THE HIGH COURT

[2021] IEHC 45

[2013 No.6563P]

BETWEEN

JAMES O'REGAN AND PAMELA O'REGAN

PLAINTIFFS

AND

ALAN LOTTY, JOHN ROCHE AND KEVIN O'CALLAGHAN

DEFENDANTS

JUDGMENT of Mr. Justice Alexander Owens delivered the 25th day of January 2021

1. This is an application to dismiss the plaintiffs' claim for want of prosecution on grounds of inordinate delay. The rules applicable are clear. The defendants must establish that delay of the plaintiffs in the prosecution of their claim is both inordinate and inexcusable. Where these matters are established, the court must exercise a judgment on whether the balance of justice is in favour of, or against, the proceeding of the case.

2. The case pleaded in the statement of claim is that in October 2007 Bank of Scotland (Ireland) Limited (the bank) gave the plaintiffs a loan of €4,500,000 for a term of 67 months to enable them to buy a block of 15 apartment units attached to a hotel in Killarney, County Kerry. The defendants were the plaintiffs' accountants. Some of the defendants were involved in the entity promoting the development.

3. These arrangements were part of a scheme devised by the defendants to fund the Killarney development which was designed to give investors tax relief. The promoters committed themselves to buy the units from the plaintiffs at the end of the period of the scheme for €4,500,000. This payment would enable the plaintiffs to repay loan capital which then became due. In the meantime, the plaintiffs would pay interest on the loan.

4. The defendants introduced the scheme to the plaintiffs and arranged the loan. The plaintiffs were already involved in similar schemes through the defendants. An "*Indicative Loan Facility Term Sheet*" issued by the bank in April 2007 specified that the proposed borrower, who was understood by the bank to be James O'Regan, would provide as security a charge over the 15 apartments and other assets to the value of €1,500,000. This document also specified: "*Recourse to be available for interest on the borrowings*". The implication was that personal recourse to the borrowers for payment was not intended to extend to the principal sum advanced. The term of the proposed loan was stated to be seven years with "*Interest only for 84 months, principal to be repaid from the sale of assets at the end of the term*." The documents exhibited indicate that the defendants negotiated the loan on the basis that personal recourse to the borrowers was confined to payment of interest charged on the loan.

5. In the latter part of 2007 the bottom was beginning to drop out of the Irish property market. In 2008 and 2009 it must have become obvious that the promoters might not be in a position to buy back the units at a price equal to the amount of capital advanced on the loan at the end of the period of the scheme. It may also have been obvious that the realisable value of the assets pledged as security might produce a shortfall when the loan

fell due for repayment. These assets consisted of the 15 apartments in Killarney and a commercial property in the centre of Cork City.

6. The legal documents which formalised the arrangement did not limit personal recourse to the borrowers to payment of interest. The bank was treating them as personally liable for repayment of capital and interest. The plaintiffs, in an affidavit sworn on their behalf by their solicitor, claim that they first became aware of this "*in or around 2010*".

7. The loan fell due for repayment in 2013. On 27 June 2013 the plaintiffs began a legal action for rectification of the loan agreement. This was met with a defence and a counterclaim for the full balance outstanding on the loan. These disputes were compromised in May 2017 on terms which obliged the plaintiffs to pay €1,290,000. This sum was paid before the end of June 2017.

8. It is unclear whether all of the assets held as security were sold. The affidavit of the solicitor for the plaintiffs sworn on 26 November 2020 states that the amount paid was "*over and above the proceeds of sale from secured properties*". The statement of claim states that the balance outstanding was €4,517,814 in September 2013. The settlement agreement records the loan balance as €3,791,834 as of 18 May 2017. Substantial further interest must have accrued and some payment was received which reduced the outstanding balance to the sum quoted. This agreement contains provisions which envisage release to the plaintiffs of unrealised security on payment of the €1,290,000.

