[2017] IEHC 450

THE HIGH COURT

2016 No. 2979P

BETWEEN:

LEONARD KINSELLA

Plaintiff

– and –

SHEILA COONEY, PADRAIC BRADY, DEIRDRE MORAN, BRENDA RUSHE and MAIREAD O'REILLY PRACTISING UNDER THE STYLE AND TITLE OF TALLANS SOLICITORS

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2017.

I. Background

1. A solicitor's undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance upon it, which is made either personally by a solicitor or by a member of her staff, in either case acting in the course of the solicitor's practice, whereby the solicitor (as solicitor or employer) becomes personally bound. This case concerns the solicitor's undertaking given by Patrick Tallan & Co., Solicitors, in a letter of 29th April, 2008, the substance of which is set out below:

> "**Re: Our Client: George McCarron**
>
> **Your Client: Leonard Kinsella**
>
> *Dear Sirs,*
>
> *[1] We confirm that we have been irrevocably appointed by Mr McCarron in relation to the sale [of]…the property comprised in Folio 13061F of the Register County Louth.*
>
> *[2] We confirm that there is a contract subject to planning for the portion 'B' on the map attached hereto, being part of Folio LH13061F.*
>
> *[3] We hereby confirm that the remaining lands in Folio LH13061F other than the portion edged red and marked 'B' on the map attached hereto are the subject-matter of an option agreement by the Purchasers of portion 'B' for €1,500,000.*
>
> *[4] In consideration of you releasing your lien on Land Certificate 1750F of the Register County Louth we hereby undertake to discharge the sum due and owing to your client in the amount of €190,460.71 plus your legal costs as agreed, or in default of agreement duly taxed out of the proceeds of sale from the remaining land in Folio LH13061F which property contains .386 hectares or thereabouts statute measure.*
>
> *Yours faithfully,*
>
> *PATRICK TALLAN & CO."*

2. It is agreed between the parties that the planning permission referred to at [2] was never granted and that the option referred to at [3] was never exercised. Counsel for the defendants maintains that the undertaking at [4] was conditional on [2] and [3] occurring, that they did not occur, and that the undertaking therefore ceases to have any effect. Counsel for Mr Kinsella maintains that the release of lien referred to at [4] did in fact occur, that the €190k+ therefore falls to be paid, and that the requirement of such payment is reflective of a broader indebtedness on the part of the late Mr McCarron and does not fall to be viewed solely in the context of the land-sale contemplated in the above-quoted letter, but never, it seems, effected.

3. Mr Kinsella has now commenced the within proceedings claiming (a) a declaration that the defendants are in breach of the undertaking given on or about 29th April, 2008, (b) damages for breach of the said undertaking and/or misrepresentation and/or breach of contract in the amount of €190,460.71, and (c) certain ancillary reliefs. A full defence has been delivered, the essential components being that (i) Mr Kinsella's claim is statute-barred, (ii) the letter of 29th April, 2008, did not constitute a warranty, representation, *etc.*, as alleged or at all, (iii) the letter of 29th April, 2008, was given only on behalf of Mr McCarron and not by or on behalf of his solicitors, (iv) the claim should be brought against the estate of Mr McCarron and so is premature, vexatious and an abuse of process, and (v) the plaintiff has not mitigated any (if any) loss suffered.

4. By notice of motion of 8th October, 2016, the defendants have brought the within application seeking the following and certain other ancillary reliefs:

> *"1. An order pursuant to Order 19 rule 28 of the Rules of the Superior Court 1986 striking out the Plaintiff's statement of claim herein and dismissing the Plaintiff's claim on the grounds that the said statement of claim discloses no reasonable cause of action, is premature, vexatious and designed to embarrass the Defendants.*
>
> *2. An order pursuant to the inherent jurisdiction of the court striking out the Plaintiff's statement of claim herein and dismissing the Plaintiff's claim on the grounds that the said claim discloses no reasonable cause of action, is premature, vexatious, designed to embarrass and that a dismissal is just and equitable in the circumstances."*

II. Applicable Law

(i) O.19, r.28.

5. Order 19, rule 28 of the Rules of the Superior Courts (1986), as amended, provides as follows:

"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 judgment to be entered accordingly, as may be just." [Emphasis added].

6. It has repeatedly been emphasised by the courts (see *inter alia*, *McCabe v. Harding* [1984] I.L.R.M. 105, *Barry v. Buckley* [1981] I.R. 306, and *D.K. v. King* [1994] 1 I.R. 166), that the jurisdiction enjoyed by the court pursuant to O.19, r.28 is exercisable by reference to the pleadings only, *i.e.* that the court can, to paraphrase Costello J. in *Barry*, at 308, only make an order under the rule when a pleading discloses no reasonable cause of action on its face. Given the professional duties owed by counsel to both client and court, the number of instances in which pleadings formulated by counsel will disclose no reasonable cause of action seem unlikely ever to be abundant. In practice, as Delaney and McGrath note in *Civil Procedure in the Superior Courts* (3rd ed.), para. 16–11, "*an application* [under O.19, r.28] *will only succeed where there are very few issues of fact or where the facts are relevant facts* [and] *are not reasonably disputable as in certain cases regarding the conclusion of contracts or the interpretation of contractual documents*". When it comes to the phrase "*reasonably disputable*", as used in the just-quoted text, the court is reminded of Charleton J.'s observation, albeit in a different context, in *Oltech (Systems) Limited v. Olivetti UK Limited* [2012] IEHC 512, para. 8, that "[E]*xperience demonstrates that there is little that cannot be argued*"; likewise, it might be noted, there is little, or certainly not a lot, that is not reasonably disputable.

