THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 365

Appeal No. 2015/506

Peart J.
Irvine J.
Stewart J.

BETWEEN/

ROGER McGREAL

PLAINTIFF / APPELLANT

- AND -

KAREN WHYTE

DEFENDANT / RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 6th day of December 2016

1. This is Mr. McGreal's appeal against the order of the High Court (Hedigan J.) of 3rd July, 2015, whereby, pursuant the Court's inherent jurisdiction, he dismissed Mr. McGreal's claim for specific performance against the defendant (Ms. Whyte") on the ground that it was bound to fail. Accordingly, core to this appeal are the circumstances in which a court may grant this relatively Draconian relief.

2. By order dated 19th February, 2016, Finlay Geoghegan J. directed that four issues be considered by the court on the appeal and these can be summarised as follows:–

> (1) Was the trial judge correct in his decision to dismiss the claim as bound to fail upon the grounds that Ms. Whyte's agreement in respect of the purchase of certain property was with a limited liability company and not with Mr. McGreal personally;
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> (2) if the trial judge was incorrect in so ruling, was Ms. Whyte entitled to the order made on the grounds that Mr. McGreal's claim was bound to fail for want of any note or memorandum of an agreement between the parties concerning the sale of the property;
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> (3) whether Ms. Whyte was entitled to an order dismissing the claim in circumstances where Mr. McGreal had claimed an entitlement to enforce the contract in reliance upon her acts of part performance, and
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> (4) whether Ms. Whyte was entitled to the relief sought in circumstances where the undisputed evidence before the High Court was that it was Mr. McGreal who had withdrawn from the proposed contract and his solicitor who had demanded the return of the contract documents.

Background

3. By plenary summons dated 29th June, 2013, Mr. McGreal commenced specific performance proceedings against Ms. Whyte. In his statement of claim he maintains that in August, 2007 she agreed to purchase from him personally certain premises at Carra Close, Westport, Co. Mayo ("the property") for a sum of €511,615.75 and that on the 2nd August, 2007, "the agreed deposit/contract payment was received". That payment, in the sum of €5,000, was made by cheque drawn in favour of Mr. McGreal.

4. Mr. McGreal claims that it was an express or in the alternative an implied term of the aforementioned agreement that once he had completed certain structural alterations to the property, as had been requested by and agreed with Ms. Whyte, she would pay the balance due on foot of the contract. He claims that while he, in accordance with his obligations under the agreement, duly carried out the said works, Ms. Whyte failed in her obligations to complete the purchase. In such circumstances Mr. McGreal claims he is entitled to an order for specific performance of the said agreement and/or in the alternative an order for damages in lieu thereof.

5. In his reply to the defendant's letter for particulars of the 10th October 2013, this is how he described the contract upon which he seeks to rely:

> "Para 9:
>
> This is a matter of evidence at the hearing. Without prejudice to the foregoing, the offer was made by the defendant to the estate agent and accepted by the plaintiff upon condition that a contract deposit was paid to him together with additional undertakings to complete certain elements of the construction work being given by the defendant. This offer, acceptance, consideration and performance constitute the legal binding and enforceable agreement entered into between the parties as a matter of law."

6. Ms. Whyte in her defence and counter claim delivered on the 22nd May, 2014, denies any concluded contract with Mr. McGreal and pleads that insofar as there was any intended contract the same was to be between herself and a limited liability company, McGreal Construction Limited ("the company"), whereof Mr. McGreal was a director. She also pleads repudiation by Mr. McGreal on his own behalf or as agent on behalf of the company of any contract concerning the sale of the property. Ms. Whyte, in her defence, put Mr. McGreal on full proof of the existence of any enforceable agreement and any memoranda to be relied upon by him in that regard. In addition she relies upon the doctrine of laches.

7. In her counterclaim Ms. Whyte claimed that in the event of the court accepting the plaintiff's claim to the effect that a binding

agreement had been concluded between herself and Mr. McGreal, she would seek to set off against any award of damages he might recover the money which she had expended on the property. It was conceded in the High Court and in this court that her counterclaim would fall away if she established that there had been no concluded agreement between herself and Mr. McGreal.

Application to dismiss

8. By notice of motion dated 7th January, 2015, Ms. Whyte sought an order pursuant to Ord. 19 r. 28 of the Rules of the Superior Courts, or alternatively an order under the Court's inherent jurisdiction, striking out Mr. McGreal's claim on the grounds that it disclosed no reasonable cause of action or alternatively could be stated to be frivolous, vexatious, or bound to fail. She also sought to invoke the court's inherent jurisdiction to dismiss the claim on the grounds of inordinate and inexcusable delay.

9. In her grounding affidavit Ms. Whyte put before the Court a substantial number of documents concerning her dealings with Mr. McGreal, his estate agent, Ms. Needham of Douglas Newman Good, and McGreal Contractors Limited for the purpose of seeking to establish beyond doubt that she had not entered into any concluded agreement with Mr. McGreal and that at all times, formal negotiations concerning the proposed sale of the property had taken place between herself as potential purchaser and the company, as the intended vendor. In particular she relied upon a Building Agreement / Contract for Sale concerning the property forwarded by Helena Boylan and Company, the solicitors acting on behalf of the company to her solicitor, Ms. Jackie Durcan, under cover of a letter dated 20th August, 2007. A complete copy of that agreement has never been produced by Mr. McGreal. Two pages of it were missing. However, Mr. McGreal accepts that the parties to that proposed agreement were Ms. Whyte as proposed purchaser/employer and the Company as proposed vendor/ contractor. Ms. Whyte also exhibited an exchange of correspondence between the said solicitors concerning the intended purchase, all of which post dates the agreement relied upon by Mr. McGreal. Ms. Whyte claims that this correspondence provides conclusive evidence:-

> 1. that there could never have been any binding agreement for the sale of the property between herself and Mr. McGreal personally. The proposed contract was to be with the company as vendor;
>
> 2. that no agreement was ever concluded. All of the correspondence made clear that there could be no agreement until such time as contracts were signed and exchanged, which they never were, and
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> 3. that the reason no sale was concluded was that by letter 10th December 2008, Ms. Boylan, on behalf of the company, advised that her client was no longer prepared to sell the property.

