

THE HIGH COURT**[2014 No. 2996 P.]****BETWEEN****JAMES RYAN****PLAINTIFF****AND****DANSKE BANK A/S TRADING AS DANKSE BANK AND STEPHEN TENNANT****DEFENDANTS****JUDGMENT of Ms. Justice Baker delivered the 29th day of April, 2014**

1. The plaintiff is the owner of two commercial unregistered premises known as Franciscan Hall situated at 1 Henry Street and 2 Sarsfield Street, Limerick, and registered lands comprised in Folio 47241F County Kerry with an address at 31 Gortamullen, Kenmare Holiday Village, Kenmare, Co. Kerry. The first defendant bank ("the Bank") has the benefit of a mortgage over the premises at Franciscan Hall created on the 27th January 2003, and a first charge over the folio lands registered on the 12th November, 2003. The Bank also has the benefit of a mortgage or charge over the plaintiff's principal private residence at the Cottage Lemonfield, Crecorca, Co. Limerick where he resides with his wife Susan Halvey.

2. The Bank by deed of appointment made on the 28th November 2013, appointed the second defendant receiver of the registered lands, and by separate deed of 20th January 2014, receiver of the unregistered premises.

3. In these proceedings the plaintiff seeks declaratory and injunctive relief and pleads that the appointments of the second defendant as receiver over each of the commercial properties are void and of no effect. The matter comes before me on a motion for an interlocutory injunction restraining the second defendant from taking any steps as receiver of either premises, and for an order restraining the first defendant from carrying out any steps pursuant to various loan agreements. An undertaking has been given by the defendants pending the determination of the injunction application.

Facts

4. The plaintiff is 45 years of age and he and his wife are employed as full time lecturers. He is the sole legal owner of the relevant lands and premises. It was stated in argument that he is 20 years from retirement and the matters which gave rise to the financial difficulty in which he has temporarily found himself are matters he can resolve over time in the course of his working life. His loans with the Bank, in the case of the loans secured on the commercial properties, were performing until August 2013, and until October 2013 in the case of the loans secured on his principal private residence.

5. The plaintiff has from time to time suffered from severe anxiety and a depressive illness and he asserts that the Bank was fully aware of this. It is not seriously disputed that the Bank had some knowledge of the plaintiff's depressive condition, although the exact extent of this and that it rendered the plaintiff incapable of dealing with some of his financial affairs at some of the times relevant to these proceedings, is in doubt. The plaintiff asserts on affidavit that the defendant knew from 2010 that he suffered from an illness and that he had at that time suffered a particularly tragic family event in that he and his wife lost their young son.

6. It is not doubted that the plaintiff had loan accounts with the Bank, that the monies advanced by the Bank were secured, that the loans were in arrears, nor that the Bank had a contractual entitlement to appoint a receiver. No technical objection is made to the manner by which the Bank appointed the receiver by deed, nor to the nature and legal effect of the security documents themselves.

7. The plaintiff, however, asserts that there is imported into his contractual relationship with the Bank an obligation on the part of the Bank to behave towards him in a fair and equitable way. In particular, it is argued that this obligation is imported from the Consumer Protection Code, the relevant one being the 2012 Code ("the Code"), and in particular clauses 2 and 8 thereof which, it is argued, import an obligation on the part of the Bank to allow him an opportunity to deal with his acknowledged arrears. He says that during the period when he fell into arrears and without his knowledge or prior notice to him, a receiver was appointed over the Kenmare property, and that a receiver was appointed over the Limerick property at a time when he was attempting to deal with the arrears. He says that the appointments are unlawful in the circumstances.

8. Mr. Ryan says that he has been attempting to engage with the Bank since 18th December, 2013, but that the Bank's sole or overriding concern is to wind up his loans as it is exiting the Irish market, and that it is not acting bona fide in that it has "engineered a default" on his loans for the sole purpose of calling in the loans and "exploiting the securities". He says he has offered to repay most or all of the arrears and to sell the Limerick premises by a self managed sale, and that the Bank owes him a duty at common law and under the Code to fully engage with his proposals.

