

## THE HIGH COURT

[2017 No. 7720 P.]

BETWEEN

EDWARD WALSH

PLAINTIFF

AND

PATRICK DILLON, PAUL McCANN AND CORN CIRCLE LTD

DEFENDANTS

**JUDGMENT of Ms. Justice Costello delivered on 2nd day of March, 2018.**

1. The defendants issued a motion seeking to dismiss the proceedings pursuant to both O. 19 r. 28 of the Rules of the Superior Courts and the inherent jurisdiction of the Court on the basis that the claim is frivolous and vexatious and bound to fail. This is my judgment in respect of the application.

**Background**

2. The proceedings relate to a licensed premises located at 103 and 104 Upper Dorset Street, Dublin 1 ("the premises"). The premises is owned by the third named defendant and the plaintiff occupies the ground floor and basement of the premises, where he runs a licensed premises known as the Long Island Bar. The first and second named defendants were appointed as receivers over the premises by Ulster Bank Ireland Ltd pursuant to a deed of appointment dated 28th June, 2013.

3. The adjoining lands are being developed by a company called River Dublin 1 SARL ("River Dublin"). River Dublin has built student accommodation on these lands. The defendants say that River Dublin has no connection with any of the defendants and it is not a party to these proceedings.

4. The plaintiff claims that the works carried out by River Dublin have created a disturbance and have infringed his entitlement to the quiet and peaceful enjoyment of the premises. The defendants maintain that they bear no responsibility for the actions of River Dublin and, accordingly, assert that the plaintiff's claim against them in respect of those actions discloses no reasonable cause of action against the defendants and/or is bound to fail.

5. The proceedings were commenced in light of correspondence received by the plaintiff from River Dublin and from the receivers concerning the use of a yard adjacent to the premises and a door leading from the premises into the yard. River Dublin contended that the yard formed part of its land and that the plaintiff had unlawfully erected the door and was trespassing on its land. River Dublin threatened to sue the receivers in relation to the alleged trespass. In response, the receivers informed the plaintiff by letter dated 17th August, 2017, of their intention to remove the door and repair the boundary wall. The plaintiff then commenced these proceedings and obtained an interim order restraining the defendants from entering on to the premises for the purpose of removing the door. Following service of that order and following action by the receivers' architect, the receivers notified the plaintiff by letter dated 26th September, 2017, that the dispute concerning the use of the door and the yard was a matter between the plaintiff and River Dublin. The receivers confirmed that they intended to take no further action concerning the use of the door or the yard. The receivers subsequently gave an undertaking to that effect. The plaintiff has since acknowledged that he no longer requires any order restraining the defendants from interfering with the door or the yard.

6. The plaintiff occupied the premises under a lease dated 10th January, 2013, for a term of two years and nine months from 1st December, 2012. The term of the lease expired on the 31st August, 2015. There is a dispute between the receivers and the plaintiff concerning the plaintiff's continued occupation of the property. The plaintiff has commenced separate Circuit Court proceedings claiming an entitlement to a new tenancy in respect of the premises. There is no claim in these proceedings relating to the plaintiff's occupation of the premises.

7. Clause 3 of the lease provides:-

*"The landlord agrees with the tenant that the tenant paying the rent and performing and observing the agreements on the tenant's part hereinbefore contained may peaceably hold the premises during the term without any disturbance by the landlord or any person lawfully claiming under the trust (sic) for the landlord."*

The effect of this clause is central to the defendants' application.

**The plaintiff's case**

8. The plaintiff delivered a statement of claim dated 19th October, 2017. Insofar as the claim relates to the issue of the door and the yard, those issues are moot as between the plaintiff and the defendants, having regard to the defendants' undertaking not to interfere in the use of the door or the yard. This was accepted by counsel for the plaintiff at the hearing of the motion.

9. Other than the injunction relating to the door and the yard, the remaining reliefs sought in the plenary summons are:-

*"2. Damages against the landlord, or against the receivers as the person responsible for the conduct of the landlord, for causing or permitting me not to peaceably hold the premises without any disturbance by the landlord or any person lawfully claiming under the trust for the landlord."*

*3. Damages against the landlord, or against the receivers as the persons responsible for the conduct of the landlord, for causing or permitting me not to have quiet use and enjoyment of the premises because of the conduct of the development at the adjacent property."*

10. In the statement of claim, the plaintiff pleads that he acquired a new lease for two years and nine months beginning on the 1st September, 2015, and ending on 30th May, 2018, in accordance with special condition 6 of the lease. The pleading sets out the dispute between the parties as to whether he is entitled to or has acquired a new lease.

