THE HIGH COURT

[Record No. 16SA2017]

IN THE MATTER OF THE SOLICITORS ACTS 195

MICHAEL QUINN AND BRIGID QUINN

AND IN THE MATTER OF PAUL MCDONNELL, A SOLICITOR

BETWEEN

MICHAEL QUINN AND BRIGID QUINN 4 TO 2011

AND IN THE MATTER OF AN APPLICATION BY

PLAINTIFFS/APPELLANTS

AND

PAUL MCDONNELL

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 25th day of August, 2017

1. This matter comes before the court on an appeal, by way of notice of motion dated 20th February, 2017, by Michael Quinn and Brigid Quinn ("the appellants") against the finding of the Solicitors Disciplinary Tribunal ("SDT"), dated 1st February, 2017, that there is no *prima facie* case for an inquiry into the conduct of the respondent. The appellants lodged their complaint of alleged misconduct by the respondent on 29th June, 2016. It was alleged by the appellants that the respondent, in his capacity as a solicitor retained by Allied Irish Banks plc ("AIB") and Mr. Ken Fennell who had been appointed Receiver over a company of which the appellants were directors, engaged in alleged misconduct. In short, the appellants alleged to the SDT that the respondent was guilty of misconduct in that he:-

> (a) misled and misdirected the High Court by interfering with evidence presented to the Court in proceedings taken by AIB against the appellants;
>
> (b) issued legal proceedings against McDonough & Breen Solicitors, twelve days before the trial of AIB's action against the appellants in order to intimidate and undermine the defence evidence;
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> (c) misled the High Court and interfered with a defence witness;
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> (d) misled the High Court in respect of the title to certain lands;
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> (e) applied to register in the Property Registration Authority (PRA) a legal document (a Lease) that had been interfered with by the respondent after its proper execution;
>
> (f) lodged a charge in the PRA in tandem with the alleged falsified lease in circumstances where Mr. Fennell, Receiver, for whom the respondent acted, had no authority or power to lodge the said charge and;
>
> (g) withheld documents on discovery.

Each of the complaints of the appellants to the SDT, as set out in their joint affidavit sworn 27th June, 2016, are more particularly set out later in the judgment.

2. On 4th August, 2016, the respondent swore an affidavit in response to the appellants' allegations. On 19th September, 2016, the first named appellant swore a further affidavit in response thereto.

3. The SDT rendered its decision by letter dated 1st February, 2017, stating that it was of the opinion that there was no *prima facie* case of misconduct on the part of the respondent to merit an inquiry in respect of each of the allegations which had been set out in the appellants' joint affidavit sworn 27th June, 2017.

4. Before addressing the SDT's decision and the parties' respective submissions with regard thereto, it is necessary to set out in some detail the background to the appellants' complaints to the SDT.

5. The appellants, who are husband and wife, were directors and shareholders of a company, Cloughvalley Stores Limited, which since in or about 1988, operated a petrol station and grocery store at Castleblayney Road, Carrickmacross, Co. Monaghan.

6. In or about 2006, Cloughvalley Stores Limited ("the Company") proposed the redevelopment of the supermarket and the rebuilding of the petrol station. In order to finance the said redevelopment, the company borrowed €6.5m from AIB. The loan was made by the bank pursuant to a facility letter from it to the directors of the Company dated 3rd May, 2006. The section of the letter dealing with the security for the loan included a reference to "legal charge over 40,000 sq. foot building premises on c.2 acres at Carrickmacross, Co. Monaghan". McDonough & Breen Solicitors furnished a solicitors' undertaking dated 30th May, 2006, on behalf of the Company to AIB.

7. The redevelopment took place both on the lands where the original petrol station stood and also on adjoining land. As found by the learned Feeney J. in his Judgment on 21st December, 2012 in proceedings bought by AIB against the appellants, more particularly referred to hereunder, the redevelopment area involved four distinct plots of land referred to as plots A, B, C and D. Plot A was held by the Company on foot of a deed of conveyance. Plot B was held by the appellants personally, as was plot C. Plot D was held by the Company on foot of a lease to the Company from Carrickmacross Town Council.

8. The 2006 redevelopment involved the Company building a supermarket and retail units on plot A and also on a significant portion of plot B. The petrol pump and overhead canopies were relocated and extended onto Plot C in part and Plot C also provided car parking

spaces associated with the supermarket. In all, the development comprised approximately 40,000sq ft located on plots A, B and C.

9. The Company defaulted on its payment obligations to AIB and, on 12th January, 2011, AIB appointed Mr. Ken Fennell as Receiver and Manager over all of the assets of the company on foot of the deed of mortgage which the company had entered into with AIB on 3rd May, 2006. AIB proceeded to appoint the Receiver on the basis that the appellants' lands (Plot B and Plot C) as well as Plot A were covered by the deed of mortgage.

10. Following the appointment of Mr. Fennell as Receiver, he initially operated the supermarket and businesses with the involvement and assistance of the appellants. However, this arrangement came to an end in May 2011. There followed a sit-in protest by the appellants which led ultimately to a successful application by the Receiver to MacMenamin J. for an injunction on 9th June, 2011, in proceedings bearing the record number 2011 No. 4878 P and entitled *Fennell and by Order Cloughvalley Stores Limited v. Michael and Brigid Quinn.*

11. It appears that in the context of making arrangements for the sale of the premises, complications emerged in relation to the security held by AIB. In the proceedings which had been brought by the Receiver, the appellants argued that given their interest in plots B and C, they could not be regarded as trespassing on the property. On 26th August, 2011, Hedigan J. agreed with the submissions that were advanced on behalf of the Receiver that although two of the plots had remained in the legal ownership of the appellants, the Company enjoyed an exclusive licence to occupy the lands since the Company had redeveloped the premises on lands with the permission of the appellants. Accordingly, he made an order continuing the injunction restraining the appellants from trespassing on the Company's lands and on the lands held by the Company on foot of the implied licence.

