

THE HIGH COURT

COMMERCIAL

[2015 No. 7740 P]

[2015 No. 136 COM]

BETWEEN

MICHAEL CORBETT AND KEVIN CORBETT

PLAINTIFFS

AND

LSREF III ACHILL INVESTMENTS LIMITED, STEPHEN TENNANT AND GEAROID COSTELLOE

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on 8th day of April, 2016.

Summary proceedings

1. On 2nd July, 2015, the first named defendant herein ("Achill") issued a summary summons seeking judgment against the plaintiffs herein ("the Corbetts") in the sum of €10,554,672.28 as against Mr. Michael Corbett and the sum of €47,257,679.21 as against Mr. Michael Corbett and Mr. Kevin Corbett on a joint and several basis. The proceedings arose from the Corbetts' default in relation to very considerable loan facilities advanced to them by Ulster Bank Ireland Limited ("Ulster Bank"). The rights of Ulster Bank in relation to two facility letters, one of 12th October, 2010, and the other of 7th June, 2011, and certain securities as more fully set out below were transferred by Ulster Bank to Achill by deed of transfer dated 17th November, 2014. On 4th March, 2015, Achill appointed the second and third named defendants as receivers over a number of properties charged by the Corbetts to Ulster Bank and which were assigned by Ulster Bank to Achill ("the Receivers").

2. The summary summons was heard before Barrett J. in the High Court on 6th October, 2015. Mr. Jeffrey Johnston swore three affidavits on behalf of Achill and Mr. Michael Corbett swore three affidavits on behalf of the Corbetts. In addition, the Corbetts' solicitor, Mr. Diarmuid O'Shea swore an affidavit in the proceedings. Barrett J. reserved judgment and delivered a written judgment on 22nd October, 2015.

3. It is clear from the affidavits of Mr. Corbett and the judgment of Barrett J. that the Corbetts defended the matter fully on a number of grounds, all of which were rejected by Barrett J. In his judgment, the learned High Court judge held:-

(i) Achill issued proper letters of demand in relation to the facilities of 12th October, 2010, and 7th June, 2011, on 2nd March, 2015.

(ii) A facility letter of 11th January, 2011, was cancelled and superseded by the express provisions of the June, 2011 facility letter. The facility of January, 2011 could not be resurrected and was of no avail to the Corbetts.

(iii) The facility letter of June, 2011 did not lapse or terminate simply because no funds were in fact drawn down pursuant to the terms of the facility agreement. The facility letter of June, 2011 contained a condition precedent to draw down which required the Corbetts to furnish certain security to Ulster Bank prior to Ulster Bank making available additional credit to the Corbetts. It was common case that the Corbetts did not comply with the condition precedent as to security in the June, 2011 facility letter. The Corbetts argued that as a result the terms of the June, 2011 facility letter were unenforceable by either Ulster Bank or Achill as assignee of the facility. Barrett J. rejected this argument and held at para. 22:-

"[t]he principal consequence of non-compliance with those conditions precedent is that no credit needs to be extended, no more; the facility letter remains extant."

(iv) Barrett J. rejected the argument that the facility letter of 20th June, 2011, did not bind the Corbetts on the basis of a want of consideration as no new draw down of funds occurred. At para. 25 of his judgment he identified the consideration offered by Ulster Bank for the June, 2011 facility letter and held that there was a binding fresh agreement between the parties "the validity of which was unaffected by any want of fresh drawdown".

(v) He rejected the argument that the facility letter of June, 2011 was not binding as the term provided for in the January, 2011 facility letter had not yet expired. At para. 27 he stated:-

"[t]here is nothing in law to stop parties to a term loan agreement agreeing, for good consideration, to cancel an existing term loan agreement and replace it with some other arrangement or simply to part ways. That is all that happened here. The notion that, in such circumstances, the new loan agreement cannot properly cancel and replace one or more previous loans is mis-founded in logic and mistaken in law."

(vi) He rejected the Corbetts' argument that Ulster Bank had repudiated the loan agreement by not allowing a draw down of part of the facility. The facility letter provided that Ulster Bank was under no obligation to provide the facility unless the conditions precedent were met.

(vii) Similar arguments were advanced by the Corbetts in relation to the October, 2010 facility letter which were rejected for like reasons by Barrett J.

