Neutral Citation: [2016] IEHC 353

THE HIGH COURT

[2013 No. 4467 P]

BETWEEN

PATRICK BURKE AND AUBREY WOOLFSON

PLAINTIFFS

AND

ROBERT BEATTY

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 22nd day of June, 2016

Introduction

1. In the within motion, the defendant seeks an order pursuant to O. 19, r. 28 of the Rules of Superior Courts and/or the inherent jurisdiction of the court striking out the plaintiffs' claim on the grounds that it discloses no reasonable cause of action, is bound to fail or is frivolous or vexatious. Alternatively, the defendant seeks an order pursuant to O.19, r. 27 of the Rules striking out such parts of the claim as the court considers to be unnecessary or scandalous, or tending to prejudice or embarrass or delay the fair trial of the action.

Background facts

2. The plaintiffs are businessmen who were in all material times the owners of a property at 45/46 Bellview Avenue Lower, Dublin. The plaintiffs' property adjoined another property known as units A and A1, Old Fairview Cinema owned by a Mr. Gary Payne. Access to Mr. Payne's property is via a right of way over the plaintiffs' property. On the 29th November, 2002, the plaintiffs obtained planning permission from the planning authority for the construction of 36 apartments and two retail units on their property. In the normal way, this planning permission extended for a period of five years and thus was due to expire on the 29th November, 2007. The plaintiffs intended funding the development by means of a loan from KBC Bank which was approved on the 16th March, 2004.

3. On the 29th July, 2005, Mr. Payne instituted proceedings against the plaintiffs arising out of an alleged apprehended interference with his right of way as a result of the development works being or to be carried out by the plaintiffs on foot of the planning permission. A statement of claim was delivered in those proceedings on the 25th November, 2005, in which he sought declaratory relief in relation to the extent of his right of way and injunctions restraining the plaintiffs from interfering with it. Mr. Payne also sought damages.

4. Arising out of the institution of these proceedings, the plaintiffs instructed Mr. Paul Ferris, solicitor, to act on their behalf in relation to the litigation. In or about December 2005, Mr. Ferris in turn instructed the defendant, who is a member of the Bar, to represent the plaintiffs. The defendant drafted a defence and counterclaim to Mr. Payne's proceedings essentially traversing the claim and contesting the extent of the right of way claimed by Mr. Payne. The counterclaim alleged that Mr. Payne was guilty of wrongful actions which caused the plaintiffs loss and for which they claimed damages. They also claimed a declaration regarding the extent of the way. Although it is unclear whether at that stage any work had been done by the plaintiffs on the site, it would appear that by 2007 at any rate, such work as was done was of a fairly preliminary nature involving site clearance and the like. It is clear however, that Mr. Payne's proceedings and his claimed right of way were a significant, and perhaps total, impediment on the plaintiffs' ability to complete the development. It was therefore imperative from the plaintiffs' perspective to have Mr. Payne's claim resolved. A settlement meeting took place between the parties on the 11th October, 2006. It would appear that a sum of €500,000 was sought by Mr. Payne to extinguish the right of way and matters did not progress further at that time.

5. Subsequently, in early May 2007, Mr. Ferris suggested to his opposite number that the parties attend a further settlement meeting at the Four Courts. The meeting took place on the 17th May, 2007. The defendant led the negotiations on behalf of the plaintiffs, having received written instructions from Mr. Ferris on the 9th May, 2007. The plaintiffs' architect, Mr. Fergus Clancy, was also present. The negotiations commenced at around 10am and concluded at around 7pm with a written settlement agreement having been executed by the parties. The agreement, entitled "Terms of Settlement" appears to have been largely drafted by the defendant. The salient terms are as follows:

> "It is agreed between the parties that above entitled proceedings will be settled on the following terms:
>
> [1.][Mr. Payne] hereby agrees to surrender and/or extinguish the right of way …
>
> [2.][Mr. Payne] agrees to enter into the necessary agreements for the extinguishment of the right of way referred to at para. 1 herein within seven days of notice in writing being given to him by registered post of the [plaintiffs'] intention to commence development … Unless and until such time as such notice is given, the plaintiff, is servants, agents, lessees, licences [sic] and/or assigns shall continue to enjoy the benefit of the right of way referred to at para. 1 herein.
>
> [3.]On extinguishment of the right of way referred to at para. 1 herein, the [plaintiffs] hereby agree to grant to [Mr. Payne] his successors and assigns and all and every, the owner or owners, lessees or occupiers of [Mr. Payne's property] a particular and pedestrian right of way at all times and for all purposes by day or by night to pass and re-pass over that portion of the [plaintiffs'] lands which at all times shall have a minimum width of 3.5 meters and a minimum height clearance of 3 meters and run from the entrance to the [plaintiffs'] lands across the [plaintiffs'] lands to the point were [Mr. Payne's] lands adjoin the [plaintiffs'] lands for the purposes of serving and/or accessing [Mr. Payne's] lands…
>
> [7.] The parties' engineers are to meet on site within 30 days to agree the exact line of the right of way to be granted by the [plaintiffs] to [Mr. Payne] referred to at para. 3 herein…
>
> [9.] The [plaintiffs] shall have an option to purchase [Mr. Payne's] property which said option shall expire on the 30th

September, 2007. [A price determination method and other terms ore stipulated]…

[11.]The [plaintiffs] shall pay [Mr. Payne] the sum of €275,000 by way of damages not later than eight weeks of the date of this settlement.

[12.] The [plaintiffs] shall pay [Mr. Payne] the sum of €40,000 (inclusive of VAT) as a contribution towards his costs of the proceedings not later than eight weeks of the date of this settlement …"

6. The plaintiffs allege in the within proceedings that at the time the settlement agreement was entered into, there was not enough time remaining for them to carry out sufficient works by the expiry of the planning permission on 28th November, 2007, to avoid the necessity for a fresh planning application. They allege that the defendant was aware of this fact. Following the conclusion of the settlement agreement, the respective parties' experts, incorrectly described as "engineers" in the settlement agreement but in fact architects, did not meet on site within the stipulated 30 day period. In fact discussions between the architects only commenced in July 2007, and ultimately, agreement was never reached on the line of the proposed new way. Mr. Payne's architect in correspondence appears to suggest that this was at least in part related to the fact that no monies were paid to Mr. Payne by the plaintiffs on foot of the agreement. Indeed it is evident from this correspondence and further exchanges between the parties in these and other proceedings that something of a "chicken and egg" debate ensued with Mr. Payne indicating that the new right of way could not be discussed or agreed until the money was paid and the plaintiffs arguing that no money could be due until such time as the old right of way was extinguished and the new one agreed.

7. Arising from this, Mr. Payne instituted new proceedings by way of summary summons on the 8th May, 2008, claiming the sum of €315,000 as money due under the settlement agreement. This was followed by Mr. Payne issuing a motion for summary judgment which was contested by the plaintiffs. In response to that motion, the second plaintiff swore an affidavit contesting Mr. Payne's right to summary judgment on the basis that the €275,000 claimed was part consideration for the extinguishment of the right of way and as this had never occurred, the money never became due. Furthermore, the second plaintiff averred that as the planning permission had now lapsed, it became impossible for agreement on a new right of way to be reached.

8. Mr. Payne's motion for summary judgment came on for hearing before this court (McKechnie J.) on the 12th April, 2010, and the court granted judgment in the sum of €40,000, being the agreed contribution to Mr. Payne's legal costs, and adjourned the balance of the claim, being for €275,000, for plenary hearing. A statement of claim was delivered by Mr. Payne on the 12th July, 2010. In it, Mr. Payne contends that the plaintiffs' obligation to pay him the sum of €275,000 for "damages" is free standing and independent of any obligation on his part to extinguish the right of way.

9. The plaintiffs delivered their defence and counterclaim on the 2nd November, 2010, which was settled by the defendant. It raises the preliminary objection that the settlement agreement is void for illegality as its purpose is to hinder the collection of tax by the Revenue Commissioners. The defence goes on to plead that the €275,000 was never intended as damages but was in fact part consideration for the extinguishment of the right of way. Further, the plaintiffs counterclaimed for damages premised on a breach by Mr. Payne of the terms of the settlement agreement, such breach being the failure to extinguish the right of way. The plaintiffs went on to plead that Mr. Payne's breach of contract had the effect of causing them to lose their entire investment in the development amounting to very substantial sums. The counterclaim goes on to allege that the settlement agreement was entered into under a mutual mistake of fact, first that the €275,000 was part payment for extinguishment of the right of the way and secondly that only a temporary right of way during construction could be provided by virtue of health and safety considerations. The prayer for relief by the plaintiffs includes the following:

[1.] Damages for breach of contract

[2.] An order declaring the contract void for illegality.

