

**THE HIGH COURT
COMMERCIAL COURT**

2009 2180 P

BETWEEN:

PADRAIC KEANE AND BERNADETTE KEANE

PLAINTIFFS

AND

THOMAS CONSIDINE, PATRICK SWEENEY AND RONALD GREENE

DEFENDANTS

Judgment of Mr Justice John Edwards delivered on the 11th day of June, 2010

1.0 Introduction

1.1 This Court is concerned with a motion brought by the defendants to strike out, alternatively to dismiss, or to stay, the plaintiffs' proceedings as against the first and second named defendants. The relevant Notice of Motion dated the 2nd of October 2009 specifically claims:

"1. An Order pursuant to Order 19, Rule 28 of the Rules of the Superior Courts striking out the within proceedings as against the first and second named defendants, or in the alternative dismissing the plaintiffs' said action or staying all further proceedings therein on the grounds that the pleadings disclose no reasonable cause of action as against the first and second named defendants and/or the action shown by the pleadings as against the first and second named defendants is frivolous and/or vexatious.

2. An Order pursuant to the inherent jurisdiction of this Honourable Court striking out the proceedings by the plaintiffs as against the first and second named defendants, or in the alternative dismissing the said action or staying all further proceedings therein on one or more of the following grounds:

- (i) the plaintiffs' action as against the first and second named defendants is frivolous and/or vexatious;
- (ii) the plaintiffs' action as against the first and second named defendants is bound to fail;
- (iii) the plaintiffs' action as against the first and second named defendants is an abuse of the process of the Court."

2.0 The proceedings herein:

2.1 On or about 5 March 2009, the plaintiffs issued a Plenary Summons seeking a number of reliefs as against the defendants. The plaintiffs sought a number of declaratory reliefs, rectification of contracts for the sale of land dated 16 August 2003 and 1 June 2003 and grants of wayleave dated 9 September 2003 and 2 June 2005, specific performance of the rectified agreements and damages.

2.2 The first and second-named defendants entered an appearance on or about 20 March 2009 and a Statement of Claim was delivered on or about 2 April 2009.

2.3 The Statement of Claim was in the following terms:

"1. The First named plaintiff is a retired Medical Consultant, and the Second named plaintiff is the wife of the First named plaintiff, and they reside together at Oranhill, Oranmore, Galway.

2. (a) By contract for Sale, dated 16th August, 2003 (hereinafter sometimes referred to as "the First contract for Sale") made between the plaintiffs, as Vendors, of the one part, and the first and second named defendants, as Purchasers, of the other part, the plaintiffs agreed to sell and the defendants agreed to purchase from the plaintiffs ALL THAT AND THOSE part of the lands comprised in Folio 20658F County Galway measuring 0.327 hectares, or thereabouts statute measure and that part of the lands comprised in Folio 29383 County Galway measuring 2.923 hectares, or thereabouts, statute measure, as delineated on the map thereto annexed, but Reserving unto the plaintiffs, their servants, agents, licensees and successors in title FIRSTLY the right at all times with or without vehicles to pass and re-pass over and along the roadways and footpaths to be constructed on the lands sold and SECONDLY without charge, to connect and make connections to all services to be constructed on the lands thereby sold and including the free passage to and from the plaintiffs' retained lands of water, soil, gas, electricity, telephone signals, oil, heating fuel and all other services through all pipes, drains, sewers, mains, ducts, pipes, electrical and telephone apparatus, cables, wires and all other services.

(b) The purchase price specified in the First contract for Sale was €4,140,582.

(c) The First contract for Sale contained certain Options in favour of the first and second named defendants.

(d) By Special Condition 8 of the First contract for Sale it was provided that the lands in sale would be subject to the plaintiffs reserving rights to services and access for their retained lands comprising the remainder of Folio 29383 County Galway insofar as these lands may be developed and all water and soil pipes accessed by gravity flow and excluding any areas which will require pumping.

The plaintiffs will refer to the said First contract for Sale at the hearing of the action herein for greater particularity.

3. By Transfer dated 10th September, 2003 made between the plaintiffs of the one part and the first and second named defendants of the other part, for the consideration specified therein, the lands comprised in the First contract were duly transferred to the first and second named defendants.

4. By Deed of Grant of Wayleaves, dated 9th September, 2003 (hereinafter sometimes referred to as "the 2003 Grant of Way leaves") made between the defendants, Thomas Considine, Patrick Sweeney and Ronald Greene, as Grantors, of the first part, the plaintiffs, as the First Grantees, of the second part, and Biondel Limited, as the Second Grantee, of the third part, for the consideration therein the defendants granted to the plaintiffs, their heirs, executors, administrators, servants, agents, licensees, successors, nominees and assigns, for the benefit of the entire lands comprised in Folios 29383 and 20658F both of the Register, County Galway the rights specified in the First Schedule hereto.

5. By contract for Sale dated the 1st day of June 2005 (hereinafter referred to as "the Second contract for Sale") made between the plaintiffs, as Vendors, of the one part and the first and second named defendants, as Purchasers, of the other part, the plaintiffs agreed to sell to the first and second named defendants agreed to purchase from the plaintiffs ALL THAT part of the lands comprised in Folio 29383 County Galway measuring 0.2206 hectares or thereabouts as delineated on the map annexed thereto and thereon marked "B 1" and "S". The plaintiffs will, at the hearing of the Action, refer to the Second contract for greater particularity.

6. By Transfer, dated 2nd June, 2005 made between the plaintiffs, as Transferors, of the one part and the first and second named defendants, as Transferees, of the other part, the lands comprised in the Second contract were transferred to the first and second named defendants.

7. By Deed of Grant of Way leaves dated 2nd June, 2005 made between the defendants, as Grantors, of the one part and the plaintiffs, as Grantees, of the other part, for the consideration specified therein the rights and easements specified in the Second Schedule hereto, being rights similar to those specified in the First Schedule hereto, were granted to the plaintiffs for the benefit of the entire remaining lands comprised in Folio 29383 retained by the plaintiffs.

8. The defendants applied for and obtained the Planning Permissions specified in the Third Schedule hereto for the development of both the plaintiffs' lands and the defendants' lands. The Planning Permission benefiting the plaintiffs' lands is Planning Register No. 04/1973, dated 31st January, 2005.

9. In making the said Planning Applications and the grants of the said Planning Permissions show the roadways on the defendants' lands connecting up with the roadways on the plaintiffs' lands.

