

## THE HIGH COURT

[2009 No. 1550SP]

BETWEEN

STEPSTONE MORTGAGE FUNDING LIMITED

PLAINTIFF

AND

PETER FITZELL AND JOAN FITZELL

DEFENDANTS

**JUDGMENT of Mrs. Justice Laffoy delivered the 30th day of March 2012****1. Background to the application**

1.1 The defendants are the owners of a dwelling house and adjoining lands at Ballyconry, Lisselton Cross, County Kerry (the Mortgaged Property), which is registered on Folio 29355 of the Register of Freeholders, County Kerry. It is accepted by the plaintiff that the Mortgaged Property comprises the defendants' primary residence. On 24th September 2007, the plaintiff issued a letter of offer offering a loan of €100,000 secured on the Mortgaged Property to the defendants. The defendants signed the form of acceptance on 1st October 2007. The loan was subsequently drawn down. By a deed of mortgage dated 8th February 2008, made between the defendants of the one part and the plaintiff of the other part (the Charge), the defendants charged the Mortgaged Property as security for the monies advanced on foot of the letter of offer. While I note that the second borrower is named as "John" at the commencement, the Charge was executed by "Joan" Fitzell. On 6th November 2009, the Charge was registered as a burden on Folio 29355, being described as "Charge for present and future advances repayable with interest". The plaintiff was registered as owner of the Charge on the folio at the same time.

1.2 By letters, which were dated 9th January 2008 to each of the defendants, although obviously intended to be dated 9th January 2009, the plaintiff's solicitors, A.C. Forde & Company, having set out that at 8th January 2009 the arrears due on foot of the Charge amounted to €4,310.19 and the total balance due as of that date was €103,652.64, and having referred to the terms of the Charge, the defendants were called upon to repay the amount outstanding within ten days. Those letters were followed up by letters of 23rd February 2009 from the plaintiff's solicitors calling on each of the defendants to deliver vacant possession of the Mortgaged Property and threatening that these proceedings for possession, with a view to a sale on foot of the Charge, would issue.

1.3 In fact, the special summons did not issue until 16th December 2009. On the special summons the plaintiff claimed an order, pursuant to s. 62(7) of the Registration of Title Act 1964 (the Act of 1964), for possession of the Mortgaged Property. I am satisfied that the repeal of subs. (7) of s. 62 of the Act of 1964 by the Land and Conveyancing Law Reform Act 2009, which became effective on 1st December 2009, is not an impediment to the plaintiff prosecuting these proceedings to finality. This special summons was grounded on the affidavit of Nicky Langton, an official of the plaintiff, sworn on 8th January 2010.

1.4 The matter was returnable before the Master of the High Court on 13th April 2010. No appearance has been entered at any time on behalf of the defendants. The matter was adjourned from time to time in the Master's Court because there was certain engagement between the plaintiff and the defendants, which is outlined in a further affidavit of Nicky Langton (the Compliance Affidavit) sworn on 6th December 2011. However, by the end of November 2011, the plaintiff had decided to proceed with the claim for possession and its solicitors so advised the defendants.

1.5 The matter was next in the Master's Court on 6th December 2011. What happened on that occasion is outlined in the affidavit of Peter Kelly, a solicitor in A.C. Forde and Company, which grounds the application now before the court and which was affirmed on 26th January 2012.

