APPROVED **[2023] IEHC 310**

THE HIGH COURT

2020 No. 4748 P

BETWEEN

PATRICK COEN
ELLEN COEN

PLAINTIFFS

AND

MARK DOYLE
MARK DOYLE BUILDING CONTRACTORS LIMITED
BALLINAGAM UPPER CONSULTING LIMITED T/A MARK DOYLE BUILDING CONTRACTORS
MICHAEL BROWNE T/A BBA ARCHITECTURE

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 June 2023

INTRODUCTION

1. This judgment is delivered in respect of an application by two of the defendants to be released from these proceedings. The application is, nominally, made pursuant to the provisions of Order 15 of the Rules of the Superior Courts. The substance of the application, however, is that there is no reasonable basis for the claim against either of the two relevant defendants. This is an application more

properly made pursuant to the court's inherent jurisdiction to dismiss proceedings as an abuse of process.

PROCEDURAL HISTORY

2. These proceedings involve a dispute in respect of a construction contract. It is the plaintiffs' case that they engaged the first and second defendants in respect of a design and build project involving a property in Cabinteely, Dublin ("*the construction project*"). The first defendant is an individual and the second defendant is a company incorporated with limited liability. The first defendant is the principal shareholder of the second defendant.

3. The first defendant denies that he has any contractual liability to the plaintiffs and asserts that his only involvement in the construction project was as a director of the second defendant. The first defendant submits that he is entitled to trade through a limited liability company and has averred that he would never work as a building contractor in his own right and through the company at the same time.

4. The third defendant is a company which has been incorporated since the date of the construction project the subject-matter of these proceedings. The plaintiffs' case against the third defendant is pleaded as follows at paragraphs 53 to 54 of the statement of claim:

> "53. Notwithstanding the incorporation of the second named Defendant, the use of the first and/or second named Defendants of the trading name *Mark Doyle Building Contractors*, the third named Defendant was incorporated on 12th June, 2018 and taking the former registered office address of the second named Defendant. The third named Defendant has similar directors to the second named Defendant being the first named Defendant and Carla Fusciari and the first named Defendant is the company secretary to both the second and third named Defendants. The first set of accounts for the third named Defendant to

> 31st May, 2019 showed an inter-company debt between the second and third named Defendants of €370,000.00 notwithstanding which the accounts of the third named Defendant showed a cash figure of €698,000.00 from eleven months of trading. Further, the third named Defendant registered as a trading name the name Mark Doyle Building Contractors.
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> 54. In circumstances where the management, business and trading name of the second and third named Defendants are similar and where the profits for the third named Defendant and for its first eleven months of trading to 31st May, 2019 showed a profit of €506,446.00 and where it appears there have been transfer of assets from the second named Defendant to the third named Defendant, the Plaintiffs seek an Order treating the businesses of the second and third named Defendants as a single entity and/or seek damages as against the third named Defendant as may arise."

5. In short, the plaintiffs seek to pierce the corporate veil and to hold the third defendant liable for any damages awarded against the second defendant. The basis for this claim against the third defendant has been elaborated upon in an accountant's report filed on behalf of the plaintiffs.

6. At an earlier stage, the second defendant brought an application, pursuant to the Arbitration Act 2010, to have the proceedings stayed pending the reference of the dispute to arbitration. This application was refused for the reasons set out in a judgment delivered by the High Court (Barniville J.) on 25 March 2021, *Coen v. Doyle* [2021] IEHC 244. This earlier judgment is relevant insofar as it held that there is no written agreement between the parties. The earlier judgment expressly left over for further consideration the separate question as to whether the oral contract between the parties implicated both the first and second defendants.

ORDER 15

7. The two notices of motion each refer to Order 15, rule 14 which provides as follows:

> "Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court at any time before trial by motion or at the trial of the action in a summary manner."

8. As explained by the High Court (Baker J.) in *Irish Bank Resolution Corporation Ltd v. Lavelle* [2015] IEHC 321 (at paragraph 26), the purpose and effect of Order 15, rule 14 is to fix the time at which an application to add, strike out or substitute a plaintiff or defendant may be made: it is not an empowering provision.

9. Presumably, the motions were intended to refer, instead, to the provisions of Order 15, rule 13. This rule, insofar as relevant, provides as follows:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. […]."

