THE HIGH COURT

[2014/1456S]

BETWEEN

DANSKE BANK A/S (TRADING AS DANSKE BANK)

PLAINTIFF

AND

GERARDINE SCANLAN

DEFENDANT

[2014/8950P]

BETWEEN

GERARDINE SCANLAN

PLAINTIFF

AND

NATIONAL IRISH BANK NOW ACTING IN THE STYLE OF DANSKE BANK A/S (TRADING AS DANSKE BANK) AND STEPHEN TENNANT

DEFENDANTS

JUDGMENT of Mr. Justice Fullam delivered on the 25th day of February, 2016.

Factual Background

1. By facility letter dated the 8th September, 2008, accepted by Ms. Scanlan on the 2nd October, 2008, Danske Bank A/S ("the Bank") provided Ms. Scanlan with a housing loan in the sum of €107,500. The principal security for the loan was a legal mortgage over the defendant's former residence at 19 Radharc Na Sleibhte, Churchtown, Mallow, Co. Cork. This was an extension of an existing all sums legal mortgage dated the 21st August, 2003.

2. Ms. Scanlan failed to comply with the terms of an Arrears Notice from the Bank dated the 17th July, 2013. By letter dated the 7th August, 2013, the Bank demanded repayment of the outstanding balance of the loan then standing at €84,599.44. Ms. Scanlan failed to discharge the amount due. Pursuant to the powers conferred by paragraph 6 (2) of the mortgage, the bank appointed Mr Stephen Tennant receiver over the property by Deed of Appointment dated the 15th August, 2013.

3. These events gave rise to two sets of proceedings. In the first on the 6th June, 2014, the Bank issued a summary summons seeking judgment in the sum of €84,439.80. In the second, Ms. Scanlan issued plenary proceedings on the 21st October, 2014 against the Bank and the Receiver Mr Tennant, claiming €600,000 damages on various grounds including gross negligence and misrepresentation. A statement of claim was delivered on the 23rd February, 2015 wherein she claims damages in the sum of €100,000.

4. The Bank's application is based on two motions:

> *(i)* A motion seeking summary judgment dated the 9th September, 2014 in the sum of €84,439.80 against Ms. Scanlan (the defendant) relating to a loan made by the Bank to the defendant in September, 2008 repayment of which was demanded by letter dated the 25th April, 2014 from the Bank's solicitors.
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> *(ii)* A motion dated the 18th March, 2015, seeking dismissal of Ms. Scanlan's proceedings on two grounds:
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> (a) the inherent jurisdiction of the court to dismiss frivolous and vexatious cases and;
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> (b) the proceedings on their face disclose no reasonable cause of action pursuant to Order 19 Rule 28

5. Ms. Scanlan's claim is for damages arising out of a number of grounds including that the Bank: engaged in reckless lending practices, misled her as to the nature of the agreement, engaged in excessive securitisation, breached a number of regulatory requirements and was in breach of licensing requirements as it was insolvent at the relevant time. She further claims the behaviour of the appointed receiver caused her damage.

6. When the matter came before O'Malley J. on the 2nd March, 2015, the Bank indicated that it proposed to issue a motion pursuant to Order 19 Rule 28 seeking dismissal of Ms. Scanlan's claim on the basis that it failed to disclose any reasonable cause of action and/or under the court's inherent jurisdiction that the claim was frivolous and vexatious.

7. O'Malley J. directed that the two motions be listed and heard together. On the 18th March the Bank issued its motion for dismissal grounded on the affidavit of Ms. Sharon Keenan, manager in the Asset Recovery Team of the Irish registered branch of the Bank.

8. The principles applicable to an application by a plaintiff for summary judgment and a defendant seeking dismissal of a plaintiff's claim based on the courts inherent jurisdiction under Order 19 Rule 28 are similar. The court's exercise of its jurisdiction in either situation amounts to a restriction on a party's right of access to the courts. In an application for summary judgment the court must be satisfied that it is clear that there is no reasonable or fair probability of the Defendant having a real or *bona fide* defence. Hardiman J in Aer Rianta cpt v. Ryanair Limited [2001] 4 I.R. 607 stated at paragraph 623:

> "In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

9. In a dismissal application the onus lies on the defendant concerned to establish that the plaintiffs claim is bound to fail. The defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established at trial.

