Neutral Citation [2015] IEHC 487

THE HIGH COURT

[2013 No. 451 SP]

BETWEEN

STEPSTONE MORTGAGE FUNDING LIMITED

PLAINTIFF

AND

JOHN HUGHES AND

TERESA HUGHES

DEFENDANTS

JUDGMENT of Ms. Justice Murphy delivered on the 21st day of July, 2015

1. The plaintiff's claim is for possession of the defendants' dwelling situated at Corbeagh, Cootehill in Co. Cavan. By letter of offer dated the 13th March, 2008 the plaintiff agreed to advance to the defendants, who were then in their early sixties, a sum of €185,000 by way of loan secured on a mortgage. The stated purpose of the loan was to discharge a prior mortgage to Start Mortgages of €100,000 and the balance of €85,000 was expressed to be in respect of home improvements. The mortgage was to be secured on lands at Corbeagh, Cootehill, Co. Cavan which comprised the defendants' family home. An indenture of mortgage was completed on the 24th April, 2008 and the plaintiff advanced to the defendants the sum of €185,000 on or about the 28th April, 2008. For some reason, the charge was not registered in the Land Registry against the defendant's folio until the 4th January, 2010 by which time the defendants were already in default.

2. The defendants contend that the Court should not grant the plaintiff an order for possession on three grounds. Firstly, they contend that a letter of demand sent on behalf of the plaintiffs on the 10th June, 2010 is defective both because the sum claimed to be due is inaccurate and because no clause of the mortgage was specified in the letter. Secondly, the defendants contend that the plaintiff is not entitled to possession by reason of its failure to comply with the Code of Conduct on Mortgage Arrears, the relevant code being the 2010 code which was effective from 1st January, 2011. Thirdly, the defendants resist the plaintiff's application on the grounds that what is contained in the charge exceeds that which was intended to be mortgaged and includes a portion of an adjacent commercial property which is also the property of the defendants.

3. Following the hearing of the case but before judgment, the Supreme Court delivered its decision in the linked cases of *Irish Life & Permanent PLC v. Dunne and Irish Life & Permanent PLC v. Dunphy* [2015] IESC 46 which clarified the court's role in assessing compliance with the Code of Conduct on Mortgage Arrears. The Court reconvened and gave the parties the opportunity to address it on the newly clarified legal landscape in relation to the code on mortgage arrears.

History of the mortgage

4. In April 2008 the defendants who, as already stated, were in their early sixties ran a small manufacturing business making clothing such as school uniforms and bridal wear. This business appears to have been run from a premises directly beside their dwelling house. From photographs exhibited in the course of the proceedings it appears that the wall of the commercial property is mere feet from the wall of the dwelling house. The buildings are so close together it appears to the Court that the sale of the dwelling house separate from the commercial unit directly adjacent to it would certainly present challenges. On the other hand, a sale of the commercial unit separate from the dwelling house appears to the Court to be something that might be feasible.