9. Paragraph 8 of the affidavit of the solicitor for the plaintiffs sworn on 12 June 2020 refers to the plaintiffs' case being *"that the cost of reaching this settlement is entirely as a result of the defendants' negligence and breach of contract*." This is ambiguous. It suggests that the claim may be confined to legal costs of the litigation relating to the loan. In para. 18 of this affidavit the deponent states that "*The settlement amount that Pentire was willing to accept was dependent on the value of sales realised from the secured properties, for this reason it was not possible to settle the proceedings until these sales had occurred. Such sales had completed by March 2017*." The *bank had sold the loan and the related security to "Pentire*". "The cost of reaching this settlement" has not been particularised.

10. This action was commenced by the plaintiffs on the same day as the action against the bank. The plenary summons claims damages for negligence, breach of contract and misrepresentation. There is no specific allegation of deceit. Clause 18.3 of the settlement agreement relating to the loan litigation points to the very strong likelihood that the plaintiffs also sued solicitors who acted in the 2007 transactions.

11. The plaintiffs were in a difficult position. They sued the bank on the basis that the terms negotiated on their behalf through their accountants were not reflected in the formal loan agreement. They also sued the accountants who they would rely on as witnesses in their litigation against the bank. In 2013 the plaintiffs were in communication with the defendants who supported their contention that the loan documentation did not reflect the underlying agreement at a meeting with bank representatives.

12. The stance of the defendants as expressed in an email from the first defendant to the plaintiffs in January 2013 was that *"it was my clear understanding at all times that recourse was limited to security advanced with full recourse to the interest and that the deal was done with the Bank of Scotland on that basis*".

13. There can be little doubt that this was the basis on which the plaintiffs entered the deal. The documents exhibited indicate that the additional security represented by the Cork City property was to cover risk to the bank of a shortfall on the realisation of the apartments if the scheme went wrong. In their action for rectification of the loan agreement, the plaintiffs pleaded that the deal agreed was that the bank's recourse for capital on the loan would be limited to the proceeds of sale of the Killarney units and the Cork City property.

14. A consequence of a contract on these terms is that the plaintiffs would remain liable for interest on any loan balance after proceeds of sale of the Killarney and Cork City properties were applied in reduction of capital. They would be obliged to pay off any outstanding capital in order to terminate the obligation to pay interest. The most recent affidavit of the plaintiffs' solicitor exhibits a letter dated 10 October 2013 complaining that the bank did not present any direct debits for interest from June 2013 onwards. This was after the date when the loan fell due for repayment.

15. The plenary summons in this action was issued to prevent any claim against the defendants from becoming statute-barred. Between 27 June 2013 and the settlement of the plaintiffs' litigation against the bank in May 2017, the only steps taken to advance this action were service of the plenary summons nearly a year after its issue and delivery of a statement of claim in January 2015. The summons was served to ensure that it would not go out of date and service of the statement of claim was prompted by an application by the defendants to court in December 2014.

16. The litigation relating to the loan was settled in May 2017. The plaintiffs served a notice of intention to proceed with this action the following month. This was responded to with a request to inspect the original loan agreement in July 2017 and a notice for particulars in September 2017. This notice for particulars was replied to in November 2017 and a defence was delivered in February 2018 after two letters threatening an application for judgment in default of defence had been received.

17. The plaintiffs criticise the defendants for delay because they did not deliver a defence until February 2018. There is no substance to this complaint. The statement of claim and the replies to the particulars sought were inadequate. The defence was delivered under protest with a preliminary objection about the deficiency in pleading. The plaintiffs were not pressing for a defence until they settled the litigation relating to the bank loan. The plaintiffs were not entitled to expect the defendants to deliver a defence to the vague claims in the statement of claim.

18. The purpose of a statement of claim is to set out in clear terms the facts which will be proved to support each element of each cause of action pleaded. There is no such thing

as a tort of misrepresentation. If the claim was for negligent misrepresentation or deceit, it was necessary for the plaintiffs to plead the facts on which they relied as showing that the defendants, based on duty of care, were negligent in representing to the plaintiffs what the bank was prepared to agree or had agreed, or were deceitful in so representing, and the falsity or error in or want of care or fraudulence in what was represented at the time it was represented. It was necessary to state what was done in reliance on the representation and how the representation induced that action or state of affairs. It is necessary to plead and particularise damage allegedly suffered as a result.

