

THE HIGH COURT

[2022] IEHC 150
[2018 No. 4663 P]

BETWEEN

COLUMB BRAZIL

PLAINTIFF

AND

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

DEFENDANTS

RULING of Mr. Justice Mark Heslin delivered on the 16th day of March 2022.

Introduction

1. On 25th November 2021, the court heard applications to dismiss the plaintiff's claims and this ruling on the question of costs must be read in conjunction with this court's judgement delivered on 21 December last. For the reasons set out in that judgement the court dismissed the plaintiff's claims in their entirety.

2. Paragraph 131 of the judgement notified the parties that they should correspond with each other, forthwith, in relation to the appropriate form of order, including as to costs, which should be made, so as to reflect the court's judgment. Insofar as the question of costs was concerned, a preliminary view was expressed in the judgment, namely, that there were no facts or circumstances which would justify a departure from the 'default position' that costs should 'follow the event'.

3. The office of the chief state solicitor ("CSSO") wrote to the plaintiff on 22 December setting out their view as to the appropriate order concerning their clients, being the first, second and third (i.e. the "State") defendants. No response was received to that letter. The solicitors for the fourth named defendant (the "Bank") wrote to the plaintiff on 10 January 2022 setting out its view as to the appropriate form of order. No response was received from the plaintiff. Nor, has the plaintiff corresponded or lodged any submissions directly with the central office.

4. This court has received and considered (i) correspondence dated 18 January 2022 from the CSSO for the State defendants, (ii) written submissions dated 18 January 2022 on behalf of

the Bank ; and (iii) written submissions dated 18 January 2022 on behalf of the 5th to 8th defendants in coming to the decision detailed in this ruling.

Statutory provisions

5. Section 169(1) of the 2015 Act states:

“A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including–

- (a) conduct before and during the proceedings,*
- (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
- (c) the manner in which the parties conducted all or any part of their cases*
- (d) whether a successful party exaggerated his or her claim*
- (e) whether a party made a payment into court and the date of that payment*
- (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and*
- (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.*

Order 99 Rules 2 and 3 of the Rules of the Superior Courts (“RSC”) provide:

“2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

- (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*

(2) *No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.*

(3) *The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.*

(4) *An award of costs shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.*

(5) *An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded.*

3. (1) *The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.*

(2) *For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs.”*

The normal rule

6. The effect of the foregoing is that “*the winning party is to obtain an order for costs to be paid by the other party, unless the court for special cause otherwise directs*” (see: *Cooper- Flynn v. RTE* [2004] 2 IR 72 at 79). That reflects the ‘default’ position or ‘normal rule’. In *Veolia Water UK Plc v. Fingal County Council* [2006] IEHC 240 Clarke J. (as he then was) held that the normal rule could be departed from “*by virtue of special or unusual circumstances*”.

7. The defendants in respect of each motion were the “*entirely successful*” parties for the purposes of section 169 (1) of the 2015 Act. The success of the defendants’ motions was the ‘*event*’ in each case for the purposes of determining the question of costs and it is uncontroversial to say that the ‘normal rule’ is that costs should ‘*follow the event*’ unless justice requires otherwise. Thus, the respective defendants are entitled to an award of costs unless there are particular circumstances where the interests of justice require a departure from the ‘normal rule’.

8. Taking full account of the nature and circumstances of the case, I am satisfied that the respective defendants are each entitled to an award of costs against the plaintiff, who was entirely unsuccessful, and it would be to create an injustice if this court did not make such orders. There are no special or unusual circumstances which would justify a departure from the ‘normal rule’.

9. It is true to say that this court enjoys a discretion with regard to costs. It is important to emphasise, however, that this court is not ‘at large’, as regards the exercise of same and its discretion must be exercised (i) fairly; (ii) consistent with the legislative provisions I have quoted earlier; and (iii) in the manner contemplated by the authorities which, like the legislative provisions, emphasise that there would need to be very particular and unusual circumstances to justify this court *not* awarding costs to the party which had been entirely successful. There are no such circumstances here and to refuse any defendant’s application for costs would be a wholly unjust and, therefore, impermissible and *ultra vires* exercise of discretion.