5. Within months of the drawdown of the loan, the mortgage was in difficulty. The direct debit of December 2008 was unpaid as was the direct debit for January 2009 and February 2009. Thereafter such payments as were made to the account were made by way of credit transfer or bank giro. At the time of the execution of the mortgage the second named defendant had taken out life cover with Irish Life, the benefit of which was assigned to the plaintiff. In February 2009 Stepstone were notified by Irish Life that the second named defendant's life cash cover plan, had lapsed due to non payment for the period since 24th December, 2008. The Court has no evidence that any steps were taken by the plaintiff arising from the default which was evident from December 2008. It appears to the Court, that the averment in the affidavit of compliance filed on behalf of the plaintiff on the 5th October, 2013, which states that the mortgage account has been in arrears since September 2009, is inaccurate in that the arrears appear to have commenced nine months earlier. In any event, a meeting was held by the plaintiff with the defendants on 2nd November, 2009 to discuss their circumstances. Their circumstances were poor, the recession having caused a virtually fatal downturn in the business of school uniforms and bridal wear as averred to in the affidavit of first named defendant sworn 8th July, 2014. In November, 2009, a temporary arrangement was entered into between the parties for a weekly payment of €200. The idea was that the arrangement would remain in place until the defendants' financial situation was reviewed by the plaintiff. The first of the agreed weekly payments of €200 was paid on 6th November by means of a giro payment. No other payment was made in November but on 1st December a credit transfer in the sum of €166.93 was paid. Because of the defendants' failure to pay the weekly sum of €200 as agreed, attempts were made by representatives of the plaintiff to contact them. The evidence is that five such attempts were made between 12th November, 2009 and 23rd November, 2009. A further meeting between the parties was held on 14th December, 2009 during which the defendants told the plaintiff that they were unable to afford €200 a week. According to the plaintiff an arrangement was put in place whereby the defendants would make a lump sum payment of €500 and payment thereafter of €150 per week. That arrangement was to remain in place until the end of January 2010. The Court notes that the latter arrangement actually increased the burden on the defendants in that under that arrangement they were to pay €1,400 in the six week period whereas under the previous arrangement the sum would have been €1,200.

6. On 22nd December, 2009, the second named defendant contacted the plaintiff to let them know that she was unable to pay the €500 lump sum and would only be in a position to pay €200. A giro payment of €200 was paid by the defendants on 31st December, 2009.

2010

7. On the 4th January, 2010 the mortgage charge was registered in the Land Registry. According to the mortgage account the total payment made by the defendants for the first third of 2010 was just in excess of €1,000. On the 28th April, 2010 the plaintiff mortgage company contacted and spoke with the defendants. The evidence is that during that conversation the second named defendant outlined the difficulties that the defendants' business had encountered as a result of the recession and informed the plaintiff that the business was currently not in operation. She also informed the plaintiff that both the defendants were then on social welfare and that the first defendant was receiving disability payments due to an inability to work. She told them that she was actively seeking employment. According to the plaintiff an interest option arrangement was discussed at that time and the defendants were due to revert to the plaintiff in this regard. It appears that after this meeting the defendants sought the assistance of a mortgage broker in Granard. According to the defendants she agreed payment of €800 per month on their behalf and the Court notes that following this arrangement there were a significant number of payments by way of bank giro in the sum of €200. The defendant also states that these payments were reduced to €600 per month on the basis of a further agreement between the mortgage broker and the plaintiff, in May 2011. The plaintiff disputes any such agreement

8. On 10th June, 2010, AC Forde & Company Solicitors for the plaintiff wrote to the defendants to inform them of their default in the payments due to the plaintiff and to formally demand repayment of the amount outstanding. The letter further informed the defendants of the plaintiff's intention to commence proceedings. It is not contested that the stated sum due on the letter of demand is incorrect. The amount demanded is €182,645.73 when at that point the sum in fact due was in excess of €193,000. Two weeks later on the 23rd June, 2010 a further letter was sent to the defendants by the plaintiff's solicitors informing the defendants that the solicitors had instructions to proceed for an order for possession and sale on foot of the legal mortgage held by the plaintiff over the named premises and inviting the defendants to deliver up vacant possession of the premises within fourteen days from the date of the letter. Neither letter made reference to the Code of Conduct on Mortgage Arrears. Following receipt of those letters the defendants made considerable payments to their mortgage account having regard to their very limited income. Between June and December, 2010 they paid €5,906.80 to the credit of their account. During this period no further letter issued from the plaintiff's solicitors.

