Neutral Citation Number: [2011] IEHC 220

THE HIGH COURT

COMMERCIAL

2009 2065 S

BETWEEN

BUSSOLENO LIMITED

PLAINTIFF

AND

PATRICK KELLY, JOHN McCABE AND JOHN WALSH

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 31st day of May, 2011

1. The plaintiff ("Bussoleno"), a company incorporated under the laws of the British Virgin Islands, seeks summary judgment against the defendants in the sum of US$5,775,000.00 plus interest, pursuant to a judgment obtained on 24th April, 2009, in the 12th Judicial Circuit of the State of Florida ("Floridian judgment"), ordering that the plaintiff therein, Bussoleno, should, *inter alia*, recover the said sum from the defendants herein, jointly and severally. The Floridian judgment was granted, pursuant to a mediated settlement agreement dated 13th August, 2008, between, *inter alia*, the parties to these proceedings and signed by them or on their behalf. Mr. McCabe and Mr. Walsh, the second and third named defendants, oppose the application for summary judgment and seek orders, pursuant to O.37, r. 7 of the Rules of the Superior Courts, giving them leave to defend the proceedings and that the matter be remitted to plenary hearing. Mr. Kelly, the first named defendant, does not oppose the application for summary judgment.

2. The immediate background to the Floridian judgment is not in dispute. Proceedings were initiated in the Florida court on 28th January, 2009, by Bussoleno, which sought to enforce a right under five promissory notes held by it and guaranteed by each of the three defendants. Four of the promissory notes were given by Irish American Management Services Ltd. I, LP ("IAMSI") and one was given by Irish American Management Services LP ("IAMS"). Following pleadings and certain procedural steps, including the joinder, on the application of the defendants herein of Mr. Rene Gareau, as a third party, a mediated settlement was reached between all the parties to the Floridian proceedings, including Mr. Gareau and other members of his family. Pursuant to the settlement agreement, the defendants therein agreed to pay to Bussoleno a total sum of US$3,750,000.00 in specified instalments over eight years. It further provided:

> "In the event of a default hereunder by the Defendants, Plaintiff, on its sole affidavit of non-payment, will be entitled to a judgment against Defendants, jointly and severally, in the amount of US$6,000,000.00 less payment already made."

3. The defendants made payments in the amount of US$225,000.00 and, thereafter, defaulted. On 24th April, 2009, judgment in the sum of US$5,775,000.00 was given against all five defendants, jointly and severally.

4. On 21st May, 2009, following letters of demand from solicitors for the plaintiff in this jurisdiction, the summary summons issued. On 3rd July, 2009, on a combined application for entry into the Commercial List and for summary judgment by order of the High Court (Kelly J.), the proceedings were entered into the Commercial List and directions given in relation to the application for summary judgment.

5. A motion was brought by Mr. McCabe to the courts in Florida to set aside the judgment in favour of the plaintiff. Upon the hearing of the plaintiff's application for summary judgment, the High Court (Kelly J.) by order of 24th July, 2009, adjourned, generally, the plaintiff's application for summary judgment against the defendants in these proceedings and granted liberty to re-enter upon the determination of the then pending application before the courts in Florida.

6. By order of 20th November, 2009, the Circuit Court of the 12th Judicial Circuit in and for Sarasota County, Florida (Judge Berlin) denied Mr. McCabe's motion to set aside the final judgment and request for an evidentiary hearing. On 20th August, 2010, the Second District Court of Appeal in the State of Florida affirmed Judge Berlin's order, and on 7th September, 2010, issued a "Mandate", the effect of which is stated to be that Mr. McCabe has no right to file any further motions or other challenges to the order of the Second District Court of Appeal.

7. By motion issued on 9th December, 2010, in these proceedings, Bussoleno sought liberty to re-enter the proceedings and summary judgment in the principal amount claimed, together with interest, pursuant to the Floridian judgment. Liberty to re-enter was granted, further affidavits filed on behalf of Bussoleno, Mr. McCabe and Mr. Walsh, and an application to cross-examine certain deponents refused. Legal submissions were exchanged and the application for summary judgment came on for hearing.

