THE HIGH COURT

THE COMMERCIAL COURT

Record No. 2014 06901P

BETWEEN

GERALDINE CANTRELL

PLAINTIFF

AND

ALLIED IRISH BANKS PLC, THE SECOND BELFRY PROPERTIES (U.K.) PLC, TULLAMONA LIMITED, THE FOURTH BELFRY PROPERTIES (U.K.) PLC, LEYALLY LIMITED, THE FIFTH BELFRY PROPERTIES (U.K.) PLC, MONSAL LIMITED, B.D.O. (A FIRM), SEAN HENNEBERRY, TONY KILDUFF, WILLIAM LEDWIDGE, JOHN ROCKET, JOHN ROGER WILKINSON, ANN BLACKMORE AND ESSEX TRUST LIMITED

DEFENDANTS

AND

BERNADETTE GOODWIN v. AIB AND OTHERS,

Record No. 2014/6898 P

LAURENCE McMULLEN v. AIB AND OTHERS,

Record No. 2014/6899 P

EDWARD SHEEHAN AND EVELYN SHEEHAN v. AIB PLC AND OTHERS

Record No. 2014/7166 P

PETER TIERNEY v. AIB AND OTHERS,

Record No. 2014/6812 P

BRIAN O'REILLY v. AIB PLC AND OTHERS,

Record No. 2015/04218 P

JUDGMENT of Mr. Justice Robert Haughton delivered on 28th day of January, 2019

1. This ruling relates to residual aspects of defence motions seeking further and better particulars of the Recast Statement of Claims delivered on behalf of the plaintiffs. In the lead case of Ms. Geraldine Cantrell, the Recast Statement of Claim was delivered on 23rd May, 2018. The motions were initially made returnable before this court on 30th July, 2018. In a ruling that I delivered *ex tempore* on 23rd October, 2018 I addressed most of the complaints made on behalf of the various defendants, some of which related to the linked test cases listed in the title hereof, and gave guidance as to the further particulars that the plaintiffs should provide.

2. Following that ruling further notices for particulars were raised by the defendants, and replies furnished by the plaintiffs on 28 November, 2018. This led to further correspondence between the parties' respective solicitors which resulted in a brief hearing before this court on 21st December, 2018 at which I indicated that there should be further engagement in respect of matters still in dispute. Further correspondence between the relevant parties solicitors ensued, and when the matters were next listed before me on 19th January, 2019, the following letters had been exchanged, largely (but not exclusively) in the context of the lead case of Ms. Cantrell:

1. Letter dated 11th January, 2019 from Tom Casey, solicitor for the plaintiffs to Gore & Grimes (solicitors for John Rockett, John Roger Wilkinson and Sean Henneberry), OSM Partners (solicitors for AIB, plc) and Maples Solicitors (solicitors for William Ledwidge).

2. Reply of Gore & Grimes dated 17th January, 2019.

3. Reply of OSM Partners dated 18th January, 2019.

4. Reply of Maples dated 18th January, 2019.

5. Letter dated 18th January, 2019 from Tom Casey.

3. Mr. Casey's response of 11th January, 2019 provides some further particulars, but the defendants' replies raise residual issues. It was agreed by Counsel for the plaintiffs and the relevant defendants that the court should consider this correspondence and give its rulings in relation to the residual issues canvassed therein.

4. In making this ruling I have had regard to relevant notices of motion, the written and oral submissions presented by the parties at or before the hearing before me on 23rd October, 2018, my ruling on that date, three Notices for (Further and Better) Particulars delivered by defendants following that ruling, the three Replies thereto by Mr. Casey on behalf of the plaintiffs, all dated 28th November, 2018, all correspondence since that date, and observations made by the parties and by this court at the brief hearing before me on 21st December, 2018. I also bear in mind the importance and relevance of pleadings/particulars to the discovery process, which is ongoing. Although the following rulings in relation to matters remaining at issue between the parties relate to the complaints raised primarily in the lead case of Ms. Cantrell, they apply equally to similar points raised in respect of the other test cases named in the title hereof.

5. In his letter of 11th January, 2019 Mr. Casey provided further particulars/responses under the following headings:

1) ategory 1 misrepresentations

2) Category 2 misrepresentations

3) Particulars furnished in relation to loan to value covenants

4) Fraudulent Concealment

5) Laurence McMullin proceedings.

6) OSM Partner' letter – LTV Covenant claims

7) Section 71(1) of the Statute of Limitations, 1957

8) Mr. Peter Tierney

6. In the reply letters Gore & Grimes took issue with Mr. Casey's response under headings 1) to 5), and OSM Partners under 6). Maples express concerns in respect of 1) and similar matters to those raised by OSM Partners in respect of 6). No further issue was taken by the defendants solicitors in respect of the response under headings 7) and 8). I now turn to deal with the residual issues under headings 1)-6).

Category 1 misrepresentations

7. The Categories refer to categories adopted in the judgment which I delivered in respect of the Statute of Limitations issues on 28th April, 2017 – see para. 19 of that judgment. Category 1 relates to misrepresentations "…arising from alleged shortcomings in the Prospectuses and advice given in relation to the level of financial risk in the investments and the suitability of the investments for particular investors." In my *ex tempore* ruling on 23rd October, 2018 I observed (p. 114 of the Transcript) that – "so far as paragraph 40 in the Cantrell case and similar paragraphs in the other cases do not differentiate between representations based on the prospectus or omissions from the prospectus and representations in [*sic*] coming through agents or staff of AIB that [*sic*]the plaintiff must differentiate between those two sources of representations."

8. This was dealt with in the first instance in the Replies to Particulars furnished on behalf of Ms. Cantrell on 28th November, 2018.

