APPROVED

THE HIGH COURT

[2024] IEHC 372

Record No. 2019/8798P

BETWEEN/

TED CUNNINGHAM

PLAINTIFF

-AND -

BARRY GALVIN, ANTHONY THOMAS QUILTER, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 12th day of June 2024

INTRODUCTION

Preliminary

1. In this application, the Defendants (collectively referred to as "the State Defendants") seek to bring the Plaintiff's action to an end on the following alternative basis:
   (a) the Plaintiff's claim is *res judicata* and/or an abuse of process and should be struck out;
   (b) the proceedings are an abuse of process arising from the rule in *Henderson v Henderson* [1843] 3 Hare 100 and should be dismissed;
   (c) the Plaintiff's claim fails to disclose a cause of action and is frivolous and vexatious and/or is bound to fail and should therefore be dismissed pursuant to Order 19, rule 28 of the Rules of the Superior Courts 1986, as amended ("RSC 1986") and/or the inherent jurisdiction of the High Court.

Background

2. On 27th March 2009, the Plaintiff was convicted of ten counts of money laundering. The Plaintiff appealed his conviction to the Court of Criminal Appeal which delivered judgment on 11th May 2012. Arising from the decision of the Supreme Court in *Damache v Director of Public Prosecutions* [2012] IESC 11; [2012] 2 I.R. 266, section 29 of the Offences against the State Act 1939 had been held to be unconstitutional because it permitted a senior Garda officer, who was not independent of the process, to grant a warrant for the search of private premises. When applied to the Plaintiff's circumstances, the *Damache* decision resulted in the quashing of the ten convictions, as stated, on 11th May 2012 and the Court of Appeal ordered a retrial on nine of the

counts (excluding Count 10 which was a charge of alleged money laundering in respect of a sum of sterling cash to the value of GBP£3,010,380).

3. At his retrial, the Plaintiff, who was legally represented, pleaded guilty to two charges on the Indictment preferred against him, which in summary *inter alia* stated that on about 15th January 2005, at Tullamore, County Offaly, the Plaintiff was reckless as to whether sterling cash to the value of £100,040 represented the proceeds of criminal conduct, namely a robbery at the Northern Bank Cash Centre, Donegall Square West, Belfast on 20th December 2004 (the "Northern Bank Robbery") and transferring same to a named individual, contrary to section 31(1)(c) of the Criminal Justice Act 1994 (as amended) ("the 1994 Act") and that on or about 7th February 2005 at Ballincollig, County Cork, the Plaintiff was reckless as to whether sterling cash to the value of £175,360 represented the proceeds of the Northern Bank Robbery and transferring same to a named individual, contrary to section 31(1)(c) of the 1994 Act.

4. On 27th February 2014, the Plaintiff was convicted and sentenced in relation to these two offences. The Plaintiff received a sentence of five years imprisonment and the court took into consideration time already served and the balance was suspended on the Plaintiff's undertaking to desist from being a director or employee in any financial business for a period of five years and, in addition, the Court ordered "[u]*nder section 61 of the Criminal Justice Act, 1994 for the forfeiture of the sum of £2,985,680.00 & €45,146.00 seized*". No objection was made by, or on behalf of the Plaintiff, to that Forfeiture Order.

5. Neither the conviction nor the Forfeiture Order were appealed by the Plaintiff.

6. However, now in these proceedings, the Plaintiff pleads and alleges *inter alia* at paragraph 11 of this Statement of Claim that "*in advance of the sentencing of the Plaintiff, and in particular that part of the sentence which ordered the confiscation of monies seized from his home, the Defendants, individually or collectively, made false statements and misrepresentations and/or omitted to provide the Plaintiff or the Cork Circuit Criminal Court with exculpatory material evidence within the knowledge of the Defendants, and in violation of the Plaintiff's right to fair hearing*".

7. In this action, the Plaintiff alleges that the monies seized from his property in Cork were not the proceeds of the Northern Bank Robbery and that the seizure of the money was allegedly unlawful.

8. Seamus Clarke SC, together with Michael Binchy BL, appeared for the State Defendants. Eamonn Dornan BL appeared for the Plaintiff. John P. Gallagher BL appeared for the Director of Public Prosecutions ("DPP"). In addition to hearing oral submissions from Mr. Clarke SC, I received written submissions from Mr. Clarke SC and Mr. Binchy BL for the State Defendants. In addition to hearing oral submissions from Mr. Dornan BL, I also received written submissions from Mr. McGrory SC KC and Eamonn Dornan BL for the Plaintiff.

ABUSE OF PROCESS: LEGAL PRINCIPLES

Abuse of process & issue estoppel

9. In *Thoday v Thoday* [1964] 2 WLR 371, Diplock L.J., at page 384, explored the policy basis behind the doctrine of *res judicata* in the context of its two limbs, *i.e.*, cause of action estoppel and issue estoppel, as reflected in the Latin maxim "*nemo debet bis vexari pro una et eadem cause*" ("*nobody should be vexed/harassed for the same act twice*").

10. In relation to 'issue estoppel', he observed as follows, at pages 384-385:

> "*The second species, which I will call "issue estoppel," is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the*

court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

11. The decision in *Thoday v Thoday* and the leading authorities in this area were also addressed by this court (Dignam J.) in *Curran & O'Donnell v Ulster Bank Ireland DAC* [2023] IEHC 513, where at paragraphs 90 and 91 of his judgment, Dignam J. referred to the ingredients of issue estoppel as defined by McDonald J. in *George v AVA Trade (EU) Ltd* [2019] IEHC 187, at paragraph 59, as follows: "[t]*he ingredients of estoppel in this context are well established. In this case, what must be determined is that the [prior judgment] was:- (a) A judgment given by a court of competent jurisdiction; (b) A final decision on the merits; (c) The judgment must have determined a question which is now raised in these proceedings;(d) The parties to this litigation must be the same as the parties to the [previous] proceedings*", and by Simons J. in *McCool Controls and Engineering Ltd v Honeywell Control Systems Ltd* [2019] IEHC 695, at paragraph 33, that the key criteria for issue estoppel may be summarised as: "*(i) there must be a judgment by a court of competent jurisdiction which involves (ii) a final decision on the merits; (iii) the earlier judgment must have (necessarily) determined the same issue as arises in the second set of proceedings; and (iv) the parties to the two proceedings must be the same or their privies*".

12. In *Morrissey v IBRC* [2015] IEHC 200, Costello J. at paragraph 5 of her judgment observed that "[i]*t is a fundamental principle of law that a party should not be entitled to re-litigate matters or raise issues which have already been determined by a final judgment of a court of competent jurisdiction between the same parties and their privies. This is known as the principle of res judicata. But beyond the strict limitations*

of res judicata the courts have long recognised that there may be abuse of process outside of the relatively confined limitations of the rule and the courts have always been prepared to balance the rights of parties to have their cases heard and determined by the courts with the rights of the opposing parties to fair procedures in the conduct of litigation and, where necessary, to strike out proceedings if they amount to an abuse of process. In addition to the private rights of litigants, there is a public policy interest in ensuring finality of litigation and preventing vexatious litigants from subjecting the same parties to multiple law suits on the same issue."