Summary Judgment

8. There is no dispute between the parties as to the test to be applied by the Court in determining the application for summary judgment and Mr. McCabe and Mr. Walsh's applications for leave to defend. It is in accordance with the principles set out by the Supreme Court in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607, and *Danske Bank A/S trading as National Irish Bank v. Durkan New Homes* [2010] IESC 22, in reliance upon earlier decisions and as applied and expanded upon by the High Court in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1. In *Aer Rianta v. Ryanair*, Hardiman J., at p. 623, summarised the test in the following terms:

> "In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the

> defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

In *Danske Bank v. Durkan*, the defence contended for included a question of law being the construction of a document and Denham J., at p. 8, in setting out the law and having referred to the above extract from the judgment of Hardiman J. in *Aer Rianta v. Ryanair*, also cited with approval the following statement by Clarke J. in *McGrath v. O'Driscoll* [2007] 1 ILRM 203, at p. 210:

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

9. Insofar as a defence contended for is reliant upon the establishment of facts, the mere assertion of a given situation alone is not sufficient to provide leave to defend. *Harrisrange Ltd. v. Duncan* at p.7 and *Aer Rianta v. Ryanair* at p. 623.

10. In summary, the issue is whether a defendant has satisfied the court that he has an arguable defence in the sense explained by the judgments referred to. This is the test which I propose applying herein.

Enforcement of Floridian Judgment

11. Again, the main applicable principles are not seriously in dispute. The parties emphasised different aspects of the principles. The application of the principles to the facts herein are in dispute.

12. The Floridian judgment is not entitled to recognition in this jurisdiction nor is it enforceable either automatically or pursuant to any international convention. Bussoleno relies upon well-established common law rules on the enforcement and recognition of foreign judgments. It submits that such long established common law rules continue to be in full force and effect pursuant to Article 50 of the Constitution.

13. No party contended for any difference in the relevant common law rules applied by the courts of England and Wales to those applicable in this jurisdiction insofar as is relevant to the issues which I have to determine. This appears to be the correct position: see Binchy, *'Irish Conflicts of Law'* Butterworth (Ireland) Ltd. 1988, Chapter 33. It is not in dispute that the Floridian judgment is one given by a court with jurisdiction to give the judgment in accordance with the relevant common law principles and that it is a judgment *in personam* and was given for a debt or definite sum of money. As such, according to Dicey, Morris & Collins, *'Conflict of Laws 14th Ed. (2006)'* at rule 35, provided it, "is not impeachable under any of rules 42 to 45 [it] may be enforced by a claim or counterclaim for the amount due under it if the judgment is . . . final and conclusive." It is also entitled to recognition at common law, provided it complies with the same conditions.

14. It is contended that the judgment is not final and conclusive. Rules 43 and 44, as set out by Dicey, Morris & Collins, are relevant to the further defences sought to be raised by Mr. McCabe and Mr. Walsh. These provide:

> "Rule 43 - A foreign judgment relied upon as such in proceedings in England, is impeachable for fraud.
>
> Such fraud may be either
>
> (1) fraud on the part of the party in whose favour the judgment is given; or
>
> (2) fraud on the part of the court pronouncing the judgment."
>
> "Rule 44 - A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition, would be contrary to public policy."

I propose considering each of the above in the context of the arguable defences for which Mr. McCabe and Mr. Walsh contend.

Arguable Defences and other Relief

15. The arguable defences contended for on behalf of Mr. McCabe and Mr. Walsh are:

> (i) The plaintiff has not discharged the onus of establishing that it is the person who obtained the Floridian judgment.
>
> (ii) The Floridian judgment is not final and conclusive as new proceedings now instituted by Mr. McCabe and Mr. Walsh in Florida against Mr. Rene Gareau may, if successful, result in Mr. McCabe and Mr. Walsh pursuing additional relief against Bussoleno and the courts of Florida piercing the corporate veil of Bussoleno.
>
> (iii) The enforcement of the Floridian judgment against Mr. McCabe and Mr. Walsh would be in breach of public policy as payment to Bussoleno, pursuant to the judgment, may expose them to a risk of penalties and criminal sanctions under US Revenue law.
>
> (iv) The mediated settlement and, in consequence, the Floridian judgment of 24th April, 2009, was obtained by fraud of Bussoleno.

16. In the alternative, it is submitted that the Court should exercise its discretion and adjourn the present application for summary judgment pending the outcome of the new proceedings instituted against Mr. Gareau in Florida.

