



**THE COURT OF APPEAL**

Neutral Citation Number: [2018] IECA 224

**Record Number 2016 558**

**Peart J.  
Irvine J.  
Hogan J.**

**BETWEEN/**

**ALLIED IRISH BANKS MORTGAGE BANK**

**DEFENDANT**

**RESPONDENT**

**- AND -**

**DANIEL LANNON**

**PLAINTIFF /**

**APPELLANT**

**JUDGMENT of Ms. Justice Irvine delivered on the 5th day of July 2018**

1. This is Mr Lannon's appeal against the order of the High Court, Reynolds J., made on the 28th November 2016. That order was perfected on the 2nd December 2016.

2. By her order the High Court judge struck out Mr Lannon's proceedings pursuant to Ord. 19, r. 28 of the Rules of the Superior Courts on the basis that his statement of claim disclosed no reasonable cause of action and also on the grounds that his pleadings were vexatious. In the alternative she dismissed the proceedings under the court's inherent jurisdiction on the basis that his claim was bound to fail and was *res judicata* by reason of the outcome of Circuit Court proceedings bearing record number 2013/9629.

**Background**

3. In December 2005 Mr. Lannon entered into a home loan agreement with AIB Mortgage Bank in the sum of €250,000. That loan was secured by way of mortgage on his premises at 99, Burnell Square, Malahide Road, Dublin. Mr Lannon defaulted in his payment obligations with the result that the bank issued proceedings ("the possession proceedings") seeking possession of the said premises. It is not disputed that for the purposes of pursuing those proceedings AIB Mortgage Bank retained the services of Joynt and Crawford solicitors. Joynt and Crawford, according to AIB Mortgage Bank, then retained a company called Park Management Ltd. to serve the civil bill for possession on Mr Lannon at the address of the mortgaged property.

4. One of Mr Lannon's grounds of defence to the possession proceedings was based upon his assertion that a Mr Ken McCutcheon, who had sworn the grounding affidavit on behalf of AIB Mortgage Bank, was not an employee of that bank and, accordingly, had no entitlement to swear it. It followed that the bank had no lawful entitlement to possession. Further, according to Mr Lannon, Mr McCutcheon, at a time when he maintained he was employed by AIB Mortgage Bank, was also swearing affidavits for other financial institutions such as EBS Limited, EBS Mortgage Finance and Haven Mortgages Limited. It followed, according to Mr. Lannon, that Mr. McCutcheon was engaged with Allied Irish Mortgage Bank and other lending institutions in a conspiracy to defraud him and other customers of the bank. Mr Lannon also sought to defend the possession proceedings in reliance upon a breach of the Data Protection Act 1988 ("the 1988 Act") by a Mr. Michael Ryan who he maintained had been employed by AIB Mortgage Bank in circumstances to which I will later refer.

5. By reason of the nature of the defence advanced by Mr. Lannon, AIB Mortgage Bank's claim for possession was adjourned so that he might serve a notice to cross-examine Mr McCutcheon on his affidavit. Accordingly, on the 25th October 2016 Mr McCutcheon was duly cross-examined by Mr Lannon as to his employment status. In the course of his evidence Mr McCutcheon produced for Mr Lannon's benefit and that of the Court, documentation to corroborate his employment status over the relevant period.

6. At the conclusion of the evidence, the Circuit judge granted the bank an order for possession of the premises. In his judgment he found as a fact that Mr. McCutcheon was an employee of AIB Mortgage Bank at the time he swore the grounding affidavit and made clear that, notwithstanding his initial reservations, he accepted Mr McCutcheon's status as an employee and his entitlement to swear the affidavit on behalf of AIB Mortgage Bank. It followed, therefore, that he could not have been engaged in the perjury or conspiracy of the type contended for by Mr Lannon.

7. For whatever reason, Mr Lannon did not appeal the judgment and order of the Circuit Court judge. He did however make an application to the High Court seeking leave to apply for judicial review of his decision. That application proved unsuccessful and the order of the High Court refusing leave is currently the subject matter of a separate appeal to this court.

8. Long in advance of the making of the order for possession, on the 5th February 2015 AIB plc, as opposed to AIB Mortgage Bank, commenced proceedings against Mr Lannon seeking recovery of the sum of €21,992.33 on foot of a loan account ("the branch loan proceedings") held with that bank. AIB plc, according to the affidavit of their employee, Mr. Neal McKeever, sworn on the 18th July 2016, retained the services of Croskerrys solicitors for the purposes of pursuing those proceedings. They in turn retained an Inquiry Agent, Glenn Collection Investments Limited ("Glenn Collections"), to establish Mr Lannon's address, which was unknown to the bank at the time. Those proceedings were later served on Mr Lannon at 22, Colpe View, Deepford, Drogheda. Following service, Mr Lannon

queried with Croskerrys how they had obtained details of an address which, as far as he was concerned, was known only to the Department of Social Protection.