10. As appears, the rule is concerned with the misjoinder of a party, i.e. where a party has been improperly joined to proceedings. This concept requires something more than that a defendant may ultimately be found to have a good defence to the proceedings. Rather, it implies that there is some impediment to the joinder of that party.

11. Counsel on behalf of the fourth defendant helpfully brought my attention to the judgment of the High Court (Baker J.) in *Raymond v. Moyles* [2017] IEHC 688. That judgment contains a very useful discussion of the type of impediment which might ground a successful application to strike out pursuant to Order 15. The examples cited include circumstances where the presence of a party would be redundant because another party is the proper *legitimus contradictor* to the proceedings; where authorisation was required prior to the institution of proceedings against a party but had not been obtained; and where a party is immune from suit.

12. The judgment goes on to say that the jurisdiction under Order 15 is not one which can be engaged in circumstances where—as in the present proceedings—it is sought to release parties on the grounds that they were not the contracting parties. See paragraphs 25 and 26 of the judgment as follows:

> "I do not consider that the jurisdiction under O. 15 by which a court may remove a party 'improperly' joined, or a party who was not a necessary party, is one that may be engaged in the present case. It could not be said that the first, second and third defendants were improperly joined in the sense that they are not necessary parties. It may emerge in the course of the trial that they were not the true contracting parties, but it could not be said that they are not necessary parties to the claim as pleaded.
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> Further, I consider that the provisions of O. 15 are more applicable to a case where it can readily be ascertained from the proceedings, from the nature of the relief claimed or the statutory or other basis of that relief that a party is not a necessary party in the true sense to the proceedings."

13. I respectfully adopt this analysis as a correct statement of the law. The claim advanced by the plaintiffs in the present case is that the first defendant was one of the two parties with whom the plaintiffs entered a contract. It cannot be said, therefore, that the first defendant is not a necessary party to the claim as pleaded.

The proper respondent to a claim for a breach of contract is the counterparty to the asserted contract. The first defendant has thus been properly joined to the proceedings for the purposes of Order 15. This is so notwithstanding that the first defendant refutes the allegation that he was a contracting party. It is ultimately a matter for the trial judge to determine who the contracting parties were.

JURISDICTION TO STRIKE OUT OR DISMISS PROCEEDINGS

14. Although the application has, formally, been brought pursuant to Order 15, it is, in substance, an application to dismiss the proceedings as bound to fail against the two defendants. The plaintiffs have, very fairly, not sought to rely on a technical objection to the form of the relief sought in the two motions but have instead engaged with the application on the assumption that it is, in effect, an application to dismiss.

15. Before embarking upon any consideration of the merits of the two motions under this heading, it is necessary first to identify the *limitations* attendant on the court's jurisdiction to strike out or to dismiss proceedings. The jurisdiction is intended to protect against an abuse of process. The principal question for the court in determining such an application is whether the very act of *instituting* the proceedings represents an abuse of process. It is not enough that the court might be satisfied that the case is a very weak one and is likely to be successfully defended. Rather, the court must be satisfied that the proceedings disclose no cause of action and/or are bound to fail.

16. For the reasons explained by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21, [2014] 2 I.R. 301 (at

paragraphs 16 to 18), it is important to distinguish between the jurisdiction to strike out and/or to dismiss proceedings pursuant to (i) Order 19 of the Rules of the Superior Courts, and (ii) the court's inherent jurisdiction. The application before the court in the present case is one made pursuant to the court's inherent jurisdiction.

17. An application under the Rules of the Superior Courts is designed to deal with circumstances where the case as pleaded does not disclose any cause of action. For this exercise, the court must assume that the facts—however unlikely that they might appear—are as asserted in the pleadings. By contrast, in an application pursuant to the court's inherent jurisdiction, the court may, to a very limited extent, consider the underlying merits of the case. If it can be established that there is no credible basis for suggesting that the facts are as asserted, and that the proceedings are bound to fail on the merits, then the proceedings can be dismissed as an abuse of process. In order to defeat a suggestion that a claim is bound to fail on the facts, 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.

