THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2047] IECA 261

Irvine J.
Whelan J.
Barr J.

Record number 2016/479

BETWEEN/

ACC BANK PLC

PLAINTIFF/RESPONDENT

AND

AIDAN CUNNIFFE, RITA CUNNIFFE, JOHN LAWLESS, BRIAN CUNNIFFE AND JAMES CUNNIFFE AND ALL PERSONS CONCERNED

DEFENDANTS/APPELLANTS

Record number 2014/1416

Record number 2014/1421

BETWEEN

JOHN LAWLESS, RITA CUNNIFFE AND AIDAN CUNNIFFE

PLAINTIFFS/ APPELLANTS

AND

ACC BANK PLC, KIERAN WALLACE, KPMG, MICHAEL REGAN, MICHAEL REGAN AUCTIONEERING LIMITED , JARLAITH MANNION, CATHERINE MANNION, ENDA CUSACK, STEPHEN GREHAN, BRIAN KENNEDY, AND JOHN JOE KENNEDY

DEFENDANTS/ RESPONDENTS

Record number 2016/51

BETWEEN/

ACC BANK PLC AND KIERAN WALLACE

PLAINTIFFS/RESPONDENTS

AND

JOHN LAWLESS, RITA CUNNIFFE AND AIDAN CUNNIFFE

DEFENDANTS/ APPELLANTS

JUDGMENT of Ms. Justice Whelan delivered on the 13th day of October 2017

1. By letter dated 7th August, 2007 ("the facility letter") ACC Bank (hereinafter called "the Bank") approved a credit facility in the amount of €3,149,500 in favour of Aidan Cunniffe, Rita Cunniffe and John Lawless. The facility letter was declared to be subject to the bank's Commercial Credit General Terms and Conditions (December 2006 Edition). Clause 3 of the facility letter provided that the terms of the credit facility was 18 months from the date of first drawdown unless demand for earlier payment was made in accordance with Clause 6. Clause 4 of the facility letter provided that the purpose of the facility was:-

(i) to purchase a dwelling house and 134 acres of agricultural land at Mullaghardagh, Ballyforan, Co. Roscommon;

(ii) to repay ACC Bank's loan reference 10005314;

(iii) to provide additional funding to cover legal fees and stamp duty;

(iv) to clear a Bank of Ireland loan;

(v) to provide for upgrades to the lands (to facilitate the borrowers obtaining grants from the Department of Agriculture under the Rural Environment Protection Scheme) and also improvements to a period dwelling house on the lands at Mullaghardagh, Co. Roscommon; and,

(vi) to fund the handling charges of €150,000

2. The date of maturity of the loan facility was 15th May, 2009. On 4th August, 2009 the bank issued a letter of demand to the borrowers. On 13th October, 2009, the bank appointed Kieran Wallace (hereinafter "the receiver") as receiver pursuant to their security instrument. In December, 2009, the bank issued summary proceedings against the borrowers (record number 2009/5579 S).

3. In the years following, a number of proceedings by way of special summons, plenary summons, and several motions have issued between the parties.

4. On 29th June, 2017, four separate appeals came before this Court from separate determinations and orders made in the High Court. Each is considered hereafter in turn.

The First Appeal/Slip rule appeal

5. On 28th October, 2016, the first named appellant in the above first entitled proceedings filed a notice of appeal in the Court of Appeal against the judgment and orders of McGovern J. made in the High Court on 17th October, 2016 on an application pursuant to Order 28, rule 12 (commonly referred to as the "slip rule") brought by the respondent to effect an amendment to an order of Finlay Geoghegan J. made in the High Court on 7th February, 2012 (and perfected 8th March, 2012) in special summons proceedings for the purposes of ensuring that the said order reflected the explicit direction of the said learned judge made in her *ex tempore* judgment delivered on the same date.

6. The respondent opposes the entire appeal.

Initial High Court proceedings

7. In proceedings [2011/753 SP] [2011/254 COM] the bank issued a special summons seeking relief pursuant to the Land and Conveyancing Law Reform Act 2009 and in particular s. 117 thereof in relation to the interest of the appellants Aidan Cunniffe, Rita Cunniffe and John Lawless in certain lands comprised in folios in Co. Roscommon.

8. The bank had previously obtained summary judgment in the High Court against the appellants jointly and severally on 4th February, 2010 in proceedings [2009/5579 S].

9. On 7th February, 2012, the special summons proceedings came on for hearing in the High Court before Finlay Geoghegan J. The bank was seeking certain declarations and consequential orders pursuant to O. 38, r. 8 of the Rules of the Superior Courts to the effect that the estate or interest of the appellants in certain folios in Co. Roscommon were charged with the judgment debt. There was evidence before the High Court at the said hearing that a payment for an unspecified amount had been made in and towards satisfaction of the judgment debt. The appellants made no challenge to the registration of the judgment mortgages against their interests in the said folios.

10. Finlay Geoghegan J. directed that the order should be formulated so that an allowance be expressly provided for, to ensure that ultimately an appropriate reduction be effected to arrive at the net sum due on foot of the judgement, stating:-

> "If I phrase it this way, because I think there must be allowance, I do not have and not [sic] declaring well charged a specific sum, it is the judgment debt, but I think the appropriate phraseology would be less any sum received by the plaintiff in reduction of the judgment debt. That covers the situation." (p. 6 of the note of the *ex tempore* judgment of Finlay Geoghegan J. dated 7th February, 2012)

11. Unfortunately, the perfected order failed to record this specific direction and noted simpliciter:-

> "And it appearing that there is due to the plaintiff on foot of the said judgment a sum of €3,793,872.13.
>
> IT IS ORDERED that in default of payment by the first, second and third named defendants to the plaintiff of the said sum and interest thereon and the costs hereinafter awarded within one month from the date hereof the said lands and premises be sold at such time and place subject to such conditions of sale as shall be settled by the Court …"

12. The order was clearly incorrect and runs counter to the express statement of the learned judge that she was not declaring well charged any specific sum. The order was perfected on 8th March, 2012. It was served by registered post on the firm of solicitors, Donal Keigher & Co., North Gate Street, Athlone, Co. Westmeath, solicitors who were on record for the first, second and third named defendants at that time. Service was effected on Friday, 23rd March, 2012.

Appeal to Supreme Court

13. The appellants appealed to the Supreme Court against the said judgment and orders of Finlay Geoghegan J. which appeal came on for hearing in the Supreme Court on 7th February, 2014. In the course of the appeal hearing, the Supreme Court raised a query regarding the accuracy of the statement in the High Court order regarding the sum of €3,793,872.13 being due to the plaintiff on foot of the judgment. Ultimately, the Supreme Court dismissed the appeal of the appellants, however it remitted the issue of the paragraph of the order which stated that the sum of €3,793,872.13 was due.

14. In considering the relevant portion of the judgment of Finlay Geoghegan J., the Supreme Court in its *ex tempore* judgment stated:-

> "She refused the defendants' application to remit any issue of fact to plenary hearing. She therefore decided to grant judgment in the form sought and she referred then to the declarations on foot of s. 117(1) of the Land and Conveyancing Law Reform Act 2009 and subs. (2)(a)."

At p. 3 of the judgment, in conclusion, the Supreme Court states:-

> "Accordingly the order of the Court will be to dismiss the appeal. However the Court of its own motion has raised a query with regard to the correctness of the statement in the order regarding the sum of €3.793 m. The Court will dismiss the appeal save that it will remit to the High Court the question of the paragraph of the order which says "and it appearing that there is due to the plaintiff on foot of the said judgment the sum of €3,793,872.13" for reconsideration of that paragraph."

15. The *ex tempore* Supreme Court judgment was delivered on 7th February, 2014, as stated above, and the order of that court was perfected on 10th February, 2014.

High Court Motion under Order 28, r. 11 and r. 12 - slip rule

16. Arising from the Supreme Court judgment, on 6th July, 2016 the respondent bank issued a motion pursuant to O. 28, r. 11 and/or O. 28, r.12 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the High Court seeking to amend the earlier order of the court perfected on 8th March, 2012 by the addition of the following words to be inserted after the euro figure in the order: "less any sum received by the plaintiff in reduction of the judgment debt." The application came on for hearing before McGovern J. in the High Court on 17th October, 2016.

Appellants' position before the High Court (McGovern J.)
17. The appellants first requested the learned trial judge at the hearing of the motion to extend time for the late filing of an affidavit. The matter had previously been in the list for hearing on 11th July, 2016. It was adjourned to enable the appellant to file an affidavit and he had been granted six weeks within which to file the affidavit. The motion was next listed for hearing on the 10th October, 2016 when, due to the indisposition of Mr. Lawless, the matter was further adjourned for one week. When the motion was called on for hearing on 17th October, 2016, it was clear that no affidavit had been filed on behalf of the defendants contrary to the court's clear directions on the issue given fourteen weeks before. Hence,no copy had been provided to the court on the Wednesday prior to the hearing in accordance with the practice of the Commercial Court.

18. The appellant, Mr. Lawless contended that the amendment under the slip rule should be in respect of an amount which, in his view, the receiver ought to have realised for the lands when they were sold after auction in May, 2010 rather than the sum that was actually realised by the receiver.

19. At the hearing of the motion on 17th October, 2016, Mr. Lawless stated his opposition to the order of the High Court of 7th February, 2012 which the bank was seeking to amend under the slip rule, as follows:-

> "… the credit for the payments made is not the correct amount. There is an unknown. The unknown is the amount that the receiver should have got for the lands at the auction. He didn't sell it for the highest available price. And these matters have been dealt with in proceedings no. 2009/10169, which was a plenary summons before the High Court. A statement of claim has been served and a defence and a counter claim has been prepared. That counter claim will be dealing with establishing the facts of that case. Hopefully it will establish the correct amount that the receiver should have got for the lands at the auction. But it can be remedied here before this Court if Kieran Wallace, receiver, is willing to put an affidavit before the Court to establish the correct amount he would have got for the lands on the day." (p. 6 of transcript of the hearing dated 17th October, 2016)

20. The appellant Mr. Lawless argued that the order of the High Court made on 7th February, 2012 should not be amended as sought and asserted as follows:-

> "… the commercial court and the Supreme Court recognised that we should get the benefit of credit for a property that was sold. There's a dispute over the fact that the property wasn't sold for the highest available price, so there's an unknown in the fact that -- how much the credit should be." (p. 3 of transcript)

He went on to say:-

> "… I remember Laffoy J. clearly stating that we should get credit for the correct amount." (p. 5 of transcript)

The transcript continues:-

> "Judge: (…) it seems that you are raising the issue as to whether or not the receiver got the correct amount that he should have got for the land"
>
> Mr Lawless: Correct, your honour." (p. 8/9 of transcript)
>
> He proceeded thereupon to set forth to the High Court his contentions that, in effect, the auction by the receiver was not conducted properly, that the highest price had not been achieved and that the true purpose of the matter being remitted to the High Court was for the purposes of establishing that claim as outlined in the passage quoted above.

Respondent's position before the High Court
21. It is clear from the transcript that the High Court was appraised in significant detail of the parties' litigation history and the particular circumstances that led to the application being brought under the slip rule by the bank. The respondent did not resist the opening up by the appellant of the contents and averments contained in the appellant's affidavit which had been excluded at the outset of the hearing and which the appellant had alluded to in depth in the course of the hearing of the motion. The respondent asserted that the last two paragraphs alone of the judgment in the Supreme Court were relevant to the application before the High Court. It was asserted that the respondent had established a clear case for the making of an order pursuant to O. 28, r. 12 of the Rules of the Superior Courts to rectify a clerical mistake.

Decision of High Court judge (McGovern J.)
22. At the hearing of the motion on 17th October, 2016, the trial judge refused to permit the affidavit to be produced by the appellant Mr. Lawless by reason of its lateness and secondly, having regard to the failure of the appellant to file same in the Central Office. Having refused to permit the affidavit to be produced as outlined above and having considered the judgment and order of the High Court of 7th February, 2012 and the judgment and order of the Supreme Court of 7th February, 2014, the judge then considered the detailed submissions of the appellant, Mr. Lawless, and also heard counsel for the bank. He concluded that:-

> "The only issue is as to whether or not credit should be given to the defendants in respect of any sums paid." (p. 10 transcript, 17th October, 2016)

McGovern J. went on to state that the application before him to correct the order was being brought so as to give the defendants credit for any sums paid in respect of the judgment debt. On the evidence before him, the learned judge made an order as sought amending the terms of the order of 7th February, 2014 in the terms of the notice of motion. He refused to make an order for costs against Mr. Lawless.

