THE HIGH COURT

[2015 No. 10717 P.]

BETWEEN

ELAINE BERGIN AND STEPHEN BERGIN

PLAINTIFFS

AND
PERMANENT TSB PLC

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 20th day of December, 2018

1. By letter of loan approval dated 10th May, 2007 the defendant agreed to advance to the plaintiffs a loan of €250,000, repayable over 35 years, secured by a mortgage over the plaintiffs' house at 11 Moyglas Vale, Lucan, Co. Dublin. The interest rate was fixed for the first three years at 4.99%.

2. Special condition 4 of the letter of loan approval provided, insofar as is material, that:

> *"On expiry of the fixed rate period, and where the applicant chooses the option of a tracker mortgage interest rate, the interest rate applicable to the loan will be the tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate for the loan will be the tracker mortgage rate applicable to the balance outstanding on the loan, at the date of expiry of the fixed rate period and as maybe varied in accordance with variations to the European Central Bank refinancing rate."*

3. On or about 21st January, 2009 the plaintiffs asked the defendant to change the interest rate from a fixed rate to a variable rate and the defendant did so and confirmed the rate change by letter dated 4th February, 2009. The pleadings are not entirely clear on this point but I gather that the rate of interest was changed to the defendant's standard variable rate.

4. The case now made on behalf of the plaintiffs is that the defendant had a duty to advise them of their contractual rights and to explain the consequences and possible implications of an early termination of the three year fixed interest period. It is pleaded that in consequence of the break in the three year fixed interest period the defendant "*… subsequently contended that the plaintiffs had forfeited their contractual right to avail of a tracker rate mortgage*" and that the defendant "*failed, refused and neglected to move the plaintiffs to a tracker rate mortgage*".

5. There is some confusion or ambiguity in the plea that the defendant "*contended*" that the consequence of early termination of the fixed interest rate period meant that they were not entitled to a tracker rate. My initial impression was that the allegation was that the defendant has wrongly contended that the plaintiffs were not entitled to a tracker rate which they contended they were entitled to. Any ambiguity is resolved by the later plea that the plaintiffs "*should have been informed in January, 2009 that breaking from their fixed rate mortgage would disentitle them from availing of a tracker rate mortgage*" and that "*had they been so informed the plaintiffs would not have broken from the said rate and would consequently have been able to avail of their contractual right to a tracker rate mortgage in or about October, 2010*".

6. It is appears to be common case, then, that *prima facie* the plaintiffs were not entitled to a tracker rate unless they paid the fixed rate of interest for the entire period of three years.

7. By letter dated 31st July, 2015 the defendant is said to have acknowledged that it had made failures in the management of certain mortgage accounts and to have said that "*customers who should have been able to move their permanent tsb mortgage to a tracker rate mortgage some time ago may not have done so because of a failure by permanent tsb*". That letter was written following an investigation by the Central Bank of Ireland into the management by mortgage lenders of "*certain mortgage accounts*" specifically tracker rate mortgages.

8. The case now made against the defendant is that it was express or implied term of loan agreement and/or that the defendant owed the plaintiffs a duty to ensure that:

(a) The defendant would not levy excessive interest charges;

(b) An appropriate rate for a tracker mortgage account would be set by reference to other similar tracker mortgage accounts;

(c) The defendant would fully and properly advise the plaintiffs about their contractual rights;

(d) The defendant would advise the plaintiffs about the best repayment options available to them;

(e) The defendant would properly and adequately advise the plaintiffs of their contractual rights in the context of any discussions the parties might have about the mortgage;

(f) The defendant would not prioritise its own profits over the interests of the plaintiffs;

(g) The defendant would not expose the plaintiffs to unreasonable and/or unnecessary financial pressure and hardship.

9. With some justification, counsel for the defendant is critical of the statement of claim as not being adequately particularised. It is also in some respects ambiguous. The ambiguity I have previously identified crept back in the particulars of loss and damage, where complaint is made that the plaintiffs were "*paying more in monthly mortgage repayments … than they were contractually obliged to pay*" which rather suggests that the plaintiffs were put on a standard variable rate when they should have been on a tracker rate but, as I have said, the substance of the claim is that the plaintiffs were not given the advice they contend that they should have been given as to their options, with the result that they found themselves bound to pay a higher rate than they would otherwise have been bound to pay.

