Neutral Citation [2015] IEHC 425

THE HIGH COURT

COMMERCIAL

[2014 No. 5450 P]

BETWEEN

EUROPEAN PROPERTY FUND PLC AND LAURELMORE LIMITED

PLAINTIFFS

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

AND

[2014 No. 5449 P]

BETWEEN

VIEIRA LIMITED

PLAINTIFF

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered the 2nd day of July, 2015

1. These are two related cases in which the defendant, Ulster Bank Ireland Ltd. ("Ulster Bank"), in each case seeks orders pursuant to the inherent jurisdiction of the court dismissing or in the alternative striking out the claims in whole, or in part, on the grounds that the actions are frivolous and vexatious, factually unsustainable and bound to fail, in the alternative on the grounds that the actions are scandalous and an abuse of process. It seeks to strike out the Statements of Claim on the basis that they are fundamentally defective and fail to comply with O. 19, r. 5(2) of the Rules of the Superior Courts. It is also sought to dismiss portions of the plaintiffs' actions on the grounds that the claims are statute barred by virtue of the provisions of s. 11 of the Statute of Limitations 1957.

The Larkin Group

2. Laurelmore Ltd. ("Laurelmore"), the second named plaintiff in the first proceedings ("the EPF proceedings") is a company incorporated in the Isle of Man. The directors of Laurelmore are professional trustees.

3. J&E Davy ("Davy") is a firm that specialises in providing wealth management, asset management, capital markets and financial adviser services. Davy incorporated a company known as Davy European Property Fund Plc on 13th July, 2006 ("DEPF") to be an investment company. The directors were very experienced qualified members of Davy with considerable expertise and experience of investment in a variety of financial instruments. DEPF subsequently changed its name to European Property Fund Plc ("EPF") and is the first named plaintiff in the EPF proceedings.

4. EPF is a variable capital investment company which provides facilities for the direct or indirect participation by the public and which is authorised by the Central Bank of Ireland under s. 256(5) of the Companies Act 1990, Part XIII. It is an express condition of EPF's authorisation by the Central Bank that it comply with the provision of NU Notices issued by the Central Bank from time to time. The notices set out the conditions imposed by the Central Bank in relation to Collective Investment Schemes other than UCITS. If a company contravenes any condition in relation to its authorisation or business imposed by the Central Bank under s. 257 of the Act of 1990, the company and every officer who is in default shall be guilty of an offence. It was a condition of EPF's authorisation to carry on business as an investment company within the meaning of Part XIII of the Act of 1990, that investors in EPF (and in particular, its shareholder, Vieira Ltd.) were required to certify in writing to EPF that they met the qualifying investor criteria and that they were aware of the risk involved in the proposed investment and that, inherent in such investment, was potential to lose all of the sum invested; EPF was required to have a prospectus which was required to contain a prominent risk warning making specific reference for the potential to above average risk in relation to the investment and that the type of investment was suitable only for people who were in a position to take such a risk; EPF was required to have an investment manager who was responsible for managing the investments of EPF in accordance with the investment objectives and borrowing policies of the scheme as identified in the prospectus.

5. Davy was authorised by the Central Bank of Ireland to act as Investment Manager of EPF and so acted pursuant to a written investment management and distribution agreement made between DEPF and Davy on 31st August, 2006. The prospectus stated:-

> *"The Investment Manager will be responsible for the identification of suitable Property and Property-related Assets for acquisition by the Company and, where appropriate, recommending how Property could be developed or improved; reviewing the assets of the Company; recommending how and when Property and Property-related Assets should be sold; and with respect to Property carrying out negotiations as to price and instructing solicitors, surveyors and other*

professional advisers (including but not limited to property management agents)…

The Investment Manager may from time to time seek the advice or recommendation of any adviser, analyst, consultant or other suitably qualified person to assist it in the performance of its duties under the Investment Management and Distribution Agreement."

6. Vieira Ltd. ("Vieira") is the plaintiff in the second proceedings ("the Vieira proceedings"), it is a company incorporated within the State and as of 31st August, 2009, the Shareholders' Fund was stated to be €56.9 million. It owned lands at Tyrrelstown and Mount Argus, Co. Dublin for residential development in 2008. It was the sole shareholder in EPF. Laurelmore was a subsidiary of Daneswood Ltd. (an Isle of Man company) which in turn was wholly owned by Vieira until 18th February, 2008, when Vieira transferred the shares in Daneswood Ltd. to EPF. Vieira and Laurelmore were engaged, *inter alia*, in property development and holding property in Ireland and England. Messrs. Richard and Michael Larkin are the ultimate beneficiaries of Vieira, Laurelmore and EPF. From about 2007, Mr. Richard Larkin was an agent of all three companies.

Chronology of Events

7. In 2001 Laurelmore purchased property in London at 11 Belgrave Road ("Belgrave Road"). On 14th November, 2002, Laurelmore resolved to accept an offer of loan facilities from Ulster Bank. The actual facility document is no longer available though a copy of the bridging facility was exhibited. The facility was accepted by Laurelmore on 19th November, 2002. Ulster Bank referred to this contract as a fixed rate loan. The plaintiffs in the EPF proceedings refer to it as the Belgrave derivative. There is a dispute as to the nature of this transaction. In this judgment I shall refer to it as the Belgrave Facility.

8. In 2007 the Larkin Group of companies decided to restructure some of the property holdings in order to hold their assets in a more tax efficient manner. Matheson Ormsby Prentice solicitors were acting on their behalf. They obtained tax analysis in respect of Ireland, the United Kingdom and the Isle of Man. The proposed steps were outlined in a letter from Matheson Ormsby Prentice dated 14th January, 2008, as follows:-

"1. Vieira Limited ("Vieira") and DEPF enter into a Share-for-Share Agreement whereby DEPF agrees to purchase the shares in Daneswood Limited ('Daneswood') from Vieira, as consideration for an issue of shares in DEPF to Vieira.

2. The Property could be transferred inter-group from Laurelmore Limited ('Laurelmore') to DEPF at market value. ***It is envisaged that DEPF would borrow from Ulster Bank to finance the acquisition of the Property. The proceeds would be paid by DEPF to Laurelmore.*** *Following the requisite holding period, Laurelmore would be liquidated after extracting all retained earnings by way of dividend.*

3. The shares in Diamondridge Ltd. ('DL') would be sold by Daneswood to DEPF for their market value which should be nominal." (emphasis added)

9. As part of the restructuring Laurelmore was to transfer Belgrave Road to DEPF (subsequently EPF). In addition, it was proposed that Laurelmore would acquire a second property in London, referred to as Old Jewry, and the intention was that this property and the financial instruments associated with Old Jewry would also be transferred and novated to EPF shortly after its acquisition. The finance was to be provided by Ulster Bank, initially to Laurelmore and subsequently to EPF.

10. Prior to entering into the Old Jewry transaction, Ulster Bank wrote to Laurelmore setting out the Terms of Business for the Conduct of Investment Services with Ulster Bank by letter date 24th January, 2008. The letter enclosed Ulster Bank's Terms of Business. The letter provided as follows:-

"All Interest Rate Derivative (IRD) trades provided to you by our Capital Markets Division are covered by these Terms. The Terms of Business include provisions introduced by the Markets in Financial Instruments Directive (MiFID).

MiFID is a European Union Directive which supports investor protection and the creation of efficient and transparent markets. All clients dealing in investment products are categorised into one of the following three groups: Retail, Professional or Eligible Counterparty. These categorisations influence the level of investor protection each client receives. You ***have been categorised as a 'Professional' client***

UBIL provides this service to you on an execution only basis and we are not acting in the capacity of your financial or other advisor. We will not provide you with investment advice. We rely on you to conduct your own assessment of the risks associated with any transaction and to undertake the ongoing monitoring and assessment that such transactions may entail. If you are in any doubt about the nature of the risk involved, you should contact your financial advisors.

Other agreements may exist between us in respect of a particular transaction or type of transaction e.g. ISDA Master Agreement for OTC Derivative Transactions and in such cases those Terms of Business will prevail…

Please call us if you have any queries in relation to this letter or the attached Terms of Business. Please sign and return one of the attached copies as confirmation you have read and understood these terms and retain the other for your files."

11. The document enclosed is headed:-

"CONSENT FORM (IRDS)…

TERMS FOR BUSINESS FOR A PROFESSIONAL CLIENT

This document is issued for your protection. If you do not fully understand any of the content or wish to have more information on any of these matters, please let us know. We will be glad to answer any queries for you. Otherwise we will assume that these terms of business are acceptable to you.

We have read and understood the above Terms of Business and confirm that they are acceptable."

12. The document is dated the 24th January, 2008, and is signed for and on behalf of Laurelmore by two directors, Mr. Conor Lawlor and Ms. Ann Nicholson.