In the Reply addressed to AIB the following appears:

> "9. Please furnish full and detailed particulars of the alleged source of the misrepresentations pleaded in the Plaintiff's most recent Statement of Claim, differentiating between those misrepresentations allegedly made by employees of the First Named Defendant and those misrepresentations allegedly comprised in the Prospectuses.
>
> *[Reply]*
>
> *The Court directed that the Plaintiff differentiate between the different sources (if any) of the representations pleaded at paragraph 40 of the Statement of Claim; this is presumably the issue this particular request is intended to address.*
>
> *It is alleged that the First Named Defendant made the representations pleaded at 27, 28, 30, 31, 32, 33, 34, 35, 40(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k),(l), (m) and (n).*
>
> *In respect of the Director Defendants those at 28, 32, 33, 34, and 40."*

In order to explain this, it is necessary to refer to the relevant paragraphs in the Recast Statement of Claim. Paragraph 27 pleads oral representations by named persons "acting on the Bank's behalf". The Director Defendants are not mentioned.

Para.28 pleads that –

> "At all material times the Plaintiff relied upon the said representations and/or advice and/or recommendations of the Bank (and where relevant the Director Defendants). As a result of the omissions of the Bank (and where relevant the Director Defendants) the Plaintiff was not aware that LTV clauses would be included in the loans to the Belfry funds."

Paragraphs 29 and 30 plead the issue of the Prospectuses generally, and these pleas do not appear to be relied on against the Director Defendants. Para 31 pleads "discussions" with named "Bank's sale agents", and is not pleaded against the Director Defendants.

Para.s 32, 33 and 34 plead omissions in the Prospectuses, and are pleaded against the Director Defendants.

Para 40 headed "Category 1 Representations (in respect of Belfry 2)", pleads –

> "The Bank and the Director Defendants, their servants or agents represented expressly (or alternatively impliedly) to the Plaintiff as follows:-
>
> …..
>
> - and sets out representations a.-n.

On the face of para. 40 all these pleas apply to the Director Defendants, and this is confirmed in Reply 9, of 28th November, 2018, recited above, albeit that this is addressed to AIB.

9. In the Replies delivered to Gore & Grimes on 28th November, 2018 the Plaintiff dealt with Category 1 Representations at item 2, which requested –

> "2. With regard to each and every representation which the Plaintiff has pleaded in paragraphs 27, 28, 31, 32, 33, 34, 35, 40, 43, 44 and 51 of the Third Recast Statement of Claim, kindly furnish the following particulars:
>
> (a) Whether or not it is alleged that the Director Defendants made the alleged representations.
>
> *[Reply]*
>
> *It has not been claimed that the Director Defendants made the representations pleaded in paragraphs 27, 31 and 35 of the Third Recast Statement of Claim. No representations are pleaded in paragraph 43, 44 and 51.*

In respect of the other representations it is alleged that the Director Defendants made the representations complained of through the prospectuses and in the correspondence identified at 2(c) below."

The reply at 2(b) confirmed that it was not alleged that the Director Defendants were responsible for the alleged representations which they did not make.

Item 2(c) requested more particulars of the representations which it was alleged the Director Defendants made, or for which they were responsible, and the reply given was:

> *"In respect of particulars 2(c)(i) and (ii) and (v), the representations and representations by omission made by each of the Director Defendants were made in the prospectus relevant to each investment provided to the Plaintiff in advance of her making her investment, and/or in the correspondence that followed in respect of each investment, identified below. The Belfry 2 Prospectus issued on 9 May 2002, the Belfry 4 Prospectus issued on 15 June 2004 and the Belfry 5 Prospectus issued on 10 May 2005. The Ninth, Tenth, Eleventh and Twelfth Named Director Defendants accepted responsibility for the information contained in the Belfry 2 prospectus and all the Director Defendants accepted responsibility for the information contained in the Belfry 4 and 5 Prospectuses. As pleaded at paragraph 38 (h) and(i) and paragraph 40(d),(e) and (m) of the Statement of Claim, the Director Defendants, which included the Thirteenth Named Defendant as and from the date he became a director of the Second Named Defendant, being the 10 May 2002 a day prior to the Plaintiff's Belfry 2 investment, had continuing obligations to keep the Plaintiff advised of the risks associated with investments and/or investment strategy, and comply with applicable statutory instruments and codes of conduct, such as the LTV covenant."*

The reply then set out the relevant correspondence in relation to Belfry 2, 4 and 5.

In answer to the query at 2(c)(vi) asking for "The precise words giving rise to the representation", the answer given was –

> *"With regard to particular 2(c)(vi) the Plaintiff will rely on the entirety of the Prospectuses and the correspondence referred to above."*

Parallel queries raised by Maples on behalf of Mr Ledwidge on this issue received Replies (to queries 1(a)-(d)) virtually identical to those provided to the other Director Defendants, as recited above.

10. Gore & Grimes and Maples in letters of 14 December, 2018 expressed dissatisfaction with these responses, and requested that the Plaintiff identify each representation in the Prospectuses relied on, whether it was one of commission or omission (and, if the latter, the information omitted), and how they were said to be false.

11. The response from Mr. Casey in the letter of 11th January, 2019 (page 2 on) sets out Category 1 misrepresentations arising from the content of the Prospectuses "and in particular the positive representations" described at (a) to (l). The letter then states:

> "It is the Plaintiff's position that the risk warnings contained in the Prospectuses are not adequate, and would have failed to convey to the average investor how risky the Funds were. Whilst this is a matter for expert evidence at the trial of the action, at this point in the plaintiff would highlight the following specific failings relating to each fund:…"

The letter then sets out at a)-f) six highlighted specific failings.

12. Gore & Grimes in their letter of 17th January complained as follows:

> "However, it appears that none of the matters listed at subparagraphs (a) to (l) are in fact the representations appearing in the Prospectus on which your clients rely in these proceedings. These subparagraphs simply contain a summary of the content of the Prospectuses.
>
> "Below this summary, at subparagraphs (a) to (f), six criticisms of the content of the Prospectuses are advanced. Each and every one of these criticisms appears to relate to items that are omitted from the Prospectuses rather than to positive representations made in the Prospectuses. Accordingly, it appears from your letter that the case now being advance by your clients is that there are no positive representations made in any of the Prospectuses on which the plaintiffs rely in these proceedings, but that the plaintiffs rely on the six alleged misrepresentations by omission specified at subparagraphs (a) to (f) appearing at pages 3 and 4 of your letter.