9. It is convenient at this juncture to record that it is accepted by the parties that Mr. Ryan unlawfully obtained Mr. Lannon's address in breach of the provisions of the 1988 Act as a result of his engagement with an employee within the Department of Social Protection. Mr. Lannon subsequently made a complaint concerning Mr. Ryan's conduct to the Data Protection Commissioner which was resolved in his favour. Mr. Ryan was later charged with and pleaded guilty to ten breaches of the 1988 Act. Relevant also is the fact that the Data Protection Commissioner made no finding of wrongdoing against either AIB plc or Croskerrys solicitors.

10. For reasons that are not entirely clear, AIB plc discontinued the branch loan proceedings and have not pursued Mr Lannon further in respect of the liability the subject matter thereof.

11. Mr. Lannon commenced the within proceedings against AIB Mortgage Bank on the 9th June 2016. It has to be said that the relief claimed in the plenary summons and that claimed in the statement of claim is not consistent as would be expected if Mr Lannon had legal representation. That being so and given that Mr Lannon is a lay litigant it is probably best to consider his appeal against the order dismissing the within proceedings based upon his statement of claim and in particular the relief therein sought. Such an approach would appear to be appropriate in that, when considering an application to dismiss a claim under Ord. 19, r. 28, the court is required to consider whether the pleadings disclose a reasonable cause of action or might be shown to be frivolous or vexatious. In other words, the court carries out a pleadings based assessment. The court is, of course, not so confined when it comes to an assessment as to whether or not the claim should be dismissed pursuant to the court's inherent jurisdiction on the basis that it is bound to fail.

12. As to the cause of action which Mr Lannon seeks to pursue against AIB Mortgage Bank, it is noteworthy that in his written submissions on the appeal, he states that he commenced the proceedings "to seek proof as to the employment status of Mr. Ken McCutcheon who claims to be employed by AIB Mortgage Bank and several other separate financial entities simultaneously". It is nonetheless clear that apart from a declaration concerning the employment status of Mr McCutcheon and other declaratory relief in respect of the conduct of AIB Mortgage Bank, Mr Lannon also claims damages for alleged breach of confidence, breach of trust and breach of his rights to privacy. He further seeks an order declaring as void the home loan contract pursuant to which AIB Mortgage Bank obtained the order for possession, an order declaring that any contract he ever had with AIB Mortgage Bank is void and that any contracts he had with any entity within the AIB plc group of companies are void and unenforceable. Finally, he seeks an order of the court directing the removal of any judgment registered against him or his home.

13. Following the delivery of his statement of claim Mr Lannon proceeded to serve a notice of motion dated the 9th June 2016 seeking a number of interlocutory reliefs. It is not necessary to detail these. By way of response, by notice of motion dated the 18th July 2016 AIB Mortgage Bank brought its application to strike out Mr Lannon's proceedings.

14. The grounding affidavit supporting that application was sworn by Mr Neil McKeever, a manager employed by AIB plc of which company AIB Mortgage Bank is a wholly-owned subsidiary. AIB Mortgage Bank also sought to rely upon the affidavit of Mr Ken McCutcheon, sworn on the 5th July 2016 in response to Mr Lannon's application for interlocutory relief. That affidavit delves into the history of the relationship between Mr Lannon and his bank/banks and details the legal proceedings concerning his various borrowings. Relevant in this regard is the fact that the aforementioned affidavits were sworn prior to the conclusion of the possession proceedings in the Circuit Court as a result of which the Circuit Court judge concluded that Mr McCutcheon was an officer of AIB Mortgage Bank entitled to swear the affidavit on its behalf in support of its application for possession. However, by the time the bank's application to dismiss the within proceedings was heard in the High Court, the possession proceedings had already been concluded in the bank's favour.

15. In his grounding affidavit Mr. McKeever complained that Mr Lannon was seeking, in the within proceedings, to revisit issues which he had already ventilated in his defence of the possession proceedings. He highlighted Mr Lannon's continued attack on the employment status of Mr McCutcheon and his affidavit which permitted AIB Mortgage Bank to obtain the order for possession.

