Neutral Citation: [2014] IEHC 340

THE HIGH COURT

[2012 No. 10545 P]

BETWEEN/

DARAGH McCARTHY, PATRICK BEVAN AND DAFYYD HUGHES

PLAINTIFFS

AND

BANK OF SCOTLAND PLC AND MICHAEL COTTER

DEFENDANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on 2nd July, 2014

1. In August, 2006 the predecessor in title of the first defendant bank advanced loan facilities in the sum of €2.2m in favour of the three plaintiffs. The object of these loans was to enable the plaintiffs to acquire two commercial properties in Enniscorthy, Co. Wexford. Like many property investments which were made at this particular time, this investment has not proved to be a success. The two properties in question were charged with separate mortgages. The plaintiffs have indeed defaulted on their loans. These loans were called in April, 2012 and a receiver (who is the second defendant) was subsequently appointed on 1st May, 2012.

2. The plaintiffs commenced the present proceedings in October, 2012. They claim damages for goods and property which have been allegedly stolen. They also claim damages for theft, deception, breach of duty, misrepresentation, causation, fraud, deceit, non-performance, breach of contract, breach of promise, attempted damage by perjury, dishonest and insolvent trading and counterfeiting. It is only fair to say that no claims have been against the receiver, Mr. Cotter, save that his appointment is invalid. That claim is really contingent on the quite separate claims as against the Bank, the basis for which can now be examined.

3. While the plaintiffs have filed an affidavit in support of these claims, it has to be said that the nature of the averments are not the easiest to follow. In many respects the plaintiffs – who are litigants in person - have perfected a style of legal writing which can, without any disrespect, be fairly described as a pastiche copy of the high style of the 19th century pleader. Almost any number of the thirty three paragraphs of this supporting affidavit could be cited for this purpose, but the opening paragraph may serve to give a flavour of what was later to come

> "This Honourable Court should in all that is Equitable and Just grant all reliefs sought by the Plaintiffs on foot of the Defendants' unlawful intentions, actions and collusions to wilfully steal the Plaintiffs' property and wantonly destroy their business."

4. Much of the remainder of the pleadings and affidavits filed by them is in the same vein. It turns out that the principal argument now advanced by the plaintiffs is that the defendant Bank did not advance them loans of money at all, but rather that it illegally created currency, so that – or so the argument runs - there is no valid contract of loan. Thus, in their replies to particulars of 18th October, 2013, the plaintiff's state:

> "The Bank of Scotland monetized our wet inked signed promissory notes/loan offers for their benefit and they were monetized with intent."

5. They had also claimed in these replies that if these defendants "cannot produce the real wet inked signed original promissory notes/loan offers and cannot produce the real wet inked signed deed of mortgage they are in breach of their alleged contract and are liable." I should add that the defendants offered to bring the original mortgages into court and did in fact do so.

6. It is, accordingly, not a great surprise that the Bank should move to seek to have the proceedings struck out as unsustainable in law, whether pursuant to O. 19, r. 28 or pursuant to the inherent jurisdiction of this Court.

The illegally created currency argument

7. So far as the illegally created currency argument is concerned, the plaintiffs drew my attention to an article contained in *Bank of England Quarterly Bulletin*, 2014, Q.1, entitled "Money Creation in the Modern Economy" by members of the Bank's Monetary Analysis Directorate. It seems to me that the plaintiffs have completely misunderstood the thrust of that article. Of course, no one could deny that in a modern banking system banks can – and do - increase the money supply by the granting of loans and credits. In that particular sense – and I emphasise these words – a macro-economist might say that the banking system "creates" money by thus increasing the money supply. This, however, is scarcely a new insight and simply reflects views which all the great economists – ranging from Adam Smith to Milton Friedman – have expressed from time to time.

8. All of this, however, is entirely irrelevant as a matter of law. At one point Mr. McCarthy seemed to argue that a loan could only be valid if something tangible (such as notes or coin) had been exchanged. At other times Mr. McCarthy suggested that he did not receive a loan of money at all, but rather that as the money advanced had been "created" by the bank, the underlying contract of loan was somehow invalid or inoperative. The plaintiffs also allege that by reason of this the Bank is guilty of fraud or, as they put it, fraud in the factum.