"With a view to avoiding any further dispute on this issue, please now confirm that this is the plaintiff's case to misrepresentations in the Prospectuses."

13. Maples in their letter of 18th January, adopt these observations and add, at para. (1):-

> "First, our letter [of 1st December, 2018] pointed to the plaintiff's failure to identify in their replies each statement made by the defendants that they claim is untrue, and to identify the particulars of how each such statement was untrue. In your response by letter dated 11th January, 2019, you refer to various portions of the Prospectus and correspondence; however, you fail to identify a single statement which you allege was untrue. On this basis, we call upon you to confirm that your clients' sole case in misrepresentation against your client is based exclusively upon an allocation of misrepresentation by omission."

Ruling

14. As appears from my ruling on 23rd October, 2018, the plaintiffs were obliged to identify the representations in the Prospectuses upon which they place reliance. Based on the pleadings to date, the particulars provided in the Replies dated 28 November, 2018, and the particulars given by Mr. Casey in his letter of 11th January, 2019, particularly those set out above, I am satisfied that this has now been done.

15. It is clear from the pleadings/particulars taken as a whole that the positive representations listed at (a) – (l) in Mr. Casey's letter are representations which the Plaintiff asserts are incorrect, inadequate or otherwise misleading. Furthermore, not all of the points which Mr. Casey "highlights" at (a) – (l) are matters of omission. The point made at (c) relating to "Forced Disposal Risk" is that this is referenced in the Prospectus, but in a manner which was "wholly inadequate", and at (d) it is accepted that there is risk warning

but it is "buried in the latter part of a large and dense document", and in (f) a plea is made criticising "the relative prominence accorded to the positive market and commentary as opposed to the risk factors within the Prospectus". For the most part, the allegations do relate to omissions, but these must be seen in the context of the positive statements of fact, advice or intent within the Prospectus. On this aspect, Mr. Casey's letter of 11th January, 2019, adequately clarifies the plaintiff's claims and no further particulars are necessary.

16. The complaints of Gore and Grimes and Maples are more in the nature of comments, and the plaintiffs are not required to provide the confirmation sought by Gore & Grimes and Maples. Having said this, and in light of Gore & Grimes threat of 'further dispute', it is entirely a matter for the plaintiff and their lawyers to review whether their replies to date correctly set out the claims that they wish to pursue against the Director Defendants, and whether to give the confirmation sought. If this does happen, it should be done promptly in light of the discovery process which is underway.

Representations appearing in correspondence sent *after* the making of investments
17. At page 4 of the letter of 11th January, 2019, after identifying the six "specific failings", Mr. Casey states:-

> "The plaintiff further relies on the omission in all of the communications received by her relating to her investment and its high risk nature during the period between the making of the investments and her receipt of correspondence from the Belfry Companies referring to investment being a high risk investment."

18. Gore & Grimes in their letter of 17th January state:

> "Insofar as it is set out thereafter that the Plaintiffs further rely on omissions and communications received by them following the making of the investments, in our letter of 14 December 2018 we asked you to explain how any representations appearing in correspondence sent after the making of the investments could conceivably have been causative of any loss allegedly suffered by the plaintiffs, in circumstances where it is common case that the plaintiffs were irrevocably committed to their investments once they were made."

19. A similar issue is raised by Gore & Grimes in respect of Category 2 misrepresentations. These are identified in my judgment of 28th April, 2017, as:-

> "Pleas of negligent mis-statement/misrepresentation alleging failure to specify, refer to or explain the LTV covenants or the possible consequences of such covenants prior to undertaking the investment of Belfry funds in UK properties."

20. In the letter of 11th January, 2019, Mr. Casey on behalf of the plaintiffs refers to the pleaded failure to disclose the intention to enter into borrowing with LTV covenants at the time of the furnishing of the Prospectuses and the making of the investments, and non-disclosure "in any communication, by way of letter, accounts and/or property update until the plaintiff's receipt of correspondence in the case of Belfry 2 a letter of 19th March 2009 and in the case of Belfry 4 and 5, letter dated 5 August 2008 and 10 September, 2009."

Ruling
21. This query relates to causation. The Director Defendants effectively ask how, if misrepresentations (whether positive or by omission), resulted in the plaintiff's investing and the purchase of UK properties, it could be said that any communications post-investment, or post the purchase of investment properties, could be said to be causative.

22. While Gore & Grimes' request may be said to interrogate a particular given, in my view this is a relevant question, and one that should be answered in order to give greater clarity to the plaintiff's cases, and in particular to assist in identifying what records may be relevant in the discovery process. As it is currently pleaded in Mr. Casey's letter, the plaintiff makes the case that further omissions in all communications to investors post the initial investment, up until 2008/2009, failed to alert them to the (allegedly) high risk nature of the investment or the LTV covenants, and that this was causative of loss. Perhaps the case made is that the plaintiffs, had they been alerted to these matters in correspondence, reports or financial statements, could have been entitled to and would have demanded repayment of their investment at an earlier point in time, but as matters stand we simply do not know if that is the case being made, or what other case in causation is being pursued based on omissions from post-investment communications.

23. I therefore direct that in Ms. Cantrell's case, the following questions be answered:-

> "(1) Insofar as the plaintiff relies on representation by omission of reference to the (alleged) high risk nature of the investment in all of the communications received by her relating to her investments during the period between the making of the investments and the receipt of correspondence from the Belfry companies referring to her investment being a high risk investment – (a) please identify the period of such communications/omissions in respect of each Belfry fund and/or the date on which she was advised of its high risk nature; and (b) state how such omissions caused or contributed to any loss allegedly suffered by the plaintiff.
>
> (2) Insofar as the plaintiff relies on the omission of reference to the LTV covenants or their effect in all of the communications received by her relating to her investment from the date of the investments until the plaintiff's receipt of correspondence, in the case of Belfry 2 a letter of 19th March, 2009 and in the case of Belfry 4 and 5, letters dated 5th August, 2008 and 10th September, 2009, please state how such omissions caused or contributed to any of the loss allegedly suffered by the plaintiff."

