THE HIGH COURT

[2022] IEHC 596

Record No. 2019 /7384 P

BETWEEN

BRIAN CROWLEY

PLAINTIFF

AND

IRELAND, THE ATTORNEY GENERAL AND THE COUNTY REGISTRAR OF WICKLOW AND THE GARDA COMMISSIONER AND ANDREW BRADY AND ALAN CAULFIELD AND JAMES PHIBBS AND BANK OF SCOTLAND PLC AND CLODAGH BUCKLEY AND IVOR FITZPATRICK SOLICITORS AND START MORTGAGES DAC AND ELAINE DE COURCEY AND THE LORD ADVOCATE OF SCOTLAND

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on the 27th day of October, 2022.

Introduction

1. These proceedings arise out of the execution of a possession order issued in respect of the plaintiff's family home. There were a number of irregularities in the renewal by the fourth defendant ("the County Registrar") of an execution order which had previously lapsed, and to which I will refer in more detail below, and on the basis of those irregularities, the plaintiff makes a large number of claims against a variety of defendants.

2. It should be noted that the plaintiff is no longer proceeding against the Lord Advocate of Scotland and no relief is sought against him. Had the plaintiff attempted to sue the Lord Advocate, I would have struck it out with costs against the plaintiff as any such action would be doomed to fail for lack of jurisdiction.

3. As regards the remaining defendants, while the first seven defendants ("the State parties") have joint representation through the Office of the Chief State Solicitor, different issues arise in relation to: first, Ireland and the Attorney General; secondly, the County Registrar; thirdly, Sergeant Andrew Brady, who is accused by the plaintiff of assaulting him; and fourthly, Garda Alan Caulfield and Inspector James Phibbs, who were the Gardaí involved in prosecuting the plaintiff for the offence of criminal damage.

4. The eighth defendant ("Bank of Scotland") was the former owner of the plaintiff's mortgages and loan facilities but had, by the date of the relevant events, transferred that interest to the eleventh named defendant ("Start Mortgages"). The twelfth named defendant, Ms. De Courcey, though a qualified solicitor, did not act as such in relation to the matters complained of but was, at the material time, Company Secretary of Start Mortgages.

5. The tenth defendant ("Ivor Fitzpatrick") is the firm of solicitors who apparently acted originally for Bank of Scotland and subsequently for Start Mortgages. The ninth defendant was apparently, at the material time, a solicitor employed by Ivor Fitzpatrick and not a partner. There has been no satisfactory explanation of why she has been sued for steps taken by her in the course of her employment.

Factual background

6. The background to the relevant facts is that by way of loan facility letter dated 29 April 2004, and accepted by the plaintiff and his wife, Ms. Karen Crowley, on 30 April 2004, Bank of Scotland granted a loan facility to the plaintiff and his wife pursuant to the terms and

conditions set out in a leaflet dated 27 August 1999, which were incorporated into that loan facility. Part of the security offered by the plaintiff and his wife in support of that loan facility was a mortgage over their family home at 9 Woodbrook Downs, Bray, County Wicklow ("the Premises"), in relation to which they executed an all sums due mortgage dated 5 November 2004 in favour of Bank of Scotland.

7. A further loan facility letter dated 18 May 2005, was accepted by the plaintiff and his wife on 23 May 2005. A third facility letter dated 19 January 2006 was accepted by the plaintiff and his wife on 24 January 2006. Both of these additional advances were arranged by Bank of Scotland Ireland but secured by the all sums due mortgage already granted to Bank of Scotland.

8. As a result, only Bank of Scotland ever held a mortgage over the Premises. While various reliefs were originally sought in relation to the alleged failure of the European Communities (Cross Border Mergers) Regulations, S.I. 157 of 2008, to give effect to Council Directive 2005/56/EC in Irish law, these were at all times irrelevant. The Plaintiff has recognised this, and all reliefs relating to the merger of Bank of Scotland Ireland with Bank of Scotland were abandoned either prior to or at the outset of the hearing of these applications. That disposes of paras. 8, 9, 10, 17, 18, 19 and 20 of the plenary summons, and paras. 6, 7, 8, 9a, 10, 10a, 10b, 10c, 11 (a), 17, 18, 19, 20 (together with all of its sub paras) and 26a of the statement of claim.

9. Ultimately, by reasons of the arrears due on foot of the various loan facilities advanced to the plaintiff and his wife, Bank of Scotland instituted possession proceedings against them. On 9 July 2012, an order for possession of the Premises, with a stay for six months, was granted by the County Registrar in favour of Bank of Scotland against the plaintiff and his wife.

10. That order records that it was granted by consent, a fact disputed by the plaintiff and his wife, but they do not dispute that their solicitors informed the County Registrar that it was on consent. As a result, the plaintiff's wife is suing the plaintiff's former solicitors (in proceedings bearing record number 2018/6133P) for negligence, but the alleged lack of consent does not affect these proceedings as the order has never been appealed or set aside. Accordingly, the order stands as a valid order for possession of the Premises.

11. On 23 January 2013, Bank of Scotland applied for an execution order for possession which was granted. Repossession was due to occur on 21 May 2013, but execution was cancelled due to the agreement for a schedule of repayments made between the plaintiff and Bank of Scotland. The plaintiff failed to meet his obligations under that agreement, and a fresh application for an execution order was made in September 2013. Payments by the plaintiff and his wife then recommenced and continued from September 2013 to December 2015.

12. The events giving rise to these proceedings concern the order to renew the execution order which was made by the County Registrar on 16 May 2016. It is common case that there were two irregularities attaching to the issue of that execution order, while the plaintiff alleges a third irregularity which is disputed by the defendants.

13. As regards the first of the two irregularities, Bank of Scotland was still named on the execution order even though it had, with effect from 20 February 2015, assigned its rights against the plaintiff and his wife to Start Mortgages.

14. Secondly, the application was grounded on an affidavit of Ms. Clodagh Buckley, a solicitor employed with Ivor Fitzpatrick, sworn 13 April 2016. However, the jurat of that affidavit was materially defective because the Commissioner for Oaths signed the jurat even though it referred to a third party, and not Ms. Buckley. The result was that the Commissioner did not *"certify in the jurat that either he himself knows the deponent or*

knows some person named in the jurat who certifies his knowledge of the deponent", as required by O. 25, r. 5 (b) of the Rules of the Circuit Court. In fact, the Commissioner certified in the jurat that he knew another person, not the deponent.

15. However, O. 25, r. 8 of the Rules of the Circuit Court provides:

> *"The Judge may receive any affidavit sworn for the purpose of being used in any action or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and in that event direct a memorandum to be made on the document that it has been so received."*

The County Registrar could therefore have recorded her decision to receive the affidavit notwithstanding the defect in the jurat but on the copy I have seen, there is no such memorandum. I therefore assume for the purposes solely of this application, either that she did not notice the defect in the affidavit or that she failed to record her decision to admit it, notwithstanding the irregularity in the jurat and that the affidavit was therefore not admissible.

