Neutral Citation: [2015] IEHC 194

THE HIGH COURT

[2013 No. 11705 P]

CORNELIUS RYAN

PLAINTIFF

AND

KBC BANK IRELAND PLC

DEFENDANT

JUDGMENT of Ms. Justice Donnelly delivered on the 12th day of January, 2015

Introduction

1. The defendant bank ("the Bank") seeks an order striking out the plaintiff's proceedings on the grounds that the plaintiff's proceedings are vexatious and/or frivolous and/or an abuse of process and/or disclose no reasonable cause of action. The order is sought pursuant to O.19 r.28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court. Further or in the alternative, the Bank seeks an order dismissing the plaintiff's proceedings on the ground that they are statute barred. In the event that the Bank succeeds *in toto* in this application, the Bank seeks an Isaac Wunder Order against the plaintiff ("Mr. Ryan"). However, in the course of the hearing of the motion, it was agreed that argument on the Isaac Wunder Order application would be left over to another day should the Court decide to strike out the entirety of Mr. Ryan's proceedings.

2. The Bank grounds this application primarily by reference to two prior sets of proceedings brought against it by Mr. Ryan. All three sets of proceedings revolve around Mr. Ryan's ownership of a property known as Kinnitty Castle, Kinnitty, County Offaly and the fact that arising from his default in the repayment of substantial borrowing from the Bank, a receiver was appointed to the property. Mr. Ryan asserts that the property is correctly called "Castle Bernard" but for the purpose of these proceedings it will be referred to as Kinnitty Castle being the name by which it is commonly known. Kinnitty Castle operated at all material times as a hotel and continues to so operate.

The Litigation History

3. By plenary summons issued in December 2008 ("the first proceedings") Mr. Ryan and his wife sought various reliefs against the Bank and the receiver. The first relief claimed was that the Bank was not entitled to appoint Mr. Declan Taite as receiver and manager of Kinnitty Castle. Mr. and Mrs. Ryan also sought an order injuncting the defendants from continuing with or concluding the tender process for the sale of Kinnitty Castle. Another relief sought the approval of the court should the defendants wish to accept a bid of less than €10 million. A further relief claimed was that Mr. Ryan be at liberty to enter into a contract for sale if a bid was received by him of sufficient amount to discharge his indebtedness to the Bank. Of note is that para. 9 of the plenary summons sought an order that the defendants include, together with the sale of Kinnitty Castle Hotel, the rights to the registered trademark "Kinnitty Castle" and the rights to the website *www.kinnittycastle.com*. That relief also sought that the defendants market the fact that the trademark and website would be included with the sale of the castle, with all issues relating to the apportionment of any additional revenues received (including whether same were outside the security held by the Bank) to be decided at a later date.

4. Mr. and Mrs. Ryan then issued a notice of motion seeking corresponding interlocutory relief. In para. 22 of the affidavit sworn by Mr. Ryan in those proceedings, he referred to his ownership of the above trademark and website. Mr. Ryan said that he was willing to include those matters in the sale of the hotel. He claimed that by not including them, the receiver was deliberately and/or negligently not seeking to achieve the best price for the hotel. He alleged that *the receiver* or any purchaser of the property may end up infringing his rights in the trademark and the website. Specifically, he averred "although I have drawn this aspect of matters to the attention of the defendants, it is not a course of action that I wish to pursue." He said that he could not account for the receiver's decision not to cooperate in relation to that matter. The Bank submits that by this assertion, Mr. Ryan clearly indicated that he did not wish to pursue the matter of the trademark and the website.

5. In any event, those matters came on for hearing before Charleton J. on the 22nd of December, 2008. It appears from the order placed before me that all reliefs were sought, including the relief concerning the trademark and the website. Furthermore, it is clear that Charleton J. refused to grant the reliefs sought. The costs of that motion were reserved.

6. A motion for directions in the case came before Kelly J. on the 26th of January, 2009. The order records that counsel for the defendants updated the court as to the outcome of the tender process, namely that the receiver had not accepted any tender received and that by default Kinnitty Castle was back for sale by private treaty on the open market. The order specifically records:-

> "and said counsel for the plaintiffs intimating to the court that the plaintiffs are not proposing to proceed further with these proceedings…it is ordered and adjudged that the defendants do recover as against the plaintiffs the costs of these proceedings…".

7. It was over four and a half years before any further proceedings issued. In the meantime, Kinnitty Castle was never sold. The receiver continued to operate the premises as a hotel.

8. By plenary summons dated the 15th of August, 2013, Mr. Ryan issued a plenary summons against the Bank ("the second proceedings"). In that claim, which was stated to be for gross negligence and misrepresentation, it was alleged the Bank had broken serious liquidity laws which had caused the financial collapse. Mr. Ryan claimed that but for that action and knowledge of same, he would or could have made different decisions about his financial affairs. He also claimed that without disclosure and forethought of the Bank's intention, the contract was seriously flawed. He claimed that due to excessive securitisation the banks created the false boom and bust situation that crippled the country. He also claimed for reckless lending procedures saying the Bank had ignored its own guidelines in breach of the consumer protection code. He claimed that his health, wellbeing and personal relationships have suffered greatly as a result of the Bank's actions. He claimed €7 million damages and an order declaring the mortgage null and void.

9. No statement of claim ever issued. Instead, the Bank brought an application under RSC O.27 r.1 dismissing Mr. Ryan's claim for want of prosecution for failure on his part to deliver a statement of claim within the prescribed time. That motion issued on the 30th of January, 2014, and was returnable for the 24th of February, 2014. Mr. Ryan had, by letter dated the 6th of December, 2013, sought additional time to complete his statement of claim on the ground he was a plaintiff in person commonly referred to as a lay litigant.

10. On the 24th of February, 2014, an order was made dismissing the action for want of prosecution for failure to deliver a statement of claim. Mr. Ryan appeared in person to that motion. He informed the court that he was not opposing the motion. He was also ordered to pay the defendant the costs of that motion. Those costs have not been discharged but neither have they been taxed and ascertained.

11. A further plenary summons issued on the 24th of October, 2013, ("the present proceedings"). Thus it can be seen that they were issued before the second proceedings were struck out and indeed prior to the letter of Mr. Ryan seeking further time in which to file a statement of claim.

12. The present proceedings were initially brought against the Bank only. The general endorsement of claim states that the plaintiff's claim is for an injunction against the Bank and the receiver. However, the receiver was not originally a party to those proceedings. Mr. Ryan issued and served the proceedings as a lay litigant.

13. The claim made in this plenary summons is in fact quite limited. It is a claim in respect of misuse of the trademark owned and registered exclusively to Mr. Ryan. It concerns an injunction in respect of the misuse of the trademark. Mr. Ryan sought interlocutory relief. At the hearing of the motion on the 12th of Deecember, 2013, counsel for Mr. Taite, the receiver, appeared as a courtesy to the court. It was ordered that Mr. Taite be joined as a co-defendant in the matter. Despite the receiver having been joined as a co-defendant, it appears that he was never served with the pleadings. Mr. Ryan was represented by solicitor and counsel at the hearing of this motion. I was informed that the solicitor had now served papers on the receiver.

