THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 216

Record Number: 2018/274

Peart J.
Edwards J.
Whelan J.

BETWEEN/

MICHAEL MCATEER, AENGUS BURNS
& ULSTER BANK (IRELAND) LIMITED

RESPONDENTS

- AND –

LASZLO FRIED, & JASZAI LIMITED

APPELLANTS

- AND –

LAZLO JEWELLERS LIMITED
& CLADDAGH JEWELLERS LIMITED

SECOND AND FOURTH
NAMED DEFENDANTS/NOTICE PARTIES

JUDGMENT of Ms. Justice Máire Whelan delivered on the 17th day of July 2019

Introduction
1. This is an appeal against the judgment of Ms. Justice Ní Raifeartaigh delivered in the High Court on the 2nd of May, 2018 and the orders made by her on the 7th June, 2018 and perfected on the 20th June, 2018 striking out certain paragraphs (collectively referred to hereafter as "The Laszlo Fried LIBOR Claim") in a defence delivered on behalf of the appellants on the 4th of September, 2015 on the grounds that same were frivolous and vexatious and bound to fail.

Background
2. The background and history to the course of dealings between the parties giving rise to the then proceedings are set out in detail in the High Court judgment. On the 21st December, 2009 the bank offered the appellant company by way of facility letter a €290,000 overdraft to provide working capital, together with a continuation of an existing demand loan facility in Swiss Francs approximately equivalent to €7,000,000 to assist in the acquisition and laying out of a jeweller's shop at Mainguard Street in Galway City. An additional sum of USD$25,000 in overdraft for working capital was also advanced on foot of the said agreement. The loan facility was secured on the Mainguard Street premises.

3. Thereafter, on 29th March, 2010 the bank offered to the first appellant by way of a facility letter a loan in Swiss Francs approximately equivalent to €5,000,000 for the purposes of restructuring outstanding debts together with €484,000 to assist with the said restructuring. The latter loan was secured on a premises situate at William Street in Galway City.

4. It appears that leases were entered into and executed in respect of the security properties by the appellants with the second and fourth defendants respectively. The second and fourth defendants went into occupation and possession of the said properties as tenants. The validity of the said leases is in dispute. Whilst specific paragraphs pleaded in a defence delivered on behalf of the second and fourth defendants were also struck out by order of the Court on the 7th June, 2018, the second and fourth defendants have not appealed that determination and same are of no further relevance in regard to the issues in this appeal.

5. The bank alleges default by reason of non-payment of the sums due on foot of the said facilities. On 19th April, 2013 the first and second named respondents were appointed as receivers. The within proceedings were instituted in 2014.

6. In the substantive proceedings the respondents seek orders restraining the defendants from preventing them carrying out their functions as receivers together with orders to account for rents received since the date of appointment of the receivers and for declarations as to the validity of the leases aforesaid. The bank seeks recovery of the sum of CHF 5,671,045.49 Swiss Francs together with USD$318.82 as against the first appellant together with interest since the 28th April, 2014. In their defence and counterclaim delivered on 4th September, 2015 the appellants, *inter alia*, deny liability, plead estoppel and counterclaim for damages for negligence, breach of contract and breach of duty.

The Laszlo Fried LIBOR Claim
7. On 29th November, 2017 the respondents issued a motion returnable before the High Court seeking, *inter alia*, "An order pursuant to the inherent jurisdiction of the court dismissing the following paragraphs of the defence delivered by the first defendant and the third defendant on the ground that same is frivolous and vexatious and is bound to fail:

(a) Paragraphs 2, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 ('The Laszlo Fried LIBOR Claim')."

Paragraph 2 of the defence delivered states; "It is pleaded that the Third Plaintiff is a public body which is subject to public law obligations and duties". The Laszlo Fried LIBOR Claim as pleaded at paragraphs 23 to 33 inclusive is set out substantially *verbatim* at pgs. 5 to 10 inclusive of the judgment of the High Court judge.

8. At para. 2 of the judgment the High Court judge characterises the Laszlo Fried LIBOR Claim in the following terms (which I adopt): -

> "… The disputed paragraphs of the defences refer to the past involvement of Royal Bank of Scotland (hereinafter 'RBS'), the parent bank of Ulster Bank (the third plaintiff) in criminal wrongdoing consisting of the rigging or manipulating of certain London Interbank Offered (or LIBOR) rates. It is sought by the defendants, in various ways, to link the third plaintiff Ulster Bank with this wrongdoing and to rely upon this link in their defence of the proceedings by the bank to enforce certain loans and by the receivers to carry out their functions in connection with the properties in question. RBS is not a party to the present proceedings."

9. In their outline written legal submissions to this Court the appellants do not appear to take issue with this characterisation of the Laszlo Fried LIBOR Claim and indeed cite para. 2 of the High Court judgment in detail at para. 6 of their said submissions.

Analysis of the Disputed Part of the Defence in High Court Judgment

10. The High Court judge noted (para. 9) that the appellants sought to introduce a claim that RBS was found guilty of manipulating certain LIBOR rates, which conduct had been widely publicised and had led to a settlement in February, 2013 with the UK Financial Services Authority (FSA) in the sum of STG£87,000,000 and further, RBS had entered into a deferred prosecution agreement under the auspices of the US District Court in Connecticut with a penalty of USD$150,000,000. Additionally, on the 4th December, 2013 the European Commission fined RBS together with a number of other international financial institutions for participating in cartels responsible for manipulating both LIBOR and EURIBOR.

