[2019] IEHC 636

THE HIGH COURT

[2016 No. 1095S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

THOMAS MULLANE

DEFENDANT

Judgment of Mr. Justice MacGrath delivered on the 11th day of July, 2019.

1. This is an application for summary judgment. The total sum claimed is €333,980.45 and is divided as follows:-

   (i) €106,595.96 in respect of loan account ending 691 [all account numbers have been edited] opened on the 2nd August, 2005;

   (ii) €7,112.75 in respect of account number ending 188 being an overdraft facility of the 11th March, 2008 ("*the overdraft*");

   (iii) €180,271.74 in respect of loan account ending 857, opened on the 28th March, 2011;

   (iv) A further sum of €40,000 is claimed in respect of a liability on a guarantee dated 8th June, 2009 whereby the defendant agreed to guarantee the debts of a company, Knockdown Construction Limited ("*the company*"). The defendant has accepted his liability in respect of the guarantee.

2. This application is grounded on the affidavit sworn on the 23rd November, 2016 by Mr. Brian McGuinness, a manager and officer of the plaintiff. He avers that on 11th March, 2008 the plaintiff entered into an agreement with the defendant whereby an overdraft facility was advanced to the value of €5,000. Sums were withdrawn in excess of the limits approved and by letter of the 17th February, 2015 the facility was terminated and repayment demanded. The amount now outstanding is €7,112.75. A credit agreement made on 2nd August, 2005 was entered into between the parties who provided for payment to the plaintiff of €125,375.56; repayable by way of monthly instalments of €302.09 commencing on 2nd September, 2005 and one instalment of €100,000 on 2nd August, 2012. The value received by the defendant was an advance of €100,000 on 11th March, 2008 and the annual percentage rate charge thereon was 3.7%. The defendant defaulted and demand was made on 20th June, 2016. The amount now outstanding is €106,595.96. A further loan agreement was entered into on 28th March, 2011 for €143,375.14; repayable by way of two monthly instalments of €458.38 followed by one final repayment of €142,458.38 payable on 26th May, 2011. The value received by the defendant was an advance of €142,000 on 28th March, 2011 with an annual percentage rate of interest being charged at 6.217%. Mr. McGuinness also refers to the guarantee for which Mr. Mullane accepts liability.

3. The application is opposed by Mr. Mullane. In a replying affidavit sworn on 6th March, 2017, he avers that he was persuaded by a manager of the plaintiff to invest in a fund, the Fifth Belfry Properties Fund (hereafter "*Belfry 5 Fund* ") and that the plaintiff provided him with a facility to fund that investment. He denies liability in respect of the account relevant to this transaction, account ending 691, on the grounds of breach of contract and negligent misrepresentation on the part of the plaintiff. He contends that he was not afforded the opportunity to seek independent legal advice. Further he states that the deal was rushed through by the local branch official. A separate overdraft was provided to service the interest. This investment ultimately became valueless and was the fund was closed.

4. With regard to the other loan (account ending 857), Mr. Mullane at first maintained that the sums due on foot of this account arose from restructuring of a previous loan or loans which had been provided to the company and that those loans were transferred into his personal name between 2008 and 2011. He avers that he was advised by a bank manager, that the bank was anxious to "*tidy everything up*" and that banking would be easier if this was done. He contends he was unaware of the implication of the loan being transferred from the company into his personal name and that he was not given an opportunity to seek independent legal advice nor was he advised about cooling-off periods. He had been brought into the local branch office and presented with various documents for signature at different times. Since the institution of these proceedings he sought copies of all documents relating to the overdraft and loans as it is his view that for the most part the loans and monies were advanced to the company and not to him. A data protection request was made but an issue arose as to whether company documentation could be released. In his initial affidavit, Mr. Mullane does not expressly allege deceit or fraud on the part of the bank.

