APPROVED

[2024] IEHC 547

THE HIGH COURT

RECORD NO. 2023/147P

Between:

FRANCIS J. MASTERSON

Plaintiff

AND

PEPPER FINANCE CORPORATION (IRELAND) DAC

CAROLINE LOFTUS

CORMAC RYAN

IAN WIGGLESWORTH

GRAINNE NAUGHTON

FRASER GEMMELL

ANDREW HASTINGS

KIERAN DESMOND

ORLA McCARTHY

Defendants

JUDGMENT OF Ms. Justice Nuala Jackson delivered on the 9th day of September 2024.

INTRODUCTION

1. The within proceedings were commenced by Plenary Summons issued on the 13th January 2023. The proceedings, which were commenced against nine defendants, seek, *inter alia*, the following reliefs:
   (a) Damages in the sum of €2,500,000 (together with interest pursuant to the Courts Act 1981);

(b) The removal of liens or charges from Land Registry Folio number WH11414F;
(c) Indemnification in respect of any future third party claims in respect of the Plaintiff's mortgage;
(d) "[A]ggregated damages".

2. The bases of the Plaintiff's claim are, *inter alia*, gross negligence and misrepresentation, breach of statutory duty and breach of contract, breach of fiduciary duty and deceit. Having entered an Appearance on the 25th January 2023, the Defendants issued a motion on the 31st March 2023 seeking the striking out of the proceedings ("the Strike Out motion") pursuant to
   (i) Order 19 Rule 28[1] of the Rules of the Superior Courts as being frivolous, vexatious, for failing to disclose a reasonable cause of action and for being bound to fail;
   (ii) Order 19 Rule 27 as being scandalous, embarrassing and for improperly delaying the execution of the Order for Possession obtained by the first named Defendant in proceedings bearing Circuit Court record number 2014/00575;
   (iii) The inherent jurisdiction of this Court as being frivolous, vexatious, for failing to disclose a reasonable cause of action and for being bound to fail;
   (iv) The inherent jurisdiction of this Court on the basis that same is res judicata and in breach of the rule in **Henderson v. Henderson** and/or an abuse of process.

3. The proceedings were struck out as against the second to ninth Defendants (Coffey J. by Order of the 13th May 2023) pursuant to Order 19 Rule 28 of the Rules of the Superior Courts as being frivolous and vexatious and for failure to disclose a reasonable cause of action and for being bound to fail. The balance of the motion is now for determination by me.

4. There is another extant motion being the Plaintiff's motion for discovery ("the Discovery motion") issued on the 16th May 2024. This motion is not before me for determination and its fate is dependent upon the outcome of the current application.

[1] The motion herein was issued prior to the amendment of Order 19 rules 27 and 28 of the Rules of the Superior effective 22 September 2023.

The parties were agreed that this motion would fall if the first named Defendant's motion is successful and that it would proceed for determination if the Plaintiff was successful in defeating the application currently under consideration.

5. The Plenary Summons asserts the following facts:
    1. The Plaintiff is the joint freehold owner and entitled to possession of the lands comprised Folio 11414F, County Westmeath.
    2. On or about the 6th March 2007, the Plaintiff entered into agreements, including "a contract for a mortgage/re-mortgage facility" with GE Capital Woodchester Home Loans Limited ("GE"). It is accepted that GE is now named Pepper Finance Corporation (Ireland) DAC, company number 34927.
    3. The Plaintiff disputes the vesting/assignment of his loan in the Plaintiff, Pepper Finance Corporation (Ireland) DAC ("Pepper") and/or Pepper's entitlement to take steps towards enforcement in respect of the security attaching thereto. The Plaintiff asserts that the first named Defendant "claimed ownership of a GE Capital Woodchester Home Loans Limited Mortgage, my mortgage, both equitable and legal", which claim, he asserts is false.
    4. The Plaintiff asserts that, in fact, his mortgage was sold by GE (now Pepper) to Windmill Funding DAC and that he has suffered loss and damage by virtue of unjustified actions taken by the first named Defendant herein pertaining to this mortgage. The essence of the Plaintiff's claim, as set out in the Plenary Summons, is:

        "The Defendant/s concealed the fact that the mortgage taken out by the Plaintiff was sold, including all related security and rights to enforce any Legal Rights to Windmill Funding DAC by GE Capital Woodchester Home Loans Limited on the 28th day of September 2012, Netherlands Holding Cooperatie U.A. then bought 100% of the share capital of company 34927, it was then that the name was changed from GE Capital Woodchester Home Loans Limited to Pepper Finance Corporation (Ireland) DAC, company number 34927 to conceal the true nature of the sale of the portfolio with all related security and Legal Rights and the Plaintiff's mortgage loan."

5. It is accepted in the Plenary Summons that there have been previous proceedings between the parties herein:

   "The Defendant/s did issue Summary Summons proceedings against the Plaintiff; presenting and relying on its untrue representation of facts in the Civil Bill and Affidavit; claiming to be the Original Lender, The Lender of Record and/or The Originator sworn as true and presented in Mullingar/Athlone Midland Circuit Court."

