THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 67

Record No: 2016 / 383

High Court Record No: 2016 No 1704P

Ryan P.
Irvine J.
Edwards J.

PATRICK O'CONNOR

Plaintiff/Appellant

V

SHERRY FITZGERALD LIMITED, RONAN DALY JERMYN

and by Order MICHAEL COTTER and LUKE CHARLETON

Defendants/Respondents

Judgment delivered on the 15th day of March, 2018 by Mr. Justice Edwards

Introduction
1. This is an appeal against the judgment and orders of the High Court (McGovern J) delivered and made on the 8th of June 2016 in these proceedings. For convenience in this judgment the plaintiff / appellant will be referred to simply as "the appellant" and the defendants / respondents as "the respondents".

Background to the appeal
2. The appellant is indebted to Bank of Scotland Plc (the Bank). The original loan had been with Bank of Scotland (Ireland) Ltd (BOSI) but following the winding down of BOSI's operations in this country BOSI's debtors book, including the appellant's debt to BOSI, had been acquired by the Bank (in what is referred to by the appellant in these proceedings as "the cross-border merger"). The appellant was sued in respect of that debt by the Bank in proceedings entitled *Bank of Scotland Plc v Patrick O'Connor* [2012] No. 4449S. For shorthand purposes the High Court judge referred to these proceedings as *"the judgment proceedings"*, and I propose to adopt the same convention. By order of the High Court (Cregan J) made on the 6th of March 2015 in those proceedings, judgment was entered against the appellant in the sum of €7,683,999.96.

3. At all material times the appellant was the owner of a registered property at 16 Amberley Heights, Douglas, Co Cork, being the lands and premises comprised in Folio 78315F of the Register of Freeholders for the County of Cork, which, together with other properties, had been pledged by way of security to BOSI in respect of the appellant's indebtedness. The relevant instrument was a Deed of Mortgage and Charge dated the 6th of July 2010. When the appellant ran into financial difficulties and defaulted on his loan the Bank, to whom in the meantime the benefit of the appellant's debt had been transferred from BOSI, and in accordance with what it understood to be its entitlement under Part 9 of the relevant Deed of Mortgage and Charge, appointed the third and fourth named respondents in the present proceedings, as joint receivers of the property at 16 Amberley Heights, Douglas, Co Cork. The appointment was by Deed of Appointment dated the 21st of September 2012.

4. In advance of the Bank obtaining its said judgment in the judgment proceedings the appellant commenced separate proceedings entitled *Patrick O'Connor v Bank of Scotland (Ireland) Limited & Ors* [2012] No 12108P, in which he sued BOSI and the Bank, respectively, alleging loss and damage due to breach of contract, undue influence, fraudulent or negligent misrepresentation, deceit and/ or negligence, arising out of various commercial property loans made between the Bank and appellant, and in the same proceedings also sued the receivers alleging negligence, breach of fiduciary duty and conflict of interest. Having issued these proceedings the appellant then registered a *lis pendens* against the property at 16 Amberley Heights, Douglas, Co Cork.

5. The effect of a *lis pendens* is that once a suit is instituted (and details of it are registered), any person subsequently dealing with the property, whether (s)he be purchaser, lessee or mortgagee, takes the property subject to all the rights and liabilities which might be declared in the suit, whether or not (s)he had notice of the suit. Such a registered *lis pendens* may be vacated under an order of the court but there is no jurisdiction to order a *lis pendens* to be vacated without the consent of the person who registered it until the suit has been determined. The proceedings on foot of which the *lis pendens* was registered by the appellant may conveniently be referred to hereinafter as *"the lis pendens proceedings"*.

6. Both the judgment proceedings, and the *lis pendens* proceedings, were admitted to the Commercial Court list in the High Court, and were set down and heard together before Cregan J, who, on the 20th of February 2015, gave a single judgment dealing with both cases. The High Court granted judgment against the appellant in the judgment proceedings for the sum previously stated (which judgment is reflected in the previously mentioned Order of the 6th of March 2015); further it dismissed all of the appellant's claims against the defendants in the lis-pendens proceedings, and vacated the *lis pendens*.

7. In further proceedings bearing High Court record number [2015 No. 2002 P] and entitled *Patrick O'Connor v. Michael Cotter & Luke Charleton*, the appellant sought to further challenge the appointment of the joint receivers and their entitlement to sell the property situate at 16 Amberley Heights, Douglas, Co. Cork ("the *receiver proceedings*"). By order of Haughton J. dated 30th July, 2015, those proceedings were dismissed under the rule in *Henderson v. Henderson* on the basis that the plaintiff was attempting to litigate one or more issues that had not previously been decided but which could have been canvassed in previous proceedings, namely, in the judgment proceedings and also in the *lis pendens* proceedings.

8. The appellant appealed the orders made in the judgment proceedings and the *lis pendens* proceedings to the Court of Appeal, which dismissed both appeals in a single judgment dated the 10th of February 2017 delivered by Peart J, and in a single supplementary judgment dated the 1st of March 2017, delivered by Finlay Geoghegan J. The Court agreed to deliver a supplementary judgment in circumstances where, subsequent to the first judgment (i.e., that of Peart J) the appellant complained that an issue

raised by him in a motion filed in the course of the appeal concerning the locus standi of one of the parties to the judgment proceedings, namely the Bank, had not been expressly dealt with in the first judgment.

9. In the course of delivering the Court of Appeal's said supplementary judgment, Finlay Geoghegan J stated the following (at paras 13 & 14):

> *"13. For those reasons the Court was satisfied that BOS did continue to have locus standi to continue as the respondent in the appeal in the judgment proceedings. The appeal against judgment of 6th March 2015 has been dismissed by the Court's first judgment.*
>
> *14. It is important to stress that the question as to the person who is now entitled to seek to enforce the High Court judgment against the appellant is not determined by this judgment. Any future application by reason of the sale of the loans of the appellant would be to the High Court and different issues may arise."*

I have set out this quotation, and its context, because the appellant places some reliance upon it in the present proceedings, a matter to which I will return later in this judgment.

10. Following the dismissal of his appeals in the judgment proceedings and in the *lis pendens* proceedings, the appellant then sought the leave of the Supreme Court to further appeal this court's orders dismissing his appeals under Article 35.4.3 of the Constitution. In a written determination dated the 23rd of June 2017 the Supreme Court refused the appellant leave to appeal under Article 35.4.3 of the Constitution in both matters.

11. Following the obtaining of its judgment against the appellant in the judgment proceedings on the 6th of March 2015, the Bank sold on the benefit of its judgment to a third party, Feniton Property Finance Limited (Feniton). The sale, which embraced the appellant's facilities, guarantees and security rights, took effect from the 20th of November 2015. The joint receivers, acting for the benefit of the judgment creditor instructed the first and second named respondents to act as their estate agents and solicitors, respectively, in anticipation of a sale by the receivers of the property at 16 Amberley Heights, Douglas, Co Cork.

The Present Proceedings

12. The present proceedings were commenced by Plenary Summons on the 25th of February 2016. The first and second named respondents were named as defendants alone in the first instance. The third and fourth named respondents were later joined by Order of the High Court.

