Neutral Citation [2016] IEHC 661

THE HIGH COURT

[2015 No. 58 IA]

BETWEEN

GERARD MCCAUGHEY

APPLICANT

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

RESPONDENT

IN THE MATTER OF AN INTENDED ACTION

BETWEEN

GERARD MCCAUGHEY

PLAINTIFF

AND

DEUTSCHE BANK AG AND IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION) AND MAINLAND VENTURE CORPORATION

INTENDED DEFENDANTS

JUDGMENT of Ms. Justice Murphy delivered on the 16th day of November, 2016.

1. This is an application for leave to issue proceedings against Irish Bank Resolution Corporation (in special liquidation), pursuant to s.6(2)(b) of the Irish Bank Resolution Act 2013 and/or pursuant to the Court's inherent jurisdiction. The claim in respect of which the applicant seeks consent is a claim for specific performance of an alleged settlement agreement made between the applicant and IBRC and the other intended defendants on 28th April, 2015, whereby IBRC allegedly agreed to settle all its claims against the applicant, including claims for costs arising from multiple hearings of multiple claims between the parties, in the High Court, the Court of Appeal and the Supreme Court.

2. The respondent Irish Bank Resolution Corporation (in Special Liquidation) is in the process of being wound up pursuant to a statutory scheme established by the Irish Bank Resolution Corporation Act 2013. The nine recitals at the commencement of the Act make it clear that the winding up is being conducted in the public interest and at public expense. Immediately following its enactment on 7th February, 2013, the Minister for Finance made a "*Special Liquidation Order*" pursuant to s.4 of the Act being Irish Bank Resolution Corporation Act, 2013 (Special Liquidation) Order 2013 (S.I. No. 36 of 2013), appointing Kieran Wallace of KPMG and Eamonn Richardson of KPMG as joint special liquidators of the company. One of the effects of the making of the special liquidation order was to prohibit the issuing of further actions or proceedings against IBRC without the consent of the court (s.6(2)(b)). This is an application for consent to issue proceedings claiming specific performance of an alleged settlement agreement against IBRC.

Background

3. The applicant appears to have been a private client of Anglo Irish Bank, Private Banking (now Irish Bank Resolution Corporation (in special liquidation), (hereinafter both referred to as "*IBRC*") since in or about the year 2006. In 2009, the applicant instituted proceedings against the bank and Mainland Ventures Corporation arising from his investment in two New York hotels (*McCaughey v. Anglo Irish Bank Corporation Limited and Mainland Ventures Corporation 2009/9042P*). In those proceedings, he sought rescission of the agreement giving rise to the said transaction, reinstating him to his position prior to investing in the fund. The applicant sought damages for fraudulent and/or reckless concealment; fraudulent misrepresentation; negligent misstatement; misrepresentation; conspiracy and intentional interference with his economic interests. He also sought aggravated and/or exemplary damages.

4. The New York hotel proceedings progressed as a pathfinder case to determine similar proceedings by co-investors. On 27th July, 2011, Birmingham J. dismissed the applicant's New York hotel proceedings with costs against him in favour of IBRC and Mainland Ventures Corporation. On 20th December, 2011, the applicant appealed that decision to the Supreme Court. The appeal was rejected and IBRC and Mainland Ventures Corporation were awarded their costs against the applicant above and below.

5. Following the conclusion of that action, on 22nd July, 2013 IBRC issued summary proceedings in the High Court against the applicant claiming the sum of €7,730,102.18 as money due and owing. Those proceedings were entitled "*Irish Bank Resolution Corporation (In Special Liquidation) v. Gerard McCaughey 2013/2346S*". It appears that summary judgment was granted in respect of part of the sum claimed and the remainder was remitted to plenary hearing on the grounds that the applicant had an arguable defence in respect of some loans. The order of the High Court granting summary judgment in respect of some of the monies due, appears to have been made on 30th January, 2014. That order was appealed to the Supreme Court and in a judgment delivered on 11th July, 2014, the Supreme Court, *inter alia*, varied the amount in respect of which summary judgment could be entered and the balance of the applicant's claim was remitted to plenary hearing.

6. While Mr. McCaughey's appeal of the order granting summary judgment was pending in the Supreme Court, IBRC sold its interest in his loans to Deutsche Bank AG. This was effected under a loan sale deed dated 28th March, 2014 which was completed by deed of transfer dated 23rd May, 2014. By the time the Supreme Court pronounced its decision on 11th July, 2014, the owner of the loans the subject of the proceedings, was *prima facie* Deutsche Bank AG. Furthermore, while the Supreme Court appeal was pending, an application for discovery in the same proceedings appears to have been made by the applicant, Mr. McCaughey which application came before Kelly J. on 12th May, 2014. The order made on that application which is not before this Court, is the subject of an appeal to the Court of Appeal.

