

THE HIGH COURT

Record Number: 2005 No.254P

BETWEEN

MARTYN BARRETT, TRADING AS CORPORATE RECOVERY SERVICES

PLAINTIFF

AND

MICHAEL BEGLAN AND ERT FOUNDATION LIMITED

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 14th day of June 2007

1. The first named defendant seeks an order striking out the plaintiff's proceedings against him pursuant to either O. 19, r. 27 RSC or O.19, r. 28 RSC. I shall refer to the first named defendant as "the defendant" as he is the sole moving party of the present motion. The second named defendant is not a party to this motion and may be no longer trading.
2. The former rule permits the Court to strike out any matter in any indorsement or pleading which may be "unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action".
3. The latter rule on the other hand permits the Court to strike out the plaintiff's claim where "it discloses no reasonable cause of action", and "in any such case or in the case of an actionbeing shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed".
4. I will proceed with this application on the basis of the latter rule, namely O. 19, r. 28 RSC.
5. By way of brief background to this application, it appears that the plaintiff and the defendant came into contact at a time when the defendant was in some financial difficulty. The plaintiff appears to have been willing to lend him some money to assist in these difficulties at the end of November 2001.
6. The papers filed on this application reveal that on that date the two parties signed an agreement which has been exhibited. This is a hand-written document prepared and written by the plaintiff. It has been signed by each party. It simply states that in consideration of a drawdown of loan facilities referred to in a letter from the defendant's solicitors of the same date a sum of €3000 was received by the defendant, and that the defendant offered as security for this loan certain property comprised in Folio 157 of the Register of Freeholders, Co. Westmeath. The defendant also acknowledged in this document that his property was "at risk of sale should the loan be defaulted upon in the terms of such agreement "(sic). There is another annexed document relating to a facility fee and an applicable interest rate of 10% and there is mention of a repayment date of the 30th May 2002.
7. There is also among the papers exhibited an attendance note made by the defendant's solicitor on the 30th November 2001 in which the solicitor notes that he had a meeting with the defendant that morning and that he was instructed that the plaintiff was willing to lend a sum of £8000. The solicitor also notes that he rang the plaintiff to discuss this, and, inter alia, that the solicitor explained that he was willing to give an undertaking in relation to the title deeds of the lands which were being offered as security; but that he could not advise his client until he knew the full terms of the loan.
8. Since that meeting with the defendant is noted as having taken place at 9.40am, I am assuming that the agreement written out by the defendant and signed as of that date by both parties was written out after 9.40am on that date, since it purports to set out the details of the loan arrangement.
9. A form of "Client Authority and Retainer" also appears to have been prepared by the defendant's solicitor and sent as a draft to the plaintiff by letter dated 30th November 2001. As matters developed, no undertaking was ever given by the defendant's solicitor to the plaintiff. However, the plaintiff has exhibited from his own file a copy of the "Client Authority and Retainer" form referred to and which appears to have been signed by the plaintiff and defendant. However, the solicitors say that this document was never sent to them, and that they never acted upon it by giving any undertaking in respect of the title deeds to the lands referred to. In fact it appears that the first occasion on which they saw the copy of the signed Client Authority and Retainer form was when the plaintiff sent this to them on the 11th June 2003. It would appear that by that date the plaintiff had lent further sums from time to time to the defendant, and was seeking security for a sum of about €16500. The solicitors stated that they would need to get their client's instructions in relation to that request.
10. It appears to be not in dispute that between the 30th November 2001 and 30th December 2001 a sum of £8000 was loaned to the defendant by the plaintiff. It is also not in dispute that it was not repaid by the 30th May 2002. This is the only sum referred to in the agreement dated £8000. The loan facilities referred to in that document are those referred to in the letter of the same date from the defendant's solicitors, and that letter refers to a loan of "approximately £8000" only and not to any future advances.
11. There was correspondence between the defendant's solicitors and the plaintiff in June/July 2003 as to the amount which may be due to the plaintiff and the terms on which the solicitor was prepared to give an undertaking. In this regard the defendant was maintaining the position that only a sum of €8157.90 remained owing to the plaintiff on foot of the original loan, and that an undertaking over the deeds of the property would have to be limited to such a sum and not the much larger sum being claimed as owing by the plaintiff. This was unacceptable to the plaintiff.
12. Before the matter of any undertaking was resolved, however, the defendant's solicitors by letter dated 17th July 2003 sent to the plaintiff a cheque in the sum of €8157.90 in discharge of the balance of the original advance of £8000 referred to in the agreement dated 30th November 2001. The original sum of £8000, when converted into Euro became the sum of €10157.90. A sum of €2000 was repaid by the defendant on the 30th June 2002, leaving this balance of €8157.90. Upon receipt of this cheque the plaintiff wrote to these solicitors stating that he was not accepting this cheque in full settlement of the loan, as there was no allowance made for interest, and it ignored also the additional advances made from time to time since the date of the original advance. The cheque however was retained by the plaintiff and encashed by him.
13. The position is therefore that by the 17th July 2003 the principal of the original loan which was the subject of the agreement dated 30th November 2001, namely £8000 had been repaid. That payment did not address the question of interest on that sum up to the date of payment, or any other sums which may have been advanced from time to time in fairly small amounts subsequent to the original loan.