7. In the within case, the statement of claim pleads that there is an undertaking contained in the letter of 29th April, 2008, that it was given on behalf of the defendant solicitors and it has been breached. The Defence essentially denies that there was an undertaking given or that it has been breached. The plaintiff seeks a declaration and damages, which damages may be awarded. The defendant solicitors deny his entitlement to either. Those are not pleadings that disclose no reasonable cause of action, or that are frivolous or vexatious. A reasonable, justiciable cause of action is disclosed on the face of the pleadings and so the defendants' application, at least so far as it relies on O.19, r.28, must fail.

(ii) Inherent Jurisdiction.

8. As to the inherent jurisdiction of the court, the court is not subject in this regard to the same judicial injunctions against trespassing into the relevant facts that have been touched upon above in the context of O.19, r.28. The logic for the distinction in approach when the inherent jurisdiction of the court is engaged, as opposed to O.19, r.28 being applied, is explained in the following terms by Clarke J. in *Lopes v. Minister for Justice* [2014] 2 I.R. 301, 309:

"*The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out…in Barry v. Buckley [1981] I.R. 306, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the court to prevent abuse can be invoked*."

9. Although the above-quoted text explains the rationale for each of the two approaches which exist at this time, it does not explain why two approaches, albeit that in practice they typically may be jointly pleaded, should in principle be considered preferable to a single approach of universal application. If the rules of court are satisfactorily to rationalise the inherent jurisdiction of the court in any particular regard, it would seem preferable, if only to make the applicable system of rules more complete, that they should seek comprehensively to do so, and there seems no reason why they could not simply do so. But alternate approaches to strike-outs and dismissals of the sort now sought there presently are, depending on whether it is the inherent jurisdiction of the court or O.19, r.28 that is engaged. This is so despite the fact that the Supreme Court has sought to foster a cautious approach to applications that invoke the inherent jurisdiction, effectively constraining the level of factual analysis that may properly be undertaken, and so perhaps ensuring that the two routes do not radically diverge – though they do diverge. Thus, in *Keohane v. Hynes* [2014] IESC 66, Clarke J. observed as follows in his judgment for the court, at para. 6.9:

> "*6.9 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred*."

10. More recently, in *Moylist Constuction Ltd v. Doheny* and others [2016] IESC 9, another decision of the Supreme Court, Clarke J. turned his attentions to circumstances involving factual issues that may not be especially complex but legal questions and consequences that may prove complex, observing, at para. 3.16:

> *"I would caution against the appropriateness of the use of the application to dismiss under the inherent jurisdiction of the court in relation to proceedings where, even if there are no factual disputes or any such factual issues as might arise come within the strictures identified in Keohane, nonetheless the legal issues or questions concerning the proper interpretation of documentation are complex. In such cases, the very complexity of the issues (even if the court has a fairly clear view on them) makes it difficult to determine, within the confines of a motion heard on affidavit, that the plaintiff's case is such that it can safely be said that it is bound to fail."*

11. In *McGreal v. Whyte* [2016] IECA 365, Irvine J., giving judgment for the Court of Appeal, observed as follows, at para. 61:

> "[T]*he jurisprudence which has built up over the years in relation to summary judgment proceedings is of assistance when considering the proper approach of the court to an application to dismiss a claim as bound to fail. In summary judgment proceedings, when asked to grant judgment in the light of the evidence advanced by a defendant on affidavit*

to demonstrate the existence of a bona fide defence, the court must ask itself the question advised by Hardiman J. in Aer Rianta v.Ryanair *[2001] 4 I.R. 607 namely:- "Is it 'very clear' that the defendant has no case?*".

12. The short answer to that last question in the context of the within proceedings is 'no', and that it seems to the court is dispositive of the application now made by the defendant solicitors by reference to the court's inherent jurisdiction; that inherent jurisdiction should not be applied by the court, and there is nothing in *Keohane or Moylist*, or case-law more generally, that would suggest that an alternative conclusion falls now to be preferred.

III. Conclusion

13. For the reasons aforesaid, the court respectfully declines to accede to the application now made by the defendant solicitors. The court notes that an amendment to the statement of claim has been mooted but is to be discussed between the parties with a view to its being effected on consent and thus proposes to make no ruling in this regard at this time.