

THE HIGH COURT

[2021] IEHC 825
[2019 No. 7318 P.]

BETWEEN

GERARDINE SCANLAN

PLAINTIFF

AND

**PAUL GILLIGAN, MAURICE COLLINS, JOE JEFFERS, SHANE O'BRIEN, FIONA O'BEIRNE,
GRANT THORNTON CORPORATE FINANCE LIMITED, AIDAN CONNAUGHTON, IRELAND,
THE ATTORNEY GENERAL AND THE DATA PROTECTION COMMISSIONER**

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 21st day of December, 2021

Introduction

1. This judgment deals with a series of applications made by the defendants to strike out proceedings issued by the plaintiff against them in 2019 ("the 2019 proceedings"). All of the defendants bar one are covered by one of the four applications before the court such that the practical effect of acceding to the applications would be to strike out the 2019 proceedings in their entirety. The one defendant who is not a moving party in these applications is the first defendant who is the subject of a separate motion brought by the plaintiff to remove him from the proceedings. Whilst that motion was brought by the plaintiff on the grounds that her inability to effect service on the first defendant was holding up the prosecution of the 2019 proceedings against the other defendants, at the hearing of these applications the plaintiff accepted unequivocally that the first defendant was not liable to her in the manner contended for and that it was a mistake on her part to have sued him. On that basis and with the consent of all parties, I made an order removing the first defendant from the proceedings.
2. The applications seek relief under O. 19, r. 28 of the Rules of the Superior Courts on the grounds that the 2019 proceedings do not disclose a reasonable cause of action against the respective defendants or that they are frivolous and vexatious. Alternatively, the applications invoke the inherent jurisdiction of the court on the grounds that the 2019 proceedings constitute an abuse of process or are bound to fail. The grounds advanced in support of both of these reliefs are very similar and vary to a limited extent dependent on the identity of the moving parties to the particular motion. However, it is a central feature of all the applications that there are other, extant proceedings taken in 2015 against the plaintiff by Grant Thornton (represented in these proceedings by the sixth and seventh defendants) ("the 2015 proceedings"). There have been multiple interlocutory applications in the 2015 proceedings, many of them taken by the plaintiff, and all of which have resulted in judgments and orders being made against the plaintiff. The defendants argue that the 2019 proceedings seek to re-litigate issues which have already been decided against the plaintiff in the 2015 proceedings or, in a similar vein, seek to make the legal personnel who acted on behalf of Grant Thornton in the 2015 proceedings and the Grant Thornton defendants liable to her for alleged breaches of a duty of care ostensibly owed to her as the opposing party in that litigation. All of the defendants argue that the 2019 proceedings are fundamentally misconceived in that they simply do not owe the duties alleged by the plaintiff and cannot be made legally liable to her in the manner in which she contends.

3. The fourth to seventh defendants also seek an Isaac Wunder order against the plaintiff to prevent her from issuing further proceedings without leave of the High Court against the fourth to seventh defendants, against Grant Thornton and any of its partners and employees, the firm of solicitors of which the fourth and fifth defendants are partners and any of its partners and employees and any member of the bar who has acted against the plaintiff. Although the motion papers do not say so, presumably the last category would necessarily be limited to members of the bar acting on behalf of Grant Thornton and instructed by the firm of solicitors. I note that a limited Isaac Wunder order has already been made against the plaintiff by Reynolds J. on 14th May, 2019 prohibiting her from issuing further motions in the 2015 proceedings without leave of the High Court. The defendants say that the plaintiff has recently breached this order by issuing a further motion in those proceedings.
4. Finally, I should note that the plaintiff has also brought a series of motions which were listed for hearing along with the applications brought by the defendants. One of these, which I have already referred to, sought the removal of the first defendant from the proceedings. The others sought the joinder of additional parties to the proceedings, the transfer of the proceedings to the jury list and to “*update*” the statement of claim to reflect court decisions made and judgments delivered since it was filed. I deferred consideration of these motions as, logically, the joinder of additional parties and the updating of pleadings will not arise if the 2019 proceedings are struck out.
5. This is necessarily just an overview of the applications and I will look in more detail at the arguments made by the defendants and the plaintiff’s reply when considering each application. It is, however, worth observing at the outset that the underlying issues of concern to both Grant Thornton and the plaintiff have already given rise to a series of complaints to the Data Protection Commission (and an outstanding appeal to this Court from at least one of the Commission’s decisions) and five sets of legal proceedings. These proceedings in turn have generated five reserved judgments, three of the High Court (together with an additional seven-page written ruling) and two in the Court of Appeal. There is also a determination of the Supreme Court refusing the plaintiff leave to appeal from the first of the two Court of Appeal decisions. In an affidavit sworn in June, 2020 by the third defendant to ground the application brought on behalf of the second and third defendants (the barristers), he notes that by that date the 2015 proceedings alone had involved some eleven separate interlocutory applications, 40 affidavits and 70 separate court listings. At the hearing of these applications in May, 2021, the court was informed by counsel for the fourth to seventh defendants, commenting on the very considerable time and resources expended on the litigation, that the number of times the various applications had been in court now exceeded 100.
6. It will, perhaps, be evident to any lawyer reading even this short introduction that the plaintiff is a litigant-in-person. The presence of litigants-in-person in Irish courtrooms has in recent years become a regular feature of the legal landscape. In many instances, litigants appear in person, particularly as defendants, because they do not have the resources to secure legal representation and do not qualify for legal aid. However, in

other instances, litigants appear in person because lawyers they have sought to instruct do not believe that the case they wish to pursue has any merit or, conversely, believe that it would be inappropriate or even improper to associate themselves with the proposed litigation. The management of cases brought by this latter group of litigants presents a myriad of difficulties for both the court system generally, the judge assigned to hear any such case and the opposing party. The cases brought by these litigants are characterised by dense, repetitive and prolix pleading, by the joinder of a multitude of often unnecessary or inappropriate parties and by multiple applications and appeals. Causes of action are rarely clearly identified or properly pleaded. Instead, every alleged wrong is pleaded as a breach of the litigant's rights under the Constitution, the European Convention on Human Rights, under European law and the EU Charter of Fundamental Rights. This makes it very difficult for the court to extract the essence of the dispute between the parties from the pleadings. It also tends to prompt a comprehensive response from the other side in which issue is taken with every plea lest something remain on the record undenied. Needless to say, this is often taken as an affront by the litigant-in-person who will rarely appreciate that the simple denial of a plea serves to put the onus of proving that claim on them.

7. There is frequently an unwillingness on the part of these litigants to accept any adverse ruling and a tendency to ascribe such rulings to a lack of *bona fides* on the part of the judge or the opposing party or its lawyers. Apart from the legal expertise that a professional lawyer provides when representing a client, the fact that the lawyer is at one remove from the issues at the heart of the litigation enables them to take an objective view both of the litigation as a whole and of individual steps in that litigation, a perspective which the litigant-in-person can struggle to achieve.
8. This is not to say that cases brought by litigants-in-person are invariably bad cases. Frequently, at the core of the litigation there may be a point of real substance although it is often obscured by excessive pleading and by an insistence on pursuing all points, however unmeritorious, to the detriment of the real issue. The court's task is to ensure that if there is a point of merit in the case, it is not overlooked or disregarded because of the verbiage by which it is sometimes surrounded. The task is unenviable not least because of the tendency of the litigant-in-person to take the view that unless the judge accepts all of their applications and arguments, they have not received justice. Needless to say, all of this absorbs a disproportionate amount of court time which is a cause of real concern as the time taken to deal with these applications is often completely disproportionate to the importance of the case. That time is then not available to enable other litigants to have their cases heard.

Factual and Procedural Background

9. In order to understand the 2019 proceedings and the applications now brought to have them struck out, it is necessary to understand the full history of the litigation between the parties. Given the complex procedural history, the following account does not purport to be complete. It is intended only to place the current applications in context. I am also

mindful that the 2015 proceedings have not yet come to trial and that many of the contentious issues between the parties await resolution in those proceedings.

10. The dispute between the parties has its origins in a loan taken out by the plaintiff in 2008 from Danske Bank which was secured on her property. The loan was subsequently acquired from Danske Bank by Promontoria but nothing turns on this and I will refer to both of these entities as "*the bank*". The plaintiff ran into difficulties in respect of the repayments on this loan as a result of which the bank took two steps. The first of these was the appointment of a receiver in August, 2013. The receiver appointed is a partner in Grant Thornton. The second step was the institution of summary proceedings to recover the monies then outstanding in June, 2014. In response, the plaintiff issued plenary proceedings against the bank and the receiver alleging reckless lending practices, breaches of the Consumer Protection Code and negligence and misrepresentation.
11. Whilst these events were ongoing, the plaintiff made a data access request of Grant Thornton by registered post in September, 2013 and again in July, 2014. As these requests were not responded to, she made a complaint to the Data Protection Commissioner in October, 2014. Subsequent to the key events in this narrative, the functions of the Data Protection Commissioner were transferred to the Data Protection Commission under s. 14 of the Data Protection Act, 2018. Nothing material turns on this and a reference in this judgment to either should be understood as referring to the entity exercising the relevant statutory powers at the time. I note that Grant Thornton suggests that they were unaware of the data access request until notified of the complaint by the Data Protection Commissioner, a suggestion which is disputed by the plaintiff, but this is not an issue to be resolved on these applications.
12. In any event, Grant Thornton did not respond to the data access request until 11th September, 2015 when it sent the plaintiff a CD containing her personal data. I note that in a decision issued by the Commissioner on 16th November, 2017 in respect of a further complaint made by the plaintiff, the Commissioner found that the initial delay in responding to the plaintiff's request outside the statutory 40-day period constituted a contravention of the Data Protection Acts by Grant Thornton. The plaintiff contends that this delay prejudiced her in the preparation of her defence to the summary proceedings which had been instituted by the bank. Her counterclaim to the 2015 proceedings includes a claim for damages under s. 7 of the Data Protection Acts in respect of this delay.
13. On 25th February, 2016, Fullam J. delivered judgment in both of the Danske Bank proceedings. He granted summary judgment to the bank against the plaintiff. On the bank's application, he struck out the plaintiff's proceedings as failing to disclose a reasonable cause of action and being bound to fail. The plaintiff did not appeal this judgment.
14. Unfortunately, this was not the end of the matter. It transpired that as a result of an inadvertent error on the part of Grant Thornton, the CD sent to the plaintiff in September, 2015 contained, in addition to her personal data, confidential information in relation to a number of other receiverships on which Grant Thornton was involved which included

personal data relating to a large number of third parties. The plaintiff brought this error to the attention of Grant Thornton on the 3rd October, 2015 and Grant Thornton in turn notified the Commissioner on 24th November, 2015. On 13th October, 2015, Grant Thornton formally advised the plaintiff that an unintended data breach had occurred and requested that she return the confidential information and not retain any copies of it.

15. Around the same time, Grant Thornton began to receive correspondence and phone calls from some of the affected third parties whose data had been inadvertently provided to the plaintiff. In some cases, those individuals had been contacted directly by the plaintiff and in other cases they had received information in respect of the data breach anonymously. Grant Thornton were also concerned that some of the documents began to appear on social media where they could be seen by members of the public. Finally, Grant Thornton became aware that the plaintiff had disclosed the information on the CD to a named third party who was not a person whose personal information was on the disk. Consequently, Grant Thornton directly and through its solicitors sought the return of the confidential information from the plaintiff together with undertakings that she would neither disseminate nor destroy the information. As the plaintiff did not agree to either of these requests, Grant Thornton issued proceedings on 27th November, 2015. On the same date, they applied for and were granted an interim injunction against the plaintiff.
16. The interlocutory injunction was made returnable for 4th December, 2015. The second and third defendants appeared as counsel instructed by the fourth and fifth defendants (the solicitors) on behalf of Grant Thornton. The plaintiff consented to the interlocutory relief sought against her although she now claims to have done so because she did not have adequate time to prepare a defence. A series of orders were made by Gilligan J. restraining the plaintiff from disseminating or communicating the confidential information, requiring her to return the originals to Grant Thornton and to retrieve the information sent by her to the named third party or made available by her to the public. An order was also made joining the sixth defendant as a co-plaintiff to the proceedings.
17. Following this, the CD and two USB sticks onto which the plaintiff had uploaded the information were returned to Grant Thornton, albeit the latter in somewhat unusual circumstances. On 23rd February, 2016, a statement of claim was delivered and, at the same time, Grant Thornton's solicitors wrote to the plaintiff asking that she consent to a permanent injunction in respect of the use of the material in exchange for which they would drop the claim for damages against her and would not seek costs. The plaintiff, as she was entitled to, refused this offer and, on 30th June, 2016, she delivered a defence and counterclaim. Notwithstanding the return of the CD and the USB sticks to Grant Thornton, they became aware in April, 2016 that extracts from the confidential information had been sent to a number of solicitors firms who brought it to Grant Thornton's attention. Consequently, Grant Thornton remain concerned that the plaintiff has retained a copy of some or all of the data which was on the CD.
18. Between 2016 and 2017, the plaintiff brought a number of motions in the 2015 proceedings (in which she is the defendant). These sought variously to add additional

parties, to exclude the second defendant from acting for Grant Thornton and to cross-examine Grant Thornton's deponent in the injunction application (which had already concluded). In February, 2017, Grant Thornton brought a motion seeking to strike out the defence and counterclaim under O. 19, r. 28 or the court's inherent jurisdiction. Grant Thornton also applied for and was granted leave to issue a motion for the attachment and committal of the plaintiff for breach of the interlocutory order, although no such motion was actually issued.

