THE HIGH COURT

[2021] IEHC 468

[2020/5328 P]

BETWEEN

DE XIAN WANG

PLAINTIFF

AND

LADYWELL HOMES LIMITED

AND

DEREK BYRNE; DANIEL WHELAN; EMERALD SKY DAC; EMERALD SKY 2 DAC; LOTUS DECALIA DAC; BRIAN MURPHY AND MYLES KIRBY

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 8th day of July, 2021.

A. Background

1. There are two versions of the claim made by the Plaintiff ('Mr. Wang') in these proceedings. The first is set out in the original Statement of Claim delivered on the 16th of September 2020. The second, significantly enhanced, version of Mr. Wang's case is set out in a draft Amended Statement of Claim circulated after the hearing of motions brought by all of the Defendants (bar the first and third Defendants) to strike out the claims against them. In accordance with the accepted jurisprudence, I have decided the strike out motions on the basis of the claim as set out in the proposed amended pleading. The motions were heard by me on the 23rd and 24th of March 2021. I directed that any revised version of the Statement of Claim be provided by the 9th of April 2021, and that the parties notify me by the 14th of April 2021 if they wished to make any submissions on the proposed amended pleading. None of the parties indicated any desire to do so, and this position was confirmed by each of them when the matter was put in before me for mention on the 22nd of June 2021. In the light of the stance taken by the parties on that occasion, it was possible for me to inform them of my decision. That decision is to strike out the proceedings against the seventh Defendant, Mr. Murphy, and not to strike out the proceedings against the other Defendants who had sought that relief. This judgment sets out the reasons for that decision. In formulating this judgment, I have taken at its height the case which Mr. Wang proposes to put before this court. I have also taken into account some uncontradicted evidence, notably from Mr. Murphy.

2. Mr. Wang is a Taiwanese businessman, who lives in Blanchardstown, County Dublin. In September 2017 he viewed a development of houses in Templeogue, County Dublin with a view to buying three of them. He instructed his agent, Ms. Fei Yan, to enter into negotiations to buy three houses and on the 23rd of October 2017 Mr. Wang entered into three separate Building and Sale Agreements with the first Defendant ('Ladywell'). He agreed to pay €2,470,000 in total for the properties. A deposit of €412,000 per property was paid on the signing of the Agreements, and Mr. Wang agreed to the release of the entire deposit monies (some €1,236,000) to Ladywell for the specific purpose of financing the construction of the three properties. While throughout this judgment I refrain from commenting on the merits of the claims which will ultimately proceed to trial, it is difficult to avoid noting the very unusual level of the deposits paid by Mr. Wang in conjunction with the release to the builder of those deposit monies.

3. The properties were due to be completed in time for the closing of the sales to Mr. Wang in October 2018. Between October 2017 and April 2018 Mr. Wang communicated directly with Christoff Kitchen Company ("Christoffs") , a supplier of kitchen and bedroom furnishings, fittings and appliances in respect of upgrade works for which he would pay Christoffs directly. The dealings with Christoffs are important, particularly when we consider the position of the second Defendant (Mr. Byrne).

4. In August 2018, it became apparent to Mr. Wang that works on the properties had stalled; no progress had been made since April of that year. In September, Mr. Wang asked Ms. Yan to find out what was happening. She was told that "the reason for the delay was that Christoffs had yet to be paid by [Ladywell] to carry out necessary works on the Properties, and that [Ladywell] was unable to make these payments." At paragraphs 30 and 31 of the fresh pleading, the story is continued:-

> "30. On or about the month of September 2018 the Plaintiff instructed his agent Ms Yan to engage with the Second Defendant to find out the cause of the delay. Through Ms Yan, and in the knowledge that this would occur, the Plaintiff was informed that the reason for the delay was that Christoffs had yet to be paid by the First Defendant to carry out necessary works on the Properties, and that the First Defendant was unable to make these payments. The Second Defendant proposed to the Plaintiff that if he (the Plaintiff) was to pay €32,000 for each property directly to Christoffs to carry out these outstanding works, the said sum would be deducted by the First Defendant from each respective contract price. The Second Defendant further represented to the Plaintiff that upon the payment of the aforesaid sum of €32,000 for each property directly to Christoffs to carry out the outstanding works, the sales of the three Properties would then be completed.
>
> 31. Accordingly, on the 9th of October 2018, in reliance upon what the Second Defendant represented as set out in paragraph 30 hereinbefore, the Plaintiff entered into three supplemental agreements with the First Defendant ("the Supplemental Agreements"), whereby it was agreed that the Plaintiff would pay Christoffs the total sum of €96,000.00 directly, and accordingly the sum of €32,000.00 would be deducted from each respective contract price. On the 15th of October 2018, in accordance with the Supplemental Agreements, the Plaintiff paid the sum of €96,000.00 directly to Christoffs. In the premises the new contract prices for each of the properties of 7, 8 and 9 Corrybeg Way were €798,000.00, €788,000.00 and €788,000.00 respectively."

5. The properties were not completed in October 2018. In March 2019 Mr. Wang was informed by his surveyor that the properties were about 75% completed, but that furnishings and fittings to be installed by Christoffs had not been commenced because basic electric and plumbing work had not been carried out by Ladywell. However, in the same month Mr. Wang was assured by Mr. Byrne that the delay was only temporary; Mr. Byrne was a director of Ladywell.

