



THE COURT OF APPEAL

UNAPPROVED

Record Number: 2024/97

High Court Record Number: 2022/3434P

Neutral Citation No: [2024] IECA 293

Costello P.

Noonan J.

Pilkington J.

BETWEEN/

DONAL KEANE AND FREDERIQUE KEANE

PLAINTIFFS/APPELLANTS

-AND-

ULSTER BANK IRELAND DESIGNATED ACTIVITY COMPANY

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 4th day of December, 2024

1. This appeal concerns a motion brought by the defendant/respondent (“the Bank”) to dismiss the within proceedings brought by the appellants (the plaintiffs) on the grounds that they constitute an abuse of process. In a written judgment delivered on the 21st of March, 2024, the High Court (Phelan J.) acceded to the Bank’s application and dismissed the proceedings.

Factual Background

2. The plaintiffs are the registered owners of a property known as Camelton Stud (“Camelton”) which comprises a farm of some 147 acres with a dwelling house thereon near Summerhill in County Meath. Camelton is comprised in two folios being numbers 2322 and 51205F of the Register of Freeholders, County Meath. It would appear that originally, the entirety of the property was within Folio 2322 but some 2.8 hectares were hived off into Folio 51205F. The plaintiffs are a married couple and described in their pleadings as a barrister and solicitor respectively. They acquired Camelton in 1996 from the first plaintiff’s parents who had purchased the property in 1975. The plaintiffs’ evidence is that the property was acquired for full value, at that time being IR£350,000.

3. In 2006 and 2007, the plaintiffs borrowed various sums from the Bank totalling some €1.7m. The plaintiffs provided security for their borrowings by way of a mortgage and charge on Camelton. From December 2010 onwards, the loans went into default and it would seem that over the course of the next year or so, negotiations took place between the parties with a view to resolving matters, but these proved unsuccessful. At some time prior to summer 2012, the plaintiffs say that they became aware of a title issue with Camelton.

4. The plaintiffs’ evidence in this regard is that the entrance to Camelton from the public road together with some 60-100 metres of the entrance driveway to the house are not encompassed within the folios owned by the plaintiffs and are in fact located on a neighbouring folio. There is no right of way registered on the neighbouring folio. Arising from this discovery, the plaintiffs sought the opinion of senior counsel concerning their title to Camelton. Counsel duly furnished an opinion in which he expressed the view that the consequence of this state of affairs is that the plaintiffs do not hold good marketable title to

Camelton. Arising from this the plaintiffs assert in pleadings, affidavits and submissions, that Camelton is unsaleable and accordingly has a zero valuation.

5. At the time that the plaintiffs' loans were raised with the Bank, the first plaintiff's brother, Mr. Michael Keane, principal of Flynn and McMorrow solicitors, acted on behalf of the plaintiffs and provided a certificate of title in respect of Camelton to the Bank. This certificate did not advert to any issues concerning the entrance driveway to the property or rights of way in relation thereto.

6. It would appear from correspondence exhibited in an affidavit sworn by the first plaintiff that he raised this issue with his brother in the early part of 2012 and in advance of any opinion being sought from counsel. The correspondence suggests that by that stage, the possibility of proceedings for negligence against Mr. Michael Keane was being contemplated by the first plaintiff.

7. Counsel's opinion was obtained in July 2012 and on the 22nd of November, 2012, the plaintiffs' solicitors wrote to the Bank drawing the matter to its attention. As appears from this letter, the ostensible purpose of writing to the Bank was to have it, rather than the plaintiffs, notify Flynn and McMorrow and their insurers of a potential claim. The expressed concern by the plaintiffs was that a failure by the Bank to notify the insurers of a possible claim before their professional indemnity insurance was renewed on 1 December might result in a difficulty with cover. The letter suggests that if such a difficulty arose, the plaintiffs would hold the Bank responsible "*for the loss incurred*". The letter goes on to say:

"On that basis Ulster Bank would become its own indemnifier and incur its own loss."

8. The purpose of this letter is quite opaque. It appears to state that the plaintiffs have a cause of action in negligence against Flynn and McMorrow, which follows from the assertion that they may suffer a loss if there is a difficulty with Flynn and McMorrow's professional indemnity cover. On the other hand, it suggests that the plaintiffs will hold the Bank responsible for the same loss should the Bank fail to make a claim against the same party. This is, at best, a peculiar proposition in circumstances where there is no obvious reason why the plaintiffs could not themselves do what they appear to be asking the Bank to do in this letter.

9. In any event, the suggestion that the Bank could have some liability to the plaintiffs for a failure to notify the insurers concerned was firmly rebuffed in a letter from the Bank's solicitors a week later on the 29th of November, 2012 in which they said:

“Whilst we note your position in relation to the Certificate of Title, you will appreciate that Flynn McMorrow was engaged by your client. In this respect, it is undeniably your client's duty to report any allegation of negligence or breach of duty in the context of that relationship. We presume that your clients have put Flynn McMorrow on notice of the position in that regard.

We confirm that we will request that Flynn McMorrow notify their Professional Indemnity Insurers of the situation that has arisen however we fervently reject any claim that any loss occasioned to your client as a result of a failure in the Professional Indemnity Cover is in any way connected to our client. This is particularly so in circumstances where your client could easily have notified its own solicitor of the potential claim ...”

10. In apparent response to this letter from the Bank's solicitors, the plaintiffs' solicitors wrote the next day, the 30th November, 2012, to both Flynn and McMorrow and their insurers notifying them of a potential claim by the plaintiffs arising out of the title matter. On the 21st December, 2012, Flynn and McMorrow wrote to the Bank's solicitors acknowledging receipt of counsel's opinion and refuting the suggestion that there was any potential difficulty with the right of way and alleging that the instructions that the first plaintiff had given to counsel concerning the matter were incorrect. This is dealt with further below.

11. A year and a half later, the Bank issued proceedings against Flynn and McMorrow on the 6th June, 2014. The proceedings were not at that time progressed. In 2015, the Bank disposed of a loan portfolio to Seaconview Limited, later DAC, which included the plaintiffs' loans by way of transfer on the 23rd October, 2015. In 2016, a motion was brought by Flynn and McMorrow to dismiss the Bank's proceedings for want of prosecution and this came on for hearing before the Master of the High Court in July 2016. On the 19th July, 2016, the plaintiffs' solicitors wrote to Capita Asset Services (Ireland) Limited on the basis that this company was managing the plaintiffs' loans on behalf of Seaconview. In that letter, the plaintiffs' solicitors complain of the failure of the Bank to serve a statement of claim in the proceedings against Flynn and McMorrow and went on to say:

"... In the event that Ulster Bank (or you if you now own that cause of action) permits that action to be struck out then our clients will hold the owner of that action responsible for the amount that it would have recovered in the event that the action was to be successful. The proceedings can only have been issued on foot of an expert's report indicating that there was indeed professional negligence on the part of Mr. Michael Keane.

In addition, our clients reserve their entitlements under the Civil Liability Act including holding Seaconview Limited and/or Ulster Bank responsible as joint tortfeasors in respect of that loss.”

12. A letter was written in similar terms to the Bank’s solicitors. The Bank’s solicitors, who were also now representing Seaconview, responded to this correspondence by letter of the 25th July, 2016 refuting the suggestion that the plaintiffs had any interest in the litigation between the Bank and Flynn and McMorrow saying, *inter alia*:

“... Any proceedings relating to third parties are entirely a matter for Ulster Bank Ireland Limited and/or Seaconview Limited. Your clients have no interest in any litigation with a third party, which arise from a direct relationship between our clients and the third party...