16. In addition, the plaintiff submits that he should have been notified of the application to renew the execution order, and sought to rely on the law relating to O. 42, r. 20 of the Rules of the Superior Courts and on *Carlisle Mortgages v. Canty* [2013] IEHC 552, for the proposition that such an application should be on notice. It is not necessary to consider the applicability of the law relating to the equivalent provisions of the Rules of the Superior Courts as I have found the issues capable of resolution by reference to the provisions of O. 36 of the Rules of the Circuit Court. I will refer to this in more detail below when I consider the application of the County Registrar to dismiss the proceedings against her.

17. In any event, the Premises were repossessed on foot of the renewed execution order on 1 November 2016. The plaintiff takes serious issue with this, given that both the

possession order and the execution order were in the name of Bank of Scotland, even though title to the mortgage had passed to Start Mortgages nearly two years previously.

18. On 10 November 2016, the plaintiff says that he went to the local garda station where he spoke to the duty sergeant, Andrew Brady, at approximately 2pm and informed him that he was going to re-enter the Premises. He makes it clear on affidavit that he did this because he had identified deficiencies in the orders on foot of which possession had been taken by Start Mortgages.

19. He then sought to re-enter the Premises using an angle grinder to break through both a gate and a steel door, which he says had been placed there by an agent of Start Mortgages. Sergeant Brady arrested him for the offence of criminal damage contrary to s. 2 (1) of the Criminal Damage Act, 1991, and remanded the plaintiff in custody overnight. He was brought to Bray District Court the following day and was then released on bail. Ultimately, he was remanded from time to time for a period of 27 months.

20. The last listing of those criminal proceedings was on 15 March 2019. It appears that a disclosure order had been made by the District Judge which seems not to have been complied with, though the affidavits are not particularly clear on this. In any event, it appears to have been only on 14 March 2019, at 5.30pm, that Garda Alan Caulfield, who was prosecuting the offence, took a written statement from Ms. De Courcey, the Secretary of Start Mortgages, in relation to the offence. This was sent to Inspector James Phibbs at 7.31pm that evening, and to the plaintiff's solicitor the following morning as, somewhat unsurprisingly, by the time the statement had been procured, it could not be passed to him on the same day as it was well after close of business.

21. On 15 March 2019, the District Judge struck out the criminal charge on the basis of the delay in the prosecution.

22. It is against that factual background that I now turn to consider the applications of the first to twelfth defendants to strike out these proceedings on the basis that they are frivolous and/or vexatious and/or fail to disclose a cause of action. In each case**,** the application was moved both on the basis of O. 19, r. 28 and pursuant to the inherent jurisdiction of the court. Nevertheless, the State parties and the Bank of Scotland moved their respective applications on the basis that it was more appropriate to deal with the applications pursuant to the inherent jurisdiction of the court, which, as is well-established, allows for a limited consideration of affidavit evidence in order to assess whether, even if the pleadings disclose a cause of action, there is any factual basis for it. Where there is clearly no credible basis for the claim, the proceedings can be struck out as an abuse of process or as being frivolous and vexatious, but the threshold for success in such an application is high.

23. As a preliminary matter, it should be noted that Ireland and the Attorney General were primarily sued because of alleged non-compliance of the Irish regulations with the Directive to which they were to give effect, but as those issues have been abandoned, it is not now clear why the State or the Attorney General should remain as parties to the proceedings. There would appear to be no independent cause of action against these defendants unless the case against the County Registrar is allowed to proceed. I will therefore consider the position of Ireland and the Attorney General as being determined by the outcome of the application by the County Registrar.

24. Before considering the substantive applications of the various defendants, I should point out that the plenary summons, statement of claim and amended statement of claim are all drafted so as to assert as many causes of action, frequently without any particularisation, against as many defendants as possible. The worst example of this is para. 26 of the Amended Statement of Claim (which I stress was drafted by the plaintiff before the involvement of his solicitors and counsel), in which it is pleaded:

> *"Damages as against all Defendants for Fraudulent Misrepresentation, Negligent Misrepresentation, Damage to the Family Dwelling of the Plaintiff, Unlawful Arrest and Imprisonment, Assault, Stress, Defamation, denial of the right to Fair Procedures and due process under Article 6 of the Convention, further associated actions carried out by the Defendants in contravention of Article 40.5 of the Constitution, Article 40.1 of the Constitution, Article 29.1 of the Constitution, Article 29.3 of the Constitution, Article 29.4.6 of the Constitution, Article 40.3.1. of the Constitution, Article 40.3.2 of the Constitution, Article 40.4 of the Constitution, and further associated actions carried out in contravention of Article 41 of the E.U. Charter of Fundamental Rights."*

Needless to say, a pleading of this kind is the antithesis of what is required, as pleadings are intended to identify, rather than obscure, the issues in the case.

25. As a result, at the hearing of the applications I asked counsel for the plaintiff to identify, as against each defendant, the causes of action actually relied on. No restriction of any kind was placed on the plaintiff in setting out the causes of action said to be asserted as against each defendant. I am considering the applications by reference to whether the causes of action identified on behalf of the plaintiff at the hearing as being relevant to each defendant, save for an additional issue to which I will refer when dealing with the applications of Bank of Scotland and Start Mortgages.

Application of the County Registrar

26. The essential facts of the plaintiff's complaints against the County Registrar are set out above. It is said that this defendant admitted an affidavit which was inadmissible on its face, that she renewed the execution order in favour of Bank of Scotland at a time when that

bank was no longer the person entitled to possession, and that she failed to ensure that the plaintiff was on notice of the application to renew.

27. I think it is evident from the copy of the affidavit which was before the County Registrar that it was defective on its face for the reasons stated above and should not have been admitted, unless its admission was recorded on the face of the affidavit in accordance with O. 25, r. 8 of the Rules of the Circuit Court.

28. Order 36 of the Rules of the Circuit Court deals with the execution of orders and provides in r. 3 that *"an execution order for possession shall not be issued by the County Registrar without evidence (by affidavit or declaration) of service of the order and disobedience thereto."*

29. Rule 9 provides:

> *"Every decree of the Court, and every judgment in default of appearance or defence, shall be in full force and effect for a period of twelve years from the date thereof, and an execution order based on any such decree or judgment may be issued in the Office within the said period, but not after the expiration of six years from the date of such decree or judgment without leave of the Court. An application for such leave shall be made by motion on notice to the party sought to be made liable."*

That rule governs the effect of the possession order granted in 2012 and the application for an execution order which was made in 2013.

30. However, the order for possession was granted to Bank of Scotland prior to the mortgage being assigned to Start Mortgages with effect from 20 February 2015. It therefore appears that O. 36, r. 10 was the rule governing any application made by or on behalf of Start Mortgage to renew the execution order. This provides:

> *"If, at any time during the period of twelve years, any change has taken place, by death, assignment or otherwise, in the parties entitled or liable to execution, the party*

claiming to be so entitled may apply to the Court on notice for leave to issue execution, and the original decree or judgment may be amended so as to give effect to any order made by the Court on the application." [Emphasis added.]

That seems to provide quite clearly that possession the order should have been the subject of an application by Start Mortgages to amend the possession order so as to name Start Mortgages as plaintiff, thereby amending it so as to grant possession to Start Mortgages. It is clear that this was never done.