19. It was necessary to set out with the terms of each alleged representation with precision and to identify by whom, when and to whom and by what means that representation was made. It is necessary to plead any relevant facts which made a representation false or which made the defendant responsible for that falsity. With reference to the claim for breach of contract, the plaintiffs were required to plead the contract and the express or implied terms giving rise to a professional obligation which was breached and identify by dates and times and actions or representations or inactions when that obligation was breached. The same rules applied to the pleading of the claim in negligence.

20. The substance of the plaintiffs' case on misrepresentation as pleaded in the statement of claim is that the loan agreement did not accord with the defendants' communication to them of the deal negotiated with the bank on their behalf and if they had any personal liability for capital advanced on the loan, this arose as a result of the defendants' misrepresentation. That is not sufficient.

21. The statement of claim does not make any specific allegation of a role of the defendants in advising on the terms of the facility letter or that the defendants were even in receipt of a copy of this document prior to the plaintiffs agreeing its terms with the bank. At para. 18 the plaintiffs claim that the defendants were negligent and in breach of their contract with the plaintiffs in failing to ensure that the terms of the loan negotiated on their behalf which the plaintiffs entered into with the bank was of limited recourse as represented by the defendants to the plaintiffs. Facts establishing responsibility of the defendants to review or advise on the facility letter prior to acceptance by the plaintiffs are not pleaded and negligence is not particularised.

22. The allegations of representations do not give any particulars of who is alleged to have said what to whom or when. No information is provided in the pleadings or affidavits on the circumstances of how or when the facility letter which was dated 18 June 2007 came to be received by the plaintiffs or of how and when it came to be accepted and returned to the bank.

23. At para. 21 an allegation is made that one or more of the defendants either knew that the alleged representations of lack of recourse were untrue at the time that they were made or made them recklessly not caring whether they were true or false. This is the first allegation of falsity of alleged representation. The complaint is not laid in negligence. The cause of action relied on is deceit. A claim is made that the plaintiffs were lured into this investment and borrowing by a dishonest untruth about the extent of their personal

exposure to the bank under the loan arrangements or by a statement made with reckless indifference to its truth or falsity.

24. This bare allegation is not supported by any of the particulars which must be provided under O.19, r.5 of the Rules of the Superior Courts. No plaintiff should allege fraud without good reason. Any plaintiff who makes this type of serious allegation must set out the core facts and circumstances in which a representation is alleged to have been made with fraudulent intent. It is also necessary to plead and particularise loss claimed to have been suffered as a result of alleged deceit.

25. It is an abuse of process to include and maintain a plea of deceit if there is no basis on which it can be maintained. I reject the submission that this type of plea can be advanced without giving particulars, pending discovery. A plea of deceit cannot be advanced without some instruction based on either credible direct evidence or provable circumstantial material from which it can be properly inferred that the defendant practiced a deceit on the plaintiff. The fraudulent intent should be identified.

26. The statement of claim limits the assertion of damage to the amount of any liability of the plaintiffs to repay the loan. The existence of any damage and quantification of amount depended on the outcome of the action by the plaintiffs against the bank. If that action succeeded it is likely that there would be no claim against the defendants. For this reason, the statement of claim lacks any clear assertion that damage was suffered.

27. The answers provided by the plaintiffs in reply to the notice for particulars were evasive. No particulars were provided. While some of the particulars sought might be described as touching on evidential matters, there is no valid excuse for the course taken in this document. The suggestion that the defendants were not entitled to particulars was misconceived. It does not lie in the mouth of plaintiffs who fail to advance a coherent claim to complain about detail requested in particulars sought with a view to trying to find out what is being alleged.

28. The defendants were entitled to sufficient particulars to know what case the plaintiffs were making on deceit, breach of contract and negligence, including negligent misrepresentation if that was what was being alleged, and to have details of the loss claimed and the current position viz-a-viz the bank loan. The particulars did not seek details of loss, which suggests that the defendants were unaware of the settlement at the time of the letter seeking the particulars.

