

THE HIGH COURT

2008 1255 S

BETWEEN

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK PLC.

PLAINTIFF

AND

JOHN MADDEN

DEFENDANT

JUDGMENT of Mr. Justice Brian McGovern delivered on the 3rd day of July 2009

1. The plaintiff's claim is for monies lent by the plaintiff to the defendant at his request. The parties are in agreement that if the defendant is indebted to the plaintiff, the amount due on foot of the loan agreement as of the date of commencement of the trial is €1,359,392.97.
2. The plaintiff is a bank. At all material times, the defendant was the principal of John Madden Car Sales and he resided at Lucan in County Dublin.
3. The claim arises out of a Loan Agreement entered into by the plaintiff and the defendant on 12th December, 2005, pursuant to which the plaintiff agreed to make available to the defendant a loan facility in the sum of €1,330,000.00. The terms on which the loan was granted were set out in a facility letter dated 8th December, 2005, and which was accepted and signed by the defendant on 12th December, 2005.
4. The agreement states that the purpose of the facility was "*to invest in further property acquisitions*". The security offered was a

"Letter of undertaking over Legal Mortgage and Deeds of property at 23, Coldwater Lakes, Saggart, County Dublin.

Any security held now or at any future time shall be security for all your liabilities to the Banks (actual or contingent) and whether as principal or surety."

The property specified is one and the same as that described elsewhere as No. 8, Tassagard Drive, Citywest, Saggart, County Dublin. A letter of undertaking was given by the defendant's solicitor, Mr. Thomas Byrne.

5. The granting of the loan followed upon a meeting that took place on 10th November, 2005, when the defendant attended with his solicitor at the bank's premises for the purpose of making a loan application. At that meeting, the bank officers outlined the requirements that had to be met in order to proceed with the application. The defendant had been introduced to the bank by Mr. Thomas Byrne, who had personal borrowing with the bank and was in the course of opening his practice account with the bank at that time. The defendant was described to Mr. Gordon Bothwell of the plaintiff bank as a client of Mr. Byrne's firm, Thomas Byrne & Co., as well as being a business associate. When the parties met on 10th November, 2005, Mr. Bothwell and Mr. David Doyle represented the bank and the defendant attended with his solicitor, Mr. Byrne. It is accepted by Mr. Bothwell and the defendant that Mr. Byrne did most of the talking.
6. There is a disagreement between the parties as to what was the purpose of the loan. The defendant maintains that the loan was to enable him to purchase the property at No. 23, Coldwater Lakes ("the property") from Mr. Byrne to compensate him in respect of losses suffered due to Mr. Byrne not completing an earlier property deal in which he and the defendant were involved. The plaintiff maintains that the clear purpose of the loan was as stated in the facility letter, namely, "*to invest in further property acquisitions*." As evidence of this, the plaintiff says that the defendant furnished a Schedule of Assets which included the property which was described as No. 8, Tassagard Drive, Citywest, Saggart, County Dublin ("the property"). This statement of affairs had been furnished to the bank by the defendant's solicitor. The defendant says that he did not see the statement of affairs before it was furnished and it now transpires that the defendant did not own the property even though it was offered as security for the loan as can be seen from clause 5 of the facility letter.
7. In the course of his evidence, Mr. Bothwell, on behalf of the bank, stated that he was never told that the loan was for the purpose of purchasing the property being offered as security. I accept that evidence. The defendant admitted, under cross-examination, that he did not tell the plaintiff that he was acquiring the property from Mr. Byrne. Following the meeting on 10th November, 2005, the defendant's solicitors sent to the bank the statement of affairs which included the property and in the credit application dated 6th December, 2005, the following appears:

"The purpose of this submission is to request sanction for a twenty-five year term loan for €1,330,000.00. This is based on 70% LTV on unencumbered property at 23, Coldwater Lakes, Saggart, County Dublin, which will be held as security. The proposed funding will be used to invest in other property."

