

THE HIGH COURT

[2018 3606 P.]

BETWEEN

PATRICIA HINDE

PLAINTIFF

AND

PENTIRE PROPERTY FINANCE DESIGNATED ACTIVITY COMPANY AND TOM KAVANAGH

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 25th day of September, 2018.**The Facts**

1. On the 9th August, 2006 the plaintiff, then of an address in Newcastle, Co. Dublin, accepted an offer from Bank of Scotland (Ireland) Ltd. dated 7th June, 2006 for a loan of €385,000 to be secured by way of a first fixed charge over No. 22 The Beeches, Straffan, Co. Kildare and any car parking spaces thereon. The loan ("the Loan") was governed by and to be construed in accordance with the laws of Ireland.

2. By a mortgage and charge dated 24th August, 2006 the plaintiff charged the property to Bank of Scotland (Ireland) Ltd. and the mortgage was registered in the Registry of Deeds, registration number 2006191261 ("the Mortgage"). The deed was governed by and to be construed in accordance with the laws of Ireland.

3. By virtue of a cross-border merger pursuant to the European Communities (Cross-Border Mergers) Regulations 2008 of Ireland and the Companies (Cross-Border Mergers) Regulations 2007 of the United Kingdom, approved by the High Court of Ireland on 22nd October, 2010 and approved by the Scottish Court of Session on 10th December, 2010, all of the rights and obligations of Bank of Scotland (Ireland) Ltd. under the loan and the mortgage became vested in Bank of Scotland plc. with effect from 31st December, 2010. Bank of Scotland plc. is a company incorporated under the laws of Scotland.

4. On the 29th November, 2014 Bank of Scotland plc. entered into a purchase deed with CarVal Investors UK Ltd. ("CarVal"). CarVal is a company incorporated in England. The purchase deed defines Bank of Scotland plc. as the seller and CarVal as the purchaser. It provides as follows:

"Background

(1) The seller is the legal and beneficial owner of the purchased assets.

(2) The seller agrees to sell and the purchaser agrees to purchase the Purchased Assets and to assume the Assumed Obligations on the terms and conditions of this Deed.

"Borrower" means the borrower or borrowers under any Finance Agreement and as specifically set out in Part A of Schedule 1 and any person who has or may have obligations either jointly or each of them severally in respect of such facility and the terms borrowers shall be construed accordingly.

"Closing Date" means 20th April, 2015 or such later date as the parties agree in writing provided that such date should not be later than the long stop date.

"Facilities" means the outstanding loans linked to the borrower's primary accounts and related to some accounts to be purchased by the purchaser pursuant to this deed and facility means any one of them, as the context requires.

"Purchased Assets" means

(a) the facilities;

(b) the related security;

(c) any and all of the seller's rights, title and interest

(i) in and to the rent, claims and other rights of the seller;

(ii) in and to any net collections; and

(iii) in and to any non-cash distributions with respect to the Facilities, in each case arising or received after the cut-off date;

(d) any and all of the seller's rights, title, interest and benefit in the finance agreements; and

(e) the ancillary rights and claims.

(2) Sale and Purchase

The seller agrees as legal and beneficial owner to sell to the purchaser the purchased assets and the purchaser agrees

to purchase the purchased assets and assume the assumed obligations, such sale to take effect on the closing date in accordance with and subject the terms and conditions of this deed.

6.1 Closing Date

Closing shall take place on the closing date and the purchaser and the seller agree that on such date the sale and transfer referred to in Clause 2 (sale and purchase) shall occur and the purchaser shall be deemed to have assumed, and shall perform and comply with all of the assumed obligations as if the purchaser was originally named as a party to the purchased assets and the seller shall be released from the assumed obligations with effect from the closing date.

6.4 Transfer of Title to the Facilities

(a) At closing, the following shall occur:

(i) upon receipt by the seller of the provisional settlement amount from the purchaser (and for the avoidance of doubt, transfer of the purchase assets shall be deemed to have occurred upon receipt of the said provisional settlement amount), all such rights, title and interest as the seller may have in and to the purchase assets (subject to and with the benefit in case of the related finance agreements) shall transfer under the relevant transfer documents to the purchaser.

29. Governing Law

This deed and all non-contractual obligations arising from or connected with it shall be construed in accordance with and governed by the laws of Ireland."

The schedule to the purchase deed included the Loan and the Mortgage.

