THE HIGH COURT

[2021] IEHC 843

[2018 No. 4663 P]

BETWEEN

COLUMB BRAZIL

PLAINTIFF

AND

IRELAND, THE ATTORNEY GENERAL, PROPERTY REGISTRATION AUTHORITY, BANK OF SCOTLAND PLC, ENNIS PROPERTY FINANCE DAC, TOM KAVANAGH, WILSONS AUCTIONS AND PEPPER FINANCE CORPORATION (IRELAND) DAC

DEFENDANTS

JUDGMENT of Mr. Justice Mark Heslin delivered on the 21st day of December, 2021

Introduction

1. On 25 November, 2021, the court heard applications to dismiss the Plaintiff's claim. Mr. Buttanshaw BL appeared for Ireland, the Attorney General and the Property Registration Authority ("PRA") (which I shall refer to, collectively, as the "State Defendants"). Mr. Hutchinson BL appeared for the Fourth Defendant, Bank of Scotland Plc (which I shall refer to as "BOS"). The Fourth Defendant bank is a company incorporated in the United Kingdom and having its registered office in Edinburgh, Scotland which, at all material times, has been regulated in the United Kingdom. Mr. Byrne BL appeared for the Fifth to Eighth Defendants. The Plaintiff is a litigant in person who participated fully during the course of the remote hearing which took place over two days.

Background facts

2. Before looking in some detail at the Plaintiff's claim, as pleaded, the following comprises relevant facts which provide the backdrop to the present proceedings.

12 December 2002

3. Bank of Scotland (Ireland) Ltd ("BOSI") agreed to advance €750,000 to the Plaintiff. The said loan offer was accepted, and the relevant loan was drawn down by the Plaintiff.

January 2003

4. The Plaintiff entered into a deed of mortgage and charge with BOSI by which he granted BOSI a first legal charge ("the charge") over property comprising and described in folio 2710 of the Land Registry County Kildare which property was described in the mortgage as

> *"ALL THAT AND THOSE part of the lands of Kinnafad with dwelling house and out offices thereon containing 56.672 hectares or thereabouts metric measure being part of the property described in Folio 2710 of the register County Kildare and which said property is delineated on a map annexed to a Transfer dated 8 January 2003 and made between John Hill and Columb Brazil and thereon bounded by a red line and letters "B 1" and "B 2" (hereinafter "the property").*

The Plaintiff pledged the property as security for "*present and future advances*" and the definition of "*the Bank*" in the aforesaid deed of mortgage and charge referred to BOSI and "*its successors and assigns*". It is appropriate to refer to certain clauses in the said deed of mortgage and charge as follows: -

- Clause 19 provided that: - *"[t]his Deed shall remain enforceable, valid and binding for all purposes notwithstanding any change in the name of the Bank or its absorption of, or by, amalgamation or consolidation with, any other company or any change in the constitution of the Bank, it successors or assigns or the company by which the business of the Bank may from time to time be carried on and shall be available to such successors, assigns or company carrying on that business for the time being";*

- Clause 26 contains "*Assignment provisions*" including that *"The Bank may assign or transfer all or any of its rights or obligations hereunder. Any assignee, transferee or successor of the Bank shall be entitled to enforce and proceed with this security in the same manner as if named herein";*

- Clause 28 provides, *inter alia*, that "*the mortgagor hereby assents to the registration as burden on the Folio of any registered land referred to in Clause 3 of which the mortgagor is the registered owner . . .".*

25 May 2003

5. The Plaintiff accepted a loan offer dated 25 March 2003, pursuant to which the December 2002 Facility was amended, subject to the terms and conditions set out therein and subject to the 2002 loan conditions which were incorporated by reference.

10 June 2004

6. The Plaintiff accepted a loan offer dated 10 May 2004, pursuant to which BOSI made a loan facility of up to €750,000 available to the Plaintiff. The foregoing was in replacement and substitution of the earlier loan offer letters dated 12 December 2002 and 25 March 2003 from BOSI to the Plaintiff. The June 2004 Facility was granted by BOSI to the Plaintiff, subject to the loan conditions set out in the June 2004 Facility, and subject also to BOSI's general loan conditions which were incorporated by reference.

25 February 2005

7. BOSI was registered as the owner of the aforesaid charge over the Plaintiff's property. This is clear from the entry in Part 3 of folio 2710 (dealing with "Burdens") which records the registration of BOSI's ownership of the relevant charge as follows:-

> *"The title to this charge was transferred by virtue of a cross-border merger made in accordance with Directive 2005/56/EC of the European Parliament and of the Council that was approved by order of The Court of Session of Scotland to take effect at 23:59 hours GMT on 31st December 2010. See entry no. 7 below."*

2007

8. A pattern began to emerge of the Plaintiff defaulting in his repayment obligations (see uncontested averments at para. 11 of affidavit sworn on 5 November 2021 by Mr Chis O'Neil on behalf of the Fourth Defendant).

31 December 2010

9. BOSI merged with BOS and the former ceased to exist, pursuant to a cross-border merger to which Directive 2005/56/EC of the European Parliament and of the Council of

26th October, 2005 on Cross-Border Mergers of Limited Liability Companies ("the Directive") applied. By virtue of the aforesaid merger, the entitlement to recover monies on foot of the loan, as well as the charge over the property granted by the Plaintiff to BOSI, became vested in BOS. This is in circumstances where Article 14(1) of the Directive which sets out the consequences of a cross-border merger of the type which occurred, provides at subs. (a) that "*all the assets and liabilities of the company being acquired shall be transferred to the acquiring company*".

10. For the purpose of giving effect to the Directive, the Minister for Enterprise Trade and Employment made the European Communities (Cross-Border Mergers) Regulations, 2008 (S.I. No. 157 of 2008) ("the Regulations"), Regulation 19 of which is entitled "*Consequences of a cross-border merger*", para. (1) of which begins as follows: -

> *"(1) Subject to paragraph (2), the consequences of a cross-border merger are that, on the effective date—*
>
> *(a) all the assets and liabilities of the transferor companies are transferred to the successor company,";*

29 November 2014

11. BOS entered into a purchase deed regarding the sale of a portfolio of loan facilities and associated security to ELQ Investors II Ltd. which included the loan facilities granted to the Plaintiff and the charge granted by the Plaintiff over his property.

12 December 2014

12. BOS, ELQ Investors II Ltd. and Ennis entered into a deed of novation whereby ELQ Investors II Ltd. novated the entirety of its rights, title, interest, obligations and liability under the aforesaid purchase deed in favour of Ennis;

9 April, 2015

13. BOS was registered as owner of the relevant charge and this is clear from "entry no. 7" at part 3 of folio 2710. That entry also records that ownership of the charge has been transferred and it refers to "*entry no. 8*".

20 April 2015

14. BOS, as assignor, and Ennis, as assignee, entered into a deed of assignment whereby, inter alia, BOS unconditionally, irrevocably and absolutely assigned to Ennis all such rights, title and interest as BOS may have had in the purchased assets, with effect from 20 April 2015, and which included the Plaintiff's loan and security. On 20 April 2015 BOS, as transferor and Ennis, as transferee entered into a deed of transfer whereby BOS transferred to Ennis the charges set out in the schedule thereto. The charge over the Plaintiff's property appears in the said schedule.

24 April 2015

15. Ennis became owner of the charge at *entry no. 3* on Part 3 of folio 2710 (being the charge originally registered in favour of BOSI) and this is confirmed by *entry no. 8* on part 3 of folio 2710;

23 November 2017

16. Ennis appointed the Sixth Defendant, Mr. Tom Kavanagh, ("the Receiver"), to be receiver and manager over the assets referred to and comprised in a mortgage identified in a schedule to his deed of appointment, being the charge granted by the Plaintiff to BOSI dated 8 January 2003;

February 2018

17. The Plaintiff's agent corresponded with an asset-manager in the Eighth Defendant, Pepper Finance Corporation Finance (Ireland) Designated Activity Company ("Pepper") with a view to seeing if a settlement could be reached and an offer of €500,000 was made and rejected;

18 April 2018

18. The Plaintiff's former solicitor made an offer by letter of €650,000 in full and final settlement, which offer was not accepted.

16 May 2018

19. The debt due by the Plaintiff was approximately €845,500 plus interest;

23 May 2018

20. The Plaintiff commenced the present proceedings and made an application for short service of a notice of motion seeking injunctive relief. The Plaintiff's motion was returnable for **28 May 2018** and sought various reliefs, namely, an order prohibiting the Seventh Defendant from offering Folio KE 2710 for sale; an order removing the deed of appointment of the Sixth Defendant; an order removing the charges placed on Folio KE 2710 by the Third Defendant at the behest of the Fourth and Fifth Defendants; and an order setting aside the contractual obligations of the Plaintiff to the Fourth and Fifth Defendants;

29 May 2018

21. The Plaintiff's application was refused by this Court (Meenan J.) and the Fifth, Sixth and Seventh Defendants were awarded their costs.

30 May 2018

22. Part of Folio 2710 consisting of agricultural lands was sold at auction and the property upon which the Plaintiff currently resides was 'carved out' of this sale.

16 May 2019

23. The Fourth Defendant issued a motion seeking an order pursuant to the provisions of O. 27, r. of the Rules of the Superior Courts dismissing the Plaintiff's action as against the bank for want of prosecution, due to the failure by the Plaintiff to deliver a statement of claim. The bank's motion was returnable for 15 July 2019

9 July 2019

24. Statement of claim, dated 1 July 2019, was delivered by the Plaintiff.

20 August 2019

25. The Fourth Defendant bank served a notice for particulars.

6 January 2020

26. The Fourth Defendant issued a motion pursuant to the provisions of O. 19, r. 7 of the Rules of the Superior Courts requiring the Plaintiff to furnish replies to the bank's notice for particulars.

12 February 2020

27. The Plaintiff wrote to the solicitors for the Fourth Defendant enclosing an unfiled and undated notice of motion, which sought to amend the statement of claim and to join Pepper as a Defendant.

17 February 2020

28. This Court ordered that the Plaintiff furnish replies to the bank's notice for particulars within 21 days.

20 February 2020

29. The Plaintiff furnished replies to the Fourth Defendant bank's notice for particulars;

11 March 2020

30. The Plaintiff furnished a filed and dated version of the motion to amend the statement of claim and a filed version of a grounding affidavit sworn by the Plaintiff on 13 February 2020;

23 March 2020

31. The solicitors for the Fourth Defendant wrote to the Plaintiff to point out that certain exhibits had not been furnished; and also confirmed that the Fourth Defendant bank would not object to the Plaintiff's motion to amend the statement of claim;

7 July 2020

32. This Court made an order permitting the amendment of the statement of claim and the joinder of Pepper as co–defendant. An amended statement of claim is dated 14 January 2020. The Plaintiff never, in fact, delivered the amended statement of claim, despite being called upon to do so (however, the hearing of the Defendants' motions proceeded on the basis of what is contained in the amended statement of claim). Prior to the hearing of the motions to dismiss, solicitors representing all eight Defendants wrote to the Plaintiff calling upon him to discontinue the present proceedings and indicating that, if he did so, their clients would not seek their costs (and I will refer to this correspondence later in this judgment).

20 November 2020

33. The First to Third Defendants' motion to dismiss was issued.

15 March 2021

34. The Fourth Defendant's motion to dismiss was issued;

26 March 2021

35. The Fifth to Eighth Defendants' motion to dismiss was issued.

36. Although each of the motions which seek to dismiss the Plaintiff's claim have a somewhat different focus, all motions on behalf of all Defendants assert that the Plaintiff's claim should be dismissed on the basis that it is bound to fail and that the continued maintenance of the claim constitutes an abuse of process.