13. The General Indorsement of Claim to the Plenary Summons claims, *inter alia*, return of the property at 16 Amberley Heights, and damages for alleged loss, damage and expense incurred by the appellant due to the first and second named respondents:

- Unlawful appropriation of the plaintiff's property;
- Trespass;
- Carrying out of various listed actions purportedly on behalf of the joint receivers;
- Slander and defamation of title;
- Unlawful interferences with economic relation;
- Unlawful interference with contractual relations;
- Breach of duty of care;
- Misrepresentation,
- Breach of the Companies Acts;
- Conflict of interest;
- Breach of "co-ownership and beneficial interest rights of third parties";
- Breaches of Conveyancing Act 1881 and the Land and Conveyancing Law Reform Act 2009;
- Detinue

14. In addition, the said General Indorsement of Claim claims an Order for Partition in respect of property (unspecified, but it is presumed to again be a reference to 16 Amberley Heights) in co-ownership and a stay on all actions of the selling agents and solicitors until the final determination of the proceedings including the exhaustion of all and any potential appeals.

15. Although there was no claim in the General Indorsement of Claim for any form of injunctive relief, the appellant subsequently issued a Notice of Motion, dated the 15th of March 2016, returnable for the 18th of April 2016, and grounded upon an affidavit of the appellant dated the 15th of March, seeking, inter alia, to restrain the sale of the property at 16 Amberley Heights.

16. There is no Statement of Claim before us in circumstances where, before any Statement of Claim was delivered, the first and second respondents issued a motion, seeking *inter alia* the dismissal of the present proceedings as being an abuse of process and/or alternatively on the basis of the rule in *Henderson v Henderson* (1843) 3 Hare 100. This was the motion that gave rise to the judgment of McGovern J. which was the subject matter of the present appeal

The Motion

17. The first and second respondents' motion was issued on the 13th of April 2016, returnable for the 18th of April 2016. It appears to have been treated as a cross-motion to the appellant's motion returnable for the same day, and it appears that the first and second named respondent's motion was in fact heard on the 25th of May 2016. It is not entirely clear from my papers what happened with respect to the appellants' own motion. It is noted that one of the appellant's purported grounds of appeal is pleaded in terms that there was a "Failure to hear the Appellant/Plaintiff's Notice of Motion". Although it is somewhat to speculate, it seems likely to me

that the appellant's motion was adjourned pending the outcome of the first and second named respondents' motion to dismiss, although it was, and if still pending it continues to be, at risk of being dismissed *in limine*, in circumstances where it seeks injunctive relief where no such relief is claimed in the General Indorsement of Claim. Whether, or which, we are only concerned on this appeal with the decision and judgment on the first and second named respondents' motion to dismiss.

18. The first and second respondents' Notice of Motion sought (inter alia) the following relief:

> (i) an order pursuant to O. 15, r. 13 of the Rules of the Superior Courts:-
>
> > (a) adding Michael Cotter and Luke Charleton as defendants to the proceedings; and,
> >
> > (b) striking out the named defendants as defendants to the proceedings;
>
> (ii) an order dismissing the proceedings on the grounds that they are an abuse of process as the plaintiff seeks to re-litigate a matter, namely, the validity of the appointment of joint receivers, that had already been decided by a court of competent jurisdiction in other proceedings;
>
> (iii) further or alternatively, an order dismissing the within proceedings on the grounds that the plaintiff was precluded, under the rule in *Henderson v. Henderson*, from litigating one or more issues that had not previously been decided but which could have been canvassed in previous proceedings; and,
>
> (iv) an order restraining the plaintiff from instituting any proceedings without leave of the court (to be sought on not less than four clear days notice to them) against any or all of:-
>
> > (a) Michael Cotter and Luke Charleton;
> >
> > (b) Sherry FitzGerald Limited;
> >
> > (c) Ronan Daly Jermyn; and,
> >
> > (d) any servant(s) or agent(s) of, or any consultant or other party assisting Michael Cotter and/or Luke Charleton in relation to any matter involving or relating to the receivership, the subject of proceedings bearing High Court record number [2012 12108 P] between Patrick O'Connor (plaintiff) and Bank of Scotland (Ireland) Limited & Ors (defendants) or proceedings bearing High Court record number [2012 4449 S] between Bank of Scotland plc (plaintiff) and Patrick O'Connor (defendant) or any act of them or any of them in the course thereof.

19. The first and second named respondent's motion was grounded upon an affidavit of Ricky Kelly, a solicitor in the firm of Ronan Daly Jermyn (the second named respondent), sworn on the 12th of April 2016, and the documents therein exhibited. A replying affidavit, again with certain documents exhibited thereto, was delivered and filed, having been sworn by the appellant on the 17th of April 2016. Mr Ricky Kelly then filed and delivered a further affidavit, with yet further exhibits, in rejoinder, which further affidavit was sworn by him on the 28th of April 2016.

The Judgment of the High Court

20. Following the hearing of the first and second respondents' motion on the 25th of May 2016 judgment was reserved.

21. It is noted that, pending judgment on the motion to dismiss, an order was in fact made on the 25th of May 2016 joining the third and fourth named respondents as defendants in the proceedings. As McGovern J. later explains (at paragraph 15 of his judgment dated the 8th of June 2016), this was done on the basis that as the appellant was seeking to restrain the sale of the property, he felt the receivers should be joined in the proceedings.

22. In his judgment of the 8th of June 2016, the High Court Judge commenced by setting out the terms of the first and second named respondents' Notice of Motion, and then proceeded to rehearse the background to the present proceedings as established before him in evidence, including the appellant's indebtedness to the Bank, the judgment obtained against the appellant in the judgment proceedings, the registration of a *lis pendens* by the appellant, the subsequent *lis pendens* proceedings and the vacation of the *lis pendens* by the Cregan J. in the High Court on the 6th of March 2015.

23. The judgment went on to describe the receiver proceedings before Haughton J. in the High Court, and the outcome of those proceedings, noting in particular that they had been dismissed *"under the rule in Henderson v. Henderson on the basis that the plaintiff was attempting to litigate one or more issues that had not previously been decided but that could have been canvassed in previous proceedings, namely, in the judgment proceedings and also in the lis pendens proceedings".*

24. In the course of his judgment McGovern J. noted that the decisions of Cregan J. in both the judgment proceedings and in the *lis pendens* proceedings were under appeal to the Court of Appeal, but that as of the date of his judgment those appeals had not yet been heard and determined. Similarly the judgment of Haughton J. in the receiver proceedings was under appeal, and again as of the date of his (McGovern J's) judgment those appeals had not yet been heard and determined.

25. The judgment went on to consider in some detail the earlier judgment of Haughton J. in the receiver proceedings. He noted in particular that Haughton J. had been satisfied that, while having pleaded claims regarding the invalidity of the appointment of the receivers, the appellant had confirmed to Cregan J. that he was confining his challenge to the receivers' appointment to issues regarding an allegedly incorrect map.

26. The High Court judge went on to review the *Henderson v Henderson* jurisprudence, noting that the rule had been cited with approved in *A.A. v The Medical Council* [2003] 4 I.R. 302.

27. He further went on to review the jurisprudence relating to the making of what are informally known as "Isaac Wunder Orders", namely the decisions in *Wunder v Irish Hospitals Trust (1940) Limited* (Unreported, Supreme Court, 24th January, 1967); *Riordan v Ireland and ors (No 4)* [2001] 3 I.R. 365; *O'Malley v Irish Nationwide Building Society* (Unreported, High Court, Costello J, 21st January, 1994); *Riordan v Ireland and ors (No 5)* [2001] 4 I.R. 463, and *Tracey t/a Engineering Design and Management v Burton* [2016] IESC 16.

