APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/233

Whelan J.
Faherty J.
Allen J.

Neutral Citation Number [2023] IECA 102

BETWEEN

GERARDINE SCANLAN

PLAINTIFF/APPELLANT

AND

DANSKE BANK TRADING AS DANSKE BANK

SHARON KEENAN, STEPHEN TENNANT

AND

TARGETED INVESTMENT OPPORTUNITIES ICAV

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 27th day of April, 2023

Introduction

1. This is an appeal by the plaintiff, Ms. Gerardine Scanlan, against the judgment of the High Court (Heslin J.) delivered on 16th March, 2022 and the consequential order made on 30th August, 2022 by which it was ordered that Ms. Scanlan's action against the first

defendant, Danske Bank, and the third defendant, Mr. Stephen Tennant, be dismissed as an abuse of process and as frivolous and vexatious and bound to fail and for disclosing no reasonable cause of action.

2. Ms. Scanlan is a litigant in person. The Bank and Mr. Tennant are represented by solicitors and counsel.

3. The background to the litigation is generally unremarkable. In October, 2008 Ms. Scanlan borrowed money from Danske Bank on the security of a residential investment property in Cork. Ms. Scanlan was unable to meet the repayments due on foot of the mortgage and in 2013 the Bank made a demand for payment of the balance of the loan. Ms. Scanlan did not pay the amount due and the Bank appointed a receiver over the property, which was eventually sold. In 2016 the Bank recovered judgment against Ms. Scanlan for judgment the remaining balance of the loan, credit having been given for the proceeds of realisation of the security.

4. If the background is unremarkable, the same cannot be said of the protracted and convoluted litigation which it has spawned. It has proved challenging to try to unpick – and to resist the temptation to cut – the knot of Ms. Scanlan's prolix, vague, obscure, and contradictory claims. I will lay out the strands.

The first action

5. In October, 2008 Ms. Scanlan borrowed €107,500 from Danske Bank on the security of a residential investment property in Cork. Ms. Scanlan having failed to meet the repayments due on foot of the mortgage, the Bank, by letter dated 17th July, 2013 demanded repayment of the sum of €84,599.44 then said to be due and owing. Ms. Scanlan did not pay

the amount due and by deed dated 15th August, 2013 Danske Bank appointed Mr. Tennant as receiver over the property.

6. By summary summons issued on 6th June, 2014 the Bank commenced proceedings to recover the balance of the loan and by notice of motion issued on 9th September, 2014 applied for leave to enter final judgment.

The second action

7. By plenary summons issued on 21st October, 2014 – 2014 No. 8950P, to which I will refer as the 2014 action – Ms. Scanlan instituted a cross action against the Bank and Mr. Tennant. In her statement of claim in that action delivered on 23rd February, 2015 Ms. Scanlan made a wide range of claims including that the Bank had engaged in reckless lending; that by reason of the actions of the Bank and Mr. Tennant, Ms. Scanlan had suffered personal injuries; that Ms. Scanlan's right to privacy and confidentiality had been violated; that the Bank had breached various provisions of consumer protection legislation; that the Bank had *"prematurely"* appointed Mr. Tennant as receiver; that the Bank had made *"no attempt at positive communication"* with Ms. Scanlan and had appointed a receiver *"to a very modest financial situation"*, adding unnecessary expense and stress to her situation; that Mr. Tennant had failed to comply with his *"duty of care"*; that the Bank and Mr. Tennant and their agents had been unjustly enriched; that the Bank was carrying on business in the State without a valid banking licence; that the Bank had breached various legislative provisions; that the Bank had engaged in *"excessive securitisation"*; that the Bank had acted negligently in its dealings with Ms. Scanlan and the mortgaged property; that the Bank and Mr. Tennant had engaged in *"Robo-signing"* – that is to say that affidavits had been sworn by persons with no knowledge of the facts deposed to; that the Bank and Mr. Tennant had been guilty of

"gross misconduct"; and that the Bank and Mr. Tennant had attempted to illegally enter the mortgaged property and had harassed the residents.

8. By notice of motion dated 18th March, 2015 the Bank applied to the High Court for an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court dismissing the 2014 action on the grounds that the summons and statement of claim failed to disclose any reasonable cause of action and that the claims were frivolous and vexatious and bound to fail.

The 2016 judgment and order

9. The Bank's motion for summary judgment and its motion to dismiss Ms. Scanlan's cross action were heard together by the High Court (Fullam J.) on 19th October, 2015. In the meantime, on 12th June, 2015, the mortgaged property was sold and the net proceeds of sale applied in reduction of Ms. Scanlan's indebtedness.

10. For the reasons given in a written judgment delivered on 25th February, 2016, ([2016] IEHC 118) on both motions, Fullam J. found that Ms. Scanlan's action should be dismissed and that the Bank was entitled to summary judgment in the sum of €47,704.46. Following a contested costs hearing on 18th March, 2016 the orders in each case – the Bank's action 2014 No. 1456S, and Ms. Scanlan's action 2014 No. 8950P – were perfected on 5th July, 2016.

11. There was no appeal by Ms. Scanlan against either order.

The third action

12. Mr. Tennant is a partner in Grant Thornton. On 11th September, 2015, in response to a previous data access request to Grant Thornton, Ms. Scanlan was provided with a CD. The

CD contained not only Ms. Scanlan's data but also, inadvertently, confidential and personal data relating to unconnected third parties and confidential proprietary information the property of Grant Thornton. That inadvertent disclosure, it will have been noted, occurred about a month before the hearing before Fullam J.

13. By plenary summons issued on 27th November, 2015 Grant Thornton and Grant Thornton Corporate Finance Ltd. commenced proceedings against Ms. Scanlan seeking orders for the return of the information and related relief. I will refer to this action as the Grant Thornton action. The course of that litigation has not been smooth but it is unnecessary for present purposes to dwell on all of the detail.

14. What is relevant – as will become apparent – is that an application by Ms. Scanlan to join the Bank as a party to those proceedings was refused by the High Court (Gilligan J.) ([2017] IEHC 648) and an appeal by Ms. Scanlan against that refusal was dismissed by the Court of Appeal, in a judgment delivered by Baker J. (with which Irvine and Donnelly JJ. agreed) on 31st October, 2019 ([2019] IECA 276).

15. The Court of Appeal affirmed the conclusion of Gilligan J. that there was no connection between the claims of the plaintiffs in that action and Ms. Scanlan's complaints involving Danske Bank. Moreover, Baker J. agreed with a submission which had been made on behalf of the Bank that Ms. Scanlan's attempt to join the Bank amounted to an attempt to mount an as-yet unarticulated collateral attack on the 2016 judgment and order of Fullam J.

16. It is also relevant – and for the moment I just note – that on 30th June, 2016 Ms. Scanlan delivered a counterclaim in the Grant Thornton action. It will be necessary in due course to examine that counterclaim in some detail.

The fourth action

17. The action which is the subject of the appeal now before this court was commenced by plenary summons issued on 17th July, 2017. I will refer to it as the 2017 action. Ms. Scanlan did not deliver her statement of claim until 27th April, 2020. The statement of claim was delivered long after the time limited by the Rules of the Superior Courts had expired and without leave or consent but while Mr. Tennant complained that Ms. Scanlan had been guilty of inordinate and inexcusable delay in prosecuting her action, neither he nor the Bank challenged the validity of the statement of claim.

18. On 17th June, 2020 a motion was issued on behalf of the Bank by which the High Court was asked to dismiss the 2017 action pursuant to O. 19, r. 28 of the Rules of the Superior Courts on the grounds that the statement of claim disclosed no reasonable cause of action and/or pursuant to the inherent jurisdiction of the court on the grounds that Ms. Scanlan was seeking to re-litigate issues decided in the 2014 action and/or to mount an impermissible collateral attack on the 2016 judgment and order and/or to litigate matters which properly and conveniently could and should have been made as part of the previous proceedings.

19. On 4th August, 2020 a similar motion was issued on behalf of Mr. Tennant, to which there was added a further alternative claim that the action should be dismissed for inordinate and inexcusable delay.

20. I note for completeness that both the Bank's and Mr. Tennant's motions also sought orders – in the alternative and if necessary – pursuant to O. 19, r. 27 and/or the inherent jurisdiction of the court striking out the summons and statement of claim of portions of them as unnecessary and/or scandalous and/or as tending to embarrass or delay the fair trial of the action, but those reliefs do not appear to have been pursued.

