



**UNAPPROVED
THE COURT OF APPEAL**

Appeal Number: 2018/368

**Barnville P.
Faherty J.
Ní Raifeartaigh J.**

Neutral Citation Number [2023] IECA 43

BETWEEN/

SEAN MCANDREW

**PLAINTIFF/
APPELLANT**

- AND -

LAUNCESTON PROPERTY FINANCE DAC AND TOM KAVANAGH

**DEFENDANTS/
RESPONDENTS**

JUDGMENT of Ms. Justice Faherty delivered on the 27th day of February 2023

1. This is an appeal by Mr. McAndrew (hereinafter “the plaintiff”) from two Orders of the High Court (Noonan J.) made on 25 July 2018, the first of which directed that the plaintiff’s motion to amend his pleadings and to join a third party be struck out and the second of which ordered that the plaintiff’s statement of claim be struck out.

Background and procedural history

2. On 27 July 2017, the plaintiff issued proceedings by way of plenary summons claiming that the defendants trespassed upon his properties and defamed him “when they were involved in the theft of the Plaintiff’s property, alleging that they had the Legal Authority to take possession of the Plaintiff’s properties”. No relief was claimed. At the time he commenced his proceedings the plaintiff was a litigant in person. He retained that status until shortly before the hearing of the within appeal.

3. The defendants entered an appearance on 3 August 2017. On 21 August 2017, the plaintiff swore an affidavit which purported to be the statement of claim in the proceedings (and which was duly accepted as such by the defendants and the High Court Judge). At para. 3 of his affidavit the plaintiff avers that he has been defamed by the defendants due to the fact that they did not have any legal right to trespass on his property on 6 July 2017 “when they stated that they were taking possession of my properties”. At para. 4, he avers that he has legal documents which prove that the defendants do not have any right to seize his property and defame him and he references “Order No. 2003/4505[SP] perfected March 2nd 2004”. At para. 5, he avers that the defendants failed to comply with his request dated 23 May 2017 for the documents which entitled them to repossess his property. At para. 6, he refers to “the case” having been discontinued by the courts on 9 March 2009. He says, at para. 7, that the defendants proceeded to defame him on 6 July 2017 “despite the fact that they had agreed to hold a meeting [with him], confirmed by phone call records.” At para. 8, he states that the defendants had earlier requested documentation from him and he asserts that all documents should have been in the defendants’ possession. At para. 9, he alleges that letters dated July 2006, August 2006 and February 2007 confirm

that the defendants caused him serious financial loss when they refused to allow a new solicitor to represent him. At para. 10, he says that he wrote to the defendants in September 2013 and 17 November 2016 outlining the history of “the loan”. Thereafter, he avers that he is lodging a criminal complaint with the Gardaí in relation to trespass and fraud by the defendants and that when that criminal investigation is complete, he will provide additional evidence on affidavit.

4. On 4 December 2017, the defendants filed a notice for particulars requesting details, *inter alia*, of the alleged defamatory statement said to have been made by the defendants and what the defamatory statement is alleged to have meant and been understood to mean. In respect of the alleged trespass, the plaintiff was asked for particulars of who it was had trespassed on his property and the identity of the property on which the defendants had allegedly trespassed. He was also requested to provide the factual basis on which it was alleged that the defendants did not have the right to seize his property. Various other particulars were raised with regard to each of the claims made in the statement of claim.

5. There was no response by the plaintiff to the notice for particulars.

6. By notice of motion dated 13 October 2017, the plaintiff applied for judgment in default of defence. The defendants resisted this application on the basis that the time for delivery of the defence had not begun to run in the absence of any affidavit of verification from the plaintiff as required under Order 18, r.2(4) RSC.

7. In the event, on 4 December 2017, in the absence of an affidavit of verification from the plaintiff, the defendants delivered a defence. By way of preliminary objection they plead that the statement of claim discloses no reasonable cause of action and/or is frivolous and vexatious and bound to fail, with the defendants reserving the right to bring an application to have the proceedings struck out pursuant to the provisions of O.19, r. 28 of the Rules of the Superior Courts (“RSC”). They plead that the plaintiff has failed both

in his plenary summons and statement of claim to identify the reliefs he is seeking and that the statement of claim does not contain a statement in summary form of the material facts on which the plaintiff relies for his claim. It is also pleaded that the statement of claim does not contain any or any adequate particulars of the wrongs alleged and fails to particularise adequately or at all the allegations of fraud or any factual basis for the alleged defamation, thus impeding the defendants' ability to invoke the statutory defences provided for in the Defamation Act 2009 ("the 2009 Act"). The defendants say that in consequence they are prejudiced by their inability to know the case being made against them.

8. There follows, without prejudice to the defendants' preliminary objection, a full traverse of the claims made in the statement of claim including a denial that the defendants trespassed on the plaintiff's property or defamed him or engaged in theft.

9. The defendants plead that if the alleged defamatory statement of which the plaintiff complains is to the effect that the first defendant was entitled to appoint the second defendant as receiver over the plaintiff's property and that the second defendant was entitled to take possession of the property, such statement is true in all material respects by virtue of the following:

- On 29 September 2000, Anglo Irish Bank Corporation Plc ("Anglo") advanced a loan to the plaintiff in the sum of £90,000 said to be in addition to a loan already extended to him in the sum of £243,000. The facility was to be repaid on demand without prejudice on or before 30 September 2001.
- The loans were secured by way of a mortgage given by the plaintiff dated 18 April 2000 over lands owned by him and which are comprised in three folios, as described in the defence.

- It was an express term of the loan that if the plaintiff was in default in respect of his repayment options the mortgagee was entitled to appoint a receiver to take possession of the mortgaged properties.
- The plaintiff failed to make repayment to Anglo or its successor in title, Irish Bank Resolution Corporation Limited (“IBRC”), in accordance with the terms of the loan agreement.
- In 2014, IBRC sold and assigned its loan agreements with the plaintiff and the associated securities to the first defendant. The first defendant duly became the registered owner of the charge over the plaintiff’s properties.
- By letter dated 25 April 2017, the first defendant demanded repayment of €404,257.55, said to be the balance of the sum due and owing by the plaintiff on foot of the 29 September 2000 facility letter.
- The plaintiff refused and neglected to make repayment.
- On 18 May 2017, the first defendant appointed the second defendant as receiver over the mortgaged properties.
- The second defendant sought to take possession of the properties but was unable to do so and the plaintiff remains in possession of the mortgaged properties.

10. The defendants go on to plead that insofar as they made a statement to the effect that the first defendant was entitled to appoint a receiver and take possession of the plaintiff’s property, they honestly believed that to be true based on the facts particularised in their defence. While making no admission of the matters pleaded at para. 4 of the statement of claim, the defendants deny that they did not have the legal right to seize the plaintiff’s property. They deny that they defamed the plaintiff or claimed any right to be entitled to defame him. They deny that they failed to comply with the plaintiff’s request for

documentation and assert that on 6 June 2017, their solicitors sent documentation to the plaintiff's then solicitors. They admit that their solicitors sought documentation from the plaintiff's then solicitors in respect of proceedings bearing Record No. 2003/450SP between Anglo and the plaintiff. The defendants deny that they caused any financial loss or damage to the plaintiff or that they refused a new solicitor to be appointed for the plaintiff.

The plaintiff's motion to amend his pleadings

11. Subsequent to the delivery of the defence, on 20 December 2017, the plaintiff emailed the defendants' solicitors seeking their clients' consent to amending the statement of claim. The solicitors replied on 9 January 2018 advising that any application to amend the statement of claim was required to be made before the High Court in accordance with O. 28 RSC. They reserved their rights in this regard.

12. On 29 January 2018, the plaintiff issued a motion returnable for 5 March 2018 seeking to amend his statement of claim and join a further party described as the owner of a named security company with an address in County Tipperary. In support of his application, he swore a short grounding affidavit averring that he had photographs of "Staff from the Security Company who attempted to seize [his] Property without any Court Order" and that the gardai had identified the staff as being employees of a private security firm based in County Tipperary. The plaintiff requested that the owner of this entity be joined as a defendant in the case. Neither the motion nor the plaintiff's grounding affidavit made clear what amendments the plaintiff wished to make to his statement of claim.

