



THE COURT OF APPEAL

Appeal No. 2017/364

Whelan J.  
McGovern J.  
Baker J.

BETWEEN/

ACC LOAN MANAGEMENT LIMITED

PLAINTIFF/RESPONDENT

- AND -

OLIVER KELLY AND MARGARET KELLY

DEFENDANTS/APPELLANTS

**JUDGMENT of Ms. Justice Baker delivered on the 22nd day of March 2019**

1. This is an appeal from an order made by Eagar J. that ACC Loan Management Ltd ("the Bank") be entitled to summary judgment in the sum of €671,097.14 against the defendants, he having determined that the defendants had advanced no arguable defence to the claim.

2. Eagar J. delivered a written judgment on 10 July 2017, *ACC Loan Management Ltd. v. Kelly* [2017] IEHC 454, in which he set out the evidence and noted the defences asserted by the defendants which he considered did not meet the threshold required to remit the proceedings for debt to plenary hearing.

3. The defendants appealed the judgment and order of Eagar J. The grounds of appeal may be summarised as follows:

(a) that at least €489,000 of personal monies alleged to have been deposited with the Bank since 2006 is "missing";

(b) that the sums of €95,000 and €75,000 were unlawfully taken by the Bank from deposit accounts operated by the defendants with the Bank and applied to loan accounts in 2006; and

(c) that the Bank failed to honour an agreement allegedly made in 2006 to provide funding to the defendants for a proposed development at 3 and 4, St. Laurence's Park, Wicklow town, which it is alleged caused a loss of €4m.

4. The appeal is fully defended.

5. The appellants are litigants in person and Mr. Kelly made the arguments on behalf of himself and his wife who attended at the hearing of the appeal. The primary ground of opposition advanced by the Bank to the appeal is that the matters sought to be raised before Eagar J. in defence of the claim were matters which more properly are to be characterised as cross-claims or counter-claims, but that even taking at their height the assertions made by the defendants in the replying affidavits before the High Court, the matters therein deposed to are mere assertions and do not meet the threshold of establishing that a *bona fide* defence or cross-claim exists.

6. The main focus of oral argument by Mr. Kelly at the hearing of the appeal was what he termed the "missing money", which he says represents funds lodged by the defendants into a deposit account or accounts with the Bank, and in respect of which the Bank has declined or failed to answer his queries.

7. Notwithstanding that Mr. Kelly made an assertion of fraud in one sentence in his second last affidavit before the High Court, his assertion is that the Bank mistakenly, rather than as a result of fraud, failed to credit the deposit accounts with substantial lodgements and that the money remains untraced within the Bank's records.

8. Mr. Kelly accepts that the amounts in respect to which he makes these assertions are very significant and that it may appear improbable that the Bank records would have failed to show the whereabouts of these monies, but he points to two serious errors in the Bank's process as a result of which documentation intended for himself and his wife were sent to the wrong address. These events have led him and his wife to take a view that the Bank processes and records are not reliable.

**Factual background**

9. Mr. and Mrs. Kelly are a married couple who have developed residential investment property in Wicklow, and who owned a licensed premises in County Wicklow and another in Strokestown, County Roscommon. The Bank's claim arises from two loan facilities granted in 2006. The first facility was advanced pursuant to a loan agreement made on or about 2 August 2006 by which the Bank agreed to advance to Mr. and Mrs. Kelly the sum of €300,000 to purchase a residential investment property. The loan was to be secured on the premises to be purchased and on another also in Wicklow town, and the contract also provided for the deposit of the sum of €35,000 in a deposit account with the Bank by way of security. The claim in respect of this loan facility is made following the sale by the receiver of the secured premises and arising from which a formal demand issued on 23 October 2013 in the sum of €71,097.44, the balance left after the proceeds of sale were applied to the then outstanding loan.

10. The second facility was advanced pursuant to a loan agreement made on or about 22 November 2006 by which the Bank agreed to provide a loan facility to Mr. and Mrs. Kelly in the sum of €600,000 for the stated purpose of assisting with the purchase of a residential investment property in Wicklow town. Security was to be provided over that property to be purchased, and over the other two premises in Wicklow town which secured the first facility. The security also included an assignment by way of security of a Bank deposit account containing €95,000.

