

Neutral Citation No. [2017] NIQB 36

Ref: **McB10253**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **28/03/2017**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

HERBERT A LUSBY

Plaintiff;

-and-

**DANIEL McATEER
GAVIN McGILL
KEVIN DOWNEY
MARTIN SHEEHAN**

Defendants.

McBRIDE J

Application

[1] This is an application by the first named defendant, Mr McAteer, for an order pursuant to Order 18 Rule 19(1) that the proceedings be struck out on the grounds:

- (a) They disclose no reasonable cause of action, and/or
- (b) Are scandalous, frivolous or vexatious; and/or
- (c) They are otherwise an abuse of process.

[2] Initially the plaintiff was a litigant in person. Subsequently he instructed solicitors and was represented at this hearing by Mr McEwen. The first named defendant acted as a litigant in person.

Relevant legal principles in respect of Order 18 Rule 19

[3] Order 18 Rule 19 of the Rules of the Court of Judicature provides:

“19. - (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

- (a) it discloses no reasonable cause of action or defence, as the case may be; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).”

[4] In O’Dwyer v Chief Constable of the RUC [1997] NI 404 Carswell LCJ set out the applicable principles in an Order 18 Rule 19 application at page 406C as follows:

“For the purposes of the applications, all the averments in the statements of claim must be assumed to be true. ... In considering the averments contained in them we must bear in mind the well-settled principle that the summary procedure for striking out pleadings is to be used only in plain and obvious cases (see Lonrho Plc v Tebbit [1991] 4 All ER 973 at 979 per Browne-Wilkinson V-C). Various formulations of this principle have been used: it has been said that it ‘ought not to be applied to an action involving serious investigation of ancient law and questions of general importance’ (see Dyson v A-G [1911] 1 KB 410 at 419 per Cozens-Hardy MR), that it should be confined to cases where the cause of action was ‘obviously and

almost incontestably bad' (see *Dyson* at 419, per Fletcher Moulton LJ), and that an order should not be made unless the case is 'unarguable' (see *Nagle v Feilden* [1966] 2 QB 633 at 651 per Salmon LJ). That said, it is to be recognised that if the claim is bound to fail on the law, the courts should not shrink from striking out. As Sir Thomas Bingham MR expressed it in *E (a minor) v Dorset CC* [1995] 2 AC 633 at 693-694, in a passage approved by the House of Lords:-

'...There should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or in any way sensitive to the facts, an order to strike out should not be made. ...'"

[5] Gillen LJ, dealing with an Order 18 Rule 19 application stated in *Rush v PSNI* [2011] NIJB 28 at paragraph [10] as follows:

"Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out."

[6] Under grounds (b)-(d) of Rule 19, evidence by affidavit is admissible and the court can explore the facts fully but should do so with caution.

[7] The court has a general jurisdiction to expunge scandalous matters in any proceedings if the matters pleaded are not admissible in evidence to show the truth of any allegation in the pleadings which is material to the relief prayed.

[8] Where it appears in a statement of claim that the cause of action arose outside the statutory period of limitation and there is nothing before the court to suggest that the plaintiff could escape from this defence, the claim will be struck out on the grounds that it is frivolous, vexatious and an abuse of the court - (as per *Riches v DPP* [1973] 1 WLR 1019).

[9] The court will also, in a proper case, prevent its machinery being used as a means of vexation or oppression. The categories of conduct rendering a claim frivolous, vexatious or an abuse of court are not closed and depend on the circumstances. Examples where cases have been struck out on this basis include proceedings issued for a collateral purpose, hopeless proceedings, re-litigation, spurious claims and proceedings which have been issued after undue delay.

Chronology of proceedings

[10] The plaintiff, whilst a litigant in person issued a writ, endorsed with a statement of claim on 17 July 2015. The plaintiff's claim was set out as follows:

- "1. Fraud.
2. Conspiracy to defraud.
3. Professional negligence.
4. Conflict of interest.
5. Loss of income."

[11] The plaintiff then filed an affidavit sworn on 25 October 2016 setting out the particulars of his claim against each of the defendants. On 28 October 2016 Deeny J ordered that this affidavit was to be "treated as the statement of claim on the writ of summons 17 July 2015 by agreement of the parties."