The sequence of events leading to the appointments

9. The Bank sent letters of demand on 11th October 2013, and 8th November 2013, in respect of the Kenmare loans, and on 25th November 2013, in respect of the Limerick loans, during a time when the plaintiff was ill and unable to deal with his post. There was a gap in communication during the acute stage of his illness between 11th September, 2013, and 6th January, 2014, a gap of almost four months. The main point of the plaintiff's arguments is that the Bank failed to properly and fully engage with him and especially with his proposal to discharge the arrears on his accounts in the sum of €40,000. The plaintiff argues that under the Code, and by implication at common law, the Bank must not merely consider any proposals he makes to deal with the arrears but must consider these in a positive manner and that the appeal procedure available within the Bank once the credit committee rejected his proposals did not afford him natural justice as the appeal was proposed to be heard by an official of the Bank and not an independent third party. He says that in his discussions with the Bank after 14th January, 2014, the Bank was less than forthcoming and he says that some discussions were held after the receivers were appointed when he was unaware of these appointments.

The claim made in the proceedings

10. The plaintiff challenges the appointment of the receivers on the grounds that there was (a) an implied term of good faith (b) an implied term from the Code that the Bank would give him an opportunity to deal with the arrears before a receiver was appointed and (c) that the Bank appointed a receiver other than for the purpose of recovering its debt. The plaintiff argues that the implied terms are to be implied at common law, under the Irish Constitution and the European Convention of Human Rights Act 2003, and that there is also imported into his contractual relationship with the Bank equitable principles of fairness which require the Bank to engage in a meaningful way with his attempts to deal with the arrears. The plaintiff also makes the argument that his constitutional rights and those under the European Convention on Human Rights Act 2003 have been breached by the fact that he was not given an opportunity to make representations i.e. that he was denied an opportunity to be heard. He says that there is imported into the relationship an obligation on the part of the Bank akin to an obligation of natural justice, and in this regard there is an averment at paras. 49 and 51 of his affidavit of 6th March, 2014, suggesting that the Bank did not give him a right to be heard in accordance with natural justice.

Is the plaintiff a consumer?

11. The plaintiff argues that he comes within the broad definition of consumer in the Consumer Credit Code 2012 and that he is a "personal customer" as therein defined. He does not carry on the business of property investment or development and his purchases were for his personal financial and tax purposes. He relies on the judgment of Barrett J. in *Ulster Bank v. Healy* 2014 IEHC 96 where the Judge held that the defendant was a consumer for the purpose of the Consumer Credit Act 1995, as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004, and that he was "*acting outside his business, trade and profession*" as he had engaged in "*personal investments ... so as to meet the retirement or other future requirements of himself or his family*". I accept the test as explained by Barrett J. and note also that I must, at interlocutory stage, take the plaintiff's argument at its height. Accordingly, I am of the view he has made out an arguable case and having regard to the case law that he is a personal consumer and entitled to the protection of the Code.

The legal effect of the Consumer Protection Code 2012

12. The plaintiff argues that the Code in particular clauses 2.1 and 2.8 and clauses 8.2 and 8.3 import a duty on the Bank to act honestly and fairly in dealing with him as a personal customer and in the handling of arrears. He says that this Court having regard to the fact that he has an arguable case that he is a consumer may imply certain terms into his contractual relationship with the Bank and into the security documents.

13. The Code was made by the Central Bank pursuant to the statutory regulatory power contained *inter alia* in s. 117 of the Central Bank Act 1989. Section 117 (1) requires the provisions of any such code to be observed by a holder of a bank licence. Failure to comply with a direction given to a licence holder to comply with the provisions of a code constitutes an offence liable to be tried summarily or on indictment. The Central Bank is also given the power to administer administrative sanction for contravention of a provision of one of its codes.

