Neutral Citation: [2016] IEHC 609

THE HIGH COURT

[2016 No. 174 P]

BETWEEN

PATRICK M. KEANE

PLAINTIFF/RESPONDENT

AND

ALLIED IRISH BANKS PLC

DEFENDANT/APPLICANT

JUDGMENT of Ms. Justice Murphy delivered on the 8th day of November, 2016.

1. This is an application by the defendant/applicant for an order pursuant to the inherent jurisdiction of the Court striking out the plaintiff/respondent's claim on the ground that it discloses no reasonable cause of action and/or on the ground that it is frivolous and vexatious and/or on the ground that it is unsustainable and bound to fail. During the course of the application, Mr. McCann S.C. on behalf of the defendant/applicant accepted that his application fell to be determined pursuant to the Court's inherent jurisdiction to dismiss proceedings which are unsustainable and bound to fail.

Background

2. In or about the year 2004, the plaintiff/respondent and various associates decided to buy a nursing home in Oranmore, Co. Galway. The purchaser of the nursing home was a company called Oranmore Nursing Home Limited. That company was wholly owned by John O'Dolan and Associates (Galway) Limited which company held the entire shareholding of Oranmore Nursing Home Limited. The plaintiff/respondent, Patrick M. Keane was a director of both companies. For reasons of tax efficiency, the plaintiff/respondent bought a leasehold interest in the property for a sum of €5,500,000. By letter of sanction dated 22nd November, 2005 the defendant/applicant agreed to advance to the plaintiff/respondent the sum of €4,300,000 to assist with the purchase of the nursing home at Oranmore, Co. Galway. The balance of the purchase price was also funded by the defendant/applicant by means of a separate loan. As a condition of the advance the defendant/applicant sought extensive security from both John G. Dolan Associates (Galway) Limited as the holding company of Oranmore Nursing Home Limited which had purchased the freehold, and from the plaintiff/respondent personally. Among the extensive security sought by the bank as a condition of granting the loan was a letter of guarantee from John O'Dolan and Associates (Galway) Limited in the amount of €4,300,000 for the obligations of Patrick Keane supported by:-

> *"Assignment over Put & Call Option between John O Dolan & Associates (Galway) Ltd and Patrick Keane in respect of buyback of Nursing Home & 2 acre site at Oranmore, Co Galway"*

3. Unfortunately for Mr. Keane and his associates the nursing home venture was a financial disaster and by the time proceedings were issued by the defendant/applicant in 2014 to seek to enforce its various securities against multiple individuals, including the plaintiff/respondent herein, the debt was well in excess of €7,000,000. Those proceedings came before this Court in July, 2015 and by and large were disposed of in favour of the bank. It is true that in the course of those proceedings the plaintiff/respondent, Mr. Keane, reserved his position on more than one occasion in relation to the legal effect of the assignment of the put and call option to the bank in support of the company guarantee advanced by John O'Dolan and Associates (Galway) Limited. However the fact of the assignment was not advanced as a defence to the relevant proceedings.

4. In the course of the July, 2015 hearings, a sale of the nursing home to a third party for the sum of €1.62 million was concluded leaving a multi-million shortfall due by the plaintiff/respondent to the defendant/applicant on foot of the loan.

The current proceedings

5. On 8th January, 2016, the plaintiff/respondent issued the within proceedings. In these proceedings he seeks:-

> *"(a) An Order for Specific Performance compelling the Defendant to comply with a Put and Call Option Agreement made on the 16th day of December 2005 between John O'Dolan and Associated [sic] (Galway) Limited and the Plaintiff of the other part the obligations whereunder of the said John O'Dolan and Associates (Galway) Limited was assigned to the Defendant by Deed of Assignment on even date on the 16th December, 2005 at the behest of the Defendant."*

All other relief sought in the plenary summons appears to the Court to be ancillary to that primary claim. These proceedings have run in tandem with enforcement proceedings by the defendant/applicant arising from judgments in favour of the defendant/applicant granted by this Court in July, 2015. A statement of claim was delivered on 23rd March, 2016. The nub of the plaintiff/respondent's claim is set out at paras. 8, 9 and 10 thereof which read as follows:-