14. That is a general background against which the plaintiff's claim as stated in the Plenary Summons and Statement of Claim must be viewed.

15. One could reasonably expect that the plaintiff might have issued proceedings in either the District Court or Circuit Court, as may be appropriate, for the recovery of interest on foot of the original agreement, and perhaps further proceedings for the recovery of other sums advanced outside the agreement dated 30th November 2001. However, the plaintiff chose instead to issue High Court proceedings by way of Plenary Summons against both the defendant, Michael Beglan, and a company called ERT Foundation Limited which in November 2001 was a company operated by Michael Beglan, and for which the loan from the plaintiff was needed to assist in financial difficulties at that time. These proceedings which commenced on the 27th January 2005 (i.e. some eighteen months after the repayment of the original loan) seek orders for specific performance under three headings, as well as other reliefs. It is best if I set out verbatim the text of the Indorsement of Claim because of the unusual nature of the claims being made therein:

The Indorsement of Claim on the Plenary Summons

"1. An order for specific performance that the first named defendant shall deliver to the plaintiff all the lands comprised in folio 157, area E o/s 34/1 and consisting of approx 0.562 acres, and which was charged to the plaintiff on the 30th November 2001, by way of loan agreement, committed to writing, as witnessed.

2. An order for specific performance against the first named defendant of an agreement brokered at Leinster House, Kildare Street, by Fergus Finlay, Philip Mulville and Michael Mulcahy, that the first named defendant Michael Beglan was (a) to immediately assume personal and sole responsibility and sole responsibility for all the debts of the ERT, (b) that Michael Beglan was to find employment in Ireland, to contribute to the accumulating debts, (c) that Michael Beglan would immediately apply for planning permission with a view to selling the aforementioned site to discharge his debts and the debts of the Foundation.

3. An order for specific performance that Michael Beglan, Fergus Finlay and Philip Mulville will personally assume the role of guarantor(s) to Allied Irish bank, Lower Baggot Street and the role of guarantor(s) to the landlords of 34 Upper Fitzwilliam Street, Dublin 2 in place of the plaintiff and/or indemnify the plaintiff herein against any and all claims of the bank, in relation to an overdraft currently standing in the sum of €9062.23, plus accruing interest.

4. An order that the first named defendant will cease and desist in setting up a phoenix syndrome activity of the ERT Foundation Limited, or the European Russian Trust, until the hearing of the action herein before this Honourable Court.

5. A judgment mortgage in favour of the plaintiff, against the named defendants in the amount of €67,718.74 being the amount legally due and owing to the plaintiff herein.

6. Such other order as this Honourable Court shall make.

7. Interest pursuant to the Courts Acts.

8. Damages.

9. Costs."

16. Some days after these proceedings were issued, they were registered as a lis pendens against the first named defendant.

17. On the 9th March 2005 a Statement of Claim was delivered. This document pleads the original loan agreement dated 30th November 2001 and that the sum loaned thereunder was not repaid in full until July 2003. It is pleaded also that other sums were advanced by the plaintiff in the meantime, and that "it was a term of the agreement(s) that all loans would stand equal to be repaid along with and including any interest accrued over the length of the agreement(s)". A reading of the documents prepared by the plaintiff and dated the 30th November 2001 does not reveal any such term, and there is no other agreement is pleaded by the plaintiff.

18. The Statement of Claim goes on to plead that "the plaintiff was assured that he would receive the agreed undertaking from the defendant's solicitors, and that he believed at all times that the defendant was aware "of the agreed undertaking" and "that only when it appeared reasonable that he would be required to transfer his property to meet his indebtedness that Michael Beglan attempted to renege on the agreement".