10. It was an implied term of the First contract for Sale and the Second contract for Sale, and the said 2003 Grant of Way leaves and the 2005 Grant of Way leaves that:

(i) The defendants would complete the construction of the roadways and footpaths and services authorised by such Planning Permissions obtained by them up to the boundary between the plaintiffs' lands and the defendants' lands (hereinafter referred to as "the Common Boundary"):

(ii) In the event of the defendants failing or neglecting to complete the construction of the said roadways, footpaths and services up to the Common Boundary, the plaintiffs should be entitled, at their own cost and expense, to enter in and upon the defendants' lands, with all necessary building equipment, men and machinery, for the purposes of connecting up the said roadways and footpaths on the defendants' lands with the roadways and footpaths on the plaintiffs' lands and the services on the defendants' lands with the services on the plaintiffs lands, causing as little damage and inconvenience as would be reasonably practicable by the exercise of such right, but making good any damage occasioned to the defendants' Land by the exercise of such right, but not being liable for any temporary inconvenience caused by the exercise of such right.

11. Insofar as the First contract for Sale and the Second contract for Sale, and the 2003 Deed of Grant of Wayleaves and the 2005 Grant of Wayleaves do not contain such provisions they do not accurately reflect the common intention of the plaintiffs and the first and second named defendants which continued up to the date of execution of the First contract for Sale and the Second contract for Sale.

12. Pursuant to the Planning Permissions specified in the Third Schedule hereto, or some of them, the defendants, or the first and second named defendants, constructed the roadways and footpaths on the defendants' lands in a manner which left a short gap between the said roadways and footpaths and the Common Boundary. The defendants have wrongfully contended that the plaintiffs, their servants or agents, are not entitled to enter in and upon the defendants' lands for the purposes, at their own cost and expense, of completing the construction of the said roadways and footpaths on the defendants' lands up to the Common Boundary and into the plaintiffs' lands.

13. The defendants wrongfully dispute the right or title of the plaintiffs, their servants or agents, to enter in and upon the defendants' lands for the purposes of opening up the same and connecting to the services on the defendants' lands, contending that such right is futile, having regard to the contention made by the defendants that there is no right for the plaintiffs to complete the said roadways and footpaths as constructed by the defendants on the defendants' lands up to and unto the plaintiffs' lands.

14. The Planning Permission authorising the development of the plaintiffs' lands will expire on 30th January, 2010. The Planning Permissions relating to the development of the defendants' lands have withered. The approved roadways and

services on the defendant's lands have not been completed in accordance with the approved Planning Applications and the Planning Permissions granted in respect of the defendants' lands.

15. If the Planning Permission dated 31st January, 2005, Register Reference 04/1973 is not implemented before its expiry or substantial development carried out thereon, it is likely that any new Planning Application or Applications for the plaintiffs' lands if granted will encounter serious planning difficulties due to environmental issues. If a new Planning Permission is in fact granted, it is anticipated, and the plaintiffs are advised, and so believe, that such Planning Permission would be more restrictive, and less beneficial to the plaintiffs and the plaintiffs' lands: as a result thereof the plaintiffs will suffer severe loss and damage by reason of the breach of contract and breach of duty of the defendants.

PARTICULARS OF LOSS AND DAMAGE

To ongoing and continuing reduction in the value of the plaintiffs' lands arising by reason of such restrictive Planning Permission

AND THE PLAINTIFFS CLAIM:

(1) A Declaration that the first and second named defendants are obliged to extend and complete the roadways and footpaths constructed by them on their lands situate at Oranhill, Oranmore, Co. Galway, and being the lands comprised in Folios 20658F and 81564F County Galway (hereinafter referred to as "the defendants' lands") up to the boundary of the defendants' lands with the plaintiffs' adjoining lands situate at Oranmore aforesaid, and comprised in Folio 29383 County Galway (hereinafter called "the plaintiffs' lands").

(2) A Declaration that the plaintiffs, their servants or agents, are entitled, at their own cost and expense, to enter in and upon the defendants' lands for the purposes of completing the roadways and footpaths thereon up to the roadway and footpaths authorised by Planning Permission dated 31st January, 2005, Register Reference No. 04/1973, to be constructed on the plaintiffs' lands.

(3) A Declaration that the plaintiffs, their servants or agents, are entitled at their own cost and expense, to enter in and upon the defendants' lands for the purposes of opening up the same and connecting the services authorized by said Planning Permission dated 31st January, 2005, Register Reference No. 04/1973 to be constructed on the plaintiffs' lands with the services on the defendants' lands.

(4) Rectification of a contract for Sale date 16th August, 2003 made between the plaintiffs, as Vendors, of the one part the first and second named defendants, as Purchasers, of the other part, for the sale by the plaintiffs of part of the defendants' lands to the first and second named defendants so as to provide in the special conditions thereto, that: -

(a) The first and second named defendants would complete the construction of the roadways and footpaths and services authorised by Planning Permission or Permissions obtained by them up to the boundary between the plaintiffs' lands and the defendants' lands (hereinafter called "the Common Boundary")

(b) In the event of the defendants, or the first or second named defendants, failing or neglecting to complete the construction of the said roadways, footpaths and services up to the Common Boundary, the plaintiffs should be entitled, at their own cost and expense, to enter in and upon the defendants' lands, with all necessary building equipment, men and machinery, for the purposes of connecting up the said roadways, footpaths and services authorized by Planning Permission to be on the plaintiffs' lands with the said roadways, footpaths and services on the defendant's lands, causing as little damage as was reasonably practicable by the exercise of such right, and making good, at their own cost and expense, any damage occasioned to the defendants' lands by the exercise of such right, but not being liable for any temporary inconvenience caused by the exercise of that right.

(5) Rectification of a Deed of Grant of Wayleaves, dated 9th September, 2003, made between the defendants, as Grantors, of the one part, and the plaintiffs, as First Grantees, of the Second Part, and Biondel Limited, as Second Grantee, of the third part in like manner as at paragraph 4(a)

(6) Rectification of a contract for Sale, dated 1st June, 2005, made between the plaintiffs, as Vendors, of the one part and the defendants, as Purchasers, of the other part, in like manner as at paragraph 4 above.

(7) Rectification of a Deed of Grant of Wayleaves, dated 2nd June, 2005, made between the defendants of the one part and the plaintiffs of the other part, in like manner as at paragraph (4) (a) and (4) (b) above.

(8) Specific performance of the contracts specified at paragraphs 4 and 6 above, as Rectified, insofar as the same remain uncompleted, and damages under Lord Cairns Act.

(9) Damages for breach of contract.

(10) An Order that the defendants do execute such Deeds of Rectification and Wayleaves and assurances as may be necessary to rectify the Deeds of Grant dated 9th September, 2003 specified at paragraph 5 above, when rectified, and the Deed of Grant of Wayleaves, dated 2nd June, 2005, specified at paragraph 7 above, when rectified.

(11) Further and other relief.

(12) Costs.

FIRST SCHEDULE

Full right and liberty for the entire of the plaintiff's lands

(1) At all times by day and by night a right of way with or without horses, carts, motor vehicles and motor lorries

and all other mode of vehicles whatsoever propelled or drawn, laden or unladen, to go over and pass and re-pass over and along the roadways and footpaths now laid or at any time within twenty-one years from the date hereof to be laid within the Grantors' lands.

