

THE HIGH COURT

[2023] IEHC 513

2018 6632 P

WESLEY CURRAN & GRAHAM O' DONNELL

Plaintiff

-V-

**ULSTER BANK IRELAND DAC, ROYAL BANK OF SCOTLAND
GROUP PLC, RICHARDSON EAMONN & KIERAN WALLACE**

Defendant

Judgment of Mr. Justice Dignam delivered on the 1st day of August 2023.

INTRODUCTION

1. The defendants seek an Order striking out or dismissing the plaintiffs' proceedings on the grounds that (i) they disclose no reasonable cause of action and/or are unsustainable and/or frivolous and vexatious and/or bound to fail; (ii) they are res judicata; (iii) they constitute an abuse of process; (iv) the plaintiffs are estopped from maintaining the proceedings; and (v) the proceedings are statute barred.

2. The bases for the defendants' application can be summarised (in no particular order) as (i) the plaintiffs' claim is an abuse of process on the grounds that it is res judicata or that an issue estoppel arises as it is an attempt to re-litigate matters which have already been decided against them or is an attempt to litigate matters which could have been raised in previous proceedings; (ii) the plaintiffs are not entitled to maintain

the proceedings due to having been adjudicated bankrupt in England; (iii) the proceedings are bound to fail on the merits; and (iv) the claim is statute-barred.

3. I propose to address each of these in turn, though in a different order. First it might be helpful to set out some of the background. I have carefully considered all of the papers for the purpose of this motion but it is sufficient to summarise the background. I will then set out the well-established principles in relation to dismissing proceedings in limine and will then consider the specific grounds.

4. There were previous proceedings between the parties in which Ulster Bank was the plaintiff and Mr. Curran and Mr. O'Donnell were the defendants. For ease of reference I will refer to Mr. Curran and Mr. O'Donnell as "the plaintiffs" (their status in these proceedings) and to the first-named defendant as "the Bank". I will refer to the second-named defendant, Royal Bank of Scotland, as "RBS", and to the third and fourth-named defendants as "the receivers" or "the joint receivers".

BACKGROUND

5. On the 19th October 2005 the parties entered a loan facility in respect of the construction of a development at Annville, Windy Arbour, in Dublin ("the Annville Loan"). The facility letter provided for a term to the 31st October 2025 and also stated that it was repayable on demand. This letter ("the Facility Letter") stated, inter alia:

"The Facility is repayable upon demand and unless demand is made interest is to be serviced monthly by direct debit for a period of 5 years to 31 October 2010, with the balance to be reduced to €14,390,000 by monthly payments of capital and interest by expiry, using 100% of rental proceeds derived from units within the Property."

6. The conditions to the facility included that any sale proceeds received from the development were to be used in full reduction of the debt and that the loan to valuation ratio was not to exceed 80%.

7. Following interactions between the parties about a number of issues, including that the 80% loan to value ratio was being exceeded, this facility was amended by a supplemental facility letter ("the Supplemental Facility Letter") dated 1st February 2011. It provided, inter alia:

"This letter is supplemental to the terms and conditions set out in the Facility Letter. The Facility Letter is hereby varied and amended by the inclusion of the following condition:

1. That the borrower shall repay the sum of €3 million in permanent reduction of the monies under the terms of the Facility Letter no later than 31 December 2012.

The above amendment notwithstanding, a condition of the Facility Letter is as follows "Loan to Valuation ("LTV") ratio is not to exceed 80%. The Bank reserves the right to call for a further valuation at any point during the currency of the Facility at the expense of the Borrower.

The Bank received a valuation of the Property from CBRE dated 18 December 2009, valuing the Property at €13,500,000 which indicates an LTV ratio of 149% resulting in an event of default.

We write to confirm that the Bank reserves any of its rights and remedies under the Agreement and any security which may arise as a result of any Default, notwithstanding that the Bank may be aware of the circumstances giving rise to it or may agree to either:

(i) enter into discussions with you or any security provider and/or any other person in respect of one or more amendments to the terms of any such documents; or

(ii) provide financial accommodation to you or any security provider,

in each case, at any time before a demand for repayment of the Facility (as defined in the Agreement) (together with any accrued and unpaid interest thereon) is made.

In all other respects, the Facility Letter is hereby ratified and confirmed."

8. The plaintiffs signed a statement at the bottom of the letter which stated:

"We hereby, Wesley Curran and Graham O'Donnell confirm that we accept the above amendment and variation to the terms of the Facility Letter as varied and amended is hereby ratified and confirmed in full. We confirm that we have taken independent legal advice into the nature and effect of the obligations contained therein."

9. There was also a facility letter dated the 23rd June 2011 in respect of a development at Castlepark Road, Dalkey, County Dublin ("*the Castlepark Loan*") which provided for three separate facilities which were to expire and be paid in full on the 31st January 2012 (two of the facilities) and the 31st October 2011 (the third facility). The purpose of the first two of these facilities was the continuation of previous facilities for development funding in respect of Castlepark.

10. On the 25th October 2012 the Bank demanded repayment of the Annville Loan (and the Castlepark Loan) and appointed receivers to the Annville Property (and the Castlepark Property) the following day, the 26th October 2012. These appointments were withdrawn on the 2nd November 2012 on the basis that demand had been made that repayment must occur on the same day as the letters of demand. On the 2nd November 2012 fresh letters of demand were issued demanding repayment by 5pm on the 5th November. On the 12th November 2012 the Bank appointed the third and fourth-named defendants as joint receivers over the Annville Property (and the Castlepark Property).

11. On the 13th April 2013 the Bank commenced summary proceedings against the plaintiffs under the title and record number *Ulster Bank Ireland Limited v Curran and O'Donnell 2013/135S* ("*the 2013 Proceedings*"). These proceedings sought summary judgment in respect of both the Annville and Castlepark Facilities and were entered into the Commercial list.

12. The Bank brought a motion for summary judgment on the 24th April 2013 and the parties exchanged affidavits. A central part of the plaintiffs' opposition to summary judgment being granted in respect of the Annville Loan, as set out in paragraph 23 to 30 of the replying affidavit of Mr. Curran of the 21st May 2013, was that the monies were not due because of the alleged existence of a collateral contract between the plaintiffs and the Bank which was made orally at a meeting the day before the Supplemental Facility Letter, ie., on the 31st January 2011, by which the Bank allegedly agreed that the "*on demand*" nature of the Annville Facility and the obligation to maintain the loan to value ratios in the facility letters were waived. It was also alleged that the Bank agreed that if the plaintiffs complied with the other repayment obligations of the Annville Loan the Bank would extend the time period provided for in the Supplemental Facility Letter for the €3 million bullet payment for a further two years in the event that they were unable to make that payment by the due date of the 31st December 2012. It was claimed that when the loan was called in they were not in default.

13. On the 5th June 2013 Cooke J granted judgment on the Castlepark Facility with a stay and refused to grant judgment on foot of the Annville Facility and adjourned it to plenary hearing. The central point upon which Cooke J remitted the Annville Loan claim to plenary hearing was the alleged existence and effect of this collateral contract.

14. The plaintiffs delivered their Defence to the claim in respect of the Annville Facility on the 21st June 2013 and the Bank delivered its Reply on the 3rd July 2013. It will be necessary to refer to the terms of the Defence advanced by the plaintiffs and I return to this below when considering some of the bases for the instant application. However, it is worth noting at this stage that a core part of the plaintiffs' Defence was the existence and effect of the alleged collateral contract.

15. The plaintiffs appealed the decision to grant judgment in respect of the Castlepark Loan to the Supreme Court on the 30th July 2013 and the following day issued a motion in the Supreme Court seeking an extension of the stay that had been granted by Cooke J on the judgment in respect of the Castlepark Loan.

16. On the 6th June 2013, i.e. before the appeal to the Supreme Court was lodged or the motion seeking an extension of the stay was issued, the first-named plaintiff was declared bankrupt in England and Wales and on the 7th August 2013 the second-named plaintiff was also declared bankrupt in that jurisdiction. It seems that the first time the Bank became aware of these bankruptcies was on receipt by the joint receivers of a letter from the Insolvency Service in England and Wales in relation to the first-named plaintiff on the 10th September 2013.

17. By Notice of Motion of the 9th October 2013 the Bank applied to have the plaintiffs' appeal in respect of the Castlepark Loan struck out as an abuse of process, partly on the grounds of the plaintiffs' bankruptcies and their non-disclosure of the bankruptcies and their alleged attempt to mislead the Court. The plaintiffs' solicitors issued a motion to come off record on the same day.

18. The plaintiffs' solicitors came off record on the 14th October 2013.

19. Following this, the solicitors acting for the Bank wrote to the Official Receiver in the plaintiffs' bankruptcies in relation to whether the Official Receiver intended to defend the proceedings and indicating that in the event that the Official Receiver did not intend to do so they had instructions to bring a motion for judgment for the full amount for failure to comply with Court directions and to make voluntary discovery as agreed. It

seems directions had previously been made in the Commercial Court. This letter was copied to the plaintiffs. There followed an exchange of correspondence with the Official Receiver in which the question of whether the plaintiffs were entitled to continue to defend the 2013 proceedings personally in light of their bankruptcies was discussed. It is more convenient to deal with the detail of this correspondence when considering the effect of the bankruptcies in greater detail below. The upshot was that the Official Receiver's position was that he would not be participating in the proceedings and believed that the plaintiffs were entitled to continue to defend the 2013 proceedings. Following that correspondence the solicitors for the Bank wrote to the plaintiffs enclosing the correspondence and calling on the plaintiffs to confirm whether they intended to continue to defend the proceedings and indicating that if no response was received or, if they intended to continue to defend the proceedings but failed to make discovery, it was the Bank's intention to bring a motion for judgment.

20. On the 25th October 2013, the Supreme Court struck out the plaintiffs' application for a stay on the Castlepark Order with costs to the Bank and adjourned the Bank's motion to strike out the plaintiffs' appeal generally with liberty to re-enter.

21. On the 4th November 2013 the Bank issued a motion in the High Court seeking to strike out the plaintiffs' Defence in respect of the Annville Loan (which had been adjourned to plenary hearing) for failure to comply with directions of the Court and to make voluntary discovery as agreed and seeking judgment in respect of that loan in the amount of €12,915,316.47. This was grounded on an affidavit dealing with the failure of the plaintiffs to make discovery in accordance with their agreement to do so. It also dealt with the correspondence with the Official Receiver and the question of the plaintiffs' entitlement to continue the proceedings. A further affidavit dealing with the sum due and owing was also filed on the direction of Kelly J. This dealt with the debt owed on foot of the Annville Facility and swore to the amount which was claimed to be due and owing as of the 4th November 2013.

22. No replying affidavits were delivered and by Order of the 25th November 2013 Kelly J granted the Bank judgment in the amount of €12,915,316.47.

23. The plaintiffs withdrew their appeal in relation to the Castlepark Loan in October 2019.

24. Prior to that, on the 20th July 2018, the plaintiffs commenced these proceedings and delivered their Statement of Claim on the 17th January 2019. The defendants served

a Notice for Particulars on the 8th May 2019 and the plaintiffs replied on the 2nd April 2020. A Defence was delivered on the 16th July 2020 and the plaintiffs delivered their Reply to Defence on the 30th July 2020. It will be necessary to refer to these pleadings in some detail but for the moment it suffices to summarise the claim being advanced by the plaintiffs. There are a number of different elements to the claim. Essentially, the plaintiffs claim that at the time of the appointment of the receivers either on the 25th October 2012 (the first appointment) or the 12th November 2012 (the second appointment) the plaintiffs were not in arrears or default or breach of agreement and there was no good, valid or any grounds for the appointment of the receivers. They claim that the loan was called in improperly for the purpose of remedying the Bank's parent, RBS's, own financial difficulties. The claim is that:

"33. The Second Defendant therefore, to remedy their own financial difficulties, established an illegitimate, illegal and improper strategy, which was in itself in breach of contract, involving the re-categorisation of certain investments and securities, and the singling out of customers and facilities that fitted the profile of being capable of immediate realisation, encashment and achievement of short term return.

34. The First and Second Defendants, and each of them, implemented such a plan and strategy to the detriment to the Plaintiffs and with no just cause or commercial reason acted to the serious harm of the Plaintiffs, and the sole purpose of seeking to recovering capital as quickly as possible to cover up the First and Second Defendant's financial reserves.

35. The Defendants made unreasonable, unconscionable and illegal demands and thereafter levied excessive pressure on the Plaintiffs with the aim of destroying the Plaintiff's investment and business."

25. The plaintiffs seek declarations that the first-named defendant unlawfully caused damage to the plaintiffs and unjustly enriched itself at the expense of the plaintiffs and that the first and second-named defendants conspired together with the purpose of causing damage to the plaintiffs. They also seek damages for breach of contract, negligence, misrepresentation, negligent misstatement, deceit, breach of duty, including breach of statutory and fiduciary duty, intentional interference in and with the economic interests of the plaintiffs, conspiracy, and loss of opportunity.

26. It is against this background that the defendants seek the dismissal of the plaintiffs' claim on the bases referred to above.

GENERAL APPROACH TO BE APPLIED

27. It was submitted on behalf of the plaintiffs that the well-established jurisprudence in relation to applications to dismiss on the basis that proceedings are bound to fail or are an abuse of process applies to all the bases upon which the defendants seek to have these proceedings struck out. I have some doubts whether this is correct in respect of some of the bases for the application (for example, res judicata and estoppel) but, as the defendants did not demur from the plaintiffs' position other than to point out that in relation to some of the grounds the Court is entitled (and required) to engage in a more detailed analysis of the facts and evidence, I have adopted this approach. Of course, the entitlement to engage in some analysis of the facts and evidence in certain circumstances is in any event part of the general approach set out in the jurisprudence.

28. This approach, starting with *Barry v Buckley* [1981] IR 306, is well-established and has been considered in very many cases and I was referred to several of them. It is not necessary to review or recite all of these authorities. It is clear that while the jurisdiction to dismiss proceedings on these grounds is an important and valuable jurisdiction, it is one to be exercised sparingly (*Barry v Buckley*, *Kenny v TCD* [2008] IESC 18, *Keohane v Hynes* [2014] IESC 66) and one which the Court should be slow to exercise (*Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425). It is only to be exercised where the proceedings are clearly an abuse of process or the proceedings are bound to fail rather than where the plaintiff's case is very weak or innovative (*Keohane v Hynes*, *Millstream Recycling Ltd v Tierney* [2010] IEHC 55).

29. It was also stated in by Barron J in *Jodifern Limited v Fitzgerald* [2000] 3 IR 529 at 333:

"In my view, a defendant cannot succeed in an application to strike out proceedings upon the basis that they disclose no reasonable cause of action or are an abuse of the process if the Court on the hearing of such application has to determine an issue for the purpose of deciding whether the plaintiff could possibly succeed in the action. It is not the function of the Court to determine whether the plaintiff will succeed in the action.

The function of the Court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontrovertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be

accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself."

30. Clarke J, who had previously given judgment in *Keohane v Hynes*, stated on behalf of the Supreme Court in *Moylist Construction Ltd v Doheny* [2016] 2 IR 283:

" [11] I should start by saying that I do not consider it necessary to depart in any way from, or to refine the views expressed in Keohane. As noted in the passages already cited, an application to dismiss under the inherent jurisdiction is not some form of surrogate summary disposal procedure. While the court can engage with the facts (and in particular documentary facts) there are what I described in Keohane as 'significant limitations' to the extent to which such an engagement is appropriate.

[12] However, in addition, it seems to me that the comments made in Keohane in reality stem from a more fundamental principle. The default position in respect of any proceedings is that they should go to trial. Depriving the parties of a full trial in whatever form is appropriate to the proceedings concerned is a departure from the norm, and one which should only be engaged in when it is clear that there is no real risk of injustice in adopting that course of action.

31. Clarke J then stated that by partial analogy the criteria which the courts apply to a consideration of whether to grant judgment on a summary summons or to adjourn to plenary hearing also apply to an application to dismiss as being bound to fail or an abuse of process. He considered *McGrath v O'Driscoll* [2007] ILRM 203 and went on:

"[18] It seems to me to follow from that analysis that there are cases which are just not suitable for an application to dismiss under the inherent jurisdiction. Clearly, cases involving factual disputes (save to the very limited extent to which it is appropriate to engage with the facts as identified in Keohane) have already been held to fall into that category. However, it seems to me that there are also limitations on the extent to which cases which involve issues of law or construction can properly be the subject of an application to dismiss under the inherent jurisdiction. The limitation is similar to that which was identified in McGrath as applying in the context of summary judgment motions. A court should not entertain an application to dismiss where the legal issues or questions of construction arising are themselves complex and such as would

require the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored.

...

*[21] That is not, of course, to say that there will not be cases where the legal or documentary issues may be clear and straightforward such that it is safe for the court to reach a conclusion on those questions on the hearing of a motion to dismiss. That is also not to say that the fact that a plaintiff may make a large number of points, each one of which is clearly unstateable, should not prevent a dismiss from being ordered. As Denham J. observed in a different context in *Bula v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412 at p.462, "seventeen noughts are still nothing."*

*[22] But I would caution against the appropriateness of the use of the application to dismiss under the inherent jurisdiction of the court in relation to proceedings where, even if there are no factual disputes or any such factual issues as might arise come within the strictures identified in *Keohane*, nonetheless the legal issues or questions concerning the proper interpretation of documentation are complex. In such cases, the very complexity of the issues (even if the court has a fairly clear view on them) makes it difficult to determine, within the confines of a motion heard on affidavit, that the plaintiff's case is such that it can safely be said that it is bound to fail.*

*[23] For the reasons identified by Murray J. in *Jodifern Ltd. v. Fitzgerald* [2000] 3 I.R. 321, and as applied in *Keohane*, a motion to dismiss should not be used as a means of obtaining a summary disposal of the case in circumstances where the issues which will need to be addressed in deciding whether the proceedings are bound to fail are themselves complex. Leaving aside those cases which might fall into the 'seventeen noughts are still nothing' category, it is necessary to consider whether a case where the issues have to be analysed on appeal, as they were in this case, for a full days hearing, can avoid the appropriate depiction of being too complex to be properly dealt with within the ambit of a motion to dismiss as being bound to fail."*

32. He also said that "[T]o use a sporting analogy, 'the dismiss as bound to fail' jurisdiction is intended to deal with the "slam-dunk".