14. The statutory regime makes no reference to the impact, if any, a breach of one of the codes might have on the contractual rights of a bank and its customers or on court proceedings for enforcement of those rights. For that reason the legal status of the codes issued by the Central Bank under its statutory regulatory powers has been the subject of what Hogan J. described in *Irish Life and Permanent v Duff & Anor* 2013 IEHC 43 as "*cross-currents of judicial opinion*". The question was characterised by Breslin at a para 4.102 in the 3rd edition of his *Banking Law* in Ireland as whether the provisions of a code are "soft law" devoid of legal effect, and not sounding in a civil claim for damages. Hogan J. in *Irish life and Permanent plc (t/a Permanent TSB) v Financial Services Ombudsman and Thomas* 2012 IEHC 367 said that the codes are "*not entirely a species of soft law, i.e. purely precatory statements not susceptible of legal enforcement*" and that the codes "*can certainly inform ... the thinking of regulatory authorities in assessing appropriate standards for credit institutions*", but that proposition does not in any sense answer the question of whether the codes might import rights or obligations between banks and their customers in private law. Gilligan J. in *Freeman v Bank of Scotland (Ireland) Ltd and others* 2013 IEHC 371 suggested that the status of the codes is "*not absolutely clear and may be dependent on the circumstances of each particular case.*"

15. Birmingham J. in *Zurich v. McConnon* 2011 IEHC 75 found as a matter of fact that Mr. McConnon was not a consumer but did raise the question of how a breach of the relevant code might affect contractual obligations and said the following *obiter*:

"Entirely lacking is any suggestion that a breach of the Code renders the contract null and void or otherwise exempts a borrower from the liability to repay."

16. In *Stepstone Bank v. Fitzell* 2012 IEHC 142 Laffoy J. refused to make an order for possession of the defendants' primary residence because the relevant code was not complied with by the plaintiff bank. This was an application under s. 62(7) of the Registration of Title Act 1964 which expressly imports a discretion into the court power to grant possession. That sub section provides as follows:

"When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession."

Laffoy J. said the following:

"I find it impossible to agree with the proposition that, in proceedings for possession of a primary residence by way of enforcement of a mortgage or charge to which the Current Code applies ... the plaintiff does not have to demonstrate to the Court compliance with the current Code... surely a court which is being asked to make an order which will, in all probability, result in a person being evicted from his or her home, is entitled to know that the requirement in provision 47, which has been imposed pursuant to statutory authority, is complied with. "

17. Hogan J. in *Irish Life and Permanent Plc v. Duff* [2013] IEHC 43 also considered the question of the effect of Central Bank codes on contractual obligations and rights. He too refused to grant an order for possession of a primary residence because the bank did not comply, or at least comply fully, with the requirements of the code prior to instituting proceedings for possession. Hogan J expressly said he was refusing to make the order for possession in the exercise of his discretion which he accepted arose from the authorities in the case of unregistered lands, notwithstanding that pre-2009 mortgages of freehold unregistered lands were made by assurance of the legal title. A court order for possession is required for all post December 2009 mortgages by s. 97 of the Land and Conveyancing Law Reform Act 2009.

18. Ryan J. in *ACC Bank Plc v. Deacon & Anor* [2013] IEHC 427 suggested that the decisions of Laffoy J. and Hogan J. in refusing relief

arose from reasons specific to "claims for repossession of family homes". He said that failure to comply with the relevant code for dealing with small and medium enterprises did not "*wipe out the loan or furnish a defence*".

Does breach of the 2012 Code give the plaintiff a cause of action?

