THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 162

Record No. 2016/024

Peart J.
Irvine J.
Hogan J.

BETWEEN/

JOHN MORRISSEY

APPELLANT

- AND -

IRISH BANK RESOLUTION CORPORATION LTD. (IN SPECIAL LIQUIDATION), LSREF III STONE INVESTMENTS LIMITED, KIERAN WALLACE, EAMONN RICHARDSON, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Record No. 2015/567

THE COURT OF APPEAL

BETWEEN/

LSREF III STONE INVESTMENTS LIMITED

RESPONDENT

- AND -

JOHN MORRISSEY

APPELLANT

Record No. 2015/608

THE COURT OF APPEAL

BETWEEN/

JOHN MORRISSEY

APPELLANT

- AND -

IRISH BANK RESOLUTION CORPORATION LTD. (IN SPECIAL LIQUIDATION), LSREF III STONE INVESTMENTS LIMITED, KIERAN WALLACE, EAMONN RICHARDSON, MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 25th day of May 2017

Part I

1. Prior to the banking collapse in September 2008 the defendant, Mr. Morrissey, was a major customer of Anglo Irish Bank Corporation ("Anglo"). It is not in dispute that Mr. Morrissey was very heavily indebted to Anglo. The fundamental question which arises in this series of appeals is whether Anglo's ultimate successor, LSREF III Stone Investments Ltd. ("Stone") is entitled to recover judgment against him following a loan sale by Irish Bank Resolution Corporation Ltd. ("IBRC").

2. That might seem like a straightforward issue, but, unfortunately, it is not. The litigation has given rise to a series of procedural rulings and reserved judgments from a series of High Court judges, including Kelly J., Finlay Geoghegan J., McGovern J. and Costello J.. Questions such as implied terms of good faith, admitted overcharging of interest by Anglo, the validity of the assignment of the loans and, for good measure, the constitutionality of s. 12 of the Irish Bank Resolution Corporation Act 2013 all arise in this appeal.

3. It is also important to state at the outset that there is, I think, little doubt but that Anglo had lent Mr. Morrissey considerable sums of money. Anglo demanded repayment of these sums on 19th January 2010. As will be seen in greater detail in the course of this judgment, by a judgment of Finlay Geoghegan J. the High Court determined on 14th May 2013, that Anglo was entitled so to demand. As it happens, Mr. Morrissey has made no repayments worth speaking of. It is, however, true to say that there have been some asset sales which have reduced the level of indebtedness. The amount of the debt was quantified by Finlay Geoghegan J. by her decision of 29th October 2014 as being in the sum of €31,542,125. No appeal has been taken against the decisions to the effect that the debt is

due or the quantification of that debt. The case now being pursued is largely to the effect that the illegal conduct of Anglo – including admitted overcharging of the defendant – precludes it from pursuing this debt recovery.

4. Before considering any of these issues, it is necessary first to sketch out some of the events which occurred in the aftermath of the banking crisis. Many of these events are very well known, but this short resumé is given simply for the purposes of completeness. In the aftermath of the global banking crisis which materialised in September 2008 it became clear that Anglo's financial position was unsustainable. Anglo was nationalised in January 2009 following the enactment of the Anglo Irish Bank Corporation Act 2009. Anglo and another financial institution, Irish Nationwide Building Society, were merged to form the Irish Bank Resolution Corporation ("IBRC"). In February 2013 the Oireachtas enacted the Irish Bank Resolution Corporation Act 2013 ("the 2013 Act").

5. The 2013 Act envisaged that IRBC would be placed into special liquidation, with Mr. Kieran Wallace and Mr. Eamonn Richardson (the third and fourth defendants, respectively) being appointed Special Liquidators. During the course of the liquidation of IBRC, the Special Liquidators offered portfolios of loans held by IBRC for sale to third party investors. In March 2014 the Special Liquidators entered into an agreement to sell a portfolio of loans to a third party, in this instance, Stone. The portfolio included the loans of Mr. Morrissey and the proceedings brought against Mr. Morrissey by IBRC in proceedings entitled Irish *Bank Resolution Corporation Ltd. (In Special Liquidation) v. John Morrissey*, Rec. No. 2011/1548 S ("the debt proceedings"). By deed of transfer dated 11th July 2014 the Special Liquidators transferred, *inter alia*, Mr. Morrissey's loans and the debt proceedings to the purchaser of those loans, namely, Stone.

The sequence of reserved judgments in the High Court
6. During the period between 2014 and 2015 there were some seven reserved judgments involving these parties delivered by Finlay Geoghegan J. and Costello J.. *In IBRC v. Morrissey* [2014] IEHC 470 Finlay Geoghegan J. held (in a judgment delivered on 29th October 2014) that IBRC had overcharged the defendant in terms of interest payments by some €143,676 and she directed that this sum should be deducted from the sum claimed by the IBRC. There has been no appeal against that decision. Some two weeks later in a judgment delivered on 10th November 2014, Finlay Geoghegan J. made an order substituting Stone for IBRC in these proceedings: see *IBRC v. Morrissey* [2014] IEHC 14.

7. On 11th March 2015 Costello J. delivered two related judgments in this matter. In the debt proceedings, the judge held that save for issues relating to the validity of the assignment of the loans from IBRC to Stone the new defence and counterclaim filed by the defendant on 16th January 2015 should be struck out as abusive and an attempt to re-litigate matters already determined by the High Court: see *LSREFIII Stone Investments Ltd. v. Morrissey [*2015] IEHC 199. In the other judgment delivered on that day Costello J. held that Mr. Morrissey could not raise the constitutionality of s. 12 of the Irish Bank Corporation Resolution Act 2013 unless he followed the procedure specified by Ord. 60: see *Morrissey v. IBRC* [2015] IEHC 200. The constitutional issue was then ultimately addressed in the 2014 proceedings

8. On 5th October 2015 Costello J. gave judgment in the 2011 proceedings: see *LSREFII Stone Investments Ltd. v. Morrissey* [2015] IEHC 603. She held that IBRC had a contractual right to assign Mr. Morrissey's loans to Stone and that the assignment was valid under the terms of the contract. In the alternative, she held that the assignment complied with the requirements of s. 28 the Supreme Court of Judicature Act (Ireland) 1877. She further held that the assignment of the chose in action was valid and she did so without relying upon the provisions of s. 12 of the Act of 2013 and that it was neither necessary nor appropriate to consider the constitutionality of the section. The final judgment was delivered by Costello J. on 27th November 2015 in which she held that the 2014 proceedings should be struck out by reason of the want of Mr. Morrissey's *locus standi* to challenge the constitutionality of s. 12 of the 2013 Act: see *Morrissey v. IBRC* [2015] IEHC 740.

The motion to admit new evidence
9. Before entering into a consideration of the main appeal *simpliciter*, I should pause to note that at the commencement of the appeal, Mr. Morrissey applied by motion to admit certain fresh evidence. This motion was not seriously opposed by the other parties and the additional evidence in any event related to matters which were, in any event, in the public domain and in respect of which the Court could probably have taken judicial notice, namely, the conviction in July 2016 of three senior Anglo executives of conspiracy to defraud. The Court accordingly admitted the new evidence.