The defendants' motion to strike out the proceedings

13. On 9 April 2018, the defendants issued a motion returnable for 16 April 2018 to strike out the plaintiff's proceedings:

- (a) Pursuant to O.19, r. 28 RSC and/or the inherent jurisdiction of the court on the basis that the statement of claim disclosed no reasonable cause of action and/or that the proceedings were frivolous or vexatious and/or an abuse of process;
- (b) Pursuant to the inherent jurisdiction of the court on the basis that the proceedings were bound to fail;
- (c) Pursuant to s.34(2) of the 2009 Act on the basis that the statement in respect of which the action was brought was not reasonably capable of being found to have a defamatory meaning;
- (d) Alternatively, pursuant to s. 14 of the 2009 Act on the basis that the statement complained of was not capable of bearing a defamatory meaning;
- (e) In the further alternative an order pursuant to O. 19, r. 27 RSC striking out certain pleas in the statement of claim on the basis that they were frivolous, vexatious and scandalous.

In the further alternative, and if necessary, the defendants sought the determination of a preliminary issue as to whether the second defendant had been validly appointed as receiver over the plaintiff's property.

14. The motion was grounded on an affidavit sworn by the second defendant on 9 April 2018. At para. 2, the second defendant avers, in the first instance, that the plaintiff's claim discloses no reasonable cause of action and is bound to fail. He says that, in the alternative, the defendants seek orders striking out parts of the claim on the basis that they cannot constitute defamation and/or are frivolous, vexatious and scandalous. He goes on to say, at para. 3, that if the court determines he was validly appointed as receiver, it necessarily follows that he was entitled to say as much to the plaintiff and any other interested party and to seek possession of the secured property.

15. At para. 8, the second defendant avers that the statement of claim does not particularise the plaintiff's allegations of defamation in that it does not identify the statements that the defendants are alleged to have made, the authors of those statements, the meaning such statements are alleged to have borne or the basis on which it is alleged that those statements were defamatory of the plaintiff. More significantly, the second defendant avers, the plaintiff did not state if the alleged statements were publicised or to whom they were publicised. He further avers that any statement to the effect that the defendants were seeking to take possession of the plaintiff's property on stated grounds cannot constitute a defamatory statement. He says that that insofar as the plaintiff referenced High Court proceedings bearing Record No. 2003/450SP, neither of the defendants were a party to that case in respect of which an order for possession was made by the High Court on 26 January 2004 and where those proceedings were later discontinued by Notice of Discontinuance on 9 March 2009.

16. At para. 11, the second defendant describes the claim that the defendants failed to comply with a request to supply the plaintiff with the documents that authorised them to repossess the plaintiff's property as "manifestly unsustainable" for reasons he explains later in his affidavit.

17. At para. 12, the second defendant takes issue with the allegation that the defendants caused financial loss and damage to the plaintiff between 2006 and 2009 and he states that neither of the defendants had any involvement with the plaintiff at that time. He asserts that no particulars of loss are pleaded by the plaintiff. It is further averred that there is no basis upon which the allegation that the defendant sought to interfere with the plaintiff's choice of legal representative can be maintained.

18. At para. 13, the second defendant points to the absence of any particulars of the alleged fraud or theft by the defendants and says that he does not know of any legitimate

ground for the plaintiff to make those very serious allegations, or seek to lodge a complaint with An Garda Síochána.

19. Paragraph 20 of the affidavit addresses the plaintiff's application to amend his statement of claim and add a further defendant. The second defendant says that it is not possible for the defendants to properly meet the plaintiff's application without knowing the nature of such amendment or the identity of the proposed defendant. He avers that the plaintiff should not be allowed to expand the scope of his claim when he has not disclosed a reasonable cause of action as regards his existing claim and where he has pleaded scandalous accusations that have not been in any way particularised.

20. At paras. 22 – 40, the second defendant reprises the factual background (already outlined above) which led to his appointment as receiver. He points to clause 11 of the mortgage deed which entitled the mortgagee to appoint a receiver over the mortgaged properties pursuant to the powers contained in the Conveyancing Act and Law of Property Act, 1881 as modified by paragraphs (a)-(f) of clause 11. He goes on to aver that by loan sale deed dated 28 March 2014, IBRC sold and assigned its loan agreements with the plaintiff and associated security to the first defendant. The plaintiff was duly notified of the said assignment.

21. At para. 31, the second defendant refers to a letter dated 17 November 2016, written by the plaintiff to Pepper Asset Servicing, an agent of the first defendant, which enclosed a letter dated 18 September 2013 which the plaintiff had sent to the Special Liquidators of IBRC. That letter complained that a named solicitor who had previously acted for the plaintiff had not complied with certain undertakings regarding the security for the plaintiff's loans. The second defendant avers that it was not clear to him how this was ever a matter for IBRC, its Special Liquidators or the first defendant, and that it appeared to be a matter between the plaintiff and his former solicitor. He avers that what is significant in

the letter is that the plaintiff acknowledged both his indebtedness and the sale of his loan by IBRC to the first defendant.

22. At para. 32, the second defendant refers to the demand made on 25 April 2017 to the plaintiff to repay the sum of €404,257.55, said to be the balance outstanding as of that date in respect of the plaintiff's loan account. He avers that the plaintiff failed neglected or refused to make repayment to the first defendant.

23. The second defendant goes on to state that following his appointment as receiver he wrote to the plaintiff on 19 May 2017 notifying him of his appointment and asserting his entitlement to take possession of the mortgaged properties.

24. He says that by letter dated 23 May 2017, the solicitors then acting for the plaintiff wrote to his office asserting that Anglo had previously commenced and then discontinued possession proceedings against the plaintiff and that the plaintiff did not accept that the first defendant had a legal entitlement to appoint a receiver over the mortgaged properties. The letter sought copies of the documentation relied upon by the first defendant and threatened to issue injunctive proceedings against the defendants. The defendants' solicitors replied on 6 June 2017, explaining the basis for the first defendant's belief that it was entitled to appoint the second defendant as receiver. The plaintiff's solicitors were furnished with copies of the mortgage, facility letter, demand letter, deed of appointment and folios, which, the plaintiff's solicitors were advised, corroborated the first defendant's assertion of an entitlement to appoint a receiver. The solicitors were requested to furnish copies of the High Court possession proceedings brought by Anglo against the plaintiff.

25. The second defendant avers that the defendants' solicitors received no response to the letter of 6 June 2017 and thereafter sent a further letter to the plaintiff's solicitors on 20 June 2017 requesting the plaintiff to yield up vacant possession of the mortgaged properties. This was responded to on 22 June 2017 by the solicitors then acting for the

plaintiff wherein they declined to provide the defendants with copies of the High Court proceedings bearing Record No. 2003/450SP and indicated that the plaintiff was making a data access request to obtain documentation from the first defendant. The letter warned that the second defendant should not take any further steps on foot of his appointment, or the plaintiff would seek to have his appointment set aside. On 29 June 2017, the defendants' solicitors replied noting that the plaintiff's solicitors had not responded to the points made on behalf of the defendants setting out the basis on which the second defendant was entitled to seek possession of the mortgaged properties. The letter warned that the second defendant reserved his right to take possession of the mortgaged properties without further warning to the plaintiff.

26. The second defendant then goes on to state:

“41. It is notable that in the said exchange of correspondence, the Plaintiff's then solicitors never contested any of the facts which grounded my appointment as Receiver, such as the validity of the mortgage or the fact of the Plaintiff's significant outstanding indebtedness. It is equally striking that the plaintiff has not put these facts in issue in his Statement of Claim.

42. On the basis of the foregoing evidence, I say and believe that I was validly appointed as receiver over the Mortgaged Properties. Accordingly, I say and believe that I was entitled to seek possession of the Mortgaged Properties. On that basis alone, it is impossible to see how taking his case at its height, the Plaintiff could succeed in an action for defamation or trespass against either myself or the First Named Defendant.

43. In fact however, in light of the Plaintiff's opposition to my appointment, I have not sought to take possession of the Mortgaged Properties. The only step I took on foot of my appointment was to ask a Building Energy Rating [BER] consultant to

attend at the Mortgaged Properties for the purpose of surveying same. This step is a necessary pre-requisite to preparing a property for sale. However, the said consultant was not admitted to the Mortgaged Properties when he attended on 6 July 2017 and did not attempt to either force entry or insist on being admitted. He left without undertaking his survey.”

