THE HIGH COURT

[2011 No. 484 SP]

BETWEEN

AVESTUS CAPITAL PARTNERS

APPLICANT

AND

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

AND

ROBERT MCQUILLAN AND JANE MCQUILLAN

RESPONDENTS

Judgment of Ms. Justice Laffoy delivered on 14th day of November, 2012.

The proceedings

1. These proceedings (the Interpleader Proceedings) were heard together with proceedings entitled the High Court, Record No. 2011/3127S between Danske Bank A/S trading as National Irish Bank, plaintiff and Robert McQuillan ,defendant (the Debt Proceedings).

2. The Interpleader Proceedings were initiated by a special summons which issued on 17th June, 2011. The applicant (Avestus), which was formerly known as Quinlan Private, seeks an interpleader order in respect of funds it holds in which it does not claim any interest. There is a dispute between the first respondent (the Bank), on the one hand, and the second respondent (Mr. McQuillan) and the third respondent (Mrs. McQuillan) as to the entitlement to the said funds, each side claiming the right thereto. The position of Avestus is that it does not in any manner collude with either the Bank or Mr. McQuillan and Mrs. McQuillan or any of them. It asserts that it is ready to bring the money into Court and to pay or dispose of the funds in such manner as the Court may order.

3. In the Debt Proceedings, which were initiated by summary summons which issued on 26th July, 2011, the Bank seeks judgment against Mr. McQuillan in the sum of €677,586.50 together with interest on foot of a loan agreement. What is before the Court is a motion for judgment, which was transferred from the Master's Court.

4. The Interpleader Proceedings and the Debt Proceedings have a common origin, as the following outline of the factual background will illustrate.

Factual background

5. On 25th July, 2005 the Bank issued a facility letter to Mr. McQuillan offering him what was termed a "structured term loan". The amount of the loan was €1,562,500, but it was stipulated that the amount would not exceed the euro equivalent of STG£1m on the date of initial drawdown up to a maximum of €1,562,500. The purpose of the facility was stated to be to fund an investment in a Quinlan Private Clients Syndicated Commercial Property Investment known as "The Estate", Knightsbridge, Central London (the Knightsbridge Scheme). It is common case that Mr. McQuillan had sought a loan in the sum of STG£2m from the Bank, because that was what he intended to invest in the Knightsbridge Scheme, but the Bank was only prepared to advance the euro equivalent of STG£1m. The acceptance of the facility letter dated 25th July, 2005 was signed by Mr. McQuillan on 12th August, 2005.

6. The terms of the loan were subsequently varied on a number of occasions, but the variation which is of relevance for present purposes was contained in a letter dated 20th January, 2006 which was expressed to be supplemental to the facility letter dated 25th July, 2005. On 10th February, 2006, Mr. McQuillan endorsed his agreement to and acceptance of the varied terms on the letter of 20th January, 2006. One of the variations made in that letter was related to the purpose of the facility. As varied the purposes of the facility were expressed to be:

> "to finance the subscription by [Mr. McQuillan] for:
>
> (a) [89] shares to be issued by Carraig Investments SA . . .;
>
> (b) [919,756] loan notes to be issued by Carraig Beag SA; and
>
> (c) [8,858] redeemable convertible bonds to be issued by Carraig Beag (collectively called the 'securities')."

Carraig Investments SA (Carraig Investments) and Carraig Beag SA (Carraig Beag) were companies incorporated under the laws of Luxembourg.

7. The provisions of the facility letter of 25th July, 2005 as so varied (the Loan Agreement) which are relevant for purposes are the following:

> (i) Clause 3, which dealt, *inter alia*, with repayment and provided that the loan was to be extended on an interest only basis until 31st July, 2010 followed by a capital repayment of €781,250 or half of the amount of the initial drawdown, whichever was the lower on that date. Thereafter the outstanding capital balance on the loan would be extended on an interest only basis for a further period until 31st July, 2012, by which date the full and final repayment would be due. However, it was provided that notwithstanding the foregoing, the loan and interest accrued thereon should become immediately due and payable on demand by the Bank (and the security would become enforceable) on the occurrence of

any event set forth at the Default Appendix attached. The event of default primarily relied on by the Bank is contained in Clause (o) of the Default Appendix and it is in the following terms:

> "If, in the reasonable opinion of the Bank, circumstances have altered materially since the granting of the Bank facilities or such new information has come to light as would justify requesting the immediate repayment or termination of the Bank facilities".

