

THE HIGH COURT

[2021] IEHC 637
[2019 No. 6381 P.]

BETWEEN

HENRY GREALLY

PLAINTIFF

AND

**HAVBELL DAC LIMITED, DUFF AND PHELPS (IRELAND) LIMITED AND FRESCATI
PROPERTY MANAGEMENT LIMITED**

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 7th day of October, 2021

Introduction

1. This is an application brought under O. 19, r. 28 of the Rules of the Superior Courts by the first and second defendants (*"the defendants"*) in these proceedings seeking to strike out the plaintiff's claim against them for failing to disclose a cause of action and/or for being frivolous and vexatious. Alternatively, the defendants invoke the inherent jurisdiction of the court and seek to have the plaintiff's proceeding against them struck out on the basis that they are bound to fail or that they constitute an abuse of process and are oppressive. There is a third defendant in the proceedings who has not made any application to the court and, consequently, the proceedings will remain in being against that defendant regardless of the outcome of this application. The defendants advance three arguments in support of their application, namely that the plaintiff has not sued the correct defendants; that the statement of claim served by the plaintiff fails to disclose a cause of action; and that both the statement of claim and the affidavits lodged by the plaintiff in response to the motion represent a collateral attack on a summary judgment obtained by Havbell DAC against the plaintiff on 25th February, 2019.
2. The plaintiff opposes the application and has sworn detailed affidavits in response as has his previous solicitor. Notably, the plaintiff served a notice of change of solicitor on 2nd March, 2021, some two months before the motion was heard. As a result, the case argued on the plaintiff's behalf at the hearing of the motion was more focused than earlier correspondence and affidavits suggested it might be. The plaintiff emphasises that the jurisdiction to strike out is one which should be exercised sparingly and relies on the principle that proceedings should not be struck out if an amendment of the pleadings could save the action. An amended statement of claim was circulated by the plaintiff immediately prior to the commencement of the hearing of the motion. The court accepted the amended statement of claim on a *de bene esse* basis.

Legal Framework

3. The principal relief sought by the defendants is the striking of the plaintiff's statement of claim as against them pursuant to O. 19, r. 28 of the Rules of the Superior Courts which provides as follows:-

"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 pleadings 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."

The inherent jurisdiction of the court, which has also been invoked by the defendants, exists to ensure that an abuse of the courts' processes does not take place. Although there is a significant overlap between the jurisdiction available to the High Court under each of these headings, it would seem from the authorities that it may be somewhat easier for a party to succeed in an application invoking the court's inherent jurisdiction. This is because, in circumstances where the facts of the case can be established with some clarity at the interlocutory stage, the court can look behind the fact that pleadings disclose a reasonable cause of action to determine whether those proceedings are nonetheless bound to fail. Obviously, this will be easier to establish where the issue between the parties is essentially a legal one rather than a case where the facts or the interpretation of the facts (including the interpretation of relevant documents and other material) is in dispute between the parties.

4. There is an abundance of case law on striking out proceedings and on both the overlap and the distinction between the jurisdiction conferred on the High Court by O. 19, r. 28 and the court's inherent jurisdiction. The court must conduct a balancing exercise between the constitutional right of the litigant to access the courts, the right of the defendant not to be burdened with the requirement to defend proceedings which are bound to fail and the court's duty to uphold the integrity of the judicial system and to prevent abusive or oppressive use of its processes. As it happens, there was little dispute between the parties to this case as to the relevant principles; the difference between them lay in how those principles should be applied to the particular facts. Consequently, in the circumstances, I will adopt the summary of the relevant principles set out in the defendants' written submission as follows:-
 - (a) The inherent jurisdiction should be exercised sparingly and only granted where there is no risk of injustice to the plaintiff (*Barry v. Buckley* [1981] IR 306);
 - (b) The court must be satisfied that it would be manifestly unfair on the defendant to allow the claim to proceed (*Kelly v. Allied Irish Bank* [2019] IESC 72);
 - (c) Where an amendment of proceedings would save the action, the plaintiff should be allowed to make such an amendment (*Sun Fat Chan v. Osseus Ltd* [1992] 1 IR 425);
 - (d) It is a primary precondition to the exercise of the jurisdiction that all essential facts upon which the claim is based are unequivocally identified (*Jodifern v. Fitzgerald* [2000] 3 IR 321);
 - (e) The court may engage in an assessment of the facts, in a limited way, to identify uncontroversial meanings from contracts, letters etc. that inform the evidential basis of the claim (*Keohane v. Hynes* [2014] IESC 66); and

