Neutral Citation: [2015] IEHC 717

THE HIGH COURT

2008 No. 4753 P

BETWEEN

ACC LOAN MANAGEMENT LIMITED

PLAINTIFF

AND

GERALD STEPHENS AND MARYANNE (OTHERWISE MARY ANNE M.) STEPHENS

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 11th day of November, 2015

1. The plaintiff on this application seeks declaratory relief and specific performance arising out of an agreement that was entered into between ACC Bank, as it then was, and Dr. and Mrs. Stephens in February, 2004. In consideration of receiving a loan of €400,000.00, Dr. and Mrs. Stephens agreed to provide the bank with a first legal mortgage in respect of their property, Thornhill Manor, Co. Mayo.

2. Thornhill Manor is a Palladian style home built in 1995. It has eleven bedrooms, extends to 8,500 feet, with a further 2,000 square foot three-bedroom apartment situated adjacent thereto. The house sits on a large parcel of land, which was limited for the purpose of the security to be given to the bank to 30 acres of land. It is situated about 16 miles from Knock Airport.

3. At the time that the bank provided the loan to Dr. and Mrs. Stephens, the bank was advised that there was an offer of €1.7 million for the purchase of the property and that it was the intention of Dr. and Mrs. Stephens to sell the property and the 30 acres and to build a new home on some additional land which they had acquired adjacent to the premises. The loan was to be a short-term loan of 12 months duration.

4. The factual background to this legal dispute is largely not in issue. It is not contested that by a letter of the 3rd February, 2004, the defendants sought to borrow and the plaintiff agreed to lend €400,000.00. It is also accepted by both parties that it was a term and condition of the borrowing that the plaintiff would get a first legal charge on the property of Thornhill Manor, and that the defendants represented to the plaintiff that, in the event €400,000.00 was advanced to them, they would give the first legal charge over Thornhill Manor, comprised in Folio 11109F of the Register of Freeholders, County Mayo. On 18th February, the plaintiff provided the defendants with the indenture of mortgage to execute. The sum of €400,000.00 was drawn down on 1st March, 2004. At all times, the defendants have failed to provide the bank with the security which was agreed under the letter of sanction.

5. On 13th February, 2004, Philip Clarke, principal of Ledwidge Solicitors, and solicitor to the defendants at the material time, executed a solicitor's undertaking in favour of the plaintiff by which he undertook, *inter alia*, to issue, stamp, and lodge for registration the plaintiff's deed of charge within one month from the issue of the initial loan cheque. Mr. Clarke provided the plaintiff with this undertaking on foot of a signed authority by the defendants, given on the 16th February, 2004, which stated:

> "We hereby irrevocably authorise and direct you to give an undertaking in the form and containing the information set out overleaf to ACC Bank and in consideration of your giving the foregoing undertaking we hereby undertake that we will not discharge your retainer as our solicitor in connection with the foregoing transaction unless and until we have procured from the Bank an effective release from the obligations imposed by such undertaking and we hereby indemnify you and all your partners and their executors, administrators and assigns against any loss arising from our act or default."

6. The principal sum of €400,000.00 was drawn down by the defendants' solicitor on 1st March, 2004. On that same date the plaintiff wrote to the defendants' solicitors noting that the loan monies had been transferred on the basis of the solicitor's undertaking. The defendants failed to execute the charge in favour of the plaintiff. On 16th August, 2006, the plaintiff wrote to the defendants' solicitors requesting that the charge be executed as a matter of urgency. On 18th August, 2006, Philip Clarke, solicitor for the defendants at the material time, wrote to the plaintiff advising: "we intend to comply with our undertaking to ACC Bank in so far as we can…"

7. What followed was a series of correspondence between the plaintiff's solicitors and various other solicitors on behalf of the defendants, culminating in a letter on the 15th July, 2008, in which Dr. Stephens indicated to the bank that he and his wife "will execute the deed of charge in accordance with your direction and I confirm we are prepared to sign the document for Mr. Rhatigan of Rhatigan & Company [solicitors]". In and around January, 2009, Dr. and Mrs. Stephens enlisted the service of a U.S attorney, Mr. Steven G. Legum, and it appears from the correspondence as opened to the Court that, in effect, what Dr. and Mrs Stephens wanted to happen was to renegotiate their borrowing with the bank. At this point, the defendants, through their U.S. attorney, indicated that they were not going to sign the deed of charge unless the bank increased the loan to 65% of the value of the property. The bank did not agree to this. The present proceedings were issued on the 12th of June, 2008.