The State defendants

10. I am satisfied that, insofar as the State defendants are concerned, it is appropriate to make costs orders in the terms which they have sought, namely:

(a) *an order dismissing the plaintiff's action as against the first, second and third named defendant's pursuant to both order 19 rule 28 of the Rules of the Superior Courts 1986 (as amended) and pursuant to the Court's inherent jurisdiction;*

(b) *an order that the plaintiff pay the first, second and third named defendants' costs of the action, to include the costs of their application to dismiss, such costs to be adjudicated in default of agreement.*

The Bank

11. As the Bank points out in its submissions, long before the hearing of these motions the Bank wrote to the plaintiff (on 25 September and 2 October 2020) explaining why the plaintiff's claims were without merit; giving notice of the Bank's intention to bring a motion to strike out the proceedings; and inviting the plaintiff to discontinue his proceedings, without cost. The plaintiff declined this invitation. The Bank also submits that it should be at liberty to recover from the plaintiff, the cost of its submissions dated 18 January 2022, in circumstances where the Bank wrote to the plaintiff in an attempt to agree the form of order but received no response and was required to incur cost in the preparation and delivery of the said submissions. I agree.

12. Given that the plaintiff expressly declined the opportunity which was afforded to him to discontinue the proceedings as against the Bank on the basis of each side bearing their own costs and, thus, compelled the Bank to actively defend the proceedings thereafter, the Bank submits that it would not be appropriate that any form of stay on costs be ordered. I agree.

13. In the circumstances, I am satisfied that, insofar as the Bank is concerned, it is appropriate to make orders in the terms suggested by the fourth named defendant, namely:

(a) *An order striking out the proceedings as against the fourth named defendant pursuant to the provisions of order 19, of the Rules of the Superior Courts 1986, on the grounds that same are frivolous and vexatious and or disclose no reasonable cause of action;*

(b) *An order pursuant to the inherent jurisdiction of Court dismissing the proceedings against the fourth named defendant on the grounds that same are unsustainable, frivolous and vexatious and or that same constitute an abuse of process; and*

(c) *An order that the plaintiff is to pay the fourth named defendant's costs of the proceedings, including the costs of the fourth named defendant's motion dated 12 March 2021 and issued on 15 March 2021 and also including the written submissions delivered on 18 January 2022 in respect of the form of order, such costs to be adjudicated in default of agreement.*

The 5th to 8th defendants

14. The submissions, dated 18 January 2022, furnished on behalf of the 5th to 8th defendants lay emphasis on the provisions of Order 99, rule 10 (3) of the RSC which empowers the court to award costs on a “*legal practitioner and client*” basis in “*any case in which it thinks fit to do so*”. As to guidance on the appropriate application of this provision, this Court's attention is drawn to the decision in *Trafalgar Developments Ltd v. Mazepin* [2020] IEHC 13, wherein Mr. Justice Barniville stated the following:-

“54. It seems to me that the following principles can be derived from O. 99 r. 10 and from the judgments of the Irish courts discussed above and should inform the exercise by a court of its discretion to make an order for costs on the solicitor and client basis: -

- (1) The normal position is that where costs are awarded against one party in favour of on other, those costs will be taxed or adjudicated on the party and party basis.*
- (2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and to direct that the costs be taxed or adjudicated on the solicitor and client basis.*

(3) *There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis (or on the even more severe basis, the solicitor and own client basis).*

(4) **The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.**

(5) *The conduct in question can include: -*

(a) A particularly serious breach of the party's discovery obligations;

*(b) **An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;***

(c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there exists clear evidence supporting a prima facie case in relation to such claims;

*(d) **Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court's displeasure or disapproval,** such a particularly serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts.*

(6) *In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should: -*

(a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;

(b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;

(c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;

(d) in light of the above, determine whether, in all the circumstances, it would be appropriate and in the interests of justice to award costs on the solicitor and client basis under O. 99, r 10 (3).

(7) While a failure to comply with the provisions of the Rules of the Superior Courts or of a direction or order of the court will normally merit the award of costs against the party in default, such costs will normally be awarded on the party and party basis. It will generally only be if the breach or failure to comply is of a particularly blatant or serious nature, having serious consequences for the other party, that the court will be justified, in the exercise of its discretion, to award costs on the solicitor and client basis (or, exceptionally, on the solicitor and own client basis).” (emphasis in submissions).

In their submissions, the 5th to 8th named defendants lay particular emphasis on the passages highlighted above and contend that they are particularly appropriate in the present case.