5. In a more detailed affidavit sworn on 7th January, 2019, Mr. Mullane contends that in 2005 he was working on a building site at Listowel, Co. Kerry when he received a phone call from Mr. John Lenihan, who was attached to the Listowel branch of the plaintiff bank. It was arranged that Mr. Lenihan would travel to meet him at the site. Mr. Lenihan informed him that the purpose of the visit was to advise him to invest in the Belfry 5 Fund, that the bank would loan him €100,000 to invest in the fund and that the interest repayments which Mr. Mullane would have to cover would be at a rate of 3%. Mr. Lenihan advised him that he "*couldn't go wrong*" with the investment and that investors in the previous Belfry 4 Fund had doubled their money over a period of six years. While Mr. Mullane states that he trusted Mr. Lenihan, and that Mr. Lenihan's belief in the fund appeared to be genuine, at that time he was not interested in the investment as he had no investment experience and he was too busy with other work commitments. Approximately one week later, Mr. Lenihan again made contact by telephone and travelled to meet him on a building site. Mr. Lenihan repeated the advice that he should invest and Mr. Mullane avers that to show the bank's confidence in the fund, the bank was now offering him a facility to service the interest payments on the investment. Mr. Mullane states that Mr. Lenihan told him that he "*would be mad not to take up the offer*" as it was costing him nothing. On the strength of such assurances Mr. Mullane agreed to

invest in the funds. He states that to the best of his recollection, Mr. Lenihan attended the site with a completed application form and he simply signed his name and also signed his wife's name. He states that Mr. Lenihan was aware of this. This was a rushed process and Mr. Lenihan made him feel that he did not have time to have his wife sign the form. He further avers that he does not remember ever receiving a prospectus but that if he did, it was certainly not presented to him when he signed the application form. He points to the fact that the application form within the prospectus, exhibited to Mr. McGuinness' affidavit, is incomplete. The application form signed by him was separate to the prospectus. Although the prospectus may have contained numerous warnings about risks, he avers that they were not drawn to his attention and that he was not provided with the prospectus prior to signing his application form, to the best of his recollection. He further avers that Mr. Lenihan knew that he was unaware of the risks involved in the investment. On the contrary, he avers that Mr. Lenihan informed him that he was guaranteed to make money on the investment. Mr. Mullane states he was certainly never advised that he could lose his entire investment. He also alleges that under the applicable regulatory regime, the plaintiff was obliged to ensure that the investment was suitable for him, which was clearly not the case; the bank did not go through a process of ascertaining his financial circumstances, appetite for risk or ability to incur losses. The investment was a highly speculative investment. He was effectively gambling with money that he did not have to lose. Fundamentally, he avers that the bank official actively misrepresented the position to him in relation to the investment. He states that a number of years later, in or around 2008, he received correspondence from the Belfry 5 Fund, notifying him that the value of his investment had decreased to €64,000. He then contacted the Listowel branch of AIB and requested to speak to Mr. Lenihan. He was informed that Mr. Lenihan was no longer an employee of the bank and he was advised by an official there that he was not permitted to withdraw the balance of the sum which had been invested. Mr. Mullane states that he was not aware of this condition and was unaware that once he invested his money he would not be permitted to withdraw it. Subsequently, he received correspondence from the Belfry 5 Fund indicating that his investment now had a nil value.

6. Mr. McGuinness, in response to the defendant's first affidavit and in a supplemental affidavit sworn by him on 11th October, 2017, exhibits loan documents relating to the investment fund and states that liability to repay €100,000 on the expiry date of the loan, 2nd August, 2012, was not dependent on the performance of the fund. The overdraft was used to service monthly interest payments and an increased overdraft of €5000 was provided to Mr. Mullane on foot of a letter of loan offer dated 11th March, 2008.