The Plaintiff's pleaded claim

37. I have carefully considered the contents of the Plaintiff's plenary summons and amended statement of claim. It is not necessary to set out their terms, *verbatim*, in this judgment but it seems entirely fair to say that central to the Plaintiff's claim is to allege that: (a) the Regulations, in particular 19 (1) (g) and (h), went beyond the scope of the Directive and are *ultra vires* as regards the consequences attributed to cross-border mergers; (b) the application of Regulation 19 to the Plaintiff's loan in the context of BOS (and, thereafter, Ennis) becoming registered as owner of the charge over his property was impermissible, rendering the entries by the PRA at part 3 of Folio 2710 a "*fraud"* and void; (c) not being in existence when the Plaintiff took a loan from BOSI in 2002 and granted a charge in favour of BOSI in 2003, the 2008 Regulations cannot be "*retrospectively*" relied upon in order to carry out what the Plaintiff describes as a "*fraud*" upon him and which he claims to be a breach of the contract (between BOSI and the Plaintiff) which BOS has inherited by reason of the cross-border merger.

No evidence in support of the pleaded claim

38. Before proceeding further, it is appropriate to note that the Plaintiff has proffered no evidence whatsoever in his replying affidavit in support of the claims pleaded in his plenary summons and amended statement of claim. It is also appropriate to note that when this Court (Meenan J.) refused the Plaintiff's application for interlocutory injunctive relief and ordered that the Plaintiff pay the Fifth, Sixth and Seventh Defendants' costs, the court held that the Plaintiff had failed even to demonstrate that there was a *'serious issue'* to be tried in the proceedings. Some two and a half years have elapsed since the court refused the Plaintiff's motion seeking injunctive relief and the *status quo*, as of the hearing date in respect of these motions, is that no evidence whatsoever has been proffered by the Plaintiff in support of the pleas he makes.

A "documents case"

39. I will presently refer to the scope of this Court's jurisdiction to dismiss proceedings on motions of this type. Before doing so, it is uncontroversial to say that certain cases will turn wholly or primarily on the construction of documents and on the interpretation of statutory provisions, as opposed to, for example, the court having to make findings of fact after weighing up oral evidence given by witnesses concerning disputed issues. I have no hesitation in saying that the present case is of the former type. In *Salthill Properties Ltd. v. Royal Bank of Scotland plc* [2009] IEHC (Unreported, High Court, 30 April 2009) Clarke J. (as he then was) stated the following: -

> *"So far as the general question of whether proceedings are, on their merits, bound to fail it seems to me that it is necessary to address the question which arose for debate between the parties as to the approach which the court should take to the evidence as presented on an application to dismiss such as that with which I am involved. It has often been noted that an application to dismiss as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. For example, in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document concerned could give rise to a claim on the part of the Plaintiff, even if all*

of the facts alleged by the Plaintiff were established . . . more difficult issues are likely to arise in an application to dismiss where there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence. At this end of the spectrum, it is difficult to envisage circumstances where an application to dismiss as bound to fail could succeed. In between are a range of cases which may be supported to a greater or lesser extent by documentation.

However, it is important to emphasise the different role which documents may play in proceedings. In cases, such as the examples which I have given earlier, involving contracts and the like, the document itself may govern the legal relations between the parties so that the court can consider the terms of the document on its face and may be able to come to a clear view as to the legal consequences flowing from the parties having governed their relations by the document concerned. . ..

On an application to dismiss as being bound to fail, there is nothing to prevent the Defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the Plaintiff has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the Plaintiff's claim".

40. It is fair to say that the documents governing the legal relations between the parties have been put before the court. The Plaintiff does not contest this. There is no denial that he executed both the loan agreement and the mortgage which created the charge. There is no dispute as to their proper interpretation. The Plaintiff acknowledges that he accepted the loan, executed the charge and availed of the funds. At its heart, the Plaintiff's claim is to assert that Regulations 19 (1) (g) and (h) are inconsistent with the Directive and that reliance on those Regulations "infects" everything, i.e. the cross- border merger between BOSI and BOS; the acquisition by the latter of the interest in the charge over his property; the assignment to Ennis; and the deed of appointment of the Receiver.

41. It is entirely fair to say that it is the proposition that Regulation 19 (1) (g) and (h) are *ultra vires* the Directive which constitutes the 'common thread' binding together the various claims made by the Plaintiff. Nor is it unfair to say that in each of the three motions the Defendants essentially contend that if one 'pulls' the foregoing 'thread', the inevitable outcome is the unravelling of the Plaintiff's case. Before looking at certain very relevant authorities, it is useful to set out certain relevant provisions which appear in Bunreacht na hÉireann, in the Directive, and in the Regulations, respectively (in circumstances where the Plaintiff refers to all three in his pleaded case).

Bunreacht na hÉireann – Article 29 (6)

42. Article 29 deals with "International Relations" and provides as follows: -

"6° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—

i the said European Union or the European Atomic Energy Community, or institutions thereof,

ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or

iii bodies competent under the treaties referred to in this section,

from having the force of law in the State".

Directive 2005/56/EC – Article 14

43. Article 14 of the Directive provides inter alia as follows: -

"Consequences of the cross-border merger

1. A cross-border merger carried out as laid down in points (a) and (c) of Article 2(2) shall, from the date referred to in Article 12, have the following consequences:

(a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;

(b) the members of the company being acquired shall become members of the acquiring company;

(c) the company being acquired shall cease to exist . . .

3. Where, in the case of a cross-border merger of companies covered by this Directive, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall be carried out by the company resulting from the cross-border merger . . ."

44. It is not in dispute that the relevant cross-border merger was a merger by absorption of the type described in Article 14 and, thus, it carried with it the consequences described in Article 14 (1), namely, the transfer of all assets and liabilities to the acquiring company by operation of law. Incontrovertible evidence is before this Court that the cross-border merger occurred. All of the assets and liabilities of BOSI transferred to BOS by operation of law as at 23:59 on 31 December 2010 and BOSI was then dissolved without going into liquidation. In addition to the uncontested averments by Mr. O'Neil to the foregoing effect (para. 4 of his 10 March 2021 affidavit) he exhibits the following.

45. Firstly, Mr. O'Neil exhibits an order made by this Court (Kelly J.) dated 22 October 2010, the operative part of which states: - *"the Court doth certify pursuant to Regulation 13 of the European Communities (Cross-border mergers) Regulations 2008 that the applicant has completed properly each of the pre-merger requirements in respect of a cross-border merger with Bank of Scotland plc".*

46. Secondly, Mr. O'Neil exhibits a copy of the pre-merger certificate dated 22 October 2010 whereby the Court certified that the applicant, BOSI, in respect of a proposed merger with BOS, had completed properly the pre-merger requirements.

47. Thirdly, Mr. O'Neil exhibited a copy of the order made by the Court of Session in Scotland, dated 10 December 2010 whereby that court, at para. 2: -

> *"Makes an order (the) 'Approval Order' approving the completion of the cross-border merger (within the meaning of Regulation 2(1) of the Companies TC (Cross-border mergers) Regulations 2007) of BOSI into Bank of Scotland plc ("the merger") for the purposes of Article 11 of Directive 2005/56/EC of the European Parliament and the Council of the European Union".*

Article 14

48. Having regard to the foregoing, it is also appropriate to quote verbatim Article 17 of the Directive which states as follows: -

> *"Article 17*
>
> *Validity*
>
> *A cross-border merger which has taken effect as provided for in Article 12 may not be declared null and void".*

The 2008 Regulations (S.I. 157 of 2008)

49. Regulation 2 sets out a number of definitions including the following: -

> *"'cross-border merger' means a merger involving at least one Irish company and at least one EEA company, being—*
>
> *(a) a merger by acquisition,*
>
> *(b) a merger by formation of a new company, or*
>
> *(c) a merger by absorption;"*

50. As already mentioned, it is not in dispute that a merger by absorption took place. That phrase is specifically defined later in Regulation 2 as follows: -

> *"'merger by absorption' means an operation in which, on being dissolved and without going into liquidation, a company transfers all of its assets and liabilities to a company that is the holder of all the shares or other securities representing the capital of the first-mentioned company"*

51. Regulation 13 is entitled "Certificate of compliance with pre-merger requirements" and it provides as follows: -

> *"On application by an Irish merging company, the Court shall, if it is satisfied that the company has completed properly the pre-merger requirements, issue a certificate to that effect, and such a certificate is conclusive evidence that the company has properly completed the pre-merger requirements".*

52. The foregoing refers to what this Court did by means of the 22 October 2010 order made (by Kelly J., as he then was) and the certificate issued by the court on the same date.

Regulation 19

53. Given that it is the provisions of Regulation 19 which the Plaintiff contends to be offensive to the Directive, it is appropriate to quote from same as follows: -

"Consequences of a cross-border merger

19. (1) Subject to paragraph (2), the consequences of a cross-border merger are that, on the effective date—

(a) all the assets and liabilities of the transferor companies are transferred to the successor company,

. . .

(g) every contract, agreement or instrument to which a transferor company is a party shall, notwithstanding anything to the contrary contained in that contract, agreement or instrument, be construed and have effect as if—

(i) the successor company had been a party thereto instead of the transferor company,

(ii) for any reference (however worded and whether express or implied) to the transferor company there were substituted a reference to the successor company, and

(iii) any reference (however worded and whether express or implied) to the directors, officers, representatives or employees of the transferor company, or any of them, were, respectively, a reference to the directors, officers, representatives or employees of the successor company or to such director, officer, representative or employee of the successor company as the successor company nominates for that purpose or, in default of nomination, to the director, officer, representative or employee of the successor company who corresponds as nearly as may be to the first-mentioned director, officer, representative or employee.

(h) every contract, agreement or instrument to which a transferor company is a party becomes a contract, agreement or instrument between the successor company and the counterparty with the same rights, and subject to the same obligations, liabilities and incidents (including rights of set-off), as would have been applicable thereto if that contract, agreement or instrument had continued in force between the transferor company and the counterparty, and any money due and owing (or payable) by or to the transferor company under or by virtue of any such contract, agreement or instrument shall become due and owing (or payable) by or to the successor company instead of the transferor company, and . . .

. . .

(2) The successor company shall comply with filing requirements and any other special formalities required by law (including the law of another EEA State) for the transfer of the assets and liabilities of the transferor companies to be effective in relation to other persons".

54. It is plain that the foregoing is the method by which this State has chosen to give effect to the requirements of the Directive, in particular Article 14 thereof. As can be seen, the wording in Regulation 19 (1) (a) mirrors the wording used in Article 14 (1) (a) of the Directive. Similarly, Regulation 19 (2) reflects the terms of Article 14 (3). As the Plaintiff's pleaded claim makes clear, his central contention is that Regulation 19 (1) (g) and (h) go beyond the scope of the Directive and are thus, ultra vires. It is fair to say that the entire of the relief sought by the Plaintiff revolves in one way or another on the foregoing assertion. That being so, I now turn to some highly relevant authorities including authorities of which the Plaintiff was either aware, or which have been drawn to his particular attention, in the context of previous invitations to discontinue these proceedings without cost, which invitations he declined.

The motion brought by the State Defendants

55. The motion brought by the State Defendants which seeks to strike out the Plaintiff's proceedings was issued on 13 November. The primary relief at para. (a) is an order sought pursuant to this Court's inherent jurisdiction dismissing the Plaintiff's claim against the State Defendants on the basis that it is bound to fail and constitutes an abuse of process. At para. (b) and in the alternative, an order pursuant to O. 19 r. 28 of the Rules of the Superior Courts (as amended), is sought, dismissing the Plaintiff's claim against the State Defendants as being vexatious. Alternative relief is sought at para. 3 that, in the event of the Plaintiff being permitted to continue with his action against the State Defendants, he be ordered to provide replies to the notice for particulars dated 29 October 2019 served by the State Defendants.

