

THE HIGH COURT

COMMERICAL

[2010 No. 1429 P]

[2010 No. 1430 P]

BETWEEN

KBC BANK IRELAND PLC.

PLAINTIFF

AND

BCM HANBY WALLACE (A FIRM)

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 6th day of July 2012

1. On 16th March, 2012, I delivered judgment on the substantive issue in this case, leaving over the fixing of damages until after a further hearing. In my earlier judgment, I set out the basis on which damages would be awarded and a number of issues remained as to the value to be ascribed to certain properties.

2. When the hearing on damages commenced, I was informed by counsel that the parties had reached agreement on all aspects of damages except for two properties, namely, the Rathmines Road property and the Oilgate property in County Wexford.

Rathmines

3. In August 2005, the plaintiff ("the Bank") obtained a valuation of €5.3 million on 167, Rathmines Road Upper ("the Rathmines Property") from Bannon Commerical, Chartered Valuation Surveyors. It is accepted by all the parties to this litigation that the figure was based on an incorrect turnover. Mr. Marcus Magnier of Colliers International gave evidence that in his view, the correct value for the premises was €2.8 million. He stood over that valuation on the discrete hearing of the damages issue. The plaintiff was content to accept his valuation for the purpose of the hearing on damages, and it has to be said that it suited the Bank's purpose to do so because this was one of the properties where security was perfected and the value of the property fixed by reference to June 2008 would be deducted from the damages awarded in this case. The Bannon valuation was postulated on the basis of a turnover of €130,000 *per week*. The Bank had used a projection of €80,000 *per week* but the actual turnover was €46,000. That was approximately one-third of the turnover estimated by Bannon.

4. The Bank, having received the Bannon valuation of €5.3 million, reduced the figure in its own calculation to €4 million in light of the actual trading history. Mr. Magnier was asked to value the Rathmines Property as of June 2008 on the assumption that the Bannon valuation of €5.3 million in August 2005 had been correct. He said if one was to carry out that exercise, the value would be €4.5 million. Mr. Magnier's own professional opinion of the value of the property in June 2008 was €2 million.

5. I think it is of some relevance to look at the way in which the plaintiff approached the valuation when the property was offered as security by Mr. Kelly. In a Bank document created in December 2006, the following appears:

"The facility will be cross-secured with the borrower's existing facilities which are secured on the Centra at 167, Rathmines Road, Dublin 6 and 7 apartments at Liberty View. .. Centra Rathmines is estimated to be conservatively valued at £4.0m. .. "

This was in 2006. The Bank also stated in the same document:

"In addition, the borrower has recently added an off-licence to the outlet's current offering. The store is achieving £55,000 per week currently. However, it is initially projected to achieve £80,000 per week."

6. This tends to suggest that the Bannon valuation was defended because it was not, in fact, given exclusively on a turnover basis but that there was a development potential and Mr. Kelly had bought the property for €4.2 million with the intention of upgrading it. Of some importance, the internal Bank document goes on to state:

- *"The property was valued by Bannon Commerical in 2005 and achieved a value of £5.3m.*
- *Whilst the value of £5.3m does not accurately reflect the standard Centra multiples, it represented the inherent value of the Rathmines property ...*
- *However, given that the borrower has not achieved the initial projections provided, we have discounted this value to £4.0m in our analysis."*

So the Bank appeared to be justifying the valuation and they were supported by DTZ Sherry Fitzgerald in a report prepared on 29th June, 2011, for the purpose of the court hearing. In that report, they stated:

"Colliers provide a valuation estimate of £2.6m. We are aware that the property sold at the time of the Bannon valuation for a figure of £4.25m. On the basis that this was a freely negotiated transaction, it is strong evidence of the market value of the property, and in the absence of some specific issue, it should equate to the market value of the property at the time. Based on the general analysis of the existing property, the price paid would appear quite strong. However,

clearly, the purchaser's motivation included not only the value of the existing building, but the future potential associated with the conversion to convenience store and the value of the established trading business. If one accepts the £5.3m valuation (which appears to take account of the potential for residential overhead) as a reasonable target value based on the assumed trading level, then the price paid does appear to leave room for the cost of conversion works from motor showroom to retail, which we understand were estimated to cost in the region of £600,000, and also leaves some room for the additional risk margin with the ultimate objective of improving the property value to the Bannon target level. Bannon Commercial did not provide a valuation of the property on a direct like-for-like basis with the circumstances at the time of acquisition."

