Neutral Citation Number: [2006] IEHC 195

THE HIGH COURT
COMMERCIAL

[2006 No. 77 S]

BETWEEN

BRENDAN McGRATH

PLAINTIFF

AND
MICHAEL O'DRISCOLL, JIM O'DRISCOLL, JIM DUGGAN, MICHAEL O'DRISCOLL, DERMOT O'MAHONEY, JOHN BUCKLEY, MICHAEL HURLEY, VINCENT MEADE, DAVID MEADE AND IASC LTD.

DEFENDANTS

[2006 No. 78 S]

BETWEEN

BRENDAN McGRATH

PLAINTIFF

AND
MICHAEL MORAN, AIDAN MORAN, MICHAEL McKEOWN, LOUIS BOURKE, BMCG (A1) LTD. AND BMCG (A2) LTD.

DEFENDANTS

[2006 No. 79 S]

BETWEEN

BRENDAN McGRATH

PLAINTIFF

AND
JOHN O'DOLAN AND PADRAIG CONNOLLY

DEFENDANTS

[2006 No. 80 S]

BETWEEN

BRENDAN McGRATH

PLAINTIFF

AND
DAVID BROSNAN AND NOEL CONNELLAN

DEFENDANTS

Judgment of the Hon. Mr. Justice Clarke delivered the 14th June, 2006.

1. Introduction

1.1 The plaintiff ("Mr. McGrath") is a fisherman who became involved in a series of transactions with investors who are the defendants in one or other of the proceedings set out above. It will be necessary to refer to certain aspects of those transactions in due course. However in simple terms the defendants formed a partnership which purchased a vessel and entered into a management agreement with a company MSV Solstice II Ltd. ("Solstice") for the management and operation of the vessel. The obligations of Solstice were guaranteed by Mr. McGrath. The funds necessary to purchase the vessel were advanced by Anglo Irish Bank Plc. ("Anglo Irish") to the partnership subject to a personal guarantee by Mr. McGrath. Furthermore certain arrangements were entered into between the defendants and Solstice which entitled either party, in certain circumstances, to require that the vessel be sold by the defendants to Solstice at a price determined in accordance with the relevant contractual arrangements. The obligations of Solstice under those arrangements were also guaranteed by Mr. McGrath.

1.2 The project ran into difficulties and default was made in relation to the Anglo Irish loan. On foot of the personal guarantee which Mr. McGrath had given for the obligations of the individual partners to Anglo Irish, proceedings were brought by Anglo Irish against Mr. McGrath ("the Anglo Irish proceedings") which resulted in a judgment in the sum of €6,375,172.78 together with interest and costs. Mr. McGrath, as a surety, claims, in these proceedings, to be entitled to recover the same sum (including interest and costs) together with his own costs of defending the Anglo Irish proceedings against each of the defendants on the basis that they are the primary debtors and are, therefore, obliged to indemnify him (Mr. McGrath) as a surety against whom judgment has been obtained by the principal creditor.

1.3 For reasons which are unimportant to the issues which I have to decide and which stem from certain time limits with which Mr. McGrath had to comply, four separate sets of proceedings were issued. However in substance the claim as against each of the defendants is the same. It should also be noted that in some of the proceedings corporate defendants are named. Those corporate entities are controlled by Mr. McGrath and, it would appear, are not a mark for any damages which might be awarded. In the circumstances judgment as against those corporate defendants was not pursued. In substance, therefore, the issues arise between Mr. McGrath on the one hand and each of the personal defendants named in any one of the four proceedings, ("the personal defendants") on the other hand.

1.4 Summary summonses claiming payment of the sum in respect of which judgment had been obtained by Anglo Irish together with interest and the costs both of Anglo Irish in bringing, and of Mr. McGrath in defending, the Anglo Irish proceedings, were issued. Appearances having been entered, the proceedings came before me on a series of motions for judgment.

1.5 In substance three points are made by the personal defendants as a basis for resisting summary judgment. They are as follows:

(a) That the proceedings should not have been brought by summary summons and are not, therefore, properly the subject of an application for summary judgment at all.

(b) Without prejudice to that earlier contention it is said that the proceedings are premature in that it is common case

that no money has in, fact, been paid by Mr. McGrath to Anglo Irish on foot of the judgment previously obtained.

