THE HIGH COURT

[2023] IEHC 326

[2021/4101P]

BETWEEN

JOHN CRONIN

PLAINTIFF

AND

PEPPER FINANCE CORPORATION IRELAND DAC

AND

OTTERHAM PROPERTY

AND

KPMG

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 25th day of May, 2023

Introduction

1. There are a number of motions before the court. These are:

(1) the third defendant's (KPMG) motion to strike out the plaintiff's case as being an abuse of process, frivolous and vexatious and/or bound to fail;

(2) a similar application by the first and second defendants;

(3) the plaintiff's motion to join a number of other co-defendants;

(4) the plaintiff's motion to compel KPMG to file a defence; and

(5) the plaintiff's motion for an injunction to restrain a sale of land (which has already been sold).

2. It was agreed between the parties that I would first deal with KPMG's motion to strike out the plaintiff's proceedings. All other motions will be considered at a later date.

3. The plaintiff's applications - and indeed that of KPMG - have been before the court on a number of occasions. During one of these earlier applications, the plaintiff indicated that he wished to bring an application to amend his statement of claim. In order to afford the plaintiff every procedural fairness and, in order to ensure that the proper issues were before the court, I granted liberty to the plaintiff to file an amended statement of claim. The plaintiff filed his amended statement of claim on 25th November, 2022.

4. Despite these amendments, KPMG still wishes to apply to have the plaintiff's amended claim against it struck out, on the grounds that it fails to disclose a reasonable cause of action, that it is an abuse of process, that it is frivolous and/or vexatious and/or that it is bound to fail.

Background to these proceedings

5. The plaintiff, Mr. Cronin, borrowed monies from ACC Bank in 2005, secured by a mortgage over his property which consisted of certain farmlands and a house in County Cork in folio 17368. Mr. Cronin subsequently defaulted on this loan and a receiver was appointed over his assets in November 2013. ACC Bank transferred this loan to another company, and the loan was eventually acquired by Pepper Finance Corporation Ireland DAC, the first defendant in these proceedings. Pepper Finance then sold this property in 2021 as mortgagee in possession.

6. The plaintiff is a lay litigant and his claims in the amended statement of claim are diffuse and difficult to follow. It appears that the central issues about which the plaintiff claims are as follows:

1. that, in or about 2009, ACC negligently, and in breach of their duties to the plaintiff, advised him not to accept an offer of €500,000 for the sale of his lands;
2. that ACC put the plaintiff under severe pressure in 2020 to sell his lands for €165,000 and threatened to appoint a receiver if he did not accept that offer;
3. that ACC unlawfully and/or fraudulently transferred his loan to the first and/or second defendants;
4. that the first and/or second defendants unlawfully and/or fraudulently sold the plaintiff's property;
5. that ACC wrongfully appointed KMPG as receiver over the plaintiff's assets;
6. that KPMG also acted unlawfully in the sale of his property; and
7. that Mr. Shane McCarthy, the receiver, acted unlawfully in not protecting the plaintiff's interests and put the interests of the first and/or second defendant and/or those of KPMG before the best interests of the plaintiff;

6. There are also other claims made by the plaintiff against KPMG which I will deal with in more detail below.

7. The plaintiff also pleads that ACC appointed an auction house to sell other assets of the plaintiff, namely industrial machinery. The plaintiff pleads that this was sold for €165,000 but none of this money was credited to the plaintiff's account with ACC .

8. In the statement of claim the plaintiff seeks *inter alia* :

1. An order setting aside the sale of his property.

2. An order for KPMG not to disclose more privileged information/data to the first or second defendant or their solicitors.

The procedural history of these proceedings

9. The plaintiff issued these proceedings on 14th June, 2021 by way of plenary summons. KPMG entered an appearance on 3rd August, 2021. On 1st September, 2021, the plaintiff delivered a statement of claim. On 22nd September, 2021 KPMG issued a request for further and better particulars. The plaintiff replied to these particulars on or about 21st October, 2021.

10. On 13th December, 2021, in the light of the statement of claim and the replies to particulars, KPMG issued a motion to strike out the plaintiff's proceedings, grounded on the affidavit of Mr. David Wilkinson. On 14th March, 2022, the plaintiff delivered a replying affidavit. Further affidavits were also filed by both parties in the motion.

11. One week after KPMG issued its motion, the plaintiff issued a motion seeking to join a number of parties to the proceedings including Mr. Shane McCarthy, the receiver, who is a partner in the restructuring department of KPMG.

12. On 20th September, 2021, Mr. Cronin issued a second motion seeking judgment in default of defence against KPMG but this was not served on KPMG until 4th March, 2022.

