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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	12/12/2024

IN HIS MAJESTY'S COURT OF APPEAL FOR NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND, KING'S BENCH DIVISION (COMMERCIAL HUB)

Between:

THE GOVERNOR & COMPANY OF THE BANK OF IRELAND

Appellant

and

JOHN CONWAY

Respondent

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Before: McCloskey LJ, Colton J and McBride J

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Craig Dunford KC (instructed by DWF (Northern Ireland) LLP) for the Appellant
Patrick Lyttle KC and Richard Shields (instructed by Shean Dickson Merrick Solicitors) for the Respondent

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McCLOSKEY LJ ***(delivering the judgment of the court)***

Introduction

[1] In this disturbingly elderly case, now of some 14 years vintage, this court is seized of an interlocutory appeal against an order of the High Court. The order under challenge was itself made on appeal, the underlying order having been made by the High Court Master. By his order, made upon the application of the Plaintiff, the Bank of Ireland (the "Bank"), the Master had struck out certain parts of the defence and counterclaim of John Conway (the "defendant"). On appeal to the High Court the deputy judge reversed certain aspects of the Master's order. The Bank being dissatisfied with this outcome, the latter order is the subject of further appeal to this court.

The bank's claim

[2] The Bank initiated its claim against the defendant by a specially indorsed Writ of Summons issued on 23 February 2010 (almost 15 years ago). The Bank's claim is

based on a deed of guarantee and indemnity dated 5 November 2008 (the "guarantee"). It is pleaded that by the guarantee the defendant agreed to pay to the Bank on demand all sums of money then or at any time thereafter due to the Bank from a commercial entity which we shall describe as the "debtor", subject to a ceiling of £200,000. The defendant was at the material time a director and sole shareholder of the debtor. The Bank's case is that pursuant to the guarantee the defendant is liable to make a payment of approximately £128,000 plus interest.

Some context

[3] An amended defence and counterclaim (the "defendant's pleading") was served on 12 March 2014 (almost 11 years ago). It is appropriate to highlight this date because the Bank's strike out application to the Master was not made until almost seven years later. As recorded by the deputy judge at para [23] of his judgment, at first instance Mr Lyttle KC submitted that the strike out application was opportunistic as it materialised only after an application by the defendant for further specific discovery (which evidently stands adjourned) had been made. The close proximity of these two events is indeed striking. Equally notable is the Bank's manifest failure to prosecute this claim with anything approaching reasonable expedition.

[4] There is one further, and disturbing, feature of the context which the judge noted at para [21]. An investigative television programme broadcast in November 2015 contained, inter alia, the defendant's recording of Bank employees on his premises apparently acting in "… an unscrupulous and potentially dishonest or even fraudulent manner in relation to the collection of book debts." As recorded by the judge, Mr Dunford KC on behalf of the Bank conceded that this was "despicable" behaviour.

The defendant's amended pleading

[5] The following elements of the defendant's pleading were struck out by the Master:

(a) The defendant denies that he entered into any personal guarantee with the Bank.

(b) Or alternatively, the defendant contends that any such guarantee is null and void for a series of reasons.

(c) The Bank negligently, in breach of contract and in breach of its fiduciary duty to the defendant and to the debtor failed to take all necessary and/or reasonable steps to collect the book debts owing to the debtor in accordance with a charge which the Bank held over the debtor's debts.

(d) The Bank, its servants and agents, acted unlawfully and fraudulently in its recovery of the said book debts and in breach of the fiduciary duty owed by them to the debtor, the defendant and all creditors of the debtor.

(e) The Bank, negligently, in breach of contract and in breach of its fiduciary duty to the defendant, attempted to create and/or increase his indebtedness to the Bank.

(f) By reason of its reckless, unlawful, fraudulent and mala fides conduct the Bank is estopped from enforcing the guarantee.

(g) Further, the guarantee is discharged and vitiated by such conduct and it would be unconscionable for the Bank to attempt to rely upon it.

(h) The taking by the Bank of payments in the amount of £149,000 from the "Invoice Discounting Agreement" was unlawful and was not permitted by the terms of the "Commercial Finance Agreement" or by the terms and conditions of the facility letters entered into between the debtor and the Bank.

Pleading elements (a)–(g) belong to the defence, whereas element (h) is in the Counterclaim compartment. The total amount of the counterclaim is just under £3million.

Before the Queen's Bench Master

[6] The Bank's interlocutory application to the Queen's Bench Master sought the following relief pursuant to Order 18, Rule 19 RCJ: an order striking out paras 4–11 and 12(a)–(g) of the defendant's pleading on the ground that they disclose no reasonable defence and/or are scandalous, frivolous or vexatious and/or no prejudice, embarrass or delay the fair trial of the action and/or are otherwise an abuse of the process of the court.

