Neutral Citation: [2015] IEHC 199

THE HIGH COURT

COMMERCIAL

[2011/1548 S]

[2011/86 COM]

BETWEEN

LSREF III STONE INVESTMENTS LIMITED

PLAINTIFF

AND

JOHN MORRISSEY

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered the 11th day of March, 2015

Introduction

1. This judgment is the fifth judgment that will be delivered by the High Court in these proceedings. It is a judgment in respect of motions to strike out in whole or in part an amended defence and counterclaim delivered on 16th January, 2015 ("the 2015 Amended Defence and Counterclaim"), brought by the plaintiff and a motion to stay the proceedings ("the Debt proceedings") or to consolidate the proceedings with new proceedings issued in 2014 *entitled John Morrissey v. Irish Bank Resolution Corporation Limited (in Special Liquidation), LSREF III Stone Investments Ltd., Kieran Wallis, Eamonn Richardson, The Minister for Finance, Ireland and The Attorney General,* Rec. No. 2014/9156 P ("the New proceedings") brought by the defendant. There was also a motion for discovery brought by the defendant. The 2015 Amended Defence and Counterclaim is attached to this judgment as a schedule and this judgment should be read referencing the pleading where necessary. Before dealing with the issues raised in these motions it is necessary to set out a history of the proceedings to date.

History of the proceedings

2. Anglo Irish Bank Corporation Ltd. ("Anglo" or "the Bank") instituted proceedings by way of summary summons on 13th April, 2011, seeking to recover judgment in the sum of €36 million from the defendant ("Mr. Morrissey") arising on foot of various facilities entered into between the Bank and Mr. Morrissey. The proceedings were entered into the Commercial List of the High Court by Order dated 23rd May, 2011. There was an exchange of affidavits and Mr. Morrissey was granted leave to defend the proceedings and the matter was adjourned to plenary hearing. This meant that the case henceforth was subject to case management by the Commercial Court and the defendant was confined to the grounds upon which he had been given liberty to defend the proceedings in his defence. At a hearing on 24th October, 2011, Kelly J. refused to allow the defendant to deliver a very wide ranging defence. Among many pleas it was pleaded that the Bank should have known in 2008 and 2009 that it was insolvent and that this afforded a defence to the claim for the monies advanced pursuant to the facilities. The vast majority of the Defence and Counterclaim Mr. Morrissey sought to deliver raised historical issues in the Bank relating to its general business conduct and its solvency to which the plaintiff took exception. Kelly J. held that:-

> *"This defence is not going to be allowed stand in this division of the Court because I am not going to be sent up blind alleys by the Defendant to start having to look at matters that can have no bearing whatsoever on such line of defence as he may have and this is entirely contrary to the whole notion of trying to have a commercial court that is to deal with commercial disputes.*
>
> *There may well be a lot of people interested in some of the issues that you raise but they are not relevant or pertinent to the enquiry that this court is obliged to undertaking having a regard to the parameters of the claim."*

3. Kelly J. ordered Mr. Morrissey to deliver an amended defence and counterclaim which was to identify and focus on the true matters and issues in issue between the parties. He expressly ruled out a defence based on wider complaints about the conduct and role of Anglo generally. This ruling still applies to the Debt proceedings.

4. On 8th November, 2011, an "Unless Order" was made by Kelly J. directing Mr. Morrissey to deliver his defence by 2:00pm on 21st November, 2011. The Defence and Counterclaim was delivered at 2:29pm and thus a judgment was automatically entered. This judgment was set aside on 8th December, 2011, and Irish Bank Resolution Corporation Ltd. ("IBRC") was substituted as plaintiff.

5. On 23rd January, 2012, there was a further directions hearing before Kelly J. It was noted that there was agreement in principle between the parties to a modular trial. Kelly J. directed that two issues were to be determined in advance of the determination of any other issues (if necessary) in the proceedings:-

> (a) Whether the plaintiff was entitled to make demands on foot of the loan facility of February, 2009 as it did; and
>
> (b) Whether the relationship between the plaintiff and the defendant went beyond that of a contractual relationship such that a fiduciary relationship existed between the plaintiff and the defendant.

6. The modular trial did not take place until a year later and was heard over 13 days between 22nd January and 20th February, 2013, by Finlay Geoghegan J. On 14th May, 2013, she delivered her reserved judgement which ran to some 66 pages. At para. 5 she identified the defences pleaded in Mr. Morrissey's Defence and Counterclaim relevant to the issues to be determined in the module before her as:-

> *"The relevant defences pleaded in Mr. Morrissey's defence and counterclaim relevant to the issues to be determined in this module in summary are:*
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> *(i) the Bank, in making demand for repayment of all monies then due, was in breach of an express or implied term*

of the then contractual arrangements between the Bank and Mr. Morrissey; and

(ii) the Bank, in January 2010, was estopped from demanding, calling in or terminating Mr. Morrissey's then facilities;

(iii) the representations, warranties, conduct, advice and consulting services provided by the Bank to Mr. Morrissey since 2000 created a fiduciary relationship between the Bank and Mr. Morrissey."

7. Thus the first line of defence involved construing the loan facility documents and assessing whether there were express or implied terms which prevented the Bank from exercising its right of demand in a certain way. The second line of defence was that there had been various representations giving rise to an estoppel and the third was that there had been a fiduciary relationship between the Bank and Mr. Morrissey giving rise to various alleged duties of care on the part of the Bank which Mr. Morrissey claimed had been breached.

8. She found as a fact that the express terms of the contractual document entitled the Bank to make demands on foot of the loan facility of February, 2009 as it did in January, 2010. Three implied terms were canvassed in evidence and in argument before her. She held that there were no implied terms of the sort intended for:-

"Counsel for Mr. Morrissey also submitted that there was an implied term of the 2009 Agreement to the effect that once interest was paid in accordance with the Agreement, the facilities would be "rolled over" and repayment would not be demanded. It is well established that the courts must be extremely cautious about implying terms into a commercial agreement (see Tradax (Ireland) Ltd. v. Irish Grain Board Ltd. [1984] I.R. 1). In my judgment, there is no factual basis on the evidence adduced which would permit the implication of such a term into the 2009 Agreement. The submission is in part based upon an incorrect assessment of the facts pertaining to the facilities granted by facility letters dated 21st December, 2006, 27th July, 2007, 22nd October, 2007 and 16th January, 2008. In each instance, the subsequent facility was granted prior to the repayment date of the relevant preceding facility which it replaced. There had not been a "rollover" of earlier facilities as submitted. Further, if the Court were to imply the term as contended for, it would be implying a term which is inconsistent with the express terms of the contract, which as a general principle the courts will not do (see Sweeney v. Duggan [1997] 2 I.R. 531 at p. 539 to 540).

113. Counsel for Mr. Morrissey, in submission, sought to rely on two further implied terms which they contended meant that the Bank was in breach of the 2009 Agreement in demanding repayment in January, 2010. In respect of both submissions, counsel for the Bank objected to the Court considering the submission upon the basis that no such implied term had been pleaded. A secondary submission was made by counsel for the Bank that a basis for the implied terms was not made out on the facts.

114. The first was an alleged implied term as to how the relevant manager in the Bank would and would not behave in making a submission in relation to Mr. Morrissey's account to the credit committee. The purpose of contending for such an implied term was to allege that the submissions made by Mr. Gilmartin to the credit committee in December, 2009, which resulted in sanction for the appointment of a receiver, were in breach of this implied term. No such implied term was pleaded, or referred to in replies to particulars or in the outline written submissions in advance of the hearing. They were only referred to in the closing written submissions. In my judgment, it would be an unfair procedure if the Court were now to permit Mr. Morrissey to seek to rely upon such a term. I would add that I am also of the view that on the evidence there is no basis for implying such a term into the 2009 Agreement.

115. The second term sought to be implied into the 2009 Agreement, was an implied term put during the hearing in a number of different ways, one of which was that "the Bank would not intentionally break the law by systemic acts of fraud and other illegality directed towards its Borrowers, State agencies and the wider community, resulting in an effective attack on the financial stability of the State, and the consequent making of a demand for immediate payment on the basis of a fundamentally transformed reality". Similarly, in my judgment, it would be an unfair procedure to permit such a case to be made in the absence of same being pleaded. I would, however, note that the only evidence in relation to the general standing of the Bank was the fact that it was nationalised on 15th January, 2009, i.e. prior to the conclusion of the 2009 Agreement and also the passing of the Irish Bank Resolution Corporation Act 2013, and the appointment of the special liquidator to the plaintiff on 7th February, 2013. There was no evidence before the Court of activities of the Bank other than its lending to Mr. Morrissey."

Thus she rejected all arguments advanced in relation to alleged implied terms in the contract on the basis of the evidence or the lack of it before her and on the absence of pleading and the failure to amend or to apply to amend the pleadings.

9. At para. 117 she stated:-

"There is one further case sought to be made in closing on behalf of Mr. Morrissey which, likewise, was not pleaded. It was that in making demand for repayment in January 2010, the Bank acted in breach of constitutional rights of Mr. Morrissey. Any such case would have had to be pleaded if it was to be pursued. In the absence of any pleading or any application prior to the commencement of the hearing to amend the pleadings to include such a claim I do not propose considering the submission made."

At para. 121 of her judgment she concluded:-

"Accordingly, my conclusion is that there was no subsisting arrangement or agreement between the Bank and Mr. Morrissey in January, 2010 according to which the Bank had agreed or represented that it would not demand repayment of the facilities granted to Mr. Morrissey pursuant to the 2009 Agreement. It follows that in January, 2010, the contractual terms between the Bank and Mr. Morrissey were exclusively those contained in the 2009 Agreement i.e. the facility letter of 2nd January, 2009, and the General Conditions of the Bank as accepted by Mr. Morrissey on 5th February, 2009."

10. She found as a fact that the Bank did not represent to Mr. Morrissey that it would not demand repayment on any date after 31st December, 2009. Based on that finding she rejected his defence that the Bank was estopped from making demand for repayment in January, 2010. Thus, she exhaustively considered all of the breach of contract defences based upon express terms, implied terms and representations allegedly made. She ruled on the facts and she rejected the defences advanced either on the basis that Mr. Morrissey had failed to establish the factual basis for same or on the basis that certain defences had not been pleaded and there had

been no application to amend the pleadings and that to allow such arguments to be adduced in those circumstances would be unfair to the Bank.

11. At paras. 139 and 141 she dealt with the issue as to whether or not there was a fiduciary relationship between the Bank and Mr. Morrissey:-

> *"In my judgment, on the evidence before me, the communications between the Bank and Mr. Morrissey in the years 2000 to 2009 did not include any advice sought from or advice proffered by the Bank or any other steps undertaken which took the relationship outside of the normal commercial relationship of a lending bank and borrowing by an experienced entrepreneur or business person. Each, throughout the period at different points in time was keen to do business with each other. However, the reason for which each was keen to do such business was that each perceived it to be in their respective commercial interests to do business with the other. Regrettably, from Mr. Morrissey's perspective, with the benefit of hindsight, he made a decision in 2006 to make a fundamental change to the terms upon which he would borrow from the Bank i.e. a change to an interest only annual demand facility, and further, in 2007, to move borrowing from other institutions to the Bank. I conclude on the evidence that those were decisions made by Mr. Morrissey at the time in what he then believed to be his own best interests and to his commercial advantage. Further, the Bank, at the relevant time, again agreed to grant the facilities upon terms which it considered to be in its commercial interest…*
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> *141. Accordingly, I have concluded on the second issue that the relationship between the plaintiff and the defendant did not go beyond that of a contractual relationship and that a fiduciary relationship between the plaintiff and the defendant did not exist at any time prior to the making of the demand in January, 2010."*

12. On 7th February, 2013, while the modular trial was at hearing the Irish Bank Resolution Corporation Act 2013 was enacted and the Minister for Finance made the Special Liquidation Order pursuant to s. 4 of the Act appointing Mr. Kieran Wallace and Mr. Eamonn Richardson as joint special liquidators ("the Special Liquidators"). Counsel for the Bank informed the Court on 8th February, 2013, that they had been instructed by the Special Liquidators to continue the proceedings against Mr. Morrissey and to continue the hearing. The Court agreed that there would be a break prior to the closing submissions for the purpose *inter alia* of Mr. Morrissey and his counsel and solicitor considering the impact of the Act and the Order on the proceedings and the issues being determined pursuant to the Order of 23rd January, 2012. On 19th February, 2013, day 12 of the hearing, the closing submissions commenced. At the outset, counsel for Mr. Morrissey made 3 additional submissions. First, that the Bank's claim was now stayed pursuant to s.6 of the Act; that if not, the Special Liquidators were not entitled to continue the claim against Mr. Morrissey and finally that the Court should exercise its discretion not to determine the two issues set down for hearing by Order of 23rd January, 2012, by reason of the passing of the Act of 2013. Finlay Geoghegan J. rejected each of those arguments. She determined following the modular trial that:-

> (a) The former plaintiff (the Bank) was entitled to make demand on Mr. Morrissey pursuant to the facilities granted in February, 2009 as it did in January, 2010.
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> (b) The relationship between the Bank and Mr. Morrissey did not go beyond that of a contractual relationship such that a fiduciary relationship existed between the Bank and Mr. Morrissey.

13. The parties were given time to consider the reserved judgment and on 31st May, 2013, Finlay Geoghegan J. adjourned the matter to 21st June, 2013, for the purpose of determining:-

> (a) What order should be made following the judgment delivered on 14th May, 2013; and
>
> (b) What issues remained to be determined in the proceedings.

Mr. Morrissey was given liberty to issue a motion seeking to amend his pleadings.

14. On 21st June, 2013, Finlay Geoghegan J. refused the application by Mr. Morrissey to amend his Defence and Counterclaim. The amendments sought related exclusively to the enactment of the Irish Bank Resolution Corporation Act 2013, the Directive 2001/24/EC of the European Parliament and of the Council of 4th April, 2001, on the Reorganisation and Winding Up of Credit Institutions. In support of his application to amend his Defence and Counterclaim Mr. Morrissey argued that a separate module was necessary that addressed the issue of the dishonest course of conduct of the plaintiff's predecessor in title, Anglo as, it was argued, such egregious conduct afforded Mr. Morrissey a defence to the claim. It was also argued that it buttressed his Counterclaim. Details of the conduct complained of were particularised in the Draft Amended Defence and Counterclaim.

15. There was a lengthy hearing before Finlay Geoghegan J. in relation to the remaining matters to be determined in the proceedings. She reserved her judgment and delivered a supplemental judgment on 12th November, 2013. She noted that Mr. Morrissey's counsel had argued that:-

> *"As appears from the above, the basis upon which it is submitted on behalf of the defendant that the Court should permit a future module in relation to the alleged wrongful conduct of the plaintiff is that such "egregious conduct affords the defendant a defence to the claim". The submission does not identify, however, where in the existing amended defence and counterclaim matters are pleaded in relation to the alleged wrongful conduct which, independently of the alleged fiduciary relationship or duty (now held not to exist), could arguably provide a defence to the plaintiff's claim or constitute a cause of action in the counterclaim giving rise to a claim for damages against the plaintiff which could be the subject of a setoff. Other than in relation to the specific matters referred to by counsel for the defendant at the hearing and set out below, no existing pleading, either in the defence or counterclaim has been identified which could, independently of the alleged fiduciary relationship, give rise to an arguable defence to the plaintiff's claim or a cause of action giving rise to a claim for damages as pleaded in the counterclaim.*
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> *12. At the hearing, counsel for the defendant also emphasised by reference to the correspondence passing between the solicitors in December 2011 and January 2012, that there was no agreement that if the issue as to the existence or not of a fiduciary relationship between the plaintiff and defendant was determined in favour of the plaintiff that such decision would bring to an end the remaining defences and counterclaims of the defendant. He then sought to identify a number of issues which he submitted remained to be determined in the proceedings, notwithstanding the decision of the Court on the two issues in the May judgment. These may be summarised as follows:*
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> *(i) An issue as to the quantum of the interest claimed by reference, inter alia, to paragraph 11 of the defence.*

(ii) Issues in relation to an alleged defence of breach of trust and confidence and related prayers for relief at paragraphs 5 and 8 of the counterclaim.

(iii) Alleged misrepresentation by the plaintiff, pleaded as a defence in paragraphs 44 and 46 and the related claim for damages for deceit in paragraph 8 of the prayer for relief in the counterclaim.

(iv) The matters pleaded as a defence in relation to the negotiations concerning TPG at paragraphs 45 to 49 (bis) inclusive.

(v) The matters pleaded as a defence in relation to the investment in shares at paragraphs 50 (bis) to 53 inclusive.

16. Finlay Geoghegan J. held that Mr. Morrissey was entitled to have an issued tried as to the amount of interest charged by the Bank on the loan facilities. This was on the basis of the specific plea at para. 11 of the Defence which provided:-

"The Accounts and Bank Statements of the Plaintiff on foot of which the sums claimed herein are inaccurate. Interest on foot of the Facility Letter of 2009 and all preceding Facility Letters were charged at the Plaintiff's stated rate which wrongfully and unlawfully included an undisclosed additional margin over the EURIBOR rate."

17. She expressly stated at para. 20:-

"However, the defendant is only entitled to dispute the amount of the plaintiff's claim and the matters pleaded in paragraph 11 are the only grounds upon which the defendant is now entitled to dispute or challenge the amount of interest included in the amounts claimed on the summary summons."

18. Mr. Morrissey's counsel submitted that defences raised in relation to alleged breach of trust of confidence and a declaration that the Bank was guilty of equitable fraud and an alternative claim to damages for breach of trust remained to be decided. The learned trial judge looked at the substance of the Defence and the Counterclaim and she held as follows:-

"The pleadings, in paragraphs 1, 4 and 7 of the defence in relation to an alleged relationship of trust and confidence are, in my judgment, pleadings which relate to the alleged fiduciary relationship between the plaintiff and the defendant, which has already been determined. There is no relationship of trust pleaded, other than the alleged fiduciary relationship nor any specific facts which could constitute a cause of action giving rise to a claim for damages for breach of trust as claimed in the counterclaim other than pursuant to the alleged fiduciary relationship. Counsel did not identify any pleading in the body of the counterclaim (and, on my review of the counterclaim, he could not so do) which sets out a basis for cause of action which, arguably, would entitle the defendant to a declaration that the plaintiff is guilty of equitable fraud. Accordingly, I have concluded that there are no further issues to be determined on the basis of this submission."

19. Mr. Morrissey also argued that he had pleaded against the Bank a claim in relation to alleged misrepresentation which remained to be determined. Finlay Geoghegan J. considered the relevant pleas in the Defence and Counterclaim and she held that the defendant had not pleaded a cause of action entitling him to pursue a claim for damages for false representation or damages for deceit independently of the alleged fiduciary relationship. She was referred to para. 44 of the Defence and Counterclaim and she concluded:-

"On a fair reading of paragraph 44, it appears to be a claim based upon four cumulative allegations, one of which is the alleged fiduciary relationship between the plaintiff and the defendant. Secondly, insofar as there is a reference to false representations allegedly made to the defendant by the plaintiff, they are stated to be those pleaded in the counterclaim. There is no express pleading of a false representation in the counterclaim. Insofar as paragraph 4 of the counterclaim pleads that the defendant misled the defendant as to its solvency and its compliance with the regulatory regime, that plea is made in the context of and as part of several pleas, all of which relate to the alleged fiduciary relationship between the plaintiff and the defendant. This is exemplified by the particulars included in the counterclaim which are particulars of non-disclosure and appear to be pleaded in support of paragraph 5 of the counterclaim which alleges that the plaintiff, in breach of the fiduciary duty owed to the defendant, did not disclose all relevant information to the defendant necessary pursuant to the existence of a fiduciary relationship."

20. At para. 28 of her judgment she held that Mr. Morrissey in his Defence and Counterclaim had not pleaded a cause of action in relation to alleged false representations which might give rise to a claim for damages for deceit independently of the alleged fiduciary relationship between Mr. Morrissey and the Bank and therefore it followed from her first judgment that there was no further issue to be determined on existing pleadings under this heading. Two further matters relating to negotiations conducted by Mr. Morrissey with or on behalf of TGP with the Bank and in relation to investment in shares were likewise rejected by the learned trial judge. They were predicated on the existence of fiduciary relationship and she had found that there was no such fiduciary relationship between Mr. Morrissey and the Bank. Thus, these possible defences were no longer available to Mr. Morrissey.

21. At para. 34 she dismissed the entirety of the Counterclaim as follows:-

"In addition to the above matters, I wish to add that I have considered the entirety of the counterclaim pleaded in the amended defence and counterclaim delivered on 21st November, 2011. In my judgment, the decisions on the two issues in the May judgment determine all issues which are pleaded in the counterclaim in favour of the plaintiff and against the defendant. Paragraph 1 of the counterclaim, in asserting that the plaintiff was estopped from calling in or terminating the facilities, has been determined by the decision on the first issue in the May judgment. The remainder of the counterclaim, commencing with paragraph 2, is, on a fair reading of the matters pleaded, all dependant upon the plea that the plaintiff and the defendant had a fiduciary relationship. In substance, the causes of action pleaded relate to breaches of the alleged fiduciary relationship. There is no cause of action pleaded based upon any alleged duty of care owed by the plaintiff to the defendant pursuant simply to a banker/customer relationship or any relationship other than a fiduciary one. . Hence, it follows from the May judgment and this judgment that the counterclaim of the defendant must now be dismissed."

