THE COURT OF APPEAL

Peart J.
Whelan J.
Baker J.

Neutral Citation Number: [2019] IECA 235

Appeal No. 2018/77

BETWEEN/

PATRICK O'CONNOR

PLAINTIFF/

APPELLANT

-AND-

JAMES KELLY, AMY MC CARTHY AND ADRIAN MAC NAMARA TRADING AS ADRIAN MAC NAMARA AND COMPANY SOLICITORS

DEFENDANTS/

RESPONDENTS

Appeal No. 2018/78

BETWEEN/

PATRICK O'CONNOR

PLAINTIFF/

APPELLANT

-AND-

PROPERTY REGISTRATION AUTHORITY OF IRELAND

DEFENDANT/

RESPONDENT

JUDGMENT of Ms Justice Baker delivered on the 31st day of July, 2019

1. Mr Patrick O'Connor, the appellant, was previously party to four separate actions, each commenced and prosecuted in the Commercial List of the High Court between 2012 and 2016. Thereafter, he commenced these proceedings and this judgment is given in the appeal against the ex tempore ruling and order of McGovern J. made on 9 October 2017, by which he struck out the proceedings as being an abuse of process, as he found them to be an attempt to litigate matters which had already been definitively and conclusively decided by a court of competent jurisdiction in the four earlier proceedings. McGovern J. also made ancillary orders in the form of injunctions, and an Isaac Wunder order against Mr O'Connor restraining him from instituting any further proceedings directly or indirectly concerning any of the properties or borrowings the subject of the earlier proceedings and these two proceedings.

2. The appellant is a litigant in person and also represented himself at the hearing of the applications before McGovern J. For convenience, I will refer to him by his name and not as "the appellant".

3. Both appeals concern secured borrowings dating from 2002 and mortgages and charges to Bank of Scotland (Ireland) Ltd ("BOSI") over residential properties and building sites in Cork City and County, full particulars whereof will appear in the course of this judgment.

4. The grounds of appeal and the factual background are complex, but the core of the proceedings concerns the registration of charges over registered lands and mortgages over unregistered lands in favour of BOSI, and the subsequent sale of those folio lands by a receiver appointed by the successor in title of BOSI. As will appear, the prior, and now definitively concluded, proceedings challenged the securities granted by Mr O'Connor between 2002 and 2010 and actions taken by the owner of the securities including the appointment of Michael Cotter and Luke Charleton as joint receivers ("the Joint Receivers"). The broad thrust of the response by the respondents to these two new proceedings and, now, to the appeals, is that the issues regarding the validity of the securities and the appointment thereunder of receivers, and those regarding other actions of the owner of the security interests may not now be maintained.

The High Court proceedings and motion
5. By the first proceedings ("the Amberley proceedings") commenced by plenary summons on 30 May 2017, Mr O'Connor seeks a number of reliefs. The primary relief sought is "the return of the plaintiff's property and land" being the dwelling house at 16 Amberley Heights Grange, Douglas, County Cork, comprised in Folio CK 78315F of the Register of Freeholders County Cork, ("Amberley") sold for valuable consideration to Mr James Kelly and Ms Amy McCarthy ("the Amberley Purchasers") by Feniton Property Finance DAC ("Feniton"), the successor in title of the original charge owner. Mr Adrian Mac Namara acted as their solicitor in the purchase and is the third defendant. At the time of the hearing, registration of the dealing of the Amberley Purchasers was pending in the PRAI and was lodged following the closing of the sale to the Amberley Purchasers.

6. An appearance was entered on behalf of all three defendants and they thereafter issued a motion on 19 July 2017 seeking the admission of the proceedings into the Commercial List of the High Court, and an order that the proceedings be dismissed as an abuse of process on the grounds that the plaintiff was seeking thereby to relitigate matters that had already been decided in a court of competent jurisdiction in the four earlier proceedings set out in the body of the motion, and which I set out below. In the alternative, an order was sought dismissing the proceedings on the grounds that Mr O'Connor was precluded by reason of the rule in *Henderson v. Henderson* (1843) 3 Hare 100 from litigating matters which, insofar as they had not already been determined, could have been brought forward in those previous proceedings. That motion also sought ancillary injunctive relief and an Isaac Wunder order in the form referred to above.

7. That motion came on for hearing in conjunction with the motion of the defendant in the second set of proceedings where similar relief was sought on substantially the same grounds.

8. By the second proceedings ("the PRAI Proceedings") commenced against the Property Registration Authority ("PRAI") by plenary summons on 20 May 2016, Mr O'Connor seeks damages for the allegedly invalid registration of invalid and defective charges and mortgages in respect of Amberley, of three dwelling houses and lands being unregistered land at Lindville, Ballintemple, Cork, of a premises known as Ashleigh, Rochestown Road, Cork, of land known as Five Firs, Rochestown Road, Cork, also unregistered lands, and of premises known as 43 Aldown Grove, Douglas, County Cork (Folio CK 75412F).

9. Again, an appearance was entered and the solicitors who act for the defendants in the Amberley Proceedings later came on record for the defendant and issued a motion in similar terms dated 1 October 2017.

10. The two sets of proceedings and the two appeals raise broadly similar but not identical facts but do raise identical issues of law.

