



**THE COURT OF APPEAL**

Neutral Citation Number: [2018] IECA 288

**Record No: 2016/505**

**Peart J.  
Whelan J.  
McGovern J.**

**BETWEEN:**

**VINCENT KELLY**

**PLAINTIFF / APPELLANT**

**- AND -**

**GOVERNOR AND COMPANY OF THE BANK OF IRELAND**

**AND RICHIE BOUCHER**

**DEFENDANTS / RESPONDENTS**

**Record No: 2016/506**

**BETWEEN:**

**VINCENT KELLY**

**PLAINTIFF / APPELLANT**

**- AND -**

**THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND**

**AND MICHAEL COTTER**

**DEFENDANTS / RESPONDENTS**

**JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 13TH DAY OF AUGUST 2018**

1. In each of the above proceedings the defendants brought a motion in the High Court seeking an order pursuant to Ord. 19, r. 28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the High Court striking out the entirety of the plaintiff's claim on the basis that it failed to disclose a reasonable cause of action and/or is bound to fail and/or is frivolous and/or is vexatious and/or is an abuse of process. In each case an order (as subsequently amended under the 'slip rule') was made to strike out the proceedings pursuant to Ord.19, r.28 of the Rules, and the inherent jurisdiction of the Court.
2. The appellant represented himself both in the High Court and in this Court on appeal. While the appellant contends that the trial judge erred ordering that each proceeding be struck out, I am satisfied that that such an order was correctly made in each case, and that these appeals must fail for reasons which I shall explain.
3. Each set of proceedings has a common factual background. I should add that in the first proceeding the second named defendant is the Chief Executive of the bank at all relevant times. In the second proceeding the second named defendant is the receiver appointed by the bank over certain property later referred to.
4. The plaintiff had operated his professional practice through a limited liability company named Vincent Kelly Limited until that company went into liquidation.
5. The plaintiff established a pension scheme through Vincent Kelly Limited, by way of trust deed dated the 1st April 2007, and in respect of which he is named as the sole beneficiary. This is a self-administered pension scheme. There were two trustees appointed to act, namely the plaintiff himself, and Private Company trustees (Ireland) Limited as Pensioner Trustee ("Private Company").
6. There is no dispute that the plaintiff and Private Company "as trustees" of the Scheme applied for and accepted a loan from Bank of Ireland in the sum of €800,000 whose purpose was to assist with the purchase of an investment property to be owned by the Retirement Scheme. Repayments were to be €9,718.54 payable monthly. In addition to this borrowing the purchase was funded by an amount of €350,000 provided by Vincent Kelly Limited. Again, that is not disputed by the plaintiff. The property was purchased in due course in the name of the Retirement Scheme as evidenced by deed of purchase dated the 1st October 2007. By deed of mortgage the property was mortgaged to the bank as security for the loan. Repayments were made over the course of some four years following this purchase but ceased in January 2012 resulting in an event of default under the terms of the mortgage. The bank appointed a receiver over the property in these circumstances as it was entitled to do under the terms of the mortgage. The property was occupied by tenants at this time, but following the service by the receiver of notices to quit upon the tenants, the receiver

obtained vacant possession of the property in October 2013.

7. That is an uncontroversial background to the two proceedings commenced by the plaintiff.

8. While the plaintiff pleaded in his statements of claim that he entered into the loan agreement with the bank in August 2007, he has accepted that it was in his capacity as trustee of the Retirement Scheme. That much cannot be gainsaid given that it specifically so stated in the facility letter that issued and that he signed "as trustee". It was not signed in his personal capacity.

9. However, the plaintiff nevertheless maintains strongly that he personally was advised by the bank and specifically by one of the bank's senior business managers, Peter Walley (his brother in law), who was also his relationship manager in the bank, in relation to setting up this retirement pension scheme, the purchase of the particular property for the purposes of the scheme, and also the financing of the transaction. He says that he was specifically advised by Mr Walley that he should use his pension fund to finance the purchase, and that it was a sound investment.

