Delany and McGrath 3rd Ed. 2012

Chapter 16 - Striking Out Proceedings

Section C. - Striking out Proceedings Pursuant to the Inherent Jurisdiction of the Court

1. Introduction

16-10

In *Barry v Buckley*,[24] Costello J confirmed that, apart from the power conferred by Order 19, rule 28, the court had an inherent jurisdiction to strike out or stay proceedings if they were frivolous or vexatious or bound to fail. He explained that this "jurisdiction exists to ensure that an abuse of the process of the courts does not take place" and if the court was satisfied that the plaintiff's case must fail, "then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to the defendant".[25] It was suggested by Edwards J in *Keane v Considine*[26] that, unlike the position in relation to applications brought pursuant to Order 19, rule 28, in considering whether to dismiss a claim pursuant to the court's inherent jurisdiction, the court is entitled to engage in some analysis of the facts of a case.

16-11

This jurisdiction is one that has been stated to be "at least in principle capable of being exercised in virtually any type of case".[27] However, given that an order striking out proceedings will only be made in very clear cases where there is no dispute as to the relevant facts, in practice, an application will only succeed where there are very few issues of fact or where the facts are relevant facts are not reasonably disputable as in certain cases regarding the conclusion of contracts or the interpretation of contractual documents.[28]

2. Restraint in the Exercise of the Jurisdiction

16-12

In *Barry v Buckley*,[29] Costello J emphasised that the jurisdiction to strike out proceedings is one to be "exercised sparingly and only in clear cases"[30] and a similar approach was advocated by McCarthy J in *Sun Fat Chan v Osseous Ltd*[31] who cautioned that "generally the High Court should be slow to entertain an application of this kind". He explained the need for this restraint on the basis that:

> Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture.[32]

16-13

So, as Keane J made clear in *Lac Minerals v Chevron Corporation*,[33] a judge acceding to an application to dismiss must be confident that no matter what may arise on discovery or at the trial of the action, the plaintiff's claim cannot succeed.

16-14

A consequence of this judicial restraint is that if the pleading in question is capable of an amendment which will remedy the deficiency in the case as pleaded, then an application to strike out will not succeed. In *Sun Fat Chan v Osseous Ltd*[34] McCarthy J expressed the view that "if the statement of claim admits of an amendment which might so to speak, save it and the action founded on it, then the action should not be dismissed."[35]This proposition was accepted by Fennelly J in *Lawlor v Ross*[36] who stated that "the court should be willing to assume in favour of the plaintiff that an appropriate amendment of the pleadings might save his case". Similarly, in *Salthill Properties Ltd v Royal Bank of Scotland*,[37] Clarke J acknowledged that there was at least the possibility that further materials might be disclosed which might affect the evidence which could be presented. He said that he would not rule out the possibility that something might "emerge" and that it was important to remember that the underlying factual basis for the proceedings involved matters which, while evidenced by documentation, might need to be assessed on the basis of evidence available at trial. While Clarke J was satisfied that the evidence then available would not be sufficient to establish a prima facie case at trial, in the circumstances he concluded that it would not be appropriate to dismiss the proceedings at this stage.

3. Basis of the Exercise of the Jurisdiction

16-15

When considering an application to strike out proceedings pursuant to its inherent jurisdiction, "the court is not limited to considering the pleadings of the parties, but is free to hear evidence on affidavit relating to the issues in the case".[38] However, a court can only exercise this jurisdiction on the basis that "on admitted facts, it cannot succeed"[39] or as O'Higgins CJ commented in *McCabe v Harding*[40] where vexation is established by undisputed facts which explain the nature of the claim made or pleading.

