NEUTRAL CITATION NUMBER [2012] IEHC 323

THE HIGH COURT

COMMERICAL

[2012 No. 1271 S]

BETWEEN

ALLIED IRISH BANKS PLC. AND AIB MORTGAGE BANK

PLAINTIFFS

AND

WILLIAM MORAN AND SHEILA MORAN

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 27th day of July, 2012

1. In these proceedings, the plaintiffs sought a total sum of €19,392,019.87 from the defendants on foot of a Summary Summons issued on 3rd April, 2012. In the Special Endorsement of Claim, the sum was broken down as follows: a claim by the first named plaintiff against the defendants in the sum of €14,848,290.06 together with interest on the said sum from 2nd December, 2011, until payment either pursuant to contract or Statute; and a claim by the second named plaintiff in the sum of €4,543,729.81 against the first and second named defendants together with interest on the said sum from 8th February, 2012, until the date of payment either pursuant to contract or Statute.

2. On 30th April, 2012, the case was admitted to the Commercial List by order of Kelly J. The defendants did not contest the claim made by the first named plaintiff and by order of Kelly J. made on 10th May, 2012, judgment was entered against the defendants jointly and severally in favour of the first named plaintiff in the sum of €14,848,290.06. The claim of the second named plaintiff was adjourned to a subsequent date. When the matter came before the court again on 14th May, 2012, the defendants accepted that they had no defence to a portion of the claim of the second named plaintiff, namely the sum of €2,776,290.18, and accordingly, judgment was entered by Kelly J. in that sum in favour of the second named plaintiff against the defendants jointly and severally. The second named plaintiff was also awarded costs coextensive with that part of the claim when taxed and ascertained, in default of agreement.

3. The balance of the claim by the second named plaintiff was adjourned to 5th July, 2012, for the hearing of the application for summary judgment, and the court noted that the parties agreed that the application for summary judgment will be treated as the trial of the action. That was confirmed by counsel when the matter opened before me. That being so, the hearing before me is a full hearing of the issues between the parties, albeit on affidavit.

4. The second named plaintiff is seeking judgment in respect of sums alleged to be due upon Loan Accounts Nos. 80789055, 21910181, 39431295, 80758081, 14211092, 67469264 and 74882055.

5. The defendants defend the claims on the basis that insufficient notice was given in respect of Mortgage Loan Accounts No. 80789055, 21910181 and 39431295. In respect of four further loans, namely, 80758081, 14211092, 67469264 and 74882055 they claim no notice was given to them at all prior to the Issue of Demand served on 8th February, 2012.

6. It is of significance that nowhere in the affidavits sworn on behalf of the defendants in the proceedings do they deny that the sums which are claimed were lent to them. Furthermore, they do not state that, if they were given the notice which they contend they ought to have been given, they would be in a position to repay the sums claimed.

7. The disputed sums were advanced by the second named plaintiff to the defendants on foot of separate loan agreements which are in identical terms. The purpose of the loan agreements was to enable the defendants to purchase property and the defendants entered into separate mortgages in respect of each property. Clause 8 of the loan agreements provides:-

> *"The Bank may, subject to due compliance with any statutory requirements, if applicable, exercise the right to demand early repayment of the mortgage loan balance outstanding and accrued interest thereon if the customer is in breach of the terms of this offer or the Bank's Deed of Mortgage over the property where, after due notice is given by the Bank, the customer fails to remedy the breach."*

8. The defendants claim that the second named plaintiff has failed to comply with the provisions of Clause 8 and, as a consequence, is not entitled to judgment for the disputed sums. The defendants maintain that prior notice of a breach must have been given to the defendants before any demand was made for early repayment of the mortgage debt followed by a failure by the defendants to remedy the breach. In respect of the three Loan Accounts Nos. 80759055, 21910181 and 39431295, the only letter which was sent by the second named plaintiff to the defendants prior to the demand on 8th February, 2011, was a letter stating that the mortgage repayments had not been made"... *which has resulted in your account appearing in arrears. This may simply be due to an oversight on your part and we would be grateful if you would contact us to discuss why the repayment was not met and possible rectification measures"*. With regard to the other four loans, the defendants complain that no prior notice of a breach was given to them prior to the issue of demand on 8th February, 2012. Accordingly, the defendants claim that the demand of 8th February, 2012, are ineffective and that no sums are due on foot of the loan agreements.

