Neutral Citation [2016] IEHC 747

THE HIGH COURT

[2013 No. 11145 P.]

BETWEEN

MICHAEL QUINN AND BRIGID QUINN

PLAINTIFFS

AND

MCDONOUGH BREEN SOLICITORS, JOHN MCDONOUGH AND

ALLIED IRISH BANKS PLC

DEFENDANTS

JUDGMENT of Mr. Justice White delivered on the 21st of December, 2016

1. This matter comes before the court by way of various motions of the Defendants and Plaintiffs.

2. The third Defendant has issued a motion dated 4th September, 2014, returnable for 3rd November, 2014, seeking the following reliefs:-

> (a) an Order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the Plaintiffs' Statement of Claim as against the third named Defendant on the grounds that it discloses no stateable cause of action;
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> (b) an Order pursuant to the inherent jurisdiction of this Honourable Court striking out the within proceedings as against the third named Defendant on the grounds that they are vexatious and/or an abuse of process and disclose no reasonable cause of action;
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> (c) in the alternative, an Order striking out the within proceedings on the grounds that each of the matters raised in issue is *res judicata*;
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> (d) further or in the alternative an order dismissing any matters raised in the within proceedings which might not be *res judicata* on the grounds that they ought to have been dealt with in proceedings entitled *Allied Irish Banks plc v. Michael Quinn & Brigid Quinn* [2011 No. 9355 P.].

This motion is grounded on the affidavit of Conal Regan, Manager of third Defendant sworn on 4th September, 2014.

3. The first and second Defendants issued a motion on 9th January, 2015, returnable for 17th February, 2015, seeking similar reliefs to the motion of the third Defendant. The motion is grounded on the affidavit of Conor Breen, Solicitor, sworn on 6th January, 2015.

4. Prior to the issue of these motions, the Plaintiffs issued a motion of 7th August, 2014, returnable for 3rd November, 2014, seeking to amend the Statement of Claim already served in the proceedings. That motion is grounded on the affidavit of Michael Quinn sworn on 7th August, 2014, exhibiting a draft amended Statement of Claim.

5. The first Plaintiff has sworn a number of affidavits in reply to the motions to dismiss. On 13th February, 2015, he swore an affidavit in reply to the motion of the third Defendant and on the same date he swore a separate affidavit in reply to the motion of the first and second Defendants. He swore a further detailed affidavit in reply on 25th November, 2015.

6. The Plaintiffs have also issued two other motions, a motion of 30th July, 2015, returnable for 12th October, 2015, seeking certain documentation from the first and second Defendants grounded on the affidavit of Michael Quinn sworn on 30th July, 2015, and a motion of 19th April, 2016, returnable for 26th April, 2016, seeking certain reliefs against the third Defendant. This motion is grounded on the affidavit of the first Plaintiff, Michael Quinn, sworn on 19th April, 2016. This affidavit also contains averments in defence of both motions to dismiss.

The Substantive Proceedings

7. The Plaintiffs issued a Plenary Summons on 14th October, 2013, seeking a number of reliefs against the Defendants. The Plaintiffs were directors and shareholders of Cloughvalley Stores Limited (hereinafter called "The Company") which owned property marked A and D on the map attached to this judgment, and personally owned lands marked B and C on the said map.

8. The Plaintiffs allege breach of contract, breach of duty including statutory and fiduciary duty, breach of trust and negligence against the third Defendant. They also allege the third Defendant acted in an aggressive, unprovoked action against the Plaintiffs and improperly disclosed information to third parties, and failed to supervise agents and pursued legal proceedings against the Plaintiffs which were unfair and unprovoked. The Plaintiffs are claiming ownership of lands marked B and C on the attached map.

9. The Plaintiffs claim negligence, breach of contract, breach of trust, breach of duty including statutory and fiduciary duty against the first and second Defendants who during the relevant time acted as solicitors for the Company and received instructions from the Plaintiffs in their capacity as directors of the Company.

10. A Statement of Claim was served on 29th October, 2013. The third Defendant entered an appearance on 24th October, 2013 and the first and second Defendants entered an appearance on 6th November, 2013. The first and second Defendants served their defence in February 2014, and the third Defendant served its defence on 11th March, 2014.

