



THE COURT OF APPEAL

Record No. 2016/480

High Court Record No. 2016/6259P

**Peart P.
Irvine J.
Hogan J.**

BETWEEN/

FINTAN FOX

PLAINTIFF / APPELLANT

- AND -

DECLAN MCDONALD AND DANKSE BANK TRADING AS DANKSE BANK AND SHERRY FITZGERALD AUCTIONEERS AND SHERRY FITZGERALD LANNON AUCTIONEERS AND SHERRY O'REILLY AUCTIONEERS

DEFENDANTS / RESPONDENTS

Judgment of Ms. Justice Irvine delivered on the 20th day of June 2017

1. This is the appeal of the appellant, Mr. Fintan Fox, ("Mr. Fox"), against an order of the High Court (Gilligan J.) dated the 12th October 2016. By his said order the High Court judge ordered that Mr. Fox's action against all five defendants be struck out as frivolous, vexatious and an abuse of the process of the Court. He also dismissed the proceedings on the grounds that the proceedings were bound to fail. Mr. Fox also appeals the order made by Gilligan J. restraining him from instituting or commencing any new action concerning the subject matter of the within proceedings or concerning his properties without leave of the court.

Background

2. In summary summons proceedings (High Court Record No.2014/7584) ("the Danske proceedings") Danske Bank, ("Danske"), sought the recovery of approximately €1.52m. from Mr Fox on foot of various loan facilities. In April 2016 the High Court, Noonan J., granted judgment in favour of Danske against Mr. Fox for €1,472,996.95 together with costs.

3. Mr. Fox's liabilities to Danske were secured by two mortgages dated the 8th May 2007 and the 6th March 2012. These entitled Danske to appoint a receiver over the various properties to which the same related. The deeds of mortgage provided that the receiver would have the power to sell the mortgaged property in such manner and upon such terms as he considered appropriate.

4. Dankse appointed a receiver, Mr. McDonald, ("the receiver") by two deeds of appointment each dated the 27th May 2014.

5. In proceedings entitled Fintan Fox v. Declan McDonald and Dankse Bank A.S. trading as Danske Bank, (High Court Record No. 2014/7584) ("the 2014 proceedings") Mr. Fox commenced an action for damages for breach of contract, negligence, breach of duty and breach of statutory duty against Danske and the receiver. In those proceedings Mr. Fox *inter alia* alleged that Danske had mismanaged and misapplied his monies. He challenged Danske's right to appoint a receiver and maintained that the latter appointment was unlawful with the result that the receiver did not have the power to seek to sell his properties or to appoint estate agents to that end.

6. Material also to the present appeal is the fact that by notice of motion returnable for the 20th June 2016 Mr Fox sought liberty to join and DTZ Sherry Fitzgerald Auctioneers, the third named respondent herein, as defendant to the 2014 proceedings. That application was struck out by the consent of the parties by the order of O'Regan J. of the 15th July 2016. Further, by motion returnable before the court on the 4th July, 2016 Mr Fox also sought orders joining Sherry Fitzgerald Lannon Auctioneers and Sherry Fitzgerald O'Reilly Auctioneers, the 4th and 5th named respondents herein as defendants to the 2014 proceedings, a motion which he later withdrew. These three defendants/respondents had been engaged by the receiver to market and sell the properties over which he had been appointed receiver.

7. By order of the High Court (O'Regan J.) dated the 15th July 2016 made following a full hearing on oral evidence, Mr. Fox's claim against the receiver and Dankse was dismissed.

8. Mr. Fox appealed to this Court against the order for summary judgment granted by Noonan J. on the 4th April 2016 as he did the judgment and order of O'Regan J. dated the 15th July 2016 dismissing the 2014 proceedings against the receiver and Dankse Bank.

9. In my judgment delivered on the 26th May 2017 I upheld first the order for summary judgment and second the order of the High Court dismissing Mr. Fox's his claim against the receiver and Danske. In that judgment I expressed myself fully satisfied that Mr. Fox had not demonstrated any *bona fide* ground of appeal in respect of Dankse's claim for summary judgment in the sense of demonstrating any bona fide arguable ground of defence to those proceedings. Second, in respect of his appeal against the dismissal by O'Regan J. of the 2014 proceedings I concluded that he had not established that she had erred in law or in fact when she dismissed his claim for negligence and /or breach of contract against Danske and in concluding that the receiver had been validly appointed.

10. Mr. Fox's proceedings which are the subject matter of the within appeal were commenced by plenary summons (Record No. 2016/6259P) ("the 2016 proceedings") issued on the 12th July 2016. At that time his 2014 proceedings against the receiver and Dankse were due to be heard in the High Court on the 14th July 2016. Following the dismissal of those proceedings by O'Regan J. the 2016 proceedings were then served on the five named defendants.