17. Bussoleno disputes the existence of an arguable defence under any of the above headings. In response to the fraud defence, it submits:

> (i) There is no relevant credible claim that the mediated settlement and/or judgment was procured by reason of alleged fraud of Bussoleno, and

(ii) even if that were so, Mr. McCabe and Mr. Walsh are estopped from seeking to impeach the Floridian judgment on grounds of alleged fraud by reason of the subsequent unsuccessful motion in Florida. Further, that it would be an abuse of process to permit Mr. McCabe and Mr. Walsh to re-litigate the issue in Ireland.

Identity of Plaintiff

18. The submission that the plaintiff in these proceedings has not discharged the onus of establishing that it is the same legal entity as entitled to the Floridian judgment is made on behalf of Mr. McCabe alone. It is primarily based on paragraph one of the Special Indorsement of Claim to the Summary Summons which states:

> "The plaintiff Bussoleno Ltd. ("Bussoleno") is a company incorporated under the law of the British Virgin Islands, having its registered address at Akara Bldg., 24 De Castro Street, Wickhams Cay 1, Road Town, Tortola, British Virgin Islands."

19. The grounding affidavit was sworn by Mr. Markus Banzer who states that he is a director of the Company or Bussoleno. In that affidavit, he states that "the plaintiff seeks judgment in Ireland pursuant to a final judgment dated 24th April, 2009, in Florida between Bussoleno, plaintiff and . . ." He exhibits a copy of the final judgment. In that, Bussoleno Ltd., in the title, is described as "a British Virgin Islands Corporation" and at paragraph one it is ordered and adjudged that:

> "The address for plaintiff, Bussoleno Limited, is Landstrasse 158, Postfach 127, LI-9494, Schaan."

20. In the first replying affidavit of Mr. McCabe, no issue is raised as to the identity of the plaintiff in these proceedings and the plaintiff in the Florida proceedings. On the contrary, in my judgment, it is implicit from that affidavit that Mr. McCabe accepts that the plaintiff in the Irish proceedings is the same legal person as the plaintiff in the Florida proceedings. At paragraph five, he states that, "the judgment relied on by the Plaintiff in these proceedings has been challenged by your deponent in the courts of Florida". At paragraph twelve, he refers to defects in the plaintiff's affidavit grounding the application outlined to the court by his Senior Counsel. This appears from subsequent affidavits to have been the failure to identify the notary public before whom the affidavit was sworn. An affidavit was subsequently sworn and lodged by Mr. Roger Lippuner, a notary public before whom the affidavit was sworn.

21. The current objection appears to have been first made in the written submissions lodged on behalf of Mr. McCabe on 9th February, 2011.

22. On 23rd July, 2009, Mr. Rene Gareau swore and filed an affidavit on behalf of Bussoleno. In that affidavit, he states that he acts as an Advisor to Bussoleno; that he makes the affidavit on behalf of Bussoleno with its full authority, and that he has been "authorised to act as Agent for the Company in relation to the Florida proceedings (as defined to (*sic*) in paragraph 5 of Mr. Banzer's grounding Affidavit herein, and in relation to the enforcement of the Final Judgment (as defined in paragraph 5 thereof) in Ireland".

23. At paragraphs 4 to 9 of Mr. Gareau's affidavit, he sets out information concerning the plaintiff in these proceedings, including the fact that it was incorporated in the British Virgin Islands on 2nd January, 2003, and exhibits the Certificate of Incorporation; that the directors are Markus Banzer and Hubert Buchel, who reside in Liechtenstein; that the issued share capital is held by BBT Treuhand AG as trustees of the Gareau Family Trust and that the address for the company in the Floridian judgment sought to be enforced, Landstrasse 158, Postfach 127 LI.-9494, Schaan, is both the address of Mr. Banzer and Mr. Buchel and of BBT Treuhand AG. He finally draws attention to the fact that in certain of the American documents exhibited by Mr. Banzer, the company is described in error as an Irish corporation and he confirms that it is a company incorporated in the British Virgin Islands and subject to the laws of the British Virgin Islands.

24. On 9th February, 2011, Mr. McCabe swore a further affidavit in the proceedings. He puts in issue many facts relating to Bussoleno and its relationship with Mr. Gareau. However, he does not dispute that is a British Virgin Islands corporation and that the plaintiff, Bussoleno, in the Irish proceedings, is one and the same company as the plaintiff, Bussoleno, in the Florida proceedings.

