



THE HIGH COURT

Record No: 2022/4984 P

Between:

EDMUND HEAPHY

Plaintiff

-AND-

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

Defendant

JUDGMENT of Mr Justice Rory Mulcahy delivered on 31 May 2024**Introduction**

1. In these proceedings, the plaintiff seeks a wide variety of declaratory orders against the defendant (“**the Bank**”), injunctive relief and damages under a number of headings. A number of the reliefs sought relate to the ownership of a property in Cork, formerly his family home (“**the Property**”). Others relate to the conduct of the Bank’s business more generally, and, in particular, the manner in which the Bank conducted its business and prepared its accounts following the giving of the bank guarantee by the State in 2008 (“**the Bank Guarantee**”). In this regard, the plaintiff alleges breaches of the provisions of the Competition Act 2002.

2. This judgment concerns three motions, the plaintiff’s two motions, the first, for judgment in default of defence, and the second, a motion to add two additional co-defendants. The third motion is the defendant’s motion to dismiss these proceedings pursuant to Order 19, rule 28 of the Rules of the Superior Courts, or pursuant to the court’s

inherent jurisdiction. The defendant also relies on Order 19, rule 27 of the Superior Courts on the basis that the pleadings are scandalous or tend to embarrass or delay the fair trial of the action. I note that rules 27 and 28 have been amended since the defendant's motion issued, as addressed below. The defendant's motion also seeks an order pursuant to section 123 of the Land and Conveyancing Act 2009 vacating a *lis pendens* registered by the plaintiff in respect of the Property registered in the Central Office on 27 September 2022 at the same time that he issued these proceedings.

3. Since the motion to dismiss will necessarily resolve both of the other motions, it is appropriate to address that first, regard being had to the apparent intention of the plaintiff to seek to amend his claim by joining additional defendants.

4. In summary terms, the defendant seeks to dismiss the plaintiff's claim on the basis that it discloses no reasonable cause of action or is bound to fail for four reasons. First, the defendant claims that the plaintiff's case discloses no reasonable cause of action. Second, the defendant contends that many of the matters which the plaintiff agitates have already been the subject of final determination in proceedings before the High Court and/or the Supreme Court. Third, it is argued that all of the plaintiff's complaints are long since statute barred. And fourth, the defendant argues that none of the plaintiff's complaints give rise to a cause of action at the suit of this plaintiff, *i.e.* he has no *locus standi* in relation to the matters about which he makes complaint.

5. For the reasons set out below, I am satisfied that all aspects of the plaintiff's claim should be dismissed as disclosing no reasonable cause of action or being bound to fail for one or more of the reasons advanced by the defendant.

Litigation Background

6. On 18 July 2011, in proceedings entitled *Governor and Company of the Bank of Ireland v Heapey and Ors*, High Court Record No.: 2010/3329S (“**the guarantee proceedings**”), the Bank secured summary judgment against the plaintiff in the sum of €768,013.67, on foot of personal guarantees he had provided to the Bank over the debts of a company, Lockson Construction Limited

7. The plaintiff appealed that judgment. The Supreme Court (Finlay Geoghegan J) delivered a reserved judgment ([2018] IESC 46) rejecting the appeal. Of note, for present purposes, is that the plaintiff sought to raise, by way of defence, an argument, described in the judgment in the following terms (at para. 18(ii)):

[A] much broader contention and a more difficult argument sought to be made which ultimately appeared to be that by reason of the statutory and regulatory regime which was put in place following the banking crisis in 2007 the plaintiff was able to benefit from a historic valuation of securities given by the defendants in support of their guarantees which neither the Company nor the defendants could do. Further that the plaintiff had been able to obtain credit in reliance upon those securities with historic valuations and, it was contended, was not obliged to repay in full credit which it had so obtained. This, it is contended was a benefit obtained by the plaintiff in reliance inter alia on the valuations of securities received from the defendants whilst the defendants in turn, by reason of the property collapse had not been able to realise those values but yet remain liable to the plaintiff for the full amount of the personal debt under the terms of the guarantee.

