Neutral Citation [2014] IEHC 325

THE HIGH COURT

Record Number: 2012 No. 11888P

Between:

Komady Limited and Michael O'Reilly

Plaintiffs

And

Ulster Bank Ireland Limited

Defendant

Judgment of Mr Justice Michael Peart delivered on the 26th day of June 2014:

1. Before the Court is a question which Mr Justice Cooke ordered should be decided as a preliminary issue in advance of the main action. In his order dated 15th October 2013, he set forth a two-fold question in the following terms:

> *"Upon the basis that the facts alleged by the plaintiffs in the statement of claim and in the reply to the defence as further particularised in replies dated the 22nd April, 3rd May and 6th June, 2013 to requests for particulars, are treated as having been established and correct, the Court directs the determination of the following issues of law:*
>
> *(a) Have the rights of action asserted by the plaintiffs in this proceeding been brought outside the limitation period applicable to them under the Statute of Limitations 1957 (as amended) by virtue of the fact that they were brought with effect from 23rd November 2012?*
>
> *(b) If the answer to the above question is in the affirmative, are the acts and omissions alleged against the defendant capable of constituting concealment by fraud on the part of the defendant of the plaintiff's rights of action in the sense of S. 71 (1) (b) of the Statute?"*

2. At paragraph 22 of his judgment delivered on 8th October 2013 on foot of the defendants motion seeking the trial of a preliminary issue, Cooke J. stated the following in relation to the basis upon which this Court should now determine these questions:

> *"22. The Bank has however, for the purposes of this application, undertaken that it will treat as correct the facts relied upon by the plaintiffs, both in relation to the circumstances surrounding their entry into the swap contracts in July 2006, including, accordingly, the fact that the pleaded inducements, representations and warranties were made or given; that the Code of Conduct for Investment Business had not been complied with and that the swap contracts were not in fact suitable for the plaintiffs or consistent with their financial objectives); and also in relation to the plea of fraudulent concealment for the purposes of paragraph (b) of s.70 (1) including the fact that the Bank did not, at or after the commencement on the 1st November 2007 of the MiFID Regulations reclassify the plaintiffs as retail clients or give any advice or information to the plaintiffs as to the applicability, effect or advantage of those Regulations or as to the duties of the defendant under them. This also, in the view of the Court, necessarily involves accepting that the relationship between the Bank and the plaintiffs at the material times was a fiduciary relationship as pleaded." [emphasis added]*

3. The parties are agreed that the above represents the basis upon which this Court shall determine the issue directed.

4. On 14th July 2006 the parties entered into two contracts referred to as 'Swap Agreements' which are a form of derivative financial instrument by which a borrower can obtain interest rate hedging based on a cumulated notional liability to a Bank. It is unnecessary to dwell upon the precise nature and detail of these Swaps and how exactly they operate, save perhaps to say that in the case of these two Swaps if interest rates rose above 3.9% the plaintiffs would be "in the money" meaning that the Bank would have to make a payment to the plaintiffs, whereas by contrast if interest rates fell below 3.9% the plaintiffs would be "out of the money" and liable to make a payment to the Bank. Since neither party will be able to forecast with certainty whether interest rates will rise or fall above or below 3.9% during any particular quarter, and since the duration of the Swaps was five years, either party could win or lose, so to speak, over the term of the Swaps, and to that extent each party to the Swap takes a chance that by entering into the agreement there will over the term of the agreement be a benefit. Whether one party or the other has gained or lost under the Swaps is not something which can be finally ascertained until the term of the agreement has expired, since rates may unpredictably vary up or down in any particular quarter.

5. A feature of the background to this case is that prior to entering into these Swaps with Ulster Bank, the plaintiffs had existing borrowings with Anglo Irish Bank, and they had entered into what is referred to as an Interest Cap Agreement with Anglo, which is another form of derivative instrument whereby for a single premium of €400,000 paid up front, they were protected against any increase in the interest rate above 5% on those borrowings. That agreement was novated when the plaintiffs became borrowers with Ulster Bank, and the Anglo borrowings were repaid. The Cap Agreement remained for the plaintiffs' ongoing benefit and protection in relation to their new borrowings with Ulster Bank, but they would gain no actual benefit until interest rates actually rose above that rate, apart from the reassurance of knowing that they were protected from any rise in interest rates above 5%. The new Swaps therefore would benefit the plaintiffs in any particular quarter when interest rates rose to levels above 3.9% and up to 5%, in the sense that they would receive a payment from the bank. Conversely, where rates fell below 3.9% the plaintiffs would have to pay a sum to the bank. I am sure there are nuances to these instruments that are not covered by this necessarily simple and brief explanation of the instruments in question, but it suffices I think for present purposes. The precise nature of the instruments is not particularly material to the issue now for determination.

