THE HIGH COURT

[2017 No. 125 C.A.]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/RESPONDENT

AND

PATRICK MCMAHON AND ANGELA MCMAHON

DEFENDANTS/APPELLANTS

EX TEMPORE decision of Mr. Justice Binchy delivered on the 15th day of June, 2018

1. This is an appeal from an order of the Circuit Court made on 26th April, 2017 whereby the Circuit Court (Judge Linnane) made an order for possession of the premises known as No. 1, Park Lodge, Laurel Lodge, Castleknock, Dublin 15 against the defendants, in favour of the plaintiff. Judge Linnane handed down a detailed written decision in the matter on 26th April, 2017.

2. Following the filing of an appeal, the defendants/appellants (hereafter simply "the appellants") filed three further affidavits dated 16th May, 2017 and two affidavits dated 19th June, 2017, together with exhibits. This gave rise to a replying affidavit of a Ms. Helen Dorris on behalf of the plaintiff/respondent (hereafter "the respondent") on 30th June, 2017, and a further replying affidavit on behalf of the appellants on 20th July, 2017.

3. I have considered all of the pleadings in this matter, both those exchanged before and after the decision of Judge Linnane. I have considered the judgment of Judge Linnane and I am satisfied that her conclusions on all matters of fact and law, based upon the materials before her were correct. There is no need to repeat the conclusions of Judge Linnane which are set out with absolute clarity in her decision. At this point therefore I affirm the conclusions of Judge Linnane, and the purpose of this decision, from this point onwards, is to consider only whether this appeal against the order for possession made by Judge Linnane should be allowed by reason of any of the additional arguments advanced by the appellants on the hearing of the appeal, which were not advanced before Judge Linnane. These arguments are set out in the additional affidavits filed by the appellants, referred to above, following upon the order of the Circuit Court.

4. Before considering those arguments, I should add to the above that on 24th October, 2017, the respondent obtained judgment from this Court (Noonan J.) in respect of the full amount claimed by the respondent in respect of the same loan, breach of the terms of which have given rise to these proceedings. The precise amount of the judgment is not clear from the terms of the judgment, (because it simply states that the plaintiff is entitled to judgment in the amount claimed), but para. 4 of the judgment states that as of the date of the issue of the summary summons, the amount claimed was €970,000.00. The appellants say that this decision is under appeal, but as matters stand that judgment remains undisturbed and it is not open to the appellants in these proceedings to challenge their indebtedness to the respondent as found by another court.

5. I turn now to address the principal arguments made by the appellants on this appeal (i.e. only those arguments not advanced in the Circuit Court).

6. The appellants rely on a newly exhibited document which they describe as "an auditor's report from Abacus Services" which is exhibited to the affidavit of Angela McMahon of 16th May, 2017. Apart from the fact that this is an attempt to introduce new evidence upon appeal, which is impermissible without the express permission of the court, the evidence is quite clearly hearsay evidence. The same evidence is referred to and described as such by Noonan J. in his decision of 24th October, 2017. Noonan J. considered that report to be inadmissible for the purposes of the application for judgment before him and I consider it likewise to be inadmissible in these proceedings.

7. In any case, that report concludes that the appellants were overcharged interest in the sum of €983.08, and rather than argue about that point the respondent agreed to waive that amount for the purposes of the application for judgment before Noonan J. Moreover, somewhat curiously, Abacus conclude that the appellants owe the respondent €1,292,523.00 as of the date of their report (12th December, 2016), whereas in her replying affidavit, Ms. Dorris states that, as of the date of the swearing of her affidavit of 30th June, 2017, the sum of €1,012,599.32 was due and owing by the appellants to the respondent.

8. The appellants argue that following the transfer of their loan by ICS to the respondent, the respondent should have issued a new demand letter. The demand letter relied upon by the respondent in the proceedings was one issued by ICS Building Society on 14th August, 2014, prior to the transfer of the appellants' loan by ICS to the respondent, which took effect on 1st September, 2014. In advancing their argument on this point, the appellants rely on the decision of Barrett J. in *Start Mortgages Ltd. v. Hanley* [2016] IEHC 320. However, it is far from clear if in that case a letter of demand was sent at all; it would appear not from a summary of the arguments made by Start Mortgages. In any case, that case was concerned with an application for summary judgment and Barrett J. merely concluded that the defendant had met the low threshold required to send the case forward to a full plenary hearing. Unlike in this case, it does not appear as though Start Mortgages contended that any letter of demand had been sent.

