THE HIGH COURT

[2022] IEHC 682

[Record No. 2021/5012 P]

BETWEEN

SHANNEN McCANN AND TARA McCANN

PLAINTIFFS

AND

COLIN McMANUS, KATHLEEN McMANUS AND SIMON WAGNER

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 6th day of December 2022

Introduction

1. This is an application by the third defendant for an order under O. 19, r. 28 of the Rules of the Superior Courts, striking out the plaintiffs' claim against him or, alternatively, orders pursuant to the inherent jurisdiction of the court directing the amendment of the plenary summons to remove any claim to relief against the third defendant. At the time the motion was issued the statement of claim had not yet been served, hence it is not specifically referred to in the motion. The background to the proceedings is complex and is not made any easier to unravel by virtue of the fact that this is the third set of proceedings the plaintiffs have issued in this jurisdiction, although the only one to name the third defendant as a defendant. There are also extant proceedings in Northern Ireland concerning the same subject matter but the third defendant is not a party to those proceedings either.

2. In brief, the plaintiffs contend that by virtue of a contribution of stg£1.2 million made by them or on their behalf towards the purchase of 256 acres of land at Buncrana Road, Derry

(*"the Derry lands"*), the first defendant 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. The first defendant (who is not a party to this motion, but who has sworn affidavits in the proceedings for other purposes) denies the existence of the alleged trust. The third defendant claims to have had no knowledge of the relationship between the plaintiffs and the first defendant nor of the plaintiffs' alleged involvement in the purchase of the property. On becoming aware of the plaintiffs' claims, he terminated his commercial involvement with the first defendant in respect of the Derry lands and reached a settlement agreement with him under which a sum of stg£8.8 million was to be paid to the first defendant in respect of any remaining interest he might have.

3. These proceedings were issued in circumstances where a portion of the lands were sold in August 2019 and paid for in tranches between March 2020 and September 2021. During this period, the third defendant became aware of the plaintiffs' alleged interest when in February 2020 they began to make certain claims through solicitor's correspondence. Consequently, on 10 April 2020, a settlement was negotiated with the first defendant as a result of which the first defendant's continued proprietary involvement in the Derry lands was terminated in exchange for a substantial payment and an agreement regarding the on-going provision of professional services. The plaintiffs then became concerned that sums were going to be paid to the first defendant which would not be distributed by the first defendant in accordance with their entitlements under the alleged trust and, consequently, issued a number of sets of proceedings culminating in these proceedings, issued on 12 August 2021. They then made an *ex parte* application to the High Court (Humphreys J.) on 10 September 2021 and obtained an order restraining the defendants from distributing or paying out a sum of stg£4.5 million, being part of the proceeds of sale of the portion of the sold Derry lands. pending the trial of the action.

4. As well as the defendants, Humphreys J. directed that notice of his order be served on four companies in which the title to the Derry lands is vested. These companies, Fadeford ltd,

Detailridge Ltd, Rusticglade Ltd and Riddleside Ltd, shall for convenience be referred to cumulatively as the FDRR companies. The issued share capital in the FDRR companies is owned by a company called Harts Investment DAC (HIL). The third defendant was a director of HIL until 2019 but is not a shareholder in either HIL or the FDRR companies.

5. The third defendant complains that he was not put on notice of the proceedings nor of the application to restrain payment out in advance of the proceedings issuing or the application being made. He makes no claim on the sum of stg£4.5 million due to be paid to the first defendant or to companies controlled by him. On becoming aware of the proceedings and of the order, the third defendant immediately offered to agree to the monies being placed in an escrow account under the control of the first defendant's and/or the plaintiffs' solicitors in which he, the third defendant, would have no further involvement. More fundamentally, he claims that the proceedings do not make out a stateable claim against him as, not only is he not a trustee of the alleged trust, the plaintiffs and the first defendant agree that the plaintiffs' involvement in providing funds for the purchase of the Derry lands was deliberately concealed from him. Insofar as the plaintiffs make any claim to an interest in the unsold Derry lands, the High Court has already refused jurisdiction in respect of this dispute as it relates to property situated outside of the State and within the jurisdiction of the Northern Ireland courts where the plaintiffs have issued further proceedings. Consequently, these proceedings relate only to the portion of the proceeds of sale of the sold Derry lands due to be paid to the first defendant over which the third defendant makes no claim.

6. The plaintiffs, on the other hand, contend that once the third defendant became aware of their involvement and of the existence of the alleged trust, he owed some sort of duty to them, and that the settlement reached between the first defendant and the third defendant in April 2020 was designed to unlawfully exclude them from the benefit of the Derry lands. The plaintiffs contend that they are entitled to proceed to trial in respect of this matter and to have

the benefit of the procedures associated with a plenary trial in making out their case against the third defendant.

Applicable Law

7. Both sides were largely agreed as to the legal principles applicable to an application to strike out proceedings, although they differed as to the emphasis placed on certain aspects of the case law and as to the appropriate outcome when those principles are applied to the facts of this case. As the legal principles are well established and have been restated in a number of Supreme Court decisions, I do not propose to quote extensively from them, but will identify the judgments relied on by either party to support the propositions for which they argued.

8. Firstly, the jurisdiction of the High Court to strike out proceedings arises under two different headings – under the Rules of the Superior Courts and, in particular, O. 19, r. 28, and under the court's inherent jurisdiction. Order 19, rule 28 provides as follows:-

> *"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."*

9. The jurisprudence establishes that this jurisdiction is only exercisable where, on the face of the pleadings, no reasonable cause of action is made out against the party seeking to have the proceedings struck out or that the action is frivolous or vexatious (see *D.K. v. King* [1994] IR 166). In reaching a determination on this issue, the court is confined to a consideration of the case as pleaded (*ACC Bank Plc v. Cuniffe* [2017] IECA 261). 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.

