Neutral citation No: [2013] NIQB 26

Please also see [2013] NIQB 51 (Discovery No. 2)

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Ref:	**WEA8730**
Delivered:	**20/01/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN

DAVID CHRISTOPHER WALSH and Others

Plaintiffs

v

BANK OF SCOTLAND plc

Defendant

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(Discovery No 1)

WEATHERUP J

[1] The plaintiffs apply for specific discovery of documents. Mr Hanna QC and Mr Shields appear for the plaintiffs and Mr Shaw QC and Mr Colmer oppose the application for the defendants.

[2] The Statement of Claim sets out the plaintiffs' case as follows. The first plaintiff is a company director who is involved with the five plaintiff companies. The defendant bank operated in Northern Ireland as the Bank of Scotland (Ireland) Ltd and ceased to exist on 31 December 2010 when it became the present Defendant, Bank of Scotland plc. Mr Walsh on behalf of the plaintiffs dealt with Stephen McDonald a Lending Manager and Regional Manager for the defendant.

[3] Between 2002 and 2007 the plaintiffs completed a series of substantial banking transactions with the defendant. From 2005 the defendant provided facilities in excess of £76M to the plaintiffs for the purpose of various commercial property

transactions throughout the UK. It is the plaintiffs case that Mr Walsh for the plaintiffs and Mr McDonald for the defendant agreed that long term banking facilities would be provided by the defendant to the plaintiffs in respect of those transactions over a period of 20 years.

[4] In 2006 Mr Walsh approached Mr McDonald in relation to the proposed acquisition of a shopping centre in Norwich and in October of that year the second plaintiff was offered a loan of £6.2M to purchase the shopping centre. A facility letter of 3 October 2006 issued by the defendant provided terms for 3 years on the loan. The plaintiffs' case is that there were express assurances and representations made by Mr McDonald on behalf of the defendant that upon the expiry of the initial 3 year facility the defendant would grant a longer term facility to allow the second plaintiff to hold the asset in the event that it was not sold, should market conditions be unfavourable for disposal at that time.

[5] In 2007 Mr Walsh was invited by the defendant to a hospitality event and there it was suggested to him by Mr McDonald that there was a commercial property in Leeds that might be suitable for investment by the plaintiffs. Mr McDonald represented that the Bank would provide the finance for such an acquisition by the plaintiffs on a long term basis. The plaintiffs plead that Mr McDonald represented to Mr Walsh that the defendant had increased lending targets and Mr McDonald was under pressure to expand the loan book to key customers and Mr Walsh was a preferred customer. The Leeds transaction proceeded and a facility letter was issued by the defendant to the third plaintiffs for finance for 3 years. The plaintiffs' case is that Mr McDonald agreed and represented and assured Mr Walsh that the defendant would provide a longer term facility upon the expiry of the 3 years if the third plaintiff was not able to sell the property. The advance to the third plaintiff was £34.6M. The fourth plaintiff provided a £5M guarantee for the Leeds purchase and the fifth plaintiff provided a legal charge over properties in London by way of a cross company guarantee.

[6] In 2007 the first plaintiff and other members of a partnership organised a working capital facility on an interest only basis and again representations were made by Mr McDonald on behalf of the defendant as to the provision of long term facilities to the plaintiffs.

[7] In 2005 the sixth plaintiff obtained from the defendant a facility for £34.2M on an interest only basis for a 20 year term. In reliance on the defendant's waiver of any repayments of capital the sixth plaintiff made adjustments to commercial leases with the knowledge of the defendant.

[8] On 18 January 2012 the defendant informed Mr Walsh that the defendant had decided as a matter of policy to wind down and close the former Bank of Scotland (Ireland) Ltd loan book within a period of 12-18 months and that all the plaintiffs' facilities without exception would be required to be repaid.

[9] The plaintiffs base their case against the defendant on estoppel, misrepresentation, breach of contract and negligence. The plaintiffs obtained an interim injunction to restrain the defendant from requiring the plaintiffs to repay all the loans. In the meantime the plaintiffs continue to service the loans in accordance with the previous arrangements.

[10] There are two aspects to the proceedings against the defendant. The first aspect concerns the claim that representations were made by Mr McDonald on behalf of the defendant to Mr Walsh on behalf of the plaintiffs that long term facilities would be provided to the plaintiffs if properties were not sold, whatever the terms of the facility letters might state in respect of the term of each loan and that capital repayments would not be required while the plaintiffs continued to service the loans. The second aspect concerns the claim that in 2012 the defendant declared a policy that the defendant's loan book would be wound up over a period of 12-18 months, without exception. Both of these aspects are disputed by the defendant.