12. In the proceedings entitled *Allied Irish Banks plc v. Michael Quinn and Brigid Quinn* [2011 No. 9355 P.], Feeney J., in his judgment delivered on 21st December, 2012, upheld two distinct claims made by AIB. The first being that under and by virtue of an equitable mortgage made between AIB and Mr. and Mrs. Quinn the sum of €7,693, 932.14, together with €18,648.60 interest, stood well-charged on the lands to which the appellants claimed ownership. Based on his analysis of the evidence, Feeney J. found that there was *"clear agreement by both the Company and the [appellants] to create a mortgage over all Plots A, B and C and not just Plot A" and that "the documentary evidence available to the Court…all lead to the same conclusion that there was an express and explicit agreement, both oral and set out in the documents, to a charge over the 40, 000 sq. foot supermarket development and the land upon which same was located*." He found that it followed as a consequence *"that the agreement to create a legal mortgage gives rise to the creation and existence of an equitable mortgage"*. AIB's second and alternative claim was for a declaration that the lands and premises in question were held by the appellants for the benefit of AIB by way of constructive trust. Feeney J. was also satisfied that a constructive trust had arisen in relation to Plot B and Plot C to the benefit of AIB to the extent of the monies advanced by it for the enhancement of the lands. In the course of his judgment, Feeney J. observed that the appellants' evidence was contradictory and inconsistent and he commented to the effect that as far as the appellants had given evidence to suggest that there was not an agreement to provide a legal charge for all of Plots A, B and C, he was satisfied in no uncertain terms that the evidence before him contradicted their evidence. On 18th January, 2013, Feeney J. made orders to give effect to his judgment

13. The trial before Feeney J. took place over a number of days in June 2012. At that time, there was also before the High Court the Receiver's proceedings against the appellants bearing record number 2011 No. 4878 P. These were the proceedings in which the Receiver sought to restrain the appellants from trespassing on the Company's property and lands. On 18th January, 2013, Feeney J. made a number of orders in respect of these proceedings, to the effect that the Receiver was entitled to a declaration that the appellants were not entitled to enter on or use the lands or premises in question and that the Receiver was also entitled to a declaration that the appellants had granted an irrevocable licence dated 3rd May, 2006 to the Company to occupy such part of the lands as was retained in the legal ownership of the appellants.

14. The appellants duly appealed the decision of Feeney J. in the case of *AIB v. Michael Quinn and Brigid Quinn*. In its judgment delivered 21st May, 2015, the Court of Appeal upheld the findings of Feeney J. The appellants subsequently sought leave from the Supreme Court to appeal from the decision of the Court of Appeal but leave was not granted by the Supreme Court.

15. In 2013, in proceedings entitled *Michael Quinn and Brigid Quinn v. Ken Fennell* (2013 No. 1603 P.), the appellants instituted proceedings against the Receiver. In a judgment dated 27th January, 2014, Birmingham J. acceded to an application brought by Mr. Fennell to have the proceedings struck out on the basis that they sought to relitigate what had been decided in the case of *Fennell v. Quinn* [2011 No. 4878 P.]. Birmingham J. noted that the appellants had also issued other proceedings against Mr. Fennell (and other defendants) relating to a separate property belonging to a different company by way of proceedings bearing record number 2013 No. 3614 P. By Order dated 27th January, 2014, Birmingham J. struck out the proceedings instituted by the appellants against the Receiver bearing record number 2013 No. 1603 P save that he stated that the appellants were at liberty to pursue two discrete issues, unrelated to the security which the Company had provided to AIB. On 3rd February, 2014, Birmingham J. granted an Isaac Wunder Order against the appellants in relation to any further proceedings against Mr. Fennell.

16. On 21st December, 2016, in proceedings entitled *Michael Quinn and Brigid Quinn v. McDonough & Breen Solicitors, John McDonough and AIB* [2013 No. 11145 P.], White J. struck out the proceedings against AIB on grounds of *res judicata* and he dismissed any matters not *res judicata* on the grounds that they should have been dealt with in the proceedings (bearing record number 2011 No. 9355P) which AIB had taken against the appellants. He granted an Isaac Wunder Order restraining the appellants from issuing any further proceedings against AIB i.e. without the prior leave of the High Court. On the same date, White J. made similar orders (including an Isaac Wunder Order) on the application of AIB in proceedings entitled *Michael Quinn and Brigid Quinn v. AIB, Johnny Hoey and Bridget Hoey* [2014 No. 4223 P.].

17. As is evident from the appellants' affidavit dated 27th June, 2016, which grounds their complaints to the SDT, and the submissions made by the appellants to this Court, the majority of the complaints levied against the respondent relate directly or indirectly to the proceedings bearing record number 2011 No. 9355 P, *AIB v. Michael Quinn and Brigid Quinn*. As stated, the trial of this action took place over a number of days in June 2012, and Feeney J. gave judgment on 21st December, 2012, and made orders on 18th January, 2013. For the purposes of the aforesaid proceedings, the respondent was the solicitor retained by AIB and, indeed, was the solicitor retained by AIB in other proceedings brought by the appellants against AIB. Moreover, the respondent was the solicitor retained by Mr. Fennell (Receiver) in the proceedings brought by Mr. Fennell against the appellants and in the proceedings which the appellants commenced against the Receiver, as referred to above.

