

THE HIGH COURT

[2011 No.6428P]

BETWEEN

PAT MALONE

PLAINTIFF

AND

CATHERINE ALLISON

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 27th day of February, 2012.

1. The application in the context of the proceedings

1.1 These proceedings (the 2011 Proceedings) were initiated by a plenary summons which issued on 15th July, 2011. At the time the plaintiff was represented by a firm of solicitors. In the general endorsement of claim on the plenary summons the following reliefs were sought:

- (a) a declaration that the agreement dated 12th December, 2006 made between the plaintiff and the defendant is illegal;
- (b) a declaration that the agreement dated 22nd February (sic) 2009 made between the plaintiff and the defendant is void;
- (c) a declaration that the interest rates charged by the defendant on foot of the said agreement dated 12th December, 2005 (sic) were excessive;
- (d) damages for misrepresentation;
- (e) interest thereon pursuant to Statute; and
- (f) costs.

In the interests of clarity I will refer to the plaintiff as Mr. Malone and to the defendant as Ms. Allison.

1.2 There were earlier proceedings between the parties in which Ms. Allison was plaintiff and Mr. Malone was defendant (Record No. 2007 No. 979 SP) (the 2007 Proceedings). By order of the Court (Laffoy J.) made on 22nd January, 2009, after the matter had been called on for hearing, it was ordered by consent of the parties that:

- (a) the special summons be struck out; and
- (b) the parties be at liberty [to apply] in relation to the implementation of the settlement (the 2009 Settlement), which had been handed into Court, and which was annexed as a schedule to the order.

Having recited that the parties each had the benefit of legal advice and were agreeable to compromise their differences, the 2009 Settlement provided as follows:

- (i) On consent that the Court make an order for the sale of the lands set out in the appendix to the summons by public auction or private treaty, carriage of the sale to be borne by Brian Berills, solicitor, and Laurence Gunne, auctioneers, Dundalk to be retained as auctioneer.
- (ii) Upon sale of the lands and payment out of the proceeds to the solicitor and auctioneer referred to at (i) above of their fees and costs, the plaintiff was to be paid €230,000 together with Courts Act interest thereon from the date of the terms of settlement (i.e. 22nd January, 2009) to the date of completion in full and final settlement of all issues between the parties.
- (iii) In respect of the sale of the lands, both parties agreed to be bound by the expert opinion of Laurence Gunne, auctioneers, Dundalk as to a fair and reasonable value and/or offer for the said lands.
- (iv) Both parties would "sign/execute all documentation required to give effect to the sale", and, in the event of a failure by either party in that regard, either party was at liberty to apply to the Court for directions.

The 2009 Settlement also provided for liberty to apply, but stipulated "no further order". The 2009 Settlement was signed by each of the parties in the presence of a solicitor. The lands set out in the appendix to the special summons were the lands registered on Folio 11743 and Folio 3583, County Louth.

1.3 The 2009 Settlement is the agreement, which was incorrectly dated 22nd February, 2009 rather than 22nd January, 2009, referred to in the general endorsement of claim on the plenary summons. The agreement dated 12th December, 2006 referred to in the general endorsement of claim on the plenary summons is not before the Court at this juncture, but, on the basis of the totality of

the documentation before the Court, I am aware that it is the deed of charge dated 12th December, 2006 (the 2006 Charge), which was the subject of the 2007 proceedings.

1.4 Following the initiation of the 2011 proceedings, Mr. Malone brought a motion against Ms. Allison in this Court. It appears that there was confusion as to whether the motion was brought in the 2011 proceedings or in the 2007 proceedings. In any event, the primary objective of the motion was to obtain an order preventing the lands registered in Folio 11743 being auctioned, the auction being due to take place on 28th July, 2011, until the proceedings, presumably meaning the 2011 proceedings, had been determined. Mr. Malone's affidavit sworn on 14th July, 2011, which grounded the motion, contained some facts in relation to the agreement dated 12th December, 2006, i.e. the 2006 Charge. It was averred that it was an agreement whereby Mr. Malone agreed to borrow from the plaintiff the sum of €160,000 and that he had executed a charge dated 12th December, 2006 over the lands at Louth Village, Dundalk, County Louth, being the lands registered on Folio 11743, County Louth. Mr. Malone set out the terms of the 2006 Charge in relation to repayment of the loan. He also referred to the 2009 settlement. He then averred that, although it was accepted that he was legally represented at the settlement talks leading up to the 2009 Settlement, he had since been advised that the entirety of the agreement between him and Ms. Allison and, in particular, the mortgage and charge which he gave to Ms. Allison on 12th December, 2006 is tainted with illegality for the reasons set out, namely:

- (a) that the plaintiff did not have a moneylender's licence;
- (b) that she was not licensed to carry on business as a bank; and
- (c) that the penalties imposed by her in respect of late payment were illegal as they were imposed while she was purporting to act in her capacity as a bank.

1.5 Mr. Malone's application was heard on 22nd July, 2011. The order made by the Court (Laffoy J.) was in fact perfected on the basis that it was made in the 2007 proceedings. In any event, the outcome of the application was that the Court ordered that the motion stand refused. However, the order recorded that the Court accepted an undertaking on behalf of Ms. Allison to hold any net proceeds of sale of the lands greater than the sum of €160,000 to abide any further order of the Court. The question of costs was adjourned.

1.6 A motion for security for costs was issued by Ms. Allison in the 2011 proceedings on 22nd September, 2011. That application has been adjourned from time to time.

1.7 A motion was brought in the 2007 proceedings, which came before the Court on 19th October, 2011, in which Ms. Allison sought an order for directions as to the execution by Mr. Malone of a contract for the sale of the lands the subject of the 2009 Settlement. On the date of the hearing of that application the solicitors on record for Mr. Malone, Ahern and McDonnell, came off record. The outcome of that application was that on 19th October, 2011 the Court made an order directing the defendant to sign the contract for sale within one week and the order provided that, in default of his so doing, the contracts should be executed by the registrar of the Court and, insofar as should be necessary, the registrar should execute a conveyance of the said lands. That order is currently under appeal to the Supreme Court.

1.8 Since his solicitors came off record, Mr. Malone has appeared in person assisted by a "McKenzie friend", Mr. Declan O'Callaghan.

1.9 The application currently before the Court was brought by Ms. Allison on foot of a notice of motion dated 30th November, 2011, which was first returnable before the Court on 16th January, 2012. The reliefs sought by Ms. Allison on this application are as follows:

- (a) an order striking out the 2011 proceedings on the grounds that they do not disclose any and/or any reasonable cause of action against Ms. Allison, Order 19, rules 27 and 28 of the Rules of the Superior Courts (the Rules) and the Court's inherent jurisdiction being invoked; and
- (b) an order dismissing Mr. Malone's claim on the grounds that "any cause of action is either frivolous or vexatious or is bound to fail", the inherent jurisdiction of the Court being invoked.

This application is grounded on the affidavit of Ms. Allison sworn on 7th December, 2011. The factual basis advanced by Ms. Allison in support of this application in her affidavit may be summarised as follows:

- (a) the subject matter of these proceedings has been dealt with in full by the Court under the 2007 proceedings, in which all matters were fully settled between the parties and the settlement made the subject of the order of the Court dated 22nd January, 2009;
- (b) the matters raised were set out in the affidavit sworn by Mr. Malone which grounded his application for the injunction restraining the auction, and were the same matters as were raised by way of defence in the 2007 proceedings, and there has been no appeal against the order dated 22nd January, 2009 nor has Mr. Malone moved to set aside the 2009 Settlement, Ms. Allison suggesting that it is doubtful if he could make such a move as he was represented in the proceedings by solicitor and counsel and the 2009 Settlement was ruled by the Court with liberty to apply only in relation to the implementation of the 2009 Settlement;
- (c) by the order of the Court of 22nd July, 2011 the Court refused to halt the sale of the lands the subject of the 2009 Settlement;
- (d) the 2011 proceedings were issued by Mr. Malone as a tactic in his attempt to delay the auction;
- (e) the lands the subject of the settlement were subsequently sold for €164,000, and notwithstanding the Court order of 19th October, 2011, Mr. Malone had not signed the contract.