8. The court dismissed that argument as follows (at para. 33):

“Those Acts were enacted and regulations made in accordance with certain public policy considerations and decisions and it is not for the courts to debate the merits of such decisions. One of the many difficulties in relation to what the defendants seek to contend is that even if they could make out an arguable case that there was some illegality in the arrangements enacted in relation to the banks (and the evidence and argument falls well short of this), they have not satisfied me that there is any arguable basis upon which it could be said that any such asserted illegality affects the contractual arrangements in existence between the plaintiff and the defendants according to which the defendants are now liable to pay to the plaintiff the sums claimed.

34. No arguable basis has been made out upon which it could be said that any lawful provision made by statute or regulatory provision to a bank could affect the guarantees entered into by the defendants in connection with loans obtained by the principal debtor.

It does not seem to me that the defendants have made out any basis for an arguable defence to the plaintiff's contractual claims against them pursuant to the guarantees.

35. Similarly even if one were to consider the claims sought to be made on the basis of an arguable claim of illegality of the statutory or regulatory regime, it is difficult to see how that might give rise to anything in the nature of any counterclaim against the plaintiff which might be a permissible set off, as the alleged wrongdoing is by the State or a regulatory authority rather than the plaintiff. Further the defendants have not made out any basis for losses which they may be considered to have suffered as a result of what they claim to be the unlawful commercial advantage given to the banks by reason of obtaining credit in reliance in part upon inflated valuations or obtaining credit which they were not bound to repay."

9. In separate proceedings, entitled *Governor and Company of the Bank of Ireland v O'Sullivan and Ors*, Record No.: 2011/1784S ("**the loan proceedings**"), the Bank secured judgment against the plaintiff and others, on 21 January 2013, in the sum of €1,386,690.89 in respect of sums due and owing on foot of two loans and an overdraft. The plaintiff and the other defendants in those proceedings appealed that judgment but withdrew the appeal. A consent order, striking out the appeal was made on 16 October 2019.

10. In a third set of proceedings, entitled *Governor and Company of the Bank of Ireland v Heaphy and Anor*, Circuit Court Record No.: 2015/01082, the Bank were granted an Order for Possession of the Property on 30 May 2017. The plaintiff and the other defendant, his wife, appealed that order, but on 4 March 2019, an order was made by the High Court (O'Regan J) on consent, striking out the appeal and affirming the Circuit Court order for possession.

11. An execution order was made on 12 November 2021 and sent to the Sheriff for Cork City in February 2022.

12. On 25 February 2022, the plaintiff commenced the fourth set of proceedings between these parties by way of plenary summons, *Heaphy v The Governor and Company of the Bank of Ireland*, Record No.: 2022/768P. The summons sought an injunction, declaratory relief, relief under the Competition Act, and damages under the Competition Act. The

plaintiff did not take any step in those proceedings and a notice of discontinuance was served on 18 November 2022.

13. The Bank took possession of the Property on 11 April 2022.

14. On 27 September 2022, the plaintiff issued the within proceedings and registered a *lis pendens* over the Property. The Bank entered an appearance on 1 February 2023 after the plaintiff issued a motion for judgment in default of appearance. The Bank issued a request for particulars on 3 April 2023 to which the plaintiff furnished a detailed reply on 26 May 2023.

15. On 27 June 2023, the plaintiff issued his motion for judgment in default of defence. On 21 July 2023, the Bank issued its motion to dismiss proceedings.

16. On 2 October 2023, the defendant executed a global deed of transfer by which it transferred all its rights, title, interest and benefit that it had in the plaintiff's facilities and related securities to a third party, MARS Capital Finance DAC.

17. On 20 November 2023, the plaintiff's solicitor was given liberty to come off record in the circumstances described below. The plaintiff thus represented himself at the hearing of these three motions.

