THE HIGH COURT

COMMERCIAL

[2023] IEHC 18

Record No. 2021/3509P

BETWEEN

PATRICK KEARNEY AND KILMONA HOLDINGS LIMITED

PLAINTIFFS

AND

J&E DAVY, T/A DAVY AND KYRAN MCLAUGHLIN, TONY GARRY, BRIAN MCKIERNAN, BARRY NANGLE, DAVID SMITH, TONY O'CONNOR, FINBARR QUINLAN, JOSEPH MCGINLEY, FIONA HOWARD, DONAL O'MAHONY, ANTHONY CHILDS, PAT LYSTER, BARRY KING, BARRY MURPHY, EAMONN REILLY AND STEPHEN LYONS T/A THE O'CONNELL PARTNERSHIP

DEFENDANTS

JUDGMENT OF Mr. Justice Twomey delivered on the 18th day of January, 2023

INTRODUCTION

1. This is the second pre-trial application which has been dealt with by this Court in relation to a dispute over the sale of subordinated floating rate notes (the "Bonds") in Anglo Irish Bank by the defendants on behalf of the plaintiffs (referred to as "Mr. Kearney", for ease of reference). In the substantive proceedings (the "2021 Proceedings"), Mr. Kearney seeks to set aside his settlement agreement (which settled the 2015 Proceedings) with the defendants on the grounds that he was induced to enter that agreement by a fraudulent misrepresentation.

2. The first pre-trial application dealt with by this Court rejected Davy's application to require Mr. Kearney to provide Davy with further information regarding the claims against it. This Court refused that application on the grounds that Mr. Kearney had established a *prima facie* case of fraud against Davy and so it was appropriate to defer the giving of any further particulars of his claim, until after discovery, because of the clandestine nature of fraud (if it were to be proven).

3. This, the second pre-trial application heard by this Court, was heard on the 20th and 21st December, 2022. It is an application by some of the defendants to strike out Mr. Kearney's claim on the basis that it is bound to fail.

4. As noted below, the defendants have raised doubts as to whether Mr. Kearney was in fact induced by a fraudulent misrepresentation to settle the 2015 Proceedings. However, this Court refuses this application because, *inter alia*, the 2021 Proceedings allege fraud, and thus there exists the possibility of clandestine activity on the part of the defendants, combined with the fact that there is *prima facie* evidence of a lack of candour on the part of Davy, regarding the transaction in dispute. Accordingly, there is a possibility that clandestine activity/lack of candour on the part of the defendants may be concealing evidence which could come to light at trial. For this reason, this Court cannot say that it is '*clear beyond doubt'* that Mr. Kearney will not succeed, such that his proceedings should be struck out now, without a trial.

BACKGROUND

5. The background to Mr. Kearney's claim against all 17 defendants is set out in the judgment on the first pre-trial application heard by this Court in *Kearney & Anor v. J&E Davy T/A Davy & Ors* [2022] IEHC 95 at paras. 1 to 11 (the "First Judgment"). Accordingly, it is

not necessary to restate that background here. Definitions which are used in that judgment are also used in this judgment.

6. This pre-trial application is made on behalf of all of the defendants, bar the first named defendant ("Davy") and the seventh named defendant ("Mr. O'Connor"). The 15 other defendants were employees of Davy and/or occupied various roles in Davy and/or were members of a consortium/partnership called the O'Connell Partnership, which purchased the Bonds (For ease of reference in this jdugment, these 15 defendants are referred to as the "Defendants"). The Defendants have brought this pre-trial application in which they seek to have Mr. Kearney's case dismissed without a hearing. They seek the order pursuant to the inherent jurisdiction of the court, on the grounds that the proceedings are unsustainable and/or bound to fail (or in the alternative, on the basis of Order 19, rule 28 of the Rules of the Superior Courts on the grounds that the pleadings disclose no reasonable cause of action or that they are frivolous and/or vexatious or an abuse of process). In particular, the motion states that these orders are being sought having regard to the fact that the:

> *"claims made by the Plaintiffs in these proceedings directly contradict the pleaded case of the Plaintiffs"*

as set out in the 2015 Proceedings and Mr. Kearney's affidavit of 27th April, 2021.

7. In the 2021 Proceedings, Mr. Kearney claims that he signed the various documents dated 11th and 12th February, 2016, which comprised the settlement of the 2015 Proceedings (the "Settlement Agreement") because of a fraudulent misrepresentation which was made by two of the Defendants (Mr. Garry and Mr. Nangle) over the course of meetings held on the 21st and 22nd December, 2015 at the Merrion Hotel. This alleged fraudulent misrepresentation was to the effect that the purchaser of the Bonds, the O'Connell Partnership, had no connection with Davy, when in fact the members of the O'Connell Partnership were employees of Davy.

