

THE HIGH COURT

[2009 No. 501 S.P.]

BETWEEN

ACC BANK PLC

PLAINTIFF

AND

NIAL QUINN

DEFENDANT

JUDGMENT delivered this 25th day of March, 2014, by White, Michael J.

1. This action was commenced by special summons on 6th May, 2009, seeking recovery of two premises held pursuant to mortgages at 140 Morehampton Road, Donnybrook, Dublin 4 and 28 Auburn Heights, Athlone County Westmeath

2. The action was heard by this Court on 21st, 22nd, 23rd and 24th January last and judgment was reserved. The court heard the following witness, Kenneth Naughton, business manager with the plaintiff; Brian Burgess, an official of the plaintiff, Robert Wynn and Noel Buckley, Private Investigators, the defendant and his spouse, Cathy Quinn.

History of the Proceedings

3. Proceedings were commenced by special summons on 6th May, 2009. By order of 24th October, 2011, proceedings were converted to a plenary hearing. A statement of claim was delivered on 25th November, 2011, and a defence delivered on 13th July, 2012.

Financial Relationship between the Plaintiff and the Defendant.

4. By letter of 1st July, 2004, the plaintiff wrote to the defendant outlining a proposal to finance the purchase of a residential investment property at 140 Morehampton Road, Donnybrook, Dublin 4. The initial facility offer was for €940,000 for a term of 25 years. The first two years were offered interest only with the rate charged at Euribor + 1.65% margin together with 1% facility fee.

5. By letter of 14th July, 2004 to the defendant a loan was sanctioned of €832,000 to part finance the purchase of a residential investment property at 140 Morehampton Road, Donnybrook, Dublin 4. The interest rate was stated to be 1.65% per annum term loan rate by reference to three month interest periods and otherwise in accordance with the bank's general terms and conditions. The term was for 25 years, a condition precedent of the loan sanction was "confirmation of proposed rental income of 140 Morehampton Road, Donnybrook, Dublin 4, to be received from GBK Properties. By letter of 2nd July 2004, from O'Sullivan Keegan & Co Accountants Athlone to the Plaintiff, the projected rent for the property was stated to be €3500 a month which would increase to €50,000 annually on completion of refurbishments.

6. The letter of sanction incorporated the Plaintiff's General Terms and Conditions for Commercial Credit Facilities. At Para 4.10 of the conditions it stated "In availing of a facility the Borrower represents, warrants and undertakes to the Bank that the Borrower is not acting as a Consumer within the meaning of the Consumer Credit Act 1995 that is to say, the Borrower is availing of the facility in the course of his or its business, trade or profession.

7. By letter of 8th September, 2004, the plaintiff wrote to the defendant at Fairfield Creggs, Co. Galway stating that the sums of €832,000 and €83,244 had been issued from the bank by cheque. It was confirmed that the interest rate was a Euribor interest rate loan with a current rate of interest of 3.794000%.

8. By letter of loan sanction issued on 28th January, 2005, the plaintiff offered to advance to the defendant €300,000. This was separate from the earlier loan. The term of the loan facility was 25 years with the rate of interest applicable at 1.65% plus Euribor for that period. The purpose of that loan facility was additional finance of €200,000 for the refurbishment of the residential property at 140 Morehampton Road, Donnybrook, Dublin 4 and to refinance an ACC Bank loan reference 10016118 of €93,000 and to fund costs of €7,000. In respect of this loan sanction, the borrower warranted that he was not acting as a consumer within the meaning of s. 2 of the Consumer Credit Act 1995.

9. Both the loan sanction of 14th July, 2004 and 28th January, 2005, stated that the bank's general terms and conditions applicable to commercial credit facilities applied.

10. By indenture of 12th November, 2004, the defendant acquired the property 140 Morehampton Road, Donnybrook, Dublin 4, for €830,000.

11. By Deed of mortgage of 18th December, 2005, the defendant mortgaged the property to the Plaintiff. The mortgage was registered in the registry of deeds in October 2006.

12. The defendant executed a separate deed of mortgage on 18th December, 2005, charging the property 28 Auburn Heights, Athlone, Co. Westmeath comprising Folio 2302 F, County Westmeath. The charge was duly registered as a burden on the folio on 12th March, 2007.

