Neutral Citation Number: [2009] IEHC 207

THE HIGH COURT

2008 8540 P

BETWEEN

SALTHILL PROPERTIES LIMITED AND BRIAN CUNNINGHAM

PLAINTIFFS

AND

ROYAL BANK OF SCOTLAND PLC, FIRST ACTIVE PLC, AND BERNARD DUFFY

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 30th April, 2009

1. Introduction

1.1 This is a further set of proceedings arising out of the long running dispute between companies associated with the second named plaintiff ("Mr. Cunningham") ("the Cunningham Group") and its bankers. There has already been a trial ("the main trial") of many issues arising between those parties generally, which is the subject of a judgment in *Moorview Developments Limited & Ors v. First Active Plc & Ors* (Unreported, High Court, Clarke J., 6th March, 2009) ("the main judgment"). The background to the relationship between the parties generally and the issues which arose subsequent to the appointment of a Mr. Ray Jackson as receiver over significant assets of the Cunningham Group are fully set out in that judgment, and it is unnecessary to repeat them here.

1.2 As appears from the main judgment, one of the sets of issues which arose between the parties at the main trial concerned the sale by the second named defendant ("First Active") to the third named defendant ("Mr. Duffy") of a significant development property at Salthill in Galway which was owned by the first named plaintiffs ("Salthill"). First Active gave effect to that sale in its capacity as mortgagee in possession. However, for reasons which are gone into fully in the main judgment, the sale of the property concerned was ultimately divided into two separate transactions being in relation to, respectively, the residential and commercial portions of the property concerned. For reasons which are again set out in the main judgment, the sale of the commercial portion of the property was delayed by reason of the existence of various court proceedings some of which were before the court in the main trial while the sale of the residential portion completed in 2005.

1.3 In that context it is said that negotiations took place between Mr. Duffy and the first and second named defendants ("the Banks"), which involved a variation in the agreement previously reached for the sale of the Salthill development to Mr. Duffy, together with the provision of funding by the banks in favour of Mr. Duffy. While it is accepted that First Active was involved in such negotiations, it is denied by the first named defendant ("RBS") that it was directly involved. RBS is the ultimate parent company of First Active. In any event, in relation to those arrangements, it is said that the Banks have acted wrongfully by entering into an agreement which led to the Banks, in their capacity as lenders, making a secret profit out of a transaction, where, in the capacity as vendor as mortgagee in possession, a duty is said to have been owed to Salthill and Mr. Cunningham to achieve the best price. That allegation forms the backdrop to these proceedings.

1.4 In circumstances which it will be necessary to analyse in a little more detail, the Cunningham Group, in the context of the previous proceedings to which I have already referred, sought on a number of occasions to amend its proceedings for the purposes of including a claim in relation to an alleged secret profit arising out of the series of transactions to which I have referred and to earlier financing arrangements which were said to have given rise to a similar secret profit. For reasons set out in a judgment of 20th May, 2008, ("the May amendment ruling") *Moorview Developments Ltd & Ors v. First Active Plc & Ors* [2008] IEHC 211, I declined to allow an amendment relating to the earlier arrangements save in respect of one aspect of same to which I will refer in due course. Again in a judgement of the 31st July, 2008, ("the July amendment ruling") *Moorview Developments Ltd & Ors v. First Active Plc & Ors* [2008] IEHC 274, I declined to allow an amendment in relation to the transactions the subject matter of these proceedings. Thereafter, these separate proceedings were commenced.

1.5 The Banks have brought this application in which they seek to have the proceedings dismissed under either O.19, r.28 of the Rules of the Superior Courts ("Order 19") or the inherent jurisdiction of the court as first identified in *Barry v. Buckley* [1981] I.R. 3006. This judgment is directed to those issues. I propose turning to the facts in a little more detail before going on to consider the specific issues which arise.

2. Facts

2.1 These proceedings arise out of a refinancing agreement entered into on the 22nd April, 2008, between First Active and Mr. Duffy. In May, 2008 shortly after the main trial opening, the Cunningham Group applied for leave to amend so as to add a claim, arising out of documents disclosed by First Active, to the effect that First Active had, it was said, agreed to accept a secret profit in respect of the sale of Bailey Point. However, that application related to an allegation arising out of the original arrangement for the purchase of Bailey Point in 2005. In any event I allowed part of the Cunningham Group's application (in relation to an allegation of secret profit on a part of the site known as the "back site") but refused to allow the Cunningham Group to advance a claim in respect of the residential element of the sale and the balance (other than the "back site") of the commercial element. The decision in respect of the part of the application refused is currently under appeal to the Supreme Court.

2.2 In the course of the application in May, 2008, First Active voluntarily disclosed a facility letter dated the 22nd April, 2008, which provided that First Active was to take a profit share on the residential element of the development as an arrangement fee. This document referred to a supplemental sale agreement which was not disclosed to the Cunningham

Group at that time. I should say that no blame seems to me to attach to First Active for not disclosing the document concerned at that stage. Counsel for First Active stated that the facility of 22nd April, 2008, was a refinancing of the unsold potion of the residential element of the Bailey Point which had previously been financed by First Active and then refinanced by a third party bank. I ruled that, in those circumstances, the supplemental sale agreement was not relevant to the secret profit issue then sought to be raised which, of course, related to the 2005 arrangements.

