

THE HIGH COURT

[2011 No. 21 SP]

BETWEEN

CATHERINE ALLISON (TRADING UNDER THE TITLE AND STYLE OF "CATHERINE ALLISON & CO. SOLICITORS")

PLAINTIFF

AND

STEPHEN DONALD, KATE AGNEW, EAMON AGNEW, SHANE AGNEW AND THOMAS AGNEW

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 30th day of March, 2012.

1. The parties and the contest

1.1 The plaintiff is the principal of the firm of Catherine Allison & Co., Solicitors, which practices at Dundalk, County Louth. The first defendant (Mr. Donald) is a property owner who at all material times was a client of the plaintiff. The second, third, fourth and fifth defendants (the Agnews) obtained judgment in the sum of €134,136.99, representing contract interest, and also for costs, when taxed and ascertained, in proceedings in this Court between the Agnews, as plaintiffs, and Mr. Donald, as defendant (Record No. 2009 No. 3813P) on 31st October, 2009. Those proceedings, which commenced in the Circuit Court and were transferred to the High Court, related to an action for specific performance of a contract for the sale of premises known as No. 1, Earl Street, Dundalk, County Louth by the Agnews to Mr. Donald for €515,000, the sale having been negotiated in February 2007, the contracts having been exchanged at the beginning of August 2007 and the Agnews having served a completion notice on Mr. Donald on 20th August, 2007. When the proceedings were listed for hearing in this Court on 30th June, 2009 they were settled on the terms of a Consent which, by order of the Court (Charleton J.) made on 30th June, 2009, was received and filed. In the Consent it was agreed that the sale would be completed at an abated price of €380,000 on or before 31st October, 2009, time being strictly of the essence. In the event, Mr. Donald did not complete the purchase and by order of the Court (Murphy J.) made in those proceedings on 3rd November, 2009 specific performance at the original contract price of €515,000 was ordered and, as I have recorded, the plaintiffs obtained judgment for the contract interest due up to that time in the sum of €134,136.99. Subsequently, by a further order of the Court (Laffoy J.) made on 1st March, 2010 the decree for specific performance was dissolved and it was ordered that the plaintiffs were entitled to damages in lieu of specific performance. As I understand the position, the assessment of damages has not yet taken place. The plaintiff acted for Mr. Donald in the proceedings brought by the Agnews against him and she witnessed his execution of the Consent.

1.2 The contest on which the Court has to adjudicate arises between the plaintiff and the Agnews. The issue between the protagonists is whether what the plaintiff contends is an "Equitable Charge dated 6th July, 2009 held by the plaintiff in respect of properties that include 33 Mary Street North, Dundalk, County Louth, which property is registered on Folio 9986F County Louth, has priority over a judgment mortgage registered by the Agnews against the property registered on Folio 9986F.

1.3 What is to be gleaned from Folio 9986F County Louth is that Mr. Donald was registered thereon as full owner with absolute title on 7th March, 2008 on foot of a dealing which, having regard to the reference number, was obviously lodged in 2008. On the same day, 7th March, 2008, there was registered as a burden on Folio 9986F a charge for present and future advances, First Active Plc (First Active) being registered as owner of the charge. That charge was subsequently cancelled off the folio on 30th September, 2009. The Agnews' judgment mortgage, which related to the judgment obtained in the High Court Proceedings (Record No. 2009/3813P), was registered as a burden on Folio 9986F on 19th February, 2010.

1.4 Mr. Donald entered an appearance to these proceedings as a personal litigant. He filed an affidavit sworn by him on 28th July, 2011 in which, in effect, he sided with the plaintiff in her dispute with the Agnews.

