Neutral Citation Number: [2012] IEHC 29

THE HIGH COURT

2010 4539 P

BETWEEN

RAYAN RESTAURANT LIMITED

PLAINTIFF

AND

GERALD KEAN PRACTISING AS KEAN SOLICITORS

AND FRANCIS MCGAGH

DEFENDANTS

Judgment of Mr Justice Michael White delivered the 17th of January 2012

1. This matter comes before the court by way of three separate notices of motion.

(1) A notice of motion issued on 19th April, 2011, returnable for 30th May, 2011, on behalf of the second named defendant, Francis McGagh, seeking an order pursuant to O. 19 r. 28 of the Superior Court Rules striking out the plaintiff's action for failing to disclose a reasonable cause of action and/or is frivolous and/or is vexatious. An order pursuant to O. 19, r. 27 striking out such parts of the plaintiff's claim as the court deems fit on the basis that such parts are unnecessary and/or scandalous and/or tend to prejudice and to embarrass and/or delay the fair trial of the action. Further orders as deemed appropriate.

(2) A separate notice of motion on behalf of the second named defendant, Francis McGagh, issued on 24th May, 2011, returnable for 11th July, 2011, seeking an order pursuant to O. 29 of the Superior court rules, and s. 390 of the Companies Act 1963, for security for costs.

(3) A notice of motion issued on behalf of the first named defendant, Gerald Kean, seeking a dismiss of the plaintiff's claim, an order pursuant to O. 49, r. 6 seeking consolidation with proceedings Record No. 2006/1249P *Djemal Mennad & Fatima Zohra Azizi .v. Kean*, an order pursuant to O. 29 for security for costs, an order pursuant to O. 99, r. 7 for costs improperly incurred, and further and other relief.

2. The matter was heard before this Court on 8th, 10th and 29th November, 2011. A notice to cross examine a director of the plaintiff company Fatima Zohra Azizi was served, and her oral evidence was heard on 10th November, 2011. Judgment was reserved on 29th November, 2011.

3. The court received the following written submissions.

(1) Submissions on behalf of the second named defendant on motion to strike out.

(2) Submissions on behalf of the second named defendant seeking security for costs.

(3) Submissions on behalf of the first named defendant in relation to the motion for security for costs and consolidation of proceedings.

(4) Submissions on behalf of the plaintiff resisting an application for security for costs.

4. The court heard detailed oral submissions from all the parties.

The Substantive Proceedings

5. The proceedings were issued by plenary summons on 12th May, 2010, seeking damages for breach of contract, misrepresentation, negligence, breach of duty including negligent mis-statement.

6. The statement of claim was delivered on 23rd December, 2010. The claim relates to the conduct of Circuit Court proceedings, finalised by court order on 17th November, 2004, an appeal to the High Court , when an order on 18th April, 2005, for security for costs, was not complied with, which resulted in the appeal being struck out on 23rd January, 2006.

7. The plaintiff in these proceedings the plaintiff also in the Circuit Court proceedings has alleged, the following particulars of breach of contract negligence and breach of duty.

(1) Wrong advice by the second named defendant in a letter of advice of 16th October, 2003.

(2) Failing to plead relief against forfeiture of the lease, and failing to advance the argument at the court hearing, that there had been no valid forfeiture of the company's leasehold interest, and that the taking over of the exclusive running of the restaurant by Claudia Puscas to the exclusion of the plaintiff could not be used by the landlord as a means of forfeiture.

(3) Advising the plaintiff not to proceed with interlocutory relief, and not applying for interlocutory relief.

(4) Failing to advise on the appropriate claim for damages and unlawful retention and use of the plaintiff's possessions and equipment.

(5) Failing to prepare the case for the Circuit Court and failing or neglecting to follow the instructions of the plaintiff in the conduct and presentation of the case.

(6) Failing to apply to Judge Reynolds-Buckley to excuse herself from the proceedings on the grounds of apparent bias.

(7) Failing to advise the plaintiff on the material and evidence and defences open to it necessary to resist an application for security for costs, and to argue it effectively at the High Court hearing.

(8) Failing to procure appropriate accounting or other financial evidence or documentation with a view to establishing the causal connection between the plaintiff's inability to pay costs and the defendants' alleged wrongdoing and permitting the motion to proceed without this documentation.

(9) Failing to appear and represent the company's interests when the quantum of security was fixed before the County Registrar for the County of Westmeath on 27th June, 2005.

History of Lease, Assignment, Agreement Re Rent and Business Arrangement with Julia's Company Restaurant Limited and Claudia Puscas

8. Rayan Restaurant Limited the plaintiff by indenture of 1st August, 2002, took an assignment of a lease of premises at High Street, Athlone, Co. Westmeath. The original lease dated 20th December, 1996, was for a term of 35 years from 1st January, 1997, with a rent reserved at IR£36,000 per annum to be paid yearly and proportionately for any fraction of a year. The tenant also had a responsibility to make a contribution towards the insurance and to discharge rates including water rates. There was a responsibility under the lease to pay interest if the rent due remained outstanding after seven days. There was a covenant to pay the rent and a clause at p. 14 of the lease which stated:-

> "Provided always and these presents are upon this condition that if the rents hereby reserved or any part thereof shall be unpaid for twenty one days after becoming payable (whether formally demanded or not)…then and in any such case it shall be lawful for the Landlord at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall absolutely determine…"

9. By written agreement of 1st August, 2002, the plaintiff agreed to pay the rent as follows:-

(1) A deposit of €11,250.

(2) A revised rent of €45,000 up to the 31/12/2006 payable quarterly in advance in the sum of €11,250 per quarter.

(3) A rent free period to 1/9/2002 and reduced rent from 1/9/2002 –to- 18/12/2002 of €600 per month, thereafter the full rent.

(4) Djemal Mennad to give a personal guarantee.

10. This Court has not had the benefit of any evidence from Claudia Puscas, but for the purpose of this application is prepared to accept in broad outline the history of the setting up of the restaurant as set out in the Circuit Court Equity Civil Bill and the statement of claim in these proceedings, although it is noted at para. 8 of the affidavit sworn by Peter Bland, on 24th May, 2011, he asserted that Claudia Puscas gave evidence at the Circuit Court hearing on 16th and 17th November 2004, contrary to the assertions in the Equity Civil Bill and the Statement of Claim".