21. The motion on behalf of the Bank was grounded on an affidavit of Mr. Michael Leonard filed on 17th June, 2020 and the motion on behalf of Mr. Tennant was grounded on

an affidavit of Ms. Patricia Shaw filed on 5th August, 2020. Ms. Scanlan swore a single affidavit in reply to both motions on 19th November, 2020, and supplemental affidavits – again in response to both motions – on 24th May, 2021, 8th June, 2021, and 22nd November, 2021. In her affidavit of 22nd November, 2021 Ms. Scanlan exhibited a draft proposed amended statement of claim which for some reason was dated 30th November, 2021.

22. The motions were heard together by the High Court (Heslin J.) on 13th January, 2022. For the reasons set out in a comprehensive written judgment delivered on 16th March, 2022 ([2022] IEHC 160) Heslin J. found that in the interests of justice the 2017 action must be halted and on 30th August, 2022 the High Court order was perfected by which the action was dismissed against the first and third defendants as an abuse of process and as frivolous and vexatious and as disclosing no reasonable cause of action against them.

The High Court judgment

23. In his judgment the subject of this appeal, Heslin J. identified the essence of the 2017 action as a claim for damages relating to the manner in which the Bank dealt with Ms. Scanlan's default in respect of her loan and the appointment of Mr. Tennant as receiver over the mortgaged property, as well as alleged data breaches arising out of the inadvertent disclosure to her of the confidential information on the CD. He identified the aim of the range of declaratory reliefs as being to reverse the sale of the mortgaged property.

24. Starting at para. 35, the judge undertook a careful and detailed analysis and comparison of the statement of claim in the 2014 action and the 2017 action which, he said, revealed numerous similarities. Over the following eleven pages the judge comprehensively demonstrated those similarities.

25. At paras. 62 to 64, under the heading *"Attack on the judgment of Fullam J."*, Heslin J. said:-

> *"62. Para. 53 of the 27 April 2020 statement of claim contains the following plea: 'The plaintiff claims substantial compensation and/or damages including punitive damages in that they were denied the right to constitutional fair hearing/trial in relation to limited summary statutory proceedings and joined proceedings that the plaintiff was denied material facts and basic data access regarding their constitutionally protected property which denied the plaintiff their constitutional procedural protections of the court …' The foregoing is a very direct attack on the outcome of the 2014 proceedings, specifically the judgment of this court given by Fullam J. on 25 February, 2016, which the plaintiff chose <u>not</u> to appeal against.*
>
> *63. It is fair to say that – whether based on allegations of a lack of fair procedures on the part of the bank, or the receiver, or whether based on constitutional rights, Convention rights, data protection legislation, or otherwise – at the very heart of the present proceedings is the proposition that the judgment by Fullam J. was wrong and that issues decided with finality must be re-litigated.*
>
> *64. It is plain from the reading of the 27 April 2020 statement of claim that, among the 'bald' and unsubstantiated assertions made are: firstly, that the evidence relied upon by the court when it decided the motions in respect of the 2014 proceedings was inadequate or defective; secondly, that this court's 15 February 2016 judgment is defective."*

26. At para. 70 of his judgment, by comparing the reliefs claimed in the 2017 action and the 2014 action, the judge concluded that the aim of the 2017 action was precisely the same as what Ms. Scanlan had sought to achieve by the 2014 action.

27. Commencing at para. 71, the judge set out the relevant legal principles to be applied. He quoted extensively from the judgment of Clarke J. in *Lopes v. Minister for Justice* [2014] IESC 21, [2014] 2 I.R. 301 and was guided by the judgment of Butler J. in *Scanlan v. Gillligan* [2021] IEHC 825 as to the approach which ought properly to be taken to cases brought by litigants in person where the pleadings may be dense, repetitive, and prolix.

28. Having identified the obvious purpose of the two actions and analysed and considered the draft proposed amended statement of claim and having compared the claims made in the 2015 and 2020 statements of claim and the claims proposed by the draft amended statement of claim, the judge concluded that Ms. Scanlan was seeking to litigate the same, or substantially the same, case for a second time and that her action must be struck out as an abuse of process.

29. It will be necessary when I come to address the several grounds of appeal to return to the detail of the High Court judgment.

The appeal

30. By notice of appeal filed on 27th September, 2022 Ms. Scanlan appealed against the judgment and order of the High Court on sixteen grounds. There is considerable overlap in the grounds of appeal and they have been conveniently and generally correctly grouped in the Bank's respondent's notice. So grouped, for a very important reason which I will come to, I will set them out in full.

Ground 1 – second and fourth defendants

*"1. The learned judge erred in law by failing to recognise that the **fourth defendant** failed to enter an appearance and was not before the court and in further failing to acknowledge or open the motions regarding the **second** and **fourth defendants.**"*

Grounds 2 and 12 – Loan in Arrears

*"*2. *The learned judge erred in fact and law by failing to acknowledge and consider that specific events give rise to the statement of claim had not actually occurred for ventilation before the court in a limited summary hearing in 2015, giving rise to circumstances of res judicata.*

*12. The learned judge erred in law and fact by failing to consider the balance of justice in that the plaintiff was not in arrears at appointment and the **first** and **second defendants** refused to communicate regarding the discharge of the loan to which the plaintiff was lawfully entitled. This non communication was evidentially supported by the plaintiff's presented claim pursuant to **S7** of the **Data Protection Acts 1998 & 2003** with legal determination by the Data Commissioner, that the **second defendant** failed and refused to engage or provide the plaintiff's personal data and private property disposal were only available after a limited summary hearing in **2015** where the **second defendant** swore on penalty of perjury that the **third defendant** was responsible for the property sale, when that claim was incorrect and further, cannot be subject to the legal principle of res judicata."*

Grounds 3 and 4 – Right to be Heard

"3. The learned judge failed in fact and law to acknowledge and honour the plaintiff's enshrined ***right to be heard*** *prior to the disposal of private property in that the plaintiff filed proceedings regarding their property when the* ***first*** *and* ***second defendants*** *sold the property without notification or the plaintiff's knowledge prior to an entitled hearing (right to be heard) regarding a life altering event over property.*

4. The learned judge failed to in law and fact to consider the principles of proportionality and fairness regarding the plaintiff's enshrined property and personal rights pursuant to ***Statute,*** *the* ***Constitution*** *and* ***A1*** *of the* ***EU Convention (S(2) ECHR 2002).****"*

Ground 5 – Right to a Fair Hearing

"5. The learned judge erred in law and fact by failing to honour the plaintiff's enshrined right to a fair hearing pursuant to ***Article 40.3*** *of the* ***Constitution*** *and* ***A6(1)*** *of the* ***EU Convention (S2 of the EU Convention (ECHR Act 2002).****"*

Grounds 6, 9, 10 and 11 – Power of Sale

"6. The learned judge failed in fact and law to formally consider the legal argument provided by the plaintiff that their private property was not in the ***first defendant's*** *possession at the point of sale as mortgagee in possession. The plaintiff raised the issue of constitutionality regarding the sale of property without peaceable possession and its effects on the plaintiff's rights in the enshrined* ***right to be heard*** *prior to the disposal of disputed property, contrary to the plaintiff's property and*

personal rights pursuant to ***Articles 40.1 & 40.3*** *of the* ***Constitution*** *and* ***Article 1, Protocol 1*** *of the* ***EU Convention (S(2)*** *of the* ***ECHR Act 2002)*** *including binding Supreme Court case law.*

9. The learned judge erred in law and fact by failing to acknowledge and consider the key elements of enshrined ***land law*** *regarding the true nature of a legal charge (set out by the Supreme Court)* ***is not land nor confers ownership or estate on the charge-holder.*** *Thus, failure to procure lawful and peaceable possession over private property and to force a sale is contrary to the plaintiff's enshrined constitutional property rights, the right to be heard and case law as provided by the plaintiff.*