13. The relevant terms of the business for a professional client provide, inter alia, as follows:-

> *"2.4* ***We shall treat you alone as our client....***
>
> *3.1 Each client is categorised by UBIL as "retail client" or "professional client". In addition, certain professional clients may be further categorised as "eligible counterparties". Categorisation is undertaken on the basis of objective criteria. Different rules and different levels of protection apply to clients depending on their categorisation.*
>
> *3.2 UBIL notifies each client of its categorisation as a retail client or professional client or, as the case may be, eligible counterparty.*
>
> *3.3 We have categorised you as a professional client…*
>
> *3.5 A client who is being categorised as a professional client by UBIL may ask UBIL in writing to be treated as a retail client (and hence may gain certain protections and investor compensation rights), either generally or in respect of a particular investment service or transaction, or type of transaction or product. UBIL may, at its discretion, decide not to take into consideration such request.*
>
> *3.6 If UBIL agrees to take into consideration such request, it will upon receipt of such request or at its own initiative, assess whether the client meets its opt-down criteria. If and when UBIL is satisfied that a client may be categorised as a retail client, it will notify the client accordingly.*
>
> *3.7 UBIL may decide to categorise a professional client as a retail client without receiving any such request…*
>
> *4.1 We will provide you with non-advisory dealing services in relation to one or more of the products as set out at Schedule 1 and other "financial instruments" from time to time as defined in the MiFID Regulations (together "Investments" and individually "Investment") together with related research, strategy and valuation facilities. Transactions in certain investments may be subject to separate or supplementary terms and conditions. We ask you to carefully consider the risk warnings set out in the Schedule 1 of these Terms…*
>
> *4.3* ***We will not provided you with advice on any transaction or account or provide you with personal recommendations. Accordingly, you should make your own assessment of any transaction that you are considering and should not rely on any opinion, research or analysis expressed or published by us or our affiliates as being a recommendation or advice in relation to that transaction or account.***
>
> *4.4 Any legal, accounting, tax or other adviser retained by us shall be the legal, accounting, tax or other adviser to us alone. You shall have sole responsibility for selecting and retaining any legal, accounting, tax or other adviser that may advise you and for all expenses and fees incurred in connection therewith. In no event shall we or any of our affiliates or any legal, accounting, tax or other adviser retained by us be deemed a provider of legal, accounting, tax or other advice to you, any affiliate of yours or any other person…*
>
> *6.2 Provision of Investment Services by us will not, unless specifically agreed between us in writing, give rise to any fiduciary or equitable duties on our part or that of our affiliates. You agree that nothing contained in these Terms shall create any fiduciary, trustee, agency, joint venture or partnership relationship between us or any affiliate of ours, on the one hand, and you or any affiliate of yours…*
>
> *6.4 Any information we provide to you relating to products and transactions is believed, to the best of our knowledge and belief at the time it is given, to be accurate and reliable. Such information does not constitute an assurance or a guarantee as to the expected outcome of any such transaction. You should also be aware that market conditions and pricing may change between the time we provide you with information and the time you approach us with a view to entering into a transaction…*
>
> *15.1* ***If you approach us to close out a transaction which has been entered into between us, we are under no obligation to do this. Where we agree to do this, we will calculate the close out value of the trade based on prevailing market conditions and may include associated costs arising from the close out in this figure. The close out value may be due from you to us or from us to you depending on the trade and may be substantial.***
>
> *15.2 In the event of any dispute regarding any transaction, we may in our absolute discretion cancel, terminate, reverse or close out the whole or part of any position resulting from and/or relating to such transaction and this may give rise to a close out cost to UBIL which you will be required to pay." (emphasis added)*

14. In the Schedule listing products and risk warning under the heading *"Interest Rate Derivatives"* it is provided as follows:-

> *"This Risk Warning cannot disclose all the risks and other significant aspects of derivative products. You should not deal in these products unless you understand their nature and the extent of your exposure to risk. You should also be satisfied that the product is suitable for you in the light of your circumstances and financial position."*

15. Laurelmore entered into what has been referred to as the Old Jewry derivative with Ulster Bank. The trade date was 22nd January, 2008, and the effective date was the 25th January, 2008, the day after Laurelmore accepted the Terms of Business and the categorisation set out above.

16. The Confirmation in respect of the Old Jewry derivative was sent by Ulster Bank to Laurelmore on 31st March, 2008. It referred to the fact that this was stg£48 million interest rate Swap. It was headed:-

> "AMENDMENT
>
> *This Confirmation supersedes and replaces any previously communication received from ourselves in relation to the below referenced transaction".*

17. It expressly states that the purpose of the document is to set forth the terms and conditions of the transaction and that it constitutes a confirmation of the Agreement. The parties agree to use all reasonable efforts promptly to negotiate and enter into an

ISDA Master Agreement and that upon the execution of the ISDA Master Agreement, the Confirmation will inform part of the ISDA Master Agreement and be subject to any terms in such an agreement. It states:-

> *"Until we execute and deliver that agreement, this Confirmation, together with all other documents referred to in the ISDA Form (each a 'Confirmation') confirming transactions (each a 'Swap Transaction') entered into between us (notwithstanding anything to the contrary in a Confirmation), shall supplement, form part of, and be subject to, an agreement in the form of the ISDA Form as if we had executed an agreement in such form (without any Schedule except for the election of English Law as the governing law, Sterling as the Termination Currency) on the Trade Date of the first such Swap Transaction between us."*

There are mutual representations set out on p. 5 et seq. of the document in the following terms:-

> *"Each party represents to the other party on the Trade Date of this Swap Transaction that (in the absence of a written agreement between the parties that expressly imposes affirmative obligations to the contrary for this Swap Transaction):-*
>
> *(a) Non-Reliance. It is acting for its own account, and it has made its own independent decisions to enter into this Swap Transaction and as to whether this Swap Transaction is appropriate or proper for it based upon its own judgement and upon advice from such advisers as it has deemed necessary. It is not relying, and has not relied, on any communication (written or oral) of the other party as investment advice or as a recommendation to enter this Swap Transaction; it being understood that information and explanations related to the terms and conditions of this Swap Transaction shall not be considered investment advice or a recommendation to enter into this Swap Transaction, no communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of this Swap Transaction.*
>
> *(b) Assessment and Understanding. It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of this Swap Transaction. It is also capable of assuming, and assumes, the risks of this Swap Transaction.*
>
> *(c) Status of Parties. The other party is not acting as a fiduciary for or an adviser to it in respect of this Swap Transaction."*

The Confirmation expressly stated that in the event that the party disagreed with any part of the Confirmations that they were to notify Ulster Bank so that the discrepancy could be quickly resolved. The counterparty was requested to confirm that the Confirmation correctly set forth the terms of the Agreement by returning the document to Ulster Bank and expressly to acknowledge that the Confirmation correctly set forth the terms of the Agreement related to the Swap Transaction described in the Confirmation. The copy of the Confirmation exhibited was not that which was executed by Laurelmore though no point was taken in this regard and it was common case that the Confirmation was accepted and not challenged by either Laurelmore or EPF.

18. Ulster Bank agreed to lend DEPF two facilities. The first facility of stg£48 million was for the purpose of DEPF acquiring Old Jewry from Laurelmore (Facility A) and the second facility of stg£31.1 million was for the purposes of DEPF acquiring Belgrave Road from Laurelmore (Facility B). The facility letter was dated 27th February, 2008, and was addressed to the directors of DEPF c/o Mr. Tom Berrigan, 49 Dawson Street, Dublin 2. Ulster Bank offered the facility:-

> *"subject to the terms and conditions set out in this Facility letter and also subject to Ulster Bank's Standard Terms & Conditions Governing Business Lending to Companies – Corporate Banking (Ref 01/2007)".*

The borrower is identified as DEPF and there were two facilities, each of which was a demand loan facility. Subject to the terms of the letter and without prejudice to the demand nature of each of the facilities, Facility A was to expire on 31st January, 2013, and Facility B on 31st March, 2021. The interest in respect of Facility A was a fixed rate of 4.92% until 31st January, 2013, plus 1% per annum and in respect of Facility B it was a fixed rate of 5.045% until 31st March, 2021, plus 0.90% per annum.

19. The minutes of the meeting of the board of directors of DEPF held on 20th March, 2008, state as follows:-

> *"1. The board carefully considered the terms of a facility letter form Ulster Bank Ireland Ltd. (the 'Bank') dated 27 February, 2008 (the 'Facility Letter') and a copy of the Bank's Standard Terms & Conditions for Business Lending to Companies – Corporate Banking (Ref 01/2007) (the 'General Conditions') which were produced to the meeting. It was noted that under the Facility Letter the Bank agreed to make available to the Company the demand loan facility detailed therein (the 'Facility').*
>
> *2. It was explained that the meeting had been called to approve the entry by the Company into the Facility Letter and after consideration IT WAS RESOLVED THAT:*
>
> > *(a) it is in the best interests of the Company and to its direct commercial benefit to avail of the Facility on the terms and conditions set out in the Facility Letter and the General Conditions;*
> >
> > *(b) the form of the Facility Letter and the General Conditions produced to the meeting be approved;*
> >
> > *(c) Tom Berrigan and Tony Garry be authorised to sign the Facility Letter by way of acceptance of the terms of the Facility Letter and the General Conditions on behalf of the Company (with such amendments thereto as they may in their absolute and unfettered discretion think fit)."*

20. The facility letter of 27th February, 2008, was duly accepted by DEPF and signed by Mr. Tom Berrigan and Mr. Tony Garry in accordance with the authorisation.

21. Ulster Bank duly advanced the two facilities to DEPF. DEPF acquired the Belgrave Road and Old Jewry properties from Laurelmore using the proceeds of the two facilities. Laurelmore in turn repaid the monies outstanding due to Ulster Bank in respect of the Belgrave Facility. This DEPF facility I refer to as the EPF Facility in this judgment.

22. The Old Jewry derivative that Laurelmore had entered into with Ulster Bank was the subject of a novation agreement between

Ulster Bank as the remaining party, Laurelmore as the transferor and DEPF as the transferee. Clause 2 of the Agreement is headed "*Transfer, Release, Discharge and Undertakings*" and provides as follows:-

> *"With effect from and including the Novation Date and in consideration of the mutual representations, warranties, covenants contained in this Novation Agreement and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged by each of the parties):*
>
> *(a) the Remaining Party and the Transferor are each released and discharged from further obligations to each other with respect to each Old Transaction and their respective rights against each other thereunder are cancelled, provided that such release and discharge shall not affect any rights, liabilities or obligations of the Remaining Party or the Transferor with respect to payments or other obligations due and payable or due to be performed on or prior to the Novation Date, and all such payments and obligations shall be paid or performed by the Remaining Party or the Transferor in accordance with the terms of the Old Transaction;".*

The Agreement was effective from 4th April, 2008.

23. The ISDA Master Agreement in respect of the Old Jewry derivative between Ulster Bank and EPF was dated 4th April, 2008. It specifically records that the parties have entered into one or more transactions that will be governed by the Master Agreement. The Master Agreement was executed by Ulster Bank on 27thJanuary, 2009, and directors Mr. Berrigan and Mr. Eamonn Doyle executed the Agreement for EPF on 29th May, 2009. The execution is acknowledged by Davy as investment manager to EPF and this is signed by Mr. Berrigan on behalf of Davy likewise on 29th May, 2009. The Schedule to the Master Agreement contained identical terms governing the relationship between the parties as were set out in the Confirmation of 31st March, 2008, and was executed by the same parties.

24. Laurelmore did not incur any early termination costs or break costs in respect of the Belgrave Facility which was repaid in full in 2008. It did not incur any break costs or other costs arising from the novation of the Old Jewry derivative. EPF has assumed Laurelmore's obligations under the Old Jewry derivative.

