

**THE HIGH COURT**

[2022] IEHC 15  
[2020 No. 7879P.]

**BETWEEN**

**MARTIN TUCKER**

**PLAINTIFF**

**AND**

**HAVBELL DESIGNATED ACTIVITY COMPANY**

**DEFENDANT**

**JUDGMENT of Mr. Justice Allen delivered on the 18th day of January, 2022**

**Introduction**

1. The is a motion brought on behalf of the defendant for an order dismissing as frivolous and vexatious and bound to fail an action commenced by plenary summons issued on 23rd November, 2020 by which the plaintiff seeks to recover possession of a property at 39 Danesfort, Castle Avenue, Clontarf, Dublin 3.
2. The defendant's case is, variously, that the statement of claim discloses no cause of action; that the action is bound to fail; that the issues on which the plaintiff's claim is founded are res judicata and/or offend against the rule in *Henderson v. Henderson* (1843) 3 Hare 100; and that the action is a collateral attack on previous court orders. In addition the defendant seeks an order pursuant to s. 123 of the Land and Conveyancing Law Reform Act, 2009 vacating two *lis pendens* registered in respect of the property and an *Isaac Wunder* order restraining the plaintiff from issuing any further proceedings against the defendant, its servants, agents or representatives relating to the property.
3. The plaintiff represents himself. His plenary summons and statement of claim (as well as a variety of motions which he has issued and written submissions filed on this motion) are homemade – not entirely, if at all, in the plaintiff's home – and his claims are rather diffuse but in broad terms there are two strands to his action. First, the plaintiff seeks to attack the validity of an order for possession of the property made by the Circuit Court on 18th May, 2018 which was executed by the Dublin City Sheriff on 21st March, 2019. Secondly, the plaintiff seeks an order for specific performance of a settlement agreement said to have been made later by which the defendant agreed to accept a sum of money in settlement of the mortgage debt. The first strand is obviously an abuse of process. The second requires close scrutiny before it becomes clear that it, too, is bound to fail.
4. Over the past four years, the property at 39 Danesfort, Castle Avenue, Clontarf, Dublin 3 has been the subject of protracted litigation in which the plaintiff was sometimes plaintiff and sometimes defendant, and the defendant was sometimes defendant and sometimes plaintiff. For convenience I will refer to the plaintiff as Mr. Tucker and the defendant as Havbell.
5. The papers fill two banker's boxes. By the motion now before the court, Havbell contends, variously, that the battle for 39 Danesfort has been fought and lost by Mr. Tucker; that Mr. Tucker seeks in this action to re-litigate claims which have already been decided or which should, if they were to have been raised at all, have been raised long ago; and that his action is bound to fail. For good measure, Havbell claims that Mr.

Tucker has so shown himself to be a serial and vexatious litigant that he ought to be restrained from bringing any further proceedings without the permission of the High Court.

6. To understand the overlap, and indeed the differences, between the case now before the court and the previous actions it is necessary to start at the beginning. To understand the argument on behalf of Havbell that Mr. Tucker's conduct to date has been such as to warrant a restriction on his access to the court, it is necessary to look at all that has transpired heretofore.

#### **Facts**

7. By Civil Bill for Possession issued on 21st December, 2017 Havbell claimed an order for possession of the property. I will refer to that action as the possession proceedings. That action was brought against Mr. Tucker's former partner, Ms. Elizabeth Curry, as well as against Mr. Tucker. The premise of the Civil Bill action was:-
  1. That Mr. Tucker and Mrs. Curry had borrowed €260,000 from Irish Life & Permanent plc and had, by deed dated 18th June, 2003, mortgaged the property to Irish Life & Permanent plc to secure the repayment of the loan;
  2. That on 29th June, 2012 Irish Life & Permanent plc changed its name to Permanent TSB plc;
  3. That by deed of conveyance and assignment dated 19th June, 2015 Mr. Tucker's and Ms. Curry's loan and the security held for it were assigned to Havbell, which was then a limited liability company;
  4. That the assignment to Havbell had been duly registered in the Registry of Deeds;
  5. That on 29th September, 2016 Havbell was converted into a designated activity company;
  6. That Mr. Tucker and Ms. Curry had failed to pay the instalments due on foot of the loan;
  7. That Havbell had demanded repayment of the loan;
  8. That the loan had not been repaid;
  9. That Havbell was entitled to an order for possession of the property.
8. The Civil Bill for Possession came before the Dublin County Registrar on 10th May, 2018. Ms. Curry consented to the order sought. Mr. Tucker, who was at that time represented by a solicitor, sought an adjournment but the adjournment was refused and the County Registrar made an order for possession, with a stay of three months.
9. Mr. Tucker appealed the order of the County Registrar and his appeal came before Her Honour Judge Linnane on 25th June, 2018. Mr. Tucker, who was at that time (and has

been on and off since) represented by a solicitor and counsel, sought an adjournment to allow for the completion of a financial analysis which, it was said, would show overcharging by Havbell, but that adjournment application was refused. Judge Linnane struck out the appeal with costs to Havbell.

10. By notice of motion issued on 24th August, 2018 Mr. Tucker applied to the Master of the High Court for an extension of time within which to appeal against the County Registrar's order of 10th May, 2018. That motion first came before the Master on 1st November, 2018 when, on the application of Mr. Tucker, it was adjourned to 15th November, 2018. On 15th November, 2018 Mr. Tucker's motion was struck out for non-attendance but on the following day it was restored to the list and adjourned to 22nd November, 2018. It appears only then to have been recognised that the application was in respect of the order of the County Registrar, rather than the order of the judge, and the motion was dismissed with costs to Havbell.
11. On 26th November, 2018 Mr. Tucker issued a second motion to extend the time for an appeal, this time from the order of Judge Linnane made on 25th June, 2018. That application came before the Master on 11th January, 2019, when it was sent forward to the common law motion list for 4th February, 2019. On Mr. Tucker's application the motion was adjourned by Barr J. to 25th February, 2019 when Cross J., having refused a further adjournment application, refused the motion.
12. I pause here to observe that while the affidavit of Shane Coman sworn on 15th June, 2021 grounding this motion suggests that Mr. Tucker's first motion to extend time to appeal was struck out by the Master and his second motion struck out by Cross J., the orders are clear that the first motion was dismissed and the second refused. Further, although Mr. Coman deposed that Cross J. made an order for costs in favour of Havbell, the order shows that he made no order as to costs. The point is that it is quite clear that both motions were heard and determined.
13. Mr. Tucker filed or attempted to file a notice of appeal to the Court of Appeal against the order of Cross J. but the Court of Appeal declined to accept or entertain an appeal for want of jurisdiction.
14. By notice dated 21st March, 2019 Mr. Tucker applied to the Supreme Court for leave to appeal against the judgment and order of the High Court (Cross J.) and for an extension of time within which to appeal. For the reasons given in a determination dated 16th October, 2019 [2019] IESCDET 232, that application was refused. The determination of the Supreme Court was that Cross J. had been entirely correct in his application of the test laid down in *Éire Continental Trading Company Ltd. v. Clonmel Foods Ltd.* [1955] I.R. 170. The determination was that there was no evidence that Mr. Tucker had formed an intention to appeal within the prescribed time. Nor could it be said that on the facts of the case he had any arguable ground of appeal.
15. In the meantime, on 21st March, 2019 the Circuit Court order for possession had been executed by the Dublin City Sheriff. By letters dated 10th April, 2019 each of Mr. Tucker

and Ms. Curry were offered the opportunity make an appointment to collect any personal belongings they wished from the property and on 24th April, 2019 Mr. Tucker and Ms. Curry attended at the property. Ms. Curry removed some of the contents. It is not clear whether Mr. Tucker then took anything away.