11. In neither case was a statement of claim delivered by Mr O'Connor and the motions were brought after the filing of an appearance.

The High Court ruling
12. McGovern J. heard the two motions on 9 October 2017. It is apparent from the transcript that he had some familiarity with the earlier related proceedings, and that he had made orders in June 2017 placing certain restrictions on the institution by Mr O'Connor of further proceedings relating to the lands in Cork City and County Cork. It is also apparent that the trial judge had read the motion papers before the matter came on for hearing, and that he had read and was familiar with earlier judgments and orders made by the Superior Courts in the related proceedings. The trial judge, having pointed out that he already made an Isaac Wunder order which, in its terms, was not broad enough to encompass the two proceedings then under consideration by him, made a further Isaac Wunder order in the terms identified above and made an order dismissing both proceedings on the grounds that they were an abuse of process and frivolous, and because they sought to relitigate a matter, namely the validity of the appointment of the Joint Receivers that had already been decided by a court of competent jurisdiction in the four earlier proceedings.

13. The trial judge expressed the proposition in strong terms that there had to be finality in the litigation and that the time for finality had long since passed in regard to Mr O'Connor's claims.

14. Mr O'Connor has been party to four sets of previous proceedings which I will, where appropriate, refer to collectively, as "the Prior Proceedings". These are in summary:

> (a) In 2012 two sets of proceedings were brought ("the 2012 Proceedings"), the first by Mr O'Connor against BOSI and others, bearing High Court record number 12108 P ("the Lis Pendens Proceedings"), and the second, summary proceedings commenced by BOS against Mr O'Connor to recover debt bearing record number 4449 S ("the Debt Recovery Proceedings"). Cregan J. gave judgment dismissing the claim in the Lis Pendens Proceedings and granting judgment against Mr O'Connor in the Debt Recovery Proceedings, on 20 February 2015, *O'Connor v. Bank of Scotland (Ireland) Ltd, Bank of Scotland v O'Connor* [2015] IEHC 274. On 10 February 2017, the Court of Appeal, *per* Peart J., upheld the judgment of Cregan J., *Bank of Scotland Plc v. O'Connor* [2017] IECA 24. A supplemental judgment of the Court of Appeal was delivered on 1 March 2017, *Bank of Scotland Plc v. O'Connor* [2017] IECA 54 ("the Supplemental Judgment") where Finlay Geoghegan J. addressed the submission by Mr O'Connor regarding the *locus standi* of BOS to continue to act as respondent to his appeal in the Debt Recovery Proceedings. The Supreme Court refused to grant Mr O'Connor leave to appeal in two determinations of 23 June 2017, *O'Connor v. Bank of Scotland (Ireland) Ltd* [2017] IESCDET 73 and *Bank of Scotland Plc v. O'Connor* [2017] IESCDET 72.
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> (b) proceedings commenced in 2015 bearing High Court record number 2002 P between Mr O'Connor and the Joint Receivers (the "Joint Receivers Proceedings"), the subject of an *ex tempore* judgment of Haughton J., *O'Connor v. Cotter* (High Court, 30 July 2015), dismissing the proceedings. The decision of Haughton J. was upheld by the Court of Appeal in *O'Connor v. Cotter* [2017] IECA 25, *per* Finlay Geoghegan J., and a determination of the Supreme Court, *O'Connor v. Cotter* [2017] IESCDET 71, on 23 June 2017, refused Mr O'Connor leave to appeal;
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> (c) proceedings commenced in 2016 bearing High Court record number 1704 P between Mr O'Connor and Sherry Fitzgerald Ltd and Ronan Daly Jermyn (the "Sherry Fitzgerald Proceedings"), the subject of an order and decision of McGovern J. delivered on 8 June 2016, *O'Connor v. Sherry Fitzgerald Ltd* [2016] IEHC 307, by which he had dismissed the proceedings of Mr O'Connor against the named defendants and the receivers who were joined to the proceedings by McGovern J. for that purpose. McGovern J. made his order, *inter alia*, on the grounds that the decision of Cregan J. in the Debt Recovery Proceedings and the later decision of Haughton J. meant, as a matter of law that the Sherry Fitzgerald Proceedings were an inadmissible challenge to an earlier determination. The Court of Appeal upheld the decision of McGovern J., *per* Edwards J., *O'Connor v. Sherry Fitzgerald Ltd* [2018] IECA 67. This resulted in a final and conclusive determination regarding the question of the appointment of the Joint Receivers, their power to negotiate the sale of Amberley and the efficacy of the deed of transfer by Feniton to the Amberley Purchasers.

The present appeals
15. Mr O'Connor appeals the orders of McGovern J. and his notices of appeal are lengthy and somewhat prolix. The appeals are contested on all pleaded grounds, and I will deal with the grounds of appeal and response in sequence.

The first ground: Admission of the proceedings into the Commercial List
16. The first ground of appeal is a challenge to the admission of the proceedings into the Commercial List. The decision whether proceeding should be entered in the Commercial List is made pursuant to O. 63A r. 1(b) of the Rules of the Superior Courts ("RSC") and in the discretion conferred by that rule. An appellate court is slow to interfere with a decision that proceedings be entered into the Commercial List: *The Governor and Company of The Bank of Ireland v. O'Donnell* [2015] IECA 73, [2016] 2 IR 185, and Mr O'Connor has shown no basis on which the discretionary power exercised by McGovern J. was wrongly exercised or that he committed any error of law.