6. The effective date for the commencement of each Swap agreement in these proceedings is agreed to be the 18th July 2006. The plaintiffs claim that the Swaps were mis-sold to them by the defendant bank. However, they did not commence these proceedings until the 23rd November 2012. In such circumstances the defendant submits that they have been commenced outside the period of six years provided for commencement of claims for breach of contract and for claims arising from a tort (excluding in relation to a

claim for personal injuries). The *deus ex machina* by which the plaintiff seek to escape the rigour of the Statute is section 71(1)(b) thereof which provides:

> *"71. – (1) Where, in the case of an action for which a period of limitation is fixed by this Act, either*
>
> *(a) ……… or*
>
> *(b) the right of action is concealed by the fraud of any such person*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."*

7. The plaintiffs say that the fiduciary nature of the relationship affects the date from which the Statute started to run against them. On the other hand, the defendant submits that any fiduciary relationship adds nothing since whether it was or was not a fiduciary relationship does not alter the fact that either way these parties entered into the Swap agreements on the 14th July 2006, and therefore time must have commenced against the plaintiffs from that date. The defendant does not accept that time did not start to run until the date in 2012 when the plaintiffs say they were first advised that the Swaps were not consistent with their financial planning objectives as explained to the bank in July 2006. That is the date when the plaintiffs say they first learned that these Swaps were not suitable, and therefore that they had been mis-sold to them.

8. The plaintiffs seek to avail of section 71(1)(b) of the Statute of Limitations using the same argument in effect. They argue that the misrepresentation to them as to the suitability of the Swaps – or mis-selling thereof – amounts to a 'concealment by fraud' of the fact that they were unsuitable. In other words, they say that the failure by the bank to advise them that these Swaps were unsuitable for their stated objectives, or misrepresenting the suitability of the Swaps, amounts to concealment by fraud thereby depriving them of a fact vital to their ability to know that they had a cause of action against the bank. They say that in such circumstances section 71(1)(b) of the Act can come to their rescue.

9. Precisely what is meant by the words "*concealed by the fraud of any such person*" in section 71(1)(b) of the Act is something which I will come to in due course. It is not to be confused or elided with "fraud" in the conventional or ordinary sense – which itself is provided for in section 71(1)(a) of the Act, and the plaintiffs have made it clear to the defendant that it is not alleging that there was "fraud" in that conventional/ordinary sense, and do not seek to rely on sub-section (1)(a).

10. The bank on the other hand submits that the plaintiffs cannot point to any fact that was revealed to them after July 2006, or which they became aware of which was material to their ability to be aware of the existence of a cause of action as of the 18th July 2006. They say that the plaintiffs are in effect attempting to apply a discoverability test – something which is not permitted except in relation to a personal injury action by virtue of section 3 of the Statute of Limitations (Amendment) Act, 1991, as later amended by section 7 of the Civil Liability and Courts Act, 2004, where a discovery test is included for such actions. It submits that the plaintiffs, as pleaded by them in their Statement of Claim, knew or ought to have known in July 2006 everything they needed to know in order to decide or be advised that they had a cause of action, and that the fact that they waited until 2012 to seek advice in relation to the Swaps they had entered into in 2006 is not sufficient to postpone the operation of the Statute.

11. I should set forth what are the facts pleaded by the plaintiffs, and which are assumed to be established for the purpose of determining this preliminary issue. Those can be gleaned from the pleadings including, to a limited further extent, from replies to particulars. For this purpose I make no distinction between the two separate plaintiffs. In so far as there are some distinctions on the facts, they are not material to the issue, and accordingly I shall simply refer to "the plaintiffs".

12. The Belgard Retail Development ("the development") was an important element in the plaintiffs' wealth. The plaintiffs did not wish to put the development at risk by getting into "high risk, unstable or complex financial products". The plaintiffs wished to ensure this by only entering into conservative financing arrangements and measures which were in their best interests. Specifically, the financial objectives identified by the plaintiffs to the bank were to minimise any future harm that might be caused by rising interest rates. They notified these financial objectives to the Bank, both orally at meetings and by email, in 2005. The plaintiffs relied upon the advice of the bank in relation to the Swap Agreements.

13. Having entered into the new 2006 loan agreements with the defendant bank, the bank advised the plaintiffs to enter into the two Swap Agreements, and represented to the plaintiffs that these Swaps were consistent with their financial objectives. The plaintiffs relied upon these advices.

14. The bank induced, represented and warranted to the plaintiffs in July 2006 that these Swaps were both necessary and appropriate financial instruments for the plaintiffs, and were required to be entered into by the plaintiffs as a condition of the 2006 loan agreements.

15. The Code of Conduct for Investment Business required by section 117 (1) of the Central Bank Act 1989 applies to the Swaps. According to the Code, the plaintiffs ought to have been treated by the bank as "private clients" and not as "professional clients". The bank failed to comply with its obligations to the plaintiffs under the Code, and failed to take all necessary steps to obtain details from the plaintiffs of their financial objectives, investment experience, and other facts which the bank knew it needed to know or should have sought. The bank failed to adhere to its Code obligations in that:

> (i) it failed to act honestly and fairly in the best interests of the plaintiffs.
>
> (ii) it failed to act with due skill, care and diligence in the best interests of its clients;
>
> (iii) it failed to seek from the plaintiffs information regarding their financial situations, investment experience and objectives;
>
> (iv) it failed to make adequate disclosure of material information;
>
> (v) it failed to comply with all applicable regulatory requirements so as to promote the plaintiffs' best interests.

