THE COURT OF APPEAL

Appeal No. 289/2015 and 324/2015

Ryan P.
Peart J.
Irvine J.

Between/

Ciara Quinn, Colette Quinn, Brenda Quinn, Aoife Quinn, Seán Quinn Junior & Patricia Quinn

Plaintiffs/Appellants

- And -

Irish Bank Resolution Corporation Limited (In Special Liquidation) and

Kieran Wallace

Defendants/Respondents

- And -

Sean Quinn Senior, Dara O'Reilly And Liam McCaffrey

Third Parties

And

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JUDGMENT of Ms. Justice Irvine delivered on the 29th day of January 2016

1. This judgment concerns two related appeals brought in respect of the same set of proceedings. The first appeal is against the Order of the High Court (Haughton J.) dated 21st May, 2015, whereby he refused an application brought by the plaintiffs to amend their statement of claim.

2. The second appeal is brought by the defendants in respect of the order of the High Court (Haughton J.) dated 21st May, 2015, whereby he refused their application to strike out certain paragraphs of the plaintiffs' statement of claim.

3. Before considering each appeal it is first necessary to briefly summarise the background circumstances germane to both.

Background

Procedural chronology

4. The proceedings were commenced by means of plenary summons dated 16th May, 2011, and were admitted to the commercial list on 30th May, 2011. In their statement of claim delivered on the 8th June, 2011, the plaintiffs, who claim that they are the ultimate beneficial owners of the Quinn Group, challenge the validity of six share charges ("Share Pledges") which they gave to Anglo Irish Bank ("the bank"), as security for monies loaned by the bank to the Quinn Group. They also seek to challenge the validity of six personal guarantees ("the Guarantees") which they gave to the bank by way of security in respect of significant loans made by the bank to six Cypriot companies. In addition they seek remedies against the bank for alleged breach of duty/breach of fiduciary duty and the negligent infliction of economic harm.

5. The following is a brief outline of the facts relied upon by the plaintiffs to support these claims.

6. As a result of the negative drop in the share price of Anglo in 2007, the bank advanced funds to companies within the Quinn Group so that the latter could meet the margin calls on its Contracts for Difference ("CFD") position. The plaintiffs signed many security documents during this period and allege that they did so without obtaining any legal or financial advice.

7. Following further price drops in Anglo's share price in 2008, the Quinn Group came under pressure from banks and bondholders. As a result, a further loan facility was provided to the Quinn Group in return for the provision of the Share Pledges executed by the

plaintiffs in favour of the bank.

8. Following a demand by the bank in 2008 that the Quinn Group reduce its CFD position, the majority of the CFDs were unwound into shares, the first portion of which (102,000,000) were purchased by a group of investors known as the "maple ten" while the second portion (108,625,000) were purchased by the Quinn Group. These shares were then transferred to the six Cypriot companies, each of which was wholly owned by an individual member of the Quinn family, *i.e.* the plaintiffs. As part of the unwinding arrangement, the plaintiffs provided the Guarantees in respect of the relevant Cypriot companies, and those companies ultimately received a total of €498 million from the bank.

9. On 14th April, 2011, Anglo appointed the second defendant as share receiver in respect of the Share Pledges.

10. In the original statement of claim, which runs to some 31 pages, the plaintiffs maintain that the Share Pledges and Guarantees are unenforceable at the suit of the bank. That claim is based on two separate assertions. The first is that these securities were procured by reason of undue influence or in the alternative that they ought to be considered to be improvident or unconscionable bargains, such that they should be set aside. The second is that the securities should be set aside on the grounds that the charges were given in respect of lending that was in breach of Section 60 of the Companies Act 1963 and/or in breach of the provisions of the Market Abuse Regulations (" MAR').

11. The defences of both defendants were delivered in July, 2011 and the plaintiffs reply thereto in August, 2011. Thereafter, the High Court (Kelly J.) on 16th December, 2011, directed the trial of a preliminary issue. That issue concerned the *locus standi* of the plaintiffs to rely on certain breaches of s.60 of the Companies Act 1963 and the MAR in support of their claims that the securities are unenforceable. The order of Kelly J. set the following question for determination:

> "Do the Plaintiffs or any of them have the standing or entitlement to rely upon the alleged or any breach:-
>
> (a) of the Market Abuse Regulations; or
>
> (b) Section 60 of the Companies Act, 1963,
>
> in aid of any of their claims for declarations of invalidity, unenforceability or no legal effect in respect of any Charge [on] Shares or any Personal Guarantees herein?"

12. By judgment of the High Court (Charleton J.) dated 23rd February, 2012, it was held that the plaintiffs had locus standi to rely on those breaches in support of their claims. However, on appeal, it was held by a unanimous decision of the Supreme Court (Clarke J.) dated 27th March, 2015, that the plaintiffs were not entitled to rely on the alleged breaches of the MAR and /or s.60 of the Companies Act 1963 in support of their claims, as they had pleaded them.

13. In the course of his judgment Clarke J. summarised the Quinns' claim as pleaded in the statement of claim at para. 12.1 of his judgment where he stated:-

> "The statement of claim refers specifically to the alleged illegality of the loan transactions and what is said to be the consequent unenforceability of the security and guarantees."

14. In the face of this particular claim he concluded that the underlying lending contracts were enforceable notwithstanding their illegality.

15. Of particular significance to the plaintiffs' application to amend their statement of claim was the observation of Clarke J. at para. 12.6 of his judgment where he stated:-

> "There does not seem to be a plea contained in the statement of claim which suggests that the security and guarantees are allegedly void or unenforceable on a separate and standalone basis, as opposed to being invalid by being closely connected to the lending transactions which are said to be void or unenforceable due to illegality."

16. Having identified the limited nature of the claims pleaded by the plaintiffs in their statement of claim, Clarke J. later concluded as follows at para. 12.16 of his judgment:-

> "I have further concluded that the Quinns never made a case which suggested that the security arrangements might be unenforceable, even if the underlying lending transactions were enforceable. On that basis, I am forced to conclude that, on the case as it has been pleaded and run to date, it can only be held that the relevant security arrangements are enforceable. This is so because the underlying loans themselves are enforceable and no alternative case has been made. In those circumstances, the question of whether it might be possible to undo executed security just does not arise."

17. In the course of his judgment Clarke J. noted that had the plaintiffs' claims been pleaded differently they might have sought to argue that the securities were unenforceable on a separate and stand alone basis as opposed to being invalid due to the illegality of the underlying lending, but they had never made that case.

