

THE HIGH COURT

[2016 No. 5972P]

BETWEEN:

JUNE SMITH

PLAINTIFF

-AND-

ACC LOAN MANAGEMENT LIMITED, KPMG, SHANE MCCARTHY, MARTIN FEELY, SEAN FARRELL, JOHN CUMMINS

DEFENDANTS

THE HIGH COURT

[2017 No. 2743P]

BETWEEN:

JANE SMITH

PLAINTIFF

-AND-

ACC LOAN MANAGEMENT AND JAMES SMITH

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 21st day of July, 2017.

1. Mrs. June Smith ("Mrs. Smith") and her daughter, Ms. Jane Smith ("Ms. Smith") both previously issued separate proceedings challenging the right of ACC Loan Management Limited ("ACC") to sell a farm belonging to Mrs. Smith and her husband, Mr. James Smith, ("Mr. Smith"), which farm is security for an unpaid loan extended by ACC to Mr. Smith and Mrs. Smith. These previous proceedings were held to be an abuse of process by both the High Court and the Court of Appeal

2. Notwithstanding this fact, this hearing is concerned with further proceedings issued by Mrs. Smith and Ms. Smith which challenge the right of ACC to sell the farm in question. Accordingly, this case considers whether the current proceedings should be dismissed as an abuse of process and whether an Isaac Wunder Order should be made against Mrs. Smith and Ms. Smith preventing the institution of future proceedings in relation to this dispute. In these proceedings Mrs. Smith and Ms. Smith have been assisted by a McKenzie Friend, Mr. William Murphy. In the context of the claim that these current proceedings are an abuse of process upon a previous abuse of process by the plaintiffs, this case also considers whether in these circumstances this Court should grant an order restricting Mr. Murphy from acting as a McKenzie Friend in the future, an issue that does not appear to have been considered by the Irish courts to date.

Background facts

3. This case involves two motions by ACC, in very similar terms, to strike out proceedings issued by Mrs. Smith and proceedings issued by her daughter Ms. Smith. Both sets of proceedings are against, *inter alia*, ACC in relation to a farm in County Laois which was mortgaged to ACC by Mrs. Smith and Mr. Smith as security for borrowings which were not repaid by Mr. and Mrs. Smith. Judgment was obtained by ACC in respect of these borrowings from Kelly J. on the 29th February, 2012, against Mr. and Mrs. Smith in the sum of almost €2 million.

4. ACC appointed Mr. Shane McCarthy of KPMG as a receiver (the "Receiver") to the farm on the 27th March, 2014. He has entered into a contract for the sale of part of the farm to a third party. ACC has recently received a completion notice from the intended purchaser. However, *lites pendentes* were registered against ACC's interest in the farm by Mrs. Smith and Ms. Smith on the back of the two sets of proceedings issued by Mrs. Smith and Ms. Smith against ACC.

5. Ms. Smith's proceedings were issued on the 24th March, 2017, against ACC and Mr. Smith. These proceedings seek an order to the effect that Ms. Smith is the owner of the said farm, as well as a permanent injunction against ACC preventing it from entering or selling the farm.

6. Mrs. Smith's proceedings were issued on the 5th July, 2016, against ACC, KPMG, Shane McCarthy (the Receiver), Martin Feely (an employee of ACC), Sean Farrell (a former employee of ACC) and John Cummins (a former employee of ACC). These proceedings seek orders, *inter alia*, that Mrs. Smith is the owner of the farm, orders setting aside the appointment of the Receiver and orders prohibiting the sale of the lands by the defendants.

7. After issuing these proceedings, Mrs. Smith registered *lites pendentes* in respect of ACC's interest in the lands. As these *lites pendentes* were frustrating the sale of the farm, ACC applied to Gilligan J. for; an order striking out Mrs Smith's proceedings, an order vacating the *lites pendentes*, and for an Isaac Wunder order against Mrs. Smith. On the 7th March, 2017, Gilligan J. vacated the *lites pendentes* registered by Mrs. Smith. The balance of the reliefs were adjourned to await the judgment of the Court of Appeal in relation to an appeal by Mrs. Smith of the dismissal of her previous proceedings against ACC referred already. Mrs. Smith's appeal was dismissed by the Court of Appeal on the 17th May, 2017.

