THE HIGH COURT

[2016 No. 1235 S.]

BETWEEN

ALLIED IRISH BANKS PLC.

PLAINTIFF

AND

JAMES P. CONNORS AND LUKE CONNORS

DEFENDANTS

JUDGMENT of Mr Justice Donald Binchy delivered on the 15th day of June, 2018

1. This is an application for summary judgment brought by the plaintiff against the defendants, in the sum of €239,192.66. By letter dated 18th March, 2010, the plaintiff offered the defendants a loan facility in the sum of €205,500.00. This was accepted by the defendants jointly on 26th March, 2010, and their signatures of acceptance were witnessed by their solicitor acting on their behalf in connection with the loan. The facility was a restructure of a previous loan facility. None of this is in dispute, and nor is the fact that the facility was drawn down.

2. The defendants fell into arrears with repayment of the loan, and by letter of 16th December, 2014, the plaintiff demanded repayment of the then outstanding balance of €232,494.45. Identical letters of demand issued to both defendants on that date. By motion dated 22nd September, 2016, which came on for hearing before this Court on 17th May, 2018, the plaintiff seeks judgment in the amount referred to above. The motion is grounded upon the affidavit of Mr Brian McGuinness, manager in the employment of the plaintiff, wherein he avers to the drawing down of the loan and the amount outstanding.

3. The second named defendant, Mr Luke Connors, who is the father of the first named defendant, swore a replying affidavit on 13th January, 2017. He deposes that while the loan was granted in the joint names of the defendants, it was understood that the first named defendant would be primarily responsible for the repayment of the loan, and that the second named defendant was being named on the loan sanction because the loan was granted on the basis of his assets and earnings at the time. In this regard, he relies on the direct debit instructions mandate completed at the time which was executed by the first named defendant only.

4. The second named defendant then goes on to relate how the dwelling house of the first named defendant had been destroyed by fire on 25th November, 2009. Although it is not stated expressly in any of the affidavits, it seems very likely that it was for the purpose of purchasing this dwelling house that the plaintiff originally advanced a loan to the defendants, or perhaps to the first named defendant only. In any event nothing turns on that issue. The second named defendant then proceeds to relate how an insurance claim brought by the first named defendant in relation to the destruction of his dwelling house was declined by the insurers, FBD Insurance plc. That declinature gave rise to an arbitration, which in turn gave rise to the subsequent issue of proceedings in the High Court. The first named defendant deposes that these proceedings were issued by FBD to have the award of the arbitrator set aside. The proceedings were successful, apparently because the High Court found that the arbitrator should, as a matter of fairness, have agreed to adjourn the arbitration at the request of FBD, and he did not do so (I have gleaned this from correspondence between the parties, not from the decision itself which was not available to me). That decision was appealed by the first named defendant to the Supreme Court. Ultimately there was a settlement of those proceedings for the sum of €195,000.00 of which sum €110,000.00 related to costs made up of engineer's fees, loss adjustor's fees, the fees of the arbitrator and all legal costs associated with both the arbitration and the proceedings. The upshot of all of this was that after deduction of all costs, there was just €85,000.00 available to reinstate the dwelling house, as against the sum of €156,000.00 awarded by the arbitrator.

5. Long before that, the solicitors acting on behalf of the first named defendant had written to the plaintiff asking for a moratorium on the repayment of the loan, pending determination of the arbitration proceedings. The second named defendant exhibits this correspondence. It starts with a letter from the solicitors for the first named defendant to the plaintiff dated 15th February, 2010. That letter describes how the first named defendant and his family were living in a caravan pending the resolution of the claim. A further letter was sent on 25th February, 2010, and another dated 22nd June, 2010. It appears that there may have been replies to at least some of these letters, but those replies were not exhibited; what is clear however, is that no moratorium was agreed to by the plaintiff.