33. An important qualification on the exercise of the jurisdiction was emphasised by Clarke J in *Moffitt v Agricultural Credit Corporation*, where he said at paragraph 3.1:

*"3.1 The jurisdiction of this court to dismiss proceedings which are bound to fail has been clear since the decision of Costello J. in Barry v. Buckley [1981] I.R. 306. The relevant principles are well settled. It is a jurisdiction to be exercised sparingly and the onus rests upon the defendant to satisfy the court that there is no prospect of success. In addition the court should not judge the matter on a narrow or technical basis referable to the pleadings. **It is well settled that, even if the proceedings as currently drafted might have no chance of success, the proceedings ought not be dismissed if, by an appropriate amendment, the proceedings could be recast in a fashion which would give rise to a prospect of success.** (See the judgments of McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 and Fennelly J. in *Lawlor v. Ross* (Unreported, Supreme Court, Fennelly J., 22nd November, 2001 at p. 10)."*
[emphasis added]

34. The approach is very usefully summarised in two judgments which are quoted in a case to which I was referred – *European Property Fund Plc v Ulster Bank* [2015] IEHC 425. In the first of these, *Irish Bank Resolution Corporation Ltd v Purcell* [2014] IEHC 525 Cregan J said at paragraph 83:

"1. The Court has jurisdiction pursuant to Order 19 Rule 28 and also pursuant to its inherent jurisdiction to strike out proceedings if they are bound to fail.

2. In considering an application to strike out proceedings pursuant to its inherent jurisdiction the Court is not limited to considering the pleadings of the parties but is free to consider evidence on affidavit relating to the issues in the case (per Costello J. in Barry v. Buckley [1981] IR 306).

3. This jurisdiction to strike out proceedings is one to be 'exercised sparingly and only in clear cases'. (See Costello J. in Barry v. Buckley [1981] IR 306).

4. Moreover as McCarthy J. stated in Sun Fat Chan v. Osseous Ltd [1992] 1 IR 425 'Generally the High Court should be slow to entertain an application of this kind'.

5. In addition as was stated by Keane J. in Lac Minerals v. Chevron Corporation [1995] 1 I.L.R.M. 161 (High Court, 6th August, 1990) (and quoted with approval by the Supreme Court) in Supermacs Ireland Ltd v. Katesan (Naas) Ltd [2000] 4 I.R. 273'a judge in considering an application to strike out or dismiss a claim

must be confident that the plaintiff's claim cannot succeed no matter what might arise on discovery or at the trial of the action.'

6. *If the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed (see McCarthy J. in Sun Fat Chan v. Osseous Ltd).*

7. *The Court can only exercise a jurisdiction to strike out a claim on the basis that 'on admitted facts it cannot succeed' (per McCarthy J. in Sun Fat Chan v. Osseous Ltd).*

8. *The Court in considering whether to strike out a claim 'must treat the plaintiff's claim at its high water mark' (per Clarke J. in McCourt v. Tiernan [2005] IEHC 268).*

9. *The burden of proof lies on the defendant to establish that the plaintiff's claim is bound to fail. (See Salthill Properties Ltd v. Royal Bank of Scotland [2009] IEHC 207)*

10. *The Court should not require a plaintiff to be in a position to show a prima facie case, merely a stateable case, in an application to strike out. (See Clarke J. in Salthill Properties Ltd v. Royal Bank of Scotland.)*

35. In the second case, *Togher Management Company Ltd & Anor v Coolanleen Developments Ltd [2014] IEHC 596*, Haughton J said at paragraph 28:

"With regard to the courts inherent jurisdiction to dismiss, the principles are well established in cases such Barry v. Buckley [1981] I.R. 306, Sun Fat Chan v. Osseous Limited [1992] 1 I.R. 425 (Supreme Court – McCarthy J), Ennis v. Butterly [1996] I.R. 426, and Salthill Properties Limited & Cunningham v. Royal Bank of Scotland Plc & Ors [2009] IEHC 207. From this jurisprudence the following principles may be extracted:-

- The jurisdiction exists to ensure than an abuse of the process of the courts does not take place.*
- The jurisdiction should be exercised sparingly and only in clear cases.*
- It enables the court to avoid injustice.*
- If a statement of claim admits of an amendment which might 'save it' and the action founded on it, then the action should not be dismissed.*

- *A variety of circumstance may emerge at the trial of an action which might not be entirely contemplated at earlier stages in proceedings, and what may appear clear and established at an early stage may become less so at trial.*
- *It is a jurisdiction to dismiss where the proceedings are bound to fail.*
- *Such an application may be of particular relevance to cases involving the existence or construction of documents – in which it may be possible for a party to persuade the court that no reasonable construction of the document(s) concerned could give rise to a claim on the part of the plaintiff, even if all the facts alleged by the plaintiff were established.*
- *Where there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence, it is difficult to envisage circumstances where an application to dismiss on the grounds that the action is bound to fail could succeed.*
- *The plaintiff should not be required to show a prime facie case at the stage of an application to dismiss.*
- *The onus lies on the defendant to establish that the plaintiff's case is bound to fail.*
- *It follows from the foregoing point that the defendant must demonstrate that any factual assertion on the part of the plaintiff that the defendant contests could not be established.”*

36. Counsel for the plaintiffs also referred to the well-known comment by Clarke J in *Moylist* to the effect that the fact that the application took a full day's hearing was indicative of the inappropriateness of such an application (at paragraph 23 of his judgment he said "*Leaving aside those cases which might fall into the 'seventeen noughts are still nothing' category, it is necessary to consider whether a case where the issues have to be analysed on appeal, as they were in this case, for a full days hearing, can avoid the appropriate depiction of being too complex to be properly dealt with within the ambit of a motion to dismiss as being bound to fail.*") Counsel did so in circumstances where this matter was before the Court for four days. A similar comment could be made about a case where the parties consider it necessary to cite a large number of authorities. In this case, fifty-three authorities were cited in the parties' written submissions alone and further authorities were cited during the course of oral submissions together with several extracts from text books. I think that Clarke J's point is well-made and is a useful rule of thumb and may be strongly indicative but the length

of the hearing can not in itself be determinative. If it were treated as such, it would simply act as an invitation to the party opposing the application to lengthen the hearing as much as possible or to create "*as much fog as possible*" in order to be able to then turn around and say that the application can not succeed because it had to run for so long. Counsel for the plaintiffs acknowledged this by saying that his submission was not "*if you can talk for long enough it gets you over the hump*" and by referring to Denham J's equally well-known phrase that "*seventeen noughts are still nothing*". This was a protracted hearing and an extremely large number of cases were cited, but those features can not in themselves determine whether or not the proceedings should be dismissed on the grounds advanced. It also needs to be recalled that there were a number of different and separate grounds advanced so this of necessity required a longer hearing and a greater number of authorities than in many cases seeking dismissal on the bound to fail or abuse of process jurisprudence.

BANKRUPTCY

37. In order to understand the parties' arguments in relation to the plaintiffs' entitlement to maintain these proceedings personally in light of their bankruptcies and the Opinions of English lawyers upon which those arguments are based it is necessary to first set out the factual and pleadings context.

38. As noted above in the summary of the background, the first-named plaintiff was admitted to bankruptcy in England on the 6th June 2013 and the second-named plaintiff was admitted to bankruptcy, also in England, on the 7th August 2013. The defendants state that they learned of this when the Official Receiver in the first-named plaintiffs' bankruptcy informed the receivers who had been appointed by the Bank.

39. This gives rise to very serious concerns about how the plaintiffs dealt with the Irish courts. However, these concerns are not directly relevant to the question of whether or not the plaintiffs are legally entitled to maintain these proceedings in light of their bankruptcies.

40. As noted above, when the Bank learned of the bankruptcies, solicitors on their behalf engaged in correspondence with the Official Receiver in respect of the 2013 proceedings.

41. By letter of the 16th October 2013, the solicitors acting for the Bank wrote to the Official Receiver stating, inter alia:

"As the Defendants have both been adjudicated bankrupt we understand that, as a matter of law, they do not have a personal entitlement to defend these proceedings and the decision on whether or not to continue to defend these proceedings is now vested in you, the Official Receiver. In the circumstances, please confirm whether or not you intend to continue to defend the above mentioned proceedings on behalf of the Defendants within 10 days from the date hereof.

In the event, that you do wish to continue to defend the proceedings please confirm within 10 days from the date hereof whether or not you will be in a position to make discovery of the categories sought and confirm the time required by you in order to comply with the said discovery request.

In the event that no response is received by this office or the response received is that you do not intend to proceed with the defence of the above proceedings by close of business on 25 October 2013, we are instructed to issue a motion against the Defendants seeking judgment against them for the full amount due and owing for failure to comply with the Court's directions and to make Voluntary discovery. We confirm that Mr. Justice Kelly of the Commercial Court of Ireland has granted our client liberty to make any such motion returnable to 11 November 2013.

We await hearing from you as a matter of urgency.

We are copying this letter to the Defendants to ensure that if, contrary to our understanding of the law, they wish to apply to continue to defend the case against them in their personal capacities, they would indicate their intention to do so, and to make Discovery as per our voluntary request. However, if we do not hear positive confirmation from you or them by 25 October 2013, a motion shall be brought as outlined above."

42. The Official Receiver replied by letter of the 17th October 2013 stating, inter alia:

"It is the understanding of the Official Receiver that Mr. Curran and Mr. O'Donnell traded in partnership together as property developers in respect of the Castlepark and Annaville Developments.

The Official Receiver does not act as liquidator or trustee in respect of the partnership's assets or affairs. To the Official Receiver's knowledge no application is pending to wind-up the affairs of the partnership. As the partnership has no centre of main interest or establishment within the UK, the Official Receiver considers he is not in a position to seek the authority of the UK court to wind-up the partnership affairs (s.303(2A-C) IA86).

Further, partnership property does not form part of the bankruptcy estates of Mr. Curran or Mr. O'Donnell (s283(3)(a) IA 86); the Official Receiver's interest in the partnership is limited to the bankrupt partners' shares in the partnership after the accounts have been settled. The Official Receiver believes that the partnership has been dissolved as a consequence of the bankruptcy proceedings against Mr. Curran and Mr. O'Donnell but in the absence of any solvent party they will retain authority to wind-up the affairs of the partnership until further order of the court.

The Official Receiver understands that the current hearing is in respect of judgment against the partnership. Whilst this is a contingent liability of the bankruptcy estates it remains open to the partnership to continue the appeal.

On the basis of the above and subject to your comments, the Official Receiver does not intend to intervene in the current application."

43. By reply of the 18th October 2013, the solicitors for the Bank wrote, inter alia:

"We note that your understanding is that Mr. Curran and Mr. O'Donnell (the Defendants) traded in partnership together as property developers in respect of the Castlepark and Annville developments. However, we confirm that this understanding is incorrect and there is no such partnership between the Defendants in respect of the Castlepark and Annville Developments.

The Defendants did not form a separate and distinct entity in the form of a partnership as understood by your office but in fact the Defendants in their personal capacities borrowed monies from Ulster Bank Ireland Limited ("the Bank") on a joint and several basis. The Defendants in their personal capacity constructed and were involved in the Castlepark and Annville developments.

Accordingly, the liabilities owed by the Defendants to the Bank do form part of the bankruptcy estates of the Defendants and in our view the entitlement to defend the above mentioned proceedings vests in the Official Receiver and not the Defendants.

...

...As the Defendants have both been adjudicated bankrupt we understand that, as a matter of law, they do not have a personal entitlement to defend these proceedings and the decision on whether or not to continue to defend these proceedings is now vested in you, the Official Receiver. In the circumstances, please confirm whether or not you intend to continue to defend the above mentioned proceedings on behalf of the Defendants..."

44. The letter went on to state that it was the intention of the Bank to issue a motion to seek judgment on the basis of the plaintiffs' failure to make discovery in the event that the Official Receiver was not proposing to defend the proceedings and to make discovery.

45. The Official Receiver replied on the same day, the 18th October 2013, setting out the information upon which he had formed the view that the plaintiffs carried on business on a partnership basis and stated:

"On the balance of the information provided it remains the opinion of the official receiver that Mr. Curran and Mr. O'Donnell traded in partnership with the effect that the current actions are partnership matters, as outlined in my letters of 15/10/2013 and 16/10/2013.

Further, as previously stated, the Official Receiver believes that the partnership has been dissolved as a consequence of the bankruptcy proceedings against Mr. Curran and Mr. O'Donnell but in the absence of any solvent party they will retain authority to wind-up the affairs of the partnership until further order of the court."

46. The Bank's solicitors noted the Official Receiver's position in a letter of the 23rd October 2013.

47. The Official Receiver likewise confirmed to Birmingham Crown Court that he did not have authority to deal with the Plaintiffs' partnership assets. In this regard, the Official Receiver stated at paragraph 17 of his report dated the 12th February 2014 concerning the first-named plaintiffs' assets that:

"I am aware of the on-going litigation in Ireland, the bankrupt has stated he traded in partnership with Graham O'Donnell and I have no authority to deal with the assets or affairs of the partnership. I am unable to apply for an order to deal with the partnership affairs (sic) as the centre of main interest of the partnership are clearly in Ireland."

48. These letters were all exchanged in the context of the 2013 proceedings. There was no evidence before the Court as to the Official Receiver's position in respect of these current proceedings but it seems very likely that the Official Receiver's position would be the same in respect of these proceedings. Indeed, while Senior Counsel for the defendants made the point that the Official Receiver's position was in relation to the 2013 proceedings, the English lawyers gave their Opinions on the basis of that being the Official Receiver's position and the parties proceeded on the basis that his position was the same in relation to these proceedings; in fact the plaintiffs in their submissions relied heavily on the view of the Official Receiver.

49. The plaintiffs issued these proceedings on the 20th July 2018 and delivered a Statement of Claim on the 17th January 2019. It is not pleaded in the Statement of Claim that the plaintiffs were acting as a partnership in their dealings with the Bank which gave rise to both the 2013 and these proceedings and it is not pleaded that they are acting as partners in bringing these proceedings. Indeed, it is difficult to understand the Statement of Claim as meaning anything other than that they were acting in their individual and personal capacities. Partnership is not referred to at all. The underlying premise in the Statement of Claim is that they were acting as consumers when dealing with the Bank. For example, the title to the proceedings does not refer to them bringing the proceedings as partners; in paragraph 12 it is expressly pleaded that the plaintiffs were advised by the first-named defendant to hold on to the Annville property as their pension fund and in paragraph 13 it is pleaded that the first-named defendant persuaded and offered the plaintiffs a 20 year loan *"again with a view to a pension plan"*; in those circumstances it is pleaded that *"the Plaintiffs were consumers"* (paragraph 12 and paragraph 36(j)); and in paragraph 9.8 of the Replies to Particulars the plaintiffs, when asked to specify the basis for the claim that they were consumers, stated *"The purpose of the facility extended under the 2005 Agreement was for the long-term hold of personal retirement assets until the Plaintiffs planned retirement at age 70. The Plaintiffs were acting as consumers as the purpose of the loan was for a consumer purpose."* There are some references to the plaintiffs' involvement in the development of the properties being a *"business"* and an *"investment"* but it does not by any means follow that they were asserting that they were acting in partnership.

50. I should pause at this point to emphasise that I am merely dealing with what is pleaded, not with the question of whether or not they were acting as partners. That is a separate matter. In fact, there are several indicators that the Bank treated them as a partnership.

51. The Defendants delivered their Defence on the 16th July 2020. Of course, that was a Defence to the claim as pleaded in the Statement of Claim which, as noted, did not expressly advance the claim on behalf of a partnership and did not plead that the plaintiffs were partners and, in its terms, is to the contrary effect. In that context, the Defendants pleaded the following at paragraphs 2 to 4 of the Defence:

"2. On 6 June 2013, the First Plaintiff was adjudicated bankrupt in England and Wales.

3. On 7 August 2013, the Second Plaintiff was adjudicated bankrupt in England and Wales.

4. In the premises, the subject matter of the within proceedings formed part of the estate of the Plaintiffs when they were bankrupts and are therefore vested in the Trustee in Bankruptcy of England and Wales and can only be advanced by the Trustee in Bankruptcy, if appropriate. On that basis alone, all of the Plaintiffs' claims fall to be dismissed in limine. Each of the objections and pleas made hereunder are strictly without prejudice to this preliminary objection."

52. The plaintiffs delivered a Reply to this Defence on the 30th July 2020. They specifically joined issue with the plea in paragraph 4 of the Defence in paragraph 5 of their Reply:

"5. By way of special reply to paragraph 4 of the Defence, the Plaintiffs specifically plead that the effect of their respective bankruptcies is a matter for English law. The Plaintiffs deny that the claim that is the subject matter of the within proceedings can only be advanced by the Official Receiver. The Plaintiffs specifically plead that they acted as a partnership as property developers and, by letter dated 18 October 2013 addressed to the Plaintiffs' former solicitors, the Official Receiver specifically confirmed that the Plaintiffs retained the right to bring any actions in respect of their partnership. In this regard, the letter dated 18 October 2013, inter alia, stated that:

"The official receiver considers that the outstanding actions are a partnership matter, which he further believes that the partnership has been dissolved as a consequence of the bankruptcy proceedings against Mr. Curran and Mr. O'Donnell but in the absence of any solvent party they will retain authority to wind-up the affairs of the partnership until further order of the court".

53. The defendants have not delivered a Rejoinder.

54. The defendants then issued this motion seeking to dismiss the plaintiffs' claim including on the basis of the plaintiffs' bankruptcies.

55. During the course of the exchange of affidavits, the plaintiffs filed an affidavit of English law by English counsel, Mr. Bacon BL, exhibiting his Opinion. This, of course, was not surprising given that the plaintiffs had expressly pleaded in paragraph 5 of their Reply (quoted above) that they *"specifically plead that the effect of their respective bankruptcies is a matter for English law."* There appeared – though it was not entirely clear – to be some move away from this in the course of oral submissions on behalf of the plaintiffs towards saying that Irish law applies but in light of this express plea and the contents of the written submissions on behalf of the plaintiffs where it is submitted (paragraph 4.1) that *"[T]he plaintiffs were adjudicated as bankrupts in the UK. The effect of their bankruptcies is governed by the law of England and Wales"* I must approach the question of the plaintiffs' entitlement to maintain the proceedings as being determined by English law. The defendants accept for the purpose of this application that English law is the applicable law.

56. The defendants subsequently filed an affidavit of English law exhibiting an Opinion of English Queens Counsel, Mr. Mark Phillips QC, addressing Mr. Bacon's Opinion. Mr. Bacon subsequently provided a supplemental Opinion addressing Mr. Phillips' Opinion.

