THE COURT OF APPEAL

UNAPPROVED
Neutral Citation Number: [2021] IECA 147
Court of Appeal Record Number 2019/482

Costello J.
Binchy J.
Pilkington J.

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF/
RESPONDENT

- AND -

BERNARD (OTHERWISE BEN) GILROY

DEFENDANT/
APPELLANT

JUDGMENT of Ms. Justice Costello delivered on the 18th day of May 2021

Introduction

1. This is an appeal by the defendant against an interlocutory injunction granted by the High Court on 31 October 2019 restraining the appellant, pending the trial of the action, from (1) arresting or (2) publishing the home addresses of any of the respondent's officers, employees or legal advisors, (3) from giving legal advice or assistance in relation to the respondent, and (4) from publishing any allegations that the respondent or its legal advisors are perpetrating a fraud. The appellant was also directed to remove certain online content referring to the respondent. The respondent was awarded the costs of the application.

2. The appellant, who represents himself, appealed on four grounds as follows:-

"1. The judge erred in fact and law by ordering the common law rights of the appellant to arrest, restrain and detain any suspected criminal committing an indictable offence be removed.

2. The judge erred in fact and law by restraining the appellant from highlighting certain documentation which may be of assistance to Irish families who may be defrauded in relation to their dwellings.

3. The judge erred in fact and law by removing the appellant's freedom of speech and of expression especially in circumstances where the appellant is seeking to expose frauds that the appellant believes have been committed and are continuing.

4. The judge erred in fact and law by granting costs to whom the appellant believes are criminals in circumstances where the (sic) Reynolds J. stated she did not see the video made by the appellant highlighting the fraud that he believes exists and continues."

Background

3. In 2006, the appellant and his wife borrowed €310,000 from Start Mortgages Limited (since renamed Start Mortgages Designated Activity Company) ("the respondent"). The loan was secured over their principal private dwelling in Navan, County Meath. The mortgage, dated 30 November 2006, was registered as a burden against the interests of the appellant and his wife on the relevant folio on 21 March 2007.

4. The appellant and his wife fell into arrears and ultimately the respondent instituted proceedings seeking possession of the property in the Circuit Court. As of 25 June 2019, the balance then outstanding stood at €512,244.85. The last payment towards the balance due was made on 2 February 2011 in the sum of €200.

5. The proceedings have been before the Circuit Court for approximately five years and the appellant filed no replying affidavit. The appellant requested inspection of the original mortgage and title documents pertaining to this home and a meeting took place for this purpose at the respondent's offices on 15 May 2019. During the meeting the appellant seized the original title documents ("the seized documents") and, despite the protestation of the respondent's Litigation Manager, Mr. Justin Nevin, removed the seized documents from the offices of the respondent. The appellant confirmed that he recorded the entire meeting despite the fact that neither Mr. Nevin nor his companion were asked to consent, nor consented, to the recording of the meeting.

6. The solicitors of the respondent, Lavelle Solicitors, wrote on 20 May 2019 calling upon the appellant to return the seized documents wrongfully removed. The appellant failed to do so and instead sought a meeting with the managing partner of the respondent's solicitors, Mr. Michael Lavelle. He was requested, on 31 May 2019, to make any proposal directly to the respondent by 10 June 2019. By letter dated 11 June 2019, the respondent's solicitors offered to meet the appellant subject to the precondition that he deliver the seized documents and a proposal for the discharge of the liabilities no later than twenty-four hours in advance of any proposed meeting.

7. On 17 June 2019 (by letter incorrectly dated 2018) the appellant wrote to Mr. Lavelle. He said that he may have to commence criminal proceedings for *"the common law offence of conspiracy to defraud"* in relation to his family home:-

> *"It may also be necessary for me to make a number of arrests if I have to pursue that matter, and trust me when I tell you I will have no hesitation in doing that and same will be videoed for my protection.*

Therefore, Michael, my position is very clear; I do not wish to see harm come to anybody so there is an opportunity here for this matter to be sorted amicably.

...

Apart from my business partner... I do not know of anybody else in the country, who is either aware of these documents, or has them in their possession. I would suggest that it is probably better to keep it that way, in circumstances where you have fraudulently taken family dwellings and same are either sold or boarded up and in other circumstances some unfortunate people may have committed suicide."

8. He threatened that if a meeting was not forthcoming that he would:

(1) make a series of YouTube videos called "The Fraud of Start Mortgages". He would post videos *"explaining every document in the suite of documents in [his] possession and the download button to download that very document"*;

(2) he would publish the home addresses of the directors of the appellant and its affiliate companies on the internet and *"explain to people how anybody can arrest any of these directors if they have conspired to commit fraud against any of the mortgagors listed in the 5,800 mortgage accounts"*;

(3) he would arrest those directors and any solicitors or barristers who attempted to pursue the Circuit Court proceedings against the appellant.

9. This letter makes clear that the appellant was prepared to return the seized documents and not to publish their content nor the addresses of the directors of the respondent where they could be arrested provided *"this matter"* is resolved amicably. The *"matter"* is the debt due to the respondent by the appellant and his wife and which was the subject of the Circuit Court possession proceedings.

10. In view of the fact that the appellant had not, and apparently would not, return the seized documents which he removed without authorisation from the offices of the

respondent on 15 May 2019, and in light of the threats contained in the letter of 17 June 2019, the respondent commenced these proceedings on 25 June 2019. The proceedings claim the return of the title deeds and injunctions restraining the appellant, his servants or agents, or any other person having notice of the order, from publishing or disseminating certain information, or from harming, harassing and/or intimidating the respondent, or any of its officers, servants, agents or employees, or any of its solicitors, partners, employees or counsel instructed to act on behalf of the respondent. There is no claim for defamation. On the same day, the respondent issued a motion seeking interlocutory relief returnable for 28 June 2019.

11. On 28 June 2019, the appellant undertook to return the title deeds to the High Court the following Monday, 1 July 2019 by 2 p.m. *By consent*, the High Court restrained the appellant from harming, harassing and/or intimidating the respondent's officers and employees or its legal representatives. The appellant was also restrained from attending at the respondent's or its solicitor's offices without prior invitation and was ordered to take down one Facebook video and not to post any further material online pertaining to the respondent until the return date of the motion, 4 July 2019. The appellant duly lodged the title documents in accordance with his undertaking and removed the video in question.

