Neutral Citation No. [2014] NIQB 138

Ref: **WEA9420**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **16/10/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

J&N COWDEN LLP
and JOHN COWDEN,
and ROBERTA COWDEN
and NOEL COWDEN

Plaintiffs

v

ULSTER BANK LIMITED

First Defendant

and

JON ANDERSON
and BILL KENNEDY

Second Defendants

WEATHERUP J

[1] This is the plaintiffs' application for an injunction restraining the first defendant bank and the second defendants as receivers, from taking any further steps in purported furtherance of any claimed rights arising from the appointment of fixed charge receivers in respect of property at 735 Antrim Road, Belfast, including selling or offering for sale or advertising for sale or otherwise dealing with the property pending the trial of this action or further order. Ms Danes QC appeared on behalf of the moving party and Mr Colmer on behalf of the defendants.

[2] The plaintiffs' claim as borrowers and guarantors and providers of security for a loan from the first defendant for declarations and damages arising from the first defendant calling in the loan and appointing the second defendants as receivers in respect of the property purchased with the advance made by the first defendant. In March 2007 the plaintiffs were considering undertaking a development of apartments on a site at 735 Antrim Road, Belfast, which was adjacent to the plaintiffs' family home at 733 Antrim Road. The plaintiffs approached the first defendant and advice was sought from Turleys, Planning Consultants, and from Colliers, Surveyers and Valuers, in respect of the site potential and from Myles Danker, Estate Agents, in respect of the value of apartments. The plaintiffs engaged David Hewitt, a former executive of the first defendant, as a general advisor on financial matters.

[3] The plaintiffs provided a deposit from their own resources in June 2007 and then obtained from the first defendant a facility for £480,000 in July 2007 and a balance of £600,000 in August 2007. The purchase of the site was completed on 2 August 2007. It is the plaintiffs' case that there was not only agreement that the first defendant would finance the purchase of the property but that the first defendant would finance the development of the site, the first defendant denying that there was any agreement to finance the development of the site.

[4] The first defendant provided a facility letter in respect of the loan on 26 July 2007. The letter stated that it was for the attention of John and Noel Cowden as J&N Cowden LLP, as borrowers, the loan was stated to be £1.275M, the purpose was stated to be to assist with the purchase of the property at 735 Antrim Road, the availability of the loan was stated at clause A5 to be that while amounts drawn under the facility were repayable on demand at the Bank's absolute discretion or in accordance with normal banking practice, in the absence of such demand the facility would remain available until 31 March 2008, prior to which date the facility would be reviewed and may be extended by mutual agreement between the Bank and the borrower. However, the letter also provided at clause A7 under the heading 'Repayment' that the facility would be repaid in full from the ultimate sale of the apartments upon completion of the development and in the interim, interest roll up and associated fees were included within the facility for the next 12 months and would be reviewed annually.

[5] The facility was extended beyond 31 March 2008. A further facility letter was issued on 23 September 2008 and clause A7 was changed by the first defendant without prior notice to the plaintiffs. The loan was there stated to be £1.32M, as increased to include additional charges that had been incurred, the availability of the loan under clause A5 was stated to be repayable on demand as before and that the loan was available until 31 May 2009. Clause A7 under the heading 'Repayment' provided that the borrower would provide for debit interest as and when it fell due until 31 May 2009 at which stage it would be reviewed, if not already demanded at that time. Hence, there was no provision in the 2008 facility letter for repayment after completion of the proposed development.

[6] There were meetings between the plaintiffs and the first defendant in relation to the proposed development in January, March, September and November of 2010. The first defendant issued a further facility letter on 15 December 2010. The covering letter of the same date stated that the facilities had been extended to 1 March 2011 and that "As we have previously outlined the Bank has no appetite for the development of the site and you have indicated that you wish to seek a JV (joint venture) partner and have requested time to do so. We will discuss this further at our January meeting, however in principle we will allow time to do so subject to progress in respect of the other businesses." It is the case that the plaintiffs had various other interests and were borrowing monies in respect of those interests and this development site was but one part of wider financial arrangements that were undertaken between the plaintiffs and the first defendant. The facility letter referred to the same loan of £1.32M and the same availability provision at clause A5, being repayment on demand, with the loan then extending to 1 March 2011. Clause A7, under the heading 'Repayment', stated that "The facility is to be repaid in full on 1 March 2011, if not already demanded by that time."

[7] Further meetings took place between the plaintiffs and the first defendant considering proposals on how to proceed. The meetings were in February 2011 and again in May 2011 when there were discussions about the call-in date that had then passed and there were further meetings thereafter. Eventually, no agreement having been reached, on 2 April 2014 the first defendant issued demand letters to the plaintiffs for recovery of the debt and on 9 April 2014 the first defendant appointed the second defendants as fixed charge receivers over the development site as well as other properties.

