

THE HIGH COURT

2017 No. 607 SP

BETWEEN

ALLIED IRISH BANK PLC

PLAINTIFF

AND

SEAN BUCKLEY

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 25 February 2019

INTRODUCTION

1. The within proceedings present a short point of law in respect of the Central Bank's Code of Conduct on Mortgage Arrears (*"the Code of Conduct"*). Specifically, the proceedings concern the criteria which trigger the application of the Code of Conduct. In brief outline, the plaintiff bank maintains that it was not required to demonstrate compliance with the Code of Conduct in circumstances where it is not seeking possession of the defendant's primary residence. Conversely, the defendant contends, first, that it is sufficient to trigger the Code of Conduct that the *mortgage* upon which the application for possession is grounded is secured by a primary residence; and, secondly, that in any event the case as pleaded does actually seek possession of his primary residence.

2. For the reasons set out in more detail below, I have come to the conclusion that the plaintiff bank was obliged to comply with the Code of Conduct prior to the institution of the within proceedings. In circumstances where it does not appear to be disputed by the plaintiff bank that the Code of Conduct was not complied with, I refuse the application for possession and dismiss the proceedings.

FACTUAL BACKGROUND

3. The within proceedings seek an order of possession in respect of registered land in Templemore, County Tipperary. The proceedings were instituted by way of Special Summons on 8 December 2017.

4. The defendant, Sean Buckley, is registered as having possessory title to the lands under Folio 37564 County Tipperary. Two charges are registered on the folio as burdens in favour of AIB Mortgage Bank, and Allied Irish Bank plc, respectively. It is stated in the grounding affidavit of Brian McGuinness sworn herein on 6 December 2017 that AIB Mortgage Bank has since transferred all of its interest in the mortgage, and all of its interest in the mortgaged property, to Allied Irish Bank plc. No issue has been taken by the defendant as to this transfer. The proceedings were issued in the sole name of Allied Irish Bank plc (*"the plaintiff bank"*).

5. The defendant has averred that the lands the subject of Folio 37564 include what he has described variously as his "principal private residence" and his "family home". The defendant has also averred that there was no compliance with the Central Bank's Code of Conduct on Mortgage Arrears. The defendant's position is set out as follows in his affidavit of 20 July 2018.

"8. I reside on Folio 37564 County Tipperary and this Folio contains my principal private residence within the meaning ascribed thereto by the Code of Conduct on Mortgage Arrears. As appears from the Plaintiff's grounding affidavit, at no stage was the above property dealt with in accordance with the Code of Conduct on Mortgage Arrears and I was not afforded any of the rights which accrue to a borrower.

9. I am further advised that as a matter of law the Plaintiff is obliged to demonstrate compliance with the moratorium period contained in the mortgage arrears process and as the Plaintiff cannot do so this is fatal to the possession application."

6. The Special Summons does not draw any distinction between that part of the folio lands which are the defendant's primary residence, and the balance of the lands. Rather, the schedule of lands in the Special Summons simply provides as follows.

"ALL THAT AND THOSE the property comprised in Folio 37564 of the Register County Tipperary."

7. In the grounding affidavit of Brian McGuinness, however, there is an attempt to draw a distinction between the primary residence and the balance of the lands. This reflects the language used in the letter of demand of 21 November 2017. See paragraph 23 of the affidavit as follows:

"23. As can be seen of the demand for vacant possession of 21 November, 2017, the Plaintiff seeks possession of part of the lands contained in Folio: 37564 County Tipperary and excluding the family property."

8. The plaintiff bank has sought to elaborate upon its position and, in particular, its intention to distinguish between the primary residence and the balance of the lands in the further affidavit of Brian McGuinness filed in the proceedings on 8 October 2018.

"4. Clause 7.1 of the AIB Mortgage Conditions (2006 Edition) which conditions are incorporated into the Mortgage deed dated 20 January 2009 makes reference to the Plaintiff being entitled to enter into possession of the Mortgage Property or any part thereof. I beg to refer to true copy of the said AIB Mortgage Conditions upon which marked with the letters and number "BMCG1" I have signed my name prior to the swearing hereof.

5. The Plaintiff can produce if required by the Court a map showing the exact portion of Folio 37564 of the Register of County Tipperary which it is seeking an Order for Possession in respect of. In order to do so, the Plaintiff will require the consent and assistance of the Defendant with regards access to the lands in seeking to have this map prepared and drawn up."

9. The full text of 7.1 of the AIB Mortgage Conditions (2006 Edition) reads as follows.

"7.1 At any time after the execution of the Mortgage, a Lender may without any further consent from or notice to the Mortgagor or any other person enter into possession of the Mortgaged Property or any part thereof or into receipt of the rents and profits of the Mortgaged Property or any part thereof."