Affidavit of Ms Joanna O'Connor

56. The aforesaid motion is grounded on the affidavit of Ms. Joanna O'Connor, solicitor in the office of the Chief State Solicitor, which was sworn on 17 November 2020. In that affidavit, Ms. O'Connor sets out the relevant background on the loan facility letter dated 12 December 2002 made by BOSI to the Plaintiff, up to the Plaintiff's unsuccessful

application for injunctive relief on 29 May 2018, following which a statement of claim was ultimately delivered, an amended statement of claim also having been furnished by the Plaintiff. She then makes averments with regard to what the State Defendants understand to be the claim which the Plaintiff makes against them. It is important to note that this is in circumstances where, by notice for particulars dated 29 October 2019, the State Defendants sought further particulars and clarifications arising out of the Plaintiff's statement of claim in the form of 8 numbered queries. Despite the foregoing, the Plaintiff failed to deliver any replies to same. In the absence of the foregoing particulars and clarification, Ms. O'Connor's affidavit parses the various claims made by the Plaintiff and she makes averments as to why the allegations made by the Plaintiff are unsustainable, in particular, with reference to *Geary v. Property Registration Authority & Ors* [2020] IECA 132 and *Kearney v. Bank of Scotland plc & Ors* [2020] IECA 92. I will presently look at both of those authorities.

Invitation to discontinue proceedings against the State Defendants

57. Ms. O'Connor also avers that, by letter dated 16 October 2020, she wrote to the Plaintiff, inter alia, asserting that in light of the decision of the Court of Appeal in *Geary*, his claim against the State Defendants could not succeed and the continued maintenance of same would constitute an abuse of process. Her letter indicated that if the Plaintiff were to discontinue the proceedings within the following 14 days, the State Defendants would not seek to recover any costs from him. That letter is exhibited. Ms. O'Connor goes on to aver that, in a response dated 20 October 2020, the Plaintiff refused the invitation to discontinue his proceedings stating inter alia that: -

> *"The core point for consideration is the provision of retrospective legislation and the permitting of such legislation to be applied to my private contract by Ireland and the Office of the Attorney General".*

The motion brought by the Fourth Defendant, BOS

58. The motion brought by the Fourth Defendant was issued on 15 March 2021. As is clear from para. (a), the primary relief sought is an order striking out the proceedings as against the Fourth Defendant pursuant to the provisions of O. 19, r. 28 of the Rules of the Superior Courts on the grounds that same are frivolous and vexatious and/or disclose no reasonable cause of action. In the alternative, para. (b) seeks an order pursuant to the court's inherent jurisdiction dismissing the proceedings as unsustainable, frivolous and vexatious and/or an abuse of process.

Affidavit of Mr. Chris O'Neil

59. The Fourth Defendant's application is grounded on an affidavit sworn by Mr. Chris O'Neil who avers, inter alia, that he is an officer of BOS and makes his affidavit with the bank's consent and on its behalf and from a review of the books and records of the bank and from facts within his knowledge save where otherwise appears and, where so appearing, he believes those facts to be true. Mr. O'Neil makes a series of averments detailing the background; the cross-border merger; the proceedings to date; the evidence comprising sworn affidavits in the context of the Plaintiff's application for interlocutory relief; the progress of the underlying proceedings and orders made therein. This included an order

made by the court on 7 July 2020 allowing the amendment of the Plaintiff's statement of claim and the joinder of Pepper as a Defendant.

60. Mr. O'Neil avers, *inter alia*, that the Plaintiff was called upon to deliver the amended statement of claim but, despite reminders, has never done so. In the manner I will presently explain, the hearing of the motions proceeded on the basis that the claim which the Plaintiff wishes to make is that pleaded in the amended statement of claim which the Plaintiff was granted liberty to deliver pursuant to the 7 July 2020 order, a copy of which Mr. O'Neil exhibits.

Invitation to discontinue proceedings against the Fourth Defendant

61. Among other things, Mr. O'Neil avers that, by letter dated 25 September 2020, Messrs. McCann Fitzgerald solicitors for the Fourth Defendant, wrote to the Plaintiff, stating, inter alia, that, in circumstances where equivalent claims had already been rejected by the Courts, the Plaintiff was called upon to discontinue the proceedings, in which case the Fourth Defendant would not seek its costs. Mr. O'Neil avers that, by email dated 28 September 2020, the Plaintiff indicated that he would not discontinue the proceedings and stated *inter alia* that: -

> *"[y]our client applied retrospective legislation to transfer charges on my property" and*
>
> *"[t]he cases you have referred have not addressed your client's reliance on retrospective legislation i.e. the use of the 2008 Irish Regulations, specifically 19 (1) (g) and (h) of the said Regulations to transfer the charges. My contract predates the referred regulations by years".*

62. The Plaintiff's 28 September 2020 correspondence is exhibited by Mr. O'Neil and it also states *inter alia* the following as regards the gravamen of the Plaintiff's claim:-

> *"Your client purportedly did by cross-border merger step into the precise contractual shoes of BOSI at 23:59 on the 31st of December 2010. The reality is your client did not do so. It dispensed with its contractual obligations".*

Mr. O'Neil goes on to aver that, in a reply sent on 02 October 2020, McCann Fitzgerald pointed out to the Plaintiff that the stance he maintained was incorrect in circumstances where the very argument raised by the Plaintiff in his 28 September 2020 communication was rejected by the Court of Appeal in the Kearney decision. The Plaintiff was again called upon to withdraw his claim against the Fourth Defendant, failing which an application would be brought to strike out the proceedings. Mr. O'Neil's affidavit also contains a detailed setting out of the relevant loan and security history. It is appropriate to note at this juncture that none of his averments in this regard are contested. I will presently set out in some detail, and in chronological order, the facts which a careful consideration of the entirety of the affidavit evidence, discloses. The final section of Mr. O'Neil's affidavit comprises an analysis of the various elements of the claim made by the Plaintiff per the amended statement of claim. In a series of averments, Mr. O'Neil contends that the

Plaintiff's claim has no prospect of success, with particular reference placed on the Court of Appeal's decisions in the *Geary* and *Kearney* cases to which Mr. O'Neil makes specific reference.

Motion by the fifth to eight Defendants

63. The motion brought by the Fifth to Eighth Defendants was issued on 26 March 2021. The primary relief at para. (a) is an order pursuant to O. 19, r. 28 and/or pursuant to the court's inherent jurisdiction, striking out the plenary summons and the statement of claim and dismissing or placing a permanent stay on the proceedings on the basis that neither the plenary summons, nor the statement of claim, discloses any reasonable cause of action as against the Fifth to Eighth Defendants. Paras. (b) to (d) of the said motion seek orders pursuant to O. 19, r. 28 and/or the inherent jurisdiction of the court dismissing or placing a permanent stay on the proceedings on the basis that they are frivolous and/or vexatious; an abuse of process; or bound to fail.

Affidavit of Ms Lorraine Fairley

64. The aforesaid motion is grounded on an affidavit sworn by Ms. Lorraine Fairley who avers that she is a senior portfolio manager of the Eighth Defendant. Ms. Fairley makes averments with regard to the relevant background and procedural history, following which she analyses the statement of claim, taking into account the proposed amendments insofar as claims are made against each of Ennis, the Receiver, and Wilsons. In a series of averments, Ms. Fairley asserts that the claims are variously unsustainable, lacking credibility, frivolous, vexatious and bound to fail.

The Plaintiff's avement that he does not contest the cross-border merger

65. Among other things, Ms. Fairley makes reference to certain averments made by the Plaintiff when he sought interlocutory injunctive relief and she highlights, in particular, the averment made by the Plaintiff in an affidavit sworn on 23 May 2018 which grounded his injunction application, wherein he averred inter alia the following: -

> *"I say for the avoidance of doubt I do not contest the Cross – Border Merger that took place by operation of Law as was determined in those Authorities".*

This Court has before it a copy of the motion papers, submissions and orders concerning the Plaintiff's interlocutory injunction application which was refused by order dated 29 May 2018. The averment made by the Plaintiff to which Ms. Fairley referred, is contained at para. 13 of the Plaintiff's 23 May 2018 affidavit, which also makes clear that the authorities to which he was referring were *Kavanagh v. McLaughlin* [2015] 3 IR 155 and *Freeman v. Bank of Scotland* [2016] IESC 14. Later in this judgment I will look at both authorities.

The Plaintiff's written submissions when seeking injunctions in 2018

66. Ms. Fairley also refers to the written submissions which were handed into court at the hearing before Meenan J. on 29 May 2018 wherein the Plaintiff stated the following in the second paragraph of his submissions: -

"The Cross – Border Merger is clearly done in accordance with Law. I wholly accept it would be an act of folly to raise any issue suggesting anything to the contrary due to the Case Law available".

The Plaintiff's 'composite' replying affidavit

67. On 6 September 2021, the Plaintiff swore a relatively short affidavit, running to 11 paragraphs, by way of a composite response to the affidavits grounding the three motions. I am satisfied that the only averments in that affidavit which concern the case as pleaded by the Plaintiff (as opposed to the introduction of wholly extraneous matters unrelated to the pleaded case) comprised the following: -

"- I have a case against each of the Defendants, my claim is most certainly not vexatious or frivolous and does not constitute an abuse of process"(para. 3)

" – What I have illustrated is a domino effect which started with Bank of Scotland plc. being in contravention of the application of law chosen by its predecessor Bank of Scotland Ireland and through a deliberate act of evasion of its obligations to the contract which included the mandatory obligation of compliance with the Central Bank Act 1971 to transfer charges, proceeded to enter into a purchase deed, a deed of novation and a deed of assignment. This process was flawed and Bank of Scotland plc had no contractual entitlement whatsoever to enter into any such contractual arrangement due to the fraudulent applications of Bank of Scotland plc and subsequent breach of contracts. I say that from this point on the assignment entered into with Ennis Property Finance DAC is void, it subsequently follows on that the deed of appointment of Tom Kavanagh is also void and my property should not have been sold". (para. 8)

" – What I did was to examine the transfer of my loan within the legal guidelines under which it should have been transferred and showed that the process was flawed. It is void and subsequently voids that actions that flow from it". (para. 8)

" – I have also outlined as per my amended statement of claim that the deed of transfer, assignment and novation entered into by Bank of Scotland plc are void and rendered the actions that flowed from this also void". (para. 9)

Matters raised by the Plaintiff which are not relevant to his pleaded claim

68. The other averments made by the Plaintiff have, I am entirely satisfied, no connection whatsoever with the case pleaded by him. These averments include reference to what are said to have been his personal circumstances when he took out the relevant loan and executed the relevant mortgage almost two decades ago; documentation signed by him, with reference made to a "*form*" (although it is not explained what this form is said to have been); what the Plaintiff maintains were his plans in respect of the property purchased; what was then an ongoing divorce; a loan which the Plaintiff alleges that he gave of €600,000 to an unnamed party in 2008 which loan, he says, was to be paid back annually with agreed amounts to be completed by 2012 of which, the Plaintiff says, he

has only received €25,000. The Plaintiff also refers to proceedings which he describes as *Columb Brazil v. CF Group, Colin Corkey and Michael Feehan* (record no. 2021/550 S) "*to seek judgment and recover €580,000"*. The Plaintiff also says that he suffered financially as a result of his divorce and that his former wife "*received cash payment and property"* and he goes on to state that he was left with a legal bill in excess of €550,000.000.