57. Any issues of foreign law are to be regarded as matters of fact. On this motion all disputed issues of fact, including therefore, issues of foreign law, must be construed in the plaintiffs' favour. The defendants accept this to be the case. At paragraph 56 of their written submissions the defendants state *"[I]t is accepted that in this motion to strike out, in so far as there is a conflict of fact, it must be resolved in favour of the Borrowers, and that their case must be taken at "its high water mark" (Clarke J in McCourt v Tiernan [2005] IEHC 268)*

58. Mr. Bacon was asked by the plaintiffs to address the pleas in paragraphs 2 to 4 of the Defence. As he put it at paragraphs 2 and 3 of his affidavit (which are reflected in his Opinion) he was asked to advise the plaintiffs *"in relation to a technical point taken in the Defence...and in particular paragraphs 2-4"*. His Opinion is given on the express basis that the plaintiffs' claims arise *"from business loans made to them trading in partnership."* He states at paragraph 4 of his Opinion that *"The Statement of Claim does not assert in terms that in taking the facilities which are the subject of the proceedings, the Plaintiffs were acting as partners. However, I proceed in this Opinion on the footing that this was the case."* He then sets out some of the bases upon which he was satisfied that they were acting as partners. Mr. Bacon's Opinion is based exclusively on the plaintiffs being a partnership. He does not address the position if they are not partners.

59. Mr. Bacon concluded at paragraph 20 and 21 of his Opinion that the plea at paragraph 4 of the Defence is wrong as a matter of law. He states:

"20. Accordingly, in my opinion, the plea at paragraph 4 of the Defence is wrong as a matter of law. Matters relating to a partnership do not form part of a bankrupt's estate save when the partnership account has been taken and the individual partner's share worked out. Any claim to be advanced by the partnership is not something which vests in the Official Receiver as trustee, it remains with the partnership in dissolution. Despite the absence of a solvent partner, the Official Receiver has not made any attempt to avail itself of the powers in the Insolvent Partnerships Order to wind up the partnership and does not consider that it even has the power to do so since the partnership had no centre of operations in the UK.

21. The challenge to the proceedings based on the allegation that any claim vests in the trustee in bankruptcy of each of the Plaintiffs is therefore in my opinion, wrong as a matter of English law."

60. His reasoning which led him to this conclusion is set out in the earlier paragraphs of his Opinion. I do not propose to set out this reasoning in full. In summary, he stated:

- section 33 of the Partnership Act provides that the bankruptcy of a partner will cause the partnership to dissolve. In this case, this occurred on the 6th June 2013 (the date of the first bankruptcy order);

- where bankruptcy orders are made against all members of a partnership there could be difficulties in dealing with the administration of the estate because there will be no solvent partner to deal with the winding-up of the partnership;
- an application to court may be made by the Official Receiver for an order in relation to the partnership assets: for example, where bankruptcy orders have been made against all partners with no order being made to deal with the partnership, the Official Receiver can make an application to court for an order consolidating the bankruptcies, that the partnership assets be administered as if the individual members had presented a joint bankruptcy petition and that the Official Receiver, as trustee of the bankrupt's estates, be trustee of the partnership and be given authority to wind up the affairs of the partnership and administer the partnership property;
- the Official Receiver has not made such an application (on the grounds that "the partnership has no centre of main interest or establishment within the UK");
- partnership property does not form part of the bankruptcy estates of individuals. The Official Receiver's interest in the partnership is limited to the bankrupt's share in the partnership after the accounts have been settled. Thus, the Official Receiver can not simply "*step into the shoes*" of the bankrupt partner (or partners) to deal with the dissolution of the partnership;
- Absent a winding up order on the partnership, the Official Receiver as trustee will not be able to deal with the partnership property. The legal position is that partnership property effectively forms a trust in favour of the partnership creditors and therefore does not form part of the bankrupt's estate capable of vesting in a trustee.

61. In his affidavit, delivered at the request of the defendants, Mr. Phillips QC stated that he was asked to respond to the English law Opinion of Mr. Bacon BL and set out five matters that he was asked to address. The first two questions were on the basis that the plaintiffs were *not* a partnership:

"Did [the] cause of action vest in the Official Receiver in 2013, if the Plaintiffs were not a partnership?"

"If the cause of action vested in the Official Receiver in 2013, can the Plaintiffs maintain it?"

62. The remaining three questions were on the basis that the plaintiffs were a partnership:

"Do the Plaintiffs still retain the right to prosecute their current High Court proceedings in Ireland?"

Is the following statement at paragraph 18 of the opinion of Jeffrey Bacon BL correct?"

"Absent a winding up order on the partnership, the official receiver as trustee will therefore not be able to deal with the partnership property. The legal position is that partnership property effectively forms a trust in favour of the partnership creditors and thus does not form part of a bankrupt's estate vesting in a trustee."

If that statement is correct, what is the consequence of that for the Plaintiffs' current cause of action in Ireland?"

63. Mr. Phillips answered the first and second questions by concluding that if the plaintiffs were not a partnership the causes of action would have vested in the Official Receiver and the plaintiffs could not maintain the action. It is important to note that this is not disputed by Mr. Bacon. Thus, if the Court had to consider the position on the basis of the Statement of Claim as currently pleaded I would be compelled to hold that the plaintiffs are not entitled to maintain the proceedings. Vigorous submissions to that effect were made by Senior Counsel for the defendants. For example, in his replying submissions he said that there is no pleaded case that this is a claim by the partnership and that if it's a personal claim then the proceedings are over because they have no entitlement to maintain the claim. Notwithstanding that, the defendants accept that I must approach this motion on the basis that they were a partnership. On Day 2 of the hearing Senior Counsel on behalf of the defendants said that for the purpose of this application I must proceed on the basis that it was a partnership. They are correct to do so. It is clear that I must take the plaintiffs case at its height and, while the partnership issue may not be properly pleaded, I think I have to approach this application on the basis that the claim is being maintained by the plaintiffs as partners. That is reinforced by Clark J's statement in *Moffitt* that if a case can be saved by an appropriate amendment then it should not be dismissed. While no application to amend the Statement of Claim has been made and no indication given that one will be made, it would be artificial and inconsistent with *Moffitt* to proceed on the basis that the partnership case is not being made.

64. Thus, the important part of Mr. Phillips' Opinion for present purposes is his answers to the third, fourth and fifth questions.

65. In respect of the situation under English law if the plaintiffs were a partnership (and the cause of action therefore a partnership asset) (i.e., the remaining three questions) he stated that the usual position is that where one or more partners become bankrupt the partnership is dissolved (subject to any agreement to the contrary)(section 33 of the *Partnership Act 1890*) and the bankrupt partner(s) cease to have any power to bind the partnership, or to have any control over its assets. Ordinarily, the solvent partners have authority to wind up the partnership but an insolvent partner does not have such authority. If there is a bankrupt partner, the rights of the partner's trustee (e.g. the Official Receiver) are limited and he does not have the right to step into the shoes of the bankrupt and act as a partner (including in the winding up of the partnership). Crucially, in relation to the specific situation in this case, i.e., where all of the partners are bankrupt he said that:

"16...the position is put in simple terms by Lindley & Banks, [13-51]...: "if all the partners are bankrupt, no-one will have authority to wind up the firm's affairs, not even a bankrupt partner's trustees" (citing Hollens...). In other words, neither the bankrupts, nor the trustee, may deal with partnership property in the absence of some further order.

17. The issue was addressed directly in Hollens. The two bankrupts there were a husband and wife who ran a business as a catering business in partnership. The partnership assets included a van, and the question had arisen of how this asset was to be dealt with. The judgment of Mr. Justice Blackburn explained the position in clear and unequivocal terms:

*'6. The making of the two bankruptcy orders brought about, as one of its consequences, the dissolution of the partnership. See section 33(1) of the Partnership Act 1890...**The making of the two bankruptcy orders also resulted in each of the debtors ceasing to have power to bind the partnership (see section 38 of the Partnership Act 1890) and ceasing to have any control or power of disposition over its assets.***

7. This meant that although, when a partnership is dissolved, each partner is entitled as against the other (or others) to have its affairs wound up, if necessary by obtaining an order of the court, so that the property of the partnership is applied in payment of its debts and liabilities leaving the

*surplus, if any, to be distributed to the former partners (see section 39 of the Partnership Act 1890), **neither debtor, being a bankrupt, had any right or authority to wind up the partnership's affairs. Nor did the Official Receiver: he had no automatic right, as such trustee and without further ado, simply to step into the shoes of the insolvent partner and act as if he were the partner in his/her place.** His right, in his position as trustee of each debtor's bankruptcy estate, was to receive whatever might be due to the estate on a winding-up of the partnership.*

8. The practical effect therefore of the making of the individual bankruptcy orders was to leave the assets of the (now dissolved) partnership in limbo: the debtors, as the sole former partners, ceased to have power to deal with them; but the power to do so did not, as a consequence of the bankruptcy orders, become vested in the Official Receiver as trustee of the two bankruptcy estate..." [emphasis in the original]

66. Mr. Phillips therefore answered the question of whether the plaintiffs retain the right to prosecute these proceedings if they were a partnership by stating at paragraph 21 that *"In this case, as a matter of English law, the plaintiffs' do not retain the right to prosecute their proceedings in the Irish High Court; rather (on the assumption that the cause of action is partnership property), the cause of action is "in limbo" pending a court order."* [emphasis in the original]

67. In relation to the fourth question – whether Mr. Bacon's statement that *"Absent a winding up order on the partnership, the official receiver as trustee will therefore not be able to deal with the partnership property, the legal position is that the partnership property effectively forms a trust in favour of the partnership creditors and thus does not from [sic] part of a bankrupt's estate vesting in a trustee"* – he stated that there are two propositions in this statement. The first relates to the Official Receiver's entitlement to deal with the partnership property and Mr. Phillips states that the Official Receiver is not able to deal with partnership property simply by virtue of his appointment as trustee in bankruptcy absent a court order. He stated that it was beyond the scope of his instructions to consider what the Official Receiver could or should have done or to consider what relief a court could grant but that the question is moot. In relation to the second sentence, he said it was moot because neither the plaintiffs nor the Official Receiver may deal with the property.

68. He then went on to consider the fifth question - what the consequence might be for the cause of action in Ireland if Mr. Bacon's statement that the cause of action did not vest in the Official Receiver is correct. He answered that it would not follow that the cause of action vests in the plaintiffs and noted that Mr. Bacon stated at paragraph 12 of his Opinion that "*[W]here bankruptcy orders have been against all members of the partnership but no order has been made against the partnership, there could be difficulties in dealing with the administration of the estate as, although the partnership will have been dissolved, there will be no 'solvent' partner to deal with the winding up of the partnership...*".

69. Mr. Phillips concluded that it is not correct that a bankrupt partner retains authority to wind up the affairs of the partnership because, after dissolution (upon bankruptcy of one or more partners), the solvent partners may wind up the partnership but a bankrupt partner cannot bind the partnership and there is no provision in the Partnership Act for circumstances in which there is no solvent partner. The right of the plaintiffs to participate in winding up the affairs of the partnership terminated upon their bankruptcies and therefore if the cause of action is partnership property, then the plaintiffs do not have a right to deal with it.

70. Mr. Bacon was asked to provide a further opinion in response to Mr. Phillips's Opinion. Mr. Bacon noted that he had originally been asked to address the plea in paragraph 4 of the Defence and noted that Mr. Phillips did not disagree with him in that respect.

71. Crucially, Mr. Bacon stated at paragraphs 8 and 9 (and in particular 9.1) of his Supplemental Opinion:

"8. As regards paragraph 19, Mr. Phillips QC refers back to the decisions in Patley v Blake and Hollens and concludes that if (as both of our Opinions had assumed for one purpose or another) the cause of action is partnership property, then the plaintiffs do not have the right to deal with it and "the bankrupts cannot pursue the present claim."

9. In considering those comments, I note the following:

9.1 the case law Mr. Philips refers to brings him to conclude that the affairs of the partnership are "in limbo" – the Official Receiver's only interest is in a distribution from either bankrupt partner's estate (with which I agree), as he notes), and neither of the bankrupt partners are able bind the firm. I do

not dispute the authorities which he cites for the latter proposition, but the present facts are unusual;

9.2 *his Opinion at paragraph 25 confirms that it is "beyond the scope of my instructions to consider what the Official Receiver could or should have done", before then saying that question is, in his opinion, moot;*

9.3 *his footnote 5 (that footnote being "tagged" to the cited words at paragraph 9.2 above) refers to a route sought to be taken in the case of Hollens and, at the end of the footnote, that one of the pre-conditions for that route was that the business of the partnership had been carried out in England and Wales at any time in the period of three years...and ends the footnote with this:*

"it is unclear whether this would have been available in the present case. Mr. Bacon's opinion observes only that the Official Receiver considered it could not seek an Order of the UK Court because the partnership had no centre of main interest or establishment within the UK. It is beyond the cope of my instructions to address this question." [emphasis in the original]

72. He then goes on in paragraphs 11 to 16 to discuss the practical difficulties that arise in circumstances where the affairs of the partnership including the cause of action are in limbo and where the Official Receiver has decided not to or that he can not do something "*to break any limbo*", and to consider the possibility of an application to the Irish courts.

73. As noted above, on this motion, where there is a conflict of fact, it must be resolved in favour of the plaintiffs and therefore any conflict between the English lawyers in respect of the plaintiffs' entitlement to maintain these proceedings would have to be resolved in favour of the plaintiffs.

74. In my view there is no material conflict of fact between the opinions of the English experts.

75. Mr. Phillips clearly states that the plaintiffs are not entitled to act on behalf of or to bind the dissolved partnership in circumstances where they were both bankrupt and the Official Receiver is not entitled to step into their shoes to conduct the affairs of the dissolved partnership absent a court order. This gives rise to what he describes as a "*state of limbo*" which, he suggests, may only be resolved by a court order. Mr. Bacon expressly states that he does not dispute the authorities which Mr. Phillips cites for his

conclusion that neither of the bankrupt partners (the plaintiffs) are able to bind the firm. He goes on to discuss the practical (and consequential legal difficulties) arising, particularly where the Official Receiver indicated (in the context of the 2013 proceedings) that he did not propose to make any application, but the inescapable conclusion from his statement that he does not dispute the authorities which Mr. Phillips cites for his opinion that neither of the bankrupt partners are able to bind the firm is that he does not dispute Mr. Phillips' opinion that the plaintiffs can not bind the partnership and therefore can not maintain the proceedings as things currently stand. There is therefore no material conflict on that central and fundamental point.

76. In his submissions, Senior Counsel for the plaintiffs placed great emphasis on the opinions of the Official Receiver, as stated in the correspondence and in his reports, largely to argue that in circumstances where the Official Receiver was of the view that the plaintiffs could continue to defend the 2013 proceedings (and, by extension, to maintain these current proceedings) the Court could not conclude that the plaintiffs could not succeed in arguing that they were entitled to maintain the proceedings, i.e. that there is a conflict. While the opinion of the Official Receiver is of course relevant, both parties have submitted expert evidence as to the legal position and I must determine the position by reference to that evidence. Mr. Bacon also places emphasis on the opinions of the Official Receiver but I understand that to be directed, particularly in the supplemental Opinion, to the practical difficulties in remedying the "*state of limbo*" in light of the Official Receiver's stated views rather than suggesting that the Official Receiver's views should be determinative of the legal question.

77. It is true to say that in his first Opinion Mr. Bacon expresses the view that the plaintiffs are entitled to maintain the proceedings. There is obviously conflict between that Opinion and Mr. Phillips' Opinion. However, the expert evidence must be taken in its entirety and it seems to me that where it rests is with no material conflict as to the entitlement of the plaintiffs to maintain these proceedings.

78. It was also argued on behalf of the plaintiffs that I must determine this aspect of the defendants' application on the basis of the plea in paragraphs 2 to 4 of the Defence and that the evidence clearly shows that this is wrong. I agree that if the plaintiffs are treated as partners, the evidence clearly does not support the plea in paragraph 4 of the Defence. However, there is a fundamental difficulty with this argument. The partnership issue is not pleaded in the Statement of Claim. Nonetheless, the plaintiffs argue that I must, for the purpose of this application, treat the plaintiffs as having been in partnership because it is pleaded in the Reply, but at the same time must not treat of the consequences of that plea because it is not what the Defence was pleading to. In my

view, to suggest that I am constrained to consider the plaintiffs' entitlement by reference to paragraph 4 of the Defence is to suggest that the Court must ignore the history of the pleadings and the deep engagement with the plaintiffs' entitlement to maintain the proceedings if they are a partnership in the expert evidence. The plaintiffs raised the issue of the partnership. The reality is that the plaintiffs may apply to amend the Statement of Claim to include the pleas in relation to partnership. At that stage the defendants can plead that the plaintiffs are not partners or, if they are, are not entitled to maintain the proceedings. At that point we would be back to the same argument. The parties have joined issue with the plaintiffs' entitlement to maintain the proceedings even as partners and, while the proceedings will have to be put in order, it is appropriate to deal with the issue.

79. It seems to me that the end point of the evidence as to English law is that as things currently stand the partnership property, including the entitlement to maintain these proceedings, is "*in limbo*"; the property has not vested in the Official Receiver; he is not entitled to deal with the property because a winding-up order has not been made; and crucially, neither of the plaintiffs are entitled to deal with the property because the partnership has been dissolved and they are both insolvent.

80. Where that leaves us is that even on the high bar to be satisfied by the defendants on a motion of this kind the plaintiffs could not succeed in establishing that they are entitled to maintain the proceedings as things currently stand. However, that does not dispose of the matter and does not seem to me to be a proper basis for simply dismissing the proceedings in circumstances where that issue can potentially be resolved. As is clear from the authorities, the Court must be cautious and slow to strike out proceedings. That is apparent in practical terms from Clarke J's statement in *Moffitt* that if a claim can be saved by an appropriate amendment the Court should not strike out the case. It seems to me that by analogy where a claim may be saved by some other application or procedural step being taken then the proceedings should not be struck out without an opportunity being given for that step to be taken.

81. There is uncertainty in the English law Opinions as to what that step might be, particularly, as highlighted by Mr. Bacon, in circumstances where the Official Receiver has indicated that he does not propose to take any step in light of what he considers the partnership's centre of main interest to be (this difficulty arises of course by reason of the plaintiffs having been adjudicated bankrupt in the UK after, presumably, taking up residence there and the partnership's business being in Ireland). Mr. Phillips sets out a number of possible ways in which the matter might be addressed including a possible

application by the plaintiffs under section 303 of the English Insolvency Act. Mr. Bacon at paragraph 58 of his Opinion (quoted above) states “*Depending on Irish advisers’ views as to what an Irish court might do, it would be most unsatisfactory if the plaintiffs might be left in a position in which the Irish Court found that they are precluded from pursuing their claim. Whether by way of application under s.303 [of the English Insolvency Act 1986] without further contact with the Official Receiver, or by first asking the Official Receiver to apply for directions and if refused then applying under s.303 or by some other route, if the Official Receiver and the court has no specific opposition to a direction that the plaintiffs can continue their action, relief ought to be capable of being obtained.*” Thus, the matter is not entirely outside the control of the plaintiffs. This is also relevant to a point made on behalf of the plaintiffs that the Official Receiver was replaced with a nominee of the Bank in 2014 and no application has been made by him.

