APPROVED **[2024] IEHC 113**

THE HIGH COURT

2020 5880 P

BETWEEN

HGREIT II MONTROSE OPCO LLC
HGREIT II MONTROSE LLC

PLAINTIFFS

AND

COGENT PROJECT & COST MANAGEMENT LTD
ETHOS ENGINEERING LTD
MICHAEL PUNCH & PARTNERS LTD
AIRCONMECH LTD
DEANE ROOFING & CLADDING LTD
SWIFT ENGINEERING SERVICES & SALES LTD
KING & MOFFATT IRELAND LTD
DEREK TYNAN ASSOCIATES LTD
JEREMY GARDNER ASSOCIATES IRELAND LTD
WALLS CONSTRUCTION LTD

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 1 March 2024

INTRODUCTION

1. This judgment is delivered in respect of an application to strike out the within proceedings as an abuse of process. The proceedings relate to a construction project consisting of the conversion of a former hotel into student accommodation. The current owners of the property contend that the

construction project was carried out negligently and in breach of contract. More specifically, it is alleged that the works did not comply with the requisite fire safety standards. It is further contended that the current owners had to carry out significant remediation works, and it is sought to recover the costs so incurred from the defendants.

2. The strike out application is brought by one of the defendants, namely, Deane Roofing & Cladding Ltd ("*Deane Roofing*"). The claim made by the Plaintiffs against Deane Roofing is that part of its roofing works was defective in that it failed to ensure that the non-combustible roofing extended above the fire compartment walls through to the roof finish.

3. In brief, Deane Roofing contends that it is entitled to an order striking out the proceedings against it in circumstances where it has put uncontroverted affidavit evidence before the court to the effect that it had no responsibility for any of the defective works. This affidavit evidence indicates that Deane Roofing installed the external roof and was not required to integrate the external roof with the fire combustible works underneath.

4. It is further contended that the failure of the Plaintiffs to reply to this affidavit evidence—whether by establishing that there is evidence to support their claim against Deane Roofing or by establishing that there is a "*credible basis*" for believing that there could be evidence which will support the claim—justifies the making of an order striking out the proceedings as an abuse of process.

5. The unusual feature of the case is that the strike out application has been brought in circumstances where the Plaintiffs are still engaged in the review of the extensive discovery documentation which has been furnished to them by certain of the defendants including, relevantly, Deane Roofing.

TEST GOVERNING AN APPLICATION TO STRIKE OUT

6. The jurisdiction to strike out or to dismiss proceedings is intended to protect against an abuse of process. The principal question for the court in determining such an application is whether the *institution* of 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.

7. 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. 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.

8. 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.

9. 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* (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."

10. These principles were elaborated upon by the Supreme Court in *Keohane v. Hynes* [2014] IESC 66 (at paragraphs 6.5 and 6.6):

> "[…] the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings. However, as again noted by Murray J. in *Jodifern*, whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis.

> It is for that reason that all of the jurisprudence emphasises that the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law. It is against that background that the extent of the court's entitlement to look at the facts needs to be judged."

11. The type of circumstances in which an abuse of process might be found are summarised as follows (at paragraph 6.10):

> "It is an abuse of process to bring a claim based on a breach of rights or failure to observe obligations where those rights and obligations are defined by documents and where there is no reasonable basis for suggesting that the relevant documents could establish the rights and obligations asserted. Likewise, it is an abuse of process to maintain a claim based on facts which can only be established by a documentary record and where that record could not sustain any necessary part of the factual assertions which underlie the case. Finally, it is an abuse of process to maintain a claim based on a factual assertion in circumstances where there is no evidence available for that assertion and, importantly, where there is no reasonable basis for believing that evidence could become available at the trial to substantiate the relevant assertion. However, the bringing of a claim based on a factual assertion for which there is or may be evidence (even if the defendant can point to many reasons why it might be argued that a successful challenge could be mounted to the credibility of the evidence concerned) is not an abuse of process. It is for that reason that a court cannot properly engage with the credibility of evidence on a motion to dismiss as being bound to fail and it is for that reason that the very significant limitations which I have sought to identify exist in relation to the extent to which a court can properly engage with the facts on such an application."

