Neutral Citation Number: [2012] IEHC 11

**THE HIGH COURT**

**2011 2228 S**

**BETWEEN**

**IRISH LIFE AND PERMANENT PLC TRADING AS PERMANENT TSB**

**PLAINTIFF**

**AND**

**RONALD HUDSON AND MIRIAM HUDSON**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Sean Ryan delivered the 13th January 2012**

1. This is a claim by the plaintiff bank for summary judgment against the defendants on foot of a series of mortgages. According to the affidavits and exhibits filed by the bank, the defendants borrowed €1,978,750 million and they now owe over €2.1 million. The defendants have filed affidavits setting out proposed grounds of defence. The issue to be decided is whether the bank is entitled to summary judgment on its claim notwithstanding the defendants' case.

**The Facts**

2. In 2003, the defendant and his wife acquired four properties which they let to tenants and they used the rental income to pay the mortgages. They got the loans for those properties – three houses in Clondalkin, Dublin and an apartment in Galway –with the assistance of a Ms. Susan Croke of Irish Mortgage Company. In 2006, the defendants bought two more houses for letting and Permanent TSB gave them a series of mortgages which superseded the previous loans for the existing rental properties and funded the two new purchases. The defendants anticipated that they would have profitable assets which increased in value over time.

3. There are five loans, the first four of which but not the fifth were to be repaid on an interest-only basis for the first three years pursuant to a special condition in their offer documents. The loan offer letters were dated and for the amounts and durations following:

> 5th April, 2006; €774,000; term 25 years;
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> 8th June, 2006; €773,250; term 25 years;
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> 7th September, 2006; €54,000; term 25 years;
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> 18th December, 2006; €322,500; term 25 years.
>
> 25th May, 2007; €45,000; term 24 years.

The defendants signed and returned acceptances that were witnessed by their solicitor.

4. The defendants defaulted in the mortgage payments for more than two months on each loan and the mortgagee in those circumstances became entitled to demand full payment of capital and interest. The bank held off sending formal letters of claim for a period of six months from November, 2010 to April, 2011 on the basis of an accommodation with the defendants but the newly agreed payment schedule also fell into arrears. The plaintiff made demand for the full amount of the loans by letters of the 11th May 2011. The defendants were unable to pay. The total sum now claimed is €2,107,679.59 plus continuing interest. The Bank seeks summary judgment on the basis that there is no defence to the action.

**The Law**

5. In *Aer Rianta v Ryanair* [2001] 4 I.R. 607, the Supreme Court endorsed two tests from the English jurisprudence that the Court had previously adopted in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75. In the latter case, Murphy J delivering the judgment of the Court said:

> "For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the *bona fide*s of the defendant or to doubt whether the defendant has a genuine cause of action (see *Irish Dunlop Co. Ltd. v. Ralph* (1958) 95 I.L.T.R. 70).
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> "In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v. Daniel* [1993] 1 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms:-
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> > 'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence.'
>
> "In the *National Westminster Bank* case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-
>
> > 'I think it right to ask, using the words of Ackner L.J. in the *Banque de Paris* case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or *bona fide* defence?' The test posed by Lloyd L.J. in the

> *Standard Chartered Bank* case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.'"

6. In *Aer Rianta*, McGuinness J. identified the issue "whether the proposed defence is so far fetched or so self contradictory as not to be credible." Hardiman J asked: "Is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?" The Court took the nature and context of the dispute into account. Hardiman J referred to the facts of the cases in the authorities cited and observed that in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, "the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable."

7. It appears therefore that while the circumstances do not dictate the nature of the test by which the defence is judged, they influence the application of the criteria. Some points of differentiation of contractual claims may be identified: Is it a commercial transaction? Is the contract a familiar one or does it have unusual terms? Is there documentary evidence to contradict the case advanced by the defendant?

8. In *Harrisrange Ltd v Duncan* [2003] 4 IR 1 McKechnie J summarised the Courts' approach to summary judgment in 12 propositions, of which the following are particularly applicable in this case:-

> (iii) the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
>
> (xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;
>
> (xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be.