31. Instead, the matter was dealt with on the basis that Start Mortgages could simply step into the shoes of Bank of Scotland without making any application to obtain an order in their own name. As the original execution order granted to Bank of Scotland had lapsed, the matter was dealt with as if Bank of Scotland remained entitled to possession and an order simply to renew the execution order previously granted to Bank of Scotland was made. This is governed by rr. 13 and 14. Rule 13 provides:

"An execution order may, on the application of the party entitled thereto, be renewed in the Office at any time during the currency of the decree or judgment in respect of which it was originally issued for the period of not more than one year from the date of such renewal, provided that the said decree or judgment be in full force and effect for the period for which the said execution order is so renewed."

32. Rule 14 provides:

"A person seeking renewal of an order for execution shall make and file an affidavit averring that he is entitled to such renewal and setting out all credits, if any, to which the person liable to such execution is entitled and, where the judgment, decree or order sought to be enforced is for payment of money, the amount then due on foot thereof."

33. The possession order was granted on 8 July 2012, and the original execution order was dated 23 January 2013. It appears that, in this case, even though the entitlement to execute the order had passed to Start Mortgages on 20 February 2015, the application was made by way of an affidavit sworn 13 April 2016, which still referred to Bank of Scotland as the plaintiff. As I think is evident from r. 10, there should have been an application by Start Mortgages to the County Registrar on notice for leave to issue execution against the plaintiff and, if the County Registrar was satisfied as to title to the mortgagee's rights and therefore to possession on foot of the Deed of Mortgage, then the original possession order should have been amended to refer to Start Mortgages. That did not happen.

34. I have no evidence as to what the County Registrar was told about the assignment of the loans and security. I was told at the hearing that the application may have been done in the office, which I think is probably correct given the procedure in O. 36, r. 13, which refers to certain applications for renewal being entered in the office. If the County Registrar was not told that the person entitled to enforce the security was now Start Mortgages, she could not have known that it was inappropriate to renew the execution order without amending the order for possession. The only relevant document that has been put in evidence in these applications is the affidavit of Ms. Buckley, in which she avers that she is acting for the plaintiff which, by reference to the title to the proceedings as set out in the affidavit, is Bank of Scotland. There is simply nothing on the face of the affidavit or the execution order which would alert the County Registrar to the fact that Bank of Scotland had assigned their right to possession.

35. I do not see, therefore, how the County Registrar could have known that the security had transferred, that the order for possession was in fact being enforced by Start Mortgages, and that application for amendment on notice to the plaintiff was required.

36. It should be noted that the application made to the County Registrar was one made pursuant to O. 36, r. 13, and O. 18, r. 1 (xxviia) of the Rules of the Circuit Court to renew the execution order. There is no doubt that the County Registrar had jurisdiction to make an order renewing an execution order, the only question is as to the validity of what was done in this case. It seems that the application was in fact moved by Ivor Fitzpatrick on behalf of Start Mortgages but on the basis of the wrong rule. But, in fact, I have no evidence from Ivor Fitzpatrick as to the procedure they invoked, the documents they filed, or as to whether it was Bank of Scotland or Start Mortgages who instructed them to make the application to renew the execution order.

37. The material point, so far as the County Registrar is concerned, is that the affidavit of Ms. Buckley of 12 April 2016 quite clearly states that Ivor Fitzpatrick acts for the plaintiff, who is identified in the title of the affidavit as Bank of Scotland, and that she makes her affidavit on behalf of the plaintiff, i.e., Bank of Scotland. Indeed, there is no reference whatsoever in the affidavit to Start Mortgages or the assignment of the Plaintiff's loans and securities and therefore of the assignment of the benefit of the possession order.

38. It is also common case that the affidavit sworn by Ms. Buckley was defective because the Commissioner for Oaths did not, in the jurat, refer to the correct deponent and the County Registrar did not record on the fact of the affidavit her decision to admit it notwithstanding this irregularity. As an affidavit is required by O. 36, r. 14 when an order for execution is being renewed, the application was defective and therefore should not have been granted.

39. The plaintiff has, therefore, established that there were three deficiencies in the issue of the order renewing the execution order.

40. The question in these proceedings, however, is whether the County Registrar is liable to the plaintiff for any of this.

41. Counsel for the plaintiff identified negligence and misrepresentation as the causes of action relied upon against the County Registrar, and there was also a general reference to the putting on oath of information which was inaccurate by parties integral to the proceedings. Counsel also placed reliance on the fact that the County Registrar had allowed the proceedings to take place without notice to the plaintiff.

42. In my view, no cause of action can be maintained against the County Registrar. It is clear from *Beatty v. Rent Tribunal* [2006] 2 I.R. 191, in which Geoghegan J. gave the majority judgment (and Hardiman J. concurring) that, at common law, a statutory tribunal is immune from action in negligence. Geoghegan J. stated (at para. 7):

> *"I am quite satisfied that provided it is purporting to act bona fide within its jurisdiction it enjoys an immunity from an action in ordinary negligence. … In this respect it is in no different position from a court whether such court be traditionally categorised as 'superior' or 'inferior'."*

This was the case, unless the statute establishing the tribunal provided otherwise, so as to remove the common law immunity. Geoghegan J. cited with approval the judgment of Lord Kilbrandon in *Arenson* [1977] A.C. 405 at 431, where he stated:

> "*The judge has no bargain with the parties before him. He pledges them no skills. His duties are to the state: it is to the state[sic] that the superior judge at least promises that he will do justice between all parties, and behave towards them as a judge should."*

43. Geoghegan J. also cited the *dictum* of Lord Denning M.R. in *Sirros v. Moore* [1975] Q.B. 118, where he stated:

> *"The orders which [a judge] gives… cannot be made the subject of civil proceedings against him."*

As explained by Lord Denning and approved by Geoghegan J., the reason for this common law immunity is *"so that [the judge] should be able to do his duty with complete independence and free from fear"*.

44. It was clear from that judgment, in my view, that it is applicable not just to the Superior Courts, but to all courts, coroners, and statutory tribunals of every kind, unless the common law immunity is removed by statute. The County Registrar is obviously the beneficiary of the same common law immunity and is therefore not liable to be sued in negligence or misrepresentation by anybody effected by the orders.

45. It must be stressed that this does not leave any litigant who is dissatisfied with the process before a County Registrar without a remedy, as he or she can always appeal to the Circuit judge against the order. That remedy was available to the plaintiff in this instance, but he did not avail of it.

46. It was stated at the hearing of the applications to dismiss that, by the time the plaintiff found out about the renewed execution order, he was out of time to judicially review or appeal it. That may be so, but there is ample jurisdiction for the extension of time for any judicial review or appeal on good and sufficient reason being shown by an applicant, and the date on which the plaintiff received notice of the making of the renewal order would be material to any such application for extension of time: see *White v. Dublin City Council* [2004] 1 I.R. 545, where the Supreme Court stressed the importance of the availability of an extension of time for an individual to challenge decisions affecting him or her where he or she is not notified of the relevant decision within the statutory period for judicial review.

47. In this case, the plaintiff has not said on affidavit when he found out about the renewal order. At para 3 of his affidavit of 9 February 2022, the plaintiff has stated:

> *"I say the discovery of the frauds carried out by Bank of Scotland plc on me and my family only came to notice in the very recent past. I say this notice occurred many weeks following the issue of the plenary summons."*

The plenary summons issued on 23 September 2019 quite clearly refers to the defect in the affidavit of Ms. Buckley and the lack of standing of Bank of Scotland, as of 13 April 2016, to make an application to renew, as well as complaining of the failure to notify him of the application itself. This is, therefore, an unusual situation where the very general and unforthcoming averment of the plaintiff is contradicted by his own pleadings.

