Neutral Citation: [2014] IEHC 284

THE HIGH COURT

[2012 No. 8705 P]

BETWEEN

ANTHONY FREEMAN AND MIRIAM FREEMAN

PLAINTIFFS

AND

BANK OF SCOTLAND PLC. SIMON DAVIDSON AND LLOYD DALY & ASSOCIATES LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 29th day of May 2014

1. The plaintiffs are husband and wife. Between 1996 and 2006, they purchased six investment properties which were financed by First Active Building Society and mortgages were created in favour of the Society. In 2006, the plaintiffs refinanced their loan with Bank of Scotland (Ireland) Ltd. (BOSI). They re-mortgaged the properties with BOSI, offering them as security for a sum of €1,406,000 which was borrowed. Their borrowings with First Active were approximately €800,000 at the time of the refinancing, so when they obtained the loan from BOSI, there was a surplus of approximately €600,000 released to them after discharging the debts due to First Active.

2. The properties offered as security for the loan from BOSI were:

(i) 52 Huntstown Drive, Blanchardstown, Dublin 15 (Folio 26512F Co. Dublin);

(ii) 55 Huntsdown Wood, Blanchardstown, Dublin 15 (Folio 34131F Co. Dublin);

(iii) 27 Willowood Lawn, Blanchardstown, Dublin 15 (Folio 61206F Co. Dublin);

(iv) 15 Ventry Drive, Cabra West, Dublin 7 (Folio 53190L);

(v) 23 Dunsink Green, Finglas, Dublin 11 (Folio 13478L);

(vi) 1 Drumcliffe Drive, Cabra West, Dublin 7 (Folio 42656F).

The loans were for a period of twenty years and the repayment method was "interest only".

3. On 31st December, 2010, BOSI was the subject of a cross-border merger with Bank of Scotland plc. ("the Bank") by virtue of which all the assets and liabilities of BOSI transferred to the Bank. The Bank is the first named defendant in these proceedings. The defendants contend that as a result of this cross-border merger, the Bank stands in the shoes of BOSI so far as the agreements between the plaintiffs and BOSI are concerned. The second named defendant was appointed by the first named defendant as receiver over the above mentioned properties of the plaintiffs on 17th November, 2011. The third named defendant was appointed by the first and second named defendants to sell certain assets, the property of the plaintiffs.

4. The plaintiffs defaulted on the loan facilities granted to them by BOSI and failed to repay the sums due when demanded. On 17th November, 2011, the Bank appointed the second named defendant as receiver over the properties and purported to do so pursuant to its contractual rights. On 28th August, 2012, the plaintiffs commenced these proceedings in which they seek, *inter alia*, to invalidate the appointment of the receiver.

5. In these proceedings, the plaintiffs made numerous allegations and raised many issues and the defendants brought an application to dismiss the plaintiffs' claim as frivolous, vexatious and bound to fail. In a judgment delivered on 31st May, 2013 (*Freeman v. Bank of Scotland* [2013] IEHC 371), Gilligan J. dismissed the plaintiffs' claim, save only for "*the issues raised by the plaintiffs in relation to securitisation and alleged non-compliance with Central Bank Codes*". The learned judge struck out the other heads of claim and directed the plaintiffs to deliver an amended statement of claim. There were various amended statements of claim. For the purpose of this trial, the relevant statement of claim is that amended pursuant to order of Gilligan J. made on 21st January, 2014 ("the amended statement of claim"). As appears therefrom, in addition to the securitisation issue, the plaintiffs were granted liberty to amend their pleadings to include a plea that, were it not for an error in interest applied to the account - which error was corrected by the Bank and the amount overcharged refunded with interest - the plaintiffs would not have defaulted on their loans. In submissions dated 8th May, 2014, and delivered to the defendants shortly before the commencement of the trial, the plaintiffs raised a new issue based on an interpretation of the Registration of Title Act 1964. While the defendants claimed that the plaintiffs were not entitled to raise the issue because it was neither pleaded nor among the issues permitted to go forward to trial by Gilligan J., the defendants have withdrawn that objection and have invited the court to consider the point taken by the plaintiffs on this issue and to rule on it.

