THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 92

Appeal No: 2018/371

Baker J.
Whelan J.
Collins J.

BETWEEN/

THOMAS KEARNEY

APPELLANT

- AND -

BANK OF SCOTLAND PLC AND PATRICK HORKAN

RESPONDENTS

Judgment of Ms Justice Máire Whelan delivered the 8th day of April 2020

Introduction

1. This is an appeal from the judgment and orders of the High Court (McGovern J.) of 4th May, 2018 wherein the High Court judge dismissed the appellant's proceedings, made an order pursuant to s. 123(b)(i) of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act") that *lites pendentes* registered by the appellant against two folios be vacated and further imposed an Isaac Wunder order against him.

Background and procedural history

2. The appellant, who is a litigant in person, was advanced several loan facilities by Bank of Scotland (Ireland) Ltd ("BOSI") on various dates between June 2003 and November 2006. The loan facilities were secured by way of a deed of mortgage and charge dated 14th January, 2004 ("the mortgage") over a commercial property the title to which was partly registered and partly unregistered, ("the secured property"). The appellant repaid certain of these loans and defaulted in relation to others.

3. On 31st December, 2010, all of the assets and liabilities of BOSI, including the mortgage and charge over the appellant's property, transferred to the first named respondent ("BOS") following a cross-border merger pursuant to the European Communities (Cross-Border Mergers) Regulations 2008 (S.I. No. 157/2008) (the "2008 Regulations"). BOSI then stood dissolved without going into liquidation.

4. In 2005, an application was made by BOSI to register the charge in the Land Registry under dealing number D2005GY000994W, which was completed on 20th August, 2013. By that date BOS stood in the shoes of BOSI and registration of the charge was effected in its name in part 3 of each Folio.

5. On 5th July, 2012, by deed of appointment, the second named respondent ("the receiver") was appointed by BOS.

2012 proceedings

6. In proceedings entitled High Court [2012 No. 8712 P] between Thomas Kearney, plaintiff and Bank of Scotland plc and Patrick Horkan, defendants (the "2012 proceedings"), the appellant challenged the validity of the charges registered against the secured property and the validity of the appointment of the receiver. The respondents issued a motion in 2013 to dismiss his claim on the grounds that same was frivolous, vexatious, disclosed no cause of action or was otherwise bound to fail. The appellant failed to appear at the hearing. By order made on 18th November, 2014 Kearns P. dismissed the 2012 proceedings.

7. On 29th November, 2014 BOS agreed to assign a portfolio of loan facilities and associated securities, including the mortgage, to Carval Investors UK Limited, which subsequently novated same to Pentire Property Finance Limited ("Pentire"). On 20th April, 2015 all of BOS's right, title and interest in the appellant's loan facilities and in the security interest over the secured property were assigned, conveyed and transferred to Pentire.

8. Meanwhile, the appellant's application for an extension of time within which to lodge an appeal against the High Court President's order dismissing the 2012 proceedings was refused by the Court of Appeal on 23rd February, 2015. It was found that he had not established any arguable grounds of appeal. The appellant's application to the Supreme Court for leave to appeal against that refusal was refused on 3rd November, 2015.

Wife's proceedings

9. On 7th September, 2017 the receiver placed the secured property for sale on the open market. On 15th September, 2017, the appellant's wife, Mrs. Fidelma Kearney, issued proceedings against the appellant and the receiver and, by order, Pentire, in which she asserted, as against the appellant, an interest in the secured property. After failing to deliver a statement of claim, she filed a notice of discontinuance on 16th November, 2017. There was no evidence that she acted as agent or proxy for the appellant in this regard.

First 2017 proceedings

10. Shortly after the discontinuance of his wife's proceedings, on 29th November, 2017 the appellant instituted proceedings entitled High Court [2017 No. 10822 P] between Thomas Kearney, plaintiff and Patrick Horkan, defendant, relating to the secured property. The said proceedings were subsequently discontinued.

Current proceedings

11. The appellant issued the proceedings the subject of this appeal by way of plenary summons on 13th December, 2017. Subsequently, the respondents issued motions seeking the dismissal of the appellant's claim.

12. The appellant's statement of claim, analysed in greater detail below, encompassed the following claims:

    i. The Registration Claim – that the charge was not registered in the name of BOSI in the Land Registry, and such registration was required before the charge could be transferred to BOS (paras. 5, 6, 8 and 10 of the statement of claim).

ii. The Indebtedness Claim – that the sums claimed on foot of the mortgage are not lawfully due and owing to any person or entity (para. 16 of the statement of claim).

iii. The Receiver Claim – the appointment of the receiver was invalid due to BOS not having registered itself as the owner of the charge. The deed of appointment of 5th July, 2012 failed to comply with clause 8.1 of the mortgage and was invalid, void and "a false instrument" (paras. 8, 9, 11, 12, 13, 14, 15 and 17 of the statement of claim).

High Court judgment

13. The High Court judgment under appeal, acceding to the respondents' motion to dismiss these proceedings, at para. 31 found that *The Merrow Limited v. Bank of Scotland plc & Anor*. [2013] IEHC 130, [2013] 2 I.L.R.M. 388 which had been relied upon by the appellant, offered no assistance to him; it was distinguishable as involving failure to make an appointment under seal as required by the terms of the debenture, when in the current case, the appellant's challenge to the appointment of the receiver was on a wholly different basis.

14. The appellant's objection that affidavits sworn on behalf of the respondents stated the place of business of the deponents and not their home addresses was rejected. The trial judge found said affidavits to be admissible in evidence.

15. The High Court judge noted at para. 33 that the appellant appeared to be under a "fundamental misapprehension" as to the legal basis on which the receiver was appointed by BOS on 5th July, 2012. Contrary to the appellant's proposition that BOS did not enjoy the right in law to have any charge or burden registered in its name unless it had first been registered in the name of BOSI, the High Court considered that the judgment of Laffoy J. in *Kavanagh v. McLaughlin* [2015] IESC 27, [2015] 3 I.R. 555, affirmed that BOS had power to appoint a receiver independently of the powers conferred by the Registration of Title Act 1964. The Act does not limit the exercise of contractual rights which are held in addition to rights under statute. Therefore, BOS had appointed the receiver validly even though it had not registered the charge in its own name.

16. The High Court, notwithstanding finding that the appellant's motion could be wholly disposed of under the rule in *Henderson v. Henderson* (1843) 3 Hare 100 by virtue of the fact that arguments raised against the validity of the appointment of the receiver could and should have been made in the 2012 proceedings, proceeded to deal with the other grounds raised by the respondents in their motion to have the proceedings dismissed. (paras. 34-35)

17. The High Court found at para. 38 that various pleas contained in the appellant's statement of claim were bound to fail. The Registration Claim failed by virtue of the Supreme Court judgment in *Kavanagh v. McLaughlin*. His claim at para. 6 of the statement of claim, that BOS was estopped from relying on the mortgage which did not confer on the charge owner any interest in the secured property, was bound to fail as

BOS had stepped into the shoes of BOSI at a time when the dealing was pending in Land Registry.

18. The Receiver Claim could and should have been made in the 2012 proceedings and was therefore bound to fail by virtue of the rule in *Henderson v. Henderson*. (para. 39)

19. The High Court noted that that the Indebtedness Claim offended the rule in *Henderson v. Henderson* but that in any event, as BOS has now no interest in the lands, the loan or the security, relief could not be obtained against it. (para. 40)

20. In relation to the alleged overcharging of the appellant by BOS, the High Court held that if there was an issue to be raised about the loan, it should have been made in the 2012 proceedings. Insofar as it was raised as a challenge to the appointment of the receiver, it was a plea bound to fail and also fell foul of the rule in *Henderson v. Henderson*. (para. 40)

21. As BOS never instituted proceedings to recover judgment for a liquidated sum against the appellant, the issue would only arise if Pentire commenced proceedings against the appellant, who had not made out any case "…that the application of surcharge interest was in any way material or linked to his falling into arrears in respect of loan repayment obligations under the loan facilities". (para. 41)

22. The High Court further granted orders dismissing the proceedings:

    (i) under O. 19, r. 28 of the Rules of the Superior Courts on the grounds that they disclosed no reasonable cause of action; and

    (ii) under the inherent jurisdiction of the court on the grounds that they were unsustainable, frivolous and vexatious, constituting an abuse of process.

23. The court found (para. 44) that the *lites pendentes* should be vacated pursuant to s. 123(b) of the 2009 Act, on the grounds that neither of the respondents claimed an interest in the property as Pentire is the registered holder of the charge. The court concluded that the history of the litigation brought by the appellant and his wife demonstrated that its dominant purpose, as well as that of the current proceedings, was to facilitate the registration of *lites pendentes* and impede a sale. The proceedings were thus brought for an improper purpose.

24. Finally, in finding that exceptional circumstances warranted the imposition of an Isaac Wunder order restraining the appellant from bringing any further proceedings against the respondents or any other party without leave of the court challenging the receivership or the right of the receiver to act on foot of his authority as receiver over the secured property, the High Court judge stated at para. 45 that the appellant "will almost certainly continue to engage in litigation in an attempt to frustrate the receiver on an ongoing basis. This cannot be allowed to continue." The trial judge noted that while courts can give some latitude to unrepresented litigants, the finite resources of the courts must be

prevented from being abused by vexatious litigants "who endlessly clog up the court lists."