48. At the hearing of these applications, counsel for Ivor Fitzpatrick handed in a letter addressed to them and dated 4 July 2016, which appeared to have been signed by the plaintiff and his wife and referred to *"the orders which you have sent for execution to the Sheriff"*. This letter asserts that the renewal was unlawful as the order remained in the name of Bank of Scotland rather than in the name of Start Mortgages. Unfortunately, as the letter was never put on affidavit, I cannot have regard to it.

49. However, the plaintiff in his affidavit of 8 June 2021, filed in response to the application of the first to fourth defendants to dismiss, makes it quite clear that he re-entered the Premises on 10 November 2016 because he had become aware of the deficiencies in the order. He therefore knew at the latest on 10 November 2016 and did not seek to extend time to appeal of judicially review the order renewing the execution order.

50. Instead the plaintiff decided to attempt to take back possession of the Premises by force, using an angle grinder to seek to obtain entry through a steel door which had been placed on it.

51. The plaintiff cannot complain that, having identified a defect in the manner in which the execution order was issued, he is left without a remedy. The plaintiff had a remedy of appeal and possibly judicial review, but he failed to exercise them.

52. The position in relation to the validity of the order remains: it has not been appealed or challenged. The time for appeal or challenge, in view of the timeline in these proceedings, is now long gone. The plaintiff has instead sought to sue the County Registrar even though she is immune from suit. He cannot make good his failure to appeal or judicially review by seeking to sweep aside the common law immunity of the County Registrar and sue for damages instead.

53. I should add that, insofar as these proceedings, which seek declarations that question the validity of the Order of the County Registrar of 16 May 2016, could be regarded as a legitimate challenge by way of plenary proceedings instead of by way of application pursuant to Order 84 of the Rules of the Superior Courts, are doomed to fail as the applicant is hopelessly out of time. The time limits in Order 84 are applicable to such plenary proceedings by analogy: see *O'Donnell v. Dun Laoghaire* [1991] ILRM 301. Order 84, rule 21 (2) applies in this instance so as to require the plaintiff to act within three months of the Order of the County Registrar of 18 May 2016.

54. The plaintiff could of course apply to extend the time, in accordance with r.21 (3), but that would require him to show that there was good and sufficient reason to extend time and that his failure to apply in time for judicial review was due to circumstances outside of his control or which could not have been anticipated. A failure to notify him of the application to renew (which is admitted, as it is contended by the defendants that the order was properly granted *ex parte*) or indeed of the making of the order itself (on which point I have no evidence on affidavit from anyone), would of course constitute circumstances outside the control of the plaintiff, but it is less clear that there is good and sufficient reason for extending the time.

55. There would of course be such good and sufficient reason in respect of the period between the making of the order and his being served with it, or otherwise becoming aware

of it. However, I do not know what that period was. Although I have discounted the letter of 4 July 2016, the onus is on the plaintiff to demonstrate good and sufficient reason, and his averment that he did not know of the various frauds perpetrated on him until after service of his plenary summons is manifestly inaccurate. The plenary summons demonstrates that the issues raised by the plaintiff now were known to him when that was drafted, and he has stated on affidavit that he knew of the defects in the order no later than 10 November 2016. As a result, the plaintiff cannot obtain an extension of time in these proceedings to seek a declaration of invalidity of the order of the County Registrar.

56. Accordingly, the proceedings, insofar as they constitute a collateral attack on the order of the County Registrar, are an abuse of process as they attempt to litigate in plenary proceedings the validity of the order of 18 May 2016 in a manner which seeks to sidestep the provisions of Order 84 and accordingly, in reliance on the principles in *O'Donnell v. Dublin Corporation*, I would dismiss the proceedings as against the County Registrar.

57. I should say for clarity that it was envisaged by Costello J. in *O'Donnell* that the court could, on the trial of a preliminary issue, consider whether leave would be granted if an application pursuant to Order 84 had been made: at p. 314, approving Ackner LJ in *O'Reilly v. Mackman* [1983] 2 AC 237, at 265. Although this is not the trial of a preliminary issue, a motion to dismiss as being frivolous and vexatious involves considerations similar to those on an application for leave to apply to judicial review in those cases, as is the case here, where the lower threshold of a stateable case apply. I am satisfied that leave would have been granted to quash the renewal order, had a judicial review been brought in time, as the affidavit is defective on its face and also because it appears that an incorrect application was made on behalf of Start Mortgages. I would not dismiss the proceedings as an abuse of process, therefore, due to the failure to apply for leave to apply for *certiorari* of the order.

58. However, the proceedings are an abuse of process in that they attempt to sidestep the provisions of O. 84, r. 21, that any challenge to the County Registrar should have been brought within three months of its making. They are manifestly out of time and the plaintiff has failed to put forward grounds for seeking an extension of time of approximately three years, as he has failed to identify when he became aware of the making of the order and has failed to put forward good and sufficient reason for failing to institute proceedings within a reasonable time of becoming aware of it.

59. The proceedings, insofar as they are brought against the County Registrar are frivolous, vexatious and ultimately, doomed to fail. I will therefore grant an order striking out the proceedings as against the third defendant.

Application of the fourth, fifth, sixth and seventh defendants

60. Insofar as the Garda Commissioner, the fourth defendant, is concerned, it is accepted that he is vicariously liable for the actions of the fifth, sixth and seventh defendants, who are all members of An Garda Síochána and, if the proceedings are not struck out against all of them, then the Garda Commissioner must remain in the proceedings. His position therefore depends on the outcome of the application of the fifth, sixth and seventh defendants.

61. Insofar as the fifth defendant is concerned, the key allegation against him is that he committed an assault on the plaintiff.

62. As regards this claim, counsel for the State parties concedes that this is an issue of fact which normally would not be amenable to a successful application of this kind. However, there has been an allegation of more than reasonable force and that has to be substantiated. Counsel relies on the fact that the plaintiff admits in his pleadings that he was kicked in the ribs while resisting arrest. And, as I understand it, the submission of the State parties is that the plaintiff has made a significant concession in admitting that he was resisting arrest, such

that the court can strike out the claim without hearing the evidence. It is conceded by counsel for the State parties that an allegation of assault of this kind was a factual dispute and a question of degree, as the court has to consider what reasonable force in any case is. However, counsel says that the plaintiff has to make that case in his pleadings and in his affidavit and he has not done so.

63. I do not agree. The plaintiff, at para. 14 of the amended statement of claim alleges that he was *"kicked into his rib area and viciously assaulted by [the fifth defendant] who acted on foot of a complaint. The plaintiff resisted arrest and lay on the ground where he was then kicked resulting in the requirement of an ambulance being called to Shankill garda station which took the said plaintiff to St. Vincent's Hospital, following which the said plaintiff was taken back under power of arrest to Shankill garda station, deprived of his liberty overnight, taken to Dun Laoghaire District Court on the 11th day of November, 2016 and further remanded on his own surety of £500 euro (sic)."*

64. I find it difficult to interpret this as anything other than an allegation of excessive force by the fifth defendant in effecting arrest. Furthermore, the plaintiff asserts excessive force in his affidavit of 8 June 2021, where he refers to a medical report from St. Vincent's Hospital Emergency Department which he says shows a rib fracture as a result of the assault. While he has accepted on affidavit that the fifth defendant kicked him as he was lying on the ground so as to get him to release his hands and allow arrest to be effected, that in itself does not dispose of the allegation of assault. The plaintiff asserts unreasonable force in taking that action and this is an issue of fact which can only be resolved in plenary hearing.

