**THE COURT OF APPEAL**

**CIVIL**

**RECORD NUMBER: 2015/172**

**FINLAY GEOGHEGAN J.**
**PEART J.**
**IRVINE J.**

**BETWEEN:**

**NATIONAL ASSET MANAGEMENT LIMITED**

**PLAINTIFF/RESPONDENT**

**- AND -**

**GARRETT KELLEHER**

**DEFENDANT/APPELLANT**

**JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 15TH DAY OF APRIL 2016**

1. This is an appeal against an order made by Fullam J. in the Commercial Court on the 24th February 2015 when he adjourned these summary summons proceedings to a plenary hearing, but limited to the single issue as to whether NAMA is estopped from enforcing certain guarantees against Mr Kelleher by virtue of alleged representations made and assurances given to him after the underlying loans had been transferred into NAMA and while he was engaging with NAMA in relation to the security assets.

2. In the proceedings NAMA seeks to recover a sum in excess of €46 million plus interest from Mr Kelleher on foot of his guarantees which were executed as part of the security provided for certain loans advanced by former Anglo Irish Bank to corporate entities, together known as the 'Shelbourne Connection' of which Mr Kelleher is in reality the beneficial owner.

3. The guarantees were given firstly in respect of a loan facility dated 16th June 2005 granted to CWD Properties Ltd to assist with its development of lands at Cratloe, Co. Limerick ('the Cratloe Facility'), and secondly in respect of loan facilities granted to certain entities within the Shelbourne Connection to assist with their development projects in Dublin and in Belgium (the 'Modillion Facilities'). The total indebtedness of these corporate entities on foot of these facilities runs to almost €260 million. However, the liability of Mr Kelleher on foot of his guarantees is capped at €50 million.

4. The issue on the appeal is whether the defendant ought to have been permitted by the trial judge to raise by way of a counterclaim one of the issues which he had raised by way of defence in his replying affidavits, but which was found by the trial judge not to meet the test in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607, or to put it another way, whether the trial judge was entitled to preclude the defendant from pursuing what he now submits is essentially a counterclaim rather than a defence, and therefore not an issue which requires to pass the *Aer Rianta* test at all.

5. That issue sought to be raised by way of counterclaim is whether NAMA breached its duty as mortgagee and in particular the duty imposed upon NAMA by sections 10 and 11 of the NAMA Act, and by doing so wrongly exposed the defendant to a liability on foot of his guarantees. In general terms Mr Kelleher argued before Fullam J. that NAMA sold what has been referred to as the Chicago Spire loan at a fire sale price, and that by failing to maximise the real potential value of the proposed Chicago Spire development which, if achieved, would have enabled all of the Shelbourne Connection loans to be repaid in full, he was left with a liability under his guarantees which he ought not and would not have otherwise had.

6. For the avoidance of any doubt I should make clear that the guarantees on foot of which Mr Kelleher is sued in these proceedings did not form part of the security for any of the loans made in respect of the Chicago Spire development, and were confined to the Cratloe facility and Modillion facilities.

7. NAMA's motion for summary judgment was heard on affidavit over three days. The transcripts of those days' hearings have been made available on this appeal. It is clear from a reading of those transcripts that the issue arising from the sale of the Chicago Spire loan at an undervalue was argued as being a ground of defence. It was not referred to as being a counterclaim before the trial judge until after judgment had been given, and only when counsel for the defendant sought a clarification from Mr Justice Fullam as to whether his ruling was intended to limit the plenary hearing to the estoppel issue alone, and that he was precluding the defendant from bringing a counterclaim for damages arising from the sale of the Chicago Spire loan. The trial judge made it clear that this was his intention. In his written judgment, having examined the ground put forward in respect of this issue, he had concluded that *"in the circumstances there is no reality in this defence"*, and by reference to the *Aer Rianta* test – is it very clear the defendant has no case? – he answered this question in the negative in respect of the estoppel issue but in the affirmative in relation to the Chicago Spire loan issue.