28. No complaint is made on this appeal as to the relevance and applicability of the jurisprudence identified as relevant and reviewed by the High Court judge.

29. The High Court judge noted with particularity that Haughton J. had made the following observation in his judgment in the receiver proceedings:

> *"I note that no Isaac Wunder order is being sought in these proceedings. I would, however, sound a word of caution to Mr. O'Connor. It seems to me that that was a concession fairly made by the defendants in these proceedings and one that was sensible and perhaps compassionate. Perhaps also bear in mind that this is only the second, as it were, set of proceedings that has been brought by Mr O'Connor. However, there is a developing pattern and Mr O'Connor should be aware that the courts can and often do grant orders of this nature…"*

30. McGovern J. observed that having received an adverse judgment from Haughton J. in the receiver proceedings, the plaintiff then went on to initiate this action. He further noted that the court had been made aware of yet further proceedings initiated by the appellant involving his son, and concerning architects fees in respect of work done to the property at issue in these proceedings. The relevance of these was the registration by the appellant of yet another *lis pendens* against the property based on that litigation.

31. The High Court judge concluded:

> *"16. Having considered the evidence adduced before the court on this motion and the submissions made by the parties, I have no doubt whatsoever but that these proceedings are an abuse of process as they seek to re-litigate matters which have already been determined by the courts. They are clearly an attempt by the plaintiff to frustrate the sale of the property, 16 Amberley Heights, Douglas, Co. Cork, even though he did not join the receivers in the action. Judgment in the sum of €7,683,999.96 has been obtained by Bank of Scotland against the plaintiff on 6th March, 2015. The plaintiff has withdrawn his challenge to the appointment of the receivers so far as this property is concerned and has confirmed that to Cregan J. in the lis pendens proceedings referred to at para. 7 above. In the receiver proceedings, Haughton J. has made an order dismissing the plaintiff's claim under the rule in Henderson v. Henderson. The commencement of these proceedings shortly afterwards is nothing but an attempt to circumvent previous orders made and frustrate the receivers in their attempt to dispose of the property in the light of the earlier decisions made by Cregan and Haughton JJ. That is an abuse of process. The defendants are entitled to an order dismissing these proceedings on the basis that they constitute an abuse of process. They are also entitled to such an order under the rule in Henderson v. Henderson. In the receiver proceedings the plaintiff challenged the authority of the receivers to deal with a number of properties including 16 Amberley Heights, Grange, Douglas Co. Cork. While these proceedings are concerned only with 16 Amberley Heights, in many other respects the same relief is sought by the plaintiff save that on this occasion the relief is sought against the receivers' selling agents and solicitors. Where new matter or argument has been introduced it could, and should, have been introduced in the earlier proceedings.*
>
> *17. I am also satisfied that the defendants in these proceedings are entitled to an Isaac Wunder order in the terms of para. 6 of the notice of motion. Having been cautioned by Haughton J. in the receiver proceedings about a developing pattern of litigation, the plaintiff immediately commenced these proceedings having had his claim against the receivers rejected by Haughton J.*
>
> *18. The plaintiff is currently awaiting the results of appeals against the orders of Cregan and Haughton JJ. If he is successful in any of those appeals, he will have whatever entitlements accrued to him as a result of the judgment of the Court of Appeal. But so far as further proceedings are concerned relating to this property and the entitlement of the receivers to dispose of same, the plaintiff has, I fear, come to the end of the road. Every time the plaintiff fails in a court action to prevent the sale of the property he commences yet further proceedings and this is likely to continue unless he is restrained by the courts.*
>
> *19. The defendants are entitled to an order under para 3(A), 4, 5; and, 6 of the notice of motion."*

The Grounds of Appeal

32. The plaintiff is a lay litigant. Although grounds of appeal are meant to be succinctly stated, his grounds of appeal as filed run to 24 A4 pages of typescript, and are really in the nature of legal submissions, although prior to the hearing he also filed a legal submissions document which in turn runs to 105 A4 pages of typescript.

33. I have considered in detail his 24 A4 pages setting out his grounds of appeal, but consider it unnecessary, and inappropriate having regard to their length, repetitiveness, and prolixity, to reproduce them in full in this judgment. Instead it will suffice if I attempt to summarise them.

34. They are presented under eleven main headings, with discrete subheadings under those main headings, and under each in turn details are given of specific alleged errors of fact/legal principle said to have been made by the High Court judge.

35. Heading No 1 is entitled "Conduct of Proceedings", under which there are subheadings relating to "A -Failure to hear Appellant's/Plaintiff's Notice of Motion"; "B - Cross Border Merger" – the principal complaint here appears to be *that "the cross border merger* (of BOSI with the Bank) *was wrongly applied for the benefit of the defendants"* ; "C - Consumer Protection Code" - – the principal complaint here appears to be that the High Court judge failed to apply the consumer protection code for the benefit of the appellant, and that if it had been applied the court would have had evidence that the appellant had never sought, nor was he ever granted, finance by the Bank (as opposed to BOSI). There is also a claim of procedural unfairness in as much as the first and second named respondent's motion was heard ahead of the appellant's motion; "D – Securities and Mortgages and facility letters & Deed of Appointment" – the complaint here is that the High Court judge failed to apply the law concerning the validity of securities, mortgages, facility letters, and a deed of appointment (presumably he is alluding to that appointing the joint receivers) and that he failed to *"have all relevant evidence, by way of documentation or otherwise, before the court"*; "E – Relevant Evidence" – this just repeats the last point. .

36. Heading No 2 is entitled "Judgments delivered and relevant outstanding judgments", under which there are subheadings as follows: "A – Reliance on Mr Justice Cregan's judgment" – the complaint here is that the respondents procured the judgment of Cregan J. in the judgment proceedings and in the *lis pendens* proceeding by committing *"a fraud on the court".* It is further alleged that the High Court judge in stating that Cregan J. had found the receivers to be validly appointed had misstated the import and effect of Cregan

J's judgment, and ignored an acknowledgement by Cregan J that what is described as *"the 2002 Mortgage document"* was not countersigned by the Bank; "B – Reliance on Mr Justice Haughton's judgment" – the complaint here concerns the High Court judge's *"misplaced misinterpretation of the complete facts"* in purporting to rely on Haughton J's judgment, and his failure to await the outcome of the appeal in the receiver proceedings; "C – Failure to wait for Court of Appeal decisions/judgment" – this repeats the last point and speaks for itself; "D – Failure to take proper account of the Appellant/Plaintiff's Motion before the Court of Appeal in May 2016" – this appears to be a reference to some form of concession by the respondents allegedly made "in arguendo" at a motion hearing before the Court of Appeal, and about which McGovern J. may have been informed. There is a further complaint that appears to be to the effect that the third and fourth named respondents were incorrectly added to the proceedings absent evidence that they, having been appointed by the Bank as joint receivers , were authorised by the new judgment creditor, i.e., Feniton, to continue to act. It is further complained that the High Court judge proceeded upon mere assumption in the absence of such evidence; "E. – Reliance on false and misleading statements in court" – the complaint here being that the High Court judge was misled by false and misleading statements allegedly made in court by the respondents.