18. At this juncture, it is appropriate to consider the first appeal.

The first appeal

19. Following the Supreme Court judgment the plaintiffs, by notice of motion dated 17th April, 2015, sought to amend their statement of claim pursuant to O.28, r.1 of the Rules of the Superior Courts, 1986. The pertinent amendment sought the insertion of what the learned High Court judge conveniently termed as a plea of *"stand alone"* unenforceability of the Share Pledges and Guarantees. This was a plea that Clarke J. at para. 12.10 of his judgment suggested might have been open to the plaintiffs, had they chosen to pursue it. This is what he said:-

> "A second type of allegation might have been to suggest that, even if the underlying loans were themselves enforceable (on the grounds that policy did not require unenforceability), then, nonetheless, security put in place to support illegal activity by persons who are unaware of the illegality concerned might not be capable of being enforced."

20. Accordingly, it would *prima facie* appear that the application brought by the plaintiffs to amend their statement of claim was

made in direct response to a number of observations made by Clarke J. at paras. 12.9 to 12.13 of his judgment.

21. The application was refused in the High Court (Haughton J.) on a number of grounds but principally on the basis of the rule in *Henderson v. Henderson* (1843) 3 Hare 100, which concerns applications which may be considered to be an abuse of process and also on the grounds of delay on the part of the plaintiffs in the making of the application. The High Court judge dealt in some detail with both of these issues but also made a number of other findings which were material to his conclusions.

22. Starting at para. 30 of his judgment he noted the following as relevant factors:-

> (1) That the issue which the plaintiffs now wished to advance was never a matter of real controversy at any time prior to the decision of the Supreme Court on 27th March, 2015, such that the application did not comfortably fall within the provisions of Order 28.
>
> (2) That there was little difference between the amendment sought and the existing pleas such that they fell under the rubric of those "which ought to have been raised" from the outset and he went on to describe the proposed stand alone plea of unenforceability as a new argument concerning the legal consequence of facts that had already been pleaded.
>
> (3) That the plaintiffs ought to have anticipated that the outcome of the preliminary issue might be that the securities would be deemed to be enforceable even if the underlying lending was found to be in breach of MAR or Section 60 of the Companies Act 1963. Thus, in anticipation of such a finding, they should have raised the stand alone enforceability plea at a much earlier time. Further, the restricted nature of the plaintiffs' claim as pleaded in the original statement of claim had been drawn to their attention by the bank in its written submissions of May, 2012 filed in respect of the appeal to the Supreme Court.
>
> (4) That no reasonable explanation had been furnished as to why the plea of stand alone enforceability had not been pleaded at the outset and that the obligation to provide such an explanation was all the more important in the context of a modular trial.
>
> (5) That what the plaintiffs were now seeking to do by way of amendment was to recast their arguments, which still essentially relied upon the illegality of the underlying lending, to allow them pursue their claim of stand alone unenforceability. Accordingly, the application to amend the pleadings both in respect of its timing and proposed wording demonstrated an intention on their part to overreach or circumvent the decision of the Supreme Court on the preliminary issue. This was an abuse of process and should not be permitted for reasons of public policy.
>
> (6) That it was questionable as to whether a preliminary issue would have been directed by Kelly J. if the proposed amendment had been in the original statement of claim because the issues to be determined would have involved a consideration of "innocence", or "lack of awareness" on the part of the plaintiffs of the alleged illegality of the underlying lending, matters which were only determinable following a full consideration of the facts at a hearing on oral evidence.
>
> (7) That to permit the amendment would precipitate general prejudice in that the efforts that had been expended by the parties but particularly by the defendant and the court itself in dealing with the preliminary issue would, to a large extent, have been wasted.
>
> (8) That the culpable delay of the plaintiffs, while not of itself a bar to the success of the proposed application, was relevant to the question of whether the amendment sought would constitute an abuse of process. The same had undermined the rights of the defendants, the efficient use of court time and the principles which seek to ensure finality in the litigation process.

23. The High Court judge in refusing the application then expressed himself satisfied that the plaintiffs had failed to provide an adequate explanation as to why the amendment sought had not been pleaded at the outset or been brought at a much earlier point in time.

Submissions on behalf of the plaintiffs

24. Mr. Dunleavy S.C., on behalf of the plaintiffs, submitted that the trial judge had erred in fact and in law in refusing the application to amend the statement of claim. He made two principal submissions. The first was based on the provisions of O.28, r.1 which he submitted had always been considered to be a liberal rule and which if properly applied to the facts of this case warranted the granting of the amendment sought. The second was that, on the facts of the present case, the rule in *Henderson v. Henderson* was not relevant to the exercise of the court's discretion.

25. Counsel submitted that the High Court judge had erred in refusing the application given that the plaintiffs required the amendment to properly plead a matter in controversy between themselves and the bank. He submitted that the plaintiffs had laboured under the mistaken belief that they had advanced their claim on a basis that included a stand alone plea as to the illegality and unenforceability of the securities, until the Supreme Court had found otherwise. He drew the Court's attention to a paragraph in the plaintiffs' written submissions to the Supreme Court to support this submission and emphasised that this was not a case in which the plaintiffs had been holding back on this aspect of their claim.

26. Counsel also argued that the reason the application to amend the statement of claim was delayed was because of the legal distinction that had been drawn by Clarke J. between the different claims that might be made by those who granted security in respect of underlying loans which were subsequently found to be illegal. His clarification of the law was not foreseeable at the outset of the proceedings. Consequently, counsel submitted that there had been no culpable delay in seeking the amendment.

27. In addition, counsel maintained that if the plaintiffs were permitted to make the amendment sought, that the same would not cause any significant logistical prejudice or delay. In respect of the former he relied on the findings of the High Court judge. In respect of the latter he relied on the fact that, by reason of the intervention of the Director of Public Prosecutions, the trial of the action was now unlikely to be heard until 2017.

28. In respect of the abuse of process point, counsel submitted that the High Court judge erred in applying the rule in *Henderson v. Henderson* to the facts of this case. In particular, he argued that it was difficult to conceive of the rule having any relevance or application to an application to amend pleadings in the course of a single set of proceedings, despite the modular trial, except in circumstances in which a plaintiff was attempting to change the grounds or facts upon which his claims were made. In this context, he relied upon the fact that the High Court judge had correctly concluded that the proposed new plea as to innocence was little

different to the lack of awareness plea already made such that the proposed claim based on the stand alone unenforceability of the securities amounted to no more than a new argument as to the legal consequences of the same facts.

