

THE HIGH COURT

[2013 No. 6338 P.]

BETWEEN

PATRICK LOONAM

PLAINTIFF

AND

WILLIAM KENNY, KAREN KENNY, K&K PLANT AND HAULAGE LIMITED, KENNY TYRES LIMITED, TOPGEAR CAR AND TRUCK WASH LIMITED AND TRIBAL CATERING LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Brian McGovern delivered on the 14th day of July, 2015

1. In these proceedings, the plaintiff seeks rescission of various agreements entered into by him with the first named defendant. He claims he was induced to enter into the agreements on foot of fraudulent misrepresentation. He also claims that he was subject to the undue influence of the first named defendant and that he entered into an improvident transaction and/or unconscionable bargain.

2. On 2nd April, 2014, by order of Gilligan J., the plaintiff was granted judgment against the third, fourth, fifth and sixth named defendants and the case against those defendants is an assessment of damages. The evidence furnished to the court in the course of the trial of the action suggests that these defendants are unprofitable and, more likely, insolvent.

3. It is necessary to outline some background which is relevant to this case. On 1st July, 2001, the plaintiff was involved in a very serious road traffic accident in which he sustained serious personal injuries including a significant head injury, multiple fractures and very serious bilateral brachial plexus lesions which left him with a significant level of disability involving loss of useful function of his right hand and a severely impaired level of function of the left hand. Prior to the accident, the plaintiff's health had not been good and he had been an insulin dependent diabetic for many years. As a result of the head injuries sustained in the accident, the plaintiff suffered some cognitive impairment and psychiatric evidence was presented to the court which suggested that he was a vulnerable individual who could be taken advantage of.

4. In November 2011, the plaintiff contacted the first named defendant on foot of an advertisement placed on the website, www.donedeal.ie, with a view to the plaintiff investing in the fourth and fifth named defendants. The plaintiff alleges that the first named defendant made representations about the fourth and fifth named defendants to the effect that they were worth approximately €75,000 each and that they were solvent and profitable. The plaintiff entered into a second agreement for the purchase of a catering trailer van for the purpose of setting up a catering business providing fast food to the customers of the fourth and fifth named defendants at their business premises. He claims to have entered into that agreement on foot of representations made by the first named defendant that the catering trailer was for sale at a sum of €10,000 and that it could be purchased for €5,000. The plaintiff alleges that this representation was untrue in that the trailer was always valued at €5,000.

5. On 13th February, 2012, pursuant to the two agreements set out above, the plaintiff paid to the first defendant the sum of €80,000 by way of bank draft. This payment was also made in respect of a 50% share to be obtained by the plaintiff in the sixth named defendant once incorporated.

6. Up to the date of commencement of these proceedings, the plaintiff paid to the first named defendant the sum of €212,540 which was intended to be used in respect of the businesses of the third, fourth, fifth and sixth named defendants and to give the plaintiff an equity in those businesses. While the nature of the evidence as to what precisely he was investing in was somewhat vague, there is no doubt as to the figure which he invested and he was not challenged on that sum.

7. So far as the initial investment was concerned in respect of the fourth and fifth defendants, it is clear that the plaintiff at that time had the benefit of legal advice. Having sought the advice of his solicitor he was informed that there was insufficient evidence available to warrant making such an investment and he was cautioned against investing any money in those businesses without getting further information. Before investing in the business, the plaintiff visited the premises of the fourth and fifth named defendants in the company of his cousin, Mr. Stephen McEvoy.

8. Despite his solicitor's advice, the plaintiff seemed determined to invest in the first named defendants companies and went ahead with what can only be described as a most foolish investment which, in the end, amounted to €212,540.

9. For reasons which I will explain later in this judgment, I am satisfied that the first named defendant made representations concerning his companies which were untrue and exaggerated their financial strength. Before making his investment, the plaintiff had already received professional advice on the matter and appeared quite determined to make the investment without carrying out a proper evaluation of the information furnished by the first named defendant. But I am satisfied that, at least to some extent, the plaintiff was induced by the representations of the first named defendant to enter into the agreements and that those representations were made either fraudulently or recklessly without regard as to whether the statements made were true or false. I have no doubt that the first named defendant intended the plaintiff to rely on these representations and that the plaintiff did so. It may well be the case that had he heeded the advice of his solicitor, he would not have entered into the transactions complained of in these proceedings. In *Keegan Quarries Limited v. McGuinness & Anor* [2011] IEHC 453, Finlay Geoghegan J. applied the principles set out by the Court of Appeal in *Edgington v. Fitzmaurice* [1885] 29 CHD 459, where Cotton L.J. at p. 481 stated:-

"It is not necessary to show that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the Defendants will still be liable."

Fry L.J. at p. 485 stated:-

"It is quite true that the Plaintiff was influenced by his own mistake, but that does not benefit the Defendants' case. The Plaintiff says: I had two inducements, one my own mistake, the other the false statement of the Defendants. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced the Plaintiff, the defendants are liable, even though the plaintiff may have been also influenced by other motives. I think, therefore, the Defendants must be held liable."

