Neutral Citation [2012] IEHC 112

THE HIGH COURT

[2011 No. 3035 P.]

BETWEEN

DANIEL COLEMAN

PLAINTIFF/RESPONDENT

AND

FINN O'NEILL, JOHN HYLAND, TOM TRACEY, KAY TRACEY, MAEVE MORAN, JOHN BRADLEY, ANNE O'MALLEY, ELEANOR MANNION, ANDREW DAFFEY, KEVIN TIERNEY AND PATRICK LYDON

DEFENDANTS/APPLICANTS

JUDGMENT of Mr. Justice Roderick Murphy dated the 8th day of March 2012

1. The applicants are directors of the Balinrobe Credit Union (the Credit Union). The respondent at all material times practiced as a solicitor on his own as Coleman and Company. By notice of motion filed on the 14th November, 2011, the applicants sought an order (pursuant to the provisions of O, 19, r. 28 of the Rules of the Superior Courts) striking out the plaintiffs proceedings on the grounds that the plaintiff had no reasonable cause of succeeding with his claim. Alternatively they sought an order pursuant to the inherent jurisdiction of the court, dismissing the plaintiffs claim on the ground that the plaintiff's action constituted an abuse of process.

2. The grounding affidavit of Finn O'Neill referred to the reliefs sought by the plaintiff for alleged negligence, breach of duty and/or breach of fiduciary duty on the part of each of the defendants in and about the granting of loan facilities to Eamon Kenny, and his two brothers Darragh Kenny and Sean Kenny. Sean Kenny had worked as a legal executive with the plaintiff. The deponent referred to the plaintiffs claim that the defendants had wrongfully accepted various written undertakings given by Sean Kenny on behalf of Coleman and Company, Ballinrobe, Co. Mayo.

Allegations of fraud and misfeasance of public office and breach of duty had also been made by the plaintiff against the defendant directors. Damages in the amount outstanding and/or due and owing to the Credit Union from Eamon Kenny, Darragh Kenny and Sean Kenny were also sought.

It was averred that the plaintiff had gradually become actively involved in the affairs of the Credit Union. On the 9th December, 1999, he was appointed to the credit committee and on the 28th November, 2001, was elected to the Board of Directors.

On the 17th December, 2002, the plaintiff was appointed legal adviser. The defendants and each of them were ordinary members of the Credit Union and members of the Board of Directors and as such were reliant on the plaintiff proffered legal advice in the best interest of the Credit Union.

On the 16th September, 2005, the Credit Union received a letter of undertaking from Coleman and Company, solicitors on behalf of Sean Kenny, in respect of a loan
€113,000, sanctioned by the Credit Union

Further letters of undertaking in respect of borrowings by Eamon Kenny and by Darragh Kenny were received by the Credit Union from Coleman and Company, solicitors.

These loans were approved by the Board of Directors which at all material times included the plaintiff. Minutes of meetings of the Board together with the attendance of the plaintiff were exhibited.

The matter of the security of the loans issued to Sean Kenny, Darragh Kenny and Eamon Kenny, were raised by the Board with the plaintiff in January, 2008. The plaintiff assured the Board of Directors that there would be compliance with the letters of undertaking. He offered and provided a further letter of undertaking dated the 6th February, 2008, reaffirming the undertakings furnished to the Credit Union. It was averred that the plaintiff made no allegation regarding the illegality or otherwise of the undertakings furnished by his firm to the Credit Union until the 10th September, 2009.

It was averred that the plaintiffs alleged concerns regarding the undertakings furnished by his firm resulted not by reason of his own internal audit as alleged in the statement of claim, but more particularly, by reason of an audit of his practice by the Law Society on or before the 15th July, 2008.

It was averred that on the 11th September, 2009, the plaintiff attended a meeting with McDarby and Company who had, at that stage, been appointed as solicitors for the Credit Union. At that meeting, the plaintiff put a proposal to the Board that the undertakings would be offered by Eamon Kenny, Darragh Kenny and Sean Kenny. That proposal was rejected by the Credit Union on the advice of its solicitors.

On the 14th September, 2009, the plaintiff tendered his resignation from the Board of Directors, which resignation was accepted by the Board.

