is at issue here), it was contended on behalf of the Defendants in written and oral submissions that the 2022 Order is equivalent to an order for specific performance and that the same principles of law and equity should apply to both forms of order.

34. In relation to *laches*, the Defendants submit that the Plaintiff delayed in purchasing the property. They submit that no explanation has been given for the delay; no funds were ever given to his solicitor; and that this has had a seriously negative impact on the Defendants. The Defendants seek to rely on the judgment of Laffoy J in *McGrath v Stewart* [2016] 2 IR 704 with regard to the assertion of *laches*.

The Plaintiff's Position

35. The Plaintiff swore a replying affidavit on 21 June 2024 and a second affidavit on 12 July 2024.

36. The Plaintiff states that at all times he followed a process of due diligence with his solicitors to purchase the Property and it was the Defendants who frustrated the purchase. He also avers that he had made two funded offers through his solicitors to purchase the Property.

37. The exhibits to his affidavit include one letter dated 14 April 2022 in which his solicitor refers to a provisional date for completion, but there is no apparent follow through on that. There is then a "*heads of terms*" between the Plaintiff and Pinemont Finance Limited confirming funds to purchase the Property for the sum of €450,000 which is dated 20 April 2024 but appears not to be signed by the lender.

38. The Plaintiff makes further averments that there had been engagement between his then solicitor and the Defendants' accountant regarding the proposed joint sale of the Property but that this was frustrated by the Defendants.

39. The Plaintiff sets out various alleged losses in his affidavit. He lists an amount in respect of legal fees at €197,660 and one outstanding invoice, noted as being "*75% payment on Court Order by the Defendant*"; the cost of fireproofing the building is listed at €190,000; the value of furniture and fittings which he alleges the Defendants removed from the Property is said to be over €150,000; and planning permission fees are said to be €45,000. He appears to claim that his investment in the Property and further monies that need to be expended should be deducted from the purchase price.

40. The Plaintiff further states that the 2020 valuation of €800,000 was incorrect as a large investment was needed to satisfy the Chief Fire Officer and the Fire Services Act 1981 and 2003.

41. The Plaintiff states that the Defendants knew of the residents in the property and that there was a fire inspection on 2 November 2017 and the Defendants had a duty of care and responsibility to inform the Court as this would have been material evidence in the previous High Court proceedings. The Plaintiff asserts that the fire safety inspection in 2017 was concealed from him and from the Court in the course of the 2020 hearings.

42. The Plaintiff's former solicitor (Mr. Morrissey) swore an affidavit in support of his application to come off record on 20 May 2024. In this affidavit, Mr Morrissey states that, since the perfection of the 2022 Order, he endeavoured to complete the purchase of the Property but the Plaintiff failed to put him in funds to do so.

Replying positions

43. Mr O'Keeffe, in his replying affidavit, rejects the evidence that the Plaintiff made offers to sell and had funds to do so. The Defendant's position is that the Plaintiff did not have funds and he is a stranger to the alleged attempt to frustrate a sale. He relies on the affidavit of Mr Morrissey which confirms that the Plaintiffs did not advance the

funds to complete the purchase of the Property. The Defendants also confirm their agreement with the Plaintiff that the Property is now worth considerably less than €800,000. It is noted that the release of the Plaintiff from the contract (by the variation of what the Defendants call the "*specific performance order*") would put the Plaintiff in a better financial position, but it is also averred by Mr O'Keeffe that the Defendants remain willing to sell the Property to the Plaintiff for the sum of €725,000.

44. The Defendants' response on the issues concerning the condition of the Property is that the Plaintiff is attempting to re-litigate issues already addressed regarding the sub-letting and condition of the premises and issues concerning fire-safety hazards. It is the Defendants' position that these issues were dealt with in the 2021 Judgment and are *res judicata.*

45. The Defendants further argue that the Plaintiff is prohibited from raising any extraneous issues which pre-date the hearing of the Proceedings in 2020 by operation of the rule in *Henderson v Henderson* (1843) 3 Hare 100.

46. The Plaintiff's second affidavit repeats his position that the Property should be acquired for the sum of €725,000 less several deductions, including for fire safety compliance issues and legal costs. He also posits the possibility of the Defendants paying what he asserts are the legal costs owing (€197,000) and the Plaintiff would then lift the *lis pendens* and the proceedings would be at an end.

47. In the course of his submissions at the hearing of the Motion, the Plaintiff again raised different proposals for the resolution of the issues, including by a proposed sale of the Property to a third party, with the Defendants discharging the legal costs from the proceeds of sale, or the sale of the Property to the Plaintiff for the sum of €425,000.

