Neutral Citation Number: [2008] IEHC 211

THE HIGH COURT

2003 No. 9018 P

BETWEEN

MOORVIEW DEVELOPMENTS LIMITED, SALTHILL PROPERTIES LIMITED, VALEBROOK DEVELOPMENTS LIMITED, SPRINGSIDE PROPERTIES LIMITED, DRAKE S.C. LIMITED, MALLDRO S.C. LIMITED, THE POPPINTREE MALL LIMITED AND BLONDON PROPERTIES LIMITED

PLAINTIFFS

AND
FIRST ACTIVE PLC AND RAY JACKSON
AND BY ORDER
BERNARD DUFFY

DEFENDANTS

AND LINKED PROCEEDINGS

Judgment of Mr. Justice Clarke delivered on the 20th day of May, 2008

1. Introduction

1.1 As is apparent from previous judgments delivered in these proceedings a number of connected cases have been under case management for some time. A general description of the proceedings and their procedural history to date can be gleaned from those previous judgments and it is unnecessary to restate the broad parameters of the issues which arise in the proceedings or that procedural history.

1.2 The proceedings have now come to trial. It might have been hoped that the elaborate case management engaged in would have led to a situation where the trial, at least procedurally, would be relatively uneventful. However, that has not proved to be the case. The parties had agreed that, with the exception of certain specified and discrete issues arising in some of these linked proceedings, all of the trials would be conducted together. For those purposes I propose referring to the plaintiffs in the proceedings specifically referred to above and all other connected companies as the "Cunningham Group". The defendants in the proceedings referred to above will be respectively referred to as "First Active", "Mr. Jackson" and "Mr. Duffy".

1.3 Both during and after the opening of the proceedings on behalf of the Cunningham Group a number of points were made by counsel on behalf of various defendants which led me to make clear that I wished any issues concerning what might or might not properly form part of the proceedings going to trial to be determined before embarking on evidence. This procedure was agreed to by all. With that in mind I identified as being encompassed by the phrase "the case as opened", the case set out on behalf of the Cunningham Group in the written submissions filed in accordance with the direction of the court as supplemented or varied in the oral submissions made by counsel in his opening. I indicated that I would consider the default position to be that the case which was to go to trial on the evidence was the case as opened and invited each of the defendants to make, at the close of the opening, any submissions which they might have concerning whether the case as opened, or more specifically any part of it, should properly be allowed go into evidence. Arising out of that process a number of points were made concerning questions relating to whether the case as opened was, in certain respects, consistent with the case as pleaded and whether the case as opened, again in certain respects, was stateable.

1.4 It was accepted on behalf of the Cunningham Group that certain aspects of the case as opened had not been pleaded and an application was made to amend the statement of claim by including additional pleadings under three headings being:-

(i) Draft amendment relating to the sale of Finglas;

(ii) Sale of Bailey Point secret profit; and

(iii) Sale of Bailey Point undervalue.

1.5 In addition counsel for First Active applied to dismiss the Cunningham Group's case insofar as it alleged fraud against First Active on two bases. Firstly it was said that the case as pleaded, and as set out in the written submissions filed on behalf of the Cunningham Group, was unstateable and that that aspect of the case should be dismissed on the opening. Secondly it was suggested that the case as opened differed from the case as pleaded and, indeed, the case as set out in the written submissions. On that basis it was urged that the case as opened, on the fraud aspect, ought not to be permitted to proceed. In response counsel for the Cunningham Group argued that there was no inconsistency as and between the case as opened and the case as pleaded. However, as a fall back position, and in the event that I was not satisfied that the case as opened was within the pleadings, counsel sought, in the alternative, an amendment.

1.6 Against that background this judgment is directed to the issues which have arisen between the parties as to the case which should now go into evidence. It is appropriate firstly to set out the specific issues which require determination at this stage.

2. The Issues

2.1 I have already referred to the three proposed amendments to the pleadings sought on behalf of the Cunningham Group. In respect of two of the relevant amendments no significant opposition was put forward to the making of the amendments concerned, save that each of the defendants made complaint about the unsatisfactory nature of the lateness of the application and, in a very limited sense, complained about a number of minor aspects of the amendments themselves. Subject to those points no opposition was made to the amendments concerned.

2.2 I should, therefore, deal firstly with the uncontroversial aspects of those amendments so as to exclude them from the issues which I have to determine. In respect of the proposed amendment in relation to the sale of Finglas, no objection was made except to a phrase which, if included, would permit the Cunningham Group to seek to have an order of rescission made in respect of the sale of its property at Finglas. The sale concerned has long since been completed and the purchaser is not a party to these proceedings. In those circumstances it would not be possible for the court to order rescission of the sale concerned without giving the purchaser an opportunity to be heard. These proceedings have been in being far too long to allow for the addition of entirely new and separate parties long after the events, which it might be argued could give rise to rescission, actually occurred. In those circumstances I am satisfied that counsel for First Active was correct when he said that no amendment in relation to rescission of the sale of the Finglas property should be allowed. Subject to the removal of the phrase "to rescission of the said contract of sale or alternatively", I, therefore, propose allowing the relevant amendment which will confine the relief sought arising out of the sale of Finglas to damages

or an account. The amendment will be allowed subject to the production of an appropriately amended statement of claim incorporating the proposed text.

2.3 Likewise the proposed amendments in relation to the sale of Bailey Point at an undervalue were not actively opposed by any of the defendants, save for the fact that included amongst the bases upon which it was suggested, in accordance with the proposed amendment, that the Bailey Point property of the Cunningham Group was sold at an undervalue was that it was said that same arose "as a result of the aforesaid secret profit". Thus that amendment was linked, in part, to the proposed second amendment relating to "sale of Bailey Point secret profit". That second amendment was opposed by each of the defendants. A knock on effect of that opposition was that it was suggested that the amendment proposed in relation to the sale of Bailey Point at an undervalue should only be permitted after the exclusion of any reference to an allegation of secret profit.

2.4 So far as those three amendments are concerned, therefore, the only real issue of substance which remains for determination concerns the question of whether it is appropriate to allow an amendment in relation to the allegation of secret profit to which I will turn in due course. Subject to the resolution of that issue the third amendment is, in principle, acceptable and I will permit such an amendment on the same basis as to the filing of an amended statement of claim as I have applied in respect of the amendment relating to the sale of the Finglas property.

