APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL

Record Number: 2022/96
High Court Record Number: 2020/7879P

Whelan J.

Donnelly J.

Butler J.

BETWEEN/

MARTIN TUCKER

APPELLANT

-AND-

HAVBELL DESIGNATED ACTIVITY COMPANY

RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 8th day of February 2023

Introduction

1. This is an appeal from a judgment of the High Court (Allen J., [2022] IEHC 15) dismissing the appellant's proceedings as frivolous and vexatious and bound to fail; vacating the *lites pendentes* registered by the appellant in the proceedings (and in earlier proceedings) and making an *Isaac Wunder* Order restraining the appellant from issuing further proceedings in connection with the property the subject of these proceedings without the leave of the President of the High Court.

2. As is often the case when orders of this nature are made, there is a protracted and complex history of litigation between the parties. Although he had legal representation initially and at some of the earlier stages of this litigation, the appellant is now and has been for some time, a litigant-in-person. It is a striking, although unfortunately not unusual, feature of this litigation that the respondent has been entirely successful in the proceedings which it initiated whereas the appellant has, to date, been entirely unsuccessful both in the appeals taken by him in the respondent's proceedings and in the various proceedings which he himself has instituted, some of which remain outstanding.

3. At the heart of the dispute between the parties lies a residential premises *("the property"*) in respect of which the respondent obtained – and executed – an order for possession but to which the appellant returned and took up residence again. The property was the security for a loan made by the respondent's predecessor to the appellant and the appellant's former partner, which loan was in default at the time the respondent first instituted proceedings in 2017. Clearly, the existence of continuing litigation in respect of these premises facilitated the appellant remaining *in situ* notwithstanding the fact that the courts have conclusively determined that he is not legally entitled to be there.

4. The notice of appeal filed by the appellant raises a single ground of appeal against the various orders made by the High Court, namely that the appellant was not afforded a fair hearing by the High Court. The basis for this complaint seems to be that the respondent's application to strike out the proceedings was heard and determined before various motions which had been issued by the appellant seeking discovery and other interlocutory relief. However, at the hearing of this application before the High Court, the appellant did not object to the respondent's motion being heard first and when presenting his appeal the appellant did not make any argument in support of this ground. If this were a live issue, I would have

no hesitation in finding that Allen J. was correct to deal with the respondent's motion – which sought the striking out or dismissal of the appellant's entire case – before dealing with discrete applications made by the appellant in the proceedings. It would be a waste of court time and would incur unnecessary legal costs to deal with pre-trial applications made in proceedings if those proceedings are not going to be permitted to continue. Therefore, it makes sense to decide that fundamental issue first and to move on to the other applications only if the proceedings remain extant.

5. Instead of addressing his Notice of Appeal, the appellant conducted a paragraph by paragraph critique of the High Court judgment raising a multitude of issues which were not set out in the Notice of Appeal and only some of which were ventilated in the appellant's affidavits. However, the court allowed the appellant considerable latitude in this regard, cognisant of the fact that he is a litigant-in-person appearing against a commercial entity which had the benefit of experienced, professional legal representation. Nonetheless, even making allowances for the appellant's lack of legal expertise, many of the issues he sought to raise were ones which were not open to him to raise on this appeal as they were or should have been raised by him in the earlier proceedings taken against him by the respondent, the outcome of which he clearly does not accept.

Procedural Background

6. I do not propose to set out in detail the entire of the history of the litigation between these parties as this has been done very comprehensively by the High Court judge in the judgment under appeal. It is however necessary to give an overview of this history in order to understand the circumstances in which the respondent brought the motion on foot of which the orders under appeal were made.

7. In 2003 the respondent's predecessor lent money to the appellant and his then partner which was secured by way of mortgage and charge on the property. The property is a residential premises in which the appellant and his partner were living at the time. The mortgage was apparently an endowment mortgage and was by way of re-mortgage rather than being an initial mortgage to purchase the property. The loan was not repaid and in 2015 the loan and its related security - along with other similar loans - were transferred to the respondent. Amongst the issues the appellant now seeks to raise are questions concerning the validity of this transfer and of its registration in the Registry of Deeds. The last repayment on the loan was made prior to this sale in 2015.