27. At para. 44, the second defendant avers that it is “very clear” that the plaintiff has no sustainable cause of action against either of the defendants.

28. The plaintiff swore an affidavit on 20 June 2018, ostensibly in reply to the second defendant’s affidavit. As it is relatively succinct, it is apposite to set out its contents in full, as follows:

“1) I say I have previously requested all documents held by Launceston Property Finance in relation to the Mortgage agreement between myself, the Plaintiff and Anglo Irish Bank. Documents specifically requested include; letters of offer, valuations for property undertaken on behalf of Anglo Irish Bank. Mortgage Deed signed by the Plaintiff and confirmation that the original would be available for inspection. Particulars of all payments made by our client in respect of all facilities with Anglo Irish Bank Corporation plc, particulars of all interest charges applied to the monies borrowed and how arrears were calculated. The documents requested are not documents to which Data Protection would be required as they are documents that would have been required by the Defendant to appoint a receiver.

2) Documents received from the Defendant on 6th June 2017 included: a copy of the signed mortgage agreement which was signed on the 18th of May 2000. A copy of the facility letter dated 29th September 2000 issued to the Plaintiff from

Anglo Irish Bank. This letter states total facilities available to the Plaintiff was IR£243,000.00.

- 3) I say, I still require the previously requested documents from Launceston Property Finance between myself, the Plaintiff and Anglo Irish Bank. It is imperative that I receive the particulars of all payments I the Plaintiff [have] made to Anglo Irish Bank and the particulars of all interest rates charged which were applied to the said monies; bring (sic) a total bill from IR£243,000.00 to €408, 643.61. I received said bill on the 27th of September 2017.
- 4) I say, I, the Plaintiff want to recover all undertakings given to Anglo Irish Bank in the year two thousand and two thousand and three by my previous solicitor. Again, the documents requested are not documents to which Data Protection would be required as they are documents that would have been required by the Defendant to appoint a receiver.
- 5) I further say that I have also lodged an official complaint with An Garda Síochána on the 22nd of January 2018 [regarding] serious misleading allegations contained in a sworn affidavit which was lodged in the Central Office on the 15th of January 2018 by my previous solicitor. We have also given an Garda Síochána a copy of the bill for €408,643.61 sent by Launceston Property Finance DAC on the 22nd of September 2017.
- 6) I request this Honourable Court to grant permission for this case to be heard by a jury.”

The hearing of the motions and the judgment of the High Court

29. Both the plaintiff’s motion to amend his statement of claim and add a third party, and the defendants’ motion to strike out the proceedings came on for hearing before the High Court in Cork on 25 July 2018. Previously, the plaintiff had sought a hearing date before

the end of Trinity term 2018 and, to this end, had consented to a hearing in Cork. The Judge had duly fixed 25 July 2018 as the hearing date. Subsequently, however, the plaintiff made two applications for an adjournment of the hearing scheduled for Cork, first at the callover (in Dublin) on 20 June 2018 and later by emails sent to the High Court registrar on 18 and 24 July 2018, the latter date being the eve of the scheduled hearing of the motions in Cork on 25 July 2018. The basis for the adjournment application on 20 June was that (a) the plaintiff had not been furnished with documents he was seeking and (b) he would not be in a position to drive to Cork. Save to say that documentation remained outstanding pursuant to his earlier request, the affidavit the plaintiff swore on 20 June 2018 did not set out any factual basis for the adjournment of the hearing scheduled for 25 July 2018.

30. As regards the second adjournment application, by email of 18 July 2018 to the High Court registrar, the plaintiff advised that he would not be in a position to attend court on 25 July 2018 and he requested that the hearing would be rearranged for the following week. On 24 July 2018 he emailed the registrar advising as follows:

“I had stated in the Court on the 20th of June that the 25th of July 2018 was not a suitable date for me for the motions to be heard. This was due to hospital and doctor’s appointments that had already been arranged prior to the 20th of June 2018.

Please note a letter from my doctor is available on request.”

31. As is evident from the High Court transcript for 20 June 2018, on 20 June the plaintiff had indicated only that he would not be available on 25 July 2018 and would not be in a position to drive to Cork; he did not say anything about hospital or doctors’ appointments, or that the reason for his unavailability to attend court on 25 July 2018 was because of medical reasons.

32. The plaintiff was not in attendance when the two motions came on for hearing on 25 July 2018. Both motions were duly dealt with by Noonan J. on that date. As the High Court transcript for 25 July 2018 shows, the Judge gave several reasons for proceeding with the hearing. First, he noted that the plaintiff had been refused an adjournment at the callover of cases on 20 June 2018. Secondly, the plaintiff had referred to his medical appointment for 25 July 2018 for the first time on the eve of the hearing (i.e. in his email of 24 July 2018 at 8.24pm) but had not furnished the court with any medical report to enable the court (and the defendants) to know the nature of his medical issue. Thirdly, the plaintiff had not made his application for an adjournment in person despite having been advised by the registrar a week previously that this was necessary. Fourthly, the Judge noted his own awareness that the plaintiff had appeared before him in separate litigation so was not unfamiliar with the court's procedures. As he expressed in the judgment under appeal, "no reason whatsoever exists as to the non-attendance of the plaintiff".

33. Having refused to adjourn the hearing, the Judge went on to rule that since the plaintiff was not present to prosecute his motion to amend his statement of claim, that motion would be struck out: the defendants were then free to proceed with their motion. Before dealing with the defendants' motion, the Judge rose to consider the papers in the matter.

34. Upon his return, the Judge addressed the defendants' motion to strike out the plaintiff's proceedings. Having recited the history of the proceedings to the point (28 March 2014) when the first defendant became the registered owner of the charges on the plaintiff's properties, the Judge went on to find that the first defendant was the registered owner of the charges and to that extent, the Land Registry folios were conclusive evidence of the first defendant's title to those charges. He noted that arising out of default on the terms of the loan, the first defendant made a demand for repayment on 25 April 2017, that

the sum demanded had not been discharged and that, accordingly, the first defendant, “as it was entitled to do under the terms of the mortgage deed, appointed the second defendant, Mr. Kavanagh, as a receiver over the properties in question on the 18th of May 2017 and Mr. Kavanagh has sworn the grounding affidavit in these proceedings and has exhibited all of the relevant documents including in relation to his appointment, which I am satisfied was a valid and lawfully made appointment.”

35. The Judge continued:

“Following [the second defendant’s] appointment, he made a demand for possession on the 19th of May 2017 of the relevant properties. But apart from making a demand for possession, no other step of any kind has been taken by [the second defendant] to actually recover possession of the properties. The only step he has taken is to appoint a building energy rating consultant to assess the property for the purposes of – obviously, ultimately, of a potential sale and that consultant ... and this is not contradicted, attended at the property on the 6th of July 2017, when he was refused admission. So that is the only act that has been taken by [the second defendant] to date and certainly, as I say, there has been no attempt at taking possession, or it would appear instituting any proceedings to recover possession. All of these matters are set out in considerable detail in the affidavit of [the second defendant].”

36. The Judge observed that the pleadings in the case brought by the plaintiff were obviously drafted by the plaintiff in his capacity as a litigant in person. While taking the affidavit sworn by the plaintiff on 21 August 2017 as his statement of claim, the Judge found that it did not in any sense comply with the RSC, nor did it amount to a verifying affidavit of a statement of claim which the plaintiff was required to swear in proceedings such as the present.

37. The Judge next addressed the allegations made by the plaintiff at para. 3 of his statement of claim that he had been defamed by the defendants. He noted that “no particulars of the defamation whatsoever are given”, stating:

“Insofar as it goes, the claim seems to be that because the defendants asserted a legal right to the plaintiff’s property which I can only assume relates to the demand for possession, that they defamed the defendant. Now, how that can be the case in circumstances where as I clearly held the appointment of [the second defendant] was valid and entirely lawful, it is impossible to discern any basis upon which that could be suggested to be a defamation of the plaintiff.”

38. In respect of the alleged serious financial loss caused to the plaintiff by the defendants’ alleged refusal to allow a new solicitor to represent the plaintiff, the Judge found this plea “entirely impenetrable in terms of what it is supposed to mean” particularly in circumstances where the defendants had not become involved in the matter until 2014 at the earliest. The Judge considered it a “mystery” as to how that could “conceivably amount to some sort of claim against the defendants”.

