THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 168

Record No. 2016/313, 443 and 444

Ryan P.
Irvine J.
Hogan J.

BETWEEN/

JUNE SMITH

PLAINTIFF / APPELLANT

- AND -

SHANE MCCARTHY, ACC LOAN MANAGEMENT LIMTIED, MICHAEL COLLINS & COMPANY, SOLICITORS, JAMES SMITH AND THE LAW SOCIETY OF IRELAND

DEFENDANTS / RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 17th day of May 2017

1. The present proceedings were commenced by the plaintiff in May 2016, but, as I propose to chronicle in the course of this judgment, as against the first three defendants they are substantially the re-iteration of claims advanced in other parallel and satellite proceedings. To appreciate this it is necessary that this judgment should be read in conjunction with the linked appeal in proceedings brought by the plaintiff's daughter, Ms. Jane Smith, involving the same parties (with the exception of the Law Society), the decision in which is also being delivered this morning. Given the overlap between the facts of the two cases, for convenience some of this judgment draws heavily on the narrative of the salient facts found in the judgment which has just been delivered in the related Jane Smith appeal.

2. In an *ex tempore* judgment delivered on 15th June 2016, O'Regan J. struck out the claim as against the first two defendants (respectively, the receiver and ACC Loan Management Ltd.) as an abuse of process. Subsequently, in *ex tempore* judgments delivered on 27th July 2016, Gilligan J. struck out the proceedings as against the third defendant, Michael Collins & Co., solicitors and the fifth defendant, the Law Society of Ireland, on the ground that each set of proceedings was unlikely to succeed. The plaintiff, Ms. June Smith, has now appealed to this Court against these decisions.

3. I should say that, in strictness, the wording used by Gilligan J. was incorrect. The strike out jurisdiction under Ord. 19, r. 28 is confined to cases where no reasonable cause of action is disclosed or where the action is frivolous or vexatious. The Court also has a supplementary inherent jurisdiction to strike out proceedings which "must fail": see **Barry v. Buckley** [1981] I.R. 306, 308, *per* Costello J. It is, however, this latter test ("must fail") which I propose to apply in considering whether these proceedings should be struck out on this ground.

The background to the present proceedings

4. In October 2007 the plaintiff's daughter, Ms. Jane Smith and her father, Mr. James Smith, approached the Agricultural Credit Corporation ("ACC") seeking a loan facility in the sum of €1.25m. to assist with the purchase of certain lands which were about to be sold by public auction and also in order to redeem certain borrowings from AIB. At that public auction the plaintiff's father, Mr. James Smith, committed to purchasing the lands in the sum of €1.825m. This was a considerably higher sum than had previously been proposed or envisaged.

5. Shortly after the public auction a revised loan application was submitted to ACC in the joint names of Mr. James Smith and Ms. June Smith who are both married to each other. By that loan application the Smith parents sought two loans: the first in the sum of €800,000 and the second in the sum of €1.296m. It later emerged that the lands which were purchased with the assistance of these loans were registered in the name of the Mr. James Smith. Gilligan J. considered that it was very likely that this step had been taken by the Smiths for reasons of tax efficiency as he was the only person who could obtain farm consolidation relief.

6. While the (apparent) discrepancy between the terms of the loan offer and the registration of the title is a matter upon which Ms. June Smith has sought to place some reliance in the course of this appeal, what is not in doubt is that by separate facility letters dated the 11th November 2007 ACC offered to advance these loan facilities to Mr. and Ms. Smith. They accepted the terms of the facility letters in writing and drew down the full amount of these loan sums. The facility in the sum of €1.296m. was a bridging loan which was for a term of one year, while the facility in the sum of €800,000 was repayable on demand, or in the absence of such a demand, over a period of twenty five years.

7. A condition precedent to ACC's obligation to advance monies under the facilities was the requirement that the Smiths' solicitor, Mr. Michael Collins, furnish ACC a letter confirming that signed contracts for the sale of other lands for €1m.were in place. Mr. Collins did, in fact, provide such confirmation to ACC by letter dated the 26th November 2007 although, as it happens, Ms. June Smith now asserts that she did not, in fact, instruct Mr. Collins to his effect.