10. In response to Ms. Whyte's affidavit Mr. McGreal swore a replying affidavit dated 13th of April, 2015. The more critical averments in that affidavit assert the following:-

> (i) that his statement of claim identifies all of the elements of the contract which he seeks to enforce by way of an order for specific performance;
>
> (ii) that if his statement of claim is deficient he should be allowed amend it;;
>
> (iii) that Ms. Whyte is estopped from applying to dismiss his claim given that she has delivered a defence and counter claim and he had replied thereto;
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> (iv) that it is for the court in the course of an oral hearing to determine whether the documents upon which he seeks to rely satisfy the requirements of the Statute of Frauds (Ireland) 1695;
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> (v) that as his contract with Ms. Whyte had legal effect as of the 25th July, 2007, all subsequent events are of no legal consequence;
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> (vi) that the contract contended for by Ms. Whyte was a legal impossibility in circumstances where he and his wife held the freehold interest in the property,
>
> (vii) that it would be unconscionable and inequitable to allow Ms. Whyte to rely upon her own breach of duty and bad faith by permitting her to rely upon the Statute of Frauds.

Judgment of the High Court

11. While the High Court judge did not deliver a formal judgment, it is apparent from the transcript of the hearing that he was satisfied, on the evidence before him, that regardless of what Mr. McGreal might have intended or the fact that he had received a payment to him personally of €5,000, he ultimately decided to sell Ms. Whyte the property using his limited liability company to effect the transfer. The High Court Judge was clearly satisfied from the correspondence and documents exhibited that there could never have been a concluded contract for the sale of the property between Mr. McGreal and Ms. Whyte and that the vendor with whom Ms. Whyte had been in negotiations was the company. That being so, Hedigan J. concluded that Mr. McGreal's claim for an order of specific performance of a contract allegedly concluded between him personally and Ms. Whyte was bound to fail. He did not dismiss the proceedings under Ord. 19 r. 28.

The Appeal

12. By Notice of Ordinary Appeal dated the 18th day of January 2016, Mr. McGreal has appealed the aforementioned order. That Notice focuses upon the matters already advised earlier in this judgment and also upon the alleged failure of the trial judge to consider the documents which he maintains satisfies the requirements of s.2 of the Statute of Frauds (Ireland) 1675 ("the Statute"). He makes a similar complaint concerning the failure of the High Court judge to consider the arguments and the evidence concerning his entitlement to rely upon the doctrine of part performance.

13. By Notice of Motion dated the 18th January, 2016, Mr. McGreal sought leave of this court to introduce new evidence on the hearing of the appeal. On 19th February, 2016, Finlay Geoghegan J. made an order permitting him introduce on the hearing of the appeal copies of such folio or folios of land as disclosed the registered owner of the property at the relevant time. She also permitted him file an affidavit sworn by Olivia Needham, Estate Agent, on the 18th December 2015, subject to granting Ms. Whyte the right to file an affidavit in response thereto. This she did on the 14th March, 2016. It was also in the course of this hearing that Finlay Geoghegan J. identified the issues to be considered by the court in the course of the appeal and to which I have already referred.

14. It is necessary to briefly refer to these affidavits insofar as the same were not available to the High Court Judge when he made

his decision. In her affidavit Ms. Needham advises that she had acted as selling agent for Mr. McGreal in respect of the property. She confirms that she had had no dealings with any limited liability company. She states that in July, 2007 Ms. Whyte had expressed interest in the property and that on 11th July she arranged what she described as a "finalising meeting" at the property. That meeting was attended by herself, Mr. McGreal, Ms. Whyte and her father. According to Ms. Needham, Ms. Whyte requested that certain structural changes be made to the property and that Mr. McGreal advised her that he would not undertake such works without the security of a contract deposit. She states she advised Ms. Whyte that the payment of such a deposit would result in an enforceable agreement. Ms. Needham says she immediately drafted a memorandum of the agreement entered into between Mr. McGreal and Ms. Whyte and informed her that the contract deposit would be non-refundable and would have to be paid directly to Mr. McGreal.

15. Later in her affidavit, having referred to the payment by Ms. Whyte of the €5,000 she states:-

> "I say also that I was present when the details of the agreement between the plaintiff and defendant, were finalised. The defendant agreed to purchase the property from the plaintiff, Roger McGreal, for the sum of €485,000 in accordance with the schedule recorded by me during the finalising meeting".

16. I infer from the aforementioned statement that the meeting at which she states "the details of the agreement between the plaintiff and the defendant were finalised", was some date subsequent to the 11th July, 2007.

17. Ms. Needham went on to state (i) that the sum of €485,000 was exclusive of extras (ii) that Ms. Whyte had stated that she would not require a mortgage and (iii) that she had agreed to carry out, at her own expense, other substantial works to the property.

18. At "ON1" Ms. Needham exhibits a memorandum which she states she prepared on the evening of the aforementioned meeting noting "the works the defendant agreed to complete at her cost." At "ON2" she exhibits a list of "details of extras" agreed between Mr. McGreal and Ms. Whyte. She states that Mr. McGreal added other items to the note such as radiators, chimney alterations *etc*. "in order to have everything recorded on one list". Finally at "ON3" she exhibits what she states was her general note of the meeting, which includes the names of the attendees, the date of the meeting and the general discussions that took place.

19. In her replying affidavit Ms. Whyte states that she never understood it to be the role of an estate agent to seek to bind an intending purchaser. She expresses alarm that Ms. Needham should attempt to invite the court to conclude that she had procured a binding contract for the sale of the property between herself and Mr. McGreal in respect of which she had obtained no legal advice and could not have known if there was marketable title to the property.

