THE COURT OF APPEAL

UNAPPROVED
REDACTED

Neutral Citation Number [2021] IECA 53
Appeal Number: 2019/475

Whelan J.
Faherty J.
Collins J.

BETWEEN/

SHAWL PROPERTY INVESTMENTS LIMITED

RESPONDENT

- AND –

A. AND B.

APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 19th day of February 2021

1. This is an appeal from an order of Allen J. made on 16 October 2019 and perfected on 25 October 2019 granting summary judgment in plenary proceedings and, *inter alia*, declaring that the appellants had no estate, right, title or interest in two properties and further dismissing the counterclaim pursuant to O. 19, r. 28 of the Rules of the Superior Courts ("RSC"). The reasoned judgment was delivered on 1 October 2019. Before considering the said judgment and orders, it is necessary to briefly review the salient background facts.

Key material facts

2. By letter of loan offer dated 20 October 2005 EBS Building Society ("EBS") offered to advance to A. a loan of up to €8,318,000 over 25 years for the purposes of the acquisition by him of eight investment properties. The proceedings concern two of the said properties. On 16

November 2005 A. accepted the said offer and drew down the entire sum of the funds on 13 December 2005. An express term of the agreement between EBS and A. confirmed that EBS would hold a first legal mortgage over each of the eight properties. Consequently on 6 January 2006 A. executed a deed of mortgage and charge over, *inter alia,* a property referred to hereinafter as "Blackacre". On 10 January 2006 A. executed a further deed of mortgage and charge over, *inter alia*, a property hereinafter referred to as "Whiteacre".

3. A. failed to discharge his liabilities on foot of the said respective mortgages.

4. On 29 October 2009 EBS obtained an order in the High Court against A. for possession of, *inter alia,* Blackacre and Whiteacre.

5. EBS did not proceed to execute the order for possession but instead on 26 May 2010 appointed a receiver over the said properties including Blackacre and Whiteacre.

6. Meanwhile, on 9 September 2013, EBS marked judgment in the Central Office of the High Court against A. in the sum of €9,433,173.79.

7. From the date of his appointment on or about 26 May 2010, the receiver took possession of the properties, managed same and collected the rents and profits in accordance with the tenor of his appointment and of the said respective security instruments. He put the properties on the market in or about the month of March 2014. There was significant litigation as between the receiver and the appellants between 2014 and 2018, as hereinafter set out.

8. On 4 April 2017 A. was adjudicated a bankrupt. On 29 April 2017 A. brought an application to show cause against his adjudication which application was dismissed by order of the High Court (Costello J.) on 17 July 2017. He was discharged from bankruptcy on 4 April 2018.

9. Under and by virtue of a deed of conveyance and assignment bearing date 30 June 2017 EBS DAC (as by then it had become) effected a transfer and disposition of A.'s loan together with the securities held for same to Beltany Property Finance DAC ("Beltany").

10. On 10 September 2018 Beltany, in pursuance of the exercise of its power of sale as specified in the mortgage instruments aforesaid, sold the properties Blackacre and Whiteacre to Shawl Property Investments Limited ("Shawl"), the respondent. Shawl went into possession of Blackacre and Whiteacre on 11 September 2018. Memorials in respect of the said assurances to Shawl were duly registered in the Registry of Deeds in accordance with the Registration of Deeds Act (Ireland) 1707.

11. B. is a former partner of A. They were never married to one another. She was not a party to any of the relevant mortgages referred to above and never held any legal interest in any of the properties.

The 2014 litigation

12. On 29 April 2014 the receiver instituted proceedings before the High Court against A., B. and a third entity. Relevant to Blackacre and Whiteacre the said proceedings sought, *inter alia,* orders requiring the appellants to vacate the said premises and restraining them from entering upon, attending at or otherwise interfering with the receivership. The reliefs sought also extended to other properties which are not material to this appeal.

The 2015 judgment

13. A redacted judgment of Donnelly J. delivered on 27 April 2015, [2015] IEHC 366 ("the 2015 judgment"), provided, *inter alia*, with particular reference to the claims of the appellant, B., as follows:-

> "42. Shortly before the hearing commenced, [B.] swore another affidavit on the 17th November, 2014. In this affidavit, apart from exhibiting various loan offers, [B.] again asserted matters that were more properly the subject matter of submissions and these are dealt with in the course of this judgment. [B.] also exhibited and referred to various Registry of Deed search results in which she said that numerous loans had not been vacated. She also said that the schedule of documents listed to support the certificates

of title sent by the solicitors in these proceedings did not contain deeds of release or vacates in relation to those loans. She said that this was a breach of contract by the EBS and was a clear breach of the law.

43. In that affidavit, she also made a counterclaim insofar as she claimed an order setting aside the plaintiff as receiver, an order restraining the plaintiff, his servants or agents from entering, attending or trespassing on or near the eight properties, a further order restraining the plaintiff, his servants or agents from receiving rent for the eight properties, an order preventing the EBS appointing further receivers and an order instructing the EBS and the defendants to engage in mediation to find an equitable solution to the problems set out.

44. In light of the above, the court views [B.'s] case as based upon two main planks. In the first place, she said that when taken together the loan offers and mortgage deeds are so full of errors (factual and legal), so flawed and/or so self-contradictory that they are null and void and/or cannot be relied upon to give legal justification to the appointment of the plaintiff as receiver. Her other argument is that she had a beneficial interest in these properties that takes priority over any interest that the EBS might have."

This latter contention represents the continuing stance of B. notwithstanding the clear import of the 2015 judgment and orders as upheld on appeal and set out below.

14. The redacted judgment provided as follows: –

"<u>The beneficial interest</u>

The family law proceedings

66. Under this heading, [B.'s] claim amounts to one that, arising from the outcome of the family law proceedings, she had a beneficial interest in the property. This is a claim that her right to possession is independent of the right to possession of [A.]. It is that

independent claim which requires the court to deal with it, despite the findings made above.

67. Family law matters were settled between [A.] and [B.]. On the 11th March, 2008, as part of the settlement agreement, the Circuit Court received and filed the terms of the consent. The court also made the orders where applicable set out in the terms of the consent. Insofar as it is relevant, [A.] transferred to [B.] a joint legal and beneficial interest in the property situate at [redacted] (the ninth premises) so that they would hold it as joint tenants free from encumbrances."

The redacted judgment further noted at para. 68 that additional terms of agreement were subsequently drawn up between A. and B. and purportedly dated 2 June 2008.

15. In the conclusions to the 2015 judgment Donnelly J. observed in relation to the counterclaims contended for by B.:-

"150. [B.] has made many and varied submissions as to why the plaintiff is not entitled to the orders he seeks. This entailed an attack on the validity of the mortgages under which he was appointed as well as a claim of entitlement to possession herself. I have dealt with and rejected each and every argument put forward by [B.]. I therefore propose to make the final orders as sought by the plaintiff in relation to [B.].

151. For the reasons set out in this judgment, it follows that the counterclaims of [B.] are dismissed."

16. With regard to A., the original sole mortgagor in respect of both mortgages, it appears that he did not attend court for the hearing of the 2014 proceedings – a pattern of behaviour replicated at the hearing of this appeal. The 2015 judgment records as follows: -

"152. In relation to [A.], I sought and was given further submissions regarding the position as to final orders against him in circumstances where the plaintiff moved by way of notice of motion. In this case, [A.] sent to the plaintiff a number of e-mails

which he asked to be placed before the court. In his first email of the 4th April, 2014 he indicated he had no hand, act or part in interfering with the receivership. In his second e-mail of 6th May, 2014, he again stated that he had in no way obstructed the receivership and indicated that in his view that the matter was 'dealt with over four years ago through my acting solicitor…'. In his third e-mail dated the 15th May, 2014, he repeated similar sentiments and went on to say 'I feel I am being harassed and drawn into another legal battle'. He acknowledged that 'Grant Thornton were appointed by the bank EBS' and goes on to say that he will delete his e-mail account if he is contacted further.

153. It appears that at one point when this matter was before the High Court, [B.] was asked to confirm if [A.] had attended with her to inspect the mortgage at the relevant offices and she confirmed he was present.

154. It is submitted that [A.] was fully on notice of the nature of the case to be made and decided not to participate in the proceedings. It goes without saying that the motion had been served on [A.].

155. [A.] has expressed his concern at being dragged into these proceedings. He was aware of what was at stake in the proceedings. It is also the case that any costs in the proceedings are ultimately borne by him subject to any order for costs against another defendant. Any surplus that might be in the receivership would be diminished by the costs of a full hearing.

156. I am of the view that I have an inherent jurisdiction to treat the hearing as the full final hearing of the matters as I have outlined. It appears that it is just and equitable to treat this hearing as the final hearing in particular in light of the e-mails from [A.] indicating he did not wish to engage in these proceedings. Furthermore, the cost of any adjournment, further pleadings and further rehearing would fall ultimately on [A.] in

light of the very clear conclusions I have made in this case. It is also the position that the orders I make against [B.] would extend to all persons having notice of that order. Such an order would include [A.] when notice is given. Those orders achieve possession by the plaintiff and should end all further obstruction with the receivership. In those circumstances, I will make the final orders against [A.] as well."

17. Paragraph 46 of the 2015 judgment of Donnelly J. was relied on by B. extensively in the course of the hearing of this appeal. It is considered in detail later.

Order of 15 May 2015

18. The face of the order made by Donnelly J. on 15 May 2015 and perfected on 5 June 2015 records that counsel for the receiver informed the court "that he now seeks final orders of the court…". With regard to B. the order recited as follows: "…the second named defendant informing the court that she consents to the within application before the court being an application that will lead to a final order". The said order provided that:-

> "[A.] and [B.] their servants or agents and all other persons having notice of the making of this order do vacate the first premises and the second premises as set out in the schedule hereto and do deliver possession thereof to the plaintiff."

19. The order further provided as follows:-

> "3. [A.] and [B.] their servants or agents and all other persons having notice of the making of this order be restrained from entering or attending at any of the eight premises set out in the schedule hereto or dealing with the said premises in any manner whatsoever or purporting to deal with the said premises in any manner whatsoever."

Whiteacre and Blackacre represent the first and second of the eight premises identified in the schedule to the order.

20. The order continued: –

"4. [A.] and [B.] their servants or agents and all other persons having notice of the making of this order be restrained from interfering with the sale of the first premises or the second premises by the plaintiff or otherwise interfering with the receivership of the plaintiff in respect of any of the premises."

21. The court further directed as follows: –

"5. [A.] and [B.] do account to the plaintiff for all monies received by [A.] and [B.] their servants or agents by way of purported collection of rent in respect of any of the eight premises set out in the schedule hereto."

A declaration was granted "that the appointment of the plaintiff as receiver of the eight premises in the schedule hereto is valid". It further provided: "It is ordered that the counterclaims of [B.] be and are hereby dismissed".

Appeal of 2015 Order

22. Following perfection of the order of Donnelly J. on 5 June 2015, B. appealed against the said order. The said appeal was dismissed by the Court of Appeal on 9 February 2017. A. also brought an application to the Court of Appeal seeking an extension of time within which to file a notice of appeal against the judgment and orders of Donnelly J. aforesaid. The said application, however, was withdrawn on 20 March 2017.

Committal of B. for contempt

23. A. and B. failed to comply with the orders of Donnelly J. as upheld on appeal and which had *inter alia* dismissed the counterclaims of B. On 4 May 2018, by order of Baker J. in the High Court, B. was committed to prison for contempt where she remained for about three and a half months. B. appealed against the said order. On 17 May 2018 the Court of Appeal refused an application for a stay on the said High Court order pending an appeal by B. An expedited hearing of the said appeal took place in the Court of Appeal on 12 June 2018. The appeal was dismissed on 21 June 2018.

24. On 27 August 2018 B. gave notice that she wished to purge her contempt and at a hearing on 28 August 2018 she undertook to the High Court to vacate the premises, including *inter alia* Blackacre and Whiteacre, and not to interfere directly or indirectly with any of the eight identified properties. She was thereupon discharged from custody. Within three weeks of B.'s release from custody a "Deed of Trust" was created by A. appointing a third party as trustee and purporting to vest the properties in same for the benefit of the two children of A. and B.