2.5 The other issues which require determination concern the allegation of fraud. As is clear from a judgment which I delivered on 7th September, 2007, in *Porteridge Trading v. First Active & Ors* [2007] I.E.H.C. 313, the Cunningham Group applied to amend some of these proceedings by the inclusion of a claim of fraud against First Active. That application to amend was hotly contested but, for the reasons set out in the judgment to which I have just referred, I was persuaded that it was appropriate to allow the amendments sought. Things have, of course, moved on. The discovery process has been completed, witness statements have been filed and written submissions have been furnished both to the court and to the respective parties.

2.6 As I outlined in the introduction to this judgment, First Active took the view that, even at its high point, the case made by and the evidence which it was suggested would be tendered on behalf of the Cunningham Group could not sustain the claim of fraud. On that basis it was intimated that an application would be made to dismiss the claim of fraud but it was, quite properly in my view, further indicated that the appropriate time to raise that issue would be at the end of the opening of the case so that the court would have as full a picture as possible as to the basis upon which the Cunningham Group hoped to establish its claim in fraud. The matter was then complicated by the fact that it was asserted on behalf of First Active that, in the course of the oral opening of the case, a significant alteration in the case sought to be made occurred. Thus the question of whether the case as opened was, in fact, the case as pleaded emerged. It seems to me that, logically, that question is the first issue that needs to be addressed under this heading.

2.7 However, the question of the merits of the case, on the available evidence, and its sustainability also arises whether or not I am satisfied that the case as opened is consistent with the case as pleaded. If I am satisfied that the case as opened is consistent with the case as pleaded, then it will be necessary to consider First Active's application to have that case now dismissed on the basis of being unsustainable on even the high watermark of the proposed evidence. If I am not satisfied that the case as opened is consistent with the case as pleaded then it follows that I will have to consider the fall back application which was made on behalf of the Cunningham Group to amend the pleadings and, in that context, the question of whether the case which would, in that eventuality, come to be pleaded, was sustainable would be a significant factor.

2.8 The three issues which, therefore, remain for determination are:-

> A. Whether it is appropriate to allow an amendment to the pleadings to permit the proposed reference to an allegation of secret profit in respect of the Bailey Point site. This application is relevant to and is separately opposed on behalf of each of the defendants.
>
> B. Whether the case as opened in respect of fraud against First Active is consistent with the case as pleaded; and
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> C. Either whether that case in respect of fraud should now be dismissed as being unsustainable on the opening (in the event that I am satisfied that the case as opened is consistent with the pleadings) or whether an amendment to the proceedings in respect of the fraud allegation should be allowed (in the event that I am not so satisfied).

2.9 I propose to address the issues in that order and, therefore, turn to the secret profit amendment.

3. The Proposed Amendment in Relation to Secret Profit.

3.1 It is necessary to start by making reference to the way in which this allegation first surfaced. In the course of the opening and while referring to various documents from the defendants discovery, counsel made reference to a number of documents from which it was asserted that it should be inferred that Mr. Jackson and/or First Active, and in conjunction with Mr. Duffy, engaged in arrangements whereby a secret profit was to be provided to both Mr. Jackson and First Active to the detriment of the Cunningham Group. At one point the suggestion was made that this amounted to a bribe by Mr. Duffy to both Mr. Jackson and First Active.

3.2 It does have to be said at this stage that it was, in my view, improper for the Cunningham Group to have raised this matter in the way in which it was. It is manifestly clear that there was no reference good, bad or indifferent to this issue in the pleadings. Neither is the issue itself adverted to in the written submissions although some of the factual background relevant to the allegation is referred to. However, it is clear that none of the defendants could reasonably have anticipated from the written submissions that an allegation of a secret profit was going to be made. The position was, therefore, that, as of the commencement of the oral opening, no intimation had been given that this allegation was to be made. It was, in those circumstances, wrong of the Cunningham Group to use an occasion of absolute privilege in court to make an allegation which clearly did not arise on the pleadings and which had not been intimated in any reasonable way prior to the commencement of the hearing. Detailed witness statements had been filed on behalf of each of the defendants but those witness statements made no mention of the "secret profit" issue for the simple reason that such an issue had not been raised by the Cunningham Group. It was again unfair to the defendants that the issue should have been raised without any opportunity being given to the defendants to set out their case, particularly in proceedings where all of the likely evidence should have been disclosed prior to the opening. The proper course of action to have adopted, if it was considered appropriate to pursue this issue, was to have brought an application to amend the pleadings at the beginning of the opening or alternatively to have refrained from making any reference to the allegations concerned until such time as an appropriate application to amend had been brought.

3.3 This is not a mere technicality. The Constitution places court proceedings under absolute privilege so that parties can conduct those proceedings without fear or favour. The quid pro quo is that parties are obliged to keep within the boundaries of the case as

made on the pleadings. To stray in any significant way outside those boundaries is an abuse of the absolute privilege conferred on parties and should not be allowed. The way in which this aspect of the issue has been dealt with does not reflect any credit on the Cunningham Group. However, that being said, I propose to consider the application to amend on its merits.

3.4 Before going on to consider the basis on which the amendment is sought it is important that I record the evidential status of documents discovered by the defendants. This issue had been the subject of a minor debate at a case management hearing. On the occasion in question I had suggested that an appropriate model might be that adopted in both *Bula v. Tara* [1997] I.E.H.C. 202 and *Fyffes v. DCC* [2005] I.E.H.C. 477. In both of those significant commercial cases the parties agreed that documents discovered by them could be introduced in evidence not only without formal proof of the existence of the document but also as *prima facie* evidence of the truth of the contents of the documents concerned subject to the right of the party concerned to seek to explain or even dispute the meaning of the contents of any relevant document by other evidence. Such a course of action is an entirely sensible one to be adopted in cases which involve significant documentation. It would be unreal, in modern litigation, to require a plaintiff to prove documentation which had, after all, been discovered on oath by a defendant or defendants.

3.5 A number of points need, however, to be made.

3.6 Firstly, there was, in fact, no agreement actually entered into between the parties as to the basis upon which documents might be admitted. All that occurred was that counsel for the various defendants agreed that documents might be admitted on what was described as the *Bula/Fyffes* model. It is important to emphasise that no order or direction was given by me in that regard.

3.7 Secondly, it is relevant to note in passing that counsel for First Active made the point at the case management hearing to which I have referred that, in the light of the very serious accusations being made against First Active, it might be that First Active would not be prepared to accept that certain categories of documents could be admitted on the *Bula/Fyffes* basis. I would like to emphasise that, while I would ordinarily consider it unreasonable for a party not to agree to documents being admitted on that basis, there may well be specific cases where it may be entirely appropriate for a party to exclude a document or a category of documents from any such agreement for good reason. However, be that as it may, no such reservation was ultimately put in place by First Active and the position remains that all relevant documents are now admissible on the *Bula/Fyffes* model.