6. The evidence before me in the context of the Strike Out motion and which I have considered (while there may be some overlap with the Discovery motion) consists of:

   - The Affidavit of Shane O'Connell sworn on 7th March 2023;
   - The Affidavit of Francis J. Masterson sworn on the 10th May 2023;
   - The Grounding Affidavit of Francis J. Masterson sworn on the 6th December 2023;
   - Supplemental Affidavit of Francis J. Masterson sworn on the 15th May 2024;
   - Replying Affidavit of Daire O'Herlihy sworn on the 31st May 2024;
   - Supplemental Affidavit of Francis J. Masterson sworn on the 11th June 2024

   (including the exhibits in these Affidavits).

I also received written and heard oral submissions by or on behalf of both parties.

BACKGROUND

7. It is clear that the substance of the disputes between the parties has a long history. It would not appear to be in dispute that proceedings commenced before the Circuit Court, Midlands Circuit in 2014 (Record No. 2014/00575) seeking an Order for Possession in respect of property comprised Folio 11414F County Westmeath. The Plaintiff herein and Jacqueline Masterson were the Defendants in the said proceedings and the first named Defendant was the Plaintiff therein (although there was an amendment of title in the course of the proceedings due to the change of name of the Plaintiff therein).

8. An Order for Possession was granted by the Circuit Court (Her Honour Judge Karen Fergus) on the 26th March 2019 with a six month stay on execution. The Plaintiff herein appealed the said Order which appeal was heard by this Court (Noonan J.) on the 11th November 2019 which appeal was dismissed with the stay being extended for a period of four months. Costs were awarded to Pepper. On the 25th February 2020, the Plaintiff made application for leave to appeal the Order of Noonan J. to the Supreme Court. The Supreme Court delivered a Determination on the 6th August 2021, refusing leave to appeal.

9. An Execution Order of Possession issued from the Circuit Court on the 24th October 2022 which Order was lodged with the County Sheriff for Westmeath on or about the 7th November 2022. The next step was the issuing of the within proceedings and the first named Defendant instructed that the execution of the Order for Possession be put on hold with the County Sheriff in the context of these new proceedings. The Defendants then issued the motion currently before me.

EVIDENCE

A. Affidavit of Shane O'Connell sworn on the 7th March 2023

10. In his Affidavit grounding this motion, Mr. O'Connell says that the complaints made in the within proceedings are *"in essence identical"* to the issues before the Circuit Court namely that the first named Defendant is not the owner of the charge registered on Folio WH11414F. Mr. O'Connell avers that this is an issue which is, in law, incapable of being advanced based upon the conclusive nature of the Folio and on the basis of the matter having been previously determined by the Circuit, High and Supreme Courts. He avers that *"the within proceedings undoubtedly constitute an improper collateral attack against the finality of the possession proceedings."* Based upon the issues determined in the previous proceedings, Mr. O'Connell avers that the claims in the within proceedings are *"preposterous, without merit and unstatable which further supports the Defendants' contention that the within proceedings are frivolous, vexatious and amount to an abuse of process."*

11. There are extensive exhibits contained in the Affidavit of Mr. O'Connell. I will consider each in turn (in so far as they have a substantive relevance to this application).

B. Civil Bill for Possession and Affidavit of Grainne Naughton sworn on the 5th November 2014

12. There is little unusual in this pleading. It references the loan offer letter of the 28th February 2007, the advance of the funds the subject of the loan and the securitisation of the loan by way of first legal mortgage dated the 6th March 2007. It further references the registration of the mortgage with the Land Registry on or about the 24th April 2007. At paragraph 12 of the Civil Bill it is pleaded: *"On 11th October 2012, GE Capital Woodchester Homes Loans Limited changed its name to Pepper Finance Corporation (Ireland) Limited, the Plaintiff herein. The Plaintiff's power to take possession of the Mortgaged Property and the Plaintiff's power to sell the Mortgaged Property have arisen and become exercisable."*

13. In the Affidavit of Ms. Naughton, the various pertinent documents are exhibited. These include the mortgage deed (Exhibit "B"), a copy of Folio WH11414F printed on the 13th June 2014 (Exhibit "C"), the Certificate of Incorporation on change of name (GE Capital Woodchester Home Loans Limited to Pepper Finance Corporation (Ireland) Limited dated 11th October 2012 (Exhibit "D"), letter dated 25th October 2012 sent by Pepper to the Plaintiff (Exhibit "F") together with various letters in respect of arrears sent by Pepper Finance Corporation (Ireland) Limited to the Plaintiff (and his co-borrower). The first paragraph of Exhibit "F" referenced above should be recited:

> *"Further to your letter from GE Money dated 10 October 2012 confirming completion of the sale of GE Capital Woodchester Home Loans Limited ("Home Loans") to Pepper Netherlands Holding Cooperatie U.A., Home Loans has now been renamed to Pepper Finance Corporation (Ireland) Limited trading as Pepper Asset Servicing ("Pepper")."*

14. In addition, the following documents are exhibited: the Order of the County Registrar, County of Westmeath dated the 27th June 2016 amending the title of the Plaintiff in the Circuit Court proceedings to Pepper Finance Corporation Ireland Designated Activity Company, the first named Defendant in the within proceedings, the Order for Possession dated the 26th March 2019 which Order indicates that the Plaintiff herein appeared in person and there was no appearance by or on behalf of the Second Named Defendant in the Circuit Court proceedings. From the documents provided to me, it does not appear that the Plaintiff herein filed a replying Affidavit or any written response pleadings to the application before the Circuit Court.

