THE COURT OF APPEAL

Whelan J.
Collins J.
Binchy J.

Neutral Citation Number [2021] IECA 162

Record No. 2019/60

BETWEEN/

PATRICK KELLY, SIMON KELLY, EMMA KELLY, CHRISTOPHER KELLY, JOHN MCCORMACK, BRIAN MCCORMACK, NIALL MCCORMACK, ALAN MCCORMACK, AND PIERSE CONTRACTING LIMITED T/A THE NORTH WALL QUAY PARTNERSHIP

PLAINTIFFS/APPELLANTS

- AND -

CLARION QUAY MANAGEMENT COMPANY LIMITED BY GUARANTEE

DEFENDANT/RESPONDENT

Record No. 2019/59

BETWEEN/

JOHN MCCORMACK, BRIAN MCCORMACK, NIALL MCCORMACK, ALAN MCCORMACK, PIERSE CONTRACTING LIMITED, AND PATRICK KELLY T/A THE CAMPSHIRE PARTNERSHIP

PLAINTIFFS/APPELLANTS

-AND-

CLARION QUAY MANAGEMENT COMPANY LIMITED BY GUARANTEE

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 2nd day of June 2021

1. The plaintiffs/appellants in the second of the above mentioned proceedings (the Campshire Partnership) were co-developers, together with the Dublin Docklands Development Authority ("DDDA") of a development known as Clarion Quay, Excise Walk, Dublin 1 ("the Development"). Construction of the Development was substantially completed in or around 2002.

2. The defendant/respondent, a company limited by guarantee, was incorporated in June 2000 for the purposes of taking over the management of the Development. It was envisaged that the respondent would at some time after completion of the Development acquire, by way of fee farm grant, title to the common areas in the Development, as well as the reversionary interest in the leases pursuant to which the Development was sold. The Development comprises 184 residential units, 8 retail units, storage areas, common areas and car parking areas. The interest of DDDA in the Development was at some stage taken over by Dublin City Council ("DCC"). The respondent has to date declined to take a conveyance of the common areas in the Development because of what it claims are serious defects in the construction of the Development. These alleged defects are the subject of separate proceedings issued by the respondent against DCC and the partners in the Campshire Partnership (the "Defects proceedings"). This Court was informed that the respondent is claiming damages of the order of €16.8m from the defendants in the Defects proceedings, being the sum estimated as being required to remedy the alleged defects. The Court was also informed of a third set of proceedings between the respondent and a number of the original subscribers to the respondent (who are mainly members of the Campshire Partnership) in the Circuit Court pursuant to the Multi-Unit Developments Act 2011, relating

to the power of the Campshire Partnership to control the respondent through weighted voting rights.

3. Each of the proceedings with which this judgment is concerned were issued by way of plenary summons dated 12th June 2018, and a statement of claim in each case was delivered on 17th December 2018. The proceedings issued by the North Wall Quay Partnership are concerned with unit 5A in the Development, which the appellants in those proceedings claim to own and occupy pursuant to a 200-year lease. In those proceedings, the appellants claim that the respondent trespassed upon the unit known as unit 5A, changed the locks and caused advertising placards to be displayed at the property advising contact to be made with the respondent. It is also claimed that the respondent unlawfully interfered with the enjoyment of the North Wall Quay Partnership in the property by, *inter alia,* impeding access through common areas, and by refusing to provide the appellants with essential services associated with that property. The appellants claim damages for trespass and/or nuisance, as well as permanent injunctions restraining the respondent from trespassing upon the property or from holding itself out as being the owner thereof.

4. The second proceedings referred to in the title hereto are in very similar terms, and relate to numbers 4A Excise Walk, Apartment No. 14 of Block 1 of the Development and 49 carpark spaces. The appellants claim to be beneficial owners of these premises, and assert an entitlement to possession of the same. The appellants also claim that the respondent has trespassed upon the aforementioned properties and claim the same reliefs from the respondent as described in the first set of proceedings.

5. On 16th October 2018, the plaintiffs/appellants in each case issued the motions with which this judgment is concerned, whereby they sought orders, pursuant either to O.15 r.4 and/or r.13 of the Rules of the Superior Courts, and/or the inherent jurisdiction of the Court, permitting the joinder of the directors of the respondent and the management agent of the

respondent as co-defendants to the proceedings. Those parties are identified in the notices of motion as follows: Ian Keogh, Thomas Hayes, Jennie Bray, Liam Francis Miller, Elean Ali, Michael Kinsella, John O'Sullivan, David Ward and Q Agile Limited t/a Core Estate Management (for convenience, I will refer to these parties, including the management agent, as "the directors"). The appellants also sought an order pursuant to O.28 r.1 of the Rules of the Superior Courts granting them liberty in each case to amend the plenary summons in terms of the draft amended plenary summons exhibited to the grounding affidavit, sworn in support of each motion, by Alan McCormack.

6. Q Agile Limited acts as agent of the respondent in the management of the Development. Of the remaining directors, the addresses of all bar two (as provided by the appellants in their grounding affidavits) are stated to be at apartments in the Development. The two directors whose addresses are not within the Development are nominees of the Voluntary Housing Association known as Clúid. They are Mr. John O'Sullivan and Ms. Jennie Bray. Somewhat unusually, the Court was given to understand that the parties whose joinder is sought by these applications were personally served with the applications and, according to affidavits sworn by Mr. Miller and Mr. O'Sullivan, they were served upon them at their home addresses.

