THE HIGH COURT

[2023] IEHC 694

Record No. 2022/ 6020 P

Between:

PETER GAWLEY

Plaintiff

and

START MORTGAGES DESIGNATED ACTIVITY COMPANY

AND

ALAN CASEY

Defendants

JUDGMENT of Ms. Justice Emily Farrell delivered on the 8th December 2023

Introduction

1. The First Defendant seeks an Order striking out the proceedings as against it on the grounds that the proceedings are frivolous or vexatious and/or are bound to fail, either under the Court's inherent jurisdiction or Order 19 Rule 27 or 28 of the Rules of the Superior Courts. In particular, it is claimed that issues raised in the proceedings are frivolous, vexations and bound to fail as they are *res judicata* or cannot be pursued by application of the rule in *Henderson v. Henderson* [1843] 3 HARE 100, (1843) 67 ER 313.

2. An Order was made by the High Court, (Mr. Justice O'Connor) on 8th May 2023 dismissing the Plaintiff's proceedings against the Second Defendant. That Order has not been appealed.

3. The Plaintiff opposes the relief sought and swore an affidavit on 27th April 2023 in response to this motion, and in particular, the grounding affidavit sworn by Georgina Lanigan on 16th March 2023.

4. The reliefs sought by the Plaintiff in these proceedings are damages including aggregated damages (which the First Defendant and the Court understand to be aggravated damages), an order removing any liens or charges from the Land Registry Folio. As appears from the Plenary Summons which issued on 30th November 2022 and the Statement of Claim which was delivered on 7th January 2023, the Plaintiff's complaints relate to a property, Folio County Dublin F14164F. An order for possession was granted by the High Court (Dunne J.) on 7th March 2011 in proceedings bearing record number 2009 /1283 SP between Nua Mortgages Limited and the Plaintiff and Sandra Gawley. Sandra Gawley is not a party to these proceedings. Subsequently, orders were made substituting Start Mortgages Designated Activity Company as plaintiff in those proceedings and granting Start Mortgages DAC liberty to issue execution.

5. Two applications were made by the Plaintiff for an adjournment at the commencement of the hearing, which applications were refused. The first application, for an adjournment on the ground that the Plaintiff contended that he had not been served with an affidavit was refused. I was satisfied that the grounding affidavit, sworn the 16th March 2023, had been served on the Plaintiff, both by the affidavit of service and by the fact that the Plaintiff had sworn a replying affidavit on 27th April 2023. A second application was made for an adjournment to enable the Plaintiff to obtain legal representation. That application was refused on the grounds that this motion was first before the High Court on 8th May 2023, when the Plaintiff attended. The application was then adjourned to 19th July 2023, when the hearing date was fixed. I also had regard to the fact that the Plaintiff had commenced the proceedings on 30th November 2022 as a litigant in person and had an ample opportunity to seek legal representation should he have wished to do so. Having balanced the potential prejudice of adjourning the proceedings to the First Defendant, bearing in mind the order for possession was granted on 7th March 2011, against the Plaintiff's right of access to the courts, I was satisfied that it was in the interests of justice that the application proceed.

Jurisdiction to dismiss proceedings which are frivolous, vexatious or bound to fail:

6. Order 19 rules 27 and 28 of the Rules of the Superior Courts provide:

> "*27. The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client.*
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> *28. The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.*"

7. The principles applicable to an application under the Rules or the inherent jurisdiction of the High Court were considered by the Supreme Court in *Fay v. Tegral Pipes Ltd* [2005] IESC 34, in which case McCracken J. held:

> "*There is no serious dispute between the parties as to the principles applicable to motions of this nature. It is accepted that there are two bases upon which such an application may be brought. The first is pursuant to the provisions of Order 19 Rule 28 of the Rules of the Superior Courts …*
>
> *In addition to this provision, the Court has an inherent jurisdiction to stay, strike-out or dismiss pleadings where no cause of action is disclosed or if the claim is frivolous or vexatious. This was explained by Costello J. in* Barry v. Buckley *[1981] IR 306 at page 308 where he said:-*
>
> > "But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see Wylie's Judicature Acts (1906) at pp 34–37 and the Supreme Court Practice (1979) at para 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They

will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley LJ in Goodson v. Grierson at p 765.