11. In paras. 47 to 64, the plaintiff pleads his case against the defendants alleging a breach of para. 3 of the lease dated 10th

January, 2013. At paras. 49 and 50, he pleads as follows:-

*"49. It was an express term of para. 3 of the lease that the plaintiff '...may peaceably hold the premises during the term...'*

*50. It is an implied term of para. 3 of the lease that the plaintiff may have the quiet use and enjoyment of the pub consistent with its use."*

The acts which he says interfered with his quiet use and enjoyment of the premises relate to the building works carried out on the neighbouring site by River Dublin. At para. 52, he pleads:-

*"In particular, the defendants breached their obligation to uphold the plaintiff's rights in this respect by failing, refusing, and/or neglecting to act appropriately or at all to abate the negligence and nuisance that they have allowed to have been committed (sic) with respect to the noise, vibrations, dust, odours, hours of work, trespass to land, damage to the fabric and contents of the pub caused by the development, and the slander of title committed by the developer."* (Emphasis added)

12. Separately, he alleges that the defendants joined in with the wrongful acts of the developer for their own purpose of unlawfully terminating the plaintiff's lease to the premises. The statement of claim then pleads particulars of the actions of the workers carrying out the development for River Dublin. At paras. 62 to 64, he pleads:-

*"62. The plaintiff reserves the right to plead further particulars of the negligence and nuisance, and slander of title committed by the developer and/or the workers, and facilitated by and/or also committed by the defendants.*

*63. The defendants' breaches of contract have caused the plaintiff to suffer damage, loss, and expense.*

*Particulars of the plaintiff's damage, loss and expense.*

*64. The plaintiff's damage, loss and expense caused by the defendants' breaches of contract are continuous and ongoing. Further and detailed particulars will be furnished to the defendant as and when they become available. In that respect, the plaintiff will rely on expert evidence including that of engineers, quantity surveyors, architects, and accountants."*

13. The reliefs sought in the statement of claim differed to those in the plenary summons. In substance, they are:-

*"1. General damages against the defendants for causing and/or permitting the plaintiff not to peaceably hold the premises without any disturbance by the landlord or any person lawfully claiming under the trust of the landlord.*

*2. General damages against the defendants for causing and/or permitting the plaintiff not to have quiet use and enjoyment of the premises because of the conduct of the development at the adjacent property.*

*3. General damages against the defendants for causing and/or contributing and/or permitting the plaintiff to suffer from the negligence and nuisance as a result of the noise, vibrations, dust, odours, hours of work, trespass to land, damage to the fabric and contents of the pub caused by the development on the land adjacent to the leased premises.*

*4. General damages against the defendants for their slander of title, and for causing and/or contributing to and/or permitting the developer on the land adjacent to the leased premises to commit slander of title.*

*5. Special damages against the defendants for the loss of trade and expenses caused by and/or contributed to and/or permitted to have been caused by the defendants' wrongs as aforesaid.*

*6. Special damages against the defendants for the remedial works caused by and/or contributed to and/or permitted to have been caused by the defendants' wrongs as aforesaid.*

*7. Special damages against the defendants for the conversion of monies paid to them by the plaintiff as rent in accordance with the current lease."*

The plaintiff also claimed interest, costs including reserve costs and exemplary and punitive costs.

### **The relevant principles**

14. Two recent cases provided useful summaries of the jurisprudence in this area. In *Irish Bank Resolution Corporation Ltd. v. Purcell* [2014] IEHC 525, at para. 83, Cregan J. identified the following ten principles:-

*"1. The Court has jurisdiction pursuant to Order 19 Rule 28 and also pursuant to its inherent jurisdiction to strike out proceedings if they are bound to fail.*

*2. In 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 consider evidence on affidavit relating to the issues in the case (per Costello J. in Barry v. Buckley [1981] IR 306).*

*3. This jurisdiction to strike out proceedings is one to be "exercised sparingly and only in clear cases". (See Costello J. in Barry v. Buckley [1981] IR 306).*

*4. Moreover as McCarthy J. stated in Sun Fat Chan v. Osseous Ltd [1992] 1 IR 425 "Generally the High Court should be slow to entertain an application of this kind".*

*5. In addition as was stated by Keane J. in Lac Minerals v. Chevron Corporation [1995] 1 I.L.R.M. 161 (High Court, 6th August, 1990) (and quoted with approval by the Supreme Court) in Supermacs Ireland Ltd v. Katesan (Naas) Ltd [2000] 4 I.R. 273 'a judge in considering an application to strike out or dismiss a claim must be confident that the plaintiff's claim cannot succeed no matter what might arise on discovery or at the trial of the action.'*

6. If the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed (see McCarthy J. in *Sun Fat Chan v. Osseous Ltd.*).

7. The Court can only exercise a jurisdiction to strike out a claim on the basis that "on admitted facts it cannot succeed" (per McCarthy J. in *Sun Fat Chan v. Osseous Ltd.*).