Contractual obligation to indemnify

15. A second basis is advanced insofar as this court is urged to award costs on a “legal practitioner and client” basis, namely, “*to enforce a commercial bargain between litigants to the effect that costs should be recoverable on that basis*”. With regard to the foregoing, the court’s attention is drawn to the decision in *Didcot Holdings Ltd v. Euro General* (unreported, High Court, 28 June 2021; (2021) 28(10) C.L.P. 207), wherein O’Hanlon J awarded costs on a legal practitioner and client basis, in a landlord and tenant dispute, in circumstances where the relevant lease contained a clause which, *inter-alia*, required the tenant: “*To pay to the landlord...*

all the costs which arise or result to the landlord or are incurred in enforcing any of the covenants on the part of the tenant herein.” It is appropriate to note, however, that it was not submitted by the 5th to 8th defendants that the costs ordered on that basis concerned legal proceedings brought by the tenant, as opposed to by the landlord. A copy of that authority did not accompany the submissions. I was, however, able to source and consider the relevant article in the ‘C.L.P.’ which makes clear that the relevant proceedings (which gave rise to the costs) were brought by the landlord, as plaintiff. Thus, the single authority relied upon by these defendants in support of the proposition that the plaintiff owes them a contractual obligation to indemnify them in respect of costs, on a legal practitioner and own client basis, is a case decided on the basis of fundamentally different facts. Even if that were not so, it seems to me that as a matter of first principles, the question of whether this plaintiff owes these defendants a contractual obligation to indemnify them fully as regards costs hinges on the proper interpretation of the contractual provisions relied upon. As to that issue, the 5th to 8th defendants rely on the contents of a range of contractual provisions which, they submit, require the plaintiff to discharge their costs on an indemnity basis.

Clause 12

16. The first of the contractual terms relied on by the 5th to 8th defendants comprises clause 12 of the Bank’s “General Conditions” governing each of the relevant loan facilities and which states *inter alia*:

“The borrower shall indemnify the Bank against any loss (including loss of profit) expense or liability which the Bank may suffer or incur

(i) as a consequence of any default in repayment of the Loan or any part thereof or payment of interest accrued thereon or any other amount payable under the loan agreement on the due date;

(ii) as a consequence of a breach of any representation or warranty by the borrower or the occurrence of any event of default, including, without limitation, as a consequence of any demand, proceedings, action, claims or enforcement action by the Bank...” (emphasis in submissions).

Clause 13

17. Reliance is also placed on the terms of clause 13 of the general conditions which states *inter alia* the following:

“The borrower shall pay to the Bank on demand all costs fees and expenses, including without limitation, all legal fees and Banking charges and all Banking, legal, accountancy and taxation fees and costs and disbursements, together with value added tax (if any) thereon, incurred by or due to the Bank and its advisers in connection with the preparation, negotiation, execution and delivery of the finance documents and the completion of the transactions contemplated thereby and all costs and expenses incurred by the Bank in connection with the enforcement of the finance documents and all such costs and expenses shall be payable by the borrower whether or not all or any part of the loan is advanced or whether or not the borrower draws down all or any part of the loan and all such amounts (including any fees set out in the facility letter) may be added to the borrower’s loan account and shall be subject to the interest charges applicable to the loan.” (emphasis in submissions)

Clause 2.1

18. The 5th to 8th named defendants also rely on clause 2.1 of the relevant mortgage which states *inter alia*:

“For good and valuable consideration, the mortgagor hereby unconditionally and irrevocably covenants with the Bank to pay and discharge on demand the secured liability is and all costs, charges, expenses and other sums (Banking, legal or

otherwise) on a full indemnity basis howsoever incurred or to be incurred by the Bank and or by or through any receiver, attorney, delegate, sub delegate, substitute or agent of the Bank (including, without limitation, the remuneration of any of them) for any of the purposes referred to in this deed or in relation to the enforcement of this security or any other security held by the Bank as security for the secured obligations or in connection therewith together with interest to the date of payment (as well after as before any demand made or judgement obtained hereunder) at any surcharge rate of interest set out in the Bank's general conditions applicable to credit facilities at the date of demand. The mortgage or acknowledges that the secured liability shall, in the absence of express written agreement to the contrary, be due and payable to the Bank on demand." (emphasis in submissions)

Clause 18

19. The 5th to 8 defendants also rely on clause 18 of the relevant mortgage which stated *inter-alia*:

"18.1 The mortgagor shall pay on a full indemnity basis all expenses and costs (including legal and out of pocket expenses and any value added tax on such expenses and costs) incurred from time to time by the Bank in connection with the preparation, negotiation, execution and delivery of this deed, any stamping under registration of this deed, any discharge or release of this deed and the preservation or exercise (or attempted preservation or exercise) of any rights under or in connection with and the enforcement (or attempted enforcement) of this Deed.