65. In my view, it is not appropriate to strike out the claim for assault on the basis of either O. 19, r. 28 or the inherent jurisdiction of the court. The plaintiff has disclosed a cause of action in his pleadings and has, so far as the inherent jurisdiction of the court is concerned, put forward credible basis for making the assault allegation.

66. I will therefore refuse the application of the fourth and fifth defendants insofar as it relates to assault.

Application of sixth and seventh defendants

67. Garda Caulfield and Inspector Phibbs are sued in connection with their handling of the prosecution of the plaintiff. As previously stated, the charge against the plaintiff was eventually struck out by the District Judge on the basis of delay by the prosecution.

68. The complaints against Garda Caulfield and Inspector Phibbs are, in my view, succinctly summarised by Ms. Joanna O'Connor, a solicitor in the office of the Chief State Solicitor, in her affidavit of 3 November 2020, where she itemises the complaints against Garda Caulfield at para 24, in the following terms:

(a) He failed to obtain and examine the execution order on foot of which the County Sheriff had put Start Mortgages into possession of the Premises;

(b) In relying on the statement of Ms. De Courcey, the twelfth defendant, he attempted maliciously and/or negligently to prosecute the plaintiff;

(c) He maliciously and/or negligently pursued the prosecution of the plaintiffs;

(d) He delayed in obtaining and providing to the plaintiff a statement from Start Mortgages, providing it only on the morning of the hearing some 27 months after the incident;

(e) He (together with Inspector Phibbs) attempted to ambush the plaintiff with the late service of documents.

The only complaint against Inspector Phibbs is as set out at sub para. (e) above.

69. The only charge sheet exhibited refers solely to the charge contrary to s. 2 (1) of the 1991 Act and does not refer to the charge contrary to s. 11 of the Criminal Justice (Public Order), 1994, to which Ms. O'Connor refers at p. 3 of her affidavit. The question then arises

as to whether the allegation of malicious prosecution for this charge is frivolous and vexatious or doomed to fail.

70. It is submitted on behalf of these defendants that there is no tort of negligent prosecution and that the constituent elements for malicious prosecution are either not pleaded and/or there is no credible basis for such an allegation.

71. The essential facts on which the plaintiff bases his claims are: first that the Gardaí should have seen that whereas Ms. De Courcey said in her statement that the execution order had been obtained by Start Mortgages, it was clearly headed Bank of Scotland. Secondly, he points to the fact that the statement was not obtained until 13 March 2019, at 5.30pm, and indeed this was too late to serve his solicitor before close of business. Thirdly, although this is not entirely clear, the plaintiff appears to rely on the delay itself in allowing proceedings to linger over him for a period of 27 months.

72. Insofar as malicious prosecution is concerned, I have been referred to the judgment of this Court (Barrett J) in *Hanrahan v. Garda Commissioner* [2020] IEHC 180 in which the statement in McMahon and Binchy, *The Law of Torts* (4th ed., Bloomsbury Professional, 2013), pp. 1391 – 97, as to the constituent elements of the tort of malicious prosecution was approved. Those elements are:

(a) The defendant must have instituted proceedings, that is to say, he or she must have been 'actively instrumental in putting the law in force'.

(b) The proceedings must have not been successful.

(c) The plaintiff must establish that the proceedings were instituted without *"reasonable and probable cause".*

(d) The plaintiff must prove that the defendant acted maliciously.

(e) The plaintiff must have suffered damage.

73. It is clear that the proceedings were not successful, so that the requirement at (b) is satisfied, and I think the requirement at (a) is satisfied in respect of both of these defendants. Garda Caulfield was the prosecutor and, while I have not been informed of the seventh defendant's role, I assume for the purposes of this application that he was the Court Presenter and that that is sufficient to meet the requirement at (a).

74. In considering whether the plaintiff's claim against Garda Caulfield for malicious prosecution is frivolous and vexatious, it must be recalled that the prosecution was for criminal damage to the steel door which the plaintiff damaged by using an angle grinder. It is clear from the charge sheet that it was asserted, as part of the charge, that the door belonged to a third party company (not Bank of Scotland or Start Mortgages) whose name is obscured on the copy charge sheet exhibited by the plaintiff.

75. No one addressed the identity of this company in the course of the applications to dismiss. However, the plaintiff says in his affidavit of 1 June 2021, that steel shutters were placed on the windows and the doors by an agent of Start Mortgages, so it seems likely that the third party mentioned on the charge sheet was an agent of Start Mortgages.

76. It is perfectly clear that this steel door, if it is to be regarded as personal property, was not the property of the plaintiff - if it was, he would not have needed an angle grinder to open it. If, however, it was to be regarded as a fixture, then the door would be owned by the owner of the Premises.

77. I think the steel shutters and door were more likely a fixture and, as s. 2 (1) of the Criminal Damage Act, 1991, makes it an offence for any person without lawful excuse to damage property belonging to another intending to damage such property or being reckless as to whether it would be damaged, the prosecution would have had to prove that the Premises were in the ownership of the person named in the charge sheet on 10 November 2016. This begs the question as to who was the lawful owner of the Premises on 10 November 2016.

78. The essential position of the defendants was that, as the possession order was not impugned, it was sufficient to demonstrate the entitlement to possession and, consequently, the existence of reasonable and probable cause.

79. That of course begs the question of who re-entered and, in particular, whether Start Mortgages were entitled to re-enter on foot of a possession order granting possession to Bank of Scotland. Suffice it to say that I do not think that the question of whether the Gardaí had reasonable and probable cause to charge the plaintiff is sufficiently clear for me to dismiss the claim of malicious prosecution on that basis, given the high threshold applicable for success in applications of this kind.

80. It is clear from *Charleton v. Hassett* [2021] IEHC 746 that such re-entry can only be affected peaceably or by court order. To re-enter by court order, I think it must be the case that the court order authorises the person who actually re-enters, though they may of course do so through their agent. If repossession must be effected by the person entitled to possession on foot of the court order, then it would be at least arguable that any re-entry by Start Mortgages or their agent on 1 November 2016 was unlawful because they had no court order authorising them to take possession of the premises. The only possession order was in favour of Bank of Scotland.

81. In those circumstances, the application of the sixth and seventh defendants cannot be granted on the basis that it is beyond argument that they had reasonable and probable cause for the prosecution. I think it is clear that they honestly believed that the agent of Start Mortgages owned the steel door, and that the prosecution was therefore well-founded. However, it is not sufficiently clear for the purposes of an application to dismiss that their belief was reasonable as I have no evidence as to the steps they took to satisfy themselves of that. Given that the door was most likely part of the Premises, and that the Premises may not have been validly repossessed by Start Mortgages, I could not dismiss on that basis as I do

not think it is clear beyond doubt that there was an objective basis for the charge preferred against the plaintiff.