11. The Bank demanded payment of the outstanding balance of €600,000 in respect of the second facility by formal letter of demand on 23 October 2013.

12. The total amount claimed in the summary summons therefore is the amount of €671,097.14, the balance outstanding on the first loan and the entire capital sum advanced on the second loan. The Bank expressly waived any interest claim on both facilities. In the light of that concession, one ground of defence advanced by Mr. and Mrs. Kelly, that the Bank had miscalculated the interest payments and had overcharged them, is no longer in issue.

### **The grounds of defence asserted**

13. In his first affidavit sworn on 21 May 2014, Mr. Kelly makes the point that the first facility letter mis-described the address of the residential investment property to be funded from that loan, and also points to the fact that the Bank, in error, sent correspondence to them to the wrong address. He makes a similar argument with regard to the second loan facility where the property to be purchased was also mis-described. He asserts that in the circumstances, it is likely that the Bank mis-directed correspondence to that incorrect address.

14. While it is not asserted that the security interest in favour of the Bank were created over the wrong property, Mr. Kelly argued that these errors show a possible frailty in Bank records which bears out or supports his assertion that the Bank has failed to keep or to disclose proper records of movements in Mr. and Mrs. Kelly's accounts with the Bank.

15. Mr. Kelly points to Bank statements which were sent to the wrong addresses on a number of occasions, and to the fact that different, but also wrong, addresses were used on a sequence of statements. Several wrong addresses are identified to which correspondence was addressed and he describes the use of, and his complaints regarding, the wrong addresses as "an on-going theme with all his dealings with the Bank", and notes that whilst the Bank did apologise, he has no way of ascertaining how many letters went astray.

16. Mr. Kelly also points to what he says he identified as mis-calculations or mistakes in interest debited to the account, and whilst the Bank does not seek that interest, these errors are another source of disquiet which he argues supports his assertion regarding the mis-management of Mr. and Mrs. Kelly's deposit account.

17. The replying affidavit of Ronan O'Flaherty on behalf of the Bank sworn on 2 July 2014 avers that the actual identity of the secured properties was never in doubt and that the error in addresses was not relevant to the contractual claim brought in these summary summons. The errors made in the addresses are acknowledged.

18. I propose now dealing with each of the matters asserted by the defendants to give rise to a *bona fide* defence.

### **The claim for alleged breach of contract**

19. Mr. and Mrs. Kelly assert that the Bank is in breach of an agreement made with them in 2006 that the Bank would advance monies to develop the lands at St. Laurence's Park in Wicklow town. They assert, on that basis, that they have an arguable counterclaim or cross-claim in the sum of €4m, calculated as the loss of profit had the development been completed. The Bank denies the making of any contract and the affidavit of Aidan McLoughlin sworn on 3 July 2014 denies that any agreement was made and also contains the following unequivocal averment:

"I did not have any discretion on behalf of the Bank to authorise any lending proposals. It was of all times necessary for a formal credit application to be made to the Bank for approval, particularly in cases such as alleged by the Defendants, where significant sums were involved. No such application was made, nor did the defendants ever ask me to do so".

20. The strong and uncontested averments by Mr. McLoughlin that, even had he entered into discussions with Mr. and Mrs. Kelly regarding provision of development finance, he had no authority to bind the Bank is, in my view, dispositive of the question of whether a contract to lend ever came into existence.

21. Further, it is well established since *Gorringe v. The Land Improvement Society* [1899] 1 IR 142 that a contract to lend money is not specifically enforceable (see, more recently: *Duggan v. Irish Allied Building Society* (Unreported, High Court, Finlay P., 4 March 1976) where the plaintiff failed in a claim for specific performance of an agreement to advance a loan upon the security of a mortgage).

22. Finally, the alleged contract must have come into existence in 2006 or 2007 and may be statute barred.

23. Regard must also be had to the fact that the agreement to lend is alleged to have been made precisely at the time when the property market collapsed, and therefore, even on that basis, a causative connection would be difficult to establish.

24. In those circumstances, it seems to me that the asserted cross-claim or counterclaim or the alleged causative link to the loss of €4m is not substantiated and could not form the basis of even a credible cross-claim or counterclaim.