16. The Code was not adhered to in relation to the Swaps or in the advice given by the bank, particularly given the existence of the Cap Agreement already referred to, and which provided a sufficient hedging/protection against interest rates rising above 5%.

17. The Code, while not actionable per se, nevertheless informs the standard of behaviour expected of the bank in relation to the plaintiffs.

18. The Swaps entered into in July 2006 were not consistent with the plaintiffs' financial objectives, were not properly explained to the plaintiffs by the bank, including the adverse effects of the Swaps. Neither was it explained by the bank to the plaintiffs the calamitous effect of breaking out of these Swaps or indeed that break benefits would accrue in certain circumstances.

19. Having knowledge of the plaintiffs' financial objectives, the bank failed to advise the plaintiffs consistently with the same, and therefore a cause of action arises for the plaintiffs based upon breach of duty, breach of contract and negligent mis-statement.

20. The plaintiffs thought that the Swaps were nothing more than fixed rates, and that they were effectively a component of the loans.

21. It was only in late 2011 – early 2012 when the relationship between the bank and the plaintiffs had deteriorated, and after the plaintiffs had initiated a full review of the Belgard loan agreements and the Swaps, and had received the result of that review in the summer of 2012 that they then examined the losses which they had suffered on foot of the Swaps and, inter alia, discovered that the losses were very significant, and that they could have ameliorated those losses by paying down the liabilities.

22. The true nature of the Swaps only became apparent to the plaintiffs when they retained legal and financial advisers, as well as the extent of the funds needed to finance the Swaps.

23. There was a fiduciary relationship between the bank and the plaintiffs.

24. Within the pleadings, generally speaking, the particulars of this fiduciary relationship and the alleged breaches of same, are the same as, or very similar to, those already set forth except that it is specifically stated that the bank failed to disclose the nature and extent of the commission earned by the bank on the sale to the plaintiffs of these Swaps – namely a commission in the order of €100,000. This is said to be a material non-disclosure and a concealment of a material fact for the purpose of section 71(1)(b) of the Act. Equally, the particulars of misrepresentation, negligence, negligent misstatement, breach of duty in respect of the mis-selling of these Swaps are set forth in similar manner.

25. The above seem to me to emerge as the assumed facts upon which the first issue must be determined – in other words whether these proceedings were commenced outside the period of six years from the date on which the right of action first accrued.

26. The second limb of the issue for determination is whether, if the answer to the first limb is answered in the affirmative, the plaintiffs' proceedings are saved by section 71(1)(b) of the Act. It seems to me that the facts to be assumed for that purpose, as appearing from the pleadings and replies to particulars, and assuming also the existence of a fiduciary relationship, are the following.

27. The fiduciary relationship between the plaintiffs and the bank is a continuing one. The Bank knew at all times that the plaintiffs had no separate advice in relation to the Swaps. The bank knew that it had never explained the true nature and vital elements of the Swaps to the plaintiffs. By non-disclosure of vital elements of the Swaps and by false misrepresentations of fact intended to induce the plaintiffs to enter into the Swaps, facts were concealed from the plaintiff that would have enabled them to know that they had a right of action against the bank. The vital elements not explained or disclosed either at the date the Swaps were entered into in July 2006 or at any time during the 5 year life of the Swaps, are the nature of the transactions, the manner in which they operated, their effect and risk level, the break costs associated with the transactions, the effects of the break-costs and any positive effects from breaking the transactions. In addition, the absence of any advice as to any alternative type of instrument that might have been suitable to the plaintiffs' circumstances and objectives, as well as the representation that the Swaps were suitable for and/or consistent with the plaintiffs' financial objectives are said to be facts supporting the 'concealment by fraud' for the purpose of section 71(1)(b) of the Act.

28. A further fact to be assumed is the breach by the bank of its obligations under the Market in Financial Instruments Directive ("MiFID"). One of those obligations after 1st November 2007 required the bank to reclassify the plaintiffs, and to communicate with them in that regard. The plaintiffs assert that the bank should have reclassified them from that date as either professional or retail customers, failed to do so, and if it had done so this MiFID would have come to the notice of the plaintiffs, and they would have become aware of the bank's obligations under it. The plaintiffs say that this failure to reclassify them and notify them in this regard amounts to a concealment of the existence of the MiFID, and therefore the application, effect and advantages to the plaintiffs under it. They say that had they been informed about the MiFID, and had the bank complied with its obligations under it, they would have been put in a position to know that the Swaps were not suitable for their stated purposes and financial objectives.