2.3 In June, 2008 the Cunningham Group made what is said to have been a chance discovery of a bank internal memorandum dated 15th April, 2008. First Active originally claimed privilege over this document but it has now been disclosed as an exhibit to an affidavit of Connor McDonnell grounding this application, sworn on the 23rd December, 2008, thus waiving privilege. That memorandum led the Cunningham Group to request a copy of the supplemental sale agreement and this was provided to them on 6th June, 2008. Based on this document, the Cunningham Group made a further application for leave to amend. I declined to allow such an amendment in the July amendment ruling. In refusing that application I indicated that if the Cunningham Group wished to make such a claim it could only be in separate proceedings

2.4 The Cunningham Group argue that the refinancing agreement of the 22nd April, 2008, was not merely a refinancing agreement but included a change to the terms of the sale of the commercial units in favour of Mr. Duffy and First Active, which is said to be to the disadvantage of Salthill. In those circumstances it is said that the Banks agreed to take a secret profit as follows:-

> (i) First Active would take a share in Mr. Duffy's profits on the as yet unsold residential portion of the Bailey Point by way of an arrangement fee on a new facility dated the 22nd April, 2008, (it is said that it was not intended that any such fee would be used to reduce Salthill's indebtedness);
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> (ii) In return for this, amongst other things, it is said that First Active agreed to repay Mr. Duffy's deposit on the commercial units of the Bailey Point to him; and
>
> (iii) That First Active would take a share in the profits on the sale of the commercial units of the Bailey Point without accounting to Salthill for same.

3. Legal Principles

3.1 The Banks' motion is based alternatively on Order 19 or on the inherent jurisdiction of the court. It is well established that a court may dismiss *in limine* proceedings which constitute an abuse of the process of the court. In the leading case on the matter, *Barry v. Buckley,* Costello J., at p. 308 of his decision, stated:-

> "…the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see Wylie's Judicature Acts (1906) at pp. 34-37 and The Supreme Court Practice (1979) at para. 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley L.J. in *Goodson v. Grierson* at p. 765. This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice"

3.2 The Banks submit that this is a "clear case" where the intervention of the court at this stage of the proceedings is necessary in order to avoid further injustice to them. The Banks further submit that these proceedings come under the principle of interest *reipublicae ut sit finis litium*, the public interest requires finality in law suits. In *Bula v. Crowley (No.4)* [2003] 2 I.R. 430, Denham J., applying this principle stated as follows, at p. 464, of her decision:-

> "It is clear that the application was in essence a second application for a stay, which had already been refused by the High Court and from which there had been no appeal to the Supreme Court. It was an attempt to set up the same case again. I am satisfied that it was in fact inappropriate to apply to the court for this order. The *dictum* of Lord Halsbury L.C. in *Reichel v. MacGrath* [1889] 14 App. Cas. 665 was referred to by counsel. That *dictum* was cited with approval by Keane J. in *Belton v. Carlow County Council* [1997] 1 I.R. 172 at p. 182 and by this court in *McCauley v. McDermott* [1997] 2 I.L.R.M. 486 at p. 497. The *dictum* was:-
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> > 'I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.'
>
> I adopt and apply this law."

It does not seem to me, however, that this line of authority puts the matter any further than the "dismiss as being bound to fail" jurisprudence. If a case sought to be made is bound to fail because it has, in substance if not in form, already been decided, then it will be dismissed. If it is truly a new case then it will, subject to the point addressed in the next paragraph, not be dismissed.

3.3 The rule in *Henderson v. Henderson* (1843) 3 Hare 100, also operates to preclude a party from raising a matter in litigation which might have been brought forward in earlier litigation but was not. The Banks argue that Salthill and Mr. Cunningham are seeking to re-litigate issues which have previously been determined against them, and / or which were omitted from previous litigation, and which, in one case, are the subject of an appeal to the Supreme Court. The Banks point to the fact that this Court has previously dismissed the secret profit claim at the end of the plaintiffs' evidence in the main trial, due to the absence of a *prima facie* case. In the judgment of 6th March, 2009, dismissing the plaintiffs' claim in the main trial, I stated, at p.160 of that decision, that:-

> "There is, therefore, no evidence that First Active, when actually selling as mortgagee in possession, received any sum by way of uplift in the form of an arrangement fee for its own benefit and in such a manner that the relevant uplift would not have accrued to reduce the Cunningham Group's liabilities. The factual basis for a claim under this heading does not, therefore, arise on the evidence and for those reason I was satisfied that First Active was

entitled to a non-suit."

3.4 Salthill and Mr. Cunningham argue that an application to strike out proceedings pursuant to Order 19, or on foot of the inherent jurisdiction of the court, looks solely to the pleadings and does not rely on affidavit evidence and that in such an application a court should proceed on the basis that any statement of fact contained in the pleading sought to be struck out is true and can be proved by the party concerned. It was further submitted that a court must show some restraint in strike out proceedings, and should only make such an order in clear cases where there is no dispute as to the relevant facts. Reliance was placed on the following statement of McCarthy J. in *Sun Fat Chan v. Osseous* [1992] 1 I.R. 425, at p. 428 to the effect that:-

> "Experience has shown that the trial of an action will identify a variety of circumstance perhaps not entirely contemplated at earlier stages in the proceedings: often times it may appear that the facts are clear and established but the trial itself will disclose a different picture."