The Bank also places some reliance on Clause (i) (if any representation or warranty or undertaking from time to time made by Mr. McQuillan to the Bank is or becomes incorrect or misleading in any material respect) and Clause (j) (if any guarantee or security for any obligation or liability from time to time owing by Mr. McQuillan to the Bank fails or is terminated or disputed or becomes in jeopardy, invalid or unenforceable) of the Default Appendix.

(ii) Clause 5, which was headed 'Security'. As varied, that clause provided that the loan should be secured by the following:

> (a) a pledge agreement governed by the laws of Luxembourg executed by Mr. McQuillan over each of "the Securities" held by him legally and/or beneficially in Carraig Investments and/or Carraig Beag and all dividends and distributions payable thereon;
>
> (b) a legal assignment over a life policy, which is not in issue;
>
> (c) an undertaking from Quinlan Asset Management that any returns on Mr. McQuillan's investment up to the total amount of the loan would be forwarded directly to the Bank on foot of its charge over Mr. McQuillan's shareholding in Carraig Investments;
>
> (d) a limited recourse guarantee and indemnity from Quinlan Investments Ltd.; and
>
> (e) a pledge agreement governed by the laws of Luxembourg executed by Quinlan Investments Ltd. creating first ranking fixed security over all securities held by or to be acquired by it in Carraig Investments and/or Carraig Beag as nominee for Mr. McQuillan.

8. The loan was duly advanced by the Bank to Mr. McQuillan. In accordance with Clause 5(e) of the Loan Agreement a so-called Pledge Agreement was executed on 16th February, 2007 between Quinlan Investments Carraig Beag Ltd. (Quinlan) and Mr. McQuillan as pledgors, the Bank as pledgee, and Carraig Investments and Carraig Beag. The provision of the Pledge Agreement on which the Bank relies is Clause 6.1.1, wherein each of Quinlan and Mr. McQuillan represented and warranted to the Bank that Quinlan held the legal title to the "Assets" and Mr. McQuillan held the beneficial title to the "Assets". In recital (B), the "Assets" were defined as the "Shares Loan Notes and Bonds of [Carraig Investments]", each of which terms was defined in Clause 1.1, and, as regards Mr. McQuillan's beneficial entitlement, quantified in Clause 3.1, which was the declaration of pledge clause. I would observe *en passant* that it is not possible to relate the assets itemised in Clause 3.1 with the assets referred to in the letter of 20th January, 2006. It was expressly provided in the Pledge Agreement that it was governed by Luxembourg law. As regards jurisdiction it was provided:

> "With respect to any proceedings arising in connection with this Agreement, each Pledgor, the Company [i.e. Carraig Investments] and the Note Issuer [i.e. Carraig Beag] irrevocably submit to the jurisdiction of the courts of Luxembourg city, notwithstanding the right of the Pledgee (i.e. the Bank) to take proceedings in any other jurisdiction."

The Loan Agreement was executed on behalf of Mr. McQuillan by Fergus Farrell "as lawful attorney" for Mr. McQuillan.

9. Issues have arisen in relation to the execution of the Pledge Agreement on behalf of Mr. McQuillan by his attorney. The copy of the power of attorney exhibited was quite illegible. However, a more legible copy was furnished to the Court. The first point which arises in relation to the power of attorney is its date, which is totally illegible. It was suggested at the hearing of the application that it might be 5th November, 2006. However, I note that in a letter dated 18th August, 2010 from A. & L. Goodbody, Solicitors for Avestus, to Mason Hayes & Curran, the then solicitors for Mr. McQuillan and Mrs. McQuillan, it is stated that it was dated 6th December, 2006. I am assuming that that date (or perhaps 5th December, 2006) is the correct date. The date is of significance because in the power of attorney Mr. McQuillan irrevocably and unconditionally appointed Fergus Farrell or another person as his attorney "for a period of three months from the date hereof" to do or execute all or any of the acts outlined including to –

> "agree, make, sign execute and deliver such documents as may be necessary for or related to my acquisition and holding of certain shares and debt instruments (together with Securities) in Carraig Investments SA and its subsidiaries including without limitation the documents specified in the Schedule hereto any and all documents relating to any facilities or borrowings which may be used by me to purchase the Securities . . .."

The Pledge Agreement is not listed in the Schedule.

