Neutral Citation: [2015] IEHC 6

THE HIGH COURT

Record No. 2013/2866S

Between/

NATIONAL ASSET LOAN MANAGEMENT LIMITED

Plaintiff

AND

NINA LYNN KESSLER (OTHERWISE KNOWN AS NINA McFEELY)

Defendant

Judgment of Ms Justice Iseult O'Malley delivered the 13th January 2015.

Introduction

1. In this case the plaintiff seeks liberty to enter final judgment against the defendant in the sum of €8,034,951.78. The claim is made on foot of a loan facility given by Irish Nationwide Building Society ("INBS") in 2006 to the defendant and her husband Thomas McFeely. The plaintiff has previously obtained orders permitting it to take possession of and sell the defendant's family home ("the property") and the figure now sought represents the balance said to be due after the proceeds of sale were applied to the reduction of the original debt.

2. The plaintiff is a "NAMA group entity" within the meaning of the National Asset Management Agency Act, 2009.

3. The defendant, who represented herself at the hearing, has resisted the claim. She has raised an argument relating to the fact that she did not have independent legal advice about her liability when taking out the loan. She also alleges that certain representations were made to her by INBS at the time of the loan as to its purpose and the way in which it would be repaid. Finally, she has attacked the position of a solicitor who, she says, placed himself in a position, giving rise to a conflict of interest relating to the transaction. She says that these issues should be decided in plenary proceedings.

4. In response, the plaintiff denies, in the first instance, that there is any substance to her arguments. It is accepted, however, that in an application for summary judgment the court cannot determine the credibility of the defendant's evidence as to the facts. The plaintiff relies upon s. 101 of the National Asset Management Agency Act, 2009 for the proposition that if any representation or collateral agreement of the sort alleged was in fact made to the defendant, the plaintiff is not bound thereby. It also makes the case, relying upon principles of *res judicata* and estoppel, that she should not be permitted to raise these issues in circumstances where courts of competent jurisdiction have already determined that the debt was well charged upon her interest in the family home and an order for possession has been granted and acted upon.

Background facts

5. By letter of offer dated the 20th December, 2006, INBS offered to advance to the defendant and her husband a loan of €9,578,240. The loan was interest-only. The capital sum (and all sums due and owing) was repayable in full on the expiry of the term. The agreement also included a provision that the loan was repayable on demand at any time. Without prejudice to that, it was repayable in full if at any time any monies payable by the borrowers were in arrears and unpaid for one month after falling due.

6. The loan was expressed to be subject to and secured by mortgage deeds of the 2nd March, 2005 and the 6th July, 2006. Each of these related to the family home and each included a covenant by the defendant and her husband to repay to INBS "any sum or sums" which might be advanced or re-advanced to them by INBS. Again, these deeds stipulated that if at any time any monies payable by the borrowers to INBS were in arrears and unpaid one month after falling due the whole of the future instalments of principal would become due and owing.

7. The offer was accepted and was signed by the defendant and her husband on the same day.

8. The interest payments on the loan went into arrears before the expiry of the loan period and the capital was not repaid.

9. In July, 2010 INBS issued a civil bill for well-charging relief. The defendant filed an affidavit in the proceedings, which did not deny liability but made the case that negotiations were ongoing between her husband and the plaintiff, and asking that the matter be adjourned to allow finalisation of the discussions. She and her husband were legally represented in the case. On the 9th December, 2010, INBS obtained a declaration in the Circuit Court that the sum of €10,477,845.35 stood well charged against the interests of the defendant and her husband in the family home. An appeal to the High Court was dismissed on the 4th April, 2011.

10. By order of the High Court made pursuant to the provisions of s. 34 of the Credit Institutions (Stabilisation) Act, 2010 on the 1st July, 2011, the assets of INBS were transferred to Anglo Irish Bank Corporation Limited. There is no dispute as to the fact that this order was effective to transfer the right to maintain the current proceedings to that company.