2. The proceedings

2.1 The proceedings were initiated by special summons which issued on 13th January, 2011. They were grounded on the affidavit of the plaintiff sworn on 13th January, 2011, which disclosed that 33, Mary Street North had been sold, the sale had been completed on 29th July, 2010, and the balance of the sale proceeds of €87,500 after discharge of auctioneers' fees, the balance being €84,240, was held in a joint account at Bank of Ireland in the joint names of the plaintiff's firm and Donal Reilly & Collins, the solicitors for the defendants, pending the determination of the issue in this case. The so-called "Equitable Charge" was exhibited in the grounding affidavit and I will be analysing it in detail later. However, apart from what is stated in the Equitable Charge, in my view, there was very little factual matter in the grounding affidavit which explained the circumstances in which the Equitable Charge arose. A replying affidavit sworn by John Collins, of the firm of Donal Reilly & Collins, Solicitors, on 31st May, 2011 raised a considerable number of issues in relation to whether the plaintiff had discharged the onus of proof in establishing the validity and priority of the Equitable Charge and it was in this affidavit that Folio 9986F was exhibited for the first time, as was an "Incident Report Form" which the plaintiff had submitted to the Solicitors Mutual Defence Fund Ltd. (SMDF), which it will be necessary to consider in detail.

2.2 The plaintiff filed two further affidavits, one sworn on 18th July, 2011 and the other sworn on 27th July, 2011, from which a greater understanding of the factual background to the Equitable Charge can be gleaned.

2.3 The Agnews' solicitors served notice to cross-examine the plaintiff and Mr. Donald. At the hearing on 23rd March, 2012, the plaintiff was cross-examined by counsel for the Agnews. However, counsel for the Agnews did not seek to cross-examine Mr. Donald. A particular difficulty which I have encountered in this case is that, in the course of cross-examination, counsel for the Agnews raised title matters in relation to four other properties which had been owned by Mr. Donald and he put certain documentation evidencing the title issues to the plaintiff, which had not been exhibited in any affidavit.

2.4 I propose outlining the points made by counsel for the Agnews in relation to those four properties when outlining the provisions of the Equitable Charge and its context.

3. The Equitable Charge and its context

3.1 In the grounding affidavit the plaintiff gave the following explanation of the context and effect of the Equitable Charge in averring as follows:

"I say that as appears from the terms of the said Equitable Charge [Mr. Donald] consented to a sale of the said property [i.e. the property registered on Folio 9986F County Louth] by your Deponent ..., as equitable mortgagee thereof on my own behalf and/or on behalf of Bank of Ireland. I say that your Deponent was further authorised to use the entire sale proceeds thereof (following discharge of the Auctioneer's fees and outlays) to deal with the insurance claim of your Deponent on my solicitor's insurance claim in relation to re-mortgage files for Bank of Ireland in both the jurisdiction of this Court and the jurisdiction of Northern Ireland I say that the said Equitable Charge also makes clear that pending sale of the property the title deeds were to remain with your Deponent and stand charged with the sums owing to Bank of Ireland. [Mr. Donald] undertook not to further charge or encumber the said title to the properties in any way and to keep the said properties insured and in good repair and condition pending completion of the said sale."

In simple terms what is to be gleaned from that was that Mr. Donald was consenting to the sale of 33, Mary Street North and the use of the proceeds of sale thereof to discharge liability to Bank of Ireland, which was also the subject of a claim by the plaintiff on her professional indemnity insurance. I propose now considering how that is reflected in the terms of the Equitable Charge.

3.2 The document, which was dated 6th July, 2009 at its end, was described in the heading as "Equitable Charge and Authority to Sell and provide Undertaking" and it was addressed to the plaintiff. The first paragraph provided as follows:

"I, Stephen Donald ... consent to the sale of 3 properties ... by [the plaintiff] as equitable mortgagee thereof on their own behalf and/or on behalf of Bank of Ireland as per the relevant auctioneer's valuations and agreed sale prices. I further authorise [the plaintiff] to use the entire sale proceeds thereof following discharge of the auctioneer's fees and outlays to deal with the insurance claim of [the plaintiff] on her solicitor's insurance claim in relation to my re-mortgage files to Bank of Ireland in both Northern Ireland and Southern Ireland and to seek to reduce the sums owing pursuant thereto including without limitation to repay Bank of Ireland the sum of €160,000 in respect of the property at 33 Hazelwood Avenue, Bay Estate, Dundalk and to provide an Undertaking to Bank of Ireland in relation thereto as I acknowledge that said property was in error double charged to Bank of Ireland and First Active Plc and also to provide an Undertaking to Bank of Ireland in the sum of €150,000 in respect of the property at 14 Oakvale, Dundalk, County Louth. I acknowledge that I have been advised to obtain independent legal advice."