13. As set out above, the plaintiff also issued a motion to amend his statement of claim and I granted liberty to the plaintiff to amend his statement of claim. The amended statement of claim was delivered on 25th November, 2022.

The legal principles governing applications to strike out proceedings

14. Order 19 rule 28 of the Rules of the Superior Courts 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 judgment to be entered accordingly, as may be just."

15. Thus a court may order pleadings to be struck out on the basis that they disclose "no reasonable cause of action" or if the action is shown to be "frivolous and vexatious ".

16. It is settled law that the jurisdiction of the courts to strike out proceedings is one which should be exercised sparingly and only in clear cases.

17. In *Salthill Properties Ltd v. Royal Bank of Scotland Plc* [2009] IEHC 207 (at para. 3.12) Clarke J. (as he then was) stated:

"For the purposes of order 19 rule 28, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim."

18. The court also has an inherent jurisdiction to strike out proceedings as an abuse of process. In *Barry v. Buckley* [1981] IR 306 Costello J. stated:

"But apart from Order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the party's pleadings but is free to hear evidence on affidavit relating to the issues in the case. ..... The principles on which it exercises this jurisdiction are well established - basically its jurisdiction exists to ensure that an abuse of the process of the courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the Plaintiff's claim must fail (per Buckley, J., in Goodson v. Grierson at 675)."

19. As was stated by Clarke J. (as he then was) giving the unanimous decision of the Supreme Court in *Keohane v. Hynes* [2014] IESC 66 at 6.5:

"It is important, for the avoidance of any doubt, that the overall principle be clearly stated. As pointed out in many of the authorities, not least in the judgment of Murray

J. in Jodifern, the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings. However, as again noted by Murray J. in Jodifern, whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis.

It is for that reason that all of the jurisprudence emphasises that the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law. It is against that background that the extent of the court's entitlement to look at the facts needs to be judged."

Analysis of the plaintiff's claim against KPMG

20. Counsel for KPMG submitted that the claims against KPMG fall into three broad categories:

(i) Complaints about the sale of the plaintiff's lands in Folio 17638 (i.e. the claims against the receiver);

(ii) Complaints about the auditing of a Plc in the UK called Carillion Plc which collapsed in recent years and

(iii) Complaints about KPMG's advice to a defendant company in 2005 in relation to a security for costs application brought by that company against two companies controlled by the plaintiff.

<u>The first claim of the plaintiff against KPMG – KPMG was appointed receiver and acted unlawfully</u>

21. The first discernible claim against KPMG is in paragraph 7 of the statement of claim (several paragraphs down) under the heading "Particulars". In the relevant paragraph the plaintiff states:

> *"In 2008 ACC appointed KPMG/Shane McCarthy to act as receiver. At no point has this appointment been verified by either Pepper Finance Corporation Ireland DAC or Otterham Property."*

22. At paragraph 13 of his amended statement of claim, the plaintiff claims that:

> *"KPMG have acted illegally in the sale of his property with Pepper Finance Corporation Ireland DAC [and other named parties]."*

23. Mr. Wilkinson states in his affidavit that, as a matter of fact, Mr. Shane McCarthy (as opposed to KPMG) was appointed as receiver over the lands on 18th November, 2013 and he exhibits the deed of appointment.

24. Mr. Wilkinson states that Mr. Shane McCarthy is a partner in the restructuring department of KPMG but is not a party to these proceedings. Mr. Wilkinson confirmed that he spoke with Mr. McCarthy who confirmed that he was appointed receiver, following a default by Mr. Cronin on his repayment obligations to ACC.

25. Mr. Wilkinson also said that he had spoken to Mr. McCarthy, who confirmed to him that on 23rd May, 2022 the title to the lands were transferred to Donnickmore Farms Ltd and that this transfer was effected by the charge-holder Pepper Finance Corporation (Ireland) DAC as mortgagee in possession.

26. Mr. Wilkinson states that, although Mr. McCarthy was a partner in KPMG, a receivership is a personal appointment and Mr. McCarthy was appointed in his personal

capacity. Mr. Wilkinson says that KPMG, as a partnership or firm, was not appointed as receiver and had no involvement in the sale of the lands.

27. KPMG submitted that the unique nature of an agency of a receiver was considered by Denham J. in *Bula Ltd v. Crowley* [2003] IESC 10 where she quoted with approval from the judgment of Costello J. in *Irish Oil and Cake Mills Ltd v. Donnelly* wherein he stated as follows:

> "*The agency here is of course very different from the ordinary agency arising every day in commercial transactions. Here the receiver has been appointed by the owner in equity of the companies 'assets with the object of realising their security and for this purpose to carry on the companies' business.*
>
> *The exceptional nature of his status is to be seen from the fact that notwithstanding his appointment as agent, he is to be personally liable under contracts entered into by him (with a right of indemnity out of the assets) unless the contract otherwise provides."*

28. It is clear from Mr. Cronin's affidavits and amended statement of claim that Mr. Cronin has misunderstood the role and function of the receiver on the one hand and KPMG on the other. Mr. McCarthy was appointed in his <u>personal capacity</u> by ACC Bank Plc to act as receiver over certain lands. However KPMG was not appointed as receiver and had no involvement in the sale of such lands.

