THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 152

[2016 No. 371CA]

Peart J.
Hogan J.
Gilligan J.

BETWEEN

AIB MORTGAGE BANK

PLAINTIFF/

RESPONDENT

AND

PATRICK HAYES AND HELENA CROWLEY HAYES

DEFENDANT/

APPELLANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 15th day of May 2018

1. This is an appeal against the order of the High Court (Baker J.) perfected on 27th May 2016, granting the plaintiff/respondent judgment in the sum of €3,972,893.57 together with an order for possession of 22 residential properties in the County of Cork which were security in respect of the loan the subject matter of these proceedings which was granted to the defendant/appellants pursuant to a letter of loan offer of the 5th May 2005 and signed by the defendant/appellants on the 2nd June 2005.

2. The background to these proceedings is that the first named appellant, Patrick Hayes, was a property developer and civil engineer and it appears that in former times, he was in a substantial way of business. His *modus operandi* appears to be that he developed, *inter alia*, residential properties and would retain a number of the properties for himself arising upon the completion of each development, thereby building up a very substantial portfolio which he then let out to tenants.

3. In early 2005, the appellants were seeking a €4m. loan facility in order to consolidate existing loans which they held with the respondents and to obtain some additional funding in the sum of €650,000.

4. An existing loan was already secured by way of mortgages in favour of the respondents over the 22 residential properties which are part of the subject matter of these proceedings and which, in February 2005, had an estimated value of a sum in the region of €5,000,000.

5. The appellants were anxious for a 10-year facility on the basis of an interest-only tracker mortgage and at the same time that they were seeking the loan facility from the respondent they had in place an offer from Bank of Ireland which was for a period of 10 years for repayment of interest only with also a slightly better interest rate of 0.855% on a tracker rate basis.

6. In early 2005, the respondent was not in a position to offer an interest-only tracker rate basis mortgage for a period in excess of five years. The appellants' case before the trial judge was, however, to the effect that there were a number of parol assurances and representation given by servants or agents of the respondent and certain written assurances and representations also given by servants or agents of the respondent to the effect that at the expiration of a 5-year period, if the appellants agreed to take the loan in question from the respondent, assurances were given that the 5-year interest-only loan would be reviewed for the purpose of an extension of 5 years on an interest-only repayment basis.

7. As regards the evidence in this respect before the trial judge, she considered the evidence in question and made a number of findings of fact.

8. The trial judge found as a fact as follows;

> • "I consider that certain open claims and unambiguous assurances were given by the Bank in the course of the negotiations that the interest only facility would be reviewed at the expiration of the initial five year period. This is also consistent with some of the internal documents in the bank and there is a reference and an internal review document of the 26th March, 2009 that the agreement reached in 2010 was for five years with a review thereafter. That precise phrase is also found in an internal document on the 27th August 2007. In each case the reference was to the request by the defendants for a ten-year interest only facility and the internal documentation suggests that five years was agreed with a review thereafter. Both of these internal documents were prepared before the relationship with Mr Hayes soured considerably and the internal documentation is to be given weight in that context."
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> • "I am satisfied that negotiations between Mr Hayes and the bank were focused on a number of issues but the primary focus of Mr Hayes was to achieve a substantial interest only period and to achieve a satisfactory interest rate. I am also satisfied that the preference of Mr. Hayes was to remain with AIB for the reasons identified above. I am satisfied however, that the Bank did not have a ten-year interest only product at the time."
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> • "The AIB loan was therefore attractive enough to Mr. Hayes for him to continue and conclude the negotiations. I am satisfied that by the e-mail of the 9th March, 2005, Mr. Dudley answered the request for a ten-year interest only period

by saying that the Bank's 'normal scenario' was for five years with review thereafter, and he was confident that the five-year review would result in an extended interest only period thereafter. I am satisfied that between early March, 2005 and the end of March, 2005 when the e-mail correspondence ended, that Mr. Hayes no longer pressed for a ten-year interest only period and was satisfied to accept five years, but this was because he was assured that at the end of the five years there would be a review of his facility."