19. The various interlocutory applications were heard by Gilligan J. who delivered judgment on 27th July, 2017. He refused all of the reliefs sought by the plaintiff including her applications to join the Attorney General and the Data Protection Commissioner to the proceedings. He allowed Grant Thornton's motion to strike out significant portions of the plaintiff's defence and counterclaim, largely on the grounds of irrelevance or because they sought to re-litigate issues determined by Fulham J. in the Danske Bank proceedings. The only element of the plaintiff's counterclaim which Gilligan J. permitted her to pursue was her claim for damages under s. 7 of the Data Protection Acts. The plaintiff served a revised defence and counterclaim on 18th December, 2017 ostensibly to comply with the order of Gilligan J. although Grant Thornton took the view that it did not in fact comply with it.
20. Meanwhile, the plaintiff appealed the decision of Gilligan J. to the Court of Appeal and, in the context of that appeal, brought an interlocutory application to have all of Gilligan J.'s orders set aside on the grounds of bias. That application was refused in an ex tempore ruling by the Court of Appeal on 26th January, 2018. The plaintiff was also refused a stay on Gilligan J.'s orders by the Court of Appeal which meant that preparation for the trial continued in the High Court. The plaintiff applied to strike out Grant Thornton's claim on the basis that it was bound to fail, an application which was refused by Stewart J. on 12th April, 2018. She then brought a discovery motion seeking 74 categories of discovery which was adjourned to the trial which was ultimately listed for hearing before Ní Raifeartaigh J. on 4th October, 2018.
21. The trial did not proceed on that date as Ní Raifeartaigh J. took the view that because of the outstanding issues regarding the pleadings and discovery, the case was not ready for hearing. She issued a seven-page written ruling to assist the parties in progressing the matter. An element of that ruling which is significant in light of certain arguments now made by the plaintiff, is the note at para. 5 that counsel for Grant Thornton had stated in court that Grant Thornton was not pursuing its claim for damages against the plaintiff which in turn removed the need for the court to consider past events, notably events between the receipt of the CD by the plaintiff and the making of the interim orders. The claim for damages against the plaintiff under s. 7 of the Data Protection Acts was the only relief sought under that legislation although other sections of the Acts had been pleaded.
22. The plaintiff's substantive appeal against the order made by Gilligan J. was heard by the Court of Appeal and judgment was delivered by Baker J. on 31st October, 2019. All of the grounds of appeal advanced by plaintiff were rejected. The difficulties arising from the

manner in which the plaintiff conducts her litigation are evident from this judgment. For example, the plaintiff revisited her allegation of bias on the part of the trial judge although this had already been dismissed by the Court of Appeal in a ruling in January, 2018. Baker J. describes these allegations as “*deeply unfounded and scandalous*”. Much of the judgment addresses the non-joinder of the Attorney General and the Data Protection Commissioner. Baker J. points out at paras. 15, 56 and 65 of the judgment that the 2015 proceedings are properly characterised as private law rather than public law proceedings even though they are connected to the operation of a statutory scheme for which the Data Protection Commissioner was then primarily responsible. This is a distinction which the plaintiff is either unable or unwilling to accept as is evident from the presence of Ireland, the Attorney General and the Data Protection Commissioner as defendants in the 2019 proceedings facing allegations that they unlawfully failed to join the 2015 proceedings.

23. It may be useful to pause at this stage and to note some threads running through the plaintiff’s applications in the 2015 proceedings which also feature in the 2019 proceedings. The first is her insistence that all matters relating to data protection fall within the exclusive jurisdiction of the Commissioner such that the High Court does not have jurisdiction to entertain Grant Thornton’s proceedings. This is expressed in various different ways ranging from her argument that Grant Thornton does not have standing to pursue the claims made in the 2015 proceedings through to her complaints about the Data Protection Commissioner and the Attorney General not being party to those proceedings. In essence the plaintiff contends that only the Data Protection Commissioner could deal with her alleged misuse of personal data whilst also contending that, as she was neither a data controller nor a data processor in respect of the data inadvertently disclosed to her, she was not subject to any obligations under the Data Protection Acts. This is also linked to the dispute as regards the public law or private law nature of the proceedings adverted to above. Secondly, she draws an absolute distinction between personal data, in this case the personal data of third parties inadvertently disclosed to her, and confidential material being business and financial records of Grant Thornton. She claims to be willing to return all confidential material to Grant Thornton but excludes all personal data from this. She relies on the fact that some of the material disclosed to her constitutes personal data in order to maintain, in the 2019 proceedings, a right on her part to contact each affected data subject directly. Again, she is unable or perhaps unwilling to accept that the same material can be both the personal data of third parties and confidential business information belonging to Grant Thornton.
24. Following the decision of the Court of Appeal, the plaintiff issued the 2019 proceedings on 20th September, 2019. Matters concerning the 2015 proceedings continued in the High Court and, on 3rd December 2019, a hearing took place before Pilkington J. on two issues. The first of these was a “*jurisdiction motion*” brought by the plaintiff asserting that Grant Thornton had no standing to bring the 2015 proceedings as the claims could only be determined by the Data Protection Commissioner. The second was a “*scope of defence*” motion brought by Grant Thornton seeking to strike out large portions of the plaintiff’s revised defence and counterclaim as not being in conformity with the order of

Gilligan J. In a judgment delivered on 2nd June, 2020, both of these issues were decided against the plaintiff. Pilkington J. was very clear (at paras. 34 and 35 of her judgment) in holding that the High Court had jurisdiction to hear the 2015 proceedings and that the relief sought by Grant Thornton in those proceedings could not be granted by the Data Protection Commissioner. She directed significant further amendment by way of deletion from the defendant's revised defence and counterclaim noting that this document constituted a wholly new pleading when compared to the original and was not what was contemplated by Gilligan J.

25. Whilst all of this was ongoing, the plaintiff made complaints to the Legal Service Regulation Authority in respect of the second to fifth defendants. These complaints arose out of circumstances where those defendants were instructed to act on behalf of Grant Thornton in the 2015 proceedings against the plaintiff. The complaint against the solicitors was rejected by the Legal Services Regulation Authority on 7th February, 2020. That body held the complaint to be inadmissible as being "*without substance or foundation*" pursuant to s. 58(2)(b) of the Legal Services Regulation Act, 2015. In a ruling of the Barrister's Professional Conduct Tribunal delivered on 6th July, 2020, the complaints against the barristers were also rejected. The ruling noted that the complaints arose from the actions of these defendants as opposing counsel and in the context of a case which was subject to the oversight of the judge in front of whom the parties were appearing. It noted also that the plaintiff had availed of the opportunity to outline her concerns to both the High Court and the Court of Appeal and that the arguments had not been accepted by the judges before whom she appeared. Even though these complaints were clearly unfounded and were dismissed at a threshold level by both decision-makers, it is nonetheless a serious and stressful matter for any lawyer to face a complaint to their professional regulatory body.
26. A few days after Pilkington J. issued her judgment in the 2015 proceedings, the plaintiff served her statement of claim in the 2019 proceedings. I will examine the statement of claim in further detail below. Suffice it to say at this point that the 28 substantive reliefs sought in the plenary summons were now extended to 151 discrete claims including multiple claims for damages against all of the defendants under a variety of headings. Between 27th July, 2020 and 8th November, 2020, motions to strike out the 2019 proceedings were issued on behalf of all of the defendants except the tenth (the Data Protection Commission), whose motion issued slightly later on 26th February, 2021. There then followed an exchange of affidavits on each motion but there is a substantial overlap between the contents of the plaintiff's replying affidavit and her supplemental affidavit across each of the four motions such that all of the applications can be appropriately dealt with together.
27. Shortly after the first of the motions were filed, the Supreme Court issued a determination ([2020] IESCDT 109) refusing the plaintiff leave to appeal the decision of Baker J. in the Court of Appeal. The Supreme Court noted the issues dealt with by the Court of Appeal and held that the Court of Appeal was entitled to make the orders made under each of the headings identified. It also held that "*no question of breach of fairness*

of procedure or, fundamental jurisdiction is shown" before concluding that no issue of general public importance arose which would meet the criteria for an appeal to the Supreme Court.

28. Meanwhile, the 2015 proceedings continued and the plaintiff brought an appeal against the decision of Pilkington J. which was heard by the Court of Appeal and judgment delivered by Haughton J. on 1st March, 2021. Although the Court of Appeal rejected all of the plaintiff's grounds of appeal, the plaintiff nonetheless places significant reliance on a single aspect of this judgment. In the course of dealing with and rejecting the plaintiff's argument that the High Court lacked jurisdiction as the subject matter of the 2015 proceedings could only be dealt with by the Data Protection Commission, Haughton J. noted, firstly, the indication given by Grant Thornton to Ní Raifeartaigh J. in October, 2019 that they were not pursuing a claim in damages under s. 7 of the Data Protection Acts and, secondly, that "*a further concession, or perhaps it was only a clarification*" was given to the Court of Appeal that Grant Thornton was also not pursuing any cause of action predicated on any section of the Data Protection Acts. At a later point in his judgment, Haughton J. describes Grant Thornton as having "*abandoned*" all claims under the Data Protection Acts and the pleading relating to those claims as being "*redundant*". Whilst Haughton J. easily disposed of the plaintiff's jurisdictional argument in circumstances where Grant Thornton were no longer relying on alleged breaches of or sought remedies under the Data Protection Acts, he nonetheless proceeded to consider her original argument that the High Court did not have jurisdiction because of the Data Protection Act (at pp. 15 and 16 of the judgment). The Court of Appeal fully upheld the rationale of Pilkington J. on this point accepting that the High Court had jurisdiction in respect of the claims in the 2015 proceedings as part of the full original jurisdiction conferred upon it under Article 34.3.1 of the Constitution.
29. Although the 2019 proceedings had been issued and the statement of claim served before Haughton J.'s comments, this aspect of his judgment features significantly in the plaintiff's supplemental affidavit which was sworn after the judgment was delivered and in her submissions to the court. The plaintiff regards the solicitors and counsel acting against her in the 2015 proceedings as having unreasonably pursued unstateable and impermissible claims before the High Court for four years in breach of her constitutional and other fundamental rights. She regards the withdrawal of the pleas under the Data Protection Acts as denying her the opportunity to defend those pleas. She contends that no reliance can be placed by the defendants on any of the judgments or rulings made in the 2015 proceedings as those proceedings have been fundamentally altered by the withdrawal of those pleas.
30. The last matter of relevance to this chronological account is that, on 26th April, 2021, the plaintiff issued a motion in the 2015 proceedings without leave of the court notwithstanding the terms of the Isaac Wunder order made by Reynolds J. in May, 2019. That motion apparently seeks to have the 2015 proceedings struck out which mirrors an application which the plaintiff had earlier made to the High Court and which was rejected by Stewart J. (April, 2018).

The 2019 Proceedings

31. As mentioned previously, in order to understand the 2019 proceedings, it is necessary to be familiar not just with the 2015 proceedings but also their procedural history and with the myriad of applications and appeals brought by the plaintiff in the course of their prosecution. A theme common to all of the applications to strike out is that the 2019 proceedings seek to re-litigate various issues all of which have already been decided against the plaintiff either by pleading those issues directly; by seeking to make the lawyers legally liable to her for having pursued them; and, similarly, by seeking to make the Attorney General and the Data Protection Commissioner legally liable to her for not having joined the 2015 proceedings of their own accord, the plaintiff's applications to join them having been refused.
32. The opening sentence of the general endorsement of claim in the 2019 plenary summons makes clear the extent to which the 2019 proceedings are bound up with and dependent on the 2015 proceedings and, in particular, on the plaintiff's view that the 2015 proceedings (which have not yet been determined) are unlawful. It states:-

"The plaintiff's claim is in relation to wrongful, unlawful legal proceedings advanced in the first instance pursuant to the Data Protection Acts 1998 and 2003 in the High Court, contrary to statute, constitutional and primary EU fundamental rights and entitlements."

The relief sought in the plenary summons takes the form of a series of declarations as to the correctness of the plaintiff's allegations regarding the 2015 proceedings and consequential declarations as to the breach of various legal instruments and of her fundamental rights as a result. For example, it is alleged that the sixth defendant wrongfully took High Court proceedings against the plaintiff and that the sixth and seventh defendants wrongfully instructed the fourth and fifth defendants (the solicitors) to initiate, advance and prosecute the 2015 proceedings in order to procure an unlawful court order. Various allegations are made against all of the lawyer defendants regarding matters allegedly done *"in the course of unlawful proceedings"*. The Data Protection Commissioner is accused of having *"declined and refused to adjoin"* the 2015 proceedings and the Attorney General is accused of having failed to vindicate the plaintiff's fundamental rights.

33. The statement of claim, at 46 pages, is a very lengthy and densely pleaded document. Multiple claims for damages against all of the defendants are made on various, laboriously detailed, grounds. Multiple declarations are sought, again largely to confirm the correctness of the plaintiff's stance regarding the legality of the defendants' actions or inactions in the context of the 2015 proceedings. The length of the pleadings is added to by the plaintiff seeking, entirely unnecessarily, the inverse of the various reliefs she seeks, presumably to cover a situation where the primary relief sought by her is refused. For example, the plaintiff seeks substantive compensation from the State defendants for what is alleged to be a *"derogation and vitiation"* of her dignity regarding fair procedures. Alternatively, she seeks a declaration that she is *"not entitled to dignity afforded by fair procedures"*. This reflects the very black and white approach to the litigation adopted by

the plaintiff which presupposes that the only reason she would not be awarded the substantial damages claimed is because the court would positively make a finding that she had no right to dignity or fair procedures rather than because of any failure on her part to establish that a breach of fair procedures had occurred.

34. The length of the statement of claim and the detail in which it is pleaded makes a meaningful summary of its contents a very difficult exercise. Whilst the following account is just a very brief summary, I have read the statement of claim in detail both prior to the hearing and again when preparing this judgment. Its central theme is the breach of the plaintiff's fundamental rights which allegedly occurred through the taking of the 2015 proceedings and the various applications made in the context of those proceedings together with a denial of fair procedures to her in the conduct of the proceedings. The plaintiff claims against those involved in the proceedings in respect of the actions they took and against those who declined to become involved because of their inaction. Her claim is, however, broader and the facts pleaded, at some length, include the appointment of a receiver and the litigation taken by Danske Bank, the plaintiff's data access request to Grant Thornton, the delay in responding to that request and the Data Protection Commissioner's handling of the plaintiff's complaint in respect of that delay. Many of the factual details central to Grant Thornton's claim in the 2015 proceedings are squarely acknowledged by the plaintiff. She pleads, as regards the material sent to her in the data breach by Grant Thornton, that she was entitled to contact the third parties (i.e. the affected data subjects) and to inform them of the violation of their rights and also that she disclosed the data to a third party "*who viewed some of the data*" in her possession.
35. The plaintiff complains that the conduct of the interlocutory hearing denied her due process as she did not have sufficient time to prepare for the hearing nor to deal with the case against her. She contends that the defendants deliberately relied on her legal ignorance and her inability to understand that the claims against her were "*impermissible*". She alleges that Grant Thornton and the lawyers acting on their behalf "*advanced wrongful impermissible claims*" and accuses the lawyers of having acted in a manner that was "*negligent, unpermitted, deceitful and substantially damaging to the plaintiff's reputation, professional and personal, standing and dignity*". Similarly, she treats the application for a grant of leave to issue a contempt motion as a threat to her "*enshrined untouchable right to freedom*" notwithstanding that no such motion was issued nor the fact that, had it issued, the plaintiff could only have been deprived of her liberty on foot of a court order made following an application at which she would be entitled to be heard.
36. A large number of pleas are directed against the Data Protection Commissioner. These include allegations of delay in dealing with the plaintiff's original complaint and of a failure to intervene both as regards the data breach and in the legal proceedings. The plaintiff pleads, in many different ways, that it was solely a matter for the Data Protection Commissioner "*to act on behalf of affected data subjects*" in respect of the data breach and, consequently, that Grant Thornton was not entitled to pursue the cause of action in

the 2015 proceedings. Similar complaints are made as regards the refusal of the Attorney General to join the proceedings, this time on the basis that he failed to fulfil his role as "*custodian of primary EU law*" or in order to vindicate the plaintiff's fundamental rights. Although the first defendant was still a nominal party to the proceedings at the time the statement of claim was served, it is expressly pleaded that the State is liable in damages for the actions of the judiciary.

