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# *33 To Strike or not to Strike? A Review of the Jurisdiction to Dismiss Proceedings in the Superior Courts

Trevor Murphy*

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## Introduction

It seems a reasonable proposition that the courts, as an organ of the State, should have the power to prevent litigants abusing their right of access to the courts by instituting disingenuous and unmeritorious litigation against a party with a view to using the courts as a "forum for lost causes"[1] and, by so doing, subjecting their opponent to the expense, hassle and worry of having to defend a baseless claim which, as a matter of law, cannot possibly succeed and is therefore bound to fail. It is for these reasons, and the imperative of upholding the integrity of the judicial system, that the courts have been conferred with jurisdiction to strike out or dismiss proceedings where they are prima facie unsustainable, display no cause of action, or which, in the view of the courts, are frivolous and/or vexatious.[2]

Against this backdrop, the purpose of this article is to consider the legal principles relating to this jurisdiction to dismiss unmeritorious litigation and consider some recent examples of circumstances where the jurisdiction has been invoked by the High Court.

## Balancing Rights

At the heart of the jurisdiction of the courts to dismiss unmeritorious litigation lie two important, yet competing, rights. The first of these rights is the well-established constitutional right of citizens to access the courts in order to allow citizens protect and vindicate justiciable rights and resolve genuine grievances, regardless of how badly articulated their claim is.[3] This right of access to the courts is fundamental and was reaffirmed by Gilligan J. in the High Court earlier this year in Freeman v Bank of Scotland.[4]

As against this right, there is equally the right of citizens not to be exposed to (and, indeed, a duty on the State to protect against) unmeritorious claims which may be

brought for some collateral or improper purpose, such as harassment or embarrassment.[5] In this regard, it was commented by McGovern J. in Doherty v Minister for Justice, Equality and Law Reform[6] that "the courts are not to be used as a forum for ventilating complaints, but, rather resolving genuine disputes between parties to the litigation".

## Reluctance

It is because of the constitutional right of access to the courts that the Irish courts have consistently displayed a degree of reluctance to exercise the jurisdiction to dismiss unmeritorious proceedings. In practice, the jurisdiction can only be successfully availed of in cases where there is no actual dispute or contest as to the facts of the proceedings as pleaded, or where facts cannot reasonably be disputed.[7] Thus, it has been held that it is a jurisdiction which will be exercised "sparingly and only in clear cases".[8]

The rationale for this caution shown by the courts towards applications to strike out proceedings is clear. It is based on the view that, while the facts of the particular litigation may not be (or reasonably be) in dispute between the parties at an early stage of the litigation, the ultimate trial of the action—through procedures such as discovery and cross-examination—may establish that the facts at issue are, in fact, less clear than previously envisaged. Essentially, the trial of the action may identify new issues or disclose "a different picture" which were not reasonably contemplated at an earlier stage of the proceedings.[9] In short, judges are reluctant to deprive a litigant of his or her day out in court (so to speak) although it has been held that "where there is no evidence to support a claim the courts should not shrink from exercising the power [to dismiss proceedings]".[10]

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In this regard, it was held by Keane J. in Lac Minerals v Chevron Corp[11] that before a court accedes to an application to dismiss proceedings, the court must be confident that no matter what may arise on discovery or at the trial of the action, the plaintiff's claim is unsustainable and cannot succeed. This view was recently endorsed by Gilligan J. in Freeman v Bank of Scotland,[12] where the judge indicated that the jurisdiction can only be exercised "upon the closest scrutiny and in clear cases" and where the court is satisfied, on the balance of probabilities, that there is "nothing meritorious in the plaintiff's claim" or that the claim has "no foundation in law". Therefore, the test for a party to satisfy is not easy to discharge.

## Jurisdiction

It is accepted that there are two bases upon which an application to strike out proceedings for having no merit may be brought: first, pursuant to Ord.19 r.28 of the Rules of the Superior Courts (RSC); and secondly, pursuant to the court's inherent jurisdiction to prevent the court process from being abused by citizens for some ulterior or improper purpose. While the principles relating to each jurisdiction are

similar and frequently overlap in practice, the inherent jurisdiction of the court to dismiss proceedings is separate and distinct to that set out under Ord.19 r.28 of the RSC.

