**APPROVED** [2023] IEHC 245

THE HIGH COURT

Record No.: 2022/2141P

Between:

PHILIP MARLEY

Plaintiff

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

Defendants

**JUDGMENT of Mr Justice Rory Mulcahy delivered on the 16th day of May 2023**

### Introduction

1. This judgment concerns three applications. The first two applications are to strike out the Plaintiff's claim in its entirety, one made by the first Defendant and the other by the second and third Defendants. The third application is the Plaintiff's application for judgment in default of defence.

2. Each of the Defendants' applications are made pursuant to Order 19, Rule 28 of the Rules of the Superior Courts as well as pursuant to the inherent jurisdiction of this Court to strike out claims which have no reasonable prospect of success, are bound to fail or are an abuse of process.

3. In addition, the first Defendant's motion seeks to have the claim against her struck out pursuant to Order 15, Rule 14 of the Rules of the Superior Courts on the basis that no right of relief exists against her in the proceedings.

4. In brief terms, the Plaintiff by these proceedings seeks a series of declaratory reliefs in relation to a number of legal issues which he says will be relevant to the defence of criminal proceedings in respect of which he is currently facing trial. The first Defendant says nothing about the merits of the legal arguments but says that they are matters for the trial judge in the criminal proceedings and that the Plaintiff is not entitled to seek to have those legal issues addressed in advance in plenary proceedings seeking declaratory relief. The second and third Defendants raise a similar objection, but also contend that the legal issues raised are without merit and therefore the Plaintiff is, in any event, bound to fail in these proceedings. As fairly acknowledged by counsel for the second and third Defendants, there is a tension created in advancing these two positions, as addressed below.

5. The Plaintiff argues that he has standing to seek the declarations sought because he faces criminal trial in which the legal questions he raised will be in issue, and that he needs to know in advance what the legal position is as it is a necessary step in preparing a proper defence for the upcoming trial. He says that the issues he raises are at least arguable and therefore the threshold for the exercise of the Court's jurisdiction to strike out proceedings has not been met.

6. The Plaintiff's motion for judgment in default of defence clearly only arises for consideration if the Defendants' applications are unsuccessful.

**Background Facts**

7. As appears from the Plaintiff's Statement of Claim, he is currently awaiting trial before the Dublin Circuit Criminal Court in respect of a number of offences, set out on an indictment, Bill Number DU1527/2021. The indictment contains twenty counts, eight of which relate to the Plaintiff. The Statement of Claim sets out the facts that are alleged. Insofar as the facts alleged are set out in this judgment, this Court reaches no conclusion in relation to them, which will be a matter for the Circuit Criminal Court.

8. Briefly, it will be alleged that in December 2016, a company called Kent International Holdings ("**Kent International**") entered into a deed of conveyance with SLGI (Holdings) plc ("**SLGI**") for a property in Phibsborough, an office block subject to a

lease of 35 years in favour of ADT Limited ("**ADT**"). The Deed was lodged with the Registry of Deeds in January 2017.

9. In April 2017, a solicitor, Mr Herbert Kilcline, applied for first registration of the property on behalf of SLGI. To explain, since 1 June 2011, following the coming into force of the Land and Conveyancing Law Reform Act 2009, all unregistered land in the State is required to be registered in the Land Registry upon the first conveyance or assignment of that land after that date. Where the value of the property is less than €1 million, an applicant for such first registration may avail of the procedure set out in Rule 19(3) of the Land Registration Rules 2012. Where certain conditions are met, this permits registration without investigation of title, based on certification by a solicitor that the title is in order. It is alleged that Mr Kilcline so certified in relation to the Phibsborough property and in November 2017, the Property Registration Authority issued Folio 220572F for the Phibsborough property, confirming SLGI as the full owner of the property.

10. In early December 2017, a solicitor was engaged by SLGI to negotiate with ADT regarding the surrender of the lease by ADT to SLGI, as legal owner. In March 2018, ADT made two payments to SLGI, one of €21,875 in respect of rent, the other of €246,250 in consideration of the surrender of the lease.

11. It is alleged that thereafter, agents for Mr Brian O'Riordan and Mr Michael O'Shea contacted agents for ADT querying why rent had not been paid to them as owners of the property. ADT explained that it had surrendered the lease to the registered owner SLGI.