11. The trial judge from para. 11 of her judgment onward proceeded to evaluate and assess the relevance of that evidence pertaining to conduct on the part of RBS to the matters in issue in the proceedings between the parties, particularly in light of the defence as pleaded and in circumstances where RBS was not a party to the within litigation. She attached weight to the following facts: -

> (a) The statement in an affidavit of Mr. Robert Skelly of the 28th November, 2017 where he deposed that at no material time was Ulster Bank a member of any panel of banks involved in setting LIBOR or EURIBOR rates for the relevant currencies;
>
> (b) That no link had been identified between the LIBOR manipulation engaged in by RBS and any loss suffered by the defendants;
>
> (c) That the manipulation engaged in had taken place prior to the commencement of the Laszlo Fried Facility;
>
> (d) That there was no valid basis for conflating the actions of RBS employees with those of its subsidiary, Ulster Bank;
>
> (e) That Ulster Bank had denied it had made any representations in relation to LIBOR such as those contended for in the defence delivered.

12. The Court noted that the first appellant had filed a replying affidavit on the 29th January, 2018 averring that the loans in question were continuations of loan facilities which had commenced in 2006 and accordingly were affected by LIBOR manipulation in those circumstances. The said affidavit set out the history of RBS and the LIBOR misconduct in detail. The first appellant averred that he had retained the services of financial risk services expert Mr. Abhishek Sachdev, whose alleged views were alluded to by the first appellant in his affidavit in support a contention that a nexus existed between Ulster Bank and RBS such as would justify the disputed Laszlo Fried LIBOR Claim paragraphs remaining in the defence delivered. The Court noted that no expert report was exhibited nor any affidavit sworn by the alleged expert in question, the judge observing: -

> "Mr. Fried averred that the expert's view was that Ulster Bank would have had to hedge out their exposure on the loans due to the bank being unable 'to run the CHF interest rate foreign exchange risk' and that the nature of this hedge… would have been too complex for Ulster Bank's 'very small capital markets dealing room' and that all the interest rate risk must have been passed to RBS." (para.13)

13. The affidavit further suggested that in the view of the expert, "RBS systems or employees must have been used to do this and the terms of the loan would have been set when the swap hedge was executed". The judgment continues at para. 13: -

> "Mr. Fried called this process 'white labelling', by which he meant that RBS would have used the brand of 'Ulster Bank' as an intermediary for itself as an undisclosed principal when transacting its products with borrowers."

In substance it was contended that an agency relationship subsisted between Ulster Bank and RBS or vice versa.

14. The Court noted at para. 14 that "Mr. Fried averred that the defendants suffered direct loss since the LIBOR manipulation would have increased the interest payments under the loans" but went on to assert that the exact effect could not be determined until disclosure was sought from RBS by way of discovery. The Court noted the contentions on behalf of the respondents that the facilities, the subject matter of the proceedings, contained express terms whereby the parties had agreed that all prior agreements between then had been superseded, and that accordingly the contention on behalf of Mr. Fried the first appellant, that the facilities were affected by the LIBOR manipulation of RBS were "misconceived".

15. The Court noted a further affidavit sworn on the 8th February, 2018 by Mr. Robert Skelly indicating the outcome of enquiries he had made with the treasury department of Ulster Bank noting that he had –

> "been informed that the loans were hedged on a portfolio basis and that the transactions had not in fact been entered into in the manner described by Mr. Fried. He said that insofar as RBS was involved in relation to managing the risk exposure, it was on an arms-length basis and would have been paid the commercial margin for those transactions."

It was further noted that no actual evidence of any loss had been produced on behalf of the appellants.

16. The High Court considered in detail the submissions of counsel for the respondents and the arguments advanced on behalf of the

borrowers. They relied on the decision in *Moylist Construction Limited v. Doheny and ors* [2016] 2 I.R. 283 on the court's inherent jurisdiction to strike out proceedings as being bound to fail. The Court noted the arguments advanced that the jurisdiction to strike out being an inherent one should be used sparingly and ought to be reserved for cases which are bound to fail. Furthermore, that the *Moylist* decision itself draws the distinction between cases involving factual disputes and those which give rise to complex legal issues; the latter requiring a full trial. It was noted that objection had been made that no advance warning had been given prior to the issue of the motion to strike out the Laszlo Fried LIBOR Claim in the defence and there had been no complaint as to the inadequacy of the particulars of fraud pleaded. It is argued that the pleadings were not closed and that at all events, further amended pleadings are in contemplation in circumstances where a new co-plaintiff *Promontoria* has been added. The core argument was that there was a legal nexus between RBS and Ulster Bank which gave rise to an agency. The Court noted the arguments of the appellants that there were conflicts as to fact as between the affidavits of Mr. Fried and those of Mr. Skelly on the issue of agency which ought to be left to plenary hearing.

17. Having considered the key Irish and English authorities including *European Property Fund Plc and Another v. Ulster Bank Ireland Ltd* [2015] I.E.H.C. 425 and *European Property Fund Plc v. Ulster Bank* [2016] I.E.H.C. 58 together with the decision of the English Court of Appeal in *Property Alliance Group Limited v. RBS* [2016] E.W.H.C. 3342 the Court noted at para. 35 that "The issues are not entirely governed by the case as pleaded to date, and I am entitled to have regard to the material put before the court on affidavit in the present application." The trial judge noted that whilst the evidence put before the Court showed that RBS was engaged in wrongdoing consisting of manipulation of certain LIBOR rates "there is no suggestion at all that Ulster Bank was involved in this wrongdoing or that it knew about it." The Court noted that the defence at para. 29 had pleaded that Ulster Bank itself had engaged in wrongdoing and concluded, "That is unsustainable on the facts…"

18. The Court further observed that the defence pleads, *inter alia*: -

> "That Ulster Bank had knowingly misled the borrowers; in my view this is implicit in certain paragraphs of the defence which are premised on the view that Ulster Bank had knowledge of the wrongdoing. Again, this is unsustainable on the facts, and that was also accepted by counsel. Essentially, counsel for the first and third defendants accepts that insofar as the defence pleads there was wrongdoing, this refers to the conduct of RBS and not Ulster Bank."