10. The learned judge erred in law and fact by failing to consider the plaintiff's legal claim and argument that the interpretation and application of the ***1881 Act*** *as an automatic right to sell an individual's private property, without possession over the property is rendered less than mortgagors subject to the* ***2009 Land reform Act,*** *and discarded as bound to fail. The learned judge erred in law and fact by failing to consider that mortgagees in possession must actually be in possession to enact a sale and further, are not entitled to discharge private property tax on behalf of the land owner when not is possession pursuant to* ***Local Property Tax Act 2012****.*

11. The learned judge erred in law and fact by failing to acknowledge and consider that the defendants by law are obliged to ***notify*** *and* ***inform*** *the plaintiff regarding the custody and use over their private data property (so the plaintiff may exercise their legal rights of control and restraint) and so it follows, the plaintiff is also entitled to* ***lawful notification*** *regarding the sale of their private property, especially where legal proceedings are pending and the property is not in possession (mortgagee) and in dispute regarding payment of arrears, subsequently nullifying*

the deed of appointment pursuant to the ***Consumer Credit Act 1995*** *and as relied on by the defendants."*

Ground 7 – Inordinate and Inexcusable Delay

"The learned judge erred in fact and law by determining that the plaintiff's case was guilty of inexcusable and inordinate delay in the initiation and advancement of the proceedings, notwithstanding the said defendant failed to pursue that relief and argument and made reference to this legal relief only when raised by the plaintiff at the closure of the hearing. The said defendant failed to pursue this argument or set out how and why this was at issue. The court erred in law in failing to apply and duly examine the plaintiff's case pursuant to the proper legal tests, which did not apply in these circumstances given the facts, documents and evidence. Further the judge erred in law by failing to consider the defendant's conduct in an examination of inexcusable and inordinate delay and against the required backdrop of ***A6 (1)*** *of the* ***EU Convention (S2 of the ECHR Act 2002).****"*

Grounds 8 and 13 – Data Protection

"8. The learned judge erred in law and fact by failing to acknowledge and consider the claims regarding the plaintiff's personal (data) property in the course of the ***first, third*** *and* ***fourth defendants'*** *commercial imperative.*

13. The learned judge erred in law and fact to acknowledge and consider the ***bona fide*** *claim pursuant to a legal determination from the* ***Data Commissioner*** *provided by the documents and entitled to advancement is not vexatious or bound to fail."*

Grounds 14, 15 and 16 – The Applicable Law

> *"14. The learned judge erred in law and fact by failing to acknowledge and consider bona fide claims entitled to advancement and not bound to fail given the documents and evidence before the court against the backdrop of the legal test for strike out, which requires the court not to strike out claims that are not clear, without focus on whether those claims would ultimately be successful at trial.*
>
> *15. The learned judge failed in law and fact by relying on interim decisions in other cases yet to be ventilated by trial or finally determined.*
>
> *16. The learned judge failed in law and fact by failing to consider the plaintiff's enshrined fundamental* ***Constitutional*** *and* ***EU rights*** *in such overall circumstances placing the defendants' statutory requirements to pursue debt at any cost, by any means as the entitled legal priority in such circumstances."*

31. I will return to the grounds of appeal but I pause here to highlight what has not been appealed.

32. There is no appeal against the accuracy of the High Court judge's analysis and comparison of the statement of claim in the 2014 action and in the 2017 action. There is no suggestion of error in the judge's conclusion that in the 2017 action, as she had in the 2014 action, Ms. Scanlan sought to challenge the actions of the Bank in calling in her loan and in appointing Mr. Tennant as receiver over the mortgaged property, and the actions of the Bank and Mr. Tennant in the realisation of the security. There is no appeal against the conclusion of the High Court judge that both the 2014 proceedings and the 2017 proceedings had the same aim. There is no appeal against the judge's finding that the obvious purpose of the 2017 action was – as the obvious purpose of the 2014 action was – to challenge (i) the

manner in which the Bank and Mr. Tennant dealt with Ms. Scanlan, (ii) the appointment of Mr. Tennant as receiver, (iii) the taking of possession of the mortgaged property, and (iv) the sale of the property, and there was no appeal against (v) the finding that claims were made in both sets of proceedings for compensation and/or the return of the property. There is no appeal against the conclusion of the judge that the 2017 action was an attack on the judgment of Fullam J. It is not suggested that the judge did not identify the correct legal principles to be applied in determining whether a claim was *res judicata* or whether an argument might be raised in later proceedings which could and should – if it was to be made at all – have been made in earlier proceedings.

Discussion and decision

Second and fourth defendants

33. The first ground of appeal can be quickly disposed of. It is suggested that the judge erred in failing to recognise that the fourth defendant failed to enter an appearance and was not before the court and in failing to acknowledge or open the motions regarding the second and fourth defendants. That is simply incorrect. The judgment, at para. 3, expressly refers to a motion by Ms. Scanlan to remove the second and fourth defendants which appeared to have been listed on 15th March, 2021 but adjourned generally, quite possibly due to the COVID-19 restrictions. The judge noted that the first and third defendants consented to the removal of the second and fourth defendants but Ms. Scanlan's motion was not formally before the court. The order under appeal deals with the motions by the Bank and Mr. Tennant. If Ms. Scanlan wishes to have a formal order made on her motion she can simply apply in the Central Office to have it restored to the High Court list.

34. When, in the course of the oral hearing of appeal, all of this was pointed out to Ms. Scanlan by the presiding judge, she correctly read the wind and abandoned the ground of appeal.

Right to a fair hearing

35. The fifth ground – that Ms. Scanlan was not afforded a fair hearing – can equally quickly be disposed of. The Bank's and Mr. Tennant's motions were issued respectively on 17th June, 2020 and 4th August, 2020 and were heard together on 13th January, 2022. Ms. Scanlan delivered her replying affidavit – a composite affidavit in response to both motions – on 26th November, 2020. Thereafter, Ms. Scanlan filed three further affidavits – on 2nd June, 2021, 14th June, 2021, and 24th October, 2021 – all of which were admitted and carefully considered by the High Court judge. In addition – without leave or consent or any motion for the amendment of her statement of claim – Ms. Scanlan furnished a draft amended statement of claim dated 30th November, 2021 which was also carefully considered by the judge who expressly recalled the fact that Ms. Scanlan is a litigant in person and the circumspection with which the jurisdiction to strike out proceedings is to be exercised, in general, and in a case of a litigant in person in particular. In fairness, Ms. Scanlan in her written submissions and at the oral hearing of the appeal, while critical of the substance of the judge's decision in a number of respects, did not suggest that the hearing afforded to her was anything less that scrupulously fair.

Loan in arrears

36. By grounds two and twelve, Ms. Scanlan argued that the judge erred in failing to consider – and, I suppose, to find – that at the time of the demand for payment and the appointment of Mr. Tennant as receiver, her loan was not – or, perhaps, might not have been – in arrears. As the High Court judge pointed out, the position which Ms. Scanlan would have taken in the draft amended statement of claim was different to that which she had taken in her statement of claim delivered on 23rd February, 2015 in the 2014 action and that taken in her statement of claim delivered on 27th April, 2020 in her 2017 action. There was in all three documents a common theme that the Bank failed to advise, notify, or seek consent prior to the Mr. Tennant's appointment but there was a significant shift in Ms. Scanlan's position as to arrears.

37. In the statement of claim of 23rd February, 2015, the complaint was that the appointment of the receiver had been made *"to a very modest financial situation"* in circumstances in which, by reason of Ms. Scanlan having lost her employment, and the diminution of the potential for rental income by reference to the dramatic fall in property values *"[Ms. Scanlan] could no longer service the full indebtedness to the [Bank] in respect of the aforesaid mortgage."* In plain English, the mortgage was in arrears, but – at least according to Ms. Scanlan – not by much.

38. In her statement of claim of 27th April, 2020 Ms. Scanlan claimed that there were *"insignificant arrears to the loan amount of just €2,257 … at the time of the receivership appointment"* but immediately went on to suggest that *"subject to a forensic analysis of the interest tracker on the loan account, it may well be that the plaintiff had no arrears at all at the time of the appointment."* The positive plea was that there were arrears, but Ms. Scanlan sought to open the possibility – coming up to seven years after the appointment and upwards of six years after her challenge to the validity of the appointment had been rejected by the High Court as bound to fail – that she might not have been in arrears after all.