82. However, it is not this Court’s function to resolve any such difficulty at this stage.

83. As things currently stand, the plaintiffs are not entitled to maintain these proceedings. Nor is the Official Receiver. They are in “*limbo*”. However, rather than striking out those proceedings where it may be possible to resolve this particular issue of no party being entitled to deal with the proceedings, it seems to me that the appropriate way is to stay the proceedings pending the matter of who is entitled to deal with the partnership property being resolved.

RES JUDICATA, ISSUE ESTOPPEL AND ABUSE OF PROCESS

84. There is a degree of overlap between these concepts and it is convenient to consider them in the same section. I propose to deal firstly with the doctrine of res judicata and then to consider abuse of process as captured by the rule in *Henderson v Henderson*.

85. The policy rationale for the doctrine of res judicata was set out by Keane CJ in *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (at page 481) where he said:

“... The justification of the doctrine is normally found in the maxim interest rei publica ut sit finis litium and it is important to bear in mind that the public interest referred to reflects, in part at least, the interest of all citizens who resort to litigation in obtaining a final and conclusive determination of their disputes. However severe the stresses of litigation may be for the parties involved – the

anxiety, the delays, the costs, the public and painful nature of the process – there is at least the comfort that at some stage finality is reached. Save in those exceptional cases where his opponent can prove that the judgment was procured by fraud, the successful litigant can sleep easily in the knowledge that he need never return to court again."

86. In *McCauley v Mc Dermott* [1997] 2 ILRM 486 (at page 498) Keane J emphasised that there must be a balance between a party's right not to have to litigate the same issues again and the other party's right of access to the courts but nonetheless emphasised the importance of the doctrine and its policy rationale:

"In cases of this nature, the courts are concerned with achieving a balance between two principles. A party should not be deprived of his or her constitutional right of access to the courts by the doctrine of res judicata where injustice might result, as by treating a party as bound by a determination against his or her interests in proceedings over which he or she had no control. Res judicata must be applied in all its severity, however, where to do so otherwise would be to permit a party bound by an earlier judgment to seek to escape from it, in defiance of the principles that there should ultimately be an end to all litigation and that the citizen must not be troubled again by a lawsuit which has already been decided."

87. McDonald J stated in *George v AVA Trade (EU) Ltd* [2019] IEHC 187:

"Res judicata is often used as an umbrella term to cover two species of estoppel namely cause of action estoppel and also issue estoppel. Res judicata in the sense of cause of action estoppel will not apply unless the cause of action asserted by the plaintiff in a later action is one and the same as the cause of action previously determined against a plaintiff in earlier proceedings."

88. At paragraph 57 of his judgment McDonald J cited with approval the following passage from Diplock LJ's judgment in *Thoday v Thoday* [1964] 1 All ER 342:

"The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call "cause of action estoppel," is that which prevents a party from asserting or denying, as against the other party, the existence of a

particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim "Nemo debet bis vexari pro una et eadem cause." In this application of the maxim "causa" bears its literal Latin meaning.

The second species, which I will call "issue estoppel", is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

89. The cause of action in the 2013 proceedings was the recovery of monies claimed to be due and owing on foot of a contract between the parties. However, the causes of action in the current proceedings range from breach of contract, misrepresentation, negligence, conspiracy, deceit, and intentional interference with the economic interests of the plaintiffs. The plaintiffs seek damages for these alleged wrongs. Thus, a cause of action estoppel does not arise and it seems to me that the species of res judicata which the defendants in fact rely on is issue estoppel in the sense that they claim that the core issue upon which the claims advanced in these current proceedings rests – that the Bank was not entitled to call in the loan - has already been determined in the 2013 proceedings.

90. McDonald J, at paragraph 59 of *George v AVA* set out the ingredients of issue estoppel. He said:

"...The ingredients of estoppel in this context are well established. In this case, what must be determined is that the [prior judgment] was:-

- (a) A judgment given by a court of competent jurisdiction;*
- (b) A final decision on the merits;*
- (c) The judgment must have determined a question which is now raised in these proceedings;*
- (d) The parties to this litigation must be the same as the parties to the [previous] proceedings."*

91. Simons J stated in *McCool Controls and Engineering Ltd v Honeywell Control Systems Ltd [2019] IEHC 695* (at paragraph 33) that the key criteria for issue estoppel may be summarised as:

"(i) [T]here must be a judgment by a court of competent jurisdiction which involves (ii) a final decision on the merits; (iii) the earlier judgment must have (necessarily) determined the same issue as arises in the second set of proceedings; and (iv) the parties to the two proceedings must be the same or their privies."

92. The plaintiffs accept that there is a judgment of a court of competent jurisdiction and that the first criteria is therefore satisfied. They contend that none of the other three criteria are satisfied. Their position is captured in paragraph 37 of their first replying affidavit: *"First, no judgment on the merits of the defence offered in respect of the Annville Facility in the 2013 proceedings was pronounced in circumstances where leave to defend was granted, but our defence was struck out due to a default. Second, and most importantly, we say that the claims advanced by us in the within proceedings are radically different in substance than the matters at issue on the 2013 proceedings. Finally, we say that an overly strict application of the doctrine of res judicata or issue estoppel should not be applied as it would give rise to an injustice and breach our right of access to the courts."* In their written submissions, the plaintiffs submitted that there was no final decision on the merits because the judgment in the 2013 proceedings was a default judgment given after the plaintiff's defence was struck out for failure to make discovery; that the 2013 proceedings did not determine a question now raised in these proceedings because they simply decided that monies were due to the Bank but not

whether the Bank acted unfairly or in breach of contract in prematurely calling in the loan; and the parties to these proceedings are not the same as the parties to the 2013 proceedings.

Default Judgment – Judgment on the Merits

93. As discussed in the Background section above, the Bank issued a Notice of Motion in the 2013 proceedings seeking to strike out the plaintiffs' Defence for failure to comply with directions of the High Court and to make voluntary discovery and for judgment in the amount of €12,915,316.47. On the first return date, the Court adjourned the matter for the Bank to file an affidavit of debt and then, on the 25th November 2013, Kelly J granted the Bank judgment in that amount. The parties disagree as to whether this amounts to a judgment on the merits. The first question is whether on the level of principle a default judgment is a judgment on the merits.

94. The defendants referred me to, inter alia *Re South American and Mexican Co, ex p Bank of England* [1895] 1 Ch 37, *Cox v Dublin City Distillery (No 3)* [1917] 1 IR 203, *Kinsella v Connor* (1942) 76 ILTR 141, *McConnell v Lombard and Ulster Banking Ltd* [1982] NI 203, and *Foley v Smith* [2004] IEHC 299. I was also directed to an extract from *Spencer Bower and Handley: Res Judicata* (4th ed) at page 24 and an extract from *McDermott on Res Judicata and Double Jeopardy* (1999).

95. Vaughan William J said in *Re South American and Mexican Co*:

"It has always been the law that a judgment by consent or default raises an estoppel, just as in the same way as a judgment after the court has exercised a judicial discretion in the matter."

96. In *Cox v Dublin City Distillery*, the plaintiff obtained judgment in default of defence after delivering a Statement of Claim. In subsequent proceedings the defendant sought to raise matters which were the subject of the Statement of Claim in the first proceedings. The Court held that the defendant was estopped from doing so and that if a default judgment is obtained against a defendant on motion of a Statement of Claim, it will bind the defendant on all issues raised in the Statement of Claim.

97. More recently, in *Foley v Smith* [2004] IEHC 299, Lavan J suggested that the courts would not strictly apply the doctrine of res judicata where to do so would cause an injustice or a breach of the right of access to the courts. I return to this aspect of the judgment below. However, Lavan J did not depart from or disagree with the principle in *Cox v Dublin City Distillery*.

98. In *McConnell v Lombard and Ulster Banking Ltd* [1982] NI 203 Gibson LJ held:

*"Where judgment has been marked in default of appearance of defence, then as between the parties and for the purpose of the proceeding, all allegations in the statement of claim are deemed to have been admitted by the defaulting party and to that extent he will generally be estopped from setting up in any subsequent proceeding any matter of defence which (to quote Lord Maugham LC in *New Brunswick Railway Co v British & French Trust Corporation Ltd* [1939] AC 1 at page 21) was "necessarily and with complete precision" decided against him by the previous judgment by default..."*

99. *Spencer Bower and Handley* write:

"A judgment (or Order) by default is a judicial decision, whether the default was in filing an appearance; in pleading; in appearance at the hearing; or in prosecution of, or resistance to, an appeal...It may not be easy to identify the issues of fact or law determined by a default judgment. In some cases it may be a form of judgment by consent, but in others it may be the result of negligence, ignorance, or other demands on the Defendant's time. A judgment by default in any form will, unless and until set aside, conclude the matters decided by its operative and declaratory parts. An issue estoppel will only be created by a default judgment if an issue was determined in favour of the Claimant which can be formulated with complete precision."

100. There are differences between these passages as to precisely what can be said to have been decided by a default judgment but there is no disagreement that a default judgment constitutes a judgment on the merits such as to raise an estoppel.

101. The plaintiffs pointed out that the defendants had really only cited one judgment of the Irish superior courts in support of their proposition that a *"default judgment has long been held as sufficient to ground res judicata and issue estoppel"* (*Cox v Dublin City*

Distillery) and that this was a pre-independence authority and was therefore decided prior to the constitutional recognition of the right of access to the courts. They acknowledged that Lavan J in *Foley v Smith* had not expressly overturned *Cox v Dublin City Distillery* but pointed out that he had declined to adopt a dogmatic approach to res judicata. The plaintiffs referred me to *Moffitt v Agricultural Credit Corporation plc [2008] 1 ILRM 416* in which Clarke J considered what constitutes a judgment on the merits. The issue in that case was the status of a previous decision striking out proceedings on the ground that they disclosed no reasonable cause of action and were frivolous and vexatious. Clarke J stated:

"3.2 ...It is well settled that in order for a plea of res judicata to succeed, the judgment upon which it is founded must be a final and conclusive judgment on the merits. There is no doubt that the [prior judgment] is a final judgment (at least since any prospect of an appeal from that judgment has disappeared by virtue of the order of the Supreme Court made in October 2006). There is, however, an issue between the parties as to whether it can properly be said that the [prior judgment] in the previous proceedings is a judgment on the merits. In that context, it is clear that the dismissal of proceedings for want of prosecution...or by virtue of prematurity...does not give rise to a bar to future proceedings.

3.3 In that context there is an issue as to whether a dismissal on the basis that proceedings are frivolous and vexatious or are an abuse of process amounts to a judgment on the merits. Counsel for Mr. Moffitt places reliance on the decision of this court in Dalton v Flynn, High Court, Laffoy J, May 20, 2004. One of the issues which arose in that case was as to whether a counterclaim brought in previous proceedings amounts to a bar to the prosecution of the case under consideration. To that counterclaim an objection was raised in the reply and defence to counterclaim to the effect that the matters raised were "unnecessary, scandalous and designed to embarrass and furthermore were frivolous and vexatious". Following an application in that regard, Finnegan P ordered the counterclaim to be struck out. It is not clear from the judgment of Laffoy J as to the precise basis upon which the counterclaim was struck out. Laffoy J concluded, at p.12, that the counterclaim in the previous proceedings was not adjudicated on the merits and that, therefore, it could not be a bar to the prosecution of the proceedings with which she was concerned.

3.4 It is suggested, therefore, that Dalton v Flynn is authority for the proposition that a dismissal on the basis that an action is bound to fail does not amount to a dismissal on the merits such as would give rise to a bar to the

same issue being raised again. There may well be cases where the fact that proceedings are dismissed as being frivolous or vexatious may not give rise to a bar to further proceedings. However it seems to me that where proceedings are dismissed as being bound to fail following on from a hearing in which the court considered the merits of the case for the purposes of determining whether the case had any chance of success, then it follows that fresh proceedings on the same basis are barred. In order to determine that proceedings are bound to fail, the court must enter into a consideration of the merits. Indeed it does so on the basis of allowing the benefit of the doubt concerning any factual or complex legal issues to be determined in favour of the plaintiff. The proceedings will only be dismissed...where the court is satisfied that there is no prospect of success on the merits. Such a hearing can, in my view, be properly described as a hearing on the merits.

3.5 *There may, of course, be other reasons why proceedings may be dismissed as being frivolous or vexatious which would not require the court to go fully into the merits of the case. In those circumstances a dismissal may not amount to a bar to future proceedings.*

3.6 *I am, therefore, satisfied that where a court enters into a consideration of the merits of a plaintiff's claim on a motion to dismiss as being bound to fail and comes to the conclusion, on the merits, that the proceedings are bound to fail, that it follows that the same proceedings cannot be recommenced without infringing the doctrine of res judicata."*

102. I do not consider Clarke J's judgment in *Moffitt* to depart from *Cox v Dublin City Distillery*. He did not even consider *Cox*. Nor did he consider the question of whether default judgments are judgments on the merits such as to give rise to an estoppel. He did not have to in circumstances where he was considering, not whether a default judgment is a judgment on the merits, but whether a dismissal on the grounds that the proceedings were frivolous and vexatious or are bound to fail amounts to a judgment on the merits.

103. I see no basis to depart from the long-standing *Cox v Dublin City Distillery* authority. I am reinforced in this view by *Foley v Smith*, *McConnell v Lombard & Ulster Banking Ltd [1982] NI 203* and the passage cited from *Spencer, Bowes and Handley*.

104. Furthermore, provided the doctrine is not pushed too far and only the bare essence is taken to have been decided, that a default judgment should be treated as a

judgment on the merits is consistent with the policy and public interest rationale underlying the doctrine of *res judicata*, ie. the interest of all citizens who resort to litigation in obtaining a final and conclusive determination of their disputes (Keane CJ in *Dublin Corporation v Building and Allied Trade Union*). Again, provided it is not pushed too far, considering a default judgment to be a judgment on the merits is not inconsistent with the right of access to the courts. A default judgment is both the end of a process and the beginning of a process. The defaulting party will have had a full opportunity to address the alleged default before judgment is granted. In respect of some alleged defaults there are specific provisions in the rules to ensure that the defaulting party has such an opportunity and, in any event, the Court is required in the interests of justice and fair procedures to ensure that they have such an opportunity. The default judgment is also the start of a process in the sense that the party against whom judgment is entered will be entitled to apply to have the judgment set aside if they believe it has been obtained irregularly. Thus, the right of access to the courts is vindicated.

105. I am therefore satisfied that a default judgment is a judgment on the merits such as can give rise to an estoppel.

106. In addition to contending that a default judgment is not a judgment on the merits, the plaintiffs made a number of specific arguments as to why this particular judgment was not one on the merits and does not give rise to an estoppel.

107. During the course of oral submissions, Senior Counsel for the plaintiffs dealt at length with the question of service of the Bank's 2013 motion for judgment which led to Kelly J's Order. He made a number of points about service of that motion and related correspondence. These included that, notwithstanding that the Bank knew that the plaintiffs were not legally represented and that the plaintiffs had been made bankrupt in England and therefore must have English addresses, the Bank served all correspondence prior to the motion itself on the plaintiffs' Irish addresses. That correspondence is referred to above. A number of points were also made in relation to service of the motion itself and the affidavits of service (of Ms. Andrea Brennan and Mr. Tony Mason). It was pointed out that Ms. Brennan referred to the motion papers being served by email even though the Rules of Court at that date did not provide for electronic service. Ms. Brennan also averred to the papers being served by ordinary pre-paid post. This was on the plaintiffs' Irish addresses rather than their English addresses. She also referred to engaging the services of a summons server to personally serve the plaintiffs. Mr. Mason, the summons server, swore an affidavit of service setting out his efforts to serve the plaintiffs personally. Ultimately, he was unable to do so, despite the efforts set out in his

affidavit. He deposes to hand-delivering the motion papers to the letter-boxes at the plaintiffs' Irish addresses. Senior Counsel for the plaintiffs emphasised that the bottom line is that personal service was not effected and there was no application for substituted service. When the motion was first before Kelly J on the 11th November he deemed the service of the motion good and adjourned it for two weeks for the purpose of the Bank filing a further affidavit deposing to the amount claimed to be due and owing. He also directed that the solicitor for the Bank give notice of this adjourned hearing to the plaintiffs "*in whatever form they think appropriate*". That affidavit was filed and Ms. Brennan swore a further affidavit of service averring that she sent a letter to each of the plaintiffs by email and post informing them of the adjourned hearing. Counsel emphasised that this letter was sent to the Irish addresses rather than the English addresses. The plaintiffs make the point that there was no application to deem service good under Order 9 rule 15 of the Rules. Counsel for the plaintiffs was critical of the direction that the solicitor for the Bank notify the plaintiff of the adjourned hearing date "*in whatever form they think appropriate*" and made the point that service is either in compliance with Order 9 Rule 15 of Order 10 Rule 1 of the Rules or not.

108. It was expressly stated on behalf of the plaintiffs that they were not asking this Court to overturn or set aside Kelly J's Order on the basis of defective service. They could not do so. It was entirely open to the plaintiffs to apply to have Kelly J's Order set aside and they did not do so. They can not ask this Court to do so in substance in the context of this motion. Rather these complaints about service or service-related issues were raised for the stated purpose of the Court assessing whether there was a determination on the merits. They were being raised to show that the defendants had failed to establish that the judgment was a merits-based assessment. Counsel said these issues go "*into the mix for [the Court's] consideration as to whether or not there was any real merit-based determination on the question of this judgment when one reads the case law as to what is involved and what constitutes a merits-based hearing.*"

109. I do not accept that this would be a correct approach. I do not accept on the level of principle that service is determinative of whether the decision of the Court is a decision on the merits. It can, of course, be determinative of whether the decision was properly made and that is precisely why a flaw in service may be a basis for setting aside an Order but that is entirely different from saying that the nature of the decision is determined by whether or not service was effected correctly. Furthermore, while it is disavowed by Counsel for the plaintiffs, the effect of the submission is that I should treat the judgment/order in a particular way because Kelly J got the question of service wrong. It is undoubtedly a collateral attack on Kelly J's Order. At the risk of repeating

the point, it was entirely open to the plaintiffs to apply to have Kelly J's Order set aside (I express no view on the merits of such application) and they did not do so.

