

THE HIGH COURT

[2014/6898 P.]

BETWEEN

BERNADETTE GOODWIN

PLAINTIFF

AND

ALLIED IRISH BANKS, PLC
THE THIRD BELFRY PROPERTIES (U.K.) PLC
SELENGA LIMITED, BDO [A FIRM], SEAN HENNEBERRY,
TONY KILDUFF, WILLIAM LEDWIDGE,
JOHN ROCKETT, JOHN ROGER WILKINSON, ANN BLACKMORE

DEFENDANTS

JUDGMENT of Mr. Justice Robert Haughton delivered on the 19th day of December 2019

1. This matter comes before me firstly to provide clarification in relation to orders made by me on 24th October, 2019, and secondly to rule on a notice of motion dated 28th November, 2019 in which the first named defendant (AIB) seeks certain orders in relation to Points of Claim delivered here on behalf of the plaintiff on 8th November, 2019.
2. The plaintiff's claim is one of six test cases that are representative of some 280 claims relating to what are known as the Belfry investment funds. The essence of the plaintiff's claim is that in July 2003 she and her late husband were induced by AIB as placing agent to invest Stg. £150,000 in Belfry 3 by the purchase of shares in the second named defendant; that the second named defendant then undertook the investment, *via* a wholly owned UK subsidiary Derby Property Investments Limited ("Derby") who "geared up" the investment with monies at a ratio of 20:80 with borrowing from Bradford & Bingley, to purchase properties in the UK; that the Prospectus indicated that the investment involved a "*degree of financial and commercial risk*", whereas the plaintiff claims it was high risk; that the Prospectus/sales literature did not detail the structure of the investment, or that the intended borrowing would include a Loan to Value Covenant ("LTV Covenant") the effect of which would be that if the value of the investment property purchased fell below a certain percentage, typically 80% of the purchase price, the loan with Bradford & Bingley would go into default. As matters transpired the properties purchased in Belfry 3 fell below the critical value in the LTV covenant, and the plaintiff's claim is that as a result properties had to be sold and Belfry 3 collapsed after 2008, something of which she became aware in 2009/2010, and that in consequence the entire investment was lost. The plaintiff's claim commenced by Plenary Summons issued on 6th August, 2014, and originally claimed damages for breach of contract, negligence/breach of statutory duty, breach of fiduciary duty, negligent misstatement and misrepresentation.
3. In a judgment delivered by me on 28th April, 2017, I found certain elements of the plaintiff's claims (and the claims in seven other test cases) statute barred, but other elements I found not to be statute barred – in particular the claims in tort/negligence misstatement/misrepresentation, and most notably the claim related to misrepresentation by omission in respect of the allegations of failure to inform investors of the LTV

Covenant. That decision was appealed successfully by the defendants, and in the judgment of the Court of Appeal (Baker J.) delivered on the 18th of July, 2019, it was held that all of the plaintiff's claims were barred by s.11 of the Statute of Limitations 1957 (as amended) as they were instituted more than six years after the accrual of the cause of action, subject only to the possibility that the period of limitation was postponed in respect of the claims for negligence/negligent misstatement/misrepresentation by virtue of s.71(1)(b) of the Statute of Limitations on the basis that the cause of action was concealed by fraud. As that was not an issue that was determined by me, the cases were returned to the High Court for determination of this issue. It was for that purpose that this case and the other test cases (now reduced to six) were listed before me on 24th October, 2019.