7. As already mentioned, the applications to join the directors were in each case grounded upon the affidavit of Mr. Alan McCormack. In each affidavit sworn by him, Mr. McCormack provides particulars of the acts of trespass alleged against the respondent as referred to in paras. 3 and 4 above. In paras. 3, 18 and 19 of his affidavit in the first proceedings (which correspond in content to paras. 3, 24 and 25 of his grounding affidavit sworn in the second proceedings), Mr. McCormack sets out the reasons why he is seeking to join the directors as co-defendants as follows:

"3. I believe and am advised that the continuing trespass and interference with the plaintiffs' property rights by the defendant has been occasioned by the specific decisions and deliberate actions of the proposed co-defendants. I am further advised that they are so closely involved in the commission of the tort that it is appropriate that they would be personally held liable for their wrongdoing and that their joinder is additionally appropriate for the purposes of ensuring effective compliance by each of them with the injunctive reliefs which the plaintiffs now seek under separate motion.…

18. It is apparent to me from the litigation campaign upon which the defendant has embarked and the decision to engage Mr. Stephen Byrne in early 2017, and later Q Agile Limited t/a Core Estate Management with a view to pursuing a highly aggressive strategy, that the defendant's directors have been closely involved and have consciously operated to pursue an aggressive and unlawful strategy.

19. I believe and am advised that the continuing trespass and interference with the plaintiffs' property rights by the defendant has been occasioned by the specific decisions and deliberate actions of the proposed co-defendants. I am further advised that they are so closely involved in the commission of the tort that it is appropriate that they would be held personally liable for their wrongdoing and that if the court is minded to join them to the proceedings by way of amended plenary summons, it would be additionally appropriate that they would be subject to any reliefs granted pursuant to this application, for the purposes of ensuring effective compliance by each of them with the injunctive reliefs which the plaintiffs now seek under separate motion."

8. Mr. McCormack exhibited a draft of the amended plenary summons. While he did not exhibit a draft statement of claim particularising the allegations against the proposed co-defendants, he did exhibit a number of documents upon which he relies as evidence of their conduct for the purpose of the applications. These are:

(i) Photographs of notices which he claims were placed on units 4A and 5A by the respondent, which simply state "Please Contact" [the respondent] at a phone number and e-mail address provided. Mr. McCormack avers that the implication of these notices is that the premises are to let, and that interested parties should contact the respondent.

(ii) A similar notice placed on the door of apartment no. 14, which states "For access to this apartment please contact" [the respondent].

(iii) E-mails exchanged, between 11th and 19th July 2018, between a Mr. Cahir Corrigan, who it appears may have been representing the appellants in some capacity, and an unidentified person named Donal (whose e-mail address is that given, for contact purposes, in the notices referred to above) about access to apartment no. 14, in the course of which "Donal" says that access will be provided for inspection purposes, but a key will not be provided.

(iv) E-mails exchanged between one of the appellants, Mr. Brian McCormack and Mr. Stephen Byrne, then managing agent of the respondent in January/February 2017, regarding apartment no. 14. In the course of these e-mails, Mr. Byrne states that the apartment is "by any judgment" abandoned, and that the management company had completed interim remedial works to protect the fabric of the building. Mr. McCormack denies that the apartment was abandoned and asserts that the management company is refusing the owners access to their property.

9. Although he swore a second affidavit dated 4th February 2019 for the purposes of replying to affidavits sworn by some of the directors in opposition to the application, Mr. McCormack does not add materially to the information regarding the conduct of the

directors, upon which he relies to ground the application. The closest he comes to this is at para. 8 where he says:

> "The motivation for the joinder of the proposed defendants is simple, to hold them to account for procuring or perpetrating deliberate acts of trespass. These have occasioned very significant losses to the plaintiffs over a number of years, when they have had a commercial need to obtain a yield from the affected properties."

10. By the time these motions came on for hearing in the High Court before Haughton J., on 4th February 2019, agreement had been reached between the parties in relation to the motions issued on behalf of the appellants seeking interlocutory injunctions to restrain trespass. Accordingly, it seems very likely that the main relevance of these proceedings, if not the only relevance thereof, is the claim for damages in respect of alleged trespass in the past.

Judgment of the High Court

11. In an *ex tempore* judgment, Haughton J. refused the reliefs sought. Having considered the provisions of O.15, and in particular rule 13 thereof, Haughton J. went on to say:

> "The question then before the Court is whether it is just and necessary for these director defendants to be joined. The basis upon which their joinder is sought is that they are officers of the defendant company and in their position as directors must be taken to have taken decisions that resulted in the defendant trespassing on the subject properties and in refusals, for instance, to provide keys to certain parts of the building, be they common areas or to actual units."

12. The trial judge noted that the proceedings had been instituted relatively recently, and at a time when the appellants knew as much about the facts of the matter, in particular as regards the alleged trespass, as they did at the time of moving the application to join the

directors as defendants. Nonetheless, they chose not to join the directors as defendants when issuing the proceedings.