Judgment Feeney J., [2011 No 9355P] Allied Irish Banks PLC -v- Michael Quinn and Brigid Quinn, 21st December 2012

11. Both Defendants have alleged that due to a judgment delivered by the late Mr. Justice Kevin Feeney on 21st December, 2012, in the matter entitled the High Court [2011 No. 9355 P.] *Allied Irish Banks plc (Plaintiff) v. Michael Quinn and Brigid Quinn* (Defendants) the proceedings now initiated by the Plaintiffs are *res judicata* and as a result are frivolous and vexatious. In addition, all three Defendants rely on the rule in *Henderson v. Henderson* to argue that if there are matters in the Plaintiffs' present action which were not dealt with by Feeney J., they cannot now proceed due to that rule.

12. To understand the nature of the claim of the Plaintiffs in these proceedings and the defence of the Defendants and the motions to dismiss, it is essential to quote extracts from the judgment.

13. Paragraphs 1.1,1.2,1.3,1.4,1.5,1.9,1.10, 2.2, 3.6, 4.1, of the judgment state as follows:-

> "1.1 The defendants, Michael Quinn and Brigid Quinn, are husband and wife and are directors and shareholders of Cloughvalley Stores Ltd. (the Company). The Company has operated a petrol station and grocery shop from premises in Carrickmacross, County Monaghan, since in or about 1988. The petrol station and grocery shop is situated at Castleblayney Road, Carrickmacross, County Monaghan. The garage and shop premises have been altered and extended since the Company started to trade. Prior to 2006 the Company proposed to redevelop the Carrickmacross site where the Company's garage and shop were situated and to develop a larger convenience supermarket or store and to rebuild the petrol station. This redevelopment was duly carried out on the lands where the original petrol station and shop were located and also on lands adjacent to those lands. It is the lands on which the redevelopment and construction were carried out which are central to the claim in this case. There are four adjoining plots of lands that I must consider in relation to the claim herein. The four plots are marked on a Land Registry map which was attached to and included in the schedule to the plenary summons. A copy of that map is Schedule A to this judgment. That map identifies four separate plots, namely, Plot A, Plot B, Plot C and Plot D. In this judgment I will follow the same designation in relation to each of the four plots. Plot A consists of 0.29 acres and is land which is held by the Company on foot of a deed of conveyance dated 1st July, 1988 between Patrick Ward and Brigid Ward and the Company. Plot B consists of 0.586 acres and Plot C consists of 0.58 acres and both of those plots are held by the defendants personally. Plot D consists of 0.63 acres and is land held by the Company on foot of a 999 year lease to the Company from Carrickmacross Town Council. Plot D is not in issue in this case.
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> 1.2 The building from which the Company carried on the business of a shop and petrol station was originally contained entirely within Plot A. The Company expanded its premises on a number of occasions and the enlarged building extended from Plot A onto Plot B and thereafter was located mainly on Plot A but also in part on Plot B. The largest development carried out by the Company took place in 2006 and it is that development which forms the backdrop to these proceedings. The 2006 development resulted in the Company building a supermarket and retail units on Plot A and also on a significant portion of Plot B. The petrol pumps and canopies were relocated and extended in part on to Plot C. Plot C also has car parking which is used for the supermarket premises now located on Plot A and Plot B. The 2006 redevelopment has resulted in the Company's buildings comprising approximately 40,000 sq. feet and those buildings are located on Plots A, B and C. Plot A and Plot D are lands which are held by the Company whilst Plots B and C are held by the defendants personally.
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> 1.3 In order to finance the redevelopment carried out in 2006, the Company borrowed €6.5m from the Allied Irish Banks Plc ('the Bank'). That loan of €6.5m was made by the Bank pursuant to a facility letter from it to the directors of Cloughvalley Stores dated the 3rd May, 2006. The stated purpose of the loan as per the letter of sanction was to clear existing borrowings with the Ulster Bank and to finance the redevelopment of the Carrickmacross business. The security for the loan was set out in five numbered paragraphs on the second page of the letter of sanction and included at paragraph 2 of that section:-
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> > 'Legal charge over 40,000 sq. foot building premises on c. .2 acres at Carrickmacross, Co. Monaghan.'
> > The facility letter was signed and dated on the third page for and on behalf of Cloughvalley Stores Ltd. by the two defendants and was dated the 3rd May, 2006. On dates after the 3rd May, 2006, further facility letters were issued by the Bank to the Company either for the purpose of extending the original facility of €6.5m or for advancing further sums to the Company for other purposes. I will refer to those subsequent facility letters later in this judgment.
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> 1.4 The redeveloped and expanded store was a supermarket premises and retail units comprising approximately 40,000 sq. feet, partly constructed on Plot A and partly on Plot B. Part of the overall redevelopment also was on Plot C in that the petrol pumps and canopies for the petrol station were located on that plot. The entire area of the four plots, that is, Plots A, B, C and D amounted to slightly in excess of two acres.
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> 1.5 The solicitors for the Company furnished a solicitors' undertaking dated the 30th May, 2006 on behalf of the Company to the Bank. The property identified in that undertaking was "1.25 acre premises with buildings, Shercock Road, Carrickmacross, Co. Monaghan AND 40,000 sq. foot building on 2 acres at Carrickmacross, Co. Monaghan as outlined in red on attached map". The attached map outlined an area which covered all of Plot A, Plot B and Plot C. That undertaking was furnished by the solicitors for the Company and was signed by a partner in the solicitors acting for the Company and was received by the Bank…….
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> 1.9 The Company defaulted on its payment obligations to the Bank and on the 12th January, 2011 the Bank appointed Ken Fennell as receiver and manager over all of the assets of the Company on foot of the deed of mortgage. It is apparent that as of 12th January, 2011 the Bank proceeded on the basis that the Bank's security had been perfected and that the Quinn lands, that is, Plot B and Plot C were covered by the deed of mortgage. The evidence that I heard established that it neither occurred to the Bank, the receiver nor the defendants that the deed of mortgage did not cover Plot B and Plot C and all parties, that is, the Bank, the receiver, the defendants and the Company, proceeded on the basis that the Bank's mortgage covered all the lands where the Company's property was located, that is, Plot A, Plot B and Plot C. The evidence established that after the appointment of the receiver, he employed the defendants to assist him in managing the business pending a sale of the Company's assets. An early sale of the Company's assets was not achieved and the defendants' efforts to compromise the Bank's claim and regain control of the business of the Company proved unsuccessful. The receiver then proceeded on the basis that he would manage the Company business for a further period of time with his own staff and therefore did not require the assistance of the defendants. That resulted in a series of incidents including a sit-in and proceedings were issued by the receiver entitled "Ken Fennell and by Order Cloughvalley

