Neutral Citation: [2015] IEHC 15

THE HIGH COURT

[2012 No.11402 P]

BETWEEN

PATRICK HARROLD

PLAINTIFF

AND

NUA MORTGAGES LIMITED

DEFENDANT

JUDGMENT of Kearns P. delivered on the 16th day of January, 2015

By notice of motion dated 13th June 2014 the defendant seeks an order pursuant to the inherent jurisdiction of the Court or in the alternative an order pursuant to Order 19 rule 28 of the Rules of Superior Courts dismissing the plaintiff's claim on the grounds that the statement of claim and plenary summons fail to disclose any reasonable cause of action against the defendant and are bound to fail. Alternatively, an order is sought pursuant to Order 19, rule 28 dismissing the plaintiff's claim on the grounds that it is frivolous and vexatious.

The plaintiff's claim is for damages arising out of a number of allegations against the defendant including that he has suffered loss and damage due to the alleged reckless lending practices of the defendant, that he was coerced into signing a mortgage agreement, that he was misled by the defendant in relation to the nature of the agreement and the source of the finance, that the defendant was insolvent at the relevant time and was therefore in breach of licensing requirements, and that the defendant engaged in excessive securitisation and breached a number of regulatory requirements.

BACKGROUND
By letter dated 18th June 2007, the plaintiff and his wife were offered a loan facility by the defendant in the sum of €256,500 for a term of 40 years. The loan was secured on a property at Middle Drumrooske, Donegal Town, County Donegal. On 25th June 2007 a deed of mortgage and charge was entered into in respect of the property. Subsequently, the plaintiff defaulted on his repayment obligations and joint receivers were appointed over the secured property by deed of appointment dated 4th October, 2012.

By plenary summons dated 12th November, 2012 the plaintiff states that "*the bank broke serious liquidity laws which has caused the financial collapse. But for this action and knowledge of same I would or could have made different decisions about my financial affairs*". He asserts that the bank engaged in excessive securitisation and reckless lending and that his health and relationships have suffered as a result. The plaintiff claims €1,000,000 in damages and an order declaring that the mortgage agreement is null and void.

In his statement of claim the plaintiff says that "*the defendant did not possess the money it claims it loaned out thus rendering the defendant a third party only*". He asserts that he was cajoled into the agreement and was offered no independent legal assistance. The plaintiff contends that the defendant misled him in relation to its financial position and that the bank was insolvent at the time of the agreement but "*created the alleged money out of thin air on a computer keyboard".* A number of other claims are set out including that the defendant did not hold a valid licence to trade on the date of the signing of the alleged agreement, that the defendant ignored warnings from the United States markets in relation to the risks involved in the transaction, that no proper risk assessment was carried out, and that the bank is a mere servicing agent for another body and therefore has no legal right to any monies from the plaintiff.

The plaintiff states that he was originally offered €110,000 from the bank which he declined. He states that the bank subsequently offered €256,500 through an agent called 'Moneypenny' and accepted falsified financial statements in the name of the plaintiff in order to arrange this loan and to profit by way of commission and ultimately repossession of the property.

The proceedings have been before the Court on a number of previous occasions where the parties were seeking directions. The defendant issued a motion to strike out the proceedings on 13th June 2014.

JURISDICTION TO DISMISS
Order 19, rule 28 of the Rules of Superior Courts provides –

> *"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."*

The Court also possesses an inherent jurisdiction to strike out proceedings. This well established position was confirmed in *Barry v. Buckley* [1981] IR 306 where Costello J. stated that the "jurisdiction exists to ensure that an abuse of the process of the courts does not take place" and where a claim is bound to fail "it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to the defendant."

It is well established that this jurisdiction is one which should be used sparingly and right of access to the courts should be preserved wherever possible. In *Lawlor v. Ross* (Unreported, Supreme Court, 22nd November 2001) Fennelly J. stated that "*the Court should be willing to assume in favour of the Plaintiff that an appropriate amendment of the pleadings might save his case*."

SUBMISSIONS OF THE DEFENDANT
Counsel for the defendant submits that the existing jurisprudence makes clear that there is no tort of 'reckless lending' in this jurisdiction. In *Healy v. Stepstone Mortgage Funding Limited* [2014] IEHC 134 Hogan J. considered this issue and previous decisions of the court in the following terms –

"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'."

