[2017] IEHC 622

THE HIGH COURT

[2015 No. 679 S]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

JAMES MILLER AND SHARON MILLER

DEFENDANTS

JUDGMENT of Ms Justice Faherty delivered on the 28th day of June, 2017

1. In these proceedings, the plaintiff seeks leave to enter summary judgment against the defendants in the sum of €93,008.52.

2. According to the affidavit sworn on 17th July, 2015, by Ms. Emma Travers, Legal Case Manager with the plaintiff, the claim arises on foot of a loan facility of €165,000 offered by the plaintiff on 8th February, 2006, for the purchase of a property at 125 Corish Park, Wexford and accepted by the defendants on 16th February, 2006. The said funds were drawn down by the defendants on 31st March, 2006. As apparent from the loan offer letter, the defendants agreed to repay the plaintiff €256,863 over 300 monthly payments. The advance of €165,000 was subject to the plaintiff obtaining a mortgage on the property at 125 Corish Park, Wexford, County Wexford. The mortgage and charge on the said property was duly executed by the plaintiff and defendants on the 14th April, 2006.

3. It is alleged that the defendants defaulted in their repayment obligations to the plaintiff, and on 18th October, 2013, the plaintiff demanded the sum outstanding as of that date being €155,243.77 which sum was inclusive of arrears of €14,368.72.

4. On 13th June, 2014, the plaintiff appointed Mr. Simon Coyle as Receiver over the secured property at 125 Corish Park, Wexford, pursuant to the mortgage and charge dated 14th April, 2006. In September, 2014, the plaintiff, as mortgagee in possession, took the decision to sell 125 Corish Park, together with a number of other mortgaged properties which it had in its possession. The sale of 125 Corish Park was negotiated and conducted by the Receiver as part of the plaintiff's portfolio sale. The sale closed on 23rd December, 2014.

5. The within summary summons was initiated on 14th April, 2015. It seeks the residual sum due and owing on foot of the loan advanced in February 2006.

6. In response to the within proceedings, the defendants have sworn a number of affidavits in which they aver that they owe no money to the plaintiff as a result of the manner in which the plaintiff advised them in relation to their personal and business affairs.

The defendants' affidavits

7. In an affidavit jointly sworn on 28th October, 2015, the defendants set out the backdrop to their dealings with the plaintiff. They aver that in 1997, they purchased their family home in Ferrycarrig, County Wexford with the assistance of a loan of £30,000 from First Active Building Society. They started an engineering business in an outbuilding at the back of the family home. In 1999, they rented premises at Castlebridge, Wexford and from there they specialised in the manufacture of household products which went on to feature on the Late Late Show. This exposure resulted in a huge growth in their business. In January, 2001, the defendants founded Pikeman Engineering which specialised in the manufacture of carved staircases and electric gates. The defendants say that in 2002, they borrowed €107,000 from National Irish Bank ("NIB") in order to pay off the First Active loan of £30,000 and to build an extension to their family home. As a result of the growth in their business, in early 2005, they purchased an industrial unit at Sinnottsmill, Castlebridge, County Wexford, which was funded by borrowings of €245,000 from Bank of Scotland and €25,000 from the defendants' own funds.

8. The defendants aver that their business relationship with the plaintiff commenced in or about 2005 when they received a loan of €200,000 on 21st April, 2005, for the remortgage of the family home of which €170,000 was used to repay the existing NIB loan, and the remaining €30,000 was used for the refurbishment of their premises at Sinnottsmill. According to the defendants, on 4th May, 2005, the plaintiff advanced them €300,000, of which €245,000 was to be used to discharge the Bank of Scotland loan on Sinnottsmill, with the balance (€55,000) to be used to refurbish the said premises. The defendants aver that the individual with whom they dealt with in the plaintiff bank (Mr. John Hackett, hereinafter referred to as the plaintiff's business manager) "intentionally and deceitfully" incorporated the funds of €30,000 and €55,000 intended for the refurbishment for Sinnottsmill into, respectively, the aforementioned loan offers of €200,000 and €300,000 in order that the plaintiff could remortgage the defendants' family home and thereby "swell its own loan book and further to have the benefit of the extra equity that was available on [their] family home". It is averred that the plaintiff should not have advised the defendants to remortgage their family home.

9. The defendants also make reference to a further loan offer which issued on 4th May, 2005, for €50,000 by way of an overdraft facility to them.

10. At paras. 25 to 29 of their affidavit, the defendants allege that in late 2005 the plaintiff's business manager advised them to purchase a house to provide accommodation for the foreign workers which they employed in their business and on this basis, they sourced the house at 125 Corish Park which was for sale for €195,000. The defendants aver that the business manager gave them bad advice in the structuring of the finance for the purchase of the said premises.

11. The defendants aver that instead of providing the finance for the purchases of 125 Corish Park in one loan, the business manager structured the financial provision being offered to the defendants into a loan offer of €165,000 on 8th February, 2006, to purchase the house and provided a separate loan on 13th February, 2006, of €100,000, of which €50,000 was to be allocated to complete the purchase of the said premises.

12. The defendants next make reference to a loan by the plaintiff to them of €340,000 on 21st May, 2007, of which €220,000 was allocated towards the building of an industrial unit on a site adjacent to their existing factory premises at Sinnottsmill, with the remaining €120,000 to be used for "miscellaneous" purposes. The defendants aver that in early 2007, the plaintiff's business manager had advised them to build an industrial unit on the said site.

13. The defendants aver that in April 2008, the €340,000 loan was supplemented by a further €150,000 loan which resulted in a rolled-up loan offer of €499,292 being issued to them on 28th April, 2008 (incorporating the previous loan of €340,000). (**Tab 11**) With regard to this loan offer, the defendants aver that the plaintiff should never have advised them to develop the industrial unit in early 2007 and that the plaintiff should have advised them to have the potential marketability of the site properly analysed. They allege that the plaintiff's bad advice in relation to the industrial unit caused them to have loans that they did not ask for or need and which adversely affected their business generally and adversely affected their ability to repay other loans, including the loan for 125 Corish Park, which is the subject of the within proceedings. The defendants also allege that when the rolled up loan offer of €499,292 was provided in April 2008, the plaintiff concealed information about the banking sector from the defendants and that if such information had not been withheld the defendants would have made different business decisions in 2008 which would have protected their financial position.