(c) In any event, it is said that the personal defendants have a valid claim against Mr. McGrath in respect of alleged breaches either by McGrath, or by companies whose performance he had guaranteed, of the various agreements to which I referred. In those circumstances it is said that the personal defendants have a counterclaim arising out of the same set of circumstances of at least a value equal to the claim and that, in those circumstances, either judgment should not be entered on the basis of the counterclaim providing a defence or, alternatively, if judgment is to be entered same should be stayed pending the trial of that counterclaim.

I propose dealing with the jurisdictional issue first. It is not necessary to consider any further facts than those already outlined for the purposes of dealing with that issue. I now turn to same.

2. The limits on Summary Proceedings.
2.1 Order 2 rule 1 of the Rules of the Superior Courts provides for summary proceedings in a limited number of cases. Insofar as potentially relevant to these proceedings sub-rule 1 provides that the summary process can be adopted in respect of:

> "(1) In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising"

from a variety of circumstances including contracts, guarantees, or trusts. The personal defendants argue that in two separate respects the claim fails to come within the ambit of O. 2.

2.2 Firstly, and most importantly, it is said that Mr. McGrath cannot claim to be entitled to recover a debt or liquidated demand by virtue of the fact that he has not, himself, discharged his liability to Anglo Irish.

2.3 Secondly it is said that the inclusion of a claim in respect of an as yet unascertained amount of the costs arising out of the Anglo Irish proceedings renders the total claim such as brings it outside the order.

2.4 In respect of the first point the personal defendants do not contend that a person in the position of Mr. McGrath may not have, in principle, a remedy. They do, however, say that any remedy which may be available to such a person is not one that can be enforced in a summary manner under O. 2.

2.5 The position of a guarantor in respect of whom the principal creditor has obtained a judgment but where no money has in fact been paid on foot of that judgment gives rise to potential difficulties. On the one hand an absolute requirement that such a person must pay the debt before having the opportunity to recover any sums paid from the principal debtor could lead to a situation where an impecunious, or relatively impecunious, guarantor might be faced with an impossible situation in that he would be, in practice, unable to recover from the principal debtor simply because he would be unable to pay the principal creditor.

2.6 On the other hand if a guarantor had, simply because judgment had been entered against him, an entitlement to recover the amount of that judgment against the principal debtor, a serious injustice could arise. Were the principal debtor to be obliged to pay the sum due to the guarantor, there would be no certainty that the guarantor would use that money to discharge the liability to the principal creditor. If the guarantor, having obtained the sum from the principal creditor on foot of a court order, were not to pay that sum to the principal creditor, than the principal debtor would, notwithstanding the fact that he had discharged the debt once, by paying it to the guarantor, be still liable to discharge it a second time if he was pursued by the principal creditor. To meet those competing difficulties courts have evolved appropriate practices to ensure that no injustice can arise.

2.7 In *Wolmerhausen v. Gullick* [1893] 2 Ch. 514 Wright J. determined, in the case of two co-sureties, that one would be entitled to obtain what was described as a "prospective order" directing the co-surety, upon payment by the surety of his own share, to indemnify him against further liability. It is clear from the report at p. 515 that what was sought in those proceedings was, in the alternative, a declaration that the defendant was jointly and severely liable to contribute with the plaintiff to the discharge of the principal debt, an order requiring the defendant to so contribute, or an order requiring the defendant to indemnify the plaintiff against any sums which might be required to be paid in excess of the plaintiffs proper share. The proceedings would not appear to have been summary proceedings nor could they have been involving, as they did, a claim for a declaration.

2.8 The substance of the courts order is to be found at p. 529 where Wright J. said the following:-

> "But I think that I can declare the Plaintiffs right, and make a prospective order, under which, whenever she has paid any sum beyond her share, she can get it back, and I therefore declare the Plaintiff's right to contribution and direct that, upon the Plaintiff paying her own share, that the Defendant *Gullick* is to indemnify her against further payment or liability, and is, by payment to her or to the principal creditor or otherwise, to exonerate the Plaintiff from liability beyond the extent of her own share. The Plaintiff must have liberty to apply in Chambers, and generally to apply."

2.9 It does not seem to me that an order of the type made in *Wolmerhausen* could be said to be an order in an action seeking "only to recover a debt or liquidated demand in money."

The order is prospective and, indeed, contingent.