- (f) The court may also resolve disputes which concern issues of law or construction insofar as they can be easily resolved (*Moylist Construction Ltd v. Doheny* [2016] IESC 9).
5. To this list, I would add the fact that O. 19, r. 28 has been held by the Supreme Court to apply to the impugned pleading as a whole and not to discrete parts of it (*Aer Rianta v. Ryanair Ltd* [2004] 1 IR 506). Therefore, the task of the court in this instance is to look at the statement of claim as a whole to see whether it discloses a reasonable cause of action and not to focus on the incoherence, mootness or unsustainability of individual pleas. Further, when assessing whether a pleading is frivolous or vexatious, the court should look only to the pleading itself and not to the surrounding circumstances or additional material which may be introduced by way of affidavit (*Barry v. Buckley* above). For the purposes of O.19, r.28 the statements made in the pleadings must be assumed to be true.
6. Notwithstanding these additional nuisances, the main focus of the argument in this case has been on para. (c) above – namely whether the action can be saved by an amendment to the statement of claim and, in particular, those proposed in the amended statement of claim circulated in connection with this motion. In order to consider this question, it is necessary to understand the circumstances in which the plaintiff came to issue these proceedings against the defendants.

Factual Background

7. In May, 2000, the plaintiff borrowed IR£170,000 from Permanent TSB which was secured by a mortgage of a property owned by the plaintiff at 158 Upper Salthill, Galway. That property, a bungalow, was originally built as a single residence but was subsequently converted into three one-bedroomed residential units. The plaintiff obtained retention planning permission in respect of this conversion in June, 2003. The plaintiff contends that work in respect of the modernisation and upgrading of these units was ongoing at the time of the events giving rise to these proceedings (i.e. the first half of 2019). The plaintiff also claims to have been living in one of the units since the breakdown of his marriage in 2014. This is disputed by the defendants to whom, at all times, the plaintiff provided a different residential address and because at various earlier stages the plaintiff had categorically sworn that he was not resident in the premises.
8. In June, 2015, Havbell Ltd purchased the interest held by Permanent TSB in various loans and securities, including those of the plaintiff relating to 158 Upper Salthill. The plaintiff was duly advised of this transfer. In September, 2016, Havbell Ltd converted to a designated activity company pursuant to the requirements of the Companies Acts, 2014 and, thereafter, the legal entity in possession of the plaintiff's loan and security became Havbell DAC. By 2017, the plaintiff had fallen into arrears with his monthly mortgage repayments. As a result of this, two things happened. Firstly, on 10th January, 2017, Havbell DAC appointed Declan Taite as the receiver of the property pursuant to the terms of the mortgage deed. Mr. Taite is employed by the second defendant, Duff and Phelps (Ireland) Ltd but, as is clear from his deed of appointment, he was appointed as receiver

in his personal capacity. Secondly, summary proceedings were issued by Havbell DAC against the plaintiff in May, 2017.