> *"8. The Defendant made it an express term and condition of the loan agreement where under it provided the said purchase monies that the Put and Call Option be assigned to it and pursuant thereto same was assigned to the Defendant on the 16th day of December 2005.*
>
> *9. Put events have occurred at the instigation of the Defendant as provided for in Schedule 2 of the Put and Call Agreement as a result of which the Defendant was obligated to purchase the said nursing home for the purchase price as defined in Schedule 4 of the said agreement. Notwithstanding the aforesaid the Defendant did insist and compel the Plaintiff to dispose of the nursing home to a third party for a sum of €1.62 million which the Plaintiff did so without excusing or relieving the Defendant of its obligations under the Put and Call Agreement which were reserved.*
>
> *10. Under the Put and Call Agreement the Defendant was obliged to pay an amount equivalent to the balance of the loan which stood at €7,406,467.44 in July 2015 when the nursing home was disposed of to the third party."*

6. The defendant/applicant raised a notice of particulars on 30th March, 2016 which was ultimately replied to on 9th May, 2016. On 2nd June, 2016, the defendant/applicant issued a notice of motion seeking an order pursuant to the inherent jurisdiction of the Court striking out the plaintiff/respondent's claim, *inter alia*, on the ground that it is unsustainable and bound to fail. The motion was grounded on the affidavit of Collette Rooney, a senior manager in the financial solutions group of the defendant/applicant company. The contents of her affidavit are uncontroverted, the plaintiff/respondent having chosen not to file a replying affidavit.

Assignment of the put and call option
7. The property on which Oranmore Nursing Home was constructed was acquired by Oranmore Nursing Home Limited from a Thomas Roche by a deed of transfer dated 23rd July, 2004. Oranmore Nursing Home Limited is a subsidiary of John O'Dolan and Associates (Galway) Limited of which the shareholders were: John O'Dolan; Patrick Keane, the plaintiff/respondent; Stephen Mackey; and Dr. Hussain Bhatti. In what was a tax driven transaction, Mr. Keane acquired a leasehold interest in the nursing home from Oranmore Nursing Home Limited for €5.5 million. Mr. Keane had to have a proprietary interest in the nursing home in order to claim capital allowances. This acquisition was financed by way of two loans from AIB, the first being for €4.3 million and the second being a €1.3 million loan.

8. As can be seen from the facility letter of 22nd November, 2005 relating to the first loan the security stipulated by AIB was to include: (a) a collateral mortgage from the company as the owner of the freehold in the nursing home, (b) a mortgage over Mr. Keane's leasehold interest in the nursing home (c) a guarantee from the holding company supported by an assignment over a put and call option agreement between the holding company and Mr. Keane.

9. The loan was drawn down in December, 2005 at a time when most of the stipulated security was not in place. This was not an unusual practice at the time. The defendant/applicant has exhibited a letter from the plaintiff/respondent almost two years after the loan was drawn down dealing with the steps then being taken to put various items of security in place. The plaintiff/respondent wrote a letter dated 2nd October, 2007 to the defendant/applicant setting out the then position in relation to each item of security stipulated in the facility letter. The guarantees from the holding company, John O'Dolan and Associates (Galway) Limited and Oranmore Nursing Home Limited were still not in place at that time and reference was made to the necessity for an EGM in order to execute the guarantees. The guarantee from John O'Dolan and Associates (Galway) Limited was to be supported by the assignment of the put and call option between John O'Dolan and Associates (Galway) Limited and Patrick Keane. In his letter of 2nd October, 2007 the plaintiff/respondent inquired as to whether there was a standard AIB deed of assignment in respect of such security.

10. Presumably sometime after 2nd October, 2007 the purported assignments of the put and call options were furnished to the defendant. They are exhibited in Ms. Rooney's affidavit. The first is the assignment on behalf of the company John O'Dolan and Associates (Galway) Limited and states:-

> *"We Patrick M. Keane and John O'Dolan being the Directors of John O'Dolan & Associates (Galway) Limited (hereinafter called "the Company") hereby confirm that the Company executed a Put and Call Option dated the 30th November day of 2004. The other party to the Put and Call Option is Patrick M. Keane.*
>
> *We hereby confirm that the Company HEREBY ASSIGNS the benefit of the said Put and Call Option Agreement to Allied Irish Banks Plc.*
>
> *Dated the 16th December, 2005"*

The document refers to having been sealed and signed by the plaintiff/respondent and John O'Dolan.