10. The other element of the court's jurisdiction to strike out proceedings arises from its inherent jurisdiction to prevent an abuse of court processes. Whilst there is a considerable overlap between the two jurisdictions, one of the key differences is that in an application to strike out pursuant to the court's inherent jurisdiction the court can engage in a limited analysis of the facts for the purposes of deciding whether the relief should be granted (see *Coleman v. Ireland* [2022] IEHC 17). Thus, unlike an application under O.19, r.28, it is not confined to a consideration of the pleaded case. However, the court should not engage in a roving examination of the asserted facts or of the plaintiffs' ability to prove them. Instead, the jurisdiction to engage in this limited analysis of the facts is primarily related to documentary evidence (see *Keohane v. Hynes* [2014] IESC 66). Even then, the court should 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 (see *Keohane v. Hynes*).

11. It is perhaps notable that the restrictive approach set out by the Supreme Court in *Keohane* is subject to two implied but potentially important qualifications which merit being set out in full (from paragraph 6.9 of the judgment):-

> *"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."

From this, it would seem that a mere assertion for which it is not credibly suggested that supporting evidence might become available does not have to be treated as a proven fact. Further, although it is clear from Clarke J.'s judgment that, in general the approach a court should take to an application of this nature of must be cautious and restrictive, there may be *"unusual circumstances"* in which it is nonetheless appropriate for a court to engage with the facts. As will be apparent later in this judgment, I am satisfied that this is a case in which the circumstances are sufficiently unusual to warrant the court engaging with the facts, at least on the limited basis suggested.

12. There are certain overarching principles which apply no matter which jurisdictional heading is invoked. In either case, the onus is on the third defendant as the moving party to establish that the relevant threshold has been met (see *Salthill Properties Ltd v. Royal Bank of Scotland* Plc [2009] IEHC 207). The threshold is a high one as the default position is that the proceedings should go to trial (see *Moylist Construction Ltd v. Doheny* [2016] 2 IR 283). Thus, the court should only make an order striking out proceedings where it is clear that there is no real risk of injustice in doing so. 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).

Factual Background

13. Bearing these legal principles in mind, I now propose to give an overview of the relevant facts. In doing so, I must bear in mind that, for the most part, the court must assume the facts pleaded by the plaintiffs are capable of being proved even when they are strenuously disputed, most notably in these circumstances by the first defendant. However, there is a

striking feature to this case which, in my view, makes it quite exceptional when compared to the various authorities which have been cited. This feature is that the trust relied on by the plaintiffs came about in circumstances where the first defendant, the plaintiffs' father and the plaintiffs deliberately structured their side of the transaction so as to conceal the plaintiffs' involvement from the third defendant and to mislead him into believing that the funding in fact provided by the plaintiffs was provided by the first defendant. The relief they claim is equitable in nature and a significant issue must arise as to whether such relief could ever be granted as against the third defendant when it is based on entitlement said to arise out of a deliberate strategy adopted to mislead the third defendant as to material facts concerning the proposed joint venture.

14. Further, it is notable that, although the first named plaintiff swore an affidavit to ground the *ex parte* application made in September 2021 to restrain the defendants from distributing part of the proceeds of sale of the Derry lands, neither plaintiff has sworn an affidavit in response to the third defendant's motion. Instead, their solicitor has sworn a replying affidavit apparently on the basis that the affidavit deals largely with the construction of documents. Given that the same documents are discussed by the first defendant in the affidavit she swore to ground the *ex parte* application (and indeed in affidavits sworn by her for the purposes of earlier proceedings), it is not entirely clear why a different approach was adopted on this motion. This approach is unsatisfactory in many respects in light of various aspects of the first plaintiff's affidavit which are contradicted and impugned both by the first defendant in a replying affidavit to the plaintiffs' motion and by the third defendant in the course of this application. I also accept the criticism of the solicitor's affidavit made on behalf of the third defendant in that, without having established any means of knowledge, the solicitor proceeds to impugn the third defendant's motives in his dealings with the first defendant. This is done notwithstanding an averment (at para. 20) in which the solicitor acknowledges that neither he

nor the plaintiffs *"can challenge anything which Mr. Wagner claims occurred solely between him and the first named defendant"*. Consequently, I have not paid much heed to the adverse inferences which the solicitor seeks to draw.

15. In order to understand the dispute underlying these proceedings, it is necessary to look at the role played by an individual who is not a party thereto, namely the plaintiffs' father, John McCann. Mr. McCann was a property investor and developer with interests in projects in various jurisdictions including this State, Northern Ireland and the USA. The first defendant originally worked as a civil engineer and met Mr. McCann in that capacity. The two men became involved in some joint property ventures in the USA when the first defendant was living there. The first defendant complains that Mr. McCann reneged on an agreement in the USA as a result of which the first defendant was left with a significant loss on foot of a security which included a personal guarantee that he had provided. In essence, the first defendant's position is that Mr. McCann owes him a significant amount of money. Despite this, on his return to Ireland, the first defendant continued to do business with Mr. McCann.

16. By October 2013, NAMA had secured a €114 million judgment against Mr. McCann. In an affidavit sworn by the first defendant for the purposes of related special summons proceedings (2020/292 SP), he asserts that, following this judgment, Mr. McCann asked him to assist him in a *"caretaker"* capacity *"in order to shield certain of his affairs from creditors"*. The first defendant states that he agreed to do this and held a number of interests on trust for Mr. McCann. Mr. McCann entered into an individual voluntary arrangement in Northern Ireland - which I understand to be some sort of personal insolvency arrangement - in February 2018. There is some suggestion in the papers that Mr McCann's continued involvement in property transactions was or would be contrary to the terms of his IVA.

17. Between these two events – the NAMA judgment against Mr. McCann and his IVA – the Derry lands became available to purchase through NAMA. The first defendant states that

he was in discussions with Mr. McCann in respect of these lands from late 2015. There is some conflict between the first defendant and the third defendant as to who was the prime mover in respect of proposals for the Derry lands, but either way the first and third defendants were introduced to each other through a mutual acquaintance.