Notice of Appeal

25. The notice of appeal advances three key grounds: -

i. The learned trial judge erred in his application of the principles in *Kavanagh v. McLaughlin*. The learned trial judge erred in accepting the reasoning applied in *Kavanagh v. McLaughlin*, a decision which contains "two averments that are totally inaccurate". First, that it is erroneously stated that corresponding provisions to Regulation 19(1)(g) and (h) in the 2008 Regulations exist in the Companies (Cross-Border Mergers) Regulations 2007 (the "U.K. Regulations") in circumstances where the approval order for the merger was issued as demanded under Directive 2005/56/EC due to the location of BOS. Secondly, that the orders of Kelly J. (as he then was) referred to in the judgment were incorrectly described.

ii. It was contended that a subsequent High Court decision of McDonald J. in *McCarthy v. Moroney* [2018] IEHC 379 confirmed that the deed of appointment ought to have referred to the receiver as a "receiver and manager".

iii. The learned trial judge erred in making an Isaac Wunder order against the appellant where he had raised a legitimate cause in relation to the receivership and that same lacked "proportionality and fair balance" and therefore breached his rights pursuant to Article 1 of the First Protocol to the European Convention on Human Rights.

Both respondents oppose the appeal on all grounds.

Submissions of the appellant

The receiver and manager

26. Clause 1.1 of the mortgage provides that:-

> "…'Receiver' shall have the meaning ascribed to it in Clause 8.1".

Clause 8.1 of the mortgage provides as follows:-

> "At any time after the power of sale has become exercisable whether or not the Bank has entered into or taken possession of the Secured Assets or at any time after the Mortgagor so requests the Bank may from time to time appoint under seal or under hand of a duly authorised officer or employee of the Bank any person or persons to be receiver and manager or receivers and managers (herein called 'Receiver' which expression shall where the context so admits include the plural and any substituted receiver and manager or receivers and managers) of the Secured Assets or any part or parts thereof and from time to time under seal or under hand of a duly authorised officer or employee of the Bank remove any Receiver so appointed and may so appoint another or other in his stead. If the Bank appoints more than one person as Receiver of any of the Secured Assets, each such person

shall be entitled (unless the contrary shall be stated in the appointment) to exercise all the powers and discretions hereby or by statute conferred on Receivers individually and to the exclusion of the other or others of them."

Clause 8.2 of the mortgage provides:

> "The foregoing powers of appointment of a Receiver shall be in addition to and not be to the prejudice of all statutory and other powers of the Bank under the Act and so that such powers shall be and remain exercisable by the Bank in respect of any part of the Secured Assets notwithstanding the appointment of a Receiver thereover or over any other part of the Secured Assets."

The deed of appointment executed by the bank provided:

> "NOW THIS DEED WITNESSETH that in pursuance of the powers contained in the document set out in the Schedule hereto (the 'Charge Document') and made between, THOMAS KEARNEY and Bank of Scotland (Ireland) Limited, the Bank does HEREBY APPOINT PATRICK HORKAN of KMPG, Odeon House, Eyre Square, Galway to be the RECEIVER of all property comprised in and charged by the Charge Document to enter upon and take possession of the same in the manner specified in the Charge Document and such Receiver shall have and be entitled to exercise the powers conferred upon him by the Charge Document and by law"

27. The appellant contends that the mortgage provided for the appointment of a "receiver and manager", while the deed of appointment specified the appointment of a "receiver" only, rendering the receiver's appointment invalid.

28. Reliance is placed by the appellant upon the decision in *The Merrow* wherein Gilligan J. cited a number of authorities in support of the proposition that the appointment of a receiver is not valid unless it is made in strict compliance with the requirements imposed by the debenture. *The Merrow* was subsequently applied in *McCleary v. McPhillips* [2015] IEHC 591. The appellant states that counsel for the receiver "evaded the point" in the High Court by referencing the authority to create the debenture when what was at issue was the strict compliance with its provisions when exercising the power of appointment thereunder. The appellant also refers to the observations of Evershed M.R. in In re B. Johnson & Co. (Builders) Ltd. [1955] 1 Ch. 634 and Jessel M.R. in *In re Manchester and Milford Railway Co.* (1880) 14 Ch. D. 645 to support the contention that "strict compliance" with security instruments is required.

29. He relies on *McCarthy v. Moroney*, wherein McDonald J. refused a mandatory injunction sought by a receiver on the basis, *inter alia*, that the latter had not made out a strong case that he had been properly appointed in circumstances where he was expressed to be appointed as "receiver" in the deed of appointment while the underlying deed of mortgage provided only for the appointment of a "receiver and manager".

30. The appellant contends, citing *McMahon v. Leahy* [1984] I.R. 525 and *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, that the High Court judge was aware that strict compliance was "alien" to the position of the receiver under "his fraudulent Deed of Appointment" and that "[his] decision…to ignore the previously delivered *Merrow* and *McCleary* decisions made at a similar High Court level was an appalling vista of unfairness and disrespect" and that the High Court judge "then returned to *Henderson v. Henderson* principles for refuge". (paras. 11 and 14 of submissions)

31. The appellant submits that in this case, a non-managing receiver has been appointed and that the formalities specified in the debenture were not followed through where same permitted the appointment of a receiver and manager alone. Hence, the receiver's appointment is unlawful. The appellant asserts that in the decision of *Kavanagh & Anor. v. Lynch & Ors.* [2011] IEHC 348 "the entire context, meaning and language of the Bank of Scotland Mortgage Deed were adapted with precision in the Deed of Appointment issued to Mr. Kavanagh" and that "[t]his is not the case here." (para. 24 of submissions)

The Cross-Border Merger

32. In oral submissions the appellant contended, *inter alia*, in relation to Regulation 19(1)(g) and (h) of the 2008 Regulations, that it had been suggested at para. 112 of the judgment of Laffoy J. in *Kavanagh v. McLaughlin* that these sub-paragraphs had corresponding provisions in Regulation 17 of the U.K. Regulations, when they did not. Further, the appellant claimed that Laffoy J. had erred in stating at para. 49 of her judgment that "[t]he orders approving the merger in this case were made by the High Court (Kelly J.)". The High Court was not in a position to make an order concerning the scrutiny of the legality of the merger as the "successor company", BOS, was not an Irish company within the provisions of Regulation 14 of the 2008 Regulations.

33. The appellant submits that the provisions of Article 14 of Directive 2005/56/EC, when read in conjunction with Article 13(1) of Third Council Directive 78/855/EEC, can only be interpreted to mean that in the context of a cross-border merger, contracts such as those at issue in the present proceedings which have been concluded by the company being acquired, are transferred to the acquiring company and thus trigger the laws chosen by the parties when the contract was first concluded. As neither of the parties had agreed to the 2008 Regulations when the loan and mortgage contract was first concluded in 2004, he submitted that it is the Central Bank Act 1971 alone which is the applicable law and that BOS has disregarded its obligations to act in accordance with the said Act.

The Isaac Wunder order

34. The appellant submits that it is the respondents' conduct which constitutes an abuse of process and that his reasoning for not offering an undertaking to desist from taking further proceedings is that "[t]o do so would contribute to the cover up of an iniquitous methodology applied by BOS plc and parties who aligned with it in a construct of deceit through the drafting and presentation of a fraudulent Deed of Appointment not in compliance with the Mortgage Deed". (para. 26 of submissions)

Henderson v. Henderson

35. Although not expressly particularised in the Notice of Appeal, the appellant in his submissions contends that no affidavits or pleadings were opened or taken into account prior to the order to dismiss being made by Kearns P. on 18th November, 2014 and his decision was thus not "a determination" of the 2012 proceedings for the purposes of the rule in *Henderson v. Henderson*.

Submissions of BOS

The receiver and manager

36. BOS contends that the appellant failed at hearing to identify any legal significance to the use of the term "receiver" as opposed to "receiver and manager" in the deed of appointment, merely asserting that "the language ought to be identical" in both instruments. (para. 4.7 of submissions)

37. BOS relies on *Charleton v. Scriven* [2019] IESC 28 wherein the Supreme Court, based on its construction of the relevant terms and definition clauses in the deeds at issue in that case, reached a different view to that as has been inferred by some from the observations of McDonald J. made in the context of an application for a mandatory interlocutory injunction in *McCarthy v. Moroney*. The decision of Allen J. in *McCarthy v. Langan* [2019] IEHC 651 was also relied upon, although same is now under appeal to this court. In response to the defendant's claim that the receivers were invalidly appointed due to the mortgage deeds providing for the appointment of a "receiver and manager" while the deed of appointment only refers to their appointment as "receivers", Clarke C.J. found that the mortgage deeds themselves defined the persons to be appointed as "receivers and managers" as "receivers" and that it was arguable that the use of the word "receiver" in the deeds of appointment (as documents which are contemplated by the mortgage deeds) would carry the same definition.

38. BOS submits that the appellant is not assisted by any observation expressed by the court in *McCarthy v. Moroney*. Firstly, such an argument was not advanced before the High Court in 2018 and had it been, it would have offended the rule in *Henderson v. Henderson* as it could and should have been raised by the appellant in the 2012 proceedings. Secondly, the interlocutory decision conflates an alleged failure to comply with a specific appointment formality, as in the case of *The Merrow*, with a "purely linguistic or semantic critique in the relevant deed of appointment". Thirdly, the term "receiver" is a defined term within clause 8.1 of the mortgage instrument itself which definition connotes a receiver manager: -

> "…any person or persons to be receiver and manager or receivers and managers (herein called 'Receiver' which expression shall where the context so admits include the plural and any substituted receiver and manager or receivers and managers) of the Secured Assets…"

39. The remainder of the mortgage deed uses "Receiver" throughout in reference to this defined term. BOS contends that, as the deed of appointment expressly describes the receiver's appointment by reference to the mortgage, which is scheduled as the "Charge Document" in the deed of appointment, the term "Receiver" in the deed of appointment,

enjoys the same meaning as the defined term "Receiver" in the mortgage, "which is expressly inclusive of a 'receiver and manager'". (para. 4.9 of submissions)

The Cross-Border Merger

40. BOS argues that this ground of appeal appears to run contrary to the appellant's plea at para. 10 of his statement of claim acknowledging the cross-border merger and that it appears to either impugn the correctness of the decision of the Supreme Court in *Kavanagh v. McLaughlin* or invites this court to undermine the legality of the cross-border merger itself.