2011

9. In the first five months of 2011 the defendants paid almost €3,500 to the credit of their mortgage account. This was an average payment of €700 per month. According to the affidavit filed on behalf of the defendants they were experiencing serious difficulties in maintaining the level of payment at the €800 per month which they state was previously agreed from their limited income. In May 2011 they again approached the mortgage broker in Granard with whom they previously dealt and asked her to negotiate a reduction in the monthly repayments to €600 per month. This fact is corroborated by the reply sent by AC Forde Solicitors to the brokers, on behalf of the plaintiff on the 22nd June, 2011. In it the solicitor notifies the mortgage broker that the proposal to pay €150 per week was not acceptable as this was less than half of the contractual monthly instalment and in no way dealt with the significant arrears of approximately €30,000. The letter informed the broker that if her clients were interested in selling the property the plaintiff might be in a position to agree to accept a sum less than the overall amount outstanding to aid in the sale of same. A MARP booklet was attached to the letter. This was the first reference to the mortgage arrears resolution process. That month the defendants paid €905.60 and in July they paid €910.96.

10. On the 1st July, 2011 the plaintiff sent a form letter signed Collections Department to the defendants. The Court notes that the pro forma letter and the booklet attached were sent out more than a year and a half after the defendants had first told the plaintiff, on 2nd November, 2009, of the financial difficulties that they were experiencing and more than two and a half years from the first indications in December 2008, that the defendants were experiencing difficulties in discharging their mortgage. Similarly, it should be noted that this pro forma letter followed a week after the solicitor's letter to their broker in which the only proposal put to the defendants was the sale of the property, in the event of which the plaintiff might be willing to accept a sum less than the amount due.

11. In its affidavit of compliance with the code of conduct the plaintiff sets out numerous unsuccessful attempts made by it to contact the defendants. Attempts were made apparently, up to five times a month. The Court has not been told as to the manner of attempted contact. No correspondence has been exhibited and the Court deduces there from that the attempted contacts were telephone contacts. The Court observes that it might have been more productive for the plaintiff to have contacted the mortgage broker whose assistance the defendants had already sought in dealing with their difficulties. Contact with such an intermediary to discuss possible solutions to the problem which presented itself might have lead to real discussion as to possible resolution, particularly bearing in mind that the defendants owned other property which is in the balance of the folio against which the charge is registered.

12. During this period, while they may not have been answering the phone, the defendants made significant payments to their mortgage account. Between August 2011 and December 2011 they paid almost €4,500 to the credit of their account.

2012

13. In the first three months of 2012 the defendants made payments of just in excess of €2,000 to the credit of their mortgage account. In the same months the plaintiff continued to log its unsuccessful attempts to contact them. On 20th March, 2012 the second named defendant contacted the plaintiff and in conversation with them told them she had not received the Standard Financial Statement which accompanies the MARP pack. A further copy of the Standard Financial Statement was forwarded to the defendants and they contacted the Money Advice and Budgeting Service in Cavan seeking their assistance. With that assistance they completed the Standard Financial Statement and it was forwarded to the plaintiff and received by it on the 15th May, 2012. During the intervening period the defendants paid over €1,400 to the credit of their mortgage account. The SFS (Standard Financial Statement) showed that the defendants had a monthly income of approximately €1,700 and an income/expenditure deficit of €802.67. Having regard to the fact that their mortgage payment is €1,350.00 per month, that suggested that the money available to them to pay towards their mortgage was roughly €550 a month. In June 2012 and again in July 2012 the defendants paid in excess of €600 to their mortgage account.

14. On 20th July, 2012, having conducted an assessment of the financial information received from the defendants, the plaintiff apparently elected not to offer them an arrangement in respect of their account and forwarded a decline letter to them. The letter outlined that the plaintiff was not prepared to offer an alternative repayment arrangement on the grounds that it appeared from the SFS that the defendants did not have sufficient disposable income to enable them to maintain an appropriate level of payment and that there was no evidence that there would be any material change in their circumstances. The plaintiff informed the defendant that they intended to continue with proceedings for the possession of the mortgage property but informed them that there were other options that they could consider to avoid repossession through litigation. The options set out were:

> *"(1) Trading down: Subject to there being equity in your property (in other words the value of your property is greater than the amount owing on your mortgage), you could sell your property, repay your mortgage in full, and use the equity (the balance remaining) to assist in your purchase of another property.*

(2) Voluntary sale: Subject to there being equity in your property (in other words the value of your property is greater than the amount owing on your mortgage); you could sell your property and repay your mortgage in full.

