THE COURT OF APPEAL

Appeal No. 133/2015

Ryan P.
Peart J.
Hogan J.

BETWEEN:

JOSEPH DELANEY

PLAINTIFF/RESPONDENT

- AND -

ALLIED IRISH BANKS PLC., DECLAN TAITE AND SHARON BARRETT

DEFENDANT/APPELLANT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 28th DAY OF JANUARY 2016:

1. This is an appeal by Mr Delaney against the order made in the High Court on the 13th January 2015 when, on an application by the defendants to strike out his claims, Mr Justice Cregan ordered that all claims be struck out on the basis that they were either unstateable or were bound to fail. He did so for the reasons he gave in his careful and considered written judgment delivered that same day.

2. Mr Delaney has no legal representation, but has had considerable assistance from a *McKenzie* friend whom this Court allowed to make submissions on his behalf given particular difficulties he himself has in properly articulating the arguments he wished to make. He was similarly assisted in the High Court.

3. Mr Taite and Ms. Barrett are statutory receivers appointed by NAMA over property 82, JKL Street, Edenderry, Co. Offaly in August 2013. For reasons which I shall explain briefly in due course, Mr Delaney claims to be entitled to possession of these premises on foot of a lease from a Ger Killaly, and over which the latter and his wife had previously executed a mortgage in favour of the bank as security for certain loans, which were in due course transferred into NAMA pursuant to the provisions of the National Asset Management Act, 2009 ("the NAMA Act").

4. The claims against the bank are fully set forth in the judgment of Cregan J. and include a claim that the bank was negligent in failing to advise him not to lend money to Mr Killaly who was a customer of the same branch of AIB in Edenderry as Mr Delaney. There is a claim also for unjust enrichment on the part of the bank, and a claim that the bank is in breach of certain provisions of the National Asset Management Act, 2009. In addition there is a miscellany of other claims such as deceit on the part of an official at the bank, a claim for a constructive trust in his favour in relation to the premises, and an allegation that the bank used the Conveyancing Act, 1881 as an engine of fraud.

5. There is a most unfortunate factual background to Mr Delaney's claims. The reality is that Mr Delaney, a hard working man who had returned from the United Kingdom where he had worked in construction for some 23 years, was duped by Mr Killaly, whom he knew, into lending him a total of almost €350,000 by a number of substantial withdrawals from his savings of about €430,000 over a period of under one month between 20th August 2008 and 15th September 2008.

6. The account in which Mr Delaney's money lay was in the name of his wife (they are now separated). The funds had been in a joint account, but because of literacy difficulties which Mr Delaney has, the money was transferred into an account in his wife's sole name, and she operated that account on his instructions. Mr Delaney got to know Mr Killaly on his return from the U.K because upon his return Mr Killaly, who was an accountant, had assisted him with his tax affairs. In addition to being an accountant, Mr Killaly was an auctioneer and had also some business interests.

7. It appears that in August 2008 Mr Killaly told Mr Delaney he was having some temporary financial problems, and asked Mr Delaney for assistance in that regard. He agreed to, and asked his wife to make the necessary withdrawals over the coming few weeks in order to assist him. As noted by the trial judge, these withdrawals were all made by his wife with his full knowledge and consent, and, indeed, on his specific instructions to her. He does not deny that in any way, but he has stated that he agreed to lend these sums on condition that Mr Killaly secured them in some way in the event that there was delay in repayment. Nothing was ever repaid.

8. On the 15th September 2008 the final withdrawal was made in the form of two bank drafts totalling €50,000 payable to Mr Killaly. Mrs Delaney's affidavit evidence was that on that date when she attended at the bank to obtain those drafts, a member of staff at the bank asked her why she was making these withdrawals, and asked if she was being threatened or forced to make them. She replied that she was not, but went on to state in her affidavit that she felt uneasy about this inquiry and that the staff member appeared to be unhappy about the situation "because she would have known the payee on the bank drafts as he was a prominent customer of the branch". She told her husband about this conversation and he stated that he would have a word with Mr Killaly.

