Neutral Citation [2013] IEHC 194

THE HIGH COURT

[2009 No. 1059 SP]

BETWEEN

ALLIED IRISH BANKS, plc

PLAINTIFF

AND

RICHARD McKENNA AND VERA McELWAINE

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 2nd day of May, 2013.

The proceedings

1. In these proceedings, which were initiated by special summons which issued on 17th August, 2009, the plaintiff seeks possession of the commercial premises known as the Percy French Hotel, Ballyjamesduff, County Cavan (the Premises). The plaintiff's claim is under a deed of mortgage dated 20th December, 2001 made between the defendants of the one part and the plaintiff of the other part (the Mortgage), on the basis that, before the proceedings were initiated, the plaintiff's power of sale had arisen and become exercisable, but, despite a demand for possession, the defendants have failed to deliver possession to the plaintiff. The Premises comprise unregistered land, not registered land.

2. At the hearing of the special summons, counsel for the defendants, having cross-examined two of the deponents on behalf of the plaintiff, submitted that the proceedings should be struck out on the basis that it had been established that there was impropriety or misconduct in the prosecution of the proceedings, which constituted an abuse of process. Alternatively, it was submitted that the matter should be referred to plenary hearing.

3. Before focusing on the allegations made on behalf of the defendants of misconduct on the part of the plaintiff in the conduct of the proceedings, I propose setting out a broad outline of the relevant dealings between the parties, insofar as there is no factual controversy, and the progress of the proceedings. I will then consider the matters in dispute between the parties which have given rise to the allegations of misconduct.

Outline of dealings

4. The defendants have been customers of the plaintiff's branch in Drogheda since at least 2001. On 13th December, 2001, the plaintiff issued to the defendants a letter of loan sanction sanctioning two loans aggregating IR£465,000, one to part-finance the purchase of the Premises and the other to part-finance the renovations which the defendants intended carrying out to the Premises. The defendants acquired the Premises by virtue of a conveyance dated 20th December, 2001 and they executed the Mortgage on the same day.

5. The Mortgage is an "all sums" mortgage, which has secured, and continues to secure, on the Premises all sums due by the defendants to the plaintiff, including the sums due on their joint current account.

6. The defendants took possession of the Premises and started the renovation work after December 2001. The position of the plaintiff is that within the twelve months following December 2001 the defendants had drawn down all of the loans sanctioned by the letter of loan sanction of 13th December, 2001. The costs of refurbishment greatly exceeded expectations and, in December 2002, at the defendants' request, the plaintiff sanctioned a further advance of €110,000. Precisely how much of the amount thus sanctioned was drawn down is not deposed to. However, the plaintiff's position is that by mid-2003, the indebtedness of the defendants to the plaintiff was in the region of €700,000, although on the basis of the statements of account exhibited, the defendants' indebtedness on the two loan accounts opened on foot of the letter of sanction of 13th December, 2001 was only approximately €545,000. In any event, the loan accounts were restructured at that stage and the principal dispute between the parties arises in relation to the restructuring and the loan agreement entered into by the defendants with the plaintiff in July or August 2013.

7. The defendants had commenced the hotel business in the Premises prior to the restructuring. The business was operated through a company, Royalmark Properties Limited (Royalmark), which also had a current account with the plaintiff in its Drogheda branch.

Progress of the proceedings

8. The following is an outline of the progress of the proceedings:

(a) On 12th October, 2009, Tom Stuart, who at the time was Assistant Manager in the plaintiff's Insolvency and Debt Recovery Unit in Dublin, swore the grounding affidavit to verify the plaintiff's claim for possession. Mr. Stuart was cross-examined by counsel for the defendants on the hearing of the special summons.

(b) An appearance was entered on behalf of the defendants by a firm of solicitors on 27th October, 2009. However, notice of the discharge of that firm was filed in the Central Office on 8th February, 2010. The defendants were unrepresented from then until a new firm of solicitors was appointed to act on their behalf on 27th June, 2012.

(c) An affidavit sworn by the defendants on 8th February, 2010 was filed by the defendants personally on that day. In that affidavit, the defendants pointed to an error in Mr. Stuart's affidavit.