82. However, there is no evidence whatsoever that the sixth and seventh defendants acted with malice, which is a necessary ingredient of the tort relied on. In *Dublin Waterworld Ltd. v. National Sports Campus Development Authority* [2019] IECA 214, Irvine J. recalled that the leading decision in this jurisdiction is *Dorene Ltd. v. Suedes (Ireland) Ltd.* [1981] IR 312, where Costello J. confirmed that malice was an essential ingredient of the tort. Irvine J. also cited with approval the following *dictum* of Toulson LJ in *Willers v. Joyce* [2016] UKSC 43, at para. 55, where he stated:

> *"Malice is an additional requirement … As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation… But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is insupportable and may bring the proceedings, not for the* bona fide *purposes of trying that issue, but to secure some extraneous benefit to which he had no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process."*

83. There is simply no evidence of anything other than an error in this case. Any allegation of malice remains at the level of bare assertion. Indeed, it is evident from the statement of Ms. De Courcey, discussed further below in the context of the application of Start Mortgages and of Ms. De Courcey, that the Gardaí were told that the execution order had been renewed by Start Mortgages. Insofar as the plaintiff emphasises the lateness with which the statement was made, he has no evidence to suggest that a complaint was not made

in the same terms at a much earlier stage, and the evidence as to the progress of the proceedings, such as it is, demonstrates that the Gardaí were late in making a disclosure, which would require the taking of a formal statement. However, that does not mean that they did not receive a complaint in the same terms in November 2016. Failure to appreciate the error as to the name of the plaintiff on the execution order is not evidence of malice, and the defendant correctly point out that there is no tort of negligent prosecution.

84. The plaintiff, therefore, has not produced any evidence of malice. That being the case, it seems to me that any action for malicious prosecution is bound to fail, and the proceedings should be dismissed as against the sixth and seventh defendants.

Application of the eighth defendant

85. It is accepted by all parties that the eighth defendant, Bank of Scotland, did not own the mortgage at the time that the renewal order was granted. In particular, it is accepted by the plaintiff that Bank of Scotland assigned its interest in the loans and mortgage in February 2015. Indeed, a crucial element of the plaintiff's case is that the execution order was invalid as it named Bank of Scotland rather than, as ought to have been the case, Start Mortgages.

86. Counsel for the plaintiff confirmed at the hearing of these applications that the sole basis for keeping Bank of Scotland in the proceedings was that it was unclear whether they were instructing Ivor Fitzpatrick, and submitted that Bank of Scotland could not be let out of the proceedings without confirmation from Ivor Fitzpatrick that they did not take instructions from Bank of Scotland. I will return later in the judgment to the issue of who Ivor Fitzpatrick were acting for and what evidence from this point has been tendered on affidavit in these applications. However, it should be noted that counsel for the plaintiff did not identify any cause of action against Bank of Scotland, when specifically asked by the Court what cause of action lay against the bank.

87. At paragraph 11 of the statement of claim, the plaintiff claims *"acts of conspiracy between Bank of Scotland Plc, Clodagh Buckley and Ivor Fitzpatrick Solicitors to mislead the County Registrar of Wicklow and making an application for an execution order for possession through deceit by concealment of relevant material facts on the 13th day of April, 2016."*

88. As confirmed at para. 32.94 of McMahon and Binchy, *loc. cit.*, the essential features of the tort of conspiracy have been set out by this court (O'Neill J.) in *Iarnród Éireann v. Holbrooke* [2000] IEHC 47, as follows:

> *"1. The agreement or combination of two or more people, the primary or predominant object of which was to injure another is actionable even though the act done to the party injured would be lawful if done by an individual.*
>
> *2. An agreement or combination of two or more persons to carry out a purpose lawful in itself but by using unlawful means is actionable, in circumstances where the act in question might not be actionable against the individual members of the combination, as individuals."*

89. On the facts of this case, this requires, at a minimum, that the plaintiff demonstrate that Bank of Scotland acted together with Ivor Fitzpatrick to procure an execution order in the name of Bank of Scotland, even though Bank of Scotland at that time had no title to the mortgage or entitlement to execute the order for possession which it had originally obtained in 2013.

90. However, even assuming that Bank of Scotland instructed Ivor Fitzpatrick to re-enter the Premises even though they no longer owned the mortgagee's interest in the Premises, I do not see how instructions to a solicitor constitutes a conspiracy. The solicitor acts on instructions, as agent for the client. I think any allegation of conspiracy against a solicitor in those circumstances is bound to fail.

91. However, I think it is arguable that any attempt by Bank of Scotland to seek to enforce a security which it had in fact assigned would constitute a trespass. Bank of Scotland says it had no hand, act or part in the application to renew the execution order and counsel for Bank of Scotland placed reliance on what he described as a refinement of the plaintiff's case, which he says occurred after Bank of Scotland delivered its defence on 16^{t} September 2020. The Bank pleads in its defence (at para. 7) that it is a stranger to the making of the application to renew the execution order as it had already sold the loans and security to Start Mortgages, that it did not instruct its former solicitors to make any such application on its behalf, and insofar as any such application was inadvertently made ostensibly on behalf of Bank of Scotland, this must have been an error on behalf of the Ivor Fitzpatrick.

92. I pause here to say that, having considered the available evidence, it seems highly likely that that is in fact what occurred. The real issue for me in considering the application of the Bank and the applications of Ms. Buckley, Ivor Fitzpatrick, Start Mortgages and Ms. De Courcey for a dismissal of the proceedings is whether that position is so clear that I can dismiss the plaintiff's claim at this stage.

93. At the hearing, I understood the submission of counsel for the plaintiff to be that, if it was confirmed on affidavit by Ivor Fitzpatrick that they were not acting for Bank of Scotland, then Bank of Scotland could be let out of the proceedings. At present, there is no affidavit evidence for Ms. Buckley or anyone in Ivor Fitzpatrick as to the identity of the person on whose instructions they were acting when they applied to renew the execution order. That presents something of a difficulty at this stage of the proceedings, as the threshold to be reached by the applications in these motions is so high, the jurisdiction being one to be exercised "*sparingly*".

94. The problem with the Bank's application is that notwithstanding the very serious difficulties with the manner in which both the plenary summons and the amended statement

of claim in this case are pleaded, it nevertheless emerges from those documents that the plaintiff is making the case against Bank of Scotland that it procured an execution order even though it no longer had any interest in the Property and indeed its entitlement to take possession of the Property had passed to Start Mortgages.

95. Furthermore, Ivor Fitzpatrick have sworn two affidavits which do not state explicitly who was instructing them and which are in contradictory terms. In an affidavit of 29 October 2020, a solicitor in Ivor Fitzpatrick avers that *"in the absence of any workable repayment arrangement an execution order was issued in favour of [Start Mortgages]and it recovered possession of the [Property] on [1 November 2016]."* However, in an affidavit sworn 20 January 2021, the same deponent swore a corrective affidavit in which she states that that statement *"was incorrect as I ought to have stated that an execution order was issued in favour of Bank of Scotland plc and that Start Mortgages DAC then recovered possession of the property."*

96. It is in my view possible to resolve the apparent conflict on the identity of the person in whose favour the execution order issues as it is evident on the face of that document that it issued in favour of Bank of Scotland.

