

THE HIGH COURT

1986 No. 11959 P

BETWEEN/

DANIEL BARRY HENNERTY

PLAINTIFF

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANT

Judgment of O'Hanlon J., delivered the 5th day of July, 1988.

In the year 1981 the Plaintiff applied to the Defendant (hereinafter referred to as "the Bank") for bridging term loan facilities to enable him to proceed with the purchase of a property at Stamullen, Co. Meath. The response of the Bank was contained in a letter of 18th November, 1981, to the Plaintiff, signed by James Walsh, Manager of his local branch of the Bank at St. Laurence Street, Drogheda. The relevant portion of that letter reads as follows:-

"I have, therefore, been instructed to inform you that further consideration of the application has been deferred due to the Bank's present very restricted lending position and taking into account the fact that completion of purchase will not take place for a period of three to six months. The application will, therefore, be reconsidered at the time the completion falls due in the light of the Bank's credit position at that time and should we not be in a position to make finance available through the Branch, we will, however, make the finances available through Bank of Ireland Finance Ltd.

In view, therefore, of the foregoing, I would confirm that it will be in order for you to arrange to place a deposit on the property being purchased and this can be arranged along the lines agreed in our telephone conversation of

the 13 November, 1981. It will, of course, be necessary for me to have available prior to set up of the account the appropriate letter of undertaking from the solicitors being employed by you to complete the transaction."

This was followed up later by a letter from Bank of Ireland Finance Ltd (hereinafter referred to as "the Finance Corporation") dated the 5th March, 1982. Although the Plaintiff does not appear to have made any direct application to the Finance Corporation, the letter refers to "your recent application" and confirms that the Finance Corporation would make available to the Plaintiff facilities of £39,000, subject to the terms and conditions spelt out in that letter. These conditions specified that the loan would be repayable within six months from the date of draw-down; the rate of interest payable was specified and was probably in excess of the normal interest rate the Plaintiff would have had to pay had he been facilitated by overdraft or term loan from the Bank; security sought was to be a promissory note to be signed by the Plaintiff, and a guarantee to be furnished by the Bank to the Finance Corporation, the same to be fully in order prior to draw-down.

The Plaintiff signified his acceptance of the said terms and conditions by signing and returning to the Finance Corporation an enclosed duplicate copy of the said letter, and he later executed the Promissory Note required, on the 29th March, 1982. Unknown to the Plaintiff, (he says), his own Bank had completed the guarantee referred to in the letter of offer of the 5th March, 1982. The Plaintiff then drew down the sum offered, £39,000, in the month of April, 1982.

It is correct to say that the Plaintiff had not initially applied to the Finance Corporation for loan facilities, but had applied to the Bank. However, when he received the letter of the 5th March, 1982, it must have been apparent to him that the loan facilities were being offered, not by the Bank, but by the Finance Corporation, and when he took up this offer by completing the documents and drawing down the money, there can be no doubt that a creditor/debtor relationship was brought into existence, coupled with an obligation on the part of the Plaintiff to pay such higher rates of interest as might be involved in borrowing from the Finance Corporation.

On or about the 24th February, 1984, a sum of £20,000 was paid in to the Plaintiff's account with the Bank. This represented the proceeds of a further loan raised by the Plaintiff from another bank - the Anglo-Irish Bank - and the Plaintiff claims that it was raised by him for the purpose of reducing his liability to the Finance Corporation.

He claims that the Bank failed to comply with his directions in relation to these moneys and instead credited the money to his current account with the Bank. However, a letter of 24th February, 1984 from the Bank to the Plaintiff, recites as follows -

"Dear Mr. Hennerty - Further to previous correspondence regarding your account, I would confirm having today received from your Solicitors, Messrs. Brannigan & Matthews, a cheque issued by Anglo Irish Bank, in their favour, which they requested be credited to your current account on our books

The correspondence does not contain any expression of dissent from the Plaintiff when he received that letter, and once

again, it must have been apparent to him from his monthly Statements of Account, that these moneys had been credited to his Current Account with the Bank and had not been applied in diminution of his liability to the Finance Corporation. The payment in question was only sufficient to pay off a large debit balance then owing by the Plaintiff to the Bank.

