Neutral Citation No. [2012] NIQB 36 | *Ref:* **WEA8498**

Judgment: approved by the Court for handing down | *Delivered:* **25/04/2012**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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12/18868

CHRISTOPHER DAVID WALSH,
TOLOMEO LIMITED,
TORINO LIMITED,
NIMES LIMITED,
SF3019 LIMITED,
LISSE LIMITED and
WALLENDER LIMITED

Plaintiffs;

-v-

BANK OF SCOTLAND plc

Defendant.

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WEATHERUP J

[1] The plaintiffs issued a summons seeking an injunction against the defendant restraining the exercise of any remedy, right or security against the plaintiffs in respect of a number of bank accounts held by the plaintiffs with the defendant. An injunction had earlier been granted to the plaintiffs ex parte. Mr Horner QC and Mr Shields appeared on behalf of the plaintiff and Mr Shaw QC and Mr Coleman on behalf of the defendant.

[2] I refer to the affidavits filed to explain the circumstances. The first plaintiff, Mr Walsh, filed affidavits on behalf of all the plaintiffs. He states that he owns shares in Nova Scotia Limited which holds as a nominee company his shareholding in the other plaintiff companies. The assets of the companies include properties at Kensington High Street in London, the Riverside shopping centre in Thetford, the

Direct Line House in Leeds, the Nags Head shopping centre in London, the Arndale shopping centre in Leeds and the Balmoral Plaza, Boucher Road in Belfast.

[3] In 2002 Mr Walsh met Stephen McDonald of the defendant bank at its offices in Belfast. Mr McDonald was then the lending manager and Mr Walsh formed a close business relationship with Mr McDonald, who eventually rose to become regional director. Between 2002 and 2007 Mr Walsh borrowed and repaid approximately £30M from the bank through its Belfast office. In the middle of 2006 Mr Walsh became interested in the acquisition of the Riverside shopping centre in Thetford and approached Mr McDonald to arrange lending. In September 2006 a special purchase vehicle, one of the plaintiff companies, took a loan of £6.2M from the bank for the purchase of the shopping centre. The terms offered included a 3 year loan with an assurance from Mr McDonald that development funding would be provided for proposed refurbishment and extension of the centre and thereafter either the bank would grant a longer term facility to hold the asset or there would be a sale if market conditions were favourable. By longer term facility Mr Walsh stated that he expected a 20 year term which would have been the length of term granted by the bank in respect of other investment acquisitions by his companies.

[4] In early 2007 Mr Walsh had financed further property investment transactions with the bank and the property portfolio was said to be valued at £76M, all save the Thetford purchase being on 20 year loans. About this time Mr McDonald told Mr Walsh that he was coming under considerable pressure to lend more money due to increased lending targets imposed by the bank and the bank was keen to expand the loan book to key customers and Mr Walsh was identified as a key customer or a preferred customer. Mr McDonald advised that the bank had received particulars of Direct Line House in Leeds and it was proposed that Mr Walsh should acquire this property. Mr Walsh agreed to do so and considered that the transaction would be financed on the usual basis for investment acquisition, that is to say, over a 20 year term.

[5] Mr Walsh received a facility letter and was surprised that it provided for only a 3 year term. He queried the 3 year term and explained that such a term would not be acceptable. Mr Walsh says that he was told by Mr McDonald that it was the bank's emerging lending policy to lend on shorter terms and that he was assured by Mr McDonald that he would be able to renew the short term loan to a longer term facility in default of the timely disposal of the property if market conditions then proved favourable. Mr Walsh states that he knew, as did the bank, that without such an assurance he would not have proceeded with the investment. The property was purchased for some £39M. Mr Walsh borrowed £34M through his companies and the bank funded his equity investment for the purchase by lending about £5.5M secured on the Arndale property, again for a 3 year term and on the same understanding as to the extension of the term.

[6] Towards the end of 2008 Mr Walsh became aware of what he calls a sea change in the attitude of the bank in that there were issues raised about lending. In 2009 he took proactive steps to try and achieve facility extension and renewal but was finding difficulties in relation to lending. Amended facility letters were issued in January 2009 and were for 1 year's duration. At that time credit facilities for the commercial property sector were unavailable. When the 3 year facility on the Leeds property expired in March 2010 the bank extended the facility for 1 year.