39. By her draft proposed amended statement of claim dated 30th November, 2021 – upwards of eight years after the demand and the appointment of Mr. Tennant – Ms. Scanlan would have made the case that: *"It has since been pointed out by Bank Check, a professional forensic accounting firm, that the plaintiff had in fact returned to full payment of the mortgage at the time of the appointment of the defendant receiver"* and later, immediately following the plea that the arrears were insignificant, amounting to only €2,257, that *"... the plaintiff had no arrears at all at the time of appointment or demand of the loan."*

40. By the way, the draft proposed amended statement of claim was exhibited marked *"RDS 8"* to the second supplemental affidavit of Ms. Scanlan sworn on 22nd November, 2021. Exhibit *"RDS 6"* to the same affidavit was a letter from Bankcheck to Ms. Scanlan of 8th November, 2021 which confirmed that Bankcheck would undertake an investigation into the interest charges and repayment schedule and anticipated that the results would be available in approximately four weeks. In para. 2 of that affidavit, Ms. Scanlan deposed that she had provided bank statements to Bankcheck and that Bankcheck intended to provide a sworn analysis of the account four weeks from 8th November, 2021 and at para. 4 referred to *"minimal arrears of 2.5K"*. Accordingly, Ms. Scanlan had no evidence to support her proposed plea that Bankcheck had reported that she had returned to full payment or that there were no arrears, but that is not the point.

41. The High Court judge, at para. 114, correctly identified the belated suggestion that the loan was not after all in arrears at the time of the demand and the appointment of the receiver as a new claim, and correctly identified that this new claim was utterly inconsistent with the case she had made earlier. Since the factual issue of whether the loan account was in arrears was the foundation of the legal issues as to the validity of the Bank's demand and the appointment of the receiver – which were determined against Ms. Scanlan by the judgment of Fullam J. – I think that the arrears issue was probably strictly speaking *res judicata* rather

than captured by the rule in *Henderson v. Henderson* (1843) 3 Hare 100, but on any analysis the issue was one which Ms. Scanlan was not in law entitled to raise.

42. Whether as of the date of demand on 17th July, 2013 or the date of appointment on 15th August, 2013 the loan was in arrears is not, by itself, material. Rather, that factual issue was critical to the legal entitlement of the Bank to have made the demand – which was the foundation of its legal entitlement to be repaid the balance of the loan – and to have appointed a receiver with a view to realising its security. By the same token, Ms. Scanlan's object in seeking to revisit the issue is not to establish whether the loan was or was not in arrears, but to seek to undermine the validity of the demand made by the Bank – which was the foundation of the order for summary judgment – and to revisit the case which she made in her 2014 action as to the validity of the appointment of Mr. Tennant – which was the foundation of the judgment and order of Fullam J. that her challenge was bound to fail.

43. As I have said, there is no challenge to the correctness of the judge's decision that it is impermissible in law to seek to litigate the same question twice, or to re-litigate an issue which has been finally decided by a court of competent jurisdiction, or to the judge's decision that that is what Ms. Scanlan was attempting to do. I do not believe that it is over technical to say that grounds 2 and 12 suggest that the judge erred in law in failing to do something which it is effectively acknowledged he was not, in law, entitled to do.

44. In her written submissions and in oral argument, Ms. Scanlan argued, variously, that the hearing before Fullam J. was a summary hearing with limited facts available; that the sale of the property by the Bank had been discovered after the case; and that too many issues arose after the summary hearing to re-open the case by way of an appeal. Her core submission was that the 2014 action was a claim for reckless lending, which she now acknowledges is not actionable. This is simply incorrect. The High Court judge, at para. 17 set put a list of sixteen primary claims made by Ms. Scanlan in her 2014 proceedings. The

first of these was a claim for reckless lending but the remainder ranged far and wide. Starting at para. 35, the judge identified over thirteen pages the similarities between the claims made in the statement of claim of 27th April, in the 2017 action and those previously made in the 2014 action. While baldly asserting that the issues sought to be litigated in the 2017 action were not those previously litigated, Ms. Scanlan has simply not engaged with the judge's analysis: against which, as I have said, she has not appealed.

Right to be heard

45. By grounds 3 and 4 of the grounds of appeal Ms. Scanlan asserts the existence of an *"enshrined"* right to have been heard prior to the disposal of the mortgaged property and an error on the part of the High Court judge in failing to recognise such a right.

46. The High Court judge dealt with this issue at paras. 104 to 111 of his judgment. At para. 106 the judge observed that it cannot be disputed that a material element of Ms. Scanlan's 2014 action was an assertion of a right to be heard; an alleged denial of that right; and a claim that the Bank and Mr. Tennant refused to engage with her. At para. 110 the judge references the relevant paragraphs in the 2015 statement of claim and said:-

> *"As previously stated, the claim based on an alleged breach of an alleged right to be heard was a central feature in the plaintiff's 2014 proceedings, which were dismissed by Fullam J. and cannot be re-litigated."*

47. Unsurprisingly, since it was plainly the fact, there is no appeal against the finding that the case which Ms. Scanlan sought to make in the 2017 action as to her alleged right to be heard was previously made in the 2014 proceedings and decided against her. Nor is there any appeal – or could there be any sensible appeal – against the judge's finding that the claim, having previously been conclusively decided by the High Court, cannot be re-litigated.

48. In support of the argument she sought to make in this - the 2017 – action, Ms. Scanlan sought to rely on the judgment of the Supreme Court in *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R. 1, which she does not appear to have relied on in her 2014 action. At para. 107 the judge explained that Ms. Scanlan's reliance on *Dellway* was misplaced. The judge's explanation of *Dellway* and the reason why it could not have availed Ms. Scanlan was intended to provide some consolation that she had not previously relied on it but if, for the sake of argument, it might have been relevant to the outcome of the 2014 action, she was nevertheless precluded from seeking to re-open the issue previously argued and decided against her. The judge explained that he dealt with the submission only because Ms. Scanlan had laid such emphasis on it and that she was not entitled to revisit the judgment of Fullam J.

Power of sale

49. In grounds 6, 9, 10 and 11 Ms. Scanlan canvasses a variety of arguments as to the exercise by the Bank of its power of sale of the mortgaged property. The contention, essentially, is that the Bank was not entitled to have sold the property unless it was in possession of the property and that Ms. Scanlan was unaware at the time of the 2014 action that the property had been sold by the Bank, as opposed to the receiver. The bones of the argument was that if the lender did not have possession, he had the right – and was bound to - apply to court for an order for possession: specifically, in the case of registered land, pursuant to s. 62(7) of the Registration of Title Act, 1964. *"Why,"* it was said, if the holder of a charge over registered land was not entitled to sell without possession, *"did the lenders lobby the legislature in 1942 to provide legal remedy for possession?"* This plaintive argument fails to recognise the difference – prior to the Conveyancing and Law of Property Act, 2009 – between a legal mortgage and a charge. As Ms. Scanlan correctly submits, a legal mortgage

of land was an interest in the land, while a charge over registered land was not. This went to the entitlement of the holder of a charge over registered land to obtain possession of the land. But whether the mortgagee of unregistered land or the charge of registered land had possession was not material to the exercise of the power of sale but to the price achievable for the security.

50. As to Ms. Scanlan's knowledge of the fact of the sale and of the fact that the transfer had been executed by the Bank as mortgagee, the judge pointed to para. 9 of Ms. Scanlan's first supplemental affidavit of 24th May, 2021 where she deposed that on 25th November, 2015 she received an e-mail from Mr. Tennant informing her that the property had been sold by the Bank. This, Ms. Scanlan had said, was *"following the conclusion of the summary proceedings"* which it plainly was not. While the summary proceedings and the strike out motion had been argued together on 19th October, 2015, judgment had been reserved and was not delivered until 25th February, 2016; following which there was a contested costs hearing on 18th March, 2016 before the order was finalised on 5th July, 2016.

51. If, as Ms. Scanlan now argues, the focus of her 2014 action against the Bank and the receiver was on the sale of the property by the receiver, it was Ms. Scanlan, as plaintiff, who set the agenda. The mortgage executed by Ms. Scanlan and held by the Bank clearly provided for the powers of sale and of appointing a receiver conferred on mortgagees by the Conveyancing and Law of Property Act, 1881 and that such powers could be exercised at any time after a demand made by the Bank. On her own case, Ms. Scanlan was plainly aware of the proposed sale of the property and she does not explain why it might have mattered that the sale was completed by the Bank rather than by the receiver.

