THE HIGH COURT

[2024] IEHC 382

Record No. 2019/6583P

Between

O.S.

Plaintiff

and

NATIONAL IRISH BANK LTD, DANSKE BANK, CHRISTOPHER D. LEHANE, O.S., GEORGE MALONEY AND THE PROPERTY REGISTRATION AUTHORITY OF IRELAND

Defendants

Judgment of Mr. Justice Conor Dignam delivered on the 21st day of June 2024

INTRODUCTION

1. This judgment concerns two applications, one brought by the third-named defendant and the other brought by the first, second, and fifth-named defendants. The third-named defendant is the Official Assignee in the plaintiff's husband's bankruptcy. I will refer to him as "the Official Assignee" in this judgment. The first-named defendant is a bank with whom the plaintiff's husband had borrowings, some of which was secured by a mortgage. The first-named defendant's business was transferred to the second-named defendant in 2007. The fifth-named defendant is a receiver who was appointed by the second-named defendant over the mortgaged lands. I will refer to them as "NIB", "Danske" and "the receiver" or collectively as "the bank defendants".

2. Both applications seek Orders pursuant to Order 19 Rule 28 of the Rules of the Superior Courts and/or the Court's inherent jurisdiction dismissing the plaintiff's claim on the grounds that it fails to disclose any reasonable cause of action and is bound to fail and, in the case of the Official Assignee's application, that it is frivolous and vexatious. In substance, the applications to dismiss the plaintiff's claim were made on the basis of the Court's inherent jurisdiction and I have approached the applications on that basis in the first instance. Both sets

of defendants also seek, in the alternative, an Order pursuant to Order 19 Rule 27 and/or the Court's inherent jurisdiction striking out the Plenary Summons and Statement of Claim as unnecessary or scandalous pleadings and, in the case of the bank defendants, as pleadings which tend to prejudice, embarrass or delay.

3. I will only consider the applications under Order 19 Rule 28 and Order 19 Rule 27 if the applications pursuant to the Court's inherent jurisdiction do not succeed (see *Scanlan v Gilligan & Ors [2021] IEHC 25*). This is also the appropriate way to proceed in light of deficiencies in the manner in which the case is pleaded.

4. I consider the bank defendants' application first, followed by the Official Assignee's application. There is a degree of overlap between the two.

5. Before doing so, it would be helpful to set out the background and the applicable principles, as these are, of course, relevant to both applications.

6. It should also be noted at this stage that the plaintiff is married to the fourth-named defendant (since 2009) and that there are several judgments in different sets of proceedings involving the fourth-named defendant and/or the plaintiff relating to some of the same issues which are relevant to the Court's consideration. The following background is drawn from the affidavits grounding these applications and from these other judgments.

7. I have anonymised the names of the plaintiff and the fourth-named defendant because they were anonymised in an earlier Court of Appeal judgment for reasons set out in that judgment. I have to refer to that judgment and in those circumstances it seems to me that I should also anonymise them. It does have to be acknowledged that they were not anonymised in the High Court judgment leading to that Court of Appeal decision (because the reasons requiring their anonymisation had not yet arisen) and in those circumstances my anonymisation of them may be somewhat academic. Furthermore, the Court of Appeal did not redact or anonymise the lands in question so I have not done so either.

BACKGROUND

8. In 2003, the fourth-named defendant ("Mr. O.S.") borrowed monies from NIB. These lands are secured by a mortgage executed by Mr. O.S. on the 15th October 2003, over the lands in Folio 976, Co. Kildare. This was not registered at the time (it was in fact not registered until the 4th February 2010). This is a point raised by the plaintiff.

9. In April 2007, NIB's business transferred to Danske. The plaintiff disputes the lawfulness of this transfer.

10. On the 5th September 2012, Danske appointed the fifth-named defendant as receiver over part of the lands in Folio 976. These lands are described as "*fields*", "*agricultural land*" or "*a farm*" in the affidavits and as "*two fields comprising 77.87 hectares, which are used for tillage and non-residential*" by Laffoy J in a judgment to which I refer below.

11. On the 4th March 2013, Danske obtained summary judgment in the sum of €1,296,114.47 against Mr. O.S. (It may be noted at this stage that he appealed this but ultimately, on the 13th May 2019, following him. having been adjudicated bankrupt, as discussed below, his appeal against that Order was dismissed by the Court of Appeal on the consent of the Official Assignee).

12. Danske, when they obtained summary judgment on the 4th March 2013, registered a judgment mortgage over another property belonging to Mr. O.S., lands in Folio 38675F, Co. Kildare. These lands and the lands in Folio 976 are adjacent to each other. Indeed, it is clear from the folio maps that the lands in Folio 976 surround the lands in Folio 38675F (which are 0.23 hectares) apart from an entrance gate and roadway.

13. It is worth pausing to note at this stage that one of the issues in the case, or at least on these applications, is the question of where the family home is: Folio 976F or Folio 38675F. It is deposed by the Official Assignee that the family home is in Folio 38675F. This is rejected by the plaintiff who says in her affidavit that "*Mr. Lehane is untruthful in his statement at paragraph 8 of his affidavit in stating that Folio 976 County Kildare did not include the family home. I reject this statement and wish to correct the record and state that KE976 does include my family home.*"

14. In May 2013, the receiver issued proceedings against Mr. O.S. and sought interlocutory injunctions directed towards obtaining possession of the part of the lands in Folio 976 over which he had been appointed receiver on the 5th September 2012, i.e. the fields or agricultural lands. Laffoy J granted relief on the 19th July 2013 and delivered a judgment on that date (*Maloney v O'Shea and Cannon Agri Limited [2013] IEHC 354*). I will have to refer to this judgment further.

15. Also in July 2013, the fifth-named defendant was appointed as receiver over the remaining part of the lands in Folio 976, which are described as four large storage sheds. Laffoy J notes that this remaining part is about 4.5 hectares.

16. In July 2014, the receiver issued a further set of proceedings seeking the same reliefs in respect of this portion of the lands in Folio 976 as he had obtained from Laffoy J in respect of the fields and I understand that Noonan J granted an Order on the 22nd December 2014 which mirrored that of Laffoy J.

17. Mr. O.S. appealed against the Order in respect of the lands in Folio 976.

18. On the 12th May 2015, the plaintiff issued proceedings against Mr. O.S. seeking, inter alia, a declaration that she has a 50% interest in various parcels of land including Folios 976, 38675F and another folio, KE5445.

19. On the 4th July 2016 Mr. O.S. was adjudicated bankrupt. The effect of section 44 of the Bankruptcy Act 1988 is that Mr. O.S.'s assets vested in the Official Assignee and, on the 27th September 2016, the Official Assignee was registered as the owner of the property in Folio 38675F (as recorded by Costello J in a judgment delivered by her on the 21st February 2018).

20. On the 20th June 2017, the Official Assignee brought an application pursuant to section 61 of the Bankruptcy Act 1988 for the sanction of the Court for the sale of the property in Folio 38675F on the basis that it comprised the family home. Section 61 provides that:

> "Notwithstanding any provision to the contrary contained in subsection (3), no disposition of property of a bankrupt, arranging debtor or person dying insolvent, which comprises—
>
> (a) a family home (within the meaning of the Family Home Protection Act 1976) of the bankrupt or the bankrupt's spouse, or
>
> (b) a shared home (within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010) of the bankrupt or the bankrupt's civil partner (within the meaning of that Act),
>
> shall be made without the prior sanction of the Court and any disposition made without such sanction shall be void."

21. This application was resisted by the plaintiff on various grounds relating to it being a family home and the legal protections afforded to family homes. On the 21st February 2018, Costello J, in a written judgment (*[2018] IEHC 181*), granted the Official Assignee leave to sell that property, to be postponed for one year. The plaintiff appealed that Order.

22. As noted above, on the 13th May 2019, the Court of Appeal dismissed Mr. O.S.'s appeal of the summary judgment Order of the 4th March 2013 on the consent of the Official Assignee (Mr. O.S. having been adjudicated bankrupt and therefore the cause of action having vested in the Official Assignee).