Assessment of the Factual Questions Raised

48. There are two broad categories of factual issues raised by the parties. First, the Plaintiff raises various complaints concerning the condition of the Property, previous application for planning permission for three apartments to be constructed on the site, and fire

safety issues that emerged with regard to the Property in 2017 and which he alleges were concealed by the Defendants.

49. Second, there is a factual question about whether the Plaintiff has attempted to, and been ready and willing to, complete the contract.

50. The first set of issues are irrelevant to this Motion and are not matters to which I can have regard. The only question before me is whether the 2022 Order needs to be and should be varied or dissolved to allow the Defendants to convey the Property to a party other than the Plaintiff. The 2021 Judgment and the terms of the 2022 Order are clear and are not – and could not be – challenged before me. Insofar as the Plaintiff is seeking to re-open the Proceedings and raise new questions about the condition of the Property in 2017 or now, it is not appropriate or permissible for the Plaintiff to now seek to re-agitate matters that were (or could have been) part of the hearing of the Proceedings and which were before Pilkington J in that context. The Defendants correctly rely on *Henderson v. Henderson* in this respect.

51. The 2021 Judgment is final and binding and the opportunity for raising any issues the Plaintiff wished to raise, including fire safety issues (as were indeed referenced in the Judgment) has passed. In any event, it is notable that the 2021 Judgement records issues concerning fire safety having been raised by the Defendants' agent in 2017 and this was part of the background addressed in that Judgment.

52. These conclusions are also supported by the terms of the 2021 Judgment itself which makes it plain that the option conferred by the 2015 Agreement was a simple one with no conditionality attached. It was for this reason that the Court rejected the relevance of the Defendants' complaints about non-compliance with the tenancy obligations to the validity of the option:

> **"***I also accept that the terms of the option agreement were in no way referable to the conduct of the parties with regard to their exercise of the tenancy. I can construe no term whereby all of the tenancy obligations must have been or should have been dealt with, as a condition precedent or otherwise, prior to the*

exercise of any option. It is not an express term and I can see no basis for construing it as an implied term" (¶100).

53. This is repeated later: "*I accept that the option is a standalone legal entitlement pursuant to the terms of the tenancy agreement; it did not require as a condition precedent or otherwise compliance with the remaining clauses of the lease*" (¶110).

54. The Court found that the terms of the 2015 Agreement were to be "*strictly construed*" (¶121) and that the option created was "*certainly succinct*" (¶97).

55. In short, there is no basis in the 2015 Agreement to make any aspect of the option, including the price payable for the exercise of the option, conditional on, or variable on the basis of, other factors. Any remediation works that may have been required in 2017 do not avail the Plaintiff. There is nothing in the 2015 Agreement which allows for the abatement of the purchase price on any such basis.

56. Insofar as the Plaintiff seeks to assert that certain matters were not disclosed to the High Court during the 2020 hearings, this point cannot advance the Plaintiff's position in this Motion. The Plaintiff sought to have his right to acquire the Property in accordance with the terms of the 2015 Agreement confirmed by the Court. The Court found that there was a valid exercise of an option to purchase the Property on 16 October 2017. The Court also found that this was a straightforward, succinct option.

57. Having prevailed in the High Court, it cannot avail the Plaintiff to now seek to suggest some relevant fact was concealed from the Court. In addition, the Court made final findings about the exercise of the option which were based on the interpretation of the 2015 Agreement and the communications from the Plaintiff and his solicitor. There is nothing in the Plaintiffs' affidavits which could justify any revisiting of these findings (if that is what is being attempted). That is no part of these Proceedings and can be no part of this Motion. The Plaintiff was the moving party and obtained an order akin (although not the same as) the order he sought. It is difficult to see how an allegation of non-disclosure by the Defendants can possibly assist the Plaintiff and the fire safety

issues in 2017 were adverted to in the Judgment, so the allegation of non-disclosure appears to be substantially if not entirely unfounded as well as being irrelevant.

58. In short, I see no merit to these points being raised by the Plaintiff now by way of defence to this Motion.

59. With regard to the second factual question, which is the Plaintiff's willingness and ability to complete the sale, there is no evidence before me of any attempt or intention by the Plaintiff to acquire the Property for the sum of €725,000. This is the only contract which Pilkington J. found to exist, and was yet to complete, and there is nothing in the Plaintiffs' affidavits or submissions which indicate any intention or attempt by him to pay that sum of money to acquire the Property.