19. Thus, the plaintiff is attempting to turn the undertaking referred to into an agreement to transfer the property to the plaintiff, hence the claim at paragraph 1 of the Indorsement of Claim set out above.

20. There follows in the Statement of Claim pleas about the failure of the defendant's solicitor to provide the undertaking sought by the plaintiff regarding the title deeds to the property, as well as pleas as to the dates and amounts of other sums loaned to the defendant. These are pleaded not to constitute gifts by the plaintiff.

21. Included in this Statement of Claim is then a claim that persons referred to therein as "respondents" owe the plaintiff certain sums in respect of rent and refurbishment of offices at 34, Upper Fitzwilliam Street, Dublin. It is pleaded that an agreement was reached whereby the plaintiff would advance sums required to open these offices and that these sums would be "repaid jointly and severally by the respondents". These "respondents" are not named as such, but presumably refer to the named defendants herein. It is further pleaded that the plaintiff guaranteed the rent and service charge to the landlord and that a sum of €15650.49 is owed to the plaintiff under this heading.

22. Other sums are pleaded to be owed by the "respondents", and a claim is made for "special damages" (later quantified as being €1,000,000) for damage "suffered in the breakdown of a 22 year relationship with Allied Irish Bank.....on the event of having introduced the respondents to such Branch and having suffered because of the respondents failure to repay the overdraft to the said Bank, standing at present in the sum of €9062.23, plus accruing interest, resulting in the bank" (sic)

23. It is important to note that nowhere in these proceedings is a claim made by the plaintiff for judgment for any liquidated sum representing what the plaintiff claims is the total of the sums allegedly lent to the defendants or respondents referred to. The prayer in the Statement of Claim seeks only the following reliefs:

"1a/ An order for specific performance that the first named Respondent shall execute the agreed charge with the plaintiff in all and those lands comprised in Folio 157, area 'E' o/s 34/1 in the County of Westmeath.

2a/ A judgment mortgage in favour of the plaintiff in the amount of €70,704 being the amount legally due and owing by the first, and second named respondents.

3a/ Such other order as this Honourable Court shall make.

4a/ Interest pursuant to the Courts Acts.

5a/ Special Damages in the sum of €1million euro.

6a/ Costs"

24. These amount to the reliefs now being claimed by the plaintiff despite the other matters set forth in the Indorsement of Claim on the Plenary Summons itself.

25. Before dealing with the substance of the application now made that these proceedings be stayed or dismissed, there is a matter which arises from the documentation filed in these proceedings and which I feel cannot be overlooked and ought to be the subject of comment by me. By the conclusion of argument on this application and after the pleadings and grounding affidavits and exhibits had been opened in full, it appeared to me that the drafting of the documents on the plaintiff's side fell considerably short of the quality which would normally be expected of solicitor and Counsel. Indeed it seemed to me that had no solicitor or Counsel would have advised and drafted the claims being made in the manner in which they appear. For example the claim for a judgment mortgage over the lands is one simply not known to the law. It is equally clear that a great deal of extraneous matter has been sucked into the pleadings and affidavits, and I will have the opportunity to express a view on the reasons for that later in this judgment.

26. I inquired of Counsel for the plaintiff if I was correct in having formed the view that although the summons was issued by solicitors acting for the plaintiff, and although Counsel's own name appeared as having signed the Statement of Claim (though not the summons), the fact was that it is the plaintiff himself who substantially prepared the documents which have been filed and served in this case to date. Counsel stated that this was correct. The Court was informed in this regard that in order to keep down costs the plaintiff had essentially drafted the papers in the case, even though they went out under the name of solicitor and Counsel. In my view it is professionally inappropriate for solicitor and Counsel to allow papers to go out in their name in this way, particularly where neither clearly have scrutinised and advised in relation to the contents of same. In this case, it is clear that either the contents were not scrutinised at all, or that even though they were scrutinised by solicitor and/or counsel the plaintiff was not advised in relation to same and they were allowed to be filed and served in their present form without amendment, or finally that any advice which may have been given to the plaintiff in relation to how the documents were drafted was not heeded by the plaintiff and the papers were filed and served in unaltered form. Either way, it is inappropriate, particularly where the claims being made are unusual to say the least and always had little chance of success given the way that they have been worded and framed. No professional, be it solicitor or counsel should allow his or her name to be put to documents prepared by a client for proceedings in any court without ensuring that they are drafted in a way which they can stand over professionally, and in a way which does not constitute an abuse of the process of the Court. In my view the documents filed by the plaintiff in this case to date bear all the hall-marks of amateurism, and no solicitor or counsel should have co-operated in the manner appearing.