29. The action relating to the bank loan had been settled prior to the notice for particulars. The claim against the accountants then no longer had the status of a "*precautionary writ*". There was no longer any tactical reason for fudging either the allegations against the defendants or quantification of damage. The defendants were none the wiser on what the plaintiffs were alleging as a result of the replies given to the particulars which, with one exception, were all "*not a proper matter for particulars*" and "*matter for evidence*".

30. This exception was the reply to particular 14 which requested the plaintiffs to identify any legal proceedings brought by or against them. This was answered by identifying the record number of the action relating to the loan agreement. There was no mention of any action taken against the solicitors who acted in the 2007 deal.

31. As of April 2018, the plaintiffs' solicitors were still insisting in correspondence that the replies to the notice for particulars were in order and that the defendants were not entitled to any more particulars. The only item which they were prepared to review was the reply to particular 12, which sought details of the current position as between the plaintiffs and the bank. The plaintiffs' solicitors advised that *"the proceedings between our clients and Bank of Scotland/Pentire have been concluded. We are agreeable to disclosing details in relation to same, but we first require consent of the other side. Please note that we have written to them seeking such consent, and we hope to be in touch shortly. Otherwise we will not be able to disclose details of same without a court order, but please note that we would consent to such an order."*

32. There is no evidence from which I could infer any arrangement for a go-slow pending resolution of the claim against the bank. The plaintiffs' solicitor avers that the solicitors for the defendants were kept updated on the progress of that litigation. That does not amount to an arrangement to defer steps in litigation.

33. It is unclear when the defendants were made aware that the bank loan litigation had been settled. The April 2018 letter advising of the conclusion of the bank loan litigation was sent nearly a year after that litigation had concluded. Paragraph 18 of the settlement terms relating to the bank loan did not in fact require any consent to disclosure of its terms in this action. No explanation is forthcoming on why it was thought proper not to refer to settlement of the bank loan action when replying to the notice for particulars in 2017.

34. I have considered whether it can be said that the plaintiffs were guilty of inordinate and inexcusable delay in the prosecution of this action up to the time when a settlement was arrived at between the plaintiffs and the bank at the end of May 2017.

35. It was in the interests of the defendants that the plaintiffs get a good deal in the action relating to the bank loan as the effect of this might be to reduce or eliminate any exposure which they had to the plaintiffs. It is clear that this action could not be brought to a hearing prior to conclusion of the bank loan litigation as the outcome of that litigation would impact on whether it would be necessary to proceed further with this action and quantification of losses which might be provable. The plaintiffs had a good excuse for not moving quickly to a trial against the defendants, so long as they were actively pursuing the bank loan litigation. The evidence does not indicate that there was any delay in bringing that litigation to a conclusion.

36. However, even before June 2017 there was nothing to stop the plaintiffs from articulating in a statement of claim precise details of any negligent misrepresentation, negligence, breach of contract and deceit in their statement of claim. They were obliged to "*pin their*

colours to the mast" in their claim against their professional advisers. The fact that they would rely on the evidence of these advisers in the claim against the bank did not justify incomplete pleading of the causes of action.

37. At of the end of June 2017 the position changed. At that stage the plaintiffs had settled the claims relating to the bank debt by paying the €1,290,000 and got back any mortgaged property which had not been used to reduce the bank debt. There could be no further excuse for delay. The plaintiffs had a self-serving duty to proceed with diligence. Failure to proceed with diligence carried with it a risk that the claim would be dismissed.

38. All plaintiffs are taken to know that where an action is commenced long after the events giving rise to cause of action, they have a positive obligation to carry matters forward to trial with expedition. Lack of attention and unjustifiable delays, which might be overlooked or treated as not being inordinate, or which may be excused in other circumstances, will not be tolerated.

39. In this case the duty to proceed with diligence included a duty to give proper particulars of the claim, reformulate the statement of claim so that the defendants had fair notice of the case which they were obliged to meet on liability and damages and comply with the commitment to make discovery of documents agreed in the letter from the plaintiffs solicitors dated 9 August 2018.