23. On the 5th March 2020, the Court of Appeal upheld the judgment and Order of Costello J giving sanction for the sale of the property in Folio 38675F and postponed that sale for six months.

THE PLAINTIFF'S CLAIM

24. The plaintiff issued these proceedings by Plenary Summons on the 24th August 2019 and delivered a Statement of Claim on the 9th October 2019. One of the reliefs sought in the General Indorsement of Claim is "*a declaration that the plaintiff has a right of possession in the properties and lands described in the Schedule*" to the Plenary Summons. These are the lands in Folio KE976 and KE38675F and lands at Narraghbeg, Castledermot, Co. Kildare in Folio KE5445 and a one third share of lands at 7 Pollerton Road, Carlow in Folio CW18329F. This declaration is not sought in the Statement of Claim. Nothing was said at the hearing about the other two parcels of land (Folio KE5445 and CW18329F) and I am therefore satisfied that the issues between the parties concern Folios 976F and 38675F. The manner in which the plaintiff's claim is pleaded lacks clarity and is vague. It is in fact not properly pleaded. As a result, it is extremely difficult to identify precisely what is being claimed (other than in very general terms). This is partly because there are very few facts pleaded and instead it consists of assertions. It is also partly because the plaintiff does not distinguish between the different parcels of lands and, even as between the two parcels of land which are the real focus of the proceedings, she does not make clear what allegations or assertions relate to which parcel of land.

25. The two sets of defendants, in their respective grounding affidavits, identified what they believed the case being made against them to be. There are other points which are obvious from the Statement of Claim. These include the claim that NIB ignored its obligation to "*extend an Express Notice of Assignment to this claimant and [Mr. O.S.] on the event or happening of the sale of such actionable facilities*"; that Danske Bank registered its charge in breach of the Power of Attorney Act 1996 and the Land Registry Rules by not obtaining "*the perfected Power of Attorney of this claimant and [Mr. O.S.] and the event and or happening of such registration of properties…*"; when NIB "*discharged its alleged debt in April 2007 to facilitate the sale of void contracts to a third party (Danske Bank), on such event and or happening the National Irish Bank was mandatorily obligated to extend the Equity of Redemption of Mortgage to this claimant and [Mr. O.S.]. No such correspondence was issued and or received. Ref: Supreme Court Ruling Dellway Investments v Nama [2011] IESC. 14.2011*"; and that NIB continued to apply interest and charges when they knew or should have been aware that the contracts between NIB and Mr. O.S. were unlawful and thereby unjustly enriched NIB. However, the plaintiff did not seriously dispute the summary of the case being made against them given by either of the sets of defendants and made no submissions on these other points. I will therefore adopt them as the plaintiff's case and the framework for this judgment. If I had to decide those other points I would in any event be satisfied that they are bound to fail.

APPLICABLE PRINCIPLES

26. The general principles applying to the Court's inherent jurisdiction to strike out proceedings on the basis that they are frivolous, vexatious, bound to fail, or are an abuse of process are well-established. They were recently stated by the Court of Appeal in *Scotchstone Capital Fund Ltd & anor v Ireland & anor [2022] IECA 23*, and in *McAndrew v Launceston Property Finance DAC & anor [2023] IECA 43*. These judgments post-date the hearing of this motion but usefully pull together the long-standing applicable principles. In paragraph 290 of the judgment in *Scotchstone*, the Court said:

> "290. …In essence these are:
>
> a) An application for a strike out of a plaintiff's claim on the basis of the inherent jurisdiction is not a substitute for summary disposal of a case;
>
> b) The jurisdiction exists, not to prevent hardship to a defendant from defending a case, but to prevent against an abuse of process of the court by the plaintiff, e.g. causing a manifest injustice to the defendant in being asked to defend a case which is bound to fail;
>
> c) The burden of proof is on the defendant;
>
> d) There is a degree of overlap between bound to fail jurisprudence and cases which are held to be frivolous and vexatious. However, the latter are cases which may have a reasonable chance of success but would confer no tangible benefit on a plaintiff or are taken for collateral or improper motives or where a plaintiff is seeking to avail of scarce resources of the courts to hear a claim which has no prospect of success;
>
> e) The standard of proof is on the defendant/respondent to show that the claim is bound to fail or frivolous or vexatious;
>
> f) Bound to fail may be described inter alia, as devoid of merit or a claim that clearly cannot succeed;
>
> g) Frivolous and vexatious must be understood in their legal context as claims which are, inter alia, futile, misconceived, hopeless;
>
> h) The threshold for the plaintiff successfully to defend such a motion is not a prima facie case but a stateable case;
>
> i) It is a jurisdiction only to be used sparingly, in clear cut cases and where there is no basis in law or in fact for the case to succeed;

j) The court must accept that the facts as pleaded by the plaintiff in considering whether an Order pursuant to O.19, r. 28 may be made but in the exercise of its inherent jurisdiction the court can to some extent look at and assess the factual basis of the plaintiff's claim;

k) Where the legal or documentary issues are clear cut it may be safe for a court to reach a conclusion on a motion to dismiss;

l) Even where a plaintiff makes a large number of points, each clearly unstateable, it may be still safe to dismiss; and

m) In some cases, even if the factual disputes are clear cut or may be easily resolved, the legal issues or questions concerning the proper interpretation of documentation may be so complex that they are unsuited to resolution within the confines of a motion to dismiss."

27. In *McAndrew v Launceston Property Finance DAC & anor [2023] IECA 43*, Faherty J, on behalf of the Court, having considered a number of the authorities, restated many of these general principles. In summary she said:

(a) when exercising its inherent jurisdiction, the court is not limited to the pleadings but is free to hear evidence on affidavit and engage in some analysis of the facts (paragraphs 59-60);

(b) the burden of proof is on the defendant (paragraph 61);

(c) the standard of proof is that the Court should not require a plaintiff to be in a position to show a prima facie case, merely a stateable case, in an application to strike out (paragraph 68);

(d) the Court has jurisdiction to strike out a case if it is clear to the Court that the case is bound to fail (paragraph 62);

(e) the Court's inherent jurisdiction extends to cases where it is shown that there is no arguable basis in law and in fact for the claim made (paragraph 63);

(f) the jurisdiction is to be exercised sparingly and only in clear cases and should not be invoked merely because the case brought by the plaintiff is very weak or where it is sought to have an early determination on some point of fact or law since the effect of striking out proceedings is to deprive a litigant of what

would otherwise be a constitutional right of access to the courts (paragraphs 63-65);

(g) there may be cases where the legal or documentary issues may be clear and straightforward such that it is safe for the Court to reach a conclusion on those questions on the hearing of a motion to dismiss (paragraph 66);

28. Implicit to these two judgments but stated explicitly in a number of cases referred to below, is that the default position is that proceedings should go to trial and that a person should only be deprived of a trial when it is clear that there is no real risk of injustice.

29. Irvine J dealt with the meaning of "frivolous and vexatious" in *Fox v McDonald [2017] IECA 189*. While she was writing in respect of Order 19 Rule 28, the same principle applies to the Court's inherent jurisdiction. She said, inter alia:

> "[t]he 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 circumstance."

30. There is, of course, a well-established difference between the Court's jurisdiction under the original Order 19 Rule 28 and its inherent jurisdiction (noted at sub-paragraph (j) of *Scotchstone* and at paragraph 27(a) above). Under the Court's inherent jurisdiction, the Court can engage, albeit to a limited extent, with the facts and the evidence, particularly where it is a "documents" case. The extent to which the Court can engage with the evidence on an application under the Court's inherent jurisdiction was considered in a series of judgments by Clarke J: including *Salthill Properties Ltd v Royal Bank of Scotland plc [2009] IEHC 207*, *Lopes v Minister for Justice [2014] IESC 21, [2014] 2 IR 301*, *Keohane v Hynes [2014] IESC 66* and *Moylist Construction Ltd v Doheny [2016] 2 IR 283*.

