UNAPPROVED

THE COURT OF APPEAL
CIVIL

Neutral Citation Number: [2020] IECA 132
Record No. 2019/12

Baker J.
Haughton J.
Murray J.

BETWEEN:

DECLAN AND MARIE GEARY

PLAINTIFFS/APPELLANTS

- AND -

PROPERTY REGISTRATION AUTHORITY, ENNIS PROPERTY FINANCE DESIGNATED ACTIVITY COMPANY, BANK OF SCOTLAND PLC, TOM KAVANAGH and MAPLES & CALDER, SOLICITORS

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 8th of May 2020

Background.

1. By Judgment and Order of the High Court of 19th November 2018 (Ní Raifeartaigh J.) these proceedings were dismissed as against each of the defendants. An application brought by the plaintiffs for certain interlocutory reliefs was refused. This is an appeal against that Judgment and Order.

2. By deed dated the 23 March 2000 between Mr. and Mrs. Geary ('the plaintiffs') and ICC Bank plc. ('ICC') the plaintiffs charged lands and premises in County Limerick with payment of all monies due or to become due by the plaintiffs to ICC either as principal or surety. The charge was registered as a burden on the relevant Land Registry Folios on 04th October 2000. On 25th March 2002 ICC (having re-registered as a private company limited by shares on that date) changed its name to Bank of Scotland (Ireland) Limited ('BOSI'). BOSI thereafter afforded loan facilities to the plaintiffs. Those facilities were secured by that charge. The facilities were granted by letters dated 17th August 2006 (as amended on 29th November 2006), 20th November 2006 (as amended on 24th November 2006) and 23rd July 2008. The terms and conditions of these facilities were set out in the relevant letters of loan offer together with BOSI's general conditions of 2004 (in respect of the 2006 letters) and 2008 (in respect of the facility of 23rd July of that year). None of these facilities or securities have been denied by the plaintiffs.

3. On 31st December 2010 all of the assets and liabilities of BOSI were transferred to the third named defendant ('BOS'), and BOSI was dissolved. This was effected by way of a cross border merger pursuant to the provisions of domestic law giving effect to Council Directive 2005/46/EC on Cross Border Mergers of Limited Liability Companies.

4. By purchase deed dated 29th November 2014, BOS agreed to sell *inter alia* the loan facilities advanced to the plaintiffs and related security to ELQ Investors II Limited. By deed of novation dated 12th December 2014 ELQ Investors II Limited transferred its rights under the Debt Purchase Deed to Ennis Property Finance Limited (now Ennis Property Finance DAC) ('Ennis'). On 19th April 2015, BOS became registered owner of the charge. By deeds of transfer and assignment dated 20th April 2015 BOS assigned, conveyed and

transferred its rights, title and interest in certain loans and securities, including the loans to and securities granted by the plaintiffs to Ennis. On 24th April 2015 Ennis was registered on the Folios as owner of the charge. By letters dated 7th November 2016 Ennis demanded €1,337,013.03 from the plaintiffs. By deed of appointment of 14th November 2016 Ennis appointed Tom Kavanagh ('the Receiver') as Receiver. The plaintiffs thereupon disputed the validity of the Receiver's appointment. Maples and Calder ('Maples') acted as the Receiver's solicitor.

5. In July 2017, the Receiver commenced an action against the plaintiffs ('the Receiver's proceedings'). In those proceedings, the Receiver sought possession of the secured properties and related reliefs. On December 6th 2017 a company alleged by the plaintiffs to be the tenant of the property - Habanville Limited - was added as a defendant to the Receiver's proceedings. Various procedural steps were directed in these proceedings by Order of Gilligan J. of 6th December 2017 and by Order of Barniville J. of 29th January 2018.

6. When the applications the subject of this appeal were heard and determined the plaintiffs had not delivered a defence to those proceedings, notwithstanding being directed to do so. Such a defence was filed by them on 13th December 2018, a defence having been delivered on behalf of Habanville Limited on 7th June of that year. The defence delivered by the plaintiffs in that action does not deny that monies were borrowed and they specifically plead that they '*do not suggest that they have been repaid'*. A variety of claims are advanced in that defence which do not feature in the affidavit evidence or submissions in this case including an allegation that the loan and security '*may well not have been part of the Cross Border Merger'* due to a sale to '*Wolfhound Funding'* prior to the merger. Claims are also made of alleged breaches of the applicable data protection legislation by Ennis. Relevant to

this case, however, is the plea there that the Receiver is not entitled to claim relief in equity in relation to loans on behalf of Ennis:

> *'... in light of very serious issues arising with the loan sale and Cross Border Merger in relation to* ***Irish Regulation 19(g) and (h)*** *which are at odds with the Order of the Scottish Court of Sessions…'*
>
> (Emphasis in original.)

7. On 17th May 2018 the High Court (O'Connor J.) refused an application by the plaintiffs to strike out the Receiver's proceedings as against them. He also refused their application to join Ennis, BOS and the PRA to those proceedings (which application was opposed by the Receiver). All of these orders are under appeal.

8. The action the subject of this appeal was commenced by the plaintiffs by plenary summons issued on 5th April 2018. No statement of claim has been delivered by the plaintiffs. On 12th April the plaintiffs issued a Notice of Motion seeking injunctive relief against the Property Registration Authority ('PRA') and the Receiver. On 23rd April 2018 Notices of Motion seeking the striking out of the proceedings were issued on behalf of Ennis, the Receiver and Maples. On 27th April a similar motion was issued on behalf of BOS. All of these motions came for hearing before Ní Raifeartaigh J. on 5th October 2018.

9. The plaintiffs did not appear before the Court on that date. They recorded on affidavit and by way of various e-mails that Mr. Geary was suffering from acute chronic anxiety and depression and was not fit for attendance in Court. By email dated 4th October Mrs. Geary said that she was not equipped to stand before the courts and that she also had medical issues

and was undergoing treatment. Ní Raifeartaigh J. did not proceed with the matter on 5th October. She took away and considered the papers resuming the matter on 12th October, thereby allowing the plaintiffs a further opportunity to participate in the hearing. On that date she explained her reasons for deciding that notwithstanding the absence of the plaintiffs it was appropriate to proceed with the hearing. The hearing thus proceeded and concluded on 12th October. The decision of the Court on each of the motions was delivered by the High Court Judge on 30th October, the detailed reasons being delivered thereafter by reserved judgment ([2018] IEHC 727).

10. The Notice of Appeal filed by the plaintiffs was amplified in detailed written legal submissions delivered by them on 18th April 2019. The appeal was heard on 18th December 2019. The plaintiffs did not appear at the hearing of the appeal having tendered medical evidence of their inability to do so. The Court directed that the transcript of the hearing be made available to the plaintiffs in order that they could deliver further submissions in the light of same. They did this on 30th January.

11. The plaintiffs have set forth in their Notice of Appeal fifteen grounds. Some overlap and one (ground 15) presents a '*catch all'* complaint. The grounds fall into four broad categories.

Granting the defendant' applications in the absence of statement of claim (grounds one and eight).

12. In ground one of their notice of appeal the plaintiffs assert that the trial Judge erred in permitting the defendants to proceed with their strike out applications '*prior to the advancement of due process and a full Statement of Claim'*.

13. The proceedings were dismissed pursuant to the Court's inherent jurisdiction as identified and explained in *Barry v. Buckley* [1981] IR 306. This enables the dismissal of an action *inter alia* where the defendant establishes that the claim is bound to fail. In exercising that jurisdiction the Court is not constrained by the content of the pleadings. It may entertain and consider any elaboration of those pleadings and the explanation of context or fact recorded in the affidavits sworn in connection with the application.