Clarification

4. As is apparent from the Transcript of the hearing before me on 24th October, 2019, I was persuaded that of the six test cases Mrs. Goodwin's case alone should be progressed to a modular hearing in respect of the fraudulent concealment issue, because she is elderly (over 80) and unwell. I did not at that time make a direction for a modular hearing because I was advised that the plaintiffs were awaiting the perfection of the Court of Appeal order with a view to considering appealing to the Supreme Court, and in the hope that there might be some clarity in relation to that I adjourned a final decision on this until 19th December, 2019. Nevertheless I did give interim directions with a view to ordering a hearing on the fraudulent concealment issues in Mrs. Goodwin's case – I directed Points of Claim be delivered by 7th November, 2019, with Points of Defence to be delivered by 28th of November, 2019. My thinking appears from p.50 of the Transcript: -

“What commends itself to the Court at this stage is that there would be a modular trial but it would be on the basis that there would be agreement over *prima facie* facts as potentially constituting a cause of action so that on that basis the issues around fraudulent concealment and the evidence of fraudulent concealment which appear to be related only to the disclosure and non-disclosure of the loan to value covenant, but that should become clearer once Points of claim are delivered, could then be dealt with without the possibility of a lot of additional evidence being called on the question of whether there is or is not potentially a claim and my provisional view is that the parties should be able to agree on that basis a set of facts as potentially constituting a claim for the purposes of hearing such an issue.”

5. I also gave a direction that the plaintiffs would prepare and agree a note of the Discovery Orders that I made in the six test cases in July, 2019. I indicated (p.52) – “so I am not going to make further directions at this stage in relation to the exchange of limited discovery or witness statements, but I think that the parties should be tentatively making preparations with in mind a trial sometime late in Hilary or early in the Easter Term but limited to Mrs. Goodwin's case.”
6. I also noted the undertaking given through counsel by solicitors acting on behalf of the six cases that if there was an adverse outcome to any modular hearing on the fraudulent concealment issue, such that her case was found to be Statute Barred, that that would be

binding on the plaintiffs in the other five cases. I further noted that if the plaintiff was successful under s.71(1) then the successful outcome for her would not be binding on the defendants in respect of the other five test cases.

7. Beyond what is recorded in the Transcript I was not prescriptive as to what should go into the Points of Claim, but it was certainly my intention that they would focus on the pleas relevant to the plaintiff's allegations of fraudulent concealment of her cause(s) of action. I remain of the view that there is an imperative that her case on fraudulent concealment should proceed first having regard to her age and ill health, and that a hearing should take place on the earliest available date. Having heard the parties in respect of the present applications on 13th December, 2019, I am reinforced in my view that were all six test cases to proceed together to a s.71(1) hearing this would cause further delay and lead to a prolonged hearing with far more witnesses and greater complexity which in turn would give rise to greater delay in the preparation and delivery of judgment(s). Were the plaintiff to succeed on the issue it would mean that her substantive action could proceed, but while that could be expedited it would entail further delay, and the adage 'justice delayed is justice denied' could become a truism in her case.
8. It was with some surprise that I was informed that the order in respect of the judgment of the Court of Appeal dated 18th of July, 2019 has yet to be perfected and that as a result application has yet to be made on behalf of the plaintiffs to the Supreme Court for leave to appeal. It is a matter for the Supreme Court as to whether it grants leave, but if it does there is bound to be some delay before the appeals are listed for hearing, and some further delay thereafter before judgment. Mrs. Goodwin cannot afford delay of the magnitude that might reasonably be anticipated in this process, and the hearing of the s.71(1)(b) issue in her case must therefore be brought to hearing as expeditiously as possible in the High Court.

AIB's Notice of Motion

9. Points of Claim were delivered by the plaintiff on 8th of November, 2019, and AIB Points of Defence were delivered on 2nd December, 2019, Points of Defence having been delivered by the other defendants on 29th November, 2019. AIB's solicitors OSM & Partners protested in correspondence at the breadth and content of the plaintiff's Points of Claim, and Tom Casey solicitor for the plaintiff joined issue in that correspondence and in correspondence with the solicitors acting for the other defendants. AIB's Points of Defence as delivered raise objections before pleading defences on a "without prejudice" basis.
10. In their Notice of Motion issued on 28th November, 2019 AIB seek the following: -
 - "1. An Order giving directions in relation to the further hearing of the issue directed by Mr. Justice Haughton to be tried, pursuant to his Order dated 24th October 2019, and in particular: -
 - (a) An Order directing the Plaintiff to furnish Points of Claim compliant with the said direction, identifying the relief sought on the issue;

- (b) An Order striking out the pleas in the Points of Claim set out in the schedule hereto, or requiring that such be limited to the LTV covenant;
- (c) An Order striking out the claim for damages for fraudulent concealment as falling outside the scope of the issue under Section 71(i)(b) and as disclosing no cause of action;
- (d) Directions in relation to the further pleading of the case."