7. Following the sale of the applicant's loans by IBRC to Deutsche Bank AG, Deutsche Bank AG applied to the High Court to be substituted as applicant in the summary proceedings. Despite opposition from Mr. McCaughey on the grounds that the extent of the redaction of the loan sale deed of 28th March, 2014 and the deed of transfer dated 23rd May, 2014 made it unclear what had been acquired by Deutsche Bank AG from IRBC, the application was granted by the High Court (Costello J.) and the order substituting Deutsche Bank AG for IRBC was perfected on 18th November, 2014. That order for substitution was also appealed by Mr. McCaughey to the Court of Appeal. Thus, at the end of 2014 there were two appeals pending before the Court of Appeal, the first being the

refusal of the discovery sought by Mr. McCaughey in May, 2014, and the second being the order substituting Deutsche Bank AG as applicant for IBRC by order of 18th November, 2014.

Correspondence re: discovery
8. A matter of some significance to the Court on this application, for reasons which will become apparent, is the correspondence which passed between the parties on the issue of discovery in late 2014. Following the substitution of Deutsche Bank AG for IBRC on 18th November, 2014, the applicant's solicitors MW Keller & Son wrote directly to IBRC (In Special Liquidation) seeking third party discovery of various documents set out in a schedule to the letter. On the same date, the said solicitors MW Keller & Son wrote to A&L Goodbody, solicitors for Deutsche Bank AG, seeking all documents relating to the deed of transfer of the loan, the subject matter of the proceedings, from IBRC to Deutsche Bank AG.

9. On 26th November, 2014, Ronan Daly Jermyn Solicitors wrote to MW Keller & Son, solicitors for the applicant confirming that that firm was acting on behalf of Irish Bank Resolution Corporation (in special liquidation) and that they had been passed a copy of the letter of the 18th November, 2014 sent directly to IBRC, requesting third party discovery.

10. There was some correspondence between A&L Goodbody, solicitors for Deutsche Bank AG, and Ronan Daly Jermyn, solicitors for IBRC, as to the appropriate approach to be taken by their respective clients in respect of the application for discovery but crucially in the Court's view there is a letter from the applicant's solicitors MW Keller & Son Solicitors dated 13th January, 2015 to Ronan Daly Jermyn Solicitors carrying the reference "*SD/FF/MCG111002" and referencing "Our client: Gerard McCaughey, Your client: Irish Bank Resolution Corporation (in special liquidation), Deutsche Bank AG v Gerard McCaughey, High Court Record Number No. 2013/2346S*". The letter is a brief one and states:

> *"Dear Sirs,*
>
> *We refer to previous correspondence and to yours of the 26th November wherein you confirm that you are seeking instructions in respect of 3rd Party Discovery. We would appreciate it if you would confirm that you have received instructions and that you are in a position to respond to our letter of the 18th of November."*

11. That letter was responded to by Ronan Daly Jermyn Solicitors on 13th February, 2015 and states:

> *"We refer to previous correspondence resting with your letter of 13 of January 2015 and in particular to your request for non-party discovery in connection with the above matter.*
>
> *Not being a party to the proceedings, our client will require an Order of the Court in order to make discovery of any documents within its possession…"*

12. It appears to the Court from this correspondence that while A&L Goodbody had previously acted for IBRC, as of the date of substitution of Deutsche Bank AG as plaintiff, IBRC were thereafter represented by Ronan Daly Jermyn Solicitors. The applicant's solicitors' correspondence shows that they were aware of that fact. The reference number used by the applicant's solicitor in the discovery correspondence is "*SD/FF/MCG111002*". This correspondence is exhibited in the second affidavit of Kieran Wallace, special liquidator.

Evidence
13. The evidence on which this application for consent to issue proceedings is based consists of three affidavits of Sharon Devereux Solicitor of MW Keller & Son, solicitors for the applicant, with the exhibits contained therein. She avers that on 10th March, 2015, approximately four months after Deutsche Bank AG had been substituted as plaintiff by order of the High Court and at a time when the appeals on discovery and substitution were listed before the Court of Appeal, a meeting occurred at the invitation of Deutsche Bank AG's representatives. Present at this meeting were the applicant and his legal advisors. Deutsche Bank AG were represented by Paul Hollway and Sophie Morris of KPMG and Brian Linnane and Gary Conway of Fitzwilliam Loan Management. According to Ms. Devereux it was agreed at that meeting that her client, the applicant, would put forward a settlement proposal to Fitzwilliam Loan Management acting on behalf of Deutsche Bank AG. She has exhibited a letter dated 30th March, 2015 addressed to Fitzwilliam Loan Management which sets out her client's proposal. The letter which is headed "*WITHOUT PREJUDICE*" states:

> *"Our client has two separate proposals which are being make [sic] strictly subject to the settlement being in full and final settlement of all claims between our client and Deutsche Bank AG and Irish Bank Resolution Corporation Limited (In Special Liquidation), Anglo Irish Bank Plc and Mainland Ventures Corporation and specifically includes any cost awards made against our client. You had confirmed at the meeting that, for the purposes of our discussions, we could assume you had taken over the entire IBRC connection relating to our client."*

The letter then goes on to set out two proposals, the contents of which are not material to this application. This letter from the applicant's solicitor bears virtually the same reference number as the earlier discovery correspondence, to wit "*SD/bw/MCG111002*".