29. The above comprises a sufficient summary of the assumed facts against which the parties' legal submissions must be considered.

30. Paul Gallagher SC has appeared for the defendant and moving party on the preliminary issue. He accepts that for the purpose of this preliminary issue the defendant must accept the facts as pleaded and particularised by the plaintiffs are established, including that there was at all times a fiduciary relationship between the parties, though he submits that the latter does not alter or add anything to the situation from the plaintiffs' point of view.

31. Mr Gallagher considers that this case is similar to that which existed in *Gallagher v. ACC Bank plc* [2012] 2 I.R. 620. That was a case where the plaintiff invested €500,000 in an investment bond provided by the defendant bank, where the return of the principal sum invested was guaranteed, as well as 80% of any net increase in the value of certain specified shares which the bond would passively track. However, the plaintiff had also borrowed from the defendant bank the amount to be invested, and therefore the bond would have needed to grow sufficiently to offset also the interest payable on that loan over the 5 year 11 month term of the bond – something which was never likely to occur. The plaintiff sued after it became evident at the end of that term that the performance of the shares being tracked was insufficient to offset the loan interest payments made by the plaintiff. The plaintiff's claim as set forth in his Statement of Claim was basically that the bank had mis-sold to the plaintiff a product that was unsuitable to him given that he was borrowing the amount to be invested.

32. The defendant sought a preliminary determination as to whether the plaintiff's claim in tort was statute-barred. The Supreme Court determined that it was statute-barred, as time started to run against the plaintiff on the date on which the investment was made, and not at the end of the term of the investment, by which time the plaintiff had become aware of the extent of his losses. In arriving at such a conclusion, Fennelly J. posited three possible approaches to the date of accrual of the plaintiff's cause of action. He stated at para. 117 et seq.:

"[117] There are three possible approaches to the accrual of the cause of action: firstly, it could accrue when the plaintiff entered into the transaction by borrowing the money and purchasing the bond; secondly, it might accrue at some intermediate date when the plaintiff could prove that he was at a loss in terms of a calculation of his liability for interest against movements in the value of the shares; thirdly, it could accrue at the end of the period of the investment.

[118] It is to my mind inescapable that the plaintiff's claim as pleaded is that he suffered damage by the very fact of entering the transaction and purchasing the bond. The cause of action then accrued. That was also the date when he entered into the contractual relationship with the defendant.

[119] In logic, if the plaintiff's loss was too uncertain at the start of the period, the same would be true to a greater or lesser extent at every point during the currency of the bond. No loss could be established during the term, since the plaintiff could not withdraw from the bond. If the plaintiff could not sue at the beginning, because of the need to await the development of the value of the bond, equally it is unlikely that he could sue on any intermediate date. The plaintiff stated in his written submissions that there was no evidence whatever of any damage being suffered by him prior to the maturity of the investment.

[120] The only possible alternative date of accrual would be at the end of the period of five year eleven months when it could be seen whether the plaintiff suffered loss by measuring any gains in the shares against the interest paid on the loan. That alternative view would apply no matter what the length of the bond, which would mean that, in the case of a bond for ten, fifteen or even thirty years, the defendant could say that no damage has been caused ……… . On the pleaded facts of the present case, as set out in para. 10 of this judgment, the damage accrued on the entry into the bond, when the plaintiff was sold a bond which was 'wholly unsuitable' for him".

[121] This case, therefore, is, on its own particular pleaded facts, a clear one. The cause of action accrued when the plaintiff purchased the bond. Since that was more than six years before he commenced the proceedings, his claim is statute barred. ……… ".

33. I have set forth already what I take to be the assumed facts as pleaded and particularised by the plaintiffs. Put more briefly, the plaintiffs claim that in July 2006 they were negligently advised and induced to enter into financial instruments which were unsuitable for the conservative financial objectives which the plaintiffs had indicated to the bank. Everything pleaded and particularised in that regard relates to July 2006. In other words, the plaintiffs are saying that what was done by the bank was done in July 2006. That was the date they say that these products were mis-sold to them.

34. Michael Howard SC for the plaintiff has attempted to counter the argument that time must be considered to have run against the plaintiffs from July 2006 by saying that where a tort is alleged to have been committed there must be not only a wrongful act but damage/loss resulting from it, and until there is actual loss which has occurred the tort is not completed, and the action has therefore not accrued. In the present case he submits that it was not until such time in 2012 that the plaintiffs sought and were given advice from legal and financial experts that their damage became manifest or apparent, and that time ran only from that time. The difficulty with that argument for the plaintiffs is that it is in effect contending for a discoverability test, and that is something which has not been provided for by the Oireachtas in any amendment to the Act of 1957, except in relation to personal injury actions. In my view, as was the case in *Gallagher v. ACC*, the plaintiffs suffered their loss when in July 2006 they entered into the Swaps which were negligently mis-sold to them according to the assumed facts in that regard. As Fennelly J. stated: "*It is to my mind inescapable that the plaintiff's claim as pleaded is that that he suffered damage by the very fact of entering the transaction and purchasing the bond. The cause of action then accrued*."