18. On 8 March 2024, this matter was listed for hearing on 8 May 2024, and the plaintiff was given liberty to issue the third motion the subject of this judgment, seeking to add the Bank's current and former auditors as defendants in the proceedings.

Motion to Add Co-defendants

19. The plaintiff's motion to add two co-defendants was prompted by the publication of the Annual Report 2022 for Bank of Ireland Group plc of which the Bank forms part. The Annual Report includes an independent auditor's report, prepared by KPMG, which excited the interest of the plaintiff. In particular, his affidavits in response to the Bank's motion and his affidavit grounding his motion to add co-defendants each quote the following passages from the report, which were also relied on by the plaintiff in his oral submissions on these motions:

Post model adjustments

PMA's are raised by management to address known impairment model limitations or emerging trends.

We have identified a significant risk of error and fraud associated with the completeness and valuation of those PMA's with the greatest degree of management judgment. There is a possibility that management could increase or decrease PMA's to meet market expectations for the Group's results.

Economic Scenarios

Economic scenarios have a direct impact on the loan staging classification and the resultant ECL [expected credit loss]. Significant management judgment is applied to the determination of the economic scenarios and the weightings applied to them,

We have identified a significant risk due to error with respect to management judgment applied in the selection of scenarios, the associated scenario probabilities and the significant economic variables which drive the scenarios and the related weightings, particularly given the elevated economic and political uncertainty.

Identification and quantification of Stage 3 loans

There is a risk that individually assessed ECLs held against counterparties are incorrectly calculated by management. Management judgment is applied to value the collateral, in determining the probability weighting of scenarios used to calculate the level of provisioning required and the impact of the likely courses of action with borrowers on ECL.

We have identified a significant risk due to error with respect to the measurement of impairment of stage 3 individually assessed loans.

20. It should be said that the Bank's affidavits point out that the passages quoted from the auditor's report are quoted without context. The section of the report immediately following the identification of risks relied on by the plaintiff is headed "*How the matter was addressed*

in our audit". The section then describes how the auditors addressed, *inter alia*, post model adjustments, economic scenarios and identification and quantification of Stage 3 loans. The section concludes with the following:

We found the significant judgments used by management in determining the ECL charge and provision, including the completeness and accuracy of PD [probability of default] models and LGD [loss given default] models, application of PMAs, economic scenarios and identification and quantification of Stage 3 loans, to be reasonable.

21. In addition, the auditor's overall conclusion was that:

In our opinion:

- *The financial statements give a true and fair view of the assets, liabilities and financial positions of the Group and Company at 31 December 2022 and of the Group's profit for the year then ended;*
- *The Group financial statements have been properly prepared in accordance with IFRS as adopted by the European Union; the Company financial statements have been properly prepared in accordance with FRS 101 Reduced Disclosure Framework issued by the UK's Financial Reporting Council;*
- *The Group and Company financial statements have been properly prepared in accordance with the requirements of the Companies Act 2014 and, as regards the Group financial statements, Article 4 of the IAS Regulation.*

22. Prior to seeking to join KPMG as a co-defendant, the plaintiff's then solicitor wrote to the partner in KPMG who had signed the auditor's report, asking a series of questions about the report. She declined to answer. Apparently unknown to the plaintiff's solicitor, the plaintiff also wrote to the KPMG partner, demanding answers to the questions and using what could be perceived as threatening language. In particular, the plaintiff wrote to the partner involved that she needed "*to be very careful about what you are doing. Your whole life could be destroyed, you may never work again. I have grave concerns for you and how this will play out*" and that she was "*going to be ruined and destroyed for the rest of your life if you don't do this.*"

23. When his then solicitors discovered that the plaintiff had been corresponding directly with the partner in KPMG, and the manner in which that correspondence was expressed, it brought its application to come off record.