18. The initial proposal seems to have been that they would each raise 50% of the finance for a 50% stake in a joint venture relating to the lands. However, the first defendant ran into difficulty raising his share as a result of which some stg£3.25 million was borrowed from a third party. This borrowing was registered as a charge on the folios and has since been discharged and so is not material to the ongoing dispute. The bulk of the monies put into the project by the first defendant was a sum of stg£1.2 million provided by the McCanns. The balance of the purchase price was provided by the third defendant and it seems that ongoing funding in relation to the cost of securing planning permission for the lands was provided through companies associated with the third defendant.

19. From the outset, it appears that the third defendant made it clear that he would not get involved in business with the first defendant if Mr. McCann were also involved. In an affidavit sworn in proceedings taken by the plaintiffs against the first and second defendant, the first defendant states:-

> *"At the outset, however, he made it very clear that he would not proceed if John McCann were a partner… John McCann was made aware of this explicitly right from the very outset (paragraph 13)*
>
> *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 were to have any involvement, it would be peripheral and it would be of the utmost importance that it remained confidential (paragraph 14).*

Furthermore, although John McCann and his advisers were well aware that Simon Wagner was adamant that John should have no interest in the Derry joint venture, correspondence was written to Simon and his corporate interests… (paragraph 25)."

This position is also reflected in a memorandum prepared by the first defendant in January 2019 for the purposes of discussions with the plaintiffs' tax advisor (a Mr. Harty) which is exhibited by the first plaintiff in her grounding affidavit of 8 September 2021.

20. More significantly, it is entirely consistent with the first plaintiff's own averments to the effect that the plaintiffs' involvement in the transaction was to be kept secret from the third defendant. At para. 16 of her grounding affidavit, she states as follows:-

"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."

Further, in correspondence issued by the plaintiffs' solicitors to the third defendant's solicitor on 29 September 2021 (i.e. after the plaintiffs had obtained their *ex parte* order), the plaintiffs' solicitor states as follows:-

"We understand that it was agreed between our Clients, John McCann and the First Named Defendant that our Client's interests would be held in trust by the First Named Defendant, without the express knowledge of the Third Named Defendant."

21. The third defendant has expressly averred that he had no dealings with the plaintiffs or their father in respect of the underlying dispute and that neither the plaintiffs nor the first defendants told him or the FDRR companies that the plaintiffs had provided funds to the first defendant. Therefore, it is undisputed that the plaintiffs' involvement in the transaction through the provision of funds to the first named defendant was deliberately withheld from the third defendant who was led to understand that the first defendant was providing the funds himself.

In addition, the third defendant had told the first defendant that he was not prepared to become involved in a commercial relationship concerning the Derry lands if Mr. McCann was also involved. The plaintiffs' counsel has argued that this did not involve concealing information from the third defendant, rather it was a case of not disclosing that information. I do not accept this characterisation. A decision not to disclose relevant information which the parties know to be material to the third party's willingness to be involved is tantamount to concealing that information from him.

22. I note in passing that there is a dispute between the plaintiffs and the first defendant as to the identity of the member of the McCann family with whom the first defendant dealt and how the sum of stg£1.2 million was acquired. The first defendant claims that, until 2018, he dealt exclusively with Mr. John McCann and not with the plaintiffs. He states that a loan for stg£1.2 million was provided by an individual I shall refer to as SB which was not for the exclusive benefit of Mr. McCann but was, instead, jointly for the benefit of himself and Mr. McCann. In contrast, the plaintiffs plead that, as the first defendant was unable to produce his share of the purchase price, they agreed with him that they would provide it in exchange for 50% of his interest in the lands. They plead that they borrowed the money from SB and that the loan was secured by a charge on a hotel property. When this money was paid to the vendors of the Derry lands as part of the purchase price, a trust was created in their favour. The first defendant's account, if it is correct, explains why he disputes the existence of the trust and asserts that this transaction has to be viewed as part of the overall history of dealings between himself and Mr. McCann. However, for the purposes of this motion and for reasons already explained, the court has to take the plaintiffs' pleaded case at its height, i.e. the court must assume that they provided monies to the first defendant as a result of which the first defendant holds 50% of his interest, whatever that might be, on trust for them.

23. Subsequent to the purchase itself, three events of note occurred. The first was an agreement entered into on 23 May 2018 between the first and second defendants, on the one part, and Mr. McCann and the plaintiffs, on the other. As noted above, the Derry lands were purchased in the name of the FDRR companies. The plaintiffs describe their interest in the Derry lands as being held in a *"complex ownership structure"*. The first plaintiff acknowledges (at para. 17 of her affidavit) that they understood the third defendant was responsible for the design and implementation of this structure which involved *"a number of companies, inter-company loans and charges"*. In fact, the first plaintiff states, quite bluntly, *"frankly we were not concerned with such details"* on the assumption that if the structure optimised the first defendant's investment, it would also optimise theirs.

24. Under clause G of the May 2018 agreement headed *"Fadeford Limited, Detailride Limited, Rusticglade Limited and Riddleside Limited"*, the first defendant declared:-

> *"Colin Hereby Declares that he holds 50% of his shareholding in Fadeford Limited, Detailride Limited, Rusticglade Limited and Riddleside Limited, 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."*

The plaintiffs plead that this agreement confirmed the existence of the trust which had been created in 2016. However, a difficulty immediately arises because the first defendant did not hold and had never held any interest or shareholding in the FDRR companies. In his replying affidavit to the *ex parte* application, the first defendant states that he had made it clear in the days prior to signing this agreement that he did not have any shareholding the FDRR companies. Instead, the first defendant's rights are described as being sub-participation rights in loans issued by an Irish company which, in turn, had rights to certain cashflows originating from the FDRR companies. Separately, the first defendant challenges the validity of the May 2018 agreement but, as the plaintiffs' case must be taken at its height, the court must assume

that this agreement, which either acknowledges or creates a trust in favour of the plaintiffs, is valid. For the same reasons I should assume that the trust was created in 2016 and formally acknowledged in the 2018 deed rather than being created by the 2018 deed – although I don't see that this difference is material to the case against the third defendant.