• "Counsel for the defendants argues that the expression 'all things being equal there wouldn't be any issue in extending at that stage for a further five years', must have been, was intended to, and did in fact have contractual import. In my view this is correct and the Bank did intend to give a degree of comfort or assurance to Mr. Hayes in the negotiation, that should he accept the loan offer, the interest only facility would be favourably reviewed after the five years, and that it was anticipated that the interest only period would be continued for another five years."

• "It is in the circumstances my view that the formal loan document was not intended to comprise all of the elements of the agreement for loan. Two elements at least were omitted from the written document, although both found clear expression in other written documents adduced in evidence, primarily the letter of the 14th April, 2005. I am satisfied that there was an agreement between the parties, that the Bank would meet the cost of breaking the fixed interest loans, and note that was a complex agreement by which Mr. Hayes met half of the cost in the first year and was reimbursed those monies the following year subject to certain conditions which were met. I am also satisfied that there was an agreement that the facility would be reviewed after five years and that there was to be no automatic reverting to annuity at that stage. This is borne out also by the internal Bank documents in 2007 and 2009."

• "There is sufficient written evidence of a collateral agreement between the parties and the evidence points me to a conclusion that the formal offer of mortgage loan dated the 5th May, 2005, did not contain the entire of the agreement between the parties."

• "Accordingly, the contract between the Bank and Mr. and Mrs. Hayes did provide for a review of the facility after five years, with regard to whether Mr. and Mrs. Hayes should be offered a further period during which repayments would be on an interest only basis. I consider that this was a term of the contract, or that it operates as a preliminary contract."

• "The expression 'all things being equal there wouldn't be any issue in extending at that stage for a further five years' did not find its way into the written formal loan documentation signed by Mr. and Mrs. Hayes. This is not surprising as the phrase is loose and is not of the type found in standard bank or other written contractual documents. I accept however, that the phrase did have a meaning and was intended to have contractual import."

9. The trial judge passed comment that neither the bank or Mr Hayes would have known in 2005 that the financial crisis in subsequent years would have such a catastrophic impact for the bank's profits, on the loan to value ratio of the securities and the rental income of Mr and Mrs Hayes. The trial judge was not satisfied that Mr Dudley acted *mala fides* in suggesting to Mr Hayes in the e-mails that "all things being equal" there would be no problem in the bank extending the interest only period for another five years. The trial judge further commented that the problem is that all things were not equal when the review came to happen. What was promised by the bank was a review. The trial judge states that the review did in fact take place, but in circumstances quite different from those in which the loan was negotiated in 2005.

10. As, I think, Baker J. found in her judgment, it is clear from the undisputed evidence that the promise of a review after five years was a key factor in inducing the defendant/appellant into enter this contract of loan with AIB. As Hogan J. stated in *Tennants Building Products Ltd. v. O'Connell* [2013] IEHC 197 following a review of the authorities on this point:

> "The effect of this case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving….written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract."

11. In the present case, the documentation relied on the High Court showed that the promise of the five year review was a critical factor in the defendant's decision, so that the "cogent evidence" required in *Tennants Building Products* is satisfied in the present case.

Did the plaintiff Bank comply with the five year review requirement?

12. The central issue in the case was primarily that at the end of the interest-only 5-year term, the loan would be reviewed with a view to continuing the loan on an interest- only basis for a further period of five years, so that in effect, the appellant would end up with a 10-year interest-only loan. There were references clearly, as the trial judge found, to "all things being equal there wouldn't be any issue in extending at that stage for a further five years", but, firstly, there had to be a review.

13. It is clear on the evidence that in fact, in 2010, there was, in fact, no review in the terms as represented to the plaintiffs because the respondent was not in a position or able to grant at that point in time a further 5-year interest-free loan. There were discussions to extend the loan for a further 12-month period.