41. BOS submits that this argument is misconceived: pursuant to the provisions of Article 17 of Directive 2005/56/EC and the 2008 Regulations, the consequences of the cross-border merger are final and cannot be subsequently impugned and same have been the subject of binding and definitive decisions of the Supreme Court (*Kavanagh v. McLaughlin, Freeman v. Bank of Scotland plc* [2016] IESC 14) with collateral challenges to the cross-border merger in other cases subsequent to *Kavanagh v. McLaughlin* failing (*McMahon v. Bank of Scotland* [2017] IEHC 438; *McDermott v. Ennis Property Finance DAC* [2017] IEHC 478; and *Geary v. Property Registration Authority* [2018] IEHC 727).

The Isaac Wunder order

42. BOS submits that the Isaac Wunder order made against the appellant was appropriate in light of the principles associated with the grant of such orders as summarised by MacMenamin J. in *McMahon v. W.J. Law & Co*. [2007] IEHC 51, which was subsequently cited with approval by Whelan J. in the Court of Appeal in *ACC Bank plc v. Cunniffe* [2017] IECA 261.

43. BOS emphasises that the similarities with the 2012 proceedings reveal a clear intention on the part of the appellant to re-litigate the same broad dispute against the respondents, that the appellant has demonstrated an unwillingness to accept the finality of court orders, that he has "presented his grievances in the 2012 Proceedings and, to a lesser extent in these proceedings, in a cryptic, opaque and changeable manner", and had declined to offer an undertaking to the High Court to refrain from instituting further proceedings. (para. 4.11 of submissions)

Henderson v. Henderson

44. BOS submits that the appellant is attempting to re-litigate substantially the same grievances that he unsuccessfully litigated in the 2012 proceedings, which, as with the current proceedings, concerned a broad challenge to the effectiveness of the security and the legality of the appointment of the receiver. To support this contention, BOS emphasises the focus of the plenary summons which instituted the 2012 proceedings and the amended/extended version of the statement of claim delivered by the appellant to BOS in those proceedings on 25th March, 2013.

45. BOS contends that the appellant was afforded the opportunity to engage with the appellate processes in response to his dissatisfaction with the High Court dismissal order of Kearns P.. The fact that he was unsuccessful in his attempts to pursue an appeal to the Supreme Court does not provide him with a basis for undermining the court orders made

in the 2012 proceedings – such would run contrary to the principle of finality in litigation and the conclusiveness of court orders (citing *Riordan v. An Taoiseach (Ex tempore*, Supreme Court, 29th June, 2000).

46. BOS posits that the appellant's tendency to re-litigate is corroborated by the pattern of other litigation featuring the appellant and concerning the same secured property.

47. It submits that the High Court correctly applied the rule in Henderson v. Henderson in circumstances where:

    (i) the parties are the same in the 2012 proceedings and the current proceedings;

    (ii) there was no valid reason why the appellant could not have raised all relevant arguments in relation to BOS's security over the secured property in the 2012 proceedings;

    (iii) the relevant Land Registry folios are matters of public record and were available to the appellant at the time of the 2012 proceedings, while clause 28 of the mortgage made clear the intention to register same as a charge on the Land Registry folios comprised in the secured property;

    (iv) any issue or dispute in relation to the cross-border merger could have been advanced in the 2012 proceedings as same occurred prior to the institution of the 2012 proceedings and the mortgage defined BOSI as "the Bank" and made it clear that the expression includes "its successors and assigns"; and

    (v) both the demands for repayment and the deed of appointment were made by BOS and not by BOSI and the appellant was unable to credibly claim to have been under any misunderstanding, having named BOS (not BOSI) as defendant in the 2012 proceedings.

Submissions of the receiver

The receiver and manager

48. Without prejudice to his submission that the appellant is precluded by the rule in *Henderson v. Henderson* from relying on an alleged deficiency in the instrument of appointment to challenge the validity of the appointment of the receiver because he could, and as a matter of law was required to, have raised all issues in relation to the validity of the deed of appointment in the 2012 proceedings, the receiver addresses this ground of appeal by firstly summarising the legal principles of contractual interpretation with reference to extensive jurisprudence for the proposition that that contractual documents should be construed according to the language used and having regard to their commercial context (*Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 W.L.R. 896; *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274; *Square Mile Partnership Ltd. v. Fitzmaurice McCall Ltd* [2006] EWCA Civ 1690*; Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900; and *Moorview Developments Ltd. v. First Active plc* [2010] IEHC 375).

49. The receiver places reliance on *Danske Bank v. McFadden* [2010] IEHC 116 to support his contention that like principles apply in respect of all types of contracts, including the documents by which a receiver is appointed.

50. The receiver also relies on the decision in *Charleton v. Scriven* which provides that the proper approach to the construction of a deed of appointment of a receiver is that terms used therein should be construed as having the same meaning as in the mortgage or charge pursuant to which the appointment is made.

51. The receiver posits that clause 8 of the mortgage: -

> "…contemplates that any appointment of a receiver shall be by way of receiver and manager…that the appointee will have not merely the powers of a receiver *simpliciter* but shall, in addition, have the power of manager to manage the secured property over which he is appointed…the Charge only contemplates appointment by way of receiver and manager and does not contemplate appointment without the power to manage.
>
> That this is so is confirmed by the provisions of clause 8.4 of the Charge where the powers of a 'Receiver' so appointed are set out and include, at clause 8.4(b), the power to manage the business of the mortgagor." (paras. 27 and 28 of submissions)

52. The receiver argues that the language of deed of appointment is unequivocal:

> "The appointment is made 'in pursuance of the powers contained in the [Charge]' that is to say, it is an appointment made in pursuance to the power conferred by clause 8.1 which, as McDonald J. correctly noted in *McCarthy v. Moroney*, is only a power to appoint a receiver and manager. The High Court decision in *McCarthy v. Langan* [2019] IEHC 651 was also relied on in support of the validity and efficacy of the deed to appoint the second-named respondent as receiver and manager under the mortgage instrument. The Deed of Appointment expressly provides 'such Receiver' shall have and be entitled to exercise 'the powers conferred on him by the Charge Document and by law', which powers include the power, at clause 8.4(b) to manage." (para. 30 of submissions)

53. In reviewing the authorities on the appointment of receivers, the receiver distinguishes between those concerning substantive requirements on the one hand and procedural on the other, such as those relating to terminological issues. Reliance is placed on the decision of the Supreme Court of Western Australia in *Wrights Hardware v. Evans* (1988) 13 A.C.L.R. 631 wherein Franklyn J. found that:

> "1. The manner in which a receiver is to be appointed is prescribed by the debenture deed…and must be strictly followed…

2. The existence of a power in the debenture holder to appoint in a particular manner will not relieve a *de facto* receiver from liability for trespass if the appropriate appointment procedure is not strictly observed…"

54. The receiver seeks to distinguish the decision in *Wrights Hardware* in which the issue was an appointment of persons "jointly and severally to be receivers and managers" whereas the debenture provided for the appointment of joint receivers and managers. As a joint and several appointment is substantively different from a joint appointment, Franklyn J. had held that the appointment was not authorised.

55. The receiver contends that the term "receiver" encapsulates a variety of potential appointments and in each case, the powers of the appointee will derive from the source, whether that be statute or contract. He argues that in the case of a receiver appointed pursuant to a mortgage, charge or debenture, their powers are derived from the document pursuant to which they are appointed and that there is no prohibition or constraint on a person described in the mortgage deed or debenture as a "receiver" having powers of a manager if same expressly so provides. He argues that while the term "manager" may connote certain powers and functions that might be exercised, these can only be identified by reference to the source. He cites *Halsbury's Laws* (4th ed., 2012) vol. 88, para.1, for the uncontroversial proposition that the powers of a receiver appointed out-of-court derive from the instrument or statute under which he or she is appointed.

56. Reliance is also placed by the receiver on Courtney, *The Law of Companies* (4th ed., Bloomsbury Professional, 2016) wherein at para. 21.003 the author considers the *dictum* at p. 653 of *In re Manchester and Milford Railway Co*.. The receiver contends that the fact that Courtney uses the term "receiver" for two distinct, but related, concepts and is required to add qualifiers – "*simpliciter*" and "manager" – as a short-hand method of distinguishing the two confirms that use of the term "receiver" is not dispositive of the powers of the appointee.

57. The receiver relied on Lynch-Fannon & Murphy, *Corporate Insolvency and Rescue* (2nd ed., Bloomsbury Professional, 2012), wherein at paras. 6.07-6.08, in relation to the introduction in England of an administrative receiver and a receiver by s. 29(2) of the Insolvency Act 1986, it is stated that: -

> "In Ireland, there never was and now probably will not be such a statutory distinction. A receiver appointed on foot of a mortgage or charge over substantially all of a company's assets would normally be given the power to manage in the debenture document, and, subsequently, in the deed of appointment. The term 'receiver and manager' simply means that the receiver has the power to trade with the company's assets. A receiver *simpliciter*, who is appointed without a right to manage, may sell existing stock but will have no right, for example, to acquire fresh stock with a view to manufacturing. The relevant powers will be set out in the debenture document."

58. The receiver submits that *The Merrow* concerned a failure to observe procedural formalities and that McGovern J. was correct at para. 31 of his judgment in distinguishing the circumstances in *The Merrow* from the current case.