31. It is also well-established that the Court can exercise its inherent jurisdiction to dismiss an action where the plaintiff is attempting to re-litigate matters that have already been determined or where they are attempting to litigate matters which could have been raised in earlier proceedings and were not. Costello J said in *Morrissey v Irish Bank Resolution Corporation [2015] IEHC 200* (paragraph 5):

> "It is a fundamental principle of law that a party should not be entitled to re-litigate matters or raise issues which have already been determined by a final judgment of a court of competent jurisdiction between the same parties and their privies. This is known as the principle of res judicata. But beyond the strict limitations of res judicata the courts have long recognised that there may be abuse of process outside of the relatively confined limitations

of the rule and the courts have always been prepared to balance the rights of parties to have their cases heard and determined by the courts with the rights of the opposing parties to fair procedures in the conduct of litigation and, where necessary, to strike out proceedings if they amount to an abuse of process."

32. The Court can also dismiss proceedings where they are being used as a mode of collateral attack on a final and binding decision.

33. These are the principles by reference to which I have determined the applications.

APPLICATION BY THE BANK DEFENDANTS

34. At paragraph 4 of the grounding affidavit on behalf of the bank defendants, the deponent sets out what he says are the four main allegations against those defendants. At paragraph 10 of the submissions delivered on behalf of the defendants, those four issues were again identified plus an additional one. I set them out in a slightly different order.

(a) The family home was mortgaged in favour of NIB without the plaintiff's knowledge and consent. She relies on the Family Home Protection Act and the Constitution. The claim that the family home was mortgaged in breach of the 1976 Act is a core part of her claim but her case in relation to the family home is also broader than that and is broader than as stated in the identification of issues in the grounding affidavit. She appears to claim that the creation of any lending by the bank and Mr. O.S. was wrongful (irrespective of security) because it was in breach of the protections given to the family home and that any dealing with the lending or security such as where it was varied, altered, changed or transferred to Danske was in breach of her rights and the defendants' obligations in respect of the family home. A key issue in this element of the plaintiff's claim is precisely which lands comprised her family home;

(b) The transfer of Mr. O.S.'s loan facilities and security from NIB to Danske was unlawful because it was in breach of the protections given to the family home and because the charge had not been registered by NIB and was not registered by Danske until 4th February 2010;

(c) The summary judgment obtained by Danske against Mr. O.S. was wrongfully obtained;

(d) Danske unlawfully appointed the receiver;

(e) The receiver in seeking to take possession of the mortgage property on foot of Court orders caused damage to the plaintiff, her children and her marriage.

35. I deal with each of these in turn.

Protection of the family home

36. This is an area where the pleadings give rise to considerable confusion and uncertainty as to precisely what the plaintiff's case is because, while the schedule to the Plenary Summons expressly refers to four separate folios, the plaintiff does not even attempt to identify in the pleadings which of those she claims constitutes the family home.

37. This was clarified somewhat during the exchange of affidavits and the submissions at the hearing. Based on that, it seems that the plaintiff's claim is that the family home is comprised in Folio 38675F **and** Folio 976. At the hearing, she said her family home is "encapsulated" in both folios and that the bank defendants are wrong to say that it is entirely encapsulated in Folio 38675F; and at paragraph 6 of her replying affidavit in the Official Assignee's application she said "*Mr. Lehane is untruthful in his statement at paragraph 8 of his affidavit in stating that Folio 976 County Kildare did not include the family home. I reject this statement and wish to correct the record and state that KE976 does include my family home.*" Surprisingly, she does not in fact say in her replying affidavit to the bank defendants' application that her family home is in both folios but I will proceed on the basis of this clarification given in response to the Official Assignee's application. The property in Folio 38675F was not mortgaged to National Irish or Danske.

38. Thus, the first issue is whether there is a stateable basis for the claim that the property in Folio 976 comprises the family home. In my view there is not.

39. The Official Assignee applied for sanction to sell the lands in Folio 38675F pursuant to section 61 of the Bankruptcy Act. He did so on the basis that they comprised the family home. The plaintiff fully participated in that application (including swearing three affidavits). Her opposition to the application was squarely grounded in the claim (accepted by the Official Assignee in bringing the application and accepted by Costello J) that the lands in Folio 38675F were the family home. There is nothing in the judgment of Costello J to suggest that the plaintiff claimed that the family home was encapsulated by the two folios, 38675F and 967F. In paragraph 8 of her judgment, Costello J recorded the plaintiff's position: "*The notice party says that she is not a bankrupt. She is not a debtor. She is an innocent party and the property in question is the family home of herself and her two young children. Sale of the property would*

be disproportionate in the circumstances as it would render her and her children homeless. Postponement of an order for sale would afford her no assistance for the same reason." It was not stated by the plaintiff that "*the property in question*" was part only of the family home. Costello J stated at paragraph 4 of her judgment that "*The petitioning creditor has a registered charge on other lands of the bankrupt comprised in Folio 976 of the County of Kildare*" and yet the plaintiff does not appear to have even stated that part of the family home was on that land. Thus, in a very detailed application which gave rise to a detailed written judgment, there was no suggestion of the claim which is now advanced. The plaintiff appealed Costello J's decision and the Court of Appeal (Baker J) delivered a judgment on the 5th March 2020 (*[2020] IECA 71*). It is clear from that judgment that even then the plaintiff did not advert to the claim that the family home spanned two folios.

40. This is directly relevant to the current application for two distinct reasons.

41. Firstly, it gives rise to a *Henderson v Henderson*-type abuse of process of the type referred to in the quote from *Morrissey v Irish Bank Resolution Corporation* in paragraph 31 above because the plaintiff had an opportunity to raise that point in the earlier proceedings and did not and now seeks relief on the basis of that point. In *Henderson v Henderson (1843) Hare 100*, it was stated by Wigram VC , inter alia, "*…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.*" The question of whether the family home spanned two folios was directly relevant to the question that Costello J had to determine in those earlier proceedings, i.e. whether to give sanction to sell the lands in Folio 38675F. The fact that the lands that it was proposed to sell might have included only part of the family home is a factor which Costello J would have had to consider and was therefore directly relevant to the question of whether or not the Official Assignee should be permitted to sell the 38675F lands. The application of the principle in *Henderson v Henderson* does not act as an absolute bar and is discretionary but it seems to me that it applies in this case in circumstances where the plaintiff did not give any explanation for why the point was not raised in the earlier proceedings.

42. Secondly, even if I am wrong on that (or if in the exercise of my discretion, I were to decide not to dismiss the plaintiff's claim on this point on this basis), it is relevant because it is inconceivable that the claim that the family home spanned two separate folios, if there was any substance to it, would not have been mentioned during the section 61 application at first instance or on appeal. The Court's ability, on a motion of this type, to engage with the facts and evidence, is, of course, very limited, but it seems to me that I can have regard to the fact that the claim was not previously raised in proceedings which directly involved the sale of the family home.

43. In any event, even if I am wrong on those two points, it seems to me that the following is determinative. Laffoy J considered the nature of part of the lands in Folio 976 in *Maloney v O'Shea & Cannon Agri Limited [2013] IEHC 354*. As referred to above, that concerned an application by the receiver for injunctions in respect of part of the lands. That part of the lands was 36.0322 hectares and was recorded by Laffoy J as "*two fields comprising 77.87 acres, which are used for tillage and are non-residential*". On that basis she held that the Code of Conduct on Mortgage Arrears of the Central Bank did not apply. One of the issues in that case was that those lands (together with additional lands in Folio 976) had been leased to the second-named defendant in those proceedings, Cannon-Agri Limited. Laffoy J recorded that the lease seemed to follow a standard form of lease for agricultural lands. It was also explained in affidavits in that case that the reason for the lease to the company was that it was prudent that a business such as that of Cannon Agri Limited would be carried out through a company. It is deposed in the bank defendants' grounding affidavit in this motion that the receiver was also appointed over the remaining lands in Folio 976 which comprised four large storage sheds and Noonan J granted the receiver injunctions in respect of these sheds on the 22nd December 2014. It seems to me that these conclusions of the courts in those other cases preclude me from reaching the conclusion that the lands in Folio 976 are capable of being considered part of the family home. The definition of a family home given in the Act, as amended, is:

> "**2.**— (1) In this Act "*family home*" means, primarily, a dwelling in which a married couple ordinarily reside. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides or, if that spouse has left the other spouse, ordinarily resided before so leaving.
>
> (2) In subsection (1), 'dwelling' means any building or part of a building occupied as a separate dwelling and includes any garden or other land usually occupied with the dwelling, being land that is subsidiary and ancillary to it, is required for amenity or convenience and is not being used or developed primarily for commercial purposes, and includes a structure that is not permanently attached to the ground and a vehicle, or vessel, whether mobile or not, occupied as a separate dwelling."