17. Quite apart from that proposition, it makes no practical sense for the Court of Appeal to set aside the entry into the Commercial List of proceedings which have been struck out and which have thereby been concluded. The admission of the two proceedings into the Commercial List was a matter well within the jurisdiction and discretion of the High Court judge, and making any order reversing the admission of the proceedings into that List at this stage would be futile.

The second ground: the respondents have no locus standi
18. The ground of appeal that the respondents have no *locus standi* in relation to any or all of the properties under consideration in the proceedings is difficult to understand as the proceedings were commenced by Mr O'Connor against those named defendants and in regard to the various properties therein and later identified in the affidavit evidence. I can see no absence of standing in the circumstances.

The third ground: Joinder of parties
19. The notice of appeal also challenges the "proposal" that the Joint Receivers, Mr Cotter and Mr Charleton be joined, but, as no order was made by McGovern J. that they be joined, those grounds of appeal (Nos. 2, 3, 4, 7, 8 and 12 in part) which relate to the "proposed defendants" will not be further dealt with.

The primary grounds of appeal
20. That leaves the remaining grounds of appeal which may conveniently be summarised as:

> (a) that new circumstances have arisen entitling Mr O'Connor to litigate the matters at issue in the Amberley Proceedings and the PRAI Proceedings;
>
> (b) that the PRAI may not register the Amberley Purchasers as owners of the dwelling house at Amberley;
>
> (c) that Feniton, which had appointed the Joint Receivers and then sold the premises at Amberley could not, as a matter of law, have purchased from BOS the benefit of the judgment already entered in the Debt Recovering Proceedings, as the debt has "merged" in the judgment and therefore no longer existed and was not capable of being sold or purchased;
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> (d) that there has been an unlawful interference with the property rights of Mr O'Connor by the PRAI and that unlawful documentation was lodged by the solicitors for the Amberley Purchasers following the sale of Amberley;
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> (e) that Mr O'Connor is the only person "with lawful authority" competent to transfer title to a purchaser in any real property in his name; and
>
> (f) that the Deed of Novation made on 20 November 2015 by which BOS novated the Deed of Appointment of the Joint Receivers following the purchase by Feniton of the loans and securities is void and of no effect.

Response of respondents to grounds of appeal
21. The respondents challenge each ground of appeal and positively rely on the determinations made in the Prior Proceedings as creating a bar to the maintenance of the proceedings. It is submitted that the validity of the appointment by BOS of the Joint Receivers over the various properties of Mr O'Connor has already been conclusively determined in the Prior Proceedings, in particular, in a judgment of Cregan J., *O'Connor v. Bank of Scotland* [2015] IEHC 274, and in the other proceedings commenced by BOS against Mr O'Connor and by the appeal to the Court of Appeal and the determination of the Supreme Court thereafter.

22. The focus of the respondents' notice of opposition is that the Prior Proceedings have conclusively determined the matters now in issue and reliance is placed on *Henderson v. Henderson* and the authorities of the Irish Superior Courts explaining and developing the principles therein. It is specifically denied that there has been any interference with any rights of Mr O'Connor in the various properties the subject matter of the proceedings, and the ground of appeal, whether constitutional or otherwise deriving, and the argument that the debt of Mr O'Connor to BOS has merged and become extinguished in the judgment of Cregan J. is specifically challenged.

23. The grounds of appeal and the detailed arguments by the parties will appear more fully in the course of this judgment but, before I deal in detail with them, it is useful to observe that at the core of the Amberley Proceedings and the PRAI Proceedings is a challenge to the registration of the Amberley Purchasers as owners of the folio lands, and a challenge to the security interests held by BOSI, by its successor BOS and latterly by Feniton in Amberley and in the other lands and premises which together make up the portfolio of real property over which various security interests were created by Mr O'Connor between 2002 and 2010 in favour of BOSI.

The rule in *Henderson v Henderson*
24. It is useful to briefly analyse the rule in *Henderson v. Henderson* which is central to the appeal and has found reflection in a number of judgments of the Superior Courts of Ireland and is well established. It is noteworthy that the rule was considered at some length in some of the Prior Proceedings and formed the basis of various orders.

25. *Henderson v. Henderson* was considered by Finlay Geoghegan J. in her judgment in the Joint Receivers Proceedings, where she usefully analysed the principles in the context of the proceedings then commenced by Mr O'Connor against the Joint Receivers appointed by BOS. That was an appeal against the judgment of Haughton J. of 30 July 2015 and was heard at the same time as the

other appeals against the judgments and orders of Cregan J. in the Debt Recovery Proceedings and the Lis Pendens Proceedings. Finlay Geoghegan J. made reference to her decision in the Court of Appeal in *Vico Ltd v. Bank of Ireland* [2016] IECA 273, where, at para. 25, she stated the principle derived from *Henderson v. Henderson* that:

> "the underlying principle is similar to that in res judicata namely the public interest in those who resort to litigation obtaining a final and conclusive determination of their disputes."