[3.] In the alternative, specific performance of [Mr. Payne's] obligations on the compromise agreement as pleaded herein if and when the development proceeds.

[4.] A declaration that the [plaintiffs] are only required to pay to [Mr. Payne] a sum of €275,000 in exchange for the extinguishment of the existing right of way as part consideration for this extinguishment with the other part of the consideration being the provision of an alternative right of way for the completion of the construction of the development pursuant to the terms of the agreement.

[5.] A declaration that the settlement agreement dated the 17th May, 2007, and signed by the parties is to be rectified so as to embody the agreement actually made between them or their true intentions at the time of executing the same in the respects that out of above and had the said compromise agreement treated as being so rectified.

[6.] Alternatively, an order that the said compromise agreement be rescinded.

[7.] A declaration of the compromise agreement is frustrated in part or altogether.

[8.] Costs.

10. It would appear that the matter has not yet proceeded to trial, having been adjourned generally on the 20th July, 2010, by which time the defendant had ceased to represent the plaintiffs.

The Law

11. The court's approach to applications of this nature is by now so well settled that I do not think it necessary to subject it to detailed analysis. The jurisdiction to strike out a claim under the Rules is quite separate and distinct from the inherent jurisdiction to strike out. This is comprehensively explained in a series of judgments delivered by Clarke J. first in the High Court in *Salthill Properties Limited & Anor v. The Royal Bank of Scotland Plc & Ors* [2009] IEHC 207 and subsequently in the Supreme Court in *Lopes v. Minister for Justice, Equality and Law Reform* [2004] IESC 21 and in *Keohane v. Hynes & Anor* [2014] IESC 66. O. 19 r 28 provides as follows:

"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 judgment to be entered accordingly, as may be

just."

12. An application under O. 19, r. 28 is concerned solely with what appears on the face of the pleadings. If the facts as pleaded by the plaintiff could not conceivably give rise to a cause of action, then the proceedings may be dismissed. The court does not, and cannot, look outside the pleadings or examine the facts or the evidence to determine if the cause of action is sustainable. In such an application, the court has jurisdiction to strike out an entire pleading but not a portion thereof, so that it is all or nothing – see *Aer Rianta v. Ryanair* [2004] 1 I.R. 506. The court must further be satisfied that the impugned pleading does not admit of any amendment that could save it – per Keane J. in *Moffitt v. Bank of Ireland* [Unreported, Supreme Court, 19th February, 1999].

13. The jurisdiction conferred on the court by O. 19, r. 27 is quite different. It provides:

> "The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client."

14. Rule 27 is concerned with a different subject matter to r. 28. Unlike r. 28, it explicitly permits the court to strike out a part of a pleading. Pleadings exist to define the issues which the court has to determine. Thus, where a pleading contains allegations which are irrelevant or otherwise unnecessary to make out the cause of action pleaded, they may be struck out. Scandalous matter may also be struck out which is not present for legitimate pleading purposes but rather is a form of abuse of process. An example would be the inclusion of gratuitous allegations defamatory of a party, which are irrelevant to the issues and included for the improper purpose of abusing the cloak of privilege conferred in court proceedings. Matters which may tend to prejudice, embarrass or delay the fair trial of an action may for example include excessive prolixity, vagueness and lack of particularity in pleadings. Rule 27 enables the court to address all such issues which are separate and distinct from the subject matter of r. 28. Applications to dismiss under the inherent jurisdiction of the court are quite different. Here, the court is not confined to an examination of the proceedings but may look outside them at uncontroversial facts to determine if the claim is bound to fail. As Clarke J. said in Salthill Properties (at para. 3.12):

> "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."

15. The same judge speaking for the Supreme Court emphasised however, the limited nature of such enquiry in Keohane at para. 6.2:

> "However, it is important to emphasise that the extent to which it is appropriate for the Court to assess the evidence and the facts on a motion to dismiss as being bound to fail is extremely limited."

