Neutral Citation No: [2013] NICh 3

Ref:	**DEE8406**

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

Delivered:	**28/01/13**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

_____

SWIFT ADVANCES PLC

Plaintiff;

and

MICHAEL GERARD McKAY

First Defendant;

and

BRIAN F WALKER [No 2]

Second Defendant.

and

SWIFT ADVANCES PLC

Plaintiff;

and

GERARD DALRIMPLE

First Defendant;

and

BRIAN F WALKER [No 2]

Second Defendant.

_____

DEENY J

[1] In Swift Advances v McKay & Walker [2011] NICh 2 I gave leave for these two defendants to appeal from the Orders of the Chancery Master of 29 June 2010 granting to the plaintiff company possession of their respective dwelling houses.

[2] Both men had been declared bankrupt but both have subsequently been discharged by effluxion of time.

[3] When the matter was before the court on the substantive hearing of their appeals Mr David Dunlop appeared for the plaintiff/respondent. Mr William Gowdy appeared for the appellants/defendants, instructed by Patrick Diamond & Co., he having appeared previously and creditably as part of the Bar Pro Bono Scheme. Ms Victoria Goward appeared for the trustee in bankruptcy of both men, Mr Brian Walker.

[4] Mr William Gowdy candidly acknowledged that he could not put forward a persuasive legal argument in respect of Mr Gerard Dalrymple. His appeal was subsequently dismissed and I confirmed that the Master's Order should stand against him.

[5] With regard to Michael Gerard McKay the court has had the benefit of able written and oral submissions from Mr Dunlop and Mr Gowdy. I have taken these into account even if all are not referred to in this judgment.

[6] Three issues have been identified on this appeal.

(1) The first issue is whether the Agreement No 75074 relied on by the plaintiff is a modifying agreement of the previous Fixed-Sum Loan Agreement between the parties of 31 January 2007 which, it is agreed, was regulated by the Consumer Credit Act 1974.

(2) If the court finds that the Agreement No 75074 is not a modifying agreement of the earlier agreement is the plaintiff nevertheless estopped from relying upon it?

(3) If the Agreement No 75074 is found by the court to be only a modifying agreement whether the agreement and the charge of 31 January 2007 are, as a result, unenforceable against the defendant by the plaintiff.

Chronology

[7] The plaintiff lender entered into an agreement with Mr McKay on 31 January 2007. It appears to have been signed by Mr McKay on an earlier date but nothing turns on that. The agreement states the following at its head.

> "Fixed-Sum Loan Agreement regulated by the Consumer Credit Act 1974 secured on [the address of the plaintiff's home]."

The amount being lent was £25,000 which was to be repaid by 204 payments over 17 years commencing on 28 February 2007 at 12.3% APR variable. There was a broker's fee for "Loans made simple" who negotiated the agreement. It is obvious

from this document and agreed that this was indeed a regulated consumer credit agreement.

[8] The second page of the regulated Credit Agreement of 31 January 2007 makes clear at paragraph 1 that the lender is lending the total amount of credit with broker fee and loan administration fee and that it is secured by way of legal charge. At paragraph E on the second page the lender provides that it "may make a temporary arrangement with you not to enforce the terms of this agreement strictly or refrain from taking steps to enforce the terms without losing the right to enforce the terms later." At G it is agreed that the lender "may at our absolute discretion agree to a request by you to increase the remaining period of the loan. If we agree to this we will give written notice to you and will recalculate your monthly payments to ensure that the actual balance and interest is repaid within any new loan period." Counsel draws attention to the fact that those clauses are to be found in the agreement of 31 January 2007 but there is no clause providing for the amount lent to be increased as opposed to the period of repayment. (Authorial underlining throughout).

[9] Bearing the same date there is a "Deed of Charge/Mortgage, Land Registry of Northern Ireland" relating to the same property and made between the borrower Mr McKay and Swift Advances plc. No objection is taken to the form of this document. One clause in the charge reads as follows.

> "The terms `you' and `we' include any people who take over your or our rights under this deed. You agree to the terms of this deed by signing below. If the property is registered at the Land Registry of Northern Ireland – you the borrower, as beneficial owner hereby charge the property being the lands and premises comprised in the above mentioned folio(s) in favour of us with the payment of all monies owing from you the borrower to us and agree to a registration of the charge as a burden affecting the property …"

I need not deal with the subsequent clause as this was registered land.

[10] In addition Mr Dunlop draws attention to Conditions 1 and 2 on the second page of the charge. These Conditions read as follows.