16. Mr McKeever also referred to Mr Lannon's claim that his personal data, namely, his address at 22, Colpe View, Deepford, Drogheda had been stolen by Mr. Ryan of Glenn Collections. According to Mr Lannon, Mr. Ryan had been hired by AIB Mortgage Bank. Mr McKeever, however, pointed to the fact that Croskerrys had not been retained by AIB Mortgage Bank as its solicitors in the possession proceedings. It had retained Joynt and Crawford Solicitors. Croskerrys had instead been retained by AIB plc in relation to the branch loan proceedings which had been discontinued. Further, Glenn Collections, the employer of Mr. Ryan, had been engaged by Croskerrys solicitors without recourse to the bank. For the purposes of clarity Mr McKeever confirmed that neither AIB Mortgage Bank nor any of the companies within the AIB Group had engaged Mr Ryan or authorised him to obtain any data belonging to Mr Lannon. Further, the fact that Croskerrys had been retained in relation to the branch loan account was known to Mr Lannon as on the 4th February 2015, as following the service of those proceedings, he had immediately contacted that firm by telephone to query how it had procured his address.

17. Mr McKeever, in his affidavit, also explained that Croskerrys had been instructed by AIB plc pursuant to a service provider agreement which enabled them instruct investigators where necessary, without recourse to the bank. He did not exhibit that agreement because it was, he maintained, commercially sensitive but stated that it would be available in court for inspection on the date of the hearing of the application.

18. Mr McKeever made the point that regardless of who was responsible for Mr. Ryan's employment or his wrongful conduct in accessing Mr. Lannon's data held with the Department of Social Protection, he had been instructed in respect of a different set of proceedings and his conduct for that reason was completely unconnected to AIB Mortgage Bank or the possession proceedings. All of the allegations of purported criminality raised by Mr Lannon were, in his view, an effort to have the repossession proceedings, which at that time were at an advanced stage in the Circuit Court, revisited in the High Court. Further, even if Mr Ryan's conduct had the potential to afford him a defence in some proceedings, it could never go to the root of the contract between the parties in the possession proceedings.

19. In support of Mr McKeever's assertion that Mr Ryan had been retained by Croskerrys and that this was known to Mr Lannon, he refers in his affidavit to a number of extracts from letters authored by Mr Lannon. In one such letter dated the 5th July 2015 addressed to Mr Byrne, CEO of AIB plc, Mr Lannon refers to the retainer of Mr Ryan in the following terms: "the geniuses in Croskerrys decided to hire a private investigator" and "whilst I'm aware that Croskerrys hired the bungling private detective AIB are ultimately responsible for all actions taken by them or their staff or agents(sic)".

20. In his affidavit sworn on the 5th July 2016 Mr McCutcheon set out in detail his employment history with the various corporate

entities referred to by Mr Lannon in his affidavit of the 9th June 2016. In paragraphs 7 to 11 he explained in some detail the structure of the AIB Group and by reference to his contract of employment and letters of co-employment detailed how it was that he had been authorised to swear affidavits on behalf of the various entities therein referred to. In so doing he stated that Mr Lannon's assertions that he had been engaged in a conspiracy to defraud customers of the various banks and had committed perjury by signing such affidavits was simply without foundation.

21. The affidavits of Mr McCutcheon and Mr McKeever spawned two replying affidavits which were sworn by Mr Lannon on the 22nd July 2016 and the 14th of November 2016 respectively. I will briefly refer to the more significant aspects of those affidavits.

22. According to Mr Lannon, at some stage after he had commenced the within proceedings, he discovered that Mr Ryan had acted unlawfully and in breach of the 1988 Act in illegally procuring a file held in his name in the Department of Social Protection. He goes on to claim that AIB Mortgage Bank hired Mr Ryan to obtain his data from the Department of Social Protection without his consent and that it is vicariously liable for his conduct. He asserts that AIB Mortgage Bank then impermissibly relied upon that data in the possession proceedings. It did so, according to Mr Lannon, for its own financial gain and in so doing AIB Mortgage Bank breached his trust, confidence and privacy.

23. Mr Lannon also challenged Mr McCutcheon's assertion that he was an employee of AIB Mortgage Bank at the time of the possession proceedings and did so by reference to his complaint that Mr McCutcheon had, in other proceedings, claimed to be an employee of EBS Ltd, EBS Mortgage Finance and Haven Mortgages Ltd, all separate corporate entities.

24. In the aforementioned circumstances Mr Lannon maintained that it could not be said that his proceedings were bound to fail or could be classified as frivolous or vexatious.

### **Judgment of the High Court judge**

25. In supporting her decision to dismiss Mr Lannon's proceedings, the High Court judge concluded that the role played by Mr. McCutcheon on behalf of AIB plc had been fully investigated in the context of the Circuit Court possession proceedings. She noted that the Circuit Court judge had rejected all allegations of legal wrongdoing on the part of Mr. McCutcheon and this finding had been made after Mr Lannon had been afforded the opportunity to cross examine him. Accordingly, in circumstances where the order of the Circuit Court had not been appealed, any issue concerning Mr. McCutcheon's status with AIB Mortgage Bank was *res judicata*. It was not open to Mr. Lannon to re-visit this issue in the context of the present proceedings.

