Keane, Barron, Murray
Hamilton & Murphy
agree with all
three.

004003

THE SUPREME COURT

Hamilton, CJ
Keane, J.
Murphy, J.
Barron, J
Murray, J.

188/1999

BETWEEN

JODIFERN LIMITED

Plaintiff

AND

PATRICK G. FITZGERALD AND
MARGARET FITZGERALD

Defendants

Judgment delivered the 21st day of December, 1999, by Keane, J.

These proceedings were commenced by plenary summons on the 16th March of this year. The statement of claim contained the following averment at paragraph 3:-

"By two agreements in writing made in or around the month of November between the plaintiff through his agent, Thomas Coughlan, of the one part and the defendants of the other part, the defendants agreed to sell and the plaintiff agreed to purchase ALL THAT part of the lands comprised in Folio 10845 of the Registrar of Freeholders County of Cork comprising approximately 111 acres or thereabouts and as therein identified for the total price or sum of £2,000,000."

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Paragraph 4 contained an averment that the plaintiff had at all times been ready, willing and able to perform the agreement on its part but that the defendants had failed, refused and neglected to perform the agreement and had purported to return to the plaintiff the deposit which it had paid. The relief claimed included specific performance of the agreement and damages in addition to or in lieu of specific performance.

On the 24th May, the defendants applied by notice of motion to the High Court for an order striking out the plenary summons and statement of claim on the grounds that they disclosed no reasonable cause of action against the defendants and/or that any cause of action thereby disclosed was frivolous or vexatious and in the alternative an order pursuant to the inherent jurisdiction of the High Court striking out the plaintiff's action on the ground that it was clearly unsustainable, bound to fail and frivolous and/or vexatious. In a reserved judgment dated the 28th July 1999, McCracken J. acceded to the defendants' application and ordered the proceedings to be struck out. From that judgment and order, the plaintiff now appeal to this court.

The facts, to the extent that they are not in dispute at this stage, or would not be in dispute if the action was allowed to proceed, are as follows. Two agreements in writing dated the 1st December 1998 for the sale of the lands referred to in paragraph 3 of the statement of claim for the sum of £2,000,000 were executed by the respective solicitors for Thomas Coughlan, described in the statement of claim as the agent of the plaintiff, and the defendants. It is not in dispute that these are the agreements referred to in paragraph 3 of the Statement of Claim and that they were executed with the authority of Thomas Coughlan and the defendants. The agreements were in the standard form approved by the Incorporated Law

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Society and provided for a total deposit of £200,000. While no deposit was paid at the time, the defendants' solicitor was sent a cheque on the 20th January 1999 in the sum of £150,000 as a deposit.

Following the execution of the two agreements of December 1st 1998, there was correspondence between the solicitors for the plaintiff and the defendants on certain features of the transaction. These related to:

(a) the date on which the sale was to be completed;

(b) an arrangement under which the defendants were to remain on in possession of the lands not immediately required by the plaintiff under a caretaker's agreement;

(c) the consent of the defendants to the plaintiff lodging an application for planning permission in relation to the development of the lands;

(e) the granting of a wayleave to Bord Gais Eireann across the lands;

(f) assurances which the defendants required that the plaintiff would be in a position to complete the sale.

All of the letters forming part of this correspondence and emanating from the defendants' solicitor were headed:- "SUBJECT TO CONTRACT-CONTRACT DENIED." On the 4th March, 1999 the defendants' solicitor wrote to the plaintiff's solicitor as follows:-

> *"Further to previous correspondence herein we wish to confirm that our clients have decided not to proceed with the proposed transaction and we*

return herewith your firm's client account cheque dated 20th January 1999 for £150,000.

Shortly, thereafter, the present proceedings were issued.

