APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2023/26

Faherty J. **Neutral Citation Number [2023] IECA 247**

Pilkington J.

Allen J.

BETWEEN

BRIAN CROWLEY

PLAINTIFF/APPELLANT

AND

IRELAND, THE ATTORNEY GENERAL, THE COUNTY REGISTRAR OF WICKLOW, THE GARDA COMMISSIONER, ANDREW BRADY, ALAN CAULFIELD, JAMES PHIBBS, BANK OF SCOTLAND PLC, CLODAGH BUCKLEY, IVOR FITZPATRICK SOLICITORS, START MORTGAGES DAC, ELAINE DECOURCEY, AND THE LORD ADVOCATE OF SCOTLAND

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 13th day of October, 2023.

1. This is an appeal by Mr. Brian Crowley against the judgment of the High Court (Stack J.) delivered on 27th October, 2022 ([2022] IEHC 596) and consequent order made on 11th January, 2023 by which Mr. Crowley's action against all but the fourth, fifth and eleventh defendants was dismissed on the grounds that it was frivolous and vexatious and had no reasonable prospect of success.

2. Although the notice of appeal identified all of the defendants bar the Lord Advocate of Scotland as respondents, the appeal was eventually established to be limited to so much of the order of the High Court as had dismissed the action against the sixth and seventh, the ninth, and the tenth defendants. The appeal as far as the twelfth defendant was concerned was abandoned in the written submissions filed on behalf of the appellant.

3. Between 2004 and 2006 Mr. Crowley and his wife borrowed several sums of money from The Governor and Company of the Bank of Scotland *("the Bank")* as well as from Bank of Scotland (Ireland) Limited on the security of a mortgage of their family home in Bray executed on 5th November, 2004 to secure all sums which then were or might thereafter become due.

4. On 31st December, 2010 the Bank the Bank – which by then had been reregistered as Bank of Scotland plc –merged with Bank of Scotland (Ireland) Limited in a cross-border merger by absorption pursuant to Directive 2005/56 on cross-border mergers of limited liability companies. Under the terms of that merger and on foot of an order of the Court of Session in Scotland made pursuant to the 2005 Directive and the implementing regulations, all of the assets and liabilities of Bank of Scotland (Ireland) Limited transferred to the Bank.

5. Mr. and Mrs. Crowley defaulted on their loans and on 9th July, 2012 the Bank obtained an order for possession of the house from the County Registrar for County Wicklow. Mr. and Mrs. Crowley were at that time represented by a solicitor and the order

shows that it was made by consent. The Bank was represented by Ivor Fitzpatrick, solicitors *("Ivor Fitzpatrick")*.

6. I mention at this point that part of Mr. Crowley's case – or at least one of the things said by Mr. Crowley – is that Mrs. Crowley has sued her solicitor for damages on the grounds that he did not have her instructions to consent to the order for possession: but this is completely irrelevant to his claim against any of the defendants.

7. On 9th December, 2012 and again on 23rd January, 2013 the Bank obtained execution orders. Execution of the order for possession was scheduled for 21st May, 2013 but was postponed when Mr. and Mrs. Crowley resumed making payments to the Bank.

8. On 20th February, 2015 the loans and the mortgage were transferred to Start Mortgages DAC *("Start")*. The payments on foot of the mortgage continued for some months but ceased at the end of 2015.

9. On 12th April, 2016 an application was made to the County Registrar for the County of Wicklow for a further execution order. The application was irregular in a number of respects. First, the application was made in the name of the Bank rather than Start. Secondly, the application was made *ex parte* rather than on notice to Mr. and Mrs. Crowley, as required by the Circuit Court Rules. Thirdly, although the affidavit grounding the application was sworn by Ms. Clodagh Buckley, a solicitor in Ivor Fitzpatrick, the jurat identified the deponent as Gill Cotter, who – according to the jurat – was personally known to the Commissioner for Oaths. According to the body of the affidavit, Ms. Buckley swore the affidavit on behalf of *"the plaintiff,"* identified in the title as the Bank. An execution order was made by the County Registrar on 16th May, 2016, and executed on 1st November, 2016.