(viii) The Corbetts argued that Ulster Bank represented that repayment or refinancing of their facilities with Ulster Bank would occur by the extension on a rolling basis of funding so that new funding would immediately replace the old funding upon its expiration. The Corbetts specifically sought to rely on certain loan amortisation schedules attached to the January, 2011 facility agreement. This argument was rejected as the January, 2011 agreement was cancelled. The extant facilities, the June, 2011 facility letter and the October, 2010 facility letter, stated that the facilities that they govern were to be repaid or refinanced by 20th August, 2011. Barrett J. stated at para. 31 of his judgment:-

"[t]he court has had careful regard to the form and substance of those agreements and, in fairness to the bank that drafted them, they could not be any clearer in what they provide."

He continued at paras. 32-33 as follows:-

"[i]t is incumbent on all of us to approach written agreements with great caution and to seek independent legal advice when and as appropriate before signing agreements that, as here, have the potential to be financially ruinous in the event of default. A critical provision in the two facility letters appears in the closing section, close to the signature blocks. It provides that 'This Facility Letter supersedes all prior agreements, arrangements or correspondence between the Bank and the Borrower in relation to the Facilities.' Yet the defendants come to court arguing that there were overarching representations on the part of Ulster Bank, when executing the facility letters, that survived the execution of same. If there were overarching representations, and there is no evidence of same, nor even, e.g., a suggestion that if Mr 'X' or Ms 'Y' of Ulster Bank's lending team were to be called to give evidence, he or she would testify to the existence of same, they cannot have survived the clause just quoted..."

However, the insurmountable difficulty which the defendants face in the within proceedings is that when it comes to that 'clear and unambiguous promise' referred to by Griffin J. in Doran, or the equities referenced in s.28(6) of the Act of 1877, there is absolutely no evidence of same before the court, nor is there even, to borrow from the wording of Clarke J. in McCaughey, 'a credible basis for believing that [such] evidence may be forthcoming'. There is therefore no basis in this regard for refusing the summary judgment sought."

The claims in plenary proceedings

4. These proceedings were commenced by the Corbetts against Achill and the Receivers on 24th September, 2015. The indorsement of claim seeks reliefs (A) to (Y) as follows:-

(A) "A declaration that the Plaintiffs have no liability to the First Defendant on foot of one, each and/or all of the facility letters set out in the First Schedule hereto (hereinafter the "Facility Letters") by reason of the fact that the said Facility Letters did not come into operation and/or the respective contractual rights of the parties as described in the Facility Letters did not become operative.

(B) In the alternative an Order for rescission and/or a declaration that one, each and/or all of the Facility Letters are invalid, void, not actionable at the behest of the First Named Defendant and/or of no effect by reason of the fact that the said Facility Letters were procured pursuant to the misrepresentation and/or deceit of Ulster Bank Ireland Limited, its servants or agents.

(C) In the alternative a declaration that one, each and/or all of the Facility Letters are invalid, void, not actionable at the behest of the First Named Defendant and/or of no effect by reason of the repudiatory and/or fundamental breach of contract on the part of Ulster Bank Ireland Limited, its servants or agents.

(D) A declaration that one, each and/or all of the mortgages set out in the Second Schedule hereto (hereinafter the "Mortgages") are invalid, void, not actionable at the behest of the First Named Defendant and/or of no effect by reason of the fact that the said Facility Letters did not come into operation and/or the respective contractual rights of the parties as described in the Facility Letters did not become operative.

(E) In the alternative an Order for rescission and/or a declaration that one, each and/or all of the Mortgages are invalid, void, not actionable at the behest of the First Named Defendant and/or of no effect by reason of the fact that the said Mortgages were procured pursuant to the misrepresentation and/or deceit of Ulster Bank Ireland Limited, its servants or agents.

(F) A declaration that one, each and/or all of the Mortgages are invalid, void, not actionable at the behest of the First Named Defendant and/or of no effect by reason of the repudiatory and/or fundamental breach of the Facility Letters on the part of Ulster Bank Ireland Limited.

(G) A declaration that the First Named Defendant, its servants or agents are estopped and/or precluded from relying on and/or enforcing one, each and/or all of the Facility Letters and/or one, each and/or all of the Mortgages by reason of the conduct of Ulster Bank Ireland Limited, its servants or agents, including their representations to the Plaintiffs.

(H) A declaration that the purported appointment of the Second and Third Named Defendants as Receivers to each of the properties set out in the Third Schedule hereto (hereinafter the "Properties") is ultra vires, null, void and of no effect.

(I) Further and without prejudice to the matters hereinbefore pleaded a declaration that the charge registered over the lands as described in the Fourth Schedule is void and of no legal effect in consequence of same having been procured in the absence of any reference thereto in any contractual document and in the absence of any agreement for its grant and/or in the absence of any consideration and/or in error.