16. On 10th May, 2019 Havbell's solicitors wrote to Mr. Tucker to say that anything not removed consensually from the property within ten days would be put into storage. On 15th May, 2019 Mr. Tucker re-entered the property. In an e-mail of 18th May, 2019 he wrote that on his daily check on his post and home on 15th May, 2019 he had been horrified to find that it had been left unsecured, with no alarm set, and so he had entered. While Mr. Tucker in his e-mail asserted that the property was unsecured, Mr. Coman has deposed – and Mr. Tucker has not contested – that Mr. Tucker broke in. Havbell's solicitors wrote a number of letters but Mr. Tucker would not move out.
17. On 8th July, 2019 Havbell issued an Equity Civil Bill claiming an injunction restraining Mr. Tucker from trespassing on the property and on the same day issued a motion for an interlocutory order. I will refer to that action as the equity proceedings. When the motion first came before the Circuit Court (Judge Linnane) on 11th July, 2019 it was adjourned, on the application of Mr. Tucker, for a week. On 18th July, 2019 a further adjournment application was refused and following the hearing of the motion Mr. Tucker gave a sworn undertaking to vacate the property by 4:00 p.m. on 25th July, 2019. The Circuit Court order recorded that undertaking as well as the several interlocutory injunctions which were then granted, with a stay until 4:00 p.m. on 25th July, 2019.
18. At some time in the morning or early afternoon of 25th July, 2019 Mr. Tucker applied to Judge Linnane for an extension of the stay on the order which she had made the previous week until the determination of his application to the Supreme Court which, it will be recalled, had been lodged on 21st March, 2019, long before the hearing of the motion for interlocutory relief. Quite how that application came to be made is unclear. It is described in the affidavit of Mr. Coman as an "*ex parte*" (in inverted commas) application but Havbell's lawyers were in attendance. In the course of that application, it emerged that earlier in the day Mr. Tucker had filed a notice of appeal to the High Court against the judgment and order of the Circuit Court made on 18th July, 2019. Whether it was because Judge Linnane refused the application or took the view that she was *functus officio*, there was no extension to the stay.
19. Late in the afternoon of 25th July, 2019 two of Havbell's agents attended at the property with a locksmith. It appears to be common case that Mr. Tucker told Havbell's representative that he was not ready to leave but that he might or would be by 10:30 a.m. on the following day. In an affidavit sworn on 20th November, 2019 in other plenary proceedings brought by Mr. Tucker against Havbell – to which I will shortly come – Mr. Tucker deposed that he had vacated the property by 10:30 a.m. but that no one from Havbell had contacted him to arrange a handover, and so, he said, he had locked up and moved out.

20. On 26th July, 2019 Mr. Tucker filed an *ex parte* docket in his Circuit Court appeal by which he proposed to seek a stay on the Circuit Court order of 18th July, 2019 pending the outcome of his application to the Supreme Court. According to Mr. Tucker, he applied first to Reynolds J. (the chancery list judge) and was re-directed to make his application to Noonan J. (the non-jury list judge) on 29th July, 2019, on which occasion, he has deposed, he told Havbell's counsel that he had vacated the property. The stay application travelled with the appeal and the two were eventually dealt with together.
21. On the same day, 29th July, 2019, Havbell took out another execution order on foot of the Circuit Court order for possession and sent it to the Dublin City Sheriff for execution.
22. On 15th August, 2019 – at a time when Mr. Tucker's appeal to the High Court against the injunction was pending – Mr. Tucker issued a plenary summons (2019 No. 6453P) against Havbell seeking a variety of reliefs, starting with a declaration that he was the owner and entitled to possession of the property at 39 Danesfort, Castle Avenue, Clontarf, Dublin 3. Mr. Tucker claimed that Havbell had refused him the opportunity to redeem the loan secured on his home; that Havbell had been unjustly enriched by "*the alleged purchase of the loan*"; that the purported transfer to Havbell of the loans and facilities was void and of no legal effect; and a declaration that Havbell had not acquired entitlement to take possession of or to sell or to appoint receivers over the property. The reliefs claimed by Mr. Tucker were various, but the core claim was that Havbell was not entitled to possession. That, plainly, was something which had been heard and determined by the Circuit Court on 25th June, 2018. Mr. Tucker had not appealed in time. The High Court had refused an extension of time and the Supreme Court had refused leave to appeal against the refusal of an extension of time, for the reason that he had no arguable ground of appeal. On the same day, 15th August, 2019, Mr. Tucker delivered a statement of claim and registered the action as a *lis pendens*.
23. On 20th August, 2019 a senior court messenger from the Dublin City Sheriff's office attended at the property with the second Circuit Court execution order. There is a conflict of evidence as to what precisely happened but it is common case that a number of Mr. Tucker's supporters were there and it is common case that the messenger did not attempt to execute the order for possession. It is not possible on this application to resolve the conflict of evidence as to precisely what was said and done but neither is it necessary to do so. The issue on this application is a legal issue which is to be determined by an analysis of the paperwork.
24. On 22nd August, 2019 Havbell issued a motion in the equity proceedings seeking the attachment and committal of Mr. Tucker for contempt of court for his breach of the order of Judge Linnane of 18th July, 2019 and of the undertaking then given by him to the Circuit Court.
25. Mr. Tucker's appeal against the order of 18th July, 2019 – the injunction restraining trespass – was heard by the High Court (Eager J.) on 13th January, 2020 and was dismissed with costs. The Circuit Court order was affirmed and Mr. Tucker was ordered to deliver up possession to Havbell's solicitors by 4:00 p.m. that afternoon. The order of

Eager J. shows that Mr. Tucker's application for a stay on the Circuit Court order was also refused.

26. In the background, on 19th August, 2019 Mr. Tucker had written to Havbell's solicitors authorising a Mr. Neil Armstrong and a Mr. Paul Scannell "to enter into discussions in regard to the above property and the outstanding debt alleged to be owed to Havbell DAC".
27. On 13th December, 2019 Mr. Tucker initiated settlement negotiations and on 16th January, 2020 Havbell's solicitors conveyed to Mr. Tucker and to Ms. Curry's solicitors Havbell's willingness to accept a sum of €310,000 in full and final settlement of all liabilities to Havbell, in return for which Havbell would release the charge over the property. Havbell's offer was expressly conditional on the withdrawal or discontinuance of all existing litigation; the irrevocable waiver of any claim or right of action by either Mr. Tucker or Ms. Curry against Havbell or its agents; and the execution of a binding settlement agreement.
28. Mr. Tucker and Ms. Curry having confirmed their willingness to settle on those terms, a draft deed of settlement was prepared which was signed and returned by Mr. Tucker on 20th February, 2020 and by Ms. Curry on 18th March, 2020.
29. I add for completeness that at the request of Mr. Tucker's "mediator", Mr. Armstrong, the original mortgage had been made available for inspection at Havbell's solicitors' offices on 5th February, 2020 and that following that inspection a number of queries raised by Mr. Tucker in a letter of 17th February, 2020, were answered by Havbell's solicitors in a letter of 19th February, 2020: that is to say, before Mr. Tucker signed and returned the settlement agreement. In his affidavit grounding this application, Mr. Coman suggests that Mr. Tucker and his representative were, during the course of the settlement discussions, seeking to destabilise the negotiations between the parties by raising issues in relation to the mortgage documentation in order to invalidate the orders for possession and injunctive relief. In circumstances in which Havbell's solicitors dealt with the queries raised by Mr. Tucker and Mr. Tucker soon after executed the deed of settlement, it does not appear to me that this criticism is well-founded. Even if Mr. Tucker was trying or hoping to raise a hare, I am unconvinced that it might not have been a perfectly legitimate ruse de guerre. Either way, Mr. Tucker later signed the deed of settlement and I take no account of this criticism.
30. By clause 2.1 of the deed of settlement Mr. Tucker and Ms. Curry acknowledged and confirmed their indebtedness to Havbell in the full amount of the "Debtors' Obligations" – stated to be as €388,744.70 as of 30th January, 2020 – and by clause 2.4 Havbell agreed that it would accept the "Settlement Payment" – of €310,000 – subject to satisfaction of the Conditions, whether by the Debtors or otherwise, and clauses 2.4 and 6.1.
31. There were ten Conditions of the settlement which were set out in Schedule 1, including:-

- "(e) The making of all payments provided for in this Deed at the time such payments are to be made (including any payments under Clause 3).*
- (f) The Settlement Payment having been made to the Lender's Account in cleared funds as outlined in Clause 3 above and Schedule 5.*
- (g) There being no Settlement Default. ...*
- (i) Satisfactory compliance by each of the debtors with the Lender's anti-money laundering requirements, including, but not limited to Personal Public Service numbers, up-to-date photo identification and up-to-date (issued within the past three months) proof of current address in a form satisfactory to the Lender and full documentary evidence to the Lender's satisfaction of the source of the Settlement Payment."*

32. Clause 3.1 provided that Mr. Tucker and Ms. Curry should pay the Settlement Payment by discharging same in accordance with Schedule 5, to be received by the Lender in cleared funds on the date specified in Schedule 5. Schedule 5, in a table, provided for a total sum payable of €310,000, to be paid one payment of €310,000 by 28th February, 2020. As to the date on which the agreed payment was to have been made, the deed might have been drafted more simply but it could not have been drafted more clearly. Havbell was to have €310,000 in cleared funds into its designated account by 28th February, 2020.

