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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

MICHELLE McKEEVER AND JOHN McKEEVER

Appellants:

-and-

BANK OF IRELAND (UK) PLC

Respondent:

Representation

Appellants: Michelle McKeever, in person
Respondent: Douglas Stevenson, of counsel, instructed by DWF (NI) LLP

Before: McCloskey LJ, Maguire LJ and the Rooney J

McCloskey LJ (delivering the judgment of the court)

Nomenclature

"The appellants" denotes, where the context so requires, Michelle McKeever and her spouse John McKeever
"The first appellant" denotes Michelle McKeever only

The Parties

[1] The parties to this appeal are Michelle McKeever and John McKeever ("*the appellants*") and Bank of Ireland (UK) PLC ("*The Bank*"). Their litigious dispute relates to the provision of a loan of £450,000 by the Bank to the appellants in June 2007 to facilitate the redevelopment of property owned by the appellants at 48/49

The Square, Crossmaglen, Co Armagh ("*the property*") and an associated arrangement whereby the appellants granted the Bank a charge over the property.

The Appeal

[2] By Writ of Summons with the Statement of Claim endorsed thereon issued on 16 May 2013 the Bank brought proceedings against the appellants in the Chancery Division of the High Court pursuing the following remedies:

(a) Payment of approximately £570,000 liquidated damages plus interest.

(b) A declaration that identified receivers had been well appointed and were empowered to let or sell the property.

(c) An injunction restraining the appellants from trespassing on the property.

(d) In the alternative to (c), an order requiring the appellants to provide possession of the property.

(e) Unliquidated damages for trespass.

Some eight years later finality at first instance was eventually achieved. By order of the Chancery Court dated 08 September 2021 judgment was given in favour of the Bank against the first appellant (only) in the amount of £477,622.91. This discrete aspect of the final order of the court was confined to the first appellant only having regard to the second appellant's status of undischarged bankrupt. The court granted two further forms of relief, namely a declaration that the receivers had been validly appointed by the Bank in respect of the property and an injunction restraining both appellants from entering onto or remaining on the property or interfering in any way with the management and/or sale of the property by the receivers. The order further required the appellants (both) to pay the Bank's costs of the proceedings, to be taxed in default of agreement. The appellants appeal to this court against this order.

Judgment of Deeny J

[3] Chronologically, following the initiation of the proceedings, the next material event was this interlocutory judgment, which arose in the context of interim injunctive relief pursued by the Bank against the appellants.

[4] The judgment recounts that the appellants had redeveloped the property (evidently with the assistance of the finance provided by the Bank in accordance with the loan agreement), thereby creating five apartments and two retail units. The appellants having defaulted in their repayment obligations, demands were made followed by the initiation of these proceedings. Receivers were then appointed by the Bank (in accordance with the terms of the legal charge). On 18 June 2013, one

month post-Writ, the Bank applied for injunctions restraining the appellants from trespassing on the property. At this remove it suffices to say that certain issues arose for determination by the court. One of the ingredients in a moderately complex equation was an order of the English High Court dated 29 October 2010 in proceedings brought by the Bank under (*inter alia*) the Financial Services and Markets Act 2000 sanctioning a scheme whereby specified business transferred to and vested in the Bank. This order was subsequently registered in the Northern Ireland Land Registry. These events post- dated by some three years the loan and charge arrangements giving rise to the legal relationship between the Bank and the appellants.

[5] Before Deeny J the appellants argued that the transfer was not legally valid because they had not been notified of it. Without deciding the factual dimension of this submission, the judge held, in unambiguous terms, that the transfer was legally valid irrespective of notification to the appellants: see [16]. This prompted a second, related conclusion namely that the Bank had a valid enforceable charge against the appellants.