37. All of the complaints made are pleaded as breaches of statute, of the Constitution, of EU Directives, of the Lisbon Treaty, of the EU Charter of Fundamental Freedoms and of the European Convention on Human Rights.
38. The foregoing summary provides a flavour of the cases pleaded by the plaintiff but, as previously mentioned, the case is very densely pleaded and includes a myriad of additional allegations. The level of detail included is unnecessary, unhelpful and, at times, counterproductive as it makes it difficult for the court to identify what, if anything, is the real cause of action which the plaintiff seeks to advance. Notwithstanding their length and detail, the pleadings do not set out a proper factual or legal basis for the very serious claims made. This, unfortunately, is typical of many of this category of litigants-in-person.
39. Legal drafting is a core skill which must be learned and practised before a legal practitioner becomes adept at it. A person undergoing professional training as a lawyer will usually be learning this skill in circumstances where they already have a solid grounding in basic legal principles and in the main areas of substantive law. In bringing this training and experience to bear on the preparation of pleadings for a client, the lawyer will usually approach the task with a level of professional objectivity which enables them to focus on the relevant and legally sustainable arguments and to discount the irrelevant or unstateable. A litigant-in-person usually has neither a decent grounding in the law nor an understanding of how to properly frame and plead a cause of action. Consequently, in approaching applications by opposing parties relating to pleadings prepared by a litigant-in-person, the court must remain conscious that just because a case is badly pleaded, it does not necessarily follow that it is a bad case. Thus, in examining the applications brought by the defendants to strike out the plaintiff's claim, the court must consciously disregard the poor state of the pleadings and focus on what is, so far as the court can ascertain, their true intent.

The Defendants' Applications

40. Although the argument made by each group of defendants varied in light of the particular context in which they have been sued by the plaintiff, the central thrust of all four applications is identical. In each case, the defendants seek to strike out the plaintiff's proceedings either on the basis that the pleadings disclose no reasonable cause of action or are frivolous and vexatious under O. 19, r. 28 or on the basis that the proceedings constitute an abuse of process pursuant to the court's inherent jurisdiction. There is a substantial overlap between the jurisdiction available to the High Court under these two headings, both as regards their purpose and the effect of any order made. Nonetheless the two jurisdictions remain distinct and somewhat different considerations apply to each of them.

41. Order 19, rule 28 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."

Although the rule allows for the striking out of a discrete pleading leaving the proceedings otherwise extant, in this case the defendants seek the striking out of both the plenary summons and the statement of claim leading, in effect, to the dismissal of the plaintiff's action in its entirety.

42. The law as regards O. 19, r. 28 is well settled and applications made under that rule are subject to three overriding principles. Firstly, the jurisdiction to strike out is one which the court should exercise sparingly. This is particularly so if the effect will be to dismiss the proceedings in their entirety since, as a result, the intending plaintiff would be deprived of their constitutionally protected right of access to the court.

43. Secondly, the court must take the plaintiff's case at its height and assume that the facts pleaded by the plaintiff will be established at trial. However, there is a distinction between the facts relied on by the plaintiff and the inferences sought to be drawn from those facts. This distinction was elaborated on by McCracken J. in *Fay v. Tegral Pipes Ltd* [2005] IESC 34:-

"In the present case, to a large extent, the facts themselves are not in issue; what is in issue is the interpretation of those facts and the question of whether the facts can give rise to any cause of action. Indeed, if any facts are in issue, that is not a matter which can be determined on a motion of this nature, and the Court must assume that the facts as pleaded or deposed to on behalf of the Plaintiff are correct. However, the Court is entitled to examine the inferences which the Plaintiff seeks to draw from the facts in ascertaining whether those facts can give rise to any reasonable cause of action."

Although the focus of the court's consideration under O. 19, r. 28 is on the pleaded case, if an amendment to the pleadings would resolve the deficiencies complained of then the application to strike out should be refused and the litigant permitted to amend their pleadings. One of the plaintiff's applications is for liberty to "update" her statement of claim. Although no draft of the proposed "updated" statement of claim was provided with the motion, it seems that the plaintiff wishes to include pleas referable to judgments given and decisions which have been made since the statement of claim was originally served, especially that of Haughton J. There is no suggestion that the plaintiff intends to, or would if afforded the opportunity, amend her pleadings so as eliminate the excessive material or to produce a more coherent claim.

44. Thirdly, the purpose of the jurisdiction is not to remove from a defendant who is likely to be successful the burden of dealing with the litigation. It is rather to ensure that a claim which cannot succeed is not permitted to engage the time and resources of the court and of the other party. Again, the rationale for this was teased out by McCracken J. in *Fay v. Tegral Pipes Ltd* (above):-

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

45. The inherent jurisdiction of the High Court to strike out proceedings which, if allowed to proceed to trial, would constitute an abuse of the court's processes, was first recognised by Costello J. in *Barry v. Buckley* [1981] 1 IR 306. Whilst there are many reasons why proceedings might constitute an abuse of process, central to most of them is the fact that the proceedings are ones which simply cannot succeed. As Barron J. pointed out in *Jodifern Ltd v. Fitzgerald* [2000] 3 IR 321, the test in these circumstances is not to ask whether the plaintiff would succeed (which necessarily involves the court making some evaluation of the evidence which is, at the time of the motion, incomplete) but rather asking whether the plaintiff could succeed. There is, however, an important difference in the manner in which the court approaches this question when exercising its inherent jurisdiction rather than its jurisdiction under O. 19, r. 28. The difference lies in the extent to which the court can look behind the pleaded facts in order to determine that the proceedings are bound to fail. This distinction was explained by Clarke J. in the Supreme Court in *Lopes v. Minister for Justice* [2014] IESC 21 where he stated:-

"The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in Barry v Buckley, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked."

Thus, the issue under O. 19, r. 28 is whether the pleadings disclose a cause of action whereas, under its inherent jurisdiction, the court can look behind the cause of action disclosed by the pleadings to see whether it is one which has no prospect of success.

46. The extent to which the court goes behind the pleadings is still fairly limited as, if there is a credible basis for the cause of action pleaded, the court should not attempt to decide it on an application to strike out. Further, the fact that a court may look behind the pleaded facts does not place an onus on the plaintiff to prove her case for the purposes of the motion. Instead, it allows the court, particularly in circumstances where either the facts are not seriously in issue, where the evidence is largely documentary or the dispute between the parties is essentially a legal one, to assess whether there is a credible basis for the claim.
47. The somewhat greater flexibility allowed to the court under its inherent jurisdiction is potentially relevant to this application. Because the plaintiff is a litigant-in-person, she has not clearly pleaded the factual basis for her claims. Instead, her pleadings comprise a series of statements which are a mixture of alleged fact, assertion and legal argument all bundled into single pleas. Consequently, it is difficult for both the court and the defendants to identify those elements of her claim which should be taken as factual and which, as a result, should be assumed to be true and capable of proof by her for the purposes of O. 19, r. 28. I have given some thought as to how the court could go about extracting the facts which must be assumed to be true from the plaintiff's pleadings and I have ultimately concluded that it is not really possible to do this. When this matter was teased out with counsel for the barristers, he acknowledged the difficulties arising because of the manner in which the plaintiff's claim is pleaded and indicated that, whilst maintaining his application under O. 19, r. 28, he was concentrating on the application pursuant to the court's inherent jurisdiction.
48. The basic factual position is reflected in the description of events set out above. There is actually little factual dispute between the parties as to these events, many of which are evidenced in correspondence and other documents. As noted, the plaintiff positively pleads to some of the facts of central concern to Grant Thornton in the 2015 proceedings (most significantly her use of the data inadvertently disclosed to her through communication with the data subjects and allowing a third party unconnected with the data to view the data in her possession). The procedural steps taken in the prosecution of the 2015 proceedings are evident from the pleadings, courts orders and judgments in that case. Beyond that, the plaintiff does not plead a factual basis for her claims. To be precise, when the plaintiff pleads, for example, that steps taken by the lawyers were impermissible and are unlawful, it is possible from the pleadings to identify what those steps were and to understand that she regards them as impermissible and unlawful but no factual basis is advanced as to why she contends those steps were impermissible or unlawful bar the fact that they occurred. Insofar as it is possible to discern a legal basis for her claim that certain actions were impermissible or unlawful, that legal basis is usually linked to her belief that only the Data Protection Commissioner had jurisdiction to act in connection with the data breach by Grant Thornton and her subsequent use of that

data and, thus, everything done in connection with the 2015 proceedings is unlawful for want of jurisdiction. These legal arguments have already been the subject of court applications, rulings and judgments in the 2015 proceedings and form the basis of *res judicata* and estoppel arguments made by the defendants. Consequently, it seems to me that the most pragmatic approach to these applications is to look at the legal arguments raised by the defendants which go primarily to the exercise of the court's inherent jurisdiction and only revert to a consideration of whether the applications under O. 19, r. 28 have been made out in the event that the applications pursuant to the court's inherent jurisdiction do not succeed. I appreciate that this inverts the normal sequence in which these applications are dealt with but, given the difficulties outlined above, I think it is likely to produce a fairer outcome. It will also obviate the need for the court to break down each of the pleas made by the plaintiff to determine what, if anything, within a plea can properly be regarded as a fact as opposed to an assertion and, hopefully, will avoid the need for any appeal on the grounds that pleas have been mischaracterised.

The Claim against the Lawyers

49. At the hearing of these applications, the second and third defendants (the barristers) were the subject of a different motion and represented separately from the fourth and fifth defendants (the solicitors). A single motion was brought jointly on behalf of the solicitors and their clients, the sixth and seventh defendants (Grant Thornton). There are significant differences between the role of a barrister and that of a solicitor within our legal system. Solicitors, unlike barristers, are officers of the court and have specific obligations as regards the provision of undertakings on behalf of their clients and the management of clients' funds. Barristers are specialist and independent advocates who must be instructed by a solicitor to appear in litigation and whose work focuses on the pleading of cases both orally and in writing. In many ways, the role of a solicitor is broader than that of a barrister. However, the differences between the two branches of the legal profession are perhaps least important in the context of litigation where, since 1981, solicitors have had a full right of audience before the Irish Superior Courts. Notwithstanding this, it remains common practice for solicitors to instruct counsel for the purposes of the specialist advocacy required in litigation before the Superior Courts. Where that is done, the work of the litigation solicitor will centre on the taking of instructions from the client, the preparation, filing and service of court documents and ensuring that all essential proofs have been complied with before the trial begins. The barrister will usually draft the pleadings and conduct the oral argument. Much of the work that is the subject of the plaintiff's pleadings, such as the making of tactical decisions as the litigation progresses, will be done by barristers and solicitors on a collaborative basis. Thus, there is a significant degree of overlap between the position of the barristers and that of the solicitors in the applications before the court, perhaps more so than as between the solicitors and their client. Consequently, I propose dealing with the application involving the lawyers first, and then dealing with that involving Grant Thornton before moving on to consider the applications brought by the State defendants and by the Data Protection Commissioner.

50. It will be apparent from the analysis of the plaintiff's pleadings above that the case made against all of the lawyers is based on their having acted against her on behalf of Grant Thornton in the 2015 proceedings. The plaintiff continues to maintain that the High Court has no jurisdiction to hear the 2015 proceedings and, consequently, that the lawyers have committed an actionable wrong by instituting and prosecuting those proceedings notwithstanding the various judgments that have been given on the jurisdiction issue. The plaintiff complains of a lack of fair procedures in the conduct of the proceedings, particularly as regards her consent to the interlocutory injunction again, notwithstanding findings by the High Court and the Court of Appeal that there has been no want of fair proceedings. She regards the pleading against her as defamatory and the seeking of liberty to issue a motion for attachment and committal as a threat to her liberty. In the course of oral argument on these applications, the plaintiff's emphasis shifted somewhat to the withdrawal by Grant Thornton of the relief sought under s. 7 and of the pleas made under the Data Protection Acts. The plaintiff characterises this as the wrongful maintenance of impermissible and unlawful proceedings against her for a period of five years.
51. In seeking to have the plaintiff's proceedings against them struck out, the lawyers contend that those proceedings are bound to fail as they are fundamentally misconceived. The lawyers have never acted for the plaintiff. They have at all times been instructed on behalf of a client to act against her in the context of litigation which, as it happens, has yet to be determined. As counsel and solicitors acting on behalf of the opposing party, the lawyers do not owe the plaintiff any duty of care. Thus, as a matter of principle, and taking the plaintiff's case at its height, the lawyers contend that the allegations she makes against them do not give rise to a stateable cause of action. Needless to say, the lawyers also dispute the contention that they have behaved improperly in any way or that they have breached the duty which lawyers engaged in litigation owe to the court. In addition to their arguments concerning their role in the litigation, the lawyers also argue that the 2019 proceedings constitute a collateral attack on the various rulings which have been made to date in the 2015 proceedings. Matters such as the jurisdiction of the High Court to hear the 2015 proceedings have been conclusively determined in those proceedings and the framing of the claim against the lawyers in the 2019 proceedings is an attempt to re-litigate those matters. This, it is contended, constitutes an abuse of process.
52. Finally, counsel argued that the proceedings should be struck out as an abuse of process because the plaintiff had not obtained a report from an independent expert confirming that there were reasonable grounds for the claim made before instituting what are, in effect, professional negligence proceedings against the lawyers. The third defendant had expressly raised this issue on affidavit and, as the plaintiff did not reply, counsel argued that the only reasonable inference to be drawn was that such a report had not been obtained. In fact, it was unnecessary to draw any inference because, in the course of her submissions, the plaintiff confirmed that she did not have an expert report. Whilst it was at times unclear whether the plaintiff was referring to an inability to get lawyers to act on her behalf in the proceedings or an inability to get a lawyer to give an expert report, she

certainly confirmed that she had been unable to procure such a report and indicated that she was “*reserving her right*” to go outside the jurisdiction to do so. The plaintiff maintains that she is not pursuing professional negligence proceedings against the lawyers but merely negligence proceedings. This is a distinction without a difference in circumstances where the lawyers are being sued for alleged negligence in respect of actions taken by them whilst acting in a professional capacity. The plaintiff cannot relieve herself of the obligations attaching to the issuing of professional negligence proceedings simply by characterising the cause of action as negligence.