25. In 2008, Vieira had very considerable borrowings and consequently considerable exposure to interest payments. It was anxious to protect itself against rises in interest rates. Ulster Bank suggested that it enter into a swap with Vieira. By letter dated 23rd July, 2008, Ulster Bank wrote to Vieira enclosing the Terms of Business for the Conduct of Investment Business Services. Both the letter and the Terms of Business are in exactly the same terms as those quoted above in relation to Laurelmore. Vieira was likewise categorised as a professional client. The Terms of Business for a professional client are also exactly the same and the directors of Vieira (Messrs. Eugene and Michael Larkin) confirmed that they had read and understood the Terms of Business and confirmed that they were acceptable. The same Terms of Business set out the same product and risk warnings attached to Schedule 1. The break costs are identified at para. 4 of the Schedule as follows:-

> *"Break Costs*
>
> *If you approach us to close out a transaction which has been entered into between us, we are under no obligation to do this. Where we agree to do this, we will calculate the close out value of the trade based on prevailing market conditions and may include costs associated costs arising from the close out in this figure. The close out value may be due from you to us or from us to you depending on the trade and may be substantial."*

26. The transaction that Vieira agreed to enter into with Ulster Bank was a cancellable accreting interest rate swap ("the Positive Carry Swap"). The trade date was 13th August, 2008, the effective date was 15th August, 2008, and the termination date was 15th August, 2013. The Confirmation addressed to Vieira is dated 22nd August, 2008, and is "*Re: EUR Bank Cancellable Acreting Interest Rate Swap*". It contains identical terms in relation to the purpose of the document and the fact that the Confirmation evidences a complete and binding agreement between the parties as to the terms of the Swap transaction to which the Confirmation relates, as is set out above in relation to the Old Jewry derivative. The notional amount of the Swap is set out in the Schedule and rises from €3.5 million from 15th August, 2008, to15th November, 2008, up to €14 million for 15th May, 2009, to 15th August, 2013.

27. The same representations in relation to non reliance, assessment and understanding and status of the parties in the Old Jewry derivative Confirmation are likewise set out in this Confirmation. The Confirmation included an invitation to contact Ulster Bank if the counterparty disagreed with any part of the Confirmation so that the discrepancy could be quickly resolved. The Confirmation concluded that Vieira confirmed that the foregoing correctly set forth the terms of the Agreement by a return of the document to Ulster Bank. Mr. Richard Larkin duly confirmed the Confirmation as a director of Vieira.

28. The Positive Carry Swap was novated to EPF on the 4th November, 2011. A novation confirmation issued on 14th November, 2011, to EPF and Vieira. The effective date of the novation is 4th November, 2011. The Confirmation was executed by Ulster Bank, EPF and Vieira. There are identical representations in relation to non reliance assessment and understanding and status of parties that are to be found in the Confirmation of the Positive Carry Swap.

29. Throughout 2008 and 2009, the value of Belgrave Road, Old Jewry and the Tyrellstown land held by Vieira declined. In April, 2009, Ulster Bank wrote to the directors of DEPF pointing out that the DEPF borrowings were subject to a maximum loan to value ("LTV") covenant of 70% and stating that in the event that the LTV covenant was breached (upon receipt of updated professional valuations) that the DEPF borrowings would be required to be restructured. Throughout 2009/2010 and up until 2012, Ulster Bank and EPF sought to deal with the deteriorating situation. Ulster Bank insisted that EPF sell Belgrave Road and Old Jewry. EPF said that it was coerced and intimidated and threatened and it sold each of the properties under duress. Belgrave Road was sold in September, 2011 and Old Jewry in November, 2012. The EPF Facility was duly repaid and additional costs were incurred by reason of the early termination of the fixed rate loan. The Old Jewry derivative was closed out and EPF was obliged to pay Ulster Bank significant sums under the terms of the derivative. It is further alleged that there was a delay of three days in closing out the derivative which resulted in significant additional losses to EPF. The Positive Carry Swap expired on 15th August, 2013.

The Proceedings

EPF Proceedings

30. The core of each of the cases is alleged mis-selling of the Belgrave Facility, the Old Jewry derivative and the Positive Carry Swap and associated claims. In the EPF proceedings it is pleaded that at the time of the provision of the Belgrave Facility, Ulster Bank represented that the fixed rate associated with the loan was a fixed rate *simpliciter* and that it was not a derivative. It is alleged that in fact it was derivative in nature and it is asserted that the plaintiffs and Mr. Richard Larkin only became aware of the true

nature of the Belgrave Facility when Belgrave Road was sold in 2011. It is said that the Code of Conduct for Credit Institutions under s. 117 of the Central Bank Act 1989 applied to the facility which set out certain obligations which apply to financial institutions dealing with advisory clients. It is pleaded that Laurelmore was an advisory client and that Ulster Bank therefore was obliged to ascertain its financial objectives and investment priorities. It is pleaded that Ulster Bank did not comply with the terms of the Code in the entry into or the execution of the Belgrave Facility and that no proper categorisation or characterisation of Laurelmore took place pursuant to the Code. It is pleaded that Ulster Bank concealed from Laurelmore the true nature of the Belgrave Facility at the time of its entry and execution in 2001. In the course of the hearing it was clarified that the concealment complained of constituted the delivery of documentation after the transactions had been entered into which differed from the representations the plaintiffs allege were made in respect of the Belgrave Facility prior to Laurelmore entering into the transaction and in failing to inform Laurelmore of this fundamental difference.

31. It alleged that there was misrepresentation on the part of Ulster Bank in this regard, there was a breach of fiduciary duties in like terms and there was deceit and fraudulent concealment.

32. Similar complaints are made in respect of the entry by Laurelmore into the Old Jewry derivative. It is pleaded that Ulster Bank acted as an advisor and a fiduciary to Laurelmore in respect of the transaction. It is pleaded that there was a failure properly to categorise Laurelmore for the purposes of MiFID Regulations (Market in Financial Instruments Directive 2004/39/EC as implemented in Ireland by the European Communities (Market in Financial Instruments) Regulations 2007 (S.I. 60/2007)) and that it ought not to have been classified as a professional client. It is said that the derivative was not suitable for the needs of Laurelmore and it is pleaded that there was misrepresentation, breach of fiduciary duties and fraudulent concealment. The fraudulent concealment alleged was that there had been representations to Mr. Richard Larkin, the agent of Laurelmore, which were not reflected in the terms of the documentation provided to Laurelmore for acceptance and execution after the effective date of the Old Jewry derivative.

33. In relation to the novation of the Old Jewry derivative to EPF, it is pleaded that EPF was not properly categorised for the purpose of the MiFID Regulations and that there was no compliance with the applicable regulatory regime in force at the time that the Belgrave Facility was novated to EPF and the Old Jewry derivative was novated to EPF. In fact, the Belgrave Facility was not novated to EPF. As is set out above, a new loan was granted by Ulster Bank to EPF. It is pleaded that Ulster Bank concealed the true nature and extent of the liabilities associated with the Belgrave Facility and the Old Jewry derivative at the time of the assumption by EPF of the liabilities associated with those transactions in 2008. It is said that Ulster Bank concealed that any break costs would be associated with the facility or the derivative in question at any time over their respective terms.

34. The plaintiffs plead that a fiduciary relationship existed between each of them and Ulster Bank. It is pleaded that Ulster Bank misrepresented and mischaracterised the use, utility and benefit of the derivative instruments in question, that they were consistent with the financial objectives of each of the plaintiffs when it is alleged they patently were not and that Ulster Bank concealed the benefit which accrued to it and made from the derivative trades in question.

35. The plaintiffs allege duress, intimidation, coercion and threats in respect of the sale of Belgrave Road and Old Jewry and the termination of the Agreements and the discharge of break costs associated with the sale of underlying assets. It is also alleged that due to a delay in closing out the EPF Facility and the Old Jewry derivative additional excessive costs were unjustifiably incurred.

36. It was accepted that Laurelmore did not suffer any damage arising out of any of the transactions in which it was involved, as it received market value for the Belgrave Road property when it was sold and the loan was paid off and EPF took over its obligations in respect of Old Jewry and the Old Jewry derivative. Nonetheless it sues Ulster Bank for damages along with EPF.

Vieira Proceedings

37. The Vieira proceedings likewise are concerned with alleged mis-selling of a financial product, the Positive Carry Swap. Allegations similar to those pleaded in the EPF proceedings are made. It is said that the Swap was inappropriate and unsuitable for its financial objectives, that it was not properly classified for the purpose of the MiFID Regulations, that there was a fiduciary relationship between Vieira and Ulster Bank and that Ulster Bank was guilty of misrepresentation, negligence, breach of fiduciary duty, failed to comply with its obligations under the MiFID Regulations, was guilty of deceit and fraudulent concealment. The deceit and fraudulent concealment consisted of representations regarding the effects of the Swap, as to the suitability of the Swap to Vieira having regard to its financial objectives and the fact that this was not reflected in the terms of the contract suggested by Ulster Bank and entered into by Vieira.

Statute of Limitations 1957

38. In considering the arguments for the purpose of deciding whether or not any or all of the claims are statute barred I shall assume that all of the facts alleged in the pleadings and Replies to Particulars can be established at trial by the plaintiffs and that there existed a fiduciary relationship between the plaintiff and Ulster Bank.

39. Ulster Bank argues that the plaintiffs' claims in the EPF proceedings are statute barred. It relies upon s. 11 of the Statute of Limitations 1957, which provides that an action founded on a simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

40. In *Komady Ltd. & Anor v. Ulster Bank Ireland Ltd*. [2014] IEHC 325 Peart J. had to consider whether or not claims based on the two Swap Agreements, the effective dates of which was the 18th July, 2006, were statute barred. The plaintiffs claim that the Swaps had been mis-sold to them. The plaintiffs in that case argued that the Swaps were not consistent with their financial planning objectives as explained to Ulster Bank at the time. They argued that the misrepresentation to them as to the suitability of swaps- or the mis-selling thereof- amounted to a concealment by fraud of the fact that they were unsuitable. The plaintiffs pleaded that they thought that the Swaps were nothing more than fixed rates and that they were effectively a component of the loans. They also allege that there was a fiduciary relationship between them and Ulster Bank. The proceedings were commenced more than six years after the effective date of the Swaps.