The two agreements in writing dated the 1st December 1998 were sent by the defendants' solicitor to the plaintiff's solicitor together with the following letter dated 30th November 1998:-

SUBJECT TO CONTRACT/CONTRACT DENIED

Re: Our client: Patrick G. Fitzgerald, Junior

Your client: Mr. Thomas Coughlan, BE (In trust)

Property: circa 111 Acres at Ballinviskrig, Whte's Cross

Dear Ray,

I refer to my telephone discussion with you and I now enclose herewith two contracts splitting the development land from the remainder of the property. I confirm that these are pro-forma contracts which, although signed by the parties, will not come into effect until both you and I agree that that should be the case. It may well be that some alterations may be negotiated to the contracts before the matter is finalised.

As you are aware it is important that the contracts be signed and dated before tomorrow. I will therefore need to get the contracts back from you, duly signed by lunch time tomorrow, to facilitate the execution thereof by my client.

If you have any queries please do not hesitate to contact me.

Yours sincerely

There is a note in the handwriting of the plaintiff's solicitor on the letter to the following effect:-

"Signed per client's instructions today 1st December 1998 - deposits will follow once agreement is to hand."

It is also not in dispute that, at the time that letter was written and the two agreements were signed, there was speculation that the rate in respect of capital gains tax might be increased in the imminent budget from 20% to 40%. The defendants, or their advisers, wished to be in a position to satisfy the Revenue Commissioners, if a question arose as to the higher rate being payable, that contracts for the sale of the land had been entered into prior to the date of the budget.

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The case, accordingly, which the plaintiff wishes to make is that a concluded agreement had been reached on the 1st December 1998 for the sale of the lands at the price of £2,000,000 and that the agreements in writing of that date constitute a note or memorandum in writing signed by the party to be charged therewith sufficient to satisfy the requirements of s.2 of the Irish Statute of Frauds.

In his judgment the learned High Court judge reviewed in some detail the correspondence subsequent to the execution of those two contracts and the letter of March 4th returning the cheque for £150,000. He concluded that the defendants had at all times insisted that there must be certainty as to the availability of funds to the plaintiff and had at all times maintained that they were not satisfied as to the relevant assurances and that for that reason alone, there was not a completed agreement between the parties. He also rejected the plaintiff's claim that the agreements of 1st December remained the basic agreement and said that the letters written on behalf of the plaintiff's solicitors quite clearly envisaged a future contract and were also headed "SUBJECT TO CONTRACT/CONTRACT DENIED". In addition, he concluded that, since those agreements were sent by the defendants' solicitor on the express condition that they would only come into force when both solicitors agreed that that should be the case and were never mentioned by the solicitors again, they had quite clearly never agreed that they should come into force.

For these reasons, the learned High Court judge held that there was no concluded agreement between the parties. He also held that, even if there were such a concluded agreement, the continued use on every letter written by the defendants' solicitors of the words

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"SUBJECT TO CONTRACT/CONTRACT DENIED" coupled with an express denial of any authority to conclude an agreement in a letter of 1st March 1999, meant that the plaintiff's case could not possibly succeed, having regard to the decision of the High Court in Mulhall v. Haren [1981] IR 364 and of this court in Boyle v. Lee [1992] 1IR 555.

The principles of law applicable are not in dispute. It could not be seriously contended that the statement of claim itself disclosed no reasonable cause of action or one that was frivolous or vexatious. The case made on behalf of the defendants and accepted by the learned High Court Judge was that the proceedings should be struck out in the exercise of the inherent jurisdiction of the High Court to take that course where it is clear that the plaintiff's claim must fail. As was pointed out by McCarthy J. in this court in ***Sun Fat Chan v Osseous Limited*** (1992) 1 IR 425, such a jurisdiction undoubtedly exists and is peculiarly appropriate to actions for the enforcement of contracts, since in such cases it may well be that the action may inhibit or preclude the party sued from entering into a new contract in respect of the same subject matter. He also observed, however, that, generally, the High Court should be slow to entertain an application of this nature, since though the facts at first sight may appear clear, a different picture may emerge at the trial. In this case, the defendants say that the correspondence exhibited with the affidavits grounding the application make it clear that the plaintiff's case must fail and that, accordingly, the High Court was correct in striking out the proceedings.

