Neutral Citation [2015] IEHC 313

THE HIGH COURT

COMMERCIAL

[2011/4336P]

BETWEEN

CIARA QUINN, COLETTE QUINN, BRENDA QUINN, AOIFE QUINN, SEÁN QUINN JNR AND PATRICIA QUINN

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION) AND KIERAN WALLACE

DEFENDANTS

AND

SEÁN QUINN, DARA O'REILLY AND LIAM MCCAFFREY

THIRD PARTIES

JUDGMENT of Mr. Justice Haughton delivered the 20th day of May, 2015

Background

1. This judgment relates to an application by the plaintiffs to amend the Statement of Claim. I have already given a decision on 13th May, 2015 dismissing the application and in this judgment I give my reasons for so doing. The main trial of this matter is listed for hearing on 3rd June, 2015.

2. The background to the application is that these proceedings were commenced by plenary summons dated 16th May, 2011 and were admitted to the Commercial List on 30th May, 2011. The claims asserted by the plaintiffs are set out in their Statement of Claim delivered on 8th July, 2011 and the case is fully defended. The proceedings arise from lending by Anglo Irish Bank, now Irish Bank Resolution Corporation Ltd (in Special Liquidation) ("the Bank") to the Quinn Group of companies over a period of time, but particularly between 2007 and 2008. The plaintiffs claim that at the relevant times they were the ultimate beneficial owners of the Quinn Group.

3. The plaintiffs *inter alia* challenge the validity of six share charges that they gave the Bank as security for lending to the Quinn Group. In addition, they seek to challenge the validity of specific personal guarantees that they gave to the Bank as security for significant lending into six Cypriot companies. Their claims to these reliefs as currently pleaded are that the securities should be declared void and unenforceable because they were obtained through undue influence, were improvident or were otherwise liable to be set aside on the basis of an unconscionable bargain. In addition, the plaintiffs pleaded that the securities and guarantees should be declared void and unenforceable on the grounds that they were given in respect of lending which they alleged breached s.60 of the Companies Act, 1963 and/or the provisions of the Market Abuse Regulations ("MAR"). They also pleaded that the securities were tainted by that alleged illegality.

Preliminary Issue and Decision of the Supreme Court

4. The pleadings were closed some three and a half years ago, but have at all times been the subject of case management in the Commercial Court. By Order dated 16th December, 2011 Kelly J directed a trial of a preliminary issue. The question that was set down for the preliminary trial was as follows:-

> *"Do the Plaintiffs or any of them have the standing or entitlement to rely upon alleged or any breach:*
>
> *1. (a) of the Market Abuse Regulations; or*
>
> *2. (b) Section 60 of the Companies Act, 1963.*
>
> *in aid of any of their claims for declarations of invalidity, unenforceability or no legal effect in respect of any Charge [on] Shares or any Personal Guarantees."*

5. In directing the trial of this preliminary issue, Kelly J stated:-

> "Now, I come to the conclusion that certainly insofar as the first part of the Issue Paper is concerned that there would be a great deal to be said in favour of a modular trial asking the Court to determine the questions concerning the Plaintiffs' standing in advance of the trial. I believe that there would be, as a result of such a hearing, a material saving in both time and costs, both by reference to discovery issues but more particularly by reference to both evidential issues and time which would have to be spent at the trial. Because these two questions of abuse of section 60 [and] failure to comply with the market abuse regulations permeate throughout insofar as the various reliefs are concerned and those reliefs are sought by reference to complaints being made on the part of the Plaintiffs concerning the failure to adhere to both the regulations and the Act. As I say it is not the only part of the Plaintiffs' case but in my view it is a material part of it and I am of opinion that the first issue as to the Plaintiffs' standing is something that is capable of being dealt with in a short period of time. It is a legal question. The facts which are alleged in the Statement of Claim are for the purpose of it accepted so there will be no need for any evidence in relation to it. It will be a legal argument as to whether those facts provide the Plaintiffs with a *locus standi* to make the case which they seek to make by reference to those two statutory provisions. And I believe that if that question is answered in the way in which the bank hope that it will remove from the case a substantial part of what the judge at trial will have to deal with. If on the other hand it is answered in a manner adverse to the bank then it means that the judge does not have to consider or concern himself with any question of standing. That will already have been decided and the matter can then proceed to the next phase.

…

> I am convinced that there would be a saving both in time and in costs, time of the litigants, time of the court and the costs of the litigants by identifying this legal issue and having it decided in advance of the trial, the advantages I have already outlined. If it's a decision in favour of what the Defendants hope for it means that that element of the case has simply disappeared, thereby reducing the trial time. If, on the other hand, it is decided in favour of the Plaintiffs and they are afforded the status which they say they have by a determination of the court then they can proceed without further having to have that question raised at trial and they move on to the second part of the claim.
>
> So I am satisfied that it is appropriate that as part of the ordinary case management of litigation of this sort that there should be a modular trial dealing with the Plaintiffs' standing and I propose, therefore, to direct a trial of the questions which are framed at paragraph No. 1 of the "Preliminary Issues" which are identified in the schedule to the Notice of Motion."