Notice of appeal
23. This appeal is brought by John Lawless alone. He relies on two grounds, namely:-

> i. "the learned judge erred in law and in fact in refusing to admit the replying affidavit of the appellant prior to the making of the order,
>
> ii. the learned judge erred in law and in fact in failing to have due regard or any regard to the decisions of Finlay Geoghegan J. in the High Court or Laffoy J. in the Supreme Court in making the order."

Submissions of appellant at the appeal hearing

24. In the first instance, the appellant, who is a litigant in person, appeals the refusal of the trial judge to extend time for the late filing of an affidavit.

25. The appellant asserted that the issue remitted by the Supreme Court to the High Court for reconsideration extends beyond the slip rule to a review as to the substance of the judgment of Kelly J. of 4th February, 2010 when he granted summary judgment in the sum of €3,793,872.13 as against the appellants. The appellant further asserts that at p. 10 of the transcript in his judgment McGovern J. wrongly concluded that:-

"There is no dispute that the sum of €3.7m is due and owing. The Supreme Court has held it to be a valid judgment, so that is beyond dispute."

The appellant submits that this wholly ignores the basis upon which the Supreme Court remitted matters to the High Court. The appellant further submits that the order of McGovern J. should be set aside, and that the matter should be remitted back to the High Court to ascertain the credit and properly finalise the order, as envisaged by the Supreme Court, which also would narrow the issues between the parties in any outstanding litigation.

Submissions of the respondents at the hearing of the appeal

26. The respondent submits that the trial court was entitled to refuse to admit the replying affidavit noting that, in the case of the Commercial Court, it is entitled to give directions and fix time limits for the delivery of affidavits, this being explicitly provided for in O. 63A, r. 5 of the Rules of the Superior Courts. It is asserted that it is a necessary corollary to this power that the Commercial Court is entitled to refuse to admit affidavits offered in contravention of such directions.

27. The respondent also asserts that notwithstanding the court's refusal to admit the replying affidavit, McGovern J. allowed the appellant address him by way of oral submissions in which he presented the arguments contained in his replying affidavit. In addition, it is asserted that the appellant Mr. Lawless was permitted a broad latitude to make oral submissions in which the contents and averments contained in his affidavit were explained to the court. Thus, it is argued that the learned high court judge's refusal to admit the affidavit did not prejudice Mr. Lawless as he was permitted to present his substantive case. In the circumstances, it is argued, that admitting Mr. Lawless' replying affidavit could not have changed the outcome of the application.

Findings in relation to the slip rule appeal

28. With regard to the refusal of the learned High Court judge to admit the replying affidavit, it is clear that significant latitude had been afforded to Mr. Lawless when a direction was given on 11th July, 2016 by McGovern J. that any replying affidavit be delivered by him within six weeks of that date. That direction was not complied with. The uncontested submission of the respondent at the hearing of the motion was that the replying affidavit had been delivered after 11am on the date of the hearing of the motion, 17th October, 2016. In the circumstances, the trial judge acted reasonably and within his discretion in declining to admit this affidavit, having regard to O. 63A, r. 5 and the non-compliance for approximately eight weeks with the directions and the limits fixed by the Commercial Court in that regard.

29. It is, furthermore, clear from the transcript of the hearing that in the appellant's oral submissions the content and the substance of this replying affidavit and each of the key points therein deposed to were comprehensively ventilated by Mr. Lawless. The trial judge thus heard and considered the central points being canvassed in the affidavit. It is clear from the transcript accordingly that Mr. Lawless suffered no prejudice from the decision of the trial judge not to allow the affidavit in question to be produced in light of significant delays on the part of the appellant and secondly, given that it had not been filed in the Central Office.

30. This appeal secondly concerns an application brought by the respondent pursuant to O. 28, r. 11 which provides, *inter alia*, that:-

> "Clerical mistakes in judgements or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court on motion without an appeal."

The mistake in question arises from the clear discrepancy between what Finlay Geoghegan J. stated in her *ex tempore* judgment of 7th February, 2012 and what ultimately appeared on the face of the perfected order dated 8th March, 2012 which was drawn on foot of the said judgment.

31. The appellant, before the High Court, in the notice of appeal, in the written submissions and before this Court at the hearing of the appeal, asserted that there has been a finding of fact by the said respective courts that the auction of part of the mortgage lands in May, 2010 was not properly conducted and that the highest price was not achieved by the receiver and that the matter was in fact required to be remitted to the High Court to, in effect, go behind the order of Kelly J. of 4th February, 2010 and ascertain the sum which in the view of the appellant constitutes "the true value of the lands".

32. However, this is entirely at variance with the judgment of the Supreme Court where at p. 3, it determined that the judgment of Kelly J. stands. It is demonstrable from the judgment of the Supreme Court that the order of Finlay Geoghegan J. was to be reviewed to reflect the precise terms of her judgment based on the fact that she found that there was evidence before her of payment of an unspecified amount in reduction of the judgment debt specified in the order of Kelly J. of 4th February, 2010. Neither the High Court nor the Supreme Court expressed any view as to what sum or sums should be deducted from the judgment debt nor was there any evidence before either that could have enabled them to do so. In that regard, the appellants are mistaken in their understanding of the import of the respective judgments and orders of the High Court of 7th February, 2012 and of the Supreme Court delivered 7th February, 2014.

33. In dismissing the appellant's appeal on 7th February, 2014, the Supreme Court quite correctly identified that reconsideration was warranted of one provision only in the said order of Finlay Geoghegan J. dated 7th February, 2012. The amendment sought is in ease of and for the benefit of the mortgagors/appellants. It imposes an express obligation on the bank to account for any sums received in and towards satisfaction of the debt in arriving at the net ultimate liability. It would not be appropriate in the circumstances that any specific or liquidated figure be applied in the formulation since such sums could vary from time to time depending, *inter alia*, on dispositions of the secured property or any parts thereof. The formulation sought to be included by the respondents under O. 28, r. 11 ensures that full credit is given to the appellants in respect of any sums paid or discharged.

34. The language of the *ex tempore* judgment of Finlay Geoghegan J. of 7th February, 2012 makes clear that on that date the High

Court was not engaged with any specific sum of money as being deductible in respect of or being applicable in reduction of the debt.

35. Accordingly, I am not satisfied that any basis has been made out to interfere with the judgment and orders of the learned High Court judge and I would propose that this appeal be dismissed on all grounds.

VAT receipt appeal (Court of Appeal No. 2014/1416)
36. In proceedings, record number 2013/6018 P, the appellants issued a motion on 2nd July, 2014. Under the terms of this motion the appellants sought an order directed to the second and third named defendants, Kieran Wallace (hereinafter "the receiver") and KPMG requiring them to produce a professional invoice to the appellants in respect of the VAT paid and discharged on fees due to the receiver out of the proceeds of sale of certain lands the subject matter of a mortgage and which were sold, post auction, on the directions of the receiver in the month of May, 2010.

37. The appellants assert an entitlement to a VAT invoice in circumstances where the receiver acted as agent of the borrowers pursuant to the terms of the mortgage instrument. The appellants assert that the provisions of the VAT Consolidation Act 2010 confers on them an entitlement to production by the receiver of a VAT invoice. The appellants assert that the receiver's fees were €405,000.

38. At para. 2 of the notice of motion, the appellants sought an order directing the receiver and KPMG to pay interest to the plaintiffs at 8% per annum from June, 2010 to date. At para. 3, they sought an order for ascertainment of any damages to which the plaintiff may be entitled, and at para. 4, an order for costs.

The High Court decision in relation to the VAT appeal
39. This motion came on for hearing before Gilligan J. in the High Court on 16th September, 2014. In the transcript of the *ex tempore* judgment, he notes as follows:-

> "… the first named plaintiff is aggrieved that he is not in a position to reclaim the VAT, as he takes the view that the receiver provided him with the service and that the receiver was his agent."

He considered and cited with approval a judgment of Denham J. in her judgment *Bula v. Crowley* [2003] 1 I.R. 396, and the judgment of Gilligan J. continues:-

> "… and there she sets out the unique nature and position of the receiver and that the agency of the receiver, quoting effectively from Gomba Holdings v. Minories Finance [1989] BCLC 115 "is not an ordinary agency. It is primarily a device to protect the mortgage or debenture holder. Thus, the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder, are treated as if they were acts of the mortgagor."
>
> Denham J. goes on to state also that "it is to be noted also that the mortgagor cannot instruct the receiver how to act in the conduct of the receivership". Perhaps that is the salient point."

40. Gilligan J. next reviewed the relevant case law in some detail including *Customs and Excise Commissioners v. Redrow Group plc* [1999] 1 W.L.R. 408. He then applied the principles in the *Redrow* decision to the facts before him and concluded:-

> "… in the particular circumstances of this case, unfortunately, Mr. Lawless had no hand, act or part in retaining, selecting, instructing either Mr. Wallace or any of the other persons whom he retained."

41. The trial judge also considered the relevant domestic legislative position in relation to VAT and relevant provisions of European law. He concluded, having regard to the legislation and jurisprudence and having regard to the facts as disclosed on the evidence of the parties before him:-

> "… Mr. Lawless had no control in the selection of Mr. Wallace, or no control over Mr. Wallace, and the services were not provided to his benefit, in that they were provided to ACC Bank plc, which retained Mr. Wallace. I am not going to go so far, as it would not be correct, to say that Mr. Lawless is not entitled to in some way seek to reclaim the VAT if the Revenue consider that an appropriate course of action. He can explain the background situation, and I am sure if the Revenue are in agreement with Mr. Lawless then Mr. Wallace can be written to, but insofar as the application which comes before me is seeking an order that the second and third named defendants produce a professional invoice to John Lawless, Rita Cunniffe and Aidan Cunniffe of Fallons Bar, Dysart, Ballinasloe, Co. Roscommon. I refused that relief for the reasons that I have indicated."

The reliefs sought at 2,3 and 4 of the Notice of Motion were also refused.

Notice of Appeal
42. The appellants' notice of appeal is dated 6th October, 2014. Two grounds are specified therein:-

> i. That the High Court judge erred in not finding that the plaintiff was entitled to a professional invoice from the second and third named defendants.
>
> ii. That the plaintiff was entitled to the reliefs sought in paragraphs 2,3 & 4 of their notice of motion.

Appellants' position at the Appeal

43. The appellants take issue with the affidavit of Jason Milne sworn on behalf of the respondents in opposition to the motion. They assert that this claim and the requirement for a VAT Invoice arises in circumstances where the receiver acts as agent for the borrower pursuant to the mortgage deed.

44. The appellants further assert that:-

> "Equally, if the receiver acting as agent for the Plaintiffs, issues a VAT invoice for his services, the Plaintiffs under the provisions of the VAT Consolidation Act 2010 are entitled to a copy of the said VAT Invoice as confirmed in the recent UK tribunal decision in the case of Secret Hotels 2 case"

Further, the appellants assert that in circumstances where the High Court in receivership proceedings exercises a supervisory function as to fees charged by receivers, such a role can be performed by the High Court. They point out that the fees amounted to €405,000.

45. At para. 2 of the notice of motion, the appellants sought an order directing Kieran Wallace and KPMG to pay interest to the plaintiffs at 8% per annum from June, 2010 to date; at para. 3, an order for ascertainment of any damages to which the plaintiff may be entitled, and; at para. 4, an order for costs.

46. At the hearing of this appeal, the appellants produced a copy invoice which was furnished by P. O'Connor & Son Solicitors and is dated 13th December, 2007, addressed to John Lawless, Aidan and Rita Cunniffe, c/o ACC Bank, Charleville Place, Dublin 2, showing total VAT at €1,081.50. Mr. Lawless asserts that the issuing of the VAT receipt to the appellants dated December, 2007 at the time of and in connection with the creation of the mortgage security in circumstances where the solicitors were solicitors acting for the bank, supports his claim to an entitlement to a VAT receipt from the receiver in regard to the fees incurred in the disposition of part of the mortgaged properties in May 2010.

Respondent's position

47. The respondents made detailed written legal submissions and, in those submissions and in oral submissions at the hearing, argued that the trial judge applied the existing legislation at EU and domestic level appropriately. Further, it was submitted that in order to deduct VAT a claimant must:-

i. have paid for the relevant goods/ services in respect of which the claim was made; and,

ii. must be the party 'to whom the service was supplied'.

The respondents argue that this is a case where Mr. Lawless is not entitled to compel the receiver to issue a VAT invoice for his professional services made out to the appellants because the services of the receiver were supplied to the bank and not to the appellants. In other words, the facts in this instance engaged the doctrine of third party consideration.