1.6 Mr. Kelly averred that on each occasion previous to 6th December 2011, the matter had been adjourned "as various discussions and arrangements" had been in place between the plaintiff and the defendants. At no time had the defendants appeared in court when the matter was listed. However, on 6th December 2011, counsel appeared on behalf of the defendants, although no appearance had been entered by solicitors on behalf of the defendants. He informed the Master that he was seeking a short adjournment to allow solicitors to enter an appearance. Counsel for the plaintiff sought that the matter be transferred to the Chancery Special Summons list and outlined the arrears position to the Master. Among the documents handed to the Master was a letter dated 29th November 2011, from the plaintiff's solicitors to the defendants, which was the letter in which the defendants were advised that the plaintiff intended proceeding with the claim for possession. Mr. Kelly's evidence of what happened next was that the Master opened the letter and stated, referring to a passage which I will quote later, that the position adopted by the plaintiff was incorrect and that the defendants had a right to appeal. The Master further directed that the plaintiff write to the defendants to rectify the mistake, as he perceived it, and to inform the defendants that they had in fact a right to appeal. The Master then adjourned the matter to 7th February 2012, on the basis that the plaintiff had misinformed the defendants of their rights.

1.7 Apparently, no formal order reflecting the Master's refusal to accede to the plaintiff's application that the proceedings be transferred to the Chancery Special Summons list and adjourning the matter in the Master's Court was perfected. However, on 12th December 2011, the plaintiff issued the motion which initiated the application to which this judgment relates, in which the following relief is sought:-

(a) an order setting aside the order of the Master of the High Court of 6th December 2011 refusing to transfer the matter to the Chancery Special Summons list on the basis that the plaintiff had not complied with the provisions of the "2011 Code of Conduct on Mortgage Arrears" and substituting for the same an order transferring the proceedings to the Chancery Special Summons list for hearing of the Special Summons;

(b) a declaration that plaintiff has complied with the provisions of the Code of Conduct on Mortgage Arrears; and

(c) if appropriate, a direction that the appeal from the Order of the Master be treated as the hearing of the proceedings proper.

1.8 On the hearing of the application, the Court was informed that since 6th December 2011 the proceedings have been adjourned in the Master's Court from time to time, and there has been no appearance on behalf of the defendants on any occasion. This application to this Court came via the Chancery Special Summons list, where it had been returnable on 23rd January 2012. I am satisfied on the evidence before the Court that the defendants were on notice that the application was listed for hearing on 14th March 2012, and was in the court list on 16th March 2012. There was no appearance by or on behalf of the defendants on either day. From the perspective of the Court, it is unfortunate that there was not a legitimus contradictor before the Court to argue the defendants' position.

## 2. The issue and the relevant facts

2.1 The core issue which the Court has to determine is whether the conclusion of the Master that the plaintiff was incorrect in informing the defendants in the letter of 29th November 2011 that they had no right of appeal was wrong in fact and in law. The determination of that issue turns on the proper application of the "Code of Conduct on Mortgage Arrears" issued by the Central Bank of Ireland in December 2010 to mortgage lenders pursuant to s. 117 of the Central Bank Act, 1989 (the Act of 1989). That code, to which I will refer as the "the Current Code", replaced two earlier codes (the Code of Conduct on Mortgage Arrears issued by the Financial Regulator in February 2009, and the Code of Conduct on Mortgage Arrears issued by the Financial Regulator on 17th February 2010).

2.2 While the Compliance Affidavit is very comprehensive and covers transactions on the defendants' mortgage account from November 2007, onwards, for present purposes I consider that it is only necessary to address the factual situation since the Current Code came into effect on 1st January 2011. However, in order to give some perspective on the monthly instalment for which the defendants were liable in 2010 and 2011, I note that it is averred in the Compliance Affidavit that, in February 2010, the plaintiff asked if the defendants could pay €150 per week "as this would cover the monthly instalment and mean that arrears were not increasing". Accordingly, I assume that the monthly instalment at that stage was in the region of €663. During the eleven months from January 2011 to November 2011, the defendants made no payments for four months, they paid €300 for one month, €400 for five months and €600 for one month. In other words, they only paid €2,900 over eleven months.

2.3 By letter dated 1st July 2011, the plaintiff informed the defendants about the Current Code, that it became effective on 1st January 2011 and that it contained certain requirements which the plaintiff was obliged to adhere to when dealing with borrowers who find themselves in arrears on their mortgage account. There was enclosed with the letter a booklet which explained the plaintiff's "Mortgage Arrears Resolution Process (MARP)" and what borrowers could expect during the process. The letter would appear to be a standard letter which, I infer in all probability, went to all of the plaintiff's borrowers.