59. The receiver argues that the fact that *The Merrow* can be "readily distinguished" is apparent from decisions such as *Danske Bank v. Scanlan* [2016] IEHC 118, which noted that the debenture in *The Merrow* expressly required the appointment of a receiver to be executed under seal; *McGuinness v. Ulster Bank Ireland Limited* [2014] IEHC 281, wherein Hogan J. summarised the ratio of *The Merrow* as "…where there is a contractual requirement that the appointment of a receiver by a deed under seal, then the appointment of a receiver other than in that fashion is fatal to the validity of that appointment"; and *McGarry v. O'Brien* [2017] IEHC 740, wherein Stewart J. applied *Kavanagh v. McLaughlin* and held that that the rigour to be applied in interpreting receivers' powers "is not so severe as to render the terms of the appointment entirely self-defeating".

60. The receiver submits that the proper construction of the word "receiver" in the deed of appointment is the same as the defined term "Receiver" in the mortgage, noting that the latter term is defined in clause 1.1 of the mortgage as having the meaning ascribed thereto in clause 8.1, within which neither of the terms "receiver" nor "manager" are defined; rather, a person who has been appointed under clause 8.1 as receiver and manager is thereafter described by the short-hand, defined term "Receiver" (with a capital "R"). He contends that clause 8.1 of the mortgage does not set out any specific requirement for the terminology to be used in a deed of appointment. A "Receiver" connotes a person who has been appointed pursuant to clause 8.1, with the only available construction being that he/she would be a receiver and manager within the meaning of that deed.

61. It is notable, the receiver further argues, that there is no attempt in the mortgage to isolate which powers may be deemed to be powers of a receiver *simpliciter* or powers of management – a person appointed under clause 8.1 is conferred with all seventeen powers set out in clause 8.4, in addition to such powers as might arise under statute by virtue of clause 8.2. He contends that it is arguable that the addition of the term "and manager" in clause 8.1 adds nothing to the substance of that clause as a person appointed as receiver thereunder would be conferred with the power set out at clause 8.4(b) "to manage and carry on…any business of the Mortgagor" even if the phrase "and manager" did not appear in clause 8.1.

62. The receiver argues that if *McCarthy v. Moroney* was correctly decided, the resulting construction of the deed of appointment would be "absurd, illogical and not consistent with the intention of the parties as expressed in the Charge and the Deed of Appointment" (para. 54 of submissions) and submitted that the decision in *McCarthy v. Langan* (now under appeal) represented the current state of the law.

63. The receiver submits that the deed of appointment, on its face, confirms an intention to appoint a "Receiver", as defined in clause 8.1 of the mortgage, that is to say a receiver

and manager, and that there was nothing in the deed of appointment that was inconsistent with the definition of "Receiver" within the mortgage.

The Cross-Border Merger

64. The receiver submits that the appellant misunderstood the Supreme Court decision in *Kavanagh v. McLaughlin*, which is binding on this court, and that in line with the rule in *Henderson v. Henderson* any issues the appellant might wish to have raised in connection with the registration of the charge were required to have been brought forward in the 2012 proceedings. Issues relating to the cross-border merger between BOSI and BOS are irrelevant to the legal principle that BOS had a contractual right to appoint a receiver.

Henderson v. Henderson

65. The receiver notes that the appellant, having self-evidently made a conscious decision not to appear at the motion to dismiss before Kearns P., nonetheless, employed a stenographer to attend the 2014 hearing. He contends that the appellant was afforded the opportunity to engage with the appellate processes and could have applied to Kearns P. to set aside or vary the orders made in November 2014 to dismiss the 2012 proceedings. The receiver submits that the position of the Court of Appeal in 2015, in dismissing the appellant's application for an extension of time within which to bring an appeal, was that none of the matters raised in the 2012 proceedings gave rise to an arguable ground of appeal.

66. Reliance is placed on *Bank of Scotland plc v. Pereira* [2011] EWCA Civ 241, [2011] 1 W.L.R. 2391, to support the contention that while the rights of appeal of an unsuccessful defendant should not be any different in principle depending on whether the judgment was given in their presence or their absence, in practice, a defendant who had not attended the trial might face greater difficulties in pursuing an appeal than one who has, because they are far more likely to have to persuade the appellate court that they should be permitted to adduce evidence or raise arguments of law not adduced or raised at trial. The receiver submits that since the 2012 proceedings were brought to an end the appellant is prevented, by virtue of the rule in *Henderson v. Henderson*, from seeking to make points several years later (after it became apparent that the secured property was being marketed for sale in Autumn 2017), many of which arise from litigants in other cases which he seeks to deploy for his benefit. All arguments whether directed to the validity of the appointment or otherwise fall to be considered by this court only if the principle in *Henderson v. Henderson* is found not to operate in respect of such claim.

Isaac Wunder order

67. The receiver relies on the established principles relating to Isaac Wunder orders set out in cases such as *Wunder v. Hospitals Trust (1940) Ltd*. (Unreported, Supreme Court, 24th January, 1967), *Riordan v. Ireland (No.4)* [2001] 3 I.R. 365, *O'Connor v. Sherry FitzGerald Limited* [2018] IECA 67 and *Farley v. Ireland* (Unreported, Supreme Court, 16th November, 2001). He contends that the only logical inference from the appellant's unwillingness to offer an undertaking as sought by the High Court is that he will continue to seek to frustrate the receivership. He notes that as a result of the appellant filing the within appeal, the preferred bidder for the secured property has withdrawn. The

continuation of the proceedings has had a detrimental effect on the receiver's ability to act.

Discussion

The Deeds

68. The deed of mortgage and charge was executed by the appellant on 14th January, 2004. The mortgagee was BOSI. Clause 8 is set out in full at para. 26 above. It governs the appointment and powers of the receiver.

69. The deed of appointment of the receiver is dated 5th July, 2012 - almost five and a half years prior to the institution of the within proceedings. Having recited the cross-border merger effected from 31st December, 2010 the instrument provides in the *testatum*: -

> "NOW THIS DEED WITNESSETH that in pursuance of the powers contained in the document set out in the Schedule hereto (the Charge Document) and made between Thomas Kearney and Bank of Scotland (Ireland) Limited, the bank does HEREBY APPOINT PATRICK HORKAN OF KPMG… to be the RECEIVER of all the property comprised in and charged by the Charge Document…"

Infirmities pleaded by the appellant

70. The plenary summons issued on 13th December, 2017. The pleas in the general indorsement of claim include what might be characterised as classic *McLaughlin v. Kavanagh* type arguments, namely that the charges registered on the two folios are invalid insofar as BOS claims to be the owner of same and registered its ownership on the folios. The argument goes that BOSI never completed its registration in the Land Registry of the charges on the two folios. Such registration was a prerequisite to any lawful transfer by BOSI to BOS of rights under the charges and any consequent entitlement of BOS to register its ownership of the charges on Part 3 of the two folios. The attraction of this thinking is evident even if its underlying reasoning is not. It offers the prospect of a *cheval de frise* giving rise to an insuperable legal obstacle sufficient to prevent the claim of BOS succeeding. The argument goes that since BOSI was dissolved without liquidation with effect from 23:59 on 31st December, 2010 and has ceased to exist, it can never rectify this alleged "infirmity". Therefore, the argument goes, the charge is now unenforceable against the appellant.

71. With regard to the receiver it was pleaded that: -

> "…the exercise of the power of appointment with regard to the second named defendant by the purported charge holder… BOS PLC, having taken place at a time when the said power was not exercisable by the charge holder, it not having registered itself as owner of the charge pursuant to the provisions of section 64 of the Registration of Title Act 1964 at the time of purported [exercise] of the power, did not give rise to a valid appointment, notwithstanding the provisions of Rule 60 of the Land Registry Rules."

It was contended that any purported transfer of the securities between BOSI and BOS: –

> "… had been effected by operation of law by virtue of the operation of the European Communities (Cross-Border Mergers) Regulations, 2008 and the Companies (Cross-Border Mergers) Regulations 2007 and not under the Central Bank Act, 1971. Therefore BOS Plc, the assignee of the charge, did require to be registered as owner if it wished to rely on any of the statutory powers contained in s. 62 of the Act of 1964 to enforce the charge and/or appoint the second named defendant."

72. In the pleadings, one line of argument advanced regarding the alleged infirmities in the appointment of the receiver is asserted to stem from the fact that the appointment by BOS on 5th July, 2012 was effected "approximately some twelve months, before the dealing of said charge was completed in or about 2013 and before BOS Plc. was registered as the owner of said charge."

73. Paragraph 18 of the writ seeks: -

> "A declaration that the deed of appointment of receiver dated the 5th July, 2012 which purported to appoint the second named defendant as receiver over the lands comprised in folio GY67197F and folio GY71601F … is void, having been made at a time when the said power was not exercisable by the charge holder, it not having registered itself as owner of the charge pursuant to the provisions of section 64 of the Registration of Title Act, 1964, and made on foot of the deed of mortgage aforesaid which was invalid in law."

74. At paras. 62 and 63 of an affidavit sworn by him on 5th February, 2018, over five and a half years after the said receiver's appointment, he deposed: -

> "…[the receiver] in his motion makes an application to transfer the proceedings herein to the Commercial Court, and on the grounds, as set out herein, that [the receiver's] appointment is invalid and void, he being appointed on foot of a false instrument, as aforesaid., [the receiver] does not enjoy the *locus standi* to make such an application."

75. In the 2012 litigation different assertions were made and different grounds identified to challenge and impugn the appointment of the receiver, including a contention that BOS did not have capacity to do so, BOS was allegedly insolvent, that BOS had allegedly deceived the appellant, and it had engaged in the "creation of currency" and other allegations.