The Court identified a key issue as being "whether the defendants can rely upon the wrongdoing of a parent company in defence of a subsidiary's claim against them." (para. 37). Counsel for the respondents' stressed that RBS is not the same as Ulster Bank and relied on the second *EPF* judgment to emphasise this: -

> "… Counsel for the borrowers seeks to draw RBS into the case (and in doing so, implicitly to distinguish the second EPF case) on basis of an expert opinion, conveyed in a hearsay manner by the first defendant in his affidavit as described above… The nub of the submission of counsel on behalf of the first and third defendants was that this amounted to sufficient evidence before the Court … to show that there is a fair issue to be tried as to whether the RBS/Ulster Bank connection was such that [there] can be considered an agency of some kind and therefore as to whether Ulster Bank had a sufficient connection with RBS such that RBS' wrongdoing may provide a defence to the plaintiffs' claim in the various ways pleaded in the defence. I do not accept this argument."

The trial judge in her judgment characterised the contentions attributed to Mr. Sachdev as–

> "Merely a theory, based on speculation by a witness who did not swear an affidavit and whose opinions were related in a hearsay manner without the Court having the benefit of a full report from the witness in question. In contrast the affidavit of Mr. Skelly described what had in fact taken place within the bank as regards the hedging of the loans."

She concluded that she was not satisfied that there was a question to be tried as to whether Ulster Bank was an agent of RBS and observed that such a proposition had not been "pleaded in the defence". She noted; "I do not see any factual basis for allowing any amendment of the pleadings based on agency." She concluded at para. 39 that the dates of the wrongdoing of RBS "do not appear to match the dates of the loan contracts with Ulster Bank in the present case."

19. Insofar as the receivers or the bank had contended that the appellants could not resist repayment of the loans based on a dispute over the interest rate the appellants had placed reliance on *IBRC v. Quinn* [2016] 1 I.R. 1 which had established that illegality may taint a contract in limited cases in such a manner as to render the entire contract unenforceable. The trial judge rejected the argument, observing: -

> "I can see how an argument relating to 'tainted' contracts might apply in a case involving (a) RBS itself, in which case it might be argued that RBS made implicit representations… that it was not and would not be making false submissions re. LIBOR and/or (b) in the case of an interest rate swap... and/or (c) where it is alleged by the borrower in a 'typical mortgage loan case' that the interest rate charged had some causal connection with the borrower's default in repayments."

She concluded in the instant case that: -

> "There is no suggestion that the interest rates which were actually applied had any bearing on why the defendants defaulted; and the argument does not, in my view, gain any traction at all when the borrower was not even dealing with the same corporate entity as that which had engaged in the wrongdoing."

Allegation of Fraud

20. In regard to the issue of fraud, the trial judge agreed with the respondent that fraud was "implicitly pleaded and therefore should have been particularised", further stating that: "However I think the more fundamental point is that RBS and Ulster Bank cannot be treated as a single entity and the reality is that no replies to particulars on fraud would ever have satisfied the plaintiff, given this fundamental objection on their part." She accordingly acceded to the application to strike out the Laszlo Fried LIBOR Claim aspect of the defence of the appellants.

The Appeal

21. In their notice of appeal, the appellants identified eight separate grounds briefly set out as follows: -

> (1) That the judge erred in finding there was no basis to believe there was an issue to be tried as to whether Ulster Bank was acting as an agent for RBS.

(2) The judge erred in preferring the evidence of Mr. Skelly over that of Mr. Fried and in discounting the averments of Mr. Fried which had been grounded on the advices of the appellants' expert as "speculation related in a hearsay manner."

(3) The judge erred in finding that there was no factual basis for allowing any amendment of the pleadings based on agency.

(4) The judge had erred in finding that an order made in the High Court on the 24th July, 2017 granting liberty to the appellants to deliver an amended defence in circumstances where Promontoria had been joined as a plaintiff in the proceedings was confined to consequent amendments, and that otherwise the appellants were required to formally seek leave of the High Court to amend their pleadings to plead agency.

(5) The judge erred in finding that any claim brought against Ulster Bank on the grounds of agency would transform the case into one against RBS.

(6) The judge had erred in finding that RBS and Ulster Bank could not be treated as a single entity.

(7) The judge had erred in finding that "irrespective of a claim grounded on agency," the appellants were not otherwise entitled to maintain a claim against Ulster Bank for an interest rate adjustment on the grounds, *inter alia*, that the loan contracts were tainted with illegality.

(8) The judge erred in finding that the dates of the wrongdoing of RBS did not match the dates of the loan contracts with Ulster Bank and in failing to have adequate regard for the terms of the relevant contracts which provided that each was "a continuation of an existing facility".

The respondents opposed the appeal on all grounds.

Submissions

22. The appellants submit that while the High Court correctly identified the test to be applied it did not apply it correctly, contending that by finding in favour of the respondents' motion the High Court judge "engaged with the facts" beyond the significant limitations identified by Clarke J. in *Moylist*. It was argued that the judge before dismissing the claim was required to be confident that the appellants' contentions would fail despite what may arise in discovery or at trial and the decision of Keane J. in *Lac Minerals v. Chevron Corporation* (unreported, High Court, Keane J., 6th August, 1993), as approved in subsequent authorities, including by *Hardiman J. in Supermacs (Ireland) Ltd. v. Katesan (Naas) Ltd*. [2000] 4 I.R. 273 at 277, was cited in support of that contention. It was contended that the High Court had failed to give due regard to the principle identified by Clarke J. at para. 12 of the *Moylist* judgment that the norm is that proceedings should go to trial and that this approach should only be departed from if there is no real risk of injustice. The appellants assert that as a result of the procedure adopted by the respondents the proceedings will be required to be resolved by plenary trial in any event even if the Laszlo Fried LIBOR Claim is not part of the defence. It was argued that the High Court erred in preferring the affidavit evidence of Mr. Skelly over the averments in the affidavit of Mr. Fried and that this ran counter to a body of jurisprudence including Clarke J. in *McCourt v. Tiernan* [2005] I.E.H.C. 268 at para. 6 where the said judge had stated that in considering whether to strike out a claim in the exercise of its inherent jurisdiction a court "… must treat the plaintiff's claim at its high water mark". It was contended that the High Court judge had erred in failing to take the appellants' counter-claim at its height for the purposes of the application.

