

THE HIGH COURT

[2011 No. 2085 S.]

BETWEEN

ACC LOAN MANAGEMENT LIMITED.

PLAINTIFF

AND

THOMAS HEFFERNAN AND MARY HEFFERNAN

DEFENDANTS

JUDGMENT of Mr. Justice Michael White delivered on the 27th day of November, 2015

1. This matter was heard by the court on 23rd 24th 25th June and 28th 29th July 2015 by way of counterclaim to summary proceedings. Judgment was reserved.

2. The plaintiff issued a summary summons on 18th May, 2011, seeking recovery of €3,366,000 advanced to the defendants on 28th September, 2007, further to a loan facility letter of 28th August, 2007. By order of this Court on 29th November, 2013, the plaintiff was granted judgment against the defendants in the principal sum of €3,366,000 and the claim for interest was adjourned to plenary hearing. The defendants were granted liberty to deliver a statement of claim by way of counterclaim.

3. The defendants delivered a statement of claim on 11th December, 2013. In the statement of claim they referred to themselves as plaintiffs, and to the plaintiff as defendant. They claimed,

(a) Damages arising from the negligence and breach of duty of the defendants' employee or agent, John Dwan, in advising the plaintiffs to apply for planning permission to develop the Slieverue site themselves rather than sell the site subject to planning permission.

(b) Damages for breach of contract in relation to the failure of the defendant to include in the loan offer of 14th September, 2007; a loan in the sum of €100,000 to fund the planning permission application leading to a delay in the processing of that application.

(c) Damages for breach of contract in requiring the plaintiff to obtain further valuation on foot of the loan offer of 28th February, 2008, leading to a further delay in releasing the sum of €100,000 to enable the plaintiff to process their planning permission application.

(d) Damages for breach of contract in refusing to allow the plaintiffs draw down the loan in the sum of €100,000 on foot of loan offer dated 16th December, 2008, as a consequence of which the plaintiffs were unable to process their planning permission application and unable to sell the site and discharge the loan and interest obtained from the defendants on foot of the loan offer of 14th September, 2007.

The plaintiff delivered a full defence to the counterclaim on 23rd January, 2014.

4. The defendants are farmers who farmed at Kearney Bay, Glenmore, Co. Kilkenny. They purchased a farm at Slieverue situated about six miles away in 1992. This farm containing 14 hectares is registered on Folio KK19249F. The property is close to Waterford City and had development potential. Over a number of years, the defendants were approached by developers seeking to purchase the property.

5. Based on the development potential of the Slieverue lands, the defendants decided to purchase another farm at Park, Bree, Enniscorthy, Co. Wexford, for agricultural purposes. That farm contained 77 hectares, and is registered on Folio WX48946F. It was purchased in 2005 for €2.79m plus stamp duty and fees totalling €3.1m. The purchase was funded by a short term loan from AIB. It was the intention of the defendants to sell the Slieverue property and to use the proceeds to pay off the loan on the Bree farm.

6. The defendants had a professional relationship with the plaintiff, and had engaged in some transactions with it. The plaintiff offered to cover the AIB facility and a loan facility letter issued to the defendants on 28th August, 2007. The facility was for the sum of €3,366,000 and was for a term of two years from the date of drawdown. The purpose of the facility was to refinance existing AIB borrowings and to pay a handling charge of €20,000. The facility was repayable on demand and interest was rolled up until the amount of interest reached a sum of €571,000. The loan facility noted that the total capital and interest would be repayable from the net sale proceeds of the lands at Slieverue, Co. Kilkenny. The security sought in the loan facility was a first legal mortgage on the 76.48 hectares holding located at Park, Bree, Enniscorthy, first legal mortgage on the 14.16 hectares of zoned development land at Slieverue, Co. Kilkenny and a solicitor's undertaking to lodge the proceeds from the sale of the 14 hectares of land at Slieverue, against the bridging loan facility.

7. The defendants signed the loan facility on 14th September, 2007, and the monies were drawn down on 28th September, 2007, and used to discharge the AIB loan, and to pay the handling fee.

