

**THE HIGH COURT****[Record No. 2016/1222 P]****HENRY SWORDS****PLAINTIFF****AND****AIB BANK PLC AND AIB LEASING LTD****DEFENDANTS****JUDGMENT of Mr. Justice Eagar delivered on the 27th day of October, 2017**

1. This judgment relates to an application on behalf of the two defendants to strike out the plaintiff's claim against the defendants as being an abuse of the court process as it discloses no reasonable cause of action against the defendants and it is frivolous and vexatious in nature, or in the alternative an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the plaintiff's claim against the defendants as it discloses no reasonable cause of action and is frivolous and vexatious.

2. The pleadings were initiated by the plaintiff on the 10th February, 2016, by way of plenary summons and the general endorsement of claim stated that the plaintiff's claim was for; (a) damages for negligence, (b) damages for misrepresentation, (c) damages for breach of fiduciary duty, (d) damages for breach of duty of care, (e) damages for breach of duty against the first defendant owing to their failure to impose their statutory duty of care imposed by them by statute in common law or further and other relief, and, (g) costs.

3. The plaintiff was a litigant in person. He was accompanied by a McKenzie friend.

4. The Court ruled that the McKenzie friend could attend as a friend, take notes, quietly make suggestions to the plaintiff and give advice but he could not take part in the proceedings as an advocate. The Court ruled that the McKenzie friend had no right to address the Court unless invited to do so, which invitation was not proffered in the course of the hearing.

5. The court pointed out that the exclusive right of counsel to audience in the courts is derived from the common law and in order to extend that right in the case of the Superior Courts to solicitors it was necessary to enact s. 17 of the Courts Act, 1971. Thus, the right of audience is regulated by law.

6. The plaintiff in his Statement of Claim sets out the following:-

(a) A declaration that the defendants had acted in contravention of the Data Protection Act, 1988 by unfairly listing the plaintiff as a director of Pro Design Print Management Ltd. as a director.

(b) The plaintiff was never a director of Pro Design Print Management Ltd. and never held out to be so.

(c) The defendants and/or servants wrongly completed lease application forms listing the defendant as a director of Pro Design Print Management Ltd.

(d) The defendants wrongfully pursued the plaintiff for a sum due and owing in the name of a defective guarantee which the defendant alleges was signed by the plaintiff.

(e) The defendants misled and misrepresented the plaintiff by the actions of their servants in the course of several meetings at the offices of the Bank in Westmoreland Street.

(f) The defendants obtained sums of money from the plaintiff on the basis of gross misrepresentation to the plaintiff as to his standing as a director of Pro Design Print Management Ltd.

(g) The defendants agree to the undertaking issued by the branch manager in relation to the plaintiff's obligation to the Bank.

(h) The defendants fail to respond to the plaintiff's request for copies of his statements and copies of his documents to allow him to reconcile his debt to the defendants.

(i) The defendants' solicitors fail to honour an undertaking to generally adjourn any action pending the completion of discussions in return of various documents as to the precise debt due and owing.

(j) The defendants' solicitor obtained Judgment on the basis of a false affidavit.

(k) The defendants' solicitor failed to inform the plaintiff of the Master Court proceedings despite the fact that the plaintiff was engaged with him in person at meetings in his office and by post and phone call to him and from him and by email.

(l) The defendants damaged the plaintiff's credit worthiness by obtaining payments from him under duress for a lease he had no obligations to pay.

(m) The defendants acted unreasonably and irrationally in obtaining the Master Court judgment.

(n) The defendant AIB Leasing Ltd. contravened the Data Protection Act, 1988 by obtaining false and misleading information from AIB Bank Plc, which was falsely relied on as to the status of the plaintiff purporting to his status as director of Pro Design Print Management Ltd.

(o) An order from the court to strike out the judgment of the Masters Court.

7. The references to pleadings in the statement of claim relate to proceedings between AIB Banks Plc (the first named defendant) and the plaintiff which were summary proceedings and the Court will deal with these proceedings as part of its judgment.

8. In relation to the present proceedings the first and second named defendants changed solicitors on the 2nd of June, 2016, and by notice of motion dated the 7th July, 2016, sought the orders referred to.

