THE COURT OF APPEAL
CIVIL

Neutral Citation No. [2024] IECA 40

Court of Appeal Record No. 2023/12

High Court Record No. 2021/5012P

Unapproved
No Redactions Needed

Noonan J.
Haughton J.
Pilkington J.

BETWEEN/

SHANNEN McCANN AND TARA McCANN

PLAINTIFFS/
APPELLANTS

- AND –

COILIN McMANUS AND KATHLEEN McMANUS

DEFENDANTS

- AND –

SIMON WAGNER

DEFENDANT/
RESPONDENT

JUDGMENT of Ms. Justice Pilkington delivered on the 21st day of February 2024

Introduction

1. By Order of Butler J. on 20 December 2022, the third named defendant or respondent ("the respondent" or "Mr Wagner") succeeded in his application to have the above entitled proceedings struck out against him, pursuant to RSC O.19 r.28. In addition, pursuant to the inherent jurisdiction of the Court, it was also ordered that all reliefs as against Mr Wagner '*be deleted from the plenary summons and the statement of claim'*. This is an appeal by the plaintiffs (collectively "the appellants") against these orders.

2. For ease of reference I intend to refer to these proceedings (2012/5012P) as 'the present proceedings' and this interlocutory application as 'the strike out application'.

3. The first and second named defendants, Coilin McManus & Kathleen McManus did not take part in the application before the High Court, or on appeal. Kathleen McManus is the wife of Coilin McManus and plays no central role in any matters considered within this appeal.

4. However, Coilin McManus and the appellants' father, Mr McCann, figure significantly in the factual background of the present proceedings, this strike out application and other related litigation.

5. The genesis of this entire matter relates to the purchase of 256 acres of land at Buncrana Road, Derry ("the Derry lands") and the subsequent sale of a portion of these lands. Issues relating to the Derry lands have spawned litigation both within this jurisdiction and in Northern Ireland. Whilst Mr Wagner has been joined as a party to the present proceedings, he is not a party to the other litigation.

6. For reasons that will be expanded upon, the appellants maintain that Mr Wagner is properly joined to the present proceedings. In summary they contend that a trust exists between Mr McManus as its trustee and the appellants as the sole beneficiaries, which came into existence prior to or upon the acquisition of the Derry lands. The precise parameters of the trust are considered below but they further contend that Mr Wagner was, at some point, on notice of its existence and that this in turn gives rise to certain legal duties, obligations and liabilities in favour of the appellants against Mr Wagner.

7. The present proceedings are at a relatively early stage, the only pleadings comprising the plenary summons and statement of claim. However, this strike out application has certain singular features. This arises as the facts, issues and reliefs within the present proceedings are mirrored within the two other proceedings which have been issued by the appellants against Mr and Mrs McManus also in respect of their entitlement, as beneficiaries of a trust, to their share in the Derry lands. This in turn forms the central issue within the present proceedings.

8. The High Court took the view that, in addition to considering the litigation set out above, it was important to ensure that the factual background between the parties was properly set out. It considered that it should do so in order that the pleadings advanced against by Mr Wagner in the present proceedings can be properly understood and I agree with that approach. That background relates to the interrelationship between the parties to this litigation (plus Mr McCann), the purchase of the Derry lands, and in particular the circumstances surrounding the subsequent sale of a portion of the Derry lands. Butler J. has set out this background in meticulous and comprehensive detail.

9. However before doing so the trial judge also very clearly set out the legal parameters that would guide her in determining this strike out application, particularly as to how she was to assess the appellants' evidence as a basis for their claim against Mr Wagner. In any event, both parties are largely in agreement as to the principles to be applied, although they may differ on occasion as to the emphasis to be applied by this Court to the case law under consideration.

10. Accordingly, I initially propose to consider the legal principles to be applied, the factual background to this dispute before setting out its attendant litigation, both here and within Northern Ireland.

Applicable law

11. The jurisdiction grounding this strike out application is invoked under two headings. RSC O.19, r.28, provides:

> *"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."*

12. The trial judge was clear that she was confined to consideration of the case as pleaded, in accordance with *ACC Bank plc v. Cunniffe* ([2017] IECA 261 ('*Cunniffe'*). She then stated at paragraph 9;

"…The court should assume that the facts as pleaded by the plaintiffs are true and capable of being proved by them and should only strike out the proceedings if, on the basis of those facts, the case is bound to fail (see Lopes v. Minister for Justice [2014] 2 IR 301). It is obviously important to identify the cause of action as pleaded in order to determine if it is capable of succeeding (see Tolan v. Dillon-Leetch Solicitors [2021] IEHC 548). In this instance the third defendant argues that no specific wrong-doing is alleged against him and that insofar as a cause of action is pleaded against him, it is one which is not known to Irish law."

13. The High Court distinguished this statutory remedy from the exercise of the court's inherent jurisdiction to prevent an abuse of court processes. Noting the overlap between the two jurisdictions, in respect of the latter (the court's inherent jurisdiction) the High Court held that a court can engage in a limited analysis of the facts for the purposes of deciding whether the reliefs should be granted and cites *Coleman v. Ireland* [2022] IEHC 17 in support of this proposition. Accordingly, the court is not confined to consideration of the pleaded case. That is not to suggest that it engage in what the trial judge described as a *"roving examination of the asserted facts or of the plaintiffs' ability to prove them"* (paragraph 10). Within this paragraph she also cites *Keohane v Hynes* [2014] IESC 66 *('Keohane')* in support of this proposition that the jurisdiction to engage with the facts is limited primarily to documentary evidence. But even so the trial judge considered that a court should in such circumstances exercise caution and *"ask itself whether there is or may be evidence outside the documentary record which could realistically have a bearing on the case the plaintiff wishes to make"*.

14. Butler J. then quotes from *Keohane*[1] in the following terms:

> *"Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."*

15. The trial judge went on to find that, based upon the facts within the strike out application, certain unusual circumstances warranted the court in engaging with these facts on the limited basis set out in *Keohane*. In this case, this is a reference to the pleadings and affidavits filed in the other proceedings, particularly by the appellants and Mr McManus, as well as those within the present proceedings. It is also of particular importance and relevance in this case, in my view, because the totality of this litigation involves the Derry lands and there is certainly a significant degree of overlap in the reliefs sought in each of the proceedings.

16. Nevertheless, in considering either ground, the trial judge confirmed that the onus is on Mr Wagner as the moving party to establish if the relevant threshold has been met. That threshold is a high one, as the default position is that the proceedings should go to trial. The court cites *Moylist Construction Ltd. v. Doheny* [2016] 2 IR 283 ('*Moylist*') a case significantly relied upon by the appellants in this appeal. The court concludes at paragraph 12 by stating:

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[1] Paragraph 6.9

"Finally, where more complex legal issues arise which would usually require the type of careful analysis that can be afforded at a full trial, the court should not dismiss the action at an early stage (see Moylist above)."

