

THE HIGH COURT

[2013 No. 12226 P]

BETWEEN

THOMAS TOUGHER

PLAINTIFF

AND

TOUGHER'S OIL DISTRIBUTORS LIMITED AND JOHN O'REGAN (NO.2)

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 15th day of May, 2014

Introduction

1. In this application the first named defendant seeks the following reliefs in its Notice of Motion:-

- (1) An Order pursuant to section 123 of the Land and Conveyancing Law Reform Act 2009, to vacate the *lis pendens* registered on the application of the plaintiff on 7th November, 2013, against lands comprised in twelve different folios.
- (2) An order pursuant to the inherent jurisdiction of the Court striking out the proceedings on the basis that they amount to an abuse of process of the court and/or are unsustainable and bound to fail.
- (3) In the alternative, an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the proceedings on the grounds that they disclose no reasonable cause of action against the defendants.

2. This application is opposed by the plaintiff, Mr. Thomas Tougher, who is a lay litigant, but has a McKenzie friend to assist in relation to this application.

Background to this Application

3. This application has a somewhat unusual procedural history.

4. On 31st October, 2012, a petition for the appointment of an examiner to the company was made to the High Court. By order of the High Court dated 15th November, 2012, an examiner was appointed to the company. Ultimately, Mr. John O'Regan the second defendant in these proceedings, acquired the entire shareholding of the company and an investment agreement was executed on 1st February, 2013. On 18th February, 2013, the High Court made an order confirming the scheme of arrangement.

5. In the grounding affidavit of Mr. O'Regan sworn on 14th March, 2014, for this application at para. 7, Mr. O'Regan avers as follows:-

"As part of the examinership process due diligence was carried out in respect of the financial affairs of the company. Naturally the company's debtors books and receivables were a crucial element in formulating and calculating my offer to invest in the company. On or around 26th March, 2013, subsequent to the company exiting examinership and me acquiring its entire issued shareholding, Michael Carroll (an officer of the company) requested by email a number of documents from Coughlan White & Partners Solicitors (who had previously represented the company) in relation to fees that law firm had levelled against the company including, inter alia, a copy of all invoices issued since 1st January, 2013. Michael Carroll also requested an explanation for an undocumented and un-vouched payment of €200,000 which was made from the company to the firm of Coughlan White & Partners on 9th January, 2013, namely during the course of the examinership."

6. Subsequently, as is set out in Mr. O'Regan's affidavit, there was correspondence between the company, Eversheds (the company's new solicitors) and Coughlan White & Partners (the company's former solicitors), in which information was sought in relation to the invoices and also in relation to the €200,000 payment.

7. By letter dated 29th May, 2013, Coughlan White & Partners Solicitors wrote to Eversheds Solicitors stating as follows, *inter alia*:-

"A sum of €200,000 was transferred to these offices by Tougher Oil on 9th January, 2013, without any prior notification. We no longer hold said sum. When the money was transferred to these offices by Tougher Oil we queried with Mr. Thomas Tougher, Director of Tougher Oil Distributors Ltd, what said money was for. Mr. Tougher instructed us that same was to be discharged to him. We queried as to whether the consent of the examiner had been received and we were instructed that it had. With respect if your client has any queries whatsoever with respect to this matter then we suggest your client take same up directly with Mr. Tougher. I am sure your client carried out due diligence prior to investing in Tougher Oil Distributors Ltd and would have been aware of all matters prior to said investment."

8. Mr. O'Regan at para. 10 of his affidavit states that:-

"On 1st October, 2013, a meeting of the Board of Directors of the company was held at which it was resolved that Eversheds should advise the company on the misappropriation of the €200,000 funds by the plaintiff. A letter was sent to the plaintiff calling on him to explain, inter alia, the payment of the funds to Coughlan White & Partners and also the onward payment to himself, to repay the funds and to account for any profit made on or by reason of the misappropriated funds. The plaintiff and Coughlan White & Partners were also advised that if an adequate response was not received within five days of the date of the letter, High Court proceedings would be initiated. No such response was ever received."