26. Insofar as Mr Lannon's claims for damages for breach of trust, breach of confidence and breach of privacy was concerned, those claims were based on the allegedly wrongful conduct of Mr Ryan who the High Court judge found as a fact had been engaged by Croskerrys. They retained him to establish Mr. Lannon's whereabouts so that the branch debt proceedings, which she noted had been withdrawn, could be served on him. She also found as a fact that Croskerrys had been instructed by AIB plc pursuant to a service provider agreement which enabled them instruct investigators where necessary without recourse to the bank and that in such circumstances the bank could not be liable for any wrongful actions on the part of Mr Ryan. Further the relationship between AIB Mortgage Bank and Mr Ryan did not satisfy the "close connection" test for the purpose of the law of vicarious liability. Accordingly, regardless of Mr. Ryan's conduct, Mr. Lannon's action was bound to fail.

### **The Appeal**

27. In his notice of appeal dated the 19th December 2016 Mr Lannon confined his grounds of appeal to a bald assertion that the decision of the High Court judge breached his rights under Art. 40.1 and 40.3 of the Constitution, Art. 6, 8 and 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights. He did not, however, set out the reasons why this court might interfere with the judgment and order of the High Court judge.

28. In its respondent's notice, AIB Mortgage Bank raises a preliminary objection. It maintains that Mr Lannon's appeal is an expedited appeal, and as such was not lodged within the permitted ten-day time frame provided in Ord. 86. It relies upon the fact that the High Court order was perfected on the 2nd December 2016 and the appeal was not filed until the 19th December 2016.

29. The respondent also claims that Mr Lannon's grounds of appeal are vague and illusionary and fail to identify why the High Court order breached his rights under the Constitution or otherwise. It claims that Mr Lannon has no valid grounds to appeal the order of the High Court based upon the European Convention on Human Rights, the Charter of Fundamental Rights and/or Art. 40 of the Constitution.

### **Submissions**

30. Somewhat surprisingly the written submissions filed by Mr Lannon canvas issues of law and fact which were not flagged in what can only be described as his skeletal notice of appeal. That said, AIB Mortgage Bank has addressed those submissions in its own written submission and does not contend that it is prejudiced by the breadth of Mr Lannon's written submissions. That being so I am satisfied that the considerations of justice and fairness would dictate that this court extend its consideration to the submissions actually made by Mr Lannon on the hearing of his appeal, regardless of the view it takes of the validity of his notice of appeal.

31. It is nonetheless important that Mr Lannon should understand that his appeal is not a rehearing of the application that took place before Ms Justice Reynolds and that he is confined, in making his submissions, to the materials and arguments that were relied upon in the court below. The principal arguments raised by Mr. Lannon on the appeal are as follows:

The High Court judge:

(i) erred in law in refusing to let him rely upon the conduct of Mr. McCutcheon or any evidence in relation to Mr. McCutcheon when seeking to resist the banks application to dismiss his proceedings;

(ii) erred in law in striking out his proceedings under Ord. 19, r. 18 as the pleadings, on their face, did disclose a reasonable cause of action as per the decision of Costello J in *Barry v. Buckley* [1981] I.R. 306);

(iii) erred in law in concluding that his claim against AIB Mortgage Bank concerning the wrongdoing of Mr Ryan was bound to fail. In particular, the High Court judge misapplied the close connection test. Mr Ryan had acted as the bank's servant/agent. AIB Mortgage Bank had paid Mr Ryan to find Mr Lannon's address and acting on behalf of AIB plc, Mr Ryan had bribed an official from the Department of Social Protection. This was a sufficiently close connection to render the bank vicariously liable for his actions. The bank could not hide behind its "non-recourse agreement" with Croskerrys. The only reason for having such an agreement was because the bank must have known that the agents working on their instructions would engage in criminality, and

(iv) erred in her conclusion that his claim for negligence against the bank was bound to fail. He maintains that he had an arguable claim the bank was negligent/reckless in hiring an unlicensed, unregulated second-hand car salesman who freelanced as a private investigator to snoop illegally into his affairs.

32. According to Mr Lannon, his claim against AIB Mortgage Bank is not one that should have been considered as bound to fail. He submits that he has an arguable case to make on the facts of this case that AIB Mortgage Bank might be held liable in damages for Mr Ryan's breach of trust, breach of confidence and breach of his rights of privacy. Mr Lannon contends that had the proceedings been allowed to advance to trial he would have been in a position to cross-examine Mr Ryan concerning his instructions. He would also have been in a position to cross-examine the bank's witnesses concerning their knowledge of Mr Ryan's methods of obtaining information. The court was premature in dismissing his claim as all of the evidence was at that time as yet unknown. Thus, the High Court judge should not have dismissed his claim. He relied in this regard on the decision in *Sun Fat Chan v. Osseous Limited* [1992] 2 I.R. 425.