12. In July 2018, Mr O'Riordan and Mr O'Shea made an application to the High Court pursuant to section 31 of the Registration of Title Act 1964, as amended ("**the 1964 Act**"), seeking to set aside the registration of SLGI as owners. In April 2019, the High Court (Owens J) made an Order setting aside the registration (see **O'Riordan and O'Shea v SLGI (Holdings) plc and Ors [2019] IEHC 247**. SLGI was thus registered as the owner of the property between November 2017 and April 2019. Of note is that when deciding to set aside the registration, the Court expressly refrained from ruling on whether there was any retrospective effect to that Order:

*"25. I am not making any finding in relation to whether ADT was entitled to rely on the then registration of the second defendant as the full owner of the superior at the time that the 1987 lease was surrendered by it to the first defendant. That is an issue for another day."*

13. The criminal proceedings against the Plaintiff concern allegations relating to transactions in respect of two Dublin properties, the one in Phibsborough and another in Ballsbridge. Counts 1 to 6 on the indictment relate to the Phibsborough property, Counts 7 and 8 relate to the property in Ballsbridge. The counts preferred on the indictment are as follows:

**Count No. 1**

**STATEMENT OF OFFENCE**

Procuring registration of false deed contrary to section 41 of the Registration of Deeds and Title Act 2006.

**PARTICULARS OF OFFENCE**

Philip Marley did, on the 20th of February, 2017 at the Registry of Deeds, the Property Registration Authority, Chancery Street in the county of the city of Dublin, procure the registration of a deed of conveyance and assignment between Kent International Holdings LLC and SLGI (Holdings) PLC dated the 20th December, 2016, knowing it to be false in a material particular.

**Count No. 2**

**STATEMENT OF OFFENCE**

Fraudulent procurement of entry to the register held at the Property Registration Authority contrary to section 119 of the Registration of Title Act 1964 as amended by section 68 of the Registration of Deeds and Title Act 2006.

**PARTICULARS OF OFFENCE**

Philip Marley did, on a date between the 6th September, 2016 and the 15th November, 2017, within the state, fraudulently procure the entry of SLGI (Holdings) PLC as the full owner with absolute title to the property at 113 Phibsborough Road, Dublin 7, contained in Folio DN220572F in the register held at the Property Registration Authority.

**Count No. 3**

**STATEMENT OF OFFENCE**

Theft contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

**PARTICULARS OF OFFENCE**

Philip Marley did, on or about the 7th March, 2018, within the state, dishonestly appropriate the sum of €21,875, the property of ADT Limited, without the consent of ADT Ltd. and with the intention of permanently depriving ADT Limited thereof.

**Count No. 4**

**STATEMENT OF OFFENCE**

Money laundering contrary to section 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

**PARTICULARS OF OFFENCE**

Philip Marley did, on dates between the 7th March, 2018, and the 14th March, 2018, both dates inclusive, convert, transfer, handle, acquire, possess or use property within the state that was the proceeds of criminal conduct, to wit the sum of €21,875, knowing, believing or being reckless as to whether or not the property was the proceeds of criminal conduct.

**Count No. 5**

**STATEMENT OF OFFENCE**

Theft contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

**PARTICULARS OF OFFENCE**

Philip Marley did, on or about the 15th March, 2018, within the state, dishonestly appropriate the sum of €246,250 the property of ADT Limited, without the consent of ADT Ltd. and with the intention of permanently depriving ADT Limited thereof.

**Count No. 6**

**STATEMENT OF OFFENCE**

Money laundering contrary to section 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

**PARTICULARS OF OFFENCE**

Philip Marley did, on dates between the 15th March, 2018, and the 23rd March 2018, both dates inclusive, convert, transfer, handle, acquire, possess or use property within the state that was the proceeds of criminal conduct, to wit the sum of €246,250, knowing, believing or being reckless as to whether or not the property was the proceeds of criminal conduct.

**Count No. 7**

**STATEMENT OF OFFENCE**

Procuring registration of false deed contrary to section 41 of the Registration of Deeds and Title Act 2006.

**PARTICULARS OF OFFENCE**

Philip Marley did, on the 26th of March, 2018, at the Registry of Deeds, the Property Registration Authority, Chancery Street in the county of the city of Dublin, procure the registration of a deed of conveyance and assignment between Kent International Holdings LLC and Hamilton Holdings LLC dated the 18th January, 2018, knowing it to be false in a material particular.

**Count No. 8**

**STATEMENT OF OFFENCE**

Fraudulent procurement of entry to the register held at the Property Registration Authority contrary to section 119 of the Registration of Title act 1964 as amended by section 68 of the Registration of Deeds and Title Act 2006.

