Neutral Citation [2015] IEHC 367

THE HIGH COURT

[2014 No. 5310P]

BETWEEN

ROBERT ROCHE AND

SALTEE HOTEL (WEXFORD) LIMITED

PLAINTIFFS

AND

INVESTEC BANK PLC (FORMERLY KNOWN AS INVESTEC BANK UK) LIMITED AND

COLM O'RIORDAN

DEFENDANTS

JUDGMENT of Ms. Justice Kennedy delivered on 12th day of June, 2015

Background

1. These proceedings arise out of a series of financial transactions between the first plaintiff, Mr Roche and the first defendant; Investec Bank. Mr. Roche was a successful property developer with lands in and about Kilmore Quay, Co. Wexford. The second plaintiff is a hotel company located at Kilmore Quay, Co. Wexford. The first defendant, Investec Bank Plc., was formally known as Investec Bank (UK) Ltd. and the second named defendant, Mr. O'Riordan was an employee of the Bank at the relevant time. He had previously been employed by First Active Plc. and had moved to Investec Bank as senior lending manager in or about May, 2004. A number of other employees of First Active Plc. moved with the second defendant to Investec Bank, including Mr. Shane Mallon and Mr. Noel Ross. Mr. O'Riordan was employed at Investec Bank for some five and half years until his departure from the bank in 2010. The plaintiffs contend that Mr. O'Riordan enticed Mr. Roche to move his business to Investec Bank shortly after he himself moved to the bank.

2. The first plaintiff owned, *inter alia*, two substantial plots of land in the Kilmore area, known as 'the Beak' (72 acres) and 'Gentstown' (98 acres). It was while employed at First Active Plc. that the banking relationship began between Mr. Roche and Mr. O'Riordan. Mr. Roche had availed of a number of lending facilities with First Active Plc. and subsequently with Investec Bank for development purposes. One of the initial developments was in respect of a site in Co. Wexford—with Glynn Properties Ltd. being the vehicle for this project—which was very successful. Mr. Roche then engaged in a further development through his company, Eastland Properties Ltd., in 2004 for the purpose of a development in Co. Wexford. This was initially through a facility provided by First Active Plc. to Eastland Properties Ltd. which was later replaced by facilities with Investec Bank. The loan facility from the Bank was secured by the plaintiff's inherited 'Beak lands'. It is not disputed that from 2005 onwards his lands located at the Beak and Gentstown were lodged as security with the bank.

3. Mr. Roche became involved in a number of property transactions, financed by the bank and adopted special purpose vehicles (SPVs) to this end. The plaintiffs contended that the loans advanced by the bank were not affected in accordance with a conventional banking relationship but were affected on the basis of a partnership and/or profit-sharing arrangements.

4. It was alleged by the plaintiffs that from mid-2004 to mid-2006, the defendants constructed a scheme to develop 495 acres at Kilmore Quay, Co. Wexford. It is alleged that the defendants sought to treat Mr. Roche's lands as their own and to incorporate his lands into their development plan. It was contended that this was based upon profit share agreements between the first named plaintiff and the defendants.

5. In 2004, Mr. Roche and other individuals, formed a special purpose vehicle company called "Seashore Leisure Ltd" (hereinafter "Seashore"). It is not in dispute that Mr. Roche was both a shareholder and a director of Seashore. Messrs. Karl Murphy, Ian Murphy, John Hynes and Links Resorts Ltd. (hereinafter "Links") were also shareholders of this company. Mr. James Murphy, father of Ian and Karl Murphy, was also a significant participant in the venture.

6. On the 13th October, 2004, Mr. Roche established an agreement with Seashore (the option agreement) which afforded an option to Seashore to purchase the 72 acres of land which were owned by him for the sum of €9 million. This portion of land was referred to throughout the proceedings as the 'Beak lands'. The agreement provided that any increase in profit above €9 million was to be divided between Mr. Roche and Seashore.

7. On the 1st August 2006, the bank issued a facility letter to the directors of Seashore Leisure Ltd. The purpose of the facility was to "partially assist with the discharge of the planning application and professional fees in respect of 495 acres of land at Kilmore, Co. Wexford". The facility was for an amount not exceeding €2,000,000, including an interest roll up. There were thirteen conditions precedent to the drawdown of the facility, one of which was "satisfaction with independent planning report confirming the likelihood of planning permission being granted on the subject site for the scheme proposed". The security required included:-

> a. "Assignment over various options to acquire 495 acres of land at Kilmore, Co. Wexford;
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> b. a profit share agreement to be entered into between the borrower and the bank in accordance with clause 11 hereof; and
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> c. several personal guarantees from Robert Roche and James Murphy each in the amount of €310,000 in respect of all the obligations from time to time of the borrower to the bank."

This loan facility was not drawn down.

The case
8. The plaintiffs claimed, *inter alia*, that:-

a. The defendants devised a scheme to develop some 495 acres of land in Kilmore Quay, Co. Wexford which would include the construction of a marina, a five star hotel, a leisure centre, an equestrian centre, hundreds of residential units and a golf course. These lands at Kilmore Quay comprised 400 acres of optioned land which Mr. Roche had negotiated with a number of local landowners;

b. the defendants directed Mr. Roche to purchase the Saltee hotel which was located proximate to the proposed development and that such direction was issued for the sole purpose of removing any perspective local hotel objectors. This direction was said to have issued to Mr. Roche at a meeting in the Radisson Hotel, Stillorgan Road in or about February 2005;

c. the defendants entered into a partnership with Mr. Roche;

d. the defendants required exclusivity for the bank through the use of penal clauses; including exit fees, arrangement fees, abort fees and profit shares;

e. that Mr. O'Riordan entered, through his company, Orac Ltd., into a consultancy agreement with Seashore which entitled him to an additional 10% profit outcome;

f. that Mr. Roche or any other shareholders were not furnished with copies of the June 2006 consultancy agreement;

g. that the defendants encouraged Mr. Roche to purchase 154 units in a development in Poznan, Poland where he only wished to purchase 24, and that as a result he lost the opportunity to purchase the original 24 units;

h. that in June 2007, an anonymous bid was made for the purchase of the Beak lands for €12,000,000 which bid was 'blocked' and/or impeded by Mr. O'Riordan. This was effected by Mr. O'Riordan threatening Mr. James Murphy that the bank would 'pull the plug on him' and that he would forfeit 50% of his shareholding in Seashore pursuant to the terms of the consultancy agreement;

i. that the bank wrongfully, dishonestly and fraudulently concealed the wrongful, dishonest and unlawful conduct on its part and/or Mr. O'Riordan;

j. that by reason of the alleged wrongs, Mr. Roche was prevented from redemption of the securities provided by him to the bank. Mr. Roche claimed that if he had been permitted to so redeem, he would not have been obliged to sell his lands at Gentstown;

k. that, as a consequence, the purported appointment of a receiver by the bank to the second plaintiff is invalid. It is claimed that the bank, its servants or agents, have thus diminished the value of the plaintiffs' assets; and

l. the plaintiffs seek rescission of the facility agreements and securities; damages for breach of contract, misrepresentation, deceit, actionable conspiracy and slander of title and an order removing the receiver.

9. In the course of the six week hearing, it was accepted by counsel for the plaintiffs that the core issues against the second defendant were as follows:-

a. that Mr. O'Riordan misrepresented to Mr. Roche that his securities, including mortgages, would not be enforced by the bank and he was induced to enter further loan facilities as a consequence;

b. that during a meeting in June 2007, Mr. O'Riordan misrepresented the powers of Orac Ltd. to Mr. James Murphy causing Seashore to decline the aforementioned anonymous bid; and

c. that Mr. O'Riordan was part of a conspiracy which consisted of a plan to retain Mr. Roche's mortgaged lands after the time for redemption.

The Saltee hotel
10. The Saltee hotel's acquisition was financed through a loan advanced to Mr. Roche by the bank in 2005 pursuant to a facility letter dated 26th April, 2005 in the sum of €1,480,000 to Glynn Properties Ltd., the parent company of the second named plaintiff, Saltee Hotel (Wexford) Ltd. This loan facility was secured through a legal charge dated 11th May, 2005 whereby the Saltee hotel was charged to Investec Bank. The plaintiff gave evidence that he was persuaded to purchase 100% of the shareholding in the Saltee hotel by Mr. O'Riordan in order to remove objections to planning permission for the large development. As additional security to this loan, on the 11th May, 2005, Saltee hotel executed a deed of guarantee whereby it guaranteed the liabilities of Glynn Properties Ltd., including the liabilities arising from the facility letter dated 26th April, 2005. By letter of demand dated 11th April, 2014, the first named defendant demanded immediate repayment of the outstanding sum of €1,168,130.17 from Glynn Properties Ltd. pursuant to the said facility letter and from Saltee pursuant to the said guarantee. It was not disputed that these demands were not met and the loan remains outstanding. By deed of appointment dated 9th June, 2014, Mr. Kieran Wallace was appointed receiver over the secured lands which included the property known as the Saltee hotel.

11. The receiver, Mr. Wallace instituted separate legal proceedings entitled *Kieran Wallace v Robert Roche and Saltee Hotel* (Wexford) Ltd. seeking, *inter alia*, possession of the charged property. By order dated 11th June, 2014 the receiver received an interim interlocutory injunction which restrained the plaintiffs from interfering with or obstructing the said receiver from taking possession of the charged property.

12. On the 13th June, 2014, the plaintiffs issued the within proceedings and the statement of claim was delivered on 21st July, 2014.

13. A central plank of Mr. Roche's case was that he was manipulated, controlled and coerced by Mr. O'Riordan while he (Mr. O'Riordan) was an employee of the bank.

14. It is common case that on 3rd May, 2012, Mr. Roche and Mr. James Murphy made oral complaints to the bank and subsequently submitted written complaints dated 24th May, 2012. In the course of the hearing it was contended that the bank had failed to properly pursue the complaints. Mr. Roche gave evidence that in or around 2010/2011, he was encouraged by Mr. O'Riordan to sell the lands at Gentstown on an incremental basis in an effort to "take some pain" and that he would then be in a position to retain the hotel and the Beak lands. This claim was not pleaded.