52. Ms. Scanlan would now make the case that she was unaware at the time that the Bank might sell – or complete the sale of – the mortgaged property and that if she had known that the Bank might execute the transfer, she would have moved to enjoin the sale. I think

that if she had known that the Bank intended to complete the sale, she might very well have applied for an injunction to restrain it but she had not identified any ground upon which the sale might have been prevented, except her argument that the Bank was not entitled to sell without possession.

53. As to the lawfulness of the sale, the judge simply pointed to the power of sale conferred by s. 19(1)(i) of the Conveyancing Act, 1881, which is *"A power, when the mortgage money has become due, to sell …"*. In the case of registered land, the procedure provided for in s. 62(7) of the Registration of Title Act, 1964 for a summary application for possession of the land is in aid of, and not a precondition to, the exercise of the power of sale conferred by section 62(6).

54. The market for mortgaged property with the mortgagor in possession is a fairly new phenomenon, but the suggestion that the exercise by a mortgagee or chargee of land of the power of sale conferred by the mortgage or charge is conditional on the mortgagee or chargee first obtaining an order for possession or being lawfully in possession is misconceived. See for example the judgment of this court in *Tarbutus Ltd. v. Hogan* [2023] IECA 23.

Data protection

55. By grounds 8 and 13, Ms. Scanlan suggests that the judge erred in failing to acknowledge and consider her data claims. Well, the judge did acknowledge and consider her data claims and concluded that they were an abuse of process and should be struck out. These claims were examined by the judge in some detail and he concluded, at para. 121, that any claim with its basis in the Data Protection Acts fell to be determined as part of Ms. Scanlan's counterclaim in the Grant Thornton proceedings.

56. At paras. 23 to 27 of his judgment, the judge set out a brief overview of the proceedings brought by Grant Thornton and Grant Thornton Corporate Finance Ltd. arising out of the inadvertent disclosure of confidential data to Ms. Scanlan and he picked up the narrative at para. 80.

57. On 27th July, 2017 the High Court (Gilligan J.) gave judgment on two motions in the Grant Thornton action: the first, brought by Ms. Scanlan, to join the Bank, the Attorney General and the Data Protection Commissioner as parties; and the second, brought by the plaintiffs, for orders striking out Ms. Scanlan's defence and counterclaim – which had been delivered on 30th June, 2016 – on the grounds that it contained pleas that were unnecessary and/or scandalous and/or which might tend to prejudice, embarrass and delay the trial, and that it was frivolous and vexatious and disclosed no cause of action.

58. As far as the Bank then was, and now is, concerned, Ms. Scanlan's application to join Danske Bank as a party to those proceedings was refused by Gilligan J. and her appeal against that decision was dismissed by the Court of Appeal on the ground, as Baker J. put it, that the Bank had no role to play in the claim.

59. By his order made on 27th July, 2017 Gilligan J. struck out a great deal of Ms. Scanlan's defence and the entirety of her counterclaim bar her claim pursuant to s. 7 of the Acts of 1988 and 2003 and he ordered that she should succinctly set out the nature and extent of that claim and the basis of the claim, which was to be particularised in detail. As I will come to, it is significant to note that Ms. Scanlan's original counterclaim was that:-

> *"12. The defendant counterclaims against the plaintiff for damages pursuant to section 7 of the Data Processing (sic.) Acts 1988 and 2003."*

60. On 18th December, 2017 Ms. Scanlan delivered a new defence and counterclaim in which *inter alia* she counterclaimed for:-

"1. … substantial damages pursuant to section 7 of the Data Protection Acts ('the Acts') for the plaintiff's failure to provide the defendant's data access request within the statutory time permitted or within any reasonable time at all, in violation of the defendant's fundamental rights as enshrined in Article 8, which concealed material facts from the defendant and had a consequential detrimental effect on the defendant's litigation "

61. The revised counterclaim went on to claim damages pursuant to s. 7 of the Acts in respect of alleged breaches of ss.12(5), 2(1), 2(2), 2A, 6, 19(6), 16 and 20 of the Acts, as well as several Articles of the Data Protection Directive.

62. This new defence and counterclaim was the subject of a further motion to strike out, which in due course was the subject of a written judgment of the High Court (Pilkington J.) delivered on 2nd June, 2020 [2020] IEHC 509 and an *ex-tempore* judgment of the Court of Appeal delivered on 1st March, 2021 by Haughton J., with which McCarthy and Murray JJ. agreed.

63. Pilkington J. found that the plea at para. 1 of the counterclaim – which I have quoted – and paras. 16, 17 and 18 – by which Ms. Scanlan counterclaimed for interest, further and other relief, and costs – should be allowed to stand but that all other elements of the counterclaim should be struck out. The Court of Appeal modified – in what Haughton J. characterised as a very minor way – the High Court order in relation to the defence but affirmed the order in relation to the counterclaim.

64. In her statement of claim in these proceedings, Ms. Scanlan pleaded her data claim – or data claims – in three strands. The first was a complaint of delay on the part of Mr. Tennant in complying with a subject access request. The second was a complaint of an alleged failure by Mr. Tennant to comply with his obligations as to the collection and storage of Ms. Scanlan's data. The third was in part a restatement in general terms of the first two

strands and in part a general complaint of non-compliance with the Data Protection Acts and the Data Protection Directive.

65. At para. 13 of her statement of claim of 27th April, 2020 Ms. Scanlan pleaded that:-

"… the receiver was found in breach of section 4(1) of the Data Protection Acts 1988 &2003 in failing to meet a subject access request issued September 2013 until September 2015 …"

and, at para. 14, that *"The plaintiff claims damages and compensation from the said receiver in breach of section 2(1)(a) and 2(D) [recte. s. 2D] of the Data Protection Acts 1988 & 2003 in the course of this receivership in failing to meet significant legal principles in relation to collection and fair processing of the plaintiff's personal data."*

66. The statement of claim immediately went on to plead, at para. 15, that:-

> *" The plaintiff claims that the said receiver operated outside of statute and the primary* ***EU Directive 95/46/EC*** *[the Data Protection Directive] from the outset of this business, contrary to law and the plaintiff's constitutional fundamental rights regarding the use of data. The receiver was not lawfully entitled nor authorised in this jurisdiction for request, storage and processing of such personal data. The receiver was not lawfully entitled nor authorised in this jurisdiction for* ***request, storage*** *and* ***processing*** *of such personal data. The receiver failed, refused and neglected to meet basic legal obligations to* ***notify*** *and* ***register*** *their* ***legal status*** **with private data** *as a* ***data controller*** *and/or* ***joint data controller*** *pursuant to* ***Sections 16-20*** *of the* ***Data Protection Acts 1988 & 3003*** *and as laid down by primary* ***EU Directive 95/46/EC.*** *It was a* ***matter of law*** *at that time that each entity in receipt of personal data from a* ***'credit or financial institution'*** *was to* ***notify*** *and* ***register*** *with the Office of the Data Protection Commissioner for such use. The importance of this primary provision was identified by the possible penalties invoked*

by the misuse of data without lawful entitlement, which carried ***criminal sanctions.***

…"

67. Under the heading *"Particulars of the claim"* – in what ordinarily would be the prayer in the statement of claim – Ms. Scanlan sought 46 reliefs in the way of damages and declarations, including damages pursuant to s. 7 of the Acts and a wide variety of declarations as to alleged non-compliance with the requirements of the Acts and the Directive

68. The first thing that can be seen from the pleading is that the data protection claims are directed exclusively to Mr. Tennant.

69. The second thing to be seen is the close similarity between the case which Ms. Scanlan sought to make in the 2020 statement of claim and the claims she had made in her revised counterclaim in the Grant Thornton action.

70. Besides attempting to separate the strands of the data claims in the statement of claim, Ms. Scanlan, in her affidavits filed in answer to the motions to dismiss, attempted to link them to two decisions of the Data Protection Commission.

71. As to the data subject access request, it is uncontested by Mr. Tennant – at least for the purposes of the motion to dismiss – that on 23rd September, 2013 Ms. Scanlan submitted a data subject access request – accompanied by the statutory €6.35 – and which was not complied with until 11th September, 2015. Along the way, on 26th September, 2014, Ms. Scanlan made a complaint to the office of the Data Protection Commissioner which, over the following year, chased Grant Thornton to comply with the subject access request.