35. However, another attempt to escape the rigours of section 11(2)(a) of the Act of 1957 has been by way of reliance upon the existence of a fiduciary relationship. By virtue of the existence of that relationship, the plaintiffs submit that their claim may be seen as one more akin to a fraudulent breach of trust, and as such a claim for which no period of limitation is provided in the Act of 1957. Mr Howard has referred to the provisions of section 44(a) of that Act which provides:

"44.- No period of limitation fixed by this Act shall apply to an action against a trustee or any person claiming through him where –

(a) the claim is founded on any fraud or fraudulent breach of trust to which the trustee was privy …".

Mr Howard has referred also to Canny: Limitation of Actions where at para 13-20 the author states:

"The Statute of Limitations 1957 contains no reference to actions for breach of fiduciary duty. A breach of fiduciary duty is a cause of action in equity rather than an equitable relief, but as the reliefs sought in action for breach of fiduciary duty will be equitable reliefs, s. 11(9) of the Act of 1957 will still apply. This has the result that no limitation period will apply to an action for breach of fiduciary duty unless the courts would have applied a limitation period by analogy prior to the passing of the 1957 Act."

36. In my view, the facts of the present case, as assumed, are just the sort of facts where a court would and should apply the limitation period by analogy, as it would have prior to the 1957 Act. In *Knox v. Gye* [1872] 5 App. Cas. 656, which was a case concerning the taking of an account, and which is referred to by Canny in his work [supra] Lord Westbury stated:

"The general principle is that where a Court of Equity assumes a concurrent jurisdiction with Courts of Law no account will be given after the legal limit of six years, if the statute is pleaded. If it could be doubted whether the executor of a deceased partner can, at Common Law, have an action of account against the surviving partner, the result will still be the same, because a Court of Equity, in affording such a remedy and giving such an account would act by analogy to the Statute of Limitations. For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase that a Court of Equity acts by analogy to the Statute of Limitations, the meaning being that where the suit in Equity corresponds with an action at Law which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule or procedure. But if any proceeding in equity be included within the words of the statute, there a Court of Equity, like a Court of Law, acts in obedience to the statute."

37. There is nothing in the facts of the present case to take it outside what is stated by Lord Westbury. The facts giving rise to the

equitable claim by virtue of any fiduciary relationship are co-terminus with the facts giving rise to the claim in tort, even if fiduciary obligations are of an ongoing nature during the relationship. That relationship does not alter the fact that the plaintiffs are able to plead, as they have done, that in July 2006 they were negligently and in breach of duty (presumably including a breach of fiduciary duty) induced by the bank to enter into the Swaps.

38. Neither do I accept that the claim comes within section 44. For the plaintiffs to assert that the claims are in the nature of a claim for fraudulent breach of trust, they would have to be able to rely also upon the provisions of section 71(1)(a) of the Act of 1957 where fraud is claimed as opposed to fraudulent concealment under (b) thereof, and the plaintiffs have stated unequivocally that they are not relying on fraud *per se*.

39. In my view, the plaintiffs have not commenced these proceedings within six years from the date on which their cause of action accrued, which was the 18th July 2006. They are therefore, even on the facts as pleaded by them, outside the period prescribed by section 11 of the Act of 1957 for such actions in tort. Even if one was to say that the date of accrual was the date on which the plaintiffs were first 'out of the money' and had to make a payment to the bank under the Swaps rather than 'in the money' and in receipt of a payment from the bank, that date was October 2006, and the plaintiffs did not commence their proceedings until 23rd November 2012. But I hold in any event that the date of accrual was the date on which they entered into these Swaps. That is the date on which they were mis-sold the Swaps and the date therefore on which they suffered damage.

40. It remains to consider the question as to fraudulent concealment, and whether section 71(1)(b) of the Act can serve as a *deus ex machina* to rescue the plaintiffs from the fatal effects of the six year limitation period.

41. I have set out the provisions of section 71(1)(b) earlier, but for convenience will do so again:

> *"71. – (1) Where, in the case of an action for which a period of limitation is fixed by this Act, either*
>
> *(a) ……… or*
>
> *(b) the right of action is concealed by the fraud of any such person*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it." (emphasis added)*

42. The plaintiffs pleaded in their Reply that the defendant concealed information from them that would have enabled them to know that they had a cause of action against the bank, or at least would have put them on inquiry. They say that the bank knew that the plaintiffs had no separate legal advice and that it, being in a fiduciary relationship, concealed the true nature of the Swaps. They say that there was further concealment for the purpose of section 71(1)(b) because the bank did not comply with the MiFID as they failed to reclassify the plaintiffs as retail clients and comply with that Directive after it came into force on the 1st November 2007.