10. These convictions arose by reason of certain transactions engaged in by Anglo senior management to bolster its balance sheet and thereby to give a false impression of the true state of its solvency. Such was not seriously disputed by counsel for the respondent, LSREF III, Mr. Maurice Collins S.C., although the relevance of this material to the issues under appeal was strongly contested. As will presently be seen later in this judgment, the question of whether Anglo had engaged in such unconscionable and illegal behaviour such that no court should entertain an application for repayment of the debt is central to this appeal.

Part II

The sequence of events before the High Court commencing in 2011
11. Anglo's application for summary judgment first came before the High Court in October 2011. After some prevarication as to whether Mr. Morrissey had ever received the monies lent by Anglo, it quickly emerged that his principal defence related to Anglo's (alleged) illegal conduct in general. Thus, for example, paragraph 4 of the defence dated 12th October 2011 pleaded that if such monies were lent, "such monies were lent for the purpose of the plaintiff's illegal trading while insolvent." Paragraph 5 denied that any interest was due as the same would be "excessive, harsh and unconscionable", such that "a court of equity would not grant relief in respect thereof."

12. This proposed line of defence met with a robust response from Kelly J. who observed:

> "This isn't a public enquiry into Anglo Irish Bank. This is a claim by the bank to recover monies and whether or not you have a defence to it. If you have a defence, the bank's claim will fail; if you don't have a defence, the bank's claim will succeed. But trawling through the newspapers and picking up pieces of information about Mr. Fitzpatrick [the former Chairman of the Bank] and his alleged activities and the Maple Ten and what other people in Anglo might have been up to can hardly provide any basis for defence when you have a contractual obligation with the bank, and the question this court has concerned itself with is whether or not that contract had been breached by either side… 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 a line of defence as he may have and this is entirely contrary to the whole notion of having a Commercial Court that has 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 undertake having regard to the parameters of the claim."

13. Kelly J. gave the defendant one further opportunity to file a defence and counter-claim. Mr. Morrissey did admittedly file a defence and counter-claim, but this defence was late by a matter of hours. On 8th December 2011 Kelly J. set aside the judgment which had automatically taken effect by virtue of the non-compliance with the "unless" order.

14. The matter came before him again on 23rd January 2012. On that occasion the defendant had identified two issues for determination between the parties, namely, whether Anglo was entitled to make the demand which it did and, second, whether there was a fiduciary relationship between the parties which superseded any contractual arrangements between the parties:

> "I believe that it would make a great deal of sense that there would be a trial of these two issues because in essence what the defendant says by way of his defence in this action is that there was not entitlement on the part of the plaintiff to seek to recover the funds which are the subject of these proceedings because of the existence of a fiduciary relationship between him and the plaintiff's Bank which superseded the mere contractual obligations undertaken in the various documents which were relied upon by the plaintiffs. If that issue is tried, then we will have an answer either in favour or against the plaintiff. If the answer is in favour of the plaintiff, that is in effect an end of the proceedings. If the answer is against the plaintiff, then Mr. Morrissey will be at large in relation to the various other matters which he would wish to adduce in evidence in support of his notion that there was indeed this fiduciary relationship and that events which are touched on in the papers have been placed before me concerning, for example, the Maple Ten, are matters which are to be taken into account by the Court in reaching a final conclusion on the matter."

15. These two issues which had been set down for hearing by Kelly J. were heard and determined by Finlay Geoghegan J. in her judgment delivered on 14th May 2013: see *IBRC v. Morrissey (No.1)* [2013] IEHC 208. In that judgment she determined that the Bank was entitled to make demand on the defendant pursuant to the facilities granted in February 2009 when it did in January 2010. She further ruled that the relationship between the plaintiff and Mr. Morrissey did not go beyond the ordinary contractual relationship between banker and lender and, specifically, that there was no fiduciary relationship between the parties. At the close of that hearing the judge had invited further submissions from the parties as to issues remained to be determine and the case stood adjourned to 21st June 2013.

16. The matter then came before Ms. Justice Finlay Geoghegan on 21st June 2013 when the defendant applied to amend his pleadings following the enactment of the 2013 Act a few months earlier. With that amendment the defendant sought to argue that the 2013 Act was unconstitutional and that such unconstitutionality rendered the IBRC in breach of the provisions of the Credit Institutions Winding-Up Directive 2001/21/EC ("the 2001 Directive"). Finlay Geoghegan J. took the view, however, that Mr. Morrissey remained free to pursue his original defence and counter-claim as if the 2013 Act had never been enacted and that it was accordingly not necessary for him to maintain this constitutional challenge. Finlay Geoghegan J. then reserved judgment on the question of what issues remained outstanding in the proceedings

17. In a judgment delivered on 12th November 2013 Finlay Geoghegan J. held that the only remaining issues in the proceedings were, first, the amount in which the plaintiff is entitled to judgment as against the defendant and, second, the extent to which the plaintiff was entitled to charge defendant interest and the extent to which (if at all) he was overcharged.

18. The issue as to interest was heard over three days by Finlay Geoghegan J. in June 2014. In a reserved judgment delivered on 28th October 2014 she held that IBRC had overcharged the defendant in terms of interest payments by some €143,676 and she further directed that this sum should be deducted from the sum claimed by the IBRC. While there has been no appeal against this particular finding, the defendant maintains that the conduct of the IBRC and its officials was such that it amounted to mala fides and that such infects the entitlement of IBRC to recover judgment in its debt proceedings.

19. Parallel to all of this the special liquidators of IBRC had reached an agreement to sell the underlying loan facilities to LSREF III Stone Investments Ltd. ("Stone"). This deed of transfer was executed on 11th July 2014 and notice of this was given to Mr. Morrissey on 23rd July 2014. In her judgment delivered on 10th November 2014 (*IBRC v. Morrissey (No.4)* [2014] IEHC 527) Finlay Geoghegan J. held that as a matter of law the special liquidators had the capacity to effect the sale of these loans, and, accordingly, it was appropriate to make an order pursuant to Ord. 15, r. 15 substituting Stone for IBRC. She further rejected the argument based on maintenance or champerty, saying:

> "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. "

20. Undaunted, perhaps, by any of the reverses which he had experienced, Mr. Morrissey then filed an amended defence and counterclaim on 16th January 2015. He also brought a motion to stay the existing 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 2014 plenary proceedings") which he had brought.

21. The matters were dealt by Costello J. in her judgment delivered on 11th March 2015: see *LSREF Stone Investment Ltd. v. Morrissey* [2015] IEHC 199. In an admirably comprehensive judgment Costello J. summarised the extensive judgments which had been delivered to date. She found first that the following findings of fact had already been made:

> "(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."