26. As Finlay Geoghegan J. said, the matter had recently been considered by Cooke J. in *In re Vantive Holdings* [2009] IEHC 408 and, on appeal to the Supreme Court, in *In re Vantive Holdings* [2009] IESC 69, [2010] 2 IR 118, at pp. 124-125, where Murray C.J. recited the stated principle from Cook J. in the High Court:

> "The rule in *Henderson v. Henderson* is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."

27. The rule was "somewhat mitigated", to use the words of Cooke J. in *In re Vantive Holdings*, at para. 33, by Bingham L.J. in *Johnson v. Gore Wood & Co (A Firm)* [2002] 2 AC 1, at para. 31, and Finlay Geoghegan J. extracted a lenghty quotation. Of particular relevance in the present appeals is the proposition stated by Bingham L.J. and adopted by Finlay Geoghegan J., and, as she noted, by other judges of the Superior Courts of Ireland in the recent past, that the bringing of a claim or raising of a defence in later proceedings may amount to an abuse if the court is satisfied that the claim or defence could have been raised in the earlier proceedings, as the claim would be capable as being seen as a collateral attack on a previous conclusive and final determination on the same point.

28. Finlay Geoghegan J. rejected the appeal from the decision of Haughton J. who had struck out the proceedings as an abuse of process and rejected the argument that, as the parties changed between the Lis Pendens Proceedings and the Joint Receivers Proceedings, the substantial point in the litigation was different. She also decided that the fact that additional parties were joined is irrelevant.

29. Edwards J. noted this judgment of Finlay Geoghegan J. in his decision in the Sherry Fitzgerald Proceedings, where he upheld the decision of McGovern J. that the proceedings were an abuse of process within the meaning of *Henderson v. Henderson*.

30. I will now examine the two proceedings the subject matter of these appeals.

The Amberley proceedings

31. These proceedings relate to one only of the properties formerly owned by Mr O'Connor but the same or a similar legal question arises in these proceedings as arises in the PRAI Proceedings. It is convenient to set out the history of Amberley and to then deal with the matters in issue in those proceedings which overlap with those in the related proceedings.

32. 16 Amberley Heights Grange Douglas County Cork is a residential property comprised in folio CK 78315F of the Register County Cork. A charge in favour of BOSI was created by Mr O'Connor, the registered owner, on 6 July 2010. BOS became entitled to the benefit of that charge and the underlying loan following the cross-border merger between BOSI and BOS which took effect just before midnight on 31 December 2010, and which had been the subject of a number of judgments of the Superior Courts (see *Freeman v. Bank of Scotland Plc* [2014] IEHC 284; *Kavanagh v. McLaughlin* [2015] IESC 27, [2015] 3 IR 555, *Tanager DAC v. Kane* [2018] IECA 352. It cannot now be doubted that, as a matter of law, all assets of whatsoever nature of BOSI became vested in BOS by the merger. BOS was registered as owner of the charge on 13 April 2011 (Burden at Entry 3)

33. The deed of 21 September 2012 by which BOS appointed the Joint Receivers of various properties, included Amberley.

34. BOS thereafter sold its debts and associated security to Feniton by deed which took effect on 23 November 2015, following notice to Mr O'Connor. BOS was registered as owner of the charge prior to the sale to Feniton. As a consequence, none of the difficulties considered in the judgment of the Court of Appeal in *Tanager DAC v. Kane* arise for consideration. There was no impediment to the sale or registration of Feniton as owner of the charge and the sale by Feniton thereafter. Feniton was registered as owner of the charge on 10 December 2015 (Burden at Entry 7).

35. But, and in case there should be any doubt regarding this, the judgment of Edwards J. in the Sherry Fitzgerald Proceedings determined the question conclusively. Edwards J. was dealing precisely with the charge of 6 July 2010 registered in favour of BOS over Amberley. In those proceedings, Mr O'Connor sued Sherry Fitzgerald Ltd, a firm of auctioneers, Ronan Daly Jermyn solicitors, and the Joint Receivers, and registered a *lis pendens* on the Folio. Edwards J. set out the history of those proceedings, the Debt Recovery Proceedings, in which Cregan J. granted judgment in the sum of €7.683,999.96 against Mr O'Connor and dismissed his claim where he had alleged undue influence, breach of contract, and misrepresentation on the part of BOSI. Edwards J. also recited the Joint Receivers Proceedings, by which Mr O'Connor challenged the appointment of the Joint Receivers and their entitlement to sell the property at Amberley which had been dismissed under the rule in *Henderson v. Henderson* by order of Haughton J. of 30 July 2015.

36. The Court of Appeal dismissed both appeals by its judgment of 10 February 2017, and supplementary judgment of 1 April 2017. The judgment of the Court of Appeal accepted that Mr O'Connor was seeking to raise points in the Joint Receivers Proceedings concerning the validity of their appointment which had not already been litigated and/or adjudicated upon in earlier proceedings, but came to the conclusion that the proceedings were correctly dismissed in reliance on the rule in *Henderson v. Henderson* on account of the fact that Mr O'Connor could have brought forward all of those grounds of challenge in the earlier proceedings.