23. With regard to the issue of agency, it was contended that notwithstanding that neither the facility letters nor the general terms and conditions relied upon by the bank made any reference to "… calculation of the interest rate chargeable on the basis of LIBOR (and in fact state quite clearly that EURIBOR is the appropriate rate)." Mr. Skelly in his affidavit had confirmed that "… The interest charged in respect of the said facilities was calculated with reference to LIBOR".

24. It was contended that the High Court had erred in finding that the argument in relation to tainted contracts established in *Quinn v. IBRC* could only apply in the three circumstances identified by the trial judge – none of which applied in the instant case. It was contended that in light of the averments on the part of Mr. Skelly regarding calculation with reference to LIBOR, the bank had "unilaterally elected to adopt LIBOR as the measure by which to calculate (at least in part) the interest rate applicable to the facilities".

25. It was contended that apart from the time period it appears to be accepted by the respondents that RBS were involved in manipulation. While the appellants accept that there is no basis to suggest "… that at any stage was Ulster Bank a submitter of EUR,USD or CHF currency LIBOR", they question the extent of which Ulster Bank (apart from the question of agency) would be entitled to enforce a contract "… which was (at least in part) predicated on financial indices that have been demonstrated to have been substantially and illegally interfered with". They cite Clarke J. in *Quinn v. IBRC* in support of a contention that the court is required to engage with the bank's state of knowledge which was inappropriate in the context of a motion and is a matter which should be left over to a plenary hearing.

26. With regard to the liability in respect of the interest aspect of the claim it was contended that the appellants are entitled to advance the argument that the facility letters were tainted with illegality such as entitled them to seek to avoid the enforcement of the entire contract or "at least the reliance on the proportion of the interest claimed by reference [to] LIBOR by operation of the doctrine of severance." The decision in *IBRC v. Morrissey* [2014] I.E.H.C. 470 was relied on as authority for the proposition that where it was found that interest was calculated incorrectly, a borrower was entitled to an interest rate adjustment by way of set-off or reduction in any amount ordered.

27. It was contended that the High Court erred in determining that there was no question to be tried as to whether Ulster Bank was an agent for an undisclosed principal, namely RBS, in stating that were such an amendment to pleadings allowed based on agency, the case would be transformed into a claim against RBS. Reliance was placed on Treitel, *Law of Contract* (14th Edn, 2015) and Courtney, *Law of Companies* (4th Edn, 2016) in support of a contention that the law on undisclosed principals is far from an "anomaly" and was incorrectly applied by the High Court in reaching its conclusion. It is pointed out that the appellants in their defence and counterclaim as delivered did not make any specific pleas delimiting the time period during which the wrongdoing of RBS occurred and that the public reports put before the Court did not purport to identify the entirety of the wrongdoing that RBS may have engaged in. It was further asserted that the facility letters dated July 2009 and March 2010 are each described by the bank as a "continuation of an existing facility". It was asserted that the facility letters "do not sterilise the underlying facilities from any illegality that has tainted them". It was pointed out that the earlier facilities dated back to January 2006 at least and cover a period when RBS engaged in misconduct regarding the manipulation of LIBOR.

28. It was contended that the High Court judge erred in finding that an order of Gilligan J. pronounced on the 24th July, 2017 following joinder of Promontoria which granted liberty to the appellants to deliver an amended defence and counterclaim to an amended statement of claim was limited to consequent amendments or that the appellants were otherwise required to formally seek leave of the High Court if they wished to amend their pleadings to raise a plea of agency against RBS. The appellants cited O.28 r. 5 of the RSC which provides: -

> "Where any party has amended his pleadings under rule 2 or rule 3, the opposite party shall plead to the amended pleading or amend his pleading within the time he then has to plead…"

It was argued that this demonstrates that a party has considerable scope in terms of a rejoinder pleading and that Gilligan J. had not expressly directed that the appellants were restricted in the delivery of any amended defence and counterclaim to plead only to the amendments made to the statement of claim. It was asserted that in consequence, the appellants were entitled to substantially amend their defence and counterclaim without any restriction and without further leave of the Court. It was contended that the *obiter* comments of the High Court at para. 43 of the judgment, which appear to express doubts that the principles laid down in *Ulster Bank v. O'Brien* [2015] I.E.S.C. 96 applied solely to motions for summary judgment was erroneous as the bank, having decided to pursue the claim by means of plenary procedure is not entitled to "double back and seek summary relief in the form of a money judgment". It was contended that in plenary proceedings a defendant to a claim by a bank for judgment on foot of a loan contract is entitled to put the plaintiff on full proof of its claim and that the appellants have done so in their defence, and that for the Court to adopt the ratio of the Supreme Court in *Ulster Bank v. O'Brien* in the context of applications to strike out proceedings pursuant to its inherent jurisdiction would result in risking "… the creation of a form of quasi or surrogate summary disposal procedure which was cautioned against by the Supreme Court in *Moylist*".

Submissions advanced on behalf of the respondents

29. The respondents contended that many of the arguments advanced in the appellants' submissions before this Court were not canvassed at all in the High Court. It is asserted that some arguments were touched upon in passing but not elaborated and that the appellants should not now be permitted to advance these new arguments. They relied in particular on the decision in *Gibb v. Promontoria (Aran) Ltd. & Others* [2018] I.E.C.A. 95 where Peart J. reviewed the jurisprudence in relation to the circumstances in which an appellant will be permitted to advance new arguments on appeal that were not advanced in the court below. In particular, it is objected that the new arguments now being advanced by the appellants are not set out in the grounds of appeal, and further that a number of matters now raised were not adverted to in the affidavit evidence and were either not mentioned at all or barely alluded to before the High Court.

