THE HIGH COURT

[2014 No. 1799 S.]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND
CARMEL DOHERTY
AND
JOHN DOHERTY

DEFENDANTS

JUDGMENT of Ms. Justice Faherty delivered on the 29th day of June, 2018

1. This matter comes before the court by way of the plaintiff's motion for summary judgment against the defendants in the sum of €98,213.55.

Background and procedural history

2. The background to the within application is set out in the grounding affidavit of Andrea de Courcey, Legal Case Manager with the plaintiff, sworn 8th May, 2015.

3. The defendants applied to the plaintiff for a mortgage loan in respect of property at 10 Churchlands Manorcunningham, County Donegal ("the property"). The said property was the family home of the defendants. By mortgage loan offer letter dated 11th January, 2007, the plaintiff offered the defendants the sum of €225,000 to be repaid over twenty years. The defendants agreed to the terms of the loan offer and drew down the funds on 15th January, 2007. A charge was duly registered on the property in favour of the plaintiff. It is accepted that the mortgage fell into arrears. By letter of demand dated 12th December, 2013, the plaintiff requested payment of all monies due.

4. The summary summons issued on 9th July, 2014 and the special endorsement of claim thereto claimed the sum of €186,127.96 as due and owing by way of principal and interest as of 19th June, 2014. The defendants entered an appearance on 8th August, 2014. A receiver, Michael McAteer of Grant Thornton ("the Receiver"), was appointed on 12th September, 2014, pursuant to the terms of the mortgage contract.

5. A motion for summary judgment dated 6th November, 2014 before the Master of the High Court was struck out by reason of the plaintiff's non-attendance. Subsequently, the within motion issued on 25th May, 2015, some three months after the plaintiff wrote to the defendants on 22nd February, 2015, advising that after the sale of the property, the balance on the mortgage stood at €95,555.36 and that that amount did not include "fees and costs of €39, 994.25" in relation to the sale and maintenance of the property, interest that continued to accrue on the defendants' account on a daily basis and any fees and costs that had been paid in the maintenance of the mortgage.

6. At the date of the swearing of Ms. de Courcey's grounding affidavit (8th May, 2015), the sum due and owing was said to be €95,998.57, together with ongoing interest, taking into account a credit of €91,830,13 to the defendants' loan account on 23rd December, 2014 following the sale of the property by the Receiver.

7. The first named defendant swore a replying affidavit on 2nd September, 2015, wherein she takes issue, inter alia, with the manner in which the property had been disposed of, described by the first defendant as having been done by way of "an inhibition transfer" along with 79 other properties to Targeted Investment Opportunities PLC.

8. By affidavit sworn 25th October, 2015, the first defendant sought discovery from the plaintiff of the original loan offer letter together with the Deed of Transfer to Target Investment Opportunities plc. and the contract of sale in respect of the property.

9. In her supplemental affidavit sworn 28th October, 2015, the first defendant avers that it came to the defendants' attention that Targeted Investment Opportunities PLC was part of a US investment group called Oaktree Capital Management and that they "seem to work with the National Asset Management Agency". It is further averred that having required the property (along with 79 other properties) for €224m, Targeted Investment Opportunities plc. sold the properties for €382m.

10. It is further averred that Targeted Investment Opportunities PLC "hoodwinked" the defendants and the Court by advertising "the relevant houses on MyHomes.ie at very, very reduced figures and on one day, that being 22/12/2014." The first defendant goes on to aver that the advertised figure for the property on 22nd December, 2014 was €91,600 when properties of the same size in the same location were being advertised in the region of €107,554. She further avers that as of time of the swearing of her affidavit in October, 2015, Targeted Investment Opportunities plc were attempting to sell the property "at the more realistic and market value, that being three times the amount previously valued."

11. The first defendant pointed out that the Receiver was obliged to ensure that the property was adequately valued and that a proper price would be received for the property. She further expressed her concern regarding interference by the plaintiff with the receivership sale. It is further averred that the defendants were suing all concerned parties, including the Receiver, for professional negligence. However, in her submissions to the Court, the first defendant acknowledged that it was not in fact the case that proceedings had issued against the Receiver.