3. By replying affidavit the respondent Mr. Coleman said that he was an arranging debtor who, on the 14th December, 2009, obtained the protection of the court exercising it jurisdiction in bankruptcy. This matter was still pending.

He referred to an order obtained from Dunne J. in the bankruptcy proceedings in reference of the claim of Balinrobe Credit Union Limited. Dunne J. ordered that William O'Connell on behalf of the Credit Union make discover y on oath of the documents which were or had been in its possession or power relating to the matters in question in the action.

Arising from the non compliance of that order, Mr. Coleman issued a motion to strike out the plaintiff's case in *Ballinrobe Credit Union v. Daniel Coleman* (2009/1303 SP).

The court notes that this is an earlier and separate action.

The plaintiff s claim in those proceedings related to the loans made by the Credit Union to Sean Kenny, Eamon Kenny and Darragh Kenny.

In these proceedings the plaintiff put Finn O'Neill on full proof of acting on the plaintiff's authority.

He averred to the partisan and select interpretation of events evidenced in paras.34 to 36 of the affidavit of Finn O'Neill in relation to the undertaking signed by him on the 6th February, 2008. At that time the loan book of the Credit Union had deteriorated to an alarmingly high level, thereby necessitating exact scrutiny of each and every loan. He listed the factors which caused such deterioration.

Mr. Coleman said that his composite undertaking of the 6th February, 2008, was procured by the Chief Executive of the Credit Union. Billy (William) O'Carroll, who met him after meeting Sean Kenny, regarding debt collection files. Mr. O'Carroll had informed him that the auditors had requested him to obtain from Mr. Coleman a composite undertaking regarding the loans to Sean Kenny, Eamon Kenny and Darragh Kenny.

Mr. Coleman averred that he was not aware of, nor had ever heard any reference to the date of the 24th January, 2007, when Sean Kenny had proffered three undertakings to the Credit Union for himself and for his brothers Eamon Kenny and Darragh Kenny.
The plaintiff disputed the averments of Finn O'Neill regarding to what happened at the meeting with McDarby and Company, solicitors. He said that it was hearsay, incorrect and fully disputed.

He alleged that Billy O'Carroll had loans drawn down in his office in similar circumstances to that of Sean Kenny, Eamon Kenny and Darragh Kenny, by means of undertakings to which he had not signed nor had sight of. Mr. O'Carroll had failed to furnish any documents of undertaking. This left Mr. Coleman with no choice but to notify his professional indemnity insurance company of a potential claim.

Mr. Coleman said that he had initiated a third proceeding, *Daniel Coleman v. William and Anne O'Carroll*, in 2010, where Charleton J. made an order joining KCB Bank.

Mr. Coleman said that he offered no terms of settlement to the Credit Union or their legal advisers. He had told the Board of Directors on the 10th September, 2009, that he could not act in the transaction as there was a total conflict of interest in his position regarding the parties.

He averred that Sean Kenny, through his then solicitor, offered to replace the security required by the Credit Union in consideration of Mr. Coleman paying the sum of €1 50,000 to Mr. Kenny by means of compensation and/or damages for loss of office. He said he was advised by Ms. Cliona Pierse of Mr. Kennys's solicitors practice, that this was a small price to pay to retain his office and business to which he had built up over the previous ten years. He said that he refused this offer, advising that he would not "concede to blackmail under any circumstances".

He referred to Geraldine Quinn, who was employed by the Credit Union and who had the benefit of funds to purchase lands which "emanated from my office through fraudulent acts of her husband".

He asked the court to take cognisance of the manner in which the Credit Union had prosecuted him without recourse to Sean Kenny, Eamon Kenny and Darragh Kenny and Geraldine Quinn.

Proceedings were not for the sole purpose of "intimidating, embarrassing and discrediting the defendants herein" but rather a vindication of his right to take action against Billy O'Carroll for his breach of undertaking.

He said he suffered substantial loss while Sean Kenny, Eamon Kenny and Darragh Kenny and Geraldine Quinn still retained all their assets and houses.

The court notes that neither Billy (William) O'Carroll nor Geraldine Quinn are parties to the proceedings.

4. The court has also considered the replying affidavit of Finn O'Neill sworn on the 21st February, 2012, the affidavit of Michael G. Ryan, solicitor sworn on the 22nd February, 2012 and several affidavits sworn in relation to further proceedings by the plaintiff en titled Daniel Coleman v. Sean Kenny, Eamon Kenny and Darragh Kenny (Record No. 2009/8944 P).