12. On 4 July 2019, there was no appearance by the appellant and the motion was adjourned to 18 July 2019 with the orders of 28 June continuing. The motion was further adjourned while the parties endeavoured to resolve the issues between them and, due to the mistaken belief of counsel that all matters save in relation to the holding of the title deeds had been resolved, by consent the order restraining further publication was not continued and the motion was "de-listed".

13. Unfortunately, this was incorrect and the efforts to resolve the issues between the parties were unsuccessful. The appellant reverted to threats. On 8 August 2019, the

appellant emailed counsel for the respondent threatening to release a video series entitled "The Fraud of Start Mortgages and Others" notwithstanding the order of 28 June 2019. The subject matter of the email was *"The Fraud of Start Mortgages and Others"*. In the body of the email the appellant said:-

> *"My patience is wearing thin and this better get fully sorted out at the proposed meeting or very shortly after. I have made my position very clear. Make sure you have a substantial compensation package to settle this matter amicably."*

14. The respondent's solicitors wrote to the appellant on 16 August 2019 reminding him that pursuant to the order of 28 June 2019 he was restrained from publishing any video or other online material relating to the respondent until the next hearing date which was set at the end of October 2019. The letter stated that the documentation upon which the appellant relied to support his allegations of fraud is:-

> *"... standard securitisation documentation. As a result, your allegations that the documentation amounts to fraud are without foundation and, should they be published, together with an allegation of fraudulent activity, will constitute defamation.*
>
> *Further, our client will not be making any proposal of payment to you. This request is wholly inappropriate. Your demand for payment in conjunction with the threat to publish knowingly defamatory statements, is a clear attempt to cause harm to our client."*

15. Between 24 and 29 October 2019, the appellant made good his threats and published a series of Facebook posts and a lengthy video which included screenshots showing photographs of the four partners of the respondent's solicitors and of three counsel who

represented the respondent in the Circuit Court possession proceedings. The video of 24 October 2019 included a statement by the appellant:-

> *"Now the question is what are we going to do about it. We are going to start arresting these people. Look at all the lives they have destroyed, look at all the property they have stolen, look at all the courts they have misled; and I think we need to get a posse together and start arresting these people in a systematic way. So I am going to try and arrange all that over the next few days.*
>
> *I did inform the Circuit Court this morning that I would be making arrests within four weeks and I intend to do that. Within four weeks I intend to make at least my first arrest within those four weeks."*

16. Further, in a separate video posted at the same date and time, while protesting that he was not giving legal advice, he went through the provisions of the securitisation documents, being some of the seized documents, in considerable detail and stated that the documents were *"self-explanatory"* and stated his conclusion that the respondent *"are (sic) nothing to do with this because they don't hold any interest in these mortgages"*. He said that he was giving his view, not legal advice. He spent some time discussing the case of *Rondel v. Worsley* ([1967] 3 All ER 993) in the context of the duty of counsel to the court and specifically the duty not to mislead the court by reference to a hearing before the County Registrar in the Circuit Court proceedings. He posted copies of the securitisation documents to be downloaded and a copy of *Rondel v. Worsley* and a transcript of the meeting in the offices of the respondent with Mr. Nevin which culminated in him removing the seized documents.

17. On 24 October 2019, Mr. Pól O'Scanaill posted on Facebook:-

"We are looking for hundreds of volunteers who are prepared to arrest solicitors and barristers representing corrupt banks in the eviction courts".

The appellant reposted the comments stating:-

"It has to be done".

On 25 October, Ms. Maria Mackessy posted on Facebook:-

"DPP just wrote to us to inform they are not going to prosecute the solicitors and [S]tart for fraudulent documents so off you go[,] do the same and see what happens!"

The appellant posted in response:-

"I don't need the DPP".

18. In a video posted on 25 October, the appellant said:-

"People ask what do they do now with this information even if their "bank" is not Start Mortgages? Here is what I would ask any judge or register (sic):

COPY THIS SHARE IT AND PRINT IT OFF … ".

19. In a further video posted on 27 October 2019 at 5:45 p.m., the appellant again stated that he was not giving legal advice but proceeded to discuss, through ten pages of transcript, how a person might resist attempts by a lending institution or the purchaser of loans from realising security, including references to legal maxims. He posted three draft documents and explained in detail how these could be used to further the strategy explained in the video.

20. In 2018, in proceedings entitled *Allied Irish Banks Plc. v. McQuaid & Ors* [2018] IEHC 516, the appellant was permanently restrained by the High Court, whether alone or in concert with any other person:-

"... from advising, participating in, assisting or otherwise engaging in litigation in any court in the State in a representative capacity on behalf of others, whether in the capacity of "McKenzie Friend" or otherwise". (emphasis added)

Thus, when the appellant posted the videos between 24 and 29 October 2019 he was aware that he was not permitted to advise or assist others who were engaged in litigation of any kind, whether as a McKenzie Friend or otherwise. He was also aware of the terms of the order made by Reynolds J. by consent on 28 June 2019.

21. The respondent was concerned that the videos and posts by the appellant breached the consent order of 28 June 2019. He not only threatened to arrest individuals, but he also threatened to organise a posse to help carry out his threats. The respondent was also of the view that the video of 24 October 2019 breached the terms of the injunction restraining him from advising or assisting in litigation in any court in the state in a representative capacity on behalf of others.

22. On 29 October 2019, the respondent's solicitors wrote to the appellant asking him to confirm that he would be willing to provide undertakings to the High Court:-

"1. That you undertake not to, whether alone or in concert with any other person, unlawfully restrain or detain any of Start Mortgages DAC's current or former officers, employees, servants or agents; or any current or former partner, employee, servant or agent of Lavelle Partners solicitors; or any current or former counsel instructed to act on behalf of Start Mortgages DAC.

2. That you undertake not to, whether alone or in concert with any other person, publish, post online or otherwise disseminate any information relating to the home address or property of any of Start Mortgages DAC's current or former officers, employees, servants or agents; or any current or former partner,

employee servant or agent of Lavelle Partners solicitors; or any current or former counsel instructed to act on behalf of Start Mortgages DAC.

