



THE SUPREME COURT

The Supreme Court Record Numbers: 2009/493

& 2009/497

High Court Record No: 2009/379P

**Clarke C.J.
Dunne J.
Irvine J.**

BETWEEN/

JOHN KELLY

PLAINTIFF/APPELLANT

- AND -

ALLIED IRISH BANKS PLC.

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 8th day of July 2019

1. This is an appeal brought by Mr. John Kelly (“Mr. Kelly”) against an order of the High Court (Kearns P.) on the 30th November, 2009. That order, which was perfected on the 1st December, 2009, was made in the context of proceedings brought by Mr. Kelly against Allied Irish Banks (“the bank”), which proceedings the court dismissed. In so doing the Court made no order as to the costs of the proceedings.

2. The order under appeal was made following the hearing of a motion brought by the bank by notice of motion dated the 27th February, 2009. That motion invited the court to strike out Mr. Kelly’s proceedings pursuant to O. 19, r. 28 of the Rules of the Superior Courts and/or its inherent jurisdiction on the grounds that the proceedings were frivolous, vexatious and disclosed no reasonable cause of action and thus amounted to an abuse of the court’s own process. In the alternative, the court was asked to set aside the proceedings on the grounds

that the issues therein contained were *res judicata*. Finally, the bank sought an order restraining Mr. Kelly and his wife, June Kelly, who was not a notice party to the motion and not a party to the proceedings, from instituting any further proceedings against the bank without leave of the court.

3. In his *ex tempore* decision delivered on the 30th November, 2009, Kearns P. concluded that Mr. Kelly had no stateable case. In particular, he determined that his proposed claims for defamation and negligence were not stateable on the facts. He refused to make any order restraining Mr. and/or Mrs. Kelly from issuing further proceedings without approval of the High Court, as did he refuse the bank's application for its costs of the motion and the proceedings.

4. By notice of appeal dated the 22nd December, 2009 Mr. Kelly appealed the order of the High Court. In that notice of appeal, he claims that the High Court judge: -

- (i) failed to consider documents which were essential to his claim and which demonstrated that the proceedings were not frivolous, vexatious or an abuse of the court's process;
- (ii) erred in concluding that the issues in his proceedings were *res judicata* by reason of the dismissal of the claim of his wife, Mrs. June Kelly, by Ms. Justice Harding Clark on the 6th November, 2008;
- (iii) erred in concluding that he had not established a reasonable cause of action; and
- (iv) erred in law and in fact in concluding that he had not made out a stateable case for negligence.

5. In its notice of cross-appeal dated the 22nd December, 2009 the bank claims that the High Court judge erred in law and in fact in failing to make an order that Mr. Kelly pay the bank's costs of the motion and of the proceedings.

Background facts

6. From the book of pleadings and the six affidavits filed by the parties for the purposes of the hearing in the High Court, the following undisputed facts emerge.

7. Mr. Kelly commenced the within proceedings by plenary summons on the 16th January, 2009. In his general indorsement of claim he seeks: -

"Damages for injury, distress, embarrassment, inconvenience, trauma, loss and damage caused and occasioned by reason of professional negligence, breach of duty, breach of legal duty of care, breach of contract, unilateral mistake, negligent misrepresentation and defamation of the plaintiff by the defendant, its servants or agents."

8. According to the evidence, Mr. Kelly, who had previously resided in Australia, came to Ireland in 1988 with his partner/wife June Beyer/June Kelly. They had intended staying six months. In November 1988 they advised the bank that they intended to remain in Ireland on a permanent basis.

9. Shortly following their arrival, Mr. and Mrs. Kelly opened a joint "cashsave" account ("the account") with the bank at its Grafton Street branch. It was opened on the 25th July, 1988. The mandate to open the account gives Ms. Beyer's address as Adelaide, South Australia. What is described in the affidavits as a Customer History Card was also completed on the 25th July, 1988 wherein the said account was designated as a non-resident account. A postal address of 17 Adelaide Street, Dun Laoghaire, County Dublin is noted and on the reverse side of the Customer History Card, which is signed by Mr. Kelly and Ms. Beyer, an Australian address is also noted.