6. There are four issues to be considered in this case, namely:

(i) the issue of securitisation;

(ii) the alleged breach of the Central Bank Codes of Practice;

(iii) the effect of s. 64 and s. 90 of the Registration of Title Act 1964, and

(iv) whether the error in interest calculation and consequent overcharging caused or contributed to the default of the plaintiffs on their loans.

Securitisation
7. The plaintiffs claim that the Bank is not entitled to enforce loans that were securitised, and in particular, to enforce any mortgage or charge granted by the plaintiffs as security for such loans. The court was referred to the definition of securitisation to be found in '*The Law on Financial Derivatives'* by Alistair Hudson (5th Ed.) at para. 1-185, where the author states:

> *"The process of 'securitisation' means translating a financial instrument or a group of financial instruments into a security. Securitisation is the process of taking rights (such as a right to receive a stream of income from a number of different mortgages or credit cards) and translating that bundle of rights into a single security which can be marketed to investors on the open market. Securitisation, then, is the process by which a range of cash receivables or similar assets are grouped together and offered to investors in the form of a security in return for a capital payment from the investors."*

Generally, the receivables are transferred to a Special Purpose Vehicle so that the receivables are taken off the balance sheet of the financial institution selling the financial instruments. The Special Purpose Vehicle issues bonds to third party investors who have no right to share in the profits of the underlying assets, and provided their notes are fully repaid for both principal and interest, any remaining surplus cash is paid back to the originator of the assets as profits.

8. It is an important principle in securitisation transactions that the originating bank that sells the mortgages to the SPV, under an equitable assignment, continues to service the mortgages and the legal title remains with the originating bank. Where customers have provided their consent as part of the standard mortgage terms and conditions, they are not specifically notified that their mortgage has been securitised. In the case of housing loans held by BOSI or the Bank, random selection was applied to determine which of these loans would be securitised. Thus, in the case of the plaintiffs' loans, five of the six were securitised. Of those, two were removed from the pool on 16th November, 2011 (prior to the appointment of the Receiver), and the remaining three were repurchased from the SPV on 5th November, 2013. By 5th November, 2013, the outstanding notes were redeemed in full and the securitisation transaction closed. Thus, the three loans to the plaintiffs that had remained in the securitisation pool were released back to the Bank.

9. The evidence establishes that:

- The property at 52, Huntstown Drive was not securitised at any time;

- the properties at 55, Huntstown Wood and 27, Willowood Lawn were initially securitised but were released from the securitised pool and assigned back to the Bank in November 2011, prior to the appointment of the Receiver;

- the properties at 15, Ventry Drive, 23, Dunsink Green and 1, Drumcliffe Drive were securitised and remained securitised at the date of appointment of the Receiver. By 5th November, 2013, each of these properties was released from the securitisation pool and assigned back to the Bank.

10. The SPV used in the securitisation was Wolfhound Funding 2008-1 Limited (the "Issuer"). It was set up for the primary purpose of issuing notes as part of a securitisation of a portfolio of Irish residential property assets. Pursuant to a Trust Deed dated 30th November, 2008, made between the Issuer and Citicorp Trustee Company Ltd., the Issuer issued notes in an aggregate amount of €4.3 billion. The proceeds of the notes were applied by the Issuer in purchasing a pool of residential mortgage loans originated by BOSI and the Bank respectively, secured over properties located in Ireland. On 30th November, 2008, BOSI sold its legal and beneficial interest in the loans and their related security comprising the portfolio to the Issuer pursuant to the terms of the Mortgage Sale Agreement. The sale by BOSI to the Issuer of the loans in the portfolio was effected by way of equitable assignment. The completion of the transfer or conveyance of the loans and related security (and, where appropriate, their registration) to the Issuer was, save in some limited circumstances, deferred.

11. At all times, legal title to the loans and related security remained with BOSI until the completion of the transfers to the Issuer and notification of the transfers being given to the borrower. Such transfers would only be completed and notifications given in the circumstances set out in Clause 7.1 of the Mortgage Sale Agreement between BOSI and the Issuer. No event specified in Clause 7.1 occurred and the assignment of each of the plaintiffs' loans and related security was effected in equity only. Notice of the assignment was not given to the plaintiffs. The security transaction was completed on 5th November, 2013, when the Bank repurchased the SPV's interest in the securitised loans and relevant securities.

