THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 257

High Court Record No. 2014/3015P

Court of Appeal Record No. 2016/388

Peart J.
Irvine J.
Whelan J.

BETWEEN/

MARGARET HOSEY

PLAINTIFF / RESPONDENT

- AND –

ULSTER BANK IRELAND LIMITED

1ST NAMED DEFENDANT / APPELLANT

- AND –

BRENDAN WELDON PRACTISING UNDER THE STYLE AND TITLE OF BRENDAN WELDON AND COMPANY

2ND NAMED DEFENDANT / APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 12th day of October 2017

1. This judgment concerns an appeal brought by the second named defendant, a firm of solicitors ("Weldon & Co.") against the judgment and order of the High Court (Murphy J.) dated respectively the 7th June and the 12th July, 2016. By her judgment, the High Court judge refused the application brought by Weldon & Co. seeking, *inter alia*, an order dismissing the plaintiff's claim as disclosing no cause of action.

Background
2. Mrs. Hosey commenced her claim by plenary summons dated the 7th March, 2014. Mrs. Hosey proceeded to deliver a statement of claim on the 28th May, 2014. As against Ulster Bank Ireland Limited ("Ulster Bank"), she seeks certain declaratory and injunctive relief concerning a loan facility which Ulster Bank maintains she entered into on the 22nd April, 2008. As against Weldon & Co., she claims, *inter alia*, damages for negligence and also an indemnity both in respect of any monies now lawfully payable by her to Ulster Bank on foot of the said loan facility and such costs as she may incur in defending proceedings brought against her by Ulster Bank in relation to the said facility.

3. By notice of motion dated the 20th May, 2015, Weldon & Co. made an application to the High Court to dismiss Mrs. Hosey's claim as then pleaded on the grounds that it disclosed no cause of action. In the alternative, the court was asked to make an order requiring her to furnish replies to a notice for particulars dated the 22nd September, 2014.

4. The aforementioned motion was ultimately heard by the High Court on the 19th February, 2016 by which time not only had the parties to the motion exchanged affidavits but Mrs. Hosey had, with the court's agreement, furnished an amended statement of claim which is dated the 16th February, 2016. The application was unsuccessful in that Murphy J. refused to strike out the proceedings.

5. In its notice of expedited appeal dated the 2nd August, 2016, Weldon & Co. asserts that the trial judge misdirected herself in law in determining that the pleadings disclosed a cause of action.

Relevant uncontested facts.
6. For the purpose of considering whether the trial judge erred in law in her decision not to dismiss Mrs. Hosey's claim, I consider it necessary to identify the uncontested background facts as well as those facts which were disputed by the parties in their affidavits.

7. Mr. and Mrs. Hosey jointly own two properties. The first of these I will refer to as the Brooklawns property and the second as the Rutland property. In 2002, Mrs. Hosey and her husband borrowed €152,000 from First Active, now Ulster Bank, on terms set out in a letter from First Active dated the 8th October, 2002. These borrowings are the subject matter of a loan account bearing the last four digits 9401 ("the 9401 account").

8. It is not disputed that on the 2nd October, 2002, Mrs. Hosey gave written irrevocable authority to Weldon & Co. to register First Active as the owners of the first legal charge over the Brooklawns property as was required by way of secturity pursuant to the terms of the loan facility.

9. Accordingly, by solicitor's undertaking dated the 2nd October, 2002, Mr. Weldon undertook, in consideration of the bank meeting its obligations as lender, to procure the execution by Mr. and Mrs. Hosey of a deed of mortgage in favour of First Active.

10. Mrs. Hosey does not deny executing a deed of mortgage in respect of Brooklawns to secure the aforementioned borrowings. However, Mr. Weldon did not register the mortgage deed in respect of Brooklawns prior to the drawdown of the aforementioned funds as agreed.