> "1. We have the legal right, if you do not keep to any of the terms of this deed and the agreements to apply to a court for an order that we can repossess and sell the property. This also means that we have an interest in any of the proceeds from selling the property.
>
> 2. `Agreements' means:

a) the Credit Agreement or Mortgage Offer Letter between you and us and signed by you when you signed this deed (the Credit Agreement);

b) any future changes to the Credit Agreement or Mortgage Offer Letter; and

c) any future Credit Agreement or Mortgage Offer Letters between you and us."

[11] Within 3 weeks of making the first payment or being due to make the first payment on that loan Mr McKay was applying to Swift for a further loan. For completeness I mention that he described his occupation at that time as a building contractor and from other documents it is clear that he traded as New Build Homes. On 13th April 2007 he signed and entered into a new credit agreement with the plaintiff lender which they signed on 17th April. It is entitled "Unregulated Credit Agreement – Capital and Interest Repayments secured on [his home](The Property)." On this occasion he was borrowing £110,000. There were broker and other fees of £2,285.

[12] This Unregulated Credit Agreement expressly warns that missing payments could have severe consequences. It expressly warns that:

> "Your home may be repossessed if you do not keep up repayments on a mortgage or other debt secured on it."

It expressly records that he has given a legal charge on his property. Among the conditions on the second page are the same paragraphs E and G cited above. There is no dispute that it is signed by Mr McKay.

[13] For completeness I note that there had been an earlier mortgage to "The Mortgage Business" with an approximate redemption figure on 20 March 2007 of £90,349. The Swift Mortgage was therefore a second charge, with the consent of the first mortgagee.

[14] The parties agree that the money from this loan was used to pay off the previous loan to Swift. They also agree that no new charge was put in place. It can be seen from above that there was no necessity for this given the terms of the earlier charge.

[15] By letter of 5 September 2007 the plaintiff was replying to a broker called the Funding Network Loans Ltd quoting a redemption figure for the second loan of £114,729.45. That second agreement is recorded as No 67255. On 7 September Mr McKay again applied for a loan from Swift. On 25 September 2007 he signed and

on 28 September the plaintiff lender signed a new agreement. Its title was "Unregulated Credit Agreement – Capital and Interest Repayments secured on [the home] (the property)." For completeness I mention that the home was described by Ann-Marie Mullin MRICS in a report as a flat maisonette although an image of it makes it look more like a house. She valued it at £375,000 at that time.

[16] This new agreement which is the one in force which the plaintiff relies on has been given the number 75074. The principal was to amount to £189,729.45. There were again fees, this time of £3,180. It carries the same warnings as the agreement of 17 April referred to above. Again it has the same paragraphs E and G on the second page.

[17] It is common case between the parties that the loan under the second agreement was paid off by the monies advanced under the third agreement. It is also common case that there was no new charge. The Deed of Charge/Mortgage of 31 January 2007 was the one relied on.

[18] Mr McKay did not keep up the payments under this loan. On 6 November 2008 the plaintiff creditor issued an Originating Summons in the Chancery Division of the High Court seeking possession of the home used to secure the loans.

Mr McKay's Case

[19] It is clear that the initial agreement of 31January 2007 was regulated under the Consumer Credit Act 1974. It is the contention of the First Defendant that the second and third agreements were in breach of the protections under that Act and are therefore unenforceable. It is of key importance therefore for him to show that the second and third agreements were also regulated agreements despite the headings on the face of them. The relevant statutory provision which Mr McKay seeks to rely on is to be found at Section 82 of the Consumer Credit Act 1974. The relevant sub-sections 2 and 3 read as follows:

> "Where an agreement (a "modifying agreement") varies or supplements an earlier agreement, the modifying agreement shall for the purposes of this Act be treated as:
>
> (a) revoking the earlier agreement; and
>
> (b) containing provisions reproducing the combined effect of the two agreements.
>
> and obligations outstanding in relation to the earlier agreements shall accordingly be treated as outstanding instead in relation to the modifying agreement.

(2A) Sub-section (2) does not apply if the earlier agreement or the modifying agreement is an exempt agreement as a result of section 16(6C) or 16C.

(2B) Sub-section (2) does not apply if the modifying agreement varies –

(a) the amount of the repayment to be made under the earlier agreement, or

(b) the duration of the agreement,

as a result of the discharge of part of the debtor's indebtedness under the earlier agreement by virtue of section 94(3).