3.8 However, there is one important aspect to that model which is of some significant relevance to this case and also to the issue with which I am now concerned. This issue did not arise in *Fyffes* because there was, as a matter of substance, only one set of defendants in that case. However, a different situation pertained in *Bula* where there were two separate sets of defendants in the shape of the Tara Mines defendants on the one hand and the relevant Minister and other State defendants on the other hand. In *Bula* it was made clear by both sets of defendants that the acceptance of documents as *prima facie* evidence of their contents related only to documents emanating from the party concerned or connected parties. There are obvious reasons for such a reservation. It does not seem to me to be reasonable to ask a party to admit third party documents (which in this context would include documents emanating from a separate defendant) as *prima facie* evidence of the proof of the contents of such documents. If such an admission were to be made, then a plaintiff could produce damning evidence by, for example, producing an internal memo of an entirely separate defendant, without calling the author of the memo and giving the defendant against whom the memo was intended to be used an opportunity to question that author. The limitation, therefore, of an admission of documents as *prima facie* proof of their contents to documents generated by the party against whom the document is to be used or connected parties seems to me to be entirely reasonable. In any event, it was with that reservation that the defendants in this case accepted that documents produced in discovery might be admitted, without formal proof, as *prima facie* evidence of their contents. Thus, First Active's documents are admissible on that basis against First Active and likewise with Mr. Jackson and Mr. Duffy.

3.9 It is of particular importance to emphasise the basis upon which documents are admissible because the evidence sought to be relied on by the Cunningham Group for the secret profit contention consists solely of documents to be found in the discovery of the various parties. It must also be emphasised that it was not suggested that there were further categories of discovery which ought to be directed in the light of the amendment being successfully obtained. Nor was it suggested that there were other witnesses who could be tendered in that eventuality. I emphasise this latter point because a court faced with an application to amend at an early stage of the proceedings will not be aware of all of the evidence which might become available at the hearing. As is pointed out in many of the authorities in relation to both amendment of pleadings and in relation to the dismissal of proceedings under the inherent jurisdiction of the court, experience has shown that matters emerge at trial which might not have been anticipated at the stage when the case was pleaded. However, this factor is of significantly less weight when the case is at trial and where there is no real prospect of any additional material evidence becoming available, whether by discovery or through witnesses. While not discounting the possibility that, in an appropriate case, unanticipated evidence might emerge at trial, even where there have been elaborate pre-trial proceedings including full exchange of witness statements, it is, in my view, appropriate for a court faced with a question such as that which faces me in this case to have all proper regard to the fact that, if it be so in the case under consideration, all of the evidence likely to be capable of being tendered to the court on the issue concerned is then available. Against that background it is necessary to turn to the evidence which is available in this case.

3.10 The background to this issue is the sale of the Bailey Point property which was owned by the Cunningham Group and was offered for sale initially by Mr. Jackson in his capacity as receiver but was subsequently sold by First Active, as mortgagee in possession, to Mr. Duffy. A variety of issues concerning both that receivership and the sale concerned arise, in any event, in the proceedings.

3.11 It is clear that the arrangements entered into with Mr. Duffy, both in terms of the original negotiations with Mr. Jackson and subsequently with First Active, contemplated a possible profit share in relation to the ultimate sale proceeds of the property concerned. The property was in the course of being developed by the Cunningham Group when the Cunningham Group went into receivership. What was available for sale was, therefore, a partly-completed development. The arrangement that was sought to be negotiated involved Mr. Duffy taking over and completing the development at an agreed price. However, that agreed price was, at least in significant part, based upon assumptions as to the likely value that would be achieved in the sale-on of the ultimately completed development (which consisted of both residential and commercial elements). There is no doubt (and there is no dispute but that) the negotiations involved the possibility that above certain thresholds, any additional profit secured by Mr. Duffy as a result of completing the development and selling on the units would be shared with either Mr. Jackson or First Active. There is nothing, of course, in itself, wrong with such an arrangement. There are issues in these proceedings in any event concerning the question of whether there was any breach by either Mr. Jackson or First Active of their obligations in relation to the sale of Bailey Point. It would be most inappropriate for me to touch on those questions at this stage when the case has only been opened.

3.12 However, the case now sought to be made by the amendment which is under consideration is to the effect that the benefit of the profit share which was undoubtedly under negotiation with Mr. Duffy, was intended to go directly to Mr. Jackson and/or First Active and not be taken into account for the benefit of the Cunningham Group as part of the proceeds of sale. It is also necessary to note that it was contemplated that First Active would act as lender to Mr. Duffy in the acquisition of the property concerned. There

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

3.13 Against that background it is necessary to consider the principles by reference to which an amendment should be granted which I have already analysed in the earlier judgment in this case as a result of which the Cunningham Group was permitted to plead fraud against First Active. It must be emphasised that this application for an amendment comes very late in the day and against a background of a situation where the parties have already exchanged voluminous discovery, detailed witness statements, and made written submissions. In such circumstances it is manifest that there is likely to be some prejudice of the type which I have described previously as logistical prejudice if the amendment were to be allowed. Against that background and in those circumstances, it is appropriate to have regard to the reason tendered for the amendment being sought at such a late date.

3.14 It is said, and indeed it is obvious from the documentation, that discovered documents made available some considerable time ago to the Cunningham Group would have made it clear that a profit share was contemplated. That much is not in dispute. However, the Cunningham Group places special reliance on a significantly later discovery of a bank memorandum, prepared for the purposes of a consideration of Mr. Duffy's loan application, in which the profit share is described in one portion of the memorandum as an "arrangement fee". Strictly speaking there were negotiations as to two separate profit shares in respect of two different aspects of the development. Both profit shares are referred to as "arrangement fee" in at least one portion of the document concerned. That document would appear to be the only document which so characterises the arrangements and on that basis it was said that it was only when that document was fully considered, that the Cunningham Group became aware that there was a credible case to be made to the effect that the profit share was intended to be kept by Mr. Jackson and/or First Active. I am prepared, for the purposes of the argument, to accept that that is so and that there is a legitimate reason for the Cunningham Group seeking to make this application at such a late stage. However, the very fact that the document concerned is, in reality, the only significant cornerstone of the evidence from which an inference of secret profit is sought to be derived seems to me to cut both ways.

