THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2017] IECA 76

Irvine J.
Edwards J.
McDermott J.

[Record No. 2015 000134]

BETWEEN

SUPERWOOD HOLDINGS PLC, SUPERWOOD LIMITED, SUPERWOOD EXPORTS LIMITED, SUPERSCHIP LIMITED, SUPERWOOD INTERNATIONAL LIMITED AND SUPERWOOD (U.U.K.) LIMITED

PLAINTIFFS/APPELLANTS

AND

SUN ALLIANCE AND LONDAN INSURANCE PLC TRADING AS SUN ALLIANCE INSURANCE GROUP/RSA INSURANCE IRELAND LIMITED CREDENTIAL ASSURANCE COMPANY LIMITED, CHURCH AND GENERAL INSURANCE COMPANY LIMITED/ALLIANCE INSURANCE GROUP

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 1st day of March, 2017.

1. This is an appeal against the judgment and order of the High Court (McGovern J.) on 27th January, 2015 dismissing the plaintiffs'(Superwood) proceedings on the grounds that they disclosed no cause of action, were frivolous and vexatious and an abuse of process. The court also ordered, having regard to the history of events between the parties, that the plaintiffs be restrained from bringing any further proceedings before the court against the defendants without the leave of the court. The plaintiffs appealed this order and judgment by notice of appeal dated the 15th May, 2015. The original 61 grounds of appeal were reduced by direction of the court to 10 grounds.

The law

2. The defendants seek orders pursuant to O. 19, r. 27 or r. 28 of the Rules of the Superior Courts striking out the plaintiffs' claim on the ground that it discloses no cause of action and/or is frivolous, vexatious or scandalous. In the alternative, an order is sought pursuant to the inherent jurisdiction of the court to strike out the claim because it is an abuse of process or otherwise offends the rule in *Henderson v. Henderson* (1843) 3 Hare 100. Under O.19, r. 27 the court may at any stage order the striking out of any pleading or element of a claim which is "unnecessary or scandalous". Under O.19, r. 28 the court may order any pleading to be dismissed or struck out on the ground that it "discloses no reasonable cause of action" or is shown on the pleadings to be frivolous and vexatious.

3. Proceedings will be regarded as scandalous if they seek to introduce materials for a purpose and motive which is not connected with the subject matter of the proceedings. In *Riordan v. Hamilton* [2000] IEHC 189 the plaintiff initiated proceedings against the defendants who were members of the Supreme Court. Smyth J. considered the allegations made and determined that they should be struck out as scandalous:-

> "The purpose of pleading is to convey what the nature of the action is. Pleadings should not be used as an opportunity of placing unnecessary or scandalous matters on the record of the court, or as an opportunity of disseminating such matters when they have nothing to do with any dispute between the parties… In the pleadings here there are allegations which are totally unnecessary to any reasonably balanced or strongly held views of a plaintiff as against a defendant. The imputations of character made here would leave a person open to litigation in defamation had they not been accorded the protection of privilege of the court. The pleadings here, it seems to me, are of that character…It is perfectly in order for a litigant to say that a defendant has acted in a particular way. However, what has been imputed here is not only over the top but is being deliberately used for the purpose of trying (to) advance some view which does not accord with fairness, common sense, justice, constitutional right or with any modicum of decency."

4. Order 19, r. 28 empowers the court to strike out, dismiss or stay proceedings in their entirety. If it is sought to strike out only part of a pleading as unnecessary or scandalous, O. 19, r. 27 should be invoked. In considering the issue the court must examine the pleadings. It must also proceed on the basis that any statement of fact contained in the pleadings is true and can be proved by the party. The case will be regarded as frivolous or vexatious if there is no reasonable chance of success.

5. In addition to the power conferred by O. 19, the court has an inherent jurisdiction to strike out or dismiss proceedings which are frivolous or vexatious or bound to fail in order to ensure that an abuse of process does not take place. In determining that issue the court is not limited to the pleadings exchanged between the parties but may consider evidence submitted on affidavit concerning the issues in the case. In this case there has been a considerable body of evidence concerning a number of matters including the alleged unavailability to the plaintiffs of the transcript of proceedings which occurred before the learned trial judge (Smyth J.) on the 7th April, 2001. There is very little dispute between the parties as to what actually transpired before the learned trial judge. The plaintiffs' case, if any, is focussed on the allegation that the defendants' solicitors fraudulently concealed or prevented the plaintiffs' solicitors from gaining access to a full transcript or whether such access was available to the plaintiffs' solicitors on the exercise of due diligence. Furthermore, if the plaintiffs did not have access to the transcript in issue the question arises whether they suffered any prejudice arising therefrom.

