

THE HIGH COURT

COMMERCIAL

[2016 No. 8810 P.]

BETWEEN

EUGENE MCDERMOTT

PLAINTIFF

AND

ENNIS PROPERTY FINANCE DAC

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 18th day of July, 2017.

1. The defendant brings this application by way of notice of motion for the following relief:-

- (i) an order dismissing the plaintiff's claim pursuant to O. 19, r. 28 of the Rules of the Superior Courts 1986 (as amended) and/or pursuant to the inherent jurisdiction of the court, on the ground that it discloses no reasonable cause of action;
- (ii) an order dismissing the plaintiff's case pursuant to the inherent jurisdiction of the court as an abuse of process, or as otherwise offending against the rule in *Henderson v. Henderson* (1843) 3 Hare 100; and,
- (iii) an order dismissing such parts of the plaintiff's case as the court deems fit pursuant to O. 19, r. 27 of the Rules of the Superior Courts 1986 (as amended) and/or pursuant to the inherent jurisdiction of the court, on the grounds that such parts are unnecessary and/or scandalous and/or may tend to prejudice or delay the fair trial of the action.

2. The proceedings arise out of four loan facilities made available to the plaintiff by Bank of Scotland (Ireland) Limited ("BOSI") between 2005 and 2008 ("the loan facilities"). The plaintiff had an existing banking relationship with Equity Bank Limited ("Equity Bank"). By deed of mortgage dated 3rd October, 1996 ("the mortgage"), the plaintiff charged land contained in Folios 17644F and 17159F of the County of Kildare ("the charged property") in favour of Equity Bank.

3. In 2000, Equity Bank was acquired by BOSI and changed its name to "Bank of Scotland (Ireland) Limited".

4. In these proceedings, the plaintiff challenges the entitlement of the defendant to own or enforce the mortgage. He seeks a number of declarations which are based on technical legal arguments. In broad terms, he seeks the following reliefs:-

- (i) a declaration that there was no contractual right, legal or otherwise, for Bank of Scotland plc. to appoint a receiver over the property mortgaged in favour of Equity Bank plus related securities and owned by the plaintiff in July 2012;
- (ii) a declaration that Alexander Wolfe Murray Bruce did not have a power of attorney from Bank of Scotland at the time he executed a deed of appointment;
- (iii) a declaration that there was no contractual right, legal or otherwise, for Bank of Scotland plc. to novate the Deed of Appointment of the Receiver (made in July 2012) in favour of the defendant on 20th November, 2015, without "the express informed consent of the plaintiff and the plaintiff being given the full prior knowledge of the identity of the proposed transferee";
- (iv) a declaration that Bank of Scotland plc. ("BOS") "was not entitled via misrepresented applications made to the Property Registration Authority in December 2010 and 8th April, 2015, to be named as the registered mortgagee of the mortgage";
- (v) a declaration that the defendant "was not entitled to become, via the Form 56 Deed of Transfer, the registered mortgagee from the application made to the Property Registration Authority on 10th December, 2015, to the mortgage contracted between the plaintiff and Equity Bank Limited on 3rd October, 1996";
- (vi) a rolled up plea as a declaration that BOS was not entitled to be registered with the Property Registration Authority in respect of the mortgage and was not entitled to contractually or legally transfer, assign, sell the mortgage or security to the defendant; and that the defendant did not receive any rights, title or otherwise from BOS and that it had no contractual or legal claim on the recovery of the debt of the plaintiff; and,
- (vii) a declaration that the sale, assignment and/or transfer of the mortgage and related securities to the defendant in 2015 is null and void because "the plaintiff did not give consent and/or in the alternative, any purported contractible signed consent was not used in the utmost of good faith" by BOS.

5. At the hearing of the motion, the court was informed that the plaintiff was withdrawing the lack of consent point as set out in relief (vii) above. The court was also informed that the securitisation point was withdrawn but it was not clear what precisely this meant as there were a number of points raised on the security and in the course of his response, counsel for the plaintiff did raise issues on the security in as much as he claimed that BOSI cannot rely on a mortgage which the plaintiff entered into with Equity Bank. However, there was no issue raised as to the actual security taken in respect of the loan.

Proceedings Involving the Plaintiff

6. In order to put this motion in context, it is of some relevance to look at other proceedings in which the plaintiff has been involved arising out of the loan facilities, the mortgage and the security.

- (a) *Eugene McDermott v. Bank of Scotland plc and Martin Ferris*, High Court Record No. [2012 No. 12919 P.] ("the plenary proceedings").