3. *That you undertake not to, whether alone or in concert with any other person, give legal advice or assistance relating to Start Mortgages DAC, whether in person, online (including the production of instructional videos and draft documents) or otherwise.*

4. *That you undertake to take down all online published by you since 24 October 2019 which refers to Start Mortgages DAC, including [scheduled content]."*

23. The appellant replied by email dated 29 October 2019 agreeing to give the first undertaking on the grounds that his intention was only to make lawful arrests. He stated that his intention was to make lawful arrests which can be made by consensual appointment at the local garda stations of the person he intended to arrest. Given that the issue between the parties was his entitlement to make any arrests, this amounted to a refusal to give the undertaking sought.

24. In relation to the second undertaking requested, he undertook not to put anything in the public domain *"that is not already in the public domain"*. The addresses of the directors of the respondent had been obtained from the entries in the CRO so the information was within the public domain and thus this too amounted to a refusal to provide the requested undertaking. He undertook not to give legal advice *"as per the Solicitors Act 1954-2015"*, but he did not address the issue of the permanent injunction and he refused to give the fourth undertaking sought on the grounds that it would infringe his constitutional rights to freedom of speech and expression.

25. The respondent's solicitors replied on 30 October 2019 stating that the appellant's counter proposals were not acceptable. The online videos named current and former employees of the respondent and members of the firm of solicitors and counsel who had

acted in the proceedings and in the Circuit Court proceedings. The letter went on to state that, the videos go on to encourage viewers:-

> *"... to form a posse in order to arrest our client's officers and/or employees, and/or their legal advisors. Our client and this firm therefore seriously apprehend that you and/or persons encouraged by you will cause physical harm [to] their personnel."*

26. The letter also said that the videos were *"clearly defamatory"* of the respondent and that the appellant had purported *"to give legal advice in breach of previous Court Orders"*. The letter said that he did not have a power to arrest whomsoever he chose.

27. By email dated 30 October 2019, sent at 10:55 p.m., the appellant responded stating that he did not share the fear of persons being caused physical harm *"as any posse under my guidance would be well selected individuals who would only act in a proper manner under my instructions"*. He undertook that any arrests *"will be made by me alone"*. He asked Mr. Lavelle to state exactly what part of the videos were claimed to be defamatory. In response to the comment that he did not have the power to arrest whomsoever he chose, he replied: *"eh… actually I do, provided I have probable cause or reasonable suspicion for the subjects I intend to arrest, that they have committed a felony"*. He refused to give the undertakings sought at nos. 1 and 4. In relation to no. 2, he agreed to give the undertaking sought. In relation to no. 3, his response was: *"I do not and will not give legal advice. As regards instructional videos, get a life."*

28. He posted the correspondence and his responses on Facebook.

29. On 31 October 2019, the respondent issued a fresh *ex parte* application seeking interim injunctions restraining the appellant, his servants or agents, or any other person having notice of the order, from arresting, or purporting to arrest, any of the respondent's current or former officers or employees, or any of the partners or solicitors of Lavelle Partners solicitors, or any current or former counsel instructed to act on behalf of the

respondent, and from publishing, posting online or otherwise disseminating any information relating to the home address or property of any of the said individuals. The respondent also sought short service of a notice of motion seeking interlocutory relief in the same terms.

30. Reynolds J. in the High Court granted the interim relief sought and gave liberty to serve the notion of motion seeking interlocutory reliefs returnable for 2 p.m. the following day, 1 November 2019.

31. The respondent's solicitors employed a summons server, Mr. Field of RB Legal Services Limited, to serve the appellant with the court order of 28 June 2019 with a penal endorsement, the court order dated 31 October 2019 with a penal endorsement, the notice of motion returnable for 1 November 2019 and the grounding affidavits of Alan Casey, sworn 29 October 2019 with exhibits, Barbara Tanzler, sworn 31 October 2019 with exhibits, and a supplemental affidavit of Barbara Tanzler, sworn on 31 October 2019.

32. Mr. Field wrote to Ms. Tanzler of the respondent's solicitors on 1 November 2019 setting out what occurred when he attempted to personally serve the appellant at his home on the evening of 31 October in advance of the return date of 1 November. While he has not sworn an affidavit, Ms. Tanzler swore an affidavit on 1 November 2019 exhibiting his letter. He stated:-

> *"When I called to the [residence of the appellant] a heavy set man in his forties approximately 5 foot 9 inches in height came to greet me. He was a very aggressive man. He was shouting profanities at me the whole time I was present informing me to read the no trespassing signs that are outside the property. He followed me to my car and continued to shout profanities at me until I left.*

I returned to the property at 9.50 p.m. on 31 October 2019. When I pulled up outside the property the same man came straight out to me before I could even get out of my car. He again continued to shout profanities at me while informing me that I was not to trespass on Mr. Gilroy's property.

I left the property as I believe this man would have assaulted me if I entered the driveway. On this attempt I could see three men inside the property with their jackets on. I was unable to see them clearly as I was watching the man shouting at me in case he assaulted me.

…

I am of the opinion that further attempts to serve Mr. Gilroy could result in the summons server being assaulted. I recommend that the summons server request the attention of the Gardaí if future attempts of service are required."

33. A Mr. Ciarán O'Dochartaigh posted on Facebook that day: *"I ran a summons server from [the appellant's] door as he wasn't home he was off helping someone stay in their home…"*. The appellant posted shortly thereafter: *"Thanks Ciarán it was just as well you were there, I will be home soon."*

34. It had not proved possible to effect personal service on the appellant, nonetheless he was served by email in accordance with the order of Reynolds J. There is no doubt as to the service of the order as at 8 p.m. on 31 October 2019 the appellant posted a further video where he referred to the interim order obtained by the respondents from Reynolds J. He said:-

"So watch out Start Mortgages, the court cannot take away my right to arrest youse (sic) I will. But in respect for the court, I'm going to go into the court on Monday and we can thrash it out. So Lavelle can get onto them. I can't make the court on

Friday morning, but I'm calling for a load of support in court on the Monday. Because, folks, this is where the rubber meets the road; either we stop banking fraud now in this country or we don't.