6. The rule concerning abuse of process was stated in *Henderson v. Henderson* (3 Hare) 114 by Wigram V.C. :-

> "…I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation

> in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

A special case arises if a judgment has been obtained by fraud. A judgment of the High Court or the Supreme Court may be set aside if it is established that it was so procured (*Waite v. House of Spring Gardens Limited* (unreported High Court 6th June, 1985); *Tassan Din v. Banco Ambrosiano SPA* [1991] 1 I.R. 569 at pp. 581-583, *Kenny v. Trinity College Dublin* [2008] IESC 18 at paras. 48-57 and *Re Greendale Developments Limited (in liquidation) v. McQuaid* [2000] 2 I.R. 514). The nature of such fraud was considered by Murphy J. in Tassan Din at p. 582 :-

> "Again in the *Ampthill Peerage* case [1977] A.C. 547 Lord Wilberforce in considering the nature of the fraud… which would justify setting aside a judgment of the court commented (at p. 571) as follows:—
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> > "What is fraud for this purpose? Learned counsel for John Russell without venturing on a definition suggested that some kind of equitable fraud, or lack of frankness, was all that is meant, but I cannot accept so anaemic an ingredient. In relation to judgments, and this case is surely a fortiori or at least analagous, it is clear that only fraud in a strict legal sense will do. There must be conscious and deliberate dishonesty, *and the declaration must be obtained by it*. Authorities as to judgments make clear that anyone wishing to attack a judgment on the grounds of fraud must make his allegation with full particularity, must when he states it be prepared to prove what he alleges and ultimately must strictly prove it." [emphasis added]
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> In the light of the foregoing I am satisfied that nothing short of fraud pleaded with particularity (and ultimately established on the balance of probabilities) would be sufficient grounds in the present case for upsetting the decision given by the Supreme Court…"

In delivering the judgment of the Supreme Court in *Kenny* (cited above), Fennelly J. stated that to succeed the plaintiff must allege and prove "deliberate and purposeful dishonesty, knowing and intentional deceit of the court". The alleged fraud must have affected the court's decision in a fundamental way. The learned judge also emphasised that the court is not confined to an assessment of the pleadings and is permitted to examine the impugned decision(s) but is not constrained by the version of the decision disclosed in the pleadings seeking to set it aside. It was emphasised by the Supreme Court in *Re: Greendale Developments Limited* and the authorities cited therein that society had an overriding interest in discouraging endless litigation. In *Vantive Holdings & Ors. and Companies Acts* [2010] 2 I.R. 118 the Supreme Court considered the purpose of the rule in Henderson :-

> "It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed." (per Lord Bingham M.R. in *Barrow v. Bankside Members Agency Limited* [1996] 1 WLR 257 at 260, cited with approval by Denham J. (as she then was) at para. 85).

Background

7. In 1987 following a fire at a premises owned by Superwood at Corke Abbey Bray, Co. Wicklow and in which the plaintiffs claimed an insurable interest, a claim was made for total losses in excess of IR£2 million under its insurance policies. Liability was repudiated at an early stage relying on a policy condition and on the ground of fraud. It was claimed that the losses sought had been so exaggerated that the claim could not have been made honestly. High Court proceedings were initiated against the insurers on the 28th June, 1989 seeking damages for wrongful repudiation of the insurance policies. Following a trial that continued for 116 days, O'Hanlon J. delivered judgment on the 13th, 14th and 15th August and 12th November, 1991 dismissing Superwood's claims with costs. The issue of liability having been determined against the plaintiffs, it was not necessary therefore to determine damages.

8. The judgment was appealed to the Supreme Court and following a 16 day hearing the appeal was allowed. The case was remitted to the High Court for retrial (*Superwood Holdings Plc. v. Sun Alliance and London Insurances Plc*. [1995] 3 I.R. 303). It was held that the insurers were not entitled to rely on a particular condition (Condition 4) of the policy and that since this provided the only basis for the finding of fraud on the part of the plaintiffs, that finding could not stand. The case was remitted "to determine what the losses were arising after the fire and what percentage of those losses were attributable to the fire; and such matters as are relevant and in issue." (per Denham J. at p. 361).

9. On 16th July, 1996 an order was made by consent in the High Court for a two-stage hearing on the issue on damages. The losses attributed to the fire would be quantified initially, followed by an assessment of the losses arising from the failure of the insurers to pay that money. In November 1996 Smyth J. ruled that he would proceed to hear the case in a composite manner notwithstanding the previous order made. The court also permitted three insurers to make lodgements which Superwood could accept within three days. This order was unsuccessfully appealed to the Supreme Court which allowed the plaintiffs a further three days within which to accept the lodgements. The first three insurers made a lodgement of IR£3,152,706 and the fourth insurer made a lodgement of IR£1,650,000.

10. In the course of the trial before the High Court, Smyth J. refused an application to allow the plaintiffs to accept the lodgement made by the fourth insurer. This was also appealed to the Supreme Court and in June 1998 the Supreme Court permitted the acceptance of the lodgement following which it was accepted and that element of the case was then settled.

11. The trial against the other three defendants recommenced on the 19th February, 1998 and continued for 281 days. At the time it was the longest civil hearing in the history of the state and generated a transcript of 41,000 pages. Between the 4th and 7th April, 2001 the High Court delivered its judgment orally. The judgment was delivered in open court and a note was taken by the stenographer. The first three insurers were held liable to Superwood in the total sum of approximately IR£150,000 together with interest. The plaintiffs failed to beat the lodgement. Consequently, the plaintiffs were granted the retrial costs up to the date of the lodgement but the first three insurers were entitled to costs from the date of their lodgement. In addition, on the application of the defendants a *mareva* type injunction was granted against the plaintiffs' assets to a value of IR£5 million.