25. For that reason, it seems to me that no credible or substantive basis exists in support of the alleged counterclaim or cross-claim deriving from the asserted promise to lend.

26. The other ground of defence is that of the "missing" funds to which I now turn.

### **The missing funds**

27. Mr. Kelly asserts that a sum of approximately €489,000, which he describes as "a minimum figure", is missing from deposit accounts that he and his wife maintained at the Bank. He does not baldly assert that monies are "missing" but does show in his affidavit the source of these funds and asserts that as he operated his banking almost wholly through the Bank these must have been lodged in deposit accounts with the Bank and that, despite his best efforts, the Bank has not located the relevant account.

28. The funds comprise in part the proceeds of an insurance settlement of €248,732.50 and he exhibits a letter of 2 June 2006 from Hibernian insurance company and a cheque drawn on Hibernian's account with AIB made payable to Mr. and Mrs. Kelly with the notation immediately after the name of the payee "ACC Bank only". The cheque was crossed "account payee only not negotiable" and he says, in those circumstances, the monies must have been lodged to a deposit account in his and his wife's joint names with the Bank and that, at the relevant time, they maintained a deposit account or accounts with the Bank, and had only one other account with another bank in which a very small balance was on deposit.

29. The other source of funds was the sale of the licensed premises at Lisroyne, Strokestown, County Roscommon, known as the Lisroyne Inn, and he exhibits a contract for sale made on 16 June 2006 between Mr. and Mrs. Kelly and a commercial entity, executed by purchaser and vendor and showing a purchase price of €450,000. The special conditions are not furnished but in his affidavit sworn

on 6 June 2007, Mr. Kelly says that following the discharge of the mortgage to the Bank, a balance of €200,000 was left. Mr. Kelly also exhibited a letter from Messrs. Haughton McCarroll, solicitors in Wicklow town, confirming the sale of The Tap Inn premises on 18 July 2003 in the sum of €640,000.

30. Mr Kelly's affidavit of 6 June 2017 contains a general averment that he and his wife dispute the sum claimed in the summary summons on the grounds that at the time the loans were made in 2006, they had over €800,000 on deposit and, thereafter, explain their understanding in relation to the movement of those funds.

31. The conclusion of their calculation in the affidavit of 6 June 2017 is as follows:

"Combining the above two amounts comes to a figure in total of €333,000 [monies expended], taking this amount from the €822,000 on deposit leaves a figure of €489,000 which is missing."

#### **Discussion regarding "missing" funds**

32. Unfortunately, for the purposes of enabling this Court to assess the credibility of Mr Kelly's argument, the Bank was unable to adduce evidence as to the mechanism by which the sales of the licenced premises closed. It is also of note that while the first and second facility letters provided for security in the form of cash on deposit the total sum to be deposited in respect of the two facilities, €35,000 in respect of the first facility and €95,000 in respect of the second facility, totalling €130,000, is far short of the combined sum of €822,000 which Mr. Kelly says was available in cash to himself and his wife in or around the year 2006 from the combined proceeds of the insurance policy, the sale of the Lisroyne public house, and the sale of another licenced premises known as The Tap Inn at Kilbride, County Wicklow.

33. I do not propose to conduct any analysis of the plausible, albeit incomplete, evidence adduced by Mr. Kelly in support of his general assumption that substantial sums of money were placed on deposit with ACC, and that the whereabouts of these monies is unexplained. I do, however, observe that Mr. Kelly asserts that the money went missing some number of years ago and even if one takes as a starting point his first replying affidavit sworn on 21 May 2014, the lapse of time, together with the fact that the sums in question are significant and, particularly so, in the context of the outstanding debts of the couple to the Bank, the circumstances do not suggest that Mr. and Mrs. Kelly engaged with any degree of urgency or diligence in their search for the "missing" funds. I note that Mr. and Mrs. Kelly did make a complaint to the Financial Services Ombudsman (the "FSO") regarding the refusal of the Bank to fund the development of the residential investment, but it does not seem from the documentation exhibited in the High Court affidavits that any complaint was made to the FSO regarding the "missing" funds.