48. The respondents further argue as a matter of law at domestic and EU level, that in determining whether a service has been supplied to a party seeking to deduct VAT, the indicia set out by the House of Lords in *Customs & Excise Commissioners v. Redrow Group plc* [1999] 1 W.L.R. 408 provides the correct test for identifying the recipient of the supply of services for the purposes of entitlement to call for the issuance of a VAT invoice. The respondents assert that jurisprudence adopted by the Irish Supreme Court has previously applied the four *indicia* in *Redrow* in the case of receivership and further, that these *indicia* of supply are absent in the instant case in respect of the mortgagor/appellant.

49. The respondent submits that the four indicia identified by the House of Lords in the Redrow judgment may be of assistance in an evaluation as to whether the appellants are, on the facts disclosed, the recipients of "services". The respondent raises the following points in that regard:-

(i) *Selection of Agent*

They assert that the appellants had no involvement in the selection of the receiver a measure that was exclusively within the control of the bank.

(ii) *Contractual Nexus*

They assert that there was no privity of contract or contractual relationship between the receiver and the appellants.

(iii) *Instruction and Control*

They assert that the respondents emphasise that the appellants could not instruct the receiver and had no function in instructing the receiver how to act in the conduct of the receivership.

(iv) *Objectives of the agent's services*

Relying on jurisprudence from this jurisdiction on the nature of the position of a receiver, particularly the decision of the Supreme Court in Bula v. Crowley [2003] 1 IR 396 and the decision of the Court of Appeal in Silvan Properties & Anor. v. Royal Bank of Scotland plc & Ors. [2004] 4 All ER 484 the respondents assert that the receiver is not managing the appellant's mortgaged property for the benefit of the mortgagors, but was managing the security, the property of the mortgagee, for the benefit of mortgagee bank.

50. With regard to the appellants' assertion that the receiver was their agent providing them with "the service of reducing our indebtedness with ACC Bank", the respondent asserts that in substance this amounts to a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions and as such is a bare assertion which falls foul of the jurisprudence of the European Court of Justice particularly the decision in *Revenue & Customs Commissioners v. Newey* [Case C-654/11] [2013] STC 2432.

The law

51. This Court is bound by the decision of the Supreme Court in *Bula v. Crowley* [2003] 1 I.R. 396 wherein that court reviewed the jurisprudence in relation to the agency of a receiver. In her judgment on behalf of the court, Denham J. set out at p. 423:-

"(ii) Unique nature of the position of the receiver

The second matter I would stress is the unique and exceptional nature of the position of a receiver. The position of a receiver is unique. The agency of a receiver is exceptional. There is a duality in the agency of the receiver. In an analysis of this unique position may be found the answer to the first appeal.

The nature of the position of a receiver has been considered extensively in case law. In *Gomba Holdings Ltd. v. Minories Finance Ltd.* [1988] 1 W.L.R. 1231, Fox L.J. said at p. 1233:-

> "The agency of a receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture holder. Thus, the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder, are treated as if they were the acts of the mortgagor. The relationship set up by the debenture, and the appointment of the receiver, however, is not simply between the mortgagor and the receiver. It is tripartite and involves the mortgagor, the receiver and the debenture holder. The receiver is appointed by the debenture holder, upon the happening of specified events, and becomes the mortgagor's agent whether the mortgagor likes it or not. And, as a matter of contract between the mortgagor and the debenture holder, the mortgagor will have to pay the receiver's fees. Further, the mortgagor cannot dismiss the receiver, since that power is reserved to the debenture holder as another of the contractual terms of the loan. It is to be noted also that the mortgagor cannot instruct the receiver how to act in the conduct of the receivership.
>
> All this is far removed from the ordinary principal and agent situation so far as the mortgagor and the receiver are concerned. Whilst the receiver is the agent of the mortgagor, he is the appointee of the debenture holder and, in practical terms, has a close association with him. Moreover he owes fiduciary duties to the debenture holder, who has a right, as against the receiver, to be put in possession of all the information concerning the receivership available to the receiver: see In *re Magadi Soda Co. Ltd.* [1925] 41 T.L.R. 297.
>
> The result is that the receiver, in the course of the receivership, performs duties on behalf of the debenture holder as well as the mortgagor. And these duties may relate closely to the affairs of the entity which is the subject of the receivership…"

At page 424 of the judgement, Denham J. continues:-

> "I adopt this statement of the law. I favour especially the description of the agency of the receiver as primarily a device to protect the mortgagee. This primary duty to the secured creditor was referred to in *Rottenberg v. Monjack* [1993] B.C.L.C. 374 where Cooke J. stated at pp. 377 and 378:-
>
> > "It is quite clear, both from these powers and the purpose for which receivers are appointed and the job they are called on to do, that their duty must be to the secured creditor. They cannot be put in the position, negligence and dishonesty apart, of having to weigh discretions between the secured creditor and the debtor. If they behave efficiently and honestly, the secured creditor must come first."
>
> I adopt this statement of the law also. Applying that statement, the receiver was put into place pursuant to the agreements for the primary benefit of the banks in this case. I adopt also the analysis of Fox L.J. of the tripartite relationship of the receiver involving the mortgagor, the receiver and the debenture holder (…) This is far removed from the routine principal and agent situation."

52. Further, at p. 425 of the judgment in *Bula*, Denham J. continued:-

> "The receiver is in a unique and exceptional position. It is a position unlike that of the ordinary agent in commercial transactions. Thus the receiver is treated, while in possession of the company's assets, as an agent of the company so that he may deal effectively with third parties. But the receiver is concerned for the benefit of the mortgagee bank to realise the security, which is usually, as in this case, by the sale of the assets."

I am satisfied that this excerpt from the Supreme Court judgement represents a correct statement of the law in this jurisdiction and I adopt same.

53. I note that the nature and extent of a receiver's duty to a mortgagor was considered by the English Court of Appeal in *Silven Properties Ltd. & Anor v. Royal Bank of Scotland plc & Ors.* [2004] 4 All ER 484. The character and incidents of a receiver's agency was considered in the course of his judgment by Lightman J. at p. 494 as follows:-

> "27. The peculiar incidents of the agency are significant. In particular:
>
> (1) the agency is one where the principal, the mortgagor, has no say in the appointment or identity of the receiver and is not entitled to give any instructions to the receiver or to dismiss the receiver. In the words of Rigby LJ in *Gaskell v. Gosling* [1896] 1 QB 669, at 692: "For valuable consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with";
>
> (2) there is no contractual relationship or duty owed in tort by the receiver to the mortgagor: the relationship and duties owed by the receiver are equitable only; (…)
>
> (3) the equitable duty is owed to the mortgagee as well as the mortgagor. The relationship created by the mortgage is tripartite involving the mortgagor, the mortgagee and the receiver;
>
> (4) the duty owed by the receiver (like the duty owed by a mortgagee) to the mortgagor is not owed to him individually but to him as one of the persons interested in the equity of redemption. The class character of the right is reflected in the class character of the relief to be granted in case of a breach of this duty. That relief is an order that the receiver account to the persons interested in the equity of redemption for what he would have held as receiver but for his default;
>
> (5) not merely does the receiver owe a duty of care to the mortgagee as well as the mortgagor, but his primary duty in exercising his powers of management is to try and bring about a situation in which the secured debt is repaid (…); and
>
> (6) the receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee (…) His powers of management are really ancillary to that duty."

54. This represents a correct statement of the law in this jurisdiction also. Aspects of that judgment concerning the normal duties of a mortgagee to a mortgagor were considered by this Court in *National Asset Loan Management v. Kelleher* [2016] IECA 118 particularly in the judgment of Finlay Geoghegan J.

The *Redrow* line of authority

55. I turn now to the issue of whether, on the facts, the appellants are entitled to seek an order directing the receiver to issue a VAT invoice for his professional services supplied to the appellants.

56. Having due regard to the economic reality that actually obtained in the tripartite relationship as between the appellant, the receiver and the bank from the date of the receiver's appointment on or about 13th October, 2009 and having due regard to the authorities including *Revenue & Customs Commissioners v. Aimia* [2013] UKSC 15, *Revenue & Customs Commissioners v. Air Tours Holidays Transport Limited* [2016] UKSC 21 and *WHA Limited & Anor. v. Revenue & Customs Commissioners* [2013] UKSC 24 in assessing whether the doctrine of third party consideration arises in the instant case, the following factors are of relevance:

> a. *Selection of agent* ; it is clear on the facts and having regard to the mortgage agreement that the bank retained the exclusive right to select the receiver. It was the bank and not the mortgagors who selected and engaged the receiver. The appellants had no involvement whatsoever in his selection.
>
> b. *Contractual nexus*; The nature and extent of any contractual relationship between the claimant and the receiver as service supplier requires scrutiny. It is clear on a review of the mortgage transaction and the agreement underpinning it that no privity of contract exists between the appellants and the receiver. The delimitations of the relationship are clearly acknowledged in the jurisprudence of the Supreme Court as outlined above in *Bula v. Crowley* [2003] 1 I.R. 396. Neither can the appellants characterise the relationship as one based on agency and in that regard, in light of the judgment in *Silvan Properties Ltd. v. Royal Bank of Scotland* [2004] 4 All ER 484 which states that the only reasonable inference to be drawn in all the circumstances as a matter of economic reality having regard to the factual circumstances as obtained between these appellants and the respondents is that there is no contractual nexus or relationship between the receiver and the mortgagors which would underpin an assertion that a supply of service for VAT purposes did occur from the receiver to the mortgagors.
>
> c. *Instruction and Control*; It is clear from the evidence in the court below and from the documentation available to this Court and the submissions of the appellants and respondents made at the hearing of this appeal, that the appellants had no involvement or input whatsoever into the day to day conduct of the receiver's functions from the time of his appointment in October, 2009 onwards nor did they have engagement with him in the context of issuing binding directions as to what steps he would take or in monitoring the steps he took or in issuing instructions from time to time or at all which the receiver was constrained to comply with.
>
> d. *The extent to which the services of the receiver were carried out in furtherance of the mortgagor's interests*. The jurisprudence of Bula v. Crowley [2003] 1 I.R. 396 underlines the reality that the mortgagors were not alone precluded from instructing the receiver on how to act in the conduct of the receivership but the appellants were contractually bound by the terms of their agreement with the bank to pay and discharge the costs incidental to the appointment of any receiver which the bank as mortgagee might proceed to appoint for its own benefit in the context of realisation of its security.

57. On the evidence before me and having regard to the terms of the mortgage agreement concluded between the appellants as mortgagors and the bank as mortgagee, the appellants had at all material times a contractual obligation with the bank to pay and discharge the costs of services including services in connection with the appointment of a receiver including the VAT component of such service. However, the appellants could not in law be regarded as the recipient of the services of the receiver having regard to the doctrine of third party consideration and having regard to the relevant EU legislation as translated into domestic law pursuant to the provisions of the VAT Act 1972 and the VAT Consolidation Act 2010.

58. On the evidence before me, the appellants meet none of the four criteria identified by the House of Lords in *Customs & Excise Commissioners v. Redrow* [1991] 1 W.L.R. 408. This Court has regard to the jurisprudence of the European Court of Justice which emphasises that, in carrying out an assessment as to whether a supply of a service has taken place, it is necessary to look beyond the language and provisions in any contract document to evaluate the economic reality that obtains as between the parties. In this regard, the decision in *Revenue and Customs Commissioners v. Newey* (Case C-653/11) 2013 STC 2432 of the ECJ is relevant in the context of the application of the doctrine of third party consideration where it states:-

> "44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

I am satisfied that the contractual and economic reality of the relationship between the receiver and the appellants does not support a claim that the appellants are the recipients of such a service.

59. Accordingly, when the appellant Mr. Lawless makes the bare assertion that "Kieran Wallace as our agent providing us with a service of reducing our indebtedness with ACC Bank" as the basis for claiming that he is entitled to an order directing the receiver to issue a VAT invoice for professional services rendered made out to the appellants, that assertion must be evaluated in the context of the economic reality as obtained between the appellant mortgagors, the bank as mortgagee and the receiver appointed by the mortgagee on foot of the security instrument. Additionally, due regard must be had to the fundamental principle of EU law as now transposed into our domestic legislation, that VAT is deductible only in respect of services which have been rendered or supplied to the party seeking to deduct the tax.