3.15 Firstly, the document concerned is an internal bank memorandum. It is not admissible as to the truth of its contents as against either Mr. Jackson or Mr. Duffy. On that basis alone it is difficult to see what evidence there is as against Mr. Jackson or Mr. Duffy which would connect them to an allegation that there was an intention to make a secret profit. However, the matter goes further. In the course of argument, a document was produced from Mr. Jackson's discovery which was a Powerpoint presentation made by him to First Active in the course of the receivership in which he set out his then best estimates (on an optimistic and pessimistic basis) for the outcome of the receivership. It is clear beyond doubt that in that presentation Mr. Jackson includes in his calculations the possible benefit that might accrue to the receivership or First Active in its capacity as mortgagee from the profit share. Taking the documents as a whole, therefore, there is, in my view, no basis for the suggestion that a court could draw an inference that either Mr. Jackson or Mr. Duffy was involved in seeking to negotiate an arrangement whereby Mr. Jackson would benefit personally by the contemplated profit share. Rather, it seems to me to be clear on the documentation that both Mr. Duffy and Mr. Jackson at all times regarded any benefit accruing from the profit share as forming part of the proceeds of sale of Bailey Point and accruing for the benefit of the Cunningham Group accordingly.

3.16 There is no other evidence (that is to say no evidence other than the documents to which I have referred) which it is suggested could be relied on by the Cunningham Group for the allegation which they now seek to make. Against that background it seems to me that it would be wholly inappropriate to allow the amendment sought as against either Mr. Jackson or Mr. Duffy. To do so would be to permit a most serious accusation to be made in circumstances where the only consequence could be that the claim would necessarily be dismissed, at the latest, at the close of the plaintiffs case. If there were any realistic basis upon which it might be anticipated that further evidence might emerge in the course of the plaintiffs case which might change that situation, then it is possible that it might have been appropriate to come to a different conclusion. However, there is no such basis. The claim that Mr. Duffy or Mr. Jackson were involved in negotiating arrangements to facilitate Mr. Jackson in obtaining a secret profit is, in my view, unsustainable even given the most favourable view of the evidence proposed to be tendered in support of it. No further evidence is remotely likely to emerge. Counsel for the Cunningham Group spoke of the possibility of cross examining defendants' witnesses. That is, however, to presuppose that the Cunningham Group could produce evidence which would have the effect of shifting the burden of proof to the defendants. There is no basis put forward which could establish even the possibility of such an eventuality. The claim is, therefore, bound to fail. The assessment of whether a claim is bound to fail is, of course, capable of much greater analysis at a stage such as has been reached in these proceedings where all of the relevant evidence, whether documentary or by witnesses, is now likely to be known. In those circumstances I must refuse the application to amend so far as Mr. Jackson and Mr. Duffy is concerned.

3.17 The issue in relation to First Active is somewhat more complex. Firstly the internal memorandum to which I have referred is, of course, the banks own document and is admissible as against First Active on the *Bula/Fyffes* basis. Secondly, the use of the phrase "arrangement fee" in that memorandum in the context in which it is used is, to say the least, unfortunate. There is nothing in itself wrong with a financial institution acting as lender to a purchaser who is in turn buying property from that financial institution in its capacity as a mortgagee. However, care needs to be exercised in such situations to ensure the avoidance of any possible or perceived conflict of interest. In a straightforward situation where there is no either direct or indirect connection between the sale transaction and the lending transaction, then it is difficult to see how any such conflict of interest could arise. The fact that a purchaser may get his funding from one bank or another hardly affects the purchase price which is, after all, the only matter in which the mortgagor has an interest. However, where there may be at least the possibility of an indirect connection between the two transactions and where the terms of both may be complex, care needs to be exercised to ensure that there is not at least an impression that there could be an interaction between the terms of purchase and the terms of the financial facilities being made available. From the purchasers point of view the transaction as a whole is what he is likely to assess. If he were, for example, to obtain less favourable financial terms, then the price or set or arrangements by virtue of which he might be prepared to purchase the property might correspondingly be affected in an adverse way from the mortgagors perspective.

3.18 Against that background it is, it has to be said, unfortunate that a phrase such as "arrangement fee" was used in the memorandum concerned. In its ordinary meaning an arrangement fee is a sum paid to a lending institution for its own benefit rather than a sum treated as part of a purchase price which would accrue to the benefit of the mortgagor. To that extent there is at least some evidence as against First Active from which it might be inferred that there was an intention to treat monies received from Mr. Duffy on foot of the profit share as a benefit accruing to First Active directly rather than for the benefit of the Cunningham Group. In noting that fact I have not ignored the argument put forward that the document as a whole does not bear such inference. Against that it is clear from all of the documentation that the only portion of the profit share that was intended to go to First Active was any additional profit that might be made in relation to what was described as the "back site". The profit share in respect of the residential

element of the development was at all times to go to Mr. Jackson as the receiver and for the reasons which I have already sought to analyse there is no evidence that Mr. Jackson ever regarded that profit share as being destined for anywhere other than for the benefit of the Cunningham Group. It is also true to say that in the PowerPoint presentation to which I have already referred, Mr. Jackson also included a small estimate of a profit share in respect of the back site as part of his overall calculations. The only inference to draw from this is that Mr. Jackson considered any such monies as being due to be paid for the benefit of the Cunningham Group rather than First Active directly.

3.19 At the end of the day I have come to the view that it would not be possible to conclude that the case in respect of First Active in relation to secret profit in respect of the back site alone is bound to fail. There are, undoubtedly, difficulties with the case which the Cunningham Group would wish to make, not least the fact that the documents suggest, as I have pointed out, that Mr. Jackson was at all times of the view that the profit share in respect of the back site was to be included in the funds which would ultimately be placed to the benefit of the Cunningham Group. The documents are, however, open to the possible inference that whatever may have been intended in respect of the profit share for the residential portion of the development, First Active did regard the profit share on the back site as being in the nature of a true arrangement fee. I should also comment at this stage on the allegation made in the course of opening on the part of the Cunningham Group that an appropriate inference to draw from the fact that there does not appear to have been any arrangement fee in the agreements ultimately put in place between First Active and Mr. Duffy is to the effect that there was a secret and undocumented arrangement ultimately put in place for such payment. Such an allegation is wholly without any supporting evidence and should not, therefore, in my view, form any part of the case which can be permitted to go into evidence. However, it would not be appropriate for me to say anything more about the merits of that aspect of the case at this stage. It follows that the case in respect of which I am satisfied that the Cunningham Group has shown that it is not bound to fail is a very limited one. It is a case to the effect that First Active is alleged to have entered into an arrangement whereby First Active was to receive the proceeds of any profit share in respect of the back site for its own benefit, as an arrangement fee in its capacity as lender rather than for the benefit of the Cunningham Group. The amendment is proposed at a time which is, in any event and particularly in the context of this case, very late in the day. However, for the very reasons I have already sought to analyse there is at least a partial explanation for that fact. In those circumstances I propose allowing an amendment limited as set out in this judgment and limited to a claim against First Active. I do not propose allowing any of the amendments which are referable to the allegation of secret profit as against Mr. Jackson or Mr. Duffy.

