THE HIGH COURT

[2016 No. 6256 P.]

BETWEEN

FRANCIS DOOLEY

PLAINTIFF

AND

RABOBANK GROUP

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 13th day of June, 2018

Introduction

1. The issue for consideration in this case is whether the pleadings disclose a reasonable cause of action or are frivolous or vexatious within the meaning O. 19, r. 28 of the Rules of the Superior Court or whether the case is in bound to fail. If so, then the proceedings should be dismissed either under O. 19, r. 28, if applicable, or otherwise under the inherent jurisdiction of the court.

Relevant legal principles

2. Order 19, rule 28 provides:

> *"28. The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."*

3. In addition to the express jurisdiction under the rules, it has been recognised since *Barry v. Buckley* [1981] 1 I.R. 306 that the court has an inherent jurisdiction to order that a plaintiff's action should be struck out if the action is bound to fail. This is because the maintenance of such an action constitutes an abuse of process.

4. In *Lopes v. Minister for Justice, Equality & Law Reform* [2014] IESC 21 Clarke J. in the Supreme Court emphasised the distinction between the two jurisdictions. It is appropriate for the court first to consider whether or not the proceedings should be dismissed pursuant to O. 19, r. 28 of the Rules of the Superior Courts. If the answer is yes, then it is not appropriate to consider the inherent jurisdiction of the court. However, if the answer is no, the court may then consider the inherent jurisdiction of the court to dismiss proceedings which are bound to fail.

5. When the court is exercising its jurisdiction to dismiss a claim it must take the plaintiff's case at its height and assume that he will be able to prove the facts he alleges in pleading his case. If the case may be saved by appropriate amendments to the statement of claim, then the proceedings ought not to be dismissed. Further, before acceding to such an application the court must be confident that nothing could later arise on discovery or at the trial of the action which could possible result in the plaintiff's claim succeeding.

6. In *Lopes'* case, Clarke J. held:

> *"If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked …*
>
> *In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings."*

The proceedings

7. The plaintiff commenced the proceedings as originally constituted on 12th July, 2016 seeking damages for breach of contract, damages for negligence and breach of fiduciary party, damages for breach of duty to include intentional interference with plaintiff's contractual relations and economic interests; aggravated damages, interest pursuant to statue and costs. The plenary summons was signed by the solicitor for the plaintiff. An undated statement of claim was delivered on the 12th December, 2017. This was a remarkable document as I shall explain more fully below. At this juncture it is worth noting that the plaintiff *counterclaimed* for:

> *1. A declaration that the plaintiff is not personally indebted to the defendant in the sum of €8,331,126.07 plus interest and charges or any sum.*
>
> *2. A declaration that the plaintiff is not indebted, as guarantor of the company, to the defendant in the sum of €11,662,667.83 plus interest and charges or any sum.*
>
> *3. A declaration that the guarantee executed by the plaintiff on 24th August, 2007 related only to the current account/overdraft facility.*
>
> *4. Damages for negligence, breach of contract and breach of duty.*
>
> *5. Further or other relief.*
>
> *6. Costs of and incidental to these proceedings and such orders over as to the costs as are appropriate."*

The name of junior counsel was appended to the statement of claim but the plaintiff subsequently admitted on affidavit that he had

drafted the statement of claim and that he "*incorrectly and mistakenly put a Counsel's name to the statement of claim without the knowledge of the said Counsel.*"

Background

8. These proceedings are the latest chapter in a very long history involving the plaintiff, his special purpose vehicle company, Ocean Point Development Company Limited, ("The Company") ACC Loan Management Limited and Cooperatieve Rabobank UA ("Rabobank").