37. Heading No 3 is entitled "prejudice in application of the Rules of Court and fair procedure". The appellant makes various allegations to the effect that he was denied fair procedures on the hearing of the motion, and that there was a failure by the High Court judge to adhere to the Rules of the Superior Courts. The complaints based on denial of fair procedures allege, *inter alia*, that account was not taken of the fact that the Bank no longer has any interest in the loan; that the respondents (somehow, it is claimed) lack *locus standi* ; that the respondents have no power to sell the property; that the appellant was denied an opportunity to file a Statement of Claim, that the High Court judge failed to have regard to the fact that the Deed of Appointment of the joint receivers had (allegedly) not been validly sealed/signed by the requisite combination of company officers; and that the High Court judge had failed to seek adequate verification of the status of the moving parties and of the documents they were relying upon. The complaint in relation to alleged non compliance with the Rules of the Superior Courts relates to short notice in respect of the hearing of the motion.

38. Heading No 4 is entitled "Rule in Henderson v Henderson does not apply and Proceedings are not an abuse of the process" – Again it is contended under this heading that the respondents *"committed a fraud on the court"*, both, it is said, before Cregan J and before Haughton J. The argument that the joint receivers' appointment was not validated is reprised. It is said that reliance on the judgments of Cregan J and Haughton J was *"ill-founded and misplaced".* The allegation that the *"2002 Mortgage document was not countersigned by the Bank"* is also reprised, as is the complaint that the High Court judge should have awaited the outcome of the various appeals to the Court of Appeal. It is alleged that the matters at issue in these proceedings have never properly or finally been adjudicated on by any court, and that indeed the respondents had objected to those issues being raised in the earlier proceedings, such that the rule in *Henderson v Henderson* simply doesn't apply in the circumstances of this case. The point about the Deed of Appointment of the joint receivers not being signed/sealed is also reprised. It is complained that the High Court judge failed to put the respondents on proof as to the validity of the joint receivers' appointment. The point alleging want of *locus standi* is reprised. It is further alleged that regard was not had by the trial judge to the principles set forth in *Johnson v Gore Wood* [2001] 1 All E.R. 481. There is a complaint of non-compliance with a direction by the Supreme Court concerning discovery of documents. It is said the Deed of Appointment of the joint receivers is also invalid because the underlying Deed of Mortgage and Charge was invalid, and that account was not taken of this. It is alleged that the associated map was wrong and was not consistent with the loan facility letter. It is further alleged under this heading that the High Court judge failed to vindicate the appellant's property rights under the Constitution. Each of the individual findings of the High Court judge is further traversed on the basis that he *"erred in law and in fact."*

39. Heading No5 is entitled "Isaac Wunder Order"- it is said this relief was inappropriately granted because *"the parties are different and the issue being the sale of 16 Amberley Heights … has not been previously litigated".* Moreover, it is said these proceedings cannot be either vexatious or frivolous *"because of other serious and substantive matters that remain at issue".* The various points made about the validity of the appointment of the joint receivers, and about allegedly inadequate documentation verifying their entitlement to act, and concerning alleged fraudulent conduct, are yet again reprised. The appellant's constitutional rights in respect of ownership of private property are again invoked. It is said that the High Court judge failed to properly balance the appellant's right to have access to justice with the respondents abusing their position. It is alleged that the High Court judge exhibited *"a complete lack of knowledge in relation to the overall facts"* and that his conduct of the case gives rise to a concern about objective bias.

40. Heading No 6 is entitled "Different parties and Different Issues" and the essential point being made here is that because different parties and different issues were involved in the earlier proceedings the suggestion that he could have litigated the issues that he now seeks to raise in those earlier proceedings is misconceived.

41. Heading No 7 is entitled "Abuse of Process was by Respondents/Defendants and not by Appellant/Plaintiff", and the title encapsulates the argument being made in this section of the grounds.

42. Heading No 8 is entitled "Protection of Justice" and in substance is a complaint that the High Court judge failed to vindicate the appellant's right of access to the courts in order to secure justice in his case. However, and for the first time in these grounds of appeal, there is also a reference to a failure by the High Court judge to take account of the actions of the defendants *"combined with failures by the Property Registration Authority of Ireland"* in allowing *"the wrongful registration of charges".* It is further contended that the appellant was obliged to bring these proceedings *"to seek to safeguard the property rights of third parties where they could allege that the appellant/plaintiff was responsible for their potential loss of property rights, flowing from the legal principle of proprietary estoppel".*

43. Heading No 9 is entitled "Appellant's rights" and invokes his rights under the Constitution, in particular citing Article 43 thereof, and also his human rights, and in particular his rights under Article 6 of the European Convention on Human Rights and Fundamental Freedoms ("the ECHR").

44. Heading No 10 is entitled "Vacating and setting aside of *Lis pendens*." It is contended here that the High Court judge erred in failing to take into account *"that the rights from an existing lis pendens that is lawfully registered to a third party in respect of separate and distinct proceedings would be prejudiced by his judgment".*

45. Finally, Heading No 11 is entitled "Stay", and there are subheadings covering "A – Costs" – the appellant says costs should not have been granted against him; and "B – Judgment" – the appellant maintains here that the High Court judge should have granted a stay on his order pending this appeal.

Submissions

46. This Court has received written submissions from both sides, and I have read and fully considered them. The parties were affording the opportunity of amplifying those legal submissions in oral argument at the appeal hearing, and they did so.

Discussion and Decision
47. The first thing to be said is that the written submissions filed by the appellant seek to canvas certain matters that are not the subject matter of any of the grounds of appeal, and where that is the case they will not be addressed in this judgment.48. Having considered the appellant's grounds of appeal and submissions it seems to me that the substance of his position can be succinctly stated as follows: First, he maintains that he had stateable legal points to make, and that in the circumstances his proceedings were not doomed to failure. Secondly, this was not an attempt to re-litigate previously decided legal issues and these proceedings are not therefore an abuse of the process. Thirdly, the issues that he seeks to pursue in the present proceedings do not fall foul of the Rule in *Henderson v Henderson.* Fourthly, the conduct of the proceedings in the court below was in certain respects unfair to him, there were procedural irregularities, and the judgment of the High Court judge contained both factual and legal errors. Fifthly, and finally, there was no justification for the granting of an Isaac Wunder Order and the fact that it was granted infringes his right of access to the courts, and other personal rights guaranteed both under the Constitution and/or by the ECHR.

49. The respondent's position is that the High Court's judgment and Order should be upheld. It is not conceded that any of the appellant's claims are stateable, much less well founded. If, however, the Court were to form the view that they are, or that any of them are, indeed stateable and therefore not doomed to failure, it is maintained that either there was a previous opportunity to litigate them that was not availed of (in which case *Henderson v Henderson*) applies; alternatively, they were previously litigated and were rejected and this is now an attempt to re-litigate them which should be restrained as being abusive of the process of the Court. The respondents further maintain that the Isaac Wunder Order was justified in the circumstances of this case.

The issues which the appellant seeks to litigate.
50. As previously noted the claim is framed as an action for damages under numerous headings. Some of these are overlapping but in substance what is being contended is that the respondents, acting without lawful authority, have done various things amounting to a trespass to the appellant's property at 16 Amberley Heights, Grange, Douglas, Cork, and in particular it is claimed that they have unlawfully appropriated it and detained it from him, and that they have slandered his title (presumably by purporting to have authority to sell it on behalf of the judgment creditor). The appellant maintains that he has suffered loss and damage as a result of these alleged unlawful actions, and he claims return of the property and damages in compensation.

