Neutral Citation: [2014] IEHC 230

THE HIGH COURT

COMMERCIAL

[2013 No. 2346 S.]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

PLAINTIFF

AND

GERARD MCCAUGHEY

DEFENDANT

JUDGMENT delivered by Mr. Justice Kelly on the 29th day of January, 2014

The Case

1. This is an application for summary judgment for a sum of €7,730,102.18. That sum is allegedly due by the defendant to the plaintiff on foot of a series of credit agreements and facility letters executed between 1st September, 2006 and 28th March, 2007. These facilities are conveniently described and the amount due in respect of them as of 20th January, 2014, in the table which is contained at para. 7 of an affidavit of Conor Nestor sworn on 22nd January, 2014.

2. There is no dispute but that the defendant executed all of the relevant facility letters and drew down and has had the benefit of the funds described in them.

3. The plaintiff contends that the defendant has no defence to these proceedings and that it ought to be granted summary judgment in respect of the sum claimed in its entirety.

The Test

4. Before considering the defendant's answer to this application, I ought to sketch out the test which I am obliged to apply on applications of this sort. That is what I did in my decision in *Bank of Scotland Plc v. Mansfield* [2011] IEHC 463, where I said:-

> *"8. The test to be applied by this Court on an application for summary judgment is well established. It has been stated and restated by the Supreme Court and this Court on many occasions in particular in recent times where applications for summary judgment, very often in respect of large amounts, are a commonplace.*
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> *9. The most recent statement from the Supreme Court on the topic is to be found in the judgment of Denham J. (as she then was) in Danske Bank A/S trading as National Irish Bank v. Durkan New Homes & Ors [2010] IESC 22.*
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> *10. Having recited the provisions of O. 37, r. 7 of the Rules of the Superior Courts that judge went on as follows:-*
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> *'Several cases were opened before the Court which have addressed this jurisdiction. These included Bank of Ireland v. Educational Building Society [1999] 1 I.R. 220 where Murphy J. emphasised that it was appropriate to remit a matter for plenary hearing to determine an issue which is primarily one of law where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly. He stated at p.231:-*
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> > *'Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had 'a real or bona fide defence', whether based on fact or on law, he was bound to afford them an opportunity of having the issued tried in the appropriate manner.'*
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> *In Aer Rianta c.p.t. v. Ryanair Limited [2001] 4 I.R. 607, Hardiman J. reviewed Irish cases and concluded at p.623:-*
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> > *'In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?'*
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> *11. At para. 22 of her judgment Denham J. stated as follows:-*
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> > *"As stated in Banque de Paris v. de Naray [1984] Lloyd's Rep. 21, by Ackner L.J. at p.23:-*
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> > *'It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants having a real or bona fide defence."*
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> *12. In Bank of Ireland v. Walsh [2009] IEHC 220, Finlay Geoghegan J. set out the principles applicable to the determination of an application such as this by reference to a decision of McKechnie J. in Harrisgrange Limited v. Duncan [2003] 4 I.R. 1. It is not necessary for me to repeat yet again the twelve considerations which he set out in that*

judgment but I do call attention to one of them where he said:-

> *'the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result.'*

13. Finlay Geoghegan J. said in relation to this:-

> *'As appears from sub-paragraph (vii) above, the threshold is one of an arguable defence and is, in relative terms, a low threshold. However, in making that determination, the Court should have regard to whether what the defendant is saying is mere assertion and whether the proposed defence is credible in the sense explained by Hardiman J. in Aer Rianta c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607.'"*

The Agreements

5. The first facility letter is dated 1st September, 2006 and was granted to part fund the defendant's investment in the AIAC Woolgate Exchanged Geared Property Fund. The second facility was dated 10th October, 2006 and had as its purpose the part funding of the defendant's equity investment in an entity called Peninsula Real Estate Fund which has been given the nomenclature for the purpose of these proceedings of the New York Hotel Fund. That is how I will refer to it.

6. The third facility was dated 17th November, 2006, and was broken down into three different elements. They were described as Facility A, B and C. Facility A was to increase the defendant's investment in the Woolgate Exchange Geared Property Fund. Facility B was to part fund the defendant's investment in the AIAC European Geared Property Fund (E.G.P.F.). Facility C was to fully fund the defendant's investment in Riverdeep. The fourth facility was dated 2nd January, 2007 and was used to provide the defendant with a €5m investment line of which €1,737,000 was drawn down.