10. On the afternoon of 10th November, 2016 Mr. Crowley went first to Shankill Garda Station where he informed the duty Sergeant, Sergeant Andrew Brady, of his intentions, and

then to the house where he broke in using an angle grinder. It appears that Sergeant Brady went to the house later in the afternoon, accompanied by Garda Alan Caulfield. Mr. Crowley was arrested by Garda Caulfield and charged with entering a building with intent to commit an offence, contrary to s. 11 of the Criminal Justice (Public Order) Act, 1994 and with criminal damage to the reinforced steel door which had been installed by Start's agent, contrary to s. 2(1) of the Criminal Damage Act, 1991. Mr. Crowley was detained overnight in the Garda station and on the following morning brought before the District Court, when he was remanded on bail on his own bond of €500. Mr. Crowley was thereafter remanded from time to time on continuing bail until 14th March, 2019. The affidavit of Ms. Joanna O'Connor, a solicitor in the Office of the Chief State Solicitor, shows that the prosecution was adjourned on approximately fifteen occasions: but not why. Along the way, the criminal damage charge was dropped.

11. On the afternoon of 13th March, 2019 Garda Caulfield took a statement from Ms. Elaine de Courcey, the secretary of Start, to the effect that the execution order for possession in respect of the house at Bray had been renewed by Start on 18th May, 2016 and that the property had been taken into possession by Start on 1st November, 2016 and secured by agents on its behalf. She said that Mr. Crowley did not have the authority, permission or consent of Start to enter the property on 10th November, 2016. By e-mail sent at 19:31 on the evening of 13th March, 2019 Garda Caulfield sent a copy of Ms. de Courcey's statement and some other documents to Garda Inspector James Phibbs, who was to be the presenting officer in the District Court on the following day. By e-mail sent at 09:33 on the morning of 14th March, 2019 Inspector Phibbs sent copies of the statement and documents to Mr. Crowley's solicitor.

12. When, on 14th March, 2019 Mr. Crowley's case was called in the District Court, Mr. Crowley's solicitor objected to the late disclosure and the District Court judge dismissed the remaining criminal trespass charge without hearing evidence.

13. On 23rd September, 2019 Mr. Crowley – at that time ostensibly acting *pro se* – issued a plenary summons naming as defendants Ireland, the Attorney General, The County Registrar for Wicklow, the Garda Commissioner, Sergeant Brady, Garda Caulfield, Inspector Phibbs, the Bank, Ms. Buckley, Ivor Fitzpatrick, Start, Ms. de Courcey, and the Lord Advocate of Scotland.

14. The indorsement of claim and statement of claim were very convoluted and difficult to follow. On the one hand, there was an attack on the validity of the cross-border merger but on the other it was expressly pleaded that the Bank had transferred all of its title to Start. Following the later appointment of solicitors on behalf of Mr. Crowley there was some attempt to put shape on the claims. In due course, I will summarise the claims as they were advanced before the High Court.

15. By notice of motion issued on 5th November, 2020 Ms. Buckley, Ivor Fitzpatrick, Start and Ms. de Courcey applied for orders pursuant to O. 19, rr. 27 and 28 of the Rules of the Superior Courts and the inherent jurisdiction of the High Court dismissing the action against them on the grounds that it was frivolous and vexatious, disclosed no reasonable cause of action, and had no reasonable prospect of success.

16. Similar motions were issued on behalf of the State, the Attorney General, the County Registrar and the Garda Commissioner on 26th November, 2020, and on behalf of Sergeant Brady, Garda Caulfield and Inspector Phibbs on 24th February, 2021.

17. On 24th February, 2021 a notice of appointment of solicitor was filed since when Mr. Crowley has – ostensibly – been represented by solicitors.

18. The defendants' motions were heard together by the High Court (Stack J.) on 9th February, 2022. Then or shortly beforehand, Mr. Crowley abandoned his action against the Lord Advocate of Scotland and all claims relating to the merger of the Bank and Bank of Scotland (Ireland) Limited.

19. In her comprehensive written judgment delivered on 27th October, 2022, the High Court judge recalled that because the amended statement of claim had been drafted so as to assert as many causes of action as possible against as many defendants as possible and obscured rather than identified the issues, she had invited counsel for Mr. Crowley to identify the causes of action asserted against each of the defendants. In effect, in a liberal application of the principle first articulated by McCarthy J. in *Sun Fat Chan v. Osseous Ltd.* [1992] 1 I.R. 425, the judge gave counsel *carte blanche* to identify what cause of action Mr. Crowley might have against each of the defendants.