22. Save for the issue of the validity of the loan transfer from IBRC to Stone – which issue Finlay Geoghegan J. indicated that she had *not* determined in her November 2014 judgment - Costello J. then proceeded to strike out the proceedings as against the IBRC and Stone defendants, finding that much of this amended defence and counter-claim amounted to an attempt to re-litigate issues – such as whether there had been a wrongful termination of banking facilities or a fiduciary relationship between the parties – that had already been ruled upon by the High Court at various stage of the proceedings between 2012 and 2014. In fact Costello J. found that the only part of the 2014 proceedings which raised any new issue which had not previously been resolved was the claim in relation to the constitutionality of s. 12 of the 2013 Act. She refused, however, to stay the debt proceedings pending the outcome of this constitutional challenge.

23. Following the decision of Costello J. in her judgment of 11th March 2015 to strike out the proceedings insofar they related to the IBRC and Stone defendants (save for the issue of the validity of the loan transfer), the State defendants (*i.e.*, the Minister for Finance, Ireland and the Attorney General) applied by notice of motion dated 20th October 2015 seeking similar relief for want of standing or, alternatively, failing to disclose a reasonable cause of action. In her second judgment delivered on 27th November 2015 (Morrissey v. IBRC (No.2)) [2015] IEHC 740) Costello J. acceded to that request and struck out those proceedings. The plaintiff has now appealed against that decision.

Part III

The scope of the High Court defence and counter-claim which Mr. Morrissey sought to advance

24. At the heart of the present appeal lies the question of the proper scope of the High Court defence and counter-claim brought by Mr. Morrissey. In this Court Mr. Morrissey sought to advance far-reaching arguments to the effect that by reason of the illegal conduct of Anglo – and, indeed, the criminal conduct of some of its senior executives – its successor, IBRC (and, following the loan sale, Stone), is itself debarred from recovering monies which it is now admitted were at one stage advanced to Mr. Morrissey. While this argument also features in respect of the overcharging issue, it would also be fair to observe that in this Court Mr. Morrissey sought to make this argument central to the run of the entire proceedings. It is accordingly necessary to examine in some detail the precise sequence of events in the High Court and the orders made by that Court as to the permitted parameters of the defence and counter-claim.

25. To understand this issue it is necessary first to re-trace the evolution of the proceedings commencing with the rulings of Kelly J. in October 2011 and January 2012 regarding the scope of the defence. In that defence and in the affidavits filed by Mr. Morrissey the argument as to the general wrongful conduct of Anglo was pleaded as a defence to the Bank's claim to recovery of the monies which had been advanced by it. But what was also clear was that Mr. Morrissey's entitlement to advance the argument based on (alleged) illegality and unconscionability on the part of Anglo was predicated on his ability to show that the relationship between the bank and himself was not simply contractual, but was also fiduciary in nature.

26. It is true that on the occasions on which Kelly J. was dealing with Anglo's application for summary judgment he observed on more than one occasion that the Court was not conducting a public inquiry into the affairs of Anglo. It is equally clear, however, that Kelly J. did not, as such, preclude the defendant from raising this ground of defence, provided it was in the context of the defendant establishing the existence of a fiduciary relationship. The first order was dated 26th October 2011 and this required the defendant to file an amended defence and counterclaim "which is to identify and focus on the true matters in issue between the parties."

27. The next relevant date is the 8th December 2011 when Kelly J. set aside an "unless" default judgment where the defence had been filed late. On that occasion counsel for the defendant assured Kelly J. that there was no intention "to cause a vast trawl" of documents, because what was intended to be achieved by the amended pleading was:

> "…to reveal that Mr. Morrissey has been in a very long-term relationship with the Bank and…had a particularly close relationship with the manner in which it financed and refinanced continuously in a basis that had been revealed to the Court, his ongoing operations….."

28. There then followed this exchange between Mr. Justice Kelly and counsel for the defendant:

> "Mr. Justice Kelly: I'm not greatly concerned if it does or it doesn't because any defendant is entitled to raise any legitimate defence and if that involves major discovery, so be it. What I am not prepared to do and what I am not is a public inquiry into the way in which Anglo Irish Bank Corporation carried on its business. Counsel: That's what I mean really."

29. What emerges from that exchange is that Kelly J. took the view that if some aspect of the affairs of Anglo gave Mr. Morrissey a defence then he was, of course, entitled to mount a defence for this purpose based on that wrong-doing. It was on that basis, therefore, that leave to defend was granted by Kelly J. The High Court is, of course, entitled to grant leave to defend a summary summons subject to conditions: see Ord. 37, rr. 7 and 10.

30. This is really put beyond doubt by the subsequent ruling of Kelly J. on 23rd January 2012 when he directed a modular trial. On this occasion Kelly J. ruled:

> "I believe that it makes a great deal of sense that there would be a trial of these two issues because in essence what the defendant says by way of his defence in this action is that there was no entitlement on the part of the plaintiff to seek to recover the funds which are the subject of these proceedings because of the existence of a fiduciary relationship between him and the plaintiff Bank which superseded the mere contractual obligations undertaken in the various documents which were relied upon by the plaintiff. If that issue is tried, then we will have an answer either in favour or against the plaintiff. If the answer is in favour of the plaintiff, that is in effect an end of the proceedings. If the answer is against, *then Mr. Morrissey will be at large in relation to the various other matters which he would wish to adduce in evidence in support of his notion that there was indeed this fiduciary relationship and that events which are touched upon in the papers that have been placed before me concerning, for example, the Maple 10 are matters which are to be taken into account by the Court in reaching a final conclusion on the matter.*" (emphasis supplied)

31. The highlighted words make the views of Kelly J. regarding the circumstances in which the general issue of Anglo's illegality might be raised by Mr. Morrissey absolutely plain. (In passing I should observe that the reference to the "Maple 10" is a reference to an alleged illegal share-support operation which Anglo put into operation in the summer of 2008.) At all events, Mr. Morrissey's counsel then stated in response:

> "Judge, with respect to the issues as raised, I think my client is disposed towards the modular issues as set out and proposed directions."

32. What, then, was the combined effect of the leave to defend and the direction for a modular trial? An analysis of the procedural history of the litigation up to January 2012 really admits of only one conclusion: Mr. Morrissey was free to raise the illegal – even criminal – conduct of Anglo by way of defence, provided only that he established the existence of a fiduciary relationship between the parties. This was the basis upon which the parties later proceeded and, of course, the various orders made by Kelly J. were never the subject of an appeal.

33. These are critical considerations. It is unnecessary in these circumstances to express any view as to whether any illegal conduct of Anglo might otherwise have given rise to a tenable defence, as it is sufficient to say that leave to defend these summary proceedings permitted Mr. Morrissey to raise these wider issues of illegality only where a fiduciary relationship was established. As I have already recorded earlier in this judgment, Finlay Geoghegan J. ruled against Mr. Morrissey on that issue in her judgment on 14th May 2013 and no appeal has been taken against that judgment. Given that the parties have acted on foot of the (un-appealed) orders of Kelly J. determining the parameters of the defence, it is now too late for this wider issue of Anglo's conduct to be raised by way of defence.