3.5 Salthill and Mr. Cunningham further submitted that the jurisdiction should not be exercised when there is a dispute between the parties as to the facts. Reliance is placed in that regard on the statement of Keane J., refusing an application to strike out, in *Lac Minerals v. Chevron Corporation* (Unreported, High Court, Keane J., 6th August, 1993) at para.14.12:-

> "It appears to me that, in these circumstances, it is not possible to say with the degree of confidence which the authorities suggest should be present in the mind of the Judge when deciding an application of this nature that, no matter what may emerge on discovery or at the trial of the action, the inconsistency will be resolved only in a manner which will be fatal to the plaintiff's contentions."

3.6 It should also be noted that, in *Ruby Property Co Ltd v. Kilty* (Unreported, High Court, McCracken J., 1st December, 1999), McCracken J. stated at p. 26 of his judgment that "it is quite clear that the court can only exercise the inherent jurisdiction to strike out proceedings where there is no possibility of success."

3.7 Salthill and Mr. Cunningham further argue that the court cannot treat a dismiss application in the same manner as a non-suit application. As no defence has been served and no discovery has taken place, it was submitted that the court cannot consider whether or not the plaintiffs have made out a *prima facie* case.

3.8 It is clear, therefore, that while a jurisdiction to dismiss proceedings on the basis that they are bound to fail does exist, it is a jurisdiction to be sparingly exercised and only in clear cases. It does, of course, follow that among the bases that can be put forward for suggesting that proceedings are bound to fail, is a contention that the issue sought to be litigated has already been determined by a court of competent jurisdiction so that the case is bound to fail in that a plea of *res judicata* or issue estopple is bound to succeed. To the extent, therefore, that the Banks seek to place reliance on previous rulings in the *Moorview* proceedings, it is necessary to assess whether those rulings involve findings which are fatal to the current proceedings. Likewise to the extent that the Banks place reliance on the rule in *Henderson v. Henderson*, it follows that it is necessary for the court to consider whether the relevant plea could and should have been maintained in the previous proceedings, and in so doing to have due regard to the comments of Hardiman J. in *A. v. the Medical Council* [2003] IESC 70, to the effect that the rule in *Henderson v. Henderson* is not an inflexible rule, but must always admit of a general consideration of whether it would be appropriate, in all the circumstances, to allow the party concerned to seek to litigate a point which might have previously been litigated in other proceedings.

3.9 So far as the general question of whether proceedings are, on their merits, bound to fail it seems to me that it is necessary to address the question which arose for debate between the parties as to the approach which the court should take to the evidence as presented on an application to dismiss such as that with which I am involved. It has often been noted that an application to dismiss as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. For example, in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document concerned could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established. Likewise, a defendant in a specific performance action may be able to persuade the court that the only document put forward as being a note or memorandum to satisfy the Statute of Frauds, could not possibly meet the established criteria for such a document. More difficult issues are likely to arise in an application to dismiss when there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence. At this end of the spectrum, it is difficult to envisage circumstances where an application to dismiss as bound to fail could succeed. In between are a range of cases which may be supported to a greater or lesser extent by documentation.

3.10 However, it is important to emphasise the different role which documents may play in proceedings. In cases, such as the examples which I have given earlier, involving contracts and the like, the document itself may govern the legal relations between the parties so that the court can consider the terms of the document on its face and may be able to come to a clear view as to the legal consequences flowing from the parties having governed their relations by the document concerned.

3.11 However, there are other cases where documents are not vital in themselves save that they may cast light on the underlying facts which may be at the heart of the proceedings concerned. Correspondence, minutes of meetings, memoranda and the like, do not, of themselves, create legal relations between the parties. Rather they purport to reflect facts such as what was said at meetings, what was communicated from one party to another or the like. Parties may explain or seek to clarify what might otherwise appear to be the natural meaning of such documents. At the end of the day, it will be what view the court takes as to what actually happened that will determine the facts on the basis of which the court will come to its judgment. Contemporary documentation is often a very valuable guide to such facts, but such documentation is not necessarily determinative. It is important, in that context, not to confuse cases which are dependent on documents themselves with cases where documents may be a guide, albeit often a most important guide, to the underlying facts which need to be determined in order to resolve the issues between the parties.

3.12 It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel for Salthill and Mr. Cunningham, to the effect that the court cannot engage in

some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court. A simple example will suffice. A plaintiff may assert that it entered into a contract with the defendant which contained certain express terms. On examining the document the terms may not be found, or may not be found in the form pleaded. On an application to dismiss as being bound to fail, there is nothing to prevent the defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the plaintiff has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim.

3.13 However, it seems to me that counsel for Salthill and Mr. Cunningham is correct when he says that the court need not and should not require a plaintiff to be in a position to show a *prima facie* case at the stage of an application to dismiss, in order that that application should fail. There have been many cases where the crucial evidence which allowed a plaintiff to succeed only emerged in the course of the proceedings. At the level of principle, this is likely to be particularly so in cases alleging fraud or other similar wrongdoing which is likely to be clandestine, if present, and where a plaintiff may only be able to come across admissible evidence sufficient to prove his case by virtue of the use of procedural devices such as discovery and interrogatories. That is not to say that it is legitimate for a party to instigate such proceedings when the party concerned has no basis for so doing. However there is, in my view, a significant difference between circumstances where a plaintiff has a legitimate basis for considering that it may have a claim at the time of commencing proceedings, on the one hand, and a situation where that party has, at that time, available to it, admissible evidence which it can put before the court to establish a *prima facie* claim, on the other hand.

