**THE HIGH COURT**

**COMMERCIAL**

**[2017 No. 11335 P.]**

**BETWEEN**

**THOMAS KEARNEY**

**APPLICANT**

**AND**

**BANK OF SCOTLAND PLC AND PATRICK HORKAN**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Brian McGovern delivered on the 4th day of May, 2018**

1. In the motions before the court the defendants seek an order striking out these proceedings pursuant to the provisions of O. 19, r. 28 of the Rules of the Superior Courts or alternatively, pursuant to the inherent jurisdiction of the court on the grounds that the same are unsustainable, frivolous and vexatious and/or that they constitute an abuse of process. The defendants also seek to dismiss these proceedings under the rule in Henderson v. Henderson (1843) 3 Hare 100 on the basis that they seek to litigate issues which could and should have been raised by the plaintiff in proceedings bearing High Court record number [2012 No. 8712 P.] between Thomas Kearney plaintiff and Bank of Scotland plc and Patrick Horkan defendants ("*the 2012 proceedings*"). The second named defendant also seeks an order pursuant to s. 123(b)(i) of the Land and Conveyancing Law Reform Act 2009, that *lites pendentes* registered against a purported interest of Bank of Scotland plc on Folio GY71601F and against the purported interest of Patrick Horkan on Folio GY67197F be vacated.

2. The defendants also seek an Isaac Wunder order restraining the plaintiff from taking any further proceedings in relation to the loan facility set out in the first part of the schedule to the notice of motion of 5 March, 2018 or in relation to the deed of mortgage and charge described in the second part of the schedule without first obtaining leave from the court.

3. At the commencement of the hearing of the motions the plaintiff sought an adjournment on the basis that the second named defendant was four days late in delivering his submissions. This was undoubtedly true and was in breach of directions given by this Court. At no time did the second named defendant apply to the court for an extension of time to file late submissions. Any breach of the court's directions can be dealt with in due course by way of sanction whether as to costs or otherwise. What I had to consider is whether or not the plaintiff was prejudiced by the late delivery of the submissions to such an extent that it would be unfair to allow these motions to proceed.

4. While the second defendant's submissions were late the plaintiff had them a number of days in advance of the hearing. He received them on 2 April and the hearing of these motions commended on 17 April. The submissions of the first named defendant were delivered on time and were dated 29 March, 2018. The submissions of both defendants cover the same legal issues so there was no new material appearing in the submissions that were delivered late. I have also taken into account the necessity of dealing with this motion without further delay having regard to the surrounding issues which are referred to later in this judgment. While I am satisfied that the delay in the second named defendant delivering its submission would have added some burden to the plaintiff in preparing his response, there was no undue prejudice to him as those submissions raise no new issues. In the circumstances, the court decided to proceed with the motions notwithstanding the objections of the plaintiff.

**Background**

5. On various dates between June 2003 and November 2006, Bank of Scotland (Ireland) Limited ("*BOSI*") made a series of loan facilities available to the plaintiff. The loan facilities were secured against a property comprised of both registered and unregistered land known as the "*Sleepzone hostel*" in Galway (the "*secured property*") by way of a deed of mortgage and charge dated 14th January, 2004 (the "*deed of mortgage and charge*"). The second named defendant (the "*receiver*") was appointed by the first named defendant (the "*bank*") by deed of appointment dated 5 July, 2012 (the "*deed of appointment*"). In 2005, an application was made to register the charge in the Land Registry under dealing number D2005GY000994W. This dealing was completed on 20 August, 2013, by which time BOSI had merged into the bank by virtue of a cross-border merger by absorption so that all of its assets and liabilities vested in the bank subject to any Irish registration requirements imposed by Regulation 19(2) of the European Communities (Cross-Border) Mergers Regulations 2008. Therefore, at the time when the dealing was completed in August 2013, the bank stood in the shoes of BOSI and registration of the charge was effected in the name of the first named defendant.