20. As to the State and the Attorney General, the judge noted that they had been primarily sued by reason of the alleged non-compliance of the Irish regulations with the cross-border merger Directive to which they were to have given effect, all of which claims had been abandoned. There appeared to the judge to be no independent cause of action against Ireland and the Attorney General unless the case against the County Registrar was allowed to proceed.

21. I pause here to observe that there is no appeal against that finding. Specifically, it is not said by Mr. Crowley that the State was properly a party to his claims against the members of An Garda Síochána.

22. The judge first analysed the case which Mr. Crowley would make against the County Registrar. It was that the affidavit of Ms. Buckley filed in support of the application for the

renewal of the execution order was, on its face, inadmissible; and that the County Registrar had failed to ensure that the application was made on notice to Mr. Crowley.

23. As to the fact that the County Registrar had dealt with the application *ex parte*, the judge found that she could not have known, unless she had been told – which she was not – of the transfer by the Bank to Start and so could not have been alive to the requirement under the Circuit Court Rules for an application on notice for leave to issue execution. As to the defect in the jurat, the judge found that the affidavit was defective on its face and absent a decision – and an indorsement on the affidavit– to admit it notwithstanding the irregularity, it was inadmissible, and the order sought should not have been granted.

24. The cause of action said by counsel to be available to Mr. Crowley in respect of the error of the County Registrar was negligence and misrepresentation. Having examined the authorities, the High Court judge found that the County Registrar was immune from suit at common law. Mr. Crowley, she said, could have appealed the County Registrar's order but did not. Or, she said, he could have applied for a judicial review but had not.

25. The judge concluded that the action against the County Registrar was frivolous, vexatious and ultimately doomed to fail. That part of the order was identified in the notice of appeal as a relevant order made in the High Court, but there was no ground of appeal. It was confirmed in Mr. Crowley's written submissions that there is no appeal against the conclusion of the judge or the order striking out the proceedings against the County Registrar, or against the judge's conclusion that that disposed of the residual involvement of the State and the Attorney General.

26. The judge prefaced her consideration of the claims against the Garda Commissioner, Sergeant Brady, Garda Caulfield and Inspector Phibbs by saying that it was common case that the Garda Commissioner was vicariously liable for the actions of the members and that

his position depended on the outcome of the applications of the members. The appeal was argued on that basis, and I am content to deal with it on that basis, but I am not to be understood as endorsing the proposition that the Commissioner of An Garda Síochána – as opposed to the State – is vicariously liable for the actions of members of the force.

27. The case against Sergeant Brady was that on the afternoon of 10th November, 2016 he used excessive force in arresting Mr. Crowley, who was resisting arrest. The judge found that his pleadings disclosed a cause of action and that the issue was an issue of contested fact that could only be resolved by plenary hearing. Against that conclusion, there is no appeal.

28. The claims against Garda Caulfield and Inspector Phibbs arose out of their handling of the prosecution of Mr. Crowley. The judge adopted the summary of the complaints against them from the affidavit of Ms. Joanna O'Connor, solicitor, filed in support of their applications and no issue has been taken with that summary. The complaints are that:-

1. Garda Caulfield failed to examine the execution order on foot of which the County Sherriff had put Start into possession of the house;
2. In relying on the statement of Ms. de Courcey, Garda Caulfield attempted maliciously and/or negligently to prosecute Mr. Crowley;
3. Garda Caulfield maliciously and/or negligently pursued the prosecution;
4. Garda Caulfield delayed in obtaining and providing the statement from Start, providing it only on the morning of the adjourned hearing some twenty seven months after the incident;
5. Garda Caulfield (together with Inspector Phibbs) attempted to ambush Mr. Crowley with the late service of documents.

29. The High Court judge referred to the judgment the High Court in *Hanrahan v. Garda Commissioner* [2020] IEHC 180, in which Barrett J. adopted the statement of the law in

McMahon and Binchy The Law of Torts (4th Ed., 2013), where the constituent elements of the tort of malicious prosecution were identified as being:-

(a) The defendant must have instituted proceedings, that is to say, he or she must have been *"actively instrumental in putting the law in force:"*

(b) The proceedings must have not been successful;

(c) The plaintiff must establish that the proceedings were instituted *"without reasonable and probable cause;"*

(d) The plaintiff must prove that the defendant acted maliciously;

(e) The plaintiff must have suffered damage.