97. I agree with the plaintiff that this casts doubt on the identity of the client for whom Ivor Fitzpatrick were acting when the application for renewal of the execution order was made. Neither of the affidavits actually identify the client for whom Ivor Fitzpatrick were acting in making that application.

98. The plaintiff says he will accept an affidavit from Ivor Fitzpatrick which states clearly for whom they were acting and will discontinue the proceedings against Bank of Scotland if it is clearly stated on affidavit that they did not receive instructions from Bank of Scotland and were at all times acting for Start Mortgages.

99. I think this is the most sensible course, given the high threshold to applications of this kind. I will therefore adjourn the application of Bank of Scotland to give Ivor Fitzpatrick the opportunity, should they so wish, to file an affidavit in which it is stated clearly who their instructing client was.

100. If it is clarified on affidavit by Ivor Fitzpatrick that they were not instructed by Bank of Scotland, then the plaintiff accepts that he has no case against Bank of Scotland as its position will have been corroborated by Ivor Fitzpatrick and he does not seek to proceed against Bank of Scotland.

Application of the ninth and tenth defendants.

101. I should say as a preliminary issue that the position of Ms. Buckley is that she acted only on behalf of the firm who employed her, Ivor Fitzpatrick. It is entirely unclear why the plaintiff felt the need to sue Ms. Buckley personally, as she was obviously acting within the scope of her employment. She is represented in these proceedings by Ivor Fitzpatrick. I will adjourn the application insofar as it is brought by Ms. Buckley to allow Ivor Fitzpatrick to confirm that Ms. Buckley was not, at the material time, a partner in their firm and if they are in a position to do that, it is my intention to dismiss the proceedings as against Ms. Buckley.

102. Counsel for the plaintiff confirmed at the hearing of the application that the plaintiff was maintaining three causes of action in tort against Ivor Fitzpatrick: misrepresentation, negligent misstatement, and conspiracy with either Start Mortgages or Bank of Scotland.

103. I should first say that I am very unclear as to why misrepresentation and negligent misstatement are separate in these cases. In any event, the essential element of any cause of action in misrepresentation, whether negligent, fraudulent, or indeed innocent, is that a misrepresentation is made to the person who relies on that cause of action. Secondly, that

person must have relied on the representation, and thirdly they must have done so to their detriment.

104. On the material facts here, any misrepresentation was made to the County Registrar, not to the plaintiff. The documents were put before the County Registrar on the basis that the Bank of Scotland still owned the mortgage. That was inaccurate.

105. The problem for the plaintiff is that there is no cause of action for the plaintiff arising out of that misstatement. It is undoubtedly the case that the execution order was renewed without the appropriate amendment of the possession order and, consequently, the execution order having been made.

106. However, I cannot see how a cause of action in misrepresentation, whether negligent or fraudulent, is sustainable in this case. The plaintiff's whole complaint is that he was not in fact told of the application to renew the execution order.

107. Furthermore, it is clear that, at common law, there was absolute privilege for any witness insofar as evidence given in court was concerned: see the judgment of McKechnie J. in *Kelly v. University College Dublin* [2009] 4 I.R. 163, where he referred to the judgment of O'Higgins J. *Looney v. Bank of Ireland* [1996] 1 I.R. 157 which had approved the following statement in Halsbury's *Laws of England* (4th ed., vol. 28) at para. 97, where it stated:

> *"No action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognised by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not. The privilege extends to documents properly used and regularly prepared for use in the proceedings."*

108. It should be noted that in *Looney v. Bank of Ireland* [1996] 1 I.R. 157, Murphy J. applied that principle to statements in affidavits. It therefore seems clear that it applies so as

to prevent any action being taken on foot of documents filed for the purpose of an application made in the office of a court, such as the application to renew the execution order.

109. These causes of action are, therefore, doomed to fail.

110. As regards Ivor Fitzpatrick, the only remaining potential cause of action therefore is conspiracy with either Bank of Scotland or Start Mortgages to obtain an erroneous order renewing the execution order.

111. In order to properly consider this cause of action, I think the nature of the application being made must be considered. It is against a background where an undoubtedly valid possession order had previously been made and a valid execution order had previously been made. The only application being made was to renew it, albeit that the identity of the person entitled to the benefit of the possession order, and therefore entitled to seek execution of it, had changed and the documentation should have been amended to reflect this fact.

112. I think there is no doubt that Ivor Fitzpatrick acted at all times as solicitors, and therefore as agents for their clients in court and in the proceedings before the County Registrar. The plaintiff says he is not sure for whom Ivor Fitzpatrick were acting and indeed it is somewhat surprising this has not been clarified by that firm on affidavit. However, they were not acting independently of any client, they were providing legal services - presumably for a fee. In the course of providing those services, an error was made. But that is not a conspiracy between two independent actors to cause damage to another. It is a mistake made by an agent acting on behalf of his or her principal.

113. The judgment of Keane J. in *Moffitt v. Bank of Ireland* (Supreme Court, unreported, 19 February, 1999), though it arose other than in relation to an allegation of conspiracy, supports that proposition. In that case, the Supreme Court granted an application of a solicitor to dismiss proceedings against him where he had been joined on the basis that the Bank had

obtained an order for sale on the basis of an affidavit which he had drafted and which the plaintiff said was false. As Keane J. stated:

> *"The fact that … a solicitor arranged for the swearing of an affidavit which subsequently turns out to be false, if indeed it is false, affords no cause of action whatever against the solicitor. The solicitor merely acts on his instructions. His instructions may be correct or they may be incorrect, but he must act in accordance with his instructions. If those instructions are incorrect or false then, of course, that may give a cause of action to [the plaintiffs] against the Bank, but it gives them no cause of action whatever against the solicitor who is merely discharging his professional duties to the client that he is acting for and to whom he owes a duty, namely, the bank."*

114. In my view, even if in this case the solicitors acting for Start Mortgages made an error, they did so in the course of their professional duties to the client, and there are no stateable grounds for saying that this could be actionable as a tort of conspiracy by the other party to the litigation.

115. There was a reference by counsel for the plaintiff in argument to *Doran v. Delaney* [1998] 2 I.R. 61, where, exceptionally, a purchaser succeeded in a claim of negligent misrepresentation against the vendor's solicitors. But no basis for establishing that a duty of care owed by Ivor Fitzpatrick to the plaintiff was set out in submissions. *Doran v. Delaney* was itself a *Hedley Byrne v. Heller* type case of reliance on misrepresentation, in that case to a purchaser by a vendor's solicitor in replies to requisitions, where the vendor's solicitor was himself aware that the reply was inaccurate. No such representation exists here and the events surrounding the renewal of the execution order all point to an error by a solicitor in carrying out the instructions of the client. As Keane J. stated in *Moffitt*, the duty owed by the solicitor is to his or her own client, not to the other party to adversarial proceedings.

116. That being the case, I will dismiss the proceedings as against Ivor Fitzpatrick as being an abuse of process, frivolous and vexatious, and doomed to fail.

Application of Start Mortgages

117. At the hearing of the applications, counsel for the plaintiff confirmed that the only causes of action being maintained against the twelfth defendant were:

1. Conspiracy with Ivor Fitzpatrick;
2. Misrepresentation;
3. Negligence;
4. Malicious prosecution, together with Start Mortgages, in relation to the in relation to the statement of Garda Síochána.