13. At paragraph 5 of her judgment, Costello J. referenced the decision of Murray C.J. in *Re Vantive Holdings* [2010] 2 I.R. 118, who in his judgment (at pages 124-125) said as follows:

> "*[20] Citizens have the right of access to the courts so that their entitlements, rights and obligations may be determined in accordance with due process. Due process means a right to a fair and complete hearing of the issues of law and fact in any proceedings. The courts have always had an inherent jurisdiction to stay or dismiss proceedings which abuse the due process of the administration of justice where to do otherwise would seriously undermine its effectiveness or integrity. In addition under the rules of court the courts have, in civil proceedings, the power to dismiss proceedings on the grounds that they are "frivolous" or "vexatious." Indeed abuse of process may take many forms according to the context or the nature of the proceedings, such as whether they are criminal or civil. In this case the court is obviously concerned with civil proceedings only.*

[21] In the High Court and in this court ACC Bank plc relied on the rule of estoppel in Henderson v. Henderson (1843) 3 Hare 100, but by way of analogy. In his judgment the trial judge stated:- "The rule in Henderson v. Henderson is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."

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

determined with finality in the first proceedings....

[25] Underlying the rule in Henderson v Henderson (1843) 3 Hare 100 is the policy of the need to protect the due and proper administration of justice from an abuse of process and uphold the principle of finality in legal proceedings."

14. In *Oman v Oman* [2019] IECA 269, the Court of Appeal[1] (McGovern J.) at paragraph 29 of its judgment observed that "[w]*hile the courts must exercise caution before striking out proceedings in limine the court has power to strike out proceedings where necessary and where there is an abuse of process. In Sweeney v Bus Átha Cliath [2004] 1 I.R. 576 O'Neill J. said at 584:- "This court cannot confine itself to the simple application of the traditional rules as to issue estoppel. In my view, it is also necessary to consider whether or not the continuance of the proceedings, sought to be precluded, would amount to an abuse of the process of the courts and whether the court should invoke its inherent jurisdiction to strike out those proceedings as being an abuse of process"*".

15. The leading text book *Delany and McGrath on Civil Procedure* (Fifth Edition, Round Hall, Thomson Reuters, November 2023)[2] *inter alia* states at paragraph 16-89 that "[t]*he doctrine of abuse of process is now being increasingly employed by the courts in addition to or in substitution for the doctrine of res judicata in order to strike out proceedings where a party is attempting to re-litigate an issue that has been decided (or could have been decided) in previous proceedings but a plea of res judicata might not be successful*". The authors[3] refer to the policy basis for the exercise of the

[1] The Court of Appeal comprised Peart J., McGovern J. and McCarthy J.

[2] The authors of the Fifth Edition are Professor Hilary Biehler (Professor of Public Law, Trinity College, Dublin), Declan McGrath SC, Emily Egan McGrath SC, Dr. Aoife Beirne BL and Dr. Gerard Downey BL.

[3] Delany and McGrath on Civil Procedure (Fifth Edition, Roundhall, Thompson Reuters, November 2023), paragraph 16-91, page 826 and footnote 209.

jurisdiction to strike out for an abuse of process as being very similar to the doctrine of *res judicata*.

16. In this regard, in *Donohoe v Browne* [1986] I.R. 90 at page 99, Gannon J. observed that "[r]*es judicata is a matter of pleading to prevent as a matter of justice an abuse of the process of the administration of justice. Of its nature it can be raised properly only as against a party by whom or against whom a judgment has been obtained. That is to say the injustice to be avoided is the apparent disclaimer of a binding court order by the party bound by it. If both parties have previously been bound by a final order, repetitious proceedings for the determination of the same issue between them will be barred*".

17. Similarly, in *Dalton & Anor v Flynn* (unreported, High Court, 20th May 2004), Laffoy J. at page 11 summarised the written and oral submissions, as including that "[t]*he abuse of process contended for is that the plaintiffs in the proceedings are attempting to re-litigate issues which were or could have been determined in earlier proceedings and mounting a collateral attack on an earlier judgment of the court, on the basis of the principles sometimes referred to as quasi res judicata. In particular, it was not argued that the claim should be struck out or stayed on the basis that it was clear that the plaintiffs' claim must fail, following the line of the authority which is generally recognised as having commenced with the decision of Costello J., as he then was, in Barry v Buckley [1981] I.R. 306*".

18. The related concepts of *res judicata*, abuse of process, the rule in *Henderson v Henderson* [1843] 3 Hare 100, O. 19, r. 28 RSC 1986 and the exercise of the court's inherent jurisdiction to strike out proceedings, are all part of the family of core

principles which emphasise finality, legal certainty and the eschewment of multiplicity of actions with the common objective of preventing or ending an abuse of process (*AA v Medical Council* [2003] IESC 70; [2003] 4 I.R. 302, page 16; *Geary v Property Registration Authority* [2020] IECA 132 per Murray J. at paragraph 32)[4] in circumstances where other proceedings have been heard, determined and brought to finality in contrast, for example, to the situation where there are parallel or overlapping proceedings which have not been determined (*McDermott v Ennis Property Finance DAC* [2017] IEHC 478).

Abuse of Process & the rule in Henderson & Henderson

19. The rule in *Henderson v Henderson* [1843] 3 Hare 100 is a reference to the much-relied upon extract from the judgment of Sir James Wigram V.C. in that case, where he stated *inter alia* that "*where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward the whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case*". He further observed that "*the plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time*."

[4] The Court of Appeal comprised Baker, Haughton and Murray JJ. Baker J. and Haughton J. agreed with the judgment delivered by Murray J.

20. In considering these matters, it is important to balance the fact that the rule in *Henderson v Henderson*, from a public interest perspective, seeks to ensure the efficient conduct of litigation to protect parties from the oppression of defending repeated litigation and should be carefully applied, mindful at all times of the Plaintiff's right of access to the courts (as per the observations of Lord Bingham in *Gairy v Attorney General of Grenada* [2001] 3 WLR 779).

21. As referred to earlier, the extensive case law in relation to these matters was also reviewed in the judgment of this court (Dignam J.) in *Curran & O'Donnell v Ulster Bank DAC & Ors* [2023] IEHC 513, a judgment which was relied upon by both the Plaintiff and the State Defendants in this application.

22. For example, at paragraph 146 of his judgment in *Curran & O'Donnell*, Dignam J. cited the following observations of Denham J. (as she then was) in *AA v The Medical Council* [2003] IESC 70; [2003] 4 I.R. 302, beginning at paragraph 85:

> "*[85] The underlying principle is similar to the concept of the abuse of process. As Bingham M.R. stated in Barrow v Bankside Ltd. [1996] 1 W.L.R. 257 at p. 260:- "The rule in Henderson v Henderson (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences*

which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed…

...[89] There are exceptional circumstances, in the interests of justice, when a matter may be revisited. But the fundamental principle is that it is in the public interest and for the common good that there should be finality in litigation. An aspect of this principle is that parties should not be exposed to multiple litigation and should have closure on an issue. Also, there is the public interest that the limited resources of the courts should be used justly and with economy."

23. Further, at paragraph 152 of his judgment in *Curran & O'Donnell*, Dignam J. referred to "*the more classic operation of the Henderson v Henderson abuse of process jurisdiction is where a party does not raise a point that he could have in one set of proceedings and then seeks to raise that point in a subsequent set of proceedings.*"

ASSESSMENT & DECISION

24. Of central importance in considering this application to strike out the Plaintiff's action, is an understanding of the nature of the previous litigation involving the parties or their privies.