The Plaintiff's Claim

24. The plaintiff, in his oral submissions, said that the contents of the auditor's report, insofar as it identified a significant risk of fraud, were "*completely aligned*" with his pleadings. His pleadings are, however, somewhat unclear and, with respect, confused.

25. The defendant's submissions helpfully identify that the claims in the plaintiff's Statement of Claim can be grouped under five different headings. The plaintiff did not dispute the defendant's characterisation, save for some clarification in relation to the claim regarding the Bank's loan sale to the National Asset Management Agency (NAMA). In the circumstances, I propose to adopt the categorisation suggested by the defendant and to describe in very brief terms each category of claim here, before addressing them in more detail when applying the relevant principles.

26. The first part of the plaintiff's claim alleges breaches of competition law and international financial reporting standards by the plaintiff. It is fair to say that this claim was the main, if not the sole focus, of the plaintiff in his oral submissions.

27. The plaintiff refers to the funding received by the Bank between 2009 and 2010 from the Central Bank and European Central Bank through what he calls the "mortgage-backed promissory note" program, or the MBPN. He says that the Bank gave their customers' mortgages, including his, as contingent collateral to receive this funding. He pleads that, in order to do this, the Bank amended the assignment clauses in the loan agreements of its customers without informing them. There doesn't appear to be any basis for the plea that the assignment clauses were amended, and in his replies to particulars, the plaintiff seems to claim that the defendant wrongfully relied on the assignment clauses in the loan agreements rather than that they were amended.

28. The alleged wrongdoing is said to have involved the defendant wrongfully "fixing" the value of the mortgages which it used as collateral at the price which was applicable at the

time the loan was first drawn down, the so-called “originating market value”. He characterises this as price fixing contrary to section 4 of the Competition Act 2002 (“**the 2002 Act**”).

29. In addition, he contends that at the same time the Bank wrote down the value of the underlying loans, by imposing impairment charges, which allegedly involved imposing an unfair selling price, contrary to section 5 of the 2002 Act.

30. He alleges breaches of the International Financial Reporting Standards (IFRS) insofar as he alleges that the Bank applied two different valuation methodologies to the mortgage assets of its customers and failed to record its earned income of €15 billion in 2010.

31. The second head of claim relates to the transfer by the Bank of certain assets to NAMA in 2010. In oral submissions, the plaintiff explained that he had included his pleas in relation to NAMA, notwithstanding that his loans were never transferred to NAMA, as an example of the Bank’s alleged unlawful conduct.

32. His third head of claim relates to his own loans. He alleges that at some point prior to 2015, the Bank used each of his mortgage charges to borrow sums in contingent collateral funding from the Central Bank for sums in excess of the value for which it sold the assets. He claims that this involved the fixing in value of the mortgage charges in contravention of section 4 of the 2002 Act. He argues that the Bank set the price at a level that was materially unfair, contrary to section 5 of the 2002 Act.

33. The first three heads of claims all, therefore, relate to the same type of conduct of the Bank, but only the third specifically relates to the plaintiff. During his oral submissions, the plaintiff asserted that the Bank were using his assets as security for its loans, as part, it seems, of the Bank’s securitisation of its loan book, and making the plaintiff liable for the Bank’s loans.

34. The fourth head of claim relates to allegations that a variety of parties engaged to review the conduct of the Bank failed to uncover what he alleges was the unlawful contingent income/profit made by the Bank and other banks.

35. The fifth head alleges collusion by a variety of third parties in the Bank’s alleged wrongdoing in 2011 and 2012. He appears to make separate allegations of wrongdoing

against other third parties, in particular a partner in a US law firm, relating to activities in 2019. He alleges unspecified collusion between the Criminal Assets Bureau and unnamed parties.

36. The balance of the Statement of Claim sets out what are described as “Particulars of misrepresentation and/or breach of the Competition Acts”, “Particulars of benefit obtained by the Defendant at the expense of the Plaintiff and through unlawful use of his assets and/or mortgages”, “Particulars of Fraud and/or Collusion and/or Fraudulent Concealment and/or Conspiracy and/or Unlawful Interference with the Plaintiff’s proprietary and/or economic rights” and “Particulars of Loss and damage”.