8. On 2nd December, 2008, the defendants' former solicitor, Mr. Philip Clarke, commenced plenary proceedings against the defendants (Record No. 2008 No. 10295P) ("The Solicitor's Proceedings"). In these proceedings, Mr. Clarke sought an order for specific performance directing the defendants to execute a deed of charge in favour of the plaintiff; or alternatively, an order directing a court official to execute the deed of charge on behalf of the defendants.

9. On 15th February, 2010, this Court (Murphy J.) made an order in the Solicitor's Proceedings in favour of Mr. Clarke. For the sake of clarity, the plaintiff in this action was not a party to those proceedings. The Court granted judgment in default of defence against both defendants. Only the first named defendant appealed the order to the Supreme Court. Mr. Clarke did not contest the appeal as brought by the first named defendant, and the Supreme Court, in May 2010, set aside the order of Murphy J. as against the first named defendant and remitted the matter back to the High Court. The Solicitor's Proceedings as against the first named defendant have remained static ever since and have not been prosecuted.

10. The order of Murphy J. as against the second named defendant has been executed. The Court ordered the second named defendant to sign the deed of charge and ordered that, if she failed to do so, the deed of charge should be signed by Ms. Paula Healy, High Court Registrar, in her stead, carrying the same effect as if the second named defendant had signed it herself. The second named defendant failed to sign the deed of charge and so the registrar signed it in accordance with the order of Murphy J, thus the deed of charge does stand executed by the second named defendant. As a result, the Court sought clarification from counsel for the plaintiff as to whether the plaintiff is still seeking any orders as against the second named defendant, Mrs. Stephens, to which counsel responded that they are not. Accordingly, the present application proceeds against the first named defendant, Dr. Stephens, only.

11. On 31st July, 2012, this Court (Ryan J.) delivered judgment against both defendants in summary proceedings in favour of the plaintiff. The Court ordered that the plaintiff recover from the defendants a sum of €775,234.57 with continuing interest until payment, together with the costs of the proceedings to be taxed and ascertained. The plaintiff is left without security by way of a first legal charge for the judgment. The judgment was stayed for six months and on 19th November, 2012, it was stayed for a further six months. The stay was afforded to the first named defendant in order to allow him to prosecute his third party claim against his former solicitor, Mr. Philip Clarke. With the consent of the plaintiff, the stay on execution of the judgment of 31st July, 2012, was further extended to September, 2013.

12. The defendants appealed the order of Ryan J. of 31st July, 2012, seeking to have the judgment stayed pending the outcome of a full appeal by the defendants of that order. The Supreme Court remitted the first named defendant's limited appeal in this regard to the High Court (Ryan J), and a final extension of the stay was afforded to the defendants by order of 12th March, 2013. The stay has now expired and no further stay has been sought or granted. The appeal has been transferred to the Court of Appeal and now bears Record No. 2014/586. The matter has not yet been listed and no steps have been taken in this appeal. The defendants have made no payment in respect of the judgment of Ryan J.

13. On 5th June, 2013, this Court (Laffoy J.) granted the plaintiff permission to renew the plenary summons in these proceedings. The Court held that the plaintiff had established that there were good reasons to justify a renewal pursuant to Order 8, Rule 1, of the Rules of the Superior Courts. This decision was not appealed by the defendants. These proceedings thus came on for hearing in front of this Court on the 21st October, 2015.

Evidence

14. Philip Clarke, principle of Ledwidge Solicitors, and former solicitor for the defendants, gave evidence at the trial. Under direct examination by Mr. Dunleavy, on behalf of the plaintiff bank, Mr. Clarke explained that he received authority from Dr. and Mrs. Stephens, who were his clients at the time, to give an undertaking to ACC Bank. He explained to the Court that the undertaking was a standard Law Society undertaking which provided that the defendants give an irrevocable authority to Mr. Clarke as their solicitor to give an undertaking to ACC Bank to take all manner of steps to perfect security on consideration of drawing down a bridging loan of €400,000.00. This undertaking was dated the 13th February, 2004. Mr. Clarke stated that shortly afterwards, relations became fraught between himself and Dr. and Mrs. Stephens, and he then realised that the Stephens' had not signed the deed of mortgage. His retainer with the defendants was terminated in October, 2004.

