Neutral Citation: [2016] IEHC 387

THE HIGH COURT

COMMERCIAL

[2014 No. 2210 S]

[2014 No. 154 COM]

BETWEEN

ENNIS PROPERTY FINANCE LIMITED

PLAINTIFF

AND

ALAN HYNES AND NOREEN HYNES

DEFENDANTS

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

1. In these proceedings the plaintiff seeks judgment against the defendants on a joint and several basis for the sum of €8,596,518.24 due and owing as of 11th May, 2016, together with continuing interest. The claim arises on foot of six commercial loan facilities which were provided by Bank of Scotland (Ireland) Ltd. to the defendants. The matter commenced by way of summary summons but was adjourned for plenary hearing on 16th December, 2014, by Fullam J. on the application of the plaintiff.

Bank of Scotland (Ireland) Ltd. ("BOSI") facilities

2. BOSI provided six loan facilities (which were amended) to the defendants between 28th February, 2003, and 13th July, 2007. The first facility was dated 28th February, 2003, and offered to the first and second named defendants a loan facility up to €720,000. The facility was accepted by the defendants. The purpose of the first facility was to fund the development of six apartments. Interest applied accruing on a day-to-day basis at a rate equivalent to the aggregate of 2.5% per annum and 3 month EURIBOR until such time as the development work was completed and the apartments let. Thereafter the rate was to be reduced to the aggregate of 1.75% per annum and 3 month EURIBOR. The first facility was to be repaid on an interest only basis each month until a date not later than 60 months following disbursement of the first tranche of the first facility or such later date as might be notified to the borrowers. Thereafter combined payments of interest and principal were to be made on a monthly basis. The first facility was subject to BOSI's General Loan Conditions (Ref: 01.06.02). The facility was accepted on or about 8th March, 2003, and the facility was drawn down on 13th May, 2003.

3. The second facility letter was dated 24th June, 2003, whereby BOSI offered the defendants a loan facility in the sum of up to €920,000. The purpose of the second facility was to fund the acquisition of a residential development site with full planning permission for the construction of 14 apartment units at Wygram Cottage, Wygram, Wexford Town. Interest applied to the second facility accruing on a day-to-day basis at an equivalent rate to the aggregate of 2% per annum and 3 month EURIBOR. The interest payable on the second facility up to a maximum of €40,000 was to be capitalised on a quarterly basis and added to the principal outstanding on the second facility on that date or on such date as BOSI might decide.

The borrowers would be deemed to have requested a drawing equal to the amount of interest then due on those dates. If either the total principal amount outstanding on the second facility was equal to the facility limit or if the amount of the interest capitalised was equal to €40,000, then interest would be payable quarterly by direct debit. The second facility, including capitalised interest and any other monies outstanding or payable, was to be paid by one payment at the end of the facility term. The term of the facility was 12 months. The second facility was subject to BOSI's General Loan Conditions (Ref: 01.06.02). Both defendants signed the facility letter by way of acceptance on or about 4th July, 2003, and the first advance of €880,000 was drawn down on 4th September, 2003. While the second facility was amended subsequently in August, 2003 and December, 2004, the amendments were not relevant to the issues in this case, save that it was now subject to BOSI's Standard Conditions (Ref: 01.01.04). There was no difference between the two versions of BOSI's General Loan Conditions in respect of matters at issue in these proceedings.

4. The third facility was offered by BOSI by letter dated 16th May, 2005, for a loan facility up to €495,000. The third facility was for a term of 20 years to include a three year deferment of principal repayments. The purpose of this facility was to fund the acquisition and refurbishment of a 2,700 sq. ft. residential investment property at John's Gate House, John's Gate Street, Wexford. Interest accrued on the third facility on a day-to-day basis at a rate equivalent to the aggregate of 1.5% per annum and 3 month EURIBOR. Interest was repayable on a quarterly basis. Once principal became repayable, interest and principal combined were payable by 68 quarterly direct debit payments. The third facility was subject to BOSI's General Loan Conditions (Ref: 01.01.04). Both defendants signed the facility letter by way of acceptance on or about 19th May, 2005, and the loan was drawn down on 28th June, 2005.

5. The fourth facility was set out in a letter dated 19th September, 2005, whereby BOSI offered to the defendants a loan facility in the sum of €2,650,000. It was for a term of three years. The purpose of the facility was first to part-fund the "*post-development*" investment funding of apartment units and newly built houses at Meadow Court, Stillorgan Park, Blackrock, Co. Dublin and secondly, to repay existing BOSI development funding. The fourth facility was likewise subject to the 2004 Standard Loan Conditions (Ref: 01.01.2004). Interest accrued on the fourth facility on a day-to-day basis at a rate equivalent to the aggregate of 1.5% per annum and 3 month EURIBOR. Interest was repayable on a quarterly basis. Principal was repayable in the first instance upon the sales and proceeds of Units 6, 8, 18, 22 and 23 at Meadow Court Stillorgan Park, Blackrock, Co. Dublin but in any event repayable in full from whatever source was to be made not later than three years from the date of drawdown. The defendants accepted the facility letter on 20th September, 2005, and the monies were drawn down and the existing liabilities refinanced on 13th December, 2005.