10. In *Keegan Quarries Limited*, Finlay Geoghegan J. also made reference to the decision of *Carey v. Independent Newspapers (Ireland) Limited* [2004] 3 I.R. 52, where at p. 70, Gilligan J. considered the extent of the reliance required in order to ground a claim in misrepresentation. He stated:-

*"...the significance of the truth to the plaintiff of what turns out to be a misrepresentation may be such that, if the plaintiff representee appreciated the true position, they (sic) would not have entered the contract at all (see *Horry v. Tate & Lyle* [1982] 2 Lloyd's Rep. 416 at p. 422, per Peter Pain J). This obviously meets the standard required for a legally effective inducement."*

11. Having regard to the evidence in this case, I am satisfied that, notwithstanding the foolishness of the plaintiff in failing to take his solicitor's advice and carry out any due diligence, he was, in part, induced to enter into the contracts as a result of misrepresentations made by the first named defendant. That is sufficient to satisfy the legal test required. There is no doubt that as a result of this misrepresentation he suffered loss.

12. A significant issue that arose in this case concerned the manner in which the plaintiff presented himself to third parties following his road traffic accident and in particular, whether he presented himself to third parties as a person who was obviously gullible and could easily be taken advantage of. The court heard evidence from Dr. Mary McInerney, a Psychiatrist. She said that the plaintiff came under her care after the road traffic accident in 2001. She felt that he was a vulnerable adult and that a person talking to him would be aware of his vulnerability, although he was well orientated in time and space. She thought that a person engaging with him would pick up on his naivety.

13. Detective Garda Naughton also gave evidence to the court that he formed the impression that the plaintiff was a vulnerable man and was quite gullible. He gave his evidence to the context of a bizarre scam involving a man named "Phil" who got in touch with the plaintiff with a proposal to make €20,000 out of €10,000. The evidence on this proposal was somewhat bizarre and seemed to involve €5 notes which were nearly out of date and could only be changed in a Credit Union. Beyond that, it is hard to fathom how the scheme was to operate in order to make a profit for the plaintiff. I am satisfied that the first named defendant was involved in this scam for the purpose of inducing the plaintiff to part with his money.

14. The first named defendant gave evidence that he did not initiate any contact with the plaintiff but that the plaintiff approached him in response to the online advertisement. I accept that evidence. At that time he did not know that the plaintiff had suffered a head injury although it is clear that he later found out about it. I had an opportunity to observe the plaintiff giving evidence in the witness box. It was not immediately apparent to me that the plaintiff was gullible or suffering from an obvious intellectual impairment. However, as time went by, it became clear from both his evidence and his demeanour that he was naive and gullible. I am not satisfied that the first named defendant would have noticed his gullibility or naivety on the first occasion when he met him. But I am satisfied that as time went by and having regard to a pattern of behaviour which emerged together with certain events described in evidence that the first named defendant became aware that he could request quite large sums of money from the plaintiff and that he would obtain those sums with little or no evidence being required by the plaintiff that such money was required or would be used to the benefit of the companies.

15. The nature of the financial evidence in this case was less than satisfactory. In part, this was due to the fact that the companies run by the first named defendant did not maintain proper books or records. The court heard evidence from Mr. Enda Cox, the Credit Control Manager of St. Columbus Credit Union, Mervue, Co. Galway. He stated that the first and second named defendants had accounts and he gave evidence which satisfies me that at a time when the plaintiff gave sums of money to the first named defendant for the benefit of the companies that a substantial portion of these monies were lodged to the personal account of the first named defendant. There was also evidence that payment of €7,000 was made on 14th April, 2012, into the second named defendant's personal account and on the same day she withdrew €1,000 payable to herself. The remainder of the €7,000 was drawn out in various sums on 16th April, 2012, 17th April, 2012 and 19th May, 2012. The evidence established that much of the money invested by the plaintiff went into the account of the first named defendant and some to the second named defendant and so these monies, at least, were used for the benefit of the first and second named defendants. However, the first named defendant gave evidence that from time to time, he made payments out of his personal account on behalf of the companies and he was supported in this evidence by Ms. Miranda Hearne. I accept that some of the monies paid into the account of the first named defendant were used by him to defray expenses connected with the business of the fourth, fifth and sixth named defendants but it is impossible to say how much money was used for this purpose due to inadequate book keeping from improper records.

16. Ms. Mary Shannon of AIB gave evidence of cash withdrawals but the evidence was inconclusive as to what the purpose of the withdrawals was or for whose benefit the monies were applied.

17. So far as figures are concerned, the only thing that can be said with confidence is that the plaintiff gave a sum of €212,540 to the first named defendant on behalf of the third, fourth, fifth and sixth named defendants and that he received very little in return. Of that figure, €10,000 was paid to the first named defendant in respect of the scam involving a man named "Phil". The evidence establishes that all the plaintiff received for his investment was a total sum of €1,000 by way of two salary cheques in the sum of €500 and some goods and equipment which he took from the businesses of the defendants. It is not clear what the value of such goods were. But the evidence persuades me that he did not receive more than €10,000 worth of equipment including vehicles and tyres. I accept the evidence of the first named defendant that the plaintiff spent little or no time in assisting in the running of the business of any of the defendants.