18. The appellants' seven specific complaints of alleged misconduct against the respondent are now addressed, in turn.

19. Before doing so, it is apposite to set out the definition of misconduct in the Solicitors Acts 1954 to 2011. The definition provides as follows:

" 'misconduct' includes

(a) The commission of treason or a felony or a misdemeanour;

(b) The commission, outside the State, of a crime or an offence which would be a felony or a misdemeanour if committed in the State,

(c) The contravention of a provision of the Solicitors Acts 1954 to 2011 or any order or regulation made thereunder,

(d) In the course of practice as a solicitor –

(i) Having any direct or indirect connection, association or arrangement with any person (other than a client) whom the solicitor knows, or upon reasonable enquiry should have known, is a person who is acting or has acted in contravention of Section 55 or 56 or Section 58 (which prohibits an unqualified person from drawing or preparing certain documents), as amended by the Act of 1994, or the Principal Act, or Section 5 of the Solicitors (Amendment) Act 2002, or

(ii) Accepting instructions to provide legal services to a person from another person whom the solicitor knows, or upon reasonable enquiry should have known, is a person who is acting or has acted in contravention of those enactments,

(e) any other conduct tending to bring the solicitors' profession into disrepute."

The first complaint

20. The appellants alleged to the SDT that in the course of the proceedings commenced by AIB in 2011, the trial of which took place in June 2012, the respondent misled and misdirected Feeney J. by interfering with evidence presented in the course of the trial, "namely the map attaching to the Solicitors Undertaking dated 30th May 2006 from McDonough & Breen solicitors". The appellants contended the map which was presented in evidence was relied on by Feeney J. as being the map outlined in red which was attached to the solicitors' undertaking. The appellants' complaint is that the colouring of the map was done by the respondent "after the fact" for the purpose of the trial in June 2012. Accordingly, they contend that the map which was put before the court in June, 2012 was not the map which attached to the solicitors' undertaking, which the appellants say was a black and white map, as later confirmed by junior counsel for AIB in subsequent proceedings.

21. The fact of the respondent having coloured the map was disclosed by counsel for AIB to White J. in the course of the proceedings bearing record number 2013 No. 11145 P, *Michael Quinn and Brigid Quinn v. McDonough Breen Solicitors, John McDonough and AIB.*

22. In his replying affidavit sworn 4th August, 2016 in response to the complaints, the respondent accounts for the colouring of the map as follows. He avers that rather than using a colour photocopier, on his instructions, a line in red was drawn on the map "as per an existing version" by a trainee or junior solicitor in the respondent's firm, Gartlan Furey, and that there was no question of the respondent having the map outlined in red "on some arbitrary basis or on supposition". The respondent avers that what was engaged in was "a copying exercise". He further avers that the map put before Feeney J. clearly corresponded to the coloured map which attached to the solicitors' undertaking dated 30th May, 2006 that had been sent to the PRA in 2011 and which the PRA had returned on 25th August, 2011. The respondent also avers that whilst the map on which he had instructed a red line be drawn was before Feeney J. in June, 2012, in the main, all parties relied upon a prepared Land Registry compliant map which set out plots A, B, C as well as Plot D. The respondent further avers that in the course of the trial before Feeney J., the appellants were represented by solicitors and senior and junior counsel and that it was clear from the judgment delivered by Feeney J. on 21st December, 2012 that there was no confusion in the course of the trial and no misleading of the trial judge.

23. The SDT addressed the complaint regarding the map in the following terms:-

"The Respondent's Solicitor has given a reasonable explanation as to the issue of the marking of the map and there is no evidence of any deliberate action on his behalf. If any marking of a map caused loss to the Applicants, then the courts are the appropriate forum for such complaint."

24. In their submissions to this Court, the appellants contend, *inter alia*, that it was not within the remit of the respondent, as a solicitor, to interfere with or hamper with evidence, and that the respondent was not qualified to draw coloured lines on maps. They reiterate their complaint that Feeney J. relied specifically on the map put before him as being the map which attached to the solicitors' undertaking when in fact it was a map upon which the respondent had drawn a line in red "after the fact" and which he had passed off as the map that attached to the solicitors' undertaking. It is submitted that this action impacted on the appellants personally and had consequences the outcome of the trial before Feeney J. and that it "demonstrates interference of the probity of the Court". They submit that they had never seen the altered map until they were provided with a copy of it on 15th June, 2016, following the proceedings before White J. on 26th and 27th April, 2016. The appellants contend that if the finding of the SDT on this issue is allowed to stand it would create a precedent for any solicitor when in court to draw lines on maps "at will", with no consequences for the solicitor.

25. Counsel on behalf of the respondent submits that there is no basis upon which the Court should impugn the finding of the SDT. This in circumstances where it was clear to all sides at the trial in June 2012 that the map put before Feeney J. was a precise reproduction of the map which attached to the undertaking given by McDonough & Breen Solicitors to AIB in 2006.

26. Having considered the relevant documentation and submissions of the parties, I am not persuaded by the appellants' submission that the SDT erred in finding as it did. In so concluding, I have found the judgment of the learned Feeney J. particularly instructive. At para. 1.5 of his judgment, he refers to the undertaking furnished by McDonough & Breen Solicitors to AIB on 30th May, 2006, on behalf of the Company, as follows. "*The property identified in [the] undertaking was '1.25 acre premises with buildings, Shercock Road, Carrickmacross, Co. Monaghan AND 40,000sq ft building 2 acres at Carrickmacross, Co. Monaghan as outlined in red on attached map'. The attached map outlined an area which covered all of Plot A, Plot B and Plot C."* The respondent's sworn testimony is that what was outlined in red by him on the map put before Feeney J., was "as per an existing version" and that what was marked in red accorded with the map which attached to the solicitors' undertaking. From Feeney J.'s finding, and indeed from a copy of the undertaking which this Court has seen, it is clear undertaking itself makes reference to portion of the map having been outlined in red, to wit, "1.25 acre premises with buildings, Shercock Road, Carrickmacross, Co. Monaghan AND 40.000 sq foot building on 2 acres at Carrickmacross, Co. Monaghan **as outlined in red** on attached map." (Emphasis added)

27. In their submissions to the Court, the appellants pointed to the contents of emails dated 4th July and 12th July, 2011 which passed between Mr. Piaras Power of the respondent's firm and Mr. Conor Breen of McDonough & Breen respectively. In the 4th July, 2011 email, Mr. Power, under subject headed "AIB/Cloughvalley Stores Limited (in receivership)", refers to McDonough & Breen's "Undertaking dated 30 May 2006 issued to AIB in relation to the Shercock Rd and the Cloughvalley Stores sites". Mr. Power goes on to state: "The map attached thereto clearly relates to a site greater than that comprises (sic) in the Deed dated 1 July 1988 from the Wards to the Company. We are trying to track down the missing deeds to complete contracts for the sale of the property by the Receiver of the company." Mr. Breen was asked to revert confirming whether or not he "held any further deeds/documents relating to the Company's title to the Cloughvalley Stores site". The reference to the deed from "Wards to the Company" was quite clearly a reference to Plot A, referred to in the Judgment of Feeney J. of 21st December, 2012 as the lands which comprised part of the legal mortgage which AIB had obtained in 2006.