20. Ms. Whyte maintains that she paid the €5,000 as a booking deposit solely to demonstrate that she was seriously interested in purchasing the property. She did not understand it to be a non-refundable deposit. Ms. Whyte asserts that the documentation exhibited by Ms. Needham is not a memorandum of any agreement by her to purchase the property. Neither she nor Mr. McGreal were invited to sign any document. She says it was always understood that the negotiations were "subject to contract". Ms. Whyte also expresses concern that Ms. Needham failed to exhibit a memo which she sent to the "vendors solicitors" dated 17th August, 2007, headed "instructions to vendors solicitors for proposed sale of property subject to contract/contract denied without prejudice" and which also noted that the "booking deposit" was awaited. This document she states supports her contention that all negotiations were subject to the normal legal formalities. Finally, she states that the reason she did not purchase the property was because it was withdrawn from the market by the vendor's solicitor and that this had cost her dearly, as was apparent from the sum claimed by her in her counterclaim.

The submissions

21. Extensive written submissions were filed by both parties, and these have been of significant assistance insofar as they canvass, not only the evidence available to the High Court judge, but also the case law relevant to the exercise by the court of its inherent jurisdiction to dismiss a claim on the basis that is bound to fail. I do not intend what follows to be an exhaustive summary of the submissions of the parties and in this regard I would merely confirm that in reaching my conclusions I have considered in full all of the written and oral submissions of the parties. I have, however, excluded from my consideration all of the additional facts which Mr. McGreal has impermissibly included in his written submissions and which are not contained in the affidavits before the court.

22. Mr. McGreal submits that the factual and legal issues in this case are complex and are only capable of being resolved by a court in the course of a full plenary hearing. That being so, his claim should not have been dismissed on an interlocutory application. He relies in particular on the decision of Clarke J. in *Moylist Construction Ltd v. Doheny and others* [2016] IESC 9, [2016] 3 JIC 0401. He submits that the trial judge misdirected himself as to the significance of the correspondence *inter partes* by ruling out the existence of a concluded oral agreement between himself and Ms. Whyte and in respect of which he contends there is a memorandum in writing as required by s. 2 of the Statute. Other evidence supporting such an agreement was to be found in:-

1. letters from Ms. Whyte's own solicitor which referred to him as the vendor;

2. the cheque for €5,000 dated 2nd August 2007 which was made payable to him personally, and

3. the fact that in 2010 Ms. Whyte had sued him personally for the return of the €5,000.

This was all evidence that could only be weighed by a court in a plenary process.

23. Mr. McGreal further submits that if the documents upon which he seeks to rely are insufficient to meet the requirements of s.2 of the Statute of Frauds, he intended to rely on his own acts of part performance in order to seek the equitable remedy claimed in his pleadings. In this regard he relies, *inter alia*, on the undisputed evidence that he altered the interior of the property to correspond with Ms. Whyte's requirements and that he permitted her access to the property to carry out her own renovations which she herself values at €50,000.

24. As to the reliance by the trial judge on the correspondence and exchange of documents between the solicitors acting on behalf of the company and Ms. Whyte which commenced with the proposed building agreement and contract for sale undercover of a letter dated 20th August 2007, Mr. McGreal maintains that the fact that such documentation came into existence does not establish that he had not already concluded a binding oral agreement with Ms. Whyte. That intended transaction was devised with a view to minimising her exposure to stamp duty. He submits that the company could not in any event have contracted to sell the property as he and his wife, Carol Ann McGreal, were the joint owners of the property. If Ms. Whyte had honoured her agreement and paid the balance of €505,615.75 they would have executed the necessary transfer of the lands to include the relevant easements in favour of Roger McGreal Contractors Ltd. Only then would the company have had the locus standi to enter into the intended split contract.

25. Finally, Mr. McGreal maintains that, having demanded a substantial reduction in the purchase price which he was unable to agree to, it was Ms. Whyte who refused to complete the agreement.

26. Ms. Fogarty B.L. on behalf of Ms. Whyte, submits that the High Court judge was correct in law and in fact when he dismissed Mr. McGreal's claim on the grounds that it was bound to fail, and that all of the contemporaneous documentation pointed to an intended agreement between Ms. Whyte and the company. She submitted also that the documentation which Mr. McGreal sought to rely upon as evidence supporting an oral agreement made between himself and Ms. Whyte was not in accordance with what is required by s.2 of the Statute and that any documentation in which Mr. McGreal was referred to as the vendor, post-dated the negotiations between Ms. Whyte and the company by many years and was of no evidential value. In these circumstances, it was submitted, that the claim could be safely dismissed without any risk of injustice.

Relevant principles

27. That the court enjoys an inherent jurisdiction to strike out or stay proceedings which it considers bound to fail has long been established. It is a jurisdiction that stems from the court's inherent entitlement to prevent an abuse of process. Clearly, to permit a plaintiff to maintain a claim which is bound to fail would be to condone an abuse of the process of the court.

28. The court's inherent jurisdiction to dismiss a claim as bound to fail is somewhat different for the jurisdiction of the court to dismiss proceedings under Ord.19 r.28 of the Rules of the Superior Courts. While an application under Ord. 19 r. 28 has as its foundation stone a contention that the claim as pleaded does not disclose a cause of action, the court's inherent jurisdiction may be invoked where it can be demonstrated that there is no arguable basis in law and in fact for the claim made.

29. Because the jurisdiction to dismiss a claim has the effect of denying the plaintiff their constitutional right of access to the Courts (Article 40.3.) it is one which must be exercised sparingly (see Costello J. in *Barry v. Buckley* [1981] IR 306). Further, an order dismissing a claim on the basis that it is bound to fail should not be made unless it is clear that there is no risk of an injustice being perpetrated upon a plaintiff should the court accede to such an application. To justify granting such relief the Court must be satisfied on the facts of the case that the continued existence of the proceedings simply cannot be justified, that it would be manifestly unfair to the defendant to allow the claim proceed and that the claim constitutes an abuse of the process of the courts.

30. It is also important to record that the court is not entitled, in the exercise of its inherent jurisdiction, to dismiss an innovative or weak case, as was advised by Charleton J. in *Millstream Cycling Limited v. Tierney* [2010] IEHC 55. However, it may do so if it can be demonstrated that what the plaintiff asserts is utterly undermined by the known and readily ascertainable circumstances of the claim, usually in written form. Neither is the process to be used to seek an early determination of issues which ought, in the normal course of events, to be determined on a plenary hearing.