[7] Mr McDonald left the bank in May 2010. Walsh says that the investment portfolio continues to meet all the banking commitments and he has a robust and commercial business plan which is in place to repay all liabilities over a 5 year period. Thus far all interest and capital payments have been made and in relation to three loans, which have on their face expired, payments have been made and accepted by the bank as if the facilities were still in place.

[8] Moving into January of 2012 Mr Walsh was informed by Ryan Telford from the bank that the bank had decided as a matter of corporate policy that it must wind down and close its former bank loan book within a time frame of 12 to 18 months and this decision was non negotiable and no exceptions would be made. This time frame of 12 to 18 months provided Mr Walsh with two alternatives. Either he would accept the requirement that all assets be disposed of voluntarily within that time frame or alternatively the bank would appoint fixed term receivers to enforce its securities. Mr Walsh then received an email from Mr Telford in February 2012 that sought a disposal plan for all assets. Mr Walsh says that the proposals reflected in Mr Telford's email were essentially to sell the properties within a very short, being what he calls a premature time frame. He considers there would be insufficient equity to repay the loans. He and other connected companies would be likely to be called upon to make up the difference by enforcement of guarantees. A sufficient call up of these guarantees would be likely to lead to his personal bankruptcy and further to the liquidation of the remaining companies, which companies he says were not otherwise in default of their bank facilities. The damage caused including reputational damage would be irreparable and uncompensatable and there would be a loss of 26 jobs.

[9] Mr Walsh states that if the bank allowed a more realistic period for final disposal of all the assets, being 5 years, it is probable that the bank would be repaid in full and he and his partners would not suffer the devastating losses that he says would otherwise arise. Currently Mr Walsh, through the companies, is financing the interest payments at a rate of £2.6M per annum and making capital reduction payments at the rate of £1.96M per annum in respect of the outstanding loans.

[10] There are three expired facilities in respect of various premises at Leeds and Thetford and Mr Walsh says that he relied on the representations made by McDonald on behalf of the bank and had renewal of the facilities ever been in doubt at the time of purchase he would not have acquired the properties. Similarly he

would not have agreed to the terms of the working capital loan in December 2007 had he not had the assurances or if he had thought there was any risk of forced sales of the properties at the time when market conditions were wholly unsuitable.

[11] A replying affidavit was filed by Mr Telford, a director of corporate real estate and relationship director with the defendant. He was not personally involved with the plaintiffs but he does give an account of the operations of the bank. This leads him to say that in his experience it would be more than unusual for a bank employee to give assurances of the type described by Mr Walsh and equally unusual for an experienced borrower such as Mr Walsh to rely on such assurances.

[12] In relation to the 2012 meetings Mr Telford refers to Mr Walsh's suggestion that in January he told Mr Walsh that as a matter of corporate policy the bank had decided to close its former loan book within 12 to 18 months and that this was non negotiable. Mr Telford describes this as incorrect but agrees that he commented that the Lloyds group was engaged in an exit strategy from the Irish portfolio and that each customer's case was being reviewed on a case by case basis as to repayment options and strategies but he did not indicate that there was a blanket exit strategy. In relation to Mr Walsh's claim that Mr Telford had also said at this meeting that he would only accept an asset disposal plan, Mr Telford says that this is not correct. He told Mr Walsh that the defendant's preference was that an asset disposal plan time line of 12 to 18 months be considered having regard to risk factors linked to the property market. The appointment of a receiver was not specifically mentioned but rather the focus remained on looking at a sequential repayment plan. There is reference to a further letter that was sent in January 2012 suggesting the 5 year payment plan and Mr Telford says that nowhere in that letter did Mr Walsh assert the right to longer term facilities, as now underpins the present application, and that on the contrary no such assertion was made during the various meetings held with Mr Walsh or in any of the correspondence sent by Mr Walsh. Mr Telford also refers to Mr Walsh claiming that at a meeting in February 2012 the bank had maintained its insistence on a 12 to 18 month disposal plan and that it had refused a request to adopt a more reasonable approach. Again Mr Telford says this is not correct and the bank did not refuse any such request. All elements of the business plan discussion were focused on asset sales. Mr Walsh at no time mentioned a desire for long term facilities. Mr Telford requested a final business plan proposal within 7 days and enforcement action was not mentioned at any time. So there is considerable dispute as to the exchanges that took place at the meetings held over the last few months.

