Neutral Citation: [2014] IEHC 1

THE HIGH COURT

[2012 No. 3037 P]

BETWEEN

THOMAS BEAUSANG AND ALISON BEAUSANG

PLAINTIFFS

AND

IRISH LIFE AND PERMANENT PLC, DENIS O'SULLIVAN, MICHAEL LANDERS AND REDMOND KELLY PRACTISING UNDER THE TITLE OF MOLONEY & MCCOURT SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on 13th January, 2014

1. By motion dated the 15th April, 2013, the first three defendants invoke the inherent jurisdiction of this Court to seek orders striking out the present proceedings on the ground that they are unsustainable in law and are thereby doomed to fail. The first defendant ("ILP") is a credit institution and the employer of the second and third named defendants who are employed at its branch at Midleton, Co. Cork. The second defendant is the manager of that bank branch.

2. The plaintiffs have commenced proceedings contending that ILP is vicariously liable for the actions of the second and third defendants who are both sued in damages for the torts of deceit and conspiracy. Similar claims are made as against the fourth defendant solicitor who is also sued for damages for breach of contract and breach of fiduciary duty. The fourth defendant admittedly acted for the plaintiffs in the transactions I am about to describe, but he did not take part in this motion.

3. It is, of course, accepted that this power to strike out proceedings on this ground must be exercised sparingly. This means that the Court must, generally speaking, at least, proceed on the basis that the plaintiff will be able to prove the facts he alleges in his pleadings, while yet examining whether the case is legally sustainable. Purely for the purposes of this motion, therefore, I will accordingly assume that the facts as alleged by the plaintiffs will be established by them at the trial of the action. I am also acutely conscious, however, of the fact that the defendants have yet to file their defence and I could not sufficiently stress that I am assessing the sustainability of the claim purely by reference to the plaintiffs' allegations. The first three defendants simply say that even if the plaintiffs are correct in what they allege, they have nonetheless no sustainable cause of action against these defendants.

4. In 2007 the first plaintiff was engaged in the business of small residential property development in the general East Cork region. In the plaintiffs' statement of claim it is alleged that in February, 2007 a named official at ACC Bank plc, purchased a property comprising 2.7 acres at Shanagarry North, Midleton on behalf of Mr. Beausang. It is claimed that Mr. Beausang and the official had discussed the purchase of the site, but the former had not obtained loan approval from ACC in respect of the funding of the site and nor, indeed, had he instructed the official in respect of the price he would be prepared to pay for the site.

5. It is claimed that a letter of loan sanction nevertheless later issued from ACC Bank to Mr. Beausang's solicitors. One of the conditions of the offer of loan sanction was confirmation from the Bank's appointed solicitors, Messrs. Fitzgerald solicitors, that there were five irrevocable and unconditional sale contracts in place for quite separate properties at Ardnahinch Bay, Shanagarry for the sum of €2,422,000 to unconnected third parties. (These five properties had just been completed by the first named plaintiff). The first plaintiff then duly executed the loan offer.

6. The Bank's solicitors then contacted the fourth defendant, Mr. Kelly, on 13th March, 2007, and Mr. Kelly then issued contracts for sale in respect of the dwelling houses at Nos. 2, 3, 4 and 5 Ardnahinch Bay, Shanagarry to Mr. Sean O'Riordan of Fitzgerald solicitors who was acting as solicitor for the nominated purchasers of the said properties. Four contracts were returned in respect of these properties. It appears that the second and three defendants were the purchasers of two properties and the beneficial purchasers of two other properties were personnel employed by ACC Bank. The purchase price for each dwelling was €555,000.

7. The plaintiffs further allege that Mr. Kelly also executed a contract of sale for a fifth dwelling. Indeed, they further contend that Mr. Kelly has admitted that this contract was subsequently destroyed by him. At all events, on 27th March, 2007, Mr. Kelly then wrote to Messrs. Fitzgerald solicitors advising them of the receipt of irrevocable contracts for the sale of all five properties.

8. At that point, the drawdown of the funds from ACC Bank was confirmed by a letter dated 29th March, 2007, from Fitzgerald solicitors to the Mr. Kelly. The plaintiffs allege that while Mr. Kelly told Mr. Beausang that there were five contracts in existence, he nonetheless failed to advise him of (i) the identity of the purchasers; (ii) the payment of the deposits by the purchasers and (iii) that the contract for sale would become binding and enforceable as against the putative purchasers once the same were executed by Mr. Beausang and returned to the solicitors for the purchasers.