25. I am satisfied on the affidavit evidence of Mr. Banzer and Mr. Gareau and the documents exhibited that the plaintiff in the present proceedings is the legal person entitled to the Floridian judgment sought to be enforced. It may have a registered address in the British Virgin Islands as referred to in the Summary Summons and a business or working address in Liechtenstein.

Floridian Judgment Final and Conclusive

26. Both Mr. McCabe and Mr. Walsh submit that they have an arguable defence that the Floridian judgment is not final and conclusive. The test of finality is the treatment of the judgment by the foreign court as a *res judicata*. They rely upon *Nouvion v. Freeman* [1889] 15 App. Cas. 1. In that case, Lord Herschell stated at p. 9:

> " . . . in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt."

In that appeal, the House of Lords was concerned with a particular procedure before the Spanish courts known as a "*remate*" judgment. The status of such a judgment is described by Lord Herschell at p. 11 by contradistinction with a situation where, on appeal, a superior court may overrule the judgment of the lower court:

> "That appears to me to be in altogether a different position from a 'remate' judgment, where the very Court which pronounced the 'remate' judgment (not the Court of Appeal) may determine, if proper proceedings are taken, that the debt for which this 'remate' judgment is sought to be used as conclusive evidence has no existence at all."

The House of Lords affirmed the Court of Appeal in holding that the "*remate"* judgment was not final and conclusive such as to permit an action to be brought on it in England.

27. The submissions made on behalf of Mr. McCabe and Mr. Walsh are not to the effect that the Floridian judgment in favour of Bussoleno against them may be further set aside by the court which pronounced it. It is accepted that following the rule 1.540 motion and the appeal therefrom, no further challenge may be brought against the Floridian judgment. Rather, they rely upon the subsequent proceedings commenced against Mr. Rene Gareau and his son, Mr. Jeffrey Gareau, and the opinion expressed by Mr. Gassenheimer, the US lawyer acting for them in those proceedings, that if they are successful and rescission of the mediated settlement is obtained, this would permit Mr. McCabe and Mr. Walsh to pursue the third party complaint against Mr. Rene Gareau and further relief against Bussoleno. At paragraph nine of his affidavit, Mr. Gassenheimer avers:

> "The effect of this rescission would be to void releases, permit Mr. McCabe and Mr. Walsh to pursue their third party complaint against Rene Gareau, and result in a substantial diminishment (if not complete discharge) of the debt allegedly owed by Mr. Walsh and Mr. McCabe. A judgment with respect to the alleged breaches of fiduciary duties (and aiding and abetting same) will result in appropriate compensatory damages to be determined by a jury. Furthermore, once the full nature of the Bussoleno entity becomes known through discovery (expected to occur over the next six months), it is possible that Mr. McCabe and Mr. Walsh can pursue additional relief against Bussoleno by piercing the Bussoleno corporate veil to enforce any judgment ultimately obtained against Mr. Gareau."

28. In my judgment, Mr. Hutton, the US attorney for Bussoleno, is correct in his observations on the careful statement made by Mr. Gassenheimer. Mr. Gassenheimer does not state that even if Mr. McCabe and Mr. Walsh were to be successful against both Mr. Gareaus, and were able to pursue further relief against Bussoleno and were successful in same, including the piercing of the corporate veil, that it would result in either the present Floridian judgment being set aside or make it unenforceable. It may be implicit in what is averred by Mr. Gassenheimer that if totally successful, Mr. McCabe and Mr. Walsh would obtain a separate and distinct judgment against Bussoleno.

29. I have concluded that there is no evidence before the court which supports the existence of an arguable defence to the present claim upon the basis that the Floridian judgment is not final and conclusive. All the relevant evidence is to the effect that it is final and conclusive.

Enforcement of Judgment contrary to Public Policy

30. Mr. McCabe and Mr. Walsh submit that it would be contrary to public policy to enforce the judgment in favour of Bussoleno in circumstances where payment to Bussoleno by them, pursuant to the Floridian judgment, may constitute an offence under US Tax laws which could expose Mr. McCabe and Mr. Walsh to criminal sanctions.