6. Nothing productive appears to have happened on site over the following months. In November 2019, when on the site at Templeogue, Mr. Wang was shocked to discover that some of the kitchen appliances (which he had paid for) had actually been removed from one of the properties in which it had been installed. Things were getting worse for Mr. Wang.

7. On the 19th of May 2020 the eighth Defendant ('Mr. Kirby') was appointed as receiver over the lands in Templeogue owned by Ladywell, including the lands on which the three properties being purchased by Mr. Wang were being built. Mr. Kirby was appointed by the fourth, fifth and sixth Defendants ('the Lenders') which held security over the lands in respect of debts due to them by Ladywell. On the 17th of June 2020, Mr. Wang informed Mr. Kirby of his position, requested him to provide a timetable for completion of the building works so that Mr. Wang could take possession of the properties, and asked him to undertake not to take any action that would interfere or prejudice Mr. Wang's interests in the properties. Mr. Kirby replied, through his solicitors, that if Mr. Wang wanted to complete the sale of the properties he would have to pay the full price, not the outstanding balance.

8. These proceedings began on the 24th July 2021. In their proposed amended form, the reliefs claimed by Mr. Wang are:-

"1. An Order for specific performance of a contract between the Plaintiff of the one part and First Defendant of the other part dated the 23rd day of October 2017 for the building and sale of the property situate at 7 Corrybeg Way, Templeogue in the County of Dublin.

2. An Order for specific performance of a contract between the Plaintiff on the one part and First Defendant of the other part dated the 23rd day of October 2017 for the building and sale of the property situate at 8 Corrybeg Way, Templeogue in the County of Dublin.

3. An Order for specific performance of a contract between the Plaintiff of the one part and First Defendant of the other part dated the 23rd day of October 2017 for the building and sale of the property situate at 9 Corrybeg Way, Templeogue in the County of Dublin.

4. A Declaration that the beneficial interests in each of the properties at 7 Corrybeg Way, 8 Corrybeg Way and 9 Corrybeg Way, Templeogue, County Dublin, have been lawfully vested in the Plaintiff, having passed to the Plaintiff on the making of the contracts for sale of the Properties referred to herein.

5. A Declaration that the Plaintiff is entitled to a lien over each of the respective properties at 7 Corrybeg Way, 8 Corrybeg Way and 9 Corrybeg Way, Templeogue, County Dublin, in the amount of the deposits paid, the monies paid for additional building works and all additional expenses incurred, including the costs recovered by the Plaintiff in this action.

6. An Order directing the First Defendant to provide the Plaintiff with an Undertaking from their solicitors in the terms of Special Condition Number 4 contained in the said three contracts.

7. A Declaration that the Plaintiff is entitled, upon closing of the said three contracts, to an Undertaking from the First Defendant's solicitor, in the terms of Special Condition Number 4 contained in the said three contracts.

8. An Order restraining the Defendants from parting or dealing with, or disposing of in any manner whatsoever of the properties at 7 Corrybeg Way, 8 Corrybeg Way and 9 Corrybeg Way, Templeogue, County Dublin, to any person other than the Plaintiff.

9. An Order directing the Fourth, Fifth, Sixth and Seventh Defendants to release the charges held under Folio DN199555F in order to facilitate the completion of the sale to the Plaintiff of the properties at 7 Corrybeg Way, 8 Corrybeg Way and 9 Corrybeg Way, Templeogue, County Dublin, upon receipt by the Eighth Defendant (and / or the First Defendant) of the balance of the contract prices, as amended by the Supplemental Agreements.

10. An Order directing the First Defendant and / or Third Defendant to return all appliances, furniture, furnishings, fixtures and fittings improperly and / or unlawfully removed from the properties at 7 Corrybeg Way, 8 Corrybeg Way and 9 Corrybeg Way, Templeogue, County Dublin, to the care of the Plaintiff.

11. Further or in the alternative, damages for breach of contract and negligence, in addition to or in lieu of each of the above sought orders of specific performance, as against the First Defendant.

12. As against the First Defendant and / or Second Defendant damages for misrepresentation.

13. As against the First Defendant and / or Third Defendant damages for conversion and / or Trespass to the Plaintiff's Goods.

14. Further or in the alternative, as against the First Defendant, recission in lieu of each of the above sought orders of specific performance.

14(a) Further or in the alternative, in the event of the sale of the said properties by the Eighth Defendant to any party other than the Plaintiff, an Order determining the priorities as between the Plaintiff, the Fourth, Fifth, Sixth, Seventh and Eighth Defendants in relation to the proceeds of sale.

15. Further or in the alternative, damages in the amount of €1,622,125.00 for unjust enrichment against the First Defendant and / or the Fourth, Fifth, Sixth and Seventh Defendants.

16. Accounts and enquiries.

17. Interest pursuant to statute.

18. Further or other relief.

19. Costs."

9. As I have said, apart from Ladywell and the third Defendant, all Defendants have brought motions to have the proceedings against them struck out or dismissed on a number of grounds, in particular that the proceedings are bound to fail. One motion was brought by the Lenders and Mr. Kirby. A second motion was brought by Mr. Byrne. The final motion is brought by Mr. Murphy. I will deal with these in reverse order.