6. In the High Court, Charleton J found that the plaintiffs were entitled to rely on s.60/MAR. That decision was appealed by the Bank to the Supreme Court and Clarke J delivered the unanimous judgment of the Court on 27th March, 2015. He stated his conclusions as follows:-

> "12.16 However, I have concluded that the underlying lending contracts are enforceable, notwithstanding their illegality. I have further concluded that the Quinns never made a case which suggested that the security arrangements might be unenforceable, even if the underlying lending transactions were enforceable. On that basis, I am forced to conclude that, on the case as it has been pleaded and run to date, it can only be held that the relevant security arrangements are enforceable. This is so because the underlying loans themselves are enforceable and no alternative case has been made. In those circumstances, the question of whether it might be possible to undo executed security just does not arise.
>
> **13. Conclusions**
> 13.1 On that basis it seems to me that, in the light of the case made by the Quinns to date, they are not *"entitled to rely"* (in the words of the preliminary issue directed to be tried) on any of the alleged breaches of either section 60 or the MAR in aid of the claims which they make concerning the invalidity of guarantees given by them and security put in place in respect of underlying lending transactions said to be in breach of those provisions."

7. In the course of his judgment Clarke J at para. 12 summarises the Quinns' claim as pleaded in the Statement of Claim and at para. 12.1 states – "the statement of claim refers specifically to the alleged illegality of the loan transactions and what is said to be the consequent unenforceability of the security and guarantees" and in that context he refers to paras. 103 and 106-110 of the Statement of Claim and then states at para. 12.4:-

> "Those seem to me to be the relevant parts of the statement of claim for present purposes. It is against the background of a claim formulated in that fashion that the trial of the preliminary issue was directed and determined. It is, therefore, in the context of a claim as thus formulated that this appeal arises. It is by reference to such a formulation of the claim that it is next necessary to look at aspects of the written submissions made by the parties to this Court."

8. Then, having referred to the parties written submissions, Clarke J stated:-

> "12.6 …There does not seem to be a plea contained in the statement of claim which suggests that the security and guarantees are allegedly void or unenforceable on a separate and stand-alone basis, as opposed to being invalid by being closely connected to the lending transactions which are said to be void or unenforceable due to illegality."

He followed this up by stating:-

> "12.9 I have analysed the statement of claim and the position adopted by the parties on this appeal in some detail for the purposes of determining with some precision the precise questions which were properly before the High Court on the hearing of the preliminary issue and, therefore, before this Court on appeal. In that context, it is important to make a distinction between two potentially different allegations. The first type of allegation, which was undoubtedly before the High Court and is before this Court, relies on the suggestion that the various underlying lending transactions were void for illegality on the basis already explored. As a consequence, it is said that security put in place to support that lending is so closely connected with the lending concerned that it too is tainted by illegality, and it too is unenforceable, because the underlying loans themselves are unenforceable.
>
> 12.10 A second type of allegation might have been to suggest that, even if the underlying loans were themselves enforceable (on the grounds that policy did not require unenforceability), then, nonetheless, security put in place to support illegal activity by persons who are unaware of the illegality concerned might not be capable of being enforced.
>
> 12.11 The reason why this distinction is important stems from the analysis already conducted in the course of this judgment which suggests that policy may require that underlying contracts entered into by parties who had knowledge of a relevant illegality might nonetheless remain enforceable, but that it was possible, in similar circumstances, that collateral contracts entered into by innocent parties in connection with such illegal activity might be unenforceable, at least against those parties where the innocent parties concerned might not also have been expected to benefit by the very series of transactions which are argued to be unenforceable.
>
> 12.12 However, it does not seem to me that an argument was ever truly advanced on behalf of the Quinns which suggested that a distinction might be made between the effect of any illegality on the underlying lending contracts, on the one hand, and on the security or guarantee arrangements in respect of those lending contracts, on the other. Rather, the case made by the Quinns was that the underlying lending contracts were unenforceable on the basis of being void for illegality and that security put in place in close connection with those unenforceable contracts could not, itself, be enforced.
>
> 12.13 While there might, therefore, be a theoretical basis on which it might have been possible to consider whether the guarantee or security arrangements from which the Quinns seek to escape in these proceedings are unenforceable, notwithstanding the fact that the underlying loans are, for the reasons already analysed, enforceable, that case was never truly made, and it would, in my view, be inappropriate to address it any further at this stage."

Amendment Sought
9. It is against this background that the plaintiffs now seek to amend their Statement of Claim to plead, in effect, that notwithstanding that the underlying lending is enforceable, it was illegal by reason of breach of s.60/MAR, and the share pledges and guarantees are void and unenforceable against them as a matter of public policy because they were innocent of the illegality. This is what may be conveniently termed as a plea of "stand alone" unenforceability of the share pledges and guarantees. Thus, they seek amendments to the Statement of Claim commencing from para. 103 in the terms as set out in the schedule to this judgment (the proposed amendments being underlined).