(3) Voluntary surrender: This would involve you signing a legal agreement whereby you would give up possession of your property to Stepstone, Stepstone would then take steps to market and dispose of your property with vacant possession being given to the purchaser."

The letter invited the defendants to contact the plaintiff "*if you are interested in pursuing any one or more of the above options"*.

15. No consideration appears to have been given to a possible sale of the balance of the defendants' folio on which stands their commercial premises as an alternative to the sale of their family home. The letter also referred to a right of appeal in respect of the plaintiff's decision to offer the proposal in question and notified the defendants that the appeal must be in writing and submitted within twenty five business days of the receipt of the letter. The signature on the letter is illegible and the letter is sent by the collections department.

16. The defendants did not file an appeal but continued to make payments to their mortgage account. Between August 2012 and the issuing of proceedings in July 2013 they paid a total of €6,600 towards their mortgage account.

The proceedings

17. On the 30th July, 2013, a little over two years after they had issued the MARP pack in accordance with the Code of Conduct on Mortgage Arrears, the plaintiff issued a special summons seeking vacant possession of "*all that and those part of Folio 6316 County Cavan as is more particularly delineated on the map lodged with the Land Registry under Dealing Number D2007NL063238R and thereon marked "No. 2" comprising an area of 0.0912 hectares or thereabouts metric measure and now contained in folio 29207F County Cavan"*. A grounding affidavit was sworn on behalf of the plaintiff, on the 27th August, 2013 by a person described as a legal officer of the plaintiff, and it was averred that at that point the defendants owed the plaintiff €45,125.94 in arrears and a total sum of €200,730. On the following day, the 28th August, 2013 a representative of the plaintiff spoke with the first named defendant. He was informed of the substantial arrears on his mortgage account and the fact that there had been no contact from him or his wife since the previous March. The defendant was told that solicitors had been instructed to commence litigation. The first defendant requested a meeting but also indicated that his financial position had not changed. According to the evidence the plaintiff agreed to facilitate a meeting with the defendants but made it clear that a decision had already been made to issue proceedings based on their current circumstances. Two days later the special summons was served on the second named defendant Teresa Hughes together with the grounding affidavit and the exhibits. The special summons was served on the first named defendant on 12th September, 2013. Around the time of service of the summons the defendants made a further payment of €800 to their mortgage account.

18. Following the service of proceedings, from September 2013 to January 2014, the defendants stopped making mortgage payments as, according to the replying affidavit of Mr Hughes, the first named defendant, having received proceedings they did not know what to do. However, they recommenced payments in January 2014 and paid a total of €4900 between then and January 2015 which is the most recent date for which an account has been furnished to the Court.

19. In the meantime the plaintiff lodged its proceedings and the matter came on before the Master of the High Court on the 31st October, 2013. The defendants did not appear. The proceedings were adjourned to the 16th January, 2014. On the 21st January, 2014 the plaintiffs applied to the Master for, and were granted, liberty to amend the schedule of lands in the special summons to specify reference to plan C1Y7Q as being the lands subject to charge. The matter was again adjourned to the 13th February, 2014. On that date the defendants again did not appear. Upon the hearing before the Master, the Master was not satisfied with the wording of the demand letters issued to the defendants on the 10th June, 2010 contained in exhibit E of the plaintiff's grounding affidavit. Following legal argument the Master of the High Court ordered that the special summons be struck out for want of a valid demand and ordered that the plaintiff pay the defendants' costs of the summons and order when taxed. On 17th February, 2014 the plaintiff's solicitors issued a notice of motion seeking an order vacating the order of the Master of the High Court made on 13th February, 2014, and substituting therefore an order transferring the proceedings to the Chancery Special Summons list of the High Court. These proceedings were served on the defendants by pre-paid registered post. On the 10th March, 2014 the order of the Master was vacated by Gilligan J. and the special summons was reinstated and adjourned to the 23rd June, 2014. On 19th March, 2014 the solicitors for the plaintiff wrote to the defendants and informed them that the order of the Master had been vacated and that the matter had been adjourned to 23rd June, 2014 before the Chancery Summons list, in order to allow them to obtain legal advice and submit any proposal that they may have to the plaintiffs. The letter requested that the defendants forward any proposal they may have to the plaintiff at the earliest opportunity.