In the Schedule to the Notice of Motion are listed -

- 6 paragraphs which AIB assert are "Pleas" that should be removed,
 - 15 "Pleas requiring confirmation they are confined to the LTV covenant", and
 - 6 further paragraphs which they assert are "Pleas that should be amended to limit them to the LTV covenant".
11. When this notice of motion first came before Barniville J. in the High Court the legal teams acting for the fifth to ninth named defendants ("the director defendants") sought and were granted leave to appear and make submissions in support of AIB's application and based on their own correspondence.
12. Section 71(1) of the Statute of Limitations 1957 provides –
- "Where, in the case of an action for which a period of limitation is fixed by this Act, either –
- (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
 - (b) the right of action is concealed by the fraud of any such person, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."
13. Section 71(1)(a) applies where "the action is based on the fraud of the defendant or his agent". The plaintiff's action in this case is not based on fraud. If it was based on fraud then under the Rules of the Superior Courts it would have been a requirement that full particulars of the fraud alleged be furnished in the (Recast) Statement of Claim or in particulars. It has never been pleaded as such, and there is no prayer alleging fraudulent misrepresentation in the Recast Statement of Claim.
14. Instead the plaintiff's action is based on the torts of negligence/negligent misstatement and/or negligent misrepresentation and negligent mistake/misrepresentation for failure to identify the (alleged) high risk nature of the investment, for failure to refer to or explain the LTV covenant or the possible consequences of such covenant, and failure to refer to or explain the structure of the investment. This last aspect refers to the undertaking of the investment by the second named defendant through another company (Derby) of which the plaintiff is not a shareholder and in respect of which the defendants raise the defence of *Foss v. Harbottle* (1843) 2 Hare 461 (that any loss is that of the second named defendant and not that of the plaintiff as a shareholder) . It has never been the plaintiff's

case that the representations/misrepresentation were themselves fraudulent, and as this is not an action based on deceit or the tort of fraudulent misrepresentation, the new prayer for “Damages for fraudulent concealment” introduced in the Points of Claim is inappropriate – something that counsel for the plaintiff now accepts.

15. As mentioned earlier, the Prospectus refers to a “degree of financial and commercial risk”, whereas the plaintiff contends that it was a “high risk” investment. It is part of the plaintiff’s claim that the “gearing” of the investment by borrowing, the structure of the investment, and the LTV covenant in the borrowing by Derby from Branford & Bingley caused Belfry 3 to be “high risk”. Although the Recast Statement of Claim alleges that the Prospectus contained positive misrepresentations as to the level of risk of the investment, for the most part the pleaded claim relies on misrepresentation by omission. This was the view taken by the Court of Appeal; as Baker J. states: -

“140. In my view, the essence of the claim made by the Investors is that the investments were more risky than they bargained for (to use the language of Haughton J.) and that they were, as a result of the alleged negligence less valuable than was represented. The claims are, for that reason, ones that accrued when the LTV covenants were entered into and I am not persuaded that time began to run when the investments were purchased. The cause of action did, in my view, accrue when the borrowings were entered into sometime later, but outside the limitation period.

141. The present claim is that the Investors were exposed immediately upon the inclusion in the borrowings of the LTV covenants to additional risk such that the exposure to the market is greater, or that less protection than had been anticipated was available against market forces.

142 ...

143 ...