9. Mr Delaney spoke to Mr Killaly who assured him that there was nothing wrong, but went on to say that if Mr Delaney had concerns, he would give him a 24 year and 9 month lease of premises at 82 JKL Street, Edenderry at a rent of €12,000 plus VAT per annum which would not be collected. Mr Killaly stated that in this way, over the period of the lease, the money lent would become repaid. He agreed to take this lease, and went into occupation in December 2008. It appears that at this time Mr Delaney was in the process of setting up a small business and could use the premises for that purpose. However, it is also clear that at no time did Mr Delaney seek any legal advice either in relation to the lending of money to Mr Killaly or in relation to securing his position by way of the lease or otherwise. He accepted that in his evidence in the High Court.

10. What Mr Delaney did not know was that the premises in question, while owned by Mr Killaly and his wife, had been mortgaged to AIB, and that one of the clauses in that mortgage required that before any lease of the premises was made, AIB's written consent was required, and that this pre-condition had not been complied with by Mr Killaly.

11. As noted by the trial judge in his judgment, the then manager of the Edenderry branch of AIB, a Mr Gillen, called to the premises while Mr Delaney was there doing some cleaning work with a Mr Dunne. It appears that Mr Dunne introduced him to Mr Gillen as the bank manager. Mr Delaney was puzzled that the manager would call to see him when he was not indebted to AIB. It soon became clear that the reason Mr Gillen had called to the premises was to express the bank's displeasure with the fact that Mr Delaney was in occupation of the premises as the bank knew nothing of the lease arrangement. Mr Delaney, who was understandably annoyed about the situation, explained the circumstances in which the lease had been taken, namely as some form of security for the monies lent to Mr Killaly.

12. Mr Delaney in his affidavit went on to state that he had told Mr Gillen that he was aware that the bank drafts which he had given to Mr Killaly had been immediately lodged by Mr Killaly to his account in the same branch, and that Mr Gillen then asked Mr Delaney "to contact him on his personal mobile phone number in relation to queries regarding the premises and undertook to resolve matters to my satisfaction". This assurance by Mr Gillen that he would resolve matters is something upon which Mr Delaney places considerable reliance both in the High Court and again on this appeal. However, it appears also that when, a number of weeks later, Mr Delaney contacted Mr Gillen on his mobile phone number he was told by Mr Gillen that he no longer dealt with any matters relating to the branch at Edenderry and could do nothing to resolve matters relating to Mr Killaly and the leasing of the premises. There had by that time already been a meeting at the Marriot Hotel at which Mr Gillen, Mr Delaney, Mr Killaly and a Laurence Murphy had all attended, but nothing emerged from that meeting which ameliorated Mr Delaney's unfortunate position.

13. Mr Delaney felt let down and humiliated by these events and the financial position that he now found himself in. He felt let down by Mr Killaly. He also felt let down by the bank since, in his view, they knew the financial position that Mr Killaly was in and yet allowed Mr Delaney to pay over large sums of money to the same Mr Killaly who was then lodging same to his own account in the same branch. Mr Delaney felt humiliated within his own family also. All of that is completely understandable, but the question remains as to whether or not it all gives rise to a cause of action against AIB.

14. It appears that by the 15th May 2009 AIB had commenced proceedings against Mr Killaly seeking judgment in the sum of about €15 million, and that judgment was secured successfully on 24th July 2009. This had the further consequence that on the 27th July 2009 both Mr Killaly and his wife were declared bankrupt. It is no surprise therefore that AIB are the only available defendant against whom Mr Delaney considered there was any prospect of recovering damages for the terrible catastrophe that has befallen him.

15. Mr Delaney eventually gave up possession of the premises to the NAMA receivers, but not before he had unsuccessfully sought an injunction to restrain the receivers from seeking to do so. There is no necessity to set out the entire course of those proceedings for the purpose of this judgment, save to note that in his judgment in the injunction proceedings, Cross J. considered the legal effect of the absence of AIB's consent to the lease by Mr Killaly and his wife to Mr Delaney, and following the decision of Dunne J. in *Fennell & anor v. N17 Electrics Ltd* [2012] IEHC 228, concluded that while the lease was binding as between the parties, it was not binding upon AIB. Nevertheless it is part of the overall history and has been clearly and succinctly summarised by Cregan J. in his judgment.