This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice."

In this case the Court had before it affidavit evidence setting out the background facts and the issues in relation to each of the claims made. In the present case, to a large extent, the facts themselves are not in issue; what is in issue is the interpretation of those facts and the question of whether the facts can give rise to any cause of action. Indeed, if any facts are in issue, that is not a matter which can be determined on a motion of this nature, and the Court must assume that the facts as pleaded or deposed to on behalf of the Plaintiff are correct. However, the Court is entitled to examine the inferences which the Plaintiff seeks to draw from the facts in ascertaining whether those facts can give rise to any reasonable cause of action.

While the words "frivolous and vexatious" are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the Courts. Such abuse cannot be permitted for two reasons. Firstly, the Courts are entitled to ensure that the privilege of access to the Courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes, and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second, and equally important, purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed."

8. MacMenamin J. considered the power to strike out proceedings under the Rules of the Superior Courts, and the Court's inherent jurisdiction, in *Ewing v. Ireland* [2013] IESC 44. He stated:

"*23. ... Court time is now a scarce resource; the courts have a public duty to ensure that such time is used appropriately. As well as rights of access to the courts, both represented litigants and litigants-in-person have duties. There is no duty to allow the*

continuance of unstateable cases to full hearing. Pleadings must be focused on the real issues, as must written and oral submissions.

…

26. As well as the jurisdiction outlined which obtains under the Rules of the Superior Courts, the court also has an inherent power to strike out entire proceedings (see the range of cases commencing with Barry v Buckley *[1981] I.R. 306, cited in chapter 16 of Delany and McGrath, Civil Procedure in the Superior Courts, 3rd ed. (2012); and also* Sun Fat Chan v Osseous Ltd *[1992] 1 I.R. 425). In such an application, the court considering the matter is not limited to a consideration of the pleadings but may be free to hear evidence on affidavit relating to issues in the case. This jurisdiction exists to ensure that an abuse of court process does not take place.*

27. This more radical power should be used sparingly. A court must take the plaintiffs case at its highest, and assume that all the relevant matters which are pleaded by a plaintiff will be established by him. A court must also take into account that a situation may exist where a simple amendment of the pleadings could "save" the case."

9. MacMenamin J. endorsed the following summary of the matters which tended to show that proceedings were vexations by Ó Caoimh J. in *Riordan v. Ireland (No. 5)* [2001] 4 IR 463:

"*(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;*

(b) where it is obvious that an action that cannot succeed, or if the action would lead to no possible good, or if no reasonable person could reasonably expect to obtain relief;

(c) where the action is 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) where 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) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

(f) where the respondent persistently takes unsuccessful appeals from judicial decisions."

10. In *Lopes v. Minister for Justice* [2014] IESC 21, Clarke J. (as he then was) emphasised that the inherent jurisdiction of the Superior Courts supplements procedural law in cases not covered or adequately covered by the procedural law itself. He held that it would be inappropriate to invoke the inherent jurisdiction of the Court in circumstances governed by the Rules. (para. 2.2)

11. At para. 2.3 Clarke J. held:

"*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.*"

12. Clarke J. confirmed, at para. 9.1, that the jurisprudence of the Irish Courts makes clear that a case should not be dismissed as being bound to fail if there is any credible basis, including an amendment of the pleadings, which could arguably save it from dismissal.

The proceedings

13. The Plenary Summons, which issued on 30th November 2022, claims the following reliefs: damages in the amount of €3,600,000 plus aggregated (understood by the First Defendant and the Court to refer to aggravated damages) and an order removing any liens or charges from the Land Registry Folio. The basis on which the Plaintiff maintains his entitlement

to those reliefs arises through gross negligence, misrepresentation, breach of contract, breach of fiduciary duty and breach of statutory duty on the part of the First Defendant.

14. An appearance was entered by the Defendants on 6th December 2022 and the Plaintiff delivered a Statement of Claim on 7th January 2023.