144. The cause of action is that sometime after the investments were made, the Directors, in the exercise of the powers vested in them and mentioned in the Prospectus, negligently and without informing the Investors, negotiated terms of lending which made the risk greater than that which existed at the date of the investments as the Investors had fewer buffers against market forces than they had contracted for, and the risk was greater than that which they understood had been assumed.

145. As a consequence, it seems to me that the damage became manifest once the LTV covenants were entered into by the directors and, at that stage, the Investors had less chance of surviving a catastrophic loss of property values.”

16. AIB in their correspondence prior to issuing the notice of motion, in the affidavit of their solicitor Mr. William Corcoran sworn on 28th December, 2019, and in submissions of counsel, argued that the Plaintiff’s Points of Claim go far beyond what is required in order

to place before the trial court the issues related to fraudulent concealment of their LTV covenant post the date of entry into the lending arrangement between Derby and Bradford & Bingley. In particular, the argument is made that the Points of Claim have conflated the omissions which the plaintiff claims form the basis of her cause of action with what are alleged to be fraudulent omissions amounting to fraudulent concealment *post* the entry into of the lending arrangement.

17. It is certainly true that in paras. 1-44 of the Points of Claim, the plaintiff very extensively sets out the basis of her claim under various sub-heading. However for the most part these pleas replicate the claims made in the Recast Statement of Claim.
18. Moreover the introductory page of the Points of Claim expressly recognises that the Points of Claim as delivered are directed to the s.71(1)(b) "issue only". It is reasonably clear that what the plaintiff is attempting to do at paras. 1- 44 is set out her underlying causes of action. Although this is done at great length – something that the director defendants in particular object to – it is not in principle wrong.
19. It will be necessary for the court trying the fraudulent concealment issue to know in the first place what are the underlying claims in order to understand and address the evidence and argument in relation to fraudulent concealment. Doubtless the Prospectus and other relevant sales material will be put into evidence – much of it may be agreed evidence - and it will be a matter for the trial judge to regulate the extent to which the plaintiff is entitled to give/call evidence of her interaction with the defendants prior to and at the time of the investment, by way of background and to demonstrate the nature of her claims in tort. That is not to say that the plaintiff is entitled to run her entire case as a lead-in to the evidence and argument on the fraud and concealment issue – far from it. Nevertheless, it seems to me that the trial court needs to know with some precision what case is being made based on the pleadings, and whilst it is entirely a matter for the trial judge, it may be appropriate to admit and hear at least some evidence from the plaintiff in relation to her interaction with the defendants in the lead up to the investment/borrowing by Derby.
20. At the hearing before me on 24th October, 2019 counsel for AIB suggested that it may be possible to agree a set of facts on a *prima facie* basis, without prejudice to the requirement that the plaintiff at full trial prove all facts/inferences required to prove her case, for the purposes of the s.71(1) issue only. This commends itself to the court, and the pleas at para.s 1-44 may form the basis for at least a partial agreement on a without prejudice basis over facts relevant to the underlying claims.
21. The Points of Claim do proceed from para. 45 under the heading "Fraudulent Concealment of Plaintiff's Cause of Action" and further headings such as "Non-Disclosure of the LTV covenant" and "Concealment of the Plaintiff's Cause of Action" and "The Defendants' Knowledge of the Plaintiff's Cause of Action" to make pleas that, in general terms, are more focused on fraudulent concealment.

22. It is also important to bear in mind that while the Court of Appeal for the purposes of deciding the appeal on section 11 of the Statute of Limitations honed in on the LTV covenants, the decision of that court was more broadly centred on the claims that the investments were riskier than the plaintiffs had bargained for. The case made in the Recast Statement of Claim, formulated and delivered after my own decision declaring some elements of the plaintiff's claims to be statute barred, does go beyond merely the LTV covenants, and includes the specific allegation that the investment was "high risk", and that one of the reasons for this was the structure of the investment which it is claimed was not referred to or explained to the plaintiff. See particularly paras. 21, 24, 25 and 35 of the Recast Statement of Claim.
23. What cannot be in issue on the s.71(1) modular trial is whether there was any fraud or fraudulent concealment *prior* to the entry into the investment. It follows that the plaintiff's claims/evidence in relation to what was or was not disclosed prior to investment cannot be relied upon of *itself* as evidence of a fraudulent concealment post-investment for the purposes of s.71(1)(b). Such evidence, which relates to the substantive action, is no more than background to the fraudulent concealment issue. Were it otherwise the modular hearing I am minded to order would run the risk of being treated as a full hearing, which it is not. Its limited purpose is to hear and determine the fraudulent concealment issue.