Seashore Leisure Ltd.'s options agreement
15. By agreement dated 13th October, 2004, Mr. Roche entered into an agreement with Seashore pursuant to which Seashore was given an option to purchase the 72 acres of land owned by Mr. Roche (the Beak lands) for €9 million. The capital gains tax was stated to be 20% on 13th October, 2004, however, a contingency clause was inserted into the agreement in the event that this rate increased between the 13th October, 2004 and the date on which the option agreement was to be exercised. In such an event, the purchaser Seashore Leisure Ltd., agreed to pay 50% of the tax due and owing that was further to the original amount payable by the first named plaintiff (the vendor).

The consultancy agreements
16. It is common case that Mr. O'Riordan had a consultancy company; Orac Ltd. It is the plaintiffs' case that Mr. O'Riordan negotiated a consultancy agreement between Seashore Leisure Ltd., the existing shareholders of the company and Orac Ltd. (the consultant) which entitled him to a further 10% profit outcome in addition to incidental fees and expenses. In the statement of claim it was pleaded that the first consultancy agreement was "drawn up and executed in June 2006". However, Mr. Roche's evidence was that the first consultancy agreement was executed at a meeting held in the Radisson Airport Hotel on the 24th May, 2006, the date, he asserted, when one of the shareholders of Seashore; Links Resort Ltd. (hereinafter 'Links Ltd.) exited the project. Whilst Mr. Hynes recalled the date of the exit of Links Ltd. from Seashore, he did not have an exact recollection as to whether there were consultancy drafts in being at that time, but simply felt that agreements had been signed because Mr. O'Riordan, in Mr. Hynes' view, would not have given assistance to the project without having an agreement in place. Mr. Hynes did not, however, have a recollection of this. Mr. Roche suggested that drafts of the agreement were not shown to him. However, Mr. Hynes, one of the shareholders of Seashore, recalled the parties to Seashore consulting with their solicitors regarding the consultancy agreements and that he had made notes on certain drafts which were consistent with his negotiations regarding the content of the agreement, thus confirming Seashore's input. I prefer Mr. Hynes' testimony and I am satisfied that the parties had access to the consultancy agreement. It was common case that Mr. Roche and Mr. James Murphy each paid Orac Ltd. the sum of €10,310.50. Mr Roche's cheque is dated 22nd May, 2006. Mr. O'Riordan accepted that his consultancy company received this money for consultancy services rendered. It was undisputed that the consultancy agreement was drafted by Mr. O'Neill, solicitor, on the instructions of Mr. O'Riordan. Mr. O'Neill gave evidence and confirmed that on 23rd June, 2006 he furnished a letter to Mr. O'Riordan at his home address regarding Seashore. This letter enclosed:

(i) "a marked up copy of the revised draft consultancy agreement;

(ii) a clean copy of the revised draft consultancy agreement; and

(iii) six original copies of the consultancy agreement for execution."

In the marked up copy of the revised draft consultancy agreement, paragraph B (a) is struck through which referred to a payment to the consultant of €20,000. The document referred to as "a clean copy of the revised draft consultancy agreement", did not contain reference to the €20,000. This indicates that on 23rd June 2006, the document was still in draft format, with the reference to €20,000 deleted, it having been paid in May 2006. I am satisfied that the consultancy agreement was not executed at the meeting in the Radisson Airport hotel in May 2006. There is further support for this conclusion in that the computer tree on the 'marked document' dated 23rd June, 2006 refers to a draft agreement.

Links Resorts Ltd.
17. I should make reference at this point to Links Resorts Ltd ("Links"). Links were tasked with providing the operations and development expenditure and were experienced in such developments. It seems that Mr. Murphy's contact with Links instigated the project according to Mr. Hynes. Mr. Roche stated in evidence that Links provided monies in relation to the options. However, it transpired that Links ran into some financial difficulties. It appears that Mr. Roche and Mr. Murphy lent the company funds at a particular point in time. It was contended by Mr. Roche that Mr. O'Riordan ultimately compelled Links to exit the Seashore project in order to, in effect, take control of the project. It was common case that he played a significant part in the Links exit deal. However, Mr. Hynes, in his evidence, stated that the decision to exit Links was made at a meeting by the Seashore shareholders and directors. Present at that meeting were Mr. Murphy, Mr. Hynes, Mr. Ian Murphy, Mr. Karl Murphy, Mr. Roche and Mr. O'Riordan. Mr. Hynes, in his evidence, did not suggest that Mr. O'Riordan compelled the Links exit. In fact, he was concerned that the project was not making progress because Links had financial problems and that Mr. O'Riordan was consulted at that stage. It is also the position that Mr. Murphy and Mr. Roche accepted that they had instructed their solicitor to demand repayment of their loans from Links through correspondence to Mr. Paul McMahon solicitor, dated 6th February, 2006. Mr. Hynes gave evidence that a Mr. O'Keeffe had been previously approached about a similar consultancy role and that Mr. Hynes had consulted with his solicitor regarding a consultancy agreement in January 2006. This does not accord with the contention that Mr. O'Riordan compelled the Links' exit or that he manoeuvred himself into the position of consultant and I prefer Mr. Hynes' evidence in this respect.

Supplemental consultancy agreement
18. It was alleged in the course of the evidence that a supplemental consultancy agreement was signed and executed prior to a meeting which took place in a building known as the "Swift Call building" in or around 25th June, 2007. I will refer further to this meeting (hereinafter the 'Swift Call meeting'). Mr. O'Neill confirmed that he had written a letter dated 21st June, 2007 to the second named defendant enclosing the draft supplemental agreement and requesting that the second named defendant review the document to ensure that he (Mr. O'Neill) had incorporated, in the supplemental consultancy agreement, Mr. O'Riordan's intentions. These "intentions" were set out in a document prepared by the second named defendant and headed 'Fee Structure'. Mr. O'Riordan, in evidence, stated that the forfeiture clause was included as a result of Mr. Keane's valuation of €20 million in respect of the Beak lands and the adjacent lands and in particular following his conversation with Mr. Murphy in the Goat pub, where Mr. Murphy stated that he would not accept anything less than €20 million. It must be noted that clause (vi) of the supplemental agreement required firstly that the board of directors of Seashore make a determination that a shareholder was in breach before any transfer could be effected.

19. Mr. James Murphy stated that on 22nd June, 2007, Mr O'Riordan called to his house and put a document to him for signature, which he signed. Mr. Murphy was unclear on this issue, he appeared to place the information furnished to him regarding "the Conlon bid" by Mr. O'Riordan and the request to sign the second consultancy agreement as having occurred simultaneously at the Swift Call meeting. He stated that he did not receive a copy of that document. Mr. Hynes gave evidence that he faxed a copy of a consultancy agreement, which copy was unsigned, to Mr. Murphy. The date of the facsimile is 24th June, 2007. Therefore, I can conclude that Mr.

Hynes and Mr. Murphy had an unsigned copy of the supplemental consultancy agreement by 24th June, 2007. Mr. Hynes stated that he may have faxed the unsigned document to Mr. Roche and whilst he believed he signed the second supplemental consultancy agreement, he could not be specific or certain as to the date he signed it. It appears that Mr. Hynes' belief that the document was executed was connected to the fact that the document featured, and was mentioned, at the Swift Call meeting. Mr. O'Riordan denied travelling around Dublin seeking signatures in respect of this supplemental consultancy agreement. Reference was made to an e-mail sent from Mr. McMahon, solicitor for Seashore, on 29th June, 2007 to Mr. Roche which attached a consultancy agreement dated 28th June, 2007. The e-mail referred to a draft document which suggests that the document was still at the draft stage. If the supplemental consultancy agreement had been executed as Mr. Roche and Mr. Murphy allege in advance of the Swift Call meeting, it would make little sense that further drafts would be advanced a few days later. Notably, Mr. McMahon's e-mail does not make any reference to Mr. Roche or Mr. Murphy seeking his advice regarding the "blocked" bid. It was contended on behalf of Mr. Roche that the third consultancy agreement was structured to pacify him as a result of the blocked bid. However, he also stated that the proposal that he may receive €6 million, as set out in the third consultancy agreement, had been considered prior to the blocked bid. This is clearly inconsistent. Two facts therefore emerge; (i) I am satisfied that the participants in Seashore had the supplemental consultancy agreement prior to the Swift Call meeting and (ii) that the agreement was not signed or executed before the Swift Call meeting.

20. In any event whilst there was much evidence advanced in respect of the consultancy agreements, the significance of the agreements ultimately appeared to rest with the second consultancy agreement and the forfeiture clause contained therein. It was not disputed that James Murphy was taken aside by Mr. O'Riordan in the course of the Swift Call meeting in June 2007 to a side room. What occurred at that meeting is in issue. James Murphy asserted that he was told forcefully by Mr. O'Riordan that if he voted to accept the anonymous €12 million bid, he would "pull the plug on him immediately" and furthermore he, James Murphy, would be in breach of the aforementioned clause in the supplemental consultancy agreement.

21. Whilst other allegations were raised against Mr. O'Riordan in relation to the consultancy agreements, this appears to be the most significant allegation. It should be noted that the parties to the consultancy agreement were Orac Ltd., Seashore and its shareholders.

The bank's knowledge of Orac Ltd and/or the consultancy agreement

22. Mr. O'Neill, solicitor, gave evidence that, whilst his company was on the bank panel, he acted on behalf of Mr. O'Riordan only in connection with the consultancy agreements and did not, either directly or indirectly act on behalf of Investec Bank in respect thereof. Furthermore, Mr. O'Riordan gave evidence that the bank was unaware of his consultancy company; Orac Ltd. and finally, the witnesses for the bank gave evidence that they were unaware of Orac Ltd. at the relevant time. The only link which the plaintiffs could direct the court's attention to was in the form of a letter on Orac headed paper which letter was signed by a Mr. Alan Casey who was working in the bank at the time. The evidence disclosed that Mr. Casey was junior to Mr. O'Riordan and would, on occasion, sign documents on his behalf. That was the height of the evidence in respect of any possible knowledge on the part of the bank relating to Orac Ltd.