8. It is accepted on both sides that when the matter was argued in the High Court the question of how the counterclaim should be dealt with in the event that the matter was being sent forward to plenary hearing on the estoppel defence was not addressed specifically, though in written submissions reference had been made to cases such as *Prendergast v. Biddle*, unreported, Supreme Court, 31st July 1957, and to the judgment of Clarke J. in the High Court in *Moohan v. S & R Motors (Donegal) Limited* [2008] I.R. 650. Nevertheless, the trial judge was clearly alert to the fact that in reality the Chicago Spire issue is a claim for damages (i.e. a counterclaim) rather than a defence to the plaintiff's claim on the guarantees, as he stated at the outset of his consideration of it in

his judgment at para. 43:-

> *"43. The effect of the plaintiff's [sic] contention is that he has a counterclaim for damages which is more than sufficient to offset against any liability under the guarantees in these proceedings. To succeed with such a counterclaim, the defendant acknowledges that he has to establish that ss. 10, 11 and 12 of the Act of 2009 impose obligations on NAMA which are more onerous than the normal duties of a mortgagee as set out in Silven Properties and approved by the Supreme Court in Dellway."*

9. During the course of his judgment, Fullam J. referred to the valuation evidence put forward by the defendant which put the potential value of a completed Chicago Spire development at $350 million, and to the evidence put forward by NAMA's valuer, which included an averment that even if the defendant's valuations were accepted in full and on a gross basis *i.e.* $350 million for the Chicago Spire development and $50 million for the secured assets of the Shelbourne Connection, there would still remain a nett liability of €98 million, which would still leave the defendant exposed to the maximum liability under his guarantees. It was in such circumstances that the trial judge expressed his conclusion that "there was no reality in this defence", and following the delivery of judgment made it clear that he was refusing to allow the issue to be raised even as a counterclaim.

10. The defendant submits that the trial judge erred in concluding that there was no reality to the counterclaim, and in excluding it as an issue in the plenary hearing. He emphasises on this appeal that the Chicago Spire issue is not a defence as such to the plaintiff's claim, but is rather an independent claim or cross-claim for damages which, if successful, would entitle him to an equitable set-off against any sum found to be due to the plaintiff. As such, it is submitted, it is a separate claim which could, if necessary, be brought against the plaintiff in separate proceedings without any leave of the court. However it is submitted that since it is closely linked to the plaintiff's claim, and the evidence supporting the estoppel defence will be relevant to the Chicago Spire loan issue, at least in part, it would be convenient, including by way of saving in court time and costs, for it to be litigated as part of the plaintiff's proceedings which have in any event been sent forward to plenary hearing on the estoppel issue.

11. The defendant has submitted that where the Court hears a contested motion for judgment in summary proceedings, the question to be determined on that motion is confined to whether the defendant has established the probability that he has a *bona fide* defence, or, as it is put in *Aer Rianta "whether it is very clear that the defendant has no defence"*. It is submitted that this does not involve any engagement with the merits or otherwise of any counterclaim which the defendant may wish to bring, whether it is raised on the replying affidavits or not, and that where a plenary hearing has been directed with appropriate directions as to delivery of statement of claim (if required) and defence (in this case on the issue of estoppel) the defendant may include a counterclaim as of right, since in any event he could bring that claim in separate proceedings without any leave to do so from the Court.

12. The plaintiff has made it clear that in the event that new separate proceedings are issued in order to litigate the counterclaim, it will argue that the issues raised by way of counterclaim are *res judicata* as a result of the finding of Fullam J. that there is no reality to the claims and his refusal to permit it to be litigated in these proceedings. Indeed at para. 3 of its Reply to Defence delivered on 13th April 2015 in answer to the defendant's Defence (limited to the estoppel, but nevertheless referencing the Chicago Spire issue) the plaintiff has pleaded that the defendant is precluded from relying in any way upon matters related to the Chicago Spire because they are *res judicata*. The defendant submits that these issues could not be considered *res judicata* given the very limited consideration of them which can take place on a motion for judgment heard only on affidavit evidence, but that in the light of that plea made by the plaintiff, it is all the more necessary that the defendant be permitted to make his case for damages by way of counterclaim in the present proceedings, rather than be met with a *res judicata* plea in any new proceedings. In reality, however, even if this matter is permitted to be pleaded in these proceedings by way of counterclaim, the plaintiff could still bring a motion to have the counterclaim struck out on the basis that the issue is *res judicata*, since if this Court was to permit the counterclaim to be pleaded it would be doing so on a jurisdictional basis only, and not by concluding as to the merits of that counterclaim, or expressing any view as to whether it is *res judicata*.