18. Whereas it is correct to say that—in the context of an application made pursuant to the court's inherent jurisdiction—it is open to the court to consider the *credibility* of the plaintiff's case to a limited extent, the court is not entitled to determine disputed questions of fact. The limitation on the assessment of credibility has been explained as follows by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21, [2014] 2 I.R. 301 (at paragraph 19):

> "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. It must be recalled that a plaintiff, like any other party, has available the range of procedures provided for in the RSC to assist in establishing the facts at trial. Documents can be discovered both from opposing parties and, indeed, third parties. Interrogatories can be delivered. Witnesses can be subpoenaed and can, if appropriate, be required to bring their documents with them. Other devices may be available in particular types of cases. In order to defeat a suggestion that a claim is bound to fail on the facts, 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 v. Osseous Ltd.* [1992] I.R. 425, 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."

19. The Supreme Court reiterated in *Supermacs Ireland Ltd v. Katesan (Naas) Ltd* [2000] IESC 17, [2000] 4 I.R. 273 that the judge acceding to an application to dismiss must be confident that—no matter what may arise on discovery or at the trial of the action—the course of the action will be resolved in a manner fatal to the plaintiff's contention.

20. The approach to be taken to an application to dismiss in respect of a "*documents case*" has been considered by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21, [2014] 2 I.R. 301 and in *Keohane v. Hynes* [2014] IESC 66. The approach to be taken to an application to strike out or to dismiss proceedings will differ slightly in circumstances where the underlying proceedings turn on the interpretation of (agreed) contractual documents. More specifically, the court may be able to resolve straightforward issues of contractual interpretation on a summary application without the risk of injustice to the parties. This is subject to a number of provisos as follows. First, there must be no factual dispute as to the validity of the contractual documents.

Secondly, it must be accepted that the contractual documents represent the entire agreement between the parties. If, for example, one of the parties alleges that the interpretation of the contract must be informed by oral representations or that a collateral contract exists between the parties, then these are issues which can normally only be properly resolved by a plenary hearing on oral evidence. Thirdly, the contractual documentation must be capable of interpretation on its own terms, i.e. without resort to extrinsic evidence. Finally, the legal issues must be straightforward.

21. In cases where these provisos are fulfilled, it may be legitimate for the court to consider the terms of the contractual documentation on a summary application. If the court concludes that no reasonable interpretation of the contractual documentation could give rise to a claim on the part of a plaintiff—even assuming that all of the facts alleged by the plaintiff would be established at trial—then the proceedings can be dismissed as an abuse of process.

22. It should be emphasised that the present case is not a "*documents case*" in the sense that the term is used in the jurisprudence. The High Court has previously held that there is no written agreement between the parties.

DISCUSSION AND DECISION

23. The first defendant characterises as simply incredible the contention that the plaintiffs thought that they had simultaneously entered into a contract with both the company and its principal. The first defendant lays great emphasis on the fact that the first plaintiff had prepared *draft* contractual documentation in May 2016 which identified Mark Doyle Building Contractors Ltd as the contracting

party. The court is invited to infer from this that the first plaintiff "*knew who he had engaged*".

24. With respect, only limited weight can ever be attached to a *draft* contract which both sides agree was never executed. This is especially so where a full set of the contemporaneous documentation is not before the court on this interlocutory application. Counsel for the first to third defendants confirmed that a number of emails had been written in connection with the draft contract but that copies of same have not been exhibited. It is not apparent, from the limited materials currently before the court, as to why the draft contract was not acceptable to the first and/or second defendants.

25. The fact that the first plaintiff appears to have been aware, as of May 2016, of the existence of a limited liability company does not necessarily support an inference that the plaintiffs ultimately entered into a contract with the company alone. There is material going the other way. The plaintiffs have exhibited, for example, a certificate submitted to the local authority pursuant to the Building Control Act 1990 which appears to have been signed by the first defendant personally, without any reference to the company. This is significant in circumstances where the purpose of the certificate had been to confirm, to the local authority, the identity of the entity who had been commissioned to undertake the relevant works and who was undertaking to comply with the Building Regulations. A person signing such a certificate on behalf of a company, rather than in a personal capacity, should identify that company. The certificate in this case is certainly open to the interpretation that it was the first defendant personally who was to be responsible for the construction project.