(2) A free passage to and from the first and second Grantees' lands respectively of water, soil, gas, electricity, telephone signals, oil, heating fuels and other services through all pipes, drains, sewers, mains, ducts, poles, electrical and telephone equipment, cables and wires now or within twenty-one years from the date hereof to be constructed under or over the Grantors' lands.

(3) The right to erect, connect up with and to cleanse and repair the said pipes, sewers, mains, ducts, poles, electrical and telephone equipment, cables and wires and for that purpose to enter the Grantors' lands hereto or any part thereof with workmen and others and all necessary equipment for making good any damage thereby occasioned and over and under the roads and footpaths contained within the Grantors' lands.

SECOND SCHEDULE

For the benefit of the plaintiffs' lands, and the entire remaining lands comprised in Folio 29383 retained by the plaintiffs insofar as these lands may be developed, the full right and liberty:

(1) At all times by day and by night a right of way with or without horses, carts, motor vehicles and motor lorries and all other mode of vehicle whatsoever propelled or drawn, laden or unladen, to go over and pass and re-pass over and along the roadways and footpaths now laid over or at any time within twenty-one years from the date hereof to be laid within the lands described in the First, Second and Third Schedules to the 2005 Deed of Grant, and including the defendants' lands.

THIRD SCHEDULE

(1) Planning Permission dated 26th July, 2002, Planning Register Reference No. 00/1957.

(2) Planning Permission dated 28th June, 2004, Planning Register Reference No. 04/1423.

(3) Planning Permission dated 31st January, 2005, Planning Register Reference No. 04/1973.

(4) Planning Permission dated 26th July, 2004, Planning Register Reference No. 04/2614.

(5) Planning Permission dated the 20th day of February 2006, Register Reference No. 05/4339."

2.4 On or about 27 April 2009, the proceedings were entered into the Commercial List of this Honourable Court pursuant to an application grounded on the Solicitor's Certificate required pursuant to Order 63A Rule 4 of the Rules of the Superior Courts, viz the Certificate of Messrs R.D.J. Glynn Solicitors, and an affidavit of the first named plaintiff Padraic Keane, sworn on the 8th day of April, 2009.

2.5 At paragraph 2 of their said Certificate, Messrs R.D.J. Glynn, Solicitors, stated that:

"The defendants have constructed the said roadways on the defendants' lands leaving a short gap between the common boundary of the plaintiffs' lands and the defendants' lands. The defendants contend that they are not bound to complete the construction of the roadways and footpaths up to the common boundary and contend that the plaintiffs have no right to enter in or upon the defendants' lands for the purposes of completing the construction of the said roadways and footpaths up to the common boundary and onto and into the plaintiffs' lands".

2.6 The first named plaintiff has deposed, at paragraph 4 of his Affidavit grounding the application for admission to the Commercial list, that:

"Notwithstanding the reservation[,] in the contract for Sale dated 16th August 2003 made between the plaintiffs as vendors of the one part and the first and second named defendants as purchasers of the other part, and the two Deeds of Grant of Wayleaves[,] of rights of way over the said roadways[,] the defendants did not complete the construction of the said roadway[s] on the defendants' lands up to the common boundary between the plaintiffs' lands and the defendants' lands but left a small or narrow strip between the same".

(The punctuation and other material in square brackets is not contained in the original and has been inserted by the Court to better convey what the Court believes was the intended sense of this lengthy sentence.)

2.7 The first and second-named defendants delivered their defence on or about 8th June 2009. The defendants denied in their defence that the agreements between the parties imposed on them the obligations contended for by the plaintiffs. They have also filed a substantial counterclaim to the plaintiffs' proceedings with which the Court is not presently concerned.

2.8 Subsequent to the delivery of the defence, it was discovered that the gap which the plaintiffs had claimed existed between the common boundary of the plaintiffs' lands and the defendants' lands, does not in fact exist. Moreover, roads which both parties had contended had not been constructed had in fact been constructed. Further, it is now accepted by both sides that physical access to the plaintiffs' lands is now, and has at all material times been, available for the purpose of carrying out development on those lands. Accordingly, the extent to which the parties are in continuing dispute concerns, principally, whether or not the roads in question have been finished to the standard required under the contract, and indeed as to what was the standard required under the contract.

2.9 This extraordinary state of affairs came about because both sides through their respective solicitors saw fit to engage in a course of robust correspondence prior to, and for some months after, the commencement of proceedings without anybody fully checking out the facts of the case. The aforementioned correspondence and proceedings were based, at least in part, upon asserted, assumed or presumed facts which were not correct. As a result both sides operated under a misapprehension or mistake as to what was the actual situation on the ground. This misapprehension or mistake, which the Court emphasises was a mutual one, could easily have been dispelled if the two sides had organised a timely joint inspection of the lands. However, there was no such inspection prior to the commencement of proceedings, prior to the delivery of a Statement of Claim and prior to the delivery of a Defence. It was only after the Defence was filed that an inspection, to be attended by both parties' respective engineers, was arranged. The error was

then discovered when that inspection was finally carried out.

2.10 It does appear from Replies to Particulars dated the 25th of May 2009, and furnished by the plaintiffs to the defendants, that John Mooney & Co, Consulting Engineers, who were retained by the plaintiffs alone, reported to the plaintiffs in September 2008 "following inspection of maps, planning permissions and drawings, *and the lands themselves*" (the court's emphasis) "that the approved roadway and services have not been fully completed in accordance with the planning approval." Although the court has not had sight of the actual report, it is the court's understanding that this representation was interpreted, incorrectly, by the plaintiffs, their servants or agents, as confirming their understanding that there was a physical gap between the roads as constructed and the boundary with the plaintiffs' lands, which understanding was induced by express representations from the first and second named defendants, their servants or agents, to the effect that "the roads are not complete, nor will they be completed". The actual position, however, was not that the roads had not been constructed up to the boundary but rather they had (arguably or allegedly) "*not been fully completed in accordance with the planning approval*" (the court's emphasis), i.e. although roads had been constructed right up to the boundary they had been only been constructed to what is referred to as "*haul route*" or "*construction*" standard and not to "*development*" standard.

3.0 The defendants' submissions

3.1 The first and second named defendants as the moving parties have submitted to the Court that it has grounds to strike out or otherwise to dismiss or to stay the proceedings both in the exercise of the Court's inherent jurisdiction and also under Order 19, Rule 28 of the Rules of the Superior Courts.

Inherent Jurisdiction

3.2 The first and second named defendants submitted that it is "beyond doubt" that a Court has inherent jurisdiction to strike out any proceeding (or pleading) on the grounds that it is frivolous or vexatious, is bound to fail or is an abuse of process (see Keane CJ in *Lawlor v Ross* [2001] IESC 110).