[8[The plaintiffs assert that the first defendant envisages conducting a fire sale of the development site, which will not yield sufficient to discharge the loan on the site, and that the first defendant will seek to recoup the deficit from the plaintiffs under guarantees and securities provided by the plaintiffs, which exercise, the plaintiffs contend, would be immensely detrimental to all their interests. Hence the plaintiffs seek this order preventing the defendants from conducting this fire sale.

[9] The plaintiffs have serviced the interest payments on the loan at all material times and have reduced the borrowings in respect of some of the related businesses.

[10] An affidavit on behalf of the defendants was filed by David McAdoo, a relationship manager with the first defendant. He referred to the 2007 facility letter and described the plaintiffs' position as asserting two agreements, one to advance the loan with repayment from the sale of the apartments to be built on the site and a further agreement that the first defendant would fund not only the acquisition of the site but also the development of the site. The first defendant's position in relation to the two alleged agreements is stated to be that, first of all, there was no agreement that the loan for the acquisition of the site would only have to be repaid once the apartments in the development had been sold and secondly, there was no

agreement, indication or assurance that the first defendant would fund the development of the site. Mr McAdoo drew attention to the clauses in the 2007 facility letter which provide that the loan would be repayable on demand and asserted that a reading of the document in totality demonstrates that the loan was not payable upon completion of the development but upon demand.

[11] A further affidavit was filed from Neil Tate who was previously a relationship manager with the first defendant. He dealt with the plaintiffs at the relevant time and rejected the plaintiffs' contention that the facility letter of 2007 provided an opportunity to repay the loan only upon completion of the development. He stated that it was made clear throughout that the loan to the partnership was limited to the cost of acquisition of the site, it did not extend to the costs of development of the site and that the loan was repayable on demand. He referred to the 2007 clause A7 on which the plaintiffs rely and stated that the clause simply reflected an arithmetic calculation that if the units were built and sold they would produce enough money to pay off the debt. It was stated that this was not intended to, nor did it purport to, deal with the contractual repayment obligations which were set out in the earlier clauses to the effect that the loan was repayable on demand. As to the suggestion that a further loan should be extended to develop the site Mr Tate stated that he did not have authority to give any indication or assurance to customers that funds would be made available as that was not part of his role and that he did not give any such indication or assurance to the plaintiffs that funds would be made available for the purposes of the development of the site.

[12] Finally, an affidavit was filed on behalf of the defendants from John O'Hara who was previously a relationship manager with the first defendant and dealt with the plaintiffs after Mr Tate. He referred to the discussions and meetings with the plaintiffs and to a development appraisal in respect of the proposed development and stated that it was apparent that the partnership had not accepted that the first defendant would not finance the development and that the plaintiffs seemed determined to progress their own agenda. Mr O'Hara stated that while the length of the relationship between the parties was acknowledged this was not in itself a basis on which the first defendant could or should commit to a sizeable funding project in light of the current market conditions in 2014. He had requested net worth statements and statements of income and expenditure from the plaintiffs for the purpose of considering the plaintiffs' position. A replying affidavit on behalf of the plaintiffs took issue with the version of events set out in the affidavits filed on behalf of the defendants.

[13] The applicable principles in relation to the grant of an interim injunction were not in dispute. They were stated in American Cyanamid Company v Ethicon [1975] AC 296. It is necessary to establish first of all whether there is a serious issue to be tried, secondly, whether damages would be an adequate remedy and thirdly where the balance of convenience lies. The principal argument concerned whether there was a serious issue to be tried. In respect of that matter it is necessary to distinguish between the terms of any agreement for repayment of the loan advanced to the

plaintiffs and whether there was any agreement between the plaintiffs and the first defendant in relation to the provision of additional funds for the development of the site.

[14] In relation to development funds the plaintiffs rely on what are described as undertakings and assurances in respect of the availability of such funds. No doubt there was consideration given by the plaintiffs to funds being made available in the event of the future development of the site. The first defendant on the other hand denied that there was any binding agreement in respect of the provision of such facilities. Ms Danes, in my view quite correctly, softened the plaintiffs' line in relation to the existence of any such agreement. I am satisfied, on the present evidence, that there was no such agreement and nothing that could in law constitute an arrangement between the parties creating any obligation on the first defendant in this regard. There was indeed, I accept, a belief on the part of the plaintiffs that in certain circumstances funds would be made available. The purchase of the site was not an end in itself. The object of the exercise was to develop the site, sell the apartments, repay the Bank and retain whatever profit was then available. That vision, which was undoubtedly shared by all concerned, was a long way from constituting an agreement as to the provision of development funds such as could be said to amount to a legal obligation on the part of the Bank to provide such funds.