December 2018 to January 2019

25. Subsequent disturbing events which precipitated the institution of the within proceedings are succinctly outlined by the trial judge in the judgment under appeal herein as follows: -

> "21. Late in the morning of 2nd December, 2018, a group of five men and one woman broke into the house at [Blackacre] and changed the locks. The woman claimed to be the owner of the house by virtue of a purported transfer to her by The [X] Family Trust, for the benefit of the [A.]'s teenage daughters. The intruders were on that occasion put out by the Gardaí.
>
> 22. At about the same time on the same day, a group of about eight men led by [A.] broke into the house at [Whiteacre]. Later that afternoon, the intruders were put out by the Gardaí.
>
> 23. On the morning of Monday 28th January, 2019 [A.], this time accompanied by about six men, again broke into the house at [Blackacre] and again changed the locks. Later in the morning [B.] arrived, and in the afternoon the defendants were joined by their daughters. The Gardaí were again called, but on this occasion [A.] claimed that he was the owner of the building and would not leave.
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> 24. On 30th January, 2019 the High Court (Reynolds J.) made an interim order restraining the defendants from trespassing on either of the properties or from interfering with or obstructing the plaintiff's possession and gave liberty to the plaintiff

to issue and serve a motion for interlocutory orders, returnable for 1st February. On the return date, the defendants (who had left the property upon service on them of the order of 30th January) gave sworn undertakings to abide the order of 30th January, and on 8th February, 2019, consented to interlocutory orders, which were then made by Reynolds J."

Events at the hearing of the said interim and interlocutory applications and particularly whether the respondent breached B.'s data, privacy rights and the *in camera* rule were central to this appeal.

26. A disturbing campaign of harassment and intimidation ensued, in the course of which B. along with A. attended at the offices of the employers of the two individual directors of the respondent company and made false and defamatory statements concerning each of them. Additionally, A. wrote letters to the employers of the two company directors making further false and defamatory statements, which statements included a baseless and false allegation that there were acts of paedophilia taking place at Blackacre and Whiteacre.

27. It transpired that, less than three weeks after B. had purged her contempt and been released from custody, A. had purported to create a "trust deed" on 17 September 2018 purporting to grant to a named trustee the properties for the benefit of the two children of A. and B. Memorials of the said sham instrument were registered against the properties.

28. Thus, approximately five months after purging her contempt of court, having spent several months in custody, B. actively participated in a scheme calculated to defy court orders and unlawfully seized possession and occupied Blackacre, driving out the owners and lawful occupants in the process. It was against such a background that Shawl was precipitated into court on 30 January 2019 and was granted interim orders restraining A. and B. until after Friday 1 February 2019 from causing damage to any portion of the said properties and directing that

A. and B. immediately surrender possession and control of the properties including Blackacre and Whiteacre to the respondent. Further, orders were made restraining A. and B. from:

(a) actually or implicitly harassing, threatening, intimidating or abusing the officers, shareholders, servants or agents of the respondent company;

(b) making or causing to be made to any person, whether orally or in writing, by any medium whatsoever, any statement which is designed to provoke violence, harassment, threats, intimidation or abuse of the officers, shareholders, servants or agents of the respondent;

(e) impeding and/or obstructing the respondent, its servants or agents in their efforts to take possession of the property;

(f) impeding or obstructing the respondent, its servants or agents in their efforts to secure the property; and,

(g) trespassing or entering upon or otherwise interfering with any portion of the properties without the prior written consent of the respondent.

As is clear from the affidavit evidence that was before the High Court, B. was an active participant in the enterprise of breaking into Blackacre and the eviction of the lawful occupants in the property. Access to the dwelling was only recovered on foot of court orders on Friday 1 February 2019.

29. It was not disputed by B. at the hearing of this appeal that she has studied law. Whether that be so or not, it must have been self-evident to her at all material times that a so-called "deed of trust" created on 17 September 2018 by A. purporting to create rights over the properties for the benefit of the children of A. and B. was of no legal effect whatsoever and was a sham and a legal fiction. Notwithstanding that fact, it is clear from the affidavits and the determinations of the High Court judge that she was an active participant in a campaign of serious intimidation which included taking to the internet and using various platforms to spread

and disseminate false and defamatory statements, in particular about two individuals who are directors of the respondent company. The baseless allegations extended to claims that the properties Blackacre and Whiteacre were the locus for paedophilia. Significant damage and waste was caused to the properties including in the case of Blackacre €9,780 worth of damage. €5,000 in cash was removed from the property.

30. On 8 March 2019 Reynolds J. made an order by consent for the exchange of pleadings between the parties.

Statement of Claim

31. A statement of claim delivered on 12 April 2019 pleaded that Shawl was the full legal and beneficial owner of the properties Blackacre and Whiteacre which it had purchased from Beltany on 10 September 2018. Echoing affidavits sworn by the directors of the company, it pleaded that Shawl, its servants and/or agents had been the subject of an orchestrated and malicious campaign of unlawful conduct "which has been organised, endorsed, facilitated and/executed by both of the defendants." Amongst the particulars pleaded as constituent elements of the alleged campaign was the following: -

> "(a) On 17 September, 2018, [A.] purported to create a deed of trust pursuant to which the properties were transferred to [X.] in trust, which said deed of trust was then registered with the Property Registration Authority on 22 November, 2018;
>
> (b) On 23 November, 2018, [A.] wrote to An Garda Síochána making a false claim of title to both of the properties".

The statement of claim then graphically particularises forcible entry by A. and B. into the dwellings Blackacre and Whiteacre. It continues:-

> "(f) On 6 December, 2018, [A.] sent an email to the solicitors for the plaintiff making a false claim of title to the properties and making a baseless threat to complain the solicitors for the plaintiff to the Law Society of Ireland".

32. Sundry other acts alleged and pleaded to constitute defamatory statements, intimidation, threats, assault, abuse, damage to the properties and to goods and chattels therein contained are pleaded in detail.

The defence and counterclaim

33. On 23 May 2019 a defence and counterclaim, including a preliminary objection, was delivered on behalf of A. and B. by solicitors retained by them. Same was settled by counsel. Paragraph 3 of the defence pleads:-

> "…[B.] was not a party to the loan facilities and mortgages as defined below."

It was further pleaded at para. 4: –

> "The defendants are formed [*sic*] life partners…"

With regard to the 2015 judgment of Donnelly J. and ensuing orders, it is pleaded as follows:-

> "13. Donnelly J. delivered Judgment on 27 April 2015 and granted various final orders against the Defendants.
>
> 14. Said judgment was to be redacted in parts in relation to certain family law matters, as well as in respect of the identity of the parties, the record number and the addresses of the properties referenced therein."

34. The defence sets up various propositions and contentions diametrically at variance with the 2015 orders of Donnelly J. aforesaid. At para. 22 it is pleaded on behalf of A. that he "seeks a declaration in the within proceedings that he remains the legal and beneficial owner of the properties herein." It is pleaded that a valid transfer to Beltany of the loan facility and mortgages did not occur on 30 June 2017. Albeit that Beltany is not a party to the proceedings, matters are alleged against Beltany including: -

> "26. …it was at all material times represented by Beltany, and/or their servants or agents, that the sums under the loan facilities remained outstanding and that they would accept the sum of €1.5 million (each) for the properties."

A wide variety of arguments and propositions are developed in the defence whereby it is sought to impugn Shawl's title and the validity of the indentures of conveyance of 10 September 2018 whereby title to Blackacre and Whiteacre came to vest in Shawl: -

> "39. In light of the matters aforesaid, it is denied that the plaintiff lawfully acquired the properties from Beltany on 10 September 2018 or was entitled to be registered as owner of the properties in the Registry of Deeds…"

35. The defence and counterclaim appears very faithfully to accord with B.'s own contentions and assertions regarding the properties in question throughout the relevant time. Amongst the groundless assertions pleaded was that, since A. had been adjudicated a bankrupt in April 2017, the adjudication had effectively extinguished the loan facilities over the properties in question. The pleadings in and of themselves amount to an extensive and detailed slander of the respondent's title. It was denied that Beltany was entitled to sell as mortgagee in possession. Whilst the defence denies that A. and/or B. orchestrated, endorsed, facilitated and/or executed a malicious campaign of unlawful conduct against the respondent, the defence goes on to admit that the locks were changed, that the intruder system was immobilised, that the CCTV systems at the properties were immobilised and that the personal effects of one of the directors of the respondent company had been placed into a motor vehicle at Blackacre.

36. In light of the events which have transpired and the circumscribed ambit of the appeal presented by B., of particular note are paras. 63 to 65 inclusive of the counterclaim which plead as follows: -

> "63. As part of said application for such reliefs, the plaintiff exhibited an unredacted copy of the judgment of Donnelly J. delivered on 27 April 2015 and marked:
>
> 'Do not publish on website'.

64. The plaintiff, and/or its servants or agents, did not, or have not, set out the basis on which such a private and confidential judgment was obtained by the plaintiff and/or their legal advisors.

65. Said disclosure represents a clear breach of the defendants' right to privacy and/or the Data Protection Act 2018 and/or contempt of this Honourable Court."

37. The reliefs counterclaimed for included, *inter alia*: -

"6. Damages for breach of privacy and/or the Data Protection Act 2018;

7. Aggravated and exemplary damages".

Reply and defence to counterclaim

38. The reply and defence to counterclaim was delivered on 6 June 2019. In light of the 2014 litigation and 2015 judgment and orders it invokes the doctrine of *res judicata*, the rule in *Henderson v. Henderson* (1843) 3 Hare 100 and the doctrine of issue estoppel insofar as A. and B. purported to dispute that Shawl was the full legal and beneficial owner of the properties.

39. Paragraph 16 pleads as follows: -

"With reference to paragraphs 63 to 65 of the defence and counterclaim, the plaintiff pleads as follows: -

(a) It is denied that the judgment of the High Court (Ms. Justice Donnelly) dated 27 April 2015 (the '2015 judgment') was *'private and confidential'*, whether in the manner pleaded or at all;

(b) It is denied that the concept of a *'private and confidential'* judgment of the High Court is known to the law in Ireland;

(c) It is pleaded that the 2015 judgment is, and at all times having materiality to these proceedings has been, a public document;

(d) It is denied that there was anything unlawful or improper in the reliance placed by the plaintiff on the terms of the 2015 judgment in the context of the application for the interim order and/or the application for the interlocutory order;

(e) It is pleaded that the defendants are estopped and/or otherwise prohibited from seeking to challenge the reliance placed by the plaintiff on the terms of the 2015 judgment in the context of the application for the interlocutory order;

(f) In support of the foregoing plea, the plaintiff shall rely upon the failure on the part of the defendants to raise any objection to the reliance placed by the plaintiff on the terms of the 2015 judgment in the context of the application for the interlocutory order;

(g) It is denied that the plaintiff, its servants and/or agents are guilty of any breach of the defendants' right to privacy and/or the data protection rights of the defendants, whether in the manner pleaded or at all; and

(h) It is denied that the plaintiff, its servants and/or agents have acted in contempt of the High Court, whether in the manner pleaded or at all."

Motion

40. A notice of motion was issued by Shawl seeking summary judgment on its claims for declaratory and injunctive reliefs alone. The approach adopted by Shawl was that, were the High Court disposed to grant the said relief and to make an order for costs, it would abandon its claim for damages.

Judgment appealed against

41. In his detailed judgment delivered on 1 October 2019, the trial judge reviewed the history of the loans and the course of dealings between the parties and Shawl's predecessors in title. The court considered the salient elements of the pleadings between the parties. The court observed at para. 31 that Shawl sought summary judgment on its claims for declaratory and

injunctive relief. He noted that Shawl acknowledged that an application for summary judgment other than in respect of a claim for a debt or liquidated sum is unusual but had contended that the court had jurisdiction to grant summary judgment based on the authority of *Abbey International Finance Ltd. v. Point Ireland Helicopters Ltd.* [2012] IEHC 374. The court noted that in reaching his conclusions in *Abbey International*, Kelly J. (as he then was) had relied on the inherent jurisdiction of the High Court and the specific rules applicable in cases transferred to the Commercial List in that court. He observed that Kelly J. had placed reliance on the judgment of Costello J. (as he then was) in *Barry v. Buckley* [1981] I.R. 306, the observations of McCarthy J. in *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425 and the judgment of Geoghegan J. in *Dome Telecom Ltd. v. Eircom Ltd.* [2007] IESC 59, [2008] 2 I.R. 726:-

> "…in which Geoghegan J. held that in modern times, the courts are not necessarily hidebound by the interpretation of a particular rule of court and if there is no rule in existence, precisely covering a situation calling for efficient case management and fair procedures, the court has an inherent power to fashion its own procedure." (para. 35)

He noted the arguments advanced on behalf of the appellants by their counsel including that *Abbey International* was a case that had been admitted into the Commercial List: -

> "…So it was, and Kelly J. found jurisdiction in the Commercial List Rules to deal with the plaintiff's claims summarily: but he expressed that finding to be quite apart from the inherent jurisdiction which he had already found.
>
> 38. It was further argued that because the court in *Abbey International* gave summary judgment only for the liquidated sum, and not for specific delivery of the helicopters, that what was said about the jurisdiction to summarily determine other claims was *obiter*. However, while the note of the judgment shows that the court did not give summary judgment on the claim for specific delivery, it did give conditional leave to

defend: which was plainly an exercise of the jurisdiction which the court had found to exist."