9. In reply to this point, the respondent submits that s. 34 of the Central Bank Act 1971 makes it clear that following the transfer of a business pursuant to s. 33 of the Act of 1971, such as occurred in this case when the business of ICS was transferred to the respondent, the transferee (in this case the respondent) enjoys all of the same rights and obligations as those previously enjoyed by the transferor. So therefore, there was no need for the respondent to issue a new letter of demand, as it was entitled to rely upon the letter of demand that had already been sent by ICS. I am satisfied that the respondent is correct in this argument. Section 34 of the Central Bank Act 1971 is clear in its intent, meaning and effect.

10. The appellants contend that the Circuit Court did not have jurisdiction to entertain these proceedings because the property that is the subject of this application did not have a rateable valuation and the appellants had not consented to the Circuit Court jurisdiction. The defendants further contended that the property is not a principal private residence and also relied upon the case of *Permanent TSB plc v. Langan & Anor* [2017] IESC 71.

11. The respondent says that it was required to issue these proceedings in the Circuit Court by reason of s. 3 of the Land and Conveyancing Law Reform Act 2013. Since these proceedings were issued on 6th January, 2015, after the 2013 Act came into effect,

it is quite clear that the respondent is correct in this regard. The proceedings were required to be taken in the Circuit Court. Furthermore, it is abundantly clear that the premises, being the family home of the appellants, is their principal private residence.

12. The respondent claims that there is an irregularity as regards the stamping of the grounding affidavit of the respondent in the proceedings. This appears to be based upon the fact that the affidavit was sworn on 15th December, 2014, whereas it is date stamped by the Circuit Court office as having been received on 6th January, 2014. This is clearly an error in the date stamp in the Circuit Court office, and nothing more. They also complain that one of the exhibits to this affidavit, which is a copy of the mortgage over the premises of the appellants, was not witnessed. This point is not understood because the document was quite clearly witnessed by their own solicitor.

13. The appellants argue that the term of the mortgage whereby they gave advance consent to any transfer of their loans is unfair and in breach of the EU Directive on unfair terms and conditions in consumer contracts. They do not say why the term is unfair, but they do submit that the Court is obliged, of its own motion, to consider whether or not any of the terms of the loan contract between the parties is unfair within the meaning of the Directive. The appellants rely upon the decision of the European Court of Justice in *Aziz v. Caixa d'Estalvis de Catalunya* (Case C-415/11, Judgment of First Chamber, 14 March, 2013) and the decision of this Court in *Allied Irish Bank v. Counihan & Anor* [2016] IEHC 752 (Barrett J.) (21st December, 2016). It should be noted that in the latter case Barrett J. sent an application for summary judgment forward for plenary hearing on other grounds, and having considered the definition of an unfair contract, concluded that in that case the contract was not unfair. I have considered the terms of the loan agreement entered into between the parties in this matter and have not identified any unfair contract terms within the meaning of Council Directive 93/13/EEC, as implemented in this jurisdiction by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995. The loan agreement is dated 12th April, 2006 and was accepted by the appellants on 21st April, 2006. It sets out clearly the amount of credit advanced, the repayment period, the instalments to be paid and the rate of interest applicable (which is stated to be variable). The appellants are clearly advised to take independent legal advice before signing the agreement. They are warned that their home is at risk if they fail to keep up payments of their mortgage. There does not appear to me to be any significant imbalance in the rights of the parties to the agreement, to the detriment of the appellants, having regard to the nature of the goods or services provided.

14. The appellants did argue in the Circuit Court that the contract was unfair in permitting ICS to securitise their loan, and they argued that their loan had been securitised. However, the Circuit Judge correctly held that securitisation had not taken place, but that even it had taken place that would not affect the right of the respondent to enforce its security. The appellants also claimed that the term of the loan agreement whereby they gave their advance consent to any future transfer or assignment of their loan is unfair. But they do not particularise why that is so. It is clear that their rights and obligations remained unchanged following the transfer of their loan from ICS to the respondent. That transaction was neutral as far as they were concerned. The condition giving rise to it therefore could not be unfair.