53. I will deal with this discrete point at the outset because it is separate to the broader issue of whether lawyers can be sued by the opposing party in litigation in which they have acted. It can at times be difficult for intending litigants in professional negligence proceedings to procure a report from an expert in this jurisdiction where the pool of persons with the requisite expertise can be small and all of those individuals will be known to each other. Therefore, it is not at all unusual for such proceedings to be instituted on the basis of a report from a professional practising outside of this jurisdiction. The plaintiff’s purporting to reserve her right to seek a report from outside the jurisdiction is meaningless both because there was no legal impediment on her doing so from the outset but, more significantly, because the requirement is that the expert report be available before proceedings are instituted so that professionals do not face the burden of defending and the reputational damage caused by the issuing of unwarranted professional negligence proceedings. The rationale for this rule is explained by Denham J. in *Cooke v. Cronin* [1999] IESC 54 as follows:-

“To issue proceedings alleging professional negligence puts an individual in a situation where for professional or practice reasons to have the case proceed in open Court may be perceived and feared by that professional as being detrimental to his professional reputation and practice. This fear should not be utilized by unprofessional conduct.”

In a somewhat different context, Haughton J., speaking for the Court of Appeal in *Murphy v. Health Service Executive* [2021] IECA 3, recognised that mere service or notification of proceedings may trigger an obligation on the part of a professional to notify their insurers which may itself have potentially significant consequences and could bring about “*the precise mischief*” that the rule “*seeks to avoid, namely, the unnecessary naming of potentially innocent professional parties*”. I accept that it was an abuse of process for the plaintiff to institute proceedings against the lawyers without having firstly obtained a report from an expert confirming that there were stateable grounds for her intended claim. For reasons which will become apparent in the balance of this judgment, I do not have to decide whether this finding alone warrants the striking out of the proceedings against the lawyers in circumstances where the plaintiff is a litigant-in-person. Were it to have been determinative I would at very least have stayed the plaintiff’s claim against the lawyers until she had procured such a report.

54. Although the plaintiff presented her oral argument very eloquently, it was, at times, difficult to follow and, in particular, difficult to identify her response to the specific arguments made by each group of defendants. She returned repeatedly to her two core arguments, namely that the High Court did not have jurisdiction to entertain the 2015 proceedings and that, by Grant Thornton dropping its claims under the Data Protection Act in the 2015 proceedings, she had been unfairly denied the opportunity to defend those claims. The plaintiff's written submissions, which ran to nearly 20,000 words, comprise a very dense argument citing over 80 judicial authorities. Unfortunately, the submissions also focus on the issues of central concern to the plaintiff and do not really engage with the substance of the applications against her. Her entire argument proceeds from the basis that, notwithstanding the various decisions already made against her in the 2015 proceedings and the fact that substantive issue in those proceedings has yet to be determined, the plaintiff is indisputably correct in law and that in suggesting otherwise the opposing party and their lawyers are necessarily advancing an impermissible, unstateable and unlawful case which the High Court does not have jurisdiction to determine.
55. Whilst it is difficult to extract from these submissions the plaintiff's response to the lawyers' application, one relevant authority relied on is *Doran v. Delaney* [1998] 2 IR 61. This is a case where the plaintiff purchaser of a site was held to have a cause of action against the vendor's solicitor in respect of their failure in response to a specific requisition to disclose the existence of an ongoing dispute between the vendor and a neighbouring landowner as regards ownership of part of the site. The Supreme Court (Keane J.) held, relying on *Midland Bank v. Cameron* [1988] SLT 611, that a solicitor could be liable to a party other than his own client if he assumed responsibility for advice or information furnished to a third party in the knowledge that the third party was likely to rely on it. The plaintiff regards this as authority for the proposition that she may sue the "opposing solicitors".
56. There is a material difference between the role of a solicitor in a conveyancing transaction where both parties to the transaction are seeking to achieve a common outcome and the role of a solicitor (or counsel) in litigation. Conveyancing is not an adversarial pursuit whereas litigation is necessarily so. *Doran v. Delaney* is not authority for the proposition that there is a general entitlement to sue the opposing solicitor where matters do not go to plan, even in the context of conveyancing or other commercial transactions. The cause of action recognised in that case was dependent on a number of conditions being satisfied, most importantly that the solicitor had assumed personal responsibility for advice or information given to the third party and that advice or information was given in circumstances where the solicitor was aware the third party was likely to rely on it. Those conditions may be satisfied in a conveyancing transaction (although not inevitably so) but it is difficult, if not impossible, to see how a lawyer engaged in litigation on behalf of a client could ever be taken to be furnishing advice to the opposing lay client on which that person is likely to rely. It is wholly contrary to the adversarial nature of litigation that an opposing client could ever reasonably understand the other side's lawyers to be assuming personal responsibility for providing him with advice on foot of which they are aware he

will likely rely. The plaintiff has not established – and does not even suggest – that the lawyers in the 2015 proceedings purported to give her advice or information let alone advice or information for which they assumed personal responsibility or that they were aware that she would rely on such advice or information. Her case is predicated on what she perceives as the incorrectness, unstateability and unlawfulness of the advice they gave to their own client and the actions taken by their own client on foot of that advice. *Doran v. Delaney* does not apply to this situation at all.

57. In her oral argument, the plaintiff seemed to acknowledge that the lawyers did not in fact owe her a duty of care. She suggested that she was nonetheless entitled to sue them either to pursue the reputational damage caused to her in the 2015 proceedings or, alternatively, on foot of an alleged breach of the duty the lawyers owe to the court. There is no basis for either of these claims. The conduct of proceedings and statements made either in pleadings or in court are covered by an absolute privilege designed to protect the administration of justice. That privilege now has an express statutory basis under s. 17(2)(g) of the Defamation Act, 2009 under which it is a defence to a defamation action for the defendant to prove that the statement was made, *inter alia*, by a party or legal representative in the course of proceedings presided over by a judge. Consequently, even if something said or done by the lawyers in the context of the 2015 proceedings were to have caused the plaintiff unjustified reputational damage (and it is certainly not clear that this has occurred), the lawyers would be absolutely immune from suit.
58. Civil litigation in Ireland is an adversarial system where one party makes allegations regarding a cause of action which the other party can accept or deny. Where a claim is disputed, it is the function of the court to decide the issue between the parties. It is important in facilitating both a litigant's right of access to the court and the administration of justice that lawyers can be instructed to advise on a claim and, where appropriate, to initiate and prosecute proceedings. It is also inevitable in an adversarial system that some claims will be made and some defences advanced that do not succeed. It would have a seriously chilling effect on the administration of justice and, in particular, on the ability of litigants to secure legal representation, if the lawyers acting on behalf of an unsuccessful litigant could be made the subject of proceedings at the hands of the successful litigant after the litigation has concluded. Facing the risk of personal liability if a case in which they are instructed does not succeed, no lawyer could commit to acting for a litigant in proceedings carrying any element of risk. The ability of lawyers to provide independent advice to their clients on the conduct of litigation will necessarily be impeded if they have to consider not just the benefit or detriment to their own client of the step proposed but also whether they will be sued by the other side for having recommended it. Obviously, the risk and the consequent chilling effect are increased if lawyers face being the subject of proceedings from the opposing litigant before the original case has even been decided. Consequently, there are strong policy reasons why the law has not applied to lawyers a duty of care to the opposing side in litigation.
59. The absence of such a duty has been recognised by both the Irish and the UK courts. In *O'Malley v. Irish Nationwide Building Society* (Unreported, 21st January, 1994), Costello

J. struck out a number of sets of proceedings as an abuse of process. The proceedings had been issued after the building society had obtained an order for possession following default by the plaintiff on repayments on his mortgage. The plaintiff issued proceedings against two solicitors and two barristers who had acted for the building society, the managing director and four other directors of the building society and an auctioneer who had been instructed to sell the property. In looking at each set of proceedings, Costello J., for the most part, dealt with them pursuant to the High Court's inherent jurisdiction which he identified and differentiated from the jurisdiction under O. 19, r. 28 as follows:-

"I wish to make it clear that the court has power under the Rules and also has inherent jurisdiction to strike out the claims. The difference is that the court when striking out under the Rules will merely consider the pleadings as filed but that when exercising its inherent jurisdiction the court will examine all the surrounding circumstances of the case and, if necessary, will consider the evidence adduced. In this case I propose to exercise my inherent jurisdiction."

Costello J. then considered each set of proceedings (of which there were ten) and struck them out either completely or in large part because they did not disclose a cause of action, because the claim was unsustainable or because they amounted to an abuse of process. The judgment is in the form of a transcript of a judgment delivered *ex tempore* and, consequently, is not detailed. However, in dismissing the claim against the barristers, it is clear that Costello J. regarded such claims as an abuse of the process of the court (p. 8 of the transcript) and, at a later point (p. 11 of the transcript), he stated that the plaintiff had "*no justification*" to sue the barristers and solicitors who had acted for the building society.

60. The principle, as it relates to barristers, was dealt with in slightly more detail in the transcript of a judgment of the UK Court of Appeal in *Orchard v, South Eastern Electricity Board* [1987] QB 565 Speaking for the court, Sir John Donaldson said:-

*"Second, because, whilst there is no doubt that members of the Bar owe a duty to the court as well as to their lay client, I know of no basis for a contention that they owe any independent duty to their lay client's opponent. Furthermore, so far as I am aware, the courts have never asserted any jurisdiction over members of the Bar, apart from their general jurisdiction to control the conduct of all who appear before them and apart from their appellate jurisdiction as visitors of the four Inns of Court, and it would seriously undermine the independence of the Bar if they did so. Equally, I can find no basis in logic or authority for holding that the essential public interest immunity affirmed in *Rondel v Worsley* [1969] 1 AC 191 protects the Bar only in relation to claims by their own lay clients, leaving them unprotected in respect of the far greater risk of claims by disgruntled litigants on the other side."*

In opening this passage, counsel for the barristers was careful to acknowledge that *Rondel v. Worsley* is no longer good law in the UK having been reversed by the House of Lords in *Arthur JS Hall v. Simons* [2002] 1 AC 615. Although the issue of barristers' potential liability in negligence for the conduct of litigation has not been definitively

determined in this jurisdiction, counsel argued strongly that any duty of care to their client that might arise, could not extend to the opposing party in litigation in which the lawyer had acted. Reliance was placed on the statement in *Jackson & Powell on Professional Liability* (2020 Ed. at para. 2-006) to the effect that “*it is very unlikely that a duty of care is owed to the other side in litigation*”. Apart from Orchard, that text also refers to a decision of the UK Court of Appeal in *Connolly-Martin v. Davis* [1999] PNLR 826 in which it was held that, in general and absent a voluntary assumption of responsibility on which it was reasonable for the other side to rely, “*counsel owes no such duties to those who are not his client*”.

61. The plaintiff’s suggestion that she is suing the lawyers not for a breach of duty to her but for a breach of their duties to the court, is an entirely circular argument. It presumes that the actions taken in the 2015 proceedings are impermissible, unstateable and unlawful. An application by the plaintiff to have the 2015 proceedings struck out on this basis has already been refused (Stewart J.). Her arguments as to a lack of jurisdiction have been rejected repeatedly by both the High Court and the Court of Appeal. The court does not know whether either the claim or the counter-claim in the 2015 proceedings will ultimately be successful as those proceedings have not yet been determined. However, it is important to note that even if Grant Thornton are unsuccessful in the 2015 proceedings, it does not follow that the claims made by the plaintiff in the 2019 proceedings are justified. Adversarial litigation necessarily means that many claims and defences will not succeed. The fact that a claim or a defence does not succeed does not mean that it is unlawful, unstateable or in some way impermissible. It simply means that in the context of that litigation, based on the evidence before the court and for whatever reasons are given by the court the claim has not succeeded.
62. Further, I think counsel for the barristers is correct in submitting that the plaintiff is making a fundamental mistake to equate the lawyers with the client on whose behalf they act. Lawyers in private practise will act on behalf of numerous clients. They may or may not share the views of their clients, either generally or as regards any particular piece of litigation. The duty of the lawyer is to provide legal advice, assistance or representation as the circumstances require provided always that the case they are asked to advance is neither improper or dishonest. A barrister may, having duly advised their client, decline to pursue a case or argument that they do not believe has a reasonable prospect of success, but the client remains at liberty to instruct another barrister. Whilst there are ethical obligations which prohibit a barrister from knowingly making any false or misleading statement of fact to a court and obliging them to correct any such statement made (including by their client), there is no obligation on a barrister to personally vouch for the case their client is making. It is the job of the court, not the barrister to decide whether the case succeeds. Quite often the task of a litigation lawyer is to extract their client from a difficulty, sometimes even a difficulty of their own making. Assuming, as the plaintiff does, that the client and their lawyers think and act as one is inherently fallacious.