The 2007 €12 million anonymous bid

23. Evidence was given on behalf of the plaintiff that an anonymous bid for €12 million for the Beak lands was received by Mr. John Keane, auctioneer, over the weekend of the 23rd/24th June, 2007. Mr Roche said that Mr. Keane contacted him and made him aware of this bid which he stated was not subject to planning. Mr. Keane gave evidence that he had received the bid from an individual who wished to remain anonymous. When tested on his evidence, Mr. Keane was unable to remember events which were more proximate in time to the hearing than the events of 2007. It transpired that Mr. Keane had moved offices sometime towards the end of 2008/early 2009 and had destroyed all files with the exception of files which were active at the time. He gave evidence that on the instruction of Mr. James Murphy he provided an open market valuation of the relevant lands on the 10th April, 2007. In this valuation, he valued 'circa' 92 acres at €20 million. Mr Keane did not use the red book valuation when carrying out his valuation. Mr. Hester (formerly of Holmes Osborne King hereinafter 'HOK') told the court that the 'red book' is an accredited valuation guide. Logically a bid of €12 million for 74 acres must be considered an undervalue in circumstances where some ten weeks prior the land was valued at €20 million for 92 acres. Mr. Keane was unable to recall the exact discussion which he had with Mr. Roche in respect of the offer of €12 million. He was, he said, aware that HOK had been engaged by Seashore. However, he did not take any steps to communicate the bid to HOK. Mr. Keane did not raise any queries as to how the bidder was to finance the transaction.

24. It is a striking feature of this case that such an important bid was made by an anonymous bidder who Mr. Keane, in his oral evidence to the court, confirmed was a local businessman with whom Mr. Keane had previously conducted business on other property transactions. Mr. Keane, in his direct evidence, outlined how he had always respected the bidder's request in the past for him to remain anonymous and that this request was respected once again on this occasion. Mr. Murphy testified that he believed he knew the identity of the bidder and that if he was correct, of which he was certain, then this bidder is now unfortunately deceased.

25. The alleged facts surrounding the offer (which was communicated through Mr. Keane to Mr. Roche) require further brief analysis. It was asserted by Mr. Keane that he received instructions from the local bidder in the summer of 2007 after he had been engaged by Mr. Murphy to conduct a valuation report of the Beak lands. Mr. Keane was also to offer a potential price for buyers and an overall assessment of the lands' potential. He did so and valued the lands to be approximately €20 million. Thereafter a bid was communicated to Mr. Keane from the anonymous bidder; the offer was for €12 million without planning permission. Mr. Keane communicated this offer to Mr. Roche through a relatively brief telephone conversation during the course of which, Mr. Roche did not enquire as to whether the bidder would be inclined to increase the offer. It was generally felt by Mr. Keane that Mr. Roche did not engage very much with the prospect during this brief telephone conversation. The plaintiff refused the bid a few days later by way of a further telephone conversation.

The Tara Towers hotel meeting

26. It was common case that a meeting took place in the Tara Towers hotel immediately prior to the Swift Call meeting between Mr. Roche and Mr. O'Riordan. Mr. Roche contended that Mr. O'Riordan indicated that an offer of €13 million had been received from a Mr. Gerry Conlon. Mr. O'Riordan, under cross-examination, stated that such a bid had not yet been finalised as such, but that it was in the process of 'coming in' from Mr. Conlon. Mr. Roche and Mr. Murphy were adamant that 'the Conlon bid' was subject to planning. However, when the first named defendant raised a particular as to the outcome of the Swift Call meeting, the plaintiffs replied as follows:-

> "The outcome of the said meeting was that Colm O'Riordan would pursue Gerry Conlon who had offered €13.000,000 non-subject to planning for a higher offer of €15/18 million...".

27. Mr. Hynes in his evidence did not state that the Conlon bid was subject to planning. Mr. Roche gave evidence that Mr. O'Riordan advised him during the meeting at the Tara Tower hotel and prior to the Swift Call meeting, that if he were to proceed with the

anonymous bid from Mr. Keane that "the bank would pull the plug on him". Mr. O'Riordan denied that he ever made such a comment. This threat was not pleaded in the statement of claim. In reply to the second named defendant's particulars, the plaintiff replied:-

> a. "He insisted that Robert Roche did not push for the sale at €12,000,000 and issued veiled threats such as, Investec Bank have an interest in the project and seeing it to a conclusion with a much more profitable outcome and that Investec Bank would not look favourably if Robert Roche was to pursue or insist on the sale of €12,000,000."

The suggestion that "veiled threats" were made is quite different to the specific allegation now made.

The 'Swift Call' meeting

28. There was some confusion as to the date when this meeting took place. It was pleaded that the meeting took place on or about Tuesday 19th June, 2007. However, Mr. Roche stated in evidence that it took place on the Monday, 25th June, 2007. Mr. O'Riordan's view was that it took place on a Tuesday and that the meeting was in order to discuss, *inter alia*, planning issues associated with the project. It is significant that Mr. Hynes' fax of the consultancy agreement is dated 24th June, 2007, thereby demonstrating that the participants had the consultancy agreement before the meeting on the evidence. The evidence differed relating to the timing when the €12 million bid was raised at the meeting, however, it is clear, on the evidence, that the bid was discussed at the meeting. Mr. O'Riordan stated that he outlined that the bid had certain associated risks which he stated and which he had already explained to Mr. Roche. These risks were:

> (1) Seashore would lose HOK who was the sole agent at the time; and
>
> (2) that it was not possible to properly consider the bid from John Keane, as the parties did not know anything about the bid, including how it would be financed.

Mr. O'Riordan gave further evidence that there was an indication of an offer of €13 million which was not subject to planning.

29. It is common case that Mr. O'Riordan and Mr. Murphy had a side meeting in the course of the Swift Call meeting. However, whilst Mr. O'Riordan agreed that such a meeting took place, the nature, tone and content of the meeting was in dispute. Mr. Murphy said that he was escorted from the main meeting room by Mr. O'Riordan, taken into another room whereupon Mr. O'Riordan locked the door and proceeded to threaten and intimidate him. He said that Mr. O'Riordan threatened him that his relationship with the bank would become untenable and that he had the power through the consultancy agreement to shut down the project. In this respect, it was contended, on behalf of the plaintiffs, that the second defendant was relying on the powers conferred on him pursuant to clause (vi) of the supplemental consultancy agreement. On a careful examination of this clause, it is clear that its terms require the board of directors of Seashore to make a determination that a shareholder is in breach of the agreements before the board can transfer 50% of the shareholding.

30. Mr. Murphy also gave evidence that he was requested/directed by Mr. O'Riordan after the meeting to go to the Goat pub. Mr. O'Riordan denied that he went to the pub on this occasion. Mr. Murphy contended that on arrival at the Goat pub, Mr. O'Riordan "exploded" and "went berserk". Mr. Murphy then requested him to leave the Goat pub, which he did, and that he, in Mr. Murphy's words, "paced around like a lion around the car park". Both Mr. Roche and Mr. Murphy contended that they yielded to Mr. O'Riordan's will. Mr. O'Riordan denied any such conduct.

Misrepresentations to James Murphy of Orac's powers

31. It is common case that Mr O'Riordan and Mr. Murphy had a side meeting in the course of the Swift Call meeting. However, whilst Mr O'Riordan agreed that such a meeting took place, the nature, tone and content of the meeting was in dispute. Mr Murphy said that he was escorted from the main meeting room by Mr O'Riordan, taken into another room whereupon Mr O'Riordan locked the door and proceeded to threaten and intimidate him. He said that Mr. O'Riordan threatened him that his relationship with the bank would become untenable and that he had the power through the consultancy agreement to shut down the project. In this respect it was contended, on behalf of the plaintiffs, that the second defendant was relying on the powers conferred on him pursuant to clause (vi) of the supplemental consultancy agreement. On a careful examination of this clause it is clear that its terms require the board of directors of Seashore to make a determination that a shareholder was in breach of the agreements before the board could transfer 50% of the shareholding.

32. He also gave evidence that he was requested/directed by Mr O'Riordan after the meeting to go to the Goat pub. Mr. O'Riordan denied that he went to the pub on this occasion. Mr. Murphy contended that on arrival at the Goat pub Mr. O'Riordan "exploded" and "went berserk". Nonetheless Mr. Murphy requested him to leave the Goat pub which he did and that he then, in Mr. Murphy's words "paced around like a lion around the car park". Both Mr. Roche and Mr. Murphy contended that they yielded to Mr O'Riordan's will. Mr. O'Riordan denied any such conduct.

Decision on the 2007 €12 million bid

33. The essence of this claim is that Mr. O'Riordan at the Tara Towers meeting —and at the side meeting held at the Swift Call building— unlawfully directed the directors and shareholders of Seashore to refuse a €12 million bid in respect of the plaintiffs' Beak lands. In order to assess this evidence in the fullest possible way, I will first look towards the bid itself. Mr. Keane had provided a value of €20 million on the lands in April 2006. This valuation was not subject to planning and whilst it was in respect of 92 acres as opposed to 73 acres, there is a significant difference between the valuation and the purported offer. There was no detail in respect of the anonymous bidder and nor was the bidder called as a witness. In fact, whilst Mr. Keane indicated that the anonymous bidder wished to remain confidential but was well-known to him, Mr. Murphy gave evidence that this bidder was deceased. The fact that the bid was communicated by Mr. Roche to Mr. Hynes and to Mr. Murphy does not lend further credibility to the bid. There was no evidence that Mr. Keane was aware as to how the bid was to be financed. There were no records for the court, such having apparently been destroyed when Mr. Keane moved offices. I conclude that Mr. O'Riordan was entitled to his view that the bid lacked credibility. However, this is not the central issue. The central issue is as to whether Mr. O'Riordan, in some manner, threatened, intimidated and coerced Mr. Roche and Mr. Murphy to refuse the offer of €12 million and by doing so impeded, thwarted or blocked the early redemption of the aforementioned lands.