43. The bank sought further particulars of the claims being made in respect of concealment, and say that they had difficulty getting replies to those requests. Replies were furnished on a number of occasions in response to requests for further and better particulars in respect of the basis upon which section 71(1) was being relied. In replies dated the 22nd April 2013 the plaintiffs stated that "*fraud and concealment*" arose from "*the non-disclosure of vital elements of the nature of the Derivative Agreements and from representations of fact intended to induce the plaintiff[s] to enter into the transactions which were false and which did induce the plaintiffs to enter into transactions to their detriment and loss*". In addition, non-compliance with the MiFID is relied upon regarding the failure to re-classify the plaintiffs after 1st November 2007, as well as non-compliance with the Code of Conduct. They say also that "*the true nature*" of the transactions was concealed from them prior to entering into the agreements, and that it was not until the 2012 review of the transactions by experts that the true nature thereof became apparent..

44. Those replies begot a further request for better particulars so that the defendant might ascertain precisely what case it had to meet in relation to section 71(1) of the Act. The bank asked what right of action was alleged to have been concealed by the defendant and what were the circumstances alleged to have given rise to concealment, and asked that they be given full and detailed particulars of any such "false representation" being relied upon, as well as details of which "vital elements of the transactions" were concealed. Those requests are made by reference to several sub-paragraphs. In addition, further particulars were sought in relation to the circumstances in which the 2012 review of the transactions was undertaken by the plaintiffs.

45. In further replies the plaintiffs clarified that it is pleaded that "*all of the causes of action pursued through the Statement of Claim were concealed by the defendant*". They stated also that they had already fully particularised the alleged false representations relied upon in relation to the vital elements of the transactions, but stated that it related to the nature of the transactions, the manner in which they operated, their effect and risk level, the break costs associated with the transactions, the effect of the break costs and any positive effects from breaking the transactions. In relation to the circumstances in which the 2012 review was undertaken, the plaintiffs stated that they did not understand how this could have any bearing on the plea of fraudulent concealment, but that the circumstances in which the review had taken place had already been sufficiently particularised in earlier Replies, and in an affidavit previously filed.

46. Yet further Replies to Particulars were furnished on the 6th June 2013,intended to expand further upon relies already given. It is a lengthy document. No new basis for reliance upon fraudulent concealment emerges from these Replies, but it expands upon the matters already stated as forming the basis for that claim, such as non-compliance with the Code of Conduct when these transactions were entered into, the MiFID from 1st November 2007, and the assertions by the bank that these instruments were consistent with the plaintiffs' financial objectives. The plaintiffs go on to state therein that "*the concealment and non-disclosure has its roots in the actions of the defendant at the time of the entry into of the Swaps in July 2006*", and they say that were it not for that concealment of the defendant's obligations under the Code, the plaintiffs "*would have understood and realised that the Cap entered into in October 2004, and which was novated to the defendant, would have provided sufficient cover and protection against interest rate fluctuations*". As I have said, it is a very lengthy document intended, no doubt, to stave off any further request for better particulars, but I will not attempt any further summary thereof.

47. Mr Gallagher for the bank submits that even on the assumed facts gleaned from the Statement of Claim and Replies to Notices for Particulars there is no fact relied upon as concealing a cause of action from the plaintiffs which was not known to them or which ought to have been known by them after 18th July 2006. He points to the fact that on their own case the allegation is that the bank in July 2006 failed to apprise the plaintiffs of the true nature of these Swaps. But he goes on to submit that this cannot amount to concealment for the purpose of section 71(1)(b) of the Act because if it could, then any plaintiff who brings a claim on the basis of a failure to advise would in effect face no limitation period under the Statute, and that it would amount to a so-called discovery test –

in other words that the statute would not begin to run until the plaintiff later discovered that he/she had not been properly advised. He submits that this could not be correct. He points to the fact that on the plaintiffs' own case, because this is what they have pleaded, they knew everything they needed to know in July 2006, and that if in July 2006 or at any time within 6 years of that date they had sought legal advice, appropriate advice could have been given, just as it was in August 2012 when eventually the plaintiffs decided to undertake a review of the agreements. He submits that in July 2006 they knew everything they needed to know in order to know or be advised that they had a cause of action against the bank in respect of a failure to properly advise them as to the true nature and effect of the Swaps, and that they could at any time after July 2006 have been advised at that time that these Swaps did not match their financial objectives as stated in July 2006 to the Bank.

48. Mr Gallagher submits that the coming into effect of the MiFID in November 2007 is not something that suddenly stopped the clock running on any claim the plaintiffs might bring, or indeed rewound it so that the six years re-commenced from that date. In so far as the bank might be in breach of any obligation to the plaintiffs arising under the MiFID it is submitted that it does not alter the fact that after July 2006 the plaintiffs knew or could have known that they had a cause of action. He submits that any failure of obligation under MiFID might assist the plaintiffs in any action which they commenced after July 2006 but that it does not assist them in relation to section 71(1)(b) of the Act.