13. In refusing the application, the trial judge did so for the following reasons:

1) There was no evidence at all that any of the directors were personally involved in the acts of trespass alleged by the appellants;

2) There was no evidence tendered by the appellants to demonstrate the extent to which any of the directors were "bound up with the acts of the company in a way that might attract personal liability";

3) The trial judge could not identify anything in the affidavits of the appellants that indicated a particular part played by any particular director in the alleged acts of trespass, and accordingly he could not see, as regards any specific director, what was alleged in relation to him/her, or what his/her role may have been in the alleged acts of trespass, or to what extent conduct of any of the individual directors was bound up with the alleged acts of the respondent;

4) The respondent is a company limited by guarantee, established not for profit, but as a management company which is intended to represent the interests of unit holders in the Development. The directors did not stand to gain in a commercial sense from being directors of the respondent;

5) The joinder of the directors of the respondent will very likely affect the ability of the respondent to prosecute its Defects proceedings. It may lead to difficulties in the giving of instructions by the directors in those proceedings, and in these proceedings, if the directors of the respondent are also co-defendants;

6) The joinder of the directors gives rise to the potential for conflict of interest as between the respondent and the directors, which may in turn lead to the need for additional representation in these proceedings, and which may in turn lead to

additional issues which may require to be addressed by way of discovery, all of which is likely to prolong the proceedings;

7) There being no evidence put before the court that would justify the joinder of the directors as co-defendants, other than the mere fact that they are directors of the respondent, the trial judge considered that the application has all the characteristics of a tactic, designed to bring pressure to bear on the directors, which is not linked to the primary claim of trespass in these proceedings.

14. The trial judge relied upon the decision of Slade L.J. in the case of *C Evans & Sons Limited v. Spritebrand Limited* [1985] 1 WLR 317 where, at page 329 Slade L.J. stated:

> "The authorities, as I have already indicated, clearly show that a director of a company is not automatically to be identified with his company for the purpose of the law of tort, however small the company may be and however powerful his control over its affairs. Commercial enterprise and adventure is not to be discouraged by subjecting a director to such onerous potential liabilities. In every case where it is sought to make him liable for his company's torts, it is necessary to examine with care what part he played personally in regard to the act or acts complained of. Furthermore, I have considerable sympathy with judges, particularly when dealing with commercial matters, who may be anxious to avoid or discourage unnecessary multiplicity of parties by the joinder of directors of limited companies as additional defendants in inappropriate cases. As Mr. Watson emphasised, the very fact of such joinder could in some cases operate to put unfair pressure on the defendants to settle. In some instances, where the joinder is demonstrably a mere tactical move, a striking out application may well be justified."

Notice of Appeal

15. The appellants set out thirteen grounds of appeal which may be summarised as follows:

1) The trial judge applied an incorrect and too exacting a test to the application to join the directors as co-defendants. The correct test is whether or not the applicant has made out a stateable case as against the intended co-defendants;
2) The trial judge failed to recognise that liability for trespass extends to any person who directs a trespass, and is not limited to persons who physically enter a property;
3) The trial judge misapplied principles of director liability and failed to have regard to the appellants' case that the alleged wrongs had been a deliberate and premeditated strategy by the proposed co-defendants;
4) The trial judge took into account irrelevant considerations, such as whether the actions of the directors were motivated by profit, whether their joinder to the proceedings would give rise to a conflict of interest and the fact that the trespass was not continuing;
5) The trial judge incorrectly concluded that an action against joint tortfeasors represented a new or separate cause of action;
6) The trial judge disregarded relevant e-mail communications implicating the proposed co-defendants;
7) The trial judge erred in concluding that the joinder of the proposed co-defendants would slow down or complicate these proceedings in circumstances where they were already being case managed alongside significantly more complex proceedings i.e. the Defects proceedings.

New Evidence

16. While Mr. McCormack exhibited the documents described at para. 8 above in support of the applications, it is clear that this provides no information at all as regards the conduct of the proposed co-defendants relied upon. At the time therefore that the applications came

on for hearing before Haughton J., there was a notable paucity of evidence relied upon by the appellants in support of the applications. However, following the making of discovery by the respondent (after the hearing before Haughton J.), Mr. McCormack swore an affidavit dated 18th November 2019 exhibiting new evidence discovered by the respondent (the "New Evidence") which was relied upon by the appellants at the hearing of this appeal in support of their submissions that there is at least a stateable case that the intended co-defendants have, by their own actions, *inter alia*, committed acts of trespass jointly with the respondent, upon the property of the appellants. Furthermore, it is submitted that they procured the company to commit, *inter alia,* those same acts of trespass. In a replying affidavit of Mr. Thomas Hayes dated 16th January 2020, sworn on behalf of the respondent, Mr. Hayes agrees to the admission of the New Evidence for the purpose of this appeal, but disputes its effect and relevance.

