Neutral Citation: [2014] IEHC 322

THE HIGH COURT

[2013 No. 74 SP]

BETWEEN

ACC BANK PLC.

PLAINTIFF

AND

ANTHONY BARRY CURRENTLY PRACTISING AS A SOLICITOR UNDER THE STYLE AND TITLE OF BARRY & COMPANY SOLICITORS, ORLA CUMMINS FORMALLY PRACITSING UNDER THE STYLE AND TITLE OF ANTHONY BARRY & COMPANY SOLICITORS AND CURRENTLY PRACTISING IN THE STYLE AND TITLE OF ORLA CUMMINS SOLICITOR, JULIE SHANLEY FORMERLY PRACTISING IN THE STYLE AND TITLE OF ANTHONY BARRY & COMPANY SOLICITORS AND CURRENTLY PRACTISING IN THE STYLE AND TITLE OF SHANLEY GLENNON & COMPANY

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 24th day of June 2014

1. The plaintiff is a Bank. The defendants are solicitors who, at various times, practised individually and in partnership with each other. In 2005, the first named defendant was the principal of the firm of Anthony Barry & Company Solicitors in Athlone. He acted on behalf of Brian Doyle of Kenagh, County Longford (the "Borrower"), who borrowed monies from the plaintiff for the purpose of developing land. On 21st October, 2005, he gave a solicitor's undertaking to the plaintiff, and on 1st December, 2005 (five weeks later), he sold his practice to the second and third named defendants.

2. The first named defendant claims that the second and third named defendants took over all undertakings from him on the sale of the practice. However, it appears from the Asset Purchase Agreement at Clause 11.2, that the first named defendant agreed to indemnify the second and third named defendants against all claims arising after the commencement date in respect of any activities of the business performed by him prior to the commencement dates which arise as a result of any act, omission or default on his part. The second and third named defendants agreed to indemnify the first named defendant against all claims arising after the commencement date in respect of any activities of the business after that date which arose as a result of any act, omission or default of the second and third named defendants or their servants or agents. The third named defendant was not represented and, by agreement, the case did not proceed against her. The proceedings against the fourth and fifth named defendants, originally named in the proceedings, were struck out by order of the court on 22nd April, 2013. The action, therefore, proceeded against the first and second named defendants only.

3. In December 2005, having sold his practice, the first named defendant was given signing authority for all Certificates of Title and accountable trust receipts for and on behalf of Anthony Barry & Company. That company ceased trading in February 2010, when the second and third named defendants went their separate ways. The second named defendant maintains that the first named defendant took over certain files at that time, on the understanding that all undertakings would be taken over by him in his new firm of Barry & Company. But it seems that the first named defendant did not do so.

4. There were a number of undertakings given by the Borrower's solicitors to the Bank. The first was the undertaking of 21st October, 2005, given by the first named defendant ("the first undertaking"). By that undertaking, the first named defendant undertook, *inter alia*, as follows:

> (a) Within one month from the initial loan cheque issued (in respect of property at Glack, County Longford ("the Glack loan facility") to stamp and lodge for registration the plaintiff's Deed of Charge/mortgage over lands at Glack, County Longford, referred to as both Glack and Lackagh, County Longford ("Glack mortgage") in the Land Registry;
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> (b) as soon as practicable, to complete and lodge with the plaintiff a report and Certificate of Title in the plaintiff's standard form, together with all documents constituting the plaintiff's security and also the title documents or other documentary evidence, evidencing the Borrower's title to a property at Glack, County Longford ("the Glack property"), including, in the case of registered land, the Land Certificate.

5. The Borrower obtained two loans from the plaintiff. The first loan was drawn down in stages and the first drawdown took place on 1st November, 2005. On 1st December, 2005, the first named defendant sold his practice to the second and third named defendants. By that date, the one-month period had elapsed, but only just. Nevertheless, it is clear that at the time of the sale of his practice to the second and third named defendants, the first named defendant had not complied with his undertaking that within one month of the initial loan cheque issue, he would stamp and lodge for registration the Bank's Deed of Charge/mortgage and the Deed of Transfer/conveyance in the Registry of Deeds or Land Registry. It is also clear that he had not, by the sale of the practice, completed and lodged with the Bank a report or Certificate of Title as he was required to do "as soon as practicable". The initial sum borrowed by the Borrower from the plaintiff in August 2005, was €660,000 which included rollup of €60,000. In the facility letter, accepted by the Borrower, he agreed, *inter alia*, to procure a first legal mortgage and charge on the development site and work in progress at Glack, Longford, and to arrange for his solicitor's undertaking to be obtained. The facility letter also required that his solicitor would irrevocably undertake, on his instructions, to furnish to the Bank the net proceeds of sale of the seven units being developed at Glack, County Longford in reduction of the Bank debt. On 27th October, 2005, the first named defendant undertook to furnish to the plaintiff the sale proceeds of the seven units being developed at Lackagh, County Longford, in payment reduction of the Bank's debt ("the second undertaking").