16-16

It follows that the jurisdiction cannot be exercised where there is a dispute between the parties as to facts.[41] In *Doe v Armour Pharmaceutical Inc*.[42] Morris J, highlighting that the court will only exercise this jurisdiction where it is clear beyond doubt that the plaintiff could not succeed, said that "such circumstances would clearly envisage that no dispute could arise on issues of fact". If such a dispute did arise then, in his view, it could only be determined by the trial judge at the hearing of the action. In the case before him Morris J pointed out that neither the plaintiff nor the remaining defendants accepted the facts relied upon by the third named defendant and held that, until such time as the facts were established, it was not open to the court to make the order sought. Similarly, in *Delahunty v Player & Wills (Ireland) Ltd*,[43] Fennelly J stated that the jurisdiction to dismiss a claim is suitable for use in cases where there is no room for doubt about the evidence and, in circumstances where there were complex and difficult issues of law and fact to be decided, he upheld the order refusing to dismiss the plaintiff's claim. On the other hand, in *Rogers v Michelin Tyre plc*[44] where Clarke J categorised one claim as turning on the construction of documents, he found that the answer was clear and that the plaintiff's claim must necessarily fail against that defendant.

16-17

In *Ruby Property Co. Ltd v Kilty*,[45] McCracken J went so far as to say that, if there is a dispute as to the facts on affidavit which is not resolved by admitted documents, then it will be virtually impossible for a defendant to have proceedings struck out as being unsustainable. This is borne out by the decision in *Jodifern Ltd v Fitzgerald*[46] which concerned a claim for specific performance in relation to an alleged contract for the sale of land. In granting the defendants' application to

have the claim struck out in the High Court, McCracken J stated that there was "very little dispute on the facts between the parties, as virtually the entire negotiation was carried out in correspondence, all of which has been exhibited". However, the Supreme Court reversed his decision, with Keane J commenting that the correspondence entered into between the parties "could undoubtedly be regarded as somewhat inconclusive in some respects". He concluded that, while the case might or might not succeed if the action were allowed to proceed to trial, it was an unsustainable proposition to say that this was a case which could not possibly succeed. Barron J also made the point that disputed oral evidence of fact could not be relied upon by a defendant to support an application to dismiss and added that, while documentary evidence may well be sufficient, it may not be adequate if the proper construction of this evidence is disputed.[47] Subsequently, in *Millstream Recycling Ltd v Tierney*,[48] Charleton J commented that a weak or innovative case based on contested assertions of fact is not the type of case that should be dismissed "unless it can be demonstrated that what the plaintiff asserts is utterly undermined by the known and readily ascertainable circumstances of the claim, usually in written documentary form".

16-18

It is also well established that, in so far as there is a conflict of fact, this must be resolved in favour of the party against whom the application to strike out has been brought.[49] As Clarke J put it in *McCourt v Tiernan*,[50] in considering whether to strike out a claim in the exercise of its inherent jurisdiction, "it must treat the plaintiff's claim at its high water mark". It was conceded by counsel for the defendant in *Ennis v Butterly*[51] that the court must assume that every fact pleaded by the plaintiff is correct and can be proved at trial[52] and that every fact asserted by the plaintiff on affidavit is likewise correct and can be proved at trial.[53] This was interpreted by O'Sullivan J in *O'Keeffe v Kilcullen*[54] to mean that the court must accept fully all averments and assertions deposed to on the plaintiff's behalf even where these are traversed in opposing pleadings or are contested on affidavit.[55]

16-19

This approach has been accepted as the correct one in a number of subsequent cases,[56] and while McCracken J commented in *Ruby Property Co. Ltd v Kilty*[57] that he thought the concession made in *Ennis* had been "somewhat rash", he was satisfied that the court can only exercise its inherent jurisdiction where there was no possibility of success. A more pragmatic approach towards the question of how to deal with any possible conflict of fact was also taken by Clarke J in *Price v Keenaghan Developments Ltd*,[58] where some dispute remained about facts which in his view was not of real significance. He was satisfied that an examination of the agreed correspondence from the plaintiffs demonstrated no dispute on critical facts and that any uncertainty arose from the meaning attributed by the plaintiffs to the negotiations and discussions which had taken place. Clarke J stated that where, as in the case before him, an examination of the facts contained in the affidavits revealed that the plaintiffs had no chance of success although the pleadings advanced a known remedy, the court should grasp the nettle and strike out such unmeritorious proceedings.