14. It follows that, whatever about an application under Order Rule 28 RSC, an application to dismiss proceedings pursuant to the inherent jurisdiction of the Court can be brought and determined, in an appropriate case, prior to the delivery of a Statement of Claim. The defendant is entitled, having regard to the terms of the Plenary Summons and relevant factual context, to identify the claim advanced by the plaintiff by reference to the Summons and to explain the basis on which it contends that that claim is bound to fail. If the plaintiff apprehends that the defendant has failed to properly address that claim, it is entitled to either explain in response by way of submissions or on affidavit why the grounds advanced by the defendant are misconceived and/or why the claim is not as apprehended by the defendant and/or to actually deliver a Statement of Claim. There is, thus, neither a basis in principle for objecting to this course of action nor any necessary unfairness attending it. Indeed, in *Barry v. Buckley* itself, where the motion to dismiss was issued within three weeks of the institution of the proceedings, it does not appear that any Statement of Claim was delivered

and, if it was, its content was clearly not viewed by the Court as relevant to the jurisdiction. There is no reference to a statement of claim in the judgment of Costello J. in that case.

15. The plaintiffs complain that '*it was within the remit of the court to require or order a statement of claim'* and contend that the fact that there is a possibility of altering a statement of claim during proceedings means '*the right to provide a statement of claim is essential'.* It was, obviously, entirely open to the plaintiffs to deliver a statement of claim at any time after the issuing of the motion to dismiss their proceedings. Between 12th April 2018 and 8th October 2018 they delivered four affidavits. Some of these were lengthy and dense. They comprehensively detailed and explained the plaintiffs' claims. Following judgment, the plaintiffs delivered a similarly detailed defence in the Receiver's proceedings, a carefully framed notice of appeal, a further affidavit and two sets of legal submissions. They variously aver that they had the assistance of '*a licensed legal professional'* in reviewing their legal file, and their '*family solicitor'* in setting out the facts in writing. The documentation delivered by them discloses that they have had access to a broad range of legal authorities, from which they have liberally quoted.

16. The plaintiffs' right to deliver a statement of claim was never either in issue or denied to them. They did not need leave to do so, and their argument that the court ought to have directed or permitted them to deliver a statement of claim fails to respect that fact. Either way (for whatever reason) they did not exercise that right. The end point of the argument they seek to advance on this aspect of their appeal is that having not delivered their statement of claim they are entitled to rely upon that omission as a basis for precluding the defendants from exercising *their* right to apply for the dismissal of the proceedings. Their argument only has to be so stated, to be rejected.

17. As observed by the trial Judge (paras. 28 and 29 of her judgment), this reflects the conclusion reached by this Court in *O'Connor v. Cotter* [2017] IECA 25. There, proceedings seeking to challenge the validity of the appointment of joint receivers were dismissed as an abuse of process in circumstances where the plaintiff had instituted and brought to trial an earlier action in which he could have, but did not, present that same challenge. The Court did not believe that the fact that the application was brought prior to the delivery of a Statement of Claim affected its jurisdiction. While noting (at para. 14) that it may be considered unusual to bring such an application in advance of the delivery of the statement of claim, the Court determined that there was no rule precluding such an application. That being so, this ground of appeal must fail.

18. Related to this is the complaint made in ground eight of the notice of appeal. There, it is said that the trial Judge erred in '*determining the Plaintiffs were in serious default of O.20 r.1 in relation to the delivery of a Statement of Clam justifying the Defendants applications'*. Certainly, it is the case that the trial Judge referred to the failure of the plaintiffs to deliver a statement of claim. She did so in the context of the arguments advanced by counsel (at para. 28):

> *'Counsel for the Bank of Scotland pointed out that Mr. Geary was in serious default with regard to filing his Statement of Claim which should have been done within the 21-day time limit pursuant to O.20, r.1 of the Rules of the Superior Courts.'*

19. The trial Judge thereafter (at para. 29) noted as one of the reasons she felt it appropriate to consider the relief claimed notwithstanding the absence of a statement of claim was '*the history of the proceedings'.*

20. The point around default of pleading does not appear to me to add anything to the plaintiffs' arguments. The Court was entitled to proceed to consider the application, and it was entitled to take account in that regard of the fact that the plaintiffs did not deliver a statement of claim. The characterisation of the default was neither evidently wrong nor the only reason the Court was, or believed itself, free to consider and determine the application as it did.

Proceeding in the absence of the plaintiffs (grounds two and (in part) three).

21. Generally, this Court has no role in directing a trial Judge in the exercise of his or her functions in the management of a case at hearing. It is a matter for the trial Judge in determining whether, and if so how, to proceed with a hearing so to ensure that an appropriate balance is struck between the interests of each party to the case, having regard to the imperative to achieve the most effective use of court time and resources and its obligation to enable, insofar as reasonably possible, the expeditious disposition of proceedings. An appellate court can only properly interfere with those decisions where a case management decision is affected by manifest error or patent unfairness. This is especially the case when it comes to the decision whether or not to adjourn proceedings. Thus, the law is clear that a trial Judge has a wide margin of appreciation in deciding whether to accede to an adjournment application, that this Court on appeal should be slow to interfere with the manner in which that discretion is exercised, that it should do so only where a clear

error is manifest, and must in making that decision have regard not only to the interests of the party seeking the adjournment, but the interests of all the parties to the suit (*Kildare County Council v. Reid* [2018] IECA 370 at para. 38).

22. Having regard to her reserved judgment on the substantive application, together with the transcript of the Court's ruling of 12th October, the approach adopted by Ní Raifeartaigh J. in determining to proceed was neither unfair nor erroneous. Both rulings disclose the careful attention paid by the trial Judge to ensuring that the plaintiffs had every opportunity to present their case (as they did in the documentation submitted by them) while at the same time enabling the defendants proceed with their application to dismiss a claim which they contended to be lacking in merit in significant respects.

23. By the time the case came before the trial Judge on 5th October, it had been before the Court (Costello J.) on 7th June, when a hearing date of 24th July 2018 was fixed, and 3rd July (Stewart J.), when the allocated date was vacated and the case was fixed peremptorily for hearing on 4th October. On that date the case was adjourned to the following day, affidavits sworn and e-mails sent by the plaintiffs confirming that neither was fit to attend Court. When, on 5th October, the matter came before Ní Raifeartaigh J., she indicated that having regard to the history of the matter she would take the papers and read them over the week, the case to resume for hearing on 12th October. She directed that the plaintiffs be written to and informed of this, as they were.

24. On 12th October, Ní Raifeartaigh J. determined that she would proceed with the matter, notwithstanding the absence of the plaintiffs. She explained that decision in her judgment (at para. 21). Thus, she outlined that the Court was in a position where there were no

indications that Mr. Geary would be sufficiently recovered to attend and make representations in court any time in the near future. She stressed that he continued to put his case forward in detail by way of affidavit, including an affidavit sworn on 8th October 2018. She took into account the timing of the plaintiffs' proceedings and the content of the motions before her. Ní Raifeartaigh J., noted that the plaintiffs, despite putting many documents before the Court since March 2018, had never complied with the deadline of 8th March fixed by Barniville J. on 29th January for the filing of a defence in the action. She explained that the Court had to find a balance of justice as between the various litigants and its own duty to progress cases with reasonable expedition, having regard to the nature of the case and the content of the motions before it at this time. The High Court judge also noted evidence of advice being given to the plaintiffs "behind the scenes". Correctly, she noted, the affidavits and motions and proceedings sworn and issued by the plaintiffs are replete with legal terminology and jargon.