20. On 27th May, 2013 the Law Centre in Cavan entered an appearance for the defendants. On 9th June, 2014 a building surveyor engaged by Cavan Law Centre, Mr. Jarlath Johnson, visited the site of the mortgaged property to carry out an inspection of the site boundaries and to compare them to that outlined on the folio map attached to Folio CN29207F. His inspection discloses, and it is not in essence disputed by the plaintiff, that plot C1Y7Q of which the plaintiff seeks possession, does measure 0.0912 hectares as set out in the schedule of lands in the special summons, but it includes part of a commercial light industry building which is not and was never intended to form part of the mortgaged property. An order for possession would therefore, both in terms of the area claimed and the map relating to that area, give the plaintiff possession of property to which they are not entitled.

21. The special summons was listed for hearing on 23rd June, 2014 and the matter was adjourned to allow Cavan Law Centre file replying affidavits on behalf of the defendants. On 10th July, 2014 Cavan Law Centre on behalf of the defendants wrote to the plaintiff's solicitors suggesting that issues arose on the sufficiency of the demand letter issued; compliance with the MARP process and identification of the land and premises covered by the mortgage. Reference was also made to the serious health issues suffered by the second defendant which they stated were linked to the stress arising from the debt and the possession proceedings. In this context they offered a payment of €645 per month out of a joint monthly income of €1,766.50 and asked the plaintiffs not to seek possession of the property. This offer was rejected on 15th July, 2014.

22. A replying affidavit was filed by the first named defendant on behalf of both defendants on 18th July, 2014, in which he deposed to his own poor state of health and exhibited a medical report in respect of the second named defendant which indicated that she suffers from severe anxiety, panic attacks, low mood and ischemic heart disease. The medical report also indicated that the second named defendant has NSTEMI with diffuse multi vessel disease and that she has attended mental health services and completed a course in cognitive behaviour therapy. The report finally indicated that the second named defendant has a number of additional stressors in her life separate from the stress associated with these proceedings. The first named defendant requested that the Court refuse to grant an order for possession to allow him and the second defendant more time to negotiate with the plaintiff and to allow them an opportunity to get the family business back on the road.

23. On 30th October, 2014 a supplemental affidavit was sworn on behalf of the plaintiff dealing with the issues raised in the defendants' affidavit of 18th July, 2014. The deponent points out that the issue of the age of the defendants when taking out the mortgage was fully addressed at the time of the creation of the mortgage and that the defendants had indicated that they proposed to maintain mortgage payments in retirement by "*trading down*". He also points out that while a medical report has been furnished in respect of the second named defendant none was furnished in relation to the first named defendant who was the deponent. He denies that any agreement was made with any mortgage broker on behalf of the plaintiff. He accepts that the demand letter contained an error but states that it is irrelevant in the context of clause 12 of the mortgage which provides for immediate payment in the event of default.

24. In so far as there may be issues with the boundaries of the charged property he contends that those are exclusively a matter for the plaintiff and do not have an impact on the possession proceedings. In response to the suggestion by the first named defendant that MARP procedures were not followed by the plaintiff its deponent points out that the first named defendant failed to identify precisely how the said procedures were not complied with. The deponent goes further and deposes to his belief that the process had been duly complied with by the plaintiff.