15. The appellants made some outlandish claims that the respondent stands to gain disproportionately in the event that the appellants default in loan repayments. They submitted that the respondent would gain from insurance on the bad debt, that it would be entitled to keep all payments made to date by the appellants, as well as tax rebates from Revenue and that the respondent would benefit from default swaps. The appellants ignored the simple fact that in the event of repossession and sale, the respondent may retain only what it is due under the terms of the loan and must remit any surplus to the appellants.

16. The appellants further submitted that the loan agreement was in breach of Clause 5(1) of the 1995 Regulations because many provisions of the contract are not drafted in plain and intelligible language. The appellants quoted extensively from the deed of mortgage in this regard and submitted that the deed of mortgage forms part of the loan agreement.

17. In response to this it was submitted on behalf of the respondent that the facility letter itself is clear. As far as the mortgage is concerned, it is necessary for the borrower to retain a solicitor in connection with the loan transaction and the appellants therefore had independent legal advice to explain to them the provisions of the mortgage.

18. I have no difficulty in agreeing with the submissions of the appellant that the various provisions of the deed of mortgage to which they referred are not written in plain and intelligible language. The mortgage document is a legal document, and while many of its provisions may readily be understood by a lay person, many others would not readily be understood by a person without legal training, and specifically a person with legal training in the conveyancing sphere.

19. The question that arises therefore is whether the obligation in the Regulations to provide a contract in plain and intelligible language extends to a deed of mortgage which is completed pursuant to the requirements of the loan agreement itself. I do not believe that this could be so.

20. While in a broad sense it is of course accurate to say that the deed of mortgage is itself an agreement between the parties to a mortgage transaction, and forms part of the suite of documents completed in connection with such transactions, it is not in itself the loan agreement. The loan agreement is the document whereby a loan is offered by a lender and then later accepted by a borrower. That is the agreement that must be in plain and intelligible language. There has been no suggestion in this case that the mortgage loan offer of 12th April, 2006 and accepted by the appellants on 21st April, 2006 offends the Regulations or the Directive.

21. Moreover, since it is not possible, in practicable terms, for a borrower to drawdown a mortgage loan without instructing a solicitor, it is clear that borrowers have the benefit of independent legal advice to explain any technical legal language, as well as the legal effect of the mortgage documentation generally. To suggest that the Regulations or the Directive apply to the deed of mortgage itself is in my view an absurd proposition, which, if accepted, might very well undermine the domestic mortgage market.

22. Finally, on the hearing of this appeal, the appellants also argued that the respondent had failed to comply with the Central Bank Code of Practice on the Transfer of Mortgages. This document, which is undated, states at para. 1:-

> "A loan secured by the mortgage of residential property may not be transferred without the written consent of the borrower. When seeking consent from either an existing or a new borrower the lender must provide a statement containing sufficient information to enable the borrower to make an informed decision. This statement, which must be cleared in advance with the Central Bank of Ireland, must include a clear explanation of the implications of a transfer (including the borrower's future membership status where the lender is a building society) and how the transfer might affect the borrower. The borrower must be approached on an individual basis and given reasonable time to give or to decline to give his consent."

23. Since this matter was raised for the first time by the appellants at the hearing of this appeal, the respondent was not in a

position to address the matter on the day of the appeal hearing, and accordingly I adjourned the matter to enable the respondent to take instructions as to whether or not there had been compliance with the Code, and, if not, the implications of such non-compliance. The respondent, through a Ms. Noreen McGovern, addressed the issue in an affidavit sworn on 17th May, 2018. In her affidavit, Ms. McGovern advanced legal arguments as regards the implications of non-compliance with the Code. She does not expressly state that the respondent did not comply with the Code and simply relies upon a notice published in the Irish Times newspaper on 30th July, 2014, advising the public generally as to the transfer from ICS to the respondent. It is clear that no specific notification was given to the appellants.

24. The appellants also relied upon Clause 3 of the Code which states:-

> "Where the lender in the ordinary course of business would no longer have control in relation to:-
>
> (a) the setting of interest rates, and/or
>
> (b) determining the conduct of relations with borrowers whose mortgage payments are seriously in arrears
>
> the lender must seek the borrower's consent to a transfer notwithstanding any previous consent which a borrower has given."

