THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 126

Record Number: 2014 1279

Peart J.
Whelan J.
Gilligan J.

BETWEEN:

TIMOTHY DAIRE

PLAINTIFF/APPELLANT

- AND -

THE WISE FINANCE COMPANY LIMITED, RONALD WEISZ

AND ARTHUR GUNNING

DEFENDANTS/RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 9TH DAY OF MAY 2018

1. This appeal is yet another episode in a lengthy history of litigation between these parties. It is an appeal by the plaintiff against the order of the High Court (Baker J.) dated the 27th March 2014 when his application for liberty to commence further proceedings against the defendants was refused in circumstances where an Isaac Wunder order had been made against him by the High Court (Laffoy J.) on the 11th July 2013 restraining him from issuing any further proceedings against the bank or Mr Weisz without leave of the Court.

2. The plaintiff borrowed money from the first named defendant ("the bank") in the late 1990s. Certain lands were put up by way of security for these loans. He defaulted on his repayments, and the defendant has been attempting ever since to realise that security in order to recover what is due and owing.

3. In 2004 the bank brought proceedings by way of special summons seeking an order for possession of certain of the lands provided by way of security for the loans, and a well-charging order in respect of the remainder of the lands. Following the filing of a number of affidavits by each side the application came before Dunne J. for final determination on the 31st July 2006. An order for possession was made in respect of some of the lands, and a well-charging order was made in respect of the remainder. A stay on the order for possession of one month was granted. Upon the expiration of that stay the order could be enforced despite any appeal that might be lodged.

4. The bank took no steps to execute on foot of the order for possession upon the expiration of that one month stay, until more than six years later on the 15th April 2013. The plaintiff in fact lodged an appeal to the Supreme Court against the order dated the 31st July 2006, and the bank chose to await the outcome thereof. That fact is at the heart of the present application. That appeal came on for hearing in the Supreme Court eventually on the 21st May 2012, almost six years later. On that date the Supreme Court was informed that by counsel for the plaintiff that he was withdrawing his appeal. The Supreme Court made an order noting the withdrawal, and went on to make an order which amended some figures in respect of the amount found by the High Court to be well-charged on the lands by the order dated the 31st July 2006, and concluded by stating: "… and that as amended the said order do stand affirmed accordingly". The amendments referred to were confined to the figures in the well-charging part of the said order, and did not alter or amend in any way the part of the said order by which the bank was granted an order for possession of certain of the secured lands.

5. Following the making of the Supreme Court's order the bank set about obtaining an execution order of possession addressed to the County Registrar of County Roscommon on foot of the order for possession made on the 31st July 2006, so that it could recover possession of the lands for the purposes of putting them up for sale. This is achieved by the bank's solicitor filing certain documents in the Central Office of the High Court, including a draft execution order of possession (see Ord.47, r. 1 and Appendix F, Part II, Form 5 Rules of the Superior Courts). The execution order of possession in this case issued from the Central Office on the 15th April 2013. In its opening recital, the form of order of possession which issued, as drafted, states:

> "Whereas lately in the High Court it was adjudged by orders of the Honourable Miss Justice Elizabeth Dunne dated the 31st day of July 2006 and the 5th February 2007 and whereas lately in the Supreme Court it was adjudged *and affirmed* by order of the Honourable Mr. Justice Fennelly, the Honourable Mr Justice McKechnie and the Honourable Mr Justice MacMenamin dated the 21st day of May 2012 that the plaintiff recover possession of ALL THAT AND THOSE [the lands]… " [emphasis provided]

The reference to an order dated the 5th February 2007 is not material. That order was simply to effect a minor amendment under the 'slip rule' to the order dated the 31st July 2006, and is not relevant for the purpose of the issues on this appeal.

6. The reason why the plaintiff wishes to obtain leave of the court to institute fresh proceedings against the defendants is that he considers that the execution order of possession that issued on the 15th April 2013 is invalid, being issued outside the period of six years from the date of the High Court's order for possession made on the 31st July 2006 and in respect of which the one month stay expired on the 31st August 2006. He argues that the date of the Supreme Court order is irrelevant, since the High Court order was at all times enforceable against him should the defendants have chosen to execute on foot of it, once the stay had expired. In this regard he relies upon the provisions of Ord. 42, r. 23 of the Rules of the Superior Courts which provides:

"(23) As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment, or the date of the order."