30. The judge focussed her examination on the criminal damage charge but I think that what she said was equally applicable to the criminal trespass charge. Whether Mr. Crowley was entitled to use an angle grinder to re-enter the premises – she said – begged the question of whether Start had been entitled to re-enter on foot of the order for possession which had been obtained in the name of the Bank. The judge was not satisfied to grant the applications of Garda Caulfield and Inspector Phibbs on the basis that it was beyond argument that they had reasonable and probable cause for the prosecution but she found that there was no evidence whatsoever of malice. The allegation of malice, she said, was a bare assertion.

31. The judge found, at para. 83, that it was evident from the statement of Ms. de Courcey that the Gardaí had been told that the execution order had been renewed by Start and that:-

> *"Insofar as the plaintiff emphasises the lateness with which the statement was made, he has no evidence to suggest that a complaint was not made in the same terms at a much earlier stage, and the progress of the [prosecution], such as it is, demonstrates that the Gardaí were late in making a disclosure, which would require the taking of a formal statement. However, that does not mean that they did not*

receive a complaint in the same terms in November, 2016. Failure to appreciate the error as to the name of the plaintiff on the execution order is not evidence of malice, and the defendant[s] correctly point out that there is no tort of negligent prosecution."

32. The High Court judge found that the action for malicious prosecution was bound to fail and dismissed it as against Garda Caulfield and Inspector Phibbs.

33. I pause here to say that there is no appeal against the finding that there is no tort of negligence prosecution.

34. The case against the Bank was obscure from the outset. The affidavit of Ms. Buckley grounding the application for the execution order– which was sworn about fifteen months after the transfer to Start and the receipt by Mr. Crowley of a *"Goodbye"* letter from the Bank and a *"Hello"* letter from Start, and in circumstances in which the repayments which Mr. Crowley had been making to the Bank had been redirected by him to Start for about ten months – was obviously wrong. The High Court judgment shows that the sole basis for the Bank having been kept in the action was that it was – or at least that it was said to have been – unclear whether it was the Bank which was instructing Ivor Fitzpatrick. At the hearing of the motion in the High Court, counsel for Mr. Crowley was unable to identify what cause of action lay against the Bank and had indicated that it could be let out if there was confirmation that Ivor Fitzpatrick did not act on the instructions of the Bank.

35. On the evidence, the judge thought that it was highly likely that the Bank had given an instruction to Ivor Fitzpatrick to apply for an execution order after the loan and security had been sold but in view of the very high threshold and the fact that the affidavits previously filed had not unequivocally said so, the judge permitted the filing of a further affidavit. An affidavit of Mr. Graham Macken, solicitor, was sworn on 3rd November, 2022 to confirm that

the instruction to renew the execution order had come from Start, and not the Bank, and the Bank was let out of the action. There is no appeal against that part of the order.

36. The action against each of Ms. Buckley and Ivor Fitzpatrick was dismissed but on slightly different grounds.

37. Ms. Buckley was a solicitor employed by Ivor Fitzpatrick. At the outset of her judgment, at para. 5, the judge observed that Ms. Buckley was, apparently, a solicitor employed by Ivor Fitzpatrick and that there was no satisfactory explanation as to why she had been sued for steps taken in the course of her employment. When, at para. 101, the judge came to deal with the applications of Ms. Buckley and Ivor Fitzpatrick, she said that it was entirely unclear why the plaintiff felt the need to sue Ms. Buckley personally, as she was obviously acting within the scope of her employment and that she would adjourn the application to allow Ivor Fitzpatrick to confirm that Ms. Buckley was not a partner: in which event, she would dismiss the action against her. The affidavit of Mr. Macken, to which I have referred, confirmed that Ms. Buckley was not and never had been a partner but was an employed solicitor, and the action against her was dismissed on that basis.

38. As far as Ivor Fitzpatrick was concerned, counsel for Mr. Crowley identified three asserted causes of action: misrepresentation, negligent misstatement and conspiracy with either Start or the Bank.

39. The High Court judge did not understand how misrepresentation and negligent misstatement might be different. The essential ingredients of any cause of action in misrepresentation, she said, was the making of a statement which is relied on to the detriment of the person to whom the statement was made. In this case, she said, any misrepresentation which had been made had been made to the County Registrar and Mr. Crowley's whole complaint was that he had not been told of the application to renew the execution order.

40. Further, said the judge – citing *Kelly v. University College Dublin* [2009] 4 I.R. 163, *Looney v. Bank of Ireland* [1996] 1 I.R. 157, and para. 97 of Vol. 28 of the 4th edition of *Halsbury* – it is clear at common law that the evidence to a court of any witness is absolutely privileged.