10. By court order made on the 3rd December, 2001, that being an order obtained by the Revenue Commissioners ("Revenue"), the bank was rendered liable to return certain information in relation to particular types of accounts held with the bank which were deemed to be non-resident as of the 31st March, 1990. This order was made in the wake of what was at the time heralded as a public scandal arising from the fact that the country's major banks had, on a widespread basis, involved themselves in opening accounts for their customers using bogus foreign addresses thus allowing them to avoid paying deposit interest retention tax ("DIRT") on their deposits.

11. In light of the fact that Mr. and Mrs. Kelly's account had been classified as a non-resident account, their account met the criteria set out in the aforementioned order. As a result, the bank wrote to Mr. and Mrs. Kelly on the 6th November, 2002 notifying them of the order and advising them that the information sought by Revenue would be provided, but that this would not happen for at least fourteen days. They were also advised of their entitlement to apply to the court in respect of that order.

11. In a document/form (hereinafter "the notification document") forwarded to Revenue, sent by way of compliance with the court order of the 3rd December 2001, the bank provided certain information in relation to the account. The critical information appeared on the notification document as follows: -

"With reference to your recent enquiry in relation to the following account:

Account Title: JOHN M KELLY & JUNE KELLY CASHSAVE.

Held at: 64 Grafton Street, Dublin branch.

The following information is that which the Bank is obliged to submit to the Revenue Commissioners at foot of the High Court order dated 3rd December 2001:

Account Number: 21647024
Banks Plc

Legal entity in which account held: Allied Irish

Balance 31/03/1990
Liable? Yes

Was Account changed from DIRT exempt to Dirt

Balance 31/03/1995
1991

Re-designated in year ended 31st March:

Account closed No
Account? No

Was the account a DIRT Liable, Non-Resident

Name: MR JOHN KELLY

Alternative Name:

Address 1 17 ADELAIDE STREET DUN LAOGHAIRE CO DUBLIN

Address 2 23 PROSPECT COURT DUBLIN ROAD MULLINGAR CO
WESTMEATH

Name: MRS JEAN KELLY

Alternative name: MRS JUNE KELLY

Address 1 17 ADELAIDE STREET DUN LAOGHAIRE CO DUBLIN

Address 2 23 PROSPECT COURT DUBLIN ROAD MULLINGAR CO
WESTMEATH"

12. On the 20th January, 2003, Revenue wrote separate letters to Mr. and Mrs. Kelly stating that it had information that they held a non-resident deposit account. They were each asked to address a number of queries to enable Revenue establish if they had any undeclared tax liabilities as a result of their account with AIB. If they considered they had any such liabilities, they were advised to make full disclosure in accordance with the "Notes on Making Full Disclosure and Payment" enclosed with that letter.

13. On the 28th May, 2003, having been made aware of the content of the notification document furnished by the bank to Revenue, which included as the second name on the account Mrs. Jean Kelly with Mrs. June Kelly as an alternative name, Mr. Kelly wrote a lengthy letter to Mr. Shaw, manager of AIB, dated the 28th May, 2003 wherein he addressed this mistake. In the course of his letter he stated as follows: -

"In passing I should point out that one of the official documents a copy of which you have kindly addressed to us and related to the disclosure of the financial status of my wife and myself mistakenly states that my wife's Christian name is Jean. My wife's Christian name is June. June Kelly. Does this error have any bearing upon the legality or otherwise of the order in question?"

14. In response, by letter of the same date, Mr. Shaw acknowledged the bank's mistake and furnished an apology accompanied by the following explanation: -

"I note that Mrs. Kelly's name is June, not Jean. While Mrs. Kelly's name as shown on the above account is indeed Mrs. June Kelly, it was, unfortunately, noted elsewhere on our records as Mrs. Jean Kelly (giving rise to both names being quoted on the 'Details to Revenue' sheet referred to) - no doubt a typographical error.

I have today changed the incorrect record to reflect Mrs. Kelly's correct name and should be obliged if both yourself and Mrs. Kelly would accept our apologies for the error."

