

APPROVED

[2020] IEHC 633

THE HIGH COURT

2018 No. 4896 P.

BETWEEN

GRAHAM FOSTER  
MICHELLE FOSTER  
JAMES HARRINGTON

PLAINTIFFS

AND

THE GOVERNOR AND COMPANY OF BANK OF IRELAND

DEFENDANT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 11 December 2020**

**INTRODUCTION**

1. This matter comes before the court by way of an application for the discovery of documents. The underlying proceedings concern a mortgage loan agreement (“*the loan*”) entered into between the plaintiffs and the defendant bank in 2004. It seems that the loan was used to purchase a residential property as an investment.
2. The gravamen of the plaintiffs’ case is that the bank applied the incorrect rate of interest for much of the loan period, with the result that the plaintiffs were overcharged by a sum in the order of €35,000. This overcharging is said to have had the consequence that it became unsustainable for the plaintiffs to service the loan, and they had to sell the mortgaged property. The plaintiffs seek to recover damages in respect of the loss of rental profits and the lost capital value of the mortgaged property.

NO REDACTION REQUIRED

## IDENTITY OF CORRECT DEFENDANT

3. Before turning to discuss the application for the discovery of documents, it is necessary first to highlight an issue which has been raised by the bank as to the identity of the correct defendant. It is the bank's position that the relevant mortgage loan was transferred to another entity, namely, Bank of Ireland Mortgage Bank, in July 2004. It is said, therefore, that the plaintiffs have joined the incorrect defendant to the proceedings. The position is put as follows by the bank in a letter to the plaintiffs' solicitor dated 3 December 2020.

“The Defendant has no documentation which would be amenable to an Order for Discovery. This will not come as a surprise to you. The liabilities of the Plaintiffs to the Defendant, and the rights and entitlements of the Defendant vis-a-vis the Plaintiffs were transferred – along with all documentation – to Bank of Ireland Mortgage Bank on 5th July, 2004. We wrote to you on 4th February, 2019 alerting you to the fact that the Plaintiffs had sued the wrong Defendant and offering to consent to a change in the title of the proceedings. For reasons which remain unexplained you declined this offer. As matters stand, in the event that the Plaintiffs obtain an Order for Discovery against the Defendant there will not be any documents in the possession or power of procurement of the Defendant, which will be responsive to any such Order. This – with respect – was always bound to happen if the Plaintiffs insisted on suing the wrong Defendant. The Defendant is concerned to avoid a situation whereby the Court makes a wasted Order. In the circumstances we confirm that we have instructions that Bank of Ireland Mortgage Bank will consent – even now – to being substituted in place of the Defendant in the event that the Plaintiffs wish to obtain an Order which will actually yield Discovery.”

4. Counsel for the bank, very properly, accepts that the question of whether the incorrect defendant has been joined is not formally before the court in the context of the discovery application. This issue was nevertheless brought to the attention of the court lest there be any suggestion in a *subsequent* application—whether to join Bank of Ireland Mortgage or to seek further and better discovery—that this issue had not been raised by the bank.
5. Counsel on behalf of the plaintiffs confirmed that his clients wished to pursue the application against the bank notwithstanding. Counsel also emphasised that any

application for discovery would relate to documents in the power and procurement of the bank and this, it is said, would oblige the bank to seek to procure any documentation held by Bank of Ireland Mortgage Bank. This is a matter for another day and may arise in the context of an application as to whether there has been compliance with the order of discovery.

### **THE BANK'S DEFENCE**

6. Insofar as relevant to the application for discovery, the position adopted by the bank in its pleaded defence is as follows. It is formally denied at paragraphs 17 to 19 that the change of interest rates was in breach of contract. However, it is thereafter pleaded at paragraphs 21 and 22 that Bank of Ireland Mortgage deemed the plaintiffs to have been charged an incorrect rate of interest. This plea is said to be without prejudice to the earlier plea. Accordingly, it is formally in dispute between the parties, on the pleadings, as to whether or not there was overcharging.
7. Insofar as the issue of the status of the plaintiffs as consumers is concerned, the bank has formally denied this plea at paragraph 8 of the defence, traversing paragraph 1 of the statement of claim. Again, this is a matter which is formally in dispute between the parties.

### **AGREED CATEGORIES**

8. Following an exchange of correspondence shortly before the hearing of this motion, the following revised categories of documents have been agreed. For convenience, these are enumerated by reference to the same numbering employed in the notice of motion.
  1. All documents relating to the Plaintiffs' knowledge of, or involvement in, the decision in May 2011 to change the interest rate applicable to the Plaintiffs' Mortgage Loan to an interest rate of 5%.

5. All documents evidencing advice or communications provided by the Defendant to the Plaintiffs in respect of interest rates available to them or applicable to the loans the subject matter of these proceedings during the period 1 January 2011 to 31 December 2013.

## **DISPUTED CATEGORIES**

9. The first category of documents which is in dispute relates to the “decision” of the bank in May 2013 to change the interest rate to a rate of 5.5%. The plaintiffs have expressly pleaded that this change was deliberate and unilateral. More generally, the plaintiffs allege that the bank failed to act with good faith. The following category of documents is said to be relevant to these various pleas.

2. All documents relating to the decision of the Defendant, their servants, or agents in May 2013 to the unilateral changing (*sic*) of the interest rate that was applicable to the Plaintiffs’ ‘mortgage loan’ to an interest rate of 5.5%.