The Company's Proceedings against Mr. Tougher

9. Subsequently, the company issued proceedings against Mr. Tougher and the firm of solicitors. These proceedings were entitled *Tougher Oil Distributors Limited v. Thomas Tougher and Grainne White, Fergal White, Joyce Coakley & Jason Teehan practising under the style and title of "Coughlan White & Partners Solicitors*. The record no. of these proceedings was 2013 No. 11295 P and the plenary summons was issued on 16th October, 2013.

10. It subsequently transpired, following correspondence with the firm of Coughlan White & Partners that the fourth and fifth named defendants (Joyce Coakley & Jason Teehan), were not actually partners in the firm. Thus, a notice of discontinuance was issued in these proceedings on 6th November, 2013.

11. Immediately thereafter a new set of proceedings was issued by the company. The title of these proceedings is *Tougher Oil Distributors Ltd v. Thomas Tougher and Grainne White and Fergal White practising under the style and title of "Coughlan White & Partners Solicitors*. This plenary summons was issued on 6th November, 2013, and the record no. of these proceedings is 2013 No. 12158 P.

12. It subsequently proved difficult for the company to serve the first and third defendants and the company formed the opinion that these defendants were actively avoiding service. An order for substituted service was sought and obtained from the High Court on 27th January, 2014.

13. No Statement of Claim has as yet issued in these proceedings.

Mr. Tougher's Proceedings against Tougher Oil Distributors Limited and John O'Regan

14. It subsequently transpired that Mr. Tougher on 7th November, 2013, issued two separate sets of proceedings against Tougher Oil Distributors Limited and Mr. O'Regan. These proceedings were as follows:-

1. The first plenary summons was entitled *Thomas Tougher v. Tougher Oil Distributors Ltd & John O'Regan*. These proceedings had a record No. [2013 No. 12194 P]. In these proceedings the plaintiff sought damages against both defendants for breach of contract, negligence and breach of duty against the defendants. These proceedings, however, have never been served on the defendants. Moreover, Mr. Tougher indicated in open court that these proceedings were now "dead".

2. The second set of proceedings was also entitled *Thomas Tougher v. Tougher Oil Distributors Limited & John O'Regan*. The record No. of these proceedings was [2013 No. 12226 P]. It is in respect of these proceedings that the current application is brought. This plenary summons also issued on 7th November, 2013. The claim on this plenary summons is as follows:-

The plaintiff's claim is for:

(a) A declaration that parts of the land comprised in folios [12 folios are then set out] are legally beneficially owned by the plaintiff. (sic)

(b) An order prohibiting the defendant from holding themselves out as the sole owners or agents of the owners of all of these lands comprised in [the 12] folios.

(c) An order prohibiting the defendant from entering into any contract for the sale of all the lands comprised in [the 12] folios.

(d) Interest pursuant to contract and/or pursuant to statute.

(e) Further, or in the alternative, damages, in addition to or in lieu of specific performance, due to breach of contract, negligence and breach of duty including statutory duty of the defendants, their servants or agents in failing to honour contracts and agreements in place.

(f) Further, or in the alternative, damages for breach of contract at common law.

(g) Further or other relief that the Honourable Court may deem appropriate.

(h) Costs.

15. These proceedings initially were not served on the defendants. However, the defendants discovered the existence of these proceedings on or about 3rd January, 2014. No pre-litigation letter had been sent by the plaintiff to the defendants and, therefore, the defendants were not on notice that the plaintiff was threatening any such litigation. Moreover, the defendants only discovered on 3rd January, 2014, that the plaintiff had registered a *lis pendens* against the relevant properties on the same date, i.e. 7th November, 2013.

16. Unusually, despite the fact that the plenary summons had not been issued or served at that time, the defendants entered an appearance on 25th February, 2014.

17. On 14th March, 2014, the first defendant then issued this notice of motion seeking to strike out the plaintiff's proceedings and to vacate the *lis pendens*. It was initially made returnable to 7th April, 2014.