[13] A further affidavit was sworn on behalf of the bank by Hugh Donnelly, the regional director of Certus. He was formerly an employee of the bank and was authorised by Certus as service provider to the defendant to make the affidavit. His affidavit explains in considerable detail the structures of the bank and the arrangements for lending. He refers to two broad themes. First, he is surprised that such assurances as Mr McDonald is said to have given would ever be given. Secondly, if such assurances were ever given, he is surprised that Mr Walsh, by

reason of his extensive business experience, would have felt that such assurances amounted to any sort of legal entitlement. The affidavit goes on to explain that as senior manager Mr McDonald reported to Mr Donnelly in his capacity as regional director for Northern Ireland. He states that ordinarily decisions as to whether or not to lend and on what terms would be made within the bank by the credit risk management division. It was important to note that in respect of the most sizeable instances of potential lending, which would include the lending to Mr Walsh, the decision on whether to lend would be taken, not within the bank but rather within HBOS in Edinburgh. Mr Donnelly refers to what he believes to be Mr Walsh's familiarity with the banking scheme and expresses his surprise that Mr Walsh now claims that he believes that Mr McDonald had authority to assure him that further facilities would be granted, never mind a substantial and long term facility of the type suggested.

[14] Mr Donnelly refers to a 'mentoring note' which comprises an overview of the loan arrangements. He states that short term facilities, such as the 3 year term, were largely in respect of properties which were not generating sufficient rental to repay the capital debt and therefore there would only be 2 to 3 year interest only loans. Within that time the borrower would need either to sell the property and repay the loan or take steps to change some of the circumstances pertaining to the property such as rental income or reduction in debt with a view to making a fresh application for lending on a longer term basis. On the other hand the 20 year facilities would be more likely to be available where the location and tenant and rental income showed that there was insufficient rental income to pay both capital and interest over the 20 year period, albeit that at the end of the term there would still be a residual capital debt at a low level which would be likely to be cleared in a sale or refinance. Thus the nature of the project had a bearing on the character of the loans that would be negotiated in order to fund the project.

[15] The affidavit proceeds to refer to two instances of the assurances which are said to have been given by Mr McDonald. The first, in relation to the Riverside shopping centre in Thetford, draws the comment from Mr Donnelly that Mr Walsh has not stated when this assurance was given, where it was given, what was actually communicated or how the assurance was given and one of the key aspects of an alleged longer term agreement namely the length of term was not mentioned in the alleged assurance. The first time that the plaintiff asserted such a right was in affidavit and not at meetings or in correspondence. The second instance of assurances by Mr McDonald relates to the Direct Line building in Leeds and again Mr Donnelly points out that for Mr McDonald to purport to give assurances about lending on any terms was outside his level of authority and the system of loan applications. Further he says again that Mr Walsh has entirely failed to give any details of when the assurance was allegedly given, where it was given, how it was given, what words were used and again one of the key aspects of the loan agreement, the length of the term, is not canvassed in the alleged assurance. He points out that Mr Walsh went on to execute a document which he says expressly

contradicts the alleged assurance and he refers to the mentoring note which was prepared in relation to the Direct Line acquisition.

[16] I refer to two of the banks internal notes. The first is the mentoring note in relation to Direct Line House signed by Mr McDonald. It points out that the deal was introduced to the bank by an agent contact of the writer and refers to placing the property directly with the promoter, Chris Walsh, the first plaintiff. The note contains a reference to 'repayment', stated as being '3 years interest only – capital repayment from sale of site, or placed on long term finance'. In relation to 'pricing' there was a 'success fee' of £175,000 if the property was sold within 3 years. Under 'Fallback Position' the note states that 'If at facility expiry, CW does not wish/ is unable to sell the property we have already discussed and assessed the longer term funding requirement and have requested an additional £4m in cash to be paid in permanent debt reduction out of the sale proceeds of the Arndale in order to finance over a 11 year term'. The schedule to the note includes the title 'Guidelines' and in a tick box fashion under 'loan terms' where it states 'Up to 20 years' the box is 'Yes' and 'repayment' it states 'Amortising if greater than 3 year term' the box is 'Yes'.

[17] The second note is called 'summary terms and conditions' and relates to Thetford. Under the heading 'Repayment Terms' it is stated that 'If the property is not sold within 3 years, the facility could be transferred onto a 20 year capital and interest repayment term to repay the facility to a minimum residual of 50% - not sought at this time'. In relation to 'arrangement and success fees' there is an entry for a 'success fee' of £45,000 'if sold within the first three years'. Under 'Introduction/Purpose' it is stated 'Should the property be held, the attached cash flow model demonstrates as a fall back position repayment of the facility to a residual balance of 50% which is considered satisfactory given the location. It is important to note that this is an alternative exit only and long term funding is not being sought at this time'. The guideline tick box is completed in the same manner as in the mentoring note above.