41. For the purposes of determining whether or not the causes of action were statute barred, Peart J. acknowledged that the Court had to assume for the purposes of the exercise that the facts were as appearing from the pleadings and Replies to Particulars and also was obliged to assume the existence of the fiduciary relationship alleged. The vital elements not explained or disclosed either at the date the Swaps were entered into in July, 2006 or at any time during the 5 year life of the Swaps was the nature of the transactions, the manner in which they operated, their effect and risk level, the break costs associated with the transactions, the effects of the break costs and any positive effects from breaking the transaction. In addition, the absence of any advice as to any alternative type of investment that might have been suitable to the plaintiffs' circumstances and objectives as well as the representation that the Swaps were suitable for and/or consistent with the plaintiffs' financial objectives were said to be facts

supporting the "*concealment by fraud*" for the purposes of the Statute of 1957.

42. In *Komady,* counsel for the plaintiffs argued that the cause of action was not completed until damage had resulted and that time only ran from the date that damage was suffered. This was rejected by the learned trial judge as in effect contending for a discoverability test which has not been provided for in the Statute (save in relation to personal injury actions). He said, following *Gallagher v. ACC Bank plc t/a ACC Bank* [2012] 2 I.R. 620, the plaintiffs suffered their loss when they entered into the Swaps in July, 2006 which were negligently mis-sold to them according to the assumed facts in that regard. He confirmed that the cause of action accrued from the effective date of the instrument, and not the date of the execution of the instrument.

43. The plaintiffs also sought to rely upon the assumed existence of a fiduciary relationship between the plaintiffs and the defendant. In relation to this argument Peart J. held at para. 36 *et seq.*:-

> *"In my view, the facts of the present case, as assumed, are just the sort of facts where a court would and should apply the limitation period by analogy, as it would have prior to the 1957 Act. In Knox v. Gye [1872] 5 App. Cas. 656, which was a case concerning the taking of an account, and which is referred to by Canny in his work [supra] Lord Westbury stated:-*
>
> *'The general principle is that where a Court of Equity assumes a concurrent jurisdiction with Courts of Law no account will be given after the legal limit of six years, if the statute is pleaded. If it could be doubted whether the executor of a deceased partner can, at Common Law, have an action of account against the surviving partner, the result will still be the same, because a Court of Equity, in affording such a remedy and giving such an account would act by analogy to the Statute of Limitations. For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase that a Court of Equity acts by analogy to the Statute of Limitations, the meaning being that where the suit in Equity corresponds with an action at Law which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule or procedure. But if any proceeding in equity be included within the words of the statute, there a Court of Equity, like a Court of Law, acts in obedience to the statute.'*
>
> *37. There is nothing in the facts of the present case to take it outside what is stated by Lord Westbury. The facts giving rise to the equitable claim by virtue of any fiduciary relationship are co-terminus with the facts giving rise to the claim in tort, even if fiduciary obligations are of an ongoing nature during the relationship. That relationship does not alter the fact that the plaintiffs are able to plead, as they have done, that in July 2006 they were negligently and in breach of duty (presumably including a breach of fiduciary duty) induced by the bank to enter into the Swaps."*

44. The claims in respect of the alleged mis-selling of the Belgrave Facility and the Old Jewry derivative are contract claims and so the date the causes of action accrued was the date the plaintiffs entered into the contracts. The claims in contract are barred as the proceedings were initiated on 19th June, 2014, which post dates by more than six years all of the transactions. It is nearly 12 years since Laurelmore entered into the Belgrave Facility. The EPF Facility was drawn down in April, 2008. The effective date of the Old Jewry derivative is 22nd January, 2008, and the Confirmation of the derivative is 31st March, 2008. The novation of the derivative is effective from 4th April, 2008. While the Novation Agreement was not executed by EPF and Davy until 29th May, 2009, the document states that it has effect from 4th April, 2008. Therefore, that is the date upon which any cause of action of EPF arising out of the Agreement accrues. The plenary summons in the EPF proceedings issued on 19th June, 2014. Accordingly, all of the claims in contract were brought more than six years after the causes of action accrued and must be struck out on the basis that they are statute barred.

45. Insofar as they are claims based on tort, it is argued that the causes of action accrued on the date that the contracts were concluded. The claim is that the financial products were mis-sold and so the tort was concluded upon the entry into the relevant Agreement. In *Gallagher v. ACC Bank* the Supreme Court held that where a plaintiff claimed that he suffered damage by the very fact of entering into a transaction which was wholly unsuitable for him, the cause of action accrued on the date of entry into the transaction. That is precisely the case that is advanced by the plaintiffs in the EPF proceedings, so, applying this authority, as I am obliged to do, I must hold that the causes of action accrued on the date of entry into the respective transactions.

46. Accordingly the six year limitation period runs from the date of the contracts in respect of the alleged torts also. Thus, unless there is an extension of the limitation period, each of the causes of action of EPF or Laurelmore based on these transactions is statute barred and therefore have no prospect of success and ought to be struck out pursuant to the inherent jurisdiction of the Court.

47. The plaintiffs argue that they have alleged that there was a fiduciary relationship between the plaintiffs and Ulster Bank and they have causes of action arising from alleged breaches of fiduciary duty which are not the subject of any specific limitation period and are therefore not statute barred. They likewise argue that they have claims in deceit and fraudulent concealment and they rely on the provisions of s. 71(1)(b) of the Statute of Limitations 1957 to extend the time from which the causes of action accrued so that they are not in fact statute barred. The section provides as follows:-

> *"Where, in the case of an action for which a period of limitation is fixed by this Act…*
>
> *(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."*

They say that they could not with reasonable diligence have discovered the nature of the transactions and thus their causes of action, until they discovered the true state of affairs in 2013 and thus they are entitled to the benefit of the provisions of s. 71(1)(b).

48. In the course of argument the plaintiffs made it clear that they were not alleging that there was any fraudulent concealment of material facts on the part of Ulster Bank subsequent to the respective transactions. The essence of the deceit and fraudulent concealment alleged was that Ulster Bank had represented that it was proposing a transaction of one kind but the actual transaction differed materially from that proposed and this was not highlighted to the representatives of the plaintiffs prior to their entering into and executing of the transactions.

49. I accept the reasoning of Peart J. in *Komady* in relation to the applicability of the limitation period of six years in respect of a very similar claim for breach of fiduciary duties in that case. I can see no difference between the assumed facts in this case and the assumed facts in *Komady*. Therefore, in my opinion claims based upon any alleged breaches of fiduciary duties in relation to the transactions the subject of the EPF proceedings are equally statute barred in this case.

50. In *Komady* Peart J. also considered whether those proceedings were saved by reason of fraudulent concealment as alleged by the plaintiffs. The case in *Komady* in this regard was that the Bank concealed information from the plaintiffs that would have enabled them to know that they had a cause of action against the Bank or at least would have put them on enquiry. They said that the Bank knew that the plaintiffs had no separate legal advice and that it, being in a fiduciary relationship, concealed the true nature of the Swaps. They further said that Ulster Bank failed to comply with its obligations under the MiFID Regulations to reclassify the plaintiffs as retail clients from the 1st November, 2007, and that this amounted to a further concealment. In replies to particulars they stated that the fraud and concealment arose from:-

> *"the non-disclosure of vital elements of the nature of the Derivative Agreements and from representations of fact intended to induce the plaintiff[s] to enter into the transactions which were false and which did induce the plaintiffs to enter into transactions to their detriment and loss".*

51. They also stated that the true nature of the transactions was concealed from them prior to entering into the Agreements. They pleaded that all of the causes of action pursued through the Statement of Claim were concealed by Ulster Bank. They also relied upon the non-compliance with the code of conduct when the transactions were entered into and the assertion by Ulster Bank that the instruments were consistent with the plaintiffs' financial objectives.

52. In *Komady*, counsel for the defendant urged that there was no fact relied upon as concealing a cause of action from the plaintiffs which was not known to them or which ought to have been known to them after the effective date of the Swaps, 18th July, 2006. While the plaintiffs, in that case claimed that Bank failed to apprise the plaintiffs of the true nature of the Swaps it argued that this cannot amount to concealment for the purposes of s. 71(1)(b) of the Statute of 1957 because, if it could, then any plaintiff who brings a claim based on a failure to advise would, in effect, face no limitation period under the Statute. That would amount to the so-called discovery test. It argued that they knew everything they needed to know in July, 2006. It was further argued that the claim of concealment being put forward was not that the cause of action as such was concealed but rather that Ulster Bank failed to disclose information or properly explain the nature of the Swaps before they entered into them in July, 2006. It was submitted that a failure to disclose information and explain the Swaps could not properly be characterised as a concealment of a cause of action.