15. In April 2003, Revenue wrote to Mr. and Mrs. Kelly stating that their investigations were closed. They accepted as valid the details that had been returned by Mr. and Mrs. Kelly.

16. Some time later, Mr. Kelly maintained that the inclusion of the name Jean Kelly on the notification document would have given the impression that the account holder was (i) involved in money laundering, (ii) trying to set up a bogus non-resident account, (iii) deceitfully using a fictitious name and/or (iv) involved in financial impropriety. He further maintained that the bank's error in including the name of Jean Kelly on the notification document had spawned proceedings (*Liam Irwin v. John Kelly* High Court record number 2002/849R) later issued by Revenue seeking to recover other tax for which it alleged he was liable.

17. Aggrieved by the error on the notification document and what she perceived to be the consequences of that error, Mrs. Kelly commenced proceedings (record number 2005/2039P) against the bank by plenary summons dated the 13th June, 2005. In her general indorsement of claim she claimed: -

"[D]amages for injury, distress, embarrassment, inconvenience, and trauma, loss and damage arising as a result of the negligence, breach of duty, breach of contract, negligent misstatement and defamation of the plaintiff, by the defendant, its servants or agents.

This claim [is] related to documents held by the Allied Irish Banks Plc pertaining to the joint account in the names of my husband John Kelly and myself June Kelly (of 23 Prospect Court, Dublin Road, Mullingar, County Westmeath) containing misstatement of fact. These documents released under the authority of the manager of the Allied Irish Banks Plc Specialist Support Unit Mr. Harry Shaw on foot of legal documents seeking disclosure and issued by legal representatives for the Revenue Commissioners."

18. That plenary summons was followed by a statement of claim delivered on the 10th August, 2005. In her statement of claim Mrs. Kelly maintained, *inter alia*, that the bank, in advising Revenue of the name of a third party in the notification document, had conveyed the impression that she and her husband were the holders of a bogus non-resident account. It was, she claimed, to be inferred from the inclusion of the third name on the notification document that they authorised this inclusion for an improper purpose and that the result of the communication of that document to the Revenue was that she was considered as a "bogus non-resident account holder". She claimed that the actions of the bank amount to defamation and

that her chances of becoming an Irish citizen and her ability to obtain a work permit as a result of that citizenship had been compromised.

19. In her proceedings Mrs. Kelly also claimed that the bank had negligently made a mistake in granting them a loan greatly in excess of the figure they had sought with the result that the repayments required to meet that loan were in excess of what they could afford.

20. The bank applied by notice of motion to have Mrs. Kelly's proceedings dismissed as failing to disclose a cause of action under O. 19, r. 28 and/or pursuant to the court's inherent jurisdiction as frivolous, vexatious and bound to fail. That application was successful and by order of Clark J. dated the 6th November 2008 the claim was struck out on the grounds that it disclosed no reasonable cause of action.

21. As already stated, Mr. Kelly commenced the within proceedings, which seek much the same relief as that which was unsuccessfully pursued by his wife in her proceedings, by plenary summons dated the 16th January, 2009. In such circumstances, it is perhaps not unsurprising that once the statement of claim was delivered the bank moved to seek to have these proceedings dismissed for the reasons earlier stated.

22. It is against the aforementioned backdrop that this Court must now decide whether, in dismissing Mr. Kelly's proceedings as bound to fail, Kearns P.'s decision is sustainable having regard to the evidence and the governing legal principles.

Legal principles

23. Whilst the bank applied to dismiss Mr. Kelly's claim pursuant to Order 19, rule 28 of the Rules of the Superior Courts, as well as pursuant to the Court's inherent jurisdiction, Kearns P. did not rely upon the provisions of O. 19, r. 28 when he dismissed Mr. Kelly's claim. Thus it is not necessary to consider further that provision. Suffice to observe that any such application is confined to an assessment of the pleadings in order that the court may determine whether or not the same disclose a cause of action.

24. The jurisdiction invoked by Kearns P. was the court's inherent jurisdiction to dismiss a claim in circumstances where it can be demonstrated that there is no arguable basis in law and fact for the claim made. The authorities which trench upon this jurisdiction are canvassed in great detail in the bank's written submissions. However, in circumstances where the exercise by the High Court of this jurisdiction has had the effect of denying Mr. Kelly his constitutional right of access to the court, I will now summarise the principles which I consider most relevant to my decision on this appeal.