25. While the notice of appeal and submissions complain of the Court proceeding in this way, and while generalised reference is made to Article 40 of the Constitution, and the EU Charter of Fundamental Rights, the plaintiffs have not offered any basis on which this Court can or should interfere with the balance thus struck by the trial Judge. Their case appears to be that the trial Judge was by reason of the illness of the first named plaintiff obliged to continue to adjourn the proceedings until such time as the first named plaintiff had sufficiently recovered from his illness to present his case. Given that at the time the matter was before Ní Raifeartaigh J. there was no indication that the first named plaintiff would be in such a position in the then foreseeable future, given indeed that one and a half years later he is apparently still not in such a position, and given that he was at the same time in a position to record his case on affidavit and in extremely detailed legal submissions, there is

no possible basis for that contention. In this regard I also have regard to the fact that before this Court the plaintiffs have had a full opportunity to present their case in the form not merely of all the material submitted by them to the High Court, but a detailed notice of appeal, an initial set of extensive written submissions, and a further set of written submissions which they were afforded the opportunity to deliver after and in response to what had been said at the oral hearing of his appeal (a full transcript of that hearing having been sent to them for that purpose).

Striking out because of the Receiver's action (ground three (in part), grounds four, five, seven (in part) and grounds thirteen and fourteen).

26. I have noted already that the Receiver's action was instituted against both plaintiffs on 28th July 2017 and that Habanville Limited was subsequently joined as a defendant. In those proceedings, the Receiver recorded the history of the lending and of his appointment and pleaded that the plaintiffs had denied the validity of his appointment. He identified various alleged actions of the plaintiffs which, he contended, amounted to a breach by them of their obligations to allow him to take peaceable possession of the mortgaged property and to dispose of same. The relief claimed by him included injunctions requiring the defendants to the action to surrender possession of the property.

27. The trial Judge struck out the claims in these proceedings as against Ennis and the Receiver, referring to *Henderson v. Henderson* (1843) 3 Hare 100, together with a series of more recent cases applying that decision. She explained as follows (at para. 25) :

'The purpose of the principle set out in Henderson v. Henderson, as described in the above Irish authorities, is to ensure that there is finality to proceedings brought in respect of a particular dispute, and to avoid repetitious and unnecessary litigation. The same logic must apply even where the first set of proceedings has not yet been concluded but a second set of proceedings, which unnecessarily duplicates the first proceedings, is brought.'

28. Noting that the Receiver's proceedings were issued in order to clarify the position regarding the validity of the receiver's appointment, and noting that the plaintiffs were both required to, and had not, delivered a defence in those proceedings, the Court continued (at para. 25):

'There is no reason the issues they raise in their own proceedings could not have been raised in the context of the existing proceedings and there is therefore, in my view, an unnecessary duplication of issues as between the proceedings, which amounts to an abuse of the court process.'

29. The central point made by the trial Judge here is patently correct. The law leans against enabling a party to proceed with a multiplicity of suits duplicating relief that is, or could be, claimed in a single set of proceedings. The reasons for this are obvious - proceedings duplicating relief and arguments in another action may unnecessarily increase costs for the parties, are potentially oppressive to a defendant, and are liable to unreasonably burden the court system. It is certainly the case that the institution by a party of proceedings against the same or related defendants which duplicate relief and grounds in another action brought by that same person, is capable of amounting to an abuse of process.

30. That said, whatever about the duplication by one party of proceedings it has brought itself, it is neither unknown nor necessarily wrong for parties who are named as defendants in an action to proceed to institute their own proceedings claiming relief which they could have sought by way of defence or defence or counterclaim in the first case. There may sometimes be entirely legitimate reasons for the adoption of such a course of action. These may include an urgent need to obtain relief by way of interlocutory injunction, the need to join as defendants to the second proceedings parties who were not plaintiffs in the first or a straightforward strategic preference for being in control and having carriage of one's own case.

31. The Courts have at their disposal a wide range of case management techniques falling short of outright dismissal of a claim, which enable them to ensure that parties are not exposed to unnecessarily duplicitous proceedings. These include orders for the consolidation of proceedings, orders that related proceedings travel and be tried together with discovery in one action being discovery in the other, and orders staying one set of proceedings pending the outcome of another. Where the existence of proceedings raising overlapping issues results in unnecessary duplication, oppression to one of the parties or risks unnecessarily burdening the resources of the Court, the appropriate course for the Court to adopt is to apply from the menu of available case management options the procedure which is best suited to the efficient disposition of the particular case in hand. The striking out of a case and consequent direction that the arguments a litigant wishes to agitate in their own proceedings must be presented in another case to which they are a defendant, is an extreme measure to be adopted when it provides the only proportionate response to a multiplicity of claims – but only then.

32. While the rule in *Henderson v. Henderson* reflects the leaning of the law against multiplicity of action, and while the principle is properly characterised as an aspect of abuse of process (*AA v. Medical Council* [2003] 4 IR 302, at p. 316), the doctrine depends upon proceedings having been brought to finality. It is thus directed to the legal effect of an action which has been heard and determined, rather than to overlapping proceedings which have not been decided. It is not necessary to resort to it or its progeny to resolve the complications that can sometimes arise where proceedings overlap in their object or substance. In this regard, it is notable that the defendants have pointed to no authority (whether under the umbrella of *Henderson v. Henderson* or otherwise) in which it has been held that it is appropriate to use the power of the Court to strike out proceedings as an abuse of process in order to compel a plaintiff to prosecute a claim he wishes to bring by way of counterclaim in an action brought by a defendant in his action, not least of all in a context in which he also wishes to join additional parties to that proceeding. In *McDermott v. Ennis Property Finance DAC* [2017] IEHC 478 McGovern J. refused to strike out proceedings said to be duplicitous with other extant actions on the basis of *Henderson v. Henderson* noting that it had not been established that the matters raised in the proceedings could and should have been raised in other proceedings '*when those other proceedings have not yet been determined'* (at para. 23). That appears to me to reflect the correct approach to that jurisdiction.

33. In this case, it would have minimised cost and inconvenience for all involved had the plaintiffs complied with the directions of Barniville J. and delivered a defence to this claim, advancing such arguments as they wished as to the validity of the appointment of the Receiver in that case. However, at the same time and in fairness to them, they have claimed in their affidavit evidence (and it has not been denied) that in the course of a short hearing

on 24th April 2018, Costello J. proposed to join the defendants to these proceedings to the existing Receiver's proceedings and introduce a counterclaim, but that the Receiver did not wish to proceed in that manner. They have also asserted in their submissions (and this has not been denied either) that they had no objection to the cases being joined. In those circumstances, I do not believe it can be said that the maintenance of these proceedings constituted an abuse of process.

34. That being so, taking account of the fact that the plaintiffs are lay litigants, of the consideration that they wished to proceed in this case against parties who were not joined to the Receiver's action, having regard to the consideration that the end point of this appeal is that two of those additional parties (Ennis and the PRA) will remain a defendant to the action, and having regard to my view that if the plaintiffs are permitted to maintain this action against the Receiver and Ennis it will not add significantly to the costs of the proceedings provided this case and the Receivers action are linked so that they are tried together, it would in all the circumstances be more proportionate to allow the proceeding to continue, but to link them in this way (see Delaney and McGrath "*Civil Procedure",* 4th Ed. (Dublin, 2018) at para. 7-26).

