

THE HIGH COURT

[2012 No. 12756P]

BETWEEN

TIMOTHY JOSEPH DAIRE

PLAINTIFF

AND

THE WISE FINANCE COMPANY LIMITED, RONALD WEISZ AND ARTHUR GUNNING

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 11th day of July, 2013.

The proceedings

1. In the plenary summons in this matter, which was issued by the plaintiff in person on 17th December, 2012, the plaintiff's claim as outlined in the endorsement of claim is for the following reliefs:

- (a) a declaration that the loan agreement made between the plaintiff and the first named defendant (the Mortgagee) on 9th October, 1996 and the loan agreement made between the plaintiff and the Mortgagee dated 10th April, 1997 are void and unenforceable;
- (b) if necessary, an order of rescission of the said loan agreements;
- (c) an order vacating the order of the High Court dated 31st July, 2006;
- (d) an order that the plaintiff is the beneficial owner of the lands contained in Folios 24157F, 35029, 35030 and 9409, County Roscommon and certain unregistered lands being part of the lands of Lisagallon or Cloverhill comprising 16.598 hectares situate in County Roscommon (the Unregistered Lands);
- (e) an order directing the Registrar of Titles to register the plaintiff as owner of the lands in Folios 24157F, 35030, 9409 and 35029, County Roscommon,
- (f) damages including "punitive", aggregated or exemplary damages;
- (g) an injunction restraining the defendants their servants or agents from dealing with or disposing of the said lands pending the determination of these proceedings;
- (h) further and other reliefs; and
- (i) costs.

2. The order of the Court referred to at (c) in the endorsement of claim is an order which was made in the High Court by Dunne J. on 31st July, 2006 in proceedings between the Mortgagee, as plaintiff, and the plaintiff in these proceedings, as defendant (Record No. 2004/401 SP) (the 2004 Proceedings). In the interests of clarity, I will refer to the plaintiff in these proceedings and the defendant in the 2004 Proceedings as Mr. Daire.

The 2004 Proceedings

3. The 2004 Proceedings were initiated by a special summons which issued on 28th September, 2004 in which the Mortgagee sought orders for possession of –

- (a) the Unregistered Lands, which had been the subject of a loan agreement dated 11th November, 1996 and a mortgage dated 13th March, 1997 in favour of the Mortgagee; and
- (b) pursuant to s. 62(7) of the Registration of Title Act 1964, of the lands comprised in Folios 35030 and 9409 of the Register of Freeholders, County Roscommon, being the lands the subject of a loan agreement dated 10th April, 1997 and a deed of charge dated 15th April, 1997 in favour of the Mortgagee.

The Mortgagee also sought a well charging order and ancillary orders in relation to the lands registered on Folio 35029 and Folio 24157F of the Register of Freeholders, County Roscommon on foot of an undertaking given by a firm of solicitors acting for Mr. Daire to hold the title deeds in respect of the said lands on trust for the Mortgagee as security for the loan advanced under the loan agreement dated 11th November, 1996. The affidavit grounding the 2004 Proceedings was sworn by the second defendant (Mr. Weisz) on 28th September, 2004. The Mortgagee's claim for the reliefs sought was comprehensively outlined in that affidavit, in which Mr. Weisz described himself as a director of the Mortgagee. An appearance was entered on behalf of Mr. Daire as defendant in the 2004 Proceedings by William Hackett & Co., Solicitors, on 8th December, 2004. There followed an exchange of affidavits which I propose to outline as far as is necessary to address the issues which arise on the applications now before the Court.

