THE HIGH COURT

[2017 No. 6989 P.]

BETWEEN

JASON BUSHE

PLAINTIFF

AND

T.P.E.M. LIMITED TRADING AS PULSE LOGISTICS, TOTAL PRODUCE INTERNATIONAL HOLDINGS LIMITED, TOTAL PRODUCE PLC. AND MASTERLINK LOGISTICS LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on 9th day of February 2018

Introduction

1. This is my decision on two applications in these proceedings. The first is an application by the second and third named defendants to dismiss the proceedings against them and the second is the application for costs by all of the parties arising from the plaintiff's motion to seek injunctive reliefs.

The motion to dismiss the claim against the second and third named defendants

2. The plaintiff commenced these proceedings by plenary summons dated the 28th July, 2017 and delivered a statement of claim on the 5th October, 2017. The statement of claim was amended on the 2nd November, 2017. The second and third named defendants issued a motion seeking to dismiss the proceedings against them on the grounds that they disclosed no cause of action and are bound to fail. The motion was brought pursuant to O. 19, r. 28 of the Rules of the Superior Courts and in the alternative, pursuant to the inherent jurisdiction of the court on the grounds that the claims have no possibility of success and are an abuse of process.

3. Before considering the specific claim in these proceedings it is useful to set out the relevant principles applicable to applications of this kind. Two recent cases provided useful summaries of the jurisprudence in this area. In *Irish Bank Resolution Corporation Ltd. v. Purcell* [2014] IEHC 525 at para. 83 Cregan J. identified the following ten principles:-

> *"1. The Court has jurisdiction pursuant to Order 19 Rule 28 and also pursuant to its inherent jurisdiction to strike out proceedings if they are bound to fail.*
>
> *2. In considering an application to strike out proceedings pursuant to its inherent jurisdiction the Court is not limited to considering the pleadings of the parties but is free to consider evidence on affidavit relating to the issues in the case (per Costello J. in Barry v. Buckley[1981] IR 306).*
>
> *3. This jurisdiction to strike out proceedings is one to be "exercised sparingly and only in clear cases". (See Costello J. in Barry v. Buckley [1981] IR 306).*
>
> *4. Moreover as McCarthy J. stated in Sun Fat Chan v. Osseous Ltd [1992] 1 IR 425 "Generally the High Court should be slow to entertain an application of this kind".*
>
> *5. In addition as was stated by Keane J. in Lac Minerals v. Chevron Corporation [1995] 1 I.L.R.M. 161 (High Court, 6th August, 1990) (and quoted with approval by the Supreme Court) in Supermacs Ireland Ltd v. Katesan (Naas) Ltd [2000] 4 I.R. 273 'a judge in considering an application to strike out or dismiss a claim must be confident that the plaintiff's claim cannot succeed no matter what might arise on discovery or at the trial of the action.'*
>
> 6. If the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed (see McCarthy J. in Sun Fat Chan v. Osseous Ltd).
>
> 7. The Court can only exercise a jurisdiction to strike out a claim on the basis that "on admitted facts it cannot succeed" (per McCarthy J. in Sun Fat Chan v. Osseous Ltd).
>
> 8. The Court in considering whether to strike out a claim "must treat the plaintiff's claim at its high water mark" (per Clarke J. in McCourt v. Tiernan [2005] IEHC 268.
>
> 9. The burden of proof lies on the defendant to establish that the plaintiff's claim is bound to fail. (See Salthill Properties Ltd v. Royal Bank of Scotland [2009] IEHC 207)
>
> 10. The Court should not require a plaintiff to be in a position to show a prima facie case, merely a stateable case, in an application to strike out. (See Clarke J. in Salthill Properties Ltd v. Royal Bank of Scotland.)"

4. In *Hosey v. Ulster Bank Ltd. and others* [2017] IECA 257 Irvine J. delivered the decision of the Court of Appeal and at paras. 35 to 40 she identified the principles relevant to the court's inherent jurisdiction to dismiss a claim on the basis that it is bound to fail.

> *"35. The court's inherent jurisdiction to dismiss a claim on the ground that it is bound to fail is a jurisdiction which is only to be "exercised sparingly and only in clear cases" as was stated by Costello J. in Barry v.Buckley [1981] 1 I.R. 306.*
>
> *36. In Lac Minerals Ltd. v. Chevron Mineral Corporation [1995] 1 I.L.R.M.161, Keane J. stated that before a judge accedes to an application to dismiss a claim on the ground that it is bound to fail, he or she must be confident that no matter what may arise on discovery or at the trial of the action that the claim cannot succeed.*
>
> *37. Further, if the proceedings can be saved by an amendment to the pleadings then once again the action should not be dismissed: See for example Sun Fat Chan v. Osseous Limited [1992] 1 I.R. 425.*
>
> *` 38. In some of the more recent decisions, such as those in Ruby Property Co. Ltd. v. Kilty [1999] IEHC 50 and Jodifern Ltd. v. Fitzgerald [2003] I.R. 321, the court has made clear that a defendant can only succeed on this type of*

application if, on the basis of admitting to all of the facts as asserted by a plaintiff, they can establish that the action cannot succeed.

