[2020] IEHC 64

THE HIGH COURT

[2020/5003P]

BETWEEN

AIRSCAPE LIMITED

PLAINTIFF

AND

INSTANT UPRIGHT LIMITED

DEFENDANT

Judgment of Mr. Justice Denis McDonald delivered on 29th January, 2021.

The application before the court

1. This is an application brought by the defendant under the inherent jurisdiction of the court to dismiss these proceedings in their entirety as an abuse of process or, in the alternative, to dismiss certain claims made in the proceedings on the basis that they are bound to fail. The application is made against the backdrop of a previous application by the plaintiff for an interim freezing order against the defendant on an *ex parte* basis which resulted in an order being made which the defendant says had a significant impact on its ability to carry on its normal activities. The interim order was subsequently discharged following an *inter partes* hearing, in the course of which an application for an interlocutory injunction (in similar terms to the interim order) was withdrawn by the plaintiff and an order for costs was made against the plaintiff.

2. The defendant is understandably aggrieved by the fact that the freezing order caused it considerable inconvenience and, it is said, reputational damage. However, it is important to bear in mind that I am not asked on this application to consider any liability which the plaintiff may potentially have pursuant to the undertaking as to damages given by it at the time the interim freezing order was originally made. It is equally important to bear in mind that the previous hearing which took place (at which the interim order was discharged and the interlocutory application withdrawn) was of an interlocutory nature only and the outcome of that hearing has no bearing on whether the plaintiff has or has not a good cause of action against the defendant.

3. In my view, the present application falls to be determined on its own terms. On an application of this kind, the defendant has the onus of demonstrating that there is a sufficiently clear basis established, at this stage of the proceedings, to demonstrate that the plaintiff's claim should be dismissed *in limine.* As noted in para. 1 above, the present application is based on two separate grounds:

   (a) In the first place, it is alleged that the proceedings, as a whole, constitute an abuse of process. This claim is advanced on the basis that, for a time, the defendant was faced with two sets of proceedings launched by the plaintiff against it in parallel, namely summary summons proceedings issued in March, 2020 and the present proceedings subsequently issued in July 2020; and

   (b) In the alternative, the defendant seeks an order striking out those aspects of the statement of claim which contain allegations of fraud, deceit, fraudulent misstatement and fraudulent misrepresentation. The defendant maintains that,

insofar as those claims are pleaded, the case made is bound to fail. On the same basis, the defendant also seeks an order striking out those paragraphs of misstatement of claim in which a claim is made in respect of the proceeds of an insurance policy put in place by the defendant.

Background

4. The plaintiff is the landlord of an industrial unit in Park West Industrial Park in Dublin 12. The unit was let by the plaintiff to the defendant pursuant to a lease dated 21st December, 2001 for a term of 25 years at an annual rent of €1,512,722.77. The terms of the lease were subsequently varied (on a temporary basis) pursuant to an agreement dated 8th August, 2017 under which the plaintiff agreed to a retrospective abatement of annual rent to €600,000 from 1st January, 2015 and €750,000 from 1st January, 2017. On 4th March, 2018 a significant snowstorm occurred causing a build-up of snow on the roof of the premises resulting in a collapse of the roof and rendering at least part of the premises unfit for purpose. For a time, the defendant remained in occupation of the usable part of the premises but on 26th October, 2018 the defendant handed over possession of part of the premises to allow necessary works to be carried out to repair the damage. On 31st January, 2019 the defendant vacated the remainder of the premises for the same purpose. In the meantime, on 24th April, 2018, the defendant, with a view to continuing its manufacturing activities, found a different factory premises at Citywest from which to operate. According to the statement of claim, the defendant took up occupation of the Citywest premises in June 2018 but the plaintiff contends that it understood this occupation to be temporary and, in para. 36 of the statement of claim, it is contended that between June 2018 and April 2019, the plaintiff carried out the repair and reinstatement works to the Park West premises on the basis that the defendant would resume occupation of those premises at the conclusion of the works.

5. The plaintiff's case is that practical completion of the reinstatement works were achieved on or about 26th April, 2019 and were duly certified by the supervising architect on 1st May, 2019. However, the defendant did not accept that the premises had been appropriately or adequately reinstated. This is reflected, for example, in correspondence issued by the defendant to the plaintiff on 7th August, 2019. It is also reflected in the affidavit sworn by Mr. Noel Corcoran sworn on behalf of the defendant in response to the application for an interlocutory injunction. In para. 15 of that affidavit, Mr. Corcoran contends that the plaintiff did not complete the reinstatement of the Park West premises to the condition it was in when the roof collapsed. In particular, Mr. Corcoran contends that the plaintiff only carried out very minor mechanical and electrical works and it failed to undertake the extensive mechanical and electrical works necessary to fully reinstate the premises. In para. 17 of his affidavit Mr. Corcoran says that there was *"no way that the defendant could move back into the plaintiff's premises at Park West as it simply could not resume its manufacturing business as reinstatement had not occurred to the level and extent that the premises had been in prior to the collapse".*

6. Under Clause 2.4 of the 5th Schedule to the lease, provision was made that in the event that the unit was rendered unfit for use and had not been reinstated or substantially

reinstated within a period of two years, the defendant should have the right, by giving three months' notice in writing to the plaintiff to terminate the lease. On 25th March, 2020, a notice of termination of the lease was served by the defendant in reliance on the provisions of Clause 2.4 and on the basis that the premises had not been substantially reinstated within a period of two years since the snow event. Not long prior to the service of that notice, the plaintiff had issued summary summons proceedings (2020 No. 75S) against the defendant claiming payment of unpaid rent. A motion seeking liberty to enter final judgment in those proceedings was subsequently issued on 26th June, 2020 which was given a return date in July 2020. Thereafter, on 10th July, 2020, the plaintiff issued these plenary proceedings in which it claimed damages for breach of contract and wrongful termination of the lease and also sought orders restraining the defendant from reducing its assets below an aggregate value of €3,647,982. In addition, the plenary summons claimed damages for deceit, fraudulent misstatement and/or fraudulent misrepresentation.