DPP v Timothy (Ted) Cunningham: Court of Criminal Appeal [2012] IECCA 64

11th May 2012

25. In *DPP v Timothy (Ted) Cunningham* [2012] IECCA 64; [2013] 2 I.R. 631, the Court of Criminal Appeal[5] held that Mr. Cunningham was entitled to invoke the judgment of the Supreme Court in *Damache v Director of Public Prosecutions* [2012] IESC 11; [2012] 2 I.R. 266 which had held that section 29(1) of the Offences Against the State Act 1939 was unconstitutional, as his appeal to the Court of Criminal Appeal was extant at the time of the delivery of the Supreme Court's judgment in *Damache* on 23rd February 2012.

26. It will be recalled that in *Damache v Director of Public Prosecutions* [2012] IESC 11; [2012] 2 I.R. 266 at p. 285, the Supreme Court (Denham C.J.) held that section 29 of the Offences against the State Act 1939 was unconstitutional because it permitted a senior Garda officer to grant a warrant for the search of private premises who was not independent of the process. Denham C.J. stated as follows ([2012] 2 I.R. 266 at 285):

> "*These circumstances include the fact that the warrant was issued by a member of An Garda Síochána investigating team which was*

[5] The Court of Criminal Appeal comprised Hardiman J., Moriarty J. and Hogan J. Judgment was delivered by Hardiman J.

investigating the matters. A member of An Garda Síochána, who is part of an investigating team is not independent on matters related to the investigation. In the process of obtaining a search warrant, the person authorising the search is required to be able to assess the conflicting interests of the State and the individual person, such as the appellant. In this case the person authorising the warrant was not independent. In the circumstances of this case a person issuing the search warrant should be independent of the Garda Síochána, to provide effective independence.

[55] The circumstances of the appellant's case also includes the fact that the place for which the search warrant was issued, and which was searched, was the appellant's dwelling house. The Constitution in Article 40.5 expressly provides that the dwelling is inviolable and shall not be forcibly entered, save in accordance with law, which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution. Entry into a home is at the core of potential State interference with the inviolability of the dwelling. These two circumstances are at the kernel of the Court's decision. No issue of urgency arose in this case, and the Court has not considered or addressed situations of urgency. The Court points out that it is best practice to keep a record of the basis upon which a search warrant is granted. This Court would grant a declaration that s. 29(1) of the Offences against the State Act, 1939 (as inserted by s. 5 of the Criminal Law Act, 1976) and referred to as s. 29(1) of the Act of 1939, is repugnant to the Constitution as it permitted a search of the

appellant's home contrary to the Constitution, on foot of a warrant which was not issued by an independent person."

27. The Court of Criminal Appeal also held that Mr. Cunningham was not debarred from relying on the judgment in *Damache* by reason of the fact that he had not instituted proceedings to have section 29(1) of the 1939 Act declared unconstitutional.

28. Hardiman J. observed that the ten counts on the indictment preferred against Mr. Cunningham had alleged separate offences of money laundering by using various items of property, all money or monies' worth, knowing or believing that it was the proceeds of the Northern Bank Robbery which had taken place on 20th December 2004, further stating that:

"*The most serious count, Count 10, is worded as follows:*

<u>Statement of Offence</u>

Money laundering contrary to s.31(1)(c) of the Criminal Justice Act, 1994 as inserted by s.21 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

<u>Particulars of Offence</u>

Timothy Cunningham between the 20th December, 2004 and the 16th February, 2005 at Farran in the County of Cork knowing or believing that property that is to say Sterling Cash to the value of £3,010,380 represented the proceeds of criminal conduct namely a robbery at the Northern Bank Cash Centre, Donegal Square West, Belfast on the 20th December, 2004 or being reckless as to whether

it was or represented such proceeds, possessed the said property."

29. The Court of Criminal Appeal quashed the convictions of Mr. Cunningham on the ten counts on which he had been convicted in the Cork Circuit Criminal Court on 27th March 2009 and as its decision was dispositive in the case of count 10 of the Indictment (set out above), a retrial was ordered on counts 1-9 inclusive, which related to smaller sums of money alleged to have been transferred by Mr. Cunningham to other persons for various purposes.

Forfeiture Order & Section 61 of the Criminal Justice Act 1994

18th February 2014 & 27th February 2014

30. Thereafter, at the retrial, Mr. Cunningham pleaded guilty to Counts No. 1 and No. 2 in the Indictment on or about 18th February 2014 and was sentenced before the Cork Circuit Court, His Honour Judge Séan Ó'Donnabháin, on 27th February 2014 when an order was also made confiscating and forfeiting monies.

31. Notwithstanding the arguments made on behalf of the Plaintiff in response to the State Defendants' application in the motion before me, the position of the parties in the application made before His Honour Judge Ó'Donnabháin on 27th February 2014 was perspicuous, and in consequence, court orders were made sentencing the Plaintiff and making a Forfeiture Order in relation to two amounts of money (comprised of sterling and Euro sums), the total amount of which was not disagreed with by, or on behalf of, the Plaintiff at the hearing before His Honour Judge Ó'Donnabháin.

32. To recap, as set out earlier in this judgment, the first count, *inter alia*, stated that on about 15th January 2005, at Tullamore, County Offaly, the Plaintiff was reckless as to whether sterling cash to the value of £100,040 represented the proceeds of criminal conduct, namely a robbery at the Northern Bank Cash Centre, Donegall Square West, Belfast on 20th December 2004 and transferring same to a named individual, contrary to section 31(1)(c) of the 1994 Act; the second count *inter alia* stated that on about 7th February 2005 at Ballincollig, County Cork, the Plaintiff was reckless as to whether sterling cash to the value of £175,360 represented the proceeds of the Northern Bank Robbery and transferring same to a named individual, contrary to section 31(1)(c) of the 1994 Act.

33. The Plaintiff received a sentence of five years imprisonment and the court took into consideration time already served, and the balance was suspended on the Plaintiff's undertaking to desist from being a director or employee in any financial business for a period of five years and, in addition, the court made an order "[u]*nder section 61 of the Criminal Justice Act, 1994 for the forfeiture of the sum of £2,985,680.00 & €45,146.00 seized*". As observed earlier, no objection was made by, or on behalf of the Plaintiff, to that Forfeiture Order, and these orders were not appealed by the Plaintiff.

34. On 17th July 2014, these forfeited sums were transferred to Danske Bank.

35. Some years later, on 4th May 2018, presumably on a request to take up the order, a written order was drawn up and signed by the nominated signatory on behalf of the County Registrar.

Judicial Review Application (Record No. 2019 No.162)

15th January 2018

36. Prior to initiating the judicial review application (Record No. 2019/162JR), solicitors on behalf of the Plaintiff sent pre-action letters on or about 20th July 2017 and 4th August 2017 to the Criminal Assets Bureau and An Garda Síochána and copied to the DPP and Danske Bank alleging that the Plaintiff's monies had been seized and retained without lawful authority and requesting *inter alia* a "*detailed and comprehensive report setting out the statutory provisions under which each monetary seizure was made; under what provisions said monies were detained; and under what provisions they were distributed to third parties, including but not limited to the Northern Bank/Danske Bank*." The essence of the Plaintiff's case was set out at paragraph 33 of the Statement of Claim dated 20th October 2010 as follows: "(*33)* [t]*he letter emphasized that, following both the original trial in 2009 and re-trial* [sic.] *in 2014, apart from the substance of the offences for which he was convicted, there had never been any determination that the monies seized were linked to the Northern Bank robbery. However, it appeared that the entire basis of the seizure, withholding and transfer of substantial sums of these monies relied on that premise, and upon an unconstitutional search warrant. Accordingly, it was alleged that the seizure, retention and dispersal by An Garda Síochána to third parties, including Danske Bank, appeared to be unlawful, as having no basis in law and arising from actions which are repugnant to the Constitution*".