(d) The defendants' affidavit was responded to by an affidavit of 14th July, 2010 (2010 affidavit) sworn by Ciaran Cousins, who described himself as a Manager then employed at the Dundalk branch, but formerly employed at the Drogheda branch of the plaintiff. Mr. Cousins corrected the error in Mr. Stuart's affidavit. I will return to that aspect of Mr. Cousins' affidavit later. In response to a letter dated 17th September, 2010 from the defendants to the plaintiff's solicitors, two affidavits were filed by officers of the plaintiff confirming that the facts set out by Mr. Cousins in

paragraphs 9 and 10 of his 2010 affidavit were true. One was sworn by John Basquille, who described himself as a Manager employed by the plaintiff in Bankcentre in Dublin, on 15th November, 2010. The other was sworn by Coman Brady, who described himself as a Manager formerly employed by the plaintiff at its branch office in Drogheda, on 22nd November, 2010. My understanding is that during the relevant period in 2003 Mr. Cousins was the lending manager in the Drogheda branch and Mr. Brady was the manager.

(e) The defendants swore a further affidavit on 9th February, 2011, which they personally filed on that day. Counsel for the defendants relied on one paragraph only of that affidavit (paragraph 9), to which I will refer later.

(f) No further affidavits were filed until after the defendants' current solicitors came on record. After they came on record, on 15th November, 2012, they served notice of cross-examination of Mr. Stuart and Mr. Cousins on their affidavits which had been filed up to that date.

(g) Around the same time, the defendants' solicitors filed the following affidavits:

(i) an affidavit sworn by both defendants on 9th November, 2010, the essence of which was that the plaintiff had not put the correct loan agreement in evidence before the Court and that they were seeking that the matter be transferred to a plenary hearing;

(ii) an affidavit sworn by the first defendant on 4th December, 2012,in which the first defendant set out what he considered to be the terms of the relevant loan agreement between the defendants and the plaintiff.

(h) Mr. Cousins swore a further affidavit on 23rd January, 2013 (2013 affidavit) in which he disputed the defendants' recollection of the agreement reached in August 2003.

(i) Finally, the first defendant swore a further affidavit on 8th April, 2013, which not only addressed his version of the terms of the relevant loan agreement, but also alleged that, because of the plaintiff's conduct, the defendants were unable to complete the contract for the sale of the Premises which had been entered into in March 2007 at a price of €1.7m and that the plaintiff was liable to them in the sum of €1.7m in respect of the loss of the sale of the Premises.

Order 9, rule 14

9. I am satisfied that Order 9, rule 14 of the Rules of the Superior Courts (the Rules) has been complied with. The affidavit of personal service of the summons, which was sworn by Peter McEvoy on 4th September, 2009, contained the necessary averment that there was nobody in actual possession or in receipt of the rents and profits of the Premises other than the defendants at the time. Mr. Stuart verified that in a further affidavit of 10th October, 2009.

10. By 2012, however, Sergio Giusti was in occupation of the Premises. In an affidavit sworn on 3rd July, 2012, Peter Meade averred that he had served Mr. Giusti personally with the special summons and a covering letter confirming that the adjourned date for the proceedings was 9th July, 2012. He further averred that Mr. Giusti confirmed that he is the leader of the Word of Life Church and that he is now occupying the Premises. He is now calling the Premises the "Word of Life Centre" and he is using the Premises to hold group meeting on Sundays. Mr. Meade averred that there was nobody else in actual possession or in receipt of the rents and profits. That averment was verified by an affidavit sworn on 11th July, 2012 by Robert Amerlynck, an Assistant Manager of the plaintiff employed at Bankcentre in Dublin. 11. I am satisfied that the plaintiff notified Mr. Giusti that the proceedings were for hearing on 17th April, 2013. There was no appearance by, or on behalf of, Mr. Giusti in court on that day.