3.14 It is clear from all of the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put forward, at that time, a *prima facie* case to the contrary effect.

3.15 To the extent, therefore, that the Banks' application is not based on matters having been allegedly previously determined, or being caught by the rule in Henderson v. Henderson, it seems to me that I should assess the factual allegations put forward on behalf of Salthill and Mr. Cunningham, not on the basis of whether those parties have shown that they have evidence which, if accepted, would lead, arguably, to success in the proceedings but rather whether the Banks have established that it is impossible that any such evidence will be produced at trial.

3.16 In the light of those general principles, I propose to consider each of the separate areas of the case in turn.

4. Profit Share on the Residential Portions

4.1 Salthill submits that, properly construed, there were two profit shares involved in the agreement of 22nd April, 2008. The first is said to be the profit share on the residential portions and the second being that on the commercial units. Salthill claims that the profit share on the residential units, which was to be taken as an arrangement fee, was to be retained by the Banks and not accounted for to Salthill. Salthill argues that the negotiation of a profit share as an arrangement fee is improper if the facility is negotiated at the same time as the price, particularly where the result of the re-negotiation is favourable to the buyer/borrower and unfavourable to the vendor/lender.

4.2 It needs to be noted that, by the time the refinancing of April, 2008 was put in place, some, but not all, of the residential portion had been completed and sold on to third parties. The refinancing related to the unsold portion. However, there was no re-negotiation of the terms of sale of the residential portion. It will be recalled that the sale of the residential portion had completed in 2005. Against that background, and in order to connect the sale terms of the residential portion (which was not re-negotiated) with the sale terms of the commercial portion (which was) Salthill and Mr. Cunningham claim that the price of the commercial units of the Bailey Point included because of, in effect, transfer pricing, part of the price of the residential units. On that basis it is said that the negotiations which led to the 2008 refinancing agreement amounted, in substance, to a re-negotiation of the price of the residential units because of the alleged connection between the two prices. In that context mention is made of an alleged stamp duty fraud as being the basis for the asserted transfer pricing. Such a claim was put forward by the Cunningham Group in the main trial, and the Banks assert that Salthill and Mr. Cunningham are not entitled to make such an allegation in these proceedings in light of the judgment of the 6th March, 2009, where at p. 163, I stated, in relation to the stamp duty fraud claim, that:-

> "I would wish to emphasise that I am not in any way satisfied that a claim had been made out on the evidence for this claim in any event. I say this in fairness to First Active."

The Banks submitted that any claim of stamp duty fraud cannot properly be pursued by the plaintiffs in the light of this finding, as such a claim is either *res judicata* or is barred by the rule in Henderson v. Henderson, and hence is an abuse of process in the wider sense.

4.3 Salthill and Mr. Cunningham referred to my judgment in *Moorview Developments v First Active and Others* [2008] IEHC 211, where I stated at para. 3.12:-

> "There can be little doubt but that if it were to occur that a bank or receiver were to arrange things so that what ought properly be part of the proceeds of sale of mortgaged property came into their hands in a way that did not allow the proceeds concerned to be credited to the mortgagor, then same would amount to the making of a secret profit. I did not understand counsel for any of the defendants to dispute that if a mortgagee, a receiver, or a purchaser were to enter into arrangements which knowingly involved part of the payment for a property which was being sold on behalf of a mortgagor to fall into the hands of either the mortgagee or a receiver in a way in which the mortgagor was not given credit for that part of the proceeds, then such an arrangement would be unlawful. The issue is, however, as to whether there is any evidence that such an arrangement was, in fact, what was contemplated in this case."

4.4 The Banks submit that there was no intention on the part of First Active to obtain a secret profit and further assert that there is not any evidence supporting such a claim. The Banks further submit that this is an issue which has already

been determined in First Active's favour in the main trial and accordingly, that it is an abuse of process for Salthill to seek to raise the issue again in these proceedings. In the May amendment ruling, I declined to give Salthill leave to amend the main proceedings so as to make a claim of secret profit in respect of the residential portion of the Bailey Point. On the following day, counsel for the Cunningham Group sought to revisit the issue, relying, *inter alia*, on the facility letter of 22nd April, 2008, contending that the facility letter referred to a profit share on the non-residential section of the development. In rejecting the plaintiffs' arguments in this regard I stated as follows:-

> "…It does not seem to me that the documentation, even including those additional documents, could reasonably be said to bear the interpretation that it was ever intended that the banks would make a secret profit out of the residential portion of the Development."

4.5 The Banks submit that the above is a binding determination and that it would be an abuse of process to seek to revisit same in these proceedings. Salthill argue that, as the allegations concerned are factual allegations, the court is required in considering the application of Order 19 to assume that Salthill's case is factually correct. Salthill also argue that it is not necessary to prove a *prima facie* case at this point.

4.6 The Banks principal contention under this heading is that the issue sought to be raised has already been determined. It is important in that context to distinguish between two different stages of the negotiation of arrangements between the Banks (or on one view and certainly in respect of the earlier stage First Active), on the one hand and Mr. Duffy on the other hand. The original arrangements between those parties were put in place in 2005 and, indeed, built on the previous arrangements negotiated (but not incorporated into binding contractual agreements) between Mr. Jackson, as receiver, and Mr. Duffy.

