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Striking out where No Reasonable Cause of Action, where Claim Frivolous or Vexatious or where Clearly Unsustainable

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It is well established that the courts have an inherent jurisdiction to stay or strike out proceedings where they are clearly unsustainable or an abuse of process in addition to their power, conferred by Order 19, rule 28 of the Rules of the Superior Courts, to strike out pleadings on the grounds that they disclose no reasonable cause of action or are frivolous or vexatious. The circumstances in which this jurisdiction may be exercised have been examined in a number of recent cases which consider in some detail a number of the well established principles in this area.

Jurisdiction Pursuant to Order 19, Rule 28

Order 19, rule 28 of the Rules of the Superior Courts 1986 provides that a court may order a pleading to be struck out on the grounds that "it discloses no reasonable cause of action or answer" and that in any case where the action or defence is shown by the pleadings to be "frivolous or vexatious", the court may order that the action be stayed or dismissed or that judgment may be entered accordingly. It was stressed by O'Higgins CJ in McCabe v. Harding[1984] ILRM 105, *108*. that in order for this rule to apply "vexation or frivolity must appear from the pleadings alone" or as Costello J commented in Barry v. Buckley[1981] IR 306, *308*. "the court can only make an order under this rule when a pleading discloses no reasonable cause of action on its face". These principles were confirmed by Costello J in the course of his judgment in D.K. v. King[1994] 1 IR 166, *170*. where he stated that rule 28 only applies where it can be shown that the text of the plaintiff's summons or statement of claim discloses no reasonable cause of action or that the action is frivolous or vexatious. So, for the purposes of considering whether to accede to an application based on rule 28 the court should consider the pleadings alone, ignoring any affidavit evidence filed.Supermac's Ireland Ltd v. Katesan (Naas) Ltd, *High Court (Macken J) March 15, 1999, p. 5*; Ratcliffe v. Wilson, *High Court (Macken J) March 23, 1999, p.3; and*Leinster Leader Ltd v. Williams Group (Tullamore) Ltd, *High Court (Macken J) July 9, 1999, p. 5*. The scope of what constitutes "pleadings" for this purpose was considered by Macken J in Leinster Leader Ltd v. Williams Group (Tullamore) Ltd*High Court (Macken J) July 9, 1999*. in which she stated that while, strictly speaking, a notice for particulars and its reply were not necessarily "pleadings", in case they should be considered as such, she was prepared to look at them to ascertain whether their contents made it certain that the plaintiff could not

succeed in its claim. However, she concluded that even taking the request for particulars and the reply into account, it seemed to her that a court could not say with certainty that the plaintiff could not succeed or was bound to fail. Clearly, given the rather restrictive wording of rule 28, it will often prove difficult in practice to establish that a pleading discloses no reasonable cause of action on its face. One recent example of a decision in which it was felt that these criteria had been met is Moffitt v. Bank of Ireland*Supreme Court, February 19, 1999. See also*McCabe v. Dolan Cosgrove & Co, *High Court (Lynch J) October 14, 1991*. in which the Supreme Court was satisfied that, even reading the statement of claim in as expansive a manner as possible, it seemed to disclose no cause of action whatever against the second named defendant.

Inherent Jurisdiction of the Court

While the power to dismiss pursuant to rule 28 has been interpreted restrictively, the courts also possess an inherent power to strike out claims on similar grounds. In exercising this 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".*Per Costello J in*Barry v. Buckley[1981] IR 306, *308*. Tassan Din v. Banco Ambrosiano SPA[1991] 1 IR 569, *572*. This inherent jurisdiction may be used to dismiss an action on the basis that "on admitted facts, it cannot succeed"*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) July 8, 1984* or as O'Higgins CJ commented in McCabe v. Harding[1984] ILRM 105, *108*. where vexation is established by undisputed facts which explain the nature of the claim made or pleading. The rationale behind this jurisdiction was explained in the following terms by Costello J in Barry v. Buckley[1981] IR 306, *308. Quoted with approval in*Stud Managers Ltd v. Marshall[1985] IR 83, *86*; Ennis v. Butterly[1997] 1 ILRM 28, *31*; Supermac's Ireland Ltd v. Katesan (Naas) Ltd, *High Court (Macken J) March 15, 1999, p. 2*; Leinster Leader Ltd v. Williams Group (Tullamore) Ltd, *High Court (Macken J) July 9, 1999, p. 12; and*Ruby Property Co. Ltd v. Kilty, *High Court (McCracken J) December 1, 1999. See also the dicta of Costello J in*D.K. v. King[1994] 1 IR 166, *170: "Basically, the jurisdiction exists to ensure that an abuse of the court's process does not take place. It it is established by satisfactory evidence that the proceedings are frivolous or vexatious or if it is clear that the plaintiff's claim must fail then the court may stay the action". Quoted with approval by Blayney J in*O'Neill v. Ryan[1993] ILRM 557, *561*.:

Basically its jurisdiction exists to ensure that an abuse of the process of the courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail *per* Buckley LJ in Goodson v. Grierson[1908] 1 KB 761, 765.