Clarke J. summarised the matter in the following way:

"[6.5.] It is important, for the avoidance of any doubt, that the overall principle be clearly stated. As pointed out in many of the authorities, not least in the judgment of Murray J. in *Jodifern*, the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings. However, as again noted by Murray J. in *Jodifern*, whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis.

> [6.6.] It is for that reason that all of the jurisprudence emphasises that the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law. It is against that background that the extent of the court's entitlement to look at the facts needs to be judged.
>
> [6.7.] I am in full agreement with the views expressed by Birmingham J. in Burke. Where there is evidence placed before the court on affidavit on behalf of a plaintiff which, if accepted at trial, might arguably lead to the plaintiff succeeding, then that is an end of the matter. But it does not necessarily follow that a plaintiff even has to put evidence of that type before the court. In Lopes, I observed at para 2.5:
>
> 'In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in *Sun Fat Chan* (at p. 428), that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.'

I commented to similar effect in *Salthill Properties* at para 3.15:

> '…it seems to me that I should assess the factual allegations .., 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 applicants] have established that it is impossible that any such evidence will be produced at trial.'
>
> [6.8.] What the Court can analyse is whether a plaintiff's factual allegation amounts to no more than a mere assertion, for which no evidence or no credible basis for believing that there could be any evidence, is put forward…
>
> [6.10] … the bringing of a claim based on a factual assertion for which there is or may be evidence (even if the defendant can point to many reasons why it might be argued that a successful challenge could be mounted to the credibility of the evidence concerned) is not an abuse of process."

These Proceedings

16. The plaintiff instituted the within proceedings by plenary summons on the 2nd May, 2013. The claim is for damages and the cause of action is stated in the general indorsement of claim on the summons as being negligence, breach of duty, mis-representation and conspiracy. The statement of claim was delivered on the 19th February, 2014, and sets out in some detail the factual background to

which I have already referred. The plaintiffs plead that the defendant was aware of all of these facts at the time he negotiated and drafted the terms of settlement. In essence, the statement of claim pleads two separate causes of action against the defendant, the first in conspiracy and the second in professional negligence.

17. With regard to the first, it is alleged that the defendant conspired with Mr. Ferris and Mr. Payne to procure an unlawful object by advising the plaintiffs to enter into the settlement agreement, namely the unlawful avoidance of capital gains tax by Mr. Payne. The second limb of the claim is that the defendant negligently advised the plaintiffs to enter into the settlement agreement when it was not in their interests to do so. Complaint is made of the fact that the settlement agreement imposed an obligation on the plaintiffs to pay a sum of €315,000 to Mr. Payne independent of any obligation on his part to extinguish the right of way. Accordingly, it is alleged that the settlement agreement as drafted by the defendant failed to impose contemporaneous mutual obligations upon the parties.

18. The plaintiffs plead that the location of the new right of way could not be agreed until the construction works commenced upon the site but no works could commence without drawing down the finance from KBC Bank who indicated to the plaintiffs that it would not advance any sums until a map was agreed between the experts outlining the precise location of the new right of way. The plaintiffs accordingly allege that they were left in a situation where they were obliged to pay €315,000 to Mr. Payne whilst at the same time being unable to agree the new right way and extinguish the old one. The plaintiffs go on to allege that all of these matters had the consequence that the planning permission expired, they were unable to proceed with the development and they lost their entire investment and the very significant profits that would have flowed from the project. All of these are claimed for in the statement of claim and subsequent replies to particulars.

The Defendant's Application
19. Mr. Hayden S.C. for the defendant submits that with regard to the first limb of the claim, conspiracy, it is bound to fail because no loss is alleged to have been suffered by the plaintiffs as a result of the conspiracy. The conspiracy is alleged to be one to defraud the Revenue and if that is correct, then it is the Revenue that have suffered the loss and not the plaintiffs. Counsel contended further that a claim for damages in conspiracy could not be advanced against a sole defendant where the essence of the tort is that he conspired with others not before the court. Although proceedings have been brought separately against Mr. Ferris which the plaintiffs say they intend to consolidate with the claim against the defendant, those proceedings against Mr. Ferris do not include a claim for conspiracy and such claim against him would now be statute barred. Insofar as it is claimed in the counterclaim against Mr. Payne, that matter appears to be determined.