18. Subsequently, Mr. Tougher served this plenary summons on the defendants' solicitors on 7th April, 2014, by serving it on them in court. The defendants' solicitors also accepted service on that date.

Submissions of the First Defendant

19. The first named defendant makes the following submissions in support of its application:-

1. Section 123 of the Land & Conveyancing Law Reform Act 2009, provides as follows:-

"123. Subject to section 124, a court may make an order to vacate a lis pendens on application by—

(a) the person on whose application it was registered, or

(b) any person affected by it, on notice to the person on whose application it was registered—

(i) where the action to which it relates has been discontinued or determined, or

(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted *bona fide*.”

2. Counsel on behalf of the first named defendant submitted to the court that in its current application it was seeking to:-

(a) To have the action to which the *lis pendens* relates “determined”, or

(b) To satisfy the court that the action was not being prosecuted *bona fide*.”

3. The first defendant also submitted that these proceedings had not been brought in a bona fide manner. There was no letter before action served; there was no notification whatsoever that a claim was pending; initially the proceedings were not served on the defendants; the defendants called on the plaintiff to serve them with the proceedings but he declined to do so for several months.

4. The first defendant also submitted that the *lis pendens* had simply been registered in order to damage and hamstring the business of the company. In this regard Mr. O'Regan stated in his affidavit that a national petroleum retail brand had expressed an interest in taking a lease of the company's forecourt operation at the Dublin Road in Carlow (folio CW9412F) and an investor on foot of this interest had indicated a willingness to purchase the freehold of the property. Mr. O'Regan stated that the company wished to divest itself of this asset in order to pay down a certain element of the financial debt owing to its bankers

5. Mr. O'Regan also stated on behalf of the company and himself that:-

“If the lis pendens which has been registered against this property by the plaintiff is not removed, I believe that both the prospective lessee and purchaser will cease their respective interests and will not proceed, in the case of the lessee with the lease and in the case of the purchaser with the freehold purchase. I have been negotiating the letting and purchase for a number of months before I became aware of the existence of the lis pendens. This will result in additional working capital not being available to the company to further its business interests. The existence of the lis pendens is also preventing the company from proceeding with an important refinancing which I believe is vital for the continued wellbeing and development of the company. The company to date since the examinership of the company commenced has availed of finance from Close Brothers Commercial Finance. This finance is expensive and the facilities that Close Brothers Commercial Finance can provide are limited and, for example, do not include standard form overdraft facilities. It is, therefore, very important for the maintenance and development of the company's business that the financial facilities are refinanced with a conventional bank so that the wide range of facilities available from a conventional bank are available to the company. I have been engaged over the last few months in ongoing negotiations with a conventional bank and these negotiations are well advanced. To achieve such a refinancing, it will be essential to create the fresh security over the properties in favour of the incoming bank and the existence of the lis pendens prevents this occurring. It is for these reasons that I believe that the hurt and damage being caused to the company is therefore irreparable if the lis pendens registered by the plaintiff is allowed to exist. An inability to provide additional working capital and conventional banking facilities will also put at risk the continued employment of the 100 or so current employees of the business and will directly impact on the growth of the business and the engagement of additional employees.”

6. Moreover, the first defendant also submitted that when the company presented its petition to the High Court for examinership, the petition stated (at para. 15) that the forecourt and retail division of the company consisted of ten locations of which seven were “owned by the company” and the remaining three were “leased by the company”. Mr. O'Regan avers in his affidavit at para. 15 that “these are the forecourt operations to which the plaintiff now claims an ownership right”.

Moreover, the first defendant submits that Mr. Tougher swore a verifying affidavit on behalf of the company dated 31st October, 2012, which accompanied the petition for examinership to the High Court. In this verifying affidavit Mr. Tougher confirmed that he had read the contents of the petition and that “all matters set out therein are true and accurate”. A copy of the petition to the High Court in the examinership and the verifying affidavit of Mr. Tougher were exhibited to the affidavit of Mr. O'Regan.