4.7 My specific ruling to the effect that a secret profit allegation in respect of the residential portion of the Bailey Point site could not be included by amendment did indeed, as the Banks argue, follow on from a finding that there was no evidence to that effect. Two points need to be made in respect of that finding, however.

4.8 Firstly, it is important to note that, at the time in question (that is to say when the application for the amendment concerned was moved), the main trial had already been opened and, perhaps of more importance, the Cunningham Group had had full disclosure, in the form of discovery, of all documents which seemed relevant to the case. A court, at a stage such as that, is in a much better position to form a judgment on whether proceedings are bound to fail insofar as factual issues are concerned, than a court will be at an early stage in the proceedings when the factual allegations between the parties are likely to be confined to the pleadings and brief accounts in grounding and replying affidavits filed in respect of a motion to dismiss on foot of the inherent jurisdiction of the court. This is so particularly where, as here, the main trial is conducted on the basis of applying the Rules of the Commercial Court, so that not only will all documentary evidence be disclosed prior to the hearing (save in very unusual cases) but also all, or virtually all (again save in unusual cases) of the oral evidence likely to be tendered will be available in the form of witness statements. In such circumstances the court is entitled to have significant regard to the unlikelihood of any new facts or evidence "emerging" in the course of the trial. It follows that it will, necessarily, be easier for the court to reach a conclusion that a factual assertion has no chance of being established at a stage such as had been reached when the ruling to which I have referred was given, as compared with the situation in which a court finds itself being asked, at an early stage of proceedings, to dismiss on the basis of the case concerned being bound to fail. Thus a court, in assessing whether a case sought to be included by amendment during the course of a trial, is in a better position to conclude that the relevant issue sought to be raised by the amendment concerned is bound to fail and thus refuse the amendment.

4.9 Secondly, there is no doubt but that the application with which I was specifically concerned in the May amendment ruling, related to the original arrangements entered into between First Active and Mr. Duffy. What is now sought to be challenged are arrangements in respect of the residential portion, which flow from a refinancing of Mr. Duffy's position conducted in 2008. It seems clear that Mr. Duffy had, in the intervening period at least for some time, obtained his finance in respect of the residential portion from sources unconnected with the Banks.

4.10 It is also important to note that it is difficult to envisage circumstances where a financial institution which has previously sold a property as mortgagee in possession could ever be said to have secured a secret profit on offering finance to the purchaser at a significant remove from the original purchase from that financial institution. There is, in an ordinary case, no connection between the terms on which such a refinancing might be offered and the original sale price such as could, possibly, give rise to an inference that profits to be derived by the financial institution in its own right from the refinancing, could have been interlinked in any way with the original sale price (which would, of course, inure to the benefit of the mortgagor). However, here it is argued by Salthill and Mr. Cunningham that the arrangements entered into in April, 2008 not only involved a refinancing of Mr. Cunningham's' borrowings, but also involved a re-negotiation of the terms of the underlying commercial agreement. 4.11 This latter situation seems to have derived from the fact that Mr. Duffy made complaint to First Active concerning the fact that the main proceedings had interfered, to a very significant extent, with his ability to deal with both the unsold residential and commercial portions of the Bailey Point development. Even though Mr. Duffy had purchased the residential portion at a time when there were no proceedings in being which could have affected his title to that portion, amendments brought about in the original proceedings on the application of the Cunningham Group led to a situation where doubt was cast on Mr. Duffy's title. It followed that Mr. Duffy was unable to market such of the residential units as remained unsold as of the time of the amendments concerned. On that basis, Mr. Duffy complained that, as a result of matters entirely outside of his control and resulting from proceedings brought by the Cunningham Group against First Active in which it was alleged that First Active had acted fraudulently, Mr. Duffy's ability to deal commercially with the assets which he had purchased from First Active had been significantly affected.

4.12 Against that background it is hardly surprising that Mr. Duffy sought some form of leeway or recompense from First Active. It would appear, on the information currently available, that the re-negotiation which culminated in the April, 2008 agreements stemmed from an attempt on the part of First Active to deal with complaints of the type which I have outlined, which were being made on behalf of Mr. Duffy.

4.13 On that basis, Salthill and Mr. Cunningham argue, correctly so far as it goes, that what is now sought to be challenged is a different alleged secret profit from that on which I ruled in May, 2008. It is also argued, again correctly so far as it goes, that there is, at least arguably, a connection between the re-negotiated terms for the purchase of all of the properties in 2008 and, the loan arrangements entered into at that time.

4.14 On that basis it seem to me that I could not conclude that this aspect of the proceedings were bound to fail, based

solely on the May amendment ruling. There remains the question of whether the subsequent July amendment ruling, which involved an attempt to raise specific claims in relation to an allegation of secret profit deriving out of the 2008 arrangements, binds these proceedings. For reasons which it will be necessary to address briefly that application failed. However, as that application related also to the commercial units, I propose to deal with it in the context of considering that aspect of these proceedings.

4.15 I should also deal with the dispute which arose between the parties concerning the so called alleged stamp duty fraud. It is important to emphasise what happened at the main trial in that regard. Reference was made by counsel for the Cunningham Group to such an allegation in opening. Counsel for Mr. Duffy objected to that aspect of the opening on the basis that the claim had not been pleaded. For reasons which I have set out in the main judgment, the defendants and I all proceeded on the basis that no specific claim in respect of stamp duty fraud was being proceeded with. In any event it is correct to state that no claim based on stamp duty fraud had been made in the pleadings. On that basis, I indicated in the main judgment that there was no basis for making any findings in favour of the Cunningham Group on the basis of the allegation of stamp duty fraud, same not having been pleaded, but also indicated, in fairness to First Active, that I was not satisfied that there was any sufficient evidence to support such an allegation in any event.