Part IV

Whether mala fides would defeat the plaintiff's claim for debt recovery

34. A central feature of Mr. Morrissey's claim in the respect of the debt proceedings is that IBRC's predecessor, Anglo, had acted *mala fide* in respect of the manner in which interest had been collected. The evidence was that at some stage after the changeover from the Irish pound to the Euro on 1st January 2002 Anglo moved from a system of calculation of interest based on a computation of 365 days to one based on 360 days. In the High Court Mr. Morrissey was successful in his contention that this change led to him being overcharged interest. (I will shortly set out the basis for this finding.) Based on this, Mr. Morrissey maintains that the Bank acted illegally or recklessly such that this illegality should disentitle it from suing for recovery on foot of the various loans which it made to him. This, however, is a more specific plea of illegality which is not otherwise captured or governed by the various orders of Kelly J.

35. In the course of the hearing in June 2014 on the over-charging issue Finlay Geoghegan J. made it clear that that hearing was in relation to the *computation of interest* only and not issues relating to intentions and conduct of Anglo in respect of that overcharging issue.

36. In order to understand this issue it is necessary first to summarise the evidence on the overcharging issue in the High Court. IBRC's first witness on this issue was a Mr. Mark Ambrose, a senior manager and Head of Recovery at IBRC. He explained the nature of the change and how it had been prompted by general banking practice in the light of the Euro changeover. When asked whether Anglo gained as a result of this change, Mr. Ambrose denied that this was so.

37. The second witness, Mr. Paul Anthony Jacobs, was a partner at Grant Thornton specialising in forensic accountancy. He stated that he had been asked in November 2013 to prepare a report in relation to the charging of interest in the present case. Mr. Jacobs' evidence was that although there had been overcharging of interest in the sum of €54,000, this was due to other factors such as the choice of the wrong EURIBOR rate in the period from 2001 to 2004 and it was not directly linked to the move from 365 days to 360 days . He rejected the suggestion that the move from 365 days to 360 days should make any difference, since, as he put it "365/365 is the same as 360/360." He was then asked by Mr. Binchy, counsel for the defendant, "what about 360/365?" Mr. Jacobs answered by saying that:

> "That is something which I don't believe is in play here."

38. The defendant called Mr. Eddie Fitzpatrick and Mr. John O'Connor as his expert witnesses on this issue. Mr. Fitzpatrick was an expert in banking and finance and specialised in forensic banking issues. Mr. Fitzpatrick gave evidence in relation to the 360/365 issue and expressed the clear view that this change in itself resulted in an additional (and unwarranted) interest rate costs to the customer. Mr. O'Connor was a former bank manager who had set up his own financial services company. He explained how Anglo had not adjusted its interest calculations in the wake of the move to the 360/365 system.

39. In the wake of this evidence, Mr. Jacobs was recalled on Day 3 of the hearing, but he still disagreed with the conclusions reached by Mr. Fitzpatrick and Mr. O'Connor.

40. In her judgment delivered on the 29th October 2014, Finlay Geoghegan J. found that:

> "… the plaintiff and Mr. Jacobs are correct in construing the total annual interest rate in each facility letter from 2003 (both margin and EURIBOR) to be an annual rate quoted on the basis of a 360 - day year. This follows from clause 19.2 of the General Conditions as there is no contra indication in the facility letter. Further, it is agreed the EURIBOR is and is known to be a 360 - day rate. However, in my judgment, there are incorrect in construing the facility letters as permitting "daily accrual" interest on the basis of a 365 day year. Such a construction is not warranted for the express terms of the

> facility letter and is inconsistent with clause general of clause 19.2 the General Conditions. In summary, … the facility letters and the General Conditions applicable to the defendants' facilities in 2003 require the application of the 360 - day convention, whereas the plaintiff and Mr. Jacobs have used the 365 - 360 or actual - 360 convention, giving rise to a further overcharge. It follows from this conclusion that the plaintiff has charged the defendant interest for five additional days in each year since July 2003."

41. Following a detailed analysis and calculation of the relevant interest figures and the additional days interest, Finlay Geoghegan J. found that the amount of overcharging came to €143,676.64. She accordingly deducted that sum from the sum otherwise found by her to be due by Mr. Morrissey to IBRC. As I have previously stated, no appeal has been taken to this court against these findings or that computation by Finlay Geoghegan J.

42. Mr. Morrissey's argument was that by overcharging in this fashion Anglo (and its successor, IBRC) had acted in bad faith and thereby debarred itself by its own conduct from the recovering the sums which it had claimed. In this regard, counsel for Mr. Morrissey, Mr. Binchy, did not shrink from advancing the argument that, as a matter of Irish contract law, there exists a general principle of good faith. Counsel further contended on this basis that in view of the overcharging by Anglo – which he submitted was intentional - Anglo (and, by extension, IBRC and, in turn, Stone) would have been debarred from recovering the monies advanced to Mr. Morrissey. I feel bound to observe in the first instance that I am not certain that this argument based on a general faith principle was ever properly open to Mr. Morrissey in the light of the scope of the issues directed by Kelly J. as to the modular trial. I nevertheless propose to address this issue since it was fully argued before us. There are, I think, several answers to this submission.

43. First, it is unnecessary to express any view on the wider issue of principle which has so exercised comparative private law lawyers for so long, namely, whether the common law recognises a general principle of good faith such as is to be found in civil law jurisdictions, such as in, *e.g.*, Article 1134 of the French *Code Civil* or Article 2 of the Swiss Civil Code.

44. Some common law courts have moved decisively in recent times to recognise the existence of a general duty of good faith, most recently the Canadian Supreme Court in its ground-breaking decision in *Bhasin v. Hrynew* [2014] SCC 71, (2014) 3 SCR 494. While the facts of *Bhasin* were complex, the Canadian Supreme Court found in that case that the failure to renew a particular contract was dishonest – and, hence, a violation of the implied duty of good faith – in part because one of the defendants did not wish to disclose the extent to which it had facilitated the other defendant from gaining improper access to the plaintiff's confidential business records, thereby undermining that business. Even if the analogy is not an exact one, one can see here clear comparisons between the implied duty of good faith identified in *Bhasin* and the remedies already provided by our law as to matters such as misrepresentation by conduct and civil fraud.

45. This very issue was raised before this Court recently in *Flynn v. Breccia* [2017] IECA 74, although the Court did not find it necessary ultimately to rule on this general question. In my concurring judgment in that case I also reserved this general question, although I also observed that:

> "……If one looks further into our general law one can find instances of specific doctrines and concepts which correspond, however approximately, to civilian concepts of good faith: the equitable doctrines of unconscionability, fraud on a power and the principle that he or she who comes to equity must come with clean hands are all in their own way at least potential examples of this. The doctrine of constructive notice - with its requirement that (as explained by Henchy J. in *Northern Bank Ltd. v. Henry* [1982] I.R. 1, 12) the reasonable person "will be expected to look beyond the impact of his decisions on his own affairs and to consider whether they may unfairly and prejudicially affect his 'neighbour'" before they can properly plead that they should not be fixed with such notice - is another such example.
>
> The fact that the Irish courts have not yet recognised such a general principle may over time be seen as simply reflecting the common law's preference for incremental, step by step change through the case-law, coupled with a distaste for reliance on overarching general principles which are not deeply rooted in the continuous, historical fabric of the case-law, rather than an objection per se to the substance of such a principle….."