72. Ms. Scanlan's complaint of 26th September, 2014 was followed by a number of other complaints all of which were dealt with together by the Data Protection Commissioner in a decision of 16th November, 2017. The Commissioner concluded that Ms. Scanlan's requests were valid access requests and that Grant Thornton had contravened section 4(1) of the Acts by failing to respond within the statutory period of forty days.

73. As to the collection and processing of data by Mr. Tennant during the currency of the receivership, this – with several other alleged breaches – was the subject of a further complaint by Ms. Scanlan to the Data Protection Commissioner of 7th October, 2018 when a complaint was made against Mr. Tennant and Grant Thornton Corporate Finance Limited. This complaint was duly investigated and on 15th November, 2019 a decision issued by the Data Protection Commission – which had replaced the Data Protection Commissioner – under s. 10 of the Data Protection Acts, 1988 and 2003. I pause here to note that the decision of the Data Protection Commission of 15th November, 2019 ran to fifteen pages but the copy exhibited by Ms. Scanlan was incomplete, comprising only the odd numbered pages of it: but Ms. Scanlan was satisfied that the partial copy exhibited included the essential finding on which she relied.

74. As far as the exhibit goes, the Commission, in its decision of 15th November, 2019 found:-

1. That Mr. Tennant as receiver was in a category of data controller specified in regulation 3(1)(g) of the Data Protection Act 1988 (Section 16(1)) Regulations and was not a person to whom s. 16(2) of the Data Protection Acts 1988 and 2003 applied, on the basis that the relationship of customer arose with Ms. Scanlan in the receivership process.
2. That the processing of Ms. Scanlan's personal data in the creation *(sic.)* of a bank account which included her name to ensure the receivership was carried out as efficiently as possible was necessary for the receiver and Grant Thornton Corporate Finance Ltd.'s legitimate interests, pursuant to s. 2A(1)(d) of the Acts 1988 and 2003.

3. That Mr. Tennant did not comply with s. 2(1)(a) of the Acts on the ground that he had not provided or otherwise made available to Ms. Scanlan the information required pursuant to section 2D.
4. That Mr. Tennant did not obtain personal data from Revenue or obtain access to Ms. Scanlan's Revenue online account.

75. At the hearing of the appeal, Ms. Scanlan accepted that so much of the claim which she sought to advance in her 2017 action as related to the delay on the part of Grant Thornton in complying with her data request – a matter in which the Bank had no involvement – was already the subject of her counterclaim against Grant Thornton – a firm of which Mr. Tennant is a partner, and so against Mr. Tennant – in the inadvertent disclosure action and that the High Court judge was entirely correct in his determination that on first principles it is entirely impermissible for Ms. Scanlan to pursue the same claim simultaneously in separate proceedings. By the time the appeal was heard, the Grant Thornton action – including Ms. Scanlan's counterclaim in those proceedings – had been heard, and judgment reserved.

76. As to the balance of the data claims – or data claim – the High Court judge found, at para. 82, that with the single exception of her claim for damages pursuant to s. 7 by reason of the alleged breach of s. 4, the High Court had previously decided that the wide range of pleas made with reference to data protection legislation should be struck out. The judge referenced the judgment of Gilligan J. of 27th July, 2017 which he had already noted had been upheld by the Court of Appeal on 31st October, 2019. That finding was plainly correct. I would add that to the extent that Ms. Scanlan in her revised defence and counterclaim of 18th December, 2017 attempted to re-introduce claims which had previously been struck out, those claims were struck out again by Pilkington J. in her judgment of 2nd June, 2020, upheld by the Court of Appeal on 1st March, 2021.

77. In the course of the oral hearing of the appeal Ms. Scanlan accepted that the receivership ended with the sale of the mortgaged property on 12th June, 2015 and that by 11th September, 2015 – when the CD was handed over – or possibly shortly afterwards when she was provided with a separate copy of her data, and at the very latest February, 2016 when she was given a hard copy of her data in boxes, Mr. Tennant had done whatever he had done and not done whatever he had not done with her data. Ms. Scanlan accepted – as she had to, because it is written down in black and white – that whatever Mr. Tennant had done or not done had been done or not done before 30th June, 2016 when she delivered the first version of her defence and counterclaim but offered an ingenious argument by reference to the decisions of the Data Protection Commission as to why the data claims she sought to advance in her 2020 statement of claim had not been included in her counterclaim in the Grant Thornton action.

78. It was not until 15th November, 2019 – said Ms. Scanlan – that she had the decision of the Data Protection Commission that Mr. Tennant had failed to comply with s. 2(1)(a) of the Acts, and her collection and storage claim was based on that finding. Asked by the court as to how this fitted with her counterclaim in the Grant Thornton action, Ms. Scanlan submitted that at the time she delivered her counterclaim on 30th June, 2016 she was awaiting a decision on the complaint which she had filed with the Data Protection Commissioner on 26th September, 2014 and, she submitted, the decision of 16th November, 2017 related back to her counterclaim. In argument, Ms. Scanlan sought to distinguish her s. 4 claim from her s. 2(1)(a) claim. At para. 15 of her statement of claim she had sought to distinguish those claims from her various other claims of non-compliance with the Acts and the Directive.

79. In *Collins v. FBD Insurance plc* [2013] IEHC 137 Feeney J. considered the private law remedies available to a data subject for a breach by a data controller of the obligations imposed by the Data Protection Acts, 1988 and 2003. In that case the plaintiff's damages

claim – a claim pursuant to s. 7 of the Acts – had been formulated by reference to breaches of specific provisions of the Acts – s. 4(1)(a), s. 4(7), s. 2(c)(3), s. 2(1)(d) – by reference to two decisions of the Data Protection Commissioner. The High Court held that the effect of s. 7 of the Acts, construed in the light of the Data Protection Directive, was to provide an entitlement to compensation from the data controller for any damage suffered by a person who can prove that they have suffered damage arising from a breach of their rights pursuant to the legislation. Section 7 provides, insofar as is material, that:-

> *"7. For the purposes of the law of torts and to the extent that the law does not so provide, a person, being a data controller or a data processor, shall, so far as regards the collection by him of personal data or information intended for inclusion in such data or his dealing with such data, owe a duty of care to the data subject concerned."*

80. Feeney J., at para. 4.2, observed that s. 7 does not provide for automatic damages for a breach of the Act but noted that the Act does deal with and expressly provides for sanctions or penalties for criminal liability. He referred to s. 31, which provides for the penalties which may be imposed on persons convicted of an offence under the Acts. By s. 10 of the Acts the Commissioner – now the Commission – was invested with significant and wide-ranging powers of enforcement, including – in s. 10(1)(b) – to investigate and decide complaints of contravention and to issue enforcement notices: but the private law duty imposed on data controllers and data processors, and the corresponding private law remedy available to data subjects, is separate. Specifically, the liability for any damage done flows from the breach and not any decision of the Commission. In *Collins,* Feeney J. noted at para. 2.11 that on the hearing of the Circuit Court appeal before him, the insurance company had acknowledged the breaches and accepted the findings of the Commissioner. The acceptance of the findings of the Commissioner was no concession since the decisions had not been appealed. The critical

fact which engaged the legal issue as to the insurance company's liability was the acceptance of the breaches.

81. In this case, the decisions first of the Commissioner and then of the Commission were not material to Ms. Scanlan's damages claims. Rather, the issue was whether she could establish a breach of statutory or a want of care which resulted in damage to her. Any act or omission by Mr. Tennant in the course of the receivership which resulted in damage was actionable at the time any damage was done and the cause of action in tort accrued.

82. It will be recalled that there are two *"Data Protection"* grounds of appeal: at ground 8 that the judge failed to acknowledge and consider *"claims regarding [Ms. Scanlan's] personal data in the course of the first, second and third defendants' commercial imperative"* and at ground 13, that the judge failed to acknowledge and consider *"the bona fide claim pursuant to a legal determination from the Data Commissioner …"*.