9. The Court's task is not simply to examine the affidavits and exhibits to discover whether there is a conflict of fact on a decisive point. Neither is it to weigh conflicting depositions in the balance to decide which is more probable. It has to apply the above credibility test to the proposed defence. That is what the Courts did in *First National Commercial Bank v. Anglin, Aer Rianta v Ryanair* and the other Irish and English authorities. In *Banque de Paris v. de Naray* Lord Ackner said:

> "It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of the defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or *bona fide* defence."

10. Also:-

> "A businessman of the experience of the defendants, faced with a demand under a guarantee of $4 million or $5 million, or any significant sum, knowing that he had only signed the guarantee on an assurance that it did not render him under any obligation at all, would not have waited for his lawyers to expresses indignation, let alone his appreciation of the substance of the defence which he must have."

**The Defendants' Case**

**(1) Affidavits of First Defendant**

11. The first defendant, Ronald Hudson has sworn affidavits on his own and his wife's behalf. He says that in or about 2003, through the medium of Irish Mortgage Corporation (mortgage brokers) he and his wife obtained mortgage facilities from a number of lending institutions, not including Permanent TSB, and bought four properties. In these transactions he dealt with Ms. Susan Croke of IMC. Ms. Croke approached him in late 2005 with a suggestion that he should buy additional properties with mortgage facilities from Permanent TSB. Ms. Croke was "a tied agent" of the plaintiff. She informed him that he would have to re-mortgage his existing properties with the plaintiff, as well as mortgaging the new acquisitions.

12. He says that he told Ms Croke that he and his wife were reliant on the existing properties, that their earnings were extremely low and "at no time would our earnings be available to subsidise any new mortgage repayments on any new properties purchased." He expressed concern, he says, as to their ability to repay any new mortgage commitments on additional properties, having regard particularly to their family commitments.

13. He says that Ms. Croke informed them that the mortgages were to be (a) non-recourse, (b) interest only, (c) entirely dependent on the performance of the assets covered by the mortgages, (d) there was to be no liability of the borrowers even in respect of any private income that they had, (e) neither was there to be any danger of the private home of the borrowers being available in any circumstances, (f) even if the properties did not produce income ie. if they were vacant for a period of up to three months or more, there was still going to be no problem.

14. He claims that it was reasonable for them to rely on these statements, in particular the interest only element and that "would form a fundamental term of contract and subsequently this was critical to our decision to accept the mortgage facilities from the plaintiff to purchase" the extra properties. Based on these reassurances the Hudson's bought two additional properties for a total of €688,000. Mr. Hudson says that he and his wife did so in circumstances which they believed that a special relationship existed between them and the plaintiff through its agent Ms Croke; that there was a pre-existing business relationship with her; they would reasonably be able to rely on the statements and/or representations she made; that she held herself out to them as a person who possessed the requisite skill and knowledge to give competent and skilful advice in respect of the financial product she was selling.

15. This part of Mr. Hudson's affidavit is endeavouring to set up a claim for negligent misstatement against Ms Croke and through her the plaintiff because of the claim that she was a "tied agent" of Permanent TSB. The earlier part of the affidavit seems to be an attempt to assemble in one affidavit as many grounds of defence as possible short of denying the transactions.

16. Is all this too good to be true? It does seem that if there is any truth in this succession of sworn allegations, it would have made sense for the Hudson's to have borrowed even more money because the terms provided them with no risk whatsoever. And this beneficent regime applied not just to the new properties they were borrowing to acquire but for all the pre-existing ones. Instead of those earlier four properties being subject to mortgages in the ordinary way with the usual risks that attended them, they were now to be taken over by Permanent TSB in a scheme that involved not virtually risk-free borrowing, but its real life embodiment.

17. Mr. Hudson makes further points that do not amount to anything about the mistaken listing of an extra property and the absence of documents for one of the loans.