8. In 2017 the respondent instituted Circuit Court proceedings against the appellant and his former partner seeking an order for possession of the secured property. Although the appellant, through his lawyers, sought to adjourn the application an order for possession was granted by the County Registrar on 10th May, 2018. By this stage the appellant's relationship with his former partner had broken down, she was no longer residing in the property and consented to the making of the order. The appellant appealed the County Registrar's order to the Circuit Court. This appeal was unsuccessful and was struck out by Linnane J. who affirmed the order for possession on 25th June, 2018. Thereafter the appellant sought to appeal to the High Court. An initial application to the Master of the High Court for an extension of time to appeal the order of the County Registrar was struck out in November 2018 on the basis that that order had been superseded by the order of the Circuit Court judge made on appeal. The appellant then sought an extension of time to appeal the order of the Circuit Court judge. This application was refused by Cross J. on 25th February, 2019. The appellant then purported to appeal the order of Cross J. to the Court of Appeal, which appeal was rejected on the basis of a lack of jurisdiction (pursuant to s.39 of the Courts of Justice Act 1936). Finally, the appellant applied for leave to appeal to the Supreme Court which

was refused in a determination dated 16th October, 2019. Thus, the appellant conclusively exhausted all possibilities open to him to appeal the order for possession initially made by the County Registrar on 10th May, 2018 and affirmed by the Circuit Court on 25th June, 2018.

9. Subsequent to the decision of Cross J., the respondent set about executing the order for possession and did so on 21st March, 2019 pursuant to an execution order issued by the Sheriff on 13th August, 2018. Despite the fact that the appellant left the property and the respondent changed the locks, the appellant re-entered the property in May 2019 without notice to or the consent of the respondent. This re-entry was undoubtedly unlawful and the respondent claims that it was also forcible. The appellant claims that the property was left unsecured and he simply decided to move back in. As the appellant refused to vacate the property the respondent issued a second set of Circuit Court proceedings on 8th July, 2019. These were equity proceedings seeking an injunction to restrain the appellant's trespass. That injunction was granted by Linnane J. on 18th July, 2019 subject to a stay which reflected an undertaking given by the appellant to the court that he would vacate the property by the 25th July, 2019.

10. Needless to say, the appellant did not vacate the property and instead applied, unsuccessfully, for the stay to be extended and then brought an appeal against the Circuit Court order which of course encompassed the undertaking which he had himself given. That appeal was ultimately rejected by the High Court, Eagar J. on 13th January, 2020. Eagar J. required the appellant to vacate the property on that date.

11. In the intervening period the respondent issued a motion to attach and commit the applicant for breach of Linnane J.'s order on 22nd August, 2019. For various reasons, including settlement negotiations between the parties, that application was not pursued. A second similar application to attach and commit the appellant was issued and ultimately

allowed by the Circuit Court (O'Connor J.) on 20th May, 2021 although the gardaí were unable to execute the attachment order when they attempted to do so on the 2nd June, 2021.

12. As was the case with the possession proceedings, the trespass proceedings were definitively determined against the appellant by 13th January, 2020. Notwithstanding this, the appellant purported to issue motions in both sets of Circuit Court proceedings on 12th March, 2021 seeking to vacate the relevant orders. Unsurprisingly, these motions were not successful and relief was refused on 4th May, 2021. A pattern emerges from this account – after an order is made against him not only does the appellant exhaust the avenues of appeal open to him (and some which are not), he singularly does not comply with the orders themselves.

13. Shortly after the Circuit Court granted the injunction against the applicant in the equity proceedings, he issued his first set of High Court proceedings against the respondent on 15th August, 2019. These proceedings sought declarations as to the appellant's entitlement to ownership and possession of the property and orders preventing the respondent from re-taking possession. Manifestly, they deal with the same subject matter as the possession proceedings issued by the respondent in 2017. On the same date the appellant registered a *lis pendens*.

14. A number of months after this, the appellant initiated settlement discussions with the respondent in December 2019. These discussions ultimately led to a settlement agreement the existence and alleged breach of which forms the basis for much of the relief sought in the appellant's current proceedings. Under the settlement agreement the appellant agreed to pay the respondent €310,000 in full and final discharge of the debt. Originally this payment was to be made by 28th February, 2020. In addition, the appellant agreed to withdraw his then-existing High Court proceedings and his outstanding appeals in the respondent's Circuit

Court proceedings. The respondent agreed to withdraw the 2019 Circuit Court proceedings (*i.e.* the equity proceedings in which there was an outstanding application for attachment and committal). Both sides were due to withdraw the specified proceedings by 20th February, 2020. The appellant did withdraw his High Court proceedings but because the settlement agreement had not been fully executed the respondent did not withdraw its proceedings.