12. The first defendant also disputed the plaintiff's entitlement to pursue the defendants for the alleged balance of monies due after the sale of the property on the basis that the loan had been sold at a loss.

13. In a further affidavit sworn 11th November, 2015, the first defendant again sought discovery from the plaintiff of the loan offer letters dated 19th December, 2006, 11th January, 2007 and 30th April, 2007. She took issue with Ms Fiona Cassidy's averment that the loan offer letter dated 11th January, 2007 was the letter which established the mortgage contract, stating that the relevant letter was that dated 30th April, 2007. The first defendant sought discovery of all documentation pertaining to the property and its sale.

14. On 7th December, 2015, Haughton J. directed that the plaintiff discover all of the documentation relating to the sale of the property.

15. The first defendant swore a further affidavit on 14th December, 2016, repeating her assertion that the relevant loan offer letter was that of 30th April, 2007. It is further averred that the plaintiff got the defendants to sign a loan offer letter of 19th December, 2006 in respect of a property "that did not exist". The first named defendant went on to aver:

> "10. I do say that there is a question regarding the whole legality of the mortgage and that the Defendants must be allowed to view the original wet ink loan offer letters
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> …
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> 13. I do say that the Receiver … was appointed to the property on the 12th September, 2014 and as Receiver is supposed to act in the best interests of the Defendant to secure the best possible price for the property when he is selling the property.
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> 14. I do say that the Receiver did not act in the best interest of the Defendant in the manner in which the property was disposed off.
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> 1 5. I do say that the property was not sold as the Plaintiff states but was transferred to a company called Targeted Investment Opportunities PLC in an inhibition transfer along with 79 other properties, therefore the property was not sold but was disposed off at a reduced price to an investment company therefore denying the [the defendant] her rights to get the full market price for her property."

16. It is further averred that the Receiver had full knowledge of the plaintiff's action and of the fact that there was never an actual sale. It is averred that the figures were just created for the purpose of issuing a summary summons. The first defendant also avers that on foot of the information obtained by them, they issued a plenary summons bearing record no. 2015/5254 P against Bank of Ireland Mortgage Bank and that they would be "attaching Grant Thornton and Michael McAteer in due course."

17. On 29th March, 2016, the defendant issued a motion seeking an order dismissing the plaintiff's claim for non-compliance with the discovery order, together with an order removing the plaintiff's right to re-enter the proceedings. In her grounding affidavit to that motion sworn 29th March, 2016, the first defendant describes it as "very strange" that the defendants' mortgage account was credited with €91,830 on 23rd December, 2014, which was one day after the sale of the property. It is averred that if it had been a legitimate sale it would have taken more than one day to complete the transaction. She further queries why, when the sale price for the property was €91,600, the defendants mortgage account had been credited with more than what had been received for the property, and when it was to be expected that there would have been costs involved in the sale.

18. She repeats her assertion that the Receiver did not act in the defendants' best interests to secure the best possible price for the property. She goes on to state:

> "25. I do say that the Plaintiff Bank have acted fraudulently in that they have tried to add charges to the Defendants mortgage account for cost and [fees] which they state they had paid to the Receiver in the sale of the property. I do further say that the Receiver Grant Thornton have also acted fraudulently in that they did not act in the best interest of the Defendant and that they submitted costs for the sale of a property that they did not sell.
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> 26. I do say that the property was not sold on the 22nd December, 2014 but was transferred in an inhibition transfer to Targeted Investment Opportunities PLC; therefore neither the Bank nor the Receiver can produce the documents granted for discovery, as there was no sale, so there are no documents and if there were they would have been able to produce them by now."

19. On 21st April, 2016, the plaintiff made discovery on foot of the order of Haughton J. dated 7th December, 2015. Among the items discovered by the plaintiff was the contract of sale of the property dated 1st December, 2014 between the Receiver and OCM Luxembourg Venus S.a. r. l.

20. On 20th May, 2016, Ms. de Courcey swore a further affidavit, supplemental to her grounding affidavit, wherein she addressed some of the matters raised by the first defendant in her various affidavits.