46. For my part, I doubt if it is necessary to go any further than this, namely, a tacit recognition that specific doctrines developed in common law jurisdictions – ranging from the "clean hands" doctrine, estoppel, constructive notice to fraud upon a power – are but particular instances of legal principles that in civilian jurisdictions have been subsumed into the wider and over-arching principle of good faith.

47. One thing, however, is clear. Even if our common law system were to recognise a general over-arching principle of good faith, such a principle would simply operate in aid of the general law of contract by precluding conduct which was overbearing, oppressive, abusive, unconscionable or unfair, in much the same way as equity has leavened the rigours of the common law. It would not, however, authorise the courts to undermine the very substance of the rights and obligations of the parties to the contract in reliance on such a general principle of good faith. Yet such would be the case if the courts were to hold that a creditor were to be deprived of his right to demand repayment under contract of that which was *lawfully due*. Naturally, I stress these latter words because the creditor has no right to recover that which is not properly due, such as the sums which were overcharged in the present case.

48. One can, of course, reach this conclusion another way. As both the High Court and the Supreme Court have stressed in recent times, law and equity have not been fused, at least in the sense that the discretion which applies in the case of standard equitable principles do not apply in the case of actions at common law: see, *e.g., Meagher v. Dublin City Council* [2013] IEHC 474; *McGrath v. Stewart* [2016] IESC 474. The action for debt is a quintessentially common law action and as I observed in *Meagher*:

> "…..there is no authority for the proposition that the court might refuse to award damages for breach of contract or in tort on discretionary grounds such as undue delay per se or because the claimant has been guilty of bad faith by, for example, exaggerating the nature of the claim, even though these would be well established grounds for refusing any equitable relief which might otherwise have been granted…"

49. It follows, therefore, that in considering the merits of any common law action for recovery of debt there is no room for the application of equitable principles, such as the doctrine that he who comes to equity must come with clean hands. The common law rather seeks only to inquire whether the sums claimed are lawfully due or not. It matters not that the creditor has otherwise sought to overcharge the debtor, for the debtor's remedy in such circumstances is to set up a defence to the claim.

50. Perhaps the closest that the common law has come to recognising such a principle of good faith in this jurisdiction is the decision of the Supreme Court in *Shelley-Morris v. Bus Atha Cliath-Dublin Bus* [2002] IESC 74, [2003] 1 I.R. 232, a case where both Denham and Hardiman JJ. expressly adverted to the possibility that the court might strike out an exaggerated personal injuries claim as an

abuse of process. Even then this was mentioned only as a possibility and the judgment of Denham J. contemplating that possibility is directed principally at the onus of proof, so that a court might be so disinclined to believe a plaintiff that he or she would fail on the onus of proof. It has not, however, been necessary for the courts to develop the *Shelley-Morris* doctrine, in view of a subsequently enacted statutory power expressly giving the courts power to strike out proceedings where false or misleading evidence has been given by a plaintiff claiming damages for personal injuries: see s. 26 of the Civil Liability and Courts Act 2004.

51. If the principle so tentatively hinted at *Shelley-Morris* were to be developed further then that decision suggests that any such development would come about by the extension of the separate doctrine of abuse of process rather than by the infusion of some form of quasi-equitable discretion into the common law. It is, however, unnecessary to express any view on whether such a development could ever come to pass because it is clear in the present case that the Bank's claim in respect of the over-charged interest came about as a result of at worst carelessness in respect of an admittedly difficult issue with which – as any reading of the three days of transcripts of the evidence before Finlay Geoghegan J. in June 2014 makes clear – even the forensic accountants who had been called as expert witnesses at times struggled.

52. It is true that Finlay Geoghegan J. excluded any line of examination of the witnesses relating to any general conduct of the Bank, including the issue of intentional overcharging. Nevertheless, as she pointed out, the confusion and errors arose from the fact that Anglo had mis-aligned the annual rate of interest and the daily rate of accrual of that interest. It was accepted that the EURIBOR (applied by the banking system after the establishment of the Euro in 2002) was a 360 - day rate. But Anglo was found to be in error in construing the facility letters as permitting "daily accrual" interest on the basis of a 365 day year. Taking Mr. Morrissey's case at its highest it might be said that this error was the product of carelessness – and, at worst, negligence - on the part of Anglo. But, for my part, at least, I do not see any suggestion of conscious intention to deceive on the part of the creditor Bank such as might possibly bring the *Shelley-Morris* principles into play, even assuming – contrary to my own view – that the defendant was entitled to raise that issue of intent so late in the course of the High Court proceedings given the previous (unappealed) High Court orders determining the remaining scope of the proceedings.

53. It follows, therefore, that even if the courts retained a jurisdiction to strike out a common law action for debt on the ground of abuse of process by reason of intentional overcharging (an issue on which I express no view), I would nevertheless reject the argument in the present case that the admitted over-charging of interest by Anglo/IBRC amounted to an intention to deceive such that the plaintiff should be debarred from recovering the sums and interest lawfully due to it.

Part V

Whether the loan sales were champertous

54. It is next necessary to consider whether the loan sales as between IBRC and Stone were in some way champertous. For my part, I doubt whether it is necessary to go further than approve in a general way the reasoning of Finlay Geoghegan J. on this point.

55. Recent Irish case-law has affirmed the continued survival of the tort of maintenance, albeit re-moulded, perhaps, in some respects by the need to ensure the right of litigants to maintain access to the courts: see, *e.g., O'Keeffe v. Sales* [1998] 1 I.R. 290 and *Greenclean Waste Management Ltd. v. Leahy (No.2)* [2014] IEHC 314. It is, however, perfectly clear from a long-line of case-law that the bare assignment of an action in debt is not champertous where the assignee has a legitimate interest in continuing the litigation. As Lord Roskill said in *Trendtex Trading Corporation v. Credit Suisse* [1982] A.C. 679, 703:

> "an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty…"

56. In *Trendtex* the House of Lords held that the agreement under which the assignment was made savoured of champerty because it was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in it in return for a division of the spoils. The critical point, of course, was that the assignee in that case had no genuine commercial interest in the litigation. The difference here is that the present litigation which has been assigned is manifestly simply in aid of the enforcement of the loans which themselves have already been found by the High Court to have been lawfully assigned.

57. It is true that the entire loan sale agreement has not been produced – whether to the defendant or even to the Court – in un-redacted form and, indeed, the version actually produced is itself plainly heavily redacted. But as Finlay Geoghegan J. observed, there is nothing to suggest that the loan sale agreement involved anything other than a bare loan sale agreement, comprising the assignment of the loans from IBRC to Stone, along with the associated right to sue in respect of the recovery of the loans. This would be so even if – as appears to have been the case - Stone was given certain consultation rights in relation to this litigation pending the completion of the sale.

