Neutral Citation Number: [2011] IEHC 325

THE HIGH COURT

COMMERCIAL

2009 905 & 1501 S

BETWEEN

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

PLAINTIFF

AND

DURKAN NEW HOMES, DON CASEY, MARIAN CASEY AND TULLYCROSS DEVELOPMENTS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 29th day of July, 2011

1. In the first set of proceedings [2009 No. 915 S], the plaintiff seeks judgment against the first, second and third named defendants, in the sum of €30,065,891.81 and as against the fourth named defendant in the sum of €7,668,243.45, pursuant to separate but related Loan Agreements. In the second set of proceedings [2009 No. 1501 S], the Bank seeks judgment against the first, second and third named defendants in the sum of €7,716,352.39, and as against the fourth named defendant in the sum of €30,251,042.05 pursuant to separate but related guarantees.

2. By letter of loan offer dated 22nd February, 2006, the plaintiff offered the first, second and third named defendants a facility, namely, €29,460,000, to assist with the refinancing of existing loans on land, the purchase of additional houses and/or sites at Beech Park, Cabinteely, County Dublin, and the costs incurred in connection with a proposed planning application, subject to the terms and conditions set out in the said Letter of Loan offer. Under the terms of the said loan offer, following a two-year and six-month moratorium from the date of first drawdown, capital repayment was to be effected by what was described as a "bullet repayment" on that date.

3. By separate letter of loan offer dated 22nd February, 2006, the plaintiff offered the fourth named defendant the sum of €7,640,000 on terms which were substantially, and in all material respects, the same.

4. The issue which arises in these proceedings is whether or not the Bank, in the circumstances that have arisen, is entitled to full recourse against the defendants, or whether the Bank's recourse is limited to the interests of the Borrowers in the property set out at paragraph 6 of the Facility Letter of 22nd February, 2006 ("the Facility Letter"). Paragraph 11 of the Facility Letter provides as follows:-

> *"11. RECOURSE*
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> *The Bank has agreed with the Borrowers that provided the Borrowers comply with their obligations as set out at paragraph 10(b) hereof and pay all interest due to the Bank pursuant to this Facility Letter the Bank's recourse will be limited to the respective interests in the properties detailed in paragraph 6 hereof. Accordingly:-*
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> *(a) Notwithstanding any other provision of this Facility Letter or any of the Security Documents and save as expressly provided in sub clauses (b) and (c) hereof of this paragraph, the Bank's recourse to the Borrowers in respect of the Borrowers' obligations hereunder and under the Security Documents and/or any judgment arising therefrom shall be limited to the respective interests in the properties detailed in paragraph 6 hereof and the Bank shall not otherwise take or pursue any judicial or other steps or proceedings or exercise any other right or remedy that it may have against the Borrowers for the discharge of any outstanding indebtedness in respect of the Loan or otherwise under this Facility Letter or the Security Documents and no action, proceedings, claim, levy, judgment or other process shall be taken or levied against the Borrowers save to the extent reasonably required by the Bank in connection with any enforcement or realisation of the security given pursuant to this Facility Letter.*
>
> *(b) The Borrowers shall be jointly and severally liable to make payments to the Bank in respect of all interest due to the Bank pursuant to the Facility Letter.*
>
> *(c) In addition, the Borrowers shall be jointly and severally liable to the Bank for all the indebtedness of the Borrower to the Bank pursuant to this Facility Letter and if and so often as there is a breach of the covenant set out at paragraph 10(a) hereof, unless the Borrowers have complied with their obligations as set out at paragraph 10(b) hereof.*
>
> *(d) . . ."*

5. Paragraph 10 of the Facility Letter provides as follows:

> *"10. FINANCIAL COVENANTS*
>
> *(a) Throughout the term of the loan, the Borrowers' indebtedness to the Bank pursuant to this Facility Letter together with the indebtedness of Tullycross Developments Limited pursuant to the Company Facility Letter shall not exceed 70% of the combined value of the properties ("the Specified Percentage") detailed at paragraph 6 thereof.*
>
> *(b) In the event that there is a breach of the Bank's requirements as set out at subclause (a) hereof, the Borrowers shall either:-*

(i) Within four weeks of being called upon by the Bank to do so pay (or procure payment) to the Bank such amount as would result in the total of such indebtedness not exceeding the Specified Percentage or

(ii) Furnish to the Bank as soon as possible after they are requested to do so but in any event no later than 4 weeks from the date of such request such additional security acceptable to the Bank and its Solicitors (acting reasonably) as may be required by the Bank to ensure that the total amount of such indebtedness does not exceed the Specified Percentage.