7. The plaintiff points also to the fact that the Rules themselves make specific provision in Ord. 42, r. 24 of the Rules of the Superior Courts for a party who wishes to execute after that period of six years has elapsed, to make an application to the High Court for leave to issue execution. That rule, he submits, permits an application to be made prior to obtaining an order of possession where the time has expired, but does not permit an application to be made retrospectively to validate what is otherwise invalid. He seeks leave therefore to institute proceedings against the bank in order to obtain a declaration that the execution order of possession which issued on the 15th April 2013 is invalid and unlawful. Being a document that issued from the High Court and under the seal of the Chief Justice, it is not amenable to being quashed by judicial review proceedings under Ors. 84 of the Rules of the Superior Courts. Such a declaration must be obtained in plenary proceedings. Either way, leave of the Court is required given the existence of the Isaac Wunder order.

8. Before addressing the particular issue at the heart of this appeal, some further detail should be given in relation to the background history of proceedings between these parties, which led to the granting of the Isaac Wunder by Laffoy J. on the 11th July 2013, and in particular to what I will refer to as the 2012 proceedings.

9. In December 2012 the plaintiff commenced his 2012 proceedings by way of a plenary summons. The reliefs sought included certain declaratory reliefs that the underlying loan agreements with the defendants and on foot of which he had defaulted, leading to the possession and well-charging orders made on the 31st July 2006, are void and unenforceable, and he sought to vacate that order. Unsurprisingly perhaps, the defendants brought two motions in May 2013 and June 2013 respectively in which they sought:-

(i) an order dismissing the proceedings for want of prosecution given that no statement of claim was delivered;

(ii) on the basis that the proceedings were frivolous and vexatious and/or an abuse of process and/or pursuant to the inherent jurisdiction of the court;

(iii) an Isaac Wunder order to restrain any further proceedings by the plaintiff against them, and

(iv) an order vacating a lis pendens that the plaintiff had registered against the lands in question, which had effectively prevented the sale of the lands put up as security for the loans.

10. When these motions were heard before Ms. Justice Laffoy she acceded to the defendants' motions and made orders striking out the proceedings against the bank and Mr Weisz pursuant to the inherent jurisdiction of the court as being an abuse of process. She made the Isaac Wunder order sought, and vacated the lis pendens. She stated that she could see no possibility that the plaintiff could deliver a statement of claim, which could be supported by evidence, which might save the proceedings, and ordered that the proceedings be struck out "on the ground that they will inevitably fail and that they constitute an abuse of process of the courts". Prior to so stating she stated at para. 33 of her written judgment:

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

11. When the matter came before Ms Justice Baker on the plaintiff's application in the present proceedings for leave to institute fresh proceedings seeking to impugn the validity of the execution order of possession on the basis that it issued outside the six year period permitted by the rules of court, it was submitted by the plaintiff's solicitor who was then representing him (he is now unrepresented before this court) that the operative date for the purpose of Ord.42, r. 23 of the Rules of the Superior Courts is the date of the High Court order, and not the date of the Supreme Court order, namely the 31st May 2012. That submission was met by the defendants' submission that what the plaintiff is attempting to do in any fresh proceedings for which he is seeking leave is to seek to impugn once again the order for possession that was made by Dunne J. on the 31st July 2006 or mount a collateral attack upon it.

12. The trial judge (Baker J.) was satisfied that the issue now sought to be raised as to the validity of the execution order of possession is a new issue that had not been previously litigated – see para. 23 of the judgment. Having so stated she went on to examine whether it could be said that the claim was frivolous and vexatious, or is likely to fail. She stated at paras. 21-22 of her judgment:

"21. In the circumstances, I turn now to examine the basis of this claim and whether it could be said to be vexatious and frivolous, or is likely to fail and it seems to me that the test I must apply in this case is as follows:

(a) Are the contemplated proceedings frivolous and vexatious?

(b) Do the contemplated proceedings seek to reopen and challenge a final decision of the court other than by way of appeal?

(c) Should the court exercise its jurisdiction to refuse leave on the basis that the plaintiff has *no stateable case* and that the contemplated proceedings are likely to fail?