The correspondence subsequent to the two agreements for sale could undoubtedly be regarded as somewhat inconclusive in some respects. The plaintiff's solicitor had not satisfied the defendants' solicitors at the time the correspondence was broken off that the

plaintiff would be in a position to produce the funds on the closing of the sale. The granting of the wayleave to Bord Gais Eireann did not appear to present a problem and the parties did not appear to envisage any difficulty in reaching agreement as to the other matters, i.e. the plaintiff's applying for planning permission, the defendants' remaining on in possession of the lands not immediately required by the plaintiff under a caretakers' agreement and a date being fixed for completion. It is, however, undoubtedly the case that the letters on both sides referred frequently to the execution of a further agreement and that, on the defendants' side, they were invariably headed "SUBJECT TO CONTRACT - CONTRACT DENIED". The correspondence before the defendants withdrew, moreover, concluded with a letter dated March 1st in which their solicitors said:-

> *"We confirm that we have no authority to bind our clients until such time as contracts are exchanged and signed by both parties."*

Counsel on behalf of the plaintiff, however, rest their claim on the two agreements in writing dated the 1st December 1998 which were admittedly executed by the solicitor for the defendants with the authority of his clients. The case they make is quite straightforward: they say that the defendants cannot have it both ways. When the action comes to trial, unless they are prepared to assert that the two agreements in question were executed with a view to perpetrating a fraud on the revenue should the rate of capital gains tax have been increased after they were executed, the court would be coerced into finding that they were what they

purported to be, i.e. concluded agreements for the sale of the lands at the price stated. Since neither document was headed with the fatal rubric, "subject to contract", the principles laid down by this court in ***Boyle v Lee*** would not apply and the two documents would constitute a note or memorandum sufficient to satisfy the requirements of the Statute of Frauds. The subsequent correspondence undoubtedly envisaged that, to provide for matters which were relatively peripheral, a further agreement would be executed, but that did not in any way negative the existence of a concluded agreement for the sale of the land, the essential terms of which were set out in the two contracts. That the parties were ***ad idem*** as to all the essential terms of the contract is, they say, made clear by the fact that a deposit of £150,000 was paid by the plaintiff and the cheque not returned until sometime later. As to the letter accompanying the two agreements from the defendants' solicitor, in which he said that the agreements were not to come into effect until both solicitors had agreed that that should happen, the plaintiff again says that, unless the defendants are asserting that they were perpetrating a fraud on the revenue, that letter was not, and could not be, intended to negate the existence of a concluded agreement.

Both that letter and the subsequent correspondence between the solicitors could be construed as negating the existence of a concluded contract. To the extent that it could be said that the two agreements failed to include all the material terms, it could be said that no sufficient note or memorandum existed for the purposes of the Statute of Frauds, since all the relevant letters were headed "SUBJECT TO CONTRACT - CONTRACT DENIED".

Support for the plaintiff's case, can, however, be found in the following well known passage from the judgment of Lord Blackburn in ***Rossiter v Millar*** (3 App.Cas.1124 (at p.1151));

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"But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

That passage was approved of by Kenny J. in ***Law and Another v Robert Roberts and Company*** (1964) IR 292 in a judgment which was subsequently unanimously upheld by this court.

In such a case, provided a document exists which is capable of constituting a note or memorandum sufficient to satisfy the Statute of Frauds and which does not contain the words "subject to contract", the principles laid down by this court in ***Boyle v Lee*** do not apply, as was made clear by the judgment of O'Flaherty J. in the latter case.

That case may or may not succeed, if the action is allowed to proceed to trial. But to say that it is a case which cannot possibly succeed or that it is a frivolous or vexatious claim and an abuse of the process of the court seems to me to be an unsustainable proposition.