10. The plaintiffs seek their liberty to amend under Order 28 rule 1 which provides:-

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The Plaintiffs' Arguments
11. Mr. Hayden S.C. on behalf of the Plaintiffs argued that the question of stand alone unenforceability is a real question in controversy between the parties and that it is necessary for it to be determined. He relied on the judgment of Geoghegan J in *Croke v. Waterford Crystal* [2005] I.R. 383 to the effect that this is a liberal rule, and argued that the mere novelty of the proposed amendments should not present a barrier to them being permitted, and that it is immaterial that they seek to make a case that may be significantly different from that made originally. It was argued that there would be no real prejudice to the defendants' position and that any residual prejudice could be met by appropriate amendment of the defence. It was submitted that no additional discovery would be needed and that the trial timetable would not be unduly affected although Mr. Hayden accepted that there might be some minimal delay if particulars were raised and rejoinders were necessary. He drew support for his application from the words "to date" as employed by Clarke J in paras. 12.16 and 13.1 of his judgment in reference to the matters as pleaded in their Statement of Claim, and from the fact that the decision of the Supreme Court did not contain any direction suggesting that the plaintiffs should not be given liberty to amend. In this regard Mr. Hayden S.C. relied by analogy on *Clarke v. O'Gorman* [2014] IESC 72 where O'Donnell J stated:-

> "43…while it was understandable on the state of the authorities, the trial judge here was wrong to dismiss the plaintiff's claim. The lack of authorisation under the [PIAB] Act had not been raised by the defendant at any time during the process of pleading. It was only mentioned in correspondence shortly before the trial and the application made at the commencement of the trial. No application was brought to amend the pleadings. Since it was not a jurisdictional matter it could only be raised if it was pleaded and therefore relevant to the issues between the parties. There was therefore no basis to hear the application and no basis for the dismissal of the proceedings. Consequently, I would allow the appeal and set aside the Order of the High Court. I should perhaps add that while it would be a matter for any court before which any application was made, the fact that the matter had proceeded so far before any issue was raised, and that in the light of this judgment the correct Order which ought to have been made in the High Court was an Order to reject the defendant's application (in which circumstances the case would have proceeded to trial and long since have been determined), should weigh heavily against any application to amend the proceedings at this stage to include any plea in relation to the 2003 Act."

12. With regard to delay, it was argued on behalf of the plaintiffs that they had moved swiftly following the delivery of the judgment of the Supreme Court on 27th March, 2015. They asserted that there was no prejudice and that the delay was explicable and reasonable in the circumstances.

13. The plaintiffs argued two other matters in support of their application. Firstly, they pointed out that lack of awareness on the part of the plaintiffs is pleaded in the Statement of Claim:

> • In para. 69(e) : "None of the plaintiffs were aware of the purchase of these shares [between 14th-21st July, 2008] in their own name and they were not consulted in relation to same";
>
> • In para. 69(h): "In October 2008, the July Facilities were refinanced, and each of the Plaintiffs shareholdings in Anglo was transferred to a Cypriot company wholly owned by each of them and, again, none of the Plaintiffs were aware of this refinancing";
>
> • In para. 71: "None of the Plaintiffs had any knowledge, involvement or input into any of the discussions preceding the transactions or in respect of the funding arrangements which were put in place in respect thereto".
>
> • They also plead at para. 91 that they "took no active role in any matter relating to Anglo lending, and were effectively dictated to in relation to such lending pursuant to which the personal guarantees and share pledges were required by Anglo" and provide some detail of this allegation.

It should be noted that in seeking Particulars the Bank asked:-

> "59. In respect of each plaintiff, please state when and by what means he or she became aware of the matters described in paragraphs 67 to 71 of the statement of claim."

The reply stated:_

> "The Plaintiffs became generally aware of the matters on or about 14 or 15 July, 2008. They became aware of the detail of the transactions in or about September 2010".

14. Secondly, it was argued that the proposed amendments do no more than set out a plea of innocence and the legal consequences flowing from factual matters already pleaded, the claimed consequence being that the share pledges and guarantees are in and of themselves unenforceable.

15. The Plaintiffs also seek to introduce a proposed amendment at 110A to read as follows:-

> "Further or in the alternative and without prejudice to the foregoing, the lending transactions, share pledges and

guarantees impugned in these proceedings are unlawful and unenforceable in an[d] of themselves as they were entered into for an illegal purpose and, as such, offend the common law rules on illegality."

16. In relation to this plea the plaintiffs referred the court to 'Outline Legal Submissions on Behalf of the Plaintiffs' prepared for the trial of the action in which they wished to rely on the case of *Scott v. Browne Doering McNab & Co* [1892] 2 QB 724 for the proposition that the lending agreements entered into by the Bank had the object of buying shares to induce the marketplace to wrongly believe that there was a true market (or higher than warranted share price) for the company's shares, and that this was a common law offence such that both the underlying loans and the collateral share pledges and guarantees were unenforceable at common law. It was argued that this common law offence survived the MAR which came into effect in 2005 (S.I. No.342 of 2005).