17. This Court agrees with this approach. Initially therefore I propose to examine the relevant background facts and circumstances of this litigation.

Background

18. The first named defendant, Mr McManus and Mr McCann (the father of the appellants and also a property investor and developer with projects within this State, Northern Ireland and elsewhere) had previously worked in business together. In October 2013 NAMA had secured a significant judgment against Mr McCann (in the order of some €114m) and it appeared that subsequently Mr McManus had agreed to assist him in a *"caretaker"* capacity *"in order to shield certain of his affairs from creditors".*

19. After the NAMA judgment against Mr McCann in 2013, but prior to his subsequent IVA (individual voluntary arrangement) in Northern Ireland in 2018, Mr McManus alerted Mr McCann to the possibility that NAMA would be disposing of the Derry lands[2].

20. There is some conflict between Mr McManus and Mr Wagner as to who was the prime mover in the transaction to purchase the Derry lands but, in any event, it appears they were introduced by a mutual acquaintance. In broad terms both agreed to provide the funding for the acquisition of the Derry lands on a 50/50 basis. Mr Wagner maintains that the agreement from the outset with Mr McManus was for the provision of the acquisition costs but that he,

[2] Affidavit of Coilin McManus sworn 22 June 2022 in proceedings 2020/292SP at Paragraph 13

with the agreement of Mr McManus, would determine the precise investment structure. This is what has occurred.

21. From the outset it appears Mr McManus had difficulty in funding his share of these acquisition costs. Of relevance to this strike out application is that a sum of stg£1.2 million was provided to him by the appellants, to assist him in doing so. The appellants contend that they borrowed the money from a named individual by way of a loan secured on a separate property in which they held an interest.

22. Mr Wagner provided his 50% share of the funding together with certain other ongoing obligations relating to the financial structure of the deal, issues relating to planning permission and other matters.

23. In any event the transaction was completed in 2016 and the Derry lands were acquired by four companies - Fadeford Limited, Detailridge Limited, Rusticglade Limited and Riddleside Limited (collectively "*FDRR*") for approximately £7.5 m. They are its registered owners.

24. The appellants' case is that they gave £1.2 m to Mr McManus towards his share in the acquisition of the Derry lands. On this basis they contend that Mr McManus *'held 25% of the lands or of a joint venture in respect of the lands or of the profits from such joint venture in trust for them.*[3]'. Thus they claim that, by an agreement between themselves and Mr McManus, a trust exists in respect of this share and this forms the basis of their entitlement

[3] Paragraph 2 of the High Court judgment.

as beneficiaries of that trust to 50% of Mr McManus' share or a 25% interest in the entirety of the Derry lands.

25. This aspect of the matter is explored in more detail below, but Mr Wagner is emphatic that, from the outset, he informed Mr McManus that he wanted no part in any acquisition of the Derry lands if either the appellants or their father was involved. This was also known by the appellants and Mr McCann. This in turn has a relevance in assessing the appellants' case, in particular their contention that Mr Wagner had some form of constructive notice of this trust and arising from this has potential liabilities to them.

26. The appellants have also emphasised, within this appeal and before the High Court, that all of the companies who acquired the Derry lands (FDRR) are registered in this jurisdiction.

27. Thereafter, again as comprehensively set out by the trial judge, three events occurred relating to the Derry lands and the relationships between the parties to this appeal.

The First Event

28. The first is an agreement of 23 May 2018 between Mr and Mrs McManus of the one part and Mr McCann and the appellants of the other part. The agreement deals with a number of transactions between the parties in respect of interests unrelated to the Derry lands. It is not until clause G of this document that there is reference to the Derry lands, and it states as follows;

"Colin[4] hereby declares that he holds 50% of his shareholding in (FDRR), together with all dividends, interest, bonus and rights issue shares and other distributions and benefits in respect of them in trust for Tara and Shannen McCann."

29. This is one of the principal documents relied upon by the appellants as proof of their trust over a portion of the Derry lands. As the trial judge points out, this does not mean that the trust came into existence as of the date of this agreement but rather confirms its existence[5].

30. It must also be noted that Mr McManus has confirmed in subsequent documentation that he never held any shareholding in any of the FDRR companies. This is also confirmed by Mr Wagner and his instructing solicitor. The implications of this are considered below.

31. It appears that Mr McManus held sub participation rights, which in turn gave him rights to certain cash flows originating from the FDRR companies. Within other litigation (2021/4531P) Mr McManus has subsequently sought to challenge certain aspects of this 23 May 2018 agreement, but his confirmation of the trust with the appellants within it is accepted for the purposes of the strike out application.

The Second Event

32. The second issue arose from the ongoing difficulties experienced by Mr McManus in financing his portion of the joint acquisition costs of the Derry lands. Arising from this, by means of an option agreement dated 13 December 2018 between a company called TBPI Limited ('TBPI') and Malleus with a side letter of the same date making it clear that Mr

[4] Mr McManus.
[5] Paragraph 24 of the High Court judgment.

McManus was the ultimate beneficial owner of TBPI and Mr Wagner the ultimate beneficial owner of Malleus, TBPI became entitled to purchase a portion of loan notes which gave it the right to sub-participate in Malleus's participation in the sale proceeds from the Derry lands. Two specific clauses are relied upon by Mr Wagner (Clauses 3.3 and 8 respectively) which provide:

> *"This Option in its entirety, or any unexercised portion of the option, shall lapse and cease to exist if it is not exercised on or before the end of the Option Period or upon the occurrence of a Change of Control or Bankruptcy Event."*
>
> Clause 8:
>
> *"8.1 Neither party shall assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with any or all of its rights and obligations under this agreement without the prior written consent of the other party.*
>
> *8.2 Each person confirms that it is acting on its own behalf and not for the benefit of any other person."*

33. The appellants contended that pursuant to Clause 1.1 the option period ran until 31 March 2019 and the option or any unexercised portion of it had lapsed after that time. Mr Wagner contended that whilst the option period might have expired, the remainder of the agreement was valid and binding on the parties. Whilst the appellants sought to argue the parameters of this agreement, they were not parties to it and all parties who were had the benefit of legal advice.

The Third Event

34. Mr Wagner avers that in February 2020 he became aware of the appellants' alleged involvement in the Derry lands through correspondence from their then solicitors (Miley & Miley LLP) to the secretary of the FDRR companies in which they assert that Mr McManus holds a 50% interest in those companies of which *'50% of same are held in trust for our clients by Mr McManus'*[6]. There is no letter from the appellants' solicitors prior to the institution of the present proceedings setting out the trust and its terms to Mr Wagner.

