Neutral Citation [2016] IEHC 707

THE HIGH COURT

[2012] No. 9028 P

BETWEEN

CORNELIUS M. CAGNEY

PLAINTIFF

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice MacEochaidh delivered on the 25th day of November, 2016

1. This is the defendant's motion of the 23rd February, 2016, for an order striking out the plaintiff's claim pursuant to the inherent jurisdiction of the court or in the alternative striking out the plaintiff's claim pursuant to O. 19, r. 28 of the Rules of the Superior Courts.

2. The plaintiff's claim commenced by a plenary summons, and a statement of claim was delivered. The plenary summons is dated on the 7th of September, 2012, and in it's operative part it states as follows:-

> "The plaintiff's claim is for an interlocutory injunction to preserve the status quo and to prevent the Bank of Ireland, Credit Operations, P.O. Box 4592, Dublin 2 in their letter dated 29th of August 2012, received by me on 5th September 2012 from proceeding with their actions and demands as set out in this letter attached.
>
> There is an interlocutory relief in the form of an injunction, heard before Ms. Justice Laffoy on the 22nd day of August, 2012 which order is set down for hearing on the 2nd October, 2012 attached. This ex parte injunction was heard by Mr. Justice McGovern on the 30th July, 2012 and a perfected order was granted on the 3rd August, 2012 attached. Bank of Ireland by their proposed actions in their letter of 29th August, 2012 are endeavouring to financial cripple the Cagney family and leaving them with no recourse to finance.
>
> Bank of Ireland have, by false and untrue information supplied to the Irish Credit Bureau, cut off all sources of finance from all of the financial institutions to the Cagney family.
>
> Bank of Ireland's action was dismissed on the 22nd January, 2012 when they sought monies in the Cagney family which are not due attached."

and then financial loss, special damages is mentioned and injury to the plaintiff reputation, aggravated damages is mentioned.

3. The plenary summons was not drafted to the best of my knowledge by a lawyer but appears to have been drafted by the plaintiff personally and whilst he has had the advice of counsel and solicitor at various points at all material times and for the purpose of this application, I accept the plaintiff is not professionally represented. He appears to have the assistance of his daughter in the matter which I have heard today.

4. The statement of claim in these proceedings is one which is comprised of twenty paragraphs and para. 1 to 6 inclusive appear to relate to the intended action of the defendant, who wrote to the plaintiff on the 29th August, 2012, and a statement from that letter is reproduced in the statement of claim at para. 1 to the following effect:-

> "With the effect from a date 21 days from the date of this letter, the Bank will terminate the overdraft facility on your account. Further the Bank is no longer prepared to offer you banking facilities."

In order to prevent the bank from acting as it indicated that it would in that letter the proceedings were instituted and injunctive relief was sought to prevent the bank from taking action with respect to the particular bank account which was the subject matter of that letter addressed to the plaintiff.

5. The rest of the statement of claim from approximately para. 7 to 19, and there are only twenty paragraphs in the statement of claim, deal with matters other than a complaint or difficulty encountered by the plaintiff in respect of the bank account which was the subject matter of the letter of the 29th August, 2012. I understand that is referred to as a business bank account.

6. The matters in respect of which complaint are made in the rest of the statement of claim arise from the plaintiff's operation of a credit card, the circumstances in which proceedings were instituted against him in respect of breach of agreement, in respect of that credit card. The circumstances in which that case against the plaintiff was dismissed by a District Court judge and the circumstances in which various communications were made by the defendant bank and a third party with respect to the credit worthiness of the plaintiff. The third party I am referring to is an agency called the Irish Credit Bureau Ltd. The plaintiff makes the complaint that negative and defamatory comments were made to the Irish Credit Bureau Ltd. and he has instituted these proceedings in respect of that complaint and sought damages.

7. The motion before the court today makes two broad points in respect of the plaintiff's proceedings. The first is that in relation to the proceedings as they refer to the business account in the name of the plaintiff and members of his family, that any complaint in respect of that matter is moot and counsel for the defendant bank say it is moot because the plaintiff unilaterally closed or asked the bank to close the account and he did so by letter which is dated in June 2014 and that letter indicates that the outstanding balance on the account is paid off and that it should now be closed at the request of the plaintiff and also at the request, it would appear, of other members of the family insofar as it was a joint account.

8. In addition, counsel on behalf of the bank, Mr. McDowell (S.C.), indicates that the issue of whether or not that bank account had been closed by Mr. Cagney and the effect it had on the proceedings has already been addressed by the Supreme Court in a decision given by Laffoy J. on the 25th October, 2015, and I am referred to two passages in that judgment in particular, I say that the text at para. 10 of the judgment of Laffoy J. which is as follows:-

> "Finally, without any objection from Mr. Cagney, counsel for the Bank put before the Court a letter of instructions to the Bank from Mr. Cagney and the other joint account holders dated 5th June, 2014, wherein provision was made for the discharge of the balance due on Account No. 11055680 and instructions were given to the Bank to close the account. Mr. Cagney confirmed to the Court that the balance due on foot of that account has been discharged. However, he took issue with the proposition that the account no longer existes…"

and Laffoy J. dealt with that particular point. Then at para. 11 Laffoy J. said as follows:-

> "As Mr. Cagney has closed the account of his own volition, there is absolutely no basis on which this Court could restrain the Bank from dealing with Account No. 11055680 as envisaged in the letter of 29th August, 2012, because the account no longer exists. Any order made by this Court to that effect would be utterly meaningless. Therefore, insofar as the objective of Mr. Cagney on the appeal is to pursue his application for an interlocutory injunction, that application and the appeal are unquestionably moot."

