

THE HIGH COURT

[2018 No. 9806 P]

BETWEEN

HIGHFIELD DISTRIBUTION LIMITED

PLAINTIFF

AND

PAT THE BAKER UNLIMITED COMPANY

DEFENDANT

**JUDGMENT of Mr. Justice Meenan delivered on the 21st day of February, 2020**

**Introduction**

1. This is the defendant's motion to dismiss the plaintiff's action on the grounds that the pleadings disclose no reasonable cause of action and/or that any cause of action disclosed is frivolous or vexatious or, in the alternative, an order pursuant to the inherent jurisdiction of the court striking out the proceedings on the basis that they are bound to fail. It should be stated at the outset that on their face, the pleadings do disclose a cause of action, but what this Court is concerned with is whether the cause of action is frivolous and/or vexatious and/or bound to fail.
2. Central to the defendant's application is its contention that it neither has, nor had, any involvement or legal relationship with the plaintiff which is related to the plaintiff's cause of action.

**Background**

3. The defendant's application is grounded on an affidavit of Mr. Declan Fitzgerald, Director of the defendant company. In his affidavit, he states that on 11 November 2015 Irish Pride Fine Foods Unlimited Company (the Company) was incorporated. The company is engaged in the business of wholesale and retail bakery and confectionery. Subsequent to its incorporation, the company purchased certain assets of Irish Pride Bakeries Unlimited Company ("IPB"), which had previously traded as Irish Pride Bakeries. IPB went into receivership on 16 June 2015, and the plaintiff purchased certain assets from the receivers.
4. On the takeover of the assets by the plaintiff, each supplier was issued with a letter in standard form, which stated, *inter alia*: -

"Please note that the company did not, as part of the acquisition of the business (IPB), assent to an assignment or transfer of any rights and/or obligations of Irish Pride or the receivers pursuant to any contract or agreement in place between you and Irish Pride or the receivers. In addition, any monies/debts due to you up to 12th December, 2015 are not for the account of the company as these liabilities have not transferred to the company."
5. It should be noted, in this context, that the plaintiff had been providing certain services to the previous owners of IPB. On the takeover by the company, transport services were put out to tender and the plaintiff tendered for these transport services. The plaintiff was unsuccessful in this regard.

6. Mr. Declan Fitzgerald states in his affidavit, the following: -

"41. I say that for the purposes of clarity, I say that the defendant company is the owner of Irish Pride Fine Foods Unlimited Company and I hold the role of managing director in both companies. While both companies are engaged in the business of wholesale and retail bakers and confectioners they operate as two separate and distinct businesses ..."

The plaintiff does not dispute this.

**Replying affidavit of the plaintiff**

7. In his replying affidavit, Mr. Dennis O'Callaghan, Director of the plaintiff, states: -

"3. I say that on the 19th day of January, 2015, the plaintiff company entered into a written contract with the defendants who at that material time were trading under the style and title of Irish Pride Bakeries Unlimited."

Mr. O'Callaghan exhibits a copy of this written contract.

8. This contract clearly states that it is between the plaintiff and "*Irish Pride Bakeries*", the defendant is neither named in the contract nor referred to. No evidence has been produced to support the contention that the defendant is, or was, trading under the style and title of Irish Pride Bakeries Unlimited. Further, there is no evidence produced by the plaintiff to support the following statement in the affidavit of Mr. O'Callaghan: -

"I say and believe that the plaintiff company had supplied similar services on an exclusive basis to the defendant company for more than 20 years on an ongoing and continuous basis without interruption until the contract averred to above was entered into ..."