9. The receivership was progressed by Mr. Taite notwithstanding what Mr. Taite regards as the plaintiff's obstructive behaviour. Mr. Taite identified a tenant residing in one of the units and sought, unsuccessfully, to have that tenant's rent paid to him in his capacity as receiver. Because he was unable to secure the rental income from the property, Mr. Taite then moved to prepare the property for sale. He obtained three valuations of the property in early 2017, although these were limited because of the valuers' inability to access some or all of the units. The valuations ranged from €120,000 to €300,000 (the latter on the assumption that the property was in good condition and ready to be occupied). The recommended reserve ranged from €120,000 to €200,000. Mr. Taite engaged the service of O'Donnell and Joyce Auctioneers to place the property on the market. The plaintiff contends that this was an unreasonable choice since that firm had provided the lowest of the three valuations. The defendants reply that that firm was chosen because their valuation was not premised on the receiver having vacant possession. The plaintiff also complains that the proposed sale did not take place through a public auction, which in the plaintiff's view would have achieved a higher price.
10. Three bids were obtained for the property and the highest bid of €311,101 was accepted. The proposed sale fell through in late 2018 and neither of the original underbidders were interested in renewing their offers. At that point, a fourth bidder made an offer of €201,000 which was accepted by Mr. Taite in January, 2019. Mr. Taite regarded the offer as acceptable because it was within the range of the valuations originally obtained by him and also because the property was being offered for sale without vacant possession. The sale was completed in March, 2019.
11. Meanwhile, the summary proceedings ultimately proceeded to judgment on 25th February, 2019. Havbell DAC was awarded judgment in the sum of €130,363.28 together with costs against the plaintiff. No order for possession was made. The plaintiff was legally represented in the summary proceedings and his then-solicitor advised the solicitors acting for Havbell DAC that an appeal would be lodged against the judgment. No such appeal was brought.
12. As can be seen from this account, Havbell DAC's obtaining judgment against the plaintiff and the sale of the property both occurred within a few weeks of each other. The plaintiff complains that he was unaware of the intended sale of the property at the time the summary proceedings were before the court and also that the court was not informed of the imminent sale. The plaintiff asserts that on the 26th February, a representative of the third defendant served notice on the owners and occupiers of the property that all rent was now to be paid to the third defendant. According to the plaintiff, that representative was Mr. Barry Fitzgerald who would shortly become the purchaser of the property. The plaintiff alleges that the sale of the property to Mr Fitzgerald (who is not a defendant to the proceedings) resulted from a conspiracy between the defendants.

13. The main complaint made by the plaintiff is that, through his solicitor, he conducted negotiations directly with the receiver from 2017 to 2019 in an attempt to reach a settlement regarding his loan. He states that an agreement had been reached as to the amount to be repaid – in effect the judgment sum - and that he was making efforts to procure that sum in order to discharge the loan and to clear the security off his property. He also maintains that to the defendants' knowledge he continued to carry out works on the property with a view to upgrading and improving it. He claims that these works added value to the property which is not reflected in the valuations provided in early 2017. In July, 2019, the plaintiff's then-solicitor wrote to the solicitors acting on behalf of Havbell DAC advising that the plaintiff was in a position to redeem the mortgage registered on the property (i.e. the judgment sum and the legal costs) and seeking to make arrangements for the transfer of that sum immediately. In response, a letter dated 22nd July, 2019 was received advising of the net sale proceeds and the refund due to the plaintiff. The plaintiff claims to have been unaware of the sale of the property prior to this correspondence. On the basis of these facts the plaintiff claims a breach of contract, a breach of his legitimate expectation, a breach of the fiduciary or other duties owed to him by the receiver and some form of conspiracy.

