Neutral Citation No. [2012] NIQB 51 | *Ref:* **GIL8549**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **06/07/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

AIB GROUP (UK) PLC

Plaintiff

and

THE PERSONAL REPRESENTATIVE OF JAMES AIKEN (DECEASED) ANDREW JONATHAN AIKEN and MARY AIKEN

Defendants

GILLEN J

Application

[1] This is an appeal against the order of Master McCorry dated 7 December 2011 whereby he dismissed in the course of an oral judgment the plaintiff's application for summary judgment pursuant to Order 14 of the Rules of the Court of Judicature. The plaintiff had sought final judgment in the action against the defendants for the sum of £397,842.85.

Factual Background

[2] The plaintiff is a banking organisation which provides specialised lending services to the public. The background facts to this matter are stated inter alia in the affidavits of Alastair McKnight dated 20 July 2011 and of Andrew Jonathan Aiken dated 28 October 2011. As occurs in all Order 14 applications, the evidence before me was set out in affidavits and exhibits. There was no cross-examination requested.

[3] The history of this matter in brief outline is that in October 2006 James Aiken deceased and his wife (the third defendant) owned and operated a nine bedroomed guesthouse at 5 May Road, Carnlough ("the guesthouse"). They wished to retire

and decided that they should purchase a small property and sell the guesthouse. At this stage the guesthouse had valuations ranging from £750,000 to £850,000. A suitable local property, a bungalow at 97A Bay Road, Carnlough ("the bungalow") was on the market at a price of £260,000. The deceased and his wife wished to retire to that bungalow determining to sell the guesthouse for at least £750,000 and purchase the bungalow for £260,000. It is common case that the defendants in December 2006 arranged with Kieran O'Hagan, bank manager with the First Trust Bank at Wellington Park, Ballymena a bridging loan of £350,000 to purchase the bungalow. Security for the loan was the defendant's guest house. Repayment was to be by 30 June 2007. That facility was renegotiated in October 2007 and the express term of the facility was that it was to be repaid in full on or before 9 January 2008. That sum remains unpaid to date.

[4] Unfortunately the property which was to be sold – and for which the bridging loan was to be financed – did not sell as had been anticipated and indeed remains unsold. The First Trust Head Office in Belfast has taken over control of the loan and has required the account now to be brought back into credit. Mr Aiken along with his wife had re-mortgaged their own house at 93 Ballyvaddy Road, Glenarm in order to finish some work on the bungalow that they had now committed to purchase. The plaintiff on 16 January 2009 informed him that his account was overdrawn and that now it required to be brought back into credit. He claims that he felt pressurised by the bank to sign over an endowment policy to First Trust Bank as an initial payment in respect of the loan which had been taken out. Mr Aiken further deposes that in February 2010 he met Alastair McKnight of the First Trust Bank Business Insolvency and Debt Recovery Unit who instructed him that he was to reduce the asking price of the guest house from the £550,000 then being asked and to offer it for sale at what Mr Aiken describes as "a ridiculously low price of £275,000". He felt he had to cooperate in putting the property on the market at that price. It is Mr Aiken's contention that the bank wished to market the guest house at a price that is much lower than he believes to be the value of the property.

The Banking Code March 2005

[5] The Banking Code is a voluntary code which sets standards of good banking practice for financial institutions to follow when they are dealing with personal customers in the United Kingdom. It purports to provide valuable protection for customers and explains how financial institutions are expected to deal with clients day to day and in times of financial difficulty. As a voluntary code, it allows competition and market forces to work to encourage higher standards for the benefit of customers. Section 2, headed "Our Key Commitments to You" records as follows:

> "We promise that we will act fairly and reasonably in all our dealings with you by meeting all the

commitments and standards in this Code. The key commitments are shown below:

- We will make sure that our advertising and promotional literature is clear and not misleading ….

- When you have chosen an account or service we will give you clear information about how it works, the terms and conditions and the interest rate which apply to it.

- We will deal quickly and sympathetically with things that go wrong and consider all cases of financial difficulty sympathetically and positively."

[6] Section 14 of the Code provides for the following:

> "14. Financial difficulties – how we can help.
>
> 14.1 We will consider cases of financial difficulty sympathetically and positively. Our first step will be to try to contact you to discuss the matter.
>
> 14.2 If you find yourself in financial difficulties you should let us know as soon as possible. We will do all we can to help you overcome your difficulties. With your co-operation, we will develop a plan with you for dealing with your financial difficulties and we will tell you in writing what we have agreed.
>
> 14.3 The sooner we discuss your problems, the easier it will be for both of us to find a solution. The more you tell us about your full financial circumstances, the more we may be able to help."

Principles governing an application under Order 14 of the Rules of the Court of Judicature

[7] I shall now summarise the well-trodden leading principles that have emerged from the authorities that govern applications such as this and are well set out in the Supreme Court Practice 1999 Volume 1 and have most recently been

adverted to by McCloskey J in Ulster Bank Ireland Limited and Others v Taggart (unreported) MCCL8540 delivered 11 June 2012.