15. The claim made in the Statement of Claim fall into the following categories:
    (a) Claims that the process which led to the grant of the order for possession on 7th March 2011 was unfair and breached the Plaintiff's rights;
    (b) That Nua (Nua Mortgages Limited), the original plaintiff in the proceedings 2009 / 1283 SP (hereinafter referred to as 'the 2009 proceedings') and the First Defendant did not have the right to the mortgage, to issue legal proceedings or to the possession order. Complaints are also made regarding the sale of the loan since it was held by Nua, including the claim that the debt became an unsecured debt as neither Investec Bank plc nor LSF IX Java Investments were registered on the Folio when the mortgage was sold to them
    (c) The First Defendant is alleged to have concealed its lack of ownership of the mortgage;
    (d) That the sole right of the First Defendant is to collect money on behalf of LSF IX Java Investments;
    (e) "*The fact that Start Mortgages is only the service provider is Champerty and Maintenance, The law on third party litigation funding in Ireland are strict: Both Champerty and Maintenance remain criminal offences and civil wrongs in Ireland.*"
    (f) That the Plaintiff was overcharged interest by both Nua Mortgages Limited and Start Mortgages DAC, in breach of the terms and conditions of the loan;
    (g) The contract between the Plaintiff and Nua is contrary to EU Directive 93/13/EEC, and was otherwise invalid or unfair. The contract in question was between the Plaintiff and Sandra Gawley on the one part and Nua Mortgages Limited on the other.

The basis of this application

16. The affidavit sworn on behalf of the Defendants sets out the belief that these proceedings were issued for the purpose of frustrating the First Defendant's ability to execute the order for possession and ultimately realise the secured property. It is also averred, and not disputed by the Plaintiff, that no payment has been made in respect of the mortgage since June 2014. The First Defendant contends that it is prejudiced to a significant extent by the issuance of these proceedings.

17. The First Defendant contends that each of the issues raised in these proceedings have been determined in the earlier proceedings, and amount to a collateral attack on the orders made in the 2009 proceedings. It is also submitted that, if any issue raised herein has not been determined in the 2009 proceedings, they could and should have been raised therein.

18. It is further submitted that the Plaintiff cannot possibly succeed in obtaining the order sought removing any charge or lien from the Folio, as Tailte Éireann is not a party to the proceedings.

19. The Plaintiff swore an affidavit on 27th April 2023 in response to this application. It includes the following averments:

> "*3. The maxim of law, 'he who comes to equity must have equity' and 'the obligation to come with clean hands lies with the Plaintiff.'*
>
> *4. I say that the issues I have is not the payment of the mortgage but who owns my mortgage and is it ever redeemable.*
> ..
> *6. I say that Start Mortgages has never produced the required documents to prove ownership: even when requested to do so by The Master of the High Court, Record number 20091283SP.*
> …
> *11. I say that throughout all and any court actions I have maintained that Nua through to Start do not own my mortgage: they have used a series of documents which, I consider fraudulent to make the court/s believe they are the true owners.*

12. I say that my mortgage is not redeemable from start mortgages: I further say that neither Nua, nor Start have ever shown definitive proof of their ownership of my mortgage."

20. The Plaintiff maintains that if the original documents had been made available to him in the 2009 proceedings, these proceedings would not be before the Court. He informed the Court that these documents had been sought in correspondence within the last six months.

21. A motion for discovery of documents has been filed by the Plaintiff, which has a return date of 1st February 2024. That application is not before this Court and accordingly, I do not consider whether or not discovery should be made of the documents sought. However, the purpose of the Plaintiff's application for discovery is solely related to the Plaintiff's claim that the documents were not provided to him in the 2009 proceedings. Furthermore, the Plaintiff's submissions in response to the application to dismiss the proceedings was confined to his contention that he was entitled to examine these documents and to ascertain whether or not there were irregularities in the documents.

22. The documents sought are:
    a) The letter of offer from Nua.
    b) Mortgage application form.
    c) The Mortgage Indenture.
    d) The Mortgage Deed.
    e) The statement of accounts and the methodology of the accounting.
    f) The Net present value or NPV calculation sheet.
    g) The Mortgage Sale Deed from Nua to LSF IX Java.
    h) The Mortgage Sale Deed from LSF IX Java to Start Mortgages.