8. The defendants were also seeking a sum of €100,000 to fund planning application fees and associated costs of developing the Slieverue lands which had been rezoned as a residential development in 2006. The first defendant was expecting the €100,000 to be included in the loan facility of 28th August, 2007. The sum was included in the preliminary application to the plaintiff made on behalf of the defendants by John Dwan, the branch manager of the plaintiff in Kilkenny. The first defendant accepted that the monies were not required before May 2008, and that wayleave agreements essential for the application for planning permission on the Slieverue lands were not signed until November 2008.

9. The defendants signed legal mortgages on 1st October, 2007, in respect of the farm at Bree, Enniscorthy and the development lands at Slieverue.

10. By loan facility of 26th February, 2008, the plaintiff offered the defendants a facility of up to €100,000. This facility was for a term of two years from the date of drawdown and its purpose was to pay for planning permission costs on the zoned lands at Slieverue, Co. Kilkenny. It was noted that the facility would issue in multiple advances and that it would be drawn down when the precondition specified in the letter of facility and the general terms had been fulfilled to the bank's satisfaction. The facility had to be drawn down within six months from 26th February, 2008. The facility was repayable on demand and interest was rolled up. It was noted that the loan would be repayable from the net sale proceeds of the 14 hectares of land at Slieverue, Co. Kilkenny. This loan facility was not accepted in writing by the defendants until 29th August, 2008, and therefore expired. A condition of the loan facility of 26th February, 2008, was an independent valuation report from a bank appointed valuer confirming the open market value of the 14 hectares of lands at Slieverue. The valuation report had to include commentary on the marketability and saleability of these lands within a twelve month timeframe.

11. Through their solicitors, the defendants had been negotiating with neighbours to procure wayleave over their lands for the purposes of procuring more immediate access to main sewage and water services. These wayleave agreements were signed on 10th November, 2008.

12. While the plaintiff was aware of the intention of the defendants to procure these wayleaves and that they were essential to advance the application for planning permission, the plaintiff had not been afforded the opportunity to approve the terms of the wayleave agreement in advance of signature.

13. The first wayleave agreement was between the defendants and Francis Walsh and provided a wayleave over a property contained in Folio 2906 Co. Kilkenny. The consideration was €10,000 within one month of 10th November, 2008, and a balance of €70,000, not later than twelve months from the receipt of planning permission. The grantor was also entitled to have transferred to him an unencumbered three bedroomed semi-detached house from the first or second phase of the development and in the alternative was entitled to be paid from the proceeds of sale a sum equal to the then market value of the house.

14. The second wayleave agreement of the same date between the defendants and Richard Wall, contained the same provisions.

15. A revised facility letter in respect of the €100,000 was issued on 16th December, 2008, similar in terms to that issued on 26th February, 2008. The condition on obtaining an independent valuation was removed from this facility letter as a valuation had already been furnished to the plaintiff. The defendants signed this facility letter on 18th December, 2008.

16. Shortly after the issue of the loan facility and its acceptance, difficulties emerged because of concerns about the conditions contained in the wayleave agreements.

17. It was first mentioned in an email of 6th January, 2009, from Jimmy Freeley to Stuart O'Donovan, employees of the bank. Mr. Freeley stated in his email:-

"In addition, I see another issue with the grant of way leave. Built into the way leave is a condition that the Heffernan's supply the owner of the lands over which the wayleave has been granted, with a three bedroomed semi detached house or money to the value of a house at an agreed time of no more than five years. This is in essence a charge ranking ahead of the banks and thereby diluting our security and approval must be sought to proceed on this basis."

18. In an email of 13th January, 2009, from Noreen Lacey of the Plaintiff bank to John Dwan, the manager in Kilkenny, which was copied to Stuart O'Donovan, Ms. Lacey stated:-

"Our best bet is to get a postponement signed/agreed by the Walls so that their entitlements to the house and monies will rank second to our new loan for €100,000."

19. The matter was addressed with the first defendant in an email of 13th January, 2009, from Stuart O'Donovan to Noreen Lacey which was copied to John Dwan. Mr. O'Donovan stated:-

"I spoke to Tom who says that he intends having the land sold within a few months of planning being granted, and he has a prospective buyer. He currently hasn't considered a contingency plan should the land prove difficult to sell within that timeframe however, I don't know how concrete the intentions of the prospective buyers are or how credit will view it, but at this stage nothing will happen with the existing exposure of €3.6m until the planning application goes in. Padraig Kiernan made a comment in September that *'I am agreeable to dispersment of this loan as it a relatively small sum and if it facilitates the sale of the asset and repayment of our loan, it is a risk worth taking'*. Tom is extremely anxious to draw down the money and is being put under severe pressure from the people who are granting the wayleave, so any further delay in issuing this money may compromise those contracts which are crucial to the clients' chances of obtaining planning, and thus directly affecting his ability to clear his outstanding commitments with the bank. Would credit not recognise this fact."