Any losses which you say your clients have suffered due to any issue with title and marketability of their property are entirely a matter for your clients and their former solicitor. Although such assertions by your clients (if true) may form the basis of a claim for indemnity from their Solicitor, it does not affect the loan contract with Seaconview Limited, as lawful successor in title to Ulster Bank Ireland Limited. Our clients have absolutely no obligation to take any action to mitigate your client’s losses and we entirely refute the suggestion that there is an obligation to progress any litigation for the benefit of your clients.

Any suggestion that either of our clients are amenable to being deemed a joint tortfeasor with Mr. Michael Keane will be vigorously defended and we will use this letter in an application to fix you with the costs arising from any such applications.”

13. On the 20th July, 2016, the Master dismissed the Bank's claim and that dismissal was affirmed on appeal to the High Court on the 22nd of November, 2016.

14. Further correspondence from the plaintiffs' solicitors in April 2017 to Seaconview's agents showed that the plaintiffs were seeking to resolve the matter by negotiation having made certain proposals which were rejected by or on behalf of Seaconview. Presumably because negotiations had broken down, Seaconview issued a summary summons on the 11th August, 2017 claiming the full amount of the debt then due, being in excess of €2m ("the summary proceedings"). The claim was disputed by the plaintiffs which appears to have resulted in the matter being sent forward for plenary hearing on consent and a statement of claim was later delivered on the 14th January, 2021.

15. On the 9th November, 2021, Seaconview issued proceedings in the Circuit Court in tandem with the summary proceedings in the High Court. The Circuit Court proceedings claimed an order for possession of Camelton ("the possession proceedings"). That in turn was resisted on the same basis as the summary proceedings in the High Court to which a defence was delivered on the 1st February, 2022.

16. On the 20th July, 2022, a plenary summons in the within proceedings was issued followed by a statement of claim on the 22nd December, 2022.

The pleaded claim in these proceedings

17. In their plenary summons, the plaintiffs claim damages under a number of headings including negligence and breach of duty, negligent misrepresentation, breach of contract and unjust enrichment together with various ancillary reliefs. In their statement of claim, the plaintiffs plead that by virtue of the alleged title defect, they "*cannot sell the lands in whole*

or in part to discharge any indebtedness under the facilities, nor offer the lands as security to refinance the facilities.”

18. The statement of claim first pleads that the Bank failed to prosecute the professional negligence proceedings against Flynn and McMorrow and had it done so, it would have succeeded and obtained damages equal to the full value of the facilities. These damages, the plaintiffs allege, would have been applied in *pro tanto* reduction of the plaintiffs’ indebtedness and the damages would have been recovered as Flynn and McMorrow are insured.

19. The plaintiffs’ case is therefore that, but for the wrongdoing of the Bank, they would have been relieved of their debt while retaining Camelton unencumbered. They thus do not allege that they have suffered any loss as a result of the alleged wrongs they identify but rather that they should be entitled to the benefit of a windfall.

20. The pleaded basis for this unusual claim is that by issuing the professional negligence proceedings, the Bank implicitly represented and created an expectation that they would be litigated to finality. The plaintiffs say they were entitled to rely on that representation and did in fact so rely in not issuing their own professional negligence proceedings against Flynn and McMorrow. Because such claim would now be statute barred, the plaintiffs say that they have lost that cause of action and the Bank is estopped from resiling from this representation.

21. Secondly, the plaintiffs plead various particulars of negligence arising from an alleged failure on the part of the Bank to check for potential conflicts which Michael Keane may have had in certifying title. This conflict is said to arise from the fact that Michael Keane was a co-investor with the plaintiffs in a development in which the funds loaned were to be invested. It is further claimed that the Bank was negligent in failing to investigate the

feasibility of the purpose of the loan, including the alleged fact that half of the property could not be developed due to unstable ground conditions.

22. Thirdly, it is pleaded that the plaintiffs and Michael Keane are concurrent wrongdoers within the meaning of the Civil Liability Act, 1961 (“the CLA”) in respect of the same “*damage*” and consequently, by allowing the professional negligence proceedings to be dismissed as against Flynn and McMorrow, the Bank is identified with the negligence of that firm with the same result, *i.e.*, the plaintiffs’ debt is eliminated.

23. Fourthly and finally, it is pleaded that the Bank has been unjustly enriched by virtue of disposing of the plaintiffs’ loans to Seaconview at full market value rather than as a distressed or impaired asset arising from the defect in title.

24. Prior to the delivery of the statement of claim, the plaintiffs had delivered their defence in the summary proceedings brought by Seaconview and in that defence, they raise substantially the same issues as are raised in the statement of claim herein.

Affidavit evidence

25. In the notice of motion herein, the Bank seeks an order pursuant to Order 19, rule 28 of the Rules of the Superior Courts striking out these proceedings on the grounds that they disclose no reasonable cause of action, are frivolous or vexatious and/or bound to fail. In the alternative they seek an order pursuant to O. 19, r. 27 striking out the proceedings on the grounds that they are unnecessary or have been brought for a collateral purpose and in the further alternative, an order pursuant to the inherent jurisdiction of the court dismissing the proceedings as an abuse of process. The motion is grounded upon the affidavit of Ms. Ciara Murphy, a solicitor in Beauchamps Solicitors, sworn on the 24th April, 2023. Ms. Murphy

sets out the facts as I have outlined them above and refers to the alleged title defect. In that regard, she says (at para. 19):

“The Plaintiffs do not appear, at any stage, to have taken any steps to remedy this apparent right of way issue by (for example): rerouting their driveway; seeking to register their right of way; or asserting any rights over the driveway lands.”

26. During the hearing of this appeal, counsel for the plaintiffs confirmed that in the twelve years since this issue arose, the plaintiffs have done nothing to remedy the situation. Ms. Murphy notes that no issue appears ever to have been raised regarding the driveway access by any party until the plaintiffs themselves decided to raise the issue *“in the course of restructure discussions”*.

27. She goes on to set out a number of reasons why the claim is bound to fail while accepting that these are matters for legal submission. Among these is Ms. Murphy’s statement that *“the plaintiffs are not entitled to rely upon their own inaction to ground a claim which would, in effect, result in a windfall of over €1.7M to them.”*

28. She avers that the proceedings are unnecessary to the extent that the defence raised in the summary claim seeks to achieve the same result, *i.e.*, to relieve them of their debt. She alleges that the plaintiffs are adopting a collateral purpose in litigating these proceedings which she characterises as follows:

“35. I say that, when one considers the factual background and the reliefs sought in these proceedings, it is clear that they have been brought for a collateral purpose – to evade repayment of loan monies received by them, to delay or frustrate the progress of the debt proceedings against them, and ultimately to retain possession of Camelton Stud.”

29. This affidavit is replied to by the first plaintiff in an affidavit sworn by him on the 5th July, 2023. At para. 19, he avers:

“I say and believe and am advised that, as a consequence of the absence of good marketable title to Camelton, the Plaintiffs cannot sell the lands in whole or in part to discharge any indebtedness under the Facilities, nor offer the land as security to refinance the Facilities. I am further advised that the charge holder will have precisely the same problems.”

30. In relation to Ms. Murphy’s averment that the plaintiffs have not taken any steps to remedy the right of way issue, giving examples, the first plaintiff says that these proposed solutions are irreconcilable with counsel’s advice. He denies that the result which the plaintiffs seek in these proceedings would result in a windfall for them but *“rather is the result which ought to have obtained in the circumstances”* had the Bank proceeded with the professional negligence claim.

Judgment of the High Court

31. In her *ex tempore* written judgment, the trial judge set out the background facts as I have described them above. She set out the applicable legal principles which she noted were not in dispute. She then considered each of the headings of claim as identified above in turn, the first being *“Negligent Misrepresentation/Misstatement/Estoppel”*. Having referred to the correspondence I have previously outlined, the judge said:

“28. ... I am at a loss to see how the facts alleged, at their height, support the contention that a representation that proceedings would be maintained to conclusion against a third-party for the Plaintiffs’ benefit can be implied.”