The Fourth Defendant's response

69. Mr. O'Neil swore a relatively short replying affidavit on 5 November 2021 making clear that, although the averments made by the Plaintiff did not appear to relate in any way to the matters pleaded in his claim, he wished, for the purpose of completeness, to set out the response of BOS to the matters raised by the Plaintiff. Mr. O'Neil proceeded to do so, and he made inter alia the following averments:

- The original internal credit proposal was submitted and approved by BOSI in December 2002 on the basis of a term loan with quarterly principal and interest repayments, and Mr. O'Neil exhibited the internal credit proposal (para. 6);

- An amendment to the December 2002 Facility was submitted in March 2003, and Mr. O'Neil exhibits the amendment to the original credit proposal which states that, when the original credit application was made, the Plaintiff was considering the option of a pension related mortgage product but that he was under pressure to complete the acquisition and so did so on the original terms of December 2002, but the Plaintiff had since purchased the pension policy and, therefore, the loan facility required to be amended. (para. 7)

- The amendment to the December 2002 facility was approved by the credit committee of BOSI on 24 March 2003 and this loan history accords with the letter of loan offer dated 25 March 2003 which was accepted by the Plaintiff on 25 May 2003. (para. 7)

- Mr. O'Neil exhibited a copy of the pension policy schedule purchased by the Plaintiff from BOSI in February 2003 (para. 8);

- With regard to the loan documentation concerning the December 2002 Facility and the amendment thereto:-

    - in each case the letters of loan offer were signed by the Plaintiff, dated and witnessed;
    - in each case, the Plaintiff nominated a solicitor to act for him; and
    - in each case, the Plaintiff confirmed that for the purposes of the Consumer Credit Act, 1995, in availing of the facility, he was acting within his business, trade or profession (para. 9);

- The Plaintiff's account of alleged events 19 years ago is not supported by the documentary evidence which is available from BOS's records (para. 10);

- The original credit proposal was submitted on the basis that the December 2002 Facility would part–fund the purchase of the charged property as an investment;

- The viability of the loan was assessed in part on this basis;

- This was the stated purpose on the face of the 2002 Facility, which was signed and witnessed by the Plaintiff, in respect of which the Plaintiff had the benefit of independent legal advice (para. 10);

- It is not clear how it is alleged that BOSI ought to have been aware of "*personal issues*" (in the form of an alleged unpaid loan in respect of which the Plaintiff has issued High Court summary proceedings with a 2021 record number, and a divorce settlement) or how same could possibly constitute a viable cause of action (para. 11);

- While a pattern emerged of the Plaintiff defaulting in his repayment obligations in or about 2007, neither BOSI nor BOS enforced the loan facilities and security interest over the charged property created by the deed of mortgage and charge and it was, in fact, Ennis which appointed the Receiver by deed of appointment in November 2017 (para. 11).

70. The foregoing uncontested averments made on behalf of the Fourth Defendant address the various issues raised by the Plaintiff; but it is important to emphasise that these issues have no connection to or bearing on the pleaded claim made by the Plaintiff. It is the claim as pleaded by the Plaintiff which is of relevance in the context of the various motions which seek to dismiss that claim.

A document which the Plaintiff sought to admit

71. At this juncture, it is also appropriate to note that, at the very outset of the hearing on 25 November 2021, I was informed that, the previous evening, the Plaintiff had delivered an unsworn document to the Defendants which he sought to rely upon. It was made clear that the contents of this document did not relate to the State Defendants and I heard submissions from Mr. Hutchinson and from Mr. Byrne as to why it was not appropriate that, at the '11th hour', this document be put before the court by the Plaintiff. I also carefully considered the submissions made by the Plaintiff. He made clear that the purpose and content of the document related to his contention that the relevant bank, at the time of the initial lending (i.e. BOSI) looked on him as a "good mark" and as a "cash cow" as he put it, and, during his submissions, he asserted that he had a number of "other" assets, including unencumbered property, at the time, which the bank could have taken charges on.

72. It was plain that the thrust of the Plaintiff's submission spoke to a claim of so-called 'negligent lending' or 'reckless lending', which, it is uncontroversial to say, is not a claim known to the law in this jurisdiction (see Charleton J. in *ICS Building Society v. Grant* [2010] IEHC 17 at para. 6 and Kelly J. (as he then was) in *McConnon v. President of Ireland* [2012] IEHC 184 at para. 62; and McGovern J. in *NAMA v. McNulty* [2013] IEHC

369 at para. 31). I gave an *ex tempore* ruling in which, for stated reasons, I decided that the document which the Plaintiff sought to introduce at this very late stage could not be put before the court. I did so in circumstances where there was no dispute as to the relevant chronology of events which can be summarised as follows.

73. The present motions were originally returnable for March 2021. At that stage, the Plaintiff was given six weeks to deliver any replying affidavit he wished to rely upon, but he failed to do so. On 08 July 2021, a hearing date was assigned and the court directed that any replying affidavit which Mr. Brazil intended to deliver, should be served by 3 September 2021. Strictly speaking, he did not meet that deadline, in that his replying affidavit, to which I have already referred, was sworn on 6 September 2021. Nothing turns on this slight delay. The point is that the Plaintiff was given, and took, the opportunity to put in a replying affidavit. The court allowed until 22 October 2021 for any response to the foregoing and, on 21 October 2021, the Plaintiff was served with Mr. O'Neil's affidavit in final draft form, together with all exhibits thereto. It was in final draft form because Mr. O'Neil, who is resident in London, had contracted Covid – 19. A sworn version of the self-same document, with exhibits, was subsequently furnished. I have previously looked at Mr. O'Neil's affidavit in this judgment (as sworn on 5 November 2021) and it was the final affidavit envisaged in terms of the exchange of affidavits. The court granted no liberty for any further affidavits to be delivered. This case was in a call–over the week before the hearing and at that call–over, no leave was sought for the delivery of any further affidavit by the Plaintiff; nor, it must be said, was any such leave sought at any point *after* 21 October 2021. This is despite the fact that well over a month elapsed between the receipt, by the Plaintiff, of Mr. O'Neil's affidavit in final draft form and the hearing date itself. Despite this, the Plaintiff purported to serve an (unsworn) affidavit on the evening before the hearing.

74. When dealing with the issue, I specifically asked the Plaintiff to explain why he had not sought to deliver an affidavit sooner. Other than to make the point that he is a litigant in person, it is fair to say that he offered no explanation; merely an apology. The Plaintiff also informed the court that he had only received the BOS internal credit proposal "a week ago" and it was clear from his submission that the document he purported to serve the evening before the hearing focused on the original credit proposal. As I pointed out during my *ex tempore* ruling, it was "troubling" for the Plaintiff to inform the court that he only received the foregoing a <u>week</u> ago. The fact is that it comprised an exhibit to Mr. O'Neil's affidavit and the relevant document was furnished to the Plaintiff on 21 October 2021 which was <u>five weeks</u> to the day *prior* to the hearing. Not only was it incorrect that the Plaintiff did not receive same until a week ago and not only is it clear that the Plaintiff could have sought, but never did seek, liberty to put in any further affidavit, it was perfectly clear that, insofar as the Plaintiff wishes to focus on the original lending to him and/or to make any case along the lines of 'negligent lending', the foregoing matters are wholly extraneous to the Plaintiff's pleaded case. Yet, it is the pleaded case with which the court is concerned on the present applications, not the lending to the Plaintiff nearly 20 years ago, which, it appeared, was the focus of the unsworn 'affidavit' which the Plaintiff sought to introduce at the 11th hour.

75. It also must be said that this is not a situation where the Plaintiff has rushed or been pressurised. He issued his plenary summons on 23 May 2018. It was well over a year later that the Plaintiff delivered a statement of claim (01 July 2019). Furthermore, some seven months later, the Plaintiff produced a draft amended statement of claim. In other words, the Plaintiff has had every opportunity to plead, in his statement of claim, what he regards his claim to be and it is certainly not a claim which concerns his availing of loan facilities and/or what was or what was not said by whom at the time and/or whether he had other unencumbered assets which the bank could have taken charges over and/or the fact that he confirmed that the property was not a family home and/or availed of a commercial loan and/or that the money should not have been advanced to him in the first place and/or under the terms upon which it was advanced. It is appropriate to return to the various claims asserted by the Plaintiff in his pleaded claim.

The key elements of the Plaintiff's claim, as pleaded

76. Although made in prolix terms, at the very heart of the Plaintiff's claim are the following specific contentions: -

- That Regulations 19 (1) (g) and (h) of the Regulations go beyond what is provided for in the Directive;

- The registration by the PRA of the transfer of ownership over the charge concerning the Plaintiff's property, from BOSI to BOS, in reliance on Regulation 19 (and not in reliance on the Directive or UK Regulations) was ultra vires and impermissible;

- The State was wrong to adopt the Regulations and, through the use of Regulations 19 (1) (g) and (h), permitted BOS to violate the approval order of the Court of Session issued under the UK Regulations of 2007 in respect of the cross – border merger;

- In making Regulations 19 (1) (g) and (h) of the Regulations, which the Plaintiff contends are inconsistent with or go beyond Article 14(1) (a) of the Directive, the State put in place a regime which resulted in his loan and the charge securing his property being transferred from BOSI to BOS which was not mandated by the Directive and constituted wrongful interference in the private contractual relationship between the Plaintiff and BOSI;

- The Plaintiff claims to have suffered breach of duty, breach of statutory duty, breach of constitutional duty and loss on the basis that Regulations 19(1) (g) and (h) attribute consequences to the relevant cross – border merger which go beyond what is required or permitted by the Directive;

- As well as asserting that the Regulations, in particular Regulations 19 (1) (g) and (h) are *ultra vires*, the Plaintiff emphasises that the Regulations were not in existence when he created a charge over the property in favour of BOSI and he asserts that the Regulations cannot be applied "retrospectively" to what he characterises as his pre-existing contract;

- With reliance on Article 14 (3) of the Directive, the Plaintiff asserts that BOS has not carried out the "*special formalities*" required by the laws of the State and/or the UK before the transfer of assets, rights and obligations between merging companies becomes effective against third parties (although it is entirely fair to say that no special formalities have been identified by the Plaintiff);

- The Plaintiff refers to s. 35 of the 1971 Central Bank Act ("the 1971 Act") which deals with the transfer of securities when the business of one licensed bank is transferred to another licenced bank and asserts that the only way BOSI and BOS could have merged was pursuant to the provisions of s. 35 of the 1971 Act;

- The Plaintiff claims that BOS entered into a purchase deed and a deed of novation without having any interest in the Plaintiff's property (which appears to be a claim that BOS was not the registered owner of the charge on the date it entered into the purchase deed and deed of novation).

Kavanagh v. McLaughlin [2015] 3 IR 555

77. The Supreme Court addressed the nature legality and effect of the cross-border merger between BOSI and BOS in *Kavanagh v. McLaughlin* [2015] 3 IR 555. In that case it was alleged that the cross – border merger did not, as a matter of law, transfer the benefit of any security held by BOSI to BOS. It is useful to quote as follows from the decision of Clarke J. (as he then was): -

> *"[I]t must, in substance, be accepted that a consequence of the McLaughlins' argument is that the involvement of a company holding security in a cross-border merger may lead to that security simply ceasing to have effect by virtue of it being neither capable of being owned by an entity which has ceased to exist, nor being transferred to another entity which is to continue in existence in the aftermath of the relevant merger. It cannot be doubted that such a result would have a consequence which was the direct opposite of the intention of the Directive (being to facilitate cross-border mergers). It would mean, in effect, that, despite there being no intention to be found to that effect in the wording of the Directive, the cross-border merger regime would have little or no application in the case of secured lenders".*

78. Having stated the foregoing (at para. 52), the following was made clear (at para. 63) of the same judgment: -

> *"The cross-border merger has been approved by the relevant courts. Unless and until (if it were to prove procedurally possible) those orders were annulled in some way, the cross-border merger remains effective and all of the assets are to be considered to have been transferred to the party contemplated by the merger documentation".*

79. The foregoing seems to me to apply with equal force to the present case, as does the following statement from para. 67 of the Supreme Court's judgment: -

"I am satisfied that it is absolutely clear that amongst the assets which passed from BOSI to BOS on the cross-border merger coming into effect was whatever security BOSI held in respect of loans which were transferred at that time".