7. The fifth facility was dated 28th March, 2007 and was to part fund the purchase of two units at the Rockefeller Plaza in New York.

8. There are a number of features which were common to all agreements. First, each had a letter of facility setting out specific terms to which I will turn in a moment. Each of them was executed by the defendant. Each of them expressly provided that the facility granted was to be repayable on demand and that that demand might be served at any time by the Bank at its sole discretion without stating any reason for such demand. Without prejudice to the demand nature of each of the facilities they were all expressly stated to be repayable on or before a specified date, the latest of which was March 2008. Each of the facilities was also granted subject to the Bank's general conditions governing personal loans. All provided that if there was any conflict between the terms of the facility letter and the general conditions, the terms of the facility should prevail. As is clear, the backstop date for the payment of the facilities has long since expired.

9. The facility letters were signed by Mr. McCaughey and in many cases were witnessed. Immediately, above his signature on each facility letter is to be found, the following:-

> *"I have read the conditions set out above and in the general conditions and in the credit agreement each of which form part of this agreement (the agreement) and agree to be bound by the provisions of the agreement. I am fully aware of, and understand, the nature of the agreement and have been advised to take and have been given due opportunity to take, separate independent legal advice on the effect of the agreement and have taken/waived (delete as appropriate) the opportunity to take such legal advice."*

In no instance was the appropriate deletion made in the latter clause of that last sentence. Amongst the general conditions under the heading "*representations and warranties*", one finds the following:-

> *"the borrower represents and warrants to the bank that:-*
>
> *(a) on execution, the agreement and any security documents executed pursuant thereto, constitute the borrowers legal, valid and binding obligations enforceable in accordance with their respective terms."*

10. It is common case that the defendant was an experienced businessman at the time when he executed all of these agreements.

11. The arguable defence which the defendant contends he has to these proceedings really falls into two parts. In truth, only one part can be considered a defence properly so called. The other part is a possible counterclaim. I will deal with the defence issue first.

The Defence

12. The defendant contends that he has led evidence sufficient to meet the threshold which he must achieve on an application for summary judgment. That evidence he says demonstrates a triable issue that, notwithstanding the clear terms of the written agreements executed by him, there was nonetheless a collateral contractual arrangement to the effect the term of the agreement would be "*for the duration of the funds*". If correct this means that the facilities were not demand facilities nor were they repayable by March 2008 at the latest.

13. This issue is dealt with from para. 7 onwards in the defendant's replying affidavit of 26th November, 2013. This is what he says:-

> *"7. Anglo Irish Bank (hereinafter referred to Anglo) had a model of lending that was based on its short term access to funds. It would agree to lend to customers on the basis of a longer term but would expressly provide for a 12 month or shorter facility on the documentation. The shorter periods would then be rolled over for the duration of the fund.*
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> *8. I can tell the court that the first agreement, the second agreement, the third agreement, facility A and facility B and part of the fourth agreement were for the purpose of investing in funds offered by the Anglo Irish Bank. All of these loan agreements were provided to me on the explicit confirmation from the Anglo Irish Bank that the term would be for the duration of the funds so that any provision to the contrary was subject to such representation and/or agreement.*
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> *9. In this regard, I beg to refer to an affidavit of Jason Drennan sworn on 23 May, 2013, when produced, which confirms that he explicitly confirmed to me that the loans were for the duration of the investment. I confirm that Mr. Drennan*

was an employee of Anglo and manager who had the role of raising equity from investors for investment opportunities. As is clear from his affidavit, he approached me in relation to the Woolgate fund, the New York Hotel fund, the European Geared Property Fund and the M&A Fund."

14. The first thing to notice about these averments advancing this defence of a collateral contract is that they are limited to some of the facilities only. Facility C of the third agreement known as Riverdeep and the fifth agreement in its entirety are excluded. Thus, this line of defence does not extend to those facilities.

15. The second thing to note is reference to the affidavit of Jason Drennan. In fact, Mr. Drennan's affidavit was not sworn in these proceedings and only became evidence as a result of being exhibited in a later affidavit of Mr. McCaughey sworn on 14th January, 2014. During the course of the hearing, counsel for the defendant indicated that he wished to have Mr. Drennan swear an affidavit in these proceedings in the precise terms of the exhibit. Counsel on behalf of the plaintiff sensibly indicated that I could treat Mr. Drennan's affidavit as though it were sworn in these proceedings so as to avoid an adjournment of the application midstream. This is what Mr. Drennan says:-

"(1) I qualified in 1992 from Dublin City University with a business degree. I have worked for IFSRA, Davy Stockbrokers and IIB Private Bank. I joined Anglo Irish Bank Corporation (Anglo) in 2002. I left my employment with Anglo Irish Bank in 2007.