5. By deed of novation dated 12th December, 2014 between CarVal, Pentire Property Finance Ltd. ("Pentire") and Bank of Scotland plc. the purchase deed dated 29th November, 2014 was novated on the following terms. CarVal was described as the transferor, Pentire was described as the transferee and Bank of Scotland plc. was described as the continuing party. The effective date of the deed was the 12th December, 2014. The deed provided:

"Background

(A) This deed is supplemental to a loan purchase deed dated 29th November, 2014 between, the transferor and the continuing party (the "purchase deed").

(B) On the effective date (defined below), the transferor will novate the entire of its rights and obligations under the purchase deed to the transferee and the continuing party has agreed to the novation.

2. Novation and Transfer

(a) On the effective date the transferor will novate and transfer all its rights, title, interest, obligations and liabilities, howsoever described or arising, under the purchase deed to the transferee.

(b) The novation and transfer referred to in Clause 2(a) will take place on the effective date.

3. Novation of Purchase Deed

3.1. The parties hereby agree, as and with effect from the effective date, that the transferee shall be and is hereby substituted in place of the transferor as a party to the purchase deed and that the purchase deed shall be treated in all respects as if the transferee had been, from the date of execution, the original party to the purchase deed instead of the transferor.

3.2. The transferee hereby accepts the liabilities of the transferor under the purchase deed and agrees that it shall perform and discharge all liabilities and obligations to be performed or discharged by it by virtue of the purchase deed in all respects as if the transferee were the original party to the purchase deed instead of the transferor.

3.3. On the effective date in relation to the rights, title, interest, obligations and liabilities relating to the purchase deed:

(a) the transferor and the continuing party will be unconditionally and irrevocably released from their respective obligations and liabilities to each other under the purchase deed (the discharged obligations);

(b) the transferee and the continuing party will assume obligations and liabilities towards each other which differ from the discharged obligations only to the extent that they are owed or assumed by the transferee instead of the transferor;

(c) the rights under the purchase deed of:

(i) the transferor against the continuing party; and

(ii) the continuing party against the transferor,

(together the discharged rights) will be unconditionally and irrevocably terminated and cancelled and neither party shall have any claim against the other for any act or omission arising under or in connection with the purchase deed.

8. Governing Law

This deed and any non-contractual obligations arising out of or in connection with it are governed by Irish law."

6. On the 20th April, 2015 Bank of Scotland plc. and Pentire executed a deed in the following terms:

"Background

1. By the mortgages, particulars of which are set out in the first and second columns of Schedule 1 to this deed (the "mortgages"), the properties, particulars of which are in the third column of the Schedule 1 to this deed (the "properties"), became security for the repayment of the monies therein mentioned.

2. By a purchase deed made between the seller and CarVal Investors UK Ltd. on 29th November, 2014 (as novated to Pentire Property Finance Ltd. pursuant to a deed of novation dated 12th December, 2014) (the "purchase deed"). The seller agreed to sell and the purchaser agreed to buy inter alia all right, title, interest, benefit and obligation (both present and future) of the seller in and under the mortgages for the consideration therein mentioned.

3. By cross-border merger pursuant to the European Communities (Cross-Border Mergers) Regulations 2008 of Ireland (the "Irish Regulations") and the Companies (Cross-Border Mergers) Regulations 2007 of the United Kingdom approved by the High Court of Ireland on 22nd October, 2010 and approved by the Scottish Court of Session on 10th December, 2010, all the estate, right and title of Bank of Scotland (Ireland) Ltd. in the mortgages became vested in the Bank of Scotland plc. on 31st December, 2010 by virtue of Article 19 of the Irish Regulations.

It is agreed that for the consideration expressed in the purchase deed (receipt of which is hereby acknowledged) the seller as legal and beneficial owner free from encumbrances hereby grants, conveys, assigns, transfers and assures to the purchaser:

1. So much of the properties as a freehold tenure to hold the same under the purchaser in fee simple subject to the proviso for redemption as contained in the mortgages.

2. So much as the properties as are leasehold tenure to hold the same under the purchaser for all the residue or respective residues of the terms or respective terms of years demised (or if applicable assigned) by the mortgages (the "mortgage terms") subject to the rents reserved by and the covenants on the part of the mortgagee contained in the mortgages and to the proviso for redemption as contained in the mortgages; and

3. All the estate, right, title and interest of the seller in the reversions expectant on the determination of the mortgage terms in respect of the properties whatsoever and howsoever arising TO HOLD and same under the purchaser subject to the proviso for redemption as contained in the mortgages, together with all rights, entitlements and interests of the seller in the mortgages TO HOLD under the purchaser absolutely."