15. The Plaintiff herein served a Notice of Appeal to this Court on the 5th April 2019. This appeal was heard and determined on the 11th November 2019 at which time the appeal was dismissed. It would appear that thereafter the Plaintiff herein issued a motion returnable to the 23rd March 2020 seeking the DAR from the hearing of the appeal on the 11th November 2019. This application appears to have been for the purposes of the application for leave to appeal to the Supreme Court (ref. Grounding Affidavit of Frank Masterson sworn on the 5th March 2020). This application was granted by Order of Meenan J. of the 15th February 2021. A similar motion in respect of the DAR of the Circuit Court proceedings (for the same reason) was issued returnable before the Circuit Court on the 31st March 2020.

16. The Application for Leave to Appeal to the Supreme Court, lodged on the 25th February 2020, is likewise exhibited by Mr. O'Connell in his grounding Affidavit herein. I have considered the issues raised therein. The proposed Notice of Appeal, in the event that leave was granted, is contained in an Appendix to the Application. In this regard, the Grounds of Appeal include, inter alia:

> *"1. The Learned High Court Judge erred in fact and in law in failing to allow the intended Appellants to counterclaim under multiple headings including, but not limited to, breach of contract, breach of the Central Bank of Ireland Codes, negligence, economic torts, tort, reputation damage, breach of data protection*

laws, constitutional law, the law of the European Union, human rights law, banking law and international law."

Of particular importance is the inclusion, at Grounds 10 – 25, of extensive references to a Determination of the Tax Appeal Commission 24TACD2017[2].

17. These matters were responded to by Pepper at Paragraphs 12 – 14 of the Grounds of Opposition in the Supreme Court application. Paragraph 14c. is particularly pertinent:

"c. The Appellant is incorrect insofar as he contends that the Respondent is not the entity entitled to possession of the property the subject matter of the proceedings. In particular, the learned High Court Judge correctly held (i) that the Respondent herein was the entity with whom the Plaintiff entered into the loan and mortgage agreements exhibited to the Grounding Affidavit, and (ii) that the Defendant had not adduced any evidence that the Respondent had alienated its title to, and entitlement to enforce the provisions of, those agreements."

18. These grounds of appeal (and the responses thereto) are the very essence of the claims being made by the Plaintiff in the within proceedings. It is clear that all of the matters referred to by the Plaintiff in his Application for Leave to Appeal long pre-dated the Circuit Court hearing in which the Order for Possession was made and the dismissal of the Appeal therefrom by this Court. It is also clear that these very matters were in play during the previous possession proceedings.

19. The final exhibit to which I wish to make reference is Exhibit "SOC2" to the Affidavit of Shane O'Connell of the 7th March 2023. This is the letter sent by the first named Defendant to the Plaintiff prior to the issuing of this motion. At paragraph 2 of the said letter, it is stated:

[2] A copy of this Determination in anonymised form was provided to me by the Plaintiff. The Notice of Appeal indicates that the Determination relates to the first named Defendant. In this regard, I refer to Paragraph 23 of the judgement of Allen J. in **Pepper Finance Corporation (Ireland) DAC v. Maloney** [2023] IECA 161.

"All of the allegations made therein were the subject matter of Circuit Court possession proceedings bearing record number 2014/00575. All issues have been conclusively considered and determined by the Circuit, High and Supreme Courts. These proceedings constitute an improper collateral attack against the finality of the possession proceedings."

It would appear that there was no response by the Plaintiff herein to this letter.

C. Affidavit of Francis J. Masterson sworn on the 10th May 2023

20. This Affidavit makes it clear that the Plaintiff is disputing ownership of his loans and the security provision relating to them. In essence, he says the loans had been sold to Windmill Funding DAC "prior to the sale of the platform and share capital of GE Capital Woodchester Home Loans Limited to the first named Defendant." However, this Affidavit does address the overlap between the within proceedings and the previous Circuit Court proceedings (and, in consequence, the appeal and subsequent leave application pertaining to those proceedings). At Paragraph 5, it is averred:

"I say that the Civil Bill claims that the Defendant company advanced to me a facility in the sum of €200,001.00. The Defendant company did not advance any facility to me: GE Capital Woodchester Home Loans Limited did, however GE Capital Woodchester Home Loans Ltd. Had sold my facility in a portfolio of some 3500 mortgages to Windmill Funding DAC, prior to the acquisition of the company GE Capital Woodchester Home Loans Ltd. By the Defendant company."

