

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (COMMERCIAL)**

**THE MORTGAGE BUSINESS plc**

**Plaintiff**

**-v-**

**GILBERT NESBITT and CHRISTINE FARRELL**

**practising as WILSON NESBITT, Solicitors**

**Defendants**

**WEATHERUP J**

[1] This is the defendants' application to strike out the plaintiff's proceedings on the basis that they disclose no reasonable cause of action and are an abuse of process. In the alternative the defendants apply for the hearing of preliminary issues as to whether the defendants owe the plaintiff a duty of care, if so, whether the losses sustained by the plaintiff are foreseeable and whether the plaintiff enjoys a cause of action against the defendants for breach of trust. Mr McMahon represented the defendants and Ms Simpson appeared for the plaintiff.

[2] The defendants' grounding affidavit sets out that in April 2007 the defendants were instructed by Bank of Scotland to act in the re-mortgage of a property owned by a Thomas Owens. The property was subject to an existing mortgage with the plaintiff. The defendants were instructed to discharge the plaintiff's mortgage and register a mortgage for Bank of Scotland.

[3] Mr Owens owned a second property that was subject to a mortgage with a different mortgagee Preferred Mortgages Ltd. The defendants drew down the mortgage monies from Bank of Scotland, discharged the Preferred Mortgages

mortgage on the second property and registered Bank of Scotland's mortgage against the first property, giving Bank of Scotland second priority to the plaintiff's mortgage. Mr Owens executed a charge over the second property in favour of Bank of Scotland. It is claimed that Bank of Scotland is subrogated to the rights of Preferred Mortgages Ltd in respect of the second property having redeemed the mortgage.

[4] Bank of Scotland issued proceedings against the defendants claiming negligence and breach of retainer by the defendants in redeeming the mortgage on the second property and failing to ensure that Bank of Scotland held a first charge over the first property. Further Bank of Scotland claimed that the monies advanced to the defendants constituted a trust and that in failing to redeem the mortgage in respect of the first property the defendants acted in breach of trust.

[5] The plaintiff brings the present proceedings against the defendants claiming that the plaintiff was owed a duty of care by the defendants by reason of the defendants knowledge of the circumstances relating to the advance from Bank of Scotland, in particular that the advance was to discharge the plaintiff's mortgage, that the mortgagor would not have had any monies to repay the plaintiff other than by relying on the advance from Bank of Scotland, that the plaintiff's mortgage would not be repaid unless the defendants ensured that the loan from Bank of Scotland was used to repay the plaintiff's mortgage, that the plaintiff was relying on the defendants to ensure the monies advanced by Bank of Scotland were used to repay the plaintiff's mortgage and that failure to ensure repayment of the plaintiff's mortgage would cause the plaintiff to sustain loss and damage.

[6] Further, the plaintiff claims breach of trust as the beneficiary of the trust monies advanced by Bank of Scotland and the defendants knew that the plaintiff would sustain loss if the defendants did not use the monies in accordance with the retainer and the trust.

[7] The defendants' refer to three tests for establishing whether a duty of care arises in negligence. The first approach is whether the defendants assumed responsibility to the plaintiff ('the assumption of responsibility approach'). The second approach is whether the loss sustained by the plaintiff was a reasonably foreseeable consequence of the defendants' actions, whether there was sufficient proximity between the parties and whether it was fair and reasonable to impose a duty of care ('the policy approach'). The third approach is the incremental test by which one proceeds by analogy with established categories of negligence ('the incremental approach').

[8] In relation to the assumption of responsibility approach the defendants contend that there are two core areas in which that test has been applied, being where there is a relationship that is equivalent to contract, namely a fiduciary relationship or where the defendant has voluntarily answered a question or tendered skilled advice or services in circumstances where he knew that an

identified plaintiff would rely on his answers or advice. According to the defendants neither of the core areas arises in the circumstances of the present case.

[9] In relation to the policy approach, the defendants contend that the losses allegedly suffered by the plaintiff were not foreseeable, that there was no proximity or neighbourhood between the plaintiff and the defendants and that there is no reason in policy or principle for imposing a duty of care.

[10] On the incremental approach the defendants contend that there is no established duty imposed on an agent to a third party lender or creditor and if a duty of care were to be imposed in the present case it would represent a significant extension of the law of negligence.