It should be noted that it has been stated that this inherent jurisdiction "should be

exercised sparingly and only in clear cases"*Per Costello J in*Barry v. Buckley[1981] IR 306, *308. See also*D.K. v. King[1994] 1 IR 166, *170 and*Olympia Productions Ltd v. Mackintosh[1992] ILRM 204, *207*. and as McCarthy J stated in Sun Fat Chan v. Osseous Ltd[1992] 1 IR 425, *428. Quoted with approval in*Philip Harrington Daly & Co. v. JVC (UK) Ltd, *Supreme Court, February 21, 1997*; Flanagan v. Kelly, *High Court (O'Sullivan J) February 26, 1999*; Supermac's Ireland Ltd v. Katesan (Naas) Ltd, *High Court (Macken J) March 15, 1999*; Leinster Leader Ltd v. Williams Group (Tullamore) Ltd, *High Court (Macken J) July 9 1999*; Jodifern Ltd v. Fitzgerald, *High Court (McCracken J) July 28, 1999; and*Ruby Property Co. Ltd v. Kilty, *High Court (McCracken J) December 1, 1999*. "generally the High Court should be slow to entertain an application of this kind". However, McCarthy J stated that he inclined to the view that if the statement of claim admitted of an amendment which might save it and the action founded upon it, the claim should not be dismissed.*Ibid at 428. See also*D.K. v. King[1994] 1 IR 166, *174 and*Flanagan v. Kelly*High Court (O'Sullivan J) February 26, 1999, p. 1*. The reason for the caution which McCarthy J urged the courts to show was set out by him in the following terms:

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.*Ibid. Quoted with approval in*Ennis v. Butterly[1997] 1 ILRM 28, *31*; Doe v. Armour Pharmaceutical Inc, *High Court (Morris J) July 31, 1997 at p. 6*; Philip Harrington Daly & Co. v JVC (UK) Ltd, *Supreme Court, February 21, 1997, p. 7*; Supermac's Ireland Ltd v. Katesan (Naas) Ltd, *High Court (Macken J) March 15, 1999, p. 3*; Leinster Leader Ltd v. Williams Group (Tullamore) Ltd, *High Court (Macken J) July 9, 1999, p. 12; and*Jodifern Ltd v. Fitzgerald, *High Court (McCracken J) July 28, 1999. 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, February 21, 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*.

As Macken J commented recently in Supermac's Ireland Ltd v. Katesan (Naas) Ltd*High Court (Macken J) March 15, 1999 pp. 20–21*.: "I bear in mind in particular that the Supreme Court has stated that while the facility to strike out a case *in limine* on the grounds that it cannot possibly succeed is one from which the court should not shirk, it is equally the case that the Supreme Court has stated that it is a remedy which ought to be applied sparingly, and in general ought to be applied only to circumstances where there are undisputed facts". Clearly a balance must be struck by the court in exercising its inherent jurisdiction in this regard and it will be more suited to some types of dispute than others. As Costello J pointed out in Barry v. Buckley,[1981] IR 306, *308. See also*Stud Managers Ltd v. Marshall[1985] IR 83. the

jurisdiction is one which enables the court to avoid injustice particularly in cases where the outcome depends on "the interpretation of a contract or agreed correspondence". In this case the plaintiff offered to buy the defendant's land and the defendant stipulated that no binding contract would be created until a written agreement had been executed by each party and a deposit paid by the plaintiff. The defendant decided to treat the transaction as at an end and did not sign the contract nor did the plaintiff pay any deposit. The plaintiff then brought an action seeking an order directing the defendant to perform his obligations under the alleged contract of sale and registered a *lis pendens* affecting the defendant's land. The defendant successfully brought an application for an order striking out the plaintiff's action and vacating the *lis pendens*. Costello J concluded "as the case is a clear one and as considerable injustice could result if the matter is not disposed of now, it seems that to allow the case to proceed to trial would be to permit an abuse of the court's processes". Similarly in Sun Fat Chan v. Osseous Ltd[1992] 1 IR 425, *429*. McCarthy J commented that "the procedure is peculiarly appropriate to actions for the enforcement of contracts", a point reiterated by Keane J delivering the judgment of the Supreme Court in Jodifern Ltd v. Fitzgerald*Supreme Court, December 21, 1999*. where he pointed out that in such cases it may well be that the action will inhibit or preclude the party sued from entering into a new contract in respect of the same subject matter.