11. The intention of the plaintiff was to set up a restaurant in the premises to be known as "Du Bella." For this purpose a separate company was incorporated to run the restaurant Julia's Company Restaurant Limited and it was intended that Djemal Mennad a director of the plaintiff be a director of Julia's Company Restaurant Limited and a 50% shareholder and that Claudia Puscas was to be the manager of the restaurant on a day to day basis and become a director of this Company and an equal shareholder.

12. The restaurant opened for business in or around 20th May, 2003. The agreement between Djemal Mennad and Claudia Puscas was concluded in or around February 2003. A dispute developed between them.

13. Fatima Zohra Azizi in her affidavit of 13th August, 2003, averred that Claudia Puscas was to pay the sum of €70,000 in order to become an equal shareholder in Julia's Company Restaurant Limited but only paid the sum of €5,000. She was to be paid €350 a week to run the restaurant. It was the responsibility of Julia's Company Restaurant Limited to discharge all outgoings on the property. It was accepted by the plaintiff that €11,250 was due in rent at the beginning of July 2003.

14. It was stated in the judgment of Budd J. delivered on 18th April, 2005, that in an affidavit sworn on 4th March, 2005, Patrick J. Farry asserted on behalf of Claudia Puscas that it was the fault of Djemal Mennad that financial difficulties arose, that he had obtained €52,000 from Claudia Puscas and had failed to invest this money in the business of the first named defendant to obtain the landlord's approval for the agreed assignment of the lease from the plaintiff to the first named defendant, and that his failure to comply with planning and other statutory requirements caused the losses of which he complained.

15. According to the affidavit of Francis McGagh sworn on 15th April, 2011, at para. 22, there had been arrears of rent from the period 1st January, 2003 and that the landlord had brought summary proceedings claiming €22,500 and the plaintiff agreed to lodge €11,250 in court the rent for the first quarter of 2003. The pleadings in those proceedings have not been exhibited.

16. The plaintiff alleges it was excluded from the restaurant premises the locks having been changed in or around 24th July, 2003.

17. Miss Azizi did not seem to be aware until the first court hearing on 15th August, that it was the landlord, Bartholomew Flynn, who had re-entered the premises on that date alleging a breach of covenant in the lease to pay rent.

18. The plaintiff alleges it had spent €110,000 in fitting out the premises as a restaurant.

The Original Circuit Court Proceedings the Subject Matter of the Claim

19. The first correspondence exhibited in this motion was a letter from Cathal O'Neill, Solicitor, of 23rd July, 2003, written on behalf of Djemal Mennad and the plaintiff seeking possession of the restaurant business from the partnership.

20. An Equity Civil Bill was issued on 15th August, 2003, by Hughes Kehoe & Co., Solicitors for the plaintiff against Julia's Company Restaurant Limited and Claudia Puscas, defendants.

21. The matter came before the Circuit Court on 15th August, 2003, when Buttimer J. granted liberty to the plaintiff to serve a notice of motion on the defendants.

22. There was a letter of 18th August, 2003, from Margaret O'Neill, Chief Clerk, of the Circuit Court to Elizabeth Sharkey, the County Registrar for Co. Westmeath in respect of papers received from Hughes, Kehoe & Co., Solicitors expressing the understanding that Buttimer J. did not consider the matter sufficiently urgent to grant an *ex parte* application in Carlow the previous Friday.

23. The matter again came before the Circuit Court on 21st August, 2002, and was adjourned to 27th August, 2003. A number of interim orders were made by Haugh J. None of these orders have been exhibited.

24. By letter of 21st August, 2003, Hughes, Kehoe & Co., Solicitors wrote to Kean's Solicitors, indicating that due to a conflict of interest which had become apparent on 21st August, they had to come off record for the plaintiff.

25. Kean's Solicitors came on record at the end of August 2003.

26. There was reference in that letter to the filing and serving of an amended Civil Bill on Mr. Barra Flynn, Solicitor.

27. An affidavit was sworn by Fatima Zhora Azizi, a director of the plaintiff Company on 13th August, 2003, grounding an application by way of notice of motion for interlocutory relief.

28. An amended Civil Bill joining Bartholomew Flynn as a co-defendant and dated 12th September, 2003, has been exhibited.

29. It seems that the case was listed at Sligo Circuit Court on 16th October, 2003 and at Portlaoise Circuit Court on 24th October, 2003, when the motion for interlocutory relief was struck out against the third named defendant with the costs of the application reserved. There was a reference in the order to a previous order of Her Honour Judge Delahunt which has not been exhibited. There is reference to a motion for summary judgment which was struck out and which is not exhibited. There was an order for discovery and the proceedings were adjourned to 10th February, 2004.

30. A further amended Equity Civil Bill was prepared and was filed in the Circuit Court Office in Portlaoise on 7th February, 2004 and the amendment added at para. 8 to the plaintiff's claim stated:-

> "A declaration herein that the plaintiff is the lawful tenant and entitled to possession of the premises situated at High Street, Athlone, in the County of Westmeath (hereinbefore referred to as 'the premises') pursuant to a 35 year Lease dated 19th April, 1996 made between Barra Flynn of the One Part (the Landlord) and Kathleen Murphy of the Other Part of which lease the plaintiff took an assignment with the consent of the landlord by deed of assignment dated 1st August, 2002 made between the said Kathleen Murphy of the One Part and the plaintiff of the Other Part (hereinafter referred to as 'the Lease')."

31. In a reply to notice for particulars raised by the third named defendant's Solicitors Tormeys on 16th October, 2007, Keans by reply on 15th December, 2003, at para. 9 stated as follows:-

> "The plaintiff denies that the said premises has been lawfully forfeited by the third named defendant and seeks a declaration pursuant to the equitable jurisdiction of the court that the plaintiff herein is the lawful tenant and entitled to possession of the premises situated at High Street, Athlone, in the County of Westmeath (hereinafter referred to as "the premises") pursuant to a 35 year Lease dated the 19th day of April, 1996 and made between Barra Flynn of the One Part (the Landlord) and Kathleen Murphy of the Other Part of which Lease the plaintiff took an Assignment with the consent of the Landlord, by Deed of Assignment dated the 1st day of August, 2002 made between the said Kathleen Murphy of the One Part and the plaintiff of the Other Part (hereinafter referred to as "the Lease")".