10. By a notice for further and better particulars dated 9th May, 2017 the defendant's solicitors sought extensive particulars of the claim. In a response entitled "*replies to particulars*" dated 1st November, 2017 the plaintiffs' solicitors declined to give any further

particulars on the grounds, variously, that the defendant was aware of the case against it; that the questions asked were not proper matters for particulars but were matters for interrogatories; that the questions were matters of evidence; and the answers to the questions were wholly within the knowledge of the defendant. Having thus responded to the notice for particulars on 1st November, 2017 the plaintiffs' solicitors promptly issued a motion for judgment on 3rd November, 2017 and the defence was delivered on 8th December, 2017.

11. By letter dated 9th May, 2018 the plaintiffs' solicitors wrote a letter topped and tailed with more or less the usual boilerplate, seeking voluntary discovery of six categories of documents which were said to be relevant and necessary for the "*conduct of the plaintiffs' case and/or for saving costs*". I do not think that it is pedantic to observe that documents relevant to the conduct of the plaintiffs' case, or the case that the plaintiffs might wish to conduct, may not necessarily be the same as documents relevant and necessary for the fair disposal of the action, which is the formula required by the rules and the test to be applied by the court.

12. By letter dated 30th May, 2018 the defendant's solicitors declined to make any discovery for the reasons they set out. On the following day, the plaintiffs' solicitors repeated the request for discovery and the reasons previously offered in support of it, and on 19th June, 2018 issued the motion for discovery which now comes before the court.

13. In the meantime, the defendant's solicitors had, by letter dated 31st May, 2018 protested the inadequacy of the replies to particulars of 1st November, 2017 and served another notice for further and better particulars, with a warning of a motion failing satisfactory replies within 21 days. This notice was replied on 9th July, 2018, after the motion for discovery had issued and, significantly, after the defendant's solicitors had set out in correspondence their reasons for declining to make the discovery sought, not least that the request was not justified by reference to the pleadings.

14. The plaintiffs' motion is grounded on a short affidavit of their solicitor which exhibits the correspondence and avers that "*… the discovery is necessary and relevant, will serve to save on costs and expedite the hearing of the matter*". Again there is a divergence from the form and substance required by the rules in that the averment does not identify the purpose for which the discovery is relevant and necessary.

15. In response to the motion the defendant's solicitor swore quite a long affidavit on 13th July, 2018 challenging, for the reasons set out, the relevance and necessity of the discovery sought; protesting the failure of the plaintiffs to link the categories to the pleadings or the reliefs claimed; and pointing to the failure of the plaintiffs to have made any effort to obtain the information sought by other means.

16. The defendant's solicitor also deposed that the discovery request was disproportionate in circumstances in which there was only a possibility that the documents would be relevant to the issues which might arise at trial. The defendant's solicitor's instructions were that compliance with the request would entail the searching of a large "*population*" of documents running to in excess of 700,000 documents, before key search terms and custodians were agreed and applied. He suggested that the vast amount of this documentation would be irrelevant and unnecessary to the determination of the proceedings. Far from saving costs, it was said, discovery of the scope sought would significantly increase the costs.

17. This case is one of a small number of cases identified by the parties as lead cases for a very large number of actions against the defendant which have been mounted, following the Central Bank of Ireland investigation of the management of tracker mortgage accounts, claiming damages for the alleged failure on the part of the defendant to allow customers to move to tracker rate mortgages. In each case, at the direction of the Central Bank, the defendant has made adjustments to the borrowers' account and has made an offer of "*additional compensation*", which the customer has the option to accept, or to appeal to an appeals panel established by the defendant to deal with these cases, or to pursue a complaint to the Financial Services Ombudsman, or to pursue the matter through the courts.

18. I am uncertain as to the extent to which this case is representative of the others but in all the circumstances I think it appropriate that I should offer some general observations as well as dealing specifically with the facts of the case in hand.

19. There is, I believe, considerable overlap between the six categories of discovery sought. This is evident not only in the formulation of the categories of documents sought, but in the reasons offered in support of the request.

20. For categories 1, 2, 3 and 6 the reasons given by the plaintiffs are identical and I will deal with these categories together. They are:-

> 1. All documents relating to any assessment and/or analysis by the defendant bank of the profitability and viability of its tracker products in or about 2008/early 2009.
>
> 2. Any documents relating to any product portfolio analysis carried out by the defendant bank of its tracker products in or about 2008 or/early 2009.
>
> 3. Any documents relating to any risk assessment carried out by the defendant bank on the likely or possible impacts of interest rate reductions on the defendant's tracker mortgage products.
>
> 6. Any documents advertising the defendant bank's variable rate product which were produced in or about the last quarter of 2008/first quarter of 2009, including any documentation sent to customers with a fixed rate product which carried an entitlement to a tracker mortgage at the end of the said fixed rate period.