5. Mr. Sean Kenny in his affidavit of the 20th October, 2009, filed in those further proceedings had sworn, in para. 17 that it was the practice in Coleman and Company to give undertakings liberally. He averred that such practice was approved of by the plaintiff. He said that the letters of undertaking exhibited in the plaintiff's affidavit, and in particular, those undertakings dated the 19th September, 2007, the 18th August, 2007, and the 25th April, 2007, were signed by him on behalf of Coleman and Company Solicitors. He said there was nothing whatsoever sinister in him signing the letters in the context of what went on for all of the years that he worked in the plaintiff's practice. He said this was standard practice and that not alone would he, as legal executive, have been

authorised to sign such letters, but that, in addition, other staff members including secretaries and receptionists would have done so also. He averred that this practice was fully approved of by the plaintiff and was the custom and practice in the office.

Mr. Kenny averred that it was the practice in the office that all undertakings were removed from files when and where necessary and in particular, before the Law Society of Ireland audit or before any audit of the Assigned Risk Pool of the Law Society which conducted insurance audits at the plaintiffs practice, including one in February, 2009.

6. The plaintiff, in an affidavit filed in the further proceedings answered those allegations in para. 37 of his affidavit filed on the 30th October, 2009, in the following
terms:-

> "37. Furthermore, and by way of complete traverse, I say that no member of my staff, receptionist or otherwise, was permitted to sign off or give undertakings as is suggested by the first named defendant as this was the explicit function of your deponent herein. Additionally, and as is evidenced by the tenor of the replying affidavits filed it would, respectfully submit, amount to a futile exercise to set out in successive paragraphs traverses as proposed and encouraged by the defendants save that in this regard it is fair and safe to say that all material facts are in dispute with the exception of the primary fact asserted by your deponent herein to the effect that the first named defendant fraudulently created undertakings for his benefit and for those of his brothers, the second and third named defendants, as a result whereof a considerable sum of money was obtained by Balinrobe Credit Union."

7. Order 19, r. 28 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 judgement to be entered accordingly, as may be just."

The jurisdiction to dismiss an action on the basis that, on admitted facts, it cannot succeed is one which the court should be slow to exercise: *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 25. Where the statement of claim admits for an amendment which might save the action, the proceedings should not be dismissed. A judge to an application to dismiss has to be confident that, no matter what might arise in discovery or at the trial of the action, the course of the action would be resolved in the manner fatal to the plaintiff's contention.

While the court should exercise great caution in striking out a claim, it should do so where convinced that the plaintiffs claim must fail: *Tassan Din v. Banco Ambrosiano* [1991] 1 I.R. 569.

Moreover, where the defendants have no evidence to support their plea and therefore are unable to furnish particulars, the plea must be struck out: *Kennedy v. Midland Oil Company* 110 I.L.T.R. 26.

Nonetheless, when the plaintiff might ultimately fail to establish a claim, but important questions of law or fact are to be determined, the claim should not be stuck out: *Irish Permanent Building Society v. Caldwell* [1979] I.R.L.M. 273.

While the court may order any pleading to be struck out on the grounds that it discloses no reason for the cause of action or answer, the court is not limited to considering the pleadings of the parties, but, is free to hear evidence on affidavit relating to the issues in the case (*Barry v. Buckley* [1981] I.R. 306).

8. Solicitors' Undertakings

The Guide to Professional Conduct of Solicitors in Ireland (2nd Ed), October 2002, gives a comprehensive definition in the following terms:-

An undertaking is any unequivocal declaration of intention addressed to the someone who reasonably places reliance on it which is made by a solicitor in the course of his practice, either personally or by a member of the solicitor's staff, whereby the solicitor, or in the case of a member of his staff, his employer, becomes personally bound .

The elements of the definition are clear: any unequivocal declaration of intention; made by a solicitor in the course of hi s practice; either personally or by a member of the solicitor's staff; whereby the solicitor becomes personally bound.

It is a formal declaration in writing which should be signed by the principal or
a partner of the firm giving the undertaking.

From a practical point of view the solicitor should obtain an irrevocable instruction in writing from the client authorising the solicitor to give the undertaking. This should be obtained before the undertaking is given.