New Arguments

30. These new arguments were identified as follows: -

> (a) The argument that the applicable interest rate should have been EURIBOR not LIBOR and that the bank had "unilaterally elected to adopt LIBOR as the measure by which to calculate (at least in part) the interest rate applicable to the facilities." It is contended that not only was this argument not advanced in the High Court but the appellants positively pleaded at para. 25 of their defence that it was a term of the contractual arrangements between the parties that the rates would be calculated by reference to LIBOR.
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> (b) In submissions the appellants make reference to the proposition that they might confine their claim to "the proportion of the interest claimed by reference to LIBOR"; a proposition not mentioned in the pleadings or the affidavits of the first appellant. It is further asserted that the stance adopted on behalf of the appellants at the hearing before the High Court steadfastly adhered to the proposition that in consequence of the alleged LIBOR manipulation none of the loan was repayable.
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> (c) The respondents disputed the contention that the appellants were at large in regard to the ambit of the defence they could deliver in consequence of the joinder of Promontoria to the proceedings. It was contended that at no time did the appellants ever furnish either to the respondents or the Court any amended defence which they proposed to deliver. It was further asserted that the proposition of an implied permission to amend was not pursued before the High Court.
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> (d) The contention that since these are plenary proceedings and the suit will go to plenary hearing as a basis for not striking out, the Laszlo Fried LIBOR Claim was never advanced in the High Court.
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> (e) Regarding the assertion of agency for an undisclosed principal, no authority was advanced in the High Court for such a proposition, neither is it contained in the pleadings.
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> (f) It was further contended that there is no pleaded claim that either Ulster Bank or any of its employees were aware of the RBS misconduct, nor was it suggested to the High Court that any case was being advanced contending for actual knowledge on the part of Ulster Bank regarding same.
>
> (g) With regard to the issue of fraud, it had not been properly pleaded or appropriately particularised in accordance with the authorities.

31. It was contended that Mr. Sachdev, the individual whose report is referred to in the affidavit of the first appellant, "is not stated to be an expert witness retained by Mr. Fried's solicitors to give evidence in this litigation". Further, even if the speculation contained in the "report" were accurate it was contended that the High Court had correctly determined that same would not have the effect of transforming the loans in question into an illegal contract and that no authorities were advanced before the High Court or in their current submissions in support of such a proposition, or that the contract was one between the appellants and RBS.

32. It was further asserted as significant that the first appellant himself had conceded in his affidavit that "the bank would have set the margin in respect of the transaction, i.e., the cost to the appellants of the loan in addition to the CHF LIBOR rate promulgated by the BBA" and further that the first appellant's averments do not (even if they were true) provide any basis for the claim that the loan facilities were between the appellants and RBS.

33. It was contended that the affidavit of Mr. Skelly demonstrates that the first appellant's speculation as to how the bank manages exposures was not accurate.

34. It was argued that even were the speculations of the first appellant in his affidavit accurate it would not render the contract between Ulster Bank and the appellants a contract between RBS and the appellants. It was asserted that there is no evidence or

argument that Ulster Bank entered into the loan facilities on behalf of any third party and that the scant authority contained in the appellants' submissions "relates to scenarios where there is actually an agency relationship".

Discussion

(i) New arguments

35. In *Gibb v Promontoria (Aran) Ltd* Peart J. observed at paras. 17 and 18 that: -

> "… the traditional approach to the question of whether a ground not argued in the High Court could be advanced on appeal was that stated by Henchy J. in *Movie News Limited v. Galway County Council* (unreported), Supreme Court, 15th July 1977, namely that only in an exceptional case ought that to be permitted, since it effectively deprives the other party of a right of appeal to which he/she has a constitutional entitlement.
>
> Nevertheless there have been some developments in more recent times which bear reference. In his judgment in *Lough Swilly Shellfish Growers v. Bradley* [2013] 1 I.R. 227, O'Donnell J. stated at para. 28:
>
> > 'There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument on the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in *K. D. (otherwise C) v. M.C.* [1985] I.R. 697) for example); or where a party seeks to *make an argument which was actually abandoned in the High Court* (…) or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point on appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps *where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court*, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made.' [Emphasis provided]"

In the instant case, no cogent reason has been identified as to why the novel arguments were not made before the High Court or articulated in the grounds of appeal. They amount to significant new arguments which the respondents have been deprived of the opportunity of effectively contesting in the High Court.

(ii) Allegation of fraud

36. On any fair reading of the defence as delivered, fraud has been implicitly alleged at paras. 30, 33 and 37 thereof. It is not appropriate to advance an allegation of fraud in a pleading in such an oblique manner. It is inappropriate to enter a plea of fraud unless there is clear and sufficient evidence to support it, and there is clear authority for the proposition that any charge of fraud or misrepresentation must be pleaded with the utmost particularity.

37. The position has been addressed with great clarity by the Supreme Court in *Keaney v. Sullivan and Others* [2015] I.E.S.C. 75. The principled approach adopted by Dunne J. was framed in the context of the Rules of the Superior Courts – Order 19, rule 5(2) provides that: -

> "In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings."

At para. 10 of the judgment Dunne J. states: -

> "… Thus in the case of fraud, it is not sufficient that a statement of claim or other pleading makes a bare assertion of fraud against another party. The facts, matters and circumstances said to give rise to the alleged fraud must be expressly pleaded."

38. In the instant case, as was correctly found by the trial judge at para. 19 of the judgment, paras. 30, 33 and 37 of the defence as delivered implicitly allege fraud and same has been advanced in clear contravention of the Rules of the Superior Courts and in a manner at variance with the jurisprudence including in particular of the Supreme Court and ought not be allowed to stand.