Freeman v. Bank of Scotland [2016] IESC 14.

80. A separate composition of the Supreme Court looked at the nature and effect of the cross – border merger the following year in *Freeman v. Bank of Scotland* [2016] IESC 14. The facts in Freeman involved borrowers who obtained a loan from BOSI and gave security over six investment properties by means of a deed of mortgage and charge dated 5 January 2007 (the "Charge" referred to in the court's judgment). The loans provided by BOSI were for a period of 20 years and were described as interest-only. On 31 December 2010 BOSI was the subject of a cross – border merger with BOS, by virtue of which all the assets and liabilities of BOSI transferred to BOSI. The Appellants defaulted on their loan facilities and failed to repay the sums due when demanded. On 17 December 2011, the Second Respondent (i.e. the Receiver) was appointed by BOS over the six properties in question. The Appellants brought High Court proceedings seeking inter alia to invalidate the appointment of the Receiver. The respondents brought an application to dismiss the Appellant's claim as frivolous, vexatious and bound to fail, and this Court (Gilligan J.) dismissed the Appellant's claim, save for issues raised by the Appellants in relation to "securitisation and alleged non – compliance with Central Bank codes". Two other issues were considered at a trial in the High Court (i.e. the effect of s. 64 and s. 90 of the 1964 Registration of Title Act and whether an error in interest calculation and consequent overcharging caused or contributed to the Appellant's default). Among the arguments raised at the hearing was that there had been no registration of the transfer of the rights and powers of BOSI to BOS, and that, as a consequence, the appointment of the Receiver was invalid. BOS contended that the transfer was effective by operation of law in accordance with the cross – border merger directive which was given effect in this jurisdiction by the 2008 Regulations. The trial judge concluded that there was no requirement to execute an instrument of transfer in the case as the transfer occurred by operation of law.

81. In the Supreme Court's judgment delivered by Dunne J., the following was emphasised (at p. 7): -

"The decision of this Court in Kavanagh v. McLaughlin makes it clear that the cross-border merger had the effect of transferring the Charge held by BOSI to the Bank together with the underlying loan contracts. Thus, the cross-border merger issue cannot give rise to any basis for invalidating the appointment of the Receiver in this case".

82. In my view, the foregoing authorities are dispositive of any claim made by the Plaintiff which challenges the legality and effect of the cross – border merger in this case.

Geary v. Property Registration Authority & Ors.

83. In circumstances where the Plaintiff lays such emphasis in his pleaded claim on the proposition that certain of the 2008 Regulations are inconsistent with the Directive (thus

tainting, in a domino-like fashion, the acquisition and registration of the interests of BOS and later, Ennis, as well as rendering the Receiver's appointment void) and that the Regulations cannot apply "retrospectively" I am satisfied that Superior Court authorities wholly undermine the propositions advanced by the Plaintiff and deal conclusively with the remaining aspects of his claim. The first of these authorities is *Geary v. Property Registration Authority & Ors.*

84. The first observation to be made in relation to *Geary* is that the various arguments raised in that case reflect those raised by the Plaintiff in the present proceedings. It is appropriate, therefore, to quote at some length from the Court of Appeal's decision in *Geary*, beginning with what Mr. Justice Murray J. had to say in respect of the challenge to Regulation 19: -

> *"64. The challenge (as they describe it) which the Plaintiffs seek to make in respect of Regulation 19 takes them nowhere unless (a) it is directed to impugning the merger itself or (b) it is intended to enable the Plaintiffs to contend that BOS has not taken over BOSI's entitlements on foot of the agreements with the Plaintiffs. The first of these cannot be done. Article 17 of the Directive is clear and emphatic: 'a cross-border merger which has taken effect as provided for in Article 12 may not be declared null and void.' This, of course, is aside from the fact that any proceedings seeking relief to that effect would comprise a challenge to the Order of the Court of Sessions in Scotland pursuant to which the merger took effect, a challenge which could only be entertained by the Courts in that jurisdiction.*
>
> *65. The second would negate the outcome required by Article 14(1)(a) as described by Clarke J. in Kavanagh v. McLoughlin. That provision mandates that a cross border merger have the consequence that '**all the assets and liabilities of the company being acquired shall be transferred to the acquiring company'**. The Court in Kavanagh v. McLoughlin held that 'assets' for this purpose means 'any element of its business which has the potential to confer value' (at para. 65). Therefore, all contractual rights of BOSI were transferred to BOS, including the right to recover debts and any securities.*
>
> *66. Thus, and having regard to the provisions of Article 29.4.6 of the Constitution, arguments based upon the alleged unconstitutionality of the Irish Regulations are doomed to fail. Measures which ensure the effectiveness of the transfer of those contractual rights are necessitated by the provisions of the Directive".*

85. It is also appropriate to quote as follows from the Court of Appeal's decision in *Geary* where Murray J. disposed conclusively of all arguments made by the Plaintiffs/appellants in that case (and similar arguments are made by the Plaintiff in the present proceedings) based on Regulations 19 (1) (g) and (h): -

> *"76. Member States in implementing an EU Directive do not have to slavishly replicate every word of it, and they are in no sense precluded from expanding on its terms. In some circumstances it would actually breach European Law to do the*

former and not to do the latter. The provisions to which the Plaintiffs object – Articles 19(1)(g) and (h) — provide in detail how specific effect is being given to general the mandate expressed in Article 14(1)(a) of the Directive. That is both common and entirely regular. Apart from pointing to the fact that the Directive does not contain the text in these provisions, the Plaintiffs have not explained how the Regulations are in any way incompatible with the Directive. For the argument they seek to advance in this context to enjoy any reality they would have to explain why the Directive, although requiring that a transfer of all assets and liabilities of the company being acquired should be effected to the acquiring company, in some sense precludes the consequences identified in Articles 19(1)(g) and (h). They have not explained this, because they cannot possibly formulate such an argument. Clearly, the opposite is the case. These stipulations have the effect of ensuring that the assets are properly and effectively transferred. The proposition that the State is in breach of EU law because of its elaboration on the consequences of Article 14(1) of the Directive in domestic law in this way is untenable".

86. If this Court discounts, as it must, all claims made by the Plaintiff which challenge the lawfulness and effect of the cross – border merger and all claims constructed on the foundation that Regulations 19 (1) (g) and (h) are offensive to the Directive or to Bunreacht na hÉireann, all that remains are arguments founded on the proposition that the Directive and/or the Regulations have been applied "retrospectively" in an unlawful manner. All such arguments were dealt with by the Court of Appeal in *Kearney v. Bank of Scotland plc & Horkan,* to which decision I now turn.

Kearney v. Bank of Scotland plc & Horkan

87. It is appropriate to quote from the *Kearney* decision, beginning with para. 33, where Whelan J. identified the argument raised by the Appellant in that case (and which mirrors the Plaintiff's claim in the present proceedings) as follows: -

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

88. Later, (at para. 88) Whelan J. summarised the central contention made by the relevant appellant (which, of course, is one and the same as the Plaintiff pleads in the present proceedings), as follows,: -

"88. A central plank in the Appellant's oral argument was that since the mortgage and charge was entered into and executed on 14th January, 2004 only legislation

operative as of that date could have been availed of by BOSI to transfer its interests in the charges and securities to a third party such as BOS. In the course of the appeal hearing he contended that: "The 2008 Irish Regulations were not chosen or agreed between the parties and cannot apply to contracts concluded by these parties pre the time the Irish Regulations were invoked." The Appellant also argued that by availing of the procedures under Directive 2005/56/EC and the national regulations operative in this State and in the United Kingdom "… Bank of Scotland PLC has fraudulently applied and used law not in existence when it inherited the contract first concluded in 2004'".

Unmoored from any legal principle

89. From para 134 onwards of her judgment, Whelan J. set out the Court of Appeal's conclusions with regard to the arguments advanced: -

> *"134. In denying the availability of Directive 2005/56/EC to facilitate the cross-border merger and its availability for that purpose to BOS and BOSI, the Appellant's contentions are unmoored from any legal principle. It is wholly misconceived to argue, as the Appellant now does, that the only mechanism whereby such a transfer might lawfully take effect was pursuant to the provisions of the Central Bank Act 1971.*
>
> *135. The Appellant contends that Directive 2005/56/EC and the relevant regulations are "an example of State interference in private contracts". The Appellant's mortgage is not exempt from the operation of Directive 2005/56/EC, provided the Directive's provisions and the relevant national measures of both member states were complied with. The Supreme Court has held that they were. It is specious to argue otherwise.*
>
> *136. The corollary of the Appellant's contentions is that mortgages which existed for the benefit of BOSI on the operative date, namely, 31st December. 2010. thereupon by some vague alchemy vanished or ceased to exist. There is no basis in logic or reason for such a proposition. Such contentions are wholly unarguable in light of the decision of the Supreme Court in Kavanagh v. McLaughlin, including the obiter comments of Laffoy J. The judgment of Clarke J. warrants careful consideration by any party who seeks to argue otherwise. The Supreme Court reiterated the position in Freeman v. Bank of Scotland plc. The High Court was bound by and correctly applied the said decisions which are clearly dispositive of all the arguments advanced by the Appellant in his pleadings including the amended statement of claim directed at impugning the cross-border merger".*

S. 64 and s. 90 of the Registration of Title Act 1964

90. Carefully examining, as I have done, all the various pleas made by the Plaintiff, I am satisfied that the foregoing authorities fatally undermine the propositions on which they are based. Insofar as the Plaintiff makes what could be called subsidiary arguments, it is appropriate to state that the entitlement of BOS to transfer a charge registered in the name of BOSI to a third party pursuant to the provisions of s. 64 of the Registration of

Title Act 1964 is not in doubt. It arises pursuant to the provisions contained within s. 90 of the 1964 Act and was confirmed by the Court of Appeal in *Tanager DAC v. Kane & Ors.* [2018] IECA 352. It is also appropriate to quote as follows from the decision by Baker J.: -

> *"133. I reject the argument of Mr Kane that 'special formalities' or 'filing requirements' were required as a matter of law under r. 19(2) of the Irish Regulations for the passing of title from BOSI to BOS. Mr Kane's argument fails in that it does not have regard to the fact that, as a matter of statute, BOS was entitled to avail of s. 90(2) of the 1964 Act and to act in all manner as a person entitled to be registered as owner of the charge . . .*
>
> *135. For completeness, I reject the argument of Mr Kane that he was entitled to be consulted before Tanager became registered as owner of the charge. Tanager took the interest in the charge, and no new charge or charging instrument was created. Mr Kane's rights as registered owner of the folio and as mortgagor are not changed. The creation of a new charge or of a new or different burden on the folio would, of its nature, require not merely the consent of Mr Kane but also his active engagement having regard to the means by which a charge is created under the 1964 Act and the Land Registration Rules, viz by execution of an instrument of charge. No charge was created by the registration of Tanager nor by the passing of the interest of BOSI to BOS by operation of law".*

No change

91. The foregoing statements seem to me to be particularly apposite, not least because of the learned judge's focus on a rather simple but crucial point, namely, there has been no change whatsoever as regards the rights and obligations of the Plaintiff, as mortgagor. No new charge has been created. No new terms have been imposed. No new obligations affect the Plaintiff, be that as a result of the cross – border merger or the registration of the interest of the current mortgagee. Nor has there been any change in the entitlement of the mortgagee to appoint a receiver. That was always so, but the foregoing observations illustrate how doomed to failure are the Plaintiff's arguments around retrospectivity, given that there has been no affect on vested rights. On the contrary, the status quo has been preserved and it is difficult to avoid the conclusion that, in reality, the present proceedings represent an attempt - and an entirely vain one - on the part of a borrower/mortgagor to avoid the obligations which he entered into with the lender/mortgagee, full in the knowledge that those obligations applied to the latter's successors.