In summary, Ms. Allison's position is that the 2011 proceedings constitute an attempt to re-litigate matters already settled between

the parties and, in the circumstances, it would be unreasonable and unfair that Ms. Allison should be required to incur further time and legal expenses in defending issues which have already been litigated in full and in respect of which Mr. Malone is bound to fail.

1.10 When this application was for hearing before the court on the 27th January, 2012, there was no response by affidavit from Mr. Malone. No statement of claim had been delivered in the 2011 proceedings. I formed the view that the application was premature, given that a statement of claim had not been delivered. In the circumstances, I adjourned the matter until 17th February, 2012 so that Mr. Malone could deliver his statement of claim and could file a replying affidavit, if he wished to do so.

1.11 What was represented as being the statement of claim, a five page document in manuscript, was furnished to the Court on 17th February, 2012. The document, which I will refer to as "the Plaintiffs Statement", did not comply with the requirements of the Rules, to the extent that it did not even contain the title of the proceedings. There are various serious allegations made against Ms. Allison in the document, which I will endeavour to record as accurately as possible.

1.12 The alleged factual basis of the claims is that Mr. Malone borrowed the money from Ms. Allison to buy a bungalow, the title to which was understood to be registered on Folio 11743, but it was not and he never got title to it. The bungalow is registered on a folio in the name of third parties and is subject to a substantial charge in favour of a bank. It is alleged that the outcome, namely, that Mr. Malone did not get title to the bungalow was due to "Fraudulent Endeavour" on the part of Ms. Allison. It is also alleged, that as Mr. Malone did not get title to the bungalow, there was no "meeting of minds" and "therefore no contract could be legal and binding". It is also alleged that the reason Ms. Allison "sought a lien" against Folio 3583, which is described as Mr. Malone's "ancestral home", which I understand was already owned by Mr. Malone, was that the bungalow was not on Folio 11743, thereby affecting the value of the land on that folio. It is alleged that Ms. Allison thereby "conspired to defraud" Mr. Malone. It is also alleged that, by devious and premeditated fraudulent endeavour and with full knowledge, Ms. Allison sought to gain unfair and illegal advantage by "abuse of power" and "abuse of position". It is further alleged that she pressed for the auction, notwithstanding that by then Mr. Malone had proof that the bungalow could not be included in the sale as it was not registered on either Folio 11743 or Folio 3583. It is alleged that, as a result of the pursuit of the auction, Mr. Malone has suffered serious loss at the hands of Ms. Allison. It is further alleged that no monies are due, presumably, to Ms. Allison "on the back of a Contract which is illegal and unenforceable", presumably meaning the 2006 Charge, although it is not identified as such.

1.13 As regards the loan of €160,000 repayable with interest, it is alleged in the Plaintiff's Statement that it was not a personal loan but was "an extortionate business loan". There is a reference to the loan being an illegal loan purporting to come from a bank, which Ms. Allison is not. There is reference to the rate, presumably, meaning the rate of interest charged, and the lack of a licence to lend. There follows an allegation that Mr. Malone has suffered great loss on a financial and personal level. There is also an allegation of "blatant perjury with knowledge" in relation to averments on previous applications in affidavits sworn by Ms. Allison, without identifying the affidavit or the alleged untruth. There is also an allegation which I would interpret as an allegation of negligence on the part of Ms. Allison in not perfecting the title to the bungalow.

1.14 Finally, there is criticism of this Court in the conduct of Ms. Allison's application which was before the Court on 19th October, 2011, in the Plaintiff's Statement. As I have stated, the order made on that date is subject to appeal to the Supreme Court and the appeal is due to be heard on 5th March, 2012.

