

## THE HIGH COURT

[2014 No. 9051 P.]

BETWEEN

SHANE HANLEY

PLAINTIFF

AND

BANK OF IRELAND MORTGAGE BANK

DEFENDANT

**EX TEMPORE JUDGMENT of Ms. Justice Reynolds delivered the 9th day of May, 2018****Introduction**

1. This is an application brought by the defendant ("the Bank") in the within proceedings seeking, *inter alia*, the following reliefs:-

1. An order dismissing the plaintiff's claim:-

(a) Pursuant to O. 19, r. 28 of the Rules of the Superior Courts, on the grounds that the case as pleaded by the plaintiff does not disclose a reasonable cause of action in respect of the mortgaged property and/or that it is frivolous and/or vexatious; and/or

(b) Pursuant to the inherent jurisdiction of this Honourable Court on the grounds that the plaintiff's claim has no reasonable prospect of success and/or that the proceedings constitute an abuse of process in circumstances where the matters pleaded are *res judicata* and/or issue estopped; and/or

(c) Pursuant to O. 122, r. 11 of the Rules of the Superior Courts, there having been no proceeding in the action for in excess of two years; and/or

(d) Pursuant to the inherent jurisdiction of the Honourable Court, on the grounds of inordinate, inexcusable and/or unreasonable delay on the part of the plaintiff in the prosecution of the action.

2. Further, the Bank seeks an order pursuant to s. 123(b) of the Land and Conveyancing Law Reform Act, 2009 vacating the *lis pendens* registered by the plaintiff ("Mr. Hanley") on the 8th June, 2015 over and against the property known as 84, County Meadows, Cloonthua, Tuam, Galway, being the lands and premises registered in Folio GY89832F, County Galway.

**Background**

3. Before dealing with the within application, it is necessary to set out something of the protracted legal history between the parties herein.

4. In 2007, Mr. Hanley and his co-borrower, a Mr. Alan Giblin, borrowed the sum of €159,000.00 for the purpose of purchasing the said property.

5. The borrowers sealed a deed of mortgage and charge over the property in favour of the Bank.

6. The mortgage account subsequently went into arrears and the Bank issued a demand for repayment of the facility in May 2012.

7. In 2013, civil proceedings issued seeking possession of the property. An Order made by the Circuit Court on the 18th December, 2014 granted possession of the property to the Bank, together with ancillary relief.

8. Mr. Hanley and his co-borrower appealed that order. Having heard the appeal, Noonan J. subsequently dismissed it by Order dated 26th November, 2015.

9. In 2016, a subsequent judgment in different proceedings (*Permanent TSB v. Langan* [2016] IECA 229) was delivered by the Court of Appeal which came to a different view of the law to that determined by Noonan J. in these proceedings. Thereafter, an application was made by Mr. Hanley to Noonan J. to set aside his judgment. This application was also dismissed.

10. In early 2017, the possession Order was finally executed in favour of the Bank and it has been in possession since that time.

11. However, in the intervening period between the commencement of the Circuit Court proceedings and prior to the granting of any relief, Mr. Hanley commenced the within proceedings by plenary summons in October 2014. An appearance was entered on behalf of the Bank in November 2014.

12. These proceedings lay dormant whilst the possession proceedings progressed through the Circuit Court and on appeal to the High Court. Mr. Hanley did, however, during that period proceed to register a *lis pendens* in June 2015 over and against the property.

13. In April 2017, one month after the execution of the order for possession, Mr. Hanley contends he wrote to the Bank's legal department consenting to the late delivery of its defence to the within proceedings.

14. By further letter dated 31st August, 2017 Mr. Hanley referred to his earlier letter and again purported to consent to the late delivery of a defence to the proceedings. However, it was indicated to him by the Bank that it had not received his earlier letter and indeed that no statement of claim had been received by the Bank. Whilst a copy of a statement of claim dated 31st May, 2016 was subsequently furnished to the Bank, it is clear that to date same has not been properly served on it.

**The Motion**

15. In respect of the within application brought by the Bank, difficulties were encountered serving Mr. Hanley with same. An Order for substituted service was granted by Meehan J. on the 19th February, 2018.

16. Mr. Hanley engaged briefly with the Bank thereafter but failed to attend the hearing of the within application.

17. By way of preliminary issue and having considered the affidavits of service and submissions by counsel for the Bank, the court was satisfied that Mr. Hanley was aware that the matter was proceeding before it.

#### **Issues Raised by the Bank**

18. It is contended on behalf of the Bank that Mr. Hanley fails to disclose any form of claim, at law or in equity, in the within proceedings and that same amount to a direct or collateral challenge on the order for possession granted in respect of the property.

19. Further counsel for the Bank posits that the proceedings constitute an abuse of process and a duplication of the arguments which were or could have been made in the context of the possession proceedings.

20. In addition, it is contended that the issues raised are *res judicata* and/or the subject of an issue estoppel preventing their being raised against the Bank at this stage.

21. All of the above issues were raised by the Bank in its grounding affidavit to the within application. No replying affidavit has been proffered by Mr. Hanley.

#### **The Law**

22. Order 19, rule 28 provides that a court may order a pleading to be struck out on the grounds that "it discloses no reasonable cause of action" and in any case where the action is shown by the pleadings to be "frivolous or vexatious" the court may order that the action be stayed or dismissed. It is clear that the court has jurisdiction under the rule to strike out the proceedings in their entirety.

23. Having regard to the relevant jurisprudence, the court can only make an order under this rule when the pleading discloses no reasonable cause of action on its face.

24. Further, having regard to the decision in *Barry v. Buckley* [1981] I.R. 308, the court also has an inherent jurisdiction to stay proceedings in such circumstances and in exercising such jurisdiction, it is clear that the court is entitled to engage in an analysis of the facts in the case.

25. In the instant case, the Bank relies on the principles in *Henderson v. Henderson* [1843] 3 Hare 100 and endorsed by the Supreme Court in *Ahmed v. the Medical Council and the Attorney General* [2003] IESC 70, in its contention that the issues as raised by Mr. Hanley in his pleadings are *res judicata* and amount to an abuse of process.

#### **Determination**

26. It is readily apparent that all of the issues raised by Mr. Hanley in his statement of claim are matters which were pertinent to the possession proceedings. They include the following:-

- (a) A denial of receipt of the letter of demand;
- (b) A complaint that the loan agreement was an unfair and/or improper contract;
- (c) A complaint that he was denied access to relevant documents; and
- (d) An alleged breach of the Consumer Protection Code.

27. In applying the "*Henderson v. Henderson*" principles, this Court is satisfied that these are matters which were relevant to the previous litigation between the parties herein and were issues which were or indeed ought to have been raised in that context. In the circumstances, this Court must conclude that the matters are *res judicata* and that the proceedings constitute an abuse of process.

28. The Court therefore orders that the proceedings be struck out and that the *lis pendens* be vacated.