

THE HIGH COURT

[2013 No. 1603 P]

BETWEEN

MICHAEL QUINN AND BRIGID QUINN

PLAINTIFFS

AND

KEN FENNEL

DEFENDANT

JUDGMENT of Mr. Justice Birmingham delivered on the 27th day of January, 2014.

1. The matter before the court sees the defendant, and moving party, who is the well known insolvency practitioner, seeking orders to have the present proceedings dismissed as an abuse of process and/or dismissed essentially on the basis that the issues which the plaintiffs now seek to litigate are *res judicata*. The defendant has by separate motion sought what is sometimes referred to as an Isaac Wunder order, *i.e.* an order restraining the plaintiffs from issuing any further proceedings against him without first obtaining leave of the High Court.

2. Listed before the court at the same time was a motion brought by the defendants seeking direction as to the mode of sale of certain lands and premises, and a motion brought by the plaintiffs which purported to seek directions in relation to certain matters pursuant to s. 316 of the Companies Act 1963, as amended. So far as the "mode of sale" motion is concerned it was indicated that this need not concern the court for the present.

So far as the s. 316 motion is concerned it was indicated on a number of occasions during the course of the proceedings and before me that the scope of this application was much reduced. Initially it appeared that there were 22 issues involved, but during the course of the proceedings and the hearing before me, it was indicated that there were only three live issues, then that there were two and then that there was one. Eventually on the afternoon of the first day that the matter was at hearing before me, there appeared to be agreement, and specifically the plaintiffs appeared to agree that the s. 316 motion served no practicable purpose and was no longer necessary. The plaintiffs agreed that there was no reason why the motion should not be struck out and the focus of attention concentrated on the real issues between the parties and I proceeded to do this. On the second day of the hearing before me, the plaintiffs sought to resile from their earlier position and suggested that the proceedings should be let lie in place, lest they or indeed Mr. Fennell need to resort to them on some aspect or other at some stage in the future. I am not persuaded by this change of heart and I do not propose to revisit my decision of the 3rd December, 2013, made with the consent of the parties. Accordingly this ruling will deal with the strike out motion and the application for an Isaac Wunder order.

3. The background to the present application, and it is an application which has already been heard before the late Feeney J., but sadly he died before delivering judgment, is that the plaintiffs in the proceedings, who are husband and wife were directors and shareholders of a company known as Cloughvalley Stores Limited (Ltd.) which, since 1988 or thereabouts, operated a petrol station and grocery store at Castleblayney Road, Carrickmacross, County Monaghan.

4. In 2006 or thereabouts Cloughvalley Stores Limited (Cloughvalley /the Company) came up with a proposal to develop a larger supermarket and to rebuild the petrol station. The development was duly carried out. In order to carry out the development Cloughvalley Stores Ltd borrowed €6.5m from Allied Irish Banks pic. (hereinafter "AIB"), an amount that was subsequently increased somewhat. Default occurred in relation to payment obligations and AIB purported to appoint Mr. Fennell as receiver.

5. Soon thereafter, it emerged that there were complications or complexities in relation to the Bank's security.

6. The redevelopment took place on the lands where the original petrol station and land had been located but also on adjoining land. The area where redevelopment took place involved four distinct plots or sub-plots referred to as plots A, B, C and D. The overall area involved being approximately two acres. The complications or complexities to which I have referred arise from the fact that the development involved these four distinct plots or sub-plots. Plot A consisted of 0.29 acres, it was held by Cloughvalley on foot of a deed of conveyance. The building from which the Company carried on the business of a shop and petrol station was originally contained entirely within plot A. However, over the years the business was expanded on a number of occasions and the building as enlarged extended onto plot B. Plot B consists of 0.586 acres approximately and was held by the defendants personally. Likewise, plot C which consists of 0.58 acres approximately was held by the defendants, Mr. and Mrs. Quinn personally. Plot D, which has not been directly in issue, in the course of the proceedings before me comprised 0.63 acres and was held by the Company on foot of a lease to the Company from Carrickmacross Town Council.

7. The 2006 redevelopment which was financed by AIB saw the Company building a supermarket and retail units on plot A, but also on a significant portion of plot B. The petrol pump and overhead canopies were relocated and extended onto plot C in part. Plot C also provided car parking spaces associated with the supermarket. In all the development comprises approximately 40,000 sq.ft located on plots A, B and C. Plot A as we have seen is held in the Company name, while plots B and C are in the name of the defendants personally.