21. Ms. de Courcey accounted for the fact that there had been three loan offer letters and repeats her assertion that the loan offer letter dated 11th January, 2007 signed by the defendants on 15th January, 2007 "is the effective letter of loan offer pursuant to which the within proceedings are grounded." She further advised that the arrears on the property which had accrued from November 2012 were cleared by the sale of the secured property when the proceeds of sale were lodged into the mortgage account on 23rd December, 2014, but that the account fell into arrears again on 30th December, 2014 and continued to be in arrears.

22. Ms. de Courcey accounted for the discrepancy between the sale price achieved for the property (€91,600) and the sum credited to the defendants' mortgage account (€91,830.13) on the basis that the difference was "an apportionment of Local Property Tax collected from the purchaser of the secured property on the closing of the sale". She goes on to state:

> "9. I say and believe that the sale of the secured property was part of a portfolio sale for which the Receiver received a global fee, which was then apportioned to the individual properties contained within the portfolio. The apportionment fee together with disbursements for the sale of the secured property in this instance amounted to the sum of €11,085.00. The figure of €11,085.00 was made up of a number of individual items of fees and outlay and in this regard, I confirm that a copy spreadsheet showing the breakdown of that figure of €11,085.00 has already been provided to the First Named Defendant.
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> 10. Notwithstanding that the Plaintiff was entitled to deduct the Receiver's fees and outlay from the proceeds of sale of the secured property before the crediting the Defendants' mortgage account … this was not done so in this instance. I say and believe that if the Plaintiff were seeking to recover the Receiver's fees and outlay, it would be entitled to seek judgment against the Defendants in the sum of €107,083.57."

23. On 15th June, 2016, the defendants issued a motion returnable for 11th July, 2016, seeking an order compelling the plaintiff to comply with the discovery order of 7th December, 2015. In response to the first defendant's affidavit sworn 15th May, 2016, the plaintiff's solicitor, Mr. Dalton, swore an affidavit confirming that the plaintiff's affidavit of discovery had been served on the defendants on 21st April, 2016.

24. On 30th June, 2016, the Master of the High Court refused the plaintiff's application for the transfer of the within matter to the Judges' list. This refusal was appealed by the plaintiff on 7th July, 2016. The appeal was allowed and by Order of Humphreys J. of 10th October, 2016, the matter was transferred to the Judges' list on the basis that the defendants' affidavits disclosed a contest.

25. The discovery issue came before the High Court again on 11th July, 2016. On that date, directions were given by Cross J. that the plaintiff set out the steps it had taken to comply with the Order for discovery made on 7th December, 2015. Further to this direction, Ms. de Courcey swore an affidavit on 3rd October, 2016. She avers, *inter alia*, as follows:

> "7. In respect of discoverable documentation received from the Receiver, it is noted that the contract for sale was provided in redacted form. I say and believe the secured property in this case was part of a portfolio sale comprising a number of other properties. I say and believe that the contract for sale was redacted by the Receiver to protect the identity of the other parties and properties involved in the transaction.
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> …
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> 9. I would also observe that it is somewhat difficult to understand how the discoverable documentation would advance any defence raised by [the] First Named Defendant to the Plaintiff's claim … Despite being in possession of the documents pursuant to the data access request and filing a substantial number of Affidavits, the First Named Defendant has not denied that monies were advanced to her by the Plaintiff, that she drew down the monies and that she failed to make repayments. It is difficult to see how the discovery process would alter this situation.
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> 10. Finally, as concerns the nature of the documents sought by the First Named Defendant, it should be noted that the Plaintiff is not seeking to recover the costs associated with the sale of the secured property from the Defendants in the within proceedings, notwithstanding its entitlement to do so."

26. In her affidavit sworn 4th November, 2016, the first defendant repeats her assertion that the Receiver played no active role in the sale process. She again queries, in circumstances where the property was not sold through a sale agent but rather through Project Venus, why it was advertised for sale on Myhome.ie.

27. With regard to the of sale of the property, the first defendant queries the circumstances which led the vendor to assert that Local Property Tax and an NPPR charge had been paid in respect to the property. The first defendant avers that there was never an NPPR charge payable in respect of the property since the property comprised the defendants' family home. She states, however, that the defendants did pay an NPPR charge in respect of another property they had at 103 Ray, Manorcunningham, County Donegal.

