APPROVED

THE HIGH COURT

[2024] IEHC 127

Record No. 2021/4S

BETWEEN:

ROBERT LEE AND EILEEN LEE

Plaintiffs

-AND-

STEPHEN LEE, YVONNE LEE [NEE CORBALLY], RONAN LEE AND MARIA LEE [NEE MARSELLA]

Defendants

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 16th day of February 2024

INTRODUCTION

Preliminary

1. This is the Plaintiffs' application for summary judgment in respect of the sum of €127,400.

2. The initial claim was for the sum of €183,788. I was informed at the commencement of the hearing on 28th November 2023 by Mr. Peter Shanley BL (for the Plaintiffs), that the sums of €41,388 and €15,000 were not now the subject of the Plaintiffs' application for summary judgment and Mr. Shanley BL's application was to adjourn the claim for those combined sums of €41,388 and €15,000 (totalling €56,388) to plenary hearing before the Circuit Court. Accordingly, when the amount of €56,388 is deducted from €183,788, this leaves the sum of €127,400.

3. Mr. Keith Farry BL (for the Defendants) indicated the first time that he became aware of this reduced claim in the sum of €127,400 (rather than €183,788) was the morning of the first day of the hearing on 28th November 2023 when the Plaintiffs' Legal Submissions were furnished.

4. While that may be the case, the fact that this application for summary judgment is now in respect of the sum of €127,400 has the consequence of reducing the matters which the court has to decide upon (removing, for example, the contest between the parties in relation to the sums of €41,388 and €15,000).

5. In essence the issue before me can be reduced to the following question: is it *very clear* that the Defendants have no case in relation to the claimed sum of €127,400?

6. Whilst the question can be simply put, the answer necessarily involves the court assessing, *inter alia*, whether the Defendants' evidence sets out in a clear way why the sum of €127,400 claimed is said not to be due and owing to the Plaintiffs and examining the overall credibility of the Defendants' case in the context, for example, of any uncontested documentary evidence posited in support of the Plaintiffs' claim for summary judgment in the amount of €127,400.

7. The sum of €127,400 represents a sum of money which the Plaintiffs allege was paid by them to the Defendants towards the purchase of a property in Italy located at 149A, Via Roma, San Donato, FR03030, Italy ("the property"). The First Named Plaintiff and the First and Third Named Defendants are brothers. The Second Named Defendant is married to the First Named Defendant. The Fourth Named Defendant is married to the Third Named Defendant.

8. While much of the correspondence and e-mails referred to the court was exchanged between the First Named Plaintiff and the First and/or Third Named Defendants, the reference to Plaintiffs and Defendants is also used in this judgment. Before assessing the contested claims of the Plaintiffs and the Defendants in relation to the sum of €127,400, I refer, briefly, to the well-settled legal principles which govern this application for summary judgment.

APPLICABLE LEGAL PRINCIPLES

9. The essence of the test which governs the court's jurisdiction to grant summary judgment has been considered by the Superior Courts in a number of judgments and essentially remains that characterised by the following fundamental questions:

> "*… is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? do the defendant's affidavits fail to disclose even an arguable defence?*".[1]

10. Further, a defence is not incredible simply because the court is not inclined to believe the defendant. It must be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendants, they would provide for a defence.

11. The approach of the court to the exercise of those principles should be a cautious one.

12. In *Ulster Bank Ireland Ltd v O'Brien, O'Brien & McDermot* [2015] IESC 96; [2015] 2 I.R. 656, the Supreme Court (MacMenamin J.) in suggesting that the court should exercise its jurisdiction on a summary judgment application with care and caution,

[1] *Aer Rianta c.p.t. v Ryanair Limited* [2001] 4 I.R. 607 per Hardiman J. at page 623.

referred to the leading authorities and summarised the primary question to be asked by the court as follows:

> "*[t]he fundamental question is whether there is a fair and reasonable probability of a defendant having a real or bona fide defence, either in law, or on the facts, or both? It is not necessary to show that the defence will succeed, or even will probably succeed. The questions, therefore, can be reduced to the following: First, is it very clear that a defendant has no case? Second, are the issues simple and easily determined? Third, has a defendant disclosed even an arguable defence? Fourth, where there is no notice to cross-examine, can a court be confident, on the affidavit evidence alone, where the justice of the case lies? These tests are set out in more detail in the three leading authorities, viz. First National Commercial Bank v Anglin [1996] 1 I.R. 75, per Murphy J; Aer Rianta c.p.t. v Ryanair [2001] 4 I.R. 607, McGuinness J. and Hardiman J.; Harrisrange Ltd. v Duncan [2003] 4 I.R. 1, per McKechnie J. As emphasised in each of these decisions, in exercising this jurisdiction, a court should proceed with care and caution …*".

13. Accordingly, the Defendants do not have to establish that they have a defence which will probably succeed but rather they must establish that it is probable that they have a *bona fide* defence: *Moohan & Bradley t/a Bradley Construction v S&R Motors (Donegal) Ltd* [2007] IEHC 435; [2008] I.R. 650, per Clarke J. (High Court) at paragraph 4.1.

14. The counter-claim issued by the Defendants on 24th April 2023 in separate proceedings entitled *The High Court, Record No. 2023/1812P, Between, Stephen Lee, Yvonne Corbally, Ronan Lee and Maria Marsella v Robert Lee and Eileen Devlin* raises a further factor which the court is required to consider.