32. She went on to express the view that there was no prospect of persuading a court that proceedings were issued by the Bank for the purposes of inducing the plaintiffs to abandon any claim they might have had or that the proceedings would be maintained for the purpose of reducing the plaintiffs' overall indebtedness. She noted that the proceedings by the Bank issued within two weeks of the expiry of the Statute of Limitations and had the plaintiffs any intention of issuing proceedings themselves, she would have expected this to be documented in some way. She pointed to the fact that the plaintiffs appeared to have sought no opinion in relation to the question of professional negligence against Flynn and McMorrow.

33. She noted that the correspondence to which I have already alluded showed that the plaintiffs had notified their former solicitors' professional indemnity insurer of a potential claim over a year and a half prior to the expiration of the limitation period but without apparently taking any further steps to progress it. While the judge accepted that the burden of proof is on the defendant in this application, she considered that there was no semblance of reality to the contention that the plaintiffs would have brought their own proceedings but for the fact that the Bank had issued proceedings. The judge also held that the contended for implicit representation by the Bank to prosecute the proceedings was irreconcilable with the Bank's recorded position in correspondence, again quoted above.

34. Nor could the plaintiffs succeed in a claim for negligent misstatement in circumstances where no statement was made to them. She went on to observe:

“32. There is no reasonable basis upon which the Plaintiffs, lawyers themselves and legally represented, could have understood the Defendant to have made any commitment to pursue proceedings against their former solicitor to finality by virtue only of the fact of having issued proceedings. I cannot accept as in any sense plausible that the Plaintiffs were somehow induced or persuaded not to issue their

own proceedings in professional negligence against their former solicitor by the mere fact that the Bank had issued proceedings in respect of a claim it might have arising from loss to it occasioned by its reliance on a negligent certification of title. The Plaintiffs' assertion that they relied on the existence of the Bank's professional negligence proceedings in not pursuing their own, even if accepted at face value, is at most evidence of unreasonable and unjustified reliance."

35. Since there was no basis in the judge's view for a negligent representation claim, then the estoppel claim fell away. In that regard, the judge said no claim is made in these proceedings that any assurance was given by the Bank upon which the Bank intended that the plaintiffs would rely regarding maintenance of the proceedings. Equally, there was no "*common mistaken assumption*" within the meaning of *Tinkler v Commissioners for Her Majesty's Revenue and Customs* [2021] UKSC 39, as the plaintiffs contended. The judge considered this argument to be misconceived because the shared mistaken assumption was required either through speech or conduct before it could raise an estoppel and there was none here. More fundamentally, the judge said that the Bank is not seeking to enforce any legal right as against the plaintiffs from which they could be estopped. Therefore, the claim for negligent misrepresentation had no prospect of success.

36. With regard to the negligence claim, the judge said that this could only arise where a duty of care exists. Again, she noted that the plaintiffs' claim that the Bank had some duty to ascertain for their benefit whether their solicitor had a conflict of interest or independently establish whether there was a good title to the property tendered as security was a proposition not supported by any authority and was, in the view of the judge, wholly unstatable. The obligations the plaintiffs seek to attribute to the Bank were in the judge's view the plaintiffs' own obligations pursuant to the terms of the mortgage loan agreement.

37. Insofar as they appear to attempt to set forth a claim for negligent or reckless lending, such a cause of action is not known in law as found in several cases. On the question of negligence concerning the maintenance of the proceedings, the judge said that the Bank owed no duty of care to plaintiffs in relation to the carriage of those proceedings, or any duty to achieve any particular result. This claim had no prospect of success.

38. On the CLA question, the judge noted that the concept of concurrent wrongdoers in the context of the distinction between a debt and a damages claim for the purposes of the action was considered in *Ulster Bank & Ors. v McDonagh & Ors* [2022] IECA 87. She cited a number of passages from that judgment which is considered further below. Suffice to say that the judge was satisfied on the authority of *McDonagh* that the Bank's claim against Flynn and McMorrow and its debt claim against the plaintiffs are not for the same damage and are not concurrent. Accordingly, any claim based on the CLA is bound to fail.

39. The judge finally considered the unjust enrichment argument which she described (at para. 46) as:

"... particularly contrived and unpalatable in circumstances where the clear objective of the Plaintiffs in these proceedings is to achieve an outcome whereby they are held free of liability for loan amounts advanced to them and not paid back."

40. She noted that the two essential preconditions to a remedy for unjust enrichment are:

- (a) enrichment of the defendant at the expense of the plaintiff; and
- (b) that the enrichment in question is unjust.

41. She found that the claim that the Bank has been enriched because it sold its interest in the plaintiffs' debt for value to be untenable. That was a commercial transaction which does not affect the plaintiffs. She said at para. 49:

"... I cannot see how it can be maintained that the sum secured by the Bank in selling their interest to Seaconview could in any sense be construed as being at the expense of the Plaintiffs whose liability under the loan agreements is unaffected by same."

42. She rejected the plaintiffs' submissions that the proceedings should not be dismissed because of the existence of the related proceedings and the risk of injustice, holding that the authorities relied upon did not support that proposition in this case. Of relevance, the judge noted that the plaintiffs are not precluded from making the arguments they advance in these proceedings in defence of the summary proceedings as they have largely already pleaded in their defence.

43. As for the argument that the court should not dismiss the plaintiffs' claim on the grounds that complex issues of law are not properly amenable to an application of this nature, she said that she approached the application based on the plaintiffs' claim at its height and that there are no factual issues which require to be resolved before she could determine the claim. There was no lack of clarity about the legal position regarding any aspect of the plaintiffs' claim. While the law, particularly in relation to the issue of concurrent wrongdoing in the context of the *McDonagh* case, may be complex and require careful reading, the judge noted that it is now settled in a manner which is clear, certain and determinative of the plaintiffs' claims in these proceedings. In dismissing the claim, the judge concluded as follows:

"55. I have considered each element of the claim advanced and am satisfied that the Plaintiffs have no prospect of success in these proceedings. There is no dispute

that they received €1.72 million in loan monies which they have not paid back. The outcome contended for by the Plaintiffs would result in their receiving a windfall – the benefit of €1.72 million and retaining ownership of their property. This scenario was contended for in McDonagh and rejected. It is difficult to see these proceedings as anything other than an attempt to confound and frustrate the debt collection proceedings brought against the Plaintiffs by the Defendant’s successor in title.”

The appeal

44. In their notice of appeal and submissions, the plaintiffs complain that the trial judge made disputed findings of fact adverse to them and determined the claim on those findings, when such approach is impermissible in a motion of this nature, the court being required to accept the facts as asserted by the plaintiffs. The plaintiffs further complain that the judge erred in law in holding that none of the causes of action identified above had a prospect of success.

45. The plaintiffs further contend that the judge failed to place appropriate weight on the impact of her decision on the related summary proceedings. Although the plaintiffs accept that the judge correctly identified the applicable legal principles relevant to an application of this kind, it is said that the Bank did not even approach this high threshold. The plaintiffs’ notice of appeal identifies a number of findings of fact which they contend the judge was not entitled to make, including that there was *“no semblance of reality to the contention that the Plaintiffs would have brought their own proceedings but for the fact that the Defendant had issued proceedings”* and that the judge could not *“accept as in any sense plausible that the Plaintiffs were somehow induced or persuaded not to issue their own proceedings in professional negligence against their former solicitor by the mere fact that the Bank had*

issued proceedings in respect of a claim it might have arising from loss to it occasioned by its reliance on a negligent certification of title.”