17. In a written 'Rejoinder Submission' by way of alternative argument, and in the event that the common law offence of cheating the public no longer existed, the plaintiffs relied on the principle that a person cannot rely on their own tortious act, citing para. 15.08 of Paul McDermott's "Contract Law" at pp. 766-767 which states that:-

> "The principle that a person should not benefit from their own wrong arises most frequently in the context of insurance policies. In *Beresford v Royan Insurance Co* it was held that the estate of a person who commits suicide was not entitled to the proceeds of a life policy that was silent on the issue….At the time of the case suicide was a criminal offence. It has ceased to be so in this jurisdiction...However, just because suicide is no longer a criminal office that does not automatically mean that a court would permit a person (through their estate) to benefit in a civil action from their own act of self-destruction."

18. Mr. Hayden also relied on a passage of Peel's "The Law of Contract" (12th ed., 2007) at para. 11-016 on p. 476 where it is stated that ***"Deliberate commission of a civil wrong.*** A contract is illegal where its object is the deliberate commission of a civil wrong." They also relied upon commentary at p. 483 of Peel headed "Conduct made lawful: future contracts" where it is stated:-

> "Secondly, it is possible that, even after the conduct in question has ceased to be a legal wrong, a contract involving such conduct would still be contrary to public policy."

Opposition to amendment

19. The Bank in opposing the application to amend argued that –

- the issues that the plaintiffs now seek to raise are res judicata following the determination of the preliminary issue by the Supreme Court;

- alternatively, the application to amend is an abuse of the process because it seeks to circumvent the decision on the preliminary issue raising arguments that should have been raised earlier;

- this is case managed litigation and it is now nearly four years since the pleadings closed, and there has been extensive and costly discovery (including non-party discovery), exchanges of interrogatories, the trial of the preliminary issue and appeal, the preparation and exchange of witness statements and reports and the preparation of legal submissions;

- they would suffer logistical prejudice if the amendments were permitted; and

- with regard to the proposed para. 110A, the plaintiff seeks to introduce an amendment on a basis that discloses no claim in law.

20. The second named defendant also opposed amendment, but simply adopted the arguments presented by Mr. Gallagher S.C. on behalf of the Bank.

Res Judicata

21. The preliminary issue related to the plaintiffs' "standing" to raise s.60/MAR in impugning the share pledges and guarantees. The use of this wording, and the general tenor of Kelly J's ruling makes it clear that he intended that the preliminary issue would deal with the s.60/MAR issues in their entirety.

22. The Supreme Court decided that the underlying lending was still enforceable notwithstanding that it might be illegal, or tainted by illegality by being in breach of s.60/MAR and concluded that the plaintiffs had no "standing" to impugn the validity of the share pledges/guarantees "in the light of the case made by the Quinns to date". It is quite clear from paragraphs of the decision quoted above (and in particular paras. 12.6 and 12.16), that the court did not regard "stand alone" unenforceability of the share pledges/guarantees as having been pleaded, and so it did not decide whether as a matter of law they might be unenforceable on that ground. Indeed, Clarke J expressly stated that this did not arise on the case as pleaded and he reserved a decision on it to "a suitable future case".

23. It follows that the Supreme Court decision determined the preliminary issue only insofar as the issues of s.60/MAR illegality were raised in the pleadings. It therefore cannot be said that the precise case that the plaintiffs now wish to make by way of amendment of their pleadings was determined by the Supreme Court. Although the question of "standing" has been determined, this only reaches as far as the matter was pleaded and it does not go beyond the ambit of the pleadings. I therefore reject the submission that the issue that the plaintiffs now seek to raise is *res judicata* in the strict sense of that term.

Delay/Abuse of the Process

24. It is convenient to deal with these two aspects of the defendant's answer to this application to amend together because they are inextricably linked, and it is under these headings that the court has decided, in its discretion, to refuse the application.

25. While it is undoubtedly the case that the plaintiffs now say that the "stand alone" enforceability issue is a real matter of controversy, it is relevant for the court to consider when this issue became a real matter of controversy, and this will be considered below.

26. The principle that it is an abuse of the process for a litigant to attempt to introduce into existing proceedings or fresh proceedings matters that have already been litigated was established in *Henderson v. Henderson* [1843] 3 Hare 100. At p. 319 Sir Wigram, Vice Chancellor, in delivering the judgment of the Privy Council, stated:-

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

27. This principle has been applied by Irish courts on many occasions, and the defendants referred me to, *inter alia*, the decision in *Morrissey v. IBRC & Ors* (unreported High Court, Costello J, 11th March, 2015). In this case the court refused to allow the plaintiff to reopen matters that had been determined in an earlier case in which he was a defendant on the grounds that those matters were *res judicata*. However, in relation to arguments that were not made in the earlier proceedings but which arose from the same transactions, Costello J held that this was a form of *Henderson v. Henderson* abuse of the process. She stated at para. 5 that:-

> "It is a fundamental principle of law that a party should not be entitled to re-litigate matters or raise issues which have already been determined by a final judgment of a court of competent jurisdiction between the same parties and their privies. This is known as the principle of *res judicata*. But beyond the strict limitations of *res judicata* the courts have long recognised that there may be an abuse of the process outside of the relatively confined limitations of the rule and the courts have always been prepared to balance the rights of the parties to have their cases heard and determined by the courts with the rights of the opposing parties to fair procedures in the conduct of litigation and, where necessary, to strike out proceedings if they amount to an abuse of the process. In addition to the private rights of litigants there is a public policy interest in ensuring the finality of litigation and preventing vexatious litigants from subjecting the same parties to multiple lawsuits on the same issue."