6. On 8th December, 2010, the solicitors for the first named defendant wrote a further letter to the plaintiff, on this occasion referring specifically to the fact that the plaintiff was named as an interested party on the insurance policy. They refer to Clause 103 of the insurance policy which they stated in their letter (the policy itself was not exhibited or made available in these proceedings) provides as follows:-

> "The interest of the mortgagee in this insurance shall not be prejudiced by any act or neglect of the mortgagor or occupier of any building hereby insured whereby the danger of loss or damage is increased without the authority or knowledge of the mortgagee provided the mortgagee shall immediately on becoming aware thereof give notice in writing to the company and on demand pay such additional premium as the company may require".

7. In the same letter, the solicitors for the first named defendant said that they had received advices from senior counsel to the effect that even if FBD were entitled to deny indemnity under the policy to the first named defendant, they would have no entitlement to do so as against the plaintiff bank, on the basis of this clause. The solicitors for the first named defendant therefore invited the plaintiff to authorise the solicitors to state that it was the intention of the plaintiff to rely on the conditions of the policy and to seek indemnity under Clause 103 thereof. The plaintiff did not respond to this invitation or give any such authority to the first named defendant or his solicitors or otherwise engage in the arbitration process.

8. Following upon the final conclusion of the Supreme Court appeal, the solicitors for the first named defendant wrote to the plaintiff on 30th October, 2012, advising as to the outcome and in particular drawing attention to the fact that the amount that would be received by the first named defendant was substantially less than the amount required to compensate him for all loss resulting from the fire.

9. It is not entirely clear precisely what happened from this onwards, because not all correspondence is exhibited. Nonetheless, the key facts are clear and are not in dispute. A cheque issued from FBD in the joint names of the plaintiff and the first named defendant,

in accordance with the settlement of the insurance claim between FBD and the first named defendant. On 3rd December, 2012, the plaintiff wrote to the solicitors for the first named defendant requesting that that cheque be lodged to the account of the first named defendant, in reduction of the debt outstanding. On 21st May, 2013, the solicitors for the first named defendant wrote to the plaintiff, referring to the first named defendant as the bearer of that letter and the settlement cheque, which letter stated that the cheque was to be applied by the first named defendant towards the restoration of his dwelling house and replacement of his personal possessions. The letter proceeded to state that any attempt that would be made by the plaintiff to apply the monies lodged to the first named defendant's account in reduction of the amount outstanding by the first named defendant to the bank, would result in an application to the High Court for an injunction. This correspondence resulted in a stalemate. The plaintiff was unwilling to give the commitment requested by the first named defendant and the cheque was not encashed. It is unclear who retained possession of the cheque, but that it was not encashed is not in dispute. Counsel for the defendants informed the Court during the course of this hearing that the cheque issued by FBD is now a stale cheque and cannot be cashed.

10. Mr McGuinness swore a replying affidavit to the affidavit of the second named defendant, but nothing really turns on these affidavits. The second named defendant puts forward the following defences on behalf of both defendants:-

> "(1) In failing to enforce its entitlements under the policy, as mortgagee, the plaintiff failed to mitigate its loss by taking such steps as were available to it to secure payment in full under the terms of the policy. It is claimed that this would have enabled the first named defendant to restore the dwelling house, replace his lost belongings, and to resume living in the dwelling and to meet the full repayments of the mortgage.
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> (2) It is further claimed that the plaintiff acted unreasonably in not permitting the net settlement proceeds of €85,000.00 to be used in the restoration of the dwelling house, and had the plaintiff done so, the first named defendant would have been enabled to move back into the dwelling house and resume repayments of the loan.
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> (3) Thirdly, it is claimed that the plaintiff failed to attempt a non-legal resolution or consensual debt restructuring prior to the institution of proceedings.
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> (4) Finally, in his second affidavit, the second named defendant claims that the plaintiff unlawfully removed monies from his bank accounts on 18th/19th December, 2014, or at least did so without the knowledge or consent of the second named defendant."