46. The plaintiffs also argue that the legal issues raised in this application are too complex to be suitable for summary disposal and rely on a number of authorities in that regard. It is said that the judge wrongly considered irrelevant matters in coming to her conclusion, one of which was that the proceedings, if successful, would result in a “windfall” for the plaintiffs.

Legal principles

47. As noted by the judge and agreed by the parties both in the High Court and in this Court, the legal principles applicable to an application of this nature are well settled. These are as the judge set them out at para. 24:

“It is a jurisdiction to be exercised sparingly, only in clear cases and only where the judge is confident that the plaintiff’s claim cannot succeed no matter what might arise on discovery or at the trial of the action. The case should be considered at its high-water mark and the burden of proof lies on the defendant to establish that the plaintiff’s claim is bound to fail.”

48. The court’s jurisdiction to dismiss a claim on the basis that it is bound to fail is long established and the subject of many judgments, one being *Keohane v Hynes & Anor* [2014] IESC 66. Clarke J. (as he then was), speaking on behalf of the Supreme Court, said:

“6.7 I am in full agreement with the views expressed by Birmingham J. in [Burke & Anor v Anglo Irish Corporation Plc and Anor [2011] IEHC 478]. Where there is evidence placed before the court on affidavit on behalf of a plaintiff which, if accepted at trial, might arguably lead to the plaintiff succeeding, then that is an end

of the matter. But it does not necessarily follow that a plaintiff even has to put evidence of that type before the court. In [Lopes v Minister for Justice Equality and Law Reform [2014] IESC 21] I observed at para. 2.5:

'In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in [Sun Fat Chan v Osseous Limited [1992] 1 I.R. 425] (at p. 428), that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance'.

I commented to similar effect in [Salthill Properties Limited & Anor v Royal Bank of Scotland Plc and Ors [2009] IEHC 207] at para. 3.15:

'... it seems to me that I should assess the factual allegations ..., not on the basis of whether those parties have shown that they have evidence which, if accepted, would lead, arguably, to success in the proceedings but rather whether [the applicants] have established that it is impossible that any such evidence will be produced at trial...'

6.8 *What the Court can analyse is whether a plaintiff's factual allegation amounts to no more than a mere assertion, for which no evidence or no credible basis for believing that there could be any evidence, is put forward.*
Likewise, the Court can go into documentary facts where the relevant

documents govern the legal relations between the parties or form the only possible evidential place basis for the plaintiff's claim (as in Lopes) ...

6.9 ... a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it ...

6.10 ... it is an abuse of process to maintain a claim based on a factual assertion in circumstances where there is no evidence available for that assertion and, importantly, where there is no reasonable basis for believing that evidence could become available at the trial to substantiate the relevant assertion ...”

(My emphasis)

49. It is accordingly clear that while on an application of this nature the plaintiffs' case must be taken at its high water mark, it does not follow that any assertion made by a plaintiff must be accepted at face value, where there is no evidence to support it or no credible basis for believing that there could be any evidence.

The alleged title defect

50. As is evident from the foregoing, the entirety of the plaintiffs' claim herein is predicated on an assertion that there is no good marketable title to Camelton and as a consequence, Camelton and any part thereof cannot be sold and thus has no value. Given the importance of this assertion to the plaintiffs' claim, it is of relevance to consider the circumstances in which it is said to arise. The documents exhibited before the Court in this application show the following sequence of events.

51. On the 17th June, 1953, Camelton, which appears then to have been entirely comprised in Folio 2322, was purchased by a Mr. and Mrs. Brennan. They sold Camelton to a Mr. and Mrs. Keogh on the 18th December, 1970. Mr. and Mrs. Keogh in turn sold the property to a Mr. and Mrs. McGrath on the 22nd April, 1974 and a short time later, in 1975 the property was sold to Mr. and Mrs. Michael P. Keane, the first plaintiff's parents. It is common case that Mr. Keane Snr. was an experienced conveyancing solicitor. As appears from the first plaintiff's replying affidavit herein (at para. 59), Mr. and Mrs. Keane Snr. sold Camelton to the plaintiffs in 1996 for full value.

52. It seems clear from a number of documents dated shortly prior to the sale to Mr. and Mrs. Keane Snr. that they were fully aware that part of the entrance driveway was not contained within Folio 2322, nor was a right of way over it registered as a burden on any other folio. For that reason, a number of statutory declarations appear to have been obtained by the vendors to the first plaintiff's parents. The first is a declaration from Mrs. Brennan dated the 10th April, 1974. In this declaration, she declares as follows:

"2. The lands in [Folio 2322] consist of the lands of Ginnett's Great area 145 acres 1 rood and 3 perches and include a dwelling house with an avenue leading from the dwelling house to the Trim/Summerhill Road. Some time after we purchased the property my husband and I found that the actual entrance was not part of the registered land but it has always been enjoyed by the owners of the registered land. Since we purchased the said property on the 17th June, 1953, and during our time in occupation we had exclusive use of the said entrance and neither of us at any time acknowledged the right or interest of any party to same, nor did any person make any adverse claim thereto or used the said entrance save ourselves our employees, agents or licensees."

53. In March 1974, both Mr. and Mrs. Keogh also provided statutory declarations almost identical to that of Mrs. Brennan in which they declared:

“... Since we purchased the property in February 1971 and during our time in occupation we had exclusive use of the said entrance and avenue and neither of us at any time acknowledged the right or interest of any party to same nor did any person make any adverse claim thereto or use the said entrance and avenue save ourselves our employees agents and licensees.”

54. Mr. McGrath in turn also provided a statutory declaration on the 17th July, 1975 in respect of his brief period of ownership to similar effect and, presumably as vendor, undertaking to indemnify Mr. and Mrs. Keane Snr. in respect of any claims relating thereto. Each of these statutory declarations were evidently provided to Mr. and Mrs. Keane Snr. to give them comfort regarding the status of the right of way over the entrance driveway precisely because it did not form part of Folio 2322 and was not registered on the adjoining folio.

55. Counsel’s opinion on title, which was furnished to the plaintiffs in July 2012, is predicated on an assertion by the first plaintiff that the use of that part of the driveway not on the folio was by express permission of a gentleman called Mr. Shaefer, who is said to be or have been the owner of part of the driveway. Counsel’s opinion records his instructions as follows (at para. 3):

“Querist’s parents acquired the premises in 1975 and Querist and his wife became registered as owners in 1996. Both Querist’s mother and his late father have informed him that access by the laneway was by express permission of a Mr. Shaefer, then the owner of the part of the laneway.”

56. Again at para. 8:

“Querist instructs that his father originally informed him that Mr. Shaefer, the then owner of part of the laneway, expressly granted him permission to use the laneway in 1975, and that his mother has recently confirmed that such was the case... It is telling that Querist’s father did not secure a statutory declaration from his predecessor in title nor provide one on sale to his son and daughter in law; as a solicitor, Querist’s father would have been fully aware of the precarious status of the access.”

57. The latter sentence is plainly incorrect in the light of the statutory declarations to which I have referred above going back to 1953. Of course, that is not in any way the responsibility of counsel as clearly those were the instructions he was given. With regard to the prospect of the plaintiffs being in a position to register the right of way, counsel’s view was as follows (at para. 24):

“Whereas it can be expected that a Court would be sympathetic to a claim for a right of way in circumstances where the use has been unchallenged many years, the origin of the use in an unequivocal and revocable permission is fatal to a claim in prescription. It appears that a right of way by necessity cannot be claimed as the holding has alternative access to the public road”

The latter sentence refers to the fact that another part of Camelton has road frontage potentially available for another entrance.