**PARTICULARS OF OFFENCE**

Philip Marley did, on a date between the 1st September, 2017, and the 5th June, 2018, within the state, fraudulently procure the entry of Hamilton Holdings LLC as the full owner with absolute title to the property at 13 St. Mary's Road, Dublin 4, contained in Folio DN224289F in the register held at the Property Registration Authority.

14. As appears, Counts 3 to 6 relate to alleged unlawful appropriation of funds from ADT, being the payments in respect of rent and in respect of the surrender of the lease, at a time when SLGI was the registered owner of the Phibsborough property.

15. The Plaintiff made an application to sever the indictment to have Counts 7 and 8 tried separately from Counts 1 to 6, which was refused by the Circuit Criminal Court (Circuit Court President Ryan). The Plaintiff attempted to appeal that refusal to the High Court. In an *ex tempore* judgment of Hyland J ([2022] IEHC 209), the Court dismissed the appeal on the basis that the High Court had no jurisdiction to entertain an appeal from a decision of the Circuit Court in respect of a criminal trial.

16. The Plaintiff also made an application pursuant to section 4E of the Criminal Procedure Act 1967 seeking to have Counts 3 to 6 on the indictment dismissed. That application is detailed in an affidavit of Ms. Sandra Manthe sworn on behalf of the first Defendant. The Court was advised at the hearing of these motions that the application pursuant to section 4E had, since the swearing of that affidavit, been heard and refused.

**The Plenary Proceedings**

17. The Plaintiff issued proceedings by way of plenary summons dated 1 June 2022 and delivered a Statement of Claim dated 17 June 2022. The second and third Defendants raised particulars on 10 August 2022 to which the Plaintiff promptly replied. The Plaintiff delivered an amended Statement of Claim on 15 August 2022. The Defendants each made their applications by reference to this amended Statement of Claim.

18. In his proceedings, the Plaintiff seeks a total of 11 declarations. By his amended Statement of Claim, he also seeks, as a consequential relief, an injunction restraining the DPP from prosecuting him in respect of the offences with which he stands charged before the Circuit Criminal Court.

19. For present purposes, it is not necessary to set out all of the declarations sought by the Plaintiff. In brief terms, what the Plaintiff seeks are declarations that the Land Registry Folio issued by the Property Registration Authority in respect of the Phibsborough property constituted conclusive proof of title until it was set aside by the High Court on 11 April 2019. He further seeks declarations that the rectification of the Register by the High Court did not have retrospective effect.

20. In so claiming, the Plaintiff seeks to rely on the provisions of section 31 of the 1964 Act, which provides as follows

> *The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just.*

21. In light of his claims regarding the effect of registration, the Plaintiff seeks further declarations, in effect, that ADT was entitled to rely on the conclusiveness of the register as it stood on the date it paid monies to SLGI in respect of rent and the surrender. He contends that as a consequence, the surrender of the lease was a valid

transaction during the period of the existence of the Folio, that ADT got valuable consideration for the sums transferred and therefore no theft can have occurred.

22. In addition to the foregoing, the Plaintiff seeks declarations regarding the operation of the Land Registration Rules 2012 and the Registration of Deeds Rules 2008, a declaration as to the legal effect of a deed being registered in the Registry of Deeds, and a declaration that the deed of conveyance between Kent International and SLGI is not false in any material respect given its compliance with the Registration of Deeds Rules 2008.

**The Motions**

23. The second and third Defendants issued a motion dated 27 October 2022. The first Defendant's motion was issued on 5 December 2022 and the affidavit of Ms. Manthe grounding the motion exhibited a transcript of the Plaintiff's application to sever the indictment referred to above. In a supplemental affidavit dated 31 January 2023, Ms. Manthe exhibited the application pursuant to section 4E of the Criminal Procedure Act 1967 also referred to above.

24. The grounding affidavit for each motion made clear the Defendants' contention that by these proceedings, the Plaintiff was seeking to usurp the function of the criminal courts, *i.e.*, the issues raised by the declarations sought are issues which fall to be determined in the criminal proceedings and should not be pre-empted by this Court.

25. The Plaintiff filed replying affidavits to both motions which are in similar terms to the helpful legal submissions he filed, and which were supplemented by oral submissions at the hearing of the motions. I will therefore address his arguments below, having set out the arguments of the Defendants.

