Neutral Citation Number: [2011] IEHC 216

THE HIGH COURT

2010 449 SP

BETWEEN

DANSKE BANK A/S

trading as NATIONAL IRISH BANK

PLAINTIFF

AND

RUAIRI O'CEALLAIGH AND CORMAC O'CEALLAIGH

PRACTISING UNDER THE STYLE AND TITLE OF SEAN O'CEALLAIGH & CO. SOLICITORS

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 23rd day of May, 2011.

1. The proceedings

1.1 In these proceedings, which were initiated by special summons which issued on 29th June, 2010 the plaintiff claims:

> (a) an order requiring the defendants to compensate the plaintiff to the extent of the plaintiff's loss arising from the defendants' breach of an undertaking of 14th June, 2006 whereby the defendants undertook to ensure that a mortgage or charge was executed over property comprising 7.2 acres in Rathnew, County Wicklow (the Rathnew property); and
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> (b) an order that arising from the breach of the said undertaking the defendants compensate the plaintiff in the sum of €2,586,338.13 which sum is the amount due and owing as of the date of issuing the proceedings to the plaintiff from the defendants' clients; or
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> (c) an order that the defendants compensate the plaintiff in such other sum as this Honourable Court deems fit.

1.2 When the proceedings came into the Chancery Motion List from the Master's Court, counsel for the defendants submitted that the matter should go to plenary hearing. Counsel for the plaintiff argued that it was not necessary that the matter should go to plenary hearing and submitted that the Court should make an order on the basis of the evidence before the Court. The purpose of this judgment is to address whether that is possible or, alternatively, how the matter should proceed.

2. The evidence

2.1 The evidence before the Court is affidavit evidence consisting of:

> (a) an affidavit of Robert John Kearns, manager of the plaintiff, sworn on 23rd June, 2010 and the exhibits referred to therein;
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> (b) the affidavit of the second defendant sworn on 29th November, 2010; and
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> (c) the further affidavit of Robert John Kearns sworn on 23rd February, 2011.

3. The undertaking and its breach

3.1 The defendants' clients referred to in the endorsement of claim on the special summons were John Murphy, Patrick Minto and John Kavanagh (the borrowers). The undertaking on which the plaintiff relies, the undertaking of 14th June, 2006, related to a loan agreement dated 22nd May, 2006 (the May Loan Agreement) wherein the plaintiff agreed to advance the borrowers the sum of €1,526,000, the purpose of which was stated to be to assist the borrowers with the purchase of a c. 1.1 acre site at Glenealy, County Wicklow (the Glenealy property). It was stipulated in the May Loan Agreement that the loan would be repaid in full in a single payment on 31st May, 2007, at which stage it would be repaid by instalments over a mutually agreeable period, refinanced or repaid. There was a default provision that the loan and interest accrued thereon would become immediately payable on demand by the bank on the occurrence of an event of default stipulated. It was provided that the security to be given to the plaintiff by the borrowers comprised:

> (a) a first legal mortgage over the Glenealy property, and
>
> (b) a first legal mortgage over the Rathnew property.

It was specifically provided that any security held then or in the future should be security for all the borrowers' liabilities to the plaintiff actual or contingent and whether as principal or surety.

3.2 The undertaking dated 14th June, 2006 was furnished by the defendants to the plaintiff with their letter of 15th June, 2006. The letter discloses that the defendants also furnished confirmation in relation to an undertaking in respect of the Glenealy property with the same letter. It is important to emphasise at this juncture that the relief sought by the plaintiff in these proceedings is based solely on the breach by the defendants of the undertaking of 14th June, 2006.

3.3 The undertaking of 14th June, 2006 was in the usual form and, while it was not stated to be in the approved form published by the Law Society, it would seem to follow that precedent. The borrowers signed the usual retainer of the defendants and authorisation, which is part of the undertaking, on 14th June, 2006. The undertaking was expressed to be made in consideration of the plaintiff agreeing to the drawdown of the loan facility before the mortgage security had been perfected and subject to payment through the defendants of the loan cheque. What is of significance for present purposes is that the defendants undertook to ensure, prior to negotiating the loan cheque or the proceeds thereof, that the borrowers had executed a mortgage or charge in the plaintiff's standard form in relation to the secured property. They also undertook, as soon as practicable, to stamp and register the mortgage deed in the appropriate registry and to furnish it together with the title deeds of the secured property to the plaintiff and, pending compliance with those requirements, to hold all the title documents to the secured property in trust for the plaintiff.

