THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 133

Record Number: 2019/63

Record Number:2019/64

Whelan J.
Ní Raifeartaigh J.
Murray J.

BETWEEN/

ALLIED IRISH BANKS PLC

RESPONDENT

- AND -

SIMON FORDE & DARRAGH O'DRISCOLL

APPELLANTS

Judgment of Ms. Justice Máire Whelan delivered on the 11th day of May 2020

Introduction

1. This is an appeal against orders for summary judgment granted to the respondent ("the bank") by O'Hanlon J. in the High Court on 11th February, 2019. The orders were made in the absence of the appellants' legal representatives. As against the first appellant summary judgment was granted in the following sums:-

   (i) €20,095.49 pursuant to a joint letter of sanction;

   (ii) €112,576.37 pursuant to a sole letter of sanction; and

   (iii) €204,000 pursuant to a guarantee together with costs.

   As against the second appellant judgment was granted as follows:-

   (i) €20,095.49 pursuant to the terms of a joint letter of sanction; and

   (ii) €204,000 pursuant to a guarantee together with costs.

History of litigation

2. The within proceedings were instituted by way of a single summary summons on 26th November, 2014. The special indorsement of claim sought interest pursuant to contract and/or pursuant to statute, a matter which the appellants contested as hereafter set out. The litigation appears to have gone into abeyance for almost three years thereafter. Both

appellants entered appearances in person on 23rd October, 2017. A notice of intention to proceed was served on 25th October, 2017 on both appellants and the third named defendant Forcoll Developments Limited which is not a party to this appeal.

3. On 28th May, 2018 and 24th May, 2018 notices of motion issued out of the Central Office of the High Court seeking summary judgment against the first and second named appellants respectively. The said motions were in each case grounded on an affidavit of Colette Rooney sworn on behalf of the bank on 18th May, 2018. One motion was initially returnable for 28th June, 2018; the other for 29th June, 2018. Thereafter the motions appeared in the Master's List on 5th July, 2018. W.B. Gavin & Co. Solicitors came on record for the appellants on 20th July, 2018 and thereafter the motions were adjourned from time to time including on 20th July, 2018; 12th October, 2018; 9th November, 2018; and, 30th November, 2018 on which latter date both motions were transferred from the Master's Court to the Judges' List on consent.

Appellants' Replying Affidavit

4. The grounding affidavits of Colette Rooney of 18th May, 2018 included eight exhibits in respect to the first named appellant and six exhibits in respect to the second named appellant. A replying affidavit was sworn on 19th July, 2018 by Darragh O'Driscoll, the second named appellant. Paragraph 1 of the said affidavit deposed as follows:-

> "…I make this affidavit on behalf of and with the authority of the first named defendant."

It was very clear therefore that this affidavit was sworn on behalf of the first named appellant, Simon Forde, as well as on the deponent's own behalf. Indeed, in a replying affidavit sworn on 8th October, 2018 Colette Rooney appears to acknowledge as much, deposing at para. 3:-

> "…I note that Mr. O'Driscoll avers to the fact that Mr. O'Driscoll's affidavit is made on behalf of and with the authority of the first named defendant, Simon Forde. I note that, to date, Mr. Forde has not sworn a replying affidavit in response to the motion issued specifically against him in the herein proceedings. However, although it is not clear, for the purposes of this affidavit I am taking it that Mr. O'Driscoll's affidavit is intended to be in response to the motion issued against Mr. O'Driscoll and also in response to the motion issued against Mr. Forde on the basis of Mr. O'Driscoll's averment that he makes his affidavit for and on behalf of Mr. Forde. If my understanding of the position is incorrect, I reserve the right to file a further affidavit." (emphasis added)

5. The said replying affidavit sworn on behalf of both appellants contested the bank's claims and disputed its entitlement to judgment on a number of grounds including the following:-

(i) By way of preliminary issue it was asserted that there had been extensive delay by the bank which had been inordinate and prejudicial to the appellants. At para. 2 the

prejudice was identified thus: "…I have been prejudiced by the delay in this regard as the plaintiff has continued to apply penal interest and surcharges without explanation or warning to me." Prejudice was also asserted on the basis that employees of the bank who had dealt with the case "are no longer employed by the plaintiff and may not be available to give evidence".

(ii) It was contended that much of the grounding affidavit was "hearsay and the terms and conditions of the loan referred to therein and in particular, the rights and entitlements upon the occurrence of any event of default were not to my recollection ever produced or given to me".

(iii) A third issue was directed towards the appointment of a receiver by the bank over property situate at Tuam. It appears that the receiver was appointed on foot of a facility advanced pursuant to a facility letter of 16th July, 2010. It was contended that the property in question was not referred to anywhere in the facility letter. Thus it was asserted that the appointment of a receiver was improper. Correspondence exhibited in the appellants' affidavit demonstrated that from December 2017 onward solicitors on their behalf were raising a wide variety of issues with regard to the receivership. Of direct relevance to these proceedings include the following issues: that the receiver had been appointed in respect of a debt of less than €20,000; that when the receiver took possession of the property there were rent-paying tenants in occupation; and, that there was no evidence forthcoming as to whether any of the rents and profits derived from the property had ever been applied in and towards satisfaction of the debt. Significantly it was expressly asserted in correspondence, including in a letter of 20th May, 2018, that the rents earned in respect of the property "should have been in excess of the amount of the money owed." The response of the bank, which failed to contradict this specific issue, will be considered hereafter.

(iv) The appellants further raised issues concerning the guarantee, asserting that they had no recollection of same being explained or shown to them: "…neither Simon Forde or I were given any explanation of what these documents were."

(v) The appellants took issue with the amount of interest levied. It was contended that the amount of interest being charged had not been particularised beyond "bald averments" in the bank's grounding affidavit. It was deposed that the appellants intended "…when such figures are presented to engage the services of Acquiring Solutions trading as BANKCheck… for the purposes of calculating the precise sum overcharged on the various loan accounts referred to in the grounding affidavit by the plaintiff."