7. On the same day an ex parte application was made for an interim injunction restraining the defendant from reducing its assets below the sum mentioned in para. 6 above. In the affidavit grounding that application sworn by Mr. Gerald Comaskey on behalf of the plaintiff it was revealed that, in the period after receipt of the letter of 25th March, 2020 terminating the lease, the plaintiff had agreed terms with a new tenant. Mr. Comaskey also referred to the plaintiff's solicitor's letter dated 7th July, 2020 in which the defendant was notified that, with a view to mitigating its losses, the plaintiff would accept the return of the premises with effect from 25th June, 2020 and was claiming payment of the rent due up to that date in the sum of €2,316,667. Mr. Comaskey said that, prior to sending the letter of 7th July, 2020, the plaintiff had caused a search to be carried out in the Companies Registration Office which had disclosed the 2018 accounts and financial statements which had been filed on 14th May, 2020. Mr. Comaskey, in his affidavit, highlighted a note to those accounts in which it was stated that, in March 2018, the unit in Park West had been damaged by a snowstorm and that, as a consequence, the defendant had to move to new premises but had the benefit of business interruption insurance which *"included the cost of setting up new premises in Citywest".* The note revealed that the bulk of the insurance receipt represented €2,119,890 in respect of the capitalisation of leasehold improvements. In addition, in the 2018 directors' report (signed in May 2020) there was a statement that, in 2019, the company had agreed a final settlement with regard to its insurance claims in the sum of €15.02 million. In para. 51 of Mr. Comaskey's affidavit, he expressed alarm that he had only discovered on the previous day that the defendant had ceased trading from its Citywest premises. In his affidavit he also expressed concern that arrears of rent in the sum of €1,331,315.88 had not been paid. In addition, Mr. Comaskey estimated that the plaintiff would suffer a future loss of rent of €2,316,667.00. In para. 57 of his affidavit, he stated that, in light of the "*very recent closure of its business on the apparent existence of an industrial dispute I apprehend that there are assets in the State which are liable to be moved and/or disposed of in the imminent future, the effect of which will be to prevent the plaintiff from recovering damages and executing upon the judgment to which it is … entitled".* An interim order was made by the court on the same day in the terms sought by the plaintiff.

8. The defendant was greatly concerned by the making of the interim order and strongly contested the subsequent application for an interlocutory order. At the same time, the defendant sought to vary the interim order having regard to its extremely broad effect which went so far as to prevent it from dealing with its own bank account. Affidavits were exchanged between the parties in the course of June and July 2020. In the course of a subsequent affidavit sworn by Mr. Comaskey on 21st July, 2020, Mr. Comaskey raised for the first time an allegation that the defendant concealed from the plaintiff the fact that it had entered into a ten-year lease in respect of the City West unit. Mr. Comaskey said that the plaintiff had understood that the defendant had moved to the City West unit on a temporary basis only and that the first time the plaintiff became aware that a ten-year lease had been entered into was when a copy of the lease was provided by the defendant by way of an exhibit in the course of the exchange of affidavits addressing the application for an interlocutory injunction. According to Mr. Comaskey, the lease demonstrated that, contrary to what the plaintiff had been led to believe, the defendant's occupation of the City West unit was not temporary in nature and that it was "*now apparent that the Defendant had no intention of going back into occupation of the [Parkwest] premises … as it had already obtained an alternative … accommodation under a ten-year term at Citywest, the existence of which it singularly failed to disclose to the plaintiff".*

9. In response to this allegation, an affidavit was sworn on behalf of the defendant by Mr. Noel Corcoran on 22nd July, 2020 immediately prior to the hearing of the application for an interlocutory order. In that affidavit, Mr. Corcoran said, in para. 18, that he took "*grave exception*" to the suggestion that the plaintiff had been misled. He continued:

> *"It was the defendant's intention and it was what I personally envisaged would actually occur as was outlined in person and in writing … that the occupation of the Citywest facility would be temporary. The defendant did genuinely intend returning to Park West and would have had to sub-let or assign its Citywest lease or otherwise pay an exit fee to depart the Citywest lease if it had returned to Park West as had been envisaged originally".*

10. When the application for an interlocutory injunction came on for hearing before O'Moore J. on 23rd July, 2020 counsel for the plaintiff was asked by O'Moore J. why the court should not accept the evidence of Mr. Corcoran and he suggested that the evidence was consistent with the documents which Mr. Corcoran exhibited. It was suggested in the course of the present application that, in response, counsel for the plaintiff effectively conceded that the plaintiff was not going to challenge Mr. Corcoran's averment that the defendant, at the relevant time, believed that it would return to Park West when the property was reinstated. However, I do not read the response of counsel in that way. In my view, the exchange between the court and counsel suggests that there had not been an opportunity to respond on affidavit to what was said by Mr. Corcoran. To the extent that any concession was made, it seems to me to relate only to the extent of the evidence available at the time of the interlocutory hearing. I do not believe that the transcript suggests that counsel made any concession that the plaintiff would not challenge this evidence at trial. Moreover, in the course of the present application, I asked counsel for

the defendant to identify authority for the proposition that a concession made by counsel during the course of an interlocutory application operates as an estoppel that prevents the client (in this case the plaintiff) from thereafter asserting anything to the contrary. No such authority was cited to me for the purposes of the present application.

11. It should also be noted that, during the course of the interlocutory hearing, questions were also raised of counsel for the plaintiff as to whether the plaintiff could demonstrate that it had suffered any loss as a consequence of the alleged misrepresentation as to whether the City West premises were a temporary measure only. In the course of that debate, it was suggested to counsel for the plaintiff that there might be difficulty in proving any loss in circumstances where the plaintiff might be said to have an obligation, under the lease, to reinstate the premises, in any event. While counsel did not have any immediate answer to that question, it is of crucial importance to bear in mind that this was an application for an interlocutory order and the outcome of such an application should not influence the position at trial. The fact that counsel may have had difficulty in responding to a question from the court does not mean that the plaintiff is prevented from maintaining a claim at trial if it is in a position to demonstrate that it has, in fact, suffered loss as a consequence of some actionable wrong on the part of a defendant.

12. Ultimately, on the second day of the hearing of the application for the interlocutory order, counsel for the plaintiff, on instructions, withdrew the application. Thereafter, O'Moore J. vacated the interim order and made an order for costs of the interlocutory application against the plaintiff. In the affidavit sworn by Mr. Declan Murphy, on behalf of the defendant, on 22nd September, 2020, grounding the present application, Mr. Murphy suggested that, during the course of the interlocutory hearing, it was *"manifestly apparent that there was simply no substance nor evidence to support … any of the allegations of dishonesty"*. In my view, it is unnecessary to form any view on that issue. Whether or not there was any evidence to support an allegation of dishonesty at the interlocutory hearing does not, in my view, affect the outcome of the present application. There are many instances of cases where the position at trial is shown to be significantly different to that which appeared at an interlocutory hearing and I therefore do not believe that the outcome of the interlocutory hearing has any bearing for present purposes. That said, it is necessary, in the context of the application to strike out the proceedings as an abuse of process, to have regard to the fact that, at the same time as summary summons proceedings were pending against the defendant, the defendant also had to address the claim made in these proceedings and to defend the application for the injunction.

