

THE HIGH COURT

Record No. 2004/791p

BETWEEN

JOHN O'SULLIVAN
AND
RONALD STUART WEISZ

PLAINTIFF

DEFENDANT

Judgment delivered by Finnegan P. on the 18th day of March 2005.

1. This is a motion by the defendant seeking the following reliefs -

"(a) Vacating the *lis pendens* registered by the plaintiff in this action on the 3rd February, 2004 on the grounds that the proceedings had been brought and pursued in bad faith.

(b) The costs of the application."

2. The facts giving rise to the present proceedings appear from the Affidavits filed in the matter of which there are four by the Defendant and two by the Plaintiff and the exhibits thereto.

3. The Plaintiff who is a farmer engaged in a number of transactions in which he borrowed monies. The first of these was with the Wise Finance Company in respect of an advance of IR£100,000 on foot of a commitment letter dated the 11th August, 1997. The actual sum advanced was IR£80,000. The copy of the commitment letter available to me has copied poorly but as I understand the position the deduction of IR£20,000 is accounted for by the deduction of a commitment fee and prepayment of the instalments of IR£2,000 per month for the seventh to twelfth month of the agreement. The loan was secured on three folios, folio 18746, folio 18848 and folio 27377F of the Register County Tipperary. The Plaintiff retained a solicitor in relation to the loan transaction. The Plaintiff failed to make repayment in accordance with the terms of the loan and proceedings for possession were instituted against him. He consulted a different solicitor in relation to these proceedings. On the 24th July, 2000 the defendant obtained an order for possession on consent together with an order for costs but with a stay on those orders for three months. That order remains in place.

4. Over the months following that judgment the plaintiff made attempts to obtain alternative finance. Early in 2001 he entered into negotiations with one Tony O'Meara which resulted in terms being agreed but not reduced to writing and signed. Under these terms Mr O'Meara was to purchase the lands in folios 18746 and 27377F and 18848 of the Register County Tipperary for the sum of IR£165,000. Further the Plaintiff was given an option to repurchase the lands within thirty days of the date of the contract for IR£195,000 or within three hundred and sixty five days at the price of IR£206,000.

5. Mr O'Meara did not proceed with the transaction. Mr O'Meara withdrew from the proposed agreement and the defendant was told of this on the 3rd August, 2001. The defendant then told the plaintiff that he personally would be willing to enter into such an agreement with him and this was in fact done on the 8th August 2001. Again the Plaintiff instructed a solicitor in relation to this transaction. The agreement which was signed between the Plaintiff and the defendant differed from that proposed between the plaintiff and Mr O'Meara in that the period for the first option was increased to sixty days. At the expiration of the sixty day period the sale to the defendant was completed by correspondence between solicitors in November and December, 2002.

6. The Plaintiff then instructed a different solicitor and on the 12th December, 2002 proceedings were instituted by him naming the defendant herein and the Wise Finance Company Limited as Defendants and seeking by way of relief rescission of the agreement for sale between the Plaintiff and the Defendant and an order vacating the High Court order for possession. These proceedings were compromised. At the date of the compromise the Defendant had entered into an agreement to sell two of the folios to a Mr Tighe. The terms of the compromise were that the proceedings should be discontinued and the *lis pendens* vacated and that the third Folio, Folio 18848 County Tipperary should be sold to the Plaintiff for the sum of €50,000 the sale to be closed within the calendar year 2003 but subject to interest being paid at 1% per month after 31st December, 2003 the sale could be closed up to the 31st December, 2004.

7. While the compromise was proceeding the Defendant arranged further facilities to be provided to the Plaintiff in the amount of €60,000 secured on lands in Folio 12165 of the Register County Tipperary by a company Secured Property Loans Limited.

8. It would appear that at all times the Plaintiff was anxious to raise finance elsewhere at a lower rate of interest and discharge his indebtedness but he failed in his endeavours to do so.