9. The second named plaintiff argues that even if there was non-compliance with the provisions of Clause 8, this is not fatal to its claim. It says that the letter which was sent drew the defendants' attention to the fact that mortgage repayments had fallen into arrears and that this was sufficient notice to them for the purposes of Clause 8. The second named plaintiff also argues that Clause 8 does not, in any event, apply to its claim in these proceedings and that it relies on Clause 3.03 of the mortgage which states:

> *"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 or bills accepted, endorsed or discounted and all bonds, guarantees, indemnities, documentary 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:*
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> > *(a) if the Mortgagor fails to pay on the due date any money or discharge any obligation or liability payable by him from time to time to the Bank ... "*

The second named plaintiff says that the effect of that clause is to make the secured monies immediately due and payable on demand once the defendants fail to discharge the loans to the first named plaintiff (which had been demanded in December 2011).

10. The loan agreements do not provide a definition of what constitutes "*due notice*". In view of the defence raised in this case, the court will have to determine what is due notice or what notice, if any, must be given before a demand for repayment can be made. The plaintiff relies on *Cripps (Pharmaceuticals) Ltd. v. Wickenden and Another* [1973] 2 ALL ER 606. That case concerned the appointment of a receiver on foot of a mortgage almost immediately after a demand for repayment of the sums due had been made. The plaintiff complained that it had been allowed insufficient time between the demand and the appointment of the receiver. The court held that the appointment could not be impugned on the ground that insufficient time had been allowed after demand for payment where it was clear that the plaintiff would not be in a position to repay the sum due. Goff J. stated at p. 616:-

> *"It was argued by the Plaintiffs that even where money is payable on demand, still a reasonable time must be given to enable the payment to be made: see Brighty v. Norton, Toms v. Wilson, and Upjohn J in Lloyds Bank Ltd. v. Margolis [references provided]. Much was made of the speed with which Mr. Stokoe acted, and it was said that he never really gave the company any chance to put up proposals in answer to the letter of 6th August; but in my judgment, that is not the point. The question is whether he gave such time as the law requires when money is payable on demand; and the cases show that all the creditor has to do is give the debtor time to get it from some convenient place, not to negotiate a deal which he hopes will produce the money. I quote from Blackburn J in Brighty v. Norton:*
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> > *'I agree that a debtor who is required to pay money on demand, or at a stated time, must have it ready, and is not entitled to further time in order to look for it'. "*

At p. 617, Goff J. stated:-

> *"It is abundantly plain that Cripps had not got the money and had no convenient place to which they could go to get it ... in my judgment, therefore, the Plaintiffs cannot object on the ground that they were not given time to find the money or that the interval of time between 11.00am or shortly before, when the demands were made and midday, or later, when the receiver was appointed was too short."*

11. The second named plaintiff argues that the defendants in this case were not in a position to make a payment to the Bank and therefore cannot object that they did not get prior notice of a breach before a demand for full payment was made. In *Sheppard & Cooper Ltd v. TSB Bank plc.* [1996] 2 ALL ER at 654, a receiver was appointed an hour after demand for repayment of sums due was made. The court held that where money was repayable on demand and the debtor had failed to make repayment, he would not be in default until he had a reasonable opportunity of implementing whatever reasonable mechanics of payment he might need to employ to discharge the debt. This requirement presumed that the debtor had the funds available. But if he had made it clear to the creditor that the funds were not available, that established the necessary default and there was no need for the creditor to allow any time to elapse before treating the debtor as in default. Blackburne J. stated at p. 657:-

> *"The case raises once again the question how much time must pass following demand by a creditor, where the money is payable on demand, before the debtor, who fails to make payment, can be said to be in default."*

In Bank of *Baroda v. Panessar* [1986] 3 ALL ER 751 at 759-760 [1987] Ch. 335 at 348, Walton J., repeating a test which he had formulated in his earlier decision in *Hawtin & Partners Ltd v. Pugh* (25th June, 1975, Unreported) stated as follows:-

> *"Money payable 'on demand' is repayable immediately on demand being made ... Nevertheless, it is physically impossible in most cases for a person to keep the money required to discharge the debt about his person. He may, in a simple case, keep it in a box under his bed; it may be at the bank or with a bailee. The debtor is therefore not in default in making the payment demanded unless and until he has had a reasonable opportunity of implementing whatever reasonable mechanics of payment he may need to employ to discharge the debt. Of course, this is limited to the time necessary for the mechanics of payment. It does not extend to any time to raise the money if it is not there to be paid."*