17. By his affidavit, Mr. McCormack exhibits several chains of e-mails between different parties. So, for example, an e-mail of 3rd October 2017 from Mr. Ian Keogh is addressed to Mr. Liam Miller and Mr. Stephen Byrne, whereas the earliest e-mail relied upon by Mr. McCormack is an e-mail of 20th August 2016 from Mr. Michael Kinsella (director of the respondent) to Mr. Liam Miller, Ms. Jennie Bray, Mr. Stephen Byrne, Mr. Colin Byrne, Mr. Thomas Hayes, Mr. Elean Ali and Mr. Ian Keogh, all named by the appellants as directors of the respondent (except Mr. Stephen Byrne and Mr. Colin Byrne). In this latter e-mail Mr. Kinsella wrote: "CQML need to take control of this car park (and other parts of the development which are currently outside their control) to protect their interests" and that "this might be the leverage opportunity we are looking for."

18. Mr. McCormack avers that this demonstrates that the directors of the respondent were actively involved in the trespass of the respondent upon the property of the appellants, and he further avers that this was in an effort to apply pressure on the appellants and DCC in the

Defects proceedings. (In passing, I note, however, that both statements of claim state that the acts of trespass complained of in the proceedings occurred "On or about dates unknown in or about June 2017…". This is, inconsistent, on the face of it at least, with reliance upon an e-mail of August 2016 in connection with those same acts of trespass. Similarly, according to Mr. McCormack, the Defects proceedings issued in June 2018, so it is difficult to see how an alleged trespass twelve months previously could be intended to bring pressure to bear in those proceedings, as claimed by Mr. McCormack).

19. In any case, in response to Mr. McCormack's averments, Mr. Hayes says that the e-mail of 20th August 2016 was written in the context of an ongoing dispute between the Campshire Partnership and the Spencer Hotel regarding the entitlement of either to access and control of certain car parking spaces, and also regarding significant outstanding unpaid charges. He avers that at this time, the Campshire Partnership had not furnished any evidence of its title to these spaces to the respondent. He avers that this e-mail does not in any way demonstrate that the respondent nor any of its directors were actively involved in a trespass, let alone for the purpose of applying pressure as alleged. He avers that this e-mail is no more than an e-mail from a single director to the Board of Directors in relation to an ongoing dispute concerning outstanding service charges and ongoing costs.

20. The second e-mail relied upon by Mr. McCormack is an e-mail of 18th October 2016 from Mr. Liam Miller to Mr. Stephen Byrne, and copied to other members of the board of the respondent, including Mr. Kinsella, Mr. Keogh, Ms. Bray, Mr. Ali and Mr. Hayes, and also Mr. Colin Byrne and a Mr. McNulty. In this e-mail, in reference to apartment no. 14, Mr. Miller states: "I feel we should now inform Campshire/Alanis and DCC (lessor) that we are proceeding with the emergency works and that these would be added to the service fees. Presumably we will need easier access to get this work done – change the lock?". Mr.

Stephen Byrne responds two minutes later to say the locks are changed and the appellants rely on this correspondence as clear evidence of trespass upon apartment no. 14.

21. It should be noted that there is an earlier e-mail the same day in which Mr. Byrne says that he was unable to get any reply from Campshire in response to a request to inspect this apartment to identify possible leak sources. It is clear from the correspondence that there was water ingress affecting the building generally and that urgent access was required. Mr. Byrne also estimates the cost of repairs to do emergency works, at €5,000.

22. In response to reliance upon this correspondence, Mr. Hayes says simply in his affidavit that the correspondence does not demonstrate any cause of action as against the directors.

23. Mr. McCormack relies on an e-mail at 23rd November 2016 from Mr. Liam Miller to the other parties mentioned above, in which, in reference to the car parking spaces, Mr. Miller asks the board if this is "the particular battle ground we choose?". He goes on then to express concern about how that might impact upon other more substantive issues, such as the "serious building defects, fire safety issues, retained common ground areas and the like".

24. In response to reliance upon this e-mail chain, Mr. Hayes says that Mr. McCormack is quoting selectively from a single director's response to a detailed proposal from Mr. Miller to the whole board. He says the context to Mr. Miller's e-mail lay in threatened proceedings, including an application for injunctive relief and that the e-mail was responded to by other board members. Mr. Hayes avers that it is extraordinary that Mr. McCormack should rely on a selective citation from an e-mail sent by one director in what was a collective deliberation of a number of issues by the whole board.

25. Mr. McCormack then relies upon a comment in an e-mail from Mr. Michael Kinsella, in response to Mr. Miller in which Mr. Kinsella says that "it is important for us to pick the right fight at the right time … possession is nine tenths of the law". Mr. McCormack then

places particular reliance upon a suggestion by Mr. Kinsella that the respondent might rent out car parking spaces in the short term for the purpose of establishing a sinking fund to carry out remedial works. It was in this context that Mr. Kinsella made the comment "possession *is nine tenths of the law"*.

26. Mr. McCormack asserts that this e-mail chain is evidence of a flagrant disregard by the proposed co-defendants of the property rights of the appellants. Mr. Hayes however claims that Mr. McCormack is quoting selectively from the e-mail chain, which Mr. Hayes contends is no more than a collective deliberation by the board of various issues, including an application for injunctive relief and the car parking spaces.

27. Mr. McCormack also relies upon an e-mail chain between 1st December and 3rd December 2017 in which there is reference to changing locks (the premises is not specified, but Mr. Hayes asked that Mr. Byrne brief the board on issues including the change of locks) and there is also reference to "retail unit offers" for a unit in the IFSC. In response, Mr. Hayes says that it is difficult to understand how a request to Mr. Byrne to brief the board of directors could render the whole board liable for alleged torts on the part of the respondent.