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.:

> "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."

10. 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.

11. In *Freeman v. Bank of Scotland Ireland* [2013] IEHC 371 Gilligan J. noted, having referred to a decision of *Meads v. Meads*, a decision of the Alberta Queens Bench, that:

> "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."

12. Similar views were expressed by Birmingham J. in *Kearney v. KBC Bank Ireland plc* [2014] IEHC 260, where, having referred to the judgment of Gilligan J. in *Freeman*, he observed:

> "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. The position is not altered by the sourcing of the article [from the Bank of England] on which the plaintiff places such reliance."

13. The Bank of England article to which Birmingham J. referred is the same one as was relied on by the plaintiff here. As Birmingham J. pointed out, the source of the Bank's funds is quite irrelevant so far as the obligation to repay the loan is concerned. It would be entirely unreal to suggest that any customer would inquire as to the source of a bank's funds and the argument as thus advanced by the plaintiffs is entirely spurious and absurd.

14. The same can just as readily be said of the contention that a loan must be somehow be made by way of coin or notes, since this runs entirely contrary to modern realities. While the plaintiffs invoke the concept of fraud, nothing whatever has been advanced to support this claim. It is accordingly quite impossible to see how any kind of fraud is involved. The simple reality is that, as Birmingham J. put in *Kearney*, the plaintiffs have drawn down funds, obtained the benefit of these funds and now have an obligation to repay these loans.

15. It is unnecessary for present purposes to examine in any detail the type of case which comes within the rubric of "frivolous or vexatious" within the meaning of O. 19, r. 28. Of course, in some cases and in some contexts, frivolous or vexatious may mean no more than that the claim is doomed to fail or that it has no reasonable prospect of success: see, *e.g.*, the comments of Barron J. in *Farley v. Ireland*, 1st May, 1997, and those of Birmingham J. in *Novak v. Data Protection Commissioner* [2012] IEHC 449, [2013] 1 I.L.R.M. 207 (where similar words appear in s. 10(1)(b) of the Data Protection Act 1988). To that extent, O. 19, r. 28 overlaps to some degree with the inherent jurisdiction of the court to strike out unsustainable claims.

16. Yet the very wording of O. 19, r. 28 demonstrates that this jurisdiction is also necessarily broader than the inherent jurisdiction to strike out unsustainable claims which was identified by Costello J. in *Barry v. Buckley* [1981] I.R. 306 and which analysis has been consistently followed in a host of subsequent cases. The concepts of frivolousness and vexatiousness are also broad enough to include those categories of cases where claims which are tenuous, flimsy, entirely lacking in substance, foolish or absurd have been advanced. I regret to say that each of these descriptions are also entirely apt so far as the plaintiffs' "money for nothing" arguments are concerned.

17. 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.

18. The same applies to the breach of contract arguments. In the replies to particular the plaintiffs state that the Bank "has wilfully monetized our promissory notes/loans and has possibly securitized our deed or mortgage." It is clear, incidentally, from the evidence of John Burnet, head of Credit Sanctioning at the Bank that these particular commercial mortgages were not securitized. It is further stated that as a result of the "monetizing" of the promissory notes/loans that the Bank is "not a part of interest in our estate and thus, the first defendant is fraudulent coercing the second defendants to action a defective deed of appointment." It is not easy to decipher what exactly is meant by this. It seems to be just another version of the argument that the plaintiffs never entered into a valid contract of loan. Again, for the reasons stated, this claim is entirely unmeritorious and lacking in any substance whatever.

Conclusions

19. While the persons who made what with hindsight appears to be poor commercial judgments by purchasing commercial or residential properties at the height of the property boom are entitled to our sympathy and understanding, this cannot take or affect from the legal rights of the parties. The plaintiffs entered into perfectly valid contracts of loan with the defendant bank on which they have now unfortunately defaulted, resulting in the appointment of a receiver. They cannot – and should not – be allowed to obstruct this process by commencing proceedings which are entirely devoid of merit and in so doing advance arguments that are both spurious and foolish.

20. I regret to say, however, that this is the only way in which these claims can be characterised. In these circumstances, I find myself coerced to the conclusion that these proceedings should be struck out pursuant to O. 19, r. 28 on the ground that they are frivolous and vexatious.