Stores Ltd. Plaintiff and Michael Quinn and Brigid Quinn, Defendants, Record No. 2011/84878P. The receiver sought an injunction within those proceedings to restrain trespass and that injunction was granted by this Court on the 9th June, 2011.

1.10 After the receiver had obtained the injunction, he proceeded to endeavour to sell the Company's assets. It was at that stage that the receiver identified that the deed of mortgage did not refer to either Plot B or Plot C and those lands were retained by the defendants in their own names. The Bank's security over those lands, that is, Plot B and Plot C had not been perfected and it is the discovery of that fact which gives rise to the dispute, the subject matter of this case.

2.2 The defendants seek to resist the plaintiff's claims on a number of grounds. The defendants expressly deny the existence of any agreement to create a charge over either Plot B or Plot C. The second ground upon which the defendants defend these proceedings is that they deny that McDonagh Breen, Solicitors, had any authority to give the undertaking to the Bank. A third ground is that the defendants deny that an equitable mortgage has been created by the deposit of title deeds since it is contended that as a matter of law the deposit of copy title deeds does not create an equitable mortgage. A fourth ground is that the defendants contend that an equitable mortgage cannot have been created by either of them since they are not indebted to the Bank. A fifth ground is that the defendants claim that even if there was an agreement to create a legal mortgage over Plot B and Plot C, that that agreement was an agreement between the Company and the Bank and the defendants are not bound by it. In this regard the defendants rely on the separate legal personality of the Company. The issue of the separate legal personality of the Company was identified by the defendants as being fundamental to their case. In the defendants' closing submissions it was stated:

> 'Throughout this case, the defendants, Michael and Brigid Quinn, have drawn or have sought to have drawn a clear distinction between themselves as two individuals who own Plots B and C, on the one hand, and the company, Cloughvalley Stores Limited, and themselves as directors/shareholders of Cloughvalley Stores Limited, on the other hand. That distinction and the legal basis for it, are fundamental to this case.'

The defendants also contend that they are not indebted and were not at any material time indebted to the plaintiff and that neither of the defendants gave a personal guarantee to the plaintiff Bank.