20. On the second limb of the claim, professional negligence, it is said that this is bound to fail for a number of reasons. Primary amongst these is that the plaintiffs have in fact suffered no loss as a result of any negligence on the part of the defendant, even if there was such. The basis of this argument is that the plaintiffs have never discharged the sum of €315,000 to Mr. Payne and are thus not at the loss of it. The proceedings involving Mr. Payne appear to have ended some years ago and the plaintiffs themselves concede that they have only discharged a sum of €10,000 on foot of the judgment already obtained against them in 2010. It is not open to the plaintiffs to argue that the obligation to pay Mr. Payne is independent of his obligations to extinguish the right of way in circumstances where the second plaintiff has sworn an affidavit to contrary effect in opposing the motion for judgment brought by Mr. Payne.

21. Insofar as the plaintiffs make a claim in relation to the loss of the development, that is also bound to fail because the plaintiffs concede and expressly plead that at the time of the settlement agreement was entered into, it was already too late for them to complete the development without the necessity for a fresh planning application. Accordingly, the defendant submits that any losses suffered by the plaintiffs in that regard are solely attributable to their own actions and cannot be attributed to any putative negligence on the part of the defendant. The defendant further argues that it is not open to the plaintiffs to contend that they have a liability for the €275,000 in circumstances where, quite apart from the fact that they have not paid it, McKechnie J. found that they had a defence to this claim in adjourning the matter for plenary hearing.

Discussion
22. Dealing first with the conspiracy claim, in discussing the constituent ingredients of the wrong, in *The Law of Torts* (4th Ed) McMahon and Binchy, the authors state at para. 32.98:

"For the plaintiff to succeed, it is necessary to show not merely that a conspiracy was in existence but that it resulted in damage to the plaintiff."

23. The tort of conspiracy was considered by Barton J. in *Van Garde Auto Finance Limited v. Byrne & Ors* [2014] IEHC 465 were he said (at para. 85 – 86): "[85.] The essential features of the tort of conspiracy were succinctly described in the judgment of O'Neill J. in *Iarnrod Eireann v. Colbrook* [2000] IEHC 47 where having reviewed a number of earlier authorities the learned judge stated

> '[1.] The agreement or combination of two or more people the primaryor predominant object of which was to injure another, is actionable even though the act done to the party injured would be lawful if doneby an individual.
>
> [2.] An agreement or combination of two or more persons to carry outa purpose lawful in itself but by using unlawful means is actionable, in circumstances where the act in question might not be actionableagainst the individual members of the combination, as individuals.'
>
> [86.] This tort requires the participation of two or more legal or natural persons to injure the plaintiff. The parties need not all act at the same time nor are they required to be of the one aim but there must be an agreement on acting together. Conspiracy is not actionable per se. It is a necessary proof on the part of the plaintiff to establish both the fact of the conspiracy and that this resulted in damage to the plaintiff."

24. In the present case, the plaintiffs allege a conspiracy involving the defendant with others to defraud the Revenue. It is clear on any view of the matter therefore that the object of the alleged conspiracy was not to injure the plaintiffs. Although they allege that the defendant was guilty of conspiracy and separately that they suffered loss, even on their own case as pleaded there is clearly no causal connection between the alleged wrongful conduct and the alleged loss. Further, looking outside the pleadings at the first plaintiff's replying affidavit which contains a lengthy section dealing with the conspiracy claim, the entirety of that is devoted to the assertion that the defendant well knew when he drafted the settlement agreement that the €275,000 was not in fact damages but was part of the consideration for the extinguishment of the right of way. That may or may not be so but it does not in any way address the fundamental issue that the plaintiffs have plainly suffered no loss as a result of the conspiracy complained of.

25. In those circumstances, it seems to me that an analysis of the claim as pleaded together with the supporting evidence of the plaintiffs, even taken at its high water mark, demonstrates clearly that this claim is bound to fail. I should add however, that were it

necessary to express a view on the argument of the defendant that a claim in conspiracy could not succeed against an individual party, I am not convinced that this is so. No authority was cited in support of this proposition and it seems to me that it is possible to envisage circumstances where there may be a number of co-conspirators but the plaintiff is only in a position to proceed against one or other because their identities may be unknown, they may not be amenable to the court's jurisdiction for whatever reason, they may be immune from suit and so forth. For those reasons I do not think that this argument is well founded.