25. Secondly, the third defendant asserts – and the first defendant does not dispute – that it was originally envisaged that the development of the Derry lands would be a joint venture for which each of them would provide 50% of the necessary funding. As I understand it, this included not just the acquisition costs but the subsequent costs involved in obtaining planning permission for the development of the lands. It was also agreed that the investment structure was to be determined by the third defendant. In the event the first defendant was unable to finance his portion of the joint venture such that, apart from a third party loan (which has since been repaid), the bulk of the funding was provided by the third defendant or by entities associated with him. Consequently, the first and third defendant and companies associated with him entered into an option agreement dated 13 December 2018 under which, on the provision of additional financing, the first defendant would acquire a sub-participation interest in a loan note issued by HIL to a Gibraltar-based company, Malleus Holdings Ltd, a company associated with the third defendant. The option agreement was entered into between a company called TBPI Ltd and Malleus Holdings Ltd and a side letter of the same date makes it clear that the first defendant was the ultimate beneficial owner of TBPI Ltd and the third defendant the ultimate beneficial owner of Malleus.

26. The third defendant relies, in particular, on clauses 3.3 and clause 8 of the option agreement. Clause 3.3 provides as follows:-

> *"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."*

A change of control is defined in the agreement as circumstances where the first defendant would cease to legally and beneficially own and control 100% of the issued shares of TBPI, the votes attaching to those shares and control the composition of the board of directors of that company.

27. Clause 8 of the option agreement, headed *"Assignment"*, provides as follows:-

> *"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."*

28. The plaintiffs, on the other hand, point to the option period as defined in clause 1.1 which ran until 31 March 2019 and the fact that under clause 3.3 the option or any unexercised portion of it lapsed and ceased to exist if it was not exercised by the end of the option period. Thus, the plaintiffs argue that the option agreement had no continuing relevance after March 2019. The third defendant argues that even though the option period had expired the rest of the agreement remained valid and binding on the parties. I note that the settlement agreement discussed below is framed in a way which suggests that TBPI Ltd. had already exercised some rights under the option agreement although this was an issue which remained unclear at the hearing.

29. Thirdly, in February 2020, the third defendant became aware of the plaintiffs' alleged involvement in the Derry lands through correspondence from the plaintiffs' solicitors to the FDRR companies in which it was asserted that the first defendant held a 50% interest in the FDRR companies of which 25% was held in trust for the plaintiffs. The third defendant states that this assertion is clearly mistaken as the first defendant never had any interest in the FDRR

companies. The third defendant states that he is unaware of the contents of any discussions had between the plaintiffs and the first defendant and whether, as alleged, the first defendant misled the plaintiffs as regard to his interests in the FDRR companies. Either way, the third defendant takes the view that it is not a matter of concern to him as a misrepresentation by the first defendant in this regard would not give the plaintiffs a claim to a beneficial interest in either the Derry lands or the FDRR companies.

30. However, the raising of these issues alerted the third defendant to the first defendant's breach of clause 8 of the option agreement and what the third defendant regards as the first defendant's misrepresentation regarding the involvement of the plaintiffs/their father in the provision of funding for the acquisition of the Derry lands. Consequently, on 21 February 2020, solicitors for Malleus wrote to the first defendant and TBPI formally serving notice of invalidation, or, alternatively, of termination of the option agreement and threatening legal action.

31. This ultimately led to a settlement agreement reached between the first and third defendants, the two companies party to the option agreement and another company, namely Cordale Management Ltd, on 10 April 2020. Under the settlement agreement, the first defendant and TBPI acknowledged that they had made misrepresentations and committed material breaches of the option agreement as set out in the solicitor's letter of 21 February 2020 such that the purported exercise of the option by TBPI was void *ab initio*. The terms of settlement require the transfer by the first defendant of all shares in TBPI, the assignment of all intellectual property related to the Derry lands and the cancellation of any related rights to cashflows in exchange for a sum of stg£8.8 million (made up of a cash payment of stg£7.1 million and debt forgiveness of stg£1.68 million) and agreement that the first defendant and Cordale would continue to be retained by the third defendant as planning and development consultants in respect of the project. Clause 12 of the settlement agreement recites that the

settlement agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, representations and understandings between them relating to its subject matter.

32. Meanwhile, planning permission had been obtained and a portion of the Derry lands sold under two separate contracts in August 2019. The purchase monies, amounting in total to stg£25 million, were paid in tranches between March 2020 and September 2021. After discharge of the outstanding loan and of various costs, amounts were paid – or were due to be paid - to the first defendant, again in phases, to discharge the sum of stg£7.1 million due to him under the settlement agreement. At this stage, a dispute arose between the plaintiffs and the first defendant as the plaintiffs allege the first defendant retained monies that should have been paid to them. The first defendant contends the retained monies were offset against monies due by John McCann to him. The first defendant also formally denied the existence of the trust in favour of the plaintiffs.