14. By letter dated 20th April, 2015, which is again stated to be "*WITHOUT PREJUDICE*", MW Keller & Son wrote to Fitzwilliam Loan Management seeking a response to its letter and proposals of 30th March, 2015.

15. Ms. Devereux avers and the applicant claims that a settlement agreement was reached on 28th April, 2015. She avers that she had a discussion at approximately 12.30 pm on that date with Mr. Gary Conway of Fitzwilliam Loan Management, who confirmed that he accepted proposal two of the letter of MW Keller & Son dated 30th March, 2015. There is nothing in writing confirming the existence of the settlement on the terms set out by Ms. Devereux. However on the same date, Ms. Devereux wrote to A&L Goodbody, solicitors for Deutsche Bank AG informing them that Mr. Conway of Fitzwilliam Loan Management had accepted proposal two of the letter dated 30th March, 2015 (a copy of which was enclosed). The letter goes on to state that it was assumed that A&L Goodbody would draft the settlement document and it was suggested that the appeals before the Court of Appeal be adjourned for a month to facilitate the execution of the agreement.

16. On the same date, 28th April, 2015, MW Keller & Son wrote to the office of the Court of Appeal stating that the entire action had been settled and consequently that both appeals before the Court of Appeal were moot. The letter pointed out that the settlement was subject to formal execution of the terms agreed and that those terms were currently being drafted. An adjournment for mention was sought to the 11th June, 2015 for the purpose of finalising the settlement. The case reference in the letter to the office of the Court of Appeal is "*IBRC (In Special Liquidation) as substituted by Deutsche Bank AG v. Gerard McCaughey, High Court Record No. 2013/2346S, Court of Appeal Record numbers: 2014/1447 and 2014/323"*. The matter was mentioned before the Court of Appeal on 29th April, 2015 and was adjourned for mention to the 11th June, 2015. It appears that all three parties, being the applicant Mr.

McCaughey, Deutsche Bank AG and IBRC were in attendance before the court on 29th April, 2015 and that all three were separately represented.

17. On 1st May, 2015, MW Keller & Son wrote to A&L Goodbody seeking a draft settlement agreement. On 8th May, 2015, Mr. Paul Madden, solicitor of A&L Goodbody, emailed Ms. Devereux. The subject of the email was stated to be "*McCaughey and Deutsche Bank*". The email was headed "*Without Prejudice, Subject to contract/Contract Denied*" and states:

> *"Sharon,*
>
> *Please see attached a first draft of the settlement agreement. We look forward to your comments."*

The draft settlement agreement prepared by A&L Goodbody solicitors for Deutsche Bank AG is headed "*Without Prejudice, Subject to contract/Contract denied*". It names three parties: 1 - Deutsche Bank AG, 2 - Gerard McCaughey and 3 - Irish Bank Resolution Corporation Limited (in special liquidation) and states that "*the plaintiff, the defendant and IBRC are hereinafter collectively called 'the Parties'*". The Court has no evidence from Deutsche Bank AG and therefore does not know how IBRC Limited (in Special Liquidation) came to be listed as a party to the settlement agreement. However, given that IBRC had an interest in the appeals then pending before the Court of Appeal, its inclusion is not surprising. The agreement refers to the settlement of the summary summons proceedings and the two appeals before the Court of Appeal and includes the record numbers of the proceedings. The settlement terms are set out at para. 1 of the draft. Having set out the obligations of the applicant, Mr. McCaughey, under the draft agreement at paras. 1.1.1, to 1.1.4, the draft goes onto provide at 1.1.5:

> *"Subject to the Defendant having complied with all of the above, the Parties agree that this Agreement and the payment of the sums hereunder is in full and final settlement, discharge and release of any and all claims the Parties and any of them have under the Loan Agreements including but not limited to the Proceedings."*

Provision is made at the end of the draft agreement for the affixing of the seal of Deutsche Bank AG and IBRC and for the signature of the applicant Gerard McCaughey.

18. The applicant's solicitor was not happy that this draft was a true reflection of the agreement with Deutsche Bank AG. She sent her proposed draft on 14th May, 2015. In her draft the parties remain the same but the subject of the agreement, namely the proceedings to be settled, was expanded to include as well as the summary proceedings, the applicant's earlier claim against Anglo Irish Bank in respect of the alleged misselling of the New York hotel funds. Further, the applicant's solicitor included a new clause in the draft agreement (clause 8), stipulating that the agreement contained the whole agreement between the parties relating to the transactions provided for in the agreement.

