APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Numbers: 2023/108

2023/233

Faherty J **Neutral Citation Number [2023] IECA 269**

Allen J.

O'Moore J.

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

PAT MEADE AND SHEILA MEADE

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 2nd day of November, 2023

1. In December, 2003 – at a time which later proved to be more or less at the top of the market – Mr. Pat Meade and Mrs. Sheila Meade bought five buy-to-let apartments in the same development in Sligo for €200,000 each. The purchases were part funded by five loans from ICS Building Society, each of €150,000, repayable with interest over twenty years, and

each secured by a mortgage over the apartments. On 1st September, 2014, by the Central Bank Act, 1971 (Approval of Scheme of Transfer between ICS Building Society and The Governor and Company of the Bank of Ireland) Order, 2014, the loans and mortgages were transferred to Bank of Ireland.

2. The repayments due on foot of the loans fell into arrears and on 12th July, 2013 the Bank made formal demands for payment.

3. In 2015 – at a time which later proved to be more or less at the bottom of the market – the apartments were sold voluntarily by Mr. and Mrs. Meade, each for €50,000, and the net proceeds of sale remitted to the Bank. The Bank claims that Mr. and Mrs. Meade are liable for the balance of the loan accounts. Mr. and Mrs. Meade dispute this. I will come to the basis on which liability for the residual debt is contested.

4. On 3rd November, 2018 the Bank issued a summary summons claiming judgment in the sum of €584,426.52 and continuing interest and on 26th September, 2018 issued a motion seeking liberty to enter final judgment. Between then and 19th February, 2020 there was a protracted exchange of affidavits. In the meantime, the Supreme Court had given its judgment in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84. Then came the COVID-19 restrictions, by reason of which most of the business of the High Court in which the litigants were unrepresented was adjourned generally.

5. Following the lifting of the COVID-19 restrictions the Bank brought a motion for liberty to amend the special indorsement of claim to provide the detail required by *O'Malley* and on 14th February, 2022 an order accordingly was made by the High Court (Coffey J.).

6. On 12th April, 2023 a supplemental affidavit was filed on behalf of the Bank to bring the figures up to date. The application of continuing interest meant that the claim had increased to €639,590.05. The Bank's motion for liberty to enter final judgment was restored

to the Master's list and transferred to the High Court list of applications for summary judgment and was heard by the High Court (Heslin J.) on 18th April, 2023.

7. The motion for summary judgment was grounded on an affidavit of Mr. Sean Buckley sworn on 21st September, 2018 and a verifying affidavit of Ms. Wendy Mitchell sworn on the same day.

8. Mr. Buckley is a manager in what the Bank describes as its arrears support unit. He deposed to the borrowing by Mr. and Mrs Meade from ICS Building Society and the security given for it; the transfer of the loans and security to Bank of Ireland; the default; the demands; and the outstanding balance. Ms. Mitchell, a legal case manager in the Bank's arrears support unit, verified Mr. and Mrs. Meade's liabilities by reference to the Bank's books and records.

9. On 10th January, 2019 Mr. Meade – who has, as has Mrs. Meade, at all times acted for himself – filed a short affidavit on his own behalf and on behalf of Mrs. Meade. He asserted that contrary to the averment of Mr. Sean Buckley in his affidavit filed on behalf of the Bank, they did have a *bona fide* defence. He said that:-

> *"5. In or about September, 2014 I received a phone call from a Thomas Feeley from Bank of Ireland who said that the five properties would have to be sold in order to settle outstanding bank balances. …*
>
> *12. I say at all times I understood that when the Bank received the market value of the five properties that they would write off any residual balance on the loans. …*
>
> *14. I say that I had similar offers from other Banks that I had been dealing with, which involved me disposing of the properties and thereafter the relevant Banks wrote off any residual loan balance and therefore I was not unfamiliar with the proposal put forward by Thomas Feeley from Bank of Ireland. …*

16. I say the conditions of the loan offers were varied when Thomas Feeley rang me and instructed me to appoint an auctioneer to sell the five properties and in the process left me understand that any residual balance would be written off once the bank received the market value for the five properties."

10. It was common case that it was agreed that the properties would be sold voluntarily by Mr. and Mrs. Meade and that they were sold by an estate agent and a solicitor nominated by Mr. Meade.

11. In response to Mr. Meade's affidavit, an affidavit of Mr. Thomas Feeley was filed on behalf of the Bank 27th March, 2019. Mr. Feeley deposed that he had first been assigned to Mr. and Mrs. Meade's accounts in March, 2015. By reference to what he described as a printout of the Bank's file notes, Mr. Feeley gave a fairly detailed account of the engagement by the Bank with Mr. and Mrs. Meade from August, 2014, when they were first contacted by Ms. Siobhan Brannigan until 26th July, 2016, when the last of the proceeds of sale were received and credited to Mr. and Mrs. Meade's accounts. Mr. Feeley's evidence as to all that happened before 3rd March, 2015 was entirely based on the Bank's records.