[11] Affidavits were filed by the solicitors for the respective parties setting out their claims and objections to specific discovery. Matthew Howse, solicitor on behalf of the defendant, summarised the defendant's position. The defendant denies that Mr McDonald made any representations to Mr Walsh as to the provision of long term facilities to the plaintiffs. The defendant asserts that the plaintiffs knew or ought to have known that Mr McDonald did not have authority to make such representations; that the representations are too uncertain to be capable of enforcement; that it was unreasonable for the plaintiffs to rely on the representations; that there is no binding agreement in respect of the provision of long term facilities. In respect of the second aspect of the case concerning the alleged fixed policy in 2012 the defendant denies that there is a 12-18 month fixed policy on closure of loans and also denies that Mr Walsh was told in 2012 that there was any such policy being operated by the defendant.

[12] The plaintiffs' application for specific discovery of documents contains a schedule of 18 categories of documents that are said to be relevant to the two aspects of the case outlined above. The defendant contends that the documents that are sought are not relevant to issues arising in the proceedings. For present purposes the issues are first of all whether the alleged representations were made by Mr McDonald, a matter denied by the defendant, and secondly, whether there is as alleged a fixed policy to close down all loans in 12 to 18 months, a matter also denied by the defendant.

[13] The first category relates to documents relating to the issue of incentivisation of staff to put profit before risk as is stated to have been referred to in an FSA report of March 2012 and in particular all documents disclosed to the FSA in relation to the culture within the defendant in relation to lending. The FSA report of March 2012 concerned the defendant's Corporate Banking Division. The findings in the FSA report include references to an aggressive high risk policy being undertaken that raised issues such as prioritising the development of relations with and the

facilitation of customers, increasing the appetite to lend, increasing the appetite to take on greater credit risk, fostering an attitude to optimism at the expense of prudence. The transactions that are relevant for the purposes of these proceedings took place in the International Division of the defendant and not the Corporate Banking Division. The plaintiffs regard this culture as pervading the International Division as well and it is pleaded that Mr McDonald asserted that he was being pressurised to increase the lending facilities.

[14] The defendant disputes that incentivisation documents are relevant to the issues in the action. The issue is whether Mr McDonald made the representations. Mr McDonald is now allied to the plaintiffs and states that he made the representations and incentives and the culture are relevant to his position. I conclude that the documents are relevant to the issue of whether the representations were made. Accordingly, I am satisfied that specific discovery should be made of category 1 to the extent that the documents relate to Mr McDonald.

[15] The second category of documents concerns what is called the 'Xtra Programme Bonuses'. The plaintiffs seek the documents on the basis that there was in place at the time a bonus programme for lending staff employed by the defendant. This was called the "Xtra" programme, which acronym stands for "Exceed Targets Receive Awards". This category raises the same issue as the first category dealing with incentives and culture. Again I am satisfied that the documents are relevant to the issue of the representations. Specific discovery will be ordered of category 2 to the extent that the documents relate to Mr McDonald.

[16] Categories 3 and 4 also go together. Category 3 seeks documents on the incentive scheme for Certus Ltd employees, servants and agents to achieve the wind down of the loan book, with particular reference to timeframe. Certus Ltd was said to be an organisation largely made up of ex-employees of the banks who were given the task of winding up the loans. Category 4 concerns the instructions to Certus at senior management level from Lloyds Bank/Bank of Scotland, as to the strategy in dealings with the loan book, in particular the timetable for exiting the loan book.

[17] These documents relate to the second aspect of the case relating to the fixed policy but also bear on the first aspect relating to the representations. The issue is whether there is such a fixed policy for a 12-18 month wind-up of loans. If such a fixed policy exists it might be said to be driving the denial of the representations alleged to have been made. Category 4 deals with strategy instructions for the closure of the loans. This is relevant to the existence of the fixed policy. If there are such strategy documents that would be sufficient to deal with the matter. It would not be necessary to look for an incentive scheme under Category 3. If there are no strategy documents it would be relevant to examine any indirect strategy through incentives to achieve the same result. In those circumstances the existence of an incentive scheme would be relevant to the issue. Specific discovery will be ordered of documents in category 4. If there are no strategy documents discovered there will be discovery under category 3.