11. On the 10th October, 2011, the loan agreements and the mortgages were transferred to the plaintiff pursuant to s.69 of the NAMA Act, having been designated as an "eligible bank asset".

12. On the 12th January, 2012, the plaintiff demanded payment of the sum of €10,634,951.78 from the defendant and her husband. No payment was forthcoming and the plaintiff issued a civil bill seeking an order for possession.

13. Affidavits were filed by the defendant's husband and by another individual claiming that the property was already the subject of a charge in favour of that individual's company.

14. The defendant herself filed a short affidavit relying on "*such other matters as are put before the court*" in opposition to the application but otherwise asking for a stay on any order made until such time as her son had completed his secondary education.

Again, the defendants were legally represented.

15. On the 6th June, 2012, Dublin Circuit Court granted an order for possession of the defendant's home. An appeal against the order was dismissed by the High Court on the 19th November, 2012. The plaintiff took possession of the property and it was sold in May, 2013. The purchase price was €2,600,000 and that sum was applied against the debt owed pursuant to the loan agreement. The balance is the amount now claimed.

16. In July 2012 the defendant's husband was adjudicated bankrupt.

The defendant's evidence

17. The defendant says that when the loan facility was offered she was advised by INBS that

> *"…this was a personal loan being advanced by the Bank in order to discharge the existing mortgages on the Property and for purposes connected with my husband's property development business…"*

18. She says that she was told that the loan would be repaid from the equity of a development being undertaken by her husband and his business partner at Priory Hall in Donaghmede, which INBS was financing. At that time the development had a value of €44m and an outstanding liability of €22.5m and she therefore believed that there was adequate equity cover to repay the loan.

19. The defendant says that she did not receive any legal advice and was not "required" to do so by INBS. She says that because she owned the property jointly with her husband and the advance was being used to repay the existing loan she did not realise that

> *"the bank owed me a duty to obtain independent legal advice in circumstances where unknown to me the bank did not intend to use the proceeds in the manner we had agreed to discharge the mortgage on the property."*

20. However, in the following paragraphs of her affidavit the defendant goes on to say that:

> *"After the loan document had been completed the bank complied with their part of the agreement by transferring part of the loan advance in order to discharge the existing mortgage on the property and they applied the balance direct in accordance with instructions given to them by my husband in relation to his own business affairs. I never received any money from the bank in respect of the Loan Agreement and I am informed by my husband that he did not receive any money either. This was entirely consistent with the agreement with the bank that they would use the loan advance in part to redeem the mortgage.*
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> *I am advised and believe that I have a good defence to the claim for summary judgment. I do not have any liability to the Bank because they are in breach of the terms of the loan agreement by failing to redeem the mortgages on the property and relying on repayment from the Donnymede [sic] development and on my husband's other partnership projects.*
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> *I would not have agreed to the loan if I had been informed that the bank were not going to discharge the mortgage on our property. I would also not have agreed if I had been informed that I had any personal liability and that repayment was not restricted from the equity in the Donnymede development and my husband's other partnership projects."*

21. In summary, on this issue, the defendant says that she believed that this was a business loan which would clear the mortgage and leave her home mortgage-free.

22. The defendant says that she had little knowledge of her husband's affairs and felt under pressure to sign the document. She asserts that her husband told her that the mortgages would be cleared and that this was a business loan for him with no risk or relevance to her. The suggestion of undue influence is raised. In the circumstances the bank should have ensured that she had independent legal advice.

23. The defendant then alleges that the solicitor now conducting this litigation on behalf of the plaintiff had acted for her husband and his business partner when INBS was taking over their business from Bank of Ireland. She says that this solicitor had put in place security for two very large developments being conducted by the partnership and that he therefore had an intimate knowledge of her husband's and her family's position. She says that he should have known that she was "totally averse" to accepting any personal liability.

