THE HIGH COURT

COMMERCIAL

[2015 No. 10665 P]

BETWEEN

JAMES OSBORNE

PLAINTIFF

AND

KBC BANK IRELAND PLC, KEN TYRELL,

PRICEWATERHOUSECOOPERS,

CHARTERED ASSETS PROPERTY LIMITED AND CBRE

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 28th day of April, 2016.

1. This is an application by the first named defendant for the following relief:-

> (i) An order pursuant to O. 19, r. 28 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim as against the first named defendant as being frivolous, vexatious and/or as disclosing no reasonable cause of action;
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> (ii) An order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim by reason of it being an abuse of process, contrary to public policy and/or by reason of the rule in *Henderson v. Henderson*; and,
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> (iii) An order dismissing the plaintiff's claim by reason that same is barred by the provisions of s. 11 of the Statute of Limitations 1957, as amended.

2. By order of Barrett J., dated the 21st December, 2015, judgment was entered against James Osborne (the plaintiff in these proceedings) in the sum of €6,217,162.27, together with costs in proceedings bearing High Court record number [2015 1856 S] entitled *KBC Bank Ireland plc v. James Osborne* ("the earlier proceedings"). The order followed the delivery of a judgment by Barrett J. on 15th December, 2015, bearing neutral citation [2015] IEHC 795. On that same day, the plaintiff issued the plenary summons in this action. A statement of claim was delivered on 11th February, 2016, and an amended statement of claim was delivered on 4th March, 2016. In that amended statement of claim, the plaintiff acknowledged that he was not proceeding with his action against the second, third, fourth and fifth named defendants. Accordingly, the claim against these defendants was dismissed by order of this Court on 7th March, 2016. It is important to note that the "loan facility" referred to in the amended statement of claim is the same loan which was the subject matter of the earlier proceedings.

3. The plaintiff's claim is based on allegations of negligence, breaches of statutory duty and breaches of contract. It is clear from the particulars of negligence, breach of statutory duty and breach of contract that, in effect, the allegation on which the plaintiff bases his claim is that the defendant completed the loan facility and lent the plaintiff monies without taking the appropriate steps to check whether there existed a fire safety certificate which, he claims, the defendant was obliged to do prior to completing the loan agreement. That is the gist of the plaintiff's claim. It is clear that the loan referred to is one and the same as that which was the subject matter of the proceedings in which the defendant obtained judgment against the plaintiff in December, 2015.

4. The plaintiff has not appealed against the order of Barrett J. dated 21st December, 2015.

The Law

5. The jurisdiction to strike out proceedings in limine is one which must be exercised sparingly. This principle applies to applications brought pursuant to O. 19, r. 28 of the Rules of the Superior Courts or under the inherent jurisdiction of the court. Where an application is brought to dismiss proceedings as disclosing no reasonable cause of action under the provisions of O. 19, r. 28, the court must accept the facts as asserted in the pleadings setting out the plaintiff's claim. The difference between applications under the inherent jurisdiction of the court and applications to dismiss under O. 19, r. 28, is that the court can look at the factual basis of the plaintiff's claim in the former category of application: see, *Salthill Properties Limited and Cunningham v. Royal Bank of Scotland plc and Ors*. [2009] IEHC 207; and, *Manning v. The National House Building Guarantee Company Limited and Anor*. [2011] IEHC 98, which both followed *Barry v. Buckley* [1981] 1 I.R. 306.

6. In *Salthill Properties Limited*, Clarke J. addressed the fact that applications to dismiss proceedings as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. But they are not solely confined to such matters. In this case, there is no dispute on the facts. Both parties agree that, at the time the monies were lent to the plaintiff, both the plaintiff, as borrower, and the defendant, as lender, knew that there was no fire safety certificate in place. So, on the issue which is alleged to constitute negligence and/or breach of statutory duty and/or breach of contract, there is no dispute. There is, in reality, only one issue in this case; namely, whether the failure on the part of the defendant to ensure that the premises were covered by a fire safety certificate at the time when the loan was made gives rise to a cause of action.