Mr Gordon S.C. on behalf of the defendants sought to rely on what he said was the inconsistent approach of the plaintiff as to what precisely the documents were on which it was sought to rely as constituting both the evidence of a concluded contract and a note or memorandum sufficient to satisfy the Statute of Frauds. The affidavits sworn on behalf of the plaintiff by its solicitor, may, as Mr Gordon urged, reflect some uncertainty as to the legal basis of the plaintiff's claim. The fact remains that as pleaded in the statement of claim and as reflected in both the oral and written submission to this court - and it would appear in the High Court - it rests unequivocally on the two agreements for sale dated the 1st December 1998 and not on subsequent correspondence protected as it is by the use of the formula "SUBJECT TO CONTRACT - CONTRACT DENIED".

I would allow the appeal and substitute for the Order of the High Court an Order dismissing the defendants' application.

[illegible signature]

5/4/2001

004014

Hamilton C.J.
Keane J.
Murphy J.
Barron J.
Murray J.
188/99

THE SUPREME COURT

JODIFERN LIMITED

Plaintiff

v.

PATRICK G. FITZGERALD AND MARGARET FITZGERALD

Defendants

JUDGMENT delivered on the 21st day of December, 1999 by

BARRON J.

This is an appeal from an order of the High Court (McCracken J.) that the proceedings be struck out. This order was made pursuant to an

application by the defendants for such an order essentially upon two grounds: (1) that the claim disclosed no reasonable cause of action; or (2) that the proceedings were an abuse of the process of the Court.

In reality the application proceeded upon the latter basis, the defendants relying upon the inherent jurisdiction of the Court to strike out proceedings upon that ground.

Although the plaintiff is a limited company, the negotiations to purchase the lands were carried out by Thomas Coughlan who for convenience I shall refer to as the plaintiff.

The relevant facts are as follows. The plaintiff approached the defendants to purchase their farm probably some time in June 1998. In any event, each consulted their respective solicitors and correspondence ensued in the course of which various terms were agreed. This

correspondence was headed on each side *"Subject to contract/contract denied"*.

On 30th November, 1998, the solicitor for the defendants furnished the solicitor for the plaintiff with two contracts for sale for execution. The letter accompanying them was also headed "*Subject to contract/contract denied*" and its terms were as follows:

> *"Dear Ray*
>
> *I refer to my telephone discussion with you and I now enclose herewith two Contracts splitting the Development Land from the remainder of the property.*
>
> *I confirm that these are Pro-forma Contracts which, although signed by the parties, will not come into effect until both you and I agree that that should be the case. It may well be that some alterations may be negotiated to the Contracts before the matter is finalised.*

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As you are aware it is important that the Contracts be signed and dated before tomorrow. I will therefore need to get the Contracts back from you, duly signed by lunchtime tomorrow to facilitate the execution thereof by my Client.

If you have any queries please do not hesitate to contact me.

Yours sincerely"

The reason for the urgency was the Budget being opened in the Dáil on the following day, it was rumoured that Capital Gains Tax would be increased from 20 per cent to 40 per cent. It is also clear from the letter that it was by no means certain in the mind of the writer that any further terms would need to be agreed between the parties.

The contracts were in the names of the defendants as vendors and in the name of the plaintiff (in trust) as purchaser. Each contract was

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executed on behalf of the plaintiff by his solicitor who returned the documents on the 1st December, 1998 with the following cover note:

> *"Frank,*
>
> *signed per client's instructions today 1st December, '98 - deposits will follow once agreement is to hand.*
>
> *Sincerely"*

On receipt the contracts were executed by the solicitor for the defendants.

Notwithstanding these executed contracts, the next letter was sent by the solicitor for the plaintiff and was headed *"Subject to contract/contract denied"*. In this letter, he dealt with several matters. They were: the legal basis upon which the vendors might remain on in possession, presumably after the sale was closed; the basis upon which the deposit would be paid; a closing date and the right of the purchaser to apply for

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planning permission before that date; and provision of funds, if the vendors found an alternative farm.

Further correspondence continued. A deposit of £150,000 was sent by the plaintiff's solicitors on the 20th January, 1999. The letter sending on this cheque indicated that the payment was made subject to incorporation in the contracts for sale of the matters more particularly set out in his letter of the 18th December, 1998.