33. One of the conditions of the agreement was that there should be no "Settlement Default". This was defined as the occurrence of any of ten specified events which included:-

- (a) Any payment required to be made under this Deed not being made on its due date, subject to the Debtors having five (5) Business Days following the relevant due date to make the relevant payment; ...*
- (c) Any Debtor fails to comply with the Conditions (or any of them); ...*
- (f) Any Debtor contests the validity of any transaction contemplated by this Deed or any Finance Document; ...*
- (i) It comes to the attention of the Lender that there was a material misstatement or omission in the Statement of affairs, or any other statement or document provided to the Lender for the purposes of or in connection with this Deed."*

34. Clause 3.5 of the settlement agreement provided that:-

*" ... the Debtors shall forthwith procure the withdrawal of proceedings entitled 'Martin Tucker v Havbell Designated Activity Company' bearing High Court Record Number 2019/6453P, 'Havbell DAC v Martin Tucker', bearing High Court Record Number 2019/340CA and Havbell DAC v Martin Tucker bearing Supreme Court Appeal Record Number 2020/000008 subject to the various terms and conditions*

*set out herein. The Charge Holder shall procure the withdrawal of proceedings entitled 'Havbell DAC v Martin Tucker bearing Record Number 2019/04526. This shall be completed no later than 20 February 2020. The said withdrawal of proceedings shall include an order vacating any costs orders made in favour of any party to the proceedings.'*

35. This clause is slightly peculiar. It provided for the withdrawal of the Circuit Court appeal, which had already been heard and determined and finally disposed of by Eager J. on 13th January, 2020, and of the application for leave to appeal to the Supreme Court, which had been disposed of by the determination of the Supreme Court of 16th October, 2019. It provided for the withdrawal by Havbell of the Circuit Court injunction proceedings but not, expressly, for the dissolution of the order for possession or the costs orders made on foot of the original 2017 Civil Bill for Possession. However, it seems quite clear that the common intention of the parties was that the €310,000, when paid, would dispose of all of the litigation, and all of the liability for costs in connection with all of the litigation. If that is not absolutely clear, certainly Mr. Tucker has a strong argument to make that that was the common intention and I must approach this application to dismiss on the basis that it was.
36. The eagle eyed reader will have spotted – if Mr. Tucker did not at the time, he later did – that the date for service of the notices of discontinuance was 20th February, 2020 while the date for the payment of the money was 28th February, 2020.
37. On 20th February, 2020 Mr. Tucker filed and served notice of discontinuance of the circuit appeal (2019/340CA) and his 2019 plenary action (2019 No. 6453P). If he did not file and serve a notice of discontinuance of the application for leave to appeal I do not believe that any such omission was of any significance as that application was already spent.
38. The settlement agreement was signed and dated by Mr. Tucker on 20th February, 2020 but not by Ms. Curry. By letters dated 24th February, 2020 to each of Mr. Tucker, and Ms. Curry's solicitors, Havbell, by its solicitors, agreed to extend the time for execution and implementation of the settlement agreement by three weeks, that is until 20th March, 2020. Following reminder letters sent by Havbell's solicitors on 9th March, 2020 the settlement agreement was executed by Ms. Curry and returned to Havbell's solicitors on 18th March, 2020.
39. On 19th March, 2020 Mr. Tucker wrote to Havbell's solicitors. He said that although the COVID-19 outbreak was having a catastrophic impact on many aspects of business and finance his funder was committed to providing funds to complete his obligations under the settlement agreement and asked for a further extension of time to complete the legal and financial aspects of the transaction. On the same day, Havbell, by its solicitors, agreed to what was described as one final extension until 30th April, 2020, warning (as it had in its earlier letters extending time) that if payment was not received on or before that date the settlement agreement would be deemed null and void and Havbell would proceed through the courts. By the same letter, Havbell's solicitors asked for (1) up to date photo



identification, (2) proof of current address in a form satisfactory to Havbell, and (3) full documentary evidence to Havbell's satisfaction of the source of the Settlement Payment.

40. Mr. Tucker provided some copy anti-money laundering documentation under cover of a letter of 30th March, 2020 which, by letter dated 14th April, 2020 Havbell agreed to accept on a temporary basis, on the basis that certified copies would be provided once the then restrictions had been lifted. Havbell's solicitors went on to say that:-

*"We note that you were previously unable to evidence your source of funding in full and we should therefore be obliged if you would please provide same or advise as to the position with this. We are instructed that this is a mandatory requirement."*

41. Mr. Tucker was reminded that the extension of time for payment to 30th April, 2020 was final.
42. On 24th April, 2020 Mr. Tucker wrote to Havbell's solicitors to say that his funder required evidence that the equity proceedings had been withdrawn and the order for possession vacated or set aside. Havbell's solicitors replied on 27th April, 2020 that the Circuit Court proceedings would not be discontinued until the settlement monies had been paid. Mr. Tucker was reminded that he was obliged to provide evidence of his source of funds which he had not done. The solicitors suggested that Mr. Tucker appeared to have misunderstood the settlement agreement.
43. On 29th April, 2020 Mr. Tucker wrote to Havbell's solicitors. He said that he had not misunderstood the settlement agreement. He quoted clause 3.5 of the deed which provided that the charge holder should procure the withdrawal of the equity proceedings which *"... shall be completed no later than 20th February, 2020."* He suggested that as the settlement date had been defined as 28th February, 2020 it was clear that the proceedings should have been withdrawn before the settlement figure was paid. As to anti-money laundering documentation, Mr. Tucker suggested that Havbell's solicitors had in their letter of 14th April, 2020 acknowledged receipt of same. As to proof of funds, Mr. Tucker asserted that:-

*"I have provided all that was and is required to bring matters to a resolution, the agreement is clear on its face, my funders are also clear in regard to their understanding of the agreement and conditions in which they are prepared to provide the funds."*

44. By letter dated 15th May, 2020 Havbell's solicitors agreed to a further extension of time until 30th June, 2020. They said that they would discontinue the equity proceedings on receipt of the balance of Mr. Tucker's source of funds which, they suggested, ought to have been forthcoming some time ago.
45. On 24th June, 2020 Havbell had a letter from a personal insolvency practitioner, Mr. Eugene McDarby, to say that he had been appointed on behalf of Mr. Tucker to apply for a protective certificate pursuant to the Personal Insolvency Act, 2012 and that an

application was listed before the court on 30th June, 2020. Mr. McDarby said that he was assessing Mr. Tucker's financials with a view to arranging a personal insolvency arrangement. On 9th July, 2020 Mr. McDarby wrote again to say that a protective certificate had been granted that day and he enclosed a copy of Mr. Tucker's Prescribed Financial Statement, which was said to list Havbell as a creditor.