16-20

As Clarke J made clear in his judgment in *Salthill Properties Ltd v Royal Bank of Scotland*,[59] the court 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. As he stated:

> 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. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put forward, at that time, a prima facie case to the contrary effect.[60]

4. Relevance of the Role of Documents in Proceedings

16-21

As Clarke J pointed out in *Salthill Properties Ltd v Royal Bank of Scotland*,[61] it is clear that an application to dismiss a claim on the grounds that it is bound to fail may be of particular relevance to cases involving the existence or construction of documents. So, 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, even if all of the facts alleged by the plaintiff were established. As he explained, 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. In his view in this type of case it is difficult to envisage circumstances where an application to dismiss as bound to fail could succeed. Clarke J also said that it is important to understand the different role which documents may play in proceedings. In some cases, such as those involving contracts, the document itself may govern the legal relations between the parties so that the court may be able to come to a clear view as to the legal consequences which flow from it. However, as he pointed out, in other cases documents may not be vital in themselves although they may cast light on the underlying facts and they will not of themselves create legal relations between the parties. As he stated, "It is important…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."

5. Claims that are Bound to Fail

16-22

A claim will be struck out where, on admitted facts or undisputed evidence, it is clearly unsustainable or bound to fail.[62] So, in *Ennis v Butterly*[63] where the cohabitation contract contended for by the plaintiff was unenforceable as a matter of public policy the court struck out the plaintiff's claim for breach of contract.[64] Similarly, in *Lopes v Minister for Justice, Equality and Law Reform*[65] Hanna J found that the allegations made by the plaintiff that he had been subjected to racial discrimination by judges of the High Court and Supreme Court who had heard his claims were "scandalous and unsustainable" and he concluded that the proceedings were wholly unsustainable in law and in fact and should be struck out. However, this is a difficult test to satisfy as it will be necessary for the defendant to establish that the plaintiff's claim is entirely devoid of merit[66] and has not just little but no reasonable prospect of success. This threshold was not met in *Leinster Leader Ltd v Williams Group Tullamore Ltd*[67] where Macken J concluded that there was no question of the court being able to come to the view at that time that the claims of the plaintiff were unsustainable. In her view the kernel of the plaintiff's claim would be dependent on the establishment of the representations made and the effect of those representations and none of this was dependent on written contracts or documents but rather on statements allegedly made orally which would have to be considered in the light of the overall evidence tendered.

16-23

Although most applications are brought by defendants to strike out claims brought by plaintiffs, it

should be noted that the court also has jurisdiction to strike out a defence and grant judgment in favour of a plaintiff if the defence is clearly unsustainable.[68] However, as Murphy J pointed out in *Phonographic Performance (Ireland) Ltd v Chariot Inns Ltd*,[69] the potential for abuse by pleading in a defence (otherwise than by counterclaim) is limited.

6. Claims that are Frivolous or Vexatious

16-24

There is a degree of overlap between claims that are unsustainable or bound to fail and those that are regarded as frivolous or vexatious. It is also evident that the category of proceedings that will be considered to be frivolous and vexatious is broader and extends to proceedings which, although they have a reasonable prospect of success will not confer any tangible benefit on the plaintiff or are taken for collateral or improper motives.[70]

16-25

In *Riordan v Ireland (No.5)*[71] Ó Caoimh J referred with approval to the decision of the Ontario High Court in *Re Lang Michener and Fabian*[72] where a number of factors indicating that proceedings were vexatious had been identified which the learned judge summarised as follows:

(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;

(c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

(f) where the respondent persistently takes unsuccessful appeals from judicial decisions.

16-26

It will often prove difficult to establish that a claim is vexatious. In *Olympia Productions Ltd v Mackintosh*[73] Costello J stated that where, as in the case before him, controversial issues of fact existed which could only be resolved by oral testimony, it seemed to him that the court could not conclude that the proceedings were vexatious. He said that while it might well be that the plaintiff's claim against one or more of the defendants would ultimately fail, that was not the same thing as saying that any of the claims were vexatious.