In his replying affidavit, Mr McGuiness confirmed that the sum of €3,971.22 was taken from the accounts of the second named defendant (following advance notification) and applied in reduction of the amount owing to the plaintiff. He exhibits bank statements from the relevant accounts to demonstrate these transactions.

Submissions

11. The plaintiff submits that it is entitled to judgment in the amount claimed, as a matter of contract, and arising from the breach of contract of the defendants. Insofar as the defendants plead that the plaintiff has failed to mitigate its losses, it is submitted that the concept of mitigation of loss is one that applies in tort. In these proceedings, the plaintiff is not making a claim based upon a wrong, but based upon a breach of contract. Moreover, the plaintiff submits that it was not a party to the policy of insurance between the first named defendant and FBD, and had no privity of contract or entitlement to join in the proceedings against FBD. The plaintiff submits that it is entirely a stranger to the dispute between FBD and the first named defendant. The plaintiff claims that the defendants' case at its height is that they may have a counterclaim of some kind against the plaintiff, but that does not arise in the context of this application for summary judgment.

12. The plaintiff relies upon the decision of this Court (Finlay Geoghegan J.) in the case of *Histon v. Shannon Foynes Port Company* [2007] 1 I.R. 781. In that case the plaintiff had issued proceedings in the High Court challenging the validity of his dismissal. Having lost in the High Court, he succeeded in the Supreme Court which declared that the plaintiff had not been validly removed from his employment. The Supreme Court did not however make any decision as to entitlement to salary post-dismissal, and following upon the decision of the Supreme Court the plaintiff issued a summary summons in respect of the same. The defendant raised a defence of contributory negligence pursuant to s. 34(1) of the Civil Liability Act 1961. The plaintiff disputed the application of s. 34(1) to the proceedings and this matter came before the Court as a preliminary issue. Finlay Geoghegan J. held:-

> "The present claim of the plaintiff is brought on a summary summons and is a claim for a debt allegedly due by the defendant to the plaintiff. The plaintiff is not making any claim for damages in respect of loss or damage suffered by him by reason of an alleged wrong (i.e. tort, breach of contract or breach of trust) of the defendant. In so proceeding, the plaintiff may have limited his claim but it appears to me to follow that in making such claim against the defendant he has excluded the application of s. 34 of the Act of 1961 to the claim made."

Finlay Geoghegan J. went on to say that in those circumstances contributory negligence, is not, as a matter of law capable of being a defence to the plaintiff's claim.

13. The plaintiff also relies upon *McGregor on Damages*, 20th Ed. wherein it is stated at para. 1-005:-

> "Actions claiming money due and payable under the terms of a contract are for money which the contracting party has promised to pay. They are based not on a wrong but on a promise made. They are in a sense a form of specific performance, ensuring that a contractual obligation is carried out …"

14. Insofar as the defendants may rely upon the case of *KBC Bank Ireland plc. v. B.C.M. Hanby Wallace* [2013] 3 I.R. 759 the plaintiff submits that that case is entirely distinguishable because that case was concerned with an action brought in negligence by the plaintiff against the defendants, and was not concerned with an amount due by the defendant to the plaintiff by way of contract.

15. The plaintiff further relies on the case of *Hu v. Duleek Formwork Ltd & Anor* [2013] IEHC 50. In that case the plaintiff had sustained an injury while working for his employer. He issued proceedings against his employer believing that his employer had the benefit of Employer's Liability Insurance. However, indemnity was repudiated by the insurer owing to the failure on the part of the employer to pay an excess payable under the terms of the policy.

16. Peart J. held that the plaintiff had no privity of contract with the insurer. He could not therefore seek to enforce the contract of insurance as between the first named defendant and the insurer. On that basis, Peart J. held that the plaintiff's claim as against the insurer disclosed no reasonable cause of action and was bound to fail.

17. Similarly, in this case, it is submitted that the plaintiff is not a party to the insurance policy and yet the defendants sought to require the plaintiff to invoke the policy.