44. I am, of course, conscious that the plaintiff was not party to those earlier proceedings. However, there is no evidence that she sought to intervene in those proceedings or to seek to discharge the injunctions on the basis that the lands in question comprised her family home. More importantly, at no stage in these current proceedings, either in the pleadings or in the replying affidavits, does she take issue with the description of the lands by Laffoy J or the defendants as being fields or as being "*used for tillage and are non-residential*" or the second part of the lands as being "*four large storage sheds*".

45. Furthermore, during the course of the hearing, I asked the plaintiff to identify the evidence of the family home being, as she put it, encapsulated in the two folios. In reply, she pointed to paragraphs 13 and 14 of the affidavit sworn by her in response to the bank defendants' affidavit, paragraph 6 of her replying affidavit in the Official Assignee's application, and paragraph 3 of the Statement of Claim. In paragraphs 13 and 14 of her affidavit she said:

> "13. I say and know to be true Mr. Leonard in paragraph (28) of his affidavit referencing the allegations regarding the Family Home states as follows:
> "*The Plaintiff's fourth allegation is that* [Mr. O.S.] *entered into a mortgage of the family home without her consent and the mortgage is void*"
> And further in paragraph (3) he states
> "*The Plaintiff's family home (i.e. the family home of* [Mr. O.S.] *and his spouse* [Ms. O.S.]*, the Plaintiff herein) is comprised within Folio 38675F County Kildare. This property was not mortgaged to NIB or Danske Bank.*"
>
> 14. I say Mr. Leonard's averment is extremely disingenuous by inference that this plaintiff's claim is limited to the family home and not its lands, at all times as clearly stated this plaintiff referenced and referred in her statement of claim on each and every occasions at paragraph (4)(5)(7)(9)(10)(13)(14) and (15) "this claimants lawful rights and vested interest in the said properties and lands"."

46. In fact, in the paragraphs of the Statement of Claim referred to in that paragraph 14, the plaintiff does not specify that Folio 976 comprises the family home or part of it. Paragraphs 13 and 14 of the plaintiff's affidavit therefore do not provide any evidence that Folio 976 includes the family home notwithstanding that I was specifically directed to those paragraphs in response to my request to be directed to the evidence supporting that claim.

47. The plaintiff also directed me to paragraph 3 of the Statement of Claim. It simply pleads that:

> "The National Irish Bank and its agents had full knowledge of this claimant's existence at all material times, both in a business and in a social context where such business meetings and functions took place in this claimant's Family Home. The National Irish Bank had full knowledge that this claimant was not aware her lawful vested rights in her property and lands were subject to security as a precondition to the facilities entered solely between [Mr. O.S.] and the National Irish Bank. The National Irish Bank neglected and or failed to hold the property rights in law of this claimant in consideration to the sanctioning and or operation of its commercial dealings with [Mr. O.S.]. *Ref: Section 3(1) of the Family Home Protection Act 1976 – Section 10(1) of the Family Home Act 1981.*"

48. The closest the plaintiff comes to putting any substance at all on the claim that the family home was included in Folio 976 is paragraph 6 of her replying affidavit in the Official Assignee's motion where she states: "*Mr. Lehane is untruthful in his statement at paragraph 8 of this affidavit stating that Folio 976 County Kildare did not include the family home. I reject this statement and wish to correct the record and state that KE976 does include my family home.*"

49. At the hearing, the plaintiff referred to allowing a valuer who was engaged by the Official Assignee onto the lands to value them and that the reports show that the family home stretches into Folio 976. However, this was not deposed to on affidavit. More significantly, in paragraph 11 of the Official Assignee's affidavit, he said that the plaintiff and Mr. O.S. were directed by the Court on the 9th October 2017 and the 6th November 2017 to allow the Official Assignee to have access to the property (Folio 38675F) for the purposes of obtaining a valuation and neither the plaintiff nor Mr. O.S. complied with those Orders. This is not contradicted or disputed in any way in the replying affidavit sworn by the plaintiff. Furthermore, Costello J notes at paragraph 21(7) of her judgment that the plaintiff "*has refused to allow a valuer appointed by the Official Assignee access to the family home in order to provide a valuation for the court.*"

50. Thus, the material to which I was referred by the plaintiff as the evidence of the family home being comprised in Folio 976 either does not even specifically refer to that Folio or constitutes nothing more than a mere assertion.

51. In my view, the plaintiff has laid no factual basis whatsoever in the pleadings or in the affidavits for the claim that Folio 976 comprised her family home.

52. For all of those reasons, the claim that Folio 976 comprises her family home is frivolous and vexatious, bound to fail and an abuse of process. Therefore, to the extent that her claim is that the bank defendants' interactions with the lands in Folio 976 were in breach of the protection afforded to a family home, it must follow that that claim must be dismissed.

53. To the extent that the plaintiff's claim in respect of the family home is based on a contention that the bank defendants' dealings with Folio 38675F have been in breach of the Family Home Protection Act, it seems to me that there is no stateable basis for such a claim. Firstly, no security was created by Mr. O.S. over this property. Dankse's interest in this property was by way of a judgment mortgage on foot of the summary judgment obtained by Danske. The protection given by the Family Home Protection Act to a non-owning spouse is against alienations of the property by the other spouse. The registration of a judgment mortgage by a third party does not constitute an alienation of the property by the spouse. It seems to be claimed by the plaintiff that the mere fact of a loan being given by NIB (and received by Mr. O.S.) engages the Act and its protections. There is no basis for such a claim. The protection is engaged where security is given over the family home. Similarly, a transfer by a chargeholder

to a different entity does not amount to an alienation of the property by the spouse. Furthermore, the protection of the family home has already been considered by both Costello J and the Court of Appeal in the section 61 application in relation to Folio 38675F. I deal with the detail of this below.

54. There is nothing pleaded in the Statement of Claim or averred to in the plaintiff's replying affidavits in respect of the other lands specified in the Schedule to the Plenary Summons (Folio KE5445 and Folio CW18329F) and there is therefore no claim that they constitute the family home.

55. The bank defendants also relied to a certain extent on the plaintiff and Mr. O.S.'s marriage post-dating the execution of the mortgage to suggest that the protections were not engaged at the time of the creation of the mortgage. In light of my decision set out above, I do not need to consider this.

56. The bank defendants also placed some emphasis on the fact that Mr. O.S. had made a statutory declaration at the time he executed the mortgage in which he declared that the lands in Folio 976 were not a family home. I do not think that a declaration made by Mr. O.S. can be determinative of the issue of whether the plaintiff would be capable of establishing that those lands comprised the family home.

Transfer of loan facilities to Danske

57. As noted above, there are essentially two bases upon which the plaintiff claims that the transfer of Mr. O.S.'s loan facilities and the charge over the lands in Folio 976 from NIB to Danske is unlawful: (i) the protections afforded to the family home are engaged in respect of such a transfer; and (ii) the delay in registering the charge.