15. Mr. Farry BL (for the Defendants) submitted that where the nature of the defence put forward amounts to a form of counter-claim (cross-claim), slightly different considerations may apply and in those circumstances the court has a wider discretion. He referred to the decision of the High Court (Clarke J.) in *Moohan & Bradley t/a Bradley Construction v S&R Motors (Donegal) Ltd* [2007] IEHC 435; [2008] I.R. 650, where the court referred to the decision of Hardiman J. in *Aer Rianta Cpt v Ryanair Limite*d [2001] 4 I.R. 607 and then went on to discuss the slightly different considerations which apply where the nature of the defence posited amounts to a form of cross-claim or counter-claim and referred to the decision of the Supreme Court in *Prendergast v Biddle* (Unreported, Supreme Court, 21st July, 1957, Kingsmill Moore J.). Clarke J. suggested that the overall approach which the court should take to a case which involves a cross-claim is as follows: (a) it is firstly necessary to determine whether the defendant has established a defence as such to the plaintiffs claim. In order for the asserted cross-claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from *the same set of circumstances* as those that give rise to the claim but also arise in circumstances where, on the basis of the defendants case, it would not be inequitable to allow the asserted set off;[2] (b) if, and to the extent that, a *prima facie* case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend

[2] Emphasis added.

the entire (or an appropriate proportion of) the claim (or, if applicable, have the matter referred to arbitration); (c) if the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v Biddle.*[3]

SUMMARY OF THE PLAINTIFFS' CASE

16. Mr. Shanley BL (for the Plaintiffs) submits that the sum of €127,400 represents a sum of money which the Plaintiffs allege was paid by them to the Defendants in a number of instalments in anticipation of a contract (and conveyance) being executed for the purchase of the property. The Plaintiffs state that they called unsuccessfully on the Defendants to complete the contract over a number of years, and due to the Defendants' failure to do so, they now seek restitution of the sum of €127,400, jointly and severally against the Defendants.

17. In describing his primary claim, Mr. Shanley BL refers to the following extract from Mitchell, Mitchell & Watterson, *Goff & Jones on Unjust Enrichment* (Tenth Edition) at paragraph 12-01 (page 461): "*[t]he core underlying idea of failure of basis is simple: a benefit has been conferred on the joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit …*".

[3] Unreported, Supreme Court, 21st July 1957, Kingsmill Moore J.

18. The Plaintiffs say that they have paid €127,400 in anticipation of concluding a formal contract (and conveyance) for the purchase of the property which, they assert, the Defendants have failed to deliver. They state that the intention of both parties was to complete the contract but the conclusion of a formal contract never materialised (for example, the Plaintiffs do not have legal title) and because of that failure, the law recognises, what is asserted to be, the Plaintiffs' entitlement to restitution of moneys.

19. Mr. Shanley BL submits that the fault lies on the Defendants' side as to why the contract never closed and suggests that while the documentary evidence is unanswerable in that regard, the Plaintiffs' claim does not rely on that and refers to the following extract from McDermott & McDermott, *Contract Law* (Second Edition) where at paragraph 24.63 (page 1609) the learned authors state *inter alia* that: "*[w]here a contract is conditional upon a stated event occurring and the event does not occur restitution of money paid in furtherance of the conditional contract is possible so long as there is not an express term to the contrary in the contract. In Lowis v Wilson [1949] I.R. 347 the plaintiff contracted to purchase the defendant's lands 'subject to contract.' When the plaintiff declined to proceed with the sale she successfully sued for recovery of the deposit on the basis that it was a sum that had been paid without consideration.*"

20. In both his written and oral submissions, Mr. Shanley BL refers to the following further observations of Dixon J. in *Lowis v Wilson* [1949] I.R. 347, 349: "… *the weight of all cases from Winn v Bull onwards is that similar wording to that here was held to have had the effect of preventing an agreement, although it contained sufficient to satisfy the Statute of Frauds, from being a binding and enforceable agreement. The reasons given in those cases was that the agreement was intended to be subject to the parties entering*

into a further agreement, and it was only when such further agreement had been entered into that the parties would have arrived at a firm and enforceable contract …".

21. He also refers to the treatment of Dixon J.'s judgment in *Lowis v Wilson* [1949] I.R. 347 in Wylie and Woods, *Irish Conveyancing Law* (Fourth Edition, November 2019) at paragraph 10.11 dealing with "Subject to Formal Agreement", where immediately after quoting the above extract, the following quotation from Dixon J. in *Lowis v Wilson* [1949] I.R. 347 at page 350 is referred to: "*[i]t seems to me that the condition contemplates the completion between the parties of a contract and in that respect the use of the word, 'contract,' is of importance…In my view, the word 'preparation', is sued in a different sense to the words, 'to be prepared,' unless the latter words are superfluous; and a literal interpretation would make the provision a futile and purposeless one…I hold that the agreement comes into the category of the cases already cited, that is to say, that it is a contract to enter into a contract. It is a case where the parties had agreed up to a point, but were not fully agreed, and where the expression of their full agreement was to be embodied in a formal document. If my view is right, then it follows that the agreement is not enforceable and never was …*".

