THE COURT OF APPEAL

CIVIL

[2018] IECA 6

[Appeal number 2016 355]

Ryan P.
Irvine J.
Whelan J.

BETWEEN

AIB MORTGAGE BANK

RESPONDENT

AND

LAURENCE O'TOOLE AND JAMES O'TOOLE

APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 29th day of January, 2018

1. This is the appellants' appeal against the judgment delivered 23rd June, 2016 and consequent orders made on 30th June, 2016 by Binchy J. in the High Court following the trial of a preliminary issue as to whether or not AIB Mortgage Bank (hereinafter "the Bank") is entitled to rely upon the terms of certain loan agreements and the security documentation completed by the appellants (in the said judgment and order and hereinafter referred to as "the first loan") in respect of all sums due and owing by the appellants to the Bank in connection with loan agreements or security over certain other properties (in the said judgment and hereinafter referred to collectively as "the second loan").

2. The first loan was availed of by the appellants to purchase six premises, being Nos. 1, 2,8 and 9 Woodbrook Place, Green Lane, Carlow, Nos. 14 and 15, The Glen, Carlow.

The facts

3. The appellants entered into four separate contracts of loan with the Bank. Details of the said loans and the security are set out with significant particularity in the above-mentioned judgment of Binchy J. delivered 23rd June, 2016. Each deed of mortgage and charge was registered in the Land Registry as a burden on Part 3 of the relevant folio. The appellants are brothers. Subsequent to the advancement of the first loan the appellants,along with another brother Donal O'Toole, borrowed additional monies (hereinafter "the second loan") from the Bank for the purposes of acquiring certain properties at Tanner Hall, Carlow,). There has been no default on the part of the appellants in respect of the first loan. The appellants and Mr Donal O'Toole are in default in respect of the second loan. Formal letters of demand issued from the Bank to the appellants and Mr Donal O'Toole on 15th December, 2014 in respect of repayment of the second loan.

4. By letter dated 18th December, 2015, served on each appellant the Bank demanded repayment of all sums due by them in connection with the first loan. The "event of default" as defined in the mortgage instrument that triggered this notice was the alleged default on the part of the appellants in repayment of their liabilities on foot of the second loan.

15 The Glen

5. The appellant James O'Toole entered into a contract in late 2015 for the sale and disposition of No. 15, The Glen, one of the properties charged with the first loan. Upon completion of that sale in November 2015 he remitted to the Bank the net sum in respect of redemption of the security over that premises alone. In the preceding months the Bank had been in communication with the appellants' solicitor in connection with the redemption of the mortgages comprised in the first loan. The letters clearly represented that upon receipt of the outstanding balance specified in the redemption letter that the charge registered against each property would be vacated. The correspondence was silent with regard to any cross securitisation.

Error

6. However, Mr Conal Regan, the Bank Manager, in an affidavit sworn on 21st December, 2015 in the High Court proceedings, deposed that the redemption letters which issued in respect of the six properties as comprised the first loan were erroneous. He stated they should have referred to the cross obligations of the appellants and in particular ought to have included express reference to the full sum required to discharge the entirety of liabilities due and owing by the appellants to the Bank on foot of the first and second loans rather than the net sums as specified in the correspondence of 17th July, 2015 and 9th October, 2015, respectively. Mr Conal Regan gave evidence before the High Court and was cross examined in that regard.

7. Having effected the sale and disposition of No. 15 the Glen, the second-named appellant James O'Toole proceeded to discharge the net sum to redeem only the loan over the said property and in December 2015 called upon the Bank to furnish a discharge for the purposes of clearing the burden on Part 3 of the relevant folio. The surplus proceeds of sale were then released into his retentive hand. It appears that it was only at that juncture that the Bank realised their error and thereafter proceeded to obtain *ex parte* orders in the nature of *Mareva* injunctions on 22nd December 2015 restraining disposition of the remaining secured properties.