18.2 all monies payable under this provision shall constitute part of the secured obligations and shall bear interest accordingly at the rate referred to in clause 2.1 from the date that they are incurred by the Bank and shall be payable on demand." (emphasis in submissions)

It is submitted that the present proceedings arose as a *direct consequence* of the enforcement by the fifth defendant of its entitlements on foot of the terms and conditions of the loan facilities and mortgage. It is submitted that the present proceedings were initiated as a *direct response* to the efforts made by the sixth defendant to exercise his powers as lawfully appointed receiver in respect of the relevant property. It is submitted that the plaintiff's claim was made *in connection with* the enforcement of rights by the relevant defendants. Thus, the 5th to 8 defendants submit that each of the clauses quoted above are 'engaged' and they lay particular emphasis on the highlighted passages in support of the contention that the plaintiff is contractually obliged to fully indemnify them in respect of all costs flowing from having to defend his claim.

20. Before proceeding further, it seems to me appropriate to say that, for these defendants to point to the plaintiff's proceedings and to submit that they were, in these specific facts and circumstances, a *response to*; or a *consequence of*; or were brought *in connection with* enforcement action by the Bank, does not seem to me to determine the meaning of the words used in the various clauses upon which the Bank seeks to rely.

21. It is also appropriate to recall the nature of the plaintiff's claim. He argued that specific Regulations made in 2008 went beyond the scope of the relevant Directive and were ultra vires as regards the consequences attributed to cross-border mergers. He went on to argue that the application of Regulation 19 to his loan rendered entries by the PRA at part 3 of the relevant Folio a "fraud" and void. The main focus of the case he ran, was that the 2008 Regulations could not be "retrospectively" relied upon.

22. Although an over-simplification, it is sufficient for present purposes to say that the aim of contractual interpretation is not for a Court to try and discover what the specific parties to a particular contract *subjectively* intended. Nor is the Court's task to decide what a clause in a contract should mean in light of the specific facts in a given situation. Rather, the task of the Court is to ascertain the *objective* meaning, having regard to the words used. Interpretation takes

place, of course, in context and against a matrix of fact, but what did (or did not) occur in this specific case does not seem to me to be particularly relevant to the meaning of the various clauses which these defendants purport to rely upon.

23. Clause 12 refers to the borrower indemnifying the Bank in respect of, *inter-alia*, expense suffered as a consequence of the borrower's default in relation to loan repayments and “*any demand, proceedings, action, claims or enforcement action **by the Bank***” (emphasis added). The present proceedings were not brought **by** the Bank, but by the borrower; and, regardless of how widely drafted the clause undoubtedly is, it clearly does *not* specify that, “*In the event that enforcement action by the Bank prompts the borrower to issue separate proceedings against the Bank (or any agent retained by the Bank) the borrower shall indemnify the Bank, regardless of the nature of the claims made*”, or words to the foregoing effect. The foregoing seems to me to be an important point to make. In other words, the court must have regard to the words actually used and it seems to me that none of the words actually used in any of the contractual provisions, which these defendants seek to rely upon, create, in explicit terms, the contractual obligation which would require the plaintiff to indemnify these defendants in respect of legal proceedings brought **by** the plaintiff.

24. It also seems to me that, if the parties to the relevant contract intended that the indemnity in respect of legal costs extended to legal proceedings brought by a borrower, that could have been stated in explicit terms. It was not. Furthermore, the wording used is perfectly capable of being interpreted in a way which does not impose upon a borrower the obligation to indemnify the bank and its agents in respect of legal costs flowing from legal proceedings brought by the borrower. That also seems to me to argue strongly against the existence of the contended-for contractual indemnity.