39. Insofar as fraud was pleaded by the plaintiff, the Judge found that there was “no detail, good bad or indifferent, or any remote hint even as to what the fraud is that the plaintiff is complaining about”.

40. In respect of the plea at para. 13 that the defendants trespassed on the plaintiff’s property and defamed him when they were in theft of his property, again, the Judge found this plea “totally unexplained, no particulars of any kind, good bad or indifferent are given”. He considered it “a manifest impossibility for the defendants to discern from [the statement of claim] what case, if any, is being made against them”. He observed that the defendants had delivered a detailed notice for particulars “in an effort to put some shape on what was being claimed against them” but that notice had been “entirely ignored” by the

plaintiff and that the defendants remained “entirely in the dark as to what the case is all about”.

41. The Judge went on to state:

“So this motion is brought by the defendants under a number of headings, and just in brief, I can summarise them as follows, there is a claim that the proceedings should be struck out under order 19 rule 28 on the basis that they disclosed no reasonable cause of action and then the alternative pleas that they [are] frivolous and vexatious, that they are bound to fail and also notably that, in terms of a claim for defamation, that the Court should make an order pursuant to section 34 subsection 2 of the Defamation Act 2009, on the basis that the statement, or in so far as one can discern it a statement, in respect of which the action was brought is not reasonably capable of being found to have a defamatory meaning”.

42. The Judge next addressed the plaintiff’s affidavit response of 20 June 2018 noting that it was a short affidavit and it really did not advance matters at all because it appears to be confined to assertions by the plaintiff that he had looked for certain documents which had not been forthcoming. He stated:

“How that is relevant to any of the issues that arise here is not clear to me, and [the plaintiff] seems to have some perceived complaint about ...dealings with Anglo Irish Bank, and there being some previous proceedings, as I say, this is quite devoid of detail and I cannot see what relevance that has to the case or...to the motion that I’m hearing today. But in any event, the key point is that none of the substantive averments made by [the second defendant] in his affidavit, to which I have referred are in any way controverted, denied or put in issue by the plaintiff.”

43. The Judge then proceeded to deal with “each of the purported causes of action” in the statement of claim. He stated:

“Dealing firstly with the issue of defamation which seems to be one of the...central pieces of the claim, the statement of claim on its face discloses no publication of any kind, which of course is an essential prerequisite for defamation, nor does it plead any fact which could be deemed to be defamatory of anybody, never mind the plaintiff. And of course, these are all absolutely essential prerequisites for the advancing of a claim for defamation. Claims for defamation have to be pleaded very clearly and carefully and must set out precisely the words complained of, that were alleged to be defamatory, and to whom when and in what circumstances the publication was made. All of these are entirely absent from the statement of claim in his case and it seems to me therefore that the statement of claim could not conceivably be regarded as disclosing a cause of action. Even if I were to stretch a point and suggest that it does disclose a cause of action, it seems to me that it is manifest from the affidavit of [the second defendant] that, insofar as the cause of action appears to arise from the suggestion that the defendants have demanded possession or even that they tried to take possession of the plaintiff’s property, even if any of that were true, the plaintiffs [sic] are lawfully entitled to take some steps, quite clearly under the terms of the mortgage deed, and under the terms of the valid appointment of [the second defendant]. So to that extent, even if it were not frivolous, vexatious and failing to disclose a cause of action, it is manifestly bound to fail in my view. And if all of that were not sufficient, I would be disposed to making a ruling that the statement under section 14 of the Defamation Act 2009, the statement in respect of which the action has been brought, insofar as there is any statement, but if there is a statement, it’s not reasonably capable of bearing the implication pleaded by the plaintiff... The Court must dismiss the action, and to the

extent that this is a claim in defamation, clearly on the basis of all the matters that I have [already] outlined, it must be dismissed”.

44. With regard to the allegation of trespass, the Judge found that nothing was pleaded that could conceivably give rise to a lawful claim for trespass, but insofar that there was any claim for trespass, “it is manifestly bound to fail on the evidence before the Court at present, which as I say, is quite uncontroverted by the [plaintiff], despite the fact that he has had that evidence in his possession now for some three or four months.”

45. The Judge found no conceivable basis upon which a claim of fraud could succeed.

46. Being satisfied that the case law was supportive of the defendants’ position he went on to state:

“[N]either in terms of any of the putative or potential causes of action pleaded either in defamation, trespass, fraud or anything else, has the plaintiff’s statement of claim either disclosed a cause of action or complied with the rules, or is capable of constituting any basis for permitting this case to proceed any further. I am also satisfied on the undisputed evidence that, irrespective of any of that, the case is bound to fail and is a frivolous and vexatious claim for all of the reasons I have already explained. Therefore, I am satisfied that the defendants have made out their claim for relief under the terms of the notice of motion and I therefore propose to dismiss ... the plaintiff’s claim on the basis I’ve already outlined.”

The appeal

47. The plaintiff’s ground of appeal as set out notice of appeal can be summarised as follows:

- (1) The Judge delivered judgment on 25 July 2018 in circumstances where:
 - the plaintiff was not in attendance to defend the strike out application;

- it had been made clear to the Judge that the plaintiff was unwell and would not be able to attend;
 - the proceedings had not been made pre-emptory against the plaintiff;
- (2) The Judge erred in law in striking out the proceedings in their entirety, thus preventing the plaintiff from receiving a fair trial, the plaintiff not having been given an opportunity to litigate his proceedings in full before the High Court.
- (3) The Judge erred in acting contrary to Article 6(1) of the European Convention on Human Rights in denying the plaintiff access to the courts and where the issue to be tried was determined in circumstances where the plaintiff was not afforded an opportunity to call evidence or fully litigate the matters in question.

The respondents' notice opposes the appeal in full.

The application to adduce further evidence

48. By notice of motion dated 3 June 2021, the plaintiff applied to this Court pursuant to O. 86, r. 4(a) RSC for an order permitting him to adduce new evidence as exhibited to his grounding affidavit sworn on 2 June 2021. Part of the new evidence sought to be adduced comprised copies of cheques and correspondence which the plaintiff claimed supported his claim that he had repaid Anglo to the tune of €253,000 by 14 May 2010, €210,000 of which, he avers, was discharged by the end of 2007. By Order of this Court (Costello J.) of 25 June 2021, the plaintiff was given liberty to adduce the evidence exhibited in his affidavit at the hearing of the appeal.

Discussion

49. As earlier referred to, when the appeal came on for hearing, the plaintiff was represented by solicitor and counsel. By and large, the plaintiff's counsel's oral submissions were directed to the argument that the Judge erred in acceding to the defendants' application to strike out the proceedings. The procedural unfairness grounds in

the notice of appeal, and as referred to in the plaintiff's written submissions, were not pursued. As acknowledged by counsel for the plaintiff at the outset of the hearing of the appeal, while the Judge struck out the plaintiff's motion to amend his pleadings because of his non-attendance in court on 25 July 2018 to prosecute his motion, the plaintiff's absence did not form part of the reasoning of the Judge when he acceded to the defendants' application to strike out the plaintiff's proceedings. As the High Court transcript makes clear, the plaintiff's proceedings were struck out following a consideration of the merits of the defendants' application, and the Judge being satisfied that there were sufficient grounds upon which to do so. Thus, while the plaintiff's notice of appeal and written submissions take issue with the fact that the hearing on 25 July 2018 proceeded in his absence, the Judge's entitlement, in all the circumstances of this case, to proceed with the hearing of the defendants' motion was not challenged at the hearing of the appeal. As the High Court transcript evidences, while the Judge did not consider, for the reasons he set out, that the plaintiff had any reasonable basis for his non-attendance on 25 July 2018, when it came to the motion to strike out the proceedings, notwithstanding the plaintiff's absence, the defendants were required to satisfy the Judge that they met the requisite threshold for the striking out of the plaintiff's claims.

50. The plaintiff takes issue with the Judge's decision to strike out his proceedings on a number of grounds. One of the arguments he advances is that before dismissing the proceedings, the Judge failed to consider whether same could have been saved by amendment thereof. Counsel for the plaintiff argues that the Judge failed to have regard to the plaintiff's affidavit evidence in respect of his motion to amend his statement of claim, and certain exhibits to the second defendant's affidavit grounding the application to strike out all of which, the plaintiff contends, contained information sufficient to save the proceedings from being struck out. This complaint will be addressed in due course.

