[2019] IEHC 948

THE HIGH COURT

[2018 No. 1105 P]

BETWEEN

ROLF KANE

PLAINTIFF

AND

PROPERTY REGISTRATION AUTHORITY, TANAGER DESIGNATED ACTIVITY COMPANY, BANK OF SCOTLAND PLC AND THE ATTORNEY GENERAL

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 13th day of December, 2019

1. Following consideration of the ruling yesterday about the sequencing of the motions to be heard before the Court, the plaintiff agreed that the applications of the second and third named defendants ("these defendants") to strike out the plaintiff's claims against these defendants should proceed. The plaintiff's approach to the recovery by the second named defendant ("Tanager") of monies which he borrowed and secured on his home in Clonsilla for the sum of €266,000 from Bank of Scotland (Ireland) Limited ("BOSI") in 2006 has been complicated and protracted. The plaintiff advances similar grounds in his complaints against the third named defendant ("BOS") which realised its security for a loan of some €240,000 by BOSI to the plaintiff in respect of a buy-to-let at Warrenstown.

2. The claims made by the plaintiff can be grouped as follows:-

   (a) The challenge to the cross-border merger which resulted in BOS acquiring the rights of BOSI under the undisputed loan and security arrangements with the plaintiff;

   (b) The challenge to the loan sale transaction with Tanager;

   (c) The challenge to the approved order;

   (d) The challenge to the regulatory status of BOS;

   (e) A fair procedures challenge;

   (f) The absence of registration in the Property Registration Authority ("PRA");

   (g) The personal data complaint.

3. The ability of a mortgagor involved with BOSI to rely on the cross-border merger whereby BOSI was dissolved has been the subject of judgments of the Superior Courts over the past number of years. Furthermore, the ability of a mortgagor to rely on a failure which could only affect the rights of a mortgagee or its assignee between themselves has been the subject of judgments which bind this Court. Perceived procedural, administrative or PRA irregularities, which can only be relied upon by parties other than a mortgagor, do not avail a mortgagor. The Court listened carefully this morning to the plaintiff iterating that the law is the law and that he accepts the full rigors of the law. The plaintiff submitted that he does not want a "*free house*"; in other words the Court understands

that he acknowledges his debt to the entity which is entitled to recover the principal and accrued interest secured against his home and for that entity's right to be exercised pursuant to contractual documents which are enforceable at law. There is no facility in private arrangements for a party to involve some perceived transgression of public law by a party to the arrangement and in respect of which the moving party is not given a right in law to prosecute or ensure enforcement.

Case law

4. For the sake of clarity, the following three judgments, *inter alia*, guide this Court:-

   (i) The Supreme Court judgments in *Kavanagh v. McLaughlin* [2015] IESC 27, [2015] 3 I.R. 555 ("*Kavanagh v. McLaughlin*") and *Freemans v. Bank of Scotland Plc* [2016] IESC 14 (unreported, Supreme Court, 15th March, 2016) concerning the said cross-border merger.

   (ii) The judgment of Simons J. in *Leahy v. Bank of Scotland Plc*. [2019] IEHC 203 (unreported, High Court, 5th April, 2019) concerning an application covering many of the grounds relied upon by the plaintiff when drafting these proceedings which originally issued on 7th February, 2018.

5. As far as this Court is concerned, the three above mentioned judgments, when read and understood, reveal that all bar two of the categories of claims i.e. data privacy and the effect of the judgment of Baker J. in Tanager DAC v. Kane [2018] IECA 352, [2019] 1 I.R. 385 on the plaintiff's grounds for seeking the reliefs sought at paras. 17(l)-(q) and 17(u) of the latest amended statement of claim are now unreasonable and do not disclose a subsisting cause of action for the plaintiff against these defendants taking the facts as pleaded by the plaintiff.

Difference between application under Order 19 rule 28 and inherent jurisdiction

6. Paragraphs 15-53 of the judgment of Clarke J. (as he then was) in *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21, [2014] 2 I.R. 301 at pp. 307-311 contain a succinct analysis of the law and its history about the sparing use of the court's inherent jurisdiction to dismiss proceedings against parties because they are bound to fail. There is little point in detaining everyone here in court this afternoon to read out those paragraphs which have been available to the parties long before the hearing of these motions commenced yesterday other than to stress that parties have a range of procedures to avail of before proceedings come to a plenary trial. All that a plaintiff has to do to defeat a suggestion that a claim is bound to fail on the facts is to put forward a credible basis for suggesting that he may at trial be able to establish facts which are necessary for success in the proceedings.