19. It is possible to reconcile the recent case law by virtue of the fact that the two "currents" evolved in different classes of remedy: In the possession cases the court was exercising either an established statutory discretion or one established by precedent in previous cases; in the debt cases the court was enforcing legal rights under contract where no discretion arose. The court in all these cases was considering the proposition that breach of a Central Bank code might give rise to a defence or raise a matter going to the discretion of the court to make or refuse relief, but was doing so in entirely different judicial contexts and exercising different classes of powers, one where equitable principles of discretion came into play and another where the remedies and rights lay at common law. I discuss later the interplay of these elements.

20. The cases most on point are the judgment of Hogan J. in *Life and Permanent Plc v. Duff* and that of Laffoy J. in *Stepstone Bank v. Fitzell* where the court accepted that the defendant was a consumer or personal borrower. Those matters had come before the court on an application for possession, in the case of *Irish Life and Permanent Plc v. Duff* of unregistered lands, and in the case of *Stepstone Bank v. Fitzell* of registered lands. The court has a discretion at common law, and now under the Act of 2009 expressly by statute, to grant or refuse possession, and to fix any terms that it considers just, albeit a discretion which is exercised in the light of established jurisprudence. The judgement of Laffoy J. in *Stepstone Bank v. Fitzell*, correctly in my view, held that the court in its discretion could and must ensure that the plaintiff bank had complied with its obligations, as failure of compliance would have had the indirect effect of rendering the enforcement by the Central Bank of the obligations "nugatory". Similarly in *Life and Permanent Plc v. Duff* Hogan J. expressly refused to make an order for possession in the exercise of his discretion. In the other cases mentioned above, in which the role of Central Bank codes were considered, the courts were not applying discretionary powers or principles but were called upon to make judgments on contractual rights, and in each case the court held that breach of the relevant code had no effect on the entitlement to relief.

21. The Central Bank codes of conduct, in the light of these authorities, may inform a court exercising its discretionary powers, and a court acting judicially and with due regard to the interest of the mortgagor and mortgagee in ordering possession, or modulating the effect of the order for possession, will take account of the regulatory requirements imposed by the relevant code. The power of the court to make an order for possession expressly imports an element of discretion, and *ipso facto* fairness to both sides, in the decision to make an order and the fixing of the terms and conditions of such an order. It seems to me not to matter that the premises are a principal private residence, and the central fact is that the power of the court is a discretionary one. An element of discretion does not however become, without more, a ground on which a plaintiff may mount a claim for relief whether in the form of injunctive relief, declaratory relief or damages. The discretion is that of the court, not one that as counsel for the plaintiff has sought to argue, one that is imported into the contractual nexus, or one which itself can found a cause of action.

Conclusion on the Code

22. In my view the codes issued by the Central Bank cannot be said to have the effect that the obligations created on licensed banks are justiciable by borrowers. The requirements of compliance are ones to which the court will have regard in the exercise of its discretionary power, *inter alia*, in making orders for possessions of secured premises. Non compliance with a relevant code may at best offer a defence to a borrower in an individual case, although the extent to which this may be so must be seen in light of the judgment of Birmingham J. in *Zurich v. McConnell* where the Judge pointed to the obvious fact that breach of a code is not expressed to make a loan null and void. Breach of a provision of a code does not in my view offer a borrower a substantive basis on which relief may be sought. It may sound in equity or in defence but it does not offer a justiciable cause of action to a plaintiff at common law.

An implied term?

23. In the alternative the plaintiff seeks to enforce the rights which he alleges arise by implication in the contract between himself and the Bank, and which the plaintiff says are imported at common law, under the Constitution, the European Convention on Human Rights and in equity.

24. At paras. 75 - 77 of his grounding affidavit sworn on 6th March, 2014, the plaintiff asserts that certain obligations and corresponding rights exist as necessary indices of the relationship between himself and the Bank. Briefly, these may be summarised as follows:-

(a) That the Bank owes him a duty to act honestly, fairly and professionally towards him, and with all due skill and diligence and in his best interest.

(b) That the Bank has a duty to act in good faith towards him.

(c) That the Bank has a duty to ensure that he was properly consulted in relation to the loans.

