



THE SUPREME COURT

Supreme Court Record No.: S:LE:IE:2012:000176

High Court Record No.: 2011/6428P

**McKechnie J.
MacMenamin J.
Irvine J.**

BETWEEN/

PATRICK MALONE

PLAINTIFF/APPELLANT

- AND -

CATHERINE ALLISON

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 20th day of December, 2019

1. This is an appeal from the judgment and order of Laffoy J. dated 28th February, 2012, and 12th March, 2012, respectively. By her order, and pursuant to the court's inherent jurisdiction, she struck out the within proceedings on the grounds that they were bound to fail.
2. In his notice of appeal, Mr. Malone maintains that the High Court Judge erred in law and in fact in dismissing his claim and failing to take into account certain allegations which he had made concerning fraud and deception.

Background Facts

3. In December 2007, in proceedings bearing record number [2007 No. 979 S.P.] (hereinafter "the 2007 proceedings"), Ms. Catherine Allison, the respondent to this appeal, commenced special summons proceedings against Mr. Malone seeking possession of certain lands and premises comprised in Folios 11743 and 3583 for the County of Louth. Those proceedings were settled on 22nd January 2011, on terms to which I will later refer.
4. The backdrop to the 2007 proceedings is that by an agreement in writing dated the 27th January, 2006 (hereinafter "the loan agreement"), Ms. Allison loaned Mr. Malone the sum of €160,000 to enable him to complete the purchase of certain property comprised in Folio 11743 for the County of Louth. At that time, as the agreement records, Mr. Malone had earlier contracted, on 21st November, 2005, to purchase those lands. Furthermore, he had been served by the vendors with a notice to complete and been unable to obtain funds elsewhere to complete the purchase notwithstanding his ownership of the adjoining property (Folio 3583). Relevant also is the fact that at the time Mr. Malone signed the contract to purchase the lands in Folio 11743 he was being advised by Paul Tiernan of Tiernan's Solicitors Church St, Dundalk.
5. The terms of the aforementioned loan agreement provided that Mr. Malone would charge both folios of land with the liabilities thereby created. I would pause here to observe that it is clear from the pleadings in the 2007 proceedings that Mr. Malone received

independent legal advice from another solicitor, Brian Johnson, concerning the loan agreement, his repayment obligations and the security to be provided. What is also abundantly clear from the affidavits sworn in those proceedings is the fact that at the time those proceedings were issued it had become clear that the bungalow which Mr. Malone had believed he was purchasing with the monies loaned by Ms. Allison was not actually on the lands in Folio 11743.

6. Regrettably, Mr. Malone did not meet his repayment obligations under the loan agreement and it was that default that led to the issuing of the 2007 proceedings.
7. In the course of his submissions on this appeal, Mr. Malone made clear that he was extremely dissatisfied with the advice which he received from his solicitor and counsel in the period which immediately preceded the date upon which the 2007 proceedings were to be heard. He believes that he was coerced into settling those proceedings and undoubtedly considers that the settlement was grossly improvident. And, it is obvious from what has happened since, that Mr. Malone regrets that he did not have the opportunity to, *inter alia*, cross-examine Ms. Allison concerning the loan agreement and her involvement in the events surrounding the purchase by him of the lands in Folio 11743 and his later efforts to sell them.
8. It is nonetheless the case that the 2007 proceedings were settled on terms which were appended to the order of High Court dated 22nd January, 2009. That order records that the terms of the settlement had been signed by both parties and their solicitors. Those terms provided, *inter alia*, for the sale of the lands the subject matter of proceedings and the payment to Ms. Allison, out of the net proceeds of sale, of a sum of €230,000 together with Courts Act interest in full and final settlement of her claim. The court's order also gave the parties liberty to apply in respect of the implementation of the settlement.
9. Notwithstanding the fact that he had been legally represented at the time of the settlement, by motion dated 19th July, 2011, Mr. Malone sought to re-enter the 2007 proceedings claiming that the loan which underscored those proceedings was tainted with illegality by reason of the fact that Ms. Allison was not a bank or a licenced money lender and also on the basis that the penalty provisions therein were unlawful. He also sought an injunction to restrain the sale of the lands the subject matter of the settlement. Mr. Malone failed in both applications.
10. In circumstances where Mr. Malone was refusing to complete the sale as provided for in the settlement, Ms. Allison brought an application in the 2007 proceedings seeking that the court direct Mr. Malone to execute the contract documents which at that point had been signed by the purchasers. That application was successful and by order of the High Court dated 19th October, 2011, Mr. Malone was directed to sign the contracts within a period of seven days. That order, as will be seen from the judgement of the Supreme Court (Murray J. dated 5th March, 2012) and to which I will later refer, was the subject matter of an unsuccessful appeal by Mr. Malone.