51. Accordingly the action as pleaded is certainly stateable. However, critical to any prospect of success is the contention that what was done, was done without lawful authority. In that regard the appellant seeks to make the following case, which appears to be reflected in its essentials in his rather wide ranging General Indorsement of Claim. He contends that the original defendants to his proceedings (the first and second named respondents i.e., the purported selling agents of the putative joint receivers), and, by implication, the additional defendants (the third and fourth named respondents i.e., the putative joint receivers themselves) were unlawfully and invalidly appointed. His case in that regard is that their purported authority derives from a Deed of Appointment of Receivers in which the appointing party was the Bank. However, the appellant maintains that the Bank had no entitlement to appoint receivers over the property in the following circumstances.

52. The appellant acknowledges that various mortgages entered into by him with BOSI on various properties purported to underpin the Deed of Appointment of the Joint Receivers, and that in that regard the Deed of Appointment was a composite document. However, it is his case that at least some of those mortgages, and in particular the relevant Deed of Mortgage relating specifically to 16 Amberley Heights, which was executed by him on the 6th of July 2010 , were not validly and lawfully registered as a charge in the name of the Bank post the cross-border merger. In essence his contention is that notwithstanding that it may have been intended that the Bank would step into the shoes of BOSI in respect of the mortgage of the 6th of July 2010, for a variety of technical reasons that did not in fact happen. Accordingly if the Bank failed to acquire the relevant interest, it could not have validly appointed joint receivers for the benefit of the creditor for the time being, whether that be the Bank itself, or any later purchaser of the debt or judgment based on the debt as the case might be, ergo the respondents had no lawful authority to take possession of, and attempt to sell, 16 Amberley Heights, and by doing so they had committed trespass, detinue, slander of title etc..

53. A difficulty that he faces in making that case is that the 2010 mortgage was *de facto* registered as a charge in favour of the Bank on the 8th of April 2011. However, what the appellant maintains in his General Indorsement of Claim in that regard is that this charge is "invalid and defective". Moreover, in his legal submissions he purports to go further and suggest that the registration of this charge was fraudulently procured by a named firm of solicitors. However, mindful of the rule that allegations of fraud must be expressly pleaded and particularised in detail (neither or which he has done), I am not prepared to entertain a contention of fraud.

54. It is necessary, however, to examine further the contention that the controversial charge in favour of the Bank is otherwise invalid and defective. The grounds on which this assertion is made are three fold.

55. First, it is contended that the 2010 mortgage was never sealed and signed by or on behalf of the mortgagee (BOSI).

56. Secondly, it is contended that the 2010 mortgage was never in fact at any time registered as a charge in the name of the mortgagee (BOSI). This is said to have been necessary if BOSI was to be in a position to transfer to the Bank this particular item of security for the appellant's indebtedness, in the course of the cross-border merger. As it is claimed that this was never done, it is said that the benefit of the 2010 mortgage did not in fact transfer to the Bank in the course of the cross-border merger.

57. Thirdly, the cross-border merger was required to be effected in compliance with the Cross-Border Merger Directive (05/56/EC) which was given effect in this jurisdiction by the European Communities (Cross-Border) Mergers Regulations 2008 (S.I. 157 of 2008) and, it is contended by the appellant, these instruments required that any transfer of securities should take place before the nominated time on the nominated date. In this case the transfer of securities was required to be effected before 23.59 on the 31st of December 2010. The appellant suggests that as BOSI had ceased to exist after 23.59 hours on the 31st of December 2010, there was no way of rectifying the omission *ex post facto*. The transfer of securities could not lawfully be effected after that time on that date as the party who would be required to act as transferor was no more.

58. The appellant contends that in consequence of these alleged irregularities and alleged illegalities the joint receivers were not validly appointed. Moreover, it is said that in circumstances where the Bank had never lawfully acquired the mortgagee's interest in the 2010 mortgage, and therefore had no entitlement to appoint joint receivers, the respondents had no *locus standi* to seek to defend the present proceedings, either in the capacity of joint receivers, or as agents on behalf of joint receivers, on behalf of the Bank.

59. The appellant further contends that in circumstances where the Bank has sold on its judgment debt to Feniton on the 26th of October 2015, but where the debt is legally an unsecured debt in circumstances where the Bank had never validly and lawfully received a transfer of security from BOSI, the respondents equally cannot claim to have received any lawful authority to act as they

have done from Feniton.

60. It does not seem to me to be necessary to seek to engage with these points that the appellant seeks to make, as I do not believe that they are justiciable in these proceeding.

61. In that regard, it seems to me that the appellant's most immediate problem is that which I have already alluded to, namely that the 2010 mortgage was *de facto* registered as a charge in favour of the Bank on the 8th of April 2011. A major feature of our system of registration of title under the Registration of Title Act 1964 is that the register speaks definitively and is conclusive evidence of a registered title, or of any charge or burden registered as affecting a registered title; and that it is not possible, in the absence of fraud, to seek to look behind it. This appellant has sought neither a declaration that the registration of the 2010 mortgage as a charge in favour of the Bank was procured by fraud, nor consequential relief including rectification of the register. Accordingly the registration of the 2010 mortgage as a charge in favour of the Bank appears to be unassailable by him, and absent any claim of fraud the various issues that he purports to raise in which he seeks to look behind and undermine that registration do not appear to me to be justiciable in these proceedings.

62. Be that as it may, the respondents contend that in any event the appellant's position is misconceived.

63. As regards his first point, they point out that there is clear authority against the appellant in *Camiveo v Dunnes Stores* [2015] IESC 43. In giving judgment on behalf of the Supreme Court in that case, Clarke J stated:

> "4.3 The legal position is, in my judgment, well settled and is simply and authoritatively stated in the leading text book, Norton, A Treatise on Deeds 2nd Ed., (London, 1928) at pp. 26-27, where the author says that "Though execution of a deed is necessary to bind the grantor, yet a party who takes the benefit of a deed is bound by it though he does not execute it…."
>
> 4.4 For the purposes of this case, there seems to me to be two important aspects to that clear principle. First, in the ordinary way, a deed does not have to be executed by the grantee in order that it take effect in the grantee's favour. A deed executed by the grantor (the vendor in the case of an ordinary purchase transaction) will transfer the interest of that party once it is executed by the party concerned and irrespective of whether it has been executed by the party to whom that interest is to be transferred."

64. Further, and with respect to his second and third points they say that even if he were correct in his contention that the 2010 mortgage was never in fact registered as a charge in favour of BOSI, and that that in some way affects the validity of the current registration in favour of the Bank, the Bank still had an entitlement arising as a matter of contract, and quite separately from the provisions of the Registration of Title Act 1964, to appoint receivers. In that regard they rely on *Kavanagh v McLaughlin* [2015] IESC 27 where Laffoy J, giving judgment for the Supreme Court stated:

> "36. As regards the appointment of the Receiver, which is the only act of enforcement of the security vested in BOS over the property of the McLaughlins' the title to which is registered in the Land Registry which is in issue on the appeal, I am satisfied that, as a matter of contract, under the terms of the 2006 Charge BOS had power to appoint the Receiver, independently of the provisions of the Act of 1964, and that the Receiver was validly appointed notwithstanding that BOS is not registered as owner of the 2006 Charge."