10. In early 2010 a decision was taken to dispose of the Knightsbridge Scheme. In connection with the proposed sale, Mr. McQuillan signed a resolution on 13th May, 2010 approving the sale. On the same day, 13th May, 2010, Mr. McQuillan executed a document headed "Direction Letter" to Quinlan in relation to Knightsbridge Scheme. In that document, Mr. McQuillan gave Quinlan extensive authority in connection with the sale, including authority to make, give, sign and execute a wide range of documents which might be necessary or desirable in connection with the sale.

11. By letter dated 9th June, 2010 from Avestus to the Bank, having referred to the Loan Agreement and the fact that it was proposed to sell the Knightsbridge Scheme, Avestus gave an undertaking in the following terms to the Bank:

> "We hereby irrevocably undertake to the Bank that following completion of the Proposed Sale, an amount equal to [Mr. McQuillan's] share of the Net Proceeds (as defined in the Schedule) which shall will *(sic)* be calculated on a pro-rata basis by reference to [Mr. McQuillan's] share of the total number of shares in Carraig Investments . . . and which shall be not less than fifty per cent of [Mr. McQuillan's] original investment of STG £2m will be paid over to the Bank by us for application towards repayment of the loan owing under the [Loan Agreement] or any other debt whatsoever owing by [Mr. McQuillan] to the Bank as soon as practicable after the completion of the Proposed Sale and in any event within 20 working days of such completion."

It was stated that Mr. McQuillan's return would be approximately seventy per cent of his original investment of STG£2m. It also was stated that the undertaking should have no further effect once the entire of Mr. McQuillan's return had been forwarded to the Bank. Finally, it was stated that the letter should be governed by Irish law. Presumably, it was intended that the undertaking would replace the Pledge Agreement, so that the purchaser of the Knightsbridge Scheme would get an unencumbered title to Mr. McQuillan's interest.

12. The opening sally in the disputes between Mr. McQuillan and Avestus and between Mr. McQuillan and the Bank was a letter dated 24th June, 2010 from Mr. McQuillan's then solicitors, Mason Hayes & Curran, to Avestus. In that letter it was asserted that Mr. McQuillan had made two separate and distinct investments in Carraig Investments, one being of STG£1m, which was funded by a loan from the Bank with recourse only to the shares acquired by that STG£1m, and the other being an investment of a further STG£1m, funded by monies borrowed by Mr. McQuillan from Allied Irish Banks (AIB). Avestus was informed that it had no authority to repay to the Bank one hundred per cent of the proceeds of the sale from the total STG£2m equity investment made by Mr. McQuillan. It was acknowledged that the Bank was entitled to be repaid out of the proceeds of sale a sum equivalent to the proceeds of the sale of the initial STG£1m investment made by Mr. McQuillan and funded by the Bank. However, AIB should be repaid the funds attributable to the STG£1m investment which was made by Mr. McQuillan with monies borrowed from AIB. That letter was responded to by A. & L. Goodbody on behalf of Avestus. The position adopted in the reply dated 29th June, 2010 was that Mr. McQuillan and Avestus were legally obliged to discharge the sums due and owing to the Bank on foot of the Loan Agreement out of Mr. McQuillan's proceeds. A. & L. Goodbody maintained that position in subsequent letters of 15th July, 2010 and 18th August, 2010 to Mason Hayes and Curran.

13. On the basis of the evidence before the Court, Mrs. McQuillan first featured in the dispute in a letter dated 10th November, 2010 from Mason Hayes & Curran to A. & L. Goodbody. In that letter it was stated that Mason Hayes & Curran had been instructed by Mrs. McQuillan that the second tranche of shares was to be in her name. It was alleged that Avestus had failed in its duties to Mr. McQuillan and Mrs. McQuillan, in particular, "to respect her investment as a separate investment". It was also contended that neither Mr. McQuillan nor Mrs. McQuillan authorised the giving of the undertaking to the Bank by Avestus on 9th June, 2010. It was requested that Avestus procure the immediate release and repayment to Mrs. McQuillan of the proceeds of sale referable to her investment.

14. Within less than a week, Beauchamps, Solicitors, wrote to the Bank, by letter dated 15th November, 2010, on behalf of Mrs. McQuillan for whom they were then acting in respect of what was described as a "joint investment" that she and her husband, Mr. McQuillan, had made in respect of the Knightsbridge Scheme as arranged by Avestus. The thrust of the letter was that the second investment of STG£1m was an investment of Mr. McQuillan and Mrs. McQuillan and the Pledge Agreement could not have captured the equity investment financed by AIB, as I understand it, on the basis of the principle *nemo dat quod non habet*. Subsequently, Beauchamps were instructed by Mr. McQuillan. Thereafter both Mr. McQuillan and Mrs. McQuillan maintained the position that only half of the return on the sale of the Knightsbridge Scheme should be remitted by Avestus to the Bank. The Bank maintained the position that it was entitled to the entire return. In fact, one half of the return amounting to in excess of €827,000 was remitted by Avestus to the Bank, as is disclosed on the indorsement of claim on the summary summons on the Debt Proceedings.