High Court

8. On 19th January, 2016, the High Court directed that a preliminary issue be determined as to whether the Bank was entitled to rely upon the terms of its loan agreements and security instruments executed by the appellants in connection with the first loan in

respect of the sums due by the appellants (together with a third party) to the Bank in connection with the second loan.

9. The appellants contended before the High Court that the equitable doctrine of consolidation was engaged and that unless the Bank was in a position to comply with the very stringent requirements of that doctrine it was not entitled to purport to consolidate the first and second loans. The contention of the appellants was to the effect that in substance the conduct of the Bank in asserting that the first loan operated as security for all sums due to it by the appellants amounted to an equitable consolidation of the several mortgages as comprise the first and second mortgages.

10. It was argued further, that notwithstanding the express terms of the loan agreements and security instruments including the mortgages executed by the appellants, the terms of same were entirely subject to the equitable doctrine of consolidation and that absent strict compliance with the prerequisites ordained by courts of chancery over the centuries for operation of the doctrine the Bank was not entitled to assert a claim in respect of any surplus proceeds of sale arising from the disposition of any property comprised in the first loan for the purposes of discharge of any liability arising on foot of the second loan.

11. The Bank disputed the appellants' contentions, asserting in particular that the equitable doctrine of consolidation was not being invoked and that the cross securitisation terms of the loan and charge instruments were clear. The Bank asserted that the doctrine of consolidation had no application to the facts of this case. The Bank sought to rely *simpliciter* on the express terms of the mortgage instruments. The preliminary issue was heard before the High Court on 11th March, 2016.

12. In his reserved judgment delivered 23rd June, 2016, after outlining the background and history of the course of dealings between the parties in regard to the first and second loan, the trial judge considered the equitable doctrine of consolidation and also considered the loan documents and charge instruments in respect of the first loan. He noted that the Bank relied on the terms of the various contracts of loan entered into with the appellants on foot of which the Bank had advanced funds for the purchase of the secured properties as well as the terms of the deeds of mortgage and charge themselves. He attached weight to the definition of "secured monies" in the mortgage instruments and considered the submissions of the Bank with regard to the effect of the said instruments and the relevant authorities including *Henry Haverty and Martine Haverty v. the Financial Services Ombudsman and ACC Bank Plc.* [2013] IEHC 233.

13. It is clear from his judgment that counsel for the appellants focused substantially on the equitable doctrine of consolidation at the hearing asserting that it was the only legal basis for the bank's contention that the terms of the security granted for the first loan extended to all indebtedness of the appellants. It was argued that the doctrine had no application on the particular circumstances of this case by reason of the fact that the appellants giving security to the Bank are different parties in respect of the two loans. In particular, emphasis was laid on the fact that the appellants' brother Donal O'Toole is one of the mortgagors in respect of the second loan. He is not a party to any of the securities created in connection with the first loan.

14. In his judgment, the trial judge concluded that the preliminary issue fell to be determined upon the interpretation of the first loan agreement, its relevant instruments and documents including the deeds of mortgage and charge.

15. At para. 30 of the judgment he states:

> "It could not be more clear that both the loan contracts and the deed of mortgage and charge provide that the security being provided is in connection with all present and future liabilities to the Bank."

He identifies various terms of the letter of loan offer, the general terms and conditions of loan, the special conditions of the loan as governing the contractual relationship between the parties. He attached particular significance to the definition of "secured liability" in the deed of mortgage and charge, as well as the covenant on the part of the appellants contained in Clause 3.0.1 of the mortgage instrument to pay all monies now or hereafter due to the plaintiff including monies owed jointly with others. He also considered material the statement in Clause 3.0.3 of the said instrument that the secured monies shall immediately become due and payable if the mortgagor fails to pay any money due to the plaintiff on the due date.

16. At para. 31 of the judgment the learned trial judge concluded that the Bank was entitled to demand repayment of the first loan in full in the event of the default of repayment of any other loans due by the defendants, including the second loan. He reached that conclusion based on the express terms of the loan agreement and mortgage instrument:

> "While therefore, the plaintiff is not entitled to rely upon the doctrine of consolidation, in my view the plaintiff is entitled to rely upon its express contractual rights and is entitled to appropriate declaratory relief, about the precise terms of which I will receive submissions from counsel."