Legal Proceedings

14. Proceedings were issued by the plaintiff on 12th August, 2019 and a statement of claim served shortly thereafter on 23rd September, 2019. The defendants named in the title of the proceedings are Havbell DAC Ltd, Duff and Phelps (Ireland) Ltd and Frescati Property Management Ltd. This application is brought on behalf of the first two of those defendants. The first defendant is sued on the basis that it purchased "*the mortgage agreement*" between the plaintiff and Permanent TSB and that it "*later issued proceedings in relation to the debt for summary judgment in the High Court*".
15. The basis on which the second defendant is sued is less clear. At para. 3 of the statement of claim, it is stated that "*the appointed receiver*", Mr. Taite, "*is an employee, agent or servant of the company*" whereas, at para. 4, it is asserted that the second defendant was "*acting as receiver in the sale of the property*". The plaintiff does not distinguish or, perhaps, accept the distinction between Mr. Taite, who was appointed receiver, and Duff and Phelps, the company for whom Mr. Taite worked at the material time. He appears to contend that because Duff and Phelps subsequently merged with another company and took on a new corporate identity that the appointment of Mr. Taite somehow became invalid with the result that the sale of the property affected by Mr. Taite as receiver is also invalid. However, the manner in which this is pleaded is, at best, garbled as is evident from the following which is, unfortunately, typical:-
- "9. *On a review of the Plaintiff would submit that the Receiver is no longer validly appointed the instrument of appointment of the Receiver was done when the Company of Duff and Phelps with the registered office at Molyneux House, Bride Street, Dublin was registered trading in Ireland. The Company later dissolved and merged in August 2017. The Company merged and there was no valid notice in relation to the changes. The documentation which we have in our possession does*

not state that there is the inclusion of successors in the writing of the documentation. There was a failure to validly assign the Receiver and we are now concerned that appointment is not in line with the legislation and practices required under Irish law. Therefore there is an argument that the contract is not valid as between Havbell and the Receiver that was created in January 2017.”

16. There follows a lengthy setting out of some facts from which no specific legal cause of action seems to be drawn and the recitation of various causes of action for which no particular factual basis has been laid. There is no logical chronology to the sequence of pleas. Reference is made to the legal costs of the summary proceedings and to the plaintiff attempting to clear the judgment without the factual position in respect of the summary proceedings - such as identifying the parties to, the amount of and the date of the judgment - ever being pleaded. Pleas are made suggesting that relief will be sought (for example, to prevent the title to the property being re-registered) which relief is not then actually sought. Alleged causes of action are escalated to a highbrow legal level such as breach of EU banking requirements, a failure to act in accordance with the European Convention on Human Rights Act, 2003 and breach of constitutionally protected property rights without any particular factual basis for these pleas being advanced nor the relevant legal instruments or the articles of which breach is alleged being identified. It is pleaded that “*specific professional responsibilities*” are owed to “*vulnerable clients*”. No indication is given as to what those responsibilities are; it is not specifically pleaded that the plaintiff was vulnerable nor is any explanation offered as to the nature of any alleged vulnerability or the extent to which the defendants were or should have been aware of it. Indeed, no formal allegation is made that those responsibilities (whatever they might have been) were breached much less any detail provided as to how they were breached.
17. In their written legal submissions, the defendants describe the statement of claim as a “*disjointed and incoherent sequence of allegations and statements*”. Unfortunately, although harsh, this characterisation is accurate. In the written legal submissions filed on behalf of the plaintiff, it is acknowledged that the statement of claim is repetitive and also that many of the reliefs sought are moot in circumstances where the property was sold in 2019. The plaintiff’s position is that the statement of claim can be amended to reflect the true nature of the controversy between the parties and to identify the correct defendants against whom the plaintiff seeks relief.
18. One of the difficulties occasionally faced by courts is that stateable cases can be very badly pleaded. This is most frequently seen in pleadings prepared by litigants-in-person who not only lack the professional knowledge necessary to plead a case well but are also, inevitably, personally involved in the case they wish to plead, but it can also occur where professional legal advisors have been retained. A court has to be careful to distinguish between the quality of the pleadings and the underlying stateability of the claim. The quality of the pleadings cannot constitute a barrier to a litigant being able to access justice once the court is satisfied that there is a *bona fide* and stateable basis for the claim evident from the pleadings. If necessary, directions can be sought and given regarding pleadings so as to remove manifestly irrelevant, prolix, unfounded or abusive

pleas. There is however a significant difference between the giving of directions so as to ensure that the pleadings accurately reflect the dispute between the parties (and only that dispute) and striking out a claim so that the litigant cannot pursue it at all.