51. In summary therefore, while both Orders made by the High Court on 25 July 2018 have been appealed, the reality is that if the plaintiff is not successful in overturning the Order striking out his proceedings for the reasons he advances (including that the Judge did not take account of relevant factors contained in the plaintiff's affidavit grounding his application to amend), then his appeal of the Order striking out his motion to amend his statement of claim and add a third party is effectively moot. The logical approach, therefore, is for the Court to firstly address the plaintiff's appeal of the Order striking out his proceedings (including the plaintiff's argument that the Judge ought to have had regard to, *inter alia*, his 29 January 2018 affidavit).

Jurisdiction to strike out proceedings

52. The High Court has jurisdiction to strike out proceedings either under O. 19, r. 28 RSC or pursuant to the inherent jurisdiction of the Court. It is clear from his ruling that the Judge invoked both jurisdictions in determining the defendants' application. It is thus necessary to consider the scope of both.

53. O. 19, r. 28 RSC provides:

“The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.”

As made clear by Costello J. in *Barry v. Buckley* [1981] IR 306, the court can only make an order under this rule where a pleading does not disclose a reasonable cause of action “*on its face.*”

54. Insofar as meaning of “frivolous or vexatious” for the purposes of Order 19, r. 28 is concerned, these words were explained by Irvine J. in *Fox v. McDonald* [2017] IECA 189:

“The word ‘frivolous’ when used in the context of O. 19, r. 28 is usually deployed to describe proceedings which the court feels compelled to terminate because their continued existence cannot be justified having regard to the relevant circumstances[...]Proceedings which are regularly struck out as ‘frivolous’ or ‘vexatious’ are proceedings clearly destined to cause irrevocable damage to a defendant, such as where a defendant is asked to defend the same claim for a second time or where a plaintiff seeks to avail of the scarce resources of the courts to hear a claim which has no prospect of success.”

In *Nowak v. Data Protection Commissioner* [2012] IEHC 449, Birmingham J. put it as follows, *“frivolous, in this context does not mean only foolish or silly, but rather a complaint that was futile, or misconceived or hopeless in the sense that it was incapable of achieving the desired outcome”*.

55. It is well established that in considering whether to dismiss proceedings as disclosing no cause of action under the provisions of O.19, r. 28, the court must accept the facts as asserted in the plaintiff's claim, since, if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings disclose a potentially valid claim. Hence, the court must take the facts asserted in the pleadings at their height and assume that they can be established in due course.

56. It also merits noting that O.19, r. 28 is only applicable where the Court is being asked to strike out the entire pleadings and not merely part of a pleading. (see Denham J. in *Aer Rianta cpt v. Ryanair Ltd* [2004] 1 I.R. 506)

57. As said by Birmingham J. in *J. O’N v. S. McD* [2013] IEHC 135, while the court is concerned in an application pursuant to O. 19, r. 28 with the form and contents of the pleadings, such an application will fail if the deficiency in the pleadings can be rectified by means of an amendment that will set out a good cause of action or defence. In the view of

Birmingham J., that rule has a particular relevance when pleadings have been drafted by a lay litigant. As he explained:

“Clearly, there can be no questions of a lay litigant being deprived of his right of access to the courts by reason of any lack of skill as a draftsman. It is also important to avoid a situation where the tone and style of the pleadings so grate on one that it leads to an assumption on the part of the reader that the pleadings are frivolous or vexatious.”

58. Here, when the within proceedings commenced, and indeed up to shortly before the hearing of the within appeal, the plaintiff was a lay litigant. Considerable emphasis was put by his counsel on this factor in his oral submissions to this Court.

59. I turn now to the inherent jurisdiction of the court to strike out proceedings. Unlike the position under O. 19, r.28, as stated by Costello J. in *Barry v. Buckley*, *“the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case.”*

60. The extent of the duty to accept the facts as asserted by a plaintiff on a motion for the court to exercise its inherent duty was discussed in *Salthill Properties v Royal Bank of Scotland plc* [2009] IEHC 207. There, Clarke J. did not accept that the courts were entirely prohibited from engaging in any analysis of the facts, saying:

“It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of order 19, the court must accept the facts as asserted in the plaintiff’s claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel... to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court....”

61. As noted by Costello J. in *Barry v. Buckley*, the purpose of the inherent jurisdiction is to ensure that an “*abuse of the process of the Courts does not take place.*” The onus of establishing an abuse of process rests with the defendant (see *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35 and *Sun Fat Chan v Osseous Ltd.* [1992] 1 IR 425).

62. The ‘bound to fail’ jurisprudence envisages the court taking necessary and proportionate action to protect its own processes for the purpose of ensuring access to the courts for litigants with genuine disputes, and to ensure that litigants are not subject to the time-consuming and expensive process of being asked to defend at trial those claims which are devoid of merit and therefore bound to fail. As Clarke J. stated in *Keohane v. Hynes* [2014] IESC 66, *[B]ringing a case which is bound to fail is an abuse of process*”. He went on to state that “*[i]f it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings*”.

63. As regards the difference between O.19, r.28 and the inherent jurisdiction to strike out, in *Moylist Construction v. Doheny* [2016] 2 IR 283, Clarke J. noted that an application under O.19, r. 28 is based on the contention that the case as pleaded does not disclose a cause of action, whereas the inherent jurisdiction set out in *Barry v. Buckley* extends to cases where it can be shown that there “*is no arguable basis in law and in fact for the claim made*”, his remarks highlighting the clear differences between the two jurisdictions. The differences were also explained by McMenamin J. in *Tracey v. Irish Times Ltd. & Ors* [2019] IESC 62 in the following terms, at para. 29:

“*...under O. 19, r. 28, a court may direct a stay or dismiss an action where a statement of claim fails to disclose a reasonable cause of action. Similar considerations may apply where what is pleaded does not amount to a defence. Additionally, proceedings may be struck out if they are frivolous or vexatious. (c.f. the discussion in Tracey v. McDowell, cited earlier). The inherent jurisdiction of the*

Court to strike out proceedings involves a somewhat broader scope of inquiry, which is not confined to the pleadings. The jurisdiction is to be exercised sparingly, and only in clear cases. If, having considered the case, a court is satisfied that a plaintiff's case must fail, then it is a proper exercise of its discretion to strike out or dismiss proceedings, the continued existence of which cannot be justified, and which may manifestly cause irrevocable damage to a defendant."

64. The case law makes clear that the court's inherent jurisdiction should not be invoked merely because the case brought by the plaintiff is very weak or where it is sought to have an early determination on some point of fact or law. As put by Birmingham J. in *J. O'N v. S. McD*:

"It is clear that the jurisdiction provided by O. 19, r. 28 and indeed the parallel jurisdiction to dismiss under the inherent jurisdiction of the court is not one to be exercised lightly. It is to be exercised only when the appropriateness of doing so is very clear".

65. This was echoed by Clarke J. in *Moylist*, when he said the jurisdiction to strike out proceedings as being bound to fail is to be "*sparingly exercised and only adopted where it is clear that the proceedings are bound to fail*". In summary, therefore, as the case law demonstrates, as a matter of course, either jurisdiction is to be exercised "*sparingly*" since the effect of striking out proceedings is to deprive a litigant of what would otherwise be a constitutional right of access to the courts.

66. However, while the courts have cautioned against the overuse of the inherent jurisdiction of the court to strike out proceedings as being bound to fail, as Clarke J. stated in *Moylist*:

"That is not, of course, to say that there will not be cases where the legal or documentary issues may be clear and straightforward such that it is safe for the court

to reach a conclusion on those questions on the hearing of a motion to dismiss. That is also not to say that the fact that a plaintiff may make a large number of points, each one of which is clearly unstateable, should not prevent a dismissal from being ordered. As Denham J. observed in a different context in Bula Ltd. v. Tara Mines Ltd. (No. 6) [2000] 4 I.R. 412 at p. 462, '[s]eventeen noughts are still nothing'." (at para. 21)

67. The burden of proof in applications to strike out proceedings lies with the party bringing the motion. As Clarke J. explained in *Salthill Properties*, "*the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail... the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established.*"

68. In relation to the standard of proof which must be satisfied by the defendant in an application to strike out, the position was summarised by Cregan J. in the High Court as follows in *Irish Bank Resolution Corporation Ltd. v. Purcell* [2016] 2 I.R. 83:

"The Court should not require a plaintiff to be in a position to show a prima facie case, merely a stateable case, in an application to strike out. (See Clarke J. in Salthill Properties Ltd v. Royal Bank of Scotland.)"

