THE HIGH COURT

COMMERCIAL

[2014 No. 10198 P.]

BETWEEN

PAUL DORMER AND GERARD DORMER

PLAINTIFFS

AND

ALLIED IRISH BANK PLC, LUKE CHARLETON AND MARCUS PURCELL

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 5th day of February, 2016

1. There are two motions before the court. The first in time is the defendants' motion issued on 31st March, 2015, to strike out the plaintiffs' claim. The other motion, issued on 20th November, 2015, is brought by the plaintiffs for leave to amend their statement of claim.

History of these Proceedings to Date

2. The proceedings were issued on 3rd December, 2014, by plenary summons in which the plaintiffs sought various reliefs against the defendants including an order setting aside a judgment of the Commercial Division of the High Court, Kelly J. in the sum of €17,663,876 delivered on 4th March, 2014. On the same date, the plaintiffs sought and obtained an interim injunction restraining the defendants from taking steps to enforce the judgment (including any judgment mortgages registered against the plaintiffs). The proceedings were admitted into the Commercial Court on 8th December, 2014, and in the course of directions made by the court on 15th December, 2014, the application for an interlocutory injunction was fixed for hearing on 11th February, 2015. That application was heard on 11th and 12th February, 2015, and on 26th February, 2015, judgment was delivered (McGovern J.). The plaintiffs' application for an injunction was refused and the interim injunction was vacated. The plaintiffs appealed that decision and the procedural directions of this Court were suspended pending the outcome of the appeal and the motion to strike out the proceedings returnable for 20th April, 2015 was also adjourned.

3. The appeal was listed for hearing on 23rd November, 2015, and legal submissions were exchanged in advance. On 13th November, 2015, the Court of Appeal was notified that the plaintiffs wished to withdraw their appeal and the appeal was formally withdrawn. On 20th November, 2015, the plaintiffs issued the motion to amend the statement of claim. That motion and the defendants' motion to strike out the proceedings were listed together for hearing before the court.

The motions before the Court

4. The plaintiffs seek leave of the court to amend their pleadings in the light of what they describe as "*new evidence*" concerning the attitude of the first named defendant ("*the bank*") at a time leading up to the settlement agreement of 30th January, 2014, which is in issue in these proceedings. In the written and oral submissions, made to the court at the hearing of the interlocutory injunction application, the plaintiffs were at pains to point out that they were not alleging fraud against the defendants. They now seek permission from the court to deliver an amended statement of claim which deletes many sections of the original and seeks to add a new claim, namely for rescission of the settlement agreement in its entirety and/or damages in lieu of rescission and/or damages for deceit on the grounds that the bank, in entering into that agreement, was guilty of a fraudulent misrepresentation. It is immediately apparent that this claim is completely at variance with the position adopted by the plaintiffs at the hearing of the interlocutory injunction.

5. The plaintiffs state that the new evidence was not available when the original statement of claim was delivered. They do not deny that it was available by the time the interlocutory injunction was heard. Indeed, para. 27 of the amended statement of claim states that the documentation comprising the "*new evidence*" came to the plaintiffs' attention in January 2015. No satisfactory reason has been offered to the court as to why the plaintiffs did not rely on this evidence at the interlocutory injunction hearing. The defence was not delivered until 2nd February, 2015 and the plaintiffs could have delivered an amended statement of claim without leave of the court under Order 28 Rule (2) of the RSC had they chosen to do so.

6. The court enjoys a wide discretion to grant leave to amend pleadings. The primary consideration of the court must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation. See *Croke v. Waterford Crystal Limited* [2005] 2 I.R. 383, per Geoghegan J. at p. 401 and *Cuttle v. ACC Bank Plc* [2012] IEHC 105, Kelly J. If an opposing party cannot show prejudice the court will allow an amendment if it is necessary to determine the real issues in the litigation. In *Citywide Leisure Limited v. IBRC* [2012] IEHC 220, this Court summarised the factors to which the court should have regard when considering an application for leave to amend as follows:-

