

## THE HIGH COURT

[2015 No. 8951P]

BETWEEN:

CAÍT O'BEIRNE

PLAINTIFF

-AND-

BANK OF IRELAND MORTGAGE BANK, FIONA CASSIDY AND SEÁN HUGHES

DEFENDANTS

**JUDGMENT of Mr. Justice Twomey delivered on 28th day of June 2016.**

1. This is an application by the first named defendant, Bank of Ireland Mortgage Bank, to dismiss, as an abuse of process or as frivolous or vexatious or as bound to fail, the High Court proceedings issued by the plaintiff, Ms. O'Beirne. Ms. O'Beirne's proceedings seek damages for, *inter alia*, defamation against the Bank and two of its employees, the second and third named defendants.
2. The claim for defamation arises out of an action for possession of a property at 16 Brindle Hill, Charleville, County Cork in the Circuit Court against Ms. O'Beirne and her husband, Mr. Brian Coleman, as they were registered owners of that property. The property was charged in favour of the Bank in respect of a loan extended to Mr. Coleman only. It is relevant to note that the Circuit Court proceedings about which Ms. O'Beirne complains were not proceedings for judgment in relation to the debt owed by Mr. Coleman to the Bank, but rather an action for possession of the charged property.
3. Mr. Coleman is not a party to these defamation proceedings against the Bank. Nonetheless, a considerable portion of the submissions made by Ms. O'Beirne was in relation to complaints about the manner in which the Bank dealt with the bank loan to which she is not a party. Matters raised in this regard include, *inter alia*, the alleged failure to pay the taxation at source, incorrect calculation of the amount due, incorrect application of interest rates etc.
4. All of these may be valid grievances, but they have no relevance to Ms. O'Beirne's proceedings against the Bank for defamation. Mr. Coleman is not a party to these proceedings, so these are not the appropriate proceedings in which to complain about a loan to him. As Ms. O'Beirne is a lay litigant, it is perhaps understandable that she would wish to air these grievances in these defamation proceedings. However, these grievances are relevant only to the Circuit Court proceedings between Mr. Coleman and the Bank (to which Ms. O'Beirne is also a party). Accordingly, this Court has no role whatsoever in deciding on these grievances. If Mr. Coleman and Ms. O'Beirne wish to pursue these grievances, they can do so by appealing the decision of the Circuit Court. In this regard, they have filed a notice of appeal.
5. What this Court must however consider is Ms. O'Beirne's claims for defamation. Ms. O'Beirne's first complaint is that in affidavits read in open court at the Circuit Court hearing, the Bank alleged that Ms. O'Beirne owed money to the Bank, when this is not the case, the money was owed by Mr. Coleman. Ms. O'Beirne was correctly joined to the possession proceedings, since she co-owned the charged property. However, it was incorrect, in the affidavits filed by the second and third named defendants on behalf of the Bank in the possession proceedings in the Circuit Court, to state the loan in question was owed by the 'defendants' in the plural to those proceedings, when in fact the loan was owed only by one of the defendants in the Circuit Court proceedings, Mr. Coleman and not Mr. Coleman and Ms. O'Beirne. The affidavit by Ms. Cassidy is the main affidavit, since this is the one which grounds the claim for the order of possession. The affidavit of Mr. Hughes is more technical in nature, since it simply confirms compliance with the Bankers Books Evidence Acts, but it also does refer to the defendants' liability (plural), rather than the liability of the first defendant alone.
6. The question for this Court to consider is whether Ms O'Beirne's claim of defamation against the Bank for the error in the two affidavits could ground a claim by Ms. O'Beirne for damages or whether this claim is bound to fail.
7. The first matter to note is that the error that exists in the affidavit of Ms. Cassidy in referring to the 'defendants' rather than the first named defendant, is evident on a careful reading of the affidavit of Ms. Cassidy. In that affidavit Ms. Cassidy exhibits bank statements to support her averment of the money being owed by the defendants, yet these statements are only in Mr. Coleman's name. On this basis, any person reading an affidavit in full (i.e. the affidavit and the exhibits) is likely to conclude that the reference to the defendants in the plural was a mistake, as commonly happens in affidavits, since it should have referred to the first named defendant alone.
8. It is likely that this was the interpretation taken by the Circuit Court in this instance, since it granted an order of possession against both defendants, but only awarded costs against Mr. Coleman. This Court infers that it did so because it was clear to the Court, despite the mistake in the affidavits, that the loan was owed by Mr. Coleman alone. On this basis, it decided not to award costs against Ms. O'Beirne.
9. Indeed, in Ms. O'Beirne's affidavit dated 25th February, 2016, she avers that the judge in the Circuit Court was advised by counsel for the Bank that she did not have any liability for the debt to the Bank. It seems clear, therefore, that despite the error in the affidavits, the Court was made aware that Ms. O'Beirne did not owe any sums to the Bank.
10. Where errors occur in affidavits in court proceedings they are regularly corrected after being read out in open court as happened in this case. More importantly, from a legal perspective is the fact that, the making of errors in affidavit, even those that are not corrected, is not a ground for a defamation action. This is clear from both the case of *Looney v. Bank of Ireland* [1996] 1 IR 157 and s. 17(1) of the Defamation Act, 2009, which makes it clear that statements in an affidavit, such as in this case, are subject to absolute privilege. This means that they cannot ground an action for defamation.
11. All of this means that the error in the affidavit, which was corrected in open court and would in any case have been obvious on an examination of the exhibits, is not a ground for making a defamation claim. For this reason this Court concludes that the action in this case is bound to fail and on this basis must be struck out.
12. The second complaint made by Ms. O'Beirne is that the Bank should not have instituted possession proceedings against her and she seeks damages for this alleged abuse of process. Unfortunately for Ms. O'Beirne, this claim is also fatally flawed. This is because the essence of her claim is that the proceedings seeking the possession order, which was granted by the Circuit Court, should not have been taken against her and it was an abuse of process for the Bank to do so. The difficulty with this proposition is that it