58. When this matter was raised by the first plaintiff with his brother, the plaintiffs’ solicitor, it would appear that arising from that interaction, Mrs. Keane Snr. swore two affidavits on the 1st June, 2012 relating respectively to the two folios in which Camelton is

comprised. Although this affidavit predates counsel's opinion by a couple of months, it was clearly not available to counsel when the papers were sent to him for an opinion and he subsequently commented on same in written advices.

59. Annexed to each affidavit of Mrs. Keane Snr. is a map of the property with an entrance and driveway marked thereon with the letters "A" to "B" which appears to fall outside the boundary on the Land Registry map. In her affidavit, Mrs. Keane Snr. avers as follows:

"3. I confirm that at the date of purchase the Vendors had a full and all purpose right of way over the property coloured yellow and marked 'A' to 'B' on the map annexed hereto. They had used this roadway to access the farm known as 'Camelton Stud' uninterrupted for all purposes and at all times with or without vehicles for upwards of 20 years prior to our date of purchase. The property is surrounded by hedges and a drain and is clearly part of the overall farm and has a defined boundary and cannot be accessed by any other party. The property with the roadway on it was solely occupied by myself and my husband Michael from the date of purchase without any query or claim by any person. This was for generations and is still the access to the property.

4. *When this property was transferred to my son Donal and his wife Frederique Keane they were residing in the property at the time and were fully aware of the situation regarding access and they have used this portion of the property and access uninterrupted for all purposes since the farm was transferred to them in 1999.*

5. *I confirm that the land can also be accessed at a second location as lands front on to a Land Commission road at the rear of the property.*

6. *I confirm that the access coloured yellow marked 'A' to 'B' has been used for upwards of 37 years by me and my successors in title and for over 20 years by the previous owners without any query whatsoever from any party."*

The affidavit concerning Folio 51205F is to similar effect.

60. When counsel's opinion was made available to the first plaintiff's brother, he challenged the conclusions thereof on the basis that the instructions given by the first plaintiff to counsel were not correct and he pointed to the documents to which I have referred in support of that contention. In addition, he furnished the Bank's solicitors with a further affidavit sworn by Mrs. Keane Snr. in December 2012 in which she swears:

"I confirm that I and my husband the late Michael P. Keane purchased Camelton Stud in 1975 from Mr. and Mrs. McGrath. I confirm that my late husband was an excellent solicitor and a very experienced conveyancer. I recall my husband was most particular in respect of the right of way at the time of purchase and carried out extensive research, examining detailed declarations confirming the position and satisfied himself that the right of way was good title in relation to the access to Camelton Stud. Before closing the sale he obtained various statutory declarations in relation to the use of the right of way from Mr. and Mrs. McGrath, Eavan Keogh, Mr. Michael Keogh and Ms. Genevieve Brennan which clearly stated that there was clear and unambiguous use of the right of way by all the owners of Camelton Stud without permission or objection from any party.

I further confirm that my husband as a very experienced solicitor and conveyancer would not have purchased a stud farm in 1975 for £150,000 with no access and then go cap in hand to a neighbour and seek his permission to access the purchased

property and for anyone to suggest otherwise is a most grievous insult to his memory and reputation as a Conveyancing solicitor.

I refer to the section in [senior counsel's] opinion where he states that both I and my late husband informed Mr. Donal Keane that the access by the laneway was by the express permission of Mr. Shaefer. This is absolutely totally and utterly false. Neither I, nor my husband ever met, knew or spoke with Mr. Shaefer in our entire lives. Mr. Shaefer owned a substantial farm beside Camelton Stud and was a German national. Apparently he used to visit his farm approximately one week every year, according to local knowledge and he had a farm manager who ran the farm for him. I am absolutely shocked that it is being alleged that we obtained Mr. Shaefer's permission and I cannot understand why this assertion has been made as it is totally false and untrue.

The access to Camelton Stud over the right of way is fully enclosed and surrounded by a ditch and a hedge on one side and a hedge and a ditch on the other side and the portion joining the public road had gates, pillars and a sign for Camelton Stud until removed by Donal Keane. It is actually physically impossible for anyone else to use this right of way and as I stated in my previous Affidavit we used this right of way for all purposes without any query or challenge by any person or any permission as it was not required. I myself was intrinsically involved in the running of this farm on a day to day basis and held a herd number in my name and along with my husband I dealt with all financial and stock husbandry issues and all day to day matters that arose running this farm and in fact I leased the farm to my son Donal Keane when I entered the farm retirement scheme some years ago..."

The first plaintiff disputes these averments sworn by his mother.

61. As the authorities demonstrate, where there is a conflict on affidavit concerning a disputed fact, the court cannot resolve that dispute and must proceed on the basis of the facts asserted by the plaintiff. That position is not absolute as the judgment of the Supreme Court in *Keohane v Hynes* shows. The court is not obliged to accept a mere assertion by a plaintiff on affidavit for which there is no evidence or no credible basis for believing that there could be any evidence.

62. The plaintiffs' claim herein hinges to a large extent, if not entirely, on the alleged conversation between Mr. Keane Snr. and Mr. Shaefer in 1975 after he and his wife had acquired the property. This is recorded in counsel's opinion as part of his instructions together with the claim that the first plaintiff's mother recently confirmed that this conversation had taken place. That appears to be vehemently disputed by Mrs. Keane Snr. in the affidavit to which I have referred.

63. Notably, the first plaintiff has not made any averment on affidavit concerning this conversation between his father and Mr. Shaefer. All that is known about it is that it occurred in 1975. What is not known, however, is when the first plaintiff had this conversation with his father, in what circumstances it occurred and when his mother allegedly confirmed it. While it is not for this Court to determine where the truth of the matter lies, I think several observations can be made.

64. When Mr. Keane Snr. acquired the property in 1975, he had the benefit of the statutory declarations to which I have referred, clearly designed to give comfort to him as a purchaser of the validity of the right of way. These documents were of course only necessary because of the known fact that part of the driveway was not on the Folio. In such circumstances, it is not at all obvious why an experienced conveyancing solicitor, as the late Mr. Keane Snr. is acknowledged to have been, armed with the benefit of documents

apparently confirming an undisputed right of way for over 20 years, would seek to set them at naught by asking Mr. Shaefer in 1975 for permission to use the way.

65. Perhaps surprisingly, given that the plaintiffs are themselves experienced lawyers, they appear to have known nothing of these important statutory declarations as to title when they instructed counsel to give an opinion on title. This appears to follow from counsel's reference, mentioned above, to the first plaintiff's father failing to secure a statutory declaration from his predecessor in title, when the opposite was the case.

66. In the normal way, if an opinion was to be sought from senior counsel concerning a title matter, one would expect at a minimum that the person seeking the opinion would first obtain copies of the title documents from their own solicitor. There is no suggestion here that the first plaintiff's brother was unwilling to provide the documents having voluntarily done so to the Bank's solicitors after the issue was raised.

67. There is also a certain curiosity about the first plaintiff's averment at para. 7 of his replying affidavit in which he discusses negotiations with the Bank regarding the plaintiffs' debt and the Bank's suggestion that they would sell some or all of Camelton to meet it. That is what appears to have prompted the plaintiffs to look at their Folios for the first time, as the first plaintiff says (at para. 7):

“At that time we ascertained that the first 100 metres or thereabouts of our entrance laneway was not on our Folio. We checked our neighbour's Folio to ascertain if there was a right of way from our property over same but discovered there was not.”

68. This leaves the reader with the clear impression that this was something only discovered by the plaintiffs in or about 2012 and of which they had no knowledge since they acquired the property 16 years earlier in 1996. That being the case, the conversation

allegedly had by the first plaintiff with his father concerning Mr. Shaefer becomes difficult to explain, because if such a conversation had taken place, it means that from then on, the plaintiffs knew that they did not own the driveway. This cannot be reconciled with what is contained in para. 7 of the first plaintiff's affidavit.