9. The plaintiff says that he purchased certain property in Courtown, Co. Wexford and he applied for planning permission for a mixed use development project. He says that in or about May, 2005 Wexford County Council granted planning permission for 34 apartments and various retail units. He established a special purpose vehicle, the Company, for the purpose of carrying out the development. ACC Bank plc offered the plaintiff a loan of €6,112,500 on 20th June, 2006 which was accepted in writing by the plaintiff on 29th June, 2006. It offered the Company a loan of €11,167,000 to finance the construction and associated costs relating to the project on 24th July, 2007. The offer was accepted by the Company on 10th August, 2007. The plaintiff entered into a personal guarantee in respect of the liabilities of the Company to ACC Bank plc.

10. Unfortunately, matters did not go well with the development. There were various difficulties for which the plaintiff blames the defendant as well as ACC Bank plc, the various professionals involved in the development, the main contractor, Clancy Project Management Limited ("*Clancy*"), the bank monitor whom the plaintiff was required to appoint, Construction Property Services Limited, and the receiver appointed by ACC Bank plc on 5th March, 2009 to the secured lands of the plaintiff and the Company.

11. It is the plaintiff's case that in late 2008 and early 2009 deficiencies in the building works carried out had crystallised and he had identified them in various expert reports. There were numerous breaches of building and fire regulations. He says it was clear that the development was being carried out in breach of planning permission, and was therefore an unauthorised development, and that no sales of the units in the developments could be concluded given the condition of the development.

12. On 5th March, 2009 ACC Bank plc demanded repayment from the plaintiff of the monies due on foot of his personal loan of June, 2006 and of the monies due on foot of the loan to the Company. He says that this was a breach of the terms of the loan as €3.3 million of the facility had not yet been drawn down. He does not clarify which loan is referred to but it would appear to be the facility advanced to the Company to carry out the development as it was to be drawn down in stages. In the event the Company failed to repay the debt and on 16th September, 2010 ACC Bank plc called upon the plaintiff to pay €10,281,980.35 on foot of his guarantee and indemnity to ACC Bank plc of the liabilities of the Company. As mentioned above, also on 5th March 2009 ACC Bank plc appointed Mr. Ferris receiver over the Company and the secured lands.

13. The plaintiff failed to repay any of the sums demanded to ACC Bank plc who instituted summary proceedings on 18th October, 2010 seeking judgment against him on foot of his personal debt and guarantee debts in a total sum of €17,795,158.52. ("*the ACC proceedings*").

14. The ACC proceedings were adjourned to plenary hearing and a statement of claim was delivered on 7th November, 2011. The defendant to those proceedings, the plaintiff herein, delivered a defence and counterclaim on 18th June, 2012. Pleadings closed with a delivery of a reply and defence to counterclaim on 5th February, 2013 and the case is ready to be certified and listed for trial.

15. In addition to these proceedings, the plaintiff has sued the following parties arising out of the development of Courtown, Co. Wexford. He sued Clancy in 2011, he sued the project architects in 2011 and he sued Construction Property Services Limited and others in 2013. In 2015 he sued the receiver, Mr. Ferris.

16. While these proceedings were commenced on 12th July, 2016 the plenary summons was not served until 31st May, 2017, together with the undated statement of claim. On 3rd July, 2017 solicitors acting for Cooperatieve Rabobank UA wrote to the plaintiff's solicitors indicating that there was no such entity as "*Rabobank Group*". The letter continued:

> *"Second, there is no basis for your client to sue Rabobank. Your client had no relationship, contractual or otherwise, with Rabobank. The monies borrowed by your client in June, 2006 and the guarantees provided by your client in August, 2007 in respect of Ocean Point Development Company Limited's loans were with ACC Bank Plc (now ACC Loan Management DAC) ("ACC LM"), not Rabobank. For the avoidance of doubt, Rabobank denies that any liability whatsoever extends to it in respect of the matters alleged by your client in the proceedings.*
>
> *Third, the aforementioned loan and guarantees are, as you are well aware, the subject of existing High Court litigation (namely, ACC Loan Management Limited v. Francis Dooley, High Court Record No. 2010/5004 S.) (The "ACC LM proceedings"). The reliefs sought on the complaints made by your client and the statement of claim are a repetition of the allegations and relief he has already sought in his counterclaim delivered in the ACC LM proceedings. ACC LM is solvent and has the capital reserves to meet any award that maybe made by the court in favour of your client in the event of his succeeding with his counterclaim in the ACC LM proceedings.*
>
> *The proceedings brought by your client are frivolous and vexatious. It is clear that your client is attempting to relitigate matters which are already before the court for determination. Harassing Rabobank, ACC LM and the courts with successive actions dealing with the same subject matter is inappropriate and an abuse of the court process.*
>
> *Having regard to the foregoing, and in an effort to avoid further unnecessary legal costs being incurred, please arrange for your client to discontinue the proceedings against Rabobank (and furnish us with a filed copy of the Notice of Discontinuance) by no later than the close of business on Monday, 17th July, 2017 failing which Rabobank will immediate issue a motion seeking an order striking out the proceedings together with an order fixing your client with the costs incurred by our client for having to bring such a Motion and in having to unnecessarily to defend the Proceedings."*

17. The plaintiff did not reply to this letter and on 21st August, 2017 the solicitor's for the defendant issued a motion seeking an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the within proceedings against the defendant or in the alternative dismissing the plaintiff's action on the grounds that the pleadings disclosed no reasonable cause of action as against the defendant. In the alternative the motion seeks an order pursuant to the inherent jurisdiction of the courts striking out or in the alternative dismissing the action as against the defendant on the grounds that the plaintiff's action as against the defendant is frivolous and/or vexatious; that the action is an abuse of process or that the action against the defendant is bound to fail.

18. The motion was grounded on an affidavit sworn by Ms. Grainne Murphy on 21st August, 2017 and on 12th December, 2017 the plaintiff swore a replying affidavit in which he said that he intended to apply to court to amend his pleadings. On 19th January, 2018

two replying affidavits were delivered on behalf of the defendant, by Colin Fullier and Ms. Grainne Murphy. When the matter came before the court in March 2018, the defendant was given 6 weeks in which to bring a motion to amend his pleadings which would be listed for hearing at the same time as this motion and would be heard after it. No such motion was issued. Finally, after the case had been called on for hearing on 4th May, 2018, the plaintiff delivered a supplemental affidavit which exhibited a draft amended statement of claim.

19. The plaintiff defended the motion on the basis that the proceedings could be retrieved if he were allowed to (a) substitute the non-existent defendant, Rabobank Group, with Cooperatieve Rabobank UA as defendant and (b) amend his statement of claim in the manner proposed in the draft amended statement of claim.

The proceedings as originally pleaded

20. Clearly proceedings issued against a non-existent defendant are bound to fail and therefore the proceedings as they stand ought to be dismissed pursuant to O.19 r, 28 on the basis that they disclose no reasonable cause of action as against the defendant. However, if Cooperatieve Rabobank UA is substituted as defendant then this difficulty will be rectified.

21. Unfortunately, despite the fact that the plaintiff has been notified of this fundamental flaw in his proceedings since 3rd July, 2017 he has taken no steps to remedy the situation and no motion has been brought nearly two years after the summons first issued. In March 2018 he was given leave to bring a motion to amend the title or the statement of claim in the context of an adjournment of this motion. That said, if the motion is finally brought and the relief is granted, then this ground for saying the proceedings are bound to fail will fall away.

22. In addition, the statement of claim as it stands is a most unsatisfactory document and sometimes manifestly incorrect or inconsistent with his own case. Perhaps this is not surprising as the plaintiff says he drafted it himself notwithstanding the fact that counsel's name appears at the end. The plaintiff has clearly taken the counterclaim from his defence and counterclaim in the ACC proceedings and reproduced it as a statement of claim in these proceedings by simply substituting references to the plaintiff with references to the defendant. This leads to unsustainable propositions such as the fact that Rabobank Group entered into a loan agreement with the plaintiff or that Rabobank Group appointed a receiver, or that Rabobank Group acted in breach of contract. Even on the plaintiff's own case, the loans were advanced by ACC Bank plc to the plaintiff and the Company and ACC Bank plc appointed the receiver and ACC Bank plc called in the loans. There are numerous other deficiencies in the statement of claim as delivered in these proceedings such that I would be impossible to proceed on the basis of the claim as it stands.