Notice of appeal

17. The notice of appeal relies on 12 distinct grounds. At the hearing of this appeal, counsel for the appellants distilled the central issue down to one, namely his contention that irrespective of the express terms and provisions of, *inter alia*, the letter of loan offer, the general terms and conditions of loan, special conditions, and the deed of mortgage and charge instruments themselves, the Bank was not entitled to rely on the said contractual terms for the purposes of enforcing cross security unless they could demonstrate strict compliance with the equitable doctrine of consolidation. In essence, it was contended for on behalf of the appellants that the provisions of the equitable doctrine of consolidation must be read into the mortgage instrument in each case.

18. It was asserted that a mortgagee is not entitled to proceed to enforce cross security unless the strict requirements of the equitable doctrine of consolidation are complied with irrespective of the contractual terms. Further, it was contended that the Bank and the bank officials misunderstood the legal obligations in relation to the equitable doctrine of consolidation and that that explained, *inter alia*, contentions advanced in various correspondence including by letter of 12th March, 2013 wherein one Graham Kelly of AIB Financial Solutions Group addressed to Byrne Casey & Associates of Tullamore, Co. Offaly, who appeared to be representing O'Toole Bros. Partnership:

> "I do not concur with your statement that these houses do not form part of the Bank's wider security package. As the mortgages held on the said properties are 'All Sums Due Mortgages' the Bank can rely on these properties as security for the respective individual's borrowings if required. In addition, I would also add that as per the Bank's General Terms and Conditions, a breach under one facility is classified as a breach under all loan facilities."

The equitable doctrine of consolidation

19. Detailed submissions were made in this court on behalf of the appellants invoking the doctrine's application to the instant case. It would appear the equitable doctrine of consolidation was formulated by Lord Keeper Bridgman in *Shuttleworth v. Laycock* 1. VERN. 245 in 1684 and also in the later 1692 decision of *Pope v. Onslow* 2. VERN. 286.

20. The original formulation of the doctrine appears to have been that if a person has mortgaged two separate parcels of land to one mortgagee to secure two different debts and has made default as to one mortgage such a debtor is not personally permitted to insist upon paying one debt and redeeming the performing mortgage only without paying and discharging the other defaulting mortgage debt also.

21. The general view is that the doctrine of consolidation was founded upon the equitable maxim that "he who seeks equity must do equity". The principle being that since redemption is an equitable right the mortgagor who redeems must for his part do equity towards the mortgagee. It would be inequitable for the mortgagor to redeem one security, perhaps with a significant surplus available after redemption leaving the mortgagee exposed to significant risk of deficiency on the other.

22. Historically, the courts of equity have recognised that the right of consolidation belongs to the mortgagee and not to the mortgagor. There is clear authority for the proposition that a mortgagor cannot compel a mortgagee to invoke or exercise consolidation; *Pelly v. Wathen* [1851], 1 DEG. M.&G. Over the centuries strict rules evolved as to the preconditions to be met prior to the invocation by a mortgagee of the doctrine.

23. In the instant case the Bank does not wish to exercise the equitable doctrine of consolidation. At no time did the bank invoke the doctrine in its dealings with these appellants. This Court was informed at the hearing of the appeal that in the High Court Mr. Conal Regan, a manager employed by the Bank, under cross examination confirmed that the Bank had not invoked the doctrine of consolidation and did not wish to do so. This is a significant factor in determining the issues arising in the instant appeal.

24. Between the late 1600s and 1st January, 1882, the right to consolidate mortgages made by the same mortgagor but affecting different properties was unlimited unless the mortgage instruments contained a clause expressly forbidding consolidation. This rule was reversed by s. 17 of the Conveyancing Act 1881.