3.4 The loan of €1,526,000 was advanced to the borrowers on foot of the May Loan Agreement and I assume that this was done electronically to the client account of the defendants, as indicated in the undertaking. The defendants never furnished the plaintiff with a mortgage over the Rathnew property, for the reasons I will outline later. Neither the undertaking in relation to the Glenealy property nor the confirmation which accompanied the letter of 15th June, 2006 is before the Court and no evidence has been adduced by the plaintiff showing that it got security over the Glenealy property, although I assume that happened. It is also important to emphasise that the plaintiff's claim is based on the breach of the undertaking of 14th June, 2006 in relation to the Rathnew property solely.

3.5 On 18th October, 2006 the plaintiff entered into a further loan agreement (the October Loan Agreement) with the borrowers. There is nothing on the evidence before the Court to indicate that the defendants had any involvement in relation to this loan agreement or, indeed, whether they were put on notice of it at the time. In any event, the amount of the facility provided to the borrowers was €1,366,000 and the purpose of the loan was expressed to be to fund the acquisition of eighteen acres of land at Ballybeg, Rathnew, County Wicklow (the Ballybeg property). It was provided that the loan would be repaid in full in a single repayment on 31st October, 2011, at which stage the loan would be either repaid by instalments over a mutually agreeable period, refinanced or repaid. There was a default provision similar to the default provision in the May Loan Agreement. The security stipulated was:

> (a) a first legal charge over the Glenealy property;
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> (b) a first legal charge over the Rathnew property; and
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> (c) a first legal charge over the Ballybeg property.

Once again, it was stipulated that any security held would be security for all liabilities to the plaintiff. Two of the special conditions contained in clause 7 are of relevance. First, paragraph (d) provided that a sale contract in respect of 4.5 acres of the Rathnew property was to be signed not later than 31st December, 2006 and a minimum of €600,000 from the sale proceeds was to be used "in permanent reduction of the banks (*sic*) facilities" by not later than 31st January, 2007. Secondly, paragraph (e) provided that a sale contract in respect of the Glenealy property was to be signed by not later than 28th February, 2007, with full proceeds to be used "in permanent reduction of the banks (*sic*) facilities" by not later than 31st March, 2007. Obviously, the terms of the May Loan Agreement were varied by those provisions.

3.6 Chronologically, the next material fact is that in June 2007 the plaintiff discovered via an estate agent that the borrowers had sold the entirety of the Rathnew property, that is to say, 7.2 acres, not merely 4.5 acres as had been stipulated in the October Loan Agreement. It was confirmed by an employee of the defendants' firm that the sale had taken place and that the full proceeds of the sale (€4,250,000) had been released to the borrowers. A meeting took place between the plaintiff and the borrowers on 22nd June, 2007. It is not suggested on the affidavit evidence that the defendants had any involvement with, or were even aware of, that meeting. Mr. Kearns, in his second affidavit, has averred that the borrowers advised the plaintiff's representatives that the majority of the sale proceeds had been dispersed among the borrowers and had been used for other projects. It was further averred that the borrowers claimed that they were unaware that they were obliged to make any payment from the proceeds of sale of any part of the Rathnew property to the plaintiff. At that meeting a proposal was made by the borrowers to reduce their liabilities by €600,000. The position of the plaintiff is that they did not accept the proposal as a discharge of the borrowers' contractual obligations to the plaintiff but, nevertheless, an "unsolicited" payment of €600,000 was made by the borrowers on 27th June, 2007 and was accepted by the plaintiff.

3.7 The plaintiff has been pursuing the defendants in relation to the undertaking in relation to the Rathnew property since October 2007. By letter dated 2nd October, 2007 the plaintiff pointed out that, in view of the sale of the Rathnew property, the defendants were not in a position to comply with the undertaking dated 14th June, 2007 to forward the title deeds and the mortgage in relation to the Rathnew property to the plaintiff and asked that the proceeds of sale be lodged with the plaintiff immediately and, if that was not possible, to inform their provider of indemnity insurance, as it was the plaintiff's intention to look for recourse from the defendants.