Of course, undertakings should be signed by the principal or partner of the solicitors firm, giving the undertaking. However, the recipient of an undertaking is entitled to assume that an undertaking given has been duly executed. Any ambiguity is generally construed in favour of the recipient.
The Guide to Professional Conduct provides specifically that:-

> "6.5.7 The solicitor is responsible for honouring an undertaking given by a member of the solicitor's staff, whether such staff member is admitted to the Role of Solicitor or not."

A solicitor will be required to honour the terms of a professional undertaking as a matter of conduct. In addition to the Law Society's power to enforce undertakings is a matter of conduct, the court, by virtue of its inherent jurisdiction over its own officers, ahs power of enforcement in respect of undertakings.

Accordingly, the undertakings executed by Sean Kelly by way of illegible signature with no indication of the undertaking being otherwise that of the firm does bind the plaintiff.

Moreover, it would appear that the plaintiff was aware of his requirement to honour the terms of such a professional undertaking by virtue of his agreeing to execute a composite undertaking at the request of McDarby and Company. While it is clear that a solicitor should not seek an undertaking from another solicitor, when the first solicitor knows, or ought to know, it should not be given (See Law Society book let: "Principles Relating to Professional Undertakings", July 1996). There i s no evidence to suggest that McDarby and Company knew, or ought to have known, that the previous undertakings should not have been given.

There is nothing in the undertakings given that indicate that the undertaking was given by the respondent as agent on behalf of his client as principal (See Callahan: The Law and Solicitors in Ireland , 2000, at 4.12). Where the undertaking is that of the solicitor, then it is the solicitor who must honour the undertaking (*Re. Marchant* [1908] 1 K.B. 998 cited as authority.

The court is satisfied that the conditions outlined in the *United Bank of Kuwait v. Hammoud* [1988] 1 W.L.R. 1051 had been satisfied. Funds may reasonably be expected to come under the control of the solicitor and originate from some transaction which is within the usual course of a solicitor's business.

In that case refers an undertaking given by legal assistance to transfer funds when they came within the firm's control was held to be within the normal course of business of the firm.

Callahan at 7.11 to 7.22 refers to the considerable care which should be exercised by solicitors when giving undertakings.

The Law Society booklet: "Principles Relating to Professional Undertakings" July 1996, stresses that a solicitor must proceed with caution and should never give an undertaking in respect of a matter over which the solicitor has no personal control.

An undertaking given by a solicitor is, of course, more than a guarantee insofar as the solicitor is required to honour the terms of a professional undertaking as a matter of conduct. The Law Society and the court have power to enforce the undertakings.

The breach of an undertaking results in personal liability on the part of the person who gives the undertaking irrespective of whether the undertaking was given with or without authority in the firm of principal solicitor in the firm (See Callahan 7.30). Reference was made to *Shangan Construction v. TP. Robinson Limited*, (Unreported, High Court, 10th July, 1990) in relation to the defendant's solicitors undertaking to release a mortgage. Barron J. held:-

> "It is not, however, material that the defendant had such reasons for not honouring his undertaking. Once he had given it he had an immediate obligation to take the necessary steps to obtain the release and to go on doing whatever was necessary until it was furnished to him. Not done statement of opposition was not only a breach of contract but also professional misconduct."

In *I.P.L.G. v. Fry* (Unreported, High Court, March, 1992), per Lardiner J. the nature of the solicitors undertaking was described at p. 25 of the transcript as follows:-

> "The solicitors undertaking is commonly understood as being one which can be safely relied upon. He is an officer of the court and it is long established that where a solicitor gives an undertaking, the court will compel him to carry it out, unless there is good reason for his not doing so. This jurisdiction is based on the court's right to require its officers to observe a high standard of conduct. It is exercised where a solicitor acting professionally for a client and in that character gives his personal undertaking whether to the client or to a third party or to the court in the course of proceedings. Further requirements are that the undertaking is clear on its terms; that the whole of the agreement to which it relates is before the court and that it is one which is not impossible for the solicitor *ab initio* to perform.

The Law Society Gazette in its issue of July 2010 published a notice to all practicing solicitors regarding undertakings from the complaints and client relations committee stressing that a solicitors undertaking is a professional conduct issue.