These proceedings were commenced on 19th December, 2012. Mr. Ferris was appointed receiver over the secured property by BOS. At para. 2 of the plenary summons in those proceedings, the plaintiff pleads that BOS is successor in title to BOSI "by way of a Cross Border Merger in 2010". In those proceedings, the plaintiff included pleas of fraud, deceit, and fraudulent misrepresentation against BOS and the receiver. These proceedings have not progressed for some time.

(b) *Eugene McDermott v. Bank of Scotland plc*, Scottish Court of Sessions Record No. [14/CA14] ("the Scottish proceedings").

The Scottish proceedings were initiated in 2014 and came before the Court of Session for argument on 16th and 17th January, 2017. In these proceedings, the plaintiff purports to challenge the Cross Border Merger and the appointment of the receiver. The proceedings have been struck out in order to enable the issues arising therein to be canvassed in proceedings in this jurisdiction.

(c) *Eugene McDermott v. An Bord Pleanála*, High Court Record No. [2016 No. 256 J.R.] ("the judicial review proceedings").

The applicant in these proceedings applied for judicial review seeking an order of *certiorari* of a decision of An Bord Pleanála in respect of which *ex parte* leave was granted on 25th April, 2016. The judicial review proceedings seek to challenge a planning permission granted by An Bord Pleanála that would assist the receiver appointed to the secured property in disposing of same.

7. Apart from those proceedings mentioned above, there are other proceedings entitled *Bank of Scotland plc v. Eugene McDermott* [2013 No. 1833 S.] ("the summary judgment proceedings"). In the proceedings, BOS obtained judgment on 29th July, 2013, (Kelly J.) in the sum of €6,971,856.49. On 18th May, 2015, the High Court (McGovern J.) refused Mr. McDermott's application to set aside the judgment. This order was appealed to the Court of Appeal which remitted the matter back to the High Court. On 15th February, 2017, Barrett J. set aside the order made on 29th July, 2013. The court was informed that that decision is under appeal. Therefore, as matters currently stand, BOS do not have a judgment against Mr. McDermott.

8. There are other proceedings entitled *Eugene McDermott v. Property Registration Authority* [2015 No. 190 MCA] but the court has not been informed of the subject matter of those proceedings.

Issues Arising on the Motion to Dismiss

9. The mortgage executed by the plaintiff on 3rd October, 1996, contains a power to appoint a receiver at paragraph 11(viii). The charged property is registered land. On 20th April, 2000, Equity Bank changed its name to "Bank of Scotland (Ireland) Limited" and the court received proof of that by means of a certificate of incorporation on change of name. This was conceded by counsel for the plaintiff on 24th February, 2017.

10. In these proceedings, the plaintiff effectively challenges the power of the receiver to act on his authority and also seeks declarations against BOS. But neither BOS nor the receiver are parties to the proceedings. Accordingly, the plaintiff cannot obtain relief against them. He has already joined those parties in the plenary proceedings. It was also open to him to raise these issues in the Scottish proceedings which have now been struck out.

11. Clause 11(iii) of the mortgage states:-

"The Lender may at any time transfer the benefit of the Mortgage to any person, company or corporation whereupon the transferee shall have the benefit of all the conveyance by the Borrower and the provisions contained in the Mortgage and any offer for the advance or other agreement in relation thereto and may at any time thereafter exercise all rights and remedies of the Lender for enforcing the security and every Statement of Fact contained in such transfer shall as against the Borrower be deemed conclusive."

12. Paragraph 14.2 in both the standard loan conditions ref: 01.01.04 and ref: 02.08 each provide:-

"The Bank may at any time, without the prior consent of the Borrower assign, novate or transfer any of its rights and benefits, transfer any of its obligations under any of the finance documents to any person, firm, company or subparticipate or subcontract any of its rights or obligations under the finance documents."

13. In this case, there was a clear contractual power to transfer the loan and to appoint a receiver. The evidence before the court shows quite clearly how on 31st December, 2010, BOSI became vested in BOS as a consequence of a cross border merger between the companies ("the cross border merger"). On the documentary evidence before the court, it is clear that BOS was entitled to novate the deed of appointment of the receiver over the plaintiff's property and the plaintiff has not provided any legal argument or evidence to support a claim that no such right exists. In fact, the defendant's evidence on the issue of the appointment of the receiver and the novation of the deed of appointment of the receiver over the plaintiff's property is uncontroverted.

14. At paras. 19 and 20 of the statement of claim, the plaintiff calls into question the legality of the cross border merger between BOS and BOSI. As part of this claim, the plaintiff pleads that BOS misled the Property Registration Authority by claiming that the courts in Ireland and Scotland sanctioned a cross border merger and alleges that the merger did not, in fact, complete.