8. In seeking to dismiss the 2021 Proceedings, the Defendants rely on the terms of Mr. Kearney's affidavit of 27th April, 2021 (seeking interlocutory orders in the 2021 Proceedings) and in particular paragraph 3 thereof:

> "These proceedings concern Settlement Agreements which were entered into on the 12th February 2016 between the Plaintiffs on the First Named Defendant ("Davy") and on foot of which previous commercial High Court proceedings having High Court (Commercial) Record No. 2015/6180P between the Plaintiffs and Davy were compromised. As explained in greater detail below, **the Plaintiffs claim that the compromise of the previous proceedings** on the terms set out in the three separate Settlement Agreements dated the 11th and 12 February 2016 respectively ("the Settlement Agreements") **were procured by the fraudulent concealment by Davy** who at all material times acted as the Plaintiffs' financial adviser and agent in the sale of the Plaintiffs' Bonds which on Davy's advice the Plaintiffs sold to the Second named Defendant ("the O'Connell partnership") on foot of a written Agreement dated the 14th November 2014." (Emphasis added)

9. The Defendants claim that there are a number of inconsistencies in Mr. Kearney's allegation that he was *induced* into signing the Settlement Agreement by a fraudulent misrepresentation, such that his claim is bound to fail. In particular, they claim that a person cannot be deceived if he knows the truth and they say that Mr. Kearney did in fact *know* that employees of Davys *were members* of the O'Connell Partnership. Accordingly, they claim that he could not therefore have been induced to sign the Settlement Agreement, even if, taking his claim at its height, he was the recipient of a false misrepresentation that they *were not members.* Thus, the Defendants claim that Mr. Kearney could not have been induced to enter the Settlement Agreement on the basis of a fraudulent representation. Therefore, they claim that these proceedings seeking the setting aside of the Settlement Agreement are bound to fail.

10. It is common case that, in considering the dismissal of Mr. Kearney's claim based on affidavits and without an oral hearing, this Court must accept fully all averments pleaded and all assertions deposed to on behalf of Mr. Kearney. Thus, for example, this Court must assume, for the purposes of this application only, that it was fraudulently misrepresented to Mr. Kearney at meetings on the 21st/22nd December, 2015 that the O'Connell Partnership did not consist of employees of Davy.

11. To support the proposition that Mr. Kearney *knew* that the O'Connell Partnership constituted Davy employees, the Defendants rely primarily on the fact that on the 21st December, 2015, Mr. Kearney's solicitors received Replies to Particulars 3(a) dated 21st December, 2015 on behalf of Davy, which they say clearly shows that Mr. Kearney knew that the O'Connell Partnership consisted of Davy employees, such that Mr. Kearney's proceedings should now be struck out.

12. Notice for Particular 3(a), which was sought by Mr. Kearney, asked Davy:

> "Please identify the material facts upon which [Davy] bases its allegation that [Mr. Kearney] knew that in negotiations to enter into the loan agreement Tony O'Connor was acting not on behalf of [Davy] but on behalf of the O'Connell Partnership."

In its Reply to Particular 3(a), Davy states:

> "This is a matter for evidence. Strictly without prejudice to the foregoing objection, the loan agreement executed was between [Mr. Kearney] and the O'Connell Partnership. It is also [Davy's] **understanding** that at a meeting on 13 October 2014 between Mr. O'Connor, Mr. Browne and [Mr. Kearney], Mr. O'Connor **indicated** that he was attending the meeting in a personal capacity and was **hopeful of securing finance from a group of Davy employees** on a personal and confidential basis. Furthermore, it is [Davy's] understanding that prior to that meeting, Mr. O'Connor had informed Mr.

> Browne that [Davy] would not lend money to [Mr. Kearney]. On 14 November 2014, [Mr. Kearney] executed the loan agreement between himself and the O'Connell Partnership." (Emphasis added)

13. Particular emphasis is placed by the Defendants on the fact that Mr. Kearney was aware, through his solicitors, of this Reply to Particulars, i.e. that it was Davy's understanding that Mr. Tony O'Connor had indicated on 13th October, 2014 to Mr. Kearney, prior to the execution of the Settlement Agreement on the 11th/12th February 2016, that Mr. O'Connor was hoping to secure finance from a group of Davy employees. The Defendants claim that this clearly relates to the money which Mr. Kearney was being lent to enable him pay off his loan to Stapleford Finance Limited ("Stapleford") which had security over the Bonds. The discharge of this security enabled him to sell the Bonds to the O'Connell Partnership. Since the lender of the funds to Mr. Kearney, to enable him to clear the security, was also the buyer of the Bonds, the Defendants are claiming that Mr. Kearney would therefore have known that the '*group of Davy employees'* (from whom Mr. O'Connor was '*hopeful of securing finance'*) made up the O'Connell Partnership.