49. He submits further that the claim of concealment being put forward is not that a cause of action as such was concealed, but rather that the bank failed to disclose information or properly explain the nature of the Swaps before they entered into them in July 2006, and that this caused the plaintiffs to enter into the Swaps, and that this in turn caused damage and loss. It is submitted therefore that this failure to disclose information and explain the Swaps cannot be characterised as a concealment of a cause of action.

50. Mr Gallagher has referred to the plaintiffs' replies to a question asked in Notice for Particulars dated 22nd April 2013 at paragraph 1(v) thereof. They had been asked to specify what aspect or feature of the nature of the transactions was discovered for the first time during the review process undertaken in August 2012 that was not disclosed to them by the bank in July 2006, or even during the life of the Swaps themselves. In answer they stated:

> *"It is asserted and pleaded that prior to the time of the instigation of a Financial Review in April 2012 together with receiving proper legal advice that the true nature of the lack of utility of the Swaps in question were not known to the plaintiffs. The advice received from Mr Downes on the basis of a Financial Analysis undertaken a few months previously in around April 2012 when this concluded in September and October this provided the backdrop for the plaintiffs to finally realise the true extent of the concealment by the defendant of its duties and responsibilities under the Code and MiFID and also the non-disclosure of the plaintiff's rights and entitlements under the Code and under MiFID. This extraordinary concealment and non-disclosure was only brought to the attention of the plaintiffs when they retained Mr Downes in September/October 2012 after having knowledge of a series of mis-selling cases against the defendant in this jurisdiction in July 2012 from media reports.*
>
> *…*
>
> *What was discovered at the time of the Review in question was:*
>
> *1. The misrepresentation that the plaintiffs were execution only clients as included in the letter of 25 April 2006. It was only at this time when the plaintiff is understood that full rights and entitlements under the Code and MiFID that the incorrectness and inappropriateness of this classification became clear to the plaintiffs.*
>
> *2. The other aspects which became clear were the consistent concealment by the defendant of their duties and responsibilities under the Code and MiFID and also the defendant's consistent non-disclosure of the plaintiffs' rights and obligations under the Code and MiFID right up to the time that this was discovered by the plaintiffs."*

51. I should add that another concealment relied upon is that the bank never disclosed to the plaintiffs before they entered into the Swaps that the bank would earn a substantial commission in the order of €100,000 from these Swaps.

52. Mr Gallagher submits that there can be no doubt that the advice sought in April-August 2012 could as easily have been sought and obtained at any time after July 2006, and that every fact that the plaintiffs needed to know as to a cause of action against the bank for mis-selling of the Swaps was available to them from that time, and that there has been no new fact that came to light later, and which was withheld or concealed by the bank, either knowingly or otherwise, that gave rise to any cause of action that did not exist from July 2006. In so far as the MiFID is relied upon in this regard, the defendant says that it is not pleaded in the Statement of Claim or elsewhere that any loss arose by reason of any failure to re-classify the plaintiffs as retail customers.

53. Michael Howard SC for the plaintiffs submits that the facts asserted against the bank in the Statement of Claim and the further particulars bring the plaintiffs within the provisions of section 71(1)(b) of the Act.

54. It is agreed by all sides that the ordinary concept of criminal fraud is not a necessary ingredient for the purpose of section 71(1)(b) of the Act, as otherwise section 71(1)(a) would be superfluous. The correct meaning for the purpose of sub-section (1)(b) has been expressed in different ways on different occasions both here and in the United Kingdom, but it certainly means, in the light of the authorities opened that where the facts necessary to found a cause of action have been concealed from a plaintiff by the defendant so that it would be unfair for that plaintiff to be held to have had knowledge of them, or to be expected to have made inquiry in that regard, and where it would be unconscionable for the defendant to be permitted to rely upon the plaintiff's delay in discovering those necessary facts, time will not be considered to have commenced for the purpose of the Statute until the facts became known. It is clear also that no moral turpitude is required on the part of the defendant. But, as Lord Denning stated in *Kitchen v. Royal Air Force Association* [1958] 1 WLR 563 it is "*clear that the phrase covers conduct which, having regard to some special relationship between the parties concerned, is an unconscionable thing for the one to do towards the other*". Mr Howard points to the assumed fact in the present case that there was a fiduciary relationship between the parties, and that the bank accordingly has a special responsibility to ensure, before these Swaps were entered into, that the plaintiffs, who had no separate advice available to them at the time, fully understood the nature of the intended Swaps, and were advised accordingly that they may not be suitable for the financial objectives. As set forth already, the allegation is that this advice was withheld from them and therefore that there was concealment of such advice.