2.4 A document referred to as a "Standard Financial Statement (SFS)" was completed by the defendants, presumably at the request of the plaintiffs, and was received by the plaintiffs on 30th September 2011. However, it was considered by the plaintiff that SFS was incorrectly completed and by letter dated 3rd October 2011 the plaintiff requested the defendants to complete the incomplete sections and return it. Once again, I would surmise that this letter was a standard letter issued to borrowers who had not completed the SFS correctly. For instance, there was a caveat in the letter that failure to provide the plaintiff with a fully completed SFS might cause the defendants to be classed "as borrower who is not co-operating", so as to allow the plaintiff to commence legal proceedings for possession of the mortgage property. Further, the letter stated that the plaintiff reserved the right to commence such proceedings "if the fully completed SFS was not provided within twenty business days". That caveat was of no relevance to the defendants because these proceedings were already in being. In any event, the defendants completed the SFS, signed it, dated it 10th October 2011, and returned it to the plaintiff. In the Compliance Affidavit it is averred that the plaintiff assessed the SFS as completed and came to the conclusion that the SFS did not show sufficient disposable income to meet an appropriate level of payment to mortgage account. That led to the letter dated 29th November 2011, which prompted the Master's decision not to accede to the plaintiffs request to transfer the matter to the Chancery special summons list.

2.5 The letter of 29th November 2011 sets out the total arrears due on the mortgage account at that stage at €17,106.78. The letter stated that, following the assessment of the defendants' personal and financial circumstances, the plaintiff was not prepared to offer the defendants a repayment arrangement; they did not have sufficient disposable income to enable them to maintain an appropriate level of payments and there was no evidence that there would be any material change in their circumstances. The letter then went on to say:-

"Therefore we intend to proceed with the litigation process for possession of your property which commenced previously. Given that this process has already commenced, you do not have the benefit of the MARP process referred in the 2010 Code of Conduct on Mortgage Arrears [i.e. the Current Code] and, consequently, amongst other things, you do not have the right to appeal this decision".

It was the plaintiff's contention in that paragraph that the defendants did not have the right to appeal the decision of the plaintiff that the Master determined was incorrect and it was to rectify what he believed was a mistake on the part of the plaintiff that the Master directed the plaintiff to inform the defendants that they did in fact have a right of appeal. In order to determine what is the correct position it is necessary to consider the provisions of the Current Code.

## 3. The Current Code

3.1 In Chapter 1, entitled "Scope" of the Current Code, existing arrears cases are addressed in the following paragraph:

"From 1 January 2011, this Code applies to all existing **Arrears** cases falling within this Code. While lenders' attention is specifically brought to provisions 21, 35, 47 and to steps 3 and 4 of the Mortgage Arrears Resolution Process, lenders must ensure that they comply with all provisions of this Code from 1 January 2011."

It is unquestionably the case that the defendants' mortgage account was an existing arrears case on 1st January 2011.

3.2 Counsel for the plaintiff emphasised the extent to which matters had advanced as between the plaintiff and the defendants by 1st January 2011. At that stage, these proceedings for possession had been in being for over a year. That being the case, it was submitted by counsel for the plaintiff that the relevant provision of the Current Code as regards what action the plaintiff could take after 1st January, 2011 is provision 50, which provides:-

"In cases where legal action to obtain an Order for Possession has commenced, a lender must endeavour to maintain contact with the **borrower** or his/her nominated representative. If an alternative repayment arrangement is agreed

between the parties before an Order for Possession is granted, the lender must put the legal proceedings on hold, for the period during which the **borrower** adheres to the terms of the alternative repayment arrangement."