…

So Monday morning in the court, I intend to be back in front of Judge Reynolds and I'll set the record straight. But she has no jurisdiction whatsoever to take away my power of arrest.

…

I'm not letting this go, folks. Start Mortgage employees will be arrested, make no mistake about that and the solicitor and barrister who mislead the courts, they will be arrested for conspiracy to defraud. But I won't do it in breach of a court order, I'll wait until I get that court order overturned."

The hearing on 1 November 2019

35. The trial judge read the affidavits in advance of the return date for the motion on 1 November 2019. The judge started by ensuring that the appellant had the papers and, in particular, a supplemental affidavit which she had directed to be prepared in ease of the appellant and the court which was relatively short and summarised the evidence set out more fully in the earlier affidavit of Ms. Tanzler.

36. When the matter resumed at 2.30 p.m. the appellant said that he had a common law right of arrest and that the court could not hinder him. He said: *"So I've over 200 arrests to my name. I have never had a false arrest to my name. There has never been an assault during any of those arrests…"*. Reynolds J. cited some of the evidence of the appellant's posts online and explained that an unlawful arrest is effectively an assault and that the manner in which the appellant was proposing to arrest people was unlawful and that she was satisfied that any attempt to falsely imprison or arrest people is tantamount to an

assault. She said: *"you seem to think you can take the law into your own hands and I'm here to tell you that you cannot."*

37. She said that:

> *"You also, Mr. Gilroy, seem to think that you can give legal advice to people. You have gone on record stating what questions people should ask and the advice that you would give them how to deal with –*
>
> *[Interjection by Mr. Gilroy] - I don't give legal advice, Judge.*
>
> *Judge: That's precisely what it is purporting to be."*

38. The appellant protested that he was not giving legal advice in his "instructional video".

39. The trial judge explained the difference between a store detective (the position formerly held by the appellant in which he claimed to have effected over 200 arrests) arresting an individual caught *"in the process of actually stealing something"* and the situation before the court. She emphatically stated that it was a matter for the gardaí to investigate and for the DPP to decide whether or not there was a case to answer. There was no right of an individual, such as the appellant, to arrest in the circumstances of these proceedings.

40. Counsel for the respondent indicated that he was anxious that the appellant be given an opportunity to reply on affidavit if he wished to do so. The appellant was asked by the trial judge was he proposing to put in a replying affidavit and he said that he did not see that it was necessary. He said:-

> *"Well, no, you've already made up your mind that you're going to give the orders and I'm going to appeal them."*

41. The trial judge emphasised that she was going to leave the interim injunctions in place until such time as he put in a replying affidavit, if that is what he chose to do. The

appellant protested that the evidence was that he would not now: *"do the posse and that I only ask that they meet me at the garda station for formal arrest"*. The trial judge said that he could not say that one day he was getting up a posse and another day decide that he was not. In the circumstances she was going to make the orders:-

> *"... because every time an order is made you do your best to circumvent it. I am very concerned about the safety of the individuals, having regard to spending almost three hours reading this content yesterday, and you have put nothing before me that gives me any comfort that you have any intention of meeting the seriousness and gravity of the situation."*

42. She again asked whether he wished to put in a replying affidavit and he declined. She referred to the correspondence seeking undertakings from the appellant and to his responses. He insisted on his right to decide who he might arrest in the future, though he said that he would do it himself by appointment at the local garda station and there would be no posse. She held that if he was not prepared to give the undertakings then she would make the orders sought. She said that she was satisfied that what was posted online amounted to advice which could potentially mislead naïve individuals. She granted the orders sought and ordered the appellant to take down all online content published since 24 October 2019 by 10 p.m. and restrained him whether alone or in concert with any other person from further publishing or causing to be published any allegations that the respondent or its solicitors or counsel are perpetrating a fraud, or causing to be published any words, images or videos of the respondent, its solicitor or counsel. She refused a stay on the orders.

The appeal

43. As stated above, the appellant appealed the order of the High Court on four grounds. His written submissions were confined to his power of arrest at common law and his right

to freedom of speech and expression. In oral submissions, he expanded upon the written submissions.

44. He said that, at common law, the power of arrest for any indictable offence is enjoyed by all people and citizens alike on the island of Ireland. He said the High Court had no power to restrain him from exercising this right. He submitted that the Oireachtas had no authority *"to remove any common law rights of the people"* even by enacting legislation. He denied that there was any statute which purported to remove this common law right of arrest of the people.

45. In his oral submissions on this issue he said that he had a common law right to arrest persons and that s. 4 of the Criminal Law Act 1997 does not *"remove"* the common law power of arrest. He submitted that the Oireachtas cannot do this. He said that because the people had adopted the Constitution that it was not open to any court to remove common law rights from the people. He said there was no legislation which removed the common law power of arrest from the people. He concluded in his reply by indicating that he did not intend to arrest *"any of them"* and that he would *"leave the matter to the gardaí"*. By inference, he suggested that the orders granted were accordingly no longer necessary and therefore, wrongly granted.

46. The appellant said that the High Court acted *ultra vires* when ordering him to remove a video he had published on Facebook. This impermissibly infringed his right to freedom of speech and freedom of expression. The appellant's primary contention was that he had in his possession what he described as *"false documents"* which he said had been used by the respondent to create a loss by deception. He argued that fraud must be exposed, that the respondent had sold the right to sue and the right to demand repayment of the loan and possession of the secured property when it entered into a Mortgage Sale Agreement. This argument appears to be based upon the documents which he removed from the offices of

the respondent in May 2019. He said that the respondent had denied to the Circuit Court that such a sale occurred, but he had documents which proved to the contrary. He also alleged that the respondent had breached the provisions of the Credit Reporting Act 2013, s. 7, by failing to register the details of the Mortgage Sale Agreement on the register, as required by the section.

