

THE HIGH COURT

[Record No. 2015/10718P]

BETWEEN

AIB MORTGAGE BANK

PLAINTIFF

AND

LAURENCE O'TOOLE AND JAMES O'TOOLE

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 23rd day of June, 2016.

1. This is a judgment on a preliminary issue between the parties herein. Before identifying that issue, it is appropriate to set out the background to the proceedings.

Background

2. The plaintiff entered into four contracts of loan (which I will refer to hereafter collectively as the "first loan") with the defendants in these proceedings for the purpose of the purchase of six different properties by the defendants as follows:-

(i) Loan advanced to James O'Toole dated 29th May, 2003 in the sum of €240,000.00 to purchase nos. 1 and 2 Woodbrook Place, Green Lane, Co. Carlow secured over those properties by way of an indenture of charge dated 11th December, 2002;

(ii) Loan advanced to James O'Toole dated 12th June, 2003 in the sum of €80,000.00 to purchase no. 15, The Glen, Carlow, Co. Carlow, secured over that property by way of indenture of charge dated 5th December, 2003;

(iii) Loan advanced to Larry O'Toole dated 10th June, 2003 in the sum of €80,000.00 to purchase no. 15, The Glen, Carlow, Co. Carlow, secured over that property by indenture of charge dated 5th December, 2003; and

(iv) Loan advanced to Larry O'Toole dated 29th May, 2003 in the sum of €240,000.00 to purchase nos. 8 and 9 Woodbrook Place, Green Lane, Co. Carlow secured by indenture of charge over that property dated 11th December, 2002.

(All of those properties I shall refer to hereafter as "the secured properties").

Each of the deeds of mortgage and charge referred to above has been registered in the Land Registry as a burden on the relevant folio.

3. The first loan was originally advanced to the defendants by Allied Irish Banks Plc.(hereafter "AIB"), but all the obligations of the defendants to AIB in connection with the first loan, together with the benefit of the mortgages/charges described above were transferred to the plaintiff herein on 8th February, 2006 and it is not in dispute that the plaintiff herein now stands in the shoes of AIB for the purposes of all rights, duties and obligations arising pursuant to the first loan as provided for in the letters of offer of loan, the general terms and conditions of loan and the deeds of mortgage and charge completed in relation to each of the loans that make up the first loan.

4. Subsequent to the advancement of the first loan to the defendants, the defendants, together with another family member, Donal O'Toole borrowed further monies from the plaintiff herein, in the sum of €760,000.00 for the purpose of purchasing properties known as 25, 27, 29 and 31 Tanner Hall, Carlow, pursuant to a letter of loan offer dated 4th September, 2008. This loan I will hereinafter refer to as the "second loan". The defendants and Mr. Donal O'Toole failed to adhere to the repayment terms of the second loan. Following unsuccessful negotiations between the defendants and Mr. Donal O'Toole, their representatives and the plaintiff, the plaintiff issued a letter of demand to the defendants and Mr. Donal O'Toole on 15th December, 2014, for repayment of the second loan. The defendants and Mr. Donal O'Toole have since that date been in default of the terms upon which the second loan was granted.

5. The default described above gave rise to the issue of proceedings by the plaintiff against the defendants and Mr. Donal O'Toole. By way of summary summons dated 1st April, 2015, the plaintiff seeks judgment in the sum of €778,684.35. The plaintiff subsequently issued a notice of motion seeking liberty to enter final judgment against the defendants and Mr. Donal O'Toole in the sum of €799,507.28 on 11th December, 2015.

6. It is not in dispute between the parties that the loans making up the first loan are "performing loans" i.e. the defendants have been meeting their repayment obligations to the plaintiff in connection with the first loan. However, by reason of the alleged default of the defendants in the repayment of their liabilities in connection with the second loan, the plaintiff notified the defendants of the occurrence of an "event of default" as defined in clause 3.03(a) of each of the deeds of mortgage and charge completed by the defendants in favour of the plaintiff over the secured properties. Accordingly, by letter dated 18th December 2015, the plaintiff demanded repayment of all sums due by the defendants to the plaintiff in connection with the first loan, save for No. 15, The Glen, which by this time had been sold by Mr. James O'Toole, and upon the sale of which he had remitted to the plaintiff the balance of the loan outstanding at the time of completion of the sale in connection with that property only.