McKenzie friend

92. In advance of the hearing, all parties were given liberty to file written submissions. This was done by the Defendants. The Plaintiff did not take that opportunity, despite it being afforded to him. After oral submissions had been made by counsel representing the various Defendants, I invited the Plaintiff to make submissions. His response was to indicate that, for health reasons, he was unable to do so, but he indicated that a "friend and neighbour" who was present with him during the conduct of the remote hearing

proposed to address the court. I explained to the Plaintiff the limits on the role of a 'McKenzie friend', which include that a McKenzie friend does not have a right to address the court or make submissions. I also invited counsel for the respective Defendants to make submissions on the issue and it is fair to say that all took the view that, so long as the Plaintiff's friend identified himself, and so long as the court was given confirmation that the extent of the role which the Plaintiff's friend proposed to play was limited to the reading-out of a document prepared by the Plaintiff comprising his submissions, there was no objection on the Defendant's part.

The Plaintiff's submissions

93. The hearing proceeded in the foregoing manner, i.e. with a Mr. William Murphy identifying himself and both the Plaintiff and Mr. Murphy confirming that the latter was simply going to read-out a document which the Plaintiff had prepared in response to the oral submissions made during the hearing by counsel for the Defendants. As an aside, it does not appear to be in doubt that Mr. William Murphy is the same gentleman to whom the Plaintiff referred at para. 10 of the Plaintiff's affidavit sworn on 23 May, 2018. In any event, Mr. Murphy read out, on his behalf, the Plaintiff's submissions which can fairly be summarised as follows:

    - As regards the case which the Plaintiff now makes, it is the amendments to his statement of claim which the Plaintiff relies upon, in particular para.13 (a) (wherein the following is pleaded: "*The Plaintiff claims Ireland and the Attorney General have provided knowing assistance to Bank of Scotland plc to violate the contract which was grounded upon the Application of Law chosen by Bank of Scotland Ireland and the said Plaintiff at the time the said contract was first concluded. Ireland and the Attorney General permitted Bank of Scotland plc to avail of Statutory Instrument S.I. 157/2008 to effect the transfer of the charge held by Bank of Scotland Ireland on the Lands of the Plaintiff in circumstances where the said S.I.157/2008 was not an application of law chosen by the said Plaintiff and Bank of Scotland Ireland at the time when the contract was first concluded. Ireland, the office of the Attorney General and Bank of Scotland plc at 23:59 did from the 31st day of December 2010 unlawfully interfered in the private contractual relations between Bank of Scotland Ireland and Plaintiff through the use of a retrospective application of law specified in S.I. 157/2008 and effective from 26 May 2008. The said S.I. 157/2008 was not chosen by the said Bank of Scotland Ireland and the Plaintiff at the time the contract was first concluded in 2002.*");

- The Plaintiff contends that his contract with BOSI was "*initiated in 2003 and in no way do the 2008 Regulations apply to the 2003 contract";*

- The Plaintiff contends that the "*Irish Regulations of 2008 have been imposed on a 2003 contract";*

- The foregoing, argues the Plaintiff, means that "*we're entering the area of retrospectivity"'*

- The Plaintiff contends that none of the authorities relied on by the Defendants' address retrospectivity;

- The Plaintiff argues that none of the authorities relied on by the Defendants apply to his claim which is based on retrospectivity;

- The Plaintiff argues that, whereas the Defendants purport to rely on the April 2020 decision of the Court of Appeal in *Kearney* ([2020] IECA 92), a later decision by the Court of Appeal in the same case which was delivered in August 2020 ([2020] IECA 224) was one in which Whelan J. did not "*address retrospectivity at all";*

- The Plaintiff contends, with regard to the Court of Appeal's second decision in Kearney, that "*it was unfair to refuse to address the retrospectivity issue"* and the Plaintiff goes on to assert that "*it was unjust by the Court of Appeal not to deal with retrospectivity";*

- The Plaintiff contends that the decisions in *Kearney*; Kavanagh; and *Geary* "are no guide in relation to retrospectivity";

- The Plaintiff submits that "*retrospectivity has been applied*", going on to submit that there was a "*remedy"* which the State could and should have allowed, namely, *"a transition period*" which would have allowed the Plaintiff and many others in a similar situation to *"opt out of their contracts*";

- The Plaintiff referred to an academic article entitled "*Retrospective application of legal rules in the European Union: Recent practice in the energy sector*" by Professor Leigh Hancher (Tilburg University, The Netherlands); Kim Talus (Tulane Law School); and Moritz Wüstenberg (University of Eastern Finland) which appeared in the "Journal of Energy & Natural Resources Law, 2021" (Vol. 39, No. 165-81);

- With reliance on the foregoing article, the Plaintiff acknowledges that Professor Hancher accepts "*the need for retrospectivity in certain instances*" the Plaintiff goes on to submit that "*the State was not precluded from giving a transitional period in its implementation of the Directive and Irish Regulations*";

- Having made the foregoing submission, it was also made clear that the Plaintiff seeks consent to amend his amended statement of claim by the addition after para. 20 (g) of a new para. 20 (f) wherein the Plaintiff "*wants to add a further declaration that the State was not precluded from giving a transitional period in its implementation of the Directive and Irish Regulations to allow those with pre-existing contracts to opt out of their contracts";*

- The Plaintiff also referred to Case C-34706 ASM Brescia S.P.A. submitting that, in the foregoing decision, a particular gas company signed contracts against the backdrop of a 1998 Directive and that, at a later stage, a 2003 Directive was introduced, the result of which rendered the previous contracts uncommercial, prompting *ASM Brescia* to apply to the Italian government for a transitional period, which was refused. The Plaintiff submits

that the European Court of Justice ruled that Italy was not precluded "*from giving a transitional period on grounds of proportionality";*

- It was made very clear on behalf of the Plaintiff that the foregoing "*in essence is really his case in his statement of claim";*

- As regards the arguments made, unsuccessfully, before Meenan J. at the interlocutory application in 2018 and the court's finding that the Plaintiff had not established a fair or serious issue to be tried, it was submitted that the additional plea which the Plaintiff now seeks to add by way of a further amendment to his amended statement of claim constitutes "*a more refined argument*", the thrust of the submission being that this contention is "*the essence*" of the Plaintiff's case and builds upon the case as already pleaded;

- The Plaintiff also submitted that the decisions in *Kavanagh; Geary* and *Freeman* all concern attacks on the cross-border merger, whereas it was submitted on behalf of the Plaintiff that he "*is at pains to emphasise that he is not trying to undermine the merger;*

- The Plaintiff submitted that "*The merger is not disputed*. *However, there was no impediment on the State in taking-in a transitional period*" for those with pre-existing contracts to opt out of same;

- On behalf of the Plaintiff it was submitted that "*at the time the merger took place, he would have been considered a very fine borrower*" by BOSI;

- It was submitted that "The State gave him no *'say'* in relation to the transfer";

- It was repeatedly emphasised in submissions on behalf of the Plaintiff that "*Ireland was not prohibited from introducing a transition period";*

- With reference to the decision in *Hamilton v. Hamilton* [1982] IR 466 and the potential unfairness of the retrospective operation of legislation, the Plaintiff submitted that his "*vested rights include the right to choose*" and the submission was made that "*retrospectivity comes into the equation*" in the foregoing manner;

- The submission was made on behalf of the Plaintiff that, even "*if you take the merger as perfect*" the Plaintiff's rights were "*denied*" as he did not have an opportunity to choose to opt out of a pre-existing contract and the situation was characterised by the Plaintiff as one of "*interference in private contracts between two parties";*

Retrospectivity

94. After these submissions were made, I took the opportunity to ensure that they constituted the entire of the submissions which the Plaintiff wished to make in this case and it was confirmed that this was so. Thus, regardless of what, on any analysis, is a lengthy statement of claim drafted with obvious care and no little sophistication as well as ingenuity, the court was informed in the clearest terms during the hearing that the "*essence*" of the Plaintiff's case was the "retrospectivity" argument and nothing else.

Indeed, based squarely on the retrospectivity argument, an application was made during the course of the Plaintiff's replying submissions for liberty to amend his amended statement of claim so as to add an additional relief which the Plaintiff wished to seek, namely, a declaration that the State was not precluded from providing a transitional period in its implementation of the Directive and Irish Regulations so as to permit those with pre-existing contracts to "opt out" of same. The foregoing was the one and only amendment which the Plaintiff sought to make at what, on any analysis, was the end of the eleventh hour.

95. It is also appropriate to note that, despite the averments made by the Plaintiff in his composite replying affidavit (as to what he says were discussions approaching 20 years ago) there was no question of the Plaintiff seeking to amend his statement of claim so as to introduce pleas touching on those matters and/or the manner in which the Plaintiff availed of the relevant loan facilities. In making this observation, I am not for a moment suggesting that any amendment of the foregoing type would have been permissible. There are several reasons why, in my view, it would not have been. These include:

(i) that any alleged discussions which pre-date the entering into, between the Plaintiff and BOSI, of legal relations were overtaken by the explicit terms of the contractual documentation which the parties entered into (in the form of the relevant loan offer dated 10 May 2004, which the Plaintiff signed by way of acceptance on 10 June 2004);

(ii) the existence of a "whole agreement" clause in the loan contract, namely, clause 25.15 of the "general conditions applicable to loan facilities provided by Bank of Scotland (Ireland) Ltd";

(iii) the fact that any claim based on alleged discussions or representations made almost two decades ago is manifestly statute-barred;

(iv) the fact that the present proceedings have been in being for three and a half years and the Plaintiff has had ample opportunity to make the case he wishes to make; and

(v) having taken the foregoing opportunity, including in the form of a statement of claim which he subsequently amended, there is no inkling in the claim, as pleaded, of any claim which relates to the events of 2002/2003.

96. I consider it appropriate to make the foregoing clear, given what is averred by the Plaintiff in the single replying affidavit which he delivered in response to the three motions brought to dismiss all claims against the eight Defendants, namely, his 6 September 2021 composite affidavit.

97. Earlier I looked at that affidavit and identified those averments which relate to the Plaintiff's claim as pleaded, as opposed to averments which relate to 2002/2003. It seems to me that taking into account (a) the submission made by the Plaintiff as to what his

case *really* is (namely a 'retrospectivity' argument); coupled with (b) the application by the Plaintiff to amend his amended statement of claim by the addition of further declaratory relief based squarely on the retrospectivity issue, all else falls away. It falls away because the Plaintiff in his submissions makes very clear that he no longer makes any case other than the one based on retrospectivity.