The law relating to striking out claims which are bound to fail

14. There was little dispute between the parties regarding the applicable law when dealing with strike-out proceedings such as this one and both parties relied on the case of *Salthill Properties Ltd & anor v. Royal Bank of Scotland plc & ors* [2009] IEHC 207. Since this case sets out in considerable detail the principles which apply to these types of cases, it is helpful to set out several extracts from that judgment:

> "It should also be noted that, in *Ruby Property Co Ltd v. Kilty* (Unreported, High Court, McCracken J., 1st December, 1999), McCracken J. stated at p. 26 of his judgment that "it is quite clear that the court can only exercise the inherent jurisdiction to strike out proceedings **where there is no possibility of success**." […]

It is clear, therefore, that while a jurisdiction to dismiss proceedings on the basis that they are bound to fail does exist, it is a jurisdiction to **be sparingly exercised and only in clear cases.** […]

It has often been noted that an application to dismiss as being bound to fail may be of **particular relevance to cases involving the existence or construction of documents**. For example, in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document concerned could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established. […]

More difficult issues are likely to arise in an application to dismiss when there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence. At this end of the spectrum, it is difficult to envisage circumstances where an application to dismiss as bound to fail could succeed. In between are a range of cases which may be supported to a greater or lesser extent by documentation.

However, it is important to emphasise the different role which documents may play in proceedings. **In cases, such as the examples which I have given earlier, involving contracts and the like, the document itself may govern the legal relations between the parties so that the court can consider the terms of the document on its face and may be able to come to a clear view as to the legal consequences flowing from the parties having governed their relations by the document concerned.**

However, **there are other cases where documents are not vital in themselves save that they may cast light on the underlying facts** which may be at the heart of the proceedings concerned. […]

At the end of the day, it will be what view the court takes as to what actually happened that will determine the facts on the basis of which the court will come to its judgment. Contemporary documentation is often a very valuable guide to such facts, but **such documentation is not necessarily determinative. It is important, in that context, not to confuse cases which are dependent on documents themselves with cases where documents may be a guide,** albeit often a most important guide, to the underlying facts which need to be determined in order to resolve the issues between the parties.

It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, **the court must accept the facts as asserted in the plaintiff's claim,** for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel for Salthill and Mr. Cunningham, to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court. A simple example will suffice. A plaintiff may assert that it entered into a contract with the defendant which contained certain express terms. **On examining the document the terms may not be found, or may not be found in the form pleaded**. On an application to dismiss as being bound to fail, there is nothing to prevent the defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the plaintiff has no chance of establishing that the document concerned could have the

meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim.

However, it seems to me that counsel for Salthill and Mr. Cunningham is correct when he says that the **court need not and should not require a plaintiff to be in a position to show a *prima facie* case** at the stage of an application to dismiss, in order that that application should fail. **There have been many cases where the crucial evidence which allowed a plaintiff to succeed only emerged in the course of the proceedings**. At the level of principle, this is likely to be **particularly so in cases alleging fraud** or other similar wrongdoing which is likely to be **clandestine, if present, and where a plaintiff may only be able to come across admissible evidence sufficient to prove his case by virtue of the use of procedural devices such as discovery and interrogatories.** […]

It is clear from all of the authorities that **the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail**. […]

This is not a case **where I could be confident that it is impossible that the evidence presented at trial might be different from what appears to be the available evidence at this stage**. The case is only, therefore, **in a limited sense, a documents case in the sense** which I have sought to analyse at para. 3.9 above. All in all I am not, therefore, satisfied that these proceedings are bound to fail as against First Active." (Emphasis added)

15. It is also relevant to note that in *Jodifern Ltd. v. Fitzpatrick* [1999] IESC 88, Murray J. pointed out that the object of an order, dismissing proceedings on the grounds that they show no cause of action or amount to an abuse of process, is

> "[N]ot to protect a Defendant from hardship in proceedings to which he or she may have a good defence but **to prevent the injustice to a Defendant** which would result from an abuse of the process of the Courts by a Plaintiff." (Emphasis added)

16. Finally in this regard, in *Doe v. Armour Pharmaceutical Inc.* [1997] IEHC 139, Morris J. described the exercise of this Court's jurisdiction in striking out cases pursuant to Order 19, rule 28 or under the inherent jurisdiction of the court as follows:

> "[I]t was made clear that **the court would only exercise this jurisdiction in which it was clear beyond doubt that the Plaintiff could not succeed**. Such circumstances would clearly envisage that no dispute could arise on issues of fact**.** If such a dispute exists then it is clear, in my view, that such an issue can only be determined by the trial Judge at the hearing of the action." (Emphasis added)

Application of these principles to this case

17. It is clear from the foregoing that an application to dismiss proceedings as being bound to fail may be of particular relevance to cases involving the existence or construction of documents which will not require any oral evidence. Accordingly, counsel for the Defendants placed particular emphasis on the fact that this application to dismiss was based primarily on a document, namely the Reply to Particular 3(a).

18. However, it seems to this Court that in *Salthill* Clarke J. was drawing an important distinction between a case which is *based* on a written agreement (e.g. a claim that a written contract contained express terms, which could be decided by examining the terms of that document) and a claim such as the present one (i.e. a claim of fraudulent misrepresentation)

where a document such as the Replies to Particulars may be *relevant* to the claim, but *not necessarily determinative* of the facts which need to be decided in order to resolve the issues between the parties (namely, was Mr. Kearney induced into the Settlement Agreement by a fraudulent misrepresentation).

19. In the former case, a court should easily be able to come to a clear view as to the legal consequences which flow from the written document, which will decide the issue between the parties (i.e. did the contract contain the alleged express terms). In the latter case, that is not necessarily the situation, since the Court has to reach a conclusion regarding whether or not Mr. Kearney was *induced* into entering the Settlement Agreement on the basis of, not only the terms of the Replies to Particulars received on the 21st December, 2015, but also on the basis of what exactly was said by the parties on that day at the Merrion Hotel and the following morning, which then led to the proceedings which Mr. Kearney had instituted against Davy being settled.

20. In this regard, evidence was provided of text messages dated 23rd December and 29th December, 2015 from Mr. Garry of Davy to Mr. Alan Mains (who was representing Mr. Kearney), to support the claim by Mr. Kearney that an agreement was finalised by 29th December, 2015 as a result of these discussions, to settle the 2015 Proceedings, *albeit* that it was not signed until 12th February, 2016.

21. In common with Clark J. in *Salthill*, this Court cannot be confident that it is impossible that the evidence presented at trial might be different from what appears to be available evidence at this stage. Such evidence might support Mr. Kearney's claim that, despite the reference to employees in the Reply to Particular 3(a) dated 21st December, 2015, he was nonetheless induced by false representation to enter the Settlement Agreement. In this regard, this Court must assume, for the purpose of this application, that Mr. Kearney was given fraudulent misrepresentations on the 21st and 22nd of December, 2015. If this were a case which

did not involve an alleged fraud and have a finding of a lack of candour by Davy regarding the transaction in question, this Court would be minded to grant the dismissal application.

22. However, of crucial significance, in this Court's lack of confidence that there might not be evidence differing from what is available at this stage, is the fact that this is a case alleging fraud. As noted by Clark J., fraud is '*likely to be clandestine'* and hence this Court needs to be alert to the possibility that prior to discovery, matters may be discovered which are currently hidden from view. Furthermore, in this case, there is something more; not only an allegation by Mr. Kearney of fraud regarding the sale of the Bonds, but a finding by the Central Bank that Davy lacked candour in its dealings with the Central Bank regarding its investigation of the sale of the Bonds. In this regard, the Central Bank Report states that:

> "Davy's lack of candour when first reporting the matter to the Central Bank was treated as an aggravating factor".

While this conclusion relates to the dealings between Davy and the Central Bank, and not between Davy and Mr. Kearney, they relate to the very transaction the subject of these proceedings, i.e. the sale of Mr. Kearney's Bonds by Davy. Accordingly, as noted in the First Judgment at para. 29, this is a case where the *'allegations of fraud are very far removed from being mere assertions.'* In addition, as noted at para. 27 of the First Judgment, the Central Bank Report makes findings regarding a potential conflict of interest by Davy regarding the transaction:

> "**[C]onflicts of interest were not properly considered**, the rules in place in relation to personal account dealing were easily sidestepped". (Emphasis added)

The other relevant findings in the Report are:

> "[**The O'Connell Partnership] circumvented the personal account dealing framework completely**, such that Davy's compliance function (Davy Compliance)

first became aware of the Transaction four months later, when certain information about the Transaction became public."