7. Mr. McGuinness states that the prospectus for the Belfry 5 Fund investment contained warnings about risk. He avers that no representation was made that the investment was guaranteed. The prospectus warned that investment in the commercial property market in the United Kingdom was speculative and involved a high degree of financial, commercial and other risk. By signing the application form to invest in the Belfry 5 Fund, the defendant and his co-investor acknowledged all the terms and expressions in the prospectus and declared that they had read them and were aware of the risk. Belfry 5

was not a subsidiary of the plaintiff or part of the AIB group of companies and Mr. McGuinness avers that if Mr. Mullane has an issue with the fund, it is a matter which he should have raised with that fund.

8. With regard to the contention of Mr. Mullane that funds were restructured in a manner such that he became personally liable for the company's debts, Mr. McGuinness outlines the following sequence of events:-

(i) On 30th June, 2008, existing loans and accounts ending 774 and 501 (which were in the name of the defendant personally) were restructured on the basis that they would be repaid within six months of the date of the sale of a bungalow owned by the defendant for €285,000.

(ii) On the 1st August, 2008, the defendant reduced his borrowings by €172,000 in respect of account ending number 774 to €102,825.06.

(iii) On the 11th September, 2008, following a request by Mr. Mullane for a top up loan of €50,000 on account ending number 774, €154,000 was sanctioned by way of a new account, ending number 857, on the basis that it would be repaid from the sale proceeds of a property owned by the defendant for €850,000.

(iv) On the 25th May, 2009 the defendant reduced the loan balance by €20,000 and sought an extension of time for two months to repay the balance of €134,000. This was also sought and granted pending completion of the sale of a property in Limerick.

(v) On the 30th November, 2009, the plaintiff agreed to extend the repayment date on the said loan by six months with interest only payments, as the sale of the property in Limerick had not been completed.

(vi) On 16th June, 2010 the plaintiff agreed to a further extension of six months on the same terms.

(vii) Finally, on the 28th March, 2011, the plaintiff agreed to a further extension for two months, with two payments of €458.38 on the 26th April 2011, and €142,458.38 on the 26th May 2011. This is one of the loans which is the subject matter of these proceedings.

9. Mr. McGuinness also avers that the liabilities of the Company to the plaintiff were secured by personal guarantees entered into on 16th July 2007, 12th October, 2007 and 26th November, 2007.

10. Mr. Mullane disputes Mr. McGuinness' contention that the Belfry 5 Fund was a separate entity to the Bank. He maintains that the bank was responsible for the sale of the Belfry 5 Fund 's investment products; which included the bank acting as investment promoter, placing agent, corporate advisor and investment relations manager. The Belfry 5 Fund did not give him investment advice and it was the bank who advised him and loaned him

money for that purpose. At para. 21 of his affidavit sworn on the 7th January, 2019, Mr. Mullane avers that the bank fraudulently misrepresented to him that the Belfry 5 Fund was a suitable investment and/or that they fraudulently misrepresented the risks involved in the investment in that fund. He therefore contends that he is entitled to maintain a counterclaim and entitled to an equitable set off against the monies due in respect of the Belfry Investment.

11. It is submitted by the plaintiff that taken at its height, any claim which the defendant may have is statute barred. Insofar as it is a claim based on fraud, it is submitted that this is essentially a ruse employed by the defendant in an attempt to circumvent the six-year limitation period prescribed by the Statute of Limitations for actions founded in negligence and breach of contract.

12. Mr. Mullane also avers that the statements of account which have come to hand during the course of these proceedings confirm his allegation that the indebtedness on account ending 857 stems from money being transferred to the company to reduce its debt and he avers that he was misled into so doing. He particularly points to the fact that a sum of €51,174.94 alleged to be due of the total sum of €154,000 was drawn down in order to reduce the company's debt, something which is apparent from the statement of accounts. He seeks to have the case to be transferred to plenary hearing and states that he will seek discovery of documentation should this occur.

13. Counsel for the bank argues that Mr. Mullane has no defence. These are personal accounts. The manner in which he dispersed payments was a matter for him and the fact that he may have reduced the company debt is irrelevant.