40. It was up to the plaintiffs to put their house in order. The defendants had no duty to press the plaintiffs to conduct litigation properly by making applications to court. The defendants' solicitors notified that they were in a position to exchange discovery in December 2018. The defendants attended to this obligation in accordance with their commitment. The defendants agreed the terms on which they would make discovery even though they were never given proper details of the plaintiffs claim.

41. The plaintiffs failed to proceed with expedition. They made serious allegations against their professional advisers in the statement of claim which they were unwilling to particularise. In spite of reminders, nothing happened from the plaintiffs' solicitors to advance discovery until March 2020. At that stage a letter was sent indicating that the plaintiffs were now ready to make discovery and requesting that discovery be exchanged. The response was this application to have the claim dismissed for want of prosecution.

42. It is clear that there has been inordinate and inexcusable delay in proceeding with this action. All of the outstanding matters of particulars and discovery should have been attended to by the end of 2018. There can be no justification for the manner in which this litigation has been conducted by the plaintiffs since July 2017. In terms of pleadings the action is still at plenary summons stage.

43. A plaintiff who has been established to be guilty of inordinate and inexcusable delay has an obligation to show that the balance of justice is in favour of permitting the action to proceed to trial. The test envisages that the action be dismissed unless it is established that the balance of justice lies with it being permitted to continue.

44. In considering the "*balance of justice",* I can look at matters other than those listed by Hamilton C.J. at para. (d), (i) to (vii) in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at pp.475-476. Where a plaintiff is faced with an application to have an action struck out for delay, many matters other than those specifically referred to by Hamilton C.J. may be relevant. I am not restricted to looking at *"prejudice in the special facts of the case"* in considering whether it is on balance more "*unfair*" to allow the action to proceed further. The "*balance of justice*" test does not require that a defendant establish that he is not in a position to meet whatever case the plaintiff is advancing or that I come to a view that because of delay it would not be possible to get a fair trial. These matters are potential individual considerations within an overall assessment of where the *"balance of justice*" lies.

45. The level of adherence to and respect for or disregard of procedural rules which have a purpose of ensuring fair play in conduct of legal proceedings are matters relevant to the *"balance of justice*" element of the test in the context of evaluating blameworthiness of the plaintiff and the defendants for the events resulting in delay. However, the jurisdiction to dismiss for abuse of process is separate from the jurisdiction to dismiss on grounds of delay.

46. Delay in the prosecution of proceedings often goes hand in hand with disregard of these procedural rules. I consider that where delay is accompanied by these abuses, courts should and must intervene to protect their processes and impose measures, including immediate costs sanctions, to ensure fair play and that a defendant is not put to expense in costs already incurred or steps which much be taken as a result of a plaintiff's default.

47. This action is brought by plaintiffs who have some experience in business against their professional advisers. It is about a property investment which went wrong. The plaintiffs have alleged deceit without any apparent supporting material and make a number of other vague allegations. This is not an action brought by a vulnerable person who may have suffered a serious injury as a result of a medical misadventure. In that type of case matters may be unclear because the defendants hold information necessary to make the plaintiff's case and have vast resources to contest liability. No complication exists which impeded the plaintiffs in advancing their claim coherently if they have a cause of action. There is nothing to prevent the plaintiffs from advancing a simple case as to what their losses are.

48. Where a statement of claim is insufficiently pleaded and there is an attempt to avoid committing the plaintiffs to any coherent case, as has happened here, or where a statement of claim and particulars are so full of waffle that it is impossible to get any clear idea of what case is being made, a court faced with an application to have the action struck out on the grounds of want of prosecution will be concerned that the proceedings are not being pursued energetically because no coherent claim can be advanced. This is relevant to whether discretion should be exercised in the interests of justice that an action should be allowed to proceed to trial.