12. The judgment was appealed as was the granting of the injunction to the Supreme Court on 16th May, 2001. The notice of appeal

contained 336 separate grounds. In December, 2001 the first three insurers applied to the Supreme Court for an order for security for costs of the appeal. On 12th April, 2002 the Supreme Court ordered that security for costs be provided. The Master of the High Court determined the amount of the security in the sum of €1,593,102.56.

13. Appeals were taken to the High Court and the Supreme Court against the Master's order. On 17th October, 2003, the Supreme Court dismissed an application by the plaintiffs to set aside the Master's order. The court directed that the grounds of appeal be abridged. The plaintiffs were given a further period of three months to furnish security. They did not do so.

14. On 26th January, 2004 the defendants brought a motion before the Supreme Court for an order that the plaintiffs' appeal be dismissed or struck out for failure to provide security for costs as ordered. That motion was heard on 13th February, 2004 and the appeal was dismissed on 15th March, 2004 (*Superwood Holdings Plc. v. Sun Alliance Plc. (No. 3)* [2004] 2 I.R. 407).

15. The plaintiffs also initiated proceedings against Ireland before the European Court of Human Rights. In *Superwood Holdings Plc, & Others v. Ireland*, application No. 7812/04, judgment of 8th September, 2011, the court determined that there had been a violation of the reasonable time requirement of Article 6(1) of the European Convention on Human Rights and ordered the Irish state to pay €3,800 plus interest to Superwood. On 27th August, 2013 the plaintiffs issued a further motion in the Supreme Court which was heard on 25th October. A number of reliefs were sought including leave to adduce additional evidence. The court noted that a number of these reliefs were simply incapable of being granted, such as an order for "Execution of the Final Judgment of the European Court of Human Rights…" and were misconceived. It noted that the plaintiffs' appeal had been dismissed by final order of the Supreme Court made on 15th March, 2004 and there was no longer any appeal pending before the court. It was therefore impossible to request that the appeal be re-entered. There was no jurisdiction to entertain an application for the admission of new evidence. The application was therefore dismissed (*Superwood Holdings Plc. and Others v. Sun Alliance and London Insurance Plc., T/A Sun Alliance Insurance Group and Others* [2014] IESC 14).

16. Fennelly J. (McKechnie and Laffoy J.J. concurring) in delivering the judgment of the court said (at para. 27):

> "This is not to say that there are no circumstances in which even a final decision of the Supreme Court may be set aside. Having regard to the constitutional provision and the principles underlying it, however, such relief can be granted only in very special and unusual circumstances. If Superwood were to allege, for example, that the judgment of the High Court or of this court had been procured by fraud, it would be necessary to commence separate proceedings to have the relevant judgment set aside. The judgments in *Re: Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514 discuss the rare and unusual circumstances in which this court will entertain an application to set aside one of its own final orders. No application of the sort has been made in the present proceeding and it is not necessary to discuss the matter further."

The Second Case

17. The plaintiffs interpreted para. 27 of the judgment of Fennelly J. as guidance or advice to them to take a case based on fraud against the defendants. By plenary summons dated 9th July, 2014 the plaintiffs claim damages against the defendants for breach of contract based upon a breach of the terms of the insurance policy made between the plaintiffs and the defendants on the 1st June, 1987. Damages are also claimed for negligence, negligent misstatement, misrepresentation, "procuring judgments and orders of the court by fraud" and the wrongful imposition of a mareva type injunction. Curiously, the plaintiffs did not seek any relief by way of declaration or order that the prior judgments of the High and Supreme Courts obtained in the previous proceedings were procured by fraud or consequential orders setting them aside and directing a new trial. Though no such relief was sought, the plaintiffs rely heavily upon allegations or assertions of fraud by the defendants and their solicitors which are peppered throughout the statement of claim, the affidavits grounding the affidavits submitted on this motion and their lengthy written submissions on this appeal.

18. A statement of claim was delivered on 9th July, 2014 which sets out the history of the case at paras. 1 – 34. Paragraphs. 36 – 46 are stated to be in the same format as the original statement of claim delivered in 1989. The plaintiffs claim that by reason of the fire which occurred at the Superwood premises on 26th October, 1987 they suffered consequential loss as defined under the policy of insurance. They claim that the defendants, their servants or agents wrongfully, in breach of contract and negligently repudiated the insurance policy and refused to be bound thereby. This is followed at pp. 12 – 14 of the statement of claim by particulars of negligence and breach of contract (1 – 21) specifying more particularly the negligence and breach of contract alleged. Particulars of loss were given including particulars of economic loss as a result of the alleged failure on the part of the defendants to honour the terms of the contract. This was the same claim that was the subject of the 1989 statement of claim and the judgment of Smyth J. in April 2001. Those proceedings were the subject of the final order of the Supreme Court dismissing the plaintiffs' appeal on 15th March, 2004.