(d) That the Bank owed him a duty to inform him of its intention to call in the loans and to seek to rely on the security for those loans.

(e) That he has a right to be heard in relation to the loans and the security, to put his case to the Bank, and a right to a proper and fair appeal of any decision made by the Bank

(f) That the Bank did not appoint a receiver for proper purpose and/or in good faith.

(g) That the actions of the Bank are unlawful and made in breach of his rights at common law and arising as outlined above.

A fiduciary or special relationship?

25. There is nothing in the documentation before me, nor has it been argued by counsel for the plaintiff, that the Bank owes a fiduciary duty to the plaintiff as borrower or in the provision by the plaintiff of security for his loans. I accept as a correct statement of the law that contained in the judgment of Hogan J. in *Irish Life and Permanent Plc v Financial Services Ombudsman and Thomas* [2012] IEHC 367, at para. 46, that "*save in the special case of where the mortgagee enters into possession of mortgaged property, it is clear that the mortgagor/mortgagee relationship is not a fiduciary one*". There is no suggestion in this case that the plaintiff relied on any advice from the Bank in obtaining the loans and putting in place the security, and no fiduciary and other special relationship existed between bank and customer that might have given rise to what Hogan J. in that case described as "*super added duties of utmost good faith and complete disclosure*". The contract between the plaintiff and the Bank was a contract made in the course of normal banking customer relations and there is nothing in that relationship that might import additional duties beyond those normally found in such relationship; no special relationship exists.

Implied term at common law?

26. The plaintiff seeks that this Court would import into the contractual relationship between himself and the Bank obligations and rights and in particular I note the assertion that is contained at para. 71 of the grounding affidavit that the Bank was obliged to act in the best interest of the borrower. It cannot be doubted that the Bank had an obligation to act fairly and professionally and indeed honestly towards the plaintiff, but the Bank's primary right in regard to its security interest is expressly described in the security documentation itself, namely a right on the giving of demand to enforce the security by the appointment of a receiver. The plaintiff seeks that this Court would import into the express contractual provisions in clause 6(2) of the mortgage and charge documents, an obligation to ensure that he was "properly consulted" both in relation to the loans and the intention to appoint a receiver, and that he had a right to be heard in relation to the loans, to put his case to the Bank and that the Bank was obliged to fully engage with him.

27. I am mindful of the strong statement in the judgment of Finlay Geoghegan J. in *Irish Bank Resolution Corporation (In Special Liquidation) v. Morrissey* [2013] IEHC 208, where at para. 101, she expressly identified the limit of the court's jurisdiction as follows:-

"Prior to determining the issues set down by Order of Kelly J, it is important to emphasise the limits of the Court's jurisdiction. This is a Court of law. Its obligation is to determine the rights and obligations of the parties in accordance with law. 'Law' in this context includes the relevant constitutional, statutory and common law, in particular, the law of contract and the applicable equitable principles, particularly in relation to the defence of estoppel. On the evidence, particularly of Mr. Morrissey, there appears, regrettably, to have been a significant gap between his commercial expectation in his dealings with the Bank and the contractual written terms to which he agreed. In his own evidence, he described 'a space between understanding and agreement'. Unless the former is such that in accordance with applicable legal or equitable principles it is enforceable, it is not cognisable by the Court and the Court must determine and enforce the rights and obligations of the parties in accordance with law. "

28. In that case, Finlay Geoghegan J. rejected the contention that the relationship between the bank and Mr. Morrissey was a fiduciary relationship and in particular took the view that there was no advice sought from or advice proffered by the bank, or any other steps undertaken which took the relationship outside of the normal commercial relationship of a lending bank and borrower by an experienced entrepreneur or business person. While Mr. Morrissey was an experienced borrower, and while I have held for the purposes of the application before me that Mr. Ryan, the plaintiff in this case, was a personal borrower, there is nothing in the relationship between personal borrower and bank which imported anything other than a common law duty imported into all contracts of honesty and basic good faith.