8. AIB advanced the €6.5m that was borrowed pursuant to a facility letter from it to the directors of Cloughvalley Stores Ltd dated the 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".

9. Following the appointment of Mr. Fennell on 12th January, 2011, as receiver he initially operated the supermarket with the involvement and assistance of Mr. and Mrs. Quinn. However, in May 2011, he dispensed with their services. There followed a protest, including a sit-in protest, leading to a successful application to MacMenamin J. for an injunction on the 9th June, 2011, in proceedings entitled *Fennell and by Order Clough Valley Stores Ltd v. Michael and Brigid Quinn*, Record No. 2011/4878 P.

10. Thereafter, Mr. Fennell set about making arrangements for the sale of the premises. The complications in relation to security to which I have referred emerged. The matter came back before the court. The plaintiffs sought to apprise the Court of what had emerged and the defendants sought the discharge of the injunction. The issue was whether an injunction granted on the basis that acts of trespass had occurred could continue. Mr. and Mrs. Quinn argued that given their interests in the plots B and C, that they could not be regarded as trespassers. However, 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 defendants, that the Company enjoyed an exclusive license to occupy the lands since the Company had redeveloped the premises on the lands with the permission of the defendants. On the 26th August, 2011, Hedigan J. made an order continuing the injunction restraining the defendants from, *inter alia*, trespassing on the Company's premises which included property held by the Company on foot of an implied license which had been granted to it by the defendants over the two plots of land.

11. In proceedings entitled *Allied Irish Banks Plc v. Michael Quinn and Bridget Quinn* Record No. 2011/9355 P, Feeney J. in a judgment delivered on the 21st December, 2012, upheld two distinct claims made by AIB. The first claim being that under and by virtue of an equitable mortgage made between the plaintiff and the defendants that the sum of €7,693,932.14 together with €18,648.46 for interest stood well charged on the lands and premises described in the schedule. The second and alternative claim was for a declaration that the lands and premises in question were held by the defendants to the benefit of the plaintiff by way of constructive trust. In the course of his judgment, Feeney J. commented that the evidence of the defendants was contradictory and inconsistent. He also commented that insofar as the defendants gave evidence to suggest that there was not an agreement to provide a legal charge over all of plots A, B and C that he was satisfied that the evidence not only contradicted their own evidence but was both fabricated and untrue.

12. When the case of *AIB v. Quinn* Record No. 2011/9355 P was before the court as it was on the 12th, 13th, 14th, 15th and the 21st June, 2012, there was also before the Court a linked case entitled *Fennell v. Quinn (otherwise Micheal O'Cuin) and Bridget Quinn* Record No. 2011/4878 P. In these proceedings, Mr. Fennell had sought to restrain the Quinns from trespassing on the company's property and lands. It appears that, with the agreement of both sides, the Court dealt initially with the *AIB v. Quinn* case as it was recognised that depending on the outcome of that case that might well see 4878 P. disposed of. When judgment in the linked action was delivered on the 21st December, the matter was adjourned to the 11th and the 18th January, 2013, for the purpose of dealing with the form of orders that was appropriate. The orders made by Feeney J. in 2011/4878P declared:-

- (i) That the plaintiff was entitled to a declaration that the defendants were not entitled to enter on or use the lands and premises in question.
- (ii) That the plaintiff was entitled to a declaration that the defendants whether by themselves or their servants or agents or otherwise were restrained from entering on or using the lands and premises in question.
- (iii) That the plaintiff was entitled to a declaration that the defendants were not entitled to retain or use any of the property in question.
- (iv) That the plaintiff was entitled to a declaration that the defendants whether by themselves or their servants or agents or otherwise restrained from taking of interfering with any of the property in question, other than the defendants' own personal property.
- (v) That the plaintiff was entitled to a declaration that the defendants had granted an irrevocable license dated the 3rd May, 2006, to the Company (Cloughvalley Stores Limited) to occupy such part of the lands as was retained in the legal ownership of the defendants.

13. While both the orders in *AIB v. Quinn* Record No. 2011/9355 P and in *Fennell v. Quinn* Record No. 2011 /4878 P, provided for a stay on the order for 42 days, my understanding is that an appeal has been lodged and is pending in the case of *AIB v. Quinn* but that there has been no appeal in the case of *Fennell v. Quinn*.