The error in Mr. Stuart's affidavit

12. In his grounding affidavit, Mr. Stuart exhibited what purported to be a copy of a letter of offer dated 14th July, 2003, which was accepted in writing by both defendants. He set out the terms of that letter of offer as follows:

". . . the Plaintiff offered the Defendants and each of them a loan of €700,000 to restructure their existing borrowings subject to the terms and conditions set out in the said letter and in the Plaintiff's General Terms and Conditions governing Business Lending which included:

(a) that the loan would be repayable over fifteen years;

(b) pending repayment the loan would attract interest at the Plaintiff's Variable Prime Rate plus 1.75% per annum;

(c) the loan would be repayable by means of consecutive payments of €5,300 per month commencing on the 14th day of August, 2003 with any residual balance being payable at the end of the fifteen year term;

(d) the Defendants' liability would be joint and several;

(e) the loan would be secured by a First Charge over the Hotel;

(f) in the event of the Defendants failing to pay any sum on due date the entire debt would become immediately repayable."

The exhibit was a copy of a two page document. The first page was on the letter heading of the Drogheda branch of the plaintiff. It was addressed to the first defendant. It set out, *inter alia*, the terms listed by Mr. Stuart. The second page appeared to be a continuation of the letter, in that it stated that a copy was being sent to the second defendant. It then contained the signature of Mr. Cousins, who was described as "Lending Manager". Further down the page the word "Accepted" appeared in manuscript, which I am satisfied was in Mr. Brady's handwriting. Below, "Accepted", the signatures of each of the defendants appeared. The essence of Mr. Stuart's affidavit was that the terms of the relevant loan agreement were as set out by him, that the defendants were in breach of the terms, that the plaintiff's power of sale had become exercisable and that the plaintiff was entitled to possession of the Premises, which it proposed to sell "in order to recover some of the monies owing" to the plaintiff.

13. It is appropriate to record that Mr. Stuart's affidavit also contained the following averments:

(a) On 15th December, 2008, there was due by the defendants to the plaintiff:

(i) €907,563.76 on foot of the loan account which replaced the two loan accounts on the restructuring in August 2003 (Account No. 80224596), and

(ii) €5,512.42 on foot of the defendants' current account (Account No. 80224166),

making in all €913,076.18. The plaintiff had demanded payment of the said sum in full by letters dated 19th February, 2009 to each of the defendants, copies of which were exhibited.

(b) By letters dated 26th February, 2009, copies of which were exhibited, the plaintiff had demanded possession of the Premises, but the defendants had failed to deliver up possession.

14. The defendants, in their first affidavit of 8th February, 2010, averred that the loan agreement exhibited by Mr. Stuart is not the written agreement which they signed with Mr. Brady and Mr. Cousins in the AIB branch in Drogheda, a copy of which was never forwarded to them. In summary, their account of what happened in July and August 2003 was that they made a complaint to Head Office of the plaintiff about Mr. Cousins. They were subsequently summoned to a meeting in the Drogheda branch, where Mr. Brady and Mr. Cousins were present. They presumed that the meeting was regarding their letter of complaint. On their arrival there was a written loan offer from AIB dated 14th July, 2003 in the terms set out by Mr. Stuart and they were asked to sign it. The first defendant gave his "forthright and frank views" that they could not generate enough income to discharge the monthly repayments commencing on 14th August, 2003 of €5,300 per month, but they would try their best to service and pay interest on the loan which was €2,500 per month approximately. A decision to sell the hotel had already been made. After considerable discussion, Mr. Brady and Mr. Cousins agreed to the proposal and Mr. Brady departed to have the new agreement drafted. The new agreement was presented a short while thereafter and the defendants signed it. They commenced monthly repayments of €2,500 on 15th September, 2003. They exhibited a letter of 4th January, 2006 from the Drogheda branch of the plaintiff, contending that it verified what they had stated. That letter, in my view, is of some significance. It was signed by Mr. Cousins, as Lending Manager, and set out the amounts due by the defendants on the loan account and the current account, which aggregated, at that stage, €759,604. In that letter, the plaintiff's "serious concerns" were outlined, one of which was the defendants' "failure to adhere to commitments to provide for interest on a monthly basis at the rate of €2,500 per month". The defendants were warned that "excess balance attract Surcharge Interest at a rate of 9% per annum, varying, in addition to the interest rate applicable to the account".

