

THE HIGH COURT

[2013 No. 530 SP]

BETWEEN

KBC BANK IRELAND PLC

PLAINTIFF

AND

JOHN HENCHION PRACTISING UNDER THE STYLE AND TITLE OF JOHN HENCHION & COMPANY SOLICITORS

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 26th day of March, 2015.

1. This is a motion which seeks to amend the special indorsement of claim on a special summons under O. 28, r. 1 of the Rules of the Superior Courts. The plaintiff, a Bank, by letter of offer dated 4th April, 2007, agreed to advance to Eugene Lynch and Bernadette Lynch a loan of €290,000.00 for a term of 25 years. The loan was to be secured by way of a first legal charge over the property known as 67 Laurel Avenue, Ballea, Carrigaline, Co. Cork. The plaintiff permitted the drawdown of these funds on foot of a solicitors undertaking executed by the defendant dated 9th April, 2007.

2. There was a special condition attached to the letter of offer under the heading "Matters for the Attention of Solicitor" that "the applicants existing mortgage must be redeemed on or prior to completion of the advance".

3. The solicitor undertook that prior to negotiating the loan cheque or the disbursement of the proceeds thereof, a mortgage deed/charge in the lenders standard form would be executed by the borrowers over the property so that the mortgage ranked as a first legal charge on the property. The defendant also undertook to register the mortgage in the appropriate registry so as to ensure that the lender obtained the first legal charge on the property and furnish the relevant documents to the bank providing confirmation that these steps had been completed.

4. The loan was for the purpose of remortgaging 67 Laurel Avenue, and the plaintiff claimed that in reliance upon the letter of undertaking it duly advanced the sum of €290,000.00 by way of a loan cheque paid through the defendant. It is claimed that the loan cheque was then negotiated but that the defendant failed to utilise the loan funds for their stated purpose, which was the discharge of the borrowers' mortgage with Bank of Ireland Mortgage Bank. In addition, a charge in favour of IIB Loans Limited (now the plaintiff) which had been registered on folio 9387F County Cork, for the benefit of the Bank, ranks second in priority to the charge in favour of Bank of Ireland Mortgage Bank.

5. A letter demanding that the defendant comply with the terms of the undertaking was sent. The defendant has failed to redeem the mortgage to Bank of Ireland Mortgage Bank and released a significant amount of the advanced funds to the borrowers. It is claimed that this was in breach of the defendants undertaking to the plaintiff to redeem the borrowers pre-existing mortgage. It is claimed that the loan was advanced only on the basis that it would rank as the first legal charge on the property and thereby provide security for the plaintiff's loan. The Bank claims that it would not have made the loan facility available to the borrowers had it believed that the borrowers would be burdened with additional loans on the property, or that the loan would not be used to redeem the existing borrowings. The plaintiff seeks an order directing the defendant to comply with the undertaking and/or compensation for loss suffered as a result of his failure to do so.

6. In its letter demanding compliance with the undertaking of 14th March, 2013, the Bank stated:-

"It is quite clear from the folio that a mortgage in favour of Bank of Ireland Mortgage Bank is registered ahead of our client's charge. Further, the mortgage property was transferred out of the joint names of the borrowers herein into the sole name of Bernadette Lynch in 2010. We call on you to furnish a full explanation in respect of the foregoing together with your proposals for dealing with same and complying with your long outstanding undertaking."

7. In a replying affidavit of 4th December, 2014, Mr. Henchion accepts that he was irrevocably authorised by the borrowers to furnish an undertaking to the plaintiff in the required form and to do all things necessary to comply with it. The loan was drawn down by the borrowers on 17th June, 2007. Mr. Henchion accepts that he discharged the sums outstanding on the specified accounts insofar as he understood them to be then due and owing. Having discharged those amounts, he applied to the Bank of Ireland Mortgage Bank for the vacation of the mortgage on the property.

8. Mr. Henchion also states that the mortgage documents and all associated documents were signed and executed by the borrowers as required in the undertaking. All necessary documents were stamped and lodged with the Property Registration Authority for the purpose of registering the plaintiff's charge over the property. The charge was registered as a burden on the property on 17th July, 2007. However, Mr. Henchion states that he made a mistake in calculating the amount necessary to ensure the discharge of the liability to Bank of Ireland Mortgage Bank.