46. On 21st August, 2020 Mr. Tucker completed a Prescribed Financial Statement in respect of a proposed Personal Insolvency Arrangement. The summary of assets and liabilities showed that Mr. Tucker had total assets of €374,512.68, of which €200,000 was attributed to a half share of the current market value of €400,000 of his principal private residence, which was given as 39 Danesfort, Castle Avenue, Clontarf, Dublin 3. It showed total debts of €1,598,261.95, of which €400,428.51 was said to be owing to "*Principal private residence lender*". Besides the debt to Havbell, the form showed a debt due and owing to Unicaja Banco in Spain of €330,000 and liabilities to Cabot Asset Purchases Ltd. of €440,829.41 and €403,151.91.
47. A proposed Standard Personal Insolvency Arrangement prepared on behalf of Mr. Tucker showed the property at 39 Danesfort valued at €400,000 and a mortgage balance of €486,772.09. It proposed that Mr. Tucker would secure finance of €250,000 which would be paid to Havbell within eight months of court approval and that the balance of €286,772.09 of the liability to Havbell would be treated as unsecured debt, of which 1.27% would be paid. Mr. Tucker's protective certificate was extended on 11th September, 2020 and the proposed PIA was put to a creditors' meeting on 22nd October, 2020, when it was unanimously rejected.
48. On 3rd November, 2020 Mr. Tucker wrote to Havbell seeking a copy of any and all information kept about him and in particular an unredacted copy of any deeds of transfer and or assignment and or novation between PTSB and Havbell concerning him, the loan and the property. The letter went on to say that should Havbell be unable or unwilling to provide the documentation "*... the offer of €295,000 in full and final settlement of any and all obligations the writer may have to you will be open for acceptance for 7 days from the date herein, at the expiration of 7 days the offer will be withdrawn and it will be assumed that you will be in a position to provide all of the said documentation and in that regard I look forward to receiving same.*"
49. On 20th November, 2020 Havbell's solicitors wrote to Mr. Tucker. Mr. Coman says that it was in response to Mr. Tucker's letter of 3rd November, 2020 but while the letter referred to previous correspondence, generally, it did not address Mr. Tucker's request or offer. Havbell's solicitors asserted that Havbell had acquired the charge from PTSB; they enclosed copies of the orders of Judge Linnane made on 18th July, 2019 and Eager J. made on 13th January, 2020; they noted that his personal insolvency proposal had been unsuccessful and that his protective certificate had expired; and asserted that his continuing occupation of the property amounted to contempt of court. They demanded that he vacate the property and return the keys by 5:00 p.m. on Monday 23rd November, 2020, failing which they would apply to have the matter re-listed before the court.

50. On the same day Mr. Tucker replied interrogating the assertion that Havbell had acquired the charge; asking which of the orders was relied on; and asserting that Havbell was in breach of contract by reason of its failure to withdraw the proceedings in which the orders relied on had been made. Mr. Tucker said that he would attend at the solicitors' offices on the following Monday to personally serve High Court proceedings: which he duly did.
51. This action was commenced by plenary summons issued on 23rd November, 2020 and a statement of claim was delivered on 24th March, 2021. The action was registered as *a lis pendens* against the property on 4th January, 2021.
52. On the same day as he issued his summons, Mr. Tucker issued a notice of motion seeking an interlocutory injunction restraining Havbell from taking possession of the property. That motion was assigned a return date of 15th March, 2021.
53. Mr. Tucker's motion for an interlocutory injunction was grounded on a short affidavit in which he asserted that he had been completely let down by his solicitor in the possession proceedings. He referred to the settlement agreement by which he had agreed to pay Havbell €310,000 and asserted that his funding had been withdrawn due to the COVID-19 pandemic. He complained that Havbell had not withdrawn its proceedings and did not have clean hands. He asserted that he had a loan offer from Allied Irish Banks plc for €295,000. He complained that Havbell had voted down his proposed PIA. And he asserted that he had done his utmost to pay sums to Havbell as agreed.
54. By notice of motion issued on 12th March, 2021 in the possession proceedings Mr. Tucker applied to the Circuit Court for an order vacating the Order of Judge Linnane made on 10th May, 2018. That motion was grounded on a short affidavit which asserted that Havbell DAC did not exist as a legal entity, as opposed to Havbell Designated Activity Company. The order of 10th May, 2018 was, of course, the County Registrar's order, which had long before been the subject of an appeal to the Circuit Court judge and a misconceived application for an extension of time to appeal.
55. By notice of motion issued on 12th March, 2021 in the equity proceedings Mr. Tucker applied to the Circuit Court to vacate the order of Judge Linnane made on 18th July, 2019. That motion was grounded on a slightly longer affidavit in which Mr. Tucker asserted that the possession proceedings had been fundamentally flawed; that he had been completely let down by his solicitor; that Cross J. had applied the wrong test on his motion to extend time to appeal; that the figures which had been relied on by Havbell had been wrong; that the order refusing his appeal had an incorrect record number and named the wrong judge; that he had agreed a settlement with Havbell for €310,000 which had been frustrated by force majeure; that Havbell had not withdrawn the order for possession and the injunction; that he had secured a loan from Allied Irish Banks plc of €310,000, which he had offered to Havbell; that – as far as I can understand – Havbell had voted against the proposed PIA; and that Havbell was using the courts to avoid its obligations in regard to redemption.

56. The two motions were dealt with by the Circuit Court on 4th May, 2021, when they were refused. Mr. Tucker has lodged an appeal to the High Court.
57. On 16th March, 2021 Mr. Tucker issued a motion in this action seeking voluntary discovery of all deeds relied on by Havbell in regard to the alleged transfer and disclosure of the consideration paid by Havbell for Mr. Tucker's debt. He claims to have previously written to Havbell's solicitors on 12th February, 2021 seeking voluntary discovery in those terms. There is dispute as to whether Mr. Tucker's letter was sent or received, but nothing turns on that.
58. By e-mail dated 8th April, 2021 Havbell was informed by Mr. Armstrong that Mr. Tucker had issued proceedings against the Register (sic.) of Titles, to which he intended applying to have Havbell joined as a notice party. That action was commenced by plenary summons issued on 1st April, 2021 under record number 2021 No. 2213P and names "*The Registrar of Titles at the Registry of Deeds*" as defendant. Mr. Coman has deposed that he does not know what the claim in those proceedings might be but has expressed apprehension that Mr. Tucker might seek somehow to use that action, and possibly further proceedings, to prevent Havbell taking possession of the property.
59. By notice of motion issued on 7th April, 2021 in these proceedings Mr. Tucker applied to join Ms. Curry, two of the solicitors in the firm on record for Havbell, and the managing partner in the firm which acted for Ms. Curry in the Circuit Court proceedings, as co-defendants, and for leave to issue *subpoenas duces tecum* directed to the first three proposed additional defendants. That element of the motion is perceived by Mr. Coman to be an attempt by Mr. Tucker to intimidate and attack the solicitors.
60. On 20th May, 2021 a further application on behalf of Havbell for attachment and committal was heard and granted by the Circuit Court, His Honour Judge O'Connor. On that application Mr. Tucker is said to have been represented by a solicitor and counsel and to have accepted that he had failed to obey the order of 18th July, 2019. Mr. Tucker has appealed against the order of Judge O'Connor and on 9th June, 2021 issued a motion in the Circuit Court appeal seeking a stay on the order of Judge O'Connor pending the hearing of his appeal.
61. On 17th June, 2021 Mr. Tucker issued a motion for judgment in default of defence.
62. The affidavit of Mr. Coman deals at some length with an attempt on 2nd June, 2021 to execute the Circuit Court order for attachment and Mr. Coman is supported in what he says by an affidavit of Mr. Sean Cahill, the managing director of a security company which was in attendance at the property. Mr. Coman's and Mr. Cahill's version of the events on 2nd June, 2021 are contested in an affidavit of Mr. Neil Armstrong which was filed by Mr. Tucker but it is not necessary for the purposes of this motion to decide precisely what happened. It is common case that two members of An Garda Síochána attended at the property with to execute a Circuit Court order for attachment but did not succeed in doing so.

63. On 3rd September, 2021 Mr. Tucker filed an affidavit in reply to the affidavit of Mr. Coman grounding this motion. Mr. Tucker exhibits and makes a number of complaints in relation correspondence written by Havbell's solicitors to the Circuit Court office in which the solicitors were urging that Havbell's motion for attachment and committal was urgent and should be listed for hearing. None of that is relevant to the application now before the court.
64. As to the substance of what Mr. Coman said, Mr. Tucker denies that his action is frivolous or vexatious, or that it is a collateral attack on the Circuit Court orders. He asserts that he agreed a settlement in December, 2019/ January, 2020 which was frustrated by the COVID-19 pandemic and later reneged on by Havbell. He says that he did not want matters to become contentious and had no option but to issue these proceedings to establish the price paid by Havbell for his debt. He asserts that Havbell has quoted numerous figures in respect of his indebtedness and has not explained why it has not pursued the missing endowment monies or Ms. Curry.
65. As to what happened in the Circuit Court possession proceedings, Mr. Tucker asserts that he instructed his solicitor to file a defence, which, he says, his solicitor failed to do. He notes that Ms. Curry consented to the order for possession but asserts that Mr. Coman has not explained why Ms. Curry was permitted to draw down endowment monies in excess of €100,000 and possibly up to €160,000 that were to have been used to pay off a significant capital amount of the mortgage monies that Havbell claims to be entitled to. As to the remainder of Mr. Coman's evidence, Mr. Tucker's response is that he has and continues to want to deal with his indebtedness, has the funds available to do so since the last quarter of 2020 but has been met with refusal, frustration and unanswered questions such as, he says:-
1. What has become of the endowment monies?
  2. Why does Havbell continue to refuse the settlement amount as the monies are available?
  3. Why does Havbell fail to provide unredacted copies of the mortgage sale deed and disclosure of the price paid for Mr. Tucker's debt?
  4. Why does Havbell continue to allege a mortgage and charge is registered against Mr. Tucker?
66. The reference by Mr. Tucker to endowment monies requires a little explanation. As is evident from his statement of claim, although not from his replying affidavit, Mr. Tucker asserts that the mortgage loan was an endowment mortgage and that it was a condition of Havbell's predecessor in title that Mr. Tucker and Ms. Curry would assign pension policies to the mortgage loan and that these pensions could be used solely against the debt. He asserts that Havbell has failed refused and neglected to acknowledge that Ms. Curry, on the advice of her solicitors, and with the consent of Havbell, drew down €160,000 that was supposed to be used against the capital amount of the mortgage. The