25. It is common case that the court's inherent jurisdiction to dismiss a claim as bound to fail must be exercised sparingly (see Costello J. in *Barry v. Buckley* [1981] I.R. 306) and should only be granted if it is clear that there is no risk that in doing so an injustice may be perpetrated upon the plaintiff. The court must be satisfied, on the facts of the case, that the continued existence of the proceedings simply cannot be justified and that it would be manifestly unfair to the defendant to allow the claim proceed.

26. The court should also be satisfied, before making an order of such magnitude, that if the action were permitted to go ahead nothing could possibly arise on discovery or at trial which might result in the plaintiff succeeding in his or her claim. Furthermore, the court should not dismiss a claim where an amendment of the pleadings might allow the plaintiff pursue the action which, in its current form, might otherwise be dismissed as bound to fail (see McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425).

27. The caution to be exercised by the court on an application to dismiss proceedings under the court's inherent jurisdiction is well described by Murray J. in *Jodifern v. Fitzgerald* [2000] 3 I.R. 321 where he stated as follows:

"The object of such an Order is not to protect a Defendant from hardship in proceedings to which he or she may have a good defence but to prevent the injustice to a Defendant which would result from an abuse of the process of the Courts by a Plaintiff. Clearly, therefore, the hearing of an application by a Defendant to the High Court to exercise its inherent jurisdiction to stay or dismiss an action cannot be of a form of summary disposal of the case either on issues of fact or substantial questions of law in substitute for the normal plenary proceedings.

For this reason, a primary precondition to the exercise of this jurisdiction is that all the essential facts upon which the Plaintiffs claim is based must be unequivocally identified. It is only on the basis of such undisputed facts that the Court may proceed."

28. It is nonetheless clear from decisions such as *Moylist Construction Limited v. Doheny & Ors.* [2016] IESC 9 that, for the purposes of considering such an application, the court is not precluded from engaging with the facts of the case and it may in certain circumstances engage in some analysis of relevant documentation. However, there are significant limitations as to the extent to which any such engagement is appropriate and the caution expressed by Clarke J. in *Keohane v. Hynes* [2014] IESC 66 is of importance in the context of the present proceedings: -

"6.8 What the Court can analyse is whether a plaintiff's factual allegation amounts to no more than a mere assertion, for which no evidence or no credible basis for believing that there could be any evidence, is put forward. Likewise, the Court can go into documentary facts where the relevant documents govern the legal relations between the parties or form the only possible evidential basis for the plaintiff's claim (as in *Lopes*). As Barron J. noted in *Jodifern*, a court can look at a contract and it may become clear beyond argument as to what that contract means. On that basis, it may follow that a plaintiff's claim may be bound to fail. But there may be cases where, notwithstanding the text of a contract, facts are asserted and backed up either by evidence or by the possibility that evidence might be found, which might lead to the contract being construed in some different way or the consequences for the wrong alleged in the proceedings being differently considered. In such cases, as Barron J. made clear, the case must go to trial.

6.9 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the

parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."

29. It is also well established that when considering an application to dismiss a claim on the grounds that it is bound to fail, the court may also resolve disputes which concern issues of law or construction. However, should these prove complex or should it be established that they cannot conveniently be dealt with otherwise than on a plenary hearing, the court should decline its jurisdiction to entertain an application for summary dismissal of the proceedings (see *Moylist Construction Limited v. Doheny & Ors.* [2016] IESC 9 and *McGrath v. O'Driscoll* [2007] 1 I.L.R.M. 203).