4. The first replying affidavit sworn by Mr. Daire on 7th January, 2005 was filed on his behalf by his solicitors. The thrust of the affidavit was that the proceedings were vexatious, because earlier proceedings had been discontinued. Of relevance for present purposes is that Mr. Daire referred to a search on 5th January, 2005 by his solicitor in "the UK Companies Office", which it was asserted indicated that there was only one director listed for the Mortgagee, being apparently Mr. Weisz, the other named director having been said to have resigned in 2000. On that basis, Mr. Daire alleged that the Mortgagee was in breach of s. 174 and/or s. 175 of the Companies Act 1963 (the Act of 1963) for upwards of four years. It was also alleged that the Mortgagee was not at the material times a "Mortgage Lender". It was further asserted that the mortgages and charges relied on by the Mortgagee were invalid,

void and unenforceable and that the terms of the loan agreements did not have the effect contended for by the Mortgagee. Among the other responses made by Mr. Daire was an assertion that it was not correct to say, as Mr. Weisz had averred in the grounding affidavit, that the lands were not a family home within the meaning of the Family Home Protection Act 1976 as Mr. Daire and his lawful wife were in actual occupation thereof.

5. Mr. Weisz swore a second affidavit on 15th February, 2005 responding to the assertions which had been made in Mr. Daire's first affidavit. As regards the alleged breach of s. 174 or s. 175 of the Act of 1963, Mr. Weisz averred that he and Fiona Marie Weisz had been directors of the Mortgagee without interruption since 1992 and he exhibited a copy of the Current Appointments Report from Companies House in the United Kingdom dated 12th January, 2005. In fact, in the grounding affidavit Mr. Weisz had averred that the Mortgagee is a limited company and that it was incorporated under the laws of England and Wales on 7th July, 1988 and that it is registered as an external company in Ireland on 14th November, 1995. Mr. Weisz also addressed Mr. Daire's allegation that the Mortgagee is not a mortgage lender. In fact, Mr. Weisz had averred in the grounding affidavit that the Mortgagee is a mortgage lender within the meaning of the Consumer Credit Act 1995 (the Act of 1995). In his second affidavit he set out the factual basis on which the Mortgagee was a mortgage lender within the meaning of the Act of 1995. Mr. Weisz observed that Mr. Daire had offered no factual basis for the contention that the relevant mortgages were invalid or void. The contention of Mr. Daire that any of the properties in issue were a family home was factually disputed by Mr. Weisz.

6. Mr. Daire swore a second affidavit on 3rd March, 2005 which, again, was filed on his behalf by his solicitors. He exhibited an article which had appeared in the Sunday Business Post on 27th February, 2005 and quoted therefrom to the effect that Mr. Weisz "ran three mortgage-lending agencies . . . offering high cost, high interest and short-term finance" and that Mr. Weisz "is no longer involved in finance". On the basis of that quotation, Mr. Daire asserted that Mr. Weisz had no involvement, control or management connection with the Mortgagee and no authority to swear any affidavit on its behalf. Mr. Daire also averred that it appeared from the article that the Mortgagee was "unregulated" and was not an approved mortgage lender within the meaning of the Act of 1995. In that affidavit Mr. Daire also outlined his dealings with the third defendant (Mr. Gunning), whom he averred had introduced him to Mr. Weisz.

7. Mr. Weisz swore a third affidavit responding to what had been averred in Mr. Daire's second affidavit on 26th April, 2005. He averred that the article in the Sunday Business Post did not, in fact, say or suggest what Mr. Daire had alleged and, in any event, he reiterated that he was a director of the Mortgagee and had been authorised to swear affidavits on its behalf. He also reiterated compliance with the Act of 1995 and averred that the Mortgagee had never traded unlawfully and was not trading unlawfully. He refuted Mr. Daire's account of his dealings with Mr. Gunning and with himself.

8. Mr. Daire swore two further affidavits before the claims in the special summons were first adjudicated on by the High Court. The first was dated 3rd June, 2005 and was also filed on behalf of Mr. Daire by his solicitors. That affidavit exhibited an article in a different newspaper, Ireland on Sunday, and Mr. Daire quoted, *inter alia*, the following paragraph from the article:

"[Mr. Weisz] agreed to pay a \$500 fine, then returned to Ireland where, despite being an undischarged bankrupt and a convicted fraudster, he was allowed to continue in the money-lending business."