3.3 There were no less than five different properties mentioned in that paragraph.

3.4 The three properties mentioned at the beginning, to which the consent to sale related, were:

(a) 33, Mary Street North, that is to say, the property registered on Folio 9986F;

(b) 17, Elizabeth Court, Bundoran, County Donegal, the title to which, on the basis of the cross-examination of the plaintiff, I am satisfied is unregistered title and further, on the basis of a Registry of Deeds search put to the plaintiff, was the subject of a mortgage and charge dated 26th January, 2009 made between Mr. Donald of the one part and the plaintiff of the other part, which mortgage also related to 1, Elizabeth Court, Bundoran; and

(c) 24, Villa Park, Dundalk, County Louth, the title to which is registered on Folio 2778F County Louth, the relevant folio having been put to the plaintiff in cross-examination. What Folio 2778F County Louth reveals is that Mr. Donald was never registered as owner on the folio, but the person identified by the plaintiff in her oral testimony as his successor in title was registered on 11th February, 2010. Therefore, I think it is reasonable to infer that Mr. Donald sold the property comprised in that folio as the person to be entitled to be registered as owner. No charge created by Mr. Donald was ever registered on that folio.

3.5 The other two properties mentioned in the first paragraph *ex facie* were properties on the security of which Mr. Donald was indebted to Bank of Ireland. What emerged in relation to those two properties in the course of the cross-examination of the plaintiff was as follows:

(a) The title to 33, Hazelwood Avenue, Dundalk is registered on Folio 3254F County Louth, the relevant folio having been put to the plaintiff in cross-examination. On 4th May, 2004 Mr. Donald became registered as sole owner on that folio, having been previously, since December 1997, the joint owner of that property. The following charges were registered on Folio 3254F after Mr. Donald became sole owner:

(i) a charge for present and future advances in favour of Irish Life and Permanent Plc, which was registered simultaneously with the registration of Mr. Donald's ownership on 4th May, 2004 and was cancelled on 13th March, 2008;

(ii) a charge for present and future advances in favour of Bank of Ireland, which was registered on 4th April, 2008 and was cancelled on 25th August, 2010; and

(iii) a charge for present and future advances in favour of First Active, which was registered on 22nd April, 2010 and is still extant on the folio.

In summary, as regards the charges created against that property by Mr. Donald, which are relevant to the issues before the Court, Bank of Ireland had a first charge between 4th April, 2008 and 25th August, 2010 and, assuming that the copy folios put before the Court are up to date, First Active now has a first charge, presumably, on account of the fact that the Bank of Ireland charge was discharged by payment of some monies due. The Agnews' judgment mortgage was also registered as a burden on this folio on 28th May, 2010.

(b) The title to 14, Oakvale, Dundalk is registered on Folio 4735F of the Register of Freeholders County Louth, the relevant folio having been put to the plaintiff in cross-examination. The registration on this folio to some extent reflects the registration on Folio 3254F, in that Mr. Donald became sole registered owner on 4th May, 2004. However, the position in relation to the charges registered during Mr. Donald's sole ownership is as follows:

(i) a charge in favour of Irish Life and Permanent Plc was registered as a burden on this folio on 4th May, 2004 but

cancelled on 1st November, 2005;

(ii) a charge for present and future advances in favour of AIB Finance Ltd. was registered on 29th September, 2005 and cancelled on 18th May, 2011; and

(iii) a charge in favour of Bank of Ireland was registered on this folio on 4th April, 2008 and the registration of that charge remains extant.