9. The affidavit to ground the notice of motion was that of Sean Cosgrove, solicitor, of The Bank Centre, Ballsbridge, Dublin 4. He avers that from the statement of claim it was quite clear that the claim against the defendants arises from the alleged breach of the Data Protection Act, 1988 due to what the plaintiff describes as "the listing by the defendants of him as a director of a company called Pro Design Print Management Ltd".

10. Mr. Cosgrove described the following; the plaintiff maintains that he was never a director of Pro Design Print Management Ltd., that he had never held himself out to be so, and the plaintiff asserts that the defendants have wrongfully pursued him on foot of a personal guarantee which, he says, they allege was signed by him.

11. While the plaintiff appears to acknowledge at para. (h) of the statement of claim that he was trying to reconcile his debt he does not go as far as to say that this is the debt arising from the personal guarantee he disputes signing.

12. The plaintiff said it is clear from the statement of claim in the brief details contained therein that his claim arises out of another set of proceedings between the parties and in particular High Court proceedings bearing record number 2013/2608S whereby the first named defendant issued summary proceedings against the plaintiff in this case in respect of a guarantee for €40,000.

13. Mr. Cosgrove said in his affidavit that it was clear from the summary summons in these proceedings that the claim in the other proceedings is the same as the one being advanced by way of this new set of proceedings. He referred to para. 3 of the summary summons which states that:-

"The plaintiff's claim against the defendant is the sum of €40,000 which said sum is due and owing by the defendant to the plaintiff on foot of a letter of guarantee dated the 29th February, 2008 whereby the defendant agreed to pay to the plaintiff on demand any sums of money due to the plaintiff by Pro Design Print Management Ltd. up to €40,000."

He says that it was clear from an appearance presented in the summary proceedings that H.J. Ward and Company solicitors acted on behalf of the plaintiff in this case (Henry Swords).

14. Mr. Cosgrove refers to para. (k) of the statement of claim where the plaintiff states that the defendants failed to inform him of the Master Court procedure despite the fact that he was engaging with the Bank at the time. He says that given the fact that solicitors represented the plaintiff in the debt collection proceeding, it is difficult to reconcile this with the plaintiff's version of events now being furnished. Mr. Cosgrove refers to the affidavit of the service of the notice of motion seeking liberty to enter final judgment. The affidavit based on same was served by posting copies by prepaid registered post on the 28th November, 2014, addressed to Hugh J. Ward and Company Solicitors, 5 Greenmount House, Harold's Cross Road, Dublin 6W. Mr. Cosgrave makes the point that if the plaintiff was unhappy with either the manner in which the Bank obtained judgment or if he maintained he may have a defence to the debt collection proceedings, the appropriate course that was open to him was to proceed by way of appeal to that judgment in respect of the summary proceedings.

15. Mr. Cosgrove says that in circumstances where it is abundantly clear that there is a complete overlap between both sets of proceedings and the same matter has been determined in the previous summary proceedings involving the same parties, it would be unjust for the defendant Bank to have to defend these proceedings, which it argues, are clearly vexatious and frivolous in nature.

16. Mr. Cosgrove says that the plaintiff was aware of the judgment obtained by the Bank whilst H.J. Ward and Company Solicitors remained on record for him up to January, 2016 and he refers to a document entitled "Notice of Discharge" in respect of the summary proceedings which appeared to have been prepared for the plaintiff and states that he discharged H.J. Ward Solicitors from acting for him. This is dated the 8th of January, 2016 ten months after the Order of the Master ordering that the plaintiff be at liberty to enter final judgment in that action.

17. As set out in the affidavit of Mr. Cosgrave, proceedings entitled Allied Irish Banks Plc v. Henry Swords (the High Court Record Number 2013/2608S) involve a summary summons against this plaintiff for the sum of €40,000.00 on foot of a letter of guarantee dated the 28th February, 2008, whereby the defendant agreed to pay to the plaintiff on demand all sums of money due to the plaintiff by Pro Design Print Management Ltd. up to €40,000.