(J) If necessary, rescission of one, each and/or all of the Facility Letters.

(K) If necessary, rescission of one, each and/or all of the Mortgages.

(L) An Order preventing the First Named Defendant, its servants or agents from carrying out any acts, or any further acts, for the purpose of enforcing one, each and/or all of the Facility Letters.

(M) An Order preventing the First Named Defendant, its servants or agents from carrying out any acts, or any further acts, for the purpose of enforcing one, each and/or all of the Mortgages.

(N) If necessary an injunction restraining the sale of the Properties by the Defendants or any of them.

(O) If necessary, an order that the defendants carry out all steps for the purpose of undoing the purported appointment of Receivers to the Properties and for the purpose of returning the said properties to the Plaintiffs.

(P) Damages for breach of contract.

(Q) Damages for negligence and including breach of duty.

(R) Damages for misrepresentation.

(S) Damages for deceit.

(T) Damages for unjust enrichment.

(U) All accounts and enquiries.

(V) Aggravated and/or exemplary damages.

(W) Interest.

(X) Further or other relief.

(Y) Costs."

The precise parameters of this case were not apparent until the Statement of Claim was delivered, after Barrett J. had given judgment in the summary proceedings.

Motion

5. The defendants issued a motion dated 4th December, 2015, seeking an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the plenary summons and Statement of Claim on the grounds that they disclose no reasonable cause of action and/or staying or dismissing the action on the grounds that the pleadings are frivolous and vexatious. In the alternative they seek an order pursuant to the inherent jurisdiction of the court dismissing and/or striking out the proceedings on the grounds that they are frivolous and/or vexatious and/or bound to fail and/or an abuse of process. They seek like orders pursuant to O. 19, r. 5(2) and/or r. 27.

6. They also seek an order pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 vacating the lis pendens registered by the Corbetts in the Central Office of the High Court on 25th September, 2015, in connection with these proceedings.

Res judicata

7. At the hearing of the motion it was accepted by counsel on behalf of the Corbetts that there was a considerable overlap between the case advanced by the Corbetts against Achill in these proceedings and the defence advanced by them in the summary proceedings. Paragraphs 5-14 of the Statement of Claim plead as follows:-

"5. The Plaintiffs had a longstanding banking relationship with Ulster Bank Ireland Limited (hereinafter 'Ulster Bank') on foot of which Ulster Bank had extended certain funding to the Plaintiffs for the purposes of, inter alia, carrying out the purchase of lands and property for commercial development. Further to a loan agreement/facility letter dated the 11th January 2011 Ulster Bank extended finance over a number of facilities to the Plaintiffs. The said loan agreement/facility letter encompassed inter alia seven different facilities referencing the refinance of pre-existing development lands in respect of various projects and the refinance of an overdraft facility. The Plaintiffs will refer to the said loan agreement/facility letter for its full import and meaning.

6. The background against which said loan agreement/facility letter came to be offered (the terms providing for repayment and refinancing by 30th August 2011) included clear and unambiguous representations on the part of Ulster Bank over a number of years that the repayments and refinance would occur by the extension on a rolling basis of funding on foot of a new facility to replace the old one on its expiration. In this regard the Plaintiffs will refer to, inter alia, the schedules which were attached to the January 2011 letter (and all earlier facility letters).

7. It was the nature of the agreement between the Plaintiffs and Ulster Bank that the system of rolling refinance operated throughout the course of the relationship to the extent that on the date anticipated for renewal of each facility Ulster Bank would automatically issue a fresh letter of offer without request.

8. In the course of 2011 the Plaintiffs were involved in litigation with a third party namely Coffey Construction (I) Limited.

9. A facility letter dated the 7th June 2011 was issued by Ulster Bank. The said facility letter was subject to a number of conditions precedent in relation to security. Further the said facility letter included provision for the advancing of funds specifically in relation to the settlement of the third party proceedings referred to above. Save for the offer of the said additional funds specific to the Coffey Construction (I) Limited dispute and in absence of the necessity for entry into a facility at that time (given the fact that the Plaintiffs were within term under their pre-existing arrangement and given the background as highlighted above) the Plaintiffs would have had no requirement of the said June 2011 loan agreement/facility letter. In the premises the sole basis for execution of the said loan agreement was the extension of the additional/new funding and execution of the agreement came about in reliance on the representations of the Ulster Bank to the effect that the funding would be extended.