2.10 I have little doubt that *Wolmerhausen*, and other cases cited, are authority for the proposition that, in an appropriate case, the court can make an order in favour of a guarantor declaring the entitlement of the guarantor in respect of the principal debtor and putting in place appropriate arrangements to ensure that the guarantor will be protected from any inappropriate failure on the part of the principal debtor to meet his liability. However the jurisdictional issue which I have to address is as to whether any such order can be said to come within O. 2 of the Rules of the Superior Courts. The only case to which I was referred in which it would appear that a court made an unconditional order for payment in favour of a guarantor who had not, in fact, paid out on his guarantee is *Smith v. Howell* [1851] Ex. Rep. 730, where it would appear that the plaintiff recovered from the defendant an amount of rent and repairs which had been the subject of a judgment against the plaintiff (as guarantor) by the landlord and where the defendant was the tenant who had the primary liability.

2.11 It appears to be the case, as asserted by counsel for the personal defendants, that *Smith v. Howell* is not cited by any of the leading authors in the area. It also seems to me that the potential for injustice (to which I referred above) which would flow from the making of an order such as the one which was, apparently, made in *Smith v. Howell* would provide good reason for not following that authority. If the defendant in *Smith v. Howell* had paid the plaintiff on foot of the judgment given by the court and the plaintiff had

not, in turn, in fact handed over the money to the landlord then the defendant, as tenant, would have remained liable to pay the same sum again to the landlord. While there is some authority (see in re: *Richardson v. St. Thomas Hospital* [1911] 2 K.B. 205) for the view that money recovered from the principal debtor by a guarantor in such circumstances is held in trust for the principal creditor, nonetheless that does not ensure that the trust will, in fact, be complied with and does not remove the risk that the defendant might be exposed to having to pay the debt twice. That risk does not, of course, arise when the guarantor has in fact paid some or all of the amount due to the principal creditor thereby extinguishing all or the appropriate part of the debt as against the principal debtor. No risk of double payment therefore arises in those circumstances.

2.12 I was also referred to a series of Irish cases such as *Fahy v. Frawley* LR Ir XXVI 78 and *Gore v. Gore* [1901] I.R. 269 but it seems to me that those cases, insofar as they were concerned with an unconditional judgment for the payment of moneys, turned on the question of whether value might have been said to have been provided to the principal creditor by the surety by means other than direct payment of money (such as by the provision of a mortgage). Those cases do not lead me to alter the view which I have taken as to the inappropriateness of making an unconditional order against a principal debtor where no value or payment has been given to the principal creditor by the surety.

2.13 For these reasons I am, therefore, satisfied that a guarantor can only obtain an unconditional order for the payment of a debt or liquidated sum against a principal debtor in circumstances where the guarantor has, in fact, paid the debt or otherwise given value. In other circumstances the guarantor may well be entitled to one of a variety of forms of conditional or prospective orders such as that made in *Wolverhausen*. However such orders are not, in my view, properly within the ambit of O.2 of the Rules of the Superior Courts and cannot, therefore, be sought in summary proceedings. The rights of parties are effected by the fact that proceedings are brought in a summary fashion under Order 2. A defendant has to persuade the court (or the Master) that he has an arguable defence in order to avoid an early judgment against him. In those circumstances it seems to me that the question of whether a claim comes within Order 2 is not a mere technicality.

2.14 In those circumstances I am satisfied that counsel for the personal defendants is correct when he contends that a claim of the type brought in these proceedings cannot properly be brought in the summary fashion allowed for by O. 2. On that basis it seems to me that I should dismiss the proceedings.

2.15 However, lest I be wrong in coming to that view, I also propose expressing my views on whether it would have been appropriate to have given the personal defendants liberty to defend in the event that the proceedings had been properly brought by summary summons. I now turn to that issue.

3. The Defence

3.1 As indicated above, the first point made by way of defence was to the effect that the proceedings were premature. I am not satisfied that that argument is well founded. On the basis of the same line of authorities which satisfied me that it is not appropriate to make an unconditional order for the recovery of a debt or liquidated sum in circumstances such as arise in this case, I am also satisfied that it may, in principle, be appropriate to make some form of order whether of the prospective type identified in *Wolmerhausen* or otherwise. I am not, therefore, satisfied that it is premature for a guarantor who has been subjected to a judgment by the principal creditor to bring proceedings seeking an appropriate form of declaration or prospective order to protect his interests even though he has not, in fact, paid the debt. To hold otherwise would be to expose the guarantor to an analogous risk of injustice to that which led me to take the view that it would be unjust to allow the guarantor to obtain an unconditional order for the payment of monies. In such circumstances, as I indicated above, a guarantor with insufficient funds might have no practical means of enforcing what would otherwise be his entitlement to call upon the principal debtor to discharge his obligations to the principal creditor.