12. What Mr. Feeley described as a printout of the Bank's file notes of various conversations appears to me to be a composite narrative account written later by a third party and not a printout of contemporaneous file notes, although it does quote from a number of e-mails. According to the Bank's records, there were two telephone conversations in August, 2014 between Ms. Branagan and Mr. Meade in the course of which there was discussion about the possible appointment of a receiver and the possibility of a voluntary sale. According to the Bank's note, Mr. Meade broached the subject of the residual debt and was told, variously, that both parties to the mortgages would remain liable for the residual debt and that a proposal for the residual debt would be required.

13. Again according to the Bank's note, Ms. Branagan sought approval to offer Mr. and Mrs. Meade the option to voluntarily sell the properties and on 19th September, 2014 the Bank issued what are described as voluntary sales packs: one in respect of each of the five properties. According to first paragraph of the letters of 19th September, 2014, Mr. and Mrs. Meade had *"recently agreed to sell the property in order to reduce/clear your mortgage debt."* According to the penultimate paragraph *"if the sale proceeds of the property do not clear the amount outstanding on the mortgage account, you remain fully liable for the residual amount outstanding on your mortgage, and you must submit a proposal for repayment of that residual amount. We will assess the payment of the residual amount based on what you can afford to pay."*

14. Mr. Feeley went on to summarise the progress of the sales. It appears that a buyer was found in the market for four of them and Mr. and Mrs. Meade's son agreed to buy the fifth. In an e-mail of 28th September, 2015 – apparently following a telephone conversation earlier in the day – Mr. Meade set out his proposal that his son would buy the fifth apartment and said: *"I am sorry to say that I have no proposal to make in relation to the outstanding debt."*

15. The money paid by Mr. and Mrs. Meade's son was received on 21st March, 2016 and the net proceeds of sale of the other four apartments on 26th July, 2016. Thereafter, said Mr. Feeley, there were without prejudice discussions with Mr. Meade as regards the residual balance but no agreement was concluded.

16. At para. 21 of his affidavit Mr. Feeley deposed that:-

> *"21. At no time was it represented to [recte. by] me that when the plaintiff received the market value of the five properties it would write off any residual balance on the loan accounts the subject of the proceedings herein. I can find no record of any*

such representations having been made by any other agent of the plaintiff to the defendants in this regard."

17. The document exhibited by Mr. Feeley and described as the Bank's file notes covers the period from 25th August, 2014 to 7th September, 2017. More or less in the middle was a note to the effect that:-

"On 17th May 2016 TF attended a Credit Forum to discuss the borrower's financials. Credit agreed to offer the borrower options to the borrower:

1. *10k lump sum in full & final settlement OR*
2. *€50 per month for 60 months*

TF called PM on the 17th May 2016 confirming the above options to the Bank would offer in to address the expected residual debt (Banks waiting sale proceeds). PM stated he would take some time to consider same."

18. On 30th May, 2019 Mr. Meade filed a further affidavit on behalf of himself and his wife. Without saying why, he suggested that Mr. Feeley's quotation from his e-mail of 28th September, 2015 was disingenuous. He went on to say that he disagreed with Mr. Feeley's evidence that there was no offer of settlement and that no agreement had been reached. As to the reference in the Bank's file note to a settlement offer of €10,000 or €50 per month over 60 months, he deposed that it was never relayed to him and that he did not receive it. Presumably by reference to file note which recorded *"(unable to locate details of email or phone call …)"* Mr. Meade said that the Bank conceded that it had no record of informing him about the offer which, he suggested supported his claim. He concluded:-

"10. I say the plaintiff should have formally sent me this offer to ensure I received it, as it would have provided me with an opportunity to consider the offer.

11. If I had received this offer I would have engaged with the bank and arranged to pay €50 per month for 60 months and I am still prepared to do this."

19. On 14th October, 2019 Mr. Feeley swore a second affidavit. He suggested that Mr. Meade's denial that the offer of settlement was never relayed to him was implicit acceptance that no agreement had been reached regarding the residual balance and repeated his evidence that no agreement had ever been concluded in respect of the residual debt and that the Bank had no record of any such agreement. Mr. Feeley deposed that he had contacted Mr. Meade by telephone on 17th May, 2016 to confirm the options *"that the [Bank] might consider."* He said that the Bank was at that stage still awaiting the sale proceeds in order to determine the actual residual balance amount. He said that at no point was a formal written offer made to Mr. and Mrs. Meade and that in order for the Bank to be in a position to formalise any such offer and assess the loan account, it would require supporting documentation together with a statement of affairs from Mr. and Mrs. Meade. I pause to observe that this was not entirely consistent with the file note.

20. Mr. Feeley then moved to a telephone call from Mr. Meade on 19th August, 2016 when Mr. Meade wanted to discuss a possible termination offer. Mr. Feeley said that his contemporaneous notes indicated Mr. Meade *"put forth"* a proposal of €10,000 in full and final settlement of the mortgage debt. He said that his contemporary notes were those exhibited to his affidavit of 27th March, 2019.