34. Mr. Hynes gave evidence that no exercise was carried out by the shareholders at the meeting to determine how much profit would be realised for the shareholders from the offer. Mr. Hynes said that Mr. O'Riordan was going to pursue a larger offer and that Mr. O'Riordan had told the meeting that Mr. Keane's offer was not a credible offer. There was contradictory evidence regarding the refusal of the bid. Mr. Hynes thought that the decision to refuse the bid was announced by either Mr. Murphy or Mr. O'Riordan on their return to the meeting. Mr. Murphy said that Mr. O'Riordan asked whether they were "going for the €12 million", to which Mr. Roche said "no" and Mr. Roche stated that Mr. O'Riordan told the meeting that the €12 million bid was not to be accepted. Mr Hynes' view on the decision to refuse the bid was that a majority of the shareholders and participants in Seashore had made almost a

unilateral decision that the bid would be rejected and that he was disappointed by this. What is clear is that the conversation which took place in the side meeting was not made known to all the participants of Seashore before the decision was taken to reject the bid. There was no evidence that Mr. Roche discussed the alleged threats made to him with Mr. Hynes before the decision not to proceed with the bid was taken. In this regard it should be borne in mind that Mr. Hynes and Mr. Roche were in the main meeting room whilst the side meeting was taking place. There was no suggestion that Mr. Roche was aware of the content of the conversation in the side room before the decision was taken at the meeting. Mr. Hynes did not appear to notice Mr. Murphy either shaking with fear as pleaded or appearing to be "upset, dishevelled, uncomfortable" as alleged in Mr. Roche's evidence. Mr Roche opined in the end that Mr. Murphy looked unsettled after the side meeting. However, Mr. Hynes' evidence did not depict an event which was in any way unusual. In fact, he made no comment about Mr. Murphy's condition on his return to the meeting. I prefer Mr. Hynes' evidence and accept that the decision to reject the bid was voiced by either Mr. Murphy or Mr. O'Riordan without any objection from any other party. Mr. Roche and Mr. Murphy's account of the evidence at the Tara Towers hotel and subsequently at the Swift Call meeting is implausible. This is borne out by the fact that the plaintiff and Mr. Murphy gave evidence that they allegedly discussed these matters on the same date as the meeting and also sought legal advice from their solicitor. Further it appears that notwithstanding Mr. Murphy's contention that he was bullied and intimidated by Mr. O'Riordan, he was still in a position, on his evidence, not only to go to the Goat pub with him after the meeting, but to oust him from the pub. Mr. O'Riordan denied going on that occasion to the Goat pub. Furthermore, Mr. Murphy's written complaint to the bank does not make any reference to threats made to him at the Swift Call meeting.

35. I do not accept Mr. Roche or Mr. Murphy's evidence that they were bullied, intimidated and coerced into refusing the purported bid. It is my view that these experienced men were more than aware that this bid lacked credibility and made the decision not to proceed with the bid. It is significant that Mr. Hynes was not alerted to any unlawful or inappropriate conduct at the meeting. It is noted by the court that there was no mention of the €12 million bid in Mr. Roche's written complaint dated 24th May, 2012 to the bank. Furthermore, in Mr. Murphy's 2012 complaint to the bank, he made no reference whatsoever to threats having been made to him at the Swift Call meeting.

36. On the other hand, Mr. Hynes' evidence was to the effect that a majority of the shareholders had made a decision that the bid would be rejected and that he was disappointed. All these factors satisfy me that neither Mr. Roche nor Mr. Murphy was subjected to any threats or coercive conduct on the part of Mr. O'Riordan. It also noted that the plaintiffs did not call Mr. McMahon, solicitor for Seashore, in these proceedings.

37. The threat purportedly made by Mr. O'Riordan to Mr. Roche that should Mr. Roche proceed with the anonymous bid from Mr. John Keane that the bank would "pull the plug on him" was never pleaded. I am satisfied, on the balance of probabilities, that this purported threat was never made. Even if such a threat had been made, which I do not accept, such threat was not a credible statement as Mr. O'Riordan did not have the capacity to remove facilities from any bank customer. I heard that Mr. Roche was in a strong financial position at the time. Furthermore, Mr Roche's evidence was that he brought the €12 million purported bid to the attention of the other parties at the meeting. This flies in the face of his evidence that prior to the meeting he was threatened by Mr. O'Riordan in the context of the bid. Mr. Murphy's account of the side meeting is equally implausible; his evidence in many respects was contradictory and lacked credibility. Even if the events occurred as Mr. Murphy described, which I do not accept, it is extraordinary that an experienced businessman who had allegedly been in receipt of the kind of threats he alleged would then proceed to go to a pub in the company of his verbal abuser. This is simply not credible. It is also the position that the second named defendant would not have had the capacity to "pull the plug" on Mr. Murphy's facilities. It was common case that Mr. Murphy had a two month old valuation dated April 2007 regarding the land suggesting a value of €20 million. Mr. O'Riordan gave evidence that he had had a meeting at the Goat pub subsequent to Mr. Keane's valuation at which meeting, Mr. Murphy had indicated that he would not accept a bid along the lines of the HOK guide price. Mr. O'Riordan gave evidence that the 50% forfeiture clause in the draft supplemental consultancy agreement was introduced because of claims that the shareholders of Seashore would not accept bids of below €20 million.

38. In reality Mr. O'Riordan would not have been in any position to 'pull the plug' as was termed in respect of either Mr. Roche's or Mr. Murphy's facilities at the bank. The court received very cogent evidence as to the construct and deliberations of the credit committees within the bank and to come to such a conclusion would involve the bank ignoring entirely the facility letters which were in being in respect of Mr. Murphy and Mr. Roche. These seasoned businessmen were more than aware of the manner in which the bank operated and had signed facility letters and, certainly in Mr. Roche's case, had the benefit of professional advice.

39. Finally, I find it implausible that any threats were made to the first named plaintiff in 2007 at the Swift Call building in light of his further dealings with the second named defendant to include the personal loan by facility letter dated 21st July, 2009 and his subsequent engagement with the second named defendant in respect of business ventures. The court received evidence that the first named plaintiff incorporated three companies with the second named defendant after the second named defendant left Investec Bank in January 2010. The first named plaintiff and the second named defendant acted as co-directors. Such ventures contradict the plaintiff's contention that he was menaced and bullied by the second named defendant, it is the position that the companies were incorporated after the second named defendant had departed from the bank; however the plaintiff suggested that such ventures were under consideration while the second named defendant was still employed by the bank. Nonetheless, it is significant that the first named plaintiff engaged with the second named defendant in business ventures after his alleged conduct at the Swift Call building in June 2007. On this evidence I am also not satisfied that the plaintiff was threatened or bullied or menaced by the second named defendant. It simply flies in the face of common sense.

The Conlon bid

40. In the course of the hearing it was suggested that Mr. O'Riordan misrepresented the existence of a bid from Mr. Conlon, in effect that Mr. O'Riordan fraudulently misrepresented that he had a bid for €13,000,000. By reason of the nature of the pleading in the case, there is a difficulty in identifying claims; however this particular claim was not pleaded. Order 19, rule 5(2) of the Rules of the Superior Courts provides:-

> "(2) In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings."

In *Keaney v Sullivan & Ors* [2007] IEHC 8, Finlay Geoghegan J. stated that:-

> "This express requirement of the Rules is in accordance with the long established practice of the courts to require allegations of fraud to be pleaded with particularity."

Finlay Geoghegan J. quoted with approval an extract from Delany and McGrath, *Civil Procedure in the Superior Courts* (2nd Ed.) at para. 5. 38:

"(b) ***Allegations of Fraud***

> 5.38 The long established practice of the courts has been to require allegations of fraud to be pleaded with particularity. Rule 5(2) now provides that, in all cases alleging misrepresentation, fraud, breach of trust, wilful or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) must be set out in the pleadings. The rationale of this requirement was explained by Barrington J. in Hanly v Finnerty in relation to a plea of undue influence as follows:
>
> > Undue influence is a plea similar to fraud and it appears to me that it would be quite unfair to require a party against whom a plea of undue influence is made to go into court without any inkling of the allegations of fact on which the plea of undue influence rests. Because of the seriousness of the plea counsel will not lightly put his name to a pleading containing a plea of undue influence so that his solicitor will usually have in his possession some allegations of fact which justify the raising of the plea or at least excuse the pleas from being irresponsible.
>
> 5.39 Thus, a party is not only required to expressly plead fraud or misrepresentation etc., but he must also give full particulars of its nature and how it is alleged to have occurred."

The authors go on to state at para. 5.74:-

> 5.74 "It is important to note that a cause of action must be pleaded in the main body of the statement of claim and it will not be regarded as having been pleaded if it is merely mentioned in the prayer for relief at the end."

References to the €13,000,000 'Conlon bid' are contained in paragraphs 32 and 33 of the statement of claim. I have considered each of the above and the replies to particulars to the first and second defendant and conclude that none satisfy the requirements of order 19, rule 5(2).

I am satisfied that this claim of fraudulent misrepresentation was not pleaded or particularised and consequently I am satisfied that the plaintiffs' cannot now advance this aspect of their case.

The direction to purchase the Saltee hotel - decision

41. Mr. Roche gave evidence that he was directed by Mr. O'Riordan to purchase the Saltee hotel to take out objectors to purported planning permission for the Beak development. The evidence heard was that Mr. Shane Mallon of Investec Bank completed the credit application for the facility regarding the purchase of 100% of the shares in the Saltee hotel. Mr. Roche accepted in evidence that he never gave the information to Mr. Mallon as to the reason why he was purchasing the hotel and there is nothing contained in the credit application to suggest that this was a reason for the purchase of the hotel. Mr. Mallon gave evidence that if Mr. Roche had told him that this was his specified purpose, he would have included this in the credit application. Mr. Roche's evidence on this issue was that Mr. O'Riordan had suggested and advised that the hotel be purchased. Mr. Roche's 2012 complaint did not refer to this alleged direction. When the facility was refinanced he did not make any mention to any person in Investec Bank that he had been directed to purchase the hotel. It was accepted by Mr. O'Riordan that a meeting took place in the Radisson Hotel when Mr. O'Riordan went to meet Mr. James Murphy. It is common case that the first named plaintiff had a map with him and that there was some discussion as regards the hotel. It is also the position that Mr. Roche gave evidence that there was no purpose in purchasing the hotel other than to take out the planning objector(s). However, this is inconsistent with the evidence that Mr. Roche expended some €500,000 on refurbishing the hotel in or around May/June 2005. I do not accept, on the balance of probabilities, that the plaintiff was directed as he alleged.