[11] The plaintiff refers to White v Jones [1995] AC 207. A testator executed a will disinheriting the plaintiff's two daughters. A reconciliation followed and the testator resolved to make a new will to include legacies to the daughters. The testator gave instructions to his solicitors to prepare a will accordingly. However the testator died without the new will being executed. A majority of the House of Lords held that the assumption of responsibility by a solicitor to his client who had been given instructions for the drawing of a will extended to an intended beneficiary under the proposed will. Lord Goff spoke of a lacuna in the law which needed to be filled -

“In the forefront stands the extraordinary fact that, if a duty is not recognised the only persons who might have a valid claim (ie the testator and his estate) have suffered no loss, and the only person who has suffered a loss (ie the disappointed beneficiary) has no claim: see Ross v Caunters [1980] Ch 279, 330A per Sir Robert Megarry V-C. It can therefore be said that, if the solicitor owes no duty of care to the intended beneficiaries, there is a lacuna in the law which needs to be filled. This I regard as being a point of cardinal importance in the present case.”

[12] Ms Simpson on behalf of the plaintiff contends that such a lacuna would exist in the present case if the solicitors did not owe a duty of care to the bank. Ms Simpson's argument proceeds on the basis that proceedings have been issued against the defendants by Bank of Scotland (which proceedings remain extant) but there has been no admission of liability by the defendants but rather blame attributed by the defendants to Bank of Scotland. Further the defendants claim that Bank of Scotland is subrogated to the rights of the mortgagee in respect of the property and the value of the Bank of Scotland claim is said to be reduced or subsumed by the value of the subrogated claim. The plaintiff's argument proceeds on the basis that Bank of Scotland have paid monies to the defendants to pay off the mortgage of the plaintiff and if the defendants continue to deny liability to Bank of Scotland the plaintiff claims to be entitled to the monies advanced to the defendants

to be paid to the plaintiff. The plaintiff contends that the issue of proceedings on behalf of the plaintiff as mortgagee would not be required if the defendants clarified the position on liability and quantum in relation to the Bank of Scotland claim. On that basis these proceedings are issued on a contingency.

[13] The plaintiff contends that a duty of care can arise in respect of a third party who has relied on the service provided by the defendant, relying on Hedley Byrne v Heller [1964] AC 465 and the assumption of responsibility. Further the plaintiff contends that a duty of care may arise even in circumstances where there has been no reliance by the plaintiff, relying on Penn v Bristol West Building Society [1996] FCR 729. With reference to White v Jones it is said that Lord Goff perceived there to be an injustice and considered that it was open to the House of Lords "to fashion a remedy", an approach which, it is said, the present case demands.

[14] It is therefore submitted by the plaintiff that there is a valid claim based on the Bank of Scotland having instructed the defendants to discharge the plaintiff's mortgage, their first charge to be replaced by the Bank of Scotland's first charge. Thus the defendants had clear responsibility to the plaintiff as the existing mortgagee. The relationship had all the indicia of contract save consideration. In the alternative there was the assumption of responsibility to the plaintiff by the defendants undertaking to discharge the monies that were due to the plaintiff mortgagee.

[15] The plaintiff perceives there to be a potential injustice if the defendants succeed in the defence of the claim by Bank of Scotland. In that event the present plaintiff would be unable to recover the value of the mortgage which the defendants failed to discharge, unless of course the plaintiff has its own remedy against the defendants. Thus the plaintiff regards the failure of the defendants to address the issue of liability or quantum in the Bank of Scotland action to be the occasion for these proceedings. Whether this claim is necessary depends on the outcome of the Bank of Scotland action. Thus the proper course is said to be to allow both claims to be listed at the same time with the action against Bank of Scotland to proceed first and these proceedings will not have to be considered at all if Bank of Scotland succeeds.

[16] I am satisfied that this is not a plain and obvious case to be disposed of under this summary process of striking out the pleadings. It is necessary to examine the circumstances and relationships between the parties more closely in order to establish whether the plaintiff has a reasonable cause of action. I accept the approach of the plaintiff that this will also involve a consideration of the circumstances and relationships that arise in the Bank of Scotland action. I am unable to conclude that the plaintiff has no reasonable cause of action based on establishing a duty of care or a breach of trust.

[17] I am also satisfied that this is not, at this stage, an appropriate case for the trial of the preliminary points set out by the defendants. Again the pending Bank of Scotland action will impact on how these proceedings might develop.

[18] In the circumstances I propose, in the first place, to adjourn the present applications to the conclusion of the hearing of the Bank of Scotland action. At that stage it may be appropriate to deal with the issues of duty of care and breach of trust, either by way of a strike out application or alternatively by way of preliminary points. However at this stage I consider the defendants' applications to be premature.