22. Mr. Shanley BL's case is that not only was a formal contract required, there was also a significant dispute in relation to the purchase price, there were issues in relation to management certificates, and there were issues in relation to certain works to be carried out, and there was no conveyance of legal title. He submits that it was on that basis – that legal title would be conveyed – that the €127,400 was paid, it did not occur and therefore, he submits, the defendants have *prima facie* entitlement to restitution of those moneys.

23. In moving this application Mr. Shanley BL referred, for example, to a number of e-mails and spreadsheets which the Plaintiffs claim detailed the moneys paid and balance due and owing at various times. Having regard to the fact that the sum of €41,388 is no longer part of the Plaintiffs' claim for summary judgment, the Spreadsheet (which the First Named Plaintiff created) entitled "*Current Balance -Apt 146a Via Toma, San Donato (Bob Lee) as at 28th February 2011*"[4] referred *inter alia* to the dates the payments were made, a description of the transaction, the purchase price in the amount of €245,845 and, for the purposes of this application, that the total deposits paid was €119,400.

24. Mr. Shanley BL submits that three main issues are in dispute between the Plaintiffs and the Defendants: (i) the negotiations in relation to the final purchase price; (ii) what the Plaintiffs allege is the Defendants' failure to close or complete the contract; (iii) issues in relation to the Plaintiffs obtaining a mortgage.

Defendants' Counterclaim & Specific Performance

25. Mr. Shanley BL makes the point (although it is not matter for the court to decide on this application) that the parties' dispute as to what the final purchase price of the property was, confirms that the Defendants could never succeed in a claim for specific performance. It is also submitted that the Defendants will be required to point to a concluded agreement to maintain a claim for specific performance.

[4] The details of the transaction suggest 30th June 2011.

26. The counter-claim raised by the Defendants is brought by way of the following separate proceedings issued on 24th April 2023, entitled *The High Court, Record No. 2023/1812P, Between, Stephen Lee, Yvonne Corbally, Ronan Lee and Maria Marsella v Robert Lee and Eileen Devlin*. Mr. Shanley BL states that this counterclaim has no basis and that there was no concluded agreement. He also argues that there was a lack of promptitude in its initiation and that it was a reaction to the Plaintiffs bringing this application for summary judgment.

27. He submits that this court – arising from the decision of the Supreme Court in *Prendergast v Biddle* (Unreported, Supreme Court, 21st July 1957, Kingsmill Moore J.) – is required to assess the conduct of the parties and the promptitude of the Defendants in initiating the counter-claim in assessing the strength of the counter-claim. Further, in this regard, Mr. Shanley BL refers to an extract from Wylie, *Irish Conveyancing Law* (Fourth Edition, November 2019) at paragraph [10.07] which states "*[s]imilarly, in Re Hibernian Transport Companies Ltd [1972] I.R. 190 where an offer was made "subject to contract" after an abortive auction in a sale under a court order, Walsh J. stated: "…in the ordinary course of events an agreement for the sale or purchase of land subject to contract means nothing more than an agreement to enter into a contract for the sale of land and, as such, it is not enforceable as if it were a contract"*".

28. He states that the court, when assessing the Defendants' defence and the strength or otherwise of its counter-claim, should have regard to the Plaintiffs' numerous requests over a prolonged period to the Defendants seeking to close the contract and the Defendants' inability to do so and refers to the following quotation from Buckley,

O'Neill and Conroy, *Specific Performance in Ireland* (2012) under the sub-heading "*[p]laintiff must be ready, willing and able to perform*" at paragraph [2.31]: "*[a] plaintiff seeking specific performance must show that he is ready, willing and able to perform his own continuing and future contractual obligations at the relevant time or times. What is required of a particular plaintiff will depend upon the terms of the contract, but typically, a vendor should be in a position to show good title and to give vacant possession. A plaintiff may also be required to show that he has complied with any agreed terms relating to planning permission. Typically, a purchaser should be in a position to present a conveyance for execution and offer the balance of the purchase money.*"

29. Mr. Shanley BL also responded to the arguments raised by Mr. Farry BL.

30. In relation to Mr. Farry's submission that the Plaintiffs' application was statute-barred, Mr. Shanley BL submitted the Defendants erroneously assumed that the Plaintiffs' case was a claim for breach of contract, which, he says, it was not. He suggests that the Defendants have responded to a claim which the Plaintiffs have not made. Mr. Shanley submits, rather, that the Plaintiffs' case is for the restitution of moneys paid in anticipation of a contract which failed to materialise. In this regard, he submits that the cause of action accrues in an action for restitution of moneys paid in respect of a contract which did not materialise when the contract negotiations failed, and refers to Canny, *Limitation of Actions* (Third Edition, 2022), Chapter 11, Unjust Enrichment (section 4 – Accrual of the Cause of Action for Unjust Enrichment Claims), at paragraph 11-05). He poses the rhetorical question: 'When did the contractual negotiations fail?', submitting that the *cause of action accrued* in July 2019 when

Plaintiffs called on Defendants to close the sale and they failed to do so. The Plaintiffs then sought the return of the moneys in December 2019.