Hogan J. concluded:–

> "It follows, therefore, that there is simply no tort of reckless lending which is known to the law."

In light of this, counsel for the defendant submits that this aspect of the plaintiff's claim discloses no reasonable cause of action and therefore ought to be struck out as being bound to fail.

In relation to the plaintiff's allegation that the defendant illegally "created" the money for the purposes of the loan, counsel submits that this claim is also bound to fail. Arguments of this kind were considered by Hogan J. in *McCarthy and Others v. Bank of Scotland PLC and Others* [2014] IEHC 340 in the following terms (para. 9):-

> "It is, I think, a measure of the desperate straits in which some litigants have found themselves as a result of the collapse in the property market from 2008 onwards that arguments of this kind have been seriously advanced, not only in this case but in other recent cases of the same kind, both here and in other jurisdictions, most notably Canada. A version of this fanciful theory had been advanced in *Dempsey v. Enviston Credit Union* [2006] BCSC 750 where it was described in the following terms by Garson J.:
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> > 'In his submissions on the motion, in the actions concerning him, Mr. Dempsey described the "money for nothing" theory. He stated that the banks do not have money. Rather, they create money out of "thin air"…He says that the plaintiffs create money by signing promissory notes, and as soon as the promissory note is signed, the banks deposit money in their own statement of account. The bank does not place hard currency in the hands of the debtors. Mr. Dempsey then charge interest on nothing and that is a criminal rate of interest because interest is charged on nothing. Mr. Dempsey states: "it is not like the old days when people used to go to the bank and, in the back room, count out dollars, there is no law that allows the banks to create dollars out of thin air.'
>
> It is scarcely a surprise that in *Dempsey* this argument was described by the British Columbia courts as "fanciful" and "completely devoid of merit." Yet this has not deterred other litigants in this jurisdiction advancing similar arguments which are equally lacking in merit and which, indeed, lack any relationship to contractual or other legal realities."

Hogan J. went on to consider the decision in *Freeman v. Bank of Scotland* [2013] IEHC 371 wherein Gilligan J. stated –

> "… this 'creation of currency' argument resembles the so-called 'money for nothing schemes' discussed in *Meads v. Meads* 2012 ABQB 571. Such arguments are coming before the Courts in numerous jurisdictions with increasing frequency since the economic and property market collapse. In Meads, Associate Chief Justice Rooke stated that such arguments are often advanced by a particular type of vexatious litigant which he termed 'Organised Pseudolegal Commercial Argument (OPCA) litigants'. He described these arguments as *'fanciful'* and *'completely devoid of merit'* and said they are often made by distressed litigants, particularly those who find themselves in financial difficulty, acting under pressure and on the instruction of organised groups or individuals who have a vested interest in disrupting court operations and frustrating the legal rights of governments, corporations and individuals.
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> It is also important to note that the funds in question, regardless of how they were allegedly 'created', were drawn down by the plaintiffs and, as stated in the statement of claim, were spent on the refurbishment and upkeep of the properties or however else the plaintiffs saw fit. The nature of the loan agreement between the parties was clear and unambiguous and was willingly signed for by the plaintiffs who were aware of their obligations and responsibilities."

Similarly, in *Kearney v. KBC Bank Ireland PLC and Others* [2014] IEHC 260 Birmingham J. dismissed the 'creation of currency' argument. Referring to the decision of Gilligan J. in *Freeman*, Birmingham J. stated –

> "In my view the phrases 'fanciful' and 'completely devoid of merit' are very appropriate to describe this argument and indeed significantly more robust language would be justified. Quite simply the plaintiff drew down funds and thereby took on the responsibility to repay. What the source of these funds was matters not a whit."