6. The fifth facility comprised a letter of offer dated 23rd March, 2006, whereby BOSI offered the defendants a loan facility in the sum of up to €1,695,000. The term of the fifth facility was 25 months. The purpose of the fifth facility was to fund the development of 14

apartment units at the "*Wygram site*" in Wexford Town, Co. Wexford which had been purchased with the funds advanced pursuant to the second facility. The fifth facility was subject to the 2004 Standard Loan Conditions (Ref: 01.01.2004). Interest accrued on the fifth facility on a day-to-day basis at a rate equivalent to the aggregate of 2.25% per annum and 3 month EURIBOR. The Interest was to be capitalised on a quarterly basis and added to the principal outstanding on the fifth facility. The borrowers would be deemed to have requested a drawing equal to the amount of interest then due on the dates when the capitalised interest was added to the fifth facility. Repayments of principal and interest were to be made by a combination of the sale or long term refinancing of the apartment units. It is the plaintiff's case that both defendants signed the facility letter by way of acceptance on or about 24th March, 2006, and that the monies commenced to be drawn down as required from 30th March, 2006, pursuant to this facility. The second named defendant stated that she did not sign the facility letter and was not a party to this loan and therefore has no liability to the plaintiff in respect of this loan.

7. The sixth facility letter was dated 13th July, 2007. BOSI offered to the defendants a loan up to €500,000 for a term of 36 months. The purpose of the sixth facility was to complete construction of the Wygram apartments development in Wexford. The loan was subject to the 2004 Standard Loan Conditions (Ref: 01.01.2004). Interest accrued on the sixth facility on a day-to-day basis at a rate equivalent to the aggregate of 1.5% per annum and 3 month EURIBOR. Interest was repayable on a quarterly basis. Principal was to be repaid from the net of that sale's proceeds but in any event repayment in full was to be made from whatever source at the end of the facility term or such later date as BOSI might determine. The facility letter was signed by both defendants by way of acceptance on or about 23rd July, 2007, and the monies were drawn down on the facility on 27th July, 2007. Together these are "the facilities".

2008 - 2009

8. In the summer of 2008 the defendants experienced difficulties with a number of financial institutions including BOSI. They explored the possibility of refinancing the BOSI facilities the subject matter of these proceedings with Bank of Ireland. They obtained valuations in respect of some of the properties from Smith Curley Estate Agents as of 6th October, 2008, as part of this process. They valued the properties at John's Gate Street at €5,030,000.00 and the Wygram properties at €4,130,000.00. In the event the refinancing negotiations with Bank of Ireland were unsuccessful and did not proceed.

9. On 10th November, 2008, the defendants appointed Mr. Declan Taite then of RSM Farrell Grant Sparks to be their financial advisor. The defendants furnished Mr. Taite with information in respect of their exposure to a number of financial institutions. They authorised Mr. Taite to obtain information in respect of their affairs from the institutions. He then prepared an overview of their exposure to the respective institutions, including the facilities. On 12th December, 2008, he sent a proposal to Mr. David Moreau of BOSI on behalf of the defendants. On 6th January, 2009, Mr. Moreau responded, indicating that BOSI would not accept the proposal and suggested that Mr. Taite act as a receiver in respect of the properties if BOSI decided to proceed by way of receivership.

10. On 7th January, 2009, Mr. Taite telephoned Mr. Hynes and the defendants' solicitor, Mr. Brendan O'Donovan, in relation to the response of BOSI to their proposal. He specifically referred to the fact that BOSI suggested that he would act as a receiver in the event that BOSI decided to appoint a receiver. Neither Mr. Hynes nor Mr. O'Donovan made any objection to this proposal.

11. On 26th January, 2009, Bank of Ireland obtained judgment against the defendants in the sum of €2.8 million. On 29th January, 2009, Mr. Moreau on behalf of BOSI wrote a letter of demand calling in the six loans. The letter was addressed to Mr. Alan Hynes, Tusker House, John's Gate Street Centre, John's Gate Street, Wexford Town, Co. Wexford. It was not addressed to Mrs. Hynes though the name of the borrower was given as Mr. Alan Hynes and Mrs. Noreen Hynes. In her witness statement, the second named defendant stated that the letter of demand had not been issued to her. The defendants wrote a joint letter dated 2nd February, 2009, to Mr. Moreau headed "*RE: LETTERS OF DEMAND CALLING IN LOANS". The letter stated:-*

> *"In response to the above correspondence we regret that we are no longer in a position to service the repayments on our current loan facilities. In the interest of maintaining our commercial relationship with the bank we hereby acquiesce to the appointment of a receiver to the underlying assets supporting these facilities."*

The second named defendant accepted that she signed this letter. She could not identify any letter of demand to which it could be replying other than the letter of 29th January, 2009. In those circumstances I am satisfied that this letter was written in response to the letter of 29th January, 2009, calling in the loans and that she therefore received that letter.

12. In light of this development, the defendants agreed to terminate the appointment of Mr. Taite as their financial advisor. They were aware of the fact that BOSI might wish to appoint Mr. Taite as a receiver and they had no objection to him accepting any such appointment should it arise. A letter of termination was signed by the defendants dated the 10th February, 2009, and the letter was stamp dated as received by Farrell Grant Sparks on 16th February, 2009.