110. Counsel raised a further point which is related to the question of service. He submitted that the only motion that the plaintiffs thought they were facing or that was before the court in 2013 was a motion to strike out the Defence for failure to comply with directions. The plaintiffs have never stated whether or not they received the correspondence or motion papers. Indeed, Senior Counsel expressly addressed this during the hearing, saying *"The only motion before the court was to strike out for not complying with discovery. That's what my clients understood was before the court when they see this motion. Now, whether they saw it or not is not the issue. And Mr. Dowling is going to say I am playing games with the court. I am not. Ultimately it's his obligation to reach the standards, not me to fill any vacuum he hasn't alleged himself"*. In any event, I fail to see the relevance of what the plaintiffs believed was before the Court to the question of whether the judgment was one on the merits or not. It seems to mean that if the plaintiffs saw the material before the hearing and thought some other type of relief was being sought they would have turned up. That can not define whether it is a judgment on the merits or not. But in any event, the motion itself sought two reliefs (i) an Order striking out the plaintiffs' Defence for failure to comply with directions of the Court and to make voluntary discovery and (ii) an Order granting the defendants judgment against the plaintiffs in a specified sum, and the motion was adjourned for two weeks to allow the Bank to file an affidavit setting out how much was due and owing. In addition, the letter informing the plaintiffs of the adjourned date stated *"We confirm that our client is seeking judgment against you on the basis that you have failed to comply with the Court's directions and to make voluntary discovery...We confirm that our client is seeking the sum of €12,915,316.40 as judgment against (sic) in respect of your liability under the Annville Facility as set out in the Notice of Motion previously served on you...We confirm that our client will be applying to the Court for judgment against you for the total amount due and owing under the Annville Facility on Monday, 25 November 2012."* It was therefore clear that judgment in that specified sum was being sought and that there was a risk of the Court granting judgment in the amount claimed was due and owing on the Annville Loan.

111. In oral submissions, (contrary to the argument made in written submissions that it was default judgment given after the plaintiffs' Defence was struck out) Senior Counsel for the plaintiff argued that the 2013 Order was not even a default judgment or a judgment in default of defence but rather was judgment for failure to comply with court directions and an agreement to make voluntary discovery. He argued that this is

analogous to judgment on the basis of a want of prosecution. I do not accept this argument. It is not supported by the facts. Kelly J did not grant judgment purely because the plaintiffs had failed to comply with directions. The terms of the Order are determinative. The motion had been adjourned for two weeks for the Bank to file a supplemental affidavit setting out the amount that was claimed to be due and owing. It is clear from the terms of the Order that the Court considered the merits of the claim. It states, after reciting that the Bank's Notice of Motion for judgment in a specified sum had come on for hearing:

"And on reading said Notice the Grounding Affidavit of Mairéad Morgan filed on the 4th day of November 2013 the Affidavit of Brian Farrell filed on the 9th day of October 2013 the exhibits referred to in said Affidavits and the pleadings and proceedings had herein including the Affidavits of Service of the Motion papers on the Defendants and on the Official Receiver (both of the Defendants having been adjudicated Bankrupt in the United Kingdom) together with the letter dated the 6th day of November 2013 from the Official Receiver to A&L Goodbody Solicitors for the Plaintiff.

And the Court on the 11th day of November 2013 having noted that the Official Receiver is not going to participate in the further defence of these proceedings.

And the Court on the 11th day of November 2013 having deemed the service to be good and sufficient service of the Motion papers on the Defendants.

And the Court on the 11th day of November 2013 having directed that the Plaintiff do file a Supplemental Affidavit/Affidavit of Debt indicating the sum now due and owing.

And the Court on the 11th day of November 2013 having directed that the Solicitors for the Plaintiff do give notice (in whatever form they think appropriate) to the Defendants of this adjourned hearing.

And on reading the Supplemental Affidavit of Mairéad Morgan filed on the 20th day of November 2013 and the exhibit thereto.

And on reading the Affidavit of Service of Andrea Brennan filed on the 20th day of November 2013 and the exhibits thereto.

And on the application of Counsel for the Plaintiff for an Order granting the Plaintiff judgment as against the Defendants, jointly and severally, in the sum of €12,915,316.47.

And on hearing said Counsel – there being no attendance in Court by or on behalf of the Defendants or either of them.

And the Court determining that the Plaintiff's proofs are now in order.

And the Court being satisfied that the Defendants are indebted to the Plaintiff in the sum of €12,915,316.47 (as at the 4th day of November 2013).

And the Court being satisfied that the Defendants are aware of the application today and that all due steps have been taken so as to ensure that that is the case.

And the Court being satisfied that the Defendants have effectively abandoned the defence to these proceedings and that in any event they are now Bankrupts in the United Kingdom.

IT IS ORDERED AND ADJUDGED that the Plaintiff do recover as against the Defendants, jointly and severally, the sum of €12,915,316.47 and the costs of this application and the costs of these proceedings, such costs to be taxed in default of agreement."

112. Kelly J in the Order expressly states that the Court was satisfied that the plaintiffs had effectively abandoned their defence to the proceedings and that in any event they were bankrupts in the United Kingdom and that he had read the pleadings and was satisfied that the Bank's proofs were in order and was satisfied that the defendants were indebted to the Bank in the sum of €12,915,316.47. Judgment was not granted simply because of non-compliance with court directions. The Court did conduct an assessment of the merits of the Bank's claim. It could not have determined that the proofs were in order, or more particularly, that the plaintiffs were indebted to the Bank in the specific sum without considering the merits. The plaintiffs also submit that the Court was not entitled to do this but judgment was one of the reliefs sought in the Notice of Motion.

113. It was also submitted on behalf of the plaintiffs that the judgment in the 2013 proceedings did not consider the merits of their Defence. They point out that the application for summary judgment was refused and the plaintiffs were given leave to defend the proceedings and that judgment was only entered after the plaintiffs' Defence was struck out. They submitted that "*The Bank's failure to obtain summary judgment can provide no clearer indication that the merits of the Plaintiff's defence to 2013 proceedings were not adjudicated on.*"

114. It is correct to say that the Kelly J Order could not have determined any specific points in the Defence. Once he had struck out the Defence (or treated it as having been abandoned) then he could not have specifically decided any matters pleaded in that Defence – it was effectively as though there was no Defence. However, it is the fact that Kelly J considered the merits of the claim made by the Bank that makes it a judgment on the merits. The fact that Kelly J could not have expressly decided any matters pleaded in the Defence goes to the question of precisely what was decided by the 2013 proceedings rather than whether it was a judgment on the merits. I therefore address this further in the next section, ie. whether the third key criteria is met – whether the 2013 proceedings determined the same issue(s) as arises in these proceedings.

Did the 2013 Proceedings Determine the Same Issues?

115. The third criteria is that the 2013 proceedings must have necessarily determined the same issue(s) as arise in the current proceedings. Of course, this goes to the heart of the doctrine of res judicata/issue estoppel.

116. There can be no suggestion that the issues raised in relation to the conduct of the receivership by the third and fourth-named defendants are res judicata and therefore this section is only concerned with the claims against the first and second-named defendants.

117. The first question to be addressed is what was decided in the 2013 proceedings. This is related to the question with which I concluded the previous section, ie. what is decided by a default judgment?

118. It was held in *Cox v Dublin City Distillery*:

“The case of the Irish Land Commission v. Ryan (2) has also been relied on by the respondents, but appears to me to be clearly distinguishable. Lord Justice Holmes in that case points out clearly the essential difference between a case like the Irish Land Commission v. Ryan (2), where there was a default of appearance to the writ, and judgment was entered in the office, and a suit like that which we are now considering, where we have a specific claim of Mr. Doherty clearly pleaded in the statement of claim, an appearance entered by the trustees, a hearing in Court, and a judgment entered which is a matter of record. It appears to me a startling proposition that a plaintiff who has delivered a statement of claim setting forth his cause of action is in a worse position when

the defendant fails to file a defence than he would be in if a mere bogus defence were put on the file of the Court which the defendant could not subsequently substantiate. The defendant who does not file a defence admits the averments in the statement of claim, but the plaintiff cannot by reason of this obtain judgment in the office; he must apply to the Court, and the Court determines what judgment is proper to be entered.

In the present case the Court had before it a perfectly clear statement of claim, claiming a right against the property comprised in the trust deed, the trustees being before the Court. The Court determines what the effect is of the failure to deliver a defence, and says that there is an admission that the plaintiff's claim is a valid one against the property comprised in the deed. What more could the plaintiff do? If the argument based on the supposed effect of the decision in the Irish Land Commission v. Ryan (1) is sound, it appears to me that the entire procedure in Mr. Doherty's action is rendered futile. I do not consider that the Irish Land Commission v. Ryan (1) is an authority in favour of the respondents. At p. 572, Lord Justice FitzGibbon said:— "That a judgment by default has an operation by estoppel cannot be denied; but the ground and extent of that estoppel must, in my opinion, be found on the face of the judgment itself, and cannot be inferred or deduced from the pleading of the party who has obtained the judgment, when the defendant has said nothing, and done nothing, and has merely allowed the judgment to go by default." Although this passage is relied on by the respondent, the learned Lord Justice clearly recognizes that a judgment by default may operate as an estoppel, and when, as in the present case, we find, on looking at the record, a complete statement of the plaintiff's claim, and a judgment entered in open Court based on admission of that claim by the defendants in not delivering a defence, that judgment must, in my opinion, operate as an estoppel."

119. In *McConnell v Lombard and Ulster Banking Ltd* [1982] NI 203, Gibson LJ held:

*"Where judgment has been marked in default of appearance of defence, then as between the parties and for the purpose of the proceeding, all allegations in the statement of claim are deemed to have been admitted by the defaulting party and to that extent he will generally be estopped from setting up in any subsequent proceeding any matter of defence which (to quote Lord Maugham L.C. In *New Brunswick Railway Co. v. British & French Trust Corporation Ltd.* [1939] A.C 1 at page 21) was "necessarily and with complete precision" decided*

against him by the previous judgment by default. As Lord Radcliffe said in *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964] A.C. 993 at page 1012, the limits prescribed by the principle will be strictly observed; and **the courts will scrutinise such judgments with extreme particularity in order to ascertain the bare essence of what must necessarily have been decided and to avoid implying as having been decided by a judgment by default any more than is necessarily involved by reason of the fact that judgment has been obtained.**" [emphasis added]

120. In *Spencer Bower & Hadley* it is stated:

"2.22 A judgment (by Order) by default is a judicial decision, whether the defendant was in filing an appearance; in pleading; in appearance at the hearing; or in prosecution of, or resistance to, an appeal... **It may not be easy to identify the issues of fact or law determined by a default judgment.** In some cases it may be a form of judgment by consent, but in others it may be the result of negligence, ignorance or other demands on the Defendant's time. **A judgment by default in any form will, unless and until set aside, conclude the matters expressly decided by its operative and declaratory parts. An issue estoppel will only be created by a default judgment if an issue was determined in favour of the Claimant which can be formulated with complete precision.**" [emphasis added]

121. *McDermott on Res Judicata and Double Jeopardy* writes :

"[4.28] The limited nature of estoppel in such circumstances was established by *Irish Land Commission v Ryan*, where it was held that a judgment by default may operate as an estoppel, but the extent of such estoppel must be found on the face of the judgment itself and cannot be inferred from the pleadings of the party who has obtained the judgment, where the defendant has said nothing but merely allowed the judgment to go by default. *Ryan* has been described as possibly the only modern case in which a distinction for the purposes of estoppel has been drawn between default before pleading and default after pleading. Under *Ryan*, the former only binds by what the judgment says on its face, whereas the latter binds as a normal estoppel (ie by what was expressly and impliedly decided).

[4.29] *The distinction was impliedly abolished by Cox v Dublin City Distillery (No. 3) where it was suggested that if a default judgment is obtained on motion of a statement of claim it will bind the defendant on all of the issues raised by the statement of claim. Unfortunately, instead of overruling Ryan, both O'Brien C and Ronan LJ distinguished it on the ground that whereas in Ryan the defendant made default of appearance in the first action, in the instant case the default had been made after the statement of claim. Their Lordships seem to have been of the opinion that Ryan was really based upon the fact that as there was no statement of claim forming part of the record there could be no estoppel. However, such an explanation is inconsistent with the majority judgment in Ryan. Nonetheless the view espoused in Cox, namely that issue estoppel is available upon the basis of a prior judgment given in total default of pleading has been followed in subsequent Irish cases. Interestingly, it has been suggested that the Ryan approach is alone consistent with the historical basis of issue estoppel and in England Lord Wright has raised his voice against applying issue estoppel too broadly to default judgments...*

[4.30] *The present position in England appears to be that issue estoppel will only apply if the identical issue arise in the first action, and must necessarily have been decided with complete precision as the basis of the default judgment. It is not enough that the issues are almost identical. The precise scope of issue estoppel based on default judgments in Ireland awaits a modern case, but given the dangers of applying estoppel in such circumstances, it is submitted that the English position should prove persuasive here."*

122. While McDermott raises concerns about the approach in *Cox v Dublin City Distillery*, Irish law as it currently stands is that the 2013 judgment binds on all of the issues raised by the Statement of Claim (or in this case the Summary Summons).

123. However, it is essential, it seems to me, particularly on a motion such as this, that the Court does not conclude that any more was decided "*than is necessarily involved by reason of the fact that judgment has been obtained.*" That follows from the requirement to balance the operation of the doctrine of res judicata with the plaintiffs' right of access to the courts.

124. It was pleaded in the Summary Summons:

"13. Under the terms of the Annville Facility Letter, the Annville Facility was repayable on demand.

DEMAND

14. ...

15. *By further letter of demand also dated 2 November 2012, delivered to the Defendants by hand, the Bank demanded the sum of €20,170,000 together with accrued interest in the sum of €70,410.67 then due pursuant to the terms of the Annaville Facility Letter.*

16. *Despite the said demands having been made, the Defendants have failed, refused and/or neglected to pay any and all of the sums due and owing to the Bank under the ... Annaville Facility Letter...*

17. *There is accordingly, due and owing to the Plaintiff by the Defendants the following sums on foot of the abovementioned facilities..."*

125. This was, of course, further expanded upon in the grounding affidavit filed on behalf of the Bank. It is clear from the Order of Kelly J that he had regard to the contents of the affidavits filed on behalf of the Bank.

126. I am satisfied that the 2013 judgment determined that the facility was an on demand facility. That was expressly claimed in the Summary Summons. This must, of necessity, have required a determination of the proper construction of the facility, as varied. It must also therefore have determined that in its terms the Bank was entitled to call in the loan, ie. to demand repayment, and, it follows, that the amount was due and owing.

127. I am not satisfied, however, as I must be on a motion of this type, that the plaintiffs could not successfully argue that the 2013 proceedings did not determine the existence and/or effect of the alleged collateral contract. In my view, there is an argument that this would be to interpret the judgment too broadly where it was not an adjudication of the Defence. I acknowledge that this gives rise to a risk of an illogicality. It could be asked how the Court could be found to have concluded that the facility was an on demand facility and that the Bank was entitled to call in the loan without also determining that there was nothing precluding them from doing so such as the collateral contract. But in the context of a motion of this type, there is a difference between finding that the earlier court must have determined the proper construction of the facility but might not have determined whether the exercise of the rights in the facility was (or

was not) waived or subject to a collateral contract . All I am required (and am entitled) to consider is whether the plaintiffs could not succeed in making the argument and, in my view, while such an argument might well not succeed it can not be said that it could not succeed.

128. The second question is what issues are raised in these proceedings and the third is whether the two sets of issues are the same.

129. The fact and effect of the alleged collateral contract are not pleaded in these proceedings as things currently stand. I discuss this in greater detail in the section on the application of the rule in *Henderson v Henderson* and I indicate that I proceed on the basis that it is or will be part of the case. I do so for this purpose also. It follows from what I said about what was not decided in the 2013 proceedings that I can not conclude that a res judicata arises in respect of the collateral contract.

130. These proceedings also raise the question of whether the facility, as varied, was an on demand facility (see, for example, paragraphs 23, 24, 29 and 30 of the Statement of claim) and I am satisfied that this was determined in the 2013 judgment.

131. However, that does not deal with all matters because the plaintiffs also submit that the claim in these proceedings is radically different to the issues in the 2013 proceedings. They put it as follows at paragraph 3.12 of their written submissions:

"...the claim advanced in the current proceedings is not the same as the matters at issue in the 2013 Proceedings and the 2013 Proceedings did not involve the same parties. In the 2013 Proceedings, the Bank sought repayment of the monies advanced to them in respect of the Annville Facility and a separate facility in relation to a development at Castlepark Road, Dalkey. In respect of the repayment of the Annville Facility, the Plaintiffs defended the Bank's claim on the basis that no default had occurred due to the existence of a collateral contract. The claim now advanced in the within proceedings is very different. In this regard, the Plaintiffs now make claims against not only the Bank, but also RBS and the Receivers. As against the Bank, the Plaintiffs have pleaded that it wrongfully withdrew their banking facilities when the Annville Facility was not in default and that it wrongfully appointed the Receivers over the Annville Property. The Plaintiffs have also pleaded that this action was taken by the Bank in accordance with instructions from RBS. Accordingly, the Plaintiffs have effectively pleaded that the Bank and RBS engaged in a conspiracy to destroy their business. Not only did these issues not form part of the 2013 Proceedings, but they also never could have formed part of the 2013 Proceedings due to the

Plaintiffs' lack of contemporaneous knowledge of RBS's strategy. No details of the various investigations into GRG had been made public at that point in time. Furthermore, the Plaintiffs' claim against the Receivers concerning the conduct of their receivership manifestly did not form part of the 2013 Proceedings."

132. The defendants' core submission is that all of the claims in the current proceedings are "entirely premised on the assertion that the Bank was not entitled to "call-in" the Annville Facility...The primary aspect of the claim against the Receivers appears to be that they were invalidly appointed...That, again, depends on the allegation that the Bank was not entitled to "call-in" the Annville Facility. The claim against RBS is that it gave an instruction to call in the Annville Facility as part of a deliberate strategy to destroy the Borrowers' business. But, yet again, that depends on "the calling" of the Annville Facility being wrongful." It was submitted that as the lawfulness of the calling in of the loan was determined by Kelly J, the issue underlying all of the claims advanced by the plaintiffs has already been determined.