28. Mr. McCormack also places some reliance on a director's report of 19th February 2018 in which there is reference to "vacant retail units" and "twelve expressions of interest since signage put up in December, no contact from Campshire…". Mr. McCormack says that this is evidence on the part of the respondent (and the directors of the respondent) to let property belonging to the appellants. This, Mr. McCormack says, needs to be read together with the signage which he referred to in his grounding affidavits.

29. However, in response to this Mr. Hayes says that the purpose of the notice placed by the respondent on the vacant retail units was to elicit contact from the persons who had an interest in the properties, not for the purpose of offering the units for rental.

Submissions

General principles

30. Both parties agree that the test that an applicant must meet on an application to join a co-defendant is that referred to by Laffoy J. in *Allied Irish Coal Supplies Limited v. Powell Duffryn Intl. Fuels Limited* [1998] 2 I.R. 519 wherein the learned judge stated that on such an application: "the onus on the plaintiff is no greater than to demonstrate that it has a stateable case". She also held that "the proper approach is to determine whether there is a stateable case on the basis that the plaintiff's version of the disputed facts is the true version."

31. However, the respondent also relies upon the decision of the Supreme Court (MacMenamin J.) in *O'Connell v. Building and Allied Trade Unions & Others* [2012] 2 I.R. 371. While in that case the main focus of the court was on whether or not it would be appropriate that an intended defendant should be joined in circumstances where, if the statute of limitations was invoked, the claim against that defendant would be statute barred, the respondent relies upon that decision because of a concluding observation of MacMenamin J. that:

> "However a court of first instance must always retain the discretion to dismiss an application to join as co-defendants if the application itself is evidently futile, would serve no purpose, is founded on insufficient evidence or if it is vexatious or an abuse of court process."

It is the respondent's case that this application is founded on insufficient evidence, is vexatious and is an abuse of process. Consideration of these matters requires a consideration of the case that the appellants wish to make against the intended co-defendants.

32. Insofar as the decision is discretionary, then in accordance with well-established principles, this Court should give significant weight to the manner in which the High Court judge exercised his discretion and should not, in general, interfere with the order made by the High Court unless it considers that it gives rise to a risk of prejudice or injustice. That is

particularly so where - as here - the decision under appeal is, in essence, a case-management one: see *Dowling v. Minister for Finance* [2012] IESC 32: paras. 3.1-3.5. As counsel for the appellants emphasised in his oral submissions in this appeal, the issue in dispute is essentially procedural: namely whether the appellants should be permitted to sue the directors in these proceedings or whether their intended claim against the directors should be pursued in separate proceedings. Counsel emphasised that his clients were entitled to prosecute such proceedings without any leave of the Court.

33. Of course, the position is somewhat complicated here by the fact that this Court has before it (by agreement) new evidence which was not before the High Court.

Personal liability of directors for torts committed by a company

Submissions of the Appellants

34. The appellants contend that the trial judge mistakenly conflated limited liability principles with principles of joint tortfeasorship. They refer to the following passage in *Bowstead and Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) wherein at para. 9-119 it is stated:

> "For a short period, it was thought that the position of the company directors was different to that of agents in general in relation to torts and other wrongs; they were to be identified with a company and not personally liable. There was, however, no reason to privilege directors over employees and other agents and it has been affirmed that the general principles applicable to unincorporated principals and their agents are as applicable to companies and directors. Where tortious liability turns on an assumption of responsibility, it may be found that directors, like other agents, have not assumed any personal liability but rather have acted solely on behalf of the company, their principal. Otherwise directors can be liable in tort in the same way as anyone else.

They may, however, be liable for procuring the commission of a tort or other wrong by the company or one of its employees."

35. Counsel on behalf of the appellants also refer to the following passage in *Clerk and Lindsell on Torts* (20th edn, Sweet & Maxwell 2013) at 4-04:

"Thus, the agent who commits a tort on behalf of his principal and the principal are joint tortfeasors…. a company director and the company itself may be regarded as joint tortfeasors where the director is "sufficiently bound up in the [company's acts] to make him personally liable."

36. The appellants refer to and rely upon various authorities in support of this proposition, including *Standard Chartered Bank v. Pakistan National Shipping Corporation (No.2)* [2003] 1 A.C. 959, *Tommy Hilfiger Europe Inc. v. McGarry* [2005] IEHC 66, *Harlequin Property v. O'Halloran* [2013] IEHC 362 and *Vanguard Auto Finance v. Browne* [2014] IEHC 465.

37. In *Standard Chartered Bank v. Pakistan National Shipping Corporation*, Mr. Mehra, the managing director of a company, Oakprime, had issued a falsely dated bill of lading so as to appear to comply with a condition of credit in a shipping transaction to which the company was party. The plaintiff claimed damages for deceit and conspiracy against both the company and Mr. Mehra, who, in his defence, contended that he had committed no deceit because he had made the representation on behalf of the company, Oakprime, and that misrepresentation was relied upon by the plaintiff as a representation made by Oakprime. As a matter of fact, this was true, but Lord Hoffman, in his judgment, considered that to be irrelevant. At para. 20, p. 968 he stated:

"The fact that by virtue of the law of agency his representation and the knowledge with which he made it would also be attributed to Oakprime would be of interest in an action against Oakprime. But that cannot detract from the fact that they

were his representations and his knowledge. He was the only human being involved in making the representation to SCB (apart from administrative assistance like someone to type the letter and carry the papers round to the bank). It is true that SCB relied upon Mr Mehra's representation being attributable to Oakprime because it was the beneficiary under the credit. But they also relied upon it being Mr Mehra's representation, because otherwise there could have been no representation and no attribution."

