THE HIGH COURT

COMMERCIAL

[2010 No. 11862 P]

BETWEEN

IBB INTERNET SERVICES LIMITED,

IRISH BROADBAND INTERNET SERVICES LIMITED BOTH (TRADING AS IMAGINE NETWORKS)

AND IMAGINE COMMUNICATIONS GROUP LIMITED

PLAINTIFFS

AND

MOTOROLA LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 2nd day of October, 2012

1. This is an application brought by the defendant to strike out the plaintiffs' statement of claim by reason of the alleged failure of the plaintiffs to comply with an order of the court made by Clarke J. on 9th November, 2011. It is claimed that the statement of claim delivered on 30th November, 2011 failed to provide proper particulars of the loss claimed by the first and second named plaintiffs. The defendant also claims an order pursuant to the inherent jurisdiction of the court dismissing the proceedings as an abuse of process or in the alternative on the grounds that the proceedings are bound to fail. In the alternative, the defendant seeks an order dismissing the claim of the first named plaintiff on the grounds that the claim is bound to fail and/or a similar order in respect of the second named plaintiff on the same ground and/or an order dismissing the claim of the third named plaintiff on the grounds that it is bound to fail.

2. The claim being made by the plaintiffs is a substantial one in which they seek sums in excess of €138 million.

3. The statement of claim in respect of which the motion is brought is the fourth statement of claim delivered in these proceedings. This arose after the third statement of claim was struck out by order of Clarke J. on 9th November, 2011, for failing to comply with directions given by Kelly J. on 6th July, 2011. The judgments of Kelly J. and Clarke J. on 6th July, 2011 and 9th November, 2011, respectively, set out the history of this matter so far as the complaints of the defendant are concerned in relation to the pleadings and the deficiencies therein.

4. What I have to decide at this stage is whether the fourth statement of claim complies with the order of Clarke J. Even if it does, I then have to decide whether or not the claim should be struck out as an abuse of process or on the grounds that it is bound to fail.

5. On any view the fourth statement of claim (like its predecessors) is evidence of a scattergun approach by the plaintiffs in connection with their claim. There are many issues that arise out of the pleadings including those involving the law of agency, privity of contract, novation and a controversial concept raised by the plaintiffs of *"single economic entity"*. It is not appropriate that I would make any comment on the merits of the plaintiffs' case under any of these headings (other than in the context of the assertion by the defendant that the claims are bound to fail) as these are matters which (if sufficiently pleaded) will have to be resolved at trial.

Compliance with the Order of Clarke J. (9th November, 2011)

6. The judgment of Clarke J. first required the plaintiffs to plead with sufficient clarity the basis on which the damages that could be due to the first and second named plaintiffs could be exactly the same as the damages which would be due to the third named plaintiff under the wider single economic entity argument. It seems to me that the fourth statement of claim seeks to address this issue by alterations to paras. 35 and 38 of the earlier statement of claim and by additional material set out in paras. 36 and 39 of the fourth statement of claim and the particulars furnished thereunder.

7. Clarke J. also held that the defendant should be informed of whether any of the representations or warranties sought to be relied on (and thus the collateral contract deriving from them) were made either before the Master Services Agreement (MSA) was executed, between the execution of the MSA and the Novation Agreement, or after the Novation Agreement. This issue has been dealt with by a new section in the fourth statement of claim entitled "Particulars of Collateral Contract", inserted after para. 24. The plaintiffs furnish the dates on which the alleged representations were made and state that they occurred between October 2009 and July 2010, and details concerning the content and effect of these representations are given. Furthermore, para. 29 of the fourth statement of claim was altered from para. 28 of the third statement of claim to provide greater detail on the inducements presented by the defendant to the third plaintiff and the effect of these inducements. In addition, a section entitled *'Particulars of Breach of Collateral Contract'* was inserted in para. 32 of the fourth statement of claim identifying how the defendant has breached the terms of the collateral contract.

8. In my view, the fourth statement of claim meets the requirements set out in the judgment of Clarke J. In saying this, I make no comment on whether or not the issues, as pleaded, are likely to succeed. There are many issues raised in the statement of claim which the defendant argues are inconsistent but they are pleaded in the alternative. I agree with Kelly J. when he stated in his judgment of61h July, 2011, that a pleading is not necessarily embarrassing just because it sets up inconsistent claims.

Abuse of Process

9. Are the pleadings as set out in the fourth statement of claim an abuse of process? In my view, they are not. To some extent this

issue is tied up with whether or not the plaintiffs showed an unwillingness to cooperate with a court order. In my view, they have cooperated and have elaborated on the facts set out in the statement of claim in a manner which is sufficient to satisfy the order of Clarke J.