9. The only conclusion that can be drawn from what is deposed to in the affidavit of the plaintiff is that the wrong company has been named as defendant. Such was clearly stated in a letter, dated 13 February 2019, from the Solicitors instructed by the defendant, which stated: -

"the current defendant named in the proceedings, namely Pat the Baker Unlimited Company had no involvement whatsoever in the business and asset purchase agreement which your client refers to and therefore, the proceedings are manifestly unstateable. Whilst it is alleged that KPMG (the receivers of IPB) agreed to the continuation of the agreement dated 19th January, 2015 with Pat the Baker Unlimited Company that proposition is simply factually untrue and we refer you to the correspondence from Arthur Cox dated 13th January, 2017 and furthermore, correspondence dated 15th December, 2015 from Irish Pride Fine Foods to your client which we attach for your convenience."

**Applicable legal principles**

10. The legal principles, which a court should apply on an application such as this, were set out recently, and comprehensively, in the judgment of Costello J. of the Court of Appeal in *Trafalgar Developments Limited & Ors. v. Dmitry Mazepin and Ors.* [2019] IECA 218: -

**"The Legal Principles Applicable to Applications to Strike Out Proceedings Pursuant to the Inherent Jurisdiction of the Court"**

50. Since *Barry v. Buckley* [1981] IR 306, it has been recognised that the court has an inherent jurisdiction to strike out, or stay proceedings, if they are frivolous or vexatious or are bound to fail. The jurisdiction exists to ensure that an abuse of the process of the courts does not take place. All the authorities emphasise that it is an exceptional jurisdiction to be exercised sparingly and only adopted when it is clear that the proceedings are bound to fail and not where the plaintiff's case is very weak (*Keohane v. Hynes* [2014] IESC 66 and *Sun Fat Chan v. Osseous Ltd.* [1992] 1 IR 425). In *Jodifern Ltd. v. Fitzgerald* [2000] 3 IR 321, Barron J. said at p. 333:-

'In my view, a defendant cannot succeed in an application to strike out proceedings upon the basis that they disclose no reasonable cause of action or are an abuse of the process if the Court, on the hearing of such application, has to determine an issue for the purpose of deciding whether the plaintiff will succeed in the action. It is not the function of the court to determine whether the plaintiff will succeed in the action.

The function of the Court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontrovertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself.' (emphasis added)

51. As Murray J. pointed out in *Jodifern*, there is no such thing as a summary trial in our rules of procedure (save as provided for in the Rules of the Superior Courts which do not apply in this case). In *Moylist Construction Ltd. v. Doheny* [2016] IESC 9, Clarke J. stated:-

'Depriving the parties of a full trial in whatever form is appropriate to the proceedings concerned is a departure from the norm, and one which should only be engaged in when it is clear that there is no real risk of injustice in adopting that course of action.'

At para. 5.9, he cautioned that the court must avoid slipping into the error of giving the defendant '*the type of summary disposal which our procedural law does not provide for and which Murray J. cautioned against in Jodifern. Such issues, by analogy with McGrath, cannot safely be dealt with in the confines of a motion on affidavit.*'

52. *In Lopes v. Minster for Justice, Equality & Law Reform* [2014] IESC 21, Clarke J. stated:-

'2.5 It is also important to remember that a plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail ... all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in *Sun Fat Chan* (at p. 428), that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.'

53. *In Keohane v. Hynes* [2014] IESC 66, Clarke J. stated:-

'6.9 ... 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.'

54. The question for the Court on an application to strike out proceedings in reliance on the court's inherent jurisdiction was described by Clarke J. in *Lopes* as:-

'...can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merit...''

#### **Application of principles**

11. The closest which the plaintiff comes to making a case against the defendant is the statement in the affidavit of Mr. O'Callaghan, on the part of the plaintiff, stating that the defendant "*at the material time were trading under the style and title of Irish Pride*

*Bakeries Unlimited ...*". No documentary evidence has been produced to support this contention. It is merely an assertion without more. It is clear to me that the plaintiff has, in fact, named the wrong defendant in these proceedings. Having done so, the proceedings are bound to fail.

**Conclusion**

12. By reason of the foregoing, I will accede to the application of the defendant and dismiss the proceedings.