42. The court then (para. 39 *et seq.*) considered the test applicable on applications for summary judgment including *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607 together with the subsequent jurisprudence which refined the principles enunciated therein including *I.B.R.C. Ltd. v. McCaughey* [2014] IESC 44, [2014] 1 I.R. 749; *McGrath v. O'Driscoll* [2006] IEHC 195, [2007] 1 I.L.R.M. 203, and *Danske Bank a/s (t/a National Irish Bank) v. Durkan New Homes* [2010] IESC 22. He then proceeded to apply the legal principles in question to the facts before him.

43. Regarding the contention that the adjudication of A. as a bankrupt on 4 April 2017 "extinguished the loan facilities", the trial judge determined at para. 44 of the judgment that, "that is just silly". The assertion that certain alleged non-disclosures on the part of EBS when A. moved an application in 2017 to show cause against his bankruptcy entitled him to a declaration that he remained the legal and beneficial owner of the properties in question, and that that omission effectively invalidated the transfer by EBS to Beltany of the loans on 30 June 2017 was disposed of at para. 46 as follows: "That is a mere assertion for which no sensible basis was advanced". An alternative contention that A.'s bankruptcy extinguished the loan facilities such that there was nothing for EBS to transfer to Beltany on 30 June 2017 was likewise rejected by the trial judge (para. 47).

44. To the second issue arising before the trial judge, namely whether A. and/or B. had established an equitable interest in the property or that the principle of estoppel was engaged, the trial judge concluded at para. 49:-

> "Being as charitable as I can, this is nonsense. Assuming, as I must for present purposes, that the defendants could establish that Beltany said that it would accept €1.5 million for each of the properties, the defendants do not allege that they agreed to pay it. …What

> [A.] says in his replying affidavit on this motion is that there were funds available, after his discharge from bankruptcy, to buy back 'the properties held by Beltany' – therefore all of the properties – and to 'discharge him from all liabilities with Beltany'. Again, there is no suggestion that any money was ever offered to Beltany or that Beltany ever agreed to anything."

He concluded at para. 51: –

> "In my firm view the proposition that the naming of an asking price to a would-be purchaser might give rise to an estoppel preventing the owner of a property from selling it to anyone else is ridiculous. *A fortiori* the proposition that an expression of interest in a property coupled with an attempt to raise the purchase price might give rise to an equitable interest in property is hair raising."

45. In response to the contentions as pleaded and as argued on behalf of A. and B., that Beltany was not entitled to sell as mortgagee in possession, nor did it sell as such, and that on 10 September 2018 it was the receiver and not Beltany who was in possession of the properties, the trial judge reviewed the legislation including the provisions of the Land and Conveyancing Law Reform Act 2009, as amended by the Land and Conveyancing Law Reform Act 2013, concluding: -

> "56. The fundamental flaw in the defendants' argument is that the statutory power of sale is not conditional on a mortgagee being in possession. It is true that in the vast majority of cases the mortgagee will be in possession, and will, if necessary, get a court order to put him into possession but this is because of the difficulty of persuading anyone to buy while the mortgagor remains in possession.
>
> 57. The conveyance and assignment, in the case of [Blackacre], and the conveyance in the case of [Whiteacre], were both made in exercise of the powers vested in Beltany by virtue of the mortgages 'and every other power it enabling' and assured the properties

to the plaintiff freed and discharged from all right or equity of redemption and from all claims and demands under the mortgages. That is the end of the matter. Whether, as a matter of fact, Beltany was or was not in possession is irrelevant to the effectiveness of the assurances to give good title to the plaintiff."

46. With regard to the various issues concerning formalities surrounding the assurances, conveyances and assignment in question, the trial judge cited with approval the decision of Murphy J. in *English v. Promontoria (Aran) Ltd. (No. 2)* [2017] IEHC 322 where a mortgagor had raised issues concerning various redactions and issues concerning, *inter alia,* execution in connection with the sale and disposition by the mortgagee of its interest under certain securities. Murphy J. had observed:-

"…All of the issues raised by counsel for the plaintiff would be properly and validly raised if the plaintiff were a party to the deeds with an entitlement to challenge their efficacy, but he is not a party to the deeds. He is a third party whose only entitlement is to be shown that the stranger knocking on his door claiming possession has in fact acquired the interests of Ulster Bank Ireland Limited.

56. In this application, what the plaintiff has singularly failed to do is to engage properly with the evidence that is actually before the court."

47. The trial judge concluded at para. 63, "The plaintiff's title deeds, duly executed, stamped and registered, are before the court and are plainly regular on their face." The trial judge observed at para. 68, "…I am satisfied that the defendants have no interest in the properties the subject of these proceedings".

48. It had been contended, *inter alia*, by A. and B. that they had consented to the making of the interlocutory orders by Reynolds J. on 1 February 2019 "strictly on the basis that there would be a full trial of the action" (para. 72). The trial judge observed:-

"…It is true that the defendants, by their solicitors, in a letter written on 7th February, 2019 intimated that they would be consenting to the making of the interlocutory orders and asserted a right and wish for a full trial: but the plaintiff never agreed to that. In all the circumstances of the case, and particularly in view of the fact that no replying affidavit had been delivered in answer to the claim for interlocutory injunctions, the defendants' consent to the making of the orders was no great concession." (para. 72)

49. The court noted that Shawl had sought an order pursuant to O. 19, r. 28 and/or the inherent jurisdiction of the court striking out the counterclaim of A. and B. on the grounds, *inter alia*, that it disclosed no reasonable cause of action, was bound to fail, was frivolous and vexatious and an abuse of process. It was further contended that A. and B. were precluded from raising the issues pleaded in the counterclaim by reason of the doctrines of *res judicata* and issue estoppel together with the rule in *Henderson v. Henderson*. The trial judge considered in detail those respective jurisdictions, observing at para. 78:-

"…The need for caution and circumspection is a recurring theme in the authorities but this, it seems to me, is a black and white case. The plaintiff bought and paid for two houses. [A.] previously owned them but never paid for them. No amount of noise or smoke is going to change that."

50. The trial judge then turned to what came to be a central plank in the arguments of B. before this Court in the course of the appeal hearing. He noted at para. 79 that: -

"…as part of the application for interim and interlocutory relief, the plaintiff exhibited an unredacted copy of the judgment of Donnelly J. delivered on 27th April, 2015 which was marked 'Do not publish on website'. That disclosure, it is said, represents a clear breach of the defendants' right to privacy and/or the Data Protection Act, 2018 and/or contempt of court and is actionable in damages."

The trial judge noted at para. 80 that the action taken against A. and B. by the receiver in the 2014 proceedings "principally concerned the same properties as are the subject of these proceedings."

51. Regarding the 2014 proceedings and judgment of Donnelly J. he further observed at para. 80: -

> "…There were in that case two main planks to [B.]'s defence. The first was an argument that the loan documentation was so flawed that it could not be relied upon to justify the appointment of the receiver. The second was an argument that a settlement made between the defendants in family law proceedings had given rise to a beneficial interest in the property for [B.], which took priority over the interest of EBS. Both arguments were rejected by the High Court and the Court of Appeal. [B.] did not accept the judgment of Donnelly J. and spent nearly four months in Mountjoy Prison before purging her contempt."

52. At paras. 81 and 82 of the judgment the trial judge noted, regarding B.'s conduct: -

> "On 28th January, 2019 the plaintiff was confronted with a situation in which a person who until five months previously had steadfastly refused to accept the authority of the High Court, had that day gone back into one of the houses. The plaintiff, presumably, was advised that there was no conceivable justification for the occupation but (unless perhaps by reference to a cock and bull story about a settlement by The [X] Family Trust, which, in the event, did not resurface) could not even guess what excuse might be offered. The plaintiff, in applying *ex parte* to the High Court for interim orders was bound by a duty of full disclosure, which included a duty to disclose the fact and outcome of the previous action against the same defendants in respect of the same properties.

The judgment of Donnelly J. records that some of the evidence and submissions in the receiver's case were heard *in camera* but that the judgment would necessarily refer to those matters. The judge noted that it would be necessary to redact the names of the parties and the properties so that, before publication, there should be as minimal as possible reference to the family law proceedings as would be consistent with the requirement to give reasons for the proper adjudication on the issues raised. The judgment records that Donnelly J. proposed to discuss the redaction of the judgment with the parties and it is available on the Courts Service website as *McCann v. A., B. and C.* [2015] IEHC 366. The names of the defendants have been anonymised and the addresses of the properties redacted."

53. With regard to how Shawl came to be in possession of a copy of the judgment of Donnelly J. of 27 April 2015 in unredacted form, the trial judge observed at para. 83: -

"There is no evidence before the court on this application as to how the plaintiff came to be in possession of the unredacted judgment and it is, perhaps, unsatisfactory that the plaintiff should have it: but the responsibility for the fact that the plaintiff has it lies with whomever it was gave it to the plaintiff, and not the plaintiff."

The trial judge concluded: –

"84. In any event the substance of the defendants' complaint of infringement of privacy is that the plaintiff exhibited an unredacted copy of the judgment. If the plaintiff had exhibited the redacted judgment, the affidavit would have had to explain that A. and B. were, respectively, the first and second defendants in this case, and that the first and second redacted properties were the houses at [Whiteacre] and [Blackacre]: which would have amounted to the same thing.

85. In my view there is no substance to the complaint in relation to the use by the plaintiff of the unredacted copy of the judgment and that the defendants' counterclaim for damages on this count is bound to fail."

54. Accordingly the trial judge concluded firstly, applying the test in *Abbey International Finance Ltd. v. Point Ireland Helicopters Ltd.*, that the defendants did not have an arguable defence:-

"…I take the defendants' case at its high-water mark but if Beltany was not in possession, that did not invalidate the sales. There is no issue of fact or nuanced question of law such as would warrant a trial of this action.

89. It is very clear that the defendants have no defence and there will be a declaration that they do not, nor do either of them, have any estate, right, title or interest in either of the properties. In addition, there will be a permanent injunction restraining the defendants their servants and agents and all other persons with notice of the making of the order from trespassing or entering upon or otherwise interfering with the properties…"

With regard to the counterclaim, the trial judge concluded: –

"90. Applying to the counterclaim the principles enunciated by Clarke J. in *Lopes v. Minister for Justice* [2014] IESC 21, [[2014] 2 I.R. 301] I find that even on the basis of the facts as pleaded, the counterclaim discloses no reasonable cause of action and is frivolous and vexatious and should be dismissed under O. 19, r. 28."

Notice of Appeal

55. By notice of appeal dated 21 November 2019, A. and B. appealed to this Court. The notice suggests that they were self-representing for the purposes of the appeal. The appeal was initially listed before this Court for directions on 17 January 2020.

56. Briefly put the grounds of appeal encompass the following issues:

(1) data breach arising from deployment of the unredacted 2015 judgment before the High Court;

(2) contempt of court in respect of the said judgment exhibited by the respondent;

(3) breach of the *in camera* rule arising from same;

(4) fair trial and due process and European Convention on Human Rights Article 6 rights; and,

(5) miscellaneous fair trial and due process and access to the courts.

These are considered hereafter to the extent actually argued at the appeal hearing.

57. The notice of appeal court form sought details including, in the event that an appellant is not legally represented, the current postal address of the appellants. A single address was provided. With regard to an email address, the email address of B. alone was provided together with a telephone number.

Submissions of B.