14. The defendants further aver that on 30th March, 2009, and 14th September, 2009, respectively, the plaintiff arranged a restructuring of some of the defendants' loans that was "totally unrealistic" and that the defendants take no responsibility for any such loans.

15. It is also averred that the plaintiff advised them to sell the property at Sinnottsmill, which the defendants now consider to be very bad advice.

The defendants also allege that the plaintiff invalidly appointed a Receiver over the property at 125 Corish Park and that the Receiver ultimately sold the property at an under value and ignored a higher offer for the property and in this regard the defendants seek to bring a counterclaim against the plaintiff and the Receiver for losses arising on the sale of the property at 125 Corish Park. They further aver that they intend to bring a counterclaim against the plaintiff for losses arising from bad advice and the concealing of information in relation to other loans provided by the plaintiff. It is further argued that the bank applied excessive charges to the defendants' accounts which caused them financial damage.

16. Overall, the defendants allege that the plaintiff:

- "targeted" their business and personal property in order to advance its own commercial interest by advising them to take out various loans that were not necessary;
- was negligent in the manner in which the loans were advanced and drawn down;
- is guilty of gross negligence in relation to the various loans provided to the defendants which has led to their financial difficulties and to the loss of their business and investment properties which they had purchased and;
- was deceitful in concealing facts that if known to the defendants would have caused them to make different decisions about their business and property investments.

17. On 17th November, 2015, the second named defendant swore an affidavit which repeats the averments in the earlier affidavit. She maintains that the plaintiff's business manager never brought to her attention the importance of obtaining independent legal advice prior to the execution of the mortgage and charge on 125 Corish Park, and that had she had proper legal advice, she would never have signed the mortgage/charge. She also avers that when the defendants were asked to sign the loan offer of 21st May, 2007, for €340,000 in respect of Sinnottsmill, she specifically asked the business manager about the viability of building the unit in question and whether the defendants would be able to repay the said loan. According to the second named defendant, the business manager ignored her concerns and advised that there would be no problem selling the industrial unit. She further avers that the business manager held himself out as having a special knowledge of property development and that accordingly she relied on his advice.

18. The defendants jointly swore a further affidavit on 17th November, 2015, wherein they repeat the allegations made in their first joint affidavit. Specifically, with regard to the loan referable to the purchase of 125 Corish Park, they swear as follows:

> "We say that John Hackett of Bank of Ireland should not have advised us to purchase this property … and should not have arranged two loans to complete the purchase and we say that the plaintiff has intentionally not set out in their affidavits the totality of the circumstances surrounding the purchase of the property at Corish Park.
>
> We say that John Hackett held himself out to us as having specialised knowledge in providing business advice to us and when he suggested that we purchase a house to provide accommodation for the workers at Sinnottsmill we relied on that advice.
>
> Furthermore when we sourced the house at 125 Corish Park costing €195,000 plus legal fees and stamp duty, we relied on John Hackett's advice that we put €165,000 into one loan and the €50,000 balance into a separate loan, and accordingly we relied on his advice
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> …
>
> Again John Hackett encouraged us to top up the second loan to purchase extra land at Sinnottsmill which we didn't need or require, which caused a second loan offer to be issued for €100,000.
>
> We say that John Hackett should not have advised us to purchase the house at Corish Park and should not have set up two separate loans to fund the purchase of the house at Corish Park.
>
> We say that we relied on the advice of John Hackett in purchasing the house at Corish Park as John Hackett held himself out as having specialised knowledge in advising us in relation to property investments.
>
> We say that the provision of these two loans created a financial burden on our business that was to our detriment.
>
> We say that Bank of Ireland arranged the two loans to swell their loan books and further to get the loan to value ratio in order.
>
> We further say that Bank of Ireland applied excessive charges to our account which subsequently caused arrears on the loans and we reserve an entitlement to submit further details in that regard."

19. The defendants go on to aver:

> "We say that because of the cash flow problems caused by the building of the industrial unit, the plaintiff offered us an interest only arrangement on Corish Park in May, 2012 which was to continue for two years
>
> …
>
> We had been paying €500 per month prior to the proposed agreement and the proposed agreement provided for repayments of €300 per month approx.
>
> The problem with the interest only proposal was that Bank of Ireland sought to obtain a second charge on our family home as part of offering the agreement. We say that we were not prepared to give Bank of Ireland a second charge on our family home, however we did agree to continue paying €500 per month, which was €200 over and above what Bank of Ireland agreed to accept as part of their proposal.
>
> We say that we made the monthly payments of €500 per month from May 2012 until January 2014 and stopped because Bank of Ireland had insisted on a second charge on the family home.
>
> We say that we had a contract with Bank of Ireland which became effective when we started paying €500 per month in May 2012, which payments were accepted by Bank of Ireland and we say that Bank of Ireland breached their contract in October 2013 by insisting that we provide a second charge on our family home.
>
> We say that in the circumstances the plaintiff was not entitled to appoint a Receiver on the 13th June, 2014 and we further say that the appointment of the receiver is invalid as the appointment has not been carried out in accordance with the 1881 Conveyancing Act.
>
> We say that the Receiver sold the house for €59,500 which accounts for the purported balance claimed by the plaintiff in the present proceedings.
>
> We say that the Receiver ignored an offer of €85,000 made on the house and instead accepted an offer of €59,500 which was 30% under the market value which created a shortfall of €25,500 from the sale proceeds.
>
> We say that the plaintiff should not have claimed that we caused the arrears, should not have appointed a Receiver, should not have sold the property, and should not have pursued this matter by way of Summary Summons in circumstances where the Plaintiff themselves caused the arrears in the first place by the manner in which they advised us to develop the industrial unit. We say that the Plaintiff is aware of a dispute between ourselves and the Plaintiff and therefore the Plaintiff should have pursued this matter by way of Plenary Summons and not by way of Summary Summons, but in any event we believe that we have an arguable defence sufficient for this matter to be transferred for a Plenary Hearing."