22. She noted that Mr. Morrissey had admitted that the various loans were made to him and that there was no defence remaining to be determined in relation to the plaintiff's entitlement to recover the amounts loaned by the Bank to Mr. Morrissey. She held he was entitled to deal with the matters raised in para. 11 of his Defence in relation to interest charged. She concluded that the only issue which remained to be determined in the proceedings was the amount in which the plaintiff was entitled to judgment against the defendant and that the only issues which remained to be determined in relation to the amount in which the plaintiff was entitled to

judgment were:-

> *"(i) the defendant's dispute in relation to the amount of interest charged upon the facilities upon the grounds set out in paragraph 11 of the defence; and*
>
> *(ii) The plaintiff's proof of the amounts for which the defendant should be given credit by reason of realisations made by the receiver less the deduction of any expenses permitted in accordance with the relevant security documents."*

23. There followed a number of hearings when the learned trial judge gave directions in relation to the trial of these two last outstanding matters. On 2nd May, 2014, counsel for the plaintiff informed the Court that an agreement for the sale of loans by the plaintiff, including the facilities the subject matter of the proceedings, had been entered into at the end of March, 2014 and that the sale was due to complete on 11th July, 2014. Mr. Morrissey responded by issuing a motion which was heard by Finlay Geoghegan J. on 27th May, 2014. He sought orders vacating or staying the trial *inter alia* upon the basis that both the entering into the Loan Sale Deed and the various steps which had been taken to bring on the hearing were an abuse of process and submissions were made in relation to probable maintenance and champerty by reasons of the terms or the existence of the Loan Sale Deed. She rejected all submissions that there had been an interference with the judicial process, abuse of process or any deliberate attempt on behalf of the plaintiff to bring forward a trial date for the remaining issues in the proceedings as being entirely without foundation. She directed that the plaintiff produce to Mr. Morrissey in advance of the hearing on 3rd June, 2014, a copy of the Loan Sale Deed redacted of all commercially sensitive and confidential information which did not relate to:-

> (1) The nature of the interest in the loans and related rights of action being sold or transferred pursuant to the deed.
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> (2) The position of the plaintiff or the vendor in relation to the loans pending completion of the sale.
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> (3) The respective rights and obligations of the vendor or plaintiff, if the plaintiff is not the vendor and purchaser, whether monetary or otherwise in relation to the rights of action the subject of the Loan Sale Deed both prior to and after completion of the sale.

24. She noted that the entering into the Loan Sale Deed undoubtedly altered the factual position and raised in her judgment an issue that the plaintiff had to satisfy the Court on: that it, notwithstanding the Loan Sale Deed, continued to be a person to whom the defendant is now bound to repay the monies. She said that that potentially depended on the terms of the Loan Sale Deed. In accordance with the Commercial Court practice relevant evidence upon which the plaintiff will be relying which would include the relevant provisions of the Loan Sale Deed were to be produced to the defendant in advance of the hearing. She said that by directing that the plaintiff produce the redacted copy in the form she indicated by Thursday at 5:00pm counsel for Mr. Morrissey will have a reasonable opportunity of considering same in advance of the hearing which had been fixed for the Tuesday thereafter.

25. She said she was not expressing a view on that occasion on Mr. Morrissey's submission that the Loan Sale Deed constituted or probably constituted maintenance or champerty as it would not be appropriate to do so in the absence of knowing the relevant terms of the deed. She permitted Mr. Morrissey to raise certain limited issues at the hearing on 3rd June, 2014, in relation to the Loan Sale Deed. She directed that the plaintiff was to provide Mr. Morrissey with supplementary submissions as to why the existence of the Loan Sale Deed did not affect the plaintiff's entitlement to continue with the proceedings and to seek judgment in its favour against Mr. Morrissey as well as furnishing him with the redacted copy of the Loan Sale Deed. She directed that Mr. Morrissey should furnish supplementary submissions outlining any legal objection he was making by reason of the existence of the Loan Sale Deed to the plaintiff now being entitled to obtain judgment against him. She permitted Mr. Morrissey to pursue any legally justified objection at the hearing on 3rd June, 2014.

26. The issue in relation to the alleged overcharging of interest (referred to as the issue of quantum) was heard by the Court on four days: 3rd, 4th 5th and 19th June, 2014, and the learned trial judge reserved her judgment until 29th October, 2014.

27. Her judgment on the quantum due on the facilities dated 29th October, 2014, ("the Quantum Judgment") was 38 pages long. She dealt with the procedural history of the matter and with the submissions raised at the hearings following the entering into the Loan Sale Agreement of March, 2014. At para. 31 she stated she had permitted Mr. Morrissey to pursue the allegation of maintenance and champerty once the redacted Loan Sale Agreement had been produced to him in accordance with the Order of 27th May, 2014:-

> *"By reason of the loan sale agreement, there were two additional issues then added to the issues for determination on 3rd June:*
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> *(i) The plaintiff's continuing entitlement to obtain judgment against the defendant, notwithstanding the sale of the underlying facilities to which the proceedings relate in the loan sale agreement of March 2014, and*
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> *(ii) the defendant's submission that the continuation of the proceedings subseuquent to the loan sale agreement were unlawful by reason of the alleged maintenance and champerty."*

28. At para. 36 she noted that the hearings fell into two parts:-

> *"The first were issues pertaining to the quantum of the liability of the defendant on the facilities which he accepts he was given by Anglo, culminating in the facility letter of 5th February 2009 i.e. the two issues identified in my supplemental judgment of 12th November 2013, and the three issues in the ruling of 2nd May 2014, set out above. Secondly, issues pertaining to the entitlement of the plaintiff to obtain judgment against the defendant for whatever amount was determined as due on the facilities advanced to the defendant. At the commencement of the hearing, these second set of issues were the plaintiff's proof that it remained entitled to obtain judgment against the defendant, notwithstanding the terms of the loan sale agreement of March 2014; the defendant's objection to the legality of the continuation of the proceedings after March 2014, upon the grounds that they contravened the prohibition on maintenance and champerty, and the defendant's objection to the Court determining these issues without production of an unredacted copy of the loan sale agreement or by reason of the extent of the redactions made to the loan sale agreement produced by the defendant."*

29. Finlay Geoghegan J. noted that Mr. Morrissey's counsel had objected to the manner in which the Loan Sale Agreement had been redacted and drew attention to clause 11.1.8 of the Deed which referred to litigation in respect of an asset, the subject matter of the sale, part of which was redacted. He also made submissions to the effect that the continuation of the proceedings by the plaintiff subsequent to the Loan Sale Agreement was illegal as constituting maintenance or champerty and it was further submitted that the

Court was not in a position to fully determine that issue by reason, *inter alia* of the redactions made to clause 11.1.8 . The judgment of 29th October, 2014, was confined to a determination of the amount due on the facility the subject matter of the proceedings as at 3rd June, 2014, and insofar as was necessary clarification of any outstanding issues in the proceedings. She did not determine all of the matters argued before her in June, 2014 in that judgment as she was obliged to deliver a separate judgment in relation to a motion for the substitution of the current plaintiff LSREF III Stone Investments Ltd. ("Stone") as plaintiff in the proceedings.

30. In dealing with the quantum issue the learned trial judge noted that the investigation required a very significant forensic examination of all accounts and facilities of Mr. Morrissey with the Bank from the year 2000 and a recalculation of the interest which ought to have been charged in accordance with the facility letters and the general conditions attached thereto. During the course of the hearing the plaintiff acknowledged that errors had been made in the computation of the interest giving rise to an overcharged figure. She set out the evidence of the witnesses for the plaintiff and Mr. Morrissey and the efforts to reach agreement of the part of their respective experts in considerable detail. She held that the facility letters and general conditions applicable to Mr. Morrissey's facilities for 2003 required the application of an interest calculated upon a 360/360 day convention whereas in fact the Bank and its expert used a 365/360 or actual/360 convention giving rise to an overcharge of interest. This led to the plaintiff charging the defendant interest for 5 additional days in each year since July, 2003. She then deducted an amount of €143,676.64 to reflect the amount of overcharged interest claimed in the proceedings by the Bank. She nowhere indicated that she thought the Bank had acted *male fide* either in the original overcharging of the interest or in the proceedings or in maintaining its defence to the claimed overcharging of interest upon which the Mr. Morrissey was partially successful. She concluded her judgment as follows:-

> *"The Court's decision is that in accordance with this judgment, for the purposes of the final determination of these proceedings in the High Court, the amount due on the facilities advanced by the plaintiff to the defendant as of 3rd June 2014 is €31,542,125.93 (i.e. €31,685,802.97 - €143,676.64).*
>
> *Further Issues*
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> *93. Following this judgment, the only issues remaining to be decided in the High Court in relation to the plaintiff's entitlement to judgment against the defendant in the sum of €31,542,125.93 (plus interest since 3rd June 2014 and less further receivership receipts) are:*
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> *(i) the application by the plaintiff and LSREF III Stone Investments Ltd. ("Stone") for substitution of Stone as plaintiff, and*
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> *(ii) any issue not already decided arising from the purported agreement to sell the defendant's facilities to Stone in March 2014 and the purported completion of the sale in July 2014 which relates to the plaintiff's entitlement to judgment against the defendant for the above sum in these proceedings.*
>
> *All issues in the proceedings relating to any matter alleged to have been done or not done prior to March 2014 in relation to the plaintiff's claim against the defendant for the recovery of the monies allegedly due and owing on the facilities advanced to the defendant have now been determined."*

31. Irish Bank Resolution Corporation Ltd. (in Special Liquidation) and the Special Liquidators executed a deed of transfer pursuant to the Loan Sale Agreement to Stone on 11th July, 2014. IBRC, the then plaintiff, and Stone applied for an order substituting Stone as plaintiff pursuant to O.15, r.14 of the Rules of the Superior Courts. At that hearing a redacted copy of the Deed of Transfer of 11th July, 2014, was exhibited. The document identified Irish Bank Resolution Corporation Ltd. (in Special Liquidation) as the assignor and LSREF III Stone Investments Ltd as assignee. The Special Liquidators were also joined in the Deed. The learned trial judge quoted in full clause 3 which dealt with the transfer of the loans, none of which was redacted. 'Assets' were defined as meaning:-

> *"All the rights, title, interest and benefits in and to (and only such rights, title, interest and benefits as the assignor may have:*
>
> *(a) All Facilities…"*

32. 'Facilities' were defined as meaning:-

> *"All principal amounts, accrued interest, including capitalised interest and any other amounts outstanding and/or owing under our connection with all loans, facilities, credit accommodation advances, commitments, leasing, hire purchase, mortgages or other contracts or agreements as applicable and all other amounts payable by a Borrower…"*

33. She noted that Mr. Morrissey was identified in an unredacted portion of Schedule 3 as being a borrower and the five account numbers were listed and that it was not in dispute that those account numbers related to the facilities which were the subject of the proceedings. Mr. Morrissey objected to the substitution of Stone as plaintiff in the proceedings and sought to distinguish the decision of Kelly J. in *Irish Bank Resolution Corporation v. Comer* (Unreported, *ex tempore*, High Court, Kelly J., 30th July, 2014) on 4 grounds:-

> *(i) "Order 15, r. 14 of the Rules of the Superior Court (if the applicable rule) should be construed and applied in accordance with O. 15, r.13 and, in particular, the Court should only make an order for substitution if satisfied that this is "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter". He submits it is not necessary to join Stone.*
>
> *(ii) This application is distinguishable from Comer because of the point in time in the proceedings at which it is made.*
>
> *(iii) The Court should not make the order sought as the special liquidators may not assign these proceedings as distinct from the debt, and this was not a point raised in Comer.*
>
> *(iv) The Court should not make the order by reason of the alleged commission of the torts of maintenance and champerty by both applicants following the agreement for sale in March, 2014."*

34. Finlay Geoghegan J. said that insofar as the application was dependant upon facts she agreed that there should be put before the Court sufficient *prima facie* evidence to justify the making of the Order leaving over to the trial of the action or, in this instance, any remaining issues to be tried, the question as to whether the evidence is sufficient to enable the substituted plaintiff obtain the reliefs sought in the proceedings. She held that she was satisfied that the applicants had put before the Court *prima facie* evidence that

IBRC (in Special Liquidation), the existing plaintiff, had, by Deed of Transfer of 11th July, 2014, assigned to Stone all its rights, title, interest and benefits in the facilities to Mr. Morrissey which were the subject matter of the proceedings. Further, that there was *prima facie* evidence that it was a legal assignment complying with the four conditions required by s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 . The applicant had also introduced *prima facie* evidence of the entitlement of IBRC pursuant to the contractual terms of the applicable general conditions to assign the debts (clause 18.2).

35. Finlay Geoghegan J. then turned to consider each of the objections raised by Mr. Morrissey to the application. She rejected each of the grounds advanced. She determined as a matter of law that the Special Liquidators had the capacity to enter into the purported transaction. She then considered the arguments in relation to maintenance and champerty. She considered the judgments of Clarke J. in *Thema International Fund Plc v. HBSC International Trust Services (Ireland) Ltd.* [2011] 3 I.R. 654; *Walden v. Herring* [2014] 1 I.L.R.M. 62 and *Greenclean Waste Mangement Ltd. v. Leahy p/a Maurice Leahy & Co. Solicitors* [2014] IEHC 314 (a judgment of Hogan J.). She said that it appeared essential to both alleged torts that the person alleged to be improperly providing support to the litigation was a person who had "neither an interest in the action or any motive recognised by law as justifying its interference" or as is sometimes put a person who had "no direct or legitimate interest" in the proceedings. She noted that counsel for Mr. Morrissey submitted that by reason of the Loan Sale Deed of 31st March, 2014, there was evidence before the Court that IBRC and Stone were potentially guilty of maintenance or champerty by reason of the control and/or support which Stone as purchaser was giving under the terms of the Loan Sale Deed. She noted that counsel for Mr. Morrissey objected that the Court was not aware of the full terms of the Loan Sale Deed which when known might provide further evidence.

36. Finlay Geoghegan J. went on to hold:-

> *"Notwithstanding that the court is not aware of the full terms of the loan sale deed, it does not appear to me that the defendant has made out a prima facie case that subsequent to entering into the loan sale deed, IBRC and/or Stone could be considered as committing torts of maintenance or champerty in relation to the continuation of these proceedings even if Stone was given certain rights in relation to the litigation pending the completion of the sale. The reason for this conclusion is that it does not appear to me that even on a prima facie basis, Stone may be considered to be a person who had no interest in these proceedings. By the loan sale deed of the 31st March, 2014, Stone purported to agree to purchase from IBRC the debts due on the facilities granted to the defendant which are the subject matter of these proceedings. As purported purchaser of the facilities Stone prima facie has a legitimate interest in the cause of action being pursued against the defendant in these proceedings.*
>
> *50. Accordingly, this ground of objection to the court making the order for substitution cannot be sustained."*

37. Finlay Geoghegan J. went onto make an order substituting Stone as plaintiff for IBRC (in Special Liquidation) and made an order amending the title of the proceedings accordingly. She further provided:-

> *"Stone will now have to plead its entitlement to judgment against the defendant in these proceedings. The defendant will have to plead in response thereto and in accordance with the decision of the court in the judgment (No. 3) delivered on the 29th October, 2014, is entitled to plead by way of defence thereto any issue arising from the purported agreement to sell the defendant's facilities to Stone in March, 2013, and the purported completion of the sale in 2014 and raise any defence in relation to those matters which it would have been entitled to raise against IBRC or is entitled to raise against Stone."*

38. When Finlay Geoghegan J. delivered judgment on 10th November, 2014, she stated that:-

> *"Stone will now have to plead its entitlement to judgment against the defendant in the proceedings, and the defendant will have to be entitled to plead by way of defence to that pleading any issue arising from the purported agreement to sell the facilities to Stone in March 2013 and the purported completion and raise any defence in relation to those matters which it would have been entitled to raise against either IBRC or Stone. In accordance with the last judgment I gave, the one outstanding matter is the entitlement of the now plaintiff, Stone, to judgment and any issue arising since March 2014."*

39. Counsel for Mr. Morrissey had the following exchange with the learned trial judge on pp. 6-8 of the transcript of that day:-

> *"Mr. Dempsey: Judge, that sounds correct but as long as it is clear that the Defendant would have the opportunity to plead to the amended defence and by way of counterclaim, and for this reason: out of caution, more than anything else, we have issued fresh proceedings, not served but issues, to cope with the various matters which might arise having regard to your determination. We now know what your determination is as of this moment, but the question for us would arise as to how to plead the amended defence, and I would like to keep that opportunity open.*
>
> *Ms. Justice Finlay Geoghegan: No, I am not giving any liberty today.*
>
> *Mr. Dempsey: Yes.*
>
> *Ms. Justice Finlay Geoghegan: To plead by way of counterclaim, because that would seem to be inconsistent with the judgment which I gave on 29th October, because I identified the only outstanding issues in the proceedings.*
>
> *Mr. Dempsey: Yes, may I assist; as I appreciate time is important. The new proceedings do contemplate that you would make the substitution order and deal with that. So that would be the counterclaim. That is a matter I would like to--*
>
> *Ms. Justice Finlay Geoghegan: If you have separate proceedings, I have nothing to do with those.*
>
> *Mr. Dempsey: I know you have always said that and I appreciate -- yes.*
>
> *Ms. Justice Finlay Geoghegan: And you are fully – I am not making any comment about that. All I am dealing with today is I want to make orders now so as to give a series of directions, and it is then my intention to remit, to send the directions motion back in before the Commercial Judge, Mr. Justice McGovern, taking the list on Monday, because it has to go back there because it seems to me that, as I have indicated in paragraph 51, 53 rather of this judgment, it seems to me inevitable that there are going to be disputes in relation to discovery and the production and inspection of documents given the dispute that exists in relation to the level of redaction. So first of all --*

Mr. Dempsey: May I just, sorry, just to be clear.

Ms. Justice Finlay Geoghegan: Therefore, the matters which will be pleaded are as a consequence of the substitution motion, and anything outside the issues and the substitution orders lie in another place, isn't that what you intend? I am sure you do.

Mr. Dempsey: (sic) If there are issues outside the orders made by you they remain open to being pursued.

Ms. Justice Finlay Geoghegan: I'm not making any comment about that I am only --

Mr. Dempsey: Yes, my Lord.

Ms. Justice Finlay Geoghegan: I am only dealing with these proceedings and the consequences of the order for substitution which I am making today, and it is consistent with this judgment and the judgment in Comer, that you are entitled to raise by way of defence any defence which you could have raised against IBRC, but the defences at this stage in these proceedings that you could have raised against IBRC are limited by the judgment of 29th October, because I have identified the only outstanding issue to be determined and the only matters which you can raise against the entitlement of what was then the plaintiff, IBRC, to a judgment. I think that is set out at paragraph 93 of my judgment of 29th October.

So you are entitled to plead, by way of defence, any issue that arises obviously on the pleading which Stone will now make as to its entitlement to judgment against your client. That must include any issue which you would have been entitled to raise against IBRC as well as Stone, arising from the purported agreement to sell the Defendant's facilities to Stone in March 2014 and the purported completion of the sale which is set out at paragraph 93(ii) of the judgment of 29th October."

40. Proceedings which Mr. Morrissey issued but had not yet served on 10th November, 2014, ("the New proceedings") were duly served on all of the defendants. IBRC (in Special Liquidation) and the Special Liquidators applied to have the New proceedings entered into the Commercial List of the High Court on the 1st December, 2014. The application was opposed by Mr. Morrissey but McGovern J. ordered that the proceedings be entered into the Commercial List of the High Court. The Statement of Claim was duly delivered on 19th December, 2014, and the defendants each raised particulars on 9th January, 2015, and they received replies there to on 23rd January, 2015.

41. Finlay Geoghegan J. had directed that the Amended Defence of Mr. Morrissey was to be delivered by 8th December, 2014. Mr. Morrissey failed to do so. McGovern J. made an "Unless Order" on 19th December, 2014, requiring that Mr. Morrissey deliver his Defence and any request for voluntary discovery by close of business on 2nd January, 2015. An amended defence and counterclaim was delivered on 1st January, 2015. Solicitors acting for Stone objected on various grounds to the Amended Defence and Counterclaim as delivered and a further amended defence and counterclaim was delivered on 16th January, 2015.