Particulars of Fraudulent Concealment

24. Critical to the issues that will be before the trial court on the s.71(1)(b) issue, are the particulars of fraudulent concealment already pleaded by the plaintiff's solicitor Tom Casey in a letter dated 17th February, 2016, to AIB's then solicitor Kieron Desmond Kiernan. This letter arose because in the original Reply to Defence of the First Named Defendant dated 21st January, 2016, the plaintiff pleaded s.71(1) of the Statute of Limitations in response to AIB's plea that the case was statute barred by virtue of s.11(2). Tom Casey's letter of 17th February, 2016 responded to a request for particulars of the facts relied upon by the plaintiff in support of the s.71(1) plea, and stated the following: -

"The Plaintiff relies on Section 71(1)(b) of the Act, and the facts that the Defendants (being AIB and the Director Defendants), during the investment's sales and marketing process, prior to the decision by the Plaintiff to invest, concealed the existence of the pleaded LTV covenant and other onerous clauses in the facility agreed between the Belfry fund company and the lending financial institution.

At all times material to these proceedings the Plaintiff trusted the Defendants and was led to believe by the Defendants that her investment in the Belfry fund was other than a high risk investment. AIB engaged in the selling process with the approval and knowledge of the other Defendants. All of the Defendants were engaged in the preparation and circulation of the sales materials, including the prospectus, which materials were deficient insofar as they omitted making reference to the above facts as pleaded. During the sales process and in the associated sales literature, including the prospectus, the Defendants failed clearly

to draw the Plaintiff's attention to and to identify the existence of clauses in the facility letter that would have demonstrated the risk-magnifying effect of the high degree of leverage in the fund on the Plaintiff's investment. The defendants failed clearly to draw the Plaintiff's attention to and to explain that the structure of the fund was designed to ensure that the Plaintiff would be deprived of any entitlement to issue proceedings against the Defendants for any losses suffered. This concealment and these failures were of a knowing and deliberate quality, and in the premises the Defendants are guilty of concealment within the meaning of section 71(1)(b) of the Statute of Limitations Act, 1957 (as amended).

The Defendants informed the Plaintiff of the LTV clause in 2009. The Plaintiff became aware that the structure of the Funds was such as to deny the Plaintiff the ability to maintain an action when preliminary motions were issued and the Defences were filed."

25. A number of points should be noted. Firstly the plea is limited to s.71(1)(b), and, as previously stated, the plaintiff cannot now suggest that the cause of action itself is based on fraud.
26. Secondly, the first paragraph goes beyond mere reference to concealment of the LTV covenant. It extends to "other onerous clauses in the facility agreed." The relevant lending documentation has not yet been discovered but is the subject of a discovery order (not yet perfected). The plaintiff is therefore entitled to adduce evidence, on the fraudulent concealment issue, of "other onerous clauses" which it is alleged were concealed.
27. It is also conceivable that following discovery the plaintiff might apply to amend or extend the claims in the Recast Statement of Claim by reference to such documentation and any "other onerous clauses". Any such application will then have to be dealt with on its merits.
28. Thirdly, the second paragraph does specifically plead "that the plaintiff was led to believe that her investment was other than high risk". This is a positive averment of negligent misstatement/misrepresentation. The plea then refers to the sales material/prospectus omitting reference "to the above facts" – a reference back to the first paragraph which pleads concealment of "the pleaded LTV covenant and other onerous clauses in the facility." The letter then goes on to plead concealment by omission "during the sales process" i.e. in the period of engagement between AIB/the defendants and the plaintiff/her late husband, by failure to draw to her attention or explain risk associated with "clauses in the facility letter" and the "structure of the fund".
29. In my view this brings into play in the s.71(1)(b) module allegations of fraudulent concealment of –
 - (1) the LTV covenant;
 - (2) other onerous clauses (if any) in the Derby facility letter; and