[15] The position of the loan that was advanced to purchase the site and the arrangements for the repayment of that loan raise quite different questions. What was the agreement in respect of the repayment of the loan that was first advanced to the plaintiffs? The plaintiffs relied on clause A7 of 2007, the repayment on completion of the development clause. The first defendant referred to the whole document and the reference to repayment on demand. It is necessary to read the document as a whole. Such reading will be by reference to the wording of the document and not by what the parties to the document say was intended by the use of those words. This is an objective exercise and it is for the Court to interpret the document.

[16] First of all there is an issue as to the effect of clause A7 of 2007. There is a serious issue to be tried in relation to the meaning of the 2007 facility letter which at clause A7 provides for repayment upon completion of the development and at clause A5 provides for repayment on demand. I do not express a conclusion in relation to the issue but there is a serious issue to be tried as to the effect of clause A7.

[17] Secondly, there was a unilateral change of the 2007 clause A7 providing for repayment on completion of the development with the introduction of the 2008 clause A7 providing for repayment if demanded in the period of the loan. The plaintiffs state that they were not aware of that change at the time as they did not notice the alteration when they received the facility letter. I will assume for present purposes that that is the case. The plaintiffs contend that this change without notice contravenes the Banking Code. I will assume for present purposes that that is the

case. However, the plaintiffs signed the facility letter in 2008 and cannot deny the contents of the document. Not reading a document that is signed is the fault of the person signing, provided that person has not been misled. That is not this case.

[18] However, the plaintiffs say that the circumstances in which this change was made to clause A7 are important. I agree. The loan had already been drawn down when the change was made in 2008. The purchase had been completed. The plaintiffs' argument is that at that stage the first defendant is estopped from changing the terms which provided for repayment upon completion of the development because the plaintiffs had already acted on the basis of the 2007 letter and been drawn into beginning the development journey by taking the loan and buying the site. Therefore, the plaintiffs contend, in 2008 it was too late for the first defendant to change the terms. There is thus an issue between the parties as to the effect on the 2007 agreement of the first defendant changing the terms in 2008. I do not reach a conclusion on that issue but there is a serious issue to be tried as to the effect of the 2008 change of terms in the circumstances.

[19] Thirdly, even if the 2007 terms are to be read as involving repayment on completion of development and even if there are restraints on the first defendant relying on the 2008 terms, repayment of the loan cannot be delayed forever if there is no completion of the development, for whatever reason. While the plaintiffs rely on the 2007 clause, which they contend allowed them to postpone the repayment until actual completion of the development, that cannot remain unalterable. There may be a myriad of circumstances in which the plaintiffs are unable to complete the development and that will not in itself excuse the plaintiff from any obligation to repay the loan. Market conditions have here contributed to the non completion of the development. However, if the development does not proceed there remains an obligation on the plaintiffs to repay the loan and the plaintiffs must do so within such time as is reasonable in the circumstances.

[20] The issue becomes, what is a reasonable time in the circumstances. The defendants contend that a reasonable time has already been allowed. The call in of the loan did not occur until 2014 and the receivers were not appointed until 2014 and the defendants contend that such reasonable time has elapsed and that the loan should be repaid. The plaintiffs on the other hand contend that a reasonable time has not yet elapsed, there are ongoing proposals for the development of the site, the opportunities for redevelopment have not been exhausted and therefore they should be afforded further time to complete their proposals for development. There is a serious issue as to whether reasonable time has already elapsed in the circumstances.

[21] Overall there are three serious issues that arise. The first issue is the effect of clause A7 of 2007, the second is the effect of the first defendant changing the terms of clause A7 in 2008 and the third is the reasonable period for repayment of the loan and whether such reasonable time has already elapsed such as to require repayment. These are issues which cannot be resolved on affidavit and require examination of the evidence of the parties.

[22] The next matter is whether damages are an adequate remedy. Clearly not. The effects of a sale of the property in the present circumstances would be catastrophic for the plaintiffs as it will lead to their financial collapse. I am satisfied that in the circumstances there will not be sufficient equity in the property to repay the loan, the plaintiffs' guarantees will be called in, such securities as are available will be realised and this will lead to their financial collapse.

[23] The third matter is the balance of convenience. I am satisfied that, with the plaintiffs continuing to finance the loan, holding the present position pending the outcome of the trial is the clear route to follow, given the serious issues to be tried and the catastrophic effects on the plaintiffs if the defendants proceed to deal with the property as intended.

[24] Accordingly, I am satisfied that an Order should issue granting this injunction restraining the defendants from dealing with this property pending the trial of this action or further order. I reserve the costs of this application to the trial of the action.