8. In September 2008 the Smiths executed a deed of mortgage and charge in favour of ACC over a number of parcels of land extending to over a hundred and eighty acres. The plaintiff's daughter, Ms. Jane Smith, claims, however, to enjoy a prior leasehold interest in those lands with the exception of sixty two acres. (This issue is addressed in the companion appeal). The first named defendant, Mr. McCarthy, was ultimately appointed as a receiver over these lands pursuant to the mortgage by ACC in March 2014. In later injunction proceedings the Smiths conceded that the mortgage was valid.

9. On the 17th July 2008 certain employees of ACC were informed by the Smith parents that the contracts of sale were not, in fact, in place. At that stage ACC was not informed that a letter of instruction had been written by Mr. Collins without, it is claimed, having been instructed to do so by the Smith parents.

10. In November 2008 the bridging loan expired and in November 2011 ACC issued summary proceedings seeking the repayment of all sums due on the facilities. The Smiths instructed a new solicitor to enter an appearance on their respective behalves and in an affidavit sworn by Ms. June Smith, on behalf of both herself and her husband, the bank's entitlement to judgment was disputed on a number of discrete grounds.

11. The principal defence advanced by the Smiths was in essence the same as that relied on by Ms. Jane Smith in these proceedings, namely, that the letter from Mr. Collins confirming that contracts for the sale of lands for €1m. were in place in November 2007 had, in fact, been written without appropriate instructions. In particular, it was not alleged that ACC either knew that the contracts for sale were not in fact in place or that ACC knew that (assuming for the moment that it is the case), Mr. Collins had written the letter to ACC without such instructions.

12. The summary judgment application was heard on the 29th February 2012. The application proceeded in the absence of the Smiths and the High Court (Kelly J.) entered judgment in the sum of €1.933m. as against the Smiths on a joint and several basis. The curial part of the order of Kelly J. specifically recited that the Court had had regard to the affidavit of Ms. June Smith in respect of which the contracts for sale issue had been raised, but that the High Court was nonetheless satisfied that no arguable defence had been thereby demonstrated.

13. On the 27th March 2014 ACC appointed the first named defendant, Mr. McCarthy, to act as receiver of the lands which were the subject of the charges created by the November 2007 facility letters. The receiver, finding himself unable to secure possession of those lands, commenced separate proceedings in June 2014 seeking injunctions restraining, *inter alia*, the Smith parents from interfering with the receivership or further trespassing upon the properties.

14. The High Court (Gilligan J.) granted an interlocutory injunction to that effect on the 17th October 2014. The Smiths then instructed Mr. Collins to enter an appearance and a defence was delivered in response to the statement of claim of the receiver. In that defence it was pleaded that the mortgage and the borrowings were predicated upon an illegality by reason of certain alleged activities by ACC's parent company, Rabobank, in connection with the setting of benchmark interest rates. The matter was due to be heard by the High Court (Gilligan J.) on the 1st December 2015.

15. At the December 2015 hearing the Smiths' solicitor, Mr. Collins, informed Gilligan J. that he did not have any formal instructions to assert any positive defence to the claim, while not formally consenting to the reliefs sought in the receiver's proceedings. It would appear that Mr. Collins conceded that the mortgage was valid and that the receiver had also been validly appointed. The first defendant, Mr. McCarthy, then gave oral evidence as to his appointment as receiver and of the steps that had been taken to interfere with the receivership. Gilligan J. granted the receiver a permanent injunction restraining, inter alios, the Smith parents from trespassing upon these lands.

The judgment of the High Court (O'Regan J.)

16. Shortly after the commencement of these proceedings the first and second, third and fifth defendants issued separate motions seeking to have the proceedings struck out pursuant to either Ord. 19, r.28 or the inherent jurisdiction of the courts.