The proper approach to the present motions

98. There is no dispute as to the appropriate approach which this Court must take when considering applications of this type. Order 19, r.28 of the 1986 Rules of the Superior Courts confers a jurisdiction on this Court to strike out a claim which discloses no reasonable cause of action or which is frivolous or vexatious. In addition, the court enjoys an inherent jurisdiction to strike out a claim which must inevitably fail. The latter jurisdiction was outlined by Costello J in *Barry v. Buckley* [1981] IR 306 and in a line of a succeeding authority. The distinction between the two jurisdictions was clarified by Clarke J (as he then was) in *Lopes v. Minister for Justice* [2014] IESC 21 wherein, (from paras. 2.1 to 2.9) the learned judge analysed the nature and extent of these parallel jurisdictions in the following terms: -

> *"2. The Jurisdiction to Dismiss*
>
> *2.1 Applications to dismiss at an early stage of proceedings are, when brought, frequently based alternatively on the provisions of O. 19, r.28 of the Rules of the Superior Courts ('RSC') and the inherent jurisdiction of the Court. It is important to emphasise that the inherent jurisdiction of the Court should not be used as a substitute for, or means of getting round, legitimate provisions of procedural law. That constitutionally established courts have an inherent jurisdiction cannot be disputed. That the way in which the ordinary jurisdiction of those courts is to be exercised is by means of established procedural law including the rules of the relevant court is also clear. The purpose of any asserted inherent jurisdiction must, therefore, necessarily, involve a situation where the Court enjoys that inherent jurisdiction to supplement procedural law in cases not covered, or adequately covered, by procedural law itself. An inherent jurisdiction should not be invoked where there is a satisfactory and existing regime available for dealing with the issue under procedural law for to do so would set procedural law at nought.*
>
> *2.2 Against that background, it is important to distinguish between the jurisdiction which arises under O. 19, r. 28 of the RSC and the inherent jurisdiction often invoked. The inherent jurisdiction can be traced back to the decision of Costello J. in Barry v. Buckley [1981] I.R. 306. However, that jurisdiction needs to be carefully distinguished from the jurisdiction which arises under the RSC, precisely because it would be inappropriate to invoke the inherent jurisdiction of the Court in circumstances governed by the rules. In that context, I said, at para. 3.12. of my judgment in the High Court in Salthill Properties Limited & anor v. Royal Bank of Scotland plc & ors [2009] IEHC 207, the following:*

'3.12 It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, the court must accept the facts as asserted in the Plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel for Salthill and Mr. Cunningham, to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court. A simple example will suffice. A Plaintiff may assert that it entered into a contract with the Defendant which contained certain express terms. On examining the document the terms may not be found, or may not be found in the form pleaded. On an application to dismiss as being bound to fail, there is nothing to prevent the Defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the Plaintiff has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the Plaintiff's claim.'

2.3 The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in Barry v Buckley, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked.

2.4 It is important to keep that distinction in mind. It is also important to note the many cases in which it has been made clear that the inherent jurisdiction of the court should be sparingly exercised. This was initially recognised by Costello J. in Barry v Buckley and by the Supreme Court in Sun. Fat Chan v Osseous Ltd [1992] 1 I.R. 425. In the latter case, McCarthy J. stated that 'generally the High Court should be slow to entertain an application of this kind'. This point has been reiterated more recently in Kenny v Trinity College Dublin [2008] IESC 18 at para. 35 and in Ewing v Ireland and the Attorney General [2013] IESC 44 at para. 27.

2.5 It is also important to remember that a Plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail. It must be recalled that a Plaintiff, like any other party, has available the range of procedures provided for in the RSC to assist in establishing the facts at trial. Documents can be discovered both from opposing parties and, indeed, third parties. Interrogatories can be delivered. Witnesses can be subpoenaed and can, if appropriate, be required to bring their documents with them. Other devices may be available in particular types of cases. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a Plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in Sun Fat Chan (at p. 428), that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.

2.6 At the same time, it is clear that certain types of cases are more amenable to an assessment of the facts at an early stage than others. Where the case is wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss. In that context, it is important to keep in mind the distinction, which I sought to analyse in Salthill Properties, between cases which are dependent in themselves on documents and cases where documents may form an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well.

2.7 The allegation made by Mr. Lopes in these proceedings is, of course, one of fact. He asserts that the outcome of his litigation was unjustly determined to his disadvantage by reason of bias, discrimination or corruption on the part of judges. There are a range of legal issues which arise in that context, not least the question of whether judicial immunity from action would afford a defence and whether, even if it does not, the Minister is vicariously liable for the actions of judges. Those questions raise important legal issues but, before coming to those issues, it is necessary that there be a credible case on the facts as to bias, discrimination or corruption.

2.8 It seems to me, therefore, that this case is more appropriately considered under the inherent jurisdiction of the Court rather than under the RSC. There is an allegation of bias, discrimination or corruption. If it is made out, then those difficult legal questions which I have just mentioned will arise. But the necessary facts are pleaded and, therefore, for the purposes of an application to dismiss under the RSC as vexatious, it would have to be assumed that those facts could be established.

2.9 On the other hand, so far as the inherent jurisdiction of the Court to protect against abuse of process is concerned, the Court can at least consider whether there is a credible basis for suggesting that Mr. Lopes might be able to establish the facts which he asserts. If there is no such basis, then these proceedings are bound to fail and their maintenance must, therefore, be an abuse of process, such that the proceedings ought now be dismissed. It is true that Hanna J., in dismissing the proceedings, had regard to some of the legal issues which might potentially arise in a claim such as this. However, for reasons which I hope to address, I am satisfied that it would not be appropriate, in all the circumstances of this case, to dismiss the claim sought to be brought by Mr. Lopes by virtue of forming a view that his claim was bound to fail on the law. Rather, it seems to me that the judgment of Hanna J. should only be upheld if it is appropriate to agree with the conclusions which he reached to the effect that there was no credible basis, on the facts, on which Mr. Lopes could hope to establish bias, discrimination or corruption. It is to that question that this judgment is directed. As the principal complaint which Mr. Lopes makes centres on the way in which his claim for damages for loss of earnings was assessed, I would, before going on the consider the credibility of his accusation of bias, feel it appropriate to make some general observations about the way in which claims for damages for loss of earnings are dealt with in the Irish legal system."

Decision

99. I have no hesitation in saying that the Plaintiff's claim is one which requires to be dismissed irrespective of whether such an order is sought pursuant to O.9, r.28 of the Superior Court Rules or pursuant to this Court's inherent jurisdiction. The proceedings disclose no cause of action. The Plaintiff makes no assertions of fact in support of his claim which, if true, would give rise to a cause of action. Thus, the Plaintiff's case is vexatious and should be dismissed under O.9, r.28.

100. In addition, there is simply no credible basis for the assertions which the Plaintiff makes in his claim, which is bound to fail on its merits. Regardless of the fact that this Court's inherent jurisdiction is one which should be sparingly exercised, this is a case where I have no hesitation in saying that the inherent jurisdiction of the court also requires the dismissal of the Plaintiff's claim to prevent an abuse of the processes of the court.

101. Having regard to the authorities which have already been referred to in this judgment, the 'refined' claim which the Plaintiff now wishes to make (i.e. based squarely on 'retrospectivity') is entirely without foundation and doomed to fail. As Mr. Buttanshaw BL correctly submits, any claim that the Regulations, in particular Regulation 19 (1) (h) and (g), are *ultra vires* and/or have an impermissible retrospective effect is unstateable. In my view it is unstateable as a matter of first principles as well as being a claim which runs contrary to the *ratio* of authorities binding on this court.

102. As Mr. Buttanshaw BL submitted, the Plaintiff's retrospectivity claim appears to be that the effect of a cross-border merger which absorbed BOSI into BOS somehow 'left out' all loans which pre-dated the merger; and the inescapable logic of such an argument is that

it left such loans and security 'ownerless'. Such an argument is entirely specious as the court has made clear in *Kearney*.

103. The Plaintiff's loan agreement and the charge he gave to secure his loan were freely transferable from the point at which the Plaintiff decided to enter into those legal agreements. In reality, the cross-border merger simply provided a mechanism for the orderly transfer between two entities based in two different EU countries. However, the cross-border merger regime did not impact on the transferability of the relevant contracts themselves. Moreover, far from adversely affecting vested rights, the cross-border merger regime ensured that the Plaintiff's rights under his loan contract and his mortgage were *preserved*.

104. It is also fair to say, as Mr. Buttanshaw BL points out, that the Plaintiff's argument made in relation to retrospectivity is, in substance, an attack on the cross-border merger. The Plaintiff's claim based on retrospectivity is necessarily and unavoidably such an attack, because it asserts that the cross-border merger was not effective in relation to the Plaintiff's loan agreement and mortgage. It was effective.

105. I have no hesitation in saying that, in order to come to the view that the Plaintiff's claim is doomed to fail, this court need look no further than the Court of Appeal's decisions in the *Geary* and *Kearney* cases. Two points are worth emphasising for the Plaintiff's benefit. Firstly, if the arguments made by the Plaintiff had never been raised in another court, the outcome would be the same. Secondly, this court is bound by the Court of Appeal's decisions which are determinative of the Plaintiff's claim.

106. As Mr. Hutchinson BL submits, the August 2020 judgment of the Court of Appeal in *Kearney* offers no support for the Plaintiff's claim whatsoever. A second decision was given because, it appears, a supplementary hearing took place in *Kearney* to deal *inter alia* with Mr. Kearney's application to invite the Court of Appeal to re-visit its findings in the April 2020 judgment (which, in the manner I have outlined earlier in this court's decision, included findings by the Court of Appeal that Mr. Kearney's contentions were "*unmoored from any legal principle").* What the Court of Appeal did in its second decision was to reject Mr. Kearney's application in the clearest of terms and the August 2020 decision by the Court of Appeal in no way undermines its April 2020 judgment. Quite the contrary.

107. As Mr. Hutchinson also very rightly points out, there is no question in the present case of vested rights being retrospectively interfered with. The fundamental point is that the cross-border merger regime is structured so as to ensure that the rights of the relevant contracting parties (in the present case BOSI and the Plaintiff) remain entirely unchanged.

108. As regards the Plaintiff's application to include another relief in his amended statement of claim, Mr. Hutchinson points out that no motion has been brought but, more fundamentally, the application is made for relief to bolster a retrospectivity argument which, Mr Hutchinson submits, is a nullity. I am entirely satisfied that this is so.

109. He also points out, quite rightly in my view, that if the retrospectivity argument is not deployed to undermine the validity of the security and the entitlement of the registered owner of the relevant charge to enforce same and/or to assert that there is some flaw in respect of the transfer from BOSI to BOS and, thereafter, to Ennis, the assertions made by the Plaintiff are simply "a debate in a vacuum".

110. The reality is, of course, that the court is presented with what is, in substance, an attack on the legal consequences and effect of the cross-border merger which is made by the Plaintiff with reference to a retrospectivity argument, with a view to suggesting that the security which he gave over his property is not enforceable by the registered owner. That claim is doomed to fail.

111. As Mr. Byrne BL rightly points out, there has been no change to the position which pertained in mid-2018 when, in refusing to grant interlocutory injunctive relief to the Plaintiff, this Court (Meenan J.) held that the Plaintiff had not demonstrated a serious issue or raised an arguable case. Despite the intervening three years and the three motions brought on behalf of all eight Defendants, the Plaintiff has proffered nothing which would allow this Court to take a different view than Mr. Justice Meenan did.

112. To say the foregoing is not to suggest that this Court is bound by the findings made when, by order of 29 May 2018, this Court refused the Plaintiff's motion. Rather, it is to acknowledge that the outcome of the analysis which this Court has engaged in (guided by relevant authorities, including *Farrelly v. Ireland; Fay v. Tegral Pipes Limited; Doherty v. Minister for Justice*; and *Barry v. Buckley & Ors*.) is to be satisfied that there is simply no issue whatsoever to be tried. The court at the interlocutory stage some three years ago came to the view that the Plaintiff had not cleared the relatively low bar of establishing a *bona fide* or serious issue. At this juncture it is entirely safe to say that there is no issue whatsoever to be determined.

113. I also agree with the submission made by Mr. Byrne BL that there is a marked inconsistency with the position adopted by the Plaintiff when he sought interlocutory injunctive relief in 2018 and the claim he now seeks to make. Approximately three and a half years ago he made clear that he was not challenging the cross-border merger but, the essence of the Plaintiff's 'refined' claim is certainly to challenge the effect and legality of the cross-border merger, insofar as his loan agreement and mortgage are concerned. It is a challenge based on the issue of retrospective, but it is no less a challenge to the effect of the cross-border merger. For the reasons detailed in this judgment, it is a challenge doomed to fail.