28. At para. 24 of her decision, Costello J stated:

> "24…However, other litigants enjoy rights in relation to litigation. They are entitled to rely upon the fact that, subject to a right of appeal, a determination by the High Court of an issue which has been raised (or *which ought to have been raised*), is final and may not (save in special circumstances which do not arise here) be re-agitated." (emphasis added)

29. In *Re Vantive Holdings* [2010] 2 I.R. 118 at p. 142, Denham J (as she then was) approved the following statement of principle by Bingham MR in *Barrow v. Bankside Ltd* [1996] 1 W.L.R. 257 at p. 260:-

> "The rule in *Henderson v. Henderson* (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of *res judicata* in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

Decision

30. The court has taken into account a number of matters that have led it to the conclusion that the issues that the plaintiffs now seek to raise by way of amendment are in reality arguments that ought to have been raised at the outset or at any rate at an earlier date, and that in exercising its duty to balance the rights of the plaintiffs and the defendants in this litigation the amendment should be refused.

31. Firstly, it is far from clear that the case that the plaintiffs now wish to make was a matter of real controversy at any time prior to the decision of the Supreme Court on 27th March, 2015. The defendants emphasised to the court not only that this issue never formed part of their pleadings but also that in various affidavits sworn by the plaintiffs they consistently relied on an allegation that the underlying loans were illegal *and unenforceable* and did not suggest that the share pledges/guarantees were in themselves unenforceable. This was the case in an affidavit sworn on 25th May, 2011 by Aoife Quinn grounding the plaintiffs' application to enter the Commercial List (para. 8(f)); in an affidavit sworn by Colette Quinn on 14th February, 2013 grounding the plaintiffs' application to lift the stay on proceedings imposed by the Irish Bank Resolution Corporation Act, 2013 (para. 28); and in an affidavit sworn by Aoife Quinn on 27th May, 2013 grounding the plaintiffs' unsuccessful application to join the Central Bank of Ireland and Minister for Finance as co-defendants (para. 5).

32. The same approach was taken by the plaintiffs in submissions to the court dated 19th September, 2013 in support of an application for injunctive relief where they submitted:-

> "In essence, the Quinns seek to set aside security (the "impugned security") provided to Anglo Irish Bank Corporation Limited ("Anglo") in respect of lending provide by Anglo to Quinn related entities. The Quinns contend that such lending was illegal and/or invalid and/or unenforceable for a number of reasons including breach of section 60 of the Companies Act 1963 and the Market Abuse (Directive 2003/6/EC) Regulations 2005. It is the Quinns' case that the lending in question was provided by Anglo for the purpose of meeting margin calls on Contracts for Difference ("CFDs") in respect of Anglo shares held by Quinn related entities in support of the share price of Anglo shares."

33. Furthermore, as appears from the affidavit of Karyn Harty sworn on 29th April, 2015 in opposition to this motion to amend, it is averred that in instituting other related proceedings the plaintiffs have consistently alleged that unenforceability of the security is consequent on alleged statutory illegality of the lending and not the security itself. Ms. Harty cites an affidavit sworn by the plaintiffs' former solicitor on 20th June, 2011 in proceedings taken by the plaintiffs in Cyprus as an example.

34. Secondly, the defendants also drew to the court's attention the eminence of counsel who prepared and signed the Statement of Claim delivered herein. The court takes note of the experience and expertise of these counsel, and of the firm of solicitors instructing them who have particular experience in commercial matters.

35. Mr. Hayden S.C. suggested that the plaintiffs could not reasonably have been aware, until the Supreme Court had delivered its judgment, of a distinct claim that the share charges/pledges might be void or unenforceable notwithstanding that the underlying lending, if illegal, is nonetheless enforceable. I cannot agree with this submission. In the court's view, the plaintiffs and their lawyers were in a position to assess the level of awareness and innocence of the plaintiffs and to foresee the possibility of making the case, if it could be made, that the security might of itself be unenforceable even if the lending was enforceable. They were equally in a position to anticipate that one outcome of the preliminary issue was that the underlying lending would be enforceable even if it was illegal. Accordingly, the delay in seeking an amendment commenced at a much earlier point in time and, as indicated below, this was probably in May 2012 when the Bank delivered a written submission noting the restricted nature of the pleas in the Statement of Claim.