Taking an overview of the terms of the Current Code, in my view, provision 50 applies in every case in which legal action is commenced, whether before or after 1st January 2011.

3.3 As stipulated in the provision quoted at para 3.1 above, all of the provisions of the Current Code applied to the defendants' case from 1st January 2011, irrespective of the fact that these proceedings had commenced a year earlier. In the standard letter from the Central Bank to mortgage lenders notifying them of the introduction of the Current Code, under the heading "Transitional Arrangements", that provision was reiterated and the attention of lenders was specifically brought to the provisions which were set out in that provision, for instance, the limits on unsolicited contact as imposed by provision 21. As regards steps 3 and 4, it was stated:-

"Where no formal arrangement is in place, a lender must review each borrower's case in accordance with steps 3 and 4 of the MARP".

The letter then went on to deal with the situation where there was an alternative repayment arrangement in place and stated as follows:-

"Where an alternative repayment arrangement (which was already in place before the introduction of this Code) breaks down, the lender's ASU must review the borrower's case immediately, in accordance with provision 41."

Provision 41 provides:-

"Where a **borrower** ceases to adhere to the terms of an alternative repayment arrangement, the lender's ASU must formally review the **borrower's** case, including the standard financial statement, immediately."

The ASU is the centralised dedicated Arrears Support Unit, which each mortgage lender which is subject to the Current Code must establish.

3.4 While not directly relevant to the issue with which the Court is concerned, I think it is worth noting that the standard letter draws attention to "some overlap of requirements between the existing Consumer Protection Code" and the Current Code and to the fact that certain provisions of the Consumer Protection Code have been "disapplied for mortgage lenders when dealing with mortgage arrears and pre-arrears cases". As I understand the position, the disapplication has been preserved in the Consumer Protection Code 2012.

3.5 In this case, there was an alternative repayment arrangement in place on 1st January 2011. In reality, there had been a series of arrangements and a series of breakdowns. The last arrangement put in place before 1st January 2011 was that the defendants would make a double payment in January 2011 and would pay €600 by 7th January 2011. The defendants only paid €300 in January 2011, so that the defendants had once again failed to adhere to the arrangement with the plaintiff. Therefore, in my view, provision 41 came into play and there was an obligation on the plaintiff to formally review the defendants' case, that is to say, to go through step 3 and 4 of the MARP. In fact, that is what the plaintiff set out to do in obtaining the completed SFS from the defendants and in conducting the assessment referred to in the letter of 29th November 2011. In my view, the submission made on behalf of the plaintiff that after July 2011 the plaintiff had gone further in engaging with the defendants than it was obliged to do under the Current Code is not correct. It follows that the statement in the letter of 29th November 2011, which I have quoted at para. 2.5 above, to the effect that the defendants did not have the benefit of the MARP process, and, consequently, did not have a right of appeal against the decision of the plaintiff, is not correct.

3.6 The interpretation of the Current Code which, in my view, is the correct interpretation, as set out in the previous paragraph, is consistent with a document which was helpfully put before the court by the plaintiff's legal advisors- a document which I believe has been produced by the Central Bank and is headed "Mortgage Arrears- Frequently Asked Questions". The pertinent question is: "I went into mortgage arrears in 2009. Am I covered by the [Current Code]?" The answer given to the question is as follows:

"Yes, you are. Anyone who was in arrears on their mortgage on their home before 1st January 2011... is covered by the [Current Code]. Your lender must apply the protections of the [Current Code] to your case after 1st January, but how they do this will depend on what stage of the Mortgage Arrears Resolution Process (MARP) you are at when the [Current Code] came into place. For example, if you entered an arrangement with your lender last year and this breaks down after 1st January 2011, your lender must formally review your case immediately. As part of this review, your lender will ask you to complete a Standard Financial Statement (SFS), which you may not have had to do before. Your case will then go through all stages of the MARP process. This means that your case will be assessed by your lender's Arrears Support Unit, which will consider what form of alternative repayment arrangement is suitable for your current circumstances. If you are not happy with the arrangement you are offered, you can make an appeal to your lender's Appeals Board..."