16. Mr Delaney's affidavit evidence on the bank's strike out motion pointed out by reference to copies of some of Mr Killaly's bank statements that Mr Killaly's financial position in the bank was precarious to say the least and that he was "walking a tight rope in banking terms" and that he had lost control over his business affairs. He refers to the lodgments to the account which he identifies as the various drafts which he had given to him.

17. At the very heart of Mr Delaney's claims against AIB is his belief that they ought to have told him of Mr Killaly's position in the bank, which they knew, in circumstances where they also knew that it was Mr Delaney who was the source of the significant lodgments to Mr Killaly's account. He believes that the bank had a duty to place Mr Killaly's accounts under inquiry long before they did so, by wrongfully allowing Mr Killaly to continue to operate his account for far longer than they ought to, and should have warned Mr Delaney of the risk he was being placed in by Mr Killaly when they knew or ought to have known that Mr Killaly had no ability to repay these sums borrowed from Mr Delaney, and that by failing to so warn him the bank concealed the bad relationship between the bank and Mr Killaly in their own interests and to the prejudice of Mr Delaney. In relation to the bank's knowledge in this regard, Mr Delaney points to the brief conversation which took place on the 15th September 2008 between an official in the bank and Mrs Delaney when the former inquired as to whether she was under any pressure from Mr Killaly. This is his case in a nutshell.

18. I have set forth just a sufficient summary of events in order to provide a context for the claims that Mr Delaney makes in these proceedings and his submissions on this appeal.

19. The judgment of the trial judge sets out what he discerns are the claims which Mr Delaney seeks to bring against the bank. He notes and takes full account of the fact that he is unrepresented, and goes to considerable lengths to set forth in a clear way what claims Mr Delaney is making against the bank, so that he can them examine them and conclude whether one or all are bound to fail.

The claims in negligence

20. He deals firstly in his judgment with the claim made in negligence. In my view he has correctly identified the basis on which Mr Delaney makes his claim in negligence and has set forth that basis in paragraphs 48-49 of his judgment as follows:

> *"48. The plaintiff's case is that*
>
> *(a) AIB actually knew that the bank drafts were payable to Gerard Killaly and Richard O'Connor because AIB made out the drafts in AIB Edenderry to these persons.*
>
> *(b) AIB knew or ought to have known of Gerard Killaly's financial position because he also had an account with AIB at the same branch in AIB Edenderry.*
>
> *(c) Because AIB knew or ought to have known of Gerard Killaly's weak financial position they ought to have advised Mr Delaney. It ought to have enquired of Mr Delaney why he was advancing monies to Mr Killaly and when it was aware that Mr Delaney was advancing a loan it should have advised him against making a loan to Mr Killaly.*
>
> *49. Essentially, based on the facts set out above, the plaintiff's claim is:*
>
> (a) *That AIB owed him a duty of care because he was a customer of AIB.*
>
> *(b) That AIB breached this duty of care because it failed to notify him of the difficulties in the account of another customer at the same AIB branch (namely Gerard Killaly), that it should have notified him about the state of the other customer's account and that if it had so notified him he would not have advanced the loans to Mr Killaly.*

(c) That as a result of this duty of care and breach of duty that Mr Delaney suffered loss and damage.

21. Having set out Mr Delaney's claim in negligence thus, the trial judge went on to say that *"the proposition only has to be stated in these terms to realise that it is completely unstateable".* He went on to explain in some detail why this is so, and referred to the very strict duty of confidentiality owed by any bank to its customer, and duty which he described as *"an absolute bedrock of banking law".* He also stated that while AIB may have known of the position of Mr Killaly *vis a vis* his accounts in AIB, it may not have been aware of Mr Killaly's overall financial position, and that to warn Mr Delaney in the way he contends for may have been completely wrong, and could cause damage to Mr Killaly. He pointed also to the fact that Mr Delaney at no time had sought the advice of the bank in the matter, not even by seeking a credit reference, and that it was unstateable that in such circumstances AIB should seek to intermeddle in a loan transaction between its two customers. The trial judge also referred to the evidence given by one of the AIB deponents that the bank was unaware of the purpose of the money withdrawals from Mr Delaney's account, and that the question asked of Mrs Delaney on the 15th September 2008 was simply to ensure that she was not being coerced.