B. Mr. Murphy's Motion

10. Mr. Murphy is hardly mentioned in the revised pleadings. He is described as the holder of a charge over the Templeogue lands dated the 22nd of November 2016. Mr. Murphy's charge predates any inspection of the site by Mr. Wang, let alone the negotiations on behalf of Mr. Wang to buy the three properties. Mr. Murphy's charge is capped at a value of €150,000 and it also became clear in the evidence that this charge is subordinate to the charges held by other Defendants. Importantly, the position taken by Mr. Murphy (through his counsel) about the value of his security is described in this exchange:-

> "MR. JUSTICE O'MOORE: And, Mr. McMorrow, just on the finances of the whole thing, Mr. Fanning made a by the way comment, I think, that given the debt he says is owed to his financiers and given the likely return on the sale of the properties, there won't be enough to pay him off. I take it that it follows from that, if you accept that proposition, that there is no money to trickle its way down to Mr. Murphy?
>
> *MR. McMORROW*:Absolutely, Judge, that's exactly my position.
>
> *MR. JUSTICE O'MOORE*: Yeah, okay.
>
> *MR. McMORROW*: We have said that on affidavit that and we have set out the extent of indebtedness. It appeared in the affidavit there we've been informed and we set this out on the affidavit of 5th December last at paragraph 37 -
>
> *MR. JUSTICE O'MOORE*: Yeah.
>
> *MR. McMORROW*: - that on 17th June AMOSS had told us that if they had said their client was indebted – was owed, I should say, the sum of 2.625 million, I had to be, because matters stand, Judge, in my papers - you're exactly right - I haven't a hope of receiving anything back, whatever about the hopes Mr. Fanning's client may have. I then, if there was any money to come, I am only entitled to be paid after Mr. Fanning's client, and the cap on the amount of money that I would be entitled to in such a scenario, if it ever occurred, which is not going to occur, would be €150,000. I can't have a liability, I can't have an interest beyond that amount because my simple secondary charge is in a fixed amount, but is conditional on Mr.

Fanning's client being fully discharged before my client gets any entitlement to the money."

11. Amoss are the solicitors for the lenders: Mr. Fanning is their Counsel.

12. In addition, Mr. Murphy's evidence was that he has already provided signed Partial Discharges which would only require to be dated "as and when they were required for the Closing of each individual house sale". These discharges are now in the possession of either the Lenders or Mr. Kirby. This evidence is to be found at paragraphs 20 and 21 of Mr. Murphy's affidavit of the 5th of December 2020 grounding his motion. These averments appear to be consistent with Mr. Murphy's position that no monies are coming his way on the sale of the three properties. The response of Mr. Wang (at paragraph 11 of his replying affidavit) is that:-

> "I say that I note the Seventh Named Defendant's explanation that he has already provided to Lotus / Amoss Solicitors all pre-signed Partial Discharges for each of the Properties at 7, 8 and 9 Corrybeg Way, and as such, he cannot physically provide the Partial Discharges to enable me to acquire the Properties, should I be successful in this case. I say and am advised that, notwithstanding these averments, the specific relief sought against the Seventh Named Defendant remain a necessity, in circumstances where the order of priority between each of the respective charges and my interests in the Properly require determination by the Court and at present there has been no undertaking or assurances provided by Lotus / Amoss Solicitors that the Seventh Named Defendant's charges over the Properties will be released should the Court decide these proceedings in my favour."

13. This response, which is echoed by paragraph 3 of the Reply, is unconvincing. If Mr. Kirby is directed to close the sales to Mr. Wang, he will have to do so and has available to him Partial Releases from Mr. Murphy to facilitate this. Keeping Mr. Murphy in the proceedings in order to ensure that Mr. Kirby furnishes these releases, which Mr. Murphy has already given to the receiver, does not appear to make sense. This relief is not necessary, the order sought to this effect would not be granted, and the proceedings in this regard are bound to fail.

14. Given that the releases are already available to the Lenders and Mr. Kirby, and can be used so that the properties can be sold to Mr. Wang or to anyone else, no reason is put forward as to why ascertaining "the order of priority" is "a necessity" or even a desirable exercise. Even the proposed amended Statement of Claim lays no basis for the relief sought at Paragraph 14(a). The most that can be gleaned from the proposed pleading is that Mr. Wang claims an entitlement to the entire beneficial interest in the properties pursuant to the provisions of Section 52 of the Land and Conveyancing Law Reform Act (as amended) and that, in the event of a sale to another buyer, the priorities as between Mr. Murphy, the banks and Mr. Wang must be determined. However, as I understand it Mr. Murphy has resigned himself to the fact that he will achieve no return on his security and that it is, in effect, written off. If I have misunderstood his position, or if Mr. Murphy wishes to re-enter the lists so that he can assert a priority that might lead to a payment

to him, he can of course do so. However, Mr. Murphy cannot be compelled to be kept in an action in order to decide the ranking of a security in respect of which he "[hasn't] a hope of receiving anything back [...]". In these unusual circumstances, the court would not make an order ranking Mr. Murphy's security as this would serve no useful purpose. In this regard, the proceedings are bound to fail in as much as they seek this relief. In addition in respect of this relief the proceedings disclose no cause of action and should also be struck out.