13. On 7th September, 2020, the statement of claim in these proceedings was delivered. It will be necessary, in due course, to examine the statement of claim in more detail. At this point, it is sufficient to note that, in the statement of claim, the plaintiff claims payment of the alleged rent arrears together with service charges and insurance which it is claimed is due. In addition, the plaintiff makes a case that there was a wrongful refusal by the defendant to resume occupation of the Park West unit and to observe the covenants and conditions of the lease. A claim is also made that the defendant misrepresented, whether intentionally, recklessly or negligently, that its occupation of the

City West premises was temporary in nature and that it intended to return to the Park West premises. It is also alleged that the position maintained by the defendant in relation to the adequacy of the reinstatement works was a device for the purpose of justifying the service of the notice of termination. Thereafter, an allegation is made of deceit and/or fraudulent misrepresentation (which is addressed in more detail below). In addition, it is alleged that the insurance monies paid to the defendant relate to the Park West unit and are held on trust for the plaintiff. In the alternative, it is alleged that the defendant has sought to unjustly enrich itself from the insurance proceeds at the expense of the plaintiff. There are also a number of other claims made but, at this point, it is unnecessary to describe those claims in any greater detail.

The basis upon which the defendant seeks relief

14. In the notice of motion filed on 22nd September, 2020, the defendant seeks an order striking out the proceedings as an abuse of process under the inherent jurisdiction of the court. The defendant seeks such relief on the basis that the plenary proceedings were commenced and pursued at the same time as the summary proceedings which were still pending and after a return date had been procured for the hearing of an application for liberty to enter final judgment. The defendant argues that it is an abuse of process for the plaintiff to run parallel proceedings at the same time against the defendant. In making this case, the defendant seeks to rely on the rule in *Henderson v. Henderson* (discussed further below). In the alternative, the defendant seeks an order striking out the following individual claims:

    (a) The claim for an order that the insurance monies are held by the defendant on trust for the plaintiff;

    (b) The claim for damages for deceit and/or fraudulent misrepresentation;

    (c) The claim for damages for breach of duty and/or negligent misstatement; and

    (d) The claim for equitable compensation.

15. With regard to the alternative claim seeking to strike out certain elements of the claims made, the specific allegations in issue are those pleaded in paras. 69-95 of the statement of claim. The defendant contends that these allegations are bound to fail and are, on that basis, an abuse of process. In making that case, the plaintiffs maintain that the case made in the statement of claim is no more than bald assertion and that there is no credible basis for suggesting that evidence might be available at trial to substantiate it. The defendant therefore contends that it comes within those classes of case where, as Clarke J. (as he then was) accepted in *Keohane v. Hynes* [2014] IESC 66, it is appropriate for the court, on an application of this kind, to reach the view that the proceedings are bound to fail and accordingly constitute an abuse of the process of the court.

16. It should be noted that, in the course of his oral submissions, counsel for the defendant sought to expand the basis upon which an abuse of process is alleged. In particular, he sought to suggest that the allegations of fraud were concocted in order to obtain a

freezing order and that this was done to exert the maximum amount of pressure on the defendant in order to extract a payment. He submitted that this amounted to an improper purpose which would, of itself, be an abuse of the court process. However, in circumstances where that contention was not advanced in the written submissions delivered on behalf of the defendant in support of the application (pursuant to the directions given by Barniville J.), I held that the defendant was not entitled to expand the basis for its application in that way. It is well settled that, in commercial court proceedings, parties are not to be taken by surprise.

17. The grounds on which the defendant seeks relief therefore fall into two distinct categories:

    (a) The argument based on *Henderson v. Henderson*; and

    (b) The argument based on *Keohane v. Hynes* and related authority.

18. I now deal with each of these arguments in turn.

The *Henderson v. Henderson* argument

19. The defendant complains that it is an abuse of process for the plaintiff to have simultaneously pursued both summary and plenary proceedings against it. As noted previously, the summary summons was issued in March, 2020 and the plenary proceedings was subsequently issued in July 2020. For a time, both sets of proceedings were in being side by side. However, the summary proceedings have since been discontinued by notice of discontinuance served on 7th September, 2020 under Order 26 Rule 1 of the Rules of the Superior Courts. This was the same day as the statement of claim in the plenary proceedings was delivered.

20. In making this application, the plaintiff has invoked the rule in *Henderson v. Henderson* (1843) 3 Hare 100 which was described in the following terms by Murray C.J. in *Re Vantive Holdings* [2010] 2 I.R. 118 at p. 124-125:

    "21. In the High Court and in this Court ACC Bank Plc relied on the rule of estoppel in Henderson v. Henderson … by way of analogy. In his judgment the trial judge stated:

    > *'The rule in Henderson v. Henderson is to the effect that a party to litigation must make its whole case when the matter is before the Court for adjudication and will not afterwards be permitted to re-open the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case.*
    >
    > *In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate.'*

> *22. Viewing it through the prism of estoppel and res judicata the rule in Henderson v. Henderson …strictly speaking applies to proceedings between parties where those proceedings determine the rights or obligations between those parties. It is intended, inter alia, to promote finality in proceedings and to protect a party from being harassed by successive actions by another party when the issues between them either were or could have been determined with finality in the first proceedings".*

21. In the *Vantive Holdings* case, the Supreme Court was not dealing with ordinary litigation in the nature of a *lis inter partes*. The case concerned an application to appoint an examiner to a company against the backdrop where a previous petition for the appointment of an examiner had been refused. The second petition to appoint an examiner (which was the subject of the Supreme Court judgment) was based on evidence that was available at the time the first petition was presented. In its judgment, the Supreme Court acknowledged that there might be circumstances where a second petition could properly be brought but held that it was improper to do so in the particular circumstances. While the court held that the rule in *Henderson v. Henderson* did not apply, the principle underlying the rule could be applied by analogy. At p. 125, Murray C.J. explained that the principle underlying the rule is the need to protect the due and proper administration of justice from an abuse of process and uphold the principle of finality in legal proceedings. The Supreme Court held that, in the absence of exceptional excusing circumstances, the presentation of the second petition on foot of evidence which had been deliberately withheld from the court at the time of the determination of the first petition constituted an abuse of process. At p. 127, Murray C.J. emphasised that the bringing of the second petition in the absence of such circumstances undermined the integrity of the proper and efficient administration of justice and the principle of finality.

22. In my view, the rule in *Henderson v. Henderson* has no application here either directly or by analogy. Classically, the rule applies where a party seeks to bring a new claim which could have and should have been included in proceedings between the same parties in earlier proceedings which have previously been determined by the court. Here, the summary summons proceedings were never determined by the court. They were discontinued without any determination of the claims made. Accordingly, I cannot see any basis on which the rule can be said to apply. As Murray C.J. explained, the rule is concerned with the need to uphold finality in legal proceedings. If legal proceedings have never been heard and determined, there can be no scope for the application of the rule.

23. Moreover, it is well settled that the discontinuance of proceedings under O. 26 r.1 does not itself give rise to the same effect as a determination of proceedings. The relevant principle is succinctly summarised by the authors of *Delany and McGrath on Civil Procedure* (4th ed., 2018) at para. 17-29:

> *"17-29 Rule 1 specifies that the discontinuance of proceedings … is not a defence to any subsequent action and proceedings that have been discontinued cannot found a plea of res judicata. Neither will it generally be considered to be an abuse of*

process to discontinue proceedings and claim the same reliefs in another set of proceedings....".