23. In view of the dicta in *Sun Fat Chan v Osseous Ltd* [1992]1 I.R. 425 that proceedings should not be dismissed if they admit of amendment which could save the proceedings, I propose to consider this application on the basis of the draft amended statement of claim, despite the very grave procedural unfairness that has been inflicted on the defendant by the manner in which the plaintiff has conducted the proceedings to date and in particular dealt with this motion.

Amended statement of claim

24. The essence of the plaintiff's claim against Rabobank is that it is liable for the alleged wrongful actions of ACC Bank plc which form the subject of the counterclaim in the ACC proceedings and that it induced or procured those wrongful actions and was a party to them in its own right. The case against Rabobank in these proceedings is that it is the parent of ACC Bank plc, its primary funder and that it directed the strategy and all decision making of ACC Bank plc with the plaintiff. It is pleaded that Rabobank directed, was fully informed of, and approved of the negotiations and decisions regarding the granting of the loans to the plaintiff. The plaintiff alleges that Rabobank was at all times aware that the development was an unauthorised development as it proceeded with 38 apartments when there was in fact planning permission for only 34 apartments. It is alleged that Rabobank's representative attended the construction works on a number of occasions while the building works were underway between 7 March 2007 and 28 March 2008 and that it was aware of the defective nature of the building works. It attributes liability to Rabobank for the wrongful acts of both ACC Bank plc and the receiver.

25. Unfortunately, the original error of referring to ACC Bank plc wrongfully as the defendant persists in the draft amended statement of claim. The defendant in these proceedings can only be Rabobank. So when at para. 8 of the draft amended statement of claim, the plaintiff pleads conditions upon which the defendant was prepared to lend money to the plaintiff this is clearly an error as even on the plaintiff's own case it was ACC Bank plc who lent money to the plaintiff, not Rabobank. Likewise, in para. 18 it is pleaded that the defendant transferred funds into the plaintiff's account and that the defendant appointed a receiver and it refers to payment of monies negligently and in breach of the contract between the defendant and the plaintiff, this is incorrect on his own case. The monies were advanced by ACC Bank plc, the receiver was appointed by ACC Bank plc and the loans were between the plaintiff and the Company and ACC Bank plc. So even the draft amended statement of claim requires further amendment. The court cannot simply adopt the proposed amended statement of claim as the claim in this case and then decide whether the claim is bound to fail or is frivolous or vexatious.

The Decision

26. The courts have emphasised that the jurisdiction to strike out proceedings either pursuant to O. 19, r. 28 or the inherent jurisdiction of the court, should be exercised sparingly and only in clear cases. If the proceedings may be saved by appropriate amendments, it is not appropriate for the court to strike out the proceedings.

27. In this case an order pursuant to O.19 r, 28 would not be appropriate as the pleadings disclose at least one cause of action known to law and therefore, however improbable the allegations, the court will not engage in an application under Order 19 in assessing the facts alleged. As was held in *Lopes*:_

> *"In an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, the court must accept the facts asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim."*

It is clear that this is such a case and so I refuse to dismiss the case pursuant to O. 19 r, 28.

28. The fact that the claim mirrors the claims made against ACC Loan Management DAC in the ACC proceedings or that the plaintiff has instituted several other proceedings concerning the same development against other parties likewise does not mean that these proceedings disclose no reasonable cause of action. These proceedings do not duplicate the existing proceedings as they are brought against a defendant who is not a party to the earlier proceedings. While it would have been more efficient and less costly if the plaintiff had sued Rabobank at the time he issued the ACC proceedings, it does not follow that these proceedings disclose no reasonable cause of action or are frivolous and vexatious.