11. The assignment of the plaintiff/respondent's interest recites as follows:-

> *"I, Patrick Keane of Averard, Taylor's Hill, Galway confirm as follows:*
>
> 1. *I have agreed to accept the terms of the Facility Letter dated the 22nd of November, 2005 from Allied Irish Bank Plc.*
>
> *In consideration of the terms of that facility letter:*
>
> *I hereby assign the benefit of Put and Call Option Agreement executed by me with John O'Dolan and Associates (Galway) Limited dated the 30th day of November, 2004 to Allied Irish Bank Plc.*
>
> *Dated the 16th day of December, 2005*
>
> *SIGNED SEALED AND DELIVERED*
>
> *by said PATRICK KEANE*
>
> *in the presence of;-*
>
> *Niamh Kavanagh*
>
> *Solicitor*
>
> *Galway"*

Both assignments refer to a put and call option agreement dated 30th November, 2004 between John O'Dolan and Associates (Galway) Limited and Patrick Keane but no such agreement has been put before the Court. Two put and call option agreements have been put before the Court. Both are dated 16th December, 2005. One is between John O'Dolan and Associates (Galway) Limited as buyer and Patrick M. Keane, the plaintiff/respondent, as the owner. The second is between Oranmore Nursing Home Limited as buyer and Patrick M. Keane as the owner. The Court has no evidence of any assignment of these put and call option agreements of 16th December, 2005. Ms. Rooney has averred on behalf of the defendant/applicant that she has seen no agreement dated 30th November, 2004 and that it is not clear whether any such agreement exists. Mr. Keane who is a party to all such agreements has chosen not to address this issue.

Defendant/applicant's claim
12. Quite apart from and independently of, the issue of the date of the put and call option agreement, the defendant/applicant asserts that the plaintiff/respondent's claim is utterly unsustainable and bound to fail. According to the defendant/applicant, in summary the plaintiff/respondent's claim is that the bank, by taking an assignment of the put and call option agreement, agreed to the purchase of the nursing home on the occurrence of a put event, at a predetermined price. The defendant/applicant maintains that this is manifestly not so as can be seen from the two assignments which refer solely to the assignment of **the benefits** of the put and call option [emphasis added]. The defendant/applicant points out that it would have been illogical for the bank to take upon

itself an obligation to purchase any interest whatsoever whether freehold or leasehold, in the nursing home in circumstances where it already held mortgages over both interests from the company and Mr. Keane respectively. The defendant/applicant further asserts that the reason why the assignments refer only to the assignment of the benefit of the put and call option agreements is because in law it is simply not possible to assign the burden of performance under a contract. The assignment of a burden requires novation. The defendant/applicant referred to *Don King Productions Inc. v. Warren* [1998] 2 All E.R. 608 in which Lightman J. set out a number of relevant principles dealing with the transfer of contractual obligations and benefits. He held first that:-

> *"It is not possible (save pursuant to statutory authority) without a novation to transfer the burden of a contract to a third party"*

He went on to state:-

> *"The only assignment in respect of a contract which is legally possible is an assignment of the benefit of the contract (i.e. the rights thereby created) or some benefit (e.g. the profits) derived by the assignor from the contract. The distinction is between the assignment of rights under the contract and of what is referred to as "the fruits". A provision for the assignment of a contract is to be construed as the assignment of the benefit of the contract"*

The defendant/applicant also relied on *Linden Gardens Trust Limited v. Lenesta Sludge Disposals Limited* [1994] 1 A.C. 85 at 103 in which Lord Keith of Kinkel held:-

> *"Although it is true that the phrase 'assign this contract' is not strictly accurate, lawyers frequently use those words inaccurately to describe an assignment of the benefit of a contract since every lawyer knows that the burden of a contract cannot be assigned…"*

In the circumstances of this particular case the Court finds that is not called upon to construe the terms of the assignment because the two assignments on their face purport only to assign the benefits of the put and call option agreement.