10. Kearns P. considered the court's jurisdiction to dismiss under Order 19 Rule 28 and under its inherent jurisdiction at pages 2 and 3 of his judgment in *Patrick Harrold v Nua Mortgages Limited* [2015] IEHC 15 stating:

> *"Order 19 Rule 28 of the Rules of the Superior Courts provides-*
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> > *"The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or the defence being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."*
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> *The court also possesses an inherent jurisdiction to strike out proceedings. This well established position was confirmed in Barry v. Buckley [1981] IR 306 where Costello J. stated that the "jurisdiction exists to ensure that an abuse of the process of the courts does not take place" and where a claim is bound to fail it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to the defendant."*
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> *It is well established that this jurisdiction is one which should be used sparingly and right of access to the courts should be preserved wherever possible. In Lawlor v. Ross (unreported Supreme Court 22nd November, 2001) Fennelly J. stated that "the court should be willing to assume in favour of the plaintiff that an appropriate amendment of the pleadings might save his case."*

11. Furthermore, in *O'N v. McD & Others* [2013] IEHC 135 Kearns P. emphasised that with cases involving litigants in person, the courts are obliged to be "particularly cautious".

12. Clarke J. considered the power to strike out proceedings in *Salthill Properties Ltd and another v. Royal Bank of Scotland plc and others* [2009] IEHC 207 stating:–

> *"… it seems to me that counsel for Salthill and Mr. Cunningham is correct when he says that the court need not and should not require a plaintiff to be in a position to show a prima facie case at the stage of an application to dismiss, in order that that application should fail. There have been many cases where the crucial evidence which allowed a plaintiff to succeed only emerged in the course of the proceedings. At the level of principle, this is likely to be particularly so in cases alleging fraud or other similar wrongdoing which is likely to be clandestine, if present, and where a plaintiff may only be able to come across admissible evidence sufficient to prove his case by virtue of the use of procedural devices such as discovery and interrogatories. That is not to say that it is legitimate for a party to instigate such proceedings when the party concerned has no basis for so doing. However there is, in my view, a significant difference between circumstances where a plaintiff has a legitimate basis for considering that it may have a claim at the time of commencing proceedings, on the one hand, and a situation where that party has, at that time, available to it, admissible evidence which it can put before the court to establish a prima facie claim, on the other hand.*
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> *It is clear from all of the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put forward, at that time, a prima facie case to the contrary effect."*

13. The Banks application for summary judgment was grounded on the affidavit sworn on the 4th September, 2014 by Ms. Sharon Keenan, manager in the Bank's Asset Recovery Team. The defendant filed a replying affidavit dated 17th November, 2014.

14. In the dismissal application, Ms. Keenan swore an affidavit on behalf of the Bank on the 16th March, 2015. The defendant filed two replying affidavits the first dated 29th April, 2015 and second on 19th October, 2015.

15. The damages claimed by Ms. Scanlan are stated in her pleadings to be compensation "to restore the plaintiffs' liquidity, to restore to the plaintiff the proper value of her equity of redemption in the property and to compensate the plaintiff for unnecessary and reckless damage to the property, her business and person and good name and standing."

16. Ms. Keenan in her affidavit of 16th March, 2015 at paragraph 3 took the approach of summarising the issues as far as possible, to correspond with the issues dealt with by Kearns P. in his judgment in the case of *Patrick Harrold v Nua Mortgages Limited* [2015] IEHC 15 16th January, 2015 and *Danske Bank v Declan and Marion Crowe* [2015] IEHC 567 dated 9th September 2015.

17. The issues summarised by Ms. Keenan are as follows:

> 1. The plaintiff (Ms. Scanlan) suffered loss as a result of reckless lending practices by the Bank including the loss of her job.
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> 2. The Bank acted in contravention of the Consumer Protection Code.
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> 3. The Bank engaged in excessive securitisation which created a false boom economy followed by a bust situation which crippled the country.