Number 40 in the Schedule to the deed is the Mortgage.

7. By letter dated 23rd March, 2015 Bank of Scotland plc. informed the plaintiff that it had sold her facility and the security and rights relating to the facility to Pentire. Pepper Finance Corporation Ireland Ltd. on behalf of Pentire wrote to the plaintiff at her then address in England informing her that as and from the 20th April, 2015 Pepper Finance Corporation Ireland Ltd. would be her new point of contact in respect of the Loan and Mortgage on behalf of Pentire.

8. From April 2015 through to October 2017 Pentire, through Pepper, engaged with the plaintiff in relation to outstanding arrears in respect of the Loan. By letter dated the 20th October, 2017 Pentire demanded immediate repayment of the aggregate of the sum then due and owing on the Loan €348,996.85. The plaintiff failed to pay the amount demanded and by a deed of appointment dated the 1st December, 2017 Pentire appointed Tom Kavanagh, the second named defendant, receiver and manager of the property pursuant to the Mortgage of the 24th August, 2016 between the plaintiff and Bank of Scotland Ireland Ltd.

9. On the 13th April, 2018 the second named defendant entered into a contract to sell the property at auction.

10. The plaintiff instituted these proceedings on the 24th April, 2018 and on the same day registered a lis pendens against both Pentire and the second named defendant.

The Plaintiff's Claim

11. The plaintiff claims that Pentire is not entitled to enforce the loan and therefore not entitled to enforce the Mortgage against her and the second named defendant is not entitled to sell the property. She says that the purchase deed of the 29th November, 2014 between Bank of Scotland plc. and CarVal is unenforceable against her. Her statement of claim dated 18th June, 2018 pleads:

"6. CarVal Investors UK Ltd. ("CarVal") was not, at the time of the said agreement, an authorised/licensed person pursuant to the United Kingdom's Financial Services and Markets Act 2000 ("FSMA"). The agreement for the sale of assets, including assets connected to the property, constituted a regulated activity, at the time of the agreement, in the United Kingdom.

7. The agreement constituted an agreement (according to Part 1, Schedule 2 of FSMA) to buy/sell investments in particular (as is brought within the rubric of FSMA by way of Part 2 of Schedule 2 thereof), loans and other forms of credit, including loans connected to the property. An agreement for the sale and/or purchase of investments (as described in the FSMA) may only be conducted by authorised persons. CarVal was, at the time it agreed to purchase the relevant assets, not so authorised.

8. Pursuant to s. 26 of FSMA, the said agreement as between [Bank of Scotland plc.] and CarVal is not enforceable as against another party to the transaction, including the plaintiff. The plaintiff, arising from her position as a party to the facility letter/mortgage is a party to the said agreement (on the basis, inter alia, of the singular importing the plural by way of the relevant statute and by way of the plaintiff's position as a party to the underlined documents purportedly transferred and whose assets sent to the transfer is ordinarily required, whether or not abrogated by contract) and,

therefore, the said agreement is unenforceable as against the plaintiff.

9. On or about the 12th December, 2014, the assets and/or obligations of CarVal were purportedly transferred, by way of novation, to the first named defendant ("Pentire"). As the antecedent assets transfer agreement providing CarVal with an authority to hold the assets connected to the property for the purposes of novation was, at that stage, unenforceable as against the plaintiff, the purported transfer of the assets connected to the property as between CarVal and Pentire, on or about 21st December, 2014 was ineffective and futile in law as regards the relevant assets connected to the property.

10. Arising from the foregoing, the relevant assets i.e. the mortgage and facility letters together with the associated data documentation, did not validly pass to the first named defendant on or about 12th December, 2014 or at all. In the foregoing circumstances, the first named defendant had no authority to appoint the second named defendant as receiver over the property and therefore the second named defendant has not been validly appointed as receiver over the property".

12. The reliefs the plaintiff seeks in the proceedings are:

"(1) A declaration that the purported appointment of the first named defendant of the second named defendant as receiver and manager of the property designated as all that and those the dwelling house known as 22 The Beeches, New Road, Straffan, Co. Kildare ("the property") is invalid, void and of legal effect.

(2) An order setting aside the purported appointment of the second named defendant as receiver of the property.

(3) A declaration that the purportedly transfer of the Bank of Scotland loan connected to the property by way of purchase deed from Bank of Scotland plc. to CarVal Investors UK Ltd. on or about 29th November, 2014 is invalid, void and of no legal effect.