31. The factual basis for this submission is advice received by Mr. McCabe from Dennis G. Kainen of Weisberg and Kainen, Attorneys At Law, Florida, in a letter dated 2nd July, 2009. In setting out his advice, Mr. Kainen states:

> "For the purpose of this letter, I have assumed, based upon representation made to me by Mr. John McCabe, relating to Rene Gareau and Bussoleno Limited, that the following facts are true:
>
> 1. Rene Gareau is the beneficial owner of Bussoleno Limited;
>
> 2. Paddy Kelly was informed by Rene Gareau that Bussoleno Limited was established for the express purpose of evading tax liability in the United States;
>
> 3. Rene Gareau and his children have been United States residents for tax purposes for the prior 6 years; and
>
> 4. Gareau has failed to disclose his beneficial ownership of Bussoleno Limited to the Internal Revenue Service.
>
> If these facts are established the payment by John McCabe directly to Bussoleno Limited may be a crime under United States tax law. If Mr. McCabe believes that taxes are owed by Rene Gareau to United States tax authorities then payment by Mr. McCabe directly to Bussoleno Limited and not to Rene Gareau may result in Mr. McCabe aiding and abetting Mr. Gareau in violating United States tax laws.
>
> The definition of certain United States tax crimes may be helpful with this analysis.
>
> . . .
>
> The reason behind this conclusion is that by John McCabe tendering a money judgment directly to Bussoleno Limited and not to Rene Gareau, may be concluded by the Internal Revenue Service and the United States Department of Justice that John McCabe is conspiring with and/or aiding and abetting Mr. Gareau in hiding monies which are rightfully reportable as income by Mr. Gareau as well as violating other statutes hereto stated.
>
> We confirm that Mr. McCabe has been advised to make an appropriate application to the proper Florida court on the grounds, among other things, that payment by Mr. McCabe to Bussoleno Limited may be illegal and may constitute a fraud or aid abet a fraud or constitute a conspiracy against the Internal Revenue Service. This action needs to be taken to protect Mr. McCabe from potential criminal charges."

32. Mr. Kelly, the first named defendant, in the affidavit sworn by him herein, at paragraph 22, does not accept the statements made by Mr. McCabe as to what he is alleged to have been informed by Mr Gareau and exhibits a letter written by his Irish solicitors to Berger Singerman, attorneys for Mr. McCabe, on 17th July, 2009, in which they state, "at no stage did Rene Gareau inform our client that 'Bussoeno Limited was established for the express purpose of evading tax liability in the United States'." Further, Mr. Gareau, in the affidavit sworn by him in these proceedings on 11th February, 2011, states, at paragraph five of his affidavit:

> "In 2009, I applied for, and was accepted into Internal Revenue Services of the United States Voluntary Declaration Program. My relationship with Bussoleno Limited has been declared to the Internal Revenue Service. I do not have any tax liability to the Internal Revenue Service".

33. The same potential exposure of the defendants, Mr. McCabe and Mr. Walsh, to sanction, pursuant to US Revenue laws, was relied upon in the motion to set aside before Judge Berlin in Florida. That motion was refused. In the course of the hearing, in accordance

with the transcript which is exhibited in these proceedings, Mr. Hutton, then appearing on behalf of Bussoleno, made submissions, *inter alia*, of a number of ways in which Mr. McCabe could protect himself if he had a genuine concern about potential exposure by payment to Bussoleno. One of these was stated to be to send the money directly to Mr. Rene Gareau. Another was to pay to Bussoleno with a covering note that it was being tendered under an express condition that it take care of taxes owed or, thirdly, to inform the Inland Revenue Services.

34. Counsel for the plaintiff submits that there is not a credible factual basis for the concern as to a potential exposure to US Revenue laws. In addition, he made legal submissions based upon the principles set out in *Buchanan v. McVey* [1954] I.R. 89, and *Bank of Ireland v. Meeneghan* [1994] 3 I.R. 111, as to why this Court could not entertain such a defence. On both grounds he submits there is no arguable defence.

35. In my judgment, there is no credible factual basis for a defence based upon a potential exposure of Mr. McCabe and Mr. Walsh to US Revenue sanctions by reason of payment pursuant to the Floridian judgment sought to be enforced. First, the advice of Mr. Kainen is based upon an assumption that all four facts set out in his letter are established. One of those is the information alleged to have been given to Mr. Kelly as to the purpose of Bussoleno who disputes that it was given to him. The second is a failure by Mr. Gareau to disclose his beneficial ownership of Bussoleno Ltd. to the Internal Revenue Service. The affidavit sworn by him states otherwise. Further, I accept the existence of practical steps which may be taken to protect the position of Mr. McCabe and Mr. Walsh *vis á vis* the Internal Revenue Service in making any payment pursuant to the Floridian judgment obtained by Bussoleno.