28. Mr. Breen's response of 12th July, 2011 to the 4th July, 2011 email advised that AIB had taken over title deeds which had been in the possession of Ulster Bank (the Company's previously lender). He went to state:

> "[T]he copy of our original undertaking of the 30th May 2006 sets out the property in the Deed of Conveyance to Cloughvalley and not any other property.
>
> There are additional properties not in the name of the company but they were never mortgaged to the Ulster Bank nor could be (sic) have passed them on to AIB".
>
> We note that in the copy undertaking that you sent us a line was drawn around additional property which was not on our original undertaking. In our original instruction we were asked to forward the title deeds to the Bank who prepared their own mortgage Debenture and we did so
>
> I will be glad to deal with any further queries you may have in the matter"

29. Based on this Court's understanding of what was in issue in the trial before Feeney J. in June 2012 in the proceedings entitled *Allied Irish Banks plc v. Michael Quinn and Brigid Quinn* [2011 No. 9355 P.], the position adopted by Mr. Breen in this email, namely that only the Company's lands had been mortgaged to AIB, was the case that was made by the appellants in the aforesaid proceedings, a position that was ultimately rejected by Feeney J. on 21st December, 2012. While there was, as set out in his judgment, differing evidence and contentions put before Feeney J. as to whether at all times it was understood and agreed by the Company and the appellants that plots B and C were to be part of the security provided to AIB, a reading of Feeney J's judgment does not reveal that in the course of the trial any issue was raised by the appellants' legal representatives concerning the map with the red outlining as had been furnished in evidence. It is clear from a reading of the judgment of Feeney J., that the issue which was before the learned Judge concerned the intentions or understanding of the parties with regard to Plots A, B and C at the time of the facility letter and at the time the solicitors' undertaking was given to AIB. No issue arose as to the identity of the lands which were the subject of the dispute before Feeney J., or that the maps which had been put before the court did not properly or adequately identify the lands as outlined on the map attached to the solicitors' undertaking, (which were as a matter of fact Plots A, B, and C), or their scale. Furthermore, in the view of this Court, it cannot be the case but that the appellants' legal representatives knew of and had sight of the map which were put before the learned Feeney J. (or at least had access to it) and it seems to this Court inconceivable that if there had been any question about the veracity of the map in question, or that it did not accurately identify the lands (Plots A, B and C) which were under consideration by Feeney J., that that would have been an matter raised by the appellants' legal representatives.

30. The appellants emphasise the fact that the respondent is not an architect and that he has no professional training to do what he did. I accept their submission in this regard. However, the fact that the respondent in the course of the preparation for the trial, rather than use a photocopier, was minded to manually colour in red an outline on a map in order to reproduce an "existing version", which he testifies had the same outline in red as that which he had instructed be outlined on the map put before Feeney J., cannot, to my mind, be a sufficient basis upon which to raise a *prima facie* case of misconduct on the part of the respondent. I so find in the absence of any evidence adduced by the appellants that what was presented to Feeney J. in June, 2012 did not, as a matter of fact, replicate what had been outlined in red on the map which attached to the solicitors' undertaking. In all of those circumstances, the Court finds no basis upon which to disturb the SDT's finding.

The second complaint

31. The second complaint levied against the respondent is that he caused legal proceedings to issue against McDonough & Breen Solicitors some twelve days before the trial of the action before Feeney J. in the matter of *AIB v. Quinn* [2011 No. 9355P]. The appellants contend that this was done "to intimidate and undermine the defence evidence". The respondent answers this complaint by stating that the decision to issue proceedings against McDonough & Breen Solicitors was taken after consultation with counsel for AIB, whereupon it was decided that in order to protect the bank's position "a protective writ" for negligence should be issued against McDonough & Breen Solicitors. The said proceedings issued on 29th May, 2012. The respondent avers that this was so given that the solicitors' undertaking to AIB was dated 30th May, 2006.

32. The SDT dealt with this complaint by stating that "it was a matter for the Respondent Solicitor to decide from a tactical point of view which proceedings to issue and the issue of the proceedings referred to cannot be construed as misconduct".

33. In their submissions to the Court, the appellants contend that while they accept that it would be reasonable for AIB to protect their position by issuing negligence proceedings against McDonough & Breen Solicitors, it was not necessary to serve the summons in an intimidatory fashion in the immediate run up to the trial of AIB's proceedings against the appellants in June 2012. They contend that the issuing of the said proceedings caused such stress to their former solicitor that he was unable to attend court and that the respondent's actions thereby allowed AIB to call another solicitor in that firm, Mr. Don McDonough, who had never dealt with the appellants' business or property affairs, to give "speculative" evidence and which severely prejudiced the appellants' position. Accordingly, the appellants submit that the issuing of the writ "went way beyond a tactical decision" and that this constituted misconduct on the part of the respondent. They also submit that in the proceedings before Feeney J. in June, 2012, their senior counsel "felt that he could not robustly cross examine a retired gentleman whose direct knowledge of [the appellants] business and files was clearly limited."