D. Affidavit of Francis J. Masterson sworn on the 6th December 2023

21. The points raised therein are substantially a repetition of the previous Affidavit at b. above.

E. Affidavit of Francis J. Masterson sworn on the 15th May 2024

22. The points raised therein are substantially a repetition of the previous Affidavit at C. above. The deponent references a journalistic article in a publication called "The Currency" and at paragraph 7 of the Affidavit deposes:

> *"I say that the report outlines my argument "Their first special-purpose vehicle (SPV) Windmill Funding, was registered on June 7th 2012. The following week, GE Capital sold 3,500 Irish residential mortgages from its ailing Woodchester Home Loans business before exiting the country. Australian firm Pepper Finance took over the servicing of the loans, also marking its entry into the Irish market. Pepper would go on to become the only boots on the ground in many Goldman Sachs's subsequent transactions here, while also collecting debt for a number of other vulture funds."*

F. Replying Affidavit of Daire O'Herlihy sworn on the 31st May 2024

23. This is substantially an Affidavit in reply to the Plaintiff's discovery application. The only paragraph substantively of relevance to the within application is paragraph 11 and the averments therein are not dissimilar to those contained in the Affidavit of Mr. O'Connell above:

> *"11. I also remain of the belief that the complaints sought to be ventilated in the within proceedings are in essence identical to those issues which were the subject matter of the Circuit Court Possession Proceedings. It appears from the General Indorsement of Claim that the Plaintiff seeks to allege that the first named Defendant is not the owner of the charge registered on Folio WH11414F, however, this argument is not capable of being advanced by reason of the conclusive nature of the Folio and has in any event been determined by the Circuit, High and Supreme Courts in the first named Defendant's favour. The within proceedings undoubtedly constitute an improper collateral attack against the finality of the possession proceedings."*

G. Supplemental Affidavit of Francis J. Masterson sworn on the 11th June 2024

24. This Affidavit avers that as the moving party in the original Circuit Court hearing, the first named Defendant *"has the onus of establishing the necessary proofs to*

ground any application for a possession order according to section 62(7) of the registration of titles act, likewise any action to transfer the charge."

25. This is undoubtedly the true position but it must be stated that the Circuit Court and, on appeal, the High Court found that the necessary proofs had been satisfied such that the Order for Possession was made and affirmed on appeal.

26. Paragraphs 6 - 14 of this Affidavit essentially purport to put forward defences and evidential shortcomings in relation to the possession proceedings. However, those are proceedings which have been significantly litigated and Orders have been made in them. The Possession proceedings are complete and final orders have been made.

SUBMISSIONS

27. I received written and oral submissions from both parties in this matter. The first named Defendant submits that the claims being made by the Plaintiff in these proceedings derive from *sequelae* allegedly arising from the fundamental assertion that the first named Defendant was not entitled to enforce the security attaching to the loan advanced by GE to the Plaintiff in 2007. The Defendant submits that this fundamental assertion has already been determined decisively through litigation namely in the context of the possession proceedings. The first named Defendant says that its entitlement to enforce the security has been determined by the Circuit Court, by the High Court on appeal and that an application for leave to appeal further to the Supreme Court was refused.

28. The first named Defendant asserts an entitlement to have these proceedings struck out as against it on a number of bases being pursuant to Order 19, rule 28 and/or Order 19, rule 27 and/or pursuant to the inherent jurisdiction of the Court. The authorities relating to these principles are well known and will be referenced below.

29. In oral submission, it was asserted that these proceedings sought to improperly reagitate matters which have already been determined. The principles of finality,

res judicata and the rule in **Henderson v. Henderson** were addressed. The first named Defendant asserted that the Plaintiff's complaints had had the opportunity of being addressed, had been addressed and had been resolved in the possession proceedings. It was asserted that this was, essentially, an improper attempt to judicially review previous finalised decisions through the issuing of new proceedings.

30. In his submissions, the Plaintiff repeatedly reiterated the issue of complaint which he has namely that Pepper did not own his loan nor did it have the entitlement to enforce the security attaching to it. It became amply clear in oral submission that these arguments were previously ventilated by the Plaintiff on numerous occasions in the possession proceedings. The Plaintiff informed me that he had raised this matter before the County Registrar in the course of the possession proceedings and that Pepper had been directed to produce documentation which direction, he asserted, had never been adequately complied with. This issue would appear, on the Plaintiff's submission, to have again been raised before His Honour Judge Keenan Johnson in the Circuit Court (at a hearing where the possession proceedings were adjourned) and also before Her Honour Judge Karen Fergus at the final hearing of the possession proceedings before the Circuit Court. These issues would appear, again on the Plaintiff's submission, to have been further raised before the High Court (Noonan J.) on appeal to this court with the Plaintiff informing me in the course of his oral submission that the appellate court stated that it was required to apply the law and that Pepper was entitled to the Order for Possession. While the Plaintiff continues to wish to express his grievances, the oral submissions herein made it clear that the very issue upon which the within proceedings are based has been a very much live issue for the Plaintiff since the outset of the possession proceedings, has been aired by him on each and every available occasion in that context and, notwithstanding this, the Order for Possession in favour of the first name Defendant was made and confirmed on appeal. The issue, as indicated earlier herein, was also clearly set out in the Notice of Appeal in the Appendix to the Application for Leave to Appeal which the Plaintiff brought before the Supreme Court. The Plaintiff informed me that the documents which he sought in the Circuit Court proceedings (and which he continues to seek in the within proceedings) had