pension fund, he claims, was for the sole purpose of the payment of the mortgage and was part of the security offered in the mortgage deed.

67. Mr. Tucker's motions in this action for an interlocutory injunction, for discovery, and for the joinder of Ms. Curry and the solicitors, and his later motion for judgment, and Havbell's motion to dismiss piled up in the list. Logic, as well as the efficient use of court time, dictated that Havbell's motion should be decided first. If it should succeed, that would be an end to the action. If it should fail, the court could proceed to hear Mr. Tucker's motions.

#### **The claims in these proceedings**

68. Having examined the chronology of events and proceedings, it is useful at this point to look at the statement of claim. It is not altogether easy to follow.
69. The statement of claim at the same time seeks to challenge the validity of the transfer of the mortgage by Permanent TSB to Havbell and to complain of alleged breach of duty and breach of contract on the part of Havbell, the premise of which can only be that there was a transfer.
70. It is said that the mortgage did not provide for a transfer of the loan and that Havbell failed to register its interest in the mortgage. It is said that in the two sets of Circuit Court proceedings Havbell misrepresented its entitlement – it is not said in what respect – in order to advance its claim. It is alleged that Havbell, its servants and agents and employees lied on affidavit for the purpose of advancing each set of proceedings but no particulars of any kind are given.
71. It is said that Havbell "... *failed to secure the payment of two pension funds which served as security for the mortgage additional to the charge's it claimed interest in*" and that "[a]t the date of realisation of the pension funds [Havbell] allowed Ms. Elizabeth Curry to retain the funds and has attempted to impose the payment of those funds on [Mr. Tucker] in breach of the special conditions of the mortgage." It is said that the mortgage loan was an endowment mortgage, a condition of which was that Mr. Tucker and Ms. Curry should assign pension policies and that those policies would be used solely to pay the debt and that Havbell "... *has failed refused and neglected to acknowledge that Ms. Curry, on advices from her legal team at Reddy Charlton Solicitors, with the consent of [Havbell] drew down €160,000 that was supposed to be used as against the capital amount of the mortgage.*"
72. The statement of claim makes a number of criticisms of the "*Deed of Transfer/Irish Law Deed of Conveyance and Assignment*" on which it is said Havbell relies. It is said that Havbell has made false claims of entitlement under the mortgage deed. It is said that while the deed is signed by a Mr. Karl Smith acting as attorney of Havbell, there is no evidence that Mr. Smith is Havbell's attorney, and no evidence that Mr. Smith is a solicitor or a lawyer. It is said that the deed is not stamped and is heavily redacted and that Havbell had failed to comply with its obligation under the Land and Conveyance (sic.) Law Reform Act, 2009 to register its interest at the Land Registry.

73. The statement of claim asserts that when taking out a mortgage the borrower routinely grants the lender a power of attorney. Such a power of attorney, it is said, cannot be delegated or transferred. Havbell, it is said, refers to a “*transfer/conveyance/assignment*” but, it is said, novation would have needed to be undertaken rather than transfer/conveyance/assignment. There follows a number of paragraphs as to the effect of assignments and the circumstances in which novation is possible, which appear to have been copied from a textbook and a peroration that “... *as a matter of law the transfer and or assignment of the loan from PTBS to [Havbell] is deficient in every respect.*”
74. There is no reference in the body statement of claim to the settlement agreement which was signed by Mr. Tucker on 20th February, 2020.
75. The prayer to the statement of claim is for an order for discovery of all deeds relied on by Havbell in regard to the alleged transfer of the mortgage in its unredacted form; a declaration that the purported transfer of the mortgage is void and of no legal effect; a declaration that Havbell has no right or entitlement to the property at 39 Danesfort; a declaration that Havbell is not entitled to claim any right of possession of the property; an injunction restraining Havbell from taking possession; an order for possession in favour of Mr. Tucker; an order for specific performance of the agreement between the parties; and damages for breach of contract, stress, conversion and unjust enrichment.

#### **Legal principles**

76. Havbell applies to have Mr. Tucker’s action struck out or dismissed on a number of alternative and cumulative bases. It is useful to recall the legal principles applicable to each of them, and to move from the particular to the general.
77. *Delany and McGrath on Civil Procedure* (4th Ed.) at para. 16-70 succinctly explains the doctrine of *res judicata*.

*“16-70. The doctrine of estoppel per rem judicatam, better known by the shorthand term res judicata, provides that the final judgment of a judicial tribunal of competent jurisdiction is conclusive and, therefore, a party is precluded from re-litigating the matters decided in the judgment or giving evidence to contradict it in subsequent proceedings. This doctrine of res judicata is recognised as encompassing two distinct branches, ‘cause of action estoppel’ and ‘issue estoppel’. However, unless the established elements of the doctrine are met, a claim to strike out proceedings is unlikely to be successful. The doctrine of abuse of process is now being increasingly employed by the courts in addition to or in substitution for the doctrine of res judicata in order to strike out proceedings where a party is attempting to re-litigate an issue that has been decided (or could have been decided) in previous proceedings but a plea of res judicata might not be successful.*

As Costello J acknowledged in *Morrissey v Irish Bank Resolution Corporation* [2015] IEHC 200:

*'[B]eyond the strict limitations of res judicata the courts have long recognised that there may be abuse of process outside of the relatively confined limitations of the rule and the courts have always been prepared to balance the rights of parties to have their cases heard and determined by the courts with the rights of the opposing parties to fair procedures in the conduct of litigation and, where necessary, to strike out proceedings if they amount to an abuse of process.'*

78. As far as what has come to be known as the rule in *Henderson v. Henderson* is concerned, the law was summarised by Hardiman J. in his judgment in *Carroll v. Law Society of Ireland* [2003] IESC 1.

*"28. There is a well-established rule of law whereby a litigant may not make the same contention, in legal proceedings, which might have been but was not brought forward in previous litigation. This rule is often traced to the judgment of Wigram V.C. in Henderson and Henderson (1843) 3 Hare 100. The learned Vice-Chancellor spoke as follows: - 'I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time'.*

*29. A number of decisions affirming this approach were opened to us. Two of these were Irish cases. In Russell v. Waterford and Limerick Railway Company [1885] 16 LR IR 314, Dowse B. said that:-*

*'Where the cause of action is the same and the plaintiff had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action'.*

*30. Similarly in Cox v. Dublin City Distillery (No. 2) [1915] 1 IR 345, Palles C.B. held that a party to a previous litigation was bound 'not only (by) any defences which they did raise in that suit, but also any defence which they might have raised but did not raise therein'. In the judgment of Kelly J. in this case he also referred to Barrow v. Bankside [1996] 1 Lloyds Law Reports 278 and to Johnson v. Gore Wood [2002] W.L.R 72. The first of these cases speaks in terms of issues that might 'sensibly' have been brought forward in previous litigation and also suggests that the rule of what is sometimes referred to as 'estoppel by omission' is not in fact based on res judicata in the strict sense but it is an independent rule of public*



policy. Lord Bingham M.R. held that the Court must take the need for efficiency in the conduct of litigation into account.