14. The court refused the plaintiff's application for interlocutory relief in respect of the use of the trademark "Kinnitty Castle". Costs were awarded against the plaintiff - there was a three month stay on the costs but no costs have been discharged. I am informed that these costs have not yet been taxed.

15. In between the issuing of the plenary summons and the hearing of the interlocutory injunction, a statement of claim was drafted and served by Mr. Ryan as a lay litigant. That statement of claim made no reference to the trademark issue. Instead, Mr. Ryan claimed quite a number of other matters. In particular, Mr. Ryan claims he has suffered undue and persistent harassment by the defendant Bank or its agents "in constructed attempts to force him to sell the property and repay the mortgage in full". He claimed that he was put under undue pressure by the Bank from late 2005 onwards, even though all mortgage payments were up to date at this stage within one year of drawdown. Mr. Ryan claims that as a result of the defendant's foreclosure on the property on the 19th of November, 2008, he was prevented from selling the property to a genuine potential buyer.

16. Mr. Ryan also claims a separate and discreet issue with regard to a bank guarantee given to AIB bank by KBC bank in respect of the property. There is a further claim regarding mismanagement of chattels by the receivers. At para. 8, he claims that the receivers appointed had no proprietary rights to the chattels at Kinnitty Castle and says that any attempts by the receivers to sell the chattels will be challenged. At para. 9, Mr. Ryan sought clarification from the Bank regarding whether or not the mortgage had been securitised. Finally, he sought a complete discharge of any monies outstanding in respect of the mortgage and any associated costs.

17. The Bank sought particulars of the claim. Mr. Ryan replied on the 21st of February, 2014, and particularised certain matters. With respect to his claim that he was prevented from selling the property to a genuine potential buyer, he makes a reference to a Mr. Peter Behrends from Frankfurt, Germany, who he says led a consortium of investors that had intimated their interest in purchasing the property at potentially €10 million. Both the position of Mr. Behrends and the fact that a bid of €10 million for Kinnitty Castle had been made, was referred to at para. 27 of the affidavit of Mr. Ryan grounding his application for injunctive relief in the first proceedings. In particular, he claimed in his original affidavit that the failure to receive confirmation from the receiver that the bid had been received prejudiced his steps to secure a firm bid for the property. Furthermore, Mr. Behrends swore an affidavit in the first proceedings referring to the bid of €10 million and saying that it was necessary for him to carry out due diligence on behalf of his clients, the consortium, before committing to the final offer of €10 million.

18. In response to the request for particulars as to the chattels, Mr. Ryan said he would be unable to do so without visiting the property so that he could reconcile the list of chattels he had in his possession against that which was available to be viewed in the property. In relation to his securitisation issue, Mr. Ryan says that he believes that the mortgage facility was securitised. Finally, Mr. Ryan says that he cannot confirm that the reliefs that are pleaded in the statement of claim are all the matters that he is claiming. He says that upon receipt of further information from the defendant, further issues may subsequently arise.

19. The Bank says that the receiver was trying to sell the hotel and had identified a buyer. The Bank says that it is against the background of Mr. Ryan's active and persistent attempts to derail the sales process, both through the courts and otherwise, that the within application is brought. The Bank relies upon the contents and procedural history of the prior proceedings to ground its claim for relief.

20. This application is brought solely by the Bank. As the receiver has now apparently been brought into the proceedings as a party, any issues between Mr. Ryan and the receiver will stand to be determined separately.

The response of Mr. Ryan

21. Mr. Ryan swore an affidavit in these proceedings on the 2nd of July, 2014. He describes himself as a businessman and an engineering professional. In relation to the first proceedings, he says he initiated them due to an existing conflict of interest concerning the appointment of FGS Partnership as receiver to Kinnitty Castle. In the affidavit, he gives great detail as to the circumstances that caused him concern arising out of the tender documents for the sale of the property on the 4th of December, 2008. He gives further detail about the potential German buyers led by Mr. Behrends. He claims that the attempts by the defendants to sell the property without proper preparation in combination with their failure to allow a *bona fide* buyer sufficient time to perform due diligence was a breach of the defendants' duty of care.

22. In response to the claim that the proceedings were "withdrawn by the plaintiffs", Mr. Ryan says that neither himself nor his wife were present in court that day. He makes a specific claim that, for reasons unknown to him, he was advised by counsel that there was no requirement for him to attend the court that day. He claims that counsel acted without instructions from either his wife or himself in withdrawing the case. He says that he cannot determine what the motive was in doing so but he says he assumes it was financial. He says that due to the loss of his business he was unable to continue to fund the action against the defendant. He says that he was so disgusted and confused by the entire episode that he lost the heart to continue the fight at the time. He says that this is the reason, which he admits was far from normal, that his case was never properly heard.

23. With respect to the second proceedings, he refers to his status as a person lacking in skills, knowledge and expertise in law. He refers to his inferior position because of his social background and his desperation and fear of losing his life's work and his family. He

says that he realised there was in fact duplication between the two respective cases and that it was for this reason he "withdrew from this case".

24. Mr. Ryan says that it was an error that the trademark and website issue was omitted from the statement of claim in the present proceedings. In relation to the claim for harassment, he says that this has continued. He says that the receiver acting as an agent for the Bank accused him of cyber squatting which he says is a serious allegation for which there was no basis and can only be considered a continuation of the intent to harass. He further claims that there was a delay in the Bank replying to his Freedom of Information request. He says that the Bank also wrote to him asking for additional information and he says this was a delaying tactic. He says that this was the cause of the delay in his statement of claim. He says that there was a deliberate attempt by the Bank to utilise its superior knowledge of proceedings to have his case dismissed even though they had not provided him with data in a timely fashion.

25. This particular claim of deliberate delay was quite properly not pushed by counsel on behalf of Mr. Ryan. The solicitor for the Bank averred that a single request under the Data Protection Act (as the Freedom of Information Act does not apply to the Bank) was made by Mr. Ryan at the end of February, 2014. This was replied to by letter dated the 4th of April, 2014, asking Mr. Ryan to give a suitable time and place for collection. It appears that there was no reply to this but on the 4th of June, 2014, Mr. Ryan arrived unannounced at the Bank's reception and the file was handed over. On this basis Mr. Ryan has no complaint about delay.