[…]

"**Davy's compliance function was kept in the dark**"

[…]

"[A member of the O'Connell Partnership] misled Davy Compliance by not providing relevant information in relation to the type of transaction contemplated – the most glaring omission being a failure to tell Davy Compliance that it was a personal transaction involving a group of Davy employees. **This resulted in a very serious failure by Davy** to provide Davy Compliance with access to all relevant information to allow it to discharge its function properly". (Emphasis added)

However, it is important to emphasise that there has not been any finding of fact by a court regarding any of these allegations, save for this Court's conclusion in the First Judgment that there is *prima facie* evidence of fraud against the defendants, which, it must be remembered, is some way from an actual finding of fraud. (This finding was required in that case, in order to ground this Court's determination that Mr. Kearney had provided adequate Replies to Particulars regarding his claims against Davy.)

23. In this context, it is relevant to note that just as there are allegations of wrongdoing against the defendants, there are also allegations of wrongdoing against Mr. Kearney, and it could well be that when a trial judge has heard all the evidence, he might conclude that the plaintiff is wholly innocent and that the defendants are completely in the wrong. Equally, the trail judge may conclude that the plaintiff is completely in the wrong and the defendants are wholly innocent or indeed that both parties were guilty of wrongdoing. In this regard, the defendants claim that Mr. Kearney sought to misrepresent to Stapleford (the lender with security over the Bonds) that the value of the loan he was obtaining from the O'Connell

Partnership (€2.3 million) was the true value of the Bonds. As a result, the defendants allege he repaid only €2.3 million of his debt of €19.25 million to Stapleford, with the rest written-off, in return for the release of the Bonds, yet he made €4 million from the sale of the Bonds. This is because in his affidavit of 9th September, 2015 Mr. Kearney avers that:

> "During the course of [a meeting between Mr. Kearney, Mr. Tom Browne of LeBruin and Mr. Tony O'Connor in 2014], both Mr. Browne and Mr. O'Connor advised me that:
>
> (a) Stapleford would be prepared to accept a sum in the region of €2,360,000 in discharge of the Loan obligations ("the Loan Settlement Sum");
>
> (b) Davy was in a position to source a buyer for the Bonds who would be prepared to pay a price in the region of 20 to 30 cent in the euro of the par value of the Bonds, which would yield an amount which exceeded the Loan Settlement Sum and which would thereby give rise to a profit;
>
> (c) **They should be careful not to disclose to Stapleford** that a buyer could be sourced who was prepared to purchase the Bonds at the range mentioned because this would prompt Stapleford to realise the '*true value'* of the Bonds and demand a higher sum in the settlement of the Loan obligations;
>
> (d) **The best way of concealing the true value of the Bonds** from Stapleford was for me to borrow the Loan Settlement Sum from lenders arranged by Davy ("the Davy Lenders") and to agree to transfer the Bonds to the Davy Lenders for an amount in excess of the Loan Settlement Sum **which excess sum would be divided between myself, Davy and LeBruin as profit**." (Emphasis added)

24. On this basis, it is claimed by the defendants that even if Mr. Kearney had a cause of action against the defendants, his involvement in a scheme designed to misrepresent/deceive Stapleford regarding the true value of the Bonds prevents him from being granted any relief.

In this regard, the defendants rely on the principle that a plaintiff should not be granted relief by a court where it arises in connection with his own wrongdoing (*ex turpi causa non oritur actio*).

25. With all of the foregoing in mind, it is clear from *Jodifern* that in striking out proceedings on the basis that they are bound to fail, this Court is not to consider whether it would constitute hardship for the Defendants to have to meet this claim of fraudulent misrepresentation (even though there is a Reply to Particulars referring to Davy employees), but rather, whether to allow Mr. Kearney to proceed would amount to an abuse of process, and so amount to an injustice to the Defendants, to allow the claim to proceed.

26. Because of the evidence regarding the lack of candour on the part of Davy, this Court does not think that it would be unjust for the Defendants to have to defend these proceedings at an oral hearing, or that it would amount to an abuse of process on the part of the plaintiffs for these proceedings to continue to an oral hearing. It is this Court's view that it would not be unjust for that oral hearing to proceed, in order to see if there is other evidence, which may come out on discovery (ordered by Quinn J. just two weeks prior to this hearing on 7th December, 2022), which might be different from what appears to be available evidence at this stage. In this regard, it is relevant to note that one of the categories of discovery which has to be disclosed to Mr. Kearney is communication between all the defendants and the Central Bank in the course of the investigation conducted by the Central Bank into Mr. Kearney's transaction.