In relation to the plaintiff's assertion that the lender engaged in excessive securitisation and that this somehow relieves him of his responsibility to repay the loan, counsel for the defendant submits that the issue of securitisation as been dealt with in a number of previous decisions of the court. At paragraph 24 of his decision in *Kearney*, Birmingham J. states: –

> "In relation to the emphasis that the plaintiff places on the issue of securitisation; observations made by Peart J. in *Wellstead v. Judge White and Others* [2011] IEHC 438, are very much on point. There, Peart J. observed:-

> 'But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors.'
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> The views expressed by Peart J. with which I find myself in complete and respectful agreement, also, accords with the approach of the English Court of Appeal in the case of *Paragon Finance plc v. Pender* [2005] 1 W.L.R. 3412. The Court of Appeal was of the view that all that the special purpose vehicle acquired, under an uncompleted agreement to transfer the legal charge, was an equity in the mortgage. Paragon remained the legal owner, and as registered proprietor of the charge, retained all the powers of a legal chargee, including the right to possession, nor was it necessary to join the special purpose vehicle."

Counsel for the defendant says that the plaintiff's claim that the bank is insolvent or was insolvent at the time of the agreement is also bound to fail. While this allegation is strenuously denied by the bank, it is submitted that the plaintiff's claim in this regard is ambiguous and even if it were true it is irrelevant. In *McCarthy* Hogan J., in striking out the plaintiff's proceedings, stated –

> "... the other arguments advanced by the plaintiffs are equally devoid of merit. It was contended that the bank was insolvent at the time it made the loans. While that claim has been strenuously denied, it is sufficient to say – as Gilligan J. said in Freeman – that even if this were so, this would not affect the validity of the loans."

In *Kearney*, Birmingham J. also considered a claim in relation to the alleged insolvency of the bank in the following terms –

> "The contention that the bank is or was insolvent or has failed to prove its solvency, again, assuming in favour of the plaintiff for the purpose of this exercise that this is or was the situation, something which is of course firmly denied by the bank, this does not have any impact or effect on the validity or enforceability of the loan arrangements and mortgages entered into between the plaintiff and the bank and certainly would not provide the plaintiff with a cause of action. The obligation to repay remains in full force and effect whether the bank is solvent or insolvent."

As to the plaintiff's allegations of fraud and misrepresentation, counsel submits that these serious allegations are not properly particularised as required by the Rules of the Superior Courts. This matter was also considered by Birmingham J. in *Kearney* where the plaintiff had made similar allegations to the present plaintiff against a lending institution. Birmingham J. stated as follows at para. 37: –

> "These allegations of extraordinary seriousness are scattered about with abandon, but are not particularised. Order 19, r. 5(2) of the Rules of the Superior Courts provides:-
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> > 'In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings.'
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> In *Keaney v. Sullivan* [2007] IEHC 8, Finlay Geoghegan J. commented that the court had an inherent jurisdiction to strike out a claim for failure to comply with O.19, r.5 (2) and in that case she proceeded to strike out claims. A similar approach was taken by Edwards J. in *Bula Holdings v. Roche* [2008] IEHC 208, where Edwards J. made an order striking out the proceedings on the basis that the pleadings were frivolous, vexatious and scandalous and that the particularisation of the claims of fraud, deceit, conspiracy and attempted perversion of the course of justice is so inadequate and deficient that no reasonable cause of action was disclosed."

Counsel for the defendant submits that while it is accepted that there must be an appropriate degree of latitude afforded to litigants in person, the plaintiff is still bound by the laws of evidence and procedure. This issue was considered by Clarke J. in In *Burke v. Judge Mary O'Halloran & Ors.* –

> "Understandably lay litigants do not always understand the rules of procedure or evidence or the law applicable to the case in which they are involved. Such parties frequently become frustrated when the court, even allowing some reasonable laxity in the application of those rules or that law, prevents them from doing or saying things that they wish in the course of the proceedings. These and many other factors often lead to such proceedings becoming disjointed, difficult and frequently much more lengthy than they would otherwise be."

Clarke J. went on to hold as follows:–

> "…it does have to be noted that a party who chooses to represent him or herself is no less bound by the laws of evidence and procedure and any other relevant laws, and by the rulings of the court in that regard, than any other party. Where a party chooses to represent him or herself and where that party fails to abide by directions of the court concerning the manner in which the case should be conducted in accordance with procedural, evidential and any other relevant law, then the court must take whatever action is appropriate to deal with any such failure."

Based on the above, it is submitted on behalf of the defendant that the proceedings should be struck out pursuant to Order 19 rule 28 and/or pursuant to the inherent jurisdiction of the Court.