35. Whilst Mr Wagner has maintained throughout that Mr McManus in fact holds no interest in the FDRR companies, in his view this correspondence triggered Clause 8 of the option agreement, arising from what he considered to be Mr McManus's misrepresentation concerning the involvement of the appellants (and possibly their father) in the Derry lands, which in turn gives rise to their claims to an interest in them. Thereafter, on 21 February 2020, solicitors on behalf of Malleus wrote to Mr McManus and TBPI formally serving notice of invalidation or alternatively termination of the option agreement and threatening legal proceedings.

36. This ultimately culminated in a settlement agreement dated 10 April 2020 reached between Mr McManus and Mr Wagner, the two companies who were parties to the option agreement (TBPI and Malleus) and Cordale Management Limited ('Cordale'), a company linked to Mr McManus ('the 2020 agreement'). Under this agreement Mr McManus and TBPI acknowledged they had made certain representations and committed a material breach of the option agreement as alleged against him in the solicitor's letter of 21 February 2020 and that any purported exercise of the option by TBPI was void *ab initio*.

[6] Quote from correspondence Miley & Miley to Byrne Wallace Corporate Secretaries Ltd dated 21 February 2020

37. In essence, the terms of the settlement required the transfer by Mr McManus of all shares in TBPI, the assignment of all intellectual property rights relating to the Derry lands and the cancellation of any related rights to cashflows in exchange for the payment of stg£8.8 million (cash payment of stg£7.1 million and a debt forgiveness of stg£1.68 million) together with an agreement that Mr McManus and Cordale would continue to be retained by Mr Wagner as a planning and development consultant in the project. Clause 12 of the settlement agreement recites that it constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, representations and understanding between them. In summary, in return for the termination of Mr McManus' and TBPI's right to participate in the proceeds, certain payments were made to Mr McManus.

38. In their pleadings and submissions, the appellants place significant emphasis upon this 2020 agreement. They argue that the 2020 letter from their solicitors put Mr Wagner on notice of the existence of a trust between the appellants and Mr McManus, which, in turn imposed certain legal obligations upon Mr Wagner as a constructive trustee of the trust. The 2020 agreement, they argue, was Mr Wagner's response to the 2020 letter, which directly impacted their interests in the Derry lands.

Sale of a portion of the Derry Lands

39. Following a grant of planning permission, a portion of the Derry lands was sold under two separate contracts in August 2019. The purchase price for this portion was stg£25 million. It is from this figure that the sum of stg£7.1 million was discharged to Mr McManus pursuant to the terms of the 2020 agreement.

40. This, in turn, has given rise to a dispute between the appellants and Mr McManus. The appellants allege that Mr McManus had retained monies that should have been paid to them. Mr McManus contends that the retained monies were offset against monies due to him by Mr McCann and in the course of that dispute also formally denies the existence of a trust in favour of the plaintiffs. As to the latter point the existence of the trust is of course recognised within this strike out application.

41. At paragraphs 34 to 36 of her judgment Butler J. deals comprehensively with an email chain from the appellants' tax consultant to the company secretary of the FDRR companies, which initially appears to confirm (on 28 August 2018) that Mr McManus' shares in FDRR are held in trust for the appellants and in doing so also references the 2018 agreement. There is then a subsequent email from the tax consultant approximately 90 minutes later confirming that the initial email was incorrect and that he had mixed this up with other correspondence he held in relation to other McCann/McManus interests. This initial error was in turn also confirmed by Mr McManus, also on the same day. As Butler J. points out[7] Mr Wagner was not a party to these emails and, in light of the clear retraction of the statement by the tax consultant and Mr McManus on the same day, this could not amount to notice to him of any alleged trust. I agree.

Litigation concerning the Derry Lands - Ireland

1- The Special Summons proceedings – 2020/292Sp

42. In November 2020 the appellants issued special summons proceedings against the first and second named defendants, Mr and Mrs McManus, seeking Orders in respect of the enforcement of the Agreement of 23 May 2018 together with declarations in respect of the

[7] Paragraph 36.

plaintiffs' interest as beneficiaries of a trust with the defendants in their 50% shareholding in the FDRR companies.

43. There was an exchange of affidavits, (the appellants (Shannen McCann) on 18 November 2020 and the reply from Mr McManus on 22 June 2021). It is within his affidavit that Mr McManus has denied the existence of the trust, impugned the validity of the 2018 agreement and avers that he did not hold any shares in the FDRR companies. It appears that these proceedings are in abeyance and may well have been superseded by the other proceedings.

2- The first plenary proceedings – 2021/4531P

44. The first plenary proceedings issued by the plaintiffs, also against the first and second named defendants on 13 July 2021, seek various equitable and declaratory reliefs in respect of named folio lands comprising the Derry lands, a declaration of trust in respect of 50% of the first named defendant's share in FDRR or any proceeds of sale, accounts of profits and an alternative Order that an *'actual or constructive trust arises in the Plaintiffs' favour over the proceeds of the sale of the Lands and/or the Companies or any charges over the Lands or Companies*[8]', together with other consequential orders and reliefs.

45. The next day, on 14 July 2021 an *ex parte* application issued (grounded on an affidavit of Shannen McCann of the same date) in the Chancery List for short service of a Notice of Motion seeking a number of reliefs seeking substantive and interlocutory reliefs in respect of the plenary summons. Allen J. refused the application. The appellants maintain that the

[8] Paragraph 7

application was not refused upon this ground but Allen J pointed out, entirely correctly, that where reliefs were sought in respect of interests in lands situate outside the State, then that was not a matter for the Courts in the jurisdiction, but rather where the lands are situate.

3- The present proceedings

46. The Plenary Summons issued on 12 August 2021 and the Statement of Claim was delivered on 16 December 2021 (after the strike out application issued and its grounding affidavit was served).

47. The appellants issued a Notice of Motion on 8 September 2021 seeking injunctive reliefs, grounded upon an Affidavit of Shannen McCann of the same date. On 10 September 2021 Humphreys J granted certain interlocutory reliefs freezing the portion of the sale proceeds sought by the appellants following the sale of a portion of the Derry lands. On 1 December this Order was varied and by Order of Allen J. the monies were transferred to a joint account agreed by the solicitors for the appellants and Mr and Mrs McManus.

Strike out application.

48. The Notice of Motion issued on 1 November 2021. The grounding affidavit of Simon Wagner was sworn 26 October 2021, the replying affidavit of Jamie Sherry (solicitor for the plaintiffs) on 5 November 2021, with two further affidavits of Mr Wagner sworn on 10 November 2021 and 11 February 2022 respectively. No affidavit is sworn by either of the appellants within the strike out application.

Litigation in Northern Ireland

49. A copy of the proceedings issued on 9 December 2021 has been furnished (2021/97800). It is issued by the appellants against FDRR.

50. It seeks reliefs in respect of the appellants beneficial interests in FDRR in respect of the Derry lands, together with other consequential orders and reliefs.