19. The statement of claim also sets out a number of allegations of fraud allegedly committed by the defendants, their legal representatives and the witnesses called on their behalf with the intention of procuring judgment from the High Court (O'Hanlon J. and Smyth J.) and the Supreme Court during the period 2001 to 2004. The following "Particulars of Fraud" are set out at page 29 of the statement of claim:

> "1. The defendants used information received from the plaintiffs at a meeting between the parties conducted on a "without prejudice" basis at the Westbury Hotel, London on the 3rd October, 1996 at which no legal representatives were present.
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> 2. The first three defendants made a lodgement of IR£150,000 against the insurance claim plus IR£3,002,761 for damages on the 19th November, 1996.
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> 3. Llyods made a *pro-rata* lodgement of IR£100,000 against the insurance claim plus IR£1,500,000 (sic) for damages on the same date.
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> 4. The total lodgement against the insurance claim was IR£250,000 plus IR£4,502,761 damages.
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> 5. The lodgement of IR£4,502,761 for damages was totally disproportionate to the interest which the court could have awarded.
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> 6. The defendants persuaded Smyth J. to conduct a retrial.
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> 7. The defendants used the same witnesses to give the same evidence as that given at the first trial while deliberately ignoring the findings of the Supreme Court.

8. The defendants did not put forward (a named witness) who had specific direct responsibility for the handling of the claim and was the local directing mind of the fraudulent conduct of the defendants.

9. The defendants falsely alleged that the plaintiffs had ordered granulated plastic material from (a named individual) in the United Kingdom prior to the date of fire.

10. The defendants allowed Smyth J. to direct … their loss adjuster to measure on behalf of the court the loss attributable to the fire.

11. The defendants did not disclose to Mr. Burke (the plaintiffs' solicitor) that Smyth J. would deliver his judgment viva voce and offer to share the transcript and its cost or give Mr. Burke the opportunity to have his own stenographer present.

12. The defendants did not point out the errors in the judgments to Smyth J.

13. The defendants deliberately withheld the Gwen Malone Transcript Judgment of Smyth J. for the 7th April, 2001 from Mr. Burke.

14. The defendants falsely obtained a *mareva* type injunction freezing the plaintiffs' assets up to a sum of IR£5 million.

15. The defendants' possession and control of the Gwen Malone Transcript Judgment dated 7th April, 2001 to the exclusion of the plaintiff and Mr. Burke was to procure a judgment and order of the court by fraud.

16. The defendants wish to conceal from the plaintiffs a number of errors in the judgment of Smyth J.

17. The defendants knew that Smyth J. had not addressed the important matter of the statutory accounts in his judgement.

18. The defendants obtained an Order for security for costs knowing that the plaintiffs do not have the additional 38 pages of the addendum to the judgment of Smyth J. or that appendixes "d" and "f" had been delivered to the Supreme Court, and were prevented from raising that matter during the hearing on security for costs.

19. The defendants deprived Mr. Burke from the sum of at least €335,380.80 (IR£264,000) due to him under the prior Order of the Supreme Court dated 4th July, 1995 which had priority before any claims of the defendants.

20. The defendants obtained an order for security for costs from Quirke J. in 2006 which prevented Mr. Burke from having the taxation of Master Flynn reviewed by the High Court."

These allegations, having regard to the history of these proceedings, could not possibly ground any stateable cause of action. A number of them are somewhat contrived allegations of procedural default on the part of the defendants in their conduct of the proceedings and later appeals. If the plaintiffs took issue with findings of fact, the fairness of the trial, any rulings made therein, the calling of witnesses, matters impinging upon their credibility, the admissibility of evidence or inferences drawn by the trial judge, they are more properly dealt with by way of appeal. In particular, I am satisfied that the complaints about the manner in which the trial judge delivered his judgment, the plaintiffs' alleged lack of notice thereof and suggestions of prejudice arising from an alleged lack of access to the transcript of the judgment are matters which are without any substance: they are frivolous and vexatious. As already noted the substantive appeal was never pursued because the plaintiffs failed to provide the security for costs ordered. That order cannot be simply ignored and circumvented by asserting "fraud" in subsequent proceedings without any evidence that anything identifiable as such occurred or led to the previous orders made.

The Motions

20. The plaintiffs made an application to have this case admitted to the Commercial Court list under O. 63A, r. 1(a)(i) of the Rules of the Superior Courts. This was granted by consent (McGovern J.) on the 30th July, 2014. The defendants then brought a motion to dismiss these proceedings upon the exercise by the court of its inherent jurisdiction and/or on the basis that the pleadings did not disclose a cause of action or, alternatively, as an abuse of process or by reason of cause of action estoppel. Orders were also sought under O. 19, r. 27 and 28 to dismiss and/or strike out the plaintiffs' claim (or elements thereof) on the basis that it was scandalous or vexatious. The plaintiffs in a further motion, brought after the defendants' motion to dismiss their proceedings, sought leave to deliver interrogatories. Both motions were listed for hearing on 27th January, 2015.