### **The respondent submissions**

33. As already stated, AIB Mortgage Bank maintains that Mr. Lannon's notice of appeal was out of time and further argues that his submissions raised on the hearing of the appeal have nothing to do with the grounds of appeal set out in his notice of appeal. That fact notwithstanding, for the reasons already stated, I have decided that the appeal should not be dismissed in limine and that the court should consider the appeal on its merits.

34. As to the merits of the submissions advanced by Mr Lannon on the appeal, counsel submits that insofar as his claim seeks to impugn the conduct of Mr. McCutcheon as agent of the bank, the claim amounts to a collateral attack on the order of the Circuit Court in the possession proceedings where that challenge was already made and determined against the interests of Mr. Lannon and was not appealed. Insofar as Mr. Lannon seeks to rely upon the conduct of Mr. Ryan, the respondent submits that his conduct cannot be visited upon AIB Mortgage Bank insofar as it did not employ him. There was no master/servant relationship between AIB Mortgage Bank and Mr. Ryan. Further, neither did Croskerrys employ Mr. Ryan. They employed Glenn Collections who in turn employed Mr. Ryan. The respondent also relied upon the fact that Mr. Ryan had not been engaged in relation to the claim by AIB Mortgage Bank in the possession proceedings. It was AIB plc that instructed Croskerrys in relation to the branch loan claim which has since been discontinued.

### **Relevant Principles**

35. It has long been accepted that the Court enjoys an inherent jurisdiction to strike out or stay proceedings which it is satisfied are bound to fail. It is a jurisdiction that exists to prevent a party abusing the process of the Court. This is because logic and common sense dictate that to allow a plaintiff maintain a claim that is obviously bound to fail would be to condone an abuse of such process and the court's scarce resources.

36. As has been stated in many judgments, the Court's inherent jurisdiction to dismiss a claim as bound to fail is different from the jurisdiction which it enjoys under Ord. 19, r. 28 of the Rules of the Superior Courts. The latter is a pleadings based assessment in which the court does not engage with the facts set out on affidavit.

37. I will summarise in skeletal form the principles to be applied on an application to dismiss a claim as bound to fail before proceeding to consider this aspect of Mr. Lannon's appeal:-

1. Because the jurisdiction to dismiss a claim has the effect of denying a plaintiff their constitutional right of access to the courts, the jurisdiction should be exercised sparingly. (See for example the judgment of Costello J. in *Barry v. Buckley*). The court should be satisfied on the facts of the case that the continued existence of the proceedings simply cannot be justified and that it would be manifestly unfair to the defendant to allow the claim proceed.
2. The court is not entitled in the exercise of its inherent jurisdiction to dismiss an innovative or novel case on those grounds alone. (See, for example, the decision of Charleton J. in *Mill Steam Cycling Limited v. Tierney* [2010] IEHC 55).
3. The Court's inherent jurisdiction should not be used to seek an early determination of issues which ought, in the normal course of events, be determined on a plenary hearing.
4. Before dismissing a claim as bound to fail the court should be satisfied that, no matter what might possibly arise on discovery or in the course of the evidence at trial, that the plaintiff's claim cannot succeed. (See, for example, *Sun Fat Chan v. Osseous Limited* ).
5. If an amendment to the pleadings as currently drafted might afford the plaintiff a prospect of success, then the court should allow the amendment to permit of such a prospect. (See, for example, *Moffitt v. Agricultural Credit Corp PLC* [2007] IEHC 245).
6. The court is not precluded from engaging with the facts of the case and may in certain circumstances engage in some analysis of relevant documentation. There are however significant limitations in the extent to which such engagement is appropriate. (See, for example, Clarke J. in *Moylist Construction Limited v. Doheny & Ors.* [2016] IESC 9, [2016] 2 I.R. 283).
7. A court will but rarely dismiss proceedings as bound to fail where there is a dispute as to facts which are not capable of being resolved by reference to admitted documents. (See, for example, *Ruby Property Co. v. Kilty* [1999] IEHC 50).
8. In order to decide if a case is bound to fail the court can look to documentary evidence to analyse whether a plaintiff's factual allegations amount to nothing more than a mere assertion for which no evidence or no credible evidence can be advanced. (See Clarke J. (as he then was) in *Keohane v. Hynes & Ors.* [2014] IESC 66).
9. Where there are factual disputes or issues of law which are in themselves complex the court should not engage its inherent jurisdiction. It can however do so if the issues are relatively straightforward.