Misrepresentation

42. The plaintiffs claim damages for breach of contract and misrepresentation and deceit, actionable conspiracy, and malicious or injurious falsehood (otherwise known as slander of title). Mr. Roche contended that it was misrepresented to him by the second defendant that his security would not be enforced and that the second defendant misrepresented Orac's powers to Mr. Murphy at the side meeting in the Swiftcall building so that Seashore did not pursue the anonymous bid of €12,000,000. I have already addressed the latter contention and I now proceed to deal with the former.

43. The plaintiff's pleadings seek to advance a claim in misrepresentation and deceit. The essential ingredients of such a claim require that an individual makes a representation as to a fact or facts in the knowledge that the representations are untrue and that as a consequence of the representation the representee is induced to enter into a contract.

44. In *Keaney v Sullivan and Ors.* [2007] IEHC 8, Finlay Geoghegan J. referred to *Bullen and Leach* (12th Edition 1975) at p. 450 sets out the essential elements of the tort of deceit which must be pleaded and proved:

> "In order to sustain the common law action of deceit, the following facts must be established, *i.e*. they must be pleaded and proved, namely:
>
> > a. there must be a representation of fact made by words or by conduct, and mere silence is not enough;
> >
> > b. the representation must be made with knowledge that it is false, *i.e*. it must be wilfully false or at least made in the absence of any genuine belief that it is true;
> >
> > c. the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in a manner which resulted in damage to him;
> >
> > d. it must be proved that the plaintiff acted upon the false statement;
> >
> > and
> >
> > e. it must be proved that the plaintiff has sustained damage by so doing (see *Bradford Third Equitable Benefit Building Society v. Borders* [1940] 1 All ER 302, *per* Viscount Maugham)."

The essential ingredients of a claim in fraudulent misrepresentation require a representation of fact by one party, knowing it to be untrue, and where the representation induces the other party to enter into a contract.

Fraudulent misrepresentations are actionable in the tort of deceit. There must be proof of fraud before such an action can be maintained. Laffoy J. in *Moffitt v Carl Scarpa Group* [2012] IEHC 227 referred to the leading case of *Derry v Peek* (1889) 14 App. Cas.

337, where Lord Herschell stated:

> "I think the authorities establish the following propositions: First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."

In the second defendant's submissions the Court was referred to a passage in McMahon and Binchy on *The Law of Torts* (4th Ed.), where the authors state at para. 35.16:

> "There is no liability in deceit if the plaintiff does not rely on the defendant's misrepresentation. If, therefore, the plaintiff ignores the representation and does not allow it to influence his decision, as where, for example, he carries out his own investigation and bases his action on his own survey, the defendant will not be liable. Similarly, if the plaintiff is not influenced by the representation because he or she is unaware of it or not deceived by it or because, in the case of goods a patent defect exists, the defendant will not be liable in deceit. However, provided the representation influenced the plaintiff in some measure, it need not be the sole factor in causing him to act as he did."

The representation that security would not be enforced

45. Mr. Roche contended that, on a number of occasions he was informed by the second named defendant that his securities would not be enforced and that in lieu thereof the bank would pursue the providers of the valuations on foot of their professional indemnity insurance. This is another allegation which did not feature in the statement of claim but was subsequently particularised by the plaintiffs. Mr O'Riordan denied making any such representations to the plaintiff. In considering this claim, it is necessary to assess the background against which it is made. Mr Roche's relationship with Mr. O'Riordan and the first named defendant was of a commercial kind. This relationship was given form by virtue of a sequence of formal commercial documents. He had a number of loan facilities with the first named defendant. Mr. Roche gave evidence (notwithstanding the issue regarding his signature) that he signed the facility letters and the security documentation. Each of the relevant facility letters and the security documents were preceded by term sheets which set out the proposed lending terms which were then forwarded to the bank's credit committee for approval. The evidence demonstrated that Mr. Roche had access to legal advice in respect of his commercial transactions. Furthermore, the first named defendant submitted that each of the term sheets contained the following provisions:

> "This is an Outline Term Sheet only and does not constitute an offer by Investec Bank. Neither does it purport to create any agreement, legal or otherwise between the parties mentioned herein. A formal loan offer is dependent on receipt of and satisfaction with the information requested herein and formal approval of the Bank's credit committee."

Therefore, where Mr Roche accepted an offer, he did so in the knowledge that approval was required by the credit committee for any loan. Each loan facility specified the security which was to be held by the bank and was offered subject to certain terms and conditions. The alleged representation was not contained in any of the facility letters or term sheets furnished to Mr Roche. There is simply no mention in any of the bank's documents that security would not be enforced. The express wording of the facility letters and the security documents set out the circumstances in which the pledged security could be enforced. The alleged representation conflicted entirely with the terms of the facility letters and security documents.

The credit committee

46. Mr. Cullen gave evidence as to the operation of the credit committee within the first named defendant and the limits of the credit committee's powers. He told the Court that the credit committee in Dublin is and was at the time a three person credit committee. He stated that up until September 2007 the credit committee limit in Dublin was €1 million and thereafter the matter would require to be approved by the credit committee in the United Kingdom. This limit varied increasing from September 2007 to 2008 to €5 million and decreasing since 2009 to zero. Mr. Cullen stated that no one individual in the bank could commit the bank and that the credit committee was required to approve all facilities. He, as branch manager and CEO of the bank, could not commit the bank and would never have been in a position to commit the bank to any loan facility on his own; any facility required the approval of the credit committee.

Decision on this issue

47. I conclude that the first named plaintiff accepted that all the security documentation stipulated that the loans were secured by way of charges over property or guarantees. Ms. Doyle acted as his solicitor on the Saltee hotel transaction and he clearly continued to have access to legal advice. The first named plaintiff gave evidence that he knew that the credit committee was required to sanction a loan and therefore he must have been aware that the second named defendant could not give any assurances regarding the security. Mr. Roche was an experienced and astute businessman who had the benefit of many loans and I am not satisfied that such a representation was made to him and even if I were so satisfied, I am not satisfied that any such representation induced the plaintiff to enter into contracts with the bank.

48. This purported representation must also be viewed through the prism of the oral and written complaints made by the first named plaintiff in May 2012 and the correspondence between Mr. Roche and the bank which make it quite clear that Mr. Roche was anxious that the bank would not seek to enforce their securities. The argument which was made on behalf of the plaintiff was that the alleged representation affected the bank's legal right to act pursuant to the loan agreements and security documents. I am not satisfied that such representations were made to the plaintiff by the second named defendant therefore this claim fails.

Representation that securities would not be enforced if plaintiff sold Gentstown

49. In the course of the evidence, a further claim under the head of misrepresentation was advanced by the plaintiff. He alleged that the second defendant represented to him in 2009 that the first named defendant would not enforce its security over the Beak lands if he agreed to sell his land at Gentstown. I was referred to an e-mail in 2010 wherein the first named plaintiff discussed his intention with the staff of the first named defendant that he intended to privately progress the sale of his lands at Gentstown and would keep the bank informed of any contractual arrangements with regard to the sale of his lands at Kilmore Quay. This contradicts the alleged representation. The second defendant denied such assurances and I accept his evidence in this respect. If one were to take the plaintiff's contention to its logical conclusion, it would mean in effect that any borrowings were unsecured. This flies in the face of the security documentation which the first named plaintiff signed. Finally such alleged assurance as to settlement with the bank is inconsistent with the plaintiff's agreement to sell the Gentstown lands. This is another allegation which was not pleaded and was raised for the first time in evidence. Order 19, rule 5(2) of the Rules of the Superior Courts is therefore engaged. Even if I was not satisfied that there is no credible evidence to make out this contention, I am satisfied that the court cannot consider this aspect of the plaintiffs' evidence as there was a failure to plead the purported representation.

Alleged cash payments/cheque payments
50. Mr. Roche maintained that he made a number of cash payments to Mr. O'Riordan on foot of demands by him. He stated that such payments were made as advisory fees to Mr. O'Riordan. He also made a number of cheque payments to Mr. O'Riordan and whilst Mr. O'Riordan accepted that he received cheque payments, he gave evidence that these represented payments to Orac Ltd, his private consultancy company in respect of works done for the Seashore project. I will first look at the payments made by cheque. Evidence was heard that at a meeting in the Radisson Hotel in May 2006, Mr. O'Riordan received cheques payable to Orac Ltd. from Mr. Murphy and Mr. Roche. This is a date on which, the court heard, that an agreement was reached that Links would exit Seashore. The cheque paid by the plaintiff was in the sum of €10,312.50 and Mr. Murphy gave evidence that he made the same payment amounting in total to approximately €20,000. I am satisfied that this payment was made to Orac Ltd, the second named defendant's private consultancy business in respect of works done by him on the Seashore project. I refer again to the draft consultancy agreement dated the 23rd June, 2006 wherein the figure of €20,000 has been discounted, thus supporting the view that this was payment for works done in respect of the Seashore project.

51. A payment by cheque was made by the plaintiff dated 13th December, 2007 for the sum of €36,200.00 to Orac Ltd. Mr. Roche contended in his May 2012 complaint that this was furnished to Mr. O'Riordan as a loan advisory fee in respect of the development at Bunclody, Co. Wexford. Mr. Roche's evidence was that he did not have cash to pay Mr. O'Riordan and that Mr. O'Riordan became irate. In his evidence Mr. Roche indicated that this payment was in respect of an abort fee. It is notable that he did not give evidence that it was in respect of a loan advisory fee for Bunclody. The second named defendant maintained that this payment was for works done by his consultancy company for the Seashore project. I accept that this is so. This is supported by an invoice dated 18th December, 2007 wherein the payment is referred to as being in respect of "property consultancy services". It is the position that Mr. Roche contended that the invoice was received many months later and indeed it is date stamped, apparently by an employee of Mr. Roche. The court did not hear from this employee. However, even if this were so, it is notable that the invoice is on Orac Ltd. headed paper and for the particular specified aforementioned purpose.