- (3) the structure of the fund whereby the plaintiff's investment secured shares in the second named defendant which then undertook the investment in UK properties, along with associated borrowing, through Derby, its wholly owned subsidiary.

It is notable that in the last paragraph of these particulars Mr. Casey again refers to the LTV covenant of which it is claimed the plaintiff was informed in 2009, and the "structure of the funds" in respect of which she states -

"The plaintiff became aware that the structure of the fund was such as to deny the plaintiff the ability to maintain an action when preliminary motions were issued and the Defences were filed."

30. The plaintiff therefore cannot be limited in pleading and addressing the s.71(b) issue to only the LTV covenant, and she is entitled to plead matters concerning alleged fraudulent concealment of the structure of the fund and fraudulent concealment of any other clauses in the Derby borrowing which she may assert were "onerous clauses".
31. It follows that the scope of discovery for the s.71(1)(b) issue should be similarly limited by reference to the particulars in this letter. The inclusion of the pleas related to the underlying claims at paras. 1- 44 in the Points of Claim cannot be used to broaden the scope of this discovery. In this regard the Derby loan facility or other relevant loan documentation will have to be discovered, and it is currently hard to see how any redaction of such documentation could be justified.

The court's view on redrafting Points of Claim

32. Having regard to the foregoing, and the director defendants' objections to the length of the Points of Claim, I have considered requiring the plaintiff to compose an entirely new and more concise Points of Claim. However, I do not believe that this is necessary and I have a further concern that a re-draft will only lead to further skirmishes over pleadings, thus running the risk of a further delay in a modular trial of the issue coming to hearing. Later in this ruling I address the particular complaints set out in the Schedule to the Notice of Motion, and insofar as these are justified they can be accommodated by changes to the existing Points of Claim. I am also conscious that AIB and the director defendants have, within the time allowed by my order of 24th of October, 2019, in fact delivered Points of Defence albeit that they incorporate preliminary objections and some of the defences are raised "without prejudice".
33. I will as a first step require the Points of Claim to incorporate a heading "The Underlying Claims" to govern paras. 1- 44. This is on the basis that the pleas that are directly relevant to the fraudulent concealment issue appear at para. 45 onwards.
34. Secondly I will direct that the claim in the prayer seeking damages for fraudulent concealment be removed. I will go further in that the Points of Claim should be limited to the matters relevant to fraudulent concealment and are not intended to set out a prayer such as is appropriate to a writ or Statement of Claim. The pleading in para.82 under the heading Loss and Damage is also not relevant to the modular issue. Therefore para.82

and the entire prayer should be removed. It would however be helpful if the plaintiff were to plead the order/declaration that is sought in the event that she is successful on the s.71(1)(b) issue, and I will give liberty to do this.