36. In those circumstances, it is unnecessary to consider the legal submissions made on behalf of the plaintiff as to the entitlement of this court to consider the US Revenue law in connection with such a defence.

37. Accordingly, I have concluded that Mr. McCabe and Mr. Walsh have not established an arguable defence that the enforcement of the Floridian judgment would be contrary to public policy as potentially exposing them to sanctions under US Revenue law.

Impeaching Judgment by Alleged Fraud

38. Halsbury's '*Laws of England'* 4th Ed. Vol. 8 (3)(Reissue/4 at 151) contains a succinct summary of the current law:

> "151. Judgment obtained by fraud.
>
> A foreign judgment which has been obtained by fraud will not be recognised or enforced in England. The judgment is impeachable whether the fraud was on the part of the court or on the part of the successful party. It is immaterial that the fraud has already been investigated by the foreign court, although in such a case the plea of fraud may involve a retrial in England of the matters adjudicated upon by the foreign court; and it is immaterial that the unsuccessful party in the foreign proceedings refrained from raising the plea of fraud in those proceedings although the facts were known to him at all material times. If, however, the allegation of fraud has been made in fresh proceedings before the foreign court by way of an application to have the judgment set aside, the English court may hold the applicant to be estopped from challenging the judgment of the court which he elected to seise, or may find it to be an abuse of the process of the court for the allegation of fraud to be relitigated in England."

39. Whilst the parties referred me to a significant number of decisions in relation to the above principles, commencing with *Abuoloff v. Oppenheimer & Co.* [1882] 10 Q.B.D. 295, and *Vadala v. Lawes* [1890] 25 Q.B.D. 310, and recent reconsideration of those principles by the Court of Appeal in, amongst others, *Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335, and the House of Lords in *Owens Bank Ltd. v. Bracco* [1992] 2 A.C. 443, where consideration was given to the need to revisit certain of the common law principles, it does not appear to me necessary to refer, on this application, to those judgments in any detail. I am satisfied that there is an arguable case that the principles, as summarised by Halsbury, continue to apply. The decision of the Court of Appeal in House of *Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241, is the authority for the propositions on estoppel and abuse of process referred to by Halsbury. I will refer to this further when considering those issues herein.

40. The contention made on behalf of Mr. McCabe and Mr. Walsh is that the mediated settlement was procured by fraud of Bussoleno and in accordance with the agreed principles set out above, subject to estoppel and abuse of process, the fact that such claim was made by Mr. McCabe in the motion to set aside the Floridian judgment as was reached does not preclude it being pursued here. The alleged fraud is non-disclosure of the relationship between Bussoleno and Mr. Gareau, and, in particular, the fact that Bussoleno was beneficially owned by Mr. Rene Gareau. It is commoncase that such non-disclosure will only constitute fraud if Bussoleno was under a duty to disclose the relationship to Mr. McCabe and Mr. Walsh at the relevant time. It further appears to be commoncase that a duty to disclose would only arise if it is established that Bussoleno owed a fiduciary duty to Mr. McCabe and Mr. Walsh. I accept that this is correct for the purposes of this application.

41. It does not appear to be in dispute on this application that Mr. McCabe and Mr. Walsh were unaware at the time of the mediated settlement or on any prior date of the fact that Bussoleno was beneficially owned by the Gareau Family Trust. The fact that it is so owned is not in dispute. Mr. Rene Gareau has averred to that effect in the affidavits sworn herein. The beneficiaries of the Gareau Family Trust have not been identified, but it is not averred that Mr. Rene Gareau is excluded.

42. Whilst counsel for Mr. McCabe and Mr. Walsh both accept that they must establish that Bussoleno owed a fiduciary duty to Mr. McCabe and Mr. Walsh since, to come within the principles set out above, the fraud must be that of Bussoleno. Nevertheless they rely heavily in their submissions upon the alleged fiduciary duty owed by Mr. Rene Gareau to Mr. McCabe and Mr. Walsh at all relevant times, the alleged fraud by non-disclosure by him and the fact that Bussoleno is a legal person acting through and by Mr. Rene Gareau and its relationship with him. It appears to me necessary to consider sequentially the fiduciary duty alleged to have been owed by Mr. Rene Gareau and then that of Bussoleno, which is dependent on the former.