Alleged cash payments
52. Mr. Roche alleged that he made cash payments at various intervals to Mr. O'Riordan; each cash payment in the sum of €5,000. He gave evidence that these alleged cash payments represented fees to Mr. O'Riordan for completing paperwork. I repeat again that Mr. Roche was an experienced business man who had numerous loans originally with First Active Plc. and subsequently with Investec Bank and I am satisfied that he was well aware that he was already paying fees in relation to his loan facilities pursuant to the express terms set out therein. Furthermore, it must be remembered that these were commercial transactions which did not require application forms as would be required in the instance of consumer loans. It is simply not credible that a person in his position would be of the view that he was then making further legitimate additional payments in cash to a bank official. It is clear on the evidence that Mr. Roche never paid any VAT on the alleged cash payments and in fact gave evidence that he concealed the making of the alleged cash payments from his own staff. In fact, on Mr. Roche's own evidence he never sought an invoice or a receipt in respect of any of the alleged cash payments and only received an invoice in respect of the cheque payment of €36,300 made payable to Orac Ltd. I am satisfied on the evidence that Mr. Roche did indeed make cash payments to Mr. O'Riordan. The true purpose of these payments is unclear but it appears to the court that Mr. Roche may have believed that such cash payments would advance his standing in some manner with the bank. Whatever the basis or the reasoning behind the making of the cash payments to the second named defendant, it is clear on the evidence that such payments were made without the knowledge of the bank. I am not satisfied that the bank was aware of Mr. O'Riordan's consultancy business which he operated whilst an employee of the bank. I am satisfied that his consultancy business did not fall within the scope of his employment. McMahon and Binchy outline in their *Law of Torts* at pg. 1091 of the text that Irish law is "sometimes prepared to hold one person liable for the wrong committed by another person even though the person held liable is not at fault in the accepted sense of the word." For our purposes, it is sufficient to state that generally speaking the relationship between the employer/employee uncertain controlling factors will determine the issue of vicarious liability. This issue is made clear from the evidence which I accept, of Mr. Cullen, Ms. Geeney, Mr. Mallon and Mr. Ross. All witnesses stated that they had no knowledge whatsoever of Orac Ltd. Furthermore, Mr. O'Riordan, in giving his evidence indicated that the bank did not know anything about his consultancy company. Finally in the drafting and preparation of the consultancy agreements, Mr. O'Neill, solicitor, gave evidence that he received his instructions directly from Colm O'Riordan and was not instructed by Investec Bank. Therefore, I conclude as a matter of fact that:

a. Cash payments were made by Mr. Roche to Mr. O'Riordan;

b. that the bank was entirely unaware of this;

c. that Mr. Roche made payments by cheque to Orac Ltd. for the purposes of consultancy services; and

d. that the bank was unaware of such payments and was unaware of Mr. O'Riordan's consultancy business.

53. I now refer back to the alleged misrepresentations made by Mr. O'Riordan to Mr. Roche and to James Murphy. I have already held that such representations were not made and to conclude that issue I am of the view that such representations should in any event be viewed through the prism of the relationship which existed between Mr. Roche and Mr. O'Riordan. I am satisfied that Mr. O'Riordan received cash payments from Mr. Roche. I am satisfied that they had an unusual relationship which relationship provided cash benefit to Mr. Roche and some uncertain benefit and certainly unproven benefit to Mr. Roche. As previously mentioned, Mr. Roche was an experienced and astute businessman and I am satisfied that he was fully aware that he was engaged in unorthodox activity with Mr. O'Riordan. This, I conclude, in light of the evidence given by Mr. Roche as regards the cash payments and as stated above that he never sought an invoice, that he never paid any VAT on the cash payments, that he concealed the making of the payments from his own staff and the reference by Mr. Murphy to the payments as backhanders in the complaint of May 2012 in the presence of Mr. Roche. Whilst Mr. Roche indicated that such payments in his complaint were fees, I do not accept this evidence. What is crystal clear is that the bank was unaware of these cash transactions and that such transactions had no affect whatsoever on any of the decisions of the credit committee to approve loans. I have already stated and set out the evidence which clearly pointed to the very careful structure within the bank in respect of credit loan approval. I am satisfied that Mr. Roche knew exactly what he was doing in his dealings with Mr. O'Riordan and that he was in some way seeking to gain advantage in his businesses. I am satisfied that Mr. O'Riordan was not acting as the agent or servant of the bank. This is further compounded by the fact that Mr. Roche and Mr. O'Riordan continued in their business ventures after Mr. O'Riordan departed from the bank.

Casino chips
54. This allegation was not contained in the statement of claim, however in the course of evidence Mr. Roche and Mr. Philip O'Brien testified that they each separately provided casino chips to Mr. Shane Mallon and Mr. Noel Ross in April 2006 at the New Bay Hotel. Mr. Mallon and Mr. Ross vehemently denied ever having received such casino chips. This complaint was referred to orally by Mr. Roche on the 3rd May, 2012 but was not included in his written complaint presented to the bank on the 24th May, 2012. The evidence given in relation to the provision of the chips was contradictory as between Mr. O'Brien and Mr. Roche. On the other hand Mr. Mallon and

Mr. Ross both gave very credible evidence contradicting the evidence of the plaintiffs. I prefer the evidence of Mr. Mallon and Mr. Ross and I am not satisfied on the balance of probabilities that this event occurred.

The conspiracy claim
55. Fundamental to the plaintiffs' case against the bank is that the bank conspired with Mr. O'Riordan to deprive Mr. Roche of his lands and sought to deprive him of his right to redeem his securities which he pledged to the bank. I will address the issues of the purported manipulation of valuations and I now address the issue of the oral and written complaints.

The complaints
56. It was submitted on behalf of Mr. Roche that the bank did not properly address his complaint and deliberately separated his complaint from Mr. Murphy's complaint in an effort to dilute both complaints. The court heard evidence from Ms. Geeney, head of compliance at the bank, that the bank made the matter known to the Central Bank and also contacted the Garda Bureau of Fraud Investigation. Mr. Cullen in his evidence repeated that the bank could not make a formal complaint to the Garda Bureau of Fraud Investigation because the bank had not suffered any loss. Evidence was heard from a member of the Garda Síochána that a complaint was made by Mr. Roche but I note that the date of this complaint was 13th June, 2014. Mr. Roche was furnished with the names of the relevant member of An Garda Síochána and also the point of contact in the Central Bank. Further, Mr. Roche was also advised that he had the facility to make a complaint to the Financial Service Ombudsman and the relevant contact details were furnished to him in this respect. The court heard lengthy evidence as regarding the complaint and the manner in which the complaint was pursued by the bank.

57. Mr. Roche made an oral complaint against Colm O'Riordan on 3rd May, 2012, present at this meeting were Michael Cullen, Investec Bank, Dolores Geeney, head of compliance at Investec Bank, James Murphy and Robert Roche. At the commencement of the meeting, it is common case that all parties were asked by James Murphy to sign a 'without prejudice' note before commencing with the complaint. On 9th May, 2012 Mr. Roche was asked to provide documentation in support of his allegation. On 24th May, 2012 he provided a written complaint and documentation at a meeting with Investec Bank. His complaint was fundamentally directed towards the purported conduct of Mr. Colm O'Riordan. I am satisfied on the evidence that the bank addressed the complaint appropriately.

Manipulation of valuations
58. In the course of his evidence it was suggested by inference or otherwise by Mr. Roche that Mr. O'Riordan had in effect conspired with HOK in order to manipulate the valuation in respect of the sale of a development site at White Rock Hill. This site was purchased by Bright Properties Ltd., a company of the first named plaintiff. In his evidence, Mr. Roche contended that €4.3 million was required to purchase the site and the second named defendant reverted to him and told him there would be a 10% profit share linked to the valuation of HOK. It was common case that the plaintiff then telephoned the second named defendant to express his surprise at the valuation placed on the site and that his view was the valuation should have been much higher. It should be noted that Mr. Roche gave somewhat contradictory evidence on this issue.

59. The first point to note is that Mr. Hester, formally of HOK, gave evidence and confirmed that the person who instructed him on behalf of the first named defendant to deal with this loan was Mr. Shane Mallon. Mr. Hester resolutely denied any suggestion that Mr. O'Riordan had engaged with him in the detail of the valuation in an effort to manipulate it. Mr. Mallon gave evidence that he instructed the valuation and he was the person who spoke with Mr. Peter Hester. It should be noted that no cross-examination ensued on the part of the plaintiffs of Mr. Hester to the effect that the valuation had been in some way manipulated. Mr. Roche had expressed a belief in his May 2012 complaint that the second named defendant had manipulated valuations upwardly in order to present loan proposals in the best possible light; however in his evidence the inference was that the second named defendant had manipulated the valuation seeking to decrease the valuation on White Rock Hill. This was to increase the value of the profit share once the property was sold. Therefore, the belief as reflected in the complaint and the evidence given are contradictory. Mr. Hester gave evidence for the second named defendant and presented as a very creditable witness who indicated that he was instructed by Mr. Shane Mallon on behalf of the bank to carry out the valuation in respect of the White Rock Hill site. He explained the procedures which operated within HOK and indicated that he applied the 'Red Book' valuation which was the highest standard valuation and where very strict quality control guidelines applied and was a rigorous process. Mr. Hester absolutely denied any interaction or effort to manipulate the valuation. The inference as to manipulation was not withdrawn on behalf of the first named plaintiff until day twenty of the hearing. I am not satisfied that there was any effort to either increase or decrease the valuation. Mr. Hester gave compelling evidence which I accept. I conclude that the plaintiff speculated entirely in his proposition and continued with this proposition until the concluding stages of the trial and subsequent to Mr. Hester's evidence. The court is entitled to draw an inference therefore that Mr. Roche was willing to engage in speculation in this regard and this affects his credibility in general terms.