63. It is also necessary to address an aspect of the plaintiff's argument which is relevant both to the application made by the lawyers and that made on behalf of Grant Thornton. This concerns the dropping, by Grant Thornton, of the relief sought under and the pleas made directly referable to the Data Protection Act in the 2015 proceedings. In normal course when elements of a claim are dropped by litigants prior to trial, this is welcomed by both the court and the opposing party. From the opposing party's perspective, any element of a case that is dropped becomes something with which that party no longer has to concern itself in preparing for the trial. From the court's perspective, when elements of a case are dropped, it facilitates the narrowing of the issues and the focusing of the court's attention on the real matters in dispute between the parties. It is virtually unprecedented for a party to strenuously object to the dropping of a claim against them on the basis that they now no longer have the opportunity to defend that claim. Order 28 of the Rules of the Superior Courts provides for the amendment of pleadings and confers a jurisdiction on the court at any stage of the proceedings to permit such amendments to be made "*as may be necessary for the purpose of determining the real questions in controversy between the parties*". It is unusual for a formal application under O. 28 to be made where a party is simply proposing not to pursue some of the pleas contained in a statement of claim as opposed to where a party is seeking to introduce new pleas which have not already been pleaded. It would, in my experience, be virtually unheard of for a court to refuse a party permission not to proceed with a plea it no longer wishes to pursue particularly where, as here, this is flagged well in advance of the trial.
64. The plaintiff's belief that the dropping of pleas from the 2015 statement of claim as originally drafted is somehow evidence of improper conduct on the part of the lawyers seems to derive from her belief that a plea will only be dropped when it is manifestly unstateable or legally incorrect. This does not actually reflect how litigation works. The dropping of a plea is not a concession that the plea is impermissible or unlawful. When a case is brought, particularly as here in circumstances of some urgency, the lawyers will usually ensure that what they perceive as all relevant pleas are made on behalf of their client. As the litigation progresses, the views of those involved are likely to crystallise and the pleadings may be refined. In some cases, a plea may be dropped because a view is taken that it is unsustainable or that the evidence necessary to support will not be forthcoming. More often a view is taken that the particular plea is not necessary either because the lawyers believe the case can succeed on the other grounds or because they believe that the other pleas are stronger and, thus, the plea which is being dropped is unlikely to succeed unless the other pleas also succeed, rendering the additional plea unnecessary. Occasionally a view might be taken that the effort involved in pursuing a plea, particularly if it is strenuously opposed by the other side, is not justified in light of the level of benefit which it contributes to the proceedings overall. These type of strategic or tactical decisions, which might include, for example, whether to call a witness in support of a plea, are regularly made on an ongoing basis in the course of litigation.
65. A party who makes a plea and then formally drops it will not be allowed to pursue that plea at trial and will be bound by the rule in *Henderson v. Henderson* (1843) 3 Hare 100 if an attempt is made to re-activate that plea in any later proceedings. Apart from that,

there is no penalty imposed on a party who narrows their claim from that originally pleaded and the imposition of a penalty in these circumstances would be counter-productive and likely to interfere with the efficient administration of justice as it would force parties to run every element of their case as originally pleaded even if this is unnecessary to achieve the outcome sought to the litigation. If the opposing party has been seriously discommoded or caused to incur significant additional costs by virtue of the inclusion of the plea in the first place, this can be addressed at the conclusion of the case when the court is being asked to exercise its discretion in relation to costs.

66. In the 2015 proceedings, Grant Thornton, through its counsel, has indicated to the High Court that it will not be pursuing certain elements of its claim as originally pleaded. This indication, given well in advance of the trial of the action, is of assistance to the court and, despite her resistance, to the plaintiff. The plaintiff no longer has to prepare to meet these issues and the court will not be called upon to decide them. In an adversarial system, the scope of the issues to be decided by the court is framed by the parties. If the party bringing the proceedings decides not to advance a particular issue, then, save as it may ultimately be relevant to costs, this is not a matter upon which the court should make any decision. A litigant does not have the right to defend a claim which is not being made against them. Consequently, the plaintiff has not established a stateable claim against the lawyers simply because they acted on behalf of Grant Thornton in the 2015 proceedings. Equally, the fact that certain pleas originally made in the 2015 proceedings are now not being pursued by Grant Thornton, does not give rise to a stateable cause of action against the lawyers (or indeed against Grant Thornton). The whole of the plaintiff's argument on these issues is fundamentally misconceived.
67. In summarising the findings of the court in relation to the application brought by the lawyers, it may be useful to have regard to a number of factors which have been identified as tending to show that a proceeding is vexatious. There are not criteria to be met on an application to strike out but rather indicia of an abusive or vexatious claim. These were originally identified in a Canadian case, *Dykun v. Odishaw* (Unreported, Alberta Court of Queen's Bench, 3rd August, 2000); considered by the High Court (Ó Caoimh J.) in *Riordan v. An Taoiseach* [2001] 4 IR 463 and approved of by the Supreme Court in *Ewing v. Ireland* [2013] IESC 44. These are:-
- "(a) *the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;*
 - (b) *where it is obvious that an action that cannot succeed, or if the action would lead to no possible good, or if no reasonable person could reasonably expect to obtain relief;*
 - (c) *where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;*

- (d) *where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;*
- (e) *where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;*
- (f) *where the respondent persistently takes unsuccessful appeals from judicial decisions."*

68. It is apparent that most of these factors, with the exception of (e), are present in this case. The issue of jurisdiction to hear the 2015 proceedings was determined on appeal by Baker J. in October, 2019. Leave to appeal from the decision of Baker J. was refused by the Supreme Court. The issue was raised again by the plaintiff as a defence to the motion heard by Pilkington J. and decided against the plaintiff by that judge in June, 2020, a decision which was upheld on appeal in the judgment of Haughton J. in March, 2021. Notwithstanding the fact that this issue has been conclusively determined against the plaintiff on multiple occasions, it features centrally in the 2019 proceedings. Thus, the plaintiff's pursuit of this issue falls foul of paras. (a), (b), (d) and (f) of the factors set out above. As there is no legal basis for her claim against the lawyers, it falls foul of para. (b). It also falls foul of para. (d), the lawyers in the case being those who acted against the plaintiff in the 2015 proceedings. Whilst the plaintiff may not see her proceedings as being brought for an improper purpose and may not intend to harass or oppress the other parties, the bringing of proceedings against the lawyers who acted in a professional capacity in earlier proceedings against the plaintiff is in my view manifestly oppressive. In reaching this conclusion, I am mindful that this is not simply a case where the plaintiff is mistaken as to the legal basis of the action she wishes to pursue. She has already made complaints to the professional regulatory bodies to whom the lawyers must answer, complaints which were dismissed at a threshold level as being without foundation. Whilst the rulings of the professional bodies came after the plaintiff had instituted the 2019 proceedings, the statement of claim was not served for over four months after the LRSA had ruled in favour of the solicitors. The plaintiff has not withdrawn the allegations against the lawyers following receipt of the rulings of the professional bodies. Her pursuit of her claim against the lawyers in these circumstances cannot be said to be for a proper purpose.
69. In light of the above, I have no hesitation in striking out the plaintiff's proceedings as against the lawyers. In my view, such an order could be made under O. 19, r. 28 on the basis that the pleadings do not disclose a reasonable cause of action and are frivolous or vexatious. However, as an order can also be made pursuant to the court's inherent jurisdiction on the basis that the proceedings are bound to fail and constitute an abuse of the process of the courts, I propose to make it on that basis to avoid the difficulty of attempting to characterise the plaintiff's pleas as either ones of "fact" or as mere assertions. There is one final argument which has been made on behalf of the lawyers to the effect that the proceedings constitute a collateral attack on the decisions already

made in the 2015 proceedings as the issues sought to be raised are *res judicata* or the subject of an issue estoppel. In light of the conclusions I have already reached, I do not think it is necessary to formally decide this issue in the context of this application and, in any event, it is an issue which is also raised by Grant Thornton in their application which I will proceed to consider now.

The Claim against Grant Thornton

70. Although the lawyers acting on behalf of a client and the client themselves have very different roles in the context of civil litigation, in this case the claim made by the plaintiff against the sixth and seventh defendants (Grant Thornton) is substantially the same as that made by her against the lawyers. She contends that the 2015 proceedings brought by Grant Thornton against her were unlawful and impermissible as only the Data Protection Commissioner has jurisdiction to deal with the allegations of misuse of data by her. In addition, she makes certain allegations about the original data breach in 2015 and Grant Thornton's handling of it whilst maintaining an entitlement on her part to contact the affected persons and to share the data with a third party. Finally, she contends that Grant Thornton has damaged her reputation by making unfounded allegations against her.
71. In moving this application, counsel for Grant Thornton made two main arguments. He also pointed to an important aspect of the outcome of Grant Thornton's motions in the 2015 proceedings which is that, although much of the plaintiff's defence and counterclaim has been struck out, she has been permitted to maintain her claim for damages against Grant Thornton under s. 7 of the Data Protection Acts. Thus, her complaints as to how Grant Thornton handled her original data access request and the subsequent data breach and whether the conduct of Grant Thornton in this regard caused her damage are still live in the 2015 proceedings.
72. The first of the other arguments is based on *res judicata* or issue estoppel and focuses on the extent to which the issues the plaintiff seeks to ventilate in the 2019 proceedings either have been or could have been raised in the 2015 proceedings. In my view counsel's characterisation of the 2019 proceedings as being a collateral attack on the decisions already made in the 2015 proceedings and an attempt the plaintiff to reopen and re-litigate those matters is correct. All of these rules or doctrines ensure the finality of litigation when it has reached a conclusion, an objective to which considerable weight is attached by the courts due to its public importance (see Keane J. (as he then was) in *Dublin Corporation v BATU* [1996] 1 IR 468). To a very significant extent many of the issues which the plaintiff seeks to raise in the 2019 proceedings have actually been determined against her in the interlocutory applications in the 2015 proceedings. A large number of cases identifying the circumstances in which *res judicata* applies or in which an issue estoppel arises were cited in the defendants' written submissions and included in the combined book of the defendants' authorities provided to the court. These included *Donohoe v. Brown* [1986] IR 90, *McCauley v. McDermott* [1997] 2 ILRM 486, *Re Vantive Holdings* [2010] 2 IR 118 and *Fuller v. Minister for Agriculture* [2013] IESC 52. Of particular note is the decision in *McCauley v. McDermott* where the Supreme Court struck

out the proceedings as an abuse of process pursuant to the court's inherent jurisdiction even though all of the criteria necessary to establish an issue estoppel had not been met.

73. Counsel was unable to identify an authority on the specific and unusual position which pertains here where the plaintiff has issued these proceedings whilst the earlier proceedings in which she raises similar issues, either by way of defence or as plaintiff in the counter-claim, are still extant and in which her entitlement to damages under s. 7 of the Data Protection Acts remains to be determined. However, I accept the logic of counsel's argument that it is inherently abusive to issue a further set of proceedings purporting to raise issues which you have already lost in the earlier set and where any outstanding issue as to your entitlements remains to be determined in the earlier proceedings. Whilst it is not technically accurate to characterise issues which have not been determined as being *res judicata*, the crux of the matter here is that insofar as the plaintiff has a stateable case against Grant Thornton as regards the handling of her data access request, the data breach and the events subsequent to the data breach, she has been expressly permitted to pursue those issues in the 2015 proceedings. Hence, issuing a second set of proceedings to ventilate the same issues is potentially abusive. This is particularly so where the proceedings in which the outstanding issues are raised for a second time also seek to make a multiplicity of additional claims which are themselves either *res judicata* or which do not disclose a reasonable cause of action.
74. The second argument made on behalf of Grant Thornton relies on the same underlying rationale as the argument made on behalf of the lawyers. Civil litigation is necessarily an adversarial process and taking proceedings against someone cannot, of itself, constitute an actionable wrong, regardless of the outcome of those proceedings. Whilst malicious abuse of the civil process can constitute a tort, in order to do so the claim to which objection is taken must have failed in its entirety (or be bound to do so) (per *Murphy v Kirwan* [1993] 3 IR 501). Of course, in this case, the earlier proceedings have not yet been determined and were Grant Thornton ultimately to succeed in those proceedings, it would be manifestly absurd to allow the plaintiff pursue a cause of action which is predicated on those proceedings having been wrongfully taken against her. However, the argument made on behalf of Grant Thornton is not dependent on the outcome of the 2015 proceedings.
75. Counsel points to the fact that, in *O'Malley v. INBS* (above), Costello J. not only struck out the proceedings against the lawyers, he also struck out that plaintiff's attempt to issue new proceedings against the building society and the directors and officials of the building society on the grounds that there was "*no justification*" for issuing those proceedings. In addition, counsel referred to the decision in *Business Computers International Ltd v. Registrar of Companies* [1988] Ch 229 in which the position of the litigant in previous litigation is expressly dealt with. The plaintiff company had been struck off the register of companies in circumstances where a winding up petition had been served by a creditor on an incorrect address. Having successfully applied to have the winding up order set aside, the plaintiff then issued proceedings claiming damages against the creditor who had presented the winding up petition and the registrar of

companies. The creditor successfully applied to have the proceedings struck out as disclosing no reasonable cause of action. Scott J. held that litigants did not owe a duty of care to each other as to the manner in which the litigation was conducted. His analysis initially considered whether the proposition underlying the plaintiff's proceedings could be limited to winding up petitions and similar applications and concluded that it could not. He then addressed the central issue as to whether the contended-for duty of care existed and concluded:-

"Is it just and reasonable that a plaintiff should owe a duty of care to a defendant in regard to service of the originating process? I do not think that it is. The plaintiff and the defendant, the petitioner and the respondent, are antagonists. The plaintiff, or the petitioner, is seeking a legal remedy in an adversarial system. The system stipulates the rules and requirements that must be observed by the two parties. The plaintiff must issue his process and must serve it on the defendant. If there is default in service the process may be struck out. If an order is obtained without the prescribed rules or regulations having been observed, the order may be discharged or set aside, sometimes by an application at first instance, sometimes on appeal. The prosecution of the action or of the petition is subject throughout its career from institution to final judgment to judicial control. Service of process is a step, and usually an essential step, in the prosecution. It must usually be proved before an order can be obtained against an absent defendant. The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind, conceptually odd. The safeguards against ineffective service of process ought to be, and I think must be, found in the rules and procedures that govern litigation. The rules and procedures require that, save on ex parte applications, proof of service be shown before an order is made against an absent party. If the proof of service is false, be it through negligence or design, an order may be made that should not have been made. The injured party's remedy is to have the order set aside. An action for damages cannot be based on the falsity of the proof of service. Nor, in my judgment, can the adequacy of the efforts made to effect service be subjected to a tortious duty of care."

Whilst the analysis focuses on the issue of service, which was the negligence alleged, the underlying rationale that no duty of care can or should be superimposed on the checks and safeguards provided through the system of judicial control over litigation applies equally to the type of want of jurisdiction/ bad faith/ negligence allegations made here. That is emphasised in Scott J.'s final conclusion to the effect that no duty of care is owed by one litigant to another as to the manner in which litigation is conducted either in regard to service "or in regard to any other step in the proceedings". I am satisfied that there is no duty of care owed by a litigant to the opposing party in any litigation in which they are mutually involved.

76. As in the case of the application brought by the lawyers, in her reply the plaintiff did not really engage with either the substance or the detail of the argument made against her.