3.7 Step 5 of the MARP deals with appeals. Provision 42 provides that a lender must establish an Appeals Board to consider any appeals submitted by borrowers and to independently review, *inter alia*, the decision of the lender's ASU. I assume that the assessment referred in the letter of the 29th November 2011 was carried out by the plaintiff's ASU in accordance with step 3 (provisions 30 to 32 inclusive of the Current Code). Provision 45 provides as follows:-

"A lender must allow the **borrower** a reasonable period of time to consider submitting an appeal to the Appeals Board, which must be at least 20 **business days** from the date he/she received notification of the decision of the lender's ASU."

In this case, the defendants were not given the opportunity to consider appealing the decision recorded in the letter of 29th November, 2011, as they should have been.

3.8 It was also part of the plaintiff's case that the defendants, through their consistent and repeated default and non-compliance with the alternative arrangements entered into between the parties, are non-co-operating borrowers. The defendants undoubtedly have reneged on agreements entered into with the plaintiff. However, I think it would be premature to form a view as to whether the defendants are non-co operating borrowers at this juncture, given that they have not been afforded the benefit of the Current Code as they should have been. In any event, the evidence before the Court, in the form of the completed SFS, raises the question as to whether the defendants are unable, as distinct from being unwilling, to meet repayment obligations they have taken on.

#### 4. Submissions

4.1 The Court has been furnished with comprehensive written legal submissions on behalf of the plaintiff to which I have had regard. The submissions have been very helpful, particularly, given the non-appearance of the defendants or anybody on their behalf.

4.2 A number of issues were raised in the affidavit of Mr. Kelly in relation to the manner in which the Master dealt with the matter on 6th December 2011. It was contended that he acted outside his jurisdiction in adjourning the matter. As the plaintiff's papers were in order, it is the plaintiff's case that the Master's only role was to transfer the matter to the Chancery Special Summons list. Further, while the position adopted on behalf of the plaintiff at the hearing of this application was that there had not been non-compliance by the plaintiff with the Current Code, it was suggested that compliance with the Current Code is not a necessary proof in an application for possession made by way of special summons.

4.3 On the status of the Current Code in the context of these legal proceedings, the court was referred to the decision of the High Court (Birmingham J.) in *Zurich Bank v. McConnon* [2011] IEHC 75 where, in the context of an application for summary judgment on foot of a summary summons, there was a discussion of the entitlement of the defendant to raise, by way of defence, his reliance on the Financial Regulator's Consumer Protection Code. The observations Birmingham J. made were against the background of his finding that the defendant was "emphatically" not a consumer who came within that code, and that his loan agreement predated the coming into force of the relevant code. Having said that, the *obiter* observations of Birmingham J. are in line with the statement on the status of Central Bank Codes of Practice quoted at para. 5.12 below.

#### 5. Conclusions

5.1 Given that the Court has not had the benefit of evidence or submissions from the defendants and has not had the benefit of any view on the application of the Current Code, either generally or to the circumstances of this case, other than that of the plaintiff, I consider that it is necessary to exercise caution in expressing a view on the application of the Current Code, particularly in the current economic climate.

5.2 The following passage from Breslin on *Banking Law* (2nd Ed.) at 3 - 56, which sets out to explain the contractual setting of Central Bank Codes of Practice is helpful in considering the status of the Current Code. It is stated:

"The Central Bank has promulgated Codes of Practice for credit institutions pursuant to its powers under s. 117 of the Central Bank Act 1989. Breach of the code is not a criminal offence and the Act does not spell out any particular consequences in civil law arising from a breach. Breach of a direction by the Central Bank to comply with particular provisions of the Code is a criminal offence. A key question is whether or not these provisions are merely 'soft law', i.e. devoid of legal effect such that a breach of a provision in the Code of Practice will not sound in a remedy in civil law for damages. In the unlikely event that the Codes of Practice have been incorporated into the bank customer bargain then they apply. Whether a particular requirement is deemed to be an implied term in that contract depends on the particular term sought to be implied, and the circumstances of the case - but the test is not an easy one to meet. It is submitted that the Codes of Practice appear more likely primarily to arise in the context of the analysis of the bank's duty of care and whether the bank has in a particular case met reasonable standards."