SUBMISSIONS OF THE PLAINTIFF

The plaintiff denies that he has failed to adequately particularise any aspect of his claim. He refers the Court to a document dated 29th November, 2013 entitled 'Replies to Particulars" which was prepared on the direction of Ryan J. at an earlier stage in the proceedings. He says that no issue was raised by the defendant in relation to the content of this document and that it clearly sets out the allegations against the defendant. In any event, the plaintiff contends that as a litigant in person he should be allowed a greater degree of latitude in relation to the form of his submissions than would be afforded to qualified professionals. In this regard, the plaintiff refers to the decision of Birmingham J. in *O'N. v. McD. and others [*2013] IEHC 135 which states as follows: –

> "On behalf of the first named defendant, and this is a point that is echoed by other defendants, it is noted that the statement of claim pleads an entirely different cause of action to what had been pleaded in the statement of plenary summons. It is contended that this is an impermissible form of pleading and that for this reason the proceedings should be struck out. There is no doubt that the form of pleadings is unorthodox and indeed quite irregular. However, I am conscious that the pleadings have been drafted by a litigant in person and, if I was of the view that the plaintiff was seeking to

pursue a legitimate cause of action and had identified such a cause of action, I would not be prepared to strike out the proceedings but rather would afford him an opportunity to regularise his pleadings."

The plaintiff submits that a large number of previous court decisions have made clear that the power of the Court to strike out proceedings in an application such as this is one which should be used sparingly. In this regard he refers to the decision of Feeney J. in *Kenny v. Trinity College* [2011] IEHC 202. At paragraph 5 Feeney J. states: –

> "The jurisdiction of striking out proceedings pursuant to Order 19, rule 28 or pursuant to the Court's inherent jurisdiction is a power which must be exercised sparingly and only when the Court is satisfied that there is a clear case to justify the exercise of such discretion (see *Sun Fat Chan v. Osseous Ltd.* [1992] 1 I.R. 425). As stated by Denham J. in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2004] 1 I.R. 506 (at p. 509):
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> > 'The jurisdiction under O. 19, r. 28 to strike out pleadings is one a court is slow to exercise. A court will exercise caution in utilising this jurisdiction.'
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> However, as emphasised by Denham J. in her judgment such jurisdiction should be exercised 'if a court is convinced that a claim will fail.'"

Feeney J. went on to consider the legal principles as set out by the Supreme Court:–

> "The courts have consistently emphasised that the jurisdiction must be used sparingly and only in clear cases. The legal principles to be applied and the decided cases were reviewed by the Supreme Court in *Supermacs Ireland Ltd. v. Katesan (Naas) Ltd.* [2000] 4 I.R. 273 and Geoghegan J. identified the legal principles in his judgment (at p. 283/284):
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> > 'A large number of cases, starting with *Barry v. Buckley* [1981] I.R. 306, were presented to the court in a book of cases but they were not really opened to any extent. However I think it important to refer briefly to the latest of those cases *Jodifern Ltd v. Fitzgerald* [2000] 3 I.R. 321 and in particular to the judgment of Barron J. In his judgment Barron J. says the following at p. 332:-
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> > > "Every case depends upon its own facts. For this reason, the nature of the evidence which should be considered upon the hearing of an application to strike out a claim is not really capable of definition. One thing is clear, disputed oral evidence of fact cannot be relied upon by a defendant to succeed in such an application. Again, while documentary evidence may well be sufficient for a defendant's purpose, it may well not be if the proper construction of the documentary evidence is disputed. If the plaintiff's claim is based upon allegations of fact which will have to be established at an oral hearing, it is hard to see how such a claim can be treated as being an abuse of the process of the court. It can only be contested by oral evidence to show that the facts cannot possibly be true. This however would involve trial of that particular factual issue.
> >
> > > Where the plaintiff's claim is based upon a document as in the present case then clearly the document should be before the court upon an application of this nature. If that document clearly does not establish the case being made by the plaintiff then a defendant may well succeed. On the other hand, if it does, it is hard to see how a defendant can dispute this *prima facie* construction of the document without calling evidence and having a trial of that question."
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> Although the issue in that case seems to have been abuse of the process of the court the same principles would equally apply to an issue as to whether or not there was or was not a reasonable cause of action."