29. Finally, counsel argued that the issues which he now sought to introduce in the amended pleadings were not *res judicata* by virtue of the Supreme Court judgment. The plaintiffs were not seeking to go behind that decision in bringing the application to amend the pleadings. Further, the fact that there had been a hearing in respect of a preliminary issue did not afford the defendants any legitimate basis upon which to argue that the application to amend constituted an abuse of process. That hearing had not resulted in any savings in costs or time. The action still had not come on for hearing regardless of the outcome of the preliminary issue and the duration of the ultimate trial was unlikely to be any different to what it would have been had there not been a preliminary issue, albeit that the Supreme Court decision would of course play an important role. Consequently, counsel submitted that the High Court judge was wrong to find the proposed amendment constituted an abuse of process.

Submissions on behalf of the first defendant
30. Mr. Gallagher S.C., counsel for the first defendant, made two principal submissions in support of the High Court judge's findings.

31. Counsel's first submission was that the High Court judge was correct in finding that if the application was to succeed, the defendants would suffer prejudice. He highlighted that the prejudice identified by the High Court judge was not logistical but rather general prejudice relating to the time and expense that had been incurred in the trial of the preliminary issue. More specifically, counsel emphasised that the amendment sought, albeit based on the same facts, would give rise to new factual enquiries concerning the innocence of the plaintiffs in respect of the illegality of the underlying lending transactions. He pointed to the fact that the Supreme Court did not have to deal with this issue as it had adjudicated upon the preliminary issue on the basis of assumed facts. Thus, counsel submitted that the proposed amendment would lead to further factual enquiries and potentially further discovery.

32. In these circumstances, counsel submitted that the plaintiffs were obliged to furnish a full explanation for their delay in seeking to amend the statement of claim. That which had been provided was, he urged, both wrong and contradictory. The claim now sought to be made had, contrary to the averments of Ms. Quinn in her affidavit, never previously been advanced. Neither had it been brought to the attention of the Supreme Court. Counsel also submitted that the plaintiffs' explanation that the claim was always considered to have been part of the original case was contradictory to the plaintiffs' written submissions which advised that it was by reason of the uncertainty of the law at the time of the inception of the proceedings that the plea had not been included at the outset of proceedings. Accordingly, counsel submitted that the High Court judge was correct to refuse the application.

33. Secondly, counsel submitted that it was wrong to suggest that the rule in *Henderson v. Henderson* was not applicable because the plaintiffs were not seeking to go behind the determination of the preliminary issue. Counsel observed that the purpose of the rule in *Henderson v. Henderson* was to deal with situations in which a party does not attempt to go behind a specific determination, because it is bound by that determination as a matter of issue estoppel, but rather seeks to advance another ground in relation to its case on which it maintains it is entitled to succeed. In this respect, counsel submitted that it was irrelevant that the facts of the case as already pleaded might be sufficient to support the new cause of action which should have been included from the outset.

34. Counsel further submitted that the amendment sought concerned a distinct but related illegality ground which undermined the determination of the preliminary issue. The principles in *Henderson v. Henderson* were very apt, he submitted, in the context of a modular trial in proceedings which were being managed in the Commercial Court. The trial of the preliminary issue had been set up to dispose of all of the plaintiffs' arguments concerning illegality in aid of their claim for declarations of invalidity concerning the Share Pledges and Guarantees. Consequently, counsel submitted that the High Court judge had been correct to apply the rule in *Henderson v. Henderson* so as to prevent the plaintiffs from introducing new illegality based pleas in response to the conclusion of the Supreme Court that the said securities were enforceable notwithstanding the illegality of the underlying lending contracts.

35. Finally, counsel submitted that the amendments sought were the subject of an issue estoppel or otherwise *res judicata*.

Discussion
36. Of particular relevance to the decision of the High Court judge are the provisions of Order 28, rule 1 of the Rules of the Superior Courts, 1986 and the decisions in *Henderson v. Henderson, Croke v. Waterford Crystal* [2005] 2 I.R. 383, *Ashcoin Limited (In Creditors's Voluntary Liquidation) v. Moriarty Holdings Ltd.* (No. 2) [2013] IEHC 8, LSREF III *Stone Investments Limited v. Morrissey* [2015] IEHC 199 and *Morrissey v. IBRC* [2015] IEHC 200.

37. Order 28, rule 1 provides as follows:-

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

38. As was held by Geoghegan J. in *Croke*, the rule was intended to be a liberal one based on the proposition that the interests of justice are best served by allowing pleadings to be amended to ensure that the real issues in controversy between the parties are determined, even at a late date, unless the court is satisfied that the amendment would cause significant prejudice to the opposing party.

39. Apart from that consideration, I am satisfied that on the facts of this particular case, there are other factors to which the Court must have regard when exercising its discretion. These include delay and also the fact that the Court directed the trial of a preliminary issue which had been determined in the Supreme Court prior to the plaintiffs' application to amend their statement of claim. I will return later to consider the significance which the High Court judge attached to these factors later.

40. Having regard to the submissions of the parties, it seems to me that the principles which emerge from the decision of Hogan J. in *Ashcoin Limited* are material to the discretion which was exercised by the High Court judge in refusing the plaintiffs' application. That decision would appear to be good authority for the following propositions, namely:-

> (i) That the rule in *Henderson v. Henderson* may be applied in any case where the court is satisfied that a party has held back in reserve an alternative argument with the intention of using it should the court reach a determination adverse to its interests on other arguments.
>
> (ii) That the rule should not be applied with remorseless severity.
>
> (iii) That the rule is one which is designed to protect a defendant from harassment or other abusive conduct.

(iv) Relevant to the exercise of the court's discretion in applying the rule is whether it can be demonstrated that the party that seeks the relief does so in order to overreach, act oppressively or circumvent unfairly an adverse judicial ruling.

41. The following are a number of helpful and relevant extracts from the judgment of Hogan J.:-

Paragraph 7

"There is no doubt but that the rule in *Henderson v. Henderson* – which, broadly speaking, requires a plaintiff to advance the entirety of his or her case and forbids him or her to hold back an alternative argument in reserve - is capable of applying to the present case since it would have been open to Ashcoin to advance the present basis for the proceedings at a much earlier stage. The rule would certainly have applied to bar the reconstitution of the proceedings if there was evidence that Ashcoin had deliberately originally elected for strategic reasons not to pursue the alternative argument."