29. When I asked the plaintiff, did he accept that he might have sued KPMG based on a mistake of fact and/or law, he said no, and that he was still maintaining his claim against KPMG.

30. However, it is clear from the legal principles set out above, that a receivership is a personal appointment and that Mr. McCarthy was appointed receiver in a personal capacity and not as a partner of KPMG. It is clear therefore that all of these claims against KPMG are

misconceived, disclose no reasonable cause of action, are bound to fail, are vexatious and should be struck out as an abuse of process.

The second complaint - auditing a UK plc

31. The plaintiff also pleaded that KPMG had negligently audited the books of a U.K. public limited company John Mowlem Construction Ltd, (which had, apparently, purchased the plaintiff's former company, Irishenco Construction Ltd). He seemed to suggest that because he had purchased £20 of shares in John Mowlem Construction Ltd that this gave him a right to make this claim. Counsel for KPMG submitted that if any such cause of action existed – which KPMG disputed – it was one for the companies involved and not for the plaintiff and that such claims are clearly statute barred. I agree with these submissions. Any claim which the plaintiff purports to make in these proceedings against KPMG in relation to these matters is clearly vexatious, is bound to fail and is an abuse of process.

32. Another complaint which Mr. Cronin makes (at paragraph 7) of his original statement of claim is that KPMG "chose to side with the Plc rather than expose the fraud and corruption associated with their negligent accounts and auditing." It appears these allegations relate to John Mowlem Construction Limited and Carillion Plc These companies however were audited by KPMG UK which, Mr. Wilkinson explained, was a partnership registered under the laws of England and which is separate and distinct from KPMG Ireland, which is a partnership registered under the laws of Ireland. KPMG Ireland had no role in auditing John Mowlem Construction Ltd and/or Carillion Plc.

33. Moreover, although the plaintiff seeks to advance a claim of professional negligence against KPMG, he has not procured an expert report expressing the view that there are reasonable grounds or credible evidence for advancing such a claim. KPMG submit that it is well established that it is an abuse of process to commence proceedings for professional negligence without first having obtained a view from a suitably qualified expert that there is

credible evidence to support such a claim. See *Cooke v. Cronin* [1999]IESC 54. *Mangan v. Dockeray* [2020] IESC 67.

34. However it is clear that Mr. Cronin's complaints against KPMG Ireland in relation to the auditing of John Mowlem Construction Ltd/Carillion Plc are entirely misdirected. All his claims against KPMG (the Irish partnership) in relation to these matters are vexatious, bound to fail and an abuse of process.

The third claim against KPMG - the security for costs report in 2005

35. This third claim against KPMG also appears at paragraph 7 of the original statement of claim under the heading "Particulars". This paragraph appears to have been omitted in error in the amended statement of claim but no point was taken in respect of this. I have therefore given liberty to the plaintiff to re-instate this paragraph into his amended statement of claim.

36. The relevant paragraph in Paragraph 7 commences as follows:

> *"KPMG have also played a major part in a fraud that has been perpetrated on Mr. Cronin and his companies. They have acted with others and knowingly certified and audited accounts of a Plc company associated with the monies owed to Mr. Cronin and his companies. They have also failed to disclose conflicts of interest with this Plc (John Mowlem Plc/Carillion Plc) prior to a report being used in the High Court against the plaintiff."* (emphasis added)

37. KPMG sought detailed particulars of this aspect of Mr. Cronin's claim. From the replies furnished, the essence of Mr. Cronin's claim appears to be as follows.

38. On 9th November, 2001 two companies in which the plaintiff was a shareholder– ATL Auto Trolley Ltd and J & J [City] Ltd issued proceedings in the High Court against John Mowlem Construction Ltd. These proceedings had a record number 2001/16606P ("the 2001 proceedings").

39. The defendant brought a motion for security for costs and it appears that on 13th March, 2006, the plaintiffs in the 2001 proceedings were ordered to provide security for the defendant's costs. It appears that no security was provided and the proceedings were either struck out or stayed.

40. Mr. Cronin submitted to the court "*that the appeal in respect of the security for costs order was never proceeded with because his solicitors "were bought off by the government"*. Needless to say, no evidence of any sort was put before the court to justify this wild and reckless allegation.