Contention that the defendants spearheaded development plan for Seashore
60. The plaintiffs contend in the statement of claim that the defendants had put together plans for the development at Kilmore Quay. However, in his evidence, Mr. Roche stated that the "Links Group" identified that further land was needed in respect of the proposed development. Therefore he sought to put together certain options and indicated that he was the only point of contact with the land owners. The shareholders agreement to which I have already referred which was executed in October 2004 defined the "scheme of development" which included the matters referred to in evidence. It is the evidence that the project was assembled through the engagement of a number of different experts when neither the first named defendant nor the second named defendant was involved. The shareholders and directors to Seashore engaged the services of those experts. It is the position, and is common case, and beyond dispute, that the bank did not provide any finance to the Seashore project. Mr. Cullen gave evidence that the credit committee for the bank considered the project to be too risky and came to this decision on foot of a report compiled by planning expert, Mr. Declan Brassil. This report issued in September 2006. Mr. Brassil gave evidence that the report, which he provided, was generally negative in respect of the project and he provided very cogent reasons for his decision. It is credible that the bank on foot of his report did not consider the transaction in a positive sense thereafter. This was a sensible business decision to have taken. It should also be noted that one of the terms and conditions to the facility letter dated 1st August, 2006 was to require Seashore to procure a planning report confirming the likelihood of planning permissions being granted on the site for the scheme proposed. This condition was not fulfilled. The drawdown did not take place and the loan offer expired. I am not satisfied on the evidence that either defendant spearheaded the project as alleged.

The exit fee on the White Rock Hill transaction
61. The plaintiff contended in evidence that there was an improper reduction in the exit fee as a result of Mr. O'Riordan's intervention in respect of the White Rock Hill transaction. Evidence was heard that this was with an eye to "keeping things sweet". This was another transaction in respect of which Mr. Shane Mallon gave evidence that he was entirely responsible. The original exit fee was valued at €220,000; however the court heard evidence from Mr. Mallon that he dealt with the adjustment to the exit fee which resulted in the exit fee coming in at €200,000. This, he stated, came about as a result of his engagement with Mr. Cody, the accountant for Bright Properties Ltd. Mr. Mallon gave evidence that he was of the opinion that the first named plaintiff's accountant had requested an advanced estimation of the exit fee for the purpose of due diligences. He stated that the reduction from €220,000

to €200,000 was as a consequence of the engagement with Mr. Cody regarding the costs involved in selling the company holding the land. Furthermore, Mr. Mallon confirmed that only the credit committee had the power to vary or accept a lower exit fee. I am satisfied that there is no basis to the plaintiffs' contention that the exit fee was reduced for some unorthodox reason.

The sale of Seashore
62. Mr. Hynes gave evidence that the participants in Seashore were of the view that the project was not going anywhere and that they should seek a buyer on a private basis. There was evidence that the first named plaintiff had met with Mr. Donie O'Sullivan of HOK in October/November 2006 and that he had sent a letter on behalf of Seashore instructing HOK to proceed with the sale of the lands in a letter dated 17th November, 2006. The guide price was stated to be €13-15 million. That then brings me onto the aforementioned meeting at the Goat pub between the Mr. O'Riordan and Mr. Murphy wherein Mr. Murphy indicated that he would not accept bids of €13-15 million and that he had obtained the aforementioned valuation of the lands in April 2007, being valued by Mr. Keane at €20 million. This was the background to the June 2007 Swift Call meeting and the subsequent reported bid of Mr. Keane for €12 million.

The allegation that the first named plaintiff's signature was forged
63. This concerned a proposed property transaction in Lodz, Poland. Mr. Roche alleged that he was wired money for this investment without having signed a facility letter. This came about in the course of the evidence, while the pleadings did not make any mention of the investment in Lodz. When the facility letter was produced to Mr. Roche in the course of his evidence, he accepted his signature which was witnessed by an employee in his office. However, he contended that Mr. O'Riordan had a scanned signature of his and, at a later stage in his evidence, he was not satisfied that he had signed the aforementioned document. However, this does not explain as to how his signature was witnessed by his own employee. He later withdrew the implication that his signature had been forged, but then declared himself to be unsure. This is a matter which caused the court concern regarding Mr. Roche's credibility and memory.

Poznan, Poland
64. The court heard evidence that Mr. Roche was interested in a development in Poznan, Poland. He claimed that he was interested in purchasing twenty-four apartments in the development. It is worth noting the sequence of events regarding the contact on foot of this development between Mr. Roche and Mr. O'Riordan. In the statement of claim it is pleaded that upon Mr. O'Riordan hearing that Mr. Roche was purchasing apartments in Poznan "…he insisted that the first named plaintiff remain at their disposal until he, the second named defendant and the CEO of the first defendant, Michael Cullen, could jet out to Poland together and see at first hand what prospects were available there". Mr. Roche gave similar oral evidence to the effect that he was directed by Mr. O'Riordan to remain in Poland. Mr. Roche gave evidence that Mr. O'Riordan and Mr. Michael Cullen came to Poland on 29th May, 2007. He stated that he was only looking for finance for twenty-four or twenty-five units, and had no interest in purchasing the entirety of the development. In the course of his evidence he made it quite clear that Mr. O'Riordan came to Poland with Mr. Cullen on the spur of the moment. However, a number of factors emerged in evidence which contradicted the impromptu nature of the visit:-

- The documentary records produced to the court of the trip to Poland demonstrated that the flights in question had been booked on 11th May, 2007 and on 15th May, 2007. This, on its own demonstrates that it was not an impromptu visit.

- Mr. Roche gave evidence that he was encouraged in conversation in Poland on 29th May, 2007 by Mr. Cullen and Mr. O'Riordan to purchase 154 apartments. The evidence disclosed however that Mr. Roche had addressed his mind in March 2007 to purchasing 154 apartments and had instructed solicitors to draw up documentation to reflect this. Such documentation was produced to the court.

- The plaintiff, in his evidence, suggested that conversations and discussions regarding the encouragement to purchase 154 apartments took place before and after the site was viewed. His evidence was somewhat inconsistent on this issue.

- Furthermore, Mr Roche swore an affidavit in the associated proceedings that the discussion regarding the purchase of 154 apartments took place after viewing the site. Therefore on this point alone there are numerous inconsistencies which again affect the plaintiff's credibility.

65. It is unclear as to the relevance of the Poznan evidence; however it is the position —and is common case— that on the return flight, Mr. Cullen and Mr. Roche were seated together. Mr. Roche stated that Mr. Cullen advised him in the course of a conversation on the flight that the bank was very interested in his lands. Mr. Cullen denied this conversation took place. As of the time of the Poznan development, the credit committee of Investec Bank had already decided (sometime in September/October 2006) that the Seashore project was too risky. It should be borne in mind that there was no drawdown of the €2 million in respect of the planning costs on foot of the facility letter dated 1st August, 2006. I accept Mr. Cullen's evidence that no such conversation took place and that Mr. Roche has used the opportunity of the acknowledged flight home to construct this evidence in an attempt to involve the bank in his claims. In support of my conclusion, I note that no complaint was made against Michael Cullen in the meetings of 3rd May, 2012 or 24th May, 2012 or in the written complaint of 24th May, 2012. In fact, the court heard evidence the first time any complaint was made against Mr. Cullen was by letter dated 23rd September, 2013. This complaint related to the alleged encouragement by Mr. Cullen to the first named plaintiff to purchase all 154 apartments in Poznan.

66. The first named defendant submitted in its written submissions that it is unexplained as to how the Seashore facility letter dated 1st August, 2006 fits into the alleged conspiracy as the security did not include a charge over the Beak lands and only included a charge over an option to purchase the Beak. It is submitted that the bank refused to release the funds and therefore passed up on the prospect of downstream profits and/or the option being exercised by Seashore. It is submitted that this act of refusing to release the funds was completely inconsistent with the bank wanting to control the first plaintiff's property and in particular the Beak. This submission commends itself to me and I accept it.

The partnership joint venture claim
67. The evidence disclosed that many of the loan facilities which were proved in the course of the hearing had features such as arrangement fees, exit fees and/or profit share. The court was told by Mr. Conor O'Malley, a banking expert called by the bank, and by Mr. Cullen, the CEO of the bank, that these fees represented arrangements which were in place in order to provide an additional return to the bank and that such fees were commonplace at the time and were in consideration of the risk associated with a given transaction. Mr. O'Malley provided very clear evidence to the court having reviewed the facility letters. It is undoubtedly the position that the plaintiff was free to reject any loan offer by refusing to sign the documentation. It is also the position however that once a letter was signed, he in so doing, accepted the terms and conditions upon which the money was lent which included, on occasion fees of a certain category.

68. It is clear to me that the relationship between the bank and Mr. Roche was one of lender and borrower and was not one of partners with a common or a shared interest. Mr. Cullen gave evidence that the fundamental interest of the bank, in financing any project was to ensure that the money was repaid. Mr. O'Malley gave evidence that such clauses were commonplace in banking at the time regarding commercial loans. Mr. O'Malley was referred to the facility letter dated 1st August, 2006 (the Seashore loan facility) and was asked specifically about the arrangement fee of €20,000 and the profit share at 23.5% as contained in the facility letter. He gave evidence that such fees were by no means unique at the time and that the banks were seeking to share the reward and such fees could be termed as profit shares/exit fees. He stated that the profit share was a reasonably high fee in this instance, but that the bank had come late into the equation and that there was a high level of risk in that the bank could have lost some or all of its funds. Mr. O'Malley also confirmed that it would be standard practice for a bank to require a borrower to pay all costs to include valuations, solicitor's fees and other costs whether or not the transaction proceeded. I have been referred in submissions to the case of *Zurich Bank v McConnon* [2011] IEHC 75, where Birmingham J. commented as follows:-

> "…it seems to me that the defendant's arguments fundamentally misunderstand the nature of the relationship between the bank and the defendant. The relationship was not that of partners with a common interest, common sharing a risk, rather, the relationship was that of lender and borrower".