26. The letter which Mr. Ryan claims constitutes harassment was written by the solicitors for the receiver. The letter is dated the 11th of November, 2013. The letter outlines various issues through which the receiver claims that the use of the words "Kinnitty Castle" by any future owners or operators of Kinnitty Castle is not an infringement of any intellectual property rights. It is said the words used are the words by which the property is commonly known and which denote its geographical location. Solicitors for the receivers said that the current content of the website of Mr. Ryan under the heading "Kinnitty Castle for sale. Latest news, important notice to investors/buyers" is an attempt to interfere with the sale process. The letter from the solicitors for the receiver states -

> *"Please immediately remove any reference to the sale of the property by the receiver or by KBC Bank Ireland PLC (the Bank) and remove all statements about any alleged breach of your trademark. Please note that if you fail to do so we are instructed by our client that he will without further notice to you take the necessary steps, including, inter alia, the issuing of proceedings in the High Court seeking the necessary orders to compel you to do so and this letter will be relied upon in support of any such application and the legal costs of same."*

The letter went on to say –

> *"your letter of 4th November last and your website are attempts on your part to interfere with our clients interest, both tortuously and by way of passing off, and appear to constitute "cyber squatting". Accordingly, we ask that you immediately relinquish all threats of trademark infringement and confirm our client's entitlement to use its intellectual property."*

27. Further affidavits were exchanged between the parties. In his second affidavit, Mr. Ryan explains that the statement of claim did not produce the contents of the plenary summons in error as he believed he was not required to particularise again the claim that had been sufficiently particularised in the plenary summons. He requests time to issue a motion to seek leave to amend the statement of claim. In relation to the website, he repeats his own claim to the use of same. He says that he created the website KinnittyCastle.com in September 1998 and that the receiver created the website KinnittyCastleHotel.com in November, 2008. He queries why the Bank is claiming that he has continuously used the website KinnittyCastle.com to obstruct the sale of the property despite the fact that the Bank and receiver have not taken proceedings against him.

Generally applicable legal principles.

28. There can be little dispute as to the basis on which the court must approach a motion of this type. It is by now well established that an application to strike out proceedings as failing to disclose a reasonable cause of action and/or as vexatious and/or as frivolous and/or as an abuse of process can be processed in one of two ways by the court. In the first instance, the court can exercise its jurisdiction to strike out pursuant to RSC O.19 r 28. When exercising that jurisdiction, the court is restricted to considering the case disclosed by the pleadings and is not entitled to consider the context or the background to the proceedings in a more wide ranging manner.

29. By contrast, the court is entitled to make a broader enquiry into the context of and the background to the proceedings when exercising its inherent jurisdiction. Costello J. in *Barry v. Buckley* [1981] IR 306 at p.308 stated:-

> *"But, apart from O.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…the principles on which the court exercises its jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley L.J. in Goodson v. Grierson [1908] 1 KB 761 at p.765.*
>
> *This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. 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."*

30. As Clark J. concluded in the case *of Price and Lynch v. Keenaghan Developments Ltd.* [2007] IEHC 190 at para. 24:-

> *"…where, as in this case, an examination of the facts contained in the affidavits reveals that the plaintiff has no chance of success although the pleadings advance a known and recognised remedy, the court should grasp the nettle and strike down such unmeritorious proceedings."*

31. In the case of *Freeman v. Bank of Scotland* [2012] IEHC 371 relied upon by Counsel for Mr. Ryan, Gilligan J. said that the jurisdiction was not one that the court exercises lightly. It was said that right of access to the court should be preserved if at all possible. In *Freeman*, Gilligan J. examined all the claims brought by the plaintiffs and found that two of them met the "the low threshold required in allowing these issues to be litigated". Gilligan J. struck out the other heads pursuant to the courts inherent jurisdiction.

32. Counsel for Mr. Ryan also relies upon the judgment of Peart J. in *Smyth and Others v. the Commissioner of An Garda Síochána and Others* [2014] IEHC 453 in which the judgment of McCarthy J. in *Sun Fat Chan v. Osseous* [1992] 1 IR 425 was relied upon. That latter judgment held that if a statement of claim admits of an amendment which might rescue the action, then the action should not be dismissed. As indicated by Peart J., the position is that in an application of this kind the plaintiff is not required to prove anything, not even a prima facie case. The entire burden of satisfying the court that the plaintiff's case has no chance of success rests upon the defendant.

33. Counsel for the Bank relies upon the rule in *Henderson v. Henderson* (1843) 3 Hare 100. Under the rule identified in that case, the court requires the parties to litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case. This plea of quasi res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment on, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.

34. Murray C.J. in In *Re Vantive Holdings* [2010] 2 I.R. 118 stated that -

> *"the courts have always had an inherent jurisdiction to stay or dismiss proceedings which abuse the due process of the administration of justice where to do otherwise would seriously undermine its effectiveness or integrity."*

He went on to say "*[a]buse of process may take many forms according to the context or the nature of the proceedings…"* see para. 20. Although *Re Vantive Holdings* dealt with an application for an examinership I am satisfied that the principles cited therein are of general application.

35. At para. 24 of *Vantive*, Murray C.J. stated "*…there still remains the inherent jurisdiction of the court to protect the integrity of the due process of the administration of justice and the finality, in principle, of a judicial decision*". Murray C.J. referred approvingly to the *dicta* of Hardiman J. in *A.A. v. Medical Council* [2003] 4 I.R. 302 in which it was said that the rule in Henderson v. Henderson was an aspect of an abuse of process. Hardiman J. said as follows:-

> *"…Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional elements such as a collateral attack on a previous decision or some dishonesty but where those elements are present the later proceedings will be much more obviously abusive and there will rarely be a finding of abuse unless the latter proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether in all the circumstances a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not".*

36. Denham J. (as she then was) in *Re Vantive Holdings* stated that "*the fundamental principle is that it is in the public interest and for the common good that there should be finality in litigation*." She held that if the petitioner was entitled to make a second and a third petition it would commence an era where multiple applications would become the norm. In the circumstances of that case where there had been a deliberate strategy to hold documents back, it was held that the petitioner had abused the process.

The submissions

37. The Bank submits that the within proceedings are an even clearer and more egregious example of *Henderson v. Henderson* abuse of process. Counsel points out that in *A.A. v. Medical Council* the second proceedings were found to be an abuse of the process even though they were brought some two years after the first proceedings. By contrast, counsel submits this is the third set of proceedings arising out of the same fundamental complaint and the first set of proceedings issued some years ago.

38. Furthermore, the Bank submits that oppression is a hallmark of Mr. Ryan's behaviour in this case. Counsel submits that it is very clear that the ultimate motive of Mr. Ryan in bringing each set of proceedings has not been to achieve any remedy likely to be granted at law but rather to obstruct and hinder in every way possible the defendants attempt to realise its security by selling the property. They rely on the averments of Ms. Lorraine Bergin in her affidavit dated the 4th of July, 2014, where she refers to Mr. Ryan's website as set out above in which she says Mr. Ryan attempts to dissuade potential purchasers from buying the property on the basis of the existence of the within proceedings.

39. Counsel for the Bank also refers to the decision of Ó Caoimh J. in *Riordan v. Ireland (No. 5) [*2001] 4 IR 463 in which the indicia which generally identify proceedings as vexatious were summarised.

> *"(a) the bringing up on one or more actions to determine an issue which is already being determined by a court of competent jurisdiction;*
>
> *(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;*
>
> *(c) where the action is brought for improper purposes including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate right;*
>
> *(d) where issues are rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;*
>
> *(e)) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;*

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

The Canadian cases relied upon by Ó Caoimh J. make clear that proceedings may be frivolous and vexatious if they satisfy any one of the above tests.