31. Mr. Shanley BL then addressed what he referred to as two technical points raised by the Defendants.

32. In response to the submission made on behalf of the Defendants that the Plaintiffs failed to aver to the fact that there was no Defence to the claim, he refers to the third Affidavit of the First Named Plaintiff sworn on 23rd June 2023 when he avers in the final paragraph of that Affidavit that "… *when the court contrasts the bare assertions made by the Defendants without any corroborating documentary evidence whatsoever, with the voluminous correspondence supporting the Plaintiff's case, the court ought to conclude that there is no reality to the Defendants' defence; and summary judgment ought to be granted in the terms of the Notice of Motion*."

33. Secondly, he submits that the Plaintiffs are seeking judgment on a joint and several liability basis against all of the Defendants. In this regard, Mr. Shanley BL referred to an extract from Mitchell, Mitchell & Watterson, *Goff & Jones on Unjust Enrichment* (Tenth Edition) at paragraph 20-79 where in addressing claims in unjust enrichment the learned authors *inter alia* observed that "*[i]n such cases, the law generally holds that all the defendants are jointly and severally enriched, with the result that a claim for the whole amount of the enrichment lies against any or all of them, but the principle against double recovery prevents the claimant from recovering from each defendant in full* …". He submits that the Plaintiffs' application is not a claim for damages and therefore is not covered by the Civil Liability Act 1961 (as amended). He also points out that the

Defendants have never disputed that the moneys were received on behalf of all of the defendants.

34. Mr. Shanley BL submits arising from the fact that the Defendants accept they received moneys from the Plaintiffs, this in turn means that there can be no basis to their claim that the Plaintiffs have failed to put sufficient or *prima facie* evidence before the court to establish a debt.

35. It is contended that the Plaintiffs' fundamental case is that the title of the property needed to be legally transferred by the Defendants to the Plaintiffs, *i.e.*, 'the property needs to be legally the Plaintiffs'. The Plaintiffs state that they have repeatedly called upon the Defendants to transfer title which, it is stated, they have failed to do. It is submitted that the whole point of the contract was that title would be legally transferred and if title is not transferred then the consideration has failed, which is why Mr. Shanley asserts, that the Defendants are bringing this application for summary judgment.

36. In relation to whether the fact that the Plaintiffs have had some use of the property and therefore the question arises as to whether consideration has failed totally, reference is made by Mr. Shanley BL to the following extract from Mitchell, Mitchell & Watterson, *Goff & Jones on Unjust Enrichment* (Tenth Edition) at paragraph 13-39 (vii) Transfer of Title (Title to land) where it is stated "*[t]itle to land: Where the parties have envisaged that title to land will be transferred in exchange for a payment, a failure to transfer title will make the basis for payment fail*" and the extract referred to the English authority of *Singh v Sanghera* [2013] EWHC 956 (Ch). On behalf of the Plaintiffs, reference is also made to the following extract from McDermott & McDermott,

Contract Law (Second Edition) where at paragraph 24.62 the learned authors refer to the decision of the High Court (Barron J.) in *Chartered Trust Ireland Ltd v Healy & Commins* (Unreported, High Court, Barron J, December 10, 1985) and comment as follows: "*[i]n Chartered Trust Ireland Ltd v Healy & Commins the defendant hired a truck on hire purchase in a transaction financed by the plaintiff hire purchase company. It transpired that the truck had been illegally brought into the State and was not the vehicle it had been represented to be. Barron J. held that the contract was null and void and refunded the defendant all the payments he had made even though he had had the use of the vehicle for over a year*…".

37. Mr. Shanley BL submits that the same principle applies here in relation to the conveyance of the property and states the following: "… *you contract to obtain title to the property; if you do not receive the title to the property then the basis of the contract has failed and you are then entitled to get restitution of the moneys paid in anticipation of that contract.*"

38. In relation to the Defendants' counter-claim for specific performance in the separate plenary proceedings issued on 24th April 2023, entitled *The High Court, Record No. 2023/1812P, Between, Stephen Lee, Yvonne Corbally, Ronan Lee and Maria Marsella v Robert Lee and Eileen Devlin*, and how that fits into this application for summary judgment, it is submitted on behalf of the Plaintiffs that there is no substantive defence put forward by the Defendants and they ostensibly raise what are pleading points. In terms of the test referenced above in *Prendergast v Bindle* and *Moohan v S&R Motors (Donegal) Ltd* it is accepted on behalf of the Defendants that the facts of the counter-claim do arise out of the same set of facts as this application and could give rise to an

equitable set-off. However, it is then submitted on behalf of the Plaintiffs that the counter-claim does not meet the arguable or *bona fide* threshold and it is contended that it could not be found that there was a concluded agreement which was capable of being specifically performed. In addition, it is submitted, from an equitable perspective, that the Defendants have only articulated this claim late in the day (Plenary Summons issued on 24th April 2023; Appearance entered on 17th May 2023; Statement of Claim delivered on 11th August 2023), and that delay will be an issue.

39. It is submitted, for example, that the Plaintiffs sought to close the sale for a decade but the Defendants have failed to show that they are *able* to close the sale, notwithstanding their assertion that they are allegedly *willing* and *ready* to do so. Reference is made to correspondence dated 4th July 2019 where the Plaintiffs wrote to the First and Third Named Defendants and *inter alia* stated that "*[w]e must stress that we can't wait any longer for you to complete the sale and to transfer legal ownership of the apartment. However, in the unlikely event that there is any previously undisclosed reason why you are unable to sell the apartment, please let us know the full facts, urgently. We might be able to reach a compromise of some sort but only if you set out the relevant facts – if any –within the next few days because we can't afford any more time on this. We look forward to hearing from you*."

