

THE HIGH COURT

2017 No. 241 CA

Between:

STEPHEN KEARNEY

APPELLANT

– and –

PERMANENT TSB PLC FORMERLY IRISH LIFE & PERMANENT PLC

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 7th March, 2018.

I

Introduction

1. This is an appeal by Mr Kearney against a decision of the Circuit Court on 19th July, 2017, which had the effect of continuing a possession order in respect of his home.

II

Background Facts

(i) Introduction.

2. By letter dated 3rd August 2001, Permanent TSB agreed to make a loan facility available to Mr and Mrs Kearney on the terms and conditions more particularly set out therein. On or about 27th August, 2001, Mr and Mrs Kearney acknowledged in writing their acceptance of the letter of approval. By way of security for the said loan facility, Mr and Ms Kearney, on 5th September, 2001, executed a mortgage and charge over the house that was the subject of the home-loan. The house was intended to be, and it does not appear to be disputed that it was, thereafter occupied as the principal residence of the Kearney family. On 5th September, 2001, the sum of €152+k was advanced by Permanent TSB to Mr and Ms Kearney. There is no dispute that Mr and Ms Kearney were consumer-borrowers.

(ii) Letter of 6th August, 2009.

3. Sadly, Mrs Kearney passed away from cancer on 15th November, 2008. Roughly eight months later, a letter dated 6th August, 2009, issued from Permanent TSB to Mr Kearney, which letter stated, inter alia, as follows:

"I refer to correspondence which has recently been received. Please accept our deepest sympathy for your loss.

On checking our records, there was a life policy with New Ireland assigned to us as collateral security to this loan. However, New Ireland have advised us that the policy was cancelled at inception."

(iii) Letter of 4th September, 2013.

4. For some reason, there is then a considerable gap in correspondence, with a letter dated 4th September, 2013, issuing from Permanent TSB, which letter states, inter alia, as follows:

"I refer to the above New Ireland Life policy. Please be advised that I have contacted New Ireland, who has advised the policy lapsed in 2001.

New Ireland has advised that the policy was never in force as they never received payment from the start of the policy on 03/08/2001 or 07/08/2001, subsequently cancelling the policy.

Permanent TSB never received a lapse letter advising of this."

(iv) Letter of circa. 8th October, 2013.

5. In an undated letter received by Permanent TSB on 8th October, 2013, Mr Kearney states, inter alia, as follows:

"I am writing to you in reference to the above Mortgage with PTSB and the Mortgage Protection Policy placed by PTSB into New Ireland.

You have recently advised me...that the New Ireland policy you placed on behalf of my Wife (deceased) and myself lapsed in 2001. You also point out that PTSB were not advised of this policy lapsing.

I also never received anything advising that this policy was lapsed and was under the assumption everything was in order and the policy was in force as normal.

I am assuming that there would be an obligation on New Ireland to advise PTSB (who acted as my intermediary for this policy) of any changes to the policy, particularly one as serious as a policy lapse.

In New Ireland failing to advise you about the lapse as you have claimed and my lack of knowledge of the lapse, this has left me in the perilous position of potentially being uninsured for the mortgage protection. Obviously this is not acceptable.

I trust you will be able to provide me an answer as to how the policy lapsed without ever notifying me.

I apologise for the delay in trying to clarify all of this, but as I'm sure you can understand the passing of my wife at such a young age has had a profound effect on me."

(v) Letter of 9th October, 2013.

6. In a letter dated 9th October, 2013, Permanent TSB wrote to Mr Kearney, stating, *inter alia*, as follows:

"I wish to confirm receipt of your letter regarding your New Ireland life policy....Unfortunately I am unable to advise how the policy lapsed without notification, as permanent tsb were also not notified of this.

I would recommend contacting New Ireland directly regarding your query.

I trust this is the information you require...".