31. Before making such a peremptory decision, the court should be satisfied that, no matter what might arise on discovery or at trial, the plaintiff's claim cannot succeed. Further, the court should not dismiss a claim where an amendment of the pleadings might allow the plaintiff pursue the action which, in its current form, might otherwise be dismissed as bound to fail. (See McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] I.R. 425).

32. In *Jodifern v. Fitzgerald* [2000] 3 I.R. 321, a case of particular relevance to these proceedings, insofar as it concerns a claim for specific performance which the defendant sought to have dismissed on the grounds that it was vexatious or amounted to an abuse of process, Murray J. (as he then was) stated that the court should exercise caution before dismissing proceedings on a summary basis. This is what he said at page 334 of his judgment concerning the exercise of the court's inherent jurisdiction:–

> "The object of such an order is not to protect a defendant from hardship in proceedings to which he or she may have a good defence but to prevent the injustice to a defendant which would result from an abuse of the process of the court by a plaintiff. Clearly, therefore, the hearing of an application by a defendant to the High Court to exercise its inherent jurisdiction to stay or dismiss an action cannot be a form of summary disposal of the case either on issues of fact or substantial questions of law in substitute for the normal plenary proceedings.
>
> For this reason, a primary precondition to the exercise of this jurisdiction is that all the essential facts upon which the plaintiff's claim is based must be unequivocally identified. It is only on the basis of such undisputed facts that the court may proceed."

33. It is nonetheless clear from a number of recent authorities (see*: Keohane v. Hynes* [2014] IESC 66, and *Moylist Construction Ltd v. Doheny and others* [2016] IESC 9) that, for the purposes of considering such an application, the court is not precluded from engaging with the facts of the case and it may in certain circumstances engage in some analysis of relevant documentation. That said, it is clear that there are significant limitations concerning the extent to which any such engagement is appropriate. As to the circumstances in which the court may engage with the facts and in particular documentary evidence, the following is what Clarke J. had to say concerning the matter in *Keohane*:-

> "6.8 What the Court can analyse is whether a plaintiff's factual allegation amounts to no more than a mere assertion, for which no evidence or no credible basis for believing that there could be any evidence, is put forward. Likewise, the Court can go into documentary facts where the relevant documents govern the legal relations between the parties or form the only possible evidential basis for the plaintiff's claim (as in *Lopes*). As Barron J. noted in *Jodifern*, a court can look at a contract and it may become clear beyond argument as to what that contract means. On that basis, it may follow that a plaintiff's claim may be bound to fail. But there may be cases where, notwithstanding the text of a contract, facts are asserted and backed up either by evidence or by the possibility that evidence might be found, which might lead to the contract being construed in some different way or the consequences for the wrong alleged in the proceedings being differently considered. In such cases, as Barron J. made clear, the case must go to trial.
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> 6.9 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would

be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."

34. In his judgment in *Moylist Construction Ltd* Clarke J. when considering once again the courts inherent jurisdiction to dismiss a claim on the grounds that it was bound to fail, made clear that there are cases in which it would not be appropriate for the court to exercise such jurisdiction and that these were not limited to cases concerning factual disputes, but included those which involved issues of law or construction which were in themselves complex and would require careful analysis. He likened, by way of analogy, the courts jurisdiction to that which it exercises when considering whether it should refer a claim for summary judgment to plenary hearing. He advised that in both cases, "the reason why it is suggested that there should not be a full plenary hearing is based on a contention that there would be no point because there is either no defence (in the case of a defendant in summary summons proceedings) or no claim (in the case of a plaintiff faced with an inherent jurisdiction application) which would justify imposing the burden and expense of a full plenary hearing on the opponent in question." In particular, he referred to his own judgment in *McGrath v. O'Driscoll* [2007] 1 ILRM 203, concerning issues that might conveniently be dealt with otherwise that on a plenary hearing. In particular he referred to the following brief passage at page 210 of his judgment where he said as follows:–

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

35. In the course of his judgment in *Moylist* Clarke J. went on to say that there are cases which are just not suitable for an application to dismiss under the court's inherent jurisdiction. These include cases involving factual disputes, save to the limited extent to which it is appropriate to engage with facts as identified in *Keohane*. However, later in his judgment he referred specifically to cases where the court might safely reach a conclusion and dismiss a claim as one which was bound to fail.

> "3.15.That is not, of course, to say that there will not be cases where the legal or documentary issues may be clear and straightforward such that it is safe for the court to reach a conclusion on those questions on the hearing of a motion to dismiss. That is not to say that the fact that a plaintiff may make a large number of points, each one of which is clearly unstatable, should not prevent a dismiss from being ordered. As Denham J. observed in a different context in *Bula v. Tara Mines Ltd (No.6)* [2000]4 IR 412, at p.462, 'seventeen noughts are still nothing'."
>
> 3.16. But I would caution against the appropriateness of the use of the application to dismiss under the inherent jurisdiction of the court in relation to proceedings where, even if there are no factual disputes or any such factual issues as might arise come within the strictures identified in *Keohane*, nonetheless the legal issues or questions concerning the proper interpretation of documents are complex. In such cases, the very complexity of the issues (even if the court has a fairly clear view on them) makes it difficult to determine, within the confines of a motion heard on affidavit, that the plaintiff's case is such that it can safely be said that it is bound to fail."

Decision

36. I do not intend to approach my decision, in the sequence suggested by the issues fixed for consideration on this appeal by, Finlay Geoghegan J. I propose to structure my judgment in the following manner:-

> 1. The Statute of Frauds. (Issue 1)
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> 2. Part Performance. (Issue 2)
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> 3. Engagement between the company and Ms. Whyte and their respective legal advisors post the 2nd August 2007, that being the last of the several differing dates relied upon by Mr. McGreal as the date upon which he maintains he concluded a personal agreement with Ms. Whyte for the sale of the property. (Covering issues 1 and 4)

37. As is apparent from what I have earlier stated in this judgment, the first two of these issues were not addressed at first instance and are addressed now by reason of the order made by Finlay Geoghegan J. on the 19th February, 2016.