19. At that stage the solicitors for Deutsche Bank AG, A&L Goodbody began to baulk at the breadth of the draft agreement proposed by the applicant. On 18th May, 2015, they objected that *"At the very least, the inclusion of 'all disputes between the parties' and the definition of the Proceedings could not be acceptable to our clients or something within their power to agree to"*. Mr. Madden stated that he would review the draft agreement with his client and revert with changes. He also advised that he needed to take further instructions.

20. That same evening, 18th May, 2015, the applicant's solicitor sent an email to Mr. Madden, the subject of which was "Deutsche Bank AG and McCaughey", the email states:

> *"Dear Paul,*
>
> *I refer to your email earlier and attach letters setting out the agreement between our clients. I would refer you to paragraph 4 of the letter of the 30th March 2015 wherein it confirmed that our clients proposal is made strictly subject to the settlement being in full and final settlement of all claims between our client and Deutsche Bank AG and Irish Bank Resolution Corporation Limited (In Special Liquidation), Anglo Irish Bank Plc and Mainland Ventures Corporation and specifically includes any costs awards made against our client. We are of the opinion that the amendments are entirely within this scope.*
>
> *Please take your client's instructions as a matter of urgency. This matter has now been on-going for quite some time and our proposed amendments were sent to you last week. We await hearing from you by return."*

21. On the same day, less than an hour later, Mr. Madden replied by email headed "*Without prejudice*":

> *"Sharon,*
>
> *I have set up a call tomorrow morning with my client to discuss. I will be advising that my client that they can only deliver what is within their power to do so, namely settle the summary proceedings and to that end, a vacation order does not seem appropriate either. With respect to your suggested amendments, we received these last Thursday. It is now Monday."*

22. Less than two days later, on 20th May, Mr. Madden sent a further email to the applicant's solicitors, again headed "Without Prejudice" and stating:

> *"Sharon,*
>
> *I have advised Deutsche Bank that they are not in a position to settle anything other than the summary proceedings. On this basis but subject to formal instruction, our client cannot accept any of the suggested changes proposed by your office and including any order to vacate.*
>
> *I have sought formal instruction to revert to your firm on this basis but still await these instructions. However, for the purposes of moving matters along, I cannot see how this position will change."*

23. On 21st May, 2015, the applicant's solicitors sent a further letter by email to Deutsche Bank AG's solicitors. Again the heading on the letter is *"Deutsche Bank AG –v- Gerard McCaughey, High Court Record No. 2013/2346S, Court of Appeal Record Numbers 2014/1447 and 2014/332".* It reads:

> *"Dear Sirs,*
>
> *We refer to your email earlier and note your comments, albeit we are somewhat shocked at them. At the meeting with Fitzwilliam Loan Management, they made it clear that they were in a position to settle all matters and could step into Anglo and IRBC's shoes. This point was specifically raised and it was confirmed by same that they were in a position to settle all matters.*
>
> *If you [sic] clients are not in a position to settle all matters then we would appreciate it if you would furnish us a full copy of the documents to establish what they did in fact buy. Again, we specifically mentioned the Woolgate Judgment in the meeting and we feel that the striking out of this Judgment is certainly, according to Fitzwilliam Loan Management, within the remit of your clients.*
>
> *To be clear we are seeking vacation of all the Orders and Judgments to do with the Summary and Plenary proceedings herein (High Court Record No. 2013/2346S and Court of Appeal Records Nos. 2014/1447 and 2014/332 and Supreme Court Record No. 070/2014) together with confirmation that your clients will not enforce any Cost Orders against our client in respect of the New York Hotel Fund proceedings (High Court Record No. 2009/9042P and Supreme Court Record No. 493/2011)."*

24. During the period between 28th April and 11th June, 2015 to which date the appeals pending before the Court of Appeal had been adjourned to allow implementation of the settlement, there was a significant level of correspondence between A&L Goodbody and MW Keller & Son relating to the alleged agreement. A&L Goodbody sought time to obtain instructions from their client but indicated that they had advised their client that they were not in a position to accept the applicant's proposed amendments to the draft settlement agreement.

25. This provoked a further iteration of the alleged agreement from MW Keller & Son solicitors for the applicant on 29th May. The letter is again headed "*Deutsche Bank AG -v- Gerard McCaughey*" and states, *inter alia*:

> *"We note your comments but the reality is that your clients confirmed in the meeting that they were in a position to deal with all matters and it was on this basis that our client entered negotiations with your client. The letter, which outlined the terms upon which a settlement was agreed, was sent to your clients on the 30th of March and to yourselves on the 28th of April. However, you did not raise any issue until the 18th May. As you are aware, the matter was adjourned by the Court of Appeal on the basis that the action had been settled on agreed terms and it was the [sic] adjourned in order for formal execution of the terms agreed. Your client is now purporting to change the terms of the agreement."*

Having recorded the applicant's grievance at what his solicitor characterised as Deutsche Bank's attempt to resile from terms which they had previously confirmed, they invited A&L Goodbody to take its client's immediate instructions. The letter goes on to assert that at the meeting on 10th March, 2015 with Fitzwilliam Loan Management, Brian Linnane and Gary Conway were quite clear that they had the authority to deal with all matters.