40. The Bank submits that many of the above indicia are present in the case. Counsel refers to (e) where the plaintiff has failed to discharge any part of the costs awards made against him in the first proceedings, the second proceedings or the interlocutory proceedings in the current proceedings. Counsel on behalf of the Bank submits that the matters described at (a) (b) and (c) are present here insofar as issues which were disposed of in the first proceedings have been rolled forward into the second proceedings and on into the third proceedings. Counsel submits that these are supplemented with further complaints with the objective of oppressing the Bank and obstructing the sale process rather than asserting legitimate rights. He also points to the serious and unsubstantiated allegations of professional misconduct made by Mr. Ryan against his lawyers in the first proceedings. Whereas no proceedings appear to have been taken against the former lawyers, counsel submits that the allegations made against them in the present proceedings are analogous to the indicator set out at (d) above. Counsel also points to the trademark issue as another indicator of how matters are rolled forward into subsequent proceedings. It is submitted the fact that that was contained in the plenary summons, abandoned in the statement of claim and now sought to be revived in these proceedings is simply not an acceptable manner in which to conduct litigation.

41. The Bank also submits that a number of strands of Mr. Ryan's proceedings are clearly statute barred. Counsel submits that the remainder constitute an abuse of process for reason of the fact that they are being advanced to oppress the Bank and have already been litigated or could with reasonable diligence have been litigated in two sets of previous proceedings over the course of six years. Furthermore, counsel for the Bank submits that a number of the issues raised simply do not concern the defendant as they relate to the receiver's conduct.

42. Counsel for Mr. Ryan submits in general that the doctrine of estoppel or *res judicata* only applies where a final and conclusive judgment has been reached. He relied upon Delaney and McGrath, *Civil Procedure in the Superior Courts* (3rd edn, Roundhall, 2012) that "an interlocutory judgment will generally not possess the requisite quality of finality". Counsel also relies upon *Dalton v. Flynn* High Court Laffoy J. 20th May, 2004, in which the learned trial judge found that the counterclaim in the previous proceedings had not been adjudicated upon on the merits and that it could not be in issue as a bar to the prosecution of these proceedings. It is submitted that it has not been shown that any of the issues raised in these proceedings have been disposed of in any previous proceedings or that any final decision has been made. Counsel submits that the defendant has not shown any rule or authority for the proposition that issues raised in interlocutory proceedings or dismissed proceedings can be considered as falling within the rule of *res judicata*.

43. It is correct that for a plea of *res judicata* to succeed the judgment on which it is sought to ground the estoppel must be a final and conclusive judgment on the merits. A determination of an interlocutory matter "will generally not possess the requisite quality of finality between the parties but may do so if 'it was clearly intended finally to determine rights between the parties'" as quoted in para. 32 – 14 of *Civil Procedure in the Superior Courts*. The Bank's position in this case is not based upon a claim solely concerning the doctrine of *res judicata*, rather it is based upon the doctrine of abuse of process, that there is no reasonable cause of action, that the claim is frivolous and vexatious and that it is clear that the claim must fail.

44. In those circumstances, the focus by Mr. Ryan on the principle of *res judicata* is somewhat misplaced. The Bank's claim of a *Henderson v. Henderson* abuse of process is much wider that the strictures of a classic claim of *res judicata*. Although an interlocutory injunction may not necessarily create a *res judicata* situation, the position here is that the first proceedings were in fact disposed of when the Court was informed by counsel for Mr. and Mrs. Ryan that no further proceedings were being proposed. Therefore, this was not merely a case of an interlocutory injunction but proceedings that were essentially withdrawn.

45. Counsel for Mr. Ryan submitted that *Henderson v. Henderson* did not apply as it had not been shown by the Bank to be an abuse of process. It was submitted that contrary to In *Re Vantive Limited* there had been no deliberate holding back of any matter in the previous litigation. It was further submitted that the Bank had not shown that the proceedings were frivolous or vexatious or bound to fail.

46. Counsel for the Bank and for Mr. Ryan dealt with specifics matters raised in the pleadings and these are addressed below in light of the principles set out above

The claims made by the plaintiff Mr. Ryan in the present proceedings.
1. **The plaintiff's claim that by reason of the defendant's appointment of a receiver over the property in 2008 he was prevented from selling the property to a genuine potential purchaser.**

47. The Bank's argument is that this claim is an attempt to re-litigate the central issue which was disposed of in the 2008 proceedings. Under this heading, counsel for Mr. Ryan submits that the court should take into account that a receiver takes control of the property without reference to a court order. Counsel for Mr. Ryan submits that this is in essence an unsupervised jurisdiction of a receiver. Counsel submits that Mr. Ryan's claim is the fact that he could have sold property for €10 million – that this is not a speculative claim but is based in fact. Counsel submits that it is of importance that the present proceedings were drafted by Mr. Ryan as a lay litigant. It is submitted that the draconian relief of striking out the proceedings is not appropriate in the circumstances of this case. Permission is sought to amend the statement of claim yet no specific amendment is identified. Counsel submits this is the first bite of the cherry as regards the challenge to the prevention of the sale to a genuine potential purchaser.

48. The main submission on behalf of Mr. Ryan under this heading is that no evidence has been put before the court to show that the present proceedings are an abuse of process or *res judicata*. In particular, counsel submits that the first proceedings were interlocutory in nature and so no final decision was made on that claim.

49. The submission on behalf of Mr. Ryan that the Bank has not put forward any evidence of abuse of process or *res judicata* in the *Henderson v. Henderson* sense ignores the fact that the first defendant has placed before the court the full contents of the first proceedings and the second proceedings including all of the orders made therein. Relevant portions of those proceedings have been referred to above. The first proceedings had at their core the issue that the defendants (i.e. the Bank and the receiver) should not be entitled to accept an offer for the property of less than €10 million (see para. 9 of the general endorsement of claim). One of the reliefs sought in the *ex parte* application made by Mr. and Mrs. Ryan in the first proceedings was that Mr. Ryan should be at liberty to enter into a binding agreement for the sale of Kinnitty Castle on notice to the defendants if a bid is received by him of sufficient amount to discharge the entirety of his indebtedness to the first defendant The offer of €10 million which the plaintiff said that he had received, was dealt with in considerable detail in the course of those proceedings. Mr. Behrends swore an affidavit in those

proceedings dealing with the issue of the €10 million bid. Indeed, he said it was necessary for his clients to carry out due diligence in relation to the business of the hotel prior to committing to a final offer.

50. The first proceedings were withdrawn by counsel acting for the plaintiffs, Mr. and Mrs. Ryan. No attempt appears to have been made by Mr. Ryan to set aside the order that was made on foot of that withdrawal of proceedings. He does not appear to have launched proceedings against counsel or his solicitor but has made an allegation in the current proceedings of gross breach of professional duty by his then legal representatives.

51. In the present circumstances there is not a scintilla of evidence to support this claim of professional misconduct. For example, there is no correspondence between Mr. Ryan and his then solicitor and/or his then counsel and there is nothing to suggest that any step was taken to rectify the alleged gross misrepresentation of his position by counsel in the intervening six years to date. I am not prepared to accept Mr. Ryan's mere assertion of such gross professional misconduct in these circumstances. That lends an air of dishonesty to his pursuit of the Bank under this heading.