65. In further support of their position in that regard the respondents also rely *on Freeman v Bank of Scotland plc* [2016] IESC 14. In her judgment in the Supreme Court in that case, Dunne J stated:

> "I find it impossible to see how the possible potential difficulty in conferring good title on the transferees can in any way invalidate the appointment of the Receiver or the validity of the Charge. Quite simply the problem that has now arisen by virtue of the non-registration of the Charge is one that affects the Bank and potential transferees but not the Appellants. Looking back once more at the provisions of s. 62(9) of the Act of 1964 it provides:
>
> > "If the registered owner of a charge on land sells the land in pursuance of the powers referred to in subssection (6), his transferee shall be registered as owner of the land and thereupon the registration shall have the same effect as registration on a transfer for valuable consideration by a registered owner."
>
> The Bank is not the registered owner of the Charge on the land. Even though the Bank can sell its interest in the property and any such sale will be binding as between the Bank and the purchaser, it is not possible for a transferee of the property to be registered as owner of the property until such time as the Bank is registered as owner of the Charge. The provisions of s. 62(10) provide that once the transferee is registered, the Charge shall be discharged and clearly that cannot occur until such time as the owner of the Charge selling the land is registered as owner of the Charge, thereby enabling the transferee to be registered but the non registration of the Bank does not vitiate or invalidate the appointment of the Receiver. It simply creates a problem for the transferees of the properties concerned in perfecting their title. In the event that any transferee sought a remedy directly against the Appellants arising out of the problem caused by the non-registration of the Bank, it is inconceivable that the Appellants would not have a remedy against the Bank for any potential liability that they could have. To suggest that the remote possibility of a transferee claiming that the Appellants have any liability for the "blot" on their title such that the charge is rendered void or "non est factum" is simply not credible. The remote possibility that such liability could be asserted does not in my view have any bearing whatsoever on the validity of the appointment of the Receiver."

66. It requires to be observed that both in *Kavanagh v McLaughlin* and in *Freeman v Bank of Scotland plc* the charge at issue was not registered in favour of the mortgagee or its successor in title. In such a situation the cases cited do indeed appear to be authority for the proposition that the entitlement to appoint receivers is not dependent on registration and may exist independently as a matter of contract. However, in the present case the Bank has no need in fact to rely on such authorities because the 2010 mortgage has actually been registered as a charge in favour of the Bank, and so the Bank is in the position that it can rely on that registration, and in the absence of any claim of fraud the appellant has no entitlement to seek to look behind it.

67. Accordingly, in the circumstances it does not, strictly speaking, appear to be necessary to consider whether these proceedings represent an attempt by the appellant to re-litigate points that were previously litigated and rejected; or, if not, whether there was a previous opportunity to litigate them that was not availed of. However, as these issues are potentially relevant in the context of the appeal against the Isaac Wunder Order, I propose to do so.

Is the appellant attempting to re-litigate issues previously litigated?

68. It is immediately clear that in so far as the appellant has yet again sought to rely on the issue that the deed of mortgage was neither signed nor sealed on behalf of the mortgagee, he is clearly attempting to re-litigate an issue that was raised by him in previous proceedings and which was decided against him.

69. First, it is clear from the judgment of Haughton J. that this point was raised in argument before Cregan J. in the *lis pendens* proceedings, and again before Haughton J. in the receiver proceedings. It was rejected by Cregan J. on the basis that the appellant had expressly confined his challenge concerning the validity of the appointment of the joint receivers to a mapping issue. It was rejected by Haughton J. in reliance on the Rule in *Henderson v Henderson* on the basis that the point could have been pursued in the *lis pendens* proceedings but the appellant had elected not to do so.

70. The issue was also previously raised by the appellant before the Court of Appeal in his appeal against the High Court's judgment in "the judgment proceedings". The point was rejected by this Court in a supplementary judgment (see *O'Connor v Bank of Scotland and ors* [2017] IECA 54), dealing with the appellant's motion challenging the *locus standi* of the Bank to continue to act as a respondent to the appellant's appeal in those proceedings. In that regard, Finlay Geoghegan J, having concluded that the appellant's motion required to be dismissed, stated (at para 17):

> "Notwithstanding, as the appellant is not legally represented, it may be appropriate to record as submitted by counsel for the respondents that in any event the legal position is well settled to the effect that a deed of mortgage or charge does not require to be executed by the mortgagee or chargee to be valid and enforceable: *Camiveo Limited v. Dunnes Stores* [2015] IESC 43, per Clarke J. at para. 4.3."

71. Accordingly, the appellant's attempt in the present proceedings to re-litigate this issue for the umpteenth time is wholly inappropriate and represents an abuse of the process of the High Court and of this Court. His claim in that regard must therefore be dismissed, on that basis alone.

72. The respondents also maintain that the present proceedings constitute an attempt to re-litigate the validity of the appointment of the joint receivers in reliance on other grounds, where the issue as to the validity of their appointment has already been decided by a court of competent jurisdiction in other proceedings. The appellant, however, maintains that while he may have previously raised other grounds of challenge in earlier proceedings they were not ultimately proceeded with and there has been no adjudication on them. While there is no doubt that there was an unsuccessful challenge to the validity of the appointment of the joint receivers in the *lis pendens* proceedings, that challenge was confined, in the words of McGovern J, *"to issues regarding an allegedly incorrect map"*. The High Court judge noted the history with regard to previous proceedings on the issue of the validity of the appointment of the joint receivers as recorded in the judgment of Haughton J. in the receiver proceedings, stating:

> "7. In the course of his judgment, given on 30th July, 2015, Haughton J. examined the proceedings which came before Cregan J. in November 2014, and in particular, the issue regarding the appointment of the receivers and the validity of the said appointment. It is unnecessary for this Court to, again, enter into that same analysis. However, it is relevant to note that Haughton J. was satisfied that, while having pleaded claims regarding the invalidity of the appointment of the receivers, the plaintiff had confirmed to Cregan J. that he was confining his challenge to the receivers' appointment to issues regarding an allegedly incorrect map. It is worth quoting from the transcript of the *lis pendens* proceedings [2012 No. 12108 P] at day 4 and at page 41 thereof. Commencing at line 6 of that page, the following exchange took place:-
>
> > 'Mr. Justice Cregan: Very good. Do you understand that Mr. Murphy? In other words I understand Mr. O'Connor to be saying that the only argument he is making in relation to the unlawful appointment of receivers relates to the issue about the incorrect map, the incorrect common areas.
> >
> > Mr. Murphy: Very good. If Mr. O'Connor confirms that that is the only point he is making then I will withdraw any further objection to the pleadings.
> >
> > Mr. Justice Cregan: Can you confirm that?
> >
> > Mr. O'Connor: I can confirm that judge.'
>
> 8. The "map" referred to in that exchange is the map attached to what is referred to on p. 37 of the same transcript as the "Lindville mortgage". That is not the property at issue in the within proceedings. The incorrect map referred to in the receiver proceedings as forming the basis of a challenge to the receiver's appointment related to the Lindville housing estate which is a separate property from 16 Amberley Heights. Haughton J. was also satisfied that the receiver proceedings primarily existed to question the validity of the appointment of the receivers over the property at issue in the within proceedings, an issue which the plaintiff had pleaded but abandoned during the course of the *lis pendens* proceedings before Cregan J. He rejected the arguments put forward by Mr. O'Connor and dismissed the proceedings under the rule in Henderson v. Henderson."