Ambit of the Proceedings

51. Within the present proceedings the appellants and those advising them have been clear that the proceedings are limited to their claim to their percentage share in the sale proceeds of the Derry lands. This is to be found within the Affidavit of the Appellants (Shannen McCann) on 8 September 2021 grounding the application for injunctive relief in respect of their share in those sale proceeds of a portion of the Derry lands (£4.5m) and within paragraphs 3 and 30 of the affidavit of their instructing solicitor Mr Sherry sworn on 5 November 2021. This is in turn reflected within paragraph 58 of the High Court judgment where Butler J. discusses certain difficulties in identifying the precise parameters of this trust and this is considered below.

Facts not in dispute in the strike out application

52. It is clear, and particularly evident from paragraph 13 of her judgment, that the trial judge clearly sets out the approach she proposed taking in reviewing the case advanced by the appellants. In her view the court must assume that the facts pleaded by the plaintiffs are capable of been proven, even in circumstances where they are disputed.

53. The matters arising from the background facts and circumstances and the pleaded case were accepted by the High Court as follows:

(a) For the purposes of this interlocutory application and taking the appellants pleaded case at its height the court accepts that the appellants provided £1.2m to Mr McManus and as a result he holds 50% of his interest, *'whatever that might be'* in the Derry lands upon trust for them (paragraph 22).

(b) That the agreement entered into in May 2018 between the appellants and Mr McCann and the first and second named defendants must, notwithstanding the defences of Mr McManus within separate proceedings, taking the appellants' case at its height, *'assume that this agreement, which either acknowledges or creates a trust in favour of the plaintiffs, is valid'*(paragraph 24).

In my view, the High Court was correct to proceed upon these premises and this Court does likewise.

54. Butler J. then goes on to point to certain unusual or in her words *"quite exceptional"* features of this case. This in particular focuses upon the matters that appear outside the pleaded case within the present proceedings.

The Trust

55. In particular the trial judge points to the appellants' reliance upon a trust between Mr McManus and themselves, where their collective involvement (the appellants, their father and Mr McManus) she found to have been deliberately withheld or concealed from Mr Wagner[9].

[99] Paragraph 64.

56. In considering the affidavit evidence in this and the other litigation within this jurisdiction, the appellants have not sworn an affidavit in respect of this strike out application; that task falling to their solicitor. This is particularly apparent where certain averments made by the first named plaintiff/appellant with regard to the trust, are highlighted by Mr Wagner. This is not dealt with by either of the appellants in any subsequent affidavit.

Mr McCann, the Appellants and Mr Wagner

57. One of the central factual averments and submissions by Mr Wagner is his emphatic assertion that he made it clear from the outset that he would have no involvement in any transaction regarding the Derry lands if the McCanns (Mr McCann and / or the appellants) had any involvement. This aversion he maintains was known both to the appellants, their father and Mr McManus.

58. The appellants appear to have been aged 18 and 20 at the time of the transaction. At no point in either the High Court or this Court has this factual assertion been contradicted.

59. This issue is of relevance as within the pleadings the appellants clearly contend that Mr Wagner was aware (or should have been on notice) of the trust between themselves and Mr McManus, which leads in turn to their allegation of his having constructive notice of its existence and, in the events which have happened, certain liabilities to the appellants based upon that notice and possibly being in knowing receipt of trust assets.

60. The relevant averments and one item of correspondence from the appellants solicitor comprises;

(a) Ex Parte Affidavit of Shannen McCann in the present proceedings (2021 5012P) at §16)

"16. I say that we left the remainder of the details to the First Named Defendant, as we all understood that the Third Named Defendant was unaware of the Trust or of the fact that the First Named Defendant could not provide his share of the purchase price."

(b) Affidavit of Shannen McCann sworn 14 July 2021 in the first plenary proceedings (2021 4531P), §16);

"*16. I say that we left the remainder of the details to the First Named Defendant, as we all understood that Simon Wagner was unaware that the First Named Defendant could not provide his share of the purchase price*."

(c) Affidavit of Coilin McManus sworn 22 June 2021 replying to special summons (2020 292 SP), §13);

"*13. One such Opportunity was a development opportunity in Derry, Northern Ireland which I sourced in late 2015 from personal contacts. After I had done a lot of work on the viability of the project, I raised it with John. John said that he would introduce me to Gerald McGreevey and Thomas O'Gorman to see if they would provide finance. Neither John or the plaintiffs had any other involvement in sourcing the opportunity, negotiating terms or otherwise securing the project. Separately, I was introduced to Simon Wagner, a German national, by Kieran O'Neill, to whom I presented the Derry proposal. Simon Wagner was prepared to enter into a joint venture arrangement with me regarding the purchase and development of the lands. At the outset, however, he made it very clear that he would not proceed if John McCann was a partner. I believe that Simon was aware of John McCann's form, so to speak, due to Kieran O'Neill's prior experience with*

him at Killin Park and simply did not wish to do business with him. John McCann was made aware of this explicitly right from the very outset."

(d) Affidavit of Coilin McManus sworn 22 June 2021 replying to special summons (2020 292 SP), §14).

"*14. The purchase price for the Derry lands was GBP £7,557,835.00. The transaction closed in February 2016. Simon Wagner funded the majority of the initial payments on the understanding that the project was to be 50/50 and that any overpayment by him would be treated as an interest bearing Loan and repaid by me in due course. All shares were held by Simon Wagner until I was able to come up with 50% of the monies required to buy into the property. Simon Wagner also set up the structure for the purchase which involved some fairly complicated tax planning. I discussed with John about Simon's strong views on refusing to be involved in any joint venture with John. John understood the situation and agreed that if he was to have any involvement, it would be peripheral and it was to be of the utmost importance that it remained confidential. At the time, it was our intention to jointly fund a 50% share in the project and to jointly share in the profits arising out of the project. Nothing was ever formally agreed or recorded in writing.*"

(e) The Plaintiffs' solicitors have also confirmed in their letter dated 29 September 2021 (an exhibit to the affidavit of Simon Wagner sworn 26 October 2021 that in the proceedings (2021 5012 P) -

"*We understand that it was agreed between our Clients, John McCann and the First Named Defendant that our Clients' interest would be held in trust*

by the First Named Defendant, without the express knowledge of the Third Named Defendant."

(f) The grounding affidavit of Simon Wagner of 26 October 2021 in these proceedings (2021 5012 P), §14-15) sets out his position as follows;

"*14. l do not know whether Mr McManus made false representations to Shannen or Tara McCann, as l was not party to any discussions between Mr McManus and Shannen or Tara McCann and l have no knowledge of any such discussions. If Mr McManus did make false representations to Shannen or Tara McCann as alleged, this is a matter between them and*

does not concern — or give rise to a cause of action against — me or the FDRR Companies.