22. The trial judge in his consideration of the law correctly stated that there is no general duty of care imposed by the law upon a bank to advise its customers on the wisdom of its commercial transactions, and he has referred to relevant authorities in that regard. Having noted again that Mr Delaney accepted that he had never sought the bank's advice in the matter, had not sought credit references, and was not seeking to borrow money from the bank in order to lend it on to Mr Killaly but was simply withdrawing his own money for that purpose, the trial judge concluded as follows:

> *"68. To impose a duty of care on banks to enquire of customers who make withdrawals as to the purpose of such withdrawals and to whom are such monies being paid, to impose a duty on banks to investigate the credit worthiness of the recipients of such funds and/or to impose a duty on banks to advise their customers generally on the wisdom of such transactions (without being asked to give a credit reference for the payee or to provide any investment advice to the customer) would be to impose a duty of care on banks which would not only go well beyond the current state of the law on the duty of care which a bank owes to its customers but it would fundamentally undermine the nature of banking confidentiality with its customers. There is no reported case for the proposition for which the plaintiff is now urging upon the court. That is not surprising in my view. The plaintiff's case in negligence against AIB is unstateable as a matter of law."*

23. Before proceeding further, I should say that on this appeal Mr Delaney has urged that simply because there has been no reported case thus far in support of the proposition urged by him ought not mean that it is his proposition is unstateable, and he has referred in support to the following statement by Lord Denning in *Packer v. Packer* [1953] 2 All ER 127 at p. 129:

> *"What is the argument of the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand while the rest of the world goes on, and that will be bad for both".*

24. I am sure that not even Lord Denning would have considered this remark to be authority for the suggestion that such a fundamental principle of the common law as the doctrine of precedent or of *'stare decisis'* as it is often referred to, should be done away with. No doubt the doctrine may have its critics, but it is the system within which our courts operate, and it can be seen to provide stability and predictability, and reasonable certainty to the citizen as to what the law of the country is. Without getting side-tracked into any sort of academic dissertation on the duty of care within the general law of negligence, one can say that within the common law there is scope for the law to develop and recognise new factual situations and relationships in which it would be fair and reasonable that a duty of care be imposed, in spite of the fact that thus far no such duty has been found to exist in any decided case. But, as has often been pointed out, while the law of negligence may develop and extend its scope, it does so incrementally, so as to avoid what Cardozo J. described in *Ultramares Corporation v. Touche* 174. N.E.441 as *"[an exposure] to a liability in an indeterminate amount for an indeterminate time to an indeterminate class".* In fairness to Lord Denning in *Packer v. Packer* referred to by Mr Delaney, his remark quoted above hails not from a case considering an extension to the common law duty of care, but rather a question of statutory interpretation of s. 26 of the Matrimonial Causes Act, 1950 and whether in the particular circumstances of that case the Divorce Court had jurisdiction to make a maintenance order in respect of a child which had been born out of wedlock, and had not been later legitimised by the subsequent marriage of his parents.

25. If the law was to impose a duty upon the bank in this case it would be a far-reaching duty of uncertain dimensions. The difficulty encountered when one tries to define and circumscribe it speaks volumes for its non-existence as a matter of law. But besides that, it cannot be overlooked that what Mr Delaney contends for is a duty upon the bank to have told him what in effect he already knew – namely that Mr Killaly was in a poor financial state. He already knew that because it is clear from the facts found by the trial judge that Mr Killaly approached Mr Delaney and told him that he was in some financial difficulties, albeit that he described them as being of a temporary nature. But it was certainly sufficient to put him on notice of the risk that he would be undertaking if he was to lend him his money, and a substantial amount of money let it be said. While Mr Delaney's knowledge of Mr Killaly's embarrassed financial circumstances might speak more readily to the question of contributory negligence, it nevertheless casts some light on the breath of the duty of care which Mr Delaney seeks to impose upon the bank, namely to take it upon itself in all cases, and not just in Mr Delaney's case, the task of inquiring as to the purpose behind a customer's withdrawal of his own money from his account, in order to ensure that he is not lending it to somebody who may not be in a position to give it back, or is not otherwise acting improvidently and to his detriment.