37. Judicial review proceedings were then brought by the Plaintiff on 15th January 2018 and resulted in judgments from the High Court and the Court of Appeal in *Timothy Cunningham (Applicant) v Commissioner of An Garda Síochána (First Named Respondent, the Criminal Assets Bureau (Second Named Respondent) and The DPP*

(First Named Notice Party) and Danske Bank (*Second Named Notice Party*) [2019] IEHC 104[6]; [2019] IECA 164[7].

38. The substantive reliefs sought in those judicial review proceedings (*Record No. 2019 No.162*) were: (i) an order of mandamus to compel the Garda Commissioner to provide the Applicant (the Plaintiff) with a detailed and comprehensive report setting out the statutory provision under which his monetary property was seized, detained and distributed, along with any and all court orders which authorised the search, detention, forfeiture and/or distribution of said monies; and the provision of related documentation as set out in the Applicant's Pre-Action Letter dated 4th August 2017; (ii) an order of mandamus to compel the Criminal Assets Bureau to provide the Applicant with a detailed and comprehensive report setting out the statutory provisions under which his monetary property was seized, detained and distributed, as set out in the Applicant's Pre-Action Letter dated 20th July 2017; (iii) a declaration that the Applicant's monies were unlawfully seized and detained by the Garda Commissioner; (iv) a declaration that the Applicant's property rights under Article 40.3 of Bunreacht na hÉireann had been infringed by the Respondents; and (v) an injunction restraining the Criminal Assets Bureau, as the Applicant's Inspector of Taxes, from taking any further action in the enforcement of any revenue liabilities pending the outcome of the within judicial review proceedings.

39. While the decisions of both the High Court and the Court of Appeal are referred to in more detail later in this judgment, by way of brief summary, this court (O'Regan J.)

[6] Judgment was delivered by the High Court (O'Regan J.) on 14th February 2019.

[7] Judgment was delivered by the Court of Appeal (Birmingham P., Edwards J. and Baker J.) on 5th June 2019.

decided that Mr. Cunningham: (i) had failed to establish any basis upon which to secure an enlargement of time to maintain the judicial review challenge (noting that there had been no formal application to the court in that regard); and (ii) had failed to discharge the onus on him to establish that the relevant monies belonged to him, in particular, after the making of the Forfeiture Order, and therefore, refused all reliefs.

40. The Court of Appeal agreed, and noting *inter alia* that the Applicant's failure to lodge an appeal against the Forfeiture Order within the time allotted had to be seen in the context of the fact that what was sought to be challenged, directly or collaterally, was an order made by His Honour Judge Séan Ó'Donnabháin on 27th February 2014, in addition to the fact that the Applicant had failed to put before the Court anything that could cause the Court to believe that any of the merits of the case were with him on even a *prima facie* basis, the court found that therefore, "[i]*n the circumstances of the case, the Court has not been persuaded that the interests of justice would be served by the extension of time, and indeed, is of the view that the contrary is the case*".

Cunningham v Galvin & Ors (Record No. 2019/8798P)

15th November 2019

41. The Plaintiff then issued a plenary summons in these proceedings on 15th November 2019. The Statement of Claim dated 20th October 2020 sets out a description of the parties at paragraphs 1 to 7. The nature of the Plaintiff's claim is pleaded from paragraphs 8 to 40; particulars of alleged conversion are set out at paragraphs 41 to 49; particulars of alleged misfeasance in public office are set out at paragraphs 50 to 70; particulars of alleged breach of constitutional rights are set out at paragraph 71;

particulars of alleged aggravated damages are set out at paragraphs 72 and 73; particulars of alleged exemplary damages are set out at paragraph 74.

42. At paragraph 8 of his Statement of Claim dated 20th October 2020 in *Cunningham v Galvin & Ors (Record No. 2019/8798P)*, the Plaintiff pleads that his claim is for damages for alleged *misfeasance in public office* in respect of the criminal prosecution brought in Cork Criminal Court, *DPP v Ted Cunningham*, and in particular the seizure, detention and transfer of monies relating to that prosecution, and at paragraph 10, the Plaintiff claims damages for alleged *conversion* of monies in the amount of over GBP£3million seized from his dwelling place pursuant to a warrant brought under section 29 of the Offences Against the State Act 1939. The Plaintiff also claims damages alleging that his constitutional rights were breached, in particular pursuant to Articles 38.1, 40.3, 40.3.2º, and Article 40.1.4.1º of the Constitution. In the alternative, the Plaintiff seeks damages for alleged malicious prosecution, claiming that he was falsely accused of money laundering offences, that the prosecution was taken without reasonable and probable cause and was motivated by malice on the part of each and/or any one of the Defendants and further seeks damages against the Defendants for the alleged torts of trespass to the person, false arrest and false imprisonment.

The Plaintiff's case

43. In opposing, and responding to, the State Defendants' application to strike out this plenary action, Mr. Dornan BL submitted that he was entitled to challenge the Forfeiture Order through the mechanism of these proceedings (contending that he has a right to an effective remedy), that the key difference was that he now had a transcript of the DAR of the hearing before His Honour Judge Séan Ó'Donnabháin, on 27th February

2014, which was not available to him when the judicial review application was made before O'Regan J.

44. In this regard, Mr. Dornan BL made a number of further specific criticisms of the application which had been made on 27th February 2014 and which led to the Forfeiture Order being made by His Honour Judge Ó'Donnabháin, including contending *inter alia* the following matters: the provisions and requirements of section 61(1) to (7) of the 1994 Act were not complied with, including a failure to have regard to the value of the property (section 61(2) of the 1994 Act), that the property was unlawfully in the possession of An Garda Síochána (section 61(4) of the 1994 Act), the Plaintiff was not provided with the opportunity to show cause (section 61(5) of the 1994 Act), the Plaintiff disputed when the Order took effect (sections 61(6) of the 1994 Act) and in this regard contended that time ran from the date of the perfected Order (citing O. 115 RSC 1986), the Police Property Act was not applied as per the evidence of Detective Healy (section 61(7) of the 1994 Act), that section 61 of the 1994 Act was not adequately explained to His Honour Judge Ó'Donnabháin and that he had to be satisfied that its provisions were complied with in order to vest the Circuit Court with jurisdiction; the property was allegedly not "*lawfully seized*" and no "*offence*" was identified as per the requirements of section 61(1) of the 1994 Act and, therefore, the property was not lawfully before the Circuit Court.