13. The defendant accepts that if new proceedings were issued, the plaintiff might decide to bring an application to strike out the claim on the basis of abuse of process or that the claim is one that is bound to fail. Equally, he accepts that if he is successful in this appeal to the extent that he ought not to have been prevented from pleading the counterclaim with his Defence on the estoppel issue, he might be faced with a similar motion to strike out the counterclaim. However, while that may be something to be faced, he points to the fact that on any such application the plaintiff seeking to have the claim struck out would have to satisfy the court that taking the defendant's case at its highest it was bound to fail or disclosed no reasonable cause of action – a test which the defendant submits is a different and more onerous test to the *Aer Rianta* test applied by the trial judge when excluding the counterclaim from the ambit of the plenary hearing.

14. The defendant submits that any question of assessing the merits of a defendant's counterclaim arises only in the event that the plaintiff obtains judgment on a motion for judgment and thereafter the defendant seeking a stay on that judgment until such time as the counterclaim is determined. The Court in such circumstances would be entitled to assess the merit of the counterclaim as part of the exercise normally to be undertaken when deciding whether or not to grant a stay, but that it does not arise where the plaintiff's claim is being adjourned to a plenary hearing in any event, as in the present case.

15. In this regard, Michael Cush SC for the defendant has referred to the judgment of Clarke J. in *Moohan v. S & R Motors (Donegal) Limited* [supra] where he considered how a cross-claim which might give rise to an equitable set-off was to be treated in a case where there was no defence as such found to pass the *Aer Rianta* test, and where the plaintiff was entitled to judgment on his claim against the defendant. That consideration involved a consideration of the judgment of Kingsmill Moore J. in *Prendergast v. Biddle* [supra]. Commencing at para. 9 of his judgment, Clarke J. stated the following:

> *"9. Where the nature of the defence put forward amounts to a form of cross-claim slightly different considerations may apply. In those circumstances the court has a wide discretion. Where the defendant does not establish a bona fide defence to the claim as such, but maintains that he has a cross-claim against the plaintiff, then the first question which needs to be determined is as to whether that cross-claim would give rise to a defence in equity to the proceedings. It is clear from Prendergast v. Biddle (unreported, Supreme Court 31st July 1957) that the test as to whether a cross-claim gives rise to a defence in equity depends upon whether the cross-claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set-off is available so that the debt arising on the claim will be disallowed to the extent that the cross-claim may be set out.*
>
> *10. On the other hand if the cross-claim arises from some independent set of circumstances then the claim (unless it can be defended on separate grounds) will have to be allowed, but the defendant may be able to establish a counterclaim in due course, which may in whole or in part be set against the claim. What the position is to be in the intervening period creates a difficulty as explained by Kingsmill Moore J. in Prendergast v. Biddle … in the following terms*

*at p. 24:-*

> *'On the one hand it may be asked why a plaintiff with a proved and perhaps uncontested claim should wait for judgment or execution of judgment on his claim because the defendant asserts a plausible but unproved and contested counterclaim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiff's demand when he asserts and may be able to prove that the plaintiff owes him a larger amount.'*

*11. The court's discretion is to be exercised on the basis of the principles set out by Kingsmill Moore J. later in the course of the same judgment in the following terms at p. 25:*

> *'It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgement, or execute judgement on his claim until after the counterclaim had been heard, for the plaintiff having received payment might use the money to pay his debts or otherwise dissipate it so that judgment on the counterclaim would be fruitless. I mention only some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of this discretion.'*

*12. It seems to me that it also follows that a court in determining whether a set-off in equity may be available, so as to provide a defence to the claim itself, also has to have regard to the fact that the set-off is equitable in nature and, it follows, a defendant seeking to assert such a set off must himself do equity.*

*13. On that basis the overall approach to a case such as this (involving, as it does, a cross-claim) seems to me to be the following: –*