19. Notwithstanding the state of this statement of claim, it is nonetheless possible to deduce from the morass of pleas the basis of the plaintiff's complaints. These are identified in his written legal submissions as being, firstly, that the plaintiff was induced by the first defendant and Mr. Taite, the receiver, into believing that subject to ongoing negotiations with the first defendant through the offices of the second defendant, he, the plaintiff, would not lose his property once an agreed sum was paid in respect of the judgment debt together with costs. Secondly, the plaintiff claims that the property was sold at an undervalue to a person connected with the third defendant without being placed on the open market. He contends that the differences in the valuations can be attributed to the fact that he was carrying out substantial refurbishment works on the property of which the defendants were on notice. The plaintiff claims that the completion of the works had a material impact as to the open market value of the property. The plaintiff was unaware of the sale of the property until July, 2019. Consequently, he continued his efforts to obtain sufficient money to discharge the judgment debt for a number of months after the property had been sold and, thus, could not in fact be redeemed by him. This is a distillation of a very large number of very poorly made pleas in the statement of claim. However, it is all, more or less, pleaded.
20. The amended statement of claim provided by the plaintiff to the court at the beginning of the hearing does not make the wholesale changes to the original statement of claim that might have been expected to reflect the far more succinct arguments made by counsel for the plaintiff at the hearing of the motion. Those changes which were made appear to reflect an acceptance that the second defendant, Duff and Phelps, were not appointed receiver and seek to introduce Mr. Declan Taite as a party in addition to Duff and Phelps to be treated collectively as the second named defendant. Notwithstanding this, the plea quoted above at para. 9 to the effect that the appointment of the receiver was invalid because Duff and Phelps subsequently merged and changed their corporate identity remains virtually unchanged. Some particularly egregious pleas which had suggested that the defendants' solicitors had somehow acted in breach of the plaintiff's legitimate expectation are removed as is a claim for damages for "*maintenance and champerty, derogation from grant*". Finally, a number of reliefs seeking to injunct the appointment of a receiver and the receivership have been removed.
21. Before leaving the statement of claim to look at the applicable legal tests, I should address a specific issue raised by the defendants. Part of the plaintiff's claim is based on the fact that he alleges that the defendants knew he was carrying out works to improve the property, which added to the value of the property and that this added value is not reflected in either the valuations or the ultimate sale price. It is pleaded under the composite heading "*Particulars in relation to Professional Negligence & Breach of Property Rights*" that "*the property was zoned as residential, and the plaintiff had obtained planning permission to provide numerous separate dwellings within the building*" (para. C)

and “the plaintiff... continued working on the property and investing in the property having previously obtained planning permission with Galway City Council” (para. G). An affidavit has been sworn on behalf of the first defendant exhibiting a printout from the website of the relevant planning authority showing that the only grant of planning permission to the plaintiff was one made by Galway City Council in May, 2003 for the retention of the conversion of the dwelling into three one-bedroomed apartments with associated parking and services. Consequently, the defendants assert that the pleas identified above are based on what the defendants characterise as an “*unequivocal falsehood*”. The defendants rely on the comments of Hardiman J. in *Vesey v. Bus Éireann* [2001] 4 IR 192 and in *Shelley-Morris v. Bus Átha Cliath* [2002] IESC 74 to suggest that, where dishonesty or exaggeration in a claim can be shown, the court retains a discretion to dismiss the claim on that basis.