14. In essence, the case made by the moving parties is that the issues sought to be litigated in the present proceedings are identical to matters that were raised in the course of *Fennell v. Quinn*, and that the reliefs now sought are reliefs which cannot be granted having regard to the terms of the order of the court of the 18th January, 2013.

15. In these circumstances, it is necessary to examine carefully the terms of the present pleadings and to compare them with the pleadings and orders in *Fennell v. Quinn*. with particular reference to the defence and counterclaim. Such an examination leaves no room for doubt but that the present proceedings are to a very large extent indeed merely a rehash of *Fennell v. Quinn*. Even if it could be established that the formulation of any of the current claims that existed prior to the 21st December, 2012 did not fall within the terms, pleadings and orders in the earlier case they are certainly matters that could and should have been litigated. It cannot be litigated now having regard to the rule in *Henderson v. Henderson*. There is a public interest in ensuring that litigation comes to an end and that the same matters are not re-litigated when they have already been decided. The current proceedings which so clearly seek to re-litigate what has already been decided have to be regarded as vexatious and as amounting to an abuse of process.

16. Looking in more detail at the plenary summons and statement of claim I mean no disrespect of the drafters, who of course are not lawyers, if I described the proceedings as taking a shotgun approach. There are aspects that immediately run into difficulties. It is clear that the High Court has already determined the extent of the security provided by the defendants and related to that determined the entitlement of Mr. Fennell to possession of the property. That is not a matter that can be re-litigated further. The avenue for pursuing that which does remain open to the Quinns is through the appeal to the Supreme Court that they have brought against the decision of Feeney J. I pause merely to observe that the complications in relation to security that emerged were unusual and that the defendants would want to litigate the point and would believe that the issue might avail them is entirely understandable. Equally the points of law that Feeney J. had to deal with in the particular factual context that he had to were quite unusual. So, that the defendants would wish to take the matter further by way of appeal is perfectly understandable. However, even when a point of potential significance is identified, there is a limit to how often and in how many different fora it can be argued.

17. From what Mr. and Mrs. Quinn have had to say I understand that they are unhappy about the way that the case ran before Feeney J. There are a number of aspects to their unhappiness, including the fact that they are critical of the lawyers that acted on their behalf. Indeed, I understand that they have issued proceedings against their former solicitor. However, that does not provide any justification for seeking to litigate the matter afresh. The Quinns' remedy, if they have one, is to be found in the Supreme Court.

18. Again, the challenge to Mr. Fennell operating as receiver is *res judicata* and cannot be raised again in the current proceedings.

19. The present proceedings raise an issue about the operation of a spirit, beer and wine off licence. This did not feature specifically in the proceedings dealt with by Feeney J., but given the breadth of the complaints that were raised, it was a matter, that, if there was any substance, could and should have been raised. It is not a matter that can be raised now.

20. The current proceedings contain complaints about the receiver taking possession of personal property belonging to the plaintiffs. There are two points that arise. If this is a general complaint, then it could and should have been dealt with in the earlier proceedings. If it relates to property allegedly taken from a premises in the Shercock Road, along with other property alleged to belong to a different company, Cloughvalley Hire Nationwide Limited, then the position is that further proceedings dealing specifically with this have been issued bearing Record No. 2013/3614 P. It seems to me to be unreasonable that Mr. Fennell should have to face multiple proceedings raising the same issue. Given that there are six defendants in those proceedings and that the plaintiffs have, as it were, cast their net wider in those proceedings, it would seem more advantageous for them to keep those proceedings live and that they would agree to this aspect being discontinued in the present proceedings. If the plaintiffs are not agreeable to that suggestion, and that is all it is at this stage, I will give the defendants leave to bring a motion dealing with the Shercock Road issue and the fact that it is being litigated simultaneously in duplicate proceedings.

21. There is, however, one issue where quite different considerations arise relating to the fact that the first named plaintiff spent a week in prison for non payment of a fine imposed by the District Court on foot of a complaint by the Irish Medicines Board. Mr. Quinn says that he was unaware of the summons and unaware of the fact that a fine was imposed with provision for imprisonment in default of payment and he blames the receiver for that who was in occupation of the supermarket at the time. In effect, Mr. Quinn blames the receiver for the fact of his incarceration, an event which he says has had a devastating effect on him. I regard it as of some significance that Mr. Quinn has indicated that the "primary purpose" of these proceedings is to raise issues in relation to his imprisonment. Given that the hearing before Feeney J. took place in June 2012, and that the imprisonment occurred in December 2012, it is obvious that arguments relating to *res judicata* or *Henderson v. Henderson* can have no relevance whatever. While I, obviously, express no view on the prospects of success, it seems to me that the plaintiffs are perfectly entitled to pursue this issue and nothing that has happened to date places any obstacle in their way.