32. In respect of the amendment to the Civil Bill which was filed on 7th February, 2004, Tormeys, Solicitors, for the third named defendant and Marcus Lynch & Co., Solicitors, for the first and second named defendants were put on notice of the amendment being sought by letter of 10th October, 2003.

33. By letter of 28th October, 2003, Keans, Solicitors, wrote to Imelda Grogan of the County Registrar's Office, the Courthouse, Portlaoise indicating that an application had been made for an early hearing date before Judge Reynolds on 24th October, 2003, and that the case would probably receive a date in the Supplemental List on 10th February or on 23rd March, 2004. The letter sought an earlier date for hearing.

34. There was also a letter of 15th April, 2004, from Elizabeth Sharkey, the County Registrar for Co. Westmeath to His Honour Judge Kennedy, the permanent judge of the circuit in which it was confirmed that Tuesday and Wednesday, 6th and 7th July, 2004, had

been set aside for the hearing of the case.

35. This seemingly had to be taken out of those dates because of the death of Barra Flynn, the third named defendant and put back to the next special sittings which were beginning on 16th November.

36. The case was heard in full over two days on 16th and 17th November, 2004, at Mullingar Circuit Court by Her Honour Judge Reynolds-Buckley and orders made as follows:-

> (1) Catherine Murphy Flynn was substituted for Bartholomew Flynn as the third named defendant,
>
> (2) The plaintiff's claim as against the defendants was dismissed with costs to include reserved costs against the second named defendant with an order over to the third party.
>
> (3) A declaration in terms of para. A of the relief sought on the third named defendant's counterclaim.
>
> (4) An order for costs of the third named defendant's counterclaim against the second named defendant with an order over to the third party.
>
> (5) The monies lodged in court by the plaintiff remain in court pending the determination of the proposed proceedings by the second named defendant with liberty to apply.
>
> (6) An order refusing the plaintiff's application for a stay on the aforesaid orders.

37. There is no transcript available for the hearing of 16th and 17th November 2004, or no transcribed notes from any of the solicitors involved exhibited in any of the affidavits before this Court. From the affidavits and the evidence of Fatima Zohra Azizi on 10th November, 2011, this Court can establish that both Fatima Zohra Azizi and Djemal Mennad, the directors of the plaintiff Company gave evidence and were cross examined.

38. Claudia Puscas also seems to have given evidence. There is no doubt that there was a full plenary hearing, where all relevant parties were represented.

The Appeal to the High Court and the Order for Security for Costs

39. The plaintiff appealed the order of 17th November, 2004, to the High Court.

40. Full pleadings have not been exhibited before this Court.

41. At some stage Djemal Mennad was joined as a third party to the proceedings.

42. Two separate notices of motion were issued for security of costs, on behalf of the First and second named defendants and on behalf of the third named defendant Catherine Murphy Flynn.

43. Declan O'Flaherty, Solicitor swore an affidavit on 8th February, 2005 and a supplemental affidavit on 3rd March 2005. Patrick J. Farry, Solicitor, on behalf of the first and second named defendants swore an affidavit on 14th February, 2005 and a supplemental affidavit on 4th March, 2005. Fatima Zohra Azizi swore a replying affidavit on 18th February, 2005, and a supplemental affidavit on 11th April, 2005. The affidavits of 4th March and 11th April were not exhibited in this Court.

44. The affidavit of Fatima Zohra Azizi sworn on 18th February, did not have any exhibits. I do not know if there were exhibits attached to the affidavit of 11th April.

45. A written judgment was delivered by Budd J. on 18th April, 2005.

46. Mr. Farry in his Affidavit exhibited a Companies Registration Office Search dated 8th February, 2005, showing no annual returns filed and that the company was first registered on 16th April, 2002.

47. Budd J. referred to *Jack O'Toole Limited v. McKeown Kelly Associates and Wicklow County Council* [1986] IR 277 at 283 quoting Finlay C.J. as stating:-

> "If a plaintiff Company seeks to avoid an order for security of costs it must as a matter of onus of proof establish to the satisfaction of the judge special circumstances which would justify the refusal of an order…having regard to these circumstances it does not seem to me a sufficient discharge of the onus of proof which I deem to be on a Company against whom an application is made under Section 390 to make a mere bald statement of fact that the insolvency of a Company has been caused by the wrong the subject matter of the claim".

48. Budd J. stated referring to two decisions of the High Court in *S.E.E. Company Ltd v. Public Lighting Services Ltd and Petit Jean (UK) Ltd* [1987] ILRM 255; and *Campbell Seafoods Ltd v. Brodrene Gram* as delivered 21st July, 1994, that both these cases involved strong positive evidence that the defendants had been the cause of the plaintiff's financial embarrassment.

49. He went on to state referring to the plaintiff:-

> "On the contrary there has been common case that the plaintiff Company was in a parlous financial state prior to the alleged wrongdoing in respect of the re-entry on 23rd July, 2003. Furthermore there has been no evidence adduced that the plaintiff Company would in fact have been able to trade out of the financial difficulty if not excluded from the premises. Indeed due to the unhappy differences between the third party and the second named defendant, whom it was envisaged would manage the first named defendant Company in running the restaurant it seems unlikely that the restaurant business of the plaintiff Company was likely to flourish."

50. He decided that the third named and second named defendants were entitled to an order for security for costs against the plaintiff pursuant to the provisions of s. 390 of the Companies Act 1963.

Separate High Court Proceedings and Appeal to the Supreme Court
51. The plaintiff, Djemal Mennad and Fatima Zohra Azizi, directors of the plaintiff issued High Court proceedings in respect of the re-entry of the landlord, Barra Flynn. These proceedings were struck out by order of the High Court of 12th October, 2006. That order was appealed to the Supreme Court, where that court permitted Djemal Mennad and Fatima Zohra Azizi to maintain a claim in detinue and conversion in relation to the contents of the premises against the Estate of the Landlord. Finnegan J. delivered the judgment of the court on 27th March, 2009. The pleadings were not exhibited before this Court, but the judgment of Finnegan J. was opened to the court.