13. The second line of argument advanced by the defendant/applicant is that even if the Court were to conclude that the plaintiff/respondent had an arguable case that the benefit and burden of the contract were both assigned to the defendant/applicant, then his claim must fail because he did not adhere to the procedures provided for in the put and call option agreement for the purposes of exercising the option. Clause two of each put and call option agreement provided that:-

> *"The Call Option **may** be exercised:- [emphasis added]*
>
> *(i) at any time during the Call Option Period;*
>
> *by notice in writing served by the Buyer on the Owner. The First Call Option shall not be exercisable at any other time or in any other manner."*

The exercise of the put option is set out at clause three and states:-

> *"The Put Option may be exercised:-*
>
> *(i) at any time during the Put Option Period;*
>
> *(ii) but only after the happening of a Put Event,*
>
> *by notice in writing served by the Owner on the Buyer. The Put Option shall not be exercisable at any other time or in any other manner."*

The defendant/applicant relies upon the fact that no notice in writing was served by the plaintiff/respondent at any time. The service of such a notice is not pleaded in the statement of claim and despite answering a particular raised as to whether a notice in writing was served in the affirmative, no evidence of a notice in writing has been produced to the Court. The uncontroverted evidence of the defendant/applicant is that no such notice was served. In support of its position that no put option was exercised by the plaintiff/respondent, the defendant/applicant also points to the following matters as establishing the fact that no put option was ever exercised:-

1. Repayment of the loan was demanded from Mr. Keane in June, 2014 and proceedings for the collection of the debt were commenced on 20th October, 2014. These were events that would have constituted put events under the put and call option agreement, yet the plaintiff/respondent asserted no rights in relation to the assignment of the put and call option agreement in response to those events.

2. The plaintiff/respondent and the companies of which he was a director sold the nursing home to a third party and sought consent of the defendant/applicant to that transaction and furthermore agreed to surrender his leasehold interest as part of that transaction. The surrender of his leasehold interest disposed of the interest which was to be the subject of the put and call option agreement.

3. In answering the defendant/applicant's claim for summary judgment the plaintiff/respondent never raised his current claim as a defence or counterclaim to those proceedings.

Plaintiff/respondent's claim

14. The plaintiff/respondent chose not to file a replying affidavit and accordingly the factual assertions in the grounding affidavit of Ms. Rooney are entirely uncontraverted. The plaintiff/respondent contented himself with filing legal submissions which he titles "*Submissions of opposition*". On the issue of the effect of the assignment of the put and call option agreement, he maintains that the facility letter is clear and stipulated "*Assignment over Put and Call Option between John O'Dolan & Associates (Galway) Limited and Patrick Keane in respect of buy back of nursing home and 2 acre site at Oranmore, County Galway*". The plaintiff/respondent submits that the defendant/applicant's position that only the benefits of the option agreement were assigned is unsustainable on the grounds "*that the agreement is not divisible and cannot be cherry picked by the Defendant as to the terms it may like or dislike but were assigned in their entirety as pre conditioned in the facility letter / agreement*". In his submissions the plaintiff/respondent makes no reference to the fact that the assignments dated 16th December, 2005 only purport to assign **the benefits** of the contract, nor does

he make reference to the fact that the purported assignments relate to a put and call agreement of 30th November, 2004 rather than that on which he now seeks to rely, being a put and call option agreement dated 16th December, 2005 [emphasis added]. It also strikes the Court that the plaintiff/respondent's submissions on the extent of the assignment create a further difficulty for him namely, that if he is correct that he had assigned both the benefit and burden of the contract to the defendant/applicant, then he has no *locus standi* to assert any claim in respect of the agreement because his full interest therein had passed to the defendant/applicant.

Failure to exercise the put option by service of a written notice
15. The plaintiff/respondent submits that written notice of the put option was not required in circumstances where the defendant/applicant had triggered the put event; that the breach was a mere technical breach and that his reliance on the put option was communicated to the defendant/applicant's alleged agent and to the defendant/applicant itself.

Sale to a third party
16. The plaintiff/respondent submits that due to the behaviour of the defendant/applicant he had no option but to comply in the sale of the nursing home to a third party. The plaintiff/respondent submits and the Court accepts that a significant motivating factor in his agreement to cooperate in the disposal of the nursing home was his concern for the 40 plus residents and the jobs of the 56 staff members. He maintains he did so without prejudice to his rights pursuant to the assignment of the put and call option agreement.