14. A review of the accounts shows a number of transfers made between the defendant's personal accounts and the accounts of the company. A premium business loan account (account number ending 774) was opened in Mr. Mullane's name on the 10th August, 2005. On the 8th November, 2005, this account was debited with the sum of €50,000, the money being paid into a company account number ending 092 ("the company account"). There are further transactions on the 15th and 16th May, 2006 being payments to the company of €50,000 each. A sum of €58,400 was debited to the company account on 28th June, 2007 and a further sum transferred to the same account on the 11th July, 2007, in the sum of €15,000. On the 7th January, 2008, a sum of €200,000 was credited to that account from the company account. Later that year, on the 21st April, 2008 and the 20th May, 2008, further sums appear to have been transferred from the company account into Mr. Mullane's personal premium business loan account. Ultimately a payment into this account of the sum of €102,825.06 was made on the 11th September, 2008 which resulted in reducing the balance to zero. This payment effectively resulted in the closure of account ending 774 by virtue of a payment of €102,625.06 from the new account ending 857. With regard to account number ending 501, described as a loan account in the name of Mr. Mullane, this was opened on the 11th November, 2004 and closed on the 11th March, 2008, with a transfer into that account from account ending 774.

15. The company's account show transfers from account ending 774 on the 28th June, 2007 in the sum of €58,400, from the same account on the 11th July, 2007 the sum of €15,000 and the payment from that account to account number ending 774 of €200,000 on the 7th January, 2008. There are further transfers into that company account reflected in the company's bank statements from account ending 774 on the 11th March, 2008.

Submissions

16. Counsel for the plaintiff, Mr. Ellis B.L., submits that the grounds of defence advanced do not amount to an arguable basis for resisting judgment. Any claim which the defendant may have had in negligence and breach of contract is statute barred. It is submitted that reliance on s. 71 of the Statute of Limitations is no more than a ruse to circumvent the six-year limitation period and that in any event, the defendant was in possession of all relevant facts upon which such a claim might have been founded for a period well in excess of the limitation period of six years. It is submitted that the allegation of fraud is no more than a mere assertion.

17. In so far as the company accounts are concerned, counsel submits that the manner in which disbursements were made from personal loans advanced does not negate the liability to repay. He relies upon a number of authorities, in support of his contention that the counterclaim is not now maintainable, namely *Allied Irish Banks plc v. McGrath* [2018] IEHC 545 and *Cantrell v. Allied Irish Banks plc* [2017] IEHC 254.

18. Counsel for Mr. Mullane, Ms. Meagher B.L., accepts that while his position on the issue of the interaction between his personal and company loans has changed, nevertheless, she submits that the nature of those loans were misrepresented and they were used to pay off company debt. Money was given to Mr. Mullane and he immediately applied it to the company's account to reduce its indebtedness. While it is accepted that generally how money is used should not be relevant to liability, in this case Mr. Mullane had relentlessly pursued information regarding the accounts, the matter was never clarified and he was never told the true position. It is argued that the way in which the bank has presented its case and its position in relation to the loans, lacks clarity and therefore judgment should not be entered. It is submitted that the uncontroverted documentary evidence is that monies were paid from Mr. Mullane's account to the company's account to reduce company indebtedness. Mr. Mullane states that he did not understand what had occurred and this has not been rebutted.

19. While the plaintiff maintains that the defendant has adopted contradictory positions between his first affidavit and subsequent affidavits, nevertheless it is submitted on his behalf that he accepts that he was incorrect in his initial understanding situation. This is not a situation where, for example, he denies that he signed a document and a signed document is thereafter produced. It is submitted that the type of contradiction to which Clarke J. was referring was not the type of misunderstanding regarding the accounts under which Mr. Mullane was labouring, and which has been corrected now that the bank has produced the documents included statements which he has sought and has been seeking for some time. His claim is that he entered into the transactions due to a

misrepresentation and the fact that there may not be a contradiction in the underlying documentation is not relevant to the case being made.