15. By letters dated 24th March, 2011, A. & L. Goodbody, on behalf of Avestus, informed the Bank and Mr. McQuillan and Mrs. McQuillan that they were not in a position to resolve the dispute arising from the competing claims of those parties in respect of the balance of the proceeds of sale which were currently held by Avestus and, in the circumstances, if the dispute was not resolved within twenty one days, interpleader proceedings would issue. In fact, the Interpleader Proceedings issued on 17th June, 2011.

16. Separately, by letter dated 14th July, 2011 from McCann Fitzgerald, Solicitors, to Mr. McQuillan, McCann Fitzgerald demanded, on behalf of the Bank, immediate payment of the amount outstanding pursuant to the terms of the Loan Agreement, which was stated to be capital of €667,586.50 together with interest of €5,768.05, being in total €683,354.55. It was stated that interest was accruing at the daily rate of €63.92. In that letter, it was made clear that the Bank was relying on Clause (o) of the Default Appendix to the Loan Agreement, in that it was stated:

> "It is the reasonable opinion of the Bank that, given the allegations made by you in relation to the ownership of the proceeds of the shares, which directly contradicts warranties given our client by you in the Pledge Agreement . . . that circumstances have altered materially since the granting of the Bank facilities, and this assertion justifies the immediate repayment of the facilities, which is an Event of Default pursuant to Clause (o) of the appendix. Furthermore, your assertion, if true (which is not accepted) breaches Clause (i) of the appendix, which provides that an Event of Default occurs if a warranty or representation given by you becomes incorrect or misleading in any material respect."

17. Mr. McQuillan denies that the money claimed is due to the Bank. I propose now considering his opposition to the motion for judgment.

Mr. McQuillan's opposition to the motion for judgment

18. In an affidavit sworn by him on 19th December, 2011 in the Debt Proceedings, Mr. McQuillan has averred that he invested in two separate tranches, in two separate ways, financed by two financial institutions in the Knightsbridge Scheme. Separately from the Loan Agreement with the Bank, he and Mrs. McQuillan arranged finance for another STG£1m from AIB to also invest in the Knightsbridge Scheme, so that the aggregate investment was STG£2m. Mr. McQuillan has averred that the finance from AIB was arranged for the benefit of himself and Mrs. McQuillan as a way for them to jointly participate in the Scheme and he has contended that the Bank is not entitled to the proceeds of the joint investment. He has exhibited a copy of the letter of offer, which was dated 25th August, 2005, from AIB. The acceptance segment of the letter is not completed on this copy or on any of the other copies which have been exhibited. The borrowers are named in the letter of offer as Mr. McQuillan and Mrs. McQuillan and the loan which the Bank had sanctioned in their names was described as "a housing loan facility". The amount to be advanced was €1,860,000. The purpose of the loan was expressed to be for fund investment in a particular medical facility, payment of pension contributions, and to "assist in investment in a Quinlan Private Property transaction in Knightsbridge, London". The security was a mortgage and charge over what I assume is a residential property in Dublin.

19. In that affidavit, Mr. McQuillan also made the following points:

> (a) The Bank is not entitled to appropriate the proceeds of his joint investment with Mrs. McQuillan as raised under the loan agreement with AIB.
>
> (b) The Bank cannot "pray in aid" the provisions of the Pledge Agreement to seek to appropriate the proceeds of the joint investment, which were never intended to be the subject of the Pledge Agreement.
>
> (c) The Pledge Agreement was not included in the documents listed in the power of attorney and the Bank cannot rely on the provisions of the Pledge Agreement, as it was not validly executed. Alternatively, the attorney "overreached himself

by pledging securities which were never intended to be pledged".

(d) The Bank has incorrectly sought to call in the balance of the loan under the Loan Agreement, which was not due to be terminated until 31st July, 2012.

(e) Quinlan/Avestus was on notice that the STG£1m which he and Mrs. McQuillan invested in the Knightsbridge Scheme came from a source other than the Bank and the joint investment financed from a separate source should never have been, and was not, encumbered, secured or made subject to the Pledge Agreement.