[18] A rejoinder affidavit by Mr Walsh takes issue with the comments made by Mr Telford and Mr Donnelly. Mr Walsh states that both Mr Telford and Mr Donnelly place considerable emphasis on what is portrayed in the affidavits as a rigorous and formalised process by which the defendant is said to have conducted its banking business at the material time. Mr Walsh's comment is that this was not his experience of dealing with the bank. The bank conducted its dealings on a particularly personalised and substantially less formal basis, his relationship with the bank was handled on a one to one basis and generally in a relatively informal context and he recites certain social settings for a variety of exchanges. A further affidavit was filed on behalf of the plaintiff by Moira McKay, solicitor for the plaintiffs, in response to criticisms made on behalf of the defendant that Mr McDonald had not made any affidavit on behalf of the plaintiffs or confirmed that he agreed with Mr Walsh. As an ex-employee of the bank it was suggested that Mr McDonald was not as available to the bank. Ms McKay responded by referring to a

telephone conversation that she had had with Mr McDonald in which Mr McDonald confirmed that he agreed that he had given the assurances that Mr Walsh had stated in his affidavit had been received from Mr McDonald.

[19] I move from the factual background to consider whether or not I should grant the injunction. The basis on which injunctions are granted was not a matter of dispute and is based on the American Cyanamid principles ([1975] AC 396) of considering whether there is a serious issue to be tried and whether the plaintiff would be adequately compensated by damages and whether the balance of convenience lies in favour of granting or refusing the injunction. The overriding consideration is to determine which course of action would be likely to involve the least risk of injustice if that course of action turned out to be wrong, that is, would the granting of the injunction cause a greater injustice to one party or the other than the refusal to grant the injunction.

[20] On the first matter as to whether there is a serious issue to be tried it is necessary to identify the cause of action. The plaintiffs rely on the representations which are said to have been made by Mr McDonald on behalf of the bank as amounting to estoppel and misrepresentation and breach of contract. There were written agreements which laid down certain terms and the defendant contends that what is sought to be achieved by the plaintiffs' claim is to establish a legal basis on which the various assurances alter the written terms. The plaintiff contends that there are various prisms through which their claims might be achieved. One is estoppel, namely that the bank, having given assurances, should be prevented from relying on strict legal entitlements under the contractual arrangements. Mr Shaw for the bank contends that if there is to be reliance on assurances it is necessary to have precision in relation to the assurances that are said to have been given. Much has been made of the content of the assurances which are said to have been given and whether or not they are sufficient to form a basis for the plaintiff's claim in estoppel or misrepresentation.

[21] The defendant referred to Snell's Equity (32nd ed.) paragraph 12-010 in relation to estoppel to indicate that the promise that is alleged to have been given must be clear and unequivocal. Although it is not necessary to achieve the same certainty that would be required to satisfy the contractual doctrine of certainty of terms, it must have at least as much precision as would be needed for a variation of the contract and it must be sufficiently certain to be enforced. The plaintiffs referred to Chitty on Contracts (30th ed.) paragraph 3-091 where it is stated that if the statement could not have contractual force because it is too vague or if it was insufficiently precise to amount to an offer or if it did not amount to an unqualified acceptance, it would not bring the equitable doctrine into operation.

[22] Mr Walsh does not contend that Mr McDonald assured him of a 20 year term. Mr Walsh assumed, by reference to practice with the bank in relation to some of the loans that he had obtained, that he would not be limited by an agreement for a 3

year term and that longer terms would be available and 20 year terms may be available but he did not assert that Mr McDonald assured him of a 20 year term. The objective assessment of the representations that are said to have been given must be that Mr McDonald offered assurances that there would be an extended loan at the conclusion of the 3 year period if the property was not sold. The duration of that extended loan period and the terms on which the extended loan might be granted were not specified. This amounts to recognition that there would be negotiation about those matters in the event of a non sale of the property and the requirement for an extended facility from the bank.