20. In a final affidavit jointly sworn on 10th January, 2016, the defendants again take issue with the manner in which the lending on their family home was transferred from NIB to the plaintiff, the transfer of their loans in respect of Sinnottsmill from Bank of Scotland to the plaintiff and the manner in which the plaintiff advanced them finance for the development of the industrial unit adjacent to their factory premises at Sinnottsmill. In this regard, the defendants allege that when the plaintiff advanced the monies for the development of the industrial unit, it was aware that the bank was insolvent and that the Irish economy was about to collapse, all of which was withheld from the defendants by the plaintiff. The defendants repeat their allegation that it was known to the plaintiff that it was neither proper nor necessary that the purchase of 125 Corish Park be financed by the provision of two loans when one of the said loans was unnecessarily linked to their business at Sinnottsmill.

21. The defendants also aver as follows:

> "We say that Bank of Ireland and their legal agent had knowingly mishandled title matters on the site at Sinnottsmill when they took over the Bank of Scotland loan and yet continued to provide finance for Corish Park on a cross security basis."

22. At para. 27 of this affidavit they aver:

> "We say that the house loan for Corish Park which is the subject of these present proceedings is definitely part of a larger set of financial transactions involving Bank of Ireland and ourselves and this dispute can only be fully determined in a plenary hearing. We believe that we have met the necessary requirements to be transferred to plenary, which requirement is to show that we have an arguable defence."

23. On the day after they swore the aforesaid affidavit, the defendants issued a plenary summons against the plaintiff and Simon Coyle as Receiver, which was served on the plaintiff on 19th January, 2016. In those proceedings, the defendants seek damages for alleged negligence, breach of contract (including breach of statutory duty and/or fiduciary duty), deceit and/or fraudulent misrepresentation and/or negligent misstatement, unlawful interference with the economic interests of the defendants, exemplary damages, punitive damages, interests and costs.

24. On 8th July 2016, Ms. Jacinta Enright, Legal Case Manager with the plaintiff, swore an affidavit supplemental to that of Ms Travers, and in response to the defendant's affidavits. She avers as follows:

> "I say that there is no substance whatsoever to the allegations made by the Defendants in the Defendants' Replying Affidavits and that even if there was substance to such allegations (which is denied), such do not avail the defendants of a defence and/or counter claim to the within summary proceedings in respect of the loan, the subject matter of the within proceedings …
>
> I wish to clarify a specific allegation made [by the defendants] where they allege that the plaintiff and "their legal agent" knowingly mishandled title matters and to that end exhibited a letter dated 13th of April 2011 from Kirwan and Kirwan Solicitors to Bank of Ireland. Contrary to what the Defendants say at paragraph 25, Messrs. Kirwan and Kirwan are not the bank's "legal agent". They are the Defendants' solicitors. Furthermore, despite the allegations made and despite the Defendants' [averments] … none of the twelve exhibits, exhibited in the Defendants' Replying Affidavits support the unsubstantiated allegations made by the Defendants. Save for the letter from Kirwan and Kirwan and a letter concerning

interest only payments, nine of the exhibits are facility letters and one is a copy deed of appointment and charge, none of which remotely support the unsubstantiated allegations which have been made.

I say that insofar as the Defendants seek to make any claim of overcharging against the Plaintiff, same is denied. The Defendants have failed, despite adequate opportunity to particularise this claim in any manner whatsoever and it is impossible for the Plaintiff to address this allegation with any greater degree of particularity other than to strenuously deny the claim made."

25. Ms Enright goes on to state:

"I say and believe and I am advised that the Receiver herein was validly appointed. The Defendants' claim that a Receiver was invalidly appointed is one which they have failed to particularise".

26. With regard to the sale of 125 Corish Park, Ms Enright avers:

"In preparation for this sale of the selected properties, the Receiver was required to assess the Fair Market Value of each property and in this instance the Fair Market Value for the Secured Property herein had been assessed at €65,276.68. However, within the context of the overall Portfolio Sale, the purchaser was only prepared to pay the sum of €59,540.00 in respect of the Property herein so that was the sum eventually paid for it and received on the 23rd December 2014.

I say that notwithstanding that the actual sale price for the secured property was €59,540.00 a further credit in the sum of €5,736.68 was applied to the Defendants' loan account herein on 23rd December 2014 to ensure the purchaser was not disadvantaged. A further credit of €92.22 was credited to the mortgage account relating to a refund of Local Property Tax. No deductions relating to the costs of Receivership or sale of the Property were deducted from the sales price of the property.

…

I say that by the date of issue of the within proceedings, the Plaintiff's security had been realised and as such, the sole issue in the within proceedings related to the residual balance due by the Defendants to the Plaintiff on foot of the loan. I further say that prior to the 11th January 2016, being the date of issue of the Defendants' proceedings against the Plaintiff and Simon Coyle, the Defendants took no steps to pursue the Plaintiff or the Receiver, despite the fact that the Receiver was appointed on the 13th June 2014, the secured property sold in or about the 23rd December 2014, the Defendants' loan account credited in December 2014 and despite the Defendants complaints … concerning an alleged failure to accept 'higher offers' for the secured property. I say and am advised the Plaintiff did not "ignore" an offer of €85,000.00 for the property as averred to by the Defendants in their affidavits."

27. As to the Defendants' claims, she states:

"The Defendants affidavits seek, in the main to raise issues with facilities which are not the subject of the within proceedings and the Plaintiff denies that there is any valid basis upon which the Defendants are entitled to rely upon complaints concerning those unrelated facilities as a defence to the within application. In this regard, only 'the third loan' as described by the Defendants in their affidavits sworn on 10th January 2016 is relevant to the within application.