Alleged Data Breach

58. B. argued that in order to make its application for interim injunctions, Shawl delivered into open court her private data "gathered and acquired through unknown methods and from unknown third parties". She contended that the data was and is protected by data protection law currently in operation in the State on which she is entitled to rely in circumstances where her private data is being or was processed, used and shared by a third party without her permission and consent. She placed emphasis on the fact that the said data contained details of prior family law proceedings which had been conducted *in camera* "…and also details disclosed in two *in camera* hearings which occurred during the currency of private litigation between the defendants and a third party". Her contention was that private data was disclosed by the deployment of the 2015 unredacted judgment in the course of an *ex parte* application by Shawl for interim injunctions. She asserted that the 2014 litigation:-

"…had occurred prior to the purported purchase of the properties by the plaintiff and was disclosed to the court by the plaintiff without any regard for its *in camera* status by way of a breach of the strict liability rule of law, by way of data breach and by way of breach of constitutional rights of the defendants."

59. B. asserted that the respondent disclosed "the details of three separate *in camera* hearings" in its pleadings and in its evidence "without…having engaged in due process to legally access the data". She also alleged that in the course of the hearing the trial judge:-

"…rose and adjourned to his rooms while counsel for the plaintiff adjourned from the court attended by the registrar who appeared to conduct an *ex parte* exchange with the registrar."

B. asserted that: -

"On his return the judge disposed of the *in camera* status of some of the data and also disposed of the defendants' data protection rights and constitutional rights to privacy and allowed the plaintiff to continue. In doing so the court and the plaintiff engaged in conduct, which constituted an outright breach of the defendants' rights to the true effect of GDPR, Data Protection Act 2018, *in camera* law and their fundamental and constitutional rights".

B. contended that, as a result, the trial judge erred in conducting the hearing in breach of the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, hereinafter "GDPR"). She placed reliance upon Recitals 1, 4 and 7 together with Article 4(11). She posited that the conduct of the trial judge constituted "an outright breach of all of the fundamental rights the GDPR seeks to protect and the manner in which those rights ought to be protected." This assertion was strenuously denied by the respondent.

The *in camera* rule

60. B. took issue with the trial judge's determination at para. 83 of the judgement that responsibility for the fact that the respondent had possession of the unredacted judgment "lies with whomever it was gave it to the plaintiff." B. contended that the judge erred in law by disposing of "the strict liability of *in camera* law". In written submissions she contended that:-

> "The data contained details of *in camera* matters and on its face the judgment, which formed the source of this *in camera* information, informed any reader that the family law section of the judgment contained *in camera* detail."

She placed reliance on the decision of Birmingham J. (as he then was) in *Health Service Executive v. L.N.* [2012] IEHC 611, [2013] 4 I.R. 49.

61. B. contended: -

> "There is no doubt that when the plaintiff and the court was informed of the *in camera* nature of the content of the data it disclosed in open court, by counsel for the defendants who took the trouble to inform the court of the issue in circumstances where it appeared the court was unaware of the matter, that the conduct by the plaintiff that flowed from that moment was designed and calculated to interfere with the administration of justice, the rule of law and the fundamental rights of the defendants in the face of the court."

Thus, B. identified the point at which she contends the *in camera* rule was breached was when her counsel apprised the court in the course of the hearing that an aspect of the matter had been the subject of an *in camera* order. It was contended that the trial judge ought thereupon to have acted to "protect the defendant's rights at that moment". She asserted that:-

> "It makes no sense at all that in order to rectify a legal wrongdoing by one party a plaintiff may be permitted to break the law and engage in legal wrongdoing against the defendant."

62. However, Donnelly J., at the behest of B., had revisited her 2015 judgment on 4 March 2020 and her *ex tempore* determination of 5 March 2020 regarding the non-applicability of the *in camera* rule to it - which was raised by Shawl but not disclosed to this Court by B. - is considered below.

Fair trial and due process

63. B. further contended that when the respondent disclosed in open court and in its evidence certain *in camera* details pertaining to her, the respondent effectively had failed to comply with its obligations "which [require] third parties who wish access to and use of third party *in camera* details of court hearings to make necessary applications to the court of original jurisdiction and prove legitimate interest." B. contended that such a step ought to have been taken by the respondent in advance of acquiring, sharing and/or using *in camera* content. Allied to that assertion, it was contended that "the *in camera* evidence and pleadings contained in the plaintiff's books of pleadings" constituted illegally obtained evidence and a breach of the appellants' rights to a fair trial and to due process.

64. In relation to the argument that the material constituted illegally obtained evidence, reliance was placed on the Supreme Court decision in *The People (Director of Public Prosecutions) v. J.C.* [2015] IESC 31, [2017] 1 I.R. 417. The second appellant's contention was that the trial judge ought not to have allowed the respondent advance its claim in circumstances where an act of data breach had taken place. It was contended that the respondent had acted in contempt of the judgment of Donnelly J.

Language in the High Court judgment

65. In the notice of appeal, B. took issue with the "strong and passionate" words of criticism used in his judgment by the trial judge. She asserted that she was represented by a competent legal team at the hearing before the High Court:-

"It is fair and reasonable for a party to assume and expect their counsel will not proffer legal arguments that could be described as silly, hair raising, nonsense or cock and bull – all words used…".

66. Ultimately, B. contended that the High Court orders should be set aside arising from the alleged data and *in camera* breaches. No legal basis or authority was identified to support such an approach, however. A data infringement claim, as with the evolving misuse of private information or privacy-invasion tort, is deemed to be founded in tort. Even were all of the claims in that behalf as are advanced in the counterclaim to succeed, the remedy specified is "compensation" and no remedy could extend to conferring or vesting in B. any interest in either Blackacre or Whiteacre. The clear terms of s. 117 of the Data Protection Act 2018, as well as Article 82 of the GDPR and the basic tenets of the law of tort, make that clear.

Submissions of respondent

67. The respondent contended that the 2015 judgment was not delivered in *in camera* proceedings nor was it otherwise subject to the *in camera* rule. It was argued that the deployment of the 2015 judgment by Shawl in the within proceedings did not constitute a violation of the law of privacy or data protection law. Even had the 2015 judgment been subject to the *in camera* rule, its deployment by Shawl in the within proceedings would nonetheless have been permissible, it was contended.

68. Emphasis was placed on the fact that no timely objection whatsoever was taken by or on behalf of the appellants to the deployment of the 2015 judgment in the context of either:

(a) an earlier 2018 Court of Appeal hearing or;

(b) the hearing of the within application for the interlocutory order.

69. It was asserted that in a judgment delivered by the Court of Appeal in 2018 there was "open references to the identity of the parties and the identity of the properties":-

"That document has been in the public domain since 21 June 2018, without any attempt being made on the part of the appellants to suggest that it ought somehow to be suppressed."

70. It was argued that the 2015 judgment was a public document and its terms were not rendered confidential to the appellants by any court order or legal principle. It was asserted that it would have been "fundamentally improper" to conceal the findings contained in the 2015 judgment from the trial judge.

71. The respondent asserted that "[t]he mere fact that the 2015 judgment contains personal information concerning the appellants does not render its dissemination by any party a breach of their data protection rights."

72. The respondent invoked the provisions of the Data Protection Act 2018 and the GDPR and relied on s. 160 of the 2018 Act to assert that the cause of action suggested by the appellants simply does not exist as a matter of data protection law.

73. With regard to the comments of the trial judge as embodied in the judgment, the respondent contended that there is no legal principle prohibiting the judiciary from criticising claims or arguments which are devoid of merit, even in colourful or castigating terms. It was asserted that the comments of the trial judge to which the appellants object "were not only permissible, but also warranted."

Discussion

74. By way of preliminary observation, it is clear from a review of the notice of appeal and the written and oral arguments advanced on behalf of the appellants that, apart from GDPR/ privacy and contempt*/in camera* issues, B. has not in any substantive or meaningful way engaged with the determinations and orders of the trial judge regarding the defence delivered on her behalf to the statement of claim nor with the preponderance of the matters pleaded in the counterclaim.

Abbey International

75. The contention of the respondent, which was accepted by the trial judge, that the High Court enjoys an inherent jurisdiction to grant orders for summary judgment in plenary proceedings based on the *Abbey International Finance Ltd. v. Point Ireland Helicopters Ltd.* jurisprudence was not the subject of any meaningful dispute or argument by B. in the course of this appeal. In the circumstances and where the issue was not argued at all before the court, I am prepared to accept, for the purposes of this appeal, that such a jurisdiction is vested in the High Court. It will be for the courts on another day, should the issue be fully argued and its implications cogently stress-tested, to fully evaluate the nature, extent and scope of any such jurisdiction.

Order 19, r. 28

76. This Court in *ACC Bank plc v. Cunniffe* [2017] IECA 261 considered the distinction between O. 19, r. 28 and the inherent jurisdiction thus:-

> "83. Order 19, r. 28 provides that a Court may order a pleading to be struck out on the grounds that 'it discloses no reasonable cause of action' and in any case where the action is shown by the pleadings to be 'frivolous or vexatious' the court may order that the action be stayed or dismissed or that judgment may be entered accordingly. The Supreme Court in the case of [*Aer Rianta c.p.t. v. Ryanair Ltd.*] held that on the plain meaning of the words of O. 19, r. 28 the rule applied to a pleading in its entirety. Therefore, a court had jurisdiction under the rule to strike out an entire pleading but not a portion thereof. This interpretation, based on a construction of the plain meaning of the words of r. 28, was both internally consistent and also externally consistent with O. 19, r. 27 dealing with 'any matter in any endorsement or pleading' and the definition of a 'pleading' in O. 125, r. 1. Denham J., in delivering judgment for the Supreme Court, stated that:-

‘12. The jurisdiction under O. 19, r. 28 to strike out pleadings is one a court is slow to exercise. A court will exercise caution in utilising this jurisdiction. However, if a court is convinced that a claim will fail such pleadings will be struck out.’

84. In coming to a determination on an application grounded on Order 19 r. 28, the court is confined to the statement of claim as actually pleaded. Affidavits and other matters before the court ought to be disregarded. In [*McCabe v. Harding Investments Ltd.* [1984] I.L.R.M. 105], O’Higgins C.J. emphasised that in order to meet the threshold under the rule ‘vexation or frivolity must appear from the pleadings alone’.”

Inherent jurisdiction

77. The alternative relief sought by Shawl was that the defence and counterclaim be struck out pursuant to the inherent jurisdiction of the court. In *ACC Bank plc v. Cunniffe* this Court considered the distinction between the two procedural applications:-

“86. …In *Barry v. Buckley* [1981] I.R. 306 at 308, Costello J. stated:-

‘But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see Wylie's Judicature Acts (1906) at pp. 34-37 and The Supreme Court Practice (1979) at para. 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; *per* Buckley L.J. in *Goodson v. Grierson* [1908] 1 K.B. 761 at p. 765.

> This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant.'

In contrast with the position when an application is brought relying on Ord. 19 r. 28 alone, in considering whether or not to strike out a statement of claim in the exercise of the court's inherent jurisdiction, the court is entitled to engage in some analysis of the facts. Cases such as Clarke J. in *Salthill Properties Ltd. v. Royal Bank of Scotland* [2009] IEHC 207 and *Sun Fat Chan v. Osseous* [1992] 1 I.R. 425 confirm that approach to be correct."

78. O'Donnell J. in *Nowak v. Data Protection Commissioner* [2016] IESC 18, [2016] 2 I.R. 585 observed at para. 14:-

> "…When used appropriately, the power to dismiss proceedings *in limine* saves court time, avoids delay, and, just as importantly, prevents the court process and the inevitable delays involved therein from being used merely to bring pressure to bear on the other party, and thus become a bargaining counter in negotiations. Of course, such a determination is a decision which can be appealed.
>
> [15] While Costello J. in *Barry v. Buckley* [1981] I.R. 306 was careful to distinguish between cases which were bound to fail and those which were otherwise 'frivolous and vexatious', that distinction, and the distinction between the jurisdiction provided by O. 19 r. 28 of the Rules of the Superior Courts 1986 and the inherent jurisdiction have become blurred. Thus, it has come to be said that a case which cannot succeed in law

is one which is frivolous and vexatious. The position was put perhaps most elegantly in the *ex tempore* judgment of the Supreme Court in *Farley v. Ireland* (Unreported, Supreme Court, 1 May 1997), at pp. 2 and 3, delivered by Barron J. and quoted by the appellant in para. 19 of his submissions:

> 'So far as the legality of the matter is concerned, frivolous and vexatious are legal terms, they are not pejorative in any sense or possibly in the sense that Mr. Farley may think they are. It is merely a question of saying that so far as the plaintiff is concerned, if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious.'
>
> …
>
> [16] …Without in any way reducing the scope of an important jurisdiction both for courts and other decision makers, I nevertheless consider that it may be desirable to distinguish between cases which are bound to fail and those which are truly frivolous and vexatious…"

79. It appears to me that insofar as this appeal fails and the decision of the High Court is upheld it is appropriate to do so pursuant to the inherent jurisdiction.