(iii) The Borrowers further agree to provide evidence of title to the Bank which is satisfactory to the Bank's Solicitors (acting reasonably) in relation to such additional security.

(c) For the avoidance of any doubt the Borrowers acknowledge that the Bank will be entitled to call for valuations of the said properties at any time throughout the term of this loan as often as it may choose for the purposes of determining whether or not there has been a breach of the Bank's requirements as set out at sub clause (a) hereof. The Bank shall be entitled to call for not more than four such valuations to be carried out at the Bank's expense. Each such valuation shall be carried out by a reputable valuer who shall in default of agreement between the Bank and the Borrowers be nominated by the Borrowers from a list of at least three reputable valuers to be furnished by the Bank to the Borrowers for such purpose. The written valuation of such valuer shall (save in the case of manifest error) be conclusive and binding on both the Bank and the Borrowers."

6. In May 2008, the defendants requested a meeting with the Bank with a view to having discussions regarding the renewal of the loan facility. The Bank wanted an updated valuation on the properties which had been offered as security, and Mr. John Noonan, on behalf of the defendants, requested CBRE to prepare a valuation. The evidence establishes that throughout the summer of 2008, CBRE were in touch with Mr. James Donagh of the Bank with a view to finalising the report. Throughout that period, the valuation being put on the site varied between €30m and €45m, depending on whether it was being assessed on the assumption of an absence of bank funding or what was called a "Standard Format basis". Finally, on 24th September, 2008, CBRE advised the first named defendant that it had reached agreement with the Bank that the site would be valued at €45m and a copy of this final Valuation Report was sent to the defendants by letter of 26th September, 2008. This valuation had implications for the maintenance of the Loan to Value ("LTV") covenant.

7. The Bank was concerned that its exposure on the LTV had extended beyond 30%, but it is clear from the witnesses who gave evidence on behalf of the plaintiff that the Irish division of the plaintiff Bank were trying to reach some agreement with the defendants on this issue. However, it is equally clear from the evidence of Mr. James Donagh that by the time he had returned from his annual holidays on 20th July, 2008, the Credit Committee of the Bank had decided to exit the relationship between the plaintiff and the defendants. It seems that the Bank's headquarters in Copenhagen were taking a harder line than Dublin on the continuing relationship. They were worried about the falling value in the property market in Ireland and that they might be caught in a situation where only limited recourse was available to the Bank.

8. A meeting took place between the parties on 28th August, 2008. The Bank indicated that it was willing to provide 50% LTV finance for eighteen months. Mr. James Donagh acknowledged to the representatives of the defendants that this offer might be perceived as insulting and make it difficult for them to do business in the future. In the course of the hearing, it appeared that this was merely a reflection of the tensions between the Dublin and Copenhagen offices as to how the future relationship between the parties should progress. Mr. John Noonan for the defendants informed the Bank that in that case, they would finance the project elsewhere and asked for an extension of their loan agreements up to December 2008. The defendants heard nothing further from the Bank on that proposal.

9. The repayment date under the terms of the Loan Agreements was 30th September, 2008. As no agreement had been reached between the parties as to the review of the arrangements, the defendants considered that it would not be in their best interests to agree the Bank's offer of a new facility of €22.5m, but decided they should act on foot of the conditions attached to the Facility Letter of 22nd February, 2006. Accordingly, on 30th September, 2008, the defendants discharged all interest due up to and including that date, and by letter of the same date, informed the Bank that the provisions of clause 11 applied and that the Bank's right of recourse was limited to the property specified in para. 6 of the Facility Letter. In other words, the defendants informed the Bank that, having discharged all interest due up to and including that date, the Bank's recourse was limited. In closing submissions for the Bank, Mr. Hennessy S.C. said that the Bank accepted that interest was paid up to the end of September. The letter was sent by courier and Mr. James Donagh accepted that it was received between 4.30pm and 5.00pm on that date. Mr. Donagh and Mr. David O'Doherty of the Bank were very surprised at the content of the letter and gave evidence that up until that time they had no indication from the defendants that this was the course they proposed to take.