11. On the 10th May, 2004, Mr. Weldon, at the request of Mr. Hosey, asked First Active to provide redemption figures in respect of a second loan account bearing the last four digits 9402 ("the 9402 account"). That account was secured on the Rutland property. First Active, for reasons which are not entirely clear, furnished redemption figures for both loan accounts. The redemption figure for account 9401, that being the account which was to have been supported by a deed of mortgage over the Brooklawns property, was

€145,402 and €88,749.09 for account 9402, that being the account that was supported by a mortgage on the Rutland property.

12. Mr. Weldon later forwarded a cheque to First Active for €145,402 which, according to a letter from First Active dated the 20th February, 2008, was applied to the Brooklawns account (9401) given that it matched the redemption figures which had been furnished for that account.

13. In early 2008, Mr. Weldon, then acting solely on behalf of Mr. Hosey given that his relationship with Mrs. Hosey had broken down and they were living apart, advised First Active that it had been the intention of Mr. Hosey back in May 2004 to redeem the Rutland mortgage (account no 9402) and not the Brooklawns account (9401) and asked that the error earlier made be rectified.

14. By letter dated the 20th February, 2008, First Active, believing that Mr. Weldon was acting on the instructions of both Mr. and Mrs. Hosey, stated that it would be willing to re-activate the Brooklawns mortgage account (9401) but pointed out that his clients "should consider their options carefully" as what was proposed would leave them with a larger mortgage debt than they had at the time and there would be substantial arrears as no payments had been made since 2004.

15. In a further letter of the 9th April, 2008, First Active wrote to Mr. Weldon, once again in respect of his clients Mr. and Mrs. Hosey, confirming it would re-activate the Brooklawns account. In this regard, they called upon him to comply with his undertaking earlier given to register the mortgage deed against Brooklawns. Mr. Weldon, who had in his possesion the deed of mortgage which had been executed by Mr. and Mrs. Hosey at the time in relation to the 9401 account, duly complied with his undertaking.

16. By letter of the 2nd December, 2008 addressed to Mr. and Mrs. Hosey at their Brooklawns address, First Active advised that a new account with a number bearing the final four digits 9403 ("the 9403 account") had been set up to correct the error in the redemption of the 9401 account that had occurred in May, 2004. The letter records that in April, 2008 First Active had reached a final agreement with Weldon & Co. to set up this new account which involved the reinstatement of a mortgage over Brooklawns.

17. On the 15th February, 2010, Ulster Bank became entitled to all of the interests of First Active in the loans and securities hereinbefore mentioned.

18. Due to their failure to meet their liabilities on foot of the 9403 account, on the 1st August, 2013, Ulster Bank commenced Circuit Court proceedings against Mr. and Mrs. Hosey seeking possession of the Brooklawns premises. In those proceedings, Ulster Bank maintains it is entitled to possession on foot of a deed of mortgage signed by Mr. and Mrs. Hosey on the 8th March, 2008 in circumstances where they had failed to meet its demand for repayment of the sum of €137,904.17 which it had made on the 4th July, 2013.

Mrs. Hosey's affidavits

19. The background facts as set forth above are supported by the documentation exhibited in the affidavits sworn by the parties. However, because of the prevailing jurisprudence to which I will later refer, it is also important to consider the facts upon which Mrs. Hosey seeks to rely and which are outside the contractual documentation and correspondence earlier mentioned.

20. Mrs. Hosey maintains that there was no mistake or error made when the loan intended to be secured on the Brooklawns property (9401) was redeemed by her husband in 2004. She makes clear at paragraph 7 of her second affidavit that there was an agreement between herself and her husband that he would repay the monies outstanding on that account to leave her in possesion of an unencumbered property. This was done, she maintains, as part of an informal separation agreement. That the discharge of the Brooklawns loan account was no mistake she claims is borne out by the fact that the sum paid by Mr. Hosey coincided with the amount due on that account. Further, the result of that payment was that her husband continued to make the repayments in respect of the Rutland mortgage, behaviour which she contends is inconsistent with that of someone who believed they had redeemed that mortgage.