18. At the time when the plaintiff made his initial investment of €80,000, I am satisfied that he was not under the undue influence of the first named defendant. The plaintiff was determined to make the investment in the company despite the advice of his solicitor. He had already visited the site at Oranmore where the car and truck wash existed having gone there with his cousin, Mr. Stephen McEvoy. He made the investment with his eyes wide open and against his solicitor's advice. If he had carried out the most rudimentary due diligence on the business of the third, fourth, fifth and sixth named defendants, he would have realised they were not profit making and would never have made the investment. I am satisfied that he was partly induced to enter into the agreement which he complains of by virtue of representations made by the first named defendant and these representations were untrue. I accept the evidence of Ms. Edel Dempsey, an accountant with Baker Tilly Ryan and Glennon who examined the records of the defendant companies and her evidence establishes the representations made by the first named defendant were untrue. By the time

the plaintiff made further investments in the businesses of the first named defendant, I am satisfied that he was under the undue influence of the first named defendant who, by that time, was aware that the plaintiff was a "soft touch" and gullible.

19. I have considered the position of the second named defendant who is the wife of the first named defendant. Undoubtedly, some monies were paid into her Credit Union account and were withdrawn by her. But the evidence as to her involvement in duping the plaintiff is inconclusive. I am satisfied on the evidence that the guiding hand behind the procurement of monies from the plaintiff was the first named defendant. The plaintiff has not discharged the burden of proving that the second named defendant misled him in any way, even if it is clear that some of the monies handed over by the plaintiff for the benefit of the corporate defendants was directed to her account. It seems to me that in the circumstances of this case, the liability to account to the plaintiff (if it exists) is that of the other defendants.

20. I have had some difficulty in trying to fit the facts of this case into a legal template which would allow for rescission on the one hand and damages on the other. Insofar as some of the agreements to hand over money were obtained while the plaintiff was under the undue influence of the first named defendant and some of the monies were paid over as a result of misrepresentations, it seems to me that a case could be made either for rescission or for damages and that there are two distinct elements to this case. Even if the plaintiff declined to accept the advice of his solicitor and carry out some rudimentary form of due diligence, he was, at least to some extent, induced to enter into a business relationship with the first named defendant and his companies as a result of representations which were made and which were not true. He is entitled to damages for misrepresentation. Insofar as he is entitled to rescission of agreements to provide money on the basis that he was under the undue influence of the first named defendant, it seems to me that it is more logical and satisfactory to deal with that aspect of the claim as one whereby the plaintiff is entitled to damages, being the return of monies given by him to the defendants on the basis of the undue influence exerted over him. Against the damages to which the plaintiff is, in my view, entitled, some credit has to be given to the defendants having regard to the fact that he has obtained some equipment which I have fixed at a value of €10,000 and he also received €1,000 by way of two salary payments of €500 each.

21. I accept the evidence of the first named defendant that the plaintiff only showed up at the business premises of the defendants on an occasional basis and it is doubtful if he contributed anything of substance to the business or added value to it.

22. I make no order against the second named defendant. Insofar as the defendant companies did receive some of the monies advanced by the plaintiff, they were the beneficiary of monies wrongfully obtained from the plaintiff and should be included in any order for restitution which I will make. Judgment has already been obtained against the third, fourth, fifth and sixth named defendants in default of defence.

23. In the course of the trial, I directed that the pleadings be amended so as to include a plea of contributory negligence against the plaintiff on the grounds that he failed to take the advice of his solicitor in deciding to proceed to enter into a commercial relationship with the first, third, fourth, fifth and sixth named defendants. I did so on the basis that the action as against all the defendants was being defended by the first named defendant acting in his personal capacity and was a man without any legal training. Notwithstanding the plaintiff's disability, I am satisfied that he had sufficient awareness to ask his solicitor's advice before entering into the financial transactions with the defendants. I also take into account that when he first visited the premises of the defendants, he did so accompanied by his cousin. Having assessed the plaintiff over a considerable period of time while he was in the witness box, I am satisfied that he had sufficient awareness to realise that he was being advised against proceeding with the transaction without obtaining further evidence. But he seemed quite fixed and determined in his view that he would invest in the defendant companies and I think he must bear some responsibility for that. Having regard to his disability, I think that any contributory negligence to be awarded against him should be small. I would assess contributory negligence in this case at 10%.

24. The plaintiff is entitled to damages based on what he contributed to the first named defendant for the benefit of the second, third, fourth, fifth and sixth named defendants. From the figure of €212,540, I will deduct the sum of €11,000 representing the estimated value of goods and materials taken by the plaintiff from the defendant companies and the €1,000 paid to him on account of salary. I assess the damages to which the plaintiff is entitled at a sum of €201,540 from which 10% will be deducted in respect of contributory negligence giving a sum of €181,386. The award in that sum shall be jointly and severally against the first, third, fourth, fifth and sixth defendants.