10. One of the problems that arises in this case is that the fourth statement of claim is controverted to some extent by the affidavit of the plaintiffs' solicitor sworn on 24th May, 2012, where he states that the defendant's understanding of the first plaintiffs claim - to recover all of losses suffered across the Imagine Group of companies by reason of an alleged agreement as to the manner in which the business plan would be implemented- is mistaken. In that affidavit, the plaintiffs' solicitor states that:-

> *"WiMax revenues and costs used for the purpose of calculating the loss of profits in their legal proceedings against Motorola have now as a matter of fact been appropriately recorded in [the first named plaintiff]".*

There appear to be inconsistencies between what is stated on affidavit and what is in the statement of claim. While these are matters that will have to be dealt with by the plaintiffs in the course of the hearing and may impact upon the credibility of their claim or weight to be given to the evidence, they are matters to be teased out at the trial of the action. If the plaintiffs seek to make out a case which is at variance with the statement of claim, then that is a matter which will require explanation and may have a bearing on the plaintiffs' entitlement to succeed on any particular point. Furthermore, the trial judge may be asked to rule on the admissibility of such evidence. The question of whether the plaintiffs are attempting to approbate and reprobate is really a matter for defence.

11. The defendant claims that the proceedings should be dismissed on the grounds that they are bound to fail. It argues that the oral agreement upon which the claim of the first and second named plaintiffs is based appears to amount to an assertion that the defendant agreed that if other companies within the Imagine Group did not enjoy the revenues projected in the August 2009 Business Plan, the defendant would compensate the first or second named plaintiffs notwithstanding that those plaintiffs themselves have never been intended to receive such revenues and had, therefore, not suffered a loss of receipt of same. This agreement and the loss as claimed are manifestly in respect of an agreement being performed for many years and on that basis the defendant claims that it does not satisfy the requirements of the Statute of Frauds. The plaintiffs argue that a contract is deemed to be performed when the rights which it purports to grant to parties to the contract are conferred and on the facts of this case the right which this contract granted to the first or second plaintiffs was conferred with immediate effect. The plaintiffs are entitled to argue for that construction of the Statute of Frauds and it seems to me that this is a matter which should properly be left over to the trial of the action and does not give rise to a situation where it could be demonstrated beyond argument that the plaintiffs' claim at this point must fail. I accept the submission of the plaintiffs that an application to dismiss on the grounds that a claim is bound to fail must be approached on the basis that any statement of fact contained in the pleadings sought to struck out is true and can be proved by the party. The defendant's assertion that the issue should be approached on the basis of the uncontested facts does not accord with the law as set out in *Aer Rianta Cpt. v. Ryanair Limited* [2004] 1 I.R. 506.

12. The plaintiffs rely, *inter alia*, on the Novation Agreement. Whether or not the Novation Agreement precludes the second named plaintiff from suing is a matter to be dealt with at the trial of the action.

13. The plaintiffs' argument based on "*single economic entity*" has been challenged by the defendant on the basis that it does not represent company law in Ireland. However, the plaintiffs have raised arguments which they say supports their contention that the courts in this jurisdiction have, on some occasions, treated a group of subsidiary companies as one and they rely on *Allied Irish Coal Supplies Limited v. Powell Doffryn International Fuels Limited* [1998] 2 I.R. 519, *The State (Mcinerney & Co. Ltd.) v. Dublin County Council* [1985] I.R. 1 and *Power Supermarkets Limited v. Crumlin Investments Limited and Dunnes Stores (Crumlin) Limited* (Unreported, High Court, Costello J., 22nd June, 1981). It seems to me that they have raised an arguable point which would get them well over the threshold of a case which is bound to fail.

14. In the course of the hearing on this motion, the defendant raised a number of significant issues pointing out inconsistencies between the case now being made by the plaintiffs and the content of the pleadings. They also raise fundamental issues such as the fact that the third named plaintiff relies on the MSA while at the same time refuses to be bound by its terms which preclude the third named plaintiff from asserting any claim at all. The defendant relies on the entire agreement clause in the contract. But this and other weighty matters raised by the defendant are all issues to be determined by the trial judge at the trial of the action and do not, in my view, take one to the point where it can be said that the statement of claim or the proceedings should be struck out on the basis that they are bound to fail. This case undoubtedly raises complex legal and factual issues and involves some claims which are alternative (and perhaps even inconsistent). The sustainability and strength of the plaintiffs' legal actions will, to some extent, depend upon oral evidence. In *Delahunty v. Players and Wills (Ireland) Limited* [2006] 1 I.R. 304, Fennelly J. stated as follows at para. 16:-

> *"In my opinion, this is not a suitable case for the remedy either under the Rules of the Superior Courts 1986 or the inherent jurisdiction of the court. There are complex and difficult issues of both law and fact to be decided, which are more appropriately argued and tested at the full hearing of the action".*

It seems to me that once the plaintiffs have met their requirements of the order of 9th November, 2011, made by Clarke J., that the matters put in issue are properly to be tested at a full hearing of the action.

15. Therefore, I would refuse the defendant's application on the motion.