20. In a further email of 15th January, 2009, from John Dwan to Noreen Lacey, Mr. Dwan stated:-

"I have also just spoken to Tom Heffernan. The idea of Richard and Francis Wall postponing their €140,000 and house is unlikely to be a runner and will probably be a deal breaker if the bank insist on it. My own view is that the bank should issue the €100,000 immediately in order for planning permission to be submitted. By issuing this €100,000 and therefore this money now ranking after the deal with the Walls does, in my view, represent an acceptable risk to the bank."

21. The matter was ultimately referred to the legal department of the bank and Tomas Rosengrave, considered the matter and in an email of 26th February, 2009, to Jimmy Freeley, raised a number of legal concerns about the wayleave agreements. Mr. Rosengrave gave evidence before this Court and repeated those concerns.

22. In his submission on behalf of the defendants, counsel stated that they were not pursuing their claim in respect of paras. (a), (b) and (c) of their statement of claim but seeking damages for breach of contract in refusing to allow the defendants to drawdown the loan of €100,000 on foot of the loan offer of 16th December, 2008.

23. Paragraphs (b) and (c) of the counterclaim were not pursued from the outset of the hearing

24. Paragraph (a) was not abandoned until the final submission on behalf of the defendants.

25. As there has been evidence in relation to these matters, the court views it important to comment on same.

26. There was an evidential dispute between the first defendant and John Dwan that anything of the nature of advice was given by John Dwan to the defendants to procure planning permission themselves, rather than have it made subject to planning permission and have a developer apply for permission or sell it without permission. The defendants had their own advisers throughout the period of time they were seeking to develop the Slieverue lands as a development with zoning. They had engaged the services of an engineer and architect and an accountant. The first defendant accepted in evidence that the advice he allegedly received arose within the course of a casual conversation between himself and Mr. Dwan.

27. Even if a comment of that nature had been made, the first defendant was an experienced farmer, who had access to independent advice as to his options in respect of the development land. He had decided himself that one offer to purchase the land by developers called Cleary Doyle was not acceptable as the developers wanted to proceed by way of license agreement. There were other suggestions in the course of the evidence that further proposed sales would be subject to planning permission.

28. There is undisputed evidence that the €100,000 was not required before May 2008, and that the loan offer had issued to the defendants on 26th February, 2008, and was not accepted in time. A request for an updated valuation of a property which was to be sold for development would not be unusual.

29. The defendants could not have succeeded in paras. (a), (b) and (c) of the statement of claim.

30. It is unfortunate that the defendants were not able to draw down €100,000 sanctioned by the loan facility of 16th December, 2008. The first defendant is a genuine person and was aggrieved that the plaintiff did not advance this money to progress the planning permission.

31. However, the wayleave agreements did present a legal difficulty for the plaintiff. It is the court's opinion the wayleave agreements could have affected the plaintiff's security. It would seem from the exchange of emails that the plaintiff would have considered a compromise in the postponement of the rights of the grantors of the wayleave agreements in favour of the €100,000 facility but that does not seem to have been seriously considered by the defendants, who were concerned that any approach to the grantors to renegotiate the terms of the wayleave agreement would upset the whole agreement.

32. There certainly would have been other ways of advancing the €100,000 to the defendants which would involve the plaintiff in taking some risk and this course was urged on the credit department by Mr. Dwan and Mr. O'Donovan.

33. The plaintiff was within its rights under the terms of the loan facility and under its general conditions of lending and pursuant to the legal mortgage documents signed by the defendants to insist that the wayleave agreements be altered.

34. Because the court is of the view that there were appropriate reasons for the refusal of the drawdown, the court does not have to consider whether the bank can refuse to follow through on a loan facility without good reason.

35. The defendants counterclaim must fail.

36. I am not allowing any surcharge interest on the outstanding loan and will calculate interest from the date of drawdown of the original facility to the date of judgment in accordance with the terms of the loan facility at 2% per annum and Euribor.