He made some averments in relation to Mr. Gunning, whom he described as a "servant or agent of Mr. Weisz", the detail of which it is not necessary to consider. The fourth affidavit was sworn by Mr. Daire on 11th July, 2005 and it was also filed on his behalf by his solicitors. Mr. Gunning's position was again explored in this affidavit. Mr. Daire averred that the mortgages and agreements which were the subject of the proceedings were "oppressive and unconscionable, comprising unfair, excessive and penal terms designed to frustrate any and all legitimate attempts to repay these loans and their terms and conditions represent a clog on the equity of redemption of [Mr. Daire]". Finally, Mr. Daire exhibited a copy of his State marriage certificate.

9. A fourth affidavit was sworn by Mr. Weisz on 28th October, 2005. He averred that the matters referred to in the article in Ireland on Sunday were neither accurate nor relevant. He averred that Mr. Gunning was at all material times an independent broker and not a servant or agent of the Mortgagee or of Mr. Weisz. He addressed all of the matters which had been averred to by Mr. Daire in his two most recent affidavits.

10. The claims in the special summons were heard by Dunne J. on 26th April, 2006. In an *ex tempore* judgment delivered by her on that day, having referred to the fact that a number of points had been raised by Mr. Daire on his affidavits, Dunne J. stated:

"I do not believe that the involvement of Mr. Gunning as averred to in the Affidavits of the Defendant [*i.e.* Mr. Daire] gives rise to any defence."

11. Dunne J. found that the Mortgagee had established its entitlement to the orders sought in the endorsement of claim in the special summons save in respect of Folio 24157F, County Roscommon. In relation to that folio, in respect of which there was an issue as to whether there was a family home and whether certain necessary proofs had been met, she adjourned the proceedings so that the issue could be addressed. She stated that the order of the Court would not be perfected until all matters were finalised or until further order.

12. Before the matter came back before the Court, two further affidavits were filed. The first was sworn by Annette Daire (Mrs. Daire) on 19th June, 2006 and was filed on her behalf by a firm of solicitors, other than the solicitors on record for Mr. Daire. In response, Mr. Weisz swore his final affidavit on 19th July, 2006. Both those affidavits addressed the question whether the family home of Mr. Daire and Mrs. Daire was located on the lands registered on Folio 24157F County Roscommon.

13. That issue was addressed by the Court at the resumed hearing of the 2004 Proceedings on 31st July, 2006. Counsel's note of the judgment of the Court indicates that the Mortgagee, Mr. Daire and Mrs. Daire were each represented by counsel. Counsel for Mrs. Daire withdrew her application under the Family Home Protection Act 1976. Dunne J. then dealt with the issue of costs. In counsel's note of the judgment, Dunne J. is quoted as stating that she was not at all impressed by the conduct of Mrs. Daire, but that she did not propose to refer the matter to the DPP, but the other parties might do so. In fact, there has been exhibited on these applications a letter dated 31st May, 2012 from the Garda Bureau of Fraud Investigation to Mr. Weisz confirming that on that day Mrs. Daire had received a four year suspended sentence "regarding production of fraudulent documents attached to her affidavit produced to Judge Elizabeth Dunne in the High Court on 31st July, 2006".

14. The orders made by Dunne J. on 26th April, 2006 and 31st July, 2006 were subsequently perfected on 26th September, 2006 and some minor errors were corrected under the slip rule, as is recorded in an order of 5th February, 2007. The combined effect of the two orders was as follows:

- (a) an order for possession was made in relation to the Unregistered Lands and the lands registered on Folios 35030 and 9409 of the Register of Freeholders, County Roscommon with a stay of one month from the date of service of the order;
- (b) a well charging order was made over the lands registered on Folio 35029, County Roscommon and there was a finding that the amount secured by the well charging order was Sterling £97,000 for principal which together with interest set the amount due up to 18th June, 2004 at €443,139;
- (c) a well charging order was made in relation to the lands registered on Folio 24157F, County Roscommon and there was a similar finding as to the amount due for principal and interest up to 18th June, 2004; and
- (d) the usual ancillary orders were made in relation to the lands registered on Folios 35029 and 24157F, County Roscommon.

