APPROVED **[2024] IEHC 500**

THE HIGH COURT

2020 8508 P

BETWEEN

GEORGE O'MALLEY

PLAINTIFF

AND

NATIONAL STANDARDS AUTHORITY OF IRELAND
COILLTE TEORANTA

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 August 2024

INTRODUCTION

1. This judgment is delivered in respect of two related applications to strike out the within proceedings on the basis that the proceedings disclose no reasonable cause of action and/or are bound to fail. Each defendant has brought its own strike out application. The strike out applications were heard together on 14 June 2024 and judgment reserved.

LEGAL TEST GOVERNING STRIKE OUT APPLICATION

2. The strike out applications have been brought pursuant to Order 19, rule 28 of the Rules of the Superior Courts. This rule has been amended with effect from 22 September 2023 by the Rules of the Superior Courts (Order 19) 2023 (SI No. 456 of 2023).

3. The amended Order 19, rule 28(1) now reads as follows:

> "The Court may, on an application by motion on notice, strike out any claim or part of a claim which:
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> (i) discloses no reasonable cause of action, or
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> (ii) amounts to an abuse of the process of the Court, or
>
> (iii) is bound to fail, or
>
> (iv) has no reasonable chance of succeeding."

4. Order 19, rule 28(3) provides, in relevant part, that the court may have regard to the pleadings and, if appropriate, to evidence in any affidavit filed in support of, or in opposition to, the application.

5. Given that the amendment is relatively recent, there is little case law to date on the precise parameters of the legal test. It is of assistance to a proper understanding of the legal test to consider the pre-amendment case law.

6. Prior to the amendment, most strike out applications were made pursuant to the court's inherent jurisdiction rather than pursuant to the *unamended* version of Order 19, rule 28. This is because the unamended rule had been directed to the content of the formal pleadings rather than to the underlying merits of the proceedings. The *unamended* version of Order 19, rule 28 had been designed to deal with circumstances where the case as pleaded did not disclose any cause of action. The court had been required to assume that the facts—however unlikely that they might appear—were as asserted in the pleadings. By contrast, in an

application pursuant to the court's *inherent jurisdiction*, the court could, to a very limited extent, consider the underlying merits of the case. If it could be established that there was 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 could be dismissed as an abuse of process pursuant to the court's inherent jurisdiction.

7. The amendment to Order 19, rule 28 has the practical effect of eroding the previous distinction 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. Nevertheless the earlier case law continues to have a relevance. The Supreme Court had consistently stated—in its case law on inherent jurisdiction applications—that whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss proceedings as being bound to fail is not a means for inviting the court to resolve issues on a summary basis.

8. See, for example, *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."

9. The effect of the amendment introduced by the Rules of the Superior Courts (Order 19) 2023 is to codify the existing jurisprudence. This is apparent from the language used under the amended rule: the phrases "*bound to fail*" and "*no reasonable chance of succeeding*" echo the language used in the previous case law to describe the limits of the inherent jurisdiction.

10. It seems to follow, by analogy with the pre-amendment case law, that the court hearing a strike out application may, to a 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 struck out pursuant to the amended rule.

11. An application to strike out proceedings will, almost by definition, have been brought at an early stage of the proceedings, at a time when the possibility of pursuing procedural mechanisms—such as the discovery of documents, interrogatories, and the power to *subpoena* witnesses—will not yet have been exhausted. The court hearing the strike out application must be confident that there is no credible basis for suggesting that it may, at trial, be possible for the plaintiff to establish the facts which are asserted in the pleadings, and which are necessary for success in the proceedings. As emphasised in the earlier case law, experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance. (See, by analogy, *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21, [2014] 2 I.R. 301). 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.

12. A strike out application will not be appropriate where the issues of law raised are not straightforward. See *Jeffrey v. Minister for Justice, Equality and Defence* [2019] IESC 27 (at paragraph 7.4):

> "It is now well settled that, in the context of a summary judgment motion in which a plaintiff seeks judgment in summary proceedings, a court can resolve straightforward issues of law or the interpretation of documents, where there is no real risk that attempting to resolve those issues within the limited confines of a summary judgment motion might lead to an injustice. By analogy, I would not rule out the possibility, without so deciding, that it may be possible to resolve a simple and straightforward issue of law within the confines of a *Barry v. Buckley* application. However, even if that should be possible, it could only be appropriate where the issue was very straightforward and where there was no risk of injustice by adopting that course of action."