9. The plaintiffs then allege the following:

> "Furthermore, the fourth named defendant failed and neglected to advise the first named plaintiff to execute the five contracts for sale which had been signed by the putative purchasers so that they could be returned to the solicitors for the putative purchasers or of the beneficial consequences that would accrue to the first named plaintiff by the execution and return of the said contracts for sale or of the ramifications and consequences that would arise in the event of the said contracts for sale not being executed and returned to the solicitors for the putative purchasers.
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> The purpose and intention of the fourth named defendant and of the putative purchasers was to provide each of them with the opportunity of 'flipping' the properties (*i.e.*, of selling the properties on or of transferring the benefit of the contract, at a profit) without advising the plaintiff of the same and without risk to each of the putative purchasers. The actions of the first named defendant in failing and neglecting to have the contracts for sale executed and returned by the first named plaintiff are consistent with that purpose and intention and were motivated by the same."

10. It might seem curious that a professional builder such as Mr. Beausang would need to be advised by Mr. Kelly that all he needed to do in order to make the contracts enforceable was to sign them and return them to the purchaser's solicitors. This point is stressed by ILP who maintain that it was inconceivable that Mr. Beausang was not aware of the existence of binding contracts for sale.

11. At all events, the plaintiffs allege that as a result of the decline in the residential housing market, the second, third and fourth defendants (along with the two other putative purchasers) shortly thereafter realised that they would be unable to sell on the property at a profit. Indeed, it is said that the properties all diminished in value to a level which was significantly below the contract price specified in each contract for sale.

12. By early 2008 Mr. Beausang came under pressure to reduce his borrowings with ACC. The plaintiffs allege that Mr. Kelly and the putative purchasers then realised that ACC were likely to inquire as to the existence of these contracts. The existence of the five completed contracts had, after all, been a term of the loan agreement. It is then alleged that a scheme was devised so that an application would be made to ILP on the plaintiffs' behalf whereby that institution would provide loan finance to him. It is contended that the second defendant encouraged this loan application and did so without reference or disclosing his own potential liabilities under the contract for sale. The plaintiffs say that while this loan application was ostensibly made for the benefit of the first plaintiff, it was in reality designed to assist the various putative purchasers and Mr. Kelly to avoid their liabilities under these contracts for sale.

13. It is not in dispute but that such a loan application was made and was ultimately accepted in May, 2008. Nor is it disputed but that the contracts were never executed and the plaintiffs have maintained complete control over these properties in the meantime. The properties are currently let by the plaintiffs.

14. So far as this motion is concerned, two legal issues immediately arise. First, having regard to the matters pleaded by the plaintiffs, can it be said that a sustainable case based on the torts of conspiracy and deceit has been out? Secondly, even if it has, can it be said that ILP could be made vicariously liable for the actions of its employees in this regard?

The tort of deceit

15. In order to establish the tort of deceit, the plaintiff must prove the following elements of that tort (see McMahon and Binchy, *Law of Torts* (Dublin, 2013) at para. 35.02):

> "(i) the making of a representation as to a past or existing fact by the defendant;
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> (ii) that the representation was made knowingly, or without belief in its truth or recklessly, careless as to whether it be true or false;
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> (iii) that it was intended by the defendant that the representation should be acted upon by the plaintiff;
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> (iv) that the plaintiff did act on foot of the representation; and
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> (v) suffered damages as a result."

16. This passage (which also appeared in earlier editions of this authoritative work was approved by Shanley J. in *Forshall v. Walsh*, High Court, 18th June, 1997, and by Murray J. in *CK v. JK* (*Foreign Divorce: Estoppel*) [2004] 1 I.R. 224, 254-255. This, accordingly, is the test which I am required to apply to the present case.