15. Under cross-examination by Dr. Stephens, Mr. Clarke explained to the Court that in the time since his retainer with the defendants was terminated he would have replied to any inquiries made by ACC Bank in relation to his undertaking, which is outstanding since 2004. At this juncture of the trial, at the end of Day 1 of the proceedings, Dr. Stephens began to stray outside of the defendants' pleaded defence, and the Court indicated to Dr. Stephens that he could not ask questions of the witness which related to issues outside the ambit of his defence and which related to proceedings other than the present case. As a result, at the opening of the second day of the trial, the Court in its discretion acceded to Dr. Stephens' application to amend his defence to include a plea of 'no transaction' which would allow him to ask questions of witnesses, either directly or in cross-examination, which related to his amended defence. However, when the Court asked Dr. Stephens if he had any more questions for Mr. Clarke, having amended his defence, Dr. Stephens indicated that he did not.

16. Mr. Donnacha O'Donovan, solicitor with G.J. Moloney, the firm of solicitors on record for the plaintiff, gave evidence on the second day of the trial. Mr. O'Donovan took the Court through a series of correspondence, between December, 2007, and October, 2008, indicating that at no stage was he given to understand that the defendants were not going to execute the deed of charge in accordance with the original agreement with the bank. Mr. O'Donovan told the Court that up until he received a letter from U.S. Attorney, Stephen Legum, dated 20th May, 2009, he had no reason to believe that the Stephens' were not going to execute the charge. From 2009 onwards, Mr. O'Donovan stated to the Court that he became aware of the existence of proceedings which Mr. Clarke had taken against Dr. and Mrs. Stephens, which was effectively looking for the same relief, that is, directing Dr. and Mrs. Stephens to execute the deed of charge. In view of this situation, Mr. O'Donovan felt that to progress the specific performance proceedings which are currently before the Court would have amounted to unnecessary duplication and may have led to duplicate orders of the Court. However, in 2012, in the absence of any apparent progress in the proceedings between Mr. Clarke and Dr. Stephens, the decision was made by the plaintiff to reactivate the present proceedings.

17. Under cross-examination by Dr. Stephens, Mr. O'Donovan confirmed that his client never received completion of Mr. Clarke's undertaking to the Bank. Mr. O'Donovan agreed with Dr. Stephens that he wrote to Mr. Clarke on a number of occasions seeking an update in relation to his proceedings against the defendants. To Mr. O'Donovan's knowledge, ACC Bank never instituted any proceedings against Mr. Clarke in this context. Dr. Stephens asked Mr. O'Donovan at what stage his firm came on record for ACC Bank, to which Mr. O'Donovan replied 2007. The loan in issue before the Court was made three years previously, in 2004. To Mr. O'Donovan's knowledge, ACC Bank did not have its own independent legal representation at the time the agreement was entered into with the defendants and the funds of €400,000.00 were drawn down to Mr. Clarke's account. Mr. O'Donovan explained to the Court that it is common practice that a financial institution would rely on the borrower's solicitor in situations such as this, and would not necessarily retain their own legal advice.

18. Mr. Peter Rolls, an employee of ACC Loan Management Limited, formerly ACC Bank, also gave evidence. He is a case handler in the Retail and SME Debt Resolution Unit in Limerick. Mr. Rolls was appointed case handler of Dr. and Mrs. Stephens' files in September, 2014. He took the Court through the commercial loan credit report which was presented to the bank's Credit Committee for approval prior to the loan being advanced to the Stephens'. Mr. Rolls indicated to the Court that the report's findings were consistent with the transaction being a short-term loan, that it was a bridging facility, that there was a sale of the property in progress, and that the value of the property at the time would have well secured the bank's advance. It would have been a low-risk facility, he said. He confirmed that the security that was to be given by the defendants was central to the loan facility, and that the bank, at all stages, was relying on this security. Dr. Stephens had no questions for this witness and chose not to cross-examine him.