Receivership

13. On 13th March, 2009, BOSI appointed Mr. Taite as receiver over the properties securing the facilities. Mr. Taite proceeded to act as receiver in respect of the properties and he instructed Sherry FitzGerald Haythornthwaite to value the offices and apartments at John's Gate Street and Wygram Place in Wexford. He retained agents HT Meagher O'Reilly to value the properties in Dublin. He took possession of the properties and sold them through the receivership between February, 2010 and June, 2012. The total gross proceeds of sale (including VAT where relevant) received for the properties was €3,350,069.68 (following deductions at source of third party professional fees relating to the sales in the sum of €36,330.32). During the course of the receivership to the date of sale, rent was collected in respect of each of the properties which were let. The total rent received amounted to €186,909.19. After accounting for the expenses of the receivership to include property management expenses and the costs of the sale of the assets the total distribution in reduction of the overall debt of the defendants was €2,887,415.06.

Cross-border merger of BOSI and Bank of Scotland plc.

14. At 23:59 on 31st December, 2010, BOSI merged with Bank of Scotland plc. ("the Bank") by cross-border merger by absorption further to an order of the Scottish Court of Session made pursuant to the Companies (Cross-Border Mergers) Regulations 2007 (UK) and all of the assets and liabilities of BOSI became vested in the Bank with effect from 31st December, 2010. The books and records of BOSI became the books and records of the Bank and the loans the subject of these proceedings became assets of the Bank.

The proceedings

15. By letter dated 7th March, 2014, the Bank instructed its solicitors, Mason Hayes & Curran, to demand immediate repayment of the sums then due and owing in respect of the facilities; €7,234,126.86. The letter noted that interest continued to accrue on the facilities at a combined daily rate of €1,565.49. The demand was sent by ordinary certified post to the defendants at Larkinstown, Coolree, Co. Wexford. These proceedings were instituted on 2nd September, 2014, and remitted to plenary hearing on 16th December, 2014. The plaintiff seeks judgment against the defendants on a joint and several basis in the sum of €8,596,518.24 as of

11th May, 2016, with continuing interest until judgment. It is common case that the defendants have not repaid the monies claimed as due and owing in these proceedings. They delivered a full defence to the proceedings which puts the plaintiff on a formal proof of all matters and they delivered a counterclaim. Paragraphs 6 to 22 of the counterclaim were severed from these proceedings by order of McGovern J. on 16th March, 2015.

Assignment of the loans in November, 2015

16. After the commencement of the proceedings, the Bank entered into a purchase deed dated 29th July, 2015, whereby it agreed to sell to the plaintiff certain assets defined as *"Purchased Assets" in the deed. They included the facilities and:-*

> *"(b) any and all of the Seller's rights, title and interest (i) in and to the rent, claims and other rights of the Seller; (ii) in and to any Net Collections; and (iii) in and to any non-cash distributions with respect to the Facilities, in each case arising or received after the Cut-Off Date;*
>
> *(c) any and all of the seller's rights, title, interest and benefit in the Finance Agreements; and*
>
> *(d) the Ancillary Rights and Claims".*

17. Clause 2.1 of the purchase deed provided:-

> *"The Seller agrees as legal and beneficial owner to sell to the Buyer the Purchased Assets and the Buyer agrees to purchase the Purchased Assets and assume the Assumed Obligations, such sale to take effect on Closing in accordance with and subject to the terms and conditions of this Deed."*

Clause 6.4 of the deed provided that, at the closing:-

> *"all such rights, title and interest as the Seller may have in and to the Purchased Assets (subject to and with the benefit in each case of the related Finance Agreements) shall transfer under the relevant Transfer Documents to the Buyer and the Buyer shall assume the Assumed Obligations".*

18. The Bank wrote to the defendants on 1st September, 2015, c/o Tuskar House, John's Gate Street, Wexford Town, notifying them that it had agreed to sell the amounts owing to it by the defendant under the facilities and the facility letters, guarantees, security and rights relating to the facilities with the Bank to Ennis Property Finance Ltd., the plaintiff. The Bank wrote on 26th October, 2015, to the defendants at the same address to inform them that the sale would occur on 20th November, 2015. The second named defendant said that she never received either of these letters and pointed out that the property to which the letters were sent in fact had been sold two years earlier on behalf of the Bank.

19. By a deed of assignment dated 20th November, 2015, between the Bank as assignor and the plaintiff as assignee, the Bank assigned, *inter alia,* the facilities to the plaintiff. Clause 2.1 of the deed provided:-

> *"Subject to the terms of the Purchase Deed and clauses 2.3 and 2.4, the Assignor unconditionally, irrevocably and absolutely assigns to the Assignee all such rights, title and interest as the Assignor may have in and to the Purchased Assets (subject to and with the benefit in each case of the related Finance Agreements) with effect from the Closing Date."*

The deed was executed on behalf of the Bank by its lawfully appointed attorney.

20. The assignee, the plaintiff, appointed Pepper Finance Corporation (Ireland) DAC, Pepper Asset Servicing ("Pepper") to provide portfolio and asset management services. Pepper wrote on behalf of the plaintiff to the defendants on 23rd November, 2015, at the address at Tuskar House informing the defendant that the facilities the subject matter of these proceedings had been transferred to Ennis Property Finance Ltd.