24. On the *res judicata* issue, the defendant argues that the well charging order does not amount to a finding of liability on her part and that such liability has not been ruled upon by any court. She asserts that the property should not have been repossessed

> *"…since legally there was no mortgage on it."*

25. In general, the defendant accuses the plaintiff of acting in bad faith in relation to herself and her husband.

Submissions on behalf of the plaintiff

26. The plaintiff says, in the first instance, that the assertion by the defendant that she and her husband never received the loan monies is directly contradicted by the affidavits in the previous proceedings and that in those circumstances both an estoppel and the rule in *Henderson v. Henderson* (1843) 3 Hare 100 arise. In any event, it is submitted that as a matter of law there was joint and several liability for the loan and the use to which the monies were put is irrelevant.

27. It is said that there is no presumption that the defendant was subjected to undue influence on the part of her husband and no evidence that this was the case.

28. The plaintiff submits that s. 101 of the National Asset Management Agency Act, 2009 as precluding reliance by the defendant, in proceedings brought by this plaintiff, on any alleged misrepresentation on the part of INBS. The section provides as follows:

> *"101 – (1) If in relation to a bank asset that NAMA or a NAMA group entity has acquired-*
>
> > *(a) it is alleged that a representation was made to, a consent was given to, an undertaking was given to, or any other obligation was undertaken (by agreement or otherwise) in favour of, the debtor or another person by the participating institution from which the bank asset was acquired or by some person acting or claiming to act on its*

behalf,

(b) no such representation, consent, undertaking or obligation was disclosed to NAMA in writing, before the service on the participating institution of the relevant acquisition schedule,

(c) the records of the participating institution do not contain a note or memorandum in writing of the terms of any such representation, consent, undertaking or obligation or do not contain a record of any consideration paid in relation to any such representation, undertaking or obligation, and

(d) the representation, consent, undertaking or obligation, if made, given or undertaken, would affect the creditor's rights in relation to the bank asset,

then that representation, consent, undertaking or obligation-

(i) is not enforceable, and cannot be relied on, by the debtor or any other person against NAMA or the NAMA group entity,

(ii) is enforceable, and can be relied on, by the debtor or any other person, only against a person other than NAMA or a NAMA group entity, and

(iii) is not enforceable, and cannot be relied on, by NAMA or the NAMA group entity against the debtor.

(2) A claim based on a representation, consent, undertaking or obligation referred to in subsection (1) gives rise only to a remedy in damages or other relief that does not in any way affect the bank asset, its acquisition, or the interest of NAMA or the NAMA group entity or (for the avoidance of doubt) any property the subject of any security that is part of such a bank asset.

29. Without prejudice to the foregoing, the plaintiff's principal argument is that four court orders have already been made, all of which could only be made on the basis that the debt was due and the defendant was liable jointly and separately with her husband.

Decision

30. I consider that there is merit in all of the submissions made on behalf of the plaintiff. In particular, it seems to me that the rule in *Henderson v. Henderson* (1843) 3 Hare 100 must apply. That rule is stated as follows:

> *"…where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward because they have, from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

31. Although the relief sought in each set of proceedings has been different, it is clear that the first issue that had to be determined was the liability of the defendants on foot of the loan. That remains the basis for the order sought in this case, and it has already been determined.

32. The rule is not to be "*blindly or invariably*" applied - per the Supreme Court in *McFarlane v Director of Public Prosecutions* [2008] 4 I.R. 117. However, I see no unfairness in applying it in this case. If there was any genuine dispute as to the liability of the defendant, based on either non-receipt of the loan monies, failure by the building society to use the loan for an agreed purpose or misrepresentation by the building society as to the consequences for the defendant's interests, it is entirely reasonable to expect that these issues would have been raised in the earlier proceedings. It is too late to do so now. Nor do I believe it possible for this defendant to raise an issue as to legal advice at this stage. She was legally represented in the earlier proceedings and there is no evidence to support any suggestion that she was not capable of instructing her then solicitors or that she had not understood the transaction she entered into. In truth, I am not at all sure that it would have made any difference had she received independent legal advice. The house was subject to a mortgage in any event with an "all sums due" provision, and it is manifest from subsequent events (including the bankruptcy of her husband) that the mortgage would not have been repaid.