10. Counsel for the bank submits that this category is too broad. The bank does not now deny that the interest rate change occurred nor that it was deliberate. The dispute centres instead on whether it was as the result of a “unilateral” act on the part of the bank (or Bank of Ireland Mortgages), or as a consequence of the alleged failure of the plaintiffs to exercise their choice as to the range of interest rates offered to them. (See paragraph 19 of the bank’s defence).

11. I am satisfied that the plaintiffs are entitled to discovery of this category, subject to a time limitation. The manner in which the bank has pleaded its defence to the case has put the circumstances in which the change of interest rate came about into dispute. Discovery of this category is relevant and necessary to this issue. The revised category reads as follows.

2. All documents relating to the decision of the Defendant, their servants, or agents in May 2013 to change the interest rate on the loan the subject matter of these proceedings, limited to the period 1 January 2013 to 31 December 2013.

12. The next category in dispute is as follows.
  3. All documents relating to the Defendant's knowledge of the Plaintiffs' use of the property.
13. The reason advanced in support of the application for discovery of this category is that it will show whether the bank was aware that the plaintiffs were using the mortgaged property as an investment property.
14. The bank objects that whether Bank of Ireland Mortgage Bank knew or did not know that the plaintiffs were using the property as an investment property is not dispositive either way of the issue of whether the increases in interest rates were sufficient to compel the plaintiffs to sell the property.
15. I am satisfied that discovery of this category is necessary. The allegation that the mortgaged property had been purchased for use as an investment property is a central plank in the claim for damages. The bank's knowledge of this issue is potentially probative in respect of the alleged breach of its duty of good faith. If, for example, a hypothetical customer had failed to disclose to a financial institution that it required a loan for the purposes of purchasing an investment property rather than for an owner occupied home, then this might have implications for the extent of the bank's duties to that customer.
16. The final category in dispute is as follows.
  4. All documents relating to the Defendants' categorisation of the Plaintiffs' loans.
17. This category is directed to the issue of whether the plaintiffs were acting as "consumers". Whereas the bank has submitted that whether the plaintiffs were acting as consumers in respect of the purchase of an investment property is a matter of law, the bank has indicated that it would be prepared to agree to a more precisely worded category as follows.

4. All documents evidencing the defendants' categorisation of the plaintiffs as consumers for the purposes of the borrowings, the subject matter of these proceedings.
18. This revised wording better captures the essence of the issue in controversy in the pleadings and I will make an order in those terms.

### **PROPOSED FORM OF ORDER**

19. For the reasons set out herein, the following order will be made.
20. An order pursuant to Order 31, Rule 12 of the Rules of the Superior Courts directing the Defendant to make discovery of all documents within its possession, power or procurement in the following categories.
1. All documents relating to the Plaintiffs' knowledge of, or involvement in, the decision in May 2011 to change the interest rate applicable to the Plaintiffs' Mortgage Loan to an interest rate of 5%.
  2. All documents relating to the decision of the Defendant, their servants, or agents in May 2013 to change the interest rate on the loan the subject matter of these proceedings, limited to the period 1 January 2013 to 31 December 2013.
  3. All documents relating to the Defendant's knowledge of the Plaintiffs' use of the property.
  4. All documents evidencing the Defendants' categorisation of the Plaintiffs as consumers for the purposes of the borrowings, the subject matter of these proceedings.
  5. All documents evidencing advice or communications provided by the Defendant to the Plaintiffs in respect of interest rates available to them or applicable to the loans the subject matter of these proceedings during the period 1 January 2011 to 31 December 2013.
21. The affidavit is to be sworn on behalf of the Defendant by Mr. Barry Vaughan within twelve weeks of the date of the perfection of the order. This extended period is allowed in recognition of the practical difficulties presented for the bank, by the covid-related restrictions on attendance at the workplace, in arranging the collation of documents.

**LEGAL COSTS**

22. Insofar as the costs of the application for discovery are concerned, my *provisional* view is that the plaintiffs are entitled to their costs on the basis of the rule that costs follow the event. The plaintiffs have succeeded in obtaining some form of discovery in respect of all of the categories sought by them (subject only to minor revisions). Whereas the bank did helpfully seek to narrow the issues in dispute through correspondence, this correspondence was only sent shortly before the hearing.
23. The adjudication upon, and execution of, the proposed costs order will be stayed pending the ultimate outcome of the proceedings. It is not appropriate that a party seeks to “cash in” a costs order prior to the determination of proceedings. I simply do not know at this stage what the ultimate outcome of the proceedings may be, but if, for example, the plaintiffs were not to be successful at the trial of the action, then there would probably be a set-off in terms of costs.
24. If the bank wishes to contend for a different costs order than that provisionally proposed, written legal submissions are to be filed in the Central Office and with the Registrar assigned to this case by 11 January 2021. The plaintiffs will have two weeks thereafter to respond. The parties’ submissions are not to exceed a word count of 2,000.

*Appearances*

Paul O’Grady for the plaintiffs instructed by Cormac O’Ceallaigh & Co.

Bernard Dunleavy, SC and Elizabeth O’Connell for the defendant bank instructed by Bank of Ireland Group Legal Services

Approved  
Gareth S. Mans