4. The Bank's licence was invalid by virtue of insolvency thus rendering the mortgage null and void.

5. The Bank failed to provide lawful paper work supporting the appointment of the Receiver.

6. The Receiver aggressively pursued a quick sale of the property and the plaintiff's marriage, health and piece of mind suffered greatly as a result.

7. The Receiver removed the rent roll therefore removing all available income to the property forcing the plaintiff Ms. Scanlan into complete default.

8. The Receiver did not discharge his duties correctly by leaving the house in a state of vandalism and disrepair.

Reckless lending
18. Ms. Scanlan submits that the Bank engaged in reckless lending practices which led to her suffering loss and damage.

19. There is no civil wrong of reckless lending in this jurisdiction. That is confirmed by a number of decisions both in this jurisdiction as elsewhere which are cited in the judgment of Kearns P. in *Harrold*.

20. At pages 10 and 11 in his judgment in *Harrold*, Kearns P. said:

> "In relation to the plaintiff's claim of reckless lending by the defendant, as is clear from the case law relied upon by counsel for the defendant, there is no such civil wrong in this jurisdiction. In particular the court notes the decisions on this issue in *Healy v. Stepstone Mortgage Funding, ICS Building Society v. Grant, and McConnell v. President of Ireland*. This aspect of the plaintiff's claim is closely aligned to a number of other broad and general allegations he makes in relation to the lending practices of "various banks" which they plaintiff contends "created the false boom and bust situation which has crippled my country". Blanket allegations such as these do not give rise to a reasonable cause of action in the plaintiff's case, are bound to fail and must be struck out. That is not to say that such allegations related to the wider context of the financial crisis should not be considered by a more appropriate forum of enquiry."

21. In light of this, the Bank submits that this aspect of the plaintiff's claim discloses no reasonable cause of action and therefore ought to be struck out as being bound to fail.

Consumer Protection Code
22. The bank submits that it acted fairly in respect of seeking repayment of the loan and in compliance with the Consumer Protection Code. This is dealt with at para. 11 of the grounding affidavit of Sharon Keenan on behalf of the bank wherein she states "that the plaintiff was notified of her default and given an opportunity to remedy the default". The bank submits that it is sufficient to state that it is well established by decisions of this court that non-compliance with a statutory code does not relieve the borrower of his obligations under a loan to repay the lender and that breach of under code does not provide a plaintiff with a cause of action.

23. In *Harrold* Kearns P. cites the decision of McGovern J. in *Freeman & other v. The Bank of Scotland (Ireland) & others* [2014] IEHC 284 as worth noting:

> "It is clear therefore that noncompliance with a statutory code does not relieve a borrower from his obligations under a loan to repay the lender, nor does it deprive the lender of his rights and powers under the loan agreement. If that is the case so far as the statutory codes of conduct are concerned, then, a *fortiori*, the plaintiffs in this action cannot make the case that they are relieved of their obligations under the loan or that the bank is deprived of its rights under the loan agreements, if there has been a breach of the bank of what is a voluntary code."

Excessive Securitisation
24. Again the bank says that numerous decisions of the High Court establish that such allegations do not disclose a cause of action. At page 11 in *Harrold* Kearns P. stated:

> *"The issue of securitization as been dealt with in detail by previous decisions of the High Court and does not warrant detailed consideration herein. However, the remarks of Peart J. in Wellstead are of particular relevance:-*
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> > *"… there is nothing unusual or mysterious about a securitization scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitization schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors."*
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> *The plaintiff contends that securitization, alongside other fraudulent practices of the bank, amount to a "policy of predatory targeting of customers with the long term goal of fraudulently acquiring valuable property at little or no cost". In light of a number of previous decisions, the Court is satisfied that this aspect of the plaintiff's claim is frivolous, bound to fail, and must also be struck out."*

Insolvency of the Bank
25. The plaintiff claims at paragraphs 29 and 49 of her statement of claim that a mortgage entered into without a bank having a valid and appropriate license is null and void. She submits that it is stipulated that an applicant must be solvent to be successfully awarded a license. The statement of claim asserts that the losses of National Irish Bank in the first six months of 2006 where €17.2 million and by 2008 the losses had increased to €552 million.