58. The transfer was effected by the Central Bank Act 1971 (Approval of Scheme of National Irish Bank Limited and Danske Bank A/S) Order 2007 (SI No. 29 of 2007) by which the Minister for Finance approved a scheme of transfer whereby the banking business of NIB was transferred to Danske. The scheme of transfer was contained in an agreement between the two banks of the 30th November 2006. The effective date for the transfer of the business was the 1st April 2007. The scheme transferred the banking business of NIB, including the assets and liabilities of the business. It is deposed on behalf of the bank defendants that Mr. O.S.'s loan facilities and related security were part of the banking business that was transferred and it was not part of the specified "Excluded Business". These facts are not disputed by the plaintiff.

59. In circumstances where I have concluded that there is no stateable case for the claim that the family home is comprised in Folio 976F or for the claim that the protections apply to a

loan (rather than the security) and therefore to Folio 38675F, I do not need to consider the first basis. Furthermore, as noted above, there is no stateable basis for the claim that the 1976 Act applies to a transfer of a charge.

60. The plaintiff's main contention in relation to the validity of Danske's ownership of the charge on foot of the transfer relates to the date of registration of the charge with the Property Registration Authority. The charge was created by Deed of Mortgage in respect of the lands in Folio 976 dated the 15th October 2003 but it was not registered on Folio 976 until the 4th February 2010, ie., after NIB's interest in the charge had been transferred to Danske. The plaintiff claims that because the charge had not been registered by NIB, it at no stage held a charge that could be transferred to Danske (see paragraphs 3 and 4 of her replying affidavit); and that NIB did not "*deposit the relevant land certificate as required by law on registration of its interest on the said folio in 2003 and thereafter on the introduction of the Registration of Deeds and Tile Act 2006, section (73) was prohibited from such registration ref;* ***Supreme court Ulster Bank Ltd v Hannon 2018****…*"(emphasis in the original)

61. In my view, the plaintiff's claims in this respect are misconceived.

62. The mere fact that the original chargeholder did not register the charge does not mean that they did not hold the charge or could not transfer it.

63. It was held by Laffoy J in *Maloney v O'Shea & Cannon-Agri Limited* that:

> "9. By virtue of the Central Bank Act 1971 (Approval of Scheme of National Irish Bank Limited and Danske Bank A/S) Order 2007 (S.I. No. 29 of 2007) the Minister for Finance approved a scheme for transfer of the banking business of National Irish Bank Limited to Danske Bank A/S. The Order provided, inter alia, that on and from 1st April, 2007 the assets and liabilities in relation to the business would be transferred to and vested in Danske Bank A/S.
>
> 10. For whatever reason, the Charge, which was created in October 2003, was apparently not lodged with the Property Registration Authority (PRA) for registration until 2010. By that stage, the interest of National Irish Bank Limited as chargee under the Charge had vested in Danske Bank A/S. The requirements of the PRA in relation to producing evidence as to the ownership of the Charge were obviously considered to have been complied with and the PRA registered Danske Bank A/S as the owner of the Charge. In this connection it is a matter of public knowledge that a copy of the Agreement for Transfer of Banking Business dated 30th November 2006 and S.I. No. 29 of 2007 were filed with the PRA. This is set out in what is described as "National Irish Bank Limited to Danske Bank A/S Legal Office Notice 4 of 2013" which is posted on the PRA website and which states as follows:
>
> > "With effect from 1st April, 2007, by order of the Minister for Finance…entitled '…(S.I. No. 29 of 2007)', National Irish Bank Limited transferred its business to Danske Bank

A/S. Charges registered in the name of National Irish Bank Limited are included in the transfer. Such a transfer operates as if it were a deed registered in the Registry of Deed or in the Land Registry on the date on which it took effect. Section 36 of the Central Bank Act 1971 refers.

11. By virtue of s.31(1) of the Registration of Title Act 1964 the register (i.e. Folio 976 in this case) is conclusive evidence of the title of Danske Bank A/S as the owner of the charge…"

64. While this judgment was given in the context of an interlocutory injunction application, I agree with the reasoning of Laffoy J. As noted by Laffoy J, section 31(1) provides that the register is conclusive evidence of Danske's ownership of the charge.

65. The plaintiff's point in relation to the Registration of Deeds and Title Act 2006 essentially was that section 73 of that Act provided for a three year period from commencement of that section (1st January 2007) within which a charge that a bank might claim they have must be registered and as NIB/Danske did not register the 2003 mortgage within three years of the 1st January 2007 they no longer had a valid charge. She relies on *Ulster Bank v Hannon* (in fact by the time it came before the Supreme Court, it was *Promontoria (Oyster) DAC v Hannon (Unreported, Supreme Court, Clarke CJ, 4th June 2019)*). In my view, the plaintiff's reliance on section 73 and *Hannon* is misplaced. Section 73 is concerned with the issuance of land certificates and certificates of charge. *Hannon* was concerned with the question of the impact that the abolition of the system of land certificates and certificates of charge had on the system of the creation of liens by deposit of land certificates. The security in this case was a mortgage deed.

66. It does not seem to me that I can conclude that the claim is frivolous and vexatious or an abuse of process merely on the basis that it was raised and determined in *Maloney v O'Shea & Cannon-Agri Ltd*, ie. on the basis of the doctrine of res judicata or the rule in *Henderson v Henderson*, in circumstances where the plaintiff was not a party to those earlier proceedings and it is not open to me to conclude that she is a privy of Mr. O.S. There are exceptions to the rule that the earlier case must have involved the same parties or their privies but they do not arise here.

67. However, I am nonetheless satisfied, for the above reasons that the plaintiff could not succeed on this point.

Challenge to the summary judgment obtained by Danske against Mr. O.S.

68. The only evidence in relation to the summary judgment obtained by Danske is contained at paragraphs 10-13 of the bank defendants' grounding affidavit. By Summary Summons, Danske claimed summary judgment on foot of monies alleged to be due and owing under commercial loan facilities that had been advanced to Mr. O.S. in respect of his farming business. The High Court granted summary judgment in the amount of €1,296,114.47 on the 4th March 2013. That judgment remains unsatisfied. Mr. O.S. appealed against that Order on the 20th March 2013. The Court of Appeal dismissed the appeal on the consent of the Official Assignee on the 13th May 2019, Mr. O.S. having been adjudicated bankrupt in the meantime.

69. I am satisfied that in general there could be no basis for a third party to have standing to challenge a summary judgment obtained by one party against another. The only way the plaintiff could have such standing is if she could show that the judgment was in some way in breach of her rights.

70. At paragraph 15 of the plaintiff's Statement of Claim, the plaintiff pleads:

> "Danske Bank issued proceedings based on void contracts by reason of matters as set out above and a liquidated sum misrepresentative of fact and truth and thereafter obtained a judgment against [Mr. O.S.]. On such happening Danske Bank sought the appointment of Christopher Lehane a Defendant in these herein proceedings being the Official Assignee to [Mr. O.S.] adversely affecting the peaceful living and family unit of this claimant and or aiding in the forfeiture of this claimant's properties and land."

71. The "contracts" referred to in paragraph 15 as giving rise to the Danske proceedings leading to summary judgment presumably were the loan agreements between NIB/Danske and Mr. O.S. The plaintiff could only have standing to challenge a judgment based on the "security" element of such agreements (if it was over the family home) but in obtaining this summary judgment Danske relied on the loan itself and not the security. The plaintiff does not have a stateable basis for asserting standing to maintain a claim which is in effect a collateral attack against a judgment obtained against a different party.

72. In any event, in my view, her claim in this regard is misconceived. She states at paragraph 10 of her replying affidavit that:

> "I say and know to be true Danske Bank relied heavily on flawed and incomplete documentation claimed to be a valid security over lands registered in the name of [Mr. O.S.] and did obtain a judgment based on such miss-representation against [Mr. O.S.]. Evidence herein identifies such security claimed by Danske Bank was miss-representative of fact and truth while being sworn and presented as bona fide evidence to the court."