26. In response, A&L Goodbody on behalf of Deutsche Bank AG asserted that the meeting of 10th March was held without prejudice and that its client did not have the benefit of legal representation during the course of the meeting. It asserted that the proposed settlement terms discussed during the meeting were not legally binding and repeated that it was still awaiting instructions. The letter is expressed to be "*without prejudice*".

27. On the same day, A&L Goodbody on behalf of Deutsche Bank AG wrote an open letter complaining that the applicant's solicitors were purporting to deal with "*without prejudice*" negotiations in open correspondence.

28. By letter of the same date the applicant's solicitors responded that the issue of legal representation was a matter for Deutsche Bank AG. The letter restates the position that it was specifically stated at the meeting (10th March, 2015) that Deutsche Bank AG had the authority to deal with matters as they did and that it was on that basis that the applicant had entered into discussions. Dealing with the suggestion from A&L Goodbody that Deutsche Bank AG had no power to enter the agreement, the applicant asked Deutsche Bank AG's solicitor to furnish them with *"a copy of all the documentation relating to what your client, Deutsche Bank AG purchased from your other client IBRC (in Special Liquidation)".* This is the first mention in the correspondence of any potential role of IBRC and may relate to the fact that at the time of the sale of the applicant's loans on 28th March, 2014, both the purchaser and the vendor appear to have been represented by A&L Goodbody. It is worth noting however that there is no suggestion in the applicant's solicitor's letter of 29th May, 2015, that IRBC was a party to, or bound by the agreement allegedly made between the applicant and Deutsche Bank AG on 28th April, 2015.

29. On 8th June, 2015, the solicitors for the applicant complained that they still had not heard from A&L Goodbody on behalf of Deutsche Bank AG as to the instructions of its client.

30. On 9th June, 2015, two days before the matter was due for mention before the Court of Appeal, A&L Goodbody on behalf of Deutsche Bank AG wrote asserting that everything that had occurred was on a without prejudice basis and that no agreement existed unless or until a signed agreement was entered into between the parties and further advising that they would revert once they had instructions from their client. There it appears the matter rests. The appeals before the Court of Appeal have been adjourned pending the outcome of this application.

The applicant's case

31. In support of the application for consent to issue proceedings against IBRC, the applicant's solicitor relies on the foregoing correspondence as demonstrating that he has a claim against IBRC. In a supplemental affidavit the applicant's solicitor seeks to underpin the claim that Deutsche Bank AG and IBRC were acting as one by repeated averments that at the material time, being March/April, 2015, A&L Goodbody was acting for both Deutsche Bank AG and IBRC.

32. At para. 5(a)(ii) of her supplemental affidavit she avers:

> *"Notably, at all material times and until the firm of Ronan Daly Jermyn contacted us on 8 July 2015, both Deutsche Bank AG and IBRC were represented by the same firm of solicitors, A&L Goodbody. Ronan Daly Jermyn has not yet come on record for IBRC."*

In the same paragraph at 5(b), Ms. Devereux avers that following the order for substitution made by the High Court in November,

2014:

> *"The solicitors for Deutsche Bank remained the solicitors for IBRC although I understand that separate individual solicitors within A&L Goodbody were acting."*

At para. 5(f) Ms. Devereux avers that following the conclusion of the alleged agreement with Mr. Gary Conway of Fitzwilliam Loan Management she wrote to A&L Goodbody acting:

> *"… on behalf of both Deutsche Bank AG and IBRC by letter dated 28 April 2015 informing them of the settlement in term of Proposal 2 of the letter of 30 March 2015 …"*

At para. 5(i) Ms. Devereux avers that at the time the first draft agreement was furnished by A&L Goodbody on behalf of Deutsche Bank AG:

> *"Notably, whilst acting for both Deutsche Bank AG and IBRC, the draft Settlement Agreement prepared by A&L Goodbody included the IBRC as a party to the settlement."*

At para. 6(b) of her affidavit Ms. Devereux avers:

> *"At all material times, the firm of A&L Goodbody were representing both Deutsche Bank AG and IBRC".*

At para. 7 of her affidavit, Ms. Devereux avers that the applicant's offer of settlement in the letter of 30th March, 2015:

> *"… was accepted by Deutsche Bank AG on behalf of itself and IBRC."*

At para. 10 of her supplemental affidavit, having referred to the proposed statement of claim, Ms. Devereux goes on to assert that in circumstances where the firm of A&L Goodbody was acting on behalf of both Deutsche Bank AG and IBRC, the exact position regarding the settlement was known to IBRC and indeed to Mr. Wallace, the special liquidator.