28. The defendants motion of 15th June, 2016, wherein they sought that the plaintiff comply further with the order of discovery of 7th December, 2015, was heard by McDermott J. on 16th January, 2017.

29. The relief sought in the defendants' motion was refused. However, McDermott J. directed that the first defendant be at liberty to file a supplemental affidavit in relation to the valuation of the property, with the plaintiff at liberty to reply thereto. The first defendant duly swore an affidavit on 16th February, 2017.

30. Therein, the first defendant avers, inter alia, that she had spoken to two different auctioneers with a view to getting a valuation for the property at the time of its sale in December, 2014. She avers that she had been informed that it would not be professional of them to give such a valuation given that there were numerous factors such as size, condition etc. to consider when valuing a property. She repeats her contention that the Receiver did not get a valuation on the property and that the sale was not carried out in a *bona fide* fashion and as a consequence, "the sale was improper and an unreasonable exercise of [the] power of sale". In the first defendants "opinion", the Receiver's mind was closed to obtaining a valuation of the property. She avers that "a Mortgagee or a Receiver does not have the power to dispose of the mortgagor's property as if it were their own." She goes on to state:

> "3. I do say that the Receiver in this instance acted solely in favour of the Plaintiff Bank and acted on their instructions to include the property as part of a portfolio sale in a project instigated by the Plaintiff Bank, and that how can the price received for the property be ascertained as the price was bundled with the other properties sold in the portfolio sale. I further say that there is one point that particularly concerns me: if the Court was selling this property it would have to see that it was sold at the best price obtainable. Why should a Mortgagee or a Receiver not be required to do likewise."

31. The plaintiff's response is set out in an affidavit of Ms. Jacinta Enright sworn 16th March, 2017. In response to the first defendant's allegation that the plaintiff was involved in the receivership sale, Ms. Enright avers as follows:

> "9. While…more properly a matter for legal submission, the Plaintiff accepts as a general principle that in some limited circumstances, a Bank may potentially be liable to a borrower if the borrower is able to adduce evidence that the Bank took [an] active role in the receivership sale and that the secured property was sold at an undervalue. However, as noted above, despite obtaining documentation from the Receiver pursuant to a data access request and obtaining an order for discovery against the Plaintiff, the Defendants have failed to adduce any evidence either that the Plaintiff was involved in the receivership sale and that the secured property was sold at an undervalue. In this regard, I respectively say and am advised that the supposition put forward by [the first defendant] must be considered to be a mere assertion which is totally unsubstantiated." She continues:
>
> "… I say and am advised there is not a fair and reasonable probability of the Defendants having a real or bona fide defence. Secondly, and even more significantly, it is absolutely clear from the averment contained in paragraph 7 of [the first defendant's] Supplemental Affidavit sworn on 16th February 2017 that even if this case were to be adjourned to Plenary Hearing, the Defendants would not be in a position to adduce any evidence at all in support of their sole ground of limited defence to the Plaintiff's claim..."

The plaintiff's submissions

32. It is the plaintiff's contention that the defendants have not adduced evidence for the Court to transfer the case to plenary hearing. It is submitted that while the defendants have raised myriad issues in the various affidavits sworn by the first defendant, all that is in reality at issue is whether the secured property was sold at an undervalue. Counsel submits that at its height the defendants' assertion that the property was sold at an undervalue is merely the "opinion" of the first defendant, as is clear from her affidavit of 16th February, 2017. It is submitted that there is no objective evidence of the property having been sold at less than its

market price despite the defendants having obtained information from the Receiver and discovery from the plaintiffs. For the purpose of a transfer to plenary hearing, at a minimum, the defendants would have to put before the Court a valuation from an auctioneer to say that the €91,600 received was not the market value of the property on 22nd December, 2014. That has not been done.