9. Having drawn down the cheque Mr. Henchion wrote to Bank of Ireland Mortgage Bank on 20th June, 2007, seeking the redemption figure on the borrowers' mortgage account. This redemption figure was provided and the defendant discharged a sum in the amount of €38,921.47 on 22nd June, 2007, from the proceeds of the loan cheque. Thereafter on 1st August, 2007, 24th October, 2007, and 6th December, 2007 he sent reminders to the Bank seeking the vacated mortgage in respect of the property.

10. In the meantime Mr. Henchion furnished an account to the borrowers setting out clearly what bank accounts and borrowings had been discharged by him from the funds drawn down, which also set out fees due to his office and the deposit which was paid by the borrowers for the purchase by them of another property. He then made two payments to the borrowers into their joint account on 26th June, 2007 in the sum of €100,000.00 and 15th October, 2007 in the amount of €56,015.03. This was on their express instructions.

11. Mr. Henchion in a further affidavit of 10th April, 2014, explains that at the time of receiving the redemption figure the only mortgage account of which he was aware was Account No. 23737946. He read the redemption figure for that account on the first page of a facsimile from Bank of Ireland Mortgage Bank and discharged it. However, he acknowledges that he failed to read the rest of the facsimile and therefore erroneously concluded that he had all the information necessary to comply with his undertaking in respect of the loan cheque. Had he read the further information set out in the facsimile he would have discovered the existence of Account No. 45563448 in respect of a further balance owing to Bank of Ireland Mortgage Bank which he was obliged to clear in compliance with his undertaking from the proceeds of the loan cheque.

12. Though the borrowers must have known of the second mortgage account they failed to correct the defendant's error when furnished with closing figures in relation to the transaction. However, when contacted by the defendant Mr. Eugene Lynch is said to have assured him that he would advance the funds to enable the discharge of the second mortgage account. He failed to do so. That figure was in the amount of approximately €100,000.

13. As already noted the property was transferred into to the sole name of Mrs Bernadette Lynch in March 2010. The defendant states that he had no part in that transaction and was not retained to act in the matter by either party.

14. The defendant solicitor wrote an open letter to the plaintiff dated 8th April 2014 which acknowledged the defendant's obligations under the terms of the undertaking and expressed a willingness to discharge the amount necessary to pay off the Bank of Ireland Mortgage Bank charge once a reliable redemption figure and commitment to vacate the mortgage on payment of that amount was obtained. The letter also sought particulars of compensation claimed by the plaintiff bank because the plaintiff bank was claiming compensation on the basis that it would not have entered the transaction and provided the loan facility if it thought that the terms of the undertaking would not be honoured: it was making a "no transaction" compensation claim.

15. In an affidavit of the 10th October 2014 Ms. Bloomer, an official with the plaintiff bank, gave the particulars of the compensation claimed. It stated that it was now based on an additional alleged breach of the defendant's undertaking as follows:-

"10. Mrs Lynch has also raised an issue with the execution of the letter of offer and the mortgage herein. She is alleging that she was not advised by the defendant as to what she was signing or the implications for the family home when she executed the loan documentation. She is asserting that she is in a similar position to the defendant in Ulster Bank Limited v. Roche & Buttimer [2012] I.R. 765. The defendant has been put on notice of this issue by letter dated the 1st August 2014... This development, which only came to the plaintiff's attention in May 2014, significantly complicates the basis on which the plaintiff could potentially seek compensation herein. If Mrs Lynch was to succeed in such a defence then the plaintiff security would be rendered unenforceable and the plaintiff would contend that such a failure by the defendant to ensure that the executed loan documents were effective would be a further clear and unambiguous breach of his undertaking. Had the plaintiff been aware of the possibility that the loan documentation could be unenforceable for the reasons as alleged by Mr Lynch, then the monies would not have been advanced in the first place. If that were to transpire then the plaintiff would contend that they should be entitled to the entire sum due and owing on the loan account as a result of what would be a fundamental breach of undertaking. At the present time the total amount outstanding on the borrower's loan account is €332,423.09...