76. In the instant case the appellant had engaged in a number of court applications subsequent to the appointment of the receiver on 5th July, 2012. As an experienced man of business it was apparent to him that BOS and third parties were placing reliance on the validity of the said deed of appointment of the receiver, save and except to the extent that he had expressly raised in the 2012 proceedings specific issues directed at impugning the validity of the appointment. From the date on which his 2012 High Court plenary proceedings were struck out on 18th November, 2014 the appointment remained unimpeached until early 2018. It was evident to the appellant - especially after his

application for leave to appeal was refused in 2015 by the Supreme Court - that the receiver continued to discharge his powers and functions and indeed he was in possession of the properties, actively managing same and in receipt of the rents and profits over many years. Such conduct must be weighed in the balance in the context of an application such as the present.

Lis pendens

77. On 4th October, 2017 a *lis pendens* was listed at entry no. 6 on part 3 of folio GY71601F County Galway. Same was cancelled on 20th December, 2017.

Thereafter, on 4th January, 2018 the appellant registered a further *lis pendens* on part 3 of folio GY71601F and it appears at entry no. 7 of the said folio. With regard to the lands in folio GY67197F County Galway a *lis pendens* was first registered on 7th March, 2014. That appeared to be in the context of litigation High Court [2014 No. 2654P] between Patrick Joseph Fallon, plaintiff, and Thomas Kearney, defendant. The said *lis pendens* was cancelled on 20th July, 2015. A further *lis pendens* was registered as outlined above on 4th October, 2017 and same was cancelled on 20th December, 2017. Thereafter, on 4th January, 2018 another *lis pendens* was registered by the appellant.

78. The grievances articulated by the respondents, particularly the second named respondent, in regard to the registration of *lites pendentes* speaks to the inadequacy of the current legislation governing the registration and vacating of a *lis pendens*.

79. Historically, the position was governed by s. 2 of the Lis Pendens Act 1867 which was updated by s. 123 of the 2009 Act. As the legislation stands now, there is no obligation on a party who registers a *lis pendens* to put affected parties on notice of its registration. This is a significant lacuna. An application to vacate a *lis pendens* must be made to court with ensuing delays and expense.

80. Whilst it is generally accepted that the procedure for the registration is potentially open to abuse and that a *lis pendens* is perhaps too readily registerable, the resolution of this issue lies exclusively within the domain of the legislature. That such registration can be effected without notice to interested parties including a registered owner, a receiver and/or mortgagee or any parties affected by its registration is also a matter for consideration by the legislature. However, the *lites pendentes* registered by the appellant on the two folios upon the institution of the within suit require to be cancelled forthwith unless he succeeds in maintaining any claim which could affect the title to same.

81. I am satisfied that the appellant, in light of the nature of the litigation that had been instituted by him at the relevant times, was strictly in law *prima facie* entitled to register the litigation in question as an action or *lis* against the registered owner of the charge within Part 12 of the 2009 Act so as to put purchasers and interested parties on notice of such rights or liabilities as might be declared subsequently in the litigation..

82. It appears that in litigation High Court [2014 No. 2654P] the appellant was sued as defendant. It is unclear which party to the litigation registered the *lis pendens*. I am not

satisfied in the instant case that any adverse inference can reasonably be drawn from the registration of the *lites pendentes* in question *per se*.

83. There does not appear to be evidence that the appellant's wife actually registered any lis pendens in 2017 against either folio.

The Cross-Border Merger

84. A central plank in the appellant's claim in his plenary summons in December, 2018 is that the cross-border merger made pursuant to the 2008 Regulations in this jurisdiction and the 2007 U.K. Regulations was inoperative or ineffective in ensuring that all the assets and liabilities of BOSI were transferred to BOS on 31st December, 2010 at 23:59.

85. It is clear from the documentary evidence and court orders that Kelly J. (as he then was) made an order in the High Court in proceedings [2010 No. 250 COM] on 22nd October, 2010 certifying for the purposes of Regulation 13 of the 2008 Regulations that BOSI had properly completed each of the pre-merger requisites in respect of a proposed cross-border merger with BOS. Further, it is evident that on 10th December, 2010 an approval order was made by Lord Glennie of the Scottish Court of Sessions approving the completion of the said cross-border merger for the purposes of Article 11 of Directive 2005/56/EC.

86. As was made clear by Clarke J. (as he then was) in *Kavanagh v. McLaughlin* at para. 49: -

> "…The effect of those orders was to ensure that all assets and liabilities of BOSI were transferred to BOS at 11.59 p.m. on the 31st December, 2010, and that BOSI then stood dissolved without liquidation and ceased to exist."

Further, at para. 54 of the said judgment Clarke J. noted: -

> "Article 14 deals with the consequences of cross-border mergers. It provides as follows:-
>
> '1. A cross-border merger carried out as laid down in points (a) and (c) of Article 2(2) shall, from the date referred to in Article 12, have the following consequences:
>
> (a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;
> (b) the members of the company being acquired shall become members of the acquiring company;
> (c) the company being acquired shall cease to exist.'"

Clarke J. observed at para. 55 of the said judgment that Regulation 19 of the 2008 Regulations was in similar form.

87. The appellant has identified no cogent basis for a proposition that the transfer of securities between BOSI and BOS was ineffectual by reason that same was effected pursuant to the provisions of the 2008 Regulations and the 2007 U.K. Regulations.

88. A central plank in the appellant's oral argument was that since the mortgage and charge was entered into and executed on 14th January, 2004 only legislation operative as of that date could have been availed of by BOSI to transfer its interests in the charges and securities to a third party such as BOS. In the course of the appeal hearing he contended that: "The 2008 Irish Regulations were not chosen or agreed between the parties and cannot apply to contracts concluded by these parties pre the time the Irish Regulations were invoked." The appellant also argued that by availing of the procedures under Directive 2005/56/EC and the national regulations operative in this State and in the United Kingdom "... Bank of Scotland PLC has fraudulently applied and used law not in existence when it inherited the contract first concluded in 2004."

Abuse of process

89. In addition to reliance on the rule in *Henderson v. Henderson* the receiver in the notice of motion which issued on 24th January, 2018 sought the dismissal of the proceedings on the ground that they were an abuse of process because the plaintiff sought to re-litigate a matter, namely the validity of the appointment of the receiver which had already been determined by a court of competent jurisdiction in the 2012 proceedings.

The 2012 Writ

90. The writ issued on 28th August, 2012. It characterises the second named defendant as a "paid agent" of the bank as having "colluded and forced [his] appointment… as a receiver… based upon the false paperwork of the first named defendant… therefore committing a fraudulent act…". It pleads that the bank and the receiver were guilty of fraud. It pleads that they are guilty of extortion and attempted extortion. It pleads crime against the bank and the offence of "creating currency", also of creating a "debt (deposit)" where in fact they offered "a loan of money". It pleads unjust enrichment "arising from fraud and deception". It alleges that the defendants had perpetrated "fraud in inducement: the use of deceit to cause someone to act to his/her disadvantage." It seeks damages "including all unlawful interest and payments stolen by the defendants". It seeks damages for "theft, deception, breach of duty/debt, misrepresentation, causation, fraud, deceit, non-performance, breach of contract, breach of promise, attempted damage by perjury, attempted extortion, fraudulent intent to induce reliance, false pretence, intent to defraud, dishonest/insolvent trading and counterfeiting".

2012 statement of claim

91. This pleads that the second named defendant was "defensively appointed as receiver by Bank of Scotland". The same combative language is deployed as in the 2012 writ. Paragraph 2 alleges that the bank "…did appoint Patrick Horgan as receiver in its efforts to wilfully obfuscate due process and obstruct and pervert the course of justice." The appellant does not identify any specific substantive deficiency in the deed of appointment notwithstanding that same had been executed over eight months previously. It impugns the validity of affidavits sworn on behalf of the defendants alleging non-compliance with O.40, r. 4. It pleads that BOS did not fund the alleged loans. In the prayer there is a claim for damages including all payments and interest "unlawfully stolen" by the defendant. Damages are sought for breach of contract "and as far as money can compensate for stolen quality of a man's life". Whilst the pleadings and the affidavits cavil

at the circumstances surrounding the appointment of the receiver they fail to impugn the validity of the deed of 5th July, 2012 on the bases now sought to be advanced.

92. The focus of the 2012 pleading, insofar as it concerned the receiver, was directed to contesting the entitlement of BOS to appoint him on foot of the mortgage and charge.

Decision of appellant not to attend High Court hearing on 18th November, 2014

93. The motion to dismiss the 2012 proceedings was heard by the President of the High Court on 18th November, 2014. The notice of motion had issued on 31st July, 2013. It is worth recalling the affidavits which were before the President of the High Court as well as the plenary summons and statement of claim. They included: -

(1) Affidavit of Shane Connolly filed 31st July, 2013.

(2) Affidavit of Kevin Hulse filed 31st July, 2013.

(3) Affidavit of Richard Ballagh filed 13th September, 2013.

(4) Affidavits (four in number) of Colm Farrell filed on 17th October, 2013, 18th October, 2013 and 22nd November, 2013 and 13th May, 2014.

(5) Affidavits - three in number sworn by Patrick Horkan and filed on 30th October 2013, 13th May, 2014 and 6th August, 2014.

(6) Affidavits - five in number sworn by Thomas Kearney filed on 20th November, 2013, 7th March, 2014, 4th July, 2014, 31st July, 2014 and 4th November, 2014.

(7) Affidavits, two in number sworn by Ronan Garvey both filed on 4th July, 2014.

(8) Affidavit of Arveen Arabshahi filed on 4th July, 2014.

(9) Affidavits two in number sworn by Gary Collins filed on 11th July, 2014 and 1st August, 2014.

(10) Affidavit of Iwona Lesniewska filed on 26th August, 2014.

94. At the hearing of this appeal on 22nd November, 2019 the appellant contended:-

> "The first case wasn't actually heard because I didn't turn up. And I didn't turn up because I was under duress from the party that was advising at the time, they threatened… I was pressured not to turn up."

He further stated –

> "... they spelled it out clearly to me that if I turned up they wouldn't support me going forward."