38. At para. 22 Lord Hoffman further stated:

> "No one can escape liability for his fraud by saying 'I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable.'"

39. In *Tommy Hilfiger Europe Inc. v. McGarry,* there had been a violation of the plaintiffs' trademark, and although trading in the pirated goods was conducted through the defendant company, Carroll J. stated that she had no hesitation in making an order personally against the first named defendant, because he had procured, directed and carried out the wrongful acts.

40. In *Vanguard,* the third named defendant had received payment from the plaintiff on foot of a false invoice. She claimed that this invoice had been prepared by the first named defendant (her husband) and/or the second named defendant, a company in which her husband, the first named defendant, was the managing director and beneficial owner of the majority shareholding and in which she, the third named defendant held one share. She claimed that she had returned these funds by making payment, not to the plaintiff, but to the first and/or second named defendants. Having referred, with implicit approval, to *Tommy Hilfiger Europe Inc. v. McGarry* at para. 96 the court held, at para. 97:

> "The director of a company cannot escape liability for deceit on the grounds that his or her act had been committed on behalf of the company, moreover, whilst an agent might assume responsibility on behalf of another without incurring personal liability in respect of a negligent misrepresentation, that reasoning does not apply to fraud. See *Standard Chartered v. PNSC* [2003] 1 BCLC 244."

41. All of the above makes clear, the appellants submit, that it is not open to the directors of a company to escape liability for tortious acts, such as copyright infringement or trespass to property, where it can be shown that the board members have taken specific and conscious decisions to commit those tortious acts, and they are not protected by the mere fact that they happen to be directors of the company who may have made those decisions through the constitutional organs of the company.

42. As I have mentioned above, when these applications were before the trial judge, the appellants did not adduce any evidence as to the conduct of any of the directors specifically, and while some documents were exhibited in support of the applications, it is apparent that they were moved substantially in reliance on the status of the intended defendants as directors of the company, or, in the case of Q Agile Limited, its status as managing agent of the company in support of its application.

43. However, on this appeal it is now argued, on the basis of the New Evidence, that the directors of the respondent planned and executed the tort of trespass upon the properties of the appellants. It is submitted that the New Evidence establishes, or at least suggests, that members of the board of the respondent expressly authorised denial of access to the appellants to their property on the pretext of demanding sight of the appellants' title to their properties in circumstances where they had demanded and received service charges from the appellants over the years. It is further submitted that New Evidence demonstrates that the respondent and the directors of the respondent have pursued a deliberate strategy of locking

the appellants out from their properties in order to pressurise them into making a settlement with the respondent. All of this occurred in circumstances where the respondent itself has not taken title to any of the common areas in the Development.

44. Finally, in so far as the decision of the trial judge is concerned, the appellants also submit that he took into account a number of irrelevant considerations in arriving at his decision. Firstly, it is submitted that the fact that the directors of the respondent are not motivated by profit is an immaterial consideration as to whether or not they have committed a tort. Secondly, it is submitted that the fact that the application for injunctive relief was compromised is irrelevant. The plenary hearing of these proceedings will be concerned with an action for damages. Thirdly, whether or not the joinder of the directors and Q Agile Limited will give rise to a conflict of interest with the interests of the respondent in the defence of the proceedings is not a relevant consideration.

45. It is also submitted on behalf of the appellants that none of the directors who have sworn affidavits in response to this application have denied the occurrence of trespass or denied that the appellants were denied access to the premises the subject of the proceedings. Nor have any of those deponents claimed that the management agent was acting entirely on his own initiative or on a frolic of his own. The directors were at all times availing of legal advice, yet they do not say that their actions the subject of these proceedings were undertaken pursuant to legal advice.

46. In response to a question from the Court, counsel for the appellants said that this application is brought against individuals who happen to be directors of the respondent, and who it is alleged engaged in tortious acts, which have not been denied. The proposition that they have responsibility for such acts does not conflict with principles of corporate immunity. Counsel for the appellants further submits that, taking the appellants' case at its height, as the Court must do for the purpose of this application, the appellants have

discharged the onus upon them to establish a stateable case as against the directors for the purposes of having them joined as co-defendants to the proceedings.

Submissions of the Respondent

47. The respondent agrees with the appellants that a director or agent of a company who individually directs or procures the performance of a tort or has such a close involvement with the matter may be held liable with the company as a joint tortfeasor. However, the respondent contends that where the involvement of the director is no more than through his participation in the constitutional organs of the company i.e. the board, that that level of participation in the tort is not sufficient to render directors liable in their personal capacity.

48. In this regard the respondent relies upon *MCA Records v. Charly Records* [2003] 1 BCLC 93 wherein Chadwick L.J. stated:

> "A director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person….. Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control."