20. With regard to the Belfry 5 Fund, it is submitted that there has been a fraudulent misrepresentation by the bank. The risks associated with this investment were not disclosed. Reliance is also placed on an allegation and misrepresentation concerning a loan to value covenant which has arisen for consideration in other cases. A significant risk of the fund was the loan to value covenant, and this only came into existence after the investment was entered into.

21. It is submitted that the code of conduct, although not actionable, provides a backdrop to the issues in the case. Thus, at para. 5.2 of the code, an obligation is placed upon the credit institution to take reasonable steps to obtain from a client details of his or her investment objectives and experience, before the investment takes place. Similarly, at para. 6.1, there is an obligation on a credit institution to take all reasonable steps to ensure that it does not give investment advice or effect transactions for a client, unless such advice or transaction is suitable to the client.

22. Insofar as the Statute of Limitations is concerned, and the reliance placed by the plaintiff on *McGrath*, Ms. Meagher B.L. submits that such reliance is misplaced and that there are significant differences between the facts of that case and this. No question of set- off arose. Noonan J., in applying the principles relating to set-off outlined and summarised by Clarke J. in *Moohan v. S&R Motors (Donegal) Ltd* [2007] IEHC 435, concluded that the counterclaim asserted by the defendant did not arise from the same set of facts as the bank's claim. It was a separate and freestanding cause of action unrelated to the credit agreement which is the subject matter of the proceedings. Therefore, the potential defence by way of set-off and counterclaim did not arise. The only issue to be considered thereafter was whether a stay ought to be put in place pending the outcome of further proceedings. Noonan J. did not impose a stay because the facts articulated in the defendant's affidavits in support of the counterclaim are at best vague and gave no information as to what the basis of quantum of such a counterclaim might be, save a bare assertion that they were told that the investment would be risk-free. There, a credit agreement provided for interest-only payments, with the entire capital sum being repayable at the end of the term. It is not clear, however, from the facts as recounted whether there was a necessary connection between the investment in the Belfry 5 Fund and the advancing of credit, or indeed what the nature and extent of any such connection might be. Mr. Ellis B.L., counsel for the plaintiff in this case who also represented the bank in *McGrath*, informs the court that cash on deposit was used to invest in the fund and not money raised by way of credit agreement.

23. Ms. Meagher B.L. submits that the precise amount sought to be recovered equates to the investment in the Belfry bond. Further, counsel points out that it does not appear from the judgment that any allegation of fraud was made in *McGrath*.

24. Insofar as reliance was placed by counsel for the bank on *Elliott & Anor v. ACC Bank PLC and ors* [2017] IEHC 808, counsel seeks to distinguish this case on the facts. This is not

the case, it is submitted, where there was no discussion about risk, rather Mr. Mullane was in fact told that the risk was low.

25. Ms. Meagher B.L. refers to decision in *Komady v. Ulster Bank Ireland Limited* [2014] IEHC 325 and emphasises the necessity to elicit facts in order to determine points of law. When it is unclear when a cause of action accrued, oral evidence is required to assist in the determination of this issue. It is submitted that it is impossible to decide at this stage when the cause of action accrued and therefore the case should be remitted to plenary hearing to this extent.

26. It is also submitted that the cause of action did not in fact accrue until these proceedings were instituted in September, 2016. The Statute of Limitations 1957, s.6 provides that "*any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded*." Further, given that the claim will include one based on fraud, the limitation period is postponed by virtue of the provisions of s. 71 of the Act of 1957, which provides that time does not begin to run until the plaintiff has discovered the fraud, or could with reasonable diligence have discovered it. It is further submitted that the evidence presented by the defendant is credible and goes beyond the mere assertion. No affidavit has been sworn by Mr. Lenihan or any other person in response to Mr. Mullane's second affidavit contradicting the facts and allegations deposed to therein.