[7] The passages in the defendant's pleading struck out by order of the Master correspond to elements (b)–(g) inclusive of the defendant's pleading, tabulated above. Element (a) did not feature in the summons. The Bank also sought the same relief in respect of element (h), corresponding to paragraph 28 of the pleading. The Bank's application to the Master succeeded in full. The Order of the Master is reproduced at Appendix 1 to this judgment.

In the High Court

[8] In his appeal to the High Court the defendant challenged the whole of the order. The outcome was the reinstatement of elements (a)–(h) inclusive (tabulated above) of his pleading. The Bank now appeals to this court with the leave of the deputy judge, as required by section 35(2)(g) of the Judicature (NI) Act 1978.

[9] In his judgment the deputy judge expressed himself satisfied that he was entitled to take into account the following three documents as they were incorporated within the pleadings:

(a) The "Commercial Finance Agreement."

(b) The "Charge on Book Debts."

(c) The "Deed of Guarantee and Indemnity."

Next, he noted that the defendant was a director and the sole shareholder of the debtor. By the mechanism of document (a) (the "CFA") the Bank purchased the commercial debts of the debtor. Simultaneously, the parties executed document (b) (the "CBD") by which the debtor charged to the Bank, by way of fixed equitable charge, the debts purchased by the Bank and future debts. Pursuant to document (c), executed some six years later (the "Guarantee") the defendant assumed the status of guarantor to the Bank of a £200,000 term loan provided by the Bank to the debtor.

[10] The deputy judge decided as follows:

(a)

> "[25] I am not satisfied that paragraphs 3 and 4(a) should be struck out. While it may be unlikely that the defendant will be able to satisfy a court of the matters pleaded, it seems to me that there are evidential factors which, if proved, could persuade a court that, notwithstanding his handwritten addition to the Guarantee, nevertheless he should not be bound by it. Therefore, I am not persuaded, as I have to be at this stage, that the allegations in paragraph 3 and paragraph 4(a) are "unarguable or almost uncontestably bad." In the circumstances I allow the defendant's appeal in relation to paragraphs 3 and 4(a)."

These correspond to elements (a) and (b) tabulated in paragraph [3] above.

(ii) The defendant's appeal relating to paragraph 4(b)(g) of its pleading was dismissed.

(iii) The defendant's appeal in respect of paragraph 9(a)–(j) of its pleading (corresponding to elements (c) and (d) tabulated above) was allowed.

(iv) Ditto paragraph 11(c) and (d) (corresponding to element (e) tabulated above).

(v) Ditto the defendant's appeal in respect of paragraph 12(a)–(g) (elements (f) and (g) tabulated above).

(vi) Ditto paragraph 28 of the defendant's pleading (element (h) tabulated above).

Those aspects of the defendant's appeal to the High Court which were unsuccessful are not before this court and, therefore, are not addressed above.

[11] We reproduce here the following table helpfully compiled by Mr Dunford:

Pleading paragraph challenged	**Master's Order result**	**The Judge's result**	**Raised in this appeal by Bank**
*Paragraph 3	Struck out	Re-instated	Yes: the Bank supports the Master's Order
*Paragraph 4	In paragraph 4 the words "If, which is denied" and "is" (replacing the word "is" with the word "being") and further in paragraph 4, deleting sub-paragraphs (b), (c), (d), (e), (f) and (g)	Sub-paragraph 4(a) re-instated: sub-paragraphs 4(b)-(g) inclusive struck out, as per Master's Order	Yes: the Bank says the Master's Order in respect of sub-paragraph 4(a) was correct, and seeks its restoration.
Paragraph 5	Struck out	Struck out, as per Master's Order	
Paragraph 6	Struck out	Struck out, as per Master's Order	
Paragraph 7	Struck out	Struck out, as per Master's Order	
Paragraph 8	Struck out	Struck out, as per Master's Order	
*Paragraph 9	Struck out	Allegations of breach of contract and breach of fiduciary duty struck out. Plea of negligence permitted "re-cast", with	Yes: the Bank submits that the Judge was wrong to permit a "re-cast" of a plea not actually made.

		particulars (a)-(j) to remain	
Paragraph 10	Struck out	Struck out, as per Master's Order	
*Paragraph 11	In paragraph 11 the words "and in breach of its fiduciary duty to" and sub-paragraphs (c) and (d)	Upheld Master's strike-out regarding breach of fiduciary duty: re-instated sub-paragraphs c and d	Yes: the Bank seeks strike out of all of paragraph 11
*Paragraph 12 a-g	In paragraph 12, sub paragraphs (a), (b), (c), (d), (e), (f) and (g)	Re-instated all sub-paragraphs	Yes
*Paragraph 28	Struck out	Re-instated, on the ground that the Bank's Global Markets T&Cs were not within the pleadings	Yes; the Bank relies on the Weatherup Judgment (as defined)
Paragraph 31	Struck out	Struck out, as per Master's Order	

The paragraphs of the defendant's pleading engaged in this appeal are 3, 4, 9, 11, 12 and 28.