Paragraph 9

"… [I]t is clear from the authorities that the rule in *Henderson v. Henderson* should not be applied with remorseless severity, as if indeed it were otherwise, the rule could then often apply so as to preclude even the routine amendment of pleadings since it might be plausibly contended that the rule precluded the plaintiff from now advancing the amended case."

Paragraph 13

"This case-law therefore mandates an approach towards the *Henderson v. Henderson* which is discretionary in nature and which, above all, seeks to protect a defendant from harassment or abusive conduct."

Paragraph 15

" [t]here was no intention to overreach or act oppressively or to circumvent unfairly an adverse judicial ruling."

42. Consistent with the aforementioned principles is the decision of Costello J. in *LSREF III Stone v. Morrissey* [2015] IEHC 199. In that case she concluded that where a modular trial had been directed, the parties ought not to be permitted to revisit or reopen at a later time issues disposed of in the course of an earlier hearing. In considering an application to have an amended defence in debt proceedings restricted or struck out for, inter alia, abuse of process, she advised as follows at para. 50:-

"Fourthly, with the agreement of both parties, the proceedings were dealt with by way of modular trials. It follows that determinations of issues in prior modular hearings governed the issues that remained to be determined in the subsequent modules. Where [one party] seeks to revisit, reopen and re-agitate matters which have been ruled out or rejected in previous hearings, to admit them at this stage would be utterly to defeat all of the proceedings and steps taken in these proceedings to date."

43. In the related case of *Morrissey v. IBRC* [2015] IEHC 200, Costello J. struck out new proceedings instituted by the defendant in the aforementioned debt proceedings on the grounds of *res judicata* and the rule in *Henderson v. Henderson*. Of particular relevance is the following observation at para. 5:-

"But beyond the strict limitations of res judicata the courts have long recognised that there may be abuse of process outside of the relatively confined limitations of the rule and the courts have always been prepared to balance the rights of parties to have their cases heard and determined by the courts with the rights of the opposing parties to fair procedures in the conduct of litigation and, where necessary, to strike out proceedings if they amount to an abuse of process. In addition to the private rights of litigants, there is a public policy interest in ensuring finality of litigation and preventing vexatious litigants from subjecting the same parties to multiple law suits on the same issue. "

44. In light of these principles, it seems clear that in proceedings involving modular trials, a subsequent attempt to introduce a matter which has the effect of utterly defeating the previous steps taken in those proceedings can in certain circumstances amount to abusive conduct, having regard to, inter alia, the intention and conduct of the parties.

Decision

45. For the purposes of seeking to determine whether the High Court judge fell into error in refusing the plaintiffs' application to amend the statement of claim I will refer briefly to the findings which appear to have influenced his refusal of the relief sought.

46. The first matter which the High Court judge was obliged to consider was whether or not the proposed amendment was required for the purpose of determining the real questions in controversy between the parties. He answered that question in the negative and having considered the helpful submissions of the parties on this appeal I cannot find fault with that conclusion.

47. I am satisfied that the amendment sought concerned an entirely new claim which was never pleaded or in issue between the parties prior to the delivery of the Supreme Court judgment on 27th March, 2015.

48. While Ms. Aoife Quinn, in her grounding affidavit of the 16th April, 2015, maintained that the issue as to the stand alone enforceability of the share pledges and guarantees was always in controversy between the parties or always intended to be so, that assertion does not sit comfortably with the pleadings as drafted or with the fact that there was no evidence presented to this court that such a claim was flagged when the preliminary issue was heard before Charleton J. in the High Court.

49. Further, the fact that the issue was referred to in passing at para. 36 of the plaintiffs written submissions to the Supreme Court does not mean that it can be stated that it was thus in controversy between the parties. To the contrary, in response to that document, the written submissions filed on behalf of the defendants made reference to the fact that the claim concerning the stand alone enforceability of the relevant securities had not been pleaded in the statement of claim as it then stood. Having had this fact drawn to their attention, no application was then made to amend the statement of claim. The only reasonable inference to be drawn from the fact that, notwithstanding the prompt from the defendants' legal advisors, the issue never resurfaced until after the decision of the Supreme Court, is that the plaintiffs after due consideration with their extremely experienced legal advisors decided not to seek to put this matter in issue in the proceedings.

50. Finally, when counsel for the plaintiffs was asked in the course of this appeal as to whether the content of para. 36 of their

written submissions had been brought to the attention of the Supreme Court; he was unable to definitively confirm that this was so. If it had been, it is difficult to believe that Clarke J. would have stated what he did in his judgment regarding the fact that no such case had at that time been advanced in reliance on an argument as to the stand alone unenforceability of the securities.

51. Accordingly, I can find no fault with the conclusion of the High Court judge that the amendment sought was not necessary to allow the true issues between the parties be determined.

52. Relevant also to the exercise of the Court's discretion on an application to amend proceedings is the conduct of the applicant and that includes a consideration of any delay in the bringing of the application. In this regard I am satisfied that the High Court judge was correct in his conclusion that the plaintiffs' delay in seeking to amend their statement of claim was not adequately explained and must be viewed as culpable in all of the circumstances. Further, I tend to agree with the submissions made by Mr. Gallagher S.C. that the reasons for the delay as advanced by the plaintiffs can at best be described as contradictory.

53. In their efforts to explain their delay the plaintiffs maintain that at the time the proceedings were commenced there was significant legal uncertainty as to whether the claim they now wished to advance was sustainable. They submit that it was only when the Supreme Court gave its decision on the 27th March, 2015, that it became clear that such a claim might reasonably be advanced as a matter of law. In their written submission to this court, they describe the judgement of Clarke J. as a watershed decision insofar as it referred to the possibility that collateral contracts entered into by innocent parties in connection with illegal but enforceable underlying lending transactions from which they were not to derive benefit, as opposed to cases in which the parties despite being innocent were intended to benefit, might not be enforceable per se.

54. For my part I find this particular submission a highly unconvincing explanation for the delay in seeking the amendment of the statement of claim. It is difficult to understand why, regardless of any alleged lack of legal certainty, the plaintiffs would not have made the relevant plea for the purposes of having the court adjudicate on the issue if they had, as is to be inferred from their submission, given consideration to the possibility of advancing a claim based on the stand alone enforceability plea.