27. Another factor in this Court's conclusion that Mr. Kearney's proceedings should not be struck out is the fact that the Central Bank Report concludes that:

> "*Davy took no steps to ensure that the client [Mr. Kearney] was aware that the consortium [the O'Connell Partnership] was comprised of Davy employees."*

In this regard, uncontroverted submissions were received on behalf of the Defendants that the Central Bank Report, and so including this statement, contained '*agreed facts'* with Davy. Similarly, uncontroverted submissions were made on behalf of Mr. Kearney that this statement in the Central Bank Report was the conclusion of a six-year investigation into the transaction in question by the Central Bank.

28. Against the background of a long investigation leading to this agreed statement by Davy that it took no steps to tell Mr. Kearney that the O'Connell Partnership consisted of Davy employees, the Defendants (employees of Davy) are now claiming the contrary. They are claiming that employees of Davy did in fact tell Mr. Kearney that the O'Connell Partnership consisted of Davy employees, by virtue of Reply to Particular 3(a). Furthermore, the Defendants are claiming that the reference to '*Davy employees*' in that reply is so significant that the case should be struck out without a plenary hearing. Bearing in mind the importance which the Defendants are now attaching to the claim that Mr. Kearney knew at the time of the Settlement Agreement that the O'Connell Partnership consisted of Davy employees, it is curious, to say the least, that this alleged "fact" would not have been front and centre of Davy's dealings with the Central Bank. To put the matter another way, it is curious that, in light of the Defendants' contention now, that Mr. Kearney knew that the O'Connell Partnership consisted of Davy employees, that Davy (the employer of the Defendants) agreed to a statement from the Central Bank which says the exact contrary in March 2021.

29. Despite all of this, the Defendants are saying to this Court that it is so clear, that Davy told Mr. Kearney in their Replies to Particulars in December 2015 that the O'Connell Partnership consisted of Davy employees, that Mr. Kearney's case should be dismissed without an oral hearing. The apparent contradictions between the Defendants position in this application and Davy's dealings with the Central Bank does raise the possibility of there being some disputes between the parties about the facts surrounding this issue and a possibility of

evidence coming to light, apart from the Reply to Particular 3(a), which is not currently available.

30. All of this is relevant because in exercising this Court's jurisdiction to dismiss Mr. Kearney's case, it is apparent from *Doe* that it should be clear beyond doubt that Mr. Kearney will not succeed. For all the foregoing reasons, it is not '*clear beyond doubt'* that Mr. Kearney will not succeed in his claim that he was induced to enter the Settlement Agreement, by a fraudulent misrepresentation that the O'Connell Partnership comprised of Davy employees. To put the matter another way, if the Central Bank Report contained an 'agreed fact' that Davy had taken 'steps to ensure that [Mr. Kearney] was aware that the [O'Connell Partnership] was comprised of Davy employees', then this Court might well strike out the proceedings. However, the contrary statement in the Central Bank Report simply highlights the room for a different conclusion arising at the trial after all the evidence is heard. Accordingly, this Court cannot conclude that if it were to allow Mr. Kearney's action to proceed, this would constitute an abuse of process. Therefore, the primary basis for the application by the Defendants is refused.

Other grounds for dismissal?

31. Particular reliance was placed by the Defendants on the terms of the Reply to Particular 3(a) not only as a written document, but as a written document which formed part of the pleadings and therefore with a status over and above that of a run of the mill letter or email. However, it is also the case that the Defendants relied on other written documents to support their case for striking out Mr. Kearney's proceedings, which will be considered next.

Execution of Settlement Agreement by a member of the O'Connell Partnership

32. The Defendants argued that the fact that the Settlement Agreement was signed by Mr. O'Connor, himself an employee of Davy, on behalf of the O'Connell Partnership is evidence of the fact that Mr. Kearney knew, when he signed the Settlement Agreement, that the

O'Connell Partnership consisted of Davy employees. On this basis, it was argued that Mr. Kearney's claim, that he was induced to enter the Settlement Agreement by false misrepresentation, is bound to fail. However, the Settlement Agreement states:

> "In executing this Agreement, Mr. Patrick Kearney represents and warrants that he has full legal authority to bind Kilmona Holdings Limited and Mr. Tony O'Connor represents and warrants that he has full legal authority to bind the O'Connell Partnership."

33. It follows that the fact that Mr. O'Connor duly executed the Settlement Agreement on behalf of the O'Connell Partnership does not *per se* mean that he was a member of that partnership. Rather it means that he was authorised by the Partnership to execute the agreement on its behalf. Thus, this Court cannot conclude that Mr. Kearney knew that the O'Connell Partnership consisted of Davy employees, simply by virtue of the fact that Mr. O'Connor signed the Settlement Agreement.