23. The affidavit sworn by Plaintiff in support of his application for discovery includes the averments to the effect that the proofs were never provided in the 2009 proceedings. He avers that the case was before the Master of the High Court on 10th February 2016 and that the Master had directed that an unredacted version of the deed of transfer be produced. He asserts that the application was withdrawn from the Master's Court and that an application was subsequently brought in the Chancery Special Summons list.

24. The sole reason proffered by the Plaintiff for requiring discovery of the documents sought is that he asserts an entitlement to see the original documents which were relied upon in the 2009 proceedings. He stated that he would not know if the documents were relevant until he received them.

25. It is not asserted by the Plaintiff that he could not have raised the issue regarding the authenticity of the documents in the previous proceedings. In his submissions, the Plaintiff informed the Court that he had been advised (but not by whom) that he should have obtained the original documents in the 2009 proceedings. He refers to *"irregularities in the documentation"* but conceded he could have raised that in the 2009 proceedings, and that he did raise this issue before Baker J. in 2016. The Plaintiff's affidavits sworn in the 2009 proceedings, on the 3rd February 2016 and 28th June 2016, raised the question of the entitlement of Start Mortgages Limited to the charge and the fact that Investec had not been registered in the Land Registry in very clear terms.

Previous proceedings - 2009 / 1283 SP

26. Proceedings were brought by Nua Mortgages Limited against the Plaintiff and Sandra Gawley 2009/ 1283 SP, in which an order for possession of the property identified in the Schedule to the Special Summons, and comprising Folio 141614F of the Register of County Dublin was sought. The papers in those proceedings have been exhibited at GL1 to the affidavit grounding this application.

27. On 7th March 2011, the High Court (Dunne J.) granted an order directing the defendants, Peter Gawley and Sandra Gawley, to deliver up possession of the property comprised in Folio F141614F County Dublin. This order, which was subject to a stay of six months, was not appealed. As appears from the order of 7th March 2011, there was no appearance by or on behalf of the defendants, but evidence of service was before the High Court. A copy of the said order of 7th March 2011, endorsed with particulars of service on the Plaintiff on 10th July 2013 is before the Court.

28. An execution order issued on 4th December 2013. An application was made by the Plaintiff for an extension of time to appeal the execution order to the Supreme Court on 25th July

2014, which application was refused. That application was brought solely on behalf of the Plaintiff, who accepted that there had been arrears at paragraph 2 of his grounding affidavit.

29. By order of the High Court (Baker J.) dated 17th October 2016, liberty to issue execution on foot of the order of 7th March 2011 was granted to Start Mortgages Limited and, if necessary, an Order was granted substituting Start Mortgages Limited as plaintiff in those proceedings. The Plaintiff attended on 17th October 2016. Subsequently, a further order was made by the High Court (Baker J.), *ex parte*, on 12th June 2018 substituting Start Mortgages Designated Activity Company as plaintiff. Neither of these orders were appealed.

30. Two applications were made by Start Mortgages DAC for leave to issue execution, both of which were granted by the High Court (Simons J.) on 9th December 2019 and 11th May 2023. The Plaintiff swore affidavits on 3rd February 2016, 28th June 2016, 4th November 2019, 4th November 2022 and 27th February 2023 in response to the applications for liberty to issue execution which were determined by Baker and Simons JJ. respectively on 17th October 2016 and 9th December 2019 and 17th April 2023.

31. In his first judgment in relation to the 2009 proceedings, [2019] IEHC 830, Simons J. held that issue relating to the entitlement of Start Mortgages DAC to ownership of the charge, and to execute the order for possession were *res judicata* and that the Plaintiff was estopped from raising those issues again. Simons J. also held that, even if that issue was not *res judicata*, the Plaintiff could not seek to challenge the correctness of the Folio, having regard to the statutory conclusiveness of the Register and the statutory limits to rectification of the Register.

32. Simons J. held:

> "*31. Mr. Gawley's argument entails an implicit challenge to the correctness of the Register of Title. The Court of Appeal in* Tanager DAC v. Kane [2018] IECA 352 *held that the correctness of the Register of Title cannot be challenged in possession proceedings. See paragraphs [67] and [68] as follows.*
>
> > "A plaintiff seeking an order for possession must adduce proof, inter alia, that he or she is the registered owner of the charge. It is registration that triggers the

entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification. The challenge to registration is brought by other types of proceedings inter partes, or where the PRA is respondent, and in the manner I have described."