3.6 The evidence that I heard established that the defendants both intended and believed that the loan agreement and the subsequent facility letters were to and did create a charge over the entire supermarket site. Thereafter, the defendants proceeded on the understanding and belief that the same had occurred. The evidence of the defendants in relation to this matter was contradictory and inconsistent and I am satisfied that the true position is that both Micahel Quinn and Brigid Quinn at all times proceeded on the basis that the Bank was to have and did obtain by the loan agreement a charge over the entire supermarket site. Brigid Quinn in her evidence, despite attempts to suggest otherwise, acknowledged that the description of the property as a 40,000 sq. foot premises in the facility letter of the 3rd May, 2006 was a reference to the property on Plots A, B and C. Mrs. Quinn endeavoured to contradict that fact by claiming that the security which was agreed with the Bank was limited to Plot A which was the same security as the Ulster Bank. However, later in her evidence, she acknowledged that the agreed security extended not only over Plots A and B but also extended over Plot C. She accepted and acknowledged that the description of 40,000 sq. feet confirmed that the security extended over the entire of the redevelopment and covered Plots A, B and C. She endeavoured to resile from that acknowledgment but I am satisfied that it is clear that Mrs. Quinn knew that the intended charge and the charge which was being offered extended beyond Plot A and included the entire area on which the supermarket was being constructed. The changing and contradictory nature of her evidence is demonstrated by her answers to questions 368 and 369 on Day 3 of the trial, where she said in answer to question 368 that:

> 'Yes, we [Mr. and Mrs. Quinn] did give the security of that description to the Bank in the letter [the security over entire 40,000 sq. foot development]'

and in the next question answered in response to the question as to what she intended to give to the Bank, that she knew that the security intended was over the entire 40,000 sq. foot area;

> 'but the area of the two lands, B and C still remained in our names and the Bank did not take a legal charge on those two areas'.

Michael Quinn in his evidence acknowledged in answer to a number of questions that the agreement which had been reached with the Bank was to give security over the 40,000 sq. foot unit incorporating a supermarket, a car park and eight retail units on circa. two acres at Carrickmacross and he accepted that that incorporated Plots A, B and C. The contradictory and changing nature of Michael Quinn's evidence was demonstrated by the fact that notwithstanding such acknowledgment, he endeavoured to insist that Plots B and C remained in the defendants' own names. I am satisfied that when viewed as a whole, the true position is that both of the defendants knew and were aware of and intended that the agreement between the Bank and the Company would be on the basis that the Company was providing security over all of Plots A, B and C and that the Company either had title to those lands or would acquire title.

4.1 Having considered the evidence and the documents in this case, I am satisfied that the following matters were established in evidence:-

(1) that there was an agreement to give the Bank security by way of a legal charge over all of the 40,000 sq. foot supermarket development including Plots A, B and C;

(2) that the defendants were personally well aware of and part of that agreement and acknowledged and accepted same;

(3) that the agreement of the Company and the participation of the defendants in such an agreement and their willingness to ensure that such agreement would be put in place was accepted and acknowledged by the defendants and they agreed and acknowledged that the Company could undertake that it had or would acquire a good marketable title to the 40,000 sq. foot building on two acres at Carrickmacross as outlined in red on the map attached to the solicitors' undertaking which was the entire of Plots A, B and C;

(4) that the agreement to give the Bank security over all of Plots A, B and C, including the entire development, was acknowledged and repeated on a number of occasions. Such agreement was expressly acknowledged in facility letters subsequent to the agreement of 3rd May, 2006. The entire chain of documents and the evidence of the witnesses called on behalf of the plaintiff and the evidence of Alan Byrne confirms an agreement to provide security over all of Plots A, B and C.

(5) That the solicitors' undertaking was given with the knowledge and consent of the defendants.

> Insofar as the defendants gave evidence to suggest that there was not an agreement to provide a legal charge over all of Plots A, B and C, I am satisfied that that evidence not only contradicted their own evidence and also was both fabricated and untrue. The consistent and unqualified use of 40,000 sq. feet on c. 2 acres in the documentation from the time of the first loan and subsequent thereto, together with the clear basis on which accounts, projections and valuations were prepared, all identify the true basis on which the parties acted. All parties, the Bank, the Company and the defendants, knew where the redevelopment was being constructed and that the full redeveloped project was available to be provided as security and would be provided. All those parties agreed to create a legal charge over all of Plots A, B and C and their intention to do so was clear."