15. One submission made on behalf of Mr. Wang in this regard is that Mr. Murphy's position is analogous to that of a defendant in Norwich Pharmacal type proceedings. There is no true analogy between the position of Mr. Murphy and the target of a Norwich Pharmacal type order. At its most basic, that jurisdiction is ordinarily confined to the requirement that documents or information be disclosed; it does not involve the assessment of the rights of parties (such as, in this case, the ranking of interests in monies realised by the sale of the three properties). It bears no resemblance, in my view, to the nature of the claim in these proceedings.

16. However, in the course of their written submissions on this motion, Mr. Wang's counsel do make a striking concession about the pleaded case against Mr. Murphy. In seeking to stand up the Norwich Pharmacal analogy, they say:-

> "[...] under [Norwich Pharmacal type] orders, though the defendant is not legally responsible for the wrong, it has become 'mixed up' in the wrongdoing so as to warrant an order being made against it. The fact that there is no specific act of wrongdoing alleged against [Mr. Murphy] is not a bar to relief."

17. While this submission appears under the heading 'Release of the Seventh Named Defendant's Charge' it is correct to say that the revised pleadings allege no wrongdoing against Mr. Murphy in respect of any of the reliefs claimed against him.

18. Notwithstanding the absence of any allegation that Mr. Murphy has done wrong, a claim is made that the court should award damages of €1,622,125 against him for unjust enrichment.

19. In assessing whether this aspect of the claim is sustainable, it is helpful to look at the judgment of McDonald J. in *HKR Middle East Architects Engineering LC & Ors. v. English* [2019] IEHC 306, where the Court sets out comprehensively what requirements must be met by a plaintiff alleging unjust enrichment.

> "394. It is clear from the decisions of the Supreme Court in *East Cork Foods Ltd v. O'Dwyer Steel Co.* [1978] IR 103, *O'Rourke v. Revenue Commissioners* [1996] 2 IR 1 and Corporation of *Dublin v. Building and Allied Trade Union* [1996] 1 IR 468 that Irish law recognises unjust enrichment as a cause of action where a defendant has received money or some other property of a plaintiff in circumstances where it would be unjust for him to retain it. In order to avoid the development of what Keane J. (as he then was) described as "palm tree justice" in *O'Rourke v. Revenue*

Commissioners, the courts have generally confined the cause of action to a number of clearly defined categories of case. These have been very usefully summarised by Barton J. in *Vanguard Auto Finance Ltd v. Browne* [2014] IEHC 465 at pp 22-23. In summary, these are:-

(a) Where money has been paid under a mistake either of fact or law;
(b) Where the plaintiff seeks to recover a benefit that was to be conferred on him under the terms of a contract which has been discharged either by breach or frustration;
(c) Where a plaintiff seeks to recover a benefit provided by him to the defendant under a transaction which becomes unenforceable in law;
(d) Claims where a plaintiff has discharged a debt of the defendant; and
(e) A restitution for "wrongs". At p. 22, Barton J. explained that the wrong in question can be tortious, a breach of contract, a breach of fiduciary duty or a breach of confidence. That does not appear to me to be an exhaustive list. On the same page, Barton J. explained that there can be unjust enrichment by wrongdoing in circumstances where the enrichment of the defendant arises "by virtue of the commission of legal or actionable wrong against the plaintiff".

395. On p. 24 of his judgment, Barton J. identified that there are two essential preconditions to the unjust enrichment remedy. These are:-

(a) enrichment of the defendant at the expense of the plaintiff; and
(b) that the enrichment in question is unjust.

This second precondition does not give the court a licence to apply some subjective notion of injustice. Barton J. cited in this context, the observation of Keane J. in *Dublin Corporation v. Building and Allied Trade Union* that total failure of consideration is one of the circumstances in which courts will accept that an injustice has arisen.

396. "Consideration", in this context, has a broader meaning than it has in the context of the formation of a contract. In *Fibrosa Spolka v. Fairbairn Lawson* [1943] AC 32 at p. 48 Lord Simon explained the difference in the following terms:-

> "[…]in the law relating to the formation of contract, the promise to do a thing may often be the consideration. But when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise."

397. McDermott & McDermott in "Contract Law" , 2nd ed., para. 24.61 cite the Irish case of *Hayes v. Stirling* (1863) 14 ICLR 277 as an example of a decision where the court upheld a claim on this ground. In that case, the plaintiff had paid a sum to the defendant to secure shares in a company that was to be formed in the future to build and sell railway carriages and in respect of which the defendant was to be a

director. The company was never established and the money was held to be recoverable on the basis of a total failure of consideration."