[<< Previous Section](#) | [Next Section >>](#)

24. *[1981] IR 306*.
25. Ibid. at 308.
26. *[2010] IEHC 267* at 28. See also the comments of Clarke J in *Salthill Properties Ltd v Royal Bank of Scotland plc [2009] IEHC 207* at [3.12].

27. *Magee v MGN Ltd [2003] IEHC 87* at 12.

28. See, e.g, *Barry v Buckley [1981] IR 306* and *Stud Managers Ltd v Marshall [1985] IR 83*. In *Sun Fat Chan v Osseous Ltd [1992] 1 IR 425, 429*, McCarthy J stated that the procedure "is peculiarly appropriate to actions for the enforcement of contracts", a comment referred to with approval by Keane J in *Jodifern Ltd v Fitzgerald [2000] 3 IR 321, 326*.

29. *[1981] IR 306, 308*.

30. See also *D.K. v King [1994] 1 IR 166, 170*; *Olympia Productions Ltd v Mackintosh [1992] ILRM 204, 207*; *Weldon v Mooney [2001] IEHC 3* at 2; *Jodifern Ltd v Fitzgerald [2000] 3 IR 321, 334*; *Jestdale Ltd v Millennium Theatre Co. Ltd [2001] 3 IR 337, 342*; *Fay v Tegral Pipes Ltd [2005] IESC 34, [2005] 2 IR 261, 265*; *Devrajan v KPMG [2006] IEHC 81* at 8; *Delahunty v Player & Wills (Ireland) Ltd [2006] IESC 21, [2006] 1 IR 304, 310*; *Keaney v Sullivan [2007] IEHC 8* at 18; *Wicklow County Council v O'Reilly [2007] IEHC 71* at 4; *Price v Keenaghan Developments Ltd [2007] IEHC 190* at 8; *Finnegan v Richards [2007] IEHC 134, [2007] 3 IR 671, 686, [2007] 2 ILRM 487, 499*; *Grant v Roche Products (Ireland) Ltd [2008] IESC 35, [2008] 4 IR 679, 695*; *Kenny v Trinity College, Dublin [2008] IESC 18* at 18; *Salthill Properties Ltd v Royal Bank of Scotland plc [2009] IEHC 207* at 5; *Gill v Bank of Ireland [2009] IEHC 210* at 8; *Keane v Considine [2010] IEHC 267* at 28; *Manning v National House Building Guarantee Co. Ltd [2011] IEHC 98* at [5.2]; *Kennedy v Minister for Agriculture, Fisheries and Food [2011] IEHC 187* at [10.3].

31. *[1992] 1 IR 425, 428*. Quoted with approval in *Philip Harrington Daly & Co. v JVC (UK) Ltd Supreme Court, 20 February 1997*; *Flanagan v Kelly [1999] IEHC 116*; *Supermac's Ireland Ltd v Katesan (Naas) Ltd [1999] IEHC 130*; *Leinster Leader Ltd v Williams Group (Tullamore) Ltd [1999] IEHC 14*; *Jodifern Ltd v Fitzgerald [1999] IEHC 19, [2000] 3 IR 321, 326 (SC)*; *Ruby Property Co. Ltd v Kilty [1999] IEHC 50*; *McGill v Bogue Supreme Court, 11 July 2000*; *Claystone Ltd v Larkin [2007] IEHC 89* at 5.