The Motions listed for hearing on 17th February, 2015

42. Three motions were issued in the Debt proceedings. The plaintiff sought an order pursuant to O.19, r.28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the Court striking out the Defence delivered by the defendant on 16th January, 2015, and an order for judgment in favour of the plaintiff. In the alternative it sought an order striking out those paragraphs of the Defence which do not fall within the scope permitted by Finlay Geoghegan J. in her judgment of 10th November, 2014, and requiring the delivery of an amended defence. Mr. Morrissey brought a motion seeking to stay the Debt proceedings until after the trial of the New proceedings or in the alternative an order consolidating the Debt proceedings with the New proceedings or an order that the two proceedings be tried together. Mr. Morrissey also brought a motion seeking discovery from the plaintiff.

43. In the New proceedings the first, third and fourth named defendants (IBRC and the Special Liquidators) brought a motion seeking an order pursuant to O.19, r.28 of the Rules of the Superior Courts striking out the entirety of the Statement of Claim on the grounds that the claims recited therein were an abuse of process and/or were frivolous and vexatious. In the alternative they sought an order pursuant to the inherent and/or equitable jurisdiction of the Court striking out those elements of Mr. Morrissey's claim which were pleaded in the Statement of Claim on the grounds that the claims were an abuse of the judicial process and/or are *res judicata* and/or were barred by virtue of the legal principle known as the rule in *Henderson v. Henderson*. In the alternative they sought an order staying the proceedings pending determination of the Debt proceedings. A similar motion was brought by Stone in the New proceedings. These motions are dealt with in a separate judgment in the New proceedings delivered at the same time as this judgment.

Plaintiff's motion to strike out the 2015 Amended Defence and Counterclaim

44. The plaintiff's application was grounded upon the affidavit of Mr. Richard Willis sworn on 3rd February, 2015. There were two replying affidavits sworn by Mr. Gerard Black, solicitor, for Mr. Morrissey on 5th and the 12th February, 2015, respectively. The essence of Mr. Willis's affidavit was that the 2015 Amended Defence and Counterclaim, as delivered, far exceeded the leave to amend the Defence and Counterclaim granted by Finlay Geoghegan J. on 10th November, 2014, and that in all the circumstances of the case it constituted an abuse of process and ought to be struck out or, in the alternative, considerable portions of the Amended Defence and Counterclaim should be struck out. Mr. Black submitted on behalf of Mr. Morrissey that the Amended Defence advanced entirely legitimate matters which required determination at a full trial and it should not be dismissed in a summary interlocutory motion. He argued that the defendant was permitted to deliver the 2015 Amended Defence and Counterclaim by the rulings of Finlay Geoghegan J. At para. 15 of his first affidavit he stated:-

"I am advised that the public law issues are relevant in sofaras they relate to the capacity of IBRC to transfer to the Plaintiff. I am further advised that the breach of public law duties by IBRC means that there was no lawful and/or effective transfer to the Plaintiff and that is why the matters are legitimately raised in the Amended Defence against the Plaintiff in accordance with the directions of Judge Finlay Geoghegan."

45. At para. 18 he averred:-

"I say and believe that this follows from the fact that striking out a defence in an interlocutory application, without a full trial or hearing of the issues, constitutes a restriction on the constitutional right of a defendant to litigate and/or to have a fair trial."

46. In his second affidavit at para. 5 he identifies the issues he believes require resolution in a non-exhaustive way as follows:-

"(i) Whether the special liquidators were legally entitled to sell the assign (sic) the within proceedings as they did; (ii) whether the said assignment was tainted by maintenance and champerty; (iii) whether IBRC, as an organ of the State, before and after its special liquidation, was disentitled to maintain a claim for unlawfully charged interest which it was aware it had not entitlement to keep before this Honourable Court; (iv) whether the manner in which the successive Plaintiffs have conducted the within proceedings constitutes an abuse of the judicial process; (v) whether there has been a failure by IBRC (in Special Liquidation) to produce the loan sale agreement in compliance with the Direction of this Honourable Court."

47. Mr. Black's affidavit then addresses the successive plaintiffs' role and the effect of their continuing to maintain a claim for overcharged interest. The balance of his affidavit concerns the Loan Sale Deed and the redactions effected to the document furnished to Mr. Morrissey and to the Court. He complains that the redaction were not in accordance with the Court's directions. He then analyses the portions of the document which were legible by Mr. Morrissey and the Court. He concludes that the claim is contaminated by maintenance and should be dismissed as constituting an abuse of the judicial process and believes that the claim may also be contaminated by champerty but concludes, by reason of the failure to disclose the appropriate provisions of the Loan Sale Deed that it is not possible for either the Court or the defendant to so conclude.

Submissions
48. In written and oral submissions the plaintiff analysed the 2015 Amended Defence and Counterclaim and argued that most of the pleas including most of the additional pleas inserted since 10th November, 2014, related to matters which had been previously ruled on by Finlay Geoghegan J. It was argued that a matter which had been the subject of a ruling of the High Court following oral hearings could not now be reopened by amending the pleadings in accordance with the direction of 10th November, 2014. The written and oral submissions on behalf of Mr. Morrissey did not engage in a forensic justification of each and every one of the new pleas which Mr. Morrissey says he is entitled to advance in compliance with the directions. The matter was approached on a thematic fashion as is clear from the affidavit of Mr. Black. Before considering the pleading in detail, it is important to make some preliminary observations.

Key issues which have been determined by the High Court
49. The following matters have been determined as matters of fact and law in the judgments of Finlay Geoghegan J. as outlined above:-

(1) IBRC, the then plaintiff, was entitled to make its demands on Mr. Morrissey on foot of the facility letters.

(2) The relationship between the Bank and Mr. Morrissey did not go beyond that of a contractual relationship such that a fiduciary relationship existed between the parties.

(3) Mr. Morrissey's counterclaim has been struck out.

(4) Mr. Morrissey's claim that the Loan Sale Agreement entered into between IBRC and the Special Liquidators and Stone interfered in the judicial process or amounted to an abuse of process was groundless.

(5) The quantum owed by Mr. Morrissey on foot of the facilities as of 3rd June, 2014, is €30, 542,125.93 plus interest and less receiver's credits since that date.

(6) Notwithstanding the fact that the Court had available to it heavily redacted copies of the Loan Sale Agreement and the Deed of Transfer nonetheless not even a *prima facie* case had been made out that the loan sale process was tainted by maintenance or champerty.

(7) The Special Liquidators had the power to sell the debts in question, the rights of action attaching to the debts and the proceedings in being relating to the causes of action.

(8) Stone had been substituted as the proper plaintiff in the proceedings in light of the evidence which established on a *prima facie* basis that there was a valid assignment of the debts in question, the rights of action attaching to the debts and the proceedings in being to Stone.

(9) The only remaining issue to be determined was Stone's entitlement to judgment arising from the agreement to sell Mr. Morrissey's facilities to Stone in March, 2014 and the completion of the sale on 11th July, 2014.

50. At all times Mr. Morrissey's liberty to raise issues in his Defence to the Bank's claim in the Debt proceedings was subject to certain constraints. Firstly, the proceedings had commenced by way of summary summons and Mr. Morrissey was granted leave to defend the proceedings on certain grounds. His right to defend the proceedings was limited by the leave granted. This was confirmed by Kelly J. in October, 2011. Secondly, the proceedings have been conducted in the Commercial List of the High Court. They are therefore subject to a case management regime. The directions and orders outlined above delimited the issues. Thirdly, the issues raised in his Defence were confined to the defences actually pleaded by him. As it set out above, Finlay Geoghegan J. dismissed a number of arguments which were sought to be advanced on his behalf on the basis that the case sought to be argued had not been pleaded and that there had been no application to amend the pleadings prior to advancing the arguments. To permit them to be raised in the circumstances would breach the plaintiff's right to fair procedures. Fourthly, with the agreement of both parties, the proceedings were dealt with by way of modular trials. It follows that determinations of issues in prior modular hearings governed the issues that remained to be determined in the subsequent modules. Where Mr. Morrissey seeks to revisit, reopen and re-agitate matters which have been ruled out or rejected in previous hearings, to admit them at this stage would be utterly to defeat all of the proceedings and steps taken in these proceedings to date.

The 2015 Amended Defence and Counterclaim
51. In light of the above principles and determinations, I turn now to consider the 2015 Amended Defence and Counterclaim which was delivered on 16th January, 2015. The first seven paragraphs are largely introductory and are directed towards establishing that there were representations warranties, conduct, advice and consultant services provided by Anglo which created a fiduciary relationship between Anglo and Mr. Morrissey. In the first judgment Finlay Geoghegan J. found that there was no such fiduciary relationship.

Wrongful termination of the facilities and estoppel (paras. 8-39)
52. Finlay Geoghegan J. held in the first judgment that the Bank was entitled to make a demand for the repayment of the loans and it was not estopped from making the demand and therefore this section of the 2015 Amended Defence and Counterclaim has been

conclusively disposed of.

53. Paragraph 11 of the 2011 Amended Defence and Counterclaim raised the issue of overcharging of interest. This has now become para. 14 of the 2015 iteration of the document. For the sake of completeness I confirm that this matter has also been disposed of by the Quantum Judgment of Finlay Geoghegan J. of 29th October, 2014.

Fiduciary relationship
54. Paragraphs 40-49 plead that there was a fiduciary relationship and paras. 50-64 plead that there was a breach of the alleged fiduciary relationship. In the first judgment Finlay Geoghegan J. held that there was no such fiduciary relationship and according no cause of action based on any alleged breach of fiduciary relationship. These matters have already been determined in the proceedings.

Balance of the 2015 Amended Defence and Counterclaim
55. The balance of the 2015 Amended Defence and Counterclaim, paras. 65-147 have been inserted allegedly pursuant to the direction of Finlay Geoghegan J. of 10th November, 2014. The issue for consideration is whether or not any or all of the paras. should be struck out as is argued for by the plaintiff.

56. Paragraph 67 purports to reserve Mr. Morrissey's position in relation to the validity of the Loan Sale Agreement and the Deed of Transfer having regard to his claims made in the New proceedings. This pleading cannot stand. The matter which Finlay Geoghegan J. directed remained to be resolved in the Debt proceedings was whether or not the plaintiff was entitled to a judgment based on the Loan Sale Agreement and the Deed of Transfer. Mr. Morrissey cannot reserve his position in that regard to a second set of proceedings. Furthermore, he appears to claim that he can also litigate this issue in the Debt proceedings and still reserve his position to the New proceedings. This amounts to an abuse of process. I strike out para. 67 of the 2015 Amended Defence and Counterclaim.

57. Paragraph 70 amounts to a submission regarding the meaning and effect of the judgment of 29th October, 2014, and the scope of the leave granted to Mr. Morrissey to defend the remaining outstanding issues. It is not an appropriate plea by way of defence and I therefore strike it out.

58. Paragraph 71 reads as follows:-

> *"Insofar as certain duties, requirements (including public law obligations relating to fair procedures) and/or conditions were breached and/or were not complied with by the former Plaintiff, whether as Anglo Irish Bank, the IBRC, the IBRC (in special liquidation) and/or were breached and/or not complied with by Special Liquidator of the IBRC and/or by the Minister for Finance in the sale process leading and/or relating to the purported agreement and/or deed of transfer to sell the alleged credit facilities and the debts to the Substituted Plaintiffs, such matters rendered ineffective any purported assignment and/or transfer of the said alleged credit facilities and/or debts of the Defendant to the Substituted Plaintiff and/or the same was void and/or no effect and/or came subject to duties and/or liabilities."*

59. Two objections were raised to this plea. On a narrow ground, Finlay Geoghegan J. clearly confined the issues to those arising from March, 2014 to July, 2014. The sale process in respect of the loans clearly preceded the Loan Sale Agreement. It therefore falls outside the scope of the limited liberty to amend the proceedings directed by Finlay Geoghegan J.

60. The second objection is that this is a plea in the nature of a judicial review application. It is a challenge not just to the transfer of Mr. Morrissey's loans but would impact upon all of the loans, the subject of the Loan Sale Agreement. It is clearly not an appropriate matter to raise in this manner in these proceedings at this stage. Had Mr. Morrissey wished to challenge the procedure and process he was in a position to do so by way of judicial review in the normal way. At all times he was aware of the fact that the Special Liquidators were proposing to offer loans including his loans for sale and he was invited to make submissions in relation to the proposed sale process. He chose not to initiate judicial review proceedings. He cannot escape the implications of that decision. In *O'Donnell v. Dun Laoghaire Corporation* [1991] 1 I.L.R.M. 301 Costello J. (as he then was) had to consider whether the delay in instituting plenary proceedings seeking declaratory relief was a bar to granting the relief and whether the proceedings were subject to any time limitations. At pp. 314-315 he held as follows:-

> *"A declaratory order is a discretionary order arising from the wording of statute which conferred jurisdiction on the courts to make such orders (see Wade, Administrative Law 5th ed., p.523) and it is well established that a plaintiff's delay in instituting plenary proceedings may, in the opinion of the court, disentitle the plaintiff to relief. It seems to me that in considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in O. 84, r. 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within in three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under O. 84 time would have been extended. The rules committee considered that there were good reasons why public authorities should be protected in the manner afforded by O. 84, r. 21 when claims for declaratory relief were made in applications for judicial review and I think exactly the same considerations apply when the same form of relief is sought in a plenary action. Furthermore, it is not desirable that the form of action should determine the relief to be granted and this might well be the result in a significant number of cases if one set of principles on the question of delay was applied in applications for judicial review and another in plenary actions claiming the same remedy. And in plenary actions the effect of delay can in many cases be determined on the trial of a preliminary issue and as speedily as if the issue fell to be determined in an application for judicial review."*

61. I accept the submission that these principles apply in this case. The facts are that Mr. Morrissey was fully aware from the late Summer, early Autumn 2013 onwards that the Special Liquidators were proposing to sell his loan facilities along with many other such facilities and he was invited to make submissions in relation to the proposed sale process. He elected not to do so. He was informed of the actual Loan Sale Agreement which affected his loans on 2nd May, 2014. He subsequently applied to amend his Defence and Counterclaim in the Debt proceedings and this application was refused. He at no stage indicated that he intended to seek the reliefs which he now seeks to advance. He cannot evade the time limits which apply to judicial review applications in this manner and, far from any basis for extending the time limits being advanced, the evidence is all to the effect that Mr. Morrissey was fully informed of all matters and was legally represented at the time. The possibility of bringing judicial review proceedings was not so much as adverted to by his counsel in submissions to this Court whether oral or written. Thus, there is no basis upon which the Court could conclude that the time limits within which a judicial review ought to have been brought should be extended. It is not open to Mr Morrissey to raise these issues at this point in time.

62. Accordingly on the basis of both objections I find that this paragraph is outside what was permitted by Finlay Geoghegan J. to be

pleaded and accordingly I strike out para. 71.

63. I strike out paras. 75-78 of the 2015 Amended Defence and Counterclaim. Paragraph 75 purports to rely upon the pleadings in the New proceedings. This is clearly impermissible. A party must bring forward his case within the pleadings of his case, he cannot refer to pleadings in a separate case. Paragraph 76 amounts to a plea that the Debt proceedings ought to be stayed pending the determination of the New proceedings. This cannot amount to a defence and certainly is not a defence permitted by the terms of the Order of November, 2014. Mr. Morrissey's application for an order of consolidation of the two proceedings or a stay of the proceedings is considered further below. Paragraph 77 says the proceedings ought to be consolidated with the New proceedings. This likewise is struck out for the same reason. Paragraph 78 says the substituted plaintiff has not *locus standi* and/or sufficient interest to maintain the present proceedings or to obtain any relief. In view of the fact that the substituted plaintiff was substituted because it was the appropriate plaintiff this plea must fail, though Mr. Morrissey is still entitled to dispute whether or not the plaintiff is entitled to judgment against him on the basis of the assignment allegedly effected by the IBRC Loan Sale Agreement and the Deed of Transfer.

64. In paras. 79-85 it is pleaded that the IBRC (in Special Liquidation) and the Special Liquidators owed duties of care and statutory duties and public law obligations to Mr. Morrissey. It is also alleged that they owed a duty to avoid breaching or threatening to breach various constitutional rights of Mr. Morrissey or various rights he had under the European Convention on Human Rights Act 2003, his rights under the Convention and the first protocol of the Act. It is also claimed that they had a duty to respect and protect his rights under the Charter of Fundamental Rights of the European Union including in particular Articles 15, 16, 17, 20, 21 and 47 thereof.

65. Any defence to the plaintiff's claim based on the duties alleged in these paragraphs also must be dismissed. Insofar as the case is now sought to be advanced that there was a relationship of proximity between Mr. Morrissey and Anglo, IBRC, IRBC (in Special Liquidation) and the Special Liquidators generating a duty of care owed to Mr. Morrissey this cannot be advanced at this stage. One of the first issues to be determined in these proceedings was whether or not there had existed a fiduciary relationship between Mr. Morrissey and Anglo. The issue has been raised and has been rejected. It cannot now be recast in this way and re-agitated. The prior rulings in the case apply to the Special Liquidators of IBRC even though they were made at a time when the then plaintiff was not in liquidation and prior to the establishment of IBRC. Insofar as the plea relates a duty of care allegedly owed in or about the sale of the credit facilities this cannot arise at this stage. In these proceedings it has already been determined that the Bank was entitled to make demand on foot of the loans and the amounts due on foot of the loans have been determined. Mr. Morrissey has had the opportunity to agitate a very considerable number of other possible defences all of which have been rejected. The remaining issue in the case is the validity and effectiveness of the Loan Sale Agreement of 31st March, 2014, to Stone and the Deed of Transfer of 11th July, 2014, to Stone insofar as they relate to Mr. Morrissey's loans.

66. In oral submissions it was contended that the conduct of Anglo, IBRC, the Special Liquidators and, impliedly, counsel and solicitors acting on their behalf during, in particular, the hearings in relation to quantum was so egregious as to afford a defence to Mr. Morrissey in respect of the entirety of the debt claimed in these proceedings. It was strenuously and vigorously opposed by counsel for both IBRC in the New proceedings and Stone in the Debt proceedings and the New proceedings. It was urged that Finlay Geoghegan J. had considered the question of the overcharging of interest carefully and in detail over a four day hearing. She held that on the correct construction of the loan facility documents and the general terms and conditions there had in fact been an overcharging of interest and she computed that amount to be €143,676.64. She did not permit the evidence to extend beyond the question of alleged overcharging in the case of Mr. Morrissey's accounts.

67. She gave no hint in the Quantum Judgment that Anglo knowingly overcharged Mr. Morrissey interest in the first place or that it and its successors in title and its legal advisers knowing maintained a claim for that interest which they knew the plaintiff was not entitled to in the second place and misled the Court in so doing. She likewise took no exception whatsoever to counsel and the Bank's expert witness advancing the case on the basis initially that interest had not been charged on the basis of a 365 day year and secondly, when it became clear that this in fact was what had occurred, seeking to justify the basis upon which the charge had in fact been applied. On the facts as they appeared to Finlay Geoghegan J. and subsequently to this Court it is quite simply untenable to allege, as was done most strenuously and unjustifiably in this case, that there was knowing improper conduct of the proceedings in an attempt to mislead the Court. Furthermore, it is extraordinary to hear an argument advanced to suggest that alleged knowing misconduct by the Bank in relation to the overcharging of interest was a basis for alleging that Mr. Morrissey was discharged entirely from his obligation to repay the monies which had been advanced to him by Anglo. Quite clearly there was no finding that the overcharging that occurred was knowing or deliberate or that the Bank sought wrongfully to sue for sums to which it knew it had no entitlement. On the contrary, having heard the interest issue in detail over four days, Finlay Geoghegan J. held that as of 14th June, 2014, the amount due on the facilities advanced by the Bank to Mr. Morrissey was € 31,542,125.93. I reject this submission entirely as being untenable and without foundation.

68. Insofar as Mr. Morrissey advances public law duties allegedly owed either by IBRC or the Special Liquidators in paras. 79-84 of his 2015 Amended Defence and Counterclaim this is subject to the same objections which I discussed in paras. 61-62 and in particular to the *ratio* of the decision in *O'Donnell v. Dun Laoghaire Corporation*. Furthermore, Finlay Geoghegan J. has already determined as of 10th November, 2014, as a matter of law that the Special Liquidators had capacity to enter into the purported transaction. This means that any challenge to the Act of 2013 or to the Special Liquidation Order or the sales process cannot now be raised in these proceedings by Mr. Morrissey at this stage. To permit such claims to be advanced would be to permit a collateral attack on the prior decisions of Finlay Geoghegan J. in this matter.

69. The balance of these paragraphs relates to general pleas that Mr. Morrissey was owed duties by IBRC and the Special Liquidators under the Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. It is not open to Mr Morrissey to seek to circumvent the prior judgments and rulings in the proceedings to date by introducing these pleas alleging new duties and obligations at a point in the proceedings when the sole remaining issue for determination is the validity or effectiveness of the Loan Sale Agreement of 31st March, 2014, and the Deed of Transfer of 11th July, 2014. These paragraphs are outside the scope of what was permitted and what was intended to be permitted by the Order of Finlay Geoghegan J. of 10th November, 2014, and must be struck out.