Claims to an interest in Blackacre or Whiteacre

80. In my view having regard to the facts, the following are salient considerations in the context of this appeal. In December 2005 A. drew down in excess of €8M to purchase properties including, *inter alia*, Blackacre and Whiteacre. A. failed to make repayments under the mortgages. In 2008 A. and B. were involved in family law proceedings. When A. and B. entered into additional "Terms of Settlement" in mid-2008 that provided that, in the event that the settlement could not be complied with, B. would reside at Blackacre and enjoy that property

as a family home indefinitely, they must have known that such an arrangement could not bind EBS which was neither a party to, nor on notice of, those terms. There is no suggestion anywhere that the 2008 orders or the subsequent additional "Terms of Settlement" concluded in June 2008 were entered into with the assent of the mortgagee, EBS.

81. This could have been achieved, for instance, for the purposes of binding EBS, by A. and B. invoking before the Circuit Court s. 40(8) of the Civil Liability and Courts Act 2004, as amended, which provides:-

> "A court hearing proceedings under a relevant enactment shall, on its own motion or on the application of one of the parties to the proceedings, have discretion to order disclosure of documents, information or evidence connected with or arising in the course of the proceedings to third parties if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings."

That they did not do so leads inexorably to an inference that the orders thus obtained are unenforceable against any interested party who had no notice of same or their successor or assigns.

82. As is noted in the redacted 2015 judgment of Donnelly J. at para. 14: -

> "In a letter dated 16th September, 2008, to the EBS from [redacted], the solicitors then acting for [A.], it was confirmed that none of the eight premises was a family home within the meaning of the Family Home Protection Act, 1976 ('the Act of 1976') and that the mortgage of the properties therein is not affected by the Act of 1976 because [A.] was not and never had been married."

83. EBS instituted proceedings seeking possession against A. in October 2008. A remarkable feature of events in 2008 and the years following is that no step was taken by A. or B. to rely on the 2008 family law orders or "Terms of Settlement" or disclose same to EBS in the context of the 2008 possession proceedings. B. never had any registered interest in the

properties and was not a party to the 2008 possession proceedings but no doubt was well aware of same. In October 2009 EBS obtained an order for possession against A. In May 2010 the receiver was appointed. Had A. or B. any *bona fide* belief in the validity of the 2008 family law orders and "Terms of Settlement", one would expect that they would immediately assert rights thereunder against EBS.

84. In September 2013 EBS marked judgment against A. in the sum of €9.433M.

The *modus operandi* of B.

85. In 2014 the receiver was obliged to institute proceedings against A. and B. together with another entity which culminated in the order of Donnelly J. made on 15 May 2015, referred to above. The order recorded that counsel for the receiver had informed the court that he sought final orders of the court and that B. informed the court that she consented to the application being an application that would lead to a final order. *Inter alia* the following actions on the part of B. had precipitated the 2014 litigation:

(i) In March 2014 B. wrote to EBS asserting that she was "the person legally appointed to oversee [A.]'s financial affairs."

(ii) In March 2014 a person claiming to be "Catherine Doyle" of "Capital Properties" attended at a third property purporting to represent new agents appointed for the collection of rent. It was unclear whether the said woman was one and the same as B. Locks on the property were changed and notices were placed upon the property with the words "Notice: removal of implied right access". Similar action took place at Blackacre and Whiteacre. Upon effecting forcible entry onto the said properties, it appears that the said woman obtained rental payments from three tenants. It is noteworthy that a similar fact pattern and *modus operandi* of forcible entry, this time with physical ejectment of lawful occupants, was effected in December 2018 and January 2019 in relation to Blackacre and Whiteacre.

(iii) At the trial of the action in 2015 before Donnelly J., B. acknowledged that she had changed the locks and was responsible for stopping the attempts by the receiver to effect a sale and disposition of the properties.

(iv) It later transpired that in respect of Blackacre and Whiteacre, which by then had become vacant, persons took up occupation of the premises - either A. and B. and/or their servants or agents.

(v) The stance of B. in the High Court in the 2014 proceedings was extraordinary. She deposed in an affidavit sworn in May 2014 that by virtue of orders procured in the Family Law Circuit Court she held a first legal charge over the properties. She asserted that she had taken possession of Whiteacre which she asserted constituted a "family home" and that she did so due to alleged damage and loss incurred by reason of the failure by the receiver to comply with the family law court orders. She further asserted that the appointment of the receiver was invalid. She sought an order setting aside the appointment of the receiver.

86. As Donnelly J. observed at para. 44, the totality of B.'s assertions and claims as hereinbefore stated distilled down to two key contentions; that she had a beneficial interest in the properties that ranked in priority to the rights of EBS under its mortgages; and, further, that the loan offer and instruments were deficient to an extent as to be null and void and incapable of forming the legal basis for the appointment of the receiver. All these claims were relaunched once more by way of defence or counterclaim in the current proceedings.

87. In her exhaustive judgment, Donnelly J. concluded that there was no sound basis for any of the contentions advanced by B. A clear order was made directing B. to vacate Blackacre and Whiteacre and to deliver up possession thereof to the receiver. B. was ordered to cease holding herself out as being a party entitled to deal with, manage or collect rents in respect of other specified properties and was restrained from entering upon or attending at any of the eight

premises identified in the schedule to the order. She was further restrained by order of the court from interfering with the sale of Blackacre or Whiteacre by the receiver or otherwise interfering with the receivership and the court formally declared that the appointment of the receiver of the eight premises in the schedule to the order was valid. The counterclaims of B. were all dismissed. B. appealed the orders of Donnelly J. and on 9 February 2017 the Court of Appeal unanimously dismissed that appeal.

88. B. identified nothing - be it fact, matter or principle of law - which would entitle me to interfere with the declaration granted that A. and B. did not, nor did either of them, have any estate, right, title or interest in either Blackacre or Whiteacre.

89. It consequentially follows that the extensive perpetual prohibitory injunctions granted and orders specified in the curial part of the order at paras. (a) to (j) inclusive must remain undisturbed since each such order was made in support of the vindication of the rights of the respondent to beneficial ownership of Blackacre and Whiteacre; restraining harassment, threats, intimidation or abuse of the respondent's officers, shareholders, servants or agents. However, the order is more appropriately made pursuant to the court's inherent jurisdiction.

Data, privacy and *in camera* claims

90. Although in the course of the hearing B. asserted breaches of privacy, GDPR and her data against a wide variety of entities and parties, these proceedings and this appeal are concerned only with the parties thereto. The net question for consideration now is whether B. has established any arguable ground to pursue any aspect of the claims at paras. 63, 64 and 65 of the counterclaim and the reliefs sought at paras. 6 ("Damages for breach of privacy and/or Data Protection Act 2018"), 7 (aggravated/exemplary damages), 9 (other relief) and 10 (costs) or are same also frivolous or vexations or otherwise bound to fail.

April 2015 judgment of Donnelly J.

91. In her redacted judgment delivered in proceedings *McCann v. A., B. and C.* [2015] IEHC 366 and referred to above, at para. 46 Donnelly J. observed as follows: -

> "*In Camera* Proceedings
>
> An issue arose in the course of the proceedings relating to the family law proceedings between the first two defendants. I raised the issue that these were matters which were more properly dealt with *in camera*. Although [B.] initially indicated that she had no issue with them being dealt with in public, she later confirmed that she did have an issue. In any event, I had already indicated that it was my view that those matters should not be aired in public. During the course of the proceedings, the court sat *in camera* to hear the evidence of, and the submissions relating to, those proceedings. As those matters were *in camera* and as this judgment will necessarily refer to them, it is therefore necessary that the parties' names and indeed the premises should be redacted from this judgment and that there should be as minimal as possible reference to the family law proceedings as is consistent with the requirements to give reasons for the proper adjudication on the issues raised. I propose to discuss with the parties the form in which this judgment can be disseminated in public."

92. B. asserted in this appeal – and the respondent does not deny – that an unredacted version of the 2015 judgment bearing the stamp "Do not publish on website" was put into evidence by the respondent when seeking interim/interlocutory injunctions in January and February 2019.

March 2020 judgment of Donnelly J.

93. Subsequent to the conclusion of the proceedings under appeal in the High Court, it appears that on 4 March 2020 B. moved an application before Donnelly J. in the High Court in the said 2014 proceedings seeking the following orders:

1. an order for enforcement of the judgment of 27 April 2015 against the receiver pursuant to O. 42, r. 7; and/or
2. an order for enforcement of the judgment of 27 April 2015 aforesaid pursuant to O. 42, r. 25; and/or
3. an order directing the respondent Paul McCann "to disclose all the names and identities of the parties with whom he shared the content of the within proceedings in contempt of the judgment of the Honourable Ms. Justice Donnelly of the 27th April, 2015".

Donnelly J. refused the application of B. Her *ex tempore* judgment delivered on 5 March 2020 is worthy of note in the context of this application with particular reference to the issue of alleged breaches of the *in camera* rule.

94. In her *ex tempore* judgment Donnelly J. observed: -

> "4. In the course of those proceedings, I was required to deal with the issue of the family law proceedings and they are dealt with from para. 66 onwards in the judgment. I had also referred to the order earlier in the judgment and in particular at para. 46…
>
> 5. What happened thereafter was that I did discuss with the parties the form in which the judgment could be disseminated in public. It is clear that at that stage counsel for the receiver quite correctly raised the issue of the redaction of the record numbers from the judgment. The judgment that I had signed, and which is exhibited before me, quite correctly reflects that position in relation to the issues raised at the hearing. The parties, children and properties were not named and the record number of the proceedings was redacted."

95. She addressed the argument that the proceedings had been *in camera* as follows: -

> "19. Both parties are now agreed that the proceedings before me today are not *in camera* proceedings and that the previous proceedings were not *in camera* proceedings. That

had appeared to be an issue when the matter was first called. They did not come within the criteria of *in camera* proceedings and I am quite satisfied that the previous proceedings also did not qualify as *in camera* proceedings.

…

22. The heart of this matter is what I said at para. 46. That paragraph was clearly and on its face intended to the publication of the judgment. That publication was what was addressed after I gave judgment and it was what was dealt with by both the parties in the discussion after the judgment. I would like to interject at this point to say that where people are relying on a transcript, the full and unedited version should be relied upon. I am not making a finding on this point but where people are relying on what was said in the transcript, the unvarnished transcript should be presented. It does seem that there are certainly some additions to that transcript and those additions may have resulted in some things being left out."

Paragraph 46 of the April 2015 judgment is set out at para. 91 above.

96. At para. 24 Donnelly J. observed: –

"…The passage in the judgment was directed towards publication of that judgment. That was all it said. It does not form and cannot form the wide ranging prohibition claimed by [B.]."

She continued: –

"…Indeed, it can be said that if any matter is to be implied into the judgment it would be that the parties could be identified to the extent necessary to permit the enforcement of the order. That is clear from the judgment itself which makes references to parties being aware of the order and the order itself including an order which restrained [B.] from interfering with the sale of certain properties or otherwise interfering with the

receivership. So there was an implied interpretation there of the order that sales would occur and certain matters would occur.

25. Even if one accepts what is being said here, that there was an implied prohibition on presenting the judgment in a public setting in a manner identifying the parties outside the enforcement of the order, I am not convinced there is evidence of that before me or any proof of it."

In conclusion, Donnelly J. observed at para. 28:-

"…just to be clear, I do not believe there is any case in relation to the enforcement and in essence that would deal with all of [B.]'s requests, including her final request for evidence or proof, but in my view, the request for evidence that [B.] says she is entitled to, and is effectively what she is seeking by the application to disclose the names and identities of the parties, is to misunderstand the court process. There is no entitlement to seek an order of the court to obtain 'proof'. A party in common law proceedings, in general, must supply the proof. This is not anywhere near a situation where a court would engage on the process she proposes. That is ultimately a fishing expedition and I reject her entitlement to any such relief.

