

THE HIGH COURT

COMMERCIAL

[2015 No. 3352 P.]

BETWEEN

D&L PROPERTIES LIMITED

PLAINTIFF

AND

YOLANDA LIMITED

DEFENDANT

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 20th day of October, 2015**

1. The defendant in these proceedings has brought a motion to dismiss the plaintiff's claim on two grounds; namely:-

(a) under O. 19, r. 28 of the Rules of the Superior Courts 1986 on the grounds that the plaintiff's statement of claim discloses no reasonable cause of action and/or on the grounds that the plaintiff's claim is frivolous and/or vexatious; and

(b) under the inherent jurisdiction of the court on the grounds that the plaintiff's claim is frivolous, vexatious and/or bound to fail.

2. In the statement of claim, the plaintiff claims that it entered into an agreement with the defendant that it would advance a sum of up to €3.8m to the defendant on terms set out in the statement of claim. The plaintiff asserts that pursuant to the agreement entered on or about 5th November, 2008, it advanced to the defendant the sum of €2.2m, "...which for expediency was paid from the bank account of Mr. Derek O'Leary and Ms. Linda O'Leary to the account of the defendant". The plaintiff claims that the defendant has not repaid the monies lent by it to the defendant and pursuant to the agreement which it contends for, seeks judgment in the sum of €9,739,880 and damages for breach of contract, breach of duty, breach of statutory duty and fiduciary duty. The plaintiff also seeks damages for misrepresentation and conversion and other reliefs set out in the statement of claim.

3. The defendant has met the plaintiff's claim head-on with a plea that it never received monies from the plaintiff. In the affidavits filed on behalf of the defendant in support of this motion to dismiss the claim, the defendant claims that any monies lent to the defendant were lent by Mr. Derek O'Leary on foot of an agreement entered into personally between Mr. O'Leary with the defendant. The defendant also denies the other claims made in the statement of claim.

**Jurisdiction Under Order 19, rule 28**

4. Order 19, rule 28 states:-

*"The Court may order any pleading to be struck out, on the ground 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 judgement to be entered accordingly, as may be just."*

5. In *McCabe v. Harding* [1994] ILRM 105 at 108, O'Higgins C.J. stated that in order for rule 28 to apply "vexation or frivolity must appear from the pleadings alone".

6. It is necessary for the court to consider the pleadings only and assume that any statements of fact contained in the pleadings sought to be struck out are true and can be proved by the party.

7. Applying these principles to the pleadings and the information put before the court on affidavit, it seems to me that it is not possible to come to the conclusion that the pleadings are frivolous or vexatious. There is nothing in the way of prior litigation between the parties which would tend to establish that these proceedings are brought in respect of matters that have already been canvassed before the courts, or have been decided by the courts and that the defendant is "vexed" by these proceedings being brought against it as understood in the normal way. Neither can it be said that the pleadings on their face disclose a frivolous action. For these reasons, I have come to the conclusion that the defendant has not met the test required by O. 19, r. 28 to have the statement of claim struck out or the action stayed or dismissed.

**Jurisdiction to strike out pleadings pursuant to the inherent jurisdiction of the court**

8. The test for striking out under the inherent jurisdiction of the court has been developed in a series of cases since *Barry v. Buckley* [1981] I.R. 306, which established that there is a concurrent and parallel inherent jurisdiction in the High Court to dismiss or strike out proceedings where they amount to abuse of process and/or are bound to fail. The starting point for the exercise of such jurisdiction is that it must be exercised sparingly. See *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425. The test is not whether the plaintiff's case is likely to fail but whether it is bound to fail. What has to be apparent is that no matter what may arise on discovery or at the trial of the action the plaintiff cannot succeed. See *Lac Minerals v. Chevron Corporation* (Unreported, High Court, 6th August, 1993) per Keane J. The recent authorities were reviewed by Clarke J. in *Salthill Properties Limited v. Royal Bank of Scotland* [2009] IEHC 207, in which he held that the plaintiff is not required to establish a *prima facie* case but rather it is for the defendant to prove that the plaintiff's claim is bound to fail. At para. 3.14 of his judgment, Clarke J. said:-

*"It is clear from all of the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put*

*forward, at that time, a prima facie case to the contrary effect."*

9. Where there are disputed issues of fact, they have to be resolved in favour of the plaintiff and the plaintiff's case must be taken at its high watermark. See *Kennedy v. Minister for Agriculture* [2011] IEHC 187 and *Keaney v. Sullivan* [2015] IESC 75, where Dunne J. reaffirmed this principle in a general review of recent jurisprudence on this topic.

10. The defendant has made out a robust case, to the effect, that the plaintiff in these proceedings was not the contracting party at all, and has exhibited documentary evidence in support of this position. But in the face of that evidence, the plaintiff maintains that it was the contracting party and that the monies advanced to the defendant by Mr. Derek O'Leary were advanced on behalf of the plaintiff and that this was, at all times, understood to be the case. There is a clear conflict of fact on this matter and this is an issue which is central to these proceedings. On 11th September, 2015, Mr. Declan Lermihan, an Accountant, who advised Mr. Derek O'Leary and Ms. Linda O'Leary in relation to the matters in dispute and the loan that they, or one of them, made to the defendant states that the accountant who represented the defendant was aware that the structure for the loan and investment had not been finalised. He also informed the court that by the end of February 2009, his advice to Mr. and Mrs. O'Leary was that the loan would be provided by the plaintiff and he had discussed this with the accountant for the defendant during the period from December 2008 to January 2009. In the statement of claim it is pleaded that the loan agreement was entered into on 4th November, 2008, and the defendant has pointed out the discrepancy between this and Mr. Lermihan's evidence that it was sometime later (by the end of February 2009) when he said it was clear to him that the loan would be provided by the plaintiff.

11. My attention has also been drawn to the plaintiff's accounts for the year ending 31st December, 2008, which shows among the creditors, a directors' current account at €2,260,000 and a note to the accounts stating that on 31st December, 2008, Mr. Derek O'Leary advanced that sum to the company.

12. It is not necessary for the court to resolve such conflicts of evidence or even improbabilities in the evidence which have been pointed out by the defendant.

13. Insofar as the defendant argues that the agreement is unenforceable by operation of s. 2 of the Statute of Frauds (Ireland) Act 1695, the plaintiff argues in its submissions:-

*"It is patently evident from emails both before and after the money was paid, that should a note or memorandum be required, that requirement has been more than met."*

14. I do not accept at all that this is patently evident. Any evidence suggestive of a note or memorandum is of the most tenuous nature. Is that enough? I think it is for the purpose of resisting an application of this type. The same could be said about the plaintiff's argument on the issue of part performance. If there was part performance there is an issue as to whether it was by the plaintiff or by Mr. O'Leary, who is not a party to these proceedings. But in the light of the plaintiff's assertion that it was understood between the parties that Mr. O'Leary was only making a loan on behalf of the plaintiff and that this was understood by the parties, I believe that this is a matter which should be permitted to go to trial and be tested in the light of the evidence produced in court.

15. The defendant has raised many issues which will have to be addressed by the plaintiff. So far as this application is concerned, I am not satisfied that the defendant has established that the plaintiff's claim is bound to fail. That is the test I have to apply. Accordingly, I dismiss the application to strike out the proceedings and I refuse the defendant's motion.