70. The Irish Bank Resolution Corporation Act 2013 was enacted in February, 2013 and the Order placing IBRC in special liquidation was made on 7th February, 2013. Mr. Morrissey was informed of the intention to offer his loans for sale in November, 2013. On 2nd May, 2014, counsel informed the Court and Mr. Morrissey of the Loan Sale Agreement and of the intended completion of the sale on 11th July, 2014. Mr. Morrissey applied to amend his Defence and Counterclaim in May, 2014 but it appears that he did not apply to make the amendments herein sought to be added now. His application to amend his Defence and Counterclaim was refused by Finlay Geoghegan J. on 27th May, 2014. Insofar as these proposed amendments are the same in substance as those ruled upon by Finlay Geoghegan J. he cannot advance them again. Likewise, he cannot now seek to raise public law issues and statutory duties based on the Act of 2013 which he did not previously argue by way of these proposed amendments. If he wished to advance them in these proceedings, he ought to have raised them before the learned trial judge along with the other amendments so that the litigation could

progress in a proper, orderly fashion. It is not permissible to bring forward defences in stages in this fashion.

71. Paragraphs 86-92 deal with the Irish Bank Resolution Corporation Act 2013 and the Special Liquidation Order. Mr. Morrissey seeks to argue *inter alia* that the Special Liquidation Order is unlawful and invalid or further and in the alternative that the purported appointment of the Special Liquidators is unlawful or void or a nullity. This is clearly not a plea that is open to Mr. Morrissey to advance in these proceedings for the reasons I have set out above. At this stage in the proceedings it amounts to an abuse of process. If Mr. Morrissey had wished to challenge this matter, he clearly would have to do so by way of judicial review and very promptly given the enormous implications of the allegations to so many parties. Furthermore, Finlay Geoghegan J. has already ruled that the Special Liquidators had the power to transfer Mr. Morrissey's loans. These arguments were not raised when that point was being canvassed before Finlay Geoghegan J. Mr. Morrissey clearly cannot go behind that ruling in this fashion. It is simply unstateable to argue that such a plea was permitted by the direction of the 10th November, 2014.

72. At para. 91 the claim is advance that the purported Deed of Transfer was not effective to transfer the facilities/loans or the associated rights relating to Mr. Morrissey's loans insofar as the Deed of Transfer was executed only by IBRC and not jointly by both Special Liquidators. It is pleaded that the purported transfer was an act done pursuant to s. 231 of the Companies Act 1963, as amended, and that the Act of 2013 and the Special Liquidation Order of 2013 does not authorise an act of sale or transfer under s. 231 of the Companies Act 1963, as amended, to be done by one special liquidator acting individually. In the Substitution Judgment of 10th November, 2014, Finlay Geoghegan J. considered the powers of the Special Liquidators to assign conduct of the proceedings in the circumstances of the Debt proceedings. She considered the matter in some detail in paras. 29-44 of her judgment she held that while the Act of 2013 removed the role of the Court in relation to the Special Liquidators of IBRC in relation to sales pursuant to s. 231 of the Companies Act 1963 it did not alter the fundamental distinction between two types of causes of action namely causes of action of the company which existed at the date of the commencement of the winding up (such as in this case) and those causes of action vested in the Special Liquidators which only arise on or after the commencement of the winding up. It was perfectly permissible to assign the property of the company and related causes of action which had arisen prior to the commencement of the liquidation pursuant to the liquidators' power of sale. It follows therefore that the issues pleaded in para. 91(a), (b) and (c) these have already been determined by the learned trial judge.

73. The pleas at para. 91(e) and (f) cannot be maintained as they amount to a counterclaim against Stone. The Counterclaim has been dismissed by Finlay Geoghegan J. as discussed below and it follows that these pleas cannot now be introduced as a defence pursuant to the directions of the 10th November, 2014.

74. Paragraphs 93-104 set out in detail a chronology of the loan sale sales process and alleged breaches of fair procedures which Mr. Morrissey claims were denied to him in that process. He claims that there was a failure to comply with fair procedures and natural or constitutional justice and that the Special Liquidators unlawfully fettered their discretion. He pleads that following the entry into special liquidation of IBRC certain corporate governance structures were established and he says that these committees and authorities were established without authority and generally alleges that their actions were unlawful. For the reasons outlined above, these pleadings also must be struck out. It is not open to Mr. Morrissey to introduce judicial review type pleadings at this point in time in the Debt proceedings pursuant to the direction of 10th November, 2014, in relation to the amendment of the existing Amended Defence and Counterclaim. Paragraphs 93-104 are accordingly struck out.

75. Paragraphs 105-108 plead that there was a failure to comply with Ministerial directions and/or instructions. This likewise is inadmissible as a defence to the plaintiff's claim against Mr. Morrissey for judgment in the Debt proceedings for the reasons discussed. It goes far beyond what was permitted by Finlay Geoghegan J. and amounts to the introduction of arguments and issues which ought to have been raised by judicial review proceedings if Mr. Morrissey wished to raise them. Furthermore, at para. 108 Mr. Morrissey pleads that the Special Liquidators had no authority or power or jurisdiction to sell the loans to the substituted plaintiff. This is directly contrary to the finding of Finlay Geoghegan J. to the effect that the Special Liquidators did have power to sell the loans in her judgment of 16th November, 2014. I strike out paras. 105-108.

76. Paragraphs 109-130 deal with the redacted Loan Sale Agreement and Deed of Transfer and the plea of maintenance and/or champerty. Mr. Morrissey sets out a history of the conduct of the proceedings to date in relation to this matter from May, 2014. It is difficult to see how a complaint that the orders of the Court in relation to matters which have been determined can amount to a defence to the matter which has not been determined. For instance, Mr. Morrissey argues that the redacted copy of the Loan Sale Agreement did not comply with the directions of Finlay Geoghegan J. However, she did not direct that a further, less redacted copy of the agreement be provided. Mr. Morrissey pleads that the effect of the clauses which are legible is that they establish maintenance and that the Loan Sale Agreement was inherently champertous. This is directly contrary to the conclusions of Finlay Geoghegan J. She made it abundantly clear in her directions in May, 2014 in relation to the provision of a redacted copy of the Loan Sale Agreement and the exchange of submissions on the question of alleged maintenance and champerty that she was dealing with this issue in the module commencing before her on 3rd June, 2014. She did not deal with it in the Quantum Judgment as she was intending to deliver a separate judgment arising out of the application to substitute Stone as the plaintiff. It is clear that she dealt with all other issues in the judgment of 10th November, 2014, that had not been decided in the Quantum Judgment of 28th October, 2014. The judgment was not confined to determining the issue of the substitution of Stone as plaintiff. She dealt with Mr. Morrissey's argument that the Loan Sale Agreement was tainted with maintenance and champerty. She held even on the basis of the redacted Loan Sale Agreement that Mr. Morrissey had not established even on a *prima facie* basis that the agreement amounted to maintenance or champerty. This matter has been determined by Finlay Geoghegan J. It cannot now be revisited by Mr. Morrissey.

77. It was sought to argue that in some way the ruling of Finlay Geoghegan J. on this matter was interlocutory and not conclusive. I reject this submission. It is abundantly clear from her ruling on 27th May, 2014, that she intended that the issue of maintenance and champerty should be argued in the hearing that commenced on 3rd June, 2014. There clearly was no point in making elaborate directions for the disclosure of a redacted copy of the Loan Sale Agreement and for supplemental submissions in respect of the effect of the agreement and for adjourning the matter to 19th June, 2014, to allow for argument in respect *inter alia* of the alleged maintenance and champerty if she was not then to rule on the matter. She did not rule on it in the Quantum Judgment as matters had already been overtaken by the application to substitute Stone as a plaintiff in place of IBRC. She did rule on it in what has been colloquially called her Substitution Judgment. However, it is clear that this judgment was not confined to the substitution of Stone as plaintiff. She ruled on the balance of the matters upon which she had not adjudicated in the Quantum Judgment. Furthermore, she quite clearly held that there was not even a prima facie basis for arguing that the agreement was void for maintenance and/or champerty. Contrary to what was argued on behalf of Mr. Morrissey, this does not mean that this is an interlocutory decision or that it is not finally determinative of the issue. This is to confuse the standard of proof required in an application to substitute a plaintiff for an existing plaintiff with her subsequent rulings on a number of issues including this issue. It follows therefore that the matters pleaded in this part of the 2015 Amended Defence and Counterclaim have already been disposed of by Finlay Geoghegan J. and no longer fall to be considered further in these proceedings. I strike out paras. 109-130 of the 2015 Amended Defence and Counterclaim.

78. Paragraphs 131-142 of the 2015 Amended Defence and Counterclaim are headed "Purported Sale of Right to Continue and Prosecute the within Proceedings". In this section Mr. Morrissey pleads that the power and entitlement of the Special Liquidators to prosecute or conduct the present proceedings were not capable of lawful assignment, transfer and/or sale and were not lawfully assigned transferred and/or sold to the substituted plaintiff. In the Substitution Judgment, the learned trial judge considered the Special Liquidators' power to assign and conduct the proceedings in considerable detail in paras. 29-45. She determined as a matter of law that the Special Liquidators had capacity and were not precluded from selling the property and assigning the causes of action in the proceedings. Thus this section of the 2015 Amended Defence and Counterclaim has already been determined by Finlay Geoghegan J. and therefore cannot be reignited by including these pleas by way of an amendment to the 2015 Amended Defence and Counterclaim. I therefore strike out paras. 131-142 of the 2015 Amended Defence and Counterclaim.

79. By her judgment of 12th November, 2013, Finlay Geoghegan J. dismissed Mr. Morrissey's Counterclaim. On 10th November, 2014, she informed his counsel that it would be inconsistent with her decisions to permit him to amend his Counterclaim: she was permitting him to amend his Defence and in a very limited way only. Thus, there can be no doubt that she did not permit any amendment to the Counterclaim which had previously been dismissed. I strike out any purported amendment to the Counterclaim: there is no outstanding counterclaim in the Debt proceedings.

80. The question as to the validity or effectiveness of the purported sale or assignment to the plaintiff was clearly left over by Finlay Geoghegan J. for final determination by this Court. I have identified the following paragraphs of the 2015 Amended Defence and Counterclaim as being the paragraphs which properly relate to the defence of these issues and therefore were amendments permitted by the Order of Finlay Geoghegan J. of 10th November, 2014: paras. 65, 66, 68, 69, 72, 73, 74, 91(d), 143, 144, 145, 146. He may rely on 147 insofar as it pleads that s. 12 of the Irish Bank Resolution Corporation Act 2013 is not applicable. The plea that it is unconstitutional as pleaded in the New proceedings may not be introduced in the Debt proceedings.

81. I direct that Mr. Morrissey produce an addendum to his 2015 Amended Defence and Counterclaim setting out just these paragraphs retaining these numbers so that the trial judge hearing the remaining issue in the Debt proceedings can more easily understand the pleadings in the remainder of the case.

Mr. Morrissey's motion to stay and/or consolidate the proceedings

82. In order to rule on this motion, it is necessary to consider the outcome of the motions in the New proceedings brought by the IBRC defendants and Stone to strike out all or part of those proceedings. Thus, this judgment must be read in conjunction with the judgment which I am delivering today on that matter also. As appears from that judgment, and for reasons therein set out I have struck out all those parts of Mr. Morrissey's claim in the New proceedings insofar as they relate to issues which were:

> (a) *Res judicata* between Mr. Morrissey and the IBRC defendants.
>
> (b) Which may not be raised in the New proceedings as offending the rule in *Henderson v. Henderson* and which therefore constitute an abuse of process of the courts and a collateral attack on existing judgments and decisions in the Debt proceedings.
>
> (c) Those parts of the claim that relate to matters yet to be determined in the Debt proceedings and therefore should be disposed of in these proceedings and should not be the subject of a second claim.

83. This leaves the balance of the New proceedings after the Order pursuant to the related judgment which essentially relates to a constitutional challenge to certain aspects of the Irish Bank Resolution Corporation Act 2013 as against the State defendants and one possible plea against Stone.

84. Thus, in determining Mr. Morrissey's motion to consolidate the Debt proceedings and the New proceedings it is necessary to have regard to the rulings I have made in relation to striking out parts of the 2015 Amended Defence and Counterclaim in the Debt proceedings and striking out parts of the Statement of Claim in the New proceedings. This motion has to be assessed in respect of the balance remaining in each case. Order 63A, r. 6(1)(iii) of the Rules of the Superior Courts makes provision for the consolidation of proceedings with another cause or matter pending in the High Court. In *Duffy v. News Group Newspapers* [1992] 2 I.R. 369 McCarthy J. considered an application to consolidate two proceedings and stated at p. 376 that:-

> *"The legal principles are:—*
>
> *(1) Is there a common question of law or fact of sufficient importance?*
>
> *(2) Is there a substantial saving of expense or inconvenience?*
>
> *(3) Is there a likelihood of confusion or miscarriage of justice?"*

85. In *Lismore Homes Ltd.(In Receivership) v. Bank Of Ireland Finance Ltd. & Ors.* [2006] IEHC 212 Quirke J. declined to consolidate actions on the basis that there had already been an unacceptable delay in bringing the matter to trial and that also that consolidation might cause or add to confusion in the two actions. I accept that these are the appropriate principles to apply in this case.

86. In light of my decisions in the Debt proceedings and the New proceedings, there is no longer a common question of law or fact of sufficient importance to warrant consolidating the two actions. Far from likely to be a substantial saving of expense or inconvenience, it is likely to add considerably to both. Furthermore, the balance remaining in the New proceedings is a constitutional challenge to parts of the Act of 2013. It is well established that the courts should not determine whether legislation is incompatible with the provisions of the Constitution where matters can be properly determined on other grounds. It is therefore appropriate to determine whether or not Stone is entitled to judgment against Mr. Morrissey pursuant to the Loan Sale Agreement and the Deed of Transfer in the Debt proceedings first. It is only if that issue is determined against Mr. Morrissey that the question of considering the constitutionality of the provisions of the Act of 2013 could even arise. Therefore, far from being a suitable case for consolidation, it is appropriate to determine the New proceedings only after the Debt proceedings have been finally determined.

87. For the same reasons, it is inappropriate to stay the Debt proceedings pending the outcome of the New proceedings. On the contrary, it should be the New proceedings that should await the outcome of the Debt proceedings.

Discovery motion

88. Discovery should only be considered when the pleadings have been closed and issues joined except in exceptional circumstances which do not apply here. Mr. Morrissey, in accordance with the directions of McGovern J., made a request for voluntary discovery on

2nd January, 2015. In fact a different Amended Defence and Counterclaim was delivered on 16th January, 2015, and I have now struck out various portions of those re-amended pleadings. In the circumstances, it is appropriate that a fresh request for voluntary discovery be made arising out of the issues defined by the Amended Summary Summons and the part of the 2015 Amended Defence and Counterclaim which I have identified at para. 81 of this judgment. In the circumstances I will hear the parties' submissions in relation to the disposal of Mr. Morrissey's motion for discovery.

Summary
89. No matters remain to be determined in relation to paras. 1-64 of the 2015 Amended Defence and Counterclaim. I strike out paras. 67, 70 71, 75-142 of that pleading for the reasons set out above. I direct that the remaining paras. 65, 66, 68, 69, 72-74, 91(d) and 143-147, subject to the limitations specified in para. 81 above, be set out with the existing paragraph numbers in an addendum to the 2015 Amended Defence and Counterclaim. I refuse the application to stay the Debt proceedings pending the outcome of the New proceedings. I likewise refuse the application to consolidate the Debt proceedings with the New proceedings. There shall be a new request by Mr. Morrissey for voluntary discovery in light of this judgment confined to the matters now in issue as defined by the permitted pleadings.

SCHEDULE

THE HIGH COURT

Record No.1548S/2011

BETWEEN:-

ANGLO IRISH BANK RESOLUTION CORPORATION LIMITED (IN

SPECIAL LIQUIDATION)

LSREF III STONE INVESTMENTS LIMITED

Plaintiff

and

JOHN MORRISSEY

Defendant

AMENDED DEFENCE AND COUNTERCLAIM

Delivered this 16th January 2015 by Black & Company, Solicitors for the Defendant, of 28 South Frederick Street, Dublin 2

INTRODUCTION
1. The Defendant is a serial entrepreneur, an actuary and physicist by training, having utilised his training and background in mathematics and risk analysis, has had a long track record in successful enterprises ranging from aircraft financing, airline and corporate restructuring, property development, private equity financing and technology companies. The defendant has had an interest in very many successful enterprises and consulting positions in many private equity funds, investment funds and investment vehicles domestically and internationally. In 2010, the Defendant acted for Enterprise Ireland as a mentor for its flagship "Leadership 4 Growth" programme.

2. Notwithstanding the banking and property collapse, the Defendant has ensured that all monies due by him to the Revenue Commissioners and all of his contractors and subcontractors have been paid in full and no trade creditor payments remain outstanding.

3. Whilst it is the case that the Defendant has personal payment obligations to the former Plaintiff, it is submitted that the relationship between the parties hereto is much more extensive than the bare assertions made by the former Plaintiff and that the nature of the relationship is more than that of Banker and Borrower.

4. It is submitted that the former Plaintiff cultivated, courted and encouraged a relationship of trust, confidence and financial intimacy with the Defendant because of his reputation and standing in certain businesses that the Defendant had a pre-eminent reputation in and the former Plaintiff wanted access to the expertise and contacts of the Defendant.

5. The former Plaintiff represented to the Defendant that it wished to participate in the entrepreneurial successes of the Defendant by means of its involvement in his enterprises. The Defendant had founded an aircraft financing company, IAMG Limited, that was ultimately bought by the Royal Bank of Scotland plc. He had also been a key investor in Havok, a software company that was later acquired by Intel. In 2007, he had set up a property fund, Capital D plc. This was a company which had as its object the restoration and development of certain Victorian and late Georgian Protected Structures in the central Dublin area. At the time the former Plaintiff offered lending facilities to the Defendant in late 2007/early 2008 the Defendant had completed the first of what was anticipated to be several similar companies in the property, software, aircraft financing and technology spheres. The former Plaintiff was anxious that it would participate in these initiatives, through both the provision of debt financing and marketing of the equity investment in these vehicles to its base of High Net Worth clients.

6. The scaling up of the financial relationship between the parties hereto by way of the refinancing of the Defendant's borrowings with Bank of Ireland, EBS Building Society and IIB Bank, with the former Plaintiff which took place in late 2007 and early 2008 was predicated on both the renowned flexibility of the former Plaintiff's lending policies and a desire, on behalf of the Defendant, to increase his options for the future expansion and development of his business. The relationship between the parties was that the former Plaintiff would provide assistance, advice, consulting services and High Net Worth contacts to the Defendant from its customer base. The Defendant would over time, provide new products, in the various sectors in which he had expertise, to these customers of the former Plaintiff and the former Plaintiff would earn a margin, fee or profit share for the introduction of these customers and

furthermore would earn more fees, margins and interest in the provision of finance to the proposed companies.

7. It is asserted that this is consistent with the established business model used by the former Plaintiff, which is now common knowledge, which sought to achieve a return by way of margin on property investments, arrangement fees and leveraged financing. The relationship between the parties hereto, described below, was predicated on the Defendant making interest payments and paying arrangement fees to the former Plaintiff and in turn the former Plaintiff expressly represented and warranted to the Defendant that all his facilities would remain open, available and committed to him provided he paid the interest thereon. But for these representations and warranties the Defendant would not have transferred his borrowings to the former Plaintiff. A fundamental part of these representations and warranties was that the former Plaintiff was a bank of good standing and capitalization and that the bank would still be in business, and continuing to lend, at the time of the expiry of the Facilities. The "interest-only" model operated by the former Plaintiff, was, as outlined in the Nyberg Report, critically dependent on a functioning financing market being in existence when facilities expired, to allow for either the sale of the related assets or their refinancing with the former Plaintiff or another bank. The representations, warranties, conduct, advice and consulting services provided by the Plaintiff created a fiduciary relationship between the former Plaintiff and the Defendant.

I. WRONGFUL TERMINATION OF THE FACILITIES AND ESTOPPEL

8. The Defendant accepts that monies have been lent by the former Plaintiff to him but requires that the Plaintiff formally proves the exact amount being claimed. The Defendant pleads herein that the former Plaintiff has incorrectly and unlawfully terminated the facilities granted to him and furthermore has breached its fiduciary duty to him and as such each element and portion of the liability, the calculations that gives rise to the liability, the interest component of the liabilities in each are all required to be formally proved.

9. The Defendant denies that on 4th April 2011 he was indebted to the former Plaintiff, Anglo Irish Bank/IBRC, in the sum of €36,330,537.81.

10. Any indebtedness of the Defendant to the former Plaintiff was incorrectly and unlawfully called in and demanded by the former Plaintiff in circumstances where no breach or default of any such contract of indebtedness had occurred nor was there any failure of the Defendant to adhere to the terms of the contract between the parties hereto. The contract was in good stead, properly functioning and was not in default and at the time the former Plaintiff purportedly called in the facilities in question they should not have been called in.