(vi) The appellants' affidavit also raised issues concerning "Central Bank charges", contending that the bank's grounding affidavit had failed to deal with certain charges granted by the bank to the Central Bank of Ireland on or about 15th February, 2008 which were "granted over certain present and future assets of AIB as part of a process of recapitalisation of AIB." The affidavit further contended that

any loan such as the appellants' "fell within the present and future assets referred to in the charges." Further, that such charges, the argument went, were and/or amounted to fixed charges or, if floating, crystallised on or before 1st December, 2010. Accordingly, the appellants contended that if any right or obligation was vested in the appellants prior to the charges, the said right or obligation was an asset which vested in the Central Bank prior to or on that date.

The bank's response

6. The appellants' affidavit contesting liability and disputing the bank's entitlement to summary judgment was responded to on 8th October, 2018 by replying affidavit of Colette Rooney sworn on behalf of the bank. She contended at para. 4 that:-

> "…a number of the issues raised in Mr. O'Driscoll's affidavit are either irrelevant to the within application or are more appropriately addressed by way of legal submission at the hearing of this application. Accordingly, I only propose to reply to certain salient matters hereunder and the absence of a response to each and every paragraph is not to be taken as an acceptance of its content."

The affidavit failed to specifically identify the particular issues which the bank contended were irrelevant, neither did it identify with particularity those which were more appropriately to be addressed by way of legal submission at the hearing of the summary summons. The transcript of the hearing does not record any legal submission on behalf of the bank directed to an averment in the appellants' affidavit.

7. In addressing the issue of delay the affidavit deposed that the bank had been attempting to dispose of secured assets to satisfy the indebtedness of the appellants and it was contended that "any alleged delay in proceeding with the herein motion has been to the benefit of the first and second named defendants as it has delayed judgment being obtained against them".

8. With regard to the claim regarding excessive interest, at para. 8 it is deposed that the bank has "waived its claim for further interest as set out in the special indorsement of claim on the summary summons issued in the herein action."

9. Concerning the receiver, para. 13 of the replying affidavit bears repeating in its entirety:-

> "I say that the allegations with respect to the receiver are denied in full. However, without prejudice to this position, I say that such allegations are not relevant to the herein proceedings and, if the first and second named defendants have an issue with any receiver and/or his appointment, I am advised by the plaintiff's solicitors that such issues should be litigated by separate and distinct proceedings. Therefore, I do not propose addressing the allegations with respect to receivers appointed by the plaintiff in the herein affidavit."

The bank disputed the appellants' claims regarding the guarantee, averring at para. 19: –

> "…the plaintiff was under no obligation to seek to ensure that the first and second named defendants were afforded the opportunity to read the guarantees. In this regard, while I am advised by the plaintiff's solicitors that it is more correctly a matter to be addressed in legal submissions, I would respectfully direct this Honourable Court to the judgment of Mr. Justice Clarke (as he then was) in the High Court case of *ACC Bank Plc v. Kelly and Kelly* [2011] IEHC 7…"

Regarding the level of interest levied, the bank exhibited statements of account from drawdown to the date of the issue of the summary summons in respect of each of the loans the subject matter of the proceedings. The bank contended that "the interest charged on each account can be quite easily assessed from the exhibited accounts without the need to engage any expert." Further, with regard to the contention that the Central Bank acquired an interest in or over the charges, the deponent averred: –

> "The plaintiff originated each of the loans the subject matter of the herein proceedings and remains the legal owner of such loans and, as such, the plaintiff is the proper plaintiff in the within proceedings."

Therefore it was evident that a number of material issues were in dispute between the parties. Further, the bank had clearly represented in its affidavit that it was deferring engagement with and would respond to some issues "…by way of legal submission at the hearing of this application".

Events immediately prior to hearing of summary summons

10. The appellants were aware that the summary summons was in the Judges' List on 11th February, 2019. Some consideration had been given to a without prejudice meeting between the parties though it appears that such a meeting did not transpire. It appears clear that insofar as the solicitor for the appellants understood there was some form of agreement to an adjournment he was under a misapprehension. The appellants' written legal submissions to this court stated:-

> "The solicitor for the [appellants] believed that, as the matter would take over fifteen minutes, it was not suitable for hearing in a Monday list as the affidavits would take longer than that to open to the court. He believes that agreement was reached on this basis that the matter would be adjourned on consent to the next list or to the list of fixed dates.
>
> The solicitor for the bank says that that was not the position and that he had no instructions to consent to an adjournment."

Hence, it would appear that a state of affairs obtained whereby following a conversation between the solicitors on or about 6th February, 2019 a mutual misunderstanding arose between them as to what would transpire in court on the following Monday, 11th February, 2019. The solicitor for the appellants believed that, in circumstances where there were four affidavits with exhibits and a practice direction requiring the court to be notified should any matter be likely to take longer than fifteen minutes so that directions

could be made as appropriate, these two motions for judgment would not be disposed of in the Monday list. No blame can reasonably be attached to either party for that misunderstanding having come about.

The hearing on 11th February, 2018

11. A written submission to this court dated 5th November, 2019 filed on behalf of the bank states: -

> "11. When counsel for the respondent was instructed to seek judgment against the appellant on 11th February, 2019, they contacted a counsel often retained by W.B. Gavin & Co. The said counsel stated he was not instructed in the within proceedings.
>
> 12. On 11th February, 2019, counsel for the respondent, was not present in court at first call. The matter was then inadvertently struck out by Ms. Justice O'Hanlon. During lunch recess, counsel for the respondent spoke to the court registrar who confirmed that no appearance had been made at first call by the appellant. The matter was then reinstated by the registrar and heard by Ms. Justice O'Hanlon at two o'clock."

12. The DAR records are important in this case and undermine the position of the bank in a number of material respects. The excerpt from the DAR of the full hearing runs to six pages in respect of the two motions for judgment. In response to the query "Anyone against you?" at p. 1, line 24, the bank's response is "No, now, I'm in a position to prove service." The judge then enquires "Are they aware that this is going on today?" The response was "Yes, they are aware this is going on today." The judge asks "Have they indicated an attitude?" The response on p. 2, line 14 states:-

> "No, they haven't indicated an attitude. When they came on record, they filed a replying affidavit on behalf of the second named [appellant], and that is in the books of papers before you. So, I suppose, the implication of that is that they are opposing the bank's motion, but they are not making an appearance today. Now, my position is that my proofs are in order."