7. Mr. Sean McCormack, the author of that report, gave evidence to the court on day 16 of the trial. He was asked by counsel if the Bannon valuation was based on an incorrect turnover figure which was lower than their calculation, did that invalidate their conclusions as to the value of the site. His reply, at answer 71, was:

"No, not necessarily. If the valuation was purely driven by the turnover calculation and if that turnover then proved to be wrong or an error was made, then, clearly, that would make a difference, but it wouldn't necessarily invalidate the overall conclusion because the further comments I make in my report are that it is known that the property did sell at the time for £4.25m and that there was (sic) plans to spend the money on the shop and generate a business. So it would be reasonable, I think, that the purchaser would expect to add value in carrying out the works and setting up the business and trading and so on, that I would have thought it reasonable, therefore, that if the price paid at £4.25 at the market price at that stage could then be enhanced by the various works and then the business that would trade. So that would bring you up from £4.25 closer to £5m or beyond £5m. In that sense, there is an alternative rationale that could be considered in the context of the Bannon's exercise".

In answer to a later question, he said that the Colliers approach was to try and deconstruct the figure of €5.3 million which, in itself, as an objective, is reasonable, but it was speculating as to what levels might be split between the bricks and mortar and the business element. He said, *"The more concrete evidence, perhaps, it could be argued, is that the price was €4.25 for the property with all of its potentials and I think that would put the £3m that is argued to be the proportionate split of the €5.3m in context. "*

8. What can be gleaned from this evidence? While the Bannon valuation was clearly based on an incorrect and exaggerated turnover, the objective evidence as to the value of the property at the time of purchase in August 2005 was €4.25 million. The development potential of the site had to be taken into account and it seems that the plaintiff, having taken everything into account, felt that the true value was in the order of €4 million. It seems to me that there is more convincing evidence to support a finding in the order of €4 million as being the value of the property in August 2005 than there is to support the Colliers figure of €2.8 million and I propose taking that as a starting point. Property prices increased between 2005 and 2008 before the catastrophic declines that followed thereafter.

9. Mr. Magnier was asked to value the Rathmines Property in June 2008 on the assumption that the Bannon valuation of €5.3 million in August 2005 had been correct. He said that on that basis, he would value the property at €4.5 million, although he adhered to his own professional opinion that the figure should be €2 million. The figure of €4.5 million is approximately 85% of the original figure of €5.3 million quoted by Bannon International. Mr. Magnier was the only witness at the hearing of the damages issue to carry out such an exercise. The figure which he suggests by way of correction to bring us to June 2008 seems to be reasonably grounded. Working off a base figure of €4 million as the value of the Rathmines site accepted by the Bank, and taking 85% of that figure to bring us to June 2008, one arrives at a figure of €3.4 million. I therefore fix that sum as the value of the Rathmines Property in June 2008.

Oilgate County Wexford

10. Two issues arise so far as this property is concerned:

- (i) The date from which the six-month period referred to in para. 60 of my judgment should commence; and
- (ii) The value of the property on that date.

11. I directed that the value of the property was to be assessed six months after the furnishing of security. On 15th February, 2008, the charge was perfected by the plaintiff (the Bank). The plaintiff contends, therefore, that the value of the property at Oilgate should be calculated by reference to August 2008.

12. Mr. Kelly informed the plaintiff that he had acquired the property in November 2006 for €3 million, that the property was unencumbered and he offered it to the plaintiff by way of a first legal charge security in respect of his indebtedness. In November 2007, Mr. Kelly was still not registered as owner of the property and although he executed a mortgage on the property on 13th November, 2007, this could not be registered as a charge, nor could the security be furnished until Mr. Kelly was registered as the owner of the property and the Stamp Duty provision on a Deed of Transfer was paid.

13. Since Mr. Kelly did not have sufficient funds, the Bank lent him the sum of €181,243 on 15th February, 2008, to pay the Stamp Duty, and on that date, he was registered as the owner of the Oilgate property. On the same date, the security was perfected when the plaintiff registered its mortgage as a first legal charge.

14. It is important to note that between November 2007 and February 2008, the property market was still buoyant and there was nothing to indicate to the parties that they should move with greater haste than would be normal in matters of that kind. It is also worth noting that it was the duty of Mr. Kelly to perfect the security he was offering to the Bank. It was only because of his inability to do so that the Bank had to step in and loan him the money to enable the security to be perfected.