13. These various limitations on the strike out jurisdiction have an especial resonance in the present case in circumstances where there is a factual controversy as to what precisely was the reason for the failure, on the part of NSAI, to provide further work assignments to the plaintiff in the period following January 2015. It is also relevant to note that some of the legal issues presented by these proceedings are complex. In particular, the contours of the tort of actionable conspiracy are unclear. It would be inappropriate to determine these issues on a summary basis.

THE PLAINTIFF'S CLAIM

14. These proceedings arise out of a contract said to have been entered into between the plaintiff, Mr. George O'Malley, and the first defendant, the National Standards Authority of Ireland ("*NSAI*"). NSAI was established as the State's

official standards body under section 6 of the National Standards Authority Act 1996. NSAI has a role in creating, maintaining, and promoting the accredited certification of certain products, processes, services and organisations for compliance with recognised standards, and in issuing certification to confirm the quality and safety of certain goods and services produced and traded in Ireland.

15. The contract was in respect of auditing services related to certification for the Programme for the Endorsement of Forest Certification Scheme ("*PEFC*"). NSAI had been conferred with the status of an accredited certification body for the PEFC Irish Forestry Management Certification standard by the Irish National Accreditation Board following an audit process carried out by Mr. O'Malley in or around 2012 to 2014.

16. The contract the subject-matter of these proceedings is dated April 2014 and ran for a period of five years (1 April 2014 to 31 March 2019). It should be recorded that there is a dispute as to the identity of the contracting parties. NSAI intends to argue, at the trial of the action, that the contract had been entered into between it and a company described as PFCI Ltd, Carrabawn, Westport, Co. Mayo. The proceedings will be defended on the basis that Mr. O'Malley himself is not privy to the contract and that, in consequence, he does not have standing to pursue a claim for breach of contract. Importantly, however, NSAI is prepared to accept, for the purpose of this strike out application only, that Mr. O'Malley does have standing to pursue the claim. This is without prejudice to NSAI's right to agitate the issue of the identity of the contracting parties at the trial of the action (in the event that the strike out application does not succeed).

17. It should be explained that in the discussion which follows reference will be made to an international standard, ISO/IEC 17021:2011. This had been the

applicable international standard prescribing requirements for bodies providing audit and certification of management systems. (This international standard has since been replaced, but this is the version which had been in force at the time of the events giving rise to these proceedings).

18. The specific clause which is relevant is that which allows for the replacement of an audit team in circumstances of a "*valid objection*" by the body being certified or audited (§9.1.7):

> "The certification body shall provide the name of and, when requested, make available background information on each member of the audit team, with sufficient time for the client organization to object to the appointment of any particular auditor or technical expert and for the certification body to reconstitute the team in response to any valid objection."

19. There is a dispute as to whether the threshold for replacing an auditor had been met in the circumstances of the present case.

20. Mr. O'Malley contends that he had been retained by NSAI to perform certain auditing services. The auditing services involved, principally, the certification of a company known as Coillte CGA ("*Coillte*"). Coillte is a semi-state company responsible for, *inter alia*, the management of state-owned forested lands established in accordance with the Forestry Act 1988. Coillte had sought certification to the PEFC Irish Forestry Management Standard. NSAI had agreed to assess Coillte for compliance with the standard. NSAI engaged Mr. O'Malley as one of two auditors: the second auditor had been Mr. Tom Mannion.

21. The gravamen of Mr. O'Malley's case is that he was removed from the role of auditor at the behest of Coillte because he had raised legitimate issues as to their compliance with the standard against which they were being certified. It is further alleged that NSAI acceded to Coillte's request to remove him because

NSAI were anxious to retain Coillte as a "*client*". Mr. O'Malley is critical of the characterisation of the subject of an audit as a "*client*".

22. Mr. O'Malley contends that his removal as auditor constituted a breach of contract and that this breach was induced by Coillte. Mr. O'Malley further contends that his reputation has been damaged by malicious falsehood. Mr. O'Malley also advances a claim in conspiracy.