7. Applying O. 19, r. 28 of the Rules of the Superior Courts, I find the facts as opposed to the law as pleaded in the latest statement of claim disclose no reasonable cause of action against these defendants insofar as the declaration sought affect these defendants at para. 17(l) (m), (n) and (o) of the latest amended statement of claim. Ideally pleading should be limited to the pleading of fact rather than the law because facts actually

underscore how the law is going to be applied. The reliefs sought at paras. 17(p), (q), (r) and (u) may be grouped into three categories:-

(i) The declaration sought at 17(p) is, respectfully, incoherent and is not grounded upon any particular of fraud which must be specifically pleaded according to the Rules of the Superior Courts and practice. More significantly, the impugned transaction from BOS to Tanager is not a transaction with the plaintiff. Therefore, the plaintiff is bound to fail in his claim in this regard on that ground alone.

(ii) The reliefs sought at (q) and (r) refer to an alleged violation of the plaintiff's private data rights. Despite having been afforded an opportunity by replying to a request for particulars, the plaintiff has not pleaded or particularised the data allegedly obtained by these defendants or the prospective illegal processing of data by Tanager. Moreover, the plaintiff does not deny that he gave the necessary consent to BOSI when originally arranging for the loan and the security

(iii) The plaintiff has singularly failed to plead or identify in submissions, whether written or oral, any loss or damage which will ground an application for damages to be awarded against either of these defendants. Therefore, the Court, pursuant to its inherent jurisdiction, strikes out the reliefs sought at paras. 17(p), (q), (r) and (u).

Judgment of Baker J.

8. The parties, and anyone following the efforts of Tanager in the courts to resolve their disputes, will be aware of the circumstances giving rise to the answers and particularly answer five given by Baker J. in the case stated by Noonan J. who heard the appeal of Tanager from the decision of Her Honour Judge Linnane. The plaintiff in his submissions to this Court refers to what he understood was a reservation expressed by Baker J. at paras. 67-68 and 86-87 which he wishes to rely upon. Baker J. mentioned that an application for possession relying on the register maintained by the PRA could be deferred by a stay on enforcement or on implementation of an order for possession to allow for inter-partes proceedings where the PRA is the respondent relating to the rectification of the register. In that vein, the plaintiff argues that these proceedings can be distinguished from the points which he made and which are resolved by reference to the three above mentioned judgments.

9. That all sounds plausible except that the Court of Appeal judgment actually determined the point arising between the plaintiff and Tanager which was referred to the Court of Appeal by Noonan J. and which the plaintiff seeks to advance now in these proceedings. Paragraphs 88-135 of Baker J.'s judgment explain how each of the challenges made by the plaintiff to the entitlement of Tanager to be registered as owner should be dismissed. The Court of Appeal, in a judgment which is binding on this Court, found that Tanager was and is entitled to be registered.

10. The plaintiff in this case states and argues that the dictum of Laffoy J. in *Kavanagh v. McLaughlin* means that one should be registered before there could be a lawful transfer.

That issue is between the plaintiff and Tanager and is now decided and issue estoppel, for want of a better description, arises. For that reason, this ground of the plaintiff, additional to those comprehensively determined by the three above mentioned judgments, means that the plaintiff's claim against these defendants as eventually pleaded and elaborated upon in this Court is bound to fail.

11. Therefore, the Court will make an order striking out the plaintiff's claim against the second and third named defendants as pleaded in his latest statement of claim pursuant to O. 19 r. 28 and the inherent jurisdiction of the Court as explained in this *ex tempore* judgment which will be typed up and will be available for collection as soon as resources are available. To be precise, and subject to what counsel and the plaintiff may wish to address me on, the plaintiff's claim against these defendants is struck out insofar as the reliefs sought at paras. 17(p), (q), (r) and (u) are concerned.

Application for costs

12. In relation to the application for costs, costs follow the event; Order 99 so provides. If the Court was to depart from that it must state the reasons. The plaintiff when asked for his submissions in regard to the application for costs said to the Court "*do what you want*". Therefore, the Court in the absence of any submission on reasons to depart form the rule and in accordance with the rules, will direct the plaintiff to discharge the costs of the second and third named defendants to be adjudicated upon in the event that there is no agreement concerning the assessment of costs.

Application by the first and fourth named defendants

13. There is now an application by parties who have been represented in Court for the duration of the two days of this hearing. I was indeed alerted to the prospect of this form of application when the matter opened. In fairness, the plaintiff did acknowledge that he knew that it may be coming down the tracks but he has not been afforded an opportunity to put forward his side about whether there is a case to be made against the Property Registration Authority or the Attorney General. Further the *ex tempore* judgment has not actually dealt with the issues which may arise.

14. So if those defendants want while acknowledging that one does not need to be given liberty to bring a motion, I will give liberty to bring a motion to this Court for the purpose of managing such applications. I am concerned that this type of application is a drain on everybody's resources – plaintiff, defendants and the taxpayer – some focus should be brought to the wide-ranging claims made by the plaintiff. Although he is a lay litigant, he cannot be treated differently to other litigants before the Court. There are rules for pleadings which should be followed - so all I can say is that the first named defendant and the fourth named defendant have liberty to issue motions returnable to this Court with a view to try to manage any applications so that they are heard in an efficient manner and with due regard to the resources available.