Particulars furnished in relation to Loan to Value Covenants
24. In the Notice for Further and Better Particulars dated 28th October, 2018 served by Gore & Grimes, at 3(c) the question was asked –

> "For each alleged breach of the LTV Covenant, please confirm whether it is alleged that the lender concerned enforced its legal rights arising from the breach".

To this the Plaintiff replied:

> *"In the case of each of Belfry 2, 4 and 5 while the plaintiff was told that the LTV Covenants were breached, as set out above, the plaintiff does not know, at this time, if the lenders concerned or any of them, enforced their legal rights.*

The plaintiff requires discovery in order to establish the precise cause of events and reserves the right to update these particulars following discovery."

25. At 3(d) Gore & Grimes raised a follow up query in the event that it was not alleged that the lender had actually enforced its legal rights arising from breach of the LTV covenant, but it was nonetheless asserted that the Belfry companies were caused to sell some or all of the assets by reason of breach, and they requested that the plaintiff identify the material facts relied upon.

In response it was stated on behalf of the Plaintiff:-

> *"The material facts that the plaintiff will rely on are those facts set out in the correspondence that the various Belfry companies sent to the plaintiff and in particular the correspondence that disclosed that various properties were disposed of after 2009."*

The response went on to provide, "by way of illustration", examples in respect of Belfry 2, 4 and 5 by reference to relevant correspondence, and responded to further sub-queries again by reference to correspondence including the Directors Reports and Consolidated Statements and Property Reports which had been furnished to the plaintiff.

26. In their letter of 14th December, 2018, Gore & Grimes effectively repeated the requests that 3(c) and (d), indicating that the reliance "in a general way" on the correspondence and reports and financial statements was inadequate.

27. In the letter of 11th January, 2019, Mr. Casey stands on the replies already furnished, emphasising the response that *"the plaintiff does not know, at this time if the lenders concerned or any of them, enforced their legal rights*" and that "*the plaintiff requires discovery in order to establish the precise cause of events and reserves the right to update these particulars following discovery".* Gore & Grimes in their response of 17th January, 2019, repeat their complaint.

Ruling
28. No further particulars in respect of these queries will be ordered pre-discovery. It is obvious that the plaintiffs are at a singular disadvantage in further answering such queries pre-discovery. In relation to questions as to whether the LTV covenants in the lending to the Belfry funds were actually breached, when they were breached, when the investment assets may have fallen below the value of the debt owed to the lender in each case, whether the lender "actually enforced its legal rights", whether there was default and what ensued, or whether the Belfry Companies were caused to sell the investment assets by something other than actual enforcement by a lender – the plaintiffs currently only have recourse to information disclosed in the financial statements, director's reports and property reports (which must also be in the possession of the Director Defendants), and they cannot provide more than is contained in those reports. In any event this is information that is likely to be in the knowledge of the Director Defendants. It is entirely reasonable for the plaintiff to defer the provision of further particulars on these questions until after discovery has been made.

Fraudulent Concealment
29. Gore & Grimes in their Notice for Further and Better Particulars dated 28th October, 2018, raised queries in relation to alleged concealment of the LTV covenant. Query 11 requested:-

> "Please state the material facts on foot of which the plaintiff claims that the information in question was deliberately or dishonestly concealed."

To this the reply made was:-

> "Self-evidently on the basis that they were material facts that ought to have been disclosed to the plaintiff and were known to the defendants."

30. In their letter of 14th December, 2018, Gore & Grimes took issue with this response, observing that "fraudulent concealment is a very serious allegation and is required to be pleaded with all due particularity".

31. In the letter of 11th January, 2019, Mr. Casey states the following:-

> "We have set out below the relevant portions of the Defendant's Notice for Particulars and the Plaintiff's replies.
>
> 7. *Please state precisely what information necessary to make her claim is alleged to have been concealed from the Plaintiff.*
>
> The existence and breach of the LTV covenant and the reduction in the value of the investments to nil.
>
> 8. *Please identify who is alleged to have concealed information from the Plaintiff .*
>
> Each of AIB, the Director Defendants and the Second, Fourth and Sixth Named Defendants.
>
> 9. *Please state when the Plaintiff is alleged to have discovered that the information in question was concealed from her.*
>
> In or around late June 2014
>
> 10. *Please state how it was that the Plaintiff is alleged to have discovered that the information in question was concealed from her*.
>
> When she received legal advice.
>
> 11. *Please state the material facts on foot of which the Plaintiff claims that the information in question was deliberately or dishonestly concealed*.
>
> Self-evidently on the basis that they were material facts that ought to have been disclosed to the Plaintiff and were known to the Defendants.

> "Contrary to what Gore & Grimes Solicitors' letter states we have clearly identified the material facts i.e. to quote from Haughton J's Judgment delivered in the Proceedings on 28 April 2017, paragraphs 34 et seq., the Plaintiff is relying *'on deliberate and unconscionable acts of non-disclosure as amounting to fraudulent concealment, being the failure by the promotors of the intention to enter into borrowing with LTV covenants at the time of the furnishing to the Plaintiffs of the Prospectus and their making their investments'* [*sic*] and the concealment of the LTV covenants in the lending arrangements entered into until the Plaintiffs receipt of correspondence, in the case of Belfry 2 a letter of 19th March 2009, in the case of Belfry 4 a letter dated 5 August 2008 and in Belfry 5 a letter dated 10 September 2009 and the effect of a breach of such a covenant, notwithstanding, on the Plaintiffs case, the Defendants must have been aware of the intention for the tending arrangements to include LTV covenants insofar as the loans (in all of which LTV covenants were ultimately agreed) were under negotiation or at an advanced stage of negotiation) and the involvement of the First Named Defendant and its officers as promotors of the funds."