37. The present appeal does not concern the validity of the appointment of the Joint Receivers but rather seeks to avoid the "sale" by them to the Amberley Purchasers. The Joint Receivers having been first appointed by BOS, and the benefit of that deed having novated to Feniton as lawful assignees of the 2010 charge and mortgage, marketed Amberley for sale and entered into a contract for sale with the Amberley Purchasers. However, in the events, the sale was completed by Feniton as the registered owner of the charge and it sold as mortgagee in possession by deed of 3 March 2017, and in pursuance of the statutory power contained in s. 62(6) of the Registration of Title Act 1964. Feniton did not rely on any power that might have been vested in the Joint Receivers to assure the title. The Joint Receivers did not "sell" Amberley in the sense relied on by Mr O'Connor.

38. Mr O'Connor argues that his present claims are different in that he seeks to challenge the title of the Amberley Purchasers and

the title of Feniton to the charge registered on Amberley. I consider that the respondents are correct in the argument made that Mr O'Connor may not now pursue the Amberley Purchasers and the solicitors who acted for them other than by means of a challenge to Feniton's title to the security and these are matters that were or could have been conclusively determined in the Prior Proceedings.

39. It seems to me that the challenge to the Feniton title was one that could have been, but was not, expressly made in the Sherry Fitzgerald Proceedings by which, *inter alia*, Mr O'Connor sought an injunction restraining Sherry Fitzgerald as auctioneers and Ronan Daly Jermyn acting on the instructions of the Joint Receivers from marketing and acting in the sale of Amberley. Mr O'Connor there made the point that the sale to Feniton had closed in November 2015, only months before he commenced those proceedings in February 2016, and it is clear from the judgment of Edwards J. that Mr O'Connor expressly relied on the fact that, as BOS had sold its assets to Feniton, it could no longer seek judgment against him.

40. It is clear therefore, that Mr O'Connor was aware, at least as far back as 2015, that Feniton had purchased the debts and security interest. Further, the Sherry Fitzgerald Proceedings were a challenge to the sale of the property at Amberley and having regard to the fact that Feniton was registered as owner of that property as long ago as 10 December 2015, some months before the Sherry Fitzgerald Proceedings commenced, Mr O'Connor could have included the arguments now made in his then challenge to the sale and not having done so, in my view, his proceedings must fail on account of the rule in *Henderson v. Henderson*, which extends to the determination of matters which could have been, but were not, raised in earlier proceedings.

41. In my view, the trial judge was correct that Mr O'Connor was required to bring forward all complaints in regard to the title of Feniton by, at the latest, the Sherry Fitzgerald Proceedings if not before, and accordingly the proceedings fall to be considered as an abuse of process and are frivolous and vexatious.

The PRAI Proceedings

42. The plenary summons issued on 20 May 2016 and essentially seeks to challenge the registration by the PRAI of charges on folio lands, or mortgages on unregistered lands, the lands in question being those identified above and those directly or indirectly considered in the Prior Proceedings or some or all of them.

43. The PRAI Proceedings raise broadly similar although not entirely overlapping issues as those in the Amberley Proceedings.

44. The primary claim against the PRAI is that it acted unlawfully and interfered with the property rights of Mr O'Connor by accepting for registration and then registering Feniton on the purchase from BOS, and that the actions of the PRAI are in breach of Directive 2005/56/EC on Cross-Border Mergers of Limited Liability Companies OJ L/310, 25.11.2005. The specific argument is that while BOSI did, by the cross border merger effected under Irish law by the European Communities (Cross-Border Mergers) Regulations 2008, S.I. 157/2008, transfer all its assets and liabilities to BOS on 31 December 2010, the fact that BOSI remained registered as owner on the respective folios created an impediment to any further action or purported dealings with the land by BOS thereafter. As will become apparent, the facts do not support that argument.

45. Thus, the core issue in the PRAI Proceedings is the validity of the registration of Feniton as owner of the relevant charges and subsequently of the Amberley Purchasers as owner of freehold registered interest. This is apparent from the fact that the PRAI Proceedings concern the security interests in:

(a) The property at 42 Alden Grove, Douglas Cork, Folio 75412F County Cork;

(b) The premises and development lands at Lindville, Ballintemple, Cork title which is unregistered and which was subject to the 2002 mortgage;

(c) The mortgage in 2007 over unregistered lands at Ashleigh and/or Five Firs.

46. The challenge of Mr O'Connor in the PRAI Proceedings is to Feniton's title and right to deal in the relevant lands.

47. A number of observations are to be made. The Debt Recovery Proceedings resulted in a binding and conclusive judgment against Mr O'Connor for the sum then calculated as somewhat in excess of €7.6 million. All routes of appeal have been exhausted and the order of the Court of Appeal made on 6 March 2017 and perfected on 13 March 2017 and the determination of the Supreme Court mean that the order and judgment of Cregan J. may not now be challenged. The money judgment therefore remains unassailable as a matter of law. The PRAI Proceedings have, or could have, conclusively dealt with title to the security interests of BOS and later of Feniton.