This statement is remarkable for a number of reasons:

a) It is difficult to understand how it could be contended that the appellants had not indicated an attitude to the proceedings and to the summary relief being sought in circumstances where a replying affidavit had been sworn on 19th July, 2018, some seven months prior, which had exhibited fifteen pages of documents and correspondence and which had raised a wide range of issues disputing and contesting liability for the sums claimed.

b) The statement to the court contended that the replying affidavit was filed "on behalf of the second named [appellant]". This was inaccurate in circumstances where the replying affidavit of Darragh O'Driscoll (the second appellant) had expressly stated at para. 1, as outlined above, that it was sworn also on behalf of

and with the authority of Simon Forde (the first appellant). Further, as referred to above, it had been accepted by the bank and expressly acknowledged in the replying affidavit of Colette Rooney that the said affidavit was sworn on behalf of both appellants.

c) Characterising the affidavit as giving rise to "the implication… that they are opposing the bank's motion" did not adequately or fairly convey to the court the tenor and content of the affidavit sworn on behalf of the appellants by the second named appellant, irrespective of the merits of the various contentions.

d) The statement that "they are not making an appearance today" inevitably conveyed to the court that the appellants and their instructing solicitors had formed an intention to deliberately absent themselves from the court process. It is not clear what could have been the basis for such a pronouncement, apart from the absence of the solicitor and counsel from the courtroom, particularly in circumstances where counsel earlier on the same day had contacted a colleague whom he erroneously surmised might have been retained to represent the appellants in court. This gesture tends to suggest that there was an expectation on the part of the bank that the appellants would be represented and would oppose both applications for summary judgment. Indeed, it was the only reasonable inference to be drawn from the tenor of the appellants' affidavit which had been sworn the previous July and the course of dealings between the parties' solicitors.

13. Counsel then proceeded to state:-

> "My position is that, particularly against the first named [appellant], no affidavit has been filed. And I intend to proceed, subject to the court, seeking judgment against the first named [appellant] today. There is no affidavit filed on behalf of the first named [appellant]."

Unfortunately, as already noted, that was not correct. It left the court under a misapprehension as to a fundamental fact. It created an impression that the first named appellant was conceding without contest the matters claimed and the reliefs being sought against him. It was inconsistent with the bank's own position set out in the replying affidavit of Colette Rooney of 8th October, 2018 at para. 3. The court was not informed that an affidavit had been sworn on behalf of and with the authority of the first named appellant advancing points against and contesting the claims of the bank. In such circumstances the court granted final judgment against the first named appellant in relation to the three sums claimed in the notice of motion together with costs.

14. In support of the application for judgment against the first appellant, reference was made to the first affidavit of Colette Rooney and in particular paras. 5, 8, 10, 13 and 15 and a number of exhibits were referred to.

15. With regard to the claim against the second appellant, at p. 5 counsel states:

> "And there is an affidavit of Colette Rooney, it's a second affidavit of Colette Rooney, which is behind tab eight."

The contents of the said affidavit were not opened to the court. The affidavit of the second appellant was not opened to the High Court judge and thus the court proceeded with no awareness of any of the issues being raised in opposition to the claim nor of the response of the bank as encompassed in the replying affidavit of Colette Rooney. The practical consequences was that the judgments came to be obtained by the bank in circumstances where (a) the judge was informed that no affidavit had been sworn on behalf of the first appellant, which was incorrect; (b) the contents of the second appellant's affidavit disputing the bank's entitlement to summary judgment (on behalf of both appellants) was not brought to the judge's attention, even in outline form; and, (c) the judge was left under the impression that the appellants had chosen not to attend the hearing.

Events in immediate aftermath of judgment

16. On 13th February, 2019, two days after securing judgment, the appellants' solicitors emailed their counterparts. The relevant extract from the email states:-

> "I refer to the above-mentioned matter and our telephone conversation of last week. It was my understanding that we had agreed that the matter would be adjourned to a hearing date on consent as the matter was over fifteen minutes with four affidavits. I note that the matter is showing as an order having been granted and can you confirm the position?"

That email was not immediately responded to.

17. On 15th February, 2019 solicitors for the appellants wrote:-

> "We refer to the above-mentioned matter and our telephone conversation of last Friday.
>
> It was our clear understanding that we had agreed that the matter would be adjourned to a hearing date on consent as the matter would take over fifteen minutes and was not suitable for a Monday, as four affidavits had been filed."

The letter concluded: –

> "We await hearing from you urgently in regard to this matter."

A similar letter was sent again on 18th February, 2019 to solicitors for the bank: -

> "We refer to the above mentioned matter and we note that judgment has been marked in these matters despite a conversation with your offices that the matter would be adjourned on consent as it was a matter that would which would (*sic*) take more than fifteen minutes.

> Please note that we are instructed to appeal the matter and our clients will be seeking any additional costs incurred in this regard as a result of you pushing on with the matter in circumstances where we were of the firm view that agreement had been reached to adjourn the matter."

18. It would appear that the solicitors for the bank did not immediately notify the appellants' solicitor that judgment had been obtained. By letter dated 20th February, 2019, nine days after judgment being obtained, the bank's solicitors responded:-

> "At the outset, we deny there was any form of agreement between the parties to adjourn our client's applications which were listed on the 11th February, 2019.
>
> For the avoidance of doubt, this letter is without prejudice save for this letter being disclosed, if necessary, to challenge any suggestion that there was some form of agreement to adjourn the applications listed on 11th February, 2019 and/or to challenge any suggestion of wrongdoing by this firm."

19. The letter alludes to an "off the record" telephone conversation on the afternoon of 6th February, 2019 and continues: -

> "While the procedure involved in the upcoming court appearance was discussed, our clear instructions from our client were to proceed with the applications. We did not, and did not have any instructions to, consent to adjourn the matters."

Certain without prejudice correspondence is then referred to.

20. The appellants moved relatively swiftly, serving a notice of appeal under cover of letter of 28th February, 2019. Over two weeks later, agents for the bank responded by letter of 15th March, 2019 contending that the appellants could invoke O. 36, r. 33 of the Rules of the Superior Courts ("RSC"). It was argued that same provided:-

> "… a specific mechanism for a party to set aside a judgment obtained in its absence. In *Bank of Scotland v. McDermott* [2017] IEHC 77, Mr. Justice Barrett confirmed that such a procedure could be availed of by a defendant in summary proceedings. While we are instructed to oppose any such application, we believe that this procedure should have been availed of by your clients in this case."