12. Blackburne J. went on to say at p. 659:

> *"In my view, the question how much time must elapse after a demand before a debtor can be said to be in default is essentially a practical one .. What that time is must, in my view, depend on the circumstances of the case. If the sum demanded is of an amount which the debtor, if he has it, will be likely to have in a bank account - which will be the position in 99 cases out of 100, the time permitted must be reasonable in all the circumstances to enable the debtor to contact his bank and make the necessary arrangements for the sum in question to be transferred from his bank to the creditor. If the demand is made out of banking hours, the period of time is likely to be longer - involving waiting until banks reopen - than if the demand is made during banking hours."*

13. The judge went on to consider circumstances where it was clear that the debtor had no money to repay the debt. At p. 659 he stated:-

> *"Where I part company from Mr. Moss is the suggestion that, short of waiver or an invitation by the debtor to the creditor to treat his failure to pay following demand as a default on his part (by, for example, inviting the creditor to appoint a receiver), the court must in all circumstances allow a minimum period to elapse before the debtor's default can be established The requirement that sufficient time be permitted to elapse to enable the debtor to effect the mechanics of payment assumes that that is the period needed if the debtor has the necessary monies available. If, however, he has made it clear to the creditor that the necessary monies are not available, then, provided a proper demand has been made, I cannot see that the creditor need allow any time to elapse before being at liberty to treat the*

debtor as in default."

14. Blackburne J. also quoted from a judgment of Harman J. who had heard an interlocutory application in the same case. He stated at p. 663:-

> *"In his judgment in the present case, when the Motion for interlocutory relief was before him on 16 February, Harman J said:*
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> > *'As it seems to me ... if the debtor admits that the debtor cannot pay, it is clearly unnecessary for the creditor to allow him time for the mechanics of payment which he knows cannot have any point. The law does nothing in vain and it will be pointless to require time to be allowed for an act that cannot happen'.*
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> *In my judgment, in so stating, Harman J was entirely correct. "*

15. By letters dated 27th April, 2011, and 16th June, 2011, Ms. Margaret Connolly of Cogent Taxation Group Ltd., who were agents of the defendants, informed the plaintiff that the defendants had insufficient funds to service all of their debt to the plaintiffs, including the disputed sums, and that there was some residual debt which the defendants would not be able to repay. Since January 2011, the defendants had been in negotiations to arrange new facilities to be granted by the first named plaintiff. On 17th October, 2011, a letter of sanction was furnished by the first named plaintiff to the defendants, but the defendants were not in a position to accept the terms of that letter, and the second named plaintiff argues that the defendants cannot have been in any doubt from that time on that the plaintiffs were going to seek to recover all sums due from the defendants on foot of the various facilities granted to them. Because of the' cross-default provisions of the mortgages, the defendants were aware that any failure to meet the terms of the loans or demands made by the Bank would have the effect of triggering the default provisions in the Mortgage Agreement. The defendants, for their part, do not accept this but it seems to me that this is so on account of the wording of Clause 3.03 of the Mortgage Agreement.

16. Both parties to the proceedings agree that neither the letter of loan offer nor the General Terms and Conditions provide that the loans were *"demand loans".* While Clause 8 of the Mortgage Agreement provides that the Bank shall give due notice of a breach to the customer, it does not specify what constitutes "*due notice*". But it does require due notice and the Bank can only exercise its right to demand early repayment of the mortgage if due notice has been given and the customer fails to remedy the breach.