The respondent's case

33. In his replying affidavit, Mr. Wallace avers that:

> *"Following its acquisition of the Plaintiff's loans, Deutsche acquired sole authority to deal with those loans and it may be the case that in that capacity it has conducted negotiations with Mr. McCaughey or his representatives. I aver on oath that no representative of IBRC has conducted any negotiations with Mr. McCaughey or his representatives".*

This, he explains, is why:

> *"(a) there is no signed Settlement Agreement to which IBRC is a party;*
>
> *and*
>
> *(b) Ms. Devereux is unable to identify on affidavit any details of any oral Settlement Agreement to which IBRC is a party."*

He contends that there is no basis at all for suggesting that IBRC has entered into any settlement agreement with Mr. McCaughey and that Mr. McCaughey has failed to set out any even *prima facie* basis to suggest the contrary.

34. Mr. Wallace avers that on being notified by A&L Goodbody on 8th July, 2015 of the within motion, Ronan Daly Jermyn wrote to the applicant solicitors confirming for the record that IBRC had not been a party to any settlement negotiations. Pointing to the correspondence upon which the application is based and in particular the letter of 30th March, 2015, he asserts and avers that IBRC was not a party to the correspondence and was not aware of the correspondence.

35. Insofar as the applicant solicitor purports to rely on "*the fact*" that at the time of the conclusion of the agreement, A&L Goodbody was acting for both Deutsche Bank AG and IBRC, Mr. Wallace refers to the discovery correspondence referred to earlier [para. 8] which dates from 18th November, 2014 to January, 2015, some months before the alleged agreement.

36. He contends that it is clear that Ms. Devereux, solicitor for the applicant was aware at that juncture, that having sold its interest in the loans to Deutsche Bank AG, IBRC was thereafter represented by Ronan Daly Jermyn Solicitors. He points to the letter of 18th November, 2014 when MW Keller & Son Solicitors, Ms. Devereux's firm wrote directly to IBRC seeking non-party discovery of various categories of documents, a request which was made under the heading "*Deutsche Bank AG v. Gerard McCaughey, High Court Record No. 2013/2346S*". He refers also to the letter of 26th November, 2014 in which Ronan Daly Jermyn Solicitors wrote to the applicant's solicitors MW Keller & Son stating "*We confirm we act on behalf of Irish Bank Resolution Corporation (in special liquidation) 'IBRC'*". He points out that by a separate letter of 18th November, 2014, MW Keller & Son wrote to A&L Goodbody and requested that its client, which the letter named as Deutsche Bank AG, make inter-party discovery of certain categories of documents.

37. A&L Goodbody on behalf of Deutsche Bank AG replied by letter of 11th December, 2015, in which it stated that certain documents which the applicant solicitors were seeking was subject to a confidentiality agreement and that A&L Goodbody had written to IBRC to ask IBRC to permit Deutsche Bank AG to discover the documents. This letter made it clear that the client for which A&L Goodbody acted was Deutsche Bank AG and that because it did not act for IBRC it needed formally to write to IBRC to obtain its consent to the discovery.

38. As it happens, IBRC did not consider it appropriate that the documents should be discovered by Deutsche Bank AG and expressed that view to A&L Goodbody in two letters dated 23rd December, 2014. Those letters were sent by Ronan Daly Jermyn Solicitors on behalf of IBRC. A&L Goodbody in turn informed MW Keller & Son, the applicant solicitors, of the fact that IBRC did not consent to the documents being discovered in a letter dated 2nd January, 2015. This letter expressly stated:

> *"… we have been in contact with the solicitors for Irish Bank Resolution Corporation Limited (In Special Liquidation), Messrs. Ronan Daly Jermyn, in relation to the contents of your letter and they have confirmed that Irish Bank Resolution Corporation Limited does not consent to the documents being furnished to you…"*

Again this letter made clear to MW Keller & Son that A&L Goodbody represented Deutsche Bank AG and Ronan Daly Jermyn represented IBRC.

39. Mr. Wallace also points to the fact of direct correspondence between the applicant's solicitors and Ronan Daly Jermyn on the issue of discovery. By letter dated 13th January, 2015 the applicant's solicitors wrote directly to Ronan Daly Jermyn to inquire whether IBRC would make non-party discovery in the terms sought in MW Keller & Son's letter of 18th November. That letter is headed: "*Your Client: Irish Bank Resolution Corporation (in special liquidation)".* Ronan Daly Jermyn responded by letter of 13th February, 2015 and again named its client as IBRC and stated on behalf of IBRC that not being a party to the proceedings, their client would require an order of the court in order to make discovery.