In the month of August, 1984, the Plaintiff was admitted for treatment as an in-patient to St. Patrick's Hospital, St. James's Street, Dublin, suffering from a nervous condition, and he was detained there until the 2nd January, 1985. Medical certificates confirming his inability to manage his affairs were issued by Dr. John A. Griffin on or about the 16th November, 1984, and were sent (inter alia), to the Bank. The Bank stamp on the letter suggests that it was received on the 18th November, 1984.

On or about the 9th November, 1984, the Bank paid off the entire balance then due by the Plaintiff to the Finance Corporation and debited the Plaintiff's Current Account with the amount so paid, thereby increasing the debit figure in his Current Account from its previous level of £5,422 to £69,953.98.

The liability to the Finance Corporation having been liquidated in this manner (and also the liability of the Bank on foot of the guarantee it had given in respect of the advance made by the Finance Corporation to the Plaintiff) the Bank commenced to apply some pressure to the Plaintiff to clear off this indebtedness to the Bank. Proceedings were commenced by Special Summons on the 18th July, 1985, seeking a declaration that under and by virtue of a declaration and undertaking of a

Deposit by the Defendant with the Plaintiff made on or about the 15th day of December, 1981, of the Title Deeds and Documents relating to the lands and premises described in the Appendix thereto, by way of equitable mortgage for securing repayment of the sum of £69,953.98 for principal together with a sum of £2,162.24 interest making in aggregate a sum of £72,116.22, that sum together with further interest on the said principal sum, stood well charged on the lands and premises described in the Appendix thereto. An Order for sale in default of payment was sought.

The grounding affidavit was sworn by James Walsh, Manager of the Laurence Street, Drogheda, Branch of the Bank. In it he referred to a letter of the 15th December, 1981, from the Plaintiff's then Solicitors, applying to the Bank for an advance of £39,000 to enable the Plaintiff to complete the purchase of the lands referred to in the proceedings, and undertaking to hold the title deeds of the lands in trust for the Bank and forward same when the transaction had been completed. The affidavit is silent as to the fact that the advance had been made by the Finance Corporation, and as to the circumstances under which the Bank purported to step into the shoes of the Finance Corporation some years later. The Bank could well have faced some difficulties in their proofs had the mortgage proceedings been fought to a conclusion. The amount of the Plaintiff's indebtedness to the Bank at the time of swearing the affidavit was said to be £72,116.22.

The Plaintiff filed a replying affidavit in the mortgage suit in which he confirmed the borrowing made by him from the

Finance Corporation and challenged the validity of the steps taken to transfer the account from the Finance Corporation to the Bank - allegedly without his knowledge or consent. He referred also to the payment made by him or on his behalf of the sum of £20,000 into his current account with the Bank on the 24th February, 1984. He claimed that by virtue of this payment, part of the lands were released from the burden of the equitable mortgage on which the Bank were relying, but he did not say that the said payment was intended or directed to be channelled through to the Finance Corporation in reduction of his liabilities to the Finance Corporation or that the Bank disregarded any instructions given them in this regard. In the event, the said mortgage proceedings were compromised before the hearing, on terms which were reduced to writing. The original Consent cannot be found and three copies have been put in evidence only one of which contains a facsimile of the Plaintiff's signature. The parties agree, however, that some discrepancies which exist as between the contents of the three copies are not material in the context of the present proceedings and may be disregarded.

Essentially, the terms of settlement provided that the title deeds of the property referred to in the Special Summons were to be released by the Plaintiff's Solicitors to the Bank and to the Anglo-Irish Bank (who had mounted concurrent proceedings against the Plaintiff) and the Plaintiff undertook to facilitate the sale of the said property. He consented to the making of a well-charging Order over the property in favour of the Bank in respect of the amount claimed in the Special Summons, and to the making of an immediate Order for Sale. On

completion of the sale, the net proceeds were to be divided between the two claimants - the Bank and the Anglo-Irish Bank - in proportions agreed between them, such payments to be accepted by each of the two Banks in full discharge of the Plaintiff's liabilities to them respectively. There is a query as to whether the Bank were retaining the right to make a further claim in respect of money due to the Bank and secured by property of the Plaintiff at Mornington, but I do not have to consider whether this is a live issue or not at the present time - the Plaintiff claims that there never was such an account, and the Bank appear to have done nothing to press any such additional claim since the previous proceedings were compromised.