17. The gist of the case as advanced by the plaintiffs is that the second and third defendants either encouraged or facilitated the first plaintiff in taking out the new loan facility with ILP in May, 2008 and in so acting did not disclose something which they ought to have disclosed, namely, that this was the method which the defendants had devised to escape from a potential obligation in respect of a contract of sale which, so far from presenting a handsome business opportunity, had now become a liability

18. This again raises the difficult question of the extent to which silence can amount to a misrepresentation, because normally "silence and inaction will not involve the defendant in liability": see McMahon and Binchy at para. 35.06. Of course, in view of his duty of loyalty to his principal, a fiduciary may well be under an obligation to volunteer relevant information, yet it would seem clear that neither the ILP nor its employees were under such a fiduciary obligation *vis-à-vis* the plaintiffs *simply* by reason of the existence of a loan arrangement: see, *e.g.*, the judgment of Finlay Geoghegan J. in *Irish Bank Resolution Corporation Ltd. (in special liquidation) v. Morrissey* [2013] IESHC 208 It is, nevertheless, striking that there is little contemporary case-law on the extent to which (if at all) silence on the part of a person who is not a fiduciary can amount to deceit.

19. Yet it is important to recall that the summary strike out jurisdiction is not well adapted to cases raising novel and difficult issues, whether of fact or law. As Cozens-Hardy M.R. observed in *Dyson v. Attorney General* [1911] 1 K.B. 410, 414, the summary strike-out jurisdiction should not be applied "to an action involving serious investigation of ancient law and questions of general importance."

20. This latter passage was quoted with approval by Keane J. in *Irish Permanent Building Society v. Caldwell* (No.1) [1979] I.L.R.M. 273, 276. In that case the defendants contended that the plaintiff building society had no *locus standi* to challenge the registration by the Registrar of Building Societies of one of the defendants as a building society. To this end the defendant brought a motion seeking to strike out the proceedings on the ground that they were unsustainable by reason of the fact that the plaintiff lacked standing to maintain them.

21. Keane J. refused to take this step, saying that ([1979] I.L.R.M. 273, 276-277) he was not satisfied that:

> "On an application of this nature the High Court should finally determine the difficult and complex question of law involved. I think that the plaintiffs are entitled to a full and unhurried consideration of the questions they have posed for a resolution by the High Court and that this cannot, in a practical manner, be achieved within the limitations of a motion such as the present."

22. These principles have considerable value and relevance so far as the resolution of the present motion is concerned. While the preponderance of existing authority (such as it is) may be against the plaintiffs, given the uncertainties to which I have just alluded, it would nonetheless be wrong at this juncture to conclude that the plaintiff's claim in deceit as against the second and third defendants is necessarily unsustainable on this ground alone. Much may depend on precisely what was or was not said and upon the exact nature of the relationship between the parties. It may be that the plaintiffs will ultimately be able to establish at a full hearing

that the defendants' silence amounted to deceit and in that context ancient law and learning (to borrow the language of Cozens-Hardy M.R in *Dyson*) may have to be explored and refashioned in a contemporary context. All of these issues remain to be fully examined at a plenary hearing.

The claim in conspiracy

23. The gist of the claim in conspiracy as alleged by the plaintiffs is that the second and third defendants combined to injure them by securing the ILP loan, thus thereby releasing them from their (undisclosed) obligations under the contracts of sale. In effect, therefore, the plaintiffs allege what is often described as a lawful means conspiracy. This occurs "where two or more persons combine to act with the predominant purpose of damaging the economic interests of another, without justification, but without resorting to unlawful means, such as the commission of a tort or criminal act": see McMahon and Binchy at para. 32.99.

24. If, of course, the plaintiffs established that the defendants were guilty of the tort of deceit and combined together for the purposes, then liability would have been established not only under that heading, but also by reference to a different aspect of the tort of conspiracy, namely, where two or more persons combine to injure the plaintiff through unlawful means and damages results. Since, however, the only unlawful action alleged in the present case is that of deceit, liability for this type of conspiracy could only be established if the plaintiffs had already established the separate tort of deceit. Since that claim turns completely on whether the plaintiffs can, in any event, establish deceit, it is unnecessary to consider this aspect of the conspiracy claim any further.

25. Returning now to the issue of the lawful means conspiracy, the case law to date (again, such as it is) suggests that much depends on the motives of the combiners. In this respect, conspiracy is unusual among the nominate torts, since questions of motive are *normally* irrelevant in any consideration of whether a tort has been committed. This, however, is not universally true since malice and motive may sometimes be relevant in nuisance cases in order to determine whether the user of the land was reasonable: see here the judgment of MacNaghten J. in *Hollywood Silver Fox Farm Ltd. v. Emmett* [1936] 1 All E.R. 825.