69. With the established case law (including the recent review of the relevant jurisprudence conducted by this Court in *Scotchstone Capital Fund Limited & Anor v. Ireland & Anor* [2022] IECA 23) in mind, I turn now to the arguments which the plaintiff advances in aid of his submission that the Judge erred in striking out the plaintiff's proceedings pursuant to O. 19, r. 28 RSC and/or the inherent jurisdiction of the court.

70. In the first instance, counsel for the plaintiff fairly accepted that it is difficult to glean what facts are set out in the affidavit sworn by the plaintiff on 21 August 2017 and which was accepted as constituting his statement of claim. That concession notwithstanding, counsel submits that given what was pleaded in the statement of claim, the margin of

latitude that was required to be given to the plaintiff as a lay litigant mandated the Judge to take the plaintiff's pleading at its height, namely that there was an attempt by the defendants on 6 July 2017 to take possession of his property. Counsel says that in failing to do so, the Judge erred in principle.

71. He further submits that while both the plaintiff's pleadings (such as they were) and affidavit evidence were light on detail, there was nonetheless information in other parts of the papers that were before the Judge which was sufficient to illuminate the plaintiff's case. He also says that albeit the language used by the plaintiff may have been wrong, his cause of action cannot be described as vexatious. Thus, according to counsel, the proceedings should not have been dismissed, particularly in circumstances where the plaintiff says that he had discharged the indebtedness arising on foot of the 29 September 2000 facility letter prior to the transfer by IBRC of the debt to the first defendant. Counsel says that the plaintiff's fundamental case is that he does not owe the money which the defendants claim is due to the first defendant.

72. In aid of his submissions, counsel points to the letter written by the plaintiff on 18 September 2013 to IBRC wherein he asserts, *inter alia*, that he borrowed money from Anglo in 2000, that a sale of the two properties developed by him on foot of the lending was duly activated and that arising therefrom monies (the amount of which the plaintiff was not aware) had been duly furnished to IBRC in permanent reduction of the loan. That letter goes on to say that "... the monies obtained for these properties should have been more than sufficient to cover the outstanding debts". It is contended that if the plaintiff's argument that he repaid the debt before the global deed of transfer is correct, then there was no transfer of the plaintiff's debt to the first defendant on 28 March 2014 and, hence, no basis for the defendants' actions on 6 July 2017. Counsel contends that the evidence supportive of the plaintiff's position was before the High Court on 25 July 2018 *via* the

exhibits to the second defendant's grounding affidavit which, *inter alia*, contained the plaintiff's letter of 18 September 2013.

73. The defendants' position is that they are entitled to clarity as regards the claims being advanced by the plaintiff, which, they say, is not there. They contend that the plaintiff's pleadings as they stand are fundamentally defective.

74. I accept the defendants' argument that the pleadings are fundamentally defective when one has regard to the plaintiff's statement of claim, encompassed as it is in the affidavit he swore on 21 August 2017. I have earlier recited the salient matters set out in that affidavit and which are said to ground the claims in defamation, trespass and fraud. However, as the Judge makes clear in his judgment, in order to plead any of the alleged torts of trespass, defamation and fraud, the plaintiff was required to plead the particular *events* which it is said constituted these torts. Here, the plaintiff has not pleaded what constituted the alleged defamation or whether there was publication of the alleged statement. It is only in his written submissions, by his reference to unnamed individuals having advised his son that they had a right to take possession of the plaintiff's property, that the plaintiff suggests publication: there is no such suggestion however in his pleadings or affidavit evidence. Nor did the plaintiff plead the meaning of the alleged defamation.

75. Similarly, in relation to the alleged trespass by the defendants, the tort is not adequately pleaded. The alleged trespass is not identified. There is no reference who it was of the defendants that came onto the plaintiff's lands, or what lands were the subject of the alleged trespass. There is no reference to how the trespass manifested itself. Again, it is only in the plaintiff's written submissions that there is a reference to an attempt to put chains and locks on a gate, a claim that is not in the pleadings or in the plaintiff's affidavit evidence. Similarly, no elements of the alleged fraud are pleaded or alluded to, either in the

affidavit taken as the statement of claim or in the plaintiff's replying affidavit to the motion to strike out.

76. Manifestly, in my view, for the reasons set out by the Judge, the plaintiff's pleadings (such as they are) *on their face* do not constitute a reasonable cause of action in trespass, defamation or fraud.

77. Even if it could be said that the plaintiff's pleadings as they presently stand disclose, at their height, a cause of action in defamation and/or trespass and/or fraud (albeit I do not find that that is the case for the reasons already set out), the gravamen of the plaintiff's complaint *vis a vis* the events of 6 July 2017 is that agents of the defendants, be they BER consultants or otherwise, turned up at his property and asserted that they were going to take possession of the property. The defendants contend that even if that were so, that cannot be a basis for the trespass, defamation and fraud alleged by the plaintiff in circumstances where the defendants' agents departed the property when confronted (as deposed to by the second defendant) and nothing further occurred thereafter. There is considerable force in this submission. As far as the alleged defamation is concerned, even taking at its height what is set out in the statement of claim, and what is deposed to in the plaintiff's affidavit of 29 January 2018 (namely that the plaintiff had "photographs of Staff from the Security Company who attempted to seize my Property without any Court Order"), as tantamount to an assertion by the defendants' agents that they were taking possession, that is no more than a statement of what the defendants and/or their agents believed as of 6 July 2017, namely that the first defendant had a right to appoint the second defendant as receiver on the basis that there was a debt in being that had not been discharged. With regard to the allegation of trespass (the claim which counsel for the plaintiff says especially should not be struck out), as I have earlier remarked, both the plaintiff's pleadings and his affidavit evidence fail to particularise who committed the act of trespass, what land was trespassed

on or what actions were alleged to constitute the trespass. There is nothing in the affidavit evidence presently before the Court to put flesh on the allegation of trespass. The paucity of evidence in respect of the fraud plea speaks for itself.

78. It was accepted by the defendants, following the oral submissions made on behalf of the plaintiff, that the gravamen of the plaintiff's dispute with the defendants is that the plaintiff says that the proceeds of certain properties sold by him in 2007 went to the first defendant's predecessors in title, IBRC, and that those proceeds ought to have been sufficient to discharge his indebtedness on foot of the 2000 loan agreement. That being so, the plaintiff contends that there is no basis upon which the second defendant could have been validly appointed as receiver over his properties. However, while that now appears to be the gravamen of the plaintiff's case, that is not the case the plaintiff advanced in the proceedings he commenced, as demonstrated above.

79. As his counsel acknowledged, the plaintiff's pleadings do not challenge the second defendant's appointment as receiver. Albeit this is so, counsel nevertheless points to the fact that on 22 June 2017, the plaintiff's then solicitors wrote to the solicitors for the defendants asserting, *inter alia*, that until receipt of certain documents which the plaintiff was seeking from the first defendant, the plaintiff was not accepting that the first defendant had any right or authority to appoint a receiver. Whilst acknowledging that the alleged invalidity of the second defendant's appointment was never advanced by the plaintiff in his pleadings or on affidavit, counsel for the plaintiff points to the fact that the plaintiff's solicitors' letter of 22 June 2017 was before the Judge as an exhibit to the second defendant's affidavit grounding the motion to strike out the proceedings. That being the case, counsel submits that it should not have been too much to expect that the Judge would have carefully perused the exhibits to the second defendant's grounding affidavit particularly when, in assessing the plaintiff's claim, the Judge was not only exercising the

jurisdiction pursuant to O. 19, r. 28 RSC but also his inherent jurisdiction. Counsel argues the Judge should have looked at what the plaintiff was in fact asserting *via* his correspondence, all of which was available to the Judge by way of exhibits to the affidavit sworn by the second defendant in the motion to strike out.