55. More importantly however is the fact that the submission that legal uncertainty was responsible for the delay in applying to amend the statement of claim, is in complete conflict with Mr. Dunleavy's argument that the original pleadings did in fact include such a plea. That of course is a submission that is simply unsustainable having regard to the decision of Clarke J. who, having conducted a detailed analysis of the pleadings, found that no such plea had been advanced. Secondly the submission is incompatible with Ms. Quinn's affidavit in which she states, not that the plaintiffs were too unsure of the legal position to plead the case of stand alone unenforceability but rather that they had formed the mistaken view that their pleadings had actually encompassed that argument. In this regard she relies on para. 36 of the plaintiffs' written submissions to the Supreme Court, where the following reference is made to a stand alone unenforceability plea:-

> "…[T]he Quinns' plead that the share charges and the guarantees are unlawful and unenforceable in and of themselves, as they were entered into for an illegal purpose, and as such, offend the common law rules on illegality."

56. This averment raises the further question as to why, when the plaintiffs received the defendants' submissions which highlighted the fact that the statement of claim did not include such a plea, they did not then immediately write to the defendants' solicitors to advise them that they intended to pursue such a claim and why they didn't follow up such correspondence with an application to amend the statement of claim, if that was what they had always intended.

57. While counsel for the plaintiffs submitted that it would have been unrealistic to seek to amend the statement of claim at that stage, in my view they would have had significantly more merits than they had at a time when it could be said that they had ignored the defendants prompt as to the absence of such a plea in the statement of claim and then either deliberately abandoned or alternatively culpably left the issue in abeyance to await the outcome of the preliminary issue in the hope that it would be resolved in their favour.

58. For these reasons I am of the view that the High Court judge was correct in finding culpable delay on the part of the plaintiffs in the bringing of their application to amend the statement of claim.

Abuse of process

59. Having considered the submissions of the parties and in particular the case law referred to earlier in the course of this judgment, I am quite satisfied that the High Court judge was correct in concluding that the principles that emerge from the decision in *Henderson v. Henderson*, were relevant and material to the exercise of his discretion on the plaintiffs' application. Those principles do not cease to be relevant merely because there has not been earlier litigation between the same parties. The fact that the court, prior to the plaintiffs application to amend their pleadings, had these proceedings under active case management, had directed the trial of a preliminary issue destined to ensure that the proceedings were conducted efficiently and the fact that that issue had been determined on appeal in the Supreme Court, were sufficient reasons to permit the court to consider these principles, which more usually apply in the context of sequential proceedings between the same parties.

60. In seeking to apply the Henderson principles to the facts of the present case, the High Court judge correctly engaged with a consideration as to whether the amendment sought could be considered to amount to culpable or abusive conduct in the circumstances. He did so by considering first whether the application if granted would undermine what the court had hoped to achieve when it directed the trial of the preliminary issue and secondly whether it would have the effect of undermining the decision that had been made on that issue.

61. To consider whether the trial judge was correct in his assessment that the application amounted to culpable and abusive conduct it is necessary to review, not only the precise terms of the Order made by Kelly J. for the determination of the preliminary issue, but also what he said concerning the objectives underlying the making of that order.

62. The precise terms of the issue which was fixed for determination as a preliminary issue have already been set out at para. 11 of this judgment and will not be repeated here. However, the issue which he directed be tried has to be viewed in the context of the reasons which he gave for the making of that order. This is what he said:-

> "I believe that there would be, as a result of such a hearing, a material saving in both time and costs, both by reference to discovery issues but more particularly by reference to both evidential issues and time which would have to be spent at the trial. Because these two questions of abuse of section 60 [and] failure to comply with the market abuse regulations permeate throughout insofar as the various reliefs are concerned and those reliefs are sought by reference to complaints being made on the part of the plaintiffs concerning the failure to adhere to both the regulations and the Act. As I say it is

> not the only part of the Plaintiffs' case but in my view it is a material part of it … And I believe that if that question is answered in the way in which bank hope that it will remove from the case a substantial part of what the judge at trial will have to deal with. If on the other hand it is answered in a manner adverse to the bank then it means that the judge does not have to consider or concern himself with any question of standing."

63. Kelly J. also made the following remark in relation to the outcome of the trial of the preliminary issue: "If it's a decision in favour of what the Defendants hope for it means that that element of the case has simply disappeared, thereby reducing the trial time."

64. In the Supreme Court, Clarke J. determined the issue on the basis of what he determined to be the plaintiffs' case, as pleaded. At para. 13.1, he concluded:

> "…[I]n the light of the case made by the Quinns to date, they are not "entitled to rely" (in the words of the preliminary issue directed to be tried) on any of the alleged breaches of either section 60 or the MAR in aid of the claims which they make concerning the invalidity of guarantees given by them and security put in place in respect of underlying lending transactions said to be in breach of those provisions."

65. It is patently self-evident that to allow the plaintiffs to introduce a new plea of stand alone unenforceability at this stage of proceedings would undermine the perceived benefits and *raison d'être* underlying the decision of Kelly J. to direct the preliminary trial. The Supreme Court, having decided that the share pledges and guarantees might be enforced notwithstanding any illegality stemming from s. 60 or MAR insofar as the underlying loans were concerned, the amendment if permitted would allow the enforceability of that security be put back into issue again in the proceedings but this time based upon an entirely new argument that would engage not only a different legal issue but which would require new factual enquiries to be made and further extensive discovery.

66. Further, in my view, the only inference which can reasonably be drawn from the evidence before the High Court is that the plaintiffs must have given serious consideration as to whether they wanted or intended to pursue a plea as to the stand alone unenforceability of the securities either at the outset of the proceeding or alternatively at the very latest in the period leading up to the lodgement of their submissions in the Supreme Court, in November, 2013, which mention such an issue. Regardless of which of these alternatives is correct, I believe it can be inferred with some certainty from the facts that the plaintiffs, with the benefit of the best of legal advice, made an informed choice to hold back an issue of very significant magnitude that they could and ought to have advanced from the outset or at a much earlier point in time and that only in the face of the loss of the preliminary issue and the observations of Clarke J. did they decide to seek to breathe life into that claim.