Decision

30. I am first of all satisfied that, regardless of the limitations imposed upon the court's jurisdiction to engage with an application to dismiss proceedings on the grounds that they are bound to fail, this is a case in which the High Court was well positioned to determine that application, even though the task at hand required Kearns P. to engage to some extent with the material facts and documents. Relevant in this regard is the fact that the two principal claims which Mr. Kelly was seeking to advance were effectively based upon the content of one single document, namely the notification document and the loss alleged to flow therefrom. Furthermore, there were no disputed facts predating or postdating the notification document which were relevant to the Court's assessment and there were no complex legal issues to be decided. Thus, the application required no more than a very limited factual analysis and was one which, I am satisfied, was capable of being decided in the relative certainty that if the proceedings had been allowed to go ahead nothing could arise at trial or in discovery that might result in the success of any aspect of Mr. Kelly's claim.

31. Given that the relevant jurisprudence provides that a claim should not be dismissed if it can be saved by an amendment to the pleadings, it is important to identify precisely what claims were advanced by Mr. Kelly in his proceedings.

32. Having considered the statement of claim and the submissions advanced by Mr. Kelly in the course of the appeal, the claims identified in his pleadings may be summarised as follows:

- (i) a claim for damages for negligence due to the alleged misstatement of fact in the notification document;
- (ii) a claim for damages for defamation arising from the publication of the notification document and its content to the Revenue;
- (iii) a claim for damages arising from the bank's negligence in providing a loan on terms to which he and his wife had not agreed with the result that demand was made of them to make repayments of €555 per month as opposed to an agreed maximum of €347.92 per month, thereby causing them anxiety, stress and trauma.

33. Apart from the aforementioned causes of action, which are clearly discernible from the statement of claim, Mr Kelly in the course of his oral submissions seeks to rely upon the notification document as a basis upon which he might make a claim for damages for infringement of his rights under the Data Protection Acts. He claims that this record contains false information and he advises the court that he has made a complaint to the Data Protection Commissioner in this regard. This is a point that may conveniently be disposed of at this juncture.

34. Regardless of any claim that Mr Kelly might be in a position to advance by reason of any infringement of his rights under the Data Protection Acts, I am satisfied that he is not entitled to rely upon any such claim in the course of this appeal for the following reasons. First, no such claim is pleaded in the statement of claim and neither did he argue in favour of such a proposed claim in the High Court. Thus, when the bank applied to dismiss his claim as one which was, *inter alia*, bound to fail, the court did not address the viability of that claim. Given that the hearing before this court is not a rehearing, but is one confined to a review of the correctness of the decision made by the High Court judge on the claim as then pleaded and argued, Mr. Kelly cannot raise this new proposed claim for consideration at this stage of the process. Second, the notice of appeal does not seek to challenge the decision of the High Court judge or contend that the appeal should be allowed based on the alleged infringement of his rights under the Data Protection Acts. Third, whilst this court may, in exceptional circumstances, permit an argument to be made which was not advanced in the court below (see for example O'Donnell J. in *Lough Swilly Shellfish Growers Co-Operative Society Ltd and another v. Bradley & Ivers* [2013] IESC 16), or may allow a claim to be amended to save it from being dismissed as one which is bound to fail (see for example *Sun Fat Chan v. Osseous Ltd* [1992] 1 I.R. 425), there is no basis to warrant any such intervention on the facts of this case. To permit the amendment of the statement of claim to include a claim based on the infringement of Mr Kelly's data protection rights would be to allow him pursue an entirely fresh cause of action not contemplated at any earlier stage of the proceedings which were commenced almost 10 years ago. Finally, a claim under the Data Protection Act does not in any event afford the aggrieved party any entitlement to an award of damages.

35. From my reading of the statement of claim I also considered it possible that Mr. Kelly intended to contend that the alleged negligence of the bank in and about the inclusion of the name Mrs. Jean Kelly on the notification document had enabled a third party make unauthorised

withdrawals from the account and/or had resulted in him receiving a lesser sum than that to which he was entitled in respect of his Australian pension which was lodged that account. That, however, was an incorrect assumption on my part and to his credit Mr. Kelly made clear in the course of his submissions that he does not maintain that the conduct of the bank in completing the notification document in the manner in which it did has resulted in any such shortfall.