10. In his statements of claim the plaintiff pleads that while advising him positively in relation to this investment for his pension fund, Mr Walley at the same time, and unknown to him, was disposing of his own shareholding in Bank of Ireland, and that given the knowledge held by the bank in relation to the state of the property market, and its own stability, the bank breached its duty of care to the plaintiff by promoting the setting up of this pension scheme and the purchase of the property. The plaintiff maintains that the bank was aware that he would be relying on the advice given, and that he was in fact one of many people who was actually targeted by the bank at the time in order to build up the bank's loan book to the benefit of the bank.

11. The plaintiff maintains that the advice given to him in relation to these matters was negligent advice, and deceitful, being knowingly made without belief as to its truth or reckless as to whether it was true or not. This last claim is the basis for a submission that the bank was guilty of fraud and deception for the purposes of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

12. The plaintiff claims that it was on foot of this negligent and reckless advice received, upon which he was entitled to rely, and did rely to the knowledge of the bank, that he invested the said sum of €350,000 in the pension scheme, and borrowed the balance of €800,000 in order to complete the said property purchase.

13. These allegations of negligence and breach of duty are set out at greater length in the statements of claim. In addition he particularises claims of *mala fides* and improper purposes against the bank, and particularises his losses.

14. In addition to making those claims, the plaintiff seeks many other reliefs including the recovery of damages, the removal of the receiver, an injunction to restrain the sale of the property by the receiver, the setting aside/rescission of the loan agreement and the mortgage.

15. In his *ex tempore* judgment delivered on the 7th October 2016 the trial judge first of all set out a brief factual background. Thereafter, he stated that there was no basis for the plaintiff to allege that Mr Boucher, as Chief Executive of the bank, had a duty to the plaintiff either "in contract or in law", and neither was there a basis for alleging that the plaintiff in his own right was owed some duty by the receiver who was appointed by the bank over property belonging to the Scheme. I am in full agreement with those conclusions by the trial judge, and need say no more about them.

16. The trial judge went on to conclude that the plaintiff had no authority or status to mount these proceedings in his personal capacity. He noted that he had not obtained the consent of the other trustee, Private Company, and described the plaintiff as going "on a frolic of his own" in relation to claims for losses or other rights of action which might be open to the Scheme itself as opposed to the plaintiff personally.

17. The trial judge then proceeded to state that even if he had overlooked some relevant matter concerning the plaintiff's status to pursue these claims, there were other "fatal flaws which the plaintiff cannot overcome". In that regard he stated:

"1. There is no causal link at law between what might be described as the macro economic knowledge of the bank to the lending and purchase of the Property. Cases before the Court and appeals from the Court have given rise to many judgements which have rejected what has been termed "reckless lending" or advice based claims to avoid the repayments of loans. Some applications by the Bank against the plaintiff may have been sent by consent or otherwise to plenary hearing based on a defence or counterclaim which included *inter alia* advice based arguments sought to be maintained by the plaintiff. Exercising the inherent jurisdiction of the Court and having regard to the undisputed evidence of the loan agreement, mortgage and deed of appointment of the receiver adduced by way of affidavit evidence, the Court find that there is no prospect of the plaintiff establishing the necessary causal link of his alleged loss to any cause of action against the bank. In other words, maintaining these sets of proceedings would be futile.

2. Birmingham J's judgment in *Kearney v. KBC Bank (Ireland) Ltd* [2014] IEHC 260 [which] mentions the "fanciful" argument (which he described as a mild term) that one can borrow money and take no responsibility because of the source of the funds, is so apt to the claim sought to be advanced by the plaintiff on behalf of the Scheme if he had the standing to pursue that."

18. Thereafter the trial judge addressed the claim by the plaintiff based on negligent advice to establish the Scheme. He stated:

"20. In returning to the claim by the plaintiff that he received negligent advice which allows him a remedy for establishing the Scheme in the first place, the Court finds he could not establish at this late stage any loss arising from that decision. The plaintiff in his quest and effort to take on the Bank alleges in the 2013 statement of claim that were it not for the Bank's advice he would not have sought and secured for the Scheme the Property with the loan repayments obligation. Unfortunately for the plaintiff, he overlooked the fact, as highlighted by counsel for the defendants, that the arrangements and facility to purchase were those of the trustees to take responsibility for solely. If they got advice and such advice was negligent, the Scheme is the proper claimant.