32. Leave to appeal to the Supreme Court was refused by Determination dated 12 April 2019, Tanager DAC v. Kane *[2019] IESCDET 80*."

33. It is also evident from the first judgment of Simons J. that the assertions regarding the non-compliance with an Order of the Master and failure to produce original documents were raised by the Plaintiff (para. 14). These assertions relate to the process which led to the making of the earlier, unappealed, orders of the High Court in the 2009 proceedings.

34. The order made by Simons J. on 9th December 2019, was upheld on appeal by the Court of Appeal on 30th November 2020. Judgment was delivered by Donnelly J. on 30th November 2020 [2020] IECA 335.

35. The Plaintiff's submission to the Court of Appeal, as set out at para. 19 of the judgment of Donnelly J,. is virtually identical to that made to this Court:

"*It is clear and has been clear from his documentation (and submissions through himself and his McKenzie friend) that his main point of contention is that the Order of possession should not have been made and in particular that Start Mortgages (or Start Mortgages Limited) had no entitlement to take over these proceedings. The appellant referred back to the request by the Master on six occasions that Nua produce the mortgage document, but they did not.*"

36. The Court of Appeal (Donnelly J.) upheld the finding of Simons J. that the issue of the validity of the transfer of the mortgage to Start Mortgages DAC and the validity of that

body as plaintiff in the 2009 proceedings, particularly by reference to the issue of Investec, was *res judicata*. That issue had previously been determined by Baker J. (and was not appealed).

37. Donnelly J. held:

"*33. … In so far as it might possibly be argued that they are a form of variation of his argument before the High Court concerning the validity of the transfer of the mortgage to Start Mortgage and the validity of the substitution of Start Mortgage as the plaintiff especially with regard to the issue of Investec, these grounds of appeal must fail because of the correctness of the decision of Simons J. that these issues were* res judicata*. They had been decided already by Baker J. in her decision of the 17th October, 2016. Simons J. had identified as a matter of fact that the affidavit of the appellant before him and that which was before Baker J. were substantially the same. Furthermore, Simons J. was correct to find that the registration of Start Mortgages as owner of the mortgage was conclusive evidence of ownership for the purpose of possession proceedings. He correctly relied on the passage from* Tanager DAC v. Kane *cited above. I therefore consider that these grounds of appeal must be rejected.*

34. In so far as any of the grounds may be said to raise a separate issue regarding the Order of possession in March 2011, these grounds must be rejected as amounting to a collateral attack on that Order. The appellant never appealed that Order and his late attempt to appeal was rejected by the Supreme Court.

37. Grounds 2, 4 and 5 are grounds which relate back to the argument that the respondent had no entitlement to hold a legal mortgage over the property. While I will later address Ground 2, these points were to all intents and purposes the same as those before Baker J. in 2016 and 2018. He makes a claim that the judgment of the 17th October, 2016 was "void ab initio due to previous failings by the Plaintiffs". As stated above, this point is res judicata. Even if the point he wishes to make is slightly different or has a different emphasis, the appellant must fail because an issue estoppel also lies. He ought to have raised these points before Baker J. and followed through by way of appeal. Moreover, the grounds he raises are not based on evidence that only came into existence afterwards or was not available to him at the time. They are claims arising out of the same material he has always had in his possession and knowledge. There

must be a finality to litigation and these grounds are attempting to make a collateral attack on the Order of October 2016 in circumstances where there was no appeal."

38. The Plaintiff had also sought to raise additional arguments, by reference to a booklet of authorities. As Donnelly J. found that they amounted to a collateral attack on the previous, and unappealed, orders of the High Court, those arguments were rejected on that basis. (paras. 45 - 46)

39. Due in part to the fact that the Plaintiff had appealed the order of 9th December 2019 to the Court of Appeal, the First Defendant did not execute the order for possession. A second application for leave to issue execution was made and determined by Simons J. on 17th April 2023. That application, but not the order or judgment were included in the grounding affidavit, which was sworn prior to the determination of the application. Simons J. made an order granting the First Defendant liberty to issue execution on 11th May 2023, for the reasons set out in just judgment delivered on 17th April 2023 [2023] IEHC 176.