21. Mr. Feeley then referred to and exhibited an e-mail which he sent to Mr. Meade at 15:25 on 19th August, 2016 referring to the earlier call and offer of €10,000 and asking for six months current account statements and various other documentation; and Mr. Meade's reply at 15:57 on the same day which suggested that the offer was €5,000 and not €10,000. Among other things, Mr. Meade wrote that he would have to get confirmation from Paul Meade –

who I guess is Mr. and Mrs. Meade's son – that *"the offer of 5k is still on the table."* Mr. Feeley gave evidence of further engagement thereafter but I need not dwell on the detail.

22. Mr. Feeley's second affidavit prompted a third affidavit from Mr. Meade, which was filed on 27th November, 2019, in which he – Mr. Meade – challenged Mr. Feeley's averment that he – Mr. Feeley – had telephoned him – Mr. Meade – on 17th May, 2016 to inform him of the settlement proposal. Mr. Meade exhibited a copy of an airline ticket which showed that he had flown to Malaga on the morning of 17th May, 2016 and a copy of his mobile phone records to show that he had had no incoming call that day. He suggested that Mr. Feeley's evidence that he had called Mr. Meade on 17th May, 2016 was a false and misleading statement. Mr. Meade acknowledged that he did ring Mr. Feeley on 19th August, 2016 and offered to pay €5,000 in full and final settlement. He repeated that if he had received the Credit Forum offer of €10,000, he would have engaged with the Bank and arranged to pay €50 per month for 60 months.

23. On 30th January, 2020 a third affidavit of Mr. Feeley was filed in which he acknowledged that his averment that he had called Mr. Meade on 17th May, 2016 was mistaken. On review of his contemporaneous notes, he said, the call in fact took place on 16th May, 2016. The call, he said, had been made in the context of without prejudice negotiations and no agreement was reached. The proposal, he said, was in any event subject to final approval by the credit committee. Mr. Feeley exhibited what does appear to be a print out of an entry made on 16th May, 2016 and which suggests that the credit forum meeting was on 12th May, 2016.

24. On 19th February, 2020 Mr. Meade swore a fourth affidavit in which he deposed that he had no recollection of a phone call from Mr. Feeley on 16th May, 2016 and he referred

back to the note marked TF1, exhibited to Mr. Feeley's first affidavit which, he said, referred to the credit committee's decision of 17th May, 2016.

25. There the evidence rested until the motion for judgment was restored to the list and an affidavit of Mr. Ian O'Reilly was filed on 12th April, 2023 to bring the figures up to date.

26. By the time the Bank's motion for summary judgment came on for hearing in the High Court on 18th April, 2023 there were six affidavits on behalf of the Bank and four on behalf of Mr. and Mrs. Meade. The papers ran to something like 283 pages.

27. At the sitting of the court, Heslin J. said that he had read the papers – every page of the papers – and was familiar with the entirety of the papers.

28. Counsel for the Bank correctly identified that the only issue in the case was whether Mr. and Mrs. Meade were liable for the residual balance of the loans. Counsel pointed to Mr. Meade's evidence that he had received a phone call from Mr. Feeley in September, 2014 and to Mr. Feeley's evidence that he had first been assigned to the accounts in March, 2015 and said that there was a dispute there as to whether Mr. Feeley had made the call. He pointed to the discussion – which was common case – as to whether the Bank would appoint a receiver or Mr. and Mrs. Meade would sell, and to the agreement that they would sell the properties voluntarily. Counsel brought the court through Mr. Meade's first affidavit.

29. Counsel for the Bank suggested that Mr. Meade's evidence – or at least the manner in which it had been expressed – gave rise to a legal issue as to the entitlement of the Bank to unilaterally vary the terms of the loan agreements. The Bank's position was that it was not entitled to do so and that even if there had been an agreement there was no consideration for it. Mr. Meade, it was said, had not said anything which would amount to an assertion of an agreement to vary the loan agreements. Counsel then brought the court through the chronology of events as set out in the Bank's file note, laying heavy emphasis on the e-mail

of 28th September, 2016 in which Mr. Meade said that he had no proposal to make in relation to the residual debt. He pointed to Mr. Feeley's averment that having reviewed the books and records of the Bank he did not believe that there was any agreement and that there was no record in the Bank's records of any agreement.

30. Counsel then turned to what Mr. Meade had said in his second affidavit as to the availability to him of the options to pay €10,000 or €50 per month for 60 months. The significance of this, said counsel, was that if the residual balance had already been forgiven, it begged the question why he wanted to consider a further offer or felt wronged that any such offer was not communicated to him. It further begged the question as to why Mr. Meade now wanted to be given the opportunity to pay €50 per month when his case appeared to be that he did not owe the Bank any money. Counsel noted that Mr. Meade appeared to take issue with the date of the telephone call in May, 2016 but said that he would leave it to Mr. Meade to explain the significance which Mr. Meade said should be attached to that. In counsel's submission, the date of the phone call was not something that the court need concern itself with.