7. The first defendant also submitted that at its height, and assuming everything the plaintiff said was true, the plaintiff's claim was a claim for breach of contract, a possible entitlement to shares in the company and damages. However, what the plaintiff could not claim was a right to the assets of the company. Those assets were assets of the company and not Mr. Tougher and as a possible shareholder he could not claim a direct legal or beneficial interest in such assets.

21. In the circumstances the first defendant submits that the plaintiff's claim over the properties is clearly unsustainable and is bound to fail, and that the sole purpose of instituting the proceedings was to enable the plaintiff to register a *lis pendens* against the property thereby frustrating the potential sale of any of the properties, the refinancing of the business of the company involving the properties being used as security and to frustrate the operation of the company in the normal course of its business.

The Replying Submissions of Mr. Tougher

22. Mr. Tougher in his replying affidavit stated that he spent 53 years working and building a business that was very successful for many years; that during the hard times and the examinership he worked tirelessly to protect the business and the jobs of many of his

friends; that he committed and delivered the transformation from the old business to the new business and that he used all his contacts of many years in the oil business to ensure a smooth transition for the company customers.

23. At para. 3 he says as follows:-

"I say I put a lis pendens on the lands in which I have an ownership interest in through my contracted position comprised in the folios KE17524, CW9412F, DN16038 [and other folios]." (emphasis added)

At para. 4 he says:-

"I say I have a claim on these sites as I have a binding contract with John O'Regan which is witnessed by a number of individuals including a solicitor. This binding contract has a number of elements many of which had been discussed previously with the examiner and the consultants employed in the process. I further say that it is essential that my interest in the company assets are not destroyed through asset stripping." (emphasis added)

At para. 5 he sets out the real basis of the claim as follows:-

"The main elements of the binding contract which was sealed with a handshake are as follows:-

(a) That Mr. O'Regan would sell all the shares in the new restructured company to me within six months or subsequently to me at his purchase price from the examiner plus 10% and plus any additional costs he incurred; upon my coming forward with the necessary funds.

(b) That I would act as director and chairman of the newly constituted Tougher's Oil Distributor Limited (TODL).

(c) That I would act as a consultant to TODL for as long as I wished for which I would ensure the seamless continuation from the old TODL to the new TODL.

(d) That I would receive a once off gratuity of €100,000 from the date of the completion of the examinership.

(e) That I would receive a consultancy fee of €100,000 per annum.

(f) That I would become an automatic 10% shareholder in the new TODL with additional increases in the shareholding based on the performance of the company up to additional 6%."

At para. 6 he says that:-

"I do say that the agreement was under discussion for some time with various discussions around various topics which included members of the consultants and advisers that were involved in the examinership. I further say that there were various draft documents and indicative documents to ensure everybody was clear as to the terms including heads of agreement. I attach a copy hereto (TT1) which I have signed while swearing this affidavit. I say and do understand that these heads of agreement were non-binding but are clearly indicative of the final agreement as sealed with the handshake between John O'Regan and I."

24. At para. 10 he states:-

"I do say that John O'Regan then proceeded over time to try to frustrate our contract which led to false and defamatory allegations against me which subsequently led to his attempt at removing me as chairman and director and subsequently as consultant for which there is a case pending in the courts that has not proceeded."

25. Mr. Tougher also exhibited a document dated 24th January, 2013 (sic) headed "Heads of Agreement/Subject to Contract". This document provides as follows:-

"Parties: Mr. Tommy Tougher (TT) Newhall, Newbridge, County Kildare

Mr. John O'Regan (JO'R) Unit 3, Blarney Business Park, Blarney, Co. Cork

Alternatively both of the parties may opt to supplement another individual, corporate body or trust in their place at any time prior to the signing of contracts."

26. This "Heads of Agreement" document then set out various terms which are summarised at para. 5 of Mr. Tougher's affidavit set out above. The document was signed by Mr. Thomas Tougher and Mr. John O'Regan and dated 5th February, 2013.

