Neutral Citation No. [2015] NIMaster 13

Ref:	**12/016308**

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

Delivered:	**12/03/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

AIB GROUP (UK) PLC

Plaintiff;

and

STEPHEN DONNELLY AS PERSONAL REPRESENTATIVE OF PETER DONNELLY

Defendant.

RULING

MASTER HARDSTAFF

[1] In these proceedings the Plaintiff seeks possession of a property at 10 Corrainey Gardens, Dungannon ("the Property"). The registration of ownership is in the name of Peter Donnelly now deceased. The Plaintiff's claim for possession is premised on a Deed of Charge dated 30 June 2006 in which Peter Donnelly is identified as the borrower/chargor and Stephen Donnelly his son is identified as the Guarantor. Stephen Donnelly has since his father's death been appointed a personal representative of his estate and is in that capacity defending these proceedings.

[2] Two advances of borrowings were made to Peter Donnelly firstly on 30 June 2006 for £48,450.00 and then on 18 June 2008 for £15,000.00.

[3] The Property was the deceased's principal private residence consisting of a dwelling-house and some modest grounds around it. It was purchased from the

NIHE under the tenant discount scheme, funded in part by the 2006 advance from the Plaintiff.

[4] The Defendant now seeks to defend these proceedings. He argues that the borrowings should not have been made available to his father. In particular, at paragraph 4 of his affidavit of 6 October 2014 he avers "when my father took out these two mortgages we believed that the payment would be £222.50 on the 2006 mortgage and £79.38 on the 2008 mortgage. It was not explained to him or to me that these amounts were dependant on a term of the mortgage that the payments would be reduced for the first three years under a "slow start" which expired in 2009. The payments then shot up to £860.52 for the 2006 loan and £260.72 for the 2008 loan amounting to a total loan amount of £1,021.24 per month". He says that that total eventual required repayment of £1,021.24 per month was wholly unsuitable for a man aged 59 who was not in employment in 2006. His source of income in 2006 was state benefit. He accepts that he took on the role of guarantor but also argues that his income would not have been sufficient for the eventual total repayment amount.

[5] He therefore seeks to defend under two grounds. Firstly, that the mortgage arrangements are contrary to the requirements placed upon a lender by the general regulatory regime and in particular by the Consumer Credit Act 1974 ("the Act"). Specifically, the Defendant argues that section 140(A) of the Act provides relief to a borrower such as his father and his father's estate, in the particular circumstances of the borrowing, by allowing the Court to declare that the relationship between the creditor and the debtor was an unfair relationship. Following such a declaration the Court would then be entitled to apply a broad range of reliefs including interfering, to the Defendants advantage, with the terms and conditions of the mortgage contract, reducing interest rates, extending time for repayment and in certain instances reducing by court order the balance of the debt to nil.

[6] If the Defendant is unsuccessful in establishing an unfair credit relationship in respect of the 2006 advance, he further argues that the 2008 advance in particular, is a second and separate loan with its own securing arrangements and that as such can be looked at by the court differently than the 2006 loan.

[7] Secondly, the Defendant argues that in addition to the relief provided by the Act the circumstances surrounding the loan advances clearly give rise to breaches under the Financial Services and Markets Act ("FSMA") and the Mortgage Conduct of Business Regulations ("MCOB"). These breaches, he says, evidence the unfairness in the relationship per se. Moreover, they would form a cause of action to recover

damages or establish an entitlement to "set off" and should therefore enable this Court to stay the current proceedings.

[8] Apart from the issues identified above, the Defendant requests that the Court conduct an adjudication to determine whether, if a product is regulated by the FSMA and MCOB, that necessarily excludes the product from regulation by the Act, and Section 140(A) thereof in particular. The Defendant argues that there is no such exclusion. In this respect the Defendant relies heavily upon the wording of Section 16(7)(a) of the Consumer Credit Act 1974 which states:

> "Nothing in this section affects the application of sections 140(A) to 140 (C)".

[9] The Defendant submits that this maybe an ambiguity which needs clarified.

[10] Prior to oral submissions, the Court has had the benefit of substantial skeleton arguments from Mr Keith Gibson BL on behalf of the Plaintiff and Mr Kevin Morgan BL on behalf of the Defendant.

[11] In his rejoinder skeleton argument, filed on 9 February 2015, Mr Gibson very helpfully sets out the background to the coming into effect of section 140(A) of the Consumer Credit Act. This is the Statutory provision which creates the concept of an unfair credit relationship. It was inserted into the Act by Section 16 of the Consumer Credit Act 2006. It became operative from the 6 April 2007 by virtue of the Consumer Credit Act 2006 (Commencement No 2 and Transitional Provisions and Savings) Order 2007.