3.3 Further, in *Barry v Buckley* [1981] 1 I.R. 425, the Court described it as a jurisdiction which should be "*exercised sparingly and only in clear cases*." However, where there is no, or no real dispute as to the facts upon which a plaintiff's claim is advanced, and the plaintiff cannot succeed on those undisputed facts, then the Court may exercise its jurisdiction (see O'Higgins J in *McCabe v Harding* [1984] ILRM 105 at 108).

Order 19, Rule 28

3.4 It was submitted that the Courts also have jurisdiction to strike out a Statement of Claim pursuant to Order 19, Rule 28 of the Rules of the Superior Courts, which states:

"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

3.5 In *Farley v Ireland*, (Unreported, Supreme Court, 1st of May 1997), the plaintiff sought declarations that certain provisions of the Guardianship of Infants Act 1964 and the Family Home Protection Act 1976 were unconstitutional. The defendants brought an application pursuant to Order 19, Rule 28. The Court dealt with the Order made by the High Court as follows:

"There is of course no doubt that proceedings claiming such relief would in terms disclose a cause of action. What the learned trial Judge concluded was that on any examination of the facts there was no possibility of such an action succeeding. To maintain an action which has no prospect of success, however honourable and well motivated the plaintiff may be, would be vexatious and accordingly would be properly struck out pursuant to Order 19 Rule 28 of the Rules of the Superior Courts."

3.6 In the course of his judgment in the *Farley* case, Barron J described what is meant by the test 'frivolous and vexatious':

"So far as the legality of the matter is concerned frivolous and vexatious are legal terms, they are not pejorative in any sense or possibly in the sense that Mr. Farley may think they are. It is merely a question of saying that so far as the plaintiff is concerned if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious."

Exercise of Jurisdiction

3.7 In *Lowes v Coillte Teoranta*, (Unreported, High Court, Herbert J., 5th of March, 2003) the Court expressed the view that in addressing the question of whether proceedings are frivolous or vexatious –

"it is undesirable to attempt any comprehensive legal definition of these terms: one must consider the pleadings and, where the inherent jurisdiction of the Court is invoked, any satisfactory evidence advanced, in each particular case and determine whether it could properly be described as clearly frivolous or clearly vexatious having regard to any relevant case law."

3.8 The High Court again considered how best to exercise its jurisdiction in the case of *Salthill Properties Ltd v Royal Bank of Scotland* [2009] IEHC 207. In that case, Clarke J. considered the type of cases in which an application to dismiss might arise, and stated:

"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."

3.9 On the question of the extent to which the Court should consider the factual background to a plaintiff's claim, Clarke J. noted:

"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."

Application of principles to the present case

3.10 It was submitted that the present case is of a type contemplated in the "*simple example*" cited by Clarke J. The first and second named defendants submitted that the Court can and should have regard to the following: the central issue of fact upon which the plaintiffs' entire claim is based is accepted by the plaintiffs to be wrong.

3.11 In particular, at paragraph 12 of the Statement of Claim it is pleaded that the first and second-named defendants "constructed the roadways and footpaths in the defendants' lands in a manner which left a short gap between the said roadways and footpaths and the Common Boundary." The reference to the common boundary is to the common boundary between the plaintiffs' and the first and second-named defendants' lands.

3.12 It was submitted that the entire basis of the plaintiffs' claim arises from this factual assertion, and that no other facts giving rise to a cause of action of any value are disclosed by the pleadings.

3.13 The first and second named defendants point out that it is admitted by the plaintiffs in affidavits sworn in these proceedings, and in particular in the affidavit of Daniel Melia, sworn on the 8th of October 2008 and in the affidavit of Imelda Tierney sworn on the same day, that insofar as it is alleged that the roadways have not been constructed as far as the common boundary, that allegation is incorrect.

3.14 It was submitted that the proceedings instituted by the plaintiffs, and the reliefs sought are therefore founded on an entirely mistaken pretext. In circumstances, where there is no dispute between the parties that the circumstances which purportedly gave rise to the plaintiffs' cause of action do not exist, the plaintiffs' cause of action is bound to fail.

3.15 It is apparent from the plaintiffs' Statement of Claim that the only substantive relief sought by the plaintiffs (other than various declarations sought) is damages for breach of contract. The said damage is alleged to arise from the plaintiffs' inability to access its lands by exercising rights of way over the defendants' lands. As is clear from the affidavits sworn herein, there is no dispute between the parties that there is in fact no barrier to the plaintiffs' accessing their lands. Nor is it disputed that there has been no material change in circumstance since the commencement of proceedings which would allow for access now where none had existed at the time of institution.

3.16 It is submitted that there is no cause of action or entitlement to a remedy disclosed by the pleadings, or in the alternative, that the plaintiffs' action against the first and second-named defendants is bound to fail and/or is frivolous and vexatious.

4.0 The plaintiffs' submissions

4.1 In response to the defendants' submissions the plaintiffs deny that their proceedings are frivolous or vexatious, or that they are bound to fail, and they submit that on the contrary, and they contend that by virtue of the penultimate and ultimate clauses of Order 19, Rule 28, which read "*or judgment to be entered accordingly, as may be just*", the Court would be entitled to, and should, make an Order in favour of the plaintiffs for part, at least, of the reliefs sought. The plaintiffs contend that at a minimum the Court can, and should, make an Order in the terms of paragraphs (1) and (2) of the prayer to the Plenary Summons and Statement of Claim (both are in identical terms). They further submit that an Order for Costs would follow the event.

4.2 The plaintiffs submit that the starting point for the Court is a consideration of the pleadings, and what caused the plaintiffs to institute and issue those Proceedings. Were there good grounds for so doing?

4.3 The Plenary Summons was issued on 5th March, 2009, and in it the plaintiffs claim a number of various reliefs. The plaintiffs say that for the purposes of this application, the first two of those reliefs are of prime importance:

(1) A Declaration that the First and Second named defendants are obliged to extend and complete (our emphasis) the roadways and footpaths constructed by them on their lands situate at Oranhill, Oranmore, Co. Galway, and being the lands comprised in Folios 20658F and 81564F County Galway (hereinafter referred to as "the defendants' lands") up to the boundary of the defendants' lands with the plaintiffs' adjoining lands situate at Oranmore aforesaid, and comprised in Folio 29383 County Galway (hereinafter called "the plaintiffs' lands").

(2) A Declaration that the plaintiffs, their servants or agents are entitled, at their own cost and expense, to enter in and

upon the defendants' lands for the purposes of completing the roadways and footpaths thereon up to the roadway and footpaths authorised by Planning Permission dated 31st January, 2005, Register Reference No. 04/1973, to be constructed on the plaintiffs' lands".