Letters by Mr. Kearney's solicitors claiming that O'Connell Partnership is part of Davy

34. The Defendants also rely on a letter dated 15th December, 2014, and so prior to the Settlement Agreement, from Mr. Kearney's solicitor to Davy at its address at 49 Dawson Street, in which it is stated:

> "In particular Mr. O'Connor arranged a loan in the amount of €2,360,000 from O'Connell Partnerships of **49 Dawson Street**, Dublin 2 (whom our clients **understand** to be a Davy entity) in favour of Mr. Kearney." (Emphasis added)

However, it is relevant to note that by letter dated 23rd December, 2014, Arthur Cox, solicitors for Davy replied as follows:

> "The **O'Connell Partnership is not part of Davy** and any issues your client may have in respect of his arrangements with that partnership should be directed to Mr. Tony O'Connor." (Emphasis added)

By letter dated 9th January, 2015, Mr. Kearney's solicitors replied that:

> "It is however of even more concern that you have recommended that our clients raise any concerns they have directly with Mr. Tony O'Connor and you have advised that the O'Connell Partnership is not part of Davy. For the avoidance of any doubt our clients did not consider they were dealing with Mr. Tony O'Connor in his personal capacity in any shape or form and as far as they were concerned they were at all times clients of Davy and expressly appointed Davy to advise them in relation to the sale of the Bonds. Furthermore they also believed that the O'Connell Partnership was a part of Davy particularly as it operated from the same address as Davy and the Loan Agreement dated the 14th November 2014 was signed by Mr O'Connor on behalf of the O'Connell Partnership. **Can you please therefore advise who is the O'Connell Partnership if it is not a part of Davy as alleged and whether any employees or parties connected with Davy are partners in this partnership**?" (Emphasis added)

35. Shortly after this exchange, on 4th March, 2015, Mr. Kearney's solicitors wrote to the Central Bank, in which they complained about the sale of the Bonds by Davy. Just as Mr. Kearney's solicitors had done in their letters to Davy, they set out again Mr. Kearney's 'understanding', at that time, of the position regarding the O'Connell Partnership:

> "He **understood that the O'Connell Partnership was made up of clients** of Davy **or** members of Davy staff and noted it had the same address as Davy and he was never told by Mr. O'Connor it was not a part of Davy. […]

He believes but cannot be certain at this point that the Bonds were sold to a party that was connected to Davy. […]

He **remains however unaware of the identity of the party to whom the Bonds** were sold." (Emphasis added)

36. When considering this correspondence, it is important to note that in the letter of 23rd December, 2014, there is an *express denial by Davy through their solicitors that the O'Connell Partnership is part of Davy*, which one assumes Arthur Cox had instructions to make. While this express denial is made prior to the Reply to Particular 3(a) dated 21st December, 2015, it nonetheless is relevant to note that this denial flies in the face of the current position adopted by Davy, that *Mr. Kearney knew that the O'Connell Partnership consisted of Davy employees*.

37. More generally, it can be seen that this correspondence contains, on the part of Mr. Kearney, allegations (based on his 'understanding' and what he 'believed' to be the position) that the O'Connell Partnership is connected with Davy and a demand for details of the partners, as well as a denial by Arthur Cox that the O'Connell Partnership is part of Davy.

38. When considering this correspondence (containing allegations, counter-allegations and a person's 'understanding' of the position) in the round, it could not be said to support the conclusion that it is '*clear beyond doubt'* that Mr. Kearney was *not* induced by a false misrepresentation that the O'Connell Partnership was not made up of Davy employees.

Mr. Kearney does not have clean hands?

39. Another claim made by the Defendants is that Mr. Kearney's claim should be dismissed because he is seeking an equitable remedy and he has not come to court with clean hands. In this regard, they point out that in Mr. Kearney's replying affidavit to this motion, he averred on 29th September, 2022 at para. 76 *et seq* that:

> "It was only subsequent to the sale of the bonds on the 14th November 2014 in circumstances where the Plaintiffs had concerns about the manner in which they have been treated by Davy particularly with regard to the price at which the bonds had been sold that the Plaintiffs sought legal advice **in late November 2014**
>
> The Plaintiffs solicitors having reviewed the documentation including the agreement advised the Plaintiffs that notwithstanding that the agreement referred to me as a "Borrower" and to the [O'Connell Partnership] as "Lender", the legal effect of Clause 5 and the immediate subsequent clause of the agreement was that I **had in fact sold the bonds under the agreement to the [O'Connell Partnership]".** (Emphasis added)

40. The Defendants point out that it is clear from this affidavit that Mr. Kearney now accepts that he knew in late November 2014 that the purchaser of the Bonds was the O'Connell Partnership. It is important to point out that he is not accepting that he knew at that stage that the O'Connell Partnership consisted of Davy employees, as he continues to maintain that he only became aware of that fact on the 2nd March, 2021 when the Central Bank Report issued, and it stated therein that:

> "Davy took no steps to ensure that [Mr. Kearney] was aware that the [the O'Connell Partnership] was comprised of Davy employees" and
>
> "No disclosure was made to [Mr. Kearney] as to the identity of the [O'Connell Partnership] members."