34. I am satisfied that the SDT properly found that the issuing by AIB of the writ cannot be construed as misconduct on the part of the respondent. As the respondent avers, and as was made clear to Feeney J. by senior counsel for AIB on 12th June, 2012, the bank's proceedings against McDonough & Breen Solicitors were instituted on the assumption that the case being made by the appellants in their defence to AIB's proceedings was correct, namely that McDonough & Breen Solicitors acted in excess of their authority in giving an undertaking to AIB in respect of lands owned by the appellants. What was put to Feeney J. by counsel for AIB

was that if AIB were to lose their title action against the appellants, AIB might have an action against the appellants' former solicitors as a "fall back" set of proceedings. Furthermore, insofar as the appellants contend that their legal representatives were somehow constrained in the conduct of the proceedings before Feeney J. in June 2012, it was at all times open to the appellants to give whatever instructions they wished to their legal representatives for the purpose of cross examination of the witnesses tendered by AIB and to instruct their legal representatives to make submissions on the quality of the evidence tendered on the part of AIB. In short, the respondent cannot be fixed with an allegation that he was guilty of misconduct solely by his having taken steps which counsel for AIB had advised should be taken to protect the Bank's position.

The third complaint

35. The appellant's third complaint was that the respondent misled Feeney J. in the course of the trial in June 2012 and interfered with a defence witness, namely John McDonough of McDonough and Breen Solicitors. The appellants alleged that the respondent advised Feeney J. on 12th June, 2012 that Mr. John McDonough was unwell and unable to give evidence. The appellants contend that this was said in circumstances where the said solicitor was in the precincts of the court. They also assert that this was said to Feeney J. in the teeth of Feeney J. having queried if Mr. McDonough was unwell to the extent that evidence could not be heard "if the court was to go to him".

36. The transcript of the exchange which took place between senior counsel for AIB and Feeney J. on 12th June, 2012 shows that Feeney J. was advised that Mr. John McDonough was no longer in practice and not well. In answer to Feeney J.'s query as to whether, effectively, Mr. McDonough was in a position to give evidence on commission, senior counsel for AIB advised that "there may difficulties" and intimated that another individual in McDonough & Breen Solicitors, Mr. Don McDonough, was the person best placed to give evidence.

37. The appellants also contend that in the course of a hearing which took place on 11th April, 2013, they apprised Feeney J. of the fact of Mr. John McDonough's presence in the vicinity of the court on 12th June, 2012.

38. In his response to the complaint, the respondent avers that following a consultation with Mr. John McDonough, both the respondent and counsel for AIB decided not to call him as a witness. The decision was then made to call Mr. Don McDonough and that a précis of his evidence should be given to the appellants. The respondent avers that on the morning of the trial Mr. John McDonough turned up at counsel's chambers by mistake and that he was told he was not needed. The respondent avers that there was no question of misleading the court or interfering with a defence witness. The respondent also contends that the appellants who were legally represented in the proceedings taken by AIB against them could have subpoenaed Mr. John McDonough to give evidence had they so wished.

39. The SDT found that the appellants had produced no evidence to support their complaint against the respondent "other than a comment in court from [senior counsel for AIB] regarding the fitness of Mr. J. McD to give evidence." The view of the SDT was that "it was for the Respondent Solicitor and his counsel to decide who to call in evidence" and that there was no evidence of misconduct.

40. In their submissions to the Court, the appellants contend that Feeney J. was denied access to the evidence of Mr. John McDonough in circumstances where not only was Mr. John McDonough present in the vicinity of the court on the day in question but had, as is clear from the respondent's affidavit, presented had himself to AIB's counsel's chambers to be told that he was not required. The appellant's contend that the respondent, as a solicitor and an officer of the court, was obliged to thus assist the court when Feeney J. had asked whether Mr. John McDonough might be able to give evidence if the court were to go to him. The appellants submit that the SDT did not understand or appreciate the seriousness of the issue.

41. Counsel for the respondent submits that, as explained by the respondent to the SDT, the respondent was not in fact involved in the exchange which took place between senior counsel for AIB and Feeney J. on 12th June, 2012. Accordingly, counsel submits that there cannot be any arguable basis for any complaint of misconduct on the part of the respondent. It is also submitted that the difficulties which Mr. John McDonough had were known to the appellants.

42. Having reviewed the evidence, the Court finds no basis to depart from the finding arrived at by the SDT on this issue. I agree with the respondent's contention that a tactical decision on the part of one side to litigation as to who to call to give evidence cannot give rise to a complaint by the other side. Insofar as the appellants submit that they were deprived of the evidence of Mr. John McDonough, I agree with counsel for the respondent that it was at all times open to the appellants to subpoena Mr. John McDonough had they wished to do so. Furthermore, in the course of their submissions to the Court, the appellants stated that on the day in question they advised their legal team that Mr. John McDonough was in the vicinity of the court but that their legal team "did not see fit to bring this to the attention of the trial judge". It seems to this Court that the apposite time to air any grievance the appellants had in relation to this matter was on 12th June, 2012. Furthermore, I have to give due weight to the respondent's evidence that he was not party to the exchange which took place between Feeney J. and senior counsel for AIB on this issue on 12th June, 2012. In light of this latter factor, I do not find any basis to overturn the SDT's finding.

43. The Court notes the appellants' submission that had Mr. John McDonough given evidence in the trial before Feeney J. the proceedings might have had a different outcome. The Court notes however that the learned Judge, in his consideration of the substantive issues before him, expressly addressed the absence of Mr. McDonough. However, he went on to state that "notwithstanding the evidence of Mr. McDonough…the evidence establishes that John McDonough had the authority to give an undertaking to create a legal motggage on behalf of both the Company and the [appellants]." I also note that the Court of Appeal, even if it were to reconsider the facts , found no basis to overturn Feeney J.