(2) I was a manger for Anglo Irish Private Bank and part of my role was to raise equity from investors for investment opportunities for Anglo private banking.

(3) In that capacity, I approached Gerard McCaughey and Gary McCaughey who ultimately entered into the Woolgate fund, the New York Hotel fund, the European Geared Property Fund and the M&A Fund all of which were sold by me. I understand that they also invested in a Taurus fund through a colleague of mine, Mr. Phillip Ahern. I can confirm that both Gerard and Gary McCaughey were provided with loan facilities by Anglo to invest into these funds. The basis on which these loans were provided were explicitly confirmed by me to them as being for the duration of the investment. This is part of the Anglo model. I explained to them that the loan offers would issue on a yearly basis and would roll over each year which was as per the Anglo model at the time.

(4) I have no hesitation in confirming my understanding as the person who sold the McCaugheys into these funds and who arranged the loan facilities. The McCaugheys fully understood that the loans were inextricably linked with the investment funds."

16. The defendant relies on his own averments as to his understanding and the material sworn to by Mr. Drennan in support of his allegation of a collateral contract which overrides the demand nature of the facilities as specified in the facility letters executed by him. He says that his averments as to his belief and the testimony of Mr. Drennan find support in internal bank documents which he has obtained on foot of data access requests. These documents are all applications which were prepared for the Bank's credit committee. In each case, they specify the amount and source of repayment as involving payment of interest and then a "*bullet repayment from liquidation of fund*". Furthermore, in all cases but one they specify that what is being proposed to the credit committee represents an exception to credit policy. This material, the defendant says, justifies him in contending for the existence of a collateral agreement. He puts it this way at para. 12 in his affidavit of 26th November, 2013:-

"In any event, I can tell the court that, whilst the loan agreements purport to be for a defined term and provide for the repayment of capital, this was not the agreement between the parties but was a model used by Anglo for the purpose of their sourcing funds to lend to customers. Therefore, insofar as it is alleged that I am in default from the expiry of the terms in the loan agreements, this is not the case and I believe and am advised that his provides me with a full defence to the plaintiff's claim. In this regard also, the plaintiff is estopped from maintaining this claim on the representations of Anglo and its employees."

17. During the hearing, counsel on behalf of the defendant began argument in support of that latter assertion of promissory estoppel but that was abandoned by him. Thus, the only issue that falls for determination is whether or not the defendant has demonstrated a triable issue on his allegation of collateral contract.

Collateral Contract

18. Collateral contracts are dealt with by Chitty at para. 12.103 as follows:-

"Even though the parties intended to express the whole of the agreement in a particular document, extrinsic evidence will nevertheless be admitted to prove a contract or warranty, collateral to that agreement. The reason is that 'the parol agreement neither alters nor adds to the written one, but is an independent agreement'.

Such evidence is certainly admissible in respect of a matter on which the written contract is silent. In a number of older cases it was stated that evidence of such a contract or warranty must not contradict the express terms of the written contract. However, more recently the courts have admitted evidence to prove an overriding oral warranty or to prove an oral promise that the written contract will not be enforced in accordance with its terms. Thus, in City Westminster Properties (1934) Limited v. Mudd, the draft of a new lease presented to a tenant contained a covenant that he would use the premises for business purposes only and not a sleeping quarters. The tenant objected to this covenant and the landlords gave him an oral assurance that if he signed the lease, they would not enforce it against him. The tenant signed the lease, but later the landlord sought to forfeit the lease for breach of this covenant. Harman J. held that the oral assurance constituted a separate collateral contract from which the landlords would not be permitted to resile. The collateral contract or warranty may be formal or informal even though the main contract is one which is required by law to be in or evidenced by writing."

19. In *Tennants Building Products Limited v. O'Connell* [2013] IEHC 197, Hogan J. neatly summarised the modern case law on this topic as follows:-

"The effect of this case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving (as in Mudd and in Galvin) written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the course of the contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in

Deane."