33. The first defendant makes a complaint about the Receiver's failure to advertise the property or obtain a market value. She infers that because it was a portfolio sale that that was a breach of the duty of care owed by the Receiver to sell the property at the best price. It is submitted that even if the Receiver's duty of care to the defendants was breached, as a matter of law the defendants can pursue that issue with the Receiver. As is clear from the charge documentation, and s. 24(2) of the Conveyancing Act 1881 ("the 1881 Act"), the Receiver is the agent of the defendants as mortgagor and, similarly, the defendants as mortgagors are solely responsible for the Receiver's acts unless the Mortgage Deed provides otherwise. It is submitted that, accordingly, the defendants' complaint is not a matter for the plaintiff since the Receiver is not the agent of the plaintiff.

34. There is UK jurisprudence to say that if can be shown that the plaintiff bank interfered with or orchestrated a receivership sale, a defendant may be entitled to an equitable set off, being the difference between the price achieved in a sale and the market value of the property. In the instant case, however, the first defendant has not adduced any evidence of interference by the plaintiff. What is absolutely critical to this case, even if the plaintiff had interfered in the sale and the Receiver breached his duty of care to the defendants, is the defendants' failure to provide some evidence that on 22nd December, 2014 the property was sold at an undervalue.

35. Moreover, despite the defendants having a "data pack" from the Receiver and discovery from the plaintiff, they have not pointed to any factor suggestive of a defence. In particular, they have not pointed to anything to suggest that the property was sold at an undervalue. It is thus submitted that the defendants have not reached the threshold for summary judgment to be denied, as set out in *Aer Rianta v. Ryanair Ltd.* [2001] 4 I.R. 607 and *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1. Accordingly, there is no legal basis for the Court to grant the defendants leave to defend.

The first defendant's submissions

36. In the first instance, the first defendant takes issue with the fact that on 19th February, 2015, the plaintiff intended to seek liberty before the Master of the High Court to enter final judgment in the sum of €186,724.94, yet on 20th February, 2015, it wrote to the defendants advising that the property had been sold and that the defendants owed €95,535.36 exclusive of the fees of €39,942.25 which had been paid to the Receiver.

37. The first defendant points to the breakdown document which was sent to the defendants by the Receiver and which recorded the Receiver's outgoings as €39,942. She submits that the correct figure should have been €39,240. She asserts that this is a significant disparity. Moreover, a letter to the defendants from the Receiver dated 25th May, 2015 referred to the net proceeds of sale as yielding €87,447, yet in the breakdown document the sale price was reflected as €91,600.

38. It is submitted that it was after receipt of the Receiver's breakdown figures that the defendants commenced their research and found that the property had been sold in a portfolio sale on 22nd December, 2014 along with a number of buy-to-let properties. This was so despite the fact that the defendants' property was a family home for which they had paid €260,000.

39. While acknowledging that there was a downturn in the economy at the time the property was purchased by them, the first defendant submits that the sum of €91,600 cannot be reflective of the downturn in property prices given that the property was constructed to a high standard. The downturn in the economy was not to the extent that a house for which the defendants had paid €260,000 could then be sold for €91,600.

40. It is further submitted that contrary to what is set out in Ms. de Courcey's affidavit of 8th May, 2015, the defendants have a clear *bona fide* defence. At the time of the plaintiff's letter of 20th February, 2015 advising that the property had been sold, the defendants presumed the house had been sold in the normal course. They then established that it had been part of a portfolio sale. Yet, the plaintiff led the defendants to believe that the property had been sold in a normal fashion when that was not the case. The property had been put up on Myhome.ie for one day only and then taken down. On 22nd December, 2014, it appeared again on that website as "sold" for €91,600. It is submitted that this was done for the purpose of making it appear as if the property was sold in a normal sale. It is further submitted that the contract for sale as appears in the plaintiff's discovery is not a proper contract for sale. It is not signed. Moreover, the purchase price is blocked out. The first defendant also contends that the Receiver's signature on the contract is different to the signature which appears on the Deed of Appointment.

41. It is submitted that the onus is on the plaintiff to show the true price obtained for the property and the mechanism by which the price obtained was determined, given that the property was sold as part of a portfolio sale. It is submitted that the only way to establish the truth is by way of plenary hearing, which in turn will establish the true debt owed by the defendants to the plaintiff. The first defendant thus contends that the defendants had met the threshold for plenary hearing as set out in the relevant case law and that it is not clear that the defendants have no defence. Moreover, the defendants have a right of access to the courts and the summary procedure denies them that right.