4.4 The plaintiffs make the case that the defendants had developed the defendants' lands pursuant to a Planning Permission which showed the three estate roadways serving or servicing the defendants' lands running up to the boundary with the plaintiffs' lands, and extending into same. Under their contracts with the defendants, the plaintiffs and their retained lands were entitled to rights of way over the roadways to be constructed on the defendants' lands. The defendants appeared not to have constructed any one of the three roads up to the boundary with the plaintiffs' lands, and their Solicitors, Messrs. MacGowan wrote to the plaintiffs' Solicitors a letter dated 12th June, 2008, in the course of which they stated:

"As a result of this error our clients have not been able to complete six properties and have lost substantial monies. Given that they could not complete these properties they were not in a position to complete roadways that would serve these properties, and as a result of this the roads are not complete, nor will they be completed, to the boundary of your clients' land. As you are aware, your clients' Right of Way allows your client use of the roadways now laid or at any time within twenty-one years from the date of the Right of Way, to be laid, over certain of our client's lands.

As our client has not completed roadways to your clients' boundary and does not intend to do so, it appears to us that your client does not currently have a Right of Way serving his property. We would be obliged if you would review your files and revert to us in relation to this matter."

They wrote again on 7th July, in the course of which they stated:

"Please also revert with regard to the mapping error and your clients' resulting lack of access to their retained lands. It is in both parties' interest to resolve this matter as soon as ever possible. As you are on notice you will not be in a position to sell the property without notifying prospective buyers of the difficulty."

They wrote again on 18th August, 2008, in the course of which they stated:

"Please also note that your client is not entitled to lay any roadways over the property in question and therefore the laying of pipe sewers, etc. is unlikely to be of use."

They wrote again on 1st September, 2008:

"1. Please point out where exactly your clients' alleged right to lay a roadway is set out in the Rights of Way and Wayleaves furnished."

They wrote again on 3rd September, 2008:

"Please note, in the interim, that the Planning Permission for the roadway in question has lapsed."

The plaintiffs make the point that, of course, if the roadways had been constructed, the Planning Permission would not have lapsed.

4.5 Thus, say the plaintiffs, before issuing the Plenary Summons, they were in receipt of a number of letters from the defendants, their servants or agents, (i) denying that the roads had been completed to the plaintiffs' boundary, (ii) further denying that they had any intention of completing them, (iii) denying the plaintiffs' entitlement to enter their lands for the purposes of completing the roads and footpaths, at their own cost and expense, up to the boundary with the plaintiffs' lands, and (iv) contending that the Planning Permission in respect of the uncompleted portion of the roadway had withered, and could not be lawfully used, therefore, for that purpose. The plaintiffs say that in those circumstances they were entirely justified in issuing the Plenary Summons herein and, in particular, to seek the reliefs claimed at paragraphs 1, 2, 4B and 10 of the Plenary Summons and in the prayer to the Statement of Claim subsequently filed.

4.6 The plaintiffs have submitted that they would have been acting most unwisely, and possibly unlawfully, if, in the face of this correspondence they had entered or attempted to enter the defendants' lands and to have carried out any works on the roadway for the purpose of extending and completing it up to the boundary with the plaintiffs' lands. In the circumstances the defendants created the necessity for the issuing of the Plenary Summons and the Statement of Claim herein. The plaintiffs claim that they are, moreover, estopped by their own conduct from contending that what the plaintiffs did in bringing the proceedings was unreasonable, or not warranted. They owed a duty to the plaintiffs. (The plaintiffs have cited *O'Dwyer v Chief Constable of the R.U.C.* [1997] N.I. 403 in support of the latter contention. However, the Court should immediately state that it considers that the facts of the *O'Dwyer* case were so radically different to those of the present case as to render it of little assistance on the question of whether the asserted duty was in fact owed.)

4.7 With regard to the claim under Order 19, Rule 28 the plaintiffs say that it cannot be contested that the Statement of Claim, which was delivered on the 2nd of April 2009, exhibits on its face a good cause of action (in the sense that it pleads a stateable case of a sort known to the law) by the plaintiffs against the first and second named defendants. They say it clearly shows that there was a good cause of action at that date. In this context the plaintiffs have also drawn the Courts attention to the case of *Salthill Properties Limited & Another v. Royal Bank of Scotland plc & Another* [2009] I.E.H.C. 207, and in addition to paragraph 3.12 relied upon by the defendants and previously quoted, the plaintiffs rely upon the two further paragraphs immediately following it, i.e. paras 3.13 and 3.14, wherein Clarke J stated:

"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."

4.8 The plaintiffs contend that the validity of their claim continues.

4.9 The plaintiffs further rely upon the fact that the first and second named defendants' position continued to be maintained up to their Defence and Counterclaim (and even thereafter). They draw attention to the following circumstances: The matter was admitted to the Commercial Court by Order of 27th April, 2009. A Notice for Particulars was served by the first and second named defendants dated 11th May, 2009. It is clear from this Request for Particulars – and in particular nos. 3 – to – 9 inclusive – that the defendants were maintaining their stance. The plaintiffs' Replies are dated 25th May, 2009, and the Court's attention is drawn to replies at 7 to 9, 10 and 11 in particular, wherein notice is given that various representations made by or on behalf of the first and second named defendants, both in meetings and in correspondence, were being relied upon by the plaintiffs. Further, the point is made reply "7 to 9" that:

"It is not pleaded that the defendants have wrongfully refused the plaintiffs entry on to the defendants' lands. Rather, it is pleaded that the first and second named defendants contend that the plaintiffs are not entitled to enter in and upon the first and second named defendants' lands and at their own cost and expense of completing the construction of roadways and footpaths onto the first and second defendants' lands up to the common boundary and into the plaintiff's lands and that the first and second named defendants wrongfully dispute the right or title of the plaintiffs', their servants or agents, to enter upon the first and second named defendants' lands for the purposes of opening up same and connecting to the services on the first and second named defendants' lands."

The first and second named defendants then caused a Defence (and Counterclaim) to be delivered on 8th June, 2009. The plaintiffs refer, in particular, to paragraphs 5, 6 and 7 thereof. The plaintiffs say that paragraph 6 is very explicit:

"6. It is denied that the first and second named defendants have wrongfully contended that the plaintiffs are not entitled to enter in and upon the defendants' lands for the purpose of completing the construction of the roadways and footpaths on the defendants' lands at their own expense as alleged in paragraph 12 of the Statement of Claim or at all. For the avoidance of doubt, it is specifically pleaded that the plaintiffs have no entitlement to enter upon the first and second named defendants' lands for such a purpose or any related purpose" (the plaintiffs' emphasis).

Moreover, in paragraph 7 they plead:

"7. It is admitted that the Planning Permission serving the first and second named defendants' lands has withered. The said Planning Permission expired on or about 11th November, 2007. As a consequence of the expiration of the said Permissions, the implied agreement relied on by the plaintiffs (which implied agreement is denied) has been frustrated (the plaintiffs' emphasis)."