8. Accordingly, this hearing is a first hearing of the motion against Ms. Smith in which ACC seeks, *inter alia*, an order vacating the *lites pendentes* registered by her. This hearing is also a resumption of the motion against Mrs. Smith to deal with the remainder of the matters not dealt with by Gilligan J. on the 7th March, 2017.

9. During the course of the hearing, this Court was advised that Mrs. Smith had issued a Notice of Motion in her proceedings before this Court, which is returnable to the 16th October, 2017. This Notice of Motion seeks to set aside all Orders made by Gilligan J. in previous proceedings involving the parties and relating to the farm the subject of these proceedings, on the grounds that there is a reasonable perception of objective bias on the part of Gilligan J. This claim is based on the allegation that Gilligan J. was involved as a passive investor with 19 others in relation to commercial property in Dublin, with one of those other investors being alleged to be a director or former director of ACC. Mrs. Smith confirmed to the Court that her McKenzie Friend, Mr. William Murphy, assisted her in the drafting of this Notice of Motion.

10. Rather than delaying the hearing of the present motion against Mrs. Smith, until the 16th October, 2017, this Court has determined that if it grants an Order against Mrs. Smith on the second motion before this Court, any such Order will lapse if Mrs. Smith is successful in her motion to be heard on the 16th October, 2017.

11. This judgment therefore deals with the two motions in relation to the two different sets of proceedings.

The two motions

12. The first motion seeks an order dismissing Ms. Smith's proceedings on the grounds that they are frivolous and/or vexatious and/or discloses no reasonable cause of action and/or amount to an abuse of process. That motion also seeks an order vacating the *lites pendentes* registered by Ms. Smith in respect of the farm and an Isaac Wunder Order against her which restrains her from issuing proceedings and from registering any further *lites pendentes* in relation to the farm.

13. The second motion seeks an order dismissing Mrs. Smith's proceedings on the grounds that they are frivolous and/or vexatious and/or disclose no reasonable cause of action and/or amount to an abuse of process. That part of the motion seeking an order vacating the *lites pendentes* registered by Mrs. Smith in respect of the farm is spent, since as already noted, that order was granted by Gilligan J. on the 7th March, 2017. The other relief sought in the second motion is an Isaac Wunder Order against Mrs. Smith, since Mrs. Smith is already subject to an order from Gilligan J. on the 25th April, 2017 prohibiting her from registering any further *lites pendentes* against the farm.

The first motion and the previous proceedings involving Ms. Smith

14. The farm which is the subject matter of these proceedings has already been the subject of numerous proceedings and it is not proposed to refer to these in detail, since they have been outlined in the Court of Appeal judgment from only two months ago in *Jane Smith v Shane McCarthy, ACC Loan Management Limited, Michael Collins & Company Solicitors and James Smith* [2017] IECA 167 ("Ms. Smith's Previous Proceedings").

15. That case dealt with previous proceedings which had been issued by Ms. Smith against, *inter alia*, ACC and Mr. Smith in which she sought to prevent the Receiver taking possession of the farm and sought to establish her right to that land on the basis of a lease. In the High Court hearing on the 18th April, 2016, in relation to those proceedings, Gilligan J. held that the proceedings were abusive as Ms. Jane Smith was seeking to re-ventilate issues which had already been raised and rejected by the High Court, first by Kelly J, as early as February of 2012 when judgment was first granted in favour of ACC against Mr. and Mrs. Smith in relation to this matter and also subsequently on the 17th October, 2014, in injunctive proceedings taken successfully by the Receiver against Mr. and Mrs. Smith before Gilligan J.

16. On the 17th May, 2017, the Court of Appeal upheld Gilligan J.'s decision of 18th April, 2016, and it too concluded that Ms. Smith's proceedings were abusive.

17. It is relevant to note that Ms. Smith's plenary summons in these current proceedings was issued by her on the 24th March, 2017. This means that Ms. Smith decided to issue a plenary summons challenging ACC's and the Receiver's rights to the farm after the 18th April, 2016, the date when Gilligan J. had held that her previous proceedings making a similar challenge amounted to an abuse of process.