31. As to the legal principles applicable to an application for summary judgment, counsel referred to the well-known and well established authorities of *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, *Aer Rianta cpt v. Ryanair Ltd.* [2001] 4 I.R. 607, *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 and *Ulster Bank Ireland Ltd. v. O'Brien* [2015] 2 I.R. 656. In support of his argument that any agreement, if any, was unsupported by consideration, counsel relied on the legal principle – established in *Pinnel's case* (1602) 5 Co. Rep. 177 and approved in *Truck and Machinery Sales v. Marubeni* [1996] 1 I.R. 12, *Re Selectmove Ltd.* [1995] 2 All E.R. 531 and *The Barge Inn Ltd. v. Quinn Hospitality* [2013] IEHC 387 – that a promise to pay a sum or part of a sum which the debtor is already bound

by law to pay cannot afford the consideration necessary to render enforceable an agreement regarding the payment of that debt.

32. Mr. Meade's submission to the High Court was brief. He focussed on what was recorded in the Bank's file note as having happened on 17th May, 2016. He categorically denied that the option to pay €10,000 or €50 per month for 60 months had ever been conveyed to him. He submitted that it should have been, and that if it had been he would have engaged with the Bank and paid €50 per month for 60 months and he said that he was still prepared to do that. Mr. Meade referred to Mr. Feeley's evidence that he had telephoned him on 17th May, 2016, which Mr. Feeley had corrected after Mr. Meade he had refuted it by producing his airplane ticket and mobile phone bill. Mr. Meade – who may not have carefully read the exhibits to Mr. Feeley's affidavit of 30th January, 2020 – submitted that Mr. Feeley, could not have telephoned him on 16th May to tell him what had happened at the committee meeting that did not take place until the following day. Mr. Meade's peroration was that two affidavits had been filed in court with false information; that judgment could not be granted on the basis of misinformation; and he asked that the case be struck out. I understand Mr. Meade's reference to *"the case"* to have been to the action as well as the motion.

33. In reply, counsel said that Mr. Feeley had acknowledged and corrected his mistaken reference to 17th May, 2016 and that there was no agreement reached in respect of that proposal which was itself in the context of without prejudice negotiations and subject to credit committee approval.

34. Heslin J. – as far as the transcript shows, without rising – gave an *ex tempore* judgment. The judge recalled that as he had said at the outset, he had read all of the papers. He noted that it was common case that Mr. and Mrs. Meade had borrowed the money from

ICS Building Society; that the loans had later been transferred to Bank of Ireland; that the loans had gone into arrears; that demand had been made for the full balances; and that there was no issue as to the calculation of the sums claimed.

35. Referencing *Ulster Bank Ireland Ltd. v. O'Brien* and the authorities referred to in that case, the judge identified the fundamental question as being whether there was a clear and reasonable possibility of the defendants having a real or *bona fide* defence either in law or on the facts or both. It was not necessary to show that the defence would succeed or even would probably succeed. The judge asked himself, firstly, whether it was very clear that the defendants had no case? Secondly, whether the issues were simple and easily determined? Thirdly, whether the defendants had disclosed even an arguable defence? And fourthly, whether, where there had been no notice to cross-examine, the court could be confident on the affidavit evidence alone where the justice of the case lay?

36. The judge noted that Mr. Meade had averred that in 2014, as a result of a telephone call with Mr. Feeley, an agreement had been reached whereby the entire liability of the defendants had been settled. Having – as he said – carefully considered the entirety of the papers, the judge thought that Mr. Meade had gone somewhat further than saying in general terms that he believed that the liabilities were fully and finally settled. The judge found that Mr. Meade had proffered evidence of facts which, if true, would at least arguably give rise to a defence. He summarised the evidence as to the agreement for the voluntary sale and later sale of the properties.

37. The judge identified the averment at para. 20 of Mr. Feeley's first affidavit that no agreement had been concluded regarding the residual balance as a stark dispute of fact. He noted Mr. Feeley's averment that he could find no record of any agreement but observed that that averment had been made without the benefit of discovery on both sides. In short, said

the judge, the Bank's witness had averred that there was no agreement concerning the residual debt and Mr. Meade had made averments to the contrary: the two propositions could not both be true. The judge was of the view that he could not fairly resolve what was a stark factual dispute in a purely paper based exercise.

38. As to the argument based on *Pinnel's case* the judge thought that it was at least arguable that the rule in *Pinnel's case* might not provide a full answer.

39. The judge noted that on the evidence before him Mr. and Mrs. Meade might well be facing an uphill battle. He pointed in particular to the e-mail of 28th September, 2015 – in which Mr. Meade said that he had no proposal to make in relation to the residual debt – as potentially presenting a significant difficulty for Mr. and Mrs. Meade but said that it did not entirely undermine and render void the sworn averments by Mr. Meade that an offer of settlement had been made and an agreement reached. The judge took into account the fact that it was agreed that discussions had taken place. He identified the question and significance, if any, of any conversation in May, 2016 as something that the trial judge would need to determine.

40. The judge concluded that Mr. and Mrs. Meade had cleared the low bar of demonstrating the existence of an arguable defence. It was not very clear to the judge that they did not have a defence and for that reason he would give leave to defend; subject he said, to a condition. and directions as to the exchange of pleadings.