The correspondence stated that the judge had not granted judgment against the appellants at first call, nor did she grant judgment in default of appearance: "Rather, the [respondent's] grounding affidavits were opened to the court and the learned judge was persuaded that the [respondent] had met its required proofs." The DAR transcript does not support the assertion that the respondent's affidavits were opened to the court.

The Appeal

21. Notices of appeal were filed promptly on 22nd February, 2019. The following orders were sought:

(1) an order setting aside the liberty granted to the respondent on 11th February, 2019 to enter final judgment;

(2) an order remitting the proceedings to the High Court;

(3) if this court intends to proceed to determine any factual matter, an order pursuant to O. 58 RSC permitting the appellants to file the affidavit evidence they did not have the opportunity to file in the High Court; and,

(4) if necessary, an order remitting the proceedings for plenary hearing by the High Court.

The grounds of appeal relied upon by both appellants are similar and provide as follows: -

(1) that the solicitor for the appellants was under a misapprehension that the matter was going to be adjourned on 11th February, 2019;

(2) as a consequence, neither solicitor nor counsel for the appellants attended in court;

(3) the trial judge erred in granting liberty to enter final judgment where the record of the High Court showed that the appellants were represented and where no prejudice would be suffered by the respondent by any adjournment, either to a second calling in the list or for a number of weeks, to ascertain the position of the appellants' representatives;

(4) the trial judge erred in law in determining the application in circumstances where the appellants had no, or no adequate, opportunity to contest the facts as stated by the respondent; and,

(5) such further factual matters as may be placed before this court.

The bank's position

22. The bank contended that the appellants should have availed of O. 36, r. 33 RSC which provides:-

> "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the court upon such terms as may seem fit, upon an application made within six days after trial."

23. Counsel for the bank sought to rely on O. 36, r. 28 RSC at the hearing of this appeal in support of his entitlement to refrain from opening to the trial judge the replying affidavit sworn on behalf of both appellants.

Discussion

24. Order 37 RSC governs the procedure in relation to the hearing of suits commenced by summary summons. Order 37, r. 2 provides that: -

> "2. Save in so far as the court shall otherwise order, a motion for liberty to enter judgment under this Order shall be heard on affidavit…"

Order 37, r. 3 provides: –

"3. The defendant may show cause against such motion by affidavit… Such affidavit shall state whether the defence alleged goes to the whole or to part only, and (if so) to what part, of the plaintiff's claim."

Clearly the instant case was not an uncontested matter since it had been transferred by the Master of the High Court to the Judges' List for hearing. Order 37, r. 7 provides: –

"7. Upon the hearing of any such motion by the court, the court 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."

There is a distinction between O. 36, which governs plenary hearings, and O. 37, which governs applications for summary judgment.

25. McMenamin J. in *Ulster Bank Limited v. O'Brien* [2015] IESC 96, [2015] 2 I.R. 656 set out the principles applicable to summary judgment applications. He started by observing:-

"[2] What is in issue in summary judgment applications is whether or not a *prima facie* case can be made out by the plaintiff. The burden of proof is on the party who asserts the debt is owed. As a general principle, a *prima facie* case will be made out when, on the evidence available, it would be open to a tribunal of fact, if no other evidence was given, or if that tribunal accepted that evidence even though contradicted in its material facts, to enter a verdict for that party (see *O'Toole v. Heavey* [1993] 2 I.R. 544, at pp. 546 and 547)."

McMenamin J. went on to observe that: –

"[3] …when one is dealing with applications for summary judgment the test is somewhat nuanced for the protection of a defendant. If there is a real conflict on the facts or law, the matter must be remitted for plenary hearing. I would point out that a simple, bald denial of indebtedness, whether in correspondence or on affidavit, will not be sufficient to discharge the burden, so far as a defendant is concerned. A defendant's evidence must set out in a clear way why the sum claimed is said not to be due and owing to a plaintiff."

In that case there was no conflict on the facts and no affidavit was filed by the defendants; therefore, the threshold test outlined above for remittal to plenary hearing was not met.

26. McMenamin J. at para. 7 of his judgment observed:-

"The summary judgment evidential tests are, by now, well established. I reiterate them here for convenience. The 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 plc v. Anglin* [1996] 1 I.R. 75, *per Murphy J.; Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607, *pe*r McGuinness and Hardiman JJ.; and *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." (emphasis in original)

27. Laffoy J. in the same case observed at p. 663, having considered the language of O. 37, and in particular O. 37, r. 1:–

> "It is clear on the wording of that rule that, as regards proof of the claim, an affidavit sworn by a person other than the plaintiff who can swear positively to the relevant facts is sufficient. However, the later provisions of O. 37 are protective of the defendant. For instance, under r. 2, although it is stipulated that the motion for liberty to enter judgment under that order shall be heard on affidavit, there is a proviso that any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination… Further, under r. 3 it is provided that the defendant may show cause against the motion by affidavit."

28. The Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 considered in detail the obligations of the plaintiff in a summary claim for debt where the Chief Justice observed at para. 5.1 that based on authorities reaching back at least 140 years:-

> "…The defendant to a summons is entitled to have sufficient particulars to enable him 'to satisfy his mind whether he ought to pay or resist'".

The Chief Justice continued: –

"5.2 Where it comes to the evidence which is required to be placed before the court, it does seem to me that it is important to emphasise that there is an obligation on any plaintiff to produce *prima facie* evidence of their debt if they wish the court to grant summary judgment (or, indeed, if, in the absence of the filing of an appearance by the defendant, they bring an application for judgment to the Central Office). The jurisprudence on the question of what a defendant must do to resist

summary judgment primarily focuses on cases where a *prima facie* claim to a debt is established and the defendant wishes to put forward a positive defence. In such cases, it is necessary for the court to assess, in accordance with the detailed requirements which can be found in the relevant jurisprudence, whether what is said to amount to a defence amounts to mere assertion or meets the threshold for entitling the defendant to a full or plenary hearing.