18. It is also relevant to note that Ms. Smith's McKenzie Friend, Mr. Murphy, indicated to the Court that he began advising Mrs. and Ms. Smith at the end of 2015. He was therefore advising Ms. Smith when those proceedings, which are now before this Court, were first issued by Ms. Smith.

19. It is significant that when counsel for ACC outlined the abusive nature of the previous proceedings and made his submissions regarding the abusive nature of these proceedings, the only submission made by Ms. Smith in her reply was, not to deny the abusive nature of these proceedings, but rather to claim that ACC's motion should be dismissed because of typographical/drafting errors in the wording of the motions and drafting errors in a second affidavit filed on behalf of ACC. This is because in the second affidavit filed by ACC there is a reference to the first affidavit having been sworn by one a solicitor in ACC's law firm (Mason Hayes & Curran), Ms. Riordan, when this reference should clearly should be to Mr. Keane, another solicitor in Mason Hayes & Curran, who had in fact sworn the first affidavit. This drafting error was duly brought to Ms. Smith's attention by letter dated 13th July, 2017, as was the fact that the affidavit of Mr. Keane had been in her possession for a number of weeks at that stage.

Strike out of Ms. Smith's proceedings

20. It is clear to this Court that if Ms. Smith's Previous Proceedings were held by the High Court and the Court of Appeal to be an abuse of process, as they were, since they sought to challenge the rights of ACC and the Receiver to the farm, which challenge had been unsuccessfully litigated previously, it must follow that it is an even greater abuse of process for Ms. Smith to pursue these later proceedings which also seek to challenge the rights of ACC and the receiver to the farm. To put it another way, where previous proceedings have been dismissed as an abuse of process, the issuing of subsequent proceedings regarding the same issue must not only be an abuse of process, but they must be an even greater abuse of process.

21. This fact would have been obvious to Ms. Smith, as it would to any right thinking person, and so this Court concludes that the only plausible reason that Ms. Smith issued the current proceedings was not in the vain hope that they would ever be successful, but rather on the basis that the issue of proceedings, regardless of their merit, would entitle her to register a *lis pendens* against the farm and so it seems because of some grudge which she holds against the bank that lent money to her parents to thereby thwart and/or delay the sale of the farm by the Receiver, on the grounds that there was litigation pending regarding the farm.

22. It is difficult for this Court to avoid the conclusion that Ms. Smith (and Mrs Smith, because of the similarity of their cases, as will be seen below) think that issuing new proceedings and registering *lites pendentes* is some kind of cat and mouse game and that there is no need to heed what the courts have said in relation to previous proceedings issued by them.

23. This is however a costly game. Considerable sums of public money are expended in dealing with these proceedings, there is a considerable cost to defendants such as ACC who have to defend expensive High Court proceedings and it also has a cost for those other litigants who do not get their cases heard because of the court system being clogged up with litigation without merit, as evidenced by the recent suspension of the Judicial Review list in the High Court for a week due to the strain on court resources from the volume of litigation.

24. For the foregoing reasons, this Court has little hesitation in concluding that these proceedings amount to a further abuse of process by Ms. Smith and it will dismiss her proceedings as an abuse of process.

The second motion and previous proceedings involving Mrs. Smith

5. In relation to the second motion, which seeks an order dismissing the proceedings against Mrs. Smith, it is necessary to make further reference to the fact that like her daughter, Mrs. Smith also has issued previous proceedings ("Mrs. Smith's Previous Proceedings") which were also dismissed as an abuse of process.

26. The background to Mrs. Smith's Previous Proceedings is the fact that after the Receiver was appointed to the farm on the 27th March, 2014, it was not possible for him to obtain possession of the farm on a consensual basis. Accordingly, he took injunctive proceedings against Mr. and Mrs. Smith. This resulted in an Order dated 17th October, 2014, from Gilligan J. in which an interim injunction was granted ordering Mr. and Mrs. Smith to refrain from impeding or obstructing the Receiver from taking possession of, or getting in and collecting, the secured assets, which assets included the farm. On the 1st December, 2015, at the conclusion of the injunction hearing, Gilligan J. granted a perpetual injunction against Mr. and Mrs. Smith in these terms.