41. The judge paused at that point to say clearly that there could be no criticism of the Bank's application for summary judgment and that:-

> *"I also want to emphasise in crystal clear terms that the evidence before the court today certainly does not allow for any finding that any party has given deliberately misleading information to the court or that the proceedings are an abuse of process,*

or that there is a scintilla of evidence which would underpin a submission that the proceedings should be dismissed."

42. It was, said the judge, unsurprising four years after the event that Mr. Feeley might have needed to correct the record as to the date on which a particular call was made.

43. Without getting ahead of myself, it was at this point that things began to go awry.

44. The judge recalled counsel's submission that the preparedness of Mr. Meade – first on affidavit and repeated in his oral submissions to the court – to pay €50 per month for 60 months sat uneasily with the grounds of defence which had been advanced, namely that there was no liability whatsoever to the Bank. But, as he said, in circumstances in which the possibility of a payment of €10,000 had been floated, the judge thought it appropriate to make it a condition of permitting Mr. and Mrs. Meade to defend that they should forthwith pay the Bank €10,000 strictly without prejudice to the respective positions and rights of the parties.

45. The judge then gave formal directions for the exchange of pleadings and particulars and requests for voluntary discovery before discussing with counsel the precise form of order. Counsel asked for judgment unless the €10,000 was paid within a specified time. There was then a discussion as to when the money might be paid. Mr. Meade suggested two weeks and asked for details of an account into which it could be paid. The judge said that he would leave the housekeeping to parties and continued:-

"... and I'm not going to – I don't think it would be appropriate to grant an unless order, in other words to grant judgment unless it's lodged. That would seem to cut across the very foundation of the ruling today, but what I will do is I'll allow a period of three weeks to give a little bit more comfort and I'll list the matter for mention only certainly relatively soon afterwards ..."

46. There was then a discussion as to whether, instead of listing the case for mention to ensure that the money was paid, the court might give the Bank liberty to apply in the event that it was not: and that was the order made. The judge then said to Mr. Meade:-

> *"Your ability to defend is conditional on this being lodged and you have three weeks to lodge it, and I'll also grant liberty to the plaintiff to apply to the court and obviously there'll be no need for a further application if the money is paid as directed, but if it's not then Mr. Powell's client will come back to me, but obviously you've heard the ruling. It's most important that that happen[s], because simply if it doesn't there could well be very significant consequences."*

47. The order of the High Court showed that the action should stand adjourned for plenary hearing – with directions for an exchange of pleadings and particulars – on condition that Mr. and Mrs. Meade pay to Bank the sum of €10,000 within three weeks, with liberty to the Bank to apply in the event that the payment was not made.

48. Although Mr. Meade's declared position was that he was willing to pay the money he did not do so. Instead, by notice of appeal filed on 17th May, 2023 he appealed against the entire order of the High Court on the ground that the judge had erred in fact and in law in not seeing that Mr. and Mrs. Meade had shown that they had a complete defence and in failing to strike out the entire proceedings. The seven numbered grounds of appeal were directed to the settlement options said to have been decided upon by the credit committee of the Bank on 17th May, 2016; the assertion that these options were not relayed to Mr. and Mrs. Meade; and the evidence of Mr. Feeley that he had telephoned Mr. Meade on 16th May, 2016. The suggestion was that the judge had failed to find as a fact that the credit committee's offer of settlement had not been communicated to Mr. Meade with the result that Mr. Meade lost the opportunity to settle on one of the options offered by the credit committee of the Bank.

49. It will immediately be seen that there is a disconnect between the defence initially put up in the High Court – that there was an agreement that if the properties were voluntarily sold Mr. and Mrs. Meade would not be pursued for the residual debt – and what I will refer to as the revised position – that if Mr. and Mrs. Meade had been offered the option to pay €50 per month for 60 months (which on their case they had not) they would have availed of it – and what I will refer to as the re-revised position, which appears to be that because they were not given the option to pay €10,000 or €50 per month for 60 months they should not have to pay anything at all. That re-revised position was not one which was at any time maintained in the High Court.

50. The Bank in its respondent's notice addressed the grounds of appeal as best it could and cross-appealed against the refusal of summary judgment. The ten grounds of cross-appeal are to some extent narrative and to some extent directed more to the Bank's arguments below than to the judgment but in substance the appeal appears to be that the judge erred in finding that Mr. and Mrs. Meade had established an arguable ground of defence and in finding that their agreement to a voluntary sale of the properties could at least arguably amount to sufficient consideration for an agreement to vary the terms of the loan agreements. In particular, it was said that the judge erred in finding that there was a *"stark factual dispute"* and *"in failing to have adequate regard"* to the e-mail of 28th September, 2015.