### *1. Order 19 rule 28 of the Rules of the Superior Courts*

Under Ord.19 r.28 of the RSC, any pleading may be struck out where it "discloses no reasonable cause of action" and where the action (or defence) is "frivolous or vexatious". In short, this provision permits a court (by way of application by a party or, indeed, of its own volition) to dismiss proceedings where the cause of action pleaded—based on the facts contained in the pleadings themselves—does not exist in law, has no foundation in law, or where a legitimate claim or cause of action is unlikely to be established at trial. There does not appear to be any limitation on the types of proceeding which may be the subject of a motion to dismiss for displaying no merit, as Ord.19 r.28 of the RSC refers to the jurisdiction being applicable to "any pleading".

However, in contrast to the inherent jurisdiction of the court to dismiss vexatious claims, the court must, under Ord.19 r.28 of the RSC, deal with such an application based solely on the pleadings (and not based on affidavit or other extraneous evidence[13] ), although the court is permitted to have regard to documents referred to in the summons or statement of claim, as necessary.[14]

A "pleading" in this context is typically a plenary summons or a statement of claim, but it can also refer to a notice for particulars and replies thereto.[15] Furthermore, Ord.19 r.28 of the RSC only applies where a party wishes to apply to dismiss the entire claim or defence (although abuse is less likely to occur with respect to a defence). It does not apply where a party only wishes to dismiss part of a claim or defence where a separate rule applies.[16]

#### *Example*

An example of where an application was successful under Ord.19 r.28 of the RSC is Moffitt v Bank of Ireland.[17] This involved a claim against a solicitor (as second-named defendant) where it was alleged that the second-named defendant prepared a false affidavit on behalf of his client. This allegation was refuted by the second-named defendant. However, despite this refutation, Keane J. (as he then was) dismissed the proceedings as against the second-named defendant in any event. This was on the basis that even if the allegation against the solicitor was true, the allegation would not assist the plaintiff in the context of the plaintiff's litigation, as it did not provide a cause of action in negligence or otherwise against the second-named defendant.

### *2. Inherent jurisdiction of the court*

In addition to Ord.19 r.28 of the RSC, the courts have an inherent power to dismiss proceedings which are frivolous or vexatious, or are bound to fail, or where

proceedings "cannot be justified and [are] manifestly causing irrecoverable damage to the defendant".[18] Like under the RSC, this jurisdiction to dismiss can be exercised with respect to virtually all types of proceedings.[19]

## Wider power

There is a substantial degree of overlap between this inherent jurisdiction to dismiss proceedings and the related jurisdiction laid down under the RSC. However, unlike the jurisdiction under Ord.19 r.28 of the RSC, when examining an application to dismiss pursuant to the court's inherent jurisdiction, the court ***35** is entitled to consider the history of the dispute from which the litigation arose. The court is not limited to reviewing the pleadings but can have regard to all of the evidence filed to date in relation to the matter.[20] In Riordan v An Taoiseach,[21] Ó Caoimh J. stated that when exercising the inherent jurisdiction to dismiss a claim, the court is entitled to consider not just the pleadings, but wider issues such as: the conduct of the parties; whether the proceedings can benefit the plaintiff in any material way; whether the proceedings have been brought without any reasonable ground; and the motivation for bringing the proceedings.

A recent example of the court exercising its inherent jurisdiction is in Murray v Fitzgerald.[22] In these proceedings, White J. invoked the court's inherent jurisdiction to dismiss the proceedings based on the manner in which the plaintiff conducted the litigation from the outset. This conclusion was reached by White J. despite the fact that the court could not conclude that the proceedings had no chance of success at trial. Thus, the court's inherent jurisdiction in this context is wider and capable of applying to a broader set of circumstances—such as the conduct of the litigants—than the jurisdiction under the RSC. In reality, the distinction between both jurisdictions is not very material, as the applicant bringing the motion to dismiss the proceedings will plead both Ord.19 r.28 of the RSC and the court's inherent jurisdiction.