(f) The Bank did not believe, nor was it its understanding, that it would have security over the STG£2m worth of securities and it is an abuse of process for the Bank to claim reliance on a representation which it never relied on when advancing the funds.

(g) Quinlan/Avestus were on actual and/or constructive notice of the joint investment with Mrs. McQuillan in the Scheme and, by extension, the Bank is on actual and/or constructive notice thereof. In the Interpleader Proceedings, Quinlan/Avestus have sought the guidance of the Court to determine the ownership of the funds retained by Avestus. Ownership of those funds should be determined in the Interpleader Proceedings.

20. Mr. McQuillan swore a further affidavit on 3rd February, 2012 in response to an affidavit filed on behalf of the Bank, which was more argumentative than factual. Mr. McQuillan made the following additional points in that affidavit:

(a) He denied that the attorney who executed the Pledge Agreement was empowered or was entitled to give the warranty as to his beneficial ownership in Carraig Investments in the terms of Clause 6.1.1 of the Pledge Agreement.

(b) He made the point that the Pledge Agreement was governed by, and was to be construed in accordance with, the laws of Luxembourg, but no evidence of Luxembourg law had been put before the Court by the Bank.

(c) The Bank has no entitlement to invoke "the material adverse change clause" (i.e. Clause (o) of the Default Appendix) in the Loan Agreement, in circumstances where it is alleged that a foreign law governed the security agreement which has been breached.

(d) In defending the Debt Proceedings Mr. McQuillan intends to pursue the plaintiff for damages for breach of contract and damages to his professional reputation which the Debt Proceedings which are described as "unlawful proceedings", have caused.

21. In the Interpleader Proceedings an affidavit sworn by Mr. McQuillan on 3rd February, 2012 has been filed, which is substantially the same as the affidavits he swore in the Debt Proceedings. In the Interpleader Proceedings an affidavit sworn by Mrs. McQuillan on 3rd February, 2012 was filed, in which she averred that her husband's affidavit of the same date was "correct and truthful" to the extent that it reflected her involvement in the Knightsbridge Scheme. She said that she and her husband jointly invested in the Knightsbridge Scheme by way of loan agreement with AIB dated 25th August, 2005.

22. Finally, by letter dated 29th August, 2012, McCann Fitzgerald, on behalf of the Bank, having referred to Clause 3 of the Loan Agreement, under which it was provided that full and final repayment of the facility was due on 31st July, 2012, stated that the Bank was then entitled to full and final repayment of the sums due pursuant to the Loan Agreement, being principal of €663,160.02 and interest of €29,857.65. There followed a demand that Mr. McQuillan arrange to make full and final repayment of those sums without delay. The response of Beauchamps dated 6th September, 2012 was that the demand was irrelevant, as the Court would adjudicate the issues before it based on the pleadings already submitted. It was asserted that the letter was an attempt "to remedy defects" in the Debt Proceedings.

Overview of contractual liability of Mr. McQuillan

23. Mr. McQuillan personally has contractual liability to the Bank pursuant to the Loan Agreement. Under Clause 3 thereof, as amended, he undertook to make a capital repayment on 31st July, 2010 of €781,250 and to pay the outstanding capital balance on 31st July, 2012. Each of those repayment obligations was subject to the proviso that the loan and interest accrued would become immediately due and payable on demand by the Bank on the happening of an event of default. The fulfilment of those obligations is not in any way affected by the fact that Mr. McQuillan contracted to give security to the Bank, save and insofar as the security is realised and his indebtedness to the Bank has been partially discharged as a consequence.

24. Mr. McQuillan also contracted to give the Bank security for the loan. His obligations in that regard are to be found in Clause 5 of the Loan Agreement, as amended. The extent to which the Bank has recourse to the assets over which it obtained security from Mr. McQuillan is to be determined primarily by reference to Clause 5. Notwithstanding that Mr. McQuillan's personal liability to the Bank under the Loan Agreement has been reduced to the extent that the Bank has recovered part of the monies owing by Mr. McQuillan out of the realisation of its security, the Debt Proceedings and the Interpleader Proceedings raise different issues. Accordingly, it is necessary to consider each separately. I propose considering the Debt Proceedings first.