11. The defendants/respondents were clearly of the view that the 2016 proceedings were in effect a duplication of the 2014 proceedings which had been dismissed by O'Regan J. and/or that they offended the rule in *Henderson v. Henderson* [1843] Hare 100. They each accordingly issued a motion seeking to have the 2016 proceedings dismissed under the Court's inherent jurisdiction and also under the provisions of Ord.19, r. 28 of the Rules of the Superior Courts.

12. The last mentioned application was heard by Gilligan J. who, following a consideration of the relevant affidavits and a comparison of the pleadings in the 2014 action with those in the 2016 proceedings, dismissed the latter on the grounds that they were frivolous, vexatious and an abuse of process and also on the ground that they were bound to fail.

Appeal

13. It is as against the judgment and order of Gilligan J. that Mr. Fox now appeals. Regrettably, none of the seven grounds of appeal in his notice of ordinary appeal are directed to any alleged error of law or fact made by the trial judge in reaching his decision. Further, Mr. Looney who made oral submissions to this court on behalf of Mr. Fox, Mr. Fox finding himself unable, by reason of deteriorating health, from articulating his own submissions, did not seek to argue that the proceedings which were issued on the 12th July 2016 were not in substance the same as those which had been unsuccessfully litigated in the 2014 proceedings.

14. Mr. Fox accepts that the within proceedings were issued by him two days before his earlier proceedings were due to be tried in the High Court. He appears to accept that he anticipated that he would lose the 2014 proceedings with the result that there would then be no obstacle to the receiver selling his properties. That being so he felt he would be justified in starting a new action which he believed would ensure that none of his properties would be sold while he appealed to this court against the order for summary judgment granted in Danske's favour and also the order dismissing the 2014 proceedings.

15. It was abundantly clear from the submissions made on Mr. Fox's behalf that he commenced the 2016 proceedings in an effort to fight off the potential sale by the receiver of assets which it had taken him thirty years to build up. He hoped that by issuing a further set of proceedings he might manage to delay the sale of his properties until after his appeals were heard by this court. Alternatively, with the benefit of the time which the 2016 proceedings would likely buy him, he felt it possible that he might be able to organise his finances such that he would be in a position to buy back his properties from the receiver.

16. Mr Fox's reason for joining the third, fourth and fifth named defendants, who had been appointed by the receiver to market and sell the various properties, to the 2016 proceedings was to ensure that the properties would not be sold pending the determination of his appeals and also to facilitate a claim that his properties had or were likely to be sold at an undervalue.

Submissions

17. Counsel for the respondents maintain that the High Court judge was correct as a matter of fact in his conclusion that the 2016 proceedings constituted an effort on the part of Mr Fox to litigate for a second time issues between himself, Danske and the receiver which had already been adjudicated upon between those parties in the 2014 proceedings. Given that the 2016 proceedings were issued two days before the date scheduled for the hearing of the 2014 proceedings, it was clear that second set of proceedings were a response to the likely dismissal of those proceedings. It was not legitimate to commence a second action to seek to, as Mr. Looney put it on Mr. Fox's behalf, "buy time" to appeal the dismissal of the 2014 proceedings. The correct approach was to apply for a stay on the High Court order pending an appeal.

18. In respect of the third, fourth and fifth named respondents, Mr. Fox had sought to add these entities as additional parties to the 2014 proceedings. He withdrew one such application and the two remaining applications were refused. He did not appeal the orders refusing those applications. In such circumstances it was not open to Mr. Fox to seek to raise the same legal issues which he had intended pursuing in the 2014 proceedings against those parties in a further set of proceedings. The rule in *Henderson v. Henderson* had been transgressed. A litigant cannot withhold a complaint in one set of proceedings where it might legitimately have been pursued and then seek to advance that argument in a later set of proceedings. Further, in the 2014 proceedings the receiver had called evidence to justify the values that had at that time been placed on Mr Fox's properties and notwithstanding cross examination the High Court judge had found no wrongdoing in this regard. In any event the properties remained unsold so that any potential claim that Mr Fox might wish to pursue in the 2016 proceedings concerning the sale of the properties by any of the respondents at an alleged undervalue was premature.

Decision

19. Having considered the submissions of all parties to this appeal I am satisfied that the High Court judge cannot be stated to have erred in law or in fact when he dismissed Mr. Fox's 2016 proceedings pursuant to Ord. 19, r. 28 of the Rules of the Superior Courts on the grounds that the proceedings disclosed no reasonable cause of action, were frivolous and vexatious and also pursuant to the court's inherent jurisdiction on the grounds that such proceedings were bound to fail.