18. Insofar as the defendants may contend that they have a counterclaim, the plaintiff says that any such case would have to be made by way of a separate claim. In this regard, the plaintiff relies upon the decision of the Court of Appeal in the case of *National Asset Loan Management Ltd. v. Garett Kelleher* [2016] 3 I.R. 568. In that case, Peart J. said:-

> "There can, of course, be cases where not only does the defendant raise a defence to the claim, but indicates that he has in addition to a defence a counterclaim which he wishes to have heard at the same time as the plaintiff's claim. Where such a counterclaim arises from, say, the same contract on foot of which the plaintiff sues, little difficulty arises in deciding that it is convenient for the counterclaim to be permitted to be determined as part of the proceedings sent for plenary hearing ... Such a counterclaim amounts to a defence by way of equitable set off …
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> It is important to distinguish between a defence put forward by way of counterclaim, and which gives rise to an equitable set off, and a counterclaim which is in fact an independent claim, and not one which naturally arises from the same factual basis for the plaintiff's claim. This is something which is specifically mentioned by Clarke J. in his judgment in *Moohan v. S & R Motors (Donegal) Ltd*. [2007] IEHC 435 …

But where the cross-claim amounts to an independent claim (i.e. arising from different facts) it is not considered to be a defence by way of equitable set off at all. That link between the plaintiff's claim and the defendant's counterclaim is absent."

19. In relation to the argument made by the second named defendant that the plaintiff did not have the authority to transfer monies from his bank accounts to the loan account, in reduction of the amount due on the loan account, the plaintiff says simply that it had that authority and moreover that it notified the second named defendant on 8th July, 2011 that unless the arrears then due were paid, one of the options which the plaintiff might avail of would be to transfer any monies standing to the credit of the second named defendant in other accounts in reduction of the amount of the loan outstanding. As to the suggestion that the plaintiff did not engage in any negotiations or did not attempt a non-legal resolution prior to institution of proceedings, Mr McGuinness disagrees and avers that the plaintiff offered the defendants a twelve months interest only repayment term, and he also exhibits correspondence inviting the defendants to meet with the plaintiff to discuss proposals.

20. Counsel on behalf of the defendants confirmed that it was accepted that there was a loan agreement with both defendants the purpose of which was to restructure existing borrowings. The purpose of the original loan was for the acquisition of the first named defendant's house and security over that dwelling house was given to the plaintiff. Accordingly, it is submitted, it is clear that the principal interest in the dwelling house was and remained at all times the security given by the first named defendant to the plaintiff. The interest of the first named defendant was limited to the equity of redemption. All of that being the case, it was the plaintiff that had the substantive interest in any proceeds of the insurance policy. At a very early stage following the destruction of the dwelling house, the solicitors for the defendants wrote to the bank asking for its authority to permit the solicitors for the first named defendant to inform FBD of the intention of the bank to rely upon the conditions of the policy and in particular Clause 103 referred to above.

21. It is submitted that as a party with such substantial interest in the property of the first named defendant, which was mortgaged to the plaintiff, the plaintiff had a duty, by reason of that interest, to exercise whatever rights they had under the policy. It is submitted that the letter of the first named defendant's solicitors of 8th December, 2010 put the bank on notice of the very issue that now arises on this application. Not having availed of the opportunity given to it, the plaintiff failed to mitigate its losses. Furthermore, having taken no active part in the arbitration or subsequent proceedings arising out of the arbitration, the plaintiff then looks to the defendants for payment of the entire proceeds received in the joint names of the parties at the conclusion of those proceedings.

22. It is submitted that the plaintiff at all times throughout the history of this matter, following the destruction of the dwelling house, has acted unreasonably. As a result of this, it is submitted, that not only did the first named defendant have to leave the country in order to find work to support his family, but it also resulted in the claim under the policy being compromised at significantly less than full value.