45. Mr. Dornan BL further submitted as follows: the Circuit Court was not informed how, what he contended were unconstitutionally obtained moneys with no established link to the Northern Bank robbery, had been detained, converted and transferred to Danske Bank; the forfeiture process was a civil process and should not have been added on, as

an application, immediately after sentencing had been completed; the Plaintiff's rights in relation to what he alleged to be the monies in his ownership could not be waived by the Plaintiff's legal advisers when the matter was before His Honour Judge Ó'Donnabháin; the Forfeiture Order was contrary to the decision of the Court of Criminal Appeal in *DPP v Timothy (Ted) Cunningham* [2012] IECCA 64; the decision of the Supreme Court in *DPP v J.C.* [2017] 1 I.R. 417 cannot now be applied to the Forfeiture Order process as it posted-dated the decision; the prosecutor was uncertain as to the actual sums involved and there was no attempt to differentiate as to what were alleged to be proceeds from the Northern Bank robbery and other monies, alleging that £2.4 million was taken from the Plaintiff's home but that the sterling amount referred to in the Forfeiture Order was £2,985,680 and also queried how the amount of €45,146 could be related to the Northern Bank robbery; the Forfeiture Order process was limited to the combined total of the counts to which the Plaintiff pleaded guilty and not the greater sum which was addressed in the decision of the Court of Criminal Appeal (again asserting that £2.4 million was taken from the Plaintiff's home).

46. Additionally, Mr. Dornan BL interpreted the statements in the transcript made by the Plaintiff's then legal advisers as an indication that the Forfeiture Order process had nothing to do with the sentencing (or criminal) process and, at best, referred to a separate (civil) process which would be properly applied for on a later occasion and that, in his view, the Forfeiture Order was not consented to on behalf of the Plaintiff at the hearing before His Honour Judge Ó'Donnabháin; in this regard Mr. Dornan BL interprets the statement from senior counsel for the Plaintiff after the Plaintiff had agreed to the terms of his conditional release (being his resignation from any financial institution and further undertaking not to take up employment or a directorship with

any financial institution for a period of five years and keeping the peace and of being of good behaviour) that, "[y]*es, in relation to forfeiture, we are not opposing application for forfeiture*", as meaning that there must be another '*proper application*' for forfeiture at another time and could not be construed as the Plaintiff consenting to what Mr. Dornan BL submits was the "*forfeiture of unconstitutionally obtained moneys*"; Mr. Dornan BL emphasises the point that the offences and subsequent sentences related to whether the Plaintiff was "reckless" as to whether the moneys were Northern Bank moneys; he contends that the judicial review determination from O'Regan J. was limited to a time issue so therefore the substantive issues were not addressed and that it was inappropriate to conflate a private law action (*Cunningham v Galvin & Ors (Record No. 2019/8798P)*) with a previous public law action (*Judicial Review Application (Record No. 2019/162*); Mr. Dornan BL argues that because O'Regan J. did not have the transcript of the hearing of 27th February 2014 before His Honour Judge Ó'Donnabháin, the court did not have the benefit of a full argument that the Forfeiture Order was unlawful; Mr. Dornan BL interpreted the following observations of His Honour Judge Ó'Donnabháin in sentencing after the guilty plea *inter alia* that "*even at this stage, a plea to his involvement in this crime is a significant matter. It puts his involvement beyond all doubt. Out of his own mouth, in the face of the prosecution, he admits his guilt. So publicly now there are no appeals; there is no doubt*" as erroneously stating that there could be no appeal.

47. As can be seen, notwithstanding that this is a strike out application, both parties tended, on occasion, to refer to *the merits* of the underlying claims and the responses to same, when advancing their respective arguments. I would simply note – in the context of, for example, Dankse Bank, as the successor-in-title of the Northern Bank (and the recipient

of the Forfeiture Order monies) – that there was no obligation to join Danske Bank as a party when seeking the Forfeiture Order and Danske Bank were, of course, a named notice party in the judicial review application.

48. For the following reasons, I am of the view that this action should be struck out on the basis that the Plaintiff's claim constitutes *a misuse* or *an abuse of process* as that term has been explained in the caselaw, referred to earlier in this judgment. In that regard, and as explained in the next part of this judgment, this action constitutes a misuse or an abuse of process involving both the re-litigation of matters already litigated and the litigation of issues which could have been addressed in previous proceedings.

49. First, and by way of general observation, the gravamen of the response on behalf of the Plaintiff to this application is to attempt to revisit matters which have already been addressed in previous litigation. This not only relates to the judgment of this court (O'Regan J.), as outlined above, but also concerns, for example, the fact of the plea of guilty by the Plaintiff and the observations of His Honour Judge Ó'Donnabháin upon receipt of those guilty pleas in the context of two of the nine counts and the fact that the Forfeiture Order (and the monies referred to in that order) made by His Honour Judge Ó'Donnabháin was not opposed on behalf of the Plaintiff, was not appealed and, the attempt to challenge the Forfeiture Order in the judicial review application, was refused.

50. Further, the issues of (a) ownership of the monies which had been forfeited and (b) the failure to challenge the Forfeiture Order either by way of an appeal or by way of a judicial review challenge within the time frames prescribed by law or the Rules of Court, *were* addressed by this court (O'Regan J.) and affirmed by the Court of Appeal

in *Timothy Cunningham (Applicant) v Commissioner of An Garda Síochána (First Named Respondent, the Criminal Assets Bureau (Second Named Respondent) and The DPP (First Named Notice Party) and Danske Bank (Second Named Notice Party)* [2019] IEHC 104; [2019] IECA 164. These issues form the central basis of the plenary action, the subject of this application to strike out, in *Cunningham v Galvin & Ors (Record No. 2019/8798P).* The Plaintiff's claims to damages for alleged misfeasance in public office, conversion and breach of constitutional rights proceedings are premised on the central claims that he (the Plaintiff) *owns* the sums of money which the High Court has determined, on a judicial review application, he has failed to establish and which decision has been affirmed on appeal by the Court of Appeal.

51. At paragraph 22 of his Statement of Claim dated 20th October 2020 in *Cunningham v Galvin & Ors (Record No. 2019/8798P)*, the Plaintiff, for example, pleads "*(22)* [m]*ore importantly, for the purposes of these proceedings, Judge Ó'Donnabháin [sic.] ordered the "confiscation of the sums of [sic.] £2,985,680.00 & €45,146.00) (the "Confiscation Order)." The Plaintiff has no knowledge or understanding of the process by which Judge Ó'Donnabháin arrived at these figures or the Confiscation Order. The combined sums ordered to be confiscated far exceed those for which the Plaintiff was convicted (which amounts to GBP£275, 400)*." This action also relates to the detention and forfeiture of the same sums, and described on behalf of the Plaintiff as to "*how was unconstitutionally seized moneys (evidence) retained and then transferred to Danske Bank (who never requested it)*". It is contended on behalf of the Plaintiff that this action seeks damages in respect of the criminal prosecution and the seizure, conversion and transfer of moneys to Danske Bank and which it is alleged constitutes misfeasance in

public office in relation to the unconstitutionally obtained evidence and discovery is sought in that regard.

52. The particulars of alleged conversion pleaded out at paragraphs 41 to 49 of the Statement of Claim in *Cunningham v Galvin & Ors (Record No. 2019/8798P)* are predicated on the Plaintiff's alleged ownership of the sums of money, the subject of the Forfeiture Order, both of which were addressed by O'Regan J. in the judicial review challenge.

53. Similarly, the particulars of misfeasance in public office pleaded out at paragraphs 50 to 70 of the Statement of Claim in *Cunningham v Galvin & Ors (Record No. 2019/8798P)* are predicated on the issue of the Plaintiff's alleged 'ownership' of the monies the subject of the Forfeiture Order (at paragraph 8, for example, of the Plaintiff's answers to the Replies to Particulars dated 20th April 2021, it is asserted that "*the Plaintiff alleges that the said monies in the amount of over GBP £3million was and remains the lawful property of the Plaintiff*") and also represents a renewed claim of ownership. As stated, this was considered and determined by O'Regan J. in the judicial review challenge. The Plaintiff's attempt to relitigate these matters in this action constitutes, in my view, a misuse or abuse of process.