18. Mr. Hudson deposes that the Bank made its approval of the mortgage facilities subject to its valuer's assessment of the properties and the potential income likely to be got from them and that those valuations were unrealistically high, particularly as to the potential rental income of the various properties. That is not a defence even if he could establish it. The plaintiff's standard conditions relating to all loan approvals provided that valuer's reports were required by the lender for its own use.

19. Another averment alleges negligence. Mr. Hudson cites a report from his chartered accountant, Anthony Fitzpatrick – who has also sworn two affidavits in the case – who made a report in October 2011, six years after the mortgages were executed between the plaintiff and the defendants – and quotes Mr. Fitzpatrick's conclusions that:

- There was never repayment capacity outside of rental income.
- The rental income did not at any stage lower capital and interest repayments "either before or after stress tests".
- Bankers and brokers financial sobriety input must be questioned.
- Bankers and brokers had a duty of care to the Hudson's.

20. Mr. Hudson says that he and his wife made frequent repayments but in December, 2007 they ran into trouble with five of the houses. They could not make the interest payments at the time and he "immediately went to the Stillorgan branch of the plaintiff Bank to seek advice as to what would be the best thing to do as we were in trouble". He informed the assistant manger that they did not have the means to service the mortgage repayments and that the broker, Ms Croke, had assured them that "in circumstances as we found ourselves now in we would not lose our family home as we had a young family and a low income and we were considering selling everything or get a mortgage break". It is clear that this event is wholly inconsistent with Mr Hudson's previous asseverations as to the terms agreed with Ms Croke and the defendants' belief in them.

21. He complains about the advice he received. He attempts to place responsibility on the plaintiff for decisions not to sell properties but I do not need to consider that unless it might constitute a defence.

22. Mr. Hudson says that the defendants made every effort to keep up a new schedule of repayments that he agreed with Mr. Connolly in late 2010 and that he contacted him in January, 2011 to explain his difficulties. Again this is inconsistent with the claims made earlier in the affidavit. If Mr. Hudson had any belief in these earlier assertions, he would have explained to Mr. Connolly that they were doing the best they could to get the houses let but were not responsible for failure to do so and it was a matter for the bank because of its "stand-alone buy to let/rent scheme" and that there was no recourse to him or his wife or to their income or to their family home.

23. There are allegations of breach of contract and negligence.

24. These defences are not simply denials of assertions made by the plaintiff but I actually think that all of these claims as to what the Hudson's were told and as to the basis on which the money was lent by the bank are practically the same or in the same category as those denials that are discussed in *Banc de Paris* by Ackner L.J. The fact is that every single document would have to be torn up if Mr. Hudson is correct. It would also appear that the conduct he engaged in, - including discussing with the bank and making arrangements with them for repayments, even when the properties were not generating income by way of rent, the Hudson's efforts to make their repayments – is not reconcilable with the case that the risk was that of the bank entirely and that the Hudson's were not in any position of exposure under these loans.

25. Mr. Hudson swore a second affidavit on the 17th November, 2011 and he again returned to the fray with a third affidavit, sworn on the 26th November, 2011 but mistakenly dated 26th October. Mr. Hudson deposed that the properties that he and his wife acquired before they did business with Permanent TSB were financed with mortgages in connection with which they had to give personal guarantees. He reiterated the claims that he put forward in his replying affidavit and that Mr. Fitzpatrick confirmed in his supplemental affidavit as to the extremely favourable terms of the facilities that were being given by Permanent TSB. He asserted that the absence of Family Home Protection Act, 1976 provisions in the mortgage deeds confirms that the terms were as he had outlined. However, I do not see that the 1976 Act has anything to do with these transactions which were commercial in nature.

26. Mr. Hudson refers to Mr. Fitzpatrick's report that was produced in October 2011 but the excerpts from the report have no relevance if the contracts were as Mr. Hudson and Mr. Fitzpatrick now swear that they understood and believed them to be. Yet there is no reference in the report or in the correspondence until the affidavit sworn by Mr. Hudson that such was their understanding or belief. The statement "to the effect that the plaintiff . . . had sold the Hudson's an unsuitable product" does not stand up on the understanding of the situation that Mr. Fitzpatrick described. This was actually an ideal arrangement and no purchaser or borrower would have refused it.