23. Counsel for the defendants stated that it is accepted that the defendants have breached their contract with the plaintiff, but submits it is not entirely clear that the principle of mitigation of loss does not apply in these circumstances. The plaintiff is pursuing a loss, and while that loss is claimed pursuant to a breach of contract, nonetheless, it is submitted, that the plaintiff had a duty to mitigate its loss.

24. Counsel referred to *McDermott On Contract*, 2nd Ed., para. 23.250 wherein it is stated that a plaintiff cannot recover avoidable losses. The burden is on the defendant to show that the plaintiff could reasonably have avoided the loss claimed. While failure to mitigate a loss is not usually a defence, it may be a tool in assessing damages.

25. It is submitted that this is not the same as pleading contributory negligence, and that the courts have not yet determined, one way or another, whether mitigation of loss might be a defence to a claim for summary judgment on foot of a breach of contract.

26. Counsel for the defendants acknowledges that the case of *KBC Bank Ireland plc. v. B.C.M. Hanby Wallace* was a case involving an action in tort, but submitted that the case does not rule out the possibility of an obligation to mitigate loss in breach of contract cases. Counsel for the defendants submit that the case of *Hu v. Duleek Formwork Ltd. & Anor* may be distinguished because in that case the insurance policy had been terminated by the insurer.

27. The defendants rely upon a recent decision of the Court of Appeal in the case of *Hyland v. Dundalk Racing (1999)* Ltd [2017] IECA 172 and related cases. The background to those proceedings was that the plaintiffs, who were bookmakers, had been required to pay a charge of €8,000.00 each in order to be allocated a pitch at the newly refurbished Dundalk racecourse. The plaintiffs maintained, amongst other things, that this was contrary to a longstanding contractual arrangement pursuant to which such pitches were allocated, without any requirement to make such a payment. As a result, the plaintiffs did not make the payment required by the defendants and declined to take up the offer of the pitches made to them by the defendants, as a result of which they suffered a loss of income in respect of which they issued the proceedings. They had also refused an offer which would have entitled them to make the payment on a date later than that originally demanded or on a staggered basis. The Court of Appeal held as follows:-

> "102. Having considered the submissions of the parties, the relevant circumstances and the findings of fact made by the trial judge, this Court is satisfied that the bookmakers acted unreasonably, notwithstanding their genuine belief that

> Dundalk was in breach of its contractual obligations in failing to mitigate their loss by accepting the offer made by Dundalk on 8th August 2007, even if it was on the terms as they were understood by Mr. Hyland i.e. requiring a payment of €8,000.00 up front, as opposed to the terms as recorded in the Heads of Agreement and Mr. Walsh's letter of 9th August 2007 i.e. a deferral of the payment.
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> 103. In coming to this conclusion, the first matter of relevance is that the bookmakers, unlike the position of many claimants, had the ability to fully and entirely mitigate the capital loss destined to flow from Dundalk's breach of contract by accepting the offer made on 8th August 2007. Instead, they elected to decline it, and in doing so, divested themselves with immediate and permanent effect of the future capital value of the pitches with the seniority they claimed that would otherwise have been allocated to them…
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> 110. In coming to its conclusions on the issue of the bookmakers' obligation to mitigate their loss, the Court has been mindful of the public policy considerations core to the concept of mitigation. That being so, it is relevant to note that the offer made by Dundalk on 8th August, 2007 did not require the bookmakers to give up any of their rights or abandon any of their principles. They could have paid the €8,000.00, taken up the pitches on offer, and brought their dispute to the courts for resolution. Had they done so, they could have avoided all of the loss they must have known would follow from Dundalk's breach of contract.
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> 111. Having determined that the bookmakers acted unreasonably in failing to agree to stand at Dundalk on the terms offered on 8th August, 2007, it is not necessary to consider the subsequent opportunities that the bookmakers might have taken to mitigate their loss."