21. The Court has some sympathy for the plaintiff as he may not have had the benefit of studying the law of tort and contract. Put simply, the concept and policy of duty of care, the standard of care, causation, remoteness and quantum are all topics which law students and legal practitioners have to grapple with regularly. The plaintiff has not put forward the necessary degree of relationship for establishing his own personal loss. He is in effect, a step or two removed by reason of the structures which he established and probably with advice which he now seeks to impugn.

22. I take this as an example: if "Joe Murphy" [a name I picked at random] incorporates a company, invest money in that company, that company then borrows money to invest further and the investments go under, Joe Murphy has no prospect of suing successfully in his own right for the loss of the investment as the loss has been suffered by the company."

19. The trial judge went on to state that:

"No matter what way the Court looks at matters, there is no realistic prospect that the plaintiff could recast the 2013 proceedings in a way which would allow him to recover damages. The 2015 proceedings rehash the plaintiff's claim, but add the receiver appointed by the Bank. The property was owned by the Scheme, mortgage to the Bank and the Receiver was appointed by the Bank."

20. The trial judge also stated that "there was no prospect of rescission of the loan or for any other reliefs sought either".

21. I am satisfied that the overall conclusions of the trial judge are correct. Both sets of proceedings have no prospect of succeeding even if the plaintiff's claim is taken at its height. At its height the plaintiff contends that he personally received advice from his brother-in-law who was a senior manager at the bank and his relationship manager, that he should set up this type of pension scheme, that he should invest funds into it himself and borrow further funds in the amount of €800,000 so that the Scheme could purchase the particular property which was duly purchased. He contends that the bank was negligent in providing that advice given what it already knew about the state of the property market, and the economy of the country and the state of the bank itself, and that it gave that advice putting its own selfish interests ahead of the plaintiff's. He says also that the bank knew that he would be relying on the advice given by it, and that he was entitled to rely on the advice, and did so. He contends that because that advice has turned out to be wrong, and because it was reckless, deceitful and even fraudulent at the time it was given, he personally has suffered a loss because the repayments due on foot of the loan could not be made after January 2012, and the bank took possession of the property having appointed a receiver. He maintains that this is a loss to him as the sole intended beneficiary of the Scheme, and that in such circumstances the trial judge was wrong to strike out the claims on the basis that it was the company and not he who is at a loss.

22. He says that the relationship between him and the bank was a fiduciary one, given his long-standing relationship with the bank, and that a heightened duty of care was therefore owed to him.

23. In my view the fatal flaw in the plaintiff's arguments that must lead inexorably to the striking out of these two proceedings as sought by the defendants is that it was the company, Vincent Kelly Limited which invested the amount of €350,000 in the Scheme, to top up the other funds in the scheme which comprised the loan drawn down by the trustees of the Scheme so as to buy the investment property. There is no doubt that the Scheme itself suffered a loss due to the inability to meet the repayments on the loan. Those repayments were being funded by Vincent Kelly Limited. While the amount of €350,000 was undoubtedly put into the Scheme to facilitate the purchase of the property, that sum was contributed not by the plaintiff himself, but by Vincent Kelly Limited.

24. It must follow that any losses that have been incurred have been suffered firstly by the Scheme because it has lost its only asset, and secondly by Vincent Kelly Limited in so far as it contributed the sum of €350,000 and that is also lost.

25. Therefore even if the plaintiff's case is taken at its height, and the advice that he claims was given was in fact given to him, and even if he relied upon that advice and would not have proceeded with setting up the scheme, and purchasing the property qua one of the trustees of the scheme without that positive advice from the bank, he has suffered no loss personally. He cannot claim as a disappointed beneficiary of the scheme. It is the scheme that has suffered the loss, and could potentially have made a claim against the bank, but in fact the Private Company trustee refused to consent to do so, as it was entitled to do. It cannot be added as a party to the proceedings in such circumstances in order to possibly save them.

26. These proceedings are bound to fail for the reasons I have stated. I am satisfied that the trial judge did not err in making the orders under appeal, and I would dismiss these appeals.