60. The obligation to issue an invoice in respect of VAT is co-terminous with the right to deduct VAT. The service provider is obliged to furnish an invoice to the party to whom the service has been supplied and the recipient of the service enjoys a reciprocal entitlement to deduct the VAT portion of that invoice. If the receiver had, as a matter of fact and a matter of law, supplied his services to the appellants/mortgagors they would be entitled to an invoice pursuant to s. 17 of the VAT Act 1972 and accordingly to deduct the VAT pursuant to s. 59 of the VAT Consolidation Act 2010. The issuance of a VAT invoice in 2007 at the time of the creation of the mortgage in connection with the fees of the solicitor who acted for the Respondents does not establish an entitlement to a VAT invoice in respect of the fees discharged to the receiver.

61. Accordingly, I am satisfied that the trial judge applied the jurisprudence, the legal principles and the legislation including relevant EU legislation as well as the domestic statutory provisions correctly to the facts of this case and further I am satisfied that he was correct in his conclusion that the appellants were fundamentally mistaken in respect of their application. Accordingly they are not entitled to an order against the second and/or third defendants, Kieran Wallace, Receiver, and KPMG, to produce a professional

invoice to John Lawless, Rita Cunniffe and Aidan Cunniffe of Fallon's Bar, Dysart, Ballinasloe, Co. Roscommon.

62. It consequentially follows that they are not entitled to orders against the second and/or the third named defendants in respect of interest nor are they entitled to an order for ascertainment of damages as claimed. Further, it is appropriate to reiterate that this Court, as with the High Court, does not say that the appellants are not entitled to in some way seek to reclaim the VAT paid should the Revenue Commissioners consider that to be an appropriate course of action. This judgment is confined to the specific relief sought in the notice of motion.

Third appeal relating to Order 19 r. 28 dismissing proceedings as frivolous & vexatious and disclosing no reasonable cause of action– CA 2014/1421

63. The third appeal between the parties arises in proceedings [2013 No. 6018 P]. In the said proceedings the first, second and third named defendants, being the respondents, issued a notice of motion on 3rd July, 2014 seeking the following reliefs;

> i. an order striking out the proceedings pursuant to Order 19 r. 27/r. 28 as frivolous/vexatious disclosing no reasonable cause of action and being an abuse of process.
>
> ii. an order vacating any *lis pendens* registered against certain lands in Co. Roscommon the subject of the respondent bank's security.
>
> iii. an order pursuant to the inherent jurisdiction of the court requiring the Plaintiffs to seek leave of the court prior to the institution of any further proceedings wherein (a) the Banks's right to sell the mortgaged lands is disputed or (b)whereby the Plaintiffs assert any other claim such that the said lands are made the subject of ongoing litigation.

Hearing and Judgment in the High Court

64. The said motion came on for hearing before Gilligan J. in the High Court on Tuesday, 16th September, 2014. The court considered the affidavit grounding the motion together with the exhibits. The first plaintiff appeared in person and addressed the court on behalf of all plaintiffs in opposition to the reliefs being sought.

65. In the course of the hearing, Gilligan J. considered the statement of claim delivered on 20th January, 2014 in some detail. He particularly focused on paragraphs 17 to 36 thereof and the matters therein pleaded. He considered the submissions by both sides

66. At the conclusion of the hearing of the motion, the learned judge delivered an *ex tempore* judgment wherein he outlined the history of dealings between the parties, the borrowings of the plaintiffs and their hopes and expectations at the time of the loan transaction. Gilligan J. stated:-

> "it has been quite clear to me that as the result of a number of appearances by Mr. Lawless that he and his co-plaintiffs feel very aggrieved about the entire situation." (page 1 judgement 16th September, 2014).

Central to his approach was that the bank had secured judgment against the plaintiffs on 4th February, 2010 in the sum of €3,793,872.13 on which date counsel for the plaintiffs advised the court that they had no defence to the proceedings. Judgment was accordingly entered in the proceedings by Kelly J. and Gilligan J. noted that that judgment stood and had been the subject of enforcement proceedings before Finlay Geoghegan J. in the High Court. He noted that from her judgment the appellants appealed to the Supreme Court where their claims were rejected.

67. Gilligan J. was concerned at the very serious allegations made against the receiver:-

> "Mr. Lawless has no difficulty in alleging fraud and criminality and effectively that appears all to relate to the fact that his mother, who attended the auction, was the only person to place a bid. It is clear from reading the papers that Mr. Lawless was very quick to indicate to all and sundry present that this was a forced sale of the land, which it was, and that the auction then never got off the ground. The receiver who was moving on the advice of the auctioneer and taking his own counsel, took the view that they would deal with another bidder and the lands were sold. Again, Mr. Lawless is very aggrieved at that. He indicates, as he had earlier today, that his mother would have paid a more substantial sum, but in the background his mother took proceedings against certain of the parties that were involved. The case went on for two days, there was a confidential settlement agreement, and Mr. Lawless took the occasion to release the confidential terms of settlement and effectively Mrs. Lawless withdrew all her allegations and accepted that the auction was conducted with absolute propriety. I have to say, and it is appropriate for me to say, that it is very very difficult to understand how Mr. Lawless can continue to float allegations of fraud and criminality against the parties involved, having regard to the admissions as made by his mother."

68. The learned judge noted that claims at paragraph 36 of the statement of claim alleging non-compliance with a supposed "1846 Land and Conveyancing Act" had no basis in law. The learned judge noted that the appellant Mr. Lawless had certain claims pursuant to an 1846 Land Act and stated:-

> "I am quite satisfied that with reference to the judgment of Judge Clarke, there is no basis in law to the submissions that were made by Mr Lawless in this regard."

69. The learned judge was taken aback by the nature of allegations set out in paragraph 31 of the statement of claim. The said paragraph alleges that the receiver was:-

> "…engaged in a personal vendetta against the plaintiffs in the form of a harassment campaign by way of employing a Wicklow based private detective company and a Westmeath based private detective company called Kellkee to monitor the Plaintiffs day to day activities."

It alleges further that the receiver orchestrated a prolonged surveillance campaign against the plaintiffs in order to damage their business standing and personal relationships within their native community and that this was apparently done in co-operation with the Gardaí. It is pleaded further that since 13th October, 2009 onwards, KPMG and their agents embarked "on a malicious vindictive campaign in the local community to destroy the good name, reputation and good standing of all of the plaintiffs in the local community. This campaign had a detrimental effect on the plaintiffs business in the locality namely "Fallons Public House" which was all but wiped out overnight." It is further pleaded that this detrimental effect was beneficial to the bank and the receiver.

70. Gilligan J. noted the judgment of the High Court (McGovern J.) in *Daniel Doherty v. Minister for Justice* [2009] IEHC 246 where, on the facts, that judge stated:-

> "What the plaintiff is doing in this statement of claim is adopting a "scattergun" approach by which he hurls accusations and abuse at the numerous defendants, sometimes on his own behalf, but frequently on behalf of others who are not even parties to the proceedings. This is not permissible. The plaintiff has made no attempt to formulate a legal claim in the manner in which this is normally understood. He does not set out what duties each of the defendants owed to him or outline how that duty was breached and what consequences flow from the breach. In many cases, his narrative of complaint does not even relate to matters involving him."

71. Gilligan J. stated that he believed that effectively the same situation had arisen on the facts of the instant case before him. The judge, in reviewing summary proceedings before Kelly J. in 2010, the special summons proceedings before Finlay Geoghegan J. and the appeal to the Supreme Court, concluded that the contents of the statement of claim amounts to a recycling of issues, the bulk of which have been canvassed previously in earlier litigation. Gilligan J. stated:-

> "I do not propose to go through every paragraph of the 36 paragraphs of the statement of claim and the various reliefs that had been sought, to try to find if there is anything of any merit and I am satisfied that the content of the statement of claim is frivolous and vexatious and I am satisfied that the appropriate order that should be made is that the proceedings should be struck out at this stage. I am also relying on the jurisdiction of the court in addition to the Rules of the Superior Courts to come to that conclusion." (page 3 judgement 16th September, 2014).

72. It should also be noted that the trial judge further stated:-

> " In all the circumstances, I am not actually prepared to make an Isaac Wunder Order against Mr. Lawless."

73. At the conclusion of the hearing, the trial judge ordered that the said action and proceedings be struck out pursuant to O. 19, r. 28 of the Rules of the Superior Courts on the basis that the claim failed to disclose a reasonable cause of action. He further ordered that the said action be struck out pursuant to the inherent jurisdiction of the court on the basis that the claim was frivolous or vexatious and an abuse of process. The plaintiffs were ordered to pay the first, second and third named defendants' costs of the motion when taxed and ascertained. The court further ordered that execution on foot of the said judgment for costs be stayed for a period of 21 days from the date of perfection of his order and in the event of the plaintiffs serving a notice of appeal within that period and duly entering same, that execution be further stayed until the final determination of such appeal. The said order was perfected on 17th September, 2014.

The grounds of appeal

74. By notice of appeal dated 6th October, 2014 the appellants based their appeal to this Court on the following three grounds:-

> i. that the High Court judge erred in law and in fact in striking out the proceedings when the plaintiff was not given an opportunity to litigate his proceedings in full before the Court;
>
> ii. that the judge erred in law and in fact in finding that the pleadings disclosed no cause of action in circumstances where the plaintiff was denied an opportunity to litigate his proceedings in full before the Court; and,
>
> iii. that the judge erred in law and in fact in finding that the pleadings disclosed no cause of action in circumstances where the plaintiff was denied an opportunity to litigate against all named defendants together and relying solely on submissions of the first, second and third named defendants.

75. The appellant's written submissions in support of this appeal were filed on 26th May, 2017. The appellant makes the following points relevant to this appeal:-

> i. That the grounding affidavit of the respondents failed to highlight that the Supreme Court had remitted a question for consideration by the High Court which is the subject of a connected appeal. (This issue is considered more fully in the Order 28 r11 /Slip Rule appeal which was determined earlier in this judgment).
>
> ii. That the said grounding affidavit of Jason Milne " at paragraph 23(h) acknowledges that the 2013 proceedings incorporate a claim for damages " arising from the appellant's contention that the receiver disposed of the lands at an undervalue.
>
> iii. That the receiver acting as agent for the plaintiffs was obliged to issue a VAT invoice for his services to the plaintiffs pursuant to the VAT legislation. (a matter considered in the second appeal above)

76. He further relies on the decision of *Ewing v. Ireland and the Attorney General* [2013] IESC 44 as authority for the proposition that acceding to an application to strike out proceedings should be used sparingly and the plaintiffs' case should be taken at its height.

Respondents' submission

77. The respondents also filed written submissions which assert that it is important to have regard to the fact that prior to the initial summary proceedings which came on for hearing before Kelly J. on 4th February, 2010 the appellants had raised many serious allegations against the bank including forgery requiring the bank to put evidence on affidavit before Kelly J. stating that:-

> i. the facility letter had in fact been signed by the appellants; and,
>
> ii. that the appellants had previously alleged forgery at a meeting with the bank on 15th December, 2008 but had subsequently withdrawn this allegation.

78. At the hearing in the summary proceedings on 4th February, 2010 that the appellants had not contested any of the averments nor did they contest the bank's entitlement to judgment on foot of the facility letter notwithstanding that prior to that hearing they had verbally alleged that the facility letter was a forgery. That subsequently in the special summons enforcement proceedings the appellants put the allegation of forgery before the Court asserting that their silence at the time of hearing of the summary summons proceedings in February 2010 had been secured by a secret parole agreement concluded between their solicitor and the receiver on foot of which the receiver had agreed to sell the secured lands to the appellants and write off their debt at a substantial discount provided the appellants would remain silent regarding the alleged forgery and not prosecute the bank criminally. The respondents point

out that this assertion has never been put forward on affidavit by the appellants. The allegation of the secret deal was rejected by Finlay Geoghegan J. on 7th February, 2012. The appellants appealed both the judgments of Kelly J. and Finlay Geoghegan J. to the Supreme Court, which appeals were heard on 7th February, 2014. The appeals were dismissed.

79. The respondents assert that the proceedings brought by Mrs. Maureen Lawless, mother of the appellants John Lawless and Rita Cunniffe, are also relevant wherein she alleged impropriety on the part of the auctioneer with regard to the manner in which he conducted the auction in May, 2010. The respondents note that the case was withdrawn following two days of hearing in the High Court on terms which left the sale contract undisturbed and which involved the plaintiff Maureen Lawless formally withdrawing all allegations of negligence and misconduct against the auctioneer and expressly acknowledging the auction had been conducted in a professional and proper manner. It appears Maureen Lawless subsequently sought to re litigate the same allegation in a second set of proceedings in the year 2015 in respect of which the appellant John Lawless spoke on her behalf in court. The said proceedings were struck out.