13. The defendant also had a current account No. 700844057 with ACC Bank Plc.

14. On foot of the first loan account No. 100161198, confirmed by loan sanction of 14th July, 2004, the defendant's last continuous payment was made in February 2007. He made one further once off payment in June 2010 of €4,140.40.

15. In respect of loan No. 10023060, on foot of the loan sanction of 28th January, 2005, the last payment on foot of that mortgage was made in December 2006.

16. On 5th March, 2009, the plaintiff wrote to the defendant setting out the arrears on foot of the various loans the bank considered to be due and owing.

17. On loan account No. 100161198, the plaintiff's calculated the sum due and owing as €920,266.83, which included arrears of €122,095.30, as of 1st March, 2009.

18. On loan account No. 10023060, the plaintiff calculated the sum due of €342,247.55 which included the sum of €53,512.98 unpaid arrears as of 1st March, 2009. Finally, on foot of current account No. 70084457, the plaintiff calculated a sum of €18,657.01 was due, €18,144.75 for principle, €512.26 for interest.

19. The proceedings already referred to were served on the defendant on 9th June, 2009.

20. In an affidavit sworn on 14th October, 2009, the defendant asserted that the correct interest rate on foot of the original loan sanction of 14th July, 2004, was 1.65% fixed and that accordingly the plaintiff had charged him excess interest of €116,100. He also claimed that there was a discrepancy on loan No. 10023060 of €1,770. The defendant asserted that he had a bona fide defence to the claim for possession in circumstances where he alleged the conduct of the plaintiff caused him to fall into arrears and thereby triggered a demand and subsequent High Court proceedings for possession. The defendant also alleged that in August 2006, he had contacted the bank and spoke to a person named Garrett who extended the capital moratorium on the loan for a further period of time.

21. This assertion by the defendant was challenged on an affidavit sworn on 27th January, 2010, by Mr. Kenneth Naughton asserting that the correct rate was 1.65% above Euribor stating that the letter of offer of 14th July 2004 accidentally omitted the express reference to Euribor.

22. In his defence the defendant disputed the plaintiff's claim on the basis of an erroneous interest rate application to the first loan. Further, factual disputes developed between the parties at the hearing of the action. The defendant stated in evidence that he at all times intended to use 140 Morehampton Road, Donnybrook, Dublin 4, as his principal private residence and family home. He stated this was agreed to by Oliver Lawler and Phillip Guerin of ACC at a meeting in or around December 2004. From January 2005, the defendant alleges together with his future spouse, Cathy Minnock he resided full time at 140 Morehampton Road, Donnybrook, Dublin 4.

23. The defendant married Cathy Minnock on 4th April, 2005. The defendant stated that he continued to live in 140 Morehampton Road, Donnybrook, Dublin 4, in 2005, 2006, 2007, 2008, 2009 and 2010. In 2009 he accepted he was over and back to the United Kingdom and that he moved out of the house in December 2011. He stated that between January 2005, and December 2011, the property was his principal residence. Cathy Quinn in her evidence stated that she moved into 140 Morehampton Road, Donnybrook, Dublin 4, in January 2005. She stated that she lived in Creggs, Co. Galway from September 2010 to Easter 2011 she stated she had looked at this property of 140 Morehampton Road, Donnybrook, Dublin 4 in June 2004. She accepted she had been living in 172 Kimmage Road Lower, another property owned by the defendant and that she was the registered owner of a property in Creggs, Co. Galway in which she resided between September 2010 and Spring 2011. She also owned a property in Station Road, Sutton, Co. Dublin. She stated that she knew the mortgage was in arrears in 2009.

24. The defendant asserts that the code of conduct on mortgage arrears issued pursuant to s. 117 of the Central Bank Act 1989 applies to the property at 140 Morehampton Road, Donnybrook, Dublin 4, as his principal private residence and thus the plaintiff is prevented from seeking an order for possession of the property until the code is fully applied. The plaintiff disputes that the code is operable. The plaintiff also disputes that the property of 140 Morehampton Road, Donnybrook, Dublin 4 has been a principal private residence of the parties.

Interest Rates.

25. The court is satisfied that the omission of the Euribor rate from the letter of sanction of 14th July, 2004, was a simple clerical omission. The court does not accept the defendant's evidence that he negotiated a straightforward rate of 1.65% fixed. The rate of 1.65% was fixed but it was fixed as the margin over the Euribor rate.

26