15. As will be recalled, the original loan was one made jointly to the appellant and his then partner who had also been a defendant to the possession proceedings. The settlement agreement was one which the respondent required to be executed by both debtors. Although the appellant signed the settlement agreement on 20th February, 2020, his former partner did not do so until 18th March, 2020. Therefore, she had not agreed to its terms by the date on which it was envisaged the specified legal proceedings would be withdrawn.

16. As it happens, it appears the appellant was in breach of other terms of the agreement - although this seems not to have been known to the respondent at the time and, therefore, did not form part of the reasons for which the Circuit Court proceedings were not withdrawn by the respondent. Under Clause 4 of the settlement agreement the appellant made a number of representations and warranties some of which, it transpires, were false. The appellant represented that there were no other proceedings in being or threatened against him when in fact he was being sued by another financial institution in proceedings which had been instituted in 2018. His statement that he had not initiated a debt relief notice process or appointed a Personal Insolvency Practitioner may have been true at the time he signed the agreement in February, 2020 but was no longer so by the extended settlement date of 30th June, 2020. Further, in a schedule of conditions attached to the settlement agreement the appellant agreed to comply with the respondent's money laundering requirements and to provide "*full documentary evidence to the [respondent's] satisfaction of the source of the*

settlement payment". Although the appellant claims at various times to have had funding in place to pay the agreed settlement sum, he did not provide full documentary evidence of the source of this funding to the respondent.

17. The settlement date for the payment under the agreement was, by consent, extended to 30th June, 2020. In the course of exchanges between the parties before that date, the appellant sought confirmation that the order for possession had been vacated or set aside on the basis that his funder required proof of this. However, the settlement agreement did not in its terms require the respondent to vacate any order made in the possession proceedings and consequently that confirmation was never given.

18. Prior to the revised settlement date, the respondent was advised on 24th June, 2020 that a Personal Insolvency Practitioner had been appointed on behalf of the appellant. An application to court for a protective certificate under the Personal Insolvency Act, 2012 was moved on behalf of the appellant on 30th June, 2020 (i.e. on the settlement date). The appellant's prescribed financial statement showed that he had debts in excess of €1.5m. In light of this level of debt, the appellant's representation that he would be in a position to secure funding to pay the respondent €310,000 seems, at best, unrealistic. The personal insolvency arrangement proposal made in respect of the respondent's debt - which at the time stood at approximately €400,000 - was payment of the sum of €250,000. The personal insolvency arrangement was rejected by all of the appellant's creditors in October, 2020. By this point, the settlement between the parties had clearly broken down.

19. The appellant responded to these events by issuing a second set of High Court plenary proceedings in November 2020. These partially duplicate those which had been withdrawn as part of the terms of settlement and again assert the appellant's entitlement to ownership and possession of the property. The appellant also registered a second *lis pendens* in January

2021. These proceedings and the related *lites pendentes* were the subject of the respondent's application to strike out and vacate and, consequently, are the subject of this appeal. (The first *lis pendens* does not appear to have been withdrawn and presumably the respondent did not make any application in relation to it because of the existence of the protective certificate.) The appellant has issued a motion for discovery and a motion seeking to join various persons as co-defendants to the proceedings (notably, the persons whom he seeks to join include the solicitors for both the respondent and for his former partner). These motions were adjourned pending the outcome of the respondent's application.

20. As noted above, the appellant purported to issue Circuit Court applications seeking to vacate the final orders which had been made in both the possession and the equity proceedings. The respondent re-issued the motion for attachment and committal of the plaintiff. On 20th May, 2021 Judge O'Connor granted an order of attachment against the appellant directing An Garda Síochána to arrest him and to bring him before the court. This order was appealed – apparently unsuccessfully - to the High Court (Hyland J). When the appellant was brought before the Circuit Court on the 18th June, 2021 he gave an undertaking to vacate the premises before the return date on the 18th June, 2021.