35. I should finally note in this regard that the trial Judge did not engage in her decision with the merits of the claims against Ennis and the Receiver, and that neither advanced any argument in this court that the claims against them were bound to fail. A number of the issues in respect of which the plaintiffs complain – for example that the Receiver proceeded contrary to Court directions having been denied interlocutory orders – are not addressed in the Receiver's evidence delivered in this application (whether or not they give rise to plausible legal claims). However, the conclusions I reach in relation to the claims against

the other defendants have implications for the extent of the claims that can be maintained against the Receiver and Ennis. I return to this later in this judgment. Furthermore, given that neither the High Court nor this Court has adjudicated upon whether the case as it will stand following this judgment against the Receiver or Ennis is a stateable one, both are free to apply to dismiss the remaining claims against them if they believe the claims disclose no cause of action. Any such application should await delivery of a Statement of Claim.

Claim that the Plaintiffs raised a fair and legal argument which met the required legal test to advance to full Plenary trial (ground three (in part); ground five, ground seven (in part) and grounds nine to twelve).

36. It was only the claims against Maples, BOS and PRA that were struck out on the basis that the claims sought to be advanced by the plaintiffs were bound to fail. The claims against Ennis and the Receiver were struck out on the distinct basis that they represented an abuse of process because they replicated the relief claimed in the Receiver's proceedings.

37. The parameters of the power of the Court to dismiss proceedings pursuant to its inherent jurisdiction are well established. The elements have been summarised in the judgment of this Court in *Hosey v. Ulster Bank Limited* [2017] IECA 257 at paras. 35 to 40. The jurisdiction is exceptional, it can only be exercised in clear cases and it must be exercised sparingly. Subject only to the entitlement of the Court to consider and determine the effect of a clear and proven documentary record, it must be established that even if all the facts (but not bare assertion) relied upon by the plaintiff are admitted, the plaintiff still cannot succeed in his action. The court must be confident that this is so no matter what may arise on discovery or at the trial of the action. There was no difference between any of the parties

as to the elements of that test, or the substantial burden imposed upon a defendant in seeking to meet it.

The claim against Maples:

38. The relief claimed by the plaintiffs against Maples is described at para. 16 of the general indorsement of claim, as follows:

> *'... the fifth Named Defendant engaged in behaviour unbecoming and engaged in unethical practice contrary to the code of conduct required by Solicitors and Officers of the Court in an abuse of process acting contrary to Court direction and determination.'*

39. It is clear from the documentation they have submitted to the Court that the acts or omissions complained of arose from Maples' representation of BOS and the Receiver. Thus, in their notice of appeal, the plaintiffs contend that '*there is case law of this nature in relation to proceedings as against the actions of an 'agent acting on instruction' which will be advanced by legal submission in the course of this appeal'*. In their written legal submissions delivered in respect of this appeal, the plaintiffs referred to case law establishing a duty of care owed by solicitors to parties other than their own clients (*Finlay v. Murtagh* [1979] IR 249) and indeed to persons dealing with their client (*Doran v. Delaney* [1998] 2 IR 61). They proceeded to frame the breach of duty alleged against Maples by reference to '*seeking equity on behalf of a client in the face of iniquity'*. Reference was made to a failure to inform the Court of available law, and to the pursuit of *extinguishment 'of proceedings to the Plaintiffs detriment'*. Later in their submission they refer to inaccuracies, falsehoods and

misstatements made in relation to the cross border merger, and to these defendants incorrectly stating that an Order of the High Court was granted by Kelly J. *'for the Merger'*. The plaintiffs say that the Order was in fact granted by the Scottish Court of Sessions. It is said that deponents for BOS and Ennis had sworn to certain facts of transactions which were false. In their affidavits, they say that Maples assisted their clients to '*enforce their authority against specific directions of the Court.* All of this is presented as negligence which, it is said, directly affected the plaintiffs.

40. While circumstances may present themselves in which a solicitor owes a duty of care to a party transacting with his client, those circumstances are rare and exceptional. The starting point, and usually the end point, is that the solicitor acts in accordance with the instructions of his client, whose interests it is his obligation to advance. He is not under an obligation to protect the interests of his client's adversary who he is entitled to assume will take care of his own interests or employ others so to do. Therefore, the solicitor does not owe a duty of care to those persons and, accordingly, will not be liable to them in negligence. *Doran v. Delaney* [1998] 2 IR 61 (which the plaintiffs say best applies to this case) was one of those exceptional cases in which a duty was held to be owed to the counterparty to a transaction with his client. The circumstance was not an adversarial one; the solicitor had issued a replies to requisitions on title on which, it was obvious, the plaintiffs would rely without any reasonable expectation that they would subject the response to query or interrogation. That reasoning cannot be transposed to the situation of the opposing party to litigation. Before any question could arise of a solicitor owing a duty of care to their client's opponent in contentious litigation it would have to be established that (exceptionally) the solicitors stepped outside their role as solicitors for their client and accepted responsibilities

towards both their client and the plaintiff (*Al-Kandari v. JR Brown and Company* [1988] 1 QB 665). There is no evident basis on which this could be said in this case,

41. It follows that Maples, in representing the Receiver, did not owe a duty of care to the plaintiffs so as to expose them to claims for damages for actions undertaken in the course of such representation. They are fully entitled to represent their client in accordance with their professional obligations to him without owing at the same time a concurrent duty to those whose debts their client is charged with recovering. This, I should state, is aside from the baseless nature of the allegations made against that firm. An order *was* made by Kelly J. (as he then was) on 22nd October whereby he certified pursuant to Regulation 13 of the 2008 Regulations that BOSI had completed properly each of the pre-merger requirements in respect of the proposed merger with BOSI. That is quite legitimately described as an order '*for the merger'*, and indeed it was described in similar terms by Clarke J. in *Kavanagh v. McLoughlin* [2015] IESC 27, [2015] 3 IR 555, at para. 49 and see also *Kearney v. Bank of Scotland and anor.* [2020] IECA 92 at para. 85 and 86. The fact that solicitors arrange for the swearing of an affidavit the contents of which subsequently turn out to be incorrect affords no cause of action whatsoever against the solicitor where the solicitor acted upon instructions. That is what the solicitor is obligated to do. He or she cannot face legal liability for discharging that obligation (see *Gilroy v. Callanan* [2019] IEHC 480).

42. None of this, of course, means that solicitors are free to engage in misrepresentation or to engage in conduct in breach of their professional code of conduct. It simply means that the remedy for such defalcation, if established, does not lie in private law litigation at the suit of the opposing party. There is no version of the law or of fact by reference to which the plaintiffs in this case enjoy any cause of action against the solicitors representing BOS

and the Receiver of the kind, or on the basis, suggested by the plaintiffs. The case against those defendants was, accordingly, correctly dismissed as a claim that was bound to fail.

The claim against BOS:

43. In their joint affidavit of 3rd May 2018, the plaintiffs summarise their claims against BOS under four headings. None discloses a cause of action that enjoys any prospect of success and the claims against BOS were thus, similarly, properly dismissed.

(a) A challenge to the contractual entitlement of BOS to sell, assign or transfer the Plaintiffs' Mortgage Deed Contract and Related Security to any other party.

44. This contention reduces itself to the proposition that because the Mortgage Deed did not contain an express power of assignment, it could not be assigned. The argument ignores four important considerations.