21. It was as a result of the aforementioned agreement with her husband that Mrs. Hosey maintains she lived in Brooklawns mortgage free until 2008 when Mr. Hosey sought to resile from their earlier agreement due to a deterioration in their relationship.

22. Mrs. Hosey maintains that such dealings as took place between First Active and Mr. Weldon in 2008 were done without her consent. She was not his client and he had no authority to act on her behalf in relation to any matters concerning her banking relationship with First Active or in relation to Brooklawns. Mrs. Hosey goes so far as to state that Mr. Weldon had a conflict of interest in circumstances where he was then advising her husband concerning their matrimonial dispute.

23. Of particular importance is the fact that Mrs. Hosey claims that she did not know of or consent to Mr. Weldon authorising First Active to re-activate the loan facility formerly the subject matter of account 9401 and neither did she know of or agree to the setting up of any new loan account (9403) with First Active in 2008. She maintains that Mr. Weldon had no authority to commit her to what was then a new liability and one to which she would not have consented by reason of the agreement made between herself and her husband in 2004. That new account could not lawfully have been set up without her consent. Further, the effect of the discharge of the monies formerly outstanding on the Brooklawns account (9401) was to release Mr. Weldon from his undertaking to register the deed of mortgage in respect of Brooklawns which she had earlier signed for the purposes of securing that loan facility in 2002. Accordingly, he had no authority to insert the date 8th October, 2008 into the deed of mortgage and to provide it as security for the liabilities created on the opening of account 9403.

24. Mrs. Hosey maintains that not only did Mr. Weldon act without her authority but he failed to advise her to take independent legal advice on his proposal to ask First Active to reverse the transaction that had resulted in the discharge of the Brooklawns loan account in 2004. Mrs. Hosey contends that as a result of Mr. Weldon's conduct she has and will likely suffer loss and damage apart from anxiety and upset. Amongst the implications alleged to arise from his conduct are the liability for the monies outstanding on account 9403, the potential loss of her home as a result of the deed of mortgage dated the 8th October, 2008 furnished to secure that loan together with additional legal costs including those she will incur in defending the Circuit Court proceedings earlier referred to.

Mr. Weldon's position

25. Mr. Weldon maintains that Mrs. Hosey is seeking to take advantage of an error which was made by First Active in 2004 when Mr. Hosey ended up redeeming the wrong mortgage and that she wants the benefit of the Brooklawns property without accepting any responsibility for the mortgage created in 2002. He relies upon the fact that Mrs. Hosey benefited from the borrowings made available by First Active in 2002 and also upon the fact that she does not dispute that she signed the mortgage deed to support those borrowings.

26. Mr. Weldon disputes the existence of any concluded agreement between Mr. and Mrs. Hosey whereby Mrs. Hosey was to be entitled to possession of Brooklawns unencumbered by any mortgage. He also relies upon the fact that Mrs. Hosey does not contest the truth of his explanation for his delay in registering the deed of mortgage in relation to the Brooklawns loan facility and the fact that she does not claim that more money is now outstanding than would have been the case if he had furnished the mortgage deed to First Active earlier.

27. In summary, Mr. Weldon contends that Mrs. Hosey's principal complaint is that Ulster Bank claims that she borrowed €144,586.29 in 2008 and he maintains that there are no circumstances in which he could have any possible liability in respect of her indebtidness for that sum.

28. Before moving to consider the judgment of the High Court judge and the legal principles to be applied on this appeal and whilst irrelevant to the Court's determination, I feel compelled to observe that Mr. Weldon in his affidavits strayed beyond what ought properly have been deposed to therein. His affidavits not only contain comment and argument but he makes judgments as to Mrs. Hosey's motivation and credibility which he has no entitlement to make regardless of how aggrieved he may feel or his belief that the within proceedings are wholly without merit. Submissions are properly a matter for counsel and all matters of judgment and credibility are for the court to determine.