…

In summary I say that there is no substance to the defendants' allegations as set out in the defendants replying affidavits. I say and believe and am advised that the defendants have failed to establish either a dispute or a bona fide defence to these proceedings."

The plaintiff's submissions

28. On behalf of the plaintiff it is submitted that at their height, the defendants' complaints amount to an allegation of "reckless lending" by the plaintiff, which the courts have stated does not amount to a tort and, accordingly, no defence arises from it.

29. Insofar as the defendants are seeking to mount a challenge to the summary judgment proceedings by reference to generalised claims that the plaintiff inveigled them to take on the said loan, in this regard the defendants merely assert a claim of "reckless lending" by the plaintiff which has not been accepted by the courts. In this regard, counsel refers to *Harrold v. Nua Mortgages Limited* [2015] IEHC 15.

30. Furthermore, even if the defendants could be said to have a valid claim that might give rise to a set off, the value of any such set off has not been formulated in any shape or form, and the defendants' proceedings against the plaintiff and the Receiver are at a stand still and no steps have been taken by the defendants save for the issue of the plenary summons.

31. It is also submitted that insofar as it is alleged that 125 Corish Park was sold below its market value, at its height, the alleged undervalue is approximately €25,000 and thus does not come near the defendants' indebtedness to the plaintiff. In any event, the defendants' allegation is not accepted by the plaintiff.

32. Insofar as there was a deficit between the price achieved and the fair market value, the defendants' loan account was credited in this regard, and, furthermore, no deductions were made in respect of the Receiver's costs arising from the sale, as is clear from Ms Enright's affidavit.

33. The defendants seek to cross-claim in respect of a myriad number of loans which are unrelated to the February, 2006 loan the subject of the within proceedings. Accordingly, the defendants' cross-claim does not solely arise out of the same set of circumstances as the contract which is the subject matter of the within proceedings. It is submitted that the defendants themselves have acknowledged this as they have issued proceedings in January, 2016, albeit that they have taken no steps in relation to same. As regards the loan the subject matter of these proceedings, at its height, the defendants raise one specific issue in respect thereof, namely that they lost approximately €25,000 due to the undervalue by the Receiver of the said property.

34. Even if it could be said that the defendants have established that they have a cross-claim to the within proceedings such as

might give rise to an equitable set off, any prospect of an equitable set off cannot avail the defendants by virtue of clause 1.05 of the mortgage document, which specifically provides that there is to be no set- off. As authority for this proposition, counsel refers to the *dictum* of Clarke J. in Moohan *v. S.&R. Motors (Donegal) Limited* [2007] IEHC 435.

35. Thus, even if the Court were to accept that the defendants have raised an arguable defence that the plaintiff was negligent in the provision of advices to them, clause 1.05 precludes any set-off. Accordingly, the defendants face a further uphill battle in this regard.

36. Insofar as the defendants contend negligence on the part of the Receiver, that claim can only be advanced against the Receiver in the defendants' own plenary proceedings.

37. While it is accepted that there is a low threshold for the defendants to cross in order to send the matter to plenary hearing, it is submitted that the defendants have not met the threshold in this case. In this regard, counsel cites *AIB v. Whelan* [2015] IEHC 135.

38. Counsel further submits that insofar as the Court might exercise a jurisdiction (if leave is given to enter summary judgment), to stay a portion of the summary judgment pending the defendants own proceedings, it is submitted that the only figure that could be stayed is the loss of approximately €25,000 which the defendants allege arises in relation to the sale of 125 Corish Park. It is submitted that in *AIB v. Whelan*, McGovern J. was satisfied to stay such portion of the judgment entered against the defendants in that case as had been particularised by the defendants in that case. In *Whelan*, however, it is not apparent whether the mortgage provisions applicable excluded a set-off. That cannot be said in the present case, as clause 1.05 of the mortgage document clearly prohibits the defendants from relying on, *inter alia*, any equitable set-off. In this circumstance, it is submitted that the plaintiffs should be entitled to summary judgment, without a stay.

The defendants' submissions

39. The core of the defendants' defence to the within application is that they were the recipients of bad advise from the plaintiff in respect of the taking out of various loans, including the loan which is the subject of the within proceedings. It is submitted that the latter loan was part of a bundle of loans which were foisted on the defendants by the plaintiff, in particular by its business manager. Accordingly, it is submitted that the defendants' circumstances differ from the "reckless lending" jurisprudence upon which the plaintiff relies. It is contended that in the defendants' case it is not that there was reckless lending but rather that the advice given by the plaintiff's business manager was negligent.

40. In particular, the defendants received bad advice in respect of the re-mortgage of their family home to the tune of €200,000 which included €30,000 for the refurbishment of their factory premises, thereby bringing their family home into the commercial loan scenario. It is further submitted that it is entirely disingenuous of the plaintiff to present the €165,000 loan on 125 Corish Park as a stand-alone borrowing in circumstances where the purchase price was €195,000 and where the balance was made up by means of a further loan advanced by the plaintiff in the sum of €100,000, of which €50,000 was to be used towards the residual costs associated with the purchase of 125 Corish Park. Yet, in the within proceedings, the plaintiffs have failed to link the €165,000 loan with the related commercial loan of €100,000. Rather, the plaintiff had sought to "slice and dice" its various transactions with the defendants to suit its own needs.

41. It is submitted that the defendants were getting along fine in their business ventures until the plaintiff intervened. They had a large business turnover and a little profit. They were subject only of two loans prior to the plaintiff's intervention, one on their then family home and one in relation to their business. It is submitted that the defendants' engagement with the plaintiff commenced solely on the premise that they required only two small loans to assist their business enterprises but instead they were fixed with a series of loans advanced by the plaintiff.

42. It is contended that the plaintiff has tailored the defendants' various loans to suit the summary judgment process. In light of the course of dealings between Mr. Hackett and the defendants, for the plaintiff to say on affidavit that it knows of no arguable defence by the defendant to the within proceedings constitutes an abuse of process.