Section 17 of the Conveyancing Act 1881
25. In practice, during the 19th Century and prior to Section 17 of the Conveyancing Act coming into operation on the 1st January, 1882, where a mortgagor had two or more mortgages of different properties with the same mortgagee, the mortgagee could insist, at its election, that all the mortgages be redeemed together to prevent the mortgagor redeeming one which might well have a significant equity of redemption, leaving unredeemed another which might constitute inadequate security for the outstanding balance on the separate mortgage.

26. Section 17 essentially provided that where the mortgages or one of them is/are made after the commencement of the Act, there is to be no right of consolidation unless a contrary intention appears. It is clear from s. 17 that the contrary intention need appear in only one of the various mortgage instruments.

27. As was pointed out by counsel for the appellants, it became standard procedure after the coming into operation of the Conveyancing Act 1881, at least in mortgages created by lending institutions and banks, that such mortgage instruments would contain a clause excluding Section 17 of the Conveyancing Act 1881.

28. Whereas Section 17 was designed to restrict the doctrine's operation it contained within it the mechanism whereby a mortgagee could defeat the intention by reserving an express right to consolidate or a provision disapplying the operation of Section 17.

29. There can be no doubt but that the equitable doctrine of consolidation has been unpopular with the courts in this jurisdiction as is exemplified in decisions such as *Re Thompson's Estate* [1912] 1 IR 194 (per Ross J.).

Land and Conveyancing Law Reform Act 2009
30. The Law Reform Commission recommended the abolition of the doctrine of consolidation altogether. The Land and Conveyancing Law Reform Act 2009, Section 92, was initially drafted with a view to abolishing the doctrine. Indeed the original bill, as introduced in the Seanad provided for abolition. It was subsequently amended at the Dáil Select Committee and Section 92 of the Land and Conveyancing Law Reform Act 2009 now re-enacts Section 17 of the Conveyancing Act 1881 and restricts the entitlement of a mortgagee of a housing loan mortgage to consolidate.

Mortgage terms
31. Before considering whether the equitable doctrine of consolidation has any application in the instant case, it is necessary to establish whether a valid cross security arrangement was put in place by the bank. Mr Beatty S.C. for the Bank contends that the doctrine of consolidation is not engaged. Similar indentures were created between the appellants and the bank or the bank's predecessor in respect of each of the properties comprised in the first loan.

32. Of note in respect of the said indentures are the following terms;

> The definition of "the secured monies" in paragraph 1: "The secured monies" is defined to mean "all monies and liability which the mortgagor covenants to pay to the Bank or discharge under the covenants hereinafter contained".

33. At clause 3.1 of the indenture it provides as follows:

> "**Covenant for payment**
>
> 3.1 The mortgagor hereby covenants with the Bank on demand to pay to the bank all monies and discharge all obligations and liabilities whether actual or contingent now or hereafter due owing or incurred to the Bank by the mortgagor in whatever currency denominated (whether on any current or other account or otherwise in any manner whatsoever and whether alone or jointly and in whatever style, name or form and whether as principal or surety) when the same are due including (without prejudice to the generality of the foregoing) all liabilities in connection with foreign exchange transactions … or other credits or any instruments whatsoever from time to time entered into by the Bank for or at the request of the Mortgagor together with interest to date or of payment at the relevant interest rate and all commission fees and other charges and all repairing, insurance, legal and other costs and expenses incurred by the Bank in relation to the Mortgagor of the mortgaged property or under these presents on a full indemnity basis (including interest at the relevant interest rate on such costs and expenses from the date the same shall have been made or incurred until the date

of actual repayment to or reimbursement of the Bank in respect thereof)."