21. On that date an application was made to the learned judge that he recuse himself on the basis of a number of comments which he made at the hearing on the 30th July which the plaintiffs submitted indicated bias on his part towards their case. This application was refused. I am satisfied having considered the transcript of the hearing of the 30th July that there was no basis for this application. There were a number of preliminary exchanges in the course of the short hearing on that date concerning the history of the case and the nature of the claim brought by the plaintiffs. There is no reasonable basis upon which it could be concluded that the learned trial judge exhibited subjective bias in his inquiries and/or exchanges with counsel in relation to the matter nor is there any material or evidence upon which such bias might be apprehended. The learned judge acceded to the plaintiffs' application to admit the case to the commercial list (by consent) and made further directions in relation to the proposed motion to dismiss the case which the defendants indicated they intended to issue.

22. On the 27th January, 2015 an application was also made on behalf of the plaintiffs that the motion concerning the interrogatories should be determined first. Having considered the submissions made in this regard the learned judge refused the application because if the defendants' motion to dismiss the action or strike out the proceedings were successful, the motion in respect of the interrogatories would be rendered moot. This was a decision entirely within the discretion of the learned judge and in accordance with the efficient and fair disposal of the court's business. The learned judge then heard the defendants' motion to dismiss the proceedings and granted the application for the reasons set out in his ex-tempore judgment delivered on the same date.

23. The appellants have appealed against that judgment and order on ten grounds.

Grounds of Appeal

24. A number of the grounds advanced are simply without any substance. Ground 1 is a general allegation of unfairness under Article 6 of the European Convention on Human Rights and was not seriously pursued nor could it have been. As already stated, there is absolutely no basis for the claim set out in Ground 2 which alleges objective and/or subjective bias in the conduct of proceedings by

the learned trial judge. Ground 3 complains that the learned judge erred in adopting unfair procedures concerning the interrogatories motion which has already been addressed. Ground 4 is without any substance. Ground 8 contends that the learned trial judge erred in publishing a draft ex-tempore judgment in transcript form informally thereby bypassing "formal structure". This ground is meaningless and unsustainable. Grounds 9 and 10 concern matters which are entirely irrelevant to any issue to be determined in these proceedings namely, alleged financial irregularities in an insurance company. Though not all of these matters were pursued or pursued strongly in the appeal, their original inclusion in the notice of appeal supported by extensive written submissions to this court and in the statement of claim are further testimony to the acute sense of wrong felt by the plaintiffs and the extent to which they have become somewhat obsessed with pursuing the defendants in litigation on any basis, however tenuous the grounds. This is also noticeable in the remaining relevant grounds.

25. In Ground 5 the appellants contend that the learned trial judge "erred in ignoring the Supreme Court guidance to take a case on fraud and the issue of statutory accounts". This is clearly a reference to para. 27 of the judgment of Fennelly J. in *Superwood Holdings Plc. & Others v. Sun Alliance and London Insurance Plc. T/A Sun Alliance Insurance Group and Others* [2014] IESC 14, quoted above. I do not consider that there is anything in the quoted passage that could or should be interpreted as an encouragement by the Supreme Court or as "guidance" to initiate a case based on fraud against the defendants by alleging that the judgment of the High Court (Smyth J.) or the Supreme Court had been procured by fraud. In its judgment the Supreme Court rejected an application under O. 58, r. 6 and 8 that it should receive additional evidence said to be relevant to the "gravamen or nucleus" of the original appeal or under O. 28, r. 11 to address a "misunderstanding which occurred in the judgment of the learned High Court judge's decision and which has now emerged …". I am satisfied that there is nothing in the judgment of the Supreme Court that could remotely justify the initiation of these proceedings in the terms set out in the statement of claim or otherwise. However, it is clear that the plaintiffs contrived to interpret the judgment of Fennelly J. as encouragement to initiate the present proceedings and in the knowledge that they could only succeed in challenging the final orders made against them if they established that they had been procured by fraud. They then set about, as the learned trial judge found, setting up allegations of "fraud" which are set out in the statement of claim. In doing so, the plaintiffs wrongfully advanced the Supreme Court judgment as a badge of legitimacy for an otherwise meritless case.

26. In Grounds 6 and 7 the appellants address issues in respect of matters concerning the transcript of the original judgment of Smyth J. delivered between the 4th and 7th April, 2001 (both dates inclusive). In the particulars of fraud alleged in the statement of claim the plaintiffs complain at paras, 11, 12, 13, 15 and 16 (quoted above) that the defendants did not disclose to Mr. Burke, the plaintiffs' solicitor, that Mr. Justice Smyth would deliver a judgment viva voce nor did they offer to share the transcript of his judgment or give Mr. Burke an opportunity to have his own stenographer present. It is also alleged that the defendants did not point out errors in the judgment to Mr. Justice Smyth before it was perfected and "deliberately withheld" a transcript of the judgment of the 7th April, 2001 from Mr. Burke which had been produced by their stenographers. In addition, it is alleged that the defendants' possession and control of this transcript to the exclusion of the plaintiffs and Mr. Burke was for the purpose of procuring a judgment and order of the court "by fraud". It is claimed that the defendants sought to conceal from the plaintiffs a number of errors in the judgment of Mr. Justice Smyth. In paragraph 18 of the statement of claim it is alleged that the defendants procured an order for security for costs knowing that the plaintiffs did not have an additional thirty-eight pages of an addendum to the judgment of Mr. Justice Smyth of the 7th April, 2001. They maintain that two appendices to the judgment, (D) and (F), were not included in the transcript of the judgment eventually furnished to the plaintiffs' solicitor, Mr. Burke. Though an appeal was brought against the judgment and order of Mr. Justice Smyth, it never proceeded to a substantive hearing because of the failure of the appellants in this case to provide the security for costs ordered. The appeal was dismissed for that reason on the 15th March, 2004.