**(2) Affidavits of Anthony Fitzpatrick**

27. Anthony Fitzpatrick's first affidavit was sworn on the 21st October, 2011, just over a month before the hearing. Mr. Fitzpatrick says that he was the defendants' accountant at all material times. It is noteworthy that the defendants had professional advice available and it suggests a degree of financial sophistication on their part that they had an accountant. The inference is that the Hudson's had the benefit of Mr. Fitzpatrick's advice since 2003 when they first acquired houses and an apartment for letting.

28. This first affidavit does not furnish a defence or even support the case that Mr. Hudson has made in his affidavit. Indeed, it implicitly undermines the arguments and facts that Mr. Hudson has stated. Mr. Fitzpatrick has some general comments and criticisms about the Bank and he furnished a report to which Mr. Hudson refers. Mr. Fitzpatrick says:

> "I believe the most the Bank is entitled is that the houses to be conveyed voluntarily or to the proceeds of the sale and I have advised my clients accordingly".

29. This is a strange thing to say in the circumstances and a strange way to say it. What is really striking about this first affidavit is the absence of any reference to the deponent's knowledge of the facts allegedly surrounding the taking out of the loans by Mr. and Mrs. Hudson. Mr Fitzpatrick exhibits the following letter dated the 4th November, 2008 that he sent on behalf of the Hudson's to Mr Connolly of the plaintiff bank:

> "As you know I am quite familiar with the Hudson's financial affairs.
>
> Please be advised that they cannot subsidise their borrowings from personal funds as they have a large family. Realistically a solution needs to be found and not just cast these people to the four winds. This is even more critical in the fact that the Bank did grant quite a large mortgage to the Hudson's who are on modest earnings with large family commitments.
>
> I believe that the bank should not expose them to a claim down the road in the event of a house being sold where the mortgage had not been paid. Any action contemplated by the bank should first be dealt with through my office as I am available for discussion. In any event your position is that the Bank won't be taking any action pending an improvement in property prices.
>
> I look forward to hearing from you."

30. The report that Mr Fitzpatrick prepared in October, 2011, also does not refer to any of the favourable terms allegedly agreed by Ms Croke. Instead, having set out how the rent that can be expected from the properties falls short of repayments especially with amortisation and specifically with reference to the apartment in Galway, he comments:

> "Clearly the PTSB expected the Hudson's to profit from increases in property prices and their loan underwriters took this factor into account when giving the Hudson's these loans. Therefore it would be entirely reasonable for the bank to accept a write off when their judgement and that of their underwriters is so wrong."

31. Mr Fitzpatrick swore a second affidavit on Thursday, 17th November, 2011, less than a week prior to the hearing. This affidavit deals with Ms. Susan Croke of Irish Mortgage Corporation. Mr. Fitzpatrick says that Ms. Croke telephoned his office "around April 2006", when she told him that:

> • She had approached the Hudson's to sell them an interest only mortgage package from Permanent TSB.
>
> • PTSB would hold the intended mortgage properties as the only security and there would not be any personal recourse to the Hudsons if rent did not perform according to plan.
>
> • PTSB had a realistic view on vacancies and the houses could be vacant for up to three to four months a year and the balance of arrears could be carried on and added to the mortgage term in that event.
>
> • It was envisaged by the bank that the product would last for anything between ten and twenty years".
>
> • Thereafter, some houses could be sold and the proceeds used to clear the balance on the sold properties and the remaining one or two could be kept by the Hudson's mortgage free.
>
> • It was envisaged by Ms. Croke that property would rise in value to allow them to discharge the borrowings.
>
> • If property did not appreciate, the Hudson's could sell and pay the proceeds to the Bank and walk away.
>
> • There would no liability on the Hudson's and whatever mortgage property they placed with PTSB was the only security the Bank would rely on.
>
> • If rents did not perform or property prices fell, the Hudson's could simply hand back the properties to PTSB and walk away with no recourse to them whatsoever by PTSB.
>
> • The mortgage market was getting more competitive and PTSB were selling a product on a stand alone basis.
>
> • Earnings from salaried employment and having a large family were not critical to PTSB as this product was akin to buying a savings policy.
>
> • Ms. Croke told Mr. Fitzpatrick that she was PTSB's agent or words to that effect.
>
> • She said that she had strongly recommended and endorsed this PTSB "buy to let interest only product" to Mr. Hudson.
>
> • By reason of the absence of personal asset recourse, it was an excellent mortgage product for Mr. and Mrs. Hudson.
>
> • Personal income had little or no bearing on the new product, nor had having a large family "as there was just no exposure for the Hudson's".
>
> • If things went wrong or prices fell they could simply hand back the keys and walk away.