11. Regardless of the events just described, on 15th July, 2011, Mr. Malone commenced the within plenary summons proceedings in which he seeks, *inter alia*, a declaration that the loan agreement was illegal and the settlement agreement of 22nd February, 2009 (sic) is void. The date of the settlement agreement was not 22 February, 2009 as stated in the plenary summons but rather the 22nd January, 2009, that being the date of the court order which records the terms on which the 2007 proceedings were settled.
12. In light of the terms upon which the 2007 proceedings had been settled and the fact that the High Court had earlier ordered Mr. Malone to complete contracts for sale of the aforementioned lands, by notice of motion dated 30th November, 2011, Ms. Allison sought, and successfully obtained an order striking out Mr. Malone's proceedings as bound to fail.

Judgment of the High Court

13. In her judgment delivered on 27th February, 2012, Laffoy J. noted the history of the dealings between the parties and, in particular, noted the terms upon which the 2007 proceedings had been settled. Commencing at para. 1.12 of her judgment, she referred in some detail to the five-page handwritten document, dated 17th February, 2012, which Mr. Malone had delivered as his purported statement of claim in her efforts to ascertain whether it contained anything which might undermine the validity of the settlement of 22nd January, 2009. The High Court Judge noted Mr. Malone's contention that the terms of the loan provided by Ms. Allison were extortionate. She also mentioned his assertion that the bungalow which he had intended to buy with the loan was not on the lands in Folio 11743 which he had purchased with the loan monies and that this was, in some way, due to fraudulent conduct on the part of Ms. Allison.
14. In the course of her judgment Laffoy J. referred to the affidavit of Ms. Allison in which she had explained that at the time Mr. Malone came to her seeking a loan, he had already signed the contract for the purchase of the lands in Folio 11743 and the fact that the bungalow which he had expected to purchase was not on the folio was not of her doing. She explained how the absence of the bungalow from those lands was prejudicial to her interests insofar as she had taken a charge over those lands as security for the loan. Laffoy J. also noted Ms. Allison's assertion that, in his replying affidavit in the 2007 proceedings, Mr. Malone had admitted the debt. She also referred to her contention that if Mr. Malone had any cause of action it was against the vendors of the land. She further recorded Ms. Allison's point that the matters raised by Mr. Malone in these proceedings were the same as those he had advanced in support of his defence to the 2007 proceedings which had been compromised with his agreement.
15. Ultimately, Laffoy J. concluded that in settling the 2007 proceedings, Mr. Malone had implicitly acknowledged the validity of the loan and charge which he wanted to have declared tainted with illegality in the within proceedings. Furthermore, she concluded that there was nothing in his purported statement of claim to show he had any prospect of having the settlement of January 2009 set aside. No circumstances had been advanced to justify reopening the issues which had been live in the 2007 proceedings such that they could be re-litigated. Also, no facts had been pleaded which might

substantiate a claim of fraud. It should also be noted that in the course of her judgment, Laffoy J. referred to the fact that Mr. Malone had not filed an affidavit for the purpose of disputing many of the facts relied on by Ms. Allison to support her application, notwithstanding the fact that he had been afforded the opportunity to do so.

16. Thus it was that the High Court Judge concluded that Mr. Malone's proceedings, wherein he sought to have the 2006 deed of charge and/or the settlement and consent order of 22nd January, 2009, declared void and inoperative, were bound to fail.

The Appeal

17. In support of his appeal, Mr. Malone delivered extensive written submissions in which he sets out all of the matters raised by him before the High Court and Supreme Court in these and the 2007 proceedings. The more significant aspects of his submission are recorded not only in the judgment of Laffoy J. but also in the *ex tempore* judgment delivered by Murray J. on 5th March, 2012, concerning his appeal to this court against the High Court order of 19th October, 2011, requiring him to sign the contract for the sale of the lands referred to in that order. And, it is these very same facts, which were known to Mr. Malone as far back as 2007, which he now seeks to rely upon to reverse the decision of Laffoy J. to dismiss his claim as one which is bound to fail.