[12] As I have said, Section 140(A) introduced a new concept into the legislation; that of an unfair relationship between the parties to a credit agreement, and permits the Court to take steps under section 140(B) to remove that unfairness. Those steps I have referred to above. Section 140(A) replaced sections 137 to section 140 of the Act which limited the scope of the Courts powers to reopening extortionated credit bargains. It is important to note that the repealing arrangements were made to include transitional provisions. There was therefore a brief period of time between 6 April 2007 and 6 April 2008 when agreements which pre-dated 6 April 2007 continued to be subject to scrutiny under the Extortionate Agreement Provisions. However, such a situation clearly does not apply in this case. Having created the concept, Sections 16(A), 16(B), and 16(C) as incorporated into the Act define a range of exemptions. Each one of those sections commences with a statement to the effect "this Act does not regulate …….". The provisions then go on to set out the

characteristics of certain agreements which are exempt. Mr Gibson submits to the Court that the agreements in this case are so exempted. Mr Morgan argues, however, that section 16(7)(a) specifically states that "nothing in this section affects the application of sections 140(A) to section 140(C)". He argues that even if the Court were to find that the agreements in this case were exempt by virtually certain of the exempting provisions, it can still consider a consumer credit agreement by reference to section 140(A) to (C). Quite so, I do not disagree with that argument. However, Mr Morgan evidently fails to appreciate where that takes him. If the Court goes to section 140(A) and subsection (5) thereof it is clear that, and I quote, "an order under section 140(B) shall not be made in connection with a credit agreement which is an exempt agreement [for the purposes of chapter 14(a) of part 2 of the Regulated Activities Order by virtue of article 60(c)(2) of that Order, Regulated Mortgage Contracts and Regulated House Purchase Plans"]. The footnote to Mr Gibson's skeleton argument at page 69 helpfully states that the words in square brackets are substituted by the Financial Services and Markets Acts Regulated Activities (Amendment) (No 2) Order 2013 Article 20(39) as of 1 April 2014.

[13] Mr Gibson argues, and I agree, that it is not possible for a Court to declare a credit relationship unfair in respect of exempt agreements under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. He argues, and I agree, that section 140(A)(5) makes clear that Land Mortgages and Regulated Home Purchase Plans, which are regularised activities for the purposes of the Financial Services and Markets Act 2000, are regulated by the Financial Conduct Authority under the Financial Services and Markets Act 2000. They are not regulated by the Consumer Credit Act. Section 60(c) of Part 2 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 makes clear that a credit agreement is an exempt agreement if it is a regulated Mortgage Contract or regulated Home Purchase Plan. A Regulated Mortgage Contract is defined under section 61 thereof.

[14] Mr Gibson argues, in my view correctly, that the Defendants mortgage arrangements both in 2006 and 2008 were such a regulated mortgage. The deceased purchased his former Housing Executive property under the Tenant Discount Purchase Scheme with the benefit of the initial advance in 2006 and took a further advance secured by the 2006 Charge in respect of the same property. Section 61 of the Financial Services and Markets Acts (Regulated Activities) Order 2001 at sub-paragraph (ii) states "the obligation of the borrower to repay secured by First Legal Mortgage on land (other than time-share accommodation) in the United Kingdom, at least forty per cent of which is used, or is intended to be used as or in connection with a dwelling by the borrower ….".

[15] It therefore seems to me that the Defendants singular reliance on section 16(7)(a) of the Act, rather than providing a gate-way for the Court to examine this agreement within the parameters of unfair credit relationships provisions, in fact, takes the court to the specific provision at section 140(A)(5) which closes the door on the Defendant in this case.

[16] The 2006 Charge which is a first charge was created consequent upon a borrowing specifically to purchase a dwelling-house. Significantly, more than forty per cent of the land the subject of the 2006 charge is used for that purpose. The further advance made in 2008 was likewise secured by the 2006 Charge as it is an all monies charge. No subsequent charge document was necessary. It therefore follows that it is unnecessary for this Court to determine whether, if the 2008 loan had been separately secured by a second Charge, that per se would affect the exemption envisaged by sub-section (5) of section 140(A). Section 61 sub-section (4) states:

> "for the purposes of paragraph 3(a)(2).
> (a) A first legal mortgage means a legal mortgage ranking in priority ahead of all other mortgages, if any, affecting the land in question where mortgage includes a charge and (in Scotland) a heritable security".

It seems to me that the Plaintiff may well have had difficulty in arguing against the Defendant's seeking relief under the unfair credit relationship provisions, if in fact, the 2008 advance had been taken and secured by a second charge, as that second charge would not have ranked in priority ahead of all other such charges, namely, the 2006 Charge.