49. In this case, the respondent submits that the appellants have failed to lead any evidence to demonstrate a direct involvement on the part of the directors in the alleged trespass, or evidence sufficient to show that their involvement in the alleged trespass went beyond their participation in the constitutional organs of the respondent. The respondent contends that what the appellants argue for is an unstateable proposition, that all directors of all companies should be liable for any collective involvement in the relevant organ of the company.

50. It is submitted on behalf of the respondent that the appellants have failed to identify any acts of any individual director or agent of the company such as would merit their joinder to the proceedings. The respondent submits that the e-mails relied on by the appellants do not indicate any evidence of any personal involvement by the directors in the alleged tortious acts, beyond their participation in the board of the respondent.

51. Moreover, there is no evidence at all to justify the joinder of Q Agile Limited to the proceedings, which company only became the management agent of the respondent after the acts complained of by the appellants.

General discretion of the Court

52. The respondent argues that the trial judge correctly identified and applied the relevant legal principles to the application and had due regard to the evidence advanced in support of the application. The decision made by the trial judge was, the respondent submits, within the limits of his reasonable discretion. In particular, the respondent argues that, in circumstances where no explanation was provided to the court as to why the appellants did not join the directors to the proceedings originally, it was open to the trial judge to conclude on the basis of the evidence before him that the application to join the directors, and Q Agile Limited, had all the characteristics of a tactic in order to exert pressure on the respondent and the directors in the other proceedings involving the parties. Having regard to the limited circumstances under which a director may be held personally liable for the torts of a

company, the very limited evidence before the court, and the conduct of the appellants, it is submitted that the trial judge was entitled to refuse the application, and the New Evidence is insufficient to displace the conclusions of the trial judge.

Decision

53. I think that the most appropriate approach to the appeal, in the light of the New Evidence, is, first, to consider the decision of the trial judge, and if I form the view that that decision was within the reasonable discretion of the trial judge, such as to lead to a conclusion that the appeal should be dismissed unless the New Evidence might lead to a different conclusion, then I will, secondly, move to consider if the impact of the New Evidence is such as to merit a different conclusion. Obviously, if I form the conclusion that the decision of the trial judge was in error by reference to the material that was before him, then it is not necessary to move to consider the New Evidence at all.

54. Central to the decision of Haughton J. was that there was no evidence before him as to any acts relied upon by the appellants such as to ground a stateable case that any of the proposed defendants, together with the respondent, committed acts of trespass, or procured the respondent to commit acts of trespass, upon the property of the appellants. The trial judge considered that the application was, in effect, grounded upon the fact of the directorships of the persons intended to be joined as co-defendants, rather than any specific acts on the part of those persons.

55. It is difficult to find any fault with the conclusion of the trial judge in this regard. However, the appellants rely on the authorities referred to above at paras. 34-40 for the proposition that in certain circumstances directors can and will be held responsible for the torts of a company. At the level of principle, this proposition is not disputed by the respondent, and the debate on this issue centres around the degree of involvement of the directors in the actions constituting the tort. So, for example, in *Standard Chartered Bank*

v. Pakistan National Shipping Corporation, the managing director was found liable because he was sued for his own tort of fraud, and the House of Lords held that once all of the elements of the tort were established against him, he was liable (with the company) for the loss that the plaintiff had incurred. Similarly, in *MCA Records v. Charly Records,* the Court of Appeal of England and Wales held that it was impossible to avoid the conclusion that the purpose and intent of the director in that case was to ensure that the plaintiff's recordings should be copied and marketed through the defendant company, Charly Records. The court held (at para. 52) that an individual who intends, procures and shares a common design [with the company concerned] that the [copyright] infringement should take place may be liable as a joint tortfeasor. In all of the cases relied upon by the appellants, the court carefully examined the actions of the directors concerned. In none of the cases relied upon by the appellants was a director found to be personally liable for the tort of a company simply on the basis that he or she was a director of the company. For this reason alone, I think that the trial judge was entitled, in his discretion, to refuse the application.

56. The trial judge also had regard to the absence of evidence as regards the conduct of the directors individually, by which I understand him to mean that the application was made to join all of the proposed defendants on the basis of the same evidence, without in any way distinguishing between them. There was no draft statement of claim setting out the case being made against each proposed defendant, and so he could not therefore conduct any assessment of the case alleged against each, or of their respective roles in the alleged trespass. The application therefore proceeded against all directors on the basis of the same evidence, even though their degree of involvement in the affairs of the respondent generally and the acts complained of in these proceedings in particular, may well vary from director to director. In my view the trial judge was entitled to take this difficulty into account.

57. Furthermore, I think that the trial judge was, in the exercise of his discretion, entitled to take into account the wider impact on the litigation of the joinder of the directors and the managing agent as co-defendants to the proceedings, which are at an advanced stage, and are being case managed in tandem with the Defects proceedings. In particular, he was entitled to take account of the possibility that it would give rise to conflicts of interests as between the directors and the respondent with the result that individual directors might feel the need to obtain separate representation thereby prolonging and adding unnecessary additional expense to the proceedings. These are all case management considerations, which the trial judge was entitled to take into account in the exercise of his discretion.