18. On 16th October, 2006, Mr. Daire served notice of appeal against the judgment and orders of Dunne J. delivered and perfected on 26th September, 2006. The appeal came on for hearing in the Supreme Court on 21st May, 2012. The order of the Supreme Court made on 21st May, 2012 and perfected on 22nd June, 2012 records that counsel for Mr. Daire and counsel for the Mortgagee were heard by the Supreme Court and that counsel for Mr. Daire informed the Court that the appeal was being "withdrawn". However, the order of the High Court was amended as follows:

- (a) £94,000 Sterling was substituted for £97,000 Sterling; and
- (b) €373,163 was substituted for €443,139.

The order of the High Court of 31st July, 2006 as so amended was affirmed.

The applications

19. The two applications to which this judgment relates were brought by the Mortgagee and Mr. Weisz and were heard together. In the first application, on foot of a notice of motion dated 28th May, 2013, the Mortgagee and Mr. Weisz sought the following reliefs:

- (a) an order dismissing Mr. Daire's claim in these proceedings for want of prosecution pursuant to Order 27, rule 1 of the Rules of the Superior Courts (the Rules) in relation to the Mortgagee and Mr. Weisz;
- (b) an order striking out Mr. Daire's claim as frivolous and vexatious and/or an abuse of process pursuant to Order 19, rule 28 of the Rules as against the Mortgagee and Mr. Weisz; and
- (c) an order striking out Mr. Daire's claim pursuant to the inherent jurisdiction of the Court as against the Mortgagee and Mr. Weisz; and
- (d) an order restraining Mr. Daire from instituting any further proceedings against the Mortgagee and Mr. Weisz without the leave of the Court.

20. In the second application, on foot of a notice of motion dated 12th June, 2013, the Mortgagee and Mr. Weisz sought an order pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 (the Act of 2009) vacating the *lis pendens* which had been registered in respect of the lands registered on Folios 9409, 35030, 35029 and 24157F of the Register of Freeholders, County Roscommon and the Unregistered Lands.

Evidence in support of the first application

21. The first application was grounded on the affidavit of Mr. Weisz sworn on 23rd May, 2013. A firm of Solicitors, Brannigan, Cosgrove & Finnegan, had entered an appearance on behalf of the Mortgagee and Mr. Weisz in these proceedings on 25th March, 2013. By letter dated 17th April, 2013 they requested Mr. Daire to deliver a statement of claim. The request was reiterated in a letter of 26th April, 2013. No statement of claim had been delivered by the time the notice of motion dated 22nd May, 2013 was issued or at all. The course of the 2004 Proceedings was outlined in the grounding affidavit and all of the relevant documents which have formed the basis of the outline set out earlier were exhibited. The bases on which the Mortgagee and Mr. Weisz were seeking the reliefs sought in the first application were referred to. It was asserted that, even in the absence of a statement of claim, it was clear that Mr. Daire had no reasonable cause of action against the Mortgagee and Mr. Weisz and it was averred that it would be unfair and unjust to allow Mr. Daire to continue with the action and to put these defendants to the expense of defending it. It was also asserted that it is clear that Mr. Daire is seeking relief in these proceedings which is not available to him in circumstances where he is attempting to re-litigate matters that are *res judicata*. It was asserted that Mr. Daire had no reasonable prospect of success and his claim is entirely devoid of merit and that the proceedings are frivolous, vexatious, unsustainable and an abuse of process. It was suggested that these proceedings are simply a device to slow down the process of executing on foot of the order of possession, which process had been put in train.