4.16 I do not understand Salthill or Mr. Cunningham to seek to raise a claim in respect of a stamp duty fraud as such in these proceedings. Rather it is said that the allocation of the consideration to be applied, on the one hand, to the residential portion and, on the other hand, to the commercial portion of Bailey Point, did not reflect the true commercial value of those two portions as and between each other, so that there was a form of transfer pricing between same. On that basis it is said that there is a connection between the two purchase prices so that, in truth, some of the price for the residential portion can be said to have been truly incorporated in the price being paid for the commercial portion. The reason why this may be important to the case which Salthill and Mr. Cunningham seek to make, is that in the absence of any change in the price obtained for the residential portion arising out the revised arrangements entered into between the parties in April, 2008, it is difficult to see how any allegation concerning the making of a secret profit in relation to the residential portion could be sustained irregardless of any of the other points raised. In other words, if the price for the residential portion was fixed in 2005 and not subsequently varied, then it is hard to see how any financing arrangements entered into in 2008 could have affected that price in such a way as to suggest that a secret profit had been made. It follows that it is necessary for Salthill and Mr. Cunningham to establish that there was an indirect change in the price of the residential portion of Bailey Point negotiated in 2008, in order for there to be a sustainable case under this heading.

4.17 The way in which it is said that there was such a change is by suggesting, as is done at para. 38 of the written submissions filed on behalf of Salthill and Mr. Cunningham, that:-

> "First Active and Mr. Duffy agreed, for whatever reason, to understate the price of the residential and overstate that of the commercial means that the sales cannot be regarded as two separate transactions, even when one has been completed and the other has not."

4.18 In relation to this aspect of the case, the first question which I need to address is as to whether it is now open to Salthill and Mr. Cunningham to allege transfer pricing. Firstly, I am not satisfied that this matter comes within the doctrine of *res judicata*. The issue of stamp duty fraud was not properly before the court in the main trial. Secondly, the indication which I gave "in fairness to First Active" was that there was no evidence of a stamp duty fraud. There did not seem to me to be any evidence which could remotely go towards establishing that the division of the price as and between the residential and commercial units was motivated by any improper design on the part of First Active (or indeed Mr. Duffy) concerning stamp duty.

4.19 Neither am I satisfied that the rule in *Henderson v. Henderson* applies. Salthill and First Active attempted to maintain a claim in respect of the 2008 transaction, but were not permitted to make an amendment to allow such a claim to be brought in the main trial. The claim now sought to be brought arises, in the main, out of events which occurred just as the main trial was about to begin. It does not seem to me that, in those circumstances, it could reasonably be concluded that the Cunningham Group "ought" to have brought the secret profit claim arising out of the 2008 transactions in the main trial. In any event the Cunningham Group attempted so to do, but their attempted amendment application failed.

4.20 I am not, therefore, satisfied that there is any reason in principle why Salthill and First Active could not attempt to establish, to the extent that it was relevant, as a matter of fact that the price of the respective units did not reflect a true commercial balance between the two portions of the property. If that were to be established (and the motivation would not necessarily be of any great relevance in that regard), then it is at least arguable that it might not be possible to view the two transactions as entirely separate transactions. It seems to me that this issue, standing alone, could not preclude Salthill and Mr. Cunningham from pursuing its claim in respect of the alleged secret profit in relation to the residential portion.

4.21 It follows that, subject to the question to which I have referred, as to the issues concerning a secret profit arising out of the residential portion being governed by the July amendment ruling and connected issues relating to the facts addressed in that ruling, I am not satisfied that the claim in respect of the residential portion is bound to fail. Those questions apply equally to the commercial portion to which I now turn.

5. Secret Profit on Sale of Commercial Units

5.1 Under this heading it is alleged that the Banks intended to take a share in the profits of the sale of the commercial units and the car park. Salthill and Mr. Cunningham claim that the Banks and Mr. Duffy intended that this profit would be retained by the Banks and not accounted for to Salthill. The claim formed the basis of the unsuccessful amendment application (to which I have referred) refused in the July amendment ruling.

5.2 In the July amendment ruling, I noted that there was nothing in the documentation then before me which could give rise to an inference of secret profit. Having reviewed additional factors which, it was asserted, could give rise to such an inference, I concluded, at para. 7.9 of the decision as follows:-

> "On the basis of the evidence currently available I could not, therefore, conclude that the Cunningham Group's case on this issue sought to be raised by the proposed amendment could have any chance of success."

5.3 The Banks submit that, accordingly, there has been a determination by this Court to the effect that the plaintiffs' claim is one which, on the basis of the evidence currently available, does not have any chance of success. However, a court, in considering whether a claim discloses a reasonable cause of action or is bound to fail, should have regard to the possibility of additional evidence emerging in the event that discovery is directed. On the other hand it is well established that a party is not entitled to discovery for the purposes of establishing a cause of action through a "fishing exercise".