32. The italicised section just reproduced and last appearing in the foregoing paragraph is not an accurate quote from my judgment of 28 April, 2017, and in particular the words "*being the failure…investments*" do not appear in that judgment . At para 34.7 of that judgment, which may be what Mr. Casey intended to reference, I did state:

> "Mr. McCarthy [Counsel for the Plaintiffs] submitted that the plaintiffs could rely on deliberate and unconscionable acts of non-disclosure as amounting to fraudulent concealment. He submitted that even if the LTV covenants had not been agreed by the defendants at the time of investment by the plaintiffs, the loans (in all of which LTV covenants were ultimately agreed) were under negotiation, or at an advanced stage of negotiation."

33. In their response of 17th January, 2019, Gore & Grimes effectively repeat their complaint that inadequate particulars of deliberate or dishonest concealment have been furnished.

34. Gore & Grimes make a second point, that the plaintiff's case has changed: whereas the response to the particulars sought at items 9 and 10 (arising out of the Reply to Amended Defence) indicated that the plaintiff discovered that the information on the LTV covenants was concealed from her until "in or around late June 2014", "or when she received legal advice", it is said that this assertion "is inconsistent with the submissions in relation to fraudulent concealment made by your counsel in the course of the hearing before the High Court and subsequent appeal" which was to the effect that the plaintiffs were unaware of the LTV covenant or reduction in value of the investments to nil until they received correspondence in the course of 2009 drawing their attention to same.

Ruling on adequacy on pleading in respect of fraudulent concealment

35. It is well established in cases of fraud there is an obligation to give full particulars of how it is alleged it occurred into give precise and full allegations of fact. But, particularly where it is alleged that there is a fraudulent concealment, it would be unreasonable to expect a plaintiff to plead with specificity facts which they cannot know. This issue of pleading in fraud cases was addressed by Costello J. in *James Elliot Construction Limited v. Lagan & Ors.* [2014] IEHC 547 where she stated:

> "13. However, the very nature of a fraudulent claim will also make it harder to achieve this standard of precision. This difficulty was addressed by Clarke J. in *National Education Welfare Board v. Ryan* [2008] 2 I.R. 816 at paras. 10-12. Clarke J. held as follows:-
>
> > "As pointed out by Bowen L. J., in *Leitch v. Abbott* (1866) 31 Ch. D. 374, if a plaintiff is not able to have the benefit of discovery before defining the precise parameters of his claim, it is likely, in cases of fraud or other clandestine activity, to place very great limits on the benefit of discovery."
> >
> > ...
> >
> > The other side of the coin requires that care be taken not to allow a party, by the mere invocation of an allegation of fraud, to become entitled to engage in a widespread trawl of the alleged fraudster's confidential documentation in the hope of being able to make his case. A balance between these two competing considerations needs to be struck. The balance must be struck on a case by case basis but having regard to the following principles. Firstly, no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party, in its pleadings, specifies, in sufficient, albeit general, terms the nature of the fraud intended together with specifying the alleged consequences thereof and establishes a prima facie case to that effect, then such a party should not be required, prior to defence and, thus, prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for, and establishes a prima facie case to that effect, the defendant should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial."
> >
> > 14. Clarke J. approached the matter in a nuanced way. Effectively he allowed for a two stage pleading of fraud. He did not resile from the high degree of precision required as outlined by Finlay Geoghegan J. in *Keaney v. Sullivan*. He required that a plaintiff having alleged fraud must do so in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for. Once that is done the defendant should then be required to put in his defence and submit to discovery and interrogatories as may be appropriate in the light of the pleadings as they then exist. Then, more detailed particulars of the fraud are to be furnished prior to trial, if required. In *National Education Welfare Board v. Ryan* he was satisfied that the pleading in that case went sufficiently beyond mere assertion and that there was no prejudice in requiring the defendants to deliver their defence or no prejudice which could not adequately be dealt with by indicating that full particulars would have to be delivered well in advance of trial and that the defendants would have the opportunity of making any appropriate amendments to their defence in the event that same should be justified by the particulars then delivered. He held that having regard to the factors outlined that the balance of justice did not require that any further particulars be delivered at that stage."

36. It seems reasonably clear from the pleas of non-disclosure in the Recast Statement of Claim and in the Replies furnished on 28 November, 2018 that what Mr. Casey intended to do in his letter of 11 January 2019 was identify as a particular "the failure by the promotors *to disclose to or advise the Plaintiff* of the intention to enter into borrowing with LTV covenants at the time of furnishing to the Plaintiffs of the Prospectus and their making of their investments and the concealment of the LTV covenants in the lending

arrangements entered into until the Plaintiffs' receipt of correspondence…...", and that the addition of words in italics provides the necessary correction.

37. I am satisfied that without discovery, Ms. Cantrell is only in a position to plead fraudulent concealment in general terms. This has been done in a sufficient manner to give the defendants a reasonable picture as to the fraudulent concealment contended for - in the responses already given by Ms. Cantrell in respect of queries 7 – 11, combined with the further material contained in Mr. Casey's letter of 11th January, 2019 when read in the context of existing pleas.

38. I will not therefore order any further particulars under this heading. Whether this changes post-discovery is for another day.

Ruling on "change of case"
39. There is on the face of it an inconsistency between Ms. Cantrell discovering the existence and breach of the LTV covenant, and the reduction of the value of her investments to nil, in or around late June, 2014 when she received legal advice, and in the case previously made, and apparently repeated before the Court of Appeal, to the effect that the plaintiffs were unaware of these matters until they received correspondence in the course of 2009. This may well be explained by the fact that submissions were being made on behalf of a number of Belfry investors, and the same date of discovery or realisation of this information may not apply to all of them. It may be, for instance, that Ms. Cantrell was not actually aware of these matters or their significance until she obtained legal advice in 2014, notwithstanding that they were revealed in the 2008/2009 correspondence. Thus the two positions are not necessarily inconsistent. However, it is desirable that there be some clarity.