10. At that point, Mr. Donagh and Mr. O'Doherty were concerned with protecting the Bank's position and they prepared letters for the defendants, calling upon them to rectify the breach of the LTV covenant, noting that repayment of the facilities was due on 30th September, 2008. These letters were emailed to Mr. Neil Durkan and Mr. Don Casey shortly after 7.00pm on 30th September, 2008. Some time around 7.45pm, Mr. David O'Doherty hand delivered the letters to the offices of the first named defendant in Ranelagh, Dublin 6. The text of the letter reads as follows:-

"Dear Sirs,

We refer to Facility Letter dated 22nd February, 2006, and in particular, clause 10. As you are aware from recent discussions with the Bank, a valuation of the property held as security under clause 6 has been undertaken on our behalf by CB Richard Ellis dated 2nd July, 2008. The final Valuation Report was received by the Bank yesterday and dated 26th September, 2008.

This valuation gives a market of Euro 45 million and in accordance with clause 10 of the Facility Letter, we formally request the Borrowers to reduce the current aggregate indebtedness of Tullycross Developments Limited and the Borrowers to Euro 31,500.000.

In addition, we further advise that the facility is due for repayment in full under clause 4 on 30th September, 2008.

You are, however, aware, that the Bank has provided the Borrower with revised Facility Letters dated 29th September, 2008, offering aggregated facilities to Tullycross Developments Limited and the Borrowers to Euro 22,500.000. Please note as of today's date, we do not appear to have received accepted Facility Letters.

We are aware that you had to cancel at short notice the scheduled meeting of September 29th which has now been rearranged for Thursday 2nd October. We can discuss the content of this letter at this meeting if you wish."

It appears from the evidence that this letter was delivered after the defendants' normal business hours. The relevance of this assumed some importance in the course of the trial.

Issues

11. The principal issue to be determined in these proceedings is whether, having discharged all interest due on the Loan Agreements up to and including the repayment date, the defendants are entitled to rely on the provisions of para. 11 of the Loan Agreements so that the Bank's recourse is limited to the specified properties referred to in para. 6 of the Loan Agreements.

12. The plaintiff accepts that on 30th September, 2008, the defendants discharged the interest due under the Loan Agreements up to and including the repayment date, but states that they failed to make the "bullet repayment" of capital due under each of the Loan Agreements.

13. In letters dated 30th September, 2008, addressed to the defendants, the Bank notified them that, according to a Valuation Report received by the Bank on 26th September, 2008, their indebtedness to the Bank exceeded 70% of the combined value of the properties detailed at para. 6 of each of the Loan Agreements. The Bank requested the defendants to repair the LTV covenant by reducing their indebtedness by an amount necessary to restore compliance with the specified percentage of 70%. The plaintiff claims that the defendants have failed to comply with this request.

14. On 1st October, 2008, the plaintiff wrote to the defendants in the following terms:-

"We note that the Repayment Date has (sic) defined in clause 5 above has now expired and request the bullet repayment of Euro 29,436,746.06 plus all interest thereon from 30th September, 2008, that is now due and owing under the Facility Letter.

We reserve the right to make further demand or demands upon you in respect of any other money or liabilities which are now or may become owing by you to the Bank.

We also refer to your letter of 30 September. Please note that, in accordance with clause 11 of the Facility Letter, National Irish Bank has agreed with the Borrowers (as defined therein) that provided the Borrowers comply with their obligations as set out at paragraph 10(b) of the Facility Letter and also pay all interest due to National Irish Bank pursuant to the Facility Letter, the Bank's recourse under the Facility Letter will be limited in the manner therein described. In our letter of 30 September, we noted that the Borrowers were in breach of the financial covenants established in clause 10 and have requested rectification of same pursuant to, and in accordance with, clause 10(b)."

15. The plaintiff's claim that even after service of the demand, the defendants did not, within a period of four weeks, pay down the loan or provide further security as required by clause 10(b) of the Agreement. The plaintiff argues that it is an essential precondition to the triggering of the limited recourse provisions of para. 11 of the Loan Agreements that the defendants meet two specific obligations. In the first place, they must comply with their obligations as set out in para. 10(b) and, secondly, they must pay all interest due to the Bank under the terms of the Facility Letter. If one or other or both of these conditions are not met, the Bank is entitled to pursue the defendants for the full amount of the relevant loans. The Bank contends that the defendants failed to comply with both of these obligations.