24. *Delany & McGrath* rely, in this context, on the decision of the Court of Appeal in *Allied Irish Banks v. Darcy* [2016] 1 I.R. 588 where, for the period from 28th January to 9th April 2014, the defendant was faced with two sets of proceedings commenced by special summons seeking possession of property. There was a defect in the claim made in the first set of proceedings and, for that reason, the plaintiff bank instituted the second set of proceedings. A notice of discontinuance was served in respect of the first set of proceedings in April 2014. It was subsequently held in the second set of proceedings that the discontinuance of the first set of proceedings did not amount to an abuse of the court process notwithstanding that there was a temporary overlap between both sets of proceedings.

25. Even if I am wrong in that view, it seems to me that this is not a case where the court, in the exercise of its *Henderson v. Henderson* jurisdiction would find that the plenary proceedings were abusive. This is because most of the claims now made in these proceedings could not have been brought in the summary summons proceedings. Thus, for example, it would not be possible to pursue a claim based on fraudulent misrepresentation in summary summons proceedings. Nor would it be possible to seek orders that the proceeds of an insurance policy are held on trust for the plaintiff. If the summary summons proceedings had not been discontinued, an issue might arise as to whether it was, quite apart from the rule in *Henderson v. Henderson*, an abuse of process to have two sets of proceedings maintained at the same time. However, in light of the notice of discontinuance served in the summary proceedings, that issue no longer arises. It seems to me that the plaintiff was correct to discontinue the summary proceedings to ensure that the defendant would not have to face the costs of two overlapping proceedings. To the extent that the defendant has been exposed to costs in the summary proceedings, it will be entitled to recover its costs of those proceedings under the provisions of O.26, r.1. In all of the circumstances, I am not satisfied that a sufficient case has been made out that the plenary proceedings are per se an abuse of process.

26. However, that does not resolve the present application in its entirety because the defendant also seeks to dismiss a number of aspects of the plaintiff's case on the grounds that they are bound to fail and the defendant invokes the inherent jurisdiction of the court and the long line of authority on that issue commencing with the decision in *Barry v. Buckley* [1981] I.R. 306 subsequently applied by the Supreme Court in *Sun Fat Chan v. Osseous Ltd* [1992] 1 I.R. 425 and reiterated in a series of later Supreme Court decisions. It is to that aspect of the present application to which I now turn.

The application to dismiss certain aspects of the proceedings on the basis that they are bound to fail

27. The relevant principles which apply where the inherent jurisdiction of the court is invoked (as opposed to those which apply where the application is made pursuant to O.19 r.28) were discussed in detail by Clarke J. in *Keohane v. Hynes* [2014] IESC 66 and in *Moylist Construction Ltd v. Doheny* [2016] 2 I.R. 283. In para. 6.5 of his judgment in *Keohane*,

Clarke J. emphasised that the underlying basis of the jurisdiction to dismiss proceedings as being bound to fail stems from the court's inherent entitlement to prevent an abuse of its process. To bring a case which is bound to fail is an abuse of process. Thus, in cases where it is sufficiently clear to a court at an interlocutory stage that a case is bound to fail, the court has jurisdiction to prevent an abuse of process by dismissing the proceedings. In the same case, Clarke J. stressed, at para. 6.6 of his judgment, that the jurisdiction is to be exercised sparingly and only where it is very clear that the proceedings are bound to fail. It is not enough that the plaintiff's case is very weak.

28. The authorities demonstrate that the jurisdiction is particularly appropriate in circumstances where the case can be decided largely on the basis of documents. It is rare that it is appropriate to engage with the facts. However, in para. 6.8 of his judgment in Keohane, Clarke J. indicated that a court can analyse 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*". The defendant's application is put forward on this basis. The defendant contends that there is no credible evidence to support the plaintiff's case in these proceedings which the defendant maintains is no more than a bald allegation of fraudulent misrepresentation. In considering the defendant's application, it is important to keep in mind that, as Clarke J. stressed, in para. 6.9 of his judgment, that a court, on an application of this kind, ordinarily cannot go beyond a limited form of factual analysis. It is not the function of the court on an application of this kind to engage in a mini trial or to attempt a summary disposal of the plaintiff's claim.

29. In *Moylist Construction Ltd v. Doheny*, Clarke J. reiterated what had been said in *Keohane v. Hynes*. At pp. 289-291, he gave the following further guidance:

(a) He emphasised that an application to dismiss under the inherent jurisdiction is not some form of *"surrogate summary disposal procedure*";

(b) The approach which the court takes to applications of this kind stems from the fundamental principle that the default position in respect of any proceedings is that they should go to trial. Depriving the parties of a full trial is a departure from the norm and should only be engaged in *"when it is clear that there is no real risk of injustice in adopting that course of action";*

(c) While the criteria applicable to an application of this kind are not precisely the same as the approach taken in deciding whether to adjourn proceedings commenced by summary summons to plenary hearing, there are broad similarities in the approach to be taken in such cases. Clarke J. referred, in this context, to his decision in *McGrath v. O'Driscoll* [2007] 1 ILRM 203 where he said at p. 210:

> *"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";

(d) While there are cases which are suitable for determination by motion, cases involving factual disputes save to the "*very limited extent to which it is appropriate to engage with the facts as identified in Keohane v. Hynes* …" are not suitable to be determined by motion. Even in cases which involve issues of law or construction of documents, the court should not entertain an application to dismiss where the legal issues or questions of construction arising are themselves complex and would require the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored;

(e) Clarke J. referred, in this context, to the observation made by McCarthy J. in *Sun Fat Chan* at p. 428 to the effect that:

> *"Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture".*

30. The present application must therefore be considered in light of these principles. As noted above, the case made by the defendant is that the plaintiff has made bare unsubstantiated allegations of fraud against the defendant and has failed to put forward any credible basis for suggesting that evidence might be available at trial to substantiate the allegations made. In order to assess the defendant's application, it is necessary to consider, in the first place, the nature of the claim made in the statement of claim and, secondly, to consider the basis on which the defendant contends that there is no credible foundation for the case pleaded.

The case pleaded in the statement of claim

31. In paras. 7 to 14 of the statement of claim, the plaintiff, by way of background, sets out some relevant terms of the lease. In paras. 15 to 19, the statement of claim addresses the agreements that were put in place in relation to rent reduction. In para. 20, it is pleaded that in July 2020, following the submission by the defendant of ten years' financial accounts to the Companies Registration Office, the plaintiff learned that the defendant's financial position had appreciably improved in each of the years 2015, 2016 and 2017 (during which the defendant's rental obligation had been reduced). In para. 21 of the statement of claim it is alleged that the improvement in the defendant's financial position was not communicated to the plaintiff.