36. Thirdly, the plaintiffs in their grounding affidavit for this motion and in their submissions failed to give any explanation or reason why the pleas they now wish to make were not pleaded at the outset, or why no application to amend was brought at an earlier point in time. It is true that in *Croke* Geoghegan J (at p. 394) stated that in a number of High Court decisions cited to him there had been "an overemphasis on an obligation to give good reason for having to amend the pleadings." However, in a case such as this where the application is made late in the day, after the trial and final determination of a preliminary issue – which in truth was more in the nature of a 'module' of the trial - and shortly before the date fixed for hearing of the remainder of the action, it is of some relevance.

37. One reason for the absence of any explanation may be that there have been changes in the plaintiffs' legal representation and therefore it may be more difficult to ascertain or present any explanation. However, the court cannot discount the possibility that the lawyers who prepared and delivered the Statement of Claim in its present form did not consider that there was a factual basis for making the claim that the plaintiffs now wish to make. For instance, it might have been considered unlikely that the plaintiffs could prove that they were entirely innocent guarantors, or it might have been considered that they would face difficulties if it were demonstrated that they stood, potentially, to gain a benefit from the underlying illegal lending – two possibilities tentatively canvassed by Clarke J at paras. 8.50-8.51 of his judgment. While the court is careful not to prejudge any aspect of the plaintiffs' case (notwithstanding an invitation to do so in the Bank's submissions), the absence of any explanation as to why these pleas were not made earlier does put the court at a disadvantage and is a factor that the court takes into account.

38. Fourthly, as the plaintiffs themselves accept in their submissions, the transactions and factual basis for the claims pleaded in their Statement of Claim are virtually identical to the transactions and facts upon which they seek to rely in pursuing the case based on the amended pleading. The primary differences are firstly a plea of innocence and secondly a plea that the share pledges/guarantees are in and of themselves unenforceable at common law as a consequence of the illegality (as opposed to unenforceability) of the underlying lending. As to the first of these, there seems to be little difference between this and the existing pleas of lack of awareness which are set out earlier in this decision. As to the second, this effectively raises a new argument as to legal consequences based on the same facts.

39. This brings the amended pleas within the rubric of those "which ought to have been raised" (to use the words of Costello J) at the outset. It is apparent from the wording of the proposed amendments, and in particular deployment of the word "innocent", that the Plaintiffs now seek to plead a question/argument identified by Clarke J at para. 8.48 of his judgment, and which he later describes at para. 12.13 as "a theoretical basis" for considering stand alone enforceability. What the plaintiffs seek to do by way of amendment is a recasting of its arguments which essentially still rely on the alleged illegality of the underlying lending under s.60/MAR. The application in its timing and in the wording of the proposed amendments both indicate an intention to overreach or circumvent the actual decision of the Supreme Court on the preliminary issue. As a matter of public policy, this should not be permitted. On this basis alone the court is of the view that none of the amendments should be allowed.

40. Fifthly, Clarke J noted, at para. 12.19, that had he decided that the share charges/guarantees were unenforceable, he would then have had to consider whether such unenforceability would permit the plaintiffs to undo the executed security and to prevent Anglo from exploiting the security in a way which did not require Anglo to invoke the jurisdiction of the court (as a receiver was appointed, and changes made to the directorships of various Quinn companies).

41. Had the plaintiffs included stand alone enforceability pleadings in their Statement of Claim and had these been part of the preliminary issue, and had the plaintiffs succeeded before the High Court/Supreme Court on the stand alone issue, then this further question would have been considered and determined by the court at that stage. As the stand alone issue was not considered, this further question was never considered by the Supreme Court.

42. Sixthly, and more fundamentally, it must now be questioned whether Kelly J would have fixed a preliminary issue at all if the case that the plaintiffs now wish to make had been included in the Statement of Claim. Kelly J clearly felt that there was a discreet legal issue, but it is difficult to characterise the broader issue as now raised by the amended pleadings as being a discreet legal issue. This is because such a preliminary issue would involve assumptions of "innocence" or "lack of awareness" on the part of the plaintiffs of the illegality of the underlying lending, and these are matters that could only really be determined at a full hearing on oral evidence.

43. At para. 12.14 of the Supreme Court's decision Clarke J stated:-

> "…it bears noting that the very issue which I have sought to address raises questions about whether, with the benefit of hindsight, a preliminary issue was really the best way of dealing with the issues addressed in this judgment. Dealing with questions concerning the enforceability of collateral security arrangements without detailed evidence is far from ideal. It is one thing to conduct the trial of a preliminary issue on the basis of the facts as pleaded. But where a nuanced view of those facts may be relevant to the very question of whether a particular legal principle might have application, then the trial of a preliminary issue may prove an inappropriate vehicle for the resolution of such questions. Furthermore, where, as here, the precise legal principles which are applicable may themselves be the subject of some debate and, potentially, refinement, and where the application of the principles ultimately found by the Court to apply may depend, at least on one view, on a very precise consideration of the facts, the trial of a preliminary issue may again prove less than ideal. Be that as it may, however, a trial of the preliminary issue was directed and conducted. This Court must, therefore, deal with the results of that exercise and the issues which thereby arise on this appeal."