22. In essence what the court must ask is whether the contemplated proceedings are sustainable, or to use the words of Laffoy J. at para. 35 of her judgment in *Daire v. The Wise Finance Company Ltd & ors*, can the plaintiff "produce a statement of claim, which could be supported by evidence, which would have the effect of saving proceedings." [Emphasis provided]

13. The trial judge then proceeded to consider whether the proposed proceedings were bound to fail, and in that regard referred to

Delaney & McGrath: Civil Procedure in the Superior Courts (Roundhall, 3rd ed., 2012) at para. 16.22, and the authors' statement that the test for whether the proceedings were "bound to fail" means that they "are wholly unsustainable in law and in fact", and their statement that:

> "[T]his is a difficult test to satisfy as it will be necessary for the defendant to establish that the plaintiff's claim is entirely devoid of merit and has not just little but no reasonable prospect of success."

14. The trial judge was clearly conscious that she was required by the case-law to take the plaintiff's case at "its high watermark" when considering whether it was bound to fail. She said as much at para. 26 of her judgment by reference to the judgment of Clarke J. (as he then was) in *McCourt v. Tiernan* [2005] IEHC 268. The trial judge then went on to state:

> "Accordingly this Court must consider whether there is a stateable proposition of law that time began to run for the calculation of the six year time limit for the issue of a writ of execution at the date of the High Court order and not the date of the Supreme Court order".

15. Having noted the fact that the High Court order was a final order, and that on the expiration of one month thereafter it "became enforceable and final between the parties subject to the right of either party to appeal", and having noted also that the plaintiff did in fact appeal to the Supreme Court, she noted that this appeal had been withdrawn, and that by its order dated the 12th May 2012 the Supreme Court had affirmed the High Court order. She reached her overall conclusions on the question of what date operated for the purpose of time running against the bank under Ord. 42, r. 23 of the Rules of the Superior Courts by stating as follows at paras 28-29 of her judgment:

> "28. As between the parties, the order of the Supreme Court was final and conclusive and stands as "one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordination jurisdiction", the test explained by Lord Diplock in *D.S.V. Silo und Verwaltungs-gesellschaft m.b.H v. Owners of the Sennar and Thirteen Other Ships:The Sennar* (No. 2) [1985] 1 WLR 490 at p. 494. A judgment of an appeal court is regarded as operative for the purpose of any argument that a matter inter partes is res judicata as explained in *Spencer Bower and Turner, the Doctrine of Res Judicata* (Butterworths. 2nd ed., 1969) at para. 62 as follows:
>
> > 'When a judicial tribunal of competent original jurisdiction has granted, or refused, the relief claimed in an action or other proceeding, and an appellate tribunal reverses the judgment or order of the court of first instance, and either refuses the relief granted below, or grants the relief refused below, as the case may be, the former decision, till then conclusive as such, disappears altogether, and is replaced by the appellate decision, which thenceforth holds the field to the exclusion of any other, as res judicata between the parties.'
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> 29. An appeal was lodged by the plaintiff to the decision of Dunne J. granting an order for possession. The appellate court made an order affirming that order and the date of the appellant's court decision is, in my view, the operative date from which time began to run for the purposes of the making of a writ of execution. To use the words of *Spencer Bower and Turner*, the High Court order "disappears altogether" or merged in the affirmation of that order by the Supreme Court on the 21st May, 2012. in the circumstances, it seems to me that there is no coherent or rational argument that can be made by the plaintiff that the writ of possession was made out of time. Having regard to that view, and even taking the plaintiff's case at its height, the action which the plaintiff now seeks liberty to commence is, in my view, bound to fail."

16. The problem that I see with the trial judge's conclusion in this respect is that the statement by *Spencer Bower & Turner* upon which she places reliance for her conclusion that the operative date is that of the Supreme Court does not in fact support that conclusion. The authors in the passage quoted are referring only to a situation where "an appellate tribunal reverses the judgment or order of the court of first instance, and either refuses the relief granted below, or grants the relief refused below". That is not what happened in the Supreme Court on the 12th May 2012. On that occasion the order for possession was simply affirmed upon the withdrawal of the appeal, and without any determination on the merits of the appeal. That is a very different situation from where the appellate court reverses the order in the court below. It would be unstateable that in such a case the operative date for the purpose of Ord 42, r. 23 of the Rules of the Superior Courts would be the date of the High Court order that was reversed on appeal. That is absolutely beyond doubt, and would be an absurd situation. But that is not the situation here. Here we have an order of the High Court that was fully enforceable after one month had expired. The filing of the plaintiff's appeal had no suspensory effect whatsoever. The Supreme Court did not alter in any way the order for possession. It is true that some amendment was made to the figures in relation to the well-charging part of the order, but that amendment did not affect the enforceability of the order for possession at any time after the expiration of the one month stay. The bank could have at any time after the one month stay had elapsed sought an execution order for possession, and have executed same in the ordinary way.