[6] The second issue which Deeny J had to determine arose out of the appellants' argument that their dispute with the Bank belonged to the jurisdiction of the Republic of Ireland. Having considered Council Regulation EC44/2001 the judge rejected this argument, ruling that the place for performance of the appellants' material obligations is Northern Ireland: see [18] and [19]. In thus ruling the judge highlighted that the dispute to which the proceedings related involved rights *in rem* in immovable property. The judge's determination of this second issue is expressed with admirable clarity at [22]:

> "*But the proper conduct of litigation where the parties domiciled in one Member State have chosen to develop property in another Member State with money borrowed in that State is, it seems to me, on foot of the EC Regulation, properly dealt with in the Member State where the property is and I so rule.*"

[7] One of the features of the litigation matrix is that the requirement of drawing up an order pursuant to and giving effect to the ruling of Deeny J was evidently overlooked by all concerned. In the weeks and months following the delivery of his ruling Deeny J made further case management orders, none of which bears directly on his injunction adjudication. While the absence of the requisite order has given rise to no nuclear consequences, it will be necessary to revisit the ruling of the judge in this court's consideration of an issue of substance *infra*.

Thereafter

[8] To summarise, therefore, before the pleadings in the action had developed in any meaningful way the Bank had secured an order of the Chancery Court prohibiting the appellants from trespassing on the property and, in so doing, had

successfully resisted the appellants' contentions that (a) the Bank was not lawfully entitled to bring its action against them arising out of the loan facility and charge arrangements made in 2007 and (b) the proceedings had been improperly brought in Northern Ireland. As appears from what follows in this judgment, this court considers that a *caveat* must be entered regarding the legal consequences of this interlocutory adjudication.

[9] Just why the proceedings were dormant for almost six years following the ruling of Deeny J is, at one and the same time, baffling and disturbing. The Bank did not move for summary judgement against the appellants. Nor did the appellants apply to have the Bank's claim dismissed for want of prosecution. The chronology of material dates and events directed by the court has a gaping chasm between the date of the aforementioned judgment and the date of the final hearing. Sandwiched between these dates were the following:

(i) ten affidavits sworn by the first appellant and by various deponents on behalf of the Bank spanning the period March 2014 to February 2021;

(ii) nine case management orders during the period February 2014 to February 2021; and

(iii) a sudden flurry of activity on the pleadings front in 2019 which included, most importantly, the appellants' Defence and Counterclaim served on 16 October 2019 and the Bank's rejoinder thereto.

The Defence and Counterclaim

[10] The following features of the Defence and Counterclaim are highlighted. First, the Bank's version (in its pleading) of the loan and charge arrangements giving rise to an agreement among the three parties is the subject of a "*not admitted*" plea. Second, there is a quibble about whether the charge was executed on 18 April 2007 or 15 June 2007. Third, it is pleaded that the deed of charge was not validly executed as it was not signed in the presence of a witness who attested the parties' signatures. Fourth, it is pleaded that there are material differences between a mortgage deed dated 18 April 2007 and one dated 15 June 2007, with a related plea that the only valid mortgage deed is that dated 18 April 2007 and that this predated the second appellant's ownership of the property. Fifth, it is pleaded that the "real" mortgage deed contains no express power of attorney for the Bank or the receiver. Next, there is a discrete plea that on 12 October 2009 the second appellant was adjudicated bankrupt and that no legally enforceable vesting of his assets in the first appellant materialised subsequently. This is followed by an alternative pleading. The denouement of these discrete pleas is the following:

> "In the premises the Plaintiff is put to strict proof that the First Defendant was and/or remains liable for the

discharge of the Second Defendant's indebtedness to the Plaintiff such as that may be."

[11] Next, there are several passages in the Defence and Counterclaim relating to the first of the two issues decided by Deeny J (*supra*). This is followed by an elaborate pleading that no valid registration of the English High Court transfer of assets Order with the NI Land Registry was effected having regard to certain provisions of the Land Registration Act (NI) 1970 (the "*1970 Act*") and the Land Registration Rules (NI) 1994 (the "*1994 Rules*"), together with section 18 of and Schedule 7 to the Civil Judgements and Jurisdiction Act 1980 (the "*1982 Act*") [paras 18 – 30]. Next there is a discrete plea that the appellants did not consent to the transfer of assets *et al* the subject of the English High Court Order and that, in consequence, the purported transfer of the subject agreement on which the Bank's claim is founded is invalid. Furthermore, assorted deficiencies in Schedules 4, 5 and 6 to the aforementioned Order are asserted. Next there is a plea that the Bank is debarred from enforcing any loan by reason of its failure to serve a Notice of Default pursuant to section 89 of the Consumer Credit Act 1974.

[12] With regard to the Bank's purported appointment of receivers, there are three specific pleas:

(i) Their appointment was invalid (without any particulars).