29. I therefore reject the application in its entirety."

No appeal of order of March 2020

97. Of significance is that B. did not appeal the said judgment and orders of Donnelly J. Accordingly, she must be taken to be bound by the key relevant determinations in the judgment of 5 March 2020 and in particular that she had no entitlement to an order directing the receiver, Paul McCann, to disclose the names or identities of parties with whom he allegedly shared the content of the judgment of 27 April 2015. Further, there is a clear determination in the judgment that the proceedings brought by way of notice of motion and heard on 4 March 2020 were not *in camera* proceedings and furthermore that the 2014 proceedings heard in 2015 and

culminating in the written judgment of 27 April 2015 were not *in camera* proceedings either. The said determinations of Donnelly J., unappealed as they are, are binding on B. She offered no convincing reason for not disclosing the said order and judgment of Donnelly J. to the court.

General Data Protection Regulation

98. The GDPR became applicable with effect from 25 May 2018 across the EU to harmonise data privacy law in Member States. As Recital 4 makes clear:-

> "…The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality."

Recital 1 provides:-

> "The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union…and Article 16(1) of the Treaty on the Functioning of the European Union…provide that everyone has the right to the protection of personal data concerning him or her."

99. Recital 146 provides: -

> "The controller or processor should compensate any damage which a person may suffer as a result of processing that infringes this Regulation. The controller or processor should be exempt from liability if it proves that it is not in any way responsible for the damage. The concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation. This is without prejudice to any claims for damage deriving from the violation of other rules in Union or Member State law."

It further provides: –

"…Data subjects should receive full and effective compensation for the damage they have suffered. Where controllers or processors are involved in the same processing, each controller or processor should be held liable for the entire damage."

100. Recital 147 addresses the issue of jurisdiction and provides: -

"Where specific rules on jurisdiction are contained in this Regulation, in particular as regards proceedings seeking a judicial remedy including compensation, against a controller or processor, general jurisdiction rules such as those of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council should not prejudice the application of such specific rules."

101. Article 79 in turn addresses the right to an effective judicial remedy against a controller or processor:-

"1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.

2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers."

102. Article 82 of the Regulation addresses the right to compensation and liability and provides, *inter alia*:-

"(1) Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

(2) Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

(3) A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage.

(4) Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are, under paragraphs 2 and 3, responsible for any damage caused by processing, each controller or processor shall be held liable for the entire damage in order to ensure effective compensation of the data subject.

…

(6) Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law of the Member State referred to in Article 79(2)."

103. Article 84 and Recitals 149 and 150 govern the issue of penalties, including for infringement of national rules, and administrative fines.

104. In substance, B.'s contention is that in particular the alleged breaches of her privacy, data protection law and *in camera* rights pleaded by her disclose a reasonable cause of action sufficient to entitle her to pursue the counterclaim and to reverse its dismissal by the High Court.

Restraints on exercise of the inherent jurisdiction

105. *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) emphasises the extent to which restraint must be exercised by the court in the exercise of the inherent jurisdiction to strike out. The authors, having reviewed the jurisprudence, note at para. 16-16:-

> "…Given that an order striking out proceedings will only be made in very clear cases where there is no dispute as to the relevant facts, in practice, an application will only succeed where there are very few issues of fact or where the relevant facts are not reasonably disputable as in certain cases regarding the conclusion of contracts or the interpretation of contractual documents. So, while the court can engage with the facts of the case, there are 'significant limitations' on the extent to which this is appropriate."

106. B.'s data-breach/privacy claims must be evaluated with particular regard to Article 5(2) of the GDPR which established the principle of accountability in respect of a data controller. Article 5(1) provides, in short form, that personal data shall be processed in accordance with the principles of lawfulness, fairness and transparency, for specified, explicit, legitimate and limited purposes, and,

> "(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality')."

Article 5(2) provides: –

> "The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability')."

107. Article 4(2) of the GDPR provides an expansive definition of processing to include: -

> "…any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording,

organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction…" (Emphasis added)

108. Article 4(8) of the GDPR defines a "processor" as "a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller". Article 4(9) defines "recipient" as "a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not." Article 4(10) defines a "third party" as "a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the direct authority of the controller or processor, are authorised to process personal data". Article 4(12) defines "personal data breach" to mean "a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed".

109. It will be recalled that Recital 61 provides: -

"…Where personal data can be legitimately disclosed to another recipient, the data subject should be informed when the personal data are first disclosed to the recipient."

110. Recital 111 provides: -

"Provisions should be made for the possibility for transfers in certain circumstances where the data subject has given his or her explicit consent, where the transfer is occasional and necessary in relation to a contract or a legal claim, regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure, including procedures before regulatory bodies. Provision should also be made for the possibility for transfers where important grounds of public interest laid down by Union or Member State law so require or where the transfer is made from a register established by law and intended for consultation by the public or persons having a legitimate

interest. In the latter case, such a transfer should not involve the entirety of the personal data or entire categories of the data contained in the register and, when the register is intended for consultation by persons having a legitimate interest, the transfer should be made only at the request of those persons or, if they are to be the recipients, taking into full account the interests and fundamental rights of the data subject."

Derogations

111. Article 49 of the GDPR acknowledges that in specific situations derogations may arise. Amongst the conditions identified at Article 49(1) are the following: -

"(d) the transfer is necessary for important reasons of public interest;

(e) the transfer is necessary for the establishment, exercise or defence of legal claims". Section 60 of the Data Protection Act 2018 is considered further below and establishes restrictions as are "necessary and proportionate" on the obligations of controllers and the rights of data subjects for important objectives of general public interest including for the establishment, exercise and enforcement of civil law claims whether before a court or otherwise.

The Data Protection Act 2018

112. The Data Protection Act 2018, implementing the GDPR in the State, permits an individual to seek compensation from the court for breaches of data subject rights even in the absence of any material damage or financial loss. With certain exceptions, it became operative on 25 May 2018 with other provisions commencing on 30 October 2019 and 1 January 2020. Section 159 of the 2018 Act governs the processing of personal data where the court is controller. That provision became operative on 25 May 2018 and the measure governing the Superior Courts, s. 159(1), is the subject of the Data Protection Act 2018 (Section 159(1)) Rules 2018 (S.I. No. 659 of 2018) whereby the rules of the Superior Courts were amended to

address the GDPR. Same become operative on 1 August 2018 but are not relevant to this appeal.

113. Section 117 of the Data Protection Act 2018 implements Article 82(1) of the GDPR. It provides: -

> "(1) Subject to subsection (9), and without prejudice to any other remedy available to him or her, including his or her right to lodge a complaint, a data subject may, where he or she considers that his or her rights under a relevant enactment have been infringed as a result of the processing of his or her personal data in a manner that fails to comply with a relevant enactment, bring an action (in this section referred to as a 'data protection action') against the controller or processor concerned.
>
> (2) A data protection action shall be deemed, for the purposes of every enactment and rule of law, to be an action founded on tort.
>
> (3) The Circuit Court shall, subject to subsections (5) and (6), concurrently with the High Court, have jurisdiction to hear and determine data protection actions.
>
> (4) The court hearing a data protection action shall have the power to grant to the plaintiff one or more of the following reliefs:
>
> (a) relief by way of injunction or declaration; or
>
> (b) compensation for damage suffered by the plaintiff as a result of the infringement of a relevant enactment."

114. The 2018 Act implementing the GDPR offers two distinct routes for redress. The first option is to proceed to submit a complaint to the Data Protection Commissioner, the second being the s. 117 tort action. Nothing stated in s. 117 or indeed the Act itself suggests that a data protection action is a tort of strict liability. B. appeared to contend in her arguments that it was. The plea at para. 64 of the counterclaim that the 2015 judgment was "private and confidential", appears to be antithetical to the judgment of Donnelly J. delivered in March 2020. However, it

is not an issue that can be confidently or definitively determined on a strike-out motion. B.'s claim is directed to the deployment by Shawl of the unredacted version of the 2015 judgment, while Donnelly J.'s observations in the 2020 judgment appear to concern the redacted version of the same judgment.

115. Perhaps disclosure of the unredacted 2015 judgment may well have been necessitated by reason of the exigencies which arose and warranted the extensive injunctions being sought and the making of interlocutory orders in like terms to which B. consented in February 2019. That was, in essence, the view taken by the High Court judge. He observed that, even if a copy of the redacted judgment had been deployed by the respondent, it would have been necessary for it to explain that the judgment related to A. and B. and to the properties at Blackacre and Whiteacre. That, in his view, "would have amounted to the same thing" (para. 84). That may be the case but it is at least arguable particularly in the context of an application pursuant to O. 19, r. 28 that, in deploying the unredacted judgment, Shawl went beyond what was necessary and disclosed private and personal information, relating to family law proceedings that had been heard *in camera*, without any sufficient justification. In my view, that issue can only properly be determined at a plenary hearing since it is not possible to definitively conclude that there is no real risk of any injustice to B. were this aspect of her claim struck out at this stage pursuant to the inherent jurisdiction. It will be for the respondent to satisfy the trial judge that it has a defence, albeit the evidence suggests it may have.

The unredacted judgment

116. Surprisingly, counsel for the respondent was unable to assist the court as to how the unredacted judgment came into his client's possession or the circumstances in which it came to be deployed. When asked about the "Do not publish on website" notation on it, counsel suggested that anyone reading that note would not necessarily understand it as anything other than a restriction on internet publication and would not have read it as a restriction on

dissemination of the judgment in that form. That may be so but anyone who actually read the judgment, and in particular para. 46, would have understood that the judgment was not intended to be published or circulated beyond the immediate parties in unredacted form. I would observe in this context that, while the High Court judge may have been correct in observing that responsibility for the respondent having the unredacted judgment rested with whomever it was gave it to the respondent, responsibility for deploying the unredacted judgment before the High Court rests squarely with the respondent.

117. It will be recalled that after B. purged her contempt on 28 August 2018 before Quinn J. in the High Court, the respondent proceeded to complete the purchase of the properties approximately two weeks later on 11 September 2018. Having regard to the history of conduct of A. and B. *vis-á-vis* Blackacre and Whiteacre and their repeated setting up of baseless claims to the effect that B. in particular had beneficial rights and interests in or over the said properties that ranked in priority to EBS, it might be expected that in the investigation of title to the two properties integral to the conveyances, the titles being unregistered, the vendor, Beltany, was obliged, *inter alia*, to make appropriate disclosures directed to establishing its title to the property. But there was no evidence on the issue one way or another and it is not open to this Court to surmise.

118. Amongst the standard requisitions on title from a conveyancing perspective is an enquiry as to whether any litigation was pending or whether any court order had been made in relation to the property, or any part of same, and a vendor is obliged to respond to such a requisition. The existence of orders dismissing baseless claims to an interest in the properties and ordering A. and B. to vacate Blackacre and Whiteacre could be reasonably expected to form part of the muniments of title since they were dispositive of the groundless claims of A. and B. to have an interest in the property. This may explain how the unredacted judgment came into the

possession of the respondent but, again there was no evidence one way or the other. In light of the O. 19, r. 28 jurisprudence it is for the High Court to make a determination on the issue.

119. No order obtained in 2008 in the context of *in camera* proceedings could confer any estate, right, title or interest upon B. in or over the said properties inconsistent with the priority rights of EBS and the rights of the validly appointed receiver to effect a sale and disposition of same. Such orders were obtained without EBS being a party to or on notice of same and as such cannot bind EBS or its successors in title, the receiver, Beltany or the respondent. We know from the judgment of Donnelly J. of 5 March 2020 in the receiver proceedings that the 2015 hearing and proceedings before Donnelly J. were not *in camera* proceedings and neither was the application the subject of the judgment of 5 March 2020 *in camera*, nor the order of 4 March 2020 made by Donnelly J.

120. That being so, it would be unsurprising and entirely in accordance with the principle of proportionality that a copy of the orders and judgment which pertained directly to the premises in sale would be disclosed to the purchaser (being the respondent herein) in the conveyancing transactions of circa 11 September 2018. However, there was no evidence before the court on the issue.