## No cause of action

No reasonable cause of action may arise in circumstances where the content of a statement of claim is clearly unsustainable or bound to fail.[23] For example, in Zurich Bank v McConnon,[24] the defendant sought to resist summary judgment proceedings brought against him by claiming—in his defence—that the plaintiff bank was guilty of reckless lending. This defence was dismissed by Bermingham J. on the basis that there is no civil wrong or tort of reckless lending recognised either at common law or on the statute books in Ireland.[25] Therefore, the defence had no reasonable prospect of success, so the court dismissed the defence as having no merit.

In practice, in order to be successful, it is necessary for a defendant bringing an application to dismiss proceedings for no merit to establish that the claim is devoid of merit and has no (not a little) reasonable prospect of success at trial. It may be difficult for a court to come to this view purely based on reviewing a plenary

summons or a statement of claim and without the benefit of discovery of documents and, indeed, the hearing any evidence. Therefore, to mitigate the risk of a court taking the view that the application is premature, it may be prudent for the defendant to raise particulars on the pleadings in advance of brining a motion under Ord.19 r.28 of the RSC, particularly where the allegations have been badly articulated or may have been drafted without the assistance of lawyers. This may be with a view to clarifying the nature and extent of the claim to determine whether any legitimate claim or cause of action is apparent or could foreseeably arise. The timing of bringing the application may thus be important.

### Dispute

It is not the function of the court which hears an application to dismiss proceedings to adjudicate on the merits or demerits of the facts or evidence pleaded to date which may be in dispute between the parties. Therefore, if there is a reasonable dispute as to the facts of a case which cannot be resolved by reference to the documents admitted, this must be resolved in favour of the party against whom the application to dismiss is brought.[26] In this context, the court must, as a general principle, assume the claims made in the pleadings are true and can be proven at trial by evidence.[27] This presumption operates against the granting of an application to dismiss proceedings for disclosing no cause of action.

### Amendment

Given the importance which the courts attach to the right of access to the courts, and the consequent reluctance of the courts to invoke this jurisdiction to dismiss, even if a court decides that proceedings do not disclose a cause of action, the court will generally consider whether any amendment to the pleadings (as drafted) may remedy the deficiency in the pleadings to enable the proceedings to proceed to trial.[28] Therefore, if an amendment to the statement of claim will "save" the proceedings, an application to dismiss under Ord.19 r.28 of the RSC for displaying no cause of action will probably not be successful.[29]

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While the courts cannot rewrite the pleadings for the parties, the benefit of the doubt in such circumstances will be afforded to the plaintiff to the proceedings, subject to the nature of the amendment necessary to remedy the contents of the defective pleadings.

### Frivolous and vexatious

There is no definition of the terms "frivolous" and "vexatious" in the RSC. However, it is generally accepted that these terms are legal terms which are often used interchangeably.[30] In essence, a claim is "frivolous" if, as a matter of law, it has no chance of succeeding.[31] Similarly, a claim is "vexatious" if it results in putting a person to the hardship of having to defend an unmeritorious claim which cannot possibly succeed in law.[32]

In practice, frivolous and/or vexatious claims may arise under many guises. In Re Lang Michener & Fabian,[33] the Ontario High Court listed a number of factors/indicia—which factors were endorsed by Laffoy J. in the High Court in Loughrey v Dolan[34] —which tend to indicate that proceedings may potentially be vexatious in nature and thus amenable to being struck out. These factors, which are not meant to be exhaustive, are:

- whether the issues in dispute are matters which have already been determined by a court of competent jurisdiction, i.e. res judicata;
- where it is obvious that an action cannot succeed, or if the action will lead to no possible good, or if no reasonable person can expect to obtain relief;
- where the action is brought for an improper purpose, including harassment and oppression of other parties, as opposed to asserting legitimate legal rights;
- where issues sought to be litigated tend to be rolled forward into subsequent actions and repeated and supplemented;
- where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;
- where the plaintiff persistently takes unsuccessful appeals against judicial decisions.