26. Experience has nevertheless shown that in respect of those torts where motive is relevant that such motives are not easily divined. An example here is supplied by *McGowan v. Murphy*, Supreme Court, 10th April, 1967. In that case Walsh J. held that the legitimacy of the plaintiff's expulsion from a trade union turned ultimately on the motive for the action. If the main object of the action was to damage and injure the plaintiff, then the tort of conspiracy would have been established, even if no specific rule of the trade union in question had been broken.

27. The situation was otherwise where the combiners had merely sought to protect their own interests, provided they did not act unlawfully. As Walsh J. explained:

> "If, however, the real purpose of the combination was not to injure the plaintiff but to defend the interests of the trade union by maintaining discipline then no wrong was committed and no action will lie even though damage to the plaintiff resulted provided that the means used were not unlawful."

28. In *McGowan* the plaintiff had been expelled from a trade union because it was claimed that he had engaged in unofficial strike action. Walsh J. upheld the decision of Teevan J. in this court to withdraw the claim for conspiracy since there was no evidence that the defendant sought to injure the plaintiff *as such* and that the evidence showed that the actions of the union had been prompted by a desire to protect its own interests. Walsh J. acknowledged, however, that the position might have been otherwise:

> "if the decision was so patently perverse that the only reasonable explanation would indicate a conspiracy, rather than some other reason such as a refusal to believe the plaintiff's account, however irrational such refusal might appear to be, or a simply failure to give the plaintiff an adequate opportunity to make his case or to understand the case being made against him, or that the defendant's judgment in the matter had been clouded by feelings of anger towards the plaintiff caused either by their previous experience of the plaintiff or by his attitude or his appearance before them, I think that the matter would have to be left to the jury."

29. One can see this approach in two other decisions of this Court which rejected conspiracy arguments based on the (potentially) anti-competitive conduct of the defendants on the ground that they had simply acted to protect their own interests rather than to injure the plaintiff as such. (It may be significant that both of these decisions pre-dated the enactment of the Competition Act 1991 and the Competition Act 2002).

30. In *Connolly v. Loughney* (1953) 87 I.L.T.R. 49 the defendants were officials of the Retail Grocery, Dairy and Allied Trades' Association who were said to have pursued a lawful means conspiracy. They had admittedly threatened certain wholesalers that if they continued to supply traders who sold certain staple groceries at prices below the minimum retail prices, the other members of the Association would withdraw their custom. The plaintiff continued to sell groceries at less than the minimum prices and, at the instigation of the Association, certain wholesalers refused to supply him further with goods.

31. Dixon J. held that the defendants were not guilty of conspiracy by combining to impose a form of resale price maintenance which injured the plaintiff, since the object of the defendants' actions had been the promotion of their own trade and economic interests rather than injury to the plaintiff as such ((1953) 87 I.L.T.R. 49, 56):

> "In the present case it was quite clear that there was never any wilful intention to injure the plaintiff or any intention to injure him except as incidental to producing the desired result of inducing him to conform to the policy of the Association."

32. A similar approach was manifested in the decision of Kenny J. in *Tru-Value Ltd. v. Switzer & Co.*, High Court, 10th March, 1972, where he refused to grant an injunction restraining certain Grafton Street retail outlets combining in order to put pressure on a cosmetics supplier not to supply a branded perfume to the plaintiff pharmacy. Kenny J. found that the defendants had been motivated by a desire to protect their business interests, rather than a desire to injure the plaintiff as such.

33. If we endeavour to apply these principles to the present case, it might suggest that insofar as the defendants acted in combination, they did so purely out of self interest (*i.e.*, seeking to avoid the liability from the contracts of sale) rather than seeking to injure the plaintiff as *such*. Nevertheless, as this claim turns on motive, this is accordingly a matter which cannot properly or fairly be resolved – save perhaps in the clearest of cases – in the absence of an oral hearing where the actions, conduct and motives of the parties can be more fully explored in the examination and cross-examination of witnesses.

34. For these reasons, therefore, I will decline to strike out the claims in deceit and conspiracy but will rather allow the case to proceed to full hearing.