32. In para. 23 of the statement of claim, the snowstorm of March 2018 is described. Paragraphs 25 to 29 of the statement of claim address the claim made by the plaintiff in respect of loss of rent. This is where there is overlap between the claim made in these proceedings and the claim previously made in the summary summons.

33. Paragraphs 30 to 46 deal with the events following the snowstorm. In para. 31 it is alleged that it was understood and agreed between the parties that the defendant would resume occupation of the premises upon substantial completion of the repair and reinstatement works to be carried out by the plaintiff. In para. 35, it is pleaded that, in June 2018, the defendant went into occupation of the CityWest premises and it is alleged that the plaintiff believed this move to be temporary. Thereafter, paras. 36 and 37 refer to the reinstatement works carried out to the premises. In para. 38 it is pleaded that, at all times, the defendant was aware that the mechanical and electrical installations (as part of the reinstatement works) were specifically tailored to the requirements of the defendant. For reasons which are explained below, this plea is of some importance in so far as the plaintiff claims that it has suffered loss.

34. In para. 39 of the statement of claim, it is alleged that the defendant misrepresented either intentionally, recklessly or negligently that its occupation of the CityWest premises were temporary and that it intended to return to the Park West premises. Paragraph 40 refers to the lease entered into by the defendant in respect of the CityWest premises for a term of ten years. In para. 41 it is alleged that the defendant was under a positive obligation to disclose to the plaintiff that it had entered into such a lease. In para. 45 it is pleaded that, having entered into the lease for the CityWest premises, the defendant did not intend to resume occupation of the ParkWest premises. Earlier, in paras. 42 to 44, the statement of claim refers to correspondence of April 2018 and February 2019 from Mr. Noel Corcoran of the defendant referring to the CityWest premises as temporary facilities and further alleges that the statement made to that effect was made falsely, recklessly and/or negligently. That correspondence is examined further below.

35. Paragraphs. 47 to 52 of the statement of claim address the insurance claim submitted by the defendant and claim in particular that part of the proceeds of the insurance claim were spent on fixtures and fittings and leasehold improvements to the CityWest premises.

36. In para. 53 of the statement of claim, it is alleged that practical completion of the repair and reinstatement works to the Park West premises was certified on 1st May, 2019 and in para. 54 it is alleged that the defendant was thereby obliged to resume occupation of the Park West premises. In para. 55 of the statement of claim, it is alleged that the failure of the defendant to resume occupation on 1st May, 2019 was in breach of contract and in breach of covenant. In paras. 56 to 60 of the statement of claim, reference is made to correspondence received from Mr. Joe Oxley on behalf of the defendant in the period June-August 2019 in which it was alleged that reinstatement had not been achieved. In para. 68 of the statement of claim, it is alleged that the further mechanical and electrical works which the defendant said were still outstanding form part of the tenant's fixtures and fittings for which the plaintiff was not responsible under the lease.

37. Paragraphs 69 to 95 are the most relevant paragraphs for present purposes. Those paragraphs contain the allegations which the defendant maintains constitute no more than bare assertion and for which there is no evidential basis.

38. In para. 69 of the statement of claim, it is alleged that the *"position purportedly maintained by the Defendant was a device for the purpose of justifying the service of the Notice of Termination and for the purpose of appropriating the insurance monies received for its own benefit*". As I read that paragraph, the reference to the "*position … maintained by the Defendant*" is intended to refer to what has previously been pleaded in the statement of claim relating to the reasons put forward by the defendant as to why the reinstatement of the premises could not be said to be complete. Thereafter para. 70 of the statement of claim contains what are described as particulars of deceit and/or fraudulent misrepresentation. Although there are seven separate sub paragraphs within para. 70, there are essentially three allegations made namely:

    (a) That in Mr. Corcoran's email of 30th April, 2018 it was represented that the move to the CityWest premises was temporary;

    (b) That this representation was reiterated and renewed in a letter dated 1st February, 2019 from Mr. Corcoran; and

    (c) That there was a failure to disclose to the plaintiff that the defendant had entered into a ten-year lease of the CityWest premises. That failure is alleged to have subsisted in the period from April 2018 to January 2019.

39. In para. 71 of the statement of claim, an alternative case is pleaded on the basis of negligence. In para. 72 it is alleged that, had the plaintiff been aware at the commencement of the repair and reinstatement works that the defendant would not resume occupation of the Park West premises or did not intend to do so, the plaintiff would not have carried out the repair works which it did. In para. 73, it is alleged that, instead, it could have carried out alternative works to restructure the premises and to increase the warehouse space within it thereby increasing its marketability. There is also a more general allegation made in para. 74 that the plaintiff has suffered loss and damage as a consequence of the alleged misrepresentation.

40. Paragraphs 75 to 77 address a claim based on the alleged repairing obligations of the defendant. Paragraph 78 of the statement of claim deals with a discrete claim that in June 2018 the defendant wrongfully removed the main distribution board from the premises and it is claimed that the board is the property of the plaintiff.

41. Paragraphs 79 to 99 deal with the alleged insurance obligations of the defendant and the way in which the defendant has treated the proceeds of its insurance claim. In essence, the allegation made in these paragraphs is that at least part of the proceeds of the insurance claim made by the defendant (to which reference is made in its financial statements) related to the repair of the Park West premises and it is alleged that, in breach of trust, the defendant failed to remit to the plaintiff the sum received in relation to property repair arising from the snowstorm insofar as that is referable to the defendant's insurance obligations under the lease. An alternative case is made in para. 94 of the statement of claim that the defendant has sought to unjustly enrich itself from the insurance proceeds at the expense of the plaintiff. This is developed further in para.

95 of the statement of claim where it is alleged that the defendant has unjustly enriched itself from the insurance proceeds by spending approximately €2,119,000 on leasehold improvements to the CityWest premises using insurance claim monies which it was obliged to spend on the repair of the Park West premises to the benefit of the plaintiff.

42. There are a number of other claims made in paras. 102 to 111 of the statement of claim relating to alleged loss of future rent and the cessation of operations in Ireland by the defendant. The latter issue appears to have been raised with reference to the claim made by the plaintiff for the interim and interlocutory injunction. I am not sure how it is relevant to the substantive claim made by the plaintiff in these proceedings.

43. Having summarised the claims made in the statement of claim, it is next necessary to consider the basis upon which the defendant maintains that the plaintiff's claims are bound to fail. This aspect of the defendant's application is focused on the allegations made in relation to fraudulent misrepresentation and the allegations made in relation to the insurance issue. It is therefore necessary to consider each of these aspects in turn.

The claim based on fraudulent misrepresentation

44. In support of its case that this element of the plaintiff's claim is bound to fail, the defendant has emphasised that the relationship between the parties is a purely commercial one which is governed by the terms of the lease. With regard to the representations alleged in para. 70 of the statement of claim (which rely on the correspondence from Mr. Corcoran) the defendant contends that, as noted above, following an exchange between the court and counsel on the first day of the hearing of the application for the interlocutory injunction, the plaintiff conceded that it had no issue with Mr. Corcoran's averment that it had been the intention of the defendant to return to Park West when the reinstatement was complete. As explained earlier in this judgment, I do not read the relevant exchange between counsel and the court in that way. Moreover, it seems to me that any such exchange can only have related to the positon at the time of the interlocutory hearing and could not be construed as a concession that the plaintiff accepted the truth of Mr. Corcoran's averment for the purposes of the trial.