## **Discussion and decision**

### **The Bank's preliminary objections**

38. As stated earlier in this judgment, it is not, in my view, necessary for the purposes of determining this appeal to consider the merits of the two preliminary objections raised by the bank in its submissions. I will leave to another day the question as to whether or not an order to dismiss proceedings under Ord. 19, r. 28 or under the court inherent jurisdiction should be considered to be a final or interlocutory order for the purpose of the time limit for appealing such an order.

39. Further, as already stated, I would forgive Mr. Lannon the irregular nature of his notice of appeal in circumstances where he delivered a detailed written submission setting out the basis upon which he disputes the validity of the High Court order. That being so, I consider it would be unfair and otherwise than in accordance with the proper administration of justice to confine Mr. Lannon to the grounds of appeal identified in his notice of appeal.

### **The substantive appeal**

40. I intend first of all to address the appeal insofar as it relates to the decision of the High Court judge to strike out Mr Lannon's proceedings under the Court's inherent jurisdiction on the basis that his claim was bound to fail and was therefore one to be considered an abuse of the Court's process.

41. For the purposes of reaching my decision I have considered in detail the facts which Mr. Lannon placed before the High Court in his effort to defend the bank's application. Likewise, I have had regard to the legal submission which he advanced in this court and in the court below. Having done so I have come to the inescapable conclusion that Mr Lannon appears intent, if permitted to proceed with the present claim, to re-engage the High Court with a consideration of the employment status of Mr. McCutcheon at the time that AIB Mortgage Bank obtained its order for possession. That was an issue which he had raised by way of defence in the Circuit Court possession proceedings and he is not entitled to litigate for a second time before this court. Indeed, in order to pursue that particular line of defence in the Circuit Court he went so far as to serve a notice to cross examine Mr. McCutcheon with the result that the proceedings were adjourned to permit that examination take place.

42. Mr McCutcheon's evidence was heard in the Circuit Court on the 25th October 2016. This court has been furnished with the transcript of that hearing from which it is clear that Mr. Lannon robustly challenged Mr McCutcheon's evidence to the effect that he was an employee of AIB Mortgage Bank at the time he swore the bank's affidavit grounding its application for possession. Having considered the oral evidence and the documentary evidence provided by Mr. McCutcheon concerning his employment the Circuit Court judge concluded that he was indeed an employee of AIB Mortgage Bank at the time and that being so the bank was entitled to the order for possession sought. The trial judge also concluded that there was nothing irregular about the affidavits that had been sworn by Mr. McCutcheon on behalf of the other lending institutions that had been identified by Mr. Lannon.

43. For reasons only known to Mr Lannon, he failed to exercise his right to appeal the findings of the Circuit judge to the High Court. Had he done so he would have been entitled to a full rehearing of the bank's application for possession. What he was not entitled to do was to commence a new action in the High Court for the purposes of seeking to re-litigate issues already determined against him in the Circuit Court and that is what he has done by issuing the within proceedings. In his failure to appeal the judgment and order of the Circuit Court he brought an end to any possibility he might otherwise have had to challenge the regularity and validity of the bank's order for possession and any subsequent steps taken by the bank on foot of that order.

44. Accordingly, it follows that the first five of Mr Lannon's claims as identified in the prayer of his statement of claim must fail by reason of the status of the earlier unappealed Circuit Court order as *res judicata*. All such claims are predicated upon his challenge to Mr McCutcheon's entitlement to swear the bank's affidavit in support of its application for the Order for possession. The Circuit Court judge found that Mr McCutcheon was lawfully employed by AIB Mortgage Bank at the time he swore the bank's affidavit and that he had the requisite knowledge to do so. He also decided that Mr McCutcheon was entitled in law to be an employee of more than one company at any given time and that in such circumstances there was nothing unlawful in the fact that he had sworn affidavits for a number of different legal entities in the same group. It follows from the findings of fact made by the Circuit Court judge that Mr McCutcheon could not have been engaged in the type of conspiracy proposed by Mr Lannon, a claim based on his assertion that Mr McCutcheon had unlawfully sworn affidavits on behalf of a number of different legal entities in the same group.

45. The High Court judge was quite correct as a matter of law when she ruled at the outset of the hearing of the banks motion to dismiss the within proceedings that the court could not re-engage with the status of Mr McCutcheon in the context of the possession proceedings. To my mind, it matters not whether this ruling on the part of the trial judge had the effect of denying Mr Lannon of 50% of the relief claimed in the within proceedings. If it had the effect of denying him all of the relief claimed there would have been nothing irregular about her ruling. It would have been an abuse of the Court's own process to allow Mr Lannon pursue these proceedings so that he might revisit issues that were determined against him in the Circuit Court and which he did not appeal. There has to be finality to litigation. Parties cannot be subjected to the cost and inconvenience of re-litigating an issue for a second time otherwise that in the context of an appeal. Further, the courts own scarce resources must be marshalled carefully to ensure proportionate access to the courts for those who need it. It follows that the court cannot indulge litigants by permitting them pursue issues which were already determined against them in earlier proceedings.