5.3 However, it also seems clear that the obligation on a defendant to establish an arguable defence is, in reality, one which only arises if the plaintiff has first placed sufficient evidence before the court to establish *prima facie* the debt alleged is due. There are, therefore, two questions. The first is as to whether the plaintiff has put sufficient evidence before the court to establish a *prima facie* debt. If the answer to that question is no, then the plaintiff cannot be entitled to summary judgment in any event. If, however, the answer to that question is yes, then the court must go on to consider, in accordance with the established jurisprudence, whether the defendant has put forward a credible defence."

29. In *I.B.R.C. Ltd. v. McCaughey* [2014] IESC 44, [2014] 1 I.R. 749 Clarke J. (as he then was) stated concerning facts put before a court on an application for summary judgment at p. 759: –

"23. Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept the facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta c.p.t v. Ryanair Ltd.* [2001] 4 I.R. 607. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

30. Order 36, by contrast, governs the conduct of plenary proceedings. Order 36, r. 28 provides:-

"If, when a trial is called on, the plaintiff appears, and the defendant does not appear, the plaintiff may prove his claim, so far as the burden of proof lies upon him."

However this was not a plenary action and no equivalent provision to O. 36, r. 28 is to be found within O. 37.

31. The taxonomy of circumstances where a judgment is sought to be set aside falls into two broad categories; default judgments and judgments after a trial. The first category, default judgments, typically arise in default of appearance such as pursuant to O. 13, r. 11. Such cases fall into two further sub-categories being firstly, judgments regularly obtained (such as *in Evans v. Bartlam* [1937] A.C. 473; The *Saudi Eagle* [1986] 2 Lloyd's Rep. 221; *Martin O'Callaghan Ltd. v. O'Donovan* (Unreported, Supreme Court, 13th May, 1997), and *O'Tuama v. Casey* [2008] IEHC 49), which will only be set aside where the defendant demonstrates on affidavit a good defence on the merits and, secondly, judgments obtained irregularly or in circumstances of mistake (such as *Fox v. Taher* (Unreported, High Court, Costello J., 24th January, 1996); *Allied Irish Banks plc v. Lyons* [2004] IEHC 129, and *McGrath v. Godfrey* [2016] IECA 178) where the court has wide discretion to set aside such an order in the interests of justice.

32. The instant case was a judgment after summary trial. Again two sub-categories emerge from the jurisprudence being firstly, cases where a party deliberately refrained from attending the trial (examples include *Shocked v. Goldschmidt* [1998] 1 All E.R. 372; *Nolan v. Carrick* [2013] IEHC 523) and secondly, those where by reason of accident, mistake or inadvertence a party who wishes and intends to attend court and be heard failed to do so (as occurred in *Bank of Scotland plc v. McDermott* [2017] IEHC 77).

33. *Shocked v. Goldschmidt*, a decision of the English Court of Appeal which analysed the principles governing the exercise by the court of the inherent jurisdiction, has been cited with approval in the Supreme Court and in this court. It is distinguishable on its facts from the instant case insofar as the trial judge had found as a fact that the plaintiff knew of the trial date but failed to appear. The court noted as key material factors informing the exercise of discretion:-

    (1) that there was no explanation why an adjournment of the trial had not been sought;

    (2) of central importance, the reasons for non-appearance of the plaintiff at the trial; and,

    (3) it was relevant to evaluate the subsequent conduct of the plaintiff.

34. In *Shocked*, a decision cited with approval by this court in *Danske Bank v. Macken* [2017] IECA 117 and *Coyle v. Gray* [2018] IECA 294 and followed by the High Court in *Nolan v. Carrick* [2013] IEHC 523 and *Onyenmezu v. Firstcare Ireland Ltd.* [2019] IEHC 697, Leggatt L.J. considered that the authorities established a distinction between a default judgment under the rules on the one hand and a judgment made following a trial at which the plaintiff had failed to appear. The key English authorities addressing the principles governing the exercise of jurisdiction to set aside a default judgment were reviewed, including *Evans v. Bartlam*. Leggatt L.J. observed at pp. 377 to 378: -

> "The cases about setting aside judgments fall into two main categories:

(a) those in which judgment is given in default of appearance or pleadings or discovery, and

(b) those in which judgment is given after a trial, albeit in the absence of the party who later applies to set it aside.

Different considerations apply to these two categories because in the second, unless deprived of the opportunity by mistake or accident or without fault on his part, the absent party has deliberately elected not to appear, and an adjudication on the merits has thereupon followed."

35. The Court of Appeal in *Shocked* turned to the second category of case, to which the instant case belongs, concerning the principles governing the setting aside of a judgment after trial. At p. 379 Leggatt L.J. proceeded to review the jurisprudence including *Grimshaw v. Dunbar* [1953] 1 Q.B. 408 at p. 416:-.

> " '…a party to an action is *prima facie* entitled to have it heard in his presence; he is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. *Prima facie* that is his right, and if by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case - no doubt on suitable terms as to costs…'"

36. *Shocked* draws a distinction between circumstances where a litigant was absent by inadvertence or oversight and those where the litigant deliberately elected not to attend. The court noted the decision of Oliver J. in *Midland Bank Trust v. Green (No. 3)* [1979] Ch. 496 where he stated at p. 505:-

> "Whilst, obviously it is always important that there should be finality in litigation, it does seem to me that the degree of importance of this as a conclusive factor must depend to some extent first upon what has occurred as a result of the order which it is sought to set aside and, secondly, upon the effect which the exercise of the court's discretion is likely to have."

37. In *Shocked* Leggatt L.J. identified a series of propositions or "general indications" derived from the authorities as to when the court should accede to an application to set aside a judgment after a trial, observing that each case, "depends on its own facts and that the weight to be accorded to the relevant factors will alter accordingly" and according pre-eminence to factors 1 and 2:-

> "1. Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.

2. Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a re-hearing.

3. Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.

4. The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.

5. Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it.