26. That is not the state of the law in this or any other common law country. Neither in my view can it be even conceivable that a duty of such scope could be fairly and reasonably imposed upon a bank. In my view the trial judge was correct to conclude that as a matter of law the claim being advanced in negligence by Mr Delaney is unstateable and bound to fail.

27. Mr Delaney has stated also that the trial judge erred in not appreciating that in addition to the matters referred to above as constituting negligence on the bank's part, he was also claiming that the bank ought to have suspended Mr Killlaly's accounts. I presume that in this respect it is contended that the bank's duty of care to Mr Delaney includes a duty to him, and therefore by extension to any other customer, not to permit a customer's account to continue to operate whenever the bank might have cause to consider that persons doing business with that customer, and in particular as far as Mr Delaney is concerned, any person who might lend money to that customer, might suffer a loss. I have to reject that submission also for much the same reason as I consider that the trial judge was correct in his conclusions. It would represent an impossibly broad, expansive and unconstrained duty to impose upon a bank.

28. I am not overlooking the fact that on this appeal, and in answer to the bank's reliance upon, inter alia, a bank's duty of confidentiality to its customers, Mr Delaney placed considerable emphasis both during oral submissions and in written submissions on case law which has recognised some exceptional circumstances where the breach of a bank's duty of confidentiality may be justified,

and which he referred to as 'the fraud exception'. He referenced in particular two cases, namely *Tournier v. National Provincial and Union Bank of England* [1924] 1 K.B. 461, and a Canadian case, namely *Canadian Imperial Bank of Commerce v. Sayani* [1993] 83 BCLR (2d) 167 (BCCA). In fact, as Mr Delaney makes clear in his submissions to this Court he never made his case on the basis that the bank was expected to breach its duty of confidentiality to Gerard Killaly. Rather, his arguments were based on alleged misconduct and negligence on the part of the bank. But given what he sees as the great reliance placed by the trial judge in his judgment at paras. 69- 71, Mr Delaney put forward arguments as to why the duty of confidentiality was not in all situations sacrosanct, and that there are exceptions permitted as enunciated in Tournier, and in particular for this case, the exception identified by Atkin L.J. in his judgment at p. 486 as follows:-

> *"It is difficult to hit upon a formula which will define the maximum of the obligation [of secrecy] which must necessarily be implied. But I think it safe to say that the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank have the right to disclose such information when, and to the extent to which it is reasonably necessary for the protection of the bank's interests, either as against their customer, or as against third parties in respect of transactions of the bank for or with their customer, or for protecting the bank, or persons interested, or the public, against fraud or crime."*

29. Mr Delaney considers that what happened to him amounts to a "fraud" on the part of Mr Killaly, and that in such circumstances in so far as the bank seeks to hide behind its obligations of confidentiality to Mr Killaly, it was not bound to do so, since disclosure by the bank to Mr Delaney of Mr Killaly's inability to repay the monies being loaned to him would be for the purpose identified by Atkin L.J. above, namely to protect Mr Delaney from that fraud.