DISCUSSION

12. It is well established that, for the purpose of a strike out application, the onus lies with a defendant to establish that the plaintiff's claim is bound to fail. The specific issue which arises in the present case is the nature of the evidential

burden upon a plaintiff. This, in turn, requires consideration of what is meant by the concept of a "*credible basis*" referred to in the case law, i.e. the concept that a plaintiff must put forward a "*credible basis*" for suggesting that it may be possible to establish at trial the facts which are necessary for success in the proceedings.

13. The position adopted by the moving party, Deane Roofing, is that once it had adduced affidavit evidence which indicated that it had no responsibility for the defective works, there was then an obligation upon the Plaintiffs to engage with that evidence. Their failure to do so meant, or so it is said, that the claim against Deane Roofing is no more than a "*bare assertion*".

14. Counsel helpfully referred me to the judgment in *GE Capital Woodchester Ltd v. Aktiv Capital* [2009] IEHC 512. That judgment was delivered by the High Court (Clarke J.) in the context of an application to enter summary judgment. The test governing such an application is analogous to that governing an application to strike out proceedings as an abuse of process. In each instance, the court is being asked to determine proceedings on a peremptory basis, without the necessity for a plenary hearing. A defendant who seeks to resist an application to enter summary judgment is required to demonstrate that there is a credible defence to the proceedings. The case law indicates that the mere assertion of a defence will be insufficient. This aspect of the test for summary judgment is elaborated upon in *GE Capital Woodchester Ltd v. Aktiv Capital* as follows (at paragraphs 6.5 and 6.6):

> "[…] It is clear that the mere assertion of a defence is insufficient. Insofar as factual issues arise it is ordinarily necessary for a defendant to place affidavit evidence before the court setting out facts which, if true, would arguably give rise to a defence. However, that proposition should not, in my view, be taken over literally. For example, the

> factual basis on which a defendant may wish to oppose a plaintiff's claim may not derive from facts within the defendant's own knowledge. There may be a variety of circumstances, nonetheless, where the defendant may be able to persuade the court that the *Aer Rianta* test is met. Where, for example, a defendant establishes a credible basis for suggesting that witnesses will be available who will depose to facts which might arguably give rise to a defence, the fact that the evidence of those witnesses is not strictly speaking before the court in the form of an affidavit sworn by such witness will not necessarily be fatal. To take but one, albeit extreme, example a defendant may have been told something by a witness who is unwilling to swear an affidavit but who would be amenable to subpoena. Provided the defendant concerned puts forward a credible basis for the contention that such evidence might be forthcoming, it could never be the case that the relevant defendant would be deprived of the opportunity of requiring the witness concerned to attend under subpoena and seeking to establish relevant facts through the evidence of that witness.
>
> Likewise, there will always be cases where the true nature of a defendant's defence will rest in evidence (whether documentary or otherwise) which will only become available through procedural devices such as discovery, interrogatories or the like. That is not to say that it is open to a defendant, on a summary judgment application, to make a vague and generalized contention which would amount to nothing more than an assertion that something useful to his case might turn up on discovery or the like. However, it seems to me that where a defendant satisfies the court that there is a credible basis for asserting that a particular state of facts might exist which state of facts, if same were in truth to exist, could be established by appropriate discovery and/or interrogatories, then such defendant should be entitled to liberty to defend. It should, again, be emphasized that mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of the motion for summary judgment, possible to put before the court direct evidence of the assertion concerned."