18. On behalf of Henry Swords an appearance was entered by H.J. Ward and Company Solicitors 5 Greenmount House, Harold's Cross Road, Dublin 6W on the 11th October, 2013. On the 3rd September, 2014 a notice of intention to proceed was issued by the plaintiff and this was served on H.J. Ward and Company Solicitors on the 8th September, 2014. On the 26th November, 2014, a notice of motion for liberty to enter final judgment was issued returnable for the 18th December, 2014, indicating that an application would be made to the Master for an order for liberty to enter final judgment in the sum of €40,000. This was grounded on the affidavit of Ms. Audrey Nicholson of the Bank. Before dealing with Ms. Nicholson's affidavit in those proceedings, the Court notes that there is an affidavit of service of the notice of motion for liberty to enter the final judgment and grounding affidavit which was served by registered post addressed to H.J. Ward and Company Solicitors 5 Greenmount House, Harold's Cross Road, Dublin 6W.

19. The affidavit of Ms. Nicholson, sworn in the 2013 proceedings, stated that she referred to the guarantee in writing dated the 29th February, 2008. Under the terms of that guarantee the defendant agreed to pay and satisfy the plaintiff on demand all sums of money owing to the plaintiff by Pro Design Print Management Ltd. up to the sum of €40,000 and she exhibits the guarantee which was dated the 29th February, 2008. The guarantee was signed by Henry Swords.

20. In addition, a guarantee copy was sent by way of the letter of sanction to Pro Design Print Management Ltd. Block 503C Unit 30 Greenogue Business Park, Rathcoole, County Dublin. It read as follows:-

"Dear Henry

I am pleased to inform you that the Bank has sanctioned the facility as set out below in the following name Pro Design Print Management Ltd.

The facility is subject to the terms and conditions set out in this letter and subject to the Bank's general terms and conditions governing lending as set out in the enclosed booklet. These are legal documents which should be read very carefully and it's clear that the overdraft is €40,000 the interest rate is set out and a security for the credit facility is one letter of guarantee for €40,000 from Mr. Henry Swords."

The overdraft facility was duly accepted by the company and drawn down and applied to account 24575076C according to the affidavit of Ms. Nicholson. She refers to a letter dated the 2nd of June, 2011, where the plaintiff made a demand of the defendant pursuant to the guarantee to pay the sum of €40,000.00 on account of the sum due and owing by the Company to the plaintiff. Notwithstanding this demand the defendant failed to discharge the sum.

21. On the 26th March, 2015, there is an order from the Master noting whereupon hearing the plaintiff's counsel and reading the affidavit and notice of motion, the affidavit of Ms. Nicholson, and the affidavit of service "[i]t is ordered the plaintiff be at liberty to enter final judgment in this action for the sum of €39,700 and costs of suit with the order for taxation of said costs". Subsequently there is an order of *fiery facias* which is a direction to the county registrar for County Kildare referring to a judgment of the court bearing the 4th September, 2015, adjudged to be paid by the said Henry Swords to the said Allied Irish Banks Plc together with costs and it is a direction to execute the order in the sum of €39,700.

22. The final document in the Booklet of Pleadings relating to the 2013 proceedings is a notice of discharge dated the 8th of January, 2016. This was nine months after the final judgment was entered by the Master.

23. In his replying affidavit to the notice of motion in the 2015 proceedings the plaintiff said at para. 3 that the contents of the defendants' affidavit are admitted with the exception to the notice of change of solicitor. He said that it was clear that the defendant and their solicitors, Ivor Fitzpatrick, were made aware on the 17th December, 2014, at a meeting of Ivor Fitzpatrick and Company whereupon John Rogers of Ivor Fitzpatrick and Company and was handed a letter by Henry Swords and informed Ivor Fitzpatrick and Company that H. G. Ward was off record and this was done in the presence of a witness. He exhibits a letter addressed to Harry J. Ward Solicitor, 5 Greenmount House, Harold's Cross Road, Dublin 6W being a letter from him saying that he wished Mr. Ward to come off record in the matter of *Allied Irish Banks v. Henry Swords and Pro Design Print Management Ltd.* He also exhibits a letter which he sent to John Rogers of Ivor Fitzpatrick and Company Solicitors where he says that "After H.J. Ward failed in his duties of the court date in December" he is informing Mr. Rogers that H.J. Ward no longer acts on his behalf.