23. In order to resolve the strike out application, it is necessary to consider the allegations made by Mr. O'Malley in a little more detail. The purpose of this exercise is to identify whether NSAI and Coillte have met the high threshold for striking out proceedings, or whether, alternatively, there is a "*credible basis*" for the plaintiff's claim. It should be emphasised that what follows is simply a *summary* of the allegations made. It does not entail any finding—one way or the other—by the High Court as to the correctness or otherwise of these allegations. It simply sets out the nature of the dispute between the parties. Thereafter, it will be necessary to consider whether this dispute is one which is capable of being justly determined on a summary basis, i.e. without the necessity for oral evidence and/or discovery of documents.

24. It should also be recorded that the defendants have, to date, chosen not to seek to refute in any detail the factual averments made by Mr. O'Malley. NSAI has chosen not to adduce any evidence from the principal protagonists. Rather, the strike out application is grounded on affidavits sworn by an individual who describes herself as "*head of corporate services*". It is apparent from the affidavits that this individual had no direct involvement in the key events.

25. Coillte's application is grounded on an affidavit sworn by a director, Mr. Ciaran Fallon. Mr. Fallon does not take the opportunity to address in any meaningful

way the allegation that he had sought the removal of the auditors. Perhaps tellingly, Mr. Fallon does, however, take the opportunity, in what is otherwise a perfunctory procedural affidavit, to criticise the auditors, saying that he felt that the auditors did not understand their role and did not understand that there was a PEFC standard by which Coillte were to be assessed.

26. The contract the subject-matter of these proceedings had been entered into in April 2014. As of this date, Mr. O'Malley had been involved in finalising an audit of Coillte. Mr. O'Malley, and his co-auditor, had submitted a final draft report in March 2014. There was a meeting held on 29 March 2014 to discuss/finalise this draft report. Mr. O'Malley asserts that the auditors were asked to reconsider the findings in the draft report and to amend same, but that they declined to do so. Mr. O'Malley asserts that, at this point in time, the auditors had the full backing of the relevant official of NSAI (Mr. Fergal O'Byrne). This is evidenced, he says, by the fact that the contract was entered into in April 2014.

27. A further meeting had been scheduled for 7 January 2015. Mr. O'Malley alleges that Mr. O'Byrne of NSAI conveyed to him that there had been "*interaction*" with representatives from Coillte at an event in Dublin in October 2014, and that the latter had expressed their unhappiness at the auditors' draft findings. (It appears from the replies to a request for further and better particulars that it is alleged that Mr. Fallon had been involved in this interaction). Mr. O'Malley alleges that Mr. O'Byrne explained that Coillte were "*not happy*" and had pointedly enquired if there were any *other* auditors who could audit them instead. Mr. O'Byrne is reported to have informed the Coillte representatives that there were no other auditors and that this had elicited the response from Coillte that

he (Mr. O'Byrne) should be aware that Coillte "*had options*" and could take their business elsewhere.

28. Mr. O'Malley then avers as follows (at paragraph 18 of his affidavit of 9 May 2024):

> "Fergal O'Byrne was clearly unnerved and concerned about this threat. Coillte moreover was essentially their one and only, sole, 'client' for standards/auditing assessment – their *raison d'etre* so to speak. He was thus extremely concerned – as relayed in his discussion with me, about the real threat or prospect that Coillte would indeed seek to look '*elsewhere*' if NSAI could not provide alternative auditors other than those currently retained. That is to say Mr Mannion and I, and that they were piling on extensive pressure on him and NSAI in that regard. Elsewhere in this context meant the certification body of another country whose auditors might be more tractable or amendable (*sic*) to what Coillte had in mind."

29. Mr. O'Byrne is alleged to have said that he had "*little choice*" but to accede to this demand by Coillte as otherwise "*we will end up fighting with the client*". It is alleged that Mr. O'Byrne had subsequently travelled to England in the week or fortnight following this meeting and had sourced alternative auditors there. This is said to have resulted in an email of 28 January 2015 from Mr. O'Byrne advising the auditors that their services were no longer required. The email reads as follows:

> "I regret to inform you that NSAI will not require your services in 2015 PEFCFM audit programme.
>
> There may be a small number of days requirements for Technical Reviews and or representation.
>
> Thank you for your support in putting in place the PEFC/NSAI FM Certification scheme."