(4) A declaration that the purported transfer of the Bank of Scotland loan connected to the property to Pentire Finance Property Ltd. (now named Pentire Property Finance DAC) on or about 20th April, 2015 is invalid, void and of no legal effect.

(5) A declaration that the first named defendant is not entitled to enforce the loan connected to the property purportedly transferred to the first named defendant on or about 20th April, 2015."

The plaintiff seeks an order for taking of account and inquiries and damages for trespass, negligence, breach of duty and/or tortious interference with contractual relations, and interest and costs.

The Application

13. By notice of motion dated the 5th June, 2018 the defendants applied for an order striking out the plaintiff's proceedings pursuant to O. 19, r. 28 on the grounds that they do not disclose a cause of action and/or pursuant to the inherent jurisdiction of the court on the grounds that they are frivolous and vexatious and bound to fail. In addition, the defendants seek an order pursuant to s. 123(b)(i) of the Land and Conveyancing Law Reform Act 2009 to vacate the lis pendens registered on 24th April, 2018 by the plaintiff.

The relevant legal principles

14. An application brought to dismiss proceedings pursuant to O. 19 r. 28 of the Rules of the Superior Courts is based on the contention that the case as pleaded does not disclose a cause of action (*Moylist Construction Ltd v. Doheny* [2016] 2 I.R. 283).

15. An application brought pursuant to the inherent jurisdiction of the court to dismiss proceedings on the basis that they are bound to fail is brought to prevent an abuse of the process of the court. It applies to cases where it can be shown that there is no arguable basis in law or in fact for the claim made (*Moylist Construction*).

16. The jurisdiction is one to be exercised sparingly and a case should be dismissed only when there is no real risk of injustice.

17. The default position is that proceedings should go to trial, whether on affidavit in the case of summary or special summons proceedings or to plenary hearing.

18. If the claim could never have succeeded, then the claim should be struck out as an abuse of the process of the court (*Jodifern Ltd v. Fitzgerald* [2000] 3 I.R. 321).

19. If the claim is based upon a document or documents which governs the legal relations between the parties, the court can consider the terms of the document or documents and may be able to come to a clear view as to the legal consequences flowing from the document or documents. (*Keohane v. Hynes* [2014] IESC 66).

20. If the legal issues are questions concerning the proper interpretation of the document and are complex, then the matter should not be dismissed on a motion that it is frivolous and vexatious and bound to fail.

21. A mere assertion, for which no evidence or no credible evidence for believing that there could be any evidence is put forward is insufficient to resist a motion to dismiss a claim. But where there is evidence on affidavit which, if accepted at trial, might arguably lead to the plaintiff succeeding, then the proceedings ought not to be dismissed on the basis that they are bound to fail.

22. A plaintiff is required to put forward a credible basis for suggesting that it may at trial be possible to establish the facts which are asserted and which are necessary for succeeding in the proceedings. (*Keohane; Lopes v. Minister for Justice* [2014] 2 I.R. 301).

23. I gratefully adopt the summary of Clarke J. in *Keohane v. Hynes* [2014] IESC 66 at paras. 6.9 and 6.10 of his judgment: -

"6.9 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. 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.

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."

Discussion

24. The Loan, the Mortgage, the Purchase Deed, the Deed of Novation and the Deed of April 2015 are all expressly governed by Irish law. The plaintiff does not dispute that the Mortgage with Bank of Scotland (Ireland) Ltd has been conveyed to Pentire. Likewise, she advances no argument based on Irish law to challenge the validity of the transfer of the Loan by Bank of Scotland Plc to Pentire. This is understandable, as, as a matter of Irish law, the Loan passed from Bank of Scotland (Ireland) Ltd to Bank of Scotland Plc by virtue of the cross border merger and Bank of Scotland Plc sold and transferred the Loan to Pentire by the Purchase Deed and the Deed of Novation, which was completed in April 2015. Bank of Scotland Plc wrote to the plaintiff on the 23rd March, 2015 informing her of the impending sale and transfer of her loan and, after the transfer of the loan, Pentire, through its agent Pepper, informed her of the transfer. Thus there was compliance with the requirements of s. 28 (6) of the Judicature Act, 1877. The plaintiff subsequently dealt with Pepper as agent of Pentire in relation to the Loan.