60. On the contrary, the nature of the offers and proposals that have been put forward by the Plaintiff in the context of this Motion demonstrate that he is not willing to pay that sum of money to acquire the Property. The same conclusion may be drawn from the fact that he seeks to have various sums of money deducted from the purchase price of the Property, including sums that he alleges are required to ensure compliance with fire safety requirements. The offers, proposals and positions advanced by the Plaintiff are simply not in furtherance of the option which Pilkington J. found was exercised on 16 October 2017. On the contrary, the very fact that the Plaintiff seems to believe he has a right to deduct certain sums from the purchase price demonstrates that he has and had no intention of seeking to purchase the Property for the agreed sum of € 725,000 in accordance with the 2022 Order.

61. One of the deductions which the Plaintiff seeks to make to the purchase price reflects a claim for reimbursement of legal costs incurred in the Proceedings. The Defendants acknowledge the liability to discharge legal costs incurred by the Plaintiff, but require a breakdown of the sum claimed (some €197,000). The issue of legal costs is separate from and does not answer, the failure by the Plaintiff to complete the contract for the purchase of the Property. The Plaintiff remains entitled to pursue the recovery of legal costs which the Defendants were ordered to pay, but this does not alter the purchase price as found by the 2022 Order.

62. Another weakness in the Plaintiff's apparent attempt to show that he has attempted to complete the contract, is that the evidence he exhibits to his own affidavit – and indeed his own averments – do not support this stance. The documents he exhibits show attempts to reach different arrangements and put in place funding for different amounts and no commitment or serious attempt to purchase the Property for the sum of €725,000, which was the only option recognised in the 2021 Judgment and 2022 Order. It is also notable that the Plaintiff made a proposal, including in open Court, for the sale of the Property to a third party, which is a firm indication that his overarching objective is not the acquisition of the Property, but rather the recoupment of money, particularly his asserted legal costs.

63. In making these findings, I am not resolving any conflicts of fact on affidavit evidence, which would be impermissible in the absence of cross-examination. Rather, I rely on the uncontested evidence which demonstrates that there has been no attempt to tender the sum of €725,000 for the acquisition of the Property, a fact that was confirmed by the Plaintiff's former solicitor and is supported by the documentation advanced by the Plaintiff himself.

64. Having determined these factual matters, the next question is the legal basis of this Motion.

Defendants' Application to Vary or Dissolve the 2022 Order

65. The Defendants' Motion hinges on the power of this Court to vary or dissolve the 2022 Order.

66. The Defendants assert that the declaration made in the 2022 Order is equivalent to an order for specific performance and that the legal principles applicable to orders for specific performance can be relied upon to grant the relief sought by this Motion. It is important that no case was made that I have jurisdiction or grounds to dissolve or vary the 2022 Order save if and to the extent I find that the principles applicable to orders of specific performance apply here.

67. Reliance is placed on the power of the Court to discharge or vary an order of specific performance as set out in *Mount Kennett*.

68. The first point that must be made is that Pilkington J. did not make an order of specific performance. On the contrary, she specifically declined to make such an order based on her view that it was not "*appropriate*" to do so. The decision as to whether or not to make an equitable order of specific performance was one squarely within the discretion of Pilkington J. and that discretion was exercised by refusing to make such an order. The decision of the Court not to make an order of specific performance is one which cannot be ignored or recharacterised as if an order of specific performance was made.

69. Second, it is an important feature of the 2021 Judgment that the order of specific performance that was sought related to a contract for the purchase of the Property for the sum of €625,000. There was no application for an order of specific performance of a contract to buy the Property for €725,000 and it is readily apparent why such an order was not made: it was an order that was not sought by any party to the Proceedings.

70. The third point to note is that the effect of the order that was made was that it confirmed a past event, namely that the Plaintiff has exercised an option to purchase the Property. The Order does not purport to direct, police or supervise what happens thereafter. Neither the Plaintiff nor the Defendants were specifically ordered to complete the contract for the sale of the Property for the sum of €725,000. The Order was not expressly directed to the future, quite unlike an order for specific performance.

71. In these circumstances, this decision cannot now be treated as if it was an order for specific performance, contrary to the submissions made on the Defendants' behalf.