> *(a) it is firstly necessary to determine whether the defendant has established a defence as such to the plaintiff's claim. In order for the asserted cross-claim to amount to a defence as such, it must arguably give rise to a set-off in equity and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendant's case, it would not be inequitable to allow the asserted set-off;*
>
> *(b) if and to the extent that a prima facie case for such a set off arises, the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);*
>
> *(c) if the cross-claim amounts to an independent claim then judgment should be entered on the claim but the question of whether execution of such judgments should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in Prendergast v. Biddle … ".*

16. Mr. Cush Submits accordingly that the merit or strength of the cross-claim comes into play only when the Court is being asked to consider the question of a stay on a judgment to which the plaintiff is otherwise entitled to, and that it is clearly envisaged that even though the defendant may not be permitted to defend the plaintiff's claim, he may nevertheless litigate a counterclaim, the only question then remaining being whether or not the plaintiff's judgment should be stayed in the meantime, that being a matter for the Court's discretion. However, as Mr Cush emphasises, there is no question of a stay in the present case as it has been adjourned to plenary hearing on the estoppel issue in any event, so the Court is not concerned as to how to exercise that discretion, and is confined to considering whether the defendant can be shut out from having the cross-claim litigated as a counterclaim in the present proceedings.

17. Declan McGrath SC for NAMA submits first of all that throughout the hearing of the motion for judgment in the High Court the Chicago Spire issue was dealt with only as a point of defence and not dealt with as a counterclaim, and that the defendant ought not now be entitled to argue on a different basis now. In a strict sense that is correct. However, I noted on going through the transcripts of the hearing in the High Court that towards the end of his submissions moving the motion, Brian O'Moore SC for NAMA, having made reference to *Prendergast v. Biddle* and to *Moohan v. S & R Motors*, and to what he considered to be the weakness of the Chicago Spire issue, stated the following at page 60, Day 2:

> *"So even if, I have given many reasons why he shouldn't be, but even if Mr Kelleher is in a position to assert either directly or through SDWS some entitlement in relation to the Chicago Spire the appropriate order is summary judgement and then some directions as to a counterclaim that may be, or an independent claim that may be pursued. But in truth I don't press that, judge, because it seems in our submission clear that nothing in relation to the Chicago Spire stacks up as a defence, still less as a counterclaim. It is simply extending the procedure to facilitate a claim being made in that regard even if summary judgement is granted against Mr Kelleher now, that option may be open to the Court but we say on the facts and on the legal status, sorry, on the legal authorities that that would not be the preferred option as far as NAMA is concerned."*

18. In the immediate aftermath of that submission, he went on at the judge's invitation to expand further on that matter, and said:

> *"Well if the Court was of the view that a claim in relation to the Chicago Spire could be maintained taking into account all of the provisions set out by Mr Justice Clarke and Mr Justice Kingsmill Moore, then the appropriate step would be to enter judgment against Mr. Kelleher and then hear the parties about the circumstances and directions required for the maintenance of the counterclaim, or sorry the claims. It is not in truth a proper counterclaim. But what Prendergast v. Biddle makes clear is that the giving of any such directions in no way prevents execution on the summary judgment. That is why the status of the plaintiff is important. Because if the plaintiff was not meant to be a mark on the independent claim there may be some restriction on the summary judgment being executed but here that simply isn't the case, because NAMA is clearly a mark on any view."*

19. That exchange with the trial judge, however, did not consider the possibility that the estoppel defence would be found to be arguable and what, in such circumstances, should become of the Chicago Spire issue in the context of it being a counterclaim as opposed to a potential defence. It was immediately thereafter that Mr Cush commenced the defendant's submissions. He identified two issues which would be submitted to constitute prima defences, namely the estoppel issue and the Chicago Spire issue. The latter was at no stage addressed on the basis that it was in the nature of a counterclaim. At the conclusion of his own submissions which were confined to the estoppel defence, Mr Cush informed the trial judge that Shane Murphy SC would address the Court *"on the detail of that second line of <u>defence</u>"* (emphasis added) *i.e.* the alleged reckless sale of the Chicago Spire loan at what the defendant argues was in the order of just 10% of what he considers to have been the full potential value of that development, if its value had been maximised. The issue was then addressed by Mr Murphy solely on the basis that this issue was a potential point of defence. In fact, what is now stated to be the reality of the issue, namely that it is a counterclaim and not a defence as such to the claim on the guarantees, was not referred to at all during Mr Murphy's submissions.