For present purposes, I accept that passage as an accurate statement of the jurisprudence of the Superior Courts on the status of the Current Code as of now. However, in the light of the observations of the author in Donnelly on *The Law of Credit and Security* at paras. 9-79 and 20-47, some development of the jurisprudence in this area in the future may be anticipated.

5.3 The legislative basis of the Current Code as set out therein is also consistent with the passage quoted above and is in the following terms:

"This Code is issued under Section 117 of the Central Bank Act 1989.

The Central Bank has power to administer sanctions for a contravention of this Code, under Part IIIC of the Central Bank Act 1942.

Lenders are reminded that they are required to comply with this Code as a matter of law."

Further, in the standard letter, it is stated that contraventions of the Current Code "may be subject to imposition of administrative sanctions".

5.4 In summary, the methods of enforcement of the Current Code provided by law are:

(a) the administrative sanctions provided for in Part IIIC of the Act of 1942 (as inserted by s. 10(1) of the Central Bank and Financial Services Authority of Ireland Act 2004 (the Act of 2004); and

(b) criminal prosecution for breach of offences created by subs. (4) of s. 117 of the Act of 1989 (as substituted by Schedule 3 of the Act of 2004).

5.5 Notwithstanding what is stated in the preceding paragraphs, I find it impossible to agree with the proposition that, in proceedings for possession of a primary residence by way of enforcement of a mortgage or charge to which the Current Code applies, which comes before the court for hearing after the Current Code came into force, the plaintiff does not have to demonstrate to the Court compliance with the Current Code. To take what is perhaps the best known provision of the Current Code, the imposition of a moratorium on the initiation of proceedings, which is now contained in provision 47 of the Current Code (and which was also to be found in the earlier codes, although the moratorium period in the case of the earliest code was six months, rather than twelve months), surely a court which is being asked to make an order which will, in all probability, result in a person being evicted from his or her home, is entitled to know that the requirement in provision 47, which has been imposed pursuant to statutory authority, is complied with. Moreover, it is likely that it would render the enforcement of provision 47 nugatory, if a lender did not have to adduce evidence to demonstrate that the moratorium period had expired.

5.6 On the facts of this case, for the reasons set out in paragraph 3.7 above- that the defendants were not given the opportunity to consider appealing the decision of the plaintiff recorded in the letter of 29th November, 2011- I consider that the Current Code was not complied with.

5.7 Under O.38, r. 6 of the Rules of the Superior Courts, 1986, it is provided:

"In all cases in which he shall not have jurisdiction... the Master shall transfer the summons, when in order for hearing, to the Court list for hearing on the first opportunity".

In this case, the position of the plaintiff on 6th December, 2011 was that the case was ready for hearing. Aside from the application on behalf of the defendants for an adjournment by counsel in circumstances where an appearance had not been entered, which, as I understand from Mr. Kelly's affidavit, the Master was not inclined to accede to, it seems to me that the function of the Master was to transfer the proceedings to the Chancery Special Summons list. In the light of the view I have taken of the application of the Current Code to the defendants' case, however, that would not have availed the plaintiff because, on the basis of the evidence before the court now, in my view, they are not entitled to an order for possession, not having complied with the Current Code.

## **6. Form of order**

6.1 I propose hearing further submissions from the plaintiff as to the form of order which the court should make in the light of the conclusions set above, the objective being to minimise the use of court time and to minimise the legal costs in relation to the matter.