(ii) There has been no obstruction of the work of the receivers by the appellants.

(iii) The receivers have taken no steps or action with which the appellants could interfere in any event.

(iv) The Bank has assumed control of the receivers and has "*directed them contrary to law*" (again without particulars).

Within these discrete pleas there is a specific averment that the purported appointment of the receivers by the Bank occurred on 22 February 2013 (which squares with the Bank's chronology of events).

[13] The following are the essential ingredients of the <u>counterclaim</u> of the appellants: when the receivers were appointed the property was "*tenanted*" (without particulars); on 21 March 2013 the receivers caused locksmiths to change the locks thereby "*unlawfully excluding the tenants of the apartments*"; in consequence the tenants left the property "*on or about April 2013*"; the receivers failed to take steps to re-let the properties subsequently; with the exception of the letting of one retail unit between July and October 2014, instigated by the appellants, all of the units which the property comprises have been vacant since April 2013. The following proposition of law forms part of the counterclaim:

> "By reason of its actions in directing the receivers the [Bank] became mortgagee in possession and as such was subject to a duty to manage the property actively so as in particular to maximise its return by taking all necessary steps to re-let the property and to collect such rents or other sums as were owing as fell due from the remaining tenants."

It is pleaded that the Bank acted in dereliction of this duty.

[14] The final feature of the Defence and Counterclaim to be highlighted is the following. It contains a vague averment that the appellants "*… have suffered loss full particulars of which will be provided upon discovery herein.*" At the time when this pleading was served, the Bank had served a List of Documents followed swiftly by an amended List of Documents, in March and May 2014. Following the service of this pleading, the Bank served a further List of Documents dated 18 November 2019. No amendment of the Defence and Counterclaim – nor any other comparable measure – to particularise the appellants' alleged "*loss*" has materialised. Nor has there been any challenge to the adequacy of the Bank's discovery.

[15] The pleadings did not end here. Rather, as one would expect – and, indeed, as expressly required by a specific case management order – a Reply and Defence to Counterclaim followed. This is an admirably elaborate pleading joining issue, in carefully formulated terms, with all aspects of the Defence and Counterclaim, enshrining a series of rebuttals and pleas in the alternative. Within the elegantly framed passages in this pleading the importance of the issues addressed by Deeny J in his interlocutory judgment looms large.

First Instance Orders

[16] The appeal bundle contains a total of ten orders generated in the first instance proceedings. It suffices to draw attention to the following orders only:

(i) Following the first of these orders, dated 24 February 2014, there was an unexplained hiatus of over five years.

(ii) A scheduled trial date of 15 October 2019 was vacated for reasons which are unclear.

(iii) *Ditto* a further scheduled trial date of 03 December 2019. By this stage the order of the court dated 22 November 2019 recorded that the trial bundles had been lodged.

(iv) A further scheduled substantive hearing date of 13 January 2020 was similarly vacated, per the order of 06 December 2019.

(v) A hiatus of 12 months followed at which stage by a further order dated 14 December 2020 recorded that counsel for all parties had been heard and directed that an "affidavit of service" was to be filed by a specified deadline.

(vi) By further order dated 03 February 2021, invoking Order 65, Rule 5(a) RCJ "… it is ordered that a process server instructed on behalf of the Plaintiff do leave a document detailing the Review at …… [a specified address in the Republic of Ireland]." (The "*Review*" is not defined.) By this order the Bank was further required to file an affidavit of service "… confirming the steps that have been taken to bring the Review to the attention of the Defendants."

(vii) Next, by order dated 22 February 2021 the Bank was required to file "any evidence of service" by 15 June 2021 and new hearing dates of 08-09 September 2021 were allocated.

(viii) The aforementioned order made specific provision for further review by the court on 15 June 2021. <u>There is no order recording any such review</u>.

Pausing, the order of 22 February 2021 has emerged as one of particular importance in the events which have occurred. In short, there was a failure to comply fully with this order, albeit this court is now aware that this occurred for understandable reasons attracting some sympathy.

[17] As noted above, a final order in the first instance proceedings was made on 08 September 2021. This is the date upon which the substantive hearing at first instance was conducted. Prior to considering events at this hearing and the circumstances in which this order materialised it will be convenient to address the appellants' Notice of Appeal ("*NOA*").