7. The background to that sale was that solicitors acting on behalf of the defendants wrote to the plaintiff seeking particulars of the amount required to redeem the plaintiff's charges over each of the secured properties. In response, between 17th July, 2015 and 9th October, 2015, the plaintiff issued a series of letters to the solicitors for the defendants, namely James Cody and Sons Solicitors, Carlow, each of which set out the sum required to redeem the charge in respect of each property. It was quite clear from the terms of these letters that upon receipt of the balance referred to in each letter, that the charge over each property would be vacated.

There was no reference in the letters to any other monies due by the defendants to the plaintiff. In an affidavit sworn on behalf of the plaintiff on 21st December, 2015 (which affidavit was sworn for the purpose of an application seeking interlocutory orders restraining the defendants from disposing of the remaining secured properties), Mr. Conal Regan, a manager employed by the plaintiff deposed that the redemption letters had been sent in error and should have referred to the cross obligations of the defendants to the plaintiff and should therefore have included reference to the amount required to discharge all liabilities owed by the defendants to the plaintiffs and not just those sums which were borrowed by the defendant to purchase the secured properties. Mr. Regan also gave evidence to this effect upon the hearing of this application.

8. Subsequent to receipt of the letters of redemption from the defendant, Mr. James O'Toole proceeded to sell no. 15, The Glen. At the conclusion of that transaction, his solicitors paid the plaintiff the amount required to redeem the loan over that property only and sought a discharge of the charge registered by the plaintiff over that property. They distributed the balance of the proceeds of sale to the plaintiff. It was at this point that the plaintiff realised that it had made an error in the redemption letters by not making it clear that the proceeds of sale of any of the secured properties would have to be applied not just as against the amount due by the defendants to the plaintiff in respect of each of those properties, but also as against any other amounts owing by the defendants to the plaintiffs. Following correspondence leading up to the issue of these proceedings, the defendants agreed to place the funds received by them by the sale of No. 15 The Glen, amounting to €74,000, in a bank account in the names of their solicitors and to abide by the outcome of the determination of this Court as to the entitlement thereto.

9. On 21st December, 2015 the plaintiff was granted, pursuant to an ex parte application, orders restraining the defendants from disposing of or otherwise dealing with the remaining secured properties (including the proceeds of sale of any such properties that may have already been sold by the time of the making of the order) i.e. no. 14 The Glen, Mortarstown, Carlow and nos. 1, 2, 8 and 9 Woodbrook Place, Green Lane, Carlow.

10. By further order of this Court made on the 11th January, 2016, the interim order made on 21st December, 2015 was continued and on 19th January, 2016 the Court directed that the matter should proceed on the basis that there should be a trial of a preliminary issue and directed the filing of points of claim and points of defence on behalf of the parties. That issue is whether or not the plaintiff is entitled to rely upon the terms of the loan agreements and the security documentation completed by the defendants in connection with the secured properties (for the purpose of the first loan) in respect of any amounts due by the defendants in connection with the second loan. That question arises in circumstances where the amounts due in connection with the second loan were borrowed and secured to the plaintiff by different borrowers, i.e. the defendants were also borrowers of the second loan, but borrowed together with Donal O'Toole, and they together with Donal O'Toole jointly executed deeds of mortgage and charge over the properties acquired by the proceeds of the second loan. If it is so entitled, then the plaintiff is entitled to have recourse to the secured properties and to apply the proceeds of sale of the same in satisfaction not just of the first loan, but also in satisfaction of the second loan, or indeed any other liabilities of the defendants to the plaintiff.

Doctrine of Consolidation

11. The doctrine of consolidation enables a mortgagee to consolidate mortgages in certain circumstances thereby enabling the mortgagee to pool all of the assets secured by the mortgagor and to realise all of the secured assets against the total of all sums due under all of the mortgages, rather than confining the mortgagee to recovering from each secured asset only that which is due in connection with the loan secured by that asset. The right of consolidation is an equitable right and there are a number of conditions that must be met before it may be exercised by a mortgagee:

- (i) the legal dates for redemption of the mortgages must have passed;
- (ii) the mortgages must originally have been made by the same mortgagor, and
- (iii) the securities must be in existence at the time when consolidation is claimed.

12. According to Fisher and Lightwood's *Law of Mortgage*, 14th Ed., 2014:

"The principle is that, redemption being an equitable right, the person who redeems must on his own part do equity towards the mortgagee, and redeem him entirely. It would be inequitable for the mortgagor to redeem one of his securities, leaving the mortgagee exposed to the risk of deficiency on the other."