Under the heading "good management" the committee stated that principals are responsible for undertakings given by staff, whether qualified or not and that clear guidance should be given to all staff as to who is permitted to give or accept undertakings. Solicitors should make sure that undertakings are not overlooked, by indicating on the file that an undertaking has been given and its date.

9. Solicitor's undertakings, such as those in the present case of the 16th September, 2005, the 23rd January, 2007, the 25th April, 2007 and the 18th May, 2007, place a heavy onus on the plaintiff as solicitor. The plaintiff averred that he did not sign such undertakings nor, indeed, was he aware of such undertakings until 2008.

The plaintiff as solicitor signed the undertaking of the 6th February, 2008, but appears now to challenge it on the basis of Mr. O'Carroll requiring him to do so. There is no pleading or evidence of coercion or undue influences.

However, it was not until the 10th September, 2009, that the plaintiff alleged that the earlier undertakings were complied with by virtue of Sean Kenny's alleged fraud. The court notes that this was some four years after the first undertaking given on the 16th September, 2005.

The respondent denied any knowledge of the undertakings, notwithstanding the minutes of meetings of the Board of Directors which noted the loans and which minuted his attendance.

The respondent a so asked the court to note that in many of the loan application forms there is no confirmation under the heading, "for office use only", that the Board of Directors had approved the loan. There was no suggestion that this, in any way, invalidated the loan.

10. The court is satisfied that in relation to the Kenny loans, undertakings were given by Coleman and Company, and had to be in place before funds could be drawn down.

Moreover, the plaintiff was, at all material times, acting as solicitor for the Kenny brothers. There is no averment that he was not so acting nor that he did not know when loans were applied for. No evidence was given as to whether previous loans were discharged from the proceeds of subsequent loans, or that loans were given without solicitors undertakings from his firm.

The court is satisfied, on the balance of probabilities that Mr. Coleman as respondent, should have been and on the balance of probability was aware of those undertakings, which awareness led him, on the request by the auditors through Billy O'Connell, Billy O'Carroll, to procure the composite undertaking of the 6th February, 2008. Indeed para. 69 of his affidavit he referred to six houses, five of which were valued at €185,000 together with a detached house valued at €220,000. This was well in excess of the amount in the undertaking of the 6th February, 2008.

No evidence was adduced that the undertakings had or had not been included in a register or that files were or were not marked "undertaken given" as would be normal in a solicitors practice.

The court notes, that notwithstanding that all eleven defendants were represented by McDarby and Company, that the plaintiff served papers on each defendant individually. The court asked counsel for the respondent to particularise the claims that were made against each of the el even defendants. No such particulars were given, other than the general assertion that the members of the Board owed a duty of care to the respondent, also a member of the Board, but, more importantly, a legally qualified member who had acted for the Credit Union and, it seems, for some of the borrowers.

If the eleven defendants were acting *ultra vires* as pleaded then, it seems to this Court, the Credit Union should have been a party.

Allegations were made against Billy (William) O'Carroll, Scan Kenny, and his wife Geraldine Kenny. None of these were included as defendants.

The court is not satisfied that the members of the Board owed a duty of care to the respondent, that their actions were *ultra vires* or that they were in breach of fiduciary duties to the respondent. The general assertion was not particularised. It was submitted that the board owed the respondent a duty of care to notify him as guarantor of irregularities and non compliance of the borrowers. An undertaking is not a guarantee.

While fraud is pleaded, it is not, as is required, pleaded particularly nor as against any of the eleven defendants.

The court is unaware from the pleadings and, indeed, from the evidence on affidavit, as to how the eleven defend ants had knowledge of Mr. Coleman's client's transactions other than in relation to those client's applications for loans.

The court is satisfied that no matter what could arise in discovery or in the course of the trial that the plaintiff s case against his fellow directors cannot succeed. There have been no particulars to support the plaintiff's claim. The plaintiffs claim must fail.
In the circumstances, the Court will grant an order in terms of para. 1 of the motion pursuant to O. 19, r. 28 striking out the plaintiff s proceedings on the grounds that the pleadings do not show cause of action.

The court, in the alternative will on the basis of the affidavit evidence dismiss the plaintiff's claim pursuant to the inherent jurisdiction of the court on the grounds that the plaintiff’s action constitutes an abuse of process.