Statute of Frauds (Ireland) 1695

38. The first question I must ask myself, leaving aside all of the other issues which arise for consideration on this appeal and treating this issue and the facts pertaining thereto in isolation from events post dating the 2nd August 2007, is whether it is clear that it is unstatable for Mr. McGreal to contend that the documentation exhibited in Ms. Needham's affidavit could arguably meet the requirements of s.2 of the Statute of Frauds and thus evidence the personal agreement for which he contends?

39. The answer to the aforementioned question is probably no. What I can say however, is that I am quite satisfied that he would have an extremely uphill battle to convince a court, on full legal argument, that the documents on which he seeks to rely could ever meet the requirements of s. 2. He does not seek to rely upon the type of formal documentation usually deployed by parties and their advisors when a contract for the sale of land is under negotiation. Further, there is no one document which contains the essential elements required by the section, namely the names of the parties, details of the property and the price. Hence he would have to satisfy a court that the documents exhibited to Ms. Needham's affidavit, which are unstructured, informal, handwritten and extremely difficult to follow, are obviously connected with the same transaction, a task further complicated by the fact that Ms. Whyte's signature appears only on one such documents, a piece of hotel notepaper, and in what can only be described as a highly unconventional position.

40. To my mind, the issue as to whether the memoranda relied upon by Mr. McGreal in this case might satisfy the requirements of the Statute, is nonetheless not straightforward from a legal perspective. The relevant documents require careful legal analysis and that task is not one that I believe can be conveniently or safely be engaged with in the context of an interlocutory hearing. The prevailing jurisprudence concerning the court's inherent jurisdiction to dismiss a claim as bound to fail, cautions that only straightforward issues of law are suitable for consideration on such an application (see Murray J. in *Jodifern*). While I can well envisage cases were a court might readily be in a position to decide whether a particular memorandum satisfied s. 2 of the Statute, I do not believe this to be such a case. That being so, if this was the only issue in the case, I would not be disposed to dismissing Mr. McGreal's claim at this juncture.

Part Performance
41. Even if I was satisfied that I could confidently dismiss Mr. McGreal's claim on the basis that it was bound to fail due to the lack of a written memorandum sufficient to meet the requirements of s. 2 of the Statute of Frauds, the evidence which he put before the High Court in support of his intended reliance on the doctrine of part performance would, if it were not for the other circumstances and documentation to which I will later refer, justify allowing the action proceed to a full plenary hearing. That is not to say that I am satisfied that such evidence would likely overcome the defendant's plea in reliance upon s.2, but the evidence was sufficient to establish that he had an arguable case based upon his acts of part performance.

42. In relation to this issue it is relevant to note that Ms. Whyte was not in a position to contest the fact that Mr. McGreal had carried out significant internal alterations to the property at her request and that he had permitted her access to the property so that she might carry out such works as she wished to complete. Mr. McGreal's actions in this regard are at least *prima facie* consistent with the terms of the oral agreement for which he contends, even if Ms. Whyte disputes that this was the basis upon which he carried out the alterations or allowed her access to the property. It is of course to be remembered that it is Mr. McGreal's acts of part performance, rather than any performance on the part of the purchaser, that is of relevance in this regard. I mention this legal matter only because issue number three, as directed by Finlay Geoghegan J. refers, inadvertently, to Ms. Whyte's acts of part performance rather than those of Mr. McGreal. It is a plaintiff's acts of part performance which gives them the equity to seek to rely upon the doctrine of part performance to cure any deficiency otherwise arising under the Statute.

Dealings between the parties post the 2nd August 2007
43. I now turn to consider the material which the trial judge appears to have relied upon when he decided to dismiss Mr. McGreal's claim on the basis that it was bound to fail.

44. Regardless of the manner in which the first of the issues which Finlay Geoghegan J. directed be considered on this appeal is formulated, it is not clear from the transcript of the High Court hearing whether the trial judge actually made his decision based upon a finding that Ms. Whyte had entered into an agreement with the company rather than with Mr. McGreal personally. I would infer from all of what the trial judge said in the course of the hearing that he decided that the claim was bound to fail because it was wholly inconsistent with the documentary evidence, which satisfied him that there could have been no prior concluded agreement for the sale of the property between Mr. McGreal and Ms. Whyte.

45. In order to consider whether the High Court judge erred in law when he concluded that Mr. McGreal's claim was bound to fail, it is necessary to consider in some detail not only the undisputed facts which post date the 2nd August 2007, but also the documentation which I consider material to my conclusions.

46. As to the facts, it is not disputed that Mr. McGreal is a director of McGreal Construction Limited and that as principal of that company he gave instructions to Ms. Helena Boylan, of Helena Boylan solicitors, to prepare all of the documentation to which I will later refer. He makes no complaint that anything said or done by Ms. Boylan was said or done otherwise than in accordance with his instructions. Ms. Whyte was at all relevant times represented by Ms. Jackie Durcan, of Durcan Solicitors.

The Documentation
47. On 17th August 2007, Ms. Needham sent a notice to Ms. Boylan asking her to issue contracts for the sale of the property. She furnished the name of the purchaser and her solicitor and referred to Mr. Roger McGreal as the vendor. At the top of her notice are the following words in bold capital letters: -

> "INSTRUCTIONS TO VENDORS SOLICITOR FOR PROPOSED SALE OF THE PROPERTY SUBJECT TO CONTRACT DENIED WITHOUT PREJUDICE"

48. Under cover of letter dated the 20th of August 2007, Ms. Boylan forwarded to Ms. Durcan, a Building Agreement and Contract for sale. It is agreed that the company was the proposed contractor and also the proposed vendor and that Ms. Whyte was to be the proposed employer and purchaser.

49. On 22nd August, 2007, Ms. Durcan raised a number of pre-contract enquiries. Her letter named the vendor as Roger McGreal Contractors Ltd and concluded with the following statement:-

> "In the meantime, please note that we do not have the authority by this, or any subsequent correspondence to bind our clients until such time as the Contracts have been signed, by both parties, exchanged, the full deposit paid, and all the special conditions complied with."

50. On the same date Ms. Durcan wrote to Ms. Whyte regarding "the proposed purchase" from "Roger McGreal Contractors Ltd". In her letter she advised that she had received the contract for sale and supporting title documentation and also set out for her client's benefit some of the relevant contractual terms and in particular the proposed payment schedule.