40. From this correspondence, Mr. Wallace invites the Court to conclude that at the time of the alleged settlement negotiations with the representatives of Deutsche Bank AG the applicant's solicitors were well aware that A&L Goodbody was not acting for IBRC and that they were further aware that IBRC was represented by Ronan Daly Jermyn. The Court notes that in all the discovery correspondence, the reference number of the applicant's solicitors is "*SD/../MCG111002*". That same reference number is on all the correspondence relating to the alleged settlement between the applicant's solicitors and A&L Goodbody. This indicates to the Court that Ms. Devereux dealt with both the discovery correspondence and the purported settlement agreement correspondence. Finally Mr. Wallace in his affidavit refers to the fact that when the applicant's two appeals were listed before the Court of Appeal for hearing on 13th April, 2015 at a time when the applicant was negotiating with the representatives of Deutsche Bank AG, IBRC were separately represented by Ronan Daly Jermyn Solicitors and counsel.

Summary of the parties' positions

41. On the evidence presented to the Court, the applicant's claim is that he entered a valid and binding agreement on 28th April, 2015 with representatives of Deutsche Bank AG who invited him to assume for the purpose of the negotiation that Deutsche Bank AG had taken over the entire IBRC connection relating to Mr. McCaughey. His perception that Deutsche Bank AG was acting on its own behalf and on the behalf of IBRC is underpinned by the fact that the initial draft agreement produced by Deutsche Bank AG's solicitors, A&L Goodbody, refers to IBRC as party to the settlement and that at that material time, A&L Goodbody were solicitors acting for IBRC and Deutsche Bank AG.

42. On the respondent's side, IBRC maintains that there is not a shred of evidence that it took part in any settlement negotiations or authorised any party to undertake settlement negotiations on its behalf. It contends that the inclusion of its name on the first draft of a settlement agreement was done without its knowledge or consent and is a matter for Deutsche Bank AG and the applicant to resolve. It asserts that the applicant's reliance on the purported fact that at the material time A&L Goodbody acted for both Deutsche Bank AG and IBRC is entirely unfounded and is unfounded to the knowledge of the applicant's solicitor who had corresponded months earlier with its actual solicitors Ronan Daly Jermyn, when seeking discovery within the same set of proceedings. The respondent also drew the Court's attention to the fact that the applicant's solicitor and deponent has chosen not to offer the Court any explanation for what it claims are misleading averments as to the identity of the respondent's legal representatives at the time of the alleged settlement.

The law

43. The Court has been directed to a number of authorities in relation to the criteria which it should apply when determining whether an application for consent to the issuing of proceedings should be granted pursuant to s.6(2)(b) of the Irish Bank Resolution Corporation Act 2013. Though a number of authorities have been opened to the Court, the Court does not consider it necessary to go beyond the High Court decision of Laffoy J. in *Wright-Morris v. Irish Bank Resolution Corporation Limited (in special liquidation)* [2013] IEHC 385, in which she set out the criteria to be applied by the court in determining an application for consent pursuant to s.6(2)(b) of the Act. The decision and analysis of Laffoy J. was subsequently endorsed by the Court of Appeal in *McGuinness v. Kenmare Property Company Limited* [2015] IECA 299, which case also concerned an application for consent pursuant to s.6(2)(b) of the Irish Bank Resolution Act, 2013.

44. While the factual issues with which Laffoy J. was grappling were complex in that the applicant's application was for consent to issue proceedings in the United Kingdom rather than in this jurisdiction, her enunciation of the legal principles to be applied to the facts of any particular case is of general application.

45. Having accepted the agreed submission of counsel that s.6(2)(b) of the Act of 2013 was analogous to the provisions of s.222 of the Companies Act 1963, Laffoy J. reviewed the available authorities, which as it happened were all U.K. authorities, and identified two criteria on which the Court should base the exercise of its discretion:

1. What is right and fair in the circumstances of the particular case?

and

2. Can the claim conveniently be determined within the liquidation?

46. Thus, if a court is persuaded that it is "*right and fair*" that an applicant's claim should proceed, then the court should go on to consider whether the claim can conveniently be disposed of within the liquidation. If the answer to the second question is "*no"*, then consent to issue proceedings should be given. Another way of formulating the question of "*what is right and fair?"* is to ask whether the applicant has demonstrated a stateable claim. In our constitutional framework, the right of access to the courts and the associated right to litigate support the view that if a person has a stateable claim then it is "*right and fair*" that he be allowed to pursue that claim. Assuming therefore the existence of a stateable claim which cannot conveniently be dealt with in the course of the liquidation, consent should be granted.

47. The threshold for establishing a stateable claim is a low one and generally speaking, in assessing the existence of such a claim, the court should take the applicant's claim at its highest. However, in exercise of its inherent jurisdiction the court is not precluded from considering the affidavit evidence on which the purported claim is based and where appropriate is not precluded from deciding on that evidence, that no stateable claim has been made out and as a consequence that it would not be "*right or fair*" to allow the claim to proceed.