43. It is specifically contended that the development by the defendants of an industrial unit adjacent to their existing factory premises was entirely at the behest of the plaintiff's business manager who advised the defendants that he had customers who wanted such a unit. This was at a time when the market only wanted smaller units. As a result, the defendants were obliged to subdivide the unit they had developed into smaller units which resulted in delays and the need for further loans.

44. The provision of the loan for the development of the industrial unit and the loan in relation to 125 Corish Park arose on foot of the greed and bad advice given by the plaintiff bank. This, it is submitted, distinguishes the defendants' circumstances from the jurisprudence relied on by the plaintiff.

45. In asserting that the plaintiff in the provision of advice owed the defendants a duty of care, reliance is placed on *Frost v. James Finlay Bank Limited & Ors*. [2001] Lexus Citation 1626 (ALL ER 261).

46. It is submitted that all of the defendants' loans arose from private meetings between them and the plaintiff's business manager. The defendants' legal representative cites *Aer Rianta c.p.t. v. Ryanair Limited* [2001] IESC 94 as authority for the proposition that the content of a private meeting is sufficient for the within application to proceed to plenary hearing.

47. Furthermore, it is contended that as 125 Corish Park was sold for undervalue, the defendants have an arguable defence. It is further contended that the defendants have a *bona fide* defence to the within proceedings by virtue of the Receiver's invalid appointment. Same did not comply with the provisions of s. 24 (1) of the Conveyancing Act 1881, which requires the mortgagee to appoint a Receiver "by writing under hand".

48. In submitting that the court should be slow to debar a right of access to the courts for the purposes of setting out a defence, reliance is also placed on the *dictum* of Charleton J. in *AIB Plc. v. Darcy* [2016] IECA 214 and that of Kelly J. in *Anglo Irish Bank Corporation Limited v. Sherry & Ors.* [2010] IEHC 271. In the latter case, Kelly J. opined:

> *"Pivotal to the success of their defence will be the credibility of Mr. Daly and of the defendants themselves. If Mr. Daly in his case succeeds in persuading the court of trial that his version of events is correct and these defendants were deprived of the opportunity of having a trial on oral evidence touching upon much the same issues, I think there would be a risk of an injustice being perceived to have been done. I am conscious of the fact that judgment against these defendants will not merely be ruinous to their own financial stability but may have serious implications for their future professional lives. It is in these circumstances that I conclude that I ought in the interests of justice to adjourn the*

action for plenary hearing and refuse summary judgment insofar as the guarantee claims are concerned."

49. It is submitted that the objectives of a speedy trial must be balanced with the need to ensure that the defendants are not deprived of an adequate opportunity to challenge the plaintiff's claim. This is reflected in the criteria set out by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1.

Considerations
50. It is important to note that the defendants do not deny that the monies the subject matter of the within proceedings were advanced to them by the plaintiff or that it was drawn down by them. There is no question but that the defendants entered into an agreement whereby they received €165,000 from the plaintiff for the purchase of 125 Corish Park and that they agreed to repay it. There is also no question but that there was default in relation to the said loan agreement. Moreover, the documents put before the Court show that the defendants agreed that said property would be mortgaged as security for the loan of €165, 000.

51. By virtue of the defendants' default, the plaintiff realised its security and what they now claim for on foot of the Summary Summons procedure is the residual sum they say is due and owing on foot of the February 2006 loan agreement. They accordingly seek leave to enter final judgment. The defendants however put a number of matters before the Court which they say constitute a bone fide defence to the plaintiff's claim.

The test for summary judgment
52. In *Aer Rianta c. p. t. v. Ryanair*, Hardiman J. opined, at p. 621, that in a motion such as the present, a defendant's hurdle "is a low one" and that the jurisdiction to grant leave to enter final judgment "*is one to be used with great care*" . He later states, 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?"*

53. In *Harrisrange Limited v. Duncan*, McKechnie J., at p.7, had occasion to review the applicable case law, including *Aer Rianta c.p. t. v. Ryanair*, and went on to set out the following helpful guidelines:

> *"In his analysis of the law, Hardiman J. surveyed what might be described as the historical cases as well as the most modern authorities on this topic. His conclusion was, I think, that leave to defend should be granted unless it was "very clear" that the defendant had no defence, not even one which could be described as arguable.*
>
> *9. From these cases it seems to me that the following is a summary of the present position:-*
>
> *(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;*
>
> *(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."*

It is against that legal backdrop that the present case must be viewed.

54. The first thing to note is that the defendants' affidavits make reference to a number of dealings between them and the plaintiff concerning the provision of loans which, in my view, have no bearing on the issues to be considered in this case. What is of concern here is the contractual arrangements that were entered into between the parties in February-April, 2006, with regard to the advance to the defendants of €165,000 for the purchase of 125 Corish Park. It is in this context that the Court will consider the defendants' evidence and submissions.

55. From the contents of their affidavits, there are a number of distinct themes to what the defendants say is their defence to the within proceedings.

The first defence
56. The defendants say that their purchase of 125 Corish Park (and the ensuing liability to the plaintiff as a result thereof) came about in circumstances where they were advised by the plaintiff's business manager to purchase the said premises. In their second joint affidavit, they put it thus: "We say that John Hackett held himself out to us as having specialised knowledge in providing business advice to us and when he suggested that we purchase a house to provide accommodation for the workers at Sinnottsmill we relied on that advice." The defendants effectively allege that the business manager was negligent in the provision of such advice.

Counsel for the plaintiff categorises the defendants' complaints in this regard (and indeed similar complaints about other loan facilities provided to them by the plaintiff) as complaint by the defendant that the plaintiff engaged in "*reckless lending*", a complaint which is not justiciable. The plaintiff relies on the High Court decision of Kearns P. in *Harrold v. Nua Mortgages*.