52. However, even if there had been a misrepresentation by counsel of the position of Mr. Ryan, that would not necessarily entitle him to launch further proceedings four and a half years later. In my view, the proper procedure would have been to either seek to set aside that order or indeed more properly to seek to appeal it.

53. In all the circumstances, I am of the view that this particular claim by Mr. Ryan is an attempted collateral attack on the previous rejection of his application for an interlocutory injunction and on the final order which had been made in those proceedings.

54. The existence of the German consortium and their interest in a bid for the property at a potential purchase price of €10 million was a central feature of the first proceedings. Those proceedings were not pursued by Mr. Ryan or his wife and an order was made accordingly. To permit Mr. Ryan to go behind that order, in separate proceedings launched four and a half years later, would violate the principle of finality in litigation. His explanation that he was so disgusted and confused by the entire episode that he lost the heart to continue the fight at that time is not, even if true, a circumstance which in the context of the entire litigation history would justify the bringing of another set of proceedings, particularly at such a time delay. It is not in the interest of justice that the Bank be exposed to multiple litigations in relation to this claim. The Bank should be entitled to regard that issue as having been disposed of in the first set of proceedings particularly with the effluxion of time since those proceedings. The entirety of the circumstances amount to harassment of the Bank on this issue. Furthermore, it would not be in the public interest that the limited resources of the courts should be utilised to allow Mr. Ryan pursue this matter when it had already come to finality in the earlier proceedings.

55. I am quite satisfied that this particular claim amounts to an abuse of process under the rule in *Henderson v. Henderson*.

56. I also accept in general terms the characterisation of the litigation history of Mr. Ryan vis a vis the Bank as set out at para.41 above as satisfying many of the tests of vexatious and frivolous proceedings. This particular aspect of his claim was litigated before and determined against Mr. Ryan at an interlocutory stage whereupon he withdrew his case. He has rolled this forward into this claim and in doing so makes allegations against his former lawyers. Costs of previous litigation remain outstanding. I note the averment of the solicitor for the Bank as to the use Mr. Ryan has made of these proceedings by attempting to dissuade buyers. In light of the entire history of this matter and the findings I have made, I draw the inference that these proceedings have not been issued for the purpose of asserting a legitimate claim but for the purpose of dissuading potential buyers. I am quite satisfied on each of these grounds as well as on a cummulative basis that this is a vexatious claim.

57. Therefore, I will strike out this part of the claim as an abuse of process of the courts and on the basis that it is a vexatious claim.

2. **The plaintiff's claim that there was a discrepancy with regard to a bank guarantee given to Allied Irish Banks PLC by the defendant in respect of the property.**

58. Mr. Ryan claims that there was a discrepancy with regard to a bank guarantee given to Allied Irish Banks PLC by the Bank in respect of the property. The Bank claims that this complaint is clearly statute barred as it relates to alleged actions on the part of the defendant which Mr. Ryan himself says occurred in 2005. Counsel for Mr. Ryan submits that he has raised an important issue in respect of an accusation of a deliberate act by the first defendant which put him into default on a loan. He submits that s.72(1) allows for the extension of the limitation time in respect of a right of action for relief for a consequence of a mistake.

59. In his particulars of claim, Mr. Ryan outlines that there were two bank guarantees provided as part of the overall loan facility. One of these was a guarantee "for an overdraft facility in favour of AIB." He claims that on or about late 2005, even though AIB had a bank guarantee from KBC, AIB discontinued the overdraft facility with the result that the facility was at its limit and KBC paid the monies due and owing over to AIB. KBC then issued a demand letter for €250,000 and deliberately and negligently put him into arrears thus enabling them to cause a deliberate default. This claim is not amplified in any of the affidavits before me.

60. In the written submissions filed on behalf of Mr. Ryan, he states that in response to this issue of the statute barred nature of this claim that "the plaintiff has raised an important issue in respect of an accusation of a deliberate act by the first named defendant which put him into default on a loan. Section 72 (1) allow[s] for the extension of the limitation time in respect of a right of action for relief for a consequence of a mistake."

61. From that submission, it is clear that it is accepted by Mr. Ryan that the claim is on its face statute barred, having first arisen in 2005. However he relies on the extension provisions concerning the consequence of mistake as set out in section 72 (1) of Statute of Limitation Act 1957 ("the Act"). In his oral submissions, counsel for Mr. Ryan did not advance any particular points in clarification of this. Indeed, at the commencement of his reply, counsel for the Bank raised the issue of whether there were any concessions being made in this regard. It was confirmed by counsel for Mr. Ryan that all matters were in issue and that nothing was in fact conceded. Indeed it can be said that counsel for Mr. Ryan has throughout the case assiduously advanced all possible arguments open to Mr. Ryan.

62. Section 72 (1) states "[w]here, in the case of any action for which a period of limitation is fixed by this Act, the action is for relief from the consequences of mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it". The language of s.72 (1) is very particular in that it relates to an action for relief "from the consequences of mistake". It is the fact of mistake and not its concealment which gives rise to the relief. In *Phillips–Higgins v. Harper* [1954] 1 QB 411, Pearson J. held in respect of equivalent English legislation that the mere concealment of a right of action from the plaintiff by a mistake did not extend the limitation period. Pearson J. held that the words were "*carefully chosen to indicate a class of actions where a mistake has been made which has had certain consequences and the plaintiff seeks to be relieved from those consequences*."

63. There is some debate among the learned authors of the Irish text books on limitation of actions as to whether this does or should represent the law in Ireland. However, in *Kearns v. McCann Fitzgerald* [2008] IEHC 85, Peart J. held that an action in negligence arising out of a mistake on the part of a *defendant* did not fall within s. 72 of the Act.

64. In that case Peart J. stated as follows –

> *"Section 72 of the Act here is clearly intended to apply to a situation where a plaintiff seeks relief from the consequences of a mistake in the context for example of a contract entered into as a result of a mistake and where the action is seeking relief by way of rescission or rectification. The present action by the plaintiffs is an action for damages arising from an alleged negligent act by the defendants, and it is clearly only an action in tort to which the case referred to has no relevance. The alleged error by the defendants cannot be equated with a mistake in the context of s.72 of the Act".*

65. On the pleadings in this case, there is no action for relief for the consequences of mistake. This is an action for damages arising from an alleged deliberate act by the defendant Bank causing damage to Mr. Ryan. While this is an action primarily in contract or for the deliberate infliction of economic loss, it is not an action seeking relief from the consequences of a mistake.

66. Even if it were possible that s.72 could be construed as permitting an action to be taken outside a limitation period where a mistake prevented the discovery of the breach of rights, no evidence has been placed before the court to sustain such a claim. Mr. Ryan has sworn numerous affidavits in these proceedings but at no point did he address any issue with respect to his claim of mistake. In circumstances where a case is bound to fail on a direct application of the limitation period set by the Statute of Limitations, there is an obligation on a plaintiff to show (either by reference to something in the papers placed before the court by the defendant or on evidence produced his or herself) that he or she comes within an exception to the limitation period. No details of the particular "mistake" on the part of Mr. Ryan or any other party were placed before the court from which the Court could be satisfied that there was such a mistake (or more properly the possibility) of such a mistake so as to permit the claim to proceed on this basis.