17. While the plight of the residents and staff might adequately explain the plaintiff/respondent's decision to cooperate in the sale of the nursing home, it does not explain why he did not advance the claim which he now makes, as a defence to the summary proceedings issued by the defendant/applicant in respect of the outstanding loan which was heard and determined by this Court in July, 2015. The Court is satisfied that during the course of those proceedings the plaintiff/respondent referred to the assignment of the put and call option agreement on more than one occasion and stated that there were issues in respect of same. However, at no point was the Court requested to remit the claim to plenary hearing on the grounds that Mr. Keane had a good defence and counterclaim to the bank's proceedings.

The law
18. As already stated during the course of the application, Mr. McCann S.C. on behalf of the defendant/applicant accepted that his application stood or fell on the exercise of the Court's inherent jurisdiction to dismiss proceedings which are unsustainable and bound to fail. When exercising its inherent jurisdiction, the Court is entitled to consider evidence as to the merits of the plaintiff/respondent's claim. The defendant/applicant relied on the oft quoted excerpt from the decision of Costello J. in *Barry v. Buckley* [1981] I.R. 306:-

> "*But, apart from order 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 Wylie's Judicature Acts (1906) at pp. 34-37 and The Supreme Court Practice (1979) at para. 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of 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 it is clear that the plaintiff's claim must fail, per Buckley L.J. in* Goodson v. Grierson5 *at p. 765*."

19. The defendant/applicant in its submissions accepts that the burden that a defendant/applicant must discharge in persuading a court that an action should be dismissed as being bound to fail is a high one as described by Clarke J. in *Salthill Properties Ltd v. Royal Bank of Scotland Plc* [2009] IEHC 207 at 3.14:-

> *"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."*

It is also well established that a defendant/applicant who seeks to strike out proceedings is generally required to accept the truth of all facts asserted by the plaintiff/respondent, in that any factual conflict arising on the affidavits must for the purpose of the application to dismiss be resolved in favour of the plaintiff/respondent. The plaintiff/respondent in this particular case has chosen not to file a replying affidavit and must therefore be taken not to dispute the factual contents of the defendant/applicant's grounding affidavit. The question for the Court therefore is whether on the basis of admitted facts or undisputed evidence the claim is bound to fail. The defendant/applicant relied on the comments of Clark J. in *Price v. Keenaghan Developments Limited* [2007] IEHC 190 where the Court struck out a claim of specific performance by a solicitor and his partner in circumstances where an analysis of the documentation established that no binding contract existed. She stated at para. 24:-

> *"Thus the clear authority opened to me by both parties is Supermacs Ireland Ltd. v. Katesan(Naas)Ltd. [2000] 4 IR 273. That authority indicates that when a court is asked to lock out a plaintiff from arguing his case, it must be vigilant to ensure that both parties have an opportunity to advance or rebut the application … However where as in this case, an examination of the facts contained in the affidavits reveals that the plaintiff has no chance of success although the pleadings advance a known and recognised remedy, the court should grasp the nettle and strike down such unmeritorious proceedings."*

The defendant/applicant contends that this is precisely such a case and that the Court ought therefore to "*grasp the nettle*" and strike out the claim so as to avoid the defendant/applicant being further exposed to the unnecessary incurring of the cost.

Decision of the Court
20. The threshold for striking out a plaintiff/respondent's claim without a full hearing of that claim is a high one and so it should be in a constitutional framework which guarantees access to the courts. That said, the Court is satisfied in this case that that high threshold has been met and that the plaintiff/respondent's claim is bound to fail. It appears to the Court that the plaintiff/respondent's claim is misconceived. The foundation of his claim is that when he personally and the company, John O'Dolan and Associates (Galway) Limited each assigned their put and call option agreement to the defendant/applicant, they each assigned the entirety of the agreement, both benefits and burdens, to the defendant/applicant and not merely the benefits of the agreement. Assuming for the moment that that is so, then, it appears to the Court to follow that the plaintiff/respondent having fully divested himself of the agreement, retains no interest therein that is actionable at his suit. Neither party to the put and call option agreement has the power to call upon the other to specifically perform the agreement since neither party has any interest in the benefits nor any obligations to perform the burdens of the agreement. It is simply not possible to assign all benefits and burdens of an agreement and thereafter sue upon the same agreement. It appears to the Court on this basis alone that the plaintiff/respondent's claim is bound to fail.