21. On 11th October, 2021 the appellant sought and was refused leave to apply for judicial review of the Circuit Court order in the possession proceedings (Meenan J.). An appeal against this refusal to the Court of Appeal was also unsuccessful (Noonan J. [2022] IECA 32). Although the appellant was clearly out of time in 2021 to seek judicial review of an order made in 2018, Noonan J. considered the substantive allegation, namely that the respondent had not acquired proper title to the appellant's mortgage deed and loan, and rejected it as not going to the validity of the Circuit Court order because these issues were not raised in the possession proceedings before the order was made. Similarly, Noonan J.

regarded the other arguments made by the appellant (which overlap with those made in this case) as being ones which, if they were of any substance, could have been made to the trial court. Other arguments made were dismissed as not going to the jurisdiction of the Circuit Court to make the impugned orders.

22. Separate to the applications, appeals and challenges brought by the appellant directly against the Circuit Court orders, there are a number of other proceedings relating to the property in which the appellant is involved although not all of these cases involve the respondent. The court was not provided with direct evidence of these proceedings but they are mentioned in the various affidavits sworn for the purposes of this application and, indeed, were addressed by the appellant in the course of his oral submissions. Firstly, in April, 2021 the appellant issued title proceedings against the Registrar of Deeds apparently asserting the invalid or incomplete registration of the transfer of his mortgage to the respondent. Surprisingly, the respondent is not a party to those proceedings and as of the date of the appeal hearing in November 2022 had not been put on notice of them. Secondly, the appellant's wife who has been residing with him in the property issued proceedings against the respondent in 2022. These proceedings were dismissed with costs against that plaintiff. Finally, the court was informed that the appellant has made an application to the President of the High Court pursuant to the terms of the *Isaac Wunder* order for leave to issue fraud proceedings – which may be connected to a complaint about the proceeds of a pension policy (or pension policies). The appellant indicated that he had issued proceedings against his former partner but it was not clear if those are the proceedings for which he sought leave from the President of the High Court or whether there is yet another set of proceedings in being against his former partner.

23. To summarise the position, the respondent issued two sets of Circuit Court proceedings in 2017 and 2019 and obtained final orders in both. The respondent issued two attachment and committal applications in the 2019 equity proceedings and was successful on the second of those, the first not having been pursued for other reasons. The appellant brought or attempted to bring six appeals from these Circuit Court orders, all of which were either jurisdictionally misconceived or unsuccessful on their merits. The debt owed by the appellant to the respondent featured in an application for a protective certificate and an unsuccessful attempt to put a personal insolvency arrangement in place. The appellant was refused leave to bring judicial review proceedings against the Circuit Court order and unsuccessfully appealed this refusal. He has issued two sets of plenary proceedings against the respondent (including these proceedings) and he has sought leave to issue a further set of proceedings in which, presumably, the respondent would be a named defendant. He has issued related proceedings against the Registrar of Titles and his wife brought proceedings against the respondent.

24. Thus, between proceedings which have been issued and proceedings in respect of which leave was sought to issue them, to date there have been nine separate sets of proceedings arising out of or involving the appellant's indebtedness to the respondent and the respondent's attempts to enforce its security over the appellant's property. The respondent has been entirely successful in its proceedings and, while some of the appellant's proceedings remain outstanding, so far the appellant has been entirely unsuccessful in his. This includes his seven appeals (not counting this one) most of which were brought in the respondent's proceedings.

25. It is clear from this picture that the appellant is neither prepared to accept in principle nor to comply with the many court orders which have been made in respect of the property.

This is the context in which the respondent brought its application seeking orders striking out or dismissing the appellant's proceedings either under O. 19, r. 28 of the Rules of the Superior courts on the grounds that they are frivolous or vexatious or disclose no reasonable cause of action or, alternatively, pursuant to the courts inherent jurisdiction on the grounds that they are unsustainable and bound to fail. In order to determine whether the trial judge was correct in acceding to this application it is necessary to look at the appellant's pleadings in some detail.

Appellant's Proceedings

26. The appellant's pleadings have been prepared without legal assistance and consequently do not follow the usual format of such documents. Even making allowances for the appellant's lack of legal expertise, these documents are not easy to understand. The relief sought is wide ranging but is primarily directed at establishing the appellant's entitlement to ownership and possession of the property and, as a corollary, the lack of any entitlement to possession on the part of the respondent and seek to injunct the respondent from actually taking possession of the appellant's property. The appellant also seeks specific performance of the settlement agreement and damages for breach of contract. A declaration is sought to the effect that the transfer of the appellant's mortgage and loan to the respondent is void and of no legal effect. Whilst the relief sought in the plenary summons (paras. 13 – 24) and in the statement of claim (paras. 49 – 60) is identical, the grounds pleaded in support of the relief differs as between the two documents.