20. On the pleaded case (by which I mean the revised Statement of Claim and the Reply to the Defence of the Seventh Defendant delivered during the hearing of the motions) the basic elements of an action for unjust enrichment against Mr. Murphy are not made out. No attempt is made by Mr. Wang's counsel, in their written submissions, to show how the requirements of McDonald J. are met on the pleadings. In his oral submissions, counsel for Mr. Wang relies upon the reference at (b) in the judgment of Barton J. that unjust enrichment might be shown if a plaintiff "seeks to recover a benefit that was to be conferred on him under the terms of a contract which has been discharged either by breach or frustration". This argument was not pressed with any level of force or elaborated upon with any level of detail. Counsel's essential submission on unjust enrichment was made by reference to the judgment of Haughton J. in *Wheelock v. Promontoria* [2021] IECA 71, a decision on an appeal against the refusal of an application for discovery.

21. In considering whether the documents sought were relevant, as that concept is understood in the context of a discovery dispute, Haughton J. considered the nature of a claim for unjust enrichment. He emphasised, in my view correctly, the fact that such claims vary greatly and are very fact dependent (at paragraph 40) and potentially engage a wide range of facts (at paragraph 42). Importantly, in outlining the principles governing the tort he referred to four judgments. I will come to these shortly. Before I do so it is worth noting that, however various the claims and however disparate the facts, unjust enrichment claims are nonetheless governed by principles which are long established.

22. These principles are to be found at paragraphs 50 and 51 of the judgment in *Wheelock*, where Haughton J. refers to the judgment of Baker J. in *Bank of Ireland Mortgage Bank v. Murray & Anor.* [2019] IEHC 234, and then to judgments of Keane J., Barton J. and McDonald J. which are identified in this extract:-

> "50. Later in her judgment Baker J. briefly addresses 'Unjust enrichment', and at paragraph 158 refers to four constituent elements identified by Keane J. in *Corporation of Dublin v. Building and Allied Trade Union* [1996] 1 I.R. 468 ("BATU"), at p.483 as –
>
> '(i) the enrichment of the defendant;
> (ii) at the plaintiff's expense;
> (iii) in circumstances in which the law requires restitution (the 'unjustness' of the enrichment); and
> (iv) the absence of defences or other policies to deny restitution.'
>
> This makes plain that there is a focus in the second element on the 'expense' of the claimant, and also on the broader question of justice.

51. The trial judge next referred to *HKR Middle East Architects LC & Ors. v. English* [2019] IEHC 306. But there McDonald J. also relied on the authority of BATU and he cites with approval a summary by Barton J. in *Vanguard Auto Finance Ltd v. Browne* [2014] IEHC 465, at pp. 22-23 of the circumstances in which an unjust enrichment action may succeed, noting –

> '395. On p.24 of his judgment, Barton J. identified that there are two essential preconditions to the unjust enrichment remedy. There are :-
> (a) enrichment of the defendant at the expense of the plaintiff; and
> (b) that the enrichment in question is unjust.'

Thus the requirement of expense of the plaintiff remains relevant. It should also be noted that the reason McDonald J. in that case gave an order for the taking of a consequential account and enquiry was that HKRME, for which the court held that certain monies were held on trust (and at whose 'expense' monies had been paid to a Guernsey account in the name of Sunvit International Ltd., a BVI company controlled by the defendant), had not yet made or proven a claim in the proceedings."

23. Haughton J. then goes on to consider two alternative views of the law of unjust enrichment, namely competing theories as to why the unjust enrichment of the defendant must be at the expense of the claimant. He ultimately concludes that the decision in the court below to refuse discovery based on a preference for one of these competing theories was wrong; it was for the trial judge, and not a judge hearing a discovery motion, to decide a basic issue such as, in that case, whether the Irish courts should follow the view of the law set out by Clarke L.J. in *Bank of Cyprus UK Ltd v. Menelaou* [2015] 2 All ER 913.

24. While the discussion about the *Bank of Cyprus* case is interesting, and while certain portions of that part of the judgment of Haughton J are relied upon by counsel for Mr. Wang, the truly relevant part of the judgment in Wheelock is the description of general principles, which I have set out. Returning to them, one notices the repeated references to the requirement that "the enrichment in question is unjust" (Barton J.) and that "there are circumstances in which the law requires restitution" (Keane J.). While McDonald J. emphasises in *HKR* that these preconditions do not "give the court a licence to apply some subjective notion of injustice", I do not see in the pleadings a coherent case made out that there will be an advantage to Mr. Murphy which arises from an injustice to Mr. Wang. In that respect, it is significant that the allegations against the bank were radically overhauled in the proposed amended pleadings. I will return to those later, but would note here that no such reconstructive surgery was carried out to the claim against Mr. Murphy. On the case made as it currently stands, I can see no advantage to Mr. Murphy (where, as I have already said, he seems to me to have written off his security as it is not going to yield any payment to him) nor can I see the required level of pleading setting out why any such advantage (if it were ever to occur) would arise from an injustice.

25. Finally, on this issue of unjust enrichment, Mr. Wang's counsel submits that he need not plead or establish that Mr. Murphy "must have acted dishonourably or wrongly or engaged in misconduct." He relies in this regard on *McMahon v. Kerry County Council* (unreported, Finlay P., High Court, 26th of July 1976) for the proposition that the court "refused to make a finding that Kerry County Council must have known that the land was not theirs when they built the two houses [...]" However, in that case the potential unjust enrichment was not of Kerry County Council but of the owners of the land who "took no or practically no steps either to supervise, protect or guard their property" and therefore had no actual knowledge of the building of houses on their land by Kerry County Council until they were practically completed (at page six of the judgment). I am not convinced that the level of knowledge on the part of Kerry County Council in that case assists Mr. Wang in these motions.