69. Even were that not so, it is difficult to understand the first plaintiff's motivation in drawing a verbal exchange with his father to the attention of the Bank which had the effect of undermining the title to his own property, when the documents of title, which he did not seek before contacting the Bank, appear to indicate that the title was sound.

70. The only plausible explanation for such an act of self-sabotage is that it was an artifice designed to create difficulty for the Bank in enforcing its security. This impression is fortified by the remarkable fact that in the 12 years since they were allegedly alerted to this title defect, which is according to them catastrophic, the plaintiffs have done nothing to try to address it. It cannot reasonably be suggested that nothing can be done.

71. It is at a minimum possible that the plaintiffs could seek to become registered as the beneficiaries of the right of way with the benefit of the evidence to which I have referred. If that does not prove possible, they could seek to negotiate with whoever the owners of the driveway now are and if that in turn did not prove feasible, there is no evidence that they cannot create a new entrance onto the Land Commission road already referred to, or indeed move the existing entrance so that it enters the driveway within their folios. Although senior counsel in his opinion alluded to the possibility that there might be planning issues around this, that is pure speculation and certainly cannot credibly be advanced in circumstances where no attempt of any kind has been made to explore the matter.

72. In the circumstances of this case, it is difficult to avoid the conclusion that the plaintiffs have deliberately refrained from taking any steps to regularise the position because it simply

does not suit them to do so in the context of their outstanding debt. It is to my mind telling that the plaintiffs have put no valuation evidence before any court dealing with the matter to substantiate the bald assertion that the property cannot be sold and, in consequence, is of no value.

73. Whatever about the conflicts of fact that exist in the matter which cannot be resolved by the court, I am quite satisfied that the assertion that the property is worthless is a mere assertion that is simply not credible in the circumstances as I have outlined them.

Implicit representation and estoppel

74. The plaintiffs complain that the judge made certain findings of fact contrary to the principle that the plaintiffs' case has to be taken at its high water mark and was thus led into error in concluding that the plaintiffs' claim under this heading is bound to fail. The first finding appears at para. 29 of the judgment quoted above, in which the judge considered that there is no semblance of reality to the contention that the plaintiffs would have brought their own proceedings but for the fact that the defendant had issued proceedings. In my view, the judge was entitled to analyse that assertion by reference to the undisputed facts which were that the plaintiffs, having intimated a claim some 19 months prior to the commencement of proceedings by the Bank, did nothing in the interim to advance such a claim.

75. As the plaintiffs themselves point out, such a claim would in the normal way require the prerequisite of a supportive expert's report and there is no suggestion that the plaintiffs ever sought or obtained one. It will be recalled that the Bank's proceedings were issued two weeks before the statutory deadline and the assertion that the plaintiffs would otherwise have issued their own proceedings within that two week period but for the Bank's proceedings is no more than that, *i.e.*, a bare assertion unsupported by any evidence such that in my view, the judge was entitled to conclude that there was no reality to it.

76. The second factual finding to which the plaintiffs object appears at para. 32 of the judgment, again already quoted, where the judge said that she could not accept as in any sense plausible that the plaintiffs were induced or persuaded not to issue proceedings by the mere fact that the Bank had issued proceedings. While it might be argued that this is a finding of fact contrary to the plaintiffs' stated position, the critical point appears to be the final sentence of para. 32 where the judge remarked:

“The Plaintiffs’ assertion that they relied on the existence of the Bank’s professional negligence proceedings in not pursuing their own, even if accepted at face value, is at most evidence of unreasonable and unjustified reliance.” (My emphasis)

77. Whilst therefore the judge considered the plaintiffs' statement as implausible, even were it to be correct, as a matter of law it was unjustified. That appears to me to be a finding of law rather than a finding of fact which again, the judge was entitled to make. As the Bank submits, whether or not the plaintiffs relied on the Bank's issuing of proceedings to forestall their own, as they claim, they had no right to rely on it as a matter of law.

78. Even if it could be said that the mere issuing of proceedings by the Bank could potentially induce a reliance by the plaintiffs, the judge found that the Bank had made clear in correspondence as far back as November 2012 that any potential loss suffered by the plaintiffs as a result of a failure of Flynn and McMorrow's professional indemnity insurance could not in any way be connected to the Bank.

79. A further fundamental difficulty which underlies the entirety of the plaintiffs' claim is that for a claim in negligent misrepresentation to succeed, the plaintiffs would have to show that they had suffered a loss. However, in this case, the plaintiffs plead no loss which is unsurprising since they have sustained none. They have borrowed money which they have not repaid. That is not a loss. What the plaintiffs seek to achieve, as the High Court

recognised, is that they should not have to repay their debt while still retaining their asset, something correctly characterised by the High Court as a windfall.

80. Before the High Court, and indeed in written submissions before this Court, the plaintiffs sought to defend the windfall argument on the basis that if that was the consequence of the defendant's negligence, they could not be criticised for the fact that this was the result. However, in oral argument before this Court, counsel for the plaintiffs entirely resiled from that position and conceded that, contrary to what had earlier been argued, the plaintiffs would not in fact be entitled to retain these monies but would ultimately have to account for them to the party entitled, which could presumably only be either the Bank/its successor in title or Flynn and McMorrow in the event that they or their insurers discharged the debt by way of damages. It is clear, however, that this argument was not advanced in the High Court and did not form the basis for that court's decision. The essential point, however, remains, which is that no true loss arises, or is pleaded, and therefore a claim in damages of any kind cannot succeed.

81. Since the claim in negligent misstatement fails, it must follow that the estoppel claim equally fails. Additionally, a claim in estoppel would in any event require an unambiguous representation, an element of unfairness or unconscionability and an assurance given by the representor upon which the representor intended that the representee would rely. None of these factors are present in this case, or indeed even asserted by the plaintiffs. Further, the plaintiffs seek to deploy an estoppel to confer a cause of action whereas the doctrine is in the normal way confined to defence (a shield rather than a sword).

82. While the plaintiffs also rely on *Tinkler* to establish an estoppel by convention, such requires a common mistaken assumption communicated to each party by the other upon which the alleged representor was entitled to rely and did rely. When one has regard to the

November 2012 letter already referred to, it could not be said that there was a common mistaken assumption in this case. As the judge found, in my view correctly, there was no entitlement on the part of the plaintiffs to rely on the mere institution of proceedings to defer their own. There is no authority for the proposition that the mere instituting of proceedings by one party can give rise to an estoppel in favour of another. I agree entirely with the trial judge's conclusion that there is no prospect of this cause of action succeeding.

Negligence

83. Insofar as any claim by the plaintiffs for negligence against the Bank is predicated on the failure of the Bank to pursue the proceedings against Flynn and McMorrow, the plaintiffs would have to establish that they were owed a duty by the Bank to prosecute those proceedings to conclusion. There is simply no authority for the proposition that the Bank owed a duty of care to the plaintiffs to conduct proceedings against a third party in any particular way, or indeed at all. Such a duty presupposes a right on the part of the plaintiffs to compel the Bank to both institute and prosecute proceedings which, thus put, is entirely unstatable.

84. Equally untenable is the suggestion that the Bank had a duty to check whether the plaintiffs' own solicitor had a conflict of interest arising from the alleged fact that the monies borrowed were to be used in some form of joint venture between the first plaintiff and his brother. These were matters entirely within the knowledge of the first plaintiff and if such a conflict arose, it was his duty to disclose it to the Bank rather than the converse. The suggestion that the Bank had a further duty to ascertain the feasibility of the loan having regard to the purpose for which it was given comes perilously close to, if not actually constituting, a claim of reckless lending, which it is by now well-settled is a claim unknown to law.