19. Dr. Stephens chose not to give evidence in these proceedings. It was explained by the Court to Dr. Stephens that if he wished to

give evidence under oath from the witness box then he could be cross-examined by Mr. Dunleavy on behalf of the plaintiff. It was further explained to Dr. Stephens that he could choose not to give sworn evidence, and opt to make a statement and/or submissions from the floor of the Court, but that in those circumstances, he could not be cross-examined by counsel. Dr. Stephens indicated at that point in time that his defence could rest and that he would opt not to be cross-examined or to give evidence under oath.

20. It should be noted that Dr. Stephens called no witnesses.

21. It is contended on the plaintiff's behalf that in these proceedings, the defendants rely on the defence that the bank's claim is *res judicata*, in the first instance, and secondly, that the plaintiff is guilty of *laches* in failing to assert its rights in a timely fashion. On the second day of the hearing of the action, the Court gave leave to Dr. and Mrs. Stephens to amend their defence to include a plea of 'no transaction,' related in some way to the fact that the bank released the money prior to receiving security from the defendants.

22. It is clear that a claimant in equity must prosecute his claim without undue delay. It is observed in the most recent edition of *Snell's Equity* (Thompson Reuters, 33rd ed., 2015, at p. 93, para 5-011) that, *inter alia*:

> "Something more than mere delay, more even than extremely lengthy delay, is required [before a plaintiff will be denied equitable rights under the doctrine of laches.]"

23. Delaney's *Equity and the Law of Trusts in Ireland*, (5th edition, Round Hall, 2011, at page 70) states that, inter alia:

> "[i]n deciding whether the defence of laches has been established, a court must first consider whether the plaintiff has delayed unreasonably in bringing his claim and secondly, assess whether prejudice or detriment has been suffered by the defendant as a result."

24. In relation to whether the plaintiff has delayed unreasonably, Dr. Stephens, on behalf of the defendants, submits that the bank did not move with expedition in prosecuting its claim against defendants. These proceedings were initiated in June, 2008, and the summons was renewed in June, 2013. This case came on for hearing in October, 2015. Dr. Stephens maintains that the passage of time since 2008 has been an inordinate delay and causes prejudice to the defendants in presenting their case.

25. Dr. Stephens submits that Mr. Donncha O'Donovan, both in his affidavit, and in his evidence to the Court, admitted that he and his firm decided not to proceed with prosecuting the within proceedings in order to await the outcome of the case taken by Mr. Philip Clarke as against Dr. Stephens and his wife for specific performance. Dr. Stephens argues that this is an admission that the plaintiff did not move with reasonable expedition with these proceedings, and as such the plaintiff should be debarred by virtue of laches from proceeding against the defendants in this case.

26. Mr. Dunleavy, on the plaintiff's behalf, submits that this Court (Laffoy J.), in her judgment of 5th June, 2013, expressly found that the reasons advanced by the plaintiff for failing to serve the summons were reasonable. There were three reasons submitted by the plaintiff which justified the plaintiff's failure to serve the summons after it was issued. They were:

> 1.) For more than a year after the plenary summons was served there were repeated promises from both of the defendants and, subsequently, their attorney, to execute the charge.
>
> 2.) Following the breakdown of communications with the defendants' U.S. attorney, the plaintiff became aware of the solicitor's plenary proceedings, which had the same objective as the plaintiff's proceedings (i.e. to procure the execution of the charge by the defendants) and it was reasonable for the plaintiff to hold back in serving these proceedings so as to avoid two sets of costs; and
>
> 3.) It was only when, following inquiries, the plaintiff became aware that the solicitor's plenary proceedings had not been progressed that it sought to serve these proceedings on the defendants.

Laffoy J heard these reasons, reviewed the case law, and found in favour of the plaintiff.

27. Dr. Stephens, in response, argues that the decision of Laffoy J. in allowing the plaintiff to renew the summons in 2013, did not go into any correspondence between the parties and did not deal with the issue of res judicata, the Judge simply dealt with renewing the summons.