21. The Court is satisfied that as a matter of law and fact that the purported assignment of the put and call option agreement between John O'Dolan and Associates (Galway) Limited and the plaintiff/respondent Patrick Keane was an assignment of the benefits (such as they may be) of the option agreement and imposed no obligation on the assignee. Quite apart from the established law that the assignment of a contract to a third party only confers a right to the benefits or fruits of the contract and does not transfer the burdens, the assignments in this case specify that what is being assigned is **the benefit** of the put and call option agreement [emphasis added].

22. In the Court's view the provision of security for the repayment of a loan cannot without specific provision create an obligation on the lender. In general terms, realisation of any item of security granted is a matter of choice for the lender. A lender can waive its entitlement to realise any specific item of security or simply choose not to pursue it without in any respect compromising its entitlement to repayment of its loan.

23. Even if the Court is entirely in error in its assessment that the plaintiff/respondent's claim is misconceived, the Court is satisfied on the facts of this particular case that the plaintiff/respondent's claim is bound to fail. The assignments executed by John O'Dolan and Associates (Galway) Limited and by the plaintiff/respondent, Patrick Keane, purported to assign the benefit of a put and call option dated 30th November, 2004. On the evidence there is no put and call option in existence dated 30th November, 2004. There are put and call option agreements dated 16th December, 2005 but those option agreements have not been assigned to the defendant/applicant. It appears to the Court that this is fatal to the plaintiff/respondent's purported claim. The put and call option agreement which was assigned does not exist and the put and call option agreement which exists was not assigned. Accordingly there is nothing upon which the plaintiff/respondent can base his claim.

24. For the sake of completeness, the Court holds that even if a put and call option agreement existed, was properly assigned to the defendant/applicant and created an obligation justiciable at the suit of the plaintiff/respondent (all of which the Court has held not to be the case) then the failure of the plaintiff/respondent to exercise the put option in accordance with the put and call option agreement, is of itself fatal. At clause three of the put and call option agreement of 16th December, 2005 the agreement states:-

> "The Put Option may be exercised:-
>
> *(i) at any time during the Put Option Period;*
>
> *(ii) but only after the happening of a Put Event,*
>
> *by notice in writing served by the Owner on the Buyer [emphasis added]. The Put Option shall not be exercisable at any other time or in any other manner."*

The provision is crystal clear and is a rational and logical provision in an option agreement. By definition the holder of an option has a choice as to whether or not he will exercise his option. If he opts to do so, he must do so in writing. The plaintiff/respondent never purported to exercise his put option in accordance with the agreement of 16th December, 2005 and even if the option were valid, it is now spent in circumstances where the plaintiff/respondent has surrendered his leasehold interest in the course of the sale of the nursing home to a third party. The plaintiff/respondent as a result no longer holds any interest in respect of which an option can be exercised.

25. The plaintiff/respondent argues that this is a mere technicality in circumstances where the defendant/applicant was at all times aware that he was making an issue of the put and call option agreement. The Court disagrees. A notice in writing is a fundamental requirement to the exercise of the option. Not merely has the plaintiff/respondent not served such a notice in writing, he has in fact surrendered his leasehold interest to a third party upon the sale of Oranmore Nursing Home and therefore no longer had any interest which he could require the defendant/applicant to purchase.

26. The plaintiff/respondent is a man who unfortunately has become inundated in a sea of debt. It is understandable in such circumstances that he seeks to grasp on to anything which might prevent his being swept away on that tide of debt. He brings this claim in the hope of finding some solid ground. Unfortunately for him, for the reasons set out in this decision, his claim is one which is bound to fail and while on a human level the Court feels sympathy for the predicament in which the plaintiff/respondent finds himself, the Court would be remiss in its duty were it to allow this claim to proceed further. Accordingly the Court will exercise its inherent jurisdiction to dismiss the plaintiff/respondent's claim on the grounds that it is unsustainable and is bound to fail.