53. The learned trial judge concluded in paras. 55 and 56 of his judgment as follows:-

> *"Much reliance is placed by the plaintiffs on the existence of the fiduciary relationship between the parties at the time these Swaps were entered into. I can agree that such a relationship could impose a greater obligation of disclosure upon the bank. But in my view, even given that relationship for the purpose of this preliminary issue, the fact remains that everything that the plaintiffs needed to know in order to get any advice on these Swaps was known to them by the 18th July 2006. They had the Swap agreements they entered into. They knew what their conservative financial objectives were and that they had explained them to the bank. They knew also that the bank had not explained these Swaps to them. They knew that they thought that they were some sort of fixed rate interest agreement. 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 the money'. 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 in order to get such advice, and to decide if the Swaps had been mis-sold. Instead, they did nothing until they ran into financial difficulties in 2012 whereupon a financial review was undertaken and they received advice to the effect that these Swaps had not been suitable for the purposes in July 2006. The fiduciary relationship does not add anything to those facts. The coming into force of the MiFID in November 2007 adds nothing of relevance to those facts. It did not suddenly reveal to the plaintiffs some vital fact that was not available to them from July 2006 and which was essential to their knowledge that they had a cause of action.*
>
> *56. The plaintiffs in my view are confusing the emergence of further facts during the course of an action, with facts sufficient for the accrual of a cause of action. They had ample facts at their disposal in order to commence an action for negligence/negligence mis-representation in relation to these Swaps. A process of discovery might in due course have strengthened their hand in terms of their ultimate success at trial – or indeed might have weakened their case. But it is not necessary that every fact be known in order to commence proceedings. Sufficient facts are necessary in order to know that a cause of action has accrued. In the present case more than sufficient was known in the immediate aftermath of July 2006, or at any time before the Swaps came to an end some five and a half years later. The plaintiffs did not have to wait until April – August 2012 before seeking and receiving advice in relation to their suitability. As I have said already, section 71(1)(b) of the Act must not be equated with some sort of discovery test. That is not the intention of the section. No such provision as has been made in relation to discoverability in the context of personal injuries, has been made in respect of other types of tort."*

54. I accept and adopt this as a correct statement of the law. The facts and arguments in *Komady* are very similar to the facts and allegations in the EPF proceedings insofar as they relate to the alleged fraudulent concealment of a cause of action in relation the alleged mis-selling of a financial product. The plaintiffs in the EPF proceedings had in their possession the relevant information in relation to the transactions by 31st March, 2008, at the very latest in the case of Laurelmore (the Confirmation of the Old Jewry derivative) and by 20th March, 2008, in respect of the EPF Facility. At all times Laurelmore and EPF were part of the Larkin Group of companies. When Laurelmore purchased Old Jewry and entered into the Old Jewry derivative it was always intended that Old Jewry would be transferred to EPF and the Old Jewry derivative novated to EPF. It was highly probable that EPF had a copy of the Old Jewry derivative shortly after 31st March, 2008. While there was no evidence when EPF had a copy of the Novation Agreement and the Schedule to the ISDA Agreement, it expressly agreed that it was to be effective from 4th April, 2008.

55. If a plaintiff is to rely upon the previous s. 71(1)(b) of the Statute of 1957, the onus is on the plaintiff to satisfy the Court: (a) that the cause of action has been concealed; and (b) the date the plaintiff discovered the fraud; or (c) the date the plaintiff with reasonable diligence could have discovered the fraud. EPF's case is that it did not know of the fraud and could not have discovered the fraud alleged in this case until it had all of the transaction documents. This, it says, did not occur until 2009 when the ISDA Master Agreement was executed by EPF.

56. I do not accept that this is the case. The ISDA Master Agreement is not central to EPF's case regarding the alleged mis-selling of the Old Jewry derivative. Therefore, the fact that it was not available to EPF prior to 20th June, 2008, is no answer to an argument

that the claim is statute barred. EPF knew or certainly ought to have known that the effective date of the novation was 4th April, 2008. If it did not have a copy of the Novation Agreement, it could have asked for it. There is no suggestion that it would not have been furnished to them. It undoubtedly, with reasonable diligence, could have had it shortly after the effective date. I am not satisfied that EPF has established that the date it could have discovered the alleged fraud exercising reasonable diligence was later than 20th June, 2008, and therefore within the six year limitation period. On the contrary, had it exercised reasonable diligence and requested a copy of the novation contract (always assuming that it did not have it) it could have discovered the fraud it alleged at that time.

57. Applying the judgment of Peart J. to the facts in the EPF proceedings, I conclude that the acts and omissions alleged against Ulster Bank are not capable of constituting concealment by fraud within the meaning of s. 71(1)(b) on the part of Ulster Bank of the plaintiffs' rights of action. It follows therefore that the limitation period is not extended by virtue of the provisions of s. 71(1)(b) of the Statute of 1957. The plaintiffs' claims in relation to the alleged mis-selling of the Belgrave Facility, the Old Jewry derivative, the novation of the Old Jewry derivative and the EPF Facility based on contract, misrepresentation, negligence, negligent mis-statement, breach of a fiduciary duty or deceit or fraudulent concealment are all statute barred and on that basis I dismiss those claims.

Inherent jurisdiction of the court

58. Ulster Bank also applies pursuant to the inherent jurisdiction of the Court to strike out all of the claims in both the EPF proceedings and the Vieira proceedings on the basis that they are frivolous and vexatious and unsustainable and bound to fail. It relies on the well known passage in *Barry v. Buckley* [1981] I.R. 306 at p. 308, which has been approved on many occasions by the Supreme Court:-

> *" But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings…*
>
> *This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to the defendant."*

59. Recently, Cregan J. in *Irish Bank Resolution Corporation Ltd. v. Purcell* [2014] IEHC 525, summarised the relevant principles at para. 83 as follows:-

> *"1. The Court has jurisdiction pursuant to Order 19 Rule 28 and also pursuant to its inherent jurisdiction to strike out proceedings if they are bound to fail.*
>
> *2. In considering an application to strike out proceedings pursuant to its inherent jurisdiction the Court is not limited to considering the pleadings of the parties but is free to consider evidence on affidavit relating to the issues in the case (per Costello J. in Barry v. Buckley [1981] IR 306).*
>
> *3. This jurisdiction to strike out proceedings is one to be "exercised sparingly and only in clear cases". (See Costello J. in Barry v. Buckley [1981] IR 306).*
>
> *4. Moreover as McCarthy J. stated in Sun Fat Chan v. Osseous Ltd [1992] 1 IR 425 "Generally the High Court should be slow to entertain an application of this kind".*
>
> *5. In addition as was stated by Keane J. in Lac Minerals v. Chevron Corporation [1995] 1 I.L.R.M. 161 (High Court, 6th August, 1990) (and quoted with approval by the Supreme Court) in Supermacs Ireland Ltd v. Katesan (Naas) Ltd [2000] 4 I.R. 273 "a judge in considering an application to strike out or dismiss a claim must be confident that the plaintiff's claim cannot succeed no matter what might arise on discovery or at the trial of the action."*
>
> *6. If the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed (see McCarthy J. in Sun Fat Chan v. Osseous Ltd).*
>
> *7. The Court can only exercise a jurisdiction to strike out a claim on the basis that "on admitted facts it cannot succeed" (per McCarthy J. in Sun Fat Chan v. Osseous Ltd).*
>
> *8. The Court in considering whether to strike out a claim "must treat the plaintiff's claim at its high water mark" (per Clarke J. in McCourt v. Tiernan [2005] IEHC 268.*
>
> *9. The burden of proof lies on the defendant to establish that the plaintiff's claim is bound to fail. (See Salthill Properties Ltd v. Royal Bank of Scotland [2009] IEHC 207)*
>
> *10. The Court should not require a plaintiff to be in a position to show a prima facie case, merely a stateable case, in an application to strike out. (See Clarke J. in Salthill Properties Ltd v. Royal Bank of Scotland.)"*

60. Haughton J. summarised them in the case of *Togher Management Company Ltd. & Anor v. Coolnaleen Developments Ltd.* [2014] IEHC 596 at para. 28:-

> *"With regard to the courts inherent jurisdiction to dismiss, the principles are well established in cases such Barry v. Buckley [1981] I.R. 306, Sun Fat Chan v. Osseous Limited [1992] 1 I.R. 425 (Supreme Court – McCarthy J), Ennis v. Butterly [1996] I.R. 426, and Salthill Properties Limited & Cunningham v. Royal Bank of Scotland Plc & Ors [2009] IEHC 207. From this jurisprudence the following principles may be extracted:-*
>
> *• The jurisdiction exists to ensure than an abuse of the process of the courts does not take place.*
>
> *• The jurisdiction should be exercised sparingly and only in clear cases.*
>
> *• It enables the court to avoid injustice.*
>
> *• If a statement of claim admits of an amendment which might "save it" and the action founded on it, then the action should not be dismissed.*

• *A variety of circumstance may emerge at the trial of an action which might not be entirely contemplated at earlier stages in proceedings, and what may appear clear and established at an early stage may become less so at trial.*

• *It is a jurisdiction to dismiss where the proceedings are bound to fail.*

• *Such an application may be of particular relevance to cases involving the existence or construction of documents – in which it may be possible for a party to persuade the court that no reasonable construction of the document(s) concerned could give rise to a claim on the part of the plaintiff, even if all the facts alleged by the plaintiff were established.*

• *Where there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence, it is difficult to envisage circumstances where an application to dismiss on the grounds that the action is bound to fail could succeed.*

• *The plaintiff should not be required to show a prime facie case at the stage of an application to dismiss.*

• *The onus lies on the defendant to establish that the plaintiff's case is bound to fail.*

• *It follows from the foregoing point that the defendant must demonstrate that any factual assertion on the part of the plaintiff that the defendant contests could not be established."*

61. Ulster Bank argued that in respect of both the EPF Facility and the novation of the Old Jewry derivative and the Positive Carry Swap it was absolutely clear from the contractual documentation entered into by EPF and Vieira that their cases were bound to fail and therefore should be struck out on the basis of *Barry v. Buckley*.

62. It is accepted that in exercising this discretion that the Court is not confined to the pleadings and replies to particulars but is free to consider evidence on affidavit relating to the issues in the case. In particular, it may consider admitted facts and undisputed facts. The burden of proof lies upon Ulster Bank to establish that the plaintiff's claim is bound to fail and the Court must treat the plaintiff's claim "*at its high watermark*". If the pleadings can be amended in such a manner as to save the action in the proceedings, it should not be dismissed.

63. This latter point does not arise in this case as the plaintiffs have not suggested that the pleadings could be amended in any way. If the Court is to refuse the application to dismiss on the basis that the pleadings could be amended, then the plaintiff should be in a position to indicate nature of the proposed amendments and the proposed amendments should be such that they would be capable of saving the proceedings.

The case of Laurelmore

64. Laurelmore's claim is based upon two transactions: the Belgrave Facility and the Old Jewry derivative. EPF purchased Belgrave Road from Laurelmore. The Belgrave Facility was repaid in full by Laurelmore and it did not incur any early termination or break costs in relation to this termination of the facility. The Old Jewry derivative was novated to EPF and EPF assumed Laurelmore's obligations under the derivative. Laurelmore did not incur any break costs or other costs arising from the novation of the derivative. It is also claimed that it was not properly categorised for the purpose of the MiFID Regulations and that consequently Ulster Bank was in breach of certain obligations under the regulations.