41. As to the claimed conspiracy, the judge found that Ivor Fitzpatrick were at all times clearly acting for a client – if it was not at that stage absolutely clear who the client was. It was clear, she said, that a mistake had been made by an agent acting for a principal. Even if – she said – the solicitors had made a mistake, they had done so in the course of their professional duties and there were no grounds for saying that that could be actionable as a tort.

42. of conspiracy by the other party to the litigation. The judge distinguished *Doran v. Delaney* [1998] 2 I.R. 61 – which had been relied on on behalf of Mr. Crowley – as being itself a *Hedley Byrne v. Heller* [1964] A.C. 465 type of reliance on misrepresentation. There was, said the judge, no representation in this case and the duty owed by a solicitor is to his or her own client and not the other party to adversarial proceedings.

43. The causes of action relied on as against Start were identified by counsel for Mr. Crowley as being (1) conspiracy with Ivor Fitzpatrick, (2) misrepresentation, (3) negligence, and (4) malicious prosecution in relation to the statement made by Ms. de Courcey to Garda Caulfield.

44. As the judge had found that there could have been no conspiracy between Ivor Fitzpatrick and Start, it followed that there could have been no conspiracy between Start and Ivor Fitzpatrick. There is no appeal against the finding that Start could not have conspired with Ivor Fitzpatrick: although there is against the finding that Ivor Fitzpatrick could not have conspired with Start.

45. As with the alleged misrepresentations to the County Registrar, the inaccurate statement made by Start had been made to the Gardaí and not to Mr. Crowley; Mr. Crowley had not relied on it; and it seemed likely to the judge that had the prosecution proceeded, Mr. Crowley would have sought to defend himself on the basis that Start had never in fact obtained an order for possession – which was true. There is no appeal against that finding.

46. As to the allegation of negligence, the judge could not see how Start could have owed Mr. Crowley a duty of care. She said that insofar as any error occurred, that was potentially only to the detriment of Start and not Mr. Crowley. Mr. Crowley, she said, had a remedy – by way of an appeal of the County Registrar's order or an application for judicial review – but failed to exercise it. There is no appeal against that finding.

47. As to the claim against Start for malicious prosecution, the judge found that the height of Mr. Crowley's case was that Ms. de Courcey had made an error in her statement to the Gardaí. As she had in the case of Garda Caulfield and Inspector Phibbs, the judge was not satisfied that there was no prospect that Mr. Crowley could establish an absence of reasonable and probable cause but she found that Mr. Crowley was not able to put the allegation of malice beyond the level of pure assertion. Citing the judgment of Clarke J. (as he then was) in *Keohane v. Hynes* [2014] IESC 66, the judge held that it was an abuse of process to maintain a claim that was based on a factual assertion in circumstances in which there was no evidence available for that assertion and no reasonable basis for believing that evidence could become available at the trial to substantiate the relevant assertion. There is no appeal against that finding.

48. Finally, although it had not been relied on by counsel, the judge contemplated whether the fact that Start re-entered the premises – which was Mr. Crowley's family home – on the basis of an order for possession which was not in its name could constitute a trespass.

She found that it was arguable – or at least that it had not been shown by Start not to be arguable – that a person asserting a right of possession based on a court order should have a court order in their favour and could not rely on an order for possession obtained by their predecessor in title.

49. The case against Ms. de Courcey (save as to the taking of possession of the house) was the same as the case against Start. There was, said the judge, no misrepresentation by Ms. de Courcey to Mr. Crowley and no evidence whatsoever in support of the allegation of malice. The judge dismissed the action against Ms. de Courcey. That part of the order was appealed in the notice of appeal but the appeal was abandoned in Mr. Crowley's written submissions.

50. Having completed the enormously tedious process of trying to corelate the grounds of appeal with what were said to be the relevant orders made in the High Court; of trying and failing to understand how the apparent appeal against the dismissal of the action against the County Registrar fitted with the plaintiff's apparent acquiescence in the dismiss of his action against Ireland and the Attorney General; and of trying to tie back the appellant's written submissions to the notice of appeal: it eventually emerges that the appeal is limited to so much of the order of the High Court as dismissed the action against Garda Caulfield and Inspector Phibbs, against Ms. Buckley, and against Ivor Fitzpatrick.