27. Despite losing these injunctive proceedings before Gilligan J. and of course losing the previous judgment proceedings on the 29th February, 2012, before Kelly J., Mrs. Smith took proceedings in May 2016 entitled *June Smith v. Shane McCarthy, ACC Loan Management Limited, Michael Collins & Company, James Smith and the Law Society of Ireland* with Record No. 2016/4311P and citation [2017] IECA 168, with the aim of preventing the Receiver from selling the farm.

28. These proceedings were struck out as an abuse of process by O'Regan J. on the 15th June, 2016, against the first two defendants, and as against the third and fifth defendant as unlikely to succeed by Gilligan J. on the 27th July, 2016.

29. These two High Court decisions were appealed to the Court of Appeal which court dismissed the appeal and held that the proceedings were '*plainly abusive*'. It is not proposed to repeat in detail the terms of that judgment against Mrs. Smith, which is in similar terms to the Court of Appeal judgment obtained against Ms. Smith.

30. The proceedings before this Court were instituted by Mrs. Smith on the 5th July, 2016, and they seek orders, *inter alia*, that she is the owner of the farm and orders preventing the defendants from selling the farm.

Strike out of Ms. Smith's proceedings

31. It is clear to this Court that if Mrs. Smith's Previous Proceedings were held by the High Court to be an abuse of process and held by the Court of Appeal to be '*plainly abusive*', then the decision of Mrs. Smith to pursue the current proceedings must be even more abusive since they involve the same dispute over the same farm and the same borrowings and seek to achieve the same result.

32. Just as it must have been obvious to Ms. Smith in similar circumstances, so too it must have been obvious to Mrs. Smith that, in light of the High Court and Court of Appeal decisions regarding Mrs. Smith's Previous Proceedings, the issue and the maintenance of the current proceedings before this Court are also abusive. It is this Court's conclusion that they were issued because of a grudge which Mrs. Smith has against ACC for being the bank, that lent money to her which she has failed to repay, and solely to enable Mrs. Smith to register a *lis pendens* and thereby thwart the sale of the farm by the Receiver appointed by ACC.

33. For this reason, Mrs. Smith's proceedings will also be struck out as an abuse of process.

Isaac Wunder Orders

34. As regards the Isaac Wunder Orders sought against Ms. Smith and Mrs. Smith, sworn evidence was provided by ACC regarding three other sets of proceedings issued by Mrs. Smith and Mr. Smith in relation to the farm, in addition to the various proceedings referenced in the two Court of Appeal judgments. These are:

(1) High Court Record Number 2016/3762P – Two days after the Court of Appeal refused to extend time to appeal against the perpetual injunction of Gilligan J. previously referred to, Mrs. June Smith issued proceedings against ACC and Michael Collins (the solicitor to Mr. and Mrs. Smith). While no statement of claim has been issued, the plenary summons makes clear that these proceedings also relate to the farm and the borrowings from ACC.

(2) High Court Record Number 2014/5445P – On the 19th June, 2014, which was shortly after the appointment of the Receiver over the farm, which occurred on the 27th March, 2014, Mr. Smith issued proceedings against ACC in relation to the farm and the borrowings, but no Statement of Claim has been delivered.

(3) High Court Record Number 2016/8757P – Mrs. June Smith issued proceedings against John E. Fletcher, John C. Fletcher and David Fletcher, two of these three being directors in the company that has contracted to buy part of the farm. After the *lites pendentes* registered by Mrs. Smith had been vacated on foot of the Order of Gilligan J. dated 7th March, 2017, at the partial hearing of the second motion referred to above, Mrs. June Smith registered *lites pendentes* against the farm on foot of the proceedings against the Fletchers. By Order dated 25th April, 2017, Gilligan J. vacated these *lites pendentes* and restrained Mrs. June Smith by injunction from registering any further *lis pendens* in respect of the farm.

35. It is clear from the details set out in this judgment and the details set out in previous judgments of the High Court and Court of Appeal that Mrs. Smith and Ms. Smith will stop at nothing to thwart or delay the exercise by ACC and the Receiver of their rights in relation to the farm and as previously noted they seem to regard the issue of new proceedings and the registering of *lites pendentes* as some kind of cat and mouse game.