57. In *Harrold v. Nua Mortgages*, what fell to be considered was whether the plaintiff's claimshould be struck out pursuant to the inherent jurisdiction of the courts and pursuant to O. 19, r. 28 of the Rules of the Superior Court on the basis that, as alleged by the defendant in that case, it disclosed no reasonable cause of action and was bound to fail. The facts in that case were that the plaintiff had borrowed €256,000 from the defendant and had defaulted on his repayments as a result of which joint receivers had been appointed over the secured property. The plaintiff instituted proceedings asserting, *inter alia*, that the defendant had, *inter alia*, engaged in reckless lending and had broken liquidity laws. It was alleged that had the plaintiff known this he "*would or could have different decisions about [his] financial affairs.*" The plaintiff also alleged that he was cajoled into the agreement and was offered no independent legal assistance.

58. After reviewing a number of decisions, Kearns P. addressed the plaintiff's arguments in the following terms:

> *"33. The plaintiff in these proceedings finds himself in a very unfortunate but unfortunately not uncommon position. Like many other litigants who have come before the courts in recent years, the plaintiff purchased property at the height of the country's unsustainable property boom and now finds himself in arrears and unable to meet his repayment obligations. Joint receivers have been appointed over his property. The plaintiff makes a number of claims against the defendant bank which he contends relieve him of any liability to repay this debt.*
>
> *34. In relation to the plaintiff's claim of reckless lending by the defendant, as is clear from the case law relied upon by counsel for the defendant, there is no such civil wrong in this jurisdiction. In particular, the Court notes the decisions on this issue in Healy v. Stepstone Mortgage Funding Limited, ICS Building v. Grant, and McConnon v. President of Ireland. This aspect of the plaintiff's claim is closely aligned to a number of other broad and general allegations he makes in relation to the lending practices of "various banks" which the plaintiff contends "created the false boom and bust situation which has crippled my country". Blanket allegations such as these do not give rise to a reasonable cause of action in the plaintiff's case, are bound to fail and must be struck out. That is not to say that such allegations related to the wider context of the financial crisis should not be considered by a more appropriate forum of inquiry."*

59. I am not persuaded that the defendants' claim in the present case can be merely categorised as a claim of "reckless lending" by the plaintiff. They allege a particular relationship with a particular individual within the plaintiff bank (Mr Hackett) who, they allege, took on the role of business advisor to them, over and above his role as agent of the lender. I note that Ms. Enright, in her replying affidavit, avers that "there is no substance whatsoever" to the defendants' allegations, without specifically alluding to the allegations made by the defendants against Mr. Hackett. I accept, however, that in the present case the onus is on the defendants to assert a *bona fide* defence and not on the plaintiff to disprove that the defendants have no defence. It is also the case, as alluded to by Ms Enright, that none of the documents which the defendants exhibit in their replying affidavits bear on the defendants' claim that Mr. Hackett provided business advice to them and that they relied on such advice, including that allegedly given by Mr. Hackett in and about the purchase of accommodation for the defendants' foreign workers. However, that, in and of itself, does not mean that the alleged relationship did not exist or that the alleged advisory role played by Mr. Hackett in the defendants' business affairs did not happen. Accordingly, given the low threshold applicable in this case, on this issue the defendants' case is arguable. That being said, however, the Court must assess the nature of this particular defence, as is sought to be put forward by the defendants. Albeit that I accept that the defendants claims *vis a vis* Mr. Hackett's alleged role as business advisor include his alleged involvement in providing them with business advice in relation to the purchase of 125 Corish Park, (and accordingly arise from the same set of facts as give rise to the primary claim by the plaintiff in the within proceedings), the defendants' claims amount, in effect, to a form of cross-claim to the within proceedings. In this regard, *prima facie*, the matter should be remitted to plenary hearing , as if the defendants were to succeed in their counterclaim, an equitable set-off would be available to them so that the debt arising on the plaintiff's claim would be disallowed to the extent that the counterclaim is made out. (*Moohan v. S. & R. Motors Donegal Ltd*. [2008] 3 I. R. 650 refers).

60. In *Moohan*, Clarke J. puts it as follows:

> *"[13] 4.6 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 defendants case, it would not be inequitable to allow the asserted set off;*
> >
> > *(b) if and to the extent that 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 portion of) claim (or have the same, in a case such as that with which I am concerned, refer to arbitration);"*

61. However, there is a further factor to be considered in the present case. Counsel for the plaintiff argues that the terms of the agreement entered into between the plaintiff and the defendant in respect of the loan facility of €165,000 prohibit any set-off and counsel points to clause 1.05 of the Mortgage and Charge which provides:

> "The Mortgagor hereby covenants with the Mortgagee to pay the secured moneys at the times and in the manner provided in this Mortgage without any deduction (whether for tax or otherwise) and not to exercise any right or claim to withhold the secured moneys or any part thereof or any right or claim to legal or equitable set-off in respect thereof."

62. In *Moohan*, Clarke J. addressed the question of when, even where, *prima facie*, circumstances may give rise to a defence of equitable set-off, a cross-claim may not be relied on in order to defeat an application for summary judgment. He stated:

> *"20. 5.6 It seems to me, therefore, that the overall test is as to whether, as a matter of construction of the contract taken as whole, it can properly be said that the parties have agreed that there can be no set off.*
>
> *5.7 The default position is that a party is entitled to a set off in equity in relation to any cross-claim arising out of the same contract. Thus if a builder is owed money on foot of a construction contract, the employer is prima facie entitled to a set off in equity, in principle, in respect of any defective works. The question which arises is as to whether that prima facie position has been displaced by the terms of the contract. There is no doubt but that the parties are free to agree that there will be no set off. The question is whether they have in fact done so."*

63. The defendants' legal representative's response to the plaintiff's contention that the defendants are contractually precluded from relying on any alleged set-off is that given the plaintiff's business manager's alleged fraudulent misrepresentation vis-à-vis the defendants affairs, same is sufficient to set aside clause 1.05 of the Mortgage Deed. I am not satisfied, however, given the circular nature of this argument, that this is a sufficient basis upon which to conclude that the plaintiff is precluded from relying on the provisions of clause 1.05. In all the circumstances therefore, the Court is constrained to find that the provisions of the contractual arrangement entered into by the parties prohibit the defendants from relying on a set-off, equitable or otherwise.