67. In light of all of the foregoing there are no grounds for conceiving of the possibility that Mr. Ryan could rely on s. 71(1) of the Statute of Limitations Act, 1957. It is simply inapplicable to the nature of the claim that he is making against the Bank in these proceedings. In all the circumstances, I am wholly satisfied that Mr. Ryan's claim under this heading is statute barred and that it is bound to fail.

3. **The plaintiff's claim that the receiver appointed in 2008 has failed to manage the contents of Kinnitty Castle as a result of which some chattels are unaccounted for and the remaining chattels have fallen into a state of disrepair.**

68. The Bank makes a simple submission in relation to this claim: this is a complaint against the receiver and the receiver alone. Counsel for the Bank submits that the receiver is not its agent.

69. In his written submissions, Mr. Ryan refers to the order of Ryan J. joining the receiver as a co-defendant. The written submissions continue:-

> *"the plaintiff is entitled to continue his proceedings and the first named defendant may take whatever action they wish to seek an indemnity from their co-defendant but, even if the first named defendant should prove that this claim should only be progressed against the second named defendant, this does not meet the low threshold either pursuant to O.19 r.28 or the courts inherent jurisdiction to strike out the plaintiff's proceedings."*

70. Counsel for Mr. Ryan repeated in oral submissions, that the Bank could seek an indemnity against the receiver in relation to this aspect of the claim. He said that in the normal course of proceedings one might pursue an action against two different sets of defendants and that the correct defendant would be identified during the course of proceedings.

71. In his oral submissions, counsel for Mr. Ryan also referred to the cases set out above in reliance on the statement that the threshold was a low one. In particular, he submitted he did not have to show a *prima facie* case (a submission which is undoubtedly correct).

72. It can be seen from para. 7 of the statement of claim served by Mr. Ryan that his claim is directed solely against the receivers. In his reply to particulars, he did not seek to extend that claim as against the Bank but merely asked the Bank for permission to visit the property so that he could reconcile the list of chattels in his possession with what is available in the property. Counsel for Mr. Ryan accepts that on the face of the statement of claim there is an issue with the proceedings. However, he submits that the claim is one which should be permitted to be made against the Bank. He relies upon the fact that his client was a lay litigant drafting the proceedings and that an amendment to the statement of claim would rescue the action. In particular, he relies upon the judgment of McCarthy J. in *Sun Fat Chan*.

73. At no stage did counsel engage with the central contention on behalf of the Bank on this issue which was to the effect that the receiver is the agent of the mortgagor and not that of the mortgagee unless the mortgage deed provides otherwise. Counsel for the Bank has relied upon Breslin, *Banking Law* (3rd edn, Round Hall, 2013) in which the author states the following at p.600:-

> *"The peculiar agency of the receiver – appointed by the bank yet agent of the charger – has been confirmed by the leading Irish authority on receivers, the judgment of the Supreme Court in Bula Ltd v. Crowley. The central issue in that case was a limitation point, namely, that the mortgagee bank's title to the charger of company's lands was defeated by the doctrine of adverse possession (the receivership was of some considerable duration). Denham J. (as she then was) noted that the position of the receiver is 'unique' and 'exceptional'."*

74. The above passage from Mr. Breslin's book goes on to detail how the particular form of agency relationship inherent in the receiver's appointment had been explicitly recognised in Irish law prior to Bula and was also confirmed subsequently. As Mr. Breslin says, "the receiver's position in the tripartite relationship comprising himself, the bank and the chargor, is such that he is the agent of the chargor but his function is to act for the benefit of the bank."

75. Mr. Ryan's principal complaint is set out at para. 9 of his second affidavit. He says that perhaps due to his limited knowledge of the law he cannot understand the argument that his action should be against the receiver and not the defendant. He says that the receiver was duly selected and appointed by the defendant and because of this the defendant should have an element of responsibility for the actions of the receiver, especially if they are not in the interest of either the defendant or the plaintiff. He says that if the receiver is his agent he should be entitled to dismiss him and he refers to his intention to join the receiver in the

proceedings.

76. In his third affidavit, Mr. Ryan sets out in considerable detail his complaints regarding the receiver. At para. 4, he says that the receiver "working on behalf of and appointed by the KBC Bank Ireland PLC" was well aware of matters concerning the lack of claim of the defendant or the receiver to the chattels. At para. 5, he says that he is reiterating his contention that the defendant "represented by the receiver" has no claim to these chattels. He repeats that depiction of the defendant in para. 6 of that affidavit. He refers to clause 8.14 of the mortgage document which gives a power "at any time after the security hereby constituted has become enforceable" to the bank or any receiver as agent of the chargor to remove, store and sell at the expense of the chargor any chattels found on or about the mortgage property. His complaint in that paragraph is very much directed at the defendant as represented by the receiver. The remaining paragraph of the affidavit is also directed at the actions of the receiver who has been appointed and is acting he says on behalf of KBC Bank Ireland PLC.

77. It is abundantly clear from the foregoing that Mr. Ryan is labouring under a misapprehension as to the legal position with respect to the receiver. The law is clear: the receiver acts as the agent of the mortgagor/chargor who in this case is Mr. Ryan himself. Nothing in his affidavits, nothing in his written submission and nothing in the oral submissions on his behalf suggests even the merest hint that the clearly outlined principle articulated by the Supreme Court in Bula Ltd v. Crowley should not operate in the circumstances of this case.

78. While it is true that there is a low threshold and that in appropriate circumstances permission might be granted to amend a statement of claim for the purpose of "rescuing" a cause of action, Mr. Ryan has not come even close to meeting that low threshold. In the very clear circumstances of this case, even an amendment to reflect the fact that he wishes to proceed against the Bank in relation to the position with regard to the chattels would not give Mr. Ryan a case at all. Thus, I am quite satisfied that the Bank has established that Mr. Ryan's claim under this heading against the Bank is bound to fail. Mr. Ryan's assertions that the receiver is acting as agent of the Bank are simply wrong in fact and in law. It is a claim that is wholly misconceived as against the Bank. It discloses no reasonable cause of action against the Bank. It is bound to fail. In the context of the history of Mr. Ryan's litigation with the Bank, and the fact that it is a claim that was obviously bound to fail as against the Bank, it is also a frivolous and vexatious claim. Finally, it must be stated that it is not a proper answer to a claim that a case is bound to fail to suggest that the party will be able to seek an indemnity against another proper defendant.

4. **The plaintiff's claim that the receiver has no right to sell the chattels.**

79. The submissions of the Bank and Mr. Ryan are identical to their submissions on the claim above. For the reasons as set out above, I am of the view that this is a claim that is bound to fail and is frivolous and vexatious.