67. While it cannot be said that to allow the amendment sought would set at nought the determination of the preliminary issue ,I am nonetheless satisfied that if it were to be permitted, the defendants would suffer general prejudice given that they spent significant time and money litigating the preliminary issue, secure in their belief, having regard to the fact that there was no response to their prompt concerning the absence of a stand alone unenforceability plea in their submissions of May, 2012, that they would not thereafter be met by any new basis upon which the plaintiffs might allege the securities were unenforceable. Indeed, in my view it is not only questionable but highly likely in such circumstances that had the issue as to the stand alone unenforceability of the securities been pleaded in the original statement of claim, Kelly J. would not have considered that the proper management of time and resources warranted the trial of the preliminary issue in the terms so ordered.

68. The High Court judge found that no logistical prejudice would be occasioned by the proposed amendment, a conclusion with which the defendants take issue. They contend that the amendment if permitted would necessitate significant new factual enquiries as to whether the Guarantees and Share Pledges were entered into innocently, i.e. without knowledge of the purpose of the underlying lending transactions or the CFD position, and that was not the basis on which the claim was made. In other words the defendants maintain that the new legal issue would precipitate a new factual dispute between the parties.

69. As to the significance of introducing such a potential dispute, the defendants rely on para.12.15 of Clarke J.'s judgment where he said as follows:

> "… it should be recalled that, on the Quinns' case, they were unaware of their beneficial ownership of the relevant Cypriot companies until well after the underlying lending transactions were put in place. Indeed, it is difficult to see how the Quinns could otherwise claim to have been unaware of the illegality which they allege, for anyone who was familiar with those Cypriot companies at the relevant time would have to have known that the purpose of those companies was to acquire a significant shareholding in Anglo with money provided through loans from Anglo, in circumstances where the overall purpose was to unwind what might have been perceived to be an excessive and difficult position taken in relation to CFDs in Anglo by the Quinn Group."

70. In addition, the defendants point to a statement released by the Quinn Group on 15th July, 2008, which was handed into court and states:

> "The Quinn Family announced today … that they are in the process of unwinding their interests held in Anglo Irish Bank through Contracts for Differences (CFDs) and as part of this process individual family members are purchasing long holdings in the bank's ordinary shares …. [T]he chairman of Quinn Group, Mr. Sean Quinn, said: 'The family regards these shareholdings in Anglo Irish Bank as long term holdings'."

71. It has been the plaintiffs' case from the outset that they were unaware of the particular illegalities which they have pleaded concerning the loans underlying the banks security. However, if the amendment were to be permitted it would place as a central issue within the proceedings the question as to whether they were not just unaware of those illegalities but rather whether they were completely innocent of knowledge of the nature of those transactions and the arrangements to which they were connected.

72. Thus, I accept the defendants' submission that if the amendment were to be permitted further factual enquiries would have to be carried out in relation to all the parties involved as to their precise state of knowledge at the relevant time and whether it was ever intended that the plaintiffs would ultimately benefit from the transactions and arrangements which were then put in place.

73. In conclusion, I am satisfied that the High Court judge was correct in his decision to dismiss the plaintiffs' application to amend the statement of claim in reliance both on the provisions of Order 28 itself and also on the basis of the *Henderson v. Henderson* principles. The amendment sought was not necessary to permit a matter that was in issue between the parties to be tried and in any event the plaintiffs' conduct and delay in making the application was such that the court was entitled in its discretion to refuse the relief sought. Further, based on the *Henderson* principles, the plaintiffs' conduct in relation to the proposed amendment may comfortably, for the reasons earlier stated, be classified as culpable and abusive both insofar as their obligations to the court and the

defendants are concerned. It behoves the court and the parties to litigation of the magnitude and complexity concerned in this type of action to ensure that the proceedings are conducted in as fair and efficient a manner as is possible. While the court must of course ensure that the need for efficiency does not trump doing justice between the parties, what was being asked of it on this appeal was to allow a plaintiff, who either had or ought to have considered the possibility of advancing a particular type of claim at the outset of the proceedings parachute that claim into the proceedings as an opportunistic response to the loss of its legal argument on a related claim and to do so in circumstances where the defendants had been led to believe by the plaintiffs' conduct that such an issue would not be pursued. The conduct of the plaintiffs in seeking to recast their claim is in my view conduct which is not only abusive of the defendants but is also such that if permitted would have the effect of circumventing or at least substantially undermining the outcome of the preliminary issue.

The second appeal

74. Following the judgment of the Supreme Court (Clarke J.) of 27th March, 2015, the defendants by notice of motion dated 15th April, 2015, brought an application to strike out paras. 103 to 110 of the statement of claim.

75. Haughton J. did not grant the entirety of the relief sought and it is his refusal to do so that forms the basis of this, the defendants' appeal. The High Court judge ordered that para. 110 as well as certain sections of paras. 106 and 109 be excised from the statement of claim and he further refused to dismiss the plea of negligent infliction of economic harm which is referred to in para. 25 of the prayer in the statement of claim on the grounds that it had been appropriately pleaded by means of the particulars.

76. In his *ex tempore* decision, the High Court judge expressed the view that the judgment of the Supreme Court did not necessarily close off any attack on the illegality of the underlying lending, but rather only as to the effect of the illegality on its enforceability. Thus, in his view, the judgment did not shut out the possibility that pleas of illegality in respect of the underlying lending could still be relied upon in the context of other pleas. He identified particular paragraphs in the statement of claim which referred, for example, to the assertion that the sole purpose behind the underlying lending by Anglo had been to prop up its own share price.

77. In addition, the High Court judge noted that the plaintiffs made a number of pleas to which the illegality referred to at paras. 103 to 110 formed an important backdrop. This included the plea that there had been no independent legal or financial advice given to the plaintiffs and thus the implied plea that the plaintiffs would not have signed the documentation if they had been aware of the full background in relation to it. The High Court judge also found that the illegality pleas could have a bearing on the plaintiffs' claim that the share charges and personal guarantees were not procured as a result of the plaintiffs' free and informed consent but rather as a result of undue influence.

78. Furthermore, the High Court judge found that the illegality issue was also central to the plea that the Share Pledges and Guarantees were improvident and unconscionable. He noted that the prime ingredient of such a plea was morally culpable behaviour and that, in this regard, the state of mind, motive or intention of Anglo officials at the time when the Guarantees and Share Pledges were executed would be of relevance. Similarly, he concluded that the issue of illegality would be of significance to the plea at para. 111 of the statement of claim, namely that Anglo breached a duty of care and fiduciary duty which it owed to the plaintiffs, on the basis of *inter alia* the wording of the relevant paragraph which begins with the phrase "In all the premises".