Instead, she relied heavily on her perception of the correctness of the position she seeks to advance in the 2019 proceedings notwithstanding any earlier judgments to the contrary. However, the plaintiff did make a number of arguments regarding the *res judicata* issue. Firstly, she disputes the assertion that she has already agitated the same claims in the 2015 proceedings. She argues that her claim for damages in the 2015 proceedings is a statutory claim which she brings as a violated data subject whereas her claim for damages in the 2019 proceedings is one under the general law of tort. She does not address the fact that although the two claims may be framed differently, they seek damages for the same alleged acts of wrongdoing or, at best, for the defendants having wrongfully pursued these matters in the 2015 proceedings. Even assuming that the claims are different, the plaintiff does not deal with the argument made pursuant to *Henderson v. Henderson* (1843) 3 Hare 100. If the plaintiff is correct in contending that the claim now made is different, then apart from allegations relating specifically to the conduct of the 2015 proceedings, she does not offer any explanation as to why they were not raised in the earlier proceedings nor why she should be permitted to institute a separate set of proceedings against the same defendants to pursue them now.

77. The plaintiff argues strongly that the defendants cannot rely on *res judicata* in light of the abandonment of the Data Protection Act claims in the 2015 proceedings. The basis for this argument is not fully understood. Insofar as Grant Thornton has narrowed its claim in the 2015 proceedings by withdrawing the claim for damages under s. 7 of the Data Protection Act and the pleas based on ss. 2 and 22 of those Acts, it is hard to understand why this would mean that the judgments already delivered in the 2015 proceedings are no longer binding on the plaintiff. Put simply, the High Court and the Court of Appeal have held that the High Court has jurisdiction to determine the 2015 proceedings even when an express claim under the Data Protection Acts was included. Consequently, the withdrawal or abandonment of that specific element of the claim cannot logically have a bearing on the decisions as to jurisdiction. If the High Court has jurisdiction to hear the broader claim, it necessarily also has jurisdiction to hear the narrower claim.
78. Similar considerations apply to the decisions refusing the plaintiff leave to join either the Data Protection Commissioner or the Attorney General. If there was no legal basis for the joinder of the Data Protection Commissioner as a mandatory party to the 2015 proceedings when Grant Thornton included express pleas under the Data Protection Acts, then there is even less reason for contending that the Data Protection Commissioner should be a party to the 2015 proceedings when those pleas have been withdrawn. Therefore, whilst the plaintiff clearly feels strongly that the withdrawal of that element of the 2015 proceedings resets the clock, as it were, so that everything that has occurred in the 2015 proceedings ceases to have continuing relevance, there is no legal basis advanced for that view and it does not make sense in light of the particular issues which have been abandoned.
79. The plaintiff relied on a recent decision of the Supreme Court in *Ennis v. AIB* [2021] IESC 12 to argue that judgments given in interlocutory applications are not final and, therefore, that the judgments given to date in the 2015 proceedings should not be regarded as

binding upon her. In my view this is not an accurate reflection of MacMenamin J.'s judgment in *Ennis v. AIB*. That case concerned the admission of new evidence on appeal from a summary judgment. MacMenamin J. looked specifically at appeals in interlocutory matters because of the analogies between the principles applicable to such appeals and those applicable to summary judgments. He recognised that there is a spectrum of interlocutory appeals with, at one end, those equivalent to appeals from plenary proceedings and, at the other, appeals in respect of which the same objective of achieving finality does not arise and in which greater flexibility can be allowed. Crucially, MacMenamin J. states at para. 22 of his judgment:-

"An interlocutory order will, generally, not have the quality of finality sufficient to give rise to a plea of res judicata. It may, however, have that effect if it was intended finally to determine rights between the parties."

In my view, *Ennis v. AIB* is not an authority for the proposition that interlocutory judgments will never be regarded as having finally determined certain issues as between the parties. If the interlocutory judgment is intended to determine an issue which will not thereafter be revisited at the substantive hearing then it will have the quality of finality sufficient to give rise to a plea of *res judicata*. Whether in fact an interlocutory order has done so will depend on the intent of order itself and on the particular context in which it was given. Whilst the orders made in the 2015 proceedings are interlocutory in the sense of being made during the course of proceedings and before final judgment, they are orders which were intended to finally determine the particular issues to which they related namely jurisdiction and the joinder/ non-joinder of parties. Therefore, these are issues which cannot be re-opened by the plaintiff either in the 2015 proceedings or by bringing these separate proceedings.

80. Finally, the plaintiff asserts that her argument in the 2019 proceedings is not a jurisdictional one challenging the jurisdiction of the High Court to deal with claims under the Data Protection Acts but, rather, is one taking issue with the *locus standi* of Grant Thornton to raise these issues. In light of the fact that Grant Thornton have indicated that they are no longer seeking relief under s. 7 of the Data Protection Act, nor maintaining any plea under ss. 2 or 22 of those Acts, it would seem that the concern expressed by the plaintiff as to its *locus standi* to do so is essentially moot. Even if this were not the case, in circumstances where the High Court and the Court of Appeal have found that the courts have jurisdiction to deal with the 2015 proceedings as originally pleaded, the issue of whether Grant Thornton has *locus standi* to advance those claims is one which can only be properly determined in the context of those proceedings and not by the issuing of a separate set of proceedings contesting their *locus standi* in the earlier proceedings.
81. It was apparent from the arguments made by the plaintiff that she perceives Grant Thornton to have no *locus standi* at all to bring a claim concerning her use of third parties' personal data irrespective of the fact that the data of which she is or was in possession emanated from them. As noted above, the plaintiff draws a very black and white distinction between what she characterises as Grant Thornton's confidential information

and the personal data of third parties without, apparently, appreciating or understanding that the same material can comprise both confidential business information of one party and personal data of others. Again, the resolution of this issue is properly a matter for the 2015 proceedings.

82. The last discrete argument which the court could identify the plaintiff making in response to this application appeared to accept that Grant Thornton did not owe her a duty of care in the conduct of litigation. Nonetheless, the plaintiff asserted that she was entitled to bring the 2019 proceedings and to pursue the defendants for breach of her rights under Article 40.3 of the Constitution. It is undoubtedly correct that the Superior Courts have accepted that a litigant may claim damages for breach of their constitutional rights even where their complaint does not neatly fit into any existing or recognised cause of action. The ability of the courts to fashion a remedy where it has been established that a breach of the fundamental rights guaranteed by the Constitution has occurred is an important safeguard and ensures that such rights are substantive and not illusory. However, it does not follow that a plaintiff who cannot fashion a stateable claim under any recognised tort or other recognised cause of action automatically has a default claim under Article 40.3 of the Constitution. In this case although the plaintiff has pleaded that all of the wrongs allegedly committed against her constitute breaches of the Constitution, the ECHR and the EU Charter, she has not pleaded any factual basis for these contentions save the fact that Grant Thornton brought the 2015 proceedings against her and took certain steps in the conduct of those proceedings. As I have already held that there is no duty of care owed by Grant Thornton as a litigant to the plaintiff as the opposing party, there is no sustainable basis for the plaintiff's assertion that the mere bringing and prosecution of that litigation constitutes a breach of her fundamental rights. Therefore, the question of a discrete cause of action pursuant to Article 40.3 of the Constitution does not arise.
83. In light of the foregoing analysis, I am satisfied that the claim made against Grant Thornton in the 2019 proceedings is fundamentally misconceived and doomed to fail. There is no reasonable cause of action against Grant Thornton merely because it has taken the 2015 proceedings against the plaintiff in circumstances where the plaintiff disputes the locus standi of Grant Thornton to do so nor because the plaintiff objects strenuously to the fact that Grant Thornton are no longer pursuing certain claims which were originally included in those proceedings. Even if the 2015 proceedings were ultimately to fail, this would not give rise to a good cause of action on the part of the plaintiff. However, in circumstances where the 2015 proceedings are still live, it is, in my view, completely misconceived for the plaintiff to issue further proceedings making complaints either as to the conduct of the 2015 proceedings or the entitlement of Grant Thornton to issue them in the first place.
84. I also accept the argument made on behalf of Grant Thornton that many of the issues the plaintiff seeks to litigate in the 2019 proceedings have already been determined against her in the interlocutory application in the 2015 proceedings. Thus, the 2019 proceedings are, to that extent, a collateral attack on the judgments given in the 2015 proceedings and, as such, an abuse of process. Insofar as the plaintiff has stateable grounds of

complaint against Grant Thornton either because of the handling of her original data access complaint, the data breach or the subsequent handling of that breach, she has been permitted to seek damages in respect of those matters in her counterclaim to the 2015 proceedings. The fact that her counter-claim only seeks damages pursuant to statute and not as a matter of general tort results from the way in which the plaintiff has framed her counter-claim in the 2015 proceedings. It would have been open to her to plead alternate basis for that claim from the outset and her failure to do so (if it cannot be remedied in the 2015 proceedings themselves) is caught by the rule in *Henderson v Henderson* (above). It would be oppressive to permit her to launch a second set of proceedings against Grant Thornton to claim damages in respect of the same complaint on a different legal ground.

85. In summary, I will strike out the plaintiff's claim against the sixth and seventh defendants pursuant to the inherent jurisdiction of the court. In these circumstances, I do not need to consider whether the plaintiff's claim should also be struck out pursuant to O. 19, r. 28 on the basis that the proceedings alone do not disclose a reasonable cause of action. Given the various comments made above regarding the state of the plaintiff's pleadings, I do not think that this would be a useful exercise.

The Claim against the State

86. The plaintiff's claim against the eighth and ninth defendants (the State) is pleaded in a typically broad way which makes it difficult to ascertain exactly what her complaint against these defendants is. Apart from wide-ranging complaints of negligence, breach of duty and abuse of power with consequent claims for damages for breach of the plaintiff's rights under statute, EU law, the Constitution and the European Convention on Human Rights, the main claim seems to be twofold. Firstly, the plaintiff contends that the Attorney General is under a constitutional duty to vindicate her personal rights and failed to do so by failing to intervene in the 2015 proceedings. In a similar vein, the plaintiff seems to assert that the State is responsible for the conduct of the Data Protection Commissioner and, by extension, for the failure of the Data Protection Commissioner to join the 2015 proceedings. Secondly, the plaintiff contends that the State is liable in law for the alleged failures of the first defendant and, in particular, the alleged denial to her of fair procedures in the conduct of the interlocutory injunction proceedings. The pleadings are replete with references to EU Directive 95/46/EC, i.e. the Data Protection Directive which preceded the introduction of the General Data Protection Regulation in May, 2018 and which was the operative EU instrument at the time of the events giving rise to these proceedings. Although it is difficult to extract what, if any, case has been made pursuant to that Directive, the plaintiff seems to assert that the fact the 2015 proceedings issued against her in the High Court rather than complaint being made to the Data Protection Commissioner is not only a breach of her right to equality but also a breach of primary EU law. She also contends that the Attorney General has obligations as regards the proper enforcement of that Directive as the "*guardian of EU law*" in this jurisdiction.
87. In moving the application on behalf of the State defendants to strike out the proceedings, counsel made three arguments. Firstly, she contended that complaints in respect of non-

joinder of the State defendants to the 2015 proceedings are *res judicata* having been raised and determined against the plaintiff in the 2015 proceedings. Although no specific ground of appeal was advanced by the plaintiff in her appeal to the Court of Appeal against the non-joinder of the Attorney General by Gilligan J., because the matter was raised in a general way in her legal submissions, it was expressly dealt with by the Court of Appeal and the decision of the High Court was upheld. In this case, the Attorney General had been served with the plaintiff's motion seeking his joinder to the 2015 proceedings in the High Court and was represented both before the High Court and the Court of Appeal when the motion was determined. Further, in circumstances where the Court of Appeal clearly characterised the proceedings as private law proceedings (and confirmed that characterisation on a subsequent occasion), counsel pointed to the decision in *TDI Metro v. Fingal County Council* [2000] 4 IR 337 as establishing that the Attorney General does not have an automatic entitlement to intervene in such proceedings. In order to do so, he must make an application to the court justifying his entitlement to intervene on the basis of the exceptional public importance of the issues arising in the proceedings. The Attorney General will generally only move to intervene where there is a clear public interest in doing so and, consequently, he does not owe a duty to any private citizen to intervene in proceedings where that person feels their fundamental rights are at issue.

88. Secondly, insofar as the plaintiff complains about the conduct of the 2015 proceedings and the alleged denial to her of fair procedures, that is primarily a complaint against the first defendant for whom she seeks to make the State liable. Without conceding that there was any want of fair procedures in the conduct of the 2015 proceedings and noting that the plaintiff did not appeal the order granting the interlocutory injunction, counsel argues that the plaintiff's claim is in any event misconceived as the State does not owe individual litigants a duty of care in respect of the conduct of individual judges. Reliance is placed on the judgment of the Supreme Court in *Ewing v. Ireland* (above), a case concerning the sale of land in 1983 which resulted in protracted litigation for many years afterwards. In proceedings issued in 2006 the plaintiff, the son of the original vendor, sought to make the State liable in respect of the conduct of earlier proceedings before the Circuit Court and the High Court. The claim was struck out as an abuse of process, a decision upheld on appeal to the Supreme Court, with MacMenamin J. stating:-

"It was not possible to discern from any of the submissions how Ireland and the Attorney General could possibly have been negligent, or had acted in breach of any duty of care. The defendants now joined in these proceedings had no power over, or duty covering, the events which have been described. On the facts as pleaded, neither defendant owed a duty to the appellant or his late father in the initiation, conduct, or conclusion of the Circuit Court proceedings, the appeal therefrom, the later High Court proceedings, or appeals to this Court. The action is, therefore, entirely misconceived.

The Court system contains within itself its own system of appeals. That system operates within parameters laid down by the Constitution and by statute. The fact

that Ireland and the Attorney General were joined in the earlier High Court proceedings renders Mr. Ewing's present case even more problematic, as both were parties to the claim which was struck out, and where that decision was not appealed. The very purpose of the present proceedings is to mount a collateral attack on the earlier decisions of the courts. This is not a permissible procedure and would, of itself, warrant the proceedings being struck out.

Both the common law and public policy dictate there must be finality in proceedings between parties."