27. The appellants claim that the full transcript including the missing thirty-eight pages was only furnished to them by the defendants' solicitors in the form of a "complimentary copy" on the 24th October, 2013 the date before the hearing of the final motion which resulted in the judgment of the Supreme Court delivered on the 21st February, 2014 (Fennelly J.). The thirty-eight pages together with the appendices are a significant feature of the claim made at pp. 24 to 25 of the statement of claim under "Period 5. Fraud on the Supreme Court (2001-2004)". The appellants allege that the defendants and their solicitors concealed matters from the plaintiffs, misled the High Court and the Supreme Court and conspired to procure judgments and orders of the courts by fraud. I am satisfied that the pleadings which set out these allegations are scandalous and vexatious.

28. It is an underlying theme of these proceedings, that Mr. Burke, the appellants' solicitor had for many years been refused access to a copy of the transcript of the judgment of Mr. Justice Smyth of the 7th April, 2001 by the defendants' solicitors. Gwen Malone Stenography Services were retained by the defendants' solicitors during the course of the trial and were present during the course of the taking of the judgment. The appellants retained stenographers during the course of the trial but did not retain stenographers for the taking of the judgment: that was their decision. Mr. Burke was present in court at all times during the taking of the judgment. Following the pronouncement of the judgment, Mr. Burke remained in court and made submissions in respect of matters ancillary to the delivery of the judgment including issues as to the contents of Appendix "F", the application for a Mareva injunction made by the respondents counsel and costs. It is clear therefore that the appellants and their solicitor were fully aware of everything that transpired following delivery of the judgment and fully participated in that part of the hearing. They were present for everything said to have been recorded in the thirty-eight pages. Mr. Burke and the appellants now affect to have been in ignorance of the contents of the transcript and Appendix F. The latter concerned insurance obtained on the judge's life during the course of the trial. The appellants also seek to characterise the contents of the thirty-eight pages as a continuation of the judgment of the learned judge. This is clearly not so. Furthermore, at no stage during the application before Mr. Justice McGovern or this court were the appellants able to demonstrate any prejudice that arose due to the suggested non-availability of the thirty-eight pages or appendices in the course of their various appeals to the Supreme Court.

29. A further allegation is made in the statement of claim that Mr. Burke was not allowed to participate in a process whereby corrections to the transcript of the judgment were invited by the learned judge at the outset of the judgment. This is clearly incorrect. The learned judge requested assistance from solicitors and counsel for both sides in relation to any minor errors such as an incorrect date or name that appeared in the judgment which he delivered orally. It was a matter for the parties to submit such corrections as they thought appropriate. The appellants suggest that they have no knowledge as to whether the defendants' counsel fulfilled their duty in this regard or not. I regard this as an unwarranted assertion of impropriety against counsel for which there is and never was any basis. On the contrary counsel were invited to assist the court and did so: nothing more. It was open to Mr. Burke on behalf of the plaintiffs to do the same. Indeed Mr. Burke indicated by letter dated 12th April, 2001 to the assistant chief registrar of the High Court that for various reasons he was "unable" to assist in the manner requested.

30. The appellants contended that a part of the transcript of the 7th April was deliberately concealed from the plaintiffs' solicitors at pp. 24 to 25 in the statement of claim. The transcripts for the dates upon which judgment was delivered by Mr. Justice Smyth were obtained by the appellants' solicitors from the Central Office of the High Court on 13th July, 2001. The contents of volume four conclude with "end of judgment". However, it is clear that there are a number of versions of the transcript of the 7th April, 2001 available at this stage. All parties accept that the transcript of the judgment did not initially include the issues raised in the subsequent thirty-eight pages which clearly arose post judgment. The differences in the transcripts are inconsequential and were

explained by developments in technology and the software by which the transcripts were transferred and stored as set out in the various affidavits submitted in the course of this motion.

31. There is nothing untoward or unusual in the course of proceedings that followed the judgment delivered by Smyth J. Both sides are agreed that what is recorded occurred in the manner now set out in the final thirty-eight pages of Volume 4 of the transcript. It is also clear that Mr. Burke had handwritten notes which he took over the four days during which Mr. Justice Smyth delivered the judgment.

32. The thirty-eight pages deal with five issues.

> (i) An application under s. 17(2) of the Civil Liability Act 1961 which arose from the settlement by the appellants of their action against Lloyds;
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> (ii) an application for a Mareva injunction to freeze the plaintiffs' assets up to a value of IR£5 million to cover the defendants' legal costs;
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> (iii) the trial judge's request that the parties check a number of facts in the transcript for errors prior to the furnishing of the approved judgment which is an extension of the request which had been made and complied with by counsel and solicitors during the course of the trial and at the commencement of the judgment;
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> (iv) the plaintiffs' application for a stay;
>
> (v) a review of correspondence concerning the defendants' application for life assurance in respect of the judge's life.