83. It is not easy to keep up. In the High Court, Ms. Scanlan indicated that she had abandoned her claims against the second defendant. And the allegations as to delay in complying with her data subject request and of irregularity in connection with the collection and processing were directed exclusively to Mr. Tennant. Moreover, Ms. Scanlan sought to treat the Data Protection Commission's decision of 15th November, 2019 like the curate's egg: adopting so much of it as upheld her complaint of non-compliance with s. 2(1)(a) as the basis of her damages claim, but not acknowledging the rejection of all her other complaints as any impediment to the repetition of those complaints in pursuit of High Court declarations of non-compliance.

84. The claims of general non-compliance with the Acts and Directive at para. 15 of the statement of claim were dealt with by the High Court judge at para. 122 of his judgment, where he said:-

"Leaving aside the fact that, as averred by Ms. Shaw in her affidavit sworn on 4 August 2020 grounding the third defendant's motion, the plaintiff had made multiple complaints which have been determined by the Data Protection Commissioner, the claims which the plaintiff seeks to advance against the receiver in the present proceedings are bound to fail. I say this because, on any analysis, the plaintiff is seeking to usurp the statutory role of the Data Protection Commissioner. As well as being bound to fail, it was a claim which was open to the plaintiff to articulate in the 2014 proceedings."

85. There was no specific appeal by Ms. Scanlan against this specific finding and I am not at all sure that it would have come within the vague suggestion at ground 8 of the notice of appeal that the judge failed to acknowledge and consider *"claims regarding [Ms. Scanlan's]* personal data. There was nothing in Ms. Scanlan's written or oral submissions in which she sought to agitate anything other than her claims *"pursuant to a legal determinations of the Data Commissioner."* In any event, the claim in para. 15 of the statement of claim – by contrast with paras. 13 and 14 – was not a claim for damages but simply a claim that Mr. Tennant had not acted in accordance with law, the claimed remedies for which were declarations. By these claims, Ms. Scanlan was attempting to arrogate to herself the function of policing compliance with the legislation and so – as the judge put it – to usurp the statutory role of the Commissioner.

86. Moreover, to the extent that Ms. Scanlan was attempting in her statement of claim delivered in 2020 – in an action commenced in 2017 – to add to or expand upon a claim for damages for an alleged breach of s. 7 which was already the subject of her counterclaim in the Grant Thornton action, this was impermissible. If and to the extent that Ms. Scanlan's claim at para. 14 of her statement of claim for damages for an alleged breach of s. 2(1)(a) or s. 2(d) (or s. 2D) of the Acts was part of her revised counterclaim in the Grant Thornton

action, it was dealt with by the judgments of Pilkington J. of 2nd June , 2020 and the Court of Appeal of 1st March, 2021. If and to the extent, if at all, that the breach alleged by the statement of claim had not previously been claimed, it was a claim that could have been included in the counterclaim and, if it was to be made at all, should have been included in the counterclaim and the attempt to raise it later plainly fell foul of the rule in *Henderson v. Henderson*.

The Applicable Law

The claim in respect of the contents of the house

87. I have already dealt with Ms. Scanlan's appeal that she was not afforded a right to be heard in relation to the calling in of the loan, the appointment of the receiver and the disposal of the property.

88. Ground 14 of the grounds of appeal – that the judge erred in failing to acknowledge and consider *bona fide* claims entitled to advancement and not bound to fail given the documents and evidence before the court – is very woolly but does engage the principle that a claim ought not to be struck out unless it is clear that it is bound to fail.

89. I observed earlier that there was overlap in the grounds of appeal and that the grouping of them in the Bank's respondent's notice was generally correct. Ground 2 – that the judge failed to take account of events that had not occurred at the time of the hearing before Fullam J. – was grouped with ground 12 – which suggested that at the time of the demand and appointment the loan was not in arrears. In Ms. Scanlan's written submissions and oral presentation a different picture emerged.

90. I noted earlier in this judgment that before embarking on the task of trying to unravel Ms. Scanlan's statement of claim, Heslin J. cited the judgment of Butler J. in *Scanlan v.*

Gillligan [2021] IEHC 825 as authority for the approach which ought properly to be taken to cases brought by litigants in person where the pleadings may be dense, repetitive, and prolix. The plaintiff in *Scanlan v. Gilligan* was the same Ms. Scanlan and the judgment of Butler J. was a judgment on a series of motions by the defendants in that case to dismiss the action against them as frivolous and vexatious and an abuse of process.

91. More than once in the course of the oral hearing of this appeal, Ms. Scanlan declared herself to be *"no fan of the statement of claim;"* that is, at least, the statement of claim which she delivered on 27th April, 2020, if not also the draft proposed amended statement of claim of 30th November, 2021 which was based in large part on the statement of claim. If Ms. Scanlan is no fan of her statement of claim, she is not alone. It is dense, prolix, unclear, and contradictory.

92. It is useful to recall what Butler J. had to say in *Scanlan v. Gilligan* about such statements of claim:-

> *"7. There is frequently an unwillingness on the part of [litigants in person] to accept any adverse ruling and a tendency to ascribe such rulings to a lack of bona fides on the part of the judge or the opposing party or its lawyers. Apart from the legal expertise that a professional lawyer provides when representing a client, the fact that the lawyer is at one remove from the issues at the heart of the litigation enables them to take an objective view both of the litigation as a whole and of individual steps in that litigation, a perspective which the litigant-in-person can struggle to achieve.*
>
> *8. This is not to say that cases brought by litigants-in-person are invariably bad cases. Frequently, at the core of the litigation there may be a point of real substance although it is often obscured by excessive pleading and by an insistence on pursuing all points, however unmeritorious, to the detriment of the real issue. The court's task*

is to ensure that if there is a point of merit in the case, it is not overlooked or disregarded because of the verbiage by which it is sometimes surrounded. The task is unenviable not least because of the tendency of the litigant-in-person to take the view that unless the judge accepts all of their applications and arguments, they have not received justice. Needless to say, all of this absorbs a disproportionate amount of court time which is a cause of real concern as the time taken to deal with these applications is often completely disproportionate to the importance of the case. That time is then not available to enable other litigants to have their cases heard."

93. Ms. Scanlan commenced her written submissions with a suggestion that:-

"Further, fair and reasonable complaint was raised that could not have been heard in [the 2014 action] at the time. In fact, events complained of hadn't yet occurred. Such as removal of private items from the disputed property. No compensation for these items was reflected against the debt."

94. While her oral presentation was in the main devoted to the sale of the mortgaged property and the data claims, Ms. Scanlan did clearly make the case that she had been deprived of her *"property within the property,"* if not what that property within the property was. She suggested that at some time in 2016 she saw an estate agent's truck at the house which had been loaded with her property and, at her request, that whatever was in the truck was put back but when she came back at an unspecified later time with a hired van to collect her *"stuff"*, the house was empty. She did not say that she had sought to establish the whereabouts of whatever had been taken from the house.

95. The statement of claim, at para. 28 of an eleven-page document, pleads:-

"28. The plaintiff claims further, that the bank and/or the receiver either sold or destroyed the plaintiff's private property within the property prior to or following the sale. The plaintiff was unaware of the sale of the property in June 2015 and

further, unaware of what happened to their fixtures fittings and personal items within the property. The property was the plaintiff's former family home which held items of significant personal value to the plaintiff. The plaintiff was not notified of pending sale nor removal of their personal property items for which have never been acknowledged or compensated. The plaintiff claims this is an (sic.) substantial issue over countless properties in this State where private property was removed, sold or auctioned and which does not form part of private receivership which amounts to significant side value in relation to property disposal."

96. At paras. 64 to 67, under the heading *"Particulars of the claim"*, the statement of claim claims damages and/or compensation for *"personal property sold within the property"*, a declaration – in substance – that she was entitled to the return of the property and that the Bank and Mr. Tennant were not entitled to have retained, sold, removed or destroyed the personal property, and a declaration that the defendants' interference with her private and personal property infringed her right to dignity and good standing before her community and peers.