17. In her judgment delivered on 15th June 2016 O'Regan J. held that the present proceedings were abusive as against the receiver and ACC. She found that the plaintiff was attempting to re-ventilate issues (such as the November 2007 letter) vis-à-vis ACC even though these issues had already been raised and rejected by Kelly J. by his order of February 2012 in the separate proceedings brought by the ACC. That order was never appealed. O'Regan J. observed that the plaintiff was attempting:

> "…to undermine proceedings that have already been brought to finality, namely, the judgment proceedings and the injunction proceedings. And she had the capacity to raise these issues and, even if she did not, in all of the circumstances of this case, I am satisfied that it would be entirely unfair to allow her to litigate the matter as against ACC Bank and the receiver who is still waiting to realise the properties. A lot of the arguments she makes are outside the scope of ACC's knowledge and she could not support any argument that would yield a result for her based on those. For example, the assertion of undue influence by her husband or the fact that she did not give instructions to her solicitor at the time when he made the representations to the ACC Bank."

The judgment of the High Court (Gilligan J.)

18. The strike out motions brought by the Michael Collins and Co. and the Law Society were then heard by Gilligan J. on 26th July 2016. Gilligan J. took the view that the plaintiff's claims as against Michael Collins and Co. and the Law Society were abusive or otherwise disclosed no reasonable cause of action. The judge saw no basis for the claim as against Michael Collins and Co. and he concluded that the Law Society owed the plaintiff no duty of care. It followed that both claims disclosed no reasonable cause of action and the claims were accordingly struck out pursuant to the inherent jurisdiction of the Court. I propose now to consider separately the claims as against respectively the receiver and ACC (2016, 313); Michael Collins and Co. (2016, 443) and the Law Society (2016, 444).

The claims as against the receiver and the Law Society

19. So far as the claims against ACC and the receiver, Mr. McCarthy, are concerned, one cannot but agree with the conclusion of O'Regan J. that they are plainly abusive. The claim rests upon the defence arising from the contention – which I appreciate is denied by Mr. Collins – that the letter of 26th November 2007 from Mr. Collins to ACC confirming that the contracts for the sale of lands was in place was written without the authorisation of the Smiths. This issue has, however, been raised by the Smiths on several occasions and it has been rejected, most particularly by the High Court as reflected in the order of Kelly J. of February 29th 2012, which ruling was never appealed. The present claim plainly represents an impermissible collateral attack upon the validity of that order.

20. The plaintiff also sought to advance an Ettridge-style undue influence claim (*Royal Bank of Scotland plc v. Etridge (No. 2)* [2002] 2 A.C. 733), contending that she had been subject to undue influence from her husband. It is important to note that the plaintiff was a principal borrower on the loan and not simply the guarantor (as has happened in some of the recent cases: see, *e.g., de Kretser v. Ulster Bank* [2016] IECA 371). In a case, however, where a borrower borrows from a lender and then alleges undue influence, something more than a purely generalised plea is required.

21. Nor is it relevant that the lands were actually purchased by Mr. Smith rather than by both Mr. and Ms. Smith. It would seem, in any event, that this was done by the Smiths to ensure that consolidated farm tax relief remained available and this relief was (apparently) available only if Mr. Smith remained the borrower.

The claim as against Michael Collins and Co. Solicitors

22. So far as the claim against Mr. Collins was concerned, I find myself in agreement with the conclusions of Gilligan J. The claim to the effect that the letter of November 26, 2007 was unauthorised amounts to a collateral attack on the earlier ruling of Kelly J. in February 2012 and, absent any further explanation, this issue cannot be re-litigated under a different guise in these proceedings. It is, moreover, clear in any event that the plaintiff was most anxious to drawdown the loan proceeds and it therefore cannot realistically be alleged that she was not aware of the contents of the letter of November 26, 2007. She either knew or must have known that under the express terms of the loan offer a certificate to this effect from her solicitor was a condition precedent to that drawdown, so that in these circumstances her drawn down of the funds must be taken to amount to a tacit acceptance that her solicitor had certified to this effect.

23. Nor is the fact that Ms. June Smith was not registered as co-owner of the lands in question of any relevance, since presumably this was a factor which was entirely within her own knowledge and control.

24. In these circumstances the conclusion is inescapable that the claim against Mr. Collins and his firm is bound to fail. I would therefore dismiss the appeal against the decision of Gilligan J. to strike out the claim pursuant to the court's inherent jurisdiction.