20. It is hardly surprising therefore that the trial judge examined whether that issue passed the *Aer Rianta* test as a bona fide defence being advanced by the defendant. In the event, he decided that while the estoppel issue met the test, the Chicago Spire issue did not. As I have mentioned already, it was only after judgment had been handed down, but before the order adjourning the case to plenary hearing on the estoppel issue was perfected that the defendant sought to raise the question of whether the order to be made excluded the possibility for the defendant to raise the Chicago Spire issue as a counterclaim. As stated already, the trial judge made it clear that on that occasion that he was not permitting the issue to be raised as a counterclaim. The order as drawn makes no reference to any counterclaim. It simply refers to the case being adjourned to plenary hearing on the single issue of estoppel.

21. In so far as the trial judge made it clear that his intention was to confine the plenary hearing to the single issue of estoppel, and that the counterclaim could not be pleaded as part of any Defence which the defendant would deliver, on the basis that there was *"no reality in this defence"*, the defendant appeals to this Court on the basis that the trial judge exceeded his jurisdiction under O. 37 RSC by reaching a conclusion on the merits of what was, according to the defendant's submissions before this Court at least, not in fact a defence but rather a counterclaim, even if it was never presented to the trial judge on that basis.

22. In relation to the point made that the issue was never raised in the High Court as being a counterclaim (and therefore arguably is something which the defendant ought not now be entitled to argue on appeal) Declan McGrath SC for NAMA does not ask this Court to send the issue back to the High Court. I think that is the correct approach given the fact that it was ventilated, albeit late in the day, after the matter was raised with the trial judge between the delivery of judgment and the perfecting of the order.

**Discussion**

23. The availability to a plaintiff of a procedure by way of summary summons enables a plaintiff who is owed by a defendant a money debt which can be easily ascertained by means of arithmetic calculation to obtain judgment for that debt by a simplified procedure and therefore more expeditiously than if the claim was commenced by way of plenary summons. That was recognised by Lavery J. in Prendergast v. Biddle [supra] when he stated:

> *"The procedure by summary summons is provided in order to enable speedy justice to be done in particular cases where there is either no issue to be tried or the issues involved are simple and capable of being easily determined".*

24. Hence a defendant who wishes to defend against such a claim must, unlike a defendant to a plenary summons, must first satisfy the Court on a motion for judgment brought by the plaintiff, that he has a *bona fide* and arguable defence. This requirement ensures as far as possible, and in a way that ensures that justice is done to each party, that a plaintiff in such a claim is not unjustly delayed in getting a judgment by a defendant who either admits the debt, or merely asserts a denial of the debt without putting forward an evidential basis or otherwise substantiating the basis for his denial. O'Dalaigh J. (as he then was) emphasised the importance of this summary procedure in respect of liquidated claims in his judgment in *Prendergast v. Biddle* [supra] when he stated:

> *"That the Rules of 1926 permit a judge to enter up judgment for a liquidated sum admitted to be due is not a matter for surprise. The law attaches to a judgment debt several privileges. Moreover as payments of debts in certain circumstances are made in order of priority the prompt obtaining of judgment is also generally a matter of importance".*

25. The filter mechanism provided in O. 37 of the Rules of the Superior Courts whereby the Court may assess the merits of a defence put up by the defendant on affidavit to the plaintiff's claim enables the Court to strike an appropriate balance between the plaintiff's right to obtain an expeditious judgment for a debt claimed to be due, and the defendant's right to have a reasonable opportunity to advance his defence to that claim by being given leave to defend.

26. Where the Court is satisfied that a bona fide defence is raised by the defendant on his affidavit(s) and that a plenary hearing should take place, the Court under O. 37, r. 3 of the Rules of the Superior Courts may give such directions as to pleadings, and also *"may make such order for determination of the questions in issue in the action as may seem just".* It is clear that these provisions give the Court a wide discretion as to the manner in which the case proceeds to a plenary hearing in order to ensure that justice between the parties is done. The most usual order made when a bona fide defence is found to exist is one adjourning the case to plenary hearing and directing the plaintiff to deliver a statement of claim within, say, twenty one days, and permitting the defendant to deliver his defence within a similar period from the date of receipt of that statement of claim.