16. In the first place, the repayment date of 30th September, 2008, passed without the defendants having made the "bullet payment" of capital provided for under the Loan Agreements. Furthermore, as of that date, the Loan to Value percentage specified by para. 10(a) had been breached.

17. The defendants argue that the repayment date, under the terms of the Loan Agreements, was 30th September, 2008. On that date, prior to the close of business, and during normal banking hours, the defendants discharged all interest falling due, up to and including the repayment date. They informed the Bank in writing that they were entitled to rely on the limited recourse provisions of para. 11 of the Loan Agreements. They say that the plaintiff's letter to them dated 30th September, 2008, was delivered after close of business and that the letters of 1st October, 2008, sent from the Bank to the defendants, demanded repayment, unlike the letters of the previous day.

18. It is the defendants' case that in order to revoke the limited recourse provisions, there had to be in existence:

(a) A written report from a reputable valuer (clause 10(c)) showing a breach of the Loan to Value covenant (clause 10(a)), and

(b) a notice given to the defendants by the Bank informing them as to the method the Bank required for the breach to be rectified and giving the defendants thirty days in which to do so (clause 10(b)).

Rules of Construction of Contract

19. There is agreement between the parties as to the rules of construction of the contract in this case. The business commonsense approach adopted in *Antaois Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] 1 A.C. 191, as approved by the Supreme Court in *Analog Devices v. Zurich Insurance* [2005] 2 ILRM 131, and by Clarke J. in *BNY Trust Company (Ireland) Ltd. and Ark Life Assurance Company Ltd. v. Treasury Holdings* (Unreported, 5th July, 2007), represents the law in this jurisdiction. The factual matrix or surrounding circumstances have to be considered and taken into account. See *Reardon Smith Line Ltd. v. Yngevar Hansen-Tangen* [1976] 1 W.L.R. 989. The principles set out in these cases have been quoted at length in many recent judgments and it is unnecessary to repeat them here.

20. In the Loan Agreements, the phrase "term of the loan" was not defined. It seems to me that, having regard to the matrix of facts and surrounding circumstances in this case, the "term of the loan" means the period of two years and six months ending on 30th September, 2008. Clause 4 of the Loan Agreement stated that:

"Following a 2 year and 6 months moratorium from the date of first drawdown, capital repayment will be effected by a

bullet repayment on that date (the 'Repayment Date')."

Frequently, a term loan will involve a loan repayable over a number of years by periodic payments. In this case, however, the payment was to be made in one lump sum referred to as a "bullet repayment" on a fixed date, namely, two years and six months from the date of first drawdown. It did not cease to be a term loan merely because it was to be repaid in one lump sum. The plaintiff argues that the term continued until the loan was discharged. I do not accept that submission. Obviously, when the "bullet repayment" was not made by 30th September, 2008, the sum (together with interest accruing) remained due and owing.

Banking Hours

21. In para. 10 of this judgment, I referred to the fact that letters were sent by the Bank to the defendants calling on them to rectify the breach of the LTV covenant and that these letters were emailed to Mr. Neil Durkan and Mr. Don Casey shortly after 7.00pm on 30th September, 2008. Some time around 7.45pm on that date, Mr. David O'Doherty of the Bank hand-delivered the letters to the offices of the first named defendant in Ranelagh, Dublin 6.

22. The defendants place great importance on the time at which these letters were delivered. The letters, in effect, amounted to the giving of the notice contemplated in para. 10(b) of the Loan Agreements and the defendants maintain that these notices were not delivered until after close of business on 30th September, 2008, thereby being outside the "term of the loan". Accordingly, the defendants argue that the Bank's right of repayment of the loans under the Loan Agreements was, in accordance with para. 11 of the Loan Agreements, limited to the property specified in para. 6 thereof. They say that the operation at para. 10(b) which limited the application of the recourse provisions in para. 11 was expressly stated to be subject to para. 10(a). Furthermore, the operation at para. 10(a) was conditional upon the obtaining of a written valuation. This appears to be acknowledged by the Bank in its letters of 30th September, 2008, which clearly link the obtaining of a valuation with a determination of a breach of para. 10(a) of the Loan Agreements.