6. On 29 November, 2014, the bank entered into a purchase deed regarding the sale of a portfolio of loan facilities and associated security to Carval Investors UK Limited. Included in the purchase deed was an agreement to sell loan facilities granted to the plaintiff and drawn down on account numbers 428858/108 and 428858/109, and an agreement to assign to Carval all rights, title and interest in the secured property including the charges registered on the relevant land registry folios.

7. Prior to completion of the transaction contemplated by the purchase deed, the bank, Carval and Pentire Property Finance DAC ("*Pentire*") entered into a deed of novation on 12 December, 2014, whereby Carval novated the entire of its rights, title and interest obligations and liability in favour of Pentire. By deed of transfer dated 20 April, 2015, the bank transferred its security interest in the said charges to Pentire which was duly registered as the owner of the charge.

8. In order to put these motions in context, it is necessary to set out in some detail the history of some other proceedings which are of relevance.

9. In proceedings entitled High Court [2012 No. 8712 P.] between Thomas Kearney, plaintiff and Bank of Scotland plc and Patrick Horkan, defendants (the "*2012 proceedings*"), the plaintiff challenged*, inter alia*, the validity of the charge registered against the secured property and the validity of the appointment of the receiver. The plaintiff failed to appear at a specially fixed hearing of a motion to dismiss his claim in those proceedings on the grounds that the claim was frivolous, vexatious, disclosed no cause of action or was otherwise bound to fail. By order made on 18 November, 2014, Kearns P. dismissed the 2012 proceedings. On 23 February, 2015, the Court of Appeal refused an application by the plaintiff for an extension of time within which to file an appeal. The court found that the plaintiff had failed to establish an arguable ground of appeal thereby failing to meet one leg of the test required under

*Éire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] I.R. 170. An application by the plaintiff for leave to appeal against that refusal to the Supreme Court was refused on 3 November, 2015.

10. The 2012 proceedings delayed the marketing and sale of the property by the receiver. But on 7 September, 2017, the receiver placed the property for sale on the open market. An offer has been made for the property which the receiver wishes to accept. However, the solicitors for the purchaser have stated their client would not be a position to proceed with the purchase until satisfied that these proceedings could not affect the title to be conveyed or their client's enjoyment of the property. The solicitors also referred to the fact that the purchase was being financed by bank finance and that in their view it was most unlikely the bank would provide facilities in circumstances where the title to the property was being impugned.

11. Within days of the property being placed for sale the plaintiff's wife, Mrs. Fidelma Kearney, issued proceedings on 15 September, 2017, against Mr. Kearney and the receiver and (by order) Pentire Property Finance DAC in which she asserted, as against Mr. Kearney, an interest in the property. The proceedings were entered into the Commercial List and Mrs. Fidelma Kearney failed to comply with a direction that she deliver a statement of claim. Instead, she filed a notice of discontinuance on 16 November, 2017. By order dated 27 November, 2017, the High Court vacated a *lis pendens* which has been registered by her in those proceedings in respect of the secured property. Neither Mrs. Fidelma Kearney nor her husband (who is the plaintiff in these proceedings) made any appearance in court in connection with those proceedings.

12. One month after the discontinuance of his wife's proceedings, the plaintiff instituted two separate sets of proceedings relating to the secured property. One of those proceedings was discontinued (High Court [2017 No. 10822 P.] between Thomas Kearney, plaintiff and Patrick Horkan, defendant). The other is this action.

**Discussion**

13. As he did in the 2012 proceedings, the plaintiff seeks to challenge the validity of the appointment of the receiver in these proceedings. In the 2017 proceedings, the plaintiff makes the following claims:-

> (i) that the receiver wrongfully claims to be lawfully appointed receiver;
>
> (ii) that the Charge was not registered in the name of BOSI in the Land Registry, which registration was required before the Charge could be transferred to the bank;
>
> (iii) that the receiver was appointed on 5 July, 2012, by the bank whereas the Charge was registered in the Land Registry by the bank only in 2013;
>
> (iv) that the deed of appointment of receiver did not comply with Clause 8.1 of the Charge so as to be invalid and void;
>
> (v) that the defendants (the bank and the receiver) "*connived and contrived*" with one another in the production and execution of the alleged void deed of appointment of receiver;
>
> (vi) that the defendants are estopped from relying on the Charge and/or deed of appointment of the receiver;
>
> (vii) that the sums claimed on foot of the loan mortgage are not lawfully due and owing to any person or entity; and
>
> (viii) that the receiver had no right in law to act.