89. The State also relied on the judgment of the High Court in *Kemmy v. Ireland* [2009] 4 IR 74 in which the plaintiff had been convicted of serious criminal offences and had served a term of imprisonment before his conviction was set aside on the ground that his trial had been unfair. He then issued proceedings against the State claiming damages for the unlawful deprivation of his liberty and the infringement of his rights by the judiciary. The case differs from this one in that the unfairness of the plaintiff's trial was an established fact having been so found by the Court of Appeal rather than merely an allegation by the plaintiff. Nonetheless, the court held that the State was not vicariously liable for the actions of the judiciary. This finding stemmed in part from the independence of the judiciary which would be compromised if the State were to be made liable for alleged wrongs committed by judges and in part from the fact that the State had vindicated the plaintiff's right through the provision of an effective appeals mechanism which enabled any error in the original process to be reviewed and corrected. In dismissing the plaintiff's proceedings, McMahon J. observed:-

"As far as this Court is concerned in determining whether there has been an "unfair trial", consideration must be given to the totality of the legal process from start to finish. When one takes this holistic view of the process one has to conclude that even if there was unfairness at the earlier stage it has been corrected and the end result of the process is not now unfair.

The State cannot guarantee that no error will ever occur in the judicial process. The judges it appoints are human and inevitably will make mistakes. In these circumstances, it is incumbent on the State to provide for a corrective mechanism to address these errors. This is the appeal process. In my view, failure by the State to do so would be a breach of its obligations to guarantee "as far as practicable" the citizen's right to a fair trial. But by doing so, the State has fulfilled its obligation under the Constitution."

90. Obviously, the facts in this case are not as pressing as those in *Kemmy* where the plaintiff had served a term of imprisonment before his trial was found to be unfair and his conviction quashed. In this case, the 2015 proceedings are not yet determined and the plaintiff may well succeed in successfully defending them. Insofar as various decisions have been made on an interlocutory basis, the plaintiff has had the opportunity of appealing these and has frequently done so, albeit unsuccessfully. The fact that the plaintiff did not appeal or otherwise take issue with the decision of Gilligan J. on the

interlocutory application is a matter for her. Having consented to and then not having appealed the order in question, she cannot now be heard to complain that it is unfair, much less seek to make the State liable in damages for the alleged unfairness. The decision in *Kemmy* is one which rests not solely on the concept of judicial immunity but on the constitutional separation of powers and the consequent limit of the obligation placed on the State in respect of liability for individual judicial decisions.

91. I am conscious that my finding that the plaintiff has not established any legal basis upon which the State could be made liable to her for the alleged unfairness of any judicial decision may well be superfluous when the Court of Appeal has already held as a matter of fact that the hearings in the High Court were not unfair. Haughton J. expressly observes that suggestions of procedural unfairness or ambush were not borne out and that the courts had afforded the plaintiff "*every available element of procedural fairness*". It is nonetheless an important principle that the State is not liable for individual judicial decisions as distinct from being responsible for the provision of and the effective workings of the court system as a whole.
92. A number of more minor arguments were also made on behalf of the State. The proceedings, insofar as they relate to the State defendants, were characterised as a collateral attack on the decisions made in the 2015 proceedings refusing to join the Attorney General to them and deciding that rather than being public law proceedings in which the Attorney General might have a role, the 2015 proceedings are private law proceedings. It is pointed out that the plaintiff cannot maintain any claim against the State in respect of the action of the judiciary under the European Convention on Human Rights Act, 2003 as the judiciary is expressly excluded from the definition of an "*organ of state*" under s.1 of that Act. The obligation to perform functions in a compatible manner under s.3(1) is imposed only on organs of the state and similarly only organs of the state are potentially liable in damages for a failure to act in a manner compatible with the State's obligations under the Convention under s. 3(2). The plaintiff's reply to this argument was to maintain that she was "*not entirely convinced*" that this is what the statutory provisions say. Finally, insofar as the plaintiff seeks to make the State liable for the actions of the Data Protection Commissioner, attention is drawn to the amendment of the Data Protection Acts made in 2003 to comply with the obligation under the Lisbon Treaty that the Data Protection Commission be independent in the performance of its functions. This latter point was developed further by the Commission.
93. Again, the plaintiff in her reply did not really engage with these arguments. She contended, in a general way as regards both the jurisdictional issue and the non-joinder of the Data Protection Commissioner to the 2015 proceedings, that the Attorney General "*has got to be vicariously liable for this*". Whilst she accepted that the Attorney General did not have an inherent right to be in the proceedings, the plaintiff contended that where questions relating to the application of an EU Directive in this jurisdiction arose, it was a matter for the Attorney General. She acknowledged that it was erroneous for her to have sued the first defendant but only because she insisted the State was legally liable for his conduct. She argued that the failure of her previous applications in the 2015 proceedings

was due to an unequal application of the law by the courts for which the Attorney General is answerable.

94. There is an element of circularity in the arguments repeatedly made by the plaintiff. The 2015 litigation between Grant Thornton and the plaintiff is private law litigation in which the courts have already held the Attorney General and the Data Protection Commissioner have no role. Litigation between private parties does not become public law litigation just because it concerns statutory provisions nor the operation as between private parties of rights and duties created by statute. Nor is there any greater onus on the Attorney General to involve himself in private litigation just because the statute in question has been enacted to comply with the State's obligations under EU law. There may be circumstances in which the Attorney General will seek to become involved (and must seek the leave of the court to do so) but only where the litigation raises issues which, in the view of the Attorney General, are of broader public importance. It is not for the parties to decide that their litigation falls into this category nor to demand that the Attorney General concern himself with it. Consequently, it cannot constitute a failure to vindicate a litigant's rights that the Attorney General or, as the case may be, the Commissioner have not involved themselves with that litigant's proceedings. It is a matter for the courts hearing the case to ensure that the parties' rights are protected and, in the event of an error on the part of the court, it is a matter for the appellate courts to correct that error.
95. The difficulty here is that the plaintiff refuses to accept any decision made by a court adverse to the case which she advances. Any issue taken or relief sought against the plaintiff by the opposing litigant is characterised as a breach of her rights and any failure by the court to accept the plaintiff's argument on this is characterised as a further breach of her rights, this time by the court. This is manifestly evident not only from the opening paragraph of the general indorsement of claim in the 2019 plenary summons in which the 2015 proceedings are described as "*wrongful, unlawful proceedings*" but also the fact that the plaintiff is attempting to sue everybody with a connection to those proceedings – the judge, lawyers, opposing parties and the public entities who successfully resisted being drawn into the proceedings. Reverting to sub-para. (b) of the *Riordan/Ewing* criteria set out above, not only is it obvious that this action against the State cannot succeed, it is an action which could lead to no possible good as it merely permits the plaintiff, as her complaints against the original parties are rejected, to endlessly extend the category of persons against whom those complaints are made.
96. Further, I accept the argument made by counsel for the State that the State is not liable in damages or otherwise for the conduct of members of the judiciary in the hearing and determination of cases before the courts. The immunity of the judiciary from suit serves a purpose similar to that already discussed as regards lawyers and litigants in the context of an adversarial legal system. If anything the need for judicial immunity is heightened given the role the judge must play in determining the issues between the parties. In addition, acknowledging the personal immunity of judges whilst making the State vicariously liable for their conduct would undermine the independence of the judiciary and, thus, the separation of powers mandated by the Constitution. I accept as correct the

analysis of McMahon J. in *Kemmy v. Attorney General* (above) echoing that of the Supreme Court in *Ewing v. Ireland* (above) to the effect that the State discharges the duty it owes to individual litigants through the provision of the courts system including appellate courts with the power to review and correct any error that may be made by a trial judge.

97. The principles of *res judicata* and issue estoppel apply as between the plaintiff and the State defendants (and also the Data Protection Commissioner) as regards the joinder issue because the Attorney General and the Commissioner were on notice of and participated in the motions brought by the plaintiff seeking their joinder to the 2015 proceeding. Insofar as other decisions were made in the context of the 2015 proceedings to which these defendants are not party, the conditions necessary to give rise to a claim of *res judicata* or issue estoppel are not satisfied because the necessary privity of parties is absent. However, in my view, that is not determinative of whether the institution of these proceedings against these defendants is abusive. The plaintiff's applications to join the Attorney General and the Data Protection Commissioner to the 2015 proceedings were refused. There may be circumstances in which a particular person is not a proper party to a given set of proceedings but one or more of the litigants in those proceedings can properly sue that person about related matters in a separate set of proceedings. However, to attempt to sue the person who was not joined to the first set of proceedings on the basis that their failure to intervene in those proceedings constitutes a breach of the litigant's rights is manifestly a collateral attack on the decision refusing joinder. Thus, all of the claims made by the plaintiff based on the non-joinder to and the non-participation of the State or the Data Protection Commissioner in the 2015 proceedings are an abuse of process. This covers not just the fact of non-participation but also the issues in the 2015 proceedings which the plaintiff alleges the particular defendant to be "responsible" for.
98. Of course, the foregoing comments are made taking the plaintiff's case at its height and assuming that she could establish the contended for breach of fair procedures on the part of the first defendant. However, if the court looks beyond the pleaded case for the purpose of the exercise of its inherent jurisdiction, it is evident that there is in fact no credible basis for suggesting that the facts are as asserted (per *Lopes v. Minister for Justice* (above)). It is interesting to note that the plaintiff raised an allegation of bias against the first defendant in her appeal from his decision. In rejecting that argument, the judgment of Baker J. notes (at para. 25) that the plaintiff expressly commended the first defendant "as not having conducted himself in any way 'untoward'". The complaint of a breach of fair procedures appears to have arisen again subsequently but was rejected by the Court of Appeal (Haughton J.) who found that the suggestion of procedural unfairness or ambush had not been borne out and that the courts had afforded the plaintiff every available element of procedural fairness. Thus, apart from there being no legal basis for the case the plaintiff now seeks to make against the State, there is also no credible factual basis for this case.

99. In summary I will allow the motion brought by the State defendants to strike out the plaintiff's proceedings pursuant to the inherent jurisdiction of the court. I am satisfied that the attempt to sue the State (and also the Data Protection Commission) for its non-intervention in the 2015 proceedings is *res judicata* and a substantial proportion of the claim now made against the State could be struck out on that basis also. Similarly, substantial portions of what has been pleaded by the plaintiff against the State lacks any sustainable legal basis and thus discloses no reasonable cause of action and could be struck out under O. 19, r. 28. However rather than parsing out the plaintiff's claim in order to identify what, if anything, might constitute facts which should be taken at their height, I will dismiss the plaintiff's claim in its entirety pursuant to the court's inherent jurisdiction.

The Claim against the Data Protection Commission

100. The final application to strike out was brought by the Data Protection Commission. Both the State and the Commission are agreed as to the requirement under European law that the Commission be independent from the State in the exercise of its functions, a requirement that has subsisted since 1995 and which is now reflected in both Article 8.3 of the Charter and Article 52 of the GDPR. Consequently, both of these parties are also agreed that the State bears no liability for the actions of the Commission, although the plaintiff contends that it does. The Commission's application traverses ground similar to that I have already dealt with in respect of the other applications, namely that the 2019 proceedings are an attempt on the part of the plaintiff to re-litigate matters which have been determined against her in the 2015 proceedings. It also raises issues of principle as to the potential liability of the Commission as a statutory body for the errors and failures alleged by the plaintiff in the exercise of its statutory functions, assuming that these could be borne out on the facts.

101. As is the case with the State defendants, the plaintiff's application to join the Commission to the 2015 proceedings was unsuccessful in both the High Court and the Court of Appeal and she was refused leave to appeal to the Supreme Court. (I note that application actually related to the Data Protection Commissioner as the office was then titled but for ease of reference I will refer to the Commission rather than to the Commissioner throughout this section). Counsel notes that while the plaintiff's application was moved in the High Court on the basis of the Commission's role under the legislation (and included a suggestion that the Commission be joined as an *amicus curiae* for that reason), in the Court of Appeal, the plaintiff also argued that the Commission should be joined on the basis of its failure to take action to compel Grant Thornton to comply with its statutory obligations. This ground was rejected on the basis that the Commission had opened an inquiry and there was an investigation ongoing at the time. The plaintiff's perception of the role of the Commission is very much linked to her jurisdictional argument and her contention that Grant Thornton cannot take and the High Court cannot determine any action against her in respect of third party personal data as the Commission has exclusive jurisdiction in this area. All of these issues have been determined conclusively against the plaintiff. It follows, for the same reasons as set out above in respect of the non-joinder of the State defendants, that it is an abuse of process for the plaintiff to issue these

proceedings against the Commission alleging, *inter alia*, a breach of her fundamental rights by virtue of the Commission's non-participation in the 2015 proceedings.

102. Counsel for the Commission, in submitting that many of the issues raised by the plaintiff in the 2019 proceedings are *res judicata* or the subject of issue estoppel, recognised that the claim now made against the Commission does include elements which were not covered by the 2015 proceedings. He argued that when the claim against the Commission is examined in light of the fact that the Commission is being sued alongside the judge, the lawyers and the other party to the 2015 proceedings, the true nature and purpose of the 2019 proceedings becomes clear. Thus, it is contended the additional elements of the claim also constitute an abuse of process.
103. Insofar as it is possible to extract the legal basis for the intended proceedings against the Commission from the statement of claim, it appears to be a case in professional negligence and breach of statutory duty for, *inter alia*, failing to apply and enforce the law, including the EU Directive, to the detriment of the plaintiff. However, when the pleadings are examined closely, the gravamen of the complaint underlying these pleas appears to be either the Commission's alleged failure to exercise its "exclusive" jurisdiction by taking action against the other defendants or its failure to join the 2015 proceedings, both of which are, of course, the issues which have already been determined against the plaintiff in the 2015 proceedings.
104. Counsel accepted that there was a somewhat different aspect to the jurisdictional argument insofar as it concerned the Commission's alleged failure to exercise its jurisdiction as this is bound up with the plaintiff's allegation of delay on the part of the Commission in the investigation of her original complaint and of inaction on the part of the Commission in respect of the data breach by Grant Thornton. Obviously, to allege positive failures of that nature on the part of the Commission is different to saying that the subject matter of the 2015 proceedings fell within the exclusive jurisdiction of the Commission. An affidavit has been sworn on behalf of the Commission by Ms. Anna Morgan who is both Deputy Commissioner and Head of Legal Affairs in the Commission setting out the history of the Commission's interaction with the plaintiff's complaints and exhibiting correspondence and decisions relating to those complaints. For the most part the plaintiff's very lengthy replying affidavit does not specifically engage with the contents of, nor the exhibits, to that affidavit. Instead she reverts to making complaints generally about the conduct of the defendants, arguing about the withdrawal by Grant Thornton of the Data Protection Acts element of the 2015 proceedings, contending that interlocutory judgments cannot give rise to *res judicata*, arguing that the Commission should have intervened in the 2015 proceedings and asserting rights on behalf of the third party data subjects affected by the 2015 data breach. Of the 13 pages of her replying affidavit only paragraph 7 responds to the factual core of Ms Morgan's affidavit. In this the plaintiff asserts that she is entitled to bring these proceedings to challenge how the Commissioner administered the investigation even if she accepts the outcome of it, complains of unreasonable delay on the part of the Commission in pursuing Grant Thornton, a failure

on the part of Commission to take enforcement action against Grant Thornton and its placing a burden on the plaintiff to pursue the matter.