5. **The plaintiff's claim of harassment.**

80. Mr. Ryan alleges that he has suffered harassment by the defendant or by its agents aimed at forcing him to sell Kinnitty Castle and to repay his loan to the defendant in full. The Bank says that this complaint is clearly statute barred as the plaintiff maintains that the said alleged harassment occurred in late 2005 and/or early 2006. In the statement of claim, Mr. Ryan says that the Bank put undue pressure on him from late 2005 onwards even though all mortgage payment were up to date at this stage within one year of drawdown. In his particulars, he refers specifically to on or about early 2006. Mr. Ryan in his affidavit of the 2nd of July, 2014, said that he was being harassed by the bank to put his property on the market from as early as September 2005 and to repay his loan in full even though repayments were up to date. He said that the whole exercise of being forced to eventually put the property on the market had an extremely negative effect on the trading position of the property. In his affidavit grounding his application for injunctive relief in the first proceedings, Mr. Ryan had sworn that a contract to sell the property was concluded in June of 2006. Nowhere does Mr. Ryan give any particulars of any incidents of harassments beyond the period of 2005 to 2006.

81. At the hearing of the action, counsel for Mr. Ryan positioned the claim with reference to the allegation of cyber squatting in 2013 as contained in the letter Mr. Ryan received from the solicitors for the receiver as set out above. In fact, counsel claimed that that was the central issue under this heading.

82. It is abundantly clear that insofar as there are allegations of harassment occurring in 2005 and in 2006, these matters are statute barred. While it may be suggested that the tort of harassment requires more than one incident in order for the tort to be completed, it appears that the initial claim in relation to harassment was made in the particular context of the claim to force him to sell the property and repay the mortgage in full. Mr. Ryan was given ample opportunity to particularise that claim and did so in his replies to particulars. His claim ended in relation to that aspect of it in 2006. I am quite satisfied even allowing a six year period for the statute of limitations, that his claim in relation to incidents of harassment in 2005 and 2006 is statute barred.

83. In relation to the claim regarding the allegation of cyber squatting, it is entirely unclear whether that claim could arise on the basis of a single letter being sent by a solicitor to another party concerning a genuine legal dispute in which proceedings are being threatened. However, the onus is on the Bank, as plaintiff, to show that such a claim is bound to fail. Perhaps the manner in which such a letter is worded could be said to go beyond legitimate legal correspondence and strays into harassment. I am of the view that it is unnecessary to decide that precise issue in light of the finding I will make that this particular claim is bound to fail against the Bank. The reason for that conclusion is based upon the legal position regarding the tri-partite relationship of the Bank as mortgagee/chargee, Mr. Ryan as mortgagor/chargor and the receiver as agent of the mortgagor/charger as discussed above.

84. As the receiver is not the agent of the Bank, any alleged wrongdoing of the receiver is not the responsibility of the Bank. There is nothing to suggest that the letter written by the solicitor for the receiver, which is alleged to constitute harassment by its claim of cyber squatting, is otherwise the responsibility of the Bank. The only claim is a general one that the receiver was acting as the agent of the Bank. The solicitor for the receiver wrote the letter on behalf of his client the receiver. In short, there is no ground at all for the advancement of this claim as against the Bank.

85. In all those circumstances and without deciding whether in fact the impugned letter could amount to the tort of harassment, the situation is quite clearly that that is a claim as against the Bank which is bound to fail. For the reasons identified under this heading and under previous headings this claim is also frivolous and vexatious.

6. **The plaintiff seeks "clarification" on whether the mortgage monies have been securitised.**

86. The Bank submits that this is a complaint which cannot constitute the basis for a cause of action in law. The Bank submits that a request for clarification is not capable of constituting a basis for legal proceedings. They further submit that the issue of securitisation was pleaded as the central cause of action in the second proceedings dismissed by Baker J. on the 24th of February,

2014. Mr. Ryan submits in his written submissions that there is no authority to support the claim that proceedings dismissed and not heard can be used as the basis that the present proceedings fall foul of the doctrine of *res judicata*. Counsel for Mr. Ryan submits that only a final decision of the court can give rise to a claim of *res judicata*.

87. Counsel for Mr. Ryan also submits that the Bank has raised no law or made a submission to support the claim that a request for clarification is not capable of constituting a basis for legal proceedings. In the circumstances, it is submitted that the low threshold required to strike out the proceedings has not been met in respect of the claim. It is also said that if there is a difficulty with the claim, an amendment to the statement of claim would be more appropriate rather than striking out the proceedings.

88. The seeking of clarification by Mr. Ryan on whether the mortgage money has been securitised is not on its face a claim against the defendant alleging any particular wrong. Order 4 rule 2 of the RSC requires that the endorsement of the relief claimed in a plenary summons shall be expressed in general terms in such one of the forms in appendix B part 2 as shall be applicable to the case, or if none be found applicable then such other similarly concise form as to the nature of the case may require. All of the claims set out in appendix B part 2 indicate a claim for a substantive wrong or a substantive relief which the plaintiff has claimed.

89. In *Caudron v. Air Zaire* [1985] IR 716, the Supreme Court refused leave to serve proceedings out of the jurisdiction under RSC O.11 r.1(g) on the basis that the relief sought was merely interlocutory in nature and no substantive relief was claimed in the endorsement of claim. While that case clearly relates to interlocutory proceedings, it does give an indication that it is necessary that proceedings contain a substantive relief.

90. In my view, RSC O.19 r.29 is also of assistance in understanding the position with regard to a claim for clarification. Order 19 rule 29 states that no action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not. Such a rule would really be unnecessary if declaratory relief was appropriately claimed under any of the other rules of court.

91. It is of further assistance to consider the nature of the claim for clarification. It is not a claim of wrongdoing. It is not even an assertion of the plaintiff's right to any particular thing. It is not a claim for declaratory relief. It is in the nature of a question being asked of the defendant. Therefore, it is similar to either an interrogatory or a claim for discovery. Those are matters which can only arise in very limited circumstances with respect to discovery, after pleadings have been issued and more usually replied to.

92. There is a very limited jurisdiction to permit an action solely for discovery as indicated by the Supreme Court in *Megaleasing UK Ltd v. Barrett* [1993] ILRM 497. It is unnecessary to delve into the details of that case but suffice to say that any of the principles identified by the Supreme Court as necessary before such exceptional relief would be granted do not exist in this case.

93. Mr. Ryan has made no real attempt to indicate to this court why the court should permit him to pursue this extraordinarily wide claim. On the contrary, he has sought to say that the Bank has failed to raise a point of law or a submission to support its case. In my view, the Bank is entitled to assert their position from what appears to be first principles.

94. Even taking into account that there is a very low threshold to be permitted to pursue an action a claim for clarification is not a relief which in the ordinary course is open to a plaintiff. However, it does seem appear that the particulars of the claim expand upon the relief claimed. In his particulars, Mr. Ryan says that he believes that the mortgage facility was securitised and that any such relief would include both the Bank and the receiver not having the required *locus standi* to have brought any proceedings and he says therefore damages shall apply in the circumstances and/or the re-instatement of the property to its rightful owner namely himself. In those circumstances and allowing for the fact that he is a lay litigant, I am of the view that the particulars save this claim from being merely one of clarification.

95. I will next consider the issue of the effect of the dismissal of the second proceedings for want of prosecution for failure to deliver a statement of claim within the time prescribed by the Rules of the Superior Courts. At issue here is whether that fact would give rise to a claim of *res judicata* in its strict sense. It appears that for a successful claim for *res judicata* there must be a judgment given by a court of competent jurisdiction which is final and conclusive on the merits.