5.4 In *Carlow Kilkenny Radio Ltd v. Broadcasting Commission of Ireland* [2003] 3 I.R. 528, the Supreme Court approved the following statement of Bingham M.R. in *R v. Secretary of State for Health, ex parte Hackney Borough* (Unreported, English Court of Appeal, 24th July, 1994):-

> "In the ordinary *inter partes* civil action the plaintiff usually makes a series of factual averments which may well be challenged, but which are not usually sufficiently plausible to raise issues calling for discovery. It is not open to a plaintiff in a civil action, or to an application for judicial review, to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertions that the applicant, or the plaintiff, is otherwise unable to begin to substantiate. This is the proscribed activity usually described as 'fishing': the lowering of a line into the other sides waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect."

5.5 The Banks submit that there is no suggestion in any of the authorities that, in considering whether issues might arise on discovery which might affect the exercise of the strike-out jurisdiction, the court should have regard to anything other than normal discovery rules. The Banks further submit that there is no evidence which could emerge on discovery in this case, given that First Active already voluntarily disclosed any relevant transaction documents in the main trial, which included disclosure, it is said, of documentation in the possession or power of RBS. I have already upheld a claim for privilege made by First Active in respect of documentation relating to the negotiations between the parties, see *Moorview Developments Ltd & Ors v. First Active Plc & Ors* [2008] IEHC 274. In reply Salthill and Mr. Cunningham submit that the case is not a mere assertion on the pleadings and it follows from this that discovery would not be a "fishing exercise".

5.6 I should also note certain legal issues which, on the basis of the argument on this application, might arise in these proceedings if they go to trial. Salthill and Mr. Cunningham are seeking a number of reliefs arising out of the alleged secret profit and, in particular, claim that as a consequence the sale of the Bailey Point should be set aside. The basis for the claim to set aside is that the agreement with Mr. Duffy for the sale of the property is said to be in breach of fiduciary duty which, it is said, makes the sale of the units void or voidable. Salthill and Mr. Cunningham submit that a mortgagee in possession exercising a power of sale is acting in part in his own interest in realising the security to repay his debt, but that this does not mean that such a party does not undertake some of the obligations of a fiduciary. In that regard reliance is placed on *Medforth v. Blake* [2000] Ch. 86, where the court held that a mortgagee in possession has duties in equity to the mortgagor, including a duty to act in good faith and to use his powers for proper purposes. The court went on to state, at p. 102 of the judgment, that:-

> "A want of good faith or the exercise of powers for an improper motive will always suffice to establish a breach of duty. What else may suffice will depend upon the facts."

5.7 The Banks submit that the relationship between a mortgagor and mortgagee is not a fiduciary one and that the court should have regard to judicial reluctance to impose a fiduciary relationship unless appropriate. In *McMullen v. Clancy (No.2)* [2005] 2 I.R. 445, the Supreme Court (per Fennelly J.) expressed agreement, at p. 470 of the judgment, with the observations of Millett L.J. in *Bristol and West Building Society v. Mothew* [1998] Ch.1, that it was inappropriate to "fling around" the notion of fiduciary duty as if it applied to all manner of breaches of duty by solicitors, directors of companies and others. Fennelly J. went on to quote with approval, the following comments of Millett L.J.:-

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of *fiduciary obligations*. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

5.8 The Banks submit that, in the absence of a fiduciary relationship, the only remedies to which Salthill could be entitled are a monetary award or an injunction. The Banks further submit that, in circumstances where there is, as of now, no profit and where First Active has already indicated that any profit will be for the benefit of Salthill, there is no remedy to which the plaintiffs could be entitled at this time arising out of the matters complained of.

5.9 In reply Salthill and Mr. Cunningham argue that even if a mortgagee does not owe a mortgagor any duties of a fiduciary, a mortgagor is, nevertheless, entitled to have the sale set aside if the mortgagee has conducted itself improperly, placing reliance on *Corbett v. Halifax Building Society* [2003] 1 W.L.R. 964.

5.10 I should firstly indicate that it does not seem to me to be appropriate to resolve the legal issues which I have noted in an application such as this. The precise extent to which it may be open to a plaintiff, who successfully establishes a secret profit on the part of a mortgagee in possession arising out of a sale by that mortgagee in possession, to have the sale concerned set aside is a complex legal question which would require detailed consideration. I am not, therefore, for the purposes of this application, prepared to hold that, in the event that Salthill and Mr. Cunningham were to establish the facts of a secret profit, Salthill and Mr. Cunningham might not be able to obtain some form of relief which would have the effect of rendering void the sale in question (at least insofar as such an order did not affect the entitlements of *bona fide* purchasers for value without notice).

5.11 It is, therefore, necessary to turn to the argument based on the refusal of the July application for an amendment. As pointed out that application was concerned with the very transaction which is now the subject of these proceedings. It follows that, as a matter of fact, I did refuse the Cunningham Group, in the main trial, leave to amend so as to include the claim which is now sought to be brought. In that context it is important to analyse the precise basis on which leave to amend was then refused.

5.12 It is correct to state, as the Banks now argue, that I conducted a review of the evidence then available and reached a conclusion to the effect that, on the basis of that evidence, it was not possible that the Cunningham Group could succeed in the allegation which it sought to include by amendment. However, I did go on, in the following paras., to consider the possibility that something further by way of evidence might emerge in the course of discovery. However, it is clear that I came to the view that it would be inappropriate to allow the Cunningham Group to embark on such an exercise, having regard to the fact that the proceedings were then well advanced.