12. The plaintiff accepts that in the absence of such a defence that the case does not fall into a "no transaction" type scenario and that if the defendant discharged the Bank of Ireland charge that the issue to be decided thereafter would be a question of calculating the loss flowing to the plaintiff as a result of the plaintiff significant and continuing delay in complying with his undertaking dated the 9th April 2007.

13. I say that as at the 6th October 2014 the total amount outstanding to the plaintiff by the borrowers is €332,423.09 which consists of €89,309.73 for arrears of payment.

14. I say and believe that if the allegations raised by Bernadette Lynch, which if successful would have the effect of rendering the plaintiff's security enforceable (sic) were not an issue in this case then the plaintiff would contend that the loss flowing from the failure to comply with the undertaking would be €89,309.73. This is on the basis that were the borrowers not required to service two mortgages and had they been in a position to engage with the plaintiff alone the chances of falling into arrears would have been reduced."

16. It is the emergence of this new allegation against the defendant which gave rise to the application to amend the endorsement of claim in the following terms:-

"10. Further in the alternative the plaintiff seeks repayment for the entire of the amount outstanding on the mortgage advanced to the borrowers on the following grounds -

"(a) Since in or about May 2014 the said Mrs Lynch and her legal advisors have asserted to the plaintiff that the charge registered in its favour on the property is unenforceable and/or invalid on the grounds inter alia that she was not advised by the defendant of the implications for the family home when she signed the letter of offer and mortgage and was under the undue influence of her husband.

(b) In the form of acceptance attached to the letter of offer the borrowers acknowledge that they had received inter alia copies of the letter of offer and the form of mortgage which they had been advised upon by their solicitor, the defendant. These signatures were witnessed by the defendant.

(c) In the solicitor's undertaking dated 9th April 2007 the defendant gave an undertaking to ensure that the plaintiff obtained a first legal charge which would require, inter alia, that the charge would be valid and enforceable by the plaintiff against both borrowers.

(d) In the premises the plaintiff claims as compensation repayment of the entire sum outstanding on the mortgage account of the borrowers."

17. For his part, the defendant understandably complains of the paucity of detail advanced to ground this aspect of the plaintiff's claim. It emerged very late in the day but he has nevertheless attempted to deal with the allegations in paras. 9 - 16 of his affidavit sworn on the 7th November, 2014. There is no doubt that, if the amendment is allowed, these fresh allegations will have to be addressed in oral evidence at a plenary hearing.

18. The defendant contends that by introducing this allegation the plaintiff is substantially altering the claim set out in the indorsement of claim as originally evidenced by the affidavit of Ms. Bloomer sworn on the 10th October, 2013, and which at that time raised no concern as to the execution of the acceptance of offer and the mortgage. It is submitted that the plaintiff is now attempting to litigate a claim which is substantially different to that set out in the original indorsement of claim. However, the plaintiff contends that it was only in its dealings with Mrs. Lynch in May, 2014 that it became aware of these allegations. It is noteworthy that the defendant in his affidavit in stating that he fully advised Mrs. Lynch and understood her to be a willing and knowledgeable participant in the transaction, also states that her present solicitors corresponded with him in November, 2009 concerning this loan and the letter of offer of the 4th April, 2007, seeking information regarding the registration of the charge, the subject of the undertaking.

19. He states that Mrs. Lynch was one of his clients in the transaction and was fully advised by him and is certain that she was fully aware of the nature of the documents she was signing and the consequences of signing them. He states that he went through the documents in detail with the borrowers and there was no substance to the hearsay allegation raised by the plaintiff. He further states that he is entirely satisfied that Mrs. Lynch was fully advised and understood and was a willing informed and knowledgeable participant in the transaction.

Order 28, Rule 1

20. It is well settled that the primary consideration of the court on an application to amend pleadings under O. 28 r. 1 must be whether the amendments are necessary for the purpose of determining the real question of controversy in the litigation. The discretion is to be exercised judicially but if an amendment can be made without prejudice to the other party and thereby enable the real issues to be tried, it should be made. Often prejudice may be overcome by an adjournment or if it puts the other party to expense, it may be regulated by an order as to costs (*Croke v. Waterford Crystal Limited* [2005] 25 I.R. 383; *O'Leary v. Minister for Transport* [2001] 1 ILRM 132; *Krops v. The Irish Forestry Board Limited & Ryan* [1995] 2 I.R. 113 and *Director of Public Prosecutions v. Corbett* [1992] ILRM 674). It is also necessary for the court to consider whether any prejudice will accrue to the defendant if this amendment is allowed.