27. Mr. Tougher also filed a supplemental affidavit in these proceedings on 27th April, 2014. This affidavit does not advance Mr. Tougher's claim to any great extent but at para. 26 Mr. Tougher says as follows:-

"I further say and believe that the second named defendant never had any intention of honouring his commitments in regard to this contract."

At para. 27 he says:-

"I say and believe that the only realistic prospect I have of getting paid under the agreement is by maintaining the lis pendens in place."

At para. 28 he states:-

"I say and believe that the only realistic prospect I have of protecting all of my rights is to maintain the status quo and the lis pendens until justice is not only done but is seen to be done at a full hearing and trial of the issues involved."

28. Mr. Tougher in his submissions to the court submitted that his case against the defendants was based on the contract which he alleges he entered into with Mr. O'Regan on 5th February, 2013, and which is set out at paras. 4 and 5 of his affidavit. He submitted that both parties had entered into a valid contract and he was entitled to issue proceedings for damages against both defendants.

29. However, it became clear in the course of Mr. Tougher's submissions that the reason he had registered the *lis pendens* against the various properties of the company was that he was concerned that the second named defendant and the company would be engaged in a process of "asset stripping" and he was concerned that the company would not have any assets to satisfy any judgment which he might obtain against either the company or Mr. O'Regan. He submitted that his claim to the properties and the registering of the *lis pendens* was to stop any asset stripping being undertaken by either of the defendants.

30. Counsel for the first defendant said in reply that it was clear from the affidavits filed by Mr. Tougher and from Mr. Tougher's legal submissions that, although Mr. Tougher had a stateable claim against the company and Mr. O'Regan, Mr. Tougher was also pursuing a claim that he was entitled to become a shareholder in the company under that alleged contract and that as a shareholder he was seeking to claim ownership over the company assets including, in particular, the company property. Counsel for the first defendant submitted that it was a basic principle of company law that a shareholder with shares in a company did not thereby acquire any direct interest in the assets of the company.

Applicable Legal Principles

31. The first defendant's application is brought, *inter alia*, pursuant to O. 19, r. 28 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the court striking out the proceedings on the grounds that they were unsustainable and/or bound to fail or that they disclose no reasonable cause of action against the defendant, or that they amount to an abuse of the process of the court.

32. Order 19, r. 28 provides that a court may order any pleading be struck out on the grounds that it discloses no reasonable cause of action and in any such case the court may order the action to be stayed or dismissed.

33. It is well established that the jurisdiction conferred by O. 19, r. 28 is exercisable by reference to the pleadings only. (See *McCabe v. Harding* [2004] 1 I.R. 506; *Barry v. Buckley* [1981] I.R. 306; *Keane v. Considine* [2010] IEHC 267; *Aer Rianta Cpt v. Ryanair Ltd* [2004] 1 I.R. 506).

34. Moreover, as is stated in Delaney & McGrath "Civil Procedure in the High Courts" (3rd Ed.) at p. 577:

"A pleading such as a statement of claim can be struck out where it fails to disclose a reasonable cause of action, i.e. where the facts and matters pleaded in the statement of claim do not constitute a cause of action that is known to the law or likely to be established."

35. Likewise, at p. 577 the authors state as follows:-

"An example of where a statement of claim was found not to disclose a reasonable cause of action can be seen in Flanagan v. Kelly (High Court, O'Sullivan J., 26th February, 1999). The defendant had acted as accountant and auditor of a company that had gone into liquidation of which the plaintiff was a former director. It was pleaded in the statement of claim that by reason of the negligence and breach of contract of the defendant the company had been prematurely wound up. Having considered the contents of the statement of claim, O'Sullivan J. was satisfied that the losses claimed by the plaintiff were all losses of the company not personal losses of the plaintiff and on the basis of the authorities, the plaintiff was not entitled to maintain such a claim which was bound to fail."

(See also *O'Neill v. Ryan* [1993] ILRM 557)

36. However, in addition to the jurisdiction of the court under O. 19, r. 28, the court also has an inherent jurisdiction to strike out proceedings if they are frivolous or vexatious or bound to fail. When exercising this jurisdiction the court is not limited to considering the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case. (See *Barry v. Buckley* [1981] I.R. 306). However, a court should only exercise this jurisdiction on the basis that "on admitted facts it cannot succeed". (per McCarthy J. in *Sun Fat Chan v. Osseous Ltd* [1992] 1 I.R. 425). (See also *Keane v. Considine* [2010] IEHC 267).