41. However, the Defendants claim that the admission in the affidavit dated 29th September, 2022 that Mr. Kearney knew in November 2014 that the O'Connell Partnership was the purchaser of the Bonds is very significant. This is because they say it directly contradicts the earlier pleadings in this case. For example, in Mr. Kearney's Replies to Particulars dated 3rd September, 2021 at Reply 29(d) he states that:

> "The Plaintiffs did not learn **until 2015** in the context of the proceedings issued by the Plaintiff against [Davy] for selling their Bonds at an undervalue that the **O'Connell Partnership had purchased the Bonds**." (Emphasis added)

42. Since the 2015 Proceedings, to which Mr. Kearney is referring in this reply, did not commence until July 2015, there is therefore a clear contradiction between the sworn evidence of Mr. Kearney that he did not know that the O'Connell Partnership had purchased the Bonds until July 2015, on the one hand, and his most recent sworn evidence that he knew this fact in November 2014, on the other hand.

43. This is a serious matter and could well have a significant bearing on Mr. Kearney's credibility when this matter comes to trial. However, in this application, the Defendants are not simply seeking to undermine Mr. Kearney's credibility, they are seeking something considerably more drastic, namely the striking out of Mr. Kearney's proceedings at this interlocutory stage and so based only on affidavit evidence, without the testing of oral evidence. This is being sought on the basis of the principle that he who comes to equity must do so with clean hands. The Defendants rely on the Court of Appeal case of *Egan v. Heatley* [2020] IECA 354 at para. 96 in which it was stated by Murray J. that:

> "[S]ubject to the exception for falsehoods that are trivial or inconsequential, the production before a court exercising an equitable jurisdiction of documentary evidence which is manufactured for the purposes of obtaining relief within that jurisdiction, or of testimony which is material and knowingly false will, of itself, debar the plaintiff from obtaining the relief claimed."

44. In that case, the Court of Appeal upheld the finding that the plaintiffs deployed a transparently forged document and vouchers which were clearly forgeries, such findings of fact having been reached after a plenary hearing in the High Court. However, it is relevant to note

that the Court of Appeal upheld the High Court's award to the plaintiffs of 2/3 of their legal costs of the trial, the 1/3 reduction reflecting the High Court's findings in relation to the forged documents. More significantly, it is important to note that the conclusion regarding the use of forged documents was reached at the trial and not during a pre-trial application, as in this case. Accordingly, that case does not provide persuasive authority for the Defendants' claim that Mr. Kearney's proceedings should be struck out, in a pre-trial application, because of the inconsistency in his pleadings, notwithstanding that it relates to a key issue in dispute between the parties (i.e. when Mr. Kearney became aware that the O'Connell Partnership was the purchaser of the Bonds).

45. While this Court cannot rule out the possibility that in a very clear or extreme case, a court might rely on *Egan v. Heatley* to strike out proceedings before trial, on the grounds that '*he who comes to equity must come with clean hands'* , this Court does not believe that this is such a case. This is particularly so in this case, where the party seeking the strike out of the proceedings is itself accused of very serious allegations of wrongdoing, for which there is *prima facie* evidence.

CONCLUSION

46. For all the foregoing reasons, this Court rejects the Defendants' application to strike out Mr. Kearney's proceedings.

47. This Court concludes that while it is of course possible that Mr. Kearney will not be able to successfully prove his claim against the defendants, a significant factor against striking out these proceedings is the fact that it concerns an alleged fraudulent misrepresentation on the part of the defendants. Critically, evidence has been provided to this Court, which may or may not be admissible at the trial, to substantiate a claim of fraud and that there was an alleged conflict of interest in Davy/amongst its employees regarding Mr. Kearney. In particular, *prima*

facie evidence has been provided of the concealment of the transaction/conflict of interest from Davy Compliance (and the misleading of Davy Compliance by a member of the O'Connell Partnership) and also *prima facie* evidence that Davy exhibited a lack of candour in its dealings with the Central Bank, when it was investigating the transaction in question. For all these reasons, this Court refuses the Defendants' application.

48. This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms of any draft agreed court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).