79. Accordingly, the High Court judge refused to excise the relevant paragraphs of the statement of claim.

Submissions on behalf of the first defendant

80. Mr. Murray S.C., counsel for the first defendant, submitted that the High Court judge made two significant errors in his decision: first, he erred in that on an objective reading of the statement of claim paras. 103 to 110 were clearly not directed to either the undue influence, improvident bargain or other such pleas; and, secondly, insofar as he interpreted the Supreme Court judgment as permitting the invocation of illegality under the guise of other pleas such as undue influence.

81. In this respect, counsel submitted that the statement of claim was logically divided and worded so that it was clear that the individual sections concerned distinct freestanding claims. Further, he maintained that the paragraphs preceding paras. 103 to 110 did not posit any specific illegal act or breaches of MAR/s.60 of the Companies Act 1963; rather, they merely referred to the purpose of Anglo entering into the transactions. In that connection, counsel elaborated on an important distinction underlying its submissions, namely that while the defendants did not object to the giving of evidence relating to the purpose of Anglo entering into the transactions for the purpose of the other pleas, there was no requirement for the court to adjudicate on any illegality, *i.e.* any breach of MAR/s.60 of the Companies Act 1963.

82. More specifically, counsel submitted that it was a step too far to imply into a plea of improvident bargain the necessity to determine illegality. Similarly, in respect of the plea of negligent infliction of economic harm, counsel submitted that such an exotic plea should have been pleaded more clearly and that, as it was only detailed in the replies to particulars, it was simply not part of the case. Counsel submitted that the focus of the remaining claims concerned the purpose for which Anglo entered into the transactions and that it did not make sense for the court to retain pleas which required the defendants to defend the illegality plea - particularly in circumstances where the purpose of the preliminary issue, when decided in the defendants' favour, was to avoid the calling of evidence and advancement of arguments in relation to that issue.

Submissions on behalf of the plaintiff

83. In response, Mr. Dunleavy S.C., counsel for the plaintiffs, submitted that it was first incorrect to contend that the finding of the Supreme Court effectively barred the plaintiffs from relying on any allegation of illegality. In particular, counsel submitted that this was not the finding of the Supreme Court and that the findings of the Supreme Court were not in terms of the question that had been posed by Kelly J. as the preliminary issue. Rather, counsel submitted that the entirety of the Supreme Court decision dealt with the enforceability of the transactions which were secured by the Share Pledges and Guarantees rather than the illegality of the conduct of the bank.

84. Secondly, counsel relied upon use of the phrase "in all the premises" at para. 111 of the statement of claim, in respect of the plea of breach of fiduciary duty/duty of care, in support of his argument that the plaintiffs intended relying on everything within the four corners of their pleadings, including the illegality pleas to support those claims. Similarly, counsel relied on the written submissions to the High Court for the trial of the action to evidence the plaintiffs' intention to rely on illegality for the purpose of advancing claims of unconscionability, improvidence and breach of duty. Further, he submitted that the illegality of the underlying transactions was material as providing the context in which the court would determine the other pleas

85. Thus, counsel submitted, the pleas which the defendants sought to have. excluded were interwoven and were part and parcel of the case which the plaintiffs wished to make to the court, rather than pleas that might be classified as distinct and free standing.

86. Finally, counsel submitted that the plea of negligent infliction of economic harm was properly detailed in the particulars provided by the plaintiffs, which had not been criticised by the defendants as being inadequate or incapable of being understood, and accordingly could be considered part of the pleadings.

Decision concerning the second appeal
87. This appeal consists of two issues. The first issue to be determined is whether the High Court judge erred in respect of his refusal to strike out paras. 103 to 110 of the statement of claim in their entirety, and the second as to whether the High Court judge erred in refusing to dismiss the plea of negligent infliction of economic harm.

Whether the relevant paragraphs should have been excised.
88. It is first necessary to briefly examine the paragraphs which the defendants seek to excise, before moving on to consider the factors influencing my decision. The relevant section is entitled "Illegality in the Loan Transactions" and begins at para. 103:-

> "Further and/or in the alternative and without prejudice to the foregoing, the loan transactions engaged in by Anglo, for and on behalf of the positions being maintained by Bazzely, and/or the Cypriot Companies, and/or the subject matter of the said loan transactions were tainted by illegality and/or were for an illegal purpose, of which Anglo was or ought to have been aware."

89. Thereafter, at paras. 104 to 106 under the heading "(a) The Market Abuse Regulation" the document details the alleged breaches of that instrument and concludes at para. 106:-

> "In the premises, the lending was in support of an illegal objective of market manipulation as prohibited by Regulation 6(1) of the Market Abuse Regulations and, accordingly, was tainted with illegality, or was intended to support an illegal purpose, such that the said loans are not enforceable."

90. Under the title "(b) Section 60 of the Companies Act, 1963", the document details the relevant breaches of that piece of legislation. The relevant paragraphs are 109 and 110, where it concludes:-

> "In the premises, the lending was further tainted by illegality such that the security taken from the plaintiffs by Anglo ought not to be enforceable insofar as it relates to the Plaintiffs.
>
> By reason of the matters pleaded above, Anglo is estopped from seeking to rely upon the security taken from the plaintiffs in the form of the personal guarantees and/or the share pledges and the purported appointment of the Share Receiver on foot of the said share pledges is invalid and ought to be set aside."

91. In coming to the conclusion which I have reached, I take account of the following factors:

92. First, on any objective reading of the statement of claim and in particular having regard to the manner in which it is structured, it is clear that the plea which commences at para. 103 and which asserts that the loan transactions were tainted with illegality as in breach of the MAR and s.60 of the Companies Act 1963 relates exclusively to the plea at para. 110 which maintains that by reason of the illegality previously pleaded "…Anglo is estopped from seeking to rely upon the security taken from the Plaintiffs in the form of the personal guarantees and/ or the share pledges and that the purpurported appointment of the Share Receiver." The illegality is not pleaded to support any alternative cause of action.

93. Secondly, I have taken account of the purpose for which the trial of the preliminary issue was directed, which –as quoted above – was to determine whether the plaintiffs could rely on the alleged illegality of the underlying lending transactions "in aid of any of their claims for declarations of invalidity, unenforceability, or no legal effect in respect of any Charge [on] Shares or any Personal Guarantees."