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

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

The plaintiff's case against the second and third named defendants

5. The plaintiff's proceedings concern his employment by the first named defendant and the vast majority of the case is directed towards securing and protecting his employment as the managing director of the first named defendant. In addition to alleging wrongs on the part of the first named defendant, he says that the other defendants also interfered wrongfully with his rights under the TUPE regime. In the summer of 2017 shares in the first named defendant were purchased by the fourth named defendant. The plaintiff contends that the transfer of undertakings regulations are thereby engaged and much of the relief sought in the proceedings relates to this aspect of his claim, though it is not disputed that the first named defendant was at all times his employer and that he was never an employee of either the second or the third named defendants.

6. But his case is not confined to the continuance of his employment by the first named defendant and reliefs related to the alleged transfer of the business to the fourth named defendant within the meaning of the regulations. At para. 8 of the statement of claim it is pleaded that the second and third named defendants were required not to interfere in the contract between the plaintiff and the first named defendant. It is pleaded at para. 13 of the statement of claim that one or more of the defendants interfered with his contract of employment by way of intimidation, breach of duty or obligation. The details of the plea are elaborated in paras. 15 and 16 of the statement of claim.

Order 19, rule 28

7. Order 19, rule 28 of the Rules of the Superior Courts provides:-

> *"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 judgment to be entered accordingly, as may be just."*

8. As I have outlined above, apart altogether from his claim based upon the TUPE regime and regulations, the statement of claim shows that the plaintiff is alleging that the second and/or third named defendants interfered with his contract of employment by way of intimidation, breach of duty or obligation. The statement of claim thus discloses two causes of action recognised by law: the tort of intimidation and the tort of inducing breach of contract. On a motion brought pursuant to O. 19, r. 28 the court is not concerned with the merits or strength of the case but rather whether the pleadings disclose a reasonable cause of action. The court can only make an order under the rule if a pleading discloses no reasonable cause of action on its face. As the statement of claim discloses two causes of action against the second and third named defendants, the application based upon O.19 r. 28 must therefore be rejected.

The inherent jurisdiction of the court

9. The application is brought on the alternative basis of the inherent jurisdiction of the court. In considering an application to strike out proceedings pursuant to its inherent jurisdiction the court is not limited to considering the pleadings of the parties but is free to consider evidence on affidavit relating to the issues in the case. In considering such an application, the court must be confident that the plaintiff's claim cannot succeed no matter what matter what might arise on discovery or at the trial of the action. It is for the defendant to establish that the plaintiff's claim is bound to fail.

10. In the voluminous affidavits which have been exchanged already in these proceedings in relation both to this motion and to the motion seeking injunctive relief, the plaintiff has advanced many allegations of intimidation and facts which he said amounted to interferences with his contract of employment. He says that agents of the second and third named defendants were responsible for some of these actions and that therefore he is entitled to damages in respect of the wrongs done to him from both the second and third named defendants. I therefore cannot be confident that at trial he will not be able to succeed on either of his claims against either the second or the third named defendant.

11. It has to be said that the pleadings – as opposed to the affidavits – lack a degree of precision and particularity at this stage in the proceedings. However, on a motion to dismiss on the basis that the plaintiff has established no cause of action or one which is bound to fail, it was held in *Sun Fat Chan v. Osseous Ltd*. that if the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed. It should therefore be possible for the plaintiff to particularise these two claims as against each of the second and third named defendants.

12. Furthermore, in the same case, McCarthy J. stated that the court can only exercise the jurisdiction to strike out a claim on the basis that "*on admitted facts it cannot succeed*". This requires the second and third named defendants to accept as true and provable for the purposes of this application each of the allegations of intimidation and interference with the plaintiff's contract of employment.

13. In my judgment the defendants have failed to establish, as they are required to do if they are to succeed on this motion, that the plaintiff's case against the second and third named defendants is bound to fail in relation to the causes of action pleaded in the statement of claim. While these causes of action may well be peripheral to the main thrust of the proceedings against the first and fourth named defendants, that does not entitle the second and third named defendants to the relief they seek in this motion. Accordingly, I refuse the relief sought.