21. By letter dated 30th November, 2015, the plaintiff's solicitors wrote to the defendants referring to the previous correspondence of 26th October, 2015, and 23rd November, 2015, in relation to the sale of the facilities by the Bank to Ennis Property Finance Ltd. and confirming that following the sale the amounts and obligations owing in respect of their facilities were now owed to the purchaser, Ennis Property Finance Ltd. The letter went on to inform them that an application will be made to substitute Ennis Property Finance Ltd. as plaintiff in these proceedings. The letter was addressed to the defendants at *"c/o Tusker House, Johns Gate Street, Wexford Town"*. On 2nd December, 2015, they wrote to both defendants at their home address, Larkinstown, Coolree, Co. Wexford referring to the Bank of Scotland loan sale and the proceedings. They enclosed copies of their own letters of 30th November, 2015, and the letters from the Bank dated 26th October, 2015, and from Pepper dated 23rd November, 2015, referred to above. The second named defendant accepted that this was her address and that it was the address given when the defendants entered an appearance to the proceedings. Therefore, I am satisfied that she received copies of correspondence under cover of the letter of 2nd December, 2015, if not otherwise.

22. Ennis Property Finance Ltd. applied to the High Court pursuant to O. 17, r. 4 of the Rules of the Superior Courts to be substituted in place of Bank of Scotland plc. as the continuing party in these proceedings.

23. On 14th December, 2015, McDermott J. in the High Court made an order amending the title of the proceedings by substituting Ennis Property Finance Ltd. as plaintiff. The making of the order was notified to the defendants.

The Defence

24. The first named defendant was duly notified of the hearing dates of the action but he did not attend. The second named defendant conducted her own defence of the proceedings. She raised a number of defences in the balance of the defence and counterclaim, in her witness statement and during the course of the conduct of the proceedings. These were:-

(1) That she did not sign the fifth facility letter.

(2) That there was an oral agreement reached with BOSI that, in consideration of their co-operating with the appointment of a receiver and the sale of the secured properties, BOSI would not have recourse to the defendants in respect of any balances due on foot of the facilities.

(3) By signing the termination letter of 10th February, 2009, with Farrell Grant Sparks, BOSI agreed that she would not be pursued for

any sums due and owing in respect of the facilities and that she divested herself of both the properties and the loans the subject of the receivership.

(4) Proceedings entitled *Bank of Scotland (Ireland) Ltd. v. Alan Hynes t/a Hynes & Co*. [2009 No. 1505 S] were struck out in 2010 and accordingly the plaintiff may not maintain these proceedings.

(5) She raised issues in relation to the appointment of Mr. Taite as receiver and the conduct of the receivership. She alleged that there was a conflict of interest such that Mr. Taite ought never to have been appointed receiver over the secured properties. She said that Mr. Taite failed properly to either collect rents or to account for rents received from the secured properties. The rents were not used to service the loans. She alleges that the secured properties were not sold for full value.

(6) She did not know that the facilities were in default until 2014.

(7) She put the plaintiff on formal proof of its entitlement to judgment in the proceedings.

Was there a valid assignment of the loans to the plaintiff?
25. The plaintiff says that there was a valid assignment of the loans to the plaintiff both in contract and in compliance with the requirements of the Supreme Court of Judicature Act (Ireland) 1877. Clause 14.2 of BOSI's General Loan Conditions provides (in both Ref: 01.06.02 and Ref: 01.01.04):-

> *"The Bank may at any time, without the prior consent of the Borrower, assign, novate or transfer any of its rights and benefits and transfer any of its obligations under any of the Finance Documents to any person, firm or company or subparticipate or subcontract any of its rights or obligations under the Finance Documents."*

This clause was incorporated into each of the facilities. It is thus clear that as a matter of contract law BOSI had authority to assign and transfer its interests in the loans. The enforceability of loans and security interests transferred by BOSI to the Bank under the cross-border merger order has been confirmed by the Supreme Court in *Kavanagh v. McLaughlin* [2015] IESC 27. Therefore there is no question in relation to the first change of ownership of the facilities.

26. Each of the facility letters incorporates BOSI's General Loan Conditions into the agreements between BOSI and the defendants. The assignment of the defendants' loans to the plaintiff by the Bank was effected by deed of assignment dated 20th November, 2015, referred to above. There was uncontroverted evidence of the execution of the purchase deed and assignment, that the deed included the loans of the defendants and that the assignment was absolute and took effect on 20th November, 2015. The evidence was given by Mr. Jonathan Hanly, a director of the plaintiff and by Mr. Alastair Hepburn, an officer of the Bank. This transaction complied with the express terms of the facility letters set out in the General Loan Conditions. As a matter of contract law, nothing further was required and the plaintiff stepped into the shoes of the Bank in respect of each facility.

27. Further, I am satisfied that the Bank and the plaintiff complied with the provisions of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 in relation to the assignment of these loans. The section requires that an assignment satisfies four conditions which were identified by Finlay Geoghegan J. in *O'Rourke v. Considine* [2011] IEHC 191 at para. 18. These are:-

> *"(a) The assignment was of a debt or other legal chose in action.*
>
> *(b) The assignment was absolute and was not by way of charge only.*
>
> *(c) It was in writing under the hand of the assignor.*
>
> *(d) Express notice in writing thereof was given to the debtors."*

28. The deed of assignment of 20th November, 2015, expressly provided at clause 2.1 for the absolute assignment of the facilities including the defendants' debts to the plaintiff. The deed of assignment is in writing and was signed by the lawfully appointed attorney of the Bank. The defendants were notified in writing of the assignment as I have set out above. The requirements of s. 28(6) have been met. The assignment passed and transferred the legal and beneficial right to the debt to the plaintiff.