1.15 There is no prayer for relief in the document. Therefore, I can only assume that the relief being sought by Mr. Malone against Ms. Allison is the relief set out in the general endorsement of claim on the plenary summons, which I have outlined in paragraph 1.1 above.

1.16 Although given leave to do so, Mr. Malone did not file an affidavit in response to this application.

1.17 Ms. Allison responded to Mr. Malone's Plaintiffs Statement in an affidavit sworn on 15th February, 2012. As regards the allegation by Mr. Malone that the bungalow he was to acquire was not contained within Folio 11743, she has averred that the plaintiff may or may not be correct in that regard. She simply does not know and goes on to explain why she does not know. She averred that in or about 27th January, 2006 Mr. Malone came to her seeking a loan to complete the purchase of a property he had already contracted to buy by a contract dated 21st November, 2005 at a price of €162,000. In the contract the property for sale was described as:

"The dwelling house and premises at Ardpark Road comprised in Folio 11743, County Louth being the property shown on the map attached hereto and numbered 1 and edged red for identification purposes only".

Ms. Allison has exhibited the contract dated 21st November, 2005. She has averred that there had been considerable delay on the vendor's side leading up to the execution of the contract. A completion notice had been served on Mr. Malone on 27th December, 2005. It was in those circumstances that he sought finance to complete the purchase. Ms. Allison has exhibited an out of date version of Folio 11743 showing the registered ownership as at 1976. Quite frankly, it is impossible to form any view whether there is any substance in the allegation made by Mr. Malone that he did not get title to what he contracted for, apparently, in November 2005. Ms. Allison's case, as I understand it, is that he was contractually bound before he came to her seeking finance. Folio 3583 is also exhibited by Ms. Allison, which shows that Mr. Malone had been the registered owner of that property since 7th August, 1997. Ms. Allison has averred that, in the replying affidavit in the 2007 proceedings, Mr. Malone admitted the debt and that he took no issue about "the folio boundary". The 2007 proceedings were compromised to cover all issues including interest. In the affidavit of 15th February, 2012 Ms. Allison has contended that, even if Mr. Malone is able to substantiate his claim that he did not acquire the bungalow, which it appears it is admitted is not registered on Folio 11743, nothing contained in the Plaintiffs Statement shows why the transaction to buy, the charge in favour of Ms. Allison (i.e. the 2006 Charge) and the sale on foot of that charge are void. It has been suggested by Ms. Allison, that, if Mr. Malone has a cause of action, it is against the vendor of the lands registered on Folio 11743. It has been contended that the matters set out in the document do not amount to an illegal contract and could not lead to the conclusion that the 2009 Settlement is void and, further, that the claims of fraud are wholly unsubstantiated. Ms. Allison has averred that it would be very much to her interest if a valuable bungalow had been included in the property charged by Mr. Malone to her.

2. Analysis of the plaintiff's claim

2.1 The manner in which I propose considering whether the Plaintiffs Statement discloses any cause of action against Ms. Allison is by attempting to connect the allegations in that document with the relief sought on the endorsement of claim in the plenary summons.

2.2 As I understand the position, there is a typographical error in the general endorsement of claim on the plenary summons and the reference to an agreement dated 12th December, 2005 should be to an agreement dated 12th December 2006. It is clear from Mr. Malone's affidavit grounding his application for an interlocutory injunction, the salient points of which I have summarised at para. 1.4 above, that the so-called agreement dated 12th December, 2006 is the 2006 Charge executed by Mr. Malone in favour of Ms. Allison, which was the subject of the 2007 proceedings. The basis on which Mr. Malone asserts that the 2006 Charge was illegal and void in the Plaintiffs Statement of claim appears to be a reiteration of the matters outlined in his affidavit sworn on 14th July, 2011 and summarised at para. 1.4 above. The reality of the situation is that, in entering into the 2009 Settlement, which is the subject of the consent order of the same day, Mr. Malone implicitly acknowledged the validity of the 2006 Charge. The existence of that consent order precludes Mr. Malone from re-opening the issue of the validity of the 2006 Charge.