65. Laurelmore's relations with Ulster Bank came to an end with the completion of the transactions. It had no residuary liabilities or obligations to Ulster Bank under the Belgrave Facility. The liabilities and obligations under the Old Jewry derivative related solely to the period prior to the date of the novation and there has been no suggestion that, in fact, any such liabilities or obligations were outstanding. It was submitted on behalf of Ulster Bank, in the circumstances, Laurelmore had and could not suffer any damage arising out of any misrepresentation or mis-selling of either Belgrave Facility or the Old Jewry derivative. Even if there had been any such misrepresentation or mis-selling, Laurelmore had suffered no damage by reason of the repayment of the Belgrave Facility and the novation of the Old Jewry derivative.

66. Counsel for the plaintiff did not disagree with the proposition that Laurelmore, in fact, suffered no loss. He explained that Laurelmore was party to the proceedings to enable EPF prosecute its claims for damages and other reliefs. It was said that the Belgrave Facility and the Old Jewry derivative were mis-sold to Laurelmore in the first instance and therefore Laurelmore was made a party to the proceedings as the transferor of the Old Jewry derivative and what the plaintiffs claimed was the Belgrave derivative (though it was not asserted that the Belgrave derivative was the subject of a novation agreement). It was clear that the plaintiffs were not maintaining a claim of damages or other reliefs on behalf of Laurelmore in its own right.

67. While I have some difficulty in understanding precisely why the plaintiffs wish to retain Laurelmore as a plaintiff in the EPF proceedings, it is clear that any claim to relief on its own behalf, if such is maintained, is bound to fail in the circumstances. It is accepted on the uncontested facts that Laurelmore sustained no damages and divested itself of any involvement in the various transactions as of 2008. It follows, therefore, that insofar as Laurelmore seeks any relief in the EPF proceedings, such claims are bound to fail.

The case of EPF

68. EPF advances claims against Ulster Bank which may be divided into four parts. The first relates to the EPF Facility, the second to the Old Jewry derivative, the third to the sale of the Belgrave Road and Old Jewry properties and the fourth relates to the delay in closing out the Belgrave Facility and the Old Jewry derivative. I shall deal with the first two matters before turning to the latter two claims.

(1) EPF Facility

69. In relation to the first matter, the plaintiffs plead at para. 11 of the Statement of Claim that EPF entered into a loan agreement which refinanced the Laurelmore indebtedness relating to the secured liability over both Old Jewry and Belgrave Road. It is pleaded that this is the Facility Agreement dated 27th February, 2008 (the EPF Facility).

70. At para. 23 of the Statement of Claim, it is pleaded that the Belgrave derivative was novated to EPF in and around early 2008. This is clearly inconsistent with the plea at para. 11. The EPF Facility is expressed to be a demand loan facility. No novation

agreement in respect of the Belgrave Facility, referred to by the plaintiffs in pleadings as the Belgrave derivative, has been either exhibited or referred to in affidavit or in the pleadings or Replies to Particulars. I conclude, therefore, that insofar as it is alleged that there was a novation of the Belgrave Facility, this claim is bound to fail as the documentary evidence upon which the plaintiffs base their case establishes that the Belgrave Facility was replaced by a demand loan facility.

71. The EPF Facility states, on its face, that the facility is:-

> *"Subject to the terms and conditions set out in this Facility Letter and subject also to the Bank's Standard Terms and Conditions Governing Business Lending To Companies – Corporate Banking (Ref 01/2007) (the 'General Conditions')."*

72. While each of the facilities is described as a demand loan facility, in respect of Belgrave Road, the term is described as:-

> *"Subject to the terms of this letter and without prejudice the demand nature of the Facilities, Facility B [Belgrave Road] shall expire on 31 March 2021."*

73. Clause 10.8 of the General Terms and Conditions for Business Lending to Companies (Ref 01/2007) allows Ulster Bank to charge broken funding costs upon any repayment or prepayment arising as a result of the termination of the facility. The facility letter was signed by two directors of DEPF following the resolution of DEPF that Mr. Berrigan and Mr. Tony Garry sign the facility letter:-

> *"…by way of acceptance of the terms of the Facility Letter and the General Conditions on behalf of the Company".*

74. The pleas in relation to the transaction are set out in paras. 35, 37, 41, 42 and 43 of the Statement of Claim. It is said that Ulster Bank concealed the true nature and extent of the liabilities associated with the Belgrave Facilities at the time of the assumption by EPF of the liabilities associated with the facility (In fact it did not assume those liabilities but assumed liabilities in respect of a new facility. The Belgrave Facility was repaid in full by Laurelmore). At para. 41 it is clarified that what is alleged to be concealed is that any break costs would be associated with the facility at any time over their term. In argument, it was clarified that the concealment relied upon was an alleged failure to bring to the attention of the plaintiffs, in this case, EPF, the fact that there were break costs associated with the facility. However, in Replies to Particulars the plaintiffs accept that the general terms of a fixed rate loan include an early repayment penalty and the general terms and conditions attaching to the EPF Facility expressly state that break costs can arise if the facility is terminated prematurely. It was further confirmed that all the misrepresentations upon which the plaintiff sought to rely predated the entry into of the relevant transactions. There was no particular misrepresentation pleaded in relation to this plea of concealment in relation to the EPF Facility.

75. It is pleaded that the EPF Facility was inappropriate and entirely at odds with the financial objectives of EPF. The plaintiffs plead that Ulster Bank represented and warranted that the EPF facility was consistent with the financial objectives of EPF and that this amounted to a misrepresentation of the utility, effect and financial benefit or advantage of the facility. In para. 50, it is pleaded that Ulster Bank advised and recommended that EPF execute the EPF Facility and that such advice and recommendation was inconsistent with the plaintiffs' and in particular, EPF's financial objectives. The financial objectives of EPF as pleaded in para. 32 of the Statement of Claim were to acquire from Laurelmore the investment property at Belgrave Road and Old Jewry and hold them for the ultra long-term using excess income to amortise debt and the long-term strategy was to expand by acquiring new assets, constantly building its income base.

76. It was also pleaded that the EPF Facility was predicated on certain financing costs which it is said were unsustainable into the future and would more than likely give rise to an event of default. It was, therefore, deceitful behaviour on the part of Ulster Bank to offer the EPF Facility in the circumstances when it knew or ought to have known this to be the case. It was pleaded that Ulster Bank set the financing costs of the EPF Facility at an artificially low rate in order to induce and encourage EPF to enter into the EPF Facility when it knew or ought to have know that the financing costs associated with the EPF Facility were unsustainable into the future, particularly in light of the cash flow impact of the break costs and/or other financing costs associated with the EPF Facility (and the Old Jewry derivative). This argument is made in the context of the interest in respect of the facility being a fixed rate of 5.045% until 31st March, 2012, plus 0.90% per annum.

(2) Novation of the Old Jewry derivative

77. EPF's contractual obligations in respect of the Old Jewry derivative arise from the Novation Agreement between Ulster Bank, Laurelmore and DEPF. It is common case that by virtue of the Novation Agreement, DEPF (subsequently EPF) accepted the transfer by novation of all the rights, liabilities, duties and obligations of Laurelmore under and in respect of the Old Jewry derivative, with effect from 4th April, 2008. The Confirmation of the derivative dated 31st March, 2008, was attached as an annex to the Novation Agreement. The ISDA Master Agreement between Ulster Bank and EPF is dated 4th April, 2008, and recites that Ulster Bank and EPF have entered and/or anticipate entering into one or more transactions that are or will be governed by this Master Agreement which includes the Schedule and documents and other confirming evidence exchanged between the parties confirming those transactions. The Schedule to the Master Agreement dated as of 4th April, 2008, between Ulster Bank and EPF is stated to be duly executed by each of the parties as of 4th April, 2008. The Master Agreement was executed by Ulster Bank on 27th January, 2009, and by EPF on 29th May, 2009, and by Davy as investment manager to EPF on 29th May, 2009. Part 5(c) of the Schedule sets out the provisions governing the relationship between the parties, it provides as follows:-

> *"Each party will be deemed to represent to the other party on the date on which it enters into a Transaction that (absent a written agreement between the parties that expressly imposes affirmative obligations to the contrary for that Transaction):-*
>
> *(i) Non-Reliance. It is acting for its own account, and it has made its own independent decisions to enter into that Transaction and as to whether that Transaction is appropriate or proper for it based upon its own judgement and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction; it being understood that information and explanations related to the terms and conditions of a Transaction shall not be considered investment advice or a recommendation to enter into that Transaction. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee after the expected results of that Transaction.*
>
> *(ii) Assessment and Understanding. It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of that Transaction. It is also capable of assuming, and assumes, the risks of that Transaction.*

(iii) Status of Parties. The other party is not acting as a fiduciary for or an adviser to it in respect of that Transaction."

78. The plaintiffs plead that the provisions of the MiFID Regulations applied in respect of the entry into and execution of the Old Jewry derivative by Laurelmore and/or the assumption of liabilities associated with this derivative by EPF. It is pleaded that Ulster Bank did not comply with certain requirements of the MiFID Regulations and in particular that it did not properly categorise or characterise EPF in respect of the Old Jewry derivative (A similar pleading is raised in respect of the alleged Belgrave derivative but in view of the fact this is clearly a fixed rate loan, the provisions of MiFID do not apply to the EPF Facility). It is alleged that Ulster Bank concealed the true nature and extent of the liabilities associated with the Old Jewry derivative at the time of the novation in 2008 and that the Old Jewry derivative was inappropriate, inconsistent and entirely at odds with the financial objectives of EPF. It is said that Ulster Bank represented and warranted that the Old Jewry derivative was consistent with the financial objectives of EPF when it manifestly was not and that this amounts to a misrepresentation of the utility effect and financial benefit or advantage of the derivative. It is alleged that Ulster Bank concealed that any break costs would be associated with the derivative at any time over its term.

The Vieira case

79. Vieira claims that it was mis-sold the Positive Carry Swap. It stated in Replies to Particulars that the agents of Ulster Bank misrepresented the nature of the Swap as a type of hedging, its cancelability and its function as a discount on interest rates. It pleads that the making of these misrepresentations constitutes the tort of deceit. It says that the Swap was unsuitable given its financial objectives which were known by Ulster Bank. It alleges that Ulster Bank owed it fiduciary duties which were breached by the sale to it of the Swap. It says it was not properly categorised under the MiFID Regulations and Ulster Bank breached various terms of the Regulations. It also pleads that it was subject to coercion and intimidation but does not link this to any claim of Vieira against Ulster Bank.