47. He said it was his absolute right to publish the details of his allegations against the respondent and the documents themselves together with his observations or opinion of the meaning or effect of the documents. He said he had a right of freedom of expression and cited the United Nations Universal Declarations of Human Rights, Article 19, and the European Convention on Human Rights, Article 10, and *Open Door and Dublin Well Woman v. Ireland* (App. No. 14234/88) (1992) 14 E.H.R.R. 131. He said that he had spoken the truth and that this case concerned his right to free speech and was not a defamation case. He said that there was no plea of defamation and the trial judge erred by effectively adding a claim of defamation by the terms of her order directing him to remove material he had posted online, and restraining him from publishing material concerning the respondent, its solicitors or counsel until the determination of the proceedings. He accepted that he had no right to defame people and that the court must balance his right to freedom of speech with the right of other persons to a good name.

48. He accepted that he did not file an affidavit. He explained that this was because the trial judge had *"made up her mind"* and that there was *"no point"* in filing an affidavit. He complained that the respondent was *"burying a lay litigant in paper"* and he only had twenty minutes to read the documents before the court.

49. He complained that the respondent had been required to deliver its statement of claim within 21 days of 25 November 2019 and it was in flagrant breach of this court order. He

said the leniency accorded to the respondent for the breach of this order in contrast with his treatment before the courts illustrated blatant favouritism.

50. He denied that he was giving legal advice in the videos he had posted. He said *"nobody in Ireland thinks that I am a solicitor"* and referred to the fact that in the video he expressly says that he does not give legal advice. He says that there is no confusion; that he is giving his *"opinion"*. He denied that he was in breach of an earlier order of the High Court as the actions complained of in these proceedings did not amount to assisting or advising in respect of litigation.

The respondent's submissions

51. The respondent submitted that the appellant's case was fundamentally undermined by the absence of any affidavit from the appellant. The respondent initially sought interim orders and on the return date, 1 November 2019, either the interim orders would be continued during a short adjournment to afford the appellant an opportunity to file a replying affidavit, or satisfactory undertakings would be furnished. The appellant did not offer satisfactory undertakings and did not seek an adjournment for the purposes of filing an affidavit. Accordingly, there was no reason to adjourn the application for an interlocutory injunction to another date. Critically, the trial judge had not made up her mind in relation to interlocutory orders, but in view of the stance adopted by the appellant, she continued the orders which she had granted on an interim basis.

52. The respondent submitted that the question of fraud is not on affidavit before the court and that there is no evidence to support the appellant's allegations.

53. The appellant says that he has the power to arrest in the manner he suggests, but this is incorrect. The respondent referred to Orange on *Police Powers in Ireland* (Bloomsbury, 2014) at para. 6.05 where the author stated:-

"The common law power of arrest has now been replaced by various statutory provisions, the applicability of which depends on the nature of the particular offence."

54. The respondent said that the previous common law power to arrest has now been replaced by the provisions of the Criminal Law Act of 1997. Section 4 provides:-

"4.(1) Subject to subsections (4) and (5), any person may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be in the act of committing an arrestable offence.

(2) Subject to subsections (4) and (5), where an arrestable offence has been committed, any person may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be guilty of the offence.

(3) Where a member of the Garda Síochána, with reasonable cause, suspects that an arrestable offence has been committed, he or she may arrest without warrant anyone whom the member, with reasonable cause, suspects to be guilty of the offence.

(4) An arrest other than by a member of the Garda Síochána may only be effected by a person under subsection (1) or (2) where he or she, with reasonable cause, suspects that the person to be arrested by him or her would otherwise attempt to avoid, or is avoiding, arrest by a member of the Garda Síochána.

(5) A person who is arrested pursuant to this section by a person other than a member of the Garda Síochána shall be transferred into the custody of the Garda Síochána as soon as practicable.

(6) This section shall not affect the operation of any enactment restricting the institution of proceedings for an offence or prejudice any power of arrest conferred by law apart from this section."

55. Pursuant to s. 4, the citizen's power of arrest has not been abolished but it is severely restricted, and it is confined to the terms of the section. The power does not exist in the circumstances of this case as there can be no question of any of the individuals concerned evading an intended arrest by a member of An Garda Síochána. Therefore, the appellant cannot have reasonable cause to suspect this to be the case as required by subs (4). It follows that there can be no question of the appellant lawfully exercising a common law power of arrest of any of the persons whom he threatened to arrest. This applies whether he simply invites them to attend for arrest at a garda station or attempts to do so with a posse.

56. Separately, the respondent submitted that there is no *evidence* before the court from which it could conclude that the appellant *with reasonable cause* suspected any of the persons he threatened to arrest to be in the act of committing an offence within the meaning of s. 4(1), or to be guilty of having committed an arrestable offence within the meaning of s. 4(2). Thus, there is simply no basis upon which the appellant has any right of arrest in the circumstances of this case.

57. The respondent also submitted that the appellant *could not* have reasonable cause to arrest any of the officers or employees of the respondent, members of the firm of the respondent's solicitors or counsel who acted for the respondent and thus, the power of arrest of a person who is not a member of An Garda Síochána, under s. 4, could not arise in any event.

58. The appellant had indicated that he did not accept that he did not have a right to arrest any of the officers or employees of the respondent, members of the firm of the respondent's solicitors or counsel who acted for the respondent and therefore the trial judge was entitled in the exercise of her discretion to vindicate their rights to liberty and to bodily integrity and to restrain the appellant from purporting to do so.

59. As regards the injunction restraining publications online, the respondent accepted that the courts have been reluctant to grant interlocutory injunctions in cases of defamation as it curtails the right to free speech and freedom of expression. But that is not to say that in appropriate cases the courts will not do so. The power to do so has been put on a statutory footing by s. 33(1) of the Defamation Act 2009 which empowers the court to:-

> *"...make an order prohibiting the publication of further publication of the statement in respect of which the application was made if in [the High Court's] opinion:*
>
> *(a) the statement is defamatory, and*
>
> *(b) the defendant has no defence to the action that is reasonably likely to succeed."*

60. In *Gilroy v. O'Leary* [2019] IEHC 52, Allen J. held that the section did not alter the matters which a court must consider when determining whether to grant an injunction. He held that the onus is on the plaintiff to establish that the statement *"is"* defamatory. Following the decision of the Supreme Court in *Sinclair v. Gogarty* [1937] I.R. 377, he held that:-

> *"... an interlocutory injunction should only be granted in the clearest cases where any jury would say that the matter complained of was libellous, and where if the jury did not so find the Court would set aside the verdict as unreasonable."*

61. The respondent said that the appellant had published allegations and threatened to continue to publish allegations which were clearly defamatory of the respondent and its agents. The trial judge asked whether the appellant could prove his allegation of fraud, but he had declined the opportunity to file an affidavit. Instead he suggested that he could make the allegations and resist the applications for injunctions while reserving the right substantiate the allegations at a later date.