12. In *Wellstead v. Judge Michael White* [2011] IEHC 438, Peart J. rejected an argument that a lending bank was not entitled to the benefit of an order for possession that had been made in favour of the lender because the relevant housing loan had been securitised. The learned judge said:

> *"The applicant is also seeking leave to argue that Ulster Bank have no longer any entitlement to benefit from the order for possession because as part of some unspecified securitisation agreement the bank has sold the applicant's mortgage, and is therefore no longer owed anything on foot of the mortgage herein*
>
> *. . .*
>
> *His grounding affidavit characterises the action by Ulster Bank in seeking repossession in circumstances where it no longer owns the mortgage and has been repaid the money lent to the applicant is (sic) fraudulent, misleading and premeditated.*
>
> *In relation to the last argument, Counsel for the bank has referred to clause 17 of the mortgage deed executed by the applicant and his former partner, which contains a consent by the mortgagors to such a disposal of the benefit of the mortgage to another party by way of a securitisation scheme or otherwise, and it is submitted that this is a point which it is simply not open to the applicant to argue, even if he was in time to do so, since he has consented to that occurring. I agree.*
>
> *But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors."*

13. Although *Wellstead* was a judicial review application and not a plenary hearing, there were notable similarities between the point taken in that case and the securitisation point taken by the plaintiffs in this action. In this case, the plaintiffs do not dispute that the loans are in default and I am satisfied that more than one "event of default", as defined in the terms and conditions applicable to the loans, has taken place. The evidence clearly establishes that the plaintiffs - in accepting the loans - signed documents in which they agreed to BOSI securitising the loans.

14. The second named plaintiff accepted that the plaintiffs began defaulting on their loans in 2009, at a time when they knew nothing about the securitisation of their loans. The second named plaintiff said that until September 2011, she had never heard of the word "securitisation". There was no evidence to show that the fact of securitisation had anything to do with the plaintiffs going into default on their loans. It became clear, in the course of the trial, that the plaintiffs' point on securitisation was confined to an allegation that securitisation affected the Bank's title to the loans. In *Kavanagh v. McLaughlin* [2013] IEHC 453, Birmingham J. rejected the assertion that the merger of Bank of Scotland Ireland Ltd. and Bank of Scotland plc. affected the entitlement of Bank of Scotland plc. to pursue former clients of BOSI in respect of debts due on foot of loan agreements made with BOSI, Birmingham J. set out the factual background to the cross-border merger and considered, in depth, the terms of Council Directive 05/56/EC and the Regulations made in Ireland and in Scotland and approved by the High Court in Ireland and the Court of Sessions in Scotland. The judge also considered fully the question of the Registration of Title Act 1964, and practice of the Property Registration Authority in accepting the Bank as standing in the shoes of BOSI so far as registration of charges is concerned where there is registered land. In his judgment, Birmingham J. set out in great detail the background to the cross-border merger legislation and Regulations as they applied to the transfer of assets and charges from BOSI to the Bank. I agree with his interpretation of Council Directive 05/56/EC of 26th October, 2005, on cross-border mergers of limited liability companies and the Regulations made in this State and in Scotland pursuant to same and how they affected the transfer of the assets (including charges) held by BOSI to the Bank. I will deal specifically with the Registration of Title point taken by the plaintiffs later in this judgment.

15. In applying for the loans, the plaintiffs accepted the entitlement of BOSI to securitise their loans. I am satisfied that the securitisation of the loans was properly effected and did not in any way alter the obligations of the plaintiffs so far as the repayment of the loans was concerned. After the cross-border merger, the Bank stood in the position of BOSI. By 5th November, 2013, the last of the plaintiffs' properties which had been securitised were released from the securitisation pool and had been assigned back to the Bank. The plaintiffs failed to establish that their liability to repay the loans to the Bank is affected by the securitisation. As the legal title in the charge over the properties is held by the Bank, the Bank is the proper body to appoint a receiver and can rely on the contractual power to do so which was formerly vested in BOSI. I therefore reject the plaintiffs' claim that the Bank was not entitled to appoint a receiver, either pursuant to the cross-border merger issue or the securitisation issue.