40. This letter was followed by further correspondence from the Plaintiffs dated 15th July 2019 to the First and Third Named Defendants where it is *inter alia* stated that "… *we are writing to ask you to arrange to complete the sale of the apartment…as a matter of extreme urgency … [w]e have paid the agreed purchase price of €188,678 in full, yet despite repeated requests and subsequent agreements to do so, you have not yet*

transferred the apartment to our names … we must either secure the transfer or a full refund of our deposits … [w]e must now insist on a quick and effective resolution of this transaction because it is long-past time for you to do so, having had the benefit of our money for up to twelve years."

41. The letter of 15th July 2019 from the First Named Plaintiff was responded to by a letter dated 22nd July 2019 from the First Named Defendant who *inter alia* stated that "*[t]he reason that this matter is as yet unresolved is not, as you allege, down to our failure (assuming myself, Yvonne, Ronan and Marie) but rather was due to your inability to pay the full, agreed price. Despite this and the fact that as you rightly point out, this has persisted for over 12 years , you have enjoyed full, exclusive and unobstructed access to the property from the point of its completion to the present. Having consulted with [the defendants], I can confirm that we remain committed to a speedy resolution to this matter, to the benefit of all concerned. To that end, and given the length of time that has elapsed, we have agreed to do a full review of the material facts, including the original agreement, monies paid (when and how) and the variance between the original agreed sale price and the sum of the payments received to date. Once this review has been completed, I will revert to you with our proposed next steps.*"

42. Mr. Shanley BL reiterated his view that there was no basis for the counterclaim of specific performance and that to find the alternative would mean ignoring the correspondence and contends that there were 'too many loose ends to perform the underlying contract.' It is submitted that for specific performance to be available it would have to be held that there was a fully concluded agreement that could be specifically formed and, in this case, with disputes about price, unresolved issues such

as the common areas in the property, it is submitted that there some distance off from being a concluded agreement. While there may be a conflict of evidence as to the reason why the contract was not concluded, it is submitted on behalf of the Plaintiffs that such issues are irrelevant and the fact is, according to the Plaintiffs, it was not concluded.

43. Relying again on the extract from McDermott & McDermott, *Contract Law* (Second Edition) at paragraph 24.63, page 1609, referred to earlier in this judgment, Mr. Shanley BL submitted that this contract was conditional upon the contract for the conveyance occurring and that had not occurred. He stated that it did not matter that a mortgage was not obtained and the instalments were paid because this was a contract that was made in anticipation of a conveyance, which has not occurred. He says the damages claim for alleged flood damage pleaded in the proceedings bearing Record No. 203/1812P (referred to earlier) did not arise from the same facts and is a different claim in a different case and therefore did not satisfy the first test/requirement in *Moohan & Bradley t/a Bradley Construction v S&R Motors (Donegal) Ltd* [2007] IEHC 435; [2009] 3 I.R. 650, namely that the claim must arise from the same set of circumstances. Mr. Shanley BL referred again to the extract from Wyle, *Irish Conveyancing Law* (Fourth Edition, November 2019) (cited earlier) which refers to *Re Hibernian Transport Companies Ltd* [1972] I.R. 190 and Walsh J.'s observation that an agreement for the sale or purchase of land subject to contract means nothing more than an agreement to enter into a contract for the sale of land and, as such, it is not enforceable as if it were a contract.

44. The fundamental issue insofar as the Defendants are concerned is that payments were made in anticipation of a contract which did not materialise.

SUMMARY OF THE DEFENDANTS' CASE

45. Mr. Farry BL (for the Defendants) accepts that the total or cumulative sum of €127,400 has been paid by the Plaintiffs to the Defendants. He does not accept, however, that the total sums paid amounting to €127,400 can be claimed jointly and severally as summary judgment against the four named Defendants and he states that different sums were paid to different parties at different times. In this regard, Mr. Farry BL submits that the Plaintiffs' Notice of Motion dated the 5th May 2021 does not specify what sum was claimed against which defendant and when they were paid, which, he submits, are necessary elements to a claim for summary judgment and as originally issued sought at paragraph (a) Final judgment against the Defendant (singularly), not against the Defendants (plurally) in the sum of €183,788.

46. In summary, Mr. Farry BL says that the claim is in fact a contract claim (not a summary judgment claim) and that the Plaintiffs are in effect seeking the return of their deposit of €127,400, notwithstanding the fact that the property was custom built according to the Plaintiffs' specifications and that it was completed and handed over to the Plaintiffs in or around June 2008, and from that date the Plaintiffs assumed effective ownership enjoying full, exclusive and unobstructed access to the property since in or around that time.

Breach of contract claim

47. Mr. Farry BL refers to the requirements of what a summary summons should contain in O.4, r. 4 of the Rules of the Superior Courts. 1986 (as amended) "RSC 1986" and describes the Plaintiffs' case as 'a moving feast of a contract claim'.