40. I therefore direct that in Ms. Cantrell's case Mr. Casey confirm the responses at no.s 9 and 10 in the Replies dated 28 November, 2018, and if so confirming, explain how the plaintiff did not discover this information on receipt of the correspondence in relation to these matters in 2009. The same clarification must be provided in respect of any of the other five cases that are proceeding where similar written replies to particulars were furnished and similar inconsistency appears.

Laurence McMullin proceedings
41. At para. 24 of the Recast of Statement of Claim it was pleaded that this plaintiff was not furnished with a copy of the Prospectus. In the letter of 14th December, 2018, in the light of earlier Replies to Particulars (21st December, 2015 and 14th January, 2016) and a letter from Mr. Casey of 20th September, 2018, Gore & Grimes asked for confirmation as to "whether Mr. McMullin is alleged: (a) to have received; and (b) to have read, the prospectus in respect of his investment."

42. In his letter of 11th January, 2019 Mr. Casey stated: -

> "We have already address[ed] this issue. Mr. McMullin did not receive a Prospectus in advance of his investment in Belfry 5 and, it follows, he did not read same prior to his making his investment."

43. In their letter of 17th January, 2019 Gore & Grimes rejoined as follows:

> "You have accepted that Mr. McMullin did not receive or read a prospectus prior to making his investment in Belfry 5. However, as set out above, Mr. McMullin's only case against our clients appears to be that our clients were guilty of misrepresentations (by omission or otherwise) in the Prospectuses. If Mr. McMullin is not in a position to rely on the Prospectus, he has no case against our clients, since it is not alleged that our clients were involved in the sale or marketing of the products to Mr. McMullin, nor that our clients had direct dealings with Mr. McMullin prior to the making of his investment.
>
> Please now explain what remaining case you say Mr. McMullin has against our clients. In the absence of an adequate explanation of the Mr. McMullin case against our clients, our clients reserve the right to issue an application for dismissal of Mr. McMullin's proceedings as against them pursuant to O.19, Rule 28 and/or pursuant to the inherent jurisdiction of the Court on the ground that the proceedings as now particularised fail to disclose a reasonable cause of action."

Ruling
44. This seeks to interrogate and comment on particulars already given, and repeated in the letter of 11 January, 2019. Accordingly, no further particulars, confirmation or response will be ordered.

45. I would note however that in his Recast of Statement of Claim at para. 24 Mr. McMullin relies on "discussions with the Bank" wherein he alleges that he was not advised adequately of the level of risk or the significance of the Loan to Value Ratio, and a plea that the existence of the LTV Covenant was not communicated to him. If, as is asserted on their behalf, these defendants – John Rockett and John Roger Wilkinson and Sean Henneberry - were not involved in the sale or marketing of the investment to Mr. McMullin, and had no direct dealings with him prior to the making of his investment (and there don't appear to be pleas to the contrary), it may be in Mr. McMullin's interest to respond the query raised rather than risk facing a motion to dismiss from these Director Defendants.

OSM Partners' issues on LTV Covenant Claims:

Loss by reference to the period post write-down to "Nil" i.e. post 31st March, 2009
46. Under the heading "loss and damage" in the Recast Statement of Claim at para. 52 Ms. Cantrell claims that she "…lost all of the value of the sums that she invested in Belfry 2, 4 and 5." Thereafter she pleads in respect of each fund extensive correspondence, including directors' reports and financial statements and property updates, leading to the point where she was advised, by correspondence received in 2009, that the value of her investment in each of the funds was written down to nil as of the financial year ended 31st March, 2009. Various particulars were raised in relation to the cause of these losses and the role of the LTV covenant.

47. In my ruling on 23rd October, 2018 I was not entirely satisfied with the responses and I stated –

> "I am of the view that to an extent these complaints are justified and it seems to me that it is incumbent on the plaintiffs to give more clarity than they have done in relation to the effect of the LTV covenant and how they say it caused the losses in respect of which they make a claim. … In essence, the Plaintiffs, in respect of this, are required to plead what they actually say caused their losses."

48. OSM Partners Solicitors for the Bank, pursued this in the Notice for Further and Better Particulars that they served on 25th October, 2018, asking at query 6(d):

> "(d) Whether the Plaintiffs are making the case that the simple existence of the LTV covenant, without more, was itself causative of loss?"
>
> - to which the answer was 'no'.

They also asked:

> "7. Arising from the Statement of Claim, is it so intended that the property should have been sold at a later stage? If the Plaintiff so contends, please provide full and detailed particulars as to when by reference to:
>
> (a) Belfry 2
>
> (b) Belfry 4
>
> (c) Belfry 5."

The Plaintiff declined to answer as this particular had not been directed by the court on 23rd October, it was not a particular of the Statement of Claim, and "is speculation" and "an impermissible attempt to cross-examine the Plaintiff on her claim".

49. In a letter dated 4 December 2018 OSM Partners expressed disappointment at the response to query 7 and repeated the request. Mr. Casey replied on 10 December, 2018 pointing out that this particular had first been raised by the Bank on 8 June 2018 and was not one in respect of which this court made any specific order on 23 October, 2018. He went on to state:

> "Secondly, and in any event it appears to us that, the issue raised in relation to the Plaintiff's response to particular 7 arises from a misunderstanding of the plaintiff's case and/or an assertion that the only way loss could have occurred is if properties were sold at an earlier stage than they should have been. All of the information that you seek is in the possession of your clients and the information that our clients have is as a result of what your client has told them."