37. This jurisdiction, however, is to be exercised "sparingly and only in clear cases" (See *Barry v. Buckley*; *Sun Fat Chan v. Osseous Ltd*).

38. Indeed, as Clarke J. stated in *McCourt v. Tiernan* [2005] IEHC 268, in considering whether to strike out a claim in the exercise of its inherent jurisdiction "it must treat the plaintiff's claim at its high watermark". (See also *Ennis v. Butterfly* [1996] 1 I.R. 426, *O'Keeffe v. Kilcullen* [1998] IEHC 101; *Price v. Keenaghan Developments Ltd* [2007] IEHC 190).

39. As is stated in Delaney & McGrath (op cit.) (3rd Ed.) at p. 579:-

"A consequence of this judicial restraint is that if the pleading in question is capable of an amendment which will remedy the deficiency in the case as pleaded, then an application to strike out will not succeed. In Sun Fat Chan v. Osseous Ltd McCarthy J. expressed the view that "if the statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed." This proposition was accepted by Fennelly J. in Lawlor v. Ross (Supreme Court, 22nd November, 2001 at p. 10) who stated that "the court should be willing to assume in favour of the plaintiff that an appropriate amendment of the pleadings might save his case."

40. Thus, it is clear that a claim - or part of a claim - will only be struck out where on the basis of admitted facts or undisputed evidence, it is clearly unsustainable or is bound to fail.

41. In *Kelly v. IBRC* [2012] IEHC 402, Ryan J. considered an application to vacate a *lis pendens* registered by the plaintiffs and to strike out the plaintiff's case as an abuse of process. In that case, Irish Nationwide had issued ejectment proceedings against the plaintiffs in the Circuit Court which resulted in a consent order dated 3rd June, 2010. The plaintiffs agreed to an order for possession in favour of the building society with a stay of execution for six months. Subsequently, due to the default of the plaintiffs, the plaintiffs were removed from the property on foot of an execution order and the Bank obtained possession of the property. Subsequently the plaintiffs issued proceedings against IBRC in respect of the property and registered a *lis pendens* against the property on the same date as the plenary summons issued on 20th July, 2012. The Bank had been trying to sell the property and had reached agreement with a purchaser when it became aware of the *lis pendens*. The court held that the proceedings insofar as they asserted an interest in land such as to justify the registration of a *lis pendens* constituted an abuse of process, and the court ordered that parts of the plenary summons be struck out and that the *lis pendens* be vacated.

42. On the basis of the above authorities, I propose to consider the matter on the basis of the court's inherent jurisdiction to strike

out proceedings.

43. I now turn to consider the plaintiff's claim in the light of these authorities. The plaintiff's essential claim against the defendants is a claim for breach of contract. Insofar as this is a claim for breach of contract and damages for breach of contract, then Mr. Tougher's claim is clearly a stateable claim and is not bound to fail.

44. However, part of Mr. Tougher's claim is a claim to be legally or beneficially entitled to the assets of the company. In my view, this part of his claim is clearly bound to fail for the following reasons:-

1. It is a fundamental principle of company law that shareholders have a right to a share in the company but they do not have a direct right to have a share in any of the company's assets. This principle is most clearly enunciated in *Ciara Quinn & Ors v. Irish Bank Resolution Corporation Ltd (in special liquidation) & Kieran Wallace Defendants & Sean Quinn Snr, Darragh O'Reilly and Liam McCaffrey Third Parties* a decision of Finlay Geoghegan J. delivered on 20th December, 2013. At para. 21 of her judgment Finlay Geoghegan J. states as follows:-

"It is the most basic principle of company law that a shareholder does not by reason of his shareholding have any proprietary interest in the company's assets. In Kerry Cooperative Creamery Ltd v. An Bord Bainne Co-op Ltd [1980] ILRM 664, Costello J. cited with approval the following statement in Keane "Company Law in the Republic of Ireland" repeated at para. 17.01 of the 4th Edition:

"Where a company has a share capital, each of the members own at least one share of that capital and is consequently a shareholder in the company. This does not mean that he is the owner of any part of the company's assets or that he owns them jointly with his fellow shareholders."