51. The notice of appeal filed on 17th May, 2023 was assigned a return date for directions on 7th July, 2023.

52. In the meantime, the Bank brought the matter back to the High Court where it was listed for mention on 6th July, 2023. Mr. Meade is recorded on the transcript as saying – without demur – that he was notified of that listing on the previous evening. The judge was shown the transcript of the earlier hearing. The Bank submitted that Mr. Meade had agreed

to pay the €10,000; that it was a condition precedent of the leave to defend that the money should be paid; that the money had not been paid; and that the Bank was entitled to judgment for the sum sought. Mr. Meade agreed that he had agreed to pay the €10,000 and that he had changed his mind and had decided, instead, to appeal. He suggested that the case had been listed in advance of the directions hearing to try to railroad the directions hearing in the Court of Appeal on the following day.

53. The judge recalled that the direction that the €10,000 should be paid was a condition of the leave to defend and that Mr. Meade had confirmed in court, without reservation, that the money would be paid but had since decided not to pay it. The judge made no criticism of the fact that Mr. Meade had decided to appeal but observed that it represented a *volte-face*. He recalled that he had made clear to Mr. Meade that there would be serious consequences if the money was not paid. The judge initially appeared to take the view that the condition as to the payment – like the rest of the order of 18th April, 2023 – was a matter for the Court of Appeal but counsel argued that the payment of the €10,000 was in the nature of an undertaking to the High Court and that Mr. Meade was flouting the order of the High Court.

54. The transcript of the hearing on 6th July, 2023 shows that the judge recalled that he had previously declined to make an unless order because he felt that that would cut across the logic of his ruling. The judge characterised the opportunity to pay the €10,000 as the *"last chance saloon"* but expressed the provisional view that all of it had been overtaken by the appeal. There was an exchange between Mr. Meade and the judge as to why the €10,000 had not been paid and why an unless order ought not to be made. The transcript shows:-

> *"JUDGE: - but I'm dealing with this net issue; why do you say it would be unfair to make an unless order effectively holding you to your word as given to the court on the 18th of April?*

MR MEADE: When I studied it, I found that I'm paying 10,000 to the bank to continue their case against me.

JUDGE: No, it's not. I have to correct you; you're paying 10,000 without prejudice to both sides' rights as a condition of being able to defend."

55. Pressed by counsel, the judge made an order for the payment by Mr. and Mrs. Meade within two weeks of the sum of €10,000, and in default of such payment giving judgment to the Bank in the sum of €639,590.05 with continuing interest and costs.

56. Inevitably, Mr. and Mrs. Meade filed a further notice of appeal on 15th August, 2023. The second notice of appeal references both the orders of the High Court of 18th April, 2023 – which was already the subject of an appeal – and that of 6th July, 2023. The grounds of the second appeal were more or less the same as the first, save that it was added that the order of 6th July, 2023 was *"a continuation of the case wrongly agreed that the plaintiff could enter judgment against the defendant/appellant."* The Bank's respondent's notice filed on the second appeal similarly reflected that filed on the first appeal, to which it was added that: *"The order of 6 July 2023 followed as a matter of course from the default of the appellants in failing to comply with the order of 18 April 2023 that as a condition of having leave to appeal they should pay to the respondent the sum of €10,000 within the prescribed 3 weeks period."*

57. In my clear view, the issue as to whether the Bank was or was not amenable to settle the residual debt for a single payment of €10,000 or 60 monthly payments of €50 is a distraction which has taken on a life of its own.

58. By itself, the fact that the Bank might have been willing to accept less than was owing was irrelevant. Any communication to Mr. Meade of any such willingness was, it seems to me, a privileged communication. In circumstances in which it is common case that there was no agreement on those terms, I cannot see how anything said or not said could be relevant.

No less to the point, I think that nice questions of law could very well arise as to whether – or, if at all, the purposes for which – evidence might be led of privileged communications.

59. As to the date of the credit committee meeting and the date on which the decision of the credit committee was allegedly relayed to Mr. Meade, the file note exhibited by Mr. Feeley in his first affidavit, to my eye, was fairly obviously not a printout of the Bank's contemporary file notes but a composite prepared at some later time. The note suggests that a decision was made at a credit committee on 17th May, 2016 to offer the options Mr. Meade and that Mr. Feeley had done so on the same day. The fundamental factual premise of the argument which Mr. Meade's would advance on his first appeal – that he could not have been given the options on 16th May – is that the credit committee meeting took place on 17th May. That proposition is solely based on the file note which – as to the date on which Mr. Feeley has deposed that he made the call – is acknowledged to have been wrong. In his second supplemental affidavit of 30th January, 2020 Mr. Feeley acknowledged the mistake in his earlier affidavit but did not explain how he had come to be so mistaken. He did, however say that he had reviewed his contemporaneous note, which he exhibited. The note shows an entry dated 16th May, 2016 which commences with a reference to a credit forum held on 12th May. It is self-evident, as Mr. Meade contends, that he could not have been told of the options before the committee had decided on them. To the extent – if at all – to which it is relevant, the issue is not when but whether the options were relayed to Mr. Meade.

60. The premise of the case which Mr. Meade would make on his first appeal is first, that if the Bank was disposed to take less than was owed, it had a legal obligation to tell him; and secondly, that the consequence of the Bank's failure to give him the opportunity to pay €10,000 is that he owes nothing at all.