8. The Court in considering whether to strike out a claim "must treat the plaintiff's claim at its high water mark" (per Clarke J. in *McCourt v. Tiernan* [2005] IEHC 268).

9. The burden of proof lies on the defendant to establish that the plaintiff's claim is bound to fail. (See *Salthill Properties Ltd v. Royal Bank of Scotland* [2009] IEHC 207)

10. The Court should not require a plaintiff to be in a position to show a *prima facie* case, merely a stateable case, in an application to strike out. (See Clarke J. in *Salthill Properties Ltd v. Royal Bank of Scotland.*)"

15. In *Hosey v. Ulster Bank Ltd. and others* [2017] IECA 257, Irvine J. identified the principles relevant to the Court's inherent jurisdiction to dismiss a claim on the basis that it is bound to fail as follows:-

"35. The court's inherent jurisdiction to dismiss a claim on the ground that it is bound to fail is a jurisdiction which is only to be "exercised sparingly and only in clear cases" as was stated by Costello J. in *Barry v. Buckley* [1981] 1 I.R. 306.

36. In *Lac Minerals Ltd. v. Chevron Mineral Corporation* [1995] 1 I.L.R.M. 161, Keane J. stated that before a judge accedes to an application to dismiss a claim on the ground that it is bound to fail, he or she must be confident that no matter what may arise on discovery or at the trial of the action that the claim cannot succeed.

37. Further, if the proceedings can be saved by an amendment to the pleadings then once again the action should not be dismissed: See for example *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425.

38. In some of the more recent decisions, such as those in *Ruby Property Co. Ltd. v. Kilty* [1999] IEHC 50 and *Jodifern Ltd. v. Fitzgerald* [2003] I.R. 321, the court has made clear that a defendant can only succeed on this type of application if, on the basis of admitting to all of the facts as asserted by a plaintiff, they can establish that the action cannot succeed.

39. While this jurisdiction is one which is to be sparingly exercised, there are of course cases w[h]ere the legal rights and obligations of the parties may be governed by documents and in such cases the court may examine such documents to consider whether the plaintiff's claim is, as alleged, bound to fail. However, even in those cases, the court must ask itself the question as to whether there is nonetheless a risk that outside of that documentary record there could realistically be evidence which might bear upon the rights and obligations as identified in the documents.

40. Finally, of some particular relevance in the context of the present proceedings is the fact that a claim may appear to be innovative or weak is no basis for dismissing the claim as was observed by Charleton J. in *Millstream Recycling Limited v. Tierney* [2010] IEHC 55."

16. In *Keohane v. Hynes* [2014] IESC 66, Clarke J. (as he then was) held:-

"6.9 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. ....Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."

### **Application of the principles to the plaintiff's case**

14. The essence of the remainder of the case (once the issue of an injunction in relation to the use of the door and the yard is discounted) is an alleged breach of contract. The plaintiff alleges that the defendants breached his right to quiet enjoyment of the premises. This is due to the actions of River Dublin and its contractors.

### **Quiet enjoyment**

15. The extent of the plaintiff's right to quiet enjoyment is central to his case. The defendants say they are not responsible at law for the actions of River Dublin and its contractors. The plaintiff alleges to the contrary. He does so on two bases:

(1) He says that River Dublin and, by extension, its contractors are connected to the defendants and therefore can be said to be persons lawfully claiming under or in trust for the landlord (the third named defendant and on whose behalf the receivers act) within the meaning of Clause 3 of the lease.

(2) In the alternative, there is a wider implied covenant as to quiet enjoyment by the tenant (the plaintiff) on the part of the landlord. Under the implied covenant, the landlord is liable for acts of third parties if they breach the plaintiff's right to quiet enjoyment.