Mr. Daire's response

22. On the day of the hearing of both applications, Padraig J. Sheehan, Solicitors, came on record for Mr. Daire and filed an affidavit sworn by him on 4th July, 2013 on his behalf. The matters averred to in that affidavit are as follows:

- (a) The incorporation of the Mortgagee in England and Wales is proved. I am satisfied that the relevant evidence was before the Court in the 2004 Proceedings.
- (b) For the purpose of proving that Mr. Weisz was declared a bankrupt in the United States of America around 1980, a copy of an affidavit of Fred Schwartz, Attorney at Law, sworn on 1st June, 1999 was exhibited. There is no evidence as to the provenance or authenticity of that copy affidavit before the Court. However, taking it at face value, it appears to be an affidavit sworn in the United States Bankruptcy Court for the Eastern District of New York. It does contain a statement that in and about 1980, Mr. Weisz filed a Chapter 7 petition in bankruptcy in that Court. It also states that prior to "the conclusion of the bankruptcy proceedings" Mr. Weisz entered into a stipulation acknowledging that his obligations to certain creditors were not "dischargeable", whatever the implications of that were. There is also a statement that on or about 2nd April, 1986, Mr. Schwartz received a "Notice of Filing of Final Account of the Bankruptcy Trustee" and a copy of that document was exhibited by him. Mr. Schwartz referred to the fact that the notice stated that the debtor, Mr. Weisz, had not been discharged. Mr. Daire has asserted that, at the time of incorporation of the Mortgagee, Mr. Weisz was "a registered bankrupt" and prohibited from holding the office of a director of a company incorporated in England and Wales pursuant to the relevant Companies Acts. He has also averred that he has no evidence

that Mr. Weisz is discharged as a bankrupt and he has also stated that he believed that Mr. Schwartz had identified that "due to fraud Mr. Weisz cannot be discharged as a Bankrupt". In those averments, Mr. Daire appears to be attempting to tell this Court what the effect of the bankruptcy code in the United States of America is and what the effects of statutory provisions regulating company law in England and Wales are. That does not advance matters any further beyond the bald assertion in Mr. Daire's third affidavit in the 2004 Proceedings that Mr. Weisz was an undischarged bankrupt based on the newspaper article in Ireland on Sunday.

(c) Mr. Daire referred to the Articles of Association of the Mortgagee and averred that the objects of the Mortgagee "do not include the ability to charge land and/or enforce a security against lands so charged". That assertion is patently incorrect. First, the objects clause is contained in the Memorandum of Association, not in the Articles of Association. It is undoubtedly the case that the Mortgagee was authorised by its Memorandum of Association to enter into transactions of the type it entered into with Mr. Daire. Para. (A) of the objects clause includes the following powers:

"... to lend and advance money to, or negotiate loans on behalf of, and provide credit facilities or other financial accommodation for, persons, firms and companies on such terms as may seem expedient ..."

Para. (G) authorises the Mortgagee –

"... to make advances to customers and others with or without security ..."

(d) Mr. Daire averred that the Mortgagee is restricted "by way of a further legal impediment", in that a search of the Office of Fair Trading in the United Kingdom disclosed that the Mortgagee's licence under the Consumer Credit Act in the United Kingdom lapsed on 25th May, 2004. In his affidavits in the 2004 Proceedings, Mr. Weisz addressed the regulatory position in this jurisdiction under the Act of 1995, which is what this Court is concerned with. I am at a loss to understand the relevance of the provisions of the Consumer Credit Act 1974 in force in England and Wales in relation to the Mortgagee's transactions with Mr. Daire in this jurisdiction.

(e) Mr. Daire exhibited copies of Financial Statements for the Mortgagee for a number of years between 1999 and 2012, which obviously had been obtained from Companies House in the United Kingdom. The Financial Statements for the year ended 31st March, 2012 in the notes on the balance sheets stated:

"The Company is dormant and has not traded during the financial year."