80. Thus, the argument the counsel advances is that the plaintiff's true claim against the defendants (namely that as he had discharged his indebtedness on foot of the facility letter of 29 September 2000, the second defendant's appointment as receiver over his lands was invalid) was evident to the court *via* the documents exhibited in second defendant's grounding affidavit and, accordingly, this should have been sufficient for the Judge to find that the proceedings should not be struck out. Counsel submits that in those circumstances, this Court cannot be satisfied or confident that no matter what may arise on discovery, or at the trial, the plaintiff's claim cannot succeed. He says that this is particularly so in circumstances where the plaintiff, in the affidavit he swore on 2 June 2021 in aid of his application to adduce further evidence before this Court, has now produced copies of the cheques said to have been furnished to IBRC in 2007 to clear his indebtedness, and which have not been contested by the defendants, and in circumstances where the defendants have not put before this Court any statement of account in respect of the alleged debt, save the bare reference to a sum of €404,257.55 which they say is due and owing. In all those circumstances, counsel requests the Court to apply the requisite proportionality test, which he says the exercise of the court's inherent jurisdiction demands, in order to save the plaintiff's proceedings and so as to avoid inevitable further proceedings being commenced by the plaintiff.

81. Notwithstanding what is now being advanced by the plaintiff, it remains the case that the defendants are presently the holders of a registered charge as provided for in the mortgage and they have the statutory/contractual power to appoint a receiver. Thus, if the

second defendant believed, as he obviously did, that he had been validly appointed by the first defendant, then he, his servants and agents had a lawful justification on 6 July 2018 for calling to the plaintiff's property and asserting that fact to the plaintiff or the plaintiff's servants or agents. Even if there is some legal infirmity in the second defendant's appointment (and I will return to the issue of his appointment as receiver shortly), that would not take from the truth of any statement of *purpose* as made by the second defendant's agents on 6 July 2018, although any infirmity in the second defendant's appointment as receiver may render future substantive action by the defendants against the plaintiff legally vulnerable.

82. In my view, the most significant factor, as far as the claims contained in the present proceedings are concerned, is that, as averred to by the second defendant (and which has not been controverted by the plaintiff on affidavit), on 6 July 2018 the second defendant's servants or agents did not try to take possession of the plaintiff's land and indeed departed the lands upon being asked to do so. In those circumstances, it is impossible to see how any trespass could have occurred. Furthermore, if the defendants' agents did go on to the plaintiff's lands on the date in question, they did no more than exercise the implied license of any lawful visitor to enter onto private property to speak to its owner. Having left when asked to do so, they could not then be said to have breached the scope of that implied license (see *Robson v. Hallett* [1967] 2 QB 939 (CA)).

83. While at para. 39 of his affidavit sworn on 2 June 2021 seeking to adduce new evidence, the plaintiff refers to two vans having arrived at his property and the drivers thereof being "imposing and predatory" this, of itself, does not contradict para. 43 of the second defendant's affidavit, in my view.

84. Moreover, as I have already adverted to, the allegations set out in the plaintiff's written submissions, namely that the defendants' servants or agents put chains and locks on

the plaintiff's gate, and made alleged defamatory statements to the plaintiff's son, have never previously been alleged either in the statement of claim or the affidavit the plaintiff swore on 20 June 2018. Nor was this alleged in the affidavit sworn by the plaintiff on 2 June 2021. Even allowing for the plaintiff's status as a lay litigant until shortly before the appeal hearing (including when he filed his written submissions), I consider that it would be unfair to the defendants if the Court were now to place weight on the allegations contained in the submissions, particularly given the opportunities which the plaintiff had to put his position prior to the hearing in the court below and of which he failed to avail (which is addressed below).

85. Even more significantly, in my view, is that at para. 43 of his affidavit, the second defendant sets out the extent of actions he has taken to date in respect of the plaintiff's alleged indebtedness. These actions comprise a demand for repayment and a request to a BER consultant to attend at the mortgaged property for the purposes of surveying same – a prerequisite to preparing the property for sale. These averments have not been contradicted by the plaintiff either in the affidavit he swore on 20 June 2018 or in the affidavit he swore in this Court on 2 June 2021.

86. Thus, the allegations the plaintiff makes in his written submissions are difficult to reconcile with the contents of para. 43 of the second defendant's grounding affidavit, where the second defendant makes clear that he has not sought to take possession of the plaintiff's properties and that the only step taken on foot of his appointment was to request a BER consultant to attend at the properties for the purpose of surveying same. The second defendant has said that the BER consultant was not admitted to the properties when he attended on 6 July 2017 and that he did not attempt to either force entry or insist on being admitted but rather left without undertaking his survey. Again, at the risk of

repetition, that averment has never been contradicted by the plaintiff, either in his replying affidavit or the affidavit he swore for this Court on 2 June 2021.

87. It also bears repeating that save for the letter of demand sent to the plaintiff in 2017 and the later instruction by the second defendant to a BER consultant to attend at the plaintiff's property, by the time this matter came before the High Court (and this Court), the defendants had not taken any other step in respect of the property. They had not sued the plaintiff for possession or brought any other claim seeking relief. Nor had they sued him for summary judgment for debt. Furthermore, the plaintiff himself had not sought to vacate the charge registered on his property or bring a claim for accounts or inquiries.

88. While I accept that there are references in the plaintiff's and his previous solicitors' correspondence with the first defendant's predecessor in title's solicitors (as exhibited by the second defendant's affidavit) that would appear, on the face of the correspondence, to be inconsistent with some of the contents of the second defendant's affidavit, I agree with the defendants that it would be unfair to the defendants for this Court to rely on the plaintiff's counsel's oral submissions as to the import of that correspondence in order to give support to the plaintiff's argument that the within proceedings as they stand should be allowed to continue. In my view, the Judge was not obliged to parse the exhibits to the second defendant's affidavit to the extent alleged by the plaintiff in the absence of any coherent case having been made in the pleadings, or the plaintiff's own affidavits, that the debt claimed by the first defendant was not due and thus the second defendant's appointment as receiver was invalid. Insofar as the plaintiff asserts that the second defendant's appointment was invalid on the basis that the plaintiff's indebtedness on foot of the 29 September 2000 facility letter had been discharged prior to that appointment, then, if that is in fact the case, that may well constitute a good cause of action for the

plaintiff, or be a defence available him if the defendants attempt to take substantive action against him by way of sale of the lands or otherwise.

Could an amendment save the proceedings as they stand?

89. Insofar as the plaintiff contends that his pleadings as framed are capable of amendment, and that there was material by way of exhibited correspondence before the Judge from which the necessary amendments could have been fashioned (and for those reason the proceedings should not have been struck out), I do not find force in that argument. While it may be, based on the case counsel for the plaintiff now makes before this Court, that the Court can anticipate an amendment that might save the proceedings from being struck out, in my view, that would not be a fair approach in all the circumstances of this case, particularly where the plaintiff's pleadings were so incoherent in the first place together with the fact that there has been no clear articulation by the plaintiff of what that amendment is to be, save the general contention that the second defendant's appointment as receiver was invalid by reason of the plaintiff's contention that he had discharged his indebtedness prior to the second defendant's appointment. I will return to this argument later.

90. I accept the defendants' counsel's submission that before the Court could decide that the proceedings as they stand ought to be saved, there would have to be clarity as to the exact nature of the amendments being proposed, and to which of the purported causes of action as presently pleaded the amendments are to apply. I am satisfied that that clarity is not available from anything the plaintiff has put before the Court either by way of the pleadings and affidavits that were before the High Court, or by way of the affidavit the plaintiff swore for the purposes of his application to this Court to adduce further evidence. There most certainly was not any such clarity in any of the material that was before the High Court. The question also arises as to whether the plaintiff's claim as to the invalidity

of the second defendant's appointment is intended to save the defamation and fraud claims as presently pleaded as well as the alleged trespass claim in circumstances where the plaintiff's counsel (to his credit) very candidly indicated, in his oral submissions, that he would advise the plaintiff to back away from the pleas of defamation and fraud.

91. Overall, I accept the defendants' counsel's argument that it is not for this Court to try and identify amendments that might conceivably save the proceedings as they stand in circumstances where no amendments have been put before the Court, either by way of the plaintiff's 29 January 2018 affidavit grounding his application to amend his statement of claim or otherwise. As said by Haughton J. writing for this Court in *Fulham v. Chadwicks Limited & Ors* [2021] IECA 72 after reviewing the relevant caselaw, the exercise of the jurisdiction to permit an amendment to 'save the action' required that "*the claimant or his/her lawyers will usually be required to intimate an intention to amend, or at least the general nature of the amendment suggested in response to the motion to dismiss*". In my view, that (relatively) low threshold has not been met here. Unlike the position in *Greally v. Havbell DAC Limited & Ors*, [2021] IEHC 637, nothing has been put by the plaintiff by way of a proposed amendment from which the Court could conceivably extract a basis for saving any of the pleas as presently set out in the statement of claim. I note that in *Greally v. Havbell*, a draft amended statement of claim was put before the court which, to some extent at least, was accepted by the court as a basis for not striking out the proceedings against the first defendant in that case.