It is clear therefore that the appellant's absence from the High Court at the hearing of the motion to dismiss the 2012 proceedings was based on his decision to rely on the advices

of an unidentified person. This was a strategic decision made for his own motives and purposes.

95. It is not open to the appellant at this remove in time to engage in speculation, based on a reading of the transcript of the hearing of the motion as to how the President of the High Court reached his determination at the hearing of the motion. If the appellant had any issues regarding the adequacy of the hearing, he had commissioned a stenographer to attend and had available a transcript of the entire hearing and was fully *au fait* with what had transpired. It was open to him to proceed to apply to the President of the High Court and raise any issue as he saw fit. He did not do so. It was also open to him to bring an appeal within time. He did not do so. The Court of Appeal subsequently refused to extend time to lodge an appeal and the Supreme Court declined to grant leave to appeal that decision.

96. Whilst the appellant contends in his written submissions and in argument to the court that the transcripts from 18th November, 2014 hearing made no reference to the receivership whatsoever, the affidavits and the pleadings from 2012 are replete with references to the receivership and the alleged conduct of the receiver. Although the appellant characterised his absence from court on 18th November, 2014 as arising from "duress", it does not amount to duress as that concept is understood in law. An unidentified individual who was providing advice to him was minded, for no apparent reason, not to continue to do so were he to attend. He went along with this stratagem and must live with the consequences. I am satisfied in the circumstances that the appellant made a conscious decision not to attend before the High Court for the hearing of the motion to dismiss on 18th November, 2014. The President of the High Court did make enquiries and satisfied himself that the appellant was aware that the motion was proceeding and that the defendants had communicated their intention to proceed in writing.

Order 19, rule 28

97. BOS for its part sought the proceedings be struck out pursuant to O. 19, r. 28 on the grounds that same were frivolous and vexatious and disclosed no reasonable cause of action or alternatively, pursuant to the inherent jurisdiction of the court to dismiss proceedings on the basis that same were unsustainable, frivolous and vexatious or constituted an abuse of process. As is clear from the jurisprudence in relation to O. 19, r. 28 an assessment as to whether the proceedings are vexatious or frivolous must be determined based on the pleadings alone. This was reiterated by Costello J. in *Barry v. Buckley* [1981] I.R. 306.

98. Irvine J. in this court in the decision *Fox v. McDonald* [2017] IECA 189 considered the word "frivolous" in the context of "frivolous or vexatious" in O. 19, r. 28 as follows: -

> "The word 'frivolous' when used in the context of O. 19, r. 28 is usually deployed to describe proceedings which the court feels compelled to terminate because their continued existence cannot be justified having regard to the relevant circumstances: see *Nowak v. Data Protection Commissioner* [2012] IEHC 449, [2013] 1 I.L.R.M. 207, 211 *per* Birmingham J.. Proceedings which are regularly

struck out as 'frivolous' or 'vexatious' are proceedings clearly destined to cause irrevocable damage to a defendant, such as where a defendant is asked to defend the claim for a second time or where a plaintiff seeks to avail of the scarce resources of the courts to hear a claim which has no prospect of success. This is the context in which these words are used in this judgment."

99. As is clear from the jurisprudence and the text book *Delany and McGrath On Civil Procedure* (4th ed., Thomson Reuters, 2018), the jurisdiction exercisable pursuant to O. 19, r. 28 is separate and distinct from the inherent jurisdiction of the court to strike out proceedings on the basis that the claims advanced are not sustainable or are bound to fail. In the exercise of the jurisdiction the court is confined to carrying out an analysis of the claim as pleaded and must proceed to exercise its jurisdiction on the premise that the facts as pleaded will be established at trial. It is only where the court is satisfied at the conclusion of that analysis that the claim does not give rise to any maintainable cause of action, that it can be either dismissed or stayed. Such an exercise is not to be carried out *in vacuo* but must be done in the context of any prior relevant determinations *inter partes* and having regard to the state of the law on the relevant issues.

100. A consideration of the statement of claim dated 5th February, 2018 in the context of O. 19, r. 28 is called for. At para. 6 it is pleaded: -

> "The first named defendant is estopped by estoppel *in pais* from denying having actual notice that at the time of the appointment of the second named defendant as receiver, the first named defendant's charging/security instrument, the mortgage deed, did not, it being denied by statute, confer on the owner of the charge any interest in the said property/land identified in paragraph 1 above."

101. This claim together with the plea at para. 7, that the receiver is:

> "…estopped from denying having notice, from his expected due diligence to validate his appointment, that at the time of his appointment as receiver, that the charging/security instrument, the mortgage deed, did not confer on the owner of the charge, the first named defendants, any lawful interest in the said property/land upon which the first named defendant, could lawfully appoint the second named defendant as receiver over this deponent's personal property, identified in paragraph 1 above",

contest the entitlement of BOS to appoint the receiver on 5th July, 2012 and to effect registration of its ownership of the charge on the relevant folios.

Kavanagh v. McLaughlin

102. Paragraph 10 of the statement of claim pleads: -

> "Any purported transfer of the securities between Bank of Scotland (Ireland) Limited, the purported original owner of the charge and Bank of Scotland Plc, had been effected by operation of law by virtue of the operation of the European Communities (Cross-Border Mergers) Regulations, 2008 and the Companies (Cross-

Border Mergers) Regulation, 2007 and not under the Central Bank Act, 1971. Therefore, BOS Plc the assignee, of the charge did, at the time of the purported appointment of the second named defendant, require to be lawfully registered as owner if it wished to rely on any of the statutory powers contained in s. 62 of the Act of 1964 to enforce the charge and/or appoint the second named defendant."

103. Those pleas are primarily directed towards contending that BOS had no interest in the security created over the properties and thus lacked capacity to appoint the receiver thereby directly impugning the correctness of the Supreme Court jurisprudence, particularly the judgment of Clarke J. in *Kavanagh v. McLaughlin*, and the validity of the cross-border merger. I am satisfied on the facts and in light of the law and jurisprudence that these claims and plea fail to disclose any reasonable cause of action; the contentions are unstateable and are doomed to fail. This issue has been litigated to the Supreme Court which has definitively clarified the legal position. There is no basis in law for contending that BOS was precluded from availing of Directive 2005/56/EC in the manner in which it did.

Appointment of receiver

104. The statement of claim at para. 11 impugns the deed of appointment of the receiver in the following terms: -

> "Further and/or in the alternative the deed of appointment is not made in strict conformity with, and pursuant to, the inescapable stipulated written contractual terms and conditions as imposed by, and set down by, the bank, in section 8.1 in the security instrument, the mortgage deed, causing the said deed to be a nullity in law, invalid and void, and so does not give rise to a valid appointment."

105. Paragraph 12 of the statement of claim pleads that the deed of appointment: -

> "…is wrongly professed to be, 'PROPERLY' made in strict conformity with, and pursuant to, the inescapable stipulated written contractual terms and conditions as imposed by, and set down by, the bank, in section 8.1 in the security instrument, the mortgage deed, and on such grounds the said deed is defined as a false instrument, it being a document that is wrongly professed/purported to be, made in circumstances in which it is not in fact made."

Inherent jurisdiction

106. In seeking to have the proceedings struck out the first respondent had also relied on the inherent jurisdiction of the court. It is worthwhile considering the operative distinctions between the jurisdiction to strike out pursuant to O. 19, r. 28 and the exercise of the concurrent jurisdiction to strike out proceedings pursuant to the inherent jurisdiction of the High Court. The inherent jurisdiction is wider in its ambit in the sense that it can take into account factors outside the four corners of the pleadings as they stand at the date of the application and in particular regard can be had to all affidavit evidence.

107. The ambit of the inherent jurisdiction of the court to dismiss proceedings was helpfully considered by Clarke J. (as he then was) in a number of decisions including *Salthill*

Properties Ltd. v. Royal Bank of Scotland plc [2009] IEHC 2017 which he reviewed and cited with approval in his later decision *Lopes v. Minister for Justice* [2014] IESC 21, [2014] 2 I.R. 301 stating at pp. 309 and 310:-

> "The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious… If, even on the basis of the facts as pleaded, the case is bound to fail then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the court to prevent abuse can be invoked.
>
> It is important to keep that distinction in mind. It is also important to note the many cases in which it has been made clear that the inherent jurisdiction of the court should be sparingly exercised. This was initially recognised by Costello J. in *Barry v. Buckley*… and by the Supreme Court in *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425. In the latter case, McCarthy J. stated at p.428 that '[g]enerally, the High Court should be slow to entertain an application of this kind.' This point has been reiterated more recently in *Kenny v. Trinity College Dublin* [2008] IESC 18, (Unreported, Supreme Court, 10th April, 2008) at para. 35 and in *Ewing v. Ireland* [2013] IESC 44, (Unreported, Supreme Court, 11th October, 2013) at para. 27.
>
> It is also important to remember that a plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail. It must be recalled that a plaintiff, like any other party, has available the range of procedures provided for in the RSC to assist in establishing the facts at trial. Documents can be discovered both from opposing parties and, indeed, third parties… In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in *Sun Fat Chan*… at p. 428, that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.
>
> At the same time, it is clear that certain types of cases are more amenable to an assessment of the facts at an early stage than others. Where the case is wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss. In that context, it is important to keep in mind the distinction, which I sought to analyse in *Salthill Properties Ltd. v. Royal Bank of*

Scotland plc… between cases which are dependent in themselves on documents and cases where documents may form an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well."

108. Clarke J. revisited the issue in *Keohane v. Hynes* [2014] IESC 66 observing:-

> "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."

Reliance on *Henderson v. Henderson*

109. The so-called rule in *Henderson v. Henderson* or at least a corpus of principles analogous to the rule have been part of our jurisprudence since the decision of Palles C.B. in *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345. The Cox decision was based on the doctrine of estoppel.