(iii) EURIBOR not LIBOR

39. Engaging in the balancing exercise specified by O'Donnell J. in *Lough Swilly Shellfish Growers Co-Op Society Limited v. Bradley* [2013] I.E.S.C. 16 I am satisfied that the proposition sought to be advanced in the course of the appeal for the first time is inconsistent with the defence as delivered and the expressed terms thereof and arguments advanced in the High Court that the bank had not entered into facilities with the appellants whereby the interests charged in respect of same was calculated with reference to LIBOR, but rather had "unilaterally elected to adopt LIBOR as the measure by which to calculate (at least in part) the interest rate applicable to the facilities" and that the agreements stated quite clearly that "EURIBOR was the applicable rate" clearly gives rise to a significant potential unfairness to the respondents who have been deprived of the opportunity of addressing this contention before the High Court, who in consequence did not make any adjudication in regard to same and that in operating the balancing exercise identified by Mr. Justice O'Donnell, it is not appropriate in this case to now indulge the appellant in launching this fresh and novel proposition when to do so risks potential unfairness and an injustice to the respondents. No good reason has been identified for the omission. To allow such an approach would necessarily result in the respondents being deprived of any opportunity of having a full hearing on the issue.

(iv) Expert

40. The primary basis for the Laszlo Fried LIBOR part of the claim contained in the defence and counterclaim of the appellant stems

from averments contained in an affidavit sworn by the first appellant on the 28th January, 2018. Of particular note are paras. 24 to 29 inclusive of the said affidavit. They state that the deponent had retained the services of a "leading expert, Abhishek Sachdev of Vedanta Hedging Advisory, to provide independent financial risk advisory services". On a careful perusal of the following paragraphs it is noteworthy that the "advices" referred to at paras. 25, 26, 27 and 28 are implicitly rather than explicitly ascribed to Mr. Sachdev. It is not clear whether advices provided were in writing, and if so, were subject to any *caveat* by Mr. Sachdev.

41. Since these averments are being relied upon for the very far reaching proposition that the bank was an agent of RBS "or *vice versa*" – assertions of potentially very far reaching implication – one would expect at a minimum, that a clear probative expert basis for such a proposition would be disclosed. At best, paras. 25 to 29 inclusive of the replying affidavit of the first appellant comprise mere speculation, conjecture, various propositions and theories unsupported by any cogent evidence. It would appear from para. 28 that what may have been provided has been some generalised views "on the basis of industry experience", and it is not clear whether the characterisations "white labelled" and "white labelling" are phrases being ascribed to the hypothetical process by the deponent Mr. Fried on his own assessment or if same represents the views of an unidentified third party or in fact is an assessment by Mr. Sachdev based on expert knowledge, and if the latter, what evidence if any, was the basis for such an assessment.

42. It is also significant, in my view, that at para. 29 of the said affidavit the deponent refrains from stating that he has "been advised" of the matters therein specified: -

> "The practice of Ulster Bank has been likened to 'white labelling' products sold by RBS to its own customers. In other words, the loans the subject of this proceeding were in reality RBS products that were 'white labelled' by Ulster Bank who added its own spread and credit spread. This would mean that the defendants were transacting with RBS through Ulster Bank as an intermediary for an undisclosed principal (save with the qualification that Ulster Bank may well have used its local knowledge to determine the spread to charge the borrowers)."

(v) Agent for undisclosed principal

43. The speculative nature of the agency contended for serves to undermine its stateability. On the one hand, it is contended that the bank was agent for an undisclosed principal for RBS the appellants also assert "*or vice versa*". As was observed by the UK Supreme Court in *VTB v. Nutritek International Corp and others* [2013] U.K.S.C. 5: -

> "The existence of the undisclosed principal rule has long been regarded as an anomaly, as discussed in *Bowstead &Reynolds on Agency*, 19th Edn. 2010, para. 8-070, and as observed by Dillon L.J. in *Welsh Development Agency v. Export Finance Co. Ltd.* [1992] B.C.L.C. 148, 173. As the Court of Appeal said in this case at para. 89, it would be inappropriate to extend an anomaly – save where it would be unjust and unprincipled not to do so. To adapt what Lord Hoffmann said in *OBG Ltd. v. Allan* [2008] A.C. 1, at paras. 103, 106, 'An anomaly created by the judges to solve a particular problem' is 'an insecure base' on which to justify an extension to a principle, especially when that principle can itself be said to be anomalous."

44. No doubt that the wrongdoing of RBS and other lending institutions has had serious implications not alone in the city of London but worldwide. In particular, the conduct engaged in by RBS between January of 2006 and March 2012 whereby the LIBOR was manipulated improperly is now well known and has been the subject of investigations, civil processes, criminal proceedings and other findings and determinations in a variety of jurisdictions. Ulster Bank is a subsidiary of RBS. There is no authority identified for a proposition that those facts in themselves give rise to, or warrant, without more, an inference of for an agency subsisting as between Ulster Bank and RBS based on pure conjecture and surmise. The affidavit of Robert Skelly sworn on the 8th February, 2018 unequivocally contradicts the surmise and suppositions contained in the first appellant's affidavit sworn on 28th January, 2018. Therein he repeats his averment that: -

> "The bank did not act as RBSs' agent for the purpose of entering into the facilities and that the interest rate charged in respect of the facilities was the rate stipulated in the facility letter and not otherwise. The bank was not a submitting bank for the purpose of CHF LIBOR."