114. As Mr. Byrne BL pointed out, at the interlocutory stage in mid-2018, the Plaintiff sought to characterise himself as acting 'honourably' as regards his dealings with the Eighth Defendant (which was, at that stage, not a Defendant in the proceedings) and it is appropriate to look at certain averments made by the Plaintiff in his affidavit sworn on 23 May, 2018 (which grounded the Plaintiff's motion which sought relief against the third, fourth, fifth, sixth and seventh Defendants):-

"7. I say that all the above issues led this deponent to the situation now in existence. I continued to discharge monies until the 13th November, 2012 but ran into financial difficulties. I say that I have attempted to be honourable in matters in my dealings with the Pepper Asset Finance hereinafter referred to as Pepper who acts for Ennis Property Finance hereinafter referred to as Ennis…

8…I did attempt to conduct what I believe were meaningful discussions with Pepper…I say that on the 28th of February, 2018 having received an offer of £500,000 Euro made on my behalf from F.H. O'Reilly & Company Solicitors, Seán O'Connor by email reverted to Ms. Clayton by email stating that due to the value of the security the offer was considerably low…

9. I say that on the 18th of April, 2018 I instructed F.H. O'Reilly Solicitors to furnish an increased offer to Pepper in the amount of £650,000 Euro as a full settlement of matters…"

115. By means of the foregoing averments, the Plaintiff put before the court that he had, in fact, made a series of offers to Pepper (acting on behalf of Ennis). Those offers were openly referred to by the Plaintiff and were not said to have been made "*without prejudice*". It is uncontroversial to say that by relying on the fact that the Plaintiff discharged monies up to the point at which he "*ran into financial difficulties*" and by relying on offers made by way of the Plaintiff's attempt at "*a full settlement of matters",* the Plaintiff was tacitly (if not openly) acknowledging his liability to, at that stage, Ennis.

116. That being so, I accept the submission made by Mr. Byrne BL that the claim the Plaintiff now seeks to make represents what can fairly be called a *volte face* on the Plaintiff's part. In May 2018, the Plaintiff made clear to this Court that he had made a series of offers made to Pepper, in order to try and deal with his liabilities *to* Ennis. Three and a half years later, the Plaintiff makes a claim in damages *against* eight Defendants, including both Ennis and Pepper and has distilled his claim to one based on a retrospectivity argument which, he contends, means that he has no liability to Ennis or Pepper whatsoever.

117. The claims against Ennis derive from the Plaintiff's challenge to the legal effect of the cross-border merger using, as a vehicle for such a challenge, his refined retrospectivity argument which is doomed to fail.

118. I also agree with the submission by Mr. Byrne that the Plaintiff has not articulated (whether in the plenary summons, statement of claim, amended statement of claim, or in his affidavit sworn in response to the Defendant's motions) any discreet claim as against the Receiver, Mr. Kavanagh, or Wilson Auctioneers. It also must be said that these are professional parties acting as agents and it is fair to say that their presence as co-Defendants reflects, viewed most charitably, what might be called a "scattergun" approach by a litigant in person to the pleading of his claim.

119. Viewed more objectively, it is difficult to avoid the conclusion that the naming of these agents was other than an attempt by the Plaintiff to create the maximum amount of pressure with a view to achieving his commercial aims, be they to avoid entirely the liabilities (which, earlier in these self-same proceedings, he tacitly accepted) or securing the acceptance of such offer as he was prepared to make (against the backdrop of having made a series of offers which he openly relied upon in the context of an unsuccessful for application for interlocutory injunctive relief).

120. The Plaintiff's motivation is certainly not determinative of the present motions and has played no part in this Court's assessment of the Plaintiff's claim. I find it necessary, however, to state in the clearest of terms that it is not at all appropriate for a Plaintiff to name, as Defendants in legal proceedings, parties whom the Plaintiff must know to be independent professionals retained as agents and against whom the Plaintiff does not articulate any discreet claim. It is not difficult to understand the variety of negative consequences likely to flow from being named as a Defendant in legal proceedings, devoid of merit, but this is all the more so when, in truth, a distinct claim is not even articulated against parties whose only role was to act as agents.

121. When considering this judgment, I read carefully both the learned article by Professor Hancher and the decision in Case-34706 *ASM Brescia, SpA v. Comune di Rodengo Saiano.* Neither can avail the Plaintiff. The former focussed on the retrospective application of EU law with regard to long-term capital-intensive investments in the energy sector and concluded that, in circumstances where the retroactive application of laws could not be avoided "…*appropriate compensation should be granted to those private investors who are negatively affected by the change. This seems to be the approach under the EU legal system, where the courts have emphasised the need to consider those private investors that are negatively affected by changes in laws".*

122. There is simply no question of the Plaintiff having been negatively affected by changes in laws. In truth, there has been no change whatsoever to the loan agreement he entered, to the mortgage he created over his property, or to the terms and conditions governing the foregoing. His rights and obligations did not change in any way. As to the decision in Case-347/06, the ruling of the Court (Second Chamber) was in the following terms: -

> *"1. Directive 2003/55/EC of the European Parliament and of the Council of 26 June, 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, from providing for the extension, on conditions which it lays down, of the length of the transitional period at the end of which the early cessation of a concession for the distribution of natural gas such as that in question in those proceedings must occur. In those circumstances, it must also be held that neither Article 10 EC nor the principle of proportionality precludes such legislation.*
>
> *2. Articles 43 EC, 49 EC and 86(1) EC do not preclude legislation of a Member State, such as that at issue in the main proceedings, from provide for the*

extension, on conditions which it lays down, of the length of the transitional period at the end of which the early cessation of a concession for the distribution of natural gas such as that in question in those proceedings must occur, provided that such an extension can be regarded as being necessary to enable the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view."

123. What was at issue in the foregoing case is utterly different to the backdrop to the present proceedings. *ASM Brescia* held a concession for the public service of natural gas distribution in the territory of Comune di Rodengo Saiano, which concession was due to expire in 2029. The Defendant Comune fixed the end of 2005 for the early expiry of the concession, so as to set in motion a call for tenders and designate a new operator of that service. The Lombardy Regional Administrative Court was uncertain about the conformity with Community Law of domestic legislation which, under certain conditions, postponed the end of the transitional period until December 2009. At the heart of the case was the implementation of common rules for the internal market in natural gas by means of the early cessation at the end of a transitional period of concessions for the distribution of natural gas granted without a competitive tendering process, and whether it was compatible with EU law to provide for the extension, on certain conditions, of the length of that transitional period. Neither the facts nor the principles derived from the foregoing case have any bearing whatsoever on the Plaintiff whose vested rights have in no way been interfered with, retrospectively or otherwise.

Request for time to put in written legal submissions

124. It is also appropriate to note that, towards the end of the Plaintiff's oral submissions, a suggestion was made that he could produce a written document and furnish this to the court in due course. Furthermore, what amounted to an application for time to produce such written legal submissions was made. This was an application I declined, coming as it did, on the second day of the hearing. In my ruling, I explained that the Plaintiff had been afforded every reasonable opportunity to prepare and file written legal submissions in advance of the hearing, had he so wished, but he had declined to do so.

125. As I made clear in my ruling, it was simply not open to the Plaintiff - having heard the submissions made by all three counsel representing all eight Defendants and half way through his own legal submissions on the second day of a 2 day hearing - to seek or to be given further time to make written legal submissions. Furthermore, it was indicated to me that what the Plaintiff wished to put in writing comprised the contents of the oral submissions made and, that being so, there could be no prejudice in refusing the request, insofar as it was made.

Fraud

126. It is also fair to say that among the pleas set out in the Plaintiff's plenary summons and statement of claim, references are made to "*fraud*" but, contrary to the requirements of O.19, r.5(2), the allegations of fraud are not particularised. The Plaintiff had every reasonable opportunity to detail in his replying affidavit the particulars, if any, which he

regarded as underpinning an allegation of fraud. He has not done so. There is simply nothing before the court of the type required by O.19, r.5(2) which is said by the Plaintiff to provide a basis for the bare assertion of *"fraud"*. I am entirely satisfied that this element of the claim cannot survive the present applications as some sort of independent 'free-floating' or severable claim, in circumstances where no basis whatsoever has been proffered by way of particularising it. My decision in this regard seems to be entirely consistent with the authorities (see in particular the decision of Finlay Geoghegan J in *Keaney v. Sullivan & Ors.* [2007] IEHC 8).

Unregulated entitly

127. It seems unnecessary to deal with the Plaintiff's assertion that it was impermissible for BOS to transfer its interest in the Plaintiff's loan agreement and mortgage to an *"unregulated"* entity. I say this because, in oral submissions, it was made very clear that the essence of the Plaintiff's claim came down to the retrospectivity argument and nothing more. Nevertheless, I am entirely satisfied that an argument based on *"unregulated"* status is devoid of merit and bound to fail. As Ní Raifeartaigh J. stated in this Court's decision in *Geary v. Property Registration Authority* [2018] IEHC 727 (at 34 and 35): -

> *"iii. Sale to unregulated entity.*
>
> *This issue has been discussed extensively in a number of authorities, most recently in McCarthy v Moroney; Moroney v. PRA Record No. [2017] 8108 P, where McDonald J. discussed those authorities (including Launceton Property Finance v. Burke [2017] 2 IR 789 (Supreme Court), Hogan v. Deloitte [2017] IEHC 673) and concluded that the law was now clear that there was no legal basis on which to make a case that the borrower is in some way wronged by the transfer of the loan and related security by Bank of Scotland to Ennis Property, because the effect of the 2015 Act is that the borrower has the same protections in practice as he would if he was dealing with a regulated financial service provider."*

128. Furthermore, in *Leahy & Anor. v. Bank of Scotland plc & Ors*. [2019] IEHC 203, Mr. Justice Simons stated the following (at para. 3): -

> *"The argument based on the alleged preclusion of a sale to an unregulated entity was misconceived. The legislative amendments introduced under the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 have remedied what was perceived to be a lacuna under the previous regime whereby there was no requirement for an unregulated entity to comply with certain provisions of the Central Bank legislation. In brief, the effect of the amendments introduced under the 2015 Act is that an entity which holds the legal title to credit granted under a credit agreement (as defined) must either (i) arrange to have credit servicing undertaken by an authorised credit servicing firm, or (ii) obtain authorisation itself; the amended legislation did not have the effect of retrospectively invalidating transfers to unregulated entities"*

Conclusion

129. For the reasons set out in this judgment, the applicants are entitled to the relief sought and the Plaintiff's claim must be dismissed. In truth, dismissing the Plaintiff's claim is not only of benefit to the Defendants but of genuine benefit to the Plaintiff, as it can under no circumstances be in his interests for a claim which is entirely devoid of merit to be permitted to continue up to and including a trial, only for the Plaintiff to face, inevitably, the failure of a baseless claim but one, the prosecution and defence of which, would have by then 'eaten up' yet more resources in terms of time and cost. The resources of the court system are finite and, therefore, there is also a significant public interest in the dismissal of wholly unmeritorious claims in order that the limited resources available to the court system can be devoted to claims which disclose a cause of action, are at least potentially valid, and which are not bound to fail.

130. On 24 March 2020, the following statement issued in respect of the delivery of judgments electronically: "*The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.*"

131. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. As to the question of costs, my preliminary view is that there are no facts or circumstances which would justify a departure from which can safely be called the 'default position' i.e. that costs should 'follow the event'. In default of agreement between the parties on the wording of a final order, short written submissions should be filed in the Central Office within 28 days from today's date, that elongated period being appropriate given the approach of the Christmas and New Year break.