58. In these circumstances the objection to the loan sale agreement on the grounds that it is champertous or savours of champerty or for that matter that it amounts to maintenance must fail.

Part VI

The decision of the Costello J. of 11th March 2015

59. It is next necessary to address the decision of Costello J. to strike out the amended defence and counter-claim delivered on 15th January 2015. It will be recalled that at the close of her judgment on the substitution motion on 10th November 2014 Finlay Geoghegan J. directed that the substituted plaintiff – *i.e.*, Stone – file an amended summary summons in consequence of the substitution order. The transcript for that day records the judge as stating that Mr. Morrissey could, of course, raise any defence which would still have been open to him as against IBRC. She added, however, that the:

> "…defences at this stage of the proceedings that you could have raised against IBRC are limited by the judgment of the 29th October [2014] because I have identified the only outstanding issue to be determined and the only matters that you can raise against the entitlement of what was the then plaintiff, IBRC, to a judgment….So you are entitled to plead, by way of defence, any issue that arises obviously on the pleadings which Stone will now make as its entitlement to judgment against your client. That must include any issue that you have been entitled to raise with IBRC as well as Stone arising from the purported agreement to sell the defendant's facilities and the purported completion of the sale."

60. Finlay Geoghegan J. then directed that the amended defence of Mr. Morrissey was to be delivered by 8th December 2014. An amended defence and counterclaim was ultimately delivered on 1st January 2015. Solicitors acting for Stone objected in correspondence on various grounds to the amended defence and counterclaim as delivered. This was withdrawn. A further amended defence and counterclaim was then delivered on 16th January 2015.

61. The most striking aspect of the defence and counterclaim was that at this stage of the proceedings – after some seven major substantive rulings (including four reserved judgments) - it extended to 147 paragraphs for the defence and some 27 paragraphs for the counterclaim. It is hard to avoid the conclusion that a fresh pleading of that intricacy and complexity almost invited a strike-out motion since one could not have realistically envisaged that there were any issues left which required a pleading of this size and nature. Mr. Morrissey had also issued fresh plenary proceedings in 2014.

62. These developments then give rise to a fresh round of motion and counter-motion which was heard by Costello J. on 17th February 2015. Three motions were issued in the 2011 proceedings. Stone sought an order pursuant to Ord.19, r.28 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. It sought in the alternative an order striking out those paragraphs of the defence which did not fall within the scope of the amended pleadings permitted by Finlay Geoghegan J. in her judgment of 10th November 2014. Mr. Morrissey brought a motion seeking to stay the 2011 proceedings until after the trial of the new 2014 plenary proceedings or, in the alternative, an order consolidating the 2011 proceedings with the 2014 proceedings or an order that the two proceedings be tried together. Mr. Morrissey also brought a motion seeking discovery from Stone.

63. So far as the 2014 proceedings were concerned, IBRC (and the special liquidators) brought a motion seeking an order pursuant to Ord.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 also 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 as the rule in *Henderson v. Henderson*. A similar motion was brought by Stone in the 2014 proceedings. The motions in the 2014 proceedings were dealt by Costello J. in a separate judgment which was also delivered on the 11th March 2015. The issues arising in respect of the 2014 proceedings are later addressed in Part VII of this judgment.

64. Following a survey of the findings and determinations already made by the High Court up to November 2014, Costello J. found that the majority of the issues raised in the proceedings were *res judicata* so far as the High Court was concerned. Thus, Mr. Morrissey's pleas (at paras. 8-39 and 40-49 of the defence) regarding the wrongful termination of the banking facilities and the existence of a fiduciary relationship had already been determined by Finlay Geoghegan J. in her first judgment. Paragraph 15 of the defence raised the question of the overcharging of interest, but this had been determined by the same judge in her third judgment delivered on 29th October 2014.

65. Costello J. then turned to consider whether the balance of the amended defence and counterclaim was within the scope of the direction of Finlay Geoghegan J. of 10th November 2014. In a most careful and thorough judgment Costello J. examined each of the remaining issues in meticulous detail: see paras. 56 to 80 of that judgment. As I could not hope to improve upon her analysis, I shall content myself with observing that I entirely agree with the analysis and the reasons which she gave for striking out the majority of the issues raised in the defence and counterclaim on the grounds that these issues were manifestly outside of the scope of Finlay Geoghegan J.'s direction.

66. In essence, therefore, Costello J. held that the question as to the validity or effectiveness of the purported sale or assignment to the plaintiff was the only issue left over by Finlay Geoghegan J. for final determination by the High Court, along with the issues associated with the effect of and, if necessary, the constitutionality of, s. 12 of the 2013 Act. For the reasons already indicated, I fully agree with this analysis.

Part VII

The constitutional challenge

67. The background to this constitutional challenge is inter-linked with the other issues raised in the main appeal. Before the main debt proceedings had concluded IBRC had entered into an agreement with Stone to sell these loans and it followed in turn that it was necessary for Stone to be substituted as plaintiff in lieu of IBRC in the debt proceedings. At this point Mr. Morrissey raised a number of issues concerning the validity of the assignment of his loan to Stone.

68. Finlay Geoghegan J. delivered a judgment whereby she permitted Stone to be substituted as plaintiff, albeit this was without prejudice to any arguments that Mr. Morrissey might wish to raise as to the validity of the assignment. She rejected Mr. Morrissey's argument that the sale agreement and the deed of transfer were void by reasons of the rules prohibiting champerty and maintenance. She held that the Special Liquidators of IBRC had capacity to sell Mr. Morrissey's loans and the associated debt proceedings pursuant to s. 231 of the Companies Act 1963.

69. So far as the assignment was concerned, Stone asserted that the assignment was a valid and enforceable assignment on three grounds:

> (a) the general conditions of Mr. Morrissey's loans with Anglo expressly authorised that the Bank could transfer the loans to third parties;
>
> (b) the assignment had been effected in accordance with the requirements of s. 28 the Supreme Court of Judicature Act (Ireland) 1877;
>
> and finally, in the alternative,
>
> (c) by virtue of the provisions of s. 12 of the 2013 Act, the assignment was valid.

70. No appeal has been taken against that part of the judgment relating to the validity of the assignment and I have already ruled on the champerty issue. This part of the judgment accordingly deals principally with Mr. Morrissey's challenge to the constitutionality of s. 12 of the 2013 Act and, in particular, the question of whether he has the requisite standing to pursue this challenge. It must, however, be observed that the procedural history of this constitutional challenge is a rather tangled one. These proceedings were commenced by him by plenary summons on 28th October 2014. In addition to seeking a declaration that s. 12 of the 2003 Act was

unconstitutional, he also claimed that it infringed his rights as guaranteed under the European Convention on Human Rights and that it infringed the Charter of Fundamental Rights of the European Union.

71. It is important to stress that when Costello J. delivered her first judgment in these proceedings on 11th March, 2015 – whereby the claim as against the non-State defendants was struck out – she nonetheless indicated that Mr. Morrissey:

> "should not be debarred from challenging whether s. 12 of the Irish Bank Resolution Corporation Act 2013 is compatible with the Constitution if Stone should succeed in obtaining judgment against him in the debt proceedings on the basis of the section."