45. First, clause 14.2 of the 2004 and 2008 loan conditions provides:

> *'The Bank may at any time, without the prior consent of the Borrower, assign, novate, or transfer any of its rights and benefits and transfer any of its* ***obligations under any of the Finance Documents*** *to any person, firm or company or subparticipate or subcontract any of its rights or obligations under the Finance Documents.'*
>
> Emphasis Added.

46. '*Finance Documents'* are defined in the loan conditions as follows:

> *'"Finance Documents" means each of the Loan Agreement, the Security Documents and any agreements, documents, arrangements, letters or undertakings that may be entered into or executed pursuant thereto or in connection therewith and any one a 'Finance Document''*

47. '*Security Documents'* mean the documents specified in the section headed '*Security'* in the Facility Letter. Each of the facility letters referred under this heading to *inter alia* the charge over the property in Limerick. Therefore, there was a binding agreement between the plaintiffs and BOSI whereby the former agreed that the latter could *inter alia* assign the security. The fact that that agreement does not take the form of an express term in the Mortgage Deed itself is neither here nor there. While the plaintiffs contend that the facility letter deals with the loan, and the Mortgage Deed with the security, this does not affect the critical consideration which is that the parties have agreed that the security can be assigned. The fact that that agreement appears in a separate document does not impact on its legal efficacy.

48. Second, and aside from this, there is no requirement that a mortgage contain an express power of assignment: the security is (as BOS contends) inherently transferrable (Wylie, "*Irish Land Law"* 5th Ed. (London, 2013) at para. 13.81). While the plaintiffs suggest at some points that the Mortgage Deed precludes assignment, it does not. It simply does not expressly so provide. The general law makes it clear that it does not have to do so.

49. Third, s.28(6) of the Supreme Court of Judicature (Ireland) Act 1877 is also clear: any absolute assignment, by writing under the hand of the assignor (not purporting to be way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receiver or claim such debt or chose in action shall be and be deemed to have been effectual in law to pass and transfer the legal right to such debt or chose in action from the date of such notice and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor. As I explain below, the notification requirements imposed by this provision were complied with. No other reason has been suggested by the plaintiffs as to why this provision cannot be relied upon.

50. Fourth, s.64(1) of the Registration of Title Act 1964 provides that the registered owner of a charge may transfer the charge to another person as owner thereof and the transferee shall be registered as owner of the charge. As I also explain later, BOS was properly registered as the owner of the charge prior to the completion of the sale transaction.

51. On December 19th 2014 BOS wrote to the plaintiffs advising:

> *'On 29th November 2014, Bank of Scotland plc … agreed to sell amounts owing to it in respect of your Facilities and the facility letter(s), guarantee(s), security and rights relating to your Facilities with BOS … to Ennis Property Finance Limited ('the Purchaser') in accordance with the Facility Documents … BOS will write to you in due course to confirm the date on which the Sale will take effect ….'*

52. The plaintiffs say (a) that this statement was not factually correct, (b) that BOS could not sell the loans and securities because they had been sold to another entity (ELQ Investors II Limited) and (c) that BOS had no legal charge registered at what is termed '*the effective date of novation'.*

53. I have referred above to the context to these objections. On 29th November, BOS entered into a purchase deed regarding an agreement to sell a portfolio of loan facilities and associated security to ELQ Investors II Limited. The plaintiffs' facilities were included in that portfolio. That transaction was never completed. Instead, on 12th December BOS, ELQ Investors II Limited and Ennis entered into a deed of novation pursuant to which ELQ Investors II Limited novated the entirety of its rights, title and interest, obligations and liability to Ennis. Two things follow. First, the cumulative effect of the agreements was as exactly as stated in the letter to the plaintiffs – BOS had agreed to sell the loans to Ennis. It agreed in the first instance to sell them to ELQ Investors II Limited. BOS and ELQ Investors II Limited then agreed that the rights under the purchase agreement could be taken over by Ennis. The end point was that Ennis thereupon had the benefit of an agreement to sell the loans and security to it. Therefore, BOS had agreed to sell the loans and securities to Ennis.

54. Second, it was not the case that BOS had disabled itself from selling to Ennis. The consequence of the novation was to achieve just that. This is the case irrespective of the reason for the novation. It is also the case even though Ennis was not incorporated at the date of the original purchase deed. It was incorporated at the time of the novation to it.

55. Finally, in this regard, the plaintiffs' complaint that BOS was not the registered charge-holder at the relevant time is misplaced. Insofar as the failure to register as charge-holder is

an impediment, this only arises at the point of completion of the sale. This was *after* BOS was registered as charge-holder. The Debt Purchase Agreement was an agreement to sell, but it was not until the Deed of Assignment that this sale and assignment was completed. By then BOS was registered as charge-holder. That was all the law required.

(b) A challenge to the contractual entitlement of BOS plc to assume the Mortgage Contract and related facilities not being a regulated entity in this jurisdiction.

56. This argument arises in a context in which (as explained by Mr. Catling in his affidavit sworn on behalf of BOS) BOS was at the date of the merger and thereafter, regulated in the United Kingdom by the Financial Services Authority (up and until 2013) and then by the Financial Conduct Authority and the Prudential Regulation Authority. BOS appears on the Central Bank of Ireland Credit Institutions Register in accordance with EU passporting rules and is regulated by the Central Bank's conduct of business rules. The plaintiffs seek to contend that, in some sense, this renders the merger ineffective and/or it is impossible for BOS to assume the mortgage contract and related facilities.

57. This argument ignores the fact that BOS was entitled, subsequent to the cross-border merger, to provide the services in the State previously carried on by BOSI in Ireland. This follows from the provisions of the European Communities (Licensing and Supervision of Credit Institutions) Regulations, 1992 (SI no. 395 of 1992) ('the 1992 Regulations'). Regulation 20(1) of the 1992 Regulations provides that:

> *'A credit institution authorised and supervised by the competent authority of another Member State may carry on business within the State by establishing a branch or any*

other means in any one or more of the activities set out in the Schedule provided that the ... provision of these activities is in accordance with the authorisation of the credit institution in that Member State and the requirements of these Regulations are complied with in full'.

58. The State is obliged, as a matter of EU law, to respect the form of regulation which is in place in the United Kingdom (as Regulation 20(1) of the 1992 Regulations makes very clear). The State does not look behind the nature of the regulatory regime in place in the United Kingdom. It would be contrary to EU law were the State to do so. What is clear is that there is such a regulatory regime in place and Bank of Scotland has at all times been subject to it. There is therefore no basis, in my view, for grounding any claim on the fact that, as a consequence of the cross-border merger, the loans and the related security have been transferred to BOS.

(c) A challenge to the contractual entitlement of BOS to sell, assign, transfer or novate the Mortgage Deed Contract and related security, taken out in regulation, to an unregulated entity thus removing the contract from the Bank's lawful obligations under regulation without consultation or consent from the counter party:

59. This point arises from the original agreement entered into with ELQ Investors II Limited and thereafter with Ennis. To some extent, it overlaps with the arguments considered above at (b). For the reasons considered under that heading, insofar as this aspect of the plaintiffs' case depends on the proposition that the plaintiffs were not advised of the sale to Ennis, or that they had a legal entitlement to some form of consultation in respect of that transaction, or that they had a veto over it, this is simply wrong in law. Insofar as it is

sought to contend that the fact that Ennis is not itself a regulated entity gives rise to any ground of legal complaint, this is also misconceived.