37. The plaintiff seeks a declaration that he is the beneficial owner of the Property, that the Order for Possession in relation to the Property is null and void, or should be set aside and that any sale of the Property is void. The plaintiff calculates his damage, under a number of headings, totalling in excess of €55 million.

38. Although there is a reference to fraudulent concealment in the Statement of Claim, no particulars of same were pleaded. The defendant sought particulars of the plea. In his replies, the plaintiff refers to the assignment clauses in the mortgages (dated 2003 and 2004) and argues that the true purpose of those clauses was concealed, since they allowed the Bank to borrow against the plaintiff’s assets and make him personally liable for the Bank’s borrowings. Other instances of fraudulent concealment appear to be the Bank’s alleged concealment of its true financial position between 2009 to 2012.

Jurisdiction to Dismiss – Applicable Principles

39. Subsequent to the Bank’s motion issuing, the provisions of Order 19, rules 27 and 28 were amended by SI 456/2023 such that Order 19, rule 27 now provides as follows:

27. The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which is unnecessary or which amounts to an abuse of the process of the Court, or which may unreasonably prejudice or delay the fair trial of the action; and may in any such case, if it thinks fit, order the costs of the application to be paid as between solicitor and client.

40. Rule 28 now provides:

28. (1) The Court may, on an application by motion on notice, strike out any claim or part of a claim which:

- (i) discloses no reasonable cause of action, or*
- (ii) amounts to an abuse of the process of the Court, or*
- (iii) is bound to fail, or*
- (iv) has no reasonable chance of succeeding.*

(2)... ..

(3) The Court may, in considering an application under sub-rule (1) or (2), have regard to the pleadings and, if appropriate, to evidence in any affidavit filed in support of, or in opposition to, the application.

41. For present purposes, the amendment to the rule, and in particular, the removal of the reference to proceedings being “frivolous and vexatious” do not appear to have any significance; neither party suggested that it did. Accordingly, the principles governing the court’s jurisdiction to strike out proceedings pursuant to Order 19, Rule 28 of the Rules of the Superior Court and/or the inherent jurisdiction remain well settled.

42. In *Scotchstone Capital Fund Ltd v Ireland* [2022] IECA 23, the Court of Appeal helpfully summarised the principles applicable to applications to strike out proceedings (at para. 290):

“In essence these are:

- a) An application for a strike out of a plaintiff’s claim on the basis of the inherent jurisdiction is not a substitute for summary disposal of a case;*
- b) The jurisdiction exists, not to prevent hardship to a defendant from defending a case, but to prevent against an abuse of process of the court by the plaintiff, e.g. causing a manifest injustice to the defendant in being asked to defend a case which is bound to fail;*
- c) The burden of proof is on the defendant;*

- d) *There is a degree of overlap between bound to fail jurisprudence and cases which are held to be frivolous and vexatious. However, the latter are cases which may have a reasonable chance of success but would confer no tangible benefit on a plaintiff or are taken for collateral or improper motives or where a plaintiff is seeking to avail of scarce resources of the courts to hear a claim which has no prospect of success;*
- e) *The standard of proof is on the defendant/respondent to show that the claim is bound to fail or frivolous or vexatious;*
- f) *Bound to fail may be described inter alia, as devoid of merit or a claim that clearly cannot succeed;*
- g) *Frivolous and vexatious must be understood in their legal context as claims which are, inter alia, futile, misconceived, hopeless;*
- h) *The threshold for the plaintiff successfully to defend such a motion is not a prima facie case but a stateable case;*
- i) *It is a jurisdiction only to be used sparingly, in clear cut cases and where there is no basis in law or in fact for the case to succeed;*
- j) *The court must accept that the facts as pleaded by the plaintiff in considering whether an Order pursuant to O.19, r. 28 may be made but in the exercise of its inherent jurisdiction the court can to some extent look at and assess the factual basis of the plaintiff's claim;*
- k) *Where the legal or documentary issues are clear cut it may be safe for a court to reach a conclusion on a motion to dismiss;*
- l) *Even where a plaintiff makes a large number of points, each clearly unstateable, it may be still safe to dismiss; and*
- m) *In some cases, even if the factual disputes are clear cut or may be easily resolved, the legal issues or questions concerning the proper interpretation of documentation may be so complex that they are unsuited to resolution within the confines of a motion to dismiss."*