15. This is a plea that is bound to fail. The same cross border merger was considered by the Supreme Court in *Kavanagh & Bank of Scotland plc v. McLaughlin* [2015] IESC 27 and also in *Freeman v. Bank of Scotland plc & Ors* [2016] IESC 14, and by the High Court in the same proceedings [2014] IEHC 284. In those cases, the validity of the cross border merger was determined. Those authorities establish that the securitisation issue generally and the actual transaction described by the plaintiff in these proceedings have neither the legal nor factual consequences pleaded by the plaintiff.

16. The jurisdiction to strike out proceedings is one which the court must exercise sparingly and with considerable caution; see, *Aer Rianta cpt. v. Ryanair Ltd.* [2004] 1 I.R. 506; and, *Sun Fat Chan v. Osseous Ltd.* [1992] 1 IR 425. This caution applies equally to applications brought pursuant to Ord. 19 r. 28 and to those brought pursuant to the inherent jurisdiction of the court. The principle difference between both applications is that, while the court must confine itself to the pleadings when considering an application pursuant to Ord. 19 r. 28, the court may consider evidence on affidavit in applications brought pursuant to the inherent jurisdiction. Such was recognised by Costello J. in *Barry v. Buckley* [1981] 1 I.R. 306 which was later followed by *Salthill Properties Ltd. v. Royal Bank of Scotland* [2009] IEHC 207 and *Manning v. National House Building Guarantee Company Ltd. and Anor.* [2011] IEHC 98.

17. The onus is on the defendant to demonstrate that the plaintiff's case is frivolous, vexatious or bound to fail. In *Supermacs Ireland Ltd. v. Kateson (Naas) Ltd.* [2000] 4 IR 273 Hardiman J. observed this onus is "a very difficult hurdle for the defendants to clear". Such was also recognised by the Supreme Court in *Grant v. Roche Products (Ireland) Ltd.* [2008] 4 I.R. 679 at 696 and by Clarke J. in

Salthill Properties Ltd. v. Royal Bank of Scotland where the learned judge stated, at para [3.14]:-

"It is clear from all of the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put forward, at that time, a *prima facie* case to the contrary effect."

18. I adopt these authorities for the purposes of considering the present application.

19. In these proceedings, the defendant has answered the plaintiff's claim by establishing through clear documentary evidence and established jurisprudence that the plaintiff's claim cannot succeed and is doomed to fail. The plaintiff executed a mortgage on 3rd October, 1996 which contained a power to appoint a receiver. The charged property is registered lands. The two folios concerned record that the plaintiff is the owner of the lands in Folio 17159F and 17644F Co. Kildare and that in each case the lands are charged and the current holder of the charge is the defendant. The register is conclusive evidence of what is contained therein in the absence of the plaintiff maintaining that the entries were procured by fraud. No such claim is made by the plaintiff. (See; s. 31 of the Registration of Title Act 1964).

20. Some of the reliefs sought by the plaintiff in these proceedings involve the making of declarations against those who are not parties to the proceedings and accordingly they are bound to fail. The plaintiff has engaged in a series of legal actions referred to at para. 6 above, all of which, in one way or another, arise out of the plaintiff's indebtedness to the defendant and its attempt to exercise its rights on foot of security documents. Some of those proceedings involve these other parties.

21. In that context, these proceedings are an abuse of process and vexatious. The court has an inherent jurisdiction to strike out the plaintiff's claim on that basis and I make such an order.

22. The court also has a jurisdiction under O. 19, r. 28 of the Rules of the Superior Courts 1986 (as amended) to dismiss the claim on the basis that it discloses no reasonable cause of action and/or is frivolous, vexatious or scandalous. I am quite satisfied that the plaintiff's claim is bound to fail as the defendant has a complete answer to the claim on the basis of the documents which the plaintiff himself has signed and cannot repudiate and also on the basis of a lawful transfer of the plaintiff's loan and security to the defendant which has been established beyond argument. Taking the plaintiff's pleas in the statement of claim at their highest, the action is bound to fail. No reasonable cause of action has been established by the plaintiff and in the interest of the proper administration of justice, this claim cannot be allowed to proceed. I will, therefore, make an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts dismissing the claim.

23. The defendant has not satisfied me that this is an appropriate case in which to make an order under the rule in *Henderson v. Henderson* (1843) 3 Hare 100. The Scottish proceedings have been struck out. The plenary proceedings are still extant though they appear to be moribund. The summary judgment proceedings are still alive although it appears the decision of Barrett J. has been appealed. But one way or the other, the issues in that case will have to be decided either summarily or by a plenary hearing. I am not satisfied that the defendant has adduced sufficient evidence to show that matters raised in these proceedings could, and should, have been raised in other proceedings when those other proceedings have not yet been determined. So I make no order under the rule in *Henderson v. Henderson*.

24. The defendant is entitled to an order in the terms of para. 1 and 3 of the notice of motion of 3rd April, 2017.