92. In concluding that none of the material or factors to which the plaintiff's counsel points are capable of being seen as an amendment such as would save the proceedings from being struck out, I have taken account of the fact that the plaintiff was a lay litigant when he commenced his proceedings and that he did in fact issue a motion to amend his statement of claim and which was grounded on the affidavit he swore on 29 January 2018.

It will be recalled that that motion was struck out by the Judge on 25 July 2018 by reason of the plaintiff's non-attendance. Counsel for the plaintiff really does not take issue with that decision save to say that in the context of assessing the defendants' motion to strike out the proceedings, the Judge should have had regard to the contents of the plaintiff's affidavit of 29 January 2018 grounding the motion to amend in order to see if the intended amendment application could save the proceedings.

93. In order to see if there is any force in this argument, it is necessary to consider what the plaintiff deposed to in that affidavit. At para. 2 thereof, all that the plaintiff avers to is that he had "photographs of Staff from the Security Company who attempted to seize my Property without any Court Order". This, counsel contends, was sufficient to contradict the second defendant's assertion that it was a BER consultant that attended the property on 6 July 2017. He thus says that the Judge was wrong to conclude that the plaintiff had not disputed the second defendant's assertion that it was a BER consultant who had attended the property on 6 July 2017. He contends that the Judge's finding of fact that it was a BER consultant who attended at the lands on 6 July 2017 was in error in circumstances where the Judge was required, for the purposes of O. 19, r. 28 RSC, to take the facts referred to at para. 3 of the statement of claim at their height, and, for the purposes of his inherent jurisdiction, to take account of the plaintiff's affidavit evidence. He submits that while trespass may have been inadequately pleaded, the pleadings could have been rescued had the Judge adverted to the matters set out in the plaintiff's affidavit sworn 29 January 2018.

94. It will be recalled that para. 3 of the plaintiff's pleadings asserts that "I say that the Plaintiff has been defamed by the Defendants due to the fact that they did not have any Legal Right to trespass on my property on July 6th 2017 when they stated they were taking possession of my properties..." To my mind, however, even taking that pleading at its

height and even accepting for present purposes that the Judge ought to have had regard to the plaintiff's affidavit, there is nothing at all said in that affidavit that could be reasonably be considered as giving coherency to the plaintiff's pleading. Effectively, the High Court lacked the requisite narratives (as might have been set out by the plaintiff in the pleadings or on affidavit) from which to frame an appropriate amendment.

95. I would also add that a feature of the present case is the plaintiff's failure to engage with the defendants' complaint that he has failed to adequately particularise the allegations of defamation, trespass and fraud which form the grounds on which he brought the defendants to court. I note that prior to the hearing in the court below, the plaintiff had at least two opportunities to mend his hand. First, he could have furnished replies to the defendants' notice for particulars dated 4 December 2017. Secondly, he could have responded to the averments contained in the affidavit of the second defendant sworn on 9 April 2018 grounding the application to strike out the proceedings. It cannot be said that the replying affidavit the plaintiff swore on 20 June 2018 addressed or took issue with the second defendant's affidavit such that it might have been possible for the High Court to extrapolate from his replying affidavit the case he now seeks to make *via* his written submissions and his counsel's oral submissions in this Court.

96. Alternatively, upon receipt of the defendants' motion to strike out his proceedings, the plaintiff could have brought a new application to amend his proceedings or sought to supplement his affidavit evidence grounding his 29 January 2018 motion to amend, in order to remedy the deficiencies in his pleadings which had been pointed out by the second defendant in his affidavit sworn on 9 April 2018. Yet, the plaintiff did none of those things.

The plaintiff's claim that the debt has been discharged

97. The plaintiff has now made clear, *via* his counsel's oral submissions to this Court, that the essential dispute between him and the defendants relates to his contention that the

debt on foot of the 2000 lending has been discharged. For the reasons already set out, I do not consider that the within proceedings can be saved by virtue of the case now being advanced on behalf of the plaintiff in this regard. In my view, what is being mooted by the plaintiff constitutes, in effect, a cause of action which does not relate to the events of 6 July 2017 (whatever those events might have been) as presently framed by the plaintiff and said to constitute the basis of the plaintiff's claims of trespass, defamation and fraud on the part of the defendants. Again, for the reasons set out above, the Judge did not err in striking out those claims pursuant to O.19, r.28 and his inherent jurisdiction.

98. What is now being advanced by the plaintiff amounts, in effect, to a new cause of action against the defendants regarding the charges registered on the plaintiff's property and the appointment of the second defendant, events which *predate* the alleged events of 6 July 2017. I note that counsel for the plaintiff takes issue with the Judge's finding that the second defendant's appointment as receiver was lawful and valid. He submits that the Judge gave no reasons for his finding.

99. At most, what the Judge found was that the second defendant had good *prima facie* grounds for asserting that he was validly appointed as receiver over the plaintiff's properties. In my view, however, notwithstanding the absence of any challenge by the plaintiff to the appointment of the second defendant in the within proceedings, the Judge's finding that the second defendant was validly appointed, cannot debar any future challenge the plaintiff may make to any future exercise by the second defendant of his powers as receiver in respect of the charged lands, be that by way of sale of the lands or otherwise. This is in circumstances where the plaintiff claims that his indebtedness on foot of the 2000 lending was discharged as early as May 2010, where he thus queries how a claim for €404,257.55 could arise, and where he says he has not been provided with a statement of account. If the plaintiff is correct in his contention that the debt due to the first defendant

has been discharged, the plaintiff has *at the very least* stateable grounds for challenging the validity of the second defendant's appointment. Of course, this Court cannot speculate as to whether the plaintiff may potentially have a good claim against the defendants on the basis that the first defendant is wrongly registered as the holder of the charge on the plaintiff's properties, or whether the plaintiff has potentially a good defence against any proceedings the defendants may choose to bring against him on foot of his alleged indebtedness.

100. As far as the plaintiff's contention that he was not provided with a statement of account is concerned, I note that counsel for the defendants had no explanation as to why a statement of account was not furnished to the plaintiff and, indeed, he acknowledged that it would have been better had the plaintiff been provided with such a statement. To my mind, it behoves the defendants to furnish the plaintiff with a statement of account so that he can see the basis upon which the defendants claim there are monies due and owing and the basis upon which the first defendant appointed the second defendant as receiver.

101. It may well be that the provision of such a statement will not be dispositive of the issue that is now between the parties, namely, the plaintiff's claim that monies which were furnished to the first defendant's predecessor in title from the sale of certain properties by the plaintiff were sufficient to clear his indebtedness. However, the provision of such statement of account will, at least, make clear to the plaintiff the basis upon which the defendants claim that a sum of €404,257.55 remains due and owing and why the first defendant saw fit to appoint the second defendant as receiver. Furthermore, the provision of a comprehensive statement of account might also serve as a prelude to a mediation between the parties from which, this Court believes, both parties might benefit.

Summary

102. In all the circumstances of this case, and for the reasons set out above, I am satisfied that the Judge properly addressed the defendants' application to strike out the plaintiff's statement of claim, both pursuant to O.19, r. 28 and the inherent jurisdiction of the court, the requirements of both tests having been met by the defendants in the instant case. I am also satisfied, again for the reasons earlier set out, that by the manner in which he proceeded to consider the defendants' motion, the Judge acted fairly and proportionately, and that his approach satisfied the requirements set out in *Tracey v. Minister for Justice & Law Reform* [2018] IESC 45 and *Tracey v. Irish Times* [2019] IESC 62.

103. For the reasons set out above, I would dismiss the appeal on all grounds.

Costs

104. The plaintiff has not succeeded on any of the grounds in the appeal. It follows that the defendants should be awarded their costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 21 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 21-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

105. As this judgment is being delivered electronically, Barniville P. and Ní Raifeartaigh J. have indicated their agreement therewith and with the orders I have proposed.