73. Having reviewed the evidence adduced before the High Court, and the various judgments of the High Court and of this Court arising from other litigation pursued by the appellant, I consider that the appellant is correct in his contention that at least some of the points that he wishes to make in these proceedings concerning the validity of the appointment of the joint receivers have not already been litigated, and adjudicated upon, in earlier proceedings. This certainly seems to be the case in relation to his contentions (i) that BOSI failed to register the 2010 mortgage as a charge, (ii) that there was no transfer of the relevant security from BOSI to the Bank on or before the cut off date and time in the context of the cross-border merger; and (iii) that as BOSI had ceased to exist it was impossible to rectify the omission *ex post facto.* While Cregan J. did express the view that the joint receivers were validly appointed, this was in the context of the withdrawal of the only point of challenge actually proceeded with in those proceedings. It was not, however, an adjudication on points not raised, or that he did not have to consider. Accordingly, the attempt to litigate in the present proceedings points that were not previously raised and adjudicated upon do not represent an abuse of the process on the grounds that they are an attempt to re-litigate matters previously litigated and rejected. However, that is by no means the end of the matter.

74. Even allowing for the fact that the appellant is correct that not all of his claims were previously litigated, and that he is not abusing the process on that account in seeking to litigate them now; there remain the related issues as to whether those claims not already litigated and adjudicated upon could have been litigated to a conclusion in earlier proceedings and, if so, whether the High Court was still correct in dismissing them in reliance on the Rule in *Henderson v Henderson.* These issues will be considered in the next section of this judgment.

Was the High Court right to dismiss the appellants proceedings

in reliance on the rule in *Henderson v Henderson*?

75. The case made by the respondents, and with which the High Court judge agreed, is that although the present proceedings are presented as a claim for damages for loss and damage allegedly suffered by the appellant on account of trespass, detinue, slander of title, etc., they are in truth no more than a vehicle in which to mount a collateral attack on the validity of the appointment of the joint receivers with a view to frustrating efforts by Feniton to enforce the judgment it has purchased from the Bank and preventing it from realising its security. The respondents maintain that points now being made, and not already litigated and adjudicated upon, could all have been brought forward and litigated in earlier proceedings brought by the appellant against the Bank and the joint receivers. However, the appellant did not do so.

76. In her judgment in the Court of Appeal in the receiver proceedings (see *O'Connor v Cotter & anr* [2017] IECA 25, Finlay Geoghegan J set out the current state of the law in relation to the rule in *Henderson v Henderson*. She said:

> 7. The rule in *Henderson v. Henderson*, as it is commonly known, deriving from the decision in *Henderson v. Henderson* [1843] 3 HARE 100, was recently considered by the Court of Appeal in *Vico Limited and Others v. Bank of Ireland and Others* [2016] IECA 273. As stated in that judgment, which I delivered (with the concurrence of Peart J. and Irvine J.), '[t]he underlying principle is similar to that in *res judicata* namely the public interest in those who resort to litigation obtaining a final and conclusive determination of their disputes.'.
>
> 8. In that judgment, I adopted the explanation of the rule in *Henderson v. Henderson* given by Cooke J. in the High Court in Re: *Vantive Holdings & Others and the Companies Acts 1963-2006* [2009] IEHC 408, at paras. 32 to 33, and cited on appeal by Murray C.J. in *Re: Vantive Holdings* [2010] 2 I.R. 118, at para. 21:-
>
> > 'The rule in *Henderson v. Henderson* is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate.'
>
> 9. As pointed out in the *Vico* judgment the special cases are primarily those where the first judgment was procured by fraud. That does not arise on the facts herein.
>
> 10. The more recent mitigation of the rule derives from the re-statement of the abuse of process rule in *Henderson v. Henderson* by Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 AC 1 at 31, which has been approved of by the Supreme Court in this jurisdiction in a number of cases:-
>
> > '. . . But *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 be twice 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 interests 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. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.'

77. The High Court judge in the present case correctly cited the law in regard to the rule in *Henderson v Henderson*, and referred in particular to *AA v The Medical Council* [2003] 4 I.R. 302 where Hardiman J. at 316, approved of the passage just quoted from the judgment of Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1.

78. I have already set out the High Court judge's conclusions at paragraph 31 above. In my view he was entirely justified in his conclusion that these proceedings are abusive of the process and that the respondents are entitled to an order dismissing the proceedings under the rule in *Henderson v Henderson*. There was absolutely no reason why the appellant could not have brought forward all of his grounds for seeking to challenge the appointment of the joint receivers in his earlier proceedings. That he should attempt to litigate matters now that he could have litigated earlier amounts to an abuse of the process, and it would be unjust to allow him to do so.

79. The appellant has sought to argue that the issues raised in these proceedings could not have been brought prior to February 2016

when the first and second named respondents were instructed by the joint receivers in respect of the sale of 16 Amberley Heights. I reject that argument on the basis that it is clear that the authority of the first and second named respondents derives in turn from the authority of the joint receivers and it was open to the appellant in his earlier proceedings to seek to challenge the lawfulness of the appointment of the joint receivers if he had any stateable grounds for doing so. There are in reality no new or different substantive issues raised in these proceedings and I agree with the respondents that it is manifest that they were instigated as a vehicle in which to mount a collateral attack on the validity of the appointment of the joint receivers with a view to frustrating efforts by Feniton to enforce the judgment it has purchased from the Bank and preventing it from realising its security.

80. In my view the High Court was fully correct in its ruling that the proceedings should be dismissed as an abuse of the process for the combined reasons that on the one hand they seek to re-litigate a matter previously litigated and rejected, and on the other hand they seek to litigate other matters that could and should have been litigated in earlier proceedings.

Other Grounds of Appeal raised

81. The appellant complains that the conduct of the proceedings in the court below was in certain respects unfair to him, that there were procedural irregularities, and that the judgment of the High Court judge contained both factual and legal errors.

82. I am satisfied that the proceedings in the High Court were not unfair to the appellant. His principal complaint in that regard relates to the fact that the High Court heard the respondent's motion to dismiss ahead of his motion seeking an injunction to prevent the sale of 16 Amberley Heights. The High Court's decision to proceed first with the motion to dismiss was logical and sensible on the basis that if good grounds were shown for a dismissal of the proceedings, as in fact transpired, the appellant's motion for injunctive relief would consequently fall by the wayside. If good grounds were not shown then the appellant could proceed with his motion. Moreover, I again re-iterate that his motion was in any event at risk of being dismissed in limine, in circumstances where it purported to seek interlocutory injunctive relief to restrain a sale where there is no prayer in the General Indorsement of Claim claiming injunctive relief, whether on an interlocutory or permanent basis, for that purpose.

83. In so far as it is complained that the High Court judge "failed to have all relevant evidence, by way of documentation or otherwise, before the court", I am satisfied that there is nothing in this point. There was manifestly sufficient evidence to justify the making of the orders that were made.

84. Further, it is complained that there was an unfairness in the High Court's decision not to await the outcome of the appeals in the judgment proceedings, the *lis pendens* proceedings and the receiver proceedings. It seems to me that the High Court judge's decision in that regard was within the range of his legitimate discretion. Moreover, the subsequent dismissal by the Court of Appeal of the appellant's appeals in all of those matters, and the Supreme Court's decisions not to accept further appeals, vindicates the High Court judge's instincts and decision in that regard as having been correct. The appellant's lack of success before the appellate courts demonstrates that no unfairness resulted from the High Court judge's decision not to await the outcome of the appeals.