25. From the date of the novation of 12th December, 2014 the Deed of Novation provides that the Purchase Deed shall be treated in all respects as if the transferee [Pentire] had been, from the date of execution, the original party to the Purchase Deed instead of the transferor [CarVal]. As of 12th December, 2014 CarVal and Bank of Scotland Plc were unconditionally and irrevocably released from their respective obligations and liabilities to each other under the Purchase Deed. The rights under the purchase deed of CarVal against Bank of Scotland Plc and of Bank of Scotland Plc against CarVal were unconditionally and irrevocably terminated and cancelled and neither party had any claim against the other for any act or omission arising under or in connection with the Purchase Deed. The operative part of the Novation Deed was to substitute Pentire in place of CarVal as a party to the Purchase Deed. The effect of the novation was that, as a matter of Irish law, neither original party to the Purchase Deed could enforce the Purchase Deed against the other.

26. The plaintiff argued that the Deed of Novation is not a simple novation but rather is a deed of novation and transfer. It is supplemental to the Purchase Deed and clause 2 provides that on the effective date the transferor will novate and transfer all its rights, titles, interest, obligations and liabilities under the Purchase Deed to the transferee. She submitted that this meant that the deed was not a simple novation, but effected a transfer as well as a novation.

27. The deed is governed by Irish law and I am in a position to construe the deed at the hearing of this application in accordance with the authorities I have cited above. This argument of the plaintiff is not sustainable as it is based on the premise that clause 2 is an operative clause of the Deed of Novation. Clause 2 is not the operative clause. Clause 3 is the operative clause. It clearly substitutes Pentire for CarVal as a party to the Purchase Deed. The Purchase deed is to be treated "in all respects" as if Pentire had been the original party to the deed. CarVal and Bank of Scotland plc were each unconditionally and irrevocably released from their respective obligations and liabilities to each other under the Purchase Deed, their respective rights under the Purchase Deed against each other were unconditionally and irrevocably terminated and cancelled. There is no *transfer* by CarVal to Pentire of any of any right, asset, liability or obligation under or relating to the Purchase Deed. The plaintiff speculates that there may be continuing obligations which survive the assignment and novation of which she is unaware due to the redactions of the deeds exhibited by the defendants. This is purely speculation on her part and speculation which requires the express terms of the operative parts of the deeds to be contradicted. The Purchase Deed was novated to Pentire and in law that novation constitutes an entirely new contract. It follows that in respect of this argument the plaintiff has failed to meet the threshold that she must satisfy to resist an application to dismiss proceedings on the basis that they are frivolous and vexatious and are bound to fail.

28. The plaintiff also argued that "absent discovery she was not aware whether [the Purchase Deed and the Deed of Novation] represent the whole of the contractual relations between the various parties to those agreements in connection with the transfer of the assets relevant to this case. The plaintiff understands that CarVal and Pentire are connected parties and, in those circumstances, it would be unusual if the arrangements as between them are to be expressed only by way of the agreements [set out above]." It is difficult to conceive of a clearer case of pure speculation and bald assertion. Insofar as the plaintiff seeks to rely on this submission to resist the defendants' application, this ground must be rejected.

29. The plaintiff, who now lives in Surrey in England, swore an affidavit on the 20th June, 2018 opposing the defendant's motion to dismiss her claim and to vacate the *lis pendens*. At paras. 6 and 7 of her affidavit she sets out her main ground for asserting that the Loan was not validly transferred to Pentire and that accordingly Pentire could not lawfully appoint the second named defendant a receiver over the property under the Mortgage. She states as follows:

"As is clear from the statement of claim, I say that the entry into of the [Purchase Deed]... was unlawful in the circumstances and, therefore, the [Deed of Novation, the sale and the Deed of April, 2015]... ought not to have taken place.

I say and am advised that the transfer of the loan as between Bank of Scotland Plc ("BOS UK") and CarVal Investors UK

Ltd is unenforceable against me according to s. 26 of the Financial Services Market Act, 2000, a UK Act which governs whether or not UK entities are required to be licensed, and setting out the consequences for any entity not so licensed, being the unenforceability of the said transfer. I say that the loan connected to my property is a regulated asset, as defined by the said Act. I say and am advised that the strictures of the UK's banking regulations apply in the circumstances given that both companies involved are governed by UK financial regulatory law."

30. She does not state the source of the advice which is the very basis of her case. From the answer to a question put to counsel for the plaintiff at the hearing of the motion, it appears that the plaintiff has not obtained the advices of a suitably qualified expert in the relevant area of English law and that the proceedings were commenced and her affidavit sworn without the benefit of such advice. It would appear therefore that she does not have advice from a qualified expert to support the propositions set out in her statement of claim.

