

FOIL Ireland Event: Superior Courts - applications to strike out proceedings

This event was held on 23rd February and was presented by **Edward Murray**, Barrister-at-Law.

The speaker highlighted that strike out applications are relevant across the whole spectrum of types of claims and both plaintiffs and defendants need to be aware of them.

There are two primary routes for striking out: Order 19, rule 28 of the Rules of the Superior Court 1986; and the inherent jurisdiction of the court.

The key points from the wording of Order 19, rule 28 RSC are that the court may strike out a claim where the pleading(s) show no reasonable cause of action or answer; and/or the cause of action or defence being shown by the pleadings are 'frivolous' or 'vexatious'.

There is a distinction between applying under O. 19, r. 28 RSC to strike out an **entire** pleading, such as a statement of claim or defence, and an application to strike out **parts** of pleadings which should be brought pursuant to O.19, r.27 RSC.

The O19 rule 28 procedure is to be contrasted with the courts' inherent jurisdiction to strike out pleadings/proceedings. Under the courts' inherent jurisdiction there is some flexibility and discretion with the court, including looking at the evidence. The court cannot look at evidence when the motion is brought under the rule: the court is limited to considering the pleadings. Motions will usually be brought along both routes.

Inherent 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.

The limitation on the courts to engage with the evidence can be traced back to the Constitution. The constitutional right of access to the courts (guaranteed by Article 40.31) includes the right to litigate claims which are justiciable and to initiate litigation in the courts.

It is necessary to balance the constitutional rights of plaintiffs to institute and prosecute proceedings with the interests of defendants who should not be forced to defend proceedings that are vexatious or bound to fail. (See *Towey & Towey v. Government of Ireland & Ors* [2022] IEHC 559, Dignam J).

There is a high threshold for a defendant to succeed in having a case struck out (see *Keohane v. Hynes* [2014] IESC 66).

Notable categories of claim where strike out may succeed

1. There is no statutory or legal basis for the plaintiff's claim (see *O'Donohue v AIB Mortgage Bank plc & Anors* [2017] IEHC 344; *Danske Bank A/S (trading as Danske Bank) v Scanlan* [2016] IEHC 118; *Hurley v Pepper Finance Corporation (Ireland) DAC* [2022] IEHC 299; *T.B and Health Service Executive and An Garda Siochana and Novartis Ireland Limited* [2022] IEHC 538).
2. The doctrines of res judicata and/or *Henderson v Henderson* are applicable (i.e., relating to a duplication of a legal claim or proceeding already determined, or the raising of a claim in subsequent litigation that ought properly to have been raised in a previous action, respectively). (See *Behan v The Governor and Company of the Bank of Ireland* [2002] IESC 20).
3. The case/claim is statute barred, although it must be remembered that limitation is usually a point of defence (see *Cunniffe v Cunniffe & Anor* [2022] IECA 272).

Practitioners should remember that under the Statute of Limitations Act 1957, examples of limitation periods include two years for personal injuries; three years for medical negligence (Statute of Limitations (Amendment) Act 1991); six years for tort and contract; and 12 years for debt secured on land.

4. The case/claim is futile, misconceived, hopeless and/or irremediable (see *Ewing v Ireland* [2013] IESC 44, where the court listed six indicators of vexatious proceedings. And see also *Towey & Towey v. Government of Ireland & Ors* [2022] IEHC 559)

It should be noted that a common defence to O.19, r.28 RSC applications, is for plaintiffs to issue an application to amend proceedings "to save the claim". The courts are more likely to facilitate an amendment to a claim rather than strike out proceedings, if the amendment(s) could take the claim out of the scope of O.19, r.28 RSC.

An Applicant can bring a motion to dismiss successfully at any point of the proceedings, but practitioners should bear in mind the cost implications for bringing late applications, particularly now that the courts have greater discretion as to how to award costs.