14. The validity of the appointment of the receiver was an issue in the 2012 proceedings. Those proceedings have been dismissed. Therefore, the defendants argue that the plaintiff is not entitled to raise those issues again. Insofar as he raises new challenges to the validity of the receiver's appointment, these are matters that could, and should have been, raised in the 2012 proceedings and that these proceedings should, therefore, be dismissed as an abuse of process under the rule in *Henderson v. Henderson* (1843) 3 Hare 100.

15. While the defendants argue that the motion can be disposed of under the rule in *Henderson v. Henderson*, they also rely on the provisions of O. 19, r. 28 of the Rules of the Superior Courts 1986, in seeking an order striking out the proceedings on the grounds that they are frivolous and vexatious and/or disclose no reasonable cause of action. In addition, the defendants rely on the inherent jurisdiction of the court in seeking an order dismissing the proceedings on the grounds that they are unsustainable, frivolous and vexatious and/or that they constitute an abuse of process.

16. As the plaintiff has registered two *lites pendentes*, the receiver seeks an order pursuant to s. 123(b)(i) of the Land and Conveyancing Law Reform Act 2009, vacating the same on the grounds that the action to which it relates has been discontinued or determined. The court is also invited to vacate them on the basis that neither of the defendants in these proceedings have an interest in the land and the action has not been prosecuted *bona* fide.

**The Law**

**Order 19, Rule 28 Rules of the Superior Courts**

17. Order 19, rule 28 RSC provides that:-

> *"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."*

18. An assessment of the plaintiff's claim for the purposes of O. 19, r. 28 is limited to the pleadings and the court must proceed on the assumption that any assertions of fact in the pleadings are true. See *Wilkinson & Ors v. Ardbrook Homes Limited & Ors* [2016] IEHC 434, where Baker J. at para. 15 said that:-

> *"If, as a result of that analysis, the court takes the view that the claim does not give rise to a cause of action, the claim will be dismissed or stayed."*

**Application to Dismiss under the Inherent Jurisdiction of the Court**

19. The court enjoys a concurrent inherent jurisdiction to dismiss proceedings which constitute an abuse of process which is broader than the jurisdiction conferred by O. 19, r. 28 RSC. In *Lopes v. Minister for Justice, Equality & Law Reform* [2014] 2 I.R. 301, Clarke J. (as he then was) quoted from his earlier High Court decision in *Salthill Properties Limited v. Royal Bank of Scotland plc & Ors* [2009] IEHC 207, and summarised the applicable principles as follows (at p. 309 – 310):-

> *"The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious… If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the court to prevent abuse can be invoked."*

20. The authorities establish that this jurisdiction should be exercised sparingly by the courts and the courts should be slow to entertain an application of this kind.

21. The inherent jurisdiction of the court is broader than the jurisdiction provided for in O. 19, r. 28 RSC. It allows the court to assess the credibility of the facts asserted by the plaintiff and is not solely confined to the pleadings but can take affidavit evidence into account. The jurisdiction should be engaged only where there is no real risk of injustice. Where a case is wholly or significantly dependent on documents, it can be much easier for a court to come to an assessment as to whether proceedings are bound to fail. See Keohane v. Hynes [2014] IESC 66, where Clarke J. stated at para. 6.09:-

> *"In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."*

**Claims which are "frivolous or vexatious"**
22. In *Ewing v. Ireland* [2013] IESC 44, MacMenamin J. at para. 28 adopted the views of Ó Caoimh J. in *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463, who set out the following issues as tending to show that litigation was "*vexatious*":-