The Debt Proceedings

25. The issue on the Debt Proceedings is whether the Court should give summary judgment on foot of the motion for judgment or, alternatively, whether the issue of Mr. McQuillan's personal liability to the Bank should go to plenary hearing. As to the test to be applied in determining that issue, counsel for the Bank referred the Court to the judgment of the High Court (Commercial) delivered by Kelly J. on 3rd June, 2010 in *Allied Irish Banks Plc v. Brian Higgins & Ors*. [2010] IEHC 219. Kelly J. stated:

"The leading case is *Aer Rianta Cpt v. Ryanair Limited* [2001] 4 I.R. 607.

There the test postulated by Hardiman J. was summarised by him by posing the question *"is it very clear that the defendant has no case?".* If the answer is in the affirmative the motion succeeds. If not, it does not. That is the test I propose to apply here.

In the course of his judgment he cited with approval some observations from *National Westminster Bank v. Daniel* [1993] 1 WLR 1453 in the following terms:-

'the mere assertion in an affidavit of a given situation which is to be the basis of a defence did not of itself provide leave to defend: the court had to look at the whole situation to see whether the defendant had satisfied the court that there

is a fair or reasonable probability of the defendants having a real or bona fide defence'."

26. Of the eleven paragraphs in Mr. McQuillan's affidavit sworn on 19th December, 2011, the first ten set out his contention that the Bank has no recourse to half of the proceeds of the realisation of the security which he alleges represents the proceeds of his and Mrs. McQuillan's joint investment in the Knightsbridge Scheme, which are the joint property of himself and Mrs. McQuillan. In the final paragraph he has alleged that the Bank has wrongfully, incorrectly and inappropriately terminated the Loan Agreement in reliance on Clause (o) of the Default Appendix and that he was not in default, since the Bank's construction of the Loan Agreement was wrong. In his affidavit sworn on 3rd February, 2012 he elaborated on his contention that the Bank was not entitled to invoke Clause (o), asserting that the Bank sought to enforce that provision in circumstances where it is alleged that a foreign law governed security agreement had been breached. He made the point that the Bank had purported to interpret the Pledge Agreement, which was a foreign law governed instrument "without the aid of suitably qualified indigenous lawyers", which he asserted was wholly improper.

27. In short, the only ground of defence advanced to challenge Mr. McQuillan's personal liability was that, when the summary proceedings were issued, the balance of the principal had not become due to the Bank because the stipulated repayment date, 31st July, 2012, had not arrived, and the Bank was not entitled to accelerate the repayment date as it purported to do by the letter of demand dated 14th July, 2011. Even if Mr. McQuillan is correct in that assertion, the reality of the situation is that prior to the hearing of the motion for judgment on 31st October, 2012, the date for full and final repayment, 31st July, 2012, had passed and Mr. McQuillan had become personally liable to repay the balance outstanding to the Bank. The balance was automatically repayable without any demand. In reality, all that is left in Mr. McQuillan's defence is his assertion that the letter of demand dated 14th July, 2011 constituted a breach of contract, in respect of which he intends to pursue a claim against the Bank for damages for breach of contract and damage to his professional reputation caused by the Debt Proceedings.

28. The manner in which Mr. McQuillan has drawn the alleged joint ownership of half of the proceeds of the secured assets into the Debt Proceedings is quite ingenious and is based on the manner in which the Bank has set out the basis of its claim on the special indorsement of claim on the summary summons. The Bank has justified the invocation of Clause (o) of the Default Appendix in the indorsement on the following basis:

> "It was the reasonable opinion of the [Bank] that [Mr. McQuillan's] assertion that he is not in fact the beneficial owner of the proceeds of the shares of Carraig Investments SA directly contradicts a warranty given by him in clause 6.1.1 of the Pledge Agreement and is a materially altered circumstance pursuant to the terms of the Default Appendix which justifies immediate repayment of the Facility."

The invocation of Clause (o), it was submitted on behalf of Mr. McQuillan, involves the application of a document which is governed by the law of Luxembourg and there is no evidence of Luxembourg law before the Court. Counsel for Mr. McQuillan also argued that the indorsement did not follow the basic principle as to what is required for a valid indorsement as outlined in Delany & McGrath on *Civil Procedure in the Superior Courts* (3rd Ed.) at para. 26 – 15. In my view, that proposition is not correct.