25. On 8th December, 2014 Grier and Associates financial consultants wrote to the plaintiff on behalf of the defendants to submit a further proposal to them. On 20th January, 2015 the plaintiff wrote to Grier and Associates and to the defendants to inform them that following an assessment of their personal and financial circumstances and after careful consideration of the proposal submitted, they believed that the arrangement proposed was not appropriate given the defendants particular circumstances. The plaintiff stated that they had concluded that the mortgage was unsustainable and that proceedings would continue for possession of the property. The matter came before this Court for hearing on 3rd February, 2015.

26. The foregoing is the background against which the Court must consider the plaintiff's application for possession of the secured property. It is not in dispute that the defendants borrowed €185,000 from the plaintiff nor that at the date of hearing being 3rd February, 2015 a balance of €215,041.02 was owing in respect of principal and arrears, nor that the defendants family home at Corbeagh, Cootehill, Co. Cavan was charged as security for the said loan.

27. As already noted, the defendants resist the plaintiff's application for possession on three grounds. Firstly, the defendants maintain that the letter of demand was ineffective and invalid. Secondly, the defendants contend that the plaintiffs have not complied with the MARP procedures promulgated by the Central Bank. Thirdly, they maintain the granting of an order of possession would constitute an unjust enrichment of the plaintiff in that both in terms of the area of land and the accompanying map the plaintiff would be entitled to possession of land which neither party intended should be charged as security for the loan.

Letter of Demand

28. By letter dated 10th June, 2010 the plaintiff demanded payment of €182,645.73. It is acknowledged that the sum quoted was inaccurate in that at the time the defendants were in debt to the plaintiffs in a sum in excess of €193,000. While not citing any clause of the mortgage the letter does state *"we are further instructed that it is a term of the mortgage that should any one instalment be unpaid for a period of 7 days the whole of the future instalments of the principal monies shall become due and payable together with all arrears and the same shall be recoverable with interest at the appropriate rate"*. While the letter of demand is defective in that it does not recite the correct amount due on foot of the mortgage it is clear from a consideration of the mortgage itself that an action to recover sums due on foot thereof is not dependant on a valid letter of demand. Clause 12 of the indenture of mortgage defines when the monies become payable on foot of the mortgage it states:

> *"In addition to and without prejudice to the terms upon which the secured monies have been or shall be or be deemed to be advanced or lent to the borrower the secured monies shall immediately become payable*
>
> *(i) if the borrower should default in the performance of any of the covenants, terms or conditions contained in this mortgage or in the letter of offer or in any loan or other agreement and if such default continues unremedied for the period of seven days."*

29. While clause 1 and clause 4 of the mortgage deed refer to monies being payable on demand, clause 12, which provides that the monies are payable in the event of default for more than seven days, is expressed to be in addition to and without prejudice to all the other terms upon which the secured monies have been advanced. The plaintiff relies on *EBS v. Gillespie* [2012] IEHC wherein Laffoy J. held that a letter of demand was not required where the wording of the mortgage deed meant that the monies became due and payable after an event of default. The decision of *EBS v. Gillespie* was followed by O'Malley J. in *Ulster Bank Ireland Limited v. Carroll* [2013] IEHC at paragraph 19 where she concluded:-

> *"It is clear that the clause provides that the entirety of the debt became due and owing on the happening of one of the stipulated events of default and that there was no requirement for a "demand" in addition."*

30. There is no doubt that at the time of the issuing of the proceedings the defendants were in default of the covenant to repay and had been in such default for a period in excess of seven days. For this reason the Court is satisfied that on the wording of the mortgage deed it was not necessary for the plaintiff to issue a letter of demand before initiating proceedings.