27. Further, it is submitted that the facts upon which the claim in respect of investment in the fund, and the counterclaim, are inextricably linked. In all the circumstances it is submitted that it is not at all clear that the defendant does not have an arguable defence.

28. Counsel for the plaintiff maintains that these grounds of defence are based on mere assertions; and in any event the claim was never based on fraud until recently. Section 71 of Act of 1957, provides:-

> *"(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either—*
>
> *(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or*
>
> *(b) the right of action is concealed by the fraud of any such person, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."*

Counsel submits that even if the defendant is correct and that the transaction was fraudulent and that fraudulent misrepresentations were made, in accordance with the provisions of s. 71, any such cause of action is statute barred because Mr. Mullane either discovered or ought to have discovered such fraud with reasonable diligence not later than 2008 when he was communicated with by the fund and when he contacted the Listowel branch of the AIB.

Applicable legal principles

29. The principles applicable on an application for summary judgement are well – established. In *Aer Rianta v. Ryanair Ltd* [2001] 4 I.R. 607, Hardiman J. stated that the fundamental question on such an application is:-

> *"Is it very clear that the defendant has no case? Was there either no issue to be tried or only issues which were simple and easily determined? Did the defendant's affidavits fail to disclose even an arguable defence?".*

30. In *Harrisrange v. Duncan* [2003] 4 I.R. 1 McKechnie J. stated that the power to grant summary judgment should be exercised with discernible caution. He observed that the overriding determinative factor is the achievement of a just result, whether that be by granting liberty to enter judgment or by granting liberty to defend. The court must be mindful of the constitutional right of access to justice either to assert or to respond to litigation. If the suggested defence is no more than a mere assertion of a given situation, leave to defend should not be granted; neither should it be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action. It is not up to a defendant to prove that his defence will probably succeed or that success is not improbable. The test is whether it amounts to an arguable defence.

31. This court must also have regard to dicta of Clarke J. in *IBRC v. McCaughey* [2014] 1 I.R. 749 where he stated at para. 23 as follows:-

> *"Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."*

32. While this court may have reservations in relation to the strength of a defence, it is clear from McCaughey that it is not the function of the court on an application such as this to determine issues of credibility where a potential conflict arises.

Decision

33. With regard to loan account number ending 857, I have considered the documentation and the affidavits of Mr. McGuiness and Mr. Mullane. There is no dispute but that Mr. Mullane received the monies and it is clear that contrary to his initial impression that this involved a consolidation of existing accounts which were in his personal name. It is also

evident from an analysis of the accounts that there was a frequent flow of monies between the personal accounts of Mr. Mullane and the company account. In my view, the fact that Mr. Mullane disbursed the monies in the manner in which he did, in reducing company debt is not a basis upon which I could conclude that he has a stateable or arguable ground of defence. On the evidence, Mr. Mullane was involved in the construction industry. A company which was closely associated with him was engaged in such business. It is also evident that on occasions he guaranteed the company's debts. In so far as the allegation relating to the *tidying up* of the accounts is concerned, it is equally clear that it was his personal accounts which were restructured into the account ending 857 (the subject matter of these proceedings). In the circumstances, I am not satisfied in respect of the amounts due on foot of this account that an arguable defence has been established in accordance with the legal principles outlined above. The fact that Mr. Mullane may have been under a mistaken view that there was a restructuring of a company account or accounts does not, in my view, aid his position. There is no evidence that company accounts were restructured and converted into a personal loan.