Separate High Court Proceedings for Professional Negligence
52. Djemal Mennad and Fatima Zohra Azizi issued separate High Court proceedings Record Number 2006 No. 1249P against Gerald Kean practising under the title of Kean Solicitors alleging professional negligence, and breach of contract. No further action seems to have been taken in this matter other than the issue of the High Court plenary summons.

The Jurisdiction of the Court to Strike Out Proceedings
53. There are three separate jurisdictions, two of which are pursuant to the Rules of the Superior Courts and the other arises pursuant to the inherent jurisdiction of the court.

(1) Order 19 Rule 28

> "The court may order any pleading to be struck out, on the grounds that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed or judgment to be entered accordingly as may be just".

54. The pleading in r. 28 means the whole pleading, in this case the plenary summons and statement of claim.

55. The court in dealing with an application pursuant to O. 19, r. 28 must deal with it on the pleadings only, and ignore any other extraneous evidence.

56. Documentation referred to in the plenary summons and statement of claim can be examined.

57. In *Aer Rianta c.p.t v. Ryanair Limited* [2004] I.R. Denham J. at 509 states:-

> "the jurisdiction under O. 19, r. 28 to strike out pleadings is one a court is slow to exercise. A court will exercise caution in utilising this jurisdiction. However if a court is convinced that a claim will fail such pleadings will be struck out.
>
> An application by way of motion under O. 19, r. 28 is decided on the assumption that the statements in the statement of claim are true and will be proved at the trial. Thus this motion relates to and is grounded on the statement of claim of the plaintiff".

At p. 510 of the judgment Denham J. stated:-

> "I am satisfied that the clear words of O. 19, r. 28 refer to single documents and not parts of a pleading. I am satisfied that on the plain meaning of the words O. 19, r. 28 applies to a pleading in its entirety and not to part of a pleading. Accordingly under O. 19, r. 28 the court has jurisdiction to strike out an entire pleading, an entire document, for example a statement of claim, but not a portion of it."

58. The words frivolous or vexatious have a particular meaning in law as stated by Barron J. in *Farley v. Ireland* and others *ex tempore* judgment of the Supreme Court delivered on 1st May, 1997, where he stated:-

> "So far as the legality of the matter is concerned frivolous and vexatious are legal terms, they are not pejorative in any sense or possibly in the sense that Mr. Farley may think they are. It is merely a question of saying that so far as the plaintiff is concerned if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious".

59. The real purpose of "frivolous and vexatious" is set out in the judgment of the Supreme Court *Fay v. Tegral Pipes Limited* [2005] 2 I.R. at 266. McGracken J. stated:-

> "While the words 'frivolous and vexatious' are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly the courts are entitled to ensure that the privilege of access to the courts which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes and not as a forum for lost causes which no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed".

The Inherent Jurisdiction of the Court
60. In the High Court case *Barry v. Buckley* [1981] I.R. at 308, Costello J. stated:-

> "But apart from O.19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case; see Wiley's Judicature Acts (1906) at pp. 34-37 and the Supreme Court practice (1979) at para. 18/19/10. The principles in which the Court exercises this jurisdiction are well established. 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 its clear that the plaintiff's claim must fail per Buckley L.J. in *Goodson v. Grierson* at 765".

61. In applying this jurisdiction, the court has to be careful to ensure that it is exercised in undisputed matters of fact, and clear legal principles.

62. The court must also be careful to ascertain whether or not the plaintiff's case can be remedied by some amendment of the pleadings and also be confident that no matter what may arise in discovery where at the time of the action the plaintiff's case could not succeed. Generally speaking the jurisdiction is exercised in circumstances where the facts are clear.

63. In exercising its jurisdiction under O. 19, r. 28 and its inherent jurisdiction there is bound to be a certain overlap.

64. In exercising its inherent jurisdiction in assessing the question as to whether the proceedings are vexatious the court is entitled to look at the whole history of the dispute.

65. In *Riordan v. An Taoiseach* [2001] 4 I.R. at 465 O Caoimh J. stated:-

> "In assessment of the question whether the proceedings are vexatious the court is entitled to look at the whole history of the matter and it is not confined to a consideration as to whether the pleadings disclose a cause of action. The court is entitled in the assessment of whether proceedings are vexatious to consider whether they have been brought without any reasonable ground. The court has to determine whether the proceedings being brought are being brought without any reasonable ground or have been brought habitually and persistently without reasonable ground.

66. *Dykun v. Odishaw* (Unreported, Alberta Court of Queen's Bench Judicial District of Edmunton, 3rd August, 2000) referred to a decision of the Ontario High Court in *Re Lang & Michener & Fabian* [1987] 37 DLR (4th) 685 at 691 where the following matters have been indicated as tending to show that a proceeding is vexatious:-

> (a) The bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction.
>
> (b) Where it's obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief.
>
> (c) Where the action is brought for an improper purpose including the harassment and oppression of other parties by multi various proceedings brought for purposes other than the assertion of legitimate rights.
>
> (d) Where issues tend to be rolled forward into subsequent actions and repeated and supplemented often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings.
>
> (e) Where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings.
>
> (f) Where the respondent persistently takes on successful appeals from judicial decisions.

Order 19 Rule 27

> "The court may at any stage of the proceedings order to be struck out or amended any matter in any endorsement or pleading which may have been unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action; and may in such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client".

67. Pursuant to this rule, the court may strike out any part of a pleading which may be (a) unnecessary; or (b) scandalous; or (c) which may tend to prejudice, embarrass or delay the fair trial of the action.

Jurisdiction of the Court in Respect of Security for Costs Pursuant to Statute and the Rules of the Superior Courts

68. Section 390 of the Companies Act 1963 states:-

> "Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given".

Order 29, rule 1 states:-

> "When a party shall require security for costs from another party he shall be at liberty to apply by Notice to the party for such security in case the latter shall not, within 48 hours after service thereof, undertake by notice to comply therewith the party requiring the security shall be at liberty to apply to the Court for an Order that the said party do furnish such security".

Rule 6

> "Where the court shall have made an order that a party do furnish security for costs, the amount of such security and the time or times at which, and the manner and form in which and the person or persons to whom, the same shall be given shall subject to rule 7, be determined by the Master in every case".