133. In circumstances where I have already held that the 2013 proceedings determined that the loan was an on demand facility and the Bank was entitled to call in the loan, it seems to me that the defendants' argument is compelling. There are a number of different aspects to the plaintiffs' claim. Hardiman J, in *AA The Medical Council* adopted the statement of Bingham J in *Johnson v Gore Woods & Co [2002] 2 AC 32* that a "broad merits-based judgment" approach should be taken. While this was in the context of a consideration of the rule in *Henderson v Henderson*, I will nonetheless adopt this approach. Thus, I do not propose to parse the plaintiffs' claim in the pleadings. The pleadings contain a number of different complaints and it is not obvious whether all of these form the basis for the prayer for relief or whether some are simply part of the narrative. However, it is clear that the plaintiffs claim that the defendants are guilty of misrepresentation, breach of contract, negligence, breach of duty, deceit, conspiracy, and intentional interference with the economic interests of the plaintiffs. There is considerable force to the defendants' argument that all of the plaintiffs' claims (other than the one against the third and fourth-named defendants in respect of their conduct of the receivership) are based on the fundamental point that the Bank was not entitled to call in the Annville Loan in October/November 2012. At paragraph 43 of the plaintiffs' first replying affidavit in these proceedings the first-named plaintiff states:

*"The claim now advanced in the within proceedings is very different. In this regard, we now make claims against not only the Bank, but also RBS and the Receivers. **As against the Bank, we have pleaded that it wrongfully***

withdrew our banking facilities when the Annville Facility was not in default (as was confirmed in a previous affidavit sworn by Gareth Fay on 31 May 2013 on behalf of the Bank) and that it wrongfully appointed the Receivers over the Annville Property. We have pleaded that this action was taken by the Bank in accordance with instructions from RBS and as executed by the GRG Division of RBS. Accordingly, we have pleaded that the Bank and RBS engaged in a conspiracy to destroy our business. Not only did these issues not form part of the 2013 proceedings, but they also never could have formed part of the 2013 proceedings due to a lack of knowledge of RBS's strategy at that time. No details of the various investigations into GRG had then been made public. Indeed, it was only in 2017 that the Bank confirmed to us that it operated the Annville Facility at the direction of RBS's GRG. The issues surrounding the operation of RBS's GRG only fully came to light following the publication of the UK Parliamentary report in 2018. Furthermore, our claim against the Receivers concerning the conduct of the receivership – namely that they wrongfully disposed of assets and failed to report in any way over 7 years to give us credit for same – manifestly did not form part of the 2013 proceedings. We do not believe that the doctrine of *res judicata* or *issue estoppel* can apply." [emphasis added]

134. This is reflected in paragraph 3.12 of the written submissions which is set out above.

135. There is considerable force to the argument that the issue underlying all of these claims was decided when Kelly J determined that the facility was an on demand one and that the Bank was entitled to call in the loan and that this must give rise to an issue estoppel.

136. However, the test on a motion such as this is not whether the defendants have a strong or compelling argument or even whether the plaintiffs are unlikely to succeed. It seems to me that it is arguable that even though Kelly J held that the Bank was entitled to call in the loan that does not resolve or determine all of the claims in these proceedings. This is most clear in relation to the case in conspiracy. That claim does not necessarily require a determination that the loan was not an on demand facility. An actionable conspiracy can arise even where the act giving rise to the damage is lawful. 'Lawful-means conspiracy' is one where persons combine to act with the predominant purpose of damaging the economic interests of a third party without employing unlawful means such as a tort or crime. Thus, it is arguable that while the act of calling in the

loan was not in itself unlawful or wrongful it was done on foot of an unlawful conspiracy and Kelly J's decision that the Bank was entitled to call in the loan does not determine that claim. Such a conspiracy itself would, of course, arguably be in breach of contract. It is true to say that the plaintiffs do appear to make the case that the Bank was not entitled to call in the loan at all and that the act of doing so was in itself wrongful. If that were the limit of the case it would be impossible to see how it could be said that the claim was not res judicata. However, it seems to me that there is sufficient basis in the pleadings, in the context of this motion, for concluding that part of their case is that even if the Bank was technically entitled to call in the loan it did so on foot of a breach of contract and conspiracy. For example, it is pleaded in paragraph 33 of the Statement of Claim that RBS "*established an illegitimate, illegal and improper strategy, **which was in itself in breach of contract**, involving the re-categorisation of certain investments and securities, and the singling out of customers and facilities that fitted the profile of being capable of immediate realisation, encashment and achievement of short term return*" (emphasis added) and at paragraph 34 that the Bank and RBS "*implemented such a plan and strategy to the detriment to the Plaintiffs and with no just cause or commercial reason acted to the serious harm of the plaintiffs, and the sole purpose of seeking to recovering capital as quickly as possible to cover up the First and Second Defendant's financial reserves.*"

137. Thus, it is open to the plaintiffs to argue that while the act of calling in the loan was not in itself unlawful or wrongful, it was done on foot of an unlawful conspiracy. That being the case, the decision by Kelly J that the Bank was entitled, under the terms of the facility, to call in the loan does not give rise to an issue estoppel precluding the plaintiffs from maintaining their claims in conspiracy, deceit, negligence, and breach of contract and duty insofar as the latter two relate to the alleged conspiracy, deceit and intentional interference with the economic interests of the plaintiffs.

138. Of course, I express no views on the merits of these arguments other than that the possibility of them succeeding can not be excluded.

Same Parties or Their Privies

139. The fourth key criteria is that the parties to both sets of proceedings be the same or their privies. *McDermott* comments at paragraph 5.02 that "*Traditionally the requirement of the same parties or privies has been a strict one, and whereas some flexibility may be permitted when deciding on identity of issues, this does not extend to*

identity of parties. In the words of Lord Lowry, "identity of issues raises a question of fact and degree, whereas privity is based on a legal rule which cannot be evaded."

140. The parties are not the same in these two sets of proceedings and therefore whether this criteria is satisfied depends on whether the parties are in fact privies. I should say that the Court has to be very alert to a situation where a plaintiff in later proceedings adds in additional defendants to a second set of proceedings purely to avoid the doctrine of res judicata. However, I could not conclude on a motion of this type that the plaintiffs have done this in these proceedings in circumstances where (i) there is a separate claim against the third and fourth-named defendants and therefore they are proper defendants and (ii) a claim of conspiracy is made against RBS and it is, therefore, on the face of it a proper additional defendant.

141. *McDermott* notes that it has been said that there is a dearth of authority on the question of privies and that it is not easy to distil any principle. The requisite privity is of blood, title or interest. In this case any privity which might arise is that of interest. Aldous LJ in *Kirin-Amgen Inc v Boehringer Mannheim GmbH* [1997] FSR 289 (quoted in *McDermott*) said:

"It is not possible to have in mind all the circumstances where privity of interest may arise and therefore it would not be right to try to formulate a definition. Each case has to be decided in the light of its particular facts. However, it will only be where the person sought be estopped has the same interest or an interest which has a sufficient degree of identification with that interest, so as to require that the decision should bind the other party in the second action, that the court will hold that there is privity of interest."

142. In my view, the question of whether RBS or the joint receivers are acting as privies of the Bank or whether the Bank was acting as privy for RBS in the 2013 proceedings is too complex a question and too fact-specific to safely conclude on a dismiss motion that the plaintiffs could not succeed in arguing that the parties are not privies and therefore I can not conclude that this criteria is satisfied.

Abuse of Process – Henderson v Henderson

143. In the well-known passage in *Henderson v Henderson* [1843] 3 Hare 100 Wigram VC said:

"I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time"

144. This rule has been indorsed and applied in innumerable cases in this jurisdiction, including by the Supreme Court in the well-known cases of *Carroll v Ryan* [2003] 1 IR 309 and *AA v The Medical Council* [2003] 4 IR 302. It was stated in *Carroll v Ryan* that there was a "well-established rule of law whereby a litigant may not make the same contention, in legal proceedings, which might have been but was not brought forward in previous litigation." Hardiman J in *Carroll v Ryan* and *AA v the Medical Council* also approved a statement of the law by Bingham J in *Johnson v Gore Woods & Co* [2002] 2 AC 32 which has often been quoted since. Bingham J said:

"... But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be

much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

145. More recently, the rule and its application were considered in cases such as *Re Vantive Holdings* [2009] IEHC 408 (High Court) and [2020] 2 IR 118, *Morrissey v IBRC & Ors* [2015] IEHC 200, *O'Connor v Sherry Fitzgerald* [2018] IECA 67 and *George v AVA. Edwards J in O'Connor v Sherry Fitzgerald* [2018] IECA 67 stated:

"76. In her judgment in the Court of Appeal in the receiver proceedings (see O'Connor v Cotter & anor [2017] IECA 25, Finlay Geoghegan J set out the current state of the law in relation to the rule in Henderson v Henderson. She said:

"7. The rule in Henderson v. Henderson, as it is commonly known, deriving from the decision in Henderson v. Henderson [1843] 3 HARE 100, was recently considered by the Court of Appeal in Vico Limited and Others v. Bank of Ireland and Others [2016] IECA 273. As stated in that judgment, which I delivered (with the concurrence of Peart J. and Irvine J.), "[t]he underlying principle is similar to that in res judicata namely the public

interest in those who resort to litigation obtaining a final and conclusive determination of their disputes."

8. *In that judgment, I adopted the explanation of the rule in Henderson v. Henderson given by Cooke J. in the High Court in Re: Vantive Holdings & Others and the Companies Acts 1963-2006 [2009] IEHC 408, at paras. 32 to 33, and cited on appeal by Murray C.J. in Re: Vantive Holdings [2010] 2 I.R. 118, at para. 21:-*

"The rule in Henderson v. Henderson is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."

9. *As pointed out in the Vico judgment the special cases are primarily those where the first judgment was procured by fraud. That does not arise on the facts herein.*

10. *The more recent mitigation of the rule derives from the re-statement of the abuse of process rule in Henderson v. Henderson by Lord Bingham in Johnson v. Gore Wood & Co. [2002] 2 AC 1 at 31, which has been approved of by the Supreme Court in this jurisdiction in a number of cases:-*

...

77. *The High Court judge in the present case correctly cited the law in regard to the rule in Henderson v Henderson, and referred in particular to AA v The Medical Council [2003] 4 I.R. 302 where Hardiman J. at 316, approved of the passage just quoted from the judgment of Lord Bingham in Johnson v. Gore Wood & Co. [2002] 2 A.C. 1"*

146. In *AA v The Medical Council* Denham J, at pp. 141-142 (quoted by Costello J in *Morrissey v IBRC*) likewise reaffirmed the rule as follows:-

"[85] [T]he underlying principle is similar to the concept of the abuse of process. As Bingham M.R. stated in *Barrow v. Bankside Ltd.* [1996] 1 W.L.R. 257 at p. 260:-

"The rule in Henderson v. Henderson (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

...

[89] There are exceptional circumstances, in the interests of justice, when a matter may be revisited. But the fundamental principle is that it is in the public interest and for the common good that there should be finality in litigation. An aspect of this principle is that parties should not be exposed to multiple litigation and should have closure on an issue. Also, there is the public interest that the limited resources of the courts should be used justly and with economy."

147. The rule in *Henderson v Henderson* as interpreted and refined in these authorities is relevant to the current case in a number of different respects.

148. Firstly, even if I am wrong that it is not arguable that Kelly J's Order is not a final order on the merits such as to engage the classic doctrine of res judicata, the rule in *Henderson v Henderson* may apply to preclude the plaintiffs from maintaining the action on the basis that they seek to raise points which they originally raised in the 2013 proceedings but which they did not pursue by allowing judgment to be entered against them and then not seeking to have that judgment set aside.

149. Secondly, even though Kelly J's Order is a judgment on the merits he did not expressly adjudicate on all the points raised in the Defence (because the Defence had

been struck out at that stage). Similar to the previous point, however, the reason why those points were not determined was because of the plaintiffs' default. In other words, they could have had a determination of those points in the 2013 proceedings but did not because they abandoned their Defence. *Henderson v Henderson* may apply to preclude them from now running the same points in these proceedings.

150. Thirdly, the plaintiffs now raise points which were not raised in the 2013 proceedings. If those points could have been raised with the exercise of reasonable diligence then the rule in *Henderson v Henderson* may apply.

151. I propose to deal with each of these in turn, dealing with the first and second together.

152. The more classic operation of the *Henderson v Henderson* abuse of process jurisdiction is where a party does not raise a point that he could have in one set of proceedings and then seeks to raise that point in a subsequent set of proceedings. However, it must also operate where a party raises the point in the earlier set of proceedings but through his actions (or inaction) the point is then not determined in those proceedings. In this case, the plaintiffs raised a number of points but did not pursue them in circumstances where they "abandoned their defence" (per Kelly J). They fully defended the 2013 proceedings up to a very advanced stage of the proceedings at significant cost to both themselves and the Bank (one of the defendants in these proceedings). In those proceedings, they raised certain points but then, through their actions or inaction, caused the points to not be determined (assuming that is the effect of Kelly J's Order either because it is not a judgment on the merits or because he did not adjudicate on the points of defence) and now raises or seeks to raise them again. The very purpose of the doctrine of res judicata and the rule in *Henderson v Henderson* is to discourage or prevent such an approach to litigation. They are directed towards preventing the unfairness to a party of having to deal with points in one set of proceedings and, even if not decided in those proceedings, of having to deal with them again in a subsequent set of proceedings or of having to deal with points that should have been raised but were not. There is also a significant public interest in ensuring that such an approach to litigation is not permitted. It is a very significant burden on scarce public resources.

153. What are the relevant points, ie. what points were raised in the 2013 proceedings that are raised again or sought to be raised again? The points raised in the 2013 proceedings are contained in the affidavits filed in those proceedings but it is most appropriate to refer to the Defence filed in those proceedings after Cooke J remitted the

matter to plenary hearing. There were essentially three points: (i) that the facility on its proper construction (as varied by the Supplemental Facility Letter) was not an "on demand" facility, (ii) the fact of the alleged collateral contract, and (iii) the alleged effect of that contract. I do not propose to recite all of the relevant paragraphs of the Defence. The most directly relevant pleas are as follows:

"6. The Defendants will rely on the full terms and conditions governing the Annville Facility – as particularised below – at the trial of this action.

(i) The Annville Facility Letter was amended by letter dated the 1st day of February 2011 (hereinafter the "Supplemental Facility Letter")

...

(vi) The terms of the Supplemental Facility Letter were offered by the Plaintiff and accepted by the Defendants in the course of a meeting which took place at the Plaintiff's offices...at which the Plaintiff was represented by John Collison and Deirdre Collier.

(vii) In the course of the Meeting Mr. Collison – on behalf of the Plaintiff – promised to the Defendants, and each of them (hereinafter "the Collateral Contract"), that in the event that the Defendants accepted the Supplemental Facility Letter and in the event that sales proceeds at Castlepark were not sufficient to permit the discharge of the "bullet payment", that the Plaintiff would extend the Annville Facility up to a maximum period of two years provided that the Defendants had made all scheduled payments in accordance with the Annville Facility Letter.

(viii) Mr. Collison expressly represented to the Defendants, and each of them, on behalf of the Plaintiff that the chief term of the Collateral Contract – the provision of additional time within which to make the "bullet payment" – was not conditional or otherwise predicated upon the approval of the Plaintiff's Credit Committee.

...

7. By reason of the matters particularised at Paragraph No.6 above, the Plaintiff is not entitled to make demand on foot of the Annville Facility before the 31st day of December, 2014. In the circumstances, the plaintiff's cause of action in these proceedings – which is denied – has not yet accrued.

...

10. It is denied that the Annville Facility was repayable on demand.

11. *Without prejudice to the foregoing and for the avoidance of doubt, after the 31st day of January, 2011 the Annville Facility ceased to be repayable on demand save in circumstances where the Defendants did not comply with the repayment schedule set forth in the Annville Facility Letter at any time up to the 31st day of December, 2014.*

...

14. *Without prejudice to the foregoing, the Plaintiff's actions in making demand of the Defendants in respect of the Annville Facility – in circumstances where the Defendants had complied with the repayment schedule outlined in the Annville Facility Letter up until the 2nd day of November, 2012 – amounts to a breach of the Collateral Contract on the part of the Plaintiff."*

154. Those precise points are raised or sought to be raised in the current proceedings. As mentioned in the section dealing with res judicata, an interesting feature of this is that the existence or the effect of the alleged collateral contract is not currently pleaded as part of the plaintiffs' claims. This topic was a significant part of the argument at the hearing. I am fully satisfied that it is not part of the pleaded case. There is no reference whatsoever to it in the Statement of Claim. Nonetheless, Senior Counsel for the plaintiffs insisted that the case relating to the alleged collateral contract is part of the case and brought the Court to the Replies to Particulars (thereby implicitly (and correctly) accepting that it was not pleaded in the Statement of Claim itself). I was referred to paragraphs 17.1, 19.4 and 44.4 of the Replies to Particulars.

155. The Replies to Particulars were helpfully given in a consolidated format with the replies contained immediately below the relevant paragraph in the Notice for Particulars. The replies are in bold below.

156. Paragraph 17 of the Notice for Particulars arose from paragraph 21 of the Statement of Claim. Paragraph 21 of the Statement of Claim pleaded:

"21. On the 1st February 2011, the Plaintiffs entered into an Agreement with the First Defendant to make a bullet payment of €3m on or before the 31st December 2012 in order to remedy the breach by the First Defendant. This was to result in an acceleration of capital payments, with capital being repaid at twice the envisaged rate. The Plaintiffs will refer to this agreement in greater particularity for its full terms, meaning and effect at the hearing of this action."

157. Paragraph 17 of the Notice and Replies to Particulars read as follows:

"17.1 Please confirm the parties to the alleged agreement for the Plaintiffs to make a "bullet payment" of €3m on or before 31 December 2012.

The First Defendant (via John Collison, Associate Director, Corporate Banking, and Deirdre Collier, Senior Manager, Corporate Banking) and the Plaintiffs.

17.2 Please specify any persons who negotiated the alleged agreement on behalf of any of the parties;

Please see the reply at paragraph 17.1 above.

17.3 In respect of the alleged agreement, please confirm whether same was made orally or in writing;

In writing. Please see attached copy of the 2011 Agreement.

17.4 If the alleged agreement was made orally, please state when and where the agreement was made, the substance of the words used and identify who was present on behalf of the Plaintiffs and who was present on behalf of the First Defendant;

Please see the reply at paragraph 17.3 above.

17.5 If the alleged agreement was made in writing and/or is evidenced in writing, please produce a copy of same;

Please see the reply at paragraph 17.3 above.

17.6 Please specify each and every term of the alleged agreement.

Please see the reply at paragraph 17.3 above. The Plaintiffs will rely on the text of the 2011 Agreement for its full meaning and effect."

158. While these replies do refer to the agreement having been negotiated by John Collison and Deirdre Collier (who it was previously alleged made the collateral contract), the agreement being referred to, as is clear from the express terms of paragraph 21 of the Statement of Claim with which paragraph 17 is dealing, is the agreement of the 1st February 2011. The complete absence of any reference to any collateral contract being reached on the 31st January together with the express reference to the written agreement of the 1st February 2011 and the plaintiffs' reliance on the terms thereof are particularly striking.