20. Given that Mr. Fox is a lay litigant it is important to record that the words "frivolous" and "vexatious" have a particular meaning when used in a legal context. Nobody would suggest for a moment that proceedings commenced by a party such as Mr Fox who has lost a lifetime's savings after several decades of hard work should have their proceedings termed "frivolous" unless it is clear that as a litigant they were aware that their proceedings were wholly unjustifiable. The word "frivolous" when used in the context of O. 19 r, 28 is usually deployed to describe proceedings which the court feels compelled to terminate because their continued existence cannot be justified having regard to the relevant circumstances: see *Nowak v. Data Protection Commissioner* [2012] IEHC 449, [2013] 1 I.L.R.M. 207, 211, per Birmingham J.. Proceedings which are regularly struck out as "frivolous" or "vexatious" are proceedings clearly destined to cause irrevocable damage to a defendant, such as where a defendant is asked to defend the same claim for a second time or where a plaintiff seeks to avail of the scarce resources of the courts to hear a claim which has no prospect of success. This is the context in which these words are used in this judgment.

21. In reviewing the approach taken by Gilligan J. to the application brought by all five respondents to strike out Mr. Fox's proceedings it is necessary to consider very briefly some of the relevant principles which apply to the jurisdiction which the court was asked to invoke.

22. Insofar as the High Court was asked to strike out the 2016 proceedings on the ground that the claim was bound to fail, the prevailing *jurisprudence* advises that this is a jurisdiction which should be exercised "sparingly and only in clear cases". See Costello J. in *Barry v. Buckley* [1981] I.R. 306. When the court is asked to engage with this jurisdiction the court must take the plaintiff's case at its height giving him the benefit of any disputed facts. 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 possibly result in the plaintiff's claim succeeding.

23. Relevant also to the discretion of the court to strike out proceedings as an abuse of process are the decisions in *Re Vantive Holdings* [2009] IESC 69 and *Henderson v. Henderson*. In *Vantive Holdings* the Supreme Court considered whether a company should be permitted to present a second petition for the appointment of an examiner after its first petition had been refused. Regarding the right of a litigant to access to the courts, the following is what Murray C.J. stated at para 20 of his judgment:-

"[20] Citizens have the right of access to the courts so that their entitlements, rights and obligations may be determined in accordance with due process. Due process means a right to a fair and complete hearing of the issues of law and fact in

any proceedings. The courts have always had an inherent jurisdiction to stay or dismiss proceedings which abuse the due process of the administration of justice where to do otherwise would seriously undermine its effectiveness or integrity. In addition under the rules of court the courts have, in civil proceedings, the power to dismiss proceedings on the grounds that they are "frivolous" or "vexatious". Indeed abuse of process may take many forms according to the context or the nature of the proceedings, such as whether they are criminal or civil. In this case the court is obviously concerned with civil proceedings only."

24. Core to the 2016 proceedings is a claim made by Mr. Fox that Danske illegally and unlawfully appointed Mr. McDonald receiver over all of the properties identified in the general endorsement of claim. That is precisely the same claim which he unsuccessfully litigated in his 2014 proceedings. All of the claims for damages in the 2016 proceedings are based upon this central claim. Insofar as the third, fourth and fifth named defendants to the 2016 proceedings are concerned, Mr. Fox claims an entitlement to an injunction restraining the sale of his properties pending the determination of the proceedings. In circumstances where this court on appeal has upheld the right of the receiver to sell Mr. Fox's properties and to retain the services of auctioneers and estate agents for such purpose, this is a claim which amounts to a collateral attack on the judgment and order of O'Regan J. in the 2014 proceedings.

25. Having carefully considered the content of the plenary summons and the affidavits which were before the High Court for the purposes of the defendants' application to dismiss the proceedings under Ord. 19, r. 28 I am quite satisfied that the High Court judge was correct as a matter of law when he concluded that Mr Fox's 2016 proceedings are bound to fail. The central legal issue in the proceedings has already been determined in an earlier action and in such circumstances these proceedings are an abuse of process.

26. It is in the public interest that there should be finality in litigation. A defendant or defendants should not be put to the expense of having to defend for a second time claims which they successfully defended in an earlier proceedings. The financial and often times reputational damage to a defendant of permitting a plaintiff to make for a second time a claim for negligence and or breach of contract which the court had earlier dismissed should not be underestimated. At the same time the court must exercise its jurisdiction to dismiss a claim as an abuse of process or as bound to fail sparingly and only in exceptional circumstances. This claim falls into that category.

27. For my part, I believe that Mr. Fox did not and still does not truly understand that the proceedings which he instituted in 2016, just two days before his 2014 proceedings were determined against him, constituted an abuse of the court's process. He considered the second set of proceedings a legitimate approach that he might take in an effort to avoid the impending disaster which would likely arise if the High Court upheld the validity of the receiver's appointment, as he anticipated would occur, thus freeing up his ability to sell his properties. He felt that if he were afforded more time he might be able to obtain sufficient finance to buy back his own properties from Danske. However, Mr. Fox was entirely misguided as to his entitlement in this regard. He was not entitled to issue a second set of proceedings making essentially the same claims as he had made in the 2014 proceedings to thwart the order of O'Regan J. and the receiver's right to sell his properties. His remedy, if any, was to seek a stay on the execution of the order for summary judgment, pending the hearing of his appeals before this court.