3.20 The amendment which I propose allowing is, as in respect of the other non controversial amendments, subject to the Cunningham Group producing an amended statement of claim which includes an amendment limited in the way which I have just described. It also seems to me that it is incumbent upon the Cunningham Group, in formulating the amendment which I have permitted as a result of this judgment, to specify precisely what consequences are alleged to flow from the allegation concerned and what relief it is said the court should grant in the event that the allegation is sustained. It also follows from what I have already indicated that, in my view, First Active have had no reasonable opportunity to file witness statements or written submissions concerning this allegation. I will hear counsel for First Active in due course on the proper way in which that situation can be remedied. It is next necessary to turn to the issue which I have identified as arising in relation to the Cunningham Group's claim in fraud against First Active. As indicated earlier the first question that needs to be addressed is as to whether the case as opened under this heading is consistent with the case as pleaded. I now turn to that question.

4. Is the Fraud Case as Opened within the Case as Pleaded.

4.1 The starting point for a consideration of this issue has to be to note that the fraud claims concerned were only introduced as a result of the contested application to amend the pleadings, which was the subject of the judgment on the 7th September of last year to which I have already referred. In the course of that contested application, affidavits were filed on behalf of the Cunningham Group and submissions made as to the basis upon which it was then contended that a fraud claim should be permitted. It is of some importance to note that one of the factors which is properly taken into account by a court in considering an application to amend is to determine, if the question is raised, whether the claim as amended would be bound to fail, for if such be established then it would, of course, be inappropriate to permit the amendment. Having reviewed the authorities, I said the following at para. 4.3 of that judgement:-

> "For the reasons I set out in *Woori Bank* I am satisfied that the proper test to the equivalent to the test which would be applied had the amendment been included in the original proceedings and had the defendant sought to have that aspect to the pleadings struck out as being bound to fail. I have come to the view, having reviewed the evidence, that I could not reach a conclusion to such affect at this stage. In those circumstances it does not appear to me that I could conclude that the amended aspect of the case (if the amendment is to be allowed), would be bound to fail."

4.2 I had also noted earlier in the same paragraph that it would be inappropriate for me to make any comments on the merits or strength of the argument as the matter was to go to trial. However the contested application for leave to amend was grounded on affidavits filed on behalf of the Cunningham Group and submissions made to the court from which the nature of the fraud allegation sought to be raised was clear.

4.3 In general terms the allegation was to the effect that First Active, finding itself inadequately secured in relation to its existing position vis-à-vis the Cunningham Group, fraudulently induced the Cunningham Group into perfecting security by offering to make additional funds available without intending to make those funds, in fact, available. For example in an affidavit sworn by Brian Cunningham, ("Mr. Cunningham") it was stated that his belief was that First Active "had no intention in mid 2002" (the relevant time) "of allowing the Group to complete existing projects or of advancing further funds to the Group". Affidavits sworn by the plaintiffs' solicitor and the submissions made to this Court were, in my view, to like effect.

4.4 The relevant portion of the re-amended statement of claim which contained the allegation, specified that First Active had "devised a fraudulent scheme and or conspired" to secure a perfection of the securities held by First active and to secure the sale of the Finglas and Bayside properties by virtue of representations concerning funding which, in accordance with para. 12D(b) were said to have been made in circumstances where First Active "did not have any intention of lending further money to the plaintiffs … but on the contrary the intention of the first named defendant was to induce (the Cunningham Group) to execute further loan agreements …"

That is the substance of the claim as it stands.

4.5 In opening the case, counsel on behalf of the Cunningham Group accepted that neither the documentary evidence nor the expert evidence contained within the witness statements furnished on behalf of the Cunningham Group, established a case to the effect that First Active were of the view, as at the time of the entering into by the parties of the agreements which were at the heart of the allegation of fraud in August 2002, that the bank would not make any advances available. Rather it was suggested that First Active misled the Cunningham Group because it had, unknown to the Cunningham Group, retained to itself in the relevant banking documentation the right to make or refrain from making further advances. As counsel put it (Transcript, day 2, pp. 61 and 62):-

> "It is further our case that those present for the bank at the meeting on 15th August, did not intend to keep that promise, in the sense that their view, their intention was that Mr. Cunningham would sign a facility letter and that was a demand facility letter, and the bank's view was that a demand facility letter, the bank could allow drawdown or not as it shows later on.
>
> Since the loan was a grade 1 loan at this time, this drawdown would only be allowed if looked at at the time the drawdown was requested, it improved the bank's security. The bank did not inform Cunningham Group of this private reservation of its rights to refuse funding later on. And its failure to do so was, on our case, dishonest and amounts to a fraudulent misrepresentation as to its intention for the completion of Bailey Point and Malahide."

4.6 That is, in a nutshell, the case as opened. The question which I now have to address is as to whether that case comes within the pleadings to which I have already referred.

4.7 There are two aspects to the argument. The first concerns the precise wording of the pleadings and whether that wording can be said to encompass the claim as opened. In addition, reference is made to the documentation and arguments supporting the application to amend from which, it is argued on behalf of First Active, appropriate inferences should be drawn as to the true meaning of the pleadings. However, I start with a literal approach.

4.8 To say that someone does not or did not have an intention to do something is, in one sense, capable of two interpretations. On the one hand it might be said to involve a statement that the person positively intended not to do the thing concerned. On the other hand it might be said that the person concerned had an absence of a positive intention to do it. There is, therefore, a sense in which the phrase "X did not have an intention to" could include an allegation that X had not made up his mind as to whether he was going to do the thing concerned and therefore did not, at the relevant time, have a positive intention to do it.

4.9 However, the exact phrase used in para. 12D(b) of the re-amended statement of claim was not to the effect that First Active did not have an intention to lend further money, but rather that First Active did not "have *any* intention of lending further money". It is difficult to see how even on a narrow literal reading of the words concerned a statement that someone did not have *any* intention of doing something could be interpreted as encompassing a situation where it was said that the person concerned did not have their mind as yet made up. The only reasonable interpretation of the phrase "did not have any intention" is that it implies that the person had a positive intention not to do the thing, rather than implying the absence of an intention to do it.

4.10 Therefore, even on a narrow syntactical analysis of the pleadings, it does not seem to me that the case as opened is encompassed by those pleadings.