43. In *Lopes v Minister for Justice Equality and Law Reform* [2014] IESC 21; [2014] 2 IR 301, the Supreme Court (Clarke J) emphasised the distinction between the jurisdiction under the Rules and the court's inherent jurisdiction (at p. 309):

"[17] 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 [1981] I.R. 306, 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.”

44. In *Mullaney v Ireland* [2023] IECA 195, the Court of Appeal (Costello J) noted that it is impermissible to bring proceedings for the purpose of challenging final orders made in earlier proceedings (at para. 8):

“It is an abuse of process to bring proceedings whose purpose and effect is to launch impermissible collateral attacks on valid, final, un-appealed Orders of the High Court. The Bank is entitled to the benefit of those final Orders.”

45. Nor can a party issue separate proceedings to pursue arguments which could have been, but were not, pursued in earlier proceedings which have been finally determined. Such is the consequence of the well-established rule in *Henderson v Henderson*. In *Munnely v Hassett and Ors* [2023] IESC 29, the Supreme Court (O’Donnell CJ) considered the applicable principles when applying the rule in *Henderson v Henderson*. The Chief Justice referred to the decision in *AA v Medical Council* [2003] IESC 70, [2003] 4 IR 302 as the “most authoritative statement of the principle in Irish law”, emphasising the passages in that judgment which made clear that the rule was a flexible one which should not be applied in a dogmatic way. He also referred with approval to the formulation of the test proposed by McDonald J in a recent High Court decision (at para. 21):

“A useful statement of the rule is contained in the judgment of McDonald J. in the High Court, in George and George v. AVA Trade (EU) Ltd. [2019] IEHC 187. At paragraph 152 of the judgment, he suggested that:-

“While the Irish cases have accepted that a broad approach should be taken and that the rule should not be applied in an automatic or unconsidered fashion, the Irish courts, in practice, have usually addressed the rule in Henderson v. Henderson by means of a two stage test:- (a) asking, in the first instance, whether an issue could and should have been raised in previous proceedings; and (b) secondly, if the issue could and should have been raised in previous proceedings, whether this is excused or justified by special circumstances”.

In the course of submissions, this approach has been usefully described as a “could and should” test: could the issue have been raised in the earlier proceedings, and if so, should it have been so raised? If so, is there any reason why this second set of proceedings raising the issue should not be dismissed.”

Application to the Plaintiff’s Case

46. As noted above, the first three heads of claim can be grouped together.

i. Breach of Competition Act 2002/Price-Fixing

47. There are innumerable difficulties with this aspect of the plaintiff’s claim. First, the claim re-agitates arguments which have been rejected by the Supreme Court in the guarantee proceedings. The plaintiff, in substance, complains about the manner in which the Bank conducted its business following the Bank Guarantee in 2008. As noted by Finlay Geoghegan in her judgment, even if there were evidence of illegality, in that case in the statutory arrangements put in place, there was no arguable case that such illegality could affect the contractual arrangements in place between the plaintiff and the Bank. Such is the case here. The plaintiff has not identified any basis for contending that any alleged misconduct by the Bank has had any bearing on his contractual entitlements.