It was suggested by Herbert J. in Lowes v Coillte Teoranta[35] that, ultimately, the terms "frivolous" and "vexatious" are broad concepts referring to unmeritorious litigation seeking to abuse the court process. Furthermore, it was stated by Barron J. that the courts should not necessarily attempt to define these terms, lest these terms be construed restrictively. Moreover, it has been commented that because of the similarity of the types of cases which fall to be considered under the headings of "frivolous" and "vexatious", often no distinction is drawn between a case which is bound to fail, one which is vexatious, or one which constitutes an abuse of the court process.[36] Therefore, frivolous and vexatious proceedings may extend to proceedings which, while they may not necessarily be bound to fail, confer no tangible benefit on the plaintiff or which are taken for some improper purpose.

## "Freeman of the land" claims

A recent application of the jurisdiction to dismiss proceedings for having no merit has arisen in the banking sector. In particular, the jurisdiction has been invoked in the context of litigation brought by certain borrowers—in financial difficulty—against some financial institutions where the plaintiff borrowers allege that they do not owe any monies under the relevant loan agreements. This may be on the basis that the particular lending institution was allegedly involved in the "creation of currency" or that the loan was allegedly the subject of a "money for nothing scheme"[37] and is therefore unenforceable as against the borrower. Such claims are being advanced despite the plaintiff borrowers not denying that they received the loan monies, so their position is somewhat paradoxical and difficult to reconcile with the reality of

the situation.

It was acknowledged that so-called "freeman of the land" arguments are coming before the Irish courts and other courts more frequently since the economic crisis.[38] However, these claims have been described as "fanciful" and "completely devoid of any merit", where borrowers have not disputed their ***37** signature on the loan agreement and not denied receiving the benefit of the loan monies. This was one of the unsustainable arguments which Gilligan J. struck out in Freeman v Bank of Scotland[39] as "frivolous, vexatious and bound to fail".

## Isaac Wonder Order

Another related jurisdiction which is arising more frequently in practice—and indeed sometimes in the context of motions to dismiss for no merit—is an order restraining a litigant from instituting proceedings against parties without first obtaining the leave of the court, i.e. the so-called "Isaac Wonder Order". Keane C.J. describes the rationale for the jurisdiction as to ensure the court process is not abused by serial litigants and to uphold the right to be protected from unnecessary harassment and expense.[40] Like the jurisdiction to dismiss proceedings, the courts exercise caution when invoking this jurisdiction, and only do so in cases where there is evidence of abuse of the court process.[41]

This jurisdiction was recently invoked by Laffoy J. in Loughrey v Dolan.[42] In that case, the court was satisfied on the evidence that the plaintiff brought a number of unmeritorious proceedings in order to harass and oppress the defendant. In light of this, the court stuck out the proceedings under the court's inherent jurisdiction. In addition, the court made an Isaac Wonder order against the plaintiff, as it was satisfied that the plaintiff would continue to institute groundless and vexatious litigation against the defendant.

## Conclusion

While recognising the constitutional right of access to the courts, the court system—as an organ of the State—is a commodity with limited resources and facing significant challenges of late. In light of that, it is clear that there is merit in the courts having the power to ensure that they are not abused by litigants seeking to air vexatious claims or seeking to harass or embarrass parties at the expense of the system and other litigants seeking to enforce their rights. It is submitted that, to date, the Irish courts have struck the right balance between these two competing rights.

*. Trevor Murphy is a solicitor in the financial services sector.

1. Fay v Tegral Pipes Ltd[2005] IESC 34 at p.226; judgment of Mr Justice McCracken delivered May 27, 2005.

2. See, for example, the case of Lopes v Minister for Justice, Equality and Law Reform[2008] IEHC 246, where Hanna J. struck out the proceedings where the plaintiff alleged that members of the Irish judiciary allegedly displayed racial bias towards the plaintiff where no evidence was produced to support the allegation.

3. It has been held that the right of access to the courts is an unenumerated personal right of citizens under Art.40.3.1° of the Constitution: see MacCauley v Minister for Post & Telegraphs[1966] I.R. 345 per Kenny J. This was recently acknowledged by O'Neill J. in Callely v Moylan[2011] IEHC 2. The right of access to the courts is also part of the right of citizens to a fair hearing and due process of law as protected under art.6 of the European Convention on Human Rights.