(3) If the earlier agreement is a regulated agreement but (apart from this sub-section) the modifying agreement is not then, unless the modifying agreement is:

(a) for running account credit; or

(b) an exempt agreement as a result of section 16(6C) or 16C,

it shall be treated as a regulated agreement. "

It is agreed that the exceptions to section 82 are not material.

[20] The net effect therefore is that the second agreement and successively the third agreement would be regulated credit agreements despite exceeding monetary thresholds under the statute if they are modifying agreements i.e. varying or supplementing the earlier agreement. Mr Gowdy submits for the first defendant that they are.

[21] In connection with this he points out that the same lender entered into all three agreements. Mr McKay was clearly not treated as a new customer by them, but I observe that he did enter into new applications for the second and third loans.

[22] Counsel relies on the decision of the Court of Appeal in Wilson v Robertson's (London) Ltd [2006] EWCA Civ. 1088 at [28] to [34]. This was an appeal from a decision of Laddie J reported at [2005] 3ALL ER 873. Counsel also relies on Goode Consumer Credit Law and Practice at 35.61 and 35.62.

[23] He draws attention to the way in which the agreements are referred to in the internal records of the lender. At trial bundle C/84 one finds a Swift letter of 5 September 2007 referring to the second loan as "CCA regulated". Likewise at C123 in her letter to Mr McKay. In a letter of 3 June 2008 a letter from Swift to Mr McKay expressly refers to the second agreement of 17 April 2007 as a "Modifying Agreement" and the third of 28 September 2007 as a "Modifying Credit Agreement". This latter letter is an actual Default Notice served under Section 87 of the Consumer Credit Act 1975. Either, he submits, this was an error on the part of the plaintiff or they were taking them to be modifying agreements as the first defendant contends.

[24] Mr Gowdy points out that the commission taken by the broker for the second loan was on the top-up element of the loan and not the total amount. He accepts that what one should look for here is the substantive nature of the loan but he says this assists him. I am not sure I find this persuasive as, of course, the second loan was being used to pay off the first loan and so the additional sum which the mortgage broker had negotiated for the first defendant was the difference between the two rather than the total sum recoverable under the second agreement. The second and third agreements both rely for security on the first charge. There is no new charge. Indeed, the plaintiff seeks to take advantage of the priority and time given by the first loan.

[25] At C34 on the face of the charge we see : "Property which is security for the loan [the first defendant's home]". Mr Gowdy points out it is singular rather than plural. Against that Mr Dunlop pointed out that at C35 we find that Condition 1 as quoted above has a reference to agreements in the plural. At 2(b) we do find reference to any future changes to the Credit Agreement but at 2(c) we find the agreement includes "any future credit agreement or mortgage offer letters between you and us". The proper interpretation would appear to be therefore that the charge while clearly referring to the loan that is granted at that time does envisage supplementary loans in the future but also other credit agreements or mortgage offers. Counsel also relies on the redemption statements of 13 March and 27 March 2007, 5 September 2007 and three subsequent statements of 2008 as stating they are dealing with regulated agreements. Arrears notices are served under the Consumer Credit Act.

Plaintiff's Response

[26] I have taken into account the plaintiff's response to the submissions made. I record that I gave leave for the plaintiff to amend its summons in the light of the crystallisation of the defendant's case, which had hitherto been quite unfocussed. It had benefited from the attentions of Mr Gowdy. In addition to the authorities relied on by Mr Gowdy, Mr Dunlop also referred to Paget's Law of Banking, paragraph 2.48 and other passages in Goode op cit.

The Conclusions: First Issue

[27] The first issue which the court must resolve is whether the second agreement entered into between the parties modified the first agreement of 31 January 2007. Did it vary or supplement it? Firstly one notes that that is not what it says on the face of it. The agreement clearly says it is an unregulated credit agreement. Secondly it does not say that it is modifying, varying or supplementing the earlier agreement of 31 January 2007. In fact it does not refer to the earlier agreement in any express way. Thirdly, although the monies advanced by the second agreement of 17 April 2007 were used in part to discharge the loan under the first agreement, that was not a requirement of the second agreement which makes no reference to that. This leans against a suggestion that it is merely varying the other agreement. Fourthly the financial limit under the Consumer Credit Act at the relevant time was £25,000 but the loan under the second "Unregulated Credit Agreement" was £110,000. One would have to infer that both the lender and Mr McKay's mortgage broker would have been aware of that limit. An accidental modification seems unlikely.

