THE HIGH COURT

[2012 No. 234 SP]

BETWEEN

ACC BANK PLC

PLAINTIFF

AND

JOHN TOBIN (PRACTISING UNDER THE STYLE AND TITLE OF JOHN A.

TOBIN & CO. SOLICITORS)

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 27th day of July, 2012.

The plaintiff's case

1. In the special endorsement of claim on the special summons in this matter, which issued on 17th April, 2012, the plaintiff seeks certain reliefs on foot of a solicitor's undertaking given by the defendant to the plaintiff, in his capacity as a solicitor. Coincidentally, the defendant was also the borrower from the plaintiff. The material aspects of the transaction are set out below.

2. On 2nd July, 2003 the plaintiff issued a letter headed "Letter of loan sanction & agreement" (the Loan Offer) to the defendant in his personal capacity offering him a loan in a maximum amount of €201,000 on the terms therein specified. It was expressly provided in the Loan Offer that the term of the loan facility was three years. It was also expressly provided that the plaintiff would get security by way of a first fixed charge over 52 acres of land at Ashroe, Murroe, County Limerick (the Secured Property). The method of repayment was set out in the Loan Offer. While it was provided that the principal should be repaid from the sale of sites in Murroe, County Limerick, it was expressly stipulated that "in any event the Loan Facility will be repaid in full on or before the 1st August, 2006". The defendant, in his personal capacity, signed the "Acceptance of borrower" form at the end of the Loan Offer on 1st August, 2003.

3. On 8th December, 2003 the defendant, as a solicitor practising as "John A. Tobin, Solicitors" gave a solicitor's undertaking (the Undertaking) to the Bank. The Undertaking was obviously in the Bank's standard form and conformed to the form of undertaking used by most lending institutions in this jurisdiction at the time. The defendant, in his capacity as borrower, authorised the giving of the Undertaking on 8th December, 2003, in a form at the end of the document headed "Client's Authority and Retainer". The Undertaking related to "lands at Ashroe Murroe County Limerick". In broad terms, in the Undertaking the defendant undertook as follows:

(a) To ensure that the defendant, in his personal capacity as borrower, acquired good marketable title to the Secured Property.

(b) To secure that the plaintiff obtained a valid first legal mortgage over the Secured Property, complying with the specific requirements set out, including the requirement that, within one month from the initial loan cheque issue, the stamped mortgage or charge would be lodged for registration in the Registry of Deeds or the Land Registry, and that there be completed and lodged with the plaintiff a report and certificate of title in the Bank's standard form as soon as practicable together with all the documents constituting the plaintiffs security.

4. The defendant, in his personal capacity and as borrower, drew down the funds the subject of the Loan Offer on 18th February, 2004. The defendant, in his personal capacity as borrower, defaulted on repayment of the loan a number of years ago. As is averred to in the grounding affidavit of Sheila English sworn on 3rd May, 2012, the balance due on the loan as at 30th April, 2012 was €266,374.12.

5. It appears that the Secured Property is registered on two Land Registry folios: Folio 41955F County Limerick; and Folio 41956F County Limerick.

6. The copy ofFolio 41955F exhibited in the grounding affidavit discloses that the lands registered on that folio comprise part of the townland of Ashroe containing 2.0700 hectares (equivalent to approximately 5 acres). On 7th August, 2003 the defendant was registered as full owner on the folio in succession to Cormac Quigley. However, on 1st December, 2008 two named individuals were registered as full owners in succession to the defendant. *Prima facie,* the defendant does not have any title to the lands registered on Folio 41955F in any capacity.

7. As appears from the copy of the folio exhibited in the grounding affidavit, the lands registered on Folio 41956F comprise part of the townland of Ashroe containing 28.8850 hectares (equivalent to approximately 71 acres). The registered owner on that folio is Cormac Quigley, who was registered on 3rd November, 2000.

8. It is averred in the grounding affidavit of Sheila English that in or about 2010 the defendant proposed a transaction involving a land swap with part of the Secured Property. However, it is averred that the defendant never provided the documentation required to allow for an assessment of the proposal and that the plaintiff never consented to the same. However, in this context there is exhibited an undated transfer in relation to Folio 41956F from Cormac Quigley to the defendant, which appears to have been executed by Cormac Quigley. However, the transfer is not stamped. There is also exhibited an undated deed of charge in the plaintiffs standard form executed by the defendant in favour of the plaintiff charging the lands registered on Folio 41955F, which has not been stamped either. Obviously, as Folio 41955F is now registered in the names of third parties, that charge, even if it were stamped, could not be

registered against Folio 41955F.

9. On the evidence put before the Court by the plaintiff, the defendant is undeniably in breach of the Undertaking and has been for in excess of eight years. Moreover, the only reasonable inference to be drawn from the evidence is that the defendant will never be in a position to comply with the Undertaking.