This corroborates what was ultimately stated in the letter of sanction and the evidence of Mr. Bothwell as to his understanding of the position. The defendant concedes that he did not state anywhere, in his replying affidavit to the

summary summons, that he had told the bank that he was buying this house. He accepted, under cross-examination, that Mr. Bothwell would have been under the impression that the loan was "to invest in other property" as stated in the facility letter and the credit application.

8. The solicitor's undertaking dated 22nd December, 2005, is given in respect of the property, and on the same date the defendant signed an authorisation to his solicitor to give that undertaking. On the same date, the defendant made a statutory declaration that the property was not a family home. In his evidence, he said that he did not sign this in front of the Commissioner for Oaths, contrary to what appears in the declaration. While this raises an issue of great concern, it was not possible to make contact with the Commissioner during the course of the trial to establish whether this assertion was contested. I cannot reach any conclusion on this evidence in the absence of hearing the Commissioner. However, it is not necessary for me to ascertain the true position in order to resolve the matters in issue between the parties. What is clear, beyond doubt, is that the defendant signed the declaration. The loan was drawn down on 23rd December, 2005, and the defendant accepts that he made payments on foot of the loan.

9. It appears, from the evidence, that the loan was paid to the defendant's solicitor at the defendant's request, but that it was never, in fact, passed on to the defendant. The defendant was given the keys of the property and took up occupation, believing he was the owner of it. Approximately six months later, he decided to sell the house but his solicitor suggested that a better option would be to re-mortgage the property with Irish Nationwide Building Society ("the building society"). The defendant accepted this suggestion and instructed his solicitor, Mr. Byrne, to proceed and arrange a re-mortgage of the property with the building society. He borrowed a sum of €1,400,000.00 from the building society which was drawn down by his solicitor. He understood that the money was being used to discharge what was owing to the plaintiff. The defendant subsequently learned that his solicitor had retained that sum of money for his own benefit and had mortgaged the property with another lending institution without reference to the defendant. When making the application for the refinancing loan, the defendant had to state his financial commitments and did not name the property at No. 23, Coldwater Lakes, as a property on which he had any commitments. He offered the property as security for that loan.

10. Between July 2006 and October 2007, the defendant made a number of payments to the building society on foot of the loan, but became aware that money was still being drawn down from his account with the bank and he received reminders from the bank about his failure to keep up payments. The defendant says that he then contacted his solicitor, Mr. Byrne, who said he would sort everything out, but he admits he never told the bank that he had taken out a refinancing loan with another financial institution in order to discharge the loan. It seems surprising to me that if demands were being made of him by a bank (the plaintiff) at a time when he understood the loan had been paid off, he was not, at the very least, indignant, and did not explain to the bank that the loan had been paid off as far as he was aware. But it seems that he never did this nor did he tell the bank that he had refinanced the loan. No satisfactory explanation has been given for this.

Issues

11. The plaintiff says that this is a simple, straightforward case of a claim on foot of a loan agreement. The defendant has raised a number of issues by way of defence to the claim. He contends that he entered into the loan agreement while acting under the undue influence of his solicitor, Mr. Thomas Byrne, and/or that he entered into the loan agreement under a fraud and deception practiced against him by his solicitor. He claims that the plaintiff had constructive notice of the fraud and that he was not the owner of the property, and that the plaintiff did not make reasonable enquiries before giving the loan. Although he did, at one point, rely on common mistake and the doctrine of *non est factum*, he withdrew reliance on those matters at the trial of the action.

12. I will deal with each of these defences as they arise.

Undue influence

13. The relationship of solicitor and client is one in which it has been held that undue influence will be presumed. It is necessary, therefore, to examine the evidence to see whether this presumption has been rebutted in the present case.