If the court is to exercise its inherent jurisdiction to dismiss a claim, it is important that there is no dispute between the parties on issues of fact. In Doe v. Armour Pharmaceutical Inc*High Court (Morris J) July 31, 1997 at p. 6*. Morris J referred to the fact that McCarthy J had made it clear in his judgment in Sun Fat Chan v. Osseous Ltd that the court will only exercise this jurisdiction where it is clear beyond doubt that the plaintiff could not succeed and said that "such circumstances would clearly envisage that no dispute could arise on issues of fact". If such a dispute did arise, Morris J stated that 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 as matters of fact the facts relied upon by the third named defendant and held that until such time as the facts were established, in his view it was not open to the court to make the order sought. Similar views were expressed by Costello J in Olympia Productions Ltd v. Mackintosh[1992] ILRM 204, *207. See also the dicta of Carroll J in*Mehta v. Marshs, *High Court (Carroll J) March 5, 1996 that as there were no agreed facts, the inherent jurisdiction of the court to dismiss the action could not be invoked*. where he said when, as in the case before him, controversial issues of fact exist which can only be resolved by oral testimony, it seemed to him that the court could not conclude that the proceedings are vexatious.

These principles have been reiterated in a number of recent cases and in Ruby Property Co. Ltd v. Kilty*High Court (McCracken J) December 1, 1999*. McCracken J

commented that if there is a dispute on 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. So, in refusing the relief sought by the defendant in Supermac's Ireland Ltd v. Katesan (Naas) Ltd*High Court (Macken J) March 15, 1999*. Macken J commented that "the very last thing that can be said about these proceedings is that there is any area in which there are undisputed facts". It is also instructive to compare the opposite conclusions reached by the High Court and the Supreme Court in Jodifern Ltd v. Fitzgerald*High Court (McCracken J) July 28, 1999*. 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, in reversing his decision Keane J commented 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.

A related issue is that it has been accepted that in so far as there may be a conflict between matters averred to by the plaintiff and the defendant, such conflict must be resolved in favour of the plaintiff. It was conceded by counsel for the defendant in Ennis v. Butterly[1997] 1 ILRM 28. that the court must assume that every fact pleaded by the plaintiff is correct and can be proved at trial and that every fact asserted by the plaintiff on affidavit is likewise correct and can be proved at trial. This was interpreted by O'Sullivan J in O'Keeffe v. Kilcullen*High Court (O'Sullivan J) June 24, 1998*. 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.*Although as O'Higgins J pointed out in*Fagan v. McQuaid, *High Court (O'Higgins J) May 12, 1999 at p. 20 "even if the entire contents of the statement of claim were proven" there may not be a reasonable chance of the plaintiff succeeding*. This approach has been accepted as the correct one in a number of subsequent cases,Supermac's Ireland Ltd v. Katesan (Naas) Ltd, *High Court (Macken J) March 15, 1999, p. 6 and*Leinster Leader Ltd v. Williams Group (Tullamore) Ltd, *High Court (Macken J) July 9, 1999, p. 8*. and while McCracken J commented in Ruby Property Co. Ltd v. Kilty*High Court (McCracken J) December 1, 1999, p. 26*. 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.

Grounds for the Exercise of the Court's Inherent Jurisdiction

Consideration was given by Murphy J in Tassan Din v. Banco Ambrosiano SPA[1991] 1 IR 569, *574*. to what will be vexatious and an abuse of the process of the court

and this will include seeking to litigate any matter which has already been concluded by a final and binding order of the court. In McSorley v. O'Mahony*High Court (Costello J) November 6, 1996*. Costello J also ordered that the action should be stayed on the grounds that it was vexatious and an abuse of the court's process. In his view the first cause of action between the parties no longer existed and in the second, the plaintiff could obtain no benefit from maintaining the proceedings. Costello J gave the following explanation of what will amount to an abuse of process:

It is an abuse of the process of the courts to permit the court's time to be taken up with litigation which can confer no benefit on a plaintiff. It is also an abuse to permit litigation to proceed which will undoubtedly cause detriment to a defendant and which can confer no gain on a plaintiff.*Ibid at p. 21*.