Judgment of the High Court Judge
29. The High Court judge decided that the "nub of the issue between the parties" was whether in 2004 Mr. Hosey had cleared the loan (9401) which was to be supported by a deed of mortgage on the Brooklawns property by agreement with Mrs. Hosey or whether he had done so in error. She referred to facts which lent support to Mrs. Hosey's claim that there had been no error and that Mr. Hosey had intended to clear the Brooklawns loan. The High Court judge expressed surprise that Mr. Hosey had not immediately noticed his error, if error it was, given that the consequence of having discharged the incorrect loan (9401) was that he continued to make mortgage repayments for several years in respect of the loan secured on the Rutland property (9402) which Mr. Weldon maintained it had been Mr. Hosey's intention to redeem. She also referred to Mrs. Hosey's averments as to requests made of her by Mr. Hosey in 2006, following a souring of their relationship, that she remortgage Brooklawns, conduct that was consistent with her account that he had earlier redeemed the Brooklawns loan by agreement.

30. Insofar as the conduct of Mr. Weldon was concerned, the High Court judge concluded that, *prima facie*, he had acted in a manner inimicable to Mrs. Hosey's interests. She had been living in Brooklawns mortgage free. However, as a result of his actions, Mr. Weldon had put First Active in a position where Mrs. Hosey became liable in respect of a loan facility which had been cleared in 2004 and he had done so without her authority. Further, as security for the liability thereby created he had, in circumstances which had not been adequately explained, provided to First Active a deed of mortgage in respect of the Brooklawns property dated the 8th March, 2008 thus exposing her to a risk of having her home repossessed. Again he had done this without her knowledge or consent. In this regard, the High Court judge referred to the fact that the date on the mortgage deed would have led First Active to believe Mr. Weldon had Mrs. Hosey's consent to the reversal of the 2004 payment and the provision of the security for the new account then set up, when this was not the case.

31. It was for the aforementioned reasons that the High Court judge expressed herself satisfied that Mrs. Hosey had at least a statable case against Mr. Weldon and that the full extent of that claim would only become known following discovery.

32. What is clear from the judgment of the High Court judge is that she addressed not only the relief sought in the notice of motion, namely that the claim should be struck out on the ground that pleadings failed to disclose a cause of action but also whether Mrs. Hosey's proceedings should be dismissed as an abuse of process on the basis that the claim made was one which was bound to fail.

Relevant legal principles
33. Before considering the decision made by the High Court judge, it is perhaps important to reflect briefly upon the different principles that apply depending upon whether a court is being asked to invoke its inherent jurisdiction to dismiss proceedings on the ground that a claim is bound to fail and those which are germaine to an application under Ord. 19, r. 28 to strike out a pleading on the ground that it discloses no reasonable cause of action.

Order 19, r. 28: Striking out a pleading as disclosing no cause of action.
34. When asked under Ord. 19, r. 28 to strike out a pleading on the ground that it discloses no reasonable cause of action, as was the application of Weldon & Co., the court must determine such an application solely by reference to the pleadings. See *McCabe v. Harding* [1984] ILRM 105 and *D.K. v. King* [1994] I.R. The court will look to the text of the statement of claim, if that is the document under scrutiny, and when it does so it must ignore any affidavit evidence that may be filed: See for example *Barry v. Buckley* [1981] 1 I.R. 306. Further, for the purposes of making its assessment, the court must proceed on the basis that any statement of fact contained in the pleadings which it is sought to strike out is true and will be proved by the party whose pleading is under attack.

The court's inherent jurisdiction to dismiss a claim on the basis that it is bound to fail
35. The court's inherent jurisdiction to dismiss a claim on the ground that it is bound to fail is a jurisdiction which is only to be "exercised sparingly and only in clear cases" as was stated by Costello J. in *Barry v. Buckley* [1981] 1 I.R. 306.