62. Counsel argued that the allegations of fraud were clearly defamatory. The appellant asserted that they were true, but the fact that the appellant had declined to file an affidavit meant that there is no evidence upon which the court could form the opinion that he had a defence that was reasonably likely to succeed. As was pointed out in Kirwan's *Injunctions, Law and Practice* (3rd ed., Round Hall, 2020), "[i]n practical terms, the basis for a plea of truth would have to be set out in any affidavit replying to the application for an interlocutory injunction." This reflects the decision of Kelly J. in *Reynolds v. Malocco* [1999] 2 I.R. 203, where he held that a plea of justification must have some substance or prospect of success on the evidence adduced by the defendant.

63. The respondent also relied upon the decision of Peart J. in *Tansey v. Gill* [2012] 1 I.R. 380, para. 24, where he said:-

> *"... it seems to me that whatever judicial hesitation has existed in the matter of granting an interlocutory injunction to restrain publication pending trial should be eased in order to provide an effective remedy for any person in this State who is subjected to unscrupulous, unbridled, scurrilous and defamatory material published on a website which can, without any editorial control by the host of the website, seriously damage him or her either in his or her private or business life. In my view, the ready availability of such a means of defaming a person by any person who for any reason wishes to do so has such a capacity to cause insult and immediate and permanent damage to reputation means that the courts should more readily move to restrain such activity at an interlocutory stage of the proceedings in these types of proceedings ...".*

64. In the circumstances, the respondent said that the appellant had refused to give undertakings on the terms sought and insisted upon his right to continue to publish the material and similar material, he had declined to file an affidavit to substantiate his

allegations and, he could not do so by assertions in oral submissions; it was therefore a proper exercise of the court's discretion under s. 33 of the Act of 2009 to direct the appellant to remove the defamatory publications and to restrain the appellant from publishing further allegations of fraud against the respondent, its solicitors and counsel pending the trial of the action.

65. Counsel for the respondent accepted that there had been *"something of a stand-off"* in relation to the failure of the respondent to deliver a statement of claim and, in effect, accepted that it was in default.

66. It is appropriate to record that before the appeal came on for hearing, the Circuit Court granted the respondent an order for possession against the appellant and his wife in respect of their family home.

Discussion

67. The first issue raised relates to the appellant's claimed right at common law to arrest persons, including the officers or employees of the respondent, the members of the firm of solicitors acting for the respondent and counsel who represented the respondent. Did the trial judge err in the exercise of her discretion when granting the orders appealed against?

68. The appellant argued that the Oireachtas had no power to curtail the common law power of arrest and that the trial judge acted *ultra vires* in restraining him from exercising these powers. Article 15 of the Constitution provides for the powers of the Oireachtas; in particular, Art. 15.2.1° declares that:-

> *"The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."*

This means that the Oireachtas has the power to enact laws, including the Criminal Law Act 1997. It has the power to alter existing common law and statute law. The appellant's submission that the Oireachtas had no power to curtail the common law power of arrest is

misconceived and untenable. The Act of 1997 represents the law and the courts are required under the Constitution to give effect to it. As was stated by Orange in *Police Powers in Ireland*, the common law power of arrest has been replaced by various statutes, including the Act of 1997. The trial judge, therefore, was required to exercise her discretion on the basis of the Act of 1997.

69. The power to arrest a person is vested in the members of An Garda Síochána. Section 4(4) states that an arrest, otherwise than one by a member of An Garda Síochána, such as one by the appellant, *"may only be effected"* under subss. 4(1) or (2) where that person *"with reasonable cause"* suspects that the person to be arrested by him or her would otherwise attempt to avoid, or is avoiding, arrest by a member of An Garda Síochána. It is thus a pre-condition to the power of arrest in subs. 4(4) that there are reasonable grounds for suspecting that the person to be arrested would otherwise attempt to avoid, or is avoiding arrest, by a member of An Garda Síochána. There was no evidence to suggest that any member of An Garda Síochána has any intention of arresting any of the officers or employees of the respondent, or of the members of the firm of solicitors acting for the respondent, nor counsel who represented the respondent. It follows that there cannot be any possibility of any such person either attempting to avoid or actually avoiding arrest by a member of An Garda Síochána. There is simply no basis whatsoever upon which the appellant can claim to have reasonable cause to believe such to be the case and thus to have any entitlement to arrest any of the individuals whom he threatened to arrest and sought to organise a posse to arrest.

70. Further, as the respondent submitted, the power to arrest without a warrant may only be exercised where the person, with reasonable cause, suspects that other person to be in the act of committing an arrestable offence (subs. (1)) or to be guilty of an arrestable offence which has been committed (subs. (2)). The appellant adduced no evidence upon

which the court could conclude that the requirements of either of these subsections was met.

71. The factual situation presented to the trial judge was that there was no basis whatsoever for the appellant to arrest any of the individuals whom he threatened to arrest. In his submissions to the court, he insisted that the respondents and its agents were guilty of fraud and he insisted on his right to arrest them for this alleged fraud. But the court could not proceed on the basis of his bare, unsubstantiated allegations. He adduced no evidence at all and, therefore, there was no evidence of any fraud before the court. There was no basis upon which the court could conclude that it would be lawful for any garda, never mind a member of the public, to arrest any of the individuals threatened with arrest.