69. The principles are very helpfully set out in Supreme Court case U*sk and District Residents Association Limited v. The Environmental Protection Agency and Greenstar Recycling Holdings Limited*, a judgment of the Supreme Court of 13th January, 2006, [2006]1 ILRM 363, when Clarke J. stated at para. 3.6.2:-

"The overall approach to security for costs was helpfully summarised by Morris P. in *Interfinance Group Limited v. KPMG Pete Marwick* (High Court unreported Morris J. 29th June, 1998, as follows:-

'1. In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish
(a) That he has a *prima facie* defence to the plaintiff's claim and

(b) That the plaintiff will not be able to pay the moving party's costs if the moving party be successful.

2. In the event that the above two facts are established then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus vests upon the party resisting the order.

The most common examples of such special circumstances include cases where a plaintiff's inability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the Order sought.

The list of special circumstances referred to is not, of course, exhaustive".

The Law on Forfeiture of Leasehold Interest for Non Payment of Rent and Relief against Forfeiture

70. I have already referred to the term in the lease allowing the landlord to re-enter for non payment of rent. Section 14 of the Conveyancing Act 1881, governs the law on notice for breach of the covenants.

71. Section 14(8) exempts from notice any re-entry for non payment of rent. It states:-

"This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent."

72. A tenant is entitled to claim equitable relief against forfeiture for non payment of rent.

73. In *Re Erris Investments Limited* [1991] ILRM at 381, Carroll J. stated:-

"Forfeiture for non payment of rent is not governed by the Conveyancing Acts 1881 and 1892 so a s.14 Notice is not required. Mr. Wylie says that the only requirement would seem to be the common law one that the landlord must make a formal demand for the rent unless the tenancy agreement exempts him from this (see para. 17.090). In this case the lease does exempt the lessor. The re-entry clause applies whether the rent is legally demanded or not. But even though s.14 does not apply in the case of forfeiture for non payment of rent, the tenant or sub tenant is entitled to equitable relief against forfeiture for non payment of rent. The normal way of proving a valid forfeiture is by an action for possession. But even when a decree for possession was granted, a tenant or sub tenant could apply to be reinstated on payment of arrears; see *Whip v. Mackey* [1927] I.R. 372, *Blake v. Hogan* [1933] 67 ILTR 237 and *Ennis v. Raftery* [1938] 72 ILTR 56".

74. In Campus & Stadium Ireland Developments Limited v. Dublin Waterworld Limited [2006] IEHC 200 Gilligan J. stated:-

"Wylie's Irish Land Law 3rd Ed (Butterworths Ltd) 1997 at page 950 provides a brief summary of the law in relation to relief against forfeiture in the following terms:-

"And the Court has a general discretion to grant whatever relief it thinks fit in the light of the parties conduct and all the other circumstances of the case, there are no fixed rules for the exercise of this discretion which is administered by the Courts in general equitable principles". It is clear in my view from the perusal of the various authorities which have been opened to me on this aspect that the courts in general strive not to place rules or restrictions on the exercise of judicial discretion in relation to relief against forfeiture.

75. The learned trial judge went on to consider a number of English authorities and went on to state:-

"I also have regard to the view expressed obiter by Murphy J. in *Cue Club Limited & Others v. Navaro Limited* (Unreported, Supreme Court, 23rd October, 1996) wherein he stated:-

'The nature of the discretion exercised by the Courts of Equity in granting relief against forfeiture is hardly applicable or applicable to the same extent, at any rate where the court is dealing with substantial commercial transactions in which the Lessor and Lessee are on equal terms'.

I take the overall view that in order to exercise my discretion fairly, I must take into account the conduct of the parties, the wilfulness of any breach by the tenant, the general circumstances particular to the issue, the nature of the commercial transaction the subject matter of the lease, whether the essentials of the bargain can be secured, the value of the property, the extent of the equality between the parties, the future prospects for their relationship, the fact that even in cases of wilful breaches it is not necessary to find an exceptional case before granting relief against forfeiture and then apply general equitable principles in reaching a conclusion."

Negligence of a Barrister and Immunity against Suit

76. This matter has not been dealt with comprehensively in a judgment of the Irish Superior Courts.

77. In *Behan v. McGinley* and *Behan v. The Governor & Company of the Bank of Ireland & Ors* [2008] IEHC 18, a judgment of Irvine J. the learned judge stated at p. 31 of her judgment:-

"for the purposes of the within applications, notwithstanding the facts that there is no definitive approval of the decision of the House of Lords in *Arthur J.S. Hall & Co. v. Simons* in this jurisdiction, the court for the purposes of this application

will assume that barristers such as those implicated in the within proceedings do not enjoy a blanket immunity from suit and can be sued for negligence in relation to their management of litigation on behalf of their clients either in respect of the preparatory work or indeed in respect of their management of the trial itself".

Negligence of a Solicitor

78. It is well established law that a solicitor can be found to be negligent in the carrying out of any business entrusted to him by a client. The standard of care is set out in *Roche v. Peilow (trading as William J. Shannon & Co.)* [1986] ILRM, Griffin J. stated at p 200:-

> "The standard of care required of a solicitor in carrying out the business entrusted to him by his client is the ordinary level or degree of skill and competence generally exercised by reasonably careful colleagues in his profession".

Collateral Attack on A Previous Judgment of the Courts and Public Policy against Re-Litigating a Decision of a Court of Competent Jurisdiction

79. In *Arthur J.S. Hall & Company v. Simons* [2002] 1 A.C. at 615 the head note of the judgment at para (1) states:-

> "That in the light of changes and in the law of negligence, the functioning of the legal profession, the administration of justice and public perceptions reconsideration of the issue of advocates' immunity from suit was appropriate; that none of the reasons set to justify the immunity, viz the 'cab rank' rule, the analogy with the immunities of witnesses and others involved in legal proceedings, the duty of the advocate to the court and the public policy against re-litigating a decision of a court of competent jurisdiction, had sufficient weight to sustain the immunity in relation to civil proceedings; that the principles of *res judicata*, issue estoppel and abuse of process were sufficient to prevent any action being maintained which would be unfair or bring the administration of justice into disrepute; that the obstacle of proving that a better standard of advocacy would have produced a different outcome and the ability of the court to strike out unsustainable claims under CPR Rule 24.2 would restrict the ability of clients to bring unmeritorious and vexatious claims against advocates should the immunity be removed; and that, accordingly the public interest in the administration of justice no longer required that advocates enjoy immunity from suit for alleged negligence in the conduct of civil proceedings."