- The onus is on the plaintiff to establish that there is no defence.
- Summary judgment applies only to those cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay.
- As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend.
- Leave to defend must be given unless it is clear that there is no real substantial question or triable issue to be tried.
- It is not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court or to make him liable in such a case to be put on terms for paying into court as a condition of leave to defend.
- This jurisdiction must be used with great care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion.
- Such a judgment should not be granted when any serious conflict as to matters of fact or any real difficulty as to the matter of law arises.
- Even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given.
- The mere fact that a defendant has a counterclaim does not necessarily entitle him to leave to defend. Where there is clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment for the plaintiff on the claim with costs with a stay of execution until the trial of the counterclaim or pending further order (Sheppards & Co v Wilkinson & Jarvis [1889] 6 TLR 13).

Principles governing the duty of bankers

[8] The modern authorities on the duties of a mortgagee exercising a power of sale have as their starting point Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949. In that case the Court of Appeal held that a mortgagee, when exercising his power of sale owed a duty to the mortgagor to take reasonable care and to obtain a proper price and that included a duty to advertise the property and to cancel an auction in order to advertise a sale. In exercising the power of sale he was not merely under a duty to act in good faith i.e. honestly and without reckless disregard for the mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgage property at the moment he chose to sell it.

[9] Cuckmere's case however is also authority for the proposition that a mortgagee was not a trustee of the power of sale for the mortgagor and, where there was a conflict of interest, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale. At page 965 Salmon LJ said:

> "I will now turn to the law. It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction even though the auction is badly attended and the bidding exceptionally low. Providing none of these adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his interests, which of course he could not do were he a trustee of the power of sale for the mortgagor".

[10] In Standard Chartered Bank Ltd v Walker [1982] 3 All ER 938 the Court of Appeal held that, within reason, a receiver was able to choose the time for the sale and was not obliged to wait until market conditions resulted in a more substantial realisation. Similarly in Bank of Cypress v Gill [1980] 2 Lloyd's Law Reports 51, the Court of Appeal endorsed the judge at first instance who had concluded that a bank as a mortgagee in possession was entitled to sell at any time and was not obliged to wait on a rising market or for a market to recover albeit he could not sell without taking proper steps to secure the best available price at the time in question

[11] It is not part of the ordinary business of a banker to give advice to customers as to investments generally (see Banbury v Bank of Montreal [1918] AC 626 at p654). On the other hand if there are occasions where advice may be given by a banker in the course of business, the banker must exercise reasonable care and skill in giving the advice. He is under no obligation to advise but if he takes it upon himself to do so he will incur liability if he does so negligently. Accordingly a banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so.

Generally speaking banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the bank is to be placed under such a duty, there must be a request from the customer which is accepted by the bank under which the advice is to be given (see Warne & Elliot Banking Litigation [1999] at p28 and National Commercial (Jamaica) Ltd v Hew & Ors [2003] UKPC 51).

[12] I caution however that the limits of a banker's business cannot be laid down as a matter of law, and the nature of such a business must in each case be a matter of fact. (See Woods v Martins Bank Ltd & Anor [1959] 1 QB 55).

The Plaintiff's/Appellant's Case

[13] Mr Gowdy, who appeared on behalf of the appellant, in the course of a well marshalled argument submitted the following points:-

- The bank is entitled to demand repayment of its advance in accordance with its terms. It is under no duty to its customers as to whether and when it decides to enforce its debt and security
- There is no basis for implying into the contract of loan the contents of the banking code (see Zurich Bank plc v McConnon [2011] IEHC 75.
- There was no history of the defendants in this case relying on the bank for financial advice which would have given rise to a duty of care (as for example occurred in Payne & Anor v Ulster Bank Ltd [2003] NIQB 67).
- There was no obligation on the appellants to advise the defendant of the beginning of a downturn in the property market at the time of the review of the facility in 2007.
- There is no evidence that the appellants will sell the security property at an undervalue or without due proper marketing.
- No evidence had been put forward by the respondents as to the quantum of their alleged counterclaim. The respondents have failed to particularise the amount of any counterclaim or to indicate how it is to be calculated.

The Respondents' Case

[14] Mr Henry, who appeared on behalf of the respondents, in the course of an equally well marshalled submission, argued the following points on their behalf:-

- The bank has not dealt sympathetically and positively in circumstances where the respondents are now facing financial difficulty. It has failed to act fairly and reasonably and consequently it is in breach of the banking code of practice which itself is part of the contractual terms with the bank.

- The appellant is acting in a heavy handed manner to maximise its own advantage without reference to the defendant's situation.
- The bank is attempting to coerce the respondents into selling the guest house at a substantial loss.
- The bank put pressure on the second defendant to sign over his endowment policy.
- The bank failed to warn or advise the respondents of the beginnings of a downturn in the property market. This should have been known to the bank in October 2007 when the second facility letter was sent.
- The respondents have a setoff and counterclaim against the plaintiffs. If successful it will prevent the bank from calling in the loan and also from precipitately selling the respondents' guesthouse.