24. In answer to the court's question in relation to what Mr. Swords said was H.J. Ward's failure, the plaintiff said that H.J. Ward would not come to court unless he was paid €5,000. He also makes the following points. He was very upset with the whole matter in relation to a personal guarantee. He was told by AIB manager Mr. K. Burke in Westmoreland Street that he had nothing to worry about as his file was being looked after in the insolvency section of the Bank. He said he was given a payments book to pay all loans including overdrafts and that he had paid AIB over €30,000 to date. He further exhibits the relevant dates on which the 2013 proceedings appeared in the Master's list: the 18th December, 2014, upon which motion for judgment was adjourned to the 26th February, 2015, when it was further adjourned to the 26th March, 2015, when the order was made by the Master. It appears that he never attended.

25. The plaintiff asserted furthermore that Ivor Fitzpatrick agreed to have the case adjourned following his request for an adjournment to properly present to the Master's court his position in relation to the facts of this case. However, it appears that Mr. Swords never appeared before the Master having allegedly discharged Henry J. Ward. Therefore, the case was further adjourned (without the presence of Henry Swords and with the consent of Ivor Fitzpatrick on the 26th February, 2015), and he refers to an exhibit which he says is a letter dated the 20th March, 2015, which Mr. Swords says refers to an email sent from Ivor Fitzpatrick on the 20th March, 2015, confirming ongoing meetings and discussions between the parties. In fact, the letter which was produced is clearly from Paul Harnett of Ivor Fitzpatrick and Company and says solely:-

"Hi Henry,

As discussed, please send these documents completed this week.

Many thanks"

Six months after the judgment had been entered on the 27th March, 2015 by the Master Mr. Harnett says that:

"In your letter you state that you met with Ivor Fitzpatrick Solicitors in December, 2014 whereby you informed them that you wanted to represent yourself and that Harry Ward Solicitors was not representing you anymore. You state that Ivor Fitzpatrick gave you an assurance that they would not proceed with any action whilst you are waiting replies and that the fact is that the Bank had secured judgment on foot of a defective guarantee."

26. The letter continues:-

"I have consulted with Ivor Fitzpatrick. They have advised me that it was agreed at this meeting that an adjournment would be granted to allow you time to have a new solicitor to come on record." Ivor Fitzpatrick wrote to H.J. Ward on the 13th January, 2015 notifying them that the matter had been adjourned to the 23rd February as they were still solicitors on record at this time. The letter continues "two payments were received by you in February 2015 along with the cover letter stating that you wish to address the matter. A further adjournment was granted to the 26th March, 2015 to give you time to file a statement of means and to put forward an agreeable payment arrangement. No statement of means or payment proposal was forthcoming and so an application for judgment was granted on that date. The letter continues it should be noted that a search of the High Court website yesterday confirms that H.J. Ward are still solicitors on record for you and that any issues you have in relation to the manner in which your case proceeded should be taken up with them."

This letter does not in any way assist the plaintiff as he suggests that Ivor Fitzpatrick agreed to have the case adjourned following his request for an adjournment to properly present to the Master's court his position in relation to the facts of the case. He says that following communications with Ivor Fitzpatrick by Henry Swords in relation to the case which included phone calls and letters the case was further adjourned by consent of Henry Swords and Ivor Fitzpatrick on the 26th February, 2015. However, the letter he refers to is an email from Paul Harnett which has previously been discussed.

27. The plaintiff's main point is in the next para. which he says that para. 5 and 6 of the defendant's affidavit has wrongly listed him as a director of Pro Design Print Management Ltd. in the data access request file supplied to him by AIB. He refers to two documents which were company printouts from the Companies Registration Office which indicate that Pro Design Print Management Ltd. has two directors Derek Swords, 1 Willow Way Road, Primrose Gates, Celbridge, County Kildare and the is Hazel Swords, 1 Willow Way Road, Primrose Gates, Celbridge, County Kildare. He further referred to a letter addressed to Pro Design Print Management Ltd. which was the private copy maintained of the sanction letter maintained by the Bank which noted the letter of guarantee for €15,000 that refers to a different account and further credit agreement of a different account with Henry Swords. He also exhibits part of a letter which refers to him as Henry Swords, financial controller and guarantor of Pro Design Print Management Ltd. but does not identify him as a

director and a further document from AIB again only a portion of it in which he is described as self employed printer-director of Pro Design Print Management Ltd. no longer trading.