The doctrine can cause difficulties to purchasers and this was recognised when the operation of the doctrine was abolished by s. 17 of the Conveyancing and Law of Property Act, 1881 the effect of which is that unless the operation of that section is excluded, a mortgagee is not entitled to require a mortgagor who seeks to redeem a mortgage to pay money due under a separate mortgage. This section gave rise to the almost invariable practice of excluding s. 17 of the Act of 1881. The deeds of mortgage and charge relied upon by the plaintiff in these proceedings expressly exclude the operation of s. 17 of the Act of 1881.

13. The defendants claim that the plaintiff may not require the defendants to apply the proceeds of the sale of the secured properties towards the discharge of the defendants' obligations under other mortgages which the defendants, either together with or individually with Donal O'Toole, granted to the plaintiff. This argument is made on the basis that the mortgagors are not the same in each case. The defendants accept that the plaintiff is entitled to consolidate any loans and mortgages where the mortgagor is one and the same person so that the plaintiff may consolidate any mortgages given by James O'Toole only to the plaintiff or Laurence O'Toole only to the plaintiff and to that extent it may consolidate the mortgages over the secured properties. The plaintiff argues however, that it is not seeking to consolidate the first loans of the defendants or at least that it is not relying upon the doctrine of consolidation. It argues that it is expressly provided by the loan contracts and the charges completed by the defendants, in favour of the plaintiff over the secured properties that the security given is for all present and future liabilities to the mortgagee and that, as a matter of contract the plaintiff is entitled to rely upon the security granted by the defendants to the plaintiff in respect of all sums due, regardless as to whichever loan the charge was originally intended to secure.

The Loan and Charge Documents

14. The letters of the first loan offer and the charge documentation completed in relation to each of the secured properties are in each case identical. The first paragraph of the letter of loan offer states:

"I am pleased to offer you a mortgage loan of the principal sum specified in Part I attached, subject to the loan being secured by a first legal mortgage/charge for present and future advances in favour of the Bank over the property described in Part I, and acceptance of and compliance with the special conditions ..."

15. Part IV of the General Terms and Conditions of the loan provides, at para. 2.2:

The customer agrees to repay the mortgage loan and interest to the Bank and, as security therefore, agrees to grant the Bank a first legal mortgage/charge over the property and where required by the Bank, an assignment of the mortgage protection ... in addition the customer agrees with the Bank to comply with all relevant terms and conditions of this offer and to keep the property fully insured ..."

16. Paragraph 8 of the General Terms and Conditions states:

"The Bank may, subject to due compliance with any statutory requirements, if applicable, exercise the right to demand early repayment of the mortgage loan and balance outstanding and accrued interest thereon if the customer is in breach of the terms of this offer or the Bank's deed of mortgage over the property where, after due notice is given by the Bank, the customer fails to remedy the breach".

17. Referring to the mortgage required to be given by the borrower, the special conditions state that:

"It is a condition that this mortgage is held for all present and future liabilities to the Bank."

18. The deed of mortgage and charge completed by the defendants in each case define "the secured monies" as meaning "all monies and liability which the mortgagor covenants to pay to the Bank or discharge under the covenants hereinafter contained".

19. Clause 3.01 of the deed of mortgage and charge provides:

"3.01 The mortgagor hereby covenants with the Bank on demand to pay to the Bank all monies and discharge all obligations and liabilities whether actual or contingent now or hereafter due, owing or incurred to the Bank by the mortgagor in whatever currency denominated whether on any current or other account or otherwise in any manner whatsoever (and whether alone or jointly and in whatever style, name or form and whether as principal or surety) when the same are due ..."

20. Clause 3.03 of the deed of mortgage and charge states:

"3.03 The Bank shall cease to be under any further commitment to the mortgagor and the secured monies shall immediately become due and payable on demand ... on the occurrence of any of the following specified events:

(a) if the mortgagor fails to pay on the due date any money or to discharge any obligation or liability payable by him from time to time to the Bank ..."

21. Clause 5.04 of the deed of mortgage and charge provides:

"5.04 The mortgagor, the registered owner or the person entitled to become registered as owner thereof as beneficial owner hereby charges (by way of charge for present and future advances) so much of the mortgaged property the ownership whereof or in the case of leasehold property, the leasehold interest whereof is registered in the Land Registry with payment to the Bank of the secured monies and hereby assents to registration of the said charge as a burden on the mortgaged property or so much thereof as is charged in this clause."