80. Irvine J. in her judgment in *Behan v. McGinley* already referred to stated:-

> "In relation to this particular issue the Court is guided by the decision of the House of Lords in *Arthur J.S. Hall and Company v. Simons* [2000] Vol. 3 All E.R. 673. That decision relates to three separate cases wherein clients brought claims for negligence against their former solicitors. Having initially successfully relied upon the immunity of advocates from suits for negligence the Court of Appeal ultimately held that the claims fell outside the scope of the immunity. The House of Lords determined that it was no longer appropriate that barristers or solicitors should enjoy immunity from proceedings for negligence against them in respect of the manner in which they conducted proceedings in court. Lawyers will not be immune from suit if it is established that they acted negligently on behalf of their client, either in the preparation or in the conduct of legal proceedings. The court did nonetheless refer to the evidential difficulties which arise in trying to establish in the course of the negligence action what conclusion would have come about in the earlier proceedings if those proceedings had been conducted differently. Nonetheless, the court determined that the existence of such evidential difficulties for a plaintiff who has to prove that the lawyer's negligence caused him loss is not a reason for continuing the immunity but might well become a reason for the court striking out such negligence proceedings on the basis that the potential action for negligence had become so weak due to the passage of time. Hoffman L.J. at p. 699 considered the difficulties for a court in such circumstances in the following manner:-
>
> > '(b) Invidious Judgments
> >
> > Then it is said that while it is difficult enough to decide what would have happened at a trial which did not in fact take place, it may become positively invidious to decide how a judge who actually heard the case would have reacted if the advocate had advanced a different argument or called different evidence. Some judges are most receptive to certain kinds of points than others. I think this is an imaginary problem. Whatever may have been the foibles of the judge who heard the case, it cannot be assumed that he would have behaved irrationally. If he did, it would have been corrected on appeal. Obviously one has to take into account the findings that the Judge made on the case as it was actually presented. For example, if he did not believe anything which the plaintiff said, it may be difficult to show that the different line of argument would have persuaded him to find in his favour. But I do not see how it is relevant for the purposes of the hypothetical exercise to have regard to the Judge's idiosyncrasies. It must be assumed that he would have behaved judicially'."

81. The court also in *Arthur J.S. Hall v. Simons* considered the problems of re-litigating an action in the following manner:-

> "The law discourages re-litigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae eut finis sit litium.* They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same. The first is concerned with the interests of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent re-litigation when the parties are the same: *autrefois acquit, res judicata* and issue estoppel. The second policy is wider: it is concerned with the interests of the State. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of issue estoppel to cases in which the parties are not the same but the circumstances are such as to bring the case within the spirit of the Rules".

82. In his submissions on behalf of the second named defendant to the court Mr. Hayden referred to the proceedings instigated by the plaintiff as constituting an impermissible collateral challenge to the decision of the Circuit Court and referred to *Murray v. Budd & Ors* (Unreported, High Court, Clarke J., 22nd November, 2010).

83. The present proceedings constitute a risk that their ultimate purpose will be the re-litigation of the matters dealt with in the Circuit Court proceedings. Mr. McDowell for the plaintiff rightly points out that these proceedings are different in character but will necessarily have to deal in detail with the conduct of those proceedings.

84. It is not just the private interest of litigants that has to be considered, but the significant public interest, in not having a plethora of legal actions which will cover ground already covered in some detail in the course of previous proceedings. This responsibility falls particularly on a court considering an application to strike out proceedings because of alleged abuse of process.

85. In considering if the plaintiff has a reasonable cause of action, the court must take the view that the learned trial judge acted judicially, knew the law, and did not act irrationally.

Conclusion
86. It is important to draw a distinction between the type of proceedings which are obviously vexatious and frivolous, and those while based on genuine justiciable matters have no reasonable chance of success for a variety of reasons.

87. The *Riordan* judgment of O Caoimh J. already quoted is an example of the former.

88. It is important to draw a distinction between what would be regarded in layman's terms as vexatious and frivolous and how the court defines those terms. The dicta of Barron J. in *Farley v. Ireland* already referred to is apt.

89. I do not place the present action in the category of the obviously vexatious and frivolous. The issues determined in the Circuit Court would have given the plaintiff's statable grounds for appeal to the High Court and it would not have been frivolous or vexatious. The loss of a right to appeal is a serious matter.

90. The financial health of the plaintiff is weak. The purpose of the company originally was to lease restaurant premises. No evidence has been adduced of any assets, shareholder funds or bank accounts held. The company seems to have been kept alive for the purpose of litigation. If there is another purpose it has not been revealed to the court. The plaintiff will not be in a position to discharge the defendants' costs if unsuccessful.

91. The constitutional balance is the right of preservation of access to the courts, as against the certainty that if Gerald Kean and Francis McGagh are successful in their defence of this action the order for costs which should follow, would not be able to be enforced against the plaintiff as the company is only being kept going for the purposes of litigation.

92. While caution has to be exercised by the court to ensure that in a motion hearing, the court does not tread on the right to a plenary hearing, the court does in the circumstances of this case have a duty to conduct a robust enquiry, to establish undisputed evidence to ensure that the plaintiff has a reasonable cause of action, to do otherwise would be an injustice to the defendants who on a successful defence of the plenary hearing, have no chance of recovering their costs.

93. The court also has a public interest duty to ensure that matters already litigated in a court of competent jurisdiction are not re-litigated by other means.

94. The court relies on the second principle enunciated in *Fay v. Tegral Pipes Limited & Ors*, already referred to that is "to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed."

95. If the court does not accede to an application to strike out the proceedings, it has to decide the issue of security for costs by allowing the plaintiff to proceed if it establishes the special circumstances of a direct causal link between the wrong alleged and the loss to the plaintiff, or in the alternative grant an order for security for costs.

96. There are differences in character between the proceedings in the Circuit Court and the motion for security for costs in the High Court.

97. One was a full plenary hearing with no transcript or written judgment. Apart from the affidavits filed on behalf of the defendants this Court has little information about that plenary hearing on 16th and 17th November, 2004. The affidavits of Fatima Zhora Azizi sworn on 2nd November, 2011, provide no information on the substance of that hearing. Despite those affidavits provided by the defendants there are significant gaps in respect of the plenary hearing and earlier interim hearings.