Paragraph 9 deposes: -

> "Insofar as the hedging of the loan book is concerned, that is an internal matter that has no impact upon the borrower. The loan contract between the borrower and the bank was based upon the borrower paying the bank an interest rate calculated with reference to LIBOR and a specified margin. The manner in which the bank offset that risk through its own treasury function has no impact on either the LIBOR rate or the margin. For completeness, I have made inquiries with the bank's treasury team and I understand that the CHF loan Book was hedged on a portfolio basis. This was done through a combination of using the CHF funds held on CHF deposit accounts with the bank and then covering any shortfall in this funding using FX swaps (i.e. the bank would buy CHF with Eur to cover any CHF funding shortfall in the period and would simultaneously agree to reverse this transaction at the end of the period). There was no transaction entered into in respect of these facilities such as that described by Mr. Fried. Insofar as the bank entered into any transactions with RBS in relation to FX or LIBOR exposures, it did so on an arm's length basis and paid RBS a commercial margin for those transactions."

45. It is further noteworthy that at para. 10 the said deponent states: -

> "Insofar as Mr. Fried suggests that the CHF interest rate may have been overstated, he does not say – and there is no pleading to this effect – that any such overstatement would have been in any way material to the admitted events of default on the part of the borrowers."

It is noteworthy that the appellants did not offer any more coherent or credible explanation beyond a mere "theory" as the High Court judge characterised them embodied in paras. 25-29 of Mr. Fried's replying affidavit to counteract the clear and unequivocal position adopted by the bank.

Moylist

46. The parties are in agreement that the key authority relevant to this application is the decision of *Moylist Construction Ltd. v. Doheny and Others* [2016] 2 I.R. 283.

As was noted by Clarke J. at 3.1: -

> "At least since the decision of Costello J. in *Barry v. Buckley* [1981] I.R. 306, it has been clear that the courts have an inherent jurisdiction to strike out proceedings as being bound to fail, which jurisdiction is in addition to the somewhat separate entitlement of a court to strike out proceedings under O. 19, r.28 of the Rules of the Superior Courts."

Clarke J. referred to his own decision in the High Court in *Keohane v. Hynes* [2014] I.E.S.C. 66 where he had concluded: -

> "It is important, for the avoidance of any doubt, that the overall principle be clearly stated. As pointed out in many of the authorities, not least in the judgment of Murray J. in *Jodifern*, the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings. However, as again noted by Murray J. in *Jodifern*, whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis."

47. In the instant case, it is merely the specific pleadings or paragraphs within the defence comprising the Laszlo Fried LIBOR Claim that are sought to be struck out on foot of the inherent jurisdiction. The matter otherwise goes to plenary hearing in regard to all of the other issues in contention between the parties. To that extent the aforementioned dicta, although sought to be relied upon by the appellants, is not entirely germane to the instant application, particularly in circumstances where, in substance, fraud is being pleaded. Furthermore, the claim is otherwise and to a substantial extent dependent on establishing an agency not borne out by any authority and not substantiated by any fact.

48. At 4.2 of *Moylist* Clarke J. does signal that there ought to be a degree of flexibility in allowing new points to be raised in an appeal where the consequence otherwise is to strike out the proceedings: -

> "It is, however appropriate, also to have regard to one aspect of the decision of this Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] 2 I.R. 301 (see para. 78) as commented on in *IBRC v. McCaughey* [2014] 1 I.R. 749 at para.24. It is clear that some additional leeway may properly be given on appeal to a party who is faced with being deprived of what might otherwise be their entitlement to a full trial. As McCarthy J. made clear in *Sun Fat Chan*, a case will not be dismissed if there is any reasonable amendment to the pleadings which could save it from being unstateable. That observation stems from the general principle that the court should be slow to dismiss proceedings as being bound to fail and should only do so in a clear case. While a plaintiff who is faced with a motion to dismiss has an obligation to put forward the basis on which it is suggested that a sustainable claim exists at the hearing of the motion, nonetheless the fact that the plaintiff may be deprived of a full hearing should any appeal result in a decision that the proceedings should be dismissed means that the court may in some circumstances be prepared to give greater latitude to such a plaintiff to argue further grounds on appeal."

49. Cregan J. in *Irish Bank Resolution Corporation Ltd. v. Purcell* [2014] I.E.H.C. 525, succinctly identified the relevant principles at para. 83 thus: -

> "1. The Court has jurisdiction pursuant to Order 19 Rule 28 and also pursuant to its inherent jurisdiction to strike out proceedings if they are bound to fail.
>
> 2. In considering an application to strike out proceedings pursuant to its inherent jurisdiction the Court is not limited to considering the pleadings of the parties but is free to consider evidence on affidavit relating to the issues in the case (per Costello J. in *Barry v. Buckley* [1981] IR 306).
>
> 3. This jurisdiction to strike out proceedings is one to be 'exercised sparingly and only in clear cases'. (See Costello J. in *Barry v. Buckley* [1981] IR 306).
>
> 4. Moreover as McCarthy J. stated in *Sun Fat Chan v. Osseous Ltd* [1992] 1 IR 425 'Generally the High Court should be slow to entertain an application of this kind'.
>
> 5. In addition as was stated by Keane J. in *Lac Minerals v. Chevron Corporation* [1995] 1 ILRM. 161 (High Court, 6th August, 1990) (and quoted with approval by the Supreme Court) in *Supermacs Ireland Ltd v. Katesan (Naas) Ltd* [2000] 4 I.R. 273 'a judge in considering an application to strike out or dismiss a claim must be confident that the plaintiff's claim cannot succeed no matter what might arise on discovery or at the trial of the action.'
>
> 6. If the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed (see McCarthy J. in *Sun Fat Chan v. Osseous Ltd*).
>
> 7. The Court can only exercise a jurisdiction to strike out a claim on the basis that 'on admitted facts it cannot succeed' (per *McCarthy J. in Sun Fat Chan v. Osseous Ltd*).
>
> 8. The Court in considering whether to strike out a claim 'must treat the plaintiff's claim at its high water mark' (per Clarke J. in *McCourt v. Tiernan* [2005] IEHC 268.
>
> 9. The burden of proof lies on the defendant to establish that the plaintiff's claim is bound to fail. (See *Salthill Properties Ltd v. Royal Bank of Scotland* [2009] IEHC 207)
>
> 10. The Court should not require a plaintiff to be in a position to show a *prima facie* case, merely a stateable case, in an application to strike out. (See Clarke J. in *Salthill Properties Ltd v. Royal Bank of Scotland*.)"