51. There is no appeal against the judge's finding that Start could not have conspired with Ivor Fitzpatrick or, as I will come to, against her finding that Ivor Fitzpatrick could not have conspired with Start.

52. There is no appeal against the judge's finding that the height of the case against Start and against Ms. de Courcey was that Ms. de Courcey made a mistake when she said that the execution order was renewed by Start. Thus, while there is no challenge to the judge's

conclusion that Mr. Crowley had no prospect of establishing that Ms. de Courcey's statement was made with malice, it is suggested that the reliance by the Gardaí on that statement – to the extent of disclosing it, or, perhaps, to the extent that they did not immediately abandon the prosecution – was malicious.

53. The grounds of appeal against the dismiss of the action against Garda Caulfield and Inspector Phibbs are that there was a failure to make disclosure in the District Court; that Garda Caulfield delayed until the eve of the adjourned hearing on 14th March, 2019 in taking what is said to have been an essential statement from Ms. de Courcey; and, in essence, that Garda Caulfield and Inspector Phibbs ought to have seen that the execution order made no reference to Start and *"at the very moment [that] Elaine de Courcey made her statement, the case before the District Court ought to have been withdrawn by the prosecution considering the obvious lack of grounds to justify the charge."*

54. It seems to me that the grounds of appeal are plainly inconsistent. On the one hand there is a complaint of non-disclosure. On the other, the complaint is that the Gardaí did not obtain until the last minute – and so could not have disclosed earlier than they did – a statement from Start to confirm that Mr. Crowley did not have permission to re-enter a house which ten days previously had been repossessed on foot of a court order. Moreover, the suggestion is that the Gardaí – who, of course, could have known nothing of Mr. Crowley's business with the Bank or with Start, or the transfer of Mr. Crowley's mortgage from the Bank to Start – ought to have determined that the execution order was invalid and, more or less, ought to have concluded that Mr. Crowley had been perfectly entitled to cut down the door of the house with an angle grinder.

55. More to the point, the grounds of appeal fail to engage with the crucial finding of the High Court judge – which was the foundation of the order dismissing the action against

Garda Caulfield and Inspector Phibbs – that the allegation that the prosecution had been motivated by malice was based on mere assertion. There is no cross appeal against the judge's conclusion that she was not persuaded that Mr. Crowley had no prospect of establishing that there was no reasonable and probable cause for the prosecution – which, of course, is not the same as saying that there was not reasonable and probable cause – but the prospect that Mr. Crowley might establish an absence of reasonable and probable cause was dependent on the legal validity of the possession of the property by Start. It is not suggested that Garda Caulfield and Inspector Phibbs did not honestly – if mistakenly – believe that Start was lawfully in possession of the property.

56. It is not the business – still less the duty – of members of An Garda Síochána to be questioning court orders.

57. At the oral hearing of the appeal, counsel for Mr. Crowley handed in a copy of the decision of the Supreme Court in *McIntyre v. Lewis* [1991] 1 I.R. 121 as an example of an action for damages for malicious prosecution in which all of the evidence had been heard. It was suggested that in this case, all of the evidence had not been heard and that if the action were to go to plenary hearing evidence of malice might be unearthed by discovery. As to this, it was firstly not an argument that was made in the High Court. No less, there was no indication of what it was the appellant hoped or expected might be shown by discovery. The case pleaded and argued in the High Court was that malice was to be inferred from the juxtaposition of the execution order in the name of the Bank and the statement of Ms. de Courcey to the effect that the renewal application had been made by Start. The argument was that Garda Caulfield and Inspector Phibbs had, variously, *"failed to establish the validity of the court order"* and had failed to *"verify the order."* At its height, the complaint was one of omission and not an abuse of authority.

58. Moreover, up to and at the hearing of the defendants' motions in the High Court, Mr. Crowley's case was that there was uncertainty as to who had instructed Ivor Fitzpatrick to apply for the execution order. If it was not obvious to Mr. Crowley – who was aware of the transfer of his loans from the Bank to Start and who had been making repayments to Start – that the application had not been made on the instructions of the Bank, I fail utterly to see how that might have obvious to Garda Caulfield or Inspector Phibbs.