4.11 However, if there were any doubt about that situation it is only necessary to refer to the affidavits and arguments advanced at the hearing before me in relation to the amendment which gave rise to those pleadings in the first place. I have to confess that the clear impression with which I was left at the time of the relevant hearing was that the case which the Cunningham Group wished to make was to the effect that First Active had an actual intention not to lend the money. The first time that I became aware of the nature of the case as opened was during the very opening itself. On that basis it would be difficult indeed to suggest that First Active should have attributed any different meaning to the pleadings.

4.12 If any further confirmation of that fact were needed it is only necessary to refer to the history of the production of the relevant expert witness statements on behalf of the Cunningham Group touching on this issue. The expert witness statements concerned have already been the subject of a dispute at a case management hearing. The original expert witness statements tendered on behalf of the Cunningham Group simply set out a list of issues to which the expert concerned would address his comments. Such witness statements were, quite correctly, objected to on behalf of the defendants as not amounting to witness statements at all. Equally properly leading counsel for the Cunningham Group accepted that the documents could not be regarded as proper witness statements at all and as a result a further and final extension of time for the delivery of proper witness statements was directed. Those final witness statements, insofar as expert witnesses are concerned, involve, in the main, questions raised to which the witness gives an answer. It is clear that the relevant banking expert intended to be called on behalf of the Cunningham Group was asked as to whether "it had been First Active's intention on the 16th August not to lend any further money to Salthill (unless covered by actual sale income), did the wording of the facility achieve that?" The reference to Salthill is a reference to Bailey Point. The witness (Mr. Jennings) in his witness statement responds as follows:-

> "I have not been shown evidence that it may have been the Bank's intention not to lend further sums to Salthill."

4.13 It is also important to note that that witness statement was belatedly filed on the 15th April, last, less than two weeks before the commencement of the proceedings.

4.14 It is, therefore, abundantly clear that the case which the Cunningham Group was seeking to pursue, up to that time at a minimum, included an allegation (for which it sought support from Mr. Jennings) that an appropriate conclusion to draw from the bank's documentation was to the effect that First Active had an intention "not to lend any further money". Otherwise why would Mr. Jennings have been asked to comment on such a proposition? It is equally clear that the Cunningham Group's own expert was unable to support that allegation and that, thereafter, the same could not be sustained.

4.15 In all the circumstances the only reasonable conclusion which can be reached is that the case as currently pleaded does not encompass the revised fraud claim now sought to be asserted and as was included in the opening. It follows that it is necessary for me to consider the application made, as a fallback position, by the Cunningham Group for an amendment to plead what I have found to be a different fraud claim. The key elements of that claim are a contention that representations were made to the Cunningham Group and its advisors at the key meetings in August 2002, to the effect that First Active would fund the completion of the two main developments still operational, that is to say Bailey Point and Malahide, while at the same time First Active, it is said, put in place documentation which allowed it to decline to provide such funding. It is said that the bank did those things deliberately and that First Active was, therefore, guilty of a fraudulent misrepresentation. The question to which I now must turn is as to whether such an amendment should be allowed.

5. The Proposed Amendment to the Fraud Claim

5.1 The starting point for any consideration of this issue has to be the strict rules which the courts have always applied to the pleading of fraud. See for example the judgment of Murphy J. in *Tassan Din v. Banco Ambrosiano Spa* [1991] 1 I.R. 569, and the judgment of Denham J. in *Superwood Holdings Plc v. Sun Alliance and London Insurance Plc* [1995] 3 I.R. 303. In particular, as noted by Denham J. "a charge of fraud must be proved as laid and where one kind of fraud has been charged another kind of fraud cannot be substituted for it." (See p. 327).

5.2 I do not, however, read those judgments as implying that it can never be possible to amend a claim in fraud. The underlying justification for the strict rules as to pleading fraud is that a party faced with such a serious allegation has a particularly strong entitlement to know the case which he has to answer. Provided that it is possible to amend pleadings without giving rise to prejudice which is not capable of otherwise being dealt with then a party will become aware, by virtue of the amended pleadings, of the case which he has to answer and can deal with it accordingly. I do not, therefore, view those authorities as imposing any necessary insurmountable barrier to the amendment of claims in fraud.

5.3 However, the authorities do emphasise the need to avoid a shifting claim in fraud which makes it difficult for the defendant to present his defence and thus gives rise to a real risk of injustice. It seems to me to follow that a court is required to consider an application which seeks to amend an allegation of fraud with particular scrutiny. This will be particularly so where the application to amend is made at a late stage, when parties have already exchanged witness statements on the basis of the existing allegations and even more so after the commencement of a trial. The risk of real prejudice is all the greater the later the application is made.

5.4 I am also, however, mindful that a party alleging fraud is often faced with significant difficulties in that fraud, by its nature, is likely to be clandestine and evidence of it is not likely to be easily available. In that context, I should refer to *the National Education Board v. Ryan and Ors* [2007] I.E.H.C. 428, in which I had to consider the extent to which the plaintiff in that case should be required, in advance of discovery, to plead fraud with great particularity. Having noted authorities such as *Arab Monetary Fund v. Hashim and Ors (No. 2)* [1990] All E.R. 673, I addressed two competing requirements. I noted that to the extent that a plaintiff, who makes an allegation of fraud, is required to give full and exhaustive particulars prior to defence (and thus prior to discovery or interrogatories) in a manner which necessarily narrows the case, then there is every chance that, in a genuine case of fraud, the perpetrator will escape having to make discovery in respect of aspects of the fraud because the plaintiff was not sufficiently aware of the details of those aspects of the fraud to plead them in an appropriate manner in advance.

5.5 I also noted the competing requirement that care should be taken "not to allow a party, by the mere invocation of an allegation of fraud, to become entitled to engage in a widespread trawl of the alleged fraudster's confidential information in the hope of being able to make his case." In balancing those competing objectives, I came to the view that a plaintiff who "passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for, and establishes a *prima facie* case to that effect" is entitled to require that the defendant should put in his defence and submit to whatever discovery and interrogatories may be appropriate on the facts of the case subject to the obligation to provide more detailed particulars prior to trial.