22. I fully accept that the court has a discretion to dismiss a claim where it is clear that a plaintiff has acted dishonestly in relation to some or all elements of the claim. However, I am not satisfied that this is necessarily the case in this instance. Firstly, it is not strictly speaking inaccurate to say that the plaintiff had obtained planning permission to provide separate dwellings within the building. A retention planning permission is itself a grant of planning permission and, in this case, the plaintiff had obtained a grant of retention planning permission in respect of the conversion of the single dwelling into three units. If the pleas in question were to be read as meaning that the plaintiff was carrying out works in 2017 on foot of that grant of planning permission, then of course that would be misleading. A grant of retention planning permission authorises the maintenance of works which have already been carried out. Retention planning permission does not authorise any future works which themselves would require a grant of planning permission in normal course. However, it is not clear that the works which the plaintiff was carrying out were works which required a grant of planning permission as opposed to constituting exempted development on an existing structure. As it is unclear whether the plea is intended to be construed as meaning that the plaintiff was acting on foot of a grant of planning permission and it is also unclear whether the plaintiff even required planning permission for whatever works he was doing, there being no evidence on the point before the court, I am not prepared to assume that these aspects of the pleading are sufficiently dishonest to warrant the striking out of the plaintiff’s claim.
23. Secondly, where a plaintiff has engaged lawyers to institute proceedings on his behalf and the resulting claim has been as badly pleaded as this one has, I would be reluctant to impute dishonesty to that plaintiff by reason of the way in which the pleadings have been framed. I think it would have to be very clear that the matter allegedly constituting a falsehood was in fact a deliberate falsehood on which the plaintiff had instructed his lawyers with the intention of misleading the defendant or the court. Where, as here, the pleadings are “*an unrelenting mess*” (to quote again the defendants’ legal submissions), it would be unduly harsh to treat a single element of those pleadings as amounting to a deliberate abuse of process which would justify the striking out of the entire claim.

Should the Plaintiff’s Claim be Struck Out?

24. The question before the court is whether the plaintiff's statement of claim discloses a reasonable cause of action against the first two defendants or whether it is frivolous or vexatious or otherwise doomed to fail. The defendants advance three reasons why they contend that some or all of these thresholds are met. Firstly, as regards the identity of the defendants, they say that the plaintiff has simply sued the wrong defendants such that no relief can be granted against them; secondly, the defendants contend that the statement of claim fails to disclose a reasonable cause of action against them; and, thirdly, it is contended that the claims in the statement of claim amount to a collateral attack on the summary judgment. I will deal with each of these in turn.
25. The case as regards identity is different in respect of each of the first two defendants. As regards Havbell, at the time of its purchase of the Permanent TSB loans and securities, the correct title of that entity was Havbell Ltd. On 16th September, 2016, Havbell Ltd changed its name to Havbell DAC in compliance with the requirements of the Companies Act, 2014. Consequently, summary proceedings were issued against the plaintiff in 2017 by Havbell DAC. When these proceedings were issued on behalf of the plaintiff in 2019 naming the first defendant as Havbell DAC Ltd, the solicitor on behalf of the first and second defendants immediately wrote to the plaintiff's then-solicitor identifying the correct title of the first defendant. That correspondence was repeated when the statement of claim was served still naming the first defendant as Havbell DAC Ltd. On 1st October, 2019, the solicitors for the defendants formally consented to an amendment of the pleadings to reflect the first defendant's correct title. Notwithstanding that the summary proceedings taken by Havbell DAC had concluded in February, 2019 with judgment being entered against the plaintiff and the fact that a certificate of incorporation had been exhibited by Havbell DAC in the affidavit grounding those proceedings, the plaintiff's solicitor wrote on 3rd October, 2019 looking for a copy of the certificate of incorporation and stating "*we are now concerned about the information that we have been given*". No explanation was given for the basis of the supposed concern, but the defendants' solicitor nonetheless forwarded a further copy of the certificate of incorporation of Havbell DAC on 7th October, 2019.
26. One can readily understand the frustration of the first defendant and its solicitor having advised the plaintiff of its correct title nearly two years ago, having consented to the amendment of the proceedings to reflect that title and having provided, twice, a copy of its certificate of incorporation, that no step was taken by the plaintiff to correct the title of the proceedings by the time this application was heard nearly two years later. Nonetheless, the error in respect of the first defendant's correct legal title is not a fundamental one. The identity of the first defendant was clearly understood at all material times and, in the proposed amended statement of claim, the title of the first defendant is correctly recited as Havbell DAC. Consequently, I do not regard this factor as being sufficient to warrant the striking out of the proceedings against the first defendant. I will instead amend the title of the proceedings *in limine* to reflect the correct title of the first defendant as Havbell DAC rather than Havbell DAC Ltd.