Conclusions

[15] I make it clear that in making an evaluative judgment in this case on the basis of the affidavits and submissions before me, this judgment is not a precedent for other Order 14 cases. This is a fact sensitive determination based on the particular circumstances of this case. I have come to the conclusion that there is no fair or reasonable probability of the defendants making out a real or bona fide defence in this instance. In short I consider the plaintiff's case is unanswerable for the following reasons.

[16] The law requires reassuring clarity. Otherwise loopholes of havoc appear in the fabric of the legal firmament. This is particularly important in the world of commerce and banking at such a vexed time in the economic climate if even more instability is not to be introduced into an already troubling situation. The public and bankers alike must appreciate that whilst there is a consistent principle that obliges banks to act in good faith there is no absolute rule preventing a sale by the bank of property which it has taken for security at a time of the bank's choosing within the ambit of the contract between customer and bank. It cannot be expected to await the upturn in the current depressing economic cycle before exercising its rights. The bank is not in the same position as a trustee of the power of sale for a client. It is entitled in this case to give preference to its own interests over that of the respondents. Banks may exercise their powers for their own purposes absent any burden which the bank has taken on to advise clients on financial matters. I see not the slightest evidence in this case that the appellant has undertaken any such onerous task or duty. It was entirely the respondents' decision to take on the burden of a bridging loan on the terms agreed with the bank. No advice was sought from or given by the appellant in this regard. The market unfortunately turned downwards but the bank cannot be expected to wait indefinitely until the cycle starts to turn in the respondents' favour. It is now a period of years since the facility was first granted and I see no evidence of capricious behaviour on the part of the bank in now

wishing to realise its security. It seems to me to be entirely within the rights of the appellant and in accord with conventional practice for it to meet with the defendants and discuss practical means of overcoming the difficulties, developing a plan and meeting the debt. On the evidence on affidavit before me I see no evidence that it has gone beyond that or acted in any way unfairly, unreasonably, negligently or in breach of contract however unpalatable the respondents have found those discussions to be. There is no parallel here with the Cuckmere case or evidence that the bank intends to sell the security at an improper price in the current market at this stage.

[17] In so far as the respondents rely upon the "Code of Practice of Good Banking" i.e. the Banking Code which became effective in March 1992 that has set out the standard of good banking practice to be observed by banks when dealing with personal customers in the United Kingdom. The governing principles of the Code include obligations that the banks will act fairly and reasonably in all their dealings with their customers, that banks will help customers to understand how their accounts operate and will seek to give them a good understanding of banking services. I find no evidence in the affidavits before me that the appellant in this case has been in breach of that practice. This conclusion makes it unnecessary for me to determine Mr Henry's assertion that this Code has become an implied term in any agreement between the bank and the customer. Despite some academic arguments to the contrary and without determining the matter, I venture to suggest that customers may have difficulty sustaining that argument. First I find no statutory basis for implying such a term. Secondly it cannot be that a failure to comply with the Code results in the borrower being exempted from the liability to repay the entire loan. Thirdly, applying the standard test, I find it difficult to accept that a bystander, asked whether such a term formed part of the agreement, would be constrained to answer "of course". (See Zurich Bank v McConnon [2011] IEHC 75). Now that it has obtained judgment the appellant may well review again the Code and enter into further discussions with the respondents before enforcing the judgment but that remains no more than an option.

[18] I do not consider that the suggestions by the bank in discussions with the respondents that the endowment policy should be realised or that the guesthouse should be sold at a lower price than that contemplated by the respondents could possibly amount to unfair or unreasonable behaviour. In my opinion the bank is entitled to demand repayment of its advance at this stage and to discuss practical means by which the respondents may meet that demand. Given that I am satisfied there was no obligation on the appellant at any time to advise the respondents about the downturn in the property market in 2007, I fail to see how a defence could be made out that their suggestions as to realisation of the assets amount to a breach of contract.

[19] For these reasons I find no basis for the counterclaim founded as it is on the propositions already outlined by me. Moreover in any event there is strength in Mr Gowdy's point that no evidence was put forward by the defendants as to the quantum of their alleged counterclaim. The defendants have not particularised the amount of their set off or counterclaim, have not specified how it is made or calculated and there is therefore no material upon which this court could consider that there was a valid counterclaim separate from the defence set out. It comprises unsustainable generalisations founded on the defence which I have determined is unsustainable.

[20] I have therefore come to the conclusion that there is no reasonable doubt that the plaintiff/appellant is entitled to judgment and there is no real substantial question to be tried. The court is obviously anxious not to shut out defendants who can show there is a triable issue applicable to the claim as a whole from laying their defence before the court, but having considered the defence in this case I can see no basis upon which it could proceed.

[21] Accordingly I accede to the appellant's application in this matter, reverse the order of the Master, order judgment for the sum contained in the amended summons and strike out the counterclaim. I shall invite counsel to address me on the matter of costs.