30. In truth, I do not believe that the duty of confidentiality is relevant to the question whether the bank owed a duty of care to Mr Delaney. The bank does not need to avail itself of arguments based on the undoubted existence of a duty of confidentiality. It is unnecessary for me to comment on the extent of that duty and any exceptions that may be considered to exist under Irish law. I have concluded that the duty of care contended for by Mr Delaney in the circumstances of this case by the bank is not one which is recognised in the law of negligence, and the losses suffered by him are not recoverable under the law of negligence. As stated already, Mr Delaney has made it clear in his written submissions that he has never made the case on the basis that a breach of the duty of confidentiality entitles him to damages. For example in the first paragraph of his written submissions filed on the 7th July 2015 he states:-

> *"This issue was relied on by the respondents in the High Court submission and was influential on the learned judge's decision. References are made by the bank to Tournier (1924). The judge described confidentiality as the "bedrock" of banking law. The reliance placed on confidentiality by the respondents may well have been a red herring placed before the court as at no time was a pleading made which gave any inference to suggest the bank was expected or obliged to breach confidentiality regarding Mr Killaly's affairs to the appellant."*

31. Mr Delaney also appeals on the ground that the trial judge failed to conclude that the assurance he says was given to him by Mr Gillen both when he met him at the premises at JKL Street and at the later meeting at the Marriot Hotel that he would sort out the lease situation for him, amounted to a constructive trust. Mr Delaney submits that this assurance amounts to a promise that what he calls his equitable interest in the premises would be sorted out in the sense. I take that to mean that the bank would disregard the fact that no prior consent was obtained, and that he would be allowed to remain in place under the lease as if everything had been done properly. Mr Delaney says that he relied upon that assurance, and the detriment element is that he gave up possession in the belief that things would be sorted out. The trial judge was completely satisfied that there was no constructive trust arising in the case. In my view he was absolutely correct in that conclusion. The lease was not within Mr and Mrs Killaly's gift without the prior consent of the bank. That consent was never sought. The bank knew nothing about the lease. It had never been consulted about it in advance. A simple comment by the bank manager that he would sort things out could not possibly act as a commitment by the bank that it would retrospectively consent to a lease granted in such circumstances. There is no evidence to support the existence of the type of trust contended for

32. As I have said already, Mr Delaney throughout his various statements of claim filed in these proceedings, included a number of other heads of claim, all of which were found by Cregan J. to be unstateable and bound to fail. He made a claim based on unjust enrichment by the bank on the basis that they knew Mr Killaly's financial position within the branch and knew also that Mr Delaney was providing his own money to alleviate that position, and therefore easing the bank's overall position. In view of the findings already made, I am satisfied that Cregan J. was correct in his conclusions in this regard, based as it was on the judgment of Lord MacFadyen in *Companie Commerciale Andresa v. Artibelle Shipping Co. Ltd* [2001] SC 653.

33. Cregan J. was also correct in his conclusions reached in relation to Mr Delaney's claims in respect of alleged breaches by AIB of the NAMA Act 2009, as expressed by him at para. 78 of his judgment.

34. I am also satisfied that Cregan J. was correct in his conclusions on the other miscellaneous claims dealt with at paras. 82 – 85 of his judgment for the reasons given therein, and also in relation to the claim based on the alleged deceit by an official of AIB who swore an affidavit in these proceedings. She is the bank employee who met with Mrs Delaney on the 15th September 2008. I am quite satisfied that for the reasons stated clearly by the trial judge there has been no factual basis advanced by Mr Delaney (including by reference to what has been averred to by Mrs Delaney in her affidavit) which is sufficient to found the tort of deceit as explained by Shanley J. in *Forshal and Fine Arts Collection Ltd v. Walsh,* unreported, High Court, 18th June 1997 to which the trial judge referred.

35. For the sake of completeness, I am satisfied also that the conclusion reached by the trial judge on the receivers' motion to strike out the claims being made against them, namely that these claims also must be struck out on the basis that they are bound to fail, is correct.

36. It is important to conclude by saying that it is clear from the judgment of the trial judge that in paragraph 39, and its 10 internal sub-paragraphs) he correctly identified the test which must be applied on applications to strike out such as those in this case. He has set forth very clearly what that test is, and has applied it correctly. In fairness to the appellant, he did not seek to argue that the trial judge had applied an incorrect test when reaching his conclusions.

37. For all these reasons I would dismiss this appeal with all the regret that I can muster for Mr Delaney because of the parlous position in which finds himself because he was duped by Mr Killaly into a misplacement of his trust which has had such dire and irretrievable consequences for him.