The fourth complaint

44. The fourth complaint made to the SDT is that the respondent misled Feeney J. in the course of the trial in June 2012 with regard to the lands referred to as Plot D on the Land Registry compliant map which was adduced in evidence before Feeney J. In this regard, the appellants point to an affidavit which was sworn by Mr. Fennell, Receiver, on 27th July, 2011 in the proceedings bearing record number 2011 4878P*, Fennell and by Order Cloughvalley Stores Limited v. Michael and Brigid Quinn*, wherein Mr. Fennell avers that the Company was the legal and beneficial owner of Plot D. The appellants contend that this was sworn by Mr. Fennell in circumstances where the respondent knew this not to be true. It is the appellant's contention that at the time Mr. Fennell swore his affidavit, the stamp duty had not been paid with regard to Plot D and that the Lease under which the Company held Plot D had not been registered in the name of the Company. The appellant's contend that at the time of swearing of Mr. Fennell's affidavit, the respondent, as his legal advisor, was in possession of letters dated 6th July, 2011 and 19th August, 2011 from McDonough & Breen Solicitors wherein it was specifically advised that the Lease held by the Company in respect of Plot D remained unstamped.

45. The respondent answered this complaint by averring that Mr. Fennell's affidavit had been drafted by counsel and sworn by Mr. Fennell. He also avers that it was clear from the judgment of Feeney J. on 21st December, 2012 in the proceedings bearing record

number 2011 No. 9355 P, *AIB v. Michael Quinn and Bridget Quinn*, that Plot D was not in issue in the case and that the proceedings concerned Plot A, Plot B and Plot C only, effectively whether the Company and the appellants had agreed that a legal charge would be created over these lands.

46. The SDT found no evidence of misconduct, it appearing to the Tribunal "that the applicant's complaint is based on a misunderstanding that if a deed is unstamped, it is not effective. This is not the case. A deed had been executed by the local authority."

47. In their submissions to the Court, the appellants contend that the SDT did not fully examine the complaint that the respondent, through his counsel, misled Feeney J. in the course of the trial in June 2012. They emphasise that the Company was not the registered legal owner of Plot D and that no steps had been taken by Mr. Fennell to rectify the title to Plot D until 2014. The appellants also contend that it is clear from Mr. Fennell's affidavit sworn on 27th July, 2011 that his averments with regard to Plot D were made on advices received from the respondent.

48. The appellants contend that while the Company bought and paid for Plot D in 2003, it was not the registered owner of the property and that the property remained registered in the name of Carrickmacross Urban Council- the entity from which the Company obtained the Lease. The appellants submit that in the absence of the Company having been registered in respect of Plot D, and in the absence of the stamp duty thereon having been paid, it was open to question as to whether Plot D formed part of AIB's security at all. They also submit that while the legal subtleties of the title to Plot D were lost on them at the time of the proceedings before Feeney J., they were known to the respondent. They contend that had if it had been made known to Feeney J. in the course of the trial in June, 2012 that the Company was not the legal and registered owner of Plot D and that AIB did not have a registered charge in respect of Plot D, the validity of Mr. Fennell's appointment as Receiver might have been open to challenge.

49. The first thing to be observed in relation to the appellants' complaint regarding Plot D is that, as observed by Feeney J. in the judgment given on 21st December, 2012, Plot D was not "in issue" before him. What was in issue was whether the appellants and the Company had agreed to create a mortgage over Plot B and Plot C, and not just Plot A as contended for by the appellants. Plot D did not, by and large, feature in any significant regard in the judgment of Feeney J. as the issues before the learned Judge centred on the question of whether an equitable mortgage/ constructive trust arose in relation to Plots B and C. Insofar as Plot D is mentioned in the judgment of 21st December, 2012, it is largely in the context of the identification of the lands on which the Company operated its various enterprises. I note that Feeney J. refers to Plot D as land "held by the Company on foot of a 999 year lease to the Company from Carrickmacross Town Council", which accords with the factual situation as pertained in 2012 and which, it appears, had pertained since 2003. In his judgment, (at para. 1.5) Feeney J. makes reference to the deed of mortgage which was entered into between the company and AIB on 30th May, 2006 and he notes that the "charged" property is described in the first and second schedule to that mortgage. He notes that the first schedule, *inter alia*, comprised the lands owned by the Company, namely Plot A. He notes that the second schedule "includes all estates or interests in other freeholds or leasehold property which at any time during the continuance of the legal mortgage belong to the Company." Feeney J. then goes on to state that there was no reference in the schedule to the mortgage to Plot B or Plot C. As I have said, it is these latter lands and the question of whether the Company and the appellants intended to create a legal charge in favour of AIB over Plots B and C that formed the crux of the Feeney J.'s judgment.

50. To my mind, it is clear that even in the context of the limited consideration which Feeney J. afforded to Plot D, the learned Judge well understood that Plot D was held by the Company on foot of a 999 year lease from Carrickmacross Town Council. Accordingly, I find no basis for the appellant's contention that Feeney J. was in some way misled as to the manner in which the Company held Plot D. I accept, of course, that Mr. Fennell's affidavit sworn 27th July, 2011 describes the Company as the "legal and beneficial owner" of Plot D and that he did not allude to the underlying basis upon which the Company held Plot D, namely the Lease between it and Carrickmacross Town Council. However, the appellants are labouring under a misapprehension in contending that because the Lease was not registered the Company was not legally or beneficially entitled to Plot D. The Company's legal entitlement to the lands is on foot of a Lease. Furthermore, I cannot agree with the appellants' arguments that the respondent, through his counsel, intentionally misled Feeney J. in the course of the trial in June, 2012 in relation to Plot D. There is no evidence on the face of the judgment that Feeney J. was misled. There is no suggestion from the judgment of Feeney J. that it was suggested that the Company's ownership of Plot D was registered in the Land Registry. Accordingly, for the reasons already outlined, it cannot be said that Mr. Fennell's averment had any bearing on the outcome of Feeney J.'s Judgment of 21st December, 2012, given that Plot D was not "in issue" in those proceedings and, moreover, in circumstances where Feeney J. clearly set out in his judgment the factual position as to the Company's ownership of Plot D, namely that it was held on foot of a 999 year lease from Carrickmacross Town Council.