11. The former Plaintiff was not and is not entitled to call in, demand or terminate any loan agreement between the parties hereto and its purported calling in, demand and/or termination of any such loan agreement is incorrect and unlawful and contrary to the terms of the implied and express terms of the loan agreements themselves and the long established and implemented course of dealing between the parties hereto.

12. As to the interest claimed in this action, the Defendant says that same is, incorrect, excessive, harsh, unlawful and unconscionable and/or otherwise such that a court of equity would give relief in respect thereof.

13. As the former Plaintiff's loans to the Defendant were at all times on an "interest-only" basis, the central requirement of the Plaintiff's business relationship with the Defendant was that interest be paid as required. All interest was paid under the terms of the Facility Letter of 2nd February 2009.

14. The Accounts and Bank Statements of the former Plaintiff on foot of which the sums claimed herein are inaccurate. Interest on foot of the Facility Letter of 2009 and all preceding Facility Letters was charged at the former Plaintiff's stated rate which wrongfully and unlawfully included an undisclosed additional margin over the EURIBOR rate.

15. The former Plaintiff has misrepresented the financial position between itself and the Defendant failing to take into account rental income, mandated to the Plaintiff's Account Number 60487013 at the former Plaintiff Bank, when claiming breach of interest payments for the purposes of the within proceedings. According to the former Plaintiff Bank's Facility Letter of 2nd February 2009 the amount of Facilities advanced to the Defendant were:

Facility A: €20,995,000

Facility B €10,480,000

Facility C €3,829,000

Facility D €1,037,000

(the "Facilities")

16. The former Plaintiff wrongly calculated the amount alleged to be due and owing under "Facility D" and further omitted to give credit for the Rental Income Account of the Defendant maintained at the former Plaintiff Bank which said Rental Income Account was in the control of the former Plaintiff Bank and was more than sufficient to pay the sums due under "Facility D."

17. As of July 31st, 2009, the amount of Rental Income not credited to the Defendant's Loan Accounts from the Rental Deposit Account Number 60487013 in the former Plaintiff Bank was €515,267.27.

18. In addition, in 2010, interest rates were at such a level that interest payments would have been fully covered by the contracted rent roll from the Defendant's portfolio, even without recourse to other resources of the Defendant.

19. The true position was that there was no default of the "Facility D" or any other facility, at any material time other than those as accepted and/or agreed with the former Plaintiff. The former Plaintiff has erred and acted negligently and wrongly in claiming a breach of interest covenant and has done so falsely as a justification for the bringing of the within proceedings. The Demand Notice served by the former Plaintiff on 19th January 2010 did not assert that the Facilities were in default.

20. The gross amount of Rental Income for the year 2009 was €1,171,983 and for 2010 was €1,061,988 and was derived from the properties listed in the table below:

John Morrissey		
Anglo Irsh Bank property		
Rental Income	**2009**	**2010**
Anglo Irish Bank Portfolio	**€**	**€**
Block A, Galway West Business Park	597,000	597,000
Block 9D Parkwest	186,008	168,256
Malakoff Villa Rathgar	48,000	47,750
7 Belgrave Square	21,600	0
7 Leinster Lawn South	0	0
60 Garville Avenue	37,000	33,704
9 Effra Road	39,000	37,515
27 Beechwood Avenue	25,000	22,500
32 Villiers Road	27,075	1,800
5 Mountpleasant Terrace	32,400	13,500
Abercorn House, Brighton Square	26,200	22,900
17 Airways Industrial Estate, Santry	47,450	47,158
18 Airways Industrial Estate,	50,200	50,205
Parochial House	0	0
10 Court, Temple Manor	15,800	7,300
10 Crescent, Temple Manor	10,550	12,400
30 De Vesci House	0	0
10 Holland Park, Liscannor	0	0
Apartment 3, 20B Highfield Road	8,700	0
Gross Anglo Portfolio	**1,171,983**	**1,061,988**

21. The Facility Letter of 2nd February 2009 had been extended by a senior manager of the former Plaintiff, Mr. Kieran Gilmartin. By e-mail of Tuesday, 30th June 2009 Mr. Gilmartin wrote to the Defendant and stated inter alia "I will forward facility letters later this week". The Defendant invited Mr. Gilmartin for lunch on Tuesday, 21st July 2009, and the Defendant and Mr. Gilmartin went to the Fitzwilliam Hotel, St. Stephens Green to discuss the documentation of the agreement made between the former Plaintiff and the Defendant for the rolling over of the Facility Letter of 2nd February 2009.Mr. Gilmartin expressed to the Defendant that unlike many other customers of the former Plaintiff, he was honouring his repayments under his Loans and that the former Plaintiff was content with the performance of the Facility. At the said meeting Mr. Gilmartin further stated to the Defendant that the administrative functions of the former Plaintiff were in disarray following its nationalisation, that formal documentation would be forthcoming following the completion of its internal reorganisation and that the Defendant should keep lodging rental income as the Defendant had previously been doing.

22. At that meeting, Mr. Gilmartin confirmed that the Agreement of 2nd February 2009 had been extended by the former Plaintiff and represented to the Defendant that so long as interest payments continued to be made, the Loan would not be called in. In his Affidavit sworn in the within Proceedings on 30th June 2011, Mr. Kieran Gilmartin averred that he had not communicated to the Defendant the expiry date of the extended facility, which had been internally approved by the Bank.Following this meeting of Tuesday, 21st July 2009. at the Fitzwilliam Hotel the Defendant e-mailed Mr. Gilmartin on Friday, 24th July 2009 and stated in his e-mail "You should have received a cheque Tuesday for the net amount due (circa 106k) to Anglo as of July 1, under our revised agreement?" and by e-mail of the same date Mr. Gilmartin acknowledged receipt of this cheque.

23. On the basis of the express representation and warranties given by Mr. Gilmartin and acted on by the defendant, in circumstances where the rent roll of the above mentioned properties were covering all interest on the various liabilities of the Defendant with the former Plaintiff, it is asserted that the former Plaintiff is estopped from terminating, calling in or demanding repayment of the Facilities since the rent roll of the above mentioned properties was and remains capable of discharging liabilities of the Defendant under the Facilities.

24. By virtue of the conduct of the former Plaintiff Bank in the entirety of its relationship with the Defendant from 2000 to the present day and by virtue of the representations and actions taken by the former Plaintiff Bank towards the Defendant it (the former Plaintiff) is estopped from calling in the Defendant's loans.

Particulars of Representation

25. When the Defendant first engaged with the Bank for the purposes of receiving a loan, which became the Loan Facility dated 30th August 2000, one of his primary concerns was to ensure that the overall loan being advanced would not be called in, on demand,

unless the interest due was unpaid. This was of such importance to the Defendant that he was concerned to get a special agreement in respect of same. The Defendant wrote to Ms. Catherine Mullarkey at Anglo on 17th July, 2000 stating that he did not want the Facility Loan called in, on demand, unless the interest due was unpaid.

26. Ms. Catherine Mullarkey, Senior Manager of Banking wrote to Mr. Morrissey by facsimile letter on 20th July, 2000 wherein she attached a revised draft facility letter which included an event of default clause said to give him the comfort he required that the loan would not be called, without just cause. The Facility Letter of 30th August 2000 stated that all monies advanced were repayable on or before 30th September 2015. This event of default clause was at all material times a fundamental term of the contract between the parties and the former Plaintiff is in breach of contract by demanding repayment of the monies advanced to the Defendant in circumstances where no event of default had occurred.

27. During the years between 2000 and 2009, it was represented by the former Plaintiff to the Defendant and the Defendant was led to believe that the loans advanced by the former Plaintiff were not on a "demand only" basis and repayment of the principal sum advanced would not be demanded provided that the Defendant continued to make the interest payments due on the loans.

28. In dealings with Mr. Jeremy O'Sullivan and Mr. Armand Lako (Assistant Manager, Lending Ireland in the former Plaintiff) in respect of the rolling over of the Facility Loan of 30th August 2000 which became the Facility Letter dated 21st December 2006, it was specifically stated to the Defendant by Mr. Jeremy O'Sullivan and Mr. Armand Lako that the loans provided to the Defendant would not be called in and would continue to be rolled over provided the Defendant did not default on interest payments. The former Plaintiff referred to the Facilities as "bespoke/tailor-made" loan facilities, by which the Defendant understood that they had been customized for the benefit of the Defendant.

29. By e-mail of 22nd May 2007, which formed part of the course of negotiations for the Facility Letter dated 27th July 2007 Mr. Lako reverted to the Defendant after the Defendant informed him that a competing bank had quoted a 1.35% margin above EURIBOR on a loan facility in circumstances where Anglo had quoted 1.75% above EURIBOR. Mr. Lako stated to the Defendant that it would be difficult to match the 1.35% margin and that margin was not something Anglo tended to compete on solely but while trying not to get priced out of the market, there might be other angles to it, which could be worked on and suggested he would discuss with the Defendant to see if there were other angles to an agreement besides the margin.

30. The ultimate margin reached on the Facility Letter dated 27th July 2007 and 16th January 2008 was 1.6% above ONE MONTH EURIBOR plus RAC and it was an express or implied condition:

a. that the LTV model would continue with interest only payments with no capital repayments envisaged except by way of sale or refinancing of an asset;

b. that there would be flexibility as regards operating the facility of the type shown at the time of the Hibernian Stamp Duty facility (see below) when the former Plaintiff provided approximately €423,000 to the Defendant to fund the payment of Stamp Duty on the purchase of a building at Galway West Business Park called "the Hibernian Building", which building was not charged to the former Plaintiff Bank;

c. that the former Plaintiff would not call a loan if contractual interest was being paid;

d. that the Defendant would be able to defer interest payments on an occasional basis in the form of temporary interest roll-ups, which could be repaid over time on a structured basis as required;

e. the former Plaintiff would at the very least seriously consider providing finance for a successor to the Defendant's property investment company in which the Defendant was a major shareholder and Director, Capital D Property plc;

f. the former Plaintiff would introduce the Defendant to its Private Wealth division with a view to Capital D designing products that would be marketed to the bank's High Net Worth clients;

g. that financing facilities would be made available for renovation of certain of the Defendant's properties that formed part of the former Plaintiff's security.

31. In 2002, the former Plaintiff in seeking to court and cultivate a relationship with the Defendant financed the payment of a Stamp Duty Liability on a building owned by the Defendant in Galway. This was represented as an inducement on the part of the former Plaintiff to the Defendant to show the business model of the former Plaintiff which was based on flexibility and commerciality. At the time of the provision of this loan the former Plaintiff had no proprietary or security interest in this Property.

32. Moreover by means of the representations and expressions of support or confidence made by and on behalf of the former Plaintiff Bank and acting on same and the inducement thereof arising out of the e-mail correspondence of 30th June 2009 and 24th July 2009 and the meeting with Mr. Kieran Gilmartin on Tuesday 21st July 2009, the Defendant accepted the extension of the term of the Facility Letter of 2nd February 2009 on the same terms as outlined above.

33. It was an express and/or implied term of the agreement between the former Plaintiff and the Defendant that there would be a "roll-over" of the facilities set out in the Facility Letters dated 30th August 2000; 5th March 2001, 20th February 2002, 17th June 2002, 21st December 2006, 27th July 2007, 22nd October 2007, 16th January 2008 and 2nd February 2009 and such facilities were in fact rolled over.

34. At the time of the appointment of the Receiver, the Defendant had ensured 100% occupancy of the lettable portfolio and 100% of the tenants were making their rental payments as required. On 19th November 2009, the Defendant recommended to the former Plaintiff that the term of an important lease to Aviva be immediately extended in return for a reduction in the rent payable by Aviva.

35. Further, the former Plaintiff negligently, wrongly and in breach of contract, claimed that the term of the loan facilities advanced to the Defendant had expired and without warning appointed a Tom Kavanagh as Receiver of the Defendant's properties on the 26th day of January 2010 and thereafter the said Receiver took possession of same and delegated the management thereof. This appointment was made despite the objections and representations made by the Defendant to the former Plaintiff that there was no reason or entitlement so to do. As part of these objections, the Defendant pointed out the absence of the requisite expertise in the proposed replacement manager, Mc Nally Handy and Company. Since the appointment of the Receiver it is understood that in excess of 50% of the contracted rent-roll has been lost.

36. Pursuant to the representations and warranties set out above, the interest on the various liabilities represented in the 2009 Facility Letter was fully paid by the Defendant to the former Plaintiff and therefore the Defendant acted in compliance with the terms of the Facilities.

37. No event of default occurred under the 2009 Facilities.

38. By virtue of the former Plaintiff's actions in calling in its loan to the Defendant when no default had occurred and when the term of the loan had not expired, in appointing a Receiver to the Defendant's properties and in issuing the within proceedings against the Defendant, the former Plaintiff has sought to obtain an Order from this Honourable Court against the Defendant in circumstances when all sums properly due and owing by the Defendant to the former Plaintiff were paid up to date and when the term of the loan to the Defendant remained in force.

39. In the circumstances of this case and because of the matters pleaded herein the former Plaintiff is estopped form demanding, calling in or terminating the Facilities.

II. FIDUCIARY RELATIONSHIP

40. From 2000 to 2009, the former Plaintiff cultivated a close commercial and business relationship with the Defendant by whose loans he has purchased properties, family homes and investments in shares (both public quoted and privately owned) based on a loan to value ratio ("LTV"), which is the ratio of the value of the loans outstanding to the market value of the assets held as security by the former Plaintiff. The nature of the business relationship between the former Plaintiff and the Defendant was not restricted to that merely of lender and borrower but was akin to dealing with a venture-capital financier who chose to participate with an entrepreneur with an exceptional track record.

41. It was during the year of 2007 that the parties commenced to build on the existing banking relationship between them and the former Plaintiff sought to capitalise on the expertise of the Defendant. At this point the first Capital D fund was up and running and operating successfully. The former Plaintiff was interested in using the same model of investment to provide additional product lines to its High Net Worth customers. This was the context of the arrangements entered into from 2007 onwards between the parties hereto.

42. Over the period in which the former Plaintiff provided loans to the Defendant the financing arrangements in question were used for the purchase of properties (including their renovation and development), family homes and investment in both publicly quoted and privately owned shares but moreover, the former Plaintiff advised and counseled the Defendant about all matters concerning same.

43. The advice which the former Plaintiff provided and on which the Defendant relied was that, as set out above, if interest payment obligations were met then the facilities would not be called in. The particulars of these representations, advice guidance and consultations given by the former Plaintiff to the Defendant are as set out above.

44. As a result of the insolvency of the former Plaintiff, the former Plaintiff was not in a position to deliver on its representations and promises, for which the Defendant had paid in terms of an above market interest rate. As a consequence of this failure by the former Plaintiff, great loss and damage has been incurred by the Defendant.

Particulars of Fiduciary Relationship

(i) the former Plaintiff provided investment advice to the Defendant in the form of inducements, representations and warranties that if the Defendant transferred his borrowings to the Plaintiff he would be the recipient of interest-only loans;

(ii) the former Plaintiff provided advice to the Defendant by way of inducements, representations, warranties that the liabilities of the Defendant would not be called in so long as the interest payments of the Defendant were met;

(iii) the former Plaintiff provided advice to the Defendant in the form of inducements representations and warranties that no enforcement proceedings would occur so long as interest payments were met;

(iv) the former Plaintiff was careful to cultivate and encourage the Defendant to have confidence in it;

(v) the former Plaintiff represented warranted and assured the defendant that it had information, relationships, special skill and technical expertise that it solely possessed which it would offer, on terms to the Defendant, in consideration of the Defendant initiating and continuing a relationship with it;

(vi) the former Plaintiff represented to the Defendant that it would behave with professionalism, responsibility and an enhanced level of good faith;

(vii) the former Plaintiff represented and warranted that it would not act against the interests of the Defendant by virtue of the special fiduciary relationship between them and that it would appropriately manage conflicts of interest;

(viii) the former Plaintiff encouraged the Defendant to have trust and confidence in it and that the Defendant could rely on its advice.

(ix) the former Plaintiff represented to the Defendant that it was different from other Banks operating in Ireland, that it responded more quickly to applications for finance and that it was more inventive and flexible in its provision of financial support.

45. Further and/or in the alternative, by reason of (i) the matters aforesaid (ii) the special relationship and/or fiduciary relationship between the former Plaintiff and the Defendant, (iii) the false representations made to the Defendant by the Plaintiff, its servants and/or agents as pleaded in the Counterclaim herein and (iv) the Defendant's reliance on these false representations, the Defendant has suffered great loss and damage such that a Court of equity should give relief in respect thereof.

46. At the onset of the financial crisis in 2008 the Defendant, using contacts and relationships made and developed by him over the previous fifteen years introduced Texas Pacific Group ("TPG"), one of the world's largest and most respected private equity firms to, inter alia, senior politicians, the NTMA, the Central Bank, the Financial Regulator, the Plaintiff Bank and other banks.

47. Consistent with the special fiduciary relationship between the parties hereto, at least half a dozen meetings took place between TPG and/or the Defendant and the former Plaintiff Bank, which had as their aim the provision of capital to the former Plaintiff Bank.

48. Representations were made by the former Plaintiff Bank as to its circumstances, state and condition which have subsequently been shown to be false and untrue. The Defendant used his contacts and arranged these meetings on the basis of these representations which have since proved to be groundless and false.

49. While assisting and dealing with TPG, the Defendant was required to undertake not to deal with (buy or sell) any shares or stock of any of the Financial Institutions in which TPG was considering investing including the former Plaintiff Bank. The Defendant gave this undertaking and was subsequently greatly embarrassed when the Plaintiff despite it being fully aware of the aforementioned undertaking sold the Defendant's portfolio of shares in the former Plaintiff Bank secured to the former Plaintiff on the afternoon of the 15th day of January 2009 on the day of and immediately prior to the announcement of the former Plaintiff's nationalisation. This action by the former Plaintiff, which had to be disclosed to TPG by the Defendant immediately he became aware of same, together with the false and untrue representations made by the former Plaintiff to TPG during the Due Diligence process have greatly damaged the reputation and good name of the Defendant with TPG.

III. BREACH OF THE FIDUCIARY RELATIONSHIP

50. On the recommendation of the Defendant, on 28th November 2008, TPG made a formal offer to subscribe €1.25 billion in capital into the Bank of Ireland. Two days earlier, the then Chief Executive of the former Plaintiff, David Drumm, had said inter alia to the Defendant, at a presentation by senior executives of the former Plaintiff at the London offices of TPG, that "his loyalties had been noted".

51. While correspondence of 14th November 2008 and 2nd December 2008 from Ms Deborah Rea of the former Plaintiff Bank showed a continuation of the former Plaintiff's well-establish *modus operandi*, the attitude of the former Plaintiff changed markedly later in December 2008, when the management of the account was taken over by Mr Kieran Gilmartin. The Defendant is of the belief that this change occurred as a result of his recommendations to that it invest in Bank of Ireland rather than the former Plaintiff Bank.

52. The former Plaintiff Bank refinanced the Defendant's loans with Bank of Ireland and the Educational Building Society in July 2007 and IIB Bank in January 2008. If the Defendant had been aware that the former Plaintiff was insolvent, he would not have refinanced his property portfolio with the former Plaintiff Bank, nor would he have purchased stock in the former Plaintiff Bank. The former Plaintiff entered into the said loans with the Defendant when it knew or ought to have known it was insolvent and if it did not so know at that time it was negligent in not so knowing.

53. At all material times in 2008 and 2009, the former Plaintiff knew or ought to have known that it was insolvent and if it did not know the former Plaintiff was negligent or reckless in the care, management and control of its business. The former Plaintiff induced the Defendant to enter into Facility Letters on 16th January 2008 and 2nd February 2009 and the subsequent extension thereof for the purpose of continuing its existence as a Bank and maintaining a false impression in the market and amongst its customers and fellow Banks as well as Regulators that it was not insolvent and attempting to avoid a winding up to enable it to cover up the true state of its finances. In breach of trust and/or in breach of duty and/or dishonestly and/or negligently the former Plaintiff failed to inform and/or disclose to the Defendant at all material times its insolvency and the former Plaintiff dishonestly and/or fraudulently and/or negligently thereby misled and induced the Defendant to enter into the said Facility Letters on 16th January 2008 and 2nd February 2009 and to accept the extension thereof.

54. Moreover, the said demand was made at a time when the former Plaintiff was insolvent and in breach of trust and of its obligations to the Defendant. The said demand was calculated to and did gravely harm the Defendant's reputation and standing in the commercial community and damaged and prejudiced his relationship with TPG and with other supporting banks and the viability, reputation and good name of his business as a result of which the Defendant suffered great loss and harm and damage which is continuing.

55. Further and/or in the alternative the former Plaintiff was aware prior to the issuing of the Facility Letters dated 22nd October 2007 and 16th January 2008 that the Defendant intended to invest in shares in the former Plaintiff Bank. The former Plaintiff received regular updates of the constitution of the Defendant's portfolio from Bloxham Stockbrokers throughout 2007 and 2008. On or before 22nd October 2007, the former Plaintiff was aware of Sean Quinn's CFD (Contracts for Difference) position in the former Plaintiff Bank and had commenced to provide loans to the Quinn family for the purposes of purchasing shares in the former Plaintiff Bank. Had the Plaintiff disclosed these matters to the Defendant or had the former Plaintiff simply declined to advance monies to the Defendant to invest in its own shares, the Defendant would not have suffered the loss amounting to €967,000 which he did, in fact, suffer on his investment in the former Plaintiff's shares and further losses of approximately €3 million on other Irish banking shares. Without the losses incurred on these shares the Defendant would have been able to continue to honour indefinitely the terms of his agreements with the former Plaintiff.