28. Insofar as Mr. Fox hoped that his 2016 proceedings would stop the sale of his properties until such time as his appeal from the order for summary judgment of Noonan J. and the dismissal of his 2014 action against Danske and the receiver by O'Regan J. were determined by the Court of Appeal, he has in fact succeeded in that objective. However, this court has dismissed both of his appeals finding that the bank's judgment was entirely lawful and that he has no claim to restrain the receiver from selling his properties. The receiver's appointment was entirely lawful with the result that he was entitled to retain the 3rd 4th and 5th named defendants for the purpose of marketing and selling Mr Fox's properties.

29. In the aforementioned circumstances the present proceedings constitute an abuse of process in that they are bound to fail against all of the defendants. They are also vexatious insofar as they would seek to litigate for a second time, issues already determined between Mr Fox, Danske and the receiver in the 2014 proceedings. Insofar as the 3rd 4th and 5th named respondents are concerned, not only is the claim bound to fail but the proceedings offend the doctrine in *Henderson v. Henderson*. This is so having regard to the fact that Mr Fox had brought applications in the 2014 proceedings seeking to join the third named respondent as a third party and the 4th and 5th named respondents as additional parties but subsequently agreed that the first of these applications might be struck out and the latter two withdrawn with his consent. That being so, he is not entitled to start a new action to determine a matter or matters he could have had disposed of in the earlier proceedings.

Conclusion

30. It is regrettable that after thirty years of hard work and coming at a time in his life when Mr. Fox has much to endure in terms of his own deteriorating health, that he should find himself in a position where his assets are to be sold to meet his outstanding liabilities to Danske. He is undoubtedly sincere in a number of concerns he has voiced to the court and in particular his fear that his properties may be sold at an undervalue. I should also say that in his dealings with the court he has been nothing but courteous and direct. That said, Mr. Fox should now stop litigating about his properties. He has been afforded every opportunity to make his claims of wrongdoing against Danske, the receiver and those retained by the receiver to market and sell his various properties. He had a full oral hearing in the High Court in the course of which he had the opportunity of challenging the actions of Danske, the receiver and his agents. He was unsuccessful in that regard and his appeal to this court both in respect of the dismissal of his claim against the receiver and Danske and his appeal against the summary judgment obtained by Danske were unsuccessful.

31. The present proceedings were, in my view, correctly dismissed by the High Court judge as being bound to fail and also as being frivolous, vexatious and an abuse of process, in the legal sense in which those words are to be understood. These are proceedings which seek to engage Danske and the receiver for a second time on precisely the same issues earlier litigated and the claim as against the third, fourth and fifth named respondents is bound to fail having regard to the validity of the receiver's appointment and the fact that as yet no properties have been sold.

32. I will conclude by stating that it is a matter of some regret that many lay litigants, such as Mr. Fox, are taking advice from individuals who have no legal qualifications and have no real understanding of the law or the rules of court. These advisors not only have no training but have no professional indemnity insurance and are not accountable for any advice which they give regardless of how reckless or wrong it might be.

33. That is not to contest that in many instances the advice giving by these non qualified advisors, as is likely the situation in this case, is furnished in the genuine belief that it will assist the recipient and if accepted will operate to their benefit. However, leaving aside the motivation of such advisors and the fact that in many instances they are paid for their work, their advice, in my experience, is rarely, if ever, correct. Day in day out this court sees lay litigants pursue appeals and applications which have no prospect of success and where, following the failure of their appeal or application, the court is left with little option but to award costs against them in respect of such hearings thus pushing them further and further into debt.

34. The situation is particularly upsetting where the litigant, who has already suffered serious financial loss, may nonetheless still retain assets which might afford them some degree of comfort and these are then lost to bills of legal costs unnecessarily incurred as a result of the pursuit of ill advised and untenable claims, applications and appeals.

35. From the history of this litigation and his repeated efforts to frustrate the lawful sale of his properties by the receiver, I am quite satisfied that not only is it in Danske and the receiver's best interests but that it is also in Mr. Fox's own interest that he be restrained from instituting further proceedings in relation to his properties without further order of the court. I am satisfied that he does not properly understand the limit of his legal entitlements and that he may fall prey to further if even possibly well intentioned but nonetheless misguided legal advice to the effect that there is some other legal avenue open to him to stave off the sale of his properties. It is also necessary that he be so restrained to avoid the further abuse of the Court's own scarce legal resources.

36. For all of these reasons, I would dismiss in its entirety Mr. Fox's appeal against all aspects of the order of the High Court.