26. In fact, the judgment in *McMahon* shows that ordinarily something more than advantage to a defendant and disadvantage to a claimant must be shown in order to establish a claim for unjust enrichment. In that case, the owners of the land had effectively slept on their rights and failed to do anything to look after their property. Had they done so, they would have become aware that the local authority was building on the land and been able to warn the local authority of its mistake. In these circumstances, it was not open to the owners to receive compensation for their land and the buildings on it when their own default had facilitated the mistake of Kerry County Council. It was the failure of the landowners to look after their own property that made it unjust for them to reap the benefit of the County Council's mistake. In the case brought by Mr. Wang, there is no such extra element even alleged against Mr. Murphy. That is so whether that element be knowledge of Mr. Wang's unusual provision of large sums of money to Ladywell, failure to look after his own affairs so that Mr. Wang acted to his detriment, or any other factor rendering the situation unjust in such a way as to constitute the tort alleged against Mr. Murphy.

27. Later in this judgment, I consider in some detail the judgment of Clarke J. in *Moylist Construction Limited v. Doheny* [2016] IESC 9. In large measure, I have decided not to strike out the claims against the other Defendants asking me to do so because of the clear direction given in that judgment, culminating in the view that a case should be dismissed only if the decision to do so is a 'slam dunk'. I have concluded that, as far as the case against Mr. Murphy is concerned, it should be dismissed even applying the approach so carefully set out in *Moylist*. I have also decided that not only is the case in this regard, as pleaded, is bound to fail, it also discloses no cause of action against Mr. Murphy in its currently pleaded form.

C. Mr. Byrnes Motion

28. Mr. Byrne is described at paragraph three of the proposed Amended Statement of Claim in this fashion:-

> "The Second Defendant is a former Director of the First Defendant and resides at 135 Charlesland Park, Greystones, County Wicklow and was at all material times the principal of the First Defendant and had authority to bind the First Defendant."

29. In his affidavit grounding his motion to strike out, Mr. Byrne says that he "was a non-shareholding director of [Ladywell] between the period 20 March 2017 to 24 September 2019." While there is an important difference between a director who is not a shareholder and a director who is also the principal of a company, this is not a material distinction for the purpose of deciding this application.

30. The relevant allegations against Mr. Byrne in the new pleading begins at paragraphs 30 and 31 (set out at paragraph five of this judgment) and continues at paragraph 34:-

> "Over the course of the following weeks and months the Plaintiff had various communications personally and through his solicitors with the Second Defendant and / or the agents of the First Defendant in respect of the failure of the First Defendant to complete the Properties. During this period the Plaintiff was given multiple assurances by the Second Defendant and / or agents for the First Defendant that the Properties were nearing completion, each of which proved to be false."

31. A radical recasting of the case against Mr. Byrne takes place at paragraph 42(A), which I will set out in full:-

> "42(A) When making the representations pleaded in paragraphs 14, 30, 32 and 34 hereinbefore the Second Defendant knew:
>
> a) the reliance placed upon the accuracy of the said representations by the Plaintiff; and
> b) the reliance placed by the Plaintiff upon the Second Defendant personally when making the said representations,
>
> and had (or was deemed in law to have) a duty to ensure the accuracy and truth of the said representations and assumed (or was deemed in law to assume) such duty. The Plaintiff will rely upon the following circumstances as establishing the relationship or proximity between the Plaintiff and the Second Defendant such that the Second Defendant was under a duty to ensure as aforesaid the accuracy and truth of the said representations and had personal responsibility for such accuracy and truth:
>
> i. the fact that the Plaintiff was a foreign national coming to Ireland from Taiwan, who was not fluent in English;
> ii. the fact that the Second Defendant knew that in circumstances where the Plaintiff was not always present in Ireland, he (the Second Defendant) was being relied upon by the Plaintiff to communicate the progress of the building works fully and honestly to the Plaintiff, his servants or agents, at all times;
> iii. the fact that the Second Defendant was involved in the Corrybeg development, both as a director and (it is understood), employee, of the First Defendant and had of necessity a better knowledge of the progress of building works than the Plaintiff;

iv. the fact that the Plaintiff was expending considerable sums of money on the said properties which might be in jeopardy if any of the representations made by him was untrue;

v. the fact that the Second Defendant was (or put himself forward as) a "contact" man between the Plaintiff (or his servants or agents), in relation to the progress of the building works and other related building matters;

vi. the fact that the level of contract between the Plaintiff, his servants or agents and the Second Defendant (as further pleaded in paragraph 23 of the Statement of Claim) was of such a high volume that the Second Defendant knew of the reliance placed upon him personally and the truth of his representations, by the Plaintiff;

vii. the fact that the Plaintiff did reasonably rely upon the Second Defendant personally and the truth of his representations."