121. Whilst counsel for the respondent very fairly did not engage in speculation as to the provenance of the unredacted judgment disclosed to the High Court when interim and interlocutory injunctions were sought in January and February 2019, B. herself identified a possible provenance for an unredacted version as set out hereafter.

122. B. asserted in the course of the hearing of this appeal that an unredacted version of the 2015 judgment was put up on the Courts Service website. This is an allegation which she also made before Donnelly J. on 4 March 2020 and which is expressly referred to in the course of the judgment delivered *ex tempore* on 5 March 2020. As of March 2020, B. asserted that she had a "screen-grab" of same.

123. As Donnelly J. noted at para. 7 of her *ex tempore* judgment: -

> "A complaint was made which she was fully entitled to make, found at Exhibit K, to the assigned judge, who is Baker J., dealing with what I understand are the GDPR issues."

124. B. informed this Court that subsequent to same Baker J. made substantive findings in her favour in her capacity as the assigned judge in respect of the Data Protection Act 2018. B. objected to disclosure of the said determination, as she was entitled to do, but I accept her statement.

Proportionality, general public interest and the balancing of rights in context

125. As the Court of Justice of the EU has repeatedly made clear, the right to the protection of personal data is not an absolute right but requires to be considered in relation to its function in society and to be balanced with other fundamental rights in accordance with the principle of proportionality. That is made clear in Recital 4 of the GDPR. The events which gave rise to the respondent moving an application for interim injunctive relief before the High Court are disturbing at a number of levels and bear repetition. It will be recalled that on 28 August 2018 B. undertook to the High Court, in order to purge her contempt, to vacate the premises and not to interfere directly or indirectly with same and was discharged from custody having spent approximately three and a half months in custody for contempt. As outlined above, thereafter the sale was completed to the respondent on 11 September 2018 in respect of the two premises Blackacre and Whiteacre.

126. None of the series of manoeuvres engaged in by B. in collaboration with A., including a court order obtained in 2008, a "settlement" document concluded in 2008 and a sham trust executed in September 2018, conferred any estate, right, title or interest in B. or indeed her offspring (who are now of full age) capable of interfering with the priorities, rights and entitlements of the original mortgagee and its successor in title. It appears that B. does not and

presumably never will accept the orders of the High Court made on 15 May 2015 and upheld on appeal directing that A. and B., their servants and agents and all other persons having notice of the making of the orders vacate Whiteacre and Blackacre and deliver up possession of same to the receiver. The emergency which necessitated the application for an interim injunction on 30 January 2019 was precipitated wholly and exclusively by the wrongful acts of A. and B. acting in concert. The appellants' notice of appeal acknowledges: -

> "It is clear that in order to comply with its obligation of full disclosure to the court to advance its claim, the plaintiff disclosed full details of proceedings and pleadings in the [2014 proceedings]."

127. Arguably, notwithstanding the GDPR and the 2018 Act, it was vitally necessary, bearing in mind the obligation of full disclosure, that the court be apprised of the fact of the court orders of relevance pertaining to the identity of the properties and the identity of the parties in respect of whom the orders of 15 May 2015, as affirmed on appeal, were made to enable the legitimate interests of the respondent be pursued and the protection of the court be obtained by way of interim and interlocutory injunctions so that the respondent could withstand and defend the false and baseless claims of A. and B. to have title to the properties.

128. Arguably, such conduct, in the exigencies that arose, represents the use of the data for a legitimate purpose in my view, particularly given the campaign of media harassment and the gravely serious allegations being published concerning two directors of the respondent company, including baseless allegations of paedophilia and the publication of their home addresses.

129. Whereas counsel for the respondent was not in a position to confirm how the unredacted version of the 2015 judgment came to be in court at the moving of the injunction application, a legal basis is potentially discernible in the context of the sale and could have arisen at the point of the sale and disposition of the property in September 2018 in the context of providing

evidence of title and evidence of the groundless nature of the claims of A. and B. having been dismissed by the court and orders having been made directing B. as well as A. to vacate the premises and deliver up possession of same.

130. A possible alternative legitimate basis in which the document was held by the respondent and adduced in evidence before the High Court on 30 January 2019 could spring from the fact that the vendor sold the properties Whiteacre and Blackacre subject to a statutory covenant for title. As Wylie and Woods note in *Irish Conveyancing Law* (4th ed., Bloomsbury Professional, 2019) at para. 21.05, the position is governed by ss. 80 and 81 together with Schedule 3 of the Land and Conveyancing Law Reform Act 2009. Accordingly, as a strict matter of law it was incumbent on the parties who sold the property to the respondent to provide clear proof that the claims of A. and B. to have an interest in or right to occupy Whiteacre and/or Blackacre were baseless, and contrary to the 2015 orders and judgment of the court. This could only be done by disclosure of the orders previously obtained and the unredacted 2015 judgment. These arguments were not advanced at the hearing of the appeal and are matters for the trial judge.

131. It will be open to the trial judge to determine that a full defence to the claim is established if at the hearing the respondent establishes that it had the data solely for a legitimate purpose within the meaning of Article 5 of the GDPR; that the respondent required the information to properly put before the court to assert its legal rights including its right to obtain emergency injunctions; that the material was wholly, exclusively and necessarily procured and deployed for the purposes of establishment of the respondent's clear title to the properties, defending the baseless claims of B. as well as A., advancing the respondent's own legal entitlement to obtain emergency injunctive relief and indeed ultimately permanent injunctive relief, together with other orders for the protection of the rights of natural persons including those lawfully in occupation and possession of both properties as licensees of the respondent, the directors of the company, and persons associated therewith, together with the company itself.

132. It will be for the trial judge to determine whether the threshold of general public interest within s. 60 of the Data Protection Act 2018 is reached and whether the application ought to be refused pursuant to s. 60(3)(a) as being necessary and proportionate-

> "(iv) in contemplation of or for the establishment, exercise or defence of, a legal claim, prospective legal claim, legal proceedings or prospective legal proceedings whether before a court, statutory tribunal, statutory body or an administrative or out-of-court procedure,
>
> (v) for the enforcement of civil law claims, including matters relating to any liability of a controller or processor in respect of damages, compensation or other liabilities or debts related to the claim".

It will be for the trial judge to determine whether the disclosure went beyond what was necessary to establish the respondent's legal rights within the meaning of ss. 60(3)(a)(iv) and/or (v) of the 2018 Act.

133. I observe that the GDPR, data infringement rights and the cognate rights of privacy asserted by B. cannot be set up to defeat the ends of justice, to pursue false or specious claims, to traduce the good name and reputation of others or to pursue ends that are dishonest, self-serving or at the expense of the legitimate interests or rights of others, particularly in the context of litigation. As such therefore, it is necessary to have regard to the principle of proportionality in evaluating claims for breaches of same.

Privacy

134. Alleged breach of privacy was not pleaded or argued with any degree of particularity save as exemplifying alleged breaches of the Data Protection Act 2018 and an aspect of same.

The *in camera* rule

135. In *Gilchrist v. Sunday Newspapers Ltd.* [2017] IESC 18, [2017] 2 I.R. 284 O'Donnell J. carried out a comprehensive analysis of the approach to the balancing of interests and rights of

Article 34.1 of the Constitution, which in general requires justice to be administered in courts established by law by judges and that same be administered in public. At para. 42 he observed that: -

> "42. In my view it is not necessary to read Article 34.1 down to the point where the only exception permissible in respect of any subject matter is where it can be demonstrated that justice simply cannot be done otherwise…
>
> 43. The fact that Article 34.1 of the Constitution states in explicit terms any hearing in private is an exception to a fundamental constitutional rule means that any such exception much be strictly construed. A demonstration that it is not possible to hear and determine a case fairly is certainly a powerful consideration justifying a hearing other than in public, but it cannot be the sole touchstone of the circumstances in which it is appropriate to have a hearing in private."

136. The Supreme Court in *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 recognised the inherent jurisdiction of the court to direct that a case be heard "otherwise than in public" within the meaning of Article 34.1 where it is necessary to protect other constitutional rights and interests, namely in that case the right to a fair trial guaranteed by Article 38.1. Such jurisdiction extends to making a direction that part of a case be heard *in camera* where same is warranted to prevent the indirect circumvention of the *in camera* rule. Donnelly J. appears to have exercised that inherent function in the course of hearing the receiver litigation in 2015 when the public were excluded during the hearing of two elements of the evidence before her.

137. Section 45 of the Courts (Supplemental Provisions) Act 1961 provides *inter alia* that matrimonial causes and matters may be heard "otherwise than in public" as an exception to the general requirement that justice be administered in public.

138. Section 40 of the Civil Liability and Courts Act 2004, as amended, and the Civil Liability and Courts Act 2004 (Section 40(3)) Regulations 2005 (S.I. No. 337 of 2005) govern the

position and provide that certain proceedings be heard "otherwise than in public". Section 40(3)(b) provides that nothing contained in a relevant enactment, including s. 45 of the Courts (Supplemental Provisions) Act 1961, shall operate to prohibit: –

> "…the publication of the decision of the court in such proceedings,
>
> in accordance with rules of court, provided that the report or decision does not contain any information which would enable the parties to the proceedings or any child to which the proceedings relate to be identified…"

Section 40(6) provides: –

> "Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the production of a document prepared for the purposes or in contemplation of such proceedings or given in evidence in such proceedings, to –
>
> (a) …
>
> (b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed." (emphasis added)

Subsection 7 provides: –

> "Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the giving of information or evidence given in such proceedings to-
>
> (a) …
>
> (b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting

of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed."

139. A useful analysis of s. 40 of the Civil Liability and Courts Act 2004, as amended, is to be found in *Kelly*: *The Irish Constitution* (5th ed., Bloomsbury Professional, 2018). At para. 6.1.349 the authors observe:-

> "Section 40(4) allows parties to *in camera* proceedings to provide copies of orders made in such proceedings to prescribed persons and in accordance with prescribed conditions. …sub-s (6) provides for the production of documentation prepared in contemplation of or for the purposes of such proceedings at subsequent related inquiries or investigations. Subsection (7) provides that evidence may be given to such investigations, while sub-s (8) gives a court hearing proceedings *in camera* discretion to order the disclosure of documentation to third parties, 'if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings'."

140. An example of the operation of s. 40(8) is the decision of the High Court in *J.D. v. S.D.* [2013] IEHC 648, [2014] 3 I.R. 483. As fn. 880 in *Kelly* observes: -

> "…In that case, the *in camera* rule was relaxed to allow the disclosure of information from family law proceedings relevant to bankruptcy proceedings. The disclosure was sought by NAMA and NALM to determine whether assets were being concealed. Also relevant in that case was s. 40(8) of the Civil Liability and Courts Act 2004…Abbott J. held that s. 40(8) did not abolish the common law power to relax the *in camera* rule."

At fn. 881 in *Kelly* the authors observe: –

> "…Abbott J. found that the common law rule conferring a discretion to relax the *in camera* rule survived the enactment of s. 40(8) of the Civil Liability and Courts Act 2004…He said [at para. 17]:

> '…I find that the court may in certain circumstances lift the *in camera* rule, it is important that the lifting of the *in camera* rule is seldom absolute and the practice of the court usually is to attach the disciplines of the *in camera* rule to the recipient or recipients of the information and documentation which has been released by lifting the rule. There is, almost invariably, a further restriction on the lifting order insofar as non-essential private material should be redacted, and where the lifting of the *in camera* rule relates to information and documentation pertaining to just one of the parties, then the privacy and business of the other party should be preserved by even more rigorous redaction, with costs orders providing that the burden of such redaction does not fall on an innocent, or less blameworthy, party.'"

141. As was made clear by Abbot J. in *J.D. v. S.D.*, where the interests of justice require it, it is always open to a court to relax or waive the *in camera* rule subject to such conditions, including a requirement for redaction, as the court sees fit.

142. In the instant case, however, there does not appear to be any evidence nor is it pleaded that the respondent ever had in its possession a copy of the order made in the family law proceedings between A. and B. in 2008. There is no evidence either that there was a written judgment at that time. Donnelly J. has since confirmed that the 2015 and 2020 hearings were not *in camera* proceedings.