Discussion and Decision

18. Before considering the approach taken by the High Court Judge to Ms. Allison's application and her conclusions thereon, it is perhaps helpful to briefly consider the court's jurisdiction to grant a defendant the relief sought by Ms. Allison in her motion of the 30th November, 2011. Whilst the decision of the High Court Judge was based upon the court's inherent jurisdiction to dismiss Mr. Malone's claim as one which was bound to fail, Ms. Allison had also sought to invoke the court's jurisdiction to strike out Mr. Malone's proceedings pursuant to O. 19 r. 28 of the Rules of the Superior Courts ("RSC") on the grounds that his pleadings did not disclose any or any reasonable cause of action.
19. An application to dismiss proceedings under O. 19, r. 28 RSC is one which may be advanced when a defendant can contend that the claim, as pleaded, does not disclose a cause of action. It is a pleadings-based assessment in the course of which the court must accept as true all of the facts upon which the plaintiff seeks to rely. Furthermore, if the pleadings can be amended so as to demonstrate a potential cause of action, the court should permit such an amendment (see McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] I.R. 425).
20. On the other hand, the court's inherent jurisdiction to dismiss a claim as one which is bound to fail invokes different considerations. It is a jurisdiction that stems from the court's entitlement to prevent an abuse of process. Clearly, to permit a plaintiff maintain a claim which is bound to fail would be to condone an abuse of the court's own process apart altogether from the fact that such an approach would be severely prejudicial to the defendant who would have to meet the costs and inconvenience of defending an unstatable claim.

21. Because the jurisdiction to dismiss a claim has the effect of denying the plaintiff their constitutional right of access to the court (Article 40.3), it is one which must be exercised sparingly (see Costello J. in *Barry v. Buckley* [1981] I.R. 306). It is also clear that an order to dismiss a claim as one which is bound to fail should not be made unless it is clear that there is no risk of an injustice being perpetrated on a plaintiff, should the court accede to such an application. The court must be satisfied on the facts of the case that the continued existence of the proceedings simply cannot be justified and that it would be manifestly unfair to the defendant to allow the claim to proceed.
22. It is also relevant to record that on an application such as that as advanced by Ms. Malone, the court is not entitled, in the exercise of its inherent jurisdiction, to dismiss an innovative or weak case as was advised by Charleton J. in *Millstream Recycling Ltd. v. Tierney* [2010] IEHC 55. Neither is the process to be used to seek an early determination of issues which ought, in the normal course of events, be determined by a plenary hearing. The court must also be satisfied that no matter what might arise on discovery or at trial, if the claim was allowed to proceed, the plaintiff's claim could never succeed. Finally, as was stated by Clarke J. in *Moylist Construction Ltd. v. Doheny* [2016] IESC 9 it is inappropriate for a court to exercise its inherent jurisdiction to dismiss a claim as bound to fail in cases concerning factual disputes or issue of law or construction which are complex and require careful analysis.
23. It is clear from the judgment of the High Court Judge that she was mindful of the fact that she was being asked first to dismiss Mr. Malone's claim under O. 19 r. 28 RSC on the basis that his five page handwritten document, which purported to be a statement of claim, did not disclose a reasonable cause of action and that, in the alternative, she was being asked to invoke the court's inherent jurisdiction to dismiss the claim as one which was bound to fail by reason of the prior history of litigation between the parties.
24. It is also beyond doubt, having regard to her careful recitation of the background facts and relevant considerations, that Laffoy J. adopted a cautious and conservative approach to the application to dismiss Mr. Malone's claim on the basis that his pleadings did not disclose a reasonable cause of action. Given that Mr. Malone had drafted the 5 page document he was relying on as his statement of claim, she was concerned that it might be unjust to strike out his claim because he lacked the ability to formulate it in a manner so as to demonstrate the existence of a reasonable cause of action. Thus, she decided not to dismiss his claim as she might otherwise have done pursuant to O. 19 r. 28 RSC. Instead, she concentrated her attention on deciding whether, in light of all the pleadings and evidence available, the claim advanced in the proceedings was one which was bound to fail.
25. As is evident from her detailed judgment, the High Court Judge clearly examined all of the facts that had been made known to the court both in these and the 2007 proceedings. She referred in her judgement to the pleadings, affidavits, exhibits and submissions made by the parties, and also to the legal issues that would arise for the court's consideration if the proceedings were permitted to go to trial. She concluded that there were no