10. It is averred in the grounding affidavit that the plaintiff has made a complaint to the Law Society in relation to the defendant's conduct. However, the outcome of the complaint has not been disclosed.

Defendant's answer

11. The firm of John A. Tobin entered an appearance as solicitors for the defendant on 20th June, 2012, which is headed "Conditional". What "Conditional" means in this context has not been explained to the Court.

12. In his replying affidavit sworn on 10th July, 2012, the defendant answers the plaintiffs claim as follows:

> (a) He refers to summary proceedings initiated by the plaintiff against him by a summary summons (Record No. 2012 1380S) which issued on 13th April, 2012, claiming €264,304.93 on foot of the Loan Offer. Those proceedings are against the defendant in his personal capacity as the borrower. A motion for liberty to enter final judgment has issued and is returnable before the Master of the High Court on 3rd October, 2012. One of the reliefs claimed by the plaintiff in the prayer on the special summons in these proceedings is an order that, arising from the breach of the Undertaking, the defendant compensate the plaintiff in the sum of €264,304.05, the sum due and owing as of 14th April, 2012 by the defendant's client, that is to say, the defendant, to the plaintiff. It is averred by the defendant that "this may well be an abuse of process on the plaintiff's part as clearly the matters herein are matters properly dealt with at a plenary hearing and the plaintiff has failed to quantify any purported loss on foot of these proceedings".
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> (b) It is averred that the Loan Offer does not "show the term of this alleged loan to be three years". It does.
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> (c) It is averred that the Undertaking ought to have been secured "from an independent solicitor" and "anyhow, it has no bearing on the realistic current site value". Further, it is averred that it was "implied by the conduct of the plaintiff that the loan facility would be extended for as long as it took to sell these sites". The defendant, who is an officer of the Court, appears to overlook the fact that it is in his capacity as the solicitor who gave the Undertaking that the claims in these proceedings are being pursued.
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> (d) There is then an oblique reference to a discrepancy between the sum averred to as being outstanding on foot of the Loan Offer in these proceedings (€266,374.12) and the sum claimed on the summary summons (€264,304.93). The sum claimed on the summary summons is the amount alleged to be due as at 28th March, 2012, whereas the amount averred to in the grounding affidavit is the amount due as at 30th April, 2012.
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> (e) There is a garbled statement in paragraph 8 which I do not fully understand, but the gist of which appears to be that the compensation to which the plaintiff is entitled for non-compliance with the Undertaking "ought to reflect the security", which it is suggested is a "plenary matter". I will return to this aspect of the matter later.
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> (f) Finally, it is averred that, where there are two sets of proceedings issued by the plaintiff and the amount outstanding is in dispute and the plaintiff "has acknowledged that the property concerned is not registered to the plaintiffs", whatever that means, the Court should dismiss the proceedings and award costs to the defendant.

13. It would be very remiss of the Court not to utterly condemn the conduct of the defendant in ignoring the fact that, as a solicitor and as an officer of the Court, he gave an Undertaking to the plaintiff, which he has not complied with and which he will never be in a position to comply with. His answer to the plaintiffs claim in these proceedings, in my view, is a serious abuse of process.

The manner in which the matter has come before the Court

14. The special summons was returnable before the Master on 16th May, 2012. Counsel for the plaintiff informed the Court that on that occasion counsel appeared on behalf of the defendant, although no appearance had been entered. The matter was adjourned until 20th June, 2012, on which date the "Conditional" appearance had been entered. The matter was adjourned again until the 11th July, 2012 by which date the defendant's replying affidavit had been filed. On 11th July, 2012 the Master made an order striking out the special summons and giving costs of the proceedings to the defendant against the plaintiff. This Court was told by counsel for the plaintiff that the basis on which the Master refused the plaintiffs application to transfer the proceedings to the Chancery list and instead struck out the proceedings with costs against the plaintiff was that the papers were not in order.

15. The matter comes before the Court for an order pursuant to Order 63, rule 9 of the Rules of the Superior Courts (the Rules) setting aside the decision of the Master. In addition, the plaintiff seeks the reliefs sought in the special summons, namely:

> (a) an order compelling the defendant to comply with the terms of the Undertaking; or
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> (b) in the alternative an order requiring the defendant to compensate the plaintiff to the extent of the plaintiffs loss arising from the defendant's breach of the Undertaking; or
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> (c) an order that, arising from the breach of the Undertaking, the defendant compensate the plaintiff in the sum of €270,747.90, which is the amount due and owing by the defendant in his personal capacity as borrower to the plaintiff as of 11th July, 2012; or
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> (d) an order that the defendant compensate the plaintiff in such other sum as to the Court seems just and appropriate.

