THE HIGH COURT

[2015 No. 7432 P.]

BETWEEN

RAYMOND COYNE AND MAUREEN COYNE

PLAINTIFFS

AND

DANSKE BANK A/S TRADING AS DANSKE BANK

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 5th day of July, 2017.

1. This application comes before the court by way of motion brought by the defendant ("the bank") seeking an order dismissing the plaintiffs' claim on a number of grounds including that it fails to disclose any reasonable cause of action, is frivolous and vexatious, is bound to fail and is an abuse of process by virtue of the rule in *Henderson v. Henderson* (1843) 3 Hare 100 .

2. The plaintiffs are a married couple. Mr. Coyne has served a notice of discontinuance in these proceedings so that the sole continuing plaintiff is Mrs. Coyne. The Coynes have four children and Mrs. Coyne does not work outside the home. Mr. Coyne was a construction worker employed as a foreman in his brother's business.

3. In 2006, the Coynes were introduced by Mr. Coyne's brother to the local National Irish Bank branch manager in Mullingar, Mr. Declan Cox. They were at that time customers of another bank. The Coynes were interested in acquiring a property which was a dwelling house on a large site with planning permission for a second dwelling house. The proposal apparently was that they would acquire this property with finance from the bank, construct the second house and sell both houses at a substantial profit.

4. In her statement of claim, Mrs. Coyne claims that she and her husband met Mr. Cox in October, 2006, with a view to discussing finance for the proposed acquisition. This resulted in a loan being advanced to the Coynes by the bank in the sum of €225,000 on foot of a facility letter dated the 10th October, 2006. They had at that time an outstanding mortgage of €50,000 on their family home with another lending institution which was discharged by NIB as part of the arrangement.

5. The scheme proceeded as envisaged but unfortunately the collapse in the property market intervened, rendering the Coynes unable to sell the properties or repay the debt. Consequently, the bank instituted proceedings by way of summary summons seeking judgment for the amount outstanding. These proceedings came on for hearing before the High Court on the 13th July, 2015, when judgment was granted in favour of the bank in the sum of €137,150.03. This was the net sum then due by the Coynes, the bank having in the interim sold the properties and credited the proceeds to their account.

6. When the summary proceedings came on for hearing before the High Court, the Coynes sought to defend the case and have the matter remitted for plenary hearing on the basis of a number of replying affidavits. These affidavits raised what could be described as technical objections and quasi-legal arguments. The court however concluded that these did not give rise to any arguable defence and granted judgment accordingly. Following judgment being granted, the Coynes appealed to the Court of Appeal and on the 15th September, 2015, instituted the within plenary proceedings claiming damages.

7. The matter came on for hearing before the Court of Appeal on the 25th April, 2016. The court dismissed the appeal and it would appear gave an *ex tempore* judgment. In their submissions to the Court of Appeal, the Coynes sought to introduce new evidence and an entirely new defence along lines similar to those set out in the within plenary proceedings. It would appear that the Court of Appeal did not permit the introduction of this new material and argument presumably on the basis that it had never been before the High Court.

8. In the statement of claim delivered herein on the 25th November, 2015, the plaintiffs allege facts broadly similar to those I have outlined. They allege that the plan to acquire the properties was devised by Mr. Cox on the basis that they would be able to complete the development and sell on the properties within eighteen months. They plead that he told them that this would leave them with a substantial surplus which would clear the mortgage on their family home and leave them with a sum to provide, *inter alia*, for their children's future education. They plead that in advising the plaintiffs, Mr. Cox acted not only as their banker but as their financial adviser. They plead that they received no independent financial advice although they did have the assistance of a solicitor and acknowledge that the loan facility letter executed by them advised them to obtain such advice.

9. At para. 9 of the statement of claim, the plaintiffs specifically plead as follows:

> "9. Mr. Cox also advised that the plaintiffs were considerably outside the financial criteria that would enable the investment to be done by means of a mortgage and that as an alternative he would arrange temporary bridging finance and thereby avoid the normal scrutiny of mortgage applicants' financial status. Evidence will be adduced at the hearing of the action to show that the loan finance for the project was fraudulently obtained by Mr. Cox."

10. It is further specifically alleged in the statement of claim that Mr. Cox knew that the plaintiffs did not fulfil any of the bank's financial criteria for obtaining a loan of this size. In affidavits put before the court in this application, Mrs. Coyne alleges that Mr. Cox knew that her husband's income from his employment with his brother's company was approximately €26,000 but Mr. Cox contacted the financial director of the company, Mr. Manus Sweeney who has sworn an affidavit herein, to request Mr. Sweeney to forward him a letter showing that Mr. Coyne was in receipt of bonus payments suggesting that his actual income was of the order of €65,000 per annum.