3.8 A further proposal was made by the borrowers to the plaintiff in January 2008 to pay €300,000 in reduction of their liabilities to the plaintiff by the end of March 2008 and also to have contracts for the sale of the Glenealy property exchanged at a price of €1,550,000 by the end of February 2008, the sale to be completed by the end of April 2008, whereupon the sale proceeds would be used to reduce the borrowers' liability with the plaintiff. In a letter of 28th January, 2008 from the plaintiff to the defendants those proposals were outlined and it was stated that they were acceptable to the plaintiff. However, it was made clear that the plaintiff was continuing to rely on the defendants' undertaking (the date of which was incorrectly stated as being 8th June, 2006) in relation to the Rathnew property and was not waiving its rights in that respect. It is not clear from the evidence before the Court whether the sum of €300,000 was paid by the borrowers. What is clear is that the proposed sale of the Glenealy property came to nought. The efforts of the plaintiff's solicitors, who had become involved on behalf of the plaintiff in September 2008, to get recompense from the defendants also came to nought.

3.9 In January 2009 the plaintiff's solicitors made a complaint on the plaintiff's behalf to the Law Society in relation to the failure of the defendants to comply with the undertaking of 14th June, 2006. On 29th April, 2009 the Complaints and Client Relations Committee (the Committee) of the Law Society directed the defendants, *inter alia*, to formally acknowledge the breach of the undertaking and to apologise for it. In a letter dated 7th May, 2009 from the defendants to the plaintiff's solicitors a letter of 19th September, 2008 was referred to, stating that it was a letter "in which we acknowledged that the undertaking … has not been complied with". The paragraph in the letter dated 19th September, 2008 referred to was in the following terms:

> "Our undertaking of 14th June, 2006 has not been complied with in circumstances where your client accepted in May 2007 the €600,000 from the proceeds of sale of the above property the subject matter of the undertaking. The €600,000 was the amount stipulated by your client as the amount it demanded from that sale; a sale that your client required."

In the letter of 7th May, 2009 the defendants stated: "We apologise to your client". There is absolutely no doubt that the defendants were in breach of the undertaking of 14th June, 2006 when they acted in the sale of the Rathnew property and it is not unfair to describe the contents of the letter dated 7th May, 2009 as "hair splitting".

3.10 The issue of the defendants compensating the plaintiff for the breach of the undertaking was pursued before the Committee until 30th November, 2009. By letter dated 22nd May, 2009 to the defendants, the plaintiff's solicitors had contended that the defendants were liable to the plaintiff in the sum of €2,604,412.04 on the basis, as I understand it, of the balance due by the borrowers to the plaintiff on foot of the May Loan Agreement and the October Loan Agreement. The basis of the defendants' liability to compensate the plaintiff was the subject of some controversy before the Committee and the Committee referred the plaintiff's solicitors to the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. Coleman* [2009] 3 I.R. 699. Eventually, however, by letter dated 30th November, 2009 the Committee informed the defendants that it had made a formal finding of breach of undertaking and had adjourned consideration of sanction pending the outcome of the proceedings between the plaintiff and the defendants. As I have recorded at the outset, these proceedings were initiated by the special summons which issued on 29th June, 2010.

4. The defendants' response

4.1 In answer to a question posed by it, the Court was informed that the solicitors on record for the defendants in these proceedings are instructed by the defendants' indemnifier.

4.2 It is not unfair to comment that there is no new factual content whatsoever in the replying affidavit of the second defendant. It is entirely argumentative. The arguments advanced are as follows:

> (a) By June 2007 the plaintiff knew that the entirety of the Rathnew property had been sold and that it had fetched a price of €4,250,000. At that stage the plaintiff should have sought and secured immediate repayment of "the loans", as was its entitlement, where it knew that the borrowers had received funds of €4,250,000 and had sold the entire of the Rathnew property. It is contended that the plaintiff's failure to do so "constituted a separate and distinct act of negligence that caused the loss sustained by the plaintiff". Further, it is contended that it constituted a failure by the plaintiff to mitigate its loss, which is continuing.
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> (b) Alternatively, it is denied that the plaintiff has suffered loss arising from the breach of the undertaking or is entitled to compensation. I take that as an implicit admission that there has been a breach of the undertaking. As I understand the basis of this contention it is that in June 2007, at a time when "the property market had begun to slide back", the plaintiff could have sought to recover the entire debt due by the borrowers and to enforce its security over the Glenealy property (to facilitate the acquisition of which the sum of €1,526,000 was advanced in the May Loan Agreement) and the Ballybeg property (to facilitate the acquisition of which €1,366,000 was advanced in the October Loan Agreement and which, by reference to clause 8(a)(i) of the October Loan Agreement, it is contended was valued at not less that €720,000 at the date of the October Loan Agreement). It is contended that by reason of the failure to act on the security of the Glenealy property and the Ballybeg property, which continues, the plaintiff is not entitled to seek compensation for loss against the defendants in circumstances where some or all of the alleged loss has not yet "crystallised". Further, it is contended that the plaintiff has failed to mitigate its loss.