Compliance with the Code of Conduct on Mortgage Arrears

31. The Court observes, and since the recent welcome clarification of the law by the Supreme Court in the linked cases of *Irish Life and Permanent v Dunne and Irish Life and Permanent v Dunphy,* it can do no more, that compliance by the plaintiff with the code of conduct in this case was more a matter of form than substance. In May 2010 the defendants engaged an intermediary to approach the plaintiff on their behalf. She is a mortgage broker based in Granard and has made a number of submissions to the plaintiff, the most recent being shortly before the hearing, all of which have been summarily rebuffed. Rather than engaging with the intermediary, the plaintiff chose to engage in 'tick box' compliance by making repeated phone calls to the defendants which went unanswered. The facts show that the defendants have been making substantial payments relative to their income and may have the capacity to meet the interest payments on their loans. In addition, the defendants own additional lands to those charged which include their commercial premises and there does not appear, on the evidence before the Court, to have been any exploration of the possibility of selling those lands in preference to the family home. It is for these reasons that the Court has the impression that once the bank decided on seeking possession its compliance thereafter with the Code of Conduct on Mortgage Arrears was formulaic.

32. That said, the Court welcomes the recent clarification by the Supreme Court of the Court's role in assessing compliance with the code in the linked decisions of *Irish Life and Permanent v Dunne and Irish Life and Permanent v Dunphy*. Having analysed the evolution of the jurisprudence in this area from *Zurich Bank v. McConnan* [2011] IECH 75 through *Stepstone Mortgage Funding Limited v. Fitzell* [2012] IEHC and *Irish Life & Permanent plc v. Duff* [2013] IEHC, the Court set out the test which it had recently formulated

in *Quinn & Ors v. Irish Bank Resolution Corporation Limited (in special liquidation) & Ors* [2015] IESC 29 and adapted it for the purpose of considering whether a financial institution must be regarded as being legally debarred from seeking to exercise a right to possession, which it would otherwise enjoy, by reason of a breach of the code. The question which the Supreme Court most helpfully addressed was whether a dispute concerning a financial institution's compliance with the code is a matter which the court must resolve in the context of possession proceedings. Having considered the various provisions of the code the court, Clarke J. concluded at paragraph 5.24:-

> *"It does not seem to me therefore that the statutory policy of the 1989 Act (section 117 of the Central Bank Act, 1989) and the code making powers contained therein is such that same is intended to, as it were, by the back door, create a whole new jurisdiction for the courts in which the court would be required to assess in some detail the type of engagement entered into between a financial institution and a borrower who is in sufficient arrears to enable that financial institution, as a matter of law, to seek possession. In such circumstances, it seems to me that criterion 3(b) of the test set out in Quinn v. IBRC would lean heavily against implying that the courts have any role in declining possession in cases other than where the breach of the code alleged is a failure to abide by the moratorium."*

33. On the basis of the Supreme Court decision the only aspect of the code to which a court can have, and must have, regard is the moratorium imposed on seeking possession in the circumstances set out in the code. As the Supreme Court held at paragraph 5.18:-

> *"Presumably the purpose of the code in that regard is to provide a window of opportunity in which there can be an exploration of whether there are other solutions to the mortgage arrears problems of the borrower in question and, if there are, to take action to put those solutions in place. A financial institution which, entirely ignoring the provisions of the code in that regard, simply went ahead and sought possession as soon as it was legally entitled so to do would be doing the very thing which the code is designed to prevent. For a court to entertain an application for possession which was brought in circumstances of clear breach of the moratorium would be for a court to act in aid of the actions of financial institution which were clearly unlawful (by being in breach of the code) and in circumstances where the very act of the financial institution concerned in seeking possession was contrary to the intention or purpose behind the code itself."*

34. It is only in circumstances where there has been a breach of the moratorium, and in no other case, can a court decline to make an order for possession, unless and until appropriate legislation is passed. As Clarke J. further held at paragraph 5.28:

> *"where the breach of the code involves a failure by a lender to abide by the moratorium referred to in the code, but in no other case, non compliance with the code affects, as a matter of law, a relevant lenders entitlement to obtain an order for possession. I would further clarify that it is a matter for the relevant lender to establish by appropriate evidence any application before the court that compliance with that aspect of the code has occurred."*