48. Mr O'Connor may not now, by action, challenge the entitlement of Feniton to the security formerly owned by BOSI and, later, BOS, and it is clear from the judgment of Edwards J. in the Sherry Fitzgerald Proceedings that, insofar as his challenge is to the title or interest of Feniton in either the debt, the money judgment, or the charge forms part of or the basis for the PRAI judgment, those matters have already been determined conclusively in the Sherry Fitzgerald Proceedings and in the Joint Receivers Proceedings.

Special and exceptional circumstances?

49. Mr O'Connor seeks, in the PRAI Proceedings, to raise what he describes as a new point of law or "special and exceptional circumstances". He argues that whilst it could be said that the Deed of Appointment of the Joint Receivers by BOS on 21 September 2012 might not be capable of challenge, the Deed of Novation of 20 November 2015 by which Feniton had taken the benefit of the appointment has not yet been subject to any scrutiny by a court. He argues that the execution of that deed was an interference with, and an attack on, his property rights and that a challenge to the Deed of Novation could not be an abuse of process as the incidents and consequence of this alleged interference and attack have not previously been analysed.

50. In that context, the starting point for consideration of whether this particular argument, irrespective of its merits, was either determined or could have been brought forward by way of argument in the earlier proceedings must involve an examination of the Lis Pendens Proceedings. There, Mr O'Connor had argued that BOS could not make the application precisely because BOS had sold its debts and related security to Feniton, and was deprived thereby of standing.

51. In an application by BOS before the Court of Appeal to vacate a *lis pendens* registered by Mr O'Connor against the various lands and premises, BOS accepted, in the course of argument, that it had, by 2016, no further interest in the loans or any right to enforce the High Court judgment against Mr O'Connor. Paragraph 6 of the judgment of Finlay Geoghegan J. in makes reference to the letter of 26 August 2015 informing Mr O'Connor of the agreement by BOS to sell its facilities, guarantees, and security rights to Feniton and the subsequent correspondence informing him that the sale had closed. Mr O'Connor argued that as BOS had sold its debts and related security to Feniton, it was deprived thereby of standing.

52. That decision and the recitals of the arguments made by Mr O'Connor show unequivocally that Mr O'Connor was aware of the Feniton interest in the loans and securities as early as August, 2015 or, even giving him the benefit of the doubt, as late as November 2015. He himself relied on the assurance to Feniton by way of defence to the BOS proceedings. That judgment was one of those the subject of the Debt Recovery Determination by which the Supreme Court refused to grant leave to appeal to that Court.

53. Mr O'Connor relies now on an observation by Finlay Geoghegan J. at para. 14 of her Supplemental Judgment which it is convenient to repeat in full:

> "It is important to stress that the question as to the person who is now entitled to seek to enforce the High Court judgment against the appellant is not determined by this judgment. Any future application by reason of the sale of the loans of the appellant would be to the High Court and different issues may arise."

54. The sale to Feniton occurred after the judgments and orders of Cregan J. and before the appeals to the Court of Appeal in 2016 from those judgments. A strict reading of the matters determined by Cregan J. might, at first, appear to suggest that the issue regarding the title or interest of Feniton, whether to the debt or to the charge, was not and could not have been raised because the assurance of title did not occur until later. Counsel for the respondent argues, however, that as Mr O'Connor could have, but did not, bring an application to the Court of Appeal to admit new evidence to take account of transfer of the debts at the end of November 2015, he may not rely on the new facts in the present action.

55. In my view, the more appropriate approach is to analyse this ground of appeal in the context of the Sherry Fitzgerald proceedings.

The Sherry Fitzgerald proceedings

56. This action was commenced some months after the sale to Feniton had closed, and after Mr O'Connor, on his own admission, knew of the sale. The judgment of McGovern J. in the Sherry Fitzgerald Proceedings and the judgment of the Court of Appeal were given against that backdrop. At para. 87 of the judgment of Edwards J. in the Sherry Fitzgerald Proceedings, the Court observed that Mr O'Connor made no challenge to the sale to Feniton in those proceedings:

> "While the appellant makes the point that the sale to Feniton only occurred in November 2015, and that he could not have raised this point in earlier proceedings, it is highly significant that no such claim is made in the pleadings in the present proceedings. The Plenary Summons in the present proceedings was issued in February 2016, several months after the sale to Feniton was concluded, yet neither the Bank nor Feniton are named as respondents. Moreover, there has been no application to amend the General Indorsement of Claim, nor to join either the Bank or Feniton as respondents in the proceedings."

57. I do not need to go so far as to say, as was argued by counsel for the respondent, that Mr O'Connor has deliberately sought to hold in reserve potential arguments that he might readily have advanced in the Prior Proceedings, and in particular in the Sherry Fitzgerald Proceedings, regarding the title of Feniton. It is possible, without making a finding that he has consciously and for litigation or other advantage sought to offend the principles of fairness, to conclude that he could have, and did not, raise those arguments now sought to be raised regarding the Deed of Novation and the transfer to Feniton of the debt and securities at least in the 2016 proceedings, if not before.