PARTICULARS

Number of shares in portfolio as of 31st July 2008:

Anglo Irish Bank 88,000

AIB Bank 80,000

Bank of Ireland 85,000

Irish Life and Permanent 90,000

Monies invested in purchase of share portfolio circa. €6,500,000

Loss on sale circa. €4,000,000

56. The former Plaintiff lent the Defendant the money used to purchase these shares. It did so (i) in the knowledge that the Defendant would be investing in the shares of the former Plaintiff and other Irish banks, (ii) at a time when the former Plaintiff was engaged in an illegal share support scheme for its own shares, (iii) at a time when the Board of the former Plaintiff Bank was concerned about a potential "run" on the bank's deposits, (iv) when the Plaintiff was manipulating its financial accounts and (v) at a

time when the former Plaintiff has subsequently been shown to have been insolvent and with no prospect of being able to honour its obligations as a lender for the duration of the period it had contracted with the Defendant.

57. By letter dated 26th September 2008, the former Plaintiff alleged that there had been a breach of Clause 6(d) of Facility Letter dated 16th January 2008. Clause 6(d) stated that if Facility C exceeded 80% of the value of the assets in the portfolio which was charged to the former Plaintiff, the former Plaintiff had sole discretion to sell all or part of the assets in the portfolio and apply the proceeds of sale in order to reduce Facility C. The said portfolio included shares in the former Plaintiff Bank itself as well as in AIB Bank, Bank of Ireland and Irish Life and Permanent. By the said letter the Plaintiff stated that the LTV had worsened to 107% on 31st July 2008 but that, subject to the interest being funded, the former Plaintiff would agree to the Defendant's request to "live with" the breach on a temporary basis. By 26th September 2008, the ratio was at 142%. At that time the Plaintiff Bank had a marked reluctance to place its own shares for sale on the market, as manifested by the so-called Maple 10 transaction and the loan of 29th September 2008 to Mr William McAteer.

58. On January 15th 2009, the day of the nationalization of the former Plaintiff, the former Plaintiff Bank approved a decision to foreclosure on the Defendant's share portfolio. The portfolio, which included shares in the former Plaintiff itself as well as in AIB Bank and Bank of Ireland, was sold in the market at 15:56pm.

59. After close of business that day, it was announced that the former Plaintiff would be nationalized. This rendered the shares immediately worthless. The Defendant was most disturbed with these actions for several reasons, inter alia (i) the decision had been made by the Credit Committee of the former Plaintiff, (ii) it appeared to be a clear case of insider trading, (iii) as a result of being involved in due diligence, on behalf of TPG, on the former Plaintiff Bank, AIB Bank and Bank of Ireland, the Defendant had signed Confidentiality Documentation that expressly debarred him from trading in these shares, and (iv) the former Plaintiff was keenly aware of these trading restrictions imposed on the Defendant given that the former Plaintiff was one of the banks under said due diligence. The Defendant wrote to Mr. Donal O'Connor, the then Chairman of the former Plaintiff, on this matter, as part of providing confirmation to the internal counsel of TPG that he had had no part in the decision of the former Plaintiff to sell his shares. Being forced to disclose this to TPG caused great embarrassment and damage to the Defendant, in particular in the light of the disclosures that had been released in connection with the former Plaintiff during the previous six months.

60. In 2010, following a range of discussions with different parties, TPG ultimately consummated a €900 million joint venture transaction with Green Property, to be known as Green TPG Ventures. However, the unwarranted/illegal installation by the former Plaintiff of a Receiver to the Defendant's properties in January 2010 meant that he had to step back from any involvement both in finalizing the deal with Green Property and in the ongoing management of the joint venture. The compensation expected from a venture of this scale was significant and was lost to the Defendant due to the improper and unlawful action of the former Plaintiff against him.

61. On or about the 19th day of January 2010, when the former Plaintiff made demand for the repayment of all sums then alleged to be outstanding, said to be €36,835,678.31, it did so on a false and inaccurate ground of expiry of the term of the Facility Letter of 2nd February 2009 and that the said alleged sum was due and owing to it which it was not.

62. On 9th September 2008, in the midst of the TPG discussions with the former Plaintiff and other banks, the Defendant suffered a subarachnoid brain haemorrhage. In the four weeks prior to this, the value of his share portfolio, which contained a very significant number of shares in the former Plaintiff Bank, AIB Bank, Bank of Ireland and Irish Life and Permanent, had fallen by approximately €4 million. This collapse in value can clearly now be linked to the actions of the former Plaintiff. The stress the Defendant was under as a result of suffering substantial losses on his property and share portfolios caused by the former Plaintiff Bank contributed to his brain haemorrhage.

63. In an Affidavit sworn on the 18th day of May 2011 in the within proceedings it was alleged by Mr. Ian Wigglesworth that, while correspondence with the Receiver was continuing, certain unsecured assets of the Defendant were gifted to third parties in trust for the Defendant's children and thus were not available to help reduce the Defendant's alleged liabilities to the former Plaintiff. This false allegation, first made in a letter of 5th April 2011 from Matheson Ormsby Prentice Solicitors to the Defendant, was refuted that same day by the Defendant in an e-mail to Matheson Ormsby Prentice Solicitors with supporting documentation provided by the Defendant's Tax Consultants, Kennelly Twomey and Company. Notwithstanding same, the said false allegation was included in Ian Wigglesworth's affidavit on behalf of the former Plaintiff and published in the Irish Times on the 24th day of May 2011 causing further damage to the good name and reputation of the Defendant. The former Plaintiff (and Receiver) have proceeded to sell certain of these assets to which they do not have title and, to date, has refused to discuss this with or compensate the owners thereof.

64. The Defendant has suffered and continues to suffer substantial loss, damage, inconvenience and expense by virtue of the former Plaintiff's said actions.

PURPORTED TRANSFER OF ALLEGED CREDIT FACILITIES AND DEBTS TO THE SUBSTITUTED PLAINTIFF

65. The Plaintiff is put on strict proof that by an agreement in writing on or about the 31 March 2014, IBRC (In Special Liquidation) as vendors and the special liquidators agreed to sell to Stone Investments, inter alia, the credit facilities and debts the subject matter of these proceedings.

66. It is denied that by a Deed of Transfer dated 11 July 2014 IBRC (In Special Liquidation) and the special liquidators as assignors absolutely assigned to Stone Investments as assignees all right, title and interest of IBRC (In Special Liquidation) to, inter alia, the credit facilities and debts the subject matter of these proceedings to Stone Investments.

67. The Commercial Court has been refused sight of the alleged agreement and/or deed as set out in the said paragraphs 8 and 9 by virtue of the wrongful unilateral redaction of the terms of a copy of the said agreement in breach of the Direction of the said judge referred and the Defendant reserves his position have a regard to the claims now made by him in re proceedings entitled *John Morrissey v Irish Bank Resolution Corporation (In Special Liquidation, LSFII Stone Investments Limited, Kieran Wallace and Eamonn Richardson (Joint Special Liquidators of the IBRC), The Minister For Finance, Ireland and the Attorney General: Record No. 2014/9156P* and where the claims therein are also particularly pleaded in this Amended Defence and Counterclaim hereunder

68. It is denied that by Notice in writing of the assignment pleaded at paragraph 9 of the Amended Summary Summons was given to the defendant by letters transmitted by email dated the 23 July 2014 and 28 July 2014, as alleged at Paragraph 10 of the Amended Summary Summons as alleged or at all. Insofar as such notice in writing was given, the same was invalid and/or of no effect.

69. It is denied that by reason of the alleged assignment, and/or in accordance with law, Stone Investments, the substituted Plaintiff,

is entitled to pursue these proceedings against the Defendant and seek judgment against him in respect of all outstanding amounts due by him on the credit facilities the subject of these proceedings as alleged at Paragraph 11 of the Amended Summary Summons as alleged or at all.

70. The Defendant admits that this Honourable Court gave judgment dated the 29 October 2014 but pleads that the said determination was not granting of judgment in that amount to the former Plaintiff and/or Substituted Plaintiff and does not to entitle the Substituted Plaintiff to judgment in that amount. The Defendant pleads that the Court found that the Defendants are, inter alia, to raise any issue which the Defendants would have been entitled to raise against the former Plaintiff as well as the Substituted Plaintiff arising from the purported agreement to sell the facilities in March 2014.

71. Insofar as certain duties, requirements (including public law obligations relating to fair procedures) and/or conditions were breached and/or were not complied with by the former Plaintiff, whether as Anglo Irish Bank, the IBRC, the IBRC (in special liquidation) and/or were breached and/or not complied with by Special Liquidator of the IBRC and/or by the Minister for Finance in the sales process leading and/or relating to the purported agreement and/or deed of transfer to sell the alleged credit facilities and debts to the Substituted Plaintiffs, such matters rendered ineffective any purported assignment and/or transfer of the said alleged credit facilities and/or debts of the Defendant to the Substituted Plaintiff and/or the same was void and/or no effect and/or came subject to duties and/or liabilities.

72. If, which is denied, the Substituted Plaintiff, purportedly acquired all right, title and interest of IBRC (In Special Liquidation) to, inter alia, the credit facilities and debts the subject matter of these proceedings, then the same came subject to (and/or the Substituted Plaintiff is bound as alleged successor in title) the rights, claims, defences of the Defendant against the former Plaintiff, whether as Anglo Irish Bank, the IBRC, the IBRC (in special liquidation) and/or against Special Liquidator of the IBRC and/or the Minister for Finance in respect of the purported sales process and has rendered void and/or ineffective any purported acquisition of the credit facilities and/or debts of the Defendant by the Substituted Plaintiff and/or the Substituted Plaintiff is bound by the same.

73. It is denied that the sum of €31,542,125.93 together with interest accrued since on an ongoing basis since 3 June 2014 (subject all just credits and allowances) is due and owing from the defendant to Stone Investments as alleged at Paragraph 13 of the Amended Summary Summons or at all.

74. The Plaintiff is put on strict proof that the defendant has not paid the said €31,542,125.93 or any amount due on foot of the credit facilities the subject matter of these proceedings as alleged at Paragraph 14 of the Amended Summary Summons or at all.

75. The Defendant relies upon the matters pleaded in the proceedings entitled *John Morrissey v Irish Bank Resolution Corporation (In Special Liquidation, LSFII Stone Investments Limited, Kieran Wallace and Eamonn Richardson (Joint Special Liquidators of the IBRC), The Minister For Finance, Ireland and the Attorney General: Record No. 2014/9156P.* Without prejudice to the same, the Defendants will rely particulars which will set out hereinafter in the

76. The present proceedings ought to be stayed pending the determination and/or resolution of the proceedings entitled John Morrissey v Irish Bank Resolution Corporation (In Special Liquidation, LSFII Stone Investments Limited, Kieran Wallace and Eamonn Richardson (Joint Special Liquidators of the IBRC), The Minister For Finance, Ireland and the Attorney General: Record No. 2014/9156P.

77. Further and/or in the alternative, the present proceedings ought to be consolidated with the proceedings entitled *John Morrissey v Irish Bank Resolution Corporation (In Special Liquidation, LSFII Stone Investments Limited, Kieran Wallace and Eamonn Richardson (Joint Special Liquidators of the IBRC), The Minister For Finance, Ireland and the Attorney General: Record No. 2014/9156P*.

78. The Substituted Plaintiff has no locus standi and/or sufficient interest to maintain the present proceedings and/or to obtain any relief.

PARTICULARS

The Former Plaintiffs' obligations

79. The Former Plaintiff, and the Special Liquidators thereof in the exercise functions including in relating to the purported sale of credit facilities and/or debts owed a duty of care to the Defendant to avoid causing him reasonably foreseeable damage in respect of his personal, family, economic and proprietary interests. The said Plaintiff was in a relationship of proximity with the Defendant such as generated the said duty and it was just and reasonable that such a duty of care arose.

80. The Special Liquidators of the Former Plaintiff, in the exercise of their statutory functions, including the several functions under the Irish Bank Resolution Corporation Act 2013, owed a statutory duty to protect the rights and interests of the Defendant.

81. The Former Plaintiff and the Special Liquidators thereof were at all relevant times subject to public law obligations, including a requirement to observe fair procedures.

82. The Former Plaintiff and the Special Liquidators thereof : (i) were and are required not to act outside the limits prescribed by the Irish Bank Resolution Corporation Act 2013; (ii) were and are limited by its purposes, functions and powers as set out in the said Act; and (iii) were and are otherwise subject to the provisions of the Irish Constitution.

83. The Former Plaintiff, and the Special Liquidators thereof in the exercise of their functions, including statutory functions, and in their conduct generally, owed a duty to avoid breaching, or threatening to breach, the constitutional rights of, or interfering with the discharge of his duties by, the Defendant, including:

i his right to property, under Article 40, section 3 and Article 43 of the Constitution;

ii his right to the person, under Article 40, section 2 of the Constitution:

iii his right to equality before the law, under Article 40, Section 1 of the Constitution;

iv his right to human dignity, under Article 40, Section 1 and 3 of the Constitution;

v his right to access of the courts, under Article 40, Section 3 of the Constitution;

vi his right to litigate under Article 40, Section 3 and 43 of the Constitution;

vii his right to fair procedures, including natural and/or other constitutional justice;

vii his rights as spouse, guardian and parent under Articles 40 and 41 of the Constitution.

84. The former Plaintiff and the Special Liquidators thereof, as organs of the State, in the exercise of their respective functions, including statutory functions, and in their conduct generally, were obliged to act in accordance with the requirements of the European Convention on Human Rights Act 2003 in respect of the Defendant's rights under the said Convention and First Protocol thereof.

85. The former Plaintiff and the Special Liquidators thereof, in their acts and omissions constituting the implementation of European Union law, had a duty to respect and protect the Defendant's rights under the Charter of Fundamental Rights of the European Union, including in particular Articles 15, 16, 17, 20, 21 and 47 thereof.

The IBRC Act 2013 and the Irish Bank Resolution Corporation Act, 2013 (Special Liquidation) Order 2013

86. On the 5th February 2013, IBRC was put into statutory "special liquidation" by force of the provisions of the Irish Bank Resolution Corporation Act 2013 for the purposes of a process of winding up subject to certain exemptions from provisions of the Companies Acts. The Irish Bank Resolution Corporation (in Special Liquidation), the Former Plaintiff, was thus created by the said Act

87. The said Act contains provisions that impact on the rights, including constitutional rights, and entitlements of the Defendant.

88. Under S.I. No. 36/2013 - Irish Bank Resolution Corporation Act, 2013 (Special Liquidation) Order 2013, the Minister for Finance purported to issue the Special Liquidation Order pursuant to section 4 of the Irish Bank Resolution Corporation Act 2013 and to appoint Special Liquidators of the Former Plaintiff. As a result of such Order the Special Liquidators are subject to public law obligations in their actions and/or decision making as special liquidators of the Former Plaintiff. Section 7(8) of the Irish Bank Resolution Corporation Act, 2013 provides that,

> "Where the Minister appoints more than one special liquidator, the Minister shall provide in the Special Liquidation Order whether any act by this Act or the Companies Acts, as they apply to IBRC, required or authorised to be done by the special liquidator is to be done by all or any one or more of the persons appointed."

89. Article 3(c) of the Irish Bank Resolution Corporation Act, 2013 (Special Liquidation) Order 2013 states:

> *"(b) each power and duty conferred and imposed upon a special liquidator by the Act may be exercised and fulfilled by either or both of the joint Special Liquidators, acting jointly or individually; and*
>
> *(c) any act required or authorised by the Act to be done by a special liquidator pursuant to the Act may be done by either or both of the joint Special Liquidators, acting jointly or individually".*

90. The Irish Bank Resolution Corporation Act, 2013 (Special Liquidation) Order 2013 failed to satisfy the mandatory requirement of section 7(8) of the 2013 Act insofar as it failed to provide in the Special Liquidation Order whether any act by the Companies Acts, as they apply to IBRC, required or authorised to be done by the Special Liquidator is to be done by all or any one or more of the persons appointed. As a result of the breach of section 7(8) of the 2013 Act, the Special Liquidation Order is unlawful and invalid. In addition and further and/or in the alternative, the purported appointment of the Special Liquidators is unlawful and/or void and/or of no effect and/or is a nullity.

91. Further and/or in the alternative and without prejudice to the foregoing, by way of purported deed of transfer dated 11th July 2014, the Former Plaintiff purported to transfer to the Substituted Plaintiff its rights, title and/or interests in facilities between the IBRC and the Defendant, as borrower. Insofar as the said deed of transfer was only executed by the Former Plaintiff and not jointly by both Special Liquidators, the purported deed of transfer was not effective to transfer the facilities/loans and/or associated rights relating to the Defendant's loans to the Former Plaintiff and in this respect the Defendant pleads as follows:

> (a) The purported transfer was an act done by the Former Plaintiff pursuant to section 231 of the Companies Act.
>
> (b) The Irish Bank Resolution Corporation Act, 2013 (Special Liquidation) Order 2013 failed to provide whether an act done by the Companies Act, required or authorised to be done by the Special Liquidator is to be done by all or any one or more of the persons appointed.
>
> (c) The Irish Bank Resolution Corporation Act, 2013 (Special Liquidation) Order 2013 does not authorise an act of sale or transfer under section 231 of the Companies Act, to be done by one Special Liquidator acting individually.
>
> (d) Insofar as the purported deed of transfer of the loans/facilities, including the Defendant's loans was only executed by one of the Special Liquidators individually, it was ineffective to transfer the facilities and/or loans to the Substituted Plaintiff.
>
> (e) Insofar as the Substituted Plaintiff has acted on foot of such purported ineffective transfer, it is has been guilty of trespass to property, has unlawfully obtained access to confidential information, interfered with business relations between the Former Plaintiff and the Defendant, has committed the torts of conspiracy, maintenance and/or champerty, has breached the Defendant's constitutional rights and/or has otherwise acted unlawfully.
>
> (f) Arising from the above, the Substituted Plaintiff, by reason of (i) the invalidity and legal ineffectiveness of the purported transfer, (ii)the tortious conduct of the Substituted Plaintiff and (ii) the breach by the Substituted Plaintiff of the Defendant's constitutional rights, as no entitlement to seek judgment against the Defendant on foot of such loans/facilities.

92. In addition, at the time of purported agreement to transfer in March 2014 and/or at the time of the purported deed of transfer in 11th July 2014, the Substituted Plaintiff was aware, and/or had full means and the contractual entitlement to become aware, of all of the following facts:

> (i) that Anglo Irish Bank had been under a contractual duty to comply the terms of its loan facilities with the Defendant

set out

(ii) that Anglo Irish Bank had breached the said terms in such a manner as to constitute a fundamental breach of contract, disentitling Anglo Irish Bank or any of its successors to obtain judgment in respect of a claim based on alleged contractual entitlements of Anglo Irish Bank.

Purported Loan Sales Process and Breach of Fair Procedures

93. A copy of a letter from the Special Liquidator dated 9th September 2013 referring to the loan sales process and enclosing extracts from the Ministerial Directions and/or Instructions was forwarded to the Defendant. The said letter of 9th September 2013 was a generic letter sent to all debtors of the IBRC. The letter itself stated that no decision had yet been taken by the special liquidator regarding how the loans would be offered for sale and referred to an entitlement to make submission as to: (1) how the loans are to be sold and (2) the criteria for determining who may be regard as a qualified bidder. Attached to the letter was Schedule 2 (said to be based on professional advice) which related to the relevant criteria identified by the Special Liquidators for the decision as to the method of disposing of the loans and also Schedule 3 (again said to be based on professional advice) which referred to relevant criteria identified by the special liquidators for determining whether or not a bidder should be regarded as a qualified bidder. In this respect the Defendant pleads as follows:

(i) The Former Plaintiff, is servants and agents, including the Special Liquidators, are, and at all material times were, subject to public law obligations and/or in carrying out the loan sales process, were obliged to afford fair procedures and/or natural and/or constitutional justice, to the borrowers which included the Defendant. In this regard the requirements of fair procedures, include adequate notice of its proposed decisions, an opportunity to make submissions, the provision of adequate information to the Defendant to allow him to make submissions and/or a requirement of notice of its ultimate decision to sell the loans and/or a requirement to give reasons.

(ii) Any purported entitlement to make submissions on these matters was entirely undermined by the fact that the Special Liquidator had already set pre-ordained criteria set out in Schedule 2 and 3 attached to the letter of 9th September 2013

(iii) In accepting the criteria set out in Schedule 2 and 3, the Former Plaintiff, its servants and agents, including the Special Liquidators, unlawfully fettered their discretion in respect of the loans sales process.