3.2 The question as to whether it would have been appropriate, had the proceedings been properly constituted, to give the personal defendants leave to defend turns, therefore, it seems to me, on the question of whether the personal defendants have established an arguable counterclaim such as would afford a defence.

3.3 It is first necessary to turn to the principles applicable to giving leave to defend on an application for summary judgment. In *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 Hardiman J., having reviewed recent Irish authority, noted that those authorities supported the view that "the defendants hurdle on a motion such as this is a low one, and the jurisdiction is one to be used with great care" (at p. 621).

3.3 Having noted the formulation of the test for summary judgment in *Banc de Paris v. de Naray* [1984] 1 Lloyds Law Rep. 21 (as adopted by the Supreme Court in *First National Commercial Bank -v- Anglin* [1996] 1 I.R. 75 at 79) Hardiman J. noted that:

> "The 'fair and reasonable probability of the defendants having a real or bona fide defence' is not the same thing as a defence which will probably succeed, or even a defence whose success is not improbable."

In summary, Hardiman J. concluded (at p. 623):

> "In my view the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendants' affidavits fail to disclose even an arguable defence?"

3.4 So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved.

3.5 So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment.

3.6 In considering whether the personal defendants in these proceedings would, in any event, have met what Hardiman J. describes as a relatively low hurdle, it is necessary to say a little more about the complex set of interrelated contractual agreements between the parties. I now turn to those agreements.

4. The Agreements

4.1 The scheme for the purchase of the vessel was essentially tax based. As the owners and operators of the vessel, the personal

defendants as partners would, subject to compliance with a number of requirements of revenue law, have been entitled to the benefit of capital allowances which, in turn, would have the effect of reducing what would otherwise have been their ordinary tax liability. In order to obtain such benefits it was necessary that the risk of the conduct of the business of operating the vessel should remain with the partners. However, there was no reason, in principle, why the parties should not agree to attempt to minimise the exposure of the partners to such risk. In that context the vessel was to be operated by Solstice in circumstances where, in accordance with the agreements reached, all monies due in respect of the operation of the vessel were to be paid into a bank account of the partnership with all outgoings (including a management fee to Solstice) being paid out of that account. Also of relevance to the issues which now arise was the existence of an agreement providing for a put and call option ("the option agreement") which would, in the ordinary way, have allowed the partnership to require that the vessel be purchased after five years by Solstice at a price calculated to ensure that the partnership would be in a position to pay off its liabilities to Anglo Irish. Thus the agreements, taken together, contemplate that at the end of the day the partnership would divest itself of the vessel in circumstances where it would be able to use the proceeds of the exercise of its option to sell, to discharge its liabilities to Anglo Irish.

4.2 Of particular relevance to the events that happened were the provisions of the agreements which provided for the possibility of an earlier exercise of the option. The option agreement provided that it might be exercised either on or within six months of 11th December, 2007 or on the occurrence of what was defined in the agreement as an "acceleration event".

4.3 Under the Third Schedule of the put and call agreement an acceleration event was defined, amongst other things, as occurring where there was:-

> "1. A breach by the Optionee or Brendan McGrath of any agreement between the Partners and/or the Partnership and Brendan McGrath or between the Partners and/or the Partnership and the Optionee, and in particular (but not limited to):-
>
> (a) Management and Operation Agreement (date)
>
> (b) Deposit Account Agreement (date)
>
> (c) Personal Guarantee of Optionee (date)
>
> (d) (other)
>
> subject that such breach shall continue after notice in writing specifying the terms of any such breaches given to the party alleged to be in such breach and such breach continues unrectified for a period of 2 months thereafter."

The other acceleration events do not appear to be material to these proceedings.