Whether ILP could be made vicariously liable for any torts committed by its employees
35. Counsel for the plaintiff, Mr. Gallagher S.C., argued very strongly that under no circumstances could ILP be made liable for the tortious conduct of its employees in this situation, even if such were actually made out. Needless to say, ILP had no possible interest in participating in any deceit vis-à-vis Mr. Beausang and under no circumstances would it have authorised such conduct.

36. It is nevertheless clear from the Supreme Court's comprehensive re-examination of this issue in *O'Keeffe v. Hickey* [2008] IEHC 72, [2009] 2 I.R. 302 that this consideration is not dispositive so far as vicarious liability is concerned. That case concerned the question of whether the State could be held to be vicariously liable for the actions of a school teacher in a secondary school who had sexually abused a pupil. A majority of the Supreme Court found against the plaintiff on the ground that the employer/employee relationship was not present. In other words, the State had, so to speak, simply put the educational architecture into place and funded that system. But it had no other responsibility for teachers and, specifically, was not their individual employer.

37. It is, nevertheless, clear from the judgment of Fennelly J. in *O'Keeffe* that the school could, in principle, have been made vicariously liable for the actions of the teacher even though the sexual abuse of children is the very antithesis of the role of a teacher. In this context Fennelly J. referred to some well known authorities in this general area and some representative examples may now be briefly mentioned.

38. In *Lloyd v. Grace Smith & Co*. [1912] A.C. 716 a widow, a client of a firm of solicitors, was defrauded by the managing clerk of the firm. The clerk fraudulently induced her to execute deeds transferring title in two cottages to himself and he then sold them for his own benefit. The House of Lords held that the clerk had been acting within the course of his employment by the solicitor. Here liability was vicariously imposed even though the defendant, a respected solicitor, was innocent of any involvement in the fraud as follows. In the words of Lord Shaw ([1912] A.C. 716, 740):

> "I look upon it as a familiar doctrine as well as a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that the loss occasioned by the fault of a third person in such circumstances ought to fall upon the one of the two parties who clothed that third person as agent with the authority by which he was enabled to commit the fraud."

39. The second example is of more recent vintage. In *Johnson & Johnson v C.P. Security* [1986] I.L.R.M. 560 Egan J, in the High Court, awarded damages to the plaintiff against the defendant, a company providing specialist protection, when their own security officer facilitated thefts from premises he was supposed to be guarding.

40. After a comprehensive review of the authorities in this and other common law jurisdictions, Fennelly J. concluded by saying ([2009] 2 I.R. 302, 378):

> "Ultimately, I am satisfied that it is appropriate to adopt a test based on a close connection between the acts which the employee is engaged to perform and which fall truly within the scope of his employment and the tortious act of which complaint is made. That test, as the cases have shown, has enabled liability to be imposed on the solicitor's clerk defrauding the client (*Lloyd v Grace Smith & Co*); the employee stealing the fur stole left in for cleaning (*Morris v C.W. Martin & Sons Ltd*) and the security officer facilitating thefts from the premises he was guarding (Johnson & Johnson v C.P. Security). In each of these cases, the action of the servant was the very antithesis of what he was supposed to be doing. But that action was closely connected with the employment. In *Delahunty v South Eastern Health Board* [2003] IEHC 132 O'Higgins J., rightly in my view, held that there was no such close connection. The employee of the orphanage had abused a visitor, not an inmate.
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> The close-connection test is both well established by authority and practical in its content. It is essentially focussed on the facts of the situation. It does not, in principle, exclude vicarious liability for criminal acts or for acts which are intrinsically of a type which would not be authorised by the employer. The law regards it as fair and just to impose liability on the employer rather than to let the loss fall on the injured party. To do otherwise would be to impose the loss on the entirely innocent party who has engaged the employer to perform the service. The employer is, of course, also innocent, but he has, at least, engaged the dishonest servant and has disappointed the expectations of the person to whom he has undertaken to provide the service. There is no reason, in principle, to exclude sexual abuse from this type of liability. That is very far, as I would emphasise, from saying that liability should be automatically imposed. The decision of O'Higgins J. provides an excellent example of practical and balanced application of the test. All will depend on a careful and balanced analysis of the facts of the particular case. In *Bazley v. Curry* (1999) 144 DLR (4th) 45, the employees of the care home were required to provide intimate physical care for the residents. The sexual abuse was held to be closely connected."