28. It is further submitted by counsel for the plaintiff that any delay on the part of the plaintiff caused no prejudice or economic injury to the defendants. The defendants did not alter their position for the worse because of any delay; they suffered no detriment because they had drawn down a sum of money on foot of a facility letter which they never repaid; they made representations and promises in relation to the execution of an agreed security and failed to honour their promises. Mr. Dunleavy further submits that, in determining whether the plaintiff has been guilty of laches, the Court is not required to consider the totality of the time which has passed since the issue of the plenary summons on the 12th June, 2008, to the present day. The judgment of Laffoy J. on the 5th of June, 2013, accepted the plaintiff's reasons for failing to serve the plenary summons, deemed them good, and permitted the renewal of the summons. Thus it is submitted that the issue of whether there has been any delay on the part of the plaintiff between 12th June, 2008, and 5th June, 2013, is a matter which has been adjudicated upon. In the time since the judgment of Laffoy J., the plaintiff submits that it has taken reasonable steps to progress the case and did progress the case as expeditiously as possible.

29. In order for the plaintiff's claim to be barred by the doctrine of laches the Court must be satisfied that the delay consists of "a substantial lapse of time" and also there would have to be circumstances present which would "make it inequitable to enforce a claim," per Keane J. in *JH v WJH, High Court*, Unreported, 21 December 1979, at p. 35.

30. In relation to the defence of *res judicata*, Dr. Stephens submits that the subject matter of these proceedings has already been adjudicated upon by this Court (Ryan J.) in the summary proceedings which were brought by the bank against him and his wife. Firstly, Dr. Stephens submits that the parties to both actions are the same, the plaintiff being ACC Bank and the defendants being Gerald and Mary Anne Stephens. Secondly, he submits that the issues in both proceedings are the same. As such, he argues that the plaintiff cannot re-litigate the issue.

31. In contrast, it is submitted on the plaintiff's behalf that that defence arises on foot of an entirely separate claim brought by the bank against Dr. and Mrs. Stephens' arising out of their failure to make repayment of their borrowings on foot of the loan. An order of this Court (Ryan J.) found in the bank's favour, and by further order of 12th March, 2013, Ryan J afforded a final period of six months to Dr. Stephens to bring his third party action (as against his former solicitor, Mr. Philip Clarke) to a conclusion, which period of stay

has now elapsed. Because that stay is at an end, the bank is in a position to register the judgment as a judgment mortgage on the property. Counsel submits that there is nothing in the judgment of Ryan J. in the summary proceedings that deals with the subject matter of the present proceedings, and as such, the defence of *res judicata* is misconceived.

32. It is submitted on the plaintiff's behalf that neither "cause of action estoppel" nor "issue estoppel" applies in this action because the matters dealt with in *ACC Bank Plc v Gerald Stephens and Maryanne Stephens* (Record No. 2007 No 2253 S) turned on one central question: the indebtedness of the defendants to the plaintiff. That issue is not the subject of the within proceedings.

33. The first action was for the recovery of a debt; this action is for the execution of a first legal charge which the defendants undertook to complete in favour of the plaintiff in 2004. The totality of the findings in the summary proceedings was that the defendants were indeed indebted to the plaintiff, and they were ordered to discharge that debt. The summary proceedings were not concerned with the first legal charge on the premises. Furthermore, the Court's finding in relation to the defendants' indebtedness to the plaintiff in the summary proceedings does not influence the outcome of these proceedings and the plaintiff is not inviting the Court to review it.

34. Counsel for the plaintiff submits that it appears that the defendants may have meant to invoke the principle enunciated in *Henderson v Henderson* (1843) 3 Hare 100. The essence of this part of the defendants' defence is not that the matter at issue in this action has been decided already, but that the plaintiff should be estopped from bringing these proceedings because the plaintiff could have sought all of its reliefs in the one set of proceedings. This appears to be the correct position as evidenced from the submissions made by Dr. Stephens on Day 4 of the trial wherein he stated:

> "Res judicata is specifically designed to stop serial proceedings. The tenet is, if you could have put it in the first one and you didn't, you are barred from bringing it a second time, a second case to get the same thing you should have gotten the first time."

Dr. Stephens added that in both these proceedings and the proceedings heard by Ryan J, both parties are identical, both proceedings share a common nucleus of operative fact, and there was a final judgment in favour of the plaintiff.