30. Mr. O'Malley asserts that, notwithstanding that no further formal notice of termination was served, he had been informed that his services were no longer required. It is common case that no further work assignments were made to

Mr. O'Malley for the balance of the five year contractual term, i.e. no work assignments were made between January 2015 and the expiration of the contractual term on 31 March 2019, a period of some four years.

31. None of these very serious allegations have, to date, been controverted by Mr. O'Byrne on behalf of NSAI. Mr. O'Byrne has not sworn an affidavit in support of the strike out application.

32. Returning to the narrative, Mr. O'Malley made a complaint in 2015 to the body which, in effect, supervises this aspect of NSAI's work. This body is known as the Irish National Accreditation Board ("*INAB*").

33. The response of NSAI to this complaint was to arrange for an internal investigation to be carried out. This internal investigation was carried out by an official from within NSAI, Mr. Tom Costello. The term "*the Costello Report*" will be used to describe the report prepared following this internal investigation.

34. Mr. Costello, in fact, prepared two versions of his report. There was a lengthier report (nine pages) which seems to have been circulated internally within the NSAI. A second report (consisting of two pages only) was sent to the Irish National Accreditation Board.

35. Given the significance attached to this second report in the pleadings, it is appropriate to set out its operative part in full:

> "*Findings of the Investigation*
>
> 1. Mr. O'Malley and Mr. Mannion worked closely with the NSAI in developing the PEFC Forest Management Scheme. Mr. O'Malley and Mr. Mannion invested much time and effort in ensuring that the scheme was suitable for Accreditation by INAB. Mr. O'Malley and Mr. Mannion were extremely upset and felt betrayed by the NSAI when the Coillte file was transferred to an alternative audit team.

2. Mr. O'Byrne decided to transfer the Coillte file to another audit team for two reasons, as follows:

   a) The client did express concerns about the ability of Mr. O'Malley and Mr. Mannion to manage the increasing Coillte audit scope;

   b) More importantly, Mr. O'Byrne found the exchanges between the client and the audit team at the Stage 2 Closing meeting in 2014 un-satisfactory as it indicated a lack of auditing skills and technique.

Therefore, there was no breach of ISO 17021:2011, Clause 9.1.7 as the client didn't specifically request a change of auditors.

3. A review was conducted of the Coillte Files and there was no evidence in the files to corroborate what had been suggested by Mr. O'Malley and Mr. Mannion regarding the reason for the transfer of the file to an alternative audit team.

4. NSAI had no other suitable work available at the time but Mr. O'Byrne offered to explore other work options over time.

Recommendations

The following are recommended actions following this investigation:

1. Mr. O'Malley, Mr. Mannion and Mr. O'Byrne should engage in exploring alternative sub-contract work opportunities available;

2. NSAI's procedures for addressing Clause 9.1.7 of ISO 17021:2011 should be reviewed at the next available opportunity;

3. NSAI should consider the need to introduce a mechanism to deal with complaints raised by sub-contract auditors."

36. It appears from the subsequent correspondence from the Irish National Accreditation Board dated 15 January 2016 that INBA was not entirely satisfied with this response:

> "INAB is not satisfied that NSAI has positively demonstrated compliance with Clause 9.1.7 in this instance as based on the evidence provided, INAB cannot determine if NSAI received a valid objection to the audit team in this case and it has not provided evidence of how the objection was evaluated and the decision taken that it was a valid.
>
> INAB acknowledges that NSAI has the right to change auditors based on a valid objection, or for other operational reasons, and therefore it remains possible that NSAI was in compliance with Clause 9.1.7.
>
> However, INAB would expect records to be available to support any review and decisions made in this regard, including involvement of the impartiality committee.
>
> As the records presented do not enable INAB to positively determine compliance of NSAI to ISO 17021 9.1.7, INAB will assess the requirements generally and in relation to this case as part of the head office visit scheduled for 28th January 2016."

37. It is not apparent from the evidence before the High Court on this strike out application as to what subsequently transpired as between NSAI and the Irish National Accreditation Board. This omission illustrates the inappropriateness of seeking to have what are factually complex cases disposed of on a summary basis. The High Court is being asked to strike out proceedings on the basis of an incomplete set of documentation.