In *Salthill Properties Ltd and another v. Royal Bank of Scotland plc and others* [2009] IEHC 207 Clarke J., in considering the power of the Court to strike out proceedings, stated:–

> "… it seems to me that counsel for Salthill and Mr. Cunningham is correct when he says that the court need not and should not require a plaintiff to be in a position to show a *prima facie* case at the stage of an application to dismiss, in order that that application should fail. There have been many cases where the crucial evidence which allowed a plaintiff to succeed only emerged in the course of the proceedings. At the level of principle, this is likely to be particularly so in cases alleging fraud or other similar wrongdoing which is likely to be clandestine, if present, and where a plaintiff may only be able to come across admissible evidence sufficient to prove his case by virtue of the use of procedural devices such as discovery and interrogatories. That is not to say that it is legitimate for a party to instigate such proceedings when the party concerned has no basis for so doing. However there is, in my view, a significant difference between circumstances where a plaintiff has a legitimate basis for considering that it may have a claim at the time of commencing proceedings, on the one hand, and a situation where that party has, at that time, available to it, admissible evidence which it can put before the court to establish a *prima facie* claim, on the other hand.
>
> It is clear from all of the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put forward, at that time, a *prima facie* case to the contrary effect."

In relation to the defendant's assertion that there is no tort of reckless lending in this jurisdiction which could give rise to a reasonable cause of action, the plaintiff submits that he still intends to pursue his claim on the basis of professional negligence and/or contributory negligence. The plaintiff relies on the case of *KBC Bank Ireland plc v. BCM Hanby Wallace* [2013] IESC 32 wherein Fennelly J. considered the law in relation to contributory negligence in detail. The Supreme Court also considered the duty owed by a lending institution to its shareholders. Fennelly J. stated:–

> "When a bank reviews a potential loan transaction, it should assess the soundness, financial standing and above all the trustworthiness of the borrower and the viability of the proposed venture…It should have robust and comprehensive credit analysis and approval processes, internal controls to monitor risk and to ensure adequate monitoring of the completion of security."

In remitting the matter to the High Court for failing to make any finding in relation to contributory negligence, the Supreme Court stated that –

> "The appellant is entitled to argue for the obligation of the bank, in accordance with the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. No. 395 of 1992)(as amended), to manage its businesses "in accordance with sound administrative and accounting principles and [to] put in place and maintain internal control and reporting arrangements and procedures to ensure that the business is so managed."

The plaintiff submits that the bank was negligent in relation to the financial assessment carried out to establish his ability to service the mortgage and by failing to have regard to warning signs from the US regarding the risks associated with "lending to people who could not afford the repayments". It is contended that the bank breached its duty of care and negligently increased the risk of injury and damage to the plaintiff. As a result, the plaintiff submits that he was induced into making a decision he wouldn't otherwise have made.

It is further submitted that the defendant's engaged in fraud, misrepresented the financial situation of the plaintiff, and knowingly relied on erroneous accounts and records in approving the mortgage. In relation to this aspect of his claim, the plaintiff refers the Court to the decision of Birmingham J. in *McCaughey v. Anglo Irish Bank Corporation Ltd & Anor.* [2011] IEHC 546. Birmingham J. stated:–