27. However, as was made clear by Finlay Geoghegan J. in *Bussoleno Ltd v. Kelly* [2012] 1 ILRM 81, where the defendant raises in his affidavits a number of different issues by way of defence to the plaintiff's claim, the Court may decide that not all the issues raised are sufficiently substantiated by evidence or arguable in order to pass the test, and in such circumstances the Court may limit the defence of the claim to a specific issue or issues, as indeed happened in the present case where Fullam J. directed a plenary hearing but confined to the single issue of estoppel.

28. There can, of course, be cases where not only does the defendant raise defence to the claim, but indicates that he has in addition to a defence a counterclaim which he wishes to have heard at the same time as the plaintiff's claim. ,Where such a counterclaim arises from, say, the same contract on foot of which the plaintiff sues, little difficulty arises in deciding that it is convenient for the counterclaim to be permitted to be determined as part of the proceedings sent for plenary hearing. ,For example, the plaintiff, a builder, may sue for money due on foot of a contract to build a house for the defendant. While, strictly speaking, there is no defence as such to the amount claimed by the plaintiff on foot of such a contract the defendant may seek to counterclaim for damages for bad workmanship, and set off those damages against the amount due under the contract. Such a counterclaim amounts to a defence by way of equitable set off. In such a case, there is little difficulty in concluding that it is mutually convenient for the counterclaim to be dealt with in the same plenary hearing as the plaintiff's claim. But because the counterclaim is in reality a defence to the claim by way of equitable set off, an examination of the merits of such a counterclaim may be undertaken by the Court in

deciding whether a plenary hearing should be directed in respect of that defence by way of counterclaim. Such situations have been considered in cases such as, *inter alia, Prendergast v. Biddle* [supra], *Agra Trading Ltd v. Minister for Agriculture*, High Court (Barrington J.) 19th May 1983, *Soanes v. Leisure Corporation International Ltd*, High Court (Geoghegan J.) 18th December 1992, *McGrath v. O'Driscoll* [200] IEHC, [2007] ILRM 203, and *Moohan v. S & R Motors* (Donegal) Ltd [2007] IEHC 435, [2008] 3 IR 650.

29. It is important to distinguish between a defence put forward by way of counterclaim, and which gives rise to an equitable set off, and a counterclaim which is in fact an independent claim, and not one which naturally arises from the same factual basis for the plaintiff's claim. This is something which is specifically mentioned by Clarke J. in his judgment in *Moohan v. S & R Motors (Donegal) Ltd* in para. 13 in the passage quoted at para.15 above. He distinguishes between a cross-claim or counterclaim which amounts to a defence to the plaintiff's claim giving rise to an equitable set off, and one which is simply an independent claim arising on different facts altogether. It is clear from what he states in his para. 13 that in respect of the former which is put up by way of a defence, the Court will assess its as a defence, and if it passes muster in that regard, the Court will not enter judgment for the plaintiff, and the defendant will be permitted to defend the claim in full. I think it would follow also that if it is clear that the maximum value of the cross-claim by way of equitable set off will be less than the amount of the plaintiff's claim, then the plaintiff may be entitled to get judgment for part of the sum claimed, with the balance being adjourned to a plenary hearing.