80. The respondents assert that it was following the refusal of the Supreme Court to allow the appellants to remit to plenary hearing any of the issues they had sought to litigate or appeal that the appellants launched the within proceedings [2013 No. 6018 P] against an expanded number of defendants including all of the purchasers of the auction lands together with the auctioneer and his company. The respondents assert that the current proceedings are essentially an attempt to remit to plenary hearing the matters which both Finlay Geoghegan J. and the Supreme Court have previously held could not be so remitted.

81. The respondents further assert the following matters in relation to the statement of claim which they sought to have struck out:

a. As regards paras. 17 to 23 that it amounts to an "alternative history" of the loan agreement of 2007. In substance the appellants contend that certain alleged oral agreements and not the facility letter of November, 2007 constitute a true basis of the loan agreement between the respondent bank and the appellants. The bank asserts that it was incumbent on the appellants to raise these issues in the summary proceedings in 2010 had they intended to rely on same. In that regard they rely on the rule in *Henderson v. Henderson* as precluding a party from having "a second bite of the cherry" and states that the bank's claim for summary judgment required the appellants to raise these defences or "forever hold their peace".

b. With regard to paras. 24 to 26 of the statement of claim which alleges, *inter alia*, that the facility letter is a forgery, this allegation was expressly withdrawn prior to the institution of the summary proceedings and was done so on 15th December, 2008. The court was informed of the making of the allegation. The appellants had the opportunity to raise this issue in the summary proceedings and they omitted to do so. They are now effectively estopped from doing so, it is asserted.

c. With regard to paras. 27 to 30 which set out the allegations pertaining to the "secret deal" allegedly offered by the receiver on behalf of the bank to the appellants' solicitors which they in turn allege induced them to "consent to judgment before Kelly J. in February, 2010. The respondents point out that this allegation was fully ventilated before Finlay Geoghegan J. on 7th February, 2012. Her decision was appealed to the Supreme Court by the appellants, which dismissed the appeal, refusing the application to remit any aspect of the matter to plenary hearing. The respondents assert that these allegations are accordingly *res judicata.*

d. With regard to para. 31 the respondent asserts that these allegations are scandalous and unparticularised in nature. The respondents rely on O. 19, r. 5(2) which provides that in all cases of fraud, full particulars (including dates and items if necessary) must be pleaded. In the summary proceedings [2009 No. 5579 S] these appellants entered an appearance on 12th January, 2010. The matter was entered into the Commercial list on 1st February, 2010 and came on for a full hearing on 4th February, 2010. The appellants were represented by solicitor and counsel at the hearing and yet refrained from articulating these allegations. Likewise, in the special summons proceedings [2011 No. 753 SP] *ACC Bank v. Cunniffe & Ors.* which came on for hearing before Finlay Geoghegan J. well over two years after the appointment of the receiver and which was the subject of an unsuccessful appeal to the Supreme Court heard on 7th February, 2014.

e. The respondents take issue with paras. 32 to 35 insofar as they seek to resurrect claims previously made and then withdrawn and expressly acknowledged to be false by Mrs Maureen Lawless in her 2009 suit. The claim was one of fraud and involved charges of theft and criminality as against the bank and the receiver. The respondents assert that it amounts to an abuse of process and rely on the case of *McCauley v. McDermott* [1997] 2 I.L.R.M. 486 for the proposition that the appellant Mr Lawless is a party, proxy or privy of his mother, Margaret Lawless, and in effect he stands in her shoes and claims through her or under her in this aspect of the statement of claim. In substance, these paragraphs, it is asserted, amount to a re-expression of the claim withdrawn by Mrs Maureen Lawless in the High Court. In that regard the respondent relies on *Arthur J. S. Paul & Co. v. Simons* [2002] 1 AC 615. They argue that since Mrs Maureen Lawless is estopped from advancing her claim in her own name it would be an abuse of process to permit this claim to be advanced in the name of her children. Further, this claim could only be prosecuted by evidence being adduced from Mrs Lawless at a plenary hearing which would contradict her earlier formal admission to the High Court in her own proceedings.

f. Para. 36 purports to rely on a Land & Conveyancing Act of 1846 which the respondent points out, does not exist.

82. With regard to the appellants' third ground of appeal that the High Court erred in striking out the case against all 11 defendants in circumstances where the motion was brought by only three of the named defendants, it is asserted that this ground is misconceived insofar as if the propriety of the auction held in May, 2010 cannot be relitigated against the vendors neither can it be relitigated against the purchasers or the auctioneer. It was further noted that no actual claim of wrongdoing is made against any of the purchasers at the auction. The respondents assert that the appeal should be dismissed.

The law

83. Order 19, r. 28 provides that a Court may order a pleading to be struck out on the grounds that "it discloses no reasonable cause of action" and in any case where the action is shown by the pleadings to be "frivolous or vexatious" the court may order that the action be stayed or dismissed or that judgment may be entered accordingly. The Supreme Court in the case of *Aer Rianta Cpt v. Ryanair Ltd* [2004] IESC 23 held that on the plain meaning of the words of O. 19, r. 28 the rule applied to a pleading in its entirety. Therefore, a court had jurisdiction under the rule to strike out an entire pleading but not a portion thereof. This interpretation, based on a construction of the plain meaning of the words of r. 28, was both internally consistent and also externally consistent with O. 19, r. 27 dealing with "any matter in any endorsement or pleading" and the definition of a "pleading" in O. 125, r. 1. Denham J., in delivering judgment for the Supreme Court, stated that:-

> "10. The jurisdiction under O. 19, r. 28 to strike out pleadings is one a court is slow to exercise. A court will exercise caution in utilising this jurisdiction. However, if a court is convinced that a claim will fail such pleadings will be struck out."

84. In coming to a determination on an application grounded on Order 19 r. 28, the court is confined to the statement of claim as actually pleaded. Affidavits and other matters before the court ought to be disregarded. In *McCabe v. Harding* [1984] I.L.R.M. 108, O'Higgins CJ. emphasised that in order to meet the threshold under the rule "vexation or frivolity must appear from the pleadings alone".

85. Having regard to the jurisprudence, which clearly provides that the court can only make an order under this rule when a pleading discloses no reasonable cause of action on its face, I am not satisfied that Gilligan J. was entitled to strike out the statement of claim on the basis that the text of the statement of claim when considered alone disclosed no reasonable cause of action. I am fortified in that view by the judgments of O'Higgins CJ. in *McCabe v. Harding* [1984] I.L.R.M. 105, Costello J. in *Barry v. Buckley* [1981] I.R. 301 and *D.K. v. King* [1994] 1 I.R. 166. It therefore follows that I find the order striking out the statement of claim could not have been validly made pursuant to Ord. 19, r. 28.

Inherent jurisdiction to strike out

86. However, in the instant case, the orders of the learned judge were not based on O. 19 r. 28 alone but also separately on the inherent jurisdiction of the court. In *Barry v. Buckley* [1981] I.R. 306 at 308, Costello J. stated:-

> "But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see Wylie's Judicature Acts (1906) at pp. 34-37 and The Supreme Court Practice (1979) at para. 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley L.J. in *Goodson v. Grierson* [1908] 1 K.B. 761 at p. 765.
>
> This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant."

In contrast with the position when an application is brought relying on Ord. 19 r. 28 alone, in considering whether or not to strike out a statement of claim in the exercise of the court's inherent jurisdiction, the court is entitled to engage in some analysis of the facts. Cases such as Clarke J. in *Salthill Properties Ltd. v. Royal Bank of Scotland* [2009] IEHC 207 and *Sun Fat Chan v. Osseous* [1992] 1 I.R. 425 confirm that approach to be correct.

87. In the instant case, the initial paragraphs of the statement of claim are unremarkable and merely set out the parties and details pertaining to same. Paragraphs 17 to 26 inclusive pertain to matters up to the appointment of the receiver on 13th October, 2009. The plaintiffs allege breach of contract, breach of agreement and revisit again matters surrounding an intention to obtain planning permission for quarries on the lands. They claim that monies in the sum of €180,000 required to obtain said planning permission were to be forwarded by the Bank which failed to honour that commitment. Paragraphs 24,25 and 26 plead fraud and forgery including that signatures of the Plaintiffs on the letter of offer of 7th August, 2007 were not the appellants' signatures and characterise the documentation as in effect fraudulent documentation. They allege fraud on the part of the respondent bank and fraudulent conduct "thereby creating an avenue for the first named defendant to appoint a receiver unlawfully to the said properties".

88. This Court notes that in the summary proceedings ACC v. Cunniffe & Ors. [2009 No. 5579 S] which were instituted in December, 2009 the appellants had ample opportunity to put before the High Court by way of affidavit or otherwise each and every allegation set forth at paras. 17 to 26 inclusive of the statement of claim. They chose not to do so. They were fully legally represented by solicitors and counsel when the summary proceedings came on for hearing before Kelly J. in the High Court on 4th February, 2010. It is noteworthy that the order of Kelly J. records "an admission by the defendants through their counsel that they have no defence to the plaintiffs' claim".

89. The Supreme Court in *Ahmed v. The Medical Council and The Attorney General* [2003] IESC 70 cited with approval what has come to be known as the principle in *Henderson v. Henderson* [1843] 3 Hare 100 of Sir James Wigram V.C. stating:-

> "I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belongs to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time."

90. The Supreme Court (Hardiman J.) also cited with approval *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345 where Pallas C.B. held that a party to previous litigation, as against the other party in that action was bound "not only [by] any defences which they did raise in that suit, but also any defences which they might have raised, but did not raise therein." In the circumstances, paras. 17 to 26 inclusive of the statement of claim amount to a *Henderson v. Henderson* abuse of process.

91. There is a public interest in the efficient conduct of litigation. In this regard, the judgment in *Woodhouse v. Consigna Plc.* [2002] 2 All ER 737 of Brooke L.J. is of relevance to the facts in this case where he considers the public interest in the efficient conduct of litigation and states:-

> "But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in *Henderson v Henderson* [1843] 3 Hare 100 that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all, is a rule of public policy based upon the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever, and that a defendant should not be oppressed by successive suits where one would do."

92. It is noteworthy that Hardiman J. in the Supreme Court in *Ahmed v. The Medical Council* [2003] IESC 70 cited the following passage from Bingham L.J. in *Johnson v. Gore Wood* [2002] W.L.R. 72 where he stated:-

> "*Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not twice be vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."

93. The judgment of *Ewing v. Ireland and The Attorney General* [2013] IESC 44 is of relevance in this regard:-

> "**The power to strike out proceedings**
>
> 23. As this appeal concerns issues which now frequently come before the courts, it may be helpful to make some more general observations as to the conduct of this and similar applications. Court time is now a scarce resource; the courts have a public duty to ensure that such time is used appropriately. As well as rights of access to the courts, both represented litigants and litigants-in-person have duties. There is no duty to allow the continuance of unstateable cases to full hearing. Pleadings must be focused on the real issues, as must written and oral submissions.
>
> 24. Order 19 Rule 27 of the Rules of the Superior Courts confers a broad jurisdiction upon the court to strike out what are termed unnecessary, scandalous or prejudicial pleadings (…)
>
> 25. Order 19 Rule 28, on the other hand, provides the court with the jurisdiction to strike out a pleading for failing to show any reasonable cause of action; or for being, what is termed "frivolous or vexatious" (…)
>
> This rule permits a court to strike out an entire pleading rather than simply parts of it (see *Aer Rianta v Ryanair* [2004] 1 I.R. 506).
>
> 26. As well as the jurisdiction outlined which obtains under the Rules of the Superior Courts, the court also has an inherent power to strike out entire proceedings (see the range of cases commencing with *Barry v Buckley* [1981] I.R. 306, cited in chapter 16 of Delany and McGrath, Civil Procedure in the Superior Courts, 3rd ed. (2012); and also *Sun Fat Chan v Osseous Ltd* [1992] 1 I.R. 425). In such an application, the court considering the matter is not limited to a consideration of the pleadings but may be free to hear evidence on affidavit relating to issues in the case. This jurisdiction exists to ensure that an abuse of court process does not take place.
>
> 27. This more radical power should be used sparingly. A court must take the plaintiffs case at its highest, and assume that all the relevant matters which are pleaded by a plaintiff will be established by him. A court must also take into account that a situation may exist where a simple amendment of the pleadings could "save" the case."

That judgment, on which the appellants seek to rely, is however distinguishable in circumstances where on the facts as proven in this case, the rule in *Henderson v. Henderson* is clearly engaged and further, particularly with regard to the matters pleaded at paras. 27 to 30 inclusive, the matter is *res judicata* and further it is clearly not open to the appellants to make bare assertions in a cavalier and gratuitous fashion that traduces the good name, reputation and standing of the first, second and third respondents as is done at para. 31 of the statement of claim delivered in these proceedings.