45. The defendant also maintains that, by virtue of an email exchange of September 2018 (discussed below) there is no basis upon which the plaintiff can say that it was in any way misled by Mr. Corcoran's emails of April 2018.

46. With regard to the alleged failure of the defendant to disclose its intention not to return to the Park West premises, it is alleged that, in circumstances where the relationship between the parties was an entirely commercial one, the defendant was not under any obligation to inform the plaintiff that it had changed its mind about resuming occupation. It was also contended that no such obligation was, in fact, pleaded. On the latter point, however, it seems to me that the defendant is mistaken. There is an allegation made in para. 41 of the statement of claim that the defendant was under an obligation to disclose its intentions.

47. The defendant also makes the case that, in the event that the court finds that the works of reinstatement carried out by the plaintiff were sufficient such that the defendant was contractually obliged to recommence paying rent for the Park West premises from 1st May, 2019, any such determination by the court will not involve any finding of deceit on its part but will be based in contract only. The defendant also says that if the reinstatement works had been carried out to the extent required to enable it to move back to the Park West premises, it would have done so and would have had to sublet or assign the lease to the CityWest unit or otherwise pay an exit fee to be released from the CityWest lease.

48. In addition, the defendant contends that the plaintiff cannot establish that it has suffered any loss as a consequence of the alleged misrepresentation. In this context, reference is again made to the exchanges between the court and counsel for the plaintiff in the course of the application for an interlocutory injunction during which the defendant contends counsel for the plaintiff was unable to identify any loss. The basic point made by the defendant is that the plaintiff was obliged under the lease of the Park West premises to reinstate those premises. If the court finds that sufficient reinstatement works had been carried out prior to 1st May, 2021, then the only consequence is that the defendant was obliged to recommence paying the rent. The defendant maintains that there is no scope to "*superimpose*" any additional losses and, on that basis, it is contended that the cause of action in misrepresentation is "*bad at law".*

49. In order to properly address the present application, it is necessary to consider the terms of the emails on which the plaintiff relies in para. 70 of the statement of claim together with the subsequent exchanges between the parties which have been highlighted by the defendant in the course of the hearing. In the email of 30th April, 2018 from Mr. Corcoran of the defendant to Mr. Comaskey of the plaintiff, the following is stated:

> *"We have now found a temporary premises that does not meet all of our requirements but as we are left with very few options we must protect the business. We have now started to move and I'm told it will take up to six weekss (sic).*
>
> *We are ready to move back when the building at Park west (sic) has been fully certified and deemed fit for purpose.*
>
> *When will the building be ready to enable us to move back?".*

50. The language of this email arguably constitutes a positive representation that the move to other premises is temporary only and that the defendant will move back to Park West when the repairs are completed. The plaintiff will, of course, have to go further at trial and prove that this was a false representation. In this context, Mr. Corcoran has said on affidavit that he genuinely meant what he said in the email at the time it was written. Nonetheless, it is important to note that the email was sent after the defendant had on 24th April, 2018 entered into a ten-year lease agreement in respect of the CityWest premises and it is claimed by the plaintiff that this was unknown to it at this time. Of

course, that does not necessarily call into question the veracity of Mr. Corcoran's evidence in relation to the intention of the defendant at the time this email was sent. Nonetheless, this is something which is capable of being explored further in discovery and, in due course, by means of cross examination of Mr. Corcoran at trial. All that can be said at this stage is that it is not beyond argument that the entry into the CityWest lease for a term of ten years is inconsistent with an innocent explanation. While the defendant maintains that it genuinely intended returning to Park West and would have dealt with the CityWest lease by means of an assignment, a subletting or the payment of an exit fee, there is scope for debate (particularly when viewed with the subsequent conduct of the defendant) that the entry into the lease for a term of ten years provides some support for the plaintiff's case. It must also be borne in mind that, even in the event that the trial judge holds that, as of 30th April, 2018, there was a genuine intention to return to the Park West premises on completion of the works as Mr. Corcoran says, the plaintiff may succeed in establishing at trial that, at some point subsequent to 30th April, 2018, the defendant formed the intention not to do so thereby arguably giving rise to a misrepresentation at that point. In this context, it is well established that a change in circumstances may render false a representation that was originally made entirely innocently. The position is well illustrated by *Montpellier Estates Ltd v. Leeds City Council* [2013] EWHC 166 (QB) where Supperstone J. explained at para. 57 of his judgment:

> *"57. The tort of deceit is complete only when the representation is acted upon. It follows that if, during the time between the making of the representation and the claimant acting upon it, the defendant discovers it to be false or circumstances change to his knowledge so that it is now untrue, liability may be incurred (Clerk & Lindsell at para 18-18). In Food Co UK LLP v Henry Boot Construction[2010] EWHC 358 (Ch) Lewison J at para 213 approved the following passage in Cartwright on Misrepresentation and Mistake and Non-Disclosure at section 5.17:*
>
> > *'In such cases the question is whether the representor can be shown to have become fraudulent by the time of the contract. For this to be established, the representee will have to show not only that the representor knew of the relevant change (he has discovered the change in the facts or he has discovered that he has already made a false statement) but also that his knowledge is sufficient to make him fraudulent: he must realise the significance of the change for the statement he has already made.'"*

51. Thus, in my view, it is impossible to form the view at this stage in the proceedings that the representation made in the email of April 2018 could not form the basis of a claim for fraudulent misrepresentation. Even if it is established that it was made innocently at the time, the plaintiff may be in a position (particularly with the facility of discovery and cross-examination of witnesses) to establish that, at some point after April 2018, the representation became false as a consequence of a decision made by the defendant not to return to the Park West premises. In making that observation, I am not to be taken as suggesting that the representation made in the email necessarily became false at any stage. Mr. Corcoran's evidence may well be accepted at trial. However, at this stage in

the proceedings, it is impossible to conclude that there is no scope for the plaintiff to pursue a claim based on the representation contained in the February 2018 email.