6. In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise his discretion in his favour.

7. A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.

8. There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short."

Leggatt L.J. concluded that the contrast between cases involving a defendant or litigant who deliberately elects not to attend the trial on the one hand and those where the absence was brought about by reason of accident or mistake is that in the first:-

> "…the court is primarily concerned to see whether there is a defence on the merits, in the second the predominant consideration is the reason why the party against whom judgment was given absented himself." (p.381)

Inherent jurisdiction to set aside

38. Barrett J. in *Bank of Scotland plc v. McDermott* considered the issue of the inherent jurisdiction of the High Court to set aside judgment in summary proceedings in a case which involved a failure to attend the hearing due to accident, inadvertence or mistake. He observed at para. 11 of the judgment:-

> "The shorthand phrase 'inherent jurisdiction' is used to refer to residual powers that the court may draw upon, when it is just or equitable to do so, in order, for example, to achieve such ends as ensuring due process, preventing oppression and doing justice between parties. It has perhaps five key features: it is procedural, not substantive; it is exercised by way of summary process, not trial; it can be exercised against anyone; it is distinguishable from judicial discretion; and, most significantly in the context of the within application, it has traditionally been

perceived as conferring powers to which those contained in the Rules of the Superior Courts are additional, not substitutive. This last dimension of the inherent jurisdiction perhaps finds at least partial expression in the oft-quoted maxim that 'the rules of court are the servants of Justice, not her master'. Sometimes conflated are the notions of inherent jurisdiction and inherent powers, but the two are not the same; the court's inherent jurisdiction involves a substantive competence to hear and determine matters; an inherent power, by contrast, is an incidental device whereby the court gives practical effect to its jurisdiction. What constraints exist as regards the exercise of inherent jurisdiction? Perhaps two key principles apply, *viz*. that it is exercised only where necessary and that it has the overriding objective of avoiding injustice. What protections exist to prevent its abuse? It seems to the court that the protections arising are essentially two-fold: the exercise of inherent jurisdiction must conform with established constitutional and other fundamental legal norms; and the prospect of appeal curtails the possibility of undesirable jurisdictional innovation, at least on the part of courts that are subject to appeal."

I respectfully adopt the said passage and consider it a correct statement of the law.

39. Barrett J. went on to observe at para. 12 of the judgment: –

> "…that the exercise of inherent jurisdiction… while it is more akin to an exercise of the power arising under O. 36, r. 33 than that arising under O. 13, r. 11 (because O. 36, r. 33 is concerned with the situation where, at plenary trial, a party does not attend, as opposed to not entering an appearance, whereas O. 13, r. 11 is concerned with default of appearance, *i.e.* a failure to enter an appearance…), it is not in fact an application under O. 36. In truth, given the absence of any set-aside provision in O. 37, the within application involves nothing more than a straightforward application that the court exercise the inherent jurisdiction to set aside a final order which appears originally to have been recognised by the Supreme Court in *In re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514."

***Greendale* jurisdiction**

40. Since judgments are generally considered final having regard to Article 34.4.3 of the Constitution, certain of the *dicta* from *Greendale* are worthy of note. In particular Denham J. (as she then was) noted at p. 542:–

> "The Supreme Court has jurisdiction and a duty to protect constitutional rights. This jurisdiction may arise even if there has been what appears to have been a final order. However, it will only arise in exceptional circumstances. The burden on the applicants to establish that exceptional circumstances exist is heavy."

41. Barron J. at p. 546 of *Greendale* observed: –

> "Nevertheless where such circumstances exist, this court must be free to so declare and to indicate the procedures whereby such circumstances should be investigated.

> Not to be able to do so would conflict with the guarantee of fair procedures enshrined in the Constitution.
>
> The Constitution requires the decisions of this court to be final and conclusive for good reason. There must be certainty in the administration of justice. Uncertainty can lead to injustice. In my view, these provisions must prevail unless there has been a clear breach of the principles of natural justice to which the applicant has not acquiesced and such that a failure to take steps to remedy such breach would, in the eyes of right-minded citizens damage the authority of this court. I believe that the jurisprudence of this court has always been to this effect."

42. Denham J. had earlier stated at pp. 544 to 545: –

> "It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights."

43. As was observed by the authors of *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) at para. 25.90: "These cases will be rare and tend to relate to a situation where a constitutional right is at stake and it will be necessary for the court to act to protect it."

44. *Greendale* was followed in the later Supreme Court decision of *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412 and again by the High Court in *M.D. v. Minister for Health* (Unreported, High Court, 15th February, 2002) where O'Neill J. reviewed the jurisprudence including *Greendale* observing: -

> "It would seem to me that the only circumstances in which the Supreme Court could interfere with a final order of that court is where a person can show that through no fault of his or hers, there has been a breach of natural justice in the conduct of the proceedings before the Supreme Court which would manifestly be irremediable unless the Supreme Court set aside the order impugned.
>
> Thus, a clear distinction opens up between the jurisprudence of the Supreme Court dealing with setting aside of final orders of that court and the law relating to the setting aside of perfected orders of the High Court. In the High Court a breach of natural justice would not be irremediable unless the order was set aside. There could be an appeal to the Supreme Court where the breach complained of could be remedied.
>
> I am of opinion therefore, that so far as the High Court is concerned, when it is acting as a court of first instance, the only circumstances in which a perfected order could be set aside are the two circumstances described in the *Ainsworth* case and

referred to by Finlay C.J. in the *Belville* case. The appellants are right in their submission to that extent."

45. The jurisprudence was helpfully reviewed by Dunne J. in *Nolan v. Carrick*, which concerned a plenary hearing before a judge and jury where the defendants had made a conscious and deliberate decision not to attend the trial. As such the provisions of O. 36, r. 33 were available to be invoked by the defendants in that case. Dunne J.'s judgment makes clear that the principles applicable to the bringing of applications under O. 36, r. 33 are distinct from the principles applicable in an application to set aside a final order brought pursuant to the court's inherent jurisdiction.