Decision of the Court

48. The Court has no difficulty in holding that if this case were stateable, it could not conveniently or appropriately be dealt with in the course of the liquidation. The alleged settlement postdates the liquidation and therefore lies against the liquidator rather than the entity being liquidated. Crucially the alleged claim involves more than one party and it is impossible to envisage how a claim involving multiple parties could be accommodated within the framework of a liquidation.

49. That said, in the Court's view, this application falls at the first hurdle in that the Court is not persuaded that the applicant on the evidence adduced, has shown even a *prima facie* case that he has a stateable claim against IBRC for specific performance of a settlement agreement. In coming to this view the Court is mindful that all of the evidence adduced on behalf of the applicant emanates from his solicitor. Regrettably the Court considers that it must approach her evidence with a certain circumspection, because the Court is persuaded that in advancing this application she misinformed the Court on a material aspect of the applicant's claim. By averring repeatedly that both Deutsche Bank AG and IBRC were represented by the same solicitors firm at the time of the purported settlement she invited the Court to infer that at the time of the alleged settlement Deutsche Bank AG was acting with the knowledge and consent of IBRC. On the evidence she knew that her repeated averments of joint representation were not true. Three months before the alleged settlement, her firm using her reference number engaged in a series of correspondence with Ronan Daly Jermyn as solicitors for IBRC and A&L Goodbody as solicitors for Deutsche Bank AG, on the issue of discovery in the very proceedings which gave rise to the alleged settlement. No explanation has been proffered by her, or on her behalf, as to how this misinformation was put before the Court, other than a throwaway remark by counsel, to the effect that there had been some "*slippage*" on the issue of representation. Affidavits are not pleadings and the court should not have to remind a solicitor that in swearing an affidavit, even one that may have been drafted by counsel, she is swearing as to the truth of its contents.

50. Leaving that issue aside and accepting for the purpose of this application that everything in the applicant's solicitors correspondence is accurate, that correspondence merely shows an engagement by the applicant with the representatives of Deutsche Bank AG. The extract of her own letter to Fitzwilliam Loan Management, the representatives of Deutsche Bank AG, on which she pins the applicant's entitlement to sue IBRC is the sentence *"You had confirmed at the meeting that for the purposes of our discussions, we could assume you had taken over the entire IBRC connection relating to our client"* [emphasis added]. It is difficult to know precisely what is meant by the "*the entire IBRC connection to our client*" but the Court is satisfied that the phrase "*for the purposes of our discussions, we could assume*" does not indicate that Deutsche Bank AG's representatives were purporting to act with the authority of IBRC. It is merely an invitation to assume for the limited purposes of the discussion that they did so. In fact such a phrase suggests that Deutsche Bank AG had no such authority but that perhaps in the event that discussions were fruitful, they might be in a position to obtain such authority.

51. All of the correspondence after the alleged settlement supports this construction. The Court has set out above in some detail, the correspondence between the applicant's solicitor and the solicitors for Deutsche Bank AG. Not once in that correspondence does the applicant's solicitor suggest that IBRC were a party to the agreement nor that Deutsche Bank AG had authority from IBRC to negotiate with the applicant. The alleged agreement is stated to be with Deutsche Bank AG and the complaints made are all made against the representatives of Deutsche Bank AG. The applicant's solicitor expressed a sense of grievance that Deutsche Bank AG had represented a position from which they were now resiling. The applicant's solicitors' letter of 21st May, 2015 is particularly instructive in this regard. It states in the second paragraph:

> *"If you [sic] clients are not in a position to settle all matters then we would appreciate it if you would furnish us a full copy of the documents to establish what they did in fact buy."*

This is not the request of someone who had been acting in the belief that Deutsche Bank AG had negotiated a settlement on behalf of and with the authority of IBRC. In fact, it suggests an acceptance by the applicant's solicitor that in conducting the negotiations the representatives of Deutsche Bank AG did not have such authority and may have overreached their capacity.

52. While the applicant may have a stateable claim against Deutsche Bank AG, (the Court wishes to make clear that it is expressing no view on the merits of such a claim) he has demonstrated no such stateable claim against IBRC. The Court has the impression that this entire application is a construction designed to implicate IBRC in a process in which it had no involvement. Based on the somewhat flimsy foundation of her own letter to Fitzwilliam Loan Management of 30th March, 2015, the applicant's solicitor has sought to advance a claim against IBRC based on the fact that Deutsche Bank AG's solicitor included IBRC as a party to a draft settlement agreement and has then topped the construction with an untrue averment that both Deutsche Bank AG and IBRC were represented by the same solicitor at the time of the settlement. The applicant's lawyers have in effect created a claim which is without evidential foundation. It appears to the Court on the evidence, that this is a claim which is bound to fail and in that sense is frivolous and vexatious and accordingly, that the Court should exercise its inherent jurisdiction to prevent an abuse of process by denying the applicant consent to issue proceedings pursuant to s.6(2)(b) of the Irish Bank Resolution Act 2013. The Court therefore refuses the application.