85. This claim too, as the judge found, is bound to fail.

Concurrent wrongdoers

86. Most of the argument in this appeal was directed to the plaintiffs' claim under the CLA. The claim as it appears in the plaintiffs' statement of claim appears to be as follows. Paragraph 14 pleads that the Bank would not have advanced the facilities but for the solicitor's negligence and accordingly, damages equal to the full value of the facilities would have been awarded on a "*no transaction*" basis. Alternatively, if the Bank would have required additional security, damages would have been awarded to the value of such additional security. In either case, the damages awarded would have been applied in *pro tanto* reduction of the plaintiffs' debt. The plaintiffs claim that the Bank's failure to prosecute the action against Flynn and McMorrow means that it is responsible pursuant to s. 35 of the CLA for the acts of the solicitor. This conclusion follows, it is said, from the fact that the plaintiffs and the solicitors are "*concurrent wrongdoers*" within the meaning of the CLA.

87. The argument goes that since the claim for damages against the solicitor would have proceeded on a "*no transaction*" basis, the Bank would have been awarded the full value of the facilities because the security is valueless. Accordingly, the plaintiffs and the solicitor are responsible for the same "*damage*" and are therefore concurrent wrongdoers. Thus, in its claim against the plaintiffs, the Bank/Seaconview is responsible for the negligence of the solicitor pursuant to the provisions of the CLA. The plaintiffs' debt is eliminated and the plaintiffs retain Camelton unencumbered.

88. The trial judge found against this argument, largely on the basis of the judgment of this Court in *McDonagh (op. cit)*. In that case, the Bank advanced €21.5 million to the defendants to part fund the acquisition of lands in Kilpedder, County Wicklow. A valuation of the lands was provided by the valuers CBRE well in excess of the loan amount. Ultimately

the loans went into default and the lands transpired to be worth substantially less than the value of the loans. The Bank instituted proceedings against CBRE for providing a negligent valuation which were compromised for some €5 million. This was credited to the defendants' account.

89. In proceedings by the Bank against the debtors for recovery of the loan, the defendants claimed, as in the present case, that they were concurrent wrongdoers with CBRE under the CLA. They argued that had the claim against CBRE been pursued to its full extent, the defendants' indebtedness would have been expunged and accordingly, under the provisions of the CLA the Bank should be identified with CBRE so that it could not now pursue the defendants for the shortfall arising from the settlement with CBRE. There are thus marked similarities to the facts of the present case.

90. In a joint judgment, Murray and Collins JJ. carried out an extensive analysis of the relevant provisions of the CLA with particular reference to the concept of concurrent wrongdoers. They noted (at para. 44):

“The issue of whether the provisions of the CLA addressing contribution between concurrent wrongdoers apply to claims for the recovery of debts at all is foundational.”

91. Having set out the factual background, the court said (at para. 48):

“.. In these circumstances we are of the view that it is both appropriate and necessary that we should address the fundamental question presented by these proceedings as to whether the provisions of Part III CLA making provision for concurrent wrongdoers have any application to an action for the recovery of a debt...”

49. *It is in our view impossible to resolve these issues satisfactorily without understanding what ‘damage’ (as that term is used in Part III CLA) is actually incurred by non-payment of a debt, what ‘damage’ was caused by the alleged negligence of CBRE and the correct relationship between those different types of ‘damage’ as envisaged by the CLA.”*

92. In addressing the distinction between claims for damages and other remedies, the court said (at para. 67):

“As we have earlier observed, it is not surprising that [Part III of the CLA] is directed only to claims for damages. This reflects a distinction that is central to the law of private obligations. Generally, the law distinguishes between two different types of coercive judicial remedy in private law. One involves the enforcement of a legal obligation. Examples are orders for specific performance of a contract, or the return of a chattel. The other is intended to require the provision of compensation for breach of such a legal obligation when it is not possible to rectify the wrong and/or the plaintiff determines to elect for damages. Damages thus ordered are intended to indemnify the plaintiff against the consequences of an injury caused by the defendant, thereby restoring it (in as much as this can be done by a monetary award) to the position it would have been in had the wrong not occurred. One way of analysing these different remedies (at least in the context of a claim of breach of contract) is to see the remedy intended to rectify the wrong as the enforcement of a primary obligation, and to define damages as a secondary obligation, which effectively substitutes for a past failure in the performance of the legal obligation in question...”

93. In that context, in explaining the distinction between a claim for a debt and an action for damages, the court continued at para. 79:

“If, as we consider to be clearly the case, a person who seeks to recover a debt does not bring an action for ‘damages’, and if, more importantly, they need to establish no ‘damage’ as a precondition to the bringing of their claim, the proposition that the person who does not pay the debt is responsible for ‘the same damage’ as a party without whose negligence the debt would not have been incurred must be wrong. To put it another way, if a plaintiff in an action for recovery of debt is not claiming ‘damages’ it must follow that his claim against a third party but for whose actions it is alleged the debt would not have been incurred (which is a claim for ‘damages’) cannot be said to be in respect of the ‘same damage’. They are legally distinct because the object of the proceedings is different, and they are factually distinct because one is for the recovery of debt and the other for damages to compensate for a loss where (and to the extent that) the debt is not recovered.”

94. As later becomes clear, this passage demonstrates the legal distinction between a claim for debt and one for damages, which is not dependent in any way on the relative quantum of each such claim. In another passage dealing with the relationship between a claim for debt and one for damages, which is closely analogous to the present case, the court said (at para. 82):

“A simple analysis of the relationship between the two types of claim explains why this must be so. If CBRE negligently valued the property, and if the Bank would not have extended a loan to the defendants had it not received that valuation, it can certainly be argued that CBRE is liable to the Bank for the extent of the loan that is not recovered from the defendants. However, the most prevalent theory would

suggest a more complex analysis based upon the relationship between the extent of the overvaluation and the value of the loan granted to the borrower (which necessarily includes the extent to which recovery has been made or is possible). Either way, it must be the case that recovery from CBRE did not affect the legal liability of the defendants under the loan agreements. The (allegedly) negligent conduct of a valuation by CBRE did not release the defendants from any part of their loan obligation. They were advanced a loan by the Bank and they were legally obliged to repay it. The fact that the Bank recovered monies from CBRE was a matter between the Bank and CBRE. In point of fact in this case the Bank did credit the defendants with the benefit of the settlement with CBRE. That was a matter for it. There is no sense in which it was required to do so. Not to do so, would have resulted in a windfall to the Bank had it obtained full recovery from the defendants, but that windfall was a detriment to CBRE not the defendants who remained liable for the debt.”

95. The court referred with approval to the judgment of Finlay Geoghegan J. in *Histon v Shannon Foynes Port Company* [2006] IEHC 190, where she said (at paras. 24 and 25):

“...The submission made on behalf of the plaintiff that section 34(1) [of the CLA] is confined to claims made in respect of damage allegedly suffered by a plaintiff by reason of alleged wrongs (i.e. a tort, breach of contract or breach of trust in accordance with s. 2 of the Act of 1961) is correct. It is of the essence of s. 34(1) that the damage allegedly suffered by the plaintiff is caused partly by the negligence or want of care of the plaintiff and partly by the wrong of the defendant. This presupposes that the claim must be in respect of damage allegedly suffered by the plaintiff by reason of an alleged wrong (as defined) of the defendant.

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

96. Commenting on this passage, the court said (at para. 89):

“If that analysis is correct – as we think it is – it follows that here, the Bank’s claim against the defendants is equally not a claim for breach of contract and that, accordingly, the claim is not one for any ‘wrong’ committed by the defendants, thus excluding the operation of Part III CLA.”