circumstances in which Mr. Malone could succeed in obtaining the relief claimed by reason of the fact that he had settled the 2007 proceedings. In so doing he had compromised all arguments upon which he might otherwise have relied for the purpose of challenging the validity of the loan agreement and the deed of charge upon which possession of the lands had been sought in the 2007 proceedings. With the benefit of legal advice, he had agreed to compromise all such issues on the terms recorded in the court's order of 22nd January, 2009.

26. Whilst the onus of proof on an applicant who seeks to invoke the court's inherent jurisdiction to dismiss a claim as one which is bound to fail is a high one and the court's jurisdiction such that it should only be exercised sparingly and in clear cases, I am fully satisfied that nothing has been advanced by Mr. Malone to demonstrate that the approach of the High Court Judge was otherwise than in accordance with the evidence and the prevailing legal principles.
27. When Ms. Allison brought her proceedings in 2007 seeking possession of the lands in question based upon Mr. Malone's default in the repayment of the loan, he could have sought to defend that claim by challenging the lawfulness of the underlying loan agreement and/or deed of charge. Indeed, that would appear to have been his intended approach until, with the benefit of legal advice, he settled the proceedings in January 2009.
28. Whilst Mr. Malone now maintains that he was pressured into that settlement by his then legal advisors, a matter upon which this court has no right to pronounce, even if such assertion were proved true, that fact would not provide him with a basis upon which he might challenge the validity of the settlement made with Ms. Allison. He clearly knew and understood the terms of the settlement even if he now considers it was improvident.
29. As was observed by Murray J. in Mr. Malone's previous appeal, having found that the folio which he purchased with the monies borrowed from Ms. Allison did not contain the bungalow which he believed he was buying, it is understandable that Mr. Malone feels grossly aggrieved. Why he did not pursue that matter with the vendors at the time, as was remarked by Laffoy J., is difficult to understand. Furthermore, if what Mr. Malone states in the affidavit which he filed on the 26th January, 2012 is correct, it would appear that the bungalow at the core of all of this litigation is on the lands contained in Folio 29475 for the County of Louth, lands which are owned by Paul, Dermot and Peter Smyth. And, whilst they apparently accept that when they purchased the lands they had not intended to buy the bungalow, those lands are now the subject matter of a charge to Ulster Bank Limited, thus putting them beyond the reach of Mr. Malone.
30. Regrettable and all as the events may be concerning Mr. Malone's efforts to buy the bungalow, all of the relevant facts concerning the loan agreement, as well as all that had transpired in relation to the lands in both folios up to and including January 2009, were known to him at the time he proceeded, with the benefit of legal advice, to settle Ms. Allison's claim rather than dispute her entitlement to possession on the grounds that he

would propose to rely upon in the within action if it was permitted to proceed to a plenary hearing.

31. Having reviewed in full all that was before the High Court Judge when she made her order, I am fully satisfied that she correctly identified the court's jurisdiction on the application and facts before her and did not err in law, or in fact, when she dismissed Mr. Malone's claim under the court's inherent jurisdiction as one which was bound to fail.
32. Although unnecessary so to decide, it also appears to me that the legal issues identified in the plenary summons have, in any event, since the judgment of Laffoy J., become *res judicata* by reason of the decision of this court delivered the week after her judgement. In his *ex tempore* judgment of 5th March, 2012, Murray J. referred to the fact that all of the matters relied upon by Mr. Malone insofar as the terms of the loan agreement were concerned and as to his dealings with Ms. Allison were known to him in 2007, yet he compromised any claim he might have had in respect of those dealings when he settled the claim for possession on the terms agreed in January 2009. That being so, he was bound by the terms of the settlement and obliged to complete the sale of the lands. It follows that Mr. Malone has no entitlement to seek to re-litigate the validity of the loan agreement or the settlement of January 2009.
33. For all of the aforementioned reasons, I would dismiss the appeal.