73. This paragraph is in the middle of a number of paragraphs dealing with whether the charge on Folio 976 had been lawfully transferred to Danske and the references to "security" therefore appear to refer to the same charge. However, the judgment complained of was not obtained on the basis of this charge or, indeed, any "security", but on the basis that a sum of money was due and owing on foot of a loan. After Danske obtained judgment, they then registered a judgment mortgage. Thus, this premise for the challenge to the summary judgment is simply incorrect, even if the plaintiff had standing to make the case.

74. In my view, therefore, the plaintiff's challenge to the summary judgment against Mr. O.S. is bound to fail and is an abuse of process.

Appointment of the receiver

75. The plaintiff does not advance any separate and distinct grounds of challenge to the receiver's appointment. The allegation that he was wrongfully appointed is based on the other grounds, addressed above, and some other issues which I refer to below. This is clear from paragraph 14 of the Statement of Claim where she pleads "***By reason of matters as set out above*** *Danske Bank unlawfully appointed George Maloney a Defendant in these proceedings being a Receiver invalidly appointed by virtue of flawed and void lending contracts and the subsequent unlawful registration of assets…*" (emphasis added).

76. In circumstances where I am satisfied that the plaintiff does not have a stateable case on those other points, i.e., the matters set out above paragraph 14 in the Statement of Claim, then it follows that her claim that the receiver was wrongfully appointed must also fail.

Actions of the receiver

77. The plaintiff also pleads at paragraph 14 of the Statement of Claim that the receiver "*…on receipt of notification of the vested rights in the properties and lands of this claimant ignored such lawful constitutionally protected rights and by such subsequent actions George Maloney caused irreversible psychological damage to this claimant's children and irredeemable damage to this claimant's marriage and irrevocable damage to the business and public standing of this claimant, her children and Mr. O.S. On receipt of the Plenary citing, George Maloney informed this claimant he vacated his position as receiver over the said properties and lands.*"

78. This in itself would appear to be nothing more than a plea that damages were caused by the receiver allegedly ignoring the plaintiff's rights in respect of the family home. It follows from what I have discussed above that this can not succeed.

79. However, a separate claim is made at paragraph 30 of the Statement of Claim. The plaintiff pleads that the receiver "*abandoned his duty on the execution of a 3am raid accompanied by circa 50 masked men illegally breaking and entering this claimant's Family Home and lands causing irrevocable mental injury to this claimant and her children and thereafter imprisoning this claimant's then husband for three months denying this claimant's children a father and this claimant her husband. Causing continued psychological trauma affecting the daily lives of this claimant and her family.*"

80. This is inadequately pleaded. No particulars whatsoever are given. For example, basic details such as when this alleged "raid" is alleged to have occurred and, indeed, on which lands it is alleged to have occurred, and the alleged basis for the alleged "raid", are not given.

81. There are in fact three earlier judgments dealing with the imprisonment of Mr. O.S. for contempt of Court. These were given in the context of applications for Inquiries under Article 40.4 of the Constitution into the lawfulness of Mr. O.S.'s imprisonment. They are reported as follows: *O'Shea v The Governor of Mountjoy Prison [2015] IECA 101*, *O'Shea v The Governor of Shelton Abbey [2015] IEHC 620*, and *O'Shea v The Minister for Justice and Equality, the Governor of Shelton Abbey, the Attorney General and Ireland [2015] IEHC 636.* It is not necessary to recite the details of these judgments. The first of these came about because Mr. O.S. was committed to prison by Hunt J for his failure to comply with the Order made by Laffoy J on the 19th July 2013. Mr. O.S. applied for an inquiry under Article 40.4 of the Constitution. Gilligan J ultimately held on the 27th March 2015 that the return to the Order was sufficient to justify the detention of Mr. O.S.. He then appealed that Order to the Court of Appeal and the President gave the Court's judgment upholding Gilligan J's Order. The second and third cases came about because on the 9th July 2015 Gilligan J found Mr. O.S. guilty of contempt for failing to comply with the Order made by Noonan J on the 22nd December 2014 (essentially an injunction in favour of the receiver in respect of the sheds part of the lands in Folio 976) (and subsequent undertakings given by Mr. O.S.). Gilligan J made an Order committing Mr. O.S. to prison for a period of a hundred days. Mr. O.S. was arrested and imprisoned on the 22nd July 2015 and he challenged the lawfulness of this detention before Barton J and McDermott J.

82. It seems very likely that the "raid" referred to by the plaintiff in paragraph 30 of the Statement of Claim refers to one of these occasions of attachment and committal and most probably refers to Mr. O.S.'s imprisonment by Gilligan J in July 2015. This seems likely because the plaintiff refers to imprisonment for three months and Gilligan J's order was for a period of one hundred days. It is unacceptable that the Court (or indeed the parties) should have to guess what is actually being claimed.

83. However, at this stage, I am considering the application to strike out for failure to disclose a cause of action, or on the grounds that the claim is frivolous and vexatious, bound

to fail or an abuse of process. I am not considering whether the claim is properly or adequately pleaded. Of course, there can be occasions when the manner of pleading may go to those questions but it must also be remembered that the jurisdiction to strike out must be exercised sparingly and should not be exercised where an application to amend may save the proceedings.

84. Thus, I am proceeding on the basis that paragraph 30 relates to an occasion on which Mr. O.S. was arrested on foot of a Court Order.

85. I am satisfied that the paragraph, as it currently stands, and the claim contained therein discloses no reasonable cause of action or no reasonable prospects of succeeding in respect of the lawfulness of the actual attachment, arrest or detention as same must have been on the basis of an Order of this Court. However, the claim goes further than that; it goes to the manner in which Mr. O.S. was arrested and to questions such as the proportionality of the manner in which that was effected. If the allegations, such as they are, are true, they potentially give rise to a cause of action.

86. However, this gives rise to several issues which immediately spring to mind. Firstly, it is highly unlikely that the receiver himself would have made arrangements for the attachment or arrest of Mr. O.S. This would most likely have been effected by An Garda Síochána on foot of one of the Court Orders discussed above. Secondly, there may well be very serious conflicts of fact. For example, even if the arrest was effected by An Garda Síochána, there may be evidence that the receiver had arranged for large numbers of individuals to be present and there may well be conflicts about whether they were masked or not. There may be conflicts about the time of the raid. There are also legal issues such as whether the manner of the arrest of Mr. O.S. could give the plaintiff a cause of action.

87. The default position is that I am required to proceed on the basis that facts alleged by the plaintiff are true. As discussed above, the Court's ability to engage with the evidence is extremely limited on a motion such as this and it certainly does not extend to engaging or resolving such conflicts.

88. It seems to me that where there are likely to be such conflicts and where such legal issues arise I am precluded from finding that the plaintiff could not succeed.

89. I am conscious that to a certain extent this is to give the plaintiff the benefit of the vagueness and inadequacy of her own pleading. However, it must be recalled that the burden of proof is on the defendants and, notwithstanding that the making of this claim is clear from the Statement of Claim (although not the details of it) and, indeed, that the bank defendants identified the "actions of the receiver" as being one of the heads of claim, they did not deal with the facts surrounding the arrest of Mr. O.S. at all in their affidavit. In circumstances where they did not engage in order to dispute the pleas in respect of the "raid" it seems to me that I

can not conclude that they have discharged the burden of proof. Of course, the plaintiff did not give any evidence of the matters pleaded in paragraph 30 but I do not believe that I can strike out her claim on that basis in circumstances where it had not been addressed at all in the grounding affidavits.

90. In all of those circumstances, I am not satisfied that I can conclude that the plaintiff's claim in respect of the events surrounding the arrest of Mr. O.S. is frivolous or vexatious or bound to fail. I emphasise that this is only in relation to the events immediately surrounding the arrest.