33. It is clear that the central issue in the judgment delivered by Mr. Justice Smyth concerned the issue of damages to be awarded to the plaintiffs. Mr. Durcan, the respondents' solicitor also refers to an approved copy of the judgment which contains the signature of Mr. Justice Smyth and a note "approved volume 1 of 4 plus appendices 4th June, 2001". It is clear that the existence of the appendices was clearly known to Mr. Burke and his clients because they were undoubtedly referenced and discussed during the hearing.

34. There is nothing in the statement of claim or the evidence advanced by the appellants to the learned trial judge on this motion which demonstrates any prejudice due to any of the alleged changes to or corrections of the transcript. The learned judge requested on a number of occasions that counsel would direct the court to any such prejudice but it is clear from the transcript that she was unable to do so.

35. The learned judge considered whether the respondents had established good grounds to dismiss the claim on the basis that it disclosed no cause of action or was frivolous and vexatious or an abuse of process as follows:-

> "15. I have considered the arguments made by the parties and I have considered the submissions to the court by the parties and I have also the affidavits. In the course of affidavits presented to the court on behalf of the plaintiffs some allegations of fraud which can only be described as lurid were presented to the court and they were presented to the court as allegations with no evidence of any *prima facie* basis set out to support them. What seems to be suggested by the plaintiffs is that there were some alterations or changes in the transcripts and the versions of the transcript of the judgment of Smyth J. in the High Court and that this somehow had a material effect on the case. When I asked counsel for the plaintiffs what were the effects of these discrepancies between the different transcripts which were before the court, I was told nothing that showed any prejudice to the plaintiffs but merely that there were discrepancies and that seemed to be the basis on which it was alleged that there was a prejudice to the plaintiffs.
>
> 16. In fact, when an analysis is done of the transcripts which do have minor variations in them, they appear to be no more than a few words missing here or there which are not of any significance to the issues in dispute between the parties. In one case I think the title "Appendix" was missing. In another one of the transcripts, the words "End of judgment" appeared after the appendix and that was not the case in another one.
>
> 17. But what is clear is that the Appendix was largely concerned with health issues relating to the trial judge in the second trial in the High Court. He felt it prudent to deal with these issues in case when the matter came before the Supreme Court, any issues should arise concerning his illness.
>
> …
>
> 19. There is nothing in the changes that are to be found in different manifestations of the transcript which have any significance to the issues which were in dispute between the parties. There is no evidence, there is not a scintilla of evidence to establish any fraudulent intent on anybody's part to deliberately alter any of the transcripts. It appears that there may have been more than one stenographer involved and for whatever reason some matters that may have appeared in one version of the transcript did not in another, but I am satisfied from reviewing the transcript that nothing of consequence flows from that."

The learned judge was satisfied that the allegations set out in the statement of claim had nothing to do with issues of fraud and that most of the issues raised in the pleading were an attempt to relitigate matters which had already been litigated over a long period in the original proceedings commenced by plenary summons issued in June 1989. I am satisfied having considered all of the papers and submissions in this case that the learned judge was entirely correct in his conclusions. These proceedings are an abuse of process. I am satisfied that no reasonable ground was advanced on this appeal as to why the judgments and orders of the High and Supreme Courts in the previous proceedings should be set aside on the basis of fraud or otherwise. The material relied upon in respect of the transcripts could not on any rational assessment be regarded as fraud by means of which either the judgment of Smyth J. or the subsequent rulings and orders of the Supreme Court were procured. These assertions and the other allegations of wrongdoing made against the defendants' legal advisors in respect of the transcripts are clearly frivolous, vexatious and scandalous and do not give rise to a cause of action which could possibly succeed.

Restraining further proceedings

36. In *Wunder v. Irish Hospitals Trust (1940) Limited* (unreported Supreme Court 24th January, 1967) the Supreme Court directed that no further proceedings should be taken in the matter without the prior leave of the court in circumstances where the plaintiff, a persistent litigant, had instituted several sets of proceedings against the defendant alleging that he had won the sweepstakes which

it promoted although there was no evidence to support this claim. The court ordered also that if such proceedings were taken without leave being first obtained the defendant was not to be required to appear or to take any steps in relation to the matter and those proceedings would be treated as void and of no effect. The original form of this type of order is set out in *Keaveny v. Geraghty* [1965] I.R. 551. The purpose of the jurisdiction is to protect the court process from abuse. As stated by Keane C.J. in *Riordan v. Ireland* [2001] 3 I.R. 365 at p. 370:-

> "It is, however, the case that there is vested in this court, as there is in the High Court an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or pursue litigation which is plainly groundless and vexatious. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens. This Court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."

In *McMahon v. W.J. Law and Company, L.L.P & Ors* [2007] IEHC 51 McMenamin J. summarised some of the factors that may be relevant in determining the issue such as:

> (i) the habitual or persistent institution of vexatious or frivolous proceedings against parties to earlier proceedings;
>
> (ii) the earlier history of the matter;
>
> (iii) that the action could not succeed and would do no possible good;
>
> (iv) whether the proceedings had been initiated for an improper purpose;
>
> (v) whether the proceedings involved the rolling forward of issues into subsequent actions; and
>
> (vi) there had been a failure to pay the costs of earlier proceedings.