34. Clause 3.03 of the indenture provides:

> "The Bank shall cease to be under any further commitment to the Mortgagor and the secured monies shall immediately become due and payable on demand and the Mortgagor shall provide cash cover on demand for all contingent liabilities of the Mortgagor to the Bank and for all notes and bills except if endorsed or discounted and all bonds, guarantees, indemnities, documents or other credits or any instruments whatsoever from time to time issued or entered into by the Bank for or at the request of the Mortgagor on the occurrence of any of the following specified events:
>
> > a. If the Mortgagor fails to pay on the due date any money or to discharge any obligation or liability payable by him from time to time to the Bank:"

35. I further note at para. 5.04 of the indentures the following provision:

> "The Mortgagor, the registered owner, or the person entitled to become registered as owner thereof as beneficial owner, hereby charges (by way of Charge for present and future advances) so much of the mortgaged property the ownership whereof or in the case leasehold property the leasehold interest whereof is registered in the Land Registry with payment to the Bank of the secured moneys And hereby Assents to the registration of the said charge as a burden on the mortgaged property or so much thereof as is charged in this clause."

36. The *proviso* for redemption is embodied in clause 6 of the mortgage indenture and provides:

> "6.01 Provided always that if the Mortgagor shall pay to the Bank the secured moneys pursuant to the covenants in that behalf herein contained then and in any such case the security and the mortgaged property shall at the cost and expense of the mortgagor be released by surrender or discharge as the mortgagor shall direct."

37. The powers of the bank are set forth in clause 8 of the indenture. 8.01 provides:

> "The Bank shall have the statutory power conferred on mortgagees by the Conveyancing Acts with and subject to the following variations and extensions that is to say:
>
> > (a) The secured moneys (whether demanded or not) shall be deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of these presents."

Cross securitisation

38. The question arises whether the various indentures of mortgage with the provisions referred to above, when taken together with the terms of the letters of loan offer, the general terms and conditions of the loans, the special conditions of the loans and the covenants recited hereinbefore in the indentures give rise to a cross security arrangement. Is the language sufficiently clear and unequivocal such that the terms of the instruments as comprise the first loan are such that the second loan is effectively cross secured by the separate "all sums due" provisions contained in each of the said mortgages? In my view the answer is demonstrably yes. That being so, does the equitable doctrine of consolidation have any application?

39. There does not appear to be any authority for the proposition that a mortgagor can compel an unwilling mortgagee into exercising the right of consolidation. As with equitable remedies and principles in general, it is for the party who wishes to avail of an equitable remedy to invoke it. The equitable doctrine of consolidation ought not be conflated with the principle of cross securitisation. They are separate and wholly discrete processes.

40. J.C.W. Wylie in his text *The Land and Conveyancing Law Reform Act 2009: Annotations and Commentary, second edition*, (Bloomsbury Professional, 2017) states at p. 279, note 5,:

> "The right of consolidation exists only where there is the same mortgagor and mortgagee, however many mortgages exist: see *Hughes v. Britannia Permanent Building Society* [1906] 2 Ch. 607; see also *Pledge v. White* [1896] AC 187; *ACC Mortgage Bank v O'Toole*, 2016, IEHC 368. The right of consolidation should not be confused with a "cross security" arrangement e.g. where a number of loans are each secured by separate "all sums" mortgages over several properties. If the mortgagor pays off one loan, that cannot alter the fact that the remaining loans are still secured on the several properties. There is no question of consolidation in such circumstances because *all* the properties remain mortgaged in respect of the remaining loans. Consolidation can only arise where the payment removes the mortgage from one property, with the consequence that the other properties are not adequate security for the remaining loans."

41. I am satisfied that Professor Wylie is correct and that the above excerpt represents a correct statement of the law. The equitable doctrine of consolidation has never been invoked by the mortgagee and is not engaged in the instant case. It is not open to a mortgagor, acting unilaterally, to attempt to compel a mortgagee to invoke the doctrine. The bank witness has given testimony before the High Court confirming that it never was the intention of the bank to invoke the equitable doctrine of consolidation.

42. Instead, the bank has validly invoking its cross security arrangement and the correspondence from December, 2015 is unequivocal in that regard. Furthermore I am satisfied that there is perfectly valid cross securitisation in operation. It is clear beyond peradventure from the aforesaid mortgage instruments that the security provided by the appellants was in connection with all present and future liabilities to the bank. It follows accordingly that the bank is entitled to rely upon the terms of the loan agreements and security instruments executed by the appellants in connection with the secured properties comprised in the first loan in respect of any amounts due and owing by the appellants, or either of them, jointly or severally in connection with the second loan.