110. The Supreme Court in *A.A. v. The Medical Council* [2003] IESC 70, [2003] 4 I.R. 302 cited with approval the principle of *Henderson v. Henderson* where Wigram V.C. stated at p.115: -

> "...where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

111. It requires to be borne in mind that the said *dictum* ought not to be over-rigidly applied nor should it operate in an absolutist fashion so as to diminish or unreasonably encroach upon the constitutional right of access to the courts by litigants.

112. Hardiman J. in *A.A. v. The Medical Council* cited Bingham L.J. in *Johnson v Gore Wood & Co*. [2002] 2 A.C. 1 with approval where the latter had stated at p. 31: -

> "…*Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."

In his judgment Hardiman J. recalled that the operation of the *Henderson* principle must be informed by due regard to the right of access to the courts and the provisions of article 6 of the European Convention on Human Rights.

113. In operating the *Henderson* principle, a weighing exercise must be engaged upon to ensure that the respective rights of all parties to litigation are respected and that the public interest is not undermined. It will be recalled that in *Re Vantive Holdings* [2009] IESC 69, [2010] 2 I.R. 118 Murray C.J. at para. 20 observed: -

> "Citizens have the right of access to the courts so that their entitlements, rights and obligations may be determined in accordance with due process. Due process means a right to a fair and complete hearing of the issues of law and fact in any proceedings. The courts have always had an inherent jurisdiction to stay or dismiss proceedings which abuse the due process of the administration of justice where to do otherwise would seriously undermine its effectiveness or integrity. In addition under the rules of court the courts have, in civil proceedings, the power to dismiss proceedings on the grounds that they are 'frivolous' or 'vexatious'."

114. This principle was reiterated by McGovern J. in *Vico Ltd. v. Bank of Ireland* [2015] IEHC 525 at para. 23 where he observed that the right of access to the courts whether pursuant to the Constitution or the European Convention on Human Rights is a right which is not unlimited and is subject to certain constraints having due regard to public policy and the relevant legal principles: –

> "…The right of access to the courts carries with it the responsibility to accept the decisions of the courts and not to use the court process to launch a collateral attack on or undermine earlier decisions of the courts on similar issues between the same parties or parties with a privity of interest."

115. The appellant sought to rely upon the decision in *Takhar v. Gracefield Developments Ltd*. [2019] UKSC 13, [2019] 2 W.L.R. 984. However, a key consideration in that case concerned the discovery of fraud subsequent to the hearing and as was observed by Lord Sumption at p. 991: "The 'existence or non-existence' of fraud has not been decided in the proceedings before Judge Purle. It is a new issue. It does not involve the re-litigation of an identical claim." The "new issue" in this case now is whether the receiver was validly appointed over the appellant's properties.

116. The court was informed at the hearing of this appeal that the receiver has been in occupation and exercising his powers as receiver and manager in accordance with clause 8 of the mortgage instrument and the powers vested in him under the deed of appointment for some time prior to the appellant instituting the 2017 proceedings raising new or modified issues regarding the validity of the deed of appointment.

117. Mindful of the principles enunciated by Clarke J. in the case-law outlined above regarding the ambit of the inherent jurisdiction, on the specific issue as to whether the receiver was validly appointed as receiver and manager pursuant to the mortgage instrument I am satisfied that it cannot be said that there is no credible basis for suggesting that, on the facts as asserted in the proceedings and directed to this net point, the appellant's claim is bound to fail on the merits. Indeed it is clear that the specific point has never been definitively determined in this jurisdiction. It was not therefore open to the High Court to dismiss the claim regarding the validity of the appointment of the second named respondent as receiver and manager pursuant to the inherent jurisdiction.

118. I am satisfied that whilst there were some delays on the part of the appellant in seeking to impugn the validity of the instrument of appointment the issue is of such fundamental importance and goes to the heart of the constitutionally protected fundamental right to hold and enjoy private property, a right also recognised by Article 1 of the First Protocol to the European Convention on Human Rights, a convention to which this court has regard in accordance with the European Convention on Human Rights Act 2003, that it would operate a disproportionate hardship upon the appellant to shut out his right of access to the courts to have this issue determined.

119. Apart from the issue of the validity of the appointment of the receiver, the trial judge was entitled to dismiss the balance of the claims pursuant to *Henderson v. Henderson*.

The ambit of the Isaac Wunder order

120. The order appealed against made on 4th May, 2018 provides: -

> "5. An order restraining the plaintiff from instituting any proceedings against any person whomsoever that directly or indirectly concerns the property identified in the Schedule – Part 1 to the said notice of motion (the Property) (including, for the avoidance of doubt, the security identified in the Schedule – Part 3 to the said notice of motion (the Charge)) or the borrowings more particularly identified in the Schedule – Part 2 thereto (the Borrowings), or any fixtures or fittings in the Property, without the prior leave of the President of the High Court, or some other

Judge nominated by him, such leave to be sought by an application in writing addressed to the Chief Registrar of the High Court.

6. An order restraining the plaintiff, his servants and all and any persons acting with or for him from:

(a) stating or otherwise suggesting to any person, whether in writing or otherwise, that the appointment of Patrick Horkan as receiver of the Property is invalid or questionable;
(b) otherwise interfering with or seeking to obstruct or object to the conduct of the said receivership by Patrick Horkan, his servants or agents."

121. The inherent jurisdiction of the superior courts to grant such an order was restated by the Supreme Court in *Wunder v. Hospitals Trust (1940) Ltd*.. Such an order requires the subject litigant to apply to the court for prior consent to institute further proceedings against a party where same have been found to be an abuse of process.

122. The jurisdiction of common law courts to make such an order appears to have been well settled by the mid nineteenth century as noted by Alderson B. in *Cocker v Tempest* (1841) 7 M&W 502 where he observed at pp. 503 to 504: -

> "The power of each court over its own process is unlimited; it is a power incident to all courts, inferior as well as superior; were it not so the court would be obliged to sit still and see its own process abused for the purpose of injustice."

He further observed: –

> "The exercise of the power is certainly a matter for the most careful discretion; and where there are conflicting statements of facts, I agree that it is in general much better not to try the question between the parties on affidavit. The power must be used equitably; but if it be made out that the process of the court is used against good faith, the court ought to interfere to prevent it, for the purpose of administering justice. The distinction between this power and that which is exercised by a court of equity in granting an injunction, is, that the injunction stops proceedings in another court, this one in the court in which the proceedings are."

123. The jurisprudence was developed further over time including by the English Court of Appeal in *Grepe v. Loam* (1887) 37 Ch. D. 168 which framed its order as follows: -

> "That the said applicants or any of them be not allowed to make any further applications in these actions or either of them to this court or to the court below without the leave of this court being first obtained. And if notice of any such application shall be given without such leave being obtained, the respondents shall not be required to appear upon such application, and it shall be dismissed without being heard."

124. Historically such orders appear to have been quite narrow in ambit and were mainly directed to preventing a litigant who had not complied with previous orders of the court, including the payment of costs, from either continuing proceedings or instituting fresh proceedings against the same defendant, his agent or proxy until such time as the said costs had been discharged and prior orders complied with.

125. The essential principle was that any action which the plaintiff could not prove or which was without a solid legal basis could be stayed pursuant to this inherent jurisdiction. Where either party to a suit makes repeated frivolous applications to the court, the court has power to make an order prohibiting any further applications by the litigant in the suit or in relation to the issues without leave of the court. By contrast, where an action is clearly demonstrated to be vexatious or oppressive the appropriate course is to dismiss the claim.

126. Article 40.3.1º of the Constitution provides: -

> "1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

It is well established that this constitutional provision encompasses the right to litigate and a right of access to the courts.

127. The textbook *Kelly: The Irish Constitution* (5th ed., Bloomsbury Professional, 2018) at para. 7.3.194 provides: -

> "The right to litigate must be read subject to the judicial power to strike out an action so as to prevent an abuse of the judicial process. If it is clear that the plaintiff's claim must fail or that he can derive no tangible benefit from the litigation, a court has an inherent jurisdiction to stay the action (in addition to a similar jurisdiction conferred by the Rules of the Superior Courts relating to frivolous or vexatious proceedings), though this jurisdiction must be exercised sparingly and only in clear cases. The court may also strike out an action if it has been taken for a purpose that the law does not recognise as a legitimate use of the remedies sought, if there has been egregious misconduct in the manner in which the proceedings have been conducted, if there has been an inordinate and inexcusable delay in pursuing a claim and the balance of justice requires dismissal of the action, or even where the plaintiff is not culpable, if the passage of time means that there is a real or substantial risk of an unfair trial or an unjust result. Moreover any court may restrain a person from instituting legal proceedings without first obtaining the consent of the court where this is necessary in order to prevent the abuse of court processes or the pursuit of vexatious litigation, a so-called 'Isaac Wunder' order".

128. In *Riordan v. Ireland (No. 4)* at p. 370 the Supreme Court advanced this rationale for the so called Isaac Wunder order :-

> "The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens. This court would be failing in its duty… if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."

129. Hence, an Isaac Wunder order should only be made to the extent necessary in order to prevent the abuse of court processes or the pursuit of vexatious litigation and no further.

130. In *Talbot v. Hermitage Golf Club* [2014] IESC 57 Charleton J. observed that the right to litigate must be construed in light of the obligation of the courts to use resources prudently and that putting a reasonable limit on submissions in terms of time and allowing a measured number of hours or days for each side to litigate their case was both appropriate and right. In *A.A. v. The Medical Council* the Supreme Court had specified that save in special circumstances it was incumbent on litigants to bring their entire case before the court so that it may be decided once and for all rather than going through successive suits.