61. Not only is there no legal basis for that argument, it is not the basis on which the case was argued in the High Court. The defence put forward by Mr. Meade in his first affidavit

was that there was an agreement or common understanding that the Bank would accept the net proceeds of the voluntary sale of the security in satisfaction of the debt. In his second and third affidavits, Mr. Meade asserted that the settlement proposal contemplated by the credit committee ought to have been relayed and that if it had been he would have availed of it and that he was still prepared to pay €50 per month for 60 months. In his fourth affidavit, Mr. Meade asserted that Mr. Feeley's evidence was false and that the action should be struck out on that basis.

62. I am quite satisfied that there was and is no basis on which the action could have been dismissed. As the judge put it, there was not a scintilla of justification for doing so. Mr. Feeley's acknowledged error as to the date of the alleged telephone call was neither here nor there. The issue as to whether – if it was any relevance – any such call was made was clearly a matter for the trial judge.

63. Mr. and Mrs. Meade's reliance on the newspaper report of the judgment of Her Honour Judge Ní Chúlacháin is misplaced. I am not at all sure that the judge was correct in saying that she had no discretion but to dismiss a personal injuries action in which the plaintiff had failed to make complete disclosure of previous claims but as the report shows, the neck injuries which the plaintiff admitted she had sustained in the undisclosed accident in 2016 – in respect of which she had recovered €15,000 – were similar to those which she claimed to have suffered in her 2020 accident. In this case, the issue is relation to the credit committee decision is whether and not when it was relayed to Mr. and Mrs. Meade. That is not something which the judge could have resolved on the affidavits.

64. The substance of the Bank's cross-appeal against the refusal of its application for summary judgment is that the judge erred in giving leave to defend.

65. The notice of cross appeal suggests – and the Bank argues – that the sole submission made was that Mr. Feeley's averment that he had contacted Mr. Meade on 17th May misled

the court and that there were no issues of fact that justified refusing the Bank the relief sought. The Bank submits that Mr. Meade abandoned his claim as to the existence of a write-down agreement. I cannot agree. While it is true that in his oral submission in the High Court Mr. Meade confined himself to his argument that the action should be dismissed, it is not correct to characterise that as his sole submission. He did not say that he was abandoning reliance on his first claim and was not properly to be taken as having done so by implication. As I have said, the judge said that he had read the papers and the substance of the ruling was directed to what was said to have been said – or not said – before the security was sold. If Mr. Meade confined his oral submission to the wholly unstateable proposition that Mr. Feeley had misled the court, counsel did not suggest in reply that he had abandoned reliance on anything else he had said in his replying affidavits.

66. The Bank now argues that the judge erred in finding that the Bank could or did unilaterally vary the terms of the loan agreement. That was the spin put by the Bank on Mr. Meade's evidence, but the judge did not so find.

67. The Bank now argues that the judge erred in finding that there was evidence before the High Court of an agreement made between Mr. Feeley and Mr. Meade which cancelled all previous agreements. Having carefully considered the evidence, the judge found that Mr. Meade had gone further than averring in general terms to a belief that the liabilities were fully and finally settled but had asserted an agreement that when the Bank had received the market value of the apartments it would write off any residual balance. In my view the judge was entitled to take the view that he did that there was a stark conflict between the evidence of Mr. Feeley and that of Mr. Meade. The Bank accepts that the judge identified the correct legal principle – which was whether it was clear that the defendants had no defence – and was correct in noting that the bar was a low one. The judge identified Mr. Meade's e-mail of 28th September, 2015 – when he said that he has no proposal to make in relation to the

outstanding debt – as something which was not obviously consistent with a prior agreement that he would have no liability for the residual debt and which might present a significant difficulty at trial but found that it did not entirely undermine his sworn evidence. In my view, that was a conclusion which the judge was entitled to have come to.

68. By the way, the Bank in its written submissions on the appeals suggests that Mr. Meade's averment that he would have considered an offer to pay a reduced sum in May, 2016 had he been aware of it *"stands in stark contrast with his unsupported assertion that there was a prior agreement to waive the residual debt following the sale of the properties."* (Emphasis added.)

69. The Bank's cross appeal as to the applicability of *Pinnel's case* can be quickly disposed of. The alleged agreement was not simply that Mr. and Mrs. Meade would pay and the Bank would accept less that the full amount outstanding. Rather the agreement alleged is that if Mr. and Mrs. Meade voluntarily sold the properties at market value, the Bank would accept the proceeds of such sale in settlement of their liabilities. It is common case that the possibility of a voluntary sale was discussed as an alternative to the appointment of a receiver, which would have added to the costs of realisation. From the Bank's point of view, it was Mr. and Mrs. Meade who, by their cooperation, were spared the expense of a receivership. That, ultimately, at least theoretically, may have been so but the immediate beneficiary of keeping the costs of realisation to a minimum was the Bank. It is sufficient for present purposes to say – as the judge said – that it is at least arguable that if Mr. and Mrs. Meade can make out their defence on the facts, *Pinnel's case* may not provide a full answer. At the trial of the action, Mr. and Mrs. Meade may be able to establish that the voluntary sale was, for the Bank, the equivalent of a hawk, a horse, or a robe.