22. In summary then, I propose to strike out the present proceedings, but subject to two exceptions. So far as the imprisonment issue is concerned, the plaintiffs are free to pursue this. The plaintiffs, therefore, are entitled to pursue their "primary purpose". So far as the personal property/Shercock Road issue is concerned, if the plaintiffs are not agreeable to discontinuing this aspect of the present proceedings on the basis that if the issue is to be pursued it will be pursued in proceedings Record No. 2013/3614 P., then the defendant will have liberty to bring a motion to deal specifically with this issue.

23. So far as the application for an *Isaac Wunder* order is concerned, it goes without saying that this is not an order to be made lightly. It represents a significant restriction on the right of access to the courts. It is of course not a complete bar on access as it merely requires that leave be obtained before further proceedings are launched, but nonetheless it is a real and significant impediment.

24. That the defendants have lodged the present proceedings seeking to litigate what has already been litigated would not of itself, in my view, be sufficient to justify making the order sought. If that was the only issue I would take the view that a mistake had been made by lay litigants and that there was no reason to believe that it would be repeated.

25. However, the present proceedings which I have categorised as vexatious and an abuse of process do not stand alone. There was the further set of proceedings Record No. 2013/51 COS. entitled Michael Quinn, director and beneficial shareholder of Clough Valley Stores Limited and Clough Valley Hire nationwide Limited and Bridget Quinn, director and company secretary and beneficial shareholder of Cloughvalley Stores Limited and Cloughvalley Hire Nationwide Limited, plaintiffs/applicants and Ken Fennell of the firm Kavanagh Fennell and Cloughvalley Stores Limited (in receivership) defendants/respondents. In those proceedings Mr. and Mrs. Quinn purported to seek directions in relation to various matters relating to Mr. Fennell's role as receiver. Taken in the round, the proceedings advanced the claimed entitlement of the Quinn's to own and occupy the lands. It is true that those proceedings have now been struck out, but not before Mr. Fennell had to engage with them.

26. Then there is a further set of proceedings Record No. 2013/3614 P. entitled Michael Quinn and Bridget Quinn, plaintiffs and Ken Fennell, Johnny Hoey, Brigid Hoey, Chris Elliott, Vincent Dullaghan and David McKeown, defendants. In those proceedings the Quinn's seek the following reliefs as emerges from the plenary summons:

"As against the first named defendant, the plaintiff claims damages and aggravated damages for trespass to the plaintiffs' goods, breach of bailment, breach of contract, breach of duty including breach of statutory duty and breach of fiduciary duty, negligence and detinue and conversion in the wrongful interference with and retention of the plaintiffs good and his refusal to investigate the ownership of goods and return same to the plaintiffs."

27. Of particular concern is that in the course of a letter to the bank from the Quinn's dated the 22nd May, 2013, they indicated an intention to issue what would be a fourth set of proceedings, in addition to the counterclaim. The letter commented:-

"Please be advised that High Court proceedings against Mr. McDonnell, (the solicitor for the receiver) Mr. Fennell and Allied Irish Banks plc are imminent.

We have suffered substantial losses personally and to our associated companies at the hands of the above named parties and we are putting you on notice that we expect our claim to be in excess of €10million plus costs restrained."

28. In saying that I acknowledge Mr. Quinn in the course of the proceedings before me commented and indeed repeated that he had no desire to issue any further proceedings. I am concerned that Mr. Quinn's position may be that while he has no desire to issue proceedings, that he may be compelled to do so.

29. It seems to me that the pattern of multiple proceedings litigating the same and overlapping issues is so clear cut that the making of an *Isaac Wunder* order is justified. If Mr. Quinn is in a position to confirm and if Mrs. Quinn agrees with him that there is no desire to issue further proceedings and that further proceedings will not be issued and that the dispute will be pursued through proceedings already in being, including the appeal that has been lodged with the Supreme Court then I will be prepared to accept undertakings to that effect and that would obviate the necessity for making an order which the Quinn's might reasonably feel would reflect poorly on them. However, absent satisfactory undertakings, I will make an order prohibiting the plaintiffs from issuing any further proceedings against Mr. Fennell without the leave of the President of the High Court or his nominee.