The plaintiff's reply

42. Counsel submits that it is clear from her affidavit sworn 4th November, 2016, and her oral submissions that the first defendant has acknowledged that a debt is due and owing to the plaintiff. Nor is it disputed that the plaintiff was entitled to appoint a Receiver on foot of the Mortgage Deed and the 1881 Act.

43. The fact that the property was not sold in the normal fashion does not, counsel submits, translate into a defence for the defendants. While the first defendant alleges a loss on the sale of the property she does not say how that loss has come about. Even if the Receiver was negligent in his actions the defendants have not shown any evidence as to how this has resulted in a loss to them. The realities of commercial life are that Receivers are appointed and there are many types of sale of assets which can take place. The fact that the defendants are upset because of the bundling up of their family home as buy-to-let properties for the portfolio sale cannot assist the defendants in their request to transfer the matter to plenary hearing unless the defendants show to an arguable basis that the Receiver's actions led to a sale at an undervalue. Moreover, even if the defendant could establish a loss, they have to show on an arguable basis that the plaintiff is liable for that loss.

44. Insofar as the defendants have any grievance, it can only be with the Receiver, as is clear from Mortgage Deed and the 1881 Act. Even if the Receiver's duty of care was breached, the defendants have to show an arguable case that €91,600 did not represent market value, which has not been shown.

45. Insofar as the defendants' point to evidence that might possibly amount to a defence, namely the first defendant's averment that

in October 2015 Targeted Investment Opportunities plc advertised the property for sale at €135,000, that is not sufficient for the defendants to be allowed go to plenary hearing as the plaintiff would still be entitled to judgment of €54,813.55, and that is even before any argument as to whether the defendants would be entitled to an equitable set off.

Considerations

46. The issue for the Court is whether there is a sufficient basis for the proceedings to go to plenary hearing. As observed by Hardiman J. in Aer Rianta v. Ryanair Ltd. [2001] 4 I.R. 607, "*… the defendant's hurdle on a motion such as this is a low one and that the jurisdiction is one to be used with great care*". He further opined:, at p.623

> *"In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

47. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, at p. 7, McKechnie J., having reviewed the relevant jurisprudence, set out the principles to be applied by the courts in the assessment of an application for summary judgment. He stated:

> *"From these cases it seems to me that the following is a summary of the present position:-*
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> *(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
>
> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;*
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> *(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
>
> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
>
> *(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."*

48. In *McGrath v. O'Driscoll & others* [2006] IEHC 195, Clarke J., noting the test set by *Aer Rianta*, nevertheless opined, at para. 3.4 that "*so far as factual issues are concerned it is clear … that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved."*

49. In *GE Capital Woodchester Ltd. v. Aktiv Capital Asset Investment Ltd.* [2009] IEHC 512, Clarke J. reprised his view that vague and generalised contentions are not sufficient to oppose summary judgment. He stated:

> *"6.6 Likewise, there will always be cases where the true nature of a defendant's defence will rest in evidence (whether documentary or otherwise) which will only become available through procedural devices such as discovery, interrogatories or the like. That is not to say that it is open to a defendant, on a summary judgment application, to make a vague and generalized contention which would amount to nothing more than an assertion that something useful to his case might turn up on discovery or the like. However, it seems to me that where a defendant satisfies the court that there is a credible basis for asserting that a particular state of facts might exist which state of facts, if same were in truth to exist, could be established by appropriate discovery and/or interrogatories, then such defendant should be entitled to liberty to defend. It should, again, be emphasized that mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of the motion for summary judgment, possible to put before the court direct evidence of the assertion concerned."*

The foregoing is the legal backdrop against which the defendants' opposition to summary judgment must be assessed. A number of matters have been raised by the first defendant in her affidavits and oral submissions.

50. Firstly, the first defendant points to the dichotomy between the letters of 20th February, 2015, which stated that the defendants owed €95,555.76, and the motion of 19th February, 2015, which refers to a debt of €186,000. Albeit no doubt bewildering and

confusing for the defendants, I find however that this is of no particular relevance as, in the within application for liberty to enter final judgment, account has been taken of the sum received by the plaintiff from the receivership sale.