35. In this regard it is submitted by counsel for the plaintiff that Ryan J. did not resolve the controversy at issue between the parties in the proceedings that are now before the Court. The defendants have not been subjected to "successive applications" on the same matter. Counsel argued that no one could sensibly suppose that by suing on foot of the debt the plaintiff was to be taken to be waiving its right to rely, if need be, on the security which it enjoys, or ought to enjoy.

36. In relation to the defendants' plea of no transaction, the defendants advance the argument that but for the negligence of some other party in failing to secure an executed first legal charge from the defendant – be it the plaintiff's in-house legal department or the defendant's solicitor at the material time – the plaintiff would not have suffered loss, because the plaintiff would not have advanced the loan monies to the defendant. Dr. Stephens submits that the bank did not receive all of the necessary documents required to complete the transaction, and that it is not disputed by the bank that it drew down the loan before the deed of charge was actually signed by the defendants. As a result, Dr. Stephens argues that there was never a completed transaction and no contract was entered into between the parties. Dr. Stephens took the Court through a series of correspondence during 2009 between the plaintiff and Ledwidge Solicitors, the firm at which Philip Clarke was a solicitor at the time, wherein it was acknowledged repeatedly that not all of the requisite forms had been completed prior to the transaction and wherein the plaintiff bank reminded Ledwidge Solicitors that Mr. Clarke continued to be bound by his undertaking to the bank on behalf of the Stephens'. In conclusion, Dr Stephens argues that there was no legal basis for the bank to release the loan to the defendants and as such there was no transaction.

37. It is submitted on the plaintiff's behalf that this is a misguided submission in circumstances where the defendants had the benefit of a substantial loan from the plaintiff which they have never repaid and where the defendants, by their breach of the terms of the facility letter in respect of the promise to furnish a first legal charge over the premises, are the parties who are the cause of the absence of the contracted security. The defendants have not pleaded negligence on the part of the plaintiff in providing them with a loan facility. The defendants have not pleaded negligence, or any matter, against their former solicitors in these proceedings.

Conclusion

38. In respect of the plea of *laches*, this Court agrees with the submissions of counsel for the plaintiff that the question of delay between the 12th June, 2008, and the 5th June, 2013, is *res judicata*, bearing in mind the written judgment of Laffoy J. as already referred to, wherein she dealt with the reasons for the delay put forward by the plaintiff and deemed them good. As such, this Court cannot simply look behind that judgment by re-examining the same issue. I am further satisfied that in the time since the renewal of the summons the plaintiff has moved with reasonable expedition in prosecuting its claim against the defendants in these proceedings. As such, I find that the plea of laches is not substantiated.

39. The defendants also rely on the defence of *res judicata*. It is not the case that the legal rights and obligations of the parties to this action have been determined in an earlier judgment. Nor has any aspect (a point of fact, a point of law, or a mix of the two) been adjudicated upon in the earlier proceedings. The present proceedings focus on the execution of a first legal charge over the defendant's property whereas the issue decided upon in the earlier proceedings between the parties was specifically the recovery of debt. Both proceedings are thus fundamentally different.

40. The plaintiff submits that the defendants' plea, in fact, lies in the principle enunciated in *Henderson v Henderson* (1843) 3 Hare 100, which states, at p. 114, as follows:

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

41. In *Barrow v Bankside Members Agency Ltd* [1996] 1 All ER 981, Bingham MR distinguished between the rule in *Henderson v Henderson* and the doctrine of *res judicata*. The rule in *Henderson v Henderson*, he stated, at 983:

> "…is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

42. In circumstances where the defendants seek to argue that the plaintiff, in taking and securing judgment for a liquidated sum in summary proceedings, should be precluded from seeking to compel the defendants to complete the first legal charge the subject matter of these proceedings, counsel for the plaintiff pointed to the English Court of Appeal decision in *Securum Finance Ltd v Ashton* [2001] Ch 291. In that case, similar facts subsisted where the defendants, a married couple, had signed a guarantee of the obligations of a private limited company to a bank. There were two common elements in two proceedings brought by the bank against the couple: 1) whether there was a debt owed by the defendants to the bank, and 2) whether the guarantee was enforceable. There had been no adjudication upon those issues in the earlier trial, and they had not been "laid to rest." Chadwick LJ stated, at 302, that it could not

> "… be argued that a secured creditor who chooses, in the first place, to sue for payment alone, is thereafter precluded from seeking to enforce his security in a separate action on the ground that that was a claim that could have been advanced in the first action."