5.13 In substance, it does not seem to me, therefore, to be correct to characterise the refusal of the July amendment application as being one which involved a definitive determination that the allegations sought thereby to be raised were bound to fail. Rather it is proper to characterise that decision as one which determined the following matters:-

A. On the evidence then available the proceedings could not succeed;

B. It followed that in order for the proceedings to succeed there would have to be further discovery which might, hypothetically, disclose additional evidence which would allow the proceedings to succeed; but

C. Having regard to the stage which the proceedings had then reached (they had, after all, been at hearing for three months) allowing such a course of action would not be appropriate.

5.14 It does not seem to me, therefore, that it is possible to rely on the July amendment refusal as a definitive ruling which requires these proceedings to be dismissed (whether relating to the residential or commercial portions) as being bound to fail. It is also true to state that the documents voluntarily disclosed by First Active in the context of the main proceedings, did not (at least on one view) cover the entire period up to the final conclusion of the arrangements between First Active and Mr. Duffy which are sought to be impugned in these proceedings. There is, therefore, at least the possibility that further materials might be disclosed which might affect the evidence which could be presented. Nor am I satisfied at this stage that any relevant discovery application would, necessarily, amount to a "fishing exercise". I am driven, therefore, to the conclusion that it is not appropriate to conclude that these proceedings are bound to fail as against First Active. Nothing in the course of the argument before me did, I should point out, persuade me that the documents currently available would provide an evidential basis for the claims sought to be brought. However, I do not rule out the possibility that, in the words of McCarthy J. in *Sun Fat Chan*, something might "emerge". It is important to remember that the underlying factual basis for these proceedings, while partly governed by legally binding documentation, also involves factual matters which, while evidenced by documentation, may need to be assessed on the basis of what evidence might be available at trial.

5.15 This is not a case where I could be confident that it is impossible that the evidence presented at trial might be different from what appears to be the available evidence at this stage. The case is only, therefore, in a limited sense, a documents case in the sense which I have sought to analyse at para. 3.9 above. All in all I am not, therefore, satisfied that these proceedings are bound to fail as against First Active. 5.16 I should also note that the dismissal of the secret profit claim made at the main trial (the relevant passage from the judgment is cited at para. 3.3 above) related to the 2005 arrangements and was confined to the only allegation permitted to be made as a result of the May amendment ruling, i.e. that relating to the back site. The dismissal was based on the fact that the 2005 arrangement relating to the back site never went ahead. That ruling does not, therefore, govern the 2008 arrangement at all. It is finally necessary to turn to the case as against RBS.

6. Position of RBS

6.1 In relation to the position of RBS, the Banks submitted that, if the court does not accept the Banks' principal submission that the proceedings in their entirety should be stuck out *in limine*, the proceedings should be struck out as against RBS. The Banks argue that RBS, as First Active's parent company, had no direct involvement in the negotiations which led to the agreement of the 22nd April, 2008, and that it was First Active, not RBS, which had a commercial relationship with Salthill, Mr. Cunningham and Mr. Duffy and which entered into the transactions sought to be impugned.

6.2 Salthill and Mr. Cunningham submit that the documents show that the alleged improper agreement between First Active and Mr. Duffy was negotiated by RBS with Mr. Duffy and that RBS was to receive the benefit of the profit share agreed in the supplemental agreement. Salthill and Mr. Cunningham argue that, if First Active was a fiduciary, RBS is liable for knowing assistance in its breach of trust. Salthill and Mr. Cunningham further claim that RBS conspired with First Active to cause loss to Salthill and Mr. Cunningham, the loss being the return of the deposit and / or the difference between the price realised under the supplemental agreement and that which would have been realised without the alleged secret profit sharing agreement.

6.3 I have very considerable reservations indeed about the case sought to be made as against RBS. There is no doubt but that the mortgagee in possession who sold the property was First Active. There were no legal relations between RBS and Mr. Duffy. RBS is, of course, the ultimate parent of First Active. It does seem that certain persons within the RBS organisation were involved in the process. On the basis of the evidence currently available, I cannot see any sufficient connection between RBS and the issues raised which would establish wrongdoing on the part of RBS. However, for like reasons to those which I have just sought to analyse in respect of First Active, it does not seem to me that I could safely conclude that evidence might not become available by the time of the trial of these proceedings by means of the exploitation of the various procedural remedies available to Salthill and Mr. Cunningham, which would alter that situation. It would not, therefore, seems to me to be appropriate to conclude that the factual basis of the allegations in respect of RBS as to a sufficient involvement in the process so as to give rise to legal liability, could not be made out. On that basis it does not seem to me to be appropriate to dismiss the proceedings against RBS at this stage.

7. Conclusions

7.1 For the reasons which I have sought to analyse it follows that it does not seem to me to be appropriate to dismiss

these proceedings at the current stage. It follows from that, that Salthill and Mr. Cunningham will be entitled to proceed and to take advantage, in whatever way the rules may permit, of whatever procedural measures may be open to them. It should, however, be emphasised that I remain of the view that the evidence currently available would not be sufficient to establish a *prima facie* case at trial.

7.2 It follows that, in the absence of a different picture emerging by the time that discovery has been completed and witness statements exchanged, it might very well be difficult for Salthill and Mr. Cunningham to survive an application to dismiss these proceedings on the opening. It is important to emphasise that my reason for not dismissing these proceedings at this stage is because I cannot have the necessary high level of confidence that things might not look different at that stage, sufficient so as to dismiss the proceedings now.