20. Reference was also made to the decision of Finlay Geoghegan J. in *AIB Plc v. Galvin* [2011] IEHC 314 where she said:-

> *"I am using 'collateral contract' in the sense explained by Cooke J., in the Supreme Court of New Zealand in Industrial Steel Plant Ltd. v. Smith [1980] 1 N.Z.L.R. 545, at p. 555, quoting with approval from Cheshire and Fifoot on Contracts:*
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> > *'The name is not, perhaps, altogether fortunate. The word 'collateral' suggests something that stands side by side with the main contract, springing out of it and fortifying it. But, as will be seen from the examples that follow, the purpose of the device usually is to enforce a promise given prior to the main contract and but for which this main contract would not have been made. It is rather a preliminary than a collateral contract. But it would be pedantic to quarrel with the name if the invention itself is salutary and successful.'*
>
> *It is clear that not every statement or promise made in the course of negotiations for a contract may give rise to a finding that a collateral contract exists. To be so treated, a statement must be intended to have contractual effect."*

21. All of these cases were, of course, decided on full oral hearings and not on applications for summary judgment.

22. It is clear that the courts have over the years on occasions accepted that in appropriate circumstances the terms of a written agreement may be affected by the existence of a collateral contract or warranty made between the parties. That is the case which is sought to be made here. Counsel for the plaintiff in reply sought to analyse very thoroughly the precise wording of the affidavit evidence from Mr. McCaughey and Mr. Drennan on this topic so as to demonstrate that it falls short of the "*cogent evidence*" referred to by Hogan J. and could better be characterised as general assertion. He also sought to raise the ability of Mr. Drennan to bind the Bank. Whilst ultimately these criticisms may well prove to be correct, it does not appear to me that I can, at this juncture, say that it is very clear that the defendant has not demonstrated a triable issue in respect of this allegation of collateral contract. There is his own sworn testimony, bolstered by Mr. Drennan's and fortified by the material which was presented to the credit committee which material antedates the signing of the formal contracts in each case.

23. Given the low threshold of proof that is required to be established at this stage of the proceedings, I am of opinion that a triable issue has been raised as to the possible existence of a collateral agreement to the effect that the term of the agreements would be "*for the duration of the funds*".

24. This line of argument could have been entirely precluded by the plaintiff by having in its contractual terms an "*entire agreement*" clause. These clauses have been commonplace for years and provide that the written agreement contains the entire and only agreement between the parties and supersedes all previous agreements and understandings respecting the subject matter of the contract. Furthermore, such clauses commonly contain an acknowledgement that when entering into the agreement, the borrower has not relied on any representation or undertaking whether oral or in writing save such as are expressly incorporated into the written document. Had such an "*entire agreement*" clause been incorporated into the conditions of the plaintiff, this line of argument would not have been available at all to the defendant.

25. Having concluded that a triable issue as to existence of a collateral contract which provided that the term would be for the duration of the funds thus not making the monies advanced repayable on demand, I now consider the consequences of that conclusion.

26. This collateral contract on the terms contended for by the defendant has its limitations. First, he accepts in his affidavit that it only applies to the first agreement, second agreement, third agreement, facility A and facility B and part of the fourth agreement. It has no relevance in relation to other parts of the claim.

27. Second, the term of the agreement under the collateral contract contended for was to be "*for the duration of the funds*" pace Mr. McCaughey or "*the duration of the investment*" pace Mr. Drennan.

28. The uncontroverted evidence is that the duration of some of these funds or investments has come to an end. Thus, insofar as the first agreement and facility A of the third agreement relating to the Woolgate is concerned, a receiver was appointed and the properties were sold as of February 2012. Insofar as the second agreement dealing with the New York Hotel Fund is concerned that fund has closed and from an economic and practical point of view is at an end. It is not, however, technically liquidated, a point to which I will return in a moment. Facility B of the third agreement EGPF still exists. The fourth agreement M&A Fund closed in September 2012. The fourth agreement EGPF Fund remains open as does the fourth agreement investment in Taurus Funds. Thus, even on the terms of the collateral agreement contended for, the defendant is liable to repay monies advanced in respect of those funds which have closed.

29. Counsel for the defendant in a valiant effort to try and avoid this conclusion sought to rely upon the reports to the credit committee which utilises the term "*liquidated*" in respect of such funds. He argued that until an actual liquidator was appointed to the fund, the loans did not become due. Apart from the fact that that is to put words into the mouth of Mr. McCaughey who made no such assertion in his affidavit nor indeed did Mr. Drennan, it is in my view in any event untenable and unrealistic and defies economic and business commonsense. It fails to meet even the low threshold of proof required at this stage of the proceedings.