25. As any lawyer who has ever been faced with the task of contractual interpretation will be very well aware, there is ever – available to them, assistance from that most helpful personage

known as the ‘*officious bystander*’. If, when the relevant contract was about to be entered-into, the officious bystander had asked: “*Would it not be helpful to make clear that the obligation on the borrower/mortgagor to indemnify the Bank in respect of legal costs also applies to any proceedings brought by the borrower - including a challenge to the provisions of Irish Regulations in the context of an EU Directive - as well as to proceedings brought by the Bank, in connection with the enforcement of the latter’s rights?*”, I am not at all satisfied that both Bank and borrower would have confirmed that this was already a term provided for, albeit unexpressed, and that they would have agreed to its expression for greater clarity.

26. This court must be very mindful of the fundamental principle that it is not for the court to *make* contracts and it seems to me that to agree with these defendants would involve an impermissible exercise in judicial contract-making. Nor can this court imply a term into the contract which is not already there, unless such a term is both relevant and *necessary* to give the contract business efficacy’. Quite apart from the *contra proferentem* rule, it seems to me that the relevant provisions relied upon by these defendants are perfectly workable, *without* the contended-for indemnity. Thus, it is unnecessary to imply such an obligation, which is nowhere provided for in explicit terms.

27. In short, an interpretation of clause 12 does not permit me to say with anything like sufficient confidence that it captures the costs incurred in the present proceedings brought by the plaintiff. Similar comments apply in relation to the other contractual clauses relied on. Clause 13 explicitly refers to the fees and expenses incurred by the Bank and its advisers “*...in connection with the preparation, negotiation, execution and delivery of the finance documents and the completion of the transactions contemplated thereby and all costs and expenses incurred by the Bank in connection with the enforcement of the finance documents...*”. Again, I cannot say with anything like sufficient confidence that this clause contemplates the legal expenses of the 5th to 8th named defendant’s arising from the present proceedings brought by the plaintiff. In a loose or

general sense, the relevant legal costs might be said to constitute expenses incurred by the Bank in connection with the enforcement of rights under the finance documents but that is true only at one remove and I am not sufficiently confident that the proper interpretation of the wording in this clauses creates the contractual indemnity asserted .

28. Similarly, clause 2.1 of the mortgage relates to the fees and expenses of the Bank or its agent incurred for any of the purposes referred to in the mortgage “*or in relation to the enforcement of this security or any other security held by the Bank as security for the secured obligations or in connection therewith*”. Once more, the legal costs and expenses arising from the plaintiff’s proceedings *against* the Bank and its agents concerning a range of claims made therein is not explicitly dealt with in clause 2.1. Not being stated explicitly, and for the reasons explained above, I have a fundamental difficulty interpreting the literal meaning of the words used in the clauses referred to as covering the present situation.

29. Clause 18.1 of the mortgage explicitly relates to costs concerning “*the preparation, negotiation, execution and delivery of this deed, any stamping and/or registration of this deed, any discharge or release of this deed, and the preservation or exercise... Of any rights under or in connection with and the enforcement... of this deed.*” The clause does not seem to me to speak to the indemnity contended for. Similar comments apply in relation to clause 18.2.

30. Leaving aside the important fact that none of these issues concerning the proper interpretation of these clauses were canvassed during the hearing, I am not sufficiently satisfied that the clauses relied upon evidence a contractual obligation on the plaintiff which requires him to discharge the costs of the 5th to 8th defendants on an indemnity basis. Plainly, those clauses capture, *inter alia*, legal proceedings taken *against* the borrower. However, a natural “*consequence*” of the breach by a borrower of his or her obligations does not seem to me to be the institution by that borrower of legal proceedings *against* the Bank. Nor is it a natural or obvious consequence of enforcement action by a Bank that a borrower would institute High

Court proceedings. Similarly, the natural or ordinary meaning of costs arising “*in connection with*” enforcement action by a Bank, does not seem to me to contemplate the costs of defending legal action by a borrower, still less a claim by a borrower/mortgagor challenging Regulations made in the context of a Directive and focusing on the issue of retrospectivity.

31. Thus, giving the wording in the various clauses the natural or common sense meaning leaves me unable to find the contractual obligation on the plaintiff borrower contended for, with respect to providing a full indemnity and I am unable to find any such implied obligation.

32. The 5th to 8th defendants point to the fact that by letter dated 21 January 2021, their solicitors wrote to the plaintiff calling upon him to withdraw his claim, but the plaintiff declined to do this. It is perfectly true, as the 5th to 8th defendants point out, that this court described the plaintiff’s claim as, variously, “*baseless*” (judgment para. 129); “*without foundation*” (para. 101); and “*entirely devoid of merit*” (para. 129). It is not axiomatic, however, that costs would be awarded on an indemnity basis where a claim, so described, has been dismissed. Rather, the principles outlined in the *Trafalgar Developments* case constitute the appropriate approach. Relying on those principles, this court is urged to mark its displeasure at the unfounded nature of the plaintiff’s claim and the manner in which it was prosecuted.