15. Indeed, the McCann Affidavit and the McManus Affidavit both make it abundantly clear that - not only was I not party to any discussions or arrangements between them - but there was an express understanding that they would be kept confidential and not disclosed to me."

61. Within this strike out application no replying affidavit has been sworn by the appellants which responds to these averments.

High Court Judgment

62. Having considered these matters Butler J. then turns to consider the pleadings within the present proceedings, which set out the appellants' case against Mr Wagner. Within the Statement of Claim her primary focus is upon paragraphs 37 to 52 where the allegations against him are pleaded.

63. In particular Butler J. focuses upon paragraphs 42 and 51 which, in her view, constitute a legal plea as distinct from a purely factual one. Paragraph 42 is as follows;

> *"42. Based on such express notification of the Trust, the Third Named Defendant claimed to have been misled and (notwithstanding his knowledge that the First Name Defendant could not deal with the Plaintiffs' interest otherwise than in accordance with the Trust), the Third Name Defendant prevailed upon the First Named Defendant (together with TBPI Limited) to enter into a "Settlement Agreement" dated 10 April 2020, wherein the First Named Defendant purported to relinquish all interest in the Derry Lands in consideration for the payment of stg£8,800,000 and the continuation of a contract for services in relation to the unsold part of the Derry Lands."*

64. Butler J. then turns to consider paragraph 51 which contains sub-paragraphs (a) to (g), and she carefully considers each in turn. Sub paragraphs (e) to (g) are set out below, in particular she considers (e);

> *'51. In the premises:- .....*
>
> *e. The Settlement Agreement of April 2020 was entered into by the Third Named Defendant in the knowledge that the Plaintiffs claimed a 25% beneficial interest in the Derry Lands and proceeds of sale of any part thereof, in which case it sought to induce the First Named Defendant to breach the Trust;*
>
> *f. Pending further particulars, discovery and/ or other interlocutory processes the Plaintiffs are unable to specify further wrongdoing (if any) on the part of the Third Named Defendant;*

g. In the event that the Third Named Defendant demonstrates to the Court that he has no liability to the Plaintiffs, he is entitled to claim all appropriate indemnities from the First and/ or Second Named Defendants.'

65. At paragraphs 53 – 56 of her judgment she sets out her conclusions as follows;

"53. Therefore, the only case raised against the third defendant in the plaintiffs' statement of claim is the assertion that, on becoming aware of the plaintiffs' potential interest in February 2020, the third defendant somehow acted unlawfully in entering into an agreement with the first defendant which terminated the first defendant's further involvement in the Derry lands. It is not obvious from the pleadings what the third defendant is alleged to have done wrongfully. The high point of the plaintiffs' case is probably reflected in the assertion at para. 51(e) that the third defendant induced the first defendant to breach the trust of which the first defendant was trustee to the benefit of the plaintiffs. That pre-supposes that the third defendant was somehow obliged to honour a trust of which up to that point he had no notice and which, even on the plaintiffs' account, arose because information was deliberately not disclosed to the third defendant to ensure that he would enter into the joint venture with the first defendant. In passing, it might be noted that, whilst the first defendant did relinquish any future involvement with the Derry land under the settlement agreement, he received a sizable payment in exchange for whatever interest he was thereby relinquishing. ....

54. When dealing with this aspect of the case, counsel for the plaintiffs asserted that, as his clients' case had to be taken at its height, the onus was on the third defendant to establish that the pleaded cause of action did not exist. I do not necessarily agree.

When a recognised cause of action has been pleaded, the court must assume that the plaintiff can prove that cause of action when asked by a defendant to strike out the proceedings. However, when a serious issue is raised as to whether the pleadings disclose a stateable cause of action, the court does not have to assume that they do. The court is certainly entitled to query whether the pleadings disclose a cause of action simpliciter as, if they do not, the court undoubtedly has jurisdiction to strike them out. The focus in applications under O. 19, r. 28 has tended to be on whether the pleaded cause of action is "reasonable" or not, but it goes without saying that there is an anterior issue as to whether there is a cause of action at all before the court moves on to consider whether it is reasonable.

55. To a certain extent, counsel for the plaintiffs adopted the position that, having pleaded his case, it was or should be virtually impossible for the third defendant to have the claim against him struck out. Counsel ……was unable to identify any legal principle underpinning the assertion that the third defendant was required to continue doing business with the first defendant, notwithstanding this discovery, in order to protect the plaintiffs' property rights in the first defendant's interest in what had been a joint venture between the first and third defendants.

56. Instead of identifying a clear legal basis for the plaintiffs' claim, counsel complained that they were being cut out of the deal by the third defendant notwithstanding that there had never been any deal between the plaintiffs and the third defendant. In the course of argument he suggested that there had been collusion between the first defendant and the third defendant in order to achieve this. Counsel for the third defendant objected strenuously to this suggestion, in my view correctly,

on the grounds that this was not part of the plaintiffs' pleaded case. She pointed to the need to plead fraud or impropriety with the utmost particularity and referred to the decision of the Court of Appeal in ACC v. Cunniffe [2017] IECA 261, where Whelan J. pointed out that, if a plaintiff requires future discovery to enable fraud to be pleaded, then that aspect of the statement of claim is not maintainable."

The Appeal

66. The appellants' submission before this Court, as well as taking issue with portions of the High Court judgment, also focuses upon the failure of the High Court to consider and apply the doctrine of knowing receipt in the context of Mr Wagner being a constructive trustee. As was pointed out within this appeal, this was not an issue raised before the High Court.

67. The appellants do not take issue with Butler J.'s view that, in considering the strike out application, she was entitled to consider the other proceedings concerning the Derry lands within this jurisdiction. Issue appears to be taken with the conclusion drawn by the High Court from certain matters within this documentation, but not the principle.

68. It is noteworthy that throughout all of this litigation, there is a remarkable degree of consistency within the averments to the affidavits and indeed a degree of duplication within the pleadings. The appellants have been represented by the same solicitor (two legal firms but it appears with the same solicitor acting throughout) and the same counsel.

69. The appellants maintain that Mr Wagner had actual or constructive notice of the trust. Within the statement of claim;

(a) Paragraph 16 pleads the trust in the following terms:

"The objects and terms of the Trust were and are clear and simple. The first named defendant holds 25% of the beneficial ownership of the Derry lands and/or proceeds of sale of any part of the Derry lands in trusts for the plaintiffs and as payments were received for the sale of the Derry lands, or parts thereof, the plaintiff's 25% share was to be paid directly to them without deduction (unless agreed)."