requires this Court to say that it was an abuse of process to seek a possession order, yet the Circuit Court granted the possession order which was sought. How can it be an abuse of court process to seek a court order which the court grants? If the Circuit Court had not granted the possession order, Ms. O'Beirne would be in a stronger position to say that the Bank should not have sought the possession order and to do so was an abuse of process. However, her claim of abuse of process is fatally flawed by virtue of the fact that the Circuit Court granted the order which she says should not have been sought.

13. In reaching this decision, it is important to bear in mind that this Court is not being asked to reverse the possession order of the Circuit Court, since that is a matter for the appeal which has been lodged. These proceedings are not appeal proceedings, but defamation and abuse of process proceedings. Therefore this Court must accept that the Circuit Court was correct to issue the possession order against Ms. O'Beirne and so this is why the claim that the Bank is guilty of abuse of process in seeking the possession order against Ms. O'Beirne is also bound to fail.

14. The third and final complaint made by Ms. O'Beirne is for damages against the Bank for the loss of her property, the subject matter of the Circuit Court proceedings. In essence, this is a claim that the Circuit Court was incorrect to make the possession order against Ms. O'Beirne. When a litigant is unhappy with a decision of a court, the correct procedure is for that person to appeal the decision, as has been done in this instance as a notice of appeal has been lodged. It is not the correct procedure to seek damages in a higher court for the decision of the lower court, as has been done by Ms. O'Beirne in these proceedings. For this reason, Ms O'Beirne's claim for damages arising from the Circuit Court's order is misconceived and also bound to fail.

15. In light of the foregoing, this Court finds that the plaintiff's action in these proceedings against the Bank is bound to fail. It makes no comment on the complaints made against the Bank regarding, *inter alia*, the calculation of interest, the amounts due by Mr. Coleman to the Bank, since Mr. Coleman is not party to these proceedings and these matters are not before this Court, save that if Ms. O'Beirne, or more accurately Mr. Coleman, wishes to pursue these complaints, the way to do so is, not for Ms. O'Beirne to issue these proceedings, but for these issues to be pursued by Mr. Coleman as the borrower.

16. Accordingly, these proceedings are struck out.