Second defence

64. The defendants also claim to have a *bona fide* defence to the within proceedings on the basis of what they say was the plaintiff's invalid appointment of a Receiver over 125 Corish Park. It is contended on the defendants' behalf that the appointment did not comply with the provisions of s. 24(1) of the Conveyaning Act 1881, ("the 1881 Act") which requires the mortgagee to appoint a Receiver "by writing under hand".

65. Counsel for the plaintiff submits there is no merit to the defendants' reliance on the provisions of s. 24 (1) of the 1881 Act and submits that by virtue of clause 6.02 of the Mortgage Deed, the plaintiff is not confined by the provisions of the said Act.

66. The defendants' solicitor contends that the plaintiff is incorrect in stating that a Receiver could be appointed in the present case otherwise by writing under hand. He argues that the exclusion in clause 6.02 of the mortgage deed merely excludes s. 20 of the 1881 Act; it does not exclude s. 24(1).

67. S. 24(1) of the 1881 Act provides:

> "24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.
>
> (2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.
>
> (3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.
>
> (4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.
>
> (5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.
>
> (6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.
>
> (7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.
>
> (8.) The receiver shall apply all money received by him as follows (namely):
>
> (i.) In discharge of all rents, taxes, rates, and outgoings whatever
>
> affecting the mortgaged property; and
>
> (ii.) In keeping down all annual sums or other payments, and the
>
> interest on all principal sums, having priority to the mortgage in right
>
> whereof he is receiver; and
>
> (iii.) In payment of his commission, and of the premiums on fire, life,
>
> or other insurances, if any, properly payable under the mortgage deed
>
> or under this Act, and the cost of executing necessary or proper repairs
>
> directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal

money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property."

68. S. 20 reads:

"20. A mortgagee shall not exercise the power of sale conferred by this Act

unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the

mortgagor or one of several mortgagors, and default has been made in

payment of the mortgage money, or of part thereof, for three months after such

service; or

(ii.) Some interest under the mortgage is in arrear and unpaid for two months

after becoming due; or

(iii.) There has been a breach of some provision contained in the mortgage

deed or in this Act, and on the part of the mortgagor, or of some person

concurring in making the mortgage, to be observed or performed, other than

and besides a covenant for payment of the mortgage money or interest

thereon.

69. Clause 6.02 of the mortgage deed provides:

"The Mortgagee shall have the statutory powers conferred on mortgagees by the Conveyancing Acts as varied and extended by this Mortgage including the power to appoint a receiver and in particular subject to the following variations and extensions that is to say:

(a) the secured monies shall be deemed to have become due within the meaning and for all purposes of the Conveyancing Acts on the execution of this Mortgage;

(b) the power of sale shall be exercisable by the Mortgagee or on its behalf by a receiver or any other party appointed by it without the restrictions on its exercise imposed by section 20 of the Act of 1881;

(c) the power of leasing conferred on the Mortgagee shall be extended so as to authorise the Mortgagee to lease and make arrangements for lease at a premium or otherwise and to accept surrenders of leases and grant options as the Mortgagee shall consider expedient and without the need to observe any of the provisions of section 18 of the Act of 1881;

(d) any receiver appointed by the Mortgagee under the power to appoint a receiver shall be deemed to be the agent of the Mortgagor and the Mortgagor shall be solely responsible for the acts omissions and defaults of such receiver and for his remuneration and the Mortgagee shall not under any circumstances be responsible for any loss or misapplication of the rents or profits of the Mortgaged Property or any part thereof by reason of any default neglect or breach of trust of or by the receiver for the time being and all moneys received by such receiver after providing for the matters specified in paragraph (i) to (iii) of sub-section 8 of section 24 of the Act of 1881 and the remuneration of such receiver and the discharge of all costs, charges and expenses of any of the powers of such receiver may and shall if the Mortgagee in its absolute discretion shall so direct be applied in or towards satisfaction of the secured moneys and in such order as the Mortgagee may from time to time conclusively determine."

70. Even taking the defendants' contention at its height, namely that clause 6.02 of the Mortgage/Charge does not exclude s.24(1) of the 1881 Act, I do not find the defendants' contention that the Receiver was invalidly appointed has been made out to an arguable threshold. In her affidavit, Ms Enright, of the plaintiff bank, has exhibited the deed of appointment dated 13th June, 2014, appointing Mr. Simon Coyle as Receiver over 125 Corish Park. In any event, the sums claimed in the within proceedings represent monies lent by the plaintiff and the advance of the monies has not been disputed by the defendants.

Third defence

71. The defendants allege that in selling 125 Corish Park for €59,540, the Receiver sold it for less than its market value, and that he and the plaintiff ignored a higher offer of €85, 000. It is alleged that the house was sold for thirty percent "under the market value". The defendants aver that they intend to counterclaim against the plaintiff for the loss which has accrued as a consequence of the Receiver's actions.

72. In her affidavit, Ms Enright avers that the fair market value of the house had been assessed at €65,276.68. She goes on to aver that, in so far as a shortfall of €5,736.68 did accrue as between the fair market value as assessed by the plaintiff and the purchase price ultimately achieved, that shortfall was in fact credited to the defendants' mortgage account, together with a refund of €92.22 in respect of Local Property Tax. It is also averred that the defendants did in fact receive the full benefit of the sale price achieved, as neither the Receiver's costs nor the costs of the sale were deducted from the sale.

73. Taking the defendants' claim in this regard against the plaintiff at its height, they have a defence in the nature of a counterclaim for an alleged loss of approximately €20,000 (€85,000 less the €65,000 odd that was credited to their account) that could be said to arise from the same factual circumstances as give rise to the plaintiff's claim. However, the Court is again constrained from remitting the within proceedings to plenary hearing on this basis by virtue of clause 1.05 of the mortgage document, wherein the parties contracted to exclude the defendants' rights to any set-off.