(b) At para 19 it is pleaded that the *"third named defendant knew or ought to have known of the existence of the Trust"*

(c) Within para. 20 it is pleaded that *"The third named defendant, by virtue of his relationship with the first and second named defendants had actually and/or constructive notice of the terms of the Trust and therefore, is fixed with knowledge of the terms of the Trust and the beneficial interests of the plaintiffs in the proceeds of the Derry lands."*

(d) At paragraph 37;

'37. …….*The Plaintiffs' plead that the Third Named Defendant has actual and/or constructive notice of the Trust and is affixed with knowledge of the Trust and/ or knowledge that 25% of the Derry Lands and any proceeds thereof are the property of the Plaintiffs'*.

70. In considering the question of Mr Wagner's actual or constructive notice of the trust the appellants also take issue with the trial judge's finding that the position they adopted, vis a vis Mr Wagner and his knowledge or otherwise of the trust between themselves and Mr McManus, was one of deliberate concealment.

71. In considering the averments of the appellants with regard to Mr Wagner's involvement which I have quoted above, within their submissions they state:

> *"36.2. This does not amount to deliberate concealment. In fact, it is clear that the plaintiffs allowed the First Named Defendant represent to the Respondent that it was the First Named Defendant's cash which was being invested."*

72. No clarity is to be found within the pleadings (paragraphs 16, 19, 20 and 37 quoted above) to the present proceedings as to how Mr Wagner became aware of the trust. At no point do they maintain that they or anyone on their behalf informed Mr Wagner of the existence of the trust, or of its terms. If they didn't inform him, then in my view any assertion pleading his knowledge of its existence, in the absence of any such notification, requires careful clarification as to how such knowledge was acquired. This has never been furnished with the statement of claim or any affidavit.

73. One of the appellants' difficulties in this case, is, to quote the trial judge at paragraph 52, that she could not *"be expected or required to take both of two manifestly contradictory positions asserted by a plaintiff as being correct and capable of being proved"*. This is particularly compelling when one considers the ongoing contention, strongly advanced by the appellants, that Mr Wagner was on notice of the trust from the outset and the appellants' own averments that they were well aware of his stated difficulties in dealing with them (and their father) in respect of the Derry lands and their solicitor's averment that the trust existed without Mr Wagner's express knowledge.

74. At paragraph 64 Butler J. states:

"Although counsel for the plaintiffs contended that there was a difference between the non-disclosure of their participation to and concealing their participation from the third defendant, in my view, that distinction is without substance."

75. In my view, Butler J.'s finding of deliberate concealment by the appellants is based upon a fair and proper examination of the evidence. One of the unique features of this case is that this evidence is, for the most part, contained within averments by the appellants, or their instructing solicitor within this litigation, all of which concerns Mr McManus and their claims to a beneficial interest in the Derry lands.

76. The appellants also plead within their statement of claim that their solicitor's correspondence in 2020 (not addressed to Mr Wagner) was the means by which he learnt of their interest in the Derry lands and was at that point on express notice of it. He does not appear to have been notified personally in advance of the present proceedings. From this they then appear to assert that the 2020 agreement imposes liabilities upon Mr Wagner arising from that knowledge. They also allege that this knowledge was the reason Mr Wagner executed an agreement with Mr McManus in April 2020, which they contend operates to their disadvantage. At paragraph 29 of Mr Sherry's affidavit sworn on 5 November 2021 he avers '….*Mr Wagner altered the terms of his agreement with Mr McManus specifically when he had notice of the trust, in which circumstances the Plaintiffs claim that he could not contrive to get around the trust by inducing or coercing Mr McManus to breach his fiduciary duties*.' This serious allegation is not pleaded within the Statement of Claim.

77. Accordingly in my view Butler J.'s view (paragraph 53) is correct when she categorises the appellants' case at its height as being the allegation that Mr Wagner, on becoming aware of the appellants' possible interest in the Derry lands in February 2020, acted unlawfully by entering into an agreement in April 2020 with Mr McManus which had the effect of ending his (Mr McManus') further involvement in the Derry lands.

78. Arising from this categorisation the documentary evidence on this point discloses a letter from the appellants' solicitor (Miley and Miley LLP) in February 2020, to the company secretary of FDRR pointing out that Mr McManus has an entitlement to a 50% shareholding in those companies and that 50% of this interest is held on trust for the appellants. Nothing further is disclosed and I can see no documentation forwarded to Mr Wagner.

79. The Notice of Invalidation of the Option Agreement[10] is dated 21 February 2020 and addressed to Mr McManus and TBPI Ltd. This in my view is the start of the process that ends with the settlement agreement between the parties on 10 April 2020. There is correspondence between the parties in the interim and Pinsent Masons (Ireland), who act for Mr Wagner in this strike out application but who were replying to this correspondence as the solicitors for FDRR stated in their letter of 12 May 2020 (and this position has been maintained throughout) that Mr McManus does not hold and never has held, any legal or beneficial interest in any shares in any of the FDRR companies. I also note that, notwithstanding Malleus' role in the 2020 settlement agreement, it is not joined as a party to the present proceedings.

[10] The letter is headed 'Notice of Invalidation and/or material breach by TBPI Ltd of Option Agreement between Malleus Holdings Ltd and TBPI Ltd'.

80. This in turn gives rise, say the appellants, to the tort or suggested tort of inducement of breach of trust. The pleading within paragraph 51(e) of the statement of claim pleads that by using the vehicle of the 2020 settlement Mr Wagner sought to induce Mr McManus to breach the trust.

81. Rather unusually, within their submissions the appellants take issue with the High Court's finding that there is no tort of inducement of breach of trust, without referencing any authority to this effect. There is no known tort of inducement of breach of trust in Irish law and no authorities were referenced by the appellants in this or any other jurisdiction, to advance any contrary position.

82. In the circumstances of this case, arising from this pleading and certainly the affidavit of Mr Sherry opposing the strike out application there is a claim of fraud or collusion by Mr Wagner. The Rules of Court are well-known and provide that any allegations of fraud or impropriety must be pleaded with particularity. *Cunniffe* confirms that if further discovery is required to enable fraud to be pleaded then that aspect of the statement is not maintainable.