33. Carefully considering all relevant matters and applying the *Trafalgar Developments* principles, the first matter which seems to me to be appropriate to point out is that the plaintiff was a ‘litigant in person’. That being so, it seems to me that in order to do justice in relation to this particular question concerning costs, requires this court to take into account, to the appropriate degree, the reality that the plaintiff, as a non-lawyer, may not have appreciated matters which to a trained legal professional would have been obvious. This reality is of potential relevance, it seems to me, to (i) the nature of the claim advanced, (ii) the manner it was pleaded, and (iii) the conduct of the plaintiff in maintaining his action. It seems uncontroversial to say that a qualified legal professional would have taken a very different view as to the merits

of the plaintiff's claim. Similarly, a qualified legal professional would not have pleaded the claim in the manner which the plaintiff did. By the same token, a qualified legal professional would have been aware of, for example the significance of the doctrine of precedent, yet it seems clear that the plaintiff did not appreciate, for example, the nature of what had been decided in relevant decisions by superior courts and/or their authoritative status (in particular, the Supreme Court's decisions in *Kavanagh v. McLaughlin* [2015] 3 I.R. 555; and *Freeman v. Bank of Scotland* [2016] IESC 14; as well as the Court of Appeal's decisions in *Geary v. Property Registration Authority* [2020] IECA 132; and *Kearney v. Bank of Scotland & Anor.* [2020] IECA 92). Furthermore, a qualified legal professional would have understood the distinct roles of the fifth named defendant, as successor to the Bank, as well as the role played, or not, by the 8th named defendant. It is also of relevance that at para. 120 of my judgment, I made clear that: "*The Plaintiff's motivation is certainly not determinative of the present motions and has played no part in this Court's assessment of the Plaintiff's claim.*" It seems appropriate to observe that a litigant in person may regard as valid, indeed may regard as strong, a claim which a qualified legal professional would regard as utterly unsustainable and inevitably doomed to fail. Such appears to be the position in the present case. Carefully considering all relevant matters, I do not believe that it would be an appropriate exercise of this court's discretion to order costs on a 'solicitor and own client' basis against the plaintiff, insofar as his claims against the 5th and 8th named defendants are concerned. They are without doubt entitled to their costs, but on the usual party/party basis.

The 6th and 7th Defendants

34. Carefully considering all relevant matters I am satisfied that a different approach should be taken as regards the 6th and 7th named defendants' costs. From para. 118 onwards of the judgment, I stated the following in relation to the plaintiff's 'claims' against these parties whom the plaintiff chose to name in the proceedings:

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

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

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

35. In these very particular circumstances I feel it is appropriate to exercise this Court’s discretion to order costs on the ‘legal practitioner and client’ basis where this Court wishes to

mark its disapproval at the conduct of the plaintiff in bringing proceedings against the 6th and 7th defendants. The plaintiff must have known that a range of adverse consequences could flow from being named as a defendant in High Court litigation. He must have known, too, that these were professionals engaged to do a job and that, as such, both had professional reputations. Despite this, he never even articulated a distinct claim against either. Thus, he knowingly created a ‘Kafkaesque’ situation for both these defendants who found themselves embroiled in litigation but with no idea of what they were supposed to have done wrong. That conduct on the Plaintiff’s part was utterly improper and inappropriate as the Plaintiff must have known, and his status as a litigant in person cannot conceivably explain or excuse it.

Orders

36. In light of the foregoing, the following seem to me to be the appropriate orders:

- (a) An order dismissing the claim of the plaintiff as against the 5th to 8 defendants on the basis that it is frivolous, vexatious, and an abuse of process;*
- (b) An order that the plaintiff pay the fifth and eighth named defendant’s costs of the proceedings, to include the costs of the application of the 5th to 8 defendants made by notice of motion issued on 26 March 2021 and also including the written submissions delivered on 18 January 2022, such costs are to be adjudicated in default of agreement;*
- (c) An order for adjudication of the costs of the sixth and seventh defendants, in default of agreement on a “legal practitioner and client” basis.*