51. Secondly, the first defendant refers to an alleged discrepancy in the sum claimed by the Receiver by way of fees and outlay. However, the defendants have not in fact been levied with the Receiver's fees and outlay and the plaintiff has stated that it is not seeking to recover the Receiver's costs and outlays from the defendants, as has been made clear in Ms. de Courcey's supplemental affidavit of 20th May, 2016. Accordingly, while I have enormous sympathy with the sense of shock the defendants must have felt in February 2015 when confronted with the spectre of a bill for €39,000 in respect of the Receiver's costs, on top of the balance still owed on their mortgage after the sale of the property, the fact of the matter is that they are not now being levied with the Receiver's costs.

52. Thirdly, the first defendant queries why two different net proceeds of sale figures (€88,477 and €91,600) were advised by the Receiver. While again confusing for the defendants, it is a fact that it is the higher of those two prices (€91,600) that was credited to the defendants' account on 23rd December, 2014, together with a refund for LPT of €230.13. Accordingly, I am constrained to find that the first defendant's arguments on this issue is not particularly germane to the issue which I have to decide in the within application.

53. The principal ground of defence advanced is that the plaintiff was actively involved in the sale of the defendants' home and that same was sold for less than its market value as of December 2014. In aid of her submission that the plaintiff was actively involved in selling the defendants' property, the first defendant points to the data pack which the defendants received from the Receiver on foot of a data access request and which included a series of emails dated 24th September, 2014, 8th October, 2014, 2nd November, 2014 and 5th November, 2014.

54. Insofar as the first defendant relies on the said emails, the first thing to be observed is that the emails relate solely to correspondence which emanated from the Receiver's office to third parties. Moreover, all of the emails postdate the Receiver's appointment. The first defendant places particular reliance on the email dated 24th September, 2014 which was sent to the offices of the Revenue Commissioners by a Ms. McCaffrey in the Receiver's office. The email reads as follows:

> "A large number of TRI forms had been sent to your offices lately due to a portfolio sale taking place with Bank of Ireland."

55. The email then lists a number of properties (all redacted save the defendants' property) in respect of which an update was sought from the Offices of the Rvenue Commissioners on the status of the tax registration of the defendants' property. A further email of 2nd November, 2015 from Danielle Grant of the Receiver's Office to its "Professional Standards" department refers to the defendants' property having been sold as part of "the Project Venus portfolio sale".

56. It is submitted by the first defendant that the import of the email of 24th September, 2014 is that when on 12th September, 2014 the plaintiff appointed the Receiver, it was aware that the defendants' property was to be included in a sale to Project Venus. The first defendant contends that that the reference to the plaintiff bank in the email is sufficient to link the plaintiff to direct involvement in the sale of the defendants' property.

57. It is further submitted that the thrust of this email shows that the plaintiff had earmarked the defendants' property to go into Project Venus even before the Receiver did so. The first defendant maintains that the plaintiff only appointed the Receiver in order to lead the defendants into believing that the property was going to be sold in the course of a normal sale.

58. I note, however, that the 24th September, 2014 email was sent some nine days after the appointment of the Receiver over the defendants' property. The author of the email is an employee of the Receiver and not the plaintiff.

59. Undoubtedly, there is reference to the plaintiff bank in the email. Counsel for the plaintiff submits that at best, the first defendant is asking the Court to assume, from the contents of the email, that the plaintiff instructed the Receiver to sell the defendants' property to Project Venus. Counsel submits that the defendants have adduced no evidence to this effect. It is further submitted that this is so notwithstanding the defendants' data request having been responded to by the Receiver, and the plaintiff having made discovery.

60. I am minded to agree with the plaintiff's submission. I am not persuaded that the wording of the 24th September, 2014 email is sufficiently cogent as might constitute an arguable case that the plaintiff was the instigator of the sale, or a primary actor in the sale of the property.