DETAILED DISCUSSION

(1). CLAIM FOR BREACH OF CONTRACT

38. The contract provides, at clause 1.1, that the contractor (as defined) "*shall*" be contracted to carry out certification services by way of "*assignment*", the specifics of which shall be agreed in advance between the consultant (*sic*) and the NSAI manager. Relevantly, the term "*assignment*" is defined as meaning a certification service work item, activity or task assigned under the agreement.

39. Counsel on behalf of NSAI submits that the claim for breach of contract cannot succeed. It is said that there was no entitlement under the contract to have any particular level of work assigned to Mr. O'Malley. Reliance is placed in this regard on clause 2.2 of the contract which provides that NSAI "*cannot and shall not guarantee a minimum number of days engagement for the period of*" the agreement. Counsel sought to characterise the agreement as more in the nature of a framework-type agreement which "*allows*" for assignments to be made to Mr. O'Malley at the election of NSAI. There is no requirement or obligation to provide for a minimum number of days of an assignment or engagement. It is said that the failure on the part of NSAI to provide any additional work to Mr. O'Malley post-January 2015 does not represent a breach of contract.

40. One of the issues which arises is as to whether the reference in clause 1.1 of the contract (above) to "*shall*" should be understood as mandatory. Counsel on behalf of NSAI says that this is not the correct interpretation. Even if it was, counsel submits that the fact that work had been provided up until January 2015 means that the contractual obligation had been complied with. Counsel submits that it is incorrect to characterise the email of January 2015 as involving a termination of the contract.

41. For the reasons which follow, I am not satisfied that the contractual aspect of the claim can be dismissed out of hand by way of a summary or peremptory application. There is a credible basis for saying that NSAI were under an implied contractual duty to exercise their discretion to assign work reasonably and in good faith. The contract partakes of the characteristics of a "*relational contract*", i.e. a contract involving a long term relationship and a high degree of communication, cooperation and predictable performance between the parties.

The contractual period had been five years. Here, Mr. O'Malley had been engaged to provide a specialist service, namely, auditing for certification. The auditing was being undertaken against objective international standards and subject to specific rules intended to ensure the integrity of the auditing process. The international standards recognised the need for independence and made provision for the replacement of an auditor in specified circumstances only (Clause 9.1.7 of ISO/IEC 17021:2011). NSAI has acknowledged, on affidavit, that as a certification body it is "*duty-bound to be independent and objective in its findings*". Against this backdrop, there is a credible basis for saying that NSAI were under an implied duty to allocate auditing work in good faith and not to withdraw or withhold work at the behest of an entity being audited. A decision to withhold work from an auditor, on the basis that an entity being audited had objected to that auditor making legitimate requests, could not be characterised as being reasonable or in good faith.

42. It is correct to say, as counsel for NSAI does, that a general contractual duty of good faith has not yet been expressly recognised in this jurisdiction. Counsel cites the judgment of the Court of Appeal in *Flynn v. Breccia* [2017] IECA 74, [2017] 1 I.L.R.M. 369 (at paragraph 99). There, the Court of Appeal held that there is no "*general principle*" of good faith and fair dealing in Irish contract law, but went on to say that there are, of course, certain types of agreements and contracts to which a duty of good faith applies, such as in a partnership agreement or the principle of *uberrima fides* in insurance contracts.

43. This is an area of law which continues to evolve. (See, for example, *O'Sullivan v. Health Services Executive* [2023] IESC 11 where the Supreme Court endorsed the *Braganza* principles in an employment context). A duty of

good faith in relational contracts and a duty to exercise a contractual discretion reasonably have been recognised in England and Wales. Of course, these judgments are, at most, of persuasive value only in this jurisdiction. Nevertheless, having regard to the very particular nature of the contractual relationship in the present case, and having regard to this case law, it cannot be said that NSAI's argument that it was under no obligation to assign work in good faith to Mr. O'Malley is one to which there is no credible answer.