> *"1. A party who applies for an order allowing it to amend its pleadings must furnish reasons as to why the court should exercise its discretion in its favour.*
>
> *2. The court is entitled to look at those reasons and the evidence adduced therefrom to inform the exercise of its discretion.*
>
> *3. Fundamentally, the exercise of that discretion involves an analysis as to whether the new claim involved the real issues in controversy between the parties.*
>
> *4. The court is entitled to look at other factors.*

5. The court can enquire if the new claim or new plea is bound to fail.

6. The inquiry by the court as to whether the new claim is or is not bound to fail can involve analysis by reference to either or both of the tests set out in Order 19, rule 28 or the court's inherent jurisdiction.

7. If the new claim fails to meet both these tests, then it is not one of the real issues in controversy between the parties.

8. If the new claim was bound the [sic] fail, the amendment will not be allowed."

7. The defendants' motion to strike out the proceedings is based on O. 19, r. 28 and also under the inherent jurisdiction of the court. The inherent jurisdiction of the court is invoked on the basis that the claims made in the proceedings are unstatable, are bound to fail, are frivolous and/or vexatious and that in all the circumstances they constitute an abuse of process. There is a certain overlap between the motion to amend and the motion to strike out because one of the matters to be taken into account in both applications is whether or not the proceedings (including the new claim, if allowed) are bound to fail.

8. The distinction between applications to dismiss under O. 19, r. 28 of the Rules of the Superior Courts and the inherent jurisdiction of the court was discussed by Clarke J. in *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21. At para. 2.3 of his judgment, Clarke J. stated:-

"The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in Barry v. Buckley, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked."

9. So far as the defendants' motion pursuant to O. 19, r. 28 is concerned, it seems to me that the defendants have established that, even accepting the matters pleaded originally in the statement of claim, they disclose no reasonable cause of action. In my judgment on the interlocutory motion delivered on 26th February, 2015, I ruled that the plaintiffs in these proceedings were making precisely the same case as they made before Kelly J. when the matter came before him for summary judgment. At para. 15 of my judgment, I stated:-

"But that issue has already been canvassed before Kelly J. on 4th March, 2014 and he decided against the Dormers and gave judgment to the bank. The order of Kelly J. has been perfected and not appealed. The issues raised in the present case were canvassed before Kelly J. and he has decided upon those issues. It follows that the plaintiffs are precluded from seeking an order in this Court setting aside or vacating the order of the court made in the earlier proceedings, as no fraud is alleged. Furthermore, the plaintiffs in this action are estopped per rem judicatam from making the case that they now seek to make as a means of challenging the judgment against them."

10. My judgment on the interlocutory motion was appealed but the appeal has been withdrawn. It follows that my findings are not challenged by the plaintiffs and they are bound by them. While it is true that the court, at an interlocutory injunction hearing, does not decide the case but is concerned with maintaining the status quo pending the determination of the action, nevertheless, the findings which I made and which are outlined above constitute a legal ruling which must now be accepted by the plaintiffs since they have withdrawn their appeal. In those circumstances, the pleadings in the original statement of claim disclosed no reasonable cause of action against the defendants.

11. I now go on to consider the position that would arise if the amendments sought to the statement of claim are allowed. On the basis of the amended statement of claim and accepting the facts as asserted by the plaintiffs therein, it seems to me that the defendants' motion can be considered under O. 19, r. 28, which Clarke J. in the *Lopes* case said:-

"…is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious."

12. The case being pleaded in the amended statement of claim is based on what are asserted to be "new facts". But they are not. The facts were known to the plaintiff before the interlocutory motion was heard and also before they submitted their written submissions for that hearing in which they made it clear that they were not relying on fraud. Even if one accepts the facts pleaded in the amended statement of claim, the defendants will be severely prejudiced as they have already defended the injunction proceedings on the basis of an entirely different case. It would, in my view, be wholly vexatious to allow the plaintiffs to make an entirely different case against the defendants based on evidence or facts available to them at the earlier interlocutory hearing and which represent a complete *volte face* by them. But if I am wrong in determining that the matter can be decided under O. 19, r. 28 of the RSC, the circumstances surrounding the application to amend are such that it is clearly within the inherent jurisdiction of the court to refuse the amendments sought both on the basis that the amended proceedings are bound to fail and the application itself is an abuse of process.