[18] Category 5 deals with the tax advice to Lloyds Banking Group with regard to the Irish loan book. The defendant contends that in 2010 after arrangements were made for cross border merger the Bank of Scotland (Ireland) Ltd was dissolved without going into liquidation. Tax advice was sought in relation to the consequences of the implementation of the cross-border merger. The defendant claims legal advice privilege in relation to that advice prepared by solicitors. The issue concerns the alleged fixed policy to close down the loan book in a specified time where there may be tax incentives to wind up within that time. The defendant regards this claim as fishing and impermissible because there is no basis on which it is said that the defendant received tax advice relevant to the issue. A letter from solicitors on behalf of the plaintiffs outlined the basis on which they sought the documents. I do not find a basis for the existence of tax advice in respect of a timescale for closing down the loans. Insofar as legal advice exists it is subject to legal advice privilege in any event. The existence of accountant's advice, which would not be privileged, relating to the tax implications of a timescale for closing down the loans is entirely speculative. I make no order in respect of category 5.

[19] Category 6 concerns the direction to Lloyds Bank in 2009 by the European Commission to reduce its loan book by £181 billion and the impact of the direction on the Irish loan book. The defendant contends that the European Commission direction is publicly available. In that case category 6 does not require discovery and no order is made.

[20] Category 7 concerns documents relating to the inclusion of any of the plaintiff's properties in any of the Project Harrogate Schemes and particularly documents reflecting the decision to include such properties and subsequently to withdraw them from such projects. The Project Harrowgate Schemes involve a number of portfolios of loans sold by Lloyds Bank to a private equity group, Oaktree Capital, and it is believed that the loans which are the subject of this action, or some of them, had been included for sale in Project Harrogate and their subsequent exclusion may provide a motive or an explanation for the defendant's failure to honour the representations. Thus this category relates to the first aspect of the claim concerning whether or not the representations were made. The plaintiffs contend that involvement in the Harrogate Scheme may explain whether there were or were not such representations. I must confess I do not follow the link that the plaintiffs make between the existence of the Harrogate Schemes and the issue whether representations were or were not made. I have not been satisfied that the plaintiffs have made the case for discovery. I refuse specific discovery of Category 7.

[21] Categories 8 and 11 can be taken together. Category 8 refers to the disposal plan of the defendant, Certus and Lloyds Bank for the properties in the Irish loan book. Category 11 refers to any disposal plan that the defendant had for the plaintiffs' assets. The categories overlap and relate to the second aspect of the claim concerning the fixed policy. A disposal plan in either category must be relevant to that issue. I make an Order for specific discovery under categories 8 and 11.

[22] There is no issue now arising in respect of categories 9 and 10. Similarly there is no issue now arising in respect of categories 12 and 13. Categories 14 and 15 can be taken together. Category 14 relates to the minutes of the meetings which took place to discuss the loan applications, the renewals thereof and the extensions thereto. The plaintiffs' have the documents that were presented to the Credit Committee and the decisions of the Credit Committee but not any written record of the deliberations and discussions which took place at the Credit Committee. Category 15 concerns the handwritten notes and minutes of all meetings for which typed records have been produced. Mr Howse, solicitor for the defendant, avers at paragraph 17 of his affidavit that he is instructed that all relevant documentation has been provided on discovery, that minutes were not necessarily taken in all cases, for example in respect of simple decisions and he is therefore instructed that there are no further minutes pertaining to this case other than those already disclosed. In respect of category 15 Mr House exhibited certain handwritten notes for specified meetings that had not previously been discovered and stated that there were no further handwritten minutes available. Thus it is stated on affidavit that there are no further minutes of meetings and therefore I do not propose to make any order in respect of categories 14 or 15.

[23] The last item is category 16, which refers to a previous key word search as part of e-discovery that did not produce any emails from the higher level personnel in Edinburgh or Lloyds who had involvement in the decision making process when the facilities were granted, renewed or extended. The plaintiffs request under category 16 was therefore for the defendant to renew the e-discovery search for the higher level personnel. In order to narrow down the scope of that search the plaintiffs provided five names of those whom they believe would be involved in such decisions. The defendant contends that this is a disproportionate exercise in terms of effort and expense. As to whether the documents are relevant to the issues I am satisfied that this is relevant material because the decisions that were made in relation to the facilities made available to the plaintiffs were signed off outside Northern Ireland and the terms approved would be relevant to the representations made and indeed to the authority of Mr McDonald. If the work of retrieving relevant material connected to the five names is found to involve disproportionate effort or expense I would revisit category 16. For the present I am persuaded that limiting the discovery to five names will not be a disproportionate exercise.

[24] Categories 17 and 18 on the original list are not being pursued.

[25] Specific discovery is ordered of categories 1, 2, 3 (if there are no documents in 4), 4, 8, 11 and 16.