25. It seems clear that the respondent did not comply with this requirement either. As to the implications of non-compliance with the Code of Conduct, the appellants submit that the transfer of the ICS loan book to the respondent, including the loan of the appellants, is invalid on account of the failure of the respondent to comply with the Code. They submitted an academic paper prepared by Mr. Trevor Murphy solicitor and dated December, 2016 which, following an examination of the authorities up to that point in time, concluded with the following comment:-

> "It is clear that the extent to which – if at all – the provisions of the Code creates rights or defences for borrowers, and whether any such rights may be relied upon or deployed in litigation with lenders, are troubling the courts at the moment. While the current regulatory scheme operates by way of "vertical" regulation, it seems that, based on *Fitzell*, certainly with respect to the CCMA, breach of it seems to provide some "horizontal" enforcement by means of private remedy by aggrieved consumers of financial services by way of a shield or a defence to repossession proceedings. Unfortunately, the case law which has developed on the status of the Codes over the last few years is confusing."

26. The respondent relies upon a number of cases in relation to this issue, but I will refer to just two. Firstly, the case of *Freeman & Anor v. Bank of Scotland Plc. and others* [2014] IEHC 284. In that case, by way of general comment as regards the implications of non-compliance with the statutory code, McGovern J. stated:-

> "It is clear, therefore, that non-compliance with a statutory code does not relieve a borrower from his obligations under a loan to repay the lender, nor does it deprive the lender of its rights and powers under the loan agreement."

27. More specifically, the question of non-compliance with the Code of Practice on the transfer of mortgages relied upon by the appellants was considered by the Court of Appeal in the case of *Healy & Anor v. McGreal, Healy v. McGreal & Anor and Healy & Anor v. McGreal* [2018] IECA 78. In that case, at para. 50, Irvine J. stated:-

> "However, as the Receiver rightly contends, the fatal flaw in the plaintiffs' submission is that the Code of Practice on the Transfer of Mortgages is in any event different from other Central Bank codes. It is a voluntary code for credit institutions, so they do not have to comply with it. Thus its breach could never afford the plaintiffs with any basis upon which they might support any of their claims against the receiver."

In her judgment, Irvine J. also referred to the decision of Clarke J. as he then was, in *Irish Life and Permanent plc. v. Dunne* [2015] IESC 46. That case was concerned with a different Code of Conduct but nonetheless Irvine J. found the reasoning of Clarke J. in the case to be equally applicable to the breach of the Code of Conduct on the transfer of mortgages and in particular she referred to para. 5.24 of his judgment in which he stated:-

> "5.24 It does not seem to me, therefore, that the statutory policy of the 1989 Act and the Code-making powers contained therein is such that same is intended to, as it were, by the backdoor, 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."

28. There is scarcely any doubt therefore that it is well settled that non-compliance with a voluntary code such as the Code of Practice on the transfer of mortgages does not afford a borrower any relief against an application for judgment, or for possession arising out of default in repayment of a mortgage loan. Any remedies that the borrowers may have in relation to such non-compliance lie in the form of a complaint to the Central Bank.

29. The appellants also contended that the procedure adopted by the respondent i.e. a civil bill for possession is contrary to article 6 of the European Convention on Human Rights (the "Convention") as well as various provisions of the European Charter. As regards the former, the appellants referred the court to the case of *Connors v. UK*, 66746/01 [2004] E.C.H.R. 223 (27 May 2004), a case in which the European Court of Human Rights ("EctHR") found that a provision of English law enabling local authorities to obtain an eviction order without having to give reasons, was contrary to article 8 of the Convention (having so found the Court did not have to address arguments made under article 6). Apart from anything else that case is entirely distinguishable, because it is not open to a party seeking an order for possession by way of civil bill for possession, to obtain such an order without first satisfying the court as to its entitlement to do so, and addressing, to the satisfaction of the court any arguments raised by the defendants in opposition to the application. There is no shortage of procedural safeguards (as the EctHR found in *Connors*), as the decision of both this Court and the decision of the Circuit Judge clearly demonstrate. Moreover, if the appellants have a grievance with the procedure for obtaining an order for possession, they would need to issue separate proceedings against the appropriate State bodies; the respondent is clearly obliged to use the procedure prescribed by law to secure an order for possession.

30. In so far as the appellants have made any argument at all under the European Charter (impugning the same procedure) it was not adequately particularised to address in any meaningful way.

31. Having considered all of the new arguments raised by the appellants on this appeal, over and above those raised by them in the Circuit Court, I am satisfied that all such arguments, including any not expressly addressed in this decision, should be rejected. The respondent is in my view entitled to the order which it seeks in these proceedings and accordingly I dismiss the appeal and affirm the order of the Circuit Court.