**Arguments of the Parties**

26. The principal contention of the Defendants is that the matters sought to be raised in these proceedings are matters which can and should be raised during the course of the criminal trial or by one of the procedures afforded for addressing legal issues in advance of a trial, such as section 4E of the Criminal Procedure Act 1967. Accordingly, it is

contended that the Plaintiff cannot bypass those procedures and usurp the role of the Circuit Criminal Court by applying to this Court in plenary proceedings to address matters which fall within the jurisdiction of the Circuit Criminal Court. The Circuit Criminal Court, it is said, routinely addresses complex legal issues in the course of criminal trials, and it is only in exceptional cases, such as a challenge to the constitutionality of a statutory provision relied on in a prosecution that it would be appropriate to ask the High Court to intervene in advance of trial.

27. Insofar as the Plaintiff relies on the inherent jurisdiction of this Court, the Defendants, and the first Defendant in particular, refer by analogy to the decision of the Supreme Court in **GMcG v DW (No. 2) (Joinder of Attorney General [2000] 4 IR 1** and to the observations of Murray J (at p. 26):

> *"Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders. It may indeed be otherwise where a fundamental principle of constitutional stature is invoked against a statutory or regulatory measure determining jurisdiction, but that is not the case here."*

28. It is argued that the practice and procedure for criminal trials is extensively regulated by legislation, that specific provision is made for the determination of matters in advance of trial, for instance by the section 4E procedure or by way of a pre-trial hearing pursuant to section 6 of the Criminal Procedure Act 2021, and that no parallel procedures exist for seeking relief in the High Court. Accordingly, it is said, any claim for such relief is bound to fail or is an abuse of process, in the sense of being an incorrect procedure.

29. The second and third Defendants join in that objection but also contend that the argument that registration in the Land Registry could have the effect contended for by the Plaintiff is frivolous, vexatious and bound to fail. In this regard, they rely on the express reservations in section 31(1) of the 1964 Act regarding 'actual fraud', and the provisions of section 30 of the Act, in particular, section 30(1):

> *Subject to the provisions of this Act with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.*

30. The second and third Defendants contend that section 31 is merely a deeming provision and, as they put it in their written submissions "*the argument that fraudulent or criminal activity would cease to be fraudulent or criminal activity in consequence of a deeming provision is nonsensical*."

31. The Plaintiff represented himself on these applications and contended both that the High Court was the appropriate forum for determining the legal issues he had raised, and also that he had clearly made out an arguable case and that, accordingly, the high threshold required to justify striking out a claim had not been met. In this respect, he referred to **Barry v Buckley [1981] IR 306** and **Freeman v Bank of Scotland (Ireland) Ltd [2013] IEHC 371**. It should be said that there was no dispute between the parties regarding the principles which are applicable to an application to strike out proceedings.

32. As regards the argument that the High Court was not the appropriate forum, in addition to arguing that he needs to know the answers to the legal issues raised in order to prepare his defence in the criminal proceedings, and that he would otherwise be "blocked" in preparing that defence, the Plaintiff argues that given the seriousness of the issues raised for the system of land registration in the State, the High Court was a more appropriate forum for resolution of those legal issues than the Circuit Court in a criminal trial.

33. He explained that the State operated a so-called Torrens title system (apparently named for Sir Robert Torrens who introduced it in South Australia in the nineteenth century) whereby title, at least in respect of registered land, was proved by registration. The Plaintiff referred to this system of registration as a form of State-backed guarantee of title. He referenced the decision in **Argyle Building Society v Hammond (1984) 49 P & CR 148**, in which Slade LJ referred to the description in a leading textbook of registration operating as a form of "statutory magic" to cure any defects in title. He contends that the entire system, and the State-backed guarantee, would be undermined if registration could not be relied on for all purposes and that, having regard to the serious consequences for the system of land registration in the State, these were issues

which manifestly should be dealt with in the High Court and to which the second and third Defendants were the appropriate *legitimus contradictor*.

34. The Plaintiff contends that he has an inalienable right to seek clarity through declaratory relief, and that the High Court is the appropriate court of competent jurisdiction to provide the authoritative rulings he seeks.

**Discussion**

35. As noted at the outset, there is a tension between the second and third Defendants' contention that the appropriate forum for the determination of the legal issues raised in these proceedings is the Circuit Criminal Court, and the contention that the claims made are in any event bound to fail. Counsel for the second and third Defendants stated that the Court should first consider the question whether it was appropriate for this Court to seek relief in plenary proceedings in the circumstances described above *at all*, and only if so satisfied should the Court address the question of whether the Plaintiff's claim discloses a reasonable cause of action.