29. It seems to me what the plaintiff asks this Court to do is to take a preliminary view that there exists in the relationship between himself and the Bank an obligation on the part of the Bank to act towards him with a degree of reasonableness or fairness, which is more commonly found in public law. I adopt the rejection of such an imposition of public law principles into private contracts contained in para. 102 of the judgment of Finlay Geoghegan J. in *Irish Bank Resolution Corporation (In Special Liquidation) v. Morrissey*, where she said as follows:-

"...this is not a dispute which involves a review by the Court as to how the Bank took the decision not to extend Mr. Morrissey's facilities and issue the demand or the reasonableness or fairness of same as the Court might do in a judicial review of a public body to which public law principles apply. No such claim is made or could be made in respect of the decisions taken by the Bank in 2009/2010. Certain of the submissions made on behalf of Mr. Morrissey appear directed to public law principles which do not apply. "

Accordingly, I cannot accept that the obligations contented for may properly be said to arise as a matter of contract. The terms contended for may be more fairly characterised as "super added duties", to borrow a phrase of Hogan J. in *Irish Life and Permanent Plc v Financial Services Ombudsman and Thomas* and I do not accept that they may be implied into the contractual nexus between the plaintiff and the Bank in the absence of a special relationship.

Good faith?

30. I am satisfied however that the law will import into the relationship of mortgagee and borrower a duty to act in good faith. It is well established in law that a bank can sit and chose not to enforce its security but once it does take enforcement steps it must act fairly. These principles arise from the nature of the relationship as one of security and can have the consequence that the decisions and actions taken by a mortgagee may result in disadvantage to the borrower. The terms that are implied are terms that the mortgagee not act capriciously or in a way that unfairly prejudices the borrower, and would satisfy any common law test of the "officious bystander", and would be terms that each party to the contract would readily accept as arising from the nature of the relationship and good sense. The terms that are implied do not go so far as to import duties of utmost good faith as might arise in a fiduciary relationship and I am not satisfied that the terms sought to be implied by the plaintiff in this case can be implied at common law.

A duty of care?

31. The plaintiff also argues that the Bank owed him a duty of care not to appoint a receiver or seek to enforce its security without giving him an opportunity to be heard and to deal with the arrears. Hoffman J. in *Shamji & Ors v. Johnson Matthey Bankers Limited & Ors* [1986] BCLC 278, described the issue as follows:-

"The appointment of a receiver seems to me to involve an inherent conflict of interest. The purpose of the power to enable the mortgagee to take the management of the company's property out of the hands of the directors and entrust it to a person of the mortgagee's choice. That power is granted to the mortgagee by the security documents in completely unqualified terms. It seems to me that a decision by the mortgagee to exercise the power cannot be challenged except perhaps on grounds of bad faith. There is no room for the implication of a term that the mortgagee shall be under a duty to the mortgagor to 'consider all relevant matters' before exercising the power. If no such qualification can be read into the security documents, I do not think that a wider duty can exist in tort ... I might add that Harman J. once remarked that the analogous power of the mortgagee to enter into possession may be exercised 'before the ink is dry on the mortgage'. Certainly there has never been any suggestion that the right to exercise the power, as opposed to the way in which the mortgagee deals with mortgage property once he is in possession, is qualified by a duty of care to the mortgagor. "

I adopt this analysis and am not persuaded that the plaintiff can show that a duty of care arises in the choice by the Bank to appoint a receiver. Certain duties may arise in the receiver or the Bank, as the case may be, if a sale is effected but these duties are not the subject of this application.