40. As appears from the Plaintiff's affidavit sworn the 4th November 2022, and the judgment of Simons J., the complaints regarding the transfer of the proceedings from the Master of the High Court to a Judge of the High Court and the claim that original documents which ought to have been produced were not produced were raised by the Plaintiff in that application. The Plaintiff averred "*I say that from day one I have disputed the ownership of my mortgage by the Plaintiff….*"

41. An allegation regarding champerty and maintenance was raised at para. 16 of the Plaintiff's affidavit sworn the 4th November 2022 in response to the application which led to the second judgment of Simons J. in April 2023. This argument is allied to the contention argument that the First Defendant is not entitled to execute the order for possession, as it did not own the charge or mortgage, which has been determined in the 2009 proceedings.

42. Simons J. held that it was not open to the Plaintiff, in the context of an application to issue execution, to seek to challenge the validity of the order for possession more than a decade after it had been made. Simons J. stated "*There is a public interest in the finality of litigation and a party, such as the plaintiff in the present proceedings, is entitled to rely on*

a final unappealed order of the High Court. See, by analogy, Start Mortgages DAC v. Kavanagh *[2023] IEHC 37*."

43. An allegation was made in the 2009 proceedings that the signature on the deed of mortgage had been forged. This was referred to at para. 40 of the judgment, where Simons J. held:

> "*The proper course for a party who alleges that an earlier judgment has been obtained by fraud is to institute separate proceedings seeking to set aside the judgment. Mr. Gawley explained that he has, in fact, instituted separate proceedings against Start Mortgages: High Court 2022 No. 6020 P. Mr. Gawley further explained that he intends to have the original deed of mortgage forensically examined in circumstances where he alleges forgery. Mr. Gawley asked if this court could direct the production of the original deed. Any application for the production of the deed of mortgage will have to be brought in the context of the separate proceedings referenced by Mr. Gawley, rather than in the context of an application for leave to issue execution.*"

44. The proceedings before me do not assert that the original mortgage document was forged.

45. It is clear from each of the written judgments delivered in 2019, 2020 and 2023, that the Plaintiff appeared before each of those Courts and opposed the grant of leave to issue execution primarily on the ground that the ownership of the charge or mortgage was disputed. The Plaintiff relied on the deed dated 4th December 2014 between Investec Bank plc and LSF IX Java Investments Ltd. Arguments were also advanced in relation to the Consumer Credit Act, 1995, regarding alleged overcharging.

46. I was informed by the parties that an application has been made by the Plaintiff for leave to appeal the Order of Simons J. made the 11th May 2023 to the Supreme Court (Appeal No. 85/2023) and that this application has not yet been determined. No application was made for an adjournment of the hearing of this application, or to delay the delivery of judgment, pending the determination of the application for leave by the Supreme Court. This reinforces my view that that application for leave to appeal has no relevance to the issues before this Court. The appeal which the Plaintiff seeks to bring does not include an appeal against the final orders of 7th March 2011, 17th October 2016 or 12th June 2018. Accordingly, any such appeal could not include a challenge to the order for possession, the

substitution of Start Mortgages DAC as plaintiff in the 2009 proceedings, or the finding that it is entitled to the benefit of the order for possession granted the 7th March 2011.

Res Judicata / Issue Estoppel

47. In *In Re Vantive Holdings Limited* [2009] IESC 69, [2010] 2 IR 118, Murray CJ held that the right of access to the courts, and to have cases determined in accordance with due process includes the right to "*a fair and complete hearing of the issues of law and fact in any proceedings.*" (para. 20) The inherent jurisdiction to stay or dismiss proceedings which abuse the due process of the administration of justice may be invoked when required to prevent proceedings which would otherwise undermine the effectiveness or integrity of the administration of justice.