Mr. Daire has averred that that statement is misleading and incorrect in a material and fundamental sense. Once again, I am at a total loss to understand the relevance of the activities of the Mortgagee in the United Kingdom to the transactions entered into by the Mortgagee in this jurisdiction with Mr. Daire more than sixteen years ago. No Companies Registration Office search in this jurisdiction has been put before the Court. Such a search might be of some relevance given that the Mortgagee is registered as an external company in this jurisdiction. Finally, on this point, both Mr. Weisz and Fiona M. Weisz signed all of the Financial Statements filed in Companies House, copies of which have been put before the Court, as directors of the Mortgagee, which corroborates the statement of Mr. Weisz that there have always been two directors.

23. In his affidavit Mr. Daire has denied that he is attempting to re-open or to re-litigate the 2004 Proceedings. He has averred that he accepted the findings of the Court in the 2004 Proceedings but his belief is that the Mortgagee "cannot enforce the orders in circumstances that it suffers fatal legal impediment" as identified in his affidavit. He has denied that these proceedings are frivolous or vexatious or lack merit or have no reasonable prospect of success.

Evidence grounding application to vacate *lis pendens*

24. In an affidavit sworn by him on 11th June, 2013, Mr. Weisz proved that Mr. Daire has registered a *lis pendens* against the various properties the subject of the order of 31st July, 2006. Copies of all relevant folios have been exhibited. Taking Folio 35030 County Roscommon as an example, there is registered on that folio as of 21st December, 2012 a *lis pendens* in the following terms:

"Proceedings affecting the interest of The Wise Finance Company Limited in the property are pending in the High Court in the matter of Timothy Joseph Daire v. The Wise Finance Company Limited."

That folio discloses that Mr. Daire was registered as full owner thereon on 11th March, 1992. On 29th April, 1997 a charge for present and future advances was registered as a burden and the Mortgagee was registered as owner of the charge. A Judgments Office search discloses that a *lis pendens* was registered against the Unregistered Lands on 17th December, 2012.

25. The response of Mr. Daire to that affidavit in his replying affidavit of 4th July, 2013 includes an averment that he is entitled to petition for the winding up of the Mortgagee and a draft petition was exhibited. The draft petition was stated to be "subject to finalisation by my solicitors and settling by Counsel". While I do not consider it appropriate to comment on the draft in the context of these applications, it is not to be taken that I consider that it discloses that Mr. Daire has either *locus standi* or grounds to petition for the winding up of the Mortgagee, which is incorporated in the United Kingdom.

Mr. Daire's claims for relief in his affidavit of 4th July, 2013

26. There is included in Mr. Daire's replying affidavit of 4th July, 2013 requests for various forms of relief including a *quia timet* injunction to prevent a breach of his legal rights, being rights to possession of his land, where the Mortgagee does not have the ability to enforce the order of 31st July, 2006 and also interlocutory relief pending a full hearing of the matters raised by him. In fact, Mr. Daire has neither issued nor served a motion seeking interlocutory injunctive relief. Accordingly, the matter is not properly before the Court.

27. It is pertinent to record that counsel for the Mortgagee and Mr. Weisz did not apply to be given time to respond to Mr. Daire's affidavit of 4th July, 2013.

First application: the law

28. Counsel for the Mortgagee and Mr. Weisz made it clear that although the provisions of the Rules were invoked, in reality, he was relying on the Court's inherent jurisdiction. The *locus classicus* of that jurisdiction is the decision of the High Court (Costello J.) in *Barry v. Buckley* [1981] I.R. 306. Costello J. explained the jurisdiction as follows (at p. 308):

"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 . . .

This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice . . . If, having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant. Having done so, the Court can also order that the *lis pendens* be vacated."

29. The foregoing exposition of the Court's inherent jurisdiction to stay, strike out or dismiss pleadings where no cause of action is disclosed was reiterated by McCracken J. delivering judgment in the Supreme Court in another authority relied on by counsel for the Mortgagee and Mr. Weisz, *Fay v. Tegral Pipes Limited* [2005] 2 I.R. 261. McCracken J. also stated (at p. 266):

"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."