59. It will be recalled that counsel for Mr. Crowley was given huge latitude by the judge in being afforded the opportunity to say what case he might have against the Gardaí that might be saved by amendment. Mr. Crowley's case against Sergeant Brady was limited to an allegation that Sergeant Brady used excessive force in arresting him on 10th November, 2016. In his notice of appeal Mr. Crowley suggests that Garda Caulfield was present in the house on 10th November, 2016 when he was arrested by Sergeant Brady and that *"A successful prosecution against the appellant in the District Court was a motivation for [Garda Caulfield] to assist his superior in justifying alleged excessive force in arresting the said appellant. The trial judge did not factor this possibility in her reasoning."*

60. Two things can be said about this. In the first place, it was not part of the case pleaded by Mr. Crowley, or made on his behalf by counsel on the hearing of the motion to dismiss, that Garda Caulfield had been present at the house on 10th November, 2016 or that this was something which the judge was asked to factor into her reasoning. No less, it is a *non sequitur*. A successful prosecution of a citizen for an offence for which he was arrested could never go to any issue as to whether excessive force had been used to arrest him.

61. Much of the oral argument on behalf of the appellant was directed to the observation of the judge – which I have quoted – that the fact that the statement taken from Ms. de Courcey was taken twenty seven months after the event did not mean that the Gardaí had not

previously received a complaint in the same terms at the time of the event. I see the argument that, on an application in which the onus of proof is squarely borne by the moving party, the judge ought not to have speculated that a previous complaint might have been made or to have given the impression that Mr. Crowley ought to have demonstrated that no such previous complaint had been made, but I do not regard this observation as central to the judge's reasoning or conclusion. Having identified the elements of the tort of malicious prosecution and contemplated that Mr. Crowley might cross – or that Garda Caulfield had failed to persuade her that Mr. Crowley would not cross – all but the last, the judge correctly focussed on the requirement to prove malice.

62. It is now said that the judge failed to reason the significance of the statement taken by Garda Caulfield from Ms. de Courcey which, it is said, was an integral part of an application to obtain a criminal conviction against Mr. Crowley and further intended to legitimise an invalid execution order. I cannot agree. The judge plainly addressed the statement taken from Ms. de Courcey, which mistakenly suggested that the application for renewal of the execution order had been made by Start. If the statement was taken very much later than it might have been – or even ought to have been – I cannot see that this could go to the question of malice. As witness what happened in the District Court on 14th March, 2019, the delay in taking and disclosing the statement was calculated to undermine the prospects of the prosecution succeeding.

63. It is said that the judge failed to apply the reasoning of the Supreme Court in *Clare County Council v. McDonagh* [2022] IESC 2 where it relied on the decision in *Director of Public Prosecutions v. Lynch* [2010] 1 I.R. 543. *Lynch* was a case in which the Gardaí had entered a house using a defective search warrant. The issue in *McDonagh* was whether lands which were illegally occupied could constitute the appellant's home. I fail utterly to see how either case is relevant to the core issue in the application to dismiss the action against Garda

Caulfield and Inspector Phibbs: which was whether there was any reasonable prospect of Mr. McDonagh being able to establish that his prosecution for breaking into the house in Bray was motivated by malice.

64. The grounds of appeal against the dismissal of the action against Ms. Buckley and Ivor Fitzpatrick are slightly different.

65. There is no appeal, certainly in the case of Ivor Fitzpatrick, against the finding of the judge that the action in conspiracy was bound to fail.

66. As to Ivor Fitzpatrick, the argument is that the judge failed to apply what is asserted to have been the reasoning of the Supreme Court in *Doran v. Delaney (No. 2)* [1998] 2 I.R. 61 which – it is said – *"affirmed a duty of care to a third party on the part of a solicitor … not to take blind instructions from a client without enquiry."* It did not. As appears from the headnote, the decision in *Doran v. Delaney (No. 2)* was that *"where a vendor's solicitor has assumed responsibility for furnishing information to the purchaser in a professional capacity knowing that that information would be relied upon by the purchaser while having reason to believe that it was not wholly truthful, he was in breach of their duty of care to the purchaser."* As the High Court judge spelled out, it was no part of Mr. Crowley's case that Ivor Fitzpatrick had ever said anything to him, or that he had relied on anything that was said – or not said – to the County Registrar. Moreover, the premise of the proposition that Ivor Fitzpatrick took *"blind instructions"* is that Start instructed the solicitors to apply for the renewal of the execution order in the name of the Bank. This, it seems to me, is fanciful and, as I have observed, there is no appeal from so much of the order of the High Court as dismissed the claims against Start for damages for conspiracy, misrepresentation and negligence.