131. Isaac Wunder type orders can be made by the High Court pursuant to its inherent jurisdiction to restrain the further prosecution by a party to proceedings without leave of the court. The power of a superior court to attach such restraint to the institution or continued prosecution of civil litigation extends to existing proceedings and to new proceedings and also to proceedings before any of the lower courts. In the case of new proceedings, such restraint may, in an appropriate case, include an order restraining the institution of proceedings against present, former or anticipated legal representatives of parties to the litigation.

132. Isaac Wunder orders now form part of the panoply of the courts' inherent powers to regulate their own process. In light of the constitutional protection of the right of access to the courts, such orders should be deployed sparingly and only be made where a clear case has been made out that demonstrates the necessity of the making of the orders in the circumstances:

    i. Regard can be had by the court to the history of litigation between the parties or other parties connected with them in relation to common issues.

    ii. Regard can be had also to the nature of allegations advanced and in particular where scurrilous or outrageous statements are asserted including fraud against a party to litigation or their legal representatives or other professionals connected with the other party to the litigation.

    iii. The court ought to be satisfied that there are good grounds for believing that there will be further proceedings instituted by a claimant before an Isaac Wunder type

order restraining the prosecution of litigation or the institution of fresh litigation is made.

iv. Regard may be had to the issue of costs and the conduct of the litigant in question with regard to the payment and discharge of costs orders incurred up to the date of the making of the order by defendants and indeed by past defendants in applications connected with the issues the subject matter of the litigation.

v. The balancing exercise between the competing rights of the parties is to be carried out with due regard to the constitutional rights of a litigant and in general no legitimate claim brought by a plaintiff ought to be precluded from being heard and determined in a court of competent jurisdiction save in exceptional circumstances.

vi. It is not the function of the courts to protect a litigant from his own insatiable appetite for litigation and an Isaac Wunder type order is intended to operate preferably as an early stage compulsory filter, necessitated by the interests of the common good and the need to ensure that limited court resources are available to those who require same most and not dissipated and for the purposes of saving money and time for all parties and for the court.

vii. Such orders should provide a delimitation on access to the court only to the extent necessitated in the interests of the common good.

viii. Regard should be had to the fact that the right of access to the courts to determine a genuine and serious dispute about the existence of a right or interest, subject to limitations clearly defined in the jurisprudence and by statute, is constitutionally protected, was enshrined in clause 40 of *Magna Carta* of 1215 and is incorporated into the European Convention on Human Rights by article 6, to which the courts have regard in the administration of justice in this jurisdiction since the coming into operation of the European Convention on Human Rights Act 2003.

ix. The courts should be vigilant in regard to making such orders in circumstances where a litigant is unrepresented and may not be in a position to properly articulate his interests in maintaining access to the courts. Where possible the litigant ought to be forewarned of an intended application for an Isaac Wunder type order. In the instant case it is noteworthy that the trial judge afforded the appellant the option of giving an undertaking to refrain from taking further proceedings which he declined.

x. Any power which a court may have to prevent, restrain or delimit a party from commencing or pursuing legal proceedings must be regarded as exceptional. It appears that inferior courts do not have such inherent power to prevent a party from initiating or pursuing proceedings at any level.

xi. An Isaac Wunder order may have serious implications for the party against whom it is made. It potentially stigmatises such a litigant by branding her or him as, in effect, "vexatious" and this may present a risk of inherent bias in the event that a

fresh application is made for leave to institute proceedings in respect of the subject matter of the order or to set aside a stay granted in litigation.

xii. Where a strike out order can be made or an order dismissing litigation whether as an abuse of process or pursuant to the inherent jurisdiction of the court or pursuant to the provisions of O. 19, r. 28, same is to be preferred and a clear and compelling case must be identified as to why, in addition, an Isaac Wunder type order is necessitated by the party seeking it.

133. There were cogent reasons for acceding to the application for an Isaac Wunder order in the instant case but only insofar as the appellant was contending that BOS was precluded from availing of Directive 2005/56/EC in the manner in which it did. The ambit of paras. 5 and 6 in the curial part of the order exceed what was strictly necessary to vindicate the respondents' rights and protect the public interest at this stage. The terms of a modified order are set out hereunder.

Conclusions

Cross-border merger

134. In denying the availability of Directive 2005/56/EC to facilitate the cross-border merger and its availability for that purpose to BOS and BOSI, the appellant's contentions are unmoored from any legal principle. It is wholly misconceived to argue, as the appellant now does, that the only mechanism whereby such a transfer might lawfully take effect was pursuant to the provisions of the Central Bank Act 1971.

135. The appellant contends that Directive 2005/56/EC and the relevant regulations are "an example of State interference in private contracts". The appellant's mortgage is not exempt from the operation of Directive 2005/56/EC, provided the Directive's provisions and the relevant national measures of both member states were complied with. The Supreme Court has held that they were. It is specious to argue otherwise.

136. The corollary of the appellant's contentions is that mortgages which existed for the benefit of BOSI on the operative date, namely, 31st December, 2010, thereupon by some vague alchemy vanished or ceased to exist. There is no basis in logic or reason for such a proposition. Such contentions are wholly unarguable in light of the decision of the Supreme Court in *Kavanagh v. McLaughlin*, including the *obiter* comments of Laffoy J. The judgment of Clarke J. warrants careful consideration by any party who seeks to argue otherwise. The Supreme Court reiterated the position in *Freeman v. Bank of Scotland plc*. The High Court was bound by and correctly applied the said decisions which are clearly dispositive of all the arguments advanced by the appellant in his pleadings including the amended statement of claim directed at impugning the cross-border merger.

137. In the exercise of its inherent jurisdiction in determining whether to dismiss proceedings as constituting an abuse of process, a wider ambit of considerations and factors can be taken into account by the court. Nevertheless, the jurisdiction is to be sparingly exercised and, as was stated by Clarke J. in *Moylist Construction Ltd. v. Doheny* [2016] IESC 9, [2016] 2 I.R. 283 at p. 290, only where there is "no real risk of injustice".

138. I am satisfied that, insofar as the claims are based on the cross-border merger and seek to impugn same or to assert that the security never vested in BOS, these proceedings constitute an abuse of process, are doomed to failure, and the appellant had no reasonable prospect of obtaining relief in regard to same. The trial judge was entitled to dismiss that aspect pursuant to the inherent jurisdiction of the court.

Appointment of receiver

139. The distinct claim that the second named respondent was not validly appointed on foot of the instrument of appointment calls for a different set of considerations. It was a contention dependant up on the construction of two instruments since the deed of appointment falls to be considered in the context of, and with due regard to, the terms of clause 8 of the mortgage deed.

140. The Supreme Court in *Ewing v. Ireland* [2013] IESC 44 considered the ambit of the inherent jurisdiction of the court to dismiss proceedings which are determined to constitute an abuse of process. McMenamin J. at para. 28 of the judgment considered *indicia* which would tend to suggest that litigation was "vexatious". He cited with approval the judgment of Ó'Caoimh J. in *Riordan v. Ireland (No. 5*) [2001] 4 I.R. 463, a judgment informed by the Ontario High Court decision *Re Lang, Michener and Fabian* (1987) 37 D.L.R. (4th) 685 at p. 691. MacMenamin J. opined that one or more of the following factors might be of relevance in a given case: -

> "(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
>
> (b) where it is obvious that [it is] an action that cannot succeed, or if the action would lead to no possible good, or if no reasonable person could reasonably expect to obtain relief;
>
> (c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;
>
> (f) where the respondent persistently takes unsuccessful appeals from judicial decisions."

141. Turning to the issue of the validity of the second named respondent's appointment, I am not satisfied that it could fairly be asserted that the claim sought to be advanced in the within proceedings by the appellant concerning the validity of the deed could be dismissed on the basis that to do so gave rise to "no real risk of injustice".

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142. There is an appeal pending to this court against the decision of the High Court in *McCarthy v. Langan* regarding the validity of the deed of appointment of a receiver and manager and in such circumstances, it would not be appropriate to express any concluded view on the issue in question which requires to be fully argued. This issue, in the circumstances, is at least arguable and the interests of justice warrant that the appellant's appeal be allowed on that narrow ground so that he is permitted to continue to pursue the within proceedings solely for the purposes of challenging the validity of the appointment of the receiver on this ground.

Isaac Wunder order

143. In my view in its current iteration the Isaac Wunder order is arguably somewhat excessive. The element of the pleading directed towards the execution of the deed of appointment cannot be characterised as a spurious claim. It cannot be said that that specific issue is either frivolous or vexatious.

144. The order restraining the institution of proceedings as specified at paras. 5 and 6 in the curial part of the order is disproportionate to what is reasonably necessary in order to prevent an abuse of court processes by the appellant in the pursuit of any claims against either respondent at this juncture.

145. Accordingly, the said orders require to be varied. In lieu thereof, on the evidence as outlined above, an order is required to be made restraining the appellant, his servants, agents or proxies, from instituting any proceedings, which seek to impugn the validity of the cross-border merger; the title of BOS to the said charges registered on Part 3 of the said Folios; the validity of the disposition of the said charges by BOS or any successor in title including, but not limited to, Pentire; the right of BOS to appoint the receiver, without the prior leave of the President of the High Court, or some other judge nominated by him, such leave to be sought by an application in writing addressed to the Chief Registrar for the time being of the High Court.

146. An order was properly made by the High Court pursuant to s. 123(b)(i) of the 2009 Act vacating the *lites pendentes* registered against the folios.

147. The appeal is otherwise dismissed.

148. A last-minute application was made by the appellant on the morning of the hearing seeking in effect to adjourn the hearing of the appeal to enable him pursue the prospect of a separate application before the Supreme Court. The application lacked any cogent or coherent basis and was refused.

149. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out below.

Baker J. I agree.

Collins J. I agree.