4. Unreported, High Court, Gilligan J., August 31, 2013.

5. Farley v Ireland, unreported, Supreme Court, May 1, 1997 per Barron J. See also Fay v Tegral Pipes Ltd[2005] IESC 34 at p.5 per McCracken J.

6. [2009] IEHC 246.

7. Sun Fact Chan v Osseous Ltd[1992] 1 I.R. 425 per MacCarthy J.

8. Barry v Buckley[1981] I.R. 306 per Costello J. See also, DK v King[1994] I.R. 166 per Costello J. This judicial reluctance was reiterated in Aer Rianta v Ryanair[2004] IESC 23 by Denham J. (as she then was) and in Freeman v Bank of Scotland, unreported, High Court, Gilligan J., August 31, 2013.

9. Sun Fat Chan v Osseous Ltd[1992] 1 I.R. 425 at 428 per McCarthy J.

10. Kenny v Trinity College[2011] IEHC 202 at p.10 per Feeney J.

11. Unreported, High Court, Keane J., August 6, 1993.

12. Unreported, High Court, Gilligan J., May 31, 2013.

13. McCabe v Harding[1984] I.L.R.M. 105 at 108.

14. Murray v Fitzgerald[2012] IEHC 20 per White J.

15. Leinster Leader Ltd v Williams Group (Tullamore), unreported, High Court, Macken J., July 9, 1999.

16. Applications to dismiss part of a claim are made pursuant to Ord.19 r.27 of the RSC—Aer Rianta v Ryanair Ltd[2004] 1 I.R. 506.

17. Unreported, Supreme Court, February 19, 1999.

18. Barry v Buckley[1981] I.R. 306 per Costello J.

19. Magee v MGN Ltd, unreported, High Court, McKechnie J., November 14, 2003 at p.12.

20. Barry v Buckley[1981] I.R. 306 per Costello J.

21. [2001] 4 I.R. 465.

22. [2012] IEHC 20.

23. DK v King[1994] I.R. 166 at 170.

24. [2011] IEHC 75.

25. The court relied upon a previous decision of Charleton J. in ICS Building Society v Grant[2010] IEHC 17.

26. Doe v Amour Pharmaceutical Inc, unreported, High Court, Morris J., July 31, 1997.

27. Ewing v Kelly, unreported, High Court, O'Sullivan J., May 16, 2000 at p.3.

28. Hu v Duleek Formwork Ltd[2013] IEHC 50 at p.6 per Peart J.

29. Sun Fact Chan v Osseous Ltd[1992] 1 I.R. 425 at 428 per MacCarthy J. This was accepted by the Supreme Court in Lawlor v Ross, unreported, Supreme Court, November 22, 2001 at p.10.

30. Farley v Ireland, unreported, Supreme Court, May 1, 1997 at p.3 per Barron J.; Murray v Fitzgerald[2012] IEHC 20 at p.16 per White J.

31. Murray v Fitzgerald[2012] IEHC 20 at p.16.

32. Farley v Ireland, unreported, Supreme Court, May 1, 1997 at p.3 per Barron J.

33. 37 D.L.R. (4th) 685.

34. [2012] IEHC 578 at p.7 per Laffoy J.

35. Unreported, High Court, Herbert J., March 5, 2003.

36. H. Delany & D. McGrath, *Civil Procedure in the Superior Courts*, 2nd edn (Dublin: Thomson Round Hall, 2005), para.14.01.

37. These so-called "freeman of the land" arguments were unsuccessfully advanced before the Ontario

courts in Canada in a case called Meades v Meades[2012] ABQB 571 per Rook C.J.

38. Unreported, High Court, Gilligan J., May 31, 2013 at p.17.

39. Unreported, High Court, Gilligan J., May 31, 2013.

40. Riordan v Ireland, unreported, Supreme Court, October 19, 2001 at 9–10.

41. Loughrey v Dolan[2012] IEHC 578 per Laffoy J.

42. [2012] IEHC 578 per Laffoy J.