34. Different considerations arise in respect of monies due on foot of accounts ending 691 and 188. The uncontroverted evidence of Mr. Mullane is that representations were made to him by Mr. Lenihan, who at that time was an employee of the Bank. The clear evidence is that Mr. Mullane was approached by Mr. Lenihan in 2005 while he was working on a building site. The first approach was by telephone call. Arrangements were made to meet later on that day and Mr. Lenihan is alleged to have informed Mr. Mullane that the bank would loan him €100,000 to "*invest in the fund*" (emphasis added). It is also alleged that Mr. Mullane was advised by Mr. Lenihan that he "*could not go wrong*". Mr. Mullane states that he had no investment experience and initially told him that he was not interested in the investment. A second approach was made within the week and on this occasion, Mr. Lenihan is alleged to have stated that to show the Bank's confidence in the fund, it was offering him an overdraft facility to service the interest and that he "*would be mad not to take up the offer as it was costing me nothing*". It was on the basis of these assurances that the investment was made. Mr. Lenihan had a completed application form ready for signature and Mr. Mullane signed his name, and also unwisely signed his wife's name in what he described as a rushed process.

35. Mr. McGuinness avers that the Bank was not the agent of the fund and furthermore, that the prospectus clearly forewarned of the risks associated with the investment. Mr. Mullane states that he does not recall receiving or reading the prospectus and that if he did, it was certainly not before he signed the application form and he points to certain inconsistencies in the prospectus which was exhibited to Mr. McGuinness' affidavit in this regard. It must be stated, however, that Mr. McGuinness describes the exhibit as being a copy of the prospectus. At para. 12 of his affidavit sworn on 7th January, 2019, Mr. Mullane avers that not alone was he not advised of the risks, on the contrary Mr. Lenihan informed him he was *guaranteed* to make money on the investment and he was never advised he could lose his entire investment. He had no contact with the fund and all contact was through Mr. Lenihan. To the extent that the Bank maintained that his co-investor, namely his wife, acknowledged the terms and expressions in the prospectus by

signing theapplication form, Mr. Mullane points to the fact that he actually signed his wife's signature. He avers that Mr. Lenihan was fully aware of that fact.

36. It appears to me that, on this basis, given the threshold which Mr. Mullane has to achieve to be granted to liberty to defend, I could not conclude that Mr. Mullane did not have an arguable defence or an arguable counter claim and it seems to me that *prima facie* the loan arose out of the same series of transaction; the clear purpose of the advancement of funds in accounts ending 188 and 691 being to fund that investment.

37. However, the defence put forward is complicated because it is contended by the plaintiff that the defendant's claim is statute barred in any event, even if arguable. The relevant dates are the following:-

    i) The application form for investment in the fund was signed by Mr. Mullane on 29th July, 2005.

    ii) On 8th August, 2005, loan account number 691 shows an entry of €100,000 under the title '*Belfry'*. It seems clear that this refers to the Belfry 5 Fund investment. Interest payments continued to be taken up from this account by way of standing order up to December, 2010 but in the later years the majority of these were returned unpaid.

    iii) In his affidavit of 6th March, 2017 Mr. Mullane avers that "*some years later*" i.e. some years after the account was opened that the "*bank decided to close down the fund*".

38. Absent a plea of fraud or deceit, it appears to me that any counterclaim or entitlement to set off Mr. Mullane may have had against the bank accrued on the date upon which he invested his funds, 8th August, 2005 or, if I am incorrect in this, perhaps in or about the year 2008 when Mr. Mullane was notified that there had been a significant drop in the value of the fund to €64,000 and at which time he spoke with representatives of the Listowel branch. It was then that Mr. Mullane made contact with the bank with the view to withdrawing the remainder of the monies from the fund. He avers that he was also then informed that under the terms of the investment, he was not permitted to withdraw the balance. It appears, therefore, that the limitation period expired no later than sometime in 2014. These proceedings were instituted in 2016. Of note, in this regard, is that Mr. Mullane avers that he received correspondence from the Belfry 5 Fund but was not able to locate it for the purpose of exhibiting same.

39. However, Mr. Mullane in his affidavit of 7th January, 2019, for the first time expressly alleges fraudulent misrepresentation by the bank in relation to the suitability of the investment and the nature of the risks. He therefore relies on the provisions of s. 71 of the Act of 1957. Counsel for the bank maintains that this allegation constitutes no more than a mere assertion, is unsubstantiated, is not corroborated and is effectively a ruse which is being employed in an attempt to overcome the normal limitation period and to rely on s. 71.