72. Costello J. then held that Mr. Morrissey could pursue the remaining constitutional issue in the debt proceedings by availing of the procedures provided in Ord. 60 of the Rules of the Superior Courts or else he could continue to maintain the plea in the plenary proceedings. She ruled, however, that he could not maintain a challenge to the constitutionality of the provisions of s. 12 of the Act of 2013 in the debt proceedings without engaging in the Ord. 60 procedure. In the event, Mr. Morrissey decided not to avail of the Ord. 60 procedure and he was not permitted to argue that the provisions of s. 12 of the Act of 2013 were invalid having regard to the provisions of the Constitution or violated Articles of the Charter of Fundamental Rights of the European Union in the debt proceedings.

73. On 5th October 2015, Costello J. gave judgment in the debt proceedings. It is of considerable importance so far as this aspect of the appeal is concerned that she held that IBRC had a contractual right to assign Mr. Morrissey's loans to Stone. Costello J. further held that the assignment was valid under the terms of the contract. In the alternative, she held that the assignment complied with the requirements of s. 28(7) Supreme Court of Judicature Act (Ireland) 1877 ("the 1877 Act") with regard to the assignment of choses in action.

74. Costello J. accordingly held that the assignment of the chose in action was valid and she did so *without relying upon the provisions of s. 12 of the Act of 2013*. Costello J. further held that it was neither necessary nor appropriate to consider the constitutionality of the section. She then gave judgment in favour of the plaintiff, Stone, against Mr. Morrissey in the sum of €30.18m. In calculating this sum Costello J. gave credit in respect of the overcharging of interest by Anglo which had been identified by Finlay Geoghegan J. (namely, the sum of €143,676.64).

75. This is the general background to the constitutional challenge. At this juncture, it is important to recall that Costello J. held that the plaintiff had no standing to challenge the constitutionality of the section, precisely because he was not directly affected by it. While he might have been so affected, it was central to Costello J.'s finding of a want of locus *standi* that the sale or transfer of any IBRC loan to Stone *was already authorised*, either as a matter of ordinary contractual assignment or by virtue of s. 28(7) of the 1877 Act. The effective and valid transfer of the loans was not, therefore, contingent in any way on the actual or potential operation of s. 12 of the 2013 Act. These loans could have been validly transferred from IBRC to Stone even if s. 12 of the 2013 Act had never been enacted.

Section 12 of the 2013 Act

76. It is next necessary to consider the terms of s. 12 of the 2013 Act itself. It provides:

> "(1) The sale or transfer of any asset or liability by IBRC, acting through a special liquidator, or by a special liquidator where such asset or liability has vested in the special liquidator, to any person or the assumption of any obligation or liability relating to such sale or transfer shall take effect notwithstanding:
>
> (a) any provision of any enactment, rule of law, code of practice, contract, or other agreement:
> (i) providing for or requiring:
>
> (I) notice to be given to any person,
>
> (II) the consent, approval or concurrence of any person,
>
> or
>
> (III) any other step, consent, notification, authorisation, licence or document to similar effect,
>
> (ii) prohibiting that sale or transfer,
>
> or
>
> (b) any other legal or equitable restriction, inability or incapacity relating to the sale or transfer of any asset or liability or the assumption of any obligation or liability relating to such sale or transfer.
>
> (2) On the sale or transfer of any cause of action or proceedings by IBRC, acting through a special liquidator, or by a special liquidator where such cause of action has, or proceedings have, vested in the special liquidator, to any person:
>
> (a) that person assumes all of the rights and obligations in relation to the cause of action or proceedings which IBRC had immediately before that sale or transfer, other than the obligations of IBRC to which paragraph (b) relates, and
>
> (b) IBRC retains obligations in relation to the defence of or liability for any counterclaim or cross-claim which, if successful, would not give rise to a right of set-off and, in respect of such defence or liability, IBRC has full rights in relation to, and is solely liable for, any remedy awarded in relation to any counterclaim or cross-claim which, if successful, would not give rise to a right of set-off.
>
> (3) Any obligation incurred, security created, payment made or act performed by IBRC (whether or not acting through a special liquidator) at any time (whether before or after the passing of this Act) in favour of the Bank, whether or not all or any part of the Bank's interest in such obligation, security, payment or act has been transferred to another person, shall be taken to be valid and enforceable in all respects notwithstanding any enactment or rule of law, which validity and

enforceability may not be challenged by any person including a special liquidator, and, without prejudice to the foregoing, shall not be invalidated or rendered void or voidable as against the Bank or any other person:

(a) by section 60, 99, 100, 101 or 111 of the Act of 1963,

(b) by section 29 or 31 of the Act of 1990,

(c) on the grounds that, in relation to IBRC, it was ultra vires,

(d) by reason that IBRC may not have been able to pay its debts as they fell due at the time the security was given or that the directors of IBRC ceased to have the power to create that security,

(e) by reason that the grant of the security may not have been duly authorised by IBRC or may not have been for the benefit of IBRC,

(f) by reason that the consent of a party required for the creation of the security may not have been obtained, or

(g) by reason that the security was created by IBRC in favour of the Bank prior to the making of the Special Liquidation Order.

(4) Unless the terms of sale specifically provide otherwise, security over property provided to the Bank by IBRC in connection with a loan made or credit facility provided by the Bank to IBRC or any other amount owing by IBRC to the Bank:

(a) shall be available to, deemed provided to, and may be relied on by, any person who purchases such a loan or credit facility or other amount, or a part thereof, from the Bank (in this subsection referred to as a "purchaser") to secure the indebtedness of IBRC under that loan or credit facility or other amount, or part thereof, to the purchaser, and

(b) where so purchased, such security, or part thereof, which relates to such purchase, shall be held by the Bank in trust for the benefit of the purchaser concerned as if that purchaser was a secured creditor under the relevant document creating such security.

(5) Notwithstanding any enactment or rule of law, IBRC, acting through a special liquidator, or a special liquidator, where such cause of action has vested in the special liquidator, may sell or transfer, on such terms and conditions and to such person as the special liquidator thinks fit, any cause of action, howsoever arising, which has accrued or will accrue to IBRC.

(6) In this section references to a special liquidator shall include references to a special liquidator when acting as a receiver, where he or she is appointed as a receiver by the Bank."

77. The primary rule as to standing in constitutional cases remains that articulated by Henchy J. in *Cahill v. Sutton* [1980] I.R. 269, 282, namely that the challenger:

> "must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right."

78. While Henchy J. acknowledged that ([1980] I.R. 269, 283) a "cogent theoretical argument might be made for allowing every citizen, regardless of personal injury" to bring constitutional proceedings, he also considered that there were "countervailing considerations which made such an approach" undesirable and not in the public interest. As he put it:

> "To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case is being put forward unsuccessfully by another may be left with a grievance that his claim was wrongly or inadequately presented."