Costs of the motion seeking interlocutory relief

14. In these proceedings the plaintiff sought:-

"(1) An Injunction restraining the Defendants, whether by their selves, their servants or agents or otherwise howsoever, from altering the terms and conditions of the Plaintiff's contract of employment and/or from transferring the said contract or otherwise taking any steps to transfer the Plaintiffs (sic) or purporting to transfer their (sic) said contracts of employment pending the resolution of the within proceedings.

(2) An order restraining the Defendants, their servants or agents from taking any decision to suspend, place on administrative leave, or take any other action in connection with the employment of the Plaintiffs (sic)."

15. The motion was returnable for the 16th August, 2017 and was adjourned to dates in September and October while affidavits were exchanged between the parties. Meanwhile, the plaintiff was on sick leave from his employment in compliance with a certificate provided by his doctor. In late August 2017 he sought to return to work but his employer, the first named defendant, indicated that it would have to be satisfied that he was medically fit to return to work before he could be permitted to return and so it sought to have him medically examined. Pending that examination and the furnishing of a report to the effect that he was fit to return to his employment, he remained off work on paid medical leave.

16. The application for the interlocutory injunctions was listed for hearing on 14th November, 2017. As of the 10th November, 2017 the plaintiff's solicitors indicated that the plaintiff was continuing with his motion. By that date, in excess of 25 affidavits had been exchanged between the parties.

17. On the morning of the 14th November, the first named defendant indicated that the medical report stated that the plaintiff was medically fit to return to work and that he would be "welcomed back" to work. The plaintiff indicated that he would not be proceeding with his motion seeking interlocutory injunctions. Each of the parties sought an order for their costs of the motion seeking interlocutory injunctions.

18. The plaintiff argued that the judge in charge of the chancery list on the 31st October, 2017 had directed that when the medical report to be obtained by the first named defendant was available it was to be furnished to the plaintiff. Once it was and the plaintiff saw that he had received a clean bill of health he then returned to work. It was argued that this maintained the status quo pertaining when the proceedings were commenced in July 2017 and that the statement by counsel for the first named defendant that the plaintiff was "welcomed back" as "managing director", while not an undertaking, was in some way to be equated to an undertaking. It was submitted that the plaintiff had thereby achieved what he sought to achieve when he issued his motion and he was entitled, without penalty as to costs, not to proceed any further with his motion. He submitted that the agreement of the first named defendant that he was medically fit to return to work and that he would be welcomed back to work as Managing director of the first named defendant was "an event" in favour of the plaintiff which entitled the plaintiff to the costs incurred in seeking an interlocutory injunction from the court pursuant to O. 99 r. 1.

19. I find little merit in this submission. One has only to consider the relief sought in the notice of motion to realise that what was sought was far more than the return to work by the plaintiff once he had recovered his health. It was abundantly clear from the correspondence that at all times all of the defendants maintained that he was not entitled to the interlocutory relief which he sought and were prepared to oppose the application for interlocutory injunctions. The parties did not compromise the dispute in any way. On the contrary, the defendants came to court on the 14th November, 2017 fully prepared to fight the motion. Moreover, they did so in circumstances where the plaintiff's solicitor had confirmed four days earlier that the matter was proceeding. The first named defendant did not give an undertaking to the court in terms of any of the reliefs sought in the notice of motion or indeed an undertaking of any sort. There was no suggestion that the second, third or fourth named defendants gave undertakings to the court. It was not contested that the plaintiff gave any prior indication to the defendants that he would not be proceeding with the matter on the 14th November, 2017. On the contrary, four days earlier, his solicitors had indicated quite the opposite.

20. In summary, the plaintiff moved the court and then unilaterally and without notice withdrew his application without obtaining either an order, a compromise or an undertaking from any of the defendants. In those circumstances the plaintiff has not achieved any result arising from the motion. To that extent it cannot be said that it was necessary for him to bring the motion to achieve the result. Accordingly, I refuse his application for costs against any of the defendants.

21. The defendants sought their costs from the plaintiff. At all stages they objected to the reliefs sought and they were required to resist the application in circumstances where the plaintiff was proceeding. They had attempted early in the proceedings to compromise matters in an open letter where the second and third named defendants offered to bear their own costs if the plaintiff discontinued his proceedings against them. He chose not to, as is his entitlement, but he did so at the risk that a costs order might be made against him. They were required to incur costs resisting his application. He withdrew his application without having achieved an order, a compromise or an undertaking or anything new that might be described as a result arising from bringing the motion. In those circumstances the opposing party is entitled to the costs of the motion which was not pursued and has not succeeded in any fashion against them.

22. The defendants are entitled to the costs of the motion seeking interlocutory injunctions against the plaintiff and I refuse the plaintiff his application for costs.