The role of equity

32. The plaintiff argues that certain terms will be implied in equity into the contractual relationship with the Bank. I note the compelling analysis by Hogan J. of the so called 'fusion' of law and equity in his recent judgment in *Meagher v. Dublin City Council* [2013] IEHC 474, at para. 27 thereof where he states as follows:-

"The very fact that such a distinction remains embedded in the legal system should perhaps give us pause to reflect before any far-reaching claims regarding substantive fusion can properly be accepted. It might also be borne in mind that many equitable principles were originally fashioned to impose particular duties on persons such as trustees and fiduciaries to ensure that they exercised their powers in a manner consistent with the overriding principle of utmost good faith, even if over time these equitable principles were applied more generally and more widely in order to temper the rigour of the common law. Yet these higher duties had been imposed by the Courts of Chancery by reason (in part, at least) of the special obligations which trustees or fiduciaries owe to third parties by virtue of their special relationship with such persons. It would not, however, be necessarily appropriate to impose these higher standards in the ordinary sphere of the law of contract and tort where these underlying principles will generally have little or no application, even though this would (or, at least, might) be a natural consequence of the substantive fusion of law and equity."

I adopt that statement as a correct analysis, for the purpose of this case, of the relationship between law and equity since the passing of the Judicature Act 1877. The rights that arise between that plaintiff and the Bank are contractual rights in which equity has no role. The Bank has an express contractual right to appoint a receiver and no equitable principles come into play.

The purpose of appointment of the receiver

33. It is argued by the plaintiff that the receiver was not appointed for the sole purpose of obtaining payment and he relies on the statement in Breslin's *Banking Law in Ireland* (3rd Ed.) 2013 at para. 15.04, where reference is made to the express statutory provision to that effect contained in s. 96 of the Land and Conveyancing Law Reform Act 2009. The statutory provision limits the power to appoint a receiver such that it does not, under that Act, become exercisable unless it is for the purpose of protecting the mortgaged property or realizing the mortgagee's security. This section applies to mortgages created after the coming into operation of the Act of 2009 and the relevant statutory powers in the case of both the mortgage and registered charge are contained in s. 19 of the Conveyancing and Law of Property Act 1881 as expressly varied by clause 6(2) of each security document so as not to include the restrictions contained in s. 20 of that Act. The power to appoint a receiver in each case became exercisable upon the making of demand by the mortgagee for payment and there was an express power to appoint a receiver "at any time thereafter". There is no statutory or contractual limitation such that the power to appoint a receiver may be exercised only for the purpose of realising the security but I accept that as matter of first principle the nature of the security contractual relationship will import at common law such a restriction.

34. The plaintiff says that the Bank is exiting the Irish market and that this is so has not been seriously disputed. The suggestion is that the Bank is engaged in bad faith in appointing a receiver and that this is not for the purpose of realising its security. I have heard no cogent evidence that the Bank has appointed the receiver of these properties for reasons other than the acknowledged arrears in the plaintiff's loans. The Bank did engage with the plaintiff since July 2013. A six week gap arose between July 2013 and 11th September, 2013 and then a gap of nearly four months between 11th September, 2013 and 6th January, 2014, the fault for which must lie at the plaintiff's feet, although it is conceded that the plaintiff was ill during the time. I can find no evidence before me of bad faith and the loans had fallen into arrears such that the express statutory power became exercisable.

The European Convention on Human Rights Act 2003

35. The plaintiff also asserts that certain rights are imported into his contractual arrangement with the Bank by the European Convention on Human Rights Act 2003. It has been established in the Irish Courts that the ECHR does not have direct effect in Irish law and the Supreme Court affirmed this in *McD. v. L.* [2009] IESC 71 where Murray C.J. made it clear that the Convention itself was not directly applicable in Irish law and that consequently no claim could be made before the court in Ireland for a breach of any provision of the Convention. Accordingly, and on the clear authority of the courts on the effect of the Convention, I hold that the plaintiff has not made out an arguable *prima facie* case that he has rights under the Convention which are capable of being protected and ought now to be preserved by way of interlocutory injunctive relief.