7. Although the amended statement of claim purports to furnish particulars of breach of statutory duty, it does not, in fact, do so.

Nowhere in the statement of claim is any statutory duty referred to. While para. 5 of the statement of claim refers to the Building Control Act 1990, it is simply in the context of a requisition to furnish a fire safety certificate. At a minimum, one would expect the plaintiff to assert a statutory duty that is imposed on the defendant and then set out in what way and by reference to what part of the statute the breach has occurred.

8. Insofar as particulars of breach of contract are concerned, they state it in terms that the defendant completed the loan facility without appropriately checking and establishing the existence of a fire safety certificate *"…which they were obligated (sic) to do prior to completion…".* No contractual clause is set out anywhere in the statement of claim, let alone the particulars, to indicate where the term existed. When one refers back to the reference to the contract at para. 4 of the statement of claim, it is clear that this refers to the loan agreements. There is no reference to any other contract. The liability of the plaintiff to the defendant under that contract has already been determined in the earlier proceedings by Barrett J. and is *res judicata.*

9. Insofar as requisitions on title were raised by the defendants' predecessor in title as vendor, it was purely a matter for that party as to whether it wished to complete the contract of loan on the basis of the answers furnished. The obligation (if any) to obtain a fire safety certificate is one resting on the owner. So far as the defendant, as lender, was concerned, any want of a fire safety certificate was something that might have had an adverse effect on its security. The suggestion that a lender has a contractual or other duty to ensure that its security was adequately protected is an entirely novel one and, if accepted, would have very far reaching consequences indeed. At the hearing of this application, no legal authority was advanced for that proposition. While the defendant may have been foolish in advancing the funds to the plaintiff without ensuring that a fire safety certificate had been obtained in respect of the premises securing the loan, this is a matter for the defendant and it cannot give rise to any legal obligation on its part to the plaintiff. Furthermore, by virtue of clause 11(a) of the defendant's standard terms and conditions, which were accepted by the plaintiff, the defendant was entitled to waive the obligation of the plaintiff to produce a fire safety certificate. It was not incumbent, however, upon the defendant to waive this entitlement in writing, as was suggested by the plaintiff. In effect, all that happened was that the defendant lent the money to the plaintiff on less onerous terms than would have been expected by the plaintiff if the defendant had insisted on the fire safety certificate being in place before the monies were transferred. But where all of this occurred, in circumstances where both parties knew there was no fire safety certificate in place, and in the absence of some express contractual term or statutory duty imposing some obligation on the defendant in that regard, it cannot give rise to a cause of action in favour of the plaintiff against the defendant.

10. Whatever way one looks at this, it is clear that the essence of the plaintiff's claim is that the defendant was negligent. This can be seen from the plaintiff's affidavit sworn on 5th April, 2016, in response to this application by the defendant. Although the plaintiff maintains that the requisitions on title and, in particular, requisitions 28.5 and 29.2, expressly make it clear that a fire safety certificate was a condition of the contract, it was for the purpose of protecting the defendants' security and giving assurance to occupiers of the premises whether as tenants or otherwise. But, so far as the relationship between the plaintiff and the defendant, as borrower and lender, was concerned, it was a matter which the defendant was entitled to insist upon or waive as the case may be. As it happened, the defendant decided to advance the loans to the plaintiff without the fire safety certificate being obtained and the defendant accepted the loan in those circumstances. This does not give rise to a cause of action against the defendant. If there was any obligation to obtain a fire safety certificate under the Building Control Act 1990, and the Fire Services Act 1981, this was an obligation that fell on the owner of the premises, namely, the plaintiff.

11. In para. 13 of his affidavit, the plaintiff avers:-

> *"In relation to paragraph 19, it is contended that the Bank was negligent in lending and channelling loan facilities in the absence of insisting on a fire safety certificate the non-existence of which it was informed of on many occasions."*

12. That is what this case is about. The plaintiff claims that when the local authority insisted on a fire safety certificate being put in place that he had to incur expense in making the premises compliant with the appropriate regulations. He further contends that this consequent expense caused him financial hardship which led him to default on the loan repayments and thus led to judgment being entered against him by order of Barrett J.