51. On the 24th August, 2007, Ms. Boylan replied to Ms. Durcan's letter. That letter is headed "subject to contract/contract" and refers to her client, as Roger McGreal Contractors Ltd. She noted that Ms. Whyte was anxious to proceed with the purchase and stated that she would advise her client accordingly. She ended her letter stating as follows:-

> "Accordingly, we await hearing from you with Contracts duly executed by your client together with deposit, if your client intends to proceed.
>
> "In the meantime please note that I have no authority either express or implied to bind by client in this matter, and no legally binding contract shall exist or be deemed to exist until such time as Contracts hearin, have been signed by both parties and a full deposit paid over to the Vendor. This letter and any correspondence/documents to date shall not be deemed to constitute a note or memorandum for the purpose of the Statute of Frauds"

52. On 3rd October, 2007, Ms. Boylan wrote on behalf of her client, Roger McGreal Contractors Ltd and again "subject to contract/contract denied", requesting signed contracts and payment of the deposit. This letter spawned a letter from Ms. Durcan to her client requesting up-to-date instructions.

53. On 28th May, 2008, presumably in circumstances where she had not heard from Ms. Whyte's solicitors, Ms. Boylan again wrote on behalf of her client "Roger McGreal Contractors Ltd" and "subject to contract" in the following relatively peremptory terms:-

> "Dear Madam,

> We have received instructions from our client that unless contracts are returned to this office before Friday, 6th June 2008, duly executed by your client, our client will be withdrawing from this sale.
>
> Accordingly if you client has not executed contracts by that date, please return all documents to this office forthwith. In the meantime, we have no authority to bind our client and no contracts shall be deemed to come into existence until such time as they have been signed by both parties, exchanged and a full deposit paid."

54. In response, by letter dated the 6th June, 2008, Ms. Durcan wrote to Ms. Boylan in terms which included the following statements: –

> "We have now taken our clients instructions herein, and she has asked us to advise you that she is proceeding with this purchase.
>
> Our mutual clients are in direct contact with each other regarding this sale, and purchase. Your client is aware that our client has expended certain monies on the house to date and your client has altered the plans somewhat to her specifications.
>
> Our client has [sic] is now liaising with her financial institution to arrange funds for the payment of the deposit, and once they are to hand, she will make an appointment to call to this office to sign the necessary contract for sale/building agreement."

55. On the 10th September, 2008, Ms. Boylan, in a letter headed "subject to contract/contract denied" and written on behalf of her client Roger McGreal Contractors Ltd, advised as follows:–

> "We note that we have not heard from you together with contracts in this case.
>
> We note that our client has given your client ample opportunity to execute the contracts in this case and we understand from our client that she is now looking for a substantial reduction in the purchase price of this property.
>
> Please note that no reduction will be made. Please note that our client is no longer selling the property to your client and he is sending in his workmen to the property next Wednesday, 17th September, 2008, to remove all the changes that have been made to the property on your client's instructions, which alterations have been made by our client at substantial cost to him to facilitate your client, detailed particulars of which and the costs of which have been served directly on your client by our client.
>
> Accordingly, our client will be changing the property back from a three bedroom house to a four bedroom house, as it was originally, and will be removing all items and works completed so that the property may be restored to a four-bedroom residence.
>
> Please accordingly return all contracts and title documents to us forthwith, as our client wishes to place the property on the market for sale."

56. On 29th September, 2008, Ms. Durcan wrote to Ms. Boylan in a letter that includes the following statement:-

> "We note that your client is no longer to sell this dwelling house at the contract price (my emphasis) to Karen Whyte and in those circumstances, we are now returning title documentation to vouch with contracts for sale in duplicate".

57. In the last mentioned letter, Ms. Durcan advised that "in order to draw a line in the sand in this matter" her client would forfeit those items that had been installed in the dwelling at her cost and other items which had not been fitted could be returned to her.

58. On the 10th December, 2008, some ten weeks after her receipt of Ms. Durcan's letter noting that the company was unwilling to sell at the agreed price, Ms. Boylan wrote to Ms. Durcan contending firstly, that she had not received the return of the contracts. Second, she stated that Ms. Durcan's letter was inaccurate and that it was Ms. Whyte who did not wish to purchase the property at the contract price.

59. A further letter entitled "Reminder" was written by Ms. Boylan on behalf of the company on the 27th January 2009, stating that she had still not received the contracts from Ms. Durcan.

60. By letter dated the 30th January, 2009, Ms. Durcan took exception to Ms. Boylan's claim that the contracts had not been returned. She stated that she had sent them on 29th September, 2008, and had written two further letters dated 31st of October 2008 and 27th of November 2008 seeking an acknowledgment of their receipt. The accuracy of that statement was not later challenged by Ms. Boylan.

Effect of the documentation post 2nd August 2007 on the Defendant's application

61. It seems to me that the jurisprudence which has built up over the years in relation to summary judgment proceedings is of assistance when considering the proper approach of the court to an application to dismiss a claim as bound to fail. In summary judgment proceedings, when asked to grant judgment in the light of the evidence advanced by a defendant on affidavit to demonstrate the existence of a *bona fide* defence, the court must ask itself the question advised by Hardiman J. in *Aer Rianta v.Ryanair* [2001] 4 I.R. 607 namely:-

> "Is it "very clear" that the defendant has no case?"

It would seem to follow that on an application to dismiss a plaintiff's claim the Court must be satisfied that it is very clear that the plaintiff has no case or, to put it another way, that the claim advanced is bound to fail. The onus of proving that this is so clearly rests with the defendant.

62. The next matter to consider is how the court should set about answering that question. What is permissible in terms of evaluating the evidence available on what is an interlocutory hearing? Again, I believe helpful guidance can be found in a number of the decided cases concerning summary judgment.

63. A court will not withhold summary judgment and refer proceedings to plenary hearing by reason only of a bare assertion made by a

defendant as to some particular situation or state of affairs which if true would provide them with an arguable defence, if there is indisputable documentation which would render such an assertion untenable.