23. In the course of his evidence, Mr. James Donagh (for the Bank) stated that up until 12.00 midnight on 30th September, 2008, the Bank had limited recourse against the Borrowers. If the Bank failed to serve notice on the defendants within the term of the loan, that is to say, by 30th September, 2008, the plaintiff maintains that the Bank's recourse is limited to the properties referred to in para. 6. It is necessary, therefore, to determine whether or not the notices served on 30th September, 2008, were served within the term of the loan and whether the question of banking hours can assist in determining this issue.

24. Expert evidence was given on this matter by Mr. Conor Holmes and Mr. Vincent Fennelly who are both retired senior bankers. Mr. Holmes expressed the view that banking hours are the same as opening hours, namely, 9.30am to 4.30pm, when branches are open to the public. He said that the business day could stretch to midnight if circumstances demanded. He made reference to the Consumer Credit Act 1995, which precludes lending institutions from making contact with customers between the hours of 9.00pm and 9.00am the following day. But he said that the loans in this case do not come within the scope of the Act. Payment late in the day by either cheque or draft would be accepted in discharge of a debt subject to further discussion on the issue of an additional day's interest. In his view, the Borrowers had until midnight on 30th September, 2008, to repay the loans. He said the Bank's letters dated 30th September, 2008, were delivered within the business day.

25. Mr. Vincent Fennelly stated that if payment was received between close of banking hours and before midnight it must be considered received. The Bank letter of 30th September, 2008, calls on the defendants to cure the breach of the LTV covenant but does not, as provided for under the terms of the facility, seek, in the alternative, the provision of additional security to bridge LTV gap.

26. Mr. Fennelly stated as his opinion that the intent of the facility was that in the event of the defendants not repaying the loans by 30th September, 2008, recourse would be limited only to the properties held as security, subject only to the requirement to maintain the LTV relationship between the value of the security and the loan. The onus was on the Bank to take action to maintain this LTV relationship through obtaining valuations on the properties held as security. Failure to maintain this LTV relationship within four weeks of the Bank calling on the defendants to do so would negate the limitation of recourse to the properties held only. He expressed the view that it was not reasonable for the Bank to call on the defendants to make good the LTV shortfall identified in the CBRE valuation, on the evening of 30th September, 2008, where the term of the loan expired on that date and the Agreement allowed four weeks for this to be done. As the "bullet repayment" had not been made on that date by normal close of business, the terms of the Facility Letter meant that the Bank's only remedy was to rely on the security held. The only circumstance in which recourse extended beyond the property offered was in the event of the defendants failing to rectify the relationship between the loan and the value of the property held as security within four weeks of having been called on to do so. The defendants maintain that that notice would have to be served within the period of the term of the loan.

27. It seems to me that the intent of the Loan Agreements entered into between the parties was that the security being offered by the defendants was a limited recourse to the property set out at para. 6 of the Facility Letter. That was the default position. The Loan Agreement provided a mechanism whereby the Bank could override the limited recourse facility in the event of default by the Borrowers. Any move by the Bank to move beyond the limited resource provisions has the most serious consequences for the directors of the defendant companies. This requires a strict interpretation of the terms of the Loan Agreement. In the Bankruptcy jurisdiction, there is well-established jurisprudence which requires strict adherence to the letter of the Bankruptcy rules and statutory provisions because the effects of Bankruptcy on an individual are penal in nature (see *Minister for Communications v. M.W.* [2010] 3 I.R. 1). It seems to me that a somewhat similar situation arises in this case where the Bank is seeking orders which would have the effect of precluding the defendants from relying on a limited recourse provision.

28. Approaching the matter from this perspective, I prefer the evidence of Mr. Vincent Fennelly. The letters from the Bank dated 30th September, 2008, were not delivered during normal business hours and were not received by the defendants until the following day. That was after the term of the loan had expired. The plaintiff was aware of the necessity to serve notice on the defendants in accordance with clause 10(b) of the Facility Letter. When the Bank received the letters from the defendants on 30th September, 2008, stating that all interest on the facilities had been paid to date, Mr. O'Doherty and Mr. Donagh of the Bank were immediately aware of the necessity to serve notice during the term of the loan. That is why the Bank's letters of 30th September, 2008, were emailed and later hand delivered by Mr. O'Doherty to the offices of the first named defendant.