The Agnews' judgment mortgage was also registered as a burden on this folio on 28th May, 2010. As regards the charges registered against this folio, which are relevant to the issues before the Court, from the time of the registration of its charge in April 2008 until 18th May, 2011, the charge of AIB Finance Ltd. had priority over the charge of Bank of Ireland. What the evidence indicates is that the discharge of the charge in favour of AIB Finance Ltd. was procured by the payment of monies to that chargee, so that Bank of Ireland's charge became a first charge. Bank of Ireland Mortgage Bank has been registered as the owner of the Bank of Ireland charge since 15th June, 2010, but nothing turns on this.

3.6 The second paragraph of the Equitable Charge document was in the following terms:

"Pending sale of the properties I confirm the title deeds will remain with [the plaintiff] and stand charged with the sums owing to Bank of Ireland as referred to herein and I undertake not to further charge or encumber the said title to the properties referred to herein in any way and to keep the said properties insured and in good repair and condition pending the completion of the sales."

There was also provision for procuring vacant possession of any tenanted property, which is not relevant for present purposes.

3.7 At its end, the Equitable Charge document was expressed to be "Sealed, Signed and Delivered" by Mr. Donald. His signature appears on it and it was witnessed. In his affidavit, Mr. Donald has confirmed that he executed the Equitable Charge document in the presence of an independent solicitor, Seamus Duffy, of MacNamee McDonnell Duffy of Newry, County Down.

3.8 Before attempting to construe the effect of the Equitable Charge, because of the nature of the submissions made on behalf of the Agnews, it is necessary to consider the additional evidence of the context in which the Equitable Charge document was created, which was put before the Court subsequent to the grounding affidavit of the plaintiff.

3.9 What emerges from the Incident Report Form to the SMDF, which was exhibited by Mr. Collins, is that at the date the report was made, that is to say, 17th July, 2009, the plaintiff anticipated two claims against her professionally arising, in each case, from a breach of an undertaking given by her firm. The details of the potential claims which she furnished to SMDF in the report were as follows:

(a) As regards 33, Hazelwood, that property was re-mortgaged with approximately fourteen separate residential properties to Bank of Ireland by way of mortgage deed dated 20th March, 2007, which was registered on 4th April, 2008. The property was already charged to First Active, but First Active's charge was not redeemed, the explanation given for that oversight being that the First Active charge had not been registered and was overlooked. It was stated that there was due on the First Active charge the sum of €263,751.92 at 7th July, 2009. The name of the potential claimant was given as First Active.

(b) As regards 14, Oakvale, it was stated that that property was also the subject of the re-mortgage to Bank of Ireland but it was originally charged to AIB and the AIB charge remained on the title and, in error, had not been redeemed. The reason given for the error is complicated and is not really relevant for present purposes. However, it was disclosed that the balance due on the AIB charge as of July 2009 was €182,562. AIB Plc was named as the potential claimant, although, of course, it was AIB Finance Ltd. which was the registered owner of the charge on Folio 4735F.

The plaintiff disclosed that her first awareness of a possible claim was June 2009.

3.10 The plaintiff's second affidavit sworn on 18th July, 2011 effectively verified the plaintiff's default in complying with the undertakings given to Bank of Ireland in relation to 33, Hazelwood Avenue and 14, Oakvale. The Mortgage Loan Offer from Bank of Ireland, which was dated 14th February, 2007, was exhibited and it was clear that the properties to be charged in favour of Bank of Ireland to secure an advance of €1,990,000 included 33, Hazelwood Avenue and 14, Oakvale. However, a twist was added to the story, in that the plaintiff averred:

"This [Bank of Ireland] loan offer did not include the property at 33, Mary Street North. However what occurred is that the mortgage proceeds released from that Bank of Ireland loan were used in error by the Plaintiff to redeem the mortgage on 33, Mary Street North. The net effect was that the balance of the re-mortgage proceeds were then insufficient to clear the existing first charges on the remaining properties which were the subject of the re-mortgage and in particular the properties at 33, Hazelwood Avenue and 14, Oakvale. This meant the Plaintiff was now in default on the undertaking to the bank and hence [Mr. Donald] gave a charge over 33, Mary Street North. The subsequent sale of 33, Mary Street North was therefore to be used to rectify this situation."