The claim as against the Law Society

25. The only entirely new claim which has been advanced in these proceedings is that as against the Law Society of Ireland ("the Society"). The plaintiff claims damages for negligence and breach of duty arising what she contends was the failure of the Society properly to monitor either certain undertakings given by her solicitor, Mr. Michael Collins, or by reason of its supposed failure to police, control or inspect certain correspondence written by Mr. Collins to the second defendant ACC on 26th November 2007. As I have already noted, in that correspondence Mr. Collins had confirmed to ACC that he had possession of signed contracts for the sale of certain lands owned by Ms. June Smith and her husband.

26. In the High Court the Society had applied to have these proceedings struck out against it either pursuant to the provisions of Ord. 19, r. 28 or the inherent jurisdiction of the Court on the ground that these proceedings were either frivolous or vexatious or else that they were bound to fail. In an *ex tempore* judgment delivered on 27th July 2016, Gilligan J. struck out these proceedings pursuant to the inherent jurisdiction of the Court. He noted that the plaintiff had not made any complaint to the Society regarding any alleged misconduct on the part of Mr. Collins or that he had been guilty of providing inadequate legal services. Gilligan J. found that the proceedings disclosed no reasonable cause of action and she had furthermore failed to identify any loss or damages which she had suffered as a result of any alleged failures on the part of the Society.

27. For the purposes of this appeal it is not necessary to rehearse in any detail any of the standard case-law regarding the inherent jurisdiction of the High Court in cases where it is alleged that no reasonable cause of action has been disclosed. It is clear from the seminal judgment of Costello J. in *Barry v. Buckley* [1981] I.R. 306 that the inherent jurisdiction is to protect the integrity of the judicial process, to conserve judicial resources that would otherwise be expended on wasteful and unnecessary litigation and, above all, to protect other litigants from being subjected to litigation which had no reasonable prospect of success.

28. The Society is a statutory body whose task it is to regulate the profession of solicitors under the provisions of the Solicitors Acts. For that purpose it can entertain complaints under the Solicitors Acts in relation to both professional misconduct and poor professional performance. In that respect, however, the Society is akin to many other public bodies who enjoy a range of statutory powers designed to regulate particular areas of activity and thereby to protect the public.

29. The special case of the tort of misfeasance of public office aside (*Kennedy v. Law Society (No.4)* [2005] 3 I.R. 228), it is true that in theory at least there are, as such, no special rules governing the liability in negligence of public bodies. In practice, however, the experience of the last thirty years or so of public law litigation has shown that claims of this kind against regulatory bodies but rarely succeed. Specifically, the case-law from *Pine Valley Developments Ltd v. Minister for Environment* [1987] I.R. 23, *Glencar Exploration Ltd. v. Mayo County Council* (No.2) [2002] 1 I.R. 84 through to the Supreme Court's most recent decision on the topic, *Cromane Foods Ltd. v. Minister for Agriculture*, *Fisheries & Food* [2016] IESC 6, [2016] 2 I.L.R.M. 81 all demonstrate in their own way a consistent judicial reluctance to impose liability for reasons such as a concern that administrators will be deterred from discharging their public functions on the one hand to issues relating to the existence of a duty of care, foreseeability of loss and remoteness on the other. Decisions which on one view might appear at first sight to suggest otherwise – such as *Duff v. Minister for Agriculture and Food (No.2)* [1997] 2 I.R. 22 - have either been doubted (as in *Glencar* and *Cromane Foods*) or else distinguished to the point that they no longer retain anything but the most exiguous precedential value (as witness the treatment of Duff in *Cromane* Foods).

30. Other case-law from this field also strongly suggest that regulators owe no duty of care to the general public or even to more limited classes of persons who might be affected by the potentially negligent exercise of statutory powers by such a regulator. Thus, for example, in *Yeun Kun Yun v. Attorney General of Hong Kong* [1987] UKPC 16, [1987] 3 W.L.R. 776 the Privy Council held that a banking regulator owed no duty of care to deposit takers, even though they had alleged that he ought to have known that the affairs of a particular deposit-taking institution were being conducted in a highly unorthodox and even fraudulent fashion. The Privy Council upheld a decision of the Hong Kong courts to strike out the action on the basis that it disclosed no reasonable cause of action.