30. But where the cross-claim amounts to an independent claim (i.e. arising from different facts) it is not considered to be a defence by way of equitable set off at all. That link between the plaintiff's claim and the defendant's counterclaim is absent. In such circumstances, as explained by Clarke J. in *Moohan v. S & R Motors (Donegal) Ltd*, where there is no other defence considered to exist to the plaintiff's claim, the plaintiff will probably be found entitled to judgment on his claim, and the only further question arising will be whether that judgment should be stayed pending the determination of the defendant's independent counterclaim, and whether that counterclaim can be more conveniently dealt with by adjourning the proceedings to a plenary hearing on that counterclaim alone, or whether, instead, the defendant should commence separate proceedings against the defendant in respect of the counterclaim. But in such a case, the Court will give judgment (with or without a stay thereon) and will adjourn the proceedings to a plenary hearing on the defendant's counterclaim. The Court in such a case is not concerned with the merit of the asserted counterclaim, unless as part of its consideration as of to the exercise its discretion to grant a stay on the plaintiff's judgment or not pending the determination of the counterclaim. But the important point is that the defendant is entitled to litigate that counterclaim (with or without a stay on the plaintiff's judgment) either in those proceedings or in separate proceedings, without any leave of the court.

31. In none of the cases discussed thus far has consideration been given to the situation which exists in the present proceedings, namely where the Court has been satisfied that one ground of defence (estoppel) put forward meets the required test and a plenary hearing has been directed on that issue alone, and where the defendant wishes in addition to that estoppel defence raise a counterclaim, not by way of an equitable set off, but in respect of an independent claim. It is correct in my view to see the counterclaim sought to be argued in these proceedings arising from the manner in which the plaintiff sold the Chicago Spire loan as being an independent claim and not a counterclaim giving rise to a defence by way of an equitable set off. In my view, that claim does not arise from the guarantees on foot of which the plaintiff sues. Those guarantees are not backing any loan that was advanced in relation to the Chicago Spire development. The representations relied upon as giving rise to an estoppel in respect of claims made under the guarantees sued upon have nothing to do with the claims being made as to the reckless disposal of the Chicago Spire loan. Another factor is that it is certainly arguable that any claim made in relation to the sale of the Chicago Spire loan at an undervalue is a not a claim maintainable by the defendant personally, but rather by the companies involved in that development project.

32. The question remains as to how the counterclaim which the defendant indicated it wished to bring ought to have been dealt with in the court below after it was clarified by the defendant following the trial judge's judgment (and prior to the perfection of any order) that he wished to bring it as a counterclaim, even though the point had been rejected as meeting the required test as a defence as such to the plaintiff's claim. While I have set forth above an exchange between Mr O'Moore and the trial judge in relation to how the issue of a potential counterclaim should be dealt with, it was only discussed in a context where no defence was found to exist and where judgment was being entered for the plaintiff, and how the counterclaim would then be dealt with in accordance with *Prendergast v. Biddle*. There was no discussion at that stage as to what the position would be where the matter was in any event being adjourned to a plenary hearing on the estoppel defence. When the trial judge was asked by the defendant to clarify if he intended by his ruling that the defendant was prohibited from pleading his counterclaim when delivering his Defence on the estoppel issue, and he so confirmed that such was his intention, there was no elaboration of his reasons for so concluding. There is a lack of clarity as to the basis on which the trial judge excluded the defendant from pursuing his intended counterclaim.

33. But in the light of Mr McGrath's assurance that he was not asking this Court to send the matter back to the trial judge on the issue of the counterclaim, I am satisfied that this Court should reach its own conclusion as to the defendant's entitlement to continue to pursue the Chicago Spire issue and, if he is so entitled, the manner in which he should do so in the light of the authorities.

34. Firstly I wish to reiterate my view that since the Chicago Spire issue was raised specifically as a point of defence and not at all as being a counterclaim, the trial judge was entirely correct to consider it in that light, and to form a view that it did not amount to a *bona fide* defence to the plaintiff's claim on the guarantees. I appreciate that he expressed this view in terms that there was not reality to the point, but given the manner in which the issue was argued by counsel, it is clear that what he was deciding was whether or not the issue met what I will loosely term the *Aer Rianta* test. It would not be fair in such circumstances to decide that the trial judge applied the wrong test.

35. This counterclaim is an independent claim which the defendant wishes to bring against the plaintiff. It is not a defence to the plaintiff's claim. Indeed, if the estoppel issue did not exist in the proceedings, it is likely that the Court would have given judgment to the plaintiff on its motion, and in my view unlikely that the Court would have granted a stay on that judgment while the Chicago Spire issue was litigated, whether in a separate action or by way of a counterclaim in these proceedings. Such a conclusion might well have been arrived because of the evidence available, which does not appear to be in contest, that even if the value of a completed Chicago Spire development as given by the defendant is taken at its highest, success on the counterclaim would still leave the defendant exposed on these guarantees to the maximum claimable thereunder.