15. In his 2010 affidavit, Mr. Cousins referred to what the defendants had averred to in relation to the accepted loan sanction exhibited by Mr. Stuart. He stated that he was "shocked to discover that an error had occurred" in Mr. Stuart's affidavit. He stated:

> "The Plaintiff exhibited . . . a letter of Sanction dated the 14th day of July 2003 comprising two pages. This is the wrong exhibit and the Defendants are quite right in saying so. I now beg to refer to a copy of the correct exhibit in its entirety, dated I believe the 15th August, 2003 . . .."

The copy document exhibited by Mr. Cousins is practically illegible. The original was not on letter heading. It would appear that it was on two blank A4 pages. I think it is probable that it was dated 15th August, 2003. It was addressed to the second defendant. The only other difference between the first page of this exhibit and the first page of the letter exhibited by Mr. Stuart relates to repayment. This exhibit, insofar as it is legible, states in relation to repayment:

> "To be reviewed in full by November 2003 with interest at €2,500 to be provided for monthly by . . . [?] standing order commencing 15/9/2003. Any residual balance will be payable at the end of the repayment period."

As I observed at the hearing, using a colloquialism, it is "as plain as a pikestaff" that the second page of this exhibit is a photocopy of the same document of which the second page of Mr. Stuart's exhibit was a copy. In other words, a photocopy of the second page of the letter of 15th August, 2003 was represented as a copy of the second page of the letter of 14th July, 2003, on which it is common case that the defendants had never indicated acceptance.

16. Mr. Cousins explained how the confusion arose in his 2010 affidavit. His version of what happened is that he wrote the letter of 14th July, 2003 providing that the instalments would be of principal and interest combined. Before posting the letter, he telephoned the first defendant and discussed the letter with him. The first defendant said he could not pay €5,300 per month. Mr. Cousins then contacted Mr. Basquille of Commercial Banking and recommended an amendment. At the time the defendants had informed Mr. Cousins that they had an offer of €1.2m for the hotel and were holding out for a better price. Mr. Basquille sanctioned interest-only repayments from September until November 2003, when the debt would be cleared by the proceeds of sale or, failing that, would be reviewed. Mr. Cousins then went on annual leave. The defendants made a complaint about him to the plaintiff's Customer Care Unit. Subsequently, a meeting was held on 15th August, 2003 at which the defendants discussed their complaint with himself and Mr. Brady. At the meeting the letter he had prepared in July was updated and amended to specify that interest of €2,500 would be provided for monthly by the defendants commencing in September to be reviewed in November 2003. Mr. Cousins then averred:

> "Documentation from the branch file later went from my office to our Customer Care Unit, Commercial Banking Unit, our Insolvency and Debt Recovery Unit, our Legal Department, to the Deputy Ombudsman and Ombudsman and back again to the branch. The file was put into different order, photocopied many times and many original documents have been lost."

At the hearing, the original of the letter of 15th August, 2003 was not forthcoming.

17. The following documents exhibited by Mr. Cousins support his chronology:

(a) A letter dated 19th April, 2003 from the first defendant to Mr. Cousins advising Mr. Cousins that the defendants had decided to sell the Premises and that it was going up for sale "in a couple of weeks", when they had obtained a fire certificate and their accountant had "prepared the books". The first defendant stated that they would try to keep the overdraft as low as possible.

(b) A memorandum signed by Mr. Cousins on 19th July, 2003, obviously, intended for Mr. Basquille. The memorandum stated:

> "We recommend the following amendment to existing sanction, i.e. 700k facility to be interest only pending full

review/full clearance from sale proceeds by 15/11/2003. Clients have an offer of €1.2m already but are holding out for €1.5m which they feel is very achievable."

Below that there was a manuscript note signed by Mr. Basquille, which stated:

"Agreed, subject to best offer being accepted if hotel remains unsold by 30/11/03".

That document was exhibited in Mr. Cousins' 2013 affidavit.