27. In the plenary summons the case made is primarily based on the settlement agreement, completion of which the appellant alleges was frustrated by forces beyond his control (the covid-19 pandemic and consequent public health measures). He alleges that the respondent

failed to withdraw *"their proceedings"* and is acting in breach of contract in continuing to rely on the order for possession. He asserts that he had secured funding of €295,000 but that the respondent had rejected this offer, also in breach of contract. An additional claim is made that the respondent wrongly assigned the benefit of pension policies which related to his mortgage to his former partner causing him loss and damage. This is the subject of proceedings against his former partner.

28. In the statement of claim the appellant alleges a failure on the part of the respondent to *"disclose pertinent facts"* relating to the transfer of his loan to the respondent. He puts the validity of that transfer and of the steps taken by the respondent to register the transfer in the Registry of Deeds in issue. He contends that the respondent misrepresented the position in the Circuit Court proceedings but it is not clear what alleged misrepresentation the appellant is referring to. He pleads the alleged wrongful payment of pension funds to his former partner and alleges collusion between the respondent, his former partner and her solicitors. There then follows 11 lengthy paragraphs which appear to be taken directly from a legal textbook – or perhaps an academic article or a legal opinion – dealing with the assignment of contracts and the need to novate if it is intended to transfer the burden of a contract. No effort is made to link any of this to the facts of the case although there is a generic plea to the effect that the transfer of the appellant's loan to the respondent was *"deficient in every respect"*. Interestingly, there is no plea in the statement of claim based on the settlement agreement.

29. In his submissions to this court on the appeal, the appellant reiterated many of his claims concerning the alleged invalidity of the transfer of his loan and mortgage to the respondent (because his name did not appear on the transfer deed) and the alleged wrongful transfer of pension funds to his former partner. He blamed his then-solicitor for failing to

appreciate that the purported transfer of his loan was invalid. He said that a complaint made by him to the Law Society against this solicitor had been upheld. However, no evidence was adduced by him in support of this assertion and, consequently, the court is unaware of the nature of the complaint or the extent to which it was upheld (if indeed it was upheld).

30. The real difficulty facing the appellant, and the central thrust of the respondent's argument, is his failure to address the existence of the previous court orders made in respect of the property. The respondent contends that the arguments the appellant now seeks to make are all ones which could have been, but were not, raised by him before Linnane J. in the Circuit Court; in his application to Cross J. for an extension of time to appeal her order or in his application to the Supreme Court for leave to appeal against the order made by Cross J. The respondent also objects to the appellant constantly making new allegations, none of which are particularised. As regards the settlement agreement, the respondent points out that the appellant was himself in breach of its terms from the outset by reason of his failure to disclose his other debts and the existence of other proceedings against him. The respondent points to Allen J.'s finding that the appellant never intended to pay the agreed sum. Finally, the respondent contends that once the appellant made a counter-offer of €295,000 rather than the €310,000 agreed under the settlement agreement, that effectively terminated the earlier agreement.

High Court Decision

31. It is well established that one of the reasons proceedings may be regarded as frivolous and vexatious or as failing to disclose a reasonable cause of action under O. 19, r. 28 or, more generally, as unsustainable and bound to fail is that the issues raised in the proceedings have been heard and determined in other proceedings between the same parties (*i.e.* they are

res judicata). It is also well established that the principle of *res judicata* applies not just in situations where the specific legal issue was raised and determined in earlier proceedings but also where the point could have been raised in earlier proceedings concerning the same subject matter, albeit that it was not actually raised and consequently not determined, and regardless of whether it was deliberately or accidentally omitted.

32. These principles and the underlying authorities on which they are based are set out in detail in Allen J.'s judgment (between paras. 76 and 87) such that it is unnecessary to repeat them here. In particular, he quotes extensively from the judgment of Hardiman J. in *Carroll v Law Society of Ireland* [2003] IESC 1 tracing the history in this jurisdiction of the rule in *Henderson v Henderson* (1843) 3 Hare 100 to the effect that "*a litigant may not make the same contention, in legal proceedings, which might have been but was not brought forward in previous litigation*".