34. In his oral submissions to this Court, Mr. Kelly says that he "assumed" that the money on deposit was safe and that the money would "turn up" once he made a positive request to the Bank that the monies be located. He has no answer to the formal assertions made on behalf of the Bank in affidavit evidence that the Bank's searches have not revealed any evidence of other deposit accounts with the Bank that might reflect the substantial sums said to have been deposited for the benefit of Mr. and Mrs. Kelly in 2003 or 2006.

35. Further, Mr. Kelly was unable to offer any explanation or evidence regarding his tax returns or the audited accounts of any of his business enterprises, albeit he did accept that Capital Gains Tax would have been payable on the sale of the licenced premises.

36. Mr. and Mrs. Kelly retained a forensic accountant to analyse their accounts with a view to advising on whether the Bank had over-charged on interest or surcharges, and he had advised them to seek bank statements from the Bank before he could further assist them in understanding the whereabouts of the "missing" funds.

37. Unfortunately, Mr. and Mrs. Kelly did not further pursue the Bank for statements or information regarding their deposit accounts, and in the course of his oral submissions, Mr. Kelly repeated his assertion that he "assumed" the missing funds would "turn up", as the amount of money in question was significant and that it must be possible to locate it within the Bank records.

38. Mr. Kelly argued in the alternative that it was possible that the "missing money" was being held in some way by the Bank as security for the advances, but, in that regard, I must take account of the written loan conditions for the first and second loan. The written loan conditions did provide for the retention of monies on deposit by way of security for the two advances, but these were for much smaller amounts, €35,000 and €75,000 respectively, and are more probably part of the larger sum of in excess of €800,000 which was available following the sale of the two licenced premises. I consider that Mr. Kelly's assertion that he "assumed" that the "missing monies" must somehow have been held as security for the advances not to be credible, it is inconsistent with the written loan terms, and having regard to the fact that the terms were negotiated and that Mr. and Mrs. Kelly were legally advised at the time, I regard it as improbable and not credible that the Bank has informally held the "missing" funds by way of an additional and not formally agreed security.

39. I must also have regard to the long and detailed letter sent by the Bank in response to Mr. and Mrs. Kelly's queries on 25 November 2011 and other correspondence including a letter of 19 September 2012. These letters are detailed and set out the result of Bank investigations into the matters raised in Mr. and Mrs. Kelly's letter of 12 September 2011, which enclosed the report of the forensic accountant engaged by Mr. and Mrs. Kelly. The letters dealt with matters such as arrangement fees, the incorrect addresses, the assertion that an agreement was entered into between Mr. and Mrs. Kelly and the Bank to fund the proposed development at St Laurence's Park, Wicklow town, interest and surcharges and the two deposit accounts held by way of security pursuant to the express terms of the facility letters.

40. A number of observations must be made. Mr. and Mrs. Kelly did not assert in this correspondence that there were substantial unexplained deficits in the credit balances in their deposit accounts, nor that there existed other deposit accounts in which were held the monies now claimed to be "missing". Correspondence that later occurred through Messrs. Byrne and Wallace on behalf of the Bank is focused on these other matters and there was also some correspondence requesting disclosure or discovery of bank accounts.

41. It is not merely that Mr. and Mrs. Kelly delayed requesting information from the Bank regarding the "missing" funds but, rather, that their extensive engagement with the Bank and the queries they raised, either themselves or through their forensic accountant, were focused on entirely different matters. It was not until the affidavit of 6 June 2017 that Mr. and Mrs. Kelly articulated their claim regarding these monies alleged to be held on deposit.

42. Mr. and Mrs. Kelly do make more than mere assertions, to use the language of the case law, in particular by Clarke J. in *McGrath v. O'Driscoll* [2006] IEHC 195, [2007] 1 ILRM 203, at para. 3.4, regarding the "missing" funds and do show some amount of documentation in support of their assertion. They do not, however, reply to the last two affidavits in the sequence. The

supplementary affidavit of Paul Shaw sworn on 6 July 2017, in which Mr. Shaw after correcting two minor errors relating to the deposit account numbers, and the waiver or write-off of surcharges and a small withdrawal, makes the general averment that having reviewed the books and records of the Bank, the affidavit of Mr. Kelly does not identify a credible defence. The earlier affidavit of Mr. Shaw sworn on 23 June 2007 avers in positive terms that "there is no record whatsoever of the sums identified as having been on deposit with the plaintiff", and sets out the precise numbers and transactions of deposit accounts he could identify. At para. 7, Mr. Shaw deposes as follows:

"I have looked into whether there is anything in the plaintiffs' records to support the suggestion that funds have gone missing in the manner suggested or at all. Having carried out this exercise, I was unable to find any evidence whatsoever that funds have gone missing in the manner alleged or at all. I have no reason to believe and do not believe that funds have gone missing as described by Mr. Kelly. I do not find support for the proposition that funds went missing from any of the materials exhibited by Mr. Kelly to his affidavit."

### **Conclusion on factual assertions**

43. Against the background of the factual matters identified, I am of the view that the trial judge was correct and Mr. and Mrs. Kelly have not identified any factual or legal basis to support a *bona fide* defence to the claim for summary judgment. The authorities are clear, and the test does not require a defendant to meet a high threshold. As stated by Hardiman J. in the most often quoted authority *Aer Rianta c.p.t. v. Ryanair Ltd (No. 1)* [2001] 4 IR 607 at p. 623, the defendant does not have to establish that he has a defence which will probably succeed but only that there is an arguable defence and the test is: "Do the defendant's affidavits fail to disclose even an arguable defence?"

44. Whilst different formulations of the test have been identified in later case law, the test still remains as described by Clarke J in *Moohan v. S. & R. Motors (Donegal) Ltd.* [2007] IEHC 435, [2008] 3 IR 650, at para. 4.1:

"As pointed out by Hardiman J., the test does not mean that the party must establish that he has a defence which will probably succeed; rather he must establish that it is probable that he has a *bona fide* defence."

45. The matters sought to be raised in defence by Mr. and Mrs. Kelly do not go to the entitlement of the Bank to summary judgment on foot of the two facility letters, and in my view, the matters raised at best are to be characterised as matters which could, if established in evidence, form the basis of a different claim or head of claim by Mr. and Mrs. Kelly against the Bank arising from what they say is the loss of substantial sums on deposit. Mr. and Mrs. Kelly have not offered any credible or *bona fide* defence that they do not owe the money for which judgment is sought, but rather that the Bank might or does hold other funds which could be applied to satisfaction of the judgment. They did not persuade Eagar J., nor have they persuaded me that the "missing monies" are held by the Bank as security for the loans and that a contractual set off is available to the Bank. They are unable to establish even an arguable basis for their view that the monies advanced are not owed on account of the fact that the Bank is entitled to credit other monies held by the Bank against the loans.

46. In those circumstances, I am satisfied that Mr. and Mrs. Kelly have not established a meaningful or *bona fide* defence to the claim in debt.

47. I turn now to examine the possible cross-claim.

### **The asserted counterclaim**

48. At its height, it seems to me that Mr. and Mrs. Kelly have asserted that they may have a counterclaim against the Bank arising from the Bank's negligence or breach of contract in the management of their deposit accounts. In *Moohan v. S. & R. Motors*, at para. 9, Clarke J. considered that when the nature of a defence put forward amounts to a form of cross-claim, the matter may not readily be dealt with under the *Aer Rianta* test and

"slightly different considerations may apply. In those circumstances the court has a wider discretion".

49. Having reviewed the Supreme Court decision in *Prendergast v. Biddle* (Unreported, Supreme Court, Kingsmill Moore J., 31 July 1957), Clarke J. concluded, at para. 4.2, that the appropriate test in those circumstances was to establish whether a cross-claim would or could give rise to a defence in equity to the proceedings as would occur if the counterclaim or cross-claim extends to the same set of facts, and gives the example of a claim that might derive from the same contract where a cross-claim may be made out and an equitable set off may be available.

50. The facts asserted by Mr. and Mrs. Kelly do not lead to a conclusion that there may exist an equitable set off in respect of the "missing" funds. This conclusion is primarily because I am not satisfied that the Bank may have held the monies in the deposit account or accounts as security for the two loan advances. As I noted above, this assertion is not borne out by the facts, and is contrary to the express written terms of the facility letters which identify two specific deposit funds, of a much smaller amount, and in respect of which the Bank's evidence is clear and which could not form part of the "missing" monies explained by Mr. Kelly in his affidavit.