(c) The defendants' letter of complaint, which was dated 14th July, 2003, was to "Joan", whom I assume was an officer in the Customer Care Unit of the plaintiff. As I understand the letter of complaint, it related to the Royalmark current account and the defendants' complaint was that Mr. Cousins had "bounced" cheques drawn on the account and stopped direct debits, which the defendants were concerned would adversely impact on the sale of the Premises.

(d) A letter dated 18th August, 2003, which was co-signed by Mr. Cousins, as Lending Manager, and Mr. Brady, as Branch Manager, to both defendants and which was obviously prepared after the meeting on 15th August, 2003. The letter dealt with the defendants' complaint. In the penultimate paragraph of that letter it was stated:

"As agreed at today's meeting we attach a Letter of Sanction for E700,000. You will note that interest only repayments commencing monthly on 15/09/2003 have been agreed as requested and that the facility will be reviewed by 15/11/2003 in line with updates from yourself".

The 18th August of 2003 was a Monday and the reference to "today's meeting" was obviously to the meeting on the previous Friday, 15th August, 2003.

18. In his affidavit sworn on 4th December, 2012, the first defendant has set out his understanding of what was agreed at the meeting with Mr. Cousins and Mr. Brady, which he believed took place on 14th July, 2003, as follows:

". . . I agreed to a short term forbearance measure and this agreement contained the following terms:

(a) a two year interest only period;

(b) interest only repayments of €2,500 per month;

(c) the sale of the secured premises and discharge the balance of the loan from the proceeds of sale;

(d) an overdraft facility would be provided to allow the business to trade and to meet any expenses incurred in arranging a sale of the secured premises."

19. The conclusion I have come to on the basis of the evidence and, in particular, the contemporaneous documents, is that the meeting at which the defendants signed acceptance of the terms of the restructured loan took place at the branch in Drogheda on 15th August, 2003, and that a true copy of the document they signed, that is to say, the two page letter of sanction of 15th August, 2003, is exhibited by Mr. Cousins in his 2010 affidavit. The terms of repayment in that letter were as set out at para. 15 above. However, I have also come to the conclusion that the defendants have truthfully set out their understanding of the agreement, as set out at para. 18 above, because the accounts were actually operated in accordance with their understanding for two years, as the statements of the restructured loan account illustrate.

20. As regards the loan account, which was opened on 15th August, 2003 with a drawdown of €700,000, the defendants paid the sum of €2,500, apparently, by standing order, for each month from September 2003 to November 2004. Thereafter, the designation of the standing order as "unpaid" became a regular feature of the account. However, they did pay €2,500 in January 2005 and sums aggregating €8,000 throughout the remainder of 2005. The last payment was in January 2006 and was in the sum of €10,000. No further payments whatsoever have been made on the loan account since then. Accordingly, even on the defendants' own version of what was agreed in August 2003, they were in breach because, as was pointed out in the letter of 4th January, 2006 referred to at para. 14 above, they had failed to adhere to the commitment to provide for interest on a monthly basis at the rate of €2,500 per month during 2005.

21. In paragraph 9 of the affidavit sworn by the defendants on 9th February, 2011, the statements on the loan account are referred to and it is contended that the plaintiff "broke" the terms of the loan agreement which the defendants contend was entered into, by imposing surcharges at a time when that loan agreement was being serviced. As I have recorded at para. 20 above, it would appear that the loan account was properly serviced in accordance with the defendants' understanding up to December 2004. That being the case, it is difficult to understand why surcharge interest in the sums of €172.03 and €1,727.54 was debited to the loan account in March and June 2004. However, that is a minor point, when one takes an overview of the defendants' personal indebtedness to the plaintiff, although, of course, the plaintiff should not have imposed what are apparently improper charges on the defendants.

22. As regards the monies due on the current account, which were also secured on the Premises, as of 18th August, 2003, the debit balance was only €1,519.21. The standing order for payment of €2,500 per month to the loan account was obviously on the current account. Before the standing order for December 2004 was designated as "unpaid", the balance due on the current account had grown to in excess of €50,000. In the grounding affidavit Mr. Stuart averred that only two sums had been credited to the current account after September 2005. In fairness to the defendants, in their first affidavit they averred that lodgments of €57,000 which they had made through their "current-deposit accounts" had not been mentioned in Mr. Stuart's affidavit. The statements in relation to the current account exhibited do show lodgments of €57,000 between May and September of 2005, which reduced the debit balance on the current account to €2,533.77 by 5th September, 2005.