41. It follows, therefore, that the ultimate question is whether there is any close connection between the role of the employees and the alleged torts. Applying that test, it does not seem to me that vicarious liability can be positively excluded. After all, if the plaintiffs are correct in their allegations, then the alleged tort or torts arise directly from the fact that a bank loan was applied for and processed by the second defendant in the course of his employment as the manager of the ILP branch in Midleton. If this state of affairs were to be established at the full hearing, could it be really said that the present case is so different in principle so far as vicarious liability is concerned than, say, the case of the fraudulent clerk in *Lloyd v. Grace, Smith & Co*.?

42. For my part, I greatly doubt that it could. At all events, it is plain that, putting the matter no lower, the plaintiffs have raised a significant issue in respect of the vicarious liability claim and it would not be at all appropriate to strike out the claim against ILP at this juncture pending the determination of the full hearing.

The claim for rescission
43. There remains the claim whereby the plaintiffs seek the rescission of the ILP loan agreement. In its application for the summary dismissal of that claim, ILP points to the fact that the plaintiffs accepted the loan offer of some €1.32m. in May, 2008 and availed themselves of those funds. There is the further point that these proceedings were commenced only in March 2012, almost four years after the alleged conspiracy of which the plaintiffs complain. Indeed, the claim for rescission appears first in the statement of claim which was delivered in June, 2012.

44. The remedy of rescission is, of course, an equitable remedy which can be defeated by undue delay or by change of circumstances. At first blush the plaintiffs have delayed unduly before seeking this relief. This is especially so given that these delays have remained unexplained. The plaintiffs, moreover, continue to have the benefit of a contract which they now seek to have either set aside or at least varied in some fashion and to that extent they may be said to have approved of - and taken the benefits from - the existence of a contract which they now seek to have set aside.

45. In such circumstances I am not unsympathetic to the application of the defendants to have the proceedings struck out on these grounds. It would generally be almost unthinkable to have a contract set aside after such a lapse of time. Yet I am also conscious of the fact the plaintiffs' claim is in deceit. If that claim were to succeed, then, by analogy with a claim in fraud, it might be said that the tort of deceit would, to borrow celebrated words of Denning L.J. in *Lazarus Estates Ltd. v. Beasley* [1956]1 Q.B. 702, 713, unravel everything.

46. One must also be conscious of the fact that one of the grounds for rescission is that of equitable fraud. This is somewhat different from fraud in the sense of the moral turpitude essential for the tort of deceit and it imposes perhaps a slightly less onerous obligation on a plaintiff in terms of proof. Equitable fraud in this sense means no more than conduct which "having regard to some special relationship between the two parties concerned is an unconscionable thing for the one to do to the other": see *Kitchen v. RAF Association* [1958] 1 W.L.R. 563, 573, per Lord Evershed M.R.

47. It is accordingly possible that the plaintiffs will be able to establish equitable fraud in this sense, even if the claim in deceit were to fail. This might be especially so if it were to be established that the true object of the loan application to ILP was really to benefit the other defendants by extricating them from their contractual arrangements and that these defendants had failed to disclose this fact. In these special circumstances it would not seem appropriate to strike out the claim for rescission.

Conclusions

48. In conclusions, therefore, since I have concluded that the claims in deceit and conspiracy cannot at this juncture be said to be unsustainable, I will accordingly refuse ILP's application for the summary dismissal of these claims. In view, moreover, of the analysis of the issue of vicarious liability contained in the judgment of Fennelly J. in *O'Keeffe v. Hickey*, it cannot be said that ILP could not be made vicariously liable for the torts committed by the second and third defendants, assuming, of course, that such were to be established at the trial of the action.

49. While the claim for rescission would seem to be *prima facie* barred by lapse of time and acquiescence on the part of the plaintiffs, all of this might change were the plaintiffs to establish equitable fraud on the part of the second, third and (more doubtfully) the fourth defendant. It is for this special reason that I will refuse to strike out the claim in rescission.

50. For all of these reasons, therefore, I will refuse to strike out the plaintiffs' claims in the manner sought by the first, second and third defendants.