Amount due and owing in respect of the facilities
29. Mr. Hepburn gave evidence on behalf of the plaintiff. He is a Senior Credit Risk Manager in the Claim Asset Management Ireland Unit and an officer of the Bank. He gave evidence that he was appointed by the board of directors of the Bank to be a manger and duly authorised officer of the Bank on 25th June, 2014. The board delegated to him, as an officer of the Bank, certain duties, including the duty to give evidence on behalf of the Bank in any court proceedings in the Republic of Ireland, whether by affidavit or oral evidence in court. He was conferred with full authority from the Bank to give all evidence required in relation to the Bank's books and the state of the accounts of any borrower of the Bank in connection with this purpose. He has by resolutions of the General Purpose Committee of the Bank been appointed an authorised signatory of the Bank since at least 1st October, 2011, and has been reappointed as an officer of the Bank.

30. Mr. Hepburn explained that following the cessation of its operations in Ireland and Northern Ireland on 31st December, 2010, the Bank appointed Certus to provide customer support and administration services to the Bank, to support it in the management of its customers in Ireland and Northern Ireland. Subsequently, the books and records of the Bank, including its electronic records were transferred to Certus for the purposes of it providing these services to the Bank. The books and records remained under the control and supervision of the Bank at all times until 20th November, 2015. Following the assignment of the loans comprised in the deed of assignment of 20th November, 2015, the books and records of the Bank relating to the loans the subject of these proceedings are in the custody of the Bank with the exception of the original loan facility letters in respect of the loans. He gave evidence that the Bank's electronically held records from which statements of accounts had been printed are one of the ordinary electronically held records of the Bank, that the entry of the account details into those electronically held records was made in the usual and ordinary course of business of the Bank, that the electronically held records are in the custody and control of the Bank, that he was the person in charge of printing the statements of accounts, that the statements of accounts were reproduced directly from the Bank's electronically held records and that he compared the statements of accounts with the Bank's electronically held records and confirmed that they are correct and accurate.

31. He adduced in evidence copies of the statements of accounts in respect of each of the six facilities from drawdown to 20th November, 2015. He gave evidence that the facilities were drawn down as follows:-

The facility	Date of drawdown
First facility	13th May, 2003
Second facility	4th September, 2003
Third facility	28th June, 2005
Fourth facility	13th December, 2005
Fifth facility	First drawdown 30th March, 2006 Account transfers on 27th February, 2006, and 13th March, 2006
Sixth facility	27th July 2007

32. Mr. Hepburn gave evidence of default in respect of each of the facilities and of the demand for repayment of 7th March, 2014. He confirmed that Mr. Taite was appointed by the Bank as receiver over certain personal assets of the defendants on 13th March, 2009, and that he took possession of and sold the charged assets. He said that from a review of the statements of account he could confirm that the sum of €2,877,415 was remitted to the Bank from the sale of these assets. He confirmed that the sum was credited to the accounts of the defendants and reduced their liabilities in respect of the six personal loan facilities. The credits were applied to the loan accounts as follows:-

Loan account number	Date	Amount credited
423325-101	22nd December, 2011	€290,356.82
423325-106	20th July, 2011	€161,606.24
423325-107	11th May, 2012	€823.403.00
423325-107	27th September, 2012	€142,049.00
423325-107	13th December, 2012	€130,000.00
423325-108	16th March, 2010	€1,340,000.00
Total		€2,887,415.06

33. He stated that the statements of account in respect of each of the facilities showed the sums due and owing as of 20th November, 2015, the date of the assignment of the facilities to the plaintiff, was set as set out in the table below. He said that these sums represented the outstanding balance over and above all just credits and allowances as at 20th November, 2015.

Facility	Sum due and owing as of 20th November, 2015
First facility	€928,612.80
Second facility	€1,587,666.78
Third facility	€610,243.06
Fourth facility	€3,264,450.03
Fifth facility	€921,242.45
Sixth facility	€883,881.60
Total outstanding	€8,196,096.72

He personally prepared a certificate of debt as at 20th November, 2015 certifying that the amount due and owing in respect of the six facilities by the defendants to the Bank was €8,196,096.72.

34. Mr. Ian Wigglesworth, a Senior Portfolio Manager in Pepper gave evidence on behalf of the plaintiff. He confirmed that Pepper had been appointed as servicing agent to the plaintiff to provide loan, portfolio and asset management services. The services included the management of the loan facilities the subject of these proceedings. He stated that as part of the services provided, Pepper maintains a database of loan account balances in respect of the loans which are owned by the plaintiff. He explained that when an assignment of facilities takes place the statements of accounts and associated data are migrated to the computer system maintained by Pepper. This ensures that the individual terms and conditions applicable to each facility continue to be applied to the facility as administered by Pepper.

35. Mr. Wigglesworth confirmed that there was a correlation between the closing balance on the Bank's system and the opening

balance on the system maintained by Pepper on behalf of the plaintiff. He stated that the interest and charges in relation to each of the accounts was applied. He demonstrated how the screenshots of each of the facilities was reflected in the statements of account that had been produced in respect of the facilities up to 11th May, 2016. He confirmed that the loan account statements and screenshots were generated from Pepper's customer account system under his supervision on 11th May, 2016, for the purposes of providing up-to-date loan account balances in respect of the facilities.