On the 29th January, 1999 evidence of financial standing was supplied. On the 4th March, 1999 the defendants' solicitor indicated that his clients were no longer prepared to proceed with the transaction and returned the cheque for the deposit which had not been lodged.

The substantial question to be determined on the motion was whether the Court, if it had allowed the proceedings to continue would be condoning an abuse of process. This in turn requires that the basis upon

which the plaintiff claims to be entitled to succeed in the action should be identified, and clarity that such basis is insufficient in law. In no sense should there be any trial.

In a claim for specific performance, a plaintiff must establish the making of an enforceable concluded agreement. Where the agreement is a verbal one, the plaintiff must establish not only the concluded agreement but also the existence of a note or memorandum of that agreement signed by the defendant or his agent.

Clearly, if the agreement is in writing, it depends upon a construction of its terms whether they amount to a contract. When the terms have been reached orally and there is a reference to a written contract, it is also a matter of construction whether such reference is the expression of a wish that what has been agreed should be embodied in a formal document or that there should be no concluded contract until the

terms had been embodied in a formal contract, executed by both parties and then exchanged.

The question of the sufficiency of a memorandum in writing arises whenever the evidence shows that the parties reached a concluded oral agreement. If a party or his agent wishes to negotiate in correspondence, but does not at the same time wish to enter into an enforceable contract, this can be avoided by heading the letter or, if appropriate, any other form of writing with the form of words which says and can be understood to mean "*there is not as yet any concluded agreement*". The expression which has legal sanction and which is normally used is "*subject to contract*".

It is important to realise that this expression has such a meaning when placed at the head of the letter or other writing so as to govern the entire. If not so contained, but contained in the body of the document it is

a matter of construction of the writing as a whole whether it is intended to deny the existence of a concluded agreement.

The relevance of this arises solely in the case of oral arrangements and merely illustrates the legal principle that there cannot be a valid note or memorandum in writing of an agreement when at the same time such note or memorandum denies that any such agreement exists.

In the present instance much of the correspondence was headed "*Subject to contract/contract denied*". It was intended to have the same meaning as "*Subject to contract*" and certainly any writing so headed would not create a valid note or memorandum sufficient to satisfy the Statute of Frauds. At the same time, the duplication shows the difficulties with which competent conveyancers believe themselves to be faced having regard to cases both in England and in this jurisdiction during the middle seventies. It would be a much more satisfactory state of affairs, if

conveyancers headed correspondence with the words "*Subject to contract*" only when their clients did not wish to be bound and omitted such words altogether when they did.

I refer to these matters because it is against these principles that the plaintiff would have had to establish his case. The plaintiff does not seek to set up a concluded oral agreement evidenced by a note or memorandum in writing thereof signed by the defendants. Accordingly, initially at any rate, the question of a note or memorandum does not arise.

The plaintiff seeks to rely upon the agreements executed on either the 30th of November, 1998 and 1st December, 1998 respectively or solely on the 1st December, 1998.

On their face, these agreements appear to be enforceable contracts. The defendants submit that these agreements do not portray the real

relationship between the parties which they submit is that of two parties negotiating, but never concluding an agreement.

To support their submission, the defendants by affidavit on the part of their solicitor have referred to the correspondence both before and since the execution of the agreements. In addition the first-named defendant has sworn an affidavit as to certain facts. This has resulted in affidavits in rebuttal by the plaintiff's solicitor and by the plaintiff. The first-named defendant and his solicitor each swore a further affidavit and these in their turn brought two further affidavits, one from the plaintiff and the other from his solicitor. As a result it is hard not to regard the consideration of these affidavits and documents as a form of trial.

Every case depends upon its own facts. For this reason, the nature of the evidence which should be considered upon the hearing of an application to strike out a claim is not really capable of definition.