(vi) *The Commencement and Progress of Proceedings.*

7. On 11th March, 2014, Permanent TSB commenced possession proceedings against Mr Kearney in the Circuit Court by way of Civil Bill for Possession on that date. On 27th February, 2017, the County Registrar issued a possession order against Mr Kearney. On 19th July, 2017, an order appears to have issued from the Circuit Court refusing an application made under O.18, r.7 of the Circuit Court Rules to "review" the decision of the County Registrar.[Under O.18, r.7, "Any party dissatisfied with any certificate, ruling or decision of the County Registrar, may, within ten days from the date of such certificate... ruling or decision, apply to the Judge by motion on notice to review such certificate, ruling or decision, and the judge may thereupon make such order as he shall think fit."] (The court uses the phrase 'appears to have issued' because, for some reason, no copy of the order has been exhibited before the court). On 31st July, 2017, a notice of appeal to this court issued. The within appeal comprises a full re-hearing (de novo) of the possession proceedings against Mr Kearney.

III

Section 126 of the Consumer Credit Act 1995

8. It is perhaps helpful to commence the court's legal analysis of matters by focusing, firstly, on s.126(1) of the Consumer Credit Act, 1995, a provision which has sat un-amended on the statute-books for the better part of a quarter-century, and under which mortgage lenders are subject, *inter alia*, to the following requirements:

"Subject to the provisions of this section, a mortgage lender shall arrange, through an insurer or an insurance intermediary, a life assurance policy providing, in the event of the death of a borrower before a housing loan made by the mortgage lender has been repaid, for payment of a sum equal to the amount of the principal estimated by the mortgage lender to be outstanding in the year in which the death occurs on the basis that payments have been made by the borrower in accordance with the mortgage, such sum to be employed in repayment of the principal."

9. None of the balance of s.126 is of practical consequence in the context of the within proceedings.

10. Mr Kearney contends that Permanent TSB stands in breach of its obligation under s.126(1) to "arrange...a life assurance policy" because the coverage under the policy concerning the lives of himself and his late wife never came into being. This contention is respectfully rejected by the court. It is undoubtedly the case that, as a matter of general contract and insurance law, an insurance policy can exist without coverage ever coming into being thereunder. Indeed, it is common practice in some classes of insurance business for an insurer to provide expressly in an insurance policy that the insurance is not to attach until the premium has been paid. The effect of such a stipulation in any one instance is a matter of contractual interpretation. But that an insurance policy can be extant without coverage coming into being thereunder is, in truth, trite insurance law. The result of the foregoing is that when s.126 requires of a mortgage holder that it "arrange...a life assurance policy", that is not the same as requiring that insurance cover be arranged. And even the verb arrange is fairly limited in scope, bearing its ordinary dictionary meaning, *viz.*, per the most relevant definition in the *Shorter Oxford English Dictionary*, 5th ed., to "[p]lan or settle beforehand the details of (something to be done); give instructions for, cause to take place".

11. Thus, as can be seen, the extent of the obligation under, and the extent of protection afforded consumers by, s.126(1) of the Act of 1995 is quite limited. A mortgage holder is simply required, to borrow from the terminology of the just-quoted dictionary definition, to "[p]lan or settle beforehand the details of [a life assurance policy]....[to] give instructions for [a life assurance policy], [to] cause [a life assurance policy] to take place". And, as mentioned, a life assurance policy may be planned, settled, etc., without insurance attaching thereunder. Here, Permanent TSB saw to it that a life assurance policy was executed between the Kearneys and New Ireland Assurance, and thus discharged its obligations under s.126, notwithstanding that the insurance under that policy never attached because of the Kearneys' failure from the outset to pay the applicable premium.

IV

The Purported Will

12. Mr Kearney avers in his affidavit evidence that "[I]n the time preceding my wife's illness we became estranged for reasons that are not relevant to these proceedings". As a consequence of that unfortunate estrangement, Mrs Kearney, at some point in 2008, purported to execute a will leaving the house that was bought with the Permanent TSB home-loan to her three children as tenants in common, subject to a right on the part of Mr Kearney to reside in the home for his lifetime.

13. Counsel for Mr Kearney contends that the execution of the purported will, post-estrangement, sufficed to convert the joint tenancy that Mr and Mrs Kearney enjoyed in their home into a tenancy in common, notwithstanding that under cl.5 of the (applicable) *Irish Permanent Mortgage Conditions 1999*:

"The Mortgagor covenants so long as the Mortgage is outstanding..."