32. Ibid. at 428. This passage was quoted with approval in *Ennis v Butterly [1996] 1 IR 426, 430, [1997] 1 ILRM 28, 31*; *Doe v Armour Pharmaceutical Inc. High Court (Morris J) 31 July 1997* at 6; *Philip Harrington Daly & Co. v JVC (UK) Ltd Supreme Court, 20 February 1997* at 7; *Supermac's Ireland Ltd v Katesan (Naas) Ltd [1999] IEHC 130* at 3; *Leinster Leader Ltd v Williams Group (Tullamore) Ltd [1999] IEHC 14* at 12; *Jodifern Ltd v Fitzgerald [1999] IEHC 19*; *Mastertrade (Exports) Ltd v Phelan [2001] IEHC 171* at 15; *Kayfoam Woolfson v Healthcare Materials Management Board [2001] IEHC 79* at 2; *Lawlor v Ross [2001] IESC 110* at 2; *Keaney v Sullivan [2007] IEHC 8* at 18; *Wicklow County Council v O'Reilly [2007] IEHC 71* at 4; *Grant v Roche Products (Ireland) Ltd [2008] IESC 35, [2008] 4 IR 679, 695*; *Salthill Properties Ltd v Royal Bank of Scotland plc [2009] IEHC 207* at 7. This approach is also borne out by the conclusion reached by O'Flaherty J in *Philip Harrington Daly & Co. v JVC (UK) Ltd Supreme Court, 20 February 1997* that while he could see the force in the argument that the plaintiff's case against the third named defendant was very tentative at that time, he held that it would be preferable that this defendant should remain in the proceedings until its role was clarified.

33. *High Court (Keane J) 6 August 1993*. Quoted with approval in *Supermac's Ireland Ltd v Katesan (Naas) Ltd [2000] IESC 17, [2000] 4 IR 273, 277, [2001] 1 ILRM 401, 405*; *Lawlor v Ross [2001] IESC 110* at 9 per Fennelly J; *Superwood Holdings Ltd v Ireland [2005] IEHC 232, [2005] 3 IR 398*; *A.F. v S.F. [2007] 4 IR 326, 332*; *Salthill Properties Ltd v Royal Bank of Scotland plc [2009] IEHC 207* at 7.

34. *[1992] 1 IR 425, 428*.

35. See also *D.K. v King [1994] 1 IR 166, 174*; *Landers v Garda Síochána Complaints Board [1997] 3 IR 347, 360*; *Flanagan v Kelly [1999] IEHC 116* at 1; *Ewing v Kelly [2000] IEHC 58* at 3; *Riordan v Hamilton [2000] IEHC 189*; *Flynn v O'Malley High Court (Ó Caoimh J) 24 July 2002*.

36. *[2010] IESC 110*, at [25]. See also *Moffitt v ACC plc [2007] IEHC 245, [2008] 1 ILRM 416, 422*.

37. *[2009] IEHC 207*.

38. Per Costello J in *Barry v Buckley [1981] IR 306, 308*. See also *Tassan Din v Banco Ambrosiano SPA [1991] 1 IR 569, 572*; *Landers v Garda Síochána Complaints Board [1997] 3 IR 347, 360*; *Gill v Bank of Ireland [2009] IEHC 210* at 7.

39. Per McCarthy J in *Sun Fat Chan v Osseous Ltd [1992] 1 IR 425, 428*. See also *McManus v Cable Management (Ireland) Ltd High Court (Morris J) 8 July 1994* and the dicta of Herbert J in *O'Connell v Environmental Protection Agency [2002] 1 ILRM 1, 13* to the effect that the court should only act "where confident that the claim must inevitably fail".

40. *[1984] ILRM 105, 108*.

41. *Olympia Productions Ltd v Mackintosh [1992] ILRM 204, 207*; *Mehta v Marshs High Court (Carroll J) 5 March 1996*; *Doe v Armour Pharmaceutical Inc. [1997] IEHC 139*; *Supermac's Ireland Ltd v Katesan (Naas) Ltd [1999] IEHC 130* at 20-21; *Ruby Property Co. Ltd v Kilty [1999] IEHC 50*; *Moran v Oakley Park Developments Ltd [2000] IEHC 39*; *Gill v Bank of Ireland [2009] IEHC 210* at 8.

42. *[1997] IEHC 139* at [10].