33. Allen J. also looked at the distinction between the court's jurisdiction to strike out proceedings under O. 19, r. 28 where the asserted facts must be assumed to be both true and capable of being proved and its inherent jurisdiction to do so where the court can consider if there is a credible evidential basis for the asserted facts (*per* the Supreme Court in *Lopes v Minister for Justice* [2014] 2 IR 301 and *Keohane v Hynes* [2014] IESC 66). Notably, in the latter case the Supreme Court emphasised that where the parties' legal rights and obligations are governed by documents a court can examine the documents to consider whether the plaintiff's case is bound to fail, bearing in mind the possibility that if the case were to proceed to trial and the full scope of pre-trial procedures, including discovery, were available to the plaintiff that additional evidence outside the documentary record might emerge.

34. In applying these principles Allen J. identified two broad strands to the appellant's case, namely that the Circuit Court order should not have been made and that the Circuit Court order (especially the order for possession) was overtaken by the settlement agreement.

This second strand was considered, albeit that it was not properly pleaded, in circumstances where Allen J. accepted that the jurisdiction invoked by the respondent was one to be exercised sparingly by the court.

35. Allen J. allowed the respondent's motion as regards both strands of the case. He held that the respondent's entitlement to an order for possession had been finally and conclusively determined and that this question could not be re-opened by the appellant in fresh litigation even to advance arguments which he had not previously made. Much of the substantive complaint made by the appellant regarding the validity of the transfer of his loan and mortgage to the respondent and of the registration of that transfer were points which could and should have been made in the Circuit Court proceedings and consequently the appellant was precluded from raising them in fresh proceedings by virtue of the rule in *Henderson v Henderson*. Although the case made in respect of the pension policies was vague and at times contradictory, Allen J. took the view that if it was relevant to the debt and the alleged wrongful payment had occurred before the order for possession was made, then the arguments now made by the appellant should have been made in the Circuit Court proceedings. On the other hand, if the payment occurred after the order for possession had been made, it could not retrospectively affect the validity.

36. As regards the second strand of the case, Allen J. noted firstly that the settlement agreement was conditional on a number of matters with which the appellant had not complied by the extended settlement date, most notably the payment of a stipulated sum of money. Secondly, the agreement had not been executed by the appellant's former partner by the date on which the respondent was otherwise obliged to withdraw its extant Circuit Court proceedings (i.e. the equity proceedings). Thirdly and contrary to the appellant's continued assertion, the settlement agreement did not make any reference to the possession proceedings and did not oblige the respondent to withdraw the order for possession.

Consequently, he concluded that the case the appellant sought to make by reference to the settlement agreement was one which could "*be shown by the terms of the agreement and the fact that the money was not paid to be bound to fail*".

Discussion

37. The appellant has not suggested that the legal principles as set out by Allen J. are incorrect. The appellant has not expressly contended that the application of those principles by Allen J. was incorrect, although this might be inferred simply from the fact of this appeal. Insofar as it might be inferred that this is his contention, the appellant has not explained in his written submissions or in his oral argument how he believes that Allen J. erred in the application of these settled principles. Instead he reiterates his allegation that the respondent misled the Circuit Court (apparently by relying on a purportedly valid transfer to it of the appellant's loan and mortgage), he asserts a right to redeem the mortgage at the settlement agreement figure (notwithstanding that the settlement date has passed) and contends that pension funds have been wrongfully paid out to his former partner.

38. The appellant only engages with the judgment appealed from to a very limited extent. He asserts that Allen J. was incorrect to describe him as a "*serial litigant*". He does not explain why this is so and, in light of the history of the litigation in which he has been and is still engaged, the description is clearly apt - certainly as concerns this particular property. It may be that the appellant regards all of the litigation concerning the property as part of a single campaign and thus does not appreciate the *"serial"* nature of repeated appeals, applications, and proceedings all to largely the same effect. He disputes the application of *Henderson & Henderson* to this case on the grounds that it falls within "*special circumstances*" where the rule does not apply. Apart from the misconceived contention that the rule does not apply because the issues now raised were not raised in the original Circuit

Court proceedings (which is, of course, the very purpose of the rule), the only "*special circumstance*" advanced is the alleged negligence of the appellant's solicitor. The court has no evidence of this alleged negligence but even if it were to be established that the solicitor was negligent this would be a matter between the appellant and the solicitor and would not go to the entitlement of the respondent to rely on the final orders made by the Circuit Court in its favour.