5.11 Not without the prior written consent of the Irish Permanent to make any disposition of the Property."

14. The court respectfully does not accept the said contention. Perhaps the most notable attribute of a joint tenancy is that, when one joint tenant dies, her undivided share in the land passes to any surviving joint tenants. As Professor Wylie observes in *Irish Land Law*, 5th ed., 448, after having noted the just-described attribute of a joint tenancy (and referenced long-standing precedents of relevance),

"It is inherent...in the nature of this right of survivorship that no joint tenant can defeat it by making a will purporting to leave his share in the land to someone other than his co-tenants".

15. What cannot be achieved by way of a valid will cannot, of course, be achieved by way of an invalid will. So whether Mrs Kearney's purported will was valid or invalid is an irrelevance: no sundering of the joint tenancy could be effected thereby. As to the legal position presenting in the context of intestacy, s.4(c) of the Succession Act 1965 has the effect that the deceased joint tenant's estate or interest in the relevant property ceases on her death where (as here) she is survived by another joint tenant.

V

Unfair Terms in Consumer Contracts Regulations

(i) Main Subject-Matter?

16. Reference was made by counsel for Permanent TSB to the court's judgment in *Allied Irish Bank plc v. Coughlin and anor* [2016] IEHC 752, and the discussion therein of the own-motion obligation incumbent upon a member state court pursuant, inter alia, to the decision of the Court of Justice in *Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (Case C-415/11, Judgment of 14th March, 2013). In this context, counsel for Permanent TSB drew the attention of the court to the recital in Council Directive 93/13/EEC of 5th April, 1993 on unfair terms in consumer contracts (O.J. L95/29, 21.4.1993) which provides that *"Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied."*

17. When it comes to the just-quoted recital, the related operative provision of Directive 93/13 is Art. 4(2), as implemented into Irish law by way of reg.4 of the Regulations of 1995, as amended. Regardless, however, of whether one focuses on the above-quoted recital or on Art.4(2) or on reg. 4, the essence of the contention made by counsel for Permanent TSB in this regard was that the within proceedings are concerned with terms which describe the main subject-matter of the Kearney home-loan contract. The court respectfully does not accept that this is so. The key focus of the within proceedings proved to be whether Permanent TSB had complied as mortgage lender with the mandatory but ancillary statutory obligation arising under s.126 of the Act of 1995. (The issue as to the will was a completely separate matter arising, claimed to be of import but in fact of none). The court sees nothing in the applicable contractual documentation that offends against the Unfair Terms in Consumer Contracts Regulations.

(ii) Hidden Terms.

18. Permanent TSB appeared to raise the argument that the purpose of Directive 93/13 and the implementing regulations is to protect consumers against 'hidden' terms' in contracts. To the extent that that contention was made (if made), it is respectfully rejected by the court. To give but one example, a seller could insert into a contract drafted in 8-font, a 24-font term with a red hand pointing at it, so that it could in no way be said to be hidden, and it could still be found to be unfair. The critical issue arising under the Regulations of 1995, as amended, is whether terms are unfair, not whether they are 'hidden'.

(iii) Cosgrove.

19. Permanent TSB referred the court to *AIB Mortgage Bank v. Cosgrove* [2017] IEHC 803. The court does not see that that decision advantages Permanent TSB. If one looks to para.60 of the judgment in that case, perhaps the key paragraph for the purposes of the proceedings at hand, Faherty J., applying *Aziz*, concludes that the securitisation provisions in the documentation in issue before her were not unfair; there is no issue regarding securitisation provisions here. She then moves on to state *"Furthermore, I am satisfied that the terms of the contract, upon which the plaintiffs seek to rely in the within proceedings, cannot be said to come within the ambit of the Unfair Terms Regulations, such that the provisions of the mortgage contract should be deemed unenforceable against the defendant."* Notably, Faherty J. uses the verb 'should', not 'could'. Thus she does not suggest that the terms in issue could not be deemed unenforceable. All that Faherty J. is saying is that the impugned terms do not come within the terms of the Regulations in such a way that they should be deemed unenforceable, or to put matters otherwise, when looked at in the context of the Regulations they were enforceable. There is nothing in that that is inconsistent with the within judgment.

VI

Conclusion

20. For the various reasons stated above, Mr Kearney's appeal must fail.