98. The court is in a better position in respect of the motion for security for cost as those were on affidavit and Budd J. delivered a written judgment setting out the arguments and gave reasons for his decision. There are still gaps and the full pleadings have not been exhibited in these proceedings.

99. In respect of the defence of the motion for security for costs before this Court, I would have expected from the plaintiff much more detailed financial information and analysis. The plaintiff could not have been under any illusions since the judgment of Budd J. as to the requirements to furnish detailed financial information.

100. This court would have expected:-

> The cash accounts of the company.
>
> Bank statements.
>
> Invoices for the work claimed at €110,000 in the Civil Bill or the sum of €150,000 referred to in Supreme Court judgment and clear acknowledgement by the directors of the company whether this was expenditure by the company or the directors.
>
> Details of the rent payments and date paid.
>
> Details of the investment in the company by the directors duly vouched.
>
> A financial analysis of the company prior to re-entry by the landlord.
>
> Details of payments made by the plaintiff to the first and second named defendants in the Circuit Court proceedings.

101. The only information provided was 3 daily reports and a spread sheet with no explanation and this was not furnished to the

second named defendant.

102. The Civil Bill included a claim for the sum of €110,000 monies expended by the company in refurbishing the premises. Both defendants and Peter Bland have averred that the director Mr. Mennad who gave evidence was not in a position to substantiate this claim by written documentation, and asserts that he misled the court by advancing documentation which was related to expenditure other than on the company or on the restaurant premises in respect of which the company had a lease. The court is surprised that Djemal Mennad has not sworn an affidavit in these proceedings.

103. No documentation is exhibited, in respect of the averments of Gerald Kean and Francis McGagh that advice was given to the directors of the company as to what was required to successfully resist an application for security of costs. The court is not advised as to how and when this advice was tendered.

104. The defendants are concerned that a portion of the judgment of Finnegan J. delivered on 27th March, 2009, in separate proceedings have caused the present proceedings to be initiated. The plaintiff has argued that the judgment has no relevance to the issues before this Court. The court is of the view the proceedings and judgment do have relevance.

105. In the Supreme Court judgment *Rayan Restaurants Ltd & Ors v. Flynn & Ors* [2007] IESC 28. Finnegan J. stated at p 3:-

> "At the time that the company obtained an assignment of the lease the premises required considerable works to make them suitable for use as a restaurant. These works were carried out by and at the expense of the company or alternatively by and at the expense of the proprietors and it is claimed cost approximately €150,000. Rent amounting to € 36,000 was paid while the works were being carried out. A gale of rent fell due on 1st July, 2003. On 24th July 2003 in reliance on the proviso for re-entry B.F. using a key re-entered the premises and took possession of the same and excluded the company therefrom. Immediately a cheque for the outstanding gale of rent was tendered to BF who refused to accept the same."

At p. 5 of the judgment Finnegan J. stated:-

> "It is not surprising therefore that the proceedings in the High Court and in this Court have been attended by considerable confusion. There is a great volume of documentation running to some five tightly packed ring binders. The documentation is a mix of pleadings, affidavits, exhibits, correspondence, unsworn statement and submissions on the law. The documents are not arranged chronologically or in any logical sequence…
>
> The sole issue in the Circuit Court was whether the Lease had been determined by re-entry. Relief against forfeiture, surprisingly, was not claimed although in the particular circumstances of this case where the outstanding rent was tendered immediately upon re-entry one would expect relief to be granted almost as a matter of course. Unless this course was adopted on the express instructions of the Company then the company is entitled to at least an explanation as to why relief was not sought at or immediately after the hearing. No issue was raised in relation to the contents of the premises."

106. An issue arose in this Court as to what version of the Civil Bill was before the Supreme Court.

107. The facts as presented by Finnegan J. recited therein conflict with the documentation and submissions before me.

108. There is no suggestion before this Court, that the plaintiff tendered immediately a cheque for the outstanding gale of rent which was refused. Miss Azizi in her affidavit sworn on 13th August, 2003 and prepared by Hughes Kehoe & Company, Solicitors, at para. 13 averred:-

> "I say that the plaintiff has discharged the rent up to the end of June 2003 due to the Landlord without recourse to the said restaurant takings but due to financial pressures the plaintiff has been unable to discharge the arrears since the beginning of July 2003 which are in the order of €11,250. I say that I am fearful that the Landlord will seek to exercise his right of forfeiture and re-entry under the Lease."

At para. 22 she averred:-

> "However I say and believe that should the interlocutory relief as sought be refused damages would not be an adequate remedy for the plaintiff if it is ultimately successful at the trial of this action. In this regard I say that without being in a position to trade in the premises and derive an income therefrom the plaintiff will shortly be unable to discharge the rent due pursuant to the Lease and the Landlord will therefore be in a position to exercise his right of forfeiture and re-entry. The plaintiff would therefore suffer the loss of the entire business. I further say and believe that unless the acts complained of herein are discontinued the plaintiff may be unable to continue to discharge its debts as they fall due and may become the subject of a Petition to the High Court by its creditors for the compulsory winding up thereof."

109. The sole issue in the Circuit Court was not whether the lease had been determined by re-entry. What exactly was before the Circuit Court is at present difficult for this Court to establish because of gaps in the pleadings and a lack of notes of the evidence? Suffice it to say that from my examination of the evidence before the court so far the findings as adopted by Finnegan J., are not in accordance with that. It may well be when there is a more complete set of documentation available the court will be able to comment more clearly on it.

110. There are some matters in the pleadings where the court can identify matters of undisputed fact and identify conflicts which on discovery may enable the court to make findings of undisputed fact. The purpose of pleadings are to identify the issues between the parties, to assist the court.

111. Mr. McDowell in his submissions to the court that the pleadings were defective and unable to provide the plaintiff with relief against forfeiture relied on extracts from Bullen & Leek & Jacobs precedents of pleadings.

112. Seven separate precedents were furnished to the court. The first two relate to a claim by a landlord for possession firstly for non payment of rent and secondly for breach of other covenants. The next four are precedent defences one of which included a counterclaim. The first six of the draft precedents presented to the court are not of assistance. The last pleading headed "Particulars of Claim for Relief against Forfeiture following Landlord's peaceable re-entry" is of assistance.