46. It follows from all I have just said that those parts of Mr Lannon's claim identified at paras. 1-5 of the relief in the Statement of Claim, are not only an abuse of the court's process but they constitute a collateral attack on the order of the Circuit Court judge with the result that those particular claims must be considered both abusive and vexatious in the legal sense in which that word is used. It also means that those claims are bound to fail.

47. Finally, on this aspect of the appeal I should also say that in my view the High Court judge was entitled to conclude as a matter of law that any issues concerning Mr. McCutcheon's employment status and the validity of the banks claim to possession were also *res judicata* by reason of the Circuit Court order.

### **Whether the plaintiff bank can be liable for the data breaches**

48. Insofar as the balance of Mr. Lannon's claim is concerned, the same focuses upon the unlawful conduct of Mr. Ryan which it is accepted was in breach of the 1988 Act. As to whether or not AIB Mortgage Bank could, as a matter of law, be held liable in damages to Mr Lannon as a result of the unlawful conduct of Mr Ryan, that, in my view, is a relatively straightforward legal issue of the type described by Clarke J. in his judgment in *Moylist* which it is appropriate to determine on an application to dismiss a claim as one which is bound to fail. The issue is not complex and there is no real factual dispute which would warrant a plenary hearing. Insofar as there are any disputed facts these are all capable of being resolved by reference to uncontested documents. The outcome of this issue is so clear on the uncontested facts that I can be satisfied that there is nothing that could possibly arise on discovery or at a full oral hearing that could possibly save Mr. Lannon's claim from failure.

49. Core to the remaining reliefs sought by Mr. Lannon is his bald assertion that AIB Mortgage Bank hired Mr. Ryan to obtain his data from the Department of Social Protection without his consent. This is the basis upon which he alleges AIB Mortgage Bank is vicariously

liable for Mr. Ryan's conduct. He then asserts that AIB Mortgage Bank then impermissibly relied upon that data to obtain its order for possession. These are two bald averments for which there is no supporting evidence of any nature whatsoever.

50. On the facts before this court it was not disputed that AIB Mortgage Bank had instructed Joynt and Crawford Solicitors in the possession proceedings. Further, Mr. Lannon himself asserts that Croskerrys retained Mr. Ryan. After all it was following the service by Croskerrys of the branch loan proceedings that he contacted that firm to enquire how it had obtained his address and authored the correspondence referred to earlier in this judgment where he twice acknowledged that Croskerrys had hired Mr. Ryan. Apart from these facts the court has a copy of the branch loan civil bill instituted by AIB plc signed by Croskerrys and several documents in the possession proceedings signed by Joynt and Crawford as the solicitors acting for AIB Mortgage Bank. It follows that Mr. Lannon cannot dispute the fact that Mr. Ryan's wrongful conduct occurred in the context of the branch loan proceedings commenced by AIB plc rather than in the course of the possession proceedings brought by AIB Mortgage Bank.

51. It is to be remembered that in the possession proceedings AIB Mortgage Bank retained Joynt and Crawford and they retained a company by the name of Park Management to serve the civil bill seeking possession. As we know service was effected not at Mr Lannon's Drogheda address, that being the address obtained as a result of a breach of the 1988 Act, but at the address of the mortgaged property. How, then, could any conduct on the part of Mr Ryan in a different action involving a different plaintiff render AIB Mortgage Bank vicariously liable for his conduct? Not only was there not a close connection between AIB Mortgage Bank and Mr. Ryan, there was not the remotest connection between them. Consequently, any wrongdoing on the part of Mr. Ryan could not go to the root of the contract the subject matter of the possession proceedings such as to afford Mr. Lannon the type of relief claimed at paras 4 and 5 of the prayer in his Statement of Claim. The bald assertion made by Mr Ryan that AIB mortgage Bank hired Mr Ryan is without foundation and is contrary to his own evidence as is his bald assertion that he was hired to obtain his data from the Department of social protection.

52. For similar reasons, the data protection breach by Mr Ryan can provide no basis upon which Mr Lannon might seek to avoid the judgment mortgage registered on foot of his credit card liabilities or any finance or leasing debt. Mr Ryan's conduct was potentially relevant only, if at all, to the branch loan proceedings which were handled by Croskerrys on behalf of AIB plc and which were later discontinued.

53. Even if had been the case that AIB Mortgage Bank as opposed to AIB plc had retained Croskerry's in the possession proceedings which is clearly not the case, Mr. Lannon's claim would, in my view, be equally unstateable.