96. In my view, there was no decision on the merits of the case in the earlier matter before Baker J. It was an order on consent that the action be dismissed for want of prosecution for failure to deliver a statement of claim within the time prescribed by the Rules of Superior Courts. In those circumstances, it was not a case where the merits were argued or indeed it was not a case where the merits of the actual claim could have been argued (which on occasion has sufficed to create a *res judicata* situation). This was simply a decision to dismiss on the basis that the rules had not been followed.

97. The further issue, as claimed by the Bank, is that this was a matter which could have been litigated with reasonable diligence in the context of the first proceedings and further could have been litigated in the context of the second proceedings. In those circumstances, the Bank says the present proceedings fall squarely within the principles outlined in *Henderson v. Henderson* and amount to an abuse of process.

98. Mr. Ryan then brought a second set of proceedings in which he made a claim relating to securitisation. Mr. Ryan's explanation for consenting to the dismissal for failure to deliver a statement of claim was that he understood that he could proceed with his claims in the present proceedings. On balance, I am prepared to accept that as an explanation. It is a curious feature of this case that the present statement of claim was apparently served prior to the making of that final order in the second proceedings by Baker J. In circumstances where Mr. Ryan had not received any objection to the contrary, it is possible that he was labouring under a misapprehension that he could have proceeded with those claims in the present proceedings.

99. Mr. Ryan is now represented by counsel. Counsel has sought to amend the statement of claim to take into account that they were defective. The precise defects have never been identified with specifics. No application has been made to amend the general endorsement of claim on the plenary summons. It is clear that the statement of claim as delivered by Mr. Ryan has added new and distinct causes of action not covered by the endorsement on the plenary summons. RSC O.20 r.6 permits alterations, modification, or extending a claim without any amendment of the endorsement of summons. However, in the case of *Moore v. Alwill* (1881) 8 LRIR 245, it was held that it was impermissible to add a new and distinct cause of action under a rule similar to O.20 r.6 of the Rules of the Superior Courts. The Bank has made reference to the defect in the statement of claim. However, they have not brought an application to set it aside. I have held that I am prepared to consider Mr. Ryan's reply to the notice for particulars as articulating a general claim regarding wrongful securitisation. In all the circumstances, without deciding if it would be permissible to rely upon a statement of claim which deviated so substantially from the general endorsement of claim, I have chosen to consider the statement of claim as if it was properly and fully drafted in accordance with the Rules of the Superior Courts.

100. I consider the existence of the second proceedings and the fact that the order of Baker J. was made on consent to dismiss for failure to deliver a statement of claim as not being indicators of themselves of an abuse of process. There are very peculiar circumstances which apply which would not render it so.

101. By contrast those circumstances do not apply to the failure to litigate this issue in the earlier set of proceedings. The current proceedings were launched five years after the first proceedings.

102. The first relief claimed in the first proceedings was a declaration that the Bank was not entitled to appoint Mr. Taite as receiver and manager over Kinnitty Castle. The claim relating to securitisation is fundamentally about the lack of entitlement of the Bank to appoint Mr. Taite as receiver and manager. In those proceedings, Mr. Ryan was represented by solicitor and counsel. As indicated above, the Court Order records that Mr. and Mrs Ryan did not pursue those proceedings. I make the same remarks and draw the same conclusions as I did earlier in this judgment as to Mr. Ryan's explanation for not proceeding. I reject his explanation of the four and a half years in which there was no further action brought against the Bank in relation to its decision to appoint Mr. Taite as receiver and manager.

103. Furthermore, there is absolutely no explanation as to why the issue of securitisation was not raised in those first proceedings. There is nothing to indicate why that aspect of the claim was only brought forward in the second set of proceedings. Mr. Ryan's belief in the securitisation of his mortgage was something that he could have litigated with reasonable diligence at an earlier stage.

104. The central relief claimed in those proceedings was as set out above. The allegation that the appointment of the receiver was invalid due to the issue of securitisation was an issue that could and should with reasonable diligence by Mr. Ryan, have been brought within those proceedings. In my view this is a collateral attack on the finality of the order in the first proceedings. The circumstances of the belated and unsupported allegations against his previous lawyers lend an air of dishonesty to these proceedings. There would be an injustice to the Bank to permit this claim to be made in these circumstances and at this remove from the original proceedings. There is a public interest also in the finality of litigation. In all of the circumstances of this case, I find that there is an abuse of process in the *Henderson v Henderson* sense in proceeding against the Bank on this issue in these proceedings.

105. In the circumstances of the litigation history and the findings I have made as set out previously in this judgment it is also vexatious to pursue this claim.

7. **The plaintiff's complaint concerning the receiver's entitlement to use a trademark he professes to have in the words Kinnitty Castle.**

106. The Bank's case is that Mr. Ryan is attempting to re-litigate an issue fully addressed in the context of the first proceedings. I propose not to address that issue in light of the finding that I am going to make under this heading. I do so on the basis of my overall finding on this matter and that while there exists a possibility that the receiver might make an application to dismiss these proceedings under a similar heading, it is inappropriate for me to express what is an unnecessary finding in that regard.

107. The Bank also submits that this issue has not been pleaded in the statement of claim. Again, in the circumstances of the order that I am about to make, I do not believe it is necessary or appropriate to examine whether that fact is a final bar to Mr. Ryan pursuing this relief or whether it would be appropriate to permit him in all the circumstances, including the fact that he is a lay litigant, to amend his statement of claim.

108. The Bank's primary submission under this heading is that this is a complaint against the receiver and the receiver alone. On the basis of the legal principles outlined above and the further matters referred to below, I am of the view that that is a correct submission. As stated previously, Mr. Ryan only claimed against the Bank in the plenary summons in these proceedings. The endorsement of claim, however, claimed as against both the Bank and the receiver for the misuse of the trademark. In the affidavits placed before the court from both parties to this motion, I am quite satisfied that Mr. Ryan's claim in this regard is directed against the receiver and the receiver alone. I refer as an example to his replying affidavit at para. 6 in which he says that he has written many letters to the receiver Mr. Declan Taite in relation to the trademarks issue. Furthermore, in oral and written submissions, nothing has been raised that would in any way suggest that there is no merit to the Bank's submission that this is a claim that is bound to fail against the Bank.

109. It is the receiver who has been operating the business at Kinnitty Castle. There is no suggestion that the Bank itself was involved in the trade or operation of Kinnitty Castle or in the use of the trademark or the website. The claim is factually directed by Mr. Ryan against the receiver's use of the trademark or the website. The receiver is not the agent of the Bank. There is simply no basis whatsoever in fact or in law to claim against the Bank for the use of the trademark. There is no reasonable cause of action against the Bank.

110. In all the circumstances, this is a claim which is bound to fail and which in the context of the litigation history outlined previously is vexatious.

Conclusion.

111. In all of the circumstances and for the reasons set out above, I make an order striking out each of Mr. Ryan's claims as against the Bank on the grounds that each particular claim either/and discloses no reasonable cause of action, is an abuse of the process of the court, is vexatious or is statute barred.