58. For all of these reasons, I can find no error in the decision of the trial judge. In my view, his decision was made within his reasonable discretion, and unless the impact of the New Evidence is such as to justify a different conclusion, this appeal should be dismissed. Accordingly, I will now proceed consider the impact of the New Evidence.

Does the New Evidence materially alter the position?

59. The respondent submits that the extracts from the documentation discovered by the respondent constitute a very small sample from a very large volume of documentation discovered. Moreover, it is submitted by the respondent that the extracts are selective and taken out of context.

60. Having reviewed the documentation exhibited by Mr. McCormack in its entirety, I have come to the conclusion that it does no more than to demonstrate that the board was, over a protracted period, required to address significant difficulties in the management of the Development. The difficulties touched upon by this correspondence include an arrears of service charges in relation to car parking units in respect of which another party, a hotel operator, had an involvement, concerns about fire safety issues arising out of vacant units and concerns associated with water ingress through apartment no. 14. The board discussed

the ongoing management of these issues and the options at their disposal (as they perceived them) and there is also some correspondence with the solicitor advising the respondent at the time. In my view, the only comment that might be regarded as being in any way incriminatory is the comment of Mr. Kinsella that "possession is nine tenths of the law". But the problem is that that comment is indeed taken out of context, as counsel for the respondent submits. It is made in an e-mail in which Mr. Kinsella is referring to a dispute with the previous operators of the hotel within the Development. Read in context, it does not amount to a stateable case of trespass by the directors. In fact, it is difficult to know exactly what Mr. Kinsella is referring to in making this remark. Also, as I observed above, this comment was made in an e-mail dated 23rd November 2016, some seven months before the dates given in the statements of claim as being the dates the appellants believe the trespass complained of commenced in each case.

61. Moreover, within the documentation exhibited by Mr. McCormack there are e-mails post-dating the e-mail chains referred to above in which it appears that payments were made on behalf of the appellants in relation to both service charges and the temporary works required to secure apartment no. 14 (and parts of the Development outside apartment 14) from the ingress of water to that apartment. These payments are made without protest, and without any complaint as regards trespass. While it is no function of the Court on an application such as this to engage in any assessment of the merits of the dispute as between the parties, this material is of some relevance when considering the merits of the arguments advanced by the appellants on this appeal, in so far as it is contended that the New Evidence is sufficient to demonstrate a stateable case against the directors. The manner in which these payments were made by the appellants (without any protest) might suggest otherwise.

62. As I have said above, one of the key reasons that Haughton J. rejected the application of the appellants was because there was insufficient evidence placed before the court of the

conduct relied upon by the appellants for the purpose of their application. On this appeal, the appellants have attempted to fill that void through the introduction of the New Evidence. However, for the foregoing reasons, I have come to the conclusion that the content of the New Evidence does not achieve that objective.

63. I have also considered whether or not the appellants are prejudiced by the decision of the trial judge. In my view they are not. It remains open to them to issue separate proceedings against the proposed defendants, if they consider that to be appropriate. While in general it is desirable that all issues raised by proceedings are dealt with at the same time, that is not an absolute rule. There are compelling countervailing factors at play here, including the advanced stage of these proceedings, and the impact of any delay in these proceedings upon the Defects proceedings. Furthermore, I agree with submissions made on behalf of the respondent that, in the event that the appellants are successful in these proceedings as against the respondent, the finding by the Court of tortious acts on the part of the respondent would be, as far as the directors are concerned, *res judicata*, and that issue could not be reopened by the proposed defendants in any separate proceedings taken against them by the appellants. Such proceedings would be concerned with the question of the personal responsibility of the proposed defendants for the torts of the respondent. There is therefore no risk of there being conflicting judgments as between decisions made in proceedings as against the respondent, and separate proceedings as against the directors, in respect of the same torts. For the same reason, it is clear that the appellants are not in any way prejudiced by the refusal of the applications.

64. In any event, the New Evidence leaves unaffected many of the considerations identified by the High Court judge as weighing against allowing the joinder of the directors here, including the potential impact on the continued prosecution of the Defects proceedings, the potential for conflicts of interest to arise and, more generally, the concern that the joinder

of the directors is being sought as a forensic tactic in the wider litigation between the parties. That the application was made to the High Court without any real evidential basis might be thought to substantiate that concern, which is not allayed by the fact that the appellants have now produced some material which is said to evidence their assertions.

65. Finally it bears mentioning that the nature of the case which the appellants wish to advance against the directors (and the managing agent) is unusual and complex, and would inevitably prolong the proceedings. This is in addition to the other factors identified by the trial judge - with which I agreed above - which he considered would be likely to lead to that outcome also. It is a further case management consideration, that weighs against the granting of the orders sought, not least in circumstances where the appellants have not at any stage explained why they did not join the proposed co-defendants to the proceedings from the outset. For all of the foregoing reasons I have come to the conclusion that the appeal should be dismissed.

66. Since this decision is being delivered electronically, Whelan and Collins JJ. have indicated their agreement with it. As the respondent has been entirely successful in this appeal, my provisional view is that it is entitled to its costs both in this Court and the High Court. If the appellants wish to contend for an alternative form of order, they will have liberty to apply to the Court of Appeal office within fourteen days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the Court, the appellants may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.