> "The meaning of fraud was settled by the House of Lords as long ago as 1889 in the case of *Derry v. Peek*. The elements of the tort of deceit were stated as follows by Lord Herschel:-
>
> > 'First, in order to sustain an action in deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made:-
> >
> > (1) Knowingly, or
> >
> > (2) Without belief in its truth or
> >
> > (3) Recklessly, careless whether it is true or false.
> >
> > Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states, to prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.'
>
> So, simple lack of care will not of itself suffice. The threshold that the plaintiff has to cross is knowledge of or belief in the falsity of the representation or recklessness as to its truth, that is to say not caring whether the representation is true or false. This aspect is summarized as follows in Cartwright on *Misrepresentation, Mistake and Non-disclosure*, 2nd Ed. as follows:-
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> > 'The representor will be fraudulent if he made the statement "recklessly, careless whether it be true or false". It is important to note that Lord Herschel does not say that a representor is fraudulent if he fails to take care – is negligent – whether his statement is true. Negligence is not dishonesty; and the House of Lords in *Derry v. Peek* was at pains to emphasise that negligence is not sufficient for deceit. Recklessness involves not caring whether the statement is true; an indifference to the truth.'
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> However, in some circumstances evidence of a lack of care may go some distance to providing evidence that a defendant in truth, lacked belief in the truth of what he was saying or did not care whether what he was saying was true.
>
> Misrepresentation can take the form of either a positive statement, or it can be through omission as it was made clear by the Lord Chancellor, Lord Chelmsford in the case of *Oaks v. Turquand and Harding* [1867] LR 2HL 325 where at p. 342 he commented:-
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> 'It is said that everything which is stated in the prospectus is literally true, and so it is, but the objection to it is not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted. The very concealment of which gives to the truth of which is told the character of falsehood.'"

The plaintiff further contends that his allegations regarding breaches of the Consumer Protection Code 2006, the Consumer Protections Act 2007 and the Consumer Credit Act 1995 should be allowed to proceed. In this regard, the plaintiff relies on the decision of Gilligan J. in *Freeman and another v. Bank of Scotland (Ireland) Ltd. and others* [2013] IEHC 371. In *Freeman*, Gilligan J. refused to accede to the Bank's application to strike out the plaintiff's claim in relation to alleged breaches of statutory codes and that aspect of the plaintiff's claim was allowed to proceed. The plaintiff in the present case contends that the bank's alleged breaches rendered him unable to exercise his free and independent will in arriving at his decision in relation to the mortgage.

The plaintiff submits that the Court should be slow to exercise its jurisdiction to strike out proceedings, particularly in cases involving litigants in person, and that the authorities relied upon in relation to particular aspects of his claim as set out above support his contention that his claim warrants further consideration by the Court and should be allowed to proceed.

DISCUSSION

The plaintiff in these proceedings finds himself in a very unfortunate but unfortunately not uncommon position. Like many other litigants who have come before the courts in recent years, the plaintiff purchased property at the height of the country's unsustainable property boom and now finds himself in arrears and unable to meet his repayment obligations. Joint receivers have been appointed over his property. The plaintiff makes a number of claims against the defendant bank which he contends relieve him of any liability to repay this debt.

In relation to the plaintiff's claim of reckless lending by the defendant, as is clear from the case law relied upon by counsel for the defendant, there is no such civil wrong in this jurisdiction. In particular, the Court notes the decisions on this issue in *Healy v. Stepstone Mortgage Funding Limited, ICS Building v. Grant, and McConnon v. President of Ireland.* This aspect of the plaintiff's claim is closely aligned to a number of other broad and general allegations he makes in relation to the lending practices of "*various banks*"

which the plaintiff contends "*created the false boom and bust situation which has crippled my country*". Blanket allegations such as these do not give rise to a reasonable cause of action in the plaintiff's case, are bound to fail and must be struck out. That is not to say that such allegations related to the wider context of the financial crisis should not be considered by a more appropriate forum of inquiry.

The Court is also satisfied that the Supreme Court decision in *KBC v. Hanby Wallace* in relation to contributory negligence as relied upon by the plaintiff does not apply to the facts of the present case and does not amount to a justification for allowing the plaintiff's claim to proceed. In *KBC*, the bank had engaged the services of the defendant solicitors to complete loan transactions after ensuring that the security provided for in the facility letter was obtained. The defendant failed to do so and instead closed the loans on the basis of undertakings only despite having no authority to accept undertakings. McGovern J. in the High Court found that the bank had failed to take reasonable steps to verify representations made by the borrowers as to their sources of income and their net wealth in order to ascertain whether they had the capacity to repay the loans. However, it was held that the defendant's negligence and breach of duty in releasing the funds before security was in place was the proximate cause of the plaintiff's loss and so no finding of contributory negligence was made. Allowing the defendant's appeal, the Supreme Court found that the bank had exclusive responsibility for checking the financial soundness of the borrowers and the matter of contributory negligence was remitted to the High Court. In the present case there is evidence that a risk assessment and Irish Credit Bureau check was carried out by the bank. In addition, the bank in the present case, unlike in *KBC*, did satisfy itself that adequate security was in place, namely, the property itself. In contrast, in *KBC* the bank's requirement that security be obtained over a total of 30 properties was not complied with. There was further evidence that the bank had failed to carry out proper searchers of previous loans made to the borrowers, had failed to discover a number of unfulfilled undertakings from the borrowers, and failed to adequately investigate the borrowers' statement of affairs. In any event, the Supreme Court made no finding as to whether or not the bank's conduct amounted to contributory negligence which the plaintiff in these proceedings can rely upon. Rather, the matter was simply remitted to the High Court for reconsideration.