97. It is not difficult to understand how, in all the noise and smoke, sight might have been lost of the claim for detinue and conversion of the contends of the house: but it is there to see and it was not addressed in the judgment of the High Court. Ms. Scanlan's submissions were not easy to follow and not always consistent. For example, she variously suggested that at the time of and after the sale of the mortgaged property she was in full possession and was collecting the rent. If Ms. Scanlan's arrangements to remove what she would now argue were the valuable contents of the house had been thwarted, it might have been expected that she would have protested at the time. But if there is no evidence of any complaint of what is now said to have happened, neither is there any evidence that there was no such complaint. If – as it is – the evidence is that the sale of the mortgaged property was

completed in June, 2015, it is difficult to see what business the Bank or Mr. Tennant or their agent might have had at the property upwards of six months later. The claim that the Bank and/or Mr. Tennant were responsible for the removal of the contents of the property is not altogether easy to reconcile with Ms. Scanlan's assertion that she was in possession of the house at the time it was sold. But the pleading clearly discloses a cause of action in detinue and conversion and applicable test is whether it is frivolous and vexatious. Neither the Bank nor Mr. Tennant engaged with this claim.

98. Counsel for Mr. Tennant argued that if Ms. Scanlan had any claim in relation to the contents of the house it should have been made as part of her 2014 action. It was acknowledged that the delivery of the statement of claim in that case predated the sale of the property but it is said that she could have applied to amend. If whatever was done with the contents of the house was done before the hearing of the motion to dismiss the 2014 action, Ms. Scanlan certainly could have applied to amend but – as in *Coyne v. Danske Bank* [2017] IEHC 435 – if she had a claim which could have been advanced by way of counterclaim, I do not believe that she was obliged to do so or that she should now be shut out from advancing what is a different claim to those which have already been dealt with. In truth I suspect that any application to amend the 2015 statement of claim to add a claim for the value of the contents would likely have been opposed.

99. It seems to me that the statement of claim, at para. 28, does disclose what is in the legal sense a reasonable cause of action which has not been shown by either the Bank or the receiver to be frivolous or vexatious and which Ms. Scanlan is entitled to pursue. I emphasise that I would allow the appeal to this very limited extent only. Whatever claim Ms. Scanlan may have in relation to the contents of the house is not a wedge which can be used to try to reopen the issues of the sale of the house. Moreover, whatever may or may not have happened to the contents of any other house is no concern of Ms. Scanlan and for the

avoidance of any possible doubt and with a view to spelling out clearly what claim Ms. Scanlan is and is not entitled to pursue, the last sentence of para. 28 should be struck out as disclosing no reasonable cause of action.

Interim decisions in other cases

100. What appears to be behind the suggestion in ground 15 that the judge erred in relying on interim decisions in other cases yet to be ventilated by trial or finally determined is a misapprehension of the nature and effect of the judgment and order of Fullam J. The Bank's money claim against Ms. Scanlan did not go to trial because the court was satisfied that she had no defence and so there was no issue which warranted a trial. However, the fact that the action did not go to trial does not mean that the Bank's claim was not finally determined. The judgment against Ms. Scanlan was final, subject to the possibility of an appeal. Absent an appeal, it became absolutely final. Similarly, Ms. Scanlan's 2014 action against the Bank and Mr. Tennant did not go to trial because of the finding of the High Court was that the claims made were frivolous and vexatious and bound to fail. Absent an appeal, that judgment was final and conclusive of the rights of the parties concerning the claims which were dismissed.

"Enshrined fundamental constitutional and EU rights"

101. The suggestion in ground 16 that the judge failed to consider Ms. Scanlan's *"enshrined"* constitutional and EU rights is hopelessly vague as it does not attempt to identify what those rights allegedly were which the judge allegedly failed to consider.

102. The reference to the *"defendants' statutory requirements"* appears to acknowledge the legal rights of the Bank to pursue the repayment if the debt and the enforcement of the security. For the reasons already given, the judgment of Fullam J. of 25th February, 2016 and the consequent orders of 5th July, 2016 are conclusive of the rights and obligations of the parties as to the disputes then before the High Court and may not be re-litigated.

Inordinate and inexcusable delay

103. Finally, and for completeness, I come to ground seven, the question of inordinate and inexcusable delay. This was an issue raised only by Mr. Tennant and I think that it is fair to say that the Bank, in its respondent's notice and written submissions, clearly distanced itself from the issue.

104. The suggestion in Ms. Scanlan's notice of appeal that this was only pursued when raised by her *"at the closure of the proceedings"* seems to have some support in the judge's observation that it was a relatively minor feature of Mr. Tennant's application. It is clear from the judge's conclusions and the order made that the decision turned on the fact that Ms. Scanlan was seeking to litigate the same, or substantially the same, issues for a second time – which offended against the principle of *res judicata* – and that insofar as Ms. Scanlan sought to re-litigate her 2014 case by reference to variations on claims previously made, offended the rule in *Henderson v. Henderson.* From this it is clear that what the judge had to say about delay was *obiter*.

105. In his analysis of the delay issue, the High Court judge looked first at the time which elapsed between the events complained of and the issue of the plenary summons on 17th July, 2017 – which he characterised, correctly, as pre-commencement delay – and then at the lapse of time between then and the delivery by Ms. Scanlan on 27th April, 2020 of her statement of

claim – which he characterised, correctly, as post-commencement delay. I respectfully agree with the judge that the delay of almost three years in the delivery of the statement of claim was neither explained nor excused by the fact that CD provided in response to Ms. Scanlan's data access request included data other than her data; by the fact that Ms. Scanlan was a litigant in person; by the dawning of her understanding as to how the Bank had disposed of the secured property; and least of all by COVID-19 issues.

106. All that said, it does seem to me that an application to dismiss proceedings by reason of inordinate and inexcusable delay sits very uneasily as an alternative to an application invoking the inherent jurisdiction of the court to dismiss an action as being frivolous and vexatious and bound to fail, *a fortiori* an application pursuant to O. 19, rule 28. The premise of an application pursuant to O. 19, r. 28 is that the pleading discloses no reasonable cause of action. That is established by reading the pleading which, it seems to me, is an exercise to which the timing of delivery of the pleading makes no difference. The premise of an application to dismiss an action pursuant to the inherent jurisdiction of the court is, ultimately, that it is demonstrably bound to fail. If, whenever a claim is brought or finally articulated, the defendant can show that it is bound to fail, it is difficult to contemplate how he might have been prejudiced by any delay in the bringing or articulation of the claim.

107. In any event, the *ratio* of the judgment was that the action should be dismissed on the ground that it was frivolous and vexatious and bound to fail and the order shows that that was the basis on which it was dismissed.

Summary

108. All of the issues which Ms. Scanlan sought to agitate in this action in relation to the demand for payment, the appointment of the receiver and the realisation of the security held

by the Bank for the loan were finally and conclusively determined by the judgment and order of Fullam J. in Ms. Scanlan's 2014 action and her attempt to re-litigate those issues in this action was frivolous and vexatious.

109. At the time of the hearing by the High Court of the first and third defendants' motions to dismiss, Ms. Scanlan's claim for damages pursuant to s. 7 of the Data Protection Acts, 1988 and 2003 was the subject of her counterclaim in the Grant Thornton action. She was not entitled to agitate the same issues in separate High Court proceedings, or in separate High Court proceedings to seek to raise claims or variations of claims that could have been made in the earlier proceedings.

110. In one respect only, the 2017 action made a claim which was not part of the previous proceedings, and it was the claim in respect of the contents of the house. Not without misgivings as to Ms. Scanlan's motivation in seeking to advance that claim, I would vary the order of the High Court to except the claim at para. 28 of the statement of claim in respect of the contents of the secured property and the claims at paras. 64 to 67 for damages and declarations arising out of the alleged disposal of the contents. For the avoidance of doubt, Ms. Scanlan is not entitled to make any case in relation to the removal, sale, auction, or disposal of the contents of any other property and the last sentence of para. 28 will be struck out

111. Otherwise, I would affirm the judgment and order of the High Court dismissing the action as an abuse of process and as frivolous and vexatious and bound to fail.

112. I propose that the panel should reconvene to deal with the question of costs. The outcome of the appeal is that first and third defendants were entitled to have succeeded largely, but not entirely, in the High Court. Ms. Scanlan has succeeded in her appeal to a very limited extent and has been largely unsuccessful. I propose that the court should hear submissions as to the proper allocation of the costs in both courts.

113. As this judgment is being delivered electronically, Whelan and Faherty JJ. have authorised me to say that they agree with it.

114. The case will be listed on Tuesday 2nd May, 2023 at 2:00 p.m. to deal with the question of costs.