58. Mr O'Connor argues that he could not have instituted the Amberley Proceedings until 2017 because it was not until 3 March 2017 that he became aware of the names or identity of the purchasers. His challenge, however, is not to any act or omission of the Amberley Purchasers or their solicitor, but rather to the title that passed to them by the transfer from Feniton. Mr O'Connor, on his own admission and submissions made to the Court of Appeal reflected in the judgment of Finlay Geoghegan J., knew all facts necessary to challenge the right of Feniton to be registered as owner of the charge over Amberley, and as consequence knew that Feniton could thereafter exercise its statutory and other rights of enforcement.

59. Knowledge of the identity of the Amberley Purchasers might have been required to bind them to any determination on the legal question arising regarding the validity and effect of the Deed of Novation, but the challenge was essentially one against Feniton and to the validity of the assurance by BOS to Feniton, and had a challenge been mounted to its title, and by implication, to its right to deal in the Amberley lands, the Amberly Purchasers could have been later joined as notice parties, or as defendants, and depending on the form of the proceedings and the date on which they were instituted, their entitlement to respond to the proceedings could have been dealt with by case management orders.

60. Mr O'Connor argues that his proceedings are against the PRAI and not against Feniton, but he is unable to answer the argument that his challenge to the actions of the PRAI are, in substance, a challenge to the entitlement of Feniton to be registered as owner of Amberley in the light of the requirements of the Registration of Title Act 1964 and the Registration of Deeds and Title Act 2006.

61. In that regard it is also important to note that Mr O'Connor appealed the order in the Sherry Fitzgerald Proceedings, *inter alia*, on the grounds that the orders of McGovern J. had failed to respect his property rights and his right of access to the courts and that those "combined with failures by the Property Registration of Ireland" in "allowing the wrongful registration of charges" has caused him loss and damage. That ground of appeal is recited at para. 42 of the judgement of Edwards J.

62. Indeed, Edwards J. recognised that Mr O'Connor was correct that some of the points he wished to make in those proceedings had not been litigated and adjudicated upon in the earlier proceedings including those concerning the validity of the appointment of the Joint Receivers. Cregan J. had expressed the view that the Joint Receivers were validly appointed but in the context of specific grounds of the challenge in those proceedings relating to the execution of the mortgage and the maps.

63. For that reason, Edwards J. considered that the attempt to litigate in those proceedings, points not previously raised and adjudicated upon, did not represent an abuse of process as an attempt to relitigate matters previously litigated and rejected, but he went on to hold against Mr O'Connor in the light of the rule in *Henderson v. Henderson*, as Mr O'Connor could have litigated those matters to a conclusion in the earlier proceedings.

64. That observation is equally apposite in the present appeal and supports the same answer. The rule in *Henderson v. Henderson* acts to prevent Mr O'Connor from now litigating the matters sought to be litigated in the PRAI Proceedings as they could have been litigated to a conclusion at the latest in the 2016 Sherry Fitzgerald Proceedings.

The argument for merger

65. Mr O'Connor raises a point from the judgment of Cregan J. in the Debt Recovery Proceedings that his debt has merged into the

order and money judgment and that this has the effect that the loan facilities and all securities have been "extinguished". He argues that, as a consequence, the Deed of Appointment of the Joint Receivers was also "extinguished" and was incapable of being novated by the Deed of Novation to Feniton. He argues, in those circumstances, that no rights could exist in Feniton to the debt, the security, or to any rights that may be derived therefrom. He relies on para. 14 of the judgment of Finlay Geoghegan J. quoted above.

66. It is not at all clear what precisely Mr O'Connor means when he argues that his debt has "merged" and "become extinguished" in the judgment. Insofar as he argues that what is to be enforced after the entry of judgment is the order or judgment itself rather than the debt, he is perfectly correct. But the "extinguishment", if that is the correct word, of the debt and its re-characterisation as a judgment of the court enforceable by various forms of remedy known to law and in equity does not mean that no person or body may seek to enforce the debt, but rather that the enforcement is done by way of an enforcement of a judgment or order of the court, the solemnity, conclusiveness, and finality of which is reflected in the forms of relief available for a money judgment. The judgment does not "extinguish" the debt if by that word is meant that the debt ceases to exist, but rather provides the gateway to enforcement.

67. A debt is capable of being assigned, and equally so is a judgment. Section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 provides for the legal assignment of any debt including a judgment debt. This is well established and Mr O'Connor does not specifically make an argument that a judgment debt may not be assigned, but rather that as the judgment has extinguished the debt, the debt may not thereafter be assigned or assured in any way as it has ceased to exist.

68. The argument on which Mr O'Connor relies is not supported by the authorities. The Court of Appeal, in *Healy v. McGreal* [2018] IECA 78 affirming the decision of Donnelly J*., Healy v. McGreal* (High Court, 29 February 2016) is authority for the proposition that a sale of a secured loan where a receiver had been appointed over the secured property does not operate to invalidate the appointment of the receiver. The monies remain owing and the receiver remained in place and was bound to act and realise the assets, and any question of who was entitled to recover the monies was a matter to be agreed and resolved as between the seller and the purchaser of the loan, and not with the debtor.