10. Finally, for the sake of completeness, it should be noted that the plaintiff bank subsequently issued a separate notice of motion seeking an order for inspection. It was agreed at the hearing before me on 11 February 2019 that the bank's motion should await the outcome of the ruling by the court on the defendant's objection that the Code of Conduct has not been complied with. The rationale here being that if the court were to decide this first issue in favour of the defendant, then the proceedings would be at an end and the question of inspection would not arise.

CENTRAL BANK'S CODE OF CONDUCT (2013 VERSION)

11. The parties were in agreement that—insofar as the Code of Conduct might have any application to these proceedings—it is the 2013 version which is relevant.

12. The Code of Conduct was issued by the Central Bank pursuant to section 117 of the Central Bank Act 1989. The Code of Conduct is stated to be effective from 1 July 2013.

13. The application of the Code of Conduct is described as follows at page 2 thereof.

"APPLICATION OF THIS CODE

This Code applies to the mortgage lending activities of all regulated entities, except credit unions, operating in the State, including:

- a financial services provider authorised, registered or licensed by the Central Bank of Ireland; and
- a financial services provider authorised, registered or licensed in another EU or EEA Member State and which has provided, or is providing, mortgage lending activities in the State.

This Code applies to the mortgage loan of a borrower which is secured by his/her primary residence."

14. A "primary residence" is defined as follows at page 5 of the Code of Conduct.

"Primary Residence: means a property which is: a) the residential property which the borrower occupies as his/her primary residence in this State, or b) a residential property which is the only residential property in this State owned by the borrower."

15. The Code of Conduct prescribes a procedure to be followed by a regulated bank in the case of mortgage arrears. This is described as the "Mortgage Arrears Resolution Process" or "MARP".

16. Relevantly, the Code of Conduct provides that a regulated bank may only commence legal proceedings for repossession where certain procedural requirements have been complied with. See, in particular, Provision 56 and Provision 57 of the Code of Conduct as follows.

"REPOSSESSIONS

56. Where a borrower is in mortgage arrears a lender may only commence legal proceedings for repossession of a borrower's primary residence, where:

a) the lender has made every reasonable effort under this Code to agree an alternative arrangement with the borrower or his/her nominated representative; and

b) (i) the period referred to in Provision 45 d) or Provision 47 d), as applicable, has expired; or

(ii) the borrower has been classified as not co-operating and the lender has issued the notification required in Provision 29.

57. Notwithstanding Provisions 56, where a borrower is in mortgage arrears the lender may apply to the courts to commence legal proceedings for repossession of a borrower's primary residence: a) in the case of a fraud perpetrated on the lender by the borrower; or b) in the case of breach of contract by the borrower other than the existence of arrears."

17. The effect of these provisions is that, generally, a regulated bank will have to await the expiration of the following time periods before instituting legal proceedings. The time periods are the later of (i) the expiration of three months from the date upon which a letter is issued to the borrower stating that he or she will not be offered an alternative repayment method, or (ii) the expiration of eight months from the date upon which the mortgage arrears arose. The imposition of these time-limits is often described in practice as a "moratorium" on repossession proceedings. However, the term "moratorium" is not actually used in the Code of Conduct.

LEGAL STATUS OF CODE OF CONDUCT

18. The legal status of such Codes of Conduct has been explained in the judgment of the Supreme Court in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92. Clarke J. (as he then was), delivering the unanimous judgment of the court, indicated that there is a distinction to be drawn from those provisions of a Code of Conduct which regulate possession proceedings, and other aspects of the Code, e.g. in terms of provision of information, communication with borrowers etc.

"[63] So far as one limited aspect of the Code is concerned, it might well be said that a court making an order for possession might be facilitating the carrying out of 'the very act' which the Code is designed to prevent. As already noted, the Code imposes a moratorium on seeking possession in certain circumstances. 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 a 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.

[64] In my view a court could not properly act to consider a possession application in those circumstances. It should be recorded that the Code (being the version applicable to this case) does make some provision for the moratorium period being cut short (see step four of the M.A.R.P. provisions) or not applying (see provision 48). I am, in this section of this judgment, dealing with a situation where an application for possession has been brought at a time when the Code precludes such action. Like consideration would apply to any similar provisions in the current or any future versions of the Code.

[65] However, in respect of the other provisions of the Code, different considerations apply. There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution, in formulating its detailed policies in respect of mortgage arrears and applying those policies to the facts of individual cases, can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the Oireachtas had intended to give the courts such a role then it would surely have required detailed and express legislation which would have established the criteria by reference to which the court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law."