51. Having considered the evidence put before the SDT in relation to this complaint, the Court finds no basis to overturn the Tribunal's finding that no *prima facie* case of misconduct by the respondent arose.

The fifth and sixth complaints

52. As with the fourth complaint, these relate to Plot D and, in particular, to dealings in the PRA undertaken by Mr. Fennell in relation to Plot D.

53. The appellants' complaint is that the Lease which was entered into between the Company and Carrickmacross Town Council in 2003, and which was duly presented to the PRA in 2014, was "interfered with after [its] proper execution". It is essentially alleged that the text of the Lease between the Company and Carrickmacross Town Council was altered by the respondent and that he did so in circumstances where the document was not re-executed following the amendments which were made to it. The appellants also alleged that a different map to that which attached to the Lease in 2003 was sent to the PRA in connection with the Lease.

54. The respondent's answer to this complaint, in the first instance, is that he is not personally involved in the Receiver's application to the PRA and that another arm of his firm is dealing with the conveyancing matters relevant to Plot D. He goes on to aver however that is that as solicitors for Mr. Fennell, Gartlan Furey's property department held a signed but undated and unstamped Lease made between Carrickmacross Town Council and the Company whereunder Carrickmacross Town Council demised plot D to the Company for a term of 999 years from the 1st July, 2003 for the yearly rent of €1.00 and the payment of €250,000.00 consideration by the Company. The respondent also avers that his firm held a Mortgage Debenture dated 3rd May, 2006 between AIB and the Company.

55. The respondent goes on to explain that as the Company's solicitors (McDonough & Breen) had failed to stamp and register the Lease and Debenture in accordance with its undertaking to AIB, Mr. Fennell, as Receiver, had been advised that it was necessary to pay the outstanding stamp duty, register the Lease in the Land Registry and contemporaneously register the Debenture as a burden, once a new folio was opened for Plot D.

56. The respondent avers that as the date of the Lease was not known, the respondent's firm wrote to Carrickmacross Town Council requesting that the Council review its records. On 14th April, 2014, Carrickmacross Town Council advised that the seal of the council

was affixed to the Indenture of the Lease on 3rd October, 2006. In this regard, the Council enclosed a certified copy of the Manager's Order. The respondent avers that as this date was contrary to the date previously given by the Company's solicitors, in order to ensure the correct stamping of the Lease it was decided to use the term commencement date of 1st July, 2003, as set out in the Lease, as the stamping date. The Receiver duly paid the stamp duty of €40,479.53 which included penalties and surcharges. The respondent goes on to aver, essentially, that in order to preserve the chain of title, the date of 3rd October, 2006 was inserted into the Lease as the date of the Lease, consistent with the date which had been given by Carrickmacross Town Council as the date of execution by the council of the Lease, which date was a matter of fact.

57. The respondent answered the appellants' claim that a different map to that which attached to the Lease had been sent to the PRA as follows:-

In December 2015, the respondent's firm drafted a Form 2 First Registration Application for the purposes of the registration the Lease in the PRA. This form was duly signed by Mr. Fennell as Receiver. The respondent avers that in order to comply with Land Registry requirements that a Land Registry compliant map be used where a new folio is being opened, the Receiver instructed an architect to complete such a map. The respondent avers that Form 2 was duly lodged with a PRA, together with the original Lease with the original map attached thereto, the Land Registry compliant map and the necessary documents for the registration of the Debenture as a burden on the folio. He goes on to state that at no time were the original documents amended or altered other than by the insertion of the date of 3rd October, 2006 on the Lease as being the date of execution, as had expressly been expressly advised by Carrickmacross Town Council.

58. The SDT found that the respondent had given a reasonable explanation for the date of 3rd October, 2006 having been inserted into the Lease and for the attachment of a Land Registry compliant map and accordingly found no evidence of misconduct.

59. I am satisfied that the SDT arrived at a correct decision in this regard. I find that the appellants' contention of impropriety on the part of the respondent is not sustainable.

60. The appellants also complained to the SDT that the respondent lodged a charge in the PRA "in tandem with the falsified lease". The appellants averred that the respondent was aware that Mr. Fennell's deed of appointment did not cover the property comprised in Plot D and that the Receiver therefore had no power to instruct the respondent to charge Plot D or deal with it in any manner. They contend that in his dealings in the PRA relating to Plot D, the respondent took liberties to which he was not entitled.

61. The respondent does not dispute that in tandem with the lodging of the Form 2 Application for registration of the Lease in the PRA, a Form 48 Assent was also lodged by Gartlan Furey for the purpose of registering the Debenture dated 3rd May, 2006 between AIB and the Company as a burden on the new folio to be opened in respect of Plot D.

62. In finding no *prima facie* case of misconduct on the part of the respondent in this regard, the SDT stated that "any dispute regarding the extent of the lands charged is a matter for the courts. There is no evidence that the respondent's solicitor was involved in falsifying the charge and the evidence is that if there was any error, he had no involvement in it".

63. In their submissions to the Court, the appellants contend that the SDT's finding is wrong on its face as they had made no complaint that the "charge" (Debenture) was falsified. They submit however that it would appear from the SDT's reasoning that there was a recognition on the part of the STD that "there are errors in relation to the charges" and the appellants' contention is that the SDT did nothing to identify the "guilty party" and that it allowed the respondent to continue pursuing an action within the PRA "which is clearly wrong".

64. I do not accept that the SDT's decision on this issue conveyed any suggestion of a finding of wrongdoing by any party. The import of the Tribunal's finding was merely to advise that if any dispute arose as to the Receiver's entitlement to register the Debenture as a burden on the folio to be created in respect of Plot D, then that was a matter to be pursued in the courts.