69. Indeed, one might also observe for this purpose that the practice of serving "hello" and "goodbye" letters for the purposes of the Supreme Courts of Judicature Act (Ireland) 1877 is based on the statutory provisions regarding the requirement to notify a debtor when his or her debts have been sold, but not that the debtor should give consent: See the judgment of Costello J. in *LSREF III Stone Investments Ltd v John Morrissey and Others* [2015] IEHC 199 and my judgment in *AIB Mortgage Bank v. Thompson* [2017] IEHC 515. The point regarding the extinguishment of the debt is legally incorrect, and para. of 14 of the judgment of Finlay Geoghegan J. in the Supplemental Judgment does not support the proposition that there is no person who could now enforce the money judgment of the High Court. She was rather making the observation that the question of who may enforce that judgment was not before her.

70. By the Deed of Novation made on 20 November 2015, BOS assured all of the rights, obligations, and liabilities under the receiver agreement to Feniton. By the earlier deed of 19 July 2015 and Deed of Amendment and Re-statement of 12 November 2015, BOS assured to Feniton a portfolio of loans and what is described therein as "ancillary rights and claims" defined as including claims, suits, causes of action, and any other rights of the seller against any obligor, the latter word being defined therein as a borrower or guarantor. The fact and validity of that deed has already been conclusively determined in the Prior Proceedings. There can be no doubt from the plain language of the deed that the judgment debt was assigned. The matter was dealt with at some length in the judgment of the Supreme Court in *Fitzgerald v. Gowrie Park Utility Society Ltd* [1966] IR 662.

71. Further, in my view, the argument sought to be made in the present cases that Feniton did not obtain the benefit of the receivership by this deed may not be maintained in the present appeal in the light of the propositions I have stated above in regard to the Deed of Novation and the reliance upon Mr O'Connor on the assurance to Feniton by way of a defence to the BOS proceedings for debt and other proceedings.

72. This ground of appeal is not a point which seems to have been raised in earlier proceedings, although, having regard to the voluminous and prolix papers furnished by Mr O'Connor, it is not possible to be quite sure of this, but the point is one without merit or substance and is to be struck out, not as an application of the rule in *Henderson v. Henderson*, but as being an abuse of process and bound to fail.

Other arguments made by Mr O'Connor

73. Mr O'Connor argues that Feniton is seeking to avoid tax and this argument seems to arise from an averment in the affidavit of Mr Ricky Kelly grounding the application for entry in the Commercial List, where he expressed the wish of his client to sell one or more of the properties in Ashleigh before 31 December 2017 in order to set off any anticipated loss from that sale against the capital gain on the disposal of Amberley. No breach of tax law has been identified by Mr O'Connor, but I must also conclude that the argument that Feniton and/or the Joint Receivers are seeking to evade tax liabilities is not a matter properly for an appellate court.

74. Mr O'Connor also raises for the first time in written speaking notes prepared for the purposes of the hearing of the appeal that Feniton is in breach of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015, and, as this matter was not raised before the High Court and is not found in the pleadings in either case, it is not a proper matter for an appeal.

75. Arguments were also made that the legal representatives of Feniton, and the firm of solicitors who came on record for the PRAI have intimidated Mr O'Connor or acted in a fraudulent manner, and there was also an argument that counsel who provided an opinion on title to the receivers had acted fraudulently. These points do not warrant any further consideration as they are obviously devoid of merit, are not supported by any evidence that was before the High Court and could not have any relevance to the title of Feniton. They also seem to me to be an impermissible, scandalous and gratuitous comment on the professional integrity of these persons.

The Isaac Wunder order

76. The purpose of an Isaac Wunder order was explained by Keane J. in *Riordan v. Ireland (No 4)* [2001] 3 IR 365, at p. 370:

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

77. The making of an Isaac Wunder order must be seen against the backdrop of the constitutional right of a person to access the courts, been identified as an important right but not an absolute one by the Supreme Court in *Tracey t/a Engineering Design &*

Management v Burton [2016] IESC 16, at para. 45, *per* MacMenamin J. The jurisdiction is exercised "in very rare circumstances", *per* Costello J. in *O'Malley v Irish Nationwide Building Society* (Unreported, High Court, 21 January 1994).

78. An Isaac Wunder order was made by the High Court in 2016 in the Sherry Fitzgerald Proceedings and was upheld on appeal in the judgment by Edwards J. Indeed, as is apparent from the ruling of the trial judge in the present case, McGovern J. first thought that there already existed a sufficiently broad Isaac Wunder order against Mr O'Connor to prevent the commencement of the two proceedings under consideration in this appeal, but it seems that that was not so.

79. The trial judge had some knowledge of the history of the O'Connor litigation surrounding his Cork lands and the borrowings and securities related thereto, and the making of the Isaac Wunder order was well within his competence and justified on the facts. The Isaac Wunder order was limited in the manner he expressed and was not a blanket prohibition on Mr O'Connor commencing litigation in other unrelated matters, nor is it an absolute prohibition on litigation concerning the Cork properties and loans, as the commencement of litigation may, in a suitable case, be authorised by court order.

80. In the light of the long history of litigation concerning the Cork properties, loans and securities and the history of the Prior Proceedings and the amount of litigation that has already conclusively and finally determined the issues now sought to be litigated the trial judge had an ample basis for exercising his discretion to make the Isaac Wunder order and I see no basis on which this Court should interfere with his order.

Summary and conclusion

81. For the reasons stated I would dismiss the appeals.