Notice of Appeal

[18] During the case management phase of this appeal this court, having noted that the initial NOA was couched in rather diffuse terms and was raising issues relating to notice of the first instance hearing and the conduct thereof, directed that a transcript of same be provided. It is appropriate to observe that the transcript which materialised thereafter was compiled via the normal independent mechanism. Furthermore, in the usual way, it was not promulgated until the trial judge had been given an opportunity to undertake any appropriate editing of the content. At this stage this court directed that an amended NOA be formulated. This was provided and is dated 18 November 2021. The amended NOA is the sole focus of this court's attention.

[19] The grounds of appeal resolve to the following:

(i) A contention that the decision of Huddleston J is inadequately reasoned.

(ii) A separate contention that the judge failed to consider adequately or at all a series of factual and legal issues: see [20] *infra*.

(iii) Failed to conduct a proper enquiry into the non-attendance of the appellants at the trial.

(iv) Consequential upon (i) a breach of the appellants' rights under Article 6 ECHR, contrary to section 6 of the Human Rights Act 1998.

[20] As regards ground (ii), the factual and legal issues which (it is said) the judge failed to consider adequately or at all are the following (verbatim):

> "[4] It appears from the transcript that the learned judge failed or appeared to fail to consider adequately or at all the following points:
>
> a. The terms and conditions of the term loan agreement and mortgage deed.
>
> b. The transfer of the loan and security from The Governor and Company of Bank of Ireland to Bank of Ireland (UK) Plc and the validity or otherwise of the said transfer and the consequences in law of the said transfer;
>
> c. The true employment status of the witnesses for the Claimant Mr O'Neill and Mr Gracey at the time of sending the Final Demand letter and at the time of the Appointment of the receivers and the consequence for the validity of the said demand an legal entity employed;
>
> d. Whether the Defendant was in arrears at the time of the service of the demand (which the Defendant denies).
>
> e. Further and in the alternative the correct amount of arrears (if any) which the Clamant averred that the Defendant was in at the time of sending the Demand letter and the subsequent Appointment of the receivers;
>
> f. The Authority needed and the formalities for the execution of a deed and the validity of the deed relied upon by the Claimant

g. The failure of the Claimant to provide evidence from any member of its staff;

h. The fact that John McKeever was still registered as owner of the property;"

Issue (b) can be linked to the Reply and Defence to Counterclaim, the Bank's rejoinder thereto and the interlocutory ruling of Deeny J.

[21] The riposte of the Bank, per counsel's skeleton argument, may be summarised thus: there are seven grounds of appeal relating to the absence of any or adequate reasons, one further ground relating to the last mentioned matter – in para [30] - and another raising more substantive issues, all lacking in merit..

The First Instance Decision and Order

[22] The hearing at first instance and the outcome thereof are evidenced before this court in the Order dated 08 September 2021 and the transcript of the hearing conducted on said date ordered by this court during the case management phase. These reveal the following.

[23] From the Order one learns three things in particular. First, the appellants were "called but not attending." Second, the court received "evidence of the attempts made by the plaintiff to give notice to the defendants of the proceedings." Third, the court heard evidence from "the witnesses" for the Bank. The rather sterile print of the order, much of it formulated in boiler plated terms, comes to life when one turns to consider the transcript of the hearing.

[24] The Bank was represented by solicitor and counsel. The first issue raised was the non-attendance of the appellants, either in person or on Sightlink. Counsel informed the court of his instructions that there had been no contact from the appellants since September 2020. He then outlined the case management listings and a series of letters which followed. Various letters either posted to or physically delivered to the appellants' address in County Louth had been returned marked "*No contact.*" At this point the judge confirmed with the court official that there had been no communication from the appellants.

[25] Counsel then proceeded to open the case for the Bank. While there were evidently several trial bundles, he focused the attention of the court on two only, namely a "*core bundle*" and "*trial bundle 2*", which he described as containing all of the documents identified in the Bank's List of Documents. The trial judge was then escorted through the following documents: the facility letter and the charge, with particular reference to the various signatures on these documents; the folio relating to the property; the judgment of Deeny J; and the deed appointing the receivers.