51. The set of facts on which Mr. and Mrs. Kelly rely, therefore, do not arise from the same contract of loan as that from which the claim in debt now arises, nor from the same circumstances by which the Bank lent money secured by agreed means.

52. At its height, the set of facts on which Mr. and Mrs. Kelly rely, fall rather into the category of claims identified by Clarke J. in *Moohan v. S. & R. Motors* as deriving from "independent set of circumstances" and to which the judgment of Kingsmill Moore J. in *Prendergast v. Biddle* provides an answer. At p. 24 of that judgment, the Supreme Court posited the following test:

"On the one hand it may be asked why a Plaintiff with a proved and perhaps uncontested claim should wait for judgment or execution of judgment on his claim because the Defendant asserts a plausible but improved and contested counterclaim. On the other hand it may equally be asked why a Defendant should be required to pay the Plaintiffs demand when he asserts and may be able to prove that the plaintiff owes him a larger amount."

53. Clarke J. adopted that paragraph as correctly identifying the source of difficulty when a court is faced with a cross-claim or counterclaim which does not give rise to an equitable set off, but where the justice of the case may demand a more flexible approach. Kingsmill Moore J. identified this discretionary approach at p. 25 of his judgment in *Prendergast v. Biddle*:

"It seems to me that a Judge in exercising his discretion may take into account the apparent strength of the counter-claim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted

their claims, the nature of their claims and also the financial position of the parties. If, for instance, the Defendant could show that the Plaintiff was in embarrassed circumstances it might be considered a reason why the Plaintiff should not be allowed to get judgment, or execute judgment on his claim till after the counterclaim had been heard, for the Plaintiff having received payment might use the money to pay his debts or otherwise dissipate it so that judgment on the counterclaim would be fruitless. I mention only some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of his discretion."

54. In *Moohan v. S. & R. Motors* at para. 4.6 of his judgment Clarke J., having identified the discretionary nature of the jurisdiction to deal with the apparent injustice that may arise when a counterclaim or cross-claim has been credibly asserted, identified the overall approach and it is convenient to set this out in full,

"On that basis the overall approach to a case such as this (involving, as it does, a cross claim) seems to me to be the following:

(a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiffs claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendant's case, it would not be inequitable to allow the asserted set off;

(b) If, and to the extent that, a prima facie case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);

(c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle*."

55. It seems to me that this is the correct approach to the exercise of a court's discretion to consider the impact of an asserted cross-claim or counterclaim in the context of a motion for summary judgment.

56. An application of these tests leads me to the view that Mr. and Mrs. Kelly have articulated a broadly plausible argument that ACC holds funds on deposit for them which have not been located. I am not persuaded that the evidence of incorrect addresses on the loan documentation is supportive of Mr. and Mrs. Kelly's assertion regarding systemic failures in Bank record keeping. However, I am not satisfied that the Bank has fully explained the manner in which its record keeping is to be assessed, and while the replying affidavits of Mr. Shaw categorically deny that there are any missing funds, he does not entirely by his assertions counter the broad proposition for which Mr. and Mrs. Kelly contend for the reasons I now analyse.

57. The Bank is unable to explain the mechanisms for the closure of the sale of the licenced premises in Strokestown, County Roscommon. Whilst there is a general averment that the records do not disclose a bank account or bank accounts not previously identified to Mr. and Mrs. Kelly, the fact remains that the insurance cheque was payable into an ACC account and could not, on the face of the cheque, have been lodged elsewhere. Mr. Shaw did not explain, for example, the movement of that money, when it was lodged and to what account, and what transactions subsequently happened on the relevant account. It is also not apparent from the affidavits of Mr. Shaw how the Bank maintained its records of deposit accounts, nor has he answered the assertion that over €800,000 was deposited with the Bank by Mr. and Mrs. Kelly in the relevant times and how the Bank records reflect this.