Impropriety in conduct of proceedings: the law

23. Counsel for the defendants relied on the commentary in Delany & McGrath in *Civil Procedure in the Superior Courts* (3rd Ed.) (at para. 16 – 47 et. seq.) on the circumstances in which proceedings may be struck out on the basis that it has been established that there has been impropriety or misconduct in the issue or prosecution of the proceedings. In particular, he relied on the commentary in para. 16 – 49 in which a number of cases are discussed in which the Supreme Court considered "the question of whether lies or deliberate exaggeration of a claim can constitute an abuse of process so as to justify the dismissal of a claim". The three authorities

referred to (*Vesey v. Bus Éireann* [2001] 4 I.R. 192; *Shelly-Morris v. Bus Atha Cliath* [2003] 1 I.R. 232; and *O'Connor v Bus Atha Cliath* [2003) 4 I.R. 459 were all personal injuries actions where exaggerated claims had been made by the plaintiffs. None of those cases was dismissed as being an abuse of process. However, the editors point out at paragraph 16 – 52 that Hardiman J. "took a much more hard-line approach" in the most recent case, the *O'Connor* case, stating:

> "[He] added that because exaggeration is not unknown it was fair to state what he believed to be the inherent powers of the court in cases of a gross dishonesty, so as to remove any possible unfairness involved in exercising those powers in a future case without warning. Hardiman J. pointed out that his comments were obiter in view of the trial Judge's finding that the plaintiff had not been subjectively dishonest. Given the tenor of Hardiman J.'s remarks in these decisions, plaintiffs should ignore them at their peril . . .."

Conclusions on application to strike out

24. The defendants' liability to the plaintiff on the loan accounts is governed by the terms of the letters of offer which were accepted by the defendants, thus giving rise to the loan agreements. Accordingly, the letters of offer are as important as the Mortgage in determining whether the plaintiff's power of sale is exercisable because of default on the part of the defendants in repaying the loan. Having regard to the finding I have made above, I consider that, for present purposes, the relevant letter of offer, which was accepted by the defendants, is the letter of 15th August, 2003, because that gave effect to the restructuring of the previous loans, so that the previous letters of offer were superseded. I find it incomprehensible that whoever had responsibility for, and custody of, the defendants' file in the Drogheda branch did not appreciate the importance of that letter and did not remove it from the file and replace it by a copy when the file was "doing the rounds", as outlined by Mr. Cousins. The fact that the original was not available to be exhibited in these proceedings, in my view, amounts to gross negligence on the part of the plaintiff.

25. However, even on the "hard-line" approach to the impact of false testimony on a litigant's case, what is required is "gross dishonesty". Counsel for the defendants urged the Court to make a finding that, by exhibiting the two page document he exhibited as purporting to be the relevant letter of offer on which the defendants put their signatures to signify acceptance of the terms, the plaintiff's deponent put false facts before the Court and the plaintiff is not entitled to possession when it was dishonest. Counsel for the defendants further criticised Mr. Stuart for not filing a corrective affidavit himself and submitted that, in not doing so, he did not follow best practice.

26. I accept Mr. Stuart's evidence that he asked the Drogheda branch to furnish to him the specific document dealing with the defendants' liability for the debt, that is to say, the most recent accepted sanction letter, not the entire file. I also accept that what was sent to him from Drogheda was the copy letter with the incorrect second page, which he exhibited in his grounding affidavit. I am satisfied that the error originated in the Drogheda branch. There is no evidence that Mr. Stuart knew, or could have known, that what he was sent was not a true copy of the two page document signed by the defendants. Accordingly, I find that there was no dishonesty on his part.