32. Mr. Fitzpatrick deposes that he found Ms. Croke very credible and a great proponent of the scheme and was reassured by her statement "on behalf of PTSB" that his clients did not have any personal exposure beyond the mortgage properties. He said that at the time mortgage products and property prices were changing virtually by the week and he was not unduly surprised someone had produced a "buy to let" product on a walk away basis. He says that he communicated what Ms. Croke told him to Mr. Hudson, who responded that she had given him similar information and that "relying upon Ms. Croke's information, he would progress with Ms. Croke's 'buy to let' product". Mr. Fitzpatrick ends this long paragraph, which echoes the replying affidavit sworn by Mr. Hudson in almost every particular, with a strange statement:

> "I endeavoured to prevail upon my clients to reconsider engaging in this endeavour, but Mr. Hudson believed in Ms. Croke's assertions and described the investment strategy outlined by her as a "win, win scenario".

33. The information Ms Croke imparted should have made the investment extremely attractive. It would have been quite inappropriate for Mr. Fitzpatrick to try to get his clients to reconsider. If the deal was what Ms. Croke said it was, it was irresistible. Indeed, it would have made sense for the Hudson's to have acquired an even larger portfolio: their own incomes were irrelevant; their circumstances similarly not material; there was no recourse to any assets other than the mortgaged properties; the Bank was satisfied to take the long view and to accept the risk that the property might not increase in value or might actually decrease, without passing any of that risk on to the Hudson's. Even if tenants left and no rent was coming in for perhaps three or four months in any year, the bank was still reconciled to the situation. There was literally no risk for the Hudson's in this transaction. If it worked out well, they would have a surplus of rental income over and above the interest-only payments they had to make and if property prices rose they would end up with substantial assets at the end of the mortgage terms. The Hudson's could not lose under any circumstances.

34. Questions arise, not only as to why Mr. Fitzpatrick did not advise the Hudsons that this deal was unmissible, but why he never mentioned anything about this in this first affidavit or previously. Neither did he refer to it in the report that he produced for the Hudsons in October, 2011 which was for use in discussions with the bank or in any proceedings that the Bank might take, to demonstrate how unreasonable the bank's behaviour was. His letter of 2008 is also silent on this important matter.

35. The one piece of advice that Mr. Fitzpatrick or any professional adviser would have given Mr. and Mrs Hudson was that they should ensure that these favourable terms were put into writing and were contained in the loan agreements and acceptances and in any mortgage deeds. Since the terms were being allegedly offered and confirmed and reiterated by Ms. Croke and were uniquely attractive, the essential requirement was to ensure that all the terms were spelled out in the documentation. Any adviser acting with ordinary care would have written to Ms Croke confirming the contents of their conversation. The deponent offers no explanation for these glaring omissions. Indeed, he is not even able to provide a date for the conversation, nor does he indicate that he kept any record. Those steps would have been routine as well as prudent practice for anybody who was advising clients on important transactions.