Counterclaim

30. The defendant also asserts that he has a counterclaim, the existence of which provides a basis to set off any judgment obtained against him or alternatively, a basis for staying any judgment until such time as the counterclaim comes to trial.

31. It is in the replying affidavit of Mr. McCaughey sworn on 26th November, 2013, that one finds the principal basis for this counterclaim. The counterclaim asserts negligence, misrepresentation, negligent misstatement, breach of duty and breach of contract against the plaintiff. Powerful criticism was made, *inter alia*, of the paucity of information and lack of specificity in support of this assertion. However, there was a potential knock out point made by the plaintiff in respect of the alleged counterclaim.

32. Counsel for the plaintiff pointed out that even if one assumes the existence of such a counterclaim, it is time barred. The limitation period in respect of the series of wrongdoings alleged by the defendant is six years. Because the assertion is sought to be made in these proceedings, the defendant gets the benefits of s. 6 of the Statute of Limitations 1957, which provides:-

> *"For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded."*

33. These proceedings commenced in July 2013. The last agreement in suit was on 28th March, 2007, and accordingly, any claim in respect of that should have been brought by March 2013. Thus, the purported counterclaim is time barred.

34. Counsel for the defendant was unable to refute that assertion other than in respect of the allegations of wrongdoing in the management of the funds. But that is clearly a complaint that can only be made against the manager of the funds. The manager was not this plaintiff but rather an insurance company, Anglo Irish Assurance Company. Thus, I am satisfied the plaintiff's contention as to such counterclaim as there may be being statute barred is correct. Thus, even if there is a triable issue as to the existence of a counterclaim, it makes no sense to allow it to proceed when it is plainly statute barred and the defendant was unable to contend otherwise. That is sufficient to dispose of this aspect of the case. Nonetheless, I will consider the merits of the alleged counterclaim lest I am wrong on the limitation question.

35. Turning then to the substance of the counterclaim, it is to be found principally in the replying affidavit of the defendant sworn on 26th November, 2013.

36. Insofar as the first agreement and Facility A of the third agreement i.e. the Woolgate agreement is concerned, the defendant says at para. 20:-

> *"20. I maintain that the Woolgate Fund was mis-sold to me and it is my intention to defend the first loan and the third loan Facility A and to counterclaim on the basis that the plaintiff is guilty of, inter alia, breach of contract, negligence and breach of duty including breach of statutory duty, misrepresentation and negligent misrepresentation.*
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> *21. In particular, I would highlight the fact that it was represented to me prior to entering into the fund that the only mechanism by which I could invest into the fund was through a direct investment with the plaintiff. This is wrong and, in fact, a percentage of the fund was held by a joint venture partner of the plaintiff in the European Geared Property Fund which invested into the Woolgate Fund or at least the building itself.*
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> *22. In addition to this, the non recourse bank balance associated with the Woolgate Fund was stated to be 83.6% of the purchase price of the property. In fact, the actual purchase price of the property was GB£311m as opposed to GB£325m so that the debt level associated with the property was 87.5% instead of 83.6%. This is because there was a finder's fee of GB£10.5m included as part of the acquisition costs. This had an effect on the fund as the loan covenant specified a maximum loan to value ratio 84% and the breach of the said covenant entitled the lenders to take control of the property and to act to protect their own interest such that the Woolgate Fund lost its control of the investment. Therefore, from the outset, the investors were not properly protected and this was a risk that was not expressed when it clearly existed. In addition to this, the senior financiers, Credit Suisse provided borrowings of €240m, which facility expired on 18th July, 2011, which was approximately five years of the investment when the fund was described to be for a term of between five and seven years."*

37. Insofar as these averments are concerned, it is important to point out that at no stage is there the slightest attempt made to indicate when, where, by whom and in what manner the representations contended for were made. Neither does the defendant attempt to say what the consequences of this alleged misrepresentation was. That is remarkable given the observations made by Birmingham J. in the defendant's last piece of litigation before the courts where the defendant brought suit against the plaintiff in respect of the New York Hotel fund. There, that judge said:-