Decision
80. Can it be said that these claims, or any of them, are bound to fail, and so should be struck out pursuant to the inherent jurisdiction of the Court?

81. The first authority relied upon by Ulster Bank is the decision of the High Court, Birmingham J. in *McCaughey v. Anglo Irish Bank Corporation Ltd. & Anor* [2012] 4 I.R. 417. At para. 78 *et seq*., the learned trial judge cited with approval the judgment in *Peekay Intermark v. ANZ Banking Group* [2006] EWCA Civ 380 of Moore-Bick L.J. at para. 57:-

> *"… 'It is common to include in certain kinds of contracts an express acknowledgement by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in Colchester Borough Council v. Smith. However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see E.A. Grimstead & Son Ltd v. McGarrigan [1999] EWCA Civ 3029] (Unreported, 27th October 1999).'*
>
> *[79] I have concluded that the effect of the provisions of the commitment agreement is that the plaintiff is precluded from pursuing claims other than those based on fraud. Insofar as the plaintiff has formulated a claim in tort, under various heads of claim, it must be recognised that this is a case where the parties have ordered their relationship on the basis of detailed, precise and elaborate contractual provisions. The effect of this is that the defendant's obligations in tort cannot be more extensive than what the parties have by contract determined should be the position. This much is clear from the judgment of the Supreme Court in Kennedy v. Allied Irish Banks plc. [1998] 2 I.R. 48."*

82. This passage was approved by Hardiman J. in the Supreme Court appeal in the matter. At p. 35 of the judgment, he stated:-

> *"…indeed, I would put it still more directly and say that the Bank has exempted itself from liability for anything short of direct lies or fraudulent concealment."*

83. In *Parsley Properties Ltd. & Ors v. Bank of Scotland Plc and Anor* [2013] IEHC 624, an application was brought by the defendants to dismiss the plaintiffs' claim pursuant to O. 19, r. 28 of the Rules of the Superior Courts. McGovern J. had to consider clauses virtually identical to those set out in both the Confirmation of 31st March, 2008, in respect of the Old Jewry derivative and the Schedule to the Master Agreement dated 4th April, 2008, between Ulster Bank and EPF concerning the relationship between the parties and those in the Confirmation of the Positive Carry Swap relating to the relationship between Vieira and Ulster Bank. McGovern J. noted that Birmingham J. in *McCaughey* took the view that very broad exclusionary clauses in a commercial contract involving interest rate swaps were enforceable and he quoted from that judgment as follows:-

> *"On their face, these representations and warranties by the plaintiff are couched in very broad terms. They involve him stating that he has all the material that he wants, that he is not relying on any representations, that he has made his decision on the basis of his own appraisal, and that he recognises that he may not have been given complete information but wishes to make the investment. Taken at their face, these representations and warranties present a substantial obstacle to any plaintiff seeking to present a claim on the basis that he has been misled or misinformed...*
>
> *The plaintiff says that the attempt to confine the case to one of fraud and to prevent the plaintiff advancing various elements of the claim that he wishes to, ignores the nature of the relationship that existed between the plaintiff and the first named defendant and says that the effectiveness or otherwise of the exemption clauses in particular those in the Commitment Agreement cannot be divorced from the nature of that relationship."*

84. McGovern J. concluded in respect of nearly identical clauses to those applicable in these cases as follows:-

> *"27. I cannot, on the basis of the evidence before me, envisage any circumstances under which Parsley might avoid the terms of the various instruments entered into by it. Even if it is the case that interest rate swap arrangements were unsuitable for its purposes, it is a corporate entity forming part of a sophisticated structure, being held by a trust and interacting with other corporate vehicles registered in other jurisdictions. Parsley was managed by a professional trustees and had available to it the possibility of obtaining any necessary legal or financial advice in relation to the*

transactions in question. The exclusionary terms were clear and are enforceable, in circumstances where the plaintiffs have not specifically pleaded fraud or fraudulent concealment…

30. If I am in error on [an unrelated point]…, I am also of the view that there is no reasonable prospect of Parsley's claim against the Bank succeeding, were it to go to trial."

85. Not only are the clauses virtually identical in these two cases to the clauses in *Parsley*, the context was similar in that in each case the party alleging it was mis-sold a swap or derivative was part of a sophisticated structure with access to very knowledgeable and sophisticated advices at the time. In the EPF proceedings, Laurelmore is a company incorporated in the Isle of Man run by professional trustees. It is part of a large group of companies which held very significant assets in both the State and in England. From 2008, its ultimate parent was EPF. EPF is a company incorporated by Davy and was licensed pursuant to s. 256 of the Companies Act 1990, Part XIII by the Central Bank. Its raison d'être is to deal in instruments of the kind with which we are concerned on behalf of its investors. All of its directors were provided by Davy and the Investment Manager under the prospectus was Davy. The acquisition, initially by Laurelmore and subsequently by EPF, of Belgrave Road, Old Jewry and the Old Jewry derivative was in the context of sophisticated legal advices and a restructuring of extensive assets of the Larkin Group. The exclusionary terms in both the Confirmation Notice and in the Schedule to the Master Agreement, each of which is incorporated into the Novation Agreement between Ulster Bank, Laurelmore and DEPF, were clearly and expressly intended to set out the basis upon which each party reached agreement with the other. The object was to ensure that there was certainty in relation to this matter with the intention that they could each rely upon the relevant clauses set out in the contractual documents.

86. Each of these transactions were very significant transactions involving very considerable sums. It was incumbent on the parties to exercise due diligence in respect of the terms of the documents offered to them prior to entering into them. They were intended to reflect the terms upon which each party contracted with the other. They were each entitled to assume that they each understood and accepted the terms as set out in the documents. If the Confirmation did not reflect the terms of the Agreement the party so asserting was expressly invited to contact Ulster Bank in relation to each confirmation. Far from concealing the nature of the transactions or the characterisation of the plaintiffs as professional clients, the documents were crystal clear in that regard.

87. In the circumstances, I can see no basis upon which I should not follow the decisions of Birmingham J. and McGovern J. and hold that the terms in the Confirmation of 31st March, 2008 and the novation of 4th April, 2008 are clear and enforceable and that they preclude the plaintiffs, either Laurelmore or EPF, from bringing any of the claims against Ulster Bank other than a plea of fraud or fraudulent concealment.

88. The EPF Facility was a demand loan which nonetheless was intended to run till 31st March, 2021, and the terms were clear on the face of the letter as regards the fixed interest rate chargeable. The possibility of incurring break costs was set out in the general terms and conditions and the plaintiffs accept that costs are likely to be incurred when a fixed rate loan is terminated. The EPF Facility was accepted by its Davy directors following a resolution of the board of EPF expressly resolving that the acceptance of the proposed facility was in the interests of EPF. It is not possible in the circumstances for EPF to argue with any credibility that Ulster Bank concealed from it the true nature and extent of the liabilities under the EPF Facility. These are stated to be that break costs could be incurred or the interest payable under the terms of the facility. As the EPF Facility is a loan the MiFID Regulations can have no relevance to the loan. Based upon the pleadings and the evidence before me, I can see no basis upon which EPF might avoid the terms of the EPF Facility. It follows that all claims in EPF proceedings in relation to terms of that facility ought to be dismissed in order to do justice to Ulster Bank as required by the authorities cited above.

Fraud and fraudulent concealment

89. EPF alleges fraud and fraudulent concealment against Ulster Bank. It pleads that the true nature of the Old Jewry derivative and the extent of the liabilities under the derivative were concealed (para. 35 of the Statement of Claim) and the break costs in the derivative were concealed (para. 31 of the Statement of Claim).

90. The jurisdiction to strike out proceedings based upon the inherent jurisdiction of the court should only be exercised in the clearest of cases. As Clarke J. stated in *McCourt v. Tiernan*, a court must treat the plaintiff's claim at its high watermark. It can only exercise the jurisdiction on the basis that "*on admitted facts it cannot succeed*" (per McCarthy J. in *Sun Fat Chan v. Osseous Ltd.*). In most cases, therefore, where fraudulent concealment and deceit are part of the claim, they will not be struck out on the basis of this jurisdiction.

91. However, it is essential to consider each case individually and to consider precisely the claims advanced before a court can conclude either that a particular claim is bound to fail and therefore should be dismissed or, alternatively, that it cannot conclude that the claim is bound to fail. In particular, it is important to ascertain whether or not the plea in fraud or deceit is truly a distinct cause of action separate from allegations of misrepresentation and breach of fiduciary duty.

92. It is not disputed that EPF entered into the Novation Agreement which included the Confirmation Agreement in respect of the Old Jewry derivative and that it had the relevant contractual documentation. It accepts this. It either understood the nature of the transaction itself or had the opportunity to obtain all professional advice necessary to understand the transaction. Ulster Bank argues that there was no concealment of any of the matters alleged by the plaintiffs. EPF can point to no fact that was not known to it at the date of the transactions (or which could to have been known to it with due diligence) and therefore it cannot be said that any of the terms of the Agreement were concealed. I accept this argument. If the plea of concealment (as opposed to misrepresentation or breach of fiduciary duty) advanced by EPF is bound to fail, the fact that it is described as fraudulent concealment does not, on the admitted facts of this case, add anything to EPF's claim.

93. In relation to the alleged fraudulent concealment, the plaintiffs accept that the losses at issue in the EPF proceedings arise by virtue of transactions entered into by Laurelmore and that "*at the time of the transfer to EPF both interest rate agreements were 'in the money' and no loss was being transferred*"[1]. Accordingly, EPF's case relating to the alleged concealment of the extent of the liabilities under the Old Jewry derivative can only be construed as meaning the possible liabilities that might arise in the future in respect of the derivative. As of the date of the novation, neither Ulster Bank nor EPF could know the extent of the liabilities of either party under the derivative at any particular date into the future. It, therefore, cannot be said that Ulster Bank concealed the extent of the liabilities EPF was taking on in respect of the Old Jewry derivative, which liabilities would arise in the future.