159. At paragraph 23 of the Statement of Claim the plaintiffs claim that the appointment of the receivers was *"in breach of the loan facility and the 2011 Agreement by reason of the ongoing performance by the Plaintiffs."* At paragraph 19.4 of the Notice for Particulars (to which the Court was referred by the plaintiffs), arising from paragraph 23, the defendants asked the plaintiffs to *"Please specify the terms of the said agreements that it is alleged were breached by the appointment of Third and Fourth Defendants as joint receivers."* However, this must be seen in context. Paragraphs 19.2 and 19.3 read as follows:

"19.2 Please specify the terms of the loan facility that it is alleged were breached;

The terms included the provision that the Plaintiffs would repay the sum of €3m no later than 31 December 2012. Despite this, the Third and Fourth Defendants were appointed on 25 October 2012 in advance of this agreed date.

19.3 Please confirm if the "2011 Agreement" means the alleged agreement referred to at paragraph 21 of the Statement of Claim. If some other agreement, please specify the agreement referred to:

Confirmed."

160. The *"alleged agreement referred to at paragraph 21 of the Statement of Claim"* is, of course, the agreement of the 1st February 2011 (the Supplemental Facility Letter).

161. The reply to particular 19.4 was as follows:

"The First Defendant breached the terms of the 2005 Agreement by failing to maintain the facility as a tracker mortgage of a 20-year duration to 2025 despite the fact that no payments had ever been late or missed.

The First Defendant breached the term of the 2011 Agreement, which allowed the Plaintiffs to address to its satisfaction any concern that it had relating to the loan-to-value condition of the 2005 Agreement. Furthermore, by appointing the Third and Fourth Defendants on 25 October 2012, the First Defendant breached the 2011 Agreement, which stated "that the borrowers shall repay the sum of €3m in permanent reduction of the monies owing under the terms of the facility letter no later than the 31st December 2012." The First Defendant further

breached the covenant contained at item 1(i) of the 2011 Agreement that it would "enter into discussions with you or any security provider and/or any other person in respect of one or more amendments in the terms of any such document; in each case, at any time before a demand for repayment of the Facility...is made". The First Defendant further breached the covenant as defined in item 1(ii) of the 2011 Agreement that it would "provide financial accommodation to you or any security provider, in each case, at any time before a demand for repayment of the Facility...is made".

162. Finally, I was referred to paragraph 44.4 of the Replies to Particulars. Paragraph 44 refers to paragraph 37 of the Statement of Claim which sets out representations which it is claimed were made by the defendants either expressly or impliedly in respect of the banking relationship. Paragraph 44.3 and 44.4 of the Notice and Replies to Particulars read as follows:

"44.3 If any part of the alleged representation is in writing, please identify the document in which it is contained and provide a copy of same. In this regard, please treat this as a request pursuant to Order 31, Rule 15 of the Rules of the Superior Courts 1986, as amended;

The 2005 Agreement and the 2011 Agreement. Please see attached.

44.4 If any part of the alleged representation is alleged to have been made orally, please state when and where the representation was made, the substance of the words used and identify who was present on behalf of the Plaintiffs and who was present on behalf of the Defendants."

163. Thus, the only agreement referred to in either the Statement of Claim or the Replies to Particulars is the agreement (the Supplemental Facility Letter) of the 1st February 2011 and therefore the existence or effect of the alleged collateral contract is simply not pleaded.

164. However, I am not at all sure that this brings us very far in the context of the discussion of the application of the rule in *Henderson v Henderson*. Senior Counsel for the plaintiffs submitted that while he did not accept that it was not pleaded, if the Court was of the view that it was unclear (or not pleaded) then I had to approach the matter on the basis of Clarke J's statement in *Moffitt* that if the case could be saved by an appropriate amendment it should not be struck out. I am not convinced that Clarke J's

statement can be understood as meaning that an amendment should be permitted to save the case by bringing a case that is not pleaded at all but I do not think it is necessary to decide this. I am approaching the discussion of the rule in *Henderson v Henderson* (as I did the discussion of res judicata) on the basis that the collateral contract is part of the plaintiffs' claim, or more properly, will be made part of the claim by way of an application to amend. But where does that get us in the *Henderson v Henderson* discussion? The collateral contract was pleaded in the 2013 proceedings but was not pursued by the plaintiffs. It seems to me that the rule in *Henderson v Henderson* may undoubtedly apply to preclude the plaintiffs from litigating this in these proceedings, subject to the "consideration [of] circumstances that might otherwise render its imposition excessive, unfair or disproportionate" (*Re Vantive Holdings*) or, as it was described during the hearing, a 'balancing exercise' required under the more modern statements or applications of the rule.

165. It was apparent from the submissions on behalf of the plaintiffs that the plaintiffs would be relying on the discussions and alleged contract for two reasons: to make the case that the facility as varied by the Supplemental Facility Letter was subject to the collateral contract and, secondly, to claim that in interpreting the Supplemental Facility Letter using the well-known "text-in-context" approach regard must be had to the discussions (and agreement) on the 31st January 2011. My comments in the previous paragraph about the application of the rule in *Henderson v Henderson* must apply to both.

166. The claims which were not raised in the 2013 proceedings are the claims in deceit, conspiracy, intentional interference in and with the economic interests of the plaintiffs, misrepresentation, breach of contract, negligence and breach of duty including breach of fiduciary duty. From the point of view of whether these could have been raised in the 2013 proceedings they have to be treated separately.

167. I am satisfied that it can not be said with sufficient certainty at this stage that the claims in conspiracy, deceit and intentional interference with the plaintiffs' economic interests could have been raised in the 2013 proceedings to ground an Order striking them out as an abuse of process. The plaintiffs say on affidavit that they only became aware of the real role of the GRG post the 2013 proceedings through the combination of what is called the Tomlinson Report, media reports and a UK Parliamentary Report in 2018. They acknowledge that they were aware from 2012 that their loans had been transferred into the GRG but they point to documents from that time which show that the purpose of the GRG was to provide "business support" and that this is very different

to what the later evidence shows the real purpose of the GRG was in relation to their loans.

168. They contrast the situation with the circumstances in *Re Vantive Holdings [2010] 2 IR 118* and *Morrissey v IBRC*.

169. In *Re Vantive Holdings*, the High Court permitted the presentation of a second petition for the appointment of an examiner notwithstanding that the first petition had been refused. The Supreme Court overturned the decision of the High Court on the basis that the second petition was based on material and information which had been available to the petitioner at the time of the first petition but had not been relied upon. Murray CJ said:

"In my view the bringing of the second petition on foot of crucial and material evidence which was deliberately withheld from the Court in the course of the proceedings determining the first petition and the reliance on evidence which could have been produced at that hearing constitutes an abuse of the process in relation to the appointment of examiners under the Act of 1990 and prima facie is a bar to the second petition proceedings. To permit the petition to proceed, unless there are exceptional excusing circumstances, would undermine the integrity of the proper and efficient administration of justice and the principle of finality."

170. In *Morrissey v IBRC [2015] IEHC 200* Costello J struck out the plaintiff's claim against IBRC as constituting an abuse of process in circumstances where judgment had been obtained against him in previous debt proceedings. The plaintiffs point out that in that case no new evidence was offered by Mr. Morrissey. Costello J said:

"It was not alleged either on affidavit, in written submissions or in oral submissions that new evidence had come to light which had not previously been available to Mr. Morrissey which amounted to a special circumstance such that he was justified in bringing these proceedings."

171. In this case, it is averred in the affidavits and submitted that the information in relation to the real role of the GRG was not available prior to the disposal of the 2013 proceedings in respect of the Annville Loans.

172. The defendants' response is that if the plaintiffs had not abandoned their defence of the 2013 proceedings they would have been entitled to seek discovery of "*all documents in the Bank's power, possession or procurement evidencing or recording the "calling-in" of the loan, including any communication with RBS*" and that, therefore, evidence of an alleged conspiracy to destroy the plaintiffs' business would have been available at trial. There is an attractiveness to this argument but, given the test to be applied to this motion, in circumstances where the 2013 proceedings did not raise conspiracy or indeed any wrongful acts on the part of RBS, any such unearthing of the alleged conspiracy would have been purely accidental or coincidental. I am not satisfied that the failure to seek discovery of documents dealing with other specific grounds of complaint which might have turned up evidence of another ground of complaint can be taken as a failure to exercise reasonable diligence.

173. The second set of issues raised in the current proceedings which were not raised in the 2013 proceedings are those of misrepresentation, breach of contract, negligence and breach of duty.

174. At first blush it is difficult to see why some of these claims could not have been advanced in the 2013 proceedings. For example, it is not immediately apparent why the case that the defendants failed "*to act with due skill, care and diligence in the best interests of their clients and the integrity of the market*", "*to act with due skill, care and diligence in relation to the Plaintiffs as consumers*". "*to act with due skill, care and diligence in advising the Plaintiffs in relation to their investment and pension*", "*to have and employ effectively the resources and procedures necessary for the proper performance of their business activities*", "*at all times to treat the Plaintiffs as a consumer and ensure that the Plaintiffs would enjoy all applicable protections pertaining to such status*", "*to respect or provide compliance with all Irish and European laws and charters of rights*" could not have been raised in the 2013 proceedings. However, it seems to me that when the Statement of Claim is read as a whole and together with the Replies to Particulars (and in particular paragraph 53 thereof) it is clear that these claims for the most part also relate to the acts giving rise to the claims in conspiracy. Thus, my comments in relation to those claims also apply.

175. It should perhaps be noted that it is not immediately apparent how some of these could constitute negligence where what is alleged are deliberate acts: for example, it is difficult to see how the defendants negligently caused "*the intentional default of the Plaintiffs facilities*" or "*failed to act honestly and fairly in conducting their business activities in the best interests of their clients and the integrity of the market.*" However, the merits or otherwise of the claims are not a matter for this discussion.

176. Thus, I am not satisfied that it can be said with the sufficient certainty that is required on a motion of this type that the plaintiffs could have raised these issues in the 2013 proceedings such as to conclude that it is an abuse of process to raise them in these proceedings.

Balancing Exercise

177. The parties are agreed that if I am satisfied that a cause of action or issue estoppel appears to arise or that the rule in *Henderson v Henderson* suggests that the raising of certain points is an abuse of process, I must also conduct a balancing or balance of justice-type exercise to ultimately determine whether in all the circumstances the plaintiffs' conduct is an abuse of process and, if so, whether the abuse is excused or justified by special circumstances. This arises from *Johnson v Gore Woods & Co, Re Vantive Holdings* and *AA v The Medical Council* amongst others. It is expressed in different ways in different cases. Hardiman J held in *AA v The Medical Council* that the rule in *Henderson v Henderson* can not be applied in an automatic or unconsidered fashion and that the public interest in the efficient conduct of litigation did not render the raising of a point which could have been raised in earlier proceedings necessarily abusive where in all the circumstances the party was not misusing or abusing the process of the court.

178. I am not fully convinced that the balancing exercise applies where the Court has found that res judicata applies. For example, in *Moffitt v Agricultural Credit Corporation* Clarke J said

"3.7 A second, and analogous, issue arises in relation to the so called rule in Henderson v. Henderson (1843) 3 Hare 100. This rule is concerned with a similar, although different, situation than that to which the doctrine of res judicata strictly speaking applies. Res judicata per se applies where the matter sought to be litigated has already been decided by a court of competent jurisdiction. Res judicata can relate to the cause of action (which may involve a consideration of whether two separate causes of action arise) or an individual issue (issue estoppel). In the latter case the issue sought to be litigated must be identical to the issue decided in the previous proceedings. (See for example Royal Bank of Ireland v. O'Rourke (1962) I.R. 159). The rule in Henderson v. Henderson, on the other hand, applies where a new issue is raised which was

not, therefore, decided in the previous proceedings but is one which the court determines could and should have been brought forward in the previous proceedings.

3.8 The importance of the distinction lies in the consequences. If a matter is res judicata then, in the absence of a defence to the application of the doctrine such as fraud, the availability of fresh evidence in respect of issue estoppel only, estoppel, or other special cases, the plea will necessarily succeed.

3.9 On the other hand, where reliance is placed on the rule in Henderson v. Henderson to the effect that it would be an abuse of process to now allow the party concerned to raise a different issue which could have been raised in the original proceedings, it is well settled that the court adopts a more broad based approach. In A.A. v. The Medical Council [2003] 4 I.R. 302 Hardiman J. (speaking for the Supreme Court) noted the principle to the effect that a party to previous litigation is bound not only by matters actually raised, but matters which ought properly have been raised but were not. However Hardiman J. went on to determine that a rule or principle so described could not, in its nature, be applied in an automatic or unconsidered fashion and that the public interest in the efficient conduct of litigation did not render the raising of a defence in later proceedings necessarily abusive where in all the circumstances the party was not misusing or abusing the process of the court.

3.10 The distinction is, therefore, quite material. If the actual matter in issue has been determined in previous proceedings, then in the absence of a specific reason, such as estoppel or fraud, it will not be open to the party who lost to re-litigate that question. However, where a party seeks to make a new and different case which, it might be said, ought to have been included in the earlier proceedings, the court enjoys a wider discretion to consider what the result should be having regard to the competing interests of justice.

179. In *McCauley v McDermott* [1997] 2 ILRM 486 Keane CJ stated:

*"In cases of this nature, the courts are concerned with achieving a balance between two principles. A party should not be deprived of his or her constitutional right of access to the courts by the doctrine of res judicata where injustice might result, as by treating a party as bound by a determination against his or her interests in proceedings over which he or she had no control. **Res judicata must be applied in all its severity, however, where to do***

otherwise would be to permit a party bound by an earlier judgment to seek to escape from it, in defiance of the principles that there should ultimately be an end to all litigation and that the citizen must not be troubled again by a lawsuit which has already been decided.” [emphasis added]

180. However, there is some authority in the same passage of *McCauley v McDermott* and in *Foley v Smith [2004] IEHC 299* and *Sweeney v Dublin Bus [2014] 1 IR 576* to proceed on the basis that there must be such a balancing exercise even in the case of classic res judicata.

181. In *Foley* Lavan J held that it would be unfair for an uncontested District Court decree to preclude subsequent High Court proceedings arising out of the same road traffic accident. Similarly, in *Sweeney v Dublin Bus [2004] 1 IR 576* the Supreme Court upheld a High Court decision refusing to dismiss a second set of proceedings where the previous Circuit Court proceedings arising out of the same road traffic accident had been defended by the plaintiff’s insurers on a ‘*quantum-only*’ basis and then settled. These cases, and *McCauley*, can be understood as concluding that a res judicata did not arise because all of the criteria for res judicata had not in fact been met. They must be seen in the context of their own facts. In both *Foley* and *Sweeney* the Court based its decision on the fact that the relevant litigant in the later proceedings did not have control over the earlier litigation. Keane CJ had made reference to the fact that the party did not have control over the litigation in *McCauley*. However, they can certainly be understood as holding that res judicata did arise but that the interests of justice required that it not be used to preclude the litigant from raising the point and that is sufficient for this motion.

182. In any event, I do not need to decide this issue in circumstances where (a) I have concluded that a res judicata does not arise and (b) the defendants agree that the Court should conduct a balancing exercise.

183. I am satisfied, having had regard to all of the circumstances that the plaintiffs attempt to raise points which were previously raised in the 2013 proceedings does amount to an abuse of process and is not excused by circumstances and that the application of the rule would not be excessive, unfair or disproportionate.

184. Firstly, no explanation whatsoever has been given by the plaintiffs for their non-attendance or non-participation in the 2013 proceedings. As noted in the authorities,

some regard can be had for the reasons why a default judgment came about but no explanation at all has been given by the plaintiffs. For example, McDonald J in *George v AVA*, referred to the "Turner principle" which he noted was explained by Chadwick LJ in *Coulter v Chief Constable of Dorset Police [2006] BBIR 10 CA* as:

"The principle is not based on estoppel...it goes no further than this:

- (i) That it is indeed a waste of the court's time and the parties' money to rehearse arguments which have already been run and have failed; and*
- (ii) That, in circumstances where it is desired to run arguments which have not already been run, then...the court will inquire why those arguments were not run at the time when they could and should have been run."*

185. It was not explained why the arguments were not run in the 2013 proceedings. In this regard, it is noteworthy that the Official Receiver clearly stated his position as being that the plaintiffs could continue to defend the proceedings and, indeed, the plaintiffs place significant reliance on this.

186. The default judgment was given after the plaintiffs had been declared bankrupt in England and Wales and where their solicitors had ceased to act for them. These may be part of the reasons for the plaintiffs non-participation but that is not stated by the plaintiffs. Whether or not they are part of the reasons, they are relevant to the consideration of all of the circumstances because bankruptcy is a significant event and the withdrawal of a party's solicitor can also be significant and should go in the balance in favour of the plaintiffs' position. It seems to me, though, that they must also be of limited weight. I was also directed to the recent decision of the Court of Appeal in *O'Connor v Sherry Fitzgerald [2018] IECA 67* to the effect that the position of the plaintiff as a litigant in person did not influence the outcome of the application of the rule in *Henderson v Henderson*. In submissions on behalf of the plaintiffs some emphasis was placed on the fact that the plaintiffs' solicitor ceased acting for them due to their impecuniosity but that is not supported by the evidence. The application to come off record was on notice to the plaintiffs and the grounds upon which the application was made were stated in the grounding affidavit to be:

"4. I say and believe that this Deponent was not aware of the impending Bankruptcy Petition – the Defendants had not apprised me of the same at any stage – and I first became aware of their adjudication when I was informed of the same by the Solicitors for the Plaintiff by letter dated the 23rd September 2013...

5. *In the circumstances the Defendants are not capable of giving my firm instructions regarding this matter – or any other matter – anymore, and I have written to both of them advising them of the consequences which attend their status as bankrupts in the United Kingdom and advising them I would be obliged to apply to this Honourable Court to come off record.”*

187. Thus, regard must also be had to the fact that while the withdrawal of the solicitor was a significant event, the plaintiffs themselves had not even informed their solicitors of the impending bankruptcies and therefore any suddenness in the solicitors coming off record was caused by the plaintiffs themselves.

188. I have also had regard to the points that were made in respect of service of the original motion papers for judgment and the related correspondence which are set out in detail above. Again, I think these issues must be of limited weight. I can certainly have regard to the fact that the Bank wrote to the plaintiffs at their Irish addresses at a time when they had been admitted to bankruptcy and when the Bank was aware they had English addresses and, indeed, had used those English addresses. However, it seems to me that to place too much weight on these points in relation to service and service-related matters risks exactly what I said earlier must not be permitted which is a collateral attack on Kelly J’s Order. It also seems to me that, in the context of the exercise of the Court’s discretion, I am entitled to have regard to (i) that the plaintiffs have not said that they did not receive the motion papers or the related correspondence and (ii) on the 31st July 2013 the first-named defendant swore an affidavit in the Supreme Court application and swore that he was residing at his Irish address. This was at a time when he had very recently been adjudicated bankrupt in the UK, presumably on the basis of a UK address. It was also in the same general period of time in respect of which complaint is now made that documents were served on his Irish address when the Bank would have known he was residing in the UK.