9. In respect of this matter, I have asked Mr. Cagney what does he say to the suggestion made by Mr. McDowell that this part of the case dealing with the threat of the bank to withdraw the credit facility and to close the account and any other threatened action by the bank in the letter addressed to the plaintiff on the 29th August, 2012. I asked Mr. Cagney what his answer to that was and he said that the case was not moot because he did not close the account of his own volition.

10. My ruling in relation to this matter is that in the first place, I agree with the decision of Laffoy J. that just as any question of an interlocutory injunction or an appeal to the Supreme Court in respect of the part of the case that dealt with the joint business account which was the subject matter of the letter of the 29th August, 2012, was moot, I too find that the point is moot in the proceedings in the High Court because any relief or protection or remedy Mr. Cagney seeks in relation to this bank account can no longer be pursued because the bank account does not exist.

11. I do not agree with Mr. Cagney that he closed the account involuntary; I believe he closed it of his own volition. He told me that he did so because he was asked to do so by the bank. The fact that he did so because he was asked to do so does not mean that it was involuntary. He closed the bank account in a letter addressed to the bank and the terms of which I have alluded to and which were available to Laffoy J. as well. Even if I am wrong about that, it seems to me that it does not matter whether he closed the bank account in a voluntary way, or whether he closed it in an involuntary way. The protection he seeks from the court in respect of the operation of that bank account cannot be sought because the bank account does not exist and the proceedings are therefore comprehensively moot with respect to that part of the case. Mr. McDowell therefore succeeds in the application insofar as it refers to the complaints addressed in relation to action threatened in respect of that joint business account.

12. With respect to the remainder of the case, that which is set out in the paragraphs not dealing with the operation of that business account. Mr. McDowell says that that case and those complaints were the subject matter of separate proceedings and those proceedings were heard and determined by a judge and jury and that the judge withdrew the matter from the jury and dismissed the plaintiff's action. Those proceedings concerned the alleged illegality associated with the communication between the bank and the Credit Bureau, and Hedigan J. ruled that any such communication was governed by qualified privilege and, therefore, the plaintiff's action in respect of statements made were not actionable covered by qualified privilege and he dismissed the action against the plaintiff.

13. I have carefully read the statement of claim which is undated and the supplemental statement of claim in respect of those proceedings which now stand dismissed by order of Hedigan J. I cannot detect a difference between them and the matters sought to be litigated in these proceedings, and two consequences flow from that. One, insofar as the plaintiff has sought to litigate matters in the instant proceedings which he has previously litigated in the first set of proceedings, this breaches the principle in the case known as *Henderson v. Henderson* (1843) 3 Hare 100 and that has been restated in a judgment of the Murray C.J. in a case called *Vantive Holdings* [2010] 2 I.R. 118 at p. 124 as follows:-

> "The rule in *Henderson v. Henderson* is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of *res judicata* applies not only to issues actually decided but every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."

14. It seems to me that that principle of law applies in this case and I have no doubt that the matters sought to be litigated in the second part of the statement of claim in these proceedings is the very matter, or are the very matters, which were comprised in the defamation proceedings in which the plaintiff was unsuccessful. And so based upon the principle of *res judicata* and based on the rule in *Henderson v. Henderson*, I find that the plaintiff is not entitled to maintain the complaints he seeks to maintain at paras. 7 to 19 of the instant proceedings.

15. The plaintiff has, it would appear, two responses to the case made by Mr. McDowell in respect of this matter. He says in the first place that there are matters in the current proceedings which were not in the earlier proceedings, and if there are, I have not been able to find them. I have no doubt but that the matter sought to be litigated in the first set of defamation proceedings related to the negative consequences and the alleged illegality connected with communications between the bank and the Credit Bureau and that to me is precisely the matter which is sought to be litigated in these proceedings and the plaintiff is not entitled to litigate the same matter in two separate sets of proceedings.

16. The plaintiff also says that the case made by Mr. McDowell and the argument he makes in favour of the proceedings being struck out should be declined by this court because the order of Hedigan J. is before the Court of Appeal.

17. The plaintiff was late in appealing the judgment of Hedigan J. and was required to apply to the Court of Appeal for an extension of time in which to appeal. The court has reserved its judgment on whether or not the plaintiff should be entitled to an extension of time within which to appeal the order of Hedigan J. In my view, the fact that there is or that there may be an appeal against the order of Hedigan J. in being can have no bearing on the submission made by counsel for the bank that the current proceedings constitute a breach of the rule in *Henderson v. Henderson (supra)*.

18. The appeal will not alter that position because if the plaintiff is successful in his appeal the matters which he is seeking to litigate in this case will be sent back to the High Court. If he is unsuccessful in it, it will be a reinstatement of the order of Hedigan J.. Either way the principles in *Henderson* and the principle of *res judicata* operate to prevent the plaintiff from either having two sets of

proceedings making the same complaint or having a second set of proceedings seeking to re litigate a point decided in earlier proceedings.

19. It does not answer the case made by Mr. McDowell that there is an appeal or a potential appeal in being and so for all of those reasons I am exceeding to the application made on behalf of the defendant and I am striking out the plaintiff's proceedings in accordance with the provisions of O. 19, r. 28 and/or in accordance with the inherent jurisdiction of the court.