36. In circumstances where I am satisfied that each of the claims advanced by Mr Kelly were, as correctly found by Kearns P., bound to fail, it is not necessary to consider the consequences for the within proceedings of the decision of Clark J. in Mrs. Kelly's proceedings. Regrettably, it is to be inferred from Mr. Kelly's grounds of appeal that he believes his claim was dismissed on the basis that it was *res judicata* by reason of the outcome of his wife's proceedings. However, he is incorrect in this regard as is apparent from the transcript of the High Court hearing and the *ex tempore* decision of Kearns P. The President, correctly in my view, and presumably by reason of the fact that Mr. Kelly was not a party to those proceedings, ignored the fact that Mrs. Kelly's proceedings had been dismissed by Clark J. in making his decision.

Mr. Kelly's claim for negligence in the completion of the notification document

37. I will consider first whether the decision of Kearns P. that Mr. Kelly's claim for damages for negligence was bound to fail was correct on the undisputed facts.

38. As is clear from the statement of claim, the negligence alleged against the bank arises from its inclusion in the notification document of two names at that part of the form designed to give the name of the second account holder. The second account holder is stated to be Mrs. Jean Kelly and her "Alternative name" is stated on the following line to be Mrs. June Kelly.

39. There are a number of very simple reasons why Mr. Kelly's claim for negligence arising out of this error on the part of the bank was bound to fail. I will summarise these as simply as I can so that Mr. Kelly may understand why it is I am satisfied that this particular claim enjoyed no prospect of success.

40. In order for Mr. Kelly to succeed in his claim for negligence, he would first have to establish that the bank owed him a duty of care in relation to the accuracy of the information it supplied to Revenue in the notification document. Second he would have to prove a breach of that duty. Third, Mr. Kelly would have to establish that it was reasonably foreseeable that as a result of the breach of that duty he might suffer loss and damage. Finally, he would have to be in a position to prove that the breach concerned had caused him actual loss and damage.

41. I think it is not unreasonable to conclude, having regard to the customer/banker relationship that existed between the parties and the fact that the information to be furnished to Revenue in the disclosure document, albeit furnished in pursuance of a court order, was to facilitate Revenue in conducting an inquiry into the existence of bogus non-resident bank accounts, that it was at least arguable that the bank owed him a duty of care in relation to the accuracy of information which it provided to Revenue concerning any account to which he was a party. Furthermore, for the purpose of the Court's consideration of the bank's application to dismiss his claim, even if there is substantial doubt as to whether the error on the part of the bank in completing the disclosure document could be classified as negligent in the prevailing

circumstances, I am satisfied that the Court should, for the purposes of the present assessment, accept that it was at least possible that he might prevail on that issue if the matter proceeded to trial.

42. I am nonetheless entirely satisfied that Mr Kelly could never establish that it was reasonably foreseeable that he could suffer loss and damage arising from the fact that the notification document recorded the second account holder as Mrs. Jean Kelly rather than Mrs. June Kelly and that her alternative name was stated to be Mrs June Kelly. The relevant question to ask is: what was the bank to anticipate would likely happen on receipt by Revenue of the notification document? I suggest that it was to anticipate that Revenue would seek to contact the named account holders at the address/addresses provided. That being so the bank should have foreseen that as a result of its mistake Revenue might write to Mrs. Jean Kelly at the address provided. However, that action could never have exposed Mr. Kelly to any potential loss as in all likelihood any such letter, which was sent to the address provided, would have been opened by Mrs. June Kelly knowing it was intended for her. Furthermore, as a matter of fact, regardless of the error on the face of the notification document, Revenue actually wrote to the correct joint account holders, Mr. John Kelly and Mrs. June Kelly at their Mullingar address on the 20th January, 2003.

43. It is also important to state, in light of the submissions made by both Mr. and Mrs. Kelly, that the information relayed by the bank to Revenue cannot be stated to include a fictitious name. The second name provided to Revenue in respect of the second account holder was furnished on the basis that it was understood to be an alternative name used by the second account holder and was a name found by the bank, according to Mr. Shaw, on some other document relating to the Kelly's account. Neither can it be said that the notification document led Revenue to believe that Mr. and Mrs. Kelly were bogus non-resident account holders. The notification document states precisely the opposite. It advises that their account was one which was not liable to DIRT.