17. In my view the question that the trial judge ought to have addressed, once she had concluded that it was a new issue not previously litigated between the parties, and on that basis not frivolous and vexatious, was whether the issue that the plaintiff seeks to raise in his proposed new proceedings had any prospect of success. In other words, was it a stateable case in the sense that there is a reasonable argument to be made, even though it may not ultimately succeed. Put another way, and by reference to a different context, does the issue sought to be litigated constitute a 'fair issue to be tried'. The trial judge concluded that it was not, but for the reasons I have stated I would not uphold her conclusion. The question therefore remains for this court to determine whether the new issue that the plaintiff wishes to obtain leave to litigate is one that is stateable, and therefore not frivolous and vexatious and an abuse of process in that sense. That is the bar which the intending plaintiff must surpass. This seems clear from the judgment of Clarke J. in *Kenny v. Trinity College* [2008] IEHC 320 in which he approved of the approach taken on a similar leave application by O'Caoimh J. in *Riordan v. Ireland* (No.5) [2001] 4 I.R. 463, namely that even though it is a new issue sought to be litigated, some view as to the merits of the intended issue can be explored in order to prevent an abuse of process where such an issue is unstateable, where leave is sought in the face of an Isaac Wunder order. At para. 2.4 of his judgment, Clarke J. stated:

> "2.4 It is clear, of course, that the whole purpose of the jurisdiction of the court to make an Isaac Wunder order is to protect persons from being the subject of frivolous or vexatious litigation. Obviously any proceedings which are frivolous or vexatious can be struck out. However, in the ordinary way there is nothing to prevent a litigant from commencing frivolous and vexatious proceedings and placing a burden on the defendant concerned to consider those proceedings and, if thought appropriate, to bring an application before the court seeking to have the proceedings struck out. However, where a party has abused the process of the court, by means of bringing a number of frivolous or vexatious proceedings, the court has a jurisdiction to make an Isaac Wunder order so as to give the defendant in such circumstances the added protection of precluding the plaintiff from maintaining proceedings against that defendant without leave of the court. It would, of course, be wholly inappropriate to prevent a party who is the subject of such an order from having an opportunity to persuade the court that whatever may have been the past history of litigation between the parties, new

proceedings were contemplated which were not frivolous and vexatious and which should, therefore, proceed.

2.5 The test, as identified by O'Caoimh J. in *Riordan* is as to whether, on the basis of the information available at the early stage of an application for leave, it can be said that the proceedings contemplated are frivolous or vexatious. It is also clear, in that context, that it is open to the court to seek to explore, at least to some extent, the basis on which the party would seek to advance their claim, with a view to assessing whether any such claim might be regarded as being frivolous or vexatious…".

18. It is not for this Court to express a definitive conclusion on the merits of the issue sought to be raised in new proceedings. In my view, once the issue is a new issue, the Court on an application for leave in the face of an Isaac Wunder order ought to be satisfied that the new issue, taken at its height from the plaintiff's viewpoint is arguable. If it is manifestly not arguable, it would be an abuse of process to permit it to be litigated, since it would defeat the whole purpose of the Isaac Wunder order already put in place. That purpose is to prevent a plaintiff from harassing a defendant repeatedly with litigation in which either issues already conclusively decided are sought to be re-litigated, or by repeatedly raising issues, which though not previously litigated, are nevertheless manifestly and obviously without merit.

19. Without expressing any concluded view on the issue that the plaintiff now seeks the leave of the court to litigate, I would consider that there exists a reasonable argument to be made as to whether or not the execution order of possession which issued outside the period of six years from the date of the High Court order for possession is a lawful execution order. The plaintiff may be found ultimately to be incorrect after the issue has been fully argued and determined after a full hearing, but it is not a manifestly unarguable issue given the very explicit terms of the rule, and the existence of Ord. 42, r. 24 of the Rules of the Superior Courts which specifically permits a party to seek an extension of time where that six year period has elapsed. On the other hand, it may be concluded after full argument that the date from which the time runs is the date of the Supreme Court order, even though the appeal lodged had no suspensory effect. The limit of my conclusion for present purposes is that the basis for the trial judge's conclusion that his proposed proceedings were bound to fail is undermined by the fact that the passage from Spencer Bower & Turner on which the trial judge relied does not in fact support her conclusion. There may be other case-law or authoritative text that could support the conclusion, but that remains to be seen at a substantive hearing should the matter be permitted to proceed. But in my view the issue raised cannot be dismissed as unstateable, and in that sense, an abuse of process.