14. There is no evidence to show that the defendant was either a vulnerable or dependent person. He was an established businessman and retained Mr. Byrne as his solicitor in the usual way. While they appear to have cooperated in at least one property transaction (which was not completed), I find no evidence that the advice being received by the defendant from Mr. Byrne was not "*independent legal advice*" as that expression is normally understood. The usual meaning of such advice is that it is advice obtained by the party himself from a lawyer retained by him and not advice coming from the legal advisor of a third party with whom he is entering into a legal relationship. There was no evidence of any conflict of interest on the part of Mr. Byrne in this transaction that was apparent, or ought to have been apparent, to the bank, in circumstances where he was advising the defendant with regard to the loan agreement. If there was an issue on the question of Mr. Byrne acting for the defendant in what was, in effect, the transfer of his interest in the property to the defendant, that was a matter between the defendant and his solicitor and did not concern the bank. Insofar as the issue of "*independent legal advice*" was relevant, it was in the context of ensuring that the defendant was not receiving legal advice from the bank's solicitors in relation to a loan being offered by the bank.

15. Because there is a presumption of undue influence in the relationship of a solicitor and client, there has to be some positive evidence to rebut that presumption. I find that evidence in the testimony of the plaintiff himself, as stated in the witness box and in his witness statement, which he adopted. The plaintiff described how he had found a suitable site in Naas, County Kildare, on which to operate his car dealership business. He reached an agreement with the vendor to purchase the property for €1,333,000.00 and a ten per cent deposit was to be paid. Apparently, the defendant and his solicitor agreed that they would enter into the deal as partners and would pay the deposit on a 50/50 basis. Subsequently, the defendant found out that Mr. Byrne had not paid the deposit or returned the contract and the vendor sold the property on to another party at auction at a price of €3,750,000.00. The defendant was annoyed with his solicitor because he had lost the deal and suffered a potential loss as the property had risen substantially in value. He threatened to report Mr. Byrne to the Law Society or to sue him, and as a result of that, he claimed the solicitor agreed to sell him the property at No. 23, Coolwater Lakes, at a price of €1,333,000.00, although it was worth in or around €2.5 million and he had a formal valuation of €1,900,000.00. This evidence clearly establishes that the defendant was not in any way overborne by his solicitor. Sadly, what does emerge from the evidence is that the defendant was the victim of a fraud perpetrated on him by his solicitor. But this is quite a separate matter from undue influence. Furthermore, in entering the loan agreement, the defendant was getting what he wanted, namely, the advance of a substantial sum of money.

16. In referring to the meeting of 10th November, 2005, at the bank, the defendant says, in his statement, "my recollection of the meeting was that Thomas did most of the talking as regards what was intended and I was happy to let him do this". Again, this tends to negative the presumption of undue influence. Accordingly, I do not accept that the defendant was the victim of undue influence in this case at a time when he entered into the agreement.

Actual/constructive knowledge

17. I accept the contention of the plaintiff that where a party is seeking to set aside a contract on the basis that it was procured by the fraud or undue influence of a third party, it is necessary that the party seeking to enforce the contract had actual or constructive notice of the fraud or undue influence. The onus is on the defendant to establish that the plaintiff had actual or constructive knowledge of the fraud or undue influence. The defendant contends that he entered into the loan agreement while acting under the undue influence of his solicitor, Thomas Byrne, and/or that he entered into the loan agreement under a fraud and deception being practiced against him by Mr. Byrne. He claimed that the officials of the plaintiff who attended the meeting on 10th November, 2005, were well aware that the property was owned by Thomas Byrne and that he was selling it (or that he had already sold it) to the defendant. He claims that it was possible for the plaintiff to discover that the defendant was not in fact the owner of the property by means of a search in the Registry of Deeds, and that such a search is an enquiry that an ordinary purchaser or mortgagee would have made had he been acting reasonably. He argues that by failing to make such an enquiry, the plaintiff is fixed with constructive notice of the facts and that had it carried out reasonable enquiries, it would have established the following matters: -

- (a) that the defendant was not the owner of the property;
- (b) that the property was owned by Thomas Byrne and subject to a prior mortgage in favour of Ulster Bank Limited;
- (c) that the representations made by Thomas Byrne at the meeting on 10th November, 2005, were false;
- (d) that the purported statement of affairs prepared by Thomas Byrne was materially incorrect;
- (e) that the solicitor's undertaking given by Thomas Byrne was given fraudulently;
- (f) that the property could not be used as security for the loan to the defendant;
- (g) that Thomas Byrne was not an appropriate person to offer independent legal advice to the defendant;
- (h) that, in fact, the defendant did not have any independent legal advice in relation to the transaction;
- (i) that it was imprudent to transfer the loan monies to the client account of Thomas Byrne;
- (j) that the transaction was a sham orchestrated by Thomas Byrne for his own benefit.