[12] Subsequently the plaintiff secured legal representation and by order dated 15 December 2016 this court gave the plaintiff liberty to serve a statement of claim in conventional form. A statement of claim was then filed on 23 December 2016.

[13] As the first named defendant's application was based on all grounds set out in Order 18 Rule 19 and not just ground (a) this court further ordered on 15 December 2016 that the parties were at liberty to file affidavit evidence.

[14] The affidavits filed by the parties in respect of this application are as follows:

- (1) Affidavits of the first named defendant dated 2 October 2016, 8 November 2016 and 3 January 2017.
- (2) Affidavits of the plaintiff dated 25 October 2016 and 6 January 2017.

Background

[15] As appears from the plaintiff's affidavit dated 25 October 2016 he entered into a joint venture agreement with the fourth named defendant, Mr Sheehan on 11 May 2005, to develop a site situate at Springtown Road, Londonderry. The site is hatched blue on the map attached to the agreement. The site is divided into plots "A", "B" and "C".

[16] Under the terms of the joint venture the parties agreed that they would control the management of the joint venture, determine policy to attain the joint venture objects and make decisions on matters of principle in relation to the joint venture.

[17] Plots B and C were developed, sold and the monies accounted for in accordance with the terms of the joint venture.

[18] The present dispute relates to Plot A. Plot A comprises just over one acre and is contained in Folio 2826 County Londonderry (hereinafter referred to as "Plot A").

[19] Plot A was originally registered in the sole name of the plaintiff. The statement of claim avers that on 12 January 2005 the plaintiff transferred Plot A to the fourth named defendant. A copy of the transfer was not provided to the court. Correspondence attached to the plaintiff's affidavit sworn on 25 October 2016 includes a letter from the first named Defendant which states the parties agreed that Plot A was to be sold for £160,000.

[20] On 9 March 2007 the fourth named defendant and the Ulster Bank entered into a mortgage secured on a number of lands including Plot A.

[21] In or around October 2011 the plaintiff became aware that the fourth named defendant was dealing with Plot A and had procured a £2m loan using Plot A as part security. He avers that the fourth named defendant "in collusion with Daniel McAteer" obtained this loan.

[22] Plot A was subsequently sold by receivers appointed by the Ulster Bank for the sum of £200,000. The plaintiff avers he never received 50% of the sale proceeds.

[23] At the 12th paragraph of the plaintiff's affidavit, sworn on 25 October 2016 he avers that "between 2005 and 2011 this Plot A was registered in the name of Martin Sheenan and remained unsold. However I was advised that at all times, that attempts were being made to sell this plot and have the monies distributed on a 50/50 basis, which was part of the initial agreement and which was my understanding".

[24] Nowhere in this affidavit does the plaintiff make any complaint that he executed the transfer of Plot A to the fourth named defendant as a result of the undue influence of the first named defendant.

[25] In the conventional statement of claim filed on 23 December 2016 the plaintiff frames his claim against the first named defendant as undue influence.

[26] He avers that the first named defendant and/or the fourth named defendant together arranged for Plot A to be conveyed into the name of the fourth named defendant on or about 12 January 2005. Contrary to the provisions in the joint

venture agreement, the fourth named defendant did not sell the lands but charged them in favour of the Ulster Bank to secure a loan of £2m borrowed by the fourth named defendant for purposes not connected with the joint venture.

[27] The plaintiff avers the first named defendant was appointed to act as his accountant in 2004. The first named defendant was also the sole director and controller of PCI Consulting Limited, which was appointed as manager of the joint venture. The first named defendant helped draw up the joint venture and recommended solicitors to the plaintiff. The plaintiff avers that the first named defendant was his business advisor and he reposed trust and confidence in him. This relationship was such that undue influence should be presumed.

[28] The plaintiff further avers that the transfer of Plot A to the fourth named defendant was manifestly disadvantageous to him as the transfer was in breach of the joint venture and he did not receive the benefit he was entitled to under the terms of the joint venture. As the lands have now been sold and are not capable of being recovered the plaintiff seeks damages, presumably in lieu of rescission of the transfer.