91. It was well-established that the Court could not dismiss part of a plaintiff's claim under Order 19 Rule 28 (Denham J in *Aer Rianta v Ryanair* [2004] IESC 23). As noted above, the substance of the defendants' applications is to rely on the Court's inherent jurisdiction rather than on Order 19 Rule 28. The Court of Appeal (Collins J) and the High Court (Stack J) in *Ballymore Residential Ltd v Roadstone Ltd [2021] IECA 167* and *Christian v Symantec Ltd [2022] IEHC 397* respectively indorsed the general approach that the Court should not strike out part only of a claim even when exercising its inherent jurisdiction and set out the weighty public interest reasons for such an approach. It seems to me that in circumstances where I am of the view that the vast bulk of the plaintiff's claims against the bank defendants should be struck out, it is open to me to do so in accordance with the approach set out in *Ballymore* and *Christian v Symantec*, notwithstanding that I have held that an element of the plaintiff's claim should not be struck out.

92. As adverted to above, it is essential that the plaintiff delivers an Amended Statement of Claim to properly plead her claim in this respect. I will direct that she do so within three weeks of today's date.

APPLICATION BY THE OFFICIAL ASSIGNEE

93. The only actions taken by the Official Assignee concern the lands in Folio 38675F and therefore the plaintiff's claims against the Official Assignee must be limited to those lands.

94. The Official Assignee (at paragraphs 16-26 of his grounding affidavit) identifies what he says are the claims against him as follows:

(a) That his actions in seeking to sell the lands in Folio 38675F breached the provisions of the Family Home Protection Act 1976 and that he ignored the plaintiffs' rights under that Act and under the Constitution (while the Statement of Claim itself does not expressly say that it was the lands in Folio 38675F that the Official Receiver was trying to sell, these are the only lands of which there is evidence of him trying to

sell. It is pleaded in paragraph 16 of the Statement of Claim that the Official Assignee "*…was informed of this claimant's lawful rights and vested interest in the said properties and lands and thereafter ignored such lawful and constitutionally protected rights: section 3(1) of the Family Home Protection Act 1976 – Section 10(1) of the Family Home Act 1981*". It is also pleaded in paragraphs 22 and 31 of the Statement of Claim that the Official Assignee, along with the other defendants, ignored his statutory obligations and violated the plaintiff's rights under the Constitution;

(b) That the Official Assignee was invalidly appointed by Danske;

(c) The plaintiff claims damages. This claim is based on the above alleged wrongs.

95. In paragraph 3 of her replying affidavit, the plaintiff also raises the issue that the Official Assignee has interfered with the plaintiff's property rights by registering himself as full owner with the Property Registration Authority.

96. The Official Assignee's overall response is that the substantive issues raised by the plaintiff have already been raised and adjudicated in the section 61 proceedings (and have been raised in the plaintiff's separate proceedings against Mr. O.S. (Record No. 2015 3633P) and raising them in this case is therefore an abuse of process, frivolous and vexatious and/or bound to fail.

97. In my view, the plaintiff's claim in respect of the family home points can not succeed in circumstances where the Oireachtas has designated an application pursuant to section 61 of the 1988 Act as the procedure by which issues relating to the family home must be considered in the context of bankruptcy and where the High Court and the Court of Appeal have already considered and determined an application under that section. The Oireachtas has prescribed a mechanism by which the Official Assignee can seek the sanction of the High Court for the sale of a bankrupt's assets, including a family home, and the Official Assignee brought such an application and it was determined. The plaintiff fully participated in that application in both the High Court and the Court of Appeal. She appealed on eight grounds which the Court of Appeal said can be conveniently grouped as follows (insofar as relevant to the current discussion):

(a) The trial judge erred in law in failing to have regard to the provisions of the Family Home Protection Act 1976 from which the appellant claims to have derived rights;

(b) The trial judge failed to afford the appellant her rights to reside in the dwelling house, as this is her 'family home' and entitled to protection under the Constitution.

98. Baker J, on behalf of the Court of Appeal, held:

"30. The next argument advanced by the appellant is that she has rights in the dwelling house derived from statute...

34. She goes on to argue that under and by virtue of the 1976 Act she has rights and that these were not respected by the trial judge. She makes no positive assertion and offers no positive statement of what these rights might be but does rely on s.3 of the Act.

35. Section 3 of the 1976 Act, as amended by the Family Law Act 1995, makes void any alienation of any interest in a family home by the other spouse without the prior consent of the non-owning spouse. The dwelling house readily comes within the statutory definition in and it is accepted that it is "a dwelling in which a married couple ordinarily reside": s. (1) of the 1976 Act

36. Section 3(1) of the 1976 Act reads as follows:

> "Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2), (3) and (8) and section 4, the purported conveyance shall be void."

37. While the 1976 Act was enacted primarily with the view to providing protection for a nonowning spouse, its remit is broad. Henchy J. explained the purpose of s. 3 of the 1976 Act in his seminal judgment in Nestor v. Murphy [1979] IR 326, at p. 328, as follows:

> "The basic purpose of the sub-section is to protect the family home by giving a right of avoidance to the spouse who was not a party to the transaction. It ensures that protection by requiring, for the validity of the contract to dispose and of the actual disposition, that the non-disposing spouse should have given a prior consent in writing. The point and purpose of imposing the sanction of voidness is to enforce the right of the non-disposing spouse to veto the disposition by the other spouse of an interest in the family home…. The provisions of s. 3, sub-s. 1, are directed against unilateral alienation by one spouse."

38. Hedigan J., in Irish Nationwide Building Society v. Rafferty [2012] IEHC 352, followed that statement of the law.

39. The 1976 Act…has the effect that any purported sale or alienation of a family home by the other spouse is void, absent the consent of the non-owning spouse. The legislation offers an important protection to the non-owning spouse against the alienation by his or her spouse of the family home, and prevents an alienation without engagement with, and active consent of, the non-owning spouse.

40. It does not prevent alienation by a person other than the spouse, and therefore in the present case the provisions of s.3 cannot prevent the sale by the Official Assignee of the dwelling house and is not a factor that would have a bearing on the exercise by the High Court of its statutory discretion to sanction the sale.

41. The appellant argues that nonetheless the trial judge was not entitled to disregard the 1976 Act in considering whether to make an order under s. 61(4) or s. 61(5) of the Bankruptcy Act.

42. Reliance is placed on the decision of Muintir Skibbereen Credit Union Ltd v. Crowley [2016] IECA 213, [2016] 2 IR 665 where Hogan J. considered inter alia, the effect of the 1976 Act:

> "The 1976 Act itself reflected a fundamental policy choice made by the Oireachtas which – reflecting constitutional values embraced in both Article 40.5 (inviolability of the dwelling) and Article 41 (protection of family life) - sought to prevent the sale or disposal of the family home by the unilateral act of one spouse at the expense of the other. That objective would be seriously compromised if a family home which the couple co-owned could be effectively sold by court order over the heads of the wives in the present cases given that they had no involvement in the business affairs of their respective husbands and, critically, where they had never been given a prior opportunity to consent to such loan transactions. The situation would, of course, have been very different had the wives in question been parties to such transactions or if they had otherwise consented to the loan agreements which had given rise to the judgment mortgages in the first place. This never occurred in either of the present cases." (para. 27)

43. The appellant argues that that judgment is authority for the proposition that the court ought not to sanction the sale of a family home on an application under s. 61(4) of the Bankruptcy Act against the wishes of the non-owning spouse, when that spouse was not a party to the debt and can be described therefore as "innocent" of the events that gave rise to bankruptcy of his or her spouse. She argues it has relevance also because she is not a debtor and did not positively consent to the alienation of the family home whether by way of security or otherwise.

44. In essence, the argument made by the appellant is that the rights of the creditors could not "prevail as against the rights of the two innocent parties […] who had nothing to do with these transactions and who did not give formal consent to them", the proposition stated by Hogan J. in Muintir Skibbereen Credit Union Ltd v. Crowley, at para. 30.

45. I am unable to read the judgment of the Court of Appeal as supporting these broad propositions. The Court was there dealing with an application by a judgment mortgagee, a "volunteer" as a matter of law (s. 117(3) Land and Conveyancing Law Reform Act 2009) for the sale and partition of property jointly owned at law and as part of a process of execution,

and where what were in consideration were the rights of the non-debtor spouses who were registered as co-owners. The position of the appellant is materially different, and she has no ascertained beneficial interest and no discernible legal interest in the dwelling house.