49. When this application came before me I pointed out that affidavits on behalf of the plaintiffs did not address material referred to in written legal submissions. The plaintiffs were given an opportunity to put in a supplemental affidavit providing a full explanation of anything which they wished to bring to my attention which would show that this action should be allowed to proceed. I identified deficiencies in the manner in which the plaintiffs' claim was presented in the statement of claim and the replies to particulars. An issue arose as to whether the plaintiffs had a coherent case; yet to be articulated and particularised.

50. I stated my view that it is necessary for plaintiffs faced with this type of application to "*play all the cards face up*" and put in a detailed affidavit explaining what the claim is; what has happened to date, what steps are in progress or intended to pursue the claim to conclusion in early course and why the action should be allowed to proceed.

51. The further affidavit of the plaintiffs' solicitor does not address some of these points. It adds nothing which supports any claim for damages for deceit, breach of contract or negligence. It contains a short averment that "*the plaintiffs claim that the second defendant assured the plaintiffs that the loan offer of 18th June 2007 reflected the agreed terms".* The deponent then goes on to argue that this should be clear from the documentation which he has exhibited, which it is not. This averment is that the basis of the claim is that the defendants misstated to the plaintiffs the effect of the facility letter prior to the plaintiffs committing themselves to the deal. No detail is given on when or where or by whom this misstatement was made.

52. The basis on which the plaintiffs compute damage suffered has not been clarified. Their claim may well be that the defendants should cover their legal costs of dealing with the bank loan litigation. The affidavits are unclear on whether all of the mortgage securities were realised. What is at stake in litigation is potentially relevant to "*balance of justice*".

53. The further affidavit exhibits a copy of the written agreement settling the bank debt litigation. This discloses the likelihood that an action was brought by the plaintiffs against solicitors who acted in the 2007 deal. The affidavit offers no evidence of what has happened to this litigation. This action was something which the defendants were entitled to know about. It was not disclosed in the replies to particulars. If there was in fact no action against the solicitors, the affidavit should have dealt with this.

54. It is difficult to see how exercise of discretion based on a balance of justice between the plaintiffs and the defendants could permit a claim based on deceit which has not been properly pleaded go to trial some 13 years after the events alleged to give rise to the cause of action took place. The documents which the plaintiffs have exhibited do not disclose any basis for that plea. On the contrary, they indicate that the accountants were negotiating a loan with personal recourse for interest only, on the basis that the plaintiffs would put up security valued at €1,500,000 in addition to the Killarney Units. The city centre property in Cork fulfilled this requirement.

55. I now turn to the other claims made by the plaintiffs. They say that there were misrepresentations. They now want to make the narrow case that the defendants misstated to them the effect of terms of the facility letter which dealt with personal recourse for loan capital. The other claim in the statement of claim is that the defendants in some way failed to ensure that the terms of the loan agreement provided that personal recourse against the plaintiffs be limited to interest on the amount lent.

56. The plaintiffs had a full opportunity in 2013 and 2014 to consult their documents and to make statements dealing with the detail of what was negotiated and agreed and how facility letters came to be issued and signed which did not reflect what appears to have been the understanding of both the plaintiffs and the defendants of the arrangement. If there was a coherent case to be made, it could have been pleaded and particularised long ago.

57. The plaintiffs through their counsel emphasised that the claim is based on misrepresentation and suggested that particulars could be provided at this stage. The plaintiffs assert that the defendants will not suffer prejudice because they have documentation and because the defendants have been aware of this claim for some years. It is said that the defendants will be able meet whatever evidence is advanced by the plaintiffs for this reason.

58. It may be difficult to establish that defendants will not be prejudiced where they have not been presented with the plaintiffs' allegations in due form in a statement of claim. Allegations of negligence which do not relate to alleged misrepresentation have not been articulated on affidavit in response to the application to have this case dismissed. Defendants cannot know if they are in a position to meet a claim if they have not been told what that claim is.

59. The plaintiffs have now stated on affidavit through their solicitor what their case on negligent misrepresentation is, without providing any supporting detail. The plaintiff's solicitor indicates on affidavit that this case is that the second defendant assured the plaintiffs that the facility letter dated 18 June 2007 reflected the "*agreed terms*".