5.6 The underlying principle behind the reasoning in that case is that genuine fraud may be hard to particularise in great detail until after discovery. However, there is a very real and significant difference between the situation which pertains at an earlier intermediate stage of the preparation of a case for trial and the situation which pertains when the case has gone to trial. At that latter stage, the plaintiff has had access to all of the procedural measures that are available to him (or if he has not, it is only through his own neglect). While it may be appropriate to allow a case to be pleaded with less than rigorous particularity at an early stage, it is equally clear that a case cannot be allowed go to trial without detailed particulars. It seems to me that a similar principle applies to an application to amend an allegation of fraud. At an early or intermediate stage of the proceedings, it is unlikely that any such amendment could give rise to significant prejudice not otherwise remediable. At or near trial, and in particular in cases where parties have been required to exchange witness statements and the like, the risk of prejudice is all the greater. Parties with a stateable claim in fraud should, in my view, be given every facility to enable them to make out their case if it be a good one. That should include allowing the case to be amended in the light of discovered documents if it becomes clear that there is a credible case for a variation on the original claim but not, perhaps, for the claim as originally conceived. However, that does not mean that a plaintiff should be permitted to shift his allegation of fraud to reflect developments in the evidence as the case goes along. To permit a belated change in a claim as to fraud gives rise to the risk of significant prejudice and is a matter which the court should scrutinise in some considerable detail.

5.7 In that context the timing of the application to amend and the reasons asserted for that timing are important. It is, therefore, important to start by looking at the basis upon which it is asserted that the Cunningham Group only became aware in very recent times of an important element of the fraud claim as opened. Reference was made to a witness statement tendered on behalf of First Active in which the grading of various types of loan is specified and in particular a grade 1 loan is defined as one where the bank believes it is likely that a loss will be suffered and where, therefore, interest is taken into suspense and further funds are only advanced where a view is taken that the further funds so advanced are likely to enhance rather than impair the recovery of the bank's overall debt. The relevant witness statement would, of course, only have been with the Cunningham Group for a very short period of time indeed prior to the commencement of these proceedings although it should be noted that that fact, in itself, was at least in significant part due to the repeated failures on the part of the Cunningham Group to comply with directions concerning the filing of its own witness statements. It also seems to me to be clear that a significant factor which has led to the revised fraud claim now proposed was the fact that the expert banking witness consulted on behalf of the Cunningham Group was not prepared to express the view that the documents discovered on behalf of First Active supported the original case. As pointed out this fact would, again, only have come to light very late in the day but that, in turn, again, must be put down to the Cunningham Group's failure to adequately address the assembly of its expert evidence in a timely fashion. There is, therefore, at least a partial explanation for why it might be said that the Cunningham Group would wish to make a revised claim in respect of the fraud alleged against First Active at this late stage. That excuse needs to be tempered by the fact that, at least in significant part, the lateness of the Cunningham Group becoming aware of relevant material was due to its own failure to secure appropriate expert evidence in a timely fashion and to meet the deadlines concerning the exchange of witness statements.

5.8 I now propose to turn to the question of whether the revised case is, in fact, stateable. It is in this context also appropriate to refer to the detailed submissions made by counsel on behalf of First Active which had been prepared for the purposes of submitting that the original claim in fraud as pleaded should be dismissed on the opening, but which were, to some extent, adapted to deal with the alternative claim as opened. It is, however, fair to say that First Active were placed, in my view, at a significant disadvantage in that what I have found to be a materially different claim in fraud was actually advanced in the course of the opening. The witness statements and submissions which had been filed on behalf of First Active were, of course, quite properly directed to the claim as pleaded. Those witness statements do not, therefore, address the fraud claim as it is now sought to be put.

5.9 At its simplest, the revised fraud allegation involves two propositions. Firstly, it is said that representations were made in the course of meetings held on 15th and 16th August, 2002, by officials of First Active to advisors of the Cunningham Group and, in particular advisors to Mr. Cunningham personally, to the effect that First Active was prepared to fund the completion of the Bailey Point project. There are, however, difficulties about the precise nature of any such representations which could or might have been given. Firstly, Mr. Sparks, who acted as financial adviser to Mr. Cunningham personally at the time of the relevant negotiations, is not being tendered as a witness. Secondly, Mr. Beatty, who acted as personal legal adviser to Mr. Cunningham during the same negotiations, is, it appears, to be tendered as a witness but has not been prepared to file a signed witness statement. However, it has been asserted on oath on behalf of the Cunningham Group by a solicitor acting for that Group, that it is believed that Mr. Beatty

will give evidence in accordance with a statement filed. In those circumstances, it must be open to some doubt as to the precise nature of the representations, if any, which it may be shown that representatives of First Active made. Given that the culmination of the negotiations involved detailed loan offers which included "sole agreement" clauses, it may well also be difficult to suggest that any representations went beyond a commitment to funding provided that there was compliance with the terms of the loan agreements themselves. However, any concluded view on issues such as those are, in my view, more appropriately made when the evidence has been heard.

5.10 The second element of the alleged fraudulent misrepresentation involves a contention that notwithstanding the assurances which it is alleged were given to the advisors to the Cunningham Group, First Active retained to itself, in its view, an entitlement not to advance any further funds in respect of the Bailey Point project unless at the relevant time when such funds were to be advanced it appeared to First Active to be beneficial to its security to advance the funds concerned.

5.11 Precisely what was First Active's state of mind (or more accurately what was the state of mind of those senior officials of First Active who were involved in the decision making process) at the relevant time is a matter which can only be established by evidence. At present, the only evidence available involves the documentation which has been admitted on the *Bula/Fyffes* basis. However, it was intimated on behalf of the Cunningham Group in the course of argument that consideration might be given to calling, as witnesses on behalf of the Cunningham Group, some officials of First Active and seeking to have such officials declared to be hostile witnesses so that they could be cross-examined. As was pointed out by counsel on behalf of First Active, the mere fact that a witness may give unfavourable evidence does not, of itself, go anywhere near establishing an appropriate basis for that witness being declared hostile and thus being open to cross-examination from the side which called the witness concerned. Furthermore, the question of the circumstances in which it may be appropriate to permit a plaintiff, in a case where witness statements have been filed in accordance with the direction of the court, to call, as its own witness, a witness whose statement of evidence has been filed on behalf of the defendant, have not yet been debated or decided. I, therefore, express no view on the extent to which it may be permissible or possible for the Cunningham Group to seek to call such witnesses, less still whether it might be possible to have any such witnesses deemed hostile. It is a matter for the Cunningham Group to make its own decision as to the course it wishes to pursue. However, I should not, in those circumstances, rule out the possibility that the state of the evidence at the close of the Cunningham Group's case might be somewhat different than it now appears.