18. The defendant claims that the plaintiff failed to carry out any investigation of the title to the property at No. 23, Coldwater Lakes, and failed to ascertain that Mr. Byrne was the owner of the property and was purportedly acting on behalf of both the vendor and purchaser of the property and was not capable of giving the defendant independent legal advice in relation to the loan transaction. The plaintiff claims that it made all enquiries and inspections as could reasonably have been expected of it. It required the defendant to attend an interview with his solicitor during which the defendant's solicitor represented that the defendant was the owner of the property and the defendant himself did not demur. The defendant's solicitor provided a signed statement of affairs, listing the assets of the defendant. The defendant says he had not seen that statement of affairs but in the context of what transpired at the meeting, and the other documents signed by the defendant, I do not think it would be reasonable to expect the bank to look behind the statement of affairs. One might argue that they should have made further enquiries if it were not for the other documents which were signed by the defendant and, in particular, the family home declaration. Although that declaration did not specifically say he was the owner of the property, the whole basis on which it was offered was that he was the owner of the property and the undertaking given by the solicitor clearly purported to suggest that the defendant was in a position to offer that property as security. The plaintiff maintains that it was acting in accordance with ordinary banking practice to rely on the statement of affairs and the solicitor's undertaking. There is no contrary evidence offered by the defendant. If he was to discharge the burden of proof on him concerning that issue, he should have called an expert in banking matters to give evidence on the inadequacies of the practice adopted by the plaintiff. He failed to do so. The defendant represented to the plaintiff, both by himself and through his solicitor, that he owned the property. Counsel for the plaintiff asserted that the doctrine of constructive notice regulates the interests of competing innocent parties.

19. In *Bank of Ireland v. Rockfield* [1979] 1 I.R. 21 at 37, Kenny J., in the Supreme Court judgment, stated:

"There is strong authority that the doctrine of constructive notice is not to be extended to commercial transactions. In Manchester Trust v. Furness, Lindley J., a great authority upon Company Law, said at p. 545 of the judgment:

'... as regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land, title is everything, and it can be leisurely investigated; in commercial transactions, possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief and paralysing the trade of the country.'"

The case of *Northern Bank Limited v. Henry* [1981] I.R. 1, relied on by the defendant, can be distinguished from the present case on the facts. In that case, a couple had separated and the husband was the legal owner of the family home but had purchased the leasehold title with money advanced by his wife. His wife commenced proceedings in the High Court, seeking a declaration that she was entitled to the leasehold interest in the family home. On the same date, her husband mortgaged the house to the plaintiff's bank to secure monies owed by him to the plaintiff. Apart from making a

search in the Registry of Deeds, the bank made no investigation whatever of the husband's title to the property. The wife claimed that the bank was on constructive notice of her claim to the house and sought to resist well charging proceedings brought by the bank. She was successful in her application. Those facts are very different to the present case where the defendant applied for a loan, signed documents in support of the application, and permitted his solicitor to make representations for that purpose, and subsequently drew down the loan to the extent that it was paid to his solicitor by his consent. In those circumstances, I do not accept that the bank had any obligation to go further than they did before granting the loan and taking steps to secure it.

20. In the absence of special circumstances, a person will be bound by their signature. The defendant signed a number of formal documents in order to obtain the loan from the plaintiff but claims that he did not read these documents. By signing these documents, he gave his assent to their contents. He cannot simply repudiate these documents by saying he did not read them. If the courts were to permit this to happen, it would lead to chaos in the day-to-day workings of commercial life.

21. Regrettably, in this case, the defendant was the victim of a fraud and deception by his solicitor, Mr. Byrne. But he is, in my view, liable to the plaintiff for the sum claimed.