27. The position in respect of the second defendant is, in my view, materially different. Duff and Phelps (or its now successor entity) is a materially different and distinct legal entity to Mr. Declan Taite. Despite the fact that Mr. Taite was employed by Duff and Phelps, in being appointed and in accepting appointment as a receiver over the charged property, Mr. Taite was acting in his personal capacity and not as the employee of Duff and Phelps. A receiver appointed in this context has specific statutory powers and functions under the Conveyancing Act, 1881 and the Land and Conveyancing Law Reform Act, 2009 which are not imputed to his employers. The fact that Mr Taite's administrative back-up was provided through the offices of Duff and Phelps and correspondence issued from or on behalf of Mr. Taite on Duff and Phelps headed notepaper does not change this legal reality. Consequently, I am not prepared to simply substitute Mr. Taite's name for that of Duff and Phelps as a defendant to the proceedings. Nor am I prepared to create a composite second defendant consisting of Duff and Phelps and Mr. Taite as is now proposed in the amended statement of claim. If the plaintiff intends to join Mr. Taite to the proceedings, that will have to be done properly and by formally making whatever application is deemed appropriate in that regard.
28. This then raises a question as to whether the statement of claim discloses a reasonable cause of action against Duff and Phelps or, approaching it from the perspective of the court's inherent jurisdiction, whether the case pleaded against Duff and Phelps is bound to fail. In my view no reasonable cause of action has been disclosed in the statement of claim. As noted earlier, the way in which the statement of claim has been drafted does not distinguish between the actions of Mr. Taite as receiver and the legal position of his employer, Duff and Phelps. The plaintiff now seems to acknowledge in his written legal submissions that Duff and Phelps were never appointed receiver but for some unexplained reason still seek to retain Duff and Phelps as a named defendant in the amended statement of claim. I can see no basis for doing this. The only facts properly pleaded against Duff and Phelps in the statement of claim are that Mr. Taite is their employee, agent or servant and that they merged with another company in 2017. Although various pleas are made against "*the defendants*" or "*the second named defendant*", all of these appear referable to the actions of the receiver and not in any way referable to the distinct legal position of Duff and Phelps. Consequently, I am satisfied not only that there is no reasonable cause of action against Duff and Phelps but that any cause of action which could conceivably be extracted from the statement of claim against Duff and Phelps would be bound to fail.
29. This is not necessarily the case in relation to Havbell DAC. I accept that a receiver appointed on foot of a mortgage deed is deemed to be the agent of the mortgagor (i.e. in this case the plaintiff) rather than being the agent of the person who has appointed the receiver. Thus, even bearing in mind all of the judicial observations to the effect that the plaintiff's case must be taken at its height and that the threshold which the plaintiff must reach in order to be permitted to continue with his proceedings is low, pleas made by the plaintiff against the receiver cannot be treated as raising a reasonable cause of action against Havbell DAC merely because the receiver was appointed by Havbell DAC.