94. I am satisfied that paragraphs 27 to 30 constitute a highly selective rendition of events from the appointment of the receiver by the respondent bank on 13th October, 2009 onwards. Paragraph 28 alleges a compromise in the first week of December, 2009 between the appellants and the receiver where in effect the plaintiffs would purchase the lands for the sum of €750,000 in full and final settlement of the €3.7m loan.

95. The issues pleaded at paras. 27 to 30 have been the subject of detailed consideration by the High Court and in the judgment of Finlay Geoghegan J. delivered on 7th February, 2012 together with the appeal to the Supreme Court wherein these claims were dismissed on 7th February, 2014 and accordingly are res judicata.

96. Paragraph 31 alleges a personal vendetta and a harassment campaign by the receiver including oppressive type conduct involving Garda surveillance and a malicious vindictive campaign within the community to destroy the reputation, good name and standing of the plaintiffs in their community. It further alleges that the first and second named defendants gained from these alleged actions. The matters as pleaded at para. 31 of the statement of claim fail to comply with O. 19, r. 5 which requires the plaintiffs to give in sufficient detail the material facts which constitute the charges being relied upon:-

> "In all cases alleging misrepresentation, fraud, breach of trust, wilful or undue influence and in all other cases in which particulars may be necessary, particulars, (with dates and items if necessary) shall be set out in the pleadings."

97. Of particular significance is the temporal ambit of the matters pleaded in para. 31 namely that the conduct alleged operated from 13th October, 2009, (being the date of appointment of the receiver) forward for a long protracted period of time. The appellants refrained and omitted from articulating these most serious and grave new allegations of egregious conduct, impropriety and wrongdoing against the respondents for over 4 years. The statement of claim is dated 20th January, 2014. The language used in paragraph 31 clearly contains generalised imputations of misconduct, wrongdoing and mala fides as against the first, second and third named plaintiff. When the plaintiffs first appeared in the Commercial Court on 4th February, 2010, the receiver had been in place for approximately 4 months and thus the alleged wrongdoing of the receiver had been in progress throughout that period of time one would expect that such egregious conduct would have been disclosed either before Kelly J. on 4th February, 2010 or at any of the other court appearances in this and the related cases. No such allegations were put forward such as those pleaded at paragraph 31 of the statement of claim. It is noteworthy that at the hearing of this motion on 16th September, 2014 before the High Court, Mr. Lawless informed the court that he was awaiting discovery to back up his allegations as pleaded at paragraph 31 of the statement of claim. It is clear from authorities such as the dicta of Denning L.J. in *Associated Leisure Ltd v. Associated Newspapers Ltd* [1970] 2 QB 450 p.456 that fraud should not be pleaded unless there is clear and sufficient evidence to support it. Further, in light of the Rules of the Superior Courts any fraud must be pleaded with the utmost particularity. That Mr. Lawless anticipates that an order for discovery at some point in the future may assist or enable him to plead fraud and forgery in a manner that is in compliance with the rules demonstrates that that aspect of this statement of claim is not maintainable.

Privity of interest

98. The proceedings instituted by Maureen Lawless [2010 No. 5539 P] (hereinafter "the first Maureen Lawless proceedings") were against Michael Regan Auctioneering Limited alone. The said company is the fifth named defendant in the within proceedings. Accordingly, none of the plaintiffs in these proceedings and ten of the 11 defendants in the within proceedings were not parties to the first Maureen Lawless proceedings. The Supreme Court in *McCauley v. McDermot* [1997] 2 I.L.R.M. 486 considered the issue whether a person is a privy of a party "by blood, title or interest when he stands in his shoes and claims through or under him".

99. Privity in this context must be understood in light of the decision in *Shaw v. Sloan* [1982] NI 393 where O'Donnell L.J. expressed caution against an over-broad concept of privity:-

> "Privity means something more than being interested in the outcome. It must involve some interest as would enable the privy to have a voice or say how the proceedings are, or will be conducted or concluded. Any other meaning could operate to cause grave injustice to servants or agents who while not parties to the proceedings, and having no voice in their conduct could be held to be bound by them."

100. Having regard to the authorities of *Belton v. Carlow Co. Co.* [1997] 1 I.R. 172 and *McCauley v. McDermot* [1997] 2 I.L.R.M. 486, the first Maureen Lawless proceedings culminating in the settlement agreement dated 21st October, 2011 do not on their own meet the threshold to establish a clear privity of interest between the respective parties, particularly in circumstances where there is only one common party between the two sets of proceedings namely Michael Regan Auctioneering Limited which was the only defendant in the first proceedings and is the fifth defendant in the within proceedings. Therefore, relying on the first Maureen Lawless proceedings alone there does not appear to be sufficient degree of identification between the two actions to make it justifiable that the settlement to which Maureen Lawless was a party should be binding on the parties to the instant proceedings to which her son John Lawless (and daughter Rita Cunniffe) are parties. However, that is not the end of the matter. Subsequent to the conclusion of the first Maureen Lawless proceedings on 21st October, 2011, after two days of hearing before Laffoy J. in the High Court, on terms which included an express discontinuance of her claim by the said plaintiff and an express statement in open court that "all allegations of negligence and other misconduct were withdrawn and further that the plaintiff Maureen Lawless accepted that Mr Michael Regan at all times conducted the auction in a professional and proper manner", a fresh plenary action was instituted on 14th June, 2013 by the said Maureen Lawless, a litigant in person, against all of the defendants in these proceedings and in addition one Thomas O'Connor, a twelfth named defendant. The said proceedings, Maureen Lawless v. ACC Bank & Ors. [2013 No. 6021 P] (hereinafter the second Maureen Lawless proceedings) were conducted on her behalf by her son the first named appellant John Lawless. The claims advanced in the said plenary proceedings in the second Maureen Lawless proceedings were substantially identical to those litigated and compromised by her in the first Maureen Lawless proceedings [2010 No. 5539 P]

101. In the second Maureen Lawless proceedings [2013 No.6021 P] John Lawless proactively sought to relitigate the issues arising in the earlier proceedings instituted by his mother [2010 No. 5539 P] agitating claims of fraud in relation to the conduct of the auction and in the conduct of the mortgagee and the receiver including allegations of theft and criminality as against the bank and the receiver. It is noteworthy that ultimately the second set of proceedings conducted on behalf of his mother by John Lawless were dismissed by order of the High Court made on 30th June, 2015 which said order was perfected on 11th August, 2015.

102. When one views the combined effect of the first Maureen Lawless proceedings Maureen Lawless v. Michael Regan Auctioneering Limited [2010 No. 5539 P], the settlement agreement of the said proceedings including the statement in open court withdrawing all allegations of negligence and other misconduct which occurred on 21st October, 2010, and the second Maureen Lawless proceedings Maureen Lawless v. ACC Bank and 11 other defendants, (including all defendants in the proceedings under consideration and the subject matter of this appeal) in respect of which it was undisputed at the hearing of this appeal that the respondent John Lawless actively conducted the entire proceedings on behalf of his mother culminating in an order dismissing the proceedings as against the bank, the receiver and KPMG on 30th June, 2015, it is clear that the statement of claim under consideration embodies a third attempt to litigate the same issue before the high court. Thus, I am satisfied that there is established a sufficient degree of identification between the earlier litigation and the current proceedings to make it just to hold that privity by interest is established and that the decisions and outcome in the first Maureen Lawless proceedings when combined with the second Maureen Lawless proceedings culminating in a dismissal of all of the claims as against the bank, the receiver and KPMG is binding in these proceedings.

103. As was stated in *Resolution Chemicals Ltd v. H. Lundbeck A/S* [2013] EWCA Civ. 924:-

> "Privity of interest provides an exception to the general principle of the law of estoppel that the estoppel binds only the parties to the previous litigation. The rules of law compendiously described as estoppels are very broadly based on the principle that nobody should be vexed twice in the same cause. Thus, in cause of action estoppel, party A will not be allowed to litigate the question of whether a cause of action exists with a counterparty B more than once. The successful litigant and the public have an interest in this being the law. The litigant has an interest in not being vexed twice in the same cause. The public also has an interest in ensuring that the scarce resources available for resolving disputes are used efficiently. There is however no reason in principle why a different party, C, who has the same complaint against B should not be free to litigate the same question. Notwithstanding, for example, the fact that A may have lost a first action, fairness normally demands that C should not be precluded by the manner in which A conducted the first action from bringing his own action, calling his own evidence and challenging the evidence called by B."

The law recognises that there are some classes of case where fairness demands that party C should be precluded from re-litigating a matter even though he was not a party to the previous proceedings between A and B. One of these is where party C is in "privity of interest" with A. Privity of interest has been said to be a "somewhat narrow" doctrine. In *Gleeson v. J. Wippell & Co.* [1977] 1 W.L.R. 510 at 515, Megarry V.C. dealt with the principles to be applied in this way:-

> "First, I do not think that in the phrase 'privity of interest' the word 'interest' can be used in the sense of mere curiosity or concern. Many matters that are litigated are of concern to many other persons than the parties to the litigation, in that the result of a case will at least suggest that the position of others in like case is as good or as bad as, or better or worse than, they believed it to be. Furthermore, it is a commonplace for litigation to require decisions to be made about the propriety or otherwise of acts done by those who are not litigants. Many a witness feels aggrieved by a decision in a case to which he is no party without it being suggested that the decision is binding upon him.
>
> Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the

> successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'. Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa.
>
> Third, in the present case, I think that the matter may be tested by a question that I put to Mr. Skone James in opening. Suppose that in the Denne action the plaintiff, Miss Gleeson, had succeeded, instead of failing. Would the decision in that action that Wippell had indirectly copied the Gleeson drawings be binding on Wippell, so that if sued by Miss Gleeson, Wippell would be estopped by the Denne decision from denying liability? Mr. Skone James felt constrained to answer Yes to that question. I say 'constrained' because it appears that for privity with a party to the proceedings to take effect, it must take effect whether that party wins or loses. (…) In such a case, Wippell would be unable to deny liability to Miss Gleeson by reason of a decision reached in a case to which Wippell was not a party, and in which Wippell had no voice. Such a result would clearly be most unjust. Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him."

It can be seen that Megarry V.C.'s test of "having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two" embraces two concepts. The first is concerned with the interest which the subsequent litigant, C, has in the subject matter of the first action. The second concept concerns the identity of the parties. Thus in *Zeiss No. 2* [1967] 1 A.C. 853 at 911, Reid LJ. suggested:-

> "A party against whom a previous decision was pronounced may employ a servant or engage a third party to do something which infringes the right established in the earlier litigation and so raise the whole matter again in his interest. Then, if the other party to the earlier litigation brings an action against the servant or agent, the real defendant could be said to be the employer, who alone has the real interest, and it might well be thought unjust if he could vex his opponent by relitigating the original question by means of the device of putting forward his servant."

In this example the new party has no interest in the previous litigation, but would be estopped because, in effect, he represents the party in the first action. That party has the identical interest in the previous action. In *Gleeson*, there was no identity of parties in this sense.

In my judgment, a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine:

> (a) the extent to which the new party had an interest in the subject matter of the previous action;
>
> (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and
>
> (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation.

In *Johnson v. Gore Wood* [2002] 2 AC 1, Mr. Johnson wished to bring a personal action for negligence against solicitors. A company controlled by Mr. Johnson, W, had previously compromised an action against those solicitors based on the same allegations of negligence. One issue in the House of Lords was whether Mr Johnson's claim was an abuse of process of the kind thought to have originated in the speech of Wigram VC in *Henderson v Henderson* [1843] 3 Hare 100 and developed in later cases such as *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. The House of Lords rejected that contention. Bingham L.J. warned against the incorporation into that principle of formulaic requirements and presumptions and advocated a broad merits-based approach. Bingham L.J. also endorsed the approach to privity in *Gleeson*.

It has subsequently been argued in this court in *Aldi Stores Limited v. WSP Group plc* [2007] EWCA Civ. 1260 that, given the approval in the House of Lords of the statement of the law by Megarry V.C. as to privity of interest, there is a necessary preliminary question in determining whether there is abuse of process, that there should be a sufficient degree of identification between the respective defendants. Thomas LJ. rejected that argument:-

> "10. I cannot accept this argument. Lord Bingham made clear in his speech that the approach should be a 'broad merits-based judgment' and not formulaic. It is clear he was approving the passage in the judgment of Sir Robert Megarry as the 'correct approach' and not as a statement of rigid application. The fact that the defendants to the original action and to this action are different is a powerful factor in the application of the broad-merits based judgment; it does not operate as a bar to the application of the principle."