43. I am satisfied that all of the properties comprised now within the first loan remain as security in respect of the outstanding sums due on foot of the second loan.

44. In his well-crafted submissions counsel for the appellants submits that the Court must examine the substance of the mortgage and security transactions in accordance with legal and equitable principles. In particular he asserted that ;"The protection provided by the Court of Chancery to ensure that a mortgage remained only a security for the loan, hence upon repayment of redemption, would be restored in its entirety to the mortgagor means that the Court will scrutinise abuse of any collateral advantage or stipulation over and above repayment of principal, interest, and costs."

45. In the instant case the question arises as to what constitutes "the loan" in the context of the course of dealings between the bank and these appellants. It is clear from the judgment of the Supreme Court in *The Law Society of Ireland v. The Motor Insurers Bureau of Ireland* IESC (25th May, 2017) that the operative principles governing the construction of an agreement are broadly those set out pp. 114-5 of the decision of Lord Hoffman in Investors *Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 All ER 98 though O'Donnell J. in his judgment in the former at paragraph 8 issued this caveat:

> "These principles represent a significant staging point in the development of what might be described as a modern approach to the interpretation of contracts, a development which, as the principles recognise, has not necessarily reached its terminus. The common law is treated as a coherent and consistent body of law developing incrementally by subtle changes, and only on occasion by sharp and dramatic turns. It is sometimes only after a period of time that the significance of a development is understood and it becomes apparent that the direction of the law has altered considerably. The modern approach to the interpretation of contracts is one which would probably be unrecognisable to, and might be regarded as heresy, by the Victorian judges who expounded so confidently on commercial matters. In my view, it is important to understand the full import of the changes wrought by the approach set out in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*. It is also necessary to be aware of the significance of this development for the overall approach to the interpretation of agreements, and not to simply mix and match authorities drawn from different eras and contexts, as if they were a body of coherent rules produced by a single author."

46. Subject to that cautionary stance one turns to consider some of the principles adumbrated by Lord Hoffman in *Investors Compensation* which appear to be of relevance in the instant case:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," …
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words.
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said... :
>
> > ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.""

47. In the instant case there is ample evidence before the Court that when the appellants entered into the securities comprised in the first loan, they expressly and unequivocally entered into a cross securitisation arrangement. The language and provisions contained in the indentures of mortgage leave no room for doubt. I would particularly refer to clauses 3.01, 3.03 and clause 5.4 and 6.01 as well as the definition of "the secured moneys". The appellants could have been under no illusion whatsoever as to the meaning and import of the said provisions. The propositions to the contrary advanced on behalf of the appellants amount to unrealistic assumptions the propounding of which has achieved significant delays in the prosecution of this litigation.

Equity acts not in vain

48. For over three centuries now the equitable doctrine of consolidation has been available in specified and limited circumstances to be invoked at the behest of a mortgagee. The doctrine is founded upon the equitable maxim that "he who seeks equity must do equity". No authority was identified by the appellants for a proposition that a mortgagor could compel or insist that an unwilling mortgagee be required to invoke the doctrine – particularly in circumstances where the strict criteria for valid invocation of the doctrine are demonstrably absent. The proposition could only be advanced for the purposes of attempting to defeat or otherwise usurp the cross securitisation agreements that have been duly executed by the appellants. Such an opportune windfall for the appellants does not accord with the equitable doctrine, properly understood.

Conclusion

49. I am satisfied that the equitable doctrine of consolidation is not engaged in the instant case. The properties comprised in the first loan remain subject to the liabilities specifically agreed to within the express terms of the said mortgage instruments. The doctrine cannot be invoked and is not available to the appellants for the purposes of precluding the bank from seeking to enforce their valid cross-security in respect of the liabilities that have arisen in respect of the second loan.

50. Accordingly I would uphold the determination of the learned judge and dismiss this appeal on all grounds.