36. In my view, this is clearly correct. If the Court concludes that the issues raised are matters which should be addressed, in the first instance at least, by the trial judge in the criminal proceedings, then it would not be appropriate for this Court to address the merits of those matters. If these are matters which can and should be dealt with by the trial judge, then this Court would be trespassing on the trial judge's jurisdiction by offering any view on the merits at this stage. The appropriate course would be for the Court to strike out these proceedings.

37. In those circumstances, it is first necessary to address the arguments regarding the appropriate forum for addressing questions of law which arise in the course of a criminal trial.

38. The first Defendant maintains that, save in limited circumstances, the determination of any legal issue relevant to a criminal trial is a matter for that criminal trial. However, the precise range of circumstances in which a challenge in advance of trial may be permitted are not easily defined.

39. In **<u>CC v Ireland</u> [2006] 4 IR 1**, the Supreme Court heard an appeal from the High Court regarding a challenge to the constitutionality of sections of the Criminal Law (Amendment) Act 1935 relating to offences with which the applicants had been charged of under-age sexual relations, including with a girl of 14 years. The accused persons wished to raise a defence of *bona fide* mistake as to the age of the girls and sought declarations in advance of trial that if that defence was not available to them, the section was unconstitutional. The High Court interpreted the legislation as precluding such a defence, and accordingly declared the relevant legislation to be contrary to the Constitution.

40. The Supreme Court expressed the view that it was not the role of the Court to give rulings on the interpretation of legislative provisions in advance of trial. However, the High Court had declared the legislation to be unconstitutional, and in those "exceptional circumstances" the Supreme Court heard the appeal. Before agreeing that the Court should do so, Fennelly J noted (at p. 54) that:

> *"It is, of course, commonplace for applications to be made to prohibit criminal trials. Such applications are brought by way of Judicial Review. It is, however, quite inappropriate and a usurpation of the function of the court of trial for an accused person or the prosecution, for that matter- to seek advance rulings from the High Court as to how any legal provisions should be interpreted in the course of a pending trial."*

41. A similar situation prevailed in **<u>Sweeney v Ireland</u> [2019] IESC 39, [2019] 3 IR 431**. In that case, the High Court (in plenary proceedings) had declared section 9(1)(b) of the Offences against the State (Amendment) Act 1998 to be unconstitutional. The section made it an offence for a person with information which may be of material assistance in securing the apprehension, prosecution or conviction of another person for a serious offence to fail, without reasonable excuse, to disclose that information to An Garda Síochána. On appeal to the Supreme Court, Charleton J (at p. 439) commented:

> *"Properly, the forum to adjudicate the interpretation of any criminal offence and the admissibility of any evidence in support of it is the court of trial. Within that forum, the trial judge has the advantage of access to the entirety of the book of evidence and may also call for any other statement or correspondence that is relevant to such adjudication. In some European criminal law systems, statements taken by police officers from witnesses and the results of relevant enquiries are referred to as the file. Our common heritage is the access by any judge adjudicating on a criminal charge to that file. Both the High Court and*

*this Court on appeal were deprived of such access. Central to the role of a trial judge is hearing submissions on the nature of a charge and ruling on the ingredients of an offence: what conduct constitutes the crime, both as to its external element and its mental element. Based upon that analysis, the trial judge is in a position to adjudicate on the admissibility of evidence in the context of whatever case being brought by the prosecution. This is set out in our system in the book of evidence, and in kindred systems, in the investigation file. If a claim is made, for instance, that a particular item of evidence should not be admitted, that can be seen within the setting of the case being made, and, if an answer to that case is then forthcoming from the accused, any relevant response can also be considered by the trial judge."*

42. As with **CC**, however, in circumstances where the High Court had already ruled on the issue, the Supreme Court heard the appeal and, in fact, found the provision to be compatible with the Constitution.

43. There are, of course, circumstances in which the Courts have entertained what might be termed 'pre-emptive' challenges to the constitutionality of legislation pursuant to which the challenger faces conviction. One such, **Osmanovic v DPP & Ors [2006] IESC 50, [2006] 3 IR 504**, was decided in the month following the decision in **Sweeney**. In **Osmanovic** the constitutionality of a provision of the Finance Act 1997 that created an offence was challenged in advance of the trial by way of judicial review. The High Court refused the reliefs on the basis that the challenge was premature, but the Supreme Court took a different view. Geoghegan J (at p. 511) stated as follows:

*"Is each of these applicants acting prematurely in seeking to challenge the constitutionality of s. 89(b)? The trial judge thought so but I do not agree. In the first case, the judge took the view that these applicants might well be acquitted on the merits and that they should wait until they were convicted before mounting any challenge to the constitutionality of the provision. In relation to the second case the respondents lay emphasis on the very early stage of that case and that it is not known yet what options are open to that appellant at the District Court stage. In other words, the Act of 1967 has not really yet come into play. The trial judge seems to have been of the same view. I do not accept that locus standi is such a narrow concept or that the views of the trial judge conformed with the principles of this court set out in Cahill v. Sutton [1980] I.R. 269. I appreciate that prematurity and locus standi are not quite the same thing. In each of these three cases, however, I am of the opinion that if the applicants' complaints based on the Constitution could be arguably justified, they are perfectly entitled to air them at this stage. In each case, prosecutions have at least been instituted.*

*Counsel for the applicants in the first case has argued that there is plenty of authority for the proposition that a person facing criminal charges has*

> *sufficient standing to challenge the constitutionality of the substantive provisions at issue. In the written submissions and at the oral hearing Norris v. The Attorney General [1984] I.R. 36, Desmond v. Glackin (No. 2) [1993] 3 I.R. 67 and Curtis v. The Attorney General [1985] I.R. 458 have all been relied on and reliance has also been placed to some extent on the recent judgments of this court in C.C. v. Ireland and P.G. v. Ireland [2005] IESC 48, [2006] 4 I.R. 1. In expressing the views which I have done, I would prefer to rely on general principle supported by the case which seems to me to be most relevant, that of Curtis v. The Attorney General, a decision of Carroll J. in the High Court. The P.G. v. Ireland and C.C. v. Ireland cases are distinguishable in that there was a very special reason which is set out in the judgments as to why this court was prepared to consider the validity of a proposed defence ahead of a trial. Some support can be gained from Norris v. The Attorney General and Desmond v. Glackin (No. 2) but Norris v. The Attorney General, in particular, would seem to me to have different features. I believe that the case most in point is Curtis v. The Attorney General. In that case, there was a prosecution under s. 186 of the Customs Act 1876, as amended, and by reason of the provision for the determination of value of the goods the plaintiff wanted to challenge the constitutionality of the relevant provision ahead of the trial. Carroll J. took the view, at p. 458, that the plaintiff had locus standi to challenge the constitutionality of the provisions in question, "as he was in imminent danger of a determination affecting his rights, and this need not necessarily be a decision which would adversely affect his rights." In my opinion, Carroll J. applied the law correctly. Applying the same principles to this case, I consider that none of the proceedings, the subject matter of this appeal, are premature."*

44. In **Kelly on the Irish Constitution (5th ed., 2018)** at paragraph 6.2.195, the authors state that "*it seems generally that having been charged with an offence will be sufficient to allow a constitutional challenge to that offence*" and refer to, *inter alia*, **Osmanovic**. The authors also refer to the decision of the Court of Appeal in **McNamee v DPP [2017] IECA 233**. In that case, the High Court had rejected an application for leave to seek judicial review challenging the constitutionality of section 11 of the Criminal Justice (Public Order) Act 1960, an offence of being "unlawfully at large", on the grounds of vagueness. Mahon J (at paragraph 6) stated:

> *"I agree that generally speaking, judicial restraint is called for in the granting of applications for prohibition and that recent jurisprudence has sought to emphasise the preference for judicial review challenges to be bought at the conclusion of a lower court's process rather than to disrupt it mid-stream. While that might be said to be the general rule, or the common approach of the courts, it is important to emphasise that this statement of general principle is subject to exceptions where the interests of justice so require. There have been many occasions when such exceptions have been recognised."*

45. In that case, Mahon J concluded that the interests of justice warranted the Court at least entertaining the application, at paragraph 10-11:

> *"In the instant case, what is at issue is the description of the offence with which the appellant is charged. In particular the appellant maintains that the charge of being unlawfully at large by way of breaching a condition of temporary release to be of good behaviour is so vague and uncertain as to be incapable of a trial in due course of law. In essence, the appellant argues that it would be unjust to require that he meet a charge of committing a crime in respect of which he does not have sufficient information because of its vagueness, and having done so, if convicted, then proceed to challenge the constitutionality of the statutory provision giving rise to that charge on the basis of vagueness. The appellant was facing a decision which would adversely affect his rights (as per Carroll J. in Curtis). The right in question was the right to liberty which would be at risk of being lost in the event of a conviction. He was entitled to know what he was charged with and to understand the basis of that charge. A claimed inability to so understand is a factor which would have justified the court in at least considering the application for leave in advance of the appellant's trial for the offence in question."*
>
> *I am satisfied that the instant case is in the nature of a case where in the interests of justice it was appropriate that the appellant be entitled to seek to challenge the constitutional validity of the statutory provision underpinning his prosecution prior to it being adjudicated in court rather than after its conclusion, and subject to the merits of the application. The issue of the vagueness of a statutory provision creating a criminal offence is by its nature one that may require judicial determination prior to any requirement on the part of an accused to defend himself or herself."*