52. The next email on which the plaintiff relies is Mr. Corcoran's email of 1st February, 2019 which addressed a request made on behalf of the plaintiff to vacate the office element of the Park West premises. In that email, Mr. Corcoran again referred to the CityWest facility as temporary. In the letter he stated:

> *"We will do our utmost to vacate and make available our office accommodation … and we are putting pressure on our contractors to complete* our temporary office facilities at City West. *We must also point out that we are responding to and dealing with an emergency that is not of our making but we do acknowledge the cooperation and goodwill that our Landlord has extended to us at a very difficult time". (*emphasis *added).*

53. Again, that email is clearly capable of constituting a representation that the move to CityWest was a temporary one only and that the defendant intended returning to Park West. Whether the email can subsequently be shown to be a misrepresentation will depend on similar factors to those outlined above with respect to the April 2018 email. However, in an affidavit sworn by Mr. Joe Oxley on 29th October, 2020 on behalf of the defendant, Mr. Oxley has exhibited some further correspondence between the parties which took place in September 2018 which the defendant suggests demonstrates that there is no basis for the misrepresentation claim. The first is an email dated 6th September, 2018 sent by Mr. Comaskey of the plaintiff to Mr. Roger Jones of the defendant (which was also copied to Mr. Corcoran and Mr. Oxley). That email is in the following terms:

> *"Roger,*
>
> *Your representative was in here last week with Pat Power, telling us you weren't coming back to the unit and would be seeking to assign or under let as I understand it.*
>
> *So fit for what purpose exactly?*
>
> *Thanks,*
>
> *Gerry".*

54. At first sight, it might well be thought that this email is devastating for the case made by the plaintiff in the statement of claim. By its terms, it suggests that, as of September 2018, the plaintiff was aware, at minimum of a rumour, that the defendant might not return to Park West. However, on closer inspection, the email does not go so far as to suggest that the plaintiff was aware that the defendant intended to disengage from its obligations under the lease. The email speaks of an assignment or a subletting neither of which would constitute a disengagement from the obligations of the lease. Both an assignment and a subletting would simply suggest a disposal of the defendant's interest

under the lease. Moreover, the email does not stand on its own. It must be read in context. There was a response to the email from Mr. Jones on 11th September, 2018 in the following terms:

> *"Gerry,*
>
> *There are two options:*
>
> *Option 1. Go back to Park west.*
>
> *For this to be possible the building as refurbished must be a safe place of work. As we now know, as originally constructed it was not safe.*
>
> *We have not as yet seen a detail (sic) schedule of works.*
>
> *Option 2. Stay at City west.*
>
> *Our representative was just exploring that option with yourselves."*

55. While this email refers to two options, when it is read as a whole, I do not believe that it demonstrates to the *Moylist* standard that it was clearly putting the plaintiff on notice of an intention on the part of the defendant not to return to Park West. This is particularly so when one looks at what is described as option 2. Arguably, the language could be said to merely suggest that this is something that would be explored with the plaintiff and that it falls short of disclosing an intention on the part of the defendant to move permanently to CityWest and to disengage from its obligations under the lease in respect of the Park West unit. These are issues which it seems to me would have to be explored at trial and it is not appropriate to attempt, on the basis of a summary application of this kind, to reach a concluded view as to their meaning and effect. As Clarke J. stressed in *Moylist*, an application of this kind is not intended to be used as a vehicle for the summary disposal of an action. It is therefore wrong, as a matter of principle, to attempt, on an application of this kind, to form a conclusion as to the meaning which a document would convey unless that meaning is very clear from the face of the document itself. That seems to me to be equally so when one looks at Mr. Comaskey's response which was sent on 14th September, 2018. In this email, Mr. Comaskey stated:

> *"Hi Roger,*
>
> *Whether or not you go back to Park West, there is an existing lease with a term certain that we would be seeking full adherence to. The message has been mixed at best as to what you are doing but none of that changes the legally binding contractual position in the lease.*
>
> *You have been sent the schedule of works under separate cover.*
>
> *As you know we are starting our enabling works on Monday, there have been too many false starts and numerous delays in your decant dates given so again we are*

legally obliged to mitigate the loss and return the unit to your beneficial use. Already the project costs are escalating due to your continuing use of the premises whilst not paying rent I might add…."

56. In the course of the hearing, counsel for the defendant described the email as very significant and submitted that it "*kills stone dead*" the notion that Mr. Comaskey or the plaintiff were deceived. It may transpire to be the case that the defendant will succeed in establishing that this email undermines the plaintiff's case that it has been deceived. I have no doubt that, at trial, it will feature significantly in any cross examination of Mr. Comaskey and other witnesses to be called on behalf of the plaintiff. Nevertheless, I cannot conclude at this interlocutory stage of these proceedings that the email demonstrates very clearly that the plaintiff knew and understood as of September 2018 (which, crucially, was prior to the commencement of construction works) that the defendant did not intend to return to Park West or that the defendant was keeping its options open in relation to any such return. In my view, no conclusion can be reached as to the import of the email in the absence of cross-examination. Counsel for the plaintiff argued at the hearing that the purpose of the email was clear and that it was plainly intended to remind the defendant of its obligations under the lease. Furthermore, the reference to the "*message has been mixed"* can arguably be said to suggest that the plaintiff was unsure as to the defendant's intention. In my view, it is of some importance that the email was written on the basis that the works to the Park West premises were due to proceed. Any lack of response by the defendant is open to the interpretation that the defendant accepted the import of the email which proceeds on the basis that the defendant was under a contractual obligation to return to Park West, an obligation which the plaintiff intended to enforce. The email also indicated that the works were about to proceed. If the defendant had an intention, at that time, not to return to the Park West premises, it is at least arguable that the defendant had an obligation to so inform the plaintiff at this point before the plaintiff incurred the expenditure involved in restoring the premises to their pre-snowstorm condition. There is no evidence before the court that there was any follow up email or other communication from the defendant to say that the defendant was not going to return to Park West. If the plaintiff proves at trial that a decision had been made by the defendant by this date not to return to Park West, then the failure of the defendant to respond to the email to clarify its intention could arguably be said to give rise to a misrepresentation in the manner explained by Supperstone J. in the Montpellier Estates case on the basis that the defendant did not correct the position previously stated in Mr. Corcoran's email of April 2018 and thereby rendered what was said in that email a misrepresentation.

57. In all of these circumstances, while the defendant may well succeed at trial in defeating the plaintiff's claim, I am unable to conclude, at this point, that the plaintiff has no case to make based on the alleged representation that the defendant would return to Park West. However, that is not the end of the matter. As noted earlier in this judgment, the defendant also argues that, in any event, in circumstances where the plaintiff had the obligation under the lease to carry out the necessary works of repair to the Park West premises, it cannot be said that the plaintiff has suffered any loss as a consequence of the

alleged misrepresentation. The defendant argues (correctly in my view) that, if the plaintiff has suffered no loss on foot of the misrepresentation, it must follow that there is no cause of action in respect of the tort of deceit. In the absence of loss, the tort would be incomplete.