79. As I later said in the context of the doctrine of mootness in a judgment in delivered as a judge of the High Court in *Salaja v. Minister for Justice* [2011] IEHC 51:

> "The mootness doctrine is a rule of judicial practice which is designed to ensure the proper and efficient administration of justice. It thus shares a close affinity with other judicially created rules of practice, such as the rules relating to *locus standi*, the rule of avoidance and the doctrine of justiciability. These doctrines and rules of practice may all said to be constitutionally inspired - in particular, by the doctrine of separation of powers reflected in Articles 6, 15, 28 and 34 of the Constitution - even if they are not actually constitutionally mandated in express terms. As Article 34.1 of the Constitution provides that the administration of justice is committed to the courts, the courts must endeavour to fulfil that mandate by confining themselves to the resolution of actual legal controversies. If they were to do otherwise, then the courts would stray beyond that proper constitutional role of administering justice as between parties to a legal dispute, inasmuch as such decisions would amount to purely "advisory opinions on abstract propositions of law": see *Hall v. Beals* 396 U.S. 45 (1969) (*per curiam*). Outside of the special confines of Article 26 (which, in any event, provides for a binding decision - and not merely an advisory opinion - by the Supreme Court on the constitutionality of a Bill following a reference by the President), the provision by judges of such advisory opinions would not, at least generally speaking, serve the proper functioning of the administration of justice, since if unchecked or not kept within clearly defined limits, it would involve the judicial branch giving gratuitous advice on legal issues to the Oireachtas and the Government, a function which was never conferred on it by the Constitution."

80. As I indicated in this passage just quoted, the doctrine of *locus standi* serves purposes akin to those associated with the doctrine of mootness. In both instances, the litigant in question has no current, practical interest in the outcome of the constitutional

challenge and if the court were to pronounce on the merits of such a challenge, it would effectively mean that the courts would depart from their proper constitutional mandate associated with the administration of justice in Article 34.1 by pronouncing on abstract issues of law and thereby giving what in effect are purely advisory opinions.

81. This is, of course, as Henchy J. explained in *Cahill v. Sutton*, but a rule of practice. The exceptions to this rule arise most frequently where the impugned legislation affects every citizen in general, but none in particular: the Supreme Court's decision in *Crotty v. An Taoiseach* [1987] I.R. 713 – where the plaintiff was permitted to challenge the validity of the ratification by the State of the Single European Act in the absence of a referendum – is, perhaps, the best illustration of this.

82. Section 12 of the 2013 Act does not, however, fit into this special and particular category. It is not directed in a generalised way at the population as a whole. It is rather directed at the discrete category of borrowers whose existing loans were to be transferred from IBRC to a third party purchaser and it seeks to ensure that such transfers are valid, the terms of any contractual clause prohibiting non-assignment of any loans as between lender and borrower notwithstanding. It is only one of those class of borrowers who would have the requisite standing to challenge the constitutionality of the section.

83. In view of the findings of Costello J. (and which this Court has upheld), the plaintiff does not come within this category, precisely because as she found, the loan sales were perfectly valid quite independently of this section. In these circumstances, the plaintiff has no standing to challenge the constitutionality of the section, precisely because he will not benefit in any tangible or practical way from a finding of unconstitutionality.

84. So far as the challenge to the legislation based on the Charter is concerned, it is, perhaps, sufficient to say that Article 51 of the Charter provides that it applies only when Member State are "implementing" Union law. As the CJEU recently observed in Case C-206/13 *Siragusa v. Regione Sicilia* EU:C: 2014: 126:

> "In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it (see Case C-309/96 *Annibaldi* [1997] E.C.R. I-7493, paragraphs 21 to 23; Case C-40/11 *Iida* [2012] E.C.R, paragraph 79; and Case C-87/12 *Ymeraga and Others* [2013] E.C.R., paragraph 41).
>
> In particular, the Court has found that fundamental EU rights could not be applied in relation to national legislation because the provisions of EU law in the subject area concerned did not impose any obligation on Member States with regard to the situation at issue in the main proceedings (see Case C-144/95 *Maurin* [1996] E.C.R. I-2909, paragraphs 11 and 12)."

85. In the present case the argument is that by enacting s. 12 of the 2013 Act the State was "implementing" Union law inasmuch as the European Commission had given approval to the IBRC for State aid purposes. For my part, I cannot help thinking that this argument is, with respect, artificial and unrealistic. The relationship between the plaintiff and the IBRC was one of lender and creditor and the matter is governed entirely by national law. There is, for example, no suggestion at all that that relationship is in any meaningful sense governed either directly or even indirectly by EU law. It is rather a case of where the law and legislation governing that relationship is entirely governed by national law.

86. In these circumstances I feel bound to hold that as the matter is entirely internal to the law of the State, there can be no basis for the application of the Charter to the present case, precisely because Ireland is not in any sense "implementing" EU law in the case at hand within the meaning of Article 51 of the Charter.

Part VIII

Overall conclusions

87. It remains only to summarise my overall conclusions in respect of the principal issues arising on the appeal:

88. First, the defendant is bound by the various (un-appealed) rulings of the High Court as to the scope of the proceedings, specifically the rulings of Kelly J. of 8th December 2011 and 23rd January 2012 and, in particular, the defendant's contention that the illegal conduct of Anglo in the general conduct of its banking affairs was outside the scope of the proceedings unless he could show that the relationship between the parties was fiduciary in nature. As Finlay Geoghegan J. subsequently ruled in a judgment delivered on 14th May 2013 that there was no such fiduciary relationship and as this particular ruling was not appealed, the defendant cannot now re-open the issue of the scope of the proceedings and now seek to rely on the (alleged) general illegal conduct of Anglo in the way in which its banking functions were actually operated.

89. Second, so far as the over-charging of interest is concerned, it must be recalled that the action for debt recovery is a quintessentially common law action and there is no room for the application of standard equitable principles such as the principle that he who comes to equity must do so with clean hands. The common law seeks rather only to inquire whether the sums claimed are lawfully due or not. Even if the *Shelley-Morris* doctrine might apply in a case of this kind, the evidence before the High Court suggests that the Bank was at worst careless in its computation of the interest issue and there is no evidence of any intention to deceive.

90. Third, there is no evidence to suggest that the loan sales involved anything more than the assignment of a bare loan sale, together with the associated right to sue in respect of the recovery of the loans. In these circumstances, there is no basis for contending that the loan sale agreement was champertous.

91. Fourth, the decision of Costello J. of 11th March 2015 striking out the majority of the defence and counter-claim of 11th January 2015 as an abuse of process was plainly correct in view of the earlier findings of the High Court in a series of rulings and judgments.

92. Fifth, given that Costello J. found that the loan sales as between IBRC and Stone were perfectly valid independently of any reliance upon s. 12 of the 2013 Act, it follows that Mr. Morrissey *qua* plaintiff in the 2014 plenary proceedings has no standing to challenge the constitutionality of the section, precisely because he will not benefit in any tangible or practical way from a finding of unconstitutionality.

93. In these circumstances, I find myself obliged to dismiss the appeal.