### **Ground (2)**

16. I shall deal with the points in reverse order. Section 41 of the Landlord and Tenant Law Amendment Act Ireland, 1860 (Deasy's Act) provides:-

"Every lease of lands or tenements made after the commencement of this Act shall (unless otherwise expressly provided by such lease) imply an agreement on the part of the landlord making such lease, his heirs, executors, administrators, and assigns, with the tenant thereof for the time being, that the said landlord has good title to make such lease, and that the tenant shall have the quiet and peaceable enjoyment of the said lands or tenements without the interruption of

*the landlord or any person whomsoever during the term contracted for, so long as the tenant shall pay the rent and perform the agreements contained in the lease to be observed on the part of the tenant."*

17. If the plaintiff is correct and there is an implied covenant in his lease as to quiet enjoyment, it is on the basis of s. 41 of Deasy's Act. In its terms, s. 41 applies unless it is displaced by an express covenant as to quiet enjoyment in different terms. Professor Wylie in his third edition of "Landlord and Tenant Law" at para. 14.07 [notes:-](#)

*"It has been held that an express covenant limiting in the usual way the landlord's liability to disturbance by himself or persons claiming through or in trust for him, displaces the implied covenant in s.41 even though it is so qualified and, therefore, narrower in scope than the implied covenant."*

18. He cites as authority for the proposition *Murphy v. The Bandon Cooperative Agricultural and Dairy Society Ltd* [1909] 2 I.R. 510. In that case, there was an express, limited covenant as to quiet enjoyment and, as a result, Madden J. held at p. 519 of the report:-

*"The presence in the lease of these express covenants is sufficient to negative the existence of any implied covenant such as that on which the defendant company relies, even if the words of the lease were capable of bearing the interpretation which they seek to put upon them. It is settled that the existence of express covenants for title excludes the operation of covenants which arise only by implication..."*

It is long-settled law that an express covenant in the term identified by Professor Wylie displaces the implied covenant in s. 41 of Deasy's Act. It follows that, insofar as the plaintiff advances a case based upon an implied covenant as to quiet enjoyment of the premises, it is bound to fail because of the existence of clause 3 in the lease and the maintenance of proceedings based upon an implied covenant would therefore be frivolous and vexatious and an abuse of process.

19. In submissions on the motion, counsel for the plaintiff argued that, while his client maintained that he was entitled to a new lease following the expiry of the lease dated the 10th January, 2013, if he were incorrect, then Clause 3 did not apply from 1st September, 2015. If that were so, then there was no express covenant to displace the implied covenant and therefore the limitation on the liability of the defendants based upon Clause 3 would no longer arise.

20. I cannot agree with this submission. Firstly, the question as to the validity of the alleged renewal of the lease is a question to be determined in the proceedings pending before the Circuit Court. Secondly, on an application such as this, the Court is required to take the facts as alleged by the plaintiff on the assumption that he would be in a position to prove them. His case is that he had the benefit of a renewal of the lease, which of course would have included a continuation of Clause 3. In the alternative, if he was not entitled to a renewal of the lease, then he has been in occupation of the premises without the benefit of a lease and therefore s. 41 of Deasy's Act cannot apply at all.

#### **Ground (1)**

21. Insofar as the plaintiff's case is based upon the express covenant in Clause 3, it must be based upon the allegation that the disturbance complained of is attributable to either the landlord or any person claiming under the trust (sic) for the landlord. The plaintiff has not alleged that any of the defendants are responsible for the disturbance. On the contrary, all of the evidence and allegations has been that the disturbance was attributable to the wrongful actions of River Dublin and its contractors.

22. Counsel for the plaintiff explained that his client believes that River Dublin might be shown to be a person claiming under the landlord, meaning all of the defendants. There was no suggestion they were claiming in trust for the landlord. Counsel fairly accepted that there was no evidence available to suggest that River Dublin was in any way connected to the defendants but the plaintiff believed that they were. If he were correct, this would bring River Dublin and its contractors within the scope of Clause 3 and therefore the defendants would be liable for their actions insofar as they breached his right to quiet enjoyment. In submissions for the first time, it was alleged that River Dublin might be a servant or agent of the landlord, though it was not clarified whether this referred to the receivers or the third named defendant.

23. This is a new case which has not so far been pleaded. That in and of itself is not necessarily an obstacle. It is well established that, if proceedings may be saved by amending the pleadings, then the Court will not strike out the proceedings but rather will permit the proceedings to be amended, even if the amendment amounts to a substantial recasting of the case.