Analysis

[12] There is a consistent theme, of unmistakable materiality, in those conclusions of the deputy judge favouring the defendant. This is discernable particularly in paragraphs 25, 60, 65, 69 and 73. It is perhaps most clearly expressed at para [60]:

> "It may turn out that on the facts of this case the Bank owed no duty to creditors, but I cannot say at this strike out stage of the proceedings that facts subsequently to be proved at trial could not establish a duty owed by the Bank to creditors, including the defendant."

Throughout the relevant passages of his judgment, the deputy judge was clearly alert to the fundamental distinction between (a) mere allegations in pleadings and (b) evidence to be adduced at the trial which could give rise to certain findings of fact, in turn giving rise to the trial court's application of the relevant legal principles, followed

by its conclusions. Furthermore, the judge made no error in his self – direction (and the contrary was not argued).

[13] The judge, in the Bank's favour, was equally alert to allegations in the defendant's pleading which, even if crystallising into findings of fact favourable to him, could not as a matter of law establish the particular cause of action advanced: this is clearly illustrated in paragraphs 33, 41-54, 55–57, 58–59, 62–63 and 64–65.

Governing principles

[14] The Bank's interlocutory application engaged the principle rehearsed in *Magill v Chief Constable of the Police Service of Northern Ireland* [2022] NICA 49, at para [7]:

> "In summary, the court (a) must take the plaintiff's case at its zenith and (b) assume that all of the factual allegations pleaded are correct and will be established at trial. As a corollary of these principles, applications under Order 18 rule 12 of the 1980 Rules are determined exclusively on the basis of the plaintiff's statement of claim. It is not appropriate to receive any evidence in this exercise. Based on decisions such as that of this court in *O'Dwyer v Chief Constable of the RUC* [1997] NI 403 the following principles apply:
>
> (i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.
>
> (ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.
>
> (iii) In approaching such applications, the court should be cautious in any developing field of law; thus in *Lonrho plc v Tebbit* (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that raised matters of State policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:
>
> > 'In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it

> would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-by-case basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the Statement of Claim.'

(iv) Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted.

(v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.

(vi) So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. Thus, in *E (A Minor) v Dorset CC* [1995] 2 AC 633 Sir Thomas Bingham stated at p--:

> 'This means that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can properly be persuaded that no matter what (within the bounds of the pleading) the actual facts of the claim it is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached.'

We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim in limine.

[15] Bearing in mind that this is an interlocutory appeal, there is a further governing principle, of some substance, to be reckoned. In short, the present type of appeal engages the well settled principle that the appellant must normally demonstrate a mistake of law or a disregard of principle on the part of the court below: see The Supreme Court Practice 1999, Vol 1, para 59/1/42. This principle is routinely applied in interlocutory appeals to this court.

The battle lines drawn

[16] On behalf of the Bank, the oral submissions of Mr Dunford faithfully reflected his full and clear skeleton argument, which we need not reproduce. His submissions had a notable forensic element which the court found to be of assistance (see particularly para [11] above).

[17] In their written submissions on behalf of the defendant Mr Lyttle KC and Mr Shields, of counsel, echoed what we have highlighted in para [12] above. They further pointed out that the evidence to be given by the defendant at the trial will include, inter alia, the following assertions:

(a) The Bank wrote off debts due to Meteor and/or allowed debts to be settled for substantial reductions without reasonable cause.

(b) The Bank edited Meteor's account histories.

(c) The Bank changed historic notes in relation to customer payments in order to make a false insurance claim.

(d) The Bank asked the Meteor's customers to make false reports about goods supplied to them.

(e) That when Meteor entered into liquidation there was a substantial surplus of good and collectable book debt beyond any sums owed to the Bank.

No objection was raised to this court considering the foregoing.

Our conclusions

[18] It is not for this court in the exercise of its circumscribed function to make any judgement about any of the foregoing assertions Rather, it suffices to recognize that the defendant's evidence at trial could include the foregoing and, further, could be accepted by the trial judge, in whole or in part, giving rise to findings of fact in his favour which, in turn, could establish or contribute to establishing one or more of his causes of action as pleading.