First named defendant's submissions

[29] Mr McAteer submitted the pleadings disclosed no reasonable cause of action; and or were scandalous, frivolous or vexatious and/or were otherwise an abuse of process.

[30] In his affidavits and in his oral submissions he submitted the plaintiff's claim, in respect of undue influence was hopeless and without foundation because:

- The plaintiff agreed to sell Plot A to the fourth named defendant in May 2004. The first named defendant was engaged as an accountant by the plaintiff from 29 March 2005. Therefore he was not in a relationship of trust and confidence at the time of the agreement to transfer Plot A and was not therefore in a position to exercise influence over the plaintiff.
- If he had been engaged by the plaintiff at the time of the transfer he denies there was a relationship of trust and confidence. He was engaged only as an accountant and never gave advice to the plaintiff about the transfer of Plot A.
- He denies that he exercised any undue influence over the plaintiff.
- The plaintiff had the benefit of independent legal advice in relation to the sale of Plot A and there was therefore no undue influence.
- The transfer of Plot A was not to the manifest disadvantage of the plaintiff as the lands were sold at market value.
- The transfer of Plot A did not breach the joint venture. Nowhere did the joint venture prevent transfers of land inter parties.
- The only breach of the joint venture was the fourth named defendant's alleged failure to pay 50% of the proceeds of the subsequent sale of Plot A to the plaintiff.

- The plaintiff's loss does not arise from the transfer of Plot A but from the subsequent behaviour of the fourth named defendant, in failing to pay him 50% of the proceeds of sale. Therefore the only case made out in the pleadings is one against the fourth named defendant and not the first named defendant.

[31] He further submitted that the claim was scandalous, frivolous and vexatious as it was statute barred. The lands were transferred in January 2005. The mortgage to the Ulster Bank was executed on 9 March 2007. The writ was not issued until 17 July 2015. In these circumstances he submitted any claim in respect of the transfer was statute barred.

[32] Thirdly, he submitted that the proceedings amounted to an abuse of process. In his affidavits he stated that he had been experiencing on-going harassment and intimidation by the plaintiff. The plaintiff had colluded with others to damage his interest. In particular he submitted that there had been a plethora of vexatious litigation and the making of false accusations against him by the plaintiff to the PSNI and the ACCA about misappropriation of funds. Mr McAteer submitted the plaintiff had already shown bad faith by acting as a witness against him in other litigation and he believed that the present proceedings contained false allegations and were issued solely to harass him. He submitted that at no time prior to the issue of the writ had the plaintiff complained about the transfer of the lands. He submitted that the sole issue related to a dispute between the plaintiff and the fourth named defendant. He submitted he was only joined to the proceedings as the plaintiff wished to further harass him and waste his time and money in defending this spurious claim.

Submissions on behalf of the plaintiff

[33] Mr McEwen submitted that the pleadings did disclose a reasonable cause of action. He said that it appeared from the statement of claim that undue influence could be presumed on the basis that the plaintiff reposed trust and confidence in the first named defendant as he was his accountant and business advisor at the date of the transfer of Plot A. Further the statement of claim set out that the transfer of Plot A was to the plaintiff's disadvantage as the fourth named defendant subsequently raised monies on it and when the lands were sold the plaintiff did not receive 50% of the proceeds. In all the circumstances he submitted the plaintiff was entitled to damages for the undue influence which had been exercised by the first named defendant over him when he transferred the lands to the fourth named defendant.

[34] Mr McEwen denied that the claim was statute barred and submitted that undue influence was an equitable claim and had therefore no statutory period of limitation. He further denied that the proceedings amounted to an abuse of court.

Undue influence – relevant legal provisions

[35] A court of equity will set aside a transaction which is entered into as a result of the exertion of undue influence. The remedy for undue influence is usually rescission of the contract. In cases where the property can no longer be returned the plaintiff can seek a monetary equivalent – see Chitty on Contracts 32nd Edition paragraphs 8.103 to 8.105.

[36] Undue influence can be presumed in two categories of relationships. First undue influence will be presumed where the relationship of the parties falls into one of the well-established categories of relationship namely solicitor/client, parent/child etc. Secondly, undue influence will be presumed where, although the relationship does not fall into one of the well-established categories, the plaintiff can prove the existence of a relationship in which he reposed trust and confidence in the other party.