4.4 The personal defendants contend that the Optionee (which for the purposes of the agreement was Solstice) was in breach of a number of aspects of the agreements including breaches in respect of the management agreement. Such breach is disputed by Mr. McGrath. In substance, under a number of headings, it is accepted that there may have been a technical breach but, Mr. McGrath contends, such breaches were with the agreement of the personal defendants and, in particular, Daniel Murphy who was the Partnership Agent of the Partnership. There are a whole series of factual disputes arising under this heading which it would be wholly impossible to resolve on the affidavit evidence before me. In any event, it is accepted that, at least in one respect, there was a breach of the agreements by Solstice. Part of the arrangements between the parties was that, as a form of security for the ultimate obligation of Solstice to buy back the vessel, certain sums of money were to be deposited into a secure account so that they could be used as part of the purchase price. It is accepted that this was not done. It would appear to be accepted, therefore, that at least in that respect there was a breach of the agreements.

4.5 In those circumstances it is also necessary to turn to some of the facts.

5. The Facts

5.1 It seems to be common case that difficult trading conditions were encountered in the early months of the operation of the venture. The Partnership (through Mr. Murphy) contend that by virtue of the failure of Mr. McGrath (through Solstice) to provide adequate details of trading, they are unaware and unable to ascertain whether those difficulties stemmed from events over which Solstice and Mr. McGrath (as the managers) had no control or whether any fault lay. Mr. McGrath's case is that the events which subsequently occurred resulted not from any significant breach on his part of the arrangements between the parties but were the result of a precipitated action on the part of the partners in the light of unanticipatedly poor trading results which resulted from market conditions generally. It would be impossible to form any view on the accuracy of the parties' positions in respect of such matters at this stage.

5.2 In any event the partnership raised written complaints as to what it contended were breaches of the agreements on a number of occasions (certainly on the 25th March, 2003 and the 8th September, 2003). On the partnership's case, and there is evidence which arguably supports its contentions, those breaches were not resolved. There is therefore an issue to be tried as to whether Solstice and/or Mr. McGrath were in breach of the various agreements and failed to remedy any such breach notwithstanding receiving a written notice thereof, so that two months after such notice an acceleration event, within the meaning of the option agreement, might be said to have occurred. It is also argued by Mr. McGrath that the relevant notices are defective in that they do not mention a two month period or seek to invoke the provisions of the agreement relating to an "acceleration event". However, I could not conclude that the partners have no arguable case for their contention that they may be able to establish that an acceleration event did occur.

5.3 Matters are then complicated by the fact that the partners purported to terminate the management agreement and retake possession of the vessel. The partners subsequently operated the vessel for a period, through another manager, and thereafter took the vessel out of service and have, since that time, been attempting to affect a sale. In this latter context it is worth noting, in passing, that part of the set of arrangements entered into between the parties was a bond designed to give some comfort to the partners in the event that the vessel was sold at low price. The financial institution entering into that bond has, therefore, a legitimate interest in the sale of the vessel in that it may, in certain circumstances, be required to make up any shortfall. In those circumstances it is said by the partners that the necessity to affect a sale in consultation with that financial institution has contributed to the delay in being able to realise the value of the vessel.

5.4 In any event, the partners thereafter (that is to say after they had taken the vessel out of service for a number of months) purported to exercise the put and call option by notice on the 22nd June, 2005, placing reliance on the existence of an acceleration

event.

5.5 Mr. McGrath contests the validity of the exercise of the put and call option. He does so on two principal grounds. Firstly, he says that having regard to the nature of the agreements as a whole it could not have been contemplated that the put and call option could be exercised by the partners in circumstances such as those which arose whereby the management agreement had been terminated and the vessel had been out of the hands of Solstice and Mr. McGrath for a considerable period of time.

5.6 Secondly, it is argued that on a proper construction of the option agreement itself, the right to exercise the option by the partners did not extend so as to enable the option to be exercised as long after the acceleration event as it was, in fact, exercised. As there are a number of possible "acceleration events" (there being more than one letter which might qualify as the necessary written notice to trigger an "acceleration event" two months later) the period between such event and the exercise of the put and call option varies but it is, in any event, in excess of 18 months. Having regard to the requirement for the ordinary exercise of the put and call option within six months of the expiry of the five-year period specified in the agreement, it is said that the put and call option was not validly exercised.

5.7 All of the above raise complex questions concerning the true construction of a series of interlocking contracts and, at least in some cases, depend upon the facts of the operation of those agreements. It seems to me that the personal defendants have more than met the low hurdle of satisfying the court that they have a prospect of successfully arguing that the put and call option was validly exercised by the partners.

