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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:*	**07/06/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

HENRY McKEOWN AND AMANDA McKEOWN

Plaintiffs/Respondents

and

AIB GROUP (UK) PLC

Defendant/Appellant

_____

Mr Shiels (instructed by … Solicitors) for the Plaintiffs/Respondents
Mr Stevenson (instructed by DWF Solicitors) for the Defendant/Appellant

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KINNEY J

Introduction

[1] This is an appeal brought by the defendant/appellant (the Bank) under the provisions of Order 58 against the judgment of the Chancery master made on 6 December 2022 whereby he dismissed the Bank's application to strike out the plaintiffs' claims pursuant to Order 18 rule 19 and/or pursuant to the court's inherent jurisdiction, and also the Banks application for summary judgment on its counterclaim under Order 14.

[2] The background facts are set out in some detail in the pleadings which I have considered. The brief history of the matter is that the plaintiffs had taken out a mortgage with the Bank secured on their home. This was taken out in 2004. The plaintiffs subsequently secured facilities from the Bank in 2007 to purchase a buy to let property. The purchase price of the buy to let property was £195,000. However, the security used by the Bank was only partly against that property being the sum of £75,000. The balance of the purchase monies, £120,000, were secured against the plaintiffs' family home as a further advance.

[3] In 2008 the plaintiffs tried to sell the buy to let property due to concerns about affordability. In 2012 the plaintiffs approached the Bank wishing to take steps to reduce the capital sum owed to the Bank and potentially to sell the property. It would appear there was in effect a desire to restructure. Whilst there is then factual dispute between the parties, it is the plaintiffs' case that the Bank refused to engage with them which resulted in the first name plaintiffs' mental health suffering a decline.

[4] In 2012 the plaintiffs issued proceedings against the Bank in relation to the advice given by the Bank to the plaintiffs in and around 2006 and thereafter. Those proceedings were compromised in 2014 on the basis that the writ would be withdrawn, and the defendant bear its own costs.

[5] The plaintiffs fell into arrears on repayments on the loans and in December 2013 the Bank issued Order 88 proceedings to seek possession of the property. The plaintiffs then issued a further writ in April 2015 and the Order 88 proceedings were overtaken by those events. The Bank filed a defence and counterclaim seeking an order for possession of the family home.

[6] The 2015 writ refers to advices given by the Bank to the plaintiffs in May 2012 but makes no explicit reference to the buy to let transaction in 2007. However, the statement of claim as amended does include claims relating to the purchase of the buy to let property in 2007 along with the Bank's failure to engage with the plaintiffs when they fell into arrears in 2012. The statement of claim has been further amended to incorporate claims for breach of the Financial Services Authority's Mortgage Conduct of Business Rules (MCOB) and a claim for failing to discharge the obligations on the Bank under the Pre-action Protocol for Possession Proceedings Based on Mortgage Arrears in respect of Residential Property promulgated in August 2011.

[7] The plaintiffs allege that the Bank breached its fiduciary duty to the plaintiffs in not engaging with them in 2012 and specifically in not engaging to explore restructuring options. This duty was owed in negligence but also by the terms of the MCOB and the pre-action protocol. The Bank denies the allegations made by the plaintiffs. It also contends that the plaintiffs are seeking to revive issues which were articulated in the earlier 2012 writ and disposed of on the withdrawal of those proceedings in 2014. Furthermore, any issue relating to the events of 2006 and 2007 were statute barred by 2015. The Bank also argues that the pleaded allegations relating to 2006 and 2007 cannot be revived in the defence to its counterclaim.

[8] The buy to let property was sold in 2015 by the Bank for £69,000 leaving a considerable shortfall on the loans secured in relation to that property.

[9] It is the plaintiffs' case that they have suffered loss due to the negligence, breach of fiduciary duty, breach of contract and breach of statutory duty by the Bank.

[10] There was no dispute on the legal principles that apply in relation to an application for strikeout:

(i) For a strike out application to succeed the plaintiffs' case must be shown to disclose no reasonable cause of action. The cause pleaded must be unarguable or almost uncontestably bad (*Lonrho v Fayed* [1992] 1 AC 448).

(ii) All of the averments in the statement of claim must be assumed to be true and a pleading should only be struck out in plain and obvious cases (*O'Dwyer v Chief Constable* [1997] NI 403).

(iii) So long as the statement of claim or the particulars disclose some cause of action, or raise some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (*Rush v Police Service of Northern Ireland and the Secretary of State* [2011] NIQB 28).

(iv) The summary jurisdiction of the court is not intended to be a minute and protracted examination to see whether the plaintiffs really have a cause of action. To do that is to usurp the position of the trial judge (*Rush* above).

[11] In this matter therefore I am entitled to take the plaintiffs' case based on the pleadings and I should take those pleadings at their height without the need for evidence. I should also consider that any inadequacy in the way in which the plaintiffs' case has been set out can be cured by amendments to the pleadings.

[12] The plaintiffs' case is broadly based, and centres on two particular sequences of events in and around 2006 and then again in 2012. It is the plaintiffs' case as pleaded that I must consider. I am satisfied that the plaintiffs have an arguable case in relation to the events in 2012. Mr Stevenson sought to persuade me that there was no possibility in law of a fiduciary duty or any duty in negligence arising on the facts. I do not accept that argument. I consider that it is a matter that should properly be considered after a full hearing.

[13] There are in addition the issues that arise from the apparent failure of the Bank to adhere to the terms of the rules and guidance contained in the MCOB and the pre-action protocol. Mr Stevenson argues that the MCOB does not apply to the circumstances. Again, I consider that that is a matter that should properly be considered at trial. I am satisfied that the issues around any potential liability for psychiatric injury should similarly be addressed at trial.

[14] I am satisfied that there are a number of issues which arise from the events of 2006 and 2007. There are unusual aspects to the transaction at that time. Again, taking the plaintiffs' case at its height there was 100% borrowing to purchase the buy to let property, but the majority of that borrowing was secured against the plaintiffs'

family home leaving only a loan to value ratio against the buy to let property of less than 40%. The first plaintiff has stated in replies to the Bank's Notice for Further and Better Particulars that he was told there was a brand-new mortgage product from the Bank whereby the plaintiffs could borrow the 20% deposit needed for the buy to let property against their family home. This part of the loan would be interest only for five years and the plaintiffs could exit at any time without penalty. The defendant has been unable to explain why the lending was secured primarily against the family home. The plaintiffs also allege that they simply signed application forms which were largely incomplete, and these were subsequently completed by Bank officials.

[15] I am satisfied that in relation to the events of 2006 and 2007 there can be no freestanding claim made by the plaintiffs against the Bank. Those matters were the subject of the earlier writ which was specifically compromised by the parties and in any event were clearly statute barred long before the writ of 2015 was issued. No counter argument was made in relation to these points. I am therefore satisfied that the elements of the plaintiffs' claim which relate to freestanding claims arising out of the events of 2006 and 2007 are unarguable and should be struck out. These are contained in the statement of claim at para 20 (a) to (k) and also under the heading "Particulars of Breach of Statutory Duty", at paras (a) to (f).

[16] I refuse the application to strike out the plaintiffs' claims in so far as they relate to the events of 2012 and thereafter as pleaded.

[17] I am further satisfied that the plaintiffs are entitled to raise the issues relating to the events of 2006 and 2007 in relation to their defence of the counterclaim brought by the Bank. In those circumstances I do not accede to the Bank's application for summary judgment on its counterclaim.