72. The appellant continued to insist on his right to arrest those whom he had threatened to arrest. He had previously advocated organising a posse to do so online. The potential for a very grave injustice, not to say a risk of injury, is immediately apparent from such an outrageous suggestion. The fact that the appellant said that he would not organise a posse, that he would arrest the individuals himself by arrangement at a garda station, and then concluded his submissions by saying that he would not attempt to effect any arrests and that he would leave it to the gardaí, did not amount to an undertaking which would adequately meet the justice of the situation in my judgment. There was no certainty that the appellant might not simply change his stance on another occasion, particularly as he continued to insist on his alleged right of common law arrest in the circumstances where *he alone* decided that a fraud had been committed. He never offered to give an undertaking in terms which adequately safeguarded the rights of those persons he previously threatened to arrest with a posse.

73. In the circumstances, I am satisfied that the trial judge acted entirely properly in restraining the appellant from attempting to arrest the respondent's agents, whether alone or in concert with a posse of like-minded individuals. I reject the first ground of appeal.

74. By the second ground of appeal, the appellant claims that the trial judge restrained him from *"highlighting certain documentation which may be of assistance to Irish families who may be defrauded in relation to their dwellings"*. In fact, the order was that the appellant *"whether alone or in concert with any other person be restrained pending the trial of this action from giving legal advice or assistance relating to the [respondent] whether in person, online (including by the production of instructional videos and draft documents) or otherwise"*. He was also directed to remove the online content published by him since 24 October 2019 concerning the respondent, including the content listed in the schedule to the order. By his third ground of appeal, the appellant alleges that his freedom of speech and of expression have been wrongfully constrained by the orders of the High Court. He says that he is seeking to expose frauds which he *"believes have been committed and are continuing"*. It is appropriate to deal with these two, related issues together.

75. The appellant contended that he is not holding himself out as a solicitor, that he is not giving legal advice and, therefore, he is not in breach of the order of Haughton J. in *Allied Irish Banks Plc. v. McQuaid & Ors*. Holding oneself out as a solicitor is not to be equated with giving legal advice. It is perfectly possible to do the latter without doing the former, so a denial of the former is no answer to the allegation of doing the latter. However, even on his own case, the appellant is giving *"assistance"* relating to the respondent, online, *"to Irish families who may be defrauded in relation to their dwellings"* by the production of instructional videos and draft documents. As is apparent from paras. 16, 18 and 19 above, the appellant uploaded a video to Facebook on 27 October 2019 setting out a draft

statutory declaration which he advised individuals to copy and send to their lenders. He posted a link where viewers could download a copy of his *"template of a statutory declaration"* which he advised borrowers to send to their lenders together with a covering letter which he drafted. The terms of his grounds of appeal indicates that he is purporting to give advice. It is no answer to say that he simply gives his "opinion", and that he does not hold himself out to be a solicitor, and that no one believes, or is misled, that he is a solicitor.

76. The permanent injunction granted in *Allied Irish Banks PLc. v. McQuaid & Ors.* restrains the appellant *"from advising, participating in, assisting or otherwise engaging in litigation in any court in the State in a representative capacity on behalf of others, whether in the capacity of "McKenzie Friend" or otherwise"*. The trial judge had sufficient evidence from the respondent (and none at all from the appellant himself) to be concerned that the appellant was providing legal advice and assistance to others engaging in litigation and thus, breaching the terms of the order of 10 September 2018.

77. Based on the evidence presented to her, I consider that the trial judge was fully entitled to exercise her discretion to further injunct the appellant from *"giving legal advice or assistance relating to the [respondent] whether in person, online (including by the production of instructional videos and draft documents) or otherwise"*.

78. The appellant objects that there is no plea of defamation and therefore no basis for the order restraining him from publishing any allegations that the respondent or its legal advisors are perpetrating a fraud. He denies that any such material is defamatory on the grounds that it is true, and complains that the respondent's solicitors have failed to identify any content of the posts or videos which they say is untrue. He does not appear to disagree with the assertion that, if untrue, the allegations are defamatory.

79. It is accepted that the general indorsement of claim does not involve a plea of defamation. Given that it issued before the posts and videos complained of, and was grounded on threats in letters to solicitors, this is not surprising. The issue of defamation only arose with the publication of material said to be defamatory of the respondent, its servants or agents. It has indicated that, if necessary, it will apply to amend its proceedings to include a plea of defamation. The real issue is whether the trial judge was entitled to restrain the publication of the videos and posts of the appellant alleging fraud against the respondent, its solicitors and counsel.

80. The respondent's notice of motion sought an injunction requiring the appellant to remove the material he had posted which referred to the respondent. This was in the context of the earlier reliefs which sought to restrain the appellant from arresting persons associated with the respondent and from giving advice or assistance relating to the respondent. In light of the response of the appellant to the request for undertakings, and his assertion that the court did not have power to restrain him from making arrests, Ms. Tanzler said in her affidavit of 1 November 2019, at para 10:-

> *"In view of the [appellant's] truculent attitude as displayed in his correspondence with this Firm and his online posts, it seems clear that he is of the view that he can interpret any undertakings which he gives [or] orders made against him in whatever manner suits his purposes. It may therefore also be appropriate for an order to be made against him in the following terms:*
>
> > *an interlocutory injunction restraining the [appellant] whether alone or in concert with any other person, from further publishing, causing to be published any allegations that the [respondent] or its solicitors or Counsel are perpetrating a fraud, or causing to be published any words, images or videos similarly defamatory of the [respondent] its solicitors or counsel."*

81. In the event, the trial judge granted an order restraining the publication of allegations that the respondent or its solicitor or counsel are perpetrating a fraud. She did not make an order in terms of the second part of the suggested order relating to defamation. I am satisfied that the order made comes within the terms of the general indorsement of claim, para. 3, which seeks to restrain publication of *"any videos, documents or other material online relating to the [respondent]."* The publication of allegations that the respondent, or its solicitors or counsel are perpetrating fraud is a publication of material relating to the respondent in a most particular and damaging way and thus, the order was one which it was open to the trial judge to make in these proceedings. The appellant is mistaken in his complaint that the trial judge made an order grounded on a claim of defamation outside the pleadings.

82. The appellant did not contend that there was *no* jurisdiction to restrain publication, which, given that he was the plaintiff in *Gilroy*, was to be expected. He accepted that the court was required to balance his right to freedom of speech and expression with the rights of the respondent's officers and employees, solicitors and counsel to their good name. He did not dispute the decision of Allen J. in *Gilroy* and appeared to accept that it correctly set out the law. Thus, the hearing proceeded on that basis and there was no debate on the learned judge's analysis of the issues.