been requested by him as far back as 2016. The written submissions and oral responses to my queries in respect of the previous determinations of the issues now sought to be advanced in these new proceedings elicited responses which repeated the grievances which the Plaintiff asserts in relation to the issues in the possession proceedings and did not address the issues which I have to determine - namely whether these current proceedings are improper or an abuse of process due to the fundamental issues therein having already been previously decisively determined?

31. There were two decisions referenced in the course of oral submissions and also by the Plaintiff in his Affidavits to which I wish to refer. The first is the case of **Pepper Finance Corporation (Ireland) DAC v. Maloney** [2021] IEHC 761 (Egan J.) which the Plaintiff references in his Affidavit of the 10th May 2023 (paragraph 18) stating "that Ownership, the Tax Determination and the Folio entry are addressed in the Maloney case: …". However, this case was the subject of an appeal to the Court of Appeal which appeal was allowed and in which judgment was delivered by Allen J. on the 23rd June 2023 – **Pepper Finance Corporation (Ireland) DAC v. Maloney** [2023] IECA 161. At paragraph 48 of the judgement, Allen J. states, referring to the High Court decision:

> *"48. In her analysis of the issue as to whether the appellant was entitled to issue execution, the judge first found that G.E. Capital Woodchester Home Loans Limited, Pepper Finance Corporation (Ireland) Limited and Pepper Finance Corporation (Ireland) DAC were one and the same legal entity: the appellant. She correctly identified ss. 30(6) and 63(12) of the Companies Act, 2014 as spelling that out and rejected the respondent's argument that his contract was with Woodchester and not Pepper."*

32. Referencing the sale to Windmill and the Determination of the Tax Appeal Commission (also extensively referenced by the Plaintiff herein), Allen J. at paragraphs 51 and 52 and later at paragraphs 55 and 56 states:

> *"51. The argument which Mr. Maloney sought to make as to the effect of the sale to Windmill was based on the findings and conclusion of the Tax Appeal*

Commission. The appellant's primary position was that the Determination of the Tax Appeals Commission was irrelevant to any question of its entitlement is issue execution but it went on to argue that, in any event, there was no basis in the Determination for Mr. Maloney's assertion that the legal as well as the beneficial interest in his father's loan and security was transferred to Windmill.

52. With respect, it seems to me that in addressing the arguments, the judge did not really compare like with like. If, as the judge found, it was not sufficient for the appellant to rely on the characterisation in the Determination of the transaction documentation, I do not understand how it might have been sufficient for the respondent to have done so. As I will come to, the Tax Appeals Commission was not concerned with the enforceability of the loans and security as between the appellant and the borrowers but if it was relevant at all, the Determination directly contradicts the assertion that the effect of the Windmill transaction was to transfer the legal as well as the beneficial ownership of the security."

The learned judge continued:

"55. While the transaction documents underlying the Determination were not before the High Court, the premise of the respondent's argument was that their effect was apparent from the Determination. The premise of the appellant's alternative argument – that if [was] the Determination was relevant it did not support the respondent's contention – was, similarly, that the effect of the transaction documents was correctly stated in the Determination. It seems to me that the premise of the judge's finding that the transaction documents ought to have been exhibited in order that the court might have been satisfied that the legal interest in the loan books remained vested in the appellant, must necessarily have been that there was a question as to the effect of those documents. While it is true that Mr. Maloney had asserted that the legal as well as the beneficial title had been transferred to Windmill, there was simply no basis for it. On the face of the Determination – if it was relevant or admissible – the appellant held the legal title to the security.

56. It seems to me, with respect, that the judge did not really engage with the appellant's primary argument that the Determination was simply irrelevant. As

the Determination shows, the issue before the Tax Appeals Commission was whether the appellant was entitled to carry forward trading losses incurred before the transfer against later profits. That, in turn depended on whether, by reason of the transfer, the business theretofore carried on by the appellant had ceased, or there had been a major change in the nature or conduct of the company's trade. Quite apart from the fact that the Determination was put up by the respondent in an attempt to undermine the register – and quite apart from the fact that it did not – the issue before the Tax Appeals Commission was quite different to the issue before the High Court."