27. Mr. Cousins has given a plausible explanation as to why the false copy of the accepted letter of offer came into being in the passage from his 2010 affidavit quoted at para. 16 above. Nothing arose in the course of his cross-examination by counsel for the defendants which could lead to the inference that the false document came into being because someone in the Drogheda branch was dishonestly motivated to deliberately misrepresent the defendants' liability to the plaintiff for repayment of the restructured loan. Accordingly, I have come to the conclusion that, in representing to the Court that the defendants' liability to repay the restructured loan was as per the first page of the letter, which was dated 14th July, 2003, and which was exhibited by Mr. Stuart, the plaintiff was not in any way dishonest, but made a mistake which could, and should, have been avoided if proper steps were taken in the branch to preserve the original and prevent it being mishandled.

28. Reliance on the terms of the letter of 15th August, 2003 and the breach thereof by the defendants to support an application for possession of the Premises, in the events which have happened, does not involve any imposition of unfairness or injustice on the defendants. As I have demonstrated, the operation of the loan account for two years from 15th August, 2003 and beyond that period, subject to the qualification in relation to the surcharge interest debits referred to in para. 21 above, was consistent with the first defendant's understanding of the terms of the restructured loan. Unfortunately, the defendants did not comply with the terms as understood by them and I think it is not unreasonable to infer that the reason for not complying was because they were unable, not unwilling, to do so. Even on the basis of the defendants' understanding of their repayment obligations, by January 2006 the plaintiff was entitled to enforce its security.

29. There is no basis on which the Court could strike out the proceedings because of the error in Mr. Stuart's affidavit, which error was corrected immediately when attention was drawn to it by the defendants.

Remit to plenary hearing

30. One reason advanced by counsel for the defendants for the Court remitting the proceedings to plenary hearing was to enable the defendants to establish dishonesty on the part of the plaintiff. For the reasons I have outlined above, I am of the view that the affidavit evidence before the Court, in combination with the oral evidence as the result of the cross-examination of Mr. Stuart and Mr. Cousins, establishes that there was no dishonesty on the part of the plaintiff.

31. There were other issues raised by the defendants in their affidavits. One was an allegation that Mr. Cousins had induced the defendants to artificially inflate the earnings of Royalmark to give the plaintiff a wrong impression of the turnover of the hotel business because he, Mr. Cousins, was being held to blame by his superiors for the defendants' and Royalmark's lack of performance. Mr. Cousins denies that he ever told the defendants to do any such thing. That allegation pre-dates the restructuring of the loan in 2003. There was also the issue raised in the final affidavit of the first defendant as to the loss of the sale of the Premises and, in consequence, the loss of €1.7m because, it was alleged, by reason of the conduct of the plaintiff, the defendants were unable to close the sale.

32. The Court's jurisdiction under Order 38, rule 9 of the Rules gives the Court a discretion to adjourn proceedings commenced by special summons to plenary hearing. In Delany & McGrath (*op. cit.),* at para. 27 – 20, it is stated that the test to be applied in deciding whether to adjourn the proceeding to plenary trial is whether issues of fact arise which can only be, or which can best be, resolved by a plenary hearing.

33. In these proceedings, the entitlement of the plaintiff to the relief it seeks, that is to say, an order for possession of the Premises, has been clearly demonstrated on the evidence before the Court, notwithstanding the error in Mr. Stuart's affidavit. In relation to that error, Mr. Stuart and Mr. Cousins have been cross-examined on behalf of the defendants. In my view, nothing could be gained as regards the alleged dishonesty issue by remitting the matter to plenary hearing. As regards the other allegations by the defendants

against the plaintiff, none of them, if true, inhibit the entitlement of the plaintiff to an order for possession on foot of the Mortgage. It is open to the defendants, if they so wish, to bring proceedings against the plaintiff, but, obviously, there is a time factor involved, which would have to be considered.

Order

34. The Court has no option but to make an order for possession of the Premises. However, in the light of what is stated at paras. 21 and 28 above in relation to the debits for surcharge interest, the statements on the loan accounts should be reviewed by the plaintiff.

35. Unfortunately, the defendants, who, as the evidence clearly demonstrates, are decent, honest and hard-working people, have been genuine victims of the "Celtic Tiger", curiously, of the "boom" element of it as much as of the "bust" element. The Court will hear submissions as to whether the order should be stayed and, if so, for how long.