(iv) Any purported entitlement to make submission on these matters was entirely illusory and meaningless.

94. Nonetheless and without prejudice to the foregoing, a submission dated 10th September 2013 was made by Black and Company, Solicitors, on behalf of the Defendant to the Special Liquidator. These submissions referred, *inter alia*, to the existence of the present proceedings which had been ongoing for some two years and that the Special Liquidator was not entitled to seek property which was the subject of litigation, as this would breach his constitutional rights. Without prejudice to this, submissions were also made to the effect, *inter alia*, that the Defendant should qualify as a qualified bidder and that the loans should be offered for sale individually as they have no economic connection with would justify the loans being offered as part of a larger portfolio. The letter of 10th September 2013 further requested that the Defendant be informed of a range of matters including the valuations and the terms of conditions of sale and sales process and sought a response from the Special Liquidator.

95. No response was received to aforesaid letter and a further letter dated 20th September 2013 was sent to the Special Liquidators. Again no response was received and another letter dated 4th October 2013 was sent to the Special Liquidators stating, *inter alia*, that for the Special Liquidators, as an organ of State, to take any steps which would affect the ongoing litigation would be an unconstitutional interference with the separation of powers.

96. A letter dated 9th October 2013 was received from the Special Liquidators. The response made no reference to the ongoing litigation and said that a decision had been made for the sale of INBS assets which included the Defendant's obligations but that no decision had been made on the Anglo Assets (which was the subject of the existing IBRC proceedings). As regards potential purchasers it said that the Special Liquidators had decided that the criteria which they would apply were those set out in Schedule 3 and repeated the same formula as was set out in their earlier letter in respect of Schedule 3 of having regard to professional advice and based on their objective of maximising sales realisation in the public interest. The letter simply confirmed the criteria which had already been established and there was no evidence of having considered any submissions. The letter concluded by saying that the Special Liquidators were considering on the appropriate method of selling the Defendant's Anglo obligations and the appropriate criteria as to who would qualify to make a bid for these loans. It then said that it was currently anticipated that the substantial majority of loans would be offered for sale by way of large loan portfolios and the submission of the Defendant would be considered.

97. By letter dated 1st November 2013, the Defendant was forwarded a letter from the Former Plaintiff. The letter referred to the Former Plaintiff's earlier letter dated 9th September 2013 and stated that a decision had been taken by the Special Liquidators to include all of the Defendant's loans in a large portfolio of loans as defined in the September letter. It further said that in the September letter, the Defendant had been informed that they anticipated that a substantial majority of loans would be offered for sale in large loan portfolios. No mention whatsoever was made of the fact that the Defendant had made submissions in respect of the sale of the loans and furthermore no reasons were given for the apparent rejection of the same. Furthermore, the reference back to the previous letter of 9th September 2013 and endorsement of the criteria stated therein further supports the view that the request for submissions on such criteria was entirely illusory.

98. The letter further said that the Former Plaintiff had obtained advice from its professional advisors in relation to the Defendant's loans and having regard to the criteria set out in Schedule 2 of the letter of September, it had been decided that the loans should be sold in this way having regard to the size of the loans; the likely credible interest from adequately funded qualified bidders and in order to maximise sales realisations in the public interest. In respect of the same, the Defendant pleads as follows:

(a) Insofar as the letter referred to advice from their professional advisors, this was the same formula used in the September 2013 letter and the Former Plaintiff, its servants and agents, including the Special Liquidators, unlawfully fettered their discretion.

(b) Insofar as the letter said that "having regard" to the criteria set out in Schedule 2 of the letter of September, it is evident that no regard was had to the submissions made by the Defendant.

99. The letter further said that the Special Liquidators were acting in accordance with their obligations under the Act and the Ministerial instructions which included to sell the assets of IBRC as soon as possible and in no any event, by not later than 31

December 2013 or as soon as practicable thereafter. It said that the Special Liquidators expected the portfolio of loans to be put on the market on or around 11th November 2013 and would be sold as soon as possible thereafter. As regards the sales process, the letter said that the Special Liquidators had decided that the criteria which they would apply were those which had been set out in the Schedule 3 of the September letter. It said that the Special Liquidators had taken this decision having regard to professional advice and based on their objective of maximising sales realisations in the public interest. It further said the portfolio would have a part value of approximately €1.33 billion. There was no evidence that the Former Plaintiff, its servants and agents had regard to the submissions made by the Defendant (and there was no reasons given for the apparent rejection of his submissions) and it again referred back to the criteria on qualified loan bidders in the September letter, notwithstanding that it had sought submissions on such criteria in that letter.

100. The letter further said that if no bid was received or if the bids fell below the valuation price, the Special Liquidator would be obliged to sell the portfolio to NAMA. The letter further said that it would be necessary for the Special Liquidators, in the course of the sales process, to provide information about the loans to qualified bidders and would only provide such information to qualified bidders who had agreed to comply with non-disclosure obligations.

101. Notwithstanding that the sale was to be completed by the 31st December 2013, no further communication of the process or decisions was made by the Special Liquidators to the Defendant. It appears that on the 31st March 2014 a contract for the assignment of the Defendant's loans was entered into between the Former Plaintiff and the Substituted Plaintiff. However, it was only during the first week of May 2014 that the existence of such agreement was disclosed to the Defendant, by counsel for the the Former Plaintiff in Court on 2nd May 2014 and by letter from Arthur Cox to Black, Solicitors for the Plaintiff, on 7th May 2014. As will be set out hereinafter, the Former Plaintiff purported to transfer the loans of the Defendant to the Substituted Plaintiff on the 11th July 2014.

102. In respect of all the foregoing, the Defendant pleads that in the purported loan sales process and/or purported sale of the Defendant's loans:

(a) The Former Plaintiff, its servants and agents, including the Special Liquidators, failed to comply with fair procedures and/or natural and/or constitutional justice.

(b) Without prejudice to the above, the former Plaintiff, its servants and agents, including the Special Liquidators, failed to afford the Defendant fair procedures and/or natural and/or constitutional justice:

(i) in failing to give any or any adequate notice of the purported transfer and/or assignment to the Substituted Plaintiff;

(ii) in failing to provide any meaningful and/or adequate entitlement to make submissions in circumstance, *inter alia*, where the criteria for the sale of loans and/or qualified bidders was already pre-ordained and/or decided;

(iii) in failing to give any reasons for the rejection (and/or notice of the rejection) of the submissions made by the Defendant regarding, *inter alia*, the purported sale of his loans and/or facilities;

(iv) in failing to inform and/or promptly inform the Defendant of the purported sale of the Defendant's loans to the Substituted Plaintiff;

(v) in failing to consider and/or give adequate consideration to the submissions made by the Defendant relating to the purported sale/transfer of his loans;

(vi) in failing to disclose adequate and/or intelligible details and/or terms relating to such sale and/or assignment by producing a redacted and/or excessively redacted loan sale agreement and/or deed of transfer;

(vii) in failing generally to keep the Defendant fully informed of the purported sale and/or transfer and/or process leading to such purported sale and/or transfer.

(c) The Former Plaintiff, its servants and agents, including the Special Liquidators, unlawfully fettered their discretion in purporting to establish criteria as to the method of disposing of the loans (as set out in Schedule 2) and in purporting to establish criteria as to whether or not a bidder should be regarded as a qualified bidder (as set out in Schedule 3)

103. Following the entry into special liquidation of the Irish Bank Resolution Corporation, the following corporate governance structure was established for the Former Plaintiff, which included:

i.A Supervisory Committee responsible for:

– oversight of the Former Plaintiff;

– overseeing the risk profile and implementation of the strategy for the liquidation/Winding Up Plan in adherence to Ministerial Instructions as well as management of legacy matters; and

– monitoring the system of internal controls.

Members of the Supervisory Committee are Special Liquidator Mr Kieran Wallace (Chairman), Special Liquidator Mr Eamonn Richardson and Mr John Hansen (KPMG partner). Members of IBRC's senior management and other KPMG partners also attend.

b.Credit Sanctioning Authorities with responsibility for, inter alia, the role of credit sanctioning authorities is to approve, monitor and control credit risk (including banking and treasury credit risk).

c.Senior Management Meeting. The Senior Management Meeting has been delegated authority from the Special Liquidators to manage

the Former Plaintiff's day-to-day affairs. Its role is to:

– propose the policies, processes and standards under which the Former Plaintiff will execute the wind up strategy;

– assist in developing the work-out plan for submission to the Special Liquidators; and

– oversee implementation of the agreed work-out plan in support of the Special Liquidators.

- The Meeting is chaired by Mr Declan Keane (KPMG partner) and its members include IBRC senior management and KPMG workstream leaders.

104. With respect to the aforesaid committees and/or authorities, the Defendant pleads as follows:

(1) There was no authority to establish such committees and/or authorities.

(2) The establishment of the same and conferring on such committees and/or authorities of decision making powers constitutes an unlawful delegation and/or abdication of statutory duties and power by the Special Liquidators.

(3) Insofar as the Senior Management Meeting decided and/or authorised and/or approved the loan sale process including the relevant criteria, the same was unlawful insofar as such decision was not made solely by the Special Liquidators.

(4) Insofar as the Senior Management Meeting and/or any other committee or authority decided and/or authorised and/or approved the sale of the Defendant's loans to the Substituted Plaintiff, the same was unlawful insofar as such decision was not made solely by the Special Liquidators.

Failure to Comply with Ministerial Directions and/or Instructions

105. Pursuant to section 9(1) of the IBRC Act 2013, the Minister for Finance purported to issue directions and/or instructions to the Special Liquidators setting out the details in respect of the manner in which the winding up of IBRC was to proceed. The said directions and/or instructions (including those issued on the 10th May 2013) required the sale of the assets of the Former Plaintiff as soon as possible and in any event, by not later than 31 December 2013 or as soon as practicable thereafter. It further said that it would thereafter be obliged to sell to NAMA.

106. In a letter dated 1st November 2013 to the Defendant, the IBRC and/or the special liquidators of the IBRC further represented that the Defendant's loans would be sold as soon as possible and in any event, by not later than 31 December 2013 or as soon as practicable thereafter. The letter further said that if no bid was received or if the bids fell below the valuation price, they would be obliged to sell the portfolio to NAMA.

107. Section 9(3) of the IBRC Act 2013 states that a Special Liquidator shall comply with instructions issued or any direction given under the Act. In breach of the said directions and/or instructions issued by the Minister for Finance, the Special Liquidators failed to sell the same assets by not later than 31 December 2013 or as soon as practicable thereafter. In further breach of the directions and/or instructions, the Special Liquidators failed to sell the portfolio to NAMA. Additionally, in breach of the Ministerial directions and/or instructions, the Former Plaintiff, its servants and agents, including the Special Liquidators, purported to sell loans of the Former Plaintiff, including that of the Defendant, to the Substituted Plaintiff by way of deed of transfer dated 11th July 2014.

108. The Former Plaintiff, its servants and agents, including the Special Liquidators, had no authority and/or power and/or jurisdiction to sell the said loans to the Substituted Plaintiff and as consequence any such purported transfer and/or sale to the Substituted Plaintiff is invalid, void and/or of no effect.

Redacted Loan Sale Agreement/Deed and Maintenance and/or Champerty

109. It was only during the first week of May 2014 that the existence of such agreement was disclosed to the Defendant, by counsel for the former Plaintiff in Court on 2nd May 2014 and by letter from Arthur Cox to Black, Solicitors for the Defendant, on 7th May 2014.

110. The Defendant responded to this disclosure by issuing a notice of motion on 15th May 2014 which was directed by Kelly J to this Honourable Court.

111. The motion was heard on 27th May 2014 and during the hearing of the motion the question arose as to the extent to which the loan sale agreement purported to give an entitlement to the purchaser of the Defendant's loans to interfere with or influence the within litigation. The Court made an order for production of a copy of the loan sales agreement, in advance of the hearing on 3rd June, redacted of all commercially sensitive and confidential information not relating to:

"(1) The nature of the interest in the loans and related rights of action ....being sold or transferred pursuant to the deed;

(2) The position of the plaintiff or the vendor in relation to the loan pending completion of the sale and

(3) The respective rights and obligations of the vendor or Plaintiff, if the Plaintiff is not the vendor, and purchaser, whether monetary or otherwise in relation to the rights of action the subject of the loan sale deed both prior to and after completion of the sale."

112. In purported compliance with the said Order for Production, the Former Plaintiff on 29th May 2014 produced a heavily redacted loan sale agreement which was almost completely redacted and the Defendant pleads that such heavily redacted loan sale agreement was not in compliance with the Court's Order for production, in particular Requirement No (3) of the Order for Production cited above.

113. Notwithstanding the heavily redacted loan agreement, the portions that were disclosed revealed that it contained a number of provisions which allowed the Substituted Plaintiff to interfere with the litigation and to impact on the Former Plaintiff's conduct in the extant proceedings against the Defendant during the entire period before which substitution might be permitted. Under paragraph 11.1.8, the Former Plaintiff agreed that it:

> "….shall not initiate or settle litigation in respect of an asset in which the vendor is the plaintiff against an obligor, or consent to orders in such litigation, which relates to an asset without first notifying the purchaser of its intention to do so and the vendor will reasonably consider any request received in writing from the purchaser to take any action or refrain from taking any action in any such current or proposed litigation, subject always to the vendor's ability to reasonably refuse to take or refrain from taking any such action ...."

The effect of such a clause, in the context of the agreement as a whole, was to place the Former Plaintiff under the control of the purchaser, the Substituted Plaintiff, in circumstances where the Special Liquidators were exercising their statutory power to prosecute and continue the proceedings against the Defendant.

114. The Former Plaintiff made a range of contractual commitments which could apply to and/or affect the extant litigation including:

> - Under paragraph 11.1.3, the Former Plaintiff agreed that it would "consider any reasonable request received in writing from the Purchaser to take any action or refrain from taking any action with respect to a particular Asset (as the case may be), subject always to the Vendor's ability to reasonably refuse to take or refrain from taking any such action ...."
>
> - Under paragraph 11.1.5, the Former Plaintiff agreed that it "shall not waive any breach by an Obligor under any Facility, Finance Agreement and/or any Hedging Transaction."
>
> - Under paragraph 11.1.6, the Former Plaintiff agreed that it "shall not assign or novate or sub-participate any of its rights under any of the Finance Agreements or any of the Hedging Agreements."

115. As will be set out hereinafter, the right of the Special Liquidators to prosecute and continue the proceedings (and also the control or funding of such proceedings) against the Defendant was and/or is not capable of lawful assignment to the Substituted Plaintiff and, in purporting to do so, the loan sale agreement was void and/or invalid. In addition and without prejudice to the foregoing, the loan sale agreement was inherently champertous insofar as the Former Plaintiff entered into a binding agreement of sale, but had also continued with the proceeding against the Defendant.

116. Certain clauses in the purported agreement also dealt with an application for substitution of the Former Plaintiff by the Substituted Plaintiff after completion. Under paragraph 11.8.5, the Purchaser undertook the obligation, within 30 days of completion, to apply to this Honourable Court to be substituted as Plaintiff in proceedings (which would include the extant proceedings being pursued by the Former Plaintiff). The Purchaser further undertook irrevocably and unconditionally, to indemnify the Former Plaintiff and Special Liquidators "against all costs incurred in relation to any Plaintiff Proceedings after the relevant Completion Date or, if later, the date on which ....notification of such Plaintiff Proceedings .... is provided under this Clause 11.6.5 (including but not limited to all legal professional fees end disbursements incurred by the Vendor after the relevant Completion Date and any extant or further orders requiring the Vendor to pay costs of any party to such litigation)."

117. Under the same paragraph, the Former Plaintiff was said to be under no obligation to continue the litigation after completion but then, somewhat confusingly and contradictorily, the paragraph stated that the Former Plaintiff, when called upon by the Purchaser, was bound to take or refrain from taking any action in the litigation after the relevant Completion Date, provided it was reasonable and would not breach duties of the Special Liquidators. In this regard it stated:

> "It is agreed that the Vendor shall be under no obligation to continue any such litigation in respect of the Assets and shall be entitled to take such action or refrain from taking such action as the Vendor sees fit (including discontinuing or settling the litigation or consenting to orders in the litigation) provided always that if the Purchaser has filed a Substitution Application within the timeframe referred to above and if the Purchaser calls upon the Vendor to take or refrain from taking any action in the litigation after the relevant Completion Date the Vendor shall agree to take such action or refrain from taking such action in the litigation (provided such requested action or inaction is reasonable and would not give rise to a breach or potential breach by the SLs of any of their official or other duties as SLs)…."

118. The above clause also mandated champertous actions, insofar as the Former Plaintiff had purported to transfer the assets to the Substituted Plaintiff but nonetheless had committed to taking action in the proceedings on behalf of the purchaser.

119. On 10th June 2014, the Former Plaintiff produced a copy of the full text of the said clause, contained in the redacted loan sale agreement. The previously redacted portion of Clause 11.1.8 makes a reference to "the Purchaser's indemnity set out in Clause 11.12", yet the document has been so radically redacted that, not only is Clause 11.12 entirely redacted but no mention of the Clause is contained in the Contents. Furthermore, the redaction of all of the clauses from Clause 2.3.6 to Clause 9.6 and the failure in the Contents even to identify what is the subject matter of these clauses make it impossible for the Defendant to have any idea as to what has been redacted or what justification there might be for such redaction.

120. In producing a heavily redacted loan sale and/or deed of transfer, the Former Plaintiff, its servants and agents, including the Special Liquidators, failed to comply with public law obligations, which includes a requirement to comply with fair procedures and/or further failed to comply with duties to (and respect for) the Court, including that justice should be administered publicly and/or the due and valid administration of justice.

121. The Defendant reserves the entitlement to refer to and/or rely upon other provisions of the redacted loan sale agreement and/or deed of transfer and/or to seek discovery of an unredacted loan sale agreement and/or deed of transfer and to rely upon the terms of the same.

122. On 11th August 2014, the Substituted Plaintiff issued a Notice of Motion and Affidavit seeking an Order that it be substituted for the Former Plaintiff in the within proceedings. Exhibited with this application was a letter of consent from the Special Liquidators. In purporting to give consent to the application to substitute, the Special Liquidators had sought to consent to transferring the control of proceedings to a third party, in breach of their fiduciary duties and in abdication of their responsibilities in the liquidation process. In so consenting the Special Liquidators wrongly acknowledged that Former Plaintiff had assigned and/or transferred to the right to prosecute and/or to conduct the proceedings, which was an exercise of statutory discretion by the Special Liquidators.

123. The acts of the Former and Substituted Plaintiffs, in entering into a loan sale agreement dated 31st March 2014 under which the Substituted Plaintiff was purportedly contractually entitled, before completion of the sale, to interfere with and/or influence the conduct of the Former Plaintiff as Plaintiff in the extant and ongoing legal proceedings between the Former Plaintiff and the Defendant and/or in entering/executing the purported deed of transfer on the 11th July 2014:

(i) constituted and/or constitutes the torts of maintenance, champerty, the causing of economic loss by unlawful means and conspiracy,

(ii) was and/or is an abuse of the judicial process, and

(iii) breaches the Defendant's constitutional rights, including his right to litigate, his right of access to the courts and his right to equal treatment.

Rendering the purported assignment void and of disentitling the Substituted Plaintiff to seek or, *a fortiori*, obtain judgment.

124. The said loan sale agreement dated 31st March 2014 and/or the purported Deed of Transfer consequent on the same dated 11th July 2014 was and/or is illegal and void and/or such portion of the same, was and/or is illegal and void insofar it purports to relate to the loans and/or accounts of the Defendant.

125. At all material times while the Former Plaintiff was litigating against the Defendant, neither the loan sale agreement nor any plans for such an agreement or agenda for the trafficking of the Former Plaintiff's and all other Anglo Irish Bank loans were disclosed to the Commercial Court.

126. In the premises the Defendant was deprived of fair procedures and gravely prejudiced in the exercise of his constitutional rights (i) to litigate, (ii) of equal treatment and (iii) of access to the courts.

127. On 23 May 2014 the Commercial Court at a case management hearing was misinformed and misled as to the nature and effect of the loan sale agreement and gave directions for the disclosure of the said loan sale agreement to the Defendant, as appears from the Order of 23 May 2014.

128. The loan sale agreement and/or purported deed of transfer, insofar as may be discerned from those parts of it that are unredacted:

(i) purports to constitute the sale of ongoing legal proceedings,

(ii) creates strong financial incentives for the Former Plaintiff:

(a) to maintain the litigation,

(b) to maintain that element of its claim, known by it to be unlawful, for the unlawfully charged interest,

(iii) not to withdraw the said claim,

(iv) not to inform the Court of the unlawful character of the claim.

129. The said redacted loan sale and/or deed of transfer does not amount to a lawful basis and/or evidence of the transfer of the loans of the Defendant to the Substituted Plaintiff.