48. He submits that the Plaintiffs' claim is statute-barred. By reference to paragraphs 5, 6, 7, 8, 9 and 10 of the Special Endorsement of Claim of the Summary Summons dated 5th January 2021, he submits that the Defendants have in fact pleaded a contract which was agreed in or about February 2007 and instalments were paid between 2007 and 2013, and as the pleadings were issued in January 2021, more than 6 years have elapsed from the alleged last payment in 2012, and therefore, whether it is claim in contract or in debt, it is statute-barred.

49. In this regard, for example, it is submitted that the Plaintiffs at paragraph 5 of the Special Endorsement of Claim of the Summary Summons plead that in or around February 2007, the Plaintiffs agreed to purchase the property at 149A Via Roma, San Donato, FR03030, Italy ("the property") from the Defendants and paid deposits totalling €183,788 to the Defendants over instalments between 2007 and 2013.

50. The Defendants admit that they agreed to sell the property to the Plaintiffs in or around February 2007 but claim that the purchase price was €245,845 and not €183,788 as alleged and that this sum of €245,845 was supposed to be paid by the Plaintiffs to the Defendants in one sum at handover.

51. Mr. Farry BL states that paragraph 6 of the Special Endorsement of Claim – "*[o]n the 4th July 2019, 15th July 2019, and 7th August 2019, the Plaintiffs wrote to the Defendants*

requesting the completion of the sale of the Property *and the transfer of legal title to the second named Plaintiff* …" – is in effect the basis for a claim of specific performance by the Plaintiffs.

52. He states that paragraphs 7 and 8 of the Special Endorsement of Claim then refer to a breach of contract by failing to complete the sale of the property and by failing to complete the conveyance of the property.

53. Mr. Farry BL says that paragraphs 6 and 7 of the Affidavit of Robert Lee (the First Named Plaintiff) sworn on 5th May 2021 makes a similar assertion:

> "*(6) [n]o response was received to the said letters (other than the letter of 22 July 2019) and the Defendants have, in breach of contract, failed and/or refused to complete the sale of the Property to the Plaintiffs.*
> *(7) In breach of contract, the conveyance of the said Property was not completed and the said €183,788 has not been returned by the Defendants to the Plaintiffs, despite numerous requests by letters dated 20th of December 2019, 2nd of January 2020, 14th of January 2020 and 2nd of December 2020.*"

54. On behalf of the Defendants, therefore, it is submitted by Mr. Farry BL that this is not evidence of a debt demand or a claim for summary judgment, but is rather, evidence of a claim 'to complete the contract.'

55. Mr. Farry BL also refers to Order 37, r. 5 RSC 1986 and *inter alia* the requirement for a summary summons motion to be "… *supported by an affidavit sworn by the plaintiff or by any other person who can swear positively to the facts showing that the plaintiff is entitled to the relief claimed and stating that in the belief of the deponent there is no defence to the action* …". Mr Farry BL submits that the Plaintiffs have not done this, nor is it referred to on any affidavit, and that such a failure to comply with O.37, r. 5 RSC 1986, in and of itself, is sufficient to send the matter to plenary hearing.

56. Mr. Farry BL submits that the letter before action dated 2nd December 2020 from the Plaintiffs' solicitors, O'Brien Redmond Solicitors, provides inadequate details in terms of the alleged breach of agreement or breach of contract, including for example, an insufficient description of what is the agreement, when was it agreed, who are the parties, what date, what are the terms, the date of the contract and date of the breach.

57. Mr. Farry BL argues that the Plaintiff has failed to establish which, if any of the defendants were in receipt of the sums paid. For example, an extract from a bank account in the joint names of the Second and First Named Plaintiffs dated 4th June 2009 states that €4,000 was paid and the reference is to INET SAN DON POOL. He submits that the Plaintiffs have failed to specify what sum of money was paid to what Defendant and when it was paid, which are also necessary elements to a claim for summary judgment as per the judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v O'Malley* [2019] IESC 84.[5] In that case it was held that the obligation on a defendant to establish an arguable defence was one which only arose if the plaintiff had first placed sufficient evidence before the court to establish *prima facie* that the debt alleged

[5] The Supreme Court was comprised of Clarke CJ, Charleton and Ní Raifeartaigh JJ.

was due. The Court held that the two questions to be answered were first, whether the plaintiff has put sufficient evidence before the court to establish a *prima facie* debt, and if not, there was no entitlement to summary judgment, and second, if it had put sufficient evidence before the court to establish a *prima facie* debt then the court had to consider, as per the relevant case law, whether the Defendant has put forward a credible defence.

58. He stated that the options for the court in considering this application were set out in O.37, r. 7 RSC 1986. This provides that the court on hearing this application may give judgment for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just.

59. The Plaintiffs' case is characterised by Mr. Farry BL as a complex series of disputes and factual matters with no averment from the Plaintiffs when bringing the application as to either what is the contract, what is the date of the contract and the statement that they have a belief that there is no defence to the application.

60. Mr. Farry asks the Court to dismiss the Plaintiffs' application or in the alternative, remit the matter to plenary hearing.

ASSESSMENT & DECISION

61. As just pointed out, in an application for summary judgment, the Rules of the Superior Courts 1986 (as amended) prescribe that a court can grant summary judgment, dismiss the action or adjourn the matter for plenary hearing.