44. Mr. and Mrs. Kelly need to understand that the bank in furnishing the detail in the notification document to Revenue did no more than comply with a court order. The court order captured their account due to the fact that it was opened as a non-resident account and in order to comply with that order the bank was obliged to furnish certain details concerning account to Revenue. Furthermore, Revenue did not designate Mr. and Mrs. Kelly to be the holders of a bogus non-resident account by reason of the information furnished by the bank. This is clear from the opening sentence of the letters forwarded to Mr. and Mrs. Kelly on the 20th January 2003 which refers to the fact that Revenue was of the belief that they held or in the past may have held a non-resident deposit account and wherein they were asked to address, with appropriate dispatch, a number of queries.

45. Finally, the claim for negligence was doomed to fail given that Mr. Kelly was clearly not in a position to establish any actual loss or damage by reason of what was in truth a benign mistake in completing the information required to be delivered to revenue on foot of the High Court order.

46. It may well be that, as a result of the information furnished to Revenue by the bank and the response by Mr. and Mrs. Kelly to the letters of the 20th January, 2003, proceedings were later commenced against Mr. Kelly in respect of certain tax liabilities which were unrelated to the joint account. However, that claim has nothing to do with the error made by the bank in terms of the names on the notification document. Furthermore, either Mr. Kelly was liable for the tax later claimed by Revenue or he was not. If he was liable, he couldn't claim that he should be reimbursed by the bank by reason only of the fact that the information provided to revenue set on a train of enquiry which ultimately resulted in uncovering an alternative tax liability. He cannot blame the bank for the fact that he had to pay Revenue for tax liability that was lawfully levied.

Mr. Kelly's claim for defamation

47. I am also satisfied that Kearns P. cannot be faulted for concluding that Mr. Kelly's claim for defamation was one which was bound to fail. To review his decision it is necessary to consider in a little more detail the content of the notification document as it is the words in that document that Mr. Kelly would have to rely upon, if this aspect of his claim was to succeed.

48. The notification document provides, in respect of each account holder, a separate line for the inclusion of an alternative name. Common sense would suggest that this facility was provided so that it would make it easier for Revenue to contact the account holder if it be the case that they did not always or had not always used the same name when dealing with the bank. The form was obviously designed to accommodate to the fact that, for example, a married woman may have some documents in her maiden name and others in her married name or that a customer might not always use their formal Christian name.

49. In order to succeed in his appeal based upon his claimed entitlement to damages for defamation, Mr. Kelly would have to be in a position to demonstrate that it is possible that if the action were to proceed to trial he might be able to prove, first, that the information provided in the notification document was defamatory and second, that as a result his reputation had been damaged.

50. Having considered the notification document upon which Mr. Kelly must rely to support his claim for defamation, I am fully satisfied that his claim was, as found by Kearns P., bound to fail. Relevant in this regard is that it is always for the trial judge, even where the trial is a jury trial, to determine whether the words complained of are reasonably capable of carrying a defamatory meaning. It is for the jury, if there be one, to determine what the words actually mean. In my view there are no circumstances in which any judge, considering the content of the notification document, could consider that its content was capable of being considered defamatory of Mr. Kelly. It is simply perverse to believe that anybody in Revenue could reasonably conclude that Mr. Kelly was engaged in financial impropriety such as money-laundering by reason only of the fact that the second account holder was stated, albeit incorrectly, to be Mrs. Jean Kelly with an alternative name of Mrs. June Kelly. The words used in the relevant entries are simply not capable, in their ordinary or natural meaning or by way of innuendo, of being understood to mean that Mr. Kelly was guilty of any such impropriety or for that matter that he was the holder of a bogus non-resident account. Furthermore, as already

stated, the notification document conveys exactly the opposite information insofar as it records on its face that the account was not a DIRT liable non-resident account.

51. Given that what was sent to Revenue could never be considered libellous, Mr. Kelly's claim for defamation against the bank was bound to fail even if as a result of that information Revenue, which it did not, had wrongly accused him of having a bogus non-resident account.