67. As to Ms. Buckley, there is no appeal against the decision of the High Court to dismiss the case against her on the ground that she was an employed solicitor, acting in the course of her employment. Rather, the argument made is that the judge failed to take cognisance of a solicitor's duty to the court and that the dismissal of the action against her *"effectively opened the gates to wilful misconduct and collusion with another on the part of a solicitor."*

68. The judgment of the High Court shows that Mr. Crowley maintained three causes of action against Ivor Fitzpatrick – misrepresentation, negligent misstatement and conspiracy – and was not able to say why Ms. Buckley had been joined. The foundation of the claim against Ivor Fitzpatrick was the renewal of the execution order and it was Ms. Buckley who had prepared and filed the application. If, for the sake of argument, Mr. Crowley might have been entitled to join Ms. Buckley personally as a concurrent wrongdoer, there was no suggestion that she might have been liable otherwise than for misrepresentation, negligent misstatement and conspiracy. Specifically, it was no part of the case pleaded or argued in the High Court that Ms. Buckley was in breach of her professional obligations to the court.

69. The suggestion that Ms. Buckley deliberately made the application in the name of the Bank and that she did so in collusion with Start is not sensible. The fact of the matter is that Start had taken an assignment of Mr. Crowley's loans and mortgage and was plainly entitled to apply to the Circuit Court for an order pursuant to O. 36, r. 10 of the Circuit Court Rules. If it is not a safe assumption that on such an application Mr. Crowley would have acknowledged the validity of the assignment to Start, it is common case that he was given notice of the assignment and for about ten months or so made repayments to Start. He certainly accepts now that the mortgage was validly assigned. While Ms. Buckley is charged with having done what she did wilfully, there is no suggestion that Ms. Buckley, or Ivor Fitzpatrick, or Start, had anything to gain, or that she or anyone else bore any personal

animus against Mr. Crowley. There is no warrant for the bald assertion that the mistaken identification of the applicant for the renewal as the Bank was a deceit of the Circuit Court.

70. There is no appeal against the judge's finding that there was absolute privilege for the mistake made by Ms. Buckley in her affidavit.

71. It is now suggested that the High Court judge erred *"in making her applications and orders [sic.] in the absence of disclosure from [Ivor Fitzpatrick] as to who the firm was acting. [sic.]"* and that post the decision the judge invited Ivor Fitzpatrick to clarify *"to whom the provision of legal services were applied."* I am quite satisfied that there is nothing in this. The judgment shows that the judge was strongly inclined to the view that source of the solicitors' instructions was Start but – with the acquiescence of Mr. Crowley – indicated that the solicitors should make assurances doubly sure before she made any order in respect of the Bank. It is now said that any invitation to clarify the identity of the solicitor's client ought to have been made at trial: but it is perfectly clear that it was.

72. At the conclusion of her oral submission, counsel suggested that there had been *"enough issues raised to keep the case alive"* and that the arguments disclosed *"many, many issues"* which required to be resolved. I disagree.

73. The core issue as far as Garda Caulfield and Inspector Phibbs were concerned was the question of malice. The High Court judge found that their failure to appreciate the error in the name of the plaintiff on the execution order was not evidence of malice. I prefer to say that malice could not be imputed to the Gardaí by any omission, *a fortiori* from an omission to interrogate a court order.

74. As far as Ivor Fitzpatrick and Ms. Buckley are concerned, it was never contended that either owed Mr. Crowley a general duty of care and I agree entirely with the judge that Mr. Crowley's reliance on *Doran v. Delaney (No. 2)* is misplaced. It is simply not sensible to

contemplate that Start might have instructed the solicitors to apply in the name of the Bank for the renewal of the execution order or that Ms. Buckley – rather than having made a mistake – might have embarked on a wilful frolic.

75. For these reasons I would dismiss the appeal.

76. Provisionally, I can think of no reason why the respondents – having been entirely successful in resisting the appeal – should not have an order for their costs but if the appellant wishes to contend for any other order, I would allow a period of fourteen days within which a short written submission – not exceeding 1,000 words – may be filed and served. In the event of any such submission being filed and served, I would allow the respondents fourteen days to file and serve their replying submissions – similarly so limited.

77. As this judgment is being delivered electronically, Faherty and Pilkington JJ. have authorised me to say that they agree with it and with the orders proposed.