30. In support of his submission that the application to dismiss or strike out Mr. Daire's claim was premature because Mr. Daire had not had an opportunity to deliver a statement of claim, counsel for Mr. Daire, having apprised the Court that Mr. Daire had only obtained the advice of the solicitors on record for him and counsel the previous day, referred the Court to a passage from the judgment of the High Court (M. White J.) in *Rayan Restaurant Limited. v. Gerald Kean & Anor.* [2012] IEHC 29. The passage referred to (paras. 55 and 56), in which it is stated that the Court must deal with the pleadings only, and ignore any other extraneous evidence and that the Court can examine documentation referred to in the plenary summons and the statement of claim, has no relevance to the application before the Court insofar as the Court's inherent jurisdiction is invoked, because M. White J. was dealing with the jurisdiction under Order 19, rule 28 of the Rules.

31. Counsel for Mr. Daire also referred to part of the commentary in Delany and McGrath on *Civil Procedure in the Superior Courts* (3rd Ed.) on the Court's inherent jurisdiction to strike out proceedings. The passage in question (at para. 16.14), which deals with the well established approach of the courts, states as follows:

"A consequence of this judicial restraint is that if the pleading in question is capable of an amendment and will remedy the deficiency in the case as pleaded, then an application to strike out will not succeed. In *Sun Fat Chan v. Osseous Ltd.* McCarthy J. expressed the view that 'if the statement of claim admits of an amendment which might so to speak, save it and the action founded on it, then the action should not be dismissed'."

Counsel for Mr. Daire also referred the Court to a passage in Delany and McGrath which addresses the timing of an application to dismiss for abuse of process. In paragraph 16 – 36 the authors state that it is clear that an application to dismiss a claim on the grounds of abuse of process should not be taken before the essential facts on which the plaintiff's case is based have been identified.

32. In relation to the element of the first application in which what has become known as an Isaac Wunder order has been sought, the Court was referred by counsel for the Mortgagee and Mr. Weisz to a passage in the judgment of Denham J. in *Charalambous v. Nagle* [2011] IESC 11 where, apropos of consent orders of the court, Denham J. stated (at para. 29):

"These were final orders. Final orders are final and conclusive and may not be relitigated except in circumstances such as indicated in *Belville Holdings v. Revenue Commissioners* [1994] 1 I.L.R.M. 29."

In response, Counsel for Mr. Daire submitted that unlike, for instance, the situation being examined by the High Court (Hogan J.) in *Gunning v. Sherry* [2012] IEHC 88, Mr. Daire has not issued a multiplicity of proceedings in his name in this case.

First application: application of the law to the facts

33. I have no doubt that, if the Court were to permit Mr. Daire to prosecute these proceedings, there would be an abuse of the process of the courts. The final order was made on the appeal against the order of the High Court by the Supreme Court. That order is final and conclusive and the matters it covers cannot be re-litigated. Those matters, that is to say, the entitlement of the Mortgagee to possession or a well charging order, as the case may be, in relation to the lands which were the subject of the 2004 Proceedings, are *res judicata*. The Mortgagee is entitled to enforce those orders and is in the course of doing so. Although this is not on affidavit, the Court was informed that the County Registrar for County Roscommon has taken possession of the lands the subject of the orders for possession, an *ex parte* application for an injunction to restrain him from doing so brought by Mr. Daire having been refused by the Court. Further, the ancillary relief in relation to the lands over which the well charging orders were granted are being pursued before the Examiner of the High Court.