26. The plaintiffs have also exhibited a number of invoices which fail to identify that the reference to "*Mark Doyle Building Contractors*" therein is to a limited liability company (as opposed to merely a trading name).

27. The plaintiffs have averred that the first defendant made all the necessary decisions regarding the construction project and was involved intimately with the day-to-day operations. The fourth defendant, the assigned certifier, has averred that he had no record or recollection of dealing with the second defendant in relation to the works and that he believed that at all material times the first defendant was personally engaged in the project.

28. On the basis of this documentation and these averments, it cannot be said that there is no credible basis for suggesting that the facts are as asserted by the plaintiffs and that the proceedings are bound to fail on the merits. The factual dispute between the parties can only be fairly resolved by way of oral evidence and cross-examination. In this regard, the position is broadly similar to that in *Raymond v. Moyles* [2017] IEHC 688 (at paragraphs 35 to 39). Moreover, the case law in relation to the dismissal of proceedings has consistently emphasised that the motion judge must be confident that nothing may arise on discovery that would support the claim. It seems that the discovery of documents may have a significant bearing on the outcome of the present proceedings.

29. I turn next to consider the application to release the third defendant from the proceedings. As appears from the paragraphs of the statement of claim cited earlier, the plaintiffs seek an order treating the businesses of the second and third named defendants as a single entity. The plaintiffs rely in this regard on the principles summarised by the UK Supreme Court in *Prest v. Petrodel Resources* [2013] UKSC 34. This decision held that a court may pierce the corporate veil

where a person, who is under an existing legal liability, seeks to deliberately evade that liability or deliberately frustrate its enforcement by interposing a company under his control.

30. The plaintiffs seek to rely on the following in support of their application to pierce the corporate veil. The third defendant has registered its business name as "*Mark Doyle Building Contractors*", i.e. a name which is almost identical to the company name of the second defendant. The first defendant meets the definition of a controlling shareholder for both companies under the Companies Act 2014. The two companies have the same directors.

31. The plaintiffs allege that the motive for transferring the assets to the new company may not have been for tax planning reasons, as asserted, but rather to strip the cash out from the company. It is averred that the filed accounts of the second defendant indicate that there has been a significant reduction in profitability in the years 2018 and onwards. This is contrasted with the profitability of the third defendant. It is also averred that the second defendant has ceased trading as of 30 April 2019. The abridged financial statements filed by the second defendant show no trade debtors/creditors as of 30 April 2021. The plaintiffs have also exhibited a report from an accountant which opines that the assets of the second defendant were transferred to the third defendant at an undervalue.

32. It is contended on behalf of the first and second defendants that the third defendant company has been incorporated for tax planning purposes. However, as the plaintiffs correctly observe, no taxation, accounting or legal advice has been exhibited. This is material in respect of which the plaintiffs may be entitled to discovery prior to the trial of the action.

33. For these reasons, therefore, I am satisfied that there is a significant factual dispute as to the precise status of the third defendant and as to its relationship and interaction with the second defendant. There are arguable grounds for saying that the plaintiffs, having had the benefit of discovery and cross-examination, might be able to persuade the trial judge to make an order piercing the veil between the two companies and treating them as a single entity in accordance with the principles identified in the UK Supreme Court decision. It cannot be said, therefore, at this stage that the pursuit of a case as against the third defendant represents an abuse of process.

CONCLUSION AND PROPOSED FORM OF ORDER

34. The application to have the first and third defendants released from the proceedings is refused. As to costs, my *provisional* view is that the plaintiffs and the fourth defendant, having been entirely successful in resisting the motions, are entitled to recover their legal costs as against the first and third defendants. This is the default position under Section 169 of the Legal Services Regulation Act 2015. If any party wishes to contend for a different costs order, I will hear submissions on Friday 23 June 2023. I will also address the costs of the earlier aborted hearing in April 2022.

35. It follows as a consequence of the refusal of the two motions that the first and third defendants must now deliver their defences. I make an order, pursuant to the motion issued by the plaintiffs, directing the delivery of defences within 21 days.

Appearances

Aillil O'Reilly SC and Neal Flynn for the plaintiffs instructed by Dillon Eustace
Arran Dowling-Hussey for the first, second and third defendants instructed by Ensor O'Connor
Stephen O'Connor for the fourth defendant instructed by Beale & Company