31. In *Woodhouse v. Consigna* [2002] 2 All E.R. 737, Brooke L.J. referred to this public interest and continued:-

*'But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in Henderson v. Henderson that, in the absence of special circumstances, parties should bring their whole case before the Court so that all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits where one would do.'*

32. This seems quite consistent with what Lord Bingham said in *Johnson v. Gore Wood*, at page 90 when he urged that the Court should arrive at:-

*'A broad, merits based judgment which takes account of the public and private interests involved and also takes account of all of the facts of the case, focussing on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it issues that could have been raised before.'*

79. The principles to be applied in determining whether an action is frivolous or vexatious are also well settled.
80. In *Murray and Air Ambulances Services Ltd v. Fitzgerald* (Unreported, High Court, White J., 18th January, 2012) [2012] IEHC 20, White J. first recalled the judgment of Costello J. in *Barry v. Buckley* [1981] I.R. 306 as to the inherent jurisdiction of the High Court to ensure that an abuse of the process of the courts does not take place. Proceedings which are frivolous or vexatious will be stayed, as will actions which are bound to fail. White J. emphasised (as do all of the cases) that the court must be careful in the exercise of this jurisdiction to ensure that it is exercised in cases of undisputed matters of fact by the application of clear legal principles.
81. In *Murray*, as in this case, the defendant relied on O. 19, r. 28 of the Rules of the Superior Courts as well as the inherent jurisdiction of the court. In *Lopes v. The Minister for Justice* [2014] 2 I.R. 301, to which I shall come, the Supreme Court explained the difference between the two jurisdictions but as White J. pointed out in *Murray*, in exercising the two jurisdictions, there is bound to be a certain overlap.
82. As White J. said in *Murray*, the court, in exercising its inherent jurisdiction in assessing whether proceedings are vexatious, is entitled to look at the whole history of the dispute and to look for one or more of a number of indicia of vexatious litigation. At para. 46 of

his judgment, White J., citing *Dykun v. Odishaw* (Unreported, Alberta Court of Queen's Bench, Judicial District of Edmonton, 3rd August, 2000), which referred to a decision of the Ontario High Court in *Re Lang Michener & Fabian* (1987) 37 D.L.R. (4th) 685 at 691, identified seven matters as tending to show that a proceeding is vexatious, which are:-

- "(a) *The bringing up of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding.*
- (b) *Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.*
- (c) *Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights.*
- (d) *It is a general characteristic of vexatious proceedings that grounds and issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings.*
- (e) *In determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action.*
- (f) *The failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious.*
- (g) *The respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings."*

83. In *Lopes v. The Minister for Justice* [2014] 2 I.R. 301, Clarke J. (with whom Laffoy and Dunne JJ. agreed) explained the difference between the jurisdiction of the court under O. 19, r. 28 and its inherent jurisdiction.

*"[17] 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* [1981] I.R. 306, 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.”*

84. Later in his judgment in *Lopes*, Clarke J. said:-

*“[90] I should emphasise again that the proper approach to a motion like this is to take the evidence which it is suggested might be capable of being secured and presented to the High Court, at its high point. However, for the reasons already analysed, almost all of that evidence concerns what transpired at the hearings before the various courts which dealt with Mr. Lopes’ case. The fact that Mr. Lopes makes assertions about many things does not amount to evidence. Either the evidence or potential evidence is capable, on an arguability basis, of supporting his accusations or assertions, or it is not.*

*[91] Having carefully analysed each of the matters which were set out in his written submissions, in the documents which he filed in support of same and in his oral submissions, it seems to me that there is just no basis for suggesting that there is any evidence, or any prospect of there being evidence, to support his factual accusations. On that basis, I am satisfied that the underlying factual assertion which lies at the back of all of the submissions made is bound to fail. If that factual assertion fails, then the legal issues, however interesting and important, just do not arise.”*

86. In *Harris v. Promontoria (Aran) Ltd.* [2021] IECA 174 the Court of Appeal considered the particular relevance of applications to dismiss cases involving the existence or construction of documents. Faherty J. , at para. 56, recalled that:-

*56. ... As said by Clarke J. (as he then was) in Salthill Properties Ltd. v. Royal Bank of Scotland [2009] IEHC 207, ‘in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established.’*

*57. Clarke J. observed, however, that ‘more difficult issues are likely to arise in an application to dismiss when there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence’. He recognised that ‘at this end of the spectrum, it is more difficult to envisage circumstances where an application to dismiss as bound to fail could succeed.’ As Clarke J. also noted, while contemporary documentation is very often a valuable guide to what is the factual matrix, it was none the less ‘important...not to confuse cases which are dependent on documents themselves with cases where documents may be a guide, albeit often a most reliable guide, to the underlying facts which need to be determined in order to resolve the issues between the parties.’ These principles require to be borne in mind in this case, in light both of the defendants’ contention that the case here is largely documents based and hence lends itself to*

*the invocation of the jurisdiction to strike out, and the plaintiff's argument that the trial judge trespassed impermissibly into the determination of a factual dispute, matters to which I will return in due course.*

*58. On the question of factual disputes generally, while it clear that the jurisdiction to strike out is primarily invoked where there is little or no dispute over the facts of a case, that does not mean, however, that the court is precluded from examining the facts as pleaded, or engaging in some analysis, in determining whether an application to strike out should be granted pursuant to the inherent jurisdiction of the Court. As said by Clarke J. in Salthill Properties:*

*'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.'*

*59. In an application to strike out proceedings, the onus rests on the defendant, explained by Clarke J. in Salthill Properties, as follows:*

*'3.14 It is clear from all of the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put forward, at that time, a prima facie case to the contrary effect.'*

87. Finally, in *Keohane v. Hynes* (Unreported, Supreme Court, 20th November, 2014) [2014] IESC 66 Clarke J. (with whom Hardiman and Laffoy JJ. concurred) revisited the same question and put it thus:-

*"6.8 What the Court can analyse is whether a plaintiff's factual allegation amounts to no more than a mere assertion, for which no evidence or no credible basis for believing that there could be any evidence, is put forward. Likewise, the Court can go into documentary facts where the relevant documents govern the legal relations between the parties or form the only possible evidential basis for the plaintiff's claim (as in Lopes). As Barron J. noted in Jodifern, a court can look at a contract and it may become clear beyond argument as to what that contract means. On that basis, it may follow that a plaintiff's claim may be bound to fail. But there may be cases where, notwithstanding the text of a contract, facts are asserted and backed up either by evidence or by the possibility that evidence might be found, which might lead to the contract being construed in some different way or the consequences for the wrong alleged in the proceedings being differently considered. In such cases, as Barron J. made clear, the case must go to trial.*

*6.9 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for the plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."*

### **Discussion and decision**

88. As I observed at the outset, there are two broad strands to Mr. Tucker's case. The first, in very broad terms, is that the Circuit Court orders, in particular the order for possession, ought not to have been made. The second strand, again in very broad terms, is that the Circuit Court orders, in particular the order for possession, were overtaken by the settlement agreement.
89. The statement of claim, beyond, perhaps, the claim in the prayer for an order for specific performance, does not refer to the settlement agreement but it is well established that the jurisdiction invoked by Havbell is to be exercised sparingly, and only in clear cases. In *Sun Fat Chan v. Osseous Ltd.* [1986] 1 I.R. 425, the Supreme Court emphasised that the court should be slow to exercise the jurisdiction where a statement of claim admits of

amendment which might save the action. Although Mr. Tucker has not pleaded his reliance on the settlement agreement he has in his affidavits made it clear that this is part of the case which he would make. The correct approach to this motion, accordingly, is to determine whether Mr. Tucker has any case by reference to the settlement agreement which, if pleaded, might have a reasonable prospect of success.