Central Bank Codes

16. The plaintiffs rely on two documents issued by the Central Bank of Ireland. The first is the Bank's Code of Practice on the Transfer of Mortgages and the second is the Bank's document entitled 'Asset Securitisation'. So far as the asset securitisation document is concerned, it does not have any relevance to these proceedings because it has no application to the relationship between a borrower and a lender.

17. With regard to the Code of Practice on the Transfer of Mortgages, a number of issues arise. In the first place, it is a non-statutory, voluntary code. The court's attention has been drawn to a number of decisions which are concerned with statutory codes that were issued by the Central Bank under s. 117 of the Central Bank Act 1989 (as amended). Where a statutory code of conduct exists, the courts have held that, even assuming a breach of the code by the Bank, that did not exempt the borrower from repaying his loan. See *Zurich Bank v. McConnon* [2011] IEHC 75, and *Friends First Finance Ltd. v. Cronin* [2013] IEHC 59. In *Stepstone Mortgage Funding Ltd. v. Fitzell* [2012] IEHC 142, Laffoy J. noted that the Code of Conduct on Mortgage Arrears ("CCMA") imposes a moratorium on the initiation of possession proceedings for a specified period, and that a court being asked for an order for possession is entitled to know that the requirements in the CCMA - which had been imposed pursuant to statutory authority (s. 117) had been complied with. A similar approach was adopted by Hogan J. in *Irish Life & Permanent plc. v. Duff* [2013] IEHC 43. But in *ACC Bank plc. v. Deacon* [2013] IEHC 427, Ryan J. distinguished the cases of *Fitzell* and *Duff* on the basis that those decisions apply only to claims for repossession of family homes. The learned judge said that compliance with the Central Bank Code of Conduct on Business Lending to Small and Medium Enterprises was not a prerequisite of a bank establishing liability against a debtor, and that failure to comply with the code does not extinguish the loan or furnish a defence to the borrower. This principle was reiterated by Baker J. in *Ryan v. Danske Bank* [2014] IEHC 236.

18. It is clear, therefore, that non-compliance with a statutory code does not relieve a borrower from his obligations under a loan to repay the lender, nor does it deprive the lender of its rights and powers under the loan agreement. If that is the case so far as statutory codes of conduct are concerned, then, *a fortiori,* the plaintiffs in this action cannot make the case that they are relieved from their obligations under the loan or that the Bank is deprived of its rights under the loan agreements, if there has been a breach by the Bank of what is a voluntary code.

19. In any event, the plaintiffs have failed to establish any breach by the Bank of the voluntary code in this case. The securitisation involves a transfer or equitable title to the mortgages but not the legal title, and the Bank remained in control of the mortgages and was responsible for setting the interest rates and determining the conduct of relations with the borrowers whose mortgage payments were in arrears. It was the Bank that was responsible for servicing the mortgages, including the taking of any enforcement steps and the rights and obligations of the bank are not affected by the code. While the plaintiffs complain that they were frustrated in their attempts to deal with the Bank after their loans went into default, there was extensive evidence produced by the Bank to show that many attempts were made to contact the plaintiffs with a view to dealing with the arrears. This evidence was supported by written records produced to the court and I accept that evidence. There was no breach of the voluntary code. Accordingly, I reject the plaintiffs' claim based on an alleged breach of the Central Bank's Code of Conduct.

Registration of Title Act 1964

20. The properties which are the subject matter of these proceedings are registered in the Land Registry. Accordingly, dispositions are governed by the Registration of Title Act 1964. The plaintiffs claim that the Receiver was not appointed by the registered owner of the charges. At the time of the appointment of the Receiver, the registered owner of the charge was BOSI, which was a limited liability company that had been dissolved. Although the defendants maintain that under the cross-border merger, BOSI transferred to the Bank all the rights and powers of the registered owner of the charge without need for registration, the plaintiffs argue that by virtue of Article 19(2) of S.I. 158/2008, there is an obligation on the Bank to be registered. While the Bank Merger and Reorganisation Acts allow a dispensation from registration, the EU Directive that is transposed into law by S.I. 157/2008 does not do so.