The plaintiff then exhibited correspondence from First Active to her firm dated 14th March, 2007 which effectively sent her firm details of the amount required to redeem three mortgages which First Active held from Mr. Donald on properties in Dundalk as of 21st March, 2007. She then averred:

"I further say two First Active Charges were repaid in error out of Bank of Ireland remortgage proceeds. One such First Active charge which was over the 33, Mary Street North property repaid in error out of the proceeds of the said Bank of Ireland re-mortgage in the sum of €151,029.07 on the 20th March, 2007 . . . however, the First Active discharge was only sent to the Land Registry by First Active on 30th September, 2009."

The plaintiff then went on to explain that the first charges on two properties, 33, Hazelwood Avenue and 14, Oakvale, had not been repaid "due to the insufficient balance monies due to [Mr. Donald's] miscalculation of redemption figures and secondly due to inadvertently paying off the 33, Mary Street North mortgage and another property".

3.11 The twist in the story is that neither the Equitable Charge nor the Incident Report Form to the SMDF disclosed that the reason

Bank of Ireland did not get first charges on 33, Hazelwood Avenue and 14, Oakvale was that part of the monies advanced by Bank of Ireland had been erroneously applied in the discharge of the First Active mortgage on 33, Mary Street North. Having said that, the evidence is clear that on 20th March, 2007, the plaintiff sent a cheque to First Active which included the sum of €151,072.43, which obviously factored in two days accrual of interest, in discharge of the charge on 33, Mary Street North.

3.12 In the plaintiff's final affidavit sworn on 27th July, 2011 it was proved that the SMDF had paid the sum of €131,750 for the purpose of discharging the AIB mortgage on 14, Oakvale in February 2011. Prior to that, the plaintiff had given an undertaking to the solicitors acting for the SMDF in a letter dated 26th October, 2010.

The terms of the undertaking were that the plaintiff would:

"... furnish the net proceeds not exceeding €135,000 from the sale of the premises of [Mr.] Donald situate at 33 Mary Street North, Dundalk, County Louth as soon as those net sale proceeds are released to this firm absolutely following completion of the litigation proceedings with the [Agnews] who [have] registered a Judgement Mortgage against the title to the property at 33 Mary Street North."

3.13 It emerged during the cross-examination of the plaintiff that the sale of 24, Villa Park yielded €85,000 and the sale of 17, Elizabeth Court, Bundoran yielded €60,000. The three properties charged by Mr. Donald in the Equitable Charge document, when one factors in the net proceeds of the sale of 33, Mary Street North, yielded €229,240. Additionally, the plaintiff received €131,750 to solve the problem in relation to 14, Oakvale, the plaintiff being liable for the excess on the basis, presumably, that the amount due to AIB had been compromised in the sum of €135,000. However, the Court has only part of the story, meaning, only some of what may be the relevant facts, in relation to the three sales. For instance, it is not clear what, if anything, was due on foot of the mortgage dated 26th January, 2009 in favour of the plaintiff registered in the Registry of Deeds against 17, Elizabeth Court, Bundoran. Moreover, while it is possible to draw inferences as to how the 33 Hazelwood Avenue security problem in favour of Bank of Ireland was resolved, there is no evidence as to what it cost to resolve it. Apart from the circumstances of the five properties mentioned in the Equitable Charge document, there was a bigger picture, in that it is to be inferred from the Equitable Charge document that there was a problem in relation to giving Bank of Ireland security over properties in Northern Ireland. In the cross-examination of the plaintiff it emerged that the sum of £465,000 Sterling was paid by the plaintiff's insurer in relation to Mr. Donald's Northern Ireland portfolio.

3.14 It is against that background that it is necessary to attempt to construe the Equitable Charge document and to address the submissions made on behalf of the Agnews that the balance of the proceeds of sale of 33, Mary Street North (€84,240) is not charged by the Equitable Charge document and is available to discharge the Agnews' judgment mortgage.