Schedule to the Notice of Motion

Pleas that should be removed

35. Complaint is made in relation to the inclusion of para. 28 (a plea that the plaintiff and her husband were not fit to invest), and 28 (concerning the "Know Your Client" document). I note that there is no plea in these paragraphs, or anywhere in the Recast Statement of Claim, that the investment agreement should be rescinded for lack of capacity, undue influence, or otherwise. Counsel for the plaintiff emphasises that these pleas are included because the personal circumstances of Mrs. Goodwin, unlike in the other test cases, are potentially relevant to the s.71(1) issue. These pleas do reflect pleas in the Recast Statement of Claim at paras. 19,20, 29 and 31, and do not contain anything new. I am of the view that evidence on foot of these pleas is potentially relevant to the s.71(1) issue, particularly the second limb which involves inquiring whether, and when, the plaintiff could "with reasonable diligence have discovered" the alleged fraudulent concealment. Accordingly these pleas need not be removed.
36. There is objection to para. 34 which pleads by inference that the loan to Derby was for a shorter period that might have been expected for a medium to long term investment, and that this risk factor was not referred to in the Prospectus.
37. The loan documentation has yet to be discovered, a point made in para. 39 of the Points of Claim where the plaintiff reserves her right to make further points, similar to those made in respect of the LTV covenant, in respect of other terms in the loan of which she is currently unaware. As stated previously the loan documentation will have to be discovered. Only then will it become apparent whether the plea at para. 34 can be maintained. At the moment it is an entirely new plea, and it is speculative, and it should be removed.
38. Should the loan documentation disclose lending terms other than the LTV covenant that the plaintiff could argue enhanced the risk to investors and are therefore terms about which the plaintiff should have been advised, then it would be open to the plaintiff to seek to amend the Recast Statement of Claim, and in turn the Points of Claim if any new pleas are relevant to the s.71(1) issue. In the circumstances, para. 39 is unobjectionable and need not be removed.
39. The plea at para. 70 relates to the pleaded cause of action for misrepresentation by omission, rather than fraudulent concealment of the cause of action, and should be removed.
40. For the same reason para. 76 should be removed.
41. In short, paras. 27, 28, 39, can be retained but paras. 34, 70 and 76 should be removed.

“Pleas requiring confirmation that are confined to the LTV covenant” and “pleas that should be amended to limit them to the LTV covenant”

42. Firstly I am of the view that the confirmation/amendment sought is in principle justified, but it would be unduly limiting if the plaintiff were required to confine or limit the listed paragraphs to the LTV covenant alone. Firstly for the reasons I have given earlier the confinement should be to “the LTV covenant and other onerous clauses in the facilities agreed between Derby and Bradford & Bingley in respect of Belfry 3,” although how this is interposed in the Points of Claim as they stand currently may depend on the context. Secondly where the context requires or permits – see for example para. 16 – this may also be amended to include “the structure of the fund” which the plaintiff also alleges was fraudulently concealed.

43. Further while “confirmation” is suggested in respect of certain paragraphs, in the interest of clarify it would be preferable if the Points of Claim were actually amended rather than the parties and the court relying on confirmation in correspondence.

44. So, for example, para. 16 might be amended by being prefaced by the following words, or similar words; -

“With regard to structure of Belfry 3, the LTV covenant, and any other onerous clause in the [Derby facility], AIB and/or the director defendants...”

45. Save where otherwise indicated in brackets below, I consider that AIB’s points are well made in respect of the following paragraphs in the Points of Claim, and that there should be appropriate amendment to confine or limit the plea: -

16.

[20. which refers to the “particular risk” associated with the LTV covenant but is not confined to it]

24.

25.

[29. already appears to be confined to the LTV covenant, but the plaintiff should confirm, or else amend]

46.

49.

[54. – read in the context of paras. 50-53 this plea is already confined to the LTV covenant]

55.

60.

[61. – this is already limited by reference to “terms in the loan agreement, such as the LTV covenant”]

62.

65.

66.

71.

77.

The Director Defendants

46. Although the director defendants sensibly did not make any separate application by notice of motion in respect of the Points of Claim, their solicitors did engage in correspondence with Tom Casey Solicitors, and their counsel were heard on the hearing of AIB’s motion. In correspondence and through counsel the director defendants broadly agreed with the thrust of AIB’s complaints, but they also objected to the length of the Points of Claim. For reasons already given I do not believe that requiring an entirely new and more concise drafting of the Points of Claim is appropriate.