One thing is clear, disputed oral evidence of fact cannot be relied upon by a defendant to succeed in such an application. Again, while documentary evidence may well be sufficient for a defendant's purpose, it may well not be if the proper construction of the documentary evidence is disputed. If the plaintiff's claim is based upon allegations of fact which will have to be established at an oral hearing, it is hard to see how such a claim can be treated as being an abuse of the process of the Court. It can only be contested by oral evidence to show that the facts cannot possibly be true. This however would involve trial of that particular factual issue.

Where the plaintiff's claim is based upon a document as in the present case then clearly the document should be before the Court upon an application of this nature. If that document clearly does not establish the case being made by the plaintiff then a defendant may well succeed. On the other hand, if it does, it is hard to see how a defendant can dispute this

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prima facie construction of the document without calling evidence and having a trial of that question.

The instant case is in reality an example of the latter situation. Here there is *prima facie* a concluded written agreement. The defendants seek to deny this on the basis that correspondence both before and subsequent to the execution of the agreement shows a different intention. Again, that is something which can only be established by evidence at a trial.

There may well be situations in claims for specific performance in relation to contracts for the sale of land where a defendant may well succeed upon such an application. For example, the plaintiff may claim the existence of a concluded oral agreement and rely upon a particular document as being a note or memorandum sufficient to satisfy the Statute of Frauds. If, for example, that note or memorandum does not disclose

the price, then clearly a defendant would be entitled to bring such an application to show that the plaintiff could not possibly succeed. In similar circumstances, the defendant may well allege that a material term of the oral agreement has not been included in the note or memorandum. Again, this would depend upon the nature of the term alleged. There are very many terms in relation to a contract for the sale of land which do not need to be expressed. They are all set out in Williams on Vendor and Purchaser and if not expressed are implied by law. The problem which could arise on an application to strike out a claim arises where a term which would be implied is alleged to have been agreed expressly. Again, such a situation would create a difficulty for a defendant because it would be unlikely that issues such as, was such a term agreed expressly and, if so, was it a material term requiring to be included in a note or memorandum, could be determined other than by a trial of such issues.

In my view, a defendant cannot succeed in an application to strike out proceedings upon the basis that they disclose no reasonable cause of action or are an abuse of the process if the Court on the hearing of such application has to determine an issue for the purpose of deciding whether the plaintiff could possibly succeed in the action. It is not the function of the Court to determine whether the plaintiff will succeed in the action.

The function of the Court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such uncontravertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself. The affidavits which have been filed and the judgment of the High Court reflect

an incomplete hearing of the case. It was incomplete because the issues had not been defined by pleadings nor could they have been. It was incomplete in the sense that the witnesses gave direct evidence only. There was no cross-examination nor re-examination. Nor should there have been.

However, this may appear to be how the matter was approached, I am satisfied that the learned trial judge applied the correct test: whether the plaintiff could succeed rather than whether he would. It is in the manner which he applied it that I think he was wrong. It is common case that formal contracts for sale were executed. The reason for so doing is also common case. Therefore, whatever else, each party was at that

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stage, for that reason, prepared to be bound by the terms of the documents. In my view, in the light of those circumstances, it could not have been an abuse of process to have commenced the proceedings. In my view, these matters call for pleadings in the course of which issues will emerge for decision at a plenary hearing.

I would allow the appeal.

Henry Barron.
21/12/99.

JB141

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THE SUPREME COURT

Hamilton, CJ
Keane, J.
Murphy, J.
Barron, J.
Murray, J.

Nº 188/99

BETWEEN

JODIFERN LIMITED

Plaintiff

AND

PATRICK G. FITZGERALD AND
MARGARET FITZGERALD

Defendants

Judgment delivered the 21st day of December, 1999, by Murray, J.

Having had the opportunity of reading the judgements delivered by Keane J. and Barron J. I agree with them and concur that the Plaintiff's appeal should be allowed. There are some aspects of this matter which I wish to address and since the facts and circumstances of the case have been comprehensively set out in those judgements, there is no need for me to recite them again.