50. OSM Partners responded to Mr. Casey on 13th December, 2018 and in their letter they bring together their concerns in four new, or newly worded, queries:

> "1. Are we to understand that you assert loss by reference to the period post write-down 'nil' value i.e. post 31/03/2009?
>
> If so, how can such loss arise?
>
> 2. Is it alleged that any of the transactions undertaken were at undervalue?
>
> If so, which?
>
> 3. Do you suggest that disposals should have occurred at an earlier stage prior to 31/03/2009?
>
> 4. In the light of the new submissions made to the Court of Appeal, are you suggesting that loss and damage giving rise to a cause of action is only complete on the disposal of the last asset?"

51. Mr. Casey in his letter of 11th January, 2019 answers these queries, adopting OSM Partners numbering:

> "1. This enquiry, goes far beyond a request for further particulars of any element of the plaintiff's claim and is a matter to be addressed at the trial.
>
> 2. Insofar as we understand the transactions being referred to relate to the sale of the Belfry Companies' Properties, as set out above the Plaintiff has not made a plea to date that the properties were disposed of at an undervalue and, as was noted by Haughton J. in his response to submissions made by Mr. Fogarty B.L. on behalf of the first named defendant, the plaintiff does not have the information, which at this moment in time is in the possession of the defendants to provide any particulars with regard to the sums realised on the disposals of the properties other than the information provided to them by the defendants and through the communications received by the investors from the Belfry companies post 2009.
>
> 3. This enquiry appears to be an attempt to cross-examine the plaintiff and a reply to the enquiry is that it could not, by any contention, be deemed to be a request for further particulars with regard to the pleas being advanced by the plaintiff. The enquiry further obviously does not address the fact that the plaintiff does not have the information, which at this moment in time is in the possession of the Defendants, to provide any particulars with regard to the sums realised on the disposals of the properties other than the information provided to them by the defendants through the communications received by the investors from the Belfry companies post 2009.
>
> 4. We do not accept any new submission was made to the Court of Appeal but regardless my reply to the enquiry is that it could not, by any contention, be deemed to be a request for further particulars with regard to the pleas being advanced by the plaintiff."

52. In their response to this on 18th January, 2019 OSM Partners assert that question 1 is fundamental – it concerns whether the plaintiff asserts loss by reference to the period post write-down to nil value, and if so how such loss can arise. Their point is that if the plaintiff's have already suffered loss by way of write-down to nil value, how can loss arise thereafter, and how can events after that date (31st March, 2009) have any implication at all.

As to question 2 OSM Partners repeat their request, emphasising its relevance to Discovery.

53. At this point it should be mentioned that Maples on behalf of Mr. Ledwidge are also concerned about whether the plaintiffs are alleging sales at undervalue. In their letter of 18th January, 2018 they stated:

> "Second, in our letter dated 14th December, 2018 we also highlighted the fact that your clients had failed to identify the particular Belfry Properties that they claimed had been sold at an undervalue, in the amounts of the relevant undervalue(s). This is not addressed in your letter of 11th January, 2019. On the one hand, your letter states that your clients do not have the information to provide any particulars with regard to the sums realised on the disposal of the properties while, later in your letter, you make reference to correspondence referring to particular disposals. You again call upon your clients to identify the disposals of the claim were made at an undervalue."

54. As to Question 3, OSM Partners in their response suggest Mr. Casey's answer was an evasion, because the plaintiff has not pleaded any criticism of any disposals prior to 31st March, 2009, despite having the Property reports. They state:

> "The net position in your response is that you refuse to identify anything by reference to loss either pre - or post - 31st March, 2009 that might allow the defendants to know how loss is said to have occurred. We are in the almost unique situation where the plaintiff is attempting to argue actionable negligence that post-dates the existence of a total loss, while declining to identify how such loss could have occurred."

55. In respect of Question 4 OSM Partners re-joined –

> "the question was asked precisely because of what was in your submissions in the Court of Appeal; are you making the case now that the cause of the action is complete only when the last asset held by the funds is disposed of?"

Ruling

56. It will be recalled that in answer to query 7 in the Notice for Further and Better Particulars raised by the Bank dated 25th October, 2018 the answer was:

> "The plaintiff does not regard this particular as having been directed by the Court and in any event this is not a particular of the Statement of Claim and is speculative. Further, this request appears to be an impermissible attempt to cross-examine the plaintiff on her claim."

57. In my view this response is correct. The Recast Statement of Claim does not plead that the investment properties should have been sold at a later stage, or that they were sold at an undervalue, and I cannot identify any particulars of negligence, breach of duty or loss raising any such contentions. It is also correct to state that further response to this particular query was not directed by this Court on 23rd October, 2018, notwithstanding that it was first raised in a Notice for Particulars in June 2018.

58. Secondly I note that in the trial of the preliminary issue on the Statute of Limitations the Plaintiff's case was based on losses arising from the write-down of the investments to "nil". I found, at Conclusion 7(a) -

> "When the shareholders' investments in each Belfry Fund were written down to nil there was provable actual loss in the context of the plaintiff's pleaded claims of negligence/negligent misstatement/misrepresentation related to the LTV covenants, and the causes of the actions accrued from that date. This finding is entirely without prejudice to the questions of whether and to what extent the LTV covenants, as opposed to other matters, caused the loss.".

59. Thirdly, significant detail as to the cause of losses and the role of the LTV covenants is already contained in the Recast Statement of Claim. At para. 45 Ms. Cantrell pleads as to the simple existence of the LTV covenant having the potential to cause loss because a downward movement in property variations could have the effect of removing "discussion from the managers of the properties in which the funds were invested. This meant that properties would be sold in order to protect the lender's position and prevented any possibility of their recovery of property values."

60. It is then pleaded at para. 46 –

> "This was very significant in circumstances where the skill of property managers, and their ability to manage the funds through adverse market conditions were key selling points. The consequence of the existence of a LTV covenant, irrespective of whether or not it was in fact triggered, was that the funds could not be managed through any market volatility, as only one movement downwards in property values immediately placed the Lender in a dominant position, leading to a sell – off of the assets. In adverse market conditions, the Lender's interests and the plaintiff's interests would be very different, meaning that the consequence of the LTV covenant just described would directly cause the plaintiff loss and damage."