[17] In considering the matters at hand I have also taken some time to research around the coming into effect of the 2006 legislation. It is apparent from the Parliamentary debates that Parliament intended that the 2006 amendments would better set the Consumer Credit Act in the context of broader regulation for specific products such as dwelling-house mortgages then existing. Mr Morgan seeks to make the most of section 16(7)(a). He refers the Court to Fisher and Lightwoods Law of Mortgages 14th edition paragraph 20.30. …… "It should, however, be noted that the powers of the Court in relation to unfair relationships apply even to exempt agreements." I however take the view that such a general proposition is not inconsistent with the necessity of applying section 140(A) in its entirety including when appropriate section 140(A)(5).

[18] Moving then to what does regulate the agreements to which the Defendant is subject. The Defendant says it is clear that the mortgage agreements including the agreement for the further advance in 2008 are regulated by the Financial Services and Markets Act 2000. I agree. In particular, FSMA provides for an award of damages in respect of a breach of any of the FCAs Regulations or Rules, of which the Mortgage Conduct of Business Regulations is one, as per section 138(d) of that Act. I should say, that in view of my decision above in respect of the applicability of the provisions relating to unfair relationships, I do not consider that any evidence in this case of unsuitable or irresponsible lending takes the defendant anywhere in respect of the unfair relationship provisions. I do not have to consider whether evidence of such matters evidences unfairness in the relationship between the parties in these proceedings. Rather, the Defendant may have grounds if such breaches occurred for mounting an action against the Plaintiff by Writ. There are obvious difficulties in that regard as identified in the case of Healy v Stepstone Mortgage Funding Limited [2014] 1EHC 134 which, at the least, casts very serious doubt on whether a cause of action by way of a tortious claim for reckless lending can actually arise. Further difficulties may arise for the Defendant in respect of the limitation period which might apply to such an action.

[19] It is not, however, for me to unnecessarily speculate as to the outcome of such proceedings, suffice to say that it is immediately apparent from examination of the mortgage facility documentation in this case that it was clear from the outset that smaller monthly repayments applied in respect of both advances for only a short period of time. The Plaintiff could at least be expected to argue, with some force, that the repayment terms and arrangements were clearly set out in writing beyond any doubt. Further in both facility letters there are a number of statements in bold print, namely "rates may increase by much more than this so make sure you can afford the monthly payment", "make sure you can afford your mortgage if your income falls", "your home may be repossessed if you do not keep up repayments on your mortgage". Reference is also made to the FSA's information sheet "You can afford your mortgage now but what if…..". Further at the end of both facility letters the following statement is included "I/We have received read and understood the terms of this formal offer of mortgage the general and other conditions referred to above and as detailed in the accompanying document(s). Accordingly, I solely/we jointly and separately agree to carry out and perform all the obligations contained or referred to in (a) this offer; (b) the general conditions; …." It seems therefore to me that the Defendant would have very considerable difficulty in bringing home his assertion that neither he nor his late father were aware that the total repayment would increase to the extent that it did. It should also be noted, as pointed out by Mr Gibson, that in fact the mortgage payments were maintained for a period of six

years before there was any default; well into the period of the increased repayment amount.

[20] In any event, the extent to which I am entitled to consider such matters is in my view limited to the issue of whether there should be any stay upon the current proceedings, taking account the possible routes for relief properly open to the Defendant.

[21] Mr Morgan seeks to argue that section 86(3) of the Judicature (NI) Act 1978 provides a broad ranging discretion which may be exercised on equitable grounds. However, the Judicature Acts both 1970 and 1973 clearly set out, in section 36 and section 8 respectively thereof, the scope of the discretion to stay which this court has in possession cases. Suffice to say that where I satisfied that the Defendant was likely to receive within a short period of time a significant sum of compensation or a "set-off" of the debt because of same, which would be applied to reduce the debt then I would in my view be entitled to stay these proceedings. That is plainly not the case.

[22] Further, it is important always to remember, as argued by Mr Gibson, that any potential claim as against the Plaintiff for an award of damages exists over and beyond any possession of the property and subsequent sale. A fortiori, there is no prejudice to the Defendant or the estate of the deceased in pressing on with the Plaintiffs entitlement to possession. Indeed, any right to a "set-off" or claim for damages must be seen in the context of the specific statutory provisions of the Financial Services and Markets Act, Further, the common law position is set out and reiterated in Bank of Ireland v Walker [2013] NICA 2 in which the Court of Appeal in Northern Ireland concluded that any claim under s 150 of FSMA is for damages only and cannot defeat a claim for possession. In short therefore I shall order possession of the subject property to the Plaintiff with an extended stay, taking into account all of the surrounding circumstances, of three months upon enforcement.