30. Nonetheless, whilst it might be difficult if not impossible to attribute any liability to Havbell DAC for some elements of the plaintiff's case (such as, for example, the alleged sale of the property at an undervalue by the receiver), it is clear that Havbell is central to other aspects of the case as pleaded. In particular, the plaintiff pleads that, in pursuit of negotiations which have been ongoing between himself, Havbell DAC and the receiver, he continued both works on the property and attempts to obtain sufficient money to discharge the judgment debt without being informed by Havbell DAC (or by the receiver) that the property had actually been sold. Equally, he states that the court was not informed of the imminent sale of the property at the time that judgment was granted in proceedings taken by Havbell DAC. Counsel for the defendants queries how this could give rise to any cause of action. In the defendants' view, Havbell DAC was entitled both to proceed to summary judgment and, simultaneously, to exercise its right under the charge to appoint a receiver to sell the property. The defendants concede that it might have been best to have notified the plaintiff of the sale and there is also a factual dispute between the parties as to when the plaintiff actually became aware of the sale of the property. Nonetheless the defendants argue that any failure to notify the plaintiff did not amount to an action of a wrong.
31. I acknowledge that the case the plaintiff appears to be making is a difficult case. There are elements of that case which, on the basis of the facts as currently presented, appear unlikely to succeed – although, as previous courts have been careful to acknowledge, the factual position can look very different when the parties have had the benefit of replies to particulars, discovery or interrogatories and the other procedural devices available to litigants. These elements relate predominantly to the alleged sale of the property at an undervalue when it appears the sale price was within the range of valuations obtained from professional valuers and the sale was, in any event, compromised by the plaintiff's failure to provide vacant possession. However, this is not the thrust of the case against Havbell DAC which, despite having appointed the receiver, did not have carriage of the sale. The case against Havbell DAC concerns the plaintiff's ongoing efforts to meet the judgment debt and discharge the mortgage pursuant to an agreement he understood he had made and at a time when he was not made aware that the property had already been sold. Although that claim might appear to be relatively marginal, given that the court's jurisdiction to strike out proceedings is one which should be exercised sparingly and should not be exercised where an amendment to the proceedings could save the action, I am reluctant to strike out the plaintiff's claim against Havbell DAC on the basis of the facts as they are currently presented.
32. The third and final ground upon which the defendants seek to have the plaintiff's claim struck out is that the claim constitutes a collateral attack against the summary judgment. The defendants point to the contents of the plaintiff's affidavits in which he appears to contend that the property should not have been sold either because the summary judgment did not include an order for possession or because the summary judgment had not been registered or a judgment mortgage obtained. The averments referred to in both an affidavit sworn by the plaintiff and an affidavit sworn by his former solicitor are as confusing and incoherent as the statement of claim itself. By the time this application was

heard, the case made on behalf of the plaintiff did not take issue with the validity of the summary judgment but, rather, contended that the plaintiff engaged in ongoing negotiations and efforts regarding the discharge of the judgment debt so as to ensure that he did not lose the property at a time when the property had already been sold. Further, in considering applications of this nature, the court is supposed to focus on the case as pleaded and not on additional material or averments made in the affidavits relating to this application. The concerns raised by the defendants under this heading are predominantly based on the affidavit evidence rather than on the statement of claim itself. As I read the statement of claim, the plaintiff is not disputing the debt owed by him to the first defendant nor (at least at the hearing) the judgment obtained by the first defendant in respect of it. Rather he is taking issue with the steps taken by the defendants in respect of his property which was provided as security for that debt. Whilst the distinction may be a fine one, it is I think sufficient to ensure that the current proceedings cannot be characterised as a collateral attack on the summary judgment.

Conclusions

33. In light of this analysis, it seems to me that the plaintiff's proceedings should be struck out as against the second defendant for failure to disclose a reasonable cause of action or because any cause of action discernible in the statement of claim against the second defendant is bound to fail. There is just about sufficient in the pleadings to allow the cause of action be continued against the first defendant. However, I accept the defendant's complaints that the proceedings are incoherent and badly pleaded. Therefore, I will direct that the plaintiff serve an amended statement of claim on the first and third defendants which properly sets out and pleads the claim the plaintiff wishes to make against those defendants. Given the extent of the inadequacies in the statement of claim as currently drafted, it would be preferable if the plaintiff's current legal advisors simply drafted a fresh statement of claim rather than trying to rectify the existing version. I do not propose to accept the draft amended statement of claim which was provided during the hearing as I do not believe the amendments go far enough to clearly plead the intended cause of action. In any event, as I have struck out the claim as against the second defendant, that needs to be reflected in any statement of claim now served. I acknowledge that no application has been made to this court by the third named defendant but I think it would be in ease of all of the parties if a single amended statement of claim applied to all the remaining parties in the proceedings.
34. It is a matter for the plaintiff whether he wishes to amend the proceedings so as to include a new defendant. Nothing in any order I intend making either permits or prohibits the plaintiff from doing this but, if it is intended to do this, a fresh application must be brought properly introducing any new defendant into the proceedings.