46. Dunne J. had observed:-

> "There is no doubt whatsoever that the circumstances in which a final order of a court can be set aside is limited. Provision is made in the Rules of the Superior Courts for the correction of mistakes. Further, the court itself can amend a final order where it finds that the judgment as drawn up does not correctly state what the court actually decided and intended. In addition, as was mentioned previously, the Rules provide a jurisdiction to set aside a judgment pursuant to the provisions of O. 36, r. 33 of the Rules of the Superior Courts. Further, it has been established that there is an inherent jurisdiction to set aside a final order in exceptional circumstances such as on the basis of bias or fraud or where there has been a breach of constitutional rights. That jurisdiction, as described above, has been set out in a number of cases, such as in *In re Greendale Developments Ltd. (No. 3)* and *Bula Ltd. v. Tara Mines Ltd. (No. 6)*. It is also necessary to bear in mind the decision in the case of *L.P. v. M.P.*"

She continued:-

> "It is clear that the onus on an applicant seeking to set aside a final order is, to quote from Denham J. in *In re Greendale Developments Ltd. (No. 3)*, 'a very heavy onus'. Further, it is clear that a case will not be re-opened save in the most exceptional circumstances and that a case will only be re-opened where through no fault of the party, he or she has been subject to a breach of constitutional rights. Finally, it is apparent from the decision of the Supreme Court in *L.P. v. M.P.* that this exceptional jurisdiction is not to be exercised in circumstances where there is another remedy available such as an appeal…
>
> The inherent jurisdiction of courts to set aside a final order is limited in its scope and is not generally available in circumstances where there is another remedy available to the aggrieved party. In this case, there is undoubtedly an appeal available to the defendant in respect of these actions. The fact that there may be some procedural difficulties in pursuing aspects of the appeals does not alter the underlying principle identified in the authorities to which I have referred from which it is apparent that where there is another remedy, namely an appeal, then the jurisdiction to set aside a final order does not arise. Accordingly, I have come to the

conclusion that it is not appropriate to exercise the jurisdiction invoked by the defendant herein."

47. In circumstances where the absence of the defendant is not referable to any contumacious conduct, where no prior intention not to attend has been communicated, and where in substance something akin to a mistake is identified, the jurisprudence suggests that a greater flexibility exists to set aside the judgment in the interests of justice and fairness. The decision of *Heyman v. Rowlands* [1957] 1 W.L.R. 317 was cited with approval by Dunne J. in *Nolan v. Carrick* and the dictum of Denning L.J. at pp. 319 to 320 is apposite:-

> "I have always understood that if, by some oversight or mistake, a party does not appear at the court on the day fixed for the hearing, and judgment goes against him, but justice can be done by compensating the other side for any costs and trouble which he has incurred, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but so long as he does so, the strength or weakness of it does not matter. I think it plain in this case that the tenant had a defence on the merits. He had a defence as to whether it was reasonable to make an order for possession against him."

48. The *Greendale* jurisdiction applies to the outcome of a trial pursuant to O. 37 where it is warranted to guarantee the right to fair procedure enshrined in the Constitution or where a breach of natural justice in the conduct of summary proceedings is established.

Should the appellants be penalised for failing to invoke the inherent jurisdiction or *Greendale* jurisprudence?

49. The respondent contends that the appellants are not entitled to appeal the judgment and ought to have applied to court pursuant to O. 36, r. 33. As was observed by Hogan J. in *Danske Bank v. Macken*, insofar as an argument is advanced that there is an obligation to elect between an application to set aside an order to the court which made the order on the one hand and a right of appeal on the other (in other words an argument that a litigant is estopped by his conduct from seeking to have the judgment set aside where an appeal is lodged):-

> "22. It is true that a litigant is normally bound by a knowing election in the course of a trial and cannot thereafter pursue a remedy inconsistent with that election, see e.g. *Corrigan v. Irish Land Commission* [1977] I.R. 317 and *The State (Byrne) v. Frawley* [1978] I.R. 326. Both of those cases concerned the deliberate election on the part of the litigant in question to object to the regularity of one aspect of the hearing or even – as in the case of *Byrne* - the constitutionality of the manner in which a particular jury had been empanelled during a criminal trial. In both cases the litigants elected with full knowledge to continue with the hearing and they were later held to be estopped by their conduct from thereafter raising their objections. I do not think, however, that the present case comes within that particular category of election."

In that case the court noted that the defendant's family home was at stake and in such circumstances it was only natural that he would wish to have the judgments set aside in accordance with O. 36, r. 33 and equally could not be faulted for seeking to appeal to the court the first judgment granting possession to the bank.

50. Considering the decision of *Shocked v. Goldschmidt* in the *Danske* decision Hogan J. cited Leggatt L.J. who stated at p. 381:-

> "Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court would be unlikely to allow a rehearing."

Decision

51. There is a material difference between a tactical decision not to attend court compared with failure to attend that results from mere inadvertence. This is a case of inadvertent failure. The appellants had at all material times every intention of defending the proceedings. A firm of solicitors represented them. There was ongoing engagement in the months leading up to the matter appearing in the Judges' List for the first time between the respective firms of solicitors for the parties. A comprehensive affidavit was sworn on behalf of both appellants.

52. In the instant case the appellants did show cause on affidavit against the sums claimed. As such, they enjoyed protections under O. 37, r. 3. The evidence adduced by the bank in support of its entitlement to summary judgment could not be characterised as uncontroverted. Order 37, r. 3 vests in a defendant an entitlement that any affidavit sworn by or on his behalf opposing the summary relief sought be brought to the notice of the trial judge, who alone is the arbiter of fact and law as to its relevance, the weight to be attached to it and the practical consequences flowing from such evaluations. The affidavit was referred to but neither the contents of the affidavit nor the issues raised in it were drawn to the attention of the trial judge, even in outline form. Nor were the responses deposed to by the bank in the replying affidavit of Colette Rooney opened to the judge.

53. Order 36 is directed towards plenary proceedings. There is no mirror provision within O. 37 for the benefit of summary proceedings. Order 37 does not make any provision for set aside applications. Accordingly, if a set aside application is available in respect of summary proceedings obtained in the absence of a party to the litigation, it can only arise by the invocation of the inherent jurisdiction of the High Court.

54. Contrary to the bank's contentions, O. 36, r. 28 did not confer an entitlement on the bank in these summary proceedings to refrain from opening the affidavit sworn by or on behalf of the appellants pursuant to O. 37, r.3 to show cause together with the responses to same deposed to in the replying affidavit of Colette Rooney. Order 36, r. 28 pertains to plenary proceedings and not to summary proceedings. Neither does it nullify the

requirements of O. 37, rr. 3, 6, 7, 8 or 9 governing the conduct of a hearing in contested summary proceedings.