60. This is an unambiguous positive statement that at some stage after the facility letter issued and before the plaintiffs committed themselves to the deal, the second defendant made a representation or representations to them that the facility letter provided for the "*agreed terms*", which included an underlying agreement that personal recourse against the borrowers would be for interest only. Issues of whether any such assurance was given about the effect of the facility letter and whether the defendants ought to have known that matters were otherwise than what they allegedly stated to the plaintiffs and how the plaintiffs became bound into the deal afterwards are straightforward and relate to a discrete matter. I do not think that lapse of time could prejudice the defendants in meeting this claim. The plaintiffs may be faced with having to explain why specific allegations are being made so late in the action.

61. The plaintiffs should be in a position to advance their claim in a concise statement of claim and give full particulars of what their losses are, bearing in mind what I have said about the vagueness of the assertions of loss which have been made in the affidavit of the plaintiffs' solicitor. If the Cork City property has not been sold or there is no loss this should become readily apparent. The plaintiffs are not making any other case based on negligence.

62. The events which gave rise to this litigation occurred in 2007. Everybody directly concerned with those events must have had them in the forefront of their minds in 2013 and 2014. At that stage all involved knew that it was at least possible that they would be witnesses in legal actions.

63. The present application was prompted by failure to attend to the discovery obligation for a period of over a year. Had the discovery been made some six months earlier it is unlikely that this application would have been made. Both parties would have provided discovery, even though the plaintiffs were refusing to state a coherent case. At some point the plaintiffs would have to state what their real case is.

64. Despite the failures and delay in the presentation of the plaintiffs' case, I am persuaded that the balance of justice is in favour of permitting the negligent misrepresentation element of this action to proceed.

65. I propose to dismiss the paras. of the statement of claim which allege deceit on the basis that there has been undue delay in advancing these claims and the balance of justice does not favour permitting the deceit claim to proceed. I will permit the plaintiffs to continue the action by allowing them to advance a narrow claim based on the allegation set out in their solicitor's affidavit and referred to in paras. 59 and 60 of this judgment.

66. The plaintiffs must deliver an amended statement of claim confined to that claim within three weeks and this must fully and adequately particularise each element of the cause of action and loss and damage, having regard to what I have stated. This will include a full explanation of what property was sold to reduce the liability on the bank loan and the amounts applied from those sales in reduction of the loan and details of any security released back to the plaintiffs and its value. The statement of claim must contain sufficient detail to make it unnecessary for the defendants to look for any further particulars on the important elements of the claim and be accompanied by any vouching documents or calculations of special damage claimed. The plaintiffs must also provide full particulars to the defendants in relation to the action against the solicitors.

67. I will now indicate what I propose in order to advance this action to a hearing and my provisional view of what costs orders I have in mind.

68. I will direct that the costs of the statement of claim, including the statement of claim already delivered and replying to the notice for particulars, be disallowed from any costs order in favour of the plaintiffs on the conclusion of the action. The defendants will at this

stage be awarded the costs of the notice for particulars and defence already delivered and of any amended defence which they may deliver.

69. The plaintiffs must also pay the costs of this application. The unsatisfactory nature of the affidavit evidence provided by the plaintiffs to meet this claim when it first came on for hearing necessitated an adjournment and I made clear that this would have an effect on an order for costs. The application by the defendants to have this claim dismissed for want of prosecution was fully warranted and appropriate, even though it has not succeeded.

70. It is also necessary to grant other costs now as a mark of disapproval of the manner in which the plaintiffs have conducted this litigation and met this application and to cover costs of the defendants arising from defaults of the plaintiffs which are contributing to delay and unpreparedness.

71. The defendants must deliver a defence within three weeks of receipt of the amended statement of claim. The discovery affidavits with copies of the discovery documents must be exchanged within three weeks after the defence. The plaintiffs must serve notice of trial and set the case down for trial within three weeks of receipt of discovery. Any failure by the plaintiffs to adhere to these directions and the time-table will not be tolerated and the defendants have liberty to re-enter this application in such event.