15. The principles from the case law on summary judgments cannot be applied unthinkingly to an application to strike out. Subject to this caveat, the above analysis is nevertheless instructive. It elaborates upon the interplay between (i) the obligation on a party to establish a credible case, and (ii) that party's

entitlement to avail of procedural mechanisms, such as the discovery of documents. Just as there will be cases where the true nature of a defendant's defence will rest in evidence (whether documentary or otherwise) which will only become available through procedural devices such as discovery, interrogatories or the like, so too will there be cases where a plaintiff cannot identify the precise evidence upon which it will pursue its claim until after the discovery process has been completed. This is subject always to the proviso that a prospective plaintiff cannot seek discovery for the purpose of deciding whether or not they have a case at all.

16. It should be explained that the Plaintiffs in the present case only acquired ownership of the property a number of years after the construction project had been carried out. The Plaintiffs state that they do not know what the allocation of duty and responsibility was between the main contractor and its domestic sub-contractor, Deane Roofing. Accordingly, the Plaintiffs sought and obtained discovery for the purpose, *inter alia*, of ascertaining the precise allocation as between the main contractor and the various subcontractors and other participants in the construction project, such as the fire safety consultant. Crucially, Deane Roofing did not object to making discovery. There was no suggestion, for example, that the Plaintiffs were engaged in a trawling or fishing exercise. The affidavits of discovery were duly delivered in mid-December 2023 and the Plaintiffs are currently engaged in a review of the discovered documents. Counsel on behalf of the Plaintiffs has suggested that this review, insofar as relevant to the role of Deane Roofing, should be complete within a period of six weeks.

17. For the reasons which follow, I am satisfied that the high threshold for striking out the claim as against Deane Roofing as an abuse of process has not been met. It has not been contended that there is no credible basis for the claim that the fire safety measures in the student accommodation were found to be non-compliant with regulatory requirements. Nor has it been contended that there is no credible basis for the claim that significant construction works were required to remediate this non-compliance and that the Plaintiffs incurred significant costs in this regard. There is, of course, a fierce dispute as to whether any or all of the defendants bear any legal liability for this state of affairs.

18. The Plaintiffs have demonstrated a "*credible basis*", subject to the completion of their review of the discovered documents, for their assertion that Deane Roofing may have responsibility for defective fireproofing in relation to the roofing works carried out by it. It is common case that Deane Roofing was engaged as a domestic subcontractor by the main contractor. There is, however, disagreement as between the various parties as to the scope of works for which it had been engaged. The main contractor has expressly pleaded in its defence that Deane Roofing were engaged for a package of cladding and roofing works, to include demolition/alteration to the sub and super structures (paragraph 48). It is correct to say, as counsel for Deane Roofing does, that the main contractor has neither served a notice of indemnity and contribution upon Deane Roofing, nor made any allegation of wrongdoing against it. Nevertheless the discrepancy on the pleadings in respect of the parties' understanding of the scope of works cannot, however, be dismissed as a red herring as suggested by counsel. Rather, it illustrates the very real practical

difficulty faced by the Plaintiffs, pending the completion of their review of the discovered documents, in further particularising their claim against the various parties.

19. Counsel for Deane Roofing was critical of the failure on the part of the Plaintiffs to engage with the affidavit evidence adduced on its behalf. Much reliance was placed on this evidence being "*uncontroverted*". With respect, there will only be limited circumstances in which the evidential burden shifts to a plaintiff in the context of an application to strike out as an abuse of process. This will, generally, only occur where the claim being advanced by a plaintiff is directly contradicted by the terms of a written agreement between the parties (the execution of which is not itself in dispute). In such a case, a plaintiff might be expected to adduce affidavit evidence which goes beyond a mere assertion. (This subject is discussed in detail in *Keohane v. Hynes* [2014] IESC 66 (at paragraphs 6.8 to 6.11)). Here, it is common case that Deane Roofing was engaged in relation to an overall construction project, part of which appears to have been non-compliant. It is not unreasonable for the Plaintiffs to apprehend that Deane Roofing may have some responsibility. The Plaintiffs are seeking to clarify the position by reviewing the discovery documentation and this may ultimately rule out Deane Roofing. It cannot, however, be said that it represents an abuse of process for the Plaintiffs to have joined Deane Roofing to the proceedings.