33. While I do not consider the determinations of this Court or the Court of Appeal to be of particular application in the matter to be determined by me in the motion now before me, I am of the view that it is appropriate to reference the appeal decision in that matter given the Plaintiff's reference to the High Court decision in his Affidavit and given the commonality of subject matter while at all times being mindful that evidence in one case is not evidence in another. As Allen J. states at paragraphs 60 and 61 of his judgment:

"60. In this case, the judge found at para. 48 that the appellant could not rely on evidence of fact given in another case. That is undoubtedly correct. The judgment of Ni Raifeartaigh J. in Hanlon could certainly be relied on in an appropriate later case as having set a precedent but in this case – apart altogether from the fact that the Windmill documents were not before the court – the respondent was neither privy or party to Hanlon and the judgment cannot be relied on as having had the effect that any issue in this case is res judicata.

61. However, Hanlon is clear authority – if authority be needed – for the proposition was that it was sufficient in law for the appellant to show that it had the legal title. Perhaps with the benefit of hindsight, Mr. Maloney's assertion could have been comprehensively refuted by the appellant exhibiting the Windmill transaction documents but in truth the only purpose of that would have been to attempt to prove a negative or the disprove a bald assertion which was contradicted by the evidence offered by Mr. Maloney in support of it."

34. The second is **Start Mortgages DAC v. Ramseyer** [2024] IEHC 329 (Simons J.). The Plaintiff references this decision in the context of the proofs necessary to ground an application for an order for possession pursuant to section 62(7) of the Registration of Title Act, 1964 and, in particular, the requirement that the moving party in possession proceedings prove that they are the registered owner of the charge. The first named Defendant references the fact that the situation in the within proceedings is distinguishable from that in **Ramseyer** in that it involved an appeal from a Circuit Court Order for Possession (which the High Court ordered be adjourned for plenary hearing) while the possession proceedings here are complete and finalised, the Order for Possession having been affirmed on appeal to this court. I accept the position of the first named Defendant in this regard. It would be entirely inappropriate for me to re-open the possession proceedings in the context of separate proceedings and where the possession proceedings have been finalised.

THE LAW

35. The jurisdiction of this court to strike out proceedings was expressed by Costello J. in **Barry v. Buckley** [1981] I.R. 306 as arising in two ways being pursuant to Order 19 rule 28 of the Rules of the Superior Court or pursuant to the inherent jurisdiction of the court. The learned judge stated at p. 308:

> *"This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant."*

36. This jurisdiction was considered by the Supreme Court in **Fay v. Tegral Pipes Limited** [2005] 2 I.R. 261 at p. 265 where McCracken J. states:

> *"There is no serious dispute between the parties as to the principles applicable to motion of this nature. It is accepted that there are two bases upon which such*

an application may be brought. The first is pursuant to the provision of O. 19, r. 28 of the Rules of the Superior Courts 1986 which reads:

> *"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleading to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."*

In addition to this provision, the court has an inherent jurisdiction to stay, strike-out or dismiss pleadings where no cause of action is disclosed or if the claim is frivolous or vexatious."

37. The Court then referenced the decision of Costello J. in **Barry v Buckley** which I have referenced above before proceeding to give guidance on the meaning of the words "frivolous and vexatious". At p. 266, McCracken J. states:

> *"While the words "frivolous and vexatious" are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes and not as a forum for lost causes which, not matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed."*

38. This provision of the Rules of the Superior Courts was considered by Butler J. in **Keary v. PRAI** [2022] IEHC 28 where it is stated at paragraph 35:

"Essentially pleadings can be struck out under Order 19 rule 28 where they fail to disclose a reasonable cause of action or where they are frivolous or vexatious. The striking out of pleadings, particularly a plaintiff's statement of claim can have the effect of disposing of the entire action. In this case if I accede to the defendants' applications to strike out the plaintiff's pleadings it will inevitably follow that his entire action will be dismissed. In considering an application under O.19, r. 28 in principle the court is confined to looking at the pleadings and must assume that the pleaded facts will be established in evidence by the party against whom the application is brought. Thus, the question is a legal one, namely whether, accepting the facts as asserted, the case as pleaded gives rise to a cause of action that is legally capable of succeeding. The issue is not whether it will or will not succeed but whether it is legally capable of doing so."

39. The Court in that case was also mindful of the challenge which pleadings may pose so far as a lay litigant, such as the Plaintiff is concerned:

"The court must be careful to differentiate between a bad case simpliciter and a case that is merely badly pleaded."

40. Similarly, in **Burke and Woolfson v. Beatty** [2016] IEHC 353, Noonan J. stated:

"12. An application under O. 19, r. 28 is concerned solely with what appears on the face of the pleadings. If the facts as pleaded by the plaintiff could not conceivably give rise to a cause of action, then the proceedings may be dismissed. The court does not, and cannot, look outside the pleadings or examine the facts or the evidence to determine if the cause of action is sustainable."

41. The broader inherent jurisdiction to strike out proceedings was also considered by Noonan J. at Paragraph 14:

"Applications to dismiss under the inherent jurisdiction of the court are quite different. Here, the court is not confined to an examination of the proceedings but may look outside them at uncontroversial facts to determine if the claim is bound to fail."