41. The report to which Mr. Cronin refers (in his amended statement of claim) is a letter dated 16th June, 2005 written by Mr. Andrew Brown, a former director of KPMG. It appears that Mr. Brown was retained by the defendant in the 2001 proceedings– in the context of its motion for security for costs - to review the publicly available information of the plaintiff companies and to comment on its financial position Mr. Brown then expressed an opinion on these matters.

42. Mr. Cronin confirmed in his replies to particulars (at paragraph. 4.17) that he was not alleging that KPMG was guilty of fraud and/or corruption. Instead, the case he appeared to be making was that, because KPMG acted as auditor for John Mowlem Construction Ltd, it should not have been involved in providing an expert report on the security for costs application.

43. Mr. Cronin also claims at paragraph 7 of his statement of claim that KPMG "failed to disclose conflicts of interest" with John Mowlem Plc prior to its report being used in the 2001 proceedings against the plaintiffs.

44. There are a number of fundamental difficulties with the plaintiff's claims. First, the report which Mr. Brown provided in the security for costs application was provided in June 2005 – nearly eighteen years ago. It was provided in the context of litigation which appears to

have concluded over 17 years ago. Thus any claim arising from this report would clearly be statute-barred.

45. Secondly, Mr. Cronin was not a party to the 2001 proceedings and therefore even if this report caused damage to the plaintiffs, it is those companies which would be the appropriate plaintiff in respect of this matter rather than Mr. Cronin.

46. Thirdly, it is impossible to understand the basis for a claim for conflict of interest which appears to be based on the fact that KPMG had previously audited companies connected to the <u>defendant</u> in the 2001 proceedings. Given that the report in June 2005 was provided to the defendant in the 2001 proceedings, no claim for conflict of interest could possibly arise.

47. In those circumstances, it is clear that there is no basis in law for Mr. Cronin to issue separate proceedings seventeen years later against KPMG arising out of the provision of this report in relation to a security for costs application in separate proceedings to which the plaintiff was not even a party. Such a claim is vexatious and clearly bound to fail.

<u>Other claims against KPMG - the representations made by ACC</u>

48. The plaintiff's claims in this regard are (i) that in 2009 the plaintiff had an offer to sell the farm for €500,000 but that ACC advised the plaintiff not to sell at this point "based on his loan to value ratio"; and (ii) that, in 2020, ACC Bank pressurised the plaintiff to accept an offer on his farm for €165,000 – and threatened to appoint a receiver if he did not accept this offer.

49. KPMG submit that insofar as any of these claims are made against KPMG, they are bound to fail for a number of reasons.

50. First, it is not alleged that KPMG made any representations or gave any advice to the plaintiff about which he relied to his detriment. Instead, it is expressly pleaded by Mr. Cronin

that such representations were made by ACC, its servants or agents. These representations were made long before the appointment of Mr. McCarthy as receiver in 2013.

51. Secondly, these representations were, according to the plaintiff, made in 2009 and 2010 and, in the circumstances, any claim arising out of these representations would clearly be statute-barred.

52. Thirdly, KPMG also submit, that any such claim against KPMG is entirely misconceived. Given that Mr. McCarthy was only appointed as receiver in 2013, it is difficult to see how Mr. McCarthy could have any liability arising from such a situation and it is impossible to see how KPMG could have any liability for any such loss.

53. I agree with these submissions. Insofar as any of the plaintiff's claims against KPMG relate to these representations they are clearly vexatious and bound to fail.

The order sought not to disclose more privileged information

54. At paragraph 15 of his prayer for relief, the plaintiff seeks an order "for KPMG not to disclose more privileged information/data to Pepper or Otterham company". Mr. Wilkinson states that KPMG has not disclosed any such information to any party and points out the statement of claim does not support any plea or particular to support this relief and it is clear that the claim should be struck out. I agree. This claim to relief is not supported by any plea or evidence. It is clearly vexatious and bound to fail.

The plaintiff's claim that the defendants claimed the plaintiff was deceased in order to sell his property.

55. The plaintiff also made a claim at paragraph 14 of his amended statement of claim that some of the defendants had claimed he was deceased (in their paperwork to the Property Registration Authority) .

56. Mr. Wilkinson confirmed that KPMG had never claimed that the plaintiff was deceased "in their paperwork to the Property Registration Authorities". Indeed KPMG never

submitted any paperwork to the Property Registration Authority in relation to the lands – an averment which makes perfect sense given that KPMG was not appointed as receiver.

Conclusion

57. I am of the view that none of Mr. Cronin's claims against KPMG disclose any cause of action, let alone any reasonable cause of action. They are all bound to fail. As such to permit the plaintiff to continue with these actions would be an abuse of process. In the circumstances I will accede to KPMG's application and dismiss the plaintiff's proceedings against KPMG.