Neutral Citation Number: [2014] IEHC 134

THE HIGH COURT

[2013 No. 11503 P]

BETWEEN

THOMAS HEALY

PLAINTIFF

AND

STEPSTONE MORTGAGE FUNDING LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered the 19th March 2014

1. The plaintiff is a customer of the defendant mortgage company ("Stepstone") having taken out a mortgage in September 2007, of €120,000 in respect of a property in Co. Westmeath. As it happens, the plaintiff has fallen somewhat behind in his mortgage payments and in 2013 Stepstone commenced separate proceedings in respect of these arrears. Those separate proceedings are not before me and I refrain from expressing any view in respect of them.

2. In these present proceedings, however, the plaintiff has sued Stepstone for what is described as "gross negligence and misrepresentation" which it is claimed has been orchestrated "by the mortgage company. The general endorsement of claim contends that Stepstone broke "serious liquidity laws which has caused the financial collapse" and it claims that by reason of this conduct the mortgage contract is "seriously flawed". The plaintiff also claims damages for "reckless lending procedures" by Stepstone and it seeks a declaration that any liens or charges registered on the folio of the plaintiff's family home otherwise secured by the mortgage be removed.

3. By motion dated the 13th January, 2014, Stepstone applied to have these proceedings struck out pursuant to both O. 28, r. 18 and the Court's inherent jurisdiction on the grounds that they disclose no reasonable cause of action. I have already ruled in Stepstone's favour on this point and now give my reasons for this conclusion.

4. In essence the plaintiff's claim is that there exists in law a tort of reckless lending It is however, absolutely clear that there is no such common law tort of reckless lending. The matter has, in any event, been put beyond doubt by two recent decisions of this Court that have considered the matter in some detail.

5. In *ICS Building v. Grant* [2010] IEHC 17, Charleton J. stated:

> ". . . the argued for tort of reckless lending does not exist in law as a civil wrong. It is not within the competence of the court to invent such a tort. Oireachtas could, if it saw fit, pass a law creating such a civil wrong. It is difficult to imagine the parameters of such a law since those who seek a loan will have different views to what should be borrowed, and if a loan is badly made by a bank, how can the issue of contribution be escaped from by the borrower who sought the money in the first place. Defining that civil wrong would tend to remove the presumption of arms length dealing as between borrower and bank and replace it with a new relationship based on a duty of nurture that other common law countries do not see it as their duty to put into the marketplace as any argued-for law as to reckless lending does not appear in the works on tort that I have consulted from other common law jurisdictions."

6. These views were followed in *McConnon v. President of Ireland* [2012] IEHC 184, [2012] I.R. 449 at 446 where Kelly J. stated, "such a tort does not exist as a civil wrong in Irish law".

7. One might add that there is no known example in the common law of a claim of this kind being judicially recognised as an established tort. Nor could a claim of this kind be said properly to represent an incremental development of the existing common law by the application of established (or even developing) principles to new sets of facts and circumstances. As Lardner J. acknowledged in *RT v. VP (orse VT)* [1990] 1 I.R. 545,558, this type of incremental change is a core feature of the common law system which has been performed by the superior courts for centuries and it is not, as he put it, "in its proper exercise an impermissible exercise of the judicial function".

8. The common law as it existed immediately prior to the coming into force of the Constitution was carried over into our law by Article 50.1, save to the extent that such law was unconstitutional. While the common law is not frozen as of the date of the coming into force of the Constitution (29th December 1937), in the case of the common law torts, the courts are, broadly speaking, confined to the general parameters of the law of torts as then existed as of that date. Entirely different considerations naturally apply where aspects of those common law rules are later found to be unconstitutional (as in *McKinley v. Minister for Defence* [1992] 2 I.R. 333) or where these common law torts have subsequently been modified, re-stated or even abolished by legislative enactment. Yet whatever might have been the case in the early days of the common law, the courts certainly do not have any authority now to invent entirely new categories of torts, as this is a matter which is reserved to the Oireachtas by Article 15.2.1 of the Constitution.

9. Leaving aside the incremental change and development which are standard features of the common law method, the courts can generally only develop or supplement the law of torts where this corpus of law has been shown to be "basically ineffective" to protect constitutional rights in a particular case: see, *e.g., Meskell v. Coras Iompair Éireann* [1973] I.R. 121, *Hanrahan v. Merck, Sharp & Dohme Ltd.* [1988] I.L.R.M. 629, 636, per Henchy J., *Herrity v. Associated Newspapers Ltd.* [2008] IEHC 249, [2009] 1 I.R. 326 and *Sullivan v. Boylan* [2013] IEHC 104.

10. It is true that the common law may also occasionally develop by reason of inveterate and established judicial practice, although this is highly unusual and exceptional. Thus, for example, in *Kennedy v. Gibbons* [2014] IEHC 67 I recently held that this was true of

the poor box system operated by the District Court, even though this practice had no clear common law roots. But this was because:

> "…..the poor box system was nevertheless so widespread and inveterate through out the State both before and after 1922, that it must accordingly be regarded as part of the common law which was carried over into our modern legal system by Article 50.1 of the Constitution, its obscure and uncertain origins notwithstanding. Although, moreover, the existence of such a jurisdiction is not to be found in any of the acknowledged sources - such as textbooks or decisions of venerable judges of some antiquity - referencing the pre-1937 common law which was carried over on the coming into force of the Constitution, its existence is nonetheless such an embedded feature of our legal system that it must be now regarded as part of that common law, if only by reference to the principle *communis error, facit jus*."

11. This cannot, however, be said of the alleged tort of reckless lending, since there are no examples at all of where the existence of such a tort can be said to have been acknowledged prior to the coming into force of the Constitution on 29th December 1937. It could not plausibly be asserted, for example, that the courts had in practice frequently awarded damages in respect of this tort, even if the existence of such a tort had not been the subject of a considered judgment from this Court or the Supreme Court. In fact, there is not a single pre-1937 instance of where this (or anything like it) had ever occurred.

Conclusions

12. It follows, therefore, that there is simply no tort of reckless lending which is known to the law. In that respect, I entirely agree with the comments of Charleton J. in *Grant* and those of Kelly J. in *McConnon.* Since the entirety of the present proceedings is premised on the assumption that there is such a tort, it further follows that the present proceedings are completely unsustainable in law and are doomed to fail.

13. For these reasons, therefore, I will accordingly grant an order striking out the claim pursuant to the inherent jurisdiction of this Court.