10. Further and in the alternative the said representations as to the extension of funding for the Coffey Construction (I) Limited dispute were made in circumstances where Ulster Bank sought to achieve the enhancement of the suite of securities it would hold without conferring any benefit on the Plaintiffs.

11. It is the Plaintiffs' case that the said loan agreement/facility letter dated the 7th June 2011 lapsed in accordance with the terms thereof, that the loan agreement/facility letter is and/or did not become binding upon the Plaintiffs in consequence of the repudiatory and/or fundamental breach by Ulster Bank and/or that the conduct of the Bank has caused loss and damage to the Plaintiffs.

12. The said conditions precedent had to be satisfied on or before the 30th June 2011 and it is the Plaintiffs' case that the said facility letter lapsed and the Plaintiffs were not bound by same. For the avoidance of doubt no additional funds were advanced to the Plaintiffs. Ulster Bank refused to advance the funds in relation to inter alia the aforesaid settlement of the proceedings. The said refusal constituted a fundamental and repudiatory breach of contract between the parties. Further the said position was confirmed inter alia by representatives of Ulster Bank in a meeting that took place in October 2012 and by way of email correspondence to the effect that the conditions precedent and special conditions detailed in the facility letter dated the 7th June 2011 had not been met in a satisfactory manner to Ulster Bank and the availability of facilities had accordingly lapsed.

13. It was the clear understanding of the Plaintiffs and Ulster Bank that the contract of loan as encompassed in the June 2011 facility letter could only become binding upon the Plaintiffs as borrowers if the funds were drawn down on that agreement. No funds were drawn down. For the avoidance of doubt, in so far as the said loan agreement/facility letter provided by way of condition precedent for the lapse of the facilities, the Plaintiffs' claim that the said facility letter lapsed, same being the loan agreement or letter in which the facilities were set forth.

14. The Plaintiffs in an attempt to perform their obligations under the said facility letter provided certain securities to Ulster Bank however notwithstanding the fact that Ulster Bank regarded the loan agreement/facility letter as lapsed it purported to hold onto the said security and transfer certain securities to the First Named Defendant."

This is precisely the same case that was made to and rejected by Barrett J. in his judgment of 22nd October, 2015. These matters are res judicata (subject to the question of an appeal and stay on the order discussed below).

8. Paragraph 15 of the Statement of Claim states "[a]s a result of the foregoing breach of contract, negligence, breach of duty and/or misrepresentation the Plaintiffs have and continue to suffer inconvenience, loss and damage." It is clear that the claim by the Corbetts in these proceedings for damages for breach of contract, negligence, breach of duty and/or misrepresentation is based upon the matters pleaded in paras. 5-14 of the Statement of Claim. As these paragraphs raise matters which are res judicata it follows that this case now advanced by the Corbetts in these proceedings is res judicata.

9. Paragraphs 16 and 17 of the Statement of Claim deal with the facility letter of 12th October, 2010. They provide as follows:-

"16. Furthermore and without prejudice to the foregoing, Ulster Bank issued a facility letter to the First Named Plaintiff dated the 12th October 2010. The said loan agreement/facility letter contained certain conditions precedent such that certain securities provided for under the subheading 'securities' would be put in place prior to the 30th November 2010 in default of which the said agreement would lapse.

17. The said securities were not put in place and in the premises the said loan agreement/facility letter did not come into operation and the respective contractual rights of the parties as described in it did not become operative. The Plaintiffs will refer to the said facility letter for its full import and meaning."

10. These arguments were addressed at the hearing before Barrett J. and rejected by him in his written judgment referred to above. Therefore, the issue pleaded is res judicata.

11. Paragraph 18 of the Statement of Claim is predicated on the allegation that the loan facilities of June, 2011 and October, 2010 had lapsed. This contention was expressly rejected by Barrett J. as I have already set out.