40. I believe that the assertion made by the defendant must be viewed in the context of his continuing to make payments in respect of interest through 2008 and into 2009. Indeed, there is evidence from the statements of certain payments being made through 2010.

41. Mr. Mullane in his affidavit does not purport to place reliance on any date or even general time in relation to the date upon which he discovered the alleged fraud or that with reasonable diligence it could be discovered. In *Cantrell v. AIB* [2017] IEHC 254 Haughton J. observed at para. 34.13 that there was insufficient evidence before the court to enable it to determine the date from which time ran against the plaintiffs. The court, in dealing with the loan to value covenant claims stated at conclusion number 10 that it was unnecessary to determine any issue arising under s. 71 because he had already determined that the claim in relation to the loan to covenants were not statute barred.

42. In *Komady*, Peart J. observed that by October, 2016 the plaintiffs had everything they needed to know in order to get advice on the swaps arrangement, a form of derivative financial instrument by which a borrower could obtain interest rate hedging based on a cumulated notional liability to the bank and "*by October 2006, if not sooner, they certainly knew that it was possible that they would have to pay money to the Bank in circumstances where they were 'out of money'*". He continued at para. 55:-

> *"in my view if they had gone to a solicitor at any time after July, 2006, and sought advice as to whether these swaps met their conservative financial objectives, they would have been in a position to provide all the necessary information to get such advice, and to decide if the swaps had been resold".*

43. In *Elliot v. ACC Bank plc* [2017] IEHC 808 the court also considered the application of s. 71 in the context of swap agreements. Ní Raifertaigh J. stated at para. 48:-

> *"It seems to me that the application of the above principles leads to the same conclusion that s.71 cannot avail the plaintiff in the present proceedings. The plaintiff received documents from Friends First in 2008 and 2007 concerning his policy, and he accepted in evidence that he may have received similar documents earlier than that. It seems highly probable that he was receiving a written update at least annually from Friends First. His claim that s.71 applies, even taken at its height, is, in reality, based not on a suggestion that he learned of new facts in 2008 which had been concealed by the second and third defendants, but rather that he for the first time began to suspect from the document received in 2008 that he had not received the product he had asked for, notwithstanding that the documents with the relevant information had been sent to him all along. The acceptance of such an approach would reduce s.71 to an entirely subjective test dependent upon a plaintiff's claimed ability to understand the significance of facts manifestly available to him before the expiry of the six-year limitation period. It could not possibly be said that, using the words of Peart J. in Komady, that 'the facts necessary to found a cause of action have been concealed from a plaintiff by the defendant so that it would be unfair for that plaintiff to be held to have had knowledge of them, or to be expected to have made inquiry in that regard', in*

circumstances where he personally received documents during the limitation period clearly stating the relevant information about how the policy was performing."

44. It seems clear that the onus of proof is on the party seeking to avail of s. 71 to establish when the alleged fraud was discovered or could with reasonable diligence have been discovered. The only evidence averred to by Mr. Mullane is contained in his affidavit at para.'s 15 to 17 regarding his acquisition of knowledge of such issues, and the only suggested date is in or around 2008. Further, to adopt *dicta* of Ní Raifertaigh J. in *Elliot* "*it could not possibly be said that the facts necessary to found the cause of action had been concealed from him*". In fact, there is no clear allegation made that any such information was concealed from him. The furthest he puts the matter in his affidavit is that if leave to defend is granted, discovery will be sought and the correspondence will then become available.

45. In all of the circumstances, I must come to the conclusion that a defence based on s. 71 of the Act of 1957 amounts to no more than a mere assertion and does not avail the defendant. Further, no evidence of a *prima facie* nature is alleged or has been adduced regarding any concealment of information.

46. For all the reasons outlined, the defendant has not raised any arguable defence and the plaintiff is entitled to judgment in the amounts claimed.