21. It seems to me that even in the formulation of the categories of documents sought, the plaintiffs get off to a bad start. The first step in the discovery process is for the party seeking discovery to set out the precise categories of documents that are sought. Common to all four of these categories is the word "any". This betrays at least a lack of confidence that the documents exist and gives the impression of fishing.

22. The reason given in each case is that the plaintiffs plead, as they do, that the defendant prioritised its own profits over the interests of the plaintiffs. The reason continues, however, to say that "*central to this plea is the contention that the defendant was proactive in its efforts to have customers with an entitlement to a tracker mortgage product switch to a variable rate of interest*."

23. Counsel for the defendant objects that this "*contention*" is not a part of the case pleaded. That is so. The plaintiffs' case is that it was they who approached the defendant with a view to reducing the level of their monthly repayments, and not the other way around. The case is not made that the defendant was proactive or that it encouraged the plaintiff to switch rates. Rather the

complaint is that the defendant failed to advise the plaintiffs of the potential downside of doing what they wanted to do and proposed to do.

24. The reason given by the plaintiffs in support of each of these categories continues "*it is contended by the plaintiffs that the defendant bank began an analysis of its tracker products in or about 2008 and it is contended that such an analysis concluded that tracker products were no longer a profitable or viable option for the bank*". Again counsel for the defendant objects that these "*contentions*" are no part of the case pleaded. Again, I am compelled to agree. It is no part of the case pleaded that the defendant's failure to give the advice which it is said it ought to have given was motivated by a desire or policy to encourage the plaintiffs to switch their interest rate, or, perhaps, a policy to not discourage the plaintiffs from doing so. Even if that case had been pleaded, I do not think that it would justify a request for discovery of documents in the terms sought. It seems to me that these four categories (if, or to the extent to which, they exist) are not directed to establishing whether such a policy existed or was pursued, but rather whether the defendant's experience of tracker mortgages might have been the basis of any such policy. Accordingly, even if there was an issue pleaded as to whether the defendant had adopted or pursued a policy of encouraging borrowers to switch their interest rates, discovery of these four categories would not either assist the plaintiffs in establishing that there was such a policy or damage any case the defendant might have made that there was not.

25. If, for the sake of argument, the defendant had adopted a policy of moving its customers away from tracker rate mortgages, I cannot see how it would be relevant, still less necessary, to establish whether, or the extent to which, any such policy was justified or supported by any analysis of profitability or viability. These categories are not directed to any issue as to the existence or implementation of any policy but to establishing whether the defendant might have had grounds for adopting such a policy. That, it seems to me, is not only fishing, but is fishing for red herrings.

26. The case made on behalf of the plaintiffs, on the pleadings and in reasons given in support of each of these categories, is that the defendant failed to highlight to the plaintiffs that switching from a fixed rate product would disentitle them from availing of a tracker rate. Assuming, for present purposes, that the defendant owed the plaintiffs such a duty (or that it was an implied term of the contract that such advice would have been given) it seems to me that the defendant's subjective state of knowledge or understanding as to what might happen to Central Bank of Ireland liquidity requirements or European Central Bank interest rates in the future is simply not relevant.

27. As I have said, the core of the plaintiffs' case is that they were not advised in January, 2009 not to switch away from their fixed term fixed interest rate. The plaintiffs' case, inferentially at least, is that the defendant should have anticipated that the rates would go the way they did and should have advised the plaintiffs to stay the three-year course, so that they would qualify for a tracker rate. If, as it is, the plaintiffs' case is that the defendant was bound to but did not give this advice, then the defendant's subjective knowledge or assessment of the way the market might or likely would move is not relevant.

28. In my view, these four categories of documents are not relevant, still less necessary for the fair disposal of the action.

29. The fourth category of documents sought is:-

> 4. Any documents relating to the defendant bank's decision to desist from offering a tracker mortgage product in or about October, 2008 – April, 2009.

30. The reason offered in support of this category starts with an assertion that the defendant ceased to offer tracker mortgage products to new customers from October, 2008 onwards. This is no part of the case pleaded but presumably this confident assertion is capable of ready proof by the evidence of a mortgage broker. The reason continues with yet another "*contention*", this time that the defendant had identified that it was no longer profitable to offer tracker rates and that those rates were either causing the bank a loss or were generating less profit than standard variable rates. It seems to me that if the fact that the defendant ceased offering a product previously offered does not by itself give rise to the inference that it had come to the conclusion that it would make more money from the products it was continuing to offer, the move away from tracker mortgages by all of the mortgage lenders in the State could be comprehensively explained by expert evidence.