On the foregoing basis it is contended by the defendant that it has a full and *bona fide* defence to the proceedings and that issues regarding causality of loss and issues going to compensation and mitigation of loss afford the defendants a full defence and require that such issues be adjudicated by way of oral evidence at plenary hearing, following discovery of relevant and necessary documents.

5. Evidence of loss

5.1 The only evidence of the loss which the plaintiff is alleged to have incurred in consequence of the breach of the undertaking of 14th June, 2006 by the defendants is what is averred to in paragraph 21 of the grounding affidavit. That paragraph contains a table which refers to two accounts of the borrowers, giving the account numbers. By comparing the table to what is stated in the letter of 22nd May, 2009 from the plaintiff's solicitors to the defendants referred to above, the position appears to be that the second account referred to in the table relates to the May Loan Agreement and the first relates to the October Loan Agreement. The information contained in the table indicates that there is due by the borrowers to the plaintiff:

> (a) on foot of the May Loan Agreement a total sum of €1,099,703.45, comprising €1,035,325.08 for principal and €64,378.37 for interest up to 23rd June, 2010; and
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> (b) on foot of the October Loan Agreement a total of €1,486,634.68, comprising €1,392,386.45 for principal and €94,248.23 for interest up to 23rd June, 2010.

No statements of account have been exhibited.

6. Jurisdiction invoked by plaintiff

6.1 The jurisdiction which the plaintiff has invoked is the Court's inherent jurisdiction to enforce an undertaking given by a solicitor, who is an officer of the Court. Invocation of that jurisdiction may be properly initiated by special summons.

6.2 The most definitive statement of the legal principles applicable to an application by a lending institution to enforce an undertaking given by a solicitor in proceedings commenced by special summons is the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. Coleman* [2009] 3 I.R. 699. In his judgment, Geoghegan J., with whom the other Judges of the Supreme Court concurred, analysed the case law in this jurisdiction and in the United Kingdom ending with the decision of the Court of Appeal in *Udall v. Capri Lighting Ltd*. [1988] 2 Q.B. 907. Geoghegan J. adopted the seven principles relating to the Court's inherent special jurisdiction to enforce solicitors' undertakings outlined in the judgment of Balcombe L.J. in that case. In relation to the first principle, as Balcombe L.J. did, he quoted (at para. 14) a passage from the speech of Lord Wright in *Myers v. Elman* [1940] A.C. 282, part of which is as follows:

> "The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is

engaged professionally … . The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice."

Geoghegan J. summarised the remaining six principles as follows (at para. 15):

> "1. although the jurisdiction is compensatory and not punitive, it still retains a disciplinary slant;
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> 2. if a person has suffered loss the court has power to order the solicitor to make good the loss occasioned by his breach of duty;
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> 3. failure to implement a solicitor's undertaking is *prima facie* evidence of misconduct even if he has not been guilty of dishonourable conduct;
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> 4. the supervisory jurisdiction is not ousted by defences that might be available to an action at law such as the Statute of Frauds but the court may take these factors into account in deciding whether or not to exercise its discretion and, if so, in what manner;
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> 5. the summary jurisdiction involves a discretion as to the relief to be granted;
>
> 6. where it is inappropriate for the court to make an order requiring a solicitor to perform his undertaking *e.g.* on grounds of impossibility, the court has a discretion as to whether it should exercise the power to order the solicitor to pay compensation."

6.3 Geoghegan J. then addressed the application of the foregoing principles to the facts before the Supreme Court as follows (at para. 16):

> "What these principles, when read as a whole, clearly indicate is that the special supervisory jurisdiction of the court invoked by summary proceedings is discretionary in nature. In this particular case, where the bank appears to have carelessly acted on an overvaluation of the property, it was, therefore, going to be at any rate left with a much lesser security than it anticipated. In those circumstances it would not be appropriate to measure the compensation that might be ordered to be paid by the solicitor as the actual amount of the loan unless, of course, the bank had been misled as a consequence of fraudulent conduct to which the solicitor had been a party. But there was no evidence before the High Court or before this court of any such complicity."