113. Insofar as the draft pleadings submitted on behalf of the plaintiff in these proceedings was suitable it is appropriate to compare the draft with the actual pleadings.

114. The first paragraph of the draft pleadings is a recital of the lease. The lease and assignments were recited at para. 1 of the amended Civil Bill.

115. Paragraph 2 of the draft recites the clause in the lease setting out provisions for re-entry. A copy of the lease was annexed to the amended Equity Civil Bill.

116. The draft pleadings recites the failure to pay the rent. The Civil Bill does not do this, but it is contained in the affidavit of Miss Azizi sworn on 13th August, 2003.

117. The draft pleadings recite at para. 4 the exercise of re-entry. The Civil Bill did not do that but the reply to notice for particulars of 15th December, 2003, at para. 3 described the re-entry by the landlord.

118. The next paragraph of the draft pleadings sets out the willingness of the claimant by letter to pay the sum due but that the landlord has refused it. There is nothing in the pleadings referring to any letter making this offer. Miss Azizi has not averred in her affidavits before this Court, that this was a course of action she followed or was advised to follow.

119. There is a contradiction between the affidavits of Frances McGagh and Gerald Kean on the one hand and Miss Azizi's affidavits.

120. The draft pleadings furnished states:-

> "and the Claimant claims relief against forfeiture or such terms as may be just and equitable".

121. The defendants claim that the amendment at para. 8 of the plaintiff's claim in the Civil Bill and the reply at para. 9 of the reply to notice for particulars of 15th December, 2003, were appropriate pleadings to ground a claim for equitable relief against forfeiture and they both aver as do Peter Bland and Declan O'Flaherty that a claim for equitable relief against forfeiture was advanced at the Circuit Court plenary hearing on 16th and 17th November, 2004.

122. In his letter of advice of 16th October, 2003, to Kean, Solicitors, Mr. Francis McGagh, B.L., stated:-

> "The plaintiff is appealing to the equitable jurisdiction of the court, basically saying that the Third Named defendant's actions were harsh, albeit within his rights. If the court sees fit to exercise its equitable jurisdiction, it will in my view restore the plaintiff's tenancy to allow him continue his business".

123. The court can at present find as a matter of undisputed fact and law:-

> (1) The appropriate equitable jurisdiction of the Circuit Court was invoked by the issue of an Equity Civil Bill.
>
> (2) All the parties necessary to grant the plaintiff full relief were joined in the proceedings.
>
> (3) The relevant amendment at para. 8 of the plaintiff's claim in the Civil Bill was notified to the third named defendant's solicitors on 10th October, 2003 and the first and second named defendant's solicitors on 17th October, 2003 and sent to the Circuit Court Office on 4th February, 2004 and acknowledged by that Office as received in February 2004. The amended civil bill was before the court.
>
> (4) As a matter of law there is nothing in the pleadings to have prevented the learned judge exercising her equitable jurisdiction, to grant relief from forfeiture if the court so wished. However, the court readily accepts that it has no knowledge at present of the detailed legal arguments, presented at the opening or closing of the case or if the learned judge gave reasons for her decision.
>
> (5) That a letter was written on 24th August, 2004, from the County Registrar of County Westmeath to the permanent judge of the Circuit Court, His Honour Judge Kennedy an extract from which reads
>
> > "the problem of a Judge not being able to hear the case due to knowing Barra Flynn now does not arise."

124. Both Mr. Kean and Mr. McGagh aver that the company was in difficulty from 1st January, 2003, with rent payments to the landlord, and the summary proceedings issued claiming €22,500 referred to this. They aver that the lodgement made in court referred to in para. 4 of the order of 24th October, 2003, related to rent due and owing as at 1st January, 2003. Miss Azizi in her affidavit refers to the lodgement of €11,250 in court on 6th November, 2003. The affidavit is silent as to what quarter of rent it related to but avers it is still lodged in court.

125. This is an issue which needs to be clarified if it can be. Was there an immediate offer of rent by the plaintiff in July/August 2003 and was it refused by the landlord. What were the state of rent payments from 1st January, 2003 to 23rd July, 2003?

126. Another issue which has not been explained to the court nor has there been any document produced to the court is the nature of the legal relationship between the plaintiff and the first defendant. The statement of claim states that it was intended that the first named defendant would run the restaurant. Was there a written agreement? Who was to be responsible for the rent? Was there any correspondence and contact with the landlord about this?

127. It is the view of the court that these are all matters which touch on the plaintiff having a reasonable cause of action and whether the defendants by their actions acted in a negligent way to deprive the plaintiff of a reasonable chance of success.

128. This Court presumes that the full pleadings in the following actions can be made available to the court:-

(1) Full pleadings in the Circuit Court action including defences, motions, application to join third parties.

(2) Full pleadings on the appeal to the High Court and on the motion for security for costs in the High Court.

(3) Full pleadings of the summary proceedings taken by the landlord in the Circuit Court.

(4) Full pleadings of the High Court action *Rayan Restaurant Limited & Ors v. Flynn & Ors.*

129. The court lacks substantial information which could be available on discovery. The court is not making an order to produce documentation or financial information, it is giving an opportunity to the parties to do so.

130. It is not appropriate to deal with the statute of limitations submissions on these motions. If the defendants are granted relief to strike out, it does not arise. If the plaintiff is permitted to proceed with the action without security for costs it can be dealt with as a separate issue.

131. It is not appropriate for this Court to consolidate High Court plenary proceedings Record No. 2006/1249P *Mennad & Azizi v. Kean* with those proceedings Fatima Zohra Azizi has acknowledged in sworn evidence before this Court that the plaintiffs do not intend to proceed with this action.

132. The court can rely on all evidence put before it, provided it can make a determination that those facts are undisputed. The burden rests on the defendants to establish the appropriate grounds to strike out the pleadings or any part thereof. The plaintiff has a responsibility to rebut the evidence adduced by the defendants. It also rests on the plaintiff the burden of persuading the court that special circumstances exist and but for the actions of the defendants the company would be able to discharge its legal costs if unsuccessful.

133. The court will adjourn the motion to a specific date. The court will retain seisin of the motion. If the case goes to plenary hearing it is appropriate that another judge of the court hears same.