39. Thus, this is a case where the appellant has not seriously impugned the High Court judgment appealed from save to assert that it is wrong. Notwithstanding the appellant's strongly held view that the arguments he now wishes to raise are meritorious, he has not really engaged with the fundamental problem which is that these were issues that could and should have been raised in the Circuit Court before final orders were made in the respondent's proceedings against him. Insofar as these arguments are based on documents (such as the transfer of the loan and security to the respondent and the pension policies required as part of the endowment mortgage) the existence of these documents was known to the applicant from the outset of the proceedings, if not beforehand, whether or not he chose to examine them at that time.

40. Whether described as an issue estoppel or a cause of action estoppel or an application of the rule in *Henderson v Henderson*, the appellant is clearly estopped from seeking to re-open the validity of the order for possession made in favour of the respondent in respect of the property. The findings in this regard made by Allen J. are consistent with all of the relevant case law and the appellant has not establish the existence of special circumstances which would render the principles set out in the case law inapplicable to these proceedings. Finally, it simply does not follow from the fact that the appellant is dissatisfied with the

outcome reflected in the High Court judgment that there was any lack of fair procedures in how that decision was reached.

41. I am satisfied that the High Court judge was correct in making the order he did that the action be dismissed on the basis that it is *res judicata* and is frivolous and/or vexatious and bound to fail. The pleadings, which seek to assert the appellant's entitlement to ownership and possession of the property and to impugn the respondent's entitlement to possession of it are manifestly *res judicata* in light of the existing order for possession made by the Circuit Court in 2018. The case based on the settlement agreement is manifestly unstateable in that it is inconsistent with the terms of the agreement on which it is based and with which, in any event, the appellant has not complied. If permitted to proceed, the proceedings are bound to fail. Therefore, the appellant's appeal against the first element of the High Court order should be dismissed.

42. In addition to dismissing the proceedings, the High Court made two ancillary orders on foot of the motion brought by the respondent. The first of these was to vacate the *lites pendentes* which had been registered by the appellant in these proceedings and in the earlier 2019 proceedings (record no. 2019/6453P) albeit that the latter proceedings were discontinued by the appellant on 20th February, 2020. As Allen J. correctly observed, the production of an order dismissing the action or of an order of discontinuance should be sufficient to secure the withdrawal of a *lis pendens* registered in those proceedings. Nonetheless, as he also points out, section 123(b)(i) of the Land and Conveyancing Law Reform Act, 2009 expressly provides that the court may make an order to vacate a *lis pendens* on the application of any person affected by it where the action to which it relates has been discontinued or determined. Therefore, in circumstances where the proceedings are dismissed, the respondent is entitled to the order sought under s. 123 of the 2009 Act.

The appellant did not advance any discrete argument as to why this should not follow in the event that his appeal against the principal order was unsuccessful, as it has been. Therefore, the order of the High Court in this regard is also affirmed.

43. On the hearing of this appeal the court expressly invited the appellant to address any issues he had with the *Isaac Wunder* order made by the High Court against him. The appellant did not make any specific argument on this aspect of the case save to contest Allen J.'s characterisation of him as a serial litigant. In those circumstances there is no real challenge to the two conclusions drawn by Allen J. upon which the making of this order was based. The first of these is that the respondent's apprehension that the appellant may institute further proceedings following the disposal of this action is well founded. The second is that whilst there was no direct evidence that the several cost orders already made against the appellant had not been paid, he was entitled to infer from the evidence of the appellant's insolvency and his failure to pay his mortgage that these costs had not been paid. In my view the making of an *Isaac Wunder* order is a necessary and proportionate response both to the amount of litigation that has already occurred in respect of the property, the amount of litigation that remains extant notwithstanding the making of final orders some years ago and the likelihood that the appellant will continue to litigate these issues. I note the form of the *Isaac Wunder* order made by the High Court judge which is limited to further proceedings relating to the property at 39 Danesfort, Castle Avenue, Clontarf, Dublin 3.

44. Whelan J. and Donnelly J. have had the opportunity of reading this judgment before it was delivered and have indicated their agreement with it.

45. In circumstances where the appellant has been entirely unsuccessful in his appeal it is the preliminary view of this court that the respondent is entitled to the costs of the appeal and we propose making an order in those terms. If either party wish to take issue with that

proposed order they have liberty to do so by filing a written submission not exceeding 1,000 words within 21 days of the date of this judgment as to the appropriate form of order. The other party shall have liberty to file a reply to those submissions within a further 14 days.