31. The plaintiffs advance two reasons for this category. The first is that the defendant has "*contended*" that a customer's entitlement to a tracker rate at the end of a fixed interest period could only be given effect to if the bank still had a tracker rate to offer to customers. The plaintiffs do not say when or how the defendant is supposed to have so contended. As was pointed out in the defendant's solicitor's response to the request for discovery and in the replying affidavit filed on this motion, this assertion is simply incorrect. The defendant has continued to provide tracker interest rates to existing customers who had a contractual entitlement to avail of such rates, as well as to customers who the Central Bank thought ought to have been advised against switching away from them: not least amongst which latter class of customers are the plaintiffs.

32. The second reason advanced for this category is the plaintiffs' contention that the bank had decided that tracker rates were less profitable or loss making and I have already dealt with that.

33. The fifth category of documents sought is:-

> 5. Any documents relating to the manner in which the margin on the tracker interest rate offered to the plaintiffs in or about July, 2015 was calculated.

34. The statement of claim says nothing whatsoever about the tracker rate of interest offered to the plaintiffs in or about July, 2015. As I have said, the statement of claim refers to a letter dated 31st July, 2015 in which the defendant is said to have acknowledged that it had made failures in the management of certain mortgage accounts and to have said that "*customers who should have been able to move their permanent tsb mortgage to a tracker rate mortgage some time ago may not have done so because of a failure by permanent tsb*". It goes no further. It does not say that the "*certain mortgage accounts*" included the plaintiffs' mortgage account, or that the "*customers who should have been able to move their permanent tsb mortgage to a tracker rate mortgage*" included the plaintiffs. The primary relief sought by the plaintiffs is a declaration that they had a contractual entitlement to a tracker rate mortgage but the statement of claim does not disclose that they have one, still less make any complaint that there is anything wrong with it.

35. In *Hartside v. Heineken* [2010] IEHC 3 Clarke J. (as he then was) citing the decision of McCracken J. in *Hannon v. Commissioners of Public Works* (Unreported, High Court, McCracken J., 4th April, 2001) observed:

> "*Relevance must be determined in relation to the pleadings in the specific case. Relevance is not to be determined by*

reason of submissions as to alleged facts put forward in affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or already discovered documents."

36. Absent any issue on the pleadings in relation to any tracker rate of interest offered to the plaintiffs in or about July, 2015, or as to the margin on any such tracker rate, there is no issue in the action to which this request can be attached. The defendant's solicitor's response to the request for voluntary discovery and the replying affidavit both made the point that the request was not tied back to any plea and went on to say, for the avoidance of doubt, that the rate offered to the plaintiffs in July, 2015 was the same as would have been offered to them in May, 2010 had they not broken early from their fixed interest rate period.

37. The reason advanced in support of this category is very peculiar. It is that the defendant was obliged to have some "*objective and verifiable criteria*" for fixing the rate offered to the plaintiffs in or about July, 2015. The case pleaded (mirroring the letter of loan approval) is that the tracker rate which the plaintiffs would have been entitled to at the end of the fixed interest period was "*the rate appropriate to the balance outstanding at the time of expiry of the fixed rate period*". There is no hook upon which to hang the "*contention*" that the defendant was obliged to have some objective and verifiable criteria for fixing the rate, or even any inferential suggestion that the rate offered to the plaintiffs was not based upon objective and verifiable criteria.

38. The reason given in support of this category goes on to "*contend*" that the unspecified tracker rate offered in or about July, 2015 was excessive and certainly greater than the tracker rate which the plaintiffs could have availed of at the time they took out their mortgage. It seems to me that this is a series of *non sequiturs*. The plaintiffs took out a 35 year mortgage in May, 2007 with a fixed interest rate for the first three years. No complaint is made that they ought then to have been offered, or would, if it had been offered, have accepted, a tracker rate mortgage. Accordingly, any tracker rate that might have been available at the time the plaintiffs took out their mortgage is irrelevant.

39. Absent, even in the letter seeking voluntary discovery, never mind the statement of claim any figure for the interest rate which the plaintiffs were offered in July, 2015 or the interest rate which they say they should have been offered, there is no basis for suggesting that the rate was excessive.

40. The plaintiffs' claim is that they lost a tracker rate which they otherwise would have availed of in May, 2010. That being so, it does not advance matters to look at, still less to seek discovery in relation to, a rate of interest offered in July, 2015.

41. For these reasons, it seems to me that the plaintiffs have failed to meet the threshold requirement of establishing the relevance of the documents which they seek and that the alternative issues of necessity and proportionality which were canvassed in argument do not arise.

42. The plaintiffs' motion is refused.