36. Mr. Fitzpatrick concludes this second affidavit by saying:

> "I say, I believe Ms. Croke simply crossed the line when she induced my clients to enter into a 'buy to let' scheme with the plaintiff, based on her own recommendations to proceed, her assessment of the Hudson's' requirements and capacity, and endorsement of their property purchases and her work in obtaining financial approval on their behalf, considering the entire circumstances of the Hudson's at the time".

37. This illustrates inconsistency, saying (1) Ms. Croke was the agent of Permanent TSB and thus what she allegedly said to Mr. Hudson is binding on Permanent TSB; (2) she was entirely in the wrong in the way she oversold and mis-sold and misrepresented the situation with regard to the loans. Obviously the difference is as to whether the Hudson's are making a defence on the basis that the Bank is simply not entitled to look for what it is claiming – because of the agreement that pre-existed with Ms. Croke - and an alternative position where they say Ms. Croke misrepresented the product to them and thereby induced them enter into agreements that they otherwise would not have done.

**The Plaintiff's Affidavits**

38. The plaintiff's affidavits sworn by Mr Sean Connolly detail the loans that the bank advanced to the defendants, their default in payment of interest, the amount now due and the accumulated arrears of interest. He outlines the arrangements that the parties agreed to deal with arrears and how the defendants failed to comply with them. He describes the failure of the parties to reach a further accord.

39. Mr Connolly contests the averments of the defendants and seeks to demonstrate that the Hudsons are experienced investors who knew what they were doing when they borrowed extra finance from his bank to purchase more properties for them to rent. He points out that Mr and Mrs Hudson are company directors and Mr Hudson is a barrister. He denies that Ms Croke was the agent of the plaintiff for the purpose of negotiating loans and avers that she was in fact the defendants' agent.

40. Mr Connolly rebuts the defendants' averment that the loans were interest-only. He also deals with a number of other points which it is not necessary to consider in reaching a decision on this application.

**Conclusions**

41. The plaintiff has established its *prima facie* entitlement to judgment – that is not disputed. The defendants allege that the loan contracts are not what is contained in the written records but an entirely different set of obligations that cannot be reconciled with the signed and witnessed documents.

42. However, the story told by Mr Hudson and Mr Fitzpatrick in their affidavits is not credible. It is far fetched and inconsistent. Considered in light of facts and circumstances that are known or accepted or obvious, including the conduct of the defendants and of their advisers, it is contradicted at every turn. The defendants behaved in a way that was not consistent with the proposed defences. In circumstances of formality and solemnity in the execution of a series of agreements, it is more difficult for a contracting party to claim that it was negated by previous wholly inconsistent verbal statements. If the defendants are correct then all the loan documents have to be torn up and the correspondence has to be ignored.

43. Relevant considerations are:

> 1. The defendants signed and returned loan documents accepting the offers on terms set out in letters of approval and their signatures were witnessed by a solicitor.
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> 2. The loans were taken up over a period of more than a year from April, 2006 and were the subject of separate documentation.
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> 3. The sums borrowed were very substantial.
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> 4. Formal loan agreements and mortgages were executed and it was apparent that these were solemn legal transactions with express written terms and conditions.
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> 5. The special condition providing for a three year moratorium on repayment of principal applied to only four of the loans.
>
> 6. The transactions were commercial. It could be argued that they were not strictly commercial but they must at the

very least be regarded as semi-commercial and I think the plaintiff would argue that if a person buys a portfolio of investment properties using borrowed money in order to acquire valuable assets in, it must be viewed as a commercial enterprise.

7. The Hudson's had professional advice available. They had Mr Fitzpatrick, their accountant. They had the opportunity of getting such legal advice as they needed. They would have been aware that the contracts contained provisions for default of payments.

8. Mr Hudson engaged in extensive correspondence with the bank over a considerable period about his proposals for trying to meet the situation of the arrears and did not at any of those times raise the matters that he is now putting forward.

9. The defendants first made their proposed defence in the replying affidavit.

10. There is nothing on paper even by way of private note or memorandum to corroborate any of the terms the defendants propose.

44. Applying the legal test set out above, there must be judgment for the plaintiff.