62. In this case, I am satisfied that the Defendants have shown that they have a fair or reasonable probability of having a real, *bona fide* and credible defence to the Plaintiffs' claim in relation to the sum of €127,400. Further, in my view, the following issues raised by and on behalf of the Defendants are not easily determinable in this summary application[6] and could not be characterised as mere assertions unsupported by either evidence or by any realistic suggestion that may be available or comprise facts which are either self-contradictory or inconsistent.[7] There are, in addition, credible issues of fact between the Plaintiffs and the Defendants which, if resolved in favour of the Defendants, will disclose a fair and reasonable probability of defence[8] . In my view, for the following reasons, it cannot be clearly concluded that the Defendants have no case in relation to the sum of €127,400 claimed by the Plaintiffs. In this regard, for example, the parties agree that the Defendants agreed to sell the property to the Plaintiffs in or around February 2007. The Defendants had bought and developed a site in Italy and agreed to sell one of three apartments ("the property") to the Plaintiffs. It appears, at least initially, that the sum of €245,845 was to be paid by the Plaintiffs to the Defendants in one sum. The amount of €245,845 is referenced in the schedules produced by the First Named Plaintiff and attached to the correspondence and emails exhibited by the First Named Plaintiff. The parties disagree, however, on what the final purchase price was. The e-mail, for example, of 28th February 2011 from the First Named Plaintiff to

[6] *Harrisrange Ltd v Duncan* [2002] IEHC 14; [2003] 4 I.R. 1 McKechnie J. at pp. 7-*8; AIB plc v Griffin* [2020] IECA 221 Murray J. at paragraph 15.
[7] *IBRC Ltd v McCaughey* [2014] IESC 44; [2014] 1 I.R. 749.
[8] *Harrisrange Ltd v Duncan* [2002] IEHC 14; [2003] 4 I.R. 1 McKechnie J. at pp. 7-8.

the First and Third Named Defendants refers to "… *the up-to-date spreadsheet which shows the balance of €87,057* …". The Plaintiffs say there was an agreement to reduce the purchase price from €245,845 to €183,788 and this is denied by the Defendants.

63. The property was built and the Plaintiffs had access to the property from in or around June-July 2008. By e-mail dated 20th September 2008 from the First Named Plaintiff to the First Named Defendant he refers to seeking the First Named Defendant's help to arrange a mortgage. In or around June 2008 in e-mail correspondence from the First Named Plaintiff to the Third Named Plaintiff, the First Named Plaintiff *inter alia* indicates that he intends to come to Italy on 30th June 2008 to pay the outstanding sums. By September 2008, the Plaintiffs were in occupation and as of 29th September 2008 had paid €40,000.

64. By e-mail on 23rd February 2009 from the First Named Plaintiff to the First Named Defendant it is *inter alia* stated that "*[t]he bottom line is that, as far as we are concerned, we are contracted with you to buy the apartment, and you are contracted to sell it to us. We have no formal written contract between us, so the terms of our contract would have to be inferred from our various correspondence back and forward*."

65. It appears that the Plaintiffs had intended to take out a loan, for example, a mortgage in Italy (assisted by the First and Third Named Defendants) to buy the property and that this was never realised. This led to the First Named Plaintiff suggesting a payment schedule. In his second affidavit, the First Named Plaintiff (sworn on 3rd May 2022) states *inter alia* at paragraph 6(iii) that in "*November 2009, after negotiation, we agreed on an all-inclusive purchase price of €245,845*."

66. A series of staged payments were paid up to, but not after, 16th December 2012 and whilst there is disagreement as to whom these moneys were paid, and as to their purpose, it appears that the parties agree that the total or cumulative amount for the purpose of this application came to €127,400. On behalf of the Defendants, it is submitted that after 16th December 2012 the balance remained outstanding and that the Plaintiffs did not sue for any debt, or in the alternative breach of contract, within 6 years. While the application of the Statute of Limitations is therefore contested as between the parties, it is reasonably probable of being a real, *bona fide* and credible defence to the Plaintiffs' claim in relation to the sum of €127,400.

67. After that period, the Plaintiffs effectively sought a discount and a reduction on the sums that were due and the documentation before me suggests that the First Named Plaintiff sought in 2015 to agree a debt write-off with the Defendants. An e-mail of 17th February 2015, again from the First Named Plaintiff to the First and Third Named Defendants, refers to a purported agreement between the Plaintiffs and the Defendants involving *inter alia* the use by the First Named Plaintiff of €25,000 for works to the property and paying to the Defendants the balance of whatever sum (from the €25,000) was left over. The Defendants deny that there was any such agreement. The Defendants, therefore, submit that the Plaintiffs have never concluded the contract despite having been in occupation since mid-2008 and there is, in my view, a reasonable probability of the aforesaid constituting a real, *bona fide* and credible defence to the Plaintiffs' claim in relation to the sum of €127,400.

68. There is also a dispute between the parties as to who is responsible for the current condition of the property including alleged damage due to flooding.