104. Considering those factors and applying them to the instant case, I am satisfied that that there is very significant identification between the matters claimed and pleaded in the first Maureen Lawless proceedings instituted in 2010 and the second Maureen Lawless proceedings instituted in 2013 on the one hand and the matters pleaded by the appellants at paragraphs 32-35 inclusive of the statement of claim under consideration such that the appellants are parties who had a very material interest in the subject matter of the previous actions being the first and second Maureen Lawless proceedings.

105. Given the appellant John Lawless' central involvement in both the first and second Maureen Lawless proceedings and particularly the fact that he conducted the second set of proceedings effectively for and on behalf of the plaintiff, his mother I am satisfied that it can fairly be said that the first appellant in particular was, in reality, a party to the original proceedings by reason of his relationship with the plaintiff.

106. Further, against this background I am satisfied that the appellants and each of them should be bound by the outcome of the previous first and second Maureen Lawless litigation such that it is no longer open to them or any of them to pursue before the courts the issues litigated in either of the said proceedings. Paragraphs 32 to 35 inclusive of the statement of claim are characterised by the respondents as constituting an abuse of process in circumstances where Maureen Lawless, mother of two of the appellants, withdrew a claim before the High Court and acknowledged at that time that the auction had been properly and professionally conducted.

107. Finally, this aspect of the claim , pleaded in paragraphs 32-35 of the Statement of Claim could not be pursued to a hearing without calling Maureen Lawlor as a witness. She is the mother of the first and second appellants and the mother in law of the third appellant she is estopped from pursuing the claim further in her own name. I am satisfied that it would be an abuse of process for her to be permitted in effect to advance the claim a third time before the High Court in the names of her children and her son in law.

Conclusions on the Third Appeal/the Strike Out Appeal

108. The constitutional right of access to the courts which is guaranteed by Article 40.3 of Bunreacht na hÉireann has been interpreted as encompassing the right "to litigate claims which are justiciable" and to "initiate litigation in the courts". These principles are adumbrated in *O'Brien v. Manufacturing Engineering Limited* [1973] I.R. 334 at 364 and *The State (McCormack) v. Curran* [1987] I.L.R.M. 225 at 237. In evaluating an application to strike out proceedings it is incumbent on the courts to balance the constitutional rights of plaintiffs to institute and prosecute proceedings with the rights and interests of defendants to expect a final and conclusive determination of disputes and they are entitled to expect that they will not be exposed to repeated re-litigation in relation to matters already decided in a judgment or the subject of a compromise in earlier proceedings.

109. When one considers the totality of the pleadings, filings, listings before the relevant courts and orders made in respect of the following proceedings:

i. ACC Bank & Anor. v. Cunniffe & Ors. [2009 No. 10169 P],

ii. ACC Bank plc v. Cunniffe & Ors. [2009 No. 5579 S] in respect of which the Supreme Court refused to extend time to file an appeal on 7th February 2014,

iii. Aidan Cunniffe, Rita Cunniffe and John Lawless v. ACC Bank and Kieran Wallace, 2014/1416

iv. John Lawless, Rita Cunniffe, Aidan Cunniffe v Acc Bank, Kieran Wallace, KPMG and others 2013/6018P

v. ACC Bank plc v. Cunniffe & Ors. [2011 No. 753 SP] together with the Appeal to the Supreme Court taken together with the collective effect of proceedings [2010 No. 5539 P] Maureen Lawless v. Michael Regan Auctioneering Limited, a compromise and settlement agreement of that litigation dated 21st October, 2011 coupled with the second Maureen Lawless proceedings [2013 No. 6021 P] Maureen Lawless v. ACC Bank

the cumulative effect is that virtually every issue raised in the within statement of claim has already at least once been litigated or could have been brought forward by the respondents in previous proceedings or has in fact been so brought forward and determined upon through the first and second Maureen Lawless litigation.

110. I am satisfied that insofar as the statement of claim raises new issues it was incumbent on the respondents when issues pertaining to the mortgage became the subject of litigation between the parties in December, 2009 and came first before a court of competent jurisdiction in February, 2010 to bring the whole of their case and all grounds and issues before the court so that all aspects of it might have been finally decided upon. A very material factor in the instant case is that no tenable explanation has been advanced for the sustained failure to raise a number of the new points of claim identified in para. 17 to 23 of the statement of claim in any of the previous proceedings between the parties.

111. Additionally, as regards matters pleaded, particularly at paras. 24 to 26 and 27 to 30, many of these points were raised in the special summons proceedings and were litigated to a determination before the High Court and the respondents' appeal was dismissed by the Supreme Court thereafter.

112. Whilst this court must have due regard to the right of access to the courts, having regard to the provisions of the Constitution and the European Convention of Human Rights nevertheless where issues, particularly including allegations of fraud, wrongdoing and impropriety previously litigated to a conclusion, as is disclosed by the facts in the instant case, having due regard to the corpus of litigation, court orders, filings and legal steps taken between the respective parties over the past eight years, I am satisfied that the High Court, in exercise of its inherent discretion and in the interests of justice, was entitled to strike out the plaintiffs' within proceedings as an abuse of process, it being demonstrable that the proceedings at paras. 17 to 30 inclusive properly belong in the first proceedings and should have been raised by the respondents with all due diligence and expedition. The inevitable further consequence is that these proceedings fall foul of the rule of public policy that litigation should not drag on forever and that defendants should not be oppressed by successive suits where matters and issues could have been appropriately disposed of in the earlier litigation.

113. Allegations of fraud or impropriety should be made only in circumstances where there is a sufficient evidential basis for them. It is not appropriate that a statement of claim be delivered with extravagant claims asserted of the gravest impropriety, criminality and misconduct without substantive factual basis. See the judgment of Peart J. in *Sheehy v. Ryan* [2005] IEHC 419 and Denham J. in *Connolly v. Casey* [2000] 1 I.R. 345. No evidential basis for such allegations pleaded generally in the statement of claim has been established by the appellants.

114. With regard to the matters alleged at para. 31 of the statement of claim they traduce the good name and reputation of the receiver and KPMG and amount to a corpus of allegations made with abandon and a lack of restraint by the respondents, recklessly, with indifference as to the consequence for the affected parties and are calculated to cause embarrassment or otherwise scandalise the first, second and third defendants. Furthermore they are pleaded in circumstances where the appellants are unable to particularise the allegations in any material respect advancing the vain hope to the High Court that discovery may turn up something to support the bare assertions pleaded. The matters alleged introduce extraneous matters for motives unconnected with the dispute between the parties. The pleadings at para. 31 embody allegations that are wholly unnecessary to any reasonably balanced or strongly held views of a right minded plaintiff as against a defendant. The imputations of character made in para. 31 would leave a person open to litigation in defamation had there not been accorded the protection of privilege of the court. In the interests of fairness these imputations warranted being struck out pursuant to the inherent jurisdiction. Paragraph 31 also warrants being struck out pursuant to the inherent jurisdiction of the court as being scandalous. With regard to the matters pleaded at paras. 32 to 35 inclusive, a case has been made out by the defendants having regard to the proceedings, pleadings, affidavits and orders and in particular the compromise order made by Laffoy J. on 21st October, 2011 coupled with the pleadings, proceedings, affidavits, orders in proceedings Lawless v. ACC Bank [2013 No. 6021 P] including in particular the order of 30th June, 2015 perfected on 11th August, 2015 dismissing the said proceedings as against the bank, the receiver and KPMG that the first and second appellants were the privies by blood and further all three appellants were more particularly privies by interest of their mother/ mother-in-law, Maureen Lawless, with regard to the claims therein embodied such that it is just in all the circumstances and having due regard to all the material facts in the within proceedings to hold that the decision and outcome in the earlier proceedings should be binding on the respondents in the

within proceedings. For the reasons stated above that contention is established. Regard must be had to the fact that the compromise concluded by Maureen Lawless amounts to an acknowledgment by her that all allegations of misconduct, impropriety and negligence pertaining to the auction were withdrawn. No proceedings can now be permitted to be pursued which would indirectly facilitate a relaunch of the claims and allegations which were twice previously the subject matter of litigation before the High Court and in which she would be a central witness.

115. Further, it is noted that the 1846 Land and Conveyancing Act cited at para. 36 of the statement of claim does not appear to exist. Hence the plaintiffs assert rights pursuant to a non-existent statute.

116. Accordingly, I am satisfied in the circumstances there is no basis to interfere with the judgment and order of the learned trial judge delivered *ex tempore* on 16th September, 2014 to the extent that same is based on the inherent jurisdiction of the court. The learned judge was correct in finding that the entire contents of the statement of claim seeks to regurgitate matters that were previously in large measure canvassed before that court. Whilst I am not satisfied, on balance, that the very high threshold required to procure an order that the proceedings be struck out pursuant to O. 19, r. 28 on the basis that the claim fails to disclose a reasonable cause of action and that they are frivolous and vexatious was met on the exacting approach that rule requires I am satisfied that nevertheless the outcome remains the same by reason that the proceedings were correctly struck out pursuant to the inherent jurisdiction of the High Court on the basis that the claim is vexatious and further constitutes an abuse of process. The appellants' appeal in this regard is accordingly dismissed.

Fourth Appeal relating to the Order restraining the institution of certain proceedings

117. In proceedings [2013 No. 6018 P] John Lawless, Rita Cunniffe and Aidan Cunniffe v. ACC Bank, Kieran Wallace and KPMG & Ors. on 16th September, 2014 Gilligan J. declined to make an Isaac Wunder order against John Lawless.

118. Subsequently a further notice of motion dated 13th July, 2015 was issued by the Plaintiffs in proceedings [2009 No. 10169 P] seeking that the appellants be restrained from instituting any proceedings whatsoever whether by summons or notice of motion or otherwise in relation to six specific matters:

i. The validity of the facility letter dated 7th August, 2007 or the signatures of the respondent thereon.

ii. The validity of the order of Kelly J. of 4th February, 2010 in proceedings [2009 No. 5569 S], [2010 No. 29 COM].

iii. The validity of the appointment of the receiver on foot of the deed of mortgage signed 6th December, 2007 over the property described in folios of the Register of Co. Roscommon 6100, 6101, 26057F, 15714F, 810F, 31304F, and 4991F.

iv. The propriety of the conduct of the plaintiffs, their servants or agents in respect of an auction of the mortgaged properties which took place on 28th May, 2010 or in respect of the negotiations which took place thereafter between the auctioneer and the various bidders.

v. The validity of the sales of the mortgaged properties concluded on or about 28th May, 2010.

vi. The right of the receiver to deal in/dispose of the original mortgage properties secured by deed of mortgage dated 6th December, 2007 and his right to deal in/dispose of those other properties against which judgment mortgages were registered and which were the subject of the enforcement proceedings before Finlay Geoghegan J. on 7th February, 2012.

Motion hearing in the High Court

119. This motion came on for hearing before Gilligan J. in the High Court on 22nd January, 2016. It is clear from the transcript that the learned judge had considered the affidavits over night which included the three affidavits of Jason Milne of 13th July, 2015, 22nd July, 2015 and 7th October, 2015 together with affidavits of John Lawless of 18th January, 2016 and 20th January 2016.

120. The respondents opened jurisprudence to Gilligan J. including *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463 and *Mc Mahon v. W. J. Law & Co* [2007] IEHC 51 which set out and analysed the jurisprudence as it then stood in relation to the granting of a so called Issac Wunder Order.

121. The trial judge noted in particular the contents and averments in an affidavit pertaining to another motion concerning the parties which had been at hearing before him the previous day and he noted in particular the contents of the affidavit sworn by the Defendant John Lawless which deposed that the letter of offer by the bank of the 7th August, 2007 had not been signed by the defendants, that the signatures in the letters were forgeries, that the letter of offer was a forged document, that the letter of offer was superseded by an oral agreement and which effectively sought to re-litigate all of the matters which the appellant, Mr. Lawless, in the learned judges view ought to have raised before Kelly J. in the High Court on the 4th February, 2010 and matters which he had attempted subsequently on very many separate occasions by different means to bring before the courts.

