

THE HIGH COURT

[2013 No. 7703 P]

BETWEEN

ANTHONY ELLIOTT AND ANNE ELLIOTT

PLAINTIFFS

AND

ACC BANK PLC, PATRICK CONDON AND JAMES J. HALLEY

DEFENDANTS

EX TEMPORE JUDGMENT of Ms. Justice Murphy delivered on the 1st day of July, 2016.

1. This is an application by the third defendant for orders pursuant to O. 19 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the Court striking out or staying the plaintiffs' claims against the third defendant on the grounds that they disclosed no cause of action and in that respect are frivolous and vexatious, or on the grounds that on the evidence, the claim is bound to fail such that to allow it to proceed would amount to an abuse of process. The plaintiffs are not legally represented.

2. An applicant who seeks such relief has a high threshold to cross. This is as it should be in a system of justice where the right of access to the courts is constitutionally guaranteed. The power and discretion of the Court should be used sparingly and only in the clearest of cases. This, in the Court's view is not such a case.

3. While the third defendant has pointed out deficiencies and inadequacies in the plaintiffs' pleadings, and has pointed to the fact that before issuing proceedings he did not obtain a peer report, the fact is that at the core the plaintiffs' case is a simple one and a stateable one.

4. In March, 2002 the first named plaintiff, who was a commercial haulier, and his wife, who was a house wife, were interested in buying a retail premises known as "Lynn's" at 59 Griffith Place, Waterford City. Their plan was to run the business for fifteen years and then sell it upon their retirement.

5. The plaintiffs sought advice from the second defendant, who apparently is an accountant, in relation to funding of the project. The Court is then told that initially funding was offered by the Bank of Scotland on a straightforward mortgage repayment basis.

6. The second defendant, according to the plaintiffs, advised them to use a different repayment structure available from the first defendant, ACC. This involved paying interest on the sum borrowed, monthly to the first defendant, and investing in a Friends First endowment-type policy, the benefit of which was to be assigned to the first defendant.

7. Being an investment type policy, its value was liable to fall as well as rise and carried no assurance or guarantee that on maturity it would be sufficient to discharge the capital sum due to the first defendants. The plaintiffs say that they were not aware of this, nor told of this by either the second or third defendant.

8. The third defendant was retained to advise the plaintiffs on the legal aspects of the transactions and the Court notes that he witnessed their signatures to:-

(i) the letter of loan sanction;

(ii) the mortgage; and

(iii) the assignment of the Friends First policy to the first defendant.

9. The plaintiffs' claim against him is that he was negligent and in breach of contract in failing to advise them of the nature and volatility of the Friends First investment and of the risk that on maturity it would not be sufficient to discharge their debt to the first defendant and its general unsuitability for their goals of which he was aware.

10. In *Pickersgill v. Riley* [2004] UKPC 14, the Privy Council decision referred to during submissions, Lord Scott noted at para. 7:-

"It is plain that when a solicitor is instructed by a client to act in a transaction, a duty of care arises. But it is also plain that the scope of that duty of care is variable. It will depend, first and foremost, upon the content of the instructions given to the solicitor by the client. It will also depend on the particular circumstances of the case."

11. Whether or not there was a breach of a duty of care is a matter for the court of trial to decide. Whether or not a loss arises from any such breach of duty is similarly a matter for a court of trial to decide, but it is manifest to this Court that a stateable claim arises on the facts alleged and that the said claim is not one which could be said to be bound to fail.

12. For that reason the Court refuses the third named defendant's application.