29. So what was the position at the close of normal business hours on 30th September, 2008? The interest on the loans had been discharged by the defendants but they had not made the "bullet repayment" required to be made by that date. The defendants maintain that the only way that they can lose their limited recourse status is if notice is served by the plaintiff in accordance with clause 10(b) of the Facility Letter and that this must be done during the term of the loan. It is the Bank that is obliged to take the first step, and if it does so within the term of the loan, the defendants have a four-week period within which to remedy the breach.

The obligations under para. 10(b) are in respect of steps to be taken by the Borrower when called upon to do so by the Bank. The defendants state that there was no default because no notice was ever served under clause 10(b) during the term of the loan.

30. Mr. Donagh accepted that if notice had been served in July or August 2008 (at the time when exiting the relationship was the preferred option for the Copenhagen headquarters), this would have allowed the defendants to repair the covenant and the Bank would not achieve their objective. He seemed to agree that if the Bank had served a notice in July 2008, the defendants would have been able to pay the €5.6m required to repair the LTV covenant and that payment, together with the payment of interest, would have left the Bank in a situation where they would have limited recourse. This would have frustrated the Bank in its objective to exit the relationship with the defendants in a way which would have been most beneficial to it.

31. In the course of his evidence, Mr. Neil Durkan on behalf of the defendants said that if the defendants had been offered an acceptable new facility by the Bank they would have repaired the covenant. I accept that evidence. His evidence is supported by the testimony of Mr. Donagh on the second day of the trial. While discussing the negotiations for a new facility, he referred to the Bank's proposal that the LTV be changed to 50%. That proposal would have involved extending the facility up until the end of December 2008. Mr. Donagh said that he believed the defendants were going to accept the facilities. He had no basis for believing this and I believe he was wrong in that view. When asked how he expected the difference between the LTV of 70% and 50% to be provided for, he said that he had no doubt about the ability of the defendants to pay this sum and that he had received audited accounts that established that they had that ability. He said that in late August 2008, he had a telephone conversation from Mr. Neil Durkan where he said that the defendants had the €14.6m necessary to pay down the facility. Mr. Donagh said that he was aware that they had the funds from information provided by both Mr. Neil Durkan and Mr. John Noonan. In the course of his evidence, Mr. Durkan said that in August 2008, Durkan New Homes was in a position to pay €5.6m if it was called upon to do so, or indeed, €14.6m which would have achieved a 50% LTV. He said that the company had the cash available. This was confirmed by Mr. John Noonan in his evidence. When asked if he had any doubt over the company's ability to pay €5.6m to repair the covenant if a call had been made on the defendants at any time during the summer of 2008, he replied, *"No"*.

32. I accept the evidence of Mr. Durkan and Mr. Noonan on this point.

33. I found the evidence of Mr. David O'Doherty for the Bank unreliable. I do not accept his evidence that he never thought, even casually, about the possibility of serving an Enforcement Notice on the defendants between June and the end of September 2008. He prepared a note in relation to a meeting of 25th July, 2008, which was dated 9th May, 2008, and his explanation for the wrong date being on the note was entirely unconvincing. It seems probable that the note was created at a later time in order to bolster the Bank's position.

34. Mr. O'Doherty also told Mr. Yde, one of his superiors in the Bank, that the directors of the borrowing companies had a personal liability on the facility when this was not so. Furthermore, he provided inaccurate information leading to errors that occurred in the pleadings which had to be amended. He gave the Credit Committee the impression that Mr. John Noonan had agreed to a net worth covenant at 1.5 times the combined loan balance being included in any new facility, when it appears that this was not the case. I found Mr. O'Doherty's evidence to be quite unreliable.

Conclusion

35. The defendants paid the interest due on foot of the loan up to 30th September, 2008. I am satisfied that if, during the term of the loan, they had been called upon to do so, the defendants would have been in a position to remedy the breach of the LTV covenant. They were not called upon to do so within the term of the loan. Therefore, while the amount of the loan remained outstanding, the plaintiff's security for that sum is confined to the properties and other matters referred to in clause 6 of the Agreement. The defendants have not contested the plaintiff's claims for the sums due. The issues argued before the court concerned whether or not the defendants were entitled to the benefit of the limited recourse provisions in the loan. I have concluded that they are entitled to the benefit of limited recourse by the Bank and I will hear counsel on the form the Order should take.