54. Second, it is clear that this court (O'Regan J.) addressed these matters in her judgment. At paragraph 21(b) of her judgment in the judicial review application, under the sub-heading 'Decision', O'Regan J. referred to the fact that in "*written submissions, the applicant does in fact seek to attack the forfeiture order or possible confiscation order in the order of the Circuit Court of the 27th February 2014. He suggests that effectively*

same was not binding on him until he had notice of same in May 2018, when the perfected order was produced. Nevertheless, it is the case that the order of the Circuit Court has not been appealed nor has same been judicially reviewed nor indeed is the forfeiture order referred to as part of the relief claimed in the within judicial review proceedings", and at paragraph 21(d) of the judgment that "[i]*f one takes the applicant's position at its height, namely that the forfeiture order only became operable against him in May 2018 on production of the perfected order, nevertheless by January 2019 (the date of the within hearing) the court has not been advised of any appeal or application for judicial review of such order and therefore any such application is now well out of time. In reality, however, the order was effective upon pronouncement regardless of the applicant's asserted understanding in particular having regard to the fact that the applicant was indeed present in court with counsel when the order was pronounced (see the affidavit of Frank Nyhan solicitor of the 9th of July 2018, at para. 4)*".

55. Third, in *Timothy Cunningham (Applicant) v Commissioner of An Garda Síochána (First Named Respondent, the Criminal Assets Bureau (Second Named Respondent) and The DPP (First Named Notice Party) and Danske Bank (Second Named Notice Party)* [2019] IECA 164, the Court of Appeal (Birmingham P.) referred at paragraph 11 of their judgment to "[t]*he applicant, with the benefit of legal representation, did not object to the forfeiture order when it was made and did not appeal the order until the virtual eve of the High Court hearing. While the applicant initially denied that he had been legally represented on the hearing of the forfeiture order; on the day before the hearing, in his fourth affidavit, he admitted that he had in fact been legally represented*".

56. The Court of Appeal upheld the decision of this court (O'Regan J.) and refused Mr. Cunningham's application to extend time.

57. In his judgment, Birmingham P. held that the High Court had taken the view that Mr. Cunningham had failed to establish any basis in order to secure an enlargement of time to maintain the judicial review challenge and that there had been no formal application to the Court in that regard. The Court of Appeal held that Mr. Cunningham, with the benefit of legal representation, did not object to the Forfeiture Order when it was made and did not appeal the order until the virtual eve of the High Court hearing.

58. Fourth, in her judgment, O'Regan J. had also found that Mr. Cunningham had failed to discharge the onus on him to establish that the relevant monies belonged to him, in particular, post the making of the Forfeiture Order, and in the circumstances, was of the view that all the reliefs sought should be refused.

59. In this regard, O'Regan J. held that it was critical to Mr. Cunningham successfully obtaining an order in the judicial review application, on any of the grounds sought, to establish ownership of the monies and the court referred to the written legal submissions on his behalf where this was identified as the first issue to be determined and in addition that "*the wording of each of the first four reliefs claimed clearly demonstrate a claim of ownership as being the basis for the relief sought*" by Mr. Cunningham.

60. However, O'Regan J. held that Mr. Cunningham had failed to establish any basis to secure an enlargement of time to maintain the judicial review proceedings, and indeed,

no formal application had been made to the court and, as referred to earlier, that the Plaintiff had failed to discharge the onus on him to establish that the relevant monies belonged to him, in particular after the making of the Forfeiture Order and refused "*all of the reliefs*" claimed in the judicial review application.

61. Fifth, as set out earlier in this judgment, in his application for judicial review, the Plaintiff had made a number of arguments and sought reliefs in relation to the ownership of the moneys the subject of the Forfeiture Order, including seeking declarations that: (i) the applicant's monies were unlawfully seized by the Commissioner of An Garda Síochána, and, (ii) his property rights under Article 40.3 of the Constitution had been infringed. The Plaintiff further argued that (iii) the money was taken from his home and that this was *prima facie* evidence of his ownership; (iv) that although the interviews between the Plaintiff and An Garda Siochána which occurred in February 2005 were technically admissible, he contended, nonetheless, that they were insufficient to displace the burden on him to show ownership of the monies which he maintained had been discharged by virtue of the fact that the monies were taken from his home in 2005; and (v) that the Forfeiture Order could not have been lawfully made because section 29 of the Offences against the State Act 1939 Act had been declared unconstitutional and therefore the money belonged to him and his rights were guaranteed by the Constitution, including under Articles 43 and 40.3.2 of the Constitution.

62. As stated earlier, in her judgment, O'Regan J. held that Mr. Cunningham had "*failed to discharge the onus on him to establish that the relevant monies belonged to him - in particular post the making of the forfeiture order*" having earlier in the judgment referred to a letter of March 2017 which had advised Mr. Cunningham's then solicitor

that the order of 27th February 2014 had incorporated a forfeiture order in respect of the said monies under section 61 of the 1994 Act and a letter dated 30th April 2014 between An Garda Síochána and the State Solicitor for the DPP was enclosed which confirmed "*the making of the forfeiture order and the fact that no appeal or challenge was made thereto*".

63. In *Timothy Cunningham (Applicant) v Commissioner of An Garda Síochána (First Named Respondent, the Criminal Assets Bureau (Second Named Respondent) and The DPP (First Named Notice Party) and Danske Bank (Second Named Notice Party)* [2019] IECA 164, Birmingham P. referred at paragraph 5 to the High Court findings that "*the applicant had failed to establish any basis in order to secure an enlargement of time to maintain the within judicial review proceeding, and that, indeed, there had been no formal application to the Court in that regard*" and that "*the applicant had failed to discharge the onus on him to establish that the relevant monies belonged to him, in particular, post the making of the forfeiture order, and in the circumstances, was of the view that all the reliefs sought should be refused*".

64. Further, Birmingham P. referred at paragraphs 11, 12 and 13 of the judgment of the Court of Appeal to the fact that: "*(11)* [t]*he applicant, with the benefit of legal representation, did not object to the forfeiture order when it was made and did not appeal the order until the virtual eve of the High Court hearing. While the applicant initially denied that he had been legally represented on the hearing of the forfeiture order; on the day before the hearing, in his fourth affidavit, he admitted that he had in fact been legally represented (12) The forfeiture order concerned substantial sums of Northern Irish currency found on the applicant's property in County Cork and the*

applicant admitted to the Gardaí that he believed them to have been stolen from [the] Northern Bank (which was subsequently purchased by Danske Bank) in the course of the armed raid on its premises in December 2004" and that "(*13)* [i]*n response to submissions that the applicant had not explained the provenance of the monies, despite that question having been put in issue in the affidavits, O'Regan J. concluded at p. 12, para. 27 of her judgment that: "the applicant had failed to discharge the onus on him to establish that the relevant monies belonged to him.'*""

65. The issues raised by Mr. Dornan BL, arising from the Supreme Court judgments in *Damache* and *JC*, including what he referred to, for example, as "'*unconstitutionally detained' monies, the operative date of the Forfeiture Order being the 'date of the perfected order'*", the Forfeiture Order monies being transferred to Danske Bank (who he submits did not apply for the return of the monies and were not put on notice of the Forfeiture Order application) during the time when, he submits, the Plaintiff was entitled to appeal, were also addressed by O'Regan J. in the judicial review application, as follows:

> "*13. The judgment in Damache aforesaid must be read in the light of the subsequent decision of the Supreme Court in DPP v J.C. [2017] 1 IR 417 which was a judgment delivered on the 15th April 2015. In J.C. the court was satisfied that evidence can be admitted when the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments. In this case the seizure of assets occurred in 2005 and s. 29 of the 1939 Act was not struck down until February 2012.*

14. The date upon which an oral order takes effect was the subject matter of a Supreme Court judgment in Kavanagh v Healy [2015] IESC 37. Clarke J. (as he then was) indicated that an order made orally by a judge is an order of the court and it does not require to be in writing to be valid and binding. The written document is simply a means of recording in a very formal way what the court order said. The court order is what the judge says in court. In addition, it was stated that the absence of the written order is purely an administrative matter and does not deprive anyone of any right or entitlement to appeal. In the circumstances, the court was satisfied that an order is effective as soon as it is made.

15. The fact that a particular individual may not have been aware of the nature of the order made does not have an impact on the judicial review time limits. In Irish Skydiving Club Ltd. v An Bord Pleanála [2016] IEHC 448 Baker J. indicated that the time limits were linked to the making of the decision so to be impugned as opposed to the applicant's awareness of same".

66. The arguments made on behalf of the Plaintiff in relation to the Forfeiture Order process were addressed by O'Regan J., who referred, for example, at paragraph 12 of the judgment, to section 61(4) of the 1994 Act, observing that this provides that a forfeiture order operates to "*deprive the offender of his rights, if any, in the property to which it*

relates, and the property shall (if not already in their possession) be taken into the possession of the Garda Síochána."

67. This reflects the legal consequences of *the presumption of validity* of the Forfeiture Order. Those consequences included the future transfer of the moneys to Danske Bank (which was a Notice Party in the judicial review proceedings), notwithstanding the criticisms made by Mr. Dornan BL in relation to how it was applied for, what was considered and the pronouncement of the Court's decision on 27th February 2014.

68. As referred to earlier in this judgment, in setting out a brief chronology, O'Regan J. referred at paragraph 2(g) of her judgment to a letter in March 2017, wherein "*the applicant's solicitor was advised that the order of the 27th February 2014 incorporated a forfeiture order in respect of the monies aforesaid under s. 61 of the Criminal Justice Act 1994 and a letter was enclosed bearing date the 30th April 2014 between An Garda Siochána and the State Solicitor for the DPP which confirms the making of the forfeiture order and the fact that no appeal or challenge was made thereto*." Further, it is noted that section 61(6) of the 1994 Act provides that an order under section 61 "*shall not take effect until the ordinary time for instituting an appeal against the conviction or order concerned has expired or, where such an appeal is instituted, until it or any further appeal is finally decided or abandoned or the ordinary time for instituting any further appeal has expired*" and, as set out above, at paragraphs 13, 14 and 15 of her judgment, O'Regan J. addressed and referred to the legal authorities which determine when the order of his Honour Judge Ó'Donnabháin took effect.

Abuse of Process & Henderson v Henderson

69. The First Named Defendant retired on 30th November 2013, prior to the second trial, and it appears upon his retirement he was involved in similar work for the authorities in the Seychelles to that which he had previously carried out for the Criminal Assets Bureau ("CAB").

70. In this regard, the Plaintiff alleges certain matters at paragraphs 19 and paragraphs 22 to 28 of his Statement of Claim dated 20th October 2020 which are an example of the litigation of issues which could have been addressed in previous proceedings and which fall foul of the *Henderson v Henderson* abuse of process rule. The Plaintiff, for example, contends (at paragraph 11 of the Statement of Claim) that when the application was made for the Forfeiture Order, the prosecution should have informed His Honour Judge Ó'Donnabháin about the First Named Defendant being a defendant in three complaints, which were subsequently withdrawn, in the United States District Court for the Southern District of New York (referred to by the Plaintiff as "SDNY") in *Xiao v Republic of Seychelles & Ors*, 09-cv-9854, *Scholes & Ors v Republic of Seychelles & Ors,* 10-cv-3672 (RJH) and *Cooperhill Investments Limited*, 11-cv-962 (NRB). Ultimately, Mr. Cunningham pleads at paragraphs 27 and 28 of the Statement of Claim in this action that "*(27)* [w]*ithout prejudice to the truth or substance of the allegations contained in the SDNY Complaints, these allegations would at a minimum have shed further light on the retention of monies unlawfully seized from the Plaintiff's property. Neither the Plaintiff nor his legal representatives were made aware at the time of the making of the Confiscation Order of the very serious allegations levelled against the First Named Defendant in relation to his involvement with the FIU in the Seychelles (the "Information"). (2) The SDNY Complaints were voluntarily discontinued and it is not known if the allegations which are the subject of the Information were ever*

substantiated in any criminal or civil forum. The Plaintiff alleges that the Information would nevertheless have been essential to inform his right to challenge the Confiscation Order of 27th February, 2014."

71. Further, when the relevance of these matters was raised in the State Defendants' Notice for Particulars dated 15th January 2021, the Plaintiff's Replies to Particulars dated 20th April 2021, in the context of the plea at paragraph 11 of his Statement of Claim was "*(v)* [t]*he question of "how it is alleged the evidence at (iii) above exonerated or tends to exonerate the Plaintiff of guilt of the offences for which he was charged" is a matter of evidence for the trial of this action. Without prejudice to the foregoing, the Plaintiff has alleged at paragraph 27 of the Statement of Claim that the allegations contained in the SDNY Complaints "would at a minimum have shed further light on the retention of monies unlawfully seized from the Plaintiff's property."*"" (Matters in relation to this plea were also addressed in the Plaintiff's Replies to Particulars dated 20th April 2021 in answer to the requests numbered 14 to 20).

72. I am of the view that the Plaintiff, in raising these issues now, is misusing or abusing the process of the court by seeking to raise issues, which could have been raised in the judicial review challenge in the manner explained by Lord Bingham in *Johnson v Gore Wood* [2002] WLR 72 and referenced by Hardiman J. in his decision applying *Henderson v Henderson* in *AA v The Medical Council* [2003] IESC 70, [2003] 4 I.R. 302, *i.e.*, as an example of the litigation of issues which could have been addressed in previous proceedings. In *Woodhouse v Consigna* [2002] 2 All ER 737, Brooke L.J. explained that the rationale of *Henderson v Henderson* required that parties bring their whole case before the Court so that all aspects of it may be decided (subject to appeal)

once and for all and constituted a rule of public policy based upon the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits where one would do.

73. The public policy context applicable is not dissimilar, in some ways, to that which applied in *Corrigan v Irish Land Commission* [1977] I.R. 317 (albeit, of course, that *Corrigan* involved an allegation of objective bias) where, Mr. Corrigan who had been legally represented at the CPO hearing had not objected at that time to the membership of the Tribunal but only sought to raise an objection subsequently in proceedings before the High Court and Henchy J. observed that "[t]*he rule that a litigant will be estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the hearing, is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the Tribunal will decide in his favour, while reserving to himself the right, if the Tribunal gives an adverse decision, to raise the complaint of disqualification. That is something that the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways*." (see also *Kennedy v DPP* [2012] IESC 34 per Fennelly J. at paragraphs 119-120).