32. The revised pleading continues, at paragraphs 42(B) and 42(C):-

"42(B) The First Defendant and / or Second Defendant was guilty of misrepresentation as against the Plaintiff in:

(i) Providing false explanations to the Plaintiff for the delay and failure to complete the construction of the dwelling houses;

(ii) Falsely representing to the Plaintiff that the Properties would be completed upon payment to Christoffs of the monies under the Supplemental Agreements;

(iii) Failing to inform the Plaintiff that the First Defendant was insolvent and unable to pay its debts as they fell due.

42(C) In making each of the said representations referred to at paragraph 42(B0 (i), (ii) and (iii) hereinbefore, the Second Defendant failed to exercise due care in making same, leading the Plaintiff, inter alia, to enter into the agreements pleaded in paragraph 31 hereof and suffering loss and damage in consequence. In the event that again following the making of discovery, there is evidence to show the said representations were made otherwise than either negligently (as pleaded hereinbefore), or innocently (as pleaded by the Second Defendant), or that the Second Defendant has been guilty of other misrepresentation, the Plaintiff reserves the right to seek to plead accordingly."

33. Before the proposed Amended Statement of Claim was circulated, it was submitted on behalf of Mr. Byrne that the claim against him should be struck out or dismissed for three broad reasons:-

(i) There is no causal connection between the representations set out at paragraph 42(B), as it now is, and any loss sustained by Mr. Wang. These alleged representations were made after the contracts to buy the properties had been made. The representations could therefore not have been relied on by Mr. Wang in agreeing to buy the properties, and therefore no claim based on these alleged representations can succeed. I find that this submission is correct, as far as it goes,

but the revised pleading now expressly alleges that these representations caused Mr. Wang to make the payment of €96,000 to Christoffs in October 2018; that is the relevant consequence of the representations of which complaint is made.

(ii) Mr. Wang's entry into the Supplemental Agreements under which he paid €96,000 caused him no harm, as "he was immediately given credit by [Ladywell] for the €96,000 he paid to the kitchen interior supplier [...]" (Byrne written submissions at paragraph 4.1.2). I do not accept this submission, at least for the purpose of this motion. If Mr. Wang succeeds in his claim for specific performance of the contracts he entered into to purchase the properties, and is given credit for the €96,000 payment, then he will have sustained no loss. However, if Mr. Wang does not succeed in his other claims (against parties apart from Mr. Byrne) then he will have given €96,000 to a company now in receivership which he has little or no chance of recovering. In those circumstances, which cannot be excluded at this time, he would be quite entitled to pursue his claim that Mr. Byrne's representations caused him to make a payment for which he received no benefit.

(iii) "Transcendingly", as his counsel submitted at Page 98 Line 5 of the transcript for Day 1 of the hearing, Mr. Byrne has no liability for any of the alleged acts or representations as he was acting not in a personal capacity but as a director of Ladywell. For the reasons which I am about to set out, I have decided that Mr. Wang has done enough in the latest version of the Statement of Claim to plead a case that should be allowed to go to trial.

34. Counsel for Mr. Byrne placed particular emphasis on *Williams v. Natural Health Foods* [1998] 2 All E.R. 577. He submitted that the decision of the House of Lords required that the following be established in order to make a director or executive of a company personally liable:-

(i) There must be an assumption of responsibility such as to create a special relationship between the claimant on the one hand and the director or employee on the other.

(ii) Even where the claimant relies on the expertise of a director in contracting with the company, that has been found not to be enough.

(iii) The test is not simply reliance "in fact". It is "whether the plaintiff could reasonably rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company."

35. These contentions were not seriously disputed by counsel for Mr. Wang. Indeed, in a tribute to these submissions many of the suggested preconditions for personal liability were pleaded in the proposed Amended Statement of Claim. It is now pleaded that Mr. Byrne assumed responsibility for the relevant representations, or that he had (or was deemed to have) a duty to ensure the accuracy of these representations. It is pleaded that particular and specific circumstances created a relationship or proximity between the

parties which gave rise to personal liability. It is further pleaded that Mr. Wang relied personally on the statements of Mr. Byrne, that Mr. Byrne knew this, and that it was reasonable for Mr. Wang so to rely.

36. Given the new pleading, which is very clearly fashioned to meet almost all of the complaints made on behalf of Mr. Byrne about the original pleading, I will not dismiss or strike out the claim against Mr. Byrne. This is the sort of case, referred to by Clarke J at paragraph 3.13 of *Moylist*, where the legal question (as to the assumption of personal liability) requies the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored. I also feel, to use the wording in *Moylist* to which I have already referred, that the decision to dismiss Mr. Wang's claim against Mr. Byrne cannot be described as a 'slam dunk'.

37. My decision in this regard cannot be seen as an acceptance that Mr. Wang must win against Mr. Byrne if the former establishes all that he has now pleaded; that is not the test, in any event. To paraphrase Charlton J. in *Millstream Recycling v. Tierney* [2010] IEHC 55, I do not know if there is enough in what is alleged to make Mr. Byrne personally liable in any way or to any degree, but the proposed new pleading at least may make the claim an arguable one.

D. The Lenders' Motion

38. The motion taken by the Lenders (in which I include where appropriate Mr. Kirby, as their appointed receiver) involves the most significant and substantial claims. For that very reason, it is paradoxically the simplest to decide.