12. At para. 18, the Corbetts say that Ulster Bank knew or ought to have known that the facility letters had lapsed and further knew or ought to have known that by purporting to transfer the said facility letters to Achill, the Corbetts would suffer and sustain inconvenience, loss and damage. The legal and factual basis for this claim has been rejected by the High Court when it held that the two facility letters in fact had not lapsed and that Achill was entitled to enter a very considerable judgment against the Corbetts on foot of the two facility letters and the demands for repayment. It follows, therefore, that any plea alleging that this conduct was wrongful has already been decided and rejected and any case now advanced based on an allegation to the contrary is bound to fail. Thus the plea at para. 18 which provides as follows cannot stand:-

"[d]espite the aforesaid lapsing of the agreements and the fact that they were consequently non-binding on the parties, the First Named Defendant purported to act on foot of the said loan agreements/facility letters and in reliance on the securities granted thereunder and in the premises wrongfully purported to take possession of the Plaintiffs' properties by way of the appointment of the Second and Third Named Defendants as receivers." (Emphasis added)

The first part of this sentence does not disclose any wrongful action on the part of Achill. It therefore follows that the plea does not substantiate that it was wrongful for Achill to take possession of the Corbetts' properties by way of the appointment of the second and third named defendants as receivers as pleaded.

13. At paras. 19-23 of the Statement of Claim, the Corbetts plead as follows:-

"19. By Deed of Transfer between Ulster Bank Ireland Limited and the First Named Defendant, Ulster Bank purported to transfer certain mortgages and charges together with a purported transfer of underlying loan agreements to the First Named Defendant. The said facility letters that Ulster bank purported to transfer were the aforesaid facility letter dated the 12th October 2010 (between Ulster Bank and the First Named Plaintiff) and the aforesaid facility letter between Ulster Bank and the First and Second Named Plaintiffs dated the 7th June 2011.

20. On foot of the said purported transfer the First Named Defendant wrongfully made demands and thereafter issued proceedings for Summary Judgment against the First and Second Named Plaintiffs. The said proceedings are now the subject of an appeal before the Court of Appeal.

21. Furthermore the First Named Defendant wrongfully purported to appoint the Second and Third Defendants as Receivers over certain assets of the Plaintiffs that the First Named Defendant claimed had been the subject of

mortgages or charges transferred to it by the aforementioned Deed of Transfer.

22. *The Plaintiffs defended the within proceedings on the basis inter alia that the facility letters dated October 2010 and June 2011 had lapsed, the rights imposed thereunder were not operational, there was a fundamental breach of contract by Ulster Bank, no funds were advanced and accordingly no liability was owed to Ulster Bank on foot of the aforesaid facility letters. Accordingly no liability was owed to the First Named Defendant and nor did the First Named Defendant have the power to appoint the Second and Third Named Defendants as receivers.*

23. *Pursuant to the provisions of Section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 the First Named Defendant has assumed the legal and equitable obligations of Ulster Bank Ireland Limited to the Plaintiffs."*

14. Achill sued the Corbetts on foot of the two facility letters and obtained judgment against the Corbetts pursuant to the outstanding obligations in respect of those facility letters. It could only have done so if the High Court had been satisfied that the deed of transfer properly assigned the facilities from Ulster Bank to Achill. The High Court also expressly held that Achill was entitled to demand repayment on foot of the facility agreements and to issue the proceedings. In reaching its judgment on 22nd October, 2015, the High Court had regard to the arguments advanced by the Corbetts which are summarised in paras. 22 and 23 of the Statement of Claim. The actions of Ulster Bank in relation to the two loan facilities and in assigning the two loan facilities to Achill and the actions of Achill in demanding repayment of the facilities and suing for summary judgment were in effect upheld by the High Court as correct and bona fide by its refusal to remit the summary proceedings to plenary hearing and by its granting Achill summary judgment against the Corbetts as set out above. It follows that these actions cannot constitute negligence, breach of duty or breach of contract or any wrongful misrepresentation on the part of Ulster Bank in the first place. It also follows that they are not matters in respect of which Achill can now be liable to the Corbetts pursuant to the provisions of s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877. It also follows that there was no negligence or breach of duty on the part of Achill in demanding repayment of the loans or issuing the proceedings.

The case against the Receivers

15. At paras. 24 and 25 of the Statement of Claim, the Corbetts plead:-

"24. As a result of the foregoing negligence, breach of duty, breach of contract and/or misrepresentation on the part of Ulster Bank the Plaintiffs have suffered and sustained inconvenience, loss and damage for which the First Named Defendant is now liable. Furthermore as a result of the negligence, breach of duty of the First Named Defendant in inter alia making the aforesaid loan demands, issuing proceedings and/or the purported appointment of the Second and Third Named Defendants as Receivers the Plaintiffs have suffered inconvenience, loss and damage.

25. In the premises all actions to enforce the securities purportedly held by the defendant in reliance on the said loan agreements/facility letters are without lawful authority and void as against the Plaintiffs."