31. The decision of Blayney J. in *McMahon v. Ireland* [1988] I.L.R.M. 610 is in much the same vein. Here the plaintiff had deposited the proceeds of a charity sale with a credit institution shortly before it went into liquidation. While she received a partial payment from the liquidator, she then sued the appropriate regulator (namely, Registrar of Friendly Societies) in negligence, claiming the balance of the moneys as damages. The essence of the claim was that the Registrar owed the depositors a duty of care to ensure that only credit institutions whose solvency was assured would be permitted to take deposits from the general public.

32. Blayney J. held, following the decision of the Privy Council in *Yuen Kun Yeu* that there was an insufficient degree of proximity between the plaintiff and the Registrar such that it could be said that he owed her a duty of care. Blayney J. further held applying *Pine Valley* principles that, in any event, as the Registrar acted in good faith and was discharging public duties which affected the property of others, he was entitled to an immunity from claims of this kind.

33. Even if it were to be said that a slightly more nuanced position - rather than the broad sweep of *de facto* quasi-immunity articulated in cases such as *Pine Valley*, *Yeun Kun Yun* and *McMahon* – should be adopted in this jurisdiction, there is, nevertheless, nothing at all in the case-law which would lend any support to the suggestion that a regulator should owe a specific duty to a particular member of the public in the manner contended for here. In any event, it should be noted that s. 36(1) of the Solicitors (Amendment) Act 1994 expressly provides for a defence along *Pine Valley* grounds, since this sub-section provides that the Society should not be liable where it exercises its statutory powers reasonably and in good faith.

34. The plaintiff's case is that the Society should be answered in negligence by reason of losses she allegedly sustained by reason of the conduct of Mr. Collins in giving undertakings to the ACC. If, however, the plaintiff was correct, it would be tantamount to making

the Law Society vicariously liable for the actions for all solicitors at the suit of all clients, irrespective of the circumstances. That proposition is no more sustainable than, for example, the suggestion that the Medical Council should field responsibility for every clinical decision of a registered medical practitioner.

35. Such a potentially open-ended liability is, of course, also entirely contrary to principle and in over 100 years of negligence litigation the courts in all common law countries have resolutely recoiled from the unfairness of open-ended duties of care of this kind which would apply regardless of the absence of proximity or other special circumstances as between the claimant and the defendant or other considerations based on foreseeability and remoteness of loss. It is perhaps worth recording that both the English courts (see, *e.g.*, *Peasegood v. Law Society* [1996] EWCA Civ 644) and the Supreme Court of Canada (see, *e.g.*, *Edwards v. Law Society of Upper Canada* [2001] 3 SCR 562) have all stressed that regulatory powers vested by statute in bodies comparable to the Law Society exist for the benefit of the general public and do not give rise to a private law duty of care to a specific private litigant.

36. It follows, therefore, that the very breadth and open-ended nature of the plaintiff's claim as against the Society is inconsistent with the existence of any generalised duty of care in the manner which she alleges. While it is perhaps unnecessary for present purposes to express any view on the question of whether the Society could ever qua regulator be held responsible in negligence for failure to take action against any particular solicitor, it is perhaps sufficient to say that the facts of any such claim would have to be exceptional.

37. The plaintiff's claim in the present case is even far more broad-ranging in character, resting as it does upon an allegation of loss resting upon a failure to supervise a particular solicitor in respect of his giving of an undertaking to a lending institution. It is clear from the authorities that the existence of such an open-ended duty of care and indeterminate liability to what, in substance, would amount to any member of the general public who obtained legal advice of any kind from any members of the public is both contrary to authority and first principles.

38. It follows, therefore, that for all of these reasons it is manifest from a consideration of both first principles and the relevant authorities that the plaintiff's claim as against the Law Society as thus formulated has no reasonable prospect of success and is bound to fail. I would accordingly dismiss the appeal against the decision of Gilligan J, to strike out such proceedings pursuant to the Court's inherent jurisdiction.

Conclusions

39. For all the reasons already set out in this judgment I would accordingly affirm the respective decisions of O'Regan J. and Gilligan J. to strike out these proceedings as against the 1st, 2nd, 3rd and 5th defendants.