60. Section 5 of the Consumer Protection (Regulation of Credit Servicing Firms) Act, 2015 ('the 2015 Act') inserts a new provision into the Central Bank Act 1997 ('the 1997 Act'). This is s.34G. That provision is intended to ensure that obligations imposed on regulated financial service providers will also apply in circumstances where a credit servicing firm is acting on behalf of the owner of the legal title of the loans and related securities. The provision imposes a prohibition on such a credit servicing firm, either on its own behalf or on behalf of the owner from taking or failing to take an action '*if the taking of or the failure to take the action would otherwise be a prescribed contravention if a retail credit firm took or failed to take that action*'. Furthermore, under s.34G (2) a person who holds the legal title to credit granted under a credit agreement is prohibited from instructing a credit servicing firm to take or fail to take an action '*if the taking of or the failure to take the action would otherwise be a prescribed contravention if a retail credit firm took or failed to take that action.*'

61. In *Launceston Property Finance Ltd v. Burke* [2017] IESC 62, [2017] 2 IR 798 at para. 20, McKechnie J. confirmed that the purpose of the enactment of the 2015 Act was to ensure that borrowers who had a 'regulated loan' which was acquired by an 'unregulated body' would continue to have the protection of various consumer codes and statutory provisions. That decision makes it absolutely clear that provided the owner of legal title to the loans has engaged a regulated credit servicing firm to act on its behalf in respect of those loans, the fact that the owner itself is not regulated provides no basis for impugning the transfer of loans or securities to it. Here it is not disputed that Ennis has retained and acts through a

regulated credit service firm within the meaning of s.5 of the 2015 Act. Accordingly, this argument inevitably fails.

(d) A challenge to Regulation 19 of the Cross Border Merger Regulations in relation to contractual and constitutional issues arising within.

62. Under the umbrella of this ground, the plaintiffs seek to advance a range of arguments as to why the merger was legally ineffective rendering the debts admittedly incurred by them with BOSI, irrecoverable. Each of these arguments is misplaced, and most have now been put to bed by the Courts in litigation brought by similarly positioned debtors. I will deal with each in turn. However, all of these arguments must be viewed in the light of a critical and overarching consideration. The European Communities (Cross-Border Mergers) Regulations 2008, SI 157 of 2008 were introduced to give effect to Council Directive 2005/56/EC on cross border mergers of limited liability companies. The Directive, in turn, was intended to facilitate cross-border mergers of companies governed by the laws of different countries (*Kavanagh v. McLoughlin* [2015] IESC 27, [2015] 3 IR 555 at para. 51). The assumption in interpreting the Directive and Regulations implementing it must be that the provisions enable, not negate, the merger process.

63. The Directive is intended to ensure that a cross border merger effected pursuant to its provisions is in every sense legally operative. This requires ensuring that the merged entity is entitled to all of the assets previously vested in the acquired company. These include its contractual rights. As explained by Clarke J. in *Kavanagh v. McLoughlin* (at para. 63):

'The cross-border merger has been approved by the relevant courts. Unless and until (if it were to prove procedurally possible) those orders were annulled in some way, the cross-border merger remains effective and all of the assets are to be considered to have been transferred to the party contemplated by the merger documentation.'

64. The challenge (as they describe it) which the plaintiffs seek to make in respect of Regulation 19 takes them nowhere unless (a) it is directed to impugning the merger itself or (b) it is intended to enable the plaintiffs to contend that BOS has not taken over BOSI's entitlements on foot of the agreements with the plaintiffs. The first of these cannot be done. Article 17 of the Directive is clear and emphatic: '*a cross-border merger which has taken effect as provided for in Article 12 may not be declared null and void.'* This, of course, is aside from the fact that any proceedings seeking relief to that effect would comprise a challenge to the Order of the Court of Sessions in Scotland pursuant to which the merger took effect, a challenge which could only be entertained by the Courts in that jurisdiction.

65. The second would negate the outcome required by Article 14(1)(a) as described by Clarke J. in *Kavanagh v. McLoughlin*. That provision *mandates* that a cross border merger have the consequence that '***all the assets and liabilities of the company being acquired shall be transferred to the acquiring company*'.** The Court in *Kavanagh v. McLoughlin* held that 'assets' for this purpose means '*any element of its business which has the potential to confer value*' (at para. 65). Therefore, *all* contractual rights of BOSI *were* transferred to BOS, including the right to recover debts and any securities.

66. Thus, and having regard to the provisions of Article 29.4.6 of the Constitution, arguments based upon the alleged unconstitutionality of the Irish Regulations are doomed to

fail. Measures which ensure the effectiveness of the transfer of those contractual rights are necessitated by the provisions of the Directive.

67. These considerations are very recently reflected in the comments of Whelan J. in *Kearney v. Bank of Scotland and anor.* [2020] IECA 92 where, in dismissing proceedings presenting challenges to the entitlements of BOS following the cross-border merger, she observed (para. 135-138):

> ***135.*** *The appellant contends that Directive 2005/56/EC and the relevant regulations are "an example of State interference in private contracts". The appellant's mortgage is not exempt from the operation of Directive 2005/56/EC, provided the Directive's provisions and the relevant national measures of both member states were complied with. The Supreme Court has held that they were. It is specious to argue otherwise.*
>
> ***136.*** *The corollary of the appellant's contentions is that mortgages which existed for the benefit of BOSI on the operative date, namely, 31st December, 2010, thereupon by some vague alchemy vanished or ceased to exist. There is no basis in logic or reason for such a proposition. Such contentions are wholly unarguable in light of the decision of the Supreme Court in Kavanagh v. McLaughlin, including the obiter comments of Laffoy J. The judgment of Clarke J. warrants careful consideration by any party who seeks to argue otherwise. The Supreme Court reiterated the position in Freeman v. Bank of Scotland plc. The High Court was bound by and correctly applied the said decisions which are clearly dispositive of all the arguments advanced by the appellant in his pleadings including the amended statement of claim directed at impugning the cross-border merger.*

> ***137.*** *In the exercise of its inherent jurisdiction in determining whether to dismiss proceedings as constituting an abuse of process, a wider ambit of considerations and factors can be taken into account by the court. Nevertheless, the jurisdiction is to be sparingly exercised and, as was stated by Clarke J. in Moylist Construction Ltd. v. Doheny [2016] IESC 9, [2016] 2 I.R. 283 at p. 290, only where there is "no real risk of injustice".*
>
> ***138.*** *I am satisfied that, insofar as the claims are based on the cross-border merger and seek to impugn same or to assert that the security never vested in BOS, these proceedings constitute an abuse of process, are doomed to failure, and the appellant had no reasonable prospect of obtaining relief in regard to same. The trial judge was entitled to dismiss that aspect pursuant to the inherent jurisdiction of the court.*

68. Turning to the specific contentions advanced by the plaintiffs in support of their challenge to Regulation 19 of the Irish Regulations, these can be summarised as follows.

69. First, they say that they had a right to be informed and heard as a directly affected party. This argument is without foundation. For a start, the rights and entitlements of the plaintiffs vis a vis BOS were exactly the same as they were vis a vis BOSI. Although they protest otherwise, I cannot see that they have identified any respect in which their contractual position has been adversely affected consequent upon the transfer. I will deal with the specific contentions they advance in this regard presently. That being so the decision in *Dellway v. National Asset Management Agency and ors.* [2011] 4 IR 1 upon which the plaintiffs rely, is not apposite. Even if this were not the case, any borrower who established that he or she was adversely affected by the merger could have sought to make such representations as they say fit to either Court. Not having sought to do so, the plaintiffs

cannot be heard to now say that there was no opportunity for them to make their objections known. For the same reason the plaintiffs' claim that Regulation 19(1) of the Irish Regulations sought to interfere with the counter-party's right to be consulted prior to such decisions is without foundation. It does not displace in any way any such rights of participation affected persons might have.