16. It is clear from the above that the Corbetts claim that Achill was not entitled to appoint the second and third named defendants as receivers over the properties the subject of the deed of transfer. They advance this case on the basis of alleged negligence and breach of duty on the part of Achill in making the loan demands and issuing the proceedings. For the reasons outlined above, the premise underpinning this pleading cannot be sustained. No allegation is made in respect of any actions or inactions of the Receivers themselves. This point was made in submissions to the Court by counsel for Achill and counsel for the Corbetts did not respond to dispute this submission or to advance any other reason why the case might be maintained by the Corbetts against the Receivers. No amendment was suggested that might save the proceedings. On the contrary, in written submissions it was stated that if the Corbetts are successful in the appeal "then it will be necessary to articulate the grounds upon which it is claimed that the appointment of the receivers was invalid" but, apparently upon no new grounds. In the premises, I am satisfied that the claim as pleaded against the Receivers is bound to fail.

Deceit

17. The Statement of Claim does not plead deceit against any of the defendants, but at relief (S) the Corbetts seek damages for deceit. The defendants raised particulars requesting the Corbetts to particularise the claim for damages for deceit against the defendants. On 23rd December, 2015, the Corbetts replied stating "this does not arise from the statement of claim", but reserving the right to plead further particulars as and when the need may arise. In his affidavit sworn to resist the defendants' motion to dismiss the proceedings, Mr. Michael Corbett averred at para. 5(f) of his affidavit:-

"[w]hile professing ignorance as to the basis for the claim in deceit in the within proceedings...the Defendants are, without explanation to this Court, disregarding the evidence already proffered to the High Court which clearly ventilates the facts underpinning this claim. In particular the averments of Diarmuid O'Shea in his affidavit of the 11th September 2015 sworn in the summary Proceedings and the attendant exhibits have for without apparent reason been disregarded by the Defendants notwithstanding service of that affidavit and its opening to the Court in the summary proceedings."

That is the sum total of the Corbetts' case in deceit against the defendants. From Mr. Corbett's testimony, it is clear that such evidence as the Corbetts wish to rely upon in relation to a claim for damages for deceit in the plenary proceedings was to be found in the evidence adduced in the summary proceedings and in particular in the affidavit of Mr. Diarmuid O'Shea. From this, two points flow. One, that the evidence has already been presented to, and considered by, the High Court. It is to be inferred that it was rejected on the basis that there was no finding of deceit in the judgment of Barrett J. Two, the affidavit of Mr. O'Shea in fact makes no allegation of deceit against either Ulster Bank or Achill. Thus, even if this was an acceptable manner in which to plead deceit, which it clearly is not, there, in fact, is no claim in deceit advanced in these proceedings. This is not so much a case of the party failing properly to plead deceit so much as not pleading it at all. This cannot be countenanced and amounts to an abuse of process.

The rule in Henderson v. Henderson

18. As a general proposition the rule in Henderson v. Henderson means that a litigant may not make a case in legal proceedings, which might have been, but was not, brought forward in previous litigation. To do so amounts to an abuse of process. In the summary proceedings, the Corbetts advanced many arguments in support of their contention that Achill was not entitled to a summary judgment and that the matter ought to be remitted to plenary hearing. As set out above, these arguments were all considered and rejected by the learned High Court judge. Insofar as there were arguments open to the Corbetts in relation to these matters which they did not advance in their defence of the summary proceedings, it would be an abuse of process to allow them to advance those arguments in these plenary proceedings unless the Corbetts could point to special circumstances which would establish that such conduct did not in fact constitute an abuse of process. In the event, an examination of the Statement of Claim leads to the conclusion that no new arguments or issues were raised by the Corbetts in the plenary proceedings which had not been ventilated in the summary proceedings so the application of the rule in Henderson v. Henderson does not arise. This conclusion is underscored by

the replies to particulars in the plenary proceedings where the Corbetts referred to affidavits sworn in the summary proceedings as a means of particularising their claim in the plenary procedures and provided no additional information. Thus it is clear that essentially the claim advanced in these proceedings is precisely the same as that already presented to the High Court in the summary proceedings.

Collateral attack.

19. The Statement of Claim and in particular the reliefs sought in the plenary proceedings in light of the case advanced make it clear that the continuance of these proceedings would constitute a collateral attack on the judgment and findings of Barrett J. in the High Court in the summary proceedings. That is not a matter which is permitted and amounts to an abuse of process. See *Morrissey v. IBRC & Ors* [2015] IEHC 200.