29. It is then necessary to consider whether the court should dismiss the proceedings pursuant to the inherent jurisdiction of the court on the grounds that they are bound to fail. In such a case the court may engage to a very limited extent with the facts and is not confined solely to a consideration of the pleadings. However, the court must resist the temptation to engage in a form of summary procedure. The court is not entitled to decide issues of disputed fact.

30. In the draft amended statement of claim there are some claims which in my opinion are bound to fail and there are claims which the plaintiff is not entitled to advance in these proceedings. For instance, he raises claims which are properly claims of the Company and he may not advance a *jus tertii*. As the draft stands, he could not succeed on these claims. But this does not apply to the whole of the draft statement of claim.

31. The reliefs now claimed in the proceedings are: -

> *"(1) an indemnity from the defendant for any claim that [ACC Loan Management DAC] might have against the plaintiff with respect to the loan that is the subject of these proceedings and the proceedings between [ACC Loan Management DAC] and the plaintiff in proceedings as follows: - ACC Loan Management DAC v. Dooley, High Court Record Number 2010/5004/S*
>
> *(2) damages for negligence and breach of duty;*
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> *(3) damages for unlawful interference in the plaintiff's contractual relations with the bank;*
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> *(4) damages for inducing breach of agreement between the plaintiff and the bank;*
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> *(5) accounts and inquiries;*
>
> *(6) further or other relief;*
>
> *(7) costs of and incidental to these proceedings."*

32. The defendant argues that the draft amended statement of claim does not make out any basis for seeking the first two reliefs. It says there is no such tort as a tort of unlawful interference in contractual relations. It says that the bank was entitled to call in the loan agreements and therefore there could be no question of Rabobank inducing any breach of the agreement between the plaintiff and/or the Company and ACC Bank plc It was also submitted that whatever of the merits of any of these claims, they must all be statute-barred, given the fact that the matters complained of occurred more than six years prior to the issuing of the plenary summons in these proceedings.

33. These arguments cannot justify an order dismissing the plaintiff's case. A plea that a claim is barred by the provisions of the statute of limitations is a matter of defence. If a defendant chooses to raise the defence, the appropriate course of action is for the defendant to seek the trial of a preliminary issue as to whether or not the whole or part of the proceedings ought to be dismissed on the basis they are statute barred. It is not appropriate to dismiss the proceedings pursuant to O. 19, r. 28 or the inherent jurisdiction of the court on the basis that they are bound to fail and that the continuance of the proceedings is frivolous or vexatious. If I were to accede to the defendant's arguments on this motion in relation to the draft amended statement of claim, I would be exceeding the jurisdiction to strike out proceedings on the basis that they are bound to fail. Preliminary applications to dismiss proceedings on the basis that they are statute barred must be determined on the basis of agreed facts or undisputed facts established in evidence. There are no such agreed facts and no facts relevant to the issues have been proved on affidavit in the motion before the court. If the defendant is correct in what it says, it has a remedy under the rules of court, but it is not to proceed by way of this motion.

34. Secondly, the plaintiff's core claim, that the defendant wrongfully induced ACC Bank plc to breach its loan agreement with the plaintiff and the Company, is one which can only be determined following the hearing of oral evidence. However unlikely the allegation may be from the perspective of the defendant, it is a cause of action known to the law, and the court must approach this motion on the basis that the plaintiff would be in a position to prove the facts he alleges. That being so, it is not open to this court to grant the defendant the relief it seeks on the notice of motion in light of the draft amended statement of claim.

35. The appropriate course of action is for the plaintiff to bring the necessary motions to seek to amend the pleadings as it has indicated. The defendant is free to oppose those applications if it wishes and it will be a matter for the judge hearing those applications to determine what is to occur and what, if any, amendments or substitutions will be allowed. If the plaintiff does not bring these motions within a short timeframe, or if he does and if he is unsuccessful in the applications, then the defendant may have liberty to re-enter this motion if it sees fit.

36. Accordingly, I adjourn the motion generally with liberty to re-enter.