46. …

47. I do not consider that Muintir Skibbereen assists the appellant. She is not a co-owner and the realisation of the dwelling house which is unencumbered, apart from the judgment mortgage which Danske Bank has agreed to release, would produce a substantial sum toward the debts of the Bankrupt.

48. **But more important in my view is the fact that the statutory scheme does provide express protection for a spouse by reason of the requirement for court sanction of a sale and the authorities are clear that factors relating to the occupancy of the property by a family are relevant. There is no lack of statutory or court protection**.

Exceptional circumstances

49. The appellant argues in a broad way that the fact that she and her young children reside in the dwelling house and have no visible means of acquiring another place to live, whether by renting or otherwise, creates an exceptional circumstance giving rise to the imperative that the order be refused. She argues that a sale would be unjust and would fail to recognise her constitutional rights and those of her young children.

50. …

51. The sale of a family home in the course of the realisation of the assets of a bankrupt must as a matter of law be sanctioned by the High Court. To that extent the Act recognises that a family home is to be given special consideration and the discretionary nature of the power vested in the court to stay or postpone, or even refuse to sanction, a sale requires that all relevant factors be weighed in the decision. The statutory scheme requires the sanction of the High Court and permits a broad range of solutions including the postponement of the sale and to have regard to "all the circumstances of the case". I accept to that extent the argument of the appellant that special protection is to be afforded to her because she resides in the dwelling house with her young children. The protection is the oversight of the High Court.

52. …

59. In my view, s. 61(4) of the Bankruptcy Act does make provision for the separate treatment by the court of the family home of a bankrupt. The Official Assignee has power

under s. 61(3)(a) of the Bankruptcy Act to sell the property of a bankrupt, which becomes vested on adjudication. However, the sale of the family home may not occur without the sanction of the High Court, and that court, in deciding whether to sanction or refuse to sanction the sale, must have regard to the interest of the spouse or dependent children of the bankrupt, but also to other interests, including, in a suitable case, the interest of the bankrupt, and the interests of the creditors… " (emphasis added)

99. It seems to me that the issues raised in relation to the protection of the family home, insofar as they relate to Folio 38675F, have, in substance, already been considered and determined (or could have been raised and were not) and these proceedings amount to a collateral attack on that final and binding decision and is therefore an abuse of process.

100. The plaintiff made the point during the course of this application that the previous decision had not considered or determined her point about Folio 976 comprising part of the family home. The plaintiff is correct in so far as it goes. Of course, that is because it was not raised by her. That in itself could be determinative. However, for the same reasons as set out above, i.e., that the claim that Folio 976 comprises the family home can not succeed, I am of the view that this part of the claim is bound to fail. Furthermore, it is important to note that there is no specific claim in the Statement of Claim which refers to the Official Assignee attempting to do anything about or with the lands in Folio 976 and there is no evidence of him attempting to do so.

101. The second issue raised against the Official Receiver is that he was unlawfully appointed by Danske. In my view, this is misconceived. Firstly, there is no stateable basis upon which the plaintiff could have standing to challenge the appointment of the Official Assignee. He was appointed in the bankruptcy proceedings against Mr. O.S.. Secondly, the Official Assignee (unlike a receiver) was not appointed by Danske. He was appointed by Court Order upon Mr. O.S. being adjudicated bankrupt. Both of these are sufficient in themselves to conclude that the plaintiff can not succeed in the claim but, furthermore, the lawfulness or otherwise of the appointment of the Official Receiver is a point which could have been raised in the section 61 proceedings by the plaintiff opposing any order in respect of the property on the grounds that the Official Assignee was not properly appointed (I do not express any view of the merits of such assignment). Therefore, in the absence of any explanation for that point not being raised in those earlier proceedings, the plaintiff is precluded from now raising it.

102. As noted above, the plaintiff also raises the issue that the Official Assignee has interfered with her property rights by registering himself as full owner of the lands in Folio 38675F with the Property Registration Authority. In my view, there is no basis for this claim. Section 44 of the Bankruptcy Act 1988 provides, inter alia, *"(1) Where a person is adjudicated bankrupt, then, subject to the provisions of this Act, all property belonging to that person shall*

on the date of adjudication vest in the Official Assignee for the benefit of the creditors of the bankrupt." Thus, by operation of section 44 of the 1988 Act, the lands became vested in the Official Assignee when Mr. O.S. was appointed and it follows that it could not be unlawful for the Official Assignee to register himself as the owner.

103. As the plaintiff's claim for damages against the Official Assignee is based on the above alleged wrongs, in light of my decision in respect of those alleged wrongs, this claim is also bound to fail. Furthermore, section 63 of the Bankruptcy Act provides, *"The Official Assignee shall not be liable—(a) by reason of any of the matters on which an adjudication was grounded being insufficient to support the adjudication, (b) in respect of his receipt of any property, provided he has not dealt with the property otherwise than as directed by the Court or as required by this Act or by* regulations made by the Minister under this Act*."* Insofar as the plaintiff claims that the attempt to sell the lands in Folio 38675F is wrongful, the Official Assignee has an immunity from suit provided his dealing with the property is in accordance with the Court Order.

104. In those circumstances I am satisfied that the Official Assignee has discharged the burden of establishing that the plaintiff's claim against him is frivolous and vexatious, bound to fail and an abuse of process.

105. In the written submissions delivered on behalf of the Official Assignee, he refers to the claim against Mr. O.S., the fourth-named defendant, and makes the point that the plaintiff was not entitled to issue these proceedings against Mr. O.S. without leave of the Court since he was adjudicated bankrupt. As far as I am aware, no application for leave to issue or maintain these proceedings against Mr. O.S. has been made by the plaintiff. I understand the Official Assignee to be contending that if I strike out the proceedings against the other defendants the claim against Mr. O.S. would be unsustainable in the absence of an application for leave to maintain the proceedings and, as no such application has been made, I should strike out the claim against him also. However, no relief in this regard has been sought by the Official Assignee in the Notice of Motion which was before the Court and it therefore is not open to me to make any such Orders. Furthermore, it is long-established that if, on an application to strike out proceedings, they can be saved by an appropriate amendment being made, the plaintiff should be given an opportunity to make such an amendment. In my view, the same principle applies to providing an opportunity for an application for leave to maintain the proceedings against the fourth-named defendant to be made.

CONCLUSION

106. I will, therefore, strike out the plaintiff's claims against the third-named defendant and against the first, second and fifth-named defendants other than her claim against the fifth-named defendant in respect of the events immediately surrounding the arrest of Mr. O.S. as adverted to in paragraph 30 of her Statement of Claim. I will direct that she deliver an Amended Statement of Claim to properly plead this claim within three weeks of today's date.

107. In those circumstances, it is not necessary to consider the applications pursuant to Order 19 Rule 28 or Rule 27 save for that part of her claim. As discussed above, I do not believe that I could conclude that this part of the Statement of Claim does not disclose a cause of action. It is undoubtedly inadequately pleaded but I do not believe that this is sufficient for me to strike it out under Order 19 Rule 27 in circumstances where it was (and remains) open to the defendants to serve a Notice for Particulars and where I have directed that the plaintiff deliver an Amended Statement of Claim.

108. My provisional view in respect of costs is that as the third-named defendant (the Official Assignee) has been entirely successful he is entitled to his costs. One application was brought on behalf of the first, second and fifth-named defendants and I will therefore deal with their costs as one set of costs. The first and second-named defendants have been entirely successful and the fifth-named defendant has been largely successful. However, I have refused to dismiss one element of the claims against the fifth-named defendant and it seems to me that this should be reflected in the costs Order. My provisional view is, therefore, that the first, second and fifth-named defendants are entitled to their costs reduced by 20%. In the event that either party wishes to make submissions on these proposed costs orders I will give them an opportunity to do so on the for mention date to be communicated with the electronic delivery of this judgment.