26. The bank submits that the decisions of the High Court establish that the insolvency of a bank would not affect the validity of the loan and secondly the allegations by the plaintiff do not give her a cause of action.

> (a) In *Danske Bank A/S v. Declan and Marion Crowe*, the defendants challenged the plaintiff's capacity to maintain summary judgment proceedings on the basis that it had never been issued a banking license in Ireland. Kearns P. agreed with the plaintiff's position however that by virtue of the EC (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. 395 of 1992) the requirement to hold a license authorization under s. 33 of the Central Bank Act 1971 was

superseded and the transfer of National Irish Bank to Danske Bank in 2007 under the provisions of S.I. 297 of 2007 entitled Danske as a credit institution already licensed in another member state, i.e. Denmark to carrying on banking business in Ireland through a branch, namely NIB.

(b) Insolvency. This issue has been considered in a number of cases as appears in the defendants submissions in *Harrold*. In *McCarthy*, Hogan J. stated:

"It was contended that been insolvent at the time it made the loans. While that claim has been strenuously denied, it is sufficient to say – as Gilligan J. said in *Freeman* – that even if this were so, this would not affect the validity of the loans."

27. In *Kearney v. KBC Bank Ireland PLC and Others* [2014] IEHC 260, Birmingham J. also considered a claim in relation to the alleged insolvency of the bank in the following terms –

" The contention that the bank is or was insolvent or has failed to prove its solvency, again, assuming in favour of the plaintiff for the purpose of this exercise that this is or was the situation, something which is of course firmly denied by the bank, this does not have any impact or effect on the validity or enforceability of the loan arrangements and mortgages entered into between the plaintiff and the bank and certainly would not provide the plaintiff with a cause of action. The obligation to repay remains in full force and effect whether the bank is solvent or insolvent."

A failure to provide lawful paperwork associated with the Deed of Appointment of the Receiver
28. Ms. Scanlan acknowledged the security provided by the existing deed of mortgage of the 21st of August, 2003 in signing the Facility Letter. A copy of the mortgage executed by Ms. Scanlan was produced in Court. The deed of appointment of Mr. Tennant dated 15th August, 2013 is exhibited with the affidavit of Ms. Keenan sworn on the 16th March, 2015.

29. Gilligan J. in *The Merrow Limited v. Bank of Scotland PLC and O' Connor* [2013] IEHC 130 stated that:

"29. Since a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument. This principle has been recognised by the leading commentators in this area and accepted and applied by the courts throughout the common law world.

30. *Courtney*, in The Law of Private Companies (3rd Ed.) has observed that:

"[t]he validity of the appointment of a receiver is dependent upon compliance with the terms contained in the debenture and the capacity of the company and authority of its officers to create the debenture ab initio."
31. Lynch-Fannon Corporate Insolvency and Rescue (2nd ed.) has noted that "[t]he penalty for non-compliance with the formalities for the appointment of the receiver is that such appointment is void". She has also observed that non-compliance with formalities of appointment amounts to an abuse of process."

30. As provided for by Paragraph 6(2) of the mortgage, the deed of appointment was executed in writing by an officer of the bank in accordance with s. 24 of the Conveyancing and Law of Property Act 1881.

31. Ms. Scanlan relies on the decision *The Merrow* as authority to the contrary. In *The Merrow* the Debenture expressly required the appointment of a receiver to be executed under seal. That is not the case here.

The Receiver aggressively pursued a quick sale causing the plaintiff specific damage.
32. Ms. Scanlan has argued that the Receiver aggressively pursued a quick sale of the property and the plaintiff's marriage, health and peace of mind suffered as a result.

33. As stated by Birmingham J. in *ACC Bank Plc. v. McEllin and others* [2013] IEHC 454 there is no obligation on a creditor to enforce rights at any particular time. It is the Bank's decision as to when to act.