Decision

21. The proposed amendment in this case falls within the cause of action already pleaded. However, although it relates to the alleged breach of undertaking, it raises entirely new and different allegations than those originally pleaded and evidenced on affidavit. The focus is now upon allegations made by Mrs Lynch that she was not fully or adequately advised by the defendant when signing the letter of loan agreement and the mortgage documents. If that is correct the plaintiff alleges that the solicitor is in breach of his undertaking to ensure that he obtained enforceable security. The plaintiff now claims that the mortgage documents may be vitiated by reason of the defendant's negligence and breach of duty towards his client, Mrs. Lynch, and/or by permitting her to execute the documents whilst under the undue influence of her husband.

22. The plaintiff contends that these matters were not included specifically in the original indorsement of claim and only arose because of the late knowledge acquired by the plaintiff from Mrs. Lynch May, 2014. I am satisfied that the new facts alleged are within the cause of action and the relief claimed in the special indorsement of claim. The factual basis, insofar as it may exist, for the claim has been set out in the additional affidavit of Ms. Bloomer. The defendant has replied by way of extensive refutation of the allegations made. It is also acknowledged by the defendant that any conflicts of fact in relation to this aspect of the case would have to be resolved by oral evidence. There is no suggestion that the defendant would be in any way prejudiced in defending the case. Therefore, I am satisfied that insofar as the plaintiff seeks an amendment expanding the basis of the factual element of the claim, namely the defendant's engagement with Mrs. Lynch and the execution by her of various documents as a result of his alleged negligence and/or breach of duty, this is an issue which comes within the cause of action as originally pleaded but has since been factually expanded on the basis of newly acquired knowledge. I am satisfied, therefore, that it is appropriate to grant the amendment on this limited aspect of the case. This will allow the real issues between the parties as to the extent of the breach of undertaking and the resulting loss, if any, to the plaintiff to be determined.

23. I am not satisfied that any factual basis or detail has been advanced in respect of the allegation of undue influence or how it is said that the defendant was in anyway in breach of his undertaking because of the alleged undue influence exercised by Mr. Lynch over his wife at the time of this transaction. No particulars of this undue influence are set out in the proposed amendment nor is any factual basis, beyond the mere assertion of undue influence contained in the affidavits. It is not stated how the defendant could possibly have known of this alleged undue influence or how it is related to his alleged failure to honour his undertaking. The ordinary rules of pleading provide under O. 19, r. 5(2) that in all cases alleging undue influence in which particulars may be necessary, particulars with dates and times if necessary shall be set out in the pleadings. These particulars must provide the defendant with sufficient detail to allow him to know the case which he has to meet. There is nothing in the proposed amendment or in the affidavits furnished which provide any evidential basis upon which this aspect of the proposed amended claim could possibly succeed, whether on a trial by affidavit or in rehearing.

24. I am, therefore, satisfied to allow the proposed amendment subject to the deletion of "*and was under the undue influence of her husband*" in para. 10(a) thereof.

25. It is now acknowledged that the expanded claim in the proposed amendment is the only basis upon which the plaintiff could claim compensation of the entire sum outstanding on the mortgage account of the borrowers at this stage. The court notes the extensive acknowledgment by the defendant of the breach of undertaking in terms of the registration of the mortgage as a first charge and the discharge of the monies due to Bank of Ireland Mortgage Bank. The court also takes into account the defendant's concerns as to the affect of the prolongation of these proceedings on his practice and reputation. The court does not see any reason why this case should not proceed in its amended form to a conclusion with reasonable speed and does not consider that it should be delayed by a reason of any other contemplated proceedings against the Lynches. It is now clear from the quoted extract from the affidavit of Ms. Bloomer that the main issue between the parties will, in effect, focus on the amended claim. Since the issue has now been narrowed considerably, it is possible to conclude the pleadings with a view to obtaining an early trial date.