47. In a letter dated 19th November, 2019 from Gore & Grimes Solicitors acting for three of the director defendants to Tom Casey Solicitors for the plaintiff, it was suggested that Points of Claim delivered should have addressed, and only addressed the following five matters: -

(1) *The facts amounting to a right of action which are alleged to have been fraudulently concealed from the plaintiff.*

This is I believe sufficiently covered in the Points of Claim, but may be assisted by use of the heading “the Underlying Claims” in the manner that I have directed.

(2) *The persons who are alleged to have fraudulently concealed those facts.*

The nature of the plaintiff’s claim to fraudulent concealment is such that the plaintiff may have a limited knowledge, at any rate prior to discovery, and even then may not be in a position to identify individuals. Doubtless the director defendants will raise particulars, but the plaintiff cannot be forced to plead detailed facts that she does not and cannot reasonably be expected to know, at least not in advance of discovery. As Clarke J stated in *National Educational Welfare Board v. Ryan* [2008]2 I.R. 816 at p.825:

“It is in the very nature of fraud (or other unconscionable wrongdoing) that the party who is on the receiving end will not have the means of knowing the precise extent of what has been done to them until they have obtained discovery. To require them to narrow their case prior to defence (and, thus, discovery) would be to create a classic Catch 22. The case will be narrowed.

Discovery will be directed only towards the case as narrowed. Undiscovered aspect of the fraud or the consequences of the fraud will, as a natural result, never be revealed. This would, in my view, be apt to lead to an unjust solution."

In my view this applies a *fortiori* to a claim to fraudulent concealment which by its very nature concerns non-disclosure.

- (3) *The basis on which the plaintiff alleges, as against each of those persons, that those facts were fraudulently concealed.*

The same considerations apply here as apply to point (2) above. The plaintiff may only be in a position to plead this generally prior to discovery.

- (4) *The date on which the Plaintiff alleges that she discovered these facts or could with reasonable diligence have discovered same.*

The date of discovery is dealt with in the Points of Claim. The question of whether the Plaintiff could with reasonable diligence have discovered the relevant facts earlier is a matter for the defendants to plead and prove, and not for the plaintiff to plead.

- (5) *That the Court is being asked to determine that the Plaintiff's claim is not Statute Barred on the basis that her right of action was fraudulently concealed from her until a date within six years prior to the issue of the proceeding.*

In my view this is addressed in the Points of Claim.

48. Later in the same letter Gore & Grimes in effect raise specific particulars as to 'what facts amounting to a right of action are alleged to have been fraudulently concealed from the plaintiff', as to whether their three director defendants are alleged to have concealed those facts, and if so on what basis. I am of the view that previous particulars furnished on the plaintiff's behalf, and the contents of the Points of Claim address these matters to the extent that the plaintiff can reasonably be expected to address them at present, and insofar as she can do prior to discovery.

Conclusion

49. A fresh Points of Claim must therefore be delivered on behalf of the plaintiff, that accords with this ruling. I will hear the parties further in relation to the time for delivery of the fresh Points of Claim, and (if required) revised Points of Defence.
50. I will also make an order directing a modular trial of the s.71(1)(b) issue in this plaintiff's case, and I will, at least provisionally, identify a trial date. With a view to achieving this I would also propose to give further directions in relation to the exchange of correspondence between solicitors to agree the scope of discovery relevant to the modular issue, which I would expect to be a sub-set of the discovery ruled by me in July, 2019. As before in relation to discovery the lead correspondence should be between the plaintiff's solicitors and AIB's solicitors, with only 'additional matters' being addressed in

correspondence between the plaintiff's solicitors and the director defendants' solicitors. For this purpose, it will be necessary to have this case listed for further directions at the start of Hilary term.

51. Lastly, I do not believe that this ruling should affect the undertaking given on 24th October, 2019 to the effect that in the event that Mrs. Goodwin is unsuccessful in her s.71(1)(b) claim this will also be binding on the other five Belfry test cases. However, the status of that undertaking should be confirmed when this matter is next before the High Court in the Hilary Term.