20. Counsel also sought to suggest that there was an obligation on the Plaintiffs to adduce evidence to demonstrate that there is a credible basis for thinking that the content of the discovered documents might support them in establishing their claim against Deane Roofing. With respect, it is difficult to understand

why the court would need expert evidence in this regard. The court is entitled to take judicial notice of the fact that documents in respect of a construction contract are likely to contain material which identifies the precise scope of works which a subcontractor has responsibility for and undertook.

21. For completeness, it is necessary to address, briefly, the relevance of the fact that a number of the defendants have served notices of indemnity and contribution on Deane Roofing. Two of these defendants had intimated an intention to make submissions at the hearing of the application to dismiss the proceedings. One of these filed an affidavit opposing the application. In the event, there was no appearance at the hearing on 31 January 2024. A letter had been sent in advance of the hearing indicating that the defendant was continuing to take a "*neutral*" position in relation to the application.

22. Counsel on behalf of Deane Roofing submitted, correctly, that if Deane Roofing is successful in its application to strike out the Plaintiffs' claim against it on the basis that the claim is bound to fail, then it follows that Deane Roofing cannot be a "*concurrent wrongdoer*" within the meaning of the Civil Liability Act 1961. Albeit that it would have been reached on the basis of a summary hearing, there would have been a determination by the High Court, *on the merits*, that Deane Roofing is not liable. This determination would create a *res judicata* as between the parties. In such a scenario, the position of the other parties under the Civil Liability Act 1961 would not be prejudiced: in a scenario where the High Court held that Deane Roofing is not a "*concurrent wrongdoer*", the Plaintiffs could not be "*identified*" with any wrongdoing on the part of Deane Roofing, and the other defendants would have no entitlement

to recover against Deane Roofing pursuant to their respective notices of indemnity and contribution.

23. Different considerations would apply in cases where the claim against a particular defendant is struck out on the grounds of delay, without any adjudication on the merits. See, for example, *O'Sullivan v. Canada Life (Ireland) Ltd* [2022] IEHC 657, and *Sneyd v. Stripes Support Services Ltd* [2023] IEHC 68.

CONCLUSION AND PROPOSED FORM OF ORDER

24. The moving party, Deane Roofing & Cladding Ltd, finds itself in the unhappy position that it is enmeshed in potentially lengthy legal proceedings in circumstances where it believes that it has a full defence to any claim against it. The moving party has sought to short-circuit matters by bringing on an application to set aside the proceedings as an abuse of process. Unfortunately for it, the case law makes it clear that such an application is not a means for inviting the court to resolve issues on a summary basis. Rather, the jurisdiction to set aside proceedings is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law.

25. For the reasons explained herein, it cannot be said that there is no credible basis for the Plaintiffs' claim as against Deane Roofing, at least not until such time as the ongoing review of the discovered documents is completed. Accordingly, the high threshold for striking out the claim as against Deane Roofing as an abuse of process has not been met.

26. It is important, however, that the nature and extent of the claim (if any) to be pursued against Deane Roofing should be clarified once the discovery process is completed. If the Plaintiffs intend to pursue their claim, then further and better particulars should be provided of the wrongdoing alleged as against Deane Roofing. If, alternatively, the Plaintiffs decide not to pursue the claim against it, Deane Roofing should be notified of this as soon as is practicable.

27. As to the allocation of the legal costs of the motion, my *provisional* view is that such costs should be made costs in the cause. This provisional view is proposed on the basis that Deane Roofing should not be exposed to costs liability in the event that it should not have been joined to the proceedings. I will, however, hear further from counsel before making a final determination on the allocation of the costs of the strike out application.

28. These proceedings will be listed before me on Thursday 7 March 2024 at 10.30 AM for final orders.

Appearances

Michael Howard SC and Patricia Hill for the plaintiffs instructed by William Fry LLP
Stephen Dowling SC and James Burke for the fifth defendant instructed by Addleshaw Goddard LLP

Approved Garrett Simons