[37] When a relationship falls within either of these two categories the plaintiff need not prove actual undue influence. He merely has to prove the existence of the relationship and undue influence will be presumed.

[38] In addition to proving the existence of a relationship giving rise to a presumption of undue influence the plaintiff also has to prove that the transaction is “not reasonably accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act” (as per Lindley LJ in Allcard v Skinner [1887] LR 36 Ch.D. 145 at 185).

[39] Thus a prima facie case of undue influence only arises when both these limbs are established. This was clearly set out by Lord Nicholls in Royal Bank of Scotland v Etridge (No. 2) [2001] UKHL 44 at paragraph 14 when he said as follows:

“Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant’s financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties’ relationship. ... So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.”

Limitation

[40] In England and Wales, in cases where the facts giving rise to a claim are sufficient to found an action at law and an action in equity and in which substantially identical relief is available in each case, section 36 of the Limitation Act 1980 provides that the limitation period applicable to a claim at law should apply by analogy to a claim in equity.

[41] There is authority for the view that the statutory limitation period for breach of contract should be applied by analogy to claims for rescission of a contract. This means a claim for rescission of a contract will be statute barred if the claim is not made within the statutory limitation period for breach of contract- see Oelkers v Ellis [1914] 2 KB 139.

[42] There is no equivalent to section 36 in the Limitation (Northern Ireland) Order 1989 and therefore there is an argument the English cases are not applicable in this jurisdiction. There is however a counter argument that equity would take the view that self-same facts giving rise to a time bar in the common law would also give rise to a bar in a court of equity - see Coulthard v Disco Mix Club Limited [2001] WLR 707. There is no authority in this jurisdiction, on this point.

[43] Separately from the statutory periods of limitation, an equitable claim such as a claim for rescission based on undue influence may also be barred on the grounds of acquiescence and or laches. What amounts to acquiescence or laches will vary depending on facts of the particular case.

Consideration

[44] The plaintiff claims damages as a monetary equivalent to rescission of the transfer of Plot A to the fourth named defendant on the basis the transfer was manifestly to his disadvantage and it occurred as a result of the undue influence of the first named defendant, which can be presumed due to the nature of the relationship of trust and confidence which existed between them.

[45] In determining whether to strike out the plaintiff's claim on the ground it discloses no reasonable cause of action it is necessary to assess whether the pleaded cause of action has "some degree of success when only the allegations in the pleadings are considered. So long as the statement of claim or the particulars disclose some cause of action, or raise some question put to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out" as per Gillen J in Rush v PSNI and Another [2011] NIQB 28, paragraph [10].

[46] To have some chance of success, the plaintiff has to establish an arguable case of undue influence. He therefore has to establish (a) that the nature of the relationship between him and the first named defendant was such that undue

influence can be presumed and (b) the transaction “calls for an explanation” or in the words of Lindley LJ in Allcard v Skinner [1887] LR 36 ChD 145 at 185:

“The transaction cannot reasonably be accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act.”

[47] Considering only the allegations contained in the statement of claim I am satisfied that the plaintiff has an arguable case that there was a relationship between the plaintiff and the first named defendant which gave rise to presumption of undue influence. The statement of claim asserts that the first named defendant was the plaintiff’s accountant and business advisor and in those circumstances he reposed trust and confidence in him. The first named defendant assisted in the drawing up of the joint venture, recommended solicitors and was the controller of PCI Consulting Limited which acted as the firm advising the joint venture. In all these circumstances I am satisfied that there is an arguable case the plaintiff reposed trust and confidence in him. I make it clear however that in so holding I am not ruling that the plaintiff will ultimately establish that such a relationship existed. I am merely holding that it is arguable that such a relationship existed. It is ultimately a matter for the trial judge, to determine in light of all the evidence whether such a relationship did exist.