36. A claim on foot of a guarantee is a straightforward claim in most cases, and therefore ideally suited to a determination in summary manner on foot of a summary summons procedure. A party entitled to judgment on foot of such a claim ought to get the benefit of such a judgment as quickly as is consistent with justice also being done to the defendant. By obtaining judgment, the judgment creditor can achieve some priority of importance in some scenarios. Delay in obtaining judgment may seriously prejudice the creditor's chances of recovery. It is for that reason that a Court will not permit a defendant to hold up the plaintiff's entitlement to judgment by reason merely of a desire on his part to litigate by way of a counterclaim some issue that realistically has little or nothing to do with the plaintiff's claim on foot of the guarantee. The position is put well by Jessel MR in *Anglo-Italian Bank v. Wells* [1878] 38 L.T. 197 when he stated in relation to summary proceedings for money due by defendants on foot of certain promissory notes:

*"The defendant says, as regards the deed, that there is another covenant in that deed which you, the plaintiffs, have broken, and that by reason of your breach of that covenant, I am entitled to claim damages from you; and if I establish the breach and get the damages, I may be entitled to set-off those damages against the sum claimed in the action. I must remark that, as regards that form of defence, it is not necessarily a defence under this order. It is quite true that you may, by way of counter-claim, bring forward, under the pleading rules, a defence of set-off of damages, but even that is in the discretion of the judge. He may strike out the counter-claim when it is there,' if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed'. So, that it is merely a right depending on the discretion of the judge. It is not an absolute right to set off damages against a debt; and I must say, speaking for myself, that I should hesitate long before I allowed a defendant in an action on a bill of exchange to set up a case for damages by reason of the breach by the plaintiff of some of the contract or the commission of some tort."*

37. In the present case, being a claim on foot of guarantees a plenary hearing on the estoppel defence alone will be a straightforward matter, and can be disposed of in a relatively short timeframe. The amount of the plaintiff's claim is not in dispute. Some discovery may be necessary in relation to the estoppel, and if no agreement is reached in relation to discovery any necessary motion can be brought rapidly once pleadings are closed. Notice of trial can then be served and a date for hearing obtained.

38. By contrast, if the defendant is to be permitted to add into the present proceedings his entirely separate claim that the plaintiff, by exercising of its statutory powers of enforcement by recklessly disposing of the Chicago Spire loan at a value representing perhaps as little as 10% of what the defendant says was the true value, and in breach of its obligations under the Act of 1999, caused him to have an exposure under the guarantees sued upon that he would not otherwise have had, the plenary hearing directed will assume an altogether different profile. It will become immensely more complex, lengthy and costly both in terns of costs and court time, and its chances of getting on for hearing in early course will disappear. Given the counterclaim's lack of relationship to the claims on foot of the guarantees, it would be unjust to require that the plaintiff should be held up in the determination of the unrelated estoppel issue while embroiled in what inevitably become a long and complex litigation of the counterclaim. In my view, it was correct to confine the present proceedings to the estoppel issue, even if the Chicago Spire issue had been addressed by the defendant in the High Court as a counterclaim and not a point of defence.

39. The defendant is perfectly free to bring his counterclaim by way of separate proceedings. He requires no leave to do so. He argues that he will be met by an argument from the plaintiff that the issue he wishes to litigate is *res judicata* as a result of the conclusions expressed by the trial judge on the motion for judgment herein. That may well be the case. But as I have already stated, that argument would have been open to the plaintiff in any event, even if this Court determined that justice required that the defendant be permitted to proceed by way of a counterclaim in these proceedings. Whether or not the issue is already determined by Fullam J. and is *res judicata*, is not something upon which this Court should express any view. That issue may arise for a determination at first instance, and will have to be addressed then on the basis of the applicable principles. It does not arise on this appeal.

40. I would uphold the decision of Fullam J. confining these proceedings to the issue of estoppel identified by him as constituting a *bona fide* defence to the plaintiff's claim, and dismiss the appeal.