[19] We can also see force in the submission on behalf of the defendant that the Bank's appeal, impermissibly, involves arguments about "evidence." The fundamental flaw thus exposed is that at this stage of these proceedings there is no evidence and, by corollary, no findings of fact, to this we would add that there are no agreed material facts. Other aspects of the Bank's arguments entail attacks on the factual strength of certain elements of the defendant's pleading, again erroneously as a matter of principle.

[20] This court must also take into account, particularly in a complex commercial action of this kind, the following cautionary words in *McBrearty v AIB Group* [2012] NIQB 12, at para [35]:

> "However, as the evidence of all three parties makes clear, these documents do not tell the complete story. That they do not do so is, I consider, simply a reflection of the real world. The documents must be considered in the light of the various claims and counterclaims, allegations and counter allegations, which the parties make concerning the events to which they are related."

And para [46]:

> "If one thing emerges clearly from the extensive case law belonging to this field, it is that the common law, in its wisdom, has at no time formulated any absolute bar to the recovery of damages against the framework of the findings rehearsed above. Furthermore, as a result of one of its characteristic trends, namely the evolution of new and modified principles designed to provide just solutions to difficult cases, the common law permits the Plaintiffs' case to be viewed in different ways. The first is through the prism of a composite contract. The second is through the lens of a collateral warranty. The third involves applying the ingredients of a negligent misrepresentation."

[21] The weakest aspect of the Bank's strike out application, by some measure, relates to its attack on para 4(a) of the defendant's pleading:

> "The defendant entered into the said agreement without the benefit of any independent legal advice from a solicitor admitted to act as a solicitor of the Supreme Court of Judicature of Northern Ireland."

The argument addressed to this court was founded on *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773, para [20]:

> "Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. **In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do.** But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case."

We have highlighted the sentence on which Mr Dunford relied. We consider that his argument suffers from the incurable infirmity of neglecting the two preceding sentences and, to a lesser extent, the remainder of the paragraph. Properly analysed, para [20] of *Etridge* is positively antithetical to the Bank's challenge to this discrete aspect of the defendant's pleading, having regard to its emphasis on "the evidence" and "all the circumstances" in any given case.

[22] We further take into account para 18/19/2 of The Supreme Court Practice, Volume 1, with reference to Order 18, Rule 19:

> "The rule also empowers the court to amend any pleading or endorsement or any matter therein. If a statement of claim does not disclose a cause of action relied on, an opportunity to amend may be given, though the formulation of the amendment is not before the court …
>
> But unless there is reason to suppose that the case can be improved by amendment, leave will not be given ….
>
> Where the statement of claim presented discloses no cause of action because some material averment has been omitted, the court, whilst striking out the pleading, will not dismiss the action, but give the plaintiff leave to amend …."

The deputy judge exercised his power of amendment in respect of para 9 of the defendant's pleading: see paras [10]–[11] above. While this step has not yet been taken, this is presumably by virtue of the further appeal to this court. We can identify

no merit in Mr Dunford's submission that the judge was wrong to permit a recast of a plea not actually made, given the express terms of para 9 of the defendant's pleading ("Negligently, in breach of its duty to the defendant …").

[23] The effect of the governing principles is that in its appeal to this court the onus rests on the Bank to establish that the contentious aspects of the defendant's pleading could not conceivably in any realistically foreseeable trial circumstances succeed and are incurably vitiated in consequence. This entails a hurdle of formidable dimensions. Giving effect to the preceding analysis and applying the principles engaged, we conclude that no material error in the judgment of the deputy judge has been demonstrated.

[24] The court's exchanges with Mr Dunford identified the potential, in principle, for certain further amendments of the defendant's pleading. This is a matter upon which the defendant's legal representatives will undoubtedly reflect. Given the lamentable delays in this litigation we do not wish to encourage further interlocutory sparring. To this end we grant leave to the defendant to serve a composite amended defence and counterclaim within 28 days of the order of this court. We uphold the order of the deputy judge and modify it to this specific extent.

[25] We wish to add that great care should be exercised in admitting affidavit evidence in Order 18, Rule 19 RCJ applications. Particular alertness is required in those cases where more than one of the listed grounds is invoked in the summons, while the invocation of all grounds (as here) should trigger the notional red alert sign. The prohibition on receipt of affidavit evidence must not be circumvented by dubious pleading devices. Furthermore, when affidavit evidence is properly admitted, averments which (again, as here) stray into the impermissible territory of sworn argument should be struck out, with appropriate costs orders to follow.