46. It must be recalled, of course, that the Circuit Court does not have jurisdiction to declare a law to be unconstitutional. That is a jurisdiction conferred by Article 34.3.2° of the Constitution on the Superior Courts alone. Thus, the interests of justice may well favour permitting a person to challenge the constitutionality of a law pursuant to which they are charged in the High Court rather than requiring that person to face conviction pursuant to a law which is potentially incompatible with the Constitution and seek a remedy by way of appeal.

47. As acknowledged by the authors in **Kelly** "*the line between challenging a statute and seeking a judicial interpretation can be very thin*." In **Habte v Minister for Justice and Equality [2020] IECA 22** Murray J (at paragraph 127) suggested that:

*"The line of authority reflected in Osmanovic may be capable of distinction on the basis that the jeopardy of a criminal trial presents a particularly pressing prejudice and indeed within the cases there may be a valid differentiation between challenges to the provision on foot of which the plaintiff or applicant is prosecuted, and challenges to evidential provisions around the prosecution, and there may be potential distinctions between proceedings in which an established factual matrix is necessary before a challenge can be properly adjudicated upon, and those in which it is not [...]."*

48. Drawing from the above authorities, although it may not be possible to draw a bright line between those cases where it is permissible to mount a challenge in advance of trial and the circumstances where it is not, the following broad principles emerge:

   i. In general, the proper forum for resolving issues of law which may arise in the course of criminal proceedings is, in the first instance, the criminal trial;
   ii. Where, however, the constitutionality of provisions pursuant to which a person is charged is in issue, it may be permissible to have that question of constitutionality determined in advance of trial;
   iii. In considering whether it is appropriate to permit such a pre-emptive challenge, the Courts will consider the extent to which the legal issue can be addressed independently of the factual matrix which would otherwise be established at trial;
   iv. The overriding consideration is whether the interests of justice require the question to be determined in advance of trial.

49. The question for these applications, therefore, is whether the nature of the declarations sought by the Plaintiff in this case make them appropriate for resolution in advance of the criminal trial.

50. Of course, these are applications to strike out the proceedings and therefore the Plaintiff need only establish that he has an arguable case that the High Court is the appropriate forum for addressing the issues he raises and, if so, that the issues raised are themselves arguable.

51. The principles applicable to an application to strike out a case are well settled: see, **Lopes v Minister for Justice Equality and Law Reform** **[2014] IESC 21, [2014] 2**

**IR 301**. In that case, the Supreme Court addressed the reason why the jurisdiction to strike out pursuant to Order 19, rule 28 of the Rules of the Superior Courts exists side by side with the jurisdiction to strike out pursuant to the inherent jurisdiction of the Court, Clarke J (as he then was) at page 309 stated:

> *"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. The reason why, as Costello J. pointed out at p. 308 of his judgment in* Barry v Buckley, *an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. 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."*

52. An application under the Rules can be brought when the pleadings disclose no reasonable cause of action, or which is vexatious or frivolous. The Court must consider the pleaded facts as true for the purpose of considering such an application, and if the pleaded case can be amended to disclose a reasonable cause of action, then a Court should not strike them out. Butler J in **Keary v Property Registration Authority [2022] IEHC 28** summarised the question for the Court as follows:

> *"Thus, the question is a legal one, namely whether, accepting the facts as asserted, the case as pleaded gives rise to a cause of action that is legally capable of succeeding. The issue is not whether it will or will not succeed but whether it is legally capable of doing so."*

53. An application pursuant to the inherent jurisdiction of the Court allows for a broader assessment in determining whether a court should dismiss a claim, *i.e.* whether having regard, to a limited extent, to the underlying merits, it is clear that the claim is bound to fail. As **Lopes** suggests, a claim should not be dismissed as bound to fail merely because the evidence is not yet available at the time of the application, in circumstances where parties may yet have the benefit of discovery, interrogatories, and oral evidence at trial that might allow their claim to succeed. It is a jurisdiction that should be exercised

sparingly, and a high burden rests on a Defendant arguing that a claim is bound to fail. The Supreme Court in **Jeffrey v Minister for Justice Equality and Defence [2019] IESC 27, [2020] 1 ILRM 67** suggests at paragraph 7.4, albeit *obiter*, that it may be possible for a court to resolve a simple and straightforward issue of law in such an application.