58. The defendant may well be proved to be right at the end of the day but the issue before the court at this point in the proceedings is to consider whether the plaintiff clearly has no case to make that it has suffered loss as a consequence of the alleged misrepresentation. At this point in the proceedings, I do not believe that it can be said that the plaintiff clearly has no case. In this context, if the plaintiff succeeds in establishing that the defendant's conduct was designed to wrongfully avoid a return to Park West, then that would give the plaintiff a basis to argue that, had the defendant's activities not been disguised behind the alleged misrepresentation that the move to CityWest was temporary only, the defendant's intention and conduct would have been manifested at a much earlier time and the plaintiff would have been able to treat that conduct as an anticipatory repudiation of its obligations under the lease thereby entitling it to elect to treat the lease as being at an end and, accordingly, treat its obligation to carry out the repairs in question as, likewise, being at an end. On that basis, the plaintiff could claim that, had the misrepresentation not occurred and had the defendant been up front about its intentions, the plaintiff could instead have carried out different works to make the premises more suitable for use by a different tenant. In this regard, para. 65 of Mr. Comaskey's affidavit of 12th October, 2020 is relevant. In that paragraph Mr. Comaskey says:

> *"65. While the plaintiff wished to quickly reinstate the Premises, had the Plaintiff been aware of the commencement of the repair and reinstatement works that the Defendant would not resume occupation of the Premises and did not intend to do so, the Plaintiff would not have carried out the type of repair works which it did. Prior to the commencement of the reinstatement works, the Plaintiff had considered raising the height of the Premises which would have benefited the long-term marketability (and value) of the Premises. However, such 'elevation works' required Plaining (sic) Permissions which would have delayed the Defendant's return to the Premises. Therefore, in reliance on the Defendant's stated intention that it was returning to the Premises, the elevation works were not carried out, and the Premises was reinstated. By reasons of the misrepresentation of the Defendant that its occupation of the Citywest Premises was temporary in nature and that it intended to return to the Premises the Plaintiff has suffered loss and damage".*

59. I appreciate fully that the plaintiff may ultimately be unable to bring home such a case. However, at this point, it seems to me to be conceivable that such a case could successfully be made and, in those circumstances, I cannot conclude today that it is sufficiently clear that the plaintiff will not be able to sustain a claim for damages arising out of the misrepresentation alleged. In these circumstances, I am not satisfied that the defendant has surmounted the *Moylist* hurdle and I must therefore refuse to strike out this element of the plaintiff's claim.

The claim in relation to the proceeds of the insurance policy

60. The defendant also says that the plaintiff's claim in relation to the insurance policy is bound to fail. In his affidavit grounding the present application, Mr. Murphy says that there was no policy of property insurance in place. He says that the only policy of insurance that was in place was in the nature of a policy of business interruption insurance. Mr. Murphy also says in very brief terms in para. 57 of his affidavit that there was no insurance claim by which I assume he means that there was no property damage claim in respect of the Park West unit. However, the policy which he exhibits appears, on its face, to provide property insurance cover for the contents of the Park West premises with a limit of liability of €5,520,000. This is clear from the renewal schedule which was exhibited by Mr. Murphy. That schedule shows that there are sub-limits of liability in respect of certain elements of property damage and I note in this context that item G in the list of sub-limits in the renewal schedule states that capital additions are not insured. I also note that item P (which is described as "*in respect of loss, destruction or damage to Leased Premises*") has a very modest limit of €25,000. Subject to the limits of liability and sub-limits, it is clear from section 1 of the policy that it provides cover in respect of property damage. It may well be the case that the property damage section of the policy is not of significant utility in the context of leased premises. However, on the face of the materials before the court, it is clear that Mr. Murphy is incorrect in characterising the policy as one of business interruption only.

61. In his replying affidavit, Mr. Comaskey draws attention to the provisions of the policy dealing with property damage. He also highlights that the amount paid to the defendant in respect of its insurance claim appears to exceed the level of cover under the business interruption section of the policy. The limit of liability in respect of business interruption is stated to be €14,962,500 while the amount paid exceeds €15 million. In the circumstances, Mr. Comaskey draws the conclusion that the defendant must have made a claim in respect of property damage under its policy. Surprisingly, when an affidavit was sworn by Mr. Oxley on behalf of the defendant, in response to Mr. Comaskey's affidavit, Mr. Oxley did not address the insurance issue at all.

62. The question which I have to consider is whether it is very clear, at this point in the proceedings, that the plaintiff has no claim in relation to the insurance policy. In my view, the evidence falls far short of establishing that the plaintiff has no claim. While the defendant may well succeed at trial, I do not believe that I can determine today that it definitely will succeed or even that it will very probably do so. On the face of it, there is damage to the premises and the tenant's fixtures. There is an obligation under the lease imposed on the defendant to insure. There is a policy of insurance in place. A significant payment has been made under the policy. No documents relating to the insurance claim have been put before the court.

63. At this very early stage of the proceedings, I cannot rule out the possibility that the plaintiff may succeed in establishing that part of the proceeds of the insurance should be applied in respect of the cost of some element of the repairs to the unit at Park West. While there is a very modest sub-limit in respect of damage to leased premises, I cannot

rule out the possibility that the insurance policy may nonetheless provide cover in respect of items within the leased premises which are not subject to such a limit of liability and which were required to be insured under the terms of the lease. In the circumstances, I am not satisfied that the defendant has surmounted the *Moylist* hurdle and I therefore refuse to strike out this element of the plaintiff's claim.

64. Before leaving the insurance issue, it should be noted that, in the course of the submissions made by counsel on behalf of the plaintiff in the course of the hearing before me, it was suggested that there had been a misrepresentation by the defendant that there was no property insurance in place. No such allegation is, however, pleaded in the statement of claim and in those circumstances I made clear to counsel that this is not a matter that could properly be ventilated in the present application unless the plaintiff proposed to seek an amendment to its statement of claim in line with the observation made by McCarthy J. in *Sum Fat Chan* at p. 428 that *"if the statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed"*. No application was made to amend the statement of claim. In those circumstances, there is no basis on which the court could consider the submission made by counsel for the plaintiff in relation to a very significant but unpleaded allegation of misrepresentation.

Conclusion

65. For all of the reasons outlined above, I have come to the conclusion that the defendant has not satisfied me that this is an appropriate case in which to dismiss the plaintiff's claim or any part of it either on *Henderson v. Henderson* grounds or on the grounds that the claim (or parts of it) are bound to fail. In my view, it is not sufficiently clear, at this point in the proceedings, that the plaintiff's claim is bound to fail.

66. In so far as the costs of the application are concerned, my provisional view is that the plaintiff should be entitled to an order for its costs of this application, such costs, in default of agreement, to be adjudicated by the Legal Costs Adjudicator but with a stay on the order for costs pending the final determination of these proceedings. If either party wishes to contend for a different form of order, an email to that effect should be forwarded to the registrar, not later than 14 days from the date of delivery of this judgment, setting out in brief terms the nature of the order proposed and the reasons for it. In such event, I will list the matter before me remotely on such date as may be convenient for the purposes of hearing short submissions on the issue of costs but the parties should be aware that any such application is likely to have additional costs consequences. In the event that no email is received within 14 days from the date of delivery of this judgment, an order for costs will be made in the terms set out above.