44. I am of the view that a "nuanced view" and "very precise consideration of the facts" would be required to consider and determine the legal issues that the plaintiffs seek to raise in their amendments. I believe that the High Court would have been very hesitant to settle a preliminary issue if those pleas had been in the Statement of Claim at the outset. It may therefore be said that were the plaintiffs permitted to amend at this late stage, the time and effort expended by the parties and the court in fixing and dealing with the preliminary issue would to a large extent be wasted.

45. Seventhly, the plaintiffs should have been alerted to the omission from their Statement of Claim of "stand alone" unenforceability

pleas when they received the written submissions of the defendants dated 1st May, 2012 in support of their appeal to the Supreme Court. They stated:-

> "15. There is no plea that the Share Charges are illegal. It clearly was not illegal for the Respondents and IBRC to enter into the Share Charges and on their face they are entirely lawful documents. The purpose of securing loans even if those loans are alleged to be illegal is not in itself an illegal purpose. Neither is it alleged that the Guarantees were themselves illegal."

46. This put the plaintiffs on notice, if they were not already aware, of the absence of such a plea. They did address this to a limited extent in their reply submissions to the Supreme Court where they stated:-

> "36. It is submitted that the authorities admit of two separate means by which agreements may be found to be illegal upon which the Quinns rely in these proceedings: first, the Quinns submit that the share charges and guarantees are so closely connected with unlawful loan transactions, the purpose and effect of which was to artificially maintain Anglo's share price in breach of s.60 and MAR, that they themselves are tainted with illegality; second, the Quinns plead that the share charges and the guarantees are unlawful and unenforceable in and of themselves, as they were entered into for an illegal purpose, and as such, offend the common law rules on illegality."

However, the plaintiffs did not develop the second of these arguments any further in their written submissions.

47. Perhaps more importantly, no application was made after 1st May, 2012 to the High Court, or to the Supreme Court, to amend the Statement of Claim, or to defer the appeal until an application was made to the High Court to amend the pleadings, or to broaden the ambit of the Preliminary Issue. While the outcome of any such application, at any rate to the Supreme Court, might have been problematic, the court does regard the plaintiffs as having failed to canvass at an earlier date the plea and legal arguments that they now wish to raise. In this respect, their delay is significant and is unexplained. It is culpable delay in all the circumstances. While of itself it might not justify refusing an amendment, it is a factor that I consider relevant to determining whether there has been an abuse of the process because it undermines the rights of the other parties to the litigation, the efficient use of court time and the finality of litigation. It is of particular significance in the unusual circumstances of this case where Kelly J fixed the preliminary issue as a form of "modular trial dealing with the Plaintiffs' standing", with the intention that this broad issue should be determined before the balance of the trial proceeded on oral evidence.

48. Additionally, the defendants pleaded that if the plaintiffs were given leave to amend, they would be prejudiced in two respects. Firstly, they asserted a general prejudice by reason of the time, effort and expense incurred in addressing the preliminary issue through two courts over a period of some three and a half years. I have already adverted to this earlier in this judgment and I consider that this is a factor that the court is entitled to and should take into account in the exercise of its discretion to refuse the amendments sought.

49. They also argued logistical prejudice in that if the amendments were allowed they would need to seek particulars, and possibly further particulars depending upon the replies, followed by the filing of amended defences, and they argued that further discovery or interrogatories would then have to be considered. They point out that as the trial date is currently fixed for 3rd June, it was likely that this would have to be deferred and they argued that this would be very unsatisfactory in the context of commercial litigation that has now been ongoing for nearly four years.

50. I do not consider that the logistical prejudice so described is a significant factor. If the court had been disposed to grant the amendments sought, while a short adjournment of the trial date might have been required, it is probable that, with appropriate case management, the deferral would not have exceeded four weeks. In the context of the overall delay in bringing this case to full trial of the remaining issues this would not have caused any significant or irreparable prejudice.

Proposed Plea of Common Law Illegality

51. While the above considerations apply equally to all of the amendments sought by the plaintiffs, some further considerations apply to the new plea that the plaintiffs seek to introduce as 110A:-

> "Further or in the alternative and without prejudice to the foregoing, the lending transactions, share pledges and guarantees impugned in these proceedings are unlawful and unenforceable in an[d] of themselves as they were entered into for an illegal purpose and, as such, offend the common law rules on illegality."

52. As recited earlier in this judgment, the plaintiffs in argument relied on submissions contained in their "Outline Legal Submission on Behalf of the Plaintiffs" prepared for the purposes of the trial of the action and in particular paras. 31-38. In essence, they wished to rely on an argument that the underlying lending by Anglo constituted the common law offence of "cheating the public" as referred to in the case of *Scott v. Browne Doering McNab & Co*.

53. In a detailed submission at paras. 96-122 of the "First Defendants' Outline Legal Submissions" the defendants argued that this plea was bound to fail principally because the Criminal Justice (Theft and Fraud) Offences Act, 2001 repealed the majority of the so-called "'acquisitive' offences at common law and in statute in Ireland. The abolished common law offences include cheating. Section 3(2) provides that:-

> "Any offence at common law of larceny, burglary, robbery, cheating (except in relation to the public revenue) extortion under colour of office and forgery is abolished."