70. Second, they say that Regulations 19(1)(g) and (h) of the Irish Regulations have *'no counterparty'* (*sic*) in the United Kingdom Regulations, or in Article 14 of the Directive. The former (if correct) is not relevant to any argument that can be advanced by the plaintiffs, and they have failed to explain anywhere how it is. The legal consequence mandated by the Directive is that the assets of BOSI – including the plaintiffs' loans and securities – have been transferred to BOS. The plaintiffs have identified no feature of the Scottish Regulations which would limit the extent to which that mandate could be implemented and they have identified no feature of those Regulations which would affect the entitlement of BOS to take any of the steps it has taken in relation to the plaintiffs' loans and securities.

71. The latter contention misunderstands the functioning of an EU Directive. As I have stated, Article 14(1)(a) of the Directive provides that a cross border merger carried out as provided for in points (a) and (c) of Article 2(2) shall have as its consequence that all the assets and liabilities of the company being acquired shall be transferred to the acquiring company. Article 14(3) provides :

> *Where, in the case of a cross-border merger of companies covered by this Directive, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies*

becomes effective against third parties, those formalities shall be carried out by the company resulting from the cross-border merger

72. The Irish Courts must give effect to these mandates of European law and must interpret domestic law to conform with these obligations. It follows that the Irish legislation must be interpreted so that the debts owing by the plaintiffs to BOSI together with the associated security were transferred to BOS by means of this provision. Nothing the plaintiffs say affects or can affect that indisputable proposition.

73. It is a matter for each member state to introduce measures which, having regard to the particular features of their own legal system, give effect to the obligations imposed by Article 14(1)(a) and 14(3). Ireland has done this in the first instance via Article 19(1)(a) of the 2008 Regulations. That states :

Subject to paragraph (2), the consequences of a cross-border merger are that, on the effective date –

(a) All the assets and liabilities of the transferor companies are transferred to the successor company,

74. In a number of other provisions in Article 19(1), the specific implications of the general consequence outlined in (a) are spelt out in respect, for example, of legal proceedings (para. (d)), and contracts of employment (para. (f)). Article 19(1)(g) states :

every contract, agreement or instrument to which a transferor company is a party shall, notwithstanding anything to the contrary contained in that contract, agreement or instrument, be construed and have effect as if –

(i) the successor company had been a party thereto instead of the transferor company

75. Paragraphs (ii) and (iii) provide for the substitution of references to the transferor with the successor and the directors, officers, representatives or employees of each. Article 19(1)(h) states :

(h) every contract, agreement or instrument to which a transferor company is a party becomes a contract, agreement or instrument between the successor company and the counterparty with the same rights, and subject to the same obligations, liabilities and incidents (including rights of set-off), as would have been applicable thereto if that contract, agreement or instrument had continued in force between the transferor company and the counterparty, and any money due and owing (or payable) by or to the transferor company under or by virtue of any such contract, agreement or instrument shall become due and owing (or payable) by or to the successor company instead of the transferor company.

76. Member States in implementing an EU Directive do not have to slavishly replicate every word of it, and they are in no sense precluded from expanding on its terms. In some circumstances it would actually breach European Law to do the former and not to do the latter. The provisions to which the plaintiffs object – Articles 19(1)(g) and (h) - provide in detail how specific effect is being given to general the mandate expressed in Article 14(1)(a) of the Directive. That is both common and entirely regular. Apart from pointing to the fact that the Directive does not contain the text in these provisions, the plaintiffs have not explained how the Regulations are in any way incompatible with the Directive. For the

argument they seek to advance in this context to enjoy any reality they would have to explain *why* the Directive, although requiring that a transfer of *all* assets and liabilities of the company being acquired should be effected to the acquiring company, in some sense precludes the consequences identified in Articles 19(1)(g) and (h). They have not explained this, because they cannot possibly formulate such an argument. Clearly, the opposite is the case. These stipulations have the effect of ensuring that the assets are properly and effectively transferred. The proposition that the State is in breach of EU law because of its elaboration on the consequences of Article 14(1) of the Directive in domestic law in this way is untenable.

77. The plaintiffs make a further point which appears to be connected to this contention. They say that EURIBOR could not be provided by BOS and that it is a LIBOR panel bank. They say that there was a failure by BOS to comply with the consequent obligation to notify borrowers of any inability to perform obligations under the loan conditions, as provided for in clause 10 thereof.

78. The difficulty for the plaintiffs is that while this claim is posited by them, they do not explain how this impacts on their own interests in such a way as to generate a cause of action which they can pursue in these proceedings. It is not sufficient for them to simply identify a provision of the loan conditions with which they say BOS is unable to comply, and from there to contend (as they variously appear to suggest) that this invalidates the merger and/or represents a breach of contract and/or a breach of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and/or invalidates the appointment of the Receiver. Leaving aside the other difficulties they face with some of these arguments as addressed elsewhere in this judgment, unless and until they identify how the asserted inability to provide EURIBOR actually affected them, the issue is purely theoretical. The

furthest they appear to be able to put this contention (as they do in their affidavit sworn on 15 November 2019) is that the contracted EURIBOR rate was '*terminated'* when the cross border merger took effect and that they had a right to be notified and/or consulted and/or heard in relation to this.

79. Taking this argument at its height, I cannot see how it grounds any of the relief claimed in the action, and I cannot see what other relief might be extracted from it. The fact is the cross border merger has occurred and taken effect. The plaintiffs cannot, as I have explained earlier, seek in this action to invalidate the merger. Therefore, the plaintiffs' loans and securities have vested in BOS. While the plaintiffs say that there is a breach of contract arising from the inability of BOS to provide them with EURIBOR rates I cannot ascertain anywhere in their affidavits or submissions any explanation as to how that alleged breach has caused them any loss. The matter is presented in an entirely abstracted way.

80. Finally, and similarly, the claim that the plaintiffs' position is advanced by the provisions of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 is without merit. The plaintiffs, having confirmed at the time of the loan facility letters that they were availing of those facilities and drawing down the loans '*within [their] business, trade and profession',* cannot claim that they were consumers for the purposes of these regulations. It follows that there is no basis on which the plaintiffs can rely upon these provisions.

<u>The claim against PRA:</u>

81. It follows not merely that the claim against BOS must be dismissed, but also that all arguments against the other parties which depend upon the propositions that (a) the merger did not transfer BOSI's interests in the relevant loans and securities to BOS, (b) that BOS could not transfer the loans and security to Ennis, or (c) that BOS was not registered as charge-holder prior to the agreement of 29th November must fail.