31. It is apparent from the extracts from her statement of claim which I have quoted above that in order to succeed in her claim she must establish certain propositions of English law as matters of fact and she must establish the legal effect of those propositions on the Purchase Deed, the Deed of Novation and the sale of the loans including the Loan, all of which are governed by Irish law. At the trial of the action an expert on foreign law, in this case English banking law, must prove as a fact that the plaintiff's statement of English law is the correct statement of the law, and not merely an arguable proposition and must state as a matter of fact that the effect of section 26 of the Act of 2000 is as she asserts.

32. Central to her case is s. 26 of the Financial Services and Markets Act, 2000. This provides as follows:

"s. 26 - Agreements made by unauthorised persons:

(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.

(2) The other party is entitled to recover—

(a) any money or other property paid or transferred by him under the agreement; and

(b) compensation for any loss sustained by him as a result of having parted with it.

(3) "Agreement" means an agreement—

(a) made after this section comes into force; and

(b) the making or performance of which constitutes, or is part of, the regulated activity in question.

(4) This section does not apply if the regulated activity is accepting deposits."

33. It is important to note that para. 8 of the statement of claim does not appear to reflect properly the terms of s. 26 of the Act of 2000. The Act says it is unenforceable against "the other party", not as against "another party" to the agreement. The agreement must relate to a regulated activity, in this case an agreement to sell loans; it does not relate to the loan agreements the subject of the sale.

34. The submissions of the parties raised many points which I do not discuss in this judgment as I am mindful of the observations of the supreme court in *Moylist* to the effect that complex legal issues ought not to be decided on a motion to dismiss on the basis that the claim is bound to fail. However, it is clear that there are two propositions which are essential to the plaintiff's case and if she cannot establish both of these propositions then her case is bound to fail and so it ought to be dismissed following the decision in *Jodifern*.

(1) The plaintiff must bring herself within the scope of the provisions of s. 26 (1). To do so she must show that as a matter of English law she comes within the expression "the other party" to the agreement;

(2) If she establishes that the Purchase Deed is unenforceable against her by reason of the fact that CarVal was an unauthorised person within the meaning of the Act of 2000, she must then prove as a matter of English law that novation of the Purchase Deed is not permissible as a means of avoiding the provisions of s.26 with the result that the Purchase Deed as novated to Pentire, an Irish company, is likewise unenforceable as a matter of English law against the plaintiff.

35. In relation to the first proposition, the plaintiff has advanced no credible basis for asserting or argument to show that she is "the other party" to the Purchase Deed because the Loan was one of the many loans CarVal agreed to purchase from Bank of Scotland Plc. Likewise she has advanced no credible basis or arguments to show that s. 26 of the Act of 2000 has any application to the Deed of Novation and thus to the Purchase Deed pursuant to which the Loan was assigned. Ordinarily a plaintiff would not be required to adduce evidence to prove her claim in order to resist an application to dismiss the proceedings on the basis that they are bound to fail. The motion is not a form of summary procedure. But the crucial propositions in this case are matters of foreign law i.e. matters of fact which can only be proved by a suitably qualified expert establishing that the foreign law is as asserted by the plaintiff. The plaintiff apparently commenced her proceedings without the benefit of any advice to that effect which can be proved at the trial of the action. Her case therefore is based upon mere assertion, for which no evidence, or no credible evidence for believing that there could be any evidence, is put forward to support the alleged propositions of English law. It is difficult to see how the plaintiff, who was not a party to the Purchase Deed, could be construed as being a party to that agreement on the basis that the Loan and the Mortgage were to be sold by one party to the agreement to the other party. The fact that the singular may include the plural would not appear to assist her case in overcoming this difficulty. She is required to put forward a credible basis for suggesting that it may be possible at trial to establish the facts which are asserted and which are necessary for succeeding in the proceedings. She has failed to do so in her affidavit. The written submissions delivered on her behalf do not advance her case either. In those submissions it was stated that the propositions were either "capable" of being asserted or falling within the relevant definitions in the Act of 2000. In effect she has merely raised theoretical arguments based on a possible statement of English law.