61. Lest I am in error in finding no arguable basis has been established that the plaintiff was involved in the sale, there remains the question of whether the defendants have established an arguable ground that their home was sold in December, 2014 for less than the market value. On 16th January, 2017, McDermott J. gave the defendants an opportunity to file a further affidavit regarding the valuation of the property. However, the defendants have not furnished any arguable evidence (even of a hearsay nature) that the sum of €91,600 represented less than the market value. The first defendant avers that she spoke to two auctioneers with a view to getting a valuation and that she was advised that any valuation they would give would only be a "guesstimate". Even if the Court were of the view that an arguable basis had been raised in respect of the defendant's contention that the plaintiff was actively involved in the sale of the property, in the absence of any arguable factual basis to underscore the claim that the property was sold for less than its market price, I am constrained to find, at this juncture at least, that the first defendant's claim constitutes a mere assertion which, case law establishes, does not suffice for a transfer to plenary hearing, particularly in circumstances where the debt is admitted.

62. I note the decision of Dunne J. in *Anglo Irish Bank Corporation Ltd. v. Collins and Kiernan* [2011] IEHC 385, which the Court finds of assistance in the present case. In *Anglo Irish Bank Corporation Ltd. v. Collins and Kiernan*, the defendant alleged that the receiver was negligent in the exercise of his functions and that Anglo was vicariously liable for the alleged negligence of the receiver. The case made by the defendants against the receiver and Anglo was that they owed a duty of care to the defendants not too hastily sell property at a knock down price, not to conduct themselves in such a way as to unfairly prejudice or damage the viability of the development in question or the credibility of the property on the market place and not to do anything which would render the property unmarketable and unmortgageable.

63. In respect of the alleged breaches of duty in the above regard, Dunne J. found nothing in the evidence to suggest that the appointment of a receiver was in any way inappropriate and found no evidence to support the contention that the replacement of the existing auctioneer and solicitor by the receiver was unsatisfactory. Nor did she find evidence that the title was unmortgageable or

unmarketable. Dunne J. found that the defendants failed to establish a breach of the duty undoubtedly owed to them by the receiver. In the course of her judgment she went on to state that even if she were wrong in coming to that conclusion, there was not "*a scintilla of evidence to show that any loss had flowed to the defendants*" arising from the manner in which the receiver had conducted the sale. In those circumstances she did not have to consider the question as to whether or not Anglo Irish Bank Ltd. could be liable in respect of any wrongdoing on the part of the receiver. As far as the present case is concerned, even allowing for the low threshold which applies in cases of this nature, I have found that no arguable basis put has been put forward that the property was sold at an undervalue.

64. The first defendant also pointed to the contract for sale between the Receiver and OCM Luxembourg Venus S.a.r.l. (Project Venus) which, she submitted, discloses no purchase price. It is further contended on affidavit that the Receiver's signature as appears on the contract for sale appears different to the signature on the Deed of Appointment. The Deed of Appointment has not been put before the Court. Moreover, the first defendant did not elaborate on this issue in the course of her submissions to the Court. Apart from the fact that any discrepancy regarding the Receiver's signature is a matter for the defendants to pursue with the Receiver, I note that no factual basis has been disclosed to the Court upon which the Court could make any assessment as to whether an arguable ground of defence has been raised on this ground.

65. The first defendant also points to the plaintiff's discovery which yielded a certificate from Donegal County Council dated 4th December, 2014. This confirmed that a NPPR charge had been paid in respect of the property for the years 2009 to 2013. The first defendant queries how this can be given that the defendants did not pay an NPPR charge for this property, albeit the defendants paid an NPPR charge in respect of another property they owned at 103, Ray, Manorcunningham, County Donegal.

66. While I note the first defendant's submissions in this regard, I find that this discrepancy has no particular bearing on the issue which the Court had to determine in this case, namely, whether the defendants have satisfied the Court that there is a arguable basis for asserting that a particular state of facts might exist.

67. In all the circumstances of this case, I find that no arguable basis has been established that the plaintiff was actively involved in selling the defendants' property and, more particularly, no arguable basis has been put before the Court to support the defendants' contention that the property was sold in December 2014 for less than its market value.

68. The plaintiff will therefore be granted liberty to enter final judgment in the sum of €98,213.55.

69. I will hear submissions on the issue of a stay of execution.