94. The same logic applies to the claim that Ulster Bank concealed the break costs arising from the Old Jewry derivative from EPF. It is true that the documentation does not set out a methodology to calculate such costs and EPF complains that this constitutes concealment. This does not mean that there was any concealment, dishonesty or deception on the part of Ulster Bank. The essence of a derivative is that neither party can predict at any particular time whether the party will be "*in the money*" or "*out of the*

money". It was made clear that there would be costs arising to one party or the other and that these could not be predicted in advance. In the Terms of Business provided to Laurelmore at Schedule 1, it specifically warns in relation to break costs as follows:-

> *"If you approach us to close out a transaction which has been entered into between us, we are under no obligation to do this. Where we agree to do this,* ***we will calculate the close out value of the trade based on prevailing market conditions and may include associated costs arising from the close out in this figure.*** *The close out value may be due from you to us or from us to you depending on the trade and may be substantial." (emphasis added)*

95. In considering whether in the light of this documentation there was concealment of the methodology of the calculation of break costs and whether this could give rise to a claim in fraudulent concealment against Ulster Bank it must be borne in mind that EPF was licensed by the Central Bank, *inter alia*, to trade in derivatives due to the nature of the expertise available to it. It is common case that the directors acting on behalf of EPF in relation to both the novation of the Old Jewry derivative and the EPF Facility were experienced Davy executives. All of the documents were based on standard documents of Ulster Bank. There is no allegation that they included any unusual or concealed clauses. The allegations are of mis-selling. As was pointed out on behalf of Ulster Bank, there was no evidence from the Davy directors of EPF asserting that terms of the transactions or the liabilities arising thereunder were concealed from them or that they did not understand them or the potential liabilities that could arise under the derivative.

96. Based on these admitted facts and the accepted documents, it seems to me that it is not possible for EPF to argue that there was concealment of either the true nature of the Old Jewry derivative or the extent of liabilities under the derivative or the break costs that would be incurred in the event of early termination of the derivative. That being so, it follows that if there was no concealment then the claim in fraudulent concealment is bound to fail. The claim in deceit in this case is identical, in effect, to that of fraudulent concealment. If the former is bound to fail, so must the latter.

97. In addition I should point out that the pleas in relation to fraud in this case are very vague. This is particularly significant because of the criticisms levelled against the pleadings on this very ground in an earlier judgment in the EPF proceedings of Keane J. when he refused an application by the plaintiffs for an interlocutory injunction. Subsequent to that judgment, the plaintiffs furnished Replies to a Notice for Particulars raised by Ulster Bank. They were aware that their pleadings in relation to fraud and deceit were not regarded as sufficient by the High Court, yet the Replies to Particulars did not materially elaborate on the claims. In my opinion, the pleadings in relation to deceit, fraud and fraudulent concealment remain remarkably nebulous. Parties who allege fraud or deceit are required to plead their case with particularity.

98. In the case of *National Education Welfare Board v. Ryan* [2008] 2 I.R. 816, Clarke J. was considering whether or not a plaintiff had adequately pleaded fraud. While the question that Clarke J. had to answer was different to that before this Court, his observations in relation to the pleading of fraud are apposite. He held as follows:-

> *"[10] 4.5…If a plaintiff who makes an allegation of fraud is required to give full and exhaustive particulars prior to defence (and, thus, prior to discovery or interrogatories) in a manner which necessarily narrows the case, then there is every chance that, in a genuine case of fraud, the perpetrator will escape having to make discovery in respect of aspects of the fraud because the plaintiff will not have been sufficiently aware of the details of those aspects of the fraud to plead them in an appropriate manner in advance. In those circumstances aspects of the fraud will be outside the case as originally pleaded and will not be caught by any order of discovery or interrogatories.*
>
> *[11] 4.6 The other side of the coin requires that care be taken not to allow a party, by the mere invocation of an allegation of fraud, to become entitled to engage in a widespread trawl of the alleged fraudster's confidential documentation in the hope of being able to make his case.*
>
> *[12] 4.7 A balance between these two competing considerations needs to be struck. The balance must be struck on a case by case basis but having regard to the following principles. Firstly, no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party, in its pleadings, specifies, in sufficient, albeit general, terms the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a prima facie case to that effect, then such a party should not be required, prior to defence and, thus, prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge…"*

99. Applying this case by analogy, it seems to me that where a court is concerned with a motion to strike out proceedings based on the inherent jurisdiction of the court and the pleadings include a plea of fraud, such as here, the court must be vigilant to ensure that such an order is not made so as to permit, in a genuine case of fraud, the perpetrator to escape from the claims sought to be advanced against it. On the other hand, the court should give no latitude to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged the fraud took place and what the consequences of the alleged fraud are said to be. The mere invocation of an allegation of fraud cannot give substance to a claim that it otherwise bound to fail as some sort of *deus ex machina*.

100. I am not satisfied that the claims of EPF based on alleged fraud or fraudulent concealment or deceit are other than bare allegations or invocations of the word fraud. In truth, they amounted to no more than the claims of misrepresentation in relation to the EPF Facility, Old Jewry derivative and Old Jewry novation. I have already held that these claims are bound to fail. As the invocation of a plea of fraud, in fact, in this case, does not advance or enhance these claims in any way, it follows that the claims in fraud and deceit are also bound to fail and accordingly, I ought in justice to Ulster Bank dismiss these claims also.

(3) Forced sale of properties

101. EPF purchased Belgrave Road and Old Jewry from Laurelmore. It claims that it was wrongfully coerced into selling these properties by Ulster Bank. Ulster Bank vehemently rejects any allegations of coercion or intimidation or other alleged wrongdoing. It says it acted lawfully in telling the representatives of the EPF that it would have to call in personal guarantees and realise its security in order to secure repayment of monies due to it by EPF and therefore this claim also is bound to fail. I cannot agree. The issue as to whether or not Ulster Bank acted lawfully or improperly in relation to the sale of the two properties can only be determined once oral evidence in relation to the matter is heard. This is totally different from construing the agreed contractual documents which govern the relations between the parties in the context of admitted and agreed facts. I refuse to strike out this aspect of the claim of EPF.

(4) Delay in closing out the Old Jewry derivative and EPF Facility

102. The plaintiffs allege that Ulster Bank delayed in closing out both the EPF Facility and the Old Jewry derivative and as a result EPF suffered far greater losses than it would have incurred if Ulster Bank had closed out the transactions in a timely manner. This likewise is a matter that can only be decided after the court has heard oral evidence in relation to it. I refuse the relief sought in relation to this aspect of the claim.

Vieira's case

103. The case that Vieira's claim is bound to fail is even more compelling than the case in respect of EPF. Vieira received a letter from Ulster Bank enclosing the Terms of Business prior to entering into the Positive Carry Swap. The relevant terms of the letter and the Terms of Business are quoted in full at paras. 8, 9, 11 and 12 above. The categorisation of Vieira as a professional client, the warnings in relation to the proposed transaction, the terms upon which Ulster Bank was dealing with Vieira, the fact that they were making no representations or recommendations, that there was no fiduciary relationship between the parties and all the other detailed clauses defining the terms upon which Ulster Bank was contracting with Vieira were clearly set out in the documents sent to Vieira. The Confirmation dated 22nd August, 2008, of the Positive Carry Swap contains the identical clause concerning the relations between the parties quoted above in relation to the EPF novation. It was absolutely clear on its face that Vieira was characterised as a professional client and that the terms of Business were accepted. Both the letter and the Terms of Business contained very clear and explicit terms governing the relations between Vieira and Ulster Bank. The clauses preclude Vieira from advancing the case it now wishes to make in relation to misrepresentation, breach of duty and breach of fiduciary duty. Just as in *McCaughey* these clauses are enforceable. It received a Confirmation in relation to the Positive Carry Swap which contained terms identical to those in the Old Jewry derivative and the novation of the Old Jewry derivative. These are virtually identical to the terms considered by McGovern J. in *Parsley*. Accordingly, applying that decision to this case also, all claims other than those based on fraud and fraudulent concealment must be dismissed on the basis that they are bound to fail.

104. The pleas advanced by Vieira in relation to deceit and fraud have even less substance than those advanced in the EPF proceedings. At para. 13 of the Statement of Claim in the Vieira proceedings, it is alleged that Ulster Bank did not disclose and in fact, concealed the true nature of the Positive Carry Swap from the plaintiff and, in particular, the cash flow that would be used to pay down the costs associated with the Positive Carry Swap. In para. 27 of the Statement of Claim it is generally pleaded that the plaintiff claims damages arising, *inter alia*, from deceit coercion, duress, and intimidation. In reply to a request for particulars arising out of the plea at para. 13, it was stated that Ulster Bank represented to it that the Positive Carry Swap was a type of hedging, that it could be cancelled in the first year by Ulster Bank and that it functioned as a discount on interest rates and that each of these representations were untrue. It is said that a fundamental element of the structure is the method as to how a discounted fixed rate is achieved and the risks that ensue. These are not addressed in the term sheet and were not discussed by Ulster Bank with the plaintiff.

105. As in the case of EPF, there was no fact in relation to the Positive Carry Swap that was not either known to Vieira at the time or that it could not have known had it taken appropriate advice which was at all times available to it.

106. Further, while Vieira alleges that the right of Ulster Bank to cancel the Swap was concealed from Vieira and it in fact exposed it to unprotected breakage costs on credit break dates. It has to be borne in mind that it is common case that the Positive Carry Swap was not terminated by Ulster Bank and thus break costs were not incurred by Vieira. The Positive Carry Swap expired after its five year term on 15th August, 2013. Therefore this allegation cannot give rise to any claim by Vieira against Ulster Bank.

107. For the reasons discussed in the case of the EPF proceedings, I am not satisfied that the plea of fraudulent concealment, in fact, adds anything to the case in mis-selling and misrepresentation in the Vieira proceedings. There is no plea at all advanced in relation to coercion or intimidation, other than a claim for damages.

108. Accordingly, based on the agreed facts and the particular pleadings in this case, I conclude that each of the claims raised in the Vieira proceedings are bound to fail and therefore, I dismiss the entire of the Vieira proceedings.

Conclusion

109. For the reasons set out above I dismiss all of the claims of Laurelmore; I dismiss all of the claims of EPF save those that relate to the alleged coercion and intimidation forcing EPF to sell Belgrave Road and Old Jewry and the claim for damages arising out of the alleged delay in closing out the EPF Facility and the Old Jewry derivative. I strike out the Vieira proceedings in their entirety.

[1]Affidavit of Mr. Richard Larkin sworn 2nd February, 2015, para. 28.