15. The defendant argues that the plaintiff should have perfected its security immediately when Mr. Kelly executed the mortgage on 13th November, 2007. They argue that the six-month time period for fixing the value of the property should commence from that date. The Bank had a duty to mitigate any potential loss it might suffer on foot of the loans outstanding to Mr. Kelly. But I find nothing in the evidence to persuade me that the Bank did not act with reasonable speed in arranging to have the security perfected. After all, the primary duty in that regard rested with Mr. Kelly.

16. In those circumstances, I prefer the argument of the plaintiff on that issue and I hold that the six-month period should run from 15th February, 2008, and that the value of Oilgate should be determined as of August 2008.

17. What was the value of the Oilgate property in August 2008? The court heard evidence from Mr. Ronan Diamond and Mr. Marcus Magnier on this issue. Mr. Diamond put a valuation of €290,000 on the lands. He assessed the forested area of the lands on the basis

of €15,000 *per acre*, for land liable to flooding, €5,000 *per acre* and for the drained lands at €25,000 *per acre*. There were three issues with the land. Some of it was under forest, other portions of the land were flooded and there was a significant problem concerning the provision of a wastewater treatment plant. He stated that in late 2008, there was a very limited market and no land in that area had sold. Although Mr. Kelly had bought the lands for €3m in November 2006, Mr. Diamond expressed the view that this amounted to "hope value".

18. On the other hand, Mr. Magnier said that the fact that the lands had been sold at auction after two earlier bids of €2.5 million and €2.8 million was indicative of its true market value at the time. In the course of his evidence, Mr. Diamond said he had consulted with the auctioneer who had told him there were no bids on the property. In fact, this information was incorrect. Mr. Magnier produced an extract from an auction book of Kehoe & Associates who sold the premises which showed that on 19th September, 2006, bids of €2.5 million, €2.6 million, €2.7 million and €2.8 million were made on the lands. They were withdrawn at €2.8 million and sold afterwards to Mr. Kelly for €3 million.

19. Mr. Magnier valued the land as development land. Mr. Diamond valued it as agricultural land. But it seems clear from the evidence that when Mr. Kelly bought the land, it was as development land and it remained such up until August 2008. There were, of course, issues surrounding the land which would have affected its value. I accept the evidence of Mr. Magnier that it is likely that the owner of those lands would have got planning permission for development on the site, but not for the number of houses sought. The attitude of the planning authorities completely changed after the property crash which began in earnest in the last quarter of 2008. But I am valuing the lands as of August 2008 when they still had a value as development lands, albeit with some restrictions. I accept Mr. Magnier's evidence that some solution would have been found to the wastewater treatment plant and this would probably have been dealt with through contributions from the developer. At that time, Oilgate was still listed for development in the County Wexford Development Plan.

20. It is of some significance that Mr. Kealy of the Bank spoke to a valuer who said that the lands were worth around €3 million and the Bank was prepared to loan further money to Mr. Kelly as late as November 2007 to pay Stamp Duty based on a land value of €3 million. Mr. Diamond sought to deprecate the €3m valuation given to the Bank from a local auctioneer and valuer on the basis that it was an oral valuation. It seems to me that that is irrelevant. I hold, therefore, that it is reasonable to assess the value of the lands at €3 million in November 2007. It is a question, then, of how much to allow off that figure for what was a falling market in 2008. Mr. Magnier said that, in his view, by August 2008, the lands would have had a value of approximately €2.25 million. This is a vastly different figure to the valuation of €290,000 given to the court by Mr. Diamond. But Mr. Diamond valued the lands as agricultural lands and 'not as development land and he also based his valuation on information which turned out to be incorrect, namely, that there had been no bids at the auction.

21. I prefer the evidence of Mr. Magnier and accept his figure of €2.25 million as representing the probable value of the site in August 2008. It is easy with hindsight to see how inflated the price of €3 million was in 2007, and indeed, the same could be said for a figure of €2.25 million in August 2008. But while these figures may, with the benefit of hindsight, seem wildly extravagant, they represented, at the time, the market value of the lands.

22. I have been furnished with a Schedule of Damages in which everything is agreed except the market value of Oilgate as at 15th August, 2008, and the market value of the Rathmines Property as at June 2008. For the Oilgate property, the figure of €290,000 should be substituted with a figure of €2.25 million and for the Rathmines Property the figure of €2 million should be substituted with a figure of €3.4 million. When those figures are substituted, it appears to me that based on the Schedule which has been handed into court, that the total damages recoverable by the plaintiff from the defendant is €17,694,130.70.

23. I will hear counsel in due course if there is any disagreement on the figures.