90. As to the challenge to the Circuit Court order for possession, it is quite clear that this is an abuse of process. By the Civil Bill for Possession issued on 21st December, 2017 Havbell claimed an order for possession of the property. The basis of that claim was that Havbell was the assignee of Permanent TSB of a mortgage granted by Mr. Tucker and Ms. Curry by deed dated 18th June, 2003, to secure repayment of a loan of €260,000 with interest, which loan had not been repaid. The Circuit Court found in favour of Havbell. Mr. Tucker had a right of appeal, which he did not exercise. He had a right to apply to the High Court for an extension of time to appeal which he did exercise, but that application was refused because he could not show that he had an arguable appeal. Mr. Tucker had a right to apply to the Supreme Court for leave to appeal against the order of the High Court, and he exercised that right. But his application was refused because the Supreme Court agreed with the High Court that he had not shown that he had an arguable ground of appeal.
91. Havbell's claim to be entitled to an order for possession of the property has been finally and conclusively determined. Mr. Tucker is not entitled to attempt to re-litigate the question previously decided against him. Nor is he entitled to attempt to re-open the case already decided to introduce any argument which he might previously have made but did not.
92. As to the challenge which Mr. Tucker would make to the validity of effectiveness of the transfer from Permanent TSB., the transfer self-evidently predated the Civil Bill for Possession. Any challenge to its validity or effectiveness or registration was plainly an issue which, if it was not made before the Circuit Court, could have been made. Mr. Tucker is not entitled to make it now. By the way, the case pleaded that Havbell might have required a novation rather than an assignment is based on a fundamental misunderstanding of the difference between the two.
93. As to the pension policies, the case pleaded is very vague, not least as to when it is said that the proceeds were drawn down by Ms. Curry. It is inherently improbable that a lender, *a fortiori* a transferee of a loan in default, would release part of its security but I take Mr. Tucker's case at its height. If whatever happened with the policies happened before the order for possession was made, any argument as to the relevance of whatever it was happened to the making of the order for possession was something that could and should have been raised before the order was made. If whatever it was happened happened after the order for possession was made, it cannot have affected the validity or enforceability of the order and Mr. Tucker, while complaining about it, does not attempt to make any link between the two. The case pleaded is that the pension policies were additional security.

94. As it is unclear whether whatever happened with the pension policies happened before or after the making of the order for possession, so it is not clear whether it is alleged that it happened before or after the settlement agreement signed by Mr. Tucker on 20th February, 2020. What is clear is that the settlement agreement made no reference to any pension policies or the proceeds of any such policies. The settlement agreement was that if Havbell was paid €310,000 in cleared funds into a designated bank account by an agreed date it would accept such payment in full and final settlement of the debt and costs. There is no suggestion in the settlement agreement or in the proposed PIA, or, indeed, in anything that Mr. Tucker has had to say about the settlement agreement, that Mr. Tucker, or Mr. Tucker and Ms. Curry, was or were entitled to a credit against their acknowledged liability for the value or proceeds of any pension policies. The case made by Mr. Tucker in his affidavits – as I will come to – is that he was willing, at least, if not ready and able, to pay the €310,000 in settlement of his liabilities. That being so, any issue, if any, in relation to any policies or the proceeds of any policies was an issue between Ms. Curry and Mr. Tucker, or at least was not an issue between Havbell and Mr. Tucker.
95. Incidentally, it appears from the summary of events provided by Mr. Tucker to Mr. McDarby, and by Mr. McDarby to the Circuit Court before Mr. Tucker's application for a protective certificate was heard, that Mr. Tucker told Mr. McDarby that Ms. Curry's cooperation with the settlement agreement had been achieved in return for her retention of the policy fund of approximately €180,000. I understand counsel for Havbell to argue, at it were, that this takes the pension policies out of the mix but I prefer to say that they never were in the mix.
96. As to what effect the settlement agreement might have had on the existing Circuit Court orders, the demonstrable fact of the matter is, and Mr. Tucker does not argue otherwise, that the agreement in principle which was reached in January, 2020 and recorded in the correspondence exchanged in January, 2020 was expressly conditional on the agreement and execution – by Ms. Curry as well as by Mr. Tucker and Havbell – of a formal settlement agreement. The agreement after the making of the Circuit Court orders on which Mr. Tucker would rely is that contained in the settlement agreement which he signed on 20th February, 2020. That agreement was conditional, in the first place, on Ms. Curry's concurrence, and thereafter on compliance with all of the conditions thereby provided, eventually as to payment to Havbell of €310,000 by a specified date (with five days' grace) but in the meantime as to Mr. Tucker establishing to the satisfaction of Havbell not only that he had the money but the provenance of the money. The date for implementation of the settlement agreement was extended from time to time until 30th June, 2020. It is not contended that it was extended beyond that. Mr. Tucker would make the case that he had the money to complete by the third quarter of 2020 but that was beyond the last agreed backstop date.
97. Mr. Tucker's submission that Havbell withdrew its consent to the agreement is demonstrably incorrect. Mr. Tucker failed to implement the settlement agreement within the agreed time.

98. I am quite content to accept, as Mr. Tucker alleges, that business was disrupted by the COVID -19 restrictions. On the evidence, Havbell accepted that that was so and was prepared to make allowances. But that is not to say that Havbell was obliged to make any such allowances. Plainly Havbell's agreement to accept €310,000 was conditional on the payment of that money within the agreed time: in the event, 30th June, 2020, with five days' grace. Not only did Mr. Tucker fail to pay the money but by his proposed PIA made it clear that he did not intend to do so.
99. Part of the case which Mr. Tucker would now make is that Havbell did not vacate the order for possession and the injunction on 20th February, 2020. I have previously offered the view that clause 3.5 of the settlement agreement is rather peculiar because while it made provision for the discontinuance of Mr. Tucker's appeals and 2019 action and the equity proceedings, it did not refer to the order for possession at all. There also appears to me to have been a disconnect between the date provided for the service of the notices of discontinuance and the date for the payment of the money. What Mr. Tucker's argument boils down to is that Havbell was obliged, immediately on the execution of the settlement agreement by Mr. Tucker, to vacate the Circuit Court orders. This makes no sense. In the first place, any settlement with Mr. Tucker was contingent on the concurrence of Ms. Curry. Secondly, the settlement agreement was expressly conditional on compliance with Havbell's anti-money laundering requirements and proof of the course of funds. Apart altogether from the agreements of the parties, this, it seems to me, would have been required by law. While the agreement contemplated separate compliance with anti-money laundering requirements and proof of the source of funds, it seems to me that as a matter of law, evidence of the source of funding was probably a component of the anti-money laundering requirement. If Mr. Tucker's argument was correct, Havbell was required to vacate the Circuit Court orders in circumstances in which Ms. Curry had not signed the settlement agreement and Mr. Tucker had not shown that he had the money to complete, or where it had come from and, on the facts, in circumstances in which he did not in fact have the money.
100. If there might have been any substance to the argument that Havbell was obliged by the letter of the settlement agreement to vacate the Circuit Court orders before Mr. Tucker had complied with his obligations as to disclosure and proof of funds and payment, it simply does not arise in circumstances in which the settlement agreement had not been executed by Ms. Curry on 20th February, 2020. Any disconnect between the dates for compliance with the various obligations on both – or on all three – sides was removed by the agreement between the parties that the time for execution and implementation would be extended, first until 20th March, 2020 and thereafter from time to time until 30th June, 2020.
101. The position which Mr. Tucker would take in this action is inconsistent in every respect with the positions taken by him heretofore. The challenge he seeks to mount against his liability to Havbell is inconsistent with his acknowledgement in the settlement agreement – which he would now rely on – and the acknowledgements in the prescribed financial statement and proposed personal insolvency arrangement which he filed with the



Insolvency Service of Ireland and in the Circuit Court. The reliance he would now place on the Havbell's agreement to accept €310,000 in settlement of his debt is inconsistent with his clear repudiation of that agreement by proposing a settlement of €250,000 and five farthings in the euro for the balance of the debt, payable eight months after the date on which proposed personal insolvency arrangement might have been approved by the Circuit Court. The inconsistency between the proposed PIA and the agreement with Havbell – which was referred to at the time an informal debt settlement agreement – was recognised before he applied for his protective certificate. This was confirmed by a letter written by Mr. McDarby on behalf of Mr. Tucker to the Circuit Court on 30th June, 2020 to which was attached a summary of events prepared by Mr. Tucker which confirmed the making of the settlement agreement and that the completion date of 28th February, 2020 had been pushed out to 30th June, 2020. Mr. McDarby confirmed that Mr. Tucker had been advised to get independent legal advice in relation to the debt settlement arrangement and the personal insolvency application and that he wished to proceed with his personal insolvency application.