> *"(a) the bringing of 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 that cannot succeed, or if the action would lead to no possible good, or if no reasonable person could reasonably expect to obtain relief;*
>
> *(c) where the action is brought for an improper purpose, including the 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."*

**Claims which are "*bound to fail*"**
23. In *Keohane v. Hynes (supra),* Clarke J. stated at para. 6.10:-

> *"It is an abuse of process to bring a claim based on a breach of rights or failure to observe obligations where those rights and obligations are defined by documents and where there is no reasonable basis for suggesting that the relevant documents could establish the rights and obligations asserted. Likewise, it is an abuse of process to maintain a claim based on facts which can only be established by a documentary record and where that record could not sustain any necessary part of the factual assertions which underlie the case. Finally, it is an abuse of process to maintain a claim based on a factual assertion in circumstances where there is no evidence available for that assertion and, importantly, where there is no reasonable basis for believing that evidence could become available at the trial to substantiate the relevant assertion. However, the bringing of a claim based on a factual assertion for which there is or may be evidence (even if the defendant can point to many reasons why it might be argued that a successful challenge could be mounted to the credibility of the evidence concerned) is not an abuse of process. It is for that reason that a court cannot properly engage with the credibility of evidence on a motion to dismiss as being bound to fail and it is for that reason that the very significant limitations which I have sought to identify exist in relation to the extent to which a court can properly engage with the facts on such an application."*

**The rule in *Henderson v. Henderson***
24. The rule in *Henderson v. Henderson* operates to prevent a party from litigating one or more issues that have not previously been decided but which could have been brought forward in previous proceedings. Parties will not be permitted to hold back certain points and then, if they fail in original litigation, seek to raise those points in subsequent litigation between the same parties.

25. In *Barrow v. Bankside Members Agency Limited* [1996] 1 WLR 257 at 260, Bingham M.R. stated:-

> *""The rule in Henderson v. Henderson (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."*

26. There is a distinction between the rule in Henderson v. Henderson and the rule of res judicata. In the case of *Henderson v. Henderson*, the court has discretion but does not in the case of *res judicata*.

**Isaac Wunder Order**
27. What has become known as an Isaac Wunder Order has its origin in an order made by the Supreme Court in *Wunder v. Irish Hospital's Trust* [1940] (22 January, 1972). The purpose of such orders was explained by Keane C.J. in *Riordan v. Ireland (No. 4)* [2001] 3 I.R. 365 at 370 where he stated:-

> *"It is, however, the case that there is vested in this court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens. This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."*

**Other Legal Issues**
28. In the course of his submissions, the plaintiff relied on the judgment of Laffoy J. in *Kavanagh v. McLaughlin* [2015] 3 I.R. 555, in support of the proposition that an entity has to be registered as owner of the charge in order to have conferred on the owner of the charge any interest in the land. He submitted that there is a statutory obligation under the Registration of Title Act 1964, for BOSI to become the registered owner of the charge in order to avail of the benefit of the powers and authority written by the charge. He submits that BOSI did not register the charge in the Land Registry and that the rights contained in the deed of charge did not, in law, come into effect and so cannot be enforced. Therefore, Bank of Scotland plc did not enjoy the right in law to have any charge/burden registered in its name unless it had first been registered in the name of BOSI.

29. The defendants argue that the fact that the bank was not registered as a holder of the charge as at the date of the appointment of the receiver was clearly a matter that could have been pleaded in the 2012 proceedings. Furthermore, they argue that *Kavanagh v. McLaughlin (supra)* confirms that as a matter of contract the bank had the power to appoint a receiver independently of the powers conferred by the Registration of Title Act 1964 and there was nothing in the 1964 Act that limited or restricted the contractual power to appoint a receiver once it was exercisable. Therefore, the fact that the bank was not registered on the relevant folio as the owner of the relevant charge did not prevent it validly appointing a receiver over the registered property secured by that charge. I accept the defendants' submission as to the meaning of *Kavanagh v. McLaughlin* and am satisfied that the plaintiff's understanding of the case is incorrect.