> *"I do not, at all, believe that Mr. McCaughey has been intentionally untruthful in making the statement that he has, but I do believe that statement is the product of hindsight and indeed of wishful thinking. This statement is undermined by the fact that Mr. McCaughey has also said that had he known about the interest rate strategy and about the long term tenants and the status of the renovation budget that he would not have invested. Indeed, it must be said the phrase 'I would not have invested' became something of a mantra. In my view no reasonable prudent investor who found the proposed investment otherwise attractive, is likely to have been dissuaded from investing by being told about the reality of the zoning issue."*

38. Even that mantra is not employed by the defendant in his evidence here.

39. As to para. 22, it is notable that the contract in question which is alluded to there was entered into with Anglo Irish Assurance Company which in the very brochure which is exhibited made it clear that it could not accept responsibility for any errors in the reports which were reproduced in that from external reports. Furthermore, that brochure made it clear that the defendant should get his own legal, financial and tax advice and it also contained a risk disclaimer. I am satisfied that the contents of these paragraphs in the defendant's affidavit are mere assertion and that is not sufficient to tee up the counterclaim even to the low threshold of proof that has to be achieved.

40. Insofar as the second agreement is concerned i.e. the New York Hotel Fund this, as I have made clear, has already been the subject of litigation pursued unsuccessfully by the defendant. The claim was dismissed in ringing tones by Birmingham J. and upheld by the Supreme Court. This aspect of the alleged counterclaim is to be found from paras. 23 onwards in the affidavit.

41. In the earlier proceedings, the defendant in this action sought a declaration that the loan agreement in respect of the New York Hotel Fund should be rescinded. Notwithstanding his lack of success in that action, he seeks to rely on alleged mis-selling of the fund as a defence to the instant proceedings. This is what the defendant says:-

> *"23. The second facility letter dated 10th October, 2006, related to a facility of €620,000 to part fund my equity investment in the Peninsula Real Estate Fund No. 1 LP (hereinafter referred to as the New York Hotel Fund) for $1m of which €602,280.86 was drawn down. The security for this agreement was the same as the first agreement except that there was an additional assignment over my investment in the Anglo New York fund. Anglo's Peninsula Real Estate Fund was the vehicle by which they structured the investment into the New York Hotel Fund.*
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> *24. The New York Hotel Fund was offered by Anglo and related to the acquisition of two hotels in New York being the Beekman and Eastgate and I beg to refer to the brochure upon which I have signed my name prior to the swearing hereof.*
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> *25. In relation to this fund, I issued proceedings entitled Gerard McCaughey v. Irish Bank Resolution Corporation and Mainland Ventures Corporation which proceedings were issued on 7th October, 2009 (hereinafter referred to as the defendant's proceedings). In the defendant's proceedings, I allege, amongst other things that I had been mis-sold*

investments and that Anglo was guilty of fraud and negligence on the part of the Bank. My claim against the Bank was dismissed by order of Mr. Justice Birmingham of the High Court on 27th July, 2011 and my appeal was unsuccessful and the Supreme Court delivered judgment on 13th March, 2013.

In the defendant's proceedings, the plaintiff maintained a counterclaim which claim did not include the claim herein pursuant to the second loan. Separate to this, and by way of a final demand dated 10th March, 2010, the plaintiff sought to call in my facilities in relation to the second agreement."

42. He then goes on to reproduce a letter from his solicitor of 12th March, 2010, and asserts that it, combined with para. 19 of the special endorsement of claim, gives rise to an estoppel because the plaintiff in these proceedings did not advance the claim on foot of the loan in that action. It is difficult to understand how this contention is made. Mr. Nester, the Bank's witness in a replying affidavit makes it clear that arrears had arisen on the New York Hotel Fund loan and the Bank asked the defendant to pay these arrears which he did. In those circumstances, there was no basis to call in the loan or to seek judgment. I am satisfied that this estoppel point is of no substance.

43. Going on then to the second and alternative contention which is made, this is what the defendant says at para. 28 of his affidavit:-

"28. It is my intention to counterclaim as against the plaintiff for, inter alia, breach of contract, negligence and breach of duty (including breach of statutory duty), misrepresentation and/or negligent misstatement in relation to the New York Hotel Fund. There are issues that arose in the High Court proceedings and/or hearing and were not pleaded as issues and no determination was made in relation to them. In particular, I have learned since issuing the defendant's proceedings that Anglo were involved in the manipulation of figures for the purpose of increasing the rate of return, which increased figures were then relied upon by Anglo for the purpose of selling the New York Hotel Fund to me."