70. In its combined written submissions in relation to both appeals, and in oral argument, the Bank submits, in the alternative, that the judge was fully within its rights and acted in the

interests of justice in adjourning the action to plenary hearing on terms that the sum of €10,000 would be paid to the Bank. If the issue that the judge may have erred in imposition of the condition on the leave to defend was not clearly and unambiguously identified in the notice of appeal or respondent's notice, it was, it seems to me, in Mr. Meade's oral submission on 6th July, 2023 when Mr. Meade explained that the reason why he had not paid the €10,000 was because when – later – he had studied it, he found that he was paying €10,000 to the Bank to continue its case against him.

71. The transcript of 18th April, 2023 shows that the judge was invited by counsel for the Bank to make what counsel referred to an *"unless order"* and what the judge correctly understood to be an order making the leave to defend conditional on the payment of the €10,000. The judge declined to do so on the basis that *"That would seem to cut across the very foundation of the ruling today."* The judge was not referred to but may have had in the back of his mind the judgment of the Supreme Court in *Calor Teoranta v. Colgan* (1990) in which the court decided that in circumstances in which the defendant has been given leave to defend, it could not be a condition precedent to the exercise of that right that he lodge a sum of money in court because this would obstruct his constitutional right of access to the courts. There appears to be no transcript available of that judgment but it was discussed by *Doyle* in an article in (1990) 8 ILT & SJ 255 and is referenced at para. 27.111 of *Delaney and McGrath on Civil Procedure (4th Ed., 2018).*

72. It was here, as I have said, that things went awry. On the one hand, the judge appeared to recognise that the imposition of a condition would cut across the foundation of his ruling and he was not prepared to give judgment unless the money was paid but on the other, he directed the payment of the money and said that Mr. and Mrs. Meade's ability to defend was conditional on the money being *"lodged."* Mr. Meade appeared perfectly willing to pay the money and appears to have forgotten for the nonce that his declared willingness to

have paid the money had he been given the opportunity to do so was on the basis that the payment would be in full and final settlement of the residual debt.

73. Mr. and Mrs. Meade filed their first notice of appeal on 17th May, 2023, which had a return date for 7th July, 2023. The Bank's respondent's notice was filed on 1st June, 2023.

74. When the matter came back before the High Court on 6th July, 2023, counsel for the Bank submitted that Mr. and Mrs. Meade had not fulfilled a condition precedent to the leave to defend and that he was entitled to judgment. He submitted that Mr. and Mrs. Meade were flouting an order of the High Court and characterised Mr. Meade's agreement to pay the money as an effective undertaking to the High Court. The judge recalled that Mr. Meade had confirmed in open court without reservation that he would pay the money. Mr. and Mrs. Meade's appeal – he said – meant that all matters, including the payment of the €10,000 were caught up by the appeal. The judge was of the view that it was a matter for this court to deal with the merits of the appeal and any cross-appeal.

75. The judge recalled that he had declined to make an unless order at the earlier hearing because he felt that to have done so would cut across the logic of his ruling but had warned Mr. Meade that there would be serious consequences if the money was not paid: which were, he said, that if the money was not paid *"then the unless order would be self-executing."* In response to Mr. Meade's submission that he found himself paying €10,000 to the Bank to continue its case against him, the judge corrected him by saying that he was paying the €10,000 without prejudice to both sides' rights as a condition of being able to defend.

76. If it was not immediately obvious from Mr. and Mrs. Meade's first appeal that they were appealing against the condition on the leave to defend, the judge certainly thought that that was something which this court could consider, and inasmuch as the Bank's written submissions seek to justify the condition, the Bank appears to agree.

77. It is true – as the Bank submits – that Mr. and Mrs. Meade stated on affidavit that they wished to avail of the alternative repayment proposal they claim was decided by the Bank's credit committee in May, 2016 but not communicated to them and that Mr. Meade stated in court that he would abide the condition and pay the €10,000 within the prescribed three weeks: but there is a disconnect between the basis on which leave to defend was granted and the declared willingness to pay the €10,000.

78. It seems to me that the judge was quite correct when he said on 18th April, 2023 that the imposition of a condition would cut across the very foundation of his ruling that Mr. and Mrs. Meade crossed the low bar of being entitled to defend the action and was also correct in declining to grant summary judgment unless the money was paid but then fell into error in making the payment of the money a condition of the leave to defend. It follows that the judge erred on 6th July, 2023 in making the order which he had earlier declined to make.

79. Mr. and Mrs. Meade's first appeal – No. 108 – that the judge erred in refusing to dismiss the action must fail, but I would vary the order of the High Court by deleting the condition that the defendants pay the plaintiff the sum of €10,000 and otherwise affirm the order. I would dismiss the Bank's cross appeal. I would allow Mr. and Mrs. Meade's second appeal – No. 233 – and set aside the order of the High Court.

[Faherty and O'Moore JJ. agreed]