2.3 However, in the general endorsement of claim on the plenary summons in the 2011 proceedings Mr. Malone also seeks a declaration that the 2009 Settlement is void. In endeavouring to ascertain on what basis Mr. Malone alleges that the settlement is void, as he does not have the benefit of legal representation, I have reviewed his affidavit of 14th July, 2011 to see what, if any, case is made therein in support of the claim that the settlement was void. In fact, it is only on the basis that the 2006 Charge was tainted with illegality for the reasons I have outlined. No other basis for setting aside the 2009 Settlement was advanced in that affidavit. However, as I have recorded at para. 1.4 above, it was acknowledged that Mr. Malone had been legally represented at the settlement talks leading up to the settlement and he also exhibited independent legal advice which he had obtained from a solicitor in Dundalk in connection with the granting of security to Ms. Allison.

2.4 I can see nothing in the Plaintiffs Statement which could form the basis of a case to set aside the 2009 Settlement. The kernel of Mr. Malone's complaint, as set out in that document, is that he did not get title to a bungalow, which is registered on another folio, when he completed the purchase of the lands registered on Folio 11743, County Louth on foot of the contract for sale dated 21st November, 2005. Ms. Allison's position, as in understand it, is that the fact that the bungalow is not registered on Folio 11743 and that Mr. Malone did not get title to it, a factor which is prejudicial to her, is not due to fault on her part. Nothing in the case put before the Court by Mr. Malone contradicts that. Moreover, he has not substantiated the various allegations of fraud on the part of Ms. Allison which he has made, by setting out the relevant facts adequately in the Plaintiffs Statement, and he has not sworn an affidavit as to the facts, as he could have done. Accordingly, there is nothing in the case as set out by him in the Plaintiffs Statement, when read in conjunction with the general endorsement of claim on the plenary summons, or otherwise before the Court, which demonstrates that Mr. Malone has a stateable cause of action to set aside the 2009 Settlement.

3. The Law

3.1 When the plaintiffs application was before the Court on the 27th January, 2012, counsel for Ms. Allison referred the Court to the decision of the Supreme Court in *Charalambous v. Nagle* [2011] IESC 11. In delivering judgment in that case, Denham J. stated in her judgment (at para. 27 et. seq.):

"... the kernel of the case is that it relates to a consent order of the Circuit Court.

There were no grounds raised upon which to set aside the consent order on a basis recognised by law. The appellant has brought several sets of proceedings subsequent to the order of the 5th February, 2008. However, there has been no claim of fraud.

These were final orders. Final orders are final and conclusive and may not be re-litigated except in circumstances such as indicated in *Belville Holdings v. Revenue Commissioners* [1994] I I.L.R.M. 29. Such circumstances do not arise in this case."

3.2 Similarly., in this case, in my view, the document presented as a statement of claim by Mr. Malone, that it so say, the Plaintiffs Statement, does not disclose that a circumstance exists in which the issues which arose in the 2007 proceedings could be re-litigated. While there are various allegations of fraud made by Mr. Malone, I can see nothing "pleaded" which would substantiate a claim to set aside the 2009 Settlement on the ground of fraud.

4. Decision

4.1 I am satisfied that the plaintiff has not shown that he has a cause of action to have either-

(a) the 2006 Charge (given the existence of the 2009 Settlement), or

(b) the 2009 Settlement and the consent order dated the 22nd January, 2009,

declared void and inoperative,

However, I am conscious of the fact that I have strayed outside the pleadings, although I have done so in aid of Mr. Malone, who is not legally represented. In the circumstances, I propose making a declaration, under the court's inherent jurisdiction, that the 2011 proceedings, as presently constituted, are bound to fail.

4.2 However, there is a considerable amount of unfinished business in the 2011 Proceedings, and I am concerned, in particular, to address the undertaking given by Ms. Allison on 22nd July, 2011 and recorded in the order of that day, referred to at para. 1.5 above. In the circumstances, I do not intend making an order dismissing the 2011 proceedings at this juncture. I propose adjourning the matter for further submissions by the parties.

APPROVED: LAFFOY, J