29. The Bank's answer to Mr. McQuillan's resistance to judgment contains two elements.

30. The first is addressing the question whether, to the extent that the Court is required to consider the Pledge Agreement, the Court can do so without evidence of foreign law and, if it cannot, who bears the burden of adducing evidence of foreign law? In this connection, counsel for the Bank relied on the following passage from the judgment of Walsh J. delivering judgment in the Supreme Court in *Kutchera v. Buckingham International Holdings Ltd*. [1988] I.R. 61 (at p. 68):

> "If an Irish court is called upon to apply any part of a foreign law the procedures for doing so are already well settled. See the decisions of the former Supreme Court of Justice in *O'Callaghan v. O'Sullivan* [1925] 1 I.R. 90 and *MacNamara v. Owners of the Steamship "Hatteras"* [1933] I.R. 675. These cases quite clearly establish that in Irish law foreign law must generally be proved by expert evidence. The burden of proving foreign law lies upon the party who bases a claim or a defence upon the foreign law, and if that party produces no evidence, or only insufficient evidence of the foreign law, the court applies Irish law. These cases also establish that if there is any conflicting evidence as to what is the foreign law, or what is the correct interpretation of the foreign law, then it is a matter for the Irish court to decide as between the conflicting expert testimonies. The possibility that some foreign law may need to be applied in a case cannot be a justification for an Irish court refusing to hear the case."

31. The second element is that Clause (o) of the Default Appendix was not wrongly invoked and that Mr. McQuillan has no cause of action arising out of its invocation. In support of his contention that Clause (o) was not wrongly invoked, counsel for the Bank cited two recent authorities of the United Kingdom courts on the implications of the giving of an invalid notice of acceleration of repayment of a debt based on the occurrence of a materially prejudicial event of default. The earlier is the decision of the House of Lords in *Concord Trust v. The Law Debenture Trust Corporation Plc* [2005] 1 WLR 1591. The passages from the speech of Lord Scott of Foscote relied on by counsel for the Bank are summarised as follows in the headnote (at p. 1592):

> ". . . since there was neither an express nor implied contractual term in the trust deed that the trustee should not give an invalid notice of acceleration and, absent any such contractual requirement, no duty of care was owed by the trustee to the company in relation to the assertion of an event of default or the giving of a notice of acceleration, nor was there any other reasonably arguable cause of action open to the company against the trustee under English law".

The later authority *BNP Paribas & Ors. v. Yukos Oil Company* [2005] EWHC 1321 was a decision of the Chancery Division of the High Court in which Evans-Lombe J. stated (at para. 23):

> ". . . in order to succeed with its proposed defence in the absence of any appropriate express term, Yukos must show that there is to be implied into the terms of the Loan Agreement a term that the banks will not give notice of an alleged event of default in circumstances where their resolution to do so is unreasonable or otherwise does not properly arise under the provisions of clause 19. In *Concord Trust v. Law Debenture Trust Corporation* . . . the House of Lords concluded that a term requiring that a lender do not make an invalid demand under a loan agreement is not, without more, to be implied into such an agreement because such term is not necessary for its business efficacy, see *per* Lord Scott at paragraph 30 *et seq."*

The argument made by counsel for the Bank was that those authorities should persuade the Court that Mr. McQuillan has no prospect of success in defending the Debt Proceedings on the basis of his allegation that Clause (o) was wrongly invoked.

32. I have come to the conclusion that Mr. McQuillan has no prospect of successfully defending the Debt Proceedings. The Loan

Agreement is governed by Irish law. Mr. McQuillan is contractually bound by the provisions of the Default Appendix, including Clause (o). In determining whether the Bank was entitled to invoke clause (o), the question which arises is whether the Bank's opinion that, by 14th July, 2011, circumstances had altered materially since the loan was advanced to Mr. McQuillan or such new information had come to light as would justify requesting the immediate repayment of the loan, was reasonable. I consider that that question can be answered in the affirmative without having to consider the provisions of the Pledge Agreement. In the Loan Agreement, Mr. McQuillan expressly contracted that the Bank would have by way of security for the advance to be made to him a "first ranking fixed security over all securities" held by or to be acquired by Quinlan in Carraig Investments and Carraig Beag as his nominee. He had clearly resiled from that position approximately a year before the demand dated the 14th July, 2011 was made. That being the case, the opinion of the Bank that circumstances had altered materially was reasonable and justified.

33. In my view, it was not necessary for the Bank to invoke the provision in Clause 6.1.1 of the Pledge Agreement as the basis for a material alteration in the circumstances which arose. However, even if it was so necessary, the burden of proving that Clause 6.1.1 means something in Luxembourg law other than its plain meaning, namely, that it was a representation by Mr. McQuillan that he was the beneficial owner of the "assets" as defined, lay on Mr. McQuillan. Mr. McQuillan adduced no evidence to discharge that burden.