43. I am satisfied, on the facts of the instant case, that the defendants cannot rely on the doctrine of *res judicata* as the plaintiff's core claim in these proceedings relating to the defendants' failure to execute a first legal mortgage on their property in favour of the plaintiff bank has never been adjudicated upon. The subject matter of previous summary proceedings has been the defendants' indebtedness to the bank, a decidedly different issue.

44. I take the view that the rule in *Henderson v Henderson* (1843) 3 Hare 100 is not applicable to the facts of this case as it is not a situation where the defendants have been subjected to successive applications or litigation on the same issue. The earlier case involving the same parties referred to herein which was the subject of a decision of Ryan J. involved summary proceedings against the defendants for their indebtedness to the bank. The present proceedings are equitable in nature and involve the narrow issue of the specific performance of an agreement entered into between the parties.

45. As referred to herein, on the second day of the hearing of the action this Court, with the consent of the plaintiff, permitted the defendants to amend their defence to include a plea of "no transaction." The Court informed the defendant that the defence was permitted in order to proceed with the case and in the course thereof to allow the defendant to avail himself to whatever extent he could of the judgment of this Court (Clarke J.) in *ACC Bank Plc v Brian Johnson* [2010] 4 IR 605.That case involved an action taken by the plaintiff bank against its own solicitor arising out of his contract of retainer with the bank. The defendant solicitor had been retained by the plaintiff bank to prevent the bank's money passing out of its control without security being in place. Through his negligence, the defendant solicitor allowed this very event to occur and the proceedings followed. The case made by the plaintiff in *ACC Bank Plc v Brian Johnson* [2010] 4 IR 605 was that none of the relevant funds would have been advanced to the borrower if the defendant solicitor had not been negligent.

46. This Court cannot see how the defence of "no transaction" applies to the facts of the present case. The defendants in these proceedings had the benefit of a substantial loan from the plaintiff which, it is undisputed, they have never repaid. As was noted by Laffoy J. in her written reserved judgment on the motion to renew the plenary summons in this action (*ACC Bank Plc v Stephens* [2013] IEHC 264 at para 23), these proceedings concern a core complaint against the defendant: that the parties made an agreement, the plaintiff honoured its side of the agreement, the defendants did not. Furthermore, in circumstances where the defendants have not pleaded negligence on the part of the plaintiff in providing them with a loan facility, or negligence against their former solicitors, and where the defendants have not sought to dispute the core facts of this case, the Court is of the view that the plea of no transaction has no role to play in the circumstances pertaining.

47. As the relief sought in this application is principally that of specific performance, there are a number of ingredients which the Court will look for in a contract before it grants the relief as sought. As observed in Halsbury's *Laws of England* (5th ed., 2013) Vol. 95, para 301 (ed Mackay LJ), the Court will look to see:

> "(1) that there is a concluded contract which would be binding at law if all proper formalities had been observed, and in particular that the parties have agreed, expressly or impliedly, on all the essential terms of the contract; and (2) that the terms are sufficiently certain and precise that the court can order and supervise the exact performance of the contract."

48. This Court is satisfied that a valid and enforceable contract exists between the parties for which consideration was provided and the written terms of which as set out in the letter of loan sanction are sufficiently certain. I also find that, in circumstances where the defendants have failed to honour the judgment in the summary proceedings as referred to herein, an award of damages is inadequate. I accept the submissions of counsel for the plaintiff that, in considering whether or not to grant specific performance, the Court must not only be mindful of the timeliness with which the remedy is sought but also of the justice of the case. In the circumstances of the present case, the plaintiff performed its obligations under the agreement between the parties. Furthermore, the wrong done to the plaintiff is not remediable by damages because, in the absence of the executed deed of charge and mortgage documentation the plaintiff's priority, with regard to the land which is the subject matter of these proceedings, is inferior to what it ought to be and the value of its interest, in those circumstances, would be significantly reduced as a result of the defendants' conduct.

49. For the reasons outlined, I take the view that the plaintiff is entitled to succeed as against the first named defendant, Dr. Stephens, and I will hear the submissions of both parties as to the form of the order to be drawn up.