36. As noted by Irvine J. in *Fox v. McDonald and Danske Bank* [2017] IECA 189, it is necessary for these courts to make Isaac Wunder Orders to prevent an abuse of court resources and this Court would in all of the foregoing circumstances have no hesitation in making an Isaac Wunder Order against Ms. Smith in the terms of paragraphs 5, 6 and 7 of the Notice of Motion, which it is to be noted is restricted since it applies to litigation regarding the farm and the secured borrowings.

37. For the same reason an Isaac Wunder Order will be made against Mrs. Smith in the terms sought by ACC as outlined in paragraphs 5 and 6 of the Notice of Motion against her.

38. As this Court is concerned that Mrs. Smith and Ms. Smith will, it seems, stop at nothing in pursuit of their claim, the terms of the Order in paragraph 7 of the Notice of Motion, restraining Ms. Smith from issuing any further *lites pendentes* against the farm, will be extended to apply to '*anyone acting in concert with her*'. Similarly paragraph 2 of the Order of Gilligan J. dated 25th April, 2017, against Mrs. Smith prohibiting her from registering *lites pendentes* against the farm, will be amended to extend to '*anyone acting in concert with her*'.

McKenzie Friend

39. This Court is of the view that it beggars belief that Mrs. Smith and Ms. Smith, after receiving the damning judgment of the High Court and the damning judgment of the Court of Appeal that their previous challenges to the sale of the farm was an abuse of process, would issue these two sets of proceedings and continue to pursue these proceedings, which they are doing to this day. It is for this reason that it has no hesitation in dismissing both sets of proceedings as an abuse of process upon abuse of process.

40. However, it is of concern to this Court that in maintaining these proceedings before this Court, Mrs. Smith and Ms. Smith, who are lay litigants, have been advised by Mr. William Murphy. At the hearing before this Court, it was clear that Mr. Murphy was providing extensive advice to Mrs. Smith, and to a lesser degree to Ms. Smith (since she made little by way of oral submissions), in their attempts to deny that these proceedings amounted to an abuse of process.

41. This Court is particularly concerned that Mr. Murphy appears to be advising Mrs. Smith and Ms. Smith to pursue these proceedings which amount to abuse of process, upon abuse of process.

42. This Court was advised by Mr. Murphy that he acts as a McKenzie Friend for several other litigants. The role of Mr. Murphy in these proceedings is clearly of some concern to ACC since it has provided sworn evidence of the extent of his involvement in this case, which Mr. Murphy has indicated began two and a half years ago. This Court was also advised by ACC that it had written to Mr. Murphy threatening to seek costs against him in relation to these proceedings, since Mrs. Smith herself was not a mark for a costs award. For this reason, Mrs. Smith appears to have no financial incentive to refrain from instituting hopeless litigation and this may be one reason why she has continued with this abuse of process upon abuse of process.

43. Mr. Murphy has been involved in advising on an abuse of process upon abuse of process, which has wasted court resources. In the interests of ensuring that court resources are not wasted by other abusive proceedings in the future, it is within the Court's power to order that Mr. Murphy is not allowed to act as a McKenzie Friend for any other person, except with the prior leave of the President of the High Court or any judge nominated by him. If it were to make such an Order, this Court would do so in reliance on the inherent jurisdiction of the Court to seek to ensure that the process of the court is not abused, which inherent jurisdiction underlies the power of the court to make Isaac Wunder Orders, as is clear from Keane CJ's judgement in *Riordan v. Ireland* [2001] 3 IR 365 at p. 370.

44. Such an Order would not prevent Mr. Murphy acting as a McKenzie Friend, but it would put a filter on the right of a litigant to use Mr. Murphy as a McKenzie Friend, which filter is the prior leave of the Court.

45. While this Court is of the view that such an Order would be justified in the current circumstances, ACC had indicated that it does not wish to seek such an Order on the grounds that it did not wish to '*throw good money after bad*' in these proceedings, on the grounds presumably that if that Order were appealed, it would involve further legal costs for ACC in defending that appeal. On this basis, this Court does not propose to make such an Order today against Mr. Murphy, but it grants liberty to ACC to apply for such an Order in the future.