34. Applying the appropriate test, in my view, it is very clear that Mr. McQuillan has no case in defence of the Debt Proceedings. Therefore, the Bank is entitled to summary judgment. There will be an order for judgment for the amount now due by Mr. McQuillan to the Bank on foot of the Loan Agreement for principal and interest when the figures are updated.

The Interpleader Proceedings

35. Relief by way of interpleader is governed by Order 57 of the Rules of the Superior Courts and may be granted in either of two circumstances, one being:

> "where the person seeking relief . . . is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this Order called the claimants) making adverse claims thereto."

Counsel for Avestus referred the Court to the explanation of interpleader proceedings contained in *State (Murphy) v. Deale* [1964] I.R. 40 (at p. 44) where it was stated:

> "Interpleader is a civil process whereby a person, in possession of property or owing money which is or may be claimed adversely by two or more persons (to one or other of whom alone he can be liable), is enabled subject to certain conditions to be relieved from liability to the claimants or either of them with regard to the disposition of the property or money. "

36. Rule 2 of Order 57 provides that the applicant for an interpleader order must satisfy the Court:

> (a) that the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; and
>
> (b) that the applicant does not collude with any of the claimants; and
>
> (c) that the applicant is willing to pay or transfer the subject-matter into Court or to dispose of it as the Court may direct.

Avestus has satisfied the Court on each of the foregoing matters and, accordingly, I consider that it is appropriate to grant the relief sought by Avestus.

37. However, the question which remains, on the basis of submissions made on behalf of the Bank, is whether the Court can go further and determine who is entitled to the balance of the proceeds of the realisation of the Knightsbridge Scheme held by Avestus: whether it is the Bank or, alternatively, Mr. McQuillan and Mrs. McQuillan jointly.

38. The outcome of that issue, in my view, turns primarily, albeit perhaps not exclusively, on –

> (a) the construction of Clause 5 of the Loan Agreement;
>
> (b) whether the Pledge Agreement was properly executed on foot of the power of attorney given by Mr. McQuillan, the date of which is unclear;
>
> (c) if the power of attorney was properly executed, the construction of the Pledge Agreement and, in particular, the identification of the assets pledged;
>
> (d) whether, with the authority of Mr. McQuillan, the undertaking dated 9th June, 2010 given by Avestus to the Bank replaced the pledge; and
>
> (e) the proper construction of the undertaking.

39. Rule 8 of Order 57 provides:

> "The Court may, with the consent of both claimants, or on the request of any claimant, if, having regard to the value of the subject matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just."

40. On the basis of the evidence before the Court, as I understand it, the subject matter in dispute, as of April 2011, was the sum of €709,626.16, which is held in a current account in Allied Irish Banks in the name of Avestus and entitled "Knightsbridge Client Account – In trust for Robert McQuillan Member of Knightsbridge Syndicate". By letter dated 8th April, 2011, AIB confirmed that it would designate the account in its record in such a way as to make it clear that the clients' funds do not belong to Avestus. Accordingly, as the subject matter in dispute is a substantial sum of money, I have come to the conclusion that it would not be appropriate for the Court to act on the request of the Bank solely to determine the beneficial entitlement to those monies.

41. Therefore, I propose making an order directing Avestus to pay the monies in question into Court. Further, I propose directing that an issue be tried as between the Bank, as plaintiff, and Mr. McQuillan and Mrs. McQuillan, as defendants, to determine who is entitled to the monies lodged in Court. I would propose case managing the issue to ensure that it is dealt with expeditiously.

42. A decision on the Interpleader Proceedings will not impact on any claim which either the Bank or Mr. McQuillan and Mrs. McQuillan may wish to pursue against Avestus and the position of the parties is reserved in that regard. However, I consider that it would not be appropriate to join Avestus as a party to the issue.

Summary of orders

43. In the Debt Proceedings there will be judgment in favour of the Bank for the balance due to it by Mr. McQuillan on the loan account, when that sum is quantified.

44. In relation to the Interpleader Proceedings, Avestus will be granted the interpleader relief sought and directed to pay the subject matter of the dispute into Court, as indicated at para. 41 above. There will also be directions as to the trial of an issue between the Bank and Mr. McQuillan and Mrs. McQuillan on the lines indicated at para. 41 above.

45. Both proceedings will be adjourned for a short period to enable the parties consider the implications of the orders which are to be made.