36. In order for the plaintiff to succeed in her case she must be able to establish that the effect of s. 26 of the Act of 2000 is that the Deed of Novation and its subsequent completion by the parties, Bank of Scotland Plc and Pentire, means that the Loan which was thereby sold by Bank of Scotland Plc to Pentire is unenforceable as against her in Ireland. The court is in a position to construe the documents which are governed by Irish law. The plaintiff's case is based upon mere assertion as to the import and effect of English law on these documents, which are governed by Irish law and are to be construed and applied by an Irish court. The onus is on her to put forward a credible basis for suggesting that it may be possible at trial to establish the facts which are asserted and which are necessary for succeeding in the proceedings. She has not done so. Based on the matters placed before this court, I conclude that this is one of those cases, which are few in number, where it is appropriate to exercise the inherent jurisdiction of the court to dismiss a claim as being bound to fail. Accordingly, I conclude that, as the proceedings are bound to fail, so their continuance would constitute an abuse of the process of the court and effect an injustice on the defendants. I therefore dismiss the plaintiff's claim.

Vacation of the *lis pendens*

37. The plaintiff registered a *lis pendens* in respect of the proceedings pursuant to s. 121 of the Land and Conveyancing Law Reform Act, 2009. The section provides

121.— (1) A register of lis pendens affecting land shall be maintained in the prescribed manner in the Central Office of the High Court.

(2) The following may be registered as a lis pendens:

(a) any action in the Circuit Court or the High Court in which a claim is made to an estate or interest in land (including such an estate or interest which a person receives, whether in whole or in part, by an order made in the action) whether by way of claim or counterclaim in the action; and

(b) any proceedings to have a conveyance of an estate or interest in land declared void.

(3) Such particulars as may be prescribed shall be entered in the register.

(4) A lis pendens registered under section 10 of the Judgments (Ireland) Act 1844 which has not been vacated before the repeal of that section continues to have effect as if that section has not been repealed and such registration shall be deemed to form part of the register to be maintained under subsection (1).

The defendants sought an order pursuant to s. 123 of the Act of 2009 vacating the *lis pendens*. Section 123 (b) of the Act of 2009 provides that an application to vacate the *lis pendens* may be brought by:

"(b) any person affected by it, on notice to the person on whose application it was registered—

(i) where the action to which it relates has been discontinued or determined, or

(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted bona fide."

38. In this case I have dismissed the proceedings pursuant to the inherent jurisdiction of the court on the basis that they are frivolous and vexatious and are bound to fail. The proceedings have therefore been determined and pursuant to s. 123 (b) (i) I order that the *lis pendens* registered in respect of these proceedings be vacated.

39. In the event that I am incorrect in dismissing the proceedings as aforesaid, it is appropriate to consider whether, nonetheless, the *lis pendens* ought to be vacated on the basis either that the *lis* ought never to have been registered or that the action is not being prosecuted *bona fide*.

40. In *Tola Capital Management LLC v. Linders (No. 2)* [2014] IEHC 324 at para. 109 Cregan J. held as follows:

"Section 121 (2) of the Land and Conveyancing Law Reform Act 2009, provides that only certain matters may be registered as a lis pendens, i.e. those matters that fall within the precise terms of s. 121(2)(a) and (b). If a lis which has been registered as a lis pendens does not fall within the statutorily permissible type of action which can be registered as a lis pendens, then it follows that the lis should not have been registered as a lis pendens in the first place. Thus, the court may consider whether the lis pendens was properly registered at all. It is only if the court is satisfied that the lis pendens was properly registered that the court goes on to consider whether to vacate the lis pendens on the grounds set out in s. 123 of the Act."

41. It is inherent in this passage that if the *lis pendens* was not properly registered in the first place that the court ought properly to vacate it.

42. In *Gannon v. Young* [2009] IEHC 511 Laffoy J. concluded that where proceedings were bound to fail, they were not being prosecuted *bona fide*:

"The test on this application is whether, in the changed circumstances, the defendants are now bona fide prosecuting their claim against the plaintiff in the plenary proceedings. Clearly, if their claim is doomed to failure, they are not."

If they were then the *lis pendens* should be vacated.

43. The first matter to be considered is whether the plaintiff is making a claim to an estate or interest in land. The plaintiff's interest in the land is not in dispute. It follows that she is not making a claim to an interest in land against either of the defendants. Neither are they challenging her interest in the land.

44. At reliefs 3, 4 and 5 of her statement of claim she seeks a declaration that the transfer of the Loan is invalid, void and of no legal effect and a declaration that the first named defendant is not entitled to enforce the loan. The defendants strongly argued that these claims did not amount to a claim to an estate or interest in land within the meaning of s. 121. In response the plaintiff said in her written submissions:

"The plaintiff clearly has asserted an interest in a particular estate which said estate will be significantly enhanced if it be the case that she succeeds at trial – and non-existent if the case fails because the property will be sold."