17. Clause 18 states:

> *"These General Terms and Conditions shall be read in conjunction with the Particulars of this Offer and the Special Conditions, the Pre Drawdown Requirements and the Statutory Notice and Other Notices incorporated in this document, and this agreement, or any supplemental agreement concluded between the Bank and the customer, shall not merge in the Bank's mortgage security over the property."*

18. The defendants argue that the second named plaintiff cannot rely on Clause 3.03 of the loan agreements because of the provisions of General Condition 18 providing for Non-Merger and that, accordingly, the provision of Clause 8 of the General Condition remains in force and effect, notwithstanding the execution of the mortgages. The court was referred to an extract from Lewison on *'The Interpretation of Contracts'* where the author states at para. 9.13:-

> *"The court is reluctant to hold that parts of a contract are inconsistent with each other, and will give effect to any reasonable construction which harmonises such clauses."*

Because Clause 8 of the General Conditions for the loan refers to a *"... breach of the terms of this offer or the Bank's Deed of Mortgage over the property ..."* the defendants argue that the provisions of Clause 8 are expressly drafted so as to encompass a breach of both the letter of loan offer and the breach of the Deed of Mortgage. Accordingly, the provisions of Clause 3.01 and 3.03 of the Mortgage Deeds are governed by the provisions of Clause 8, and as no prior notice was given, the defendants argue that the demands of the plaintiffs made on 8th February were invalid and of no effect.

19. The terms of Clause 3.03 are clear on their face and apply in respect of the loans remaining in dispute. The defendants referred to an extract from Chitty on Contracts, 30th Ed. para 25-001, where the authors state:-

> *"In general, a debt or security by simple contract is extinguished by a speciality security being given for the same if the remedy on the latter is coextensive with that which the creditor had upon the former."*

They argue that presumably, to avoid the risk that the simple contract debt represented by the letters of loan offer would merge in the mortgages, the plaintiffs inserted the provisions of General Condition 18 providing for Non-Merger. They say that it is therefore clear that the provisions of Clause 8 of the General Conditions remain in force and effect, notwithstanding the execution of the mortgages. Even if the defendants are correct in their assertion that the provisions of Clause 8 of the General Conditions remain in force, they do not extinguish the provisions of Clause 3.03 in the Mortgage Deed. For the doctrine of merger to take place, two conditions must be fulfilled. In the first place, the later security must be of a higher efficacy than that which it is sought to replace. Secondly, the remedy on the security must be coextensive with the earlier agreement. According to Chitty at para. 25-001, if the securities are of equal degree, no merger will take place. The Mortgage Deed is a speciality security and gives the lender a better remedy than he had for the original debt. Furthermore, the remedy under the Mortgage Deed was not coextensive with the remedy under the loan agreement.

20. The defendants raise an interesting point concerning the Non-Merger clause to be found in General Condition 18 of the loan agreement. In the absence of Merger and Insofar as the two conditions standing side by side create an ambiguity as to whether or not notice is required, I think such ambiguity should be resolved in favour of the borrower.

21. Adopting that approach, what effect does that have on the claim, in circumstances where the defendants have not disputed that they borrowed the money and have indicated that they are not in a position to repay it even if given time?

22. Where the demand was made in respect of some of the loans, the defendants do not' have a good defence to the claim on the basis that the notice was insufficient, having regard to the fact that they are not in a position to repay the loans even if the notice they contend for was actually given.

23. With regard to the other loans, it seems to me that while the defendants may have a technical point, they have no defence on

the merits as they do not have the funds to repay the outstanding loans. The question of notice becomes irrelevant in circumstances where the defendants are unable to pay the sums due. The law does nothing in vain and it would be pointless, in the circumstances of this case, to require further steps to be taken by the second named plaintiff before it can recover its debt where the claim would inevitably be brought again and the defendant would, on their own admission, have no answer to it. The inevitable reactivation of that part of the claim would result in further expense for the parties and would amount to a waste of court time. Nevertheless, the defendants should have been given notice of default before the letter of demand. In the absence of a fixed time, the notice should have been reasonable. In my view, this part of the claim can be dealt with by way of a stay and/or a suitable costs order without doing any injustice to the parties. If this was an application for summary judgment rather than the full hearing, I should have taken a different view, because the defendants• have raised an arguable defence on the technical point concerning the lack of notice. But I have heard the evidence on the agreed basis that this is the full hearing, and on the balance of probabilities, I am satisfied that the defendants have no answer to the second named plaintiff's claim in respect of these loans.

24. I will allow the plaintiffs' claim on the mortgage Loan Accounts Nos. 80789055, 21910181 and 39431295. In respect of the other loans, namely, 80758081, 14211092, 67469264 and 74882055, I will give the plaintiffs judgment but will put a stay on the judgment for a period of three months in order to give the defendants an opportunity to pay the sums due and to put them in the position they would have been in had a period of notice been given to them to repay the debt.