36. In *Lac Minerals Ltd. v. Chevron Mineral Corporation* [1995] 1 I.L.R.M. 161, Keane J. stated that before a judge accedes to an application to dismiss a claim on the ground that it is bound to fail, he or she must be confident that no matter what may arise on discovery or at the trial of the action that the claim cannot succeed.

37. Further, if the proceedings can be saved by an amendment to the pleadings then once again the action should not be dismissed: See for example *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425.

38. In some of the more recent decisions, such as those in *Ruby Property Co. Ltd. v. Kilty* [1999] IEHC 50 and *Jodifern Ltd. v. Fitzgerald* [2003] I.R. 321, the court has made clear that a defendant can only succeed on this type of application if, on the basis of admitting to all of the facts as asserted by a plaintiff, they can establish that the action cannot succeed.

39. While this jurisdiction is one which is to be sparingly exercised, there are of course cases were the legal rights and obligations of the parties may be governed by documents and in such cases the court may examine such documents to consider whether the plaintiff's claim is, as alleged, bound to fail. However, even in those cases, the court must ask itself the question as to whether there is nonetheless a risk that outside of that documentary record there could realistically be evidence which might bear upon the rights and obligations as identified in the documents.

40. Finally, of some particular relevance in the context of the present proceedings is the fact that a claim may appear to be

innovative or weak is no basis for dismissing the claim as was observed by Charleton J. in *Millstream Recycling Limited v. Tierney* [2010] IEHC 55.

Decision

41. Having considered the submissions of the parties, I can find no error in the approach of the High Court judge to the application made by Mr. Weldon to have the proceedings of Mrs. Hosey dismissed as against his firm.

42. Whist not specifically addressed in her judgment, I am first of all satisfied that the High Court judge would have been in error if she had decided to dismiss these proceedings against Weldon & Co. on the grounds that the pleadings and in particular that the statement of claim as amended, does not disclose a cause of action as was the application before her pursuant to Order 19 r. 28 of the Rules of the Superior Courts.

43. Whatever about the statement of claim as originally drafted, the amended statement of claim does, I believe, does disclose a cause of action against Weldon & Co. The cause of action asserted is one in which Mrs. Hosey seeks damages for alleged negligence, breach of duty and breach of fiduciary duty. Whether she will suceed in that action or how likely her prospects of success are is immaterial to the court's consideration when exercising this particular jurisdiction which involves an assessment of the particular pleading rather than the merits of the claim.

44. It is true to say that even the amended statement of claim is somewhat short on specifics such as the precise basis for the duty of care which underlies the claim for negligence. However, the existence of such a duty is pleaded and is pursued by Mrs. Hosey on the basis that Mr. Weldon, in his dealings with First Active in 2008, held himself out as acting on her behalf when he was no longer her solicitor and at a time when he was in fact acting in pursuit of her husband's interests which were inimicable to hers.

45. Mrs. Hosey pleads that Mr. Weldon's duty of care in such circumstances obliged him, *inter alia*, to advise her to take independent legal advice concerning his intention to request First Active to resuscitate the loan formerly the subject matter of account 9401 and as to his intention to provide the security demanded by First Active on foot of the irrevocable authority that she had signed in 2002.

46. Finally, in terms of the tort of negligence as pleaded, Mrs. Hosey claims that had Mr. Weldon not acted in breach of his duty of care she would have been in a position to prevent the re-activation of her liabilities as per the 9401 account which had been discharged by her husband in 2004. She claims that without her agreement First Active would not have been in a position to open loan account 9403 in the joint names of herself and her husband with a liability of €114,113.52 as of the 1st December, 2008 and she would not now be facing repossession of her home due to the monies outstanding on that account. There are also other heads of damage claimed such as damages for anxiety and distress as well as the costs of defending the Circuit Court proceedings that have been instituted against her by Ulster Bank seeking possession of the Brooklawns property.

47. Accordingly, whilst the amended statement of claim puts forward a somewhat unusual claim against Weldon & Co. and is one which will no doubt be hotly contested, it cannot in my view be said that it does not disclose a cause of action such that it should be struck out.