Costs

[26] The effect of our decision is that the Bank had no justification for bringing this appeal. In contrast, the outcome of the defendant's appeal to the Master was the mixed one of partial, but significant, success for the defendant. In these circumstances we consider that the defendant's costs of the appeal to the deputy judge should be in the cause. The appropriate order regarding the further appeal to this court, taking into account the defendant's outright victory and having regard to para [25] above, is that the defendant is entitled to his costs.

APPENDIX 1: Order of Master Bell

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEENS BENCH DIVISION

BEFORE MASTER BELL

on Thursday the 2nd day of September 2021

Between

THE GOVENOR AND COMPANY OF THE BANK OF IRELAND
Plaintiff

and

JOHN CONWAY
Defendant

UPON the plaintiff having made an application under Order 18 Rule 19 that paragraphs 4-11 and 12(a)-(g) of the Re-amended defence be struck out on that basis that they disclose no reasonable defence

AND UPON considering the oral submissions of counsel appearing on behalf of the plaintiff and the defendant

AND UPON considering the various written submissions submitted by counsel appearing on behalf of the plaintiff and the defendant (including a written submission filed by the plaintiff after the conclusion of the hearing)

AND UPON considering the defence, together with the documents referred to in the defence which, based on the authority of *Day v William Hill (Park Lane) LD* [1949] 1 KB 632, thereby become part of the pleadings

AND UPON considering the authorities of *Lonrho* v *Fayed* [1992] 1 AC 448, *O'Dwyer* v *Chief Constable* [1997] NI 403 (CA), *Rush v Police Service of Northern Ireland and the Secretary of State* [2011] NIQB 28 as to the exercise of the power to strike out pleadings

AND UPON concluding that, in the light of the authorities in *Governor and Company of the Bank of Scotland v A Ltd and others* [2001] EWCA Civ 52, *Kotonou v National Westminster Bank plc* [2010] EWHC 1659 (Ch), and *Bailey and another v Barclays Bank plc* [2014] EWHC 2882 (QB) there was no fiduciary relationship between the plaintiff and the defendant

AND UPON concluding that a defence of economic duress was unsupported by the authorities of *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 and *Pau On v Lau You Long* [1980] AC 614 and the pleaded facts

AND UPON considering the Commercial Finance Agreement entered into by the plaintiff and Meteor Controls International Ltd

THE COURT STRUCK OUT the following portions of the defendant's defence as being "obviously and almost incontestably bad":

(i) Paragraph 3
(ii) In paragraph 4 the words "If, which is denied" and "is" (replacing the word "is" with the word "being")
(iii) In paragraph 4, sub-paragraphs (b), (c), (d), (e), (f) and (g)
(iv) Paragraph 5
(v) Paragraph 6
(vi) Paragraph 7
(vii) Paragraph 8
(viii) Paragraph 9
(ix) Paragraph 10
(x) In paragraph 11 the words "and in breach of its fiduciary duty to" and sub-paragraphs (c) and (d)
(xi) In paragraph 12, sub paragraphs (a), (b), (c), (d), (e), (f) and (g)
(xii) Paragraph 28
(xiii) Paragraph 31

AND THE COURT AWARDED the costs of this application to the plaintiff

AND THE COURT CERTIFIED for counsel.

Christy Byers
Proper Officer
Filed Date 20 September 2021

APPENDIX 2: Agreed Chronology

Date	Event
16 July 2002	Commercial Finance Agreement between Plaintiff and Meteor Controls (International) Limited (dissolved) ("Meteor")
2004 – 2008	Plaintiff sells FX Forward Contracts to Meteor (see paragraph 19 of the (Re-)amended Defence and Counterclaim)
5 November 2008	(Disputed) Guarantee and Indemnity by defendant
23 June 2009	Meteor enters Liquidation
23 February 2010	Writ issued in this action
6 September 2013	Meteor (acting by its Liquidator) issued a Writ (13/91477) against the Plaintiff in respect of the same subject matter as these proceedings. The Liquidator subsequently assigned that action to the defendant.
12 March 2014	Re-amended Defence and Counterclaim served (entitled 'Amended Defence and Counterclaim')
5 October 2020	Specific Discovery Summons issued by the defendant
20 November 2020	Instant Summons issued by the Plaintiff
14 June 2021	Listed before Master Bell (part heard)
26 July 2021	Hearing completed before Master Bell
2 September 2021	Master Bell gives Judgment
23 September 2021	Defendant appealed Judgment of Master Bell
3 May 2024	Hearing before Simpson J
31 May 2024	Judgment given by Simpson J
18 June 2024	Plaintiff appealed Judgment of Simpson J