[26] Next, the court heard evidence from the following witnesses:

(i) (**Apparently unsworn**). Michelle McArdle, a solicitor then employed in the firm of Tara Walsh, who attested to two attendance notes dated 18 and 27 April 2007 respectively, relating to the attendances of the appellants and the witness (first meeting) and another identified solicitor (second meeting). The witness confirmed that she had witnessed the signatures of the appellants on the charge.

(ii) (**Sworn**). Eamon O'Neill, the bank manager who had direct dealings with the appellants in relation to the loan and charge arrangements, attesting to inter alia a site meeting with them, the letter of offer of £450,000, the written acceptance thereof by the appellants, the relevant security (the charge) and a fire policy, life insurance cover and the first draw down, £80,000 on 15 June 2007, with the full draw down of £450,000 being achieved by 10 December 2007. Until that date the appellants had to pay interest only. From that (or a later?) date capital and interest repayments were required. Until 05 July 2009 repayments were made by the mechanism of a standing order related to the appellants' current account in the same bank. From that date the appellants fell into arrears. No further loan facility was created. (By reference to specified documents) a decision was made to appoint receivers and this occurred (the date being 22 February 2013).

(iii) (**Sworn**). Nicholas Gracey, who testified that he was a relationship manager in Newry Bank of Ireland at the material time. He described his role in the appointment of the receivers. He testified that as of 05 September 2017 the amount owing by the appellants was £477,622.91. (At this point counsel interjected, intimating that the Bank was seeking judgement in that amount, ie it was not pursuing any interest accrued thereafter*)*

(iv) (**Affirmed**). Gerard Kelly, a surveyor in the firm of Best Property Services Newry, who gave evidence of a letter dated 29 January 2013 from his firm to the appellants informing them of the appointment of fixed charge receivers (Mr Kelly and a colleague his firm); several emails relating to a proposed meeting with the appellants in February 2013, cancelled by the first appellant; an email from the first appellant in March 2013 querying the validity of the receivers' appointment; communications with existing tenants concerning the payment of their rent direct to the receivers; a change of locks effected by the receivers; and the ensuing change of these locks by the appellants – "… that's where everything ceased in terms of having control over the property" - followed by a communication from two tenants of their intention to vacate their respective units as soon as possible. Thereafter two tenants of the residential apartments and one tenant of a commercial unit did vacate, whereas another commercial unit tenant remained. On the date of trial, all of the units were vacant.

[27] No further witnesses were called on behalf of the Bank. At this juncture, addressing the court, counsel for the Bank submitted that as the debt had been proven and the security had been lawfully granted, the Bank was entitled to a money judgment in the amount of £476,622.91. The money judgment was sought against the first appellant only as her spouse had been made bankrupt. The Bank was also pursuing the injunction and declaration claimed. The judge thereupon pronounced himself satisfied of the Bank's entitlement to each of these forms of relief together with costs.

Summary

[28] Two issues in particular arise out of this court's survey above of the history of the proceedings, the pleadings, the interlocutory injunction phase and the outcome thereof, the affidavits, certain of the multiple case management orders and, most recently, the transcript of the hearing conducted at first instance and the consequential order now under appeal. The first issue emerging is that of notice to the appellants of the first instance hearing. The second concerns the limits of the adjudication which the trial judge carried out.

First issue: notice of hearing to the Appellants

[29] As recorded in the transcript, at the outset of the hearing, counsel for the Bank stated inter alia –

> "… my instructing solicitor had – had served an affidavit or provided an affidavit yesterday rather to the court, which is setting out the various attempts ….made to contact Mrs McKeever and advise her of today's date."

This was followed by the case outline from counsel noted at [23] – [24] above. There was no further reference to this affidavit thereafter. Furthermore, while the appeal bundle contains a total of 17 affidavits, none of them matches this description.

[30] There is an affidavit sworn by the Bank's solicitor just two weeks ago, on 29 November 2021. Having regard to the court's observation in [16] above and the supporting evidence now provided, it is appropriate to admit this affidavit. While there is also an unsolicited affidavit sent by the first appellant to the court just before the hearing conducted on 16 December 2021 and certain related communications, these have no bearing on the court's adjudication of this appeal and are not admitted accordingly. What might become of these materials in the future is beyond the remit of this court.