72. In assessing this matter, I have considered the judgment of Clarke J. in *Mount Kennett* on which the Defendant placed heavy emphasis. I consider it to be manifest from that judgment and the excerpt from *Spry* quoted by Clarke J. that the reason why a variation or discharge of an order of specific performance may be necessary is that the specific performance obligation imposed by the order would otherwise work an injustice. The

jurisdiction to amend or dissolve an order of specific performance hinges on the order being an equitable one and on the fact that, as *Spry* expressed it, "*Until an order of specific performance is dissolved or terminated in a material respect it must be complied with, and a failure to comply may constitute contempt of Court.*"

73. It is very important to distinguish these features of an order of specific performance from the 2022 Order. The declaration that was granted is not an equitable order, it is not an order that directs future compliance and it does not impose an apparent present risk of injustice on the parties. The jurisdiction considered in *Mount Kennett* is simply not exercisable here, and the justification for that jurisdiction is not engaged.

74. As against this, it is of course a matter of legitimate and readily understandable concern for the Defendants that the Plaintiff has failed to take steps to complete the contract, despite being called upon to do so. I note that the Defendants remain willing to complete the contract in accordance with the 2022 Order. The obstacle to that completion is the Plaintiff.

75. It is striking that, three years after the Order was made, there is no evidence before me that the Plaintiff has attempted to complete the contract in accordance with the 2022 Order or that he has any intention of seeking to do so and the Plaintiff's own evidence points in the opposite direction.

76. I also have sympathy with the Defendants' concerns to ensure they are not acting contrary to the Order if they now convey the Property to a third party or otherwise render it impossible for the Plaintiff to complete the purchase on the terms directed in the 2022 Order.

77. Nonetheless, these legitimate concerns cannot alter the nature of the 2022 Order or create a discretion that does not properly arise.

78. In reaching this finding, I would make the following observations.

79. First, I note that it would be plainly unjust if the Defendants (who Pilkington J. expressly found were in financial difficulties and needed to sell either their family home or the

Property) were obliged to continue to keep the Property for the benefit of the Plaintiff indefinitely, until the Plaintiff decides whether and when he wishes to complete the purchase. I do not believe the 2022 Order can be interpreted so as to require that outcome. Put simply, the 2022 Order does not address what may happen if the option exercised by the Plaintiff did not culminate in a completed contract, as has now occurred. Accordingly, the unfortunate situation in which the Defendants find themselves is not covered by the terms of the 2022 Order or by the issues and pleadings in these Proceedings.

80. Second, while I was not addressed on this point and do not therefore wish to attach undue weight to it in deference to the parties, I consider that any proposition that the option remains available to the Plaintiff to complete at any time of his choosing could have the effect of indefinitely preventing the disposal of the Property to any other party. This could well fall foul of the rule against perpetuities and cannot have been the intention or effect of the 2022 Order. The judgment of Carroll J in *Roadstone Dublin Limited v. McDonnell* (unrep. HC 6 November 2003) confirms that options are subject to that rule:

> *"It is not disputed that an option to purchase is subject to the rule against perpetuities . Since the exercise of this option is not limited to the perpetuity period it is void as offending against the rule. (c.f. London and South Western Railway Co. v. Gomm (1882 20 Ch. D.562)."*

81. Third, while this point was not the subject of submissions before me, and is not within the scope of the Proceedings or the 2022 Order, it appears to me that there would be good *prima facie* reasons to believe that the Plaintiff by his actions has repudiated the contract and the Defendants should no longer be bound by it.

82. Finally, if Pilkington J. had made an order of specific performance, I would consider it appropriate to discharge or vary that order given the intervening events. However, no such order was made, and neither the discretion nor the necessity to make an order of dissolution or variation arises.

83. The salient point is that the question of whether the Defendant is still constrained by an option which was validly exercised over six years ago and upheld as such in the 2021 Judgment was not a matter that was the subject of these Proceedings or the pleadings in this case, nor could it have been. It was not therefore addressed by the 2022 Order.

Conclusions

84. For the reasons set out above, I do not have the discretion to vary or dissolve the 2022 Order and must refuse the relief sought by this Motion.

85. This is not owing to any rejection of the merits of the Defendants' position as a matter of fact or of law, but rather owing to the finality of the 2022 Order and the fact that it is not and cannot be equated with an order of specific performance.

86. Given this fact, and despite my decision that it is not appropriate to grant the specific reliefs sought by this Motion, my provisional view is that this is a case in which no order as to costs should be made.

87. If the parties wish to contend for a different form of order as to costs, they have liberty to file short written submissions (not exceeding 1,500 words each) on or before 4 February 2025 and the matter can then be listed before me at 10.30am on 17 February 2025 for oral submissions to be made. The parties have liberty to inform the Registrar in the event that this listing is not required.

88. I would invite the parties to correspond with each other before 27 January 2025 to confirm whether they do intend to file written submissions.