The proceedings were to be adjourned to October, 1985. The Plaintiff acknowledged that the sums claimed by the Bank stood well charged on the property as claimed in the Special Summons and he undertook to co-operate in the sale of the lands through the Court or out of Court, as might be decided. The Agreement is dated the 28th June, 1985. An Order was made by consent by Mr. Justice Barrington on the 1st July, 1985, declaring the amount claimed and agreed well charged on the Plaintiff's lands; reciting the amount due, and ordering sale in default of payment, without requiring that any further accounts or inquiries be taken of the amounts due and owing by the Plaintiff and secured by the equitable mortgage of the lands which was relied on by the Bank.

When the matter again came before the Court on the 21st October, 1985, that Order was varied by consent, and the Order

for Sale was discharged as the parties had by then agreed that the sale should take place out of Court. It is apparent from the documentary evidence that considerable difficulty was being experienced in bringing the sale to fruition, and the lands were eventually sold for less than £50,000, the Bank receiving little over £40,000 in respect of their claim.

We now come to the institution of the present proceedings by Plenary Summons dated the 19th December, 1986, in which the Plaintiff claims damages against the Bank for conversion, and/or breach of contract, and/or breach of duty. The Statement of Claim commences with an averment that - "In or about the month of November, 1981, the Plaintiff obtained a loan from the Defendant's Drogheda branch in County Louth in the sum of £39,000, which said sum represented the purchase price of a property at Stamullen in the County of Meath." This does not appear to me to accord with the facts of the case, as already recited. While the Plaintiff made application for the loan in or about the month of November, 1981, to the Bank, it was not forthcoming for some months later, and was then made by the Finance Corporation and not by the Bank.

The Statement of Claim continues by reciting that the Plaintiff was indebted to Allied Irish Banks Limited in the sum of approximately £78,000, in or about the month of October, 1983, and that the said debt was secured by second charge on the lands at Stamullen, ranking after an undertaking of the 15th December, 1981, given by the Plaintiff in favour of the Bank.

The specific complaints on which the Plaintiff seeks to

establish his cause of action are then set forth, and may be summarised as follows:-

(1) He complains that while he was detained in hospital in the month of November, 1984, the Bank, without his authority or knowledge, debited his account with the sum of £64,531 (being the amount which they concurrently paid over to the Finance Corporation in discharge of the Plaintiff's liabilities to the Finance Corporation).

(2) He complains that the sum of £20,000 obtained on loan by him from the Anglo Irish Bank was applied by the Bank in reducing his indebtedness to the Bank, instead of being transmitted in accordance with his instructions to the Finance Corporation to reduce his indebtedness to that particular creditor.

(3) He claims that the Bank by taking over the loan which had been made to the Plaintiff by the Finance Corporation, did so for the purpose of availing of the security given by the Plaintiff by way of equitable mortgage of the lands at Stamullen, whereas the loan made by the Finance Corporation was, he says, an unsecured loan. As a result the Plaintiff claims that the Bank were able to gain priority for the said debt over the Plaintiff's liability to Allied Irish Banks Limited, which was secured by a second charge on the lands, and also by personal guarantees given by the Plaintiff and his wife. As the ^Csecond charge proved worthless, this ultimately resulted in steps being taken by Allied Irish Banks Limited to enforce the said personal guarantees against the Plaintiff and his wife.

After evidence had been taken in relation to the previous proceedings in which the Bank as mortgagee sued the Plaintiff as mortgagor, the further hearing of these present proceedings was adjourned pending a decision as to whether the Plaintiff was estopped by reason of the earlier proceedings and the Orders made therein, from maintaining his present claim against the Bank.