50. Haughton J. summarised the key principles in the case of *Togher Management Company Ltd. & Anor v. Coolnaleen Developments Ltd.* [2014] IEHC 596 at para. 28: -

> "With regard to the courts inherent jurisdiction to dismiss, the principles are well established in cases such *Barry v. Buckley* [1981] I.R. 306, *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 (Supreme Court – McCarthy J), *Ennis v. Butterly* [1996] I.R. 426, and *Salthill Properties Limited & Cunningham v. Royal Bank of Scotland Plc & Ors* [2009] I.E.H.C. 207. From this jurisprudence the following principles may be extracted: -
>
> - The jurisdiction exists to ensure than an abuse of the process of the courts does not take place.

• The jurisdiction should be exercised sparingly and only in clear cases.

• It enables the court to avoid injustice.

• If a statement of claim admits of an amendment which might 'save it' and the action founded on it, then the action should not be dismissed.

• A variety of circumstance may emerge at the trial of an action which might not be entirely contemplated at earlier stages in proceedings, and what may appear clear and established at an early stage may become less so at trial.

• It is a jurisdiction to dismiss where the proceedings are bound to fail.

• Such an application may be of particular relevance to cases involving the existence or construction of documents – in which it may be possible for a party to persuade the court that no reasonable construction of the document(s) concerned could give rise to a claim on the part of the plaintiff, even if all the facts alleged by the plaintiff were established.

• Where there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence, it is difficult to envisage circumstances where an application to dismiss on the grounds that the action is bound to fail could succeed.

• The plaintiff should not be required to show a prime facie case at the stage of an application to dismiss.

• The onus lies on the defendant to establish that the plaintiff's case is bound to fail.

• It follows from the foregoing point that the defendant must demonstrate that any factual assertion on the part of the plaintiff that the defendant contests could not be established."

51. As was stated by Clarke J. in *Moylist*, again referring to his own decision in *Keohane*: -

> "…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. …"

52. In regard to each of the assertions advanced on behalf of the appellants in the Laszlo Fried LIBOR Claim, including agency, the appellants have failed to advance any credible basis for their propositions and in particular, given the potential significance of the assertions contained in para. 25-29 of the affidavit of the first appellant sworn 28th January, 2018, it was incumbent on the appellants to adduce before the High Court any credible evidence they had in support of such contentions. The absence of any affidavit – or even a written report – from Mr. Sachdev deprived the High Court of an opportunity to properly stress-test and evaluate the very stateability of the propositions in question where they were not otherwise supported by evidence. Furthermore, it was impossible to assess whether paras. 25-29 represent a fair and comprehensive rendition of any statement written or oral, or report prepared by Mr. Sachdev based on evidence and facts specific to the matters at issue in this case.

53. In light of the entire absence of any documentary evidence or legal authority that would otherwise support a proposition that an agency ever subsisted as between the bank and RBS at best it can be described as a hypothetical proposition. The said contentions as to agency in light of jurisprudence particularly *VTB Capital v. Nutritek* should be viewed as an "anomaly" which the courts should be slow to extend.

54. I am satisfied on balance having regard to the matters pleaded at paras. 23-38 inclusive of the defence – the Laszlo Fried LIBOR Claim – that even had cogent evidence been available in regard to the speculative matters identified at paras. 25-29 of the said affidavit of Mr. Fried of the 28th January, 2018, same does not support the contentions advanced in the impugned pleadings in circumstances where the affidavit of Robert Skelly sworn on the 8th February, 2018 addresses the said contentions and offers a straightforward coherent contradiction on a factual basis confirming the position that the bank was no a submitting bank for the purpose of CHF LIBOR.

55. It is clear from the face of the Laszlo Fried Facility letter that it is expressed to supersede all prior agreements, arrangements or correspondence between the parties. That facility letter was accepted and executed by the appellants who cannot now seek to resile from its terms. Accordingly, it is not significant that the facility in question predated the manipulation of LIBOR by RBS.

56. The affidavit of Mr. Skelly at para. 9 identifies the manner in which, according to the bank's treasury team the CHF loan book was hedged on a portfolio basis. There is nothing unusual about the averments at paras. 9 or 10 in circumstances where Ulster Bank was a subsidiary of RBS.

57. I am satisfied that paras. 25-29 of the replying affidavit of Mr. Fried does not amount to expert advice and is but a bare unsupported assertion which could not safely have been relied upon by the trial judge in respect of any proposition or contention which it was advanced in support of in all the circumstances. Mr. Fried does not identify which statements Mr. Sachdev stands over as fact in regard to Ulster Bank and RBS and the extent, if at all, to which Mr. Sachdev was made aware of the factual details concerning the loan facilities in question, their terms and the overall material context that obtained between the bank and the appellants in connection with and from the date of entering into the Laszlo Fried Facility as distinct from the initial facility letter of the 27th January, 2006 which, it appears clear, was effectively and validly superseded by express agreement between the parties by the subsequent agreement entered in to in 2010 between them. The assertions are at best hearsay.

Conclusion

58. I am satisfied in all the circumstances that the clauses contained in the defence and counterclaim of the appellants at paras. 23-38 (inclusive) thereof the Laszlo Fried LIBOR Claim are, in all the circumstances, unsustainable, and further there is no realistic prospect that by discovery or otherwise the claims therein contained can be salvaged. No coherent basis has been identified to disturb the findings and conclusions of the High Court judge. Accordingly, I would dismiss the appeal.