New issue

20. Mr. Corbett's affidavits sworn in these proceedings raised one new issue not previously argued in the summary proceedings in relation to security taken by Ulster Bank over four identified properties and which was not pleaded in the Statement of Claim. It is clear from the evidence and submissions of Achill that any security Ulster Bank enjoys or enjoyed over those properties was never assigned to Achill. Achill asserts no right in respect of those properties and has not appointed receivers to those properties. Furthermore, solicitors for Ulster Bank have indicated that Ulster Bank is no longer relying upon the security and is prepared to release the security to the Corbetts.

21. This evidence was not contested on behalf of the Corbetts, though counsel on their behalf wished the Court to infer that this course of action was wrongful or unfair to the Corbetts and that this amounted to a new matter introduced in these proceedings which was not introduced in the summary proceedings and thus afforded a ground for refusing the defendants the relief sought in the notice of motion. This argument is without merit. Even if the Corbetts' case is taken at its height, they do not assert that the properties were ever assigned to Achill or that Achill asserted any rights in respect of the properties. Achill has quite clearly indicated that it does not rely upon the properties as security for the debts due by the Corbetts. In those circumstances, any complaint the Corbetts may have in relation to this issue does not found a cause of action against any of the defendants.

22. I therefore conclude both on the basis of the doctoring of *res judicata* and an application of the rule in *Henderson v. Henderson* that the continuance of these proceedings against Achill constitutes an abuse of process.

Appeal and stay on the order of the High Court.

23. The decision of the High Court has been appealed to the Court of Appeal, and the High Court granted an order staying the execution of the judgment pending the determination of the appeal. The question, therefore, is whether or not the appeal or the stay affords a reason for refusing Achill the relief sought in the notice of motion.

24. It is well established that the existence of either an appeal that is pending or a right of appeal does not prevent the operation of the rule of *res judicata*. In *McConnan v. President of Ireland* [2012] 1 I.R. 449, Kelly J. reviewed the authorities in England (*The Sennar* (No. 2) [1985] 1 W.L.R. 490) and in Northern Ireland (*Deighan v. Sunday Newspapers Ltd.* [1987] N.I. 105). He held that the law of Ireland on the subject of *res judicata* where there is an appeal pending was no different to that of those jurisdictions. He held that the judgment of the High Court in summary proceedings was capable of raising a *res judicata* despite the fact that there was an appeal pending from it to the Supreme Court.

25. The Corbetts seek to distinguish this case from the authorities on the grounds that the order of the High Court is stayed. In the application to the High Court for a stay on its order, counsel for the Corbetts submitted:-

"The Court is well-aware and has made some reference in the judgment to the fact of the existence of parallel proceedings. Those parallel proceeding, one way or the other, reference the securities underpinning, as claimed by the Plaintiff, the credit agreements in place. And to that extent, there is something of a lockdown on the status quo insofar as the available recourse in substantial terms on the judgments. This in a huge amount of money, there is no question about it; the ordinary processes of execution, one can assume, wouldn't avail in any event, to any great extent given the vast amount at issue. And, as I say, when one couples that consideration with the fact of the parallel proceeding which, one way or the other in plenary form will have to, at some level notwithstanding this judgment, proceed at some pace and be disposed of one way or the other. And when you couple that with the inevitability of the appeal, as I say, which I can assure the Court will take place; without getting into the merits of it, there are obviously issues of dispute which were ventilated before the Court..."

With all of that in mind, I am simply asking the Court to both stay the costs pending the appeal and place a stay on execution pending the appeal and the determination in that regard. The process that will otherwise apply will be an inevitable application to the Court of Appeal for that stay. Some courts tend to stagger the application by saying a stay until such time as the Court of Appeal stay is made, but I say that the particular context of this case and the realities of this case and the vast sums at issue and the fact, as I say, that we have this debate on securities and nothing is going to happen in relation to the secured properties which underline this, that there is no reality other than to allow, or, I am suggesting that some allowance should be given to allow us to proceed in a vacuum, without those ancillary debates and disputes that will add cost, etc, etc, to this debate."

26. In ruling on the application for a stay, Barrett J. held:

"[a]s regards a stay on the balance of the order, it seems to me that the losing party here have a right of appeal and I may be wrong in what I said and that a stay on the entirety of the order simply maintains the status quo until the Court of Appeal reaches its decision, so I am going to grant that stay as well."

27. The Order of the High Court provides:-

"[a]nd IT IS ORDERED that execution of the said judgment and costs Order be stayed from the date of perfection hereof for such period as is provided for in Order 58 or Order 86A of the Rules of the Superior Courts (as the case may be) for the lodging of an appeal herein and in the event of such appeal being lodged within that period that execution be further stayed until the final determination of such appeal".