54. The court accepts this submission as correct. Indeed, Mr. Hayden S.C. did not appear to contest that the common law offence had been abolished, but as indicated earlier in this judgment he sought to rely on extracts from McDermott's "Contract Law" to suggest that a person is not entitled to benefit from their own wrong notwithstanding that a criminal act may have been decriminalised; and he relied on Peel's "The Law of Contract" to suggest that the wrong may be a civil wrong, i.e. tortious activity.

55. This was the first time that an entirely new argument based on tortious wrongdoing was raised in these proceedings, by way of argument in rejoinder on the second day of the hearing of the motion. In the view of the court this was a belated and impermissible attempt to recast the illegality argument and for that further reason the amendment sought at 110A is refused.

Schedule- Amended Pleadings, Paragraphs 103- 110A

ILLEGALITY IN THE LOAN AND SECURITY TRANSACTIONS

103. Further and/or in the alternative and without prejudice to the foregoing, the loan transactions engaged in by Anglo, for and on behalf of the positions being maintained by Bazzely, and/or the Cypriot Companies, and/or the subject matter of the said loan transactions were tainted by illegality and/or were for an illegal purpose, of which Anglo was or ought to have been aware.

103A At all material times, the Plaintiffs were innocent parties and to the extent they furnished securities by way of collateral contracts i.e. the share pledges and guarantees impugned in these proceedings, the Plaintiffs did so innocent of and independent from the underlying central contractual arrangements which are of themselves illegal by reason of a breach of Section 60 of the Companies Act 1963 and the Market Abuse Regulations.

103B In so providing the security in such circumstances, the shares pledges and guarantees impugned in these proceedings are unenforceable as against the named, innocent, Plaintiffs, in and of themselves, and independently of the illegality attaching to the underlying loan transactions. In this regard, the Plaintiffs are entitled to rely on the matters pleaded herein in support of the Plaintiffs' contention that the cultural contractual arrangements are tainted with illegality.

(a) The Market Abuse Regulations

104. The underlying purpose of the advances from Anglo and of the share pledges and the guarantees impugned in these proceedings, as pleaded above, constituted or evidence market manipulation within the meaning of the Market Abuse (Directive 2003/6/EC) ***Regulations***, implemented in Ireland on 1 July, 2005 (the "Regulations") in that the advances, share pledges and guarantees, *inter alia*, involved or were advanced in connection with:-

a) transactions which gave, or were likely to give, false or misleading signals as to the supply of, demand of, financial instruments (viz. Anglo shares);

b) transactions which secured the price of Anglo shares at an abnormal or artificial level; and

c) the dissemination of information which gave, or was likely to give, false or misleading signals as to Anglo shares, in circumstances where Anglo knew, or ought to have known, that the information was false or misleading.

105. As appears from the chronology already pleaded above, from an early stage Anglo was supporting Bazzely in amassing and, as the share price fell, retaining a large stake in Anglo through CFD positions. These CFD purchases that were supported by Anglo loans and ultimately secured by the share pledges and guarantees impugned in these proceedings gave, or were likely to have given, false or misleading signals as to the supply of, demand for, or price of, financial instruments, in a manner prohibited by the Regulations.

106. In the premises, the lending and, in particular, the provision of the share pledges and guarantees impugned in these proceedings were in support of an illegal objective of market manipulation as prohibited by Regulation 6(1) of the Market Abuse Regulations and, accordingly, were tainted with illegality, or were intended to support an illegal purpose, such that the said loans and said share pledges and guarantees are not enforceable as against the Plaintiffs, as wholly innocent parties.

(b) Section 60 of the Companies Act, 1963

107. Further and/or in the alternative, the loans were advanced by Anglo and, in particular the share pledges and securities impugned in these proceedings were sought by Anglo in breach of Section 60 of the Companies Act, 1963 in that they involved the giving of financial assistance, within the meaning of that section, by Anglo for the purchase or support of its own shares. As a consequence thereof, as innocent parties, the said share pledges and guarantees are void and unenforceable as against the Plaintiffs.

108. Such lending and seeking/obtaining of share pledges and guarantees, *prima facie*, constituted the commission of a criminal offence on the part of certain officers of Anglo pursuant to the provisions of section 60(15) of the Companies Act 1963.

109. In the premises, the lending was further tainted by illegality such that the security taken from the Plaintiffs by Anglo ought not to be enforceable insofar as it relates to the Plaintiffs.

110. By reason of the matters pleaded above, Anglo is estopped from seeking to rely upon the security taken from the Plaintiffs in the form of the personal guarantees and/or the share pledges and the purported appointment of the Share Receiver on foot of the said share pledges is invalid and ought to be set aside.

(c) Common Law Illegality

110A Further or in the alternative and without prejudice to the foregoing, the lending transactions, share pledges and guarantees impugned in these proceedings are unlawful and unenforceable in an[d] of themselves as they were entered into for an illegal purpose and, as such, offend the common law rules of illegality.