43. The factual basis for the fiduciary duty alleged to have been owed by Mr. Rene Gareau and his son, Mr. Jeffrey Gareau, to Mr. McCabe and Mr. Walsh is set out in some detail in the amended complaint in the proceedings filed in Florida in December 2010, against both Mr. Gareaus. Mr. Gassenheimer, the trial lawyer acting for Mr. McCabe and Mr. Walsh in those proceedings in his affidavit sworn herein, expresses the view at paragraph 12 of his affidavit that, "there is a strong factual and legal basis to provide Mr. McCabe and Mr. Walsh with the reliefs sought in the complaint". He expresses that view, having explained to this Court the implication of the certificate filed by him in the pleadings before the Florida court in accordance with the Federal Rules of Civil Procedure. The complaint asserts a fiduciary duty, a failure to disclose the relationship between the Gareaus and Bussoleno and seeks relief, including damages, for breach of fiduciary duty and rescission of the release of Mr. Gareau which form part of the mediated settlement.

44. Mr. Hutton, also an attorney licensed to practice in the State of Florida, who acted for Bussoleno and Mr. Gareau in the earlier Florida proceedings expresses the view in his replying affidavit at paragraph 6(vii) that there is, "no merit to the Complaint previously filed on 16th December, 2010. The Complaint is attempting to allege a fiduciary relationship that does not exist". Nevertheless, the facts pleaded, as distinct from the inferences drawn from those facts or intentions ascribed do not appear to be in dispute. Mr. Hutton does not explain the basis for his above opinion. He does explain why even if found to exist it does not affect the finality of the Floridian judgment.

45. In my judgment, Mr. McCabe and Mr. Walsh, for the purpose of these proceedings, have made out an arguable claim that Mr. Rene Gareau owed them a fiduciary duty prior to and at the time, in 2005, when the Bussoleno loan and personal guarantees of Mr. McCabe and Mr. Walsh for the liabilities of IAMSI were put in place. Further, that they have made out an arguable claim that such fiduciary duty continued up to and including the time of the mediated settlement. I have formed such view, principally on the claims made in the amended complaint filed in Florida against Mr. Rene Gareau and Mr. Jeffrey Gareau in December 2010, and the apparently undisputed facts as to the role played by Mr. Rene Gareau in relation to the investment in The Quay, Florida; the fact that it is undisputed that Mr. McCabe and Mr. Walsh were unaware at all material times until after judgment of the relationship between Bussoleno and Mr. Gareau, and the fact that Mr. Gareau joined with Mr. McCabe and Mr. Walsh and Mr. Kelly as a guarantor to Bussoleno of the liabilities of IAMSI in connection with the loan at issue. It is, therefore, in my view, arguable that Mr. Rene Gareau, at the time of the mediated settlement, continued to owe a fiduciary duty to Mr. McCabe and Mr. Walsh, and as part of that fiduciary duty, had a duty to disclose the relationship between himself and Bussoleno.

46. It is not, of course, sufficient for Mr. McCabe and Mr. Walsh to establish an arguable claim that Mr. Gareau owed them a fiduciary duty. They must establish an arguable claim that Bussoleno owed them a fiduciary duty and a consequent duty to disclose its relationship with or its ownership by Mr. Gareau. The submission made is that Bussoleno, as was stated, is the "alter ego" of Mr. Rene Gareau, and that at all material times, including at the time of the mediated settlement, as a legal person, it acted through its agent, Mr. Gareau. Thus, it is claimed that insofar as Mr. Gareau owed a fiduciary duty to Mr. McCabe and Mr. Walsh, Bussoleno must be considered as owing the same fiduciary duty.

47. In support of this claim, there is the uncontroverted fact that Mr. Gareau, in the three affidavits sworn in these proceedings, whilst describing himself as an advisor to Bussoleno, has stated that he has been authorised to act as agent for Bussoleno in relation to the Florida proceedings and in relation to the enforcement of the final judgment. Whilst Mr. Banzer has sworn affidavits as a director and signed the mediated settlement, there appears a credible factual basis for an arguable contention that Mr. Gareau is the person at whose direction Bussoleno acts.