4.10 The plaintiffs point out that they furnished a further Notice for Particulars dated the 22nd June, 2009, particularly in relation to the gap understood by them to exist between the road as constructed on the defendants' lands, and the plaintiffs' lands. After this, a meeting took place on site between the Engineers and the Solicitors for both parties on the 9th of July, 2009. Following this meeting, and on the same date, the solicitors for the first and second named defendants wrote to the solicitors for the plaintiffs stating:

"we note that all parties are now agreed that two roads are laid that provide access to lands retained by your client. Both roads are constructed to and beyond the boundary of their lands transferred to our clients. One road is constructed substantially to development standard and one road is constructed to a standard suitable for use as a haul or construction route.

We confirm that our clients do not dispute, and have never disputed, your client's rights to use any laid roads for the purposes of access to and development of their retained lands as set out in the rights of way and way leaves granted to them. We are informed by our clients that the roads examined this morning were constructed to haul route standard at some point in 2005. If required we can revert with specific dates."

4.11 The plaintiffs then refer with particularity to various affidavits sworn in connection with this motion what is the stage or state of the construction of the three roadways. They point to the following:

4.12 In paragraph 4 of his Affidavit sworn on 2nd October, 2009 Mr. Hanniffy, the defendants' Engineer, refers to the meeting on site on 9th July, and says:

"(i) Road 1 was constructed to haul route standard to a point up to and beyond the Transfer Boundary.

(ii) Road 2 was constructed to development standard to a point up to and beyond the Transfer Boundary.

(iii) I confirm that Road 3 was constructed at least to haul route standard to a point up to and beyond the Transfer Boundary in 2005.

I was unable to determine the standard of Road 3 at the site meeting of 9th July, 2009 due to the presence of builder's rubble which had been temporarily dumped on the road and was fenced off. However I have since examined the aerial photograph referred to in Mr. Considine's Affidavit and confirm that Road 3 was constructed at least to haul route standard to a point up to and beyond the Transfer Boundary in 2005."

4.13 Further, Mr. Daniel Melia, Engineer, of John Mooney & Company Limited, the plaintiffs' Engineers, sets out in paragraph 7 of his affidavit sworn on the 8th of October, 2009, his professional understanding of the expressions used by Mr Hannafy. He stated:

".

- haul/construction standard: temporary road consisting of well compacted imported fill or in-situ material suitable for construction traffic.

- "Development Standard": Permanent road constructed in accordance with Department of Environment specifications and suitable for all traffic. "

4.14 Mr Melia then dealt with Road 1, stating:

"The tarmac road at this location stops approximately 14.4 metres short of the land transfer boundary. There is then an area of ground – uncompleted road (length 14.4m) between completion of the tarmac road, and the transfer boundary, which appears to have been stripped/excavated down to reasonably solid ground. The section of ground/uncompleted road referred to as a "haul road" or "construction road" extends up to and beyond the Land Transfer Boundary, and to a point approximately 1M short of the physical boundary, (i.e. the post and wire fence). The haul road / construction road does not extend up to the physical boundary (the post and wire fence). In paragraph 11 he refers to the fact that this said road will require considerable further work in order to construct, complete and maintain this section as a permanent road, in accordance with Department of the Environment specifications.

4.15 With regard to Road 3, Mr Melia avers that when he attended the lands on 9th July, 2009 in the company of Mr. Hanniffy, and with the Solicitors acting for the plaintiffs and defendants, he was unable to assess whether this roadway had even been built to haul road standard as this area was (then) covered with builder's rubble and Mr. Hanniffy acknowledged this in his Affidavit sworn on 2nd October, 2009.

4.16 In relation to Road 2 Mr Melia avers that this had been constructed to a development standard to a point close to the transfer boundary. The kerbs and footpaths of this road have not yet been completed up to the Land Transfer Boundary. The road surface has not been fully completed to a final (development) standard up to the Land Transfer Boundary.

4.17 The Court has also been referred to the Supplemental Affidavit of Mr. Gerard Hanniffy, sworn on 12th October, 2009, wherein he accepts that with respect to Road 1 the tarmac road stops approximately 14.4 metres short of the land Transfer Boundary. Mr Hannaffy contends that this fact is not in any way an impediment to the plaintiffs' development of their lands. The road continues on completed to construction road standard to the Transfer Boundary.

4.18 The plaintiffs submit that paragraph 20 of Mr. Hanniffy's Affidavit of 19th October, 2009 contains some very important averments: He stated:

"I beg to refer to paragraph 19. I say and believe that the defendants are aware that there is an obligation on them in respect of the houses within their own development to have the roads completed to development standard. This will require a final wearing course tarmac layer placed on the roads. However it is not prudent or appropriate to have these completed while the said roads are being used for construction traffic. I say and believe and am instructed that it is the defendants' intention to attend to the finishing of these roads at an appropriate time when the passage of construction traffic on a heavy scale has ceased."

4.19 The plaintiffs comment as follows on paragraph 20 of Mr. Hanniffy's Affidavit of 19th October, 2009:

"(a) It might be observed that while Mr. Thomas Considine also swore a Supplemental Affidavit on 19th October, 2009, no such averment is contained in his Affidavit: he has given no undertaking:

(b) Nor is there any time specified for the carrying out of this work – if it is to be done.

(c) If the plaintiffs' claim herein is struck out, as sought by the defendants, and the defendants did not complete the construction of the three roads, what would be the plaintiffs' situation? What would be their remedy? That question shows why the application to strike out or dismiss should not succeed".

The plaintiffs maintain that there is no reason in all the circumstances of the case why the Court should not grant a Declaration in the terms of paragraph 1 of the Prayer on the Plenary Summons and Statement of Claim.

4.20 The plaintiffs have referred the court to a course of correspondence between the parties respective Solicitors from the 10th of July 2009 until the end of October 2009. They contend that in the post July 10th, 2009 correspondence, the defendants have acknowledged the right of the plaintiffs to use the "roadways", as laid down, but have tried to avoid acknowledging the right of the plaintiffs, at their own cost and expense, to enter in and upon the defendants' lands for the purpose of completing the said roadways and footpaths up to the roadways and footpaths on the plaintiffs' lands. The Court is invited to review the correspondence and to conclude that the statements that the defendants have never denied the plaintiffs' rights and entitlement "at their own cost and expense, to enter in upon the defendants' lands for the purpose of completing the roadways and footpaths thereon up to the roadways and footpaths authorised by Planning Permission dated 31st January, 2005, Register Reference No. 04/1973, to be constructed on the plaintiffs' lands" is at variance with the facts, as established by the correspondence and by the Defence.