33. The first plaintiff in her grounding affidavit states that the plaintiffs only became aware in February 2020 that there would be a controversy about their claimed 25% interest in the Derry lands. According to an email dated 14 February 2020 from the plaintiffs' tax advisor to their solicitor, the tax advisor had contacted the solicitor who acted as the corporate secretary to the FDRR companies who *"was shocked"* to learn about the plaintiffs' claimed 25% interest. In response, that solicitor told their tax advisor that, on paper, the first defendant had no interest in the FDRR companies and that the first defendant *"could be in breach of covenants and the 50% shareholder could walk off with the lot"*. Although the first plaintiff in her affidavit states that this was *"the first indication"* that the third defendant *"would challenge or in some way dispute the entitlement that I and my sister had in the proceeds of the Derry lands"*, I regard this averment as disingenuous where the same deponent in the same affidavit acknowledges that she and her sister understood that the third defendant was to be kept unaware of the trust

and, by extension, of their involvement in the Derry lands. Unsurprisingly, in a subsequent email on 20 February 2020, the plaintiffs' tax advisor advised them that the third defendant *"does not seem to have received your and Tara's involvement in the Derry transaction well"* and recommended that they contact their solicitor.

34. There is one other factual issue which should be mentioned. In an affidavit sworn in other proceedings the first defendant exhibited a chain of emails dating from August 2018 which he asserted strained his relationship with the third defendant. Without adducing any evidence indicating that the third defendant was ever aware of these emails, the plaintiffs' solicitor suggests that the third defendant entered into the option agreement of December 2018 "*specifically when he had notice of the trust*". This is not actually reflected in any plea made in the plaintiffs' pleadings. Further, as I read the emails they do not actually support the inference the solicitor seeks to draw.

35. Firstly, there is an email headed "*Coilin McManus & the McCanns*" from the plaintiffs' tax consultant to a solicitor whose firm acted as company secretary to the FDRR companies sent at 15:51 on 28 August 2018. In that email the tax consultant lists the FDRR companies and states that the first defendant had advised "*that he has no personal interest in any of the companies and that any shares that are registered in his name are in fact held for the benefit of*" the plaintiffs and referred to the May 2018 agreement. He indicated that the parties were "*keen to ensure that the company registry reflects all of the above*" and asked the recipient to give him a call. The solicitor replied 10 minutes later stating that he would need to take instructions from the first defendant prior to responding.

36. Before any further response was received from the solicitor, the tax consultant sent him another email at 17:13 on the same date. In that email he apologised stating that his "*earlier email is incorrect and you should disregard it. I mixed up other correspondence that I have in relation to other McCann/McManus interests*". Three minutes later the solicitor replied stating

simply "*thanks*" which was, in effect, an acknowledgement of the retraction of the first email. The following day the solicitor sent an email to the first defendant to which the chain of emails from the previous day was attached, noting that he was due to speak to the third defendant that evening and inviting the first defendant to call him. The first defendant replied by email the same afternoon confirming the fact that the first email had been sent in error. He stated that the tax consultant "*was incorrect in the email sent out yesterday as it was relevant to other companies that were part of a severance agreement between myself and John*". Thus, both the tax consultant and the first defendant not only withdrew the original email but in doing so positively asserted that the error was not just in the sending of the email but rather that the contents were erroneous and that it was intended to refer to other matters or companies that were part of the on-going dealings between the McCanns and the first defendant. Apart from the fact that the third defendant was not a party to these emails and there is no evidence that he saw them at the time, it is difficult to understand how a statement that was retracted twice as being a substantive error could be said to have put him on notice of the alleged trust.

Legal Proceedings

37. To date, four sets of legal proceedings had been issued by the plaintiffs in respect of these transactions. In November 2020, the plaintiffs issued special summons proceedings against the first and second defendants (2020/292 SP.). Those proceedings sought, *inter alia*, declarations that the defendants were trustees of the plaintiffs' properties, relying on the terms of the 2018 agreement, and orders that the first defendant holds 50% of his shareholding in the FDRR companies in trust for the plaintiffs. Affidavits were exchanged in which the first defendant denied the existence of the trust, impugned the validity of the 2018 agreement and averred that he did not hold any shares in the FDRR companies. I understand that these proceedings have since been adjourned from time to time in the Master's Court.

38. In light of these denials, the plaintiffs issued plenary proceedings against the first and second defendants seeking various equitable and declaratory reliefs (2021/4531 P)("the first plenary proceedings"). On 13 July 2021, an *ex parte* application was made on behalf of the plaintiffs in the Chancery List for short service of an injunction application to restrain the first and second defendants from interfering with the plaintiffs' rights as beneficial owners of a quarter share in the lands or the FDRR companies or the proceeds of sale. That application was refused by Allen J. on 14 July 2021. Although the order simply states that the application for short service was refused, the affidavit evidence suggests that the refusal was on three grounds, two of which – a lack of urgency and a delay in making the application – went exclusively to the intended interlocutory application. The third reason for refusal was more fundamental and related to the fact that the principal relief sought by the plaintiffs in the first plenary summons was for a declaration in respect of the beneficial ownership of the Derry lands. As those lands are situated outside the State, Allen J. concluded that the issues raised were exclusively within the jurisdiction of the courts in Northern Ireland. Apparently, a notice of appeal was lodged on the 16 July 2021 but the court was not provided with information as to the progress, if any, of that appeal. The first plaintiff avers that the first plenary action was discontinued but the first defendant contends that a search on the Courts Service website on 10 October 2021 showed that it was still extant on that date.

39. The third set of proceedings and the second set of plenary proceedings is this action which is also the first time the third defendant was named as a defendant. I will examine in more detail below the claim made against the third defendant.

40. Finally, in her affidavit grounding the *ex parte* application sworn on 8 September 2021, the first plaintiff states (at para. 58) that proceedings had been issued in Northern Ireland to confirm the plaintiffs' 25% ownership of the unsold lands as a result of which she confirmed that these proceedings are confined to seeking the plaintiffs' share of the proceeds of sale of

the sold Derry lands. In fact, the first plaintiff's averment as to the existence of proceedings in Northern Ireland was also inaccurate as proceedings were not issued by the plaintiffs in Northern Ireland until 9 December 2021, some three months after she had sworn to their existence. In addition to the first and second defendants, the FDRR companies are named as defendants to the Northern Ireland proceedings, but the third defendant is not a named party. Although nothing of significance in respect of this application turns on the date on which the Northern Ireland proceedings were issued, it is plainly unsatisfactory that an *ex parte* application was moved on the basis of an affidavit which states, as fact, matters which are manifestly not correct. Were it not well-established that the case as pleaded by the plaintiffs must be taken at its height in an application of this nature, the court would otherwise be cautious about accepting the veracity of the first plaintiff's averments when she has casually sworn to something which is simply not correct.