22. The provision for redemption of the deed of mortgage and charge is contained at clause 6 thereof which provides:

"6.01 Provided always that if the mortgagor shall pay to the Bank the secured monies pursuant to the covenants in that behalf herein contained then and in any such case this security and the mortgaged property shall at the cost and expense of the mortgagor be released by surrender or discharge as the mortgagor shall direct."

23. Clause 8 of the deed of mortgage and charge sets out the powers of the mortgagee and subclause (a) provides:-

"8.01(a) The secured monies (whether demanded or not) shall be deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of these presents."

This provision is of course subject to the equity of redemption reserved to the mortgagor provided that the mortgagor complies with his obligations under the deed.

Points of Claim and Defence

24. In its preliminary points of claim delivered pursuant to the directions of this Court, the plaintiff relies upon the terms of the contracts of loan entered into with the defendants whereby the plaintiff advanced funds to the defendants to purchase the secured properties, as well as the terms of the deeds of mortgage and charge themselves. They point to the definition of "secured moneys" and argue that that definition includes all monies due by the defendants to the plaintiff, and not just the monies advanced to purchase the secured properties. Accordingly, it is submitted on behalf of the plaintiff that when the defendants defaulted in the repayment of other loans advanced by the plaintiff to the defendants (i.e. the second loan), the plaintiff was entitled to demand repayment of the first loan and thereafter to recover possession of the secured properties and to apply the proceeds of sale of the sale as against all loans due by the defendants, including the second loan, and not just the first loan. Neither in its points of claim nor in its submissions to court, does the plaintiff seek to rely upon the doctrine of consolidation.

25. In their preliminary points of defence, the defendants focus entirely upon the doctrine of consolidation and argue that the plaintiff is prohibited from taking the action that it seeks to take on the grounds that it is not entitled to consolidate loans where the mortgagors are different parties. This is indeed well established, but the plaintiff relies upon its contractual rights and does not seek to rely upon the doctrine of consolidation.

Submissions

26. Counsel for the plaintiff relies upon the decision of Kearns P. in the matter of *Henry Haverty and Martine Haverty v. the Financial Services Ombudsman, and ACC Bank Plc.* [2013] IEHC 233. That case concerned an appeal by the appellants against a finding of the respondent upon a complaint by the appellants that the notice party was failing to release a charge over the family home of the appellants, in circumstances where the monies borrowed by the appellants in connection with their family home had been repaid in full, but the notice party was refusing to release the charge over the property because of other monies owing by the first named appellant. The deed of mortgage in charge in that case stated that:

"The following sums shall from time to time be considered to be monies due on the security of the Mortgage hereby created and to form part of the balance or balances secured to be secured hereby videlicet; all monies now due or from time to time due by the Borrower to ACC Bank on foot of loans made to the Borrower on foot of agreements or covenants made or executed by the Borrower ..."

27. The respondent considered that the effect of this clause was that the deed of mortgage and charge covered present and future borrowings. In considering the interpretation of the deed of mortgage and charge, Kearns P. referred to the decision of the Supreme Court in the case of *Analog Devices B.V. v. Zurich Insurance Company* [2005] 2 ILRM 131 in which Geoghegan J., delivering the judgment of that court stated:-

"interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

28. Kearns P. considered that the respondent in that case had correctly interpreted the deed of mortgage and charge and that it undoubtedly covered future advances, and not just the advances made at the time that the charge was granted.

29. In their submissions, counsel for the defendants focus entirely on the doctrine of consolidation and submit that it has no application in the particular circumstances of this case, by reason of the fact that the mortgagors giving security to the plaintiff are different parties in the two loans. However, they do not address the contractual entitlements of the plaintiff.

30. This preliminary issue falls to be determined upon the interpretation of the first loan agreements and the deeds of mortgages and charge completed by the defendants over the secured properties. It could not be more clear that both the loan contracts and the deeds of mortgage and charge provide that the security being provided is in connection with all present and future liabilities to the Bank. This is clear, inter alia, from:

(i) the terms of the letter of loan offer which expressly requires the borrowers to provide security for present and future advances;

(ii) the general terms and conditions of loan which entitle the plaintiff to demand early repayment if the customer is in breach of the terms of the deed of mortgage and charge;

(iii) the special conditions of loan which state that the mortgage is held for all present and future liabilities;

(iv) the definition of "secured liabilities" in the deed of mortgage and charge;

(v) the covenant on the part of the defendants contained in clause 3.01 of the deed of mortgage and charge to pay all monies now or hereafter due to the plaintiff, including monies owed jointly with others; and

(vi) the statement in clause 3.03 of the deed of mortgage and charge that the secured monies shall immediately become due and payable if the mortgagor fails to pay any money due to the plaintiff on the due date.