11. Mr. Sweeney has sworn an affidavit in which he avers that he was contacted by Mr. Cox asking him to provide a letter which would show Mr. Coyne's income at this level despite the fact that it was not. A letter was provided to the bank showing that Mr. Coyne was in receipt of a €65,000 salary package. Mrs. Coyne avers that both her husband and Mr. Cox knew this to be untrue but at the time of the loan, she was unaware of the letter. She avers that had the bank sought her husband's pay slips, they would have

demonstrated his true income.

12. She avers that all of this was concealed from her by her husband under whose influence she was at all material times and in a separate motion, she seeks to join him as a co-defendant to these proceedings.

13. In its defence to these proceedings, the bank plead by way of preliminary objection that the proceedings are *res judicata* and/or moot by virtue of the earlier judgment of this court and the Court of Appeal. The balance of the defence is a traverse. The Statute of Limitations is not relied upon.

14. This application is grounded upon an affidavit of Patrick Kennedy, an officer of the bank, in which he avers that the matters raised in these proceedings were not raised in the summary proceedings although they clearly could have been. He avers further that the plaintiffs' liability on foot of the loan facility has already been determined conclusively by the court and that insofar as the plaintiffs' claim appears to be based on the so called tort of reckless lending, the authorities establish clearly that no such tort is known to Irish law.

15. In summary therefore, the bank relies upon three points in support of this application. First they say it amounts to a claim of reckless lending which is bound to fail. Second they say the matter is *res judicata* and this claim represents an attempt to go behind the earlier judgment and thirdly, the bank says that the claim is governed by the rule in *Henderson v. Henderson*.

16. The latter case is authority for the proposition that a plaintiff, having once brought proceedings against a defendant based on a cause of action arising out of particular facts, will not subsequently be permitted to sue the same defendant for a different cause of action arising out of the same facts when such cause of action ought to have been properly included in the earlier proceedings. Thus it is not open to a plaintiff to drip feed different causes of action in serial litigation which amounts to an abuse of process.

17. It seems to me that the case pleaded in the statement of claim herein goes considerably further than an allegation of mere reckless lending. The primary allegation is that the bank's servant or agent, Mr. Cox, knew that Mr. Coyne's financial profile would not have enabled him to qualify for this loan but despite that knowledge, Mr. Cox not only recommended to the bank that the loan be advanced but put forward evidence in support of the loan application which he knew to be false. Mrs. Coyne says she knew nothing about this. Of course these are allegations yet to be proved.

18. It is certainly true to say that the claim for damages now advanced by Mrs. Coyne in these proceedings is one that would have been available to her to raise by way of defence in the summary proceedings. It would be a defence by way of set off and counterclaim. In other words Mrs. Coyne would in answer to the bank's summary judgment claim would have been entitled to say, "I have a claim for unliquidated damages which equals or exceeds your claim and I should therefore be entitled to pursue it by way of set off and counterclaim".

19. Does the fact that Mrs. Coyne did not raise this issue in the summary proceedings by way of defence now preclude her from pursuing a separate claim? Had she raised it in the summary proceedings, the court would have been faced with a decision as to whether the entire matter should go to plenary hearing or it should in any event grant judgment to the bank leaving Mrs. Coyne to litigate her damages claim separately. Cases such as *Prendergast v. Biddle* (Unreported, Supreme Court, 21st July, 1957, Kingsmill Moore J.) and *Moohan v. S. & R. Motors (Donegal) Ltd* [2008] 3 I.R. 650 are judgments which consider the appropriate criteria to be applied by the court in such circumstances.

20. However, it seems to me that none of this is material to the within application. Mrs. Coyne had no obligation per se to raise the issues in these proceedings by way of a defence to the earlier proceedings. Even if she had, the outcome might well have been as it is now, that is to say a judgment in favour of the bank with Mrs. Coyne being left to separately litigate the damages claim.

21. Accordingly I do not believe that this is a case in which the rule in *Henderson v. Henderson* has any application. The claim now made by Mrs. Coyne is not one that she was obliged to raise by way of defence to the earlier proceedings. As she chose not to, the court has not determined any of the issues raised in this case in the earlier matter so that it cannot be said that *res judicata* arises or that this claim is somehow a collateral attack on the earlier judgment. They are in my view separate and distinct and the fact that a set off and counterclaim might have been raised in the first proceedings does not in my view preclude its pursuit now.

22. For these reasons therefore I will dismiss this application.