In my view this cannot be read as a plea that the investment properties were sold too soon, or at an undervalue.

61. Fourthly this issue was also explored by Gore & Grimes in their Notice for Further and Better Particulars dated 28th October, 2018 at query 3(i), where the query and response were as follows:

> "(i) With reference to paragraph 46 of the Third Recast Statement of Claim, please identify:
>
> (a) how the LTV covenant had, or would have had the consequences referred to in the event that it was "… not … triggered";
>
> (b) explain the meaning of the term "dominant position".
>
> *[Response]*
>
> *This has been fully explained in paragraph 46 of the Statement of Claim and in reply at 3 above. The key issue is that it appears that from late 2008 onwards, in respect of each of the Belfry 2, Belfry 4 and Belfry 5, key decisions were taken in respect of the property portfolios in the interests of, and at the behest of (and having regard to the content of the correspondence received by the Plaintiff subject to the agreement of) the lenders whose interest did not align with that of the investors."*

This response added to the sum of the pleas on this issue.

62. Fifthly in the Notice for Further and Better Particulars raised on behalf of Mr. Ledwidge by Maples on 26th October, 2018, the relevant query and response are as follows:

> "3(c) For each alleged breach of the LTV covenant, please confirm whether it is alleged that the lender concerned enforced its legal rights arising from the breach. If it is so alleged, please identify:
>
> …
>
> (iv) how the sale of the assets caused the plaintiff to suffer losses complained of in this case;
>
> [Response]
>
> *In the case of each of Belfry 2, 4, and 5, while the plaintiff was told that the LTV covenants were breached, as set out above, the plaintiff does not know at this time, if the lender's concern, or any of them, enforced their legal rights.*
>
> *The plaintiff requires discovery in order to establish the precise cause of events and reserves the right to update these particulars following discovery."*
>
> *With regard to particular 3(c) (iv) the disposal of the property as it is resulted in the eradication of the value of the Plaintiff's investments and had the effect of diminishing the possibility of the recovery of the investments."*

63. I also bear in mind that at para. 66 of Recast Statement of Claim Ms. Cantrell reserves the right to serve further updated particulars of loss, damage, inconvenience and expense.

64. When the pleadings and all of the responses to requests for particulars are taken into account I am of the view that the effect of the LTV covenant and its connection to the write-down to 'nil' of the investments has been pleaded as far as it reasonably can be in advance of the defendants making discovery of relevant documentation such as documents concerning the actual covenants, the extent to which there was breach/default, the extent to which lenders undertook enforcement action, communications between the Belfry Funds and the lenders which resulted in sales of properties, and the process of actual wind down of the Belfry Funds.

65. Finally, while the plaintiff's primary claim in respect of losses relates to the write-down of the investments to 'nil' value by reference to Financial Statements approved by auditors and signed off on by directors, the plaintiffs make quite limited pleas of a factual nature in para. 46 of the Recast Statement of Claim and in the particulars furnished to Maples Solicitors in relation to the differing interests of the lenders and investors in circumstances where the LTV covenants are breached. On my reading of these pleas the case is not made that the "key decisions" taken in respect of the property portfolios – presumably related to property sales or other management decisions related to the winding down of the funds and repayment of the lenders - which it is suggested were in the interests of the lenders, were in themselves negligent or led to sales at below market value, even though such sales "resulted in the eradication of the value of the plaintiff's investments and the effect of diminishing the possibility of recovery of the investment". Rather these pleas and particulars seem to be directed at explaining how the sales that were undertaken after 2008 crystallised the eradication of the plaintiff's investments that had already been written down to 'nil value' in the books of the Belfry funds.

66. I have therefore come to the conclusion, by reference to the four questions posed by OSM Partners in their letter of 13th December, 2018, that in light of all the extant pleas and replies to particulars, the responses in Mr. Casey's letter of 11th January, 2019 are appropriate, and that no further responses are required at this stage to those questions, or any similar or related requests for particulars from other defendants.

67. This does not mean that discovery in relation to property sales or other "key decisions" and communications between the Belfry Funds/Managers and the lenders during the period of wind down of the funds may not be relevant or necessary. Such documents may be relevant to the wind-down of the funds and the ultimate sales of investment properties, and the "eradication of the plaintiff's investments", and establishing the monies realised from those sales and how the proceeds were distributed. Such documents may also be relevant to whether and to what extent any of the investments recovered any value, or whether there was a total loss. They may also be relevant to the pleas in paras. 45 and 46 of Ms. Cantrell's Recast Statement of Claim as to the consequences of the LTV covenants (notwithstanding that the write-down on paper, by virtue of property revaluations, occurs in financial statements in 2008/2009). This, however, is not something upon which the court is required to make any decision in this ruling.

68. The foregoing rulings seek to deal with all matters raised in the Notices for Particulars of October 2018 and in the correspondence from the defendants' solicitors still in contention after being addressed by Mr. Casey in his letter of 11th January, 2019. Counsel can address me further as to the time to be allow for delivering the limited further particulars required by this ruling.

Postscript

69. As I have stated on previous occasions these cases – and the large number of cases which will be affected by the outcome of these cases – must now be brought to hearing as quickly as possible, both because of the inordinate length of time that it has taken to bring these cases this far, and the age profile of many of the plaintiffs. At this point it is incumbent on the parties and their legal advisors to progress the discovery process as quickly as possible, and this is likely to mean compromise on all sides. Because of the number of defendants, the number of legal teams, and the complexity of the proceedings, and the added burden on the plaintiffs' solicitors and counsel of handling five cases, it may not be difficult for a defendant minded to delay the trials or rely on 'litigation fatigue' on the part of the plaintiffs, to pursue procedural road blocks or otherwise cause delay. The court will be astute not to let that happen.