20. A further question is raised by the bank which needs to be addressed on this appeal, and that is the question whether, even though the proposed issue is a new issue, and even though I consider that it is not devoid of any arguable merit, leave should nonetheless be refused on the basis that even if the plaintiff was to succeed in having the execution order for possession declared to be invalid, the bank would be in a position to obtain an order extending time for the issue of a new execution order under the provisions of Ord. 42, r. 24 of the Rules of the Superior Courts. In other words, there is futility in what the plaintiff seeks to achieve, and the bank should not have to defend the proposed proceedings in such circumstances, particularly given the history of previous proceedings and which led to the making of the Isaac Wunder order in the first place.

21. Counsel has referred again to the judgment of O'Caoimh J. in Riordan v. Ireland, and to the expression of approval therein of the judgment of the High Court of Ontario, Canada in *Re Lang, Michener and Fabian* [1987] 37 D.L.R. (4th.) 685 which listed a variety of matters as tending to show that proceedings were vexatious. Those matters, though I am sure not intended to be an exhaustive list, were the following:

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

(b) where it is obvious that an action 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 an improper purpose, including harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

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

22. For the purpose of the present question, it is the underlined part of paragraph (b) above on which the bank relies as a further basis for contending that the proposed proceedings are vexatious, namely that no possible good can ultimately derive for the plaintiff even if he were successful in the proposed proceedings beyond simply causing harassment and further financial loss to the bank. The bank points to the fact that there can no longer be any argument that the bank is not entitled to take possession of the lands given the conclusive nature of the High Court order and its affirmation by the Supreme Court, and that any further issue which the plaintiff wishes to litigate is in reality a collateral attack once more upon the bank's entitlement to possession of the lands in question. It is submitted therefore that inevitably the bank would simply obtain an extension of time for the issue of a new execution order of possession under Ord.42, r. 24 of the Rules of the Superior Courts

23. Order 42, r. 24 of the Rules of the Superior Courts provides, as relevant:

"(24) In the following cases, viz:

(a) where six years have elapsed since the judgement or order, or any change has taken place by death or otherwise in the party is entitled or liable to execution;

(b) …

(c) …

the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly. *The Court may*, if satisfied that the party so applying is entitled to issue execution, *make an order to that effect*, or may

> order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: …".

24. Counsel submits that it is hard to envisage any circumstances in which such an order would not be granted if the bank was to apply for an extension of time under Ord.42, r.24 of the Rules of the Superior Courts, given the history of these proceedings and the clear entitlement of the bank to possession of the lands pursuant to the orders referred to. The plaintiff on the other hand points to the discretionary nature of the Court's power to grant an extension of time by the use of the word "may" in the rule. He submits that it is by no means certain that the Court would excuse the failure of the bank to obtain an execution order within the six year period where that delay has not been explained, and certainly cannot be laid at the door of the plaintiff who simply exercised his constitutional right to appeal against the order for possession. In such circumstances the plaintiff denies that obtaining a declaration in his proposed proceedings that the present execution order is invalid could serve no useful purpose for him. In the event that an extension of time application was refused, there would be no lawful basis on which the bank could lawfully recover possession of the property.

25. Given the discretionary nature of the court's power under Ord.42, r. 24 of the Rules of the Superior Courts I would not consider that the plaintiff, all other things being equal, should be shut out from litigating his new issue in relation to the lawfulness of the execution order of possession on the grounds of futility alone. I do not consider that the case for futility has been made out sufficiently.

26. Finally, the bank has argued that on at least two occasions in the past the plaintiff had an opportunity to raise the issue that he now wishes leave of the court to litigate, and did not do so. It is urged therefore that the principles expounded by Wigram VC in Henderson V Henderson [1843] 3 Hare 100 apply, and reliance is placed upon the judgement of Clarke J. (as he then was) in *Moffit v. Agricultural Credit Corporation plc.* [2007] IEHC 245 where he stated:

> "*Res judicata* per se applies where the matter sought to be litigated has already been decided by a court of competent jurisdiction … The rule in Henderson v. Henderson, on the other hand, applies where a new issue is raised which was not, therefore, decided in the previous proceedings but is one which the court determines could and should have been brought forward in the previous proceedings".