9. The case which the Plaintiff makes in his Statement of Claim can be summarised as follows -

10. The Defendant is a Director of Wise Finance Company Limited and Secured Property Loans Limited. In 1997 the Plaintiff borrowed IR£100,000 from Wise Finance Company Limited secured by a charge on his lands. He defaulted in repayment and proceedings were instituted against him and in which an Order for possession of the lands charged was obtained on consent on the 24th July 2000. On the 8th August 2001 the Plaintiff entered into an agreement with the Defendant to sell to him the charged lands for IR£165,000 the lands at that time having a value of some IR£500,000 the Plaintiff being given the option to repurchase the lands and which have now expired. Under the terms of the agreement of the 8th August 2001 the Plaintiff was obliged to pay stamp duty, land registry fees, solicitors fees and brokers fees which total IR£13,550: in order to do this he obtained a loan from Secured Property Loans Limited secured on the lands in Folio 12165 of the Register County Tipperary. The Plaintiff then issued the proceedings which were the subject matter of a settlement agreement reached in January 2003.

11. The Plaintiff claims that the contract of the 8th August 2001 was entered into by him as a result of duress or undue influence of the Defendant or that in the alternative it constituted an unconscionable bargain. Further the settlement entered into in January 2003 was likewise entered into as a result of duress or undue influence and represents an unconscionable bargain. The relief sought accordingly relates to the contract of the 8th August 2001 and the settlement of January 2003. In relation to the Order for possession obtained by Wise Finance Company Limited relief against the same in terms of having it set aside is not sought but the Plaintiff seeks to restrain proceedings on foot of the Order for possession pending the outcome of the present proceedings.

12. A judgment given or an order made by consent may in a fresh action brought for that purpose be set aside on any ground which would invalidate a compromise not contained in a judgment or order: *Weilding v Sanderson* (1897) 2 CH 534, *Hickman v Berens* (1895)

2 CH 638. Thus a compromise may be set aside on the ground that it was illegal as against public policy, or obtained by fraud, or misrepresentation, or non disclosure, or was concluded under a mutual mistake of fact. Specifically a compromise can be set aside on the ground that it was obtained by duress: *Cumming v Ince* (1847) 11 Q.B. 112. Thus the compromise and the agreement sought to be set aside by the Plaintiff in these proceedings can be set aside on the grounds of duress. Duress can encompass economic duress. A compromise gains no additional status by being embodied in an order or by being made a Rule of Court.

13. Counsel for the Defendant drew my attention to the decision of the Court of Appeal in *Binder v Alachouzos* 1972 2 All ER 189 and dicta of Phillimore LJ therein. In that case the Court refused to set aside a compromise of an action which had been freely negotiated between the parties on the advice of experienced Counsel and solicitors on both sides. Phillimore J. stated that the Court ought to be very slow to look behind an agreement reached in such circumstances. However I am satisfied that this dicta relates to the attitude which the Court should adopt on an action taken to set aside a compromise but falls far short of saying that the Court ought never set aside such a compromise.

14. I do not propose to comment on the strength of the Plaintiff's case as I do not consider that to be relevant on the present application. However I am satisfied that the Plaintiff's case as pleaded is one that could succeed. In these circumstances it ought not to be struck out as an abuse of process as being a case disclosing no reasonable cause of action.

15. In the ordinary course to compromise proceedings and then instituted fresh proceedings seeking substantially the same relief or in the alternative raising matters which ought properly to have been raised in the compromise proceedings could lead to a successful application to strike out the proceedings as an abuse of process. In this regard see *Carroll v Law Society of Ireland* Unreported Kelly J.* In this case however the Plaintiff contends that the compromise was procured by duress, undue influence or in the alternative represents an unconscionable bargain and to this extent there remains the possibility that the compromise will be set aside. In these circumstances the present case can be distinguished from *Carroll v Law Society of Ireland* and I am satisfied that it would be inappropriate to strike out these proceedings as an abuse of process.

16. Finally I have been informed by Counsel that there is pending before the Master a motion to add further parties to these proceedings namely the Wise Finance Company Limited, Secured Property Loans Limited, Home Funding Corporation Limited and also the purchasers from the present Defendant of two of the Folios in issue between the Plaintiff and the Defendant. This Motion stands adjourned before the Master pending determination of this application. That Motion should be re-entered before the Master as quickly as possible so that these proceedings can be progressed. It is in the interest neither of the Plaintiff nor the Defendant that there should be further delay. To ensure that these proceedings are determined as promptly as possible I propose assigning a Judge to case manage the same to whom all applications in the matter hereafter shall be made.