58. It is not correct that I would express any view regarding the strength of the assertions made by Mr. and Mrs. Kelly regarding the "missing" funds, but certain of the factors identified in the case of *Prendergast v. Biddle* as restated by Clarke J. in *Moohan v. S. & R. Motors* are relevant to my considerations. In particular, I would comment as follows:

1) Mr. and Mrs. Kelly have not moved with any expedition with regard to the "missing" funds. The amount in question is very substantial, and more particularly material in the context of the financial catastrophe that has befallen the couple. Promptitude was a factor noted as relevant by Kingsmill Moore J. in *Prendergast v. Biddle*, at p. 25, and this is consistent with the general approach of the court to the exercise of its discretion. Mr. and Mrs. Kelly have not acted with any expedition, notwithstanding the serious consequences for them of the entry and execution of judgment and how their financial circumstances might have been improved had the "missing" funds come to light;

2) The evidence supporting the assertions regarding the "missing" funds is to be examined, and Kingsmill Moore J. made it clear in *Prendergast v. Biddle*, at p. 25, that the court may take into account "the apparent strength of the counter-claim and the answer suggested to it". Mr. and Mrs. Kelly have furnished some documentation but it is scant and incomplete and they are to be criticised in this regard for failing to engage the type of forensic search that was proposed by the accountant they engaged;

3) Because it is clear that the principles identified by Kingsmill Moore J. in *Prendergast v. Biddle* are not exhaustive, it seems to me that the fact that Mr. and Mrs. Kelly are in dire financial straits at the present time is a factor which weighs somewhat in their favour, as the evidence they have adduced would suggest that the recovery of judgment against them is likely to be difficult if not impossible;

4) The claim regarding the "missing" monies could sound in equity against the Bank as a trustee and therefore, while delay could defeat that claim, it is less obviously statute barred than the claim which Mr. and Mrs. Kelly argue regarding the breach of the alleged agreement to advance money for the development.

59. Taking all of those factors into account, it seems to me that the trial judge fell into error in failing to have fully considered the possible cross-claim or counterclaim which Mr. and Mrs. Kelly assert, and in failing to exercise the discretionary jurisdiction that fell to be engaged in the circumstances.

60. None of the matters raised seem to me to give rise to a defence to the claim and, therefore, are not matters which should delay the grant by this Court of judgment against Mr. and Mrs. Kelly and, to that extent, the judgment of Eagar J. is to be upheld.

61. I consider that the correct overall approach to the matters now raised is to grant a short stay on execution of the judgment. The stay should be short, as the Bank is not to be further prejudiced in the execution of its judgment, but should be long enough to allow

Mr. and Mrs. Kelly to commence proceedings against the Bank seeking to trace the "missing" funds.

62. I can take no view as to the strength of, or indeed, the legal basis for, such claim save in the broad way outlined above, but the justice of the case can best be met by granting a stay on execution limited for the period of three months to enable proceedings to be commenced, and thereafter, for that purpose at this juncture, to give some directions as follows:

63. Having regard to the delay that has already occurred in the matter the proceedings must be commenced and a statement of claim delivered within three months of today's date; Mr. and Mrs. Kelly or the Bank should seek that the matter be case managed in the non-jury High Court list within six weeks of the service of the statement of claim; and the Bank be given liberty to seek further direction, including a lifting of the stay on execution or any other motion that is deemed fit or necessary to have the proceedings, if they are issued, dealt with expeditiously and effectively.

64. All further applications are to be made to the High Court.

#### **Conclusion and summary**

65. In conclusion, then, I consider that the trial judge was correct and that the defendants did not establish a *bona fide* or credible defence to the claim for summary judgment. However, I consider that he did fall into error in not considering the possible counterclaim or cross-claim of Mr. and Mrs. Kelly and, in the circumstances and having regard to the authorities regarding the correct approach to such counterclaim or cross-claim, I consider that the execution of judgment is to be stayed on the condition that Mr. and Mrs. Kelly commence proceedings regarding the "missing" funds within three months of today's date, and the proceedings be closely case managed thereafter with a view to bring them to a conclusion. The Bank is to have liberty to bring any motions it considers appropriate in the context of those intended proceedings, should they be issued, or arising from the order of this Court. For the avoidance of doubt, the execution of judgment is not to prevent the registration of any judgment mortgage by the Bank, and what is to be stayed is any other mode of execution including the taking of any action on foot of judgment mortgage is registered.

66. For the reasons and to the extent stated, I therefore propose allowing the appeal in part.