4.21 The plaintiffs say the relevant course of correspondence in fact commences with a letter dated 8th July, 2009 from Messrs. MacGowan on behalf of the defendants: there they acknowledge the right of the plaintiffs pursuant to the Right of Way and Wayleaves previously granted to them, to have access to the lands retained by them sufficient for development purposes. Then by letter dated 9th July, 2009 they "confirm" that their clients "do not dispute, and have never disputed, your clients' right to use any laid roads for the purposes of access to and development of their retained lands as set out in the Rights of Way and Wayleaves granted to them."

4.22 By letter dated 10th July, 2009 Messrs. R.D.J. Glynn on behalf of the plaintiffs sought confirmation of three points:

"(a) Our clients have an undisputed Right of Way to their lands over the two roadways that are laid;

(b) That our clients may freely use those Rights of Way; and

(c) That your clients will do nothing to hinder the use of those roadways for the purposes of developing or selling the lands retained by our clients."

4.23 To this Messrs. MacGowan replied by letter dated 10th July, 2009:

"With regard to points numbered (a), (b) and (c) in your letter, we note that we have already stated in our letter of 9th

July that we have never disputed your clients' right, pursuant to the Rights of Way granted to them, to use any laid roads for the purposes of access to and development of their retained lands. Given that all parties agree that two roads are laid to the boundary of land transferred to our clients, it is clear that your clients have the right to use those roads, and your clients have enjoyed this right since the date the roads were laid. Clearly our clients will do nothing to hinder the lawful use by your clients of Rights of Way granted to them."

4.24 The plaintiffs then draw attention to the Supplemental Affidavit of Imelda Tierney sworn on 22nd October, 2009, and the letters referred to therein. Messrs. MacGowan, Solicitors, in their letter of 2nd October, 2009 conclude:

"You state in your letter that we have at all times disputed the entitlement of your clients to entire (enter) on our lands for the purposes of carrying out the works. This is not correct. We have repeatedly confirmed that it was our understanding of the Rights of Way and Wayleaves that your clients were entitled to come on our lands **for the purpose of carrying out works related to all services with the exception of roadways**. Our position is unchanged." (the plaintiffs' emphasis)

4.25 The plaintiffs' then refer to the letter dated 14th October, 2009 from Messrs. R.D.J. Glynn – where they sought confirmation of two points:

"Can you now please confirm the following:

(1) That the plaintiffs, their servants or agents are entitled, at their own cost and expense, to enter upon the lands of Messrs. Considine and Sweeney for the purpose of completing the roadways and footpaths thereon up to the roadway and footpaths to be constructed on the plaintiffs' lands, which roadways and footpaths may be constructed to "development standard" in accordance with the Department of the Environment specifications.

(2) That pending the ultimate construction and completion of the roadways to development standard, that the plaintiffs and/or their servants or agents may enter upon the first and second named defendants' lands for the purposes of upgrading and maintaining the roadways while same are being used by construction traffic."

4.26 Messrs. MacGowan replied by a letter dated 21st October, 2009, but did not give any answer or confirmation in respect of either of the two points. Then by letter dated 27th October, 2009 they stated, *inter alia*, the following:

"1. The confirmation which you are seeking at paragraph 1 is difficult to understand – given that the said roads have been completed to your clients' lands.

Where the roads have been constructed – whether to construction standard or development standard (on which the Contract is silent) – your clients have an express right under the Contract to enter upon the said roads and to use them to go onto their own lands. We have never denied your clients such an entitlement.

2. There was no reference in the express term of either Agreement (in 2003 or in 2005) (or in either Grant of Wayleave) about the standards to which the roadways and footpaths had to be constructed. The three access roads have been constructed. They have been constructed to construction standard (and indeed the second road has been constructed to development standard). It follows therefore that the plaintiffs, their servants or agents may enter upon the First and Second named Defendant's lands at any time to use those roads. Moreover, if they so (wish) they may do so for the purpose of upgrading and maintaining the roadways while same are being used by construction traffic. We have never denied your clients' right to do so."

4.27 In the circumstances of this correspondence the plaintiffs say that, once again, the following questions arise – what would happen if the plaintiffs' claim at 1 and/or 2 of the prayer to Plenary Summons or Statement of Claim was dismissed, and the defendants did not complete the construction of the road, or if the roadway fell into bad disrepair? What would be the rights of the plaintiffs in respect of entering in and upon the defendants' lands for the purpose of repairing and completing the said roadways at their own cost and expense? The plaintiffs accept that in law the owner of the dominant tenement has the right to repair and improve the subject matter of an easement to make it more suitable for the accommodation of the dominant tenement: but point out that this is a case in which the defendants have expressly denied the entitlement of the plaintiffs to so do. In the circumstances they contend that they are justified in seeking the relief claimed in paragraph (2) of the prayer to the Plenary Summons and Statement of Claim, namely a Declaration as to the right or entitlement of the Plaintiffs, which exists. Accordingly they contend that this claim should not be dismissed: rather, it should be granted.

5.0 The Court's decision

The claim based on Order 19, Rule 28

5.1 In this Court's view the plaintiffs have misinterpreted Order 19, Rule 28. It is not correct of them to suggest that it is open to this Court, if the Court were minded to dismiss the first and second named defendants' application under this rule, to then proceed immediately to enter judgment for the plaintiffs. In so far as it relates to a case brought by a plaintiff or plaintiffs, Order 19, Rule 28 provides that a court may order a pleading to be struck out on the grounds that "*it discloses no reasonable cause of action*" and in any case where the action is shown by the pleadings to be "*frivolous or vexatious*", the Court may order the action "*to be stayed or dismissed*". However, Order 19, Rule 28 does not just apply to cases brought by a plaintiff or plaintiffs. It can also apply to an answer or defence to a claim filed by a defendant or defendants. In that instance, a court may order a pleading to be struck out on the grounds that "*it discloses no reasonable answer*" and in any case where the defence is shown by the pleadings to be "*frivolous or vexatious*", the Court may order "*judgment to be entered accordingly*". However, in this case the plaintiffs have not filed a cross motion requesting the Court to strike out the first and second named defendants' defence and accordingly, even if it be the case that there were no outstanding controversies as to matters of fact or law, the Court has no jurisdiction to enter judgment in their favour at this stage.

5.2 It is well established that the jurisdiction under Order 19, Rule 28 is one to be exercised sparingly and cautiously. Nevertheless, as stated by Denham J in *Aer Rianta Cpt v Ryanair Ltd* [2004] 1 I.R. 506 at 509 a pleading will be struck out "if a court is convinced that a claim will fail."

5.3 Costello J stated in *Barry v Buckley* [1981] I.R. 306 (at p.308 of the report) that "the court can only make an order under this rule when a pleading discloses no reasonable cause of action on its face." Again in *D.K. v. King* [1994] 1 I.R. 166 he stated (at p. 170 of the report) that:

"Rule 28 only applies where it can be shown that the text of the plaintiff's summons or statement of claim discloses no reasonable cause of action or that the action is frivolous or vexatious."