28. Counsel for the defendants submits that this is clear authority for the proposition that the principle of mitigation of loss may be invoked in cases involving breach of contract. There is a requirement for plaintiffs to act reasonably and take all reasonable measures to mitigate their losses, which it is submitted the plaintiff did not do in this case. Or put, more accurately in the context of an application for summary judgment, counsel for the defendants submits that *Hyland* is authority for the proposition that the defendants may have a defence to these proceedings, on the ground that the plaintiff failed to mitigate its loss.

29. In reply to this argument, counsel for the plaintiff says that *Hyland* may be distinguished. That was not a case involving an application for summary judgment in a liquidated amount, but a claim for damages for breach of contract in which the Court would have been required to assess damages. Moreover, unlike in *Hyland*, the plaintiff in these proceedings was not a party to the arbitration of the refusal of indemnity by FBD and was not in a position to mitigate its losses in the manner that the plaintiffs could have done in *Hyland*, as clearly identified by the Court of Appeal.

Decision

30. The law as to summary judgment is well-established and requires no repetition here. The principles have been set out in a number of cases, most notably the decision of the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 I.R. 607 and *Harrisgrange Ltd. v. Duncan* [2003] 4 I.R. 1 in which McKechnie J. summarised the relevant principles in detail. In simple terms however, it may be said, as McKechnie J. did in *Harrisgrange*, that leave to defend should be granted unless it is very clear that there is no defence.

31. Aside from the general principles applicable to such applications, the plaintiff also relies upon the case of *Promontoria (Aran) Ltd v. Hughes* [2017] IEHC 447 in which Barrett J. considered the possible impact of the failure to deny a debt following receipt of a letter of demand from a financial institution. He cited the decision of the Supreme Court in *Ulster Bank Ireland v. O'Brien* [2015] 2 I.R. 656 in which Charleton J. observed at pp. 683-4:-

> "… the documents exhibited in the affidavit of Mary Murray [for Ulster Bank] carry indications of reliability. These are bolstered by her sworn evidence coming, as it does, from a position where she has had the means of knowledge to support what she says. Of those documents, perhaps the most important is the letter of demand. That letter was sent to the defendants and it was never replied to. The sworn affidavit was furnished to the legal representatives of the defendants and it was never replied to. Both the sworn and the unsworn documents amount to the same thing: a party is making an allegation that money has been borrowed and that a debt has not been repaid, which is now due for payment. Depending upon the particular circumstances, an inference can be drawn, where a reasonable person would feel compelled to issue some form of denial, whereby the absence of contradiction can amount to the acceptance of the contrary case; in other words, an admission against interest."

32. In *Promontoria*, Barrett J. placed some reliance on the fact that the defendants did not deny the existence of their liabilities to the plaintiff and that for some time following the initial demand, the defendants continued to negotiate with the plaintiff.

33. The principal defence relied upon by the defendants in these proceedings is that the plaintiff acted unreasonably in not joining with the defendants to require FBD to indemnify the defendants in full in respect of all losses sustained by them as a result of the fire at the first named defendant's dwelling house. It is further alleged that the plaintiff acted unreasonably in failing to agree to the request of the first named defendant to encash the settlement cheque on the terms requested by the first named defendant.

34. Even taking the defendants' case at its height, as I must do for the purposes of this application for summary judgment, I consider that the defendants face insurmountable difficulties in relation to each of these arguments. In relation to the suggestion that the plaintiff should in some way have joined in the arbitration of the decision of FBD under the policy to refuse indemnity, the simple fact of the matter is that the plaintiff had no privity of contract with FBD and would have no standing to make a claim under the policy. It is of course true that, indirectly, and through the mortgage granted by the first named defendant to the plaintiff over his dwelling house, that it was the plaintiff had the principal interest in the dwelling house and that the first named defendant's equity of redemption would have been minor by comparison. But that argument is something of a red herring. The household insurance that is put in place at the time that a mortgage is taken out is put in place for the joint protection of the mortgagor and the mortgagee. The interest of the mortgagee is usually protected by a simple statement noting its interest on the policy. In the event of a successful claim under the policy, the interest of the mortgagee is protected through the expedience of payment being made in the joint names of the mortgagor and the mortgagee. Typically, no other interest is conferred on the mortgagee under the terms of the policy.