30. The plaintiff also relies on a judgment of Gilligan J. in The *Merrow Limited v. Bank of Scotland plc & Anor* [2013] IEHC 130, wherein he cites a number of authorities in support of the proposition that the appointment of a receiver is made invalid and void and of no effect if not made in strict compliance with the legal requirements stipulated by the bank in the written contractual terms and conditions imposed by the security instruments. In the circumstances, the plaintiff invites the court to conclude that what he calls the "*purported appointment*" of the receiver in this case is invalid, void and of no effect.

31. The circumstances in that case were different and involved the failure to make an appointment under seal in circumstances where that was the method of appointment which had been nominated by the bank and to which it had agreed. In this case, the plaintiff's challenge to the receiver is on an entirely different basis. But in any event, the plaintiff challenged the appointment of the receiver in the 2012 proceedings and those proceedings have been dismissed. Furthermore, the hearing of the motion to dismiss the 2012 proceedings took place on 18 November, 2014 which was after the judgment given by Gilligan J. in *The Merrow Limited*. If the plaintiff had turned up to prosecute the 2012 proceedings on that date, he could have made any point he wished to make as a result of that decision. Raising the point now offends the rule in *Henderson v. Henderson*, but in any event, for the reasons set out above, the judgment of Gilligan J. does not give any assistance to the plaintiff.

32. At the hearing of this motion, the plaintiff continued to assert that the defendants' affidavits in support of the motion are inadmissible because they stated the place of business of the deponents and not their home address. He relied on O. 40, r. 9 of the RSC which states that every affidavit shall state the description and true place of abode of the deponent. If one was to assume, for a moment, that this amounted to some deficiency under the rules, it is not at all clear to the court how he would have been prejudiced by this. But in any event, this point was raised by him before the Court of Appeal on 23 February, 2015, and was comprehensively dealt with in a ruling by Kelly J. (as he then was) citing a long line of authority which is against the plaintiff on this point. Kelly J. observed that:-

> *"…frankly it would be absurd to rule out this affidavit simply because the deponent gave as his place of abode his place of business. I do not believe that it is necessary to rely on the provisions of O. 40, r. 15 but if it were I would have no hesitation, speaking for myself in any event, in applying it and overruling this objection on that basis."*
>
> This rule provides:-
>
> *"The Court may receive any affidavit sworn for the purpose of being used in any cause or matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received."*
>
> The ruling of the Court of Appeal conclusively deals with the objection to the defendants' affidavits on this point.

**Decision**
33. The plaintiff appears to be under a fundamental misapprehension as to the legal basis on which the receiver was appointed by the bank on 5 July, 2012. The appointment was made pursuant to a contractual entitlement of the bank to appoint a receiver in the circumstances that arose. Far from *Kavanagh v. McLaughlin*, being of assistance to the plaintiff it is, in fact, authority for the validity and lawfulness of the appointment of the receiver.

34. These motions can be disposed of entirely by the rule in *Henderson v. Henderson*. Insofar as any new points are canvassed in these proceedings to argue against the validity of the appointment of the receiver, these are arguments that could have been made in the 2012 proceedings and should have been made in those proceedings. The 2012 proceedings challenged the bank's entitlement to enforce the loans and appoint the receiver and also challenged the authority of the receiver. Those proceedings have been dismissed. The plaintiff cannot now bring forward new challenges to the appointment of the receiver that he did not make in 2012 and which he could have made at that time. On the basis of *Henderson v. Henderson* alone, I would allow the defendants' motions to dismiss these proceedings *in limine*.

35. But in view of the conduct of the plaintiff in earlier proceedings and his persistent challenge to the authority of the receiver, and in the interest of completeness, I intend to deal with each of the other grounds raised by the defendants in their motion to have these proceedings dismissed.