82. This is relevant to the claims against the PRA. The general indorsement of claim in the plenary summons makes the following claims in respect of this defendant:

(i) that it acted in breach of duty and statutory duty (at paras. 1 to 2);

(ii) that it breached constitutional duty '*through a deprivation of fair procedures to the detriment of the Plaintiffs'* (at para. 3);

(iii) that it breached constitutional obligations '*through the provision of knowing assistance to the second named Defendant and third named Defendant in the carrying out of an unlawful attack on the private property rights of the Plaintiffs'* (at para. 4);

(iv) that there was '*a failure on the part of first named Defendant to ensure it applied the appropriate interpretation and understanding of the constructions within the Irish Regulations 19(1)(g) and (h) and its Constitutional obligations to the Plaintiffs in the application of such interpretation and understanding'* (at para.5);

(v) that it '*failed to ensure its actions were in compliance with the constructions within Article 14(3) of the EU Directive on Cross Border Mergers* (at para. 6);

(vi) that in assisting the second named Defendant in placing a charge on the property folios of the Plaintiffs, the PRA, in breach of duty, assisted the second named

defendant to exploit the Registration of Title Act through an act of fraud and/or mistake; and

(vii) In assisting the second and third named defendants the PRA in the registration of a legal charge on the private property folios of the plaintiffs in breach of duty failed, refused and neglected to correctly interpret the constructions of Regulation 19(1)(g) and (h) and Regulation 19(2) of the Irish Regulations and Article 14(3) of the Cross Border Merger Directive. In so acting, PRA provided assistance to the second and third named Defendants to exploit Regulation 19(1) and Regulation 19(2) of the Irish Regulations and Article 14(3) of the Directive on Cross Border Mergers to be used as instruments for fraud and/or mistake.

83. PRA did not bring any application to have the proceedings against it struck out. While it is clear that the reliefs summarised at (iv), (v) and (vii) relate to BOS and the transfer of the loans by BOS, and thus cannot be proceeded with, in the absence of a specific application to that end, and having regard to the fact that (as matters presently stand) the case against Ennis and the Receiver will proceed, I do not believe it appropriate to conclude at this point and before the plaintiffs have identified with specificity the alleged breaches by the PRA and the manner in which it is contended that the PRA "assisted" the relevant defendants in the registration of the charge that that the remainder of the claims against PRA enjoy no prospect of success. Unlike the position in relation to BOS and Maples, there was no affidavit evidence and no application from PRA specifically addressed to the striking out of the case against it. The plaintiffs have therefore not been afforded the opportunity to more fully formulate their case that they would have enjoyed had they been facing such an application.

84. Accordingly, these aspects of the plaintiffs' claims against PRA will not, at this point, be dismissed. PRA is, of course, free to bring an application to dismiss the proceedings should it wish to do so following the delivery of a statement of claim in this case.

Claim for interlocutory relief.

85. While the plaintiffs' notice of appeal purports to appeal the refusal by Ní Raifeartaigh J. of their application for interlocutory injunctive relief, no specific grounds on which it is alleged the trial Judge erred in this aspect of her decision are identified either there or in their written legal submissions. It is not obvious to me how it can be said the Judge erred in refusing that relief. The orders sought, as I have noted above, were directed to compelling the PRA to remove Ennis' legal charge from the property of the plaintiffs, or in the alternative an order restraining the Receiver from further interference or progression of the receivership over that property. Noting that the application was framed as final relief rather than interlocutory relief and that this alone was a reason for refusing the application, Ní Raifeartaigh J. proceeded to explain that she would have refused the application for interlocutory relief for four reasons with each of which I agree :

(i) the plaintiffs had failed to explain the damage they would suffer if the charges were not removed and had failed to provide an undertaking as to damages;

(ii) the balance of convenience favoured refusal of that relief because if the charge was removed on an interlocutory basis other creditors would obtain priority. That could not, the Judge said, be reversed;

(iii) the plaintiffs had delayed in seeking interlocutory relief, the charges having been registered in April 2015 and the application for an injunction being brought two years later;

(iv) the relief sought was mandatory in nature, yet fell short of the test for a mandatory injunction (*Maha Lingham v. HSE* [2005] IESC 89.

86. For these reasons the interlocutory relief sought by the plaintiffs would not have been appropriate. Insofar as the PRA is concerned, the relief being sought against it was mandatory interlocutory relief. In circumstances in which the claim stands shorn of the various objections made to the merger and its effect, the best that can be said of the plaintiffs' claim against PRA is that it is unclear. It does not meet the threshold required for mandatory interlocutory relief. As to the Receiver, similarly, when the claim against him has the elements arising from the claim against BOS extracted from it the exact basis on which it can be said that he is disabled from discharging his functions as Receiver is not obvious. Either way, the considerations identified by the High Court Judge and referred to at (i) above in themselves mandate the conclusion that the balance of convenience favours the refusal of interlocutory relief against the Receiver.

Conclusions.

87. It follows that the appeals against the Order of Ní Raifeartaigh J. insofar as the High Court dismissed the plaintiffs' claims against BOS and Maples are ill founded and should be dismissed.

88. Similarly, insofar as the plaintiffs' appeal against the refusal by Ni Raifeartaigh J. of their applications for injunctive relief, this should also be dismissed.

89. However, I would allow the appeal of the plaintiffs against that part of the Order of the High Court dismissing the claims in these proceedings as against the Receiver, Ennis and (in part) the PRA. In my view the proper order to address the well-founded concerns of the Court as to the existence of multiple proceedings seeking duplicated relief is for this action and the Receiver's action to be linked, and tried together.

90. However, it also follows that a number of paragraphs of the general endorsement of claim should be struck out. These are paras. 5, 6, and 9 (relating to the PRA and the effect of the merger), paras. 7, 9, and 10 (each of which assumes that BOS's charge was invalid having regard to the 2008 Regulations), paras. 11, 12 and 13 (which assumes that BOS was precluded from effecting a transfer of the plaintiffs' loans and securities relevant thereto) and para. 16 (concerning Maples). The claims for damages referred to at para. 17 that remain live are limited to claims against the PRA, Ennis and the Receiver. It also follows from this judgment (for the avoidance of any doubt around the issue) that no claim may be advanced against PRA Ennis or the Receiver based on or involving a challenge in any way to, the merger or registration of BOS as the owner of the charges, nor upon BOS's entitlement to transfer its rights *vis-a-vis* the plaintiffs, to Ennis.

91. It is my view that the plaintiffs have now had ample time within which to formulate their Statement of Claim in this action. Accordingly, I would order that they be afforded a further eight weeks from the date of this judgment to deliver a Statement of Claim as against PRA, Ennis and the Receiver in accordance with the preceding paragraph. This order shall

be an 'unless' Order, to the extent that if the Statement of Claim is not delivered within that period, the proceedings shall stand dismissed as against those parties also for failure to deliver that pleading.

92. I would therefore substitute for the Order of the High Court the following :

(i) An Order dismissing these proceedings as against the third and fifth named defendants.

(ii) An Order striking out the reference to the third named defendant in paragraph 4 of the Indorsement of Claim, and an Order striking out paragraphs 5, 6, 7, 9, 10, 11, 12, 13 and paragraph 16 of the General Endorsement of Claim.

(iii) An Order that within eight weeks from the date of this judgment the Plaintiffs shall deliver a Statement of Claim as against PRA, Ennis and the Receiver. If the Statement of Claim is not delivered within that period, the proceedings shall stand dismissed as against those parties.

(iv) An Order that no claim may be advanced in these proceedings against PRA, Ennis or the Receiver based on or involving a challenge in any way to, the merger or registration of BOS as the owner of the charges, nor upon BOS's entitlement to transfer its rights *vis-a-vis* the plaintiffs, to Ennis

(v) An Order directing that the within proceedings be linked to the action bearing the record number and title '*The High Court Record Number 2017/6534P*

Between Tom Kavanagh, Plaintiff, and Declan Geary and Marie Geary, Defendants' and that same be heard one after the other.

(vi) An Order refusing the plaintiffs' applications for interlocutory injunctive relief.

93. Baker J. and Haughton J. are in agreement with this judgment and the Orders I propose.