48. I have concluded, for the purpose of this application, that Mr. McCabe and Mr. Walsh have established an arguable claim that Bussoleno owed them a fiduciary duty and had an obligation to disclose its relationship with Mr Gareau at the time of the mediated settlement and, hence, an arguable defence that the mediated settlement was procured by fraud of Bussoleno. In doing so, I have not ignored the view expressed by Mr. Hutton, the US lawyer, in his affidavit, that, as at the time of the mediated settlement, the parties were adverse and represented by counsel, there could not then be a duty on either Bussoleno or Mr. Gareau to disclose the relationship between them. This also appears to me to me to be a arguable contention. It appears to me probable that if, at the full hearing, Mr. McCabe and Mr. Walsh establish a fiduciary duty and duty to disclose at the time of the loan and giving of the guarantees, there may be a separate and distinct issue as to whether that duty survived to the time of the mediated settlement.

49. However, I have also had regard to the principles in relation to the establishment of fiduciary relationships. It is well established that the categories of fiduciary relationship are not closed. In Snell's Equity 32nd Ed., Sweet & Maxwell 2010, at p. 175, that point is made, and then it states:

> "Fiduciary duties may be owed despite the fact that the relationship does not fall within one of the settled categories of fiduciary relationships, provided the circumstances justify the imposition of such duties. Identifying the kind of circumstances that justify the imposition of fiduciary duties is difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship, preferring to preserve flexibility in the concept."

50. In my judgment, identifying the kind of circumstances which justify the imposition of fiduciary duties is a mixed question of fact and law. On even the undisputed facts herein, it is not either an issue capable of simple and easy determination or straightforward in the terms used in the decisions of the Supreme Court in *Aer Rianta v. Ryanair* and *Danske Bank v. Durkan* New Homes in the extracts set out above. In accordance with the principles set out in those judgments, such issues on the facts herein should not be determined on an application for summary judgment and must be determined at plenary hearing.

51. The final issue is the estoppel and abuse of process sought to be relied upon by Bussoleno in accordance with the decision of the Court of Appeal in *House of Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241. Counsel for Mr. McCabe and Mr. Walsh submit that the present situation is distinguishable on its facts from that which pertained in the *House of Spring Gardens.* The facts of that decision related to an attempt to impeach in England, on grounds of fraud, a judgment given in the High Court in Ireland by Costello J. in favour of the plaintiffs, notwithstanding that subsequent plenary proceedings had been brought in Ireland seeking to set aside the judgment of Costello J. on the grounds of fraud. There was a 21-day hearing on the merits in the second proceedings and the proceedings were dismissed by Egan J. In the present proceedings, the subsequent motion to set aside the Floridian judgment was not an evidentiary hearing on the merits. It was a hearing of a motion on the pleadings alone. To succeed, Mr. McCabe had to establish a "colourable entitlement to relief" to obtain an evidentiary hearing. The court determined that he had failed to establish "a colourable entitlement to relief" and denied his application. Bussoleno also seeks to rely upon abuse of process by reason of the earlier stay granted herein by Kelly J.

52. In my judgment, it is arguable that the present factual situation is materially different to that in the *House of Spring Gardens* case. The plaintiff's entitlement to rely upon an estoppel or abuse of process against Mr. McCabe and Mr. Walsh is also an issue which must be determined at a plenary hearing in accordance with the principles set out above. It is not an issue capable of simple and easy determination or straightforward.

Relief

53. On this application for summary judgment, O. 37 of the Rules of the Superior Courts, and, in particular, rules 7 and 10 apply. These provide:

> "7. Upon the hearing of any such motion by the Court, the Court may give judgement for the relief to which the plaintiff

may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just.

10. Leave to defend may be given unconditionally or subject to such terms as to give security, or time and mode of trial, or otherwise as the Court may think fit."

54. In accordance with the above judgment, I have determined that Mr. McCabe and Mr. Walsh should be given leave to defend and the case adjourned for plenary hearing. However, such leave should not be unconditional. The proceedings seek the enforcement of a judgment of a court of competent jurisdiction given in personam for a sum of money. Upon the agreed principles, the only arguable defence, in accordance with this judgment, is that the mediated settlement and subsequent Floridian judgment was obtained by the fraud of Bussoleno. In the interests of justice and a fair and efficient hearing for all parties only this defence should be permitted to be pursued. There will, therefore, be an order remitting the matter for plenary hearing and giving leave to defend on this ground alone.

55. The present motion also contains applications for directions, pursuant to O. 63A and I will hear the parties as to the appropriate directions now to be given in accordance with the practice in the Commercial List.

56. I will also hear Counsel on the order to be made in respect of Mr. Kelly, the first defendant.