24. In this case, counsel accepted that the plaintiff has only a suspicion that the receivers and River Dublin are working together to get him out of the premises. He has no evidence at all that River Dublin was in any way connected with any of the defendants. He was not claiming that River Dublin was acting on trust for the landlord or claiming through him, in the sense of being an assignee or sub-lessee. Insofar as the submission went, it was pure speculation on behalf of the plaintiff.

25. In these circumstances, I do not believe that it would be permissible for the Court to permit the plaintiff to amend his case to allow a claim that the receivers and River Dublin were working together to get him out of the premises and thus avert an order striking out the proceedings on the grounds that they were otherwise frivolous and vexatious and bound to fail. This would amount to the Court endorsing the plaintiff bringing a claim based upon a mere conjecture and without any factual basis.

26. The defendants submitted that the plaintiff's claim relates to loss and damage allegedly suffered by him as a result of works carried out by River Dublin on the lands adjoining the premises. The defendants have no control of, or responsibility for, those works. The liability of the defendants under the lease is limited expressly to disturbance caused by the landlord (i.e. the third named defendant) or persons claiming under it. The works by River Dublin fall outside those limitations.

27. I agree with these submissions and I do not believe that any possible amendment to the statement of claim could save the proceedings against the defendants for a claim for damages resulting from these works.

#### **Other claims**

28. While this disposes of the principal claim against the defendants in these proceedings, some further matters were relied upon by the plaintiff in resisting the application.

29. It was submitted that the proceedings should be kept in being so that the plaintiff could enforce any future possible breach of the existing undertaking by the receivers in relation to the door and yard. I am not persuaded by this submission. The undertaking is enforceable as if it were an order of the Court. Where permanent injunctions are granted, they remain enforceable notwithstanding the fact that the proceedings have come to an end. The undertaking in this case was not given pending the trial of the action but is a continuing undertaking. The plaintiff may enforce possible future breaches of the undertaking (if any) without the necessity for the

continuance of these proceedings.

30. The plaintiff reserves the right to plead particulars of negligence or nuisance or slander of title allegedly committed by the developer which were "facilitated" by the defendants and/or "committed" by the defendants. The plaintiff has not advanced any basis upon which he says that the defendants are vicariously liable for any negligence or nuisance or slander of title allegedly committed by the developer, if indeed this is what is intended by the reference to facilitating these actions. The plaintiff is making a claim against River Dublin and its contractors in separate proceedings. What is at issue here is whether the defendants have any vicarious liability to the plaintiff for their actions. On the basis that no claim at all, or any basis for such a claim, has been articulated, the answer to that question must be no.

31. The plaintiff has reserved the right to plead particulars of these actions actually committed by the defendants, but has not pleaded any negligence, nuisance or slander of title on the part of the defendants. This amounts to maintaining proceedings on the basis that he will plead a cause of action in the future.

32. Counsel advanced no case and made no allegation that the defendants (or indeed their servants or agents) committed any acts of negligence or nuisance or slander of title against the plaintiff. He did not suggest any possible amendments to this part of the plaintiff's claim. While of course these are recognised causes of action, in the absence of any pleading whatsoever, or any indication that such pleading could be furnished if permitted, I must apply the third dictum of Clarke J in *Keohane*, and, in so doing, it seems to me that these claims as they stand are bound to fail and cannot be saved by any proposed amendment.

33. Finally, insofar as the plaintiff claims damages for either the wrongful termination of the lease or failure to grant a new lease, these are matters which are to be dealt with in the Circuit Court proceedings. If the plaintiff is entitled to a new lease, the Circuit Court will so order and the defendants will not be permitted to terminate his lease. Therefore, this will dispose of any claim that the defendants have wrongfully colluded with River Dublin to terminate his lease. If he is not entitled to a new lease, then he cannot complain that it was unlawfully terminated once the original lease terminated by effluxion of time. It is not permissible effectively to pursue the same relief in two parallel proceedings. The legislation requires that proceedings claiming a right to a new lease are brought in the Circuit Court. Accordingly, that claim should continue in that Court and it may not be pursued in another guise in these proceedings.

### **Conclusion**

34. This is one of the very limited number of cases where, at this early stage in the proceedings, the Court is in a position to determine an application based upon the legal effect of the central document in the case. The other peripheral claims are bound to fail for the reasons I have set out. It is therefore appropriate to strike out the proceedings on the grounds that they are bound to fail and, accordingly, I dismiss the proceedings as against the defendants.