14. It does appear that the learned trial judge fell into error on the factual evidence, as found by her in coming to a conclusion, that the respondent was in compliance with the *parol* and the written assurances given by virtue of a review undertaken on 25th February 2010. Mr. Stephen Roe, of the respondent bank, did not review the loan in accordance with the verbal and written assurances given to the appellant and offered no evidence that at any time he considered extending the first 5-year interest-only period for a second 5-year interest-only period. More significantly, Ms. Marie McBride, the Senior Lending Manager in the Financial Solutions Group of the respondent bank, took over the appellants' file from Mr. Roe.

15. Ms. Marie McBride stated that it was she who reviewed the request for the 5- year extension when she took over the file in May 2010; that it was her job to review the file, but that as far as she was concerned, the contract with the bank was for a 5-year interest-only period followed by capital and interest over the remaining term of 15 years. When asked as to her reason as to why she refused a 5-year extension, she stated that "it wasn't in my power to grant a five year extension, we wouldn't give a five year extension." She further stated that she did not have the necessary sanctioning authority. The customer had a contract and the plaintiffs were willing to extend the loan for a certain period of time, and further, she made it clear that it was not in her power to extend the loan for a further 5-year term on an interest-only basis.

It may be fair to say that the respondent bank considered the situation that pertained on the expiry of the 5-year interest-only loan, but the evidence not only discloses that the *parol* aspect of the initial agreement and the written e-mails were not before any review

body, but that further, contrary to the assurances and representations that had been given to the appellants and upon which they relied, the review as promised did not take place and could not have taken place because the respondent bank at that moment in time was not giving out 5-year interest-free loans or extensions to loans and the persons involved did not have the authority to and could not have extended the loan. Accordingly, the loan was never actually reviewed for the purpose of a 5-year interest-only extension, much less reviewed favourably. Nor was it reviewed on an all things being equal basis as made out in the written and *parol* assurances given to the appellants earlier in 2005 if they entered into the loan agreement. The reality of the situation, on the evidence as found by the trial judge, was that should the appellants accept the loan offer, the facility would be favourably reviewed after five years. As the trial judge stated:

> "In my view, this is correct and the Bank did intend to give a degree of comfort or assurance to Mr. Hayes in the negotiation that should he accept the loan offer, the interest-only facility would be favourably reviewed after five years and that it was anticipated that the interest-only period would be continued for another five years."

16. It has to be borne in mind that the appellants had an alternative 10-year interest-only offer of a loan from Bank of Ireland, and they relied on the written and oral assurances of the respondents that after five years, the loan would be reviewed for the purpose of granting a further 5-year interest-only extension and this did not happen.

17. The situation may be case-specific, but in this instance, the respondents did not comply with their written and oral representations and assurances made to the appellants prior to them taking up the loan offer. In these circumstances, the Bank cannot be allowed to take the benefit from its own failure to honour the terms of the collateral contract, so that the matter must be approached as if the five year interest only contract was extended for a further five years. That, however, was the extent of the Bank's obligations, so that from (approximately) May 2015 the interest only agreement concluded and the loans became repayable on a capital and interest basis.

18. While it may not have a central relevance to the issue before this Court, it does appear that the appellants, between 2010 and 2015, continued to pay the accruing interest only on their loan. It is, of course, the situation that the original loan remains outstanding and remains to be repaid by the defendant, but in the absence of compliance with the assurances that were given to the appellants and upon which they relied in 2005, it was not open to the respondent bank to have issued the letter of demand in respect of the loan on 8th November 2012 on the basis that the defendant had defaulted on the payment of capital rather than simply interest only. As I have already explained, that obligation to repay capital and interest only arose from May 2015 onwards.

Conclusions

19. Accordingly, the judgment and order of the High Court of 27th May 2016, whereby judgment was entered against the defendants in the sum of €3,972,893.57 and the orders for possession in respect of the 22 identified properties must be set aside and the appellants can proceed ahead with their counterclaim for damages for breach of contract, misrepresentation, negligence and breach of duty.