This does not bring her claim within the scope of s. 121. That section is not concerned with the economic value of an interest in a particular estate in land so whether the value of her interest in land would be enhanced by reason of the fact that the loan cannot be enforced against it is neither here nor there. Likewise, the fact that if she fails in this case the receiver will then be free to sell the lands does not bring the case within the scope of s. 121. The sale of the lands is not an issue in the case, though clearly the proceedings were brought with a view to preventing and frustrating the intended sale entered into by the receiver on the 13th April, 2018. At the hearing counsel submitted that it was sufficient to challenge the Loan as the Mortgage could not be freestanding. Whatever the merits of this argument it cannot bring the case within the statutory provisions and counsel did not argue that it did. Therefore, following the decision of Mr. Justice Cregan, the *lis pendens* should not have been registered as a *lis pendens* in the first place.

45. Secondly, the plaintiff argued that she sought to have the "purported interest" of the first named defendant declared void and that this brought the case within the provisions of s. 121 (2) (b) of the Act of 2009. Sub para. (b) includes "*any proceedings to have a conveyance of an estate or interest in land declared void.*"

46. If the plaintiff had sought a declaration that the Mortgage should be declared void, this would come within the scope of s. 121. However, it is clear that the plaintiff's case is based on the Act of 2000, that she challenges the Loan and not the Mortgage. The fifth relief which she seeks in her statement of claim is a declaration that the first named defendant is not entitled to enforce the Loan. She makes no reference to the Mortgage.

47. At paras. 1 and 2 of the statement of claim the plaintiff seeks a declaration that the purported appointment of the second named defendant as receiver and manager of the property is invalid, void and of no legal effect and an order setting aside the purported appointment of the second named defendant as the receiver of the property. The defendants argued that the receiver does not have any independent interest which extends beyond the interest of the plaintiff. The receiver is an agent of the borrower (the plaintiff) and only holds an interest in the property as agent of the borrower. Therefore, in the circumstances, registration of a *lis pendens* constitutes an abuse by the plaintiff.

48. The defendants rely upon the decision of Clarke J. in *Moorview Developments Ltd v. First Active Plc* [2011] 1 I.R. 117 where it was held that a party cannot register a *lis pendens* against a receiver. At paras. 15 and 16 Clarke J held:

"15. ... The issue between the parties must relate to the ownership of some interest in land. Where there is more than one defendant in the proceedings, then in order that a lis pendens be validly registered in respect of a particular defendant, the issues which arise on the pleadings and which are being bona fide pursued by the plaintiff, insofar as the relevant defendant is concerned, must relate to the ownership of some interest in land.

16. In those circumstances, it does not seem to me that the position of a receiver or agent is captured. A receiver does not own any interest in lands which are properly described as being owned by the company to which the receiver has been appointed. The lands remain owned by the company (in receivership). The fact that the receiver may well be entitled, provided that all necessary formalities are complied with, to execute a deed of transfer of a relevant interest in property in the name of the company does not alter that fact. It is the company which transfers the property. The receiver is simply entitled, by virtue of the debenture in favour of the relevant lender, and his appointment, to cause the company to effect the transfer."

The defendants also rely upon the decision of McGovern J. in *Donore Garages v. O'Reilly* [2017] IEHC 178 which followed *Moorview*.

49. Counsel for the plaintiff sought to distinguish the position of a receiver to a company from a receiver appointed pursuant to a personal mortgage of land. While there may be distinctions to be made between different types of receiverships, the analysis of the interest of a receiver in the secured property of Mr. Justice Clarke in *Moorview* applies with equal force to a receiver appointed pursuant to the Mortgage in this case. When the receiver exercises the power of sale in the mortgage he sells the interest of the mortgagor, not any interest of his own in the secured property. It follows that the submissions of the defendants on this point are correct and there is no basis for registering a *lis pendens* against the receiver.

50. As long as the *lis pendens* remains on the register, the receiver cannot conclude the sale of the property and there is a risk that the contract for sale may in fact fall by the wayside. On the facts before the court and even if I am incorrect in dismissing the proceedings, I can find no legal basis on which the *lis pendens* registered in respect of the property against either defendant should be allowed to stand. Accordingly, I direct that the *lis pendens* be vacated.