26. Turning now to the professional negligence claim, although lengthy and detailed allegations are made in the pleadings on this issue, I think when one steps back and takes an overview of the matter, it is perhaps not unduly complex.

27. The plaintiffs wanted to proceed with their development. They could not do so as long as Mr. Payne's claim remained extant. The purpose of attending the settlement meeting was therefore to procure a compromise that would enable the development to proceed. This was clearly going to involve the payment of money to Mr. Payne one way or the other. The plaintiffs' evidence is that they had no intention of paying damages to Mr. Payne and presumably believed he had suffered none. Their intention was to buy out his right of way and reinstate it in a different location where it would not interfere with their development. They were prepared to pay Mr. Payne for this facility. The defendant was aware of these facts. He was also aware as Mr. Ferris's letter of 9th May, 2007, to him clearly shows that the plaintiffs were unlikely to have sufficient time to complete the development before the planning permission expired but they still wished to compromise the matter if that were possible. The plaintiffs may well have felt that even in the event of running out of time, they would have a reasonable prospect of getting a fresh planning permission. Alternatively they may have felt that if they managed to extinguish the right of way, this would considerably enhance the value of their site with a view to selling it on to a third party who had the means to develop it. However, the important point is that whatever their motivation, the plaintiffs believed that it was in their interests to extinguish Mr. Payne's right of way.

28. It seems to me that at minimum, it is at least arguable that the settlement agreement failed to achieve this relatively simple objective. On one view of the matter, which is of course the view advanced by Mr. Payne, after the conclusion of the settlement agreement, the plaintiffs were left with an obligation to pay him €315,000, described as "damages" and costs, while at the same time being left with no final and conclusively binding commitment by him to extinguish the right of way. Mr. Payne's agreement to extinguish his right of way was left contingent upon a further agreement between the parties' experts which might never be, and has not to date in fact been, reached. In that respect, Mr. Payne's commitment in relation to the extinguishment of his right of way might reasonably be characterised as no more than an agreement to agree.

29. As against that, the plaintiffs have arguably been left with an obligation to pay damages of €275,000 to Mr. Payne. I do not accept the defendant's submission that it is not open for the plaintiffs to make this argument in circumstances were they have sworn in Mr. Payne's claim that this sum is in fact part consideration for the extinguishment of the right of way, in the absence of which there can be no obligation to pay. That issue has not been finally determined as the proceedings have simply been adjourned generally and could, in theory at least, be resurrected in the future. Furthermore, the suggestion that McKenchie J. found that the plaintiffs had a defence at the summary judgment hearing is not something that in my view can be relied upon by the defendant to show that the plaintiffs' claim is either frivolous or vexatious or bound to fail.

30. At the summary judgment hearing, all that the court was required to conclude was that the plaintiffs had raised no more than an arguable defence but whether such defence might ultimately succeed is something as yet undetermined.

31. It is also of particular significance that judgment was given against the plaintiffs in those proceedings for €40,000, in respect of which a part payment only has been made. The fact is that the plaintiffs remain liable on foot of that judgment and might reasonably argue that this at least is a clear liability to which they have been exposed for which they have received no benefit and which arises from the manner in which the settlement agreement was drafted by the defendant.

32. The defendant argues that the claim for the losses arising from the failure of the project cannot be visited upon him as the project was in effect already doomed before the settlement was concluded. That may or may not be the case and is no doubt something that will be forcefully argued at the trial of the action. However, at this juncture, I do not think it is possible for me to say that there are no circumstances in which this claim could succeed irrespective of what evidence may be led by the plaintiffs at the trial. The plaintiffs' case may be weak in that regard, it may be lacking in credibility and perhaps even contradicted to an extent by their own pleadings, but to conclude that the case is thus bound to fail would involve embarking on precisely the kind of analysis and weighing of the evidence that is impermissible in an application of this nature for the reasons explained in the authorities to which I have already referred.

33. I am therefore not satisfied that this aspect of the plaintiffs claim is bound to fail.

Conclusion

34. For the reasons already set out, I propose to strike out those parts of the plaintiffs' plenary summons and statement of claim that refer to the conspiracy claim. In respect of the balance of the plaintiffs' claim, I will refuse the defendant's application herein. I will hear counsel further on the final form of order necessary to give effect to these findings.