6. There appears to be no dispute but that the proceeds of sale of the properties sold at Glack have been transferred to the Bank.

7. By a facility letter of 18th December, 2006, a letter of loan sanction and agreement for bridging finance in respect of a development at Newtowncashel, County Roscommon, issued to the Borrower. The security required was:

(i) a first legal mortgage and charge over the property at Newtowncashel, County Roscommon;

(ii) an extension of a first legal mortgage and charge over the site and works in progress at the site at Glack, County Longford, and

(iii) a solicitor's undertaking to furnish the plaintiff with €150,000 sales proceeds in reduction of the balance of the Newtowncashel facilty from the sales proceeds of the Glack site, County Longford, once the Glack site loan facility has been repaid.

By letter dated 9th February, 2007, the second and third named defendants gave an undertaking in those terms ("the third undertaking"). Although the undertaking refers to a sum of €155,000, it clearly should be €150,000 by reference to the facility letter of 18th December, 2006. In time, the Glack loan facility was paid off and the sum of €150,000 was paid in reduction of the balance of the Newtowncashel facility.

8. The Newtowncashel facility was for €589,000. As a the condition of the loan, Anthony Barry & Company (the second and third named defendants) agreed to extend the first legal mortgage and charge over the site and work in progress at Lackagh (Glack), County Longford, and undertook to furnish a sum of €155,000 (€150,000) out of the sale proceeds of the property at Lackagh in reduction of the Newtowncashel facility from the sale of proceeds of the Lackagh site, County Longford, once the Lackagh site loan facility had been repaid. This was duly done and there is no dispute about it.

9. On 19th February, 2007, Anthony Barry Solicitors signed an extension of solicitors existing undertaking to the plaintiff in which they confirmed, *inter alia*, the undertaking already given to the plaintiff in respect of the site at Lackagh (Glack). By letter dated 24th April, 2008, Anthony Barry & Company confirmed to the plaintiff that their client had sold Units 1, 2, 3, 5 and 6 at Glack, and that two units remained outstanding. In further correspondence, they informed the plaintiff that it held their undertaking to furnish the proceeds of sale in relation to each of the units built which are currently built on the site at Glack. By 20th December, 2011, the second named defendant wrote to the plaintiff confirming that "*some time ago*" the entire loan facility for the property at Glack had been repaid and that the sum of €150,000 was also paid off the loan for Newtowncashel after the Glack facility had been repaid.

10. It appears clear from the evidence that by the time the first named defendant sold his practice to the second and third named defendants on 1st December, 2005, the Glack mortgage had not been stamped and lodged for registration and therefore he was technically in breach of his undertaking to take this step within one month (albeit by only one day as of that date). Furthermore, a report and Certificate of Title had not been completed and lodged as soon as practicable, and the title documents were not lodged as soon as practicable. On the other hand, everything that was required of the Borrower under the Glack facility was done. The monies were repaid, and out of the proceeds of sale, a further sum of €150,000 was paid in reduction of the Newtowncashel liability. Correspondence from the plaintiff on 27th February, 2012, tends to confirm that there was security in place, at least by that time.

11. By letter dated 20th April, 2012, the plaintiff clearly accepted that it had a security in respect of the loan for the Newtowncashel development. The letter says, inter alia, "*. . . that as the security is continuing security for the facility, the Bank can continue to rely on the security for monies under the facility. Therefore, the Bank is entitled to state that it does not consent to the partial release of any its security as the security is held for all liabilities of the Borrower*". Later, in the same letter, the author states "*. . . therefore, we would suggest that you revert to your client in respect of the property at Glack, and if your client is seeking a partial release of security, that an adequate and reasonable offer is made to the Bank in respect of same*". This, again, underlines the Bank's assertion that there was security in place.

12. Counsel for the second named defendant argues that there is security in place and all the plaintiff is entitled to is the value of the security. The Bank obtained an affidavit and report from Mr. Michael W. Carrigan, a solicitor with expertise with conveyancing in both commercial and residential property. He furnished an expert opinion which suggests that the Borrower had good marketable title to the properties because he was able to sell them. Mr. Carrigan says that the 2008 charge should have been over the entire site owned by the Borrower, but excluding the five units already sold. It appears that, in fact, this was done, as Property No. 2 on the Folio comprised the other units, namely, 4, 7 and 8. It seems that once all the properties in the Glack site were sold, the only security left in that site was the value of any lands which could be deemed to be "*development site and work in progress*". It is by no means clear what was covered by this once the other properties on the site had been sold and the monies repaid to the Bank, so say nothing of the additional €150,000 paid against the Newtowncashel loan. The 2008 charge was registered on Folio 4447 on 26th January, 2009. Mr. Carrigan says that the second named defendant says, in paragraph 4 of her affidavit of 22nd May, 2013, that Property No. 2 comprises Units 4, 7 and 8 of the developments, and if this is so, to the extent that the 2008 charge was stated to relate to Units 4, 7. and 8 of the development only, this would mean that the property comprised in the 2008 charge has been correctly charged. He says that, this, however, would need to be checked by examining the Folio map and verifying the identity of Property No. 2.