[23] The plaintiffs rely on the documents where they state a fall-back position for an extended loan. The defendant relies on the documents to confirm the 3 year term and the absence of any terms for an extended loan period. The documents also confirm discussion of the position in the post 3 year period. I do not accept, as Mr Shaw contends, that the documents flatly contradict the idea of an extended loan period. I conclude that the documents tend to support the representations that the 3 year term was not a final fixed term and that further arrangements would be made in relation to an extended loan period if there was no sale at the end of the period. There was no arrangement as to what that extended period would be or as to the terms of the extended loan. Those were clearly matters to be discussed if the situation arose. I accept that there was sufficient precision in the assurances in that there would be an extended facility in the absence of sale but there was no precision as to what would constitute that extended facility.

[24] An important point raised by the defendant was that the plaintiffs did not raise this issue of the assurances until proceedings were issued. On behalf of Mr Walsh it is said that it would have been economic suicide to raise the issue in the discussions with the bank as the bank would have liquidated the companies and bankrupted the plaintiff. I do not doubt that had there been a breakdown in the discussions about repayment of the loans that such moves by the bank may have been the eventual outcome but I am not persuaded that the risk of that outcome provides a sound basis for failing to mention the assurances during the discussions. The plaintiffs could have moved quickly to obtain an injunction had there been a breakdown and indeed they did move quickly as events unfolded to prevent actions by the bank. I do recognise that had Mr Walsh disclosed his hand to the bank he and the bank might have been in a race to protect their respective positions by recourse to legal action. Thus there is a question mark over the failure to raise this issue during the negotiations. The defendant implied but did not assert that this issue of the assurances may have been thought up later when negotiations failed. If that implication is to be developed it will require examination and I am not in a position to reach any conclusion on the matter on affidavit. The alternative is that the plaintiff withheld the information about the assurances for tactical reasons. Mr Walsh contends that disclosure during negotiations would have been economic suicide. There may have been other tactical reasons as well. What reasons Mr Walsh had and whether he was justified require examination.

[25] While there remains a question about the lateness of raising with the bank the issue of the assurances this does not diminish the serious issue to be tried. Indeed it becomes part of a serious issue to be tried. Overall there are factual and legal disputes as to estoppel and misrepresentation and breach of contract. As stated above the assurances are certainly not precise as to period or terms of any extended loans. I am, however, satisfied that there is evidence that the assurances were precise to this extent, that there would be a further loan period and that terms would be arranged if there was no sale of the properties at the conclusion of the 3 years. This is not a case where the defendant's representative involved in the discussions with the plaintiff contradicts the claims that there were such assurances. Mr McDonald gives positive support to the plaintiffs' position. Mr Walsh states that he relied on the representations and if he received representations of the type which are alleged in the circumstances, namely that there would be a period of extended loans on terms that had yet to be arranged, it would have been reasonable for him to have relied on those assurances.

[26] Accordingly I conclude that there is a serious issue to be tried as to whether the assurances or representations that there would be a further period for an extended loan if property was not sold and that the terms of any extension had yet to be agreed if there was no sale, are capable of making out the plaintiff's case on estoppel or misrepresentation or breach of contract. The precision exists in relation to the fact that there was to be an extended loan in the event of no sale. It is correct that there is no precision in relation to the terms of that extended loan but I do not believe that that defeats the existence of a serious issue to be tried. I will not, as Mr Shaw suggests, reject on paper the contentions that are being made on behalf of the plaintiffs.

[27] I move on to consider whether damages are an adequate remedy. As far as the plaintiffs are concerned I am satisfied that damages would not be an adequate remedy. If there were to be no injunction there would be a winding up of the companies and the bankruptcy of Mr Walsh. In relation to the defendant's position there is a question mark over the plaintiffs' capacity to give an undertaking as to damages in the event that an injunction is granted. The defendant says that the plaintiffs' undertaking would be worthless as the plaintiffs have negative worth. At present the plaintiffs are servicing the debt in relation to interest payments and in relation to capital repayments. If the grant of an injunction results ultimately in a loss to the defendant I consider that any such loss will be modest compared to the loss that would be suffered by the plaintiffs if the injunction were not to be granted. In relation to damages the balance lies with the plaintiffs.

[28] In relation to the balance of convenience, the debt is being serviced, there is a plan for repayments to continue, it is not asserted that the payment plan is not sustainable, that plan involves substantial payments of interest and capital, on the plaintiffs' case the payment plan is capable of discharging the debt if sufficient time

is available. My conclusion is that the status quo is the preferred way forward pending a determination of the issues between the parties. Accordingly I propose to maintain the injunction pending the trial of the action.