36. Quite apart from the fact that the plaintiff's challenge to the receivership was dismissed in the 2012 proceedings, his plea in para. 5 of the statement of claim cannot succeed and is bound to fail. Paragraph 5 states:-

> *"That Bank of Scotland Ireland (BOSI) is purported to have a first legal charge over the said lands which were allegedly granted to them by the first named defendant pursuant to the purported deed of mortgage and charge of 14th January, 2004, no such alleged charge was ever registered in the Land Registry, and the alleged charge must, in Law, be so registered before the said alleged charge can be lawfully transferred to any third party, such as the first named defendant herein."*

37. The decision of the Supreme Court in *Kavanagh v. McLaughlin* disposes of that point. In that case, Laffoy J. said at para. 109:-

> *"Having regard to the terms of clause 9.1 of the 2006 Charge [Clause 8 in the mortgage in this case], which has been quoted earlier, as a matter of contract between BOS, a successor in title of BOSI, and the McLaughlins, BOS unquestionably had power to appoint a receiver independently of the powers conferred by the Act of 1964. There is nothing in the Act of 1964 which limits or restricts the contractual power to appoint a receiver once it is exercisable. Accordingly, I am satisfied that the fact that BOS is not registered on the relevant folio as the owner of the 2006 Charge did not prevent it appointing the Receiver as receiver over the registered property secured by that charge."*

38. Therefore, the claim at para. 5 of the statement of claim is bound to fail. The same can be said of para. 6 of the statement of claim as the bank had stepped into the shoes of BOSI at the time when the dealing was pending before the Land Registry.

39. The claims made in paras. 8, 9 and 10 are also disposed of by *Kavanagh v. McLaughlin*. So far as para. 11 is concerned, it is a plea that the deed of appointment was not made in strict conformity with the deed of mortgage without elaborating in what way this was so. But in any event, this argument should have been made in the 2012 proceedings and is, therefore, bound to fail by virtue of the rule in *Henderson v. Henderson*. The same position arises with regard to paras. 12, 13, 14 and 15 of the statement of claim.

40. The relief sought in para. 16 also offends against the rule in *Henderson v. Henderson* and cannot succeed. In any event, the first named defendant has no interest in the lands, the loan or the security and that relief could not be obtained against the first defendant. Moreover, the plaintiff swore an affidavit on 17 April, 2018, in which he alleged that the bank overcharged him by the sum of €20,686.05. This is after an affidavit had been sworn by the second named defendant on 22 January, 2018, in which he stated his understanding to be that the debt outstanding to Pentire from the plaintiff was in the sum of €2,692,043.89 as of 12 October, 2017, which had been set out in an affidavit of Donal O'Sullivan sworn on behalf of Pentire in the plaintiff's wife proceedings which were discontinued. In the 2012 proceedings, there are some oblique references to the debt but not in very clear terms and, in any event, the claim in these proceedings is not for the debt but is one brought by the plaintiff challenging the powers of the bank and the receiver. If there was a point to be made about the loan, it should have been made in the 2012 proceedings and again would fall foul of the rule in *Henderson v. Henderson*. While, I can express no view on the precise sum that may be due and owing by the plaintiff to Pentire, any credits or deductions against a sum which may be claimed will be a matter for other proceedings. But so far as the plaintiff raises this issue as a challenge to the appointment of the receiver, it is a plea which is bound to fail and also falls foul of the rule in *Henderson v. Henderson*. No explanation was tendered as to why (if it constitutes a cause of action at all) the claim as to the amount of the debt could not have been included in the 2012 proceedings.

41. In any event, the bank never instituted proceedings to recover judgment for a liquidated sum against the plaintiff and it would only arise as a matter for the plaintiff to raise with Pentire in the event that it commenced proceedings on the debt. The plaintiff has not made out any case that the application of surcharge interest was in any way material or linked to his falling into arrears in respect of loan repayment obligations under the loan facilities.