42. The extent to which a court may look beyond the pleadings in the exercise of the inherent jurisdiction has been considered in a number of decisions. The Supreme Court in **Lopes v. Minister for Justice** [2014] 2 IR 301 (Clarke J.):

"2. The Jurisdiction to Dismiss

2.1 Applications to dismiss at an early stage of proceedings are, when brought, frequently based alternatively on the provisions of O.19, r.28 of the Rules of the Superior Courts ("RSC") and the inherent jurisdiction of the Court. It is important to emphasise that the inherent jurisdiction of the Court should not be used as a substitute for, or means of getting round, legitimate provisions of procedural law. That constitutionally established courts have an inherent jurisdiction cannot be disputed. That the way in which the ordinary jurisdiction of those courts is to be exercised is by means of established procedural law including the rules of the relevant court is also clear. The purpose of any asserted inherent jurisdiction must, therefore, necessarily, involve a situation where the Court enjoys that inherent jurisdiction to supplement procedural law in cases not covered, or adequately covered, by procedural law itself. An inherent jurisdiction should not be invoked where there is a satisfactory and existing regime available for dealing with the issue under procedural law for to do so would set procedural law at nought.

2.2 Against that background, it is important to distinguish between the jurisdiction which arises under O.19, r. 28 of the RSC and the inherent jurisdiction often invoked. The inherent jurisdiction can be traced back to the decision of Costello J. in Barry v. Buckley [1981] I.R. 306. However, that jurisdiction needs to be carefully distinguished from the jurisdiction which arises under the RSC, precisely because it would be inappropriate to invoke the inherent jurisdiction of the Court in circumstances governed by the rules. In that context, I said, at para. 3.12. of my judgment in the High Court in Salthill

Properties Limited & anor v. Royal Bank of Scotland plc & ors [2009] IEHC 207, the following:

> *"3.12 It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel for Salthill and Mr. Cunningham, to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court. A simple example will suffice. A plaintiff may assert that it entered into a contract with the defendant which contained certain express terms. On examining the document the terms may not be found, or may not be found in the form pleaded. On an application to dismiss as being bound to fail, there is nothing to prevent the defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the plaintiff has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim."*
>
> *2.3 The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in Barry v Buckley, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of*

action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked.

2.4 It is important to keep that distinction in mind. It is also important to note the many cases in which it has been made clear that the inherent jurisdiction of the court should be sparingly exercised. This was initially recognised by Costello J. in Barry v Buckley and by the Supreme Court in Sun Fat Chan v Osseous Ltd [1992] 1 I.R. 425. In the latter case, McCarthy J. stated that "generally the High Court should be slow to entertain an application of this kind". This point has been reiterated more recently in Kenny v Trinity College Dublin [2008] IESC 18 at para. 35 and in Ewing v Ireland and the Attorney General [2013] IESC 44 at para. 27.

2.5 It is also important to remember that a plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail. It must be recalled that a plaintiff, like any other party, has available the range of procedures provided for in the RSC to assist in establishing the facts at trial. Documents can be discovered both from opposing parties and, indeed, third parties. Interrogatories can be delivered. Witnesses can be subpoenaed and can, if appropriate, be required to bring their documents with them. Other devices may be available in particular types of cases. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in Sun Fat Chan (at p. 428), that experience has shown that

cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.

2.6 At the same time, it is clear that certain types of cases are more amenable to an assessment of the facts at an early stage than others. Where the case is wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss. In that context, it is important to keep in mind the distinction, which I sought to analyse in Salthill Properties, between cases which are dependent in themselves on documents and cases where documents may form an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well."

43. So, in the present instance, can the Plaintiff's proceedings as against the first named Defendant be viewed as frivolous and vexatious on the basis that they constitute an abuse of process and, if so, is the case bound to fail on the facts as pleaded or, alternatively, is there no credible basis for suggesting that the facts are as asserted such that the Plaintiff's proceedings are bound to fail on the merits? In the first instance, Order 19 rule 28 is engaged; in the latter the inherent jurisdiction may be invoked to prevent an abuse of process.

44. In the present case, the first named Defendant asserts that an abuse of process arises herein based upon the principles of finality, *res judicata* and the rule in **Henderson v. Henderson**. In this regard, the first named Defendant references the judgment of Murphy J. in **Tassan Din v. Banco Ambrosiano S.P.A.** [1991] 1 I.R. 569.

45. It is important to recite that no new issue or evidence is asserted herein as the basis of the Plaintiff's claim. The Plaintiff acknowledges that the arguments being raised by him in relation to the entitlement of the first named Defendant to enforce the security attaching to his mortgage was raised by him in the previous proceedings, before courts at multiple jurisdictions. He was clear that he has argued these points

robustly before the County Registrar, County Westmeath, before the Circuit Court and before this court. Additionally, these arguments are set out in some detail in the Notice of Appeal appended to the Application for Leave to Appeal submitted by the Plaintiff to the Supreme Court.