In my opinion it is not open to the Plaintiff to dispute at this stage what was conceded on his behalf in the earlier proceedings and recorded in the Orders made therein, namely, that he was at that time indebted to the Bank in the sum of £72,116.22 for principal and interest and that the sum stood well charged on his interest in the lands at Stamullen by virtue of an equitable mortgage in the Bank's favour over the said lands.

This appears to me to rule out any scope for challenging the validity of the steps taken by the Bank and the Finance Corporation when the original loan was made, as a result of which the moneys were advanced, not by the Bank, to which the loan application was made, but by the Finance Corporation, which appears to have been brought into the transaction on the initiative of the Bank. It also appears to me that the Plaintiff's present challenge to the validity of what was done when the Bank paid off the Finance Corporation and took over the loan themselves is defeated in the same way. If the Bank did this without any lawful authority, then it meant that the Plaintiff was not indebted to the Bank in the amount subsequently claimed in the mortgage proceedings and could

have set up these matters by way of defence to the Bank's claims in the mortgage suit. He did, in fact, raise them in the course of an affidavit sworn by him when initially resisting the Bank's action to enforce the mortgage, but must be taken to have abandoned these grounds of defence when negotiating the settlement already referred to and submitting to the Court Orders made in those proceedings. It may be remarked, in passing, that the Plaintiff gained substantial benefits from the terms of settlement, since the Bank and Anglo Irish Bank each reduced their claims against the Plaintiff to a considerable extent when entering into the Consent.

These findings appear to me to dispose of the entire claim made by the Plaintiff in the present proceedings, with the possible exception of the minor claim in relation to the £20,000 raised by him from the Anglo Irish Bank which he says should have been paid over to the Finance Corporation but was diverted instead by the Bank to reduce his liabilities on his overdraft with the Bank itself. This claim, if substantiated as a good cause of action, would appear to give rise only to a claim for such damages as could be attributed to a higher rate of interest payable to the Finance Corporation for the period from February to November, 1984, on the balance then due to them, as compared with the (presumably) lower rate of interest that would have arisen on the Bank overdraft.

On the documentary evidence hitherto adduced it would seem very difficult for the Plaintiff to sustain this claim. As already mentioned the Bank wrote to him on the 24th February, 1984, acknowledging receipt of the Anglo Irish Bank cheque and

putting on record that the Plaintiff's Solicitors, in lodging it, had requested that it be credited to the Plaintiff's current account with the Bank. The correspondence does not disclose any objection to this course taken by the Plaintiff. Secondly, when the Plaintiff came to swear his affidavit in the mortgage suit, he deposed as follows in Paragraph 10 of that document:-

"10. I say that on or about the 24th day of February, 1984, the sum of £20,000 was paid in by me into my current account at the Bank of Ireland, 14 St. Laurence Street, Drogheda, and as a result of the payment in of this sum of money Mr. Walsh released my Solicitors, Messrs. Brannigan & Matthews from their undertaking in relation to the Dispensary premises which form part of the premises referred to in the Special Summons herein"

There is no hint there that the payment to the credit of the Plaintiff's current account with the Bank was made on that occasion without his authority or consent or contrary to express instructions given by the Plaintiff or on his behalf.

This minor claim, however, appears to lie outside the framework of the settlement entered into in the mortgage proceedings and at this stage I am not prepared to find that the Plaintiff is estopped from raising it as a separate claim against the Bank. I would hold that it is the only part of the Plaintiff's claim in the present proceedings which remains to be litigated, should the Plaintiff elect to do so, and I would be prepared to allow the action to proceed on this basis only.

R. J. O'Hanlon.

R.J. O'Hanlon.

5th July, 1988

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Cases & Materials Cited:-

- Henderson v Henderson, (1843) 3 Hare 100/114/115
- Fidelitas Shipping Co. Ltd v VO Exportchleb (1966)
 1 QB 630
- White v Spendlove (1942) IR 224
- Spencer Barr, Res Judicata p 37 (1969 edn.) 160/161

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