Neutral Citation Number: [2010] IEHC 17

**THE HIGH COURT**

**Between**

**2009 679 S**

**ICS Building Society**

**Plaintiff**

**And**

**David Grant**

**Defendant**

**Judgment of Mr Justice Charleton, delivered on the 26th day of January 2010.**

1. In 2002 the Defendant bought an investment property in the countryside near Newtownmountkennedy in County Wicklow. It consists of a house and some land, which he might have thought had potential to be turned into a housing estate. It is accessed by a narrow laneway over a neighbouring property by way of a right of way. He paid £293,000, or €372,033.26. He then borrowed money from the Plaintiff. The first borrowing was on 29 October 2003 for €788,000 and the second was on 17 November 2004 for €92,000. These were secured by mortgage over the property. I note that in the loan offer of the 19 October, the Plaintiff bank valued the property for mortgage purposes at €1,100,000 and for insurance purposes at €500,000. By May 2007, the Defendant had an arrears balance of €22,679.37 and a redemption balance of €811,028.66. Perhaps the Defendant should then have sold the property in a market that was then over-buoyant, but he did not. The bank reposed it in December 2008, having been granted an order subject to a stay of four months by Dunne J. on the 7th of July 2008. The plaintiff bank sold the property in September 2009 for €355,000. There were three interested parties, but that is the best price that could be obtained. Then, because the loan merely was merely secured by the mortgage, the plaintiff bank sought judgment in the Master's Court for the balance. Despite waiving a period of 9 months of interest, the indebtedness came to €1,007,102.89 less the gross sale proceeds and adding on the cost of clearing out the property, the Defendant now owes the Plaintiff bank €663,059.62. The Master issued judgment in the larger amount on 9 June 2009, before the sale of the property. The Defendant appealed that order, out of time, by a notice of motion dated the 7 December 2009.

2. Firstly, I am satisfied that the loan papers disclose just that. The monies borrowed by the Plaintiff are subject to a contract by him to repay it. It is not accurate to claim that by entering into a mortgage deed with a bank that a borrower has thereby secured a promise that the bank will, in the event of default, simply secure possession of the property and sell it for what it may be then worth, taking whatever the proceeds are and surrendering the rest of the debt. Such a contract is possible. That is not the contract here. Nor is there any suggestion that the express words of the loan contracts and security by way of mortgage deed in this case were varied by an express collateral undertaking. Were that oral, the rule whereby the entirety of a carefully drafted written contract is presumed to be the agreement between the parties would have to be overcome. Such an assertion would, as well, suffer from the infirmity of recollection and the conscious and unconscious desire of those lending and borrowing to imagine an oral contract in the way that best suits their needs. That is why people reduce contracts to writing; then everything is in black and white. Such a claim of additional oral evidence as to intention is not made here. Instead, the claim by the plaintiff bank to recover its debt is described as unfair.

3. The Defendant says that when he borrowed the money from the plaintiff bank he "reasonably considered" his investment intentions as "sound, prudent and wise". He claims, in addition to unfairness that he had a legitimate expectation that he would be able to develop the property so as to keep up his repayments and make "in due course a profit on my investment".

4. Secondly, I am satisfied that there is nothing on the papers to suggest that the Plaintiff bank acted negligently in selling the property. Three buyers were interested. The property was well advertised. Any development potential had not been realised by the Defendant at that height of the over-valuation of housing that characterised the property market in the years 2000 – 2008. Such prospect of development as existed on purchase was dependant on planning permission and by the necessity to enlarge the narrow right of way suitable for one dwelling through agreement with the owner of the dominant tenement. Further, the Plaintiff may have made efforts in that regard or may have felt that the ever rising market up to early 2008 made sale unattractive. There is no evidence of this. Rather, there is evidence of the Plaintiff bank instructing a serious auctioneer and of the best price reasonably to be obtained being secured in 2009. That price was close to what the Defendant bought the property for in 2003. This has more to do with domestic lack of prudence than, as the Plaintiff claims, the occurrence, as he says, unexpectedly, of a "major, economic and financial worldwide collapse".

5. Furthering that argument, the Defendant pleads that the Plaintiff bank will obtain judgment unfairly if the court makes an order that he repay his debt. Why, the Defendant asks, should he be asked to repay when the banks in general are being bailed out by the Irish taxpayer?

6. I wish to briefly address this issue. Under the Constitution, the courts adjudicate on disputes. Contrary to perceptions that might arise from the rare occasions when legislation is declared to be unconstitutional, the courts have no law-making powers. The law derives from the statutes passed by the Oireachtas and from such law as continues in force on the enactment of the Constitution in 1937 under Article 50. The overall claim of the Defendant is that reckless lending took place from the bank to him. Contract law assumes that those entering into an agreement intend that it should be legally enforceable and, unless the contrary is shown, have acted in relation to each other by their mutual choice and not out of compulsion. People can enter into bad bargains. The law never enquires into the adequacy of any consideration for a contract. One can sell a motor manufacturing company for billion Euros or for ten Euros. There can be occasions

whereby someone is forced into an apparent agreement where the courts can interfere. That power is derived from an existing law whereby undue influence can upset a contract, declaring it void. In situation of close personal relationship, as for instance between a parent purchasing for an undervalue the wealth of a child who has independently inherited property, unfair pressure may be more easily found, and is in some cases presumed, thus casting the burden of proof on the party seeking to uphold the bargain. No such principle of undue influence exists unless actual facts showing pressure beyond the normal to and fro of bargaining are proved. Undue influence is not even asserted here. For a business to recklessly trade and to collapse leaving debts is both a criminal offence and a civil wrong. Reckless trading must involve some lack of prudence going beyond the risk-taking that is inherent in the enterprise of business so that a real and apparent risk emerges that a company will be unable to pay its debts. In those circumstances, the controllers of a company must also think of their debtors and make provision for the repayment of obligations. Here, what is asserted is some alleged wrong akin to reckless lending. I have no material whereby I could come to any such conclusion on this case since both the Plaintiff and the Defendant seem to have taken the same overvalued view as to the worth of the security. But, more fundamentally, the argued for tort of reckless lending does not exist in law as a civil wrong. It is not within the competence of the court to invent such a tort. The Oireachtas could, if it saw fit, pass a law creating such a civil wrong. It is difficult to imagine the parameters of such a law since those who seek a loan will have a view as to what should be borrowed, and if a loan is badly made by a bank, how can the issue of contribution be escaped from by the borrower who sought the money in the first place. Defining that civil wrong would tend to remove the presumption of arms length dealing as between borrower and bank and replace it with a new relationship based on a duty of nurture that other common law countries do not see it as their duty to put into the marketplace as any argued-for law as to reckless lending does not appear in the works on tort that I have consulted from other common law jurisdictions.

7. In any event, I am unable to act on this argument because such a law does not exist beyond the principle of undue influence, which is not raised in any way on the facts in this case.

8. In the event I must enter judgment against the Defendant in favour of the Plaintiff bank.