48. He asserts that in reliance on the assignment provisions of his mortgage, the Bank has made him personally liable for the Bank's debts. There is simply no basis disclosed or even alleged for such a contention. There is no suggestion that the Bank has ever sought repayment from the plaintiff of anything other than the sum that he borrowed. Insofar as the argument seems to be based on the proposition that the Bank wrote down the value of its assets, including its security from the plaintiff, no attempt is made to explain how this imposed an additional liability on the plaintiff or deprived him of a benefit to which he was otherwise entitled. He argued, in oral submission, that the Bank had made a profit on his security and that he had not been given credit for it. He advances no basis for asserting an entitlement to such credit.

49. Insofar as the claim is subtended by an objection to the process of securitisation engaged in by the Bank, such arguments have already been rejected in a multiplicity of cases, starting with the decision on that issue in *Wellstead v Judge White* [2011] IEHC 438.

50. The plaintiff's arguments in this case does include a novel variation on a theme, which is that the Bank, in "fixing" the value of its mortgage charges when giving them as collateral through the MBPN program, was engaged in price-fixing contrary to section 4 and 5 of the Competition Act 2002. His contention seems to be that, when valuing the mortgage charges for the purpose of obtaining collateral, the Bank applied the "originating market value", being the value of the mortgage when the loan was first drawn down. The apparent basis for this contention is a statement by the then CEO of the Bank before an Oireachtas Committee on 1 November 2012, when asked how the Bank calculated negative equity, to the effect that the Bank applied originating market value to each of its customers' security. He calls this price-fixing contrary to section 4 of the Competition Act 2002. He describes the transfer of loans to NAMA as an example of this type of unlawful behaviour, and alleges that sometime between 2009 and 2015, his own loans were subjected to the same unlawful treatment.

51. The plaintiff's argument, with respect, involves a complete mismatching of concepts and is an argument with no legal coherence whatsoever. In the simplest terms, price-fixing, contrary to the Competition Act 2002, involves competitors agreeing to fix a price at which to provide a product or service. The valuation of one's assets for the purpose of providing collateral could not conceivably come within the terms of section 4 or, for that matter,

section 5 of the Act, which prohibits the imposition of unfair purchase or selling prices for goods or services by an undertaking in a dominant position in trade for those goods or services. There is, accordingly, simply no substance to this argument.

52. Even if the plaintiff's argument was not legally unsustainable, it faces two further obstacles. The first is that all of the activity of the Bank about which he complains took place not later than 2015 by which time, he alleges, the Bank had used the mortgage charges on his properties, including the Property, to borrow what he calls "collateral contingent funding" under the MBPN program based on, what he alleges, an unlawfully fixed price. Any complaint about this activity is clearly statute-barred. On the plaintiff's own argument, the relevant information to make the claim – the statement by the then CEO in November 2012 – was in the public domain from that point on. He argues now that the significance of the CEO's statement was not understood, but that does not alter the fact that any cause of action would have expired by 2021 at the latest. The plaintiff pleads fraudulent concealment, but the matters identified do not involve fraudulent concealment of a claim at all, rather they are the very matters which are the subject of his claim. In those circumstances, his claim is bound to fail as being out of time.

53. The final, insurmountable, obstacle facing the plaintiff is that, insofar as he wishes to complain about the conduct of the Bank, his only standing to do so is in respect of the activities of the Bank which might have affected him (see *Cahill v Sutton* [1980] IR 269). As a customer of the Bank, if any unlawful activity of the Bank had a bearing on his liability as a customer, he might have had standing to complain about that activity. But he does not have standing to complain about the conduct of the bank by which he is not affected, nor can he use the forum of civil proceedings to invite the court to engage in a generalised review of the Bank's conduct over a number of years. His allegations, for instance, regarding the failure by the Bank to comply with international accounting standards could not conceivably give rise to a cause of action relating to loans he took out many years previously.