48. Referring to the judgment in the High Court, Murray CJ held:

> "*21. In the High Court and in this Court the appellant relied on the rule of estoppel in* Henderson v. Henderson *[1843] 3 Hare 100, but by way of analogy. In his judgment the learned High Court judge stated "The rule in* Henderson v. Henderson *is to the effect that a party to litigation must make its whole case when the matter is before the Court for adjudication and will not afterwards be permitted to re-open the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case.*
>
> > *"*In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate.*"*
>
> *22. Viewing it through the prism of estoppel and res judicata the rule in* Henderson v. Henderson *strictly speaking applies to proceedings between parties where those proceedings determine the rights or obligations between those parties. It is intended, inter alia, to promote finality in proceedings and to protect a party from being harassed by successive actions by another party when the issues between them either were or could have been determined with finality in the first proceedings. …*

24., Nonetheless there still remains the inherent jurisdiction of the Court to protect the integrity of the due process of the administration of justice and the finality, in principle, of a judicial decision.

25. Underlying the rule in Henderson v. Henderson *is the policy of the need to protect the due and proper administration of justice from an abuse of process and uphold the principle of finality in legal proceedings.*"

49. Having given the Plaintiff multiple opportunities to identify the elements of the proceedings which were not raised in the 2009 proceedings, and could not have been raised in those proceedings, he referred solely to his entitlement to the documents and said that he required them to check their authenticity. He repeated the complaints made relating to the application before the Master's Court and High Court in 2016. The Plaintiff contended that had the documents been produced in 2016 "*we wouldn't be here.*" He also confirmed that the issue regarding irregularities in the documents was raised before Baker J. in 2016. Insofar as the Plaintiff wanted to raise the issues regarding the process before the order was made in 2016, and the validity of the documents, he had the opportunity of doing so in the 2009 proceedings.

50. The claims made in the Plenary Summons and Statement of Claim which seek to challenge the entitlement of the First Defendant to the mortgage or charge and thereby, seek to go behind the order of 11th March 2011 and/or orders of 17th October 2016 and 12th June 2018 cannot be advanced in these proceedings as they are *res judicata* or governed by issue estoppel. These grounds amount to a collateral attack on those orders of the High Court, which orders are final, and were not appealed.

51. Specifically, the claims relating to the process which led to the grant of the order for possession on 7th March 2011, the entitlement of the First Defendant to the charge or mortgage, including by reference to involvement of Investec and/or Java, the conclusiveness of the Register and the validity of the original contract between the Plaintiff (and Sandra Gawley) and Nua Mortgages Limited, cannot be advanced in these proceedings as they are *res judicata*. The allegation that the First Defendant concealed its lack of ownership of the mortgage could, and therefore should have been raised in the 2009 proceedings when that party first sought liberty to issue execution. Similarly, the allegation

that the sole right of the First Defendant is to collect monies on behalf of LSF Java IX Investments is one which should have been raised in 2016.

52. The claim made in the Statement of Claim, at para. 11 is unclear. Insofar as it might ground a valid claim, it is clear that this issue is linked to the question of the entitlement of the First Defendant to the charge or mortgage and, as such, it also offends the rule in *Henderson v. Henderson.* Similarly, if the Plaintiff wanted to allege that the First Defendant or Nua Mortgages Limited had concealed the true nature of their involvement in relation to the mortgage, that should have been raised in the 2009 proceedings. As Donnelly J. held in the Court of Appeal. "*Even if the point he wishes to make is slightly different or has a different emphasis, the appellant must fail because an issue estoppel also lies."* (para. 37).

53. The substance of the claims made by the Plaintiff in the Plenary Summons and elaborated in the Statement of Claim has been determined by the High Court, and Court of Appeal in the 2009 proceedings.

54. The High Court, and Court of Appeal, relied on the statutory conclusiveness of the Register in the 2009 proceedings. The judgments of both Simons J. and Donnelly J. considered the judgment of the Court of Appeal (Baker J.) in *Tanager v. Kane* [2018] IECA 352, [2019] 1 IR 385. Leave to appeal was refused by the Supreme Court in [2019] IESCDET 80. As in the 2009 proceedings, neither Nua Mortgages Ltd, Investec Bank plc nor LSK IX Java Investments Ltd are parties to the proceedings, nor is there any dispute between any parties who the Plaintiff asserts might have ownership of the mortgage. Furthermore, Tailte Éireann is not a party to the proceedings.