6.4 Earlier, in the *Coleman* case, Geoghegan J. stated (at para. 7):

> "Although the supervisory jurisdiction and its principles were decided long before the major lenders in this country adopted the two solicitor system, a judge being asked to enforce an undertaking given in the context of such a transaction but in exercising his or her discretion ought to have regard to the maintenance of the integrity of that system. There would be cases, therefore, analogous to this case, where if the undertaking solicitor behaved in a similar manner, it would be appropriate for a court to order the solicitor to repay to the bank the whole of the sum advanced. However, for reasons indeed adverted to by the High Court judge, that would not have been appropriate in this case. The bank by its own negligence independently of any connection with the default by the solicitor provided loan facilities on an overvaluation of the property. The English authorities clearly indicate that an order made by the court under this jurisdiction should not be oppressive towards the solicitor."

7. Conclusion

7.1 On the basis of recent experience, I find it appropriate to make the general observation that both lenders, who are seeking to enforce solicitors' undertakings, and indemnifiers, who represent the defendant solicitors, need to be realistic in their approach to proceedings invoking the Court's jurisdiction to enforce undertakings. In the simple case where, in accordance with established principles, the level of compensation to which the plaintiff lender is entitled is quantifiable on the affidavit evidence before the Court, it serves no useful purpose for the legal representative acting on behalf of the defendant solicitor to seek to have the matter referred to plenary hearing. That approach is, in fact, contrary to the interest of the defendant solicitor and his indemnifier, in that, presumably, interest is running on the debt owed by the client to the plaintiff lender and the costs of the proceedings are increasing. However, it is obviously crucial that all of the relevant evidence be put before the Court to enable it to assess the appropriate compensation in a simple case. In my view, all relevant facts should be disclosed in the grounding affidavit.

7.2 Having said that, this is by no means a simple case. Its core element is that, if the undertaking of 14th June, 2006 had been complied with, the sale of the Rathnew property or, indeed, any part of it could not have been completed without the procurement of a release of the security by the plaintiff. The only inference which can be drawn is that a deed of mortgage by the borrowers in favour of the plaintiff giving the plaintiff security over the Glenealy property was never registered in the Registry of Deeds. However, in accordance with the terms of the undertaking of 14th June, 2006, even if a legal mortgage was not in place and registered, the defendants held the title deeds in trust for the plaintiff. The release of the title deeds to the purchaser of the Rathnew property was in breach of the defendants' undertaking. No matter how one looks at it, the position is that, if the defendants had complied with the undertaking, they could not have sold the entirety of the 7.2 acres of the Rathnew property, instead of 4.5 acres referred to in the October Loan Agreement, without putting the plaintiff on notice. Therefore, the fact that the plaintiff does not have security over the balance of the Rathnew property (2.7 acres) is a result of the breach of the undertaking.

7.3 There is absolutely no way in which, at this juncture, the Court could be satisfied that it was exercising its jurisdiction in a manner which is not oppressive to the defendants if it were to assess the implementation on the basis of the evidence before the Court. This is particularly so given that, at all material times, the plaintiff has had other security for the advances which were secured on the Rathnew property: security on the Glenealy property in respect of both the May Loan Agreement and the October Loan Agreement; and security on the Ballybeg property in relation to the October Loan Agreement. Therefore, before the Court can adjudicate on the proper level of compensation, further evidence will have to be adduced and the Court will have to hear submissions having regard to the lines of defence relied on in the replying affidavit of the second defendant.

7.4 On the other hand, given the nature of the jurisdiction invoked by the plaintiff, I see no basis for simply adjourning this matter to plenary hearing, as sought by the defendants, which would result in the Court having no supervisory function in relation to the

progress of the proceedings.

7.5 Accordingly, I am of the view that the proper course is to give the following directions:

> (a) that the plaintiff deliver points of claim to the defendants within two weeks, outlining fully the basis on which the plaintiff contends that the Court should assess the compensation which it claims, having regard to the points of defence raised by the defendants;
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> (b) that contemporaneously with the delivery of the points of claim, the plaintiff file in Court and deliver to the defendants' solicitors such affidavit or affidavits as are necessary to evidentially support the claim made by the plaintiff in the points of claim, exhibiting all necessary documents;
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> (c) that the defendants within two weeks of receipt of the points of claim deliver points of defence;
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> (d) that contemporaneously with the delivery of the points of defence, the defendants file in Court and deliver to the plaintiff's solicitor any affidavits to establish any factual matters relied on in the points of defence;
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> (e) that each side, within one week of the delivery of the points of defence issue to the other side a request for voluntary discovery, if that party is seeking discovery, and that the request be responded to within one week.

The matter will be listed before the Court on 11th July, 2011 to review the situation.