28. The plaintiff then makes the following points; that the judgment was obtained by gross misrepresentation to the Master of the High Court, and by abuse of process by Ivor Fitzpatrick who failed to inform the Master that he was made aware of the €15,000 guarantee. He also suggests that the guarantee of €40,000 is not a true copy and that he did not sign this guarantee and that in para. 9 of Mr. Cosgrave's affidavit that those proceedings are based on an abuse of process failure by the officers of the court to properly inform the Master of the High Court of all relevant issues.

29. In effect the proceedings brought by the plaintiff against the defendants' amount to an attempt to rerun the proceedings of Record No. 2013/2608 F. There is nothing in the proceedings brought by way of plenary summons that can possibly succeed against either defendant.

30. The plaintiff has clearly taken these proceedings without appropriate legal advice and this Court is concerned that he is taking these proceedings on the advice of a McKenzie friend.

31. The plaintiff was entitled to seek to appeal the judgment awarded against him and he may have had grounds for same.

32. The plaintiff also had the option of seeking to set aside the order and again he may have had grounds. However, the Court is satisfied that the defendants are entitled to seek to dismiss the plaintiff's claim pursuant to O. 19, r. 28 of the Rules of the Superior Court.

33. The jurisprudence is set out in a number of judgments of the High Court. In *Barry v. Buckley* [1981] I.R. 306 Costello J. stated that:-

"The court can only make an order under this rule when a pleading discloses no reasonable cause of action on its face."

The Court is satisfied that the matters pleaded in the statement of claim do not constitute a cause of action against the defendants that is known to law or likely to be established.

34. The defendants seek to strike out the plaintiff's claim on the basis that it is frivolous or vexatious. In *Farley v. Ireland* (unreported, ex tempore, 1st of May, 1997) a Supreme Court decision, Barren J. stated:-

"If a plaintiff has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly, it is hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious."

35. Costello J. stated that the jurisdiction to strike out proceedings is one to be "exercised sparingly and only in clear cases" and in *Sun Fat Chan v. Osseous Ltd.* [1992] 1 I.R. 425 McCarthy J. cautioned that:-

"Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought.

Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture."

36. However, the following are the causes of action:-

(1) Breaches of the Data Protection Act. The plaintiff claims that the defendants breached data protection legislation by unfairly listing him as a director of Pro Design Management Ltd. However, the document referred to by the plaintiff states that the plaintiff is a financial controller and guarantor of that company only. It does not state that the defendant thought that he was a director.

(2) The defendants mislead and misrepresented the plaintiff. The plaintiff contends that the defendants obtained sums of money from him but provides no reason as to why he paid money to the defendants. He was of the view that no such sums were paid. The plaintiff on his own analysis of the facts is of the view that he tried to negotiate with the defendants and there is therefore explicit acknowledgment by him of monies due and owing.

(3) The defendants' solicitor obtained judgment on the basis of a false affidavit. The plaintiff alleges that the affidavit and guarantee used to ground the application for summary judgment are false in that he is listed as a director of Pro Design Ltd. and also says that *he did not sign the guarantee*. The affidavit avers to the fact that he was a guarantor of the loan but does not list him as a director. Any such claim is without foundation and bound to fail.

37. The plaintiff claims that he had an agreement with the first named defendant, so that the court should now set aside the Order of the Master. It is not something which this Court can contemplate doing in these proceedings. The principle of estoppel arises by way of the general principle that a final adjudication of a legal dispute is conclusive between the parties to the litigation.

38. The Court is satisfied that the present matter has already been ventilated in the context of the High Court summary proceedings and the plaintiff's claim as pleaded is frivolous and vexatious and without foundation unmerited and bound to fail.

39. In the circumstances the Court proposes to accede to the application of the defendants in respect of their notice of motion dated the 7th of July, 2016, and strikes out the plaintiff's claim against the defendants as being an abuse of the court process as it discloses no reasonable cause of action against the defendants and it is frivolous and vexatious in nature and future that the plaintiff's claim against the defendant discloses no reasonable cause of action and is frivolous and vexatious.