69. I am satisfied that this was the position in this instance and that there is no evidence of a partnership or joint venture as between the plaintiffs and the first named defendant. I am satisfied that the relationship disclosed on foot of the facility letters was one of banker and customer. Birmingham J. in *McConnon* goes on to say:-

> "…the bank's interest in this was loaning money with the expectations that the loan would be repaid and that the bank would make a profit from the loan. Undoubtedly, the defendant's purpose in seeking funding from the plaintiff bank, and indeed, from the other banks that were approached, was so that he could proceed with the project of which he had already expended some €10 million. However, there is no basis whatever for suggesting that the parties had agreed to enter into a risk sharing partnership. Such a proposition is unstatable."

70. I am satisfied that the same position pertains in this instance. There is clear evidence that such a fee structure was not in anyway unique and that the documentation discloses that the relationship was simply of lender and borrower. This is very clear from the various facility letters.

Deterioration of relationships
71. James Murphy gave evidence that in February 2011 he had a serious disagreement with Mr. O'Riordan. In the course of his complaint to the bank in 2012 Mr. Murphy stated that he had a major grievance with Mr. O'Riordan and that he was determined to put Mr. O'Riordan "back in his box, big time". The court also heard evidence that Mr. Roche had a major difficulty with Mr. O'Riordan from November 2011. It is clear that both these witnesses had difficulties in their relationship with Mr. O'Riordan prior to their complaint in May 2012. It is significant that no complaint was made by Mr. Roche following the alleged threats and intimidation by Mr. O'Riordan in June 2007. The complaint only came about in May 2012 subsequent to their disagreement in 2011.

Loss of opportunity
72. Mr. Roche gave evidence that he wished to avail of the purported 2007 Keane bid, which he was prevented and impeded from doing so by the conduct of Mr. O'Riordan. I have already decided that he was not blocked in the manner described or at all and that the decision not to proceed with the bid was one taken freely by the participants in Seashore. As I elaborated above, this bid was an anonymous bid, there was no evidence as to the alleged bidder's financial resources and on the evidence that I heard, there must have been concerns as to any potential profit for Seashore. The bid did not have the hallmarks of a credible bid. This is relevant in considering any loss of opportunity and I will refer to the decision of the *Minister for Communications v Figary Watersports Developments Ltd.* [2001] IEHC 601 McKechnie J., in assessing a loss of chance claim, stated:

> "1. A claimant must show it had, on the balance of probabilities, a real and substantial chance of success, not merely a speculative one;
>
> 2. This extends to showing that there were not actions which, on the balance of probabilities, would have prevented that chance from being real and substantial;
>
> 3. Once this is done, the [C]ourt will assess the quantum of damages based on the likelihood of that chance."

73. As stated, I am not satisfied on the evidence that the bid in any event was a credible bid. The evidence of Mr. Keane did not bear close scrutiny but even if the bid were a credible bid, the evidence I heard called into question as to whether there would have been any discernable profit for the shareholders of Seashore. Therefore, I am satisfied that there was no loss of opportunity. Whilst it is unclear from the statement of claim as to whether this particular cause of action is being pursued, I have addressed it nonetheless.

Documents
74. The plaintiffs complain that documents were unearthed by degrees and that primarily, the consultancy agreements were unavailable for inspection. It is readily apparent from the evidence that this was not the case and, as I have already addressed this issue, I do not intend to elaborate further.

Fiduciary duty
75. In his closing submissions, Mr. Molloy, S.C. for the plaintiffs, submitted that the defendants were in breach of their fiduciary duty. This claim is not contained within the proceedings and nor was any reference made thereto in the course of the six week hearing. In *Irish Bank Resolution Corporation Limited (In Special Liquidation) v Morrissey* [2013] IEHC 208, counsel for the defendant sought to rely on implied terms of an agreement which terms were not pleaded. Finlay Geoghegan J. found that it would be an unfair procedure to permit the defendant to rely upon an unpleaded allegation at that point of the hearing. I respectfully agree with this. I would add that I am also of the view, on the evidence that the relationship which existed between the Bank and Mr Roche at the relevant time was one of lender and borrower and did not extend beyond that of a contractual relationship. A fiduciary relationship between Mr Roche and the defendants did not exist.

The statute of limitations
76. As I have decided the case on the merits, I do not propose to consider whether the claims are statute barred as contended by the defendants.

Conclusion
77. The proof of a case on the balance of probabilities must be applied with common sense. In order to be satisfied of such proof, the

court must be satisfied on the evidence that an event was more likely to have occurred than not. I am not satisfied on the evidence on the balance of probabilities that Mr. O'Riordan misrepresented any facts to the plaintiffs nor am I satisfied that he misrepresented Orac's powers to James Murphy. Further on the evidence, I am not satisfied, on the balance of probabilities, that the defendants blocked, thwarted or impeded the purported €12 million "Keane" bid in the manner as alleged in respect of Mr. Roche or Mr. Murphy. I am satisfied on the contrary that Mr. Roche was an experienced businessman who knew precisely what he was doing in his dealings with Mr. O'Riordan and that he was satisfied not to proceed with the €12 million bid.

78. I am satisfied that the nature of the relationship as between Mr. Roche and the bank was a commercial relationship of lender and borrower. There is no basis to suggest that the parties had agreed to enter into a risk sharing partnership.

79. Mr. Roche, in his evidence, was shown to be inconsistent and contradicted on occasions by the documentation produced. Whilst he was represented in the opening of the case as having a memory like an elephant, this did not prove to be the situation as the hearing evolved. It is of concern to the court that the proceedings did not issue until 13th June, 2014, two days following the institution of the proceedings by the receiver. When this is viewed in the context of the contention that the purported block of the €12 million bid occurred in 2007, this gives rise to even greater concerns. No complaint was made to the bank until May 2012 notwithstanding that Mr. O'Riordan was alleged to have bullied, intimated, coerced and manipulated both Mr. Murphy and Mr. Roche certainly since June 2007 and perhaps even before that date. It is inconceivable in those circumstances that Mr. Roche, if he had a legitimate complaint, would have refrained from such a complaint until 2012 and instead continued in his business relationship with Mr. O'Riordan to the extent that he incorporated companies with him subsequent to Mr. O'Riordan's departure from the bank. It is notable that Mr. Roche indicated that these companies in effect were in train before Mr. O'Riordan's departure from the bank, but the significant point surely is that he maintained his relationship with Mr. O'Riordan after the purported events of June 2007. It is significant also that Mr. Roche had a falling out with Mr. O'Riordan in 2011.

80. For the reasons given in the body of the judgment, I am satisfied that Colm O'Riordan received cash payments from Mr. Roche and I find that the first named defendant was unaware of this situation. I do not accept that he was bullied, harassed, intimidated or manipulated by Mr. O'Riordan into making the cash payments but I am of the view that these payments were made by Mr. Roche in order to secure some form of benefit for him as he perceived the position to be. I find that Mr Roche has not established that he suffered loss by reason of Mr O'Riordan's conduct in accepting cash payments.

81. It is the position that he whom comes to equity must come with clean hands and, in this respect, I refer to the decision of *Smelter Corporation v. O'Driscoll* [1977] IR 305. In *Smelter Corporation*, O'Higgins, C.J., dealing with a claim for specific performance, stated at pg. 311:-

> "In this instance the defendant was under a fundamental misapprehension as to the true facts. This misapprehension was brought about by the plaintiffs' agent…He led the defendant's husband and her solicitor to believe that, if the defendant did not agree to sell, the lands would be acquired…In these circumstances it appears to me there was a fundamental unfairness to the transaction."

82. Mr. Roche appeared to be satisfied to give evidence which was speculative and which brought in issue the conduct of professionals which later proved unfounded. I am not satisfied that any claim of conspiracy has been proven to the required standard. I am satisfied for the reasons stated in the judgment that the aforementioned complaints were properly met by the first named defendant.

83. It is the position on the evidence that each of the executed letters of facilities, charges and guarantees are not unique. It is also the position that loans were not drawn down in respect of Seashore or in respect of the Poznan development. Mr. Roche claimed that the defendants wanted to take control of his lands. It is the position that Mr. Roche willingly pledged his lands on foot of signed facility letters to the bank as security for various borrowings. I am satisfied that these proceedings represent an attempt by the plaintiffs to secure the release of the securities and to avoid the legal obligations thereunder.

84. Mr. O'Riordan accepted that the draft consultancy agreement would have brought in significant profits for his company Orac Ltd., but it is clear on a reading of the consultancy documents that such profits were conditional on successful financial outcomes. I am satisfied, as stated, that he was engaged by the participants in Seashore to act as a consultant on the exit of Links and that he received payment in this respect. I am satisfied that whilst he disclosed a potential conflict of interest to the bank on 21st June, 2006, he was less than frank in this internal memorandum. It is clear from the evidence that he had already received the sum of approximately €20,000 for works done in respect of the Seashore project as their consultant. I find that Mr Roche knew that Mr O'Riordan was acting in a private capacity on behalf of Orac Limited.

85. I am satisfied on the evidence that Mr. Roche encountered difficulties in repaying the loans and whilst he initially sought to address the situation by selling the Gentstown lands, his situation deteriorated. As a result, a complaint was made by him in May 2012 which initially was against Mr. O'Riordan and extended laterally to the CEO of the bank, Mr. Michael Cullen. I am satisfied that this was done in the expectation that Mr. Roche would be in a position to reach an agreement with the bank regarding the various securities. It is the position on the evidence that the bank was not willing to come to any such consensus and subsequent to the appointment of the receiver to the Saltee hotel, the plaintiffs issued the within proceedings.

86. I am not satisfied on the balance of probabilities that the plaintiffs have made out a case on the basis of the evidence before me. I note that the relief claimed at para. (7) also relates to the associated proceedings. In so far as that relief is sought on the basis of matters raised in the substantive hearing and on foot of the statement of claim, I am refusing that relief also. The plaintiffs' claims are dismissed.