Fourth defence
74. In their affidavit sworn 28th October, 2015, the defendants allege that the plaintiff "applied excessive charges" on their accounts, which caused them "financial damage". The plaintiff denies that any overcharging occurred. Ms Enright specifically avers that "despite adequate opportunity", the defendants have failed to particularise this particular allegation. I am inclined to agree with the argument put forward by the plaintiff. Other than the bare assertion that charges that were applied to their accounts were excessive, the defendants have not sought to adduce any evidence in this regard in respect of the loan account in issues in these proceedings, or indeed in respect to any loan account such as might persuade the Court to hold as arguable that a similar infraction may have been committed in respect of the loan account relating to 125 Corish Park. That being the case, I am not satisfied to hold that the defendants have established a fair probability of their having a *bona fide* defence on this basis, for this matter, or any part thereof, to be remitted to plenary hearing.

Fifth defence
75. The second named defendant alleges that the plaintiff never brought to her attention the importance of obtaining legal advice. I am not persuaded that the absence of legal advice establishes a fair or reasonable probability of the second named defendant having a real or *bona fide* defence in this context. The loan related to a commercial enterprise and, accordingly, I am satisfied that there was no obligation on the lender to advise or explain to the second named defendant the necessity of obtaining legal advice, particularly so when the loan document itself "strongly recommended" that the defendants " seek independent legal advice" before signing it.

Sixth defence
76. The defendants also allege that in May, 2012, the plaintiff offered them an interest only arrangement on 125 Corish Park which was to continue for two years. They aver that prior to the said agreement that they were paying €500 per month by way of repayments and that the proposal which emanated from the plaintiff in May, 2012, was for €300 approximately to be paid per month.

77. It is certainly the case that on 28th May, 2012, the plaintiff wrote to the defendants stating that:

> "Two years Interest only has been approved on account number 32615608
>
> From June 2012 to May 2014 subject to the following conditions:-
>
> 1: Your consent to providing a Second Legal Charge on your PDH Maypark Crossabeg Wexford."

Letters amending the Offer Letter for the defendants' mortgage on 125 Corish Park (and presumably the mortgage on their family home at Maypark) were enclosed with the letter of 28th May, 2012 which were to be signed by the defendants.

It is common case that the defendants were not prepared to give the plaintiff a second charge over their family home. It is not contended by the defendants that the proposal in the 28th May, 2012 letter was ever concluded. However, the defendants contend, effectively, that they had a "new" contract with the plaintiff which became effective in May, 2012 when their payments of €500 per month continued to be accepted by the plaintiff until, they say, the plaintiff "breached" that contract in October, 2013 "by insisting that [they] provide a second charge on [their] family home". Even with the low hurdle the defendants have to surmount to send the within application to

plenary hearing, there is no evidence of any concluded agreement varying the terms of the 2006 loan agreement in respect of 125 Corish Park. Unfortunately, I do not find the defendants' reliance on the fact that the plaintiff accepted repayments of €500 per on the loan to be sufficient evidence of the existence of a concluded revised repayment terms in respect of 125 Corish Park, such as to remit the matter to plenary hearing. This is particularly so in light of the plaintiff's letter of 28th May, 2012.

Seventh defence
78. In their joint affidavit sworn 10th January, 2016, the defendants allege that the mortgage charge on 125 Corish Park "is invalid as the spouse never signed the consent". This is not further elaborated on, nor is it stated which of the defendants was required to give consent to the charge. The Court will however consider the argument that is sought to be canvassed as one whereby one or other of defendants seeks to rely on the provisions of the Family Home Protection Act, 1976 as amended by the Family Law Act, 1995. It is common case however that 125 Corish Park was never the defendants' family home and was purchased solely in connection with their business. Accordingly, reliance on the provisions of the 1976 Act cannot assist the defendants in establishing that they have arguable grounds to remit the matter to plenary hearing.

Conclusion
79. For the reasons set out in this judgment, the court is satisfied that the vast majority of the defendants' claims do not meet the low threshold for this case to be remitted to plenary hearing. In respect of two aspects of their claims, the Court has found that they could be said to arise from the same factual matrix as gives rise to the plaintiff's claim, such as to give the defendants an arguable defence in equity. However, the Court has also found that the defendants are contractually precluded from relying on an equitable set-off.

80. It is, however, common case that the defendants have instituted proceedings against the plaintiff for alleged negligence, breach of duty (including breach of statutory duty and/or fiduciary duty, deceit, and/or fraudulent misstatement and/or negligent misstatement in the course of its dealings with the defendants.

Save for the plenary summons, at the date of the hearing of the within application, no further steps had been taken by the defendant to further their proceedings. It is also the case that, save for their allegation that the plaintiff's business manager took on the role of advisor to them in their business affairs and that in that guise he negligently advised them to purchase 125 Corish Park, the defendants have not particularised their alleged loss on foot of the alleged negligence and breach of duty, on affidavit. However, the thrust of their case appears to be that their present indebtedness of €93,008.52 would not have arisen but for the alleged advisory role played by the plaintiff's business manager. As already referred to, a secondary claim made against the plaintiff is that it allowed 125 Corish Park to be sold for less than its market value.

Summary

81. In all of the circumstances of this case, the Court deems it appropriate to give the plaintiff leave to enter judgment against the defendants in the sum of €93, 008.52 which sum should be updated either by agreement or by the filing of an affidavit in order to fix the correct sum as due as of the date of this judgment. However, I will put a stay on execution of the judgment. This stay will be for a period of nine months to see what steps are taken by the defendants in the interim in prosecuting their proceedings against the plaintiff in respect of the parties' dealings in respect of 125 Corish Park.

82. I will hear from the parties' legal representatives as to when the matter should be next listed before the Court to ascertain the progress of the defendants' litigation against the plaintiff and to see what extension (if any) to the stay might be appropriate.