83. The appellants in particular rely upon *Lopes v. The Minister for Justice* [2014] 2 IR 301 ('Lopes') and *Moylist* where Mr Justice Clarke (then of the High Court) at 289 stated as follows:

> *"The default position in respect of any proceedings is that they should go to trial. Depriving parties of a full trial in whatever form is appropriate to the proceedings concerned is a departure from the norm, and one which should only be engaged in when it is clear that there is no real risk of injustice in adopting that course of action."*

84. The quotation from *Lopes* relied upon is at para. 19 of the judgment, also of Clarke J.

"*[19] It is also important to remember that a plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail. It must be recalled that a plaintiff, like any other party, has available the range of procedures provided for in the RSC to assist in establishing the facts at trial. Documents can be discovered both from opposing parties and, indeed, third parties. Interrogatories can be delivered. Witnesses can be subpoenaed and can, if appropriate, be required to bring their documents with them. Other devices may be available in particular types of cases.* In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. *Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in Sun Fat Chan v. Osseous Ltd.[1992] I.R. 425, at p. 428, that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance*." (my emphasis)

85. In addition, *Moylist* is invoked on the grounds of the complexity of litigation and the appellants rely upon paragraph 37 of that judgment as follows:

[37]……. However, in this case, the individual points, or at least many of them, are sufficiently complex in themselves that it cannot be said that each of them is a "nothing" so that each of them, in turn, can be found, in a simple and clear way, to provide no basis for a sustainable claim. It should be made clear, for the avoidance of doubt, that the High Court retains an obligation to assess whether, in the way in which an application to dismiss as being bound to fail may evolve, the issues raised remain

sufficiently clear and easy to resolve as to render it appropriate to determine them within the confines of such a motion. Where that is not the case, then the High Court should be free to decline to enter into the merits of those points at all. ……To deal with such issues on such a motion is to slip into the error of giving the defendant the type of summary disposal which our procedural law does not provide for and which Murray J. cautioned against in Jodifern Ltd. v. Fitzgerald [2000] 3 I.R. 321. Such issues, by analogy with McGrath v. O'Driscoll [2006] IEHC 195, [2007] 1 I.L.R.M. 203, cannot safely be dealt with in the confines of a motion on affidavit."

86. In my view, simply asserting a case is complex does not preclude an application seeking to strike out proceedings. Whilst I accept that perceptions may vary as to what constitutes a complex case, in my view the appellants' case, as pleaded, is not complex. Some of the background facts and circumstances may require a certain degree of explanation but the case advanced by the appellants does not. In addition, if this ground is being relied upon by the appellants, in my view it is for them to point to the complexities and issues that arise that necessitate a full hearing. I am not satisfied they have done so in this case.

87. The appellants in expanding that proposition suggest that the equitable remedy of tracing may arise and ordering Mr Wagner to account on the basis of knowing assistance and knowing receipt citing Keane's *Equity and the Law of Trusts in Ireland* (3rd Edition at para. 19.09 and paras. 13.26) as follows;

[19.09]

"*A person, then, who is entitled to the equitable interest in any property, real or personal, will be entitled to trace that property, for so long as it continues to exist and even though it may have been mixed with other property, into the hands of anyone in*

a fiduciary relationship with him and into the hands of any third party, except a bona fide purchaser for value without notice of the fiduciary relationship……"

[13.26]

"*A person who beneficially receives trust property or its proceeds, knowing them to have been misapplied by the trustees in breach of trust, will be liable to the beneficiaries as if he were a constructive trustee of the property or its proceeds. As already noted, they are not trustees in the true sense, but can be required to account as if they were. This will also be the case where the property was not held by a trustee as such but by a person who owed a fiduciary duty to a principal in respect of his handling of the property.*"

88. At para. 31.3 of their submissions the Appellants state:

"As such, notwithstanding already having constructive notice of the existence of the trust, when the Respondent explicitly became aware of the trust in February 2020 through solicitors' correspondence informing him that the Appellants had an interest in Derry lands, the Respondent became liable and accountable to the Appellants upon receipt of specific trust property i.e. the Appellants' interests pursuant to the Trust between them and the First Named Defendant."

89. This seems to me to be a neat encapsulation of the appellants' case.

90. What arises from this is that the unsold Derry lands, which remain registered in the names of FDRR, are now the subject of litigation commenced by the appellants in Northern Ireland. This court was informed that steps had been taken to protect the appellants' interest (I understand by the registration of a *lis pendens*) in respect of their interest.

91. In my view, it is therefore difficult to discern, on the basis of the appellants' pleadings and the parties it has joined to the present proceedings, as to what specific items of trust property are currently held by Mr Wagner, arising from which, the High Court or this Court on appeal could make a finding that he is in knowing receipt of that property, adopting either of the principles advanced within *Keane* cited above.

92. The Statement of Claim and indeed the submissions are replete with the appellants' contention that Mr Wagner had constructive notice of the existence of the trust but only became explicitly aware of it in February 2020 (paragraph 31.3 of the submissions). They repeatedly assert that Mr Wagner was in receipt of property which he knew to be the subject of a trust. This is followed by an extremely general submission (within the Notice of Appeal and Statement of Claim) to the effect that:

> *"The trial judge failed to consider that once there is a trust created in favour of the appellants that any person who receives funds from that trust, will bear a responsibility to return those funds to the appellants."*

93. Adopting any criteria this is simply not an appropriate legal definition which properly defines any third party liability in respect of any trust property. It requires, at the very least on the facts of this case, proper identification of the terms of the trust, clarification as to the application of the doctrine of constructive notice to Mr Wagner and the consequential liabilities associated with the doctrine as it applies to him if he is found to be in receipt of trust property.

94. In my view in considering the appellants' case at its height it is important to be clear as to the case they advance. Its parameters are set out at paragraph 53 above.

95. The appellants have pursued their entitlement to their share of the sale proceeds from the Derry lands, 25% of £20m[11], which, having received £500,000, leaves a shortfall of £4.5m. Mr Wagner claims not to have been served with papers seeking any undertakings in advance of the Court Order of Humphreys J. for injunctive reliefs in respect of these sale proceeds (which assertion was not contradicted) but in any event at the earliest opportunity his solicitors made it clear that he has never claimed an entitlement to these monies and makes no claim to them.

96. As to the remainder of the appellants' claim, they have commenced proceedings against FDRR in Northern Ireland. It is a long recognised principle of private international law that the jurisdiction to determine issues concerning land is the jurisdiction where that land is situate.

97. As the litigation regarding their entitlement to a portion of the Derry lands is being litigated in Northern Ireland, and the monies claimed by the appellants from a previous sale of a portion of those lands is being held, in full, upon joint deposit receipt, with an explicit unequivocal averment from Mr Wagner and confirmed by his solicitors and submissions to the Court, all of which confirm that he has no entitlement to these monies and makes no claim upon them. In respect of those sale proceeds what cause of action do the appellants continue to maintain against him within the present proceedings in such circumstances? What trust do they invoke when, as matters stand, it is very difficult to discern how Mr Wagner can be in knowing receipt of trust property when that property (the entire sum sought by the appellants from the sale proceeds) has been fully accounted for and remains on joint

[11] I assume this figure is arrived at after certain deductions.

deposit account and in respect of which Mr Wagner has made clear he has no legal interest or entitlement?

98. Within the present proceedings, if this appeal is unsuccessful, it means that the appellants continue their litigation against Mr and Mrs McManus, not FDRR or any of the other entities that have been referenced within affidavits, this judgment and that of the High Court in setting out the background facts and circumstances to this and other litigation. The letter on February 2020 relied upon by the appellants as putting Mr Wagner on notice of the existence of the trust make the claim against FDRR, who are not parties to the present proceedings.