[31] The following further observations are appropriate

(a) The Bank's solicitor avers inter alia that a search of the Land Registry in Ireland in February 2021 confirmed that the appellants were the registered owners of an identified property in County Louth.

(b) The deponent further avers (in substance) that the method of service under Order 65, Rule 5, authorised by the court's order of 05 February 2021 was not pursued in the event. As a result no affidavit attesting to service by this means had been sworn.

(c) As already noted, there was only one further case management order of the Chancery Court, that dated 22 February 2021 ordering that "… any evidence of service should be filed by 15 June [2021]". (This order also fixed the trial dates of 08/09 September 2021.)

(d) The deponent describes various letters and electronic communications belonging to the period of 19 days between the last two case management orders.

(e) There is an averment that on 22 February 2021 the deponent provided the Chancery Office with an affidavit sworn by one Lauren Christie describing "the steps taken to engage the first named Defendant and bring this review to the attention of the Defendants".

(f) The affidavit of Ms Christie (employed in the same firm of solicitors) describes the personal actions of the deponent in posting two letters – dated 18 November 2020 and 10 February 2021 respectively – to the aforementioned County Louth address: both sent by first class post and the second by tracked post only, yielding a response from the postal service that at 08.49 hours on 16 February 2021 there had been no one present at the premises when delivery was attempted. This affidavit, in common with that of Ms Cully, purports to exhibit materials which do not accompany it.

(g) Next the affidavit describes the actions of a process server (identified) on 13 May 2021 at the County Louth address and the subsequent receipt by the solicitors of a returned "no contact" letter.

(h) The deponent deposes to a Chancery Court review scheduled for 15 June 2021 notified by her to the appellant by email in advance: there is no case management order pertaining to this date. This listing appears to have been fairly perfunctory.

(i) The final averments relate to emails and letters sent by the deponent to the appellant in advance of the scheduled substantive listing on 08/09 September 2021.

[32] The amended NOA has been outlined above. It contains no explicit suggestion in any of the grounds that the decision and order of the first instance judge are vitiated on the basis that the appellants had as a matter of fact received no notice of the hearing. Rather, there is the more refined complaint that the trial judge should have made further enquiry into the reasons for the appellants' non-attendance and the service of notice of the hearing upon them.

[33] This is in contrast with the initial NOA which asserted inter alia –

> "… the failure of service of the actual trial proceedings … [whereby the Appellants] … were unaware of the proceedings and in any event Michelle McKeever and John McKeever would not have been able to attend as they were isolating due to their daughter who lives with them testing positive for Covid on 01 September 2021".

This court does not overlook that this bare assertion was, and remains, unsupported by any evidence and has not been the subject of any application to this court to receive fresh evidence. The appellants' skeleton argument reproduces the grounds rehearsed in the amended NOA. There is no repetition of the "no notice/service" claim in the initial NOA. This court is alert to this element of equivocation.

[34] Furthermore it is, as a minimum, highly surprising that the appellants have made no attempt to adduce before this court medical (or other) evidence supporting their "Covid claim". This failure is striking. Nor have they made any attempt to explain how they learned of the first instance order and were able to serve and file a timeous NOA. In addition they have not attempted to engage with any of the extensive evidence relating to letters and emails sent to them and service attempts at the County Louth address. The appellants are experienced litigants who have throughout the protracted history of these proceedings demonstrated ample capacity to engage with court procedures to their advantage.

[35] On the other hand this court cannot overlook a matter of fundamental importance, namely the absence of any evidence before the trial judge that the appellants had received notice of the hearing. Counsel's outline to the court of his instructions bearing on this issue could not be, and was not, a substitute for this indispensable and foundational requirement. Nor could a draft unsworn affidavit (which barely flickered before the court), in the absence of sworn evidence attesting to the contents from the deponent. Furthermore, the specific requirements of an earlier order of the court were not observed.

[36] One of the ancient rights of the common law was in play, namely the right of every litigant to receive notice of hearing. This is a particular feature of the common law to which Article 6 ECHR has made no addition (albeit Article 6 has made other contributions to United Kingdom law). This right is indelible and inalienable, incapable of being waived by the party concerned. It goes hand in hand with a

corresponding duty on the part of the other party to provide adequate notice of the hearing concerned. To this discrete equation there belongs also an onus, namely a burden on the relevant party to establish to the satisfaction of the court that the requisite notice has been given. While this burden applies in every litigation context, it is of particular force in cases involving large sums of money and the possible loss of one's dwelling. The corresponding duty on the court is to satisfy itself that the aforementioned onus has been discharged.