48. I am also satisfied that the High Court judge was correct in law when she decided not to dismiss Mrs. Hosey's claim as an abuse of process on the grounds that it is bound to fail particularly having regard to the facts deposed to in her affidavits. In this regard, it is important to remember that the court, on an application to dismiss a claim on the basis that it is bound to fail, must proceed to make its adjudication based on the assumption that the plaintiff will prove the facts which they allege at trial. In *Ennis v. Butterly* [1996] 1 I.R. 426 at 431, Kelly J. set this principle out as follows:-

> "In view of the fact that this inherent jurisdiction is relied on by the defendant, it is permissible for affidavit evidence to be adduced. A number of affidavits have been filed and I will consider their contents in due course. From the point of view of this application, however, it is conceded by [counsel for the defendant] that I must assume:
>
> (a) that every fact pleaded by the plaintiff in her amended statement of claim is correct and can be proved at trial, and
>
> (b) that every fact asserted by her on affidavit is likewise correct and can be proved at trial.
>
> This approach necessarily means that, insofar as there may be conflict between matters averred to by the plaintiff and the defendant on their respective affidavits, such conflicts must be resolved in favour of the plaintiff."

49. In my view, Mr. Weldon could only have succeeded in his application had the High Court judge been prepared to reject Mrs. Hosey's sworn testimony that the loan secured on the Brooklawns property was discharged as a result of an agreement between herself and her husband and such an approach having regard to the conflict on the facts before her, was simply not permissible having regard to the prevailing jurisprudence.

50. There are, of course, those very rare cases in which the documentary evidence is so clear that a court may conclude that what has been deposed to by a plaintiff on affidavit to support their claim can be safely rejected, but this is not such a case. Not only were there no documents available to challenge the agreement contended for by Mrs. Hosey, there was nothing before the court to contest the existance of such an agreement save for Mr. Weldon's bald assertion to the contrary. There was not even a brief affidavit from Mr. Hosey to say that he not entered into any such agreement. Further, whilst it is repeatedly stated by Mr. Weldon that the Brooklawns loan was discharged as a result of an error made by "the bank" in 2004, it is clear from the letter of First Active of the 13th March, 2008 (Exhibit "MH4" to Mrs. Hosey's affidavit of 22nd July, 2015) that it was quite satisfied that it was not responsible for any error when the liabilities on that account were redeemed on the 25th May, 2004.

51. In addition to what was stated by First Active in its letter of the 13th March, 2008, Mrs. Hosey has referred to certain facts which lend some support to the existance of the agreement for which she contends, as was noted by the High Court judge in the course of her judgment.

52. First, the sums due in respect of the Brooklawns and the Rutland account were substantially different yet Mr. Hosey wrote a cheque for the precise sum that was outstanding on the Brooklawns account at a time when it is alleged he had intended to discharge the Rutland account.

53. Second, Mr. Hosey continued for several years to make mortgage repayments in respect of a loan account which, according to

Mr. Weldon, it had been his intention to discharge.

54. Third, there was the evidence of Mrs. Hosey that subsequent to the agreement with her husband in 2004 that both her husband's financial position and their relationship deteriorated to the point that in 2006 he had asked her to remortgage the property at Brooklawns, evidence which if true would lend support to her contention that Mr. Hosey had earlier by agreement discharged the Brooklawns loan.

55. Of some further import is the fact that as yet Mrs. Hosey has not been in a position to seek discovery against Weldon & Co. and/or Ulster Bank concerning documentation in their possession material to the circumstances in which loan account 9401 was discharged. Having regard to the dispute between the paties as to the circumstances surrounding that transaction, the High Court judge could never have concluded that a document or documents might not emerge to support Mrs. Hosey's contention that the loan was discharged by agreement as opposed to as a result of a mistake made by Mr. Hosey, First Active and/or Mr. Weldon.