99. The requirement that this Court take the appellants' case at its height is perhaps more straightforward in this case, as one can do so from the appellants' own averments and those who advise them. It is for this reason I have set them out in some detail and highlighted the uniformity that is present within the litigation surrounding the Derry lands in this jurisdiction. In my view, the trial judge was entirely correct in considering these averments in light of the allegations made by the appellants in their pleadings as to Mr Wagner's involvement or otherwise in this Trust. It does appear that the appellants' categorisation of Mr Wagner's involvement in this trust now appears to centre upon the 2020 agreement. In any event it is clear that the 2020 settlement agreement arose following negotiations between the parties where both were legally advised. No evidence but rather conjecture has been advanced by the appellants regarding the motivation for Mr Wagner's conduct. Mr Wagner on the other hand has set out his documentary evidence of his dealings with Mr McManus and the reasons for the 2020 settlement agreement between them.

100. I have set out the conclusions reached by Butler J. within paragraph 65 above and I endorse them. As she points out it would certainly be unusual if Mr Wagner was obliged to continue with a joint venture with Mr McManus in order to protect the interests of the appellants who deliberately sought to conceal their involvement from the outset.

101. It has already been pointed out that if the appellants require their case to be proven by subsequent discovery or other subsequent interlocutory applications matters then that is not a factor to which the court can have regard within this strike out application. In addition, those matters are merely alluded to without any substantial averments or pleadings that would form a proper foundation for any consideration as to the nature of these potential future complexities. In my view, categorising it in such general terms is at least suggestive of the possibility that these appellants hope or perhaps intend to seek additional future information to seek a possible remedy against Mr Wagner.

102. In pleading the doctrine of constructive trust and knowing receipt the appellants seek equitable reliefs. Biehler[12] defines a constructive as one which arises by operation of law *'and which ordinarily comes into being as a result of conduct and irrespective of the intention of the parties.'*

103. However, on the facts of this case I accept that Mr Wagner having expressly disavowed any suggestion of a business relationship with the appellants, by way of trust or otherwise, in respect of the Derry lands and the averments set out above makes plain that the appellants were aware of this fact from the outset. I therefore endorse the findings of Butler J. that there was a deliberate concealment of these matters from Mr Wagner. The appellants seek

[12] *Equity and the Law of Trusts in Ireland*, (7th ed, 2020) Chapter 8.

to plead that he was on notice from the outset when their own averments directly contradict this pleading.

104. In terms of knowing receipt of trust property, as I have pointed out I struggle to see how Mr Wagner is in receipt of any other monies claimed by the appellants arising from the sale of the Derry lands. More fundamentally I also find it very difficult to understand how he could be on notice of the sale of a portion of the Derry lands when there is, in my view, a difficulty on the pleadings and certainly with regard to the other evidence set out above that he was on notice of the trust at the time of this sale in 2019. On the appellants' own case they seek to argue that any express notice arose in February 2020.

105. The remainder of their claim relates to the real property in Northern Ireland. Whilst they emphasise that FDRR consist of Irish registered companies, they are not parties to the present proceedings, do not appear to concern Mr Wagner who has no interest in these companies and which in any event are the subject of litigation in Northern Ireland.

Discussion and Conclusion

106. Denham C.J. in *Leopardstown Club Limited v Templeville Developments Limited & anor* [2017] 3 IR 707 stated at paragraph 82;

> "*[82] The principles identified by the Hay v. O'Grady [1992] I.R. 210 jurisprudence include the following:-*
>
> - *An appellate court does not proceed by way of a full rehearing of a case.*
> - *An appellate court is bound by the findings of fact of a trial judge which are supported by credible evidence.*
> - *In general, an appellate court proceeds on the findings of fact of a trial judge.*
> - *The fact that there is contrary evidence does not alter the position.*

- *An appellate court should be slow to substitute its own inferences of fact where such depends upon oral evidence, and a different inference has been drawn by the trial judge.*
- *The fact that there is some evidence before a trial judge which may lead to a different conclusion does not alter the fundamental principle.*
- *A finding of the credibility, or not, of a witness is a primary finding of fact.*"

107. If there is a significant error in the assessment of that evidence the authority of *Doyle v Banville*[13] is clear that the Court may intervene.

108. I can find no basis for the Appellants' pleading, within their statement of claim, that Mr Wagner was on notice of the trust at or around the time of its creation. In my view the careful findings of fact of a trial judge are clearly supported by credible evidence, much of it furnished by the Appellants or those advising them, and rather than supporting the appellants' pleadings, clearly suggests to the contrary. In considering the court's inherent jurisdiction, in contradistinction to the criteria within RSC O. 19 Rule 28 the Court in *Cunniffe* confirmed that '*the court is entitled to engage in some analysis of the facts'* and in my view, this is an entirely appropriate case to do so.

109. The requirement set out in *Lopes* quoted above states, in the portion underlined, that all the appellants in this case need to do is to put forward a credible basis for suggesting that at trial it may be possible to establish the facts which are asserted. For the reasons set out above, neither on the face of its pleadings nor pursuant to this court's inherent jurisdiction, have the appellants established such a credible basis against Mr Wagner.

[13] [2012] IESC 25.

110. The proceeds of sale are not held by Mr Wagner and he has expressly disavowed any entitlement to them. In seeking equitable reliefs arising from the law of trusts, it is a long standing maxim of equity that it does nothing in vain. I do not therefore see how Mr Wagner can remain as a party to the present proceedings on the basis that some as yet unspecified future claim might arise; in dealing with a strike out application that claim must exist so it can be considered by the Court and accordingly requires to be carefully pleaded. The case must be made out within the present pleading and any accompanying documentation that this Court has regard to. Any other potential claims that have been mooted involve parties who are not joined to the present proceedings.

111. Based upon these matters I agree with Butler J. that a basis exists, pursuant to the inherent jurisdiction of the court, to strike out all reliefs sought against Mr Wagner from the plenary summons and statement of claim to the present proceedings. I also confirm her Order pursuant to RSC O.19 r. 28.

Outcome of the appeal

1. For the reasons set out above I would dismiss this appeal and uphold the judgment and orders of the High Court.

Costs

2. As Mr Wagner has been entirely successful, my provisional view is that he should be entitled to the costs of this appeal against the Appellants, such costs to be adjudicated in default of agreement.

3. If the appellants wish to contend for an alternative order, they can so notify the Court of Appeal Office by email within 14 days of the date of this judgment and a short costs

hearing will be arranged. In default of any such notification the proposed costs order will be made.

4. As this judgment is being delivered electronically Noonan & Haughton JJ. have indicated their agreement with it and the Orders I have proposed.