97. At the end of the judgment, the court summarised its conclusions, *inter alia*, as follows:

“229. A claim for recovery of a debt is not an action for the recovery of damages, but an order in the nature of specific performance of a contractual obligation. The law governing contribution as between or claims as against concurrent wrongdoers has never applied to an action for the recovery of a debt and nothing in the CLA changes that.

230. Even if the CLA could be interpreted in such a way that an action for the recovery of a debt and an action for damages for breach of contract are to be equated so that debt recovery proceedings come within Part III CLA, a claim against a debtor on foot of a loan instrument and a claim against a valuer whose negligence is alleged to have resulted in the granting of the loan are not actions to recover the same

'damage'. The debtor's liability is for the whole of the debt while the valuer's liability is (at most) only for the amount of the loan that the lender is unable to recover from the debtor. The liability of the debtor and the debtor (sic) [valuer] are not therefore concurrent."

98. In my judgment, these passages are fatal to the plaintiffs' argument concerning the CLA herein, as the High Court correctly found. Though valiant attempts were made by counsel for the plaintiffs to distinguish *McDonagh*, the situation could not be clearer. One of the arguments advanced on behalf of the plaintiffs is that, on their case, since the Bank's claim against Flynn and McMorrow ought to have yielded damages equivalent to the plaintiffs' debt, again on the hypothesis of Camelton being worthless, para. 230 of *McDonagh* above cited suggests that the equivalence of the damages and debt supports the concurrent wrongdoer thesis. That is plainly wrong. The court had already determined that the CLA had no application to a claim in debt, but even were that not so, the lack of equivalence was another factor indicating an absence of concurrence in the context of "*concurrent wrongdoers*".

99. However, as I have already pointed out, that entire argument is underpinned by the assertion, which I have found not to be credible, that Camelton is worth nothing. It has an unknown value which is a notional X. The Bank would in theory therefore have recovered from Flynn and McMorrow the amount of the loan minus X, assuming X to be less than the loan. On the assumption that the Bank would have to give credit to the plaintiffs for the amount recovered, and *McDonagh* casts doubt on that in para. 82 above cited, this would leave the plaintiffs with a liability to the Bank equal to X. However, X is still a debt and not '*damages*' so that there is no concurrence. That is in truth, however, immaterial to the primary issue which is that a debt *per se* is not a breach of contract or a "*wrong*" within the

meaning of the CLA and accordingly a debtor cannot be a concurrent wrongdoer with a solicitor who negligently certifies title to the secured lands. There is in principle no distinction in this case between the position of Flynn and McMorrow and that of CBRE in *McDonagh*.

100. Accordingly, I am quite satisfied that the judge was correct to conclude that this claim is bound to fail.

Unjust enrichment

101. The judge described this claim as “*particularly contrived and unpalatable*”. The “*clear objective*” of the plaintiffs is to escape liability for the loans. The judge referred to a summary of the principles as they appear in *Wang v Ladywell Homes Limited* [2021] IEHC 468 where O’Moore J. cited the earlier decision of Keane J. (as he then was) in *Corporation of Dublin v BATU* [1996] 1 IR 468 as including:

- (i) the enrichment of the defendant;
- (ii) at the plaintiff’s expense;
- (iii) in circumstances in which the law requires restitution (the ‘*unjustness*’ of the enrichment); and
- (iv) the absence of defences or other policies to deny restitution.

It is difficult to see, as the judge found, how the plaintiffs can bring themselves within any of these prerequisites. There is no evidence of any kind that the Bank has been enriched by a sale on commercial terms of a loan portfolio, which includes the plaintiff’s loans, to Seaconview. This is a perfectly routine commercial transaction which is now a common feature of the banking landscape so again, this claim falls at the first fence. Even if it did

not, it is self-evident that if such enrichment had occurred, it would have occurred at the expense of Seaconview and not the plaintiffs. The judge recognised these claims as untenable and I agree entirely. As the Bank submits, the only party seeking to become enriched here are the plaintiffs by receiving over €1.7 million *gratis*. The judge was therefore correct to conclude that this claim could not succeed.

Related proceedings

102. Another argument advanced by the plaintiffs is that these proceedings should not be dismissed in circumstances where it may prejudice their defence to both the summary and possession proceedings. Two authorities are relied upon by the plaintiffs in that regard, *Anglo Irish Bank Corporation Limited v Sherry & Ors* [2010] IEHC 271 and *Bank of Ireland Mortgage Bank v Cody* [2021] IESC 26. In *Sherry*, the defendants were guarantors of company loans. They were sued in summary proceedings on foot of those guarantees and their defence was that it was understood between the parties when the guarantees were executed that they would not be enforced. The issue for the court was whether the matter should be remitted to plenary hearing.

103. Central to the decision of Kelly J. (as he then was) was the fact that another party was sued on foot of his guarantee relating to the same transaction and he raised the same defence which the High Court considered surmounted the threshold for referral to plenary hearing. Kelly J. adopted a similar course saying that were it not for the other decision, he would have been inclined to refuse leave to defend. He was of the view that if the other party succeeded in persuading a court that his version of events was correct, it could be seen as giving rise to injustice to defendants to have excluded them from making the same argument. The issue in that case clearly depended on the resolution of disputed facts concerning the enforceability

of the guarantee. That has no application to facts of the present case, as the High Court found here.

104. Similar considerations arose in *Cody*. The Bank in that case sought an order for possession against Ms. Cody in circumstances where in related summary proceedings, she was contesting the debt and those proceedings were remitted to plenary hearing. The factual issue to be determined in the plenary proceedings was whether or not the loan and charge documents had been executed by Ms. Cody's husband without her knowledge or consent. That was an issue of fact that required resolution and the possession proceedings should await that determination. Clearly it would be quite unjust to Ms. Cody if she were ordered to surrender possession of her family home in circumstances where she was subsequently found not to be indebted to the Bank.

105. None of that arises here. The plaintiffs argue that since the summary proceedings were remitted for plenary hearing, by consent, it must be accepted that they have established that they have a *bona fide* defence to those proceedings based on claims of a similar nature to those agitated here. However, as the High Court found, these proceedings must stand or fall on their own merits and as the judge pointed out, the plaintiffs remain free to agitate whatever defences they wish to the possession and summary proceedings. There is thus no prejudice or injustice arising from the dismissal of these proceedings which could be equated with the situations in either *Sherry* or *Cody*.

Conclusion

106. As the High Court judge recognised, the raising of multiple issues, some of apparent complexity particularly in the context of the CLA, by professionally represented plaintiffs does not mean that these claims cannot be dismissed as inherently bound to fail. Each claim was carefully and meticulously analysed by the High Court and this resulted in a conclusion

that each claim in turn was not capable of succeeding. As noted above, in the context of the CLA claim, the judge put it thus:

“The law may be complex and requires careful reading, but it is now settled in a manner which is clear, certain and determinative of the plaintiff’s claims in these proceedings.”

107. I agree with the judge’s concluding observation, again already cited, that *“It is difficult to see these proceedings as anything other than an attempt to confound and frustrate the debt collection proceedings brought against the plaintiffs by the defendant’s successor in title.”*

108. I am satisfied that the plaintiffs have failed to demonstrate any error in the judgment of the High Court and I would accordingly dismiss this appeal.

109. In those circumstances, my provisional view regarding costs is that as the Bank has been entirely successful, it should be entitled to the costs of the appeal. If the plaintiffs wish to contend for a different order, they will have liberty to deliver written submissions within 14 days of the date of this judgment not to exceed 1,000 words and the Bank will have liberty to respond likewise within 14 days.

110. As this judgment is delivered electronically, Costello P. and Pilkington J. have authorised me to record their agreement with it.