28. On the basis of counsel's submissions and the Court's decision to preserve the status quo, the Corbetts argue that this case can be distinguished from *McConnan*; a stay on the execution of the judgment prevents the judgment from giving rise to a *res judicata*.

29. This argument is without merit. A stay on execution of a judgment for a period of time or pending an appeal, stays the execution of the court order. It does not reverse the decision, which stands. From the perspective of the law of res judicata, the decision remains a decision of a judicial tribunal of competent jurisdiction; it is still a final and conclusive judgment. The crucial indicia for res judicata remain unaltered.

30. Furthermore, the implication of the Corbetts' argument is that a stay on execution of an order in one proceedings could operate to "stay" other proceedings pending the duration of the stay in the first set of proceedings. This is clearly beyond the scope of a stay order, and seeks to extend it to some form of collateral injunction. If the Corbetts wished to restrain the prosecution of these proceedings, they ought to have sought an injunction in these proceedings, not a stay in the summary proceedings. In my opinion it is quite clear that Barrett J. had no thought of staying the plenary proceedings in addition to the stay on execution of his order.

31. It is my judgment that the decision and judgment of Barrett J. in the summary proceedings is final and conclusive for res judicata purposes notwithstanding the appeal to the Court of Appeal and the stay on the execution of the Order of the High Court. The continuance of these proceedings falls foul of the principle of res judicata and the rule in Henderson v. Henderson. The cause of action advanced against the Receivers is bound to fail for the reasons outlined above. It follows that I must dismiss the proceedings on the basis that their continuance is not permissible as they are bound to fail and an abuse of process.

Lis pendens

32. The Corbetts registered a lis pendens against certain secured properties on 25th September, 2015, in connection with these proceedings. Achill seeks to have this lis pendens vacated pursuant to s. 123 of the Land Conveyancing and Law Reform Act 2009. Section 123 provides:-

"[s]ubject to section 124, a court may make an order to vacate a lis pendens on application by—

(a) the person on whose application it was registered, or

(b) any person affected by it, on notice to the person on whose application it was registered—

(i) where the action to which it relates has been discontinued or determined, or

(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted bona fide."

33. Achill has appointed the Receivers to the secured properties to realise the sums due in respect of the Corbetts' loans. The registration of the lis pendens in respect of these proceedings hinders the realisation of the security. Mr. Johnson swore at para. 43 of his affidavit of 3rd December, 2015, that:-

"...the Receivers are actively marketing certain of the secured properties for sale and one in particular, the Beasley Hotel site (Second Schedule, Mortgage Agreement No. 1), is close to execution of a contract for sale. I say and believe and am advised that the Receivers anticipate that the continued existence of the lis pendens registered by the Corbetts herein is likely to constitute a barrier to the completion of the said sale. I say and believe that a loss of the proposed sale would result in significant prejudice to Achill."

In his second affidavit, sworn on 29th January, 2016, he noted that the intending purchaser of the Beasley Hotel was taking a pragmatic commercial view and may be willing to close the sale notwithstanding the lis pendens. However, he pointed out that the lis pendens is "in practical terms, causing severe commercial prejudice to Achill." Achill values the entire portfolio as in excess of €45 million. He did not anticipate that the level of commercial pragmatism of the purchaser of the Beasley Hotel would readily be found amongst potential purchasers of the remaining properties, valued at approximately €35 million.

34. Achill argues that the plenary proceedings are not being pursued bona fide and that they do not constitute a sufficient basis for the continuance of the lis pendens. Achill submits that insofar as the lis pendens relates to the claim against the Receivers, the Receivers do not have sufficient interest in the properties against which such a registration could properly be made. This is correct and the registration of the plenary proceedings against the Receivers cannot stand.

35. In this case, the Court may make an order to vacate the lis pendens on Achill's application as a party affected by it, either on the basis that the action to which it relates has been determined or on the basis that the Court is satisfied that the action is not being prosecuted bona fide. In view of the fact that I have dismissed the proceedings on the grounds that they are bound to fail or that they amount to an abuse of process, the action has been determined and the lis pendens should be vacated. In the circumstances, it is not necessary to consider whether the lis pendens should be vacated on the second ground advanced by Achill and I expressly make no decision on the second ground.

Conclusion

36. The proceedings are dismissed and the lis pendens is to be vacated pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009.