105. The plaintiff's pleaded allegation of a failure to investigate and enforce is inconsistent with the documentary evidence which shows that full consideration was given to the plaintiff's complaints (of which there were a number) and that these were fully and actively investigated by the Commission. Of relevance is the fact that the Commission responded promptly to the plaintiff's initial complaint in September, 2014 by commencing an investigation into that complaint of which it notified Grant Thornton in October, 2014 and in respect of which it issued a final warning letter to Grant Thornton in November, 2014. It appears that the provision by Grant Thornton of her personal data to the plaintiff in September, 2015 followed numerous contacts by the Commission with Grant Thornton. It does however have to be acknowledged that it took a full year from the plaintiff's initial complaint for her to actually receive the data she had originally requested.
106. The plaintiff made a further complaint to the Commission in August, 2016 which also became the subject of an investigation that involved an on-site inspection in Grant Thornton's premises. It is a feature of the Commission's decision-making processes that they are often, and were in this case, accompanied by a flow of information to the complainant in response to the original request during the course of the investigation. Nonetheless, the investigation resulted in a decision in November, 2017 which formally found Grant Thornton to have been in breach of the relevant statutory provisions through their delay in furnishing the plaintiff with her personal data in response to her various requests. Again, this decision was reached over a year after the complaint to which it relates was made. The plaintiff asserts that the Commission breached its statutory duty by delaying or failing to respond to her complaints. No particulars are provided by the plaintiff in respect of this latter assertion and when the documentary evidence was exhibited in Ms. Morgan's affidavit, the plaintiff did not meaningfully engage with it or provide any contrary evidence. All of the evidence shows that the Commission did in fact actively engage with and carry out investigations into the plaintiff's complaints. Indeed, counsel notes that the plaintiff relies on the investigations carried out by the Commission and the decisions made by the Commission to make allegations in the 2019 proceedings against the other defendants. It is manifestly unsustainable for the plaintiff to allege that investigations were not carried out whilst relying in the same proceedings on the content of those investigations. Thus, there is no credible evidence that the Commission failed to investigate the plaintiff's complaints and consequently, insofar as the plaintiff's proceedings make this allegation, they are bound to fail.
107. In light of the time lines noted above it is not possible for the court to be satisfied that there is no credible basis for the factual assertion of delay or breach of statutory duty by reason of that delay on the part of the Commission. Thus, is it not possible to dismiss this aspect of the plaintiff's claim against the Commission on that basis. However, for the reasons discussed in the following paragraph this is not the end of the matter as there is a separate legal issue as to whether this complaint can form a proper basis for plenary proceedings of this nature. Before I turn to that I should make it clear, lest there is any

misunderstanding, the basis of the finding I have made in this paragraph. I have not reached a conclusion that the Commission was guilty of any, much less any unreasonable, delay in dealing with the plaintiff's complaint. In circumstances where the threshold for concluding that a claim is bound to fail on the merits is high and the jurisdiction to strike a claim out on this ground should be sparingly exercised, the court cannot conclude at this stage that that the plaintiff might not be able to establish the facts which she asserts as regards delay. If it were otherwise proper to allow the plaintiff to pursue that complaint in these proceedings, it is one which would have to be determined on the basis of oral evidence and with the parties having had the benefit of pre-trial procedures such as discovery. However, I am not satisfied that this is a complaint which can properly be made against the Commissioner in plenary proceedings.

108. Counsel argued that, as a matter of law, the Commission could not and does not owe a duty of care to individual data subjects. He acknowledges that the immunity from suit expressly introduced by s. 154 of the Data Protection Act, 2018 did not have a statutory precursor prior to that date. However, the Data Protection Acts, 1988 to 2003 included an express statutory duty of care under the data protection regime for data controllers and data processors vis-à-vis data subjects. There was no equivalent provision in relation to the Data Protection Commissioner. The lack of an express statutory duty of care is consistent with established law which recognises that a statutory body does not have a liability in tort for the manner in which a statutory duty is discharged (*Beatty v. The Rent Tribunal* [2006] 2 IR 191). Instead, there is a statutory right of appeal against the decisions of the Commissioner and the right to seek judicial review if it is contended that any decision of the Commissioner has been reached through an unfair, unlawful or *ultra vires* process. Order 86 allows declaratory relief, damages and injunctions to be sought in connection with the main judicial review remedies. There is a particular judicial review remedy, mandamus, for circumstances in which a decision maker fails, whether through delay or otherwise, to make a decision which it is legally obliged to make. Without necessarily suggesting that the delay alleged against the Commission (if made out) would warrant the granting of such an order, this is clearly the appropriate remedy for a dissatisfied complainant to seek when alleging a failure to conduct an investigation rather than asserting a breach of statutory duty in plenary proceedings.
109. In reply, at times the plaintiff appeared to accept that the claim against the Commission could be struck out insofar as it concerned the Commission's failure to join the 2015 proceedings. However, at the same time, she maintained that as the 2015 proceedings did not include any claim against the Commission, the claim now made in the 2019 proceedings was necessarily different. In expanding on this argument, the plaintiff reverted to contending that the Data Protection Commission could not allow a third party such as Grant Thornton to assume *locus standi* and to take action in the courts to enforce the Data Protection Acts. Thus, within a sentence or two, her response reverted to an argument about jurisdiction and a complaint that the 2015 proceedings cannot be properly determined without the Commission's involvement, both points which have already been determined against her in the 2015 proceedings. In a purported response to the argument concerning the Commission's statutory independence, the plaintiff sought to

argue that the Commission was not independent from the Data Protection Acts and, again, reverted to her jurisdiction argument. In essence, there was no real engagement with the arguments made against her as regards the role of and potential immunity of statutory bodies, of which the Commission is one.

110. I am satisfied that for the most part the claims made by the plaintiff against the Data Protection Commissioner are both bound to fail on the merits and constitute an abuse of the courts' processes. Insofar as her pleadings seek to re-litigate matters which have already been decided against her in the context of her application seeking to join the Commission to the 2015 proceedings, they are manifestly an abuse of process. Insofar as her claim concerns allegations of a failure to investigate on the part of the Commission which are separate from her related complaints as to jurisdiction, I am satisfied in light of the evidence adduced on behalf of the Commission to support its motion that there is no factual basis to these claims and, thus, they cannot succeed on the merits. Insofar as her claims concerns allegations of delay on the part of the Commission in the investigation of her complaints, these are claims concerning the exercise of a statutory function by a statutory body and thus are matters for which the Commission does not bear any liability in tort. Consequently, her claim in this regard is misconceived and bound to fail. I will allow the Commission's motion to strike out the plaintiff's proceedings pursuant to the inherent jurisdiction of the court. For the reasons set out as regards the other defendants I do not think it would serve any useful purpose to comb through the plaintiff's pleadings in an attempt to distinguish factual allegations from mere assertions as regards the Commission in order to decide if the motion should also be allowed under O. 19, r. 28.

Isaac Wunder Order

111. The last matter to consider is the application made by the fourth to seventh defendants inclusive for an Isaac Wunder order which would prevent the plaintiff from instituting further proceedings against Grant Thornton or any member of the solicitors' firm acting on behalf of Grant Thornton or any counsel instructed by them without leave of the High Court. Although an Isaac Wunder order undoubtedly represents a restriction on the otherwise unqualified right of a litigant to bring proceedings before the courts, it does not necessarily prevent a litigant from litigating. The requirement to obtain the leave of the High Court in advance of proceedings being instituted acts as a filter to ensure that unmeritorious proceedings cannot be instituted by a litigant against parties whom or concerning subject matter about which that litigant has already engaged in litigation, usually unsuccessfully. It is rare for an application for an Isaac Wunder order to be made unless the previous litigation has been prolonged, repetitive and unsuccessful. The making of such an order ensures that the opposing party is not subjected to an endless stream of litigation from the same litigant unless a court has determined that there is some objective merit to the proposed proceedings. It also ensures that the time of the courts is not needlessly taken up with either unmeritorious proceedings or applications such as these to strike out unmeritorious proceedings.

112. In this case, Reynolds J. has already made a form of Isaac Wunder order which prevents the plaintiff from issuing further motions in the 2015 proceedings without leave of the High Court. Notwithstanding this order, the plaintiff purported to issue a motion in the 2015 proceedings on the 26th April, 2021. The fact that the plaintiff issued that motion in breach of the Isaac Wunder order is, itself, a cause for concern and suggests that, unless restricted, the plaintiff will not curtail her litigation against these parties or in connection with the underlying subject matter of the 2015 proceedings. This observation is made in a context where the 2015 proceedings are still live, where the plaintiff's application to strike them out has been refused and the plaintiff has been permitted to continue with a counterclaim in those proceedings in which she is seeking damages from the sixth defendant for breach of her rights as a data subject. Thus, the courts have already given detailed consideration to the justiciability of the 2015 proceedings and the extent to which the plaintiff has a legitimate counterclaim which the courts should be required to consider.
113. The plaintiff opposes the grant of the Isaac Wunder order on the grounds, *inter alia*, that she is a defendant to the 2015 proceedings and relies on the decision of Noonan J. in the Court of Appeal in *Leslie Fitzsimons v. Bank of Scotland* [2019] IECA 336 in this regard. Noonan J in looking generally at the jurisdiction to make such orders observed:

With the increase in recent years in the amount of litigation pursued in our courts by litigants in person, the making of restraining orders has perhaps become more common. However, by no measure can the making of such orders be regarded as in any sense routine. They are, of course, a serious restriction on the constitutional right of access to the court and, as the authorities make clear, should only be made sparingly and in relatively rare circumstances. Where the circumstances warrant however, the court has the inherent jurisdiction to make such orders and indeed a duty to do so to protect parties from habitual and costly vexatious litigation. The making of an Isaac Wunder order is not an abrogation of the constitutional right of access to the court, but rather a proportionate filtering mechanism to protect the opposing party from the injustice of having to incur what are often very significant and unrecoverable costs, in meeting oppressive and abusive claims.

Quite apart from the interest of the oppressed party, the court must also have regard to protecting its own processes from abuse, which result in scarce court resources being wasted to the detriment of other parties with genuine claims. All the cases recognise that a primary indicator of the necessity for a restraining order is the habitual or persistent institution of frivolous and vexatious proceedings against parties to earlier proceedings.

114. The plaintiff appears to rely on the case for two reasons. Firstly, Noonan J. cites with apparent approval the decision of Feeney J. in *Gill v. Bank of Ireland* [2009] IEHC 210 to the effect that there could be no basis for making an Isaac Wunder order against a party who has not previously instituted proceedings. Secondly, on the facts of the particular case Noonan J. was satisfied that although Mr Fitzsimons had brought two unsuccessful applications post-judgment in the proceedings which had been brought against him, those

applications sought to raise issues which had not previously been determined in the proceedings.

115. In my view each application for an Isaac Wunder order has to be considered on the basis of its particular facts and the circumstances of the previous litigation between the parties. Whilst in general it will not be appropriate to make such an order against a litigant who has not previously instituted proceedings, this is not an invariable rule as the conduct of the litigant in the earlier proceedings may be such that they have *de facto* become the moving party in the unreasonable or unnecessary extension or prolongation of that litigation. Here although the plaintiff is the defendant to Grant Thornton's claim in the 2015 proceedings, she is the plaintiff in the counterclaim which she has brought in the context of those proceedings. She was also the moving party in a series of motions which she brought in the 2015 proceedings including the motions in which she sought, unsuccessfully, to join the State and the Commission. Consequently, I do not think that the plaintiff is in a position identical to that of the plaintiff in *Fitzsimons v. Tanager*. The 2015 proceedings are not simply proceedings which have been brought against her but now include her claim against Grant Thornton. Further the issues raised in the 2019 proceedings cannot be said to be ones which have not previously been determined. The plaintiff's new proceedings manifestly do seek to re-litigate matters which have been conclusively determined against her in the earlier proceedings, albeit that those proceedings have not themselves yet reached a conclusion.
116. Given the extent to which the plaintiff has pursued the issues on a repeated basis in the 2015 proceedings which she now seeks to advance in the 2019 proceedings, the manifestly unstateable nature of her claim against the lawyers and the opposing litigant for their role in the 2015 proceedings and the generally misconceived nature of her claim against the other defendants, I am satisfied that a situation has been reached where to permit the plaintiff an unrestricted right to continue to litigate against Grant Thornton or its legal representatives would be unfair and oppressive to those persons and a waste of scarce court time and resources to the detriment of other litigants. It is clear, not just from the 2019 proceedings, but also from the fact that the plaintiff has issued a further motion in the 2015 proceedings without the leave of the High Court which she is required to obtain, that she is intent on habitual and persistent litigation against those parties. Therefore I will make an Isaac Wunder order against the plaintiff in the terms sought by the fourth to seventh defendants save that the orders in respect of the firm of McCann Fitzgerald solicitors, its partners and employees and members of the Bar of Ireland will be limited to the firm itself and to those members of the firm and of the Bar who have acted against or are at any material time acting against the plaintiff on behalf of Grant Thornton and any of its partners or employees.
117. Finally, it is an unusual feature of this case that the 2015 proceedings which feature so significantly in both the applications, the argument and this judgment have yet to be determined. There is clearly a live issue in those proceedings as to whether Grant Thornton are entitled to the relief sought against the plaintiff and also as to whether the plaintiff is entitled to damages as against Grant Thornton. In circumstances where the

plaintiff seems to admit certain of the salient facts and Grant Thornton have narrowed the scope of their claim by dropping certain pleas against the plaintiff, the residual issues appear to be largely issues of principle which should be capable of being brought on for trial without further unnecessary delay or additional applications. It is now 6 years since those proceedings were instituted and it would certainly be to everybody's benefit if those issues could simply be determined rather than being left in the ether as a source of frustration and discontent to both sides.