94. Thirdly, I place reliance upon Kelly J.'s observation that "…these two questions of abuse … [and] failure to comply [with the relevant statutory provisions] … permeate throughout insofar as the various reliefs are concerned…" and that "[i]f it's a decision in favour of what the defendants hope for it means that that element of the case has simply disappeared, thereby reducing the trial time." Accordingly, it is abundantly clear that the preliminary issue was concerned with removing the issue of illegality from the case, and the evidentiary burden associated therewith. It is in this light that the following extract from the judgment of Clarke J. must be viewed.

95. At para. 1.6, Clarke J. noted that:-

> "However, the underlying contention of Anglo, which led to the decision of the High Court to direct the trial of a preliminary issue, was to the effect that, even if the factual contentions put forward in their claim by the Quinns concerning breaches of either or both the MAR and section 60 were to be sustained, then the Quinns still could not succeed. That contention was based on a legal argument which, in substance, comes down to a contention that the application of relevant legal principles does not render lending transactions, guarantees or security void or unenforceable even if the relevant transactions are in breach of the MAR, or are in contravention of section 60, or are connected with transactions which breach those provisions. That net question is the issue which arose on the preliminary issue."

96. However, despite focusing on this net issue Clarke J. ultimately concluded his judgment at paras. 13.1 to 13.2 with the following passage:-

> "On that basis it seems to me that, in the light of the case made by the Quinns to date, they are not " entitled to rely " (in the words of the preliminary issue directed to be tried) on any of the alleged breaches of either section 60 or the MAR in aid of the claims which they make concerning the invalidity of guarantees given by them and security put in place in respect of underlying lending transactions said to be in breach of those provisions.
>
> It follows that, in my view, the appeal should be allowed and the result of the preliminary issue should be determined in the manner described in the preceding paragraph."

97. It must surely be inferred from this conclusion that the learned Supreme Court judge was of the belief that the issues of statutory illegality pleaded, regardless of the terms in which the preliminary issue was formulated, were only material to the proceedings in the context of the plaintiffs' claim that the security could not be enforced. There is nothing in his judgment from which it could be inferred that he considered the plaintiffs might seek to rely on the illegality pleaded in support of their other claims.

98. Further, his express conclusion that the plaintiffs are not entitled to rely on illegality in the context of their other pleas concerning the Share Pledges and the Guarantees would also support a conclusion that the trial judge was in error when he concluded that the judgment of Clarke J. had not closed off potential reliance on illegality to support their remaining claims.

99. Perhaps it is worth noting that, given the fact that the plaintiffs are still able to advance evidence concerning the purpose of the underlying transactions and the motive of Anglo, namely the propping up of its share price, it is difficult to see how the exclusion of any plea concerning the specific illegality of such transactions would be unduly prejudicial to the plaintiffs.

100. In conclusion, in light of the specific purpose and rationale outlined by Kelly J. in directing the preliminary trial of the illegality issue, the clear and unambiguous ruling of Clarke J. in the Supreme Court and the fact that the plaintiffs can still adduce evidence as to the purpose and motivation of Anglo in entering the underlying transactions in order to illuminate the background context of their other pleas, I am satisfied that the High Court judge erred in dismissing the application of the defendants.

Whether the plea of negligent infliction of economic harm had been properly pleaded?
101. The relevant principles to be applied on the consideration of this issue are those set out in *Croke v. Waterford Crystal Limited and Irish Pension Trust Limited*, to which the court has earlier referred. In that case, the causes of action mentioned in the prayer of relief in the plenary summons did not distinguish between the first and second defendants.

102. Thus, in the context of considering an application to amend the statement of claim, Geoghegan J. observed at para. 10:-

> "It is trite law that a cause of action merely mentioned by name in the prayer does not and cannot in any sense constitute the pleading of such cause of action. It is, therefore, necessary to look at the main body of the statement of claim. It is important that I should do so separately in relation to each defendant."

103. Accordingly, Geoghegan J. proceeded to analyse the factual basis set out against each of the defendants in the statement of claim to see if they could support each of the claims in the prayer of relief. Having done so he conclued that no claim for fraud or deliberate concealment had been made out as the necessary factual basis had not been established against the second defendant and also by reason of the fact that only vague allegations as to deliberate concealment had been articulated in the plaintiff's replies to particulars. The latter is an important point of distinction to the present case. Accordingly, Geoghegan J. refused to allow an amendment of the statement of claim to include a claim for fraud.

104. The plaintiffs relied on the decision in *Davy v. Bentinck* [1893] 1 Q.B. 185 as support for their contention that the particulars form part of the pleadings. As Lord Esher noted at pp. 187 to 188:-

> "Whether the case can be brought within Order XXV., r. 4, depends on whether for that purpose such particulars as have been ordered in this case can be considered as part of the pleadings. I incline to that opinion, and to the view that the rule should be construed in its largest sense, so that where particulars shew that the grounds on which a party is either bringing or defending an action are frivolous or vexatious that is sufficient to warrant an order to dismiss the action or strike out the defence, as the case may be. It is not necessary finally to decide this point, because I have no doubt that the Court at any stage of the proceedings, if it appears that the action is frivolous or vexatious or that the defence is so, has by its inherent jurisdiction power to stop the proceedings or to strike out the defence."

105. Similarly, Lopes L.J. at p. 188 opined:-

> "It is not necessary to decide whether Order XXV., r. 4, applies, and whether within the meaning of that rule particulars are part of the pleadings, though I am inclined to think that that is so… "

106. The substantial issue is whether the particulars constitute part of the pleadings. Indeed, in *Croke* it was the absence of a factual basis in the statement of claim to support a claim for fraud and the fact that only vague references to such a claim were articulated in the particulars that formed a key part of the court's reasoning.

107. Accordingly, the question for this Court is whether there is a sufficient factual basis in the statement of claim to support a claim of negligent infliction of economic harm and whether such a claim is sufficiently articulated in the particulars.

108. Having regard to the factual claims made at paras. 12 to 82 of the statement of claim and the reply to the first defendant's notice for particulars dated 6th July, 2011, and more specifically the pleas at item 79 (i)-(xi) thereof, I am satisfied that the High Court judge did not err in finding that the claim of negligent infliction of economic harm had been properly pleaded.

Conclusion
109. In conclusion, I would propose that the first appeal be dismissed and I would allow the second appeal to the extent that I have just described.