13. Mr. Carrigan also says that the mortgage and charge required by the plaintiff pursuant to both the 2005 letter of loan offer and the 2006 letter of loan offer was not stamped and lodged for registration within one month of the issue of the relevant loan cheque. He says that insofar as this was not done, Anthony Barry & Company was in default of the terms of its undertaking to the Bank, but that it was a mere technical or administrative default if the delay did not deprive the Bank of its entitlement to a first mortgage in charge over the property to be charged and the Bank did not suffer any loss as a result.

14. As events unfolded, the plaintiff did not lose any priority by the late registration of the charge.

15. The lands which are at the heart of the dispute between the parties were registered lands, and insofar as there may have been defects in undertakings furnished, or to give a report and Certificate of Title to the plaintiff or to lodge title documents as soon as practicable, these seem to be issues of a purely technical nature which have not prejudiced the plaintiff in any way. No expert evidence has been given to show whether or not undertakings of that nature were appropriate or enforceable in the case of registered land. What was clearly important, in this case, was that the Bank would not lose priority by the registration of charges, or that it would not be affected by some lack of marketable title. But that did not happen. The Folio is the title so far as these lands are concerned.

16. So far as the Certificate of Title is concerned, this is only relevant if the plaintiff suffered loss as a result of the security not being in accordance with the title certified. There is really no issue about this because there was good, marketable title, and this is as good as acknowledged by Mr. Carrigan in his expert opinion. There is no question that the title was defective in any way, nor is such an allegation made by the plaintiff. Folio 4447, County Longford, shows the title to be absolute and the Borrower is registered as the full owner. The land is freehold and, accordingly, the registration of the Borrower as full owner with absolute title requires no further investigation. It is difficult to see what Certificate of Title could have been furnished by the defendants which would have made the position any clearer than that set out on the Folio which is conclusive of the title.

17. On 28th September, 2012, Mr. Colm Ryan and another representative of the plaintiff called to the office of the second named defendant demanding certain Title Deeds and appear to have taken a rather heavy-handed attitude. I accept the evidence on behalf of the second named defendant that the Bank sent these people to her office without appointment and that they acted in a way which intimidated staff and was wholly unwarranted. The behaviour of the Bank representatives when they called to the office of the second named defendant on 28th September, 2012, was quite unacceptable. It is clear that office staff were intimidated and it was necessary for the second named defendant to call for members of An Garda Síochána to have the Bank representatives removed.

18. These proceedings, in themselves, are very unusual in that they seek, *inter alia*, an order declaring that the defendants are guilty of misconduct by failing to comply with undertakings given on 21st October, 2005, and 19th February, 2007. It is most unusual to find such a claim made in proceedings taken by a financial institution in respect of a solicitor's undertaking. The plaintiff appears to have contacted the Law Society in relation to its complaints about the defendants and the undertakings which, the plaintiff claims, were not honoured. But the Law Society does not appear to have regarded the matter as of much significance, or to have taken any steps against the defendants, and it is clear that in his expert opinion, Mr. Carrigan views any breaches of undertaking as being of the most technical kind and does not suggest there is any evidence that the plaintiff's position was adversely affected.

19. It hard to understand, in the light of the facts of this case and the expert opinion obtained by the plaintiff, why it is maintaining these proceedings. The real problem for the plaintiff in this case is the reduction in the value of its security but not the want of security.

20. The plaintiff appears to be using these proceedings as some form of leverage with the defendants as a means of making good the loss in value of its security due to the downturn in property prices. There is no evidence that, even if all of the undertakings were complied with, down to the last detail, the plaintiff's position would have been any better than it is now, or was at the time when these proceedings were commenced.

21. Solicitors must be held to account in respect of any losses suffered by parties to whom they give an undertaking where there has been a breach of that undertaking by the solicitor. The burden of proof is on the plaintiff to establish its case against the defendants. All it has done is to establish that there were some breaches of undertakings of the most technical nature, but which, in reality, had no adverse consequences for the plaintiff as it had not lost its priority by the time the charges were registered. This case seems to me to come within the ambit of the maxim "*de minimis non curat lex*". The plaintiff claims, *inter alia*, a declaration that the defendants are guilty of misconduct, and yet, having lodged a complaint with the Law Society, that body did not see fit to take any steps against the defendants. The courts have limited time and resources available and should be used for the resolution of genuine disputes and not for the enforcement of trivial and technical breaches of undertakings in circumstances where there cannot have been any appreciable loss suffered by the plaintiff as a result of those breaches. To take such a step is an abuse of process and that is what has occurred here.

22. I refuse the plaintiff the relief which it seeks in these proceedings.