34. I have outlined in detail the contents of the affidavits which were before the High Court in the 2004 Proceedings and the matters adverted to by Mr. Daire in his replying affidavit on the first application with a view to demonstrating that no new issue has been raised by Mr. Daire which could possibly lead to the order of 31st July, 2006, as affirmed by the order of the Supreme Court, being vacated or Mr. Daire being in a position to establish that that order should not be enforced. In truth, what Mr. Daire is trying to do is to re-litigate issues which were fully litigated in the High Court and his appeal in respect of which was withdrawn in the Supreme Court. Mr. Daire tried to advance an argument that the appeal was not "withdrawn", because of the variations effected by the order of the Supreme Court. The reality is that as regards the issues which Mr. Daire is now attempting to pursue, his appeal was withdrawn, as is recorded in the perfected order of the Supreme Court.

35. In relation to the specific submissions made on behalf of Mr. Daire, even if the Court considered it appropriate to give Mr. Daire time to deliver a statement of claim, it is inconceivable that Mr. Daire, on the basis of the matters addressed in his replying affidavit, would be able to produce a statement of claim, which could be supported by evidence, which would have the effect of saving the proceedings. In any event, the essential facts on which his case is based were identified between 2004 and 2006 in the 2004 Proceedings. No new relevant fact has been adduced by him on this application. Therefore, the submission made on behalf of Mr. Daire that the application is premature is wholly without foundation. As a matter of law, it is open to the Court to strike out proceedings under the Court's inherent jurisdiction at a time when only a plenary summons has been issued, as happened in *Barry v.*

Buckley.

36. Accordingly, the Court must strike out these proceedings on the ground that they will inevitably fail and that they constitute an abuse of the process of the courts.

37. As regards the application for an Isaac Wunder order, the reality is that Mr. Daire is pursuing these proceedings on precisely the same basis as he defended the 2004 Proceedings. I am of the view that it is appropriate to make an Isaac Wunder order having regard to all of the circumstances. These proceedings are a clear attempt to re-open litigation which has been finally determined and to pursue litigation which is groundless and vexatious. Even if, strictly speaking, there have not been "repeated attempts" to re-open litigation, taking an overview of the matter, I am of the view that the Court would be failing in its duty, if it allowed its processes to be repeatedly invoked in order to re-open issues already determined, as Keane C.J. stated in *Riordan v. Ireland* (No. 4) [2001] 3 I.R. 365 (at p. 370). Accordingly, I propose making an order in the terms sought by the Mortgagee and Mr. Weisz. Such an order will not preclude Mr. Daire bringing proceedings which are not an abuse of process and for the initiation of which he obtains the leave of the High Court.

Application to vacate *lis pendens*: the law and its application

38. Section 123 of the Act of 2009, insofar as is relevant for present purposes, provides:

" . . . a court may make an order to vacate a *lis pendens* on application by –

(a) . . . ;

(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 . . ."

Mr. Daire is the relevant notice party and he was on notice of the application to vacate the *lis pendens* and, indeed, was represented on the hearing of the second application.

39. Counsel for Mr. Daire properly recognised that, if these proceedings were to fall, the *lis pendens* would also fall. Having determined that there should be an order striking out the proceedings under the Court's inherent jurisdiction, it follows that there must be an order vacating the *lis pendens* under s. 123 of the Act of 2009.

Orders

40. It is important to emphasise that the orders the Court intends making only relate to these proceedings by Mr. Daire as against the Mortgagee and Mr. Weisz, not as against Mr. Gunning. The orders are as follows:

(a) an order striking out Mr. Daire's claim as against the Mortgagee and Mr. Weisz pursuant to the inherent jurisdiction of the Court on the basis that it is an abuse of process;

(b) an order restraining Mr. Daire from instituting any further proceedings against the Mortgagee or Mr. Weisz without the leave of the Court; and

(c) an order pursuant to s. 123 of the Act of 2009 vacating the *lis pendens* registered against the interest of the Mortgagee in the lands registered on Folios 9409, 35030, 35029 and 24157F of the Register of Freeholders County Roscommon and the Unregistered Lands.

The proceedings as against Mr. Gunning remain pending and unaffected by this judgment.