4. Construction of the Equitable Charge

4.1 To recapitulate, on 6th July, 2009, the date on which the Equitable Charge document was executed, Mr. Donald was registered as full owner on Folio 9986F. The property registered on that folio, 33, Mary Street North, was free from encumbrances, the charge in favour of First Active having been discharged by mistake, although it had not yet been cancelled as a burden on the folio. Accordingly, Mr. Donald was free to create unregistered rights in respect of 33, Mary Street North.

4.2 There is no doubt that, as was asserted by Mr. Collins in his affidavit, the Equitable Charge document did not comply with the requirements of s. 62(2) of the Registration of Title Act 1964 (the Act of 1964) and, as such, it did not operate to charge the lands registered on Folio 9986F nor was it registered as a charge on that folio. However, s. 68(2) of the Act of 1964 provides:

"Nothing in this Act shall prevent a person from creating any right in or over any registered land ..., but all such rights shall be subject to the provisions of this Act with respect to registered transfers of land ... for valuable consideration."

Insofar as the Equitable Charge document did create an unregistered right over Folio 9986F, in order to determine the impact of the registration of the Agnews' judgment mortgage on it, it is necessary to consider s. 117 of the Land and Conveyancing Law Reform Act 2009 (the Act of 2009), which came into force on 1st December, 2009, that is to say, before the Agnews' judgment mortgage was registered. Sub-section (3) of s. 117 provides:

"The judgment mortgage is subject to any right or incumbrance affecting the judgment debtor's land, whether registered or not, at the time of its registration."

Accordingly, to the extent that an unregistered right was created by the Equitable Charge document, it has priority over the Agnews' judgment mortgage.

4.3 Although it could hardly be described as a specimen of exemplary draftsmanship, I am satisfied that the Equitable Charge document did create an unregistered right in the form of a charge in favour of the plaintiff over the property registered on Folio 9986 County Louth, which the plaintiff, by giving the undertaking of 26th October, 2010 to the solicitors for the SMDF, has effectively transferred in equity to the SMDF. In this connection, I would stress that what is important in establishing the true effect of those transactions is the intention of Mr. Donald, of the plaintiff and of the SMDF in entering into them, rather than the form of the documentation by virtue of which the intended rights were created.

4.4 As a matter of construction, the intention of Mr. Donald in giving the plaintiff the Equitable Charge, and the effect of the document, was to create security with a view to realising funds which could be used to rectify the errors which arose in relation to the security to which Bank of Ireland was entitled over Mr. Donald's properties both in this jurisdiction and in Northern Ireland. The two errors requiring rectification which were specified - the perfection of security in relation to 33, Hazelwood Avenue and 14, Oakvale - were expressly exemplified "without limitation". The clear intention was that the plaintiff was entitled to utilise all the monies realised from the sale of the three properties, including 33, Mary Street North, until the sums due to Bank of Ireland on its security in relation to properties on both sides of the border were reduced or discharged.

4.5 Counsel for the Agnews made an ingenious submission with a view to demonstrating that the plaintiff had not discharged the onus of proving that the net proceeds of sale of 33, Mary Street North were required to meet the liability identified in the Equitable Charge document. It is true that the main focus of the evidence put before the Court by the plaintiff on affidavit was that, in order to perfect the security of Bank of Ireland in relation to 14, Oakvale, AIB had to be paid €135,000 to procure the release of its charge which had priority. It is also true that the evidence given by the plaintiff in cross-examination was that €145,000 had been realised as a result of the sale of 17, Elizabeth Court and 24, Villa Park. However, it cannot be inferred that that means that the sum of €135,000 due to AIB, €131,750 of which was advanced by the SMDF on the basis of the plaintiff's undertaking of 26th October, 2010, could have been discharged out of the proceeds of sale of 17, Elizabeth Court and 24, Villa Park, leaving, as counsel for the Agnews put it, the net proceeds of sale of 33, Mary Street North "in the kitty" to be captured by the Agnews' judgment mortgage.