64. The courts evaluation of such documentation on an application for summary judgement was crucial to the conclusion of Finlay Geoghegan J. in *Bank of Ireland v. Walsh* [2009] IEHC 220. In that case the bank brought a claim against a company director on foot of a guarantee. He did not deny executing the guarantee but claimed that the company, whose debt he had guaranteed, had a claim for damages against the bank. That being so he maintained that he was entitled to rely in his defence upon any set off to which the company was entitled against the bank in respect of the sum guaranteed.

65. What Finlay Geoghegan J. had to determine was whether the defendant's proposed defence was more than a mere assertion and whether there was an arguable claim that the bank had committed an actionable wrong against the company with the result that it had suffered the loss alleged. In concluding that the defendant had not met the low threshold required to have the claim sent forward for plenary hearing, she expressed herself satisfied that the defendant's assertions were not consistent with the contemporaneous documents that he had exhibited. His primary complaint was that the bank had failed to permit the company to draw down a facility of €1.9m. on 23rd September 2008, as had been agreed. In the light of that complaint, Finlay Geoghegan J. considered the available documentation concerning the facility including certain e-mails which did not refer to any such agreement. She also noted that the agreement contended for had not been recorded in correspondence post dating the 23rd September 2008. As a result she concluded that the contemporaneous documentation was inconsistent with the assertions that had been made by the defendant.

66. A similar approach was taken by Murphy J. in *First National Commercial Bank v. Anglin* [1996] IR 75, a case which again involved a claim by a bank on foot of a guarantee. In that case the defendant denied signing the guarantee. He asserted that he was out of the country on the relevant date *i.e.* 1st February 1989. In the course of his appeal against the judgment granted against him in the High Court, the defendant relied exclusively on the contention that the guarantee had been executed in September 1989, and argued that if his evidence to that effect was accepted it followed that the guarantee was void as having been given for past consideration.

67. In the course of his judgment Murphy J. made clear that a defendant could not be denied leave to defend because the court had reason to doubt his bona fides. However, he quoted with approval the approach laid down in *Banque de Paris v. De Naray* [1984] 1 Lloyd's Rep 21 namely:-

> "The mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence."

68. Thus, Murphy J. proceeded to consider all of the relevant circumstances surrounding the original loan as well as the guarantee. He looked, inter alia, at the facility letter, the resolution of the company concerning the loan and also the legal documentation emanating from the lawyers concerning the proposed security documentation. Having done so, he stated he had no difficulty concluding that Mr. Anglin had not executed the guarantee on 1st February but that he had done so on some date prior to 13th January 1989. That being so, there was no credible evidence to support his defence which asserted that the guarantee was void as having been given in respect of past consideration.

69. The aforementioned decisions are in my view of significant assistance when it comes to considering the proper approach of a court on an application to dismiss a claim as bound to fail where the defendant puts forward for the court's consideration documentation which it claims fundamentally undermines the purported validity of the claim which the plaintiff seeks to pursue. That an approach such as that adopted by Finlay Geoghegan J. in *Bank of Ireland v. Walsh* and Murphy J. in *Anglin* is permissible on such an application would appear to be supported by the decisions in *Keohane, Moylist Construction Ltd* and *Millstream Cycling Ltd* to which I have already referred, particularly where such documentation is not disputed, where it purports to govern legal relations between the parties thereto and was authored by those with legal experience and who, at the time they prepared such documentation, were charged with the protection of their client's interests.

70. The documentation upon which the defendant seeks to rely in this case is of that calibre. All of it, with the exception of the Notice of the 17th August 2007, which was authored by Ms. Needham, was written by lawyers. Insofar as much of the correspondence was written not on behalf of Mr. McGreal but on behalf of his company, I reject Mr. McGreal's efforts to distance himself from that correspondence as I do his submission that the court must ignore it because the company is not a party to these proceedings. Mr. McGreal was a director and was the principal of the company at the relevant time. He does not dispute that he was the only person in a position to give instructions to Ms. Boylan on behalf of the company. Neither does he contest that in all of her dealings with Ms. Whyte's solicitor that she acted in accordance with his instructions and with his authority.

71. Accordingly, I propose to analyse the documentation which post dates the 2nd August, 2007, in order to assess whether Mr. McGreal's claim to the effect that he concluded a binding oral agreement with Ms. Whyte for the sale of the property on some date prior the 3rd August, 2007, amounts to anything more than a mere assertion for which no evidence or no credible basis has been put forward or, to adopt the words of Charleton J. in *Millstream Cycling Ltd*, is his claim utterly undermined by the circumstances which are ascertainable from such documentation.

72. I well recognise that in taking this approach I must proceed with great caution because my conclusions have the potential to deny Mr. McGreal the opportunity of having his claim determined at a full plenary hearing, to which he is otherwise entitled. As McCarthy J. advised in *Sun Fat Chan* I must be certain that nothing could turn up at the trial or in the course of discovery which could render my analysis of the validity of Mr. McGreal's claim incorrect. Likewise, before I could conclude that his claim is one that is bound to fail, I would have to be certain that there is no risk that an injustice might be done to Mr. McGreal by determining the possible validity of his claim in the course of an interlocutory hearing.

73. Notwithstanding the limitations under which the court must operate when urged to dismiss a claim as bound to fail and the caution advised in the authorities to which I have already referred, I am satisfied that defendant has established clearly that the existence of the contract for which the plaintiff claims specific performance is fatally undermined by the known and readily ascertainable circumstances contained in the documentation to which I have already referred.

74. It is not disputed that on the 20th August, 2007, on the instructions of Mr. McGreal, his company, with the benefit of legal advice, commenced negotiations with a view to selling the property to Ms. Whyte on the terms and in the manner proposed in the Building Agreement and Contract for Sale forwarded to Ms. Durcan on that date. That approach by the company is wholly inconsistent with the existence of a prior binding agreement for the sale of the property between Mr. McGreal and Ms. Whyte. If such an agreement had been concluded, the company could not have offered the property for sale. Neither could it ever have done so without Mr. McGreal first releasing Ms. Whyte from that agreement. That legal position is not undermined in any way by Mr. McGreal's

submission that the building agreement and contract for sale were to be deployed in order to reduce Ms. Whyte's potential liability for stamp duty. Either there was or was not a binding agreement between Mr. McGreal and Ms. Whyte. The intended parties were only in a position to execute the building agreement and contract for sale absent the existence of a prior binding agreement. Neither is it relevant that at the time the company was negotiating with Ms. Whyte the property was in the ownership of Mr. McGreal and his wife. It was for the company to procure title to the property such that it could complete the proposed sale to Ms. Whyte.