44. Over then next three paragraphs of the affidavit, the defendant alludes to matter which in my view quite clearly was dealt with by Birmingham J. in the course of his judgment. True it is that these issues were apparently raised without being pleaded or any notice of them being given in advance of the opening of that case. But it is quite clear from the terms of that judge's judgment that, although objections were taken to them being raised at that late stage, he decided to allow them to be dealt with. Indeed, he dealt with the evidence and dismissed them. That is clear from the terms of his judgment. I do not propose to add to the length of this ruling by reciting at length from the judgment of Birmingham J. save to comment that he clearly gave great leeway to the defendant to run these points although not pleaded or notified to the other side in advance because he took the view that they had the potential to be of significance. When he reached his conclusions on them, he said:-

"While the diligence of the plaintiff and his legal team in locating the entries in the documentation which have been relied upon to advance these topics is to be commended, it must be said that some of the issues which appeared to have the potential to be of the greatest significance in fact turned out to be balls of smoke."

45. I am of opinion that these averments cannot be the basis of a counterclaim having already being decided upon by Birmingham J. whose decision was affirmed by the Supreme Court.

46. At para. 35, a further issue is sought to be raised about the sale of the Beekman Hotel which it is difficult to understand and certainly in my view does not amount to a basis for any counterclaim.

47. This attempt to relitigate a matter already dealt with by the courts cannot form the basis for a counterclaim.

48. As to the third agreement, the defendant says at para. 38 of his affidavit that he has serious complaints in relation to the European fund. He says the fund was an investment for the purpose of acquiring investment properties throughout Europe and he refers to the brochure. All of these allegations which are contained at paras. 38 and 39, amount to assertion. Insofar as they amount to claims concerning the fund, it has to be borne in mind that the plaintiff was only involved at the point of sale of the investment or at the time when the investors went into it. Thereafter, the fund was operated by Anglo Irish Assurance Company. The defendant and other investors contracted with that entity and it was that entity that was the manager and custodian of the funds. Thus, insofar as there are complaints made about the manner in which they were managed or invested, they are not complaints which lie against the plaintiff.

49. Finally, insofar as the fourth agreement is concerned, there is a complaint which appears to be one of mis-selling but again it amounts in my view to mere assertion without any of the necessary detail being forthcoming.

50. I therefore conclude that the defendant has not demonstrated even on the low threshold of proof required, the basis for a counterclaim in respect of the various complaints which he has identified.

51. Even if I am wrong in that, as I have already made clear, such claims are in any event already statute barred.

52. Even if I am wrong in both of those conclusions and he does indeed have the basis for a counterclaim which is not statute barred, I would not in any event permit this counterclaim to be utilised for the purposes of staying execution on foot of the judgment to which the plaintiff is entitled.

53. The approach of the court on this topic has been dealt with by Clarke J. in *Moohan v. S&R Motors (Donegal Limited)* [2008] 3 I.R. 650. In my view, this is a case in which judgment should be entered on that part of the claim to which no defence has been demonstrated. Judgment should be refused in respect of the part of the claim to which a defence has been demonstrated. There should be no stay on the judgment to which the plaintiff is entitled. In exercising my discretion on this aspect of the matter, I take into account the factors identified by Clarke J. and conclude that the equities would not justify the plaintiff being deprived of the fruits of its judgment.

54. The net effect of this is as follows. The defendant's alleged defence only applies to the first and second agreements and facilities A and B of the third agreement and part of the fourth agreement. So there will be judgment on facility C of the third agreement and the Riverdeep part of the fourth agreement and the fifth agreement in full. So, there will be judgment for €560,265.83, on facility C of the third agreement and judgment for €112,000 plus interest accrued in respect of the Riverdeep monies. There will be judgment for €1,266,319.62 on foot of the fifth agreement. This gives a grand total of €1,938,585.45.

55. The defence on the terms alleged by the defendant has no application once the duration of the investment has expired. That has happened in the case of closed funds. Thus, there will be judgment for a combined total of €1,885,028.94 in respect of the first agreement and facility A of the third agreement (the Woolgate facility). There will also be judgment on the second facility i.e. the New York Hotel Fund in the sum of €631,561.51 and there will also be judgment in favour of the plaintiff on the M&A part of the fourth agreement being €750,000 plus interest accrued. In respect of the balance of the claim, it will be adjourned to plenary hearing so as to enable the defendant to prosecute the line of defence pertaining to the existence of a collateral agreement. There will be judgment for €5,205,175.90.