44. NSAI is compelled to argue that it would have been entitled, *as a matter of law*, to remove the plaintiff as auditor at the behest of the company being certified. The logical terminus of NSAI's position is that it enjoyed an *absolute discretion*, under the five year contract, on whether to assign *any* work to the contractor, untrammelled by any duty of good faith and reasonableness and untrammelled by reference to the relevant international standard. This is so notwithstanding the context of the contract, i.e. a certification process by a public authority, and the length of the relationship between the parties. It is far from certain that such a stark contractual analysis will succeed at trial.

45. It will, ultimately, be a matter for the trial judge to determine, first, whether such an implied duty of good faith or reasonableness exists as a matter of law; and, secondly, whether such a duty, if it exists, has been breached. There is a significant factual dispute as to why it is that no work had been assigned to Mr. O'Malley from 2015 onwards. It is, to put the matter no higher, surprising that no work had been assigned to him for four of the five years of the contractual term, especially in circumstances where the contract followed on immediately from a two year contract. These are all issues which can only properly be teased out at a plenary hearing of the action.

(2). CLAIM FOR MALICIOUS FALSEHOOD

46. Counsel for NSAI submits that the claim for malicious falsehood cannot succeed because of the (supposed) failure on the part of Mr. O'Malley to plead or identify "*special damage*". Counsel draws attention to the provisions of section 42 of the Defamation Act 2009 as follows:

> "(1) In an action for slander of title, slander of goods or other malicious falsehood, the plaintiff shall be required to prove that the statement upon which the action is founded—
>
> (a) was untrue,
>
> (b) was published maliciously, and
>
> (c) referred to the plaintiff, his or her property or his or her office, profession, calling, trade or business.
>
> (2) In an action for slander of title, slander of goods or other malicious falsehood, the plaintiff shall be required to prove—
>
> (a) special damage, or
>
> (b) that the publication of the statement was calculated to cause and was likely to cause financial loss to the plaintiff in respect of his or her property or his or her office, profession, calling, trade or business."

47. Counsel also refers to the judgment of the High Court (Meenan J.) in *Lappin v. Mediahuis UK Ltd* [2023] IEHC 668. There, a claim for special damages for malicious falsehood was struck out in circumstances where there had been no mention in the statement of claim of any "*special damage*", nor any plea to the effect that the publication was calculated to cause and was likely to cause financial loss to the plaintiff in respect of his or her property or his or her office, profession, calling, trade or business.

48. For the reasons which follow, I am not satisfied that this aspect of the claim can be dismissed on a summary basis. The essence of the complaint being made by Mr. O'Malley is that the Irish National Accreditation Board were told, in the *Costello Report*, that Mr. O'Malley was incompetent as an auditor ("*lack of auditing skills and technique*"). It is not necessarily an answer to this to suggest, as NSAI does, that the Irish National Accreditation Board is not a potential client or user of Mr. O'Malley's services. To describe an individual as lacking auditing skills and technique to the very body which exercises a supervisory role in respect of auditing cannot be dismissed, *at this stage of the proceedings*, as a statement which is incapable of damaging that individual in his profession or calling. Mr. O'Malley alleges that "*word quickly got out*" that he had been summarily removed as auditor. There is a credible basis for a claim that potential clients would be reluctant to engage Mr. O'Malley having regard to these events.

49. Mr. O'Malley seeks to substantiate this aspect of his claim by seeking the discovery of documents. The case law in relation to strike out applications emphasises that the possibility of a plaintiff availing of procedural mechanisms, such as the discovery of documents or interrogatories, is a factor to be taken into account in determining whether proceedings should be dismissed peremptorily. In the present case, the need for there to be appropriate discovery is illustrated by the fact that the existence of the nine-page version of the *Costello Report* has only been belatedly disclosed. NSAI has had to acknowledge that this version was omitted from the FOI schedule issued in response to Mr. O'Malley's request pursuant to the Freedom of Information Act 2014.

50. Counsel has been critical of the supposed failure on the part of Mr. O'Malley to provide a detailed basis for his claim for damages. Mr. O'Malley has estimated

his loss in the sum of €60,000. Counsel is also critical of the fact that Mr. O'Malley did not actively seek any additional work. Again, it is suggested that this means that there is no reasonable prospect of success. With respect, this does not follow. If Mr. O'Malley is found at trial to be correct in saying that his professional reputation has been damaged, it may not be necessary for him to adduce positive evidence of his applications for work having been made and rejected. Mr. O'Malley has made the point that there is really only one market for auditing services and that he apprehended that he would not be successful in securing work in circumstances where his reputation had, on his case, been traduced.