43. *[2006] IESC 21, [2006] 1 IR 304*.

44. *[2005] IEHC 294*.

45. *[1999] IEHC 50*.

46. *[1999] IEHC 19, [2000] 3 IR 321 (SC)*.

47. *[2000] 3 IR 321, 332*. See also *Claystone Ltd v Larkin [2007] IEHC 89* at 6.

48. *[2010] IEHC 55* at [15].

49. *Devrajan v KPMG [2006] IEHC 81* at 8. See also *Kennedy v Minister for Agriculture, Fisheries and Food [2011] IEHC 187* at [10.4].

50. *[2005] IEHC 268* at 6.

51. *[1996] 1 IR 426, [1997] 1 ILRM 28*.

52. *Ewing v Kelly [2000] IEHC 58* at 3. See also *Lawlor v Ross [2001] IESC 110* at 2 per Keane CJ; *Talbot v Hibernian Group plc [2007] IEHC 385* at 4; *W.J. Prendergast & Son Ltd v Carlow County Council [2007] IEHC 192, [2007] 4 IR 362, 366*.

53. See also *Sunreed Investment Ltd v Gill [2000] IEHC 124*.

54. *[1998] IEHC 101*.

55. Although as O'Higgins J pointed out in *Fagan v McQuaid [1998] IEHC 69* at 20 "even if the entire contents of the statement of claim were proven" there may not be a reasonable chance of the plaintiff succeeding.

56. *Supermac's Ireland Ltd v Katesan (Naas) Ltd [1999] IEHC 130* at 6; *Leinster Leader Ltd v Williams Group (Tullamore) Ltd [1999] IEHC 14* at 8; *Moran v Oakley Park Developments Ltd [2000] IEHC 39* at 4; *Twohig v Bank of Ireland Supreme Court, 22 November 2003* at 2.

57. *[1999] IEHC 50* at 26.

58. *[2007] IEHC 190*.

59. *[2009] IEHC 207*.

60. Ibid. at [3.14]. See also *Manning v National House Building Guarantee Co. Ltd [2011] IEHC 98* at [5.4].

61. *[2009] IEHC 207*. See also *Manning v National House Building Guarantee Co. Ltd [2011] IEHC 98* at [5.3].

62. *D.K. v King [1994] 1 IR 166, 171*; *O'Neill v Ryan [1993] ILRM 557, 561*; *Ennis v Butterly [1996] 1 IR 426, 430, [1997] 1 ILRM 28, 32*; *Flanagan v Kelly [1999] IEHC 116* at 11; *Supermac's Ireland Ltd v Katesan (Naas) Ltd [1999] IEHC 130* at 3; *Leinster Leader Ltd v Williams Group (Tullamore) Ltd [1999] IEHC 14* at 13; *Lynch v English [2003] IEHC 24* at 3.

63. *[1996] 1 IR 426, [1997] 1 ILRM 28*.

64. Although Kelly J held that the plaintiff's claim for damages for misrepresentation should not be struck out as he could not say that it had to fail.

65. *[2008] IEHC 246, [2008] 4 IR 743*.

66. *D.K. v King [1994] 1 IR 166, 174*.

67. *[1999] IEHC 14*.

68. *Sun Fat Chan v Osseous Ltd [1992] 1 IR 425, 428*. See also *Ruby Property Co. Ltd v Kilty [1999] IEHC 50*.

69. *[1998] IESC 64*.

70. *Devrajan v KMPG [2006] IEHC 91* at 8.

71. *[2001] 4 IR 463, 466*.

72. *(1987) 37 DLR (4th) 685, 691*. There was an additional factor "(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings." See also *Devrajan v KMPG [2006] IEHC 91* at 9; *O'Reilly McCabe v Minister for Justice [2006] IEHC 208* at 35-36; *Behan v McGinly [2008] IEHC 18* at 13-14.

73. *[1992] ILRM 204, 207*. (The defendants' appeal was dismissed by the Supreme Court on 15 March 1996).