Conclusions

27. Clearly while in 2001 the plaintiff was prepared to assist the defendant with his financial difficulties in relation to his business, and did so, relations between the parties have broken down. I am satisfied about a number of things. Firstly, I am satisfied that the defendant has repaid the principal sum of money referred to in the agreement dated 30th November 2001, and did so about eighteen months prior to the issue of these proceedings. On foot of that agreement there may be an outstanding claim for interest. That claim, if being pursued, is one capable of pursuit in the Circuit Court or District court, whichever is appropriate, and certainly does not justify the present proceedings.

28. Secondly, I am satisfied that no undertaking was ever given by the defendant's solicitor in relation to the deeds to the property referred to, and any attempt to drag those solicitors into this case in the manner which the plaintiff has sought to do in the pleadings and affidavits is misplaced. It is true that the agreement refers to an offer of the lands as security for the loan, and that the defendant acknowledged that his property was at risk should he default on the loan, but no security was put in place on foot of that agreement.

29. Thirdly, I am satisfied that while the plaintiff pleads in the Statement of Claim that a large number of other sums of money were paid by him from time to time for the defendant and that he is owed these sums since they were never a gift, he does not seek judgment for any such amount, but merely "a judgment mortgage in favour of the plaintiff in the amount of €70,704.45". This claim fails in limine, as being one which any Court could not in any circumstances grant. If on the other hand the plaintiff wishes to sue the defendant for the total of these amounts which he says he has paid for or loaned to the defendant, then he should sue for those amounts in the appropriate way in the appropriate court. At the moment these sums are simply pleaded by way of facts to support the claim for the relief prayed for in the prayer of the Statement of Claim, namely "an order for specific performance that the first named Respondent shall execute the agreed charge with the plaintiff in all and those lands comprised in Folio 157, area 'E' o/s 34/1 in the County of Westmeath", as well as a "judgment mortgage in favour of the plaintiff in the amount of €70,704 being the amount legally due and owing by the first, and second named respondents.

30. The Statement of Claim appears to have abandoned by default any claim as sought in either paragraph 2, 3, or 4 of the Indorsement of Claim. The prayer in the Statement of Claim is limited in the way which I have set out already.

31. Based on the affidavit filed by the plaintiff by way of answer to the defendant's motion, and based on my understanding of the true nature of any claim which the plaintiff may have against the defendant, I am satisfied that these proceedings are misconceived and an abuse of process. It is clear to me that the plaintiff feels aggrieved that he has helped the defendant and has been left high and dry for his money. But the proceedings issued in any court jurisdiction must not be abused, or used for some collateral or ulterior motive. In my view the plaintiff is using these proceedings in a way which oppressive to the defendant and in a way designed to expose the defendant to expense in order to put additional pressure on him to settle the sums claimed.

32. He has attempted also to drag the defendant's solicitors into the net, by alleging that they have failed to honour an undertaking and have failed in their professional duties, and has even threatened to make a complaint to the Law Society in that regard. In my view, this is an attempt through these proceedings to pressurise the solicitors into trying to resolve matters for the plaintiff. That is

an abuse of process also.

33. The plaintiff in his documentation has displayed a propensity to refer to certain persons whose names would be publicly well-known, and his correspondence has in some instances sought to drag these persons into the claim against the defendant. I believe that the plaintiff is attempting to drag these persons also into the picture so that perhaps they also might through some anticipated embarrassment put pressure upon the defendant to settle matters in dispute with the defendant. That is an abuse of process, particularly where those persons are not parties to this suit and are not in a position to defend them selves, and such contents of the plaintiff's affidavits may well come within the sort of content covered by O.19, r. 27 RSC, already set forth at the commencement of this judgment, as being "unnecessary or scandalous, or which may tend to prejudice, embarrass.....".

34. However, I am satisfied that the appropriate order to be made in this case is that the present proceeding should be dismissed on the basis that it discloses no reasonable cause of action, and that in part at least the claim is shown by the pleadings to be vexatious. That order is not to be taken as preventing the plaintiff from pursuing any remaining claim he feels he has against any defendant for judgment for a liquidated sum said to be due and owing to him. He has not made such a claim in the present proceedings. Had he done so, this Court may have been in a position to leave in tact such part of the proceedings as sought judgment for a liquidated sum and transferred that claim to the appropriate court for determination. But that is not the case. So the order of the Court is that these proceedings be dismissed.