75. For the following twelve months formal correspondence was exchanged between the Company's solicitors and Ms. Whyte's solicitor, all of which is wholly inconsistent with the existence of any prior concluded agreement. The property could not have been "on the market" if Ms. Whyte was already contractually bound to purchase it, as is alleged by Mr. McGreal. Why would Ms. Boylan, on Mr. McGreal's instructions, have written a myriad of letters entitled " subject to contract/ contract denied" stating she had no authority to bind the company until contracts were signed and exchanged, if all along Ms. Whyte was already contractually bound to purchase at the price specified in the proposed contract?

76. There is no shortage of evidence in the present case, to allow me safely to conclude that Mr. McGreal's claim is bound to fail. I ask myself how the company, on Mr. McGreal's instructions, could have called upon Ms. Whyte to complete the contract documents so as to bind her to purchase the property from the company (as per Ms. Boylan's letter of 3rd October 2007) if she had already contracted to buy the property from Mr. McGreal? I also question how Ms. Boylan, when demanding the return of the contract documents on 10th September 2008 could, having regard to Mr. McGreal's present claim, state the following:-

> "Please accordingly return all contracts and title documents to us forthwith, as our client wishes to place the property on the market for sale?"

It goes without saying that the company could not place the property on the market for sale if, as Mr. McGreal maintains, there already existed a binding agreement pursuant to which he was bound to sell the property to Ms. Whyte.

77. Having considered all of the evidence placed before the court on the present application, I am quite satisfied that the legal and factual proposition which Mr. McGreal seeks to advance in these proceedings is wholly and utterly undermined by documentation authored on his instructions. It matters not that the company rather than Mr. McGreal was the client of Ms. Boylan for the purposes of that correspondence. The company could only give instructions to Ms. Boylan via Mr. McGreal and to that extent he must be fixed with full knowledge and responsibility for the effect that any such correspondence has on these proceedings. All of the documentation upon which the defendant relies was brought into being for the purposes of governing the dealings between the company and Ms. Whyte and it is wholly inconsistent with the agreement for which Mr. McGreal contends.

78. Because of the view that I have taken of the documentation concerning the proposed sale of the property by the company to Ms. Whyte, it is not necessary for me to engage with the last of the four issues which Finlay Geoghegan J. directed might be considered on this appeal. Accordingly, I will do no more than make the following observation in relation thereto.

79. Regardless of the wording of this issue as set out in the schedule to the court order of 19th February, 2016, it is clear that "the plaintiff" did not withdraw from any proposed contract. It was the company, albeit on the instructions of Mr. McGreal, that was responsible for the letter of the 10th September 2008, in which Ms. Boylan advised Ms. Durcan that her client was no longer willing to sell and wherein she sought the return of the title documents. Accordingly, save that what is stated in that letter is inconsistent with a prior concluded agreement between Mr. McGreal and Ms. Whyte, the legal effect of that letter is immaterial to my conclusions on this appeal. That said, the assertion made by Ms. Boylan in her letter of 10th December that it was Ms. Whyte that withdrew from the proposed sale is one which on the face of the correspondence would appear to be difficult if not impossible to sustain. In her letter dated 6th June 2008, Ms. Durkan made clear that Ms. Whyte was willing to proceed with the purchase. While Ms. Boylan's letter of 10th September, 2008, does indeed refer to a request apparently made by Ms. Whyte to Mr. McGreal for a reduction in the purchase price, no mention is made of her being unwilling to pay the proposed price. Indeed, Ms. Durkan in her letter of 29th September, 2008, noted that the company was no longer willing to sell the property <u>at the contract price</u> and that it was in these circumstances that the title documentation was being returned. Regardless of further correspondence concerning the circumstances in which the dealings between the company and Ms. Whyte were terminated, that particular assertion was never been denied. Nonetheless, as already stated, my view on this particular issue is not material to my conclusion as to how this appeal should be resolved.

80. Finally, I should state that for the purposes of determining the outcome of the appeal I have not found it necessary, and neither do I think it would have been appropriate, to consider the relevance, if any, of the fact that Mr. McGreal allowed some five years to elapse between the date when negotiations between the company and Ms. Whyte were brought to an end and the commencement of these proceedings. Delay of that nature, while clearly material to any claim for equitable relief, is in my view a matter for the court's discretion at a plenary hearing.

Conclusion.

81. Having considered the evidence that was before the High Court judge and such additional evidence as was admitted on this appeal, I am satisfied that Mr. McGreal's appeal must be dismissed. The High Court judge did not err in law when he decided to exercise the Court's inherent jurisdiction to dismiss his claim as one which is bound to fail. The continued existence of those proceedings cannot, in my view, be justified. The claim which Mr. McGreal seeks to advance is one which is utterly undermined by the facts and circumstances to be found in documents and other correspondence authored by a solicitor in accordance with his instructions. It is untenable, in light of the documentary evidence to which I have referred in the course of this judgment, for Mr. McGreal to argue that his claim, which depends upon him establishing that, prior to the 3rd August, 2007, a binding contract for the sale of the property was concluded between himself and Ms. Whyte, is not one which is bound to fail.

82. In reaching my conclusions I am mindful of the fact that the inherent jurisdiction of the court to dismiss a plaintiff's claim on the grounds that it is bound to fail is one which must be exercised sparingly and only in circumstances where there is no risk that in making the order sought, an injustice might be perpetrated on the plaintiff. After all, the effect of the exercise by the court of that jurisdiction is that the plaintiff is thereby denied their constitutional right of access to the court. That notwithstanding, for the reasons earlier advised in this judgement, I would dismiss the appeal.

83. For these reasons I would dismiss the appeal.