Moreover, in *McCabe v Harding* [1984] I.L.R.M 105 O'Higgins C.J. makes it plain at p. 108 of the report that for Order 19, Rule 28 to apply "vexation or frivolity must appear from the pleadings alone".

5.4 It is well established that the Court cannot go beyond the pleadings and seek to examine the evidence available to support the claim as pleaded. See *Barry v Buckley* [1981] I.R. 306; *Supermacs Ireland Ltd v Katesan (Naas) Ltd* (Unreported, High Court, Macken J., 15th March 1999; *Ratcliff v Wilson* (Unreported, High Court, Macken J., 23rd March 1999) and *Leinster Leader Ltd v Williams Group (Tullamore) Ltd* (Unreported, High Court, Macken J., 9th July 1999) among other cases. Rather, and in the words of Clarke J in *Salthill Properties Limited & Another v Royal Bank of Scotland plc & Another* [2009] I.E.H.C. 207:

"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."

5.5 While a pleading such as a Plenary Summons or Statement of Claim may indeed be struck out under Order 19, Rule 28 where it fails to disclose a reasonable cause of action, i.e. where the facts and matters pleaded do not constitute a cause of action that is known to the law or likely to be established, this Court has no hesitation in concluding, upon a consideration of the relevant pleadings in the present case, that the plaintiffs have pleaded a case based upon a cause of action that is known to the law, and that upon the facts as pleaded (and ignoring any affidavit evidence filed) that that cause of action is likely to be established.

5.6 Moreover, I also do not think that the plaintiff's pleadings here can be regarded as frivolous or vexatious.

5.7 In the circumstances the Court must dismiss the first and second named defendants' applications for relief under Order 19, Rule 28 of the Rules of the Superior Courts. It therefore follows that if I am to strike out the plaintiffs' claims it must be in the exercise of the Court's inherent jurisdiction, or not all.

The claim based upon inherent jurisdiction

5.8 McCarthy J in *Sun Fat Chan v Osseous Ltd* [1992] 1 I.R. 425 cautioned (at 428) that:

"Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought.

Experience has shown that the trial of an action will identify a variety of circumstances 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."

5.9 In doing so he was echoing the views of Costello J in *Barry v Buckley*, where that learned judge had stated that the jurisdiction was one "to be exercised sparingly and only in clear cases."

5.10 The jurisdiction can only be exercised where "on admitted facts" the case "cannot succeed", per McCarthy J in *Sun Fat Chan* (at 428). In the present case the first and second named defendants seek to make exactly that case. They contend that as it is now common case that the roads in question were in fact constructed up to the transfer boundary, and that no physical gap exists, the plaintiffs proceedings are entirely misconceived and their case cannot succeed.

5.11 Unlike the position with respect to the application under Order 19, Rule 28, I am satisfied, as was Clarke J in the *Salthill Properties* case, that in considering whether or not to strike out the plaintiffs pleadings, dismiss their claim or stay the proceedings in the exercise of the Court's inherent jurisdiction, the Court is entitled to engage in some analysis of the facts.

5.12 The primary basis for the Court having inherent jurisdiction to strike out the plaintiffs pleadings, dismiss their claim or stay the proceedings is to protect the process of the Court and to ensure that it is not being abused. Although the plaintiffs are not blameless in the matter, the Court is satisfied that in issuing the proceedings herein they have acted at all times in good faith and that at no time have they sought to deliberately abuse the process of the Court, as would be the case for example where proceedings are commenced on a fraudulent basis. To the extent that the plaintiffs may be criticised it is on the basis that they failed to make sufficient or adequate enquiries concerning what was the position on the ground before launching their action. However, the defendants were equally guilty in regard to the quality of their initial investigations, and with respect to their correspondence and their pleadings filed in response to the plaintiffs' claim. I am satisfied that as a matter of probability the plaintiffs were led into a false sense of security as to what was the position on the ground by the express, and often repeated, representations of the first and second named defendants, their servants or agents both in correspondence, and, seemingly, in the course of several meetings (the latter are detailed in replies 7-9, 10 and 11 of the plaintiffs' Replies to Particulars dated the 25th of May 2009). It is also clear to the Court that these misrepresentations were not deliberate, and in fairness to the plaintiffs the contrary is not suggested.

5.13 While the Court does not consider that the plaintiffs have established that the defendants owed them a duty not to erroneously or accidentally mislead them, the fact of the matter is that the plaintiffs were unwittingly misled by the defendants and in this Court's view the defendants should not be allowed to take advantage of that unless it has resulted in a situation where the plaintiffs case is now utterly hopeless and doomed to failure. In such circumstances the Court would be entitled to act in order to protect its own process. Conversely, if it is the situation that at least part of the plaintiffs' claim remains stateable and tenable in terms of having at least some prospect of success the Court should not strike out the plaintiffs' pleadings in their entirety, or dismiss their claim, or stay the proceedings, but rather should allow them to salvage what they can from the wreckage of a partially misconceived claim.

5.14 I am satisfied that the plaintiffs' claim, although partially misconceived for having been launched on the basis of an erroneous understanding of the situation on the ground, is not certain to fail in every respect. It validly remains to be determined whether the contracts between the parties did contain the implied terms contended for in paragraph 10 of the Statement of Claim. Moreover, if there was an implied term, as the plaintiffs allege, that the defendants would "complete" the construction of the roadways and footpaths it remains to be determined (i) to what standard they were required to complete them; (ii) as to what might be the consequences of any established failure on the part of the first and second named defendants in that regard; and (iii) whether in fact

there has been a failure of the first and second named defendants in that regard. There is a claim for damages which could conceivably succeed in the Court's view, although the quantum of any damages recovered is now likely to be less than it would have been had the claim as pleaded been properly conceived in every respect. Moreover in the Court's view the point made by the plaintiffs that they are entitled, in the light of the position adopted in correspondence by the first and second named defendants, to seek the declarations that they seek at paragraphs 1 and 2 of the prayer to both the Plenary Summons and Statement of Claim for the purpose of having certainty concerning their rights to avail of, maintain and where necessary (due to any default on the part of the first and second named defendants as owners of the servient tenement) to improve their easements, as the owners of the dominant tenement, is well made.

5.15 In all the circumstances of the case the Court is not disposed to strike out the plaintiffs' pleadings in their entirety, or dismiss their claim, or stay the proceedings. Rather the Court will only strike out so much of the plaintiffs' claim as does not come within the parameters of those "live" issues that the Court has just identified and in that regard the plaintiffs will be directed to submit an amended Statement of Claim for the Court's consideration in due course with a view to substituting it for the existing Statement of Claim. Clearly, the first and second named defendants will also have to be afforded an opportunity to reconstitute their pleadings in defence of the plaintiffs reconstituted claim and the Court will give all appropriate directions in that regard in due course.