[48] The plaintiff must also establish that the transfer “calls for an explanation”. It is clear from the pleadings that the plaintiff had the benefit of independent legal advice when he executed the transfer. Nowhere in the statement of claim does the plaintiff allege that the transfer of Plot A to the fourth named defendant was for less than market value or was in breach of the terms of the joint venture. The pleadings do not set out any basis on which the transfer was to the plaintiff’s disadvantage or “calls for an explanation”.

[49] At the 12th paragraph of his affidavit he states:

“I say and believe that in relation to Plot A...between 2005 and 2011... was registered in the name of Martin Sheehan and remained unsold. However I was advised at all times that attempts were being made to sell this plot and have the money distributed on a 50/50 basis, which was part of the initial agreement and which was my understanding.”

It is clear from this affidavit, the transfer of Plot A to the fourth named defendant was part of the normal commercial dealings of the parties under the joint venture and the transaction can therefore be accounted for on this basis.

[50] I therefore find that there is nothing about the transfer of Plot A by the plaintiff to the defendant which “calls for an explanation”. The transaction can reasonably be accounted for on the grounds of relationship namely a business relationship as set out in the joint venture under which lands could be transferred between the parties, ultimately for resale. In addition there is nothing about the circumstances of the transfer which “calls for an explanation”. The plaintiff had the benefit of legal advice and there is no allegation that Plot A was sold at an undervalue or in breach of the joint venture. In fact the situation was quite the reverse. Such inter party transfers of land were a feature of the joint venture. I therefore find that the plaintiff has not made out even an arguable case that the transaction calls for an explanation. In these circumstances his claim based on undue influence is uncontestably bad.

[51] The statement of claim asserts at paragraph 10 that the transfer was:

“so manifestly disadvantageous to the plaintiff in that he did not receive the benefit to which he was entitled under the terms of the joint venture agreement or the value of the lands, being at least the value of the amount lent to the fourth named defendant by the Ulster Bank Limited”.

[52] It is clear from these pleadings that the case being made, is not that the transfer of Plot A to the fourth named defendant was manifestly disadvantageous to the plaintiff, but rather that the fourth named defendant’s actions in subsequently raising security for a loan on the lands and failing to pay the plaintiff 50% of the net proceeds of the sale of Plot A was manifestly to his disadvantage and in breach of the joint venture. His complaint is therefore about what happened, not when Plot A was transferred by him but when it was resold by the fourth named defendant. This view is supported by the fact the first time the plaintiff complained that the transfer of Plot A occurred as a result of the undue influence of the first named defendant was when the lands were sold by the fourth named defendant and he did not receive 50% of the proceeds of sale.

[53] I therefore find that the only case made in the pleadings, is that the plaintiff’s claim and his loss, arises not from the initial transfer but from the fourth named defendant’s alleged failure to pay him 50% of the net proceeds of sale when Plot A was resold. The plaintiff’s pleaded claim is not a claim against the first named defendant but rather a claim against the fourth named defendant.

[54] For these reasons I find that the plaintiff has failed to disclose a reasonable cause of action in the pleadings against the first named defendant.

Vexatious and frivolous

[55] Pleadings can be struck out on this basis if they are statute barred. In the present case the writ was issued ten years after the transaction. If this was a simple

case in contract it would be statute barred. The claim however is framed as an equitable claim. At the present time there is no definitive authority in this jurisdiction as to whether such a claim would be statute barred on the basis it is analogous to a common law claim. In these circumstances it would be wrong for this court on an Order 18 Rule 19 application to strike out the claim as the matter raises legal issues which should be fully argued before the court.

[56] A claim in equity can also be barred on the grounds of laches and acquiescence. Such bars however depend on all of the circumstances of the case and therefore at this stage, in the absence of evidence the court is not in a position to say that such defences would definitely bar the plaintiff's claim. Therefore although there has been significant delay by the plaintiff, the court would not strike out the pleadings on this basis as there is an arguable case to be made to address the issues of whether the claim is barred on the basis of acquiescence and/or laches.

Abuse of court

[57] Given that the court has already indicated the pleadings will be struck out on the basis that they disclose no reasonable cause of action there is no need to further consider whether they should also be struck out on the basis they are an abuse of court.

Conclusion

[58] I therefore grant the first named defendant's application to strike out the pleadings as against the first named defendant.

[59] I will hear the parties in respect of costs.