Case as Pleaded Against the Third Defendant

41. Central to the third defendant's application is the contention that the plaintiffs' pleadings do not make out a proper cause of action as against him. The plenary summons issued on 12 August 2021 seeks various relief, mostly against the first defendant. That relief relates primarily to the alleged trust and is expressed variously in the forms of declarations as to the plaintiffs' entitlement to a one-quarter share/a beneficial interest in the FDRR companies, the venture, the proceeds of sale, etc. The only relief sought specifically against the third defendant requires him, along with the other defendants, to disgorge funds received by him which are claimed to be the property of the plaintiffs and an order restraining him from interfering with the plaintiffs' claimed beneficial interest. The statement of claim is dated 16 December 2021 and was served after the third defendant's motion had issued on 1 November 2021. Consequently, the statement of claim is framed somewhat differently to the plenary summons

and takes account both of information contained in the first defendant's replying affidavit of 13 October 2021 and the third defendant's affidavit grounding this motion.

42. Put baldly, the plaintiffs' assert that by agreement with the first defendant they provided him with a sum of stg£1.2 million which he invested in the Derry lands, as a result of which he holds one-half of his interest in trust for them. Details of this transaction are set out at paras. 13 to 18 inclusive of the statement of claim. It is then pleaded at para. 19 that the third defendant *"knew or ought to have known of the existence of the trust"* and, at para. 20, that *"by virtue of his relationship with the first and second defendants"*, the third defendant *"had actual 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 interest of the plaintiffs in the proceeds of the Derry lands"*.

43. It will be noted that, apart from the assertion of actual or constructive notice by virtue of the third defendant's relationship with the first and second defendants, no factual basis is pleaded for the assertion that the third defendant knew or ought to have known of the existence of the trust or of its terms. Moreover, these pleas are completely contrary to the averment made by the first plaintiff in the affidavit relied on to ground the *ex parte* application and the contents of their solicitor's correspondence to the effect that the provision of funding by the plaintiffs and the resulting relationship between the plaintiffs and the first defendant was deliberately not disclosed to the third defendant so that he did not actually have the knowledge of the trust which the pleadings now seek to impute to him.

44. It is then pleaded that the third defendant was responsible for the design and implementation of the ownership structure, a matter in which the plaintiffs did not participate and of which they had no knowledge, and that the Derry lands were purchased by the FDRR companies (paras. 21 and 22 of the statement of claim).

45. From paras. 23 to 35 inclusive, the statement of claim deals with the 2018 agreement between the plaintiffs, their father and the first defendant and the securing of planning

permission for and the sale of a portion of the Derry lands. The only references to the third defendant are in passing as the undisputed owner of 50% of the Derry lands. Particulars of negligence, breach of duty, breach of fiduciary duty and breach of trust are pleaded as against the first defendant.

46. There then follows a section of the statement of claim from para. 37 headed *"The Third Named Defendant"*. Paragraph 37 repeats the pleas at paras. 19 and 20 that the third defendant had actual or constructive notice of the trust and is fixed with knowledge thereof. This is followed by a factual recitation of the events in August 2018 involving the plaintiffs' tax advisor and the FDRR companies' secretary; the entering into the December 2018 option agreement; the plaintiffs' solicitor's correspondence in February 2020 to the FDRR companies' secretary; the April 2020 settlement agreement and the subsequent solicitor's correspondence. The only paragraph in the series of pleas which could be construed as containing a legal plea as distinct from a purely factual one is para. 42 which is as follows:-

> *"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."*

47. Implicit in this is the assertion that, once the third defendant became aware of the trust - which until that point had been deliberately concealed from him - he *"prevailed"* on the first defendant to do something which was in breach of the first defendant's obligations towards the plaintiffs.

48. Paragraph 51 then sets out a series of propositions which it is contended flow from the preceding factual pleas. I will look at these in turn. Firstly, at (a), it is contended that, if the plaintiffs had not named the third defendant as a defendant, he would not have admitted that stg£4.5 million was held by him or the FDRR companies as the proceeds of sale of the Derry lands. Quite frankly, this is an attempt at retrospective justification for having sued the third defendant which is entirely unjustified in circumstances where the plaintiffs did not send the third defendant any correspondence prior to the issuing of proceedings nor prior to the making of the *ex parte* application. A failure to make an admission is only relevant as a justification for issuing proceedings if a party has been called upon and refused to make the admission in question.

49. Secondly, at (b), the plaintiffs query who gave the solicitors now acting for the third defendant instructions on behalf of the FDRR companies and infer that it was the third defendant. Even if this were so, it is difficult to see how it raises or contributes to any cause of action that the plaintiffs may have against the third defendant personally. Thirdly, at paras. (c) and (d), the plaintiffs query the validity of the 2018 option agreement on the grounds that the lands were purchased in 2016, not in 2018, and that the first defendant did not have an interest in or control over TBPI Ltd at the time the agreement was entered into. Apart from the fact that the plaintiffs are strangers to the agreements that were reached between the first defendant and the third defendant in both 2016 and 2018, and to any changes in circumstance which may have resulted in changes to the original agreement, it is very difficult to see how these issues are relevant to any cause of action that the plaintiffs might have against the third defendant and no particular connection is pleaded.