**Decision**

54. The Plaintiff in these proceedings seeks declaration as to the legal effect of certain statutory provisions, in particular, section 31 of the 1964 Act. The difficulty for the Plaintiff in seeking to argue that this Court has jurisdiction to address the questions he raises in advance of trial is two-fold.

55. Firstly, he is not charged with any offence in relation to section 31 of the 1964 Act or, indeed, any of the statutory provisions the legal effect of which he seeks to have interpreted by the Courts. Insofar as he seeks declarations that the surrender was a valid transfer of "land" within the meaning of section 5(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001, that claim is entirely derivative of his claim regarding the effect of section 31.

56. Secondly, and perhaps more fundamentally, he does not seek to challenge the lawfulness of any statutory provision *at all,* whether by reference to the constitution or otherwise. He does not, for instance, plead that there are any constitutional implications if section 31 is not given the interpretation for which he contends, albeit he does argue that a particular interpretation of section 31 may have serious implications for the operability of the State's system of registration of title.

57. In effect, the Plaintiff seeks an advisory opinion on the interpretation of statutory provisions, something which the authorities make clear is wholly impermissible. Although there may be a jurisdiction in this Court to provide interpretations of statutory provisions in advance of trial where the constitutionality of those provisions is in issue, and where a person may be exposed to jeopardy on the basis of provisions which are incompatible with the Constitution, there does not appear to be any jurisdiction to simply provide declarations as to the legal effects of statutory provisions in advance of

a criminal trial where the lawfulness of those provisions is not in dispute. There is no barrier to the Circuit Criminal Court addressing in full all of the issues of statutory interpretation which the Plaintiff has raised.

58. The fact that the legal effect of section 31 and the other provisions in respect of which the Plaintiff seeks declarations may well be an issue which requires to be addressed by the Circuit Criminal Court is not a basis for the High Court entertaining the Plaintiff's claim, indeed the reverse is the case. The fact that the Circuit Criminal Court can deal with the legal issues arising dictates that this Court should not so do.

59. Moreover, insofar as the Circuit Criminal Court may be required to address the issues of interpretation raised by the Plaintiff, it will be able to do so in a particular factual context – the course of dealings alleged in the indictment – which will need to be established in evidence at the criminal trial.

60. In the circumstances, entertaining an application for the declarations sought here would very clearly, in my view, involve this Court engaging in precisely the type of "*usurpation of the functions*" of the criminal court deprecated by Fennelly J in **CC**.

61. The Plaintiff argues that the significance and complexity of the issues he raises and the potential significance of any conclusion which might be reached mean that it is more appropriate that the issues are addressed by the High Court rather than the Circuit Criminal Court. There is, in my view, no substance to this contention, and it certainly does not provide a basis for departing from the conduct of a trial in the ordinary way. The Circuit Criminal Court habitually deals with matters of significant factual and legal complexity and there is no reason to suppose that it cannot address the issues raised here. In any event, the option of stating a case pursuant to section 16 of the Courts of Justice Act 1947 will be available during the pendency of any criminal trial (see, for example, **DPP v O Leary [2023] IECA 48**).

**Conclusion**

62. In light of the above, I have concluded that the Plaintiff is not entitled to seek the declarations set out in his Plenary Summons and Statement of Claim in advance of his criminal trial. His claim for an advisory opinion is not "legally capable of succeeding"

and his pleadings therefore disclose no reasonable cause of action. Accordingly the proceedings should be struck out pursuant to Order 19, Rule 28 of the Rules of the Superior Courts. It is not, therefore, necessary to consider whether the claim should also be struck out pursuant to the inherent jurisdiction of the Court or the first Defendant's reliance on Order 15, Rule 14.

63. In the circumstances, it is also not necessary, and for the reasons stated above it would be inappropriate, to express any view on the merits of any of the issues raised by the Plaintiff in these proceedings.

64. The Plaintiff's motion does not fall for consideration as a result of the conclusion I have reached on the Defendants' applications.

65. I propose making an Order striking out the proceedings pursuant to Order 19, Rule 28 of the Rules of the Superior Courts. I will hear the parties in relation to the form of the Order and costs.