39. Before summarising the nature of the dispute now persisting between Mr. Wang and the Lenders, I will (as indicated earlier in this judgment) consider in some greater depth the judgment of the Supreme Court in *Moylist*. It is possible to cull the following general propositions (on the jurisdiction to strike out a claim as being bound to fail) from the judgment of Clarke J., building on his earlier judgment in Keohane v. Haynes [2014] IESC 66, as well as the judgment of Murray J. in *Jodfern Ltd. v. Fitzgerald* [2000] 3 I.R. 321:-

    (i) The jurisdiction to dismiss a case as being bound to fail arises from the power of the court to prevent an abuse of process. It is an abuse of process to bring an action which cannot succeed, and the court can act to end such an abuse by dismissing such proceedings.

    (ii) It follows from (i) that the court, in hearing such an application, is not engaging in some form of 'surrogate summary disposal procedure'.

    (iii) The power to dismiss a case as being bound to fail is one which must only be used when it is clear that such failure will occur. The fact that the case may appear to be a very weak one is not enough to justify its dismissal. Equally, the jurisdiction should not be used to secure an early determination of points of law or points of fact; there are potentially other avenues available to parties who wish to try to secure such early decisions on particular aspects of a claim.

(iv) The jurisdiction is one to be exercised sparingly, given its very limited function.

(v) In exercising this power, the court must be clear that there is no real risk of injustice in dismissing a case. The court must be mindful that the 'default position' in any proceedings is that they will go to trial.

(vi) The court should be alive to the possibility that, even where the only issue in the proceedings appears to be a legal one seemingly capable of determination without further evidence, it may well be that such an issue should only be decided 'at a full trial and in circumstances where the facts can be fully explored'. This is particularly likely to arise where the legal issues are themselves complex, and require careful analysis.

(vii) Where there are disputes on the facts (which are material or, I think, even potentially material) then it will almost never be appropriate to dismiss a case as being bound to fail.

(viii) The type of case most suitable for exercise of this jurisdiction is one where there is no dispute on the facts, where the legal or documentary issues are clear and straightforward, and where these issues are ones which the court is confident it can safely decide.

(ix) By way of contrast to (viii), where the issues raised in an application such as this reach a certain level of complexity, the appropriate course of action is to let the action proceed to trial even if the judge hearing the application has formed his or her own views about the merit of the points raised.

(x) The court should nonetheless be careful to avoid falling into the trap of finding that a range of arguments, worthless in themselves, collectively give rise to sufficient complexity to refuse the application to dismiss; 'seventeen mouths are still nothing'.

(xi) In the event that the court decides that the issues arising on a motion to dismiss are genuinely so complex that the motion should fail, it is preferable that the court would refrain from expressing any view on the issues involved; that is a matter for the trial judge, at least in first instance.

40. This summary, though inevitably a broad one, at least catches the main principles which I must apply in deciding these motions.

41. I might observe that the references in *Moylist* to the amount of time the matter was at hearing before the Supreme Court (one day) have an echo of *Electric & General Contract Corporation v. Thomson-Houston Electric Company* 10 T. L. R. 103 (1893), where Willis J. felt the fact that a case took two hours in argument ("and yet no time was wasted") meant in itself that the matter should not be dealt with summarily. During the hearing of *Danske Bank v. Durkan New Homes* [2010] IESC 22 this was a view expressly rejected by

Finnegan J., but it appears once more (to some small extent) to have come back into vogue.

42. The claim against the Lenders includes the following legal and factual issues:-

(a) Did Mr. Wang, pursuant to section 52 of Land and Conveyancing Law Reform Act 2009 (as amended) acquire the entire beneficial interest in the three properties when he agreed to buy them in October 2017?

(b) Does any interest of Mr. Wang in the three properties rank above the interests (and in particular the securities) of the Lenders?

(c) Did the Lenders have knowledge (actual, constructive or imputed) of the agreements by which Mr. Wang contracted to acquire the three properties? If so, when and to what extent? Did the Lenders have any such knowledge of the payment of the deposit monies to Ladywell by Mr. Wang? If so, when and to what extent? Did the Lenders have any such knowledge of the progress (or lack of it) on the part of Ladywell in building the three houses notwithstanding the payments made by Mr. Wang? If so, when and to what extent?

(d) Have the Lenders been unjustly enriched by the matters described in the proposed amended Statement of Claim? In this respect, the position of the Lenders is very different to the position of Mr. Murphy, in that it is alleged that the Lenders had the knowledge described at (c) above. It is also undisputed that any return on the sale of the three properties will benefit the Lenders, but not Mr. Murphy.

(e) Were the deposit monies (or any of them) paid by Ladywell to the Lenders rather than used to build the houses? This specific allegation of unjust enrichment is confined to the Lenders, and is not made against Mr. Murphy.

43. While issue (a) might well have been amenable to being decided on this motion, the other issues do not. In large measure, these other issues were introduced in the proposed amended pleadings. Taken in the round it is clear to me that the issues between Mr. Wang and the Lenders are ones which are not suitable for determination on a motion such as this, given the principles which I have set out earlier in this judgment and by which, it need hardly be said, I am bound.

44. I will therefore not dismiss the proceedings as against the Lenders as being one bound to fail.

45. I will hear the parties on the costs of these motions at 10.30am on the 20th of July 2021.