54. It was accepted by Mr Lannon in the correspondence earlier referred to that it was Croskerry's that had retained Mr Ryan. In fact, that is a slight over simplification of the factual situation. The uncontested evidence was that Crosskerrys did not in fact employ Mr Ryan. Rather, they employed Glenn Collections, an agency used for the purposes of the service of court proceedings and it in turn employed Mr Ryan.

55. The "close connection" test, that was applied by the High Court judge when considering Mr. Lannon's claims based upon the law of vicarious liability, has been the subject matter of significant litigation in this jurisdiction in recent times. (See for example *Hickey v. McGowan* [2017] IESC 6, [2017] 2 I.R. 196 and *O'Keeffe v. Hickey* [2008] IESC 72, [2009] 2 I.R. 302. In the former case the Supreme Court considered the "close connection" test in the context of a claim made by the plaintiff to the effect that he had been sexually abused by his teacher in a classroom setting. The key issue in the case was whether vicarious liability could be imposed upon the head of the Marist order in Ireland, in which order the teacher was a member. In upholding the finding of vicariously liability made by the High Court judge O'Donnell J. confirmed that it was clear that the close connection test that had been described by Fennelly J. in *O'Keeffe v. Hickey* must be taken to represent the law in Ireland when it comes to a consideration of vicarious liability. That being so, on the facts of the case under consideration, the test had been met with relative ease.

56. It is accordingly clear that in considering whether Mr Lannon's proceedings against the bank, based upon its alleged vicarious liability for the wrongdoing of Mr Ryan, the High Court judge correctly deployed the close connection test.

57. Applying the close connection test to these uncontested facts one cannot, I think, credibly suggest that in circumstances where AIB plc employed Croskerrys on a non recourse agreement and it in turn employed Glenn Collections that AIB plc, or for that matter AIB Mortgage Bank, could be held liable for the manner in which Mr Ryan conducted himself in relation to Mr Lannon's data.

58. Not only did the bank that employed Croskerrys have no control over the manner in which Mr Ryan carried out his work as a private investigator, there was no evidence that either bank knew that Mr Ryan had been engaged for any purpose. The uncontested evidence was that the bank, AIB plc, left it to Croskerrys to determine what assistance it required for the purpose of acting on its behalf to recover the monies due on foot of the branch facility. For reasons of commercial sensitivity that service provider agreement was not exhibited in the banks affidavit but was in court at the time the motion was heard. It is not disputed that Mr Lannon was offered the opportunity of inspecting the agreement between AIB plc and Croskerrys but he elected not to do so.

59. Whilst it is perhaps unnecessary in light of what I have already said to establish the state of the evidence before the High Court judge, in his affidavit of the 18th July 2016 Mr McCutcheon confirmed that none of the companies within the AIB plc engaged Mr Ryan or authorised him to obtain information that was in breach of the data protection legislation. Croskerrys had engaged the investigators without reference to the bank. A further indication of the hopelessness of Mr. Lannon's claim is to be found in the decision of the Data Commissioner who found no wrongdoing on the part of either AIB plc or Croskerrys. There was, accordingly, no proximity between AIB Mortgage Bank and Mr. Ryan such as to render it liable for his actions.

60. What is, to my mind, absolutely certain is that Mr. Lannon can have no claim against AIB Mortgage Bank based upon any claim which depends on his establishing that Mr. Ryan was an employee of AIB Mortgage Bank or was at any time under his control or that Mr Ryan was so closely associated with the bank that it could be held accountable for his wrongdoing. Any such claim is simply unstateable. Accordingly, the claims which support the relief claimed by Mr Lannon at paragraphs 6 to 10 in the prayer of his statement of claim are bound to fail.

61. Whilst not particularly material to my conclusion is the fact that the torts relied upon by Mr. Lannon in support of the relief claimed at paras 6 - 10 of the prayer of his statement of claim are all dependant on him being in a position to establish loss and damage. In the circumstances of this case the wrongdoing of Mr Ryan was not used by AIB Mortgage bank to obtain the order for possession in the Circuit Court. The information obtained was used solely for the purposes of serving Mr. Lannon with Circuit Court proceedings in respect of a debt which he does not deny. Further, in circumstances where AIB plc discontinued those proceedings it is difficult to see how Mr. Lannon, who is no longer being pursued in respect of the monies claimed therein, can maintain that he suffered loss as a result of Mr. Ryan's wrongdoing.

62. Having regard to my conclusion that the High Court judge did not err in law and fact when she dismissed Mr Lannon's claim on the basis that was bound to fail, it is not necessary to deal with any other aspect of her order or judgment.

63. For all of the aforementioned reasons I would dismiss the appeal.