65. As far as this Court is concerned, the appellants have not come close to making a case that the SDT erred in finding no *prima facie* case of misconduct on the part of the respondent.

66. It is common case that the appellants have lodged an Objection in the PRA to the Receiver's application to have Plot D registered and to have the Debenture registered as a burden on the folio. The Receiver's application is being dealt with by the PRA under dealing D 2015LR164421X. Gartlan Furey received a copy of the Objection on 2nd June, 2016. On 24th August, 2016, the appellants furnished the PRA with legal submissions in respect of dealing D 2015LR164421X in which they raise a number of matters including the validity of the appointment of Mr. Fennell as Receiver. They also claim, *inter alia*, that the Lease between the Company and Carrickmacross Town Council, the subject matter of dealing D 2015LR164421X, has been altered post execution. They also maintain that the Lease which the Receiver is endeavouring to have registered cannot be the original Lease as they maintain that post the agreement entered into between the Company and Carrickmacross Town Council in 2003, difficulties arose when it transpired that a third party owned part of the lands which had been demised to the Company by Carrickmacross Town Council on foot of the Lease. The appellants allege that as the Council were unable to re-acquire the portion of the lands which had been sold to the third party, a revised area of ground was agreed between the Company and the Council. The appellants allege that the revised site and changes were never implemented by way of a new Lease and they state that it is unclear whether the present application before the PRA relates to the original or the revised site area.

67. In the course of the within hearing, the Court was advised that the matter is ongoing before the PRA. The appellants' Objection to the Receiver's applications to the PRA in respect of Plot D, and the submissions filed by the appellants with the PRA, are clearly matters which arise in the course of dealing D 2015LR164421X. Accordingly, the Court does not propose to trespass on the functions of the PRA. To this end therefore, the Court has no jurisdiction, in the context of the present proceedings (being an appeal of the decision of the SDT) to accede to the appellants' request that the Court direct the PRA to furnish documents to the appellants. Nor is it within the remit of the Court in the context of the within proceedings to direct that the PRA refrain from dealing with the registration application.

The seventh complaint

68. The appellants' seventh complaint is that the respondent wrongfully failed to make full discovery in the proceedings *AIB v. Michael and Brigid Quinn* [2011 No. 9355 P.] and which was the subject of Feeney J.'s judgment of 21st December, 2012.

69. The appellants' complaint centres on an email dated 4th July, 2011 from Mr. Piaras Power, a solicitor in the respondent's firm, to Mr. Conor Breen of McDonough & Breen solicitors. The thrust of the respondent's evidence on this issue is that while this email was referenced in a sequence of correspondence that was discovered in a supplemental affidavit of discovery made by AIB in the said

proceedings, it was not included in the actual discovery.

70. Subsequent to the conclusion of the aforesaid proceedings, on 6th February, 2014, the appellants sought the said email from the respondent. The respondent advised them that he was unable to locate same in the respondent's firm's files and computer system. However, by letter dated 11th September, 2014, the respondent furnished the appellants with the said email after he received a copy of same from McDonough & Breen. The respondent made this known to the SDT and further advised that the appellants had received the email dated 4th July, 2011 prior to the hearing of their appeal of Feeney J.'s judgment to the Court of Appeal.

71. The SDT found no evidence of any deliberate action on the part of the respondent that could be construed as misconduct and noted the issue of the email could have been canvassed "through the [appellants] proceedings".

72. In their submissions to this Court, the appellants contend that the failure to discover the email constituted "underhand behaviour" on the part of the respondent. They also contend that the email in question "throws doubt" on whether plot D formed part of AIB's security. The thrust of the appellants' submissions is that if the email had been included in the Discovery made by AIB prior to the conclusion of the trial before Feeney J., the trial might have had a different outcome.

73. With regard to this particular complaint, the first observation the Court would make is that the failure of AIB to make discovery of the email could have been addressed before Feeney J. by the appellants if they considered that the failure to actually discover this email was germane to the proceedings before the learned judge. This is in circumstances where it appears that in a supplemental affidavit of discovery the email had been referred to in a chain of correspondence actually discovered. Moreover, even if that course of action had been overlooked by the appellants during the course of the trial before Feeney J., it remained opened to them to canvas the issue of the missing email before the Court of Appeal had they so wished. This is so in circumstances where the respondent avers that upon receipt, in September, 2014, of the email in question, the appellants had in fact amended their grounds of appeal in this regard on 19th January, 2015. This was some four months prior to the hearing of the appellants' appeal of Feeney J.'s judgment which was heard on 13th May, 2015. In those circumstances, the Court does not find any error in the conclusion reached by the SDT as regards the seventh complaint.

Conclusion

74. For the reasons which the Court has set out above, the Court does not find any basis to overturn the findings of the SDT.

In the course of the hearing of the appeal, the appellants set out a very detailed account of how it came to pass that they lost their business, and the toll that this has taken on their lives. In the course of the within proceedings, the appellants have directed the Court's attention to two reports from BankCheck dated 5th April, 2013 and 6th January, 2017, the import of which, the appellants submit, is that AIB made a serious error of judgment in calling in its security and appointing a Receiver in January, 2011.

75. As the entitlement of AIB to pursue the course of action it took regarding its security was not before this Court, the Court cannot comment on the contents of the said reports. Nor is the Court in a position to comment on the appellants' submission that the Company's debts have grown from €7,463,380 to almost €10m since the Receiver was appointed. The sad reality for the appellants is that in a number of proceedings before the High Court, AIB's entitlement to realise its security has been upheld, as has the Receiver's entitlement to possession of the property. That notwithstanding, the Court has enormous sympathy for the appellants and acknowledges that they have a number of grievances as to the manner in which they came to lose the business in which they and their family worked so diligently and in respect of which so many of their family members invested over a long number of years.