[29] Fifthly, while the documents referred to by Mr Gowdy do clearly use nomenclature helpful to his submissions they are not contractual documents. If this is to be a modifying agreement it had to be a modifying agreement at the time the parties entered into contractual relations on foot of it. Subsequent misdescriptions cannot alter the legal nature of the agreement as of 17 April. The same would apply with the subsequent agreement of 28 September 2007. At page C80 in the bundle we see, by contrast, on the day the agreement is entered into, 17 April 2007, a clear statement that this is a new account and that "this agreement replaces agreement 63539-McKay." See also pages C82, C115 and C117 to consistent effect.

[30] Sixthly, the same charge is used but it seems to me that that is neutral between the parties on this issue because of the provision in the charge at conditions 1 and 2 set out above that it could cover future credit agreements.

[31] Seventhly, the wording of the regulated Fixed Sum Loan agreement expressly describes itself as regulated by the Consumer Credit Act 1974. It does as set out above allow for extensions of time but it does not allow for supplementary loans on foot of it or a variation of the loan amount. One clear reason for that would be that the amount of credit being given i.e. £25,000 was the maximum for a regulated loan under the Consumer Credit Act 1974.

[32] It seems to me that the section cited by counsel from Professor Goode's book at 35.62 does not in fact assist the defendant. He says:

> "A typical borderline case arises where a mortgage is taken to secure both a contemporaneous regulated agreement and a subsequent agreement. Is the latter to

> be treated as supplementing the earlier agreement so as to constitute a modifying agreement? Probably not, if the only link between the two agreements is they are secured by the same mortgage. By contrast, an agreement for the making of a further advance as provided by the original agreement supplements the original agreement and is thus a modifying agreement; a separate agreement by way of top up of the original advance and to be used for the same purpose would seem to constitute a modifying agreement even if not provided for by the original agreement; and a new agreement which provides additional security for the obligations assumed under the original agreement is clearly a modifying agreement."

[33] It seems to me that this is of more assistance to the plaintiff than the defendant. I observe that the amounts here tell against the defendant. If the initial loan had been the maximum regulated loan, as it was of £25,000 and the second agreement was for, say, a further £10,000 it would have something of the character of a supplement. Here it is the other way round in the sense that the second loan is for more than four times the amount of the first loan. See also Goode at 35-13.

[34] These reasons are not of equal weight. Nor are all necessary to reach the conclusion I find, that neither the loan agreement of 17 April 2007 nor its successor, the agreement of 28 September 2007 were modifying agreements varying or supplementing the original regulated agreement of 31 January 2007. In my view the second and third agreements were freestanding and separate agreements. I therefore find for the plaintiff on this issue.

[35] I can deal with the second issue between the parties, as to estoppel, quite shortly. Mr Gowdy submits that it is unconscionable for the plaintiff to resile from the "clear and unambiguous representations to the first defendant that the second and third agreements are modifying agreements (or otherwise regulated agreements) and to assert that the second and third agreements are unregulated."

[36] He cites Goode at [23.8]. While this acknowledges in principle that such a claim can be brought it seems to me that any suggestion that it applies here falls very far short on the facts. For estoppel to be established the defendant would have had to rely on the representations of the plaintiff and, normally, to have suffered some detriment as a result of that reliance. But the misdescriptions of the agreements are all after the respective events here. As counsel for the defendant conceded there was no evidence of Mr McKay relying on the representations. He was in the unhappy position of having borrowed money for the wrong purposes or at the wrong time or both and being unable to repay. It is a very different matter from the situation contemplated by Professor Goode where a lender may have described a loan agreement as regulated at the time that the borrower entered into it. I can see that

such a lender might well be estopped from subsequently denying the representation made upon which the borrower relied. Conceivably that would be so even if detriment were not shown. But there is no reliance. It is merely erroneous misdescription by employees of the plaintiff company after the event. The plaintiff here lent the money to the defendant and they did so on the security of the plaintiff's home which at that time was thought to be of a value more than sufficient, even with the existing mortgage, to secure these loans. I am afraid that I can see nothing unconscionable in the lender now wishing to enforce its security on foot of the charge which the defendant had given it.

Unenforceability

[37] In the light of those two findings any conclusion I reached on whether or not the agreements would in fact be unenforceable if they had been modifying agreements would be obiter. As contemplated at the hearing of the action I will not therefore make any decision on that issue. If I am wrong on either of the first two issues the matter can be remitted to me for decision.

[38] I therefore find that the defendant's appeal from the order of the Master for possession of the dwelling house fails and the plaintiff is entitled to enforce the said order.