50. Only one of these paragraphs hints at a cause of action against the third defendant. This is para. (e) which links back to the plea made at para. 42. It states as follows:-

> *"(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;"*

51. Paragraph 51 concludes by reserving the plaintiffs' right to plead further wrongdoing against the third defendant pending receipt of particulars, discovery, etc. and, rather oddly, by claiming that, if the third defendant *"demonstrates to the court that he has no liability to the plaintiffs"*, he can claim an appropriate indemnity from the first and second defendants. Apart from the fact that in substantive proceedings the onus of proof would be on the plaintiffs to prove that the third defendant is liable to them and not the other way around, it is no answer to the joinder of a defendant, against whom no cause of action is pleaded, to say that he can seek an indemnity from other co-defendants. I acknowledge, of course, that there is provision under s. 78 of the Court of Justice Act 1936 for a court in civil proceedings to order that a defendant against whom a plaintiff has succeeded shall, in addition to the plaintiff's own costs, also pay the costs that the plaintiff is liable to pay to the successful defendant against whom the plaintiff has failed. However, s. 78 does not operate automatically and the court may only make such an order where, having regard to all of the circumstances, it thinks it proper to do so. The Supreme Court has indicated that, where there was a genuine alternative claim and alternative potential liability between two defendants, the court should generally exercise its discretion to make an order over for the costs of the successful defendant against the unsuccessful defendant (*O'Keeffe. v. Russell* [1994] 1 ILRM 137). It is by no means clear that an unsuccessful defendant would be made liable for a successful defendant's costs if the plaintiff had not pleaded a stateable cause of action against the successful defendant. This of course begs the question as to whether a cause of action, known to law, has been pleaded against the third defendant.

Inducement of Breach of Trust

52. Clearly, the plea that the third defendant was or ought to have been aware of the trust so as to be fixed with constructive notice of it is unsustainable in light of the first plaintiff's own averment and the plaintiffs' solicitor's correspondence averted to above. Although the court is, in principle, obliged to take the plaintiffs' case at its height, in my view, it would be contrary to public policy to allow the plaintiffs to rely on a plea of either actual or constructive notice in light of their own averment of having deliberately concealed from the third defendant the very thing of which they now seek to assert he should be fixed with notice. The court cannot be expected or required to take both of two manifestly contradictory positions asserted by a plaintiff as being correct and capable of being proved. However, if I am wrong in my view on this issue as regards O.19, r.28, the contradictory averments and correspondence is certainly something of which the court can take cognisance in even a limited examination of the facts under its inherent jurisdiction.

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 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. Including the money allegedly provided by the plaintiffs, the first defendant's total investment in the project seems to have been less than stg£1.3 million. The settlement had a value to him of stg£8.8 million which represents a substantial return on his original investment. If, as the plaintiffs claim, they are entitled to 50% of the first defendant's interests, this also represents a sizable return on their investment on fact in excess of 300%.

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 adopted the approach that, unless the claim was *"absolutely dead in the water"*, the plaintiffs had to be allowed to proceed and that, as long as he was able to debate the third defendant's "*points*", the matter must go to trial. However, when pushed on

key issues, counsel was unable to provide any answers as to what exactly was the basis for the plaintiffs' case against the third defendant. In short, he was unable to provide any clear legal basis for the assertion that the third defendant, not a trustee and not on notice of the alleged trust, was nonetheless under a legal or fiduciary obligation to the plaintiffs when he discovered that he had been, at best, misled, but at worst, deceived as to their involvement in his business dealings with the first defendant. He 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.

57. In this instance, the ostensible cause of action is inducement of breach of trust. Counsel for the plaintiffs put it in various ways but ultimately summarised it as the contention that, if the third defendant does something *"in knowledge of the trust"* to defeat the plaintiffs' property rights, this amounts to a tort. When the court asked whether there was authority for the existence of such a tort, counsel for the plaintiffs pointed to an analogous line of case law in

respect of the well-established tort of inducement of breach of contract. Counsel for the third defendant asserted strongly that there was no tort known to Irish law of inducement of breach of trust. Equally, there is no such tort known to UK law, although counsel flagged the existence of some academic commentary suggesting that such a cause of action should be recognised. The proposition that the third defendant is obliged to continue in a joint venture with the first defendant in order to protect the claimed interests of the plaintiffs – about whose involvement he was misled - is a startling one. In the absence of an established cause of action or of a known wrong being pleaded against the third defendant I have great difficulty in accepting that the pleadings disclose a reasonable cause of action against the third defendant.

58. An additional difficulty for the plaintiffs arises from the fact that the plenary summons and statement of claim do not clearly identify the property the subject of the alleged trust. The pleadings, the correspondence and the affidavits sworn on behalf of the plaintiffs vary in describing their interest as being an interest in property, an interest in an investment, in a transaction, in shares in companies, in a joint venture and in the proceeds of sale. It is invariably described as a share of the first defendant's interest, but again, the description of what that interest is in changes continually. As counsel for the third defendant argues, if a party wishes to exert the existence of a trust, they need to identify what the property claimed to be the subject of the trust is. It is an essential element of a trust that the subject matter be certain. When pressed, counsel for the plaintiffs defined the trust property as being a 25% undivided share of the Derry lands. That being so, the trust property lies wholly outside the jurisdiction of this State and within the jurisdiction of the courts in Northern Ireland. The plaintiffs have proceedings in being in Northern Ireland, asserting their entitlement to a beneficial interest in the Derry lands. Counsel argued that those proceedings relate to the title to the lands only and that the plaintiffs want to litigate matters relating to the trust in this jurisdiction. The only property with any connection to the trust in this jurisdiction is the proceeds of sale due to be

paid to the first defendant in which the third defendant claims no interest. There does not appear to be any support for the proposition that the plaintiffs can simply choose to litigate issues concerning the trust against the third defendant in this jurisdiction when the trust property lies outside the jurisdiction.