118. For the reasons stated above, no cause of action in conspiracy can succeed as the conspiracy is alleged to have been conducted by Ivor Fitzpatrick and Start Mortgages, when in fact it is clear that Ivor Fitzpatrick were acting on behalf of either Start Mortgages or Bank of Scotland, most likely the former though. As already stated, this should be stated on affidavit and this application to dismiss will also be adjourned to afford Ivor Fitzpatrick an opportunity to state on affidavit for whom they were acting. However, as I understand it, the plaintiff accepts that Ivor Fitzpatrick were acting as solicitors instructed by either Start Mortgages or Bank of Scotland.

119. It is clear that, insofar as Ivor Fitzpatrick were acting on behalf of Start Mortgages, they were acting as agent of Start Mortgages and not as an independent entity with whom Start Mortgages did or could conspire.

120. As with the earlier allegations of misrepresentations based on what was represented to the County Registrar, the inaccurate statement here was made to the Gardaí and not to the plaintiff. There is no evidence of any reliance by the plaintiff on it, and indeed it seems likely

that if the matter had proceeded to hearing, the plaintiff would have sought to defend himself on the basis that Start Mortgages had in fact never obtained an order for possession in their favour (which is true). As the essential elements for misrepresentation are therefore lacking, this claim cannot succeed.

121. As regards negligence, I think this claim must be struck out. It is not clear how Start Mortgages could be said to owe a duty of care to the plaintiff. Indeed, insofar as any error occurred in the repossession process, that was potentially only to the detriment of Start Mortgages and not to the plaintiff. As already stated, the plaintiff had a remedy, on discovery of the defect in the execution order, but he failed to exercise it. Had he done so promptly, Start Mortgages would have had additional difficulties in enforcing their security.

122. Finally, though it was not relied upon by the plaintiff's counsel at hearing, I think it is only fair to consider whether the fact that Start Mortgages re-entered the Premises, which were the plaintiff's family home, on the basis of an order for possession which was not in its name could constitute a trespass.

123. It must be recalled that this was a mortgage of unregistered land and that it operated to convey the lands to Bank of Scotland in fee simple, subject to the proviso for redemption, on which I think it is clear the plaintiff is not in a position to rely. On assignment of the mortgage to Start Mortgages, the latter became entitled to that fee simple interest. As such, Start Mortgages had a right to possession under the mortgage, which it could exercise either peaceably or on foot of a court order.

124. It is clear that re-entry was done on foot of a court order, the 2012 possession order which had been granted to Bank of Scotland. Given that the jurisdiction to dismiss is one where an application must demonstrate that there is no basis at all for the continuance of the proceedings, I do not think I can dismiss a claim in trespass. It is arguable, even if such a claim might ultimately fail, that a person asserting a right of possession on foot of a court

order should have a court order in their favour, and that it is not sufficient to rely on an order granted to a predecessor-in-title. Certainly, the Circuit Court Rules assume that such an order will be amended to reflect the change in the identity of the person entitled to possession.

125. Finally, the plaintiff again relies on the tort of malicious prosecution, a claim also maintained against the twelfth defendant, as regards what they say is an inaccuracy in the statement to Gardaí, where Ms. De Courcey gave her statement to the effect that the execution order had been *"renewed by Start Mortgages"*. Although I think it is likely that the application to renew was made by Ivor Fitzpatrick on the instructions of Start Mortgages, it is nevertheless the case that the incorrect procedure was used and the possession order, which was never amended, and consequent execution order, which was never renewed, continued to name Bank of Scotland as the plaintiff and therefore as the person entitled to possession. I will therefore accept for the purposes of this application (again without deciding) that the quoted statement of Ms. De Courcey was inaccurate.

126. The height of the plaintiff's case against Start Mortgages is that Ms. De Courcey, in her capacity as Company Secretary, made an error in her statement of evidence to the Gardaí. The question then arises as to whether this is actionable.

127. For the reasons stated above in relation to the sixth and seventh defendants, I do not think it is appropriate to dismiss the proceedings on the basis that there was *"reasonable and probable cause"*. However, as already stated, malice is a necessary ingredient of this cause of action and there is simply no evidence whatsoever of any improper motive by Ms. De Courcey or Start Mortgages.

128. As stated by Clarke J. in *Keohane v. Hynes* [2014] IESC 66, where he stated (at para. 6.10):

> *"…. [I]t is an abuse of process to maintain a claim based on a factual assertion in circumstances where there is no evidence available for that assertion and,*

importantly, where there is no reasonable basis for believing that evidence could become available at the trial to substantiate the relevant assertion."

129. That statement is, I think, particularly apposite in a case where malice is alleged but without any evidence of any kind to support it. The plaintiff is not able to put the allegation beyond the level of pure assertion. As stated in *Keohane v. Hynes*, this is an abuse of process.

130. For these reasons, I will also dismiss the proceedings as against Start Mortgages, save for an allegation that they trespassed by re-entering the Premises without the benefit of a possession order in their favour. This claim may well fail at trial, but I do not think it can be struck out in exercise of the exceptional jurisdiction identified in *Barry v. Buckley* [1981] IR 306.

131. I would like to add that any claim in trespass cannot be struck out at this stage on the basis of the failure of the plaintiff to either appeal or challenge the renewal of the execution order. Neither does the maintenance of such a cause of action constitute a collateral attack on the possession order. The question is whether these orders, which stand as valid if unchallenged and unappealed, can be availed of by a third party, not named in them.

Application of Ms. De Courcey

132. No additional issues are raised in relation to the claim against Ms. De Courcey. Counsel for the plaintiff confirmed at the hearing that the causes of action relied upon in relation to the twelfth defendant were misrepresentation as regards her statement to the Gardaí and malicious prosecution as in relation to the error in it.

133. Again, no misrepresentation can arise as this statement was furnished to Gardaí and not the plaintiff, so the plaintiff has no cause of action on the basis of misrepresentation. No representations were made to the plaintiff.

134. As regards malicious prosecution, as already stated, there is no evidence whatsoever to support an allegation of malice.

135. Accordingly, I will also dismiss the proceedings as against the twelfth defendant.

Conclusion

136. I will hear the plaintiff and counsel for Sergeant Brady as to the appropriate directions that should now be made to permit the assault charge to proceed to trial, and counsel for Bank of Scotland, Ivor Fitzpatrick, and Start Mortgages as to whether it is possible to definitively establish on whose instructions Ivor Fitzpatrick were acting. Once that is done, only that identified person will remain in the proceedings and will thus be required only to defend a claim of trespass to lands.

137. I would like to add that it is not necessary to deal with the various constitutional provisions cited in the Amended Statement of Claim. The manner in which constitutional rights, such as the right to inviolability of the dwelling, for example, are protected, is by defending them through causes of action such as, in this case, an action in trespass. I am also of the view that this matter is not governed by the provisions of the Charter of Fundamental Rights of the European Union cited at various points in the Amended Statement of Claim, as that only applies where Union law is being implemented. I do not see how Union law governs matters such as possession orders or execution orders, and it does not generally apply to the question of trespass to land situate in this jurisdiction.