36. Mr. Hanly confirmed that Pepper provided him with a copy of the statements of account in respect of the facilities from 21st November, 2015, together with screenshots from Pepper's accounts system up to the 11th May 2016. As of that date the outstanding balance over and above all just credits and allowances in respect of each of the loans was as follows:-

Facility	**Sum due and owing as of 11th May 2016**
423325/101	€969,395.25
423325/102	€1,668,751.48
423325/106	€638,328.00
423325/107	€3,424,888.01
423325/108	€976,010.37
423325/109	€919,145.13
Total outstanding	€8,596,518.24

I accept that as of 11th May, 2016, this is the figure due and owing in respect of the facilities.

Did the second named defendant sign the fifth facility?
37. Mr. Moreau, formerly of BOSI, gave evidence on behalf of the plaintiff. He was the relationship manager of the defendants in respect of their facilities save the first facility. The fifth facility was required in order to develop the Wygram lands which had been bought with the proceeds of the second facility. The first defendant contacted him stating that the funds were required as a matter of urgency in order to pay suppliers and builders. He met Mr. Moreau at a function organised by BOSI in Portmarnock, Co. Dublin. Mr. Moreau gave him the facility letter executed on behalf of BOSI. The first defendant took it away intending to have it executed by himself and the second defendant. The facility letter was returned to BOSI. It is stamped "*Return signed to Bank*" on the first page indicating that it had been checked by BOSI personnel upon its return to BOSI. Signatures, dated 24th March, 2006, purporting to be those of the first and second named defendant appear on p. 6 of the facility letter dated 23rd March, 2006. They are each apparently witnessed by Ms. Sinead Kehoe, a trainee accountant. The solicitor who habitually acted on behalf of the defendants in relation to their borrowings from BOSI, Mr. Fergal Dowley c/o Seamus Maguire & Co. is stated to be the solicitor who will act on behalf of the defendants. It was not suggested that anybody at BOSI fixed the signature of the second defendant to the facility letter. Neither the first defendant nor Ms. Kehoe gave evidence. There was no evidence adduced by a handwriting expert in relation to the authenticity or otherwise of the signature of the second defendant.

38. On the face of it, this was a validly executed acceptance of a facility letter executed by both borrowers and witnessed in the normal way. BOSI acted upon the acceptance of the facility offer and permitted drawdown of the funds in accordance with the terms of the facility. A further facility was required in order to complete the Wygram development. The second defendant accepts that she entered into this facility, the sixth facility (as indeed she accepts that she entered into the second facility). She confirmed that had the Wygram development been sold at a profit she would have shared in that profit in the normal way.

39. When the defendants consulted Mr. Taite in November and December, 2008, the fifth facility formed part of their joint liabilities under consideration. The proposal put by Mr. Taite on their behalves to BOSI on 12th December, 2008, listed three facilities in respect of the Wygram development. The second defendant had previously worked for Bank of Ireland. She has engaged in property development since the 1990s. It is difficult to accept that she could have been unaware of the inclusion of three facilities in relation to the Wygram development in the proposal to BOSI or of the significance of the fact that there were three loan facilities associated with the development in circumstances where she maintains she only agreed to two such facilities.

40. Furthermore, when the letter of demand of the 29th January, 2009, issued by BOSI, it listed six facilities. The fifth facility is clearly listed as a loan agreement dated 23rd March, 2006, and shows the balance due as of 29th January, 2009, as €1,775,464.40. When the second defendant replied to this letter jointly with the first defendant on 2nd February, 2009, no reference whatsoever was made to the fact that she was not a party to this agreement, though even the most casual reading of this letter must have brought to her attention the very significant sums personally due and owing in respect of this facility.

41. Mr. Taite gave evidence that in all his dealings with the defendants the second named defendant never indicated that she was not a party to the fifth facility. Similarly, when a further letter of demand issued on 7th March, 2014, from the Bank's solicitors to both defendants, the fifth facility was included as a joint liability of both of the defendants showing the balance at that stage at €815,956.74, yet again the second defendant did not object that she was not a party this agreement.

42. The first time the second named defendant asserted that the signature on the fifth facility was not her signature and that she was not party to the loan agreement was by way of defence to these proceedings.

43. I accept the evidence of Mr. Moreau in relation to the receipt of the executed facility letter, which indeed was not controverted by Ms. Hynes. I accept the evidence of Mr. Taite that the second named defendant never instructed him that she was not a borrower in relation to the fifth facility and that her signature (which occurs in three places) on the fifth facility letter was not her signature. The conduct of the second named defendant between the date of the draw down of the fifth facility and the date of the

commencement of these proceedings is all entirely consistent with the fact that she accepted that she was a party to this facility along with the other five facilities. In the circumstances, I do not accept her evidence that she did not sign the fifth facility letter and that she did not enter into the fifth loan agreement with BOSI. Therefore this ground of defence is rejected.

Was there a limited recourse agreement?
44. The defendants allege that they entered into an oral agreement at a meeting with BOSI at its premises on St. Stephen's Green whereby in return for co-operation with a receivership in respect of the secured properties, BOSI would not pursue them for any balance outstanding. They also assert that the valuations of the properties suggested that there would be a surplus after the assets were realised which BOSI agreed to return to the defendants. This was pleaded by way of counterclaim but in fact no evidence of the agreement was adduced at the trial. The first named defendant did not attend and therefore his witness statement was not admissible in evidence. The second named defendant furnished a witness statement which she verified in oral evidence and she gave oral evidence on her own behalf. At no stage did she give any evidence in relation to this alleged agreement.