4.6 Counsel for the Agnews also submitted that there was no evidence before the Court that any of the proceeds of sale were required to be paid to rectify the problem in relation to Bank of Ireland's security over 33, Hazelwood Avenue. The terms of the Equitable Charge document itself indicate that there was a problem in relation to the Bank's security over this property. The Incident Report Form to the SMDF corroborates that document in demonstrating that a problem did exist, as is outlined at para. 3.9(a) above, in that First Active's charge, although unregistered when the Bank of Ireland loan was drawn down, had priority over Bank of Ireland's charge on foot of an undertaking given by the plaintiff to First Active. As the details from Folio 3254F County Louth, which I have outlined at para. 3.5(a) above disclose, the problem was obviously solved by the charge in favour of First Active being registered on the folio, and the charge in favour of Bank of Ireland being cancelled off the folio. I think it is reasonable to infer that money had to be paid to Bank of Ireland to procure that solution, because it is clear on the evidence that First Active had an undertaking from the plaintiff to get security on 33, Hazelwood Avenue when that property was charged in favour of Bank of Ireland on 20th March, 2007. It cannot have been the case that Bank of Ireland relinquished that charge, which was registered on Folio 3254F on 4th April, 2008, free gratis.

4.7 It is undoubtedly the case that evidence put before the Court by the plaintiff, while giving hints of the broader picture, does not comprehensively address the manner in which the problems created by the plaintiff's seriously deficient conduct of Mr. Donald's borrowing activities were resolved. However, I am satisfied from the totality of the evidence before the Court that on 6th July, 2009 Mr. Donald created an unregistered equitable right in the form of a charge over the three properties, including 33, Mary Street North, the sale of which he consented to, and that the unregistered right in the form of a charge has attached to that property since 6th July, 2009 and to the proceeds of the sale of 33, Mary Street North following the sale thereof. Further, I am satisfied that the net proceeds of sale should be released to the plaintiff for transmission to the SMDF in accordance with her undertaking and that the Agnews have no entitlement to those monies as judgment creditors.

4.8 For completeness, I do not think there is any merit in a number of technical points, which were made on behalf of the Agnews. While it is true that no land certificate had issued in respect of Folio 3254F County Louth and the reference in the Equitable Charge document to the title deeds remaining with the plaintiff and standing charged with the sums owing to Bank of Ireland is meaningless in terms of creating an equitable mortgage by deposit of title deeds, I am satisfied that the effect of the document was to create an equitable right in the form of a charge in relation to the property and the proceeds of sale of that property on 6th July, 2009 for the purpose specified therein. As regards the submission that the Equitable Charge document only captured the proceeds of sale of 33, Mary Street North after discharge of the Agnews' judgment mortgage, that proposition is wholly contrary to s. 117(3) of the Act of 2009 and, indeed, to s.71(4) of the Act of 1964, which it replaced.

4.9 For the record, I note that an allegation that the Equitable Charge document was void as against the Agnews pursuant to s. 10 of the Conveyancing Act (Ireland) 1634 was not pursued at the hearing.

4.10 Finally, both the Agnews' legal advisers and the Court had to go through a process, to use a colloquialism, akin to "pulling teeth" to ascertain the overall true evidential position in relation to Mr. Donald's personal liability and the plaintiffs professional liability to Bank of Ireland and the implications of the steps taken in 2009 to deal with such liabilities in the context of determining the issue before the Court. If the plaintiff had put all of the relevant facts before the Court from the outset, there could have been a considerable saving of court time, of judicial time and of costs.

5. Form of order

5.1 The only order which is necessary, in my view, is an order directing the plaintiff and Donal Reilly and Collins, Solicitors, to transfer the balance of the proceeds of sale amounting to €84,240 held by them in a joint account at Bank of Ireland together with any interest accrued thereon to Groarke and Partners, Solicitors for the SMDF, in discharge of the undertaking dated 26th October, 2010 given by the plaintiff to that firm.