21. The plaintiffs also argue that the transfers from BOSI to the Bank were not registered and that it is now unclear whether the Bank is entitled to be registered under s. 90 of the Registration of Title Act 1964. They also claim that the person or body entitled to be registered under s. 90 of the Act has and had no power of sale or power to appoint a Receiver, and that any subsequent unification

of the legal and equitable estates in the Bank will not relate back to cure any defect in the exercise of the power of appointment.

22. The loan documents executed by the plaintiffs gave BOSI the power to appoint a Receiver over the charged property on the occurrence of a specified event of default. The Receiver in this case was appointed under a Deed of Charge and his appointment and authority derives from contract and not from any statutory power. Such a power has been confirmed in *Kavanagh v. Lynch* [2011] IEHC 348, by Laffoy J. and applied by me in *Moran v. AIB Mortgage Bank* [2012] IEHC 322. Since the Receiver was appointed under the terms of the Home Loan Mortgage conditions, there is no necessity to rely on any statutory power.

23. A similar point was taken in *Kavanagh v. McLaughlin* [2013] IEHC 423, and was rejected by Birmingham J. In that case, the plaintiffs also relied on the same provisions of the Cross-Border Merger Directive and the 2008 Regulations in support of their contention that in default of registration of the Bank, as the owner of the charge on the folio, the Bank has no power to appoint a Receiver. Birmingham J. had regard to the provisions of Article 40(3) of the Council Directive 05/56/EC, and the equivalent provision of the Regulations of 2008 (Regulation 19(1)).

24. I accept the defendants' submission that in its plain wording, Regulation 19(1)(h) requires that not only every contract agreement but every "Instrument" to which BOSI was a party, becomes a contract agreement or instrument between the Bank and the counterparty, so that the Bank enjoys the same rights as BOSI held in its loan agreements and related documents between it and the plaintiffs.

25. The contention that, following the merger and transfer of the charge by operation of law, the Bank does not automatically have the same rights, including the right to appoint a Receiver, which BOSI enjoyed, runs directly counter to Regulation 19(1)(h) of the European Communities (Cross-Border) Mergers Regulations 2008. It is important to remember that those Regulations are stated to be "*. . . for the purpose of giving effect to Council Directive No. 2005/56/EC of 26th October 2005 on cross-border mergers*". The consequences of the merger contended for by the plaintiffs would have the effect of impeding rather than facilitating such mergers.

26. The plaintiffs' argument depends on s. 64 and s. 90 of the Registration of Title Act 1964. But there is no requirement to execute an instrument of transfer in this case as the transfer occurred by operation of law. Section 90 of the Registration of Title Act 1964 is limited to circumstances where "*by reason of an instrument of transfer*" a transfer is made. As there is no such instrument of transfer, s. 90 has no application.

27. The court heard evidence from Mr. John Murphy, the Examiner of Titles in the Land Registry (now the Property Registration Authority) as to the practice which operates there where a cross-border merger has taken place. The Property Registration Authority ("PRA") issued an Office Notice 1/2011 which says that discharges by Bank of Scotland (the Bank) of BOSI charges will be acted upon as if the charge was registered by the Bank. He explained the practical reasons for doing so. As far as the PRA is concerned, the Bank stands in the shoes of BOSI, so far as the charges are concerned. It seems to me that this is a sensible and practical application of the cross-border merger and is not legally deficient in any way. The PRA notice 1/2011 was specifically considered by Birmingham J. in *Kavanagh v. McLaughlin*, who held that while the notice was not determinative of the issue, it was of "considerable significance" since the PRA is the body that is primarily concerned with the integrity of the Register. At para. 24 of his judgment, he said:

> *"It seems to me that the approach taken by the Property Registration Authority accords with commonsense. It reflects the fact that Bank of Scotland Ireland has ceased to exist, and in the space where Bank of Scotland once stood, now stands Bank of Scotland plc. Accordingly, I am satisfied that the arguments raised by the defendants in relation to the non-registration of the charges in the name of Bank of Scotland plc. fail."*

I agree with the views expressed by Birmingham J. and find no merit in the arguments raised by the plaintiff with regard to the Registration of Title Act 1964. I therefore reject the plaintiffs' claim under that heading.