56. The next question that the High Court judge had to address was whether, if Mrs. Hosey had reached the agreement which she contended for with her husband, she could claim that Mr. Weldon was negligent when he, on Mr. Hosey's instructions, procured an agreement with First Active whereby the Brooklawns loan account would be re-activated by the setting up of a new account (9403) and thus creating a joint liability of €114,113.52 for Mr. and Mrs. Hosey but one which was secured on the Brooklawns property?

57. It is clear from the correspondence exchanged between Mr. Weldon and First Active concerning his request that the transaction that had taken place in 2004 be reversed that at all stages First Active assumed that Mr. Weldon was acting on behalf of Mr. and Mrs. Hosey. Each letter to Mr. Weldon is written "Re: Your Clients: Patrick and Margaret Hosey".

58. Of real importance is the fact that without making any contact with Mrs. Hosey, who had been his client in 2002 when the Brooklawns facility was agreed, he reached an agreement with First Active whereby she was to assume a liability for €114,113.52 which was to be secured over her family home. He did this without her consent, in circumstances where the agreement was clearly to the advantage of Mr. Hosey for whom he was acting in the course of their matrimonial dispute and in circumstances where he was fully aware that Mrs. Hosey had for several years lived mortgage free in that property. For my part, I do not consider it unstatable that Mr. Weldon was under a legal obligation to advise Mrs. Hosey as to the agreement which he proposed to reach with First Active which he knew or must have known had serious implications for her.

59. I am also satisfied that, based on the facts as they are presently known, a court could not rule out the possibility that if First Active had been advised by Mrs. Hosey that the Brooklawns loan had been discharged by her husband by agreement in 2004 that it would not have agreed to Mr. Weldon's request and that it would have refused to reactivate the 9401 account by the setting up of the 9403 on the 1st December, 2008. It follows that the deed of mortgage of the 8th October, 2008 could not have been relied upon by the bank to seek to recover possesion of Brooklawns if loan account 9403 had not been established.

60. Having regard to the view I have taken of the matters addressed by the High Court judge in her judgment it is not necessary to consider further some of the more peripheral arguments made on behalf of the parties on this appeal which I would dismiss.

Conclusion

61. As was stated by Fennelly J. in *Delahunt v. Players and Wills (Ireland) Limited* [2006] IESC 21, the inherent jurisdiction vested in the court to dismiss a claim as bound to fail is suitable only for use in cases where there is no room for doubt about the evidence. In circumstances where there are complex and difficult issues of law and fact to be decided, the jurisdiction should not be exercised. In my opinion, Mrs. Hosey's case falls comfortably within the class of case which Fennelly J. advised should not be dismissed.

62. The reason which underlies the restraint advised in much of the case law concerning this aspect of the court's inherent jurisdiction is because the consequence of making the order sought is to deny the plaintiff their constitutional right of access to the court. This is why a judge met with such an application must be careful not to fall prey to the temptation to use his or her jurisdiction to weed out cases which appear somewhat speculative, weak or novel and must only make the order sought if they can be assured that the claim might not be saved by a document or documents as might later emerge from discovery which, as in the present case, had not been made at the time of the application.

63. For the reasons already stated, I am satisfied that the trial judge did not err in law when she rejected the application of Weldon and Co. that the pleadings be struck out as disclosing no cause of action, albeit that she did so based on an amended statement of claim delivered on behalf of Mrs. Hosey after the motion issued. I am also fully satisfied that the High Court judge did not err in law or in fact when she failed to dismiss Mrs. Hosey'c claim against Weldon & Co. as a claim that is bound to fail. While the success of these proceedings will depend upon Mrs. Hosey establishing the existance of an agreement which is hotly contested and even then will raise complex and somewhat novel considerations for the court both in respect of the duty of care alleged and the loss and damage claimed, her claim is one which I consider can only be resolved on a full plenary hearing. It is not a claim that is clearly bound to fail such that it should be dismissed at an interlocutory stage.

64. For all of the aforementioned reasons I would dismiss the appeal of Weldon & Co.