13. The plaintiff accepts, as he must, that the expense to which he was put in order to obtain the fire safety certificate was expense that he would always have had to meet in any event regardless of whether or not the defendant insisted on the certificate in advance of the disbursement of the monies pursuant to the various loan facility agreements.

Discussion

14. The plaintiff accepts that there is no tort of reckless lending in this jurisdiction: see, *ICS Building Society v. Grant* [2010] IEHC 17; *Healy v. Stepstone Mortgage Funding Limited* [2014] IEHC 134; and *McConnon v. President of Ireland* [2012] IEHC 184; [2012] I.R. 449. It is clear that the plaintiff has raised issues of breach of contract and breach of statutory duty in an attempt to get around this difficulty. The plaintiff also maintains that, although there is no tort of reckless lending, nevertheless, he is entitled to argue that a claim based on negligent lending can exist. This is mere sophistry. The concept of "recklessness" is one connoting a greater lack of care than negligence simpliciter. It requires a party being indifferent to the likely consequences of his or her act. If there is no tort of reckless lending then *a fortiori* there is no tort of negligent lending.

15. These proceedings seem to have their genesis in para. 20 of the abovementioned judgment of Barrett J. delivered on 15th December, 2015, in the earlier proceedings. It is worth quoting in full that paragraph:-

> *"iii. The fire certificate.*
>
> *20. As the court understands Mr Osborne's contentions in this regard, it is that he was required to mortgage certain premises for the benefit of KBC and to the satisfaction of its solicitors. It appears that the absence of a fire certificate was not recognised when the requisite mortgage documentation was executed and that Mr Osborne has been seeking of late to resolve the issues that this presents. But taking Mr Osborne's arguments at their height (and ignoring the obstacles that appear offhand to arise), even if he were able to establish that KBC and/or its solicitors were guilty of some form of negligence as regards the original procurement of the certificate, and he has as yet commenced no proceedings alleging such negligence, this is no defence to the within application"*

16. The plaintiff appears to have latched onto these observations and interpreted them as raising the possibility of mounting a claim in negligence against the defendant arising out of the absence of the fire safety certificate. It is clear that Barrett J. did not reach any conclusion on whether or not a claim in negligence could be made out against the defendant or would give rise to a cause of action. His remarks on that issue are clearly obiter and only go so far as to say that, even if the plaintiff were to establish some negligence based on the absence of a fire safety certificate, that is no defence to the claim against him in respect of the outstanding loans. The

plaintiff is inviting the court to read more into that statement than what appears on its face.

17. The plaintiff relies on the judgment of Kearns P. in *Harrold v. Nua Mortgages Limited* [2015] IEHC 15, in which the then President of the High Court referred to the judgment of the Supreme Court in *KBC Bank Ireland v. BCM Hanby Wallace* [2013] IESC 32 insofar as it relates to issues of negligence on the part of a bank. That case can be distinguished from the present one in that the parties to the proceedings were the bank and its solicitors and the issue concerned the failure of the solicitors to carry out the bank's instructions with regard to the obtaining of security before funds were released to borrowers. One of the issues that arose on appeal to the Supreme Court was whether or not the bank's own conduct might amount to contributory negligence. It was not a case involving a borrower and a financial institution. The plaintiff claims that that decision allows him to make the case in these proceedings that the bank was negligent. However, for the purposes of this application, what the court has to decide is whether or not there is a tort of negligent lending. I have already stated at para. 13 above that there is no tort of negligent lending and that raises the question as to whether the plaintiff's claim in these proceedings should be dismissed as having no reasonable prospect of success and being doomed to fail.