Overcharging and Error in Interest Calculation

28. The first named defendant accepts that there was an error in the calculation of interest on three of the plaintiffs' loan accounts, namely:

(i) 27 Willowood Lawn, Blanchardstown, Dublin 15;

(ii) 52 Huntstown Drive, Blanchardstown, Dublin 15, and

(iii) 52 Huntstown Drive, Blanchardstown, Dublin 15.

That error has been corrected by the Bank. The Bank calculated the amount of interest properly due by the plaintiffs and refunded the amount of interest overcharged, together with interest thereon calculated at the rate of 8% *per* annum of the amount overcharged. By letters dated 27th October, 2011, the Bank notified the plaintiffs that an error had been made and further notified them of the amount of the credit and the revised arrears figure consequent on the application of the credit to each account. This resulted in credits being made in respect of each of the three accounts and the total amount of these credits was €20,735.

29. The plaintiffs claim that if they had not been overcharged, they would not have been in arrears and would have been able to manage their accounts.

30. The second named plaintiff was extensively cross-examined concerning the plaintiffs' financial situation from the time they restructured their loan through BOSI. The evidence disclosed that the plaintiffs obtained loans amounting to €1,406,000 from BOSI. They paid off an existing loan to First Active which then stood at approximately €799,000 plus other charges, leaving a surplus available to them of €546,972.47. At a time when they owed the Bank over €1.4m, they had the benefit of a sum in excess of €546,000 which they spent on themselves over a period of 16 months without taking any steps to reduce the principal sum due and owing to the Bank. They were not legally obliged to reduce the principal, but insofar as the plaintiffs claim that they could have restored their finances and their investment property business to an even keel but for the overcharging of interest, this argument does not stand scrutiny. The interest credited back to their accounts was €20,735 and that must be set against the surplus in excess of €500,000 which was available to them to apply towards their business or reduce the principal, as the case may be. But they chose not to do either. The evidence clearly showed that the plaintiffs went on a spending spree with the surplus available to them, where regular and quite substantial sums of cash were withdrawn from the first named plaintiff's bank account over a period of 16 months. The plaintiffs both bought expensive motor vehicles and also went on at least one holiday to the United States. Between February 2007 and March 2008, there were US Dollar transactions on the first named plaintiff's account amounting to a debit of US$59,524.33. The second named plaintiff was unable to explain to the court why so many substantial cash withdrawals were made in that period and why they were not applied towards the investment property business or the reduction of the loans.

31. There was compelling evidence before the court that the plaintiffs furnished misleading information to BOSI at the time when they applied for the loans. They gave grossly inflated figures about the net profit from the first named defendant's window cleaning business in the years 2003, 2004 and 2005, when it was clear that the business was something of a sideline for the plaintiffs and that they only derived a modest income from it. Notice of assessment of that business for the year ending 31st December, 2006, assessed Income Tax at €605.

32. In these proceedings, the plaintiffs claim damages based on loss of rental income and from the conduct of the Receiver in the management and/or disposal of the investment properties. Two of the properties have not been disposed of pending the outcome of these proceedings. Evidence was given to the court by a Valuer on behalf of the plaintiffs and by the second named defendant (the Receiver). I prefer the evidence of the Receiver to that of Mr. Eugene Davy who gave evidence on behalf of the plaintiffs. Mr. Davy's evidence was based on inadequate, and in some cases incorrect evidence as to the condition of the premises and the state of the lettings. On the other hand, the Receiver gave clear and detailed evidence as to the reasons why he sold the properties and how he went about doing so. While there appears to have been some recovery of the property market by the time of hearing, this was not at all predictable at the time the properties were sold. The properties were sold in a falling market and at a time when there was no reliable evidence of a recovery. The Receiver accepted his duty to get the best price available in the market at the time when he was selling, and I am satisfied that he did so and took reasonable steps to get the properties out into the market before the widest range of people possible for the particular market. Apart from the state of the market, the Receiver also had to balance the expense of redecorating some of the properties against the likely increase in the selling price after such work was carried out. Having heard his evidence, I am satisfied the Receiver acted prudently. The plaintiffs do not, therefore, have any cause of action against the Receiver in respect of the manner in which the sales of the properties was conducted.

33. For the reasons set out above, the plaintiffs have failed to prove their case against the defendants on any of the issues before the court and I, accordingly, dismiss the claim.