54. The difficulty for the plaintiff is that his liabilities to the Bank have already been the subject of final determinations, in the Supreme Court, High Court and Circuit Court. In respect of the final determinations in the loan proceedings, the plaintiff withdrew appeals and consented to final orders in the Court of Appeal and High Court respectively. His main complaint in these proceedings relates to the Property, his former family home, and he seeks,

in express terms, orders setting aside final orders of those courts. It is well settled that it is an abuse of process to issue proceedings for the purpose of challenging final orders made in earlier proceedings (see *Mullaney v Ireland* cited above). The fact that he seeks to make arguments now, by reference, *inter alia*, to the Competition Act 2002, that he failed to advance in those proceedings is contrary to the rule in *Henderson v Henderson*, even if they were stateable arguments. There are no special circumstances justifying his failure to raise, in those earlier proceedings, the arguments he now seeks to rely on to undermine the final determinations in those proceedings.

55. In the circumstances, the plaintiff's main claim in these proceedings discloses no reasonable cause of action, is clearly bound to fail and is an abuse of process and should be struck out pursuant to Order 19, rule 28(1) of the Rules of the Superior Courts.

ii. Collusion Claims

56. Similar considerations apply in relation to the plaintiff's claims of collusion in the Bank's alleged unlawful conduct by a variety of parties. Insofar as I have concluded that the plaintiff's main claim discloses no reasonable cause of action against the Bank, it follows that alleged collusion in, or failure to discover, that alleged misconduct cannot give rise to a cause of action.

57. Nor does the plaintiff have any standing to pursue such claims. The collusion claims reflect the same motivation by the plaintiff as does his application to join the Bank's current and former auditors as co-defendants. The plaintiff's purpose is not to pursue a cause of action against the Bank regarding matters which directly affect him, but rather to invite the court to engage in a wide-ranging review of the Bank's activities from the time of the Bank Guarantee until, it would seem, the preparation of group accounts in 2022. There is no basis for asking the court, or upon which the court could, conduct such a review.

Application to vacate *lis pendens*

58. Section 123 of the Land and Conveyancing Act 2009 ("the 2009 Act") empowers the court to make an order vacating a *lis pendens* on the application of the person who registered the *lis* or on the application of "any person affected by it".

59. The plaintiff argues that, in light of the sale of the rights and interests in his facility and security to a third party, the defendant is no longer a person affected by the *lis* and is therefore not entitled to seek that order.

60. Although it seems inevitable that the *lis* will be vacated in light of the order striking out these proceedings, the vacation of the *lis* does not flow automatically from such an order. It is not clear, in light of the sale to a third party, that the defendant continues to be a party affected by the *lis pendens*. In the circumstances, it is not clear that it has standing to seek an order under section 123 of the 2009 Act. In the circumstances, I propose making an order refusing to vacate the *lis pendens*.

Conclusion

61. For the foregoing reasons, the plaintiff's claim discloses no reasonable cause of action, is bound to fail and is an abuse of process. Accordingly, I propose making an order striking out the entirety of his claim pursuant to Order 19, rule 28(1) of the Rules of the Superior Court. It is not necessary, in the circumstances, to consider the Bank's argument under rule 27.

62. It follows that the plaintiff's applications for judgment in default of defence and to join co-defendants to the proceedings should be refused. I should note, for completeness, however, that the plaintiff's application to join the co-defendants was entirely misconceived. His application identified no basis upon which he might have a cause of action against the Bank's current or former auditors. The suggestion that the auditor's report from 2022 somehow supports the arguments he makes regarding the Bank's conduct in the period many years before the period to which the report relates is difficult to understand and appears, in any event, to be based on a misreading of the report. He stated in oral submissions that the auditors, in particular, the current auditor, should be joined to the proceedings so that they could be required to answer questions about that audit, again revealing the plaintiff's true purpose, which is to trigger an investigation into the conduct of the Bank rather than pursue any claim he might have against it. If that is the plaintiff's goal, his remedy lies in the political sphere rather than the courts.

63. I will list the matter on 14 June 2024 for the purpose of making final orders.