5.8 It is common case that Solstice did not comply with the put and call option by purchasing the vessel. If, therefore, the put and call option was validly exercised, then it necessarily follows that the Solstice was in breach. It is equally common case that Mr. McGrath had personally guaranteed the performance by Solstice of its obligations under a variety of agreements including the option agreement. If, therefore, Solstice was in breach of an obligation to purchase the vessel under the put and call option then any losses flowing from such a breach are visited upon Mr. McGrath as guarantor. It, therefore, follows from my conclusion that the personal defendants have established a *prima facie* case to the effect that they served a valid notice under the option agreement, that there is equally a prima facie case that Mr. McGrath is liable to the partners for any losses attributable to the failure to purchase the vessel by Solstice. It seems clear that the purchase price set out in the option agreement was designed to ensure that it would be sufficient to meet the partner's obligation to Anglo Irish. Given that these proceedings concern the amount of the partnership's obligation to the bank (given that that was the sum in respect of which the bank obtained judgment against Mr. McGrath as guarantor) it seems equally clear that it is arguable that any counterclaim would, at a minimum, equal and might well exceed the value of Mr. McGrath's claim.

5.9 It seems clear, therefore, that the personal defendants have established an arguable claim that they are entitled to counterclaim for a sum at least equivalent to the claim. Before reaching a conclusion as to the consequences of such a finding, it is necessary to turn to one final matter which stems from the fact that it is common case that the relevant monies were lent by Anglo Irish to the personal defendants as individuals so that they might invest in the partnership while any counterclaim is necessarily a claim of the partnership because it arises in respect of a guarantee of the obligations of Solstice to the partnership on foot of the option agreement. It is, therefore, necessary to turn to the situation which arises where a counterclaim of substance is raised.

Prendergast v. Biddle

6.1 In *Prendergast v. Biddle* (Supreme Court, Unreported, 31st July, 1957) Kingsmill Moore J., speaking for the court, noted the issue as being as follows:

> "On the one hand it might be asked why a plaintiff with a proved and perhaps uncontested claim should wait for judgment or execution of judgment on its claim because the defendant asserts a plausible but improved (sic) and contested counterclaim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiffs demand when he asserts and may be able to prove that the plaintiff owes him a larger amount."

6.2 Two separate questions appear to arise. The first is as to whether the counterclaim can be said to amount to a defence. It is clear from *Prendergast v. Biddle* and also from *Axel Johnson Petroleum A.B. v. Mineral Group* [1992] 1 WLR 270, that where a counterclaim arises out of circumstances which are sufficiently connected to a claim, a set off in equity arises because it would be inequitable to allow the plaintiffs claim without taking the defendants cross claim into account. The first question which the court has to ask, is, therefore, as to whether the counterclaim amounts to a defence. If it does then liberty to defend should be given. That question turns on whether there is a sufficient connection between the circumstances giving rise to the claim, on the one hand, and the counterclaim on the other hand.

6.3 If, however, the counterclaim would not give rise to a set off in equity then the court has to exercise a wider discretion as to whether, in all the circumstances of the case, it is appropriate to grant judgment and, if judgment be granted, whether the judgment should be stayed pending the trial of the counterclaim. In such a case *Prendergast v. Biddle* gives guidance as to the factors which can properly be taken into account.

6.4 However on the facts of this case I am more than satisfied that there is a sufficient connection between the claim and the counterclaim such as would make it inequitable to allow the claim to be disposed of without also taking into account the counterclaim. The whole series of transactions entered into were part of a package. That package included the banking transactions from which the claim derives. The package also included the wide range of other agreements which give rise to the counterclaim. It does not seem to me that the mere fact that the money was advanced to individuals for the purposes of their investing same into the partnership, which partnership in turn entered into the arrangements which gives rise to the counterclaim, breaks that connection. In all the circumstances I am satisfied that if the counterclaim is made out it would provide the personal defendants with a set off in equity sufficient to arguably extinguish the plaintiffs claim. On that basis I am satisfied that the personal defendants have made out an arguable case to the effect that they do not actually owe any sum to the plaintiff.

6.5 Therefore, even if I had been satisfied that these proceedings were properly constituted, I would have made an order giving the defendants liberty to defend on the basis of the counterclaim contended for in the replying affidavits.