42. In summary, therefore, I am satisfied that the defendants are entitled to an order dismissing these proceedings under O. 19, r. 28 of the Rules of the Superior Courts 1986, on the grounds that they disclose no reasonable cause of action. I am satisfied that the proceedings are frivolous and vexatious having regard to all the circumstances outlined in the affidavits and submissions before the court as they are an attempt to frustrate the receiver in the exercise of his powers and are not brought for a legitimate purpose. Furthermore, they are seeking to re-litigate matters which have already been dealt with in the 2012 proceedings. I also have regard to the fact that *lites pendentes* have been registered as a result of these proceedings which have continued to frustrate the receiver in his attempt to dispose of the secured property.

43. I am also satisfied that the defendants are entitled to an order under the inherent jurisdiction of the court dismissing these proceedings on the grounds that they are unsustainable, frivolous and vexatious and on the basis that they constitute an abuse of process. As I have said, the proceedings seek to re-litigate matters that were raised in the 2012 proceedings which have been dismissed. Furthermore, any points that are new in these proceedings could have been raised in the 2012 proceedings and fall foul in the rule of *Henderson v. Henderson*. Earlier in this judgment, I have referred to the jurisprudence on the subject of what constitutes frivolous and vexatious litigation and abuse of process and I am quite satisfied that the action of the plaintiff in mounting this litigation comes within the scope of those terms defined in the authorities referred to.

44. It follows from the above that the *lites pendentes* should be vacated. Neither of the defendants' claim an interest in the property.

It is Pentire which is the registered holder of the charge and it is not a party to these proceedings. The history of the litigation brought by the plaintiff and, on one occasion, by his wife, establishes quite clearly that the dominant purpose was to facilitate the registration of *lites pendentes*. I am satisfied that these proceedings were also brought for that purpose and, accordingly, for an improper purpose or, to use the wording of s. 123 of the Land and Conveyancing Law Reform Act 2009, the proceedings are "…*not being prosecuted bona fide*". I will make an order directing that the *lites pendentes* be vacated pursuant to s. 123(b) of the 2009 Act.

45. Finally, there is the claim by the defendants for an Isaac Wunder Order restraining the plaintiff from bringing further proceedings without leave of the court. For six years, the receiver has been obstructed in carrying out his duties and he now has a buyer for the property. It is all too evident from the history of proceedings taken by the plaintiff in connection with the receivership that, unless restrained by this Court, he will almost certainly continue to engage in litigation in an attempt to frustrate the receiver on an ongoing basis. This cannot be allowed to continue. It is only in the most exceptional of circumstances that a court will make an order of this kind because the right of access to the courts is one to be respected and cherished. But that right carries with it the obligation not to abuse the privilege by never ending litigation covering ground already travelled, thereby imposing a significant burden not only on the other parties to the litigation but also to the administration of justice. The resources of the courts are finite and there are good public policy reasons for preventing abuse by litigants who endlessly clog up the court lists resulting in delayed access for other citizens to the justice system. The administration of justice would be brought into disrepute if the courts were to permit vexatious litigants to come to the courts again and again re-litigating points already disposed of or which could have been disposed of if earlier proceedings had been conducted properly.

46. I make all due allowance for the fact that the plaintiff is a litigant in person. But the courts cannot overindulge litigants merely because they are not legally represented as this would skew the system to the detriment of those parties who take the trouble and expense of retaining legal advisors to present their cases. While the courts can give some latitude to unrepresented litigants they have to act in an even handed manner. A great deal of court time has been taken up by the plaintiff in litigating his challenge to the appointment of the receiver and the time has now come when this has to stop.

47. This is one of the exceptional cases where the court must make an Isaac Wunder Order in order to prevent further abuse of process. Accordingly, I will make an order restraining the plaintiff from bringing any further proceedings, without leave of the court, against the defendants or any other party challenging the receivership or the right of the receiver to act on foot of his authority as receiver over the secured property.