189. Reliance is placed by the plaintiffs on the fact that a contributing factor to them being declared bankrupt were the debts with the Bank and, therefore, that the alleged wrongs contributed to them being admitted to bankruptcy. Against that must be balanced the fact (i) the alleged wrongs have not yet been established and (ii) once they were admitted to bankruptcy the Bank was precluded from pursuing the plaintiffs for any residual debt left over after the sale of any assets on which the Annville Loan was secured.

190. I am also entitled to have regard to the manner in which the plaintiffs dealt with the Irish courts at the time of their bankruptcies and their application for a stay to the Supreme Court. The plaintiffs issued their motion in the Supreme Court seeking an extension of the stay on Cooke J's order in respect of the Castlepark Loan on the 31st July 2013. In the grounding affidavit, sworn on the 31st July 2013 (six weeks after the first named plaintiff had been adjudicated bankrupt and a week before the second-named plaintiff was also adjudicated bankrupt – the petition having been issued a number of weeks earlier) the first-named plaintiff stated that the stay was necessary because without a stay "*the Plaintiff will be at large to move against our assets and to bankrupt us.*" This is, of course, inconsistent with the fact that the first-named plaintiff was already in bankruptcy and the process in respect of the second-named plaintiff was at a very advanced stage. Yet there was no mention whatsoever of these bankruptcies. Indeed, as noted above, the plaintiffs do not appear to have even informed the solicitors who were acting for them in the Supreme Court proceedings of their impending bankruptcies. Furthermore, in the affidavit sworn by the first-named plaintiff for the stay application he averred that he resided at an address in Ireland, which, of course, appears to be inconsistent with him having been adjudicated bankrupt in England and Wales.

191. The plaintiffs simply did not attend to the 2013 proceedings and thereby declined the opportunity to make any points they wished to make to these courts. At that stage the Bank had already been to very significant expense. I am entitled to and do have regard to the fact that if the plaintiff were permitted to raise the same points again, the Bank would be put to additional expense in dealing with the same points.

192. Furthermore, in this regard, the significant factor in *Foley and Sweeney* does not arise. In those cases, the Court did not preclude the plaintiffs from maintaining their actions because the earlier proceedings had been within the control of insurance companies. No such absence of control arises or is even claimed in this case.

193. I have also had regard to the fact this decision does not preclude the plaintiffs from maintaining their core complaint of conspiracy against the defendants or of maintaining their claims against the joint receivers in respect of their conduct of the receivership. That the conspiracy claim is the core complaint in these proceedings is clear from (i) the absence from the Statement of Claim or the Notice for Particulars of any express (or, arguably, even implicit) plea in respect of the alleged collateral agreement. This is particularly striking given its central place in the 2013 proceedings and in Cooke J's 2013 judgment; (ii) the interconnection between the other pleas of

negligence, breach of contract and breach of duty and the conspiracy claim. Thus, while it has some impact on the plaintiffs' right of access to the courts, that impact is limited.

194. Some regard has to be had to the fact that the 2013 judgment is a default judgment. However, this must be of very limited weight in circumstances where I have concluded that a default judgment is a judgment on the merits and where the judgment came about through the plaintiffs own default.

195. In all of those circumstances I am satisfied, notwithstanding the high bar set down in the authorities, that the insofar as these proceedings raise or seek to raise points which were raised in the 2013 proceedings – the construction of the Facility Letter and the Supplemental Facility Letter and the existence and effect of the alleged collateral contract – they are an abuse of process and should to that extent be dismissed or the plaintiffs are estopped from raising them.

MERITS – BOUND TO FAIL

196. In addition to the above points, the defendants claim that the proceedings should be dismissed on the basis that the proceedings disclose no reasonable cause of action, are frivolous and vexatious and are bound to fail.

197. As I have already decided that some aspects, or intended aspects, of the plaintiffs' claim are an abuse of process under the rule in *Henderson v Henderson*, including the construction of the Facility Letter and the Supplemental Facility Letter and the existence and effect of the collateral contract, it is only necessary for me to consider the other aspects of the claim: breach of contract and breach of duty (other than insofar as they are based on the aforementioned grounds), negligence, misrepresentation, conspiracy, deceit and intentional interference with the plaintiffs' economic interests, as against the first and second-named defendants. In reality these are all tied in together in the claim for conspiracy. I also have to consider the claims against the joint receivers in respect of the conduct of the receivership.

198. As discussed above, the defendants must satisfy a very high bar and the court must be slow to exercise its jurisdiction to dismiss proceedings as being bound to fail.

199. In my view, the defendants have not satisfied the high bar in respect of these aspects of the claim. There are very clear difficulties with these claims. I have already mentioned one such difficulty in relation to the claim in negligence. In respect of the

claim in conspiracy and deceit (and related breaches of duty and contract) there are very clear issues: (i) there is no dispute that the plaintiffs' breach of the loan-to-value ratio was not engineered by the defendants; (ii) the Bank gave the plaintiffs more money after the alleged conspiracy started which could be said to be inconsistent with the plaintiffs' claim; (iii) on the face of the documentary evidence the plaintiffs did not respond properly to requests for information which contributed to the breach of trust which the defendants claim fed into the decision to exercise their right to call in the loan; (iv) the plaintiffs alleged that a central part of the wrongs committed by the defendants was to refuse an offer to repay the loan but there is an issue about what this offer amounted to and therefore precisely what was refused by the defendants. I have to confess that these cause me to have serious doubts about whether the plaintiffs will be able to make out their claims but, while I am entitled to have some regard to the evidence, particularly the documentary evidence, this is far from sufficient to allow me to conclude that the claims are bound to fail or are an abuse of process on that basis. As it was put in *McCourt v Tiernan*, "[W]hile I have very grave reservations about the manner in which Mr. McCourt seeks to maintain his claim for an interest in the property, I am not persuaded that it has been established that he has no chance of success in relation to being in a position to establish that he has an equitable interest...in the property." The plaintiffs' claims may transpire to be entirely without merit but it seems to me that they go well beyond mere assertion in light of the general conduct outlined in the Tomlinson Report and the UK Parliamentary Report. The defendants point out that the conduct identified in these reports do not relate to the specific wrongs complained of in the proceedings. There will also be issues about admissibility and the probative value of the contents of these reports but I am satisfied that they do bring the case beyond mere assertion. The matters complained of in the proceedings are classic matters of evidence. They will undoubtedly be the subject of discovery. They do fall within the type of action referred to by McCarthy in *Sun Fat Chan v Osseous* "where the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings."

200. It remains to consider the claims against the joint receivers in relation to the conduct of the receivership.

201. The plaintiffs' case against the receivers in respect of their conduct of the receivership is set out in paragraph 39 of the Statement of Claim (in which the alleged obligations of the receivers are set out) and paragraph 41 (in which the Particulars of Negligence, Breach of Duty and Breach of Contract are pleaded). Further particulars are set out in paragraph 54 of the Replies to Particulars.

202. It is beyond doubt that some of the obligations contended for and the particulars of breach of duty pleaded can only be described as novel: for example, it is pleaded that the receivers were negligent and in breach of duty in "*failing to refrain from taking any steps that jeopardised the Plaintiff's wealth*" and "*failing to act with due skill, care and diligence in the best interests of the Plaintiffs.*" However, in my view, the best way to approach whether or not the plaintiffs' claim discloses any reasonable cause of action is to examine the case against the receivers as a whole rather than to parse the individual particulars.

203. There is no basis for a claim in breach of contract against the receivers in circumstances where there is no contract between the plaintiffs and the joint receivers (in *Ferris v Meagher* [2013] IEHC 380 it was held that "*There is no contractual relationship or duty owed in tort by the receiver to the mortgagor: the relationship and duties owed by the receiver are equitable only: see Medforth v Blake [2000] Ch 86 and Raja v Austin Gray [2003] 1 EGLR 91*") and therefore the only claim which could be sustained is one for breach of duty.

204. The position in respect of the alleged breach of duty is less clear. The defendants' position is that the third and fourth named defendants, as receivers, owe no duty of care to the plaintiffs, as mortgagors, over and above a duty of good faith and to act reasonably and prudently (*Hoare v Allied Irish Bank* [2014] IEHC). The defendants state that "*it is doubtful in Irish law whether a receiver owes any duty of care to a borrower over and above a duty of good faith (see: Clarke J in Moorview Developments Ltd v First Active plc [2009] 214 at para 12.14). So the claims are without merit on this basis.*" For the purpose of a motion to dismiss it is insufficient that the existence of a duty that is being contended for is merely "*doubtful*". However, it also seems to me that there is a different emphasis in *Moorview* than suggested in that submission. While Clarke J does cast doubt on whether there is any duty of care over and above a duty of good faith (which is perhaps unsurprising given the authorities), he certainly does not close the door on the existence of such a duty. It is necessary to quote Clarke J at some length:

"12.1 There is no doubt but that a receiver who sells the assets of a company may be liable, both at common law and under statute (s. 316A, Companies Act 1963, as inserted by s. 172 Companies Act 1990) for failing to realise the true value of the asset concerned.

...

... In this respect the Cunningham Group relied on the English case of Medforth v Blake [2000] Ch 86, where, at page 102, Sir Richard Scott VC set out the following propositions in relation to the functions of receivers:-

"(1) A Receiver managing mortgaged property owes duties to the mortgagor and any one else with an interest in the equity of redemption.

(2) The duties include, but are not necessarily confined to, a duty of good faith.

(3) The extent and scope of any duty additional to that of good faith will depend on the facts and circumstances of a particular case.

(4) In exercising his powers of management the primary duty of the Receiver is to try and bring about a situation in which the interest on the security can be paid and the debt itself repaid.

(5) Subject to the primary duty, the Receiver owes a duty to manage the property with due diligence.

(6) Due diligence does not oblige the Receiver to continue to carry on a business on the alleged premises previously carried out by the mortgagor.

(7) If the Receiver does carry on a business on the mortgaged premises, due diligence requires reasonable steps to be taken in order to do so profitably."

...

12.6 It is possible, therefore, to discern two strands in the United Kingdom authorities. Cases such as Downsvie are part of a line of authority which suggests that a receiver is immune from liability for acts carried out in the management of an asset (as opposed to the sale of the same asset), where no mala fides can be established.

12.7 However, Medforth v. Blake represents a different view which suggests that while the primary obligation of a receiver is towards the debenture holder, the receiver may, subject to that obligation, have a remaining obligation to the company.

12.8 The Irish authorities, so far as they go, appear to accept the Downsvie position with no Irish authority being cited which has considered the expanded view of the potential liability of a receiver identified in Medforth v. Blake.

12.9 *The real question which I had to address was, therefore, as to whether Medforth v. Blake represents the law in this jurisdiction.*

12.10 *The underlying problem can be simply put. As was accepted in Medforth v. Blake the underlying obligation of a receiver is to the debenture holder who has appointed that receiver. The reason for this is obvious. A debt has already fallen due by the company in circumstances where the debenture holder has an entitlement, under the debenture, to appoint a receiver. The purpose of the appointment of the receiver is to arrange for the payment of the debt including any interest on it. The fact that one particular means of managing the business of the company might, from the company's point of view, be perceived to be more advantageous in the long run is, in those circumstances, not a relevant consideration for a receiver who is faced with the overriding entitlement of the debenture holder to be paid.*

12.11 *In the light of that overriding obligation to ensure that the debt is discharged, the line of authority exemplified by Downsvie suggests that it is impossible to impose any obligation on the receiver in respect of the management of the property, when his primary obligation is to the debenture holder. In a sense it is said that the receiver cannot reasonably be expected to serve two masters. As the position of the debenture holder is superior (because the company has allowed itself to get into default) then the receiver must serve the interests of the debenture holder, and not the company. On that basis it is suggested that to attempt to impose some residual obligation on the receiver would be a recipe for difficulty, with the court being constantly faced with an attempt to strip out from the primary obligation of the receiver towards the debenture holder, some residual obligation in respect of the company.*

12.12 *Medforth v. Blake seeks to get round that difficulty by recognising that the primary duty of the receiver is to procure that the debt be paid, but suggests that, subject to that primary duty, there remains a duty on the receiver to manage the property with due diligence in order that the business of the company be carried on profitably.*

12.13 *The real question of principle is as to whether that residual obligation, identified in Medforth v. Blake, represents the law in this jurisdiction.*

12.14 *For reasons which I will shortly address I came to the view that even if Medforth v. Blake represented the law in this jurisdiction it would not avail the Cunningham Group for no sufficient case had been made out for negligence on the part of Mr. Jackson or, of equal importance, for any causal link between the*

*alleged negligence and any consequences for the Cunningham Group. In those circumstances it seemed to me that it would be inappropriate to seek to make a definitive ruling on the applicability of Medforth v. Blake in this jurisdiction in circumstances where that question was not, in my view, decisive on the facts of the case. Any such view would, necessarily, be obiter. **I would confine myself to indicating that I believe that there are at least arguable grounds for the proposition that Medforth v. Blake does represent the law in this jurisdiction.** While understanding the practical difficulties which have led courts in the common law world to shy away from imposing a liability on receivers in such circumstances, (and in particular the difficulty in identifying the responsibility of a receiver to a company where the primary responsibility of that receiver is to the debenture holder), I am not convinced that a blanket immunity from liability on the part of receivers for the management of businesses placed in their hands is an appropriate response to the undoubted difficulties which arise. On the other hand, it is also necessary to take into account the fact that the legislature has decided to enact a specific provision providing for the liability of receivers in cases of sale at an undervalue without specifying any similar liability in cases of mismanagement. It is at least open to the view that in so doing the legislature impliedly declined to extend the potential liability of receivers beyond the category of sale at an undervalue traditionally established at common law. In those circumstances, I would prefer to leave a definitive decision on this point to a case where negligence and causation had been established. It, therefore, follows that it is appropriate to set out the position, so far as the claim against Mr. Jackson in relation to Malahide Road is concerned, in relation to the allegation of negligence against Mr. Jackson.” [emphasis added]*

205. Thus, it seems to me that *Moorview Developments* does not close the door on the plaintiffs’ ability to contend for the alleged breaches of duty.

206. In any event, it seems to me that the particulars of breach of duty pleaded in the Statement of Claim and in the Replies to Particulars certainly amount in substance to claims of a breach of the duty of good faith and the duty to act reasonably and prudently. It is difficult to see, for example, how the pleas that they disposed of assets/contents that were unencumbered and not subject to the receivership process and failed to account for or return the proceeds of sale to the plaintiffs is anything other than an allegation of a breach of the duty of good faith and to act reasonably and prudently. This is particularly so in circumstances where it is specifically claimed in the Replies to Particulars (paragraph 54) that the third and fourth-named defendants sought

the plaintiffs' permission to sell such assets and this permission was refused. That the case made against the receivers is one of a breach of the duty of good faith and to act reasonably and prudently is also clear from paragraph 52.2 where it is stated that "*The Third and Fourth named Defendants were aware of the GRG's plans of GRG with respect to the Plaintiffs in advance of their appointment.*" *The Third and Fourth Defendant exceeded the scope of their appointment, have never accounted for the assets of the Plaintiffs, sold assets not encumbered to the bank, interfered with the plaintiff's property of the Plaintiffs and deliberately misdirected all reasonable enquiry with respect to the Plaintiff's assets made by their legal representatives.*"

207. The defendants made the point that in circumstances where the plaintiffs remain indebted to the Bank for a very large sum and, following the plaintiffs' bankruptcies, the Bank can not recover the balance owed following realisation of the security there is no reality to the plaintiffs' claim against the receivers for a very modest sum in comparison with the amount to the Bank. I do not accept that this is the correct way to approach matters. If the plaintiffs have a good claim against the defendants their claim can not be dismissed in limine just because they also owe the Bank significant sums.

208. I am therefore not satisfied that the defendants have established that the plaintiffs' claims which were not pat of the 2013 proceedings are bound to fail.

STATUTE OF LIMITATIONS

209. The defendants accept that what they describe as the "*main aspect of the claim*", i.e., the claim for alleged breach of contract against the Bank arising out of the "*calling-in*" of the Annville Loan on the 2nd November 2012 is not prima facie statute-barred because the proceedings were issued on the 20th July 2018, i.e., within six years of the alleged breach of contract.

210. Thus, for the purpose of this application I was only going to have to consider the other aspects of the plaintiffs' claim. However, in closing submissions, the defendants accepted that due to the decision *Cantrell v Allied Irish Banks* (Belfry litigation) a lot of what they had claimed was statute-barred had fallen away and that while there may be some minor aspects of their claim which could be on the wrong side of the Statute, they were not placing any great emphasis on that. In those circumstances, I do not propose to consider the limitation points other than to say that my preliminary view is that in

circumstances where it is arguable that in some instances the alleged wrongful act(s) or alternatively the occurrence of damage were the calling in of the loan or the appointment of the receivers, it could not be said that the plaintiffs could not defeat the case that the claims are statute-barred.

211. No submissions were made about the claim against the receivers in respect of the conduct of the receivership. In any event, any such complaint could only relate to the period after October/November 2012 and so it is difficult to see any basis for a contention or conclusion that any such claim is statute-barred.

CONCLUSION

212. I am satisfied that the evidence of English law is to the effect that as things currently stand, the plaintiffs are not entitled to maintain these proceedings. Rather than dismiss the proceedings on that basis, the proceedings should be stayed to provide an opportunity for this difficulty to be resolved.

213. An issue estoppel does not arise such as to justify the dismissal of the proceedings. While the 2013 proceedings did determine an issue which is sought to be raised in these proceedings, that issue does not determine all of the plaintiffs' claims and, in any event, the parties are not the same and I can not be satisfied in the context of a motion of this type, that the parties are privies for each other.

214. I am satisfied that insofar as these proceedings raise or seek to raise points which were raised in the 2013 proceedings – the construction of the Facility Letter and the Supplemental Facility Letter and the existence and effect of the alleged collateral contract they are an abuse of process and should to that extent be dismissed or the plaintiffs are estopped from raising them.

215. I am not satisfied that the defendants have established that those aspects of the claim which were not raised in the 2013 proceedings (ie. the issues which are not an abuse of process on *Henderson v Henderson* grounds) are bound to fail.

216. As this judgment is being delivered electronically, I will hear from the parties at a suitable time in relation to the precise terms of the Court's Order and in relation to costs.