69. It is argued that any forbearance shown by the Defendants over the years for whatever reason (including the familial context of the dispute), and any acceptance of payments made, does not detract from the fact that the Plaintiffs have not paid all of the moneys due for the purchase of the property. In *Healy v Ulster Bank Ireland Ltd & Others* [2020] IECA 332, for example, the Court of Appeal[9] (Faherty J.) at paragraph 72 of the court's judgment endorsed *inter alia* the following extract of the trial judge in that case (McGovern J.) beginning at paragraph 48 of the judgment of the High Court (McGovern J.):

> "*50. [t]he court respectfully does not see how Dr. Healy can contend on the basis of the foregoing that there was an enforceable [contract] whereby Ulster Bank agreed to release him from the partnership liabilities or the guarantee. In the absence of consideration, there was no binding agreement whereby Ulster Bank agreed to release Dr Healy from the partnership liabilities or the liability under the guarantee. What presents instead is an informal, unilateral and, in truth, gratuitous undertaking by Ulster Bank which is not enforceable under contract law. The want of enforceability arises because Ulster Bank can of course pray successfully in aid the so called rule in Pinnel's case (1602) 5 Co. rep. 117a, held to be a rule of continuing force in Irish law by Laffoy J. in Barge Inn Ltd v Quinn Hospitality Irl Operations 3*

[9] The Court of Appeal was comprised of Faherty, Haughton and Murray JJ.

Ltd [2013] IEHC 387, para.62, following a consideration of relevant authority.

51. The rule in Pinnel's case has the effect that if a liquidated sum is owed by A to B, a promise by B to take a lesser sum (here nothing) in satisfaction of the larger debt will not bind B. In the case at hand, there is not, to borrow from the terminology of Laffoy J. in Barge Inn, para.62, any 'new element 'in' the relationship of the debtor and creditor', here that of Dr Healy and Ulster Bank that would remove the said relationship from the scope of the rule. Of course, as Laffoy J. moves on to note 'The application of the doctrine of promissory estoppel may obviate an inequitable outcome to which the application of the rule in Pinnel's Case would otherwise give rise'. But, as will be seen hereafter, the doctrine of promissory estoppel is of no avail to Dr Healy in the circumstances now presenting …".

70. In this regard, on behalf of the Defendants, reference has been made to a clear and defined legal principle and a proposition of law – *Healy v Ulster Bank* - as authority to the effect that any forbearance shown by the Defendants over the years, because of the familial context of this dispute and the acceptance of payments made, did not detract from the fact that the overall sum due to be paid by the Plaintiffs to the Defendants remains the sum of be €245,845 – which, in my view, cannot be resolved without further and fuller legal argument by way of a plenary hearing.

71. It is submitted on behalf of the Defendants that they have at all material times been *ready*, *willing* and *able* to complete the sale, which, as stated above is contested by the Plaintiffs, particularly the claim that the Defendants had the *ability* to complete the sale. This is a matter which will also require to be resolved at a plenary hearing.

Counter-claim/Set-off

72. The corollary of the restitution claim by the Plaintiffs in this application for summary judgment is the Defendants' 'counter-claim' contained in proceedings issued on 24th April 2023, entitled *The High Court, Record No. 2023/1812P, Between, Stephen Lee, Yvonne Corbally, Ronan Lee and Maria Marsella v Robert Lee and Eileen Devlin*. The Plaintiffs here (the Defendants in that case) entered an Appearance on 17th May 2023 and the Defendants here (the Plaintiffs in that case) delivered a Statement of Claim on 11th August 2023, where they *inter alia* seek an order of specific performance of the agreement entered into between the parties for the purchase by the Plaintiffs of the property known as and situate at 146A Via Roma, San Donato, FR03030, Italy, (the property the subject of this application) in addition to damages, declaratory relief and costs.

73. In the counter-claim in proceedings bearing *Record No. 2023/1812P*, the Defendants in this application (the Plaintiffs in the specific performance application) have met the requirements set out in *Moohan & Bradley t/a Bradley Construction v S&R Motors (Donegal) Ltd* [2007] IEHC 435; [2008] 3 I.R. 650, and *Prendergast v Biddle* (Unreported, Supreme Court, 21st July, 1957, Kingsmill Moore J.). The claim arises from the same set of circumstances which give rise to the claim here and, on the basis

of the Defendants case, it would not, in my view, be inequitable to allow the claimed set off. Accordingly, given that a *prima facie* case for such a set off arises, the Defendants have established a defence to the proceedings and should be given liberty to defend same.

74. In considering this application, it is not my function to decide whether the Plaintiffs or the Defendants are right or wrong in their respective claims in the context of the substantive proceedings. In answering the rhetorical question posed by Hardiman J. in *Aer Rianta c.p.t. v Ryanair Limited* [2001] 4 I.R. 607 at page 623 the Defendants have identified a number of possible defences which are open to them to plead.

75. Accordingly, I am not satisfied that the Plaintiffs have a subsisting entitlement to summary judgment in the sum of €127,400 when considering the matters put forward by the Defendants in opposing the Plaintiffs' application.

PROPOSED ORDERS

76. I, therefore, refuse the Plaintiffs' application and in accordance with O.37, r. 7 of the Rules of the Superior Courts 1986 (as amended), I direct that the case be adjourned for plenary hearing and the Defendants be given liberty to defend the proceedings.

77. I will put the matter in for mention at 10:30 on 27th February 2024 and will hear the parties in relation to any further consequential or ancillary matters, including the question of costs.