27. It has been described as being estoppel by omission, but it also comes within the more general public interest in a party not being subjected to an abuse of process from multiple law suits where all issues could have been raised in a single suit. Given the plaintiff's lack of relevant knowledge on that occasion, I would not hold that he ought to have raised this new issue on that occasion.

28. There are two occasions on which it is alleged by the bank that the plaintiff failed to raise the proposed issue as to the expiry of six years under Ord. 42, r. 23 of the Rules of the Superior Courts and failed to. The first such occasion was when the plaintiff first became aware that the County Registrar was intending to take possession of the lands in question. He immediately sought to restrain him from doing so, and to that end made an ex parte application to the High Court for an interim injunction which was refused. The plaintiff has stated that while he had received a letter from the County Registrar indicating an intention to take possession of the lands under the order for possession, this letter did not enable him to be aware that the execution order was issued out of time. He says that he did not become aware of that particular fact until his solicitor eventually became aware of it in January 2014 from a review of the relevant file. It is submitted that in such circumstances it was not open to the plaintiff to have raised this particular issue when the interim injunction was sought, as he did not have the requisite knowledge as to the date of issue of the execution order of possession. Given the plaintiff's lack of relevant knowledge on that occasion, I would not hold that he ought to have raised this new issue on that occasion.

29. The second opportunity to raise the present issue that the bank submits was ignored by the plaintiff was on the bank's motion which issued on the 28th May 2013 and was heard by Laffoy J. on the 4th July 2013 to have the plaintiff's 2012 proceedings dismissed as an abuse of process, and in respect of which she delivered her written judgment on the 11th July 2013. I should add that on this application the plaintiff was represented by solicitor and counsel. In his resistance to that application, the plaintiff never asserted that the execution order for possession was unlawful for the reason now being urged. In fact by the date of hearing of that motion to dismiss the 2012 proceedings, the County Registrar, as noted by Laffoy J. in her judgment, had already executed the order of possession by taking possession of the lands and giving possession over to the bank's representative. The County Registrar's return on the said execution order states that this was done on the 28th May 2013.

30. In answer to why this new issue was not raised in any response given by him to the bank's application to dismiss his 2012 proceedings, the plaintiff has handed into this Court a copy of a letter that he wrote to the Chief Registrar of the High Court dated the 4th February 2014. In that letter he gives a brief history of the litigation up to that point, and having referred to the order made by Laffoy J. on the 11th July 2013 he then states the following by way of conclusion:

> "Subsequent to this order my solicitor reviewed the file and he felt that the Possession Order that was granted was granted in error as it did not comply with Order 42, Rule 23 of the Rules of the Superior Court. This rule requires that an Execution Order shall issue within six years of the original Order or Judgement. I believe that this did not happen in this instance and I further believe that the defendants must now show just cause as to why they should be granted such a Possession Order. In such circumstances I am required to seek and receive the Court's permission to issue any proceedings and I therefore respectfully seek the permission of this Honourable Court to bring this application before the Court to enable the court to determine this matter."

31. It was this letter which led to the plaintiff's application for leave to institute new proceedings before Ms Justice Baker, and to the order now under appeal whereby she refused leave for the reasons which I have already outlined.

32. The plaintiff's reason for not having raised the issue as to the date when defending the bank's application to dismiss his 2012 proceedings, is that his solicitor had not by that time reviewed the file and discovered from such a review the date on which the execution order of possession actually issued, and therefore that it issued outside a period of six years from the date of the order for possession issued by Dunne J. on the 31st July 2006. In my view that is an insufficient explanation to permit the plaintiff to now escape the clutches of *Henderson v. Henderson*. If that information was available from a look at the file by the plaintiff's solicitor in February 2014, it was information that was available in mid-2013. The fact that nobody appreciated the significance of the date of issue of the execution order at that stage cannot now avail the plaintiff. The information was available, and it is such an obvious point to raise against the efforts of the bank to obtain possession of the lands on foot of the execution order that the plaintiff ought not be now permitted to do so, where he could have done so earlier. To pursue that issue in yet further litigation would in my view offend against the issue estoppel principles of *Henderson v. Henderson*, and would amount to an abuse of process which the Court should not allow. It is also relevant that the County Registrar to whom the execution order of possession was directed has actually

done what he was directed to do. He took possession of the lands on foot of this execution order on the 28th May 2013. The order is therefore spent, and for that reason no useful purpose can be achieved by any declaration that the plaintiff could achieve in his intended new proceedings.

33. In all these circumstances, I would disallow the plaintiff's appeal.