35. In this case, the policy was not exhibited by either party, but it was not suggested that the mortgagee enjoyed any additional protections or specific rights under the policy, other than in Clause 103 to which I have referred above. However, that clause does no more than confer a right on a mortgagee to pay an increased premium (presumably in the event of a default by the mortgagor) in the event of increased risk. It is true that it is curious that such a right is conferred at all on the mortgagee in circumstances where it is not a party to the contract, but again taking that issue at its height from the point of view of the defendants, it goes no further. On the basis of that clause alone, it is impossible to see how a mortgagee could claim an entitlement to join in an arbitration under the

terms of the policy document. While the defendants relied on advice received from senior counsel, that advice was quoted from but not exhibited.

36. For all of these reasons I can see no basis to support the argument that the plaintiff had available to it measures which it could have taken to mitigate its loss. The very furthest that this argument can go is that had the plaintiff acceded to the request of the defendants, FBD might have yielded to the greater pressure brought about by the mere threat of involvement of the plaintiff in the arbitration proceedings, but such an argument could not possibly support a claim that the plaintiff has failed to mitigate its losses in circumstances where it had no legal entitlements under the policy, other than that the proceeds of any claim in relation to damage to the property should be paid into the joint names of the policy holders (the defendants) and the plaintiff, and the entitlement to pay an increase in premium in the circumstances described in clause 103.

37. While *Hyland* does indeed appear to be the authority for the proposition that in an appropriate case involving breach of contract, the court will require a plaintiff to have acted reasonably and to have taken steps that were readily available to mitigate loss, the facts of *Hyland* are altogether different to the facts of this case. As pointed out by the Court of Appeal the plaintiffs in that case, "… unlike the position of many claimants, had the ability to fully and entirely mitigate the capital loss destined to flow from [the] breach of contract…"

38. As to the second limb of this argument, that the plaintiff acted unreasonably in not encashing the cheque issued in the joint names of the parties by FBD, the difficulty with this argument is that by that time the defendants were already in arrears and the plaintiff was quite entitled to have the cheque applied in reduction of those arrears. That can hardly be considered unreasonable.

39. As to the other arguments advanced on behalf of the defendants, while these were put forward they were not put forward with any great conviction. It was not disputed that the plaintiff was entitled to take any funds held by the second named defendant in other accounts with the plaintiff and to apply them in reduction of the amount due by the defendants jointly to the plaintiff. Nor was it disputed that this was precisely what occurred and that the second named defendant, in effect, has obtained a credit for those funds through the corresponding reduction in the debt for which he is jointly responsible. Nor did the defendants dispute that the plaintiff engaged in correspondence with the defendants in relation to the arrears owing and at one point offered a twelve month interest only period by way of assistance to the defendants.

40. In all of these circumstances I can see no possibility that the defendants would succeed with any of the lines of defence advanced on their behalf on this application and, subject to what I say in the next paragraph, the plaintiff is entitled to obtain judgment in the amount sought in the sum of €239,192.66.

41. A particularly unusual feature to this case is that a cheque for €85,000 issued by an insurer, FBD, has not been encashed. Counsel for the defendants stated that it is now stale, and cannot be negotiated. Two points may be made about this. Firstly, FBD may agree to honour the cheque if it is asked to do so. It is to be hoped that it would do so, as otherwise it would be unjustly enriched. Secondly, if the settlement with FBD was made an order of court (I was not informed one way or another), then that order is likely to be enforceable against FBD for twelve years from the date of the order, and accordingly it may be obliged as a matter of law to honour the existing cheque or make payment afresh to the parties. I will therefore defer making a final order to allow the parties explore this further with FBD. If it agrees to make payment afresh, then the payment may be applied in reduction of the amount claimed by the plaintiff.