14. By order of 18th January, 2013, Feeney J. ordered:-

> (i) That the Plaintiff is entitled to the declaration sought at paragraph (a) of the endorsement of claim that is that the Plaintiff is entitled to a declaration that under and by virtue of an equitable mortgage made between the Plaintiff of the one part and the Defendants of the other part on 3rd May, 2006, that the sum of €7,693,932.14 together with €18,648.46 for interest up to 13th October, 2011, making in the aggregate, the sum of €71,258.60 stands well charged in the lands and premises more fully described in the second schedule to the Plenary Summons.
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> (ii) That the Plaintiff is entitled to the declaration sought at para. (c) of the endorsement of claim that is that in default of payment of the said monies, payment thereof, be enforced by the sale of the lands more fully described in the schedule to the Plenary Summons with liberty to apply on this issue.
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> (iii) That the Plaintiff is entitled to the declaration sought at para. (e) of the endorsement of claim that is that the Plaintiff is entitled to a declaration that the lands and premises more fully described in the schedule to the Plenary Summons are held by the Defendants to the benefit of the Plaintiff by way of a constructive trust.

15. The Plaintiffs appealed to the Court of Appeal and by judgment delivered *ex tempore* on 21st May, 2015, that Court dismissed the appeal and affirmed the order of the High Court of 18th January, 2013.

16. The Plaintiffs sought to appeal the matter to the Supreme Court on a point of law of public importance and that Court issued a determination in writing on 4th November, 2015, which states at paras. 22 and 23,

> "22. The Court is not satisfied that the decision of the Court of Appeal raises either a matter of general public importance or that it is necessary in the interest of justice that there be an appeal to the Supreme Court. Facts were found and law was applied by the trial judge, and the decision of the trial judge was appealed to the Court of Appeal. The law as to equitable mortgages and constructive trusts are well established concepts in law.
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> 23. Consequently, on neither of the grounds set out in Article 34.5.3 does this Court have jurisdiction under the Constitution to grant leave to appeal from the Court of Appeal. It follows that the applicants are not entitled to a further appeal."

17. The third Defendant appointed a receiver, Ken Fennell, on 12th January, 2011, in respect of its security. In separate High Court proceedings, Ken Fennell and by order of *Cloughvalley Stores Limited v. Michael Quinn and Brigid Quinn* [2011 No. 4878 P.], the Receiver obtained injunctive relief against the Defendants, the Plaintiffs in these proceedings.

18. Arising out of certain actions by the Receiver, the Plaintiffs have now issued separate proceedings [2014 No. 4223 P.] against the third Defendant and Johnny Hoey and Brigid Hoey. A motion to dismiss those proceedings, has also been heard by this Court contemporaneously. and the court will deal with this application by way of separate judgment.

Legal Principles

19. The doctrine of *res judicata* is helpfully summarised in *Delaney and McGrath Civil Procedure in the Superior Courts*, Third Edition Chapter 32

B. Policy Basis of *Res Judicata*

32-02 The doctrine of *res judicata* is firmly rooted in the public policy considerations of ensuring the finality of litigation and preventing vexatious litigation. These concerns are commonly encapsulated in the twin Latin maxims of interest *rei publicae ut sit finis litium* (it is in the public interest that there should be an end to litigation) and *nemo debet bis vexari pro eadem causa* (no one should be sued twice in respect of the same cause). In *Dublin Corporation v. Building and Allied Trade Union* [1996] 1 I.R. 468, Keane C.J. said that the public interest referred to in the former maxim reflected:-

> "The interest of all citizens who resort to litigation in obtaining a final and conclusive determination of their disputes. However severe the stresses of litigation may be for the parties involved - the anxiety, the delays, the costs, the public and painful nature of the process - there is at least the comfort that at some stage finality is reached. Save in those exceptional cases where his opponent can prove that the judgment was procured by fraud, the successful litigant can sleep easily in the knowledge that he need never return to court again."

32-03 Another and not insignificant, policy factor is that underpinning the legitimacy of the judicial system and the administration of justice by ensuring consistency of decision making. Finally, there is a theoretical idea, promoted mainly in older cases and commentary, that a final and conclusion judgment has the character of an admission by the party against whom it is invoked.