55. Much reliance is placed by the plaintiffs on the existence of the fiduciary relationship between the parties at the time these Swaps were entered into. I can agree that such a relationship could impose a greater obligation of disclosure upon the bank. But in my view, even given that relationship for the purpose of this preliminary issue, the fact remains that everything that the plaintiffs

needed to know in order to get any advice on these Swaps was known to them by the 18th July 2006. They had the Swap agreements they entered into. They knew what their conservative financial objectives were and that they had explained them to the bank. They knew also that the bank had not explained these Swaps to them. They knew that they thought that they were some sort of fixed rate interest agreement. By October 2006, if not sooner, they certainly knew that it was possible that they would have to pay money to the bank in circumstances where they were 'out of the money'. In my view if they had gone to a solicitor at any time after July 2006, and sought advice as to whether these Swaps met their conservative financial objectives, they would have been in a position to provide all the necessary information in order to get such advice, and to decide if the Swaps had been mis-sold. Instead, they did nothing until they ran into financial difficulties in 2012 whereupon a financial review was undertaken and they received advice to the effect that these Swaps had not been suitable for the purposes in July 2006. The fiduciary relationship does not add anything to those facts. The coming into force of the MiFID in November 2007 adds nothing of relevance to those facts. It did not suddenly reveal to the plaintiffs some vital fact that was not available to them from July 2006 and which was essential to their knowledge that they had a cause of action.

56. The plaintiffs in my view are confusing the emergence of further facts during the course of an action, with facts sufficient for the accrual of a cause of action. They had ample facts at their disposal in order to commence an action for negligence/negligence mis-representation in relation to these Swaps. A process of discovery might in due course have strengthened their hand in terms of their ultimate success at trial – or indeed might have weakened their case. But it is not necessary that every fact be known in order to commence proceedings. Sufficient facts are necessary in order to know that a cause of action has accrued. In the present case more than sufficient was known in the immediate aftermath of July 2006, or at any time before the Swaps came to an end some five and a half years later. The plaintiffs did not have to wait until April – August 2012 before seeking and receiving advice in relation to their suitability. As I have said already, section 71(1)(b) of the Act must not be equated with some sort of discovery test. That is not the intention of the section. No such provision as has been made in relation to discoverability in the context of personal injuries, has been made in respect of other types of tort.

57. The weakness of the plaintiffs' arguments in this regard is in my view demonstrated by reference to the difference in facts between *Gallagher v. ACC Bank* already referred to, and those in *Behan v. Bank of Ireland* [1998] 2 ILRM 507, the latter being a case relied upon by the plaintiffs. I have already set forth the facts and conclusions in the former case. In Behan, the facts are quite involved, but it suffices to say that a sum of £18,455 (being a refund due to the plaintiff under a farm rescue package) which had been received by the bank, was, unknown to the plaintiff, credited to his bank account so that the bank could claim it as a credit against its own corporation tax liability. This was considered by the Court to be an acknowledgement by the bank of the plaintiff's entitlement to it, and accordingly that it would be inequitable for the bank to be entitled to rely upon the plaintiff's delay in order to disbar him from claiming the sum, in circumstances where the plaintiff was not made aware by the bank that the sum had been credited to his account. Clearly the fact that the plaintiff was not told by the bank that the sum had been lodged to his account, and that the plaintiff only discovered the fact during the course of an action he brought against the bank for negligence in relation to other advices the bank had given, was something which was concealed from the plaintiff within the meaning of section 71(1)(b) of the Act, until it was discovered by him during the course of the trial process. That is a very different situation from where one receives certain financial advice in 2006 and it is not until you seek legal advice over six years later that you are told that the advice was bad advice, and decide to commence proceedings. If the advice was bad advice in August 2012, it was bad in July 2006. That fact is not dependent upon any new fact later discovered and that was concealed by the defendant. That is wholly different from the fact discovered in Behan. Again, I add that the existence of a fiduciary relationship does not in my view add anything in the plaintiffs' favour. In so far as there is a claim based on breach of any fiduciary duty, that claim relies upon the same facts as for the other claims, and no special rule of limitation applies. It is still six years. In so far as some reliance is placed upon the fact that the bank received an undisclosed commission when these Swaps were entered into, it does not in my view serve to delay the accrual of a cause of action on the part of the plaintiffs. Even if they had been told about this in July 2006 it would not have added anything to the facts necessary to found a cause of action at that time, no matter how the plaintiffs might have reacted to the news, and no matter how they might have deployed that fact whenever the action might have come to trial.

58. Having concluded already that the action was commenced by the plaintiff outside the six years from date of accrual provided by section 11 of the Act of 1957 for such actions in tort, I now conclude that acts and omissions alleged against the defendant are not capable of constituting concealment by fraud on the part of the defendant of the plaintiffs' right of action in the sense of section 71(1)(b) of the Act.

59. I accept that a Court should be slow to determine as a preliminary issue that a claim is statute barred where essential facts are in dispute and should await a trial for their resolution. But in the present case the facts being relied upon are those asserted by the plaintiffs and which are assumed to be correct and established for the purpose of the issue. In that way, there is no prejudice to the plaintiffs, and there is a desirable saving both in terms of costs to the parties, and in terms of court time and resources by having this determinitive issue decided now.

60. There will accordingly be an order dismissing the plaintiffs' proceedings.