" 32. More fundamentally, this argument ignores the fact that there is no obligation to enforce rights at any particular time. It is for the bank to choose the time to act. That appears very clearly from the decision of the Court of Appeal in Silven Properties Limited v. Royal Bank of Scotland plc [2004] 1 W.L.R. 997. In that case, Lightman J. at para. 14, delivering the judgment of the court commented as follows:-

"14. A mortgagee 'is not a trustee of the power of sale for the mortgagor'. This time-honoured expression can be traced back at least as far as Sir George Jessel M.R. in Nash v. Eads (1880) 25 SJ 95. In default of provision to the contrary in the mortgage, the power is conferred upon the mortgagee by way of bargain by the mortgagor for his own benefit and he has an unfettered discretion to sell when he likes to achieve repayment of the debt which he is owed: see Cuckmere Brick Co v . Mutual Finance Limited [1971] Ch 949, 969g. A mortgagee is at all times free to consult his own interests alone whether and when to exercise his power of sale. The most recent authoritative restatement of this principle is to be found in Raja v. Austin Gray [2002] 1 EGLR 91, 96 para. 29 per Peter Gibson L.J. The mortgagee's decision is not constrained by reason of the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor: (see China and South Sea Bank Limited v. Tan Soon Gin (alias George Tan) [1990] 1 AC 536). It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price: see Tse Kwong Lam v. Wong Chit Sen [1983] 1 WLR 1349 at 1355b."

33. This issue was also considered by McKechnie J. in Ruby Property Company Limited v. Raymond Kilty and Superquinn (Unreported, High Court, 31st January, 2003). In paragraph 13 of his judgment he set out in concise form the conclusions that he felt could be deduced from the authorities. Particularly in point is his comment at subparagraph (d) which was as follows:-

"If there is no duty to wait, logically, it would appear to follow that there is no duty to sell immediately so as to avoid a possible decrease in the value of the charged asset. See China and South Sea Bank Ltd. [[1990] 1 AC 536]."

34. In this case it has now emerged that matters would have worked out better for the defendants had the plaintiffs not afforded them time. However, that is with the benefit of hindsight. Arguments that banks and finance houses should move promptly and robustly lest matters get worse would have serious consequences if they were to carry the day and be universally applied. However, for my part, I am satisfied that the position is as indicated by McKechnie J. Accordingly, as far as this argument is concerned, I am satisfied that not even an arguable case is made out."

Removal of rent roll /Damage to premises
34. The Plaintiff submits that the receiver removed the rent roll therefore removing all available income to the property forcing the Plaintiff into complete default. Furthermore, the Plaintiff claims that the receiver did not discharge his duties correctly by leaving the house in a state of vandalism and disrepair.

35. The Bank submits that the Plaintiff defaulted on her loan and the Bank demanded payment. Thereafter, the Bank, in pursuance of the powers contained in the deed of mortgage, lawfully appointed the receiver over the property. Upon appointment, the receiver is under a duty to act in good faith. There is no basis for the allegation that the second named defendant acted otherwise than honestly and in good faith.

36. Ms. Scanlan's allegations in the previous two sections that the receiver has acted in breach of his duties are not supported by evidence and amount to mere assertions.

Conclusion
37. The courts afford litigants in person an appropriate degree of latitude. However, they are still bound by the laws of evidence and procedure. Ms. Scanlan's extensive blanket grounds amount to general assertions that are not backed up by evidence.

38. It is the court's view that the plaintiff's claim discloses no reasonable cause of action and is bound to fail. Accordingly, the plaintiff's claim against the Bank and the receiver is struck out pursuant to the inherent jurisdiction of the Court and pursuant to Order 19, Rule 28 of the Rules of the Superior Courts.

39. The court is satisfied that this matter should not go to full plenary hearing and final judgment should be entered against Ms. Scanlan. The Court was informed that the proceeds of sale of the property have been applied to Ms. Scanlan's indebtedness leaving a balance due of €47,704.46. Liberty to apply.