85. There is a further complaint that the High Court "failed to take proper account of the appellant's motion before the Court of Appeal in May 2016". This is understood from the appellant's submissions, and in particular paragraphs D(i) to D(iv) inclusive, to be a reference to an observation made by one of the three judges of the Court of Appeal in the course of dealing with a motion in the appeal relating to the judgment proceedings, to the effect that there appeared to be no evidence before the Court of Appeal *"to counter the uncontested documentary evidence lodged by which showed that Bank of Scotland plc Bank had sold on the appellant/plaintiff's loans without that documentation showing/proving that the Bank of Scotland plc Bank had retained any interest in the loans after the sale date"*; and a concession allegedly made by the respondents' counsel *"that Appellant/Plaintiff would have judgment by default meaning that the High Court money judgment in favour of the Bank of Scotland plc would be set aside"* (the quotations in italics are from the appellant's written submissions).

86. The motion in question related to the entitlement of the Bank to remain as a respondent in the judgment proceedings, in circumstances where it had, subsequent to obtaining judgment, sold on the benefit of it's judgment to Feniton. This was the motion that gave rise to the supplementary judgment dated the 1st of March 2017, delivered by Finlay Geoghegan J. The appellant's point appears to be that when the Bank ceased to have any interest in the loan, having sold on the appellant's facilities, guarantees, security rights and the benefit of it's judgment to Feniton, the authority of the joint receivers, who were appointed to act on behalf of the Bank, would have evaporated, and that McGovern J. should have taken account of this.

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

88. The appellant attaches significance in the context of the present appeal to the observation made *obiter dictum* by Finlay Geoghegan J. at paragraph 14 of her judgment of the 1st of March 2017 (quoted above at paragraph 9).

89. It is understood that the appellant maintains that this observation was reflective of a similar observation made earlier by another of the judges of the Court of Appeal in response to a submission made *in arguendo* by counsel on the hearing of the motion in question in May 2016, and that McGovern J was apprised of this observation at the hearing of the motion to dismiss in the present proceedings.

90. It is important to appreciate the relevant chronology. The hearing of this motion took place in May 2016, following which judgment was reserved. McGovern J. heard the motion to dismiss in the present proceedings and gave his judgment on the 8th of June 2016. The Court of Appeal gave its supplementary judgment on the 1st of March 2017. The appellant maintains that if McGovern J. had awaited the outcome of the appeal in the judgment proceedings he would have been able to cite Finlay Geoghegan J's observation to McGovern J. in support of his argument.

91. There is no transcript record of the exchanges between counsel and the bench at the said motion hearing, and there is vagueness as to what exactly was said, and what exactly was represented to McGovern J. arising out of it. There was certainly no judgment or Order of the Court of Appeal arising from the motion referred to that would have had legal implications for the hearing before McGovern J, or that would have bound him in any way. Although it is entirely possible that McGovern J may have been apprised of some observation made by a judge of this Court in response to a submission made *in arguendo* by counsel on the hearing of the motion in question in May 2016, there is nothing to suggest a failure by McGovern J. to apply the law correctly in the present proceedings, or that he was unfair to the appellant in any way in how he conducted the hearing of the respondents' motion to

dismiss.

92. The context in which Finlay Geoghegan J's observation was made is clear from the judgment of the 1st of March 2017 and it would have had no bearing whatever on the correctness of McGovern J's conclusion that the present proceedings represented a collateral challenge to the validity of the appointment of the joint receivers and as such were abusive of the process for attempting to re-litigate a point previously litigated and rejected, and for attempting to litigate other matters that could and should have been litigated in earlier proceedings, thereby offending the rule in *Henderson v Henderson*. Any potential uncertainty as whether the Bank, or Feniton, or both are entitled to enforce the judgment obtained by the Bank against the appellant is primarily an issue between the Bank and Feniton. Moreover, in circumstances where the appellant had not elected in the present proceedings to seek to challenge, in the light of the sale to Feniton, the continuing right of the Bank and/or of Feniton to enforce the Bank's judgment against the appellant, there was no requirement for McGovern J to engage with that issue. It was not properly before him as an issue in the case. Equally, it is not properly an issue before us.

93. There is a further complaint that the High Court judge acted upon assumption or without an adequate evidential basis. I reject that submission without hesitation. McGovern J had before him *prima facie* evidence that the Bank had obtained judgment against the appellant for €7,683,999.96; that the judgment debt was secured by a Deed of Mortgage and Charge covering several properties including 16 Amberley Heights; that the third and fourth named respondents were appointed by Deed to be joint receivers over 16 Amberley Heights at the behest of the Bank; that the third and fourth named respondents had appointed the first and second respondents as their agents; that the Bank had sold on the appellant's facilities, guarantees, security rights and the benefit of it's judgment to Feniton; and consequent upon the sale to Feniton that the joint receivers were now acting for and at the behest of Feniton. He also had evidence of the multiple proceedings initiated by, and litigated by, the appellant. In my judgment McGovern J had ample evidence on which to arrive at the conclusions that he did, and the contention that he acted upon assumption or without an adequate evidential basis is simply not made out.

94. In so far as there are complaints that the High Court judge failed to adhere to the Rules of the Superior Courts, these were not pressed at the oral hearing. The complaint about short notice has at this stage been overtaken by events. In any event, the High Court judge had an entitlement under the rules to abridge the relevant time limit. In so far as it is complained that it was unorthodox for the High Court judge to have proceeded to hear a motion to dismiss in advance of a Statement of Claim being filed, there was nothing in the Rules of the Superior courts to prevent him from doing so.

Conclusion on the appeal against the motion to dismiss
95. For the above reasons, I reject all of the grounds of appeal against the High Court's dismissal of the appellant's proceedings, and consequently would dismiss that appeal.

The appeal in respect of the Isaac Wunder Order
96. The High Court judge in these proceedings concluded that this was an appropriate case in which to grant an Isaac Wunder Order in circumstances where, although no such order was sought by the joint receivers in the 2015 Receiver proceedings, Haughton J had seen fit to caution the appellant that he was at risk of having such an order made against him – see the earlier quotation from Haughton J's judgment at paragraph 29 above. Despite this warning the appellant had proceeded to issue the present proceedings, which I am satisfied are abusive of the process and require to be dismissed as such.

97. Counsel for the respondents in the present proceedings submits that the High Court was correct in his assessment of the need to restrain the appellant by means of an Isaac Wunder Order in the light of the events that have transpired.

98. Bearing in mind all of the authorities cited earlier at paragraph 27 of this judgment, and notwithstanding the oft repeated injunction that such orders are to be granted sparingly, I have concluded nonetheless that the High Court judge was correct to grant such an order in the circumstances of this case, and in the terms in which he did so.

99. In so far as the appellant makes the point that he has sued different parties in the present proceedings, I reject that as being a point of any substance in the circumstances of this case. While the appellant did not sue the joint receivers directly in the first instance, these proceedings were clearly intended to mount a collateral attack on the validity of their appointment.

100. I would therefore also dismiss the appeal against the granting of the Isaac Wunder Order.