35. The thrust of the decision, it appears to this Court, is that a failure to comply with the provisions of the code is a matter between the central bank and the financial institution. The only matter to which a court deciding on possession can have regard is whether the financial institution has complied with the moratorium contained in this case, in item 47 of the code. The defendants, in their supplemental submissions, suggest that it is in fact item 46 of the code which lays down the moratorium referred to by the Supreme Court. Item 46 provides:

> *"The lender must not apply to the courts to commence legal action for repossession of the borrower's primary residence, until every reasonable effort has been made to agree an alternative arrangement with the borrower or his/her nominated representative."*

However the Court considers the defendant's argument to be misconceived in this regard, in light of the comments of Clarke J. as to how the banks might prove compliance with the moratorium, at paragraph 5.26:

> *"While it will be a matter for any court hearing an individual application to determine the adequacy of the evidence placed before it, I should say that it seems to me that a simple averment in an appropriate affidavit to the effect that the proceedings were commenced outside the moratorium period, insofar as it is relevant to the case in question, ought to be sufficient to establish compliance with that requirement on a prima facie basis*

Furthermore the defendant's interpretation of the decision runs completely counter to the rationale of the Supreme Court decision and would involve the Court assessing the conduct of the mortgage provider in its dealings with the borrower under the Code of conduct, which is precisely the jurisdiction that the Court does not enjoy under current legislation.

36. On the facts of this case it is clear that the defendants had well in excess of the twelve month moratorium stipulated by article 47 of the code. The defendants' mortgage was in trouble within months of its creation. Direct debits went unpaid in December 2008 and in January 2009; thereafter such payments as were made to the account were made by way of credit transfer or bank giro. In February 2009 Stepstone were notified by Irish Life that the second defendant's life cash cover plan had lapsed due to non payment for the periods since 24th December, 2008. In November 2009 a meeting was held with the defendants. Their circumstances were poor, the recession having caused a virtually fatal downturn in their business of manufacturing school uniforms and bridal wear. In the intervening years the defendants have struggled and strained to make significant payments toward their mortgage. The level of payments made by them, despite being on a limited income of slightly in excess of €1,700 per month, has been at a level which approximates to the interest on their loan but it is now almost five years since they were notified formally that they were in default of their payments in a letter dated 10th June, 2010. It is almost four years since they were furnished with a MARP booklet on 1st July, 2011. Between the issuing of the MARP booklet and the issuing of proceedings seeking possession two years elapsed during which unfortunately no solution was arrived at. Given the two year lapse of time between the issuing of the MARP booklet and the issuing of proceedings, it cannot be said that the plaintiff issued the proceedings within the period of the moratorium. That provision of the code having been complied with, the Court has no discretion or power to consider or act upon any other provisions of the code. In these circumstances the plaintiff is entitled to an order for possession of the charged property.

Possession

37. The plaintiff is entitled to an order for possession pursuant to its mortgage. A problem arises however as to the extent of the mortgaged property and accordingly the extent of the property to which the plaintiff is entitled to possession. It is common case that the property mortgaged was the family home. The land contained in the schedule of lands in the mortgage and contained in the plot C1Y7Q on the register is more extensive than the family home and includes part of a commercial premises adjacent to the family home. The mortgage charged the entirety of plot C1Y7Q whereas the agreement of the parties was to charge only part of that plot being the family home. The plaintiff has submitted that any issues as to the extent of the property mortgaged or the boundaries of

the property mortgaged are matters exclusively for the plaintiff in the event that it proceeds to sell the property. The Court disagrees. Before an order for possession can properly be made, the property which is to be the subject of the order must be clearly and unambiguously identified for the purposes of the order. Furthermore the registration on the folio has to be rectified to reflect the agreement of the parties. A map based on Land Registry requirements correctly identifying the property which was agreed to be the subject of the charge and which is agreed by both parties will have to be produced to the Court for annexation to the order for possession. Moreover the Court requires an undertaking from the plaintiff that the registration of the charge on the folio will be rectified to cover only the property agreed to be charged The Court proposes to adjourn the proceedings to allow the plaintiff to produce the agreed map to be annexed to the order for possession.