Claim for negligence in relation to the provision of additional finance

52. The final claim advanced in the pleadings is one stated to arise due to the alleged negligence on the part of the bank in giving Mr. and Mrs. Kelly a loan which was on terms beyond those which had been agreed. They had sought a top up on their original loan with the result that the bank agreed to afford them additional facilities on terms which provided that their monthly repayment would be restricted to a maximum sum of €347.92. Due to the bank's alleged negligence, Mr. and Mrs. Kelly, they were given additional banking facilities beyond that which they had sought with the result that they were rendered liable to repayments of €555 per month. This, Mr. Kelly claims, caused them a great deal of upset over a period of a month or two before the position was rectified by the bank and the monies incorrectly charged were refunded.

53. Given that Mr. Kelly cannot be stated to have sustained any loss or damage by reason of the bank's negligence in relation to this top up loan facility, it follows that this cause of action is also one that is bound to fail. Any stress or anxiety experienced by Mr. Kelly which was generated as a result of the improper charges made by the bank over this period of one or two months has not resulted in an injury which is compensatable in damages.

54. Before concluding this judgement, I think it only fair to say that Mr. and Mrs. Kelly strike me as people who are well motivated and have shown themselves willing to meet all of their lawful obligations since they came to Ireland some thirty years ago. They are people who, regrettably, found themselves living in strained financial circumstances for many years whilst awaiting the outcome of their applications for citizenship. Neither of them was entitled to work during that period and I have no doubt that it was challenging for them to survive for such a long period solely on the basis of Mr. Kelly's pension. Nobody doubts their evidence to the effect that they felt vulnerable and stressed, being acutely aware that any financial irregularity or improper conduct on their part would likely thwart their prospects of obtaining citizenship, an outcome that would bring with it serious turmoil, financial and otherwise.

55. Perhaps it is for these reasons that Mr and Mrs Kelly became suspicious that there could be a link between the information conveyed by the bank to Revenue and other adverse occurrences in their lives. However, they now need to come to terms with the fact that they have not, contrary to their suspicions, as I hope this judgement demonstrates, been adversely affected by the conduct of the bank in the manner in which it conveyed information concerning their account to Revenue. I would urge Mr. and Mrs. Kelly to now press on with their lives and disconnect from the litigation process which has done no more than expose them to significant costs which might otherwise have been avoided.

56. For all of the aforementioned reasons I would dismiss Mr. Kelly's appeal.

Cross-appeal by the bank

57. The bank's cross-appeal is against an order that was made by the High Court judge in the exercise of his discretion and as such is the type of order that an appellate court should be slow to interfere with unless satisfied that a failure to do so would visit a significant injustice upon the appellant.

58. The complaint is that having dismissed Mr. Kelly's proceedings as bound to fail, the High Court judge should have awarded the bank its costs of the proceedings and of its motion in accordance with O. 99 of the Rules of the Superior Courts which provides that costs should, "follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct."

59. It is correct to say, as was submitted on behalf of the bank, that Kearns P. did not, as he ought to have done, state why he did not award costs against Mr. Kelly given that his proceedings were dismissed as bound to fail. Indeed, from the transcript it appears that, for reasons he did not explain, the President had even entertained the possibility of awarding costs against the bank, an approach which had it been adopted would, in my view, have been difficult to reconcile with his dismissal of the proceedings.

60. Even if it be the case that the more obvious result might have been for the costs to have been awarded against Mr. Kelly, there are a number of factors which may well have weighed on the mind of the High Court judge when he exercised his discretion in the manner in which he did. First, the bank had failed in its application to have an Isaac Wunder order made against Mr. Kelly. In this regard I would also note that the bank sought the same relief against Mrs. Kelly even though she was not a party to the proceedings. Second, the bank had sought to advance its application based upon a number of legal arguments which were without merit, such as that which contended that Mr. Kelly was estopped from maintaining his own proceedings by reason only of the fact that many of the same issues had been dismissed as bound to fail in his wife's proceedings, those being proceedings to which he was not a party.

61. In these circumstances I am not satisfied that there is sufficient reason to justify this Court interfering with the manner in which Kearns P. exercised his discretion in making the costs order which he did. Furthermore, in my view, no significant injustice has been visited upon the bank as a result of that order. Accordingly, I would dismiss the cross-appeal.