Statute of Limitations
18. The defendant also seeks to have these proceedings dismissed on the basis that they are barred by the provisions of s. 11 of the Statute of Limitations 1957, as amended. The defendant asserts that the negligence and breach of duty and breach of contract complained of occurred in 2004 when the monies were advanced to the plaintiff without ensuring that a fire safety certificate was in place. The defendant argues that the negligence alleged by the plaintiff relates to events in December, 2004, and in particular on foot of a letter of 20th December, 2004, when the solicitors for the plaintiff informed the then solicitors for the defendant that the fire safety certificate was unavailable. If there was a breach of duty, this was a breach that was manifest or easily detectible in 2004.

19. The plaintiff maintains that the loans were restructured over the years and that the issue pertaining to the fire safety certificate was an ongoing one changing from time to time as loans were extended or restructured. It appears that, between 2002 and 2004, a total of €7,000,000.00 was drawn down by the plaintiff and that the loans were restructured as late as 28th September, 2009. The last disbursement of monies from the defendant to the plaintiff was on 28th September, 2009, when the loans were restructured. These proceedings commenced by plenary summons on 15th December, 2015, more than six years later.

Rule in Henderson v. Henderson
20. The final issue in this case concerns the rule in *Henderson v. Henderson* (1843) 3 Hare 100. To put it simply, the defendant contends that the plaintiff is trying to re-litigate matters already ruled on by Barrett J. in the earlier proceedings and, therefore, constitutes an abuse of process and is contrary to public policy and/or is barred by reason of the rule in Henderson v. Henderson.

21. There is no doubt that the fire safety certificate issue was raised in the earlier proceedings as they are referred to by Barrett J. in his judgment. The defendant argues that, if the plaintiff had intended to maintain that there was some distinction between *"reckless lending"* and *"negligent lending",* this could and should have been raised before Barrett J. in those proceedings and the plaintiff cannot do so now.

22. The plaintiff maintains that these proceedings constitute a new cause of action separate and distinct from the summary proceedings before Barrett J.

Decision
23. As this case is essentially one based on negligent lending and the failure to ensure that the plaintiff had obtained a fire safety certificate before the monies were advanced, the claim is bound to fail. In the first place, if there was an obligation to obtain a fire safety certificate, it was the plaintiff's obligation, under whatever statutory or regulatory regime applied to the owners of commercial premises. Furthermore, as indicated at para. 9 above, even if the obtaining of such a certificate was a requirement, as contended for by the plaintiff, it was one which was for the benefit of protecting the defendants' security and in any event the defendant was entitled, pursuant to clause 11(a) of its standard terms and conditions, to waive that requirement and proceed in the absence of it being complied with. That is what happened. The plaintiff's claim, as pleaded, discloses no reasonable cause of action, it is frivolous and vexatious and must be dismissed pursuant to O. 19, r. 28 of the Rules of the Superior Courts.

24. Furthermore, the claim amounts to an abuse of process as it is, on any objective view, a collateral attack on the judgment delivered by Barrett J. in the earlier proceedings. Therefore, I dismiss the claim under the inherent jurisdiction of the court.

25. The claim also offends against the rule in Henderson v. Henderson. It is clear that the issue of the absent fire safety certificate was canvassed before Barrett J. in the earlier proceedings. But there does not appear to have been any argument advanced to the learned judge to suggest that a tort of negligent lending exists in contradistinction to reckless lending. This matter could have then been disposed of in the earlier proceedings had it been raised.

26. Finally, I am also satisfied that the claim is time barred by virtue of s. 11 of the Statute of Limitations 1957, as amended. The negligent act complained of, unambiguously, goes back to December 2004. If there was a breach of duty, this was a breach that was manifest or easily detectible at that time. I am also satisfied that any restructuring of the loans did not give rise to ongoing renewed obligations which were breached by the defendant. But if I am wrong about that, the last disbursement of monies from the defendant to the plaintiff was made on 28th September, 2009, and these proceedings commenced on 15th December, 2015, more than six years later.

27. The defendant is entitled to the relief claimed in paras. 1, 2 and 3 of the notice of motion. I dismiss the plaintiff's claim.