2. The plaintiff is seeking in these proceedings – in part - to assert and maintain by reason of his alleged agreement with the second defendant a right to shares in the first defendant and - by virtue of that alleged shareholding - to claim a proprietary interest in the company's assets and, in particular, its parcels of land in different parts of the country. However, that claim is unstateable by virtue of the basic principle of company law that a shareholder does not, by reason of his shareholding, acquire any proprietary interest in the company's assets.

3. I am fortified in this view by Mr. Tougher's own submissions to the court that he registered a *lis pendens* on the various properties to ensure that the defendants did not engage in any asset stripping of the company pending the determination of his claim. In particular, he submitted to the court that he was concerned that if he was successful in his claim against the defendants that the defendants would have sold the assets of the company and that the company would be just a shell. In those circumstances he was concerned that any judgment which he might obtain might not be satisfied. Thus, he sought to register a *lis pendens* against various folios of the company to assert a right therein in order to ensure that this would not happen. However, based on the principles set out at 1 and 2 above, there was no lawful justification for registering a *lis pendens* against the company's property in these circumstances.

4. It is also of significance that in the petition seeking an examinership, Mr. Tougher swore an affidavit verifying that the company had full title to, and owned, all of the lands that are now the subject matter of the *lis pendens*.

5. I am also of the view that the continued existence of the *lis pendens* cannot be justified as it is manifestly causing significant and perhaps irrevocable damage to the company.

45. In all these circumstances, therefore, I am satisfied that the claim by Mr. Tougher in which he seeks an interest in the lands of the company and also seeks to register a *lis pendens* over those lands, is unsustainable and clearly bound to fail.

46. In those circumstances I believe that the appropriate order is that parts of Mr. Tougher's claim should be struck out.

Conclusions

47. I would, therefore, conclude as follows:-

1. The plaintiff has a stateable case against the defendants for damages for breach of contract, negligence and breach of duty which he has set out in his plenary summons. This claim is both stateable and sustainable and not bound to fail. I express, however, no view on the merits or otherwise of the plaintiff's claim and this is a matter which can only be determined at the trial of the action. However, it is clearly not appropriate to strike out that part of the plaintiff's claim.

2. However, insofar as the plaintiff's claim seeks declaratory orders that he is legally or beneficially entitled to lands comprised in various folios which are clearly the property of the company and, therefore, company assets, he has no right *qua* shareholder to share in those assets. Thus, the plaintiff's claims in respect of these matters are clearly unsustainable, bound to fail and/or disclose no reasonable cause of action against the defendants. I will, therefore, strike out these parts of the claim [paras A, B & C of the plenary summons).

3. Moreover, any claim which the plaintiff seeks to maintain for specific performance appears to be related to his claim to an interest in the lands comprised in the folios which are the assets of the company. This claim also is clearly unsustainable and bound to fail and should be struck out. Therefore, at para. (e) of the plenary summons I would strike out the words in lines 1 and 2 "*in addition to or in lieu of specific performance*".

4. Insofar as the plaintiff's claims in relation to lands comprised in the folios set out in the Plenary Summons have been struck out, then clearly the plaintiff has no entitlement to register a *lis pendens* against all such properties.

48. In the light of my conclusions that those parts of the plaintiff's claim, insofar as they relate to the lands comprised in the folios which are the assets of the company, should be struck out, then the action in respect of such matters has been "determined" within the meaning of s. 123(b) of the Land and Conveyancing Law Reform Act 2009. In the circumstances I will make an order vacating the *lis pendens* on the lands comprised in the folios set out in the Plenary Summons and the Notice of Motion pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009.