122. Mr. Lawless was present in court and raised with the judge his view that it would be unjust to make such an order against him. The appellant asserted in court that the learned trial judge had himself in 2014 mentioned that Mr. Lawless "most likely had a case for damages against the receiver". When Gilligan J. queried the possibility of such an eventuality it was found that the transcript of the relevant court hearing failed to support Mr. Lawless' claim (page 9 transcript of hearing of motion 22nd January, 2016). In the course of the hearing, no plausible or credible answer was advanced by Mr. Lawless to the inquiry by the learned judge as to why, if he believed that the documents were forged at a time when he was before Kelly J. in the High Court on summary proceedings on 4th February, 2010 he had not advised his counsel to raise the matter with the court and why it was not stated to the judge that the issue of forged documents was arising in the proceedings. The trial judge noted that instead the instructions he had given to counsel and which had been conveyed to the court on 4th February, 2010 was that Mr. Lawless and his co defendants had no defence to the claim. The learned high court judge noted that Mr. Lawless' response was effectively to ignore this query and assert that he was not in a position to pay the loan for sundry reasons.

123. Mr. Lawless further acknowledged to the learned high court judge that he has not paid any of the orders for costs, of which there were several, which had been made against him and his co litigants. In the course of the hearing of the motion the appellant Mr. Lawless actively agitated his allegation of forgeries and other wrongdoing against the bank and the other respondents in open court.

124. In the course of the hearing, Mr. Lawless further asserted in response to queries from the judge, "I did not get the level of money the bank is saying". It appears from the affidavits filed and having regard to the tenor of the facility letter and various documentations exhibited that the loan was drawn down in two tranches, on the 15th November, 2007 a sum of €2,849,575.76 and thereafter on the 22nd May 2008 a sum of €299,924.24 respectively. No plausible or credible explanation is given for this new assertion nor is it explained why, if it be the case that he did not receive the monies as the bank claims, neither Mr. Lawless nor any of the appellants raised this matter in court expeditiously in February 2010 or had it raised on his behalf by solicitor and counsel who represented him in the summary proceedings on the 4th February 2010 before Kelly J. in the Commercial Court.

Decision of the High Court Judge

125. Gilligan J. concluded that it was clear that the appellants, and in particular Mr. Lawless, had pursued:-

> "…what can only be described as extensive litigation running to several sets of proceedings and on no occasion has Mr. Lawless or Aidan Cunniffe or Rita Cuniffe being successful. In many ways this was very amply demonstrated by the motion that was brought before the court, the first of the two motions coming before the court where effectively the defendants tried to go beyond an order of the 18th November 2009 of Murphy J. All that order provided for was for the removal of cattle from the relevant lands. But in effect Mr. Lawless and Aidan and Rita Cunniffe tried to go behind all the sales that were made by Mr. Wallace of the lands to the various people. The motion in itself in a very simplistic way demonstrates the lengths that the Cunniffes and Mr. Lawless are prepared to go to."

126. Another factor that the learned trial judge took into account was that none of the applications and motions bought by the appellants across several sets of proceedings over the years had on any occasion been successful.

127. Further, the court had regarded the fact that even on the date of hearing, the 22nd January, 2016, being almost six years after summary judgment was entered on the 4th February, 2010, Mr. Lawless continued to maintain that the original documents were forged. Gilligan J. noted:-

> "It's difficult for the court to try to comprehend how Mr. Lawless can still make these allegations in open court when at the time he had the benefit of solicitor and counsel he choose to effectively agree to the judgment being entered against him. But be that as it may be, the law appears to me to be reasonably clearly set out in the judgment of McMenamin J. (…) I'm satisfied on the evidence before this Court that there effectively has been habitual and persistent institution of vexatious or frivolous proceedings against the bank and Mr. Wallace" (page 15 of transcript dated 22nd January, 2016)

128. The judge continued:-

> "Mr. Lawless is still prepared to make the most serious of allegations across the floor of the court with no restraint, alleging that he has been called a liar, alleging improper conduct on behalf of ACC Bank, alleging that ACC Bank are involved in forged documents, alleging that I, as the Judge, on one of the many occasions when Mr. Lawless was before me, indicated to him that he had a good cause of action against the bank, and on and on it goes. There's been a rolling of the issues already decided upon into future applications and there's been a failure by Mr. Lawless and the Cunniffes to pay any of several sets of orders for costs that have been made against them." (page 15 of transcript 22nd January, 2016)

129. Having considered case law the learned judge concluded:-

> "I'm satisfied that the time has come where the Court unfortunately has to intervene in the interests of justice and in the circumstances of this particular case I propose to grant the application in respect of an Issac Wunder Order. The order will be made in accordance with the appropriate wording and will be subject only to the leave of this Court. Effectively Mr, Lawless and Mr. Cunniffe that effectively means, as I've already indicated, you can continue with any proceedings that are already in being or any appeals of that nature but you can't issue any further motions or proceedings or any type of proceeding in relation to the matters that are the subject matter of effectively the earlier judgment of Kelly J. on the 4th February, 2010 in the Commercial Court." (page 16 transcript of judgment 22nd January, 2016.)

The Appeal

130. By notice of appeal dated 25th February, 2016 the appellants appealed the decision of the learned high court judge. The grounds of appeal include:-

> i. That the trial judge erred in restraining the appellants from instituting proceedings in relation to the validity of the appointment of the receiver and in relation to the validity of the sales of mortgaged properties and in particular, the lands the subject of enforcement proceedings before Finlay Geoghegan J. on 7th February, 2012 where the said proceedings "had not progressed beyond instituting proceedings and obtaining interlocutory injunctions and where the issue of the receiver's appointment and his powers arising therefrom has not been determined and the issue of res judicata does not arise."
>
> ii. That the learned trial judge erred in making an Isaac Wunder order since in other proceedings he had refused to make such an order against the appellants on 16th September, 2014.

131. Written submissions were filed by both parties. The appellants assert that the learned judge did not in his judgement set out the test in Riordan v. Ireland correctly, and that in other proceedings between the parties the said judge had refused to make such an order against the appellants on 16th September, 2014. Further that from 16th September 2014 the appellants had taken only one step in proceedings for the purposes of giving effect to the order of Murphy J. made in the High court on 18th December, 2009. Further those issues had been identified in the Supreme Court on 7th February, 2014 which had not been fully considered by Mr Justice McGovern and that failure to highlight the previous refusal of the learned high court judge to grant an Isaac Wunder type order breached his Article 6 rights pursuant to the European Convention on Human Rights.

Findings in relation to the Isaac Wunder Appeal

132. It is noteworthy that the order under appeal was made over six years after the appellants had entered an appearance in the summary proceedings in early January 2010. It is clear from the jurisprudence that it is necessary to exercise caution when considering an application for an Issac Wunder order. It is appropriate to have due regard to the constitutional right of access to the courts which has been recognised in *MacCauley v. Minister for Posts and Telegraphs* [1966] I.R. 345 and subsequent judgments. In addition there is the equivalent right protected pursuant to Article 6(1) of the European Convention on Human Rights. Balanced

against that however as the Supreme Court has pointed out in *O'Reilly, McCabe v. the Minister for Justice, Equality and Law Reform* [2009] IESC 52, Denham J., this right of access to the courts, whilst an important constitutional right, is not an absolute one. In the course of her judgment she pointed out that the courts must also protect the rights of defendants, the principle of the finality of litigation, and have regard to the fact that the resources of the courts are finite and the courts must deal with litigation so as to ensure fair procedures. In the circumstances before her , she was satisfied that the Supreme Court should order that the appellant should not commence further proceedings against the defendants without obtaining leave of the High Court.

133. McMenamin J. highlighted the principles relating to Isaac Wunder orders in *Mc Mahon v. W. J. Law & Co* [2007] IEHC 51 as follows:-

> "Among features identified by Ó Caoimh J. in Riordan v. Ireland (No. 5) [2001] 4 I.R. 463 as justifying such an order, or militating against the vacating of such an order already granted are:-
>
> 1. The habitual or persistent institution of vexatious or frivolous proceedings against parties to earlier proceedings.
>
> 2. The earlier history of the matter, including where proceedings have been brought without any reasonable ground or have been brought habitually and persistently without reasonable ground.
>
> 3. The bringing up of actions to determine an issue already determined by a court of competent jurisdiction when it is obvious that an action cannot succeed or where such action would lead to no possible good, or where no reasonable person could expect to obtain relief.
>
> 4. The initiation of an action for an improper purpose including the oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights.
>
> 5. The rolling forward of issues into a subsequent action and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings.
>
> 6. A failure on the part of a person instituting legal proceedings to pay the costs of successful proceedings in the context of unsuccessful appeals from judicial decisions."

134. I am satisfied that this represents a correct statement of the law and it has been cited with approval by the Court of Appeal in *Superwood Holdings plc v. Sun Alliance* [2017] IECA 76 and the Supreme Court in *Ewing v. Ireland* [2013] IESC 44.

135. Several of the above factors are disclosed in the instant case. It is demonstrable across all the litigation and in light of his statements in the High Court and in the course of this appeal considered with the contents of affidavits sworn by him that Mr. Lawless, in particular, is either incapable or unwilling to resile from a position that the bank the receiver and his company have been guilty of fraud, dishonesty, forgery and improper conduct in connection with the loan facility. Further it is clear that he ascribes grave wrongdoing and impropriety to the receiver and the firm, KPMG. These allegations have been repeated on an ongoing basis across all of the proceedings save one. The appellants failed and omitted to raise any issue of this nature in the crucial initial summary proceedings where on the 4th February, 2010 summary judgment was entered by order of Kelly J. in the High Court. The latter is an order which stands and in respect of the Supreme Court refused to extend time for the late service of a notice of appeal on 7th February, 2014. Nonetheless, Mr. Lawless remains undeterred in his zeal to pursue the bank, the receiver and the receiver's firm in an oppressive fashion with the intent of effectively setting aside the sale of the mortgaged lands which occurred following the auction over seven years ago on 28th May, 2010 and further he seeks to retrieve the lands sold by the receiver to sundry purchasers in late May 2010 .

136. It is clear from their stance in court and issues raised at the hearings in the High Court and in this court and the statements made to the learned judge at the hearing of this motion on the 22nd January, 2016 that the appellants do not intend to resile from their position of maintaining the allegations of wrongdoing and improprietary against the bank, the receiver and the latter's firm come what may. It is noteworthy that the learned trial judge exercised considerable restraint and had previously, quite appropriately, declined to make a similar order when sought by the bank sixteen months earlier on the 16th September, 2014. It is clear that in coming to his decision and making the order in question the learned judge had before him cogent evidence on which he could be satisfied that the appellants had habitually or persistently instituted vexatious or frivolous civil proceedings. The court considered the entire history of the matter ranging back to the entering into the loan agreement in 2007 and the subsequent sundry litigation and actions pursued before the court. The court correctly assessed whether the proceedings were vexatious and came to a conclusion that they were in all the circumstances. The cautious and conscientious approach of the judge is confirmed by the fact that in the first instance he refused to grant an Issac Wunder order in September, 2014. I find that the cumulative impact of all the motions, affidavits and applications brought before the court over the intervening time, including the first Maureen Lawless proceedings and the second Maureen Lawless proceedings created circumstances which warranted the making of the order in the interests of fairness and for the purposes of protecting the rights of the defendants affected and to ensure that the principle of the finality of litigation is respected and that the finite resources of the courts are not exhausted, depleted or compromised by the apparently inexhaustible appetite for litigation on the part of the first appellant in particular.

137. This court has regard to the dicta of the Supreme Court *in Riordan v. Ireland (No. 4)* [2001] 3 I.R. 365 where Keane C.J. observed:-

> "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 re-open 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 with the High Court, if it allowed its processes to be repeatedly invoked in order to re-open issues already determined or to pursue groundless and vexatious litigation."

The observations of Keane C.J. are as apposite in the instant case as they were in Riordan.

138. I have regard to the entire history of the litigation and the persistent institution of proceedings and the issuing of motions, the raising of issues particularly issues previously determined in the High Court or by way of appeal to the Supreme Court and not now capable of being re litigated. I further note the pattern of raising broadly similar issues in successive proceedings aimed at reversing the appointment of the receiver - which first occurred almost 8 years ago on 13th October, 2009 - together with every consequent

act and decision pertaining to the mortgaged lands. I note also the pursuance of the proceedings through the first and second appellant's mother in the two Maureen Lawless actions outlined above which concerned the exercise of the powers by the Receiver following that appointment. I find that a situation is now disclosed which demonstrates a persistent rolling forward of the same core issues, supplemented now by more lurid allegations as are to be found, by way of just one example, in paragraph 31 of the statement of claim under consideration.

139. I am driven to a conclusion that in large measure the litigation is now calculated to disparage and oppress the defendants rather than as a vehicle which could objectively or realistically achieve any positive or legitimate outcome for the benefit of the appellants. Accordingly, I find that in light of the facts and circumstances of this particular case the Issac Wunder order was appropriately made and should not be interfered with. The appeal is accordingly dismissed.