[37] This hallowed common law right, save perhaps in highly limited circumstances (which this court is not required to consider), does not admit of dispensation, dilution or discretion. The question is almost invariably a binary one: was notice of the hearing given or was it not? It is self-evident that trial judges can determine this question only on the basis of evidence and by applying the rules of evidence. The solemnities of the judicial exercise to be performed must be observed accordingly.

[38] The background to this court's determination of the first of the two issues identified is rehearsed in [29] – [34] above. Having regard to everything considered and for the reasons given therein we are driven to conclude that this appeal must succeed on the notice of hearing issue. Ultimately, after the court had outlined to the parties the substance of the foregoing, Mr Stephenson, counsel for the Bank, conveyed his client's recognition that this ground of appeal could not be contested. This was an entirely proper and realistic acknowledgement in the circumstances.

The Second Issue of Substance

[39] While it is possible to deal with the second of the two issues identified above briskly, it is of no lesser moment than the first. In short, in the events which occurred at the trial, there was no adjudication of the multiple issues raised in the Defence and Counterclaim of the appellants. This is the irresistible analysis of both the transcript and the final order of the court of trial. This too, ultimately, was not contested on behalf of the Bank. It represents the second ground on which this appeal must be allowed.

[40] It is in this context that this court must add the following observation. It is not clear that the careful judgment of Deeny J was, as a matter of law, finally dispositive of the legal issues which it addressed, subject of course to onward appeal. This was a purely interlocutory judgment. Furthermore the judge expressly acknowledged that he was not attempting to determine any disputed material issues of fact. While the question of whether there are in reality any such issues is unclear to this court, it is inappropriate to venture beyond this limited observation. It has been unnecessary for this court to explore, much less determine, the application of the familiar principles of issue estoppel/res judicata to this interlocutory judgment. This will be a matter lying within the exclusive domain of the first instance court pursuant to the order which we propose to make.

Concealed Legal and Other Advisors

[41] In cases where a litigant has the services of or assistance, of whatever kind, from a legal advisor who is not that party's solicitor on record or instructed counsel, there is, pursuant to the overriding objective, a duty of candour owed to the court in every such case requiring disclosure of the existence of support of this kind. This duty is triggered inter alia because of the recurring circumstance that apparently unrepresented litigants routinely and repeatedly pray in aid, for a variety of reasons and purposes, the assertion that they have no legal representation or advice. Those litigants who do have support of this kind would do well to reflect carefully on the potential consequences of concealing it from the court and misleading the court by their words (both spoken and written), actions and omissions. Such reflections should focus fundamentally on the duty of every litigant not to mislead the court in any material way, the long established doctrine of abuse of the process of the court and the criminal offence of perjury. This offence attracts a maximum punishment of seven years imprisonment or an unlimited fine.

[42] It is timely to observe that non - litigants who engage in conduct and services of the kind just mentioned open a veritable pandora's box of significant legal considerations. These include, inexhaustively, legal duties owed to the recipient of the advice and services; professional indemnity insurance; ethical and professional duties owed to the court where the shadowy advisor is a qualified legal practitioner; possible disciplinary proceedings by the appropriate regulator; possible prosecution; and potential costs liability.

Conclusion and Order

[43] The appeal succeeds for the reasons given. In the exercise of this court's powers under section 35 of the Judicature (NI) Act 1978 the following order is made:

(i) The appeal is allowed and the order of the trial judge reversed.

(ii) The case is remitted to the Chancery Court for the purpose of conducting a full trial of all issues requiring to be determined arising out of the pleadings.

(iii) Such trial will be conducted in accordance with this judgment insofar as material.

(iv) Having considered the parties' written submissions, there shall be no order as to costs inter - partes.

(v) There shall be liberty to apply.

[44] To the foregoing we would add the following. First, there is absolutely no reason why the retrial should not be assigned to the same trial judge. Second, it will

be clear from this judgment that certain pre-trial case management steps will be required. Third, given the antiquity of this dispute, expeditious finality is highly desirable.