31. That being the case, notwithstanding that the loans comprising the first loan were performing loans, the plaintiff was entitled to demand repayment of the same in full in the event of the default of repayment of any other loans due by the defendants, including the second loan. This is expressly provided for in the terms set out above. While therefore, the plaintiff is not entitled to rely upon the doctrine of consolidation, in my view the plaintiff is entitled to rely upon its express contractual rights and is entitled to appropriate declaratory relief, about the precise terms of which I will receive submissions from counsel.

32. Finally, it should be recorded that at the outset of this hearing I disclosed to the parties that I am the holder of what I described as a derisory shareholding in AIB Plc. I informed the parties that I estimated the value of that shareholding to be of the order of €500.00. I invited the submissions of the parties.

33. Having taken instructions, Mr. Beatty SC for the plaintiff indicated that his client had no objection to my hearing the case. Mr. Mulloy SC for the defendants however said that his clients felt that I should recuse myself. I asked Mr. Mulloy on what grounds he felt that I should do so and he said that "it would be unhelpful if there was any perception, however remote, of objective bias." Mr. Mulloy submitted that while the shares concerned were in a repressed state at the moment, there was a re-floatation planned of AIB stock, after the "Brexit" referendum and that "these matters were in the public domain."

34. I rose to consider the guidance of the Supreme Court in such matters in the case of *Goode Concrete v. CRH Plc., Roadstone Wood Ltd. and Kilsaran Concrete* [2015] IESC 70. In that case, Denham C.J. considered the authorities on the subject of objective bias/judicial impartiality both in this country, England and further afield. She referred to her own previous decision in the case of *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412 where she stated at page 449:-

"A judge has a duty to sit and hear a case. However, in certain circumstances it is appropriate that he or she disqualify himself or herself from a particular case."

The test is not whether that judge believes he or she would be impartial. Nor is it whether the judge or judges on a motion to set aside such a judgment believes the judge was or would be impartial. Nor is it whether the parties consider the judge impartial. The test is objective."

35. Denham C.J. referred to the Bangalore Principles of Judicial Conduct 2002, where it is stated at paragraph 2.5:-

"A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:

2.5.1. The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2. The judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3. *The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy."*

36. Denham C.J. also cited the following extract from a commentary on the Bangalore Principles:-

"Even if the parties consent to a judge who feels he or she should be disqualified, the judge would not be justified in continuing to preside over the case. This is because the public also have an interest in the manifestly impartial administration of justice."

37. Denham C.J. concluded in Goode as follows:-

"66. The test to be applied when considering the issue of the perception of bias of a judge is the reasonable person test as described in established jurisprudence.

67. A reasonable person would, in general, have a concern if a judge held shares himself or herself (not in a shares unit) in a company which was a party in an action being heard by that judge.

69. In analysing this issue of alleged perceived bias, it is a matter not only for the parties, or the trial judge, but there is the fundamental concern for the manifest impartial administration of justice, and the confidence which the people rest in the judiciary. Judicial impartiality is the fundamental principle upon which the administration of justice proceeds, upon which rests confidence in the judiciary, and upon which rests the rule of law...

71. It is the responsibility of a judge to make the necessary inquiries into his or her holdings of shares in a company which is in litigation before him or her, and to inform the parties, so that an informed assessment may be made as to whether he or she should recuse himself or herself. It is not a burden of inquiry to be borne by the parties. If a judge holds shares (as opposed to shares held in a pension plan or units over which he or she has no control), then, in general, he or she should recuse himself or herself from hearing the action."

38. However, Denham C.J. also stated:-

"However, in exceptional circumstances, where the interest declared is "trivial", "insubstantial", or that not to hear the case would be "absurd", a judge may proceed to hear the case. In such an approach it is not necessary to take a further step to establish that the outcome of the decision to be made by the judge would have an impact on the price of the shares, or assets, which the judge owns, or which his family own."

39. Having considered the observations of the parties and the principles set out above, I concluded that no reasonable person, in an objective consideration of the matter, could conclude that the shareholding which I hold in the plaintiff company is anything other than trivial and that in the circumstances it would have been absurd for me not to hear the case.