It will often prove difficult to establish that a claim is vexatious. In Olympia Productions Ltd v. Mackintosh,[1992] ILRM 204, *207. (The defendants' appeal was dismissed by the Supreme Court on March 15, 1996)*. 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 the any of the claims were vexatious.

Even if it cannot be established that a claim is frivolous or vexatious, the court may strike out a claim where there is satisfactory evidence that it is clearly unsustainable.D.K. v. King[1994] 1 IR 166, *171*, O'Neill v. Ryan[1993] ILRM 557, *561*; Ennis v. Butterly[1997] 1 ILRM 26, *32*; Flanagan v. Kelly, *High Court (O'Sullivan J) February 26, 1999, p. 11*; Supermac's Ireland Ltd v. Katesan (Naas) Ltd, *High Court (Macken J) March 15, 1999, p. 3; and*Leinster Leader Ltd v. Williams Group (Tullamore) Ltd, *High Court (Macken J) July 9, 1999, p. 13* So, in Ennis v. Butterly[1997] 1 ILRM 28. 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.*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*. However, it would appear that, provided the court reaches the conclusion that the plaintiff's case is one which he should be permitted to make and that it is not so devoid of merit as to justify the conclusion that by making it the court's processes have been abused, a claim to have the action struck out will not succeed.D.K. v. King[1994] 1 IR 166, *174*. So, in Leinster Leader Ltd v. Williams Group Tullamore Ltd*High Court (Macken J) July 9, 1999*. 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. This may be contrasted with the conclusion reached by O'Sullivan J in Flanagan v. Kelly*High Court (O'Sullivan J) February 26, 1999*. where he held that there was satisfactory evidence that the proceedings were unsustainable in the sense that they were bound to fail. In his view, that statement of claim failed to show a reasonable cause of action and, even it it were amended along the lines indicated by counsel for the plaintiff, this position would not change.

Finally it should be noted that McCarthy J stated in Sun Fat Chan v. Osseous Ltd[1992] 1 IR 425, *428. See also*Ruby Property Co. Ltd v. Kilty, *High Court (McCracken J) December 1, 1999*. that a defendant may be denied the right to defend an action in plenary hearing if the facts are clear and it is shown that the defence is unsustainable. However, it should be pointed out that as Murphy J stated in Phonographic Performance (Ireland) Ltd v. Chariot Inns Ltd*Supreme Court, February 16, 1998*. the potential for abuse by pleading in a defence (otherwise than by counterclaim) must be limited.

Conclusions

Clearly, in exercising its power to strike out a claim both pursuant to the Rules of the Superior Courts and on the basis of its inherent jurisdiction, the court must seek to balance the rights of plaintiff and defendant. The implied constitutional right of access to the courtsMacauley v. Minister for Post and Telegraphs[1966] IR 345. *Although note that this right of access to the courts is no an unqualified one, see generally Kelly "The Irish Constitution" (1994, 3rd ed., Hogan and Whyte) pp. 770–773 and Casey "Constitutional Law in Ireland" (1992, 2nd ed.) pp. 328–334*. has been interpreted as encompassing the right "to litigate claims which are justiciable"O'Brien v. Manufacturing Engineering Ltd[1973] IR 334, *364*. and "to initiate litigation in the courts"State (McCormack) v. Curran[1987] ILRM 225, *237*. but clearly the courts also have a duty to uphold the integrity of the judicial system by declining to adjudicate on matters which constitute an abuse of the court's process. While the circumstances in which the pleadings themselves will disclose no reasonable cause of action on their face will be relatively limited, the inherent jurisdiction of the court to look beyond the pleadings has meant that it can act at a relatively early stage to strike out proceedings where a claim is clearly unsustainable and on the admitted facts cannot succeed. As a consideration of the case law has shown, a crucial precondition to the exercise of this inherent jurisdiction is that there is no dispute between the parties on issues of factDoe v. Armour Pharmaceutical Inc, *High Court (Morris J) July 31, 1997*. and for this reason it has tended to be invoked successfully in cases involving the interpretation of an alleged contractBarry v. Buckley[1981] IR 306*and*Stud Managers Ltd v. Marshall[1985] IR 83. or where the dealings between the parties have been well

documented. However, the very existence of the jurisdiction acts as a deterrent to litigants who seek to pursue vexatious or unsustainable claims and it represents an important weapon in the armoury of the courts to prevent abuse of process.

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