13. The plaintiffs have offered no credible evidence to suggest that the facts are as asserted in the proposed amended statement of claim. The very particular circumstances surrounding the plaintiffs' application have a bearing on whether or not the claim, if amended, is bound to fail. These proceedings are in effect a collateral attack on the judgment of Kelly J. made on 4th March, 2014. The plaintiffs are aware from the arguments raised at the hearing of the interlocutory injunction and the judgment given by this Court on that issue that in the absence of fraud or deceit, giving rise to a rescission of the contract, the judgment of Kelly J. cannot be impeached. That judgment was not appealed. Within days of the plaintiffs withdrawing their appeal against this Court's decision in the interlocutory injunction hearing, they brought a motion to amend the statement of claim which involves the plaintiffs making an entirely different case, and one which is completely at odds with their earlier stated position and the original pleadings. The evidence on which they seek to rely and which they characterise as "*new facts*" are nothing of the kind. They were available to the plaintiffs at the time the interlocutory injunction hearing took place and before they delivered their written submissions for that hearing. If the court was to allow the amended pleadings it is simply not credible that the plaintiffs could now maintain a case which is completely at odds with their position heretofore. On that basis, the claim is bound to fail.

14. It is clear that the amendments sought by the plaintiffs cannot be allowed because they fall foul of the rule in *Henderson v. Henderson* [1843] 3 Hare 100, approved by the Supreme Court in *F. McK. v. T.H. (Proceeds of crime)* [2007] 4 I.R. 186. The plaintiffs were represented by solicitors and counsel throughout these proceedings and the "*new facts*" which formed the basis of an application to amend the statement of claim were available to the plaintiffs and their legal advisers in advance of the interlocutory motion and in advance of the written submissions prepared for that hearing. In those circumstances, the courts cannot permit the plaintiffs to proceed with the case on an entirely different basis when they failed to agitate these matters at the interlocutory hearing. It would necessarily involve a rehearing of the interlocutory injunction with a further right of appeal. As Hardiman J. stated in *F. McK. v. T.H.*:-

> "*No legal system whose decrees were contingent to that degree would meet the requirements of justice…"* (See para. [14], p. 192)

15. It is true, of course, that at the interlocutory hearing, the court is principally concerned with preserving the status quo and is not making a final determination on the matters in dispute. But there may be circumstances, such as here, where the judgment on the interlocutory injunction effectively determines the issues between the parties because of the surrounding circumstances. It would be a parody of justice to allow the plaintiffs make the case which they now wish to make having regard to everything that has taken place to date. If the plaintiffs are not permitted to make the case which they now seek to make, these proceedings are bound to fail because I have already ruled that the matters in dispute between the parties are *res judicata* and the appeal against that decision has been withdrawn.

16. The fact that the defendants' motion to dismiss was brought before the plaintiffs sought to rely on "*new facts*" does not affect the position.

Decision

17. The plaintiffs' application to amend must be refused. It amounts to nothing less than an attempt to completely recast the proceedings in order to overcome a fatal legal impediment to the setting aside of the summary judgment obtained against them. It is a complete repudiation of the plaintiffs' earlier position in the proceedings – a position which was maintained in written legal submissions at the interlocutory hearing after the "*new facts*" came to light. To try and introduce such a new claim at this stage is highly prejudicial to the defendants and is an abuse of process. No satisfactory explanation has been offered to the court as to why the plaintiffs did not amend the statement of claim without leave when it was open to them to do so as they had the information on which they now seek to rely.

18. I, therefore, refuse the plaintiffs' application for leave to amend the statement of claim. The defendants are entitled to an order striking out the proceedings under O. 19, r. 28 on the basis that they disclose no reasonable cause of action against the defendants and are vexatious. I also strike out the proceedings under the inherent jurisdiction of the court because they amount to an abuse of process.