55. Whilst proceedings should not be dismissed without considering whether or not a simple amendment of the Statement of Claim would be sufficient to "save the case", I am satisfied that an amendment of the Statement of Claim would not be sufficient to enable the Plaintiff to proceed with the claim, save in relation to para. 15 of the Statement of Claim which is considered below. In reaching this conclusion, I have considered the nature of the claim sought to be advanced by the Plaintiff in these proceedings, the issues which were, or could have been, determined in the 2009 proceedings and the fact that the Plaintiff does not, and cannot, assert that none of the credit institutions referred to are entitled to the mortgage. Therefore, insofar as any application might properly be made for the rectification of the

Register, the Plaintiff does not have standing to challenge the Register by reference to the transfer of the mortgage charge between Nua Mortgages Ltd, Investec Bank plc, LSK IX Java Investments Ltd. and the First Defendant. This is clear from *Tanager v. Kane*, in particular para. 62 and 79.

56. Therefore, I find that insofar as the Plaintiff seeks to raise or re-litigate these issues in the current proceedings, he is not entitled to do so. For the reasons set out above, I am satisfied that those parts of the Statement of Claim which relate to these issues are unnecessary and would prejudice the fair trial of the action, and would add pointlessly to the length and cost of the proceedings.

Interest rates – alleged overcharging

57. The Plaintiff claims breach of contract in the Plenary Summons and at para. 15 of the Statement of Claim he asserts that both Nua and the First Defendant had overcharged on the mortgage account. He claims that the overcharging arose as interest was charged by reference to the cost of funds rather than the Euribor, as per the contract.

58. The claim advanced must be taken at its height, and a claim should not be dismissed if an amendment of the pleadings would rectify a deficiency in pleading. The question of overcharging is not a matter which was, or could have been, determined in the 2009 proceedings as it is, and was, not asserted that the level of overcharging is such that an order for possession should not have been granted. This is evident from para. 37 of the recent judgment of Simons J. in the 2009 proceedings. Despite multiple opportunities to explain what elements of these proceedings were not, and could not have been, dealt with in the 2009 proceedings, the Plaintiff did not refer to this aspect of his case, nor has it been asserted that were it not for the overcharging, he would have been able to make payments as they fell due. It would appear from the affidavits before the Court, and it is not disputed, that no payments have been made since 2014.

59. As Simons J. held, at para. 37 of the judgment delivered on 17th April 2023 (which is the subject of an application for leave to appeal to the Supreme Court), "*If and insofar as Mr. Gawley wishes to dispute the allocation of the proceeds of sale following a disposal of the*

mortgaged property, this is a matter which can be raised before the Examiner." This does not preclude him from raising it in proceedings before the High Court, nor has such a submission been made by the First Defendant.

60. This aspect of the Plaintiff's claim is not *res judicata* or subject to issue estoppel as the amount of interest charged to the Plaintiff was not an issue in the 2009 proceedings. This element of the Plaintiff's claim does not amount to a collateral attack on the order for possession, or the orders substituting the First Defendant as plaintiff and granting it liberty to issue execution.

61. It is not a matter for me to determine whether or not this claim is likely to succeed, but it cannot be said, on the basis of the pleadings and the limited evidence before me, that such a claim is doomed to fail. The wisdom of pursing such claim in the courts, particularly in the High Court, is not entirely clear. Assessing that will become more clear to the parties if/when the Plaintiff particularises his claim.

Orders

62. For the reasons set out above I am satisfied that, save in relation to the Plaintiff's claim in respect of breach of contract by way of overcharging at para. 15 of the Statement of Claim, "*it is obvious that [the] action that cannot succeed, [that] the action would lead to no possible good, [and] no reasonable person could reasonably expect to obtain relief.*"

63. Therefore, I shall make an order, under Order 19 r. 27 RSC dismissing the Plaintiff's claim as set out in the Statement of Claim at paragraphs 1 – 14 and 16 to 19. The only element of the Plaintiff's claim which remains is the claim for breach of contract by way of the overcharging of interest.

64. I shall hear the parties before making directions as to service of an amended Statement of Claim, and the service of other pleadings.

Approved Judgment

Emily Farrell.
8th December 2023