19. For the sake of completeness, it should be noted that Clarke J. went on to indicate the manner by which compliance with the Code of Conduct might be demonstrated.

"[71] In those circumstances, it seems to me that it is appropriate that the court should require that it be satisfied that there has been no breach of the moratorium. 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 of the moratorium period, insofar as it is relevant to the case in question, ought be sufficient to establish compliance with that requirement on a prima facie basis. If the full or normal moratorium period is said not to apply then that should be explained. Clearly, if the matter is contested, the court may have to consider what further evidence may be necessary to enable the court to be satisfied that there was no breach of the moratorium.

[72] In conclusion on this issue I should say that in those circumstances I am satisfied that, in the limited cases of a breach of the moratorium, but in no other cases unless and until appropriate legislation is passed, a court should decline to make an order for possession."

ARE THE PROCEEDINGS SUBJECT TO THE MORATORIUM?

20. The principal dispute in the present proceedings is whether the so-called moratorium applies in circumstances where it is said by the plaintiff bank that it is not, in fact, seeking possession of the defendant's principal private residence.

21. The resolution of this dispute requires the consideration of two distinct issues as follows. First, it is necessary to consider what steps on the part of a regulated bank are prohibited pending the expiration of the moratorium. Secondly, it is necessary to consider whether, on the particular facts of this case, the plaintiff bank is seeking possession of the defendant's primary residence.

22. On behalf of the plaintiff bank, Mr Andrew Walker, BL submitted that the loan was provided for the purpose of the defendant's business, i.e. farming, and did not finance the purchase of the primary residence. Although part of the security included the defendant's primary residence, the plaintiff bank was not seeking possession of the primary residence. This had been explained in the letter of demand of 21 November 2017.

23. Counsel for the defendant, Mr John Madden, BL, relied on the introductory chapter of the Code of Conduct which, it will be recalled, states that the Code applies to the mortgage loan of a borrower which is secured by his/her primary residence. This language focuses on the mortgage loan, rather than on the nature of the property which is the target of possession proceedings. On a literal reading, it would be sufficient to trigger the Code of Conduct that a primary residence is included as part of the security held in respect of a mortgage loan. This could have the anomalous consequence that what is in substance a commercial business loan might be subject to the Code of Conduct if part of the security includes a primary residence.

24. For the purposes of these proceedings, however, the crucial part of the Code of Conduct is that set out at Provision 56. This provision has been set out in full at paragraph 16 above. As appears, same refers to "legal proceedings for repossession of a borrower's primary residence". This language focuses on the target of the possession proceedings, and indicates that it is only where the proceedings are directed to a primary residence that the moratorium must be observed.

25. I do not think that there is any conflict in the Code of Conduct as between the approach taken in the introductory chapter and that taken in Provision 56 in the context of the so-called moratorium. The wide definition in the introductory chapter has the—possibly unintended—consequence that where a commercial loan is secured by properties which include the primary residence, the regulated bank has to comply with certain provisions of the Code of Conduct. The regulated bank might, for example, have to offer an alternative payment arrangement in respect of the entire loan notwithstanding that the principal purpose of same might have been commercial. However, insofar as that part of the Code of Conduct which is directly enforceable, i.e. the so-called moratorium on repossession proceedings, is concerned, same only arises where the legal proceedings seek an order of possession in respect of the borrower's primary residence.

26. On this interpretation of the Code of Conduct, a regulated bank would be able to proceed at any time against *other* property held as security for a loan notwithstanding that the loan is also secured against the borrower's primary residence.

27. The crucial issue, therefore, is whether the within proceedings seek an order of possession in respect of the borrower's primary residence. This must be determined by reference to the terms of the Special Summons. On the facts of this case, no distinction is made under the Special Summons between the defendant's primary residence and the balance of the folio lands. Had the plaintiff bank wished to confine the relief sought to part-only of the folio lands, then this should have been clearly stated in the Special Summons. This did not happen. It is not enough that this distinction is mooted in the letter of demand and the verifying affidavit. It is the Special Summons which establishes the parameters of the proceedings.

28. In circumstances where the plaintiff bank has not adduced any evidence to the effect that there was compliance with the moratorium, I hold that the proceedings were instituted in breach of the Code of Conduct.

29. (As noted in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92, [71], the onus on a regulated bank to demonstrate compliance with the Code of Conduct can be readily discharged in most cases).

PROPOSED ORDER

30. Accordingly, I propose to refuse the application for possession and to dismiss the proceedings.