5.12 I must, therefore, approach the question of whether it is appropriate to allow the fall back amendment proposed on the basis of a number of findings. Firstly it is clear that the amendment is sought very late in the day and that such a situation gives rise to an obligation on the part of the court to scrutinise the application with particular rigour to ensure that no real prejudice, not otherwise capable of remedy, could be caused to the party against whom the amendment is sought. That scrutiny also needs to be conducted against the background of my finding that while there was a basis for it only becoming apparent to the Cunningham Group at a very late stage that the original case in fraud could not be sustained and that the revised case might be made, the Cunningham Group is, at least to a material extent, itself responsible for the lateness of those matters becoming apparent. Against that needs to be set the fact that the claim, although materially different, is at least related to the same sort of general issues and considerations as had already been pleaded. It is also important to take into account the fact that it is possible, for the reasons which I have sought analyse, that the evidence which may be presented in the course of the Cunningham Group's case is not, as yet, absolutely clear. While the documentary aspect of the Cunningham Group's case (i.e. that aspect of its case which relies on inviting the court to draw inferences from documents discovered by First Active) will not change, it is possible, for the reasons which I have set out, that oral evidence might lead to further matters not immediately apparent being the subject of evidence although it has to be noted that in such an eventuality it is at least possible that the oral evidence might diminish rather than enhance the Cunningham Group's case. Against that background, and for the reasons which I have already set out, I am not satisfied that the proposed revised case is one which I could conclude was bound to fail.

5.13 In all those circumstances, and with some reluctance, I am, therefore, prepared to allow the amendments sought subject to a number of conditions which I will address in due course. It is now necessary to turn to the consequences of the findings which I have made.

6. Consequences

6.1 The first issue which, therefore, needs to be addressed is as to the consequences of the views which I have set out for the existing fraud claim. For the reasons which I have sought to analyse, I am satisfied that the claim advanced in the opening is different from the existing claim as pleaded. On that basis it is clear that there is no evidence to support the claim as pleaded given that an essential element of that claim, as I have found, was an intention on the part of First Active not to advance any funds. The Cunningham Group's own expert witness does not support that contention nor does a reading of the relevant documentation permit of an inference to that effect. Furthermore, it is clear that the Cunningham Group does not any longer wish to assert that First Active had a positive intention not to advance any further monies in respect of Bailey Point as of August, 2002.

6. Some question was raised in the course of argument as to the extent to which a court has a jurisdiction to dismiss a plaintiff's case on the opening of that case. It seems to me to logically follow from the jurisprudence of the courts concerning the inherent jurisdiction to dismiss a claim which is bound to fail that that jurisdiction can, in principle, be exercised at any time. The most normal time when the court is invited to exercise such a jurisdiction is, of course, at an early stage in or around the time when the pleadings have closed or when the precise parameters of the plaintiffs claim has become clear by the filing of a statement of claim and, if necessary, the giving of particulars.

6.3 There are cogent reasons why a court should be slow to permit an application to dismiss at any other stage of the process. The encouragement of applications, particularly applications relating to some only of a plaintiff's claim, to dismiss carries with it the possibility of the court being invited to adopt an unsatisfactory piecemeal approach to litigation whereby repeated applications are made at various stages to prune aspects of the plaintiff's case. Such a course of action is likely to be counter productive in terms of the efficient despatch of litigation. In addition there may be practical consequences flowing from the dismissal of all or a portion of a plaintiff's case, some of which at least are analogous to the considerations which may go to determining whether a modular hearing may be appropriate which I had occasion to analyse in *Cork Plastics and Ors v. Ineos Compounds and Ors* [2008] I.E.H.C. 93. Questions such as whether evidence will need to be taken in any event, what is to happen in the event of an appeal, and the like may well bear on a decision as to whether it is appropriate to entertain an application to dismiss a claim or a portion thereof on the opening.

6.4 The entitlement of a party to apply for a non suit at the close of the plaintiffs case is, of course, well settled and the basis upon which such an application should be considered is as laid down by the Supreme Court in *Hetherington v. Ultra Tyre Services Limited* [1993] 2 I.R. 535 and *O'Toole v. Heavey* [1993] 2 I.R. 544. As is clear from the comments of Finlay C.J. in *Hetherington*, amongst the matters which the court needs to take into account are complications arising by, for example, the existence of more than one defendant and the possibility of claims for contribution or indemnity as and between defendants.

6.5 It seems to me, therefore, that while a jurisdiction exists to dismiss a claim as being bound to fail at any stage, it is a jurisdiction which needs to be most sparingly invoked. Firstly this is so because it could, in any event, be a jurisdiction which could only be invoked where there was no risk that an injustice might arise. If there is any possibility that a plaintiffs case might come to be established by evidence led during the course of the presentation of that case, then such a risk of injustice is obvious. In addition it seems to me that the courts should not encourage the potential for a multiplicity of applications to dismiss at different stages and should, therefore, be reluctant to entertain an application to dismiss on the opening save where it appears that there is a real possibility that the effective management of the litigation concerned could be enhanced by a consideration of such an application. In an ordinary case it would seem to be me to be unlikely that it would make sense to entertain an application to dismiss a portion only of the case on the opening unless it were clear that in the event that such an application were successful, there was likely to be a significant saving of time and expense proportionate to that which would be used up in considering the application in the first place. I should, however, also comment that perhaps somewhat different considerations might apply where, as here, there are very serious allegations (such as fraud) and where the party against whom such allegations are made may have a legitimate interest in seeking to have such allegations dismissed at the earliest possible stage. While not decisive by any manner of means such a matter is a factor to be properly taken into account.

6.6 It seems to me that the existing fraud claim against First Active must, therefore, be dismissed. It is, in effect, not being pursued. Even if it were being pursued it is not, for the reasons which I have sought analyse, capable of success. Strictly speaking, therefore, the application to dismiss on the opening is allowed. However, other than engaging in the necessary consideration of the potential merits of the revised fraud claim for the purposes of determining the fall back application for an amendment, it does not seem to me, on the other hand, to be appropriate to embark on a consideration of whether the amended claim, had it been the original claim, should have been dismissed on the opening. The amended claim is too connected with the contractual claims made to be likely to involve any significant saving in evidence. That together with any possible complications that might arise in the event of an appeal would, in my view, more than outweigh any possible benefit of considering the matter at this stage notwithstanding the legitimate interests of First Active to seek to have a claim which makes most serious allegations against them dismissed at the earliest possible time. The appropriate time, in my view, to give consideration as to whether First Active has a case to answer in respect of the revised claim is when all of the evidence concerning that claim as the Cunningham Group is able and willing to put forward has been heard. If an appropriate application is made at the close of the Cunningham Group's case I would, of course, consider same in accordance with the established jurisprudence to which I have referred.

6.7 The amendment will, therefore, be allowed subject to:-

(i) An appropriate amended statement of claim being produced which also sets out the consequences of the fraud now alleged and the reliefs which, it is said, flow from same.

(ii) First Active being given an opportunity to file revised or additional witness statements directed towards the claims as now made; and

(iii) First Active being given an opportunity to file revised submissions directed towards that case.

The comments made at para 3.20 apply equally to this amendment.