102. Any suggestion that Mr. Tucker now is, or ever was, ready, willing or able to pay €310,000 is inconsistent with his suggestion that his funding was withdrawn due to the COVID-19 pandemic, with the proposal in his proposed PIA that he would pay €250,000, and with his offer of 3rd November, 2020 – open for seven days – to pay €295,000. Mr. Tucker's questioning of the validity of the transfer by Permanent TSB to Havbell is inconsistent with his earlier acknowledgements and his various offers to pay various sums in satisfaction of his acknowledged liability.
103. Havbell now complains that Mr. Tucker's failure to disclose his other liabilities, and the fact that at the time of the negotiations there was ongoing litigation against him by Cabot Asset Purchases Limited, amounted to a breach of the conditions of the settlement agreement. It will be recalled that one of the conditions of the settlement agreement was that there should be no "*Settlement Default*", which included a material misstatement or omission in the statement of affairs or other statement or document provided to the lender for the purposes of or in connection with the settlement agreement. Havbell now complains that Mr. Tucker did not disclose his liabilities to Cabot of €440,829.41 and €403,151.91 or the existence of High Court proceedings by Cabot against Mr. Tucker by which Cabot sought to recover those liabilities but I am not persuaded that this was a breach by Mr. Tucker of his obligations under the settlement agreement. Clearly the agreement contemplated that Mr. Tucker would provide a statement of affairs but I have no evidence that he did. As far as the evidence goes, the height of Havbell's complaint is of non-disclosure, not material misstatement or omission. Moreover, while on this application Havbell would make much of the undisclosed Cabot liabilities and litigation, those matters were not relied upon when, after the proposed scheme of arrangement had been rejected, Havbell demanded possession of the property and compliance with the Circuit Court orders.
104. I am satisfied that this action bears all the hallmarks of vexatious litigation. Mr. Tucker would ask the court to determine the issue of Havbell's entitlement to possession of the

property. This is something which has been heard and determined against him. It is obvious that the action cannot succeed. Havbell's entitlement to possession on the basis of the mortgage, assignment, and default is *res judicata*. The case that Mr. Tucker would make by reference to the settlement agreement can be shown by the terms of the agreement and the fact that the money was not paid to be bound to fail. The grounds and issues can be seen to have been rolled forward into this action and the many motions in this court and the Circuit Court. Mr. Tucker would implead Ms. Curry's solicitors, Havbell's solicitors, and the Property Registration Authority. If Mr. Tucker has not been shown to have persistently taken appeals from judicial decisions, his conduct in persistently seeking to go back to the judges who have decided against him is, if anything, worse.

105. Mr. Tucker's bald assertions of perjury are baseless and scandalous.
106. Apart from the fact that the order for possession is final, Mr. Tucker's assertion that Havbell has been inconsistent in the figures relied on is wrong. There is inconsistency between the figures relied on by Mr. Tucker and Havbell but not in the figures relied on by Havbell.
107. In his correspondence and affidavits Mr. Tucker repeatedly asserted that he had the money to implement the settlement agreement, although he was inconsistent as to when he was saying that he had secured the necessary funding. All that Mr. Tucker had to say about the availability of funding was mere assertion, unsupported by any detail or documentary evidence. In his written submissions on this motion Mr. Tucker asserted that he had raised a new mortgage with an Irish Bank for €310,000 and had provided proof of funds to Havbell and in his oral submissions Mr. Tucker insisted that he had the money and could show that. While there was no evidence before the court beyond Mr. Tucker's bare assertions, I was prepared to contemplate that he might have evidence which he had not brought forward and in view of the seriousness of the orders sought against him I agreed to look at some documents which he handed in on the basis that if they tended to show what he said they showed he could be given an opportunity to put them into evidence.
108. The documents handed in by Mr. Tucker included a letter dated 17th July, 2019 from Lotus Investment Group to a Mr. Karl Scully approving a facility in the sum of €500,000 secured against the properties said to have been discussed at a meeting including 39 Danesfort, Clontarf, Dublin 3. Apart from the fact that this letter long preceded the settlement agreement, it did not show that any funding was available to Mr. Tucker.
109. Mr. Tucker also handed in an e-mail dated 5th October, 2020 which set out non-binding heads of terms for a loan of €200,000 by Martin Brady Transport Limited to The Ragged Trousered Painting Company Limited, 39 Danesfort Avenue, Dublin, and a letter dated 4th May, 2021 from O'Reilly Thomas LLP solicitors by which they confirmed to whom it might concern that they were the solicitors for The Ragged Trousered Painting Company Limited (Martin Tucker) and held in their client account the sum of €225,000, which they were instructed was to be used in the purchase of the property at 39 Danesfort, Castle Avenue,

Clontarf, Dublin 3. Although The Ragged Trousered Painting Company Limited had a bank account with an address at the property, Mr. Tucker explained that the Martin Tucker referred to was his son. Apart from any consideration of the source of the money, the documents post-dated the relevant time and did not show that Mr. Tucker ever had funding or that anyone ever had available funding of €310,000.

110. Besides the multifarious actions and motions already referred to, Mr. Tucker advised the court on the hearing of the motion that he had commenced proceedings by way of judicial review, which were listed for hearing in October, 2021. The record of those proceedings, 2021 No. 808 JR, shows that Mr. Tucker filed an originating statement and affidavit on 8th September, 2021, that his *ex parte* application was heard and refused on 11th October, 2021, and that he filed a notice of appeal on 21st October, 2021.
111. It is clear that Mr. Tucker will not give up. I am satisfied that Havbell's apprehension that following the disposal of this action he may institute further proceedings is well-founded. I am satisfied that it is necessary and proper to protect Havbell from further harassment, vexation and expense. I do not have direct evidence that the several costs orders which have been made against Mr. Tucker have not been paid, but I believe that I am entitled to infer from the evidence of his insolvency and from his failure to pay the mortgage monies that those costs have not been paid.

#### **Order**

112. I am satisfied to make an order in the terms of the notice of motion dismissing the action on the grounds that Havbell's entitlement to possession of the property is *res judicata* and that the claim as articulated by Mr. Tucker in his affidavits, and any claim that could be formulated by reference to the settlement agreement, is frivolous and vexatious and bound to fail.
113. The notice of motion seeks an order pursuant to s. 123 of the Land and Conveyancing Law Reform Act, 2009 vacating the registration on 15th August, 2019 of Mr. Tucker's 2019 action and the registration on 4th January, 2021 of this action as *lis pendens*.
114. Section 123 of the Act of 2009 provides:-
- "123. - Subject to section 124, [which deals with *lis pendens* registered under the Judgments (Ireland) Act, 1844] a court may make an order to vacate a *lis pendens* on application by—
- (a) the person on whose application it was registered, or
- (b) any person affected by it, on notice to the person on whose application it was registered—
- (i) where the action to which it relates has been discontinued or determined, or
- (ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted *bona fide*."

115. In principle, it seems to me that a requisition in relation to a *lis pendens* can be simply dealt with by the production of the notice of discontinuance or order dismissing the action – so showing that there is no pending litigation – the Act allows an application and order to be made in either case. Havbell has brought itself within the section and – whether it is necessary or not – is entitled to the order sought.
116. The order vacating the two *lis pendens* will not issue until Havbell has produced to the registrar the certificate of registration which will allow the order to be drawn by reference to the book and entry numbers.
117. For the reasons given, I am also satisfied to make an order restraining Mr. Tucker from issuing or causing to be issued, in any court, any further proceedings relating to the property at 39 Danesfort, Castle Avenue, Clontarf, Dublin 3, without the leave of the President of the High Court or such other judge of the High Court as may be nominated by the President to hear any such application.
118. The order dismissing the proceedings will dispose of the several other motions in the action.
119. I cannot think of any reason why Havbell, having been entirely successful on this application, should not have the costs of the motion issued on 15th June, 2021 and of the action and of the motions issued on 23rd November, 2020 seeking interlocutory relief, on 16th March, 2020 seeking discovery, and 7th April, 2021 seeking the joinder of additional defendants. Mr. Tucker's motion for judgment was issued on 17th June, 2021, two days after Havbell's motion to dismiss. While Havbell's motion to dismiss was issued about six months after the service of the summons and about three months after delivery of the statement of claim, my recollection is that Mr. Tucker was well aware that it was coming before he issued his motion for judgment, in which case it seems to me that – for what it might be worth – Havbell should have the costs of that motion as well.
120. I will list the matter for mention on 1st February, 2022 at 11:00 a.m. to deal with any issue there may be as to costs.