55. Assuming that the bank was not obliged to open or bring to the attention of the trial judge the averments of the appellants purporting to show cause against the motion for summary judgment, nevertheless it was necessary for the trial judge to consider them in determining the application, in the light of O. 37, rr. 7 and 9, in particular.

56. Prior to granting both judgments, for a number of reasons the trial judge was under a significant misapprehension regarding material facts relevant to the exercise of her judicial functions including:

(a) that there was no affidavit filed on behalf of the first named appellant;

(b) that the appellants had deliberately decided not to appear at the trial hearing;

(c) that the filing of an affidavit on behalf of the appellants at most gave rise to "an implication" that they were opposing the bank's motion;

(d) the appellants' affidavit was not read or considered by the judge and thus there was no evaluation as to whether it showed cause against the claim within O. 37; and,

(e) the replying affidavit of Colette Rooney was not opened to the court.

By failing to consider the appellants' affidavit and the bank's replying affidavit, the court was not in a position to make an informed evaluation as to whether the bank was or was not entitled to summary judgment within the meaning of O. 37, r. 7. It was uniquely a function of the trial judge to assess the appellants' affidavit and the weight to be attached to it. Otherwise the court was hampered and precluded from carrying out a determination within the meaning of O. 37, r. 9 as to whether the appellants had a good defence or ought to be permitted to defend the action in the manner they sought in the affidavit.

57. The reasons for the failure of the appellants' lawyers to attend court are of central importance and do not now appear to be in dispute. While they had an opportunity to appear at trial and oppose the application for summary judgment, the solicitor was labouring under a misapprehension as to fact and proceeded on the working assumption that since the opening of the affidavits in the case would take substantially longer than fifteen minutes the matter either could not or would not proceed on Monday 11th February, 2019 and would be put into a list to fix dates. It is noteworthy that the three affidavits sworn on behalf of the bank together with the affidavit of the second named appellant sworn on both the appellants' behalf when considered with the exhibits amounted in total to about two hundred and eighty-one pages of documents. It was therefore not unreasonable for the solicitor to infer that the matter could not be comprehensively opened to the court in less than fifteen minutes.

58. In circumstances such as the present the task of the court is to ensure as best may be that justice between the parties is achieved and the guarantee of fair procedure enshrined in the Constitution is upheld.

59. It was in principle open to the appellants to make an application to the High Court. However, an application pursuant to O. 36, r. 33 is strictly speaking only available in plenary proceedings. Rather, it was open to the appellants to invoke the inherent jurisdiction of the High Court. It is, however, understandable that they hesitated in doing so in circumstances where O. 37 is silent on the matter. The decision in *Danske Bank v. Macken* supports the approach taken by the appellants.

60. In addition I consider it relevant that:

    (i) there was no delay on the part of the appellants in bringing the appeal;

    (ii) it was not open to the appellants to bring an application to set aside the decision pursuant to O. 36, r. 33 which pertains to plenary proceedings;

    (iii) a letter confirming that judgment had been obtained was not sent by the bank until nine days later, being therefore well outside the period of six days specified in O. 36, r. 33; and,

    (iv) it was open to the appellants to bring an application to the trial judge to set aside the judgment after trial in the interests of justice, having regard to the decision in *In re Greendale Developments Ltd. (No.3)*, *Bank of Scotland plc v. McDermott* and the jurisprudence derived from *Shocked v. Goldschmidt* but failure to do so did not bar the right of appeal in this case for the reasons stated above.

61. Before concluding, I believe it appropriate to make one observation. In circumstances, such as presented themselves here, where there is no appearance by a defendant to an application for summary judgment, where that defendant has nonetheless committed its response to the application on affidavit replying to it, and where the plaintiff determines that it is appropriate to proceed with their application for judgment, the court should be advised not merely that a replying affidavit has been filed to the application, but should be told in broad terms (a) what the defence of the defendant as suggested in that affidavit is, and (b) the response of the plaintiff to that defence. While it may not be necessary in all cases to open the replying affidavit or affidavits in their entirety, the court should at the very least be advised of the gist of that defence and the basis suggested by the defendant for it.

Conclusion

62. It was exclusively an exercise in the judicial function to evaluate whether the various issues raised by the appellants in their affidavit sworn within the meaning of O. 37, r. 3 amounted to meaningful evidence sufficient to rebut all or part of the bank's claim. Thereafter it was open to the court to evaluate whether the respondent had discharged the burden of proof devolving upon it. Basic fairness of procedure required that the court be apprised of the basis on which the appellants controverted the claim; it was a matter

for the court to determine what weight might be given to the said matters claimed in the circumstances and whether it warranted the matter being remitted to plenary hearing or not, irrespective of whether the appellants were represented in court. Nothing in the Rules required the bank to open the affidavit of the appellants to the court or to engage with the grounds and causes against summary judgment raised in it. However, by not considering all the affidavits, the trial judge failed to carry out the necessary assessment in accordance with O. 37 and the jurisprudence as to whether there was a fair and reasonable probability of these defendants having a real or *bona fide* defence, either in law or on the merits to the claims made in the summary summons. The failure of the trial judge to consider the affidavit of the appellants, in the circumstances of this case, resulted in a breach of natural justice in the conduct of the proceedings which warrants the orders being set aside.

63. Separately, the appellants have demonstrated that the failure of the lawyers to appear at the trial arose from mistake and inadvertence such as would have warranted an application to the trial judge to have the orders set aside pursuant to the inherent jurisdiction and in accordance with the *Greendale* principles. Given, however, that the right operated not pursuant to O. 37 but rather pursuant to the inherent jurisdiction, it is understandable and not to be criticised that the appellants elected to appeal the determination instead.

64. It is in the public interest the appellants be afforded a hearing in due course of law. In the circumstances the order of the High Court requires to be set aside, the matter be remitted to the High Court to the next list to fix dates as a matter which will take longer than fifteen minutes, granting liberty to the parties to file such further affidavits in support of their respective positions as they see fit. All further directions thereafter are exclusively a matter for the High Court as it may consider appropriate.

Ní Raifeartaigh J.; I have read and agree with the judgment herein delivered.

Murray J.; I have read and agree with the judgment herein delivered.