45. On the other hand, both Mr. Moreau and Mr. Taite denied that any such agreement was ever entered into. Mr. Moreau was quite clear that at the meeting referred to by the defendants in their pleadings, that he and his colleague outlined that it was outside of the discretion of anybody present in the room to state whether or not BOSI would pursue them for judgment:-

> *"We did say that [BOSI] may take a view that it is not commercially viable to pursue them for judgment but it was very expressly and clearly stated to them that we did not know whether [BOSI] would pursue such an action or not, nor could anybody in the room decide it, it could only be decided by [BOSI] at whatever later date."*

He was categoric that no such agreement as alleged by the defendants was ever reached and that none of the facilities were non-recourse or limited recourse.

46. When the defendants wrote to BOSI by letter dated 2nd February, 2009, referred to above, they made no reference whatsoever to any limited recourse agreement. Given the gravity of the situation at that time and the contents of that letter, this is a surprising omission if any agreement of the nature asserted had been reached.

47. The first time the defendants claimed that an agreement of this kind was reached was in the defence of these proceedings. The Bank, who was the plaintiff at the time, raised particulars in relation to the alleged agreement. In replies to particulars, the defendants stated that the agreement was oral and that the second named defendant had a note of the agreement. This was pursued by way of further particulars and by way of discovery but at no stage were any written notes of the meeting produced.

48. In the circumstances, I am satisfied that the second named defendant has not made out this ground of defence either. I hold that there was no agreement to limit recourse in respect of the facilities and the plaintiff is entitled to pursue the defendants personally for any sums due and owing.

Was the claim of Bank of Scotland (Ireland) Ltd. compromised?
49. Bank of Scotland (Ireland) Ltd. issued a summary summons against Alan Hynes t/a Hynes & Co. on 17th April, 2009. These proceedings concerned a business hire purchase agreement dated 22nd July, 2005, in respect of a Range Rover Sport TD V6 HSE, and a consumer hire purchase agreement dated 20th February, 2007, in respect of an Aston Martin DB9 Coupe vehicle. They also sued the defendant in respect of a preliminary tax and balance of tax loan agreement in writing dated 14th November, 2007. The proceedings were solely against the first named defendant in these proceedings. They did not relate to the facilities. The 2009 summary proceedings were struck out by BOSI. In the circumstances, this has no relevance to the liability of the defendants in respect of the facilities and specifically does not amount to a compromise of the liabilities arising out of each of these facilities.

Termination of engagement letter dated 10th February, 2009
50. Farrell Grant Sparks issued a letter referred to as a termination of engagement for financial advisory and restructuring services to Mr. Alan Hynes, Mrs. Noreen Hynes and A & N Properties dated 10th February, 2009. The letter records the fact that the defendants engaged the services of Farrell Grant Sparks which provide financial advisory and restructuring advice and that since their appointment they have carried out work in accordance with the terms of reference outlined in a letter of engagement dated 10th November, 2008. They negotiated on behalf of the defendants with a number of financial institutions. The letter records:-

> *"Financial institutions may wish to appoint us as receiver, in this event we could no longer continue to act for you in this matter. In discussions with us you have indicated that you have no objection to us accepting such an appointment should it arise. On that basis, we are therefore resigning as your advisors in this matter.*
>
> *On the basis that you have no objection as set out above, we are satisfied that we have no conflict of interest in accepting appointment from financial institutions, should this arise."*

51. This letter was a letter written by Farrell Grant Sparks to the defendants and it was accepted by the defendants. It terminated the contractual arrangement that had existed between those two parties since 10th November, 2008. Farrell Grant Sparks were not acting as agent on behalf of BOSI. On the contrary, they had been appointed to act on behalf of the defendants. BOSI was not a party to this relationship or this agreement. It had no effect whatsoever on the liabilities existing between BOSI and the defendants. This ground of defence is misconceived and I therefore reject it.

Sales of the secured properties
52. The second named defendant referred to valuations of the secured properties set out in the report of Smith Curly as at 6th October, 2008. She contrasted these most unfavourably with the reports of Sherry Fitzgerald Haythornthwaite and TH Meagher O'Reilly of March, 2009. She complained that the assets were clearly undervalued and she alleged that the sale prices actually achieved by the receiver in realising the assets was at a significant undervalue. She led no valuation evidence which related to the date of the receivership, March, 2009, or for the dates of the realisations of the various properties between February, 2010 and June, 2012. Thus, she did not establish the factual basis upon which to advance this claim. On the other hand, Mr. Taite gave evidence of the fact that he received the valuations from Sherry Fitzgerald Haythornthwaite and TH Meagher O'Reilly in March, 2009. These reports referred to the drastic state of the property market in Ireland at that time. In particular, it referred to the extremely difficult problem of over supply of properties in provincial towns such as Wexford or Waterford. He gave evidence of the fact that when he realised certain properties, he managed to achieve a price in excess of the valuation of Sherry Fitzgerald Haythornthwaite by selling properties as one block to Wexford County Council.

53. I am satisfied that the receiver carried out his duties in a proper fashion and that the sums realised, net of all relevant expenses and costs, have been duly remitted to the Bank and credited to the respective accounts of the defendants as set out in the evidence

of Mr. Hepburn. The conduct of the sales of the properties and the realisation of the proceeds of sale has been properly accounted for. It does not establish a defence by the second named defendant to the plaintiff's claim.