46. Murphy J. cites the *dictum* of Lord Simon in the **Ampthill Peerage Case** [1977] A.C. 547:

"And once the final appellate court has pronounced its judgment the parties and those who claim through them are concluded; and, if the judgment is as to the status of a person, it is called a judgment in rem and everyone must accept it. A line can thus be drawn closing the account between the contestants. Important though the issues may be, how extensive whatsoever the evidence, whatever the eagerness for further fray, society says: "we have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end you must accept what has been decided. Enough is enough."

47. Consideration was given to the fraud exception but such circumstances do not arise in the instant case either in terms of the proofs before me or, more particularly, in terms of facts discovered since the previous litigation. The Plaintiff accepted that the arguments currently being made had previously been unsuccessfully advanced.

48. The principle of finality is also the focus of the rule in **Henderson v Henderson** [1843] 3 Hare 100. This rule was enunciated by the Supreme Court (Murray CJ) in **Re Vantive Holdings** [2010] 2 I.R. 118 in the following terms:

"20. Citizens have the right of access to the courts so that their entitlements, rights and obligations may be determined in accordance with due process. Due process means a right to a fair and complete hearing of the issues of law and fact in any proceedings. The courts have always had an inherent jurisdiction to

stay or dismiss proceedings which abuse the due process of the administration of justice where to do otherwise would seriously undermine its effectiveness or integrity. In addition under the rules of court the courts have, in civil proceedings, the power to dismiss proceedings on the grounds that they are "frivolous" or "vexatious". Indeed, abuse of process may take may forms according to the context or the nature of the proceedings, such as whether they are criminal or civil. In this case the court is obviously concerned with civil proceedings only.

21. In the High Court and in this court ACC Bank plc relied on the rule of estoppel in Henderson v. Henderson (1843) 3 Hare 100, but by way of analogy. In his judgment the trial judge stated:

> *"The rule in Henderson v Henderson is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."*

22. Viewing it through the prism of estoppel and res judicata the rule in Henderson v. Henderson (1843) 3 Hare 100 strictly speaking applies to proceedings between parties where those proceedings determine the rights or obligations between those parties. It is intended, inter alia, to promote finality in proceedings and to protect a party from being harassed by successive actions by another party when the issues between them either were or could have been determined with finality in the first proceedings."

DETERMINATION

49. It appears clear that the root of the claim being made by the Plaintiff herein goes back to the issue of ownership of the charge registered on the folio aforementioned. He asserts that the first named Defendant is not such owner and that in consequence he has suffered loss and damage. It is important to clearly articulate the jurisdiction which I am currently exercising and the issue which I must determine. I am not involved in a substantive hearing of the Plaintiff's issues. I am not concerned with the process or trajectory of the previous possession proceedings. I must determine whether the new proceedings, commenced in the wake of the making of the Possession Order and the completion of the possession proceedings, are proceedings which should not be allowed to continue due to their being an attempt to re-open, replicate and reagitate those proceedings. I must determine whether these proceedings represent an attempt to re-litigate issues which have been within the ambit of previous proceedings, indeed, which were determined in the context of such proceedings and, in consequence, are an abuse of process.

50. Applying the principles applicable to relief pursuant to Order 19, rule 28 of the Rules of the Superior Courts, I have concluded that the within proceedings contained in record number 2023/147P are frivolous and vexatious on the basis that they constitute an abuse of the process of the courts and that this is evident from the case as pleaded in the Plenary Summons. The pleading herein seeks to challenge the entitlement of the first named Defendant to enforce the security attaching to the loan advanced to the Plaintiff. This is precisely the issue which has been previously determined and concerns the precise arguments which have been unsuccessfully advanced by the Plaintiff and in respect of which he has fully exhausted his rights of appeal. Alternatively, I have concluded that, in any event, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits having regard to the previous litigation and the determinations therein as between these very same parties. In this context, I would, alternatively, strike out the proceedings in the exercise of the inherent jurisdiction of this court.

51. I have formed the view and I have determined that in consequence the first named Defendant is entitled to the relief which it seeks whether pursuant to Order 19 rule 28 or pursuant to the inherent jurisdiction of the court. I am, therefore, granting the

reliefs sought at paragraphs 1, 3 and 4 of the motion under consideration. In these circumstances, it is not necessary for me to determine paragraph 2 of the said motion.

52. I will therefore strike out the Plaintiff's proceedings as against the first named Defendant.

53. In the circumstances, it would appear to me that the usual principles in respect of costs arise and that costs should follow the event meaning that the first named Defendant is entitled to its costs as against the Plaintiff. However, if either party wishes to make submissions in this regard, I direct that written submissions be made to me in this regard within 21 days of the date of this judgment with 14 days thereafter for submissions by the other side and, upon receipt of such submissions, a date for oral submissions in this regard will be assigned.

54. I do not underestimate the importance of these matters to the Plaintiff and his desire to pursue these issues. However, litigation must be finite and the authorities are amply clear in this regard. The Plaintiff has had ample opportunity to advance the arguments in question and, most importantly, he acknowledges that he has previously advanced such arguments before multiple court fora without success.