36. No argument was made before the court that certain rights in the form of additional duties are owed to the plaintiff by the Bank under the Irish Constitution and even were such argument to have been made, it seems to me it would fail having regard to the fact that no specific constitutional provision has been invoked by the plaintiff in asserting such a claim.

Summary

37. In summary the Bank and the plaintiff entered into formal security documentation which entitled the Bank as a matter of contract to appoint a receiver on the happening of certain expressly identified events. Certain restrictions will be implied as a matter of common law in the exercise by the Bank of this right, but these are no more than the obligation on the part of the Bank to act fairly and honestly. The Bank was entitled to appoint a receiver following the making of a demand and it has not been asserted that proper demand was not made. I reject the assertion that there can be imported into the contractual relationship between the parties an obligation on the part of the Bank to act reasonably, to consult, or still less to fully consult, with the customer, or to act in the interest of the borrower. A duty of care may well arise should the receiver or the Bank sell either or both of the secured properties, but such a duty has not arisen in these circumstances to date. What the plaintiff asserts is that he had a right to be heard, that the offer made by him to discharge the arrears ought to have been positively considered by the Bank, that the Bank failed to afford him natural justice in its process. These are rights and obligations which I cannot accept as a matter of law are arguably terms that may be implied into the security contract and the mortgage deeds.

The test for granting an interlocutory injunction

38. It has long been accepted that the test whether the court should grant an interlocutory injunction is whether a plaintiff can show a *bona fide* issue to be tried, and it is equally clear that the threshold is relatively low. That law is well established, and I do not need to rehearse it here. What is equally clear, however, is that a plaintiff must at least establish that he has an arguable cause of action and an injunction may be called in aid of either a common law or equitable right as the case may be.

39. The plaintiff asserts that he has raised an issue to be tried and the court cannot enter upon the exercise of assessing the strength of the plaintiff's case or the strength of the defence. He says that he suffers the risk of losing his family home and that is the type of loss that cannot be compensated by damages. He says that on the balance of convenience, the Bank will suffer little, and indeed, that the Bank cannot show any prejudice. In that regard, I note that the Bank has not asserted that the value of the properties is declining nor has the Bank suggested that a sale has been negotiated and was likely to be lost. He says the real risk must lie with the plaintiff because of the relationship between the loans taken together and the family home and also because of the fact that he will lose his property.

40. Having regard to the continued distinction between equitable and legal rights, and the justifiable reluctance of the courts to import into contractual relationships principles which might more properly be described as equitable principles, I find it impossible to accept the argument advanced by counsel for the plaintiff that the contractual relationship between the plaintiff and the Bank did and must be understood to have contained such rights and principles on which this action is grounded. In the circumstances, I find that the plaintiff has not made out a *bona fide* or arguable case that there can be imported into the relationship between the plaintiff and the Bank, the high standards which he seeks to import, namely standards which require the Bank to act in his interest, to properly consult him and reasonably engage with him in the management of the arrears and the enforcement of the securities.

41. Accordingly, I hold that the plaintiff has not made out an arguable case on the pleadings and evidence now before this Court.

The position of the plaintiff's principal private residence

42. The Bank has not appointed a receiver over the principal private residence of the plaintiff and his wife at the Cottage Lemonfield, Gecorca, Co. Limerick. If the Bank is to sell the family home, it must seek a court order for possession in default of agreement and in the circumstances, the plaintiff would be entitled to the benefit of the MARPS code. The arguments made here may well come to figure in any court application and this decision does not preclude any arguments at any such hearing. I note the argument that the loans are so interconnected that without the income from the Limerick premises, the loan on the primary residence will fall into further arrears. I cannot accept that as a matter of law that a financial interconnection between the loans means that the security for the commercial loans must be dealt with in the same way as that for the principal private residence nor that this interconnection gives the plaintiff a cause of action in regard to the commercial premises.

43. Accordingly, I refuse to make the injunctions sought.