Rent

54. The second named defendant submitted that during the receivership some of the properties were not let and this was accepted by Mr. Taite. He said that on average five out of 15 apartments in the Wygram development were rented. He gave evidence that he instructed agents to assist him with the renting of the properties as he was conscious of the fact that the properties were not going to be disposed of expeditiously. He was aware of his duties of care both to BOSI (and subsequently the Bank) and the defendants. The second named defendant adduced no evidence to establish that the properties which were not rented could, with reasonable diligence, have been rented. She did not quantify in any way the alleged rental income lost as a result of the alleged failure in this regard. On that basis it cannot be said that she has established that there was any failure on the part of the receiver to maximise the return of the rents or, that as a consequence, there was a failure to afford the defendants the benefit of a credit to which they ought to have been entitled. Aside from the complete absence of relevant evidence to establish the argument, it is of course the case that the receiver is the agent of the mortgagor, in this case the defendants, and therefore any alleged failure by the receiver in this regard could not give to rise a claim against the mortgagee, BOSI (and the Bank after 31st December, 2010).

55. The second named defendant complained that the rents actually recovered in respect of the properties were not used to meet the repayments due in respect of the six facilities. She argued that had the rents been so deployed that the amounts due and owing would have been reduced correspondingly (and a reduction in the further interest charged in respect of the reduced balance). She argued that it was a term of each of the facilities that the rents be used to discharge the repayments due. This was incorrect and she nowhere pointed to any clause in any of the facility letters which could substantiate this argument. Secondly, Mr. Taite, a most experienced insolvency practitioner with more than 25 years' experience, stated that it was usual in receiverships to use rents recovered to fund the costs of the receivership in the first place. This evidence was not challenged. In this case the rents actually recovered were insufficient to meet the expenses associated with the management of the properties, the cost of the receivership and the costs of the sales. A credit line in fact was made available by BOSI and subsequently the Bank to fund the shortfall pending the sales of the properties. Accordingly, I am satisfied that there was no improper use of the rents received from the properties or a failure properly to account for the rents received. In short, the second named defendant has failed to establish any credit or allowance to which the defendants were entitled and which was not afforded to them as set out in the calculations of the plaintiff's witnesses. She has failed to prove any defence to the plaintiff's claim in these proceedings.

Miscellaneous

56. In submissions the second named defendant said that she believed that she did not owe any money to BOSI or the Bank after the appointment of the receiver to the properties. She said that she believed that the values of the properties exceeded the sums due and owing and that accordingly her liabilities in respect of the facilities would be paid out of the realisation of the assets. It is clear that the second named defendant was fully aware of the fact that there was a considerable indebtedness due and owing by the defendants to BOSI from the negotiations with BOSI in October and November, 2008, her consultations with Mr. Taite, the submission of his proposal to BOSI in December, 2008, the letter of demand of 29th January, 2009, her acquiescence in the appointment of the receiver by her letter of 2nd February, 2009, and the subsequent appointment of Mr. Taite as a receiver on 13th March, 2009. The fact that she may not have been in receipt of statements of accounts from either BOSI or the Bank thereafter does not alter this fact. There was no evidence whatsoever that she ever enquired as to the balance outstanding in respect of the loans or that she made any enquiries whatsoever to satisfy herself that the debts had been repaid. This being so, it is difficult to accept that she was of the belief that the very substantial debts due and owing in March, 2009 were fully repaid. In any event, she received the letter of demand from the Bank's solicitors dated 7th March, 2014, setting out the sum then due and owing. From that point onwards she can have been in no doubt as to the true situation. In addition, it has to be pointed out that ignorance of the precise level of the debt is of course no defence to a claim for the sums proved to be due and owing.

57. In evidence and in submissions the second named defendant objected to the appointment of Mr. Taite as receiver over the secured properties on the basis that the defendants did not have the opportunity to take legal advice in respect of the termination letter of the 10th February, 2009, and the alleged conflict of interest in Mr. Taite acting as receive on behalf of BOSI in circumstances where he had previously acted as their financial adviser. Even if one is to take her case at its height, the evidence established that her solicitor was aware of the fact that BOSI was considering appointing Mr. Taite as receiver over the properties of the defendants on 7th January, 2009. Neither the solicitor nor the first named defendant objected to this proposed cause of action. More than a month later the defendants met with Mr. Taite with a view to terminating the appointment so that he could be appointed receiver by a financial institution if it so wished. Even if the defendants signed the letter at the meeting on 10th February, 2009, without consulting their solicitor as the second named defendant stated in evidence, they could nonetheless have taken legal advice and they had a further month to object to the appointment of Mr. Taite as a receiver over their assets had they seen fit so to do. There was no evidence whatsoever advanced on behalf of the defendants to suggest that they sought legal advice or that it was not open to them to obtain legal advice had they so wished from the solicitor who was acting on their behalves or from any other solicitor. It is instructive to note that in the seven years which have elapsed since the appointment of Mr. Taite as receiver by BOSI the defendants have not sought his removal on the grounds that he is not an appropriate person to be appointed receiver over their assets on the grounds that he had previously advised them in relation to their financial affairs.

Conclusion

58. The first named defendant has not defended these proceedings. The second named defendant has not satisfied me that she has any defence to the plaintiff's claim. I am satisfied that the plaintiff is the party who is legally and beneficially entitled to the loans the subject of the six facilities. The defendants are jointly and severally liable in respect of each of the facilities. The total sum due and owing in respect of the six facilities as of 11th May, 2016, is €8,596,518.24. Accordingly, the plaintiff is entitled to judgment against each of the defendants in the said sum together with continuing interest thereon from 12th May, 2016.