51. Mr. O'Malley has averred that—other than the Coillte estate—there was no other forestry-related consultancy work available in NSAI. This work would have involved follow-on audit, surveillance, and site inspections of the Coillte estate to confirm if action had been taken and to provide up-to-date checks and evaluation thereof. Mr. O'Malley has expressly averred that it is "*wholly misleading*" to say that this workstream was quite separate from the assignment in relation to the registration assessment.

52. Mr. O'Malley has also made the reasonable point that, until discovery has been sought and obtained, he does not know whether the criticisms made of his auditing services were published to other parties such as the European Accreditation, International Accreditation Forum, PEFC Ireland and PEFC International.

53. It should be noted that counsel on behalf of NSAI confirmed that she did not seek to argue, at this stage, that it was apparent that the *other* three criteria under section 42 of the Defamation Act 2009 had not been met. It should be

emphasised that this does not preclude NSAI from making these arguments at the trial of the action. The point is that the strike out application was pursued *solely* on the basis that the supposed failure to establish special damages meant that there was no reasonable prospect of success. The High Court was not asked to determine, on this interlocutory application, that the published statements were, for example, not true or that they were not maliciously made. These are issues which will only arise now for determination at the trial of the action.

(3). CLAIM FOR CONSPIRACY

54. The third strand of the case is a claim for conspiracy. Counsel for NSAI submitted that the legal test for conspiracy is that approved of by the High Court (O'Neill J.) in *Iarnród Éireann v. Holbrooke* [2000] IEHC 47 as follows:

> "1. The agreement or combination of two or more people, the primary or predominant object of which was to injure another is actionable even though the act done to the party injured would be lawful if done by an individual.
>
> 2. An agreement or combination of two or more persons to carry out a purpose lawful in itself but by using unlawful means is actionable, in circumstances where the act in question might not be actionable against the individual members of the combination, as individuals."

55. NSAI characterise Mr. O'Malley's case as a claim of *unlawful means* conspiracy. More specifically, NSAI understands the allegation to be that the NSAI acted together with Coillte, and did so deliberately to damage Mr. O'Malley, as opposed to acting individually, and that the parties combined to publish the statements complained of.

56. Counsel on behalf of NSAI and Coillte, respectively, make the objection that the claim in conspiracy has not been pleaded with special clarity. There is some

force in this objection: the pleadings are not a model of clarity. However, it is possible to identify the essence of the claim in conspiracy. Mr. O'Malley contends that Coillte induced a breach of contract in that Coillte threatened, or otherwise put pressure on, officials within the NSAI to remove Mr. O'Malley as auditor. It is said that such an inducement was the unlawful means which is necessary to ground a claim in conspiracy.

57. The principal answer made to all of this, for the purpose of the present interlocutory application, is to say that there was no breach of contract. Counsel on behalf of Coillte made the point that it is a condition precedent to a successful claim of inducing a breach of contract that there must actually have been a breach of contract. It is further submitted that the procurer must act with the requisite knowledge of the existence of the contract and intention to procure a breach (citing *Clerk & Lindsell on Tort*, 24th Ed., at §23-21)

58. This argument stands and falls on the first strand of the case, i.e. the claim for breach of contract. For the reasons already explained under the first heading, I am not satisfied that, at this interlocutory stage, it can be said that the plaintiff has no reasonable prospect of success in relation to the breach of contract claim.

59. On this analysis, if Mr. O'Malley were to be successful on that claim, he could then, in principle, rely on the breach of contract in support of his argument for conspiracy. It should also be said that the law in relation to conspiracy is itself not entirely clear. It would, therefore, be inappropriate to reach important legal findings on this issue on an interlocutory application.

CONCLUSION AND PROPOSED FORM OF ORDER

60. The plaintiff, Mr. O'Malley, has made very serious allegations as to the manner in which the National Standards Authority of Ireland approached its certification role. More specifically, it is alleged that NSAI removed Mr. O'Malley as auditor at the behest of the company being certified in circumstances where that company complained that the auditing process was too rigorous. If these allegations were found to be true, then this would undermine public confidence in the independence and integrity of NSAI as an accredited certification body.