83. The appellant did not dispute that a wrongful allegation of fraud was defamatory or that publication of such an allegation could or should be restrained. The sole basis upon which he contended that the trial judge erred in granting the order restraining him was that it wrongfully curtailed his right to free speech.

84. As I have said, the appellant accepted, correctly, that there are competing rights at stake and that the trial judge and this court are required to balance those rights. Crucial to that exercise is the *bona fides* of his intended publication. A wish, maliciously, to publish

damaging allegations without any foundation, while it may amount to an exercise of freedom of speech, will not outweigh the rights of persons to be protected against the wrongful, irremediable damage occasioned by such publication.

85. This case began as a result of the seizure by the appellant, on 15 May 2019, of the seized documents. When the solicitors for the respondent wrote demanding their return, this led to further correspondence and, ultimately, the letter from the appellant that caused the respondent to issue these proceedings *i.e.* his extraordinary letter of 17 June 2019 (see paras. 7-9 above). Having failed in his attempt to force a settlement of his private litigation, the appellant decided to use the seized documents, which he wrongfully removed, to exert further pressure upon the respondent, but also on its solicitors and counsel, with a view to increasing this pressure to compromise with him. This is clear from the emails of August 2019 quoted above. That still did not produce his desired outcome, so he proceeded to make good on his threats. Not only has he published the securitisation documents, commercial documents which do not belong to him, he also published a transcript of a meeting which he secretly recorded without the consent of the other participants. He has published his "opinion" as to the meaning and effect of the securitisation documents and himself concluded that the parties he has accused are guilty of perpetrating fraud. If he truly had concerns that a fraud was being perpetrated, it was at the very least incumbent upon him to obtain legal advice, given that, as he himself insists, he is not legally qualified, and to place evidence before the court to substantiate his allegations. Despite the fact that the trial judge made it abundantly clear that he was not entitled to determine for himself the validity of his charge of fraud, he refused to accept this and persisted in asserting that he was entitled to make these allegations without substantiating them in any way. Given the damaging and clearly defamatory nature of the existing and intended publications online, the only basis upon which a court could

withhold an interlocutory injunction in such circumstances would be on the basis of evidence as to the truth of the allegations. Not only did he fail to adduce such evidence, he repeatedly declined to do so. In the circumstances, it was not open to him to argue the truth of his allegations at the interlocutory hearing.

86. Two things follow from this conclusion. First, the court cannot act on the basis of bare assertions. The High Court and this court, therefore, must approach the application for injunctive relief on the basis that the publication, and the intended publication, is defamatory, and there is no case of justification or truth. That being so, the justice of the case requires the court to uphold the right of the respondent's officers, employees, solicitors and counsel to their good name; the right of the appellant to exercise his freedom of speech is outweighed in circumstances where he has not made out, and has failed to attempt to make out, any basis which could justify his right to injure others by his exercise of his right to freedom of expression. Second, the inference that the appellant is acting maliciously is inescapable.

87. I adopt the comments of Peart J. in *Tansey v. Gill*, quoted above, as correctly stating the approach to be taken in the era of the instant worldwide publication of material, without any editorial control, made maliciously and, as a particularly illegitimate tactic, in ongoing litigation. In my judgment, the trial judge was well within the exercise of her discretion in granting the order sought and I would refuse the appeal on this ground.

88. Finally, I should say that there was no want of fairness in the hearing before the High Court by reason of the service of papers on the appellant shortly before the hearing. The material was familiar to the appellant as it largely related to his own videos, posts and correspondence. He was not being unfairly *"buried"* in paper in the circumstances. The appellant had received the papers by email by 8 p.m. the night before. The affidavits, excluding backing sheets, ran to thirteen pages, which could not be considered to be an

unmanageable burden for the appellant to digest prior to the hearing at 2:30 p.m. the following day. Even if one affidavit of four pages was not served until 1 November 2019, it was open to the appellant to apply for a short adjournment in order to file a replying affidavit, but he declined more than once so to do. In the circumstances, he cannot now be heard to complain about the failure to adjourn the application.

Conclusion

89. The trial judge was presented with overwhelming evidence that the appellant insisted that the respondent, its solicitors and counsel, had perpetrated and were perpetrating a fraud. On the basis of his conclusion that this was so, he had posted, and intended to further post online, posts, videos and images alleging fraud and calling for the arrest of the persons he identified as being responsible, including organising a posse to effect a citizen's arrest of the persons he accused of fraud. He posted instructional videos advising viewers how to respond to claims for possession of their homes based, *inter alia*, on documents he wrongfully seized from the offices of the respondent.

90. The appellant was entitled to do none of these things. He refused to substantiate his claims of fraud. He insisted on his entitlement to post the material online which was clearly gravely damaging to the respondent, its officers, employees, solicitors and counsel, and potentially could give rise to dangerous developments at attempted arrests. He denied that he was acting in breach of the permanent injunction of 10 September 2018, prohibiting him from assisting or advising people engaged in litigation in the state, while simultaneously insisting on his right to advise people how to resist claims to repossess their homes.

91. In the circumstances, the trial judge was entitled, in the exercise of her discretion, to grant the reliefs sought by the respondent. For these reasons, I would refuse the appeal.

92. As this judgment is being delivered electronically, it is the practice to give a provisional view on the costs of the appeal, subject to any application as to costs which may be brought. My provisional view is that the appeal has been refused in its entirety and thus, the respondent has been completely successful on the appeal. The provisions of s. 169 of the Legal Services Regulation Act 2015 and Order 99 of the Rules of the Superior Courts apply and, in my judgment, there are no reasons to depart from the normal rule that costs follow the event. If any party wishes to contend otherwise, the party should contact the Office of the Court of Appeal to request a short oral hearing on the costs, though any party who requests such a hearing which results in an order in line with that indicated provisionally, may incur the further costs of such a hearing.

93. Binchy and Pilkington JJ. have indicated their agreement with this judgment and order I propose in advance of delivery.