59. Thus, even if the plaintiffs had pleaded a recognised cause of action against the third defendant regarding the trust, it is difficult to see how the courts in this State would have jurisdiction over that cause of action. This point may be somewhat academic as I am satisfied that the plaintiffs have not pleaded a recognised cause of action against the third named defendant. Even if inducement of breach of trust could be categorised as coming within some broader – and necessarily more ill-defined – tort such as intentional infliction of economic harm or causing loss by unlawful means (neither of which had been pleaded), the plaintiffs would still face an uphill struggle to establish that such a cause of action had been made out on their pleadings (even assuming they can prove the facts as pleaded). Strikingly, the plaintiffs' pleadings do not assert that the third defendant did anything unlawful. At its height, the case is that the third defendant reached an agreement with the first defendant which terminated the first defendant's future interest in the joint venture concerning the Derry lands. Under that agreement, the first defendant received very significant consideration for the termination of his future interests in the project. If the plaintiffs are correct and they are entitled to 50% of the first defendant's interests, they too will have made a very handsome profit rather than having suffered any economic loss. In all of the circumstances, I am satisfied that the pleadings do not disclose a reasonable cause of action against the third name defendant.

Conclusions:

60. It will be apparent from the above analysis that I am of the view that the plaintiffs' pleadings do not disclose a reasonable cause of action against the third defendant. I have

reached that conclusion taking the plaintiffs' pleaded case at its height but disregarding the pleas to the effect that the third defendant had constructive notice of the trust in light of the first plaintiff's averments that their involvement was not disclosed to the third defendant who was led to believe that the sum of stg£1.2 million came directly from the first defendant and their solicitor's correspondence confirming that the plaintiffs, the first defendant and Mr McCann agreed that the plaintiffs' interest would be held in trust without the express knowledge of the third defendant. There is no tort of inducement of breach of trust known to Irish law. If such a tort were to be recognised, this is very unlikely to occur in a case where the existence of the alleged trust was deliberately kept secret from the proposed defendant.

61. If I am incorrect in the view I have taken as regards the court's entitlement to disregard those pleas for the purpose of O.19, r.28, I am in any event satisfied that they can be taken into account for the purposes of exercising the court's inherent jurisdiction. The exercise of the court's jurisdiction arises in circumstances where it is necessary to prevent an abuse of the court's processes. I am satisfied that the plaintiffs cannot assert a trust against the third defendant after having been part of a deliberate agreement to keep the existence of the trust from his knowledge and that to permit them to do so would be tantamount to an abuse of process.

62. Under this jurisdiction the court can conduct a limited examination of the facts in order to determine whether there is a credible basis for the facts as asserted by the plaintiffs. In this case the pleaded assertion that the third defendant knew or ought to have known of the trust or had constructive notice of the trust is contrary to the averments of the first plaintiff and to the plaintiffs' solicitor's correspondence. As it happens, the position asserted by the plaintiffs and their solicitor as regards this issue is broadly consistent with that averred to by the first defendant (there are disputed issues regarding the extent to which the first defendant claims to have been dealing with Mr McCann rather than the plaintiffs) and it is consistent with the

averments of the third defendant that he had no knowledge of the plaintiffs' involvement and understood the monies to have been provided by the first defendant. However, it is not necessary to rely on the averments of the first or third defendant in circumstances where the plaintiffs' own evidence reveals that to their knowledge their involvement was deliberately withheld from the third defendant. Consequently, I am prepared to make the orders sought under the court's inherent jurisdiction in addition to or as an alternate to making an order pursuant to Order 19, r.28.

63. In reaching this conclusion, I am mindful of the principles expressed in the authorities referred to earlier in this judgment. In particular, I am satisfied that no real injustice will be caused by striking out the proceedings in this jurisdiction against the third named defendant. There are two principal reasons why this is so. Firstly, the plaintiffs have extant proceedings in Northern Ireland regarding the ownership of the Derry lands which, counsel confirmed to me, is the subject matter of the alleged trust. Insofar as part of the lands have been sold, and some of the proceeds of sale which were due to be paid to the first defendant pursuant to the settlement agreement are within this jurisdiction, the plaintiffs can continue with their litigation against the first and the second defendant regarding those proceeds in this jurisdiction. The third defendant has made it clear he is not making any claim to those monies and, consequently, is not asserting any rights over the monies that are now the subject matter of the proceedings in this jurisdiction. Whilst the plaintiffs might wish to keep the third defendant in the proceedings in the hope that the utilisation of pre-trial procedures such as the raising of particulars and discovery might produce evidence which would be useful to them, they cannot keep the third defendant in the proceedings simply in the hope that something will emerge which would allow them to make a stateable claim against him when the existing pleadings do not disclose a reasonable cause of action against him.

64. Finally, whilst the application made by the third defendant is an application brought under the Rules of the Superior Courts, the underlying proceedings are ones based in equity. Both the declaration of a trust and the granting of any injunctive relief are equitable remedies. These proceedings arise because of steps taken by the third defendant to terminate a business relationship with the first defendant when he discovered he had been misled by the first defendant as to the plaintiffs' involvement in their business dealings. In addition, the plaintiffs and their advisors were aware of the fact that the third defendant understood he was doing business with the first defendant on the understanding that the funding provided by the first defendant was being provided by him and on his own behalf. 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. The plaintiffs were aware from the outset that knowledge of their involvement was being deliberately concealed from the third defendant. In those circumstances, it will be manifestly inequitable to allow them to maintain a case based on the proposition that, once the third defendant discovered their involvement which had been deliberately concealed from him by them and the first defendant, he was then under a fiduciary duty to protect their interests.

65. Strictly speaking, as I have found that the plaintiffs' proceedings do not disclose a stateable cause of action against the third named defendant, I will make the order requested under O. 19, r. 28. However, for completeness, I should state that, for the reasons already set out in this judgment, I am satisfied that the proceedings now brought by the plaintiffs against the third defendant are tantamount to an abuse of the court's processes and consequently I will also make the orders requested under the court's inherent jurisdiction deleting from the plenary summons and the statement of claim all relief sought against the third defendant.