Decision

16. Order 38 of the Rules, which deals with the hearing of proceedings commenced by special summons, provides in rule 5 that, in all cases in which he shall have jurisdiction, the Master may decide the matter himself or put it in the Court list for hearing. In my view, the Master had no jurisdiction to dismiss these proceedings when the matter was before him on 11th July, 2012. Accordingly, the decision of the Master is set aside.

17. On the hearing of the appeal from the Master in this Court on 23rd July, 2012, counsel for the defendant submitted that the matter should go to plenary hearing, citing the decision of this Court (Peart J.) in *Allied Irish Banks Pic v. Maguire* [2009] IEHC 374.

18. Counsel for the plaintiff, on the other hand, in reliance of the decision of this Court in *Danske Bank v. 0'Ceallaigh* [2011] IEHC 216, submitted that the matter should not go to plenary hearing.

19. In my judgment in *Danske Bank v. 0'Ceallaigh* (at para. 6.1 *et.seq*.), I outlined the legal principles applicable to an application by a lending institution to enforce an undertaking given by a solicitor in proceedings commenced by way of special summons by reference to the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. Coleman* [2009] 3 I.R. 699. I quoted the following passage from the judgment of Geoghegan J. in that case (at para. 7):

"Although the supervisory jurisdiction and its principles were decided long before the major lenders in this country adopted the two solicitor system, a judge being asked to enforce an undertaking given in the context of such a transaction but in exercising his or her discretion ought to have regard to the maintenance of the integrity of that system. There would be cases, therefore, analogous to this case, where if the undertaking solicitor behaved in a similar manner, it would be appropriate for a court to order the solicitor to repay to the bank the whole of the sum advanced."

While the observation in the last sentence in that quotation was *obiter*, nonetheless it is clearly founded on principle.

20. It is difficult to imagine a situation which would have the effect of undermining the integrity of the system whereby a lending institution advances money to a borrower on foot of the borrower's solicitor's undertaking to ensure that the borrower gets, or has got, good title to the property the subject of the security and to procure the registration by the borrower in favour of the lending institution of a valid security over the property in question, to a greater extent than the situation which has arisen here. Here the defendant was the borrower. He was also the solicitor who, as such and as an officer of the Court, gave the Undertaking to the plaintiff on the basis of which the money was advanced to him in his personal capacity as borrower. The Court was informed that there is no indemnifier involved in this matter.

21. The terms of the Undertaking, in my view, are clear and unequivocal and its breach by the defendant is beyond question. The defendant, in his personal capacity as borrower, took the advance from the Bank. In his capacity as a solicitor and as an officer of the Court, he failed to comply with the Undertaking. On the evidence, I am satisfied that, in his personal capacity as borrower, the defendant was indebted to the plaintiff in the sum of€266,374.12 as at 30th April, 2012. The specious comments made by the defendant in the replying affidavit do not in any way refute the averment as to the amount due as set out in the grounding affidavit. The defendant, notwithstanding that the only reasonable inference one can draw is that it was within his power to do so, has neither obtained title to the Secured Property, nor has he given the security thereover, which he undertook to give to the plaintiff. He has not indicated that he will ever be in a position to furnish the security he undertook to furnish to the plaintiff, and, as I have already stated, the only reasonable inference is that he will never be able to do so.

22. In those circumstances, I am of the view that the proper exercise of the Court's discretion is to direct that the defendant compensate the plaintiff for the breach of the Undertaking by paying to the plaintiff the amount now due, both for principal and interest, to the plaintiff on foot of the advance made by the plaintiff to the defendant in his personal capacity, in reliance on the Undertaking given by the defendant in his capacity as solicitor and officer of the Court. I measure that compensation at €266,374.12. While the amount due probably has increased since 30th April, 2012, the Court does not have evidence of the amount currently due. There will be an order for payment of that sum. However, in the normal way, interest at the Court rate will be payable on that sum from the date of the judgment and order.

23. As regards the averment which I have interpreted as meaning that the Court should take into account the current value of the Secured Property, there is no doubt that there are cases in which it is appropriate to have regard to what the security would be worth to the lending institution, if a solicitor complied with the undertaking. In my view, this is not such a case. In the circumstances which prevail here, there is no factor, other than the egregious default of the defendant, both in his personal capacity as borrower and in his capacity as a solicitor and as an officer of the Court, which has contributed to the plaintiffs loss. To form any other view would be to ignore the importance of the maintenance of the integrity of the system whereby third parties rely on solicitors' undertakings. It would also be an abdication of the Court's right and duty to supervise the conduct of solicitors, as was recognised by the Supreme Court in the *Coleman* case.

24. Obviously, the order I propose making will have implications for the summary proceedings in that the plaintiff cannot recover the same debt twice.