As to the plaintiff's contention that the lender simply "*created the alleged money out of thin air on a computer keyboard*", the Court agrees entirely with the decisions of Gilligan and Hogan JJ. in the *Freeman* and *McCarthy* cases respectively. As indicated by Gilligan J. in *Freeman*, this argument has come before the Courts with increasing frequency in recent times and is invariably advanced by litigants who unfortunately find themselves in financial distress. As set out above, this 'creation of currency' argument has quite rightly been described as 'fanciful' and 'completely devoid of merit'. This aspect of the plaintiff's claim is frivolous in the extreme, bound to fail, and accordingly should be struck out. In any event, regardless of how the money was allegedly 'created', it is not disputed that the plaintiff applied for the loan, drew down the loan, and spent the funds. By his own admission, the plaintiff was initially offered a lesser amount by the lender which he rejected as "*not sufficient for the project which the plaintiff wanted to pursue".* Undoubtedly, the plaintiff willingly participated in the transaction.

The issue of securitisation has been dealt with in detail by previous decisions of the High Court and does not warrant detailed consideration herein. However, the remarks of Peart J. in *Wellstead* are of particular relevance:–

> "…there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors."

The plaintiff contends that securitisation, alongside other fraudulent practices of the bank, amount to a "*policy of predatory targeting of customers with the long term goal of fraudulently acquiring valuable property at little or no cost*". In light of a number of previous decisions, the Court is satisfied that this aspect of the plaintiff's claim is frivolous, bound to fail, and must also be struck out.

The plaintiff relies on the decision of Gilligan J. in *Freeman* as authority for the proposition that his claim in relation to alleged breaches of statutory codes by the bank should be allowed to proceed. However, the decision of McGovern J. in the substantive hearing in *Freeman & Anor. v. Bank of Scotland (Ireland) & ors.* [2014] IEHC 284 is worth noting:–

> "It is clear, therefore, that non-compliance with a statutory code does not relieve a borrower from his obligations under a loan to repay the lender, nor does it deprive the lender of its rights and powers under the loan agreement. If that is the case so far as statutory codes of conduct are concerned, then, *a fortiori*, the plaintiffs in this action cannot make the case that they are relieved from their obligations under the loan or that the Bank is deprived of its rights under the loan agreements, if there has been a breach by the Bank of what is a voluntary code."

No credible evidence has been brought to the attention of the Court that the plaintiff was "lured into a contract" as suggested or that he was coerced or induced in any way to sign up to the mortgage agreement. The plaintiff has failed to meet the very low threshold required to allow this aspect of his claim to succeed and I am satisfied that no amendment of the pleadings could rectify this.

The plaintiff quite correctly submitted that the jurisdiction to strike out proceedings is one which the Court should be slow to exercise and he relied upon a number of authorities in this regard, including *Kenny v. Trinity College* and *Salthill Properties*. In *O'N. v. McD. & Ors.* Birmingham J. emphasised the need for the court to be particularly cautious in cases involving litigants in person. The Court entirely agrees with these decisions and the plaintiff was afforded a great deal of latitude in relation to the form of his pleadings and his submissions to the Court. However, while the Court may sympathise with the unfortunate predicament the plaintiff finds himself in, I am satisfied that this is one such case where the plaintiff's claim is bound to fail and must be struck out.

DECISION

For the reasons outlined above the plaintiff's claim is struck out pursuant to the inherent jurisdiction of the Court and pursuant to Order 19, rule 28 of the Rules of the Superior Courts on the basis that it discloses no reasonable cause of action and is bound to fail.