130. On the 10th November 2014, Ms Justice Finlay Geoghegan made an order in the within proceedings entitled substituting the Substituted Plaintiff for the Former Plaintiff as Plaintiff. In making such Order for substitution the Court made no final determination as to the effectiveness or validity of the purported transfer or assignment of the debts or loans of the Defendant, pursuant to the deed of the 11th July 2014., as the test applied for ordering substitution was merely one of a *prima facie* character.

Purported Sale of Right to Continue and Prosecute the within Proceedings

131. Following the appointment of the Special Liquidators to the Former Plaintiff on the 7th February 2013, Counsel for the Former Plaintiff informed Ms Justice Finlay Geoghegan on the 8th February 2013, that they had been instructed by the Special Liquidators to continue the proceedings against the Defendant. In continuing to prosecute the proceedings the Special Liquidators were acting in the purported exercise of their statutory powers under section 231(1)(a) of the Companies Act 1963 as amended.

132. By an agreement in writing made the 23rd March 2013 the Special Liquidators purported to negotiate a sale of the Former Plaintiff's loans (including relating to the Defendant) to the Substituted Plaintiff.

133. On the 11th July 2014 Mr Wallace, Special Liquidator, purported to execute a Deed of Transfer whereupon the Former Plaintiff waived and abandoned all rights, title and interest to the Defendant's loans and/or the security provided by the relevant Facility Letters.

134. The present proceedings were at the date of the purported loan sale agreement and/or deed of transfer being prosecuted and/or conducted by the Special Liquidators of the Former Plaintiff pursuant to their statutory power under section 231(1)(a) of the Companies Act 1963 as amended.

135. The power and/or entitlement of the Special Liquidators of the Former Plaintiff to prosecute and conduct the present proceedings was not capable of lawful assignment, transfer and/or sale and was not lawfully assigned, transferred and/or sold to the Substituted Plaintiff.

136. The control and funding of the said proceedings is not capable of lawful assignment, transfer and/or sale and/or was not assigned, transferred and/or sold to the Substituted Plaintiff.

137. Any power and/or right of the Special Liquidators of the Former Plaintiff to prosecute and conduct the said proceedings does not fall within the scope of the purported loan sale agreement and/or deed of transfer of the Defendant's loans to the Substituted Plaintiff.

138. The power and/or right of the Special Liquidators of the Former Plaintiff to prosecute and conduct the present proceedings is not an asset of the Former Plaintiff and was and/or is not capable of lawful assignment and/or sale.

139. Insofar as the Special Liquidators of the Former Plaintiff decided on the 8th February 2013 to continue with the present proceedings, they did so pursuant to their statutory powers under section 231 of the Companies Act and as such the proceedings constituted a cause of action vested in the Special Liquidators by virtue of their statutory powers and not a cause of action of the Former Plaintiff.

140. The Special Liquidators acted unlawfully and/or in breach of their fiduciary duties and/or statutory duties or otherwise and/or in breach of the integrity of the liquidation process and/or in breach of public policy, in purporting to transfer and/or agree to transfer the right to prosecute and/or conduct the present proceedings to the Substituted Plaintiff.

141. The Substituted Plaintiff has no lawful entitlement to prosecute and/or conduct and/or obtain judgment as plaintiff in the within proceedings, whether as a result of the purported loan sale agreement, deed of transfer or otherwise and, insofar as the purported loan sale agreement and/or deed transfer purports to so entitle the Substituted Plaintiff, the same are null, void and/or of no effect.

142. In the alternative and without prejudice to the foregoing, insofar as the Former Plaintiff has transferred, sold and/or assigned the loans of the Defendant, the subject matter of the within proceedings, then:

(i) the right of Former Plaintiff and/or the Special Liquidators of the Former Plaintiff to prosecute and/or conduct such proceedings constitutes a bare right with no underlying assets and they have no standing and/or entitlement to continue those proceedings,

and

(ii) such right to prosecute and/or conduct such proceedings has not and/or is and has not lawfully been transferred, sold and/or assigned to the Substituted Plaintiff,

and

(iii) consequently, the within Proceedings require to be struck out and/or dismissed.

Absence of Legal Basis and/or Power to transfer loans to the Substituted Plaintiff

143. Without prejudice to the foregoing, the Former Plaintiff purported to transfer the loans of the Defendant to the Substituted Plaintiff pursuant to Clause 18.2 of the General Terms and Conditions which accompanied the facility to the Defendant dated 2nd February 2009.

144. Section 18 of the General Terms and Conditions which entitled "Disclosure of Information". Clause 18.1 relates to disclosure of information relating to the performance by the Defendant of obligations to the Irish Credit Bureau Limited and to other credit reference bureaus. Also Clause 18.3 provides that the Defendant as borrower consents for the purposes of the Data Protection Act, 1988 to the disclosure of personal data to the Irish Credit Bureau Limited.

145. In the context of the above, Clause 18.2 relates to the disclosure of information and does not in itself confer a substantive entitlement to the Bank to transfer and/or assign the agreement and/or security. Clause 18.2 of the general terms and condition is not a valid legal basis for the purported transfer and/or assignment of the facilities from the Former Plaintiff to the Substituted Plaintiff.

146. Further and/or in the alternative, insofar as the Former Plaintiff, its servants and agents, including the Special Liquidators or the Substituted Plaintiff seek to rely upon section 28(6) of the Supreme Court of Judicature Ireland Act 1877 as the legal basis and/or authority for the transfer/sale , such provision was not invoked by the Former Plaintiff as the basis for the sale and/or transfer and/or such provision is inapplicable to the purported sale/transfer and/or, if it is applicable, the conditions of the subsection were not satisfied so as to effect the sale and/or transfer to the Substituted Plaintiff.

147. Further and/or in the alternative, insofar as the Former Plaintiff, its servants and agents, including the Special Liquidators or the Substituted Plaintiff seek to rely upon section 12 of the IBRC Act 2009 as the legal basis and/or authority for the transfer/sale such provision is not inapplicable and/or if applicable, in the alternative, is unconstitutional as pleaded in proceedings entitled *John Morrissey v Irish Bank Resolution Corporation (In Special Liquidation, LSFII Stone Investments Limited, Kieran Wallace and Eamonn Richardson (Joint Special Liquidators of the IBRC), The Minister For Finance, Ireland and the Attorney General: Record No. 2014/9156P.*

COUNTERCLAIM

The Defendant repeats paragraphs 1-64 of the Defence herein (including all of the particulars of the claims and matters raised against the former Plaintiff, the special liquidators of the IBRC and/or the Minister for Finance) and states as by way of Counterclaim as follows:-

1. The former Plaintiff and the Defendant had a fiduciary relationship. The establishment and the breaches of this relationship are set out above.

2. The Defendant trusted the former Plaintiff to act as a responsible lending institution and on that basis reposed trust and confidence in the Plaintiff.

3. Contrary to the fiduciary duty owed the Defendant, the former Plaintiff preferred the interests of other parties to the interests of the Defendant.

4. The former Plaintiff misled the Defendant as to its solvency and its compliance with the regulatory regime applicable to it since the former Plaintiff at the time it entered into financial arrangements with the Defendant it was clearly insolvent and in breach of the regulatory regime applicable to it.

5. The former Plaintiff, in breach of the fiduciary duty owed to the Defendant, did not disclose all relevant information to the Defendant necessary pursuant to the existence of a fiduciary relationship.

6. The former Plaintiff engaged in activities and dealings which were in breach of this established fiduciary relationship.

7. The activities of the former Plaintiff, in which it engaged in fraud, duplicity and deception on an unprecedented scale, in its purported activity as a Bank or financial institution, were the direct cause of the calamitous economic collapse that has befallen the State. The former Plaintiff encouraged, cultivated and gave confidence to the Defendant that its model of economic activity was sustainable, whilst at the same time engaged in fraud, duplicity and deception which had the direct and foreseeable consequence of destroying the economic conditions in which its purported business model could work and prosper frustrating the performance of the Defendant's payment obligation and the Facilities.

8. The former Plaintiff was falsifying its accounts to disguise its insolvency, sought State Assistance and accepted the State Guarantee when without such Guarantee the former Plaintiff would not have been able to trade. Such was the degree of insolvency of the former Plaintiff, the Irish Government nationalised it on the 15th day of January 2009. The knock-on effects of this nationalisation have inter alia resulted in the reduction industry-wide in the availability of credit by the unprecedented amount of circa 95% and consequent massive decline in business and property values causing a catastrophic fall in the worth and value of the Defendant's property and share portfolios.

9. The Defendant has been unable to sell his properties or refinance his liabilities because of the calamitous financial collapse which has been caused directly by the fraud, deception and duplicity of the former Plaintiff.

PARTICULARS OF FRAUD, DUPLICITY AND DECEPTION GIVING RISE TO CLAIMS OF EQUITABLE FRAUD AND FORMING THE BASIS FOR THE PLEAS OF FRUSTRATION AND NON DISCLOSURE.

A. As of 29 September 2008 the former plaintiff was insolvent.

B. The Chairman of the former Plaintiff, one Sean Fitzpatrick, engaged in the falsification of the former Plaintiff's annual accounts and misled the Central Bank during the years from 2004 to 2008. He engaged in the annual "warehousing" of his personal debts for the purpose of deceiving customers of the former Plaintiff, its shareholders and the Defendant herein. These actions were engaged in with the knowledge and acquiescence of senior executives whose names are not pressing but who knew or were deemed to have known and conspired to conceive such a warehousing of personal debt and or acquiesced in the same and by deceiving and failing to inform the Defendant to whom the former Plaintiff had a duty to disclose all relevant information pursuant to its fiduciary duty.

C. Irish Life and Permanent plc engaged in the transfer of substantial cash deposits to the Plaintiff that were expressly for the purposes of manipulating the books of the Plaintiff at the end of a number of financial quarters in 2007 and 2008.

D In or about November 2007, four senior directors of the former Plaintiff were induced by the former Plaintiff to and conspired with the former Plaintiff for the purpose of falsely supporting the former plaintiffs share price by buying shares of the former Plaintiff with loans from the former Plaintiff without contemporaneous credit committee approval or loan documentation on a full recourse basis and at the request of the Management of the former Plaintiff bank falsely to support the former Plaintiff banks share price.

E. In or about the month of July 2008, the former Plaintiff loaned in the region of €45,000,000 to 10 investors known as "the Maple 10" for the purpose of manipulating the share price of the former Plaintiff and misleading investors. In relation to the true financial position of the former Plaintiff. Such action was done with the knowledge and acquiescence of senior executives and management of the former plaintiff. Furthermore the former plaintiff engaged in fraud, duplicity and deception by financing the Defendant's purchase of shares in the former Plaintiff bank whilst knowing the event described in this particular.

F. On or about 29 September 2008, the chief executive of the former Plaintiff, David Drumm, approved a non-recourse loan to a director of the former Plaintiff, Mr William McAteer, to assist him in connection with avoiding the foreclosure and forced sale of certain shares he owned in the former Plaintiff, without the knowledge or approval of the credit committee of the former Plaintiff bank and in breach of its internal regulations.

G. The former Plaintiff did not inform the Central Bank and the Financial Regulator of these actions nor did it inform the Central Bank and the Financial Regulator of its true financial position resulting therefrom. Such actions amounted to a breach of the former Plaintiff's Banking License and banking regulations and/or accounting standards.

H The former Plaintiff misled the Defendant by failing to disclose the acts and omissions complained of above and others of which details are not yet available due to the delay and or/suspension by the Government of statutory and other inquiries into alleged crimes and fraudulent activity at the former Plaintiff Bank at all material times.

I. The Defendant says that having regard to this security and repayment of principal by way of securitization and by reinvestment the risk to the former Plaintiff Bank was not such as to justify the rate of interest charged and without prejudice thereto the amount fairly due to the former Plaintiff bank from the Defendant in respect of principal and interest.

10. In the circumstances of this case and because of the matters pleaded herein the Defendant is entitled to set off such damages as may be awarded in the Counterclaim herein against the former Plaintiffs claim.

11. On January 15th 2009, the day of the nationalization of the former Plaintiff, the former Plaintiff Bank approved a decision to foreclosure on the Defendant's share portfolio. The portfolio, which included shares in the former Plaintiff itself as well as in AIB Bank and Bank of Ireland, was sold in the market at 15:56pm. After close of business, it was announced that the former Plaintiff would be nationalized. This rendered the shares immediately worthless. The Defendant was most disturbed with these actions for several reasons, inter alia (i) it appeared to be a clear case of insider trading, (ii) as a result of being involved in due diligence, on behalf of TPG on the former Plaintiff, AIB Bank and Bank of Ireland, the Defendant had signed Confidentiality Documentation that expressly debarred him from trading in these shares, and (iii) the former Plaintiff was aware of these trading restrictions imposed on the Defendant given that the Plaintiff was one of the banks under said due diligence. The Defendant engaged in correspondence with Mr. Donal O'Connor, the then Chairman of the former Plaintiff, on this matter, as part of providing confirmation to internal counsel for the Private Equity Funds that he had had no part in the decision of the former Plaintiff to sell his shares. The Defendant believes that this action coupled with the Defendant's recommendation to TPG to invest in Bank of Ireland as opposed to the former Plaintiff Bank prejudiced all subsequent interactions between the former Plaintiff and the Defendant.

12. Being forced to disclose this TPG caused great embarrassment and damage to the Defendant, and more particularly the light of the disclosures that had been released in connection with the former Plaintiff during the previous six months.

13. The Bank Guarantee of September 29th, 2008 and the subsequent nationalisation of the former Plaintiff in the context of the economic collapse of the State precipitated by the fraud, duplicity and deception of the former Plaintiff constitutes an event or series

of events that has caused the frustration of the Facilities and the payment obligation of the Defendant.

14. The Defendant has suffered and continues to suffer substantial loss, damage, inconvenience and expense by virtue of the former Plaintiff's said actions.

15. The Defendant is further prejudiced by the continued delay in the completion of the Statutory and other Investigations and Inquiries into the former Plaintiff Bank.

16. For reasons which are particularised in the Defence herein, the purported assignment and/or transfer of the Defendant's alleged credit facilities and debts by the former Plaintiff to the Substituted Plaintiff, was ineffective and/or void. Insofar as the Substituted Plaintiff has acted on foot of such purported ineffective transfer, it is has, inter alia, been guilty of trespass to property, has unlawfully obtained access to confidential information, interfered with business relations between the Former Plaintiff and the Defendant, has committed the torts of conspiracy, maintenance and/or champerty, has breached the Defendant's constitutional rights and/or has otherwise acted unlawfully. As a result of the same, the Defendant has suffered loss, damages, inconvenience and/or expenses.

And the Defendant counterclaims as follows:

1. A Declaration that the Defendant was not in breach of "Facility D" in Facility Letter dated 2nd February 2009 or any other Facility and that the facilities afforded by the former Plaintiff to the Defendant have not expired;

2 Declaration that the failure to include rental income in the calculation of interest claimed herein was in breach of contract and negligent;

3. A Declaration that the fraud, duplicity and deceptive actions of the former Plaintiff has frustrated the performance of the Facilities and the payment obligations of the Defendant.

4. A Declaration that in the premises the former Plaintiff has repudiated the Facilities;

5. A Declaration that the former Plaintiff purported to lend money to the Defendant and did so wrongfully and or fraudulently while insolvent;

6. A Declaration that the former Plaintiff's conduct constitutes equitable fraud.

7. A Declaration that the level of interest charged or purported to be charged by the former Plaintiff Bank was wrong or incorrect and in breach of the lawful and appropriate rate

8. Rescission of the Facilities.

9. Alternatively Damages for Deceit and breach of trust;

10. Damages for breach of Fiduciary Duty

11. Exemplary Damages

12. Aggravated Damages

13. An order for Accounts and Inquiries;

14. Without prejudice to any other relief, a declaration that the Substituted Plaintiff, is bound as alleged successor in title to the alleged credit facilities and debts of the Defendant, to all of the liabilities and claims of the Defendant against the former Plaintiff and/or is further bound and/or liable by the acts and/or conduct of the former Plaintiff including with respect to the reliefs sought at 1 to 13 above.

15. A declaration that that the acts of the former Plaintiff and Substituted Plaintiff, in entering into a loan sale agreement dated 31st March 2014 under which the Substituted Plaintiff was purportedly contractually entitled, before completion of the sale, to interfere with and/or influence the conduct of the former Plaintiff in the extant and ongoing legal proceedings between the First Named Defendant and the Plaintiff and/or in entering/executing the purported deed of transfer of the 11th July 2014

> (i) constituted and/or constitutes the torts of maintenance, champerty, the causing of economic loss by unlawful means and conspiracy,
>
> (ii) was and/or is an abuse of the judicial process,
>
> (iii) breached and/or breaches the Defendant's constitutional rights, including his right to litigate, his right of access to the courts and his right to equal treatment.

16. A declaration that the said loan sale agreement dated 31st March 2014 and/or the purported Deed of Transfer dated 11th July 2014 was and/or is illegal and void and/or such portion of the same, was and/or is illegal and void insofar it purports to relate to the loans and/or accounts of the Defendant.

17. A declaration that the control and funding of the present proceedings is not capable of lawful assignment, transfer and/or sale and/or was not assigned, transferred and/or sold to the Substituted Plaintiff.

18. A declaration that the power and/or right of the Special liquidators, to prosecute and conduct the present proceedings does not fall within the scope of the purported loan agreement and/or deed of transfer of the Defendant's loans to the Substituted Plaintiff.

19. A declaration that the Substituted Plaintiff has no lawful entitlement to prosecute and/or conduct the present proceedings whether as a result of the purported loan sale agreement, deed of transfer or otherwise and/or further, if insofar as the purported loan sale agreement and/or deed transfer purports to so entitle the Substituted Plaintiff, the same are null, void and/or of no effect.

20. Further and/or in the alternative and without prejudice to the foregoing, a declaration that if insofar as the former Plaintiff has transferred, sold and/or assigned the loans of the Plaintiffs, the subject matter of the earlier proceedings, then:

(i) The right of former Plaintiff to prosecute and/or conduct such proceedings constitutes a bare right with no underlying assets and they have no standing and/or entitlement to continue those proceedings and

(ii) Such right to prosecute and/or conduct such proceedings has not and/or is and has not lawfully been transfer, sold and/or assigned to the Substituted Plaintiff and

(iii) Consequently, the proceedings require to be struck out and/or dismissed.

21. A Declaration that the purported sale of the Defendant's loan by virtue of the loan sale agreement of 31st March and/or the deed of transfer dated 11th July 2013 and/or the sale of all other loans and/or assets contained in such agreement and/or deed, is invalid and/or void and/or ultra vires by virtue of being in breach of the Ministerial instruction dated 10th May 2013 (and/or other Ministerial instructions and/or declarations) , that the former Plaintiff sell its assets not later than 11.59pm on 31 December 2013 or as soon as practicable thereafter (the sales deadline) and/or is further void and/or invalid by virtue of being in breach of a representation to such effect in a letter by the former Plaintiff and/or its special liquidators to the Plaintiff dated 1st November 2013.

22. A declaration the acts of the former Plaintiff and Substituted Plaintiff, in preventing and/or in failing to afford proper and effective access by the Court and the Defendant to the terms of the said loan sale agreement consistent with the prior Order of the Court and with the requirements of the Constitution,

(i) constituted an abuse of the judicial process, and

(ii) breached the Defendant's constitutional rights, including his right to litigate, his right of access to the courts and his right to equal treatment.

23. A declaration that the acts of the former Plaintiff and Substituted Plaintiff, in having the Substituted Plaintiff substituted as Plaintiff in the present proceedings without having disclosed to the Court the true nature and full terms of the said loan sale agreement

(i) constituted an abuse of the judicial process, and

(ii) breached the Defendant's constitutional rights, including his right to litigate, his right of access to the courts and his right to equal treatment.

24. A declaration that Clause 18.2 of the General Condition and terms of Sale which accompanied the facility to the Plaintiff dated 2nd February 2009, did not authorise the former Plaintiff and/or the Special Liquidators, to transfer and/or assign the loan and/or facility to the Substituted Plaintiff and/or the purported transfer/assignment pursuant to such Clause is void and/or of no effect.

25. A declaration that insofar as the purported deed of transfer of the 11th July 2014 was only executed by one special liquidator and not jointly by both special liquidator, the purported deed of transfer was not effective to transfer the facilities/loans and/or associated rights relating to Defendant's loans to the Substituted Plaintiff.

26. An Order against the Substituted Plaintiff for damages (including exemplary and aggravated damages) for the torts of maintenance, champerty, the causing of economic loss by unlawful means and conspiracy, and for breaches of the Defendant's constitutional rights, including his right to litigate, his right of access to the courts and his right to equal treatment.

27. The Costs of and incidental to the proceedings had herein;

JARLATH RYAN B.L.

EOIN MCGONIGAL S.C.

STEPHEN DODD BL

WILLIAM BINCHY BL

BRIAN DEMPSEY S.C.

RECORD No. 1548S/2011

THE HIGH COURT

ANGLO IRISH BANK CORPORATION LIMITED

Plaintiff

JOHN MORRISSEY

Defendant

_____

DEFENCE AND COUNTERCLAIM

_____

Black & Company

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Dublin 2