The Rule in Henderson v. Henderson

20. The Defendants also invoke the rule in *Henderson v. Henderson*, as applied in this jurisdiction in *Re Vantive Holdings* [2010] 2 I.R. 118 at para. 88 – 89 and *Arklow Holidays Limited v. An Bord Pleanála* [2002] 2 I.R. 99 at paragraph 46 - 48. Wigram V.C. stated at p. 114 – 115 of *Henderson v. Henderson* [1843] 3 Hare 100:-

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

Decision

21. The claim in the present proceedings that the Plaintiffs remain the legal owners of lands set out in the schedule to the Plenary Summons and an allegation that the third Defendant, its servants are trespassing on the lands are the same lands as the subject matter of the order of the late Feeney J. of 18th January, 2013, when he held that the third Defendant was entitled to an equitable mortgage and that the Plaintiffs held the said property on a constructive trust for the third Defendant. Those lands are marked B and C on the map attached to this judgment.

22. The Company of which the Plaintiffs were directors was advanced substantial monies by the third Defendant to develop a supermarket, retail units and petrol station. It has been decided in previous proceedings that the third Defendant advanced the monies and was at all times assured by the Company and its directors, (the Plaintiffs) and its solicitors, (the first and second Defendants), that it had appropriate security on the property on which the supermarket, retail units and petrol station and pumps were constructed, which are marked A, B and C on the attached map.

23. Its security permitted the third Defendant to appoint a Receiver if the company defaulted in its obligations under the loan.

24. The Plaintiffs have no right to pursue reliefs on behalf of the company. Insofar as they are seeking reliefs, it relates to the ownership of lands marked B and C on the map which had remained in their personal ownership. The High Court has determined that the Plaintiffs held these lands by way of constructive trust on behalf of the third Defendant and decided that the sum of €7,712,580.60 stands well charged on the said lands by way of equitable mortgage.

25. Insofar as the proceedings relate to the third Defendant, they are *res judicata*. Any matters contained in the proceedings which are not *res judicata* cannot be proceeded with due to the provisions of the rule in *Henderson v. Henderson*.

26. It is, therefore, appropriate to accede to the reliefs sought by the third Defendant and accordingly, it is entitled to an order in accordance with (c) and (d) of the motion of 4th September, 2014, that is:-

"(c) an Order striking out the within proceedings on the grounds that the substantial issues in dispute between the Plaintiffs and the third Defendants are *res judicata*;

(d) an Order dismissing any matters raised in the within proceedings which are not *res judicata* on the grounds that they should have been dealt with in proceedings entitled Allied Irish Banks plc v. Michael Quinn and Brigid Quinn [2011 No. 9355 P.]."

27. It is appropriate also an Order should issue preventing the Plaintiffs from issuing any further proceedings against the third Defendant, without leave of the Court.

28. Insofar as the motion of the first and second Defendants is concerned they are entitled to a strike out of all those pleadings in the Plenary Summons and Statement of Claim which were determined by the late Feeney J. and are *res judicata*.

29. Insofar as any allegation arises that the Plaintiffs did not instruct the first and second Defendants, to give an undertaking to the third Defendant and to prepare a certificate of title in relation to the lands marked B and C on the map and the subject matter of the plaintiffs' claim., that is *res judicata* as the High Court has already determined that the Plaintiffs gave unequivocal instructions to their solicitors to provide an undertaking to the third Defendant.

30. However, *prima facie* issues of negligence against the first and second Defendants arise as before finalising the certificate of title, it is alleged they did not procure the transfer of the lands from the Plaintiffs to the Company of the lands marked at B and C on the attached map and accordingly, did not include those lands in the mortgage document in favour of the third Defendant. It is not clear if the Plaintiffs suffered any loss arising from the alleged first and second Defendant's failure to properly perfect title.

31. For comprehensive purposes, the court will deal with the Plaintiffs' claim based on their amended Statement of Claim. They are not entitled to make an allegation of fraud against the first and second Defendants.

32. It is appropriate that the court gives the opportunity to the Plaintiffs and the first and second Defendants to make submissions as to what portion of the claims in the Plenary Summons and Statement of Claim should be struck out to reflect the decision of the court that any of the matters determined by the late Feeney J. are *res judicata* as against the Plaintiffs.

33. The rule in *Henderson v. Henderson* does not apply in these proceedings to the first and second Defendants as they were not parties to the original proceedings.