61. NSAI vigorously denies these allegations and has filed a full defence to the proceedings. Indeed, NSAI contends that the claim against it has no reasonable chance of succeeding and is bound to fail. To this end, NSAI has sought to dispense with the necessity of a trial of the action, and seeks, instead, to have the proceedings disposed of on a summary basis.

62. In pursuing this litigation strategy, NSAI has undertaken the burden of satisfying the high threshold prescribed for striking out proceedings. Moreover, NSAI has accepted that—for the purposes of the strike out application only—it must take the plaintiff's claim at its height. NSAI has not sought to contest the facts asserted by Mr. O'Malley. Instead, NSAI has sought to advance an argument that, even if the allegations were found to be true, the plaintiff's claim is still bound to fail.

63. The constraints on the strike out application are such that NSAI is compelled to adopt an extreme position. NSAI is compelled to argue that it would have been entitled, *as a matter of law*, to remove the plaintiff as auditor at the behest of the company being certified. The logical terminus of NSAI's position is that it enjoyed an *absolute discretion*, under the five year contract, on whether to assign

any work to the contractor, untrammelled by any duty of good faith and reasonableness and untrammelled by reference to the relevant international standard. This is so notwithstanding the context of the contract, i.e. a certification process by a public authority, and the length of the relationship between the parties. It is far from certain that such a stark contractual analysis will succeed at trial.

64. The defendants' argument that the claims in conspiracy and for inducement of breach of contract are bound to fail is predicated upon the proposition that there has been no breach of contract. In circumstances where it cannot be said that the claim for breach of contract is bound to fail, it follows that these other two claims cannot be said to be bound to fail.

65. As to the claim for malicious falsehood, the only objection advanced for the purpose of the strike out application is that the claim for special damages has not been substantiated. With respect, this objection tends to overlook the statutory language under section 42 of the Defamation Act 2009. It is sufficient for a claim to succeed that the publication was calculated to cause, and was likely to cause, financial loss to a claimant in his profession, calling, trade or business. Here, NSAI published a statement to the effect that the relevant official in NSAI considered that exchanges at the closing meeting indicated a "*lack of auditing skills and technique*" on the part of Mr. O'Malley. This statement is one which questions the professional competence of Mr. O'Malley. On Mr. O'Malley's case, the real reason for his removal as auditor had been to appease the company being certified. If this allegation were to be upheld at trial, there is a credible basis for saying that the publication, of what would have been held to be a false explanation, was malicious and calculated to cause financial loss.

66. The full extent of the publication internally and externally of this statement is unclear. The fact that NSAI omitted a lengthier version of the Costello Report from the FOI schedule (issued in response to Mr. O'Malley's request pursuant to the Freedom of Information Acts) is a cause of concern. In any event, it cannot conclusively be said, in the context of a strike out application, that the publication of a statement, which questions the professional competence of a claimant, to the very body which supervises accreditation will not have caused financial loss.

67. Accordingly, the defendants' respective strike out applications are refused. As to legal costs, my *provisional* view is that the plaintiff, having been entirely successful in resisting the strike out applications, is entitled to recover the costs of the motions as against the respective defendants. This would represent the default position under the recast Order 99, rules 2 and 3 of the Rules of the Superior Courts. If any party wishes to contend for a different form of costs order than that proposed, they will have an opportunity to make submissions at the case management hearing (below).

68. In circumstances where there has been significant delay in the progress of same, these proceedings will now be subject to intense case management with a view to an early trial date. The parties are directed to exchange any requests for voluntary discovery by 12 September 2024 and to respond by 26 September 2024. The proceedings will be listed before me on Wednesday 9 October 2024 for further directions.

Appearances

Éanna Mulloy SC and Berenice McKeever for the plaintiff instructed by J.V. Geary Solicitors
Margaret Gray SC and Mark William Murphy for the first defendant instructed by Eversheds Sutherland LLP
Paul H. O'Neill (with Micheál Ó Scanaill SC) for the second defendant instructed by Clyde & Co (Ireland) LLP