74. The arguments now made on behalf of the Plaintiff belies the fact that, first, he was at all times legally represented and there was no objection to the Forfeiture Order application before the Circuit Court and second, the Plaintiff sought to make arguments

about the Forfeiture Order in the judicial review challenge and that issue was addressed by O'Regan J., whose judgment was affirmed by the Court of Appeal. (See also the judgment of the Court of Appeal (Haughton J., Binchy J. and Pilkington J.) in *Dowling v The Minister for Finance & Ors* [2023] IECA 93).

75. Additionally, the Plaintiff points out that the Seychelles litigation was "*voluntarily discontinued*." Again, the central complaint in this regard, *i.e.*, that His Honour Judge Ó'Donnabháin should have been informed of the fact of this litigation is predicated on the Plaintiff's assertion that he owned the sums of money, which was addressed and determined in the judgment of O'Regan J. in the judicial review proceedings.

76. The Plaintiff pleaded guilty to the two counts of money laundering. He did not appeal the conviction. Further, the Plaintiff made no objection to the Forfeiture Order being made and did not appeal the Forfeiture Order. It was open to the Plaintiff to seek a claim for damages, properly particularised, in the judicial review application (as Order 84 RSC 1986 provides for the availability by way of an application for judicial review of what were previously the private law remedies of injunction, declaration and damages in addition to the traditional prerogative or State-side remedies). For example, in the judicial review application the Plaintiff (the Applicant) sought at paragraph 3 of the Statement of Grounds a declaration that the applicant's monies were unlawfully seized by the Garda Commissioner and at paragraph 4 of the Statement of Grounds, a declaration that the Applicant's property rights under Article 40.3 of the Constitution had been infringed (the injunction sought until the conclusion of the judicial review proceedings does not appear to have been pursued). It was therefore open to the Plaintiff in the earlier judicial review application to seek damages in the event of being granted

the declaratory reliefs sought in the judicial review application rather than the alternative plea in this action where the Plaintiff seeks damages for alleged malicious prosecution or being allegedly taken without reasonable and probable cause and allegedly motivated by malice on the part of each and/or any one of the Defendants and for the alleged torts of trespass to the person, false arrest and false imprisonment.

77. Further, the Forfeiture Order enjoys the presumption of validity and cannot be the subject of a collateral challenge and this issue was also addressed by O'Regan J. in her judgment who stated under the sub-heading 'Collateral Attack', the following:

> "*(19) In Sweetman v An Bord Pleanála & Ors [2018] IESC 1 Clarke C.J. identified the rationale underlining the collateral attack jurisprudence when he said it was clear and a party who have the benefit of an administrative decision which is not challenged within any legal mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings.*
>
> *(20) In A. v Governor of Arbour Hill Prison [2006] 4 IR 88 Murray C.J. indicated that a collateral attack arises where a party outside the ambit of the original proceedings seeks to set aside the decision in a case which has already been finally decided, or legal avenues, including appeal, having been exhausted*".

78. The Forfeiture Order, therefore, enjoys the legal consequences which flow from the presumption of validity including the transfer of the monies to Danske Bank who are the successor-in-title of the Northern Bank: see the observations of Finlay P. (as he then

was) in *In Re Comhaltas Ceolteorí Éireann* (Unreported, High Court, 14th December 1977) and the similar observations of Clarke J. (as he then was) in O*kunade v Minister for Justice, Equality and Law Reform* [2012] IESC 49; [2012] 3 I.R. 152 at 188).

79. In delivering the judgment of the Court of Appeal in the judicial review challenge, Birmingham P. referred at paragraph 10 of the judgment to the fact that "*in the course of the affidavit and in the course of submissions to this Court, Danske Bank makes the case that the current application for an extension is the latest in a litany of delays on the applicant's part since the forfeiture order, delays which would be unacceptable in any proceedings, but which are even more inappropriate in the context of judicial review. Indeed, the delay becomes more problematic bearing in mind that these proceedings constitute the applicant's belated attempt to challenge a forfeiture order made on 27th February 2014 following the applicant's guilty plea to money laundering charges*."

80. The public policy imperatives, discussed earlier in this judgment, which inform the court's inherent jurisdiction to strike out an action for misuse or abuse of process share common features with challenges brought by way of an application for judicial review and in addition to the principles such as the rule against collateral challenge and the application of time limits, discussed by O'Regan J. in the Plaintiff's judicial review challenge. The discretionary jurisdiction of the court in a judicial review application is informed by concepts, including, for example, the presumption of validity, delay, applications to extend time, standing, acquiescence, failure to exhaust other remedies, adverse public consequences, such as the effect on third parties, futility or lack of useful purpose. These are not merely legal shibboleths but form important factors in the

exercise of the court's jurisdiction. In this regard, in the Plaintiff's judicial review challenge, O'Regan J. observed at paragraphs 24, 25 and 26 as follows:

> "*(24) Clearly the affidavit evidence before the court puts at issue the ownership of the subject matter of the forfeiture order and indeed the only argument presented by the applicant is that the money was removed from his home which at best may have provided him with an interest in the money up until the expiry of the time limits to appeal or apply for judicial review proceedings in respect of the order of the Circuit Court of February 2014;*
>
> *(25) The within proceedings having regard to the applicant's submissions as aforesaid, are demonstrably seeking to mount a collateral attack on the Circuit Court order of February 2014;*
>
> *(26) Insofar as time limits are concerned, there has been no engagement by the applicant with respect to the content of O. 84 of the Rules of the Superior Courts save for a brief mention thereof in paragraph 72 of the written submissions which merely records that time begins to run when grounds for the application first arose. There is no attempt to explain or justify the delay in accordance with the provisions of O. 84 save to state that it was unfair of the respondents to raise the issue of time*".

81. In Mr. Cunningham's previous judicial review challenge, this court (O'Regan J.) refused his application for the reliefs claimed by way of judicial review and determined that he had failed to establish any basis to secure an enlargement of time to maintain that challenge (noting that no formal extension application had been made) and further

determined that he had failed to discharge the onus on him to establish that the relevant monies belonged to him, particularly after the making of the Forfeiture Order. This decision was affirmed by the Court of Appeal. In the exercise of my inherent jurisdiction, for the reasons which I have set out in this judgment, I am of the view that these proceedings should be dismissed as a misuse or abuse of process.

CONCLUSION

82. For the reasons set out herein, I shall, in the exercise of my inherent jurisdiction, strike out the Plaintiff's action in proceedings entitled "*The High Court, Record Number 2019/8798P Between Ted Cunningham (Plaintiff) and Barry Galvin, Anthony Thomas Quilter, The Commissioner of An Garda Síochána, the Director of Public Prosecutions, The Minister for Justice and Equality and the Attorney General (Defendants)*."

PROPOSED ORDER

83. Accordingly, I shall make an Order striking out the Plaintiff's action in proceedings entitled "*The High Court, Record Number 2019/8798P Between Ted Cunningham (Plaintiff) and Barry Galvin, Anthony Thomas Quilter, The Commissioner of An Garda Síochána, the Director of Public Prosecutions, The Minister for Justice and Equality and the Attorney General (Defendants*)".

84. I shall put the matter in for mention before me on Thursday 20th June 2024 to deal with any ancillary and consequential matters, including the question of costs.