Contempt of court

143. Contempt of court may be criminal or civil in nature. As was observed by Thomas O'Malley in *The Criminal Process* (1st ed., Round Hall, 2009) at para. 16-39:-

> "…While it is sometimes difficult in practice to distinguish between them, civil contempt usually arises from failure to obey a court order or abide by an undertaking,

whereas criminal contempt embraces a range of behaviour calculated to interfere with the course of justice, or tending to do so."

The author continues: –

"…The dividing line between criminal contempt and the common-law offence of perverting the course of justice is not always easy to draw. The latter consists of some positive act that tends and is intended to pervert the course of public justice."

144. In this jurisdiction, notwithstanding the recommendations of the Law Reform Commission in *Report on Contempt of Court* (L.R.C. 47-1994), contempt of court remains on a common law footing.

145. Considering the issue of contempt, Shatter in his seminal text *Family Law* (4th ed., Bloomsbury Professional, 1997) observes at para. 2.33: -

"Where family proceedings are heard *in camera* publication of information which relates to the proceedings in a manner which identifies the parties…is a contempt of court. Publication of a judgment of the court and comment made on it in a manner that does not identify the parties involved does not constitute contempt."

He considers in detail at para. 2.35 the decision in *P.S.S. v. Independent Newspapers (Ireland) Ltd*. (Unreported, High Court, Budd J., 19 and 22 May 1995) where Budd J. observed at p. 112 that: -

"…the contents of this judgment may be discussed and published but in such manner that the parties involved in the family law…dispute are not identifiable."

Such an approach represents best practice.

146. Keane J. (as he then was) in *Kelly v. O'Neill* [2000] 1 I.R. 354 observed at p. 374 that: -

"…our law in this area is in many respects uncertain and in need of clarification by legislation."

That view was echoed subsequently by the Supreme Court in *Irish Bank Resolution Corporation Ltd*. *v. Quinn* [2012] IESC 51 where Hardiman J. observed at p. 16: -

> "It is 20 years now since the Law Reform Commission urged the need for statutory reform in this area, and some 31 years since such reform took place by statute in the neighbouring jurisdiction. It is most unfortunate that no positive steps have been taken here with the result that this fraught matter has come on for resolution in an uncertain state of the law."

147. McKechnie J. observed in the Supreme Court in *Walsh v Minister for Justice and Equality* [2019] IESC 15 at paras. 2 to 3:-

> "…there are several different species of contempt: further within each such area there are multiple ways in which one can offend. Although subject to some criticism, even as severe as saying it was, 'unhelpful and at most a meaningless classification' (*Jennison v. Baker* [1972] 1 All E.R. 997 at 1002) I find usefulness in the distinction between civil and criminal contempt. That view of Lord Salmon, as he then was, is an overreach, if intended for all purposes; in any event it must be seen in an English context where statute has much intervened…
>
> 3. Ó Dálaigh C.J., has said that civil contempt is coercive in purpose, whereas criminal contempt is punitive in motion: (*Keegan v. De Burca* [1973] I.R. 223 at 227). That statement, despite the views of Hardiman J. (*Irish Bank Resolution Corporation Ltd. v. Quinn* [2012] IESC 51, ((Unreported, Supreme Court, 24th October 2012) at p. 16 of his judgment), now requires adjustment. As several subsequent decisions show, there can also be a penal element in civil contempt where the conduct or behaviour, in addition to having an *inter partes* impact, is grossly offensive to the administration of justice so much so that the courts of themselves must have a say (*Shell E. & P. Ltd. v. McGrath* [2006] IEHC 108, [2007] 1 I.R. 671, *Dublin City Council v. McFeely* [2012]

IESC 45, [2015] 3 I.R. 722). Incarceration does not necessarily have to follow, a fine or even a much lesser sanction may suffice. Such approach is focused on the 'public interest' aspect of justice."

148. The issue of contempt in its context in the instant case as argued by B. is integrally bound up with the allegation of breach by the respondent of the *in camera* rule. The question is whether B. can persuade this Court that she has an arguable cause of action to pursue a claim for a remedy in respect of contempt in her counterclaim or whether this aspect is frivolous or vexatious or otherwise bound to fail.

149. In my view a review of the authorities suggests that B. does not have an arguable cause of action and this aspect of the counterclaim is bound to fail.

150. The law of contempt is concerned with maintaining and defending the authority of the court in the public interest. As was observed by the majority judgment of Pearson L.J. in *Chapman v. Honig* [1963] 2 Q.B. 502 at p. 522: -

"…The jurisdiction exists and is exercised…for the protection of the administration of justice and is not for the protection of individuals."

151. In the context of civil proceedings, a litigant can instigate proceedings for contempt with the objective of thereby ensuring that the alleged contemnor will respect her rights. However, the law of contempt as it operates in this jurisdiction is not directed towards compensating a litigant who alleges she has suffered loss as a result of a contempt of court.

152. The law of contempt is directed towards punishing those who fail to comply with orders of the court for the dominant purpose of maintaining the authority of the court in the public interest. To sound in damages private claims are to be framed normally in the context of contract or tort.

153. It follows as a matter of principle that, insofar as B. contends that the alleged conduct of Shawl amounted to a contempt of court, such a claim would not confer on a court the power to

compensate her by an order for damages. Damages are not generally recoverable for breach of a court order in a counterclaim such as that framed by B. since breach of a court order *simpliciter* does not in itself constitute a cause of action in private law. In coming to that conclusion I place reliance, *inter alia*, on the decision of the UK House of Lords in *Customs and Excise Commissioners v. Barclays Bank Plc* [2006] UKHL 28, [2007] 1 A.C. 181 where Lord Bingham analysed the law in some detail and concluded that a simple breach of a court order does not constitute a cause of action sounding in damages. In doing so, he distinguished earlier authorities where a duty of care which was found to be congruent with an obligation embodied in the terms of a court order had been found to exist on the basis that in such cases there was an additional element amounting to a voluntary assumption of responsibility by the party who was on notice of the making of the court order.

154. The judgment of Lord Hoffmann is likewise noteworthy, particularly at paras. 35 to 40 inclusive. In my view the contention that a contempt alleged to arise from the deployment of an unredacted copy of the 2015 judgment could generate a cause of action sounding in damages is comparable with the question of whether a statutory duty can generate a common law duty of care for the reasons adumbrated by Lord Hoffmann in *Customs and Excise Commissioners v. Barclays Bank plc*. On the facts before him he concluded that the order carried its own remedies and its reach did not extend any further: -

> "…But you cannot derive a common law duty of care directly from a statutory duty. Likewise, as it seems to me, you cannot derive one from an order of court." (para. 39)

155. Insofar as B. seeks to litigate in her counterclaim the issue of contempt arising from the deployment of the unredacted judgment, the contempt/breach of the *in camera* rule contended for, were she to establish it to the satisfaction of a court, carries its own discrete remedies. An action in damages in a private civil suit is not one of them. An alleged breach of the *in camera*

rule does not, on the facts disclosed in this case, create private law duties and does not in itself constitute a cause of action in private law.

156. I have been unable to find any clear authority in this jurisdiction for the proposition that a cause of action arises simply by virtue of a civil contempt of court being committed by a defendant. No authority was identified by B. for a proposition that it is possible to rely on the breach of an *in camera* requirement in support of a claim in private law for compensatory damages. I have had regard to the decision of Pearson L.J. in *Chapman v. Honig*. I further note the more recent decision of the English Court of Appeal in *JSC BTA Bank v. Ablyazov (No. 14)* [2017] EWCA Civ. 40, [2017] Q.B. 853 where Sales L.J. concluded that no authority being relied upon by the cross-appellant established that damages were recoverable in a private law suit for a simple breach of a court order. Therefore it follows that the counterclaim insofar as it seeks to pursue a claim in damages for contempt of court/breach of the *in camera* rule discloses no reasonable cause of action and is doomed to fail. It is further both frivolous and vexatious. Accordingly that part of the counterclaim falls to be struck out pursuant to the inherent jurisdiction.

Conclusion on private claim arising from alleged civil contempt/breach of *in camera* rule

157. In my view B. has failed to establish that she has any reasonable cause of action by way of counterclaim in these proceedings arising simply by virtue of an alleged contempt of court committed by the respondent by deployment in the injunction application of the unredacted version of the 2015 judgment of Donnelly J. in breach of the *in camera* rule. The claim based on contempt of court/breach of the *in camera* rule is bound to fail and must be struck out.

158. Donnelly J. has stated that the proceedings before her in 2015 and 2020 were not *in camera* proceedings. The evidence indicates that the disclosure of the identities of A. and B. and the properties *via* the unredacted judgment may have been made to the court only to the extent necessary to discharge the burden of proof in support of the interim and interlocutory

injunctions sought . Whether that is so and whether same offers a complete answer to the claims of B. for damages for a breach of the Data Protection Act 2018 is a matter to be determined by the trial judge in the counterclaim solely having regard to the said Act.

Comments of the trial judge

159. I have some sympathy for B.'s contention that the use of nomenclatures in the judgment such as "nonsense", "just silly", "hair raising" and "cock and bull" were regrettable. B. takes offence at what she considers to be their derogatory tone and that is to some extent understandable. The words detract from what is otherwise a very comprehensive and thorough analysis of the facts and the evidence. I am constrained to conclude that they represent a wholly uncharacteristic expression of view by the trial judge, perhaps precipitated by the profoundly shocking and disturbing evidence before him of a campaign of intimidation orchestrated by B., with the active assistance of A., towards the innocent individuals who are the directors of the respondent company, the *bona fide* purchasers and beneficial owners of Blackacre and Whiteacre together with their tenants and lodgers disclosed by the evidence, which conduct was wholly unwarranted and calculated to drive the true owner out of occupation and seize the properties on the strength of an entirely bogus deed of trust.

Conclusion

160. A. did not appear at the hearing of the appeal. Counsel on behalf of the respondent informed this Court that on or about 23 October 2020 solicitors for the respondent communicated by email with A. at the email address he had provided to them informing him of the date for hearing of this appeal. B. also confirmed to the court that A. was aware that his appeal was for hearing on 16 November 2020. There being no appearance by or on his behalf and no communication by him with the court, in the circumstances it is appropriate that his appeal be struck out and the orders of the High Court against him be affirmed together with an order for the respondent's costs of this appeal on a party and party basis when ascertained.

161. B. has failed to establish that any part of the defence should stand. It was correctly struck out by the High Court, albeit that in my view doing so was warranted pursuant to the inherent jurisdiction of the court as bound to fail. I would affirm the High Court order on the basis of the inherent jurisdiction in relation to the counterclaim save and except as to the parts of paras. 63, 64 and 65 of the counterclaim, confined solely and exclusively to the claim of alleged breach of the Data Protection Act 2018 together with paras. 6, 9 and 10 of the reliefs counterclaimed, said aspects alone to proceed to plenary hearing. All other aspects of paras. 63, 64 and 65 of the counterclaim to be struck out pursuant to the inherent jurisdiction of the court as bound to fail and not maintainable.

162. Accordingly, the declaratory and other reliefs and orders sought at paras. 1 to 5 and 7 to 8 inclusive of the prayer in the counterclaim are not maintainable and manifestly include a continuing slander of the respondent's title and irrevocable damage to it and must likewise be struck out pursuant to the inherent jurisdiction.

163. B. was self-represented at this appeal. Regarding the issue of costs, I would propose that same be dealt with as follows. It is appropriate in the circumstances that the order for costs made against B. in the High Court be set aside. It is in the interests of justice, in light of the gravity of her conduct, the nature of the interim and interlocutory orders made against her in January 2019 and February 2019, the failure of B. to disclose to this Court the judgment and order of Donnelly J. made in March 2020 and given the very limited nature of success in this appeal, that order for one half of the High Court costs of the respondent be made against B. No order as to costs be made in favour of either party in respect of this appeal. If either party wishes to contend for an alternative order, liberty is granted to apply to the Office of the Court of Appeal within 14 days of the date of delivery of this judgment for a brief supplemental hearing on the issue of costs, with written submissions of not more than 1,000 words to be filed with the Office of the Court of Appeal and delivered to the other party herein within 14 days of the

date of delivery hereof and a further like period to be afforded to the other party to respond to same to enable this Court to consider the arguments and adjudicate same. If such hearing is requested and results in an order in the terms already proposed by the Court, the unsuccessful party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed above will be made.

164. Faherty J. and Collins J. hereby assent to the within judgment which is being delivered electronically by reason of the Covid-19 pandemic.