The Appeal concerns the exercise of the inherent jurisdiction of the High Court to stay or strike out proceedings in order to prevent an abuse of the process of the Courts taking place. As Costello J. stated in **Barry v. Buckley** [1981] IR 306 *"This jurisdiction should be exercised sparingly and only in clear cases;"* This view was echoed by McCarthy J. in

Sun Fat Chan v. Osseous Ltd [1992] 1 IR 425 when he expressed the view that the High Court should be slow to entertain an application of this kind and grant the relief sought.

The reason for such caution is self-evident. The making of an Order staying or dismissing the proceedings on the basis of such inherent jurisdiction deprives the Plaintiff of access to the Courts for a trial of his or her action.

The object of such an Order is not to protect a Defendant from hardship in proceedings to which he or she may have a good defence but to prevent the injustice to a Defendant which would result from an abuse of the process of the Courts by a Plaintiff. Clearly, therefore, the hearing of an application by a Defendant to the High Court to exercise its inherent jurisdiction to stay or dismiss an action cannot be of a form of summary disposal of the case either on issues of fact or substantial questions of law in substitute for the normal plenary proceedings.

For this reason, a primary precondition to the exercise of this jurisdiction is that all the essential facts upon which the Plaintiff's claim is based must be unequivocally identified. It is only on the basis of such undisputed facts that the Court may proceed.

Moreover, and this is the aspect I wish to emphasise, where all the essential facts have been so identified, it must also be manifest that on the basis of those facts the Plaintiff's case has no foundation in law. It seems to me that if on the basis of the undisputed facts there remains a substantial issue or issues of law as to whether the Plaintiff is entitled to some or any of the relief's sought, the proceedings can hardly be said to constitute an abuse of the

process of the Courts. It may indeed be that since the factual basis of the Plaintiff's claim has been identified that the legal issues arising are susceptible to judicial determination. For this reason it may be tempting, in the interests of economy of litigation, to do just that. However, to proceed (at least in the absence of agreement between the parties) to make a final determination of such issues in an application to stay or dismiss proceedings for abuse of the process of the Courts would deprive the Plaintiff of the due process of plenary proceedings before the Courts. It must be borne in mind that such an application is usually if not invariably to be made by the Defendant before he or she has filed a defence and always before the action is heard. McCarthy J. in **Sun Fat Chan v. Osseous Ltd** also pointed out 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; Oftentimes it may appear that the facts are clear and established but the trial itself will disclose a different picture.*" I fully agree with that observation. Any such change in perception of the circumstances of the case or disclosure of a different picture could well have implications as to the application of the relevant principles of law and how the legal issues are determined.

Certainly, a Plaintiff faced with an application to have the proceedings stayed or dismissed in these circumstances is likely to raise, in one form or another, legal issues in response. In a case where there is in effect an abuse of the process of the Courts, it is quite possible that some at least will be clearly spurious or have no relevance to the facts of the case. Any other legal issues must be clearly discernible as being without merit and readily capable of being resolved in favour of the Defendant. It is for the Judge hearing the application, within the scope of his discretion, to determine whether any points of law raised

can be so clearly and readily resolved in favour of the Defendant that to allow the action to proceed would constitute an abuse of the process of the Courts. Legal issues that are sufficiently substantial as to fall outside that bracket should be left to the trial of that action in those proceedings.

In the present proceedings, even if one were, in this context, to take the Defendant's/ Applicant's case at its highest and assume there were no issues of fact to be tried, I am of the view, for the reasons set-out in the Judgements of Keane J. and Barron J., that there was clearly at least a substantial issue of law as to the binding or non-binding effect of the two agreements referred to and identified in the Statement of Claim as being the agreements in writing made in or around the month of November 1998. That issue of law being a substantial one it was therefore of a nature which should be determined at a hearing of the action and not in the course of the application made before the High Court.

For this reason and also having regard to the judgements of Keane J. and Barron J. I would allow the appeal and dismiss the Defendant's application.

Approved,
[illegible]
2/3/00