Though the courts must be cautious to ensure the right of access to the courts under Article 40.3 of the Constitution and Article 6 of the Convention is assured, nevertheless the principle of finality of litigation and the resources of the courts and fair procedures to all parties in the proceedings must also be considered. The making of such an order is not a denial of the right of access to the affected party who is required to seek the court's leave before initiating further proceedings. It provides a filter to ensure that a litigant is prevented from initiating any further frivolous, vexatious or scandalous proceedings and to protect the administration of justice from further abuse of process. It is a proportionate response to that party's proven abuse of process. As Ó'Caoimh J. stated in *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463 at p. 465:-

> "Where the court is satisfied that a person has habitually or persistently instituted vexatious or frivolous civil proceedings it may make an order restraining the institution of further proceedings against parties to those earlier proceedings without prior leave of the court. In assessment of the question whether the proceedings are vexatious, the court is entitled to look at the whole history of the matter and it is not confined to a consideration as to whether the pleadings disclose a cause of action. The court is entitled in the assessment of whether proceedings are vexatious to consider whether they have been brought without any reasonable ground. The court has to determine whether the proceedings being brought are being brought without any reasonable ground or have been brought habitually and persistently without reasonable ground."

37. In this case, the learned trial judge made an order restraining the plaintiffs from bringing any further proceedings before the court. Having determined that he would make an order dismissing the proceedings on the ground that they disclosed no cause of action and that they were frivolous, vexatious and an abuse of process the learned trial judge stated as follows:-

> "38. The only issue that remains then is whether or not I should make an order restraining the plaintiffs from bringing any further proceedings having regard to the history of the events between the parties. It seems to me that in view of the particular facts of this case and the long history attached to it and what can only be described as an obsession, and I think a sad obsession on the part of the parties controlling the plaintiff companies relating to this matter and their dissatisfaction with the legal process to date, that there is every possibility that if I do not make an order restraining them from bringing further proceedings without leave of the court that yet further proceedings will be brought because it is clear that having exhausted every possible avenue in these proceedings, including going to the Court of Human Rights, and having been told by the Supreme Court in February, 2014 that the matter could not be revisited except in the most exceptional circumstances, that even in the face of that judgment the plaintiffs decided once more to seek to litigate the issues which have been in dispute between them for so many years.
>
> 39. Having regard to that conduct, it seems to me that as a matter of probability that if not restrained by the court that the plaintiffs are likely to try yet again to litigate this matter. It is in everybody's interest including the plaintiffs that futile litigation should not be engaged in the Courts.
>
> 40. I have said it before and I will repeat it again. The court's time and resources are limited. When cases take up time it should be applied in the resolution of *bona fide* disputes between the parties and those cases should be conducted expeditiously and with the minimum amount of time being wasted. When cases that should not be before the court are brought before the Courts and maintained before the Courts with every likelihood of their going to take a significant amount of time before they come to conclusion, this affects not only the parties to the litigation but it affects other parties who have a constitutional right to have their cases heard before the Courts.
>
> 41. For every case that takes a week, a month, a year, more than a year, there are other cases which cannot be reached, cannot be dealt with, so there is a public policy issue in determining that cases, which should not and ought not to be before the Courts are not entertained and permitted to be litigated because it is contrary to the administration of justice."

38. The defendants sought relief against the bringing of any further proceedings against them related to or concerning the issues the subject matter of the first and these proceedings. Apart from the complaints of fraud contained in the statement of claim, the plaintiffs, in affidavits submitted from Mr. Burke and Mr. Bunyan, the executive chairman of the first plaintiff and the chairman of the others, make wholly unwarranted allegations of fraud, forgery and perverting the course of justice against the defendants and their

legal representatives. They are based on assertions which reflect a disgruntlement and dissatisfaction with previous orders of the courts and a determination that the plaintiffs will never accept the judgment and orders made in the first proceedings. These allegations were scandalous and vexatious. Many of the points made also concern the credibility of witnesses, the evidence adduced and rulings made in the course of the trial before Smyth J. and might, more properly have been the subject of their appeal which was dismissed. The plaintiffs are not entitled to seek to circumvent that order or re-litigate the decided case by simply restating it and asserting that the rulings and judgment of Smyth J. and the Supreme Court should be deemed to be tainted by fanciful allegations of fraud. There was ample evidence, therefore, upon which the learned trial could conclude that, having regard to the history of the case and the nature and content of the pleadings and affidavits submitted by the plaintiffs, they are likely, unless restrained by the court, to engage in future futile proceedings. This will result in further waste of court resources and constitute a further abuse of process which should not be facilitated. I am satisfied, for these reasons and those set out by the learned trial judge, that the order sought restraining the issuing of any further proceedings in respect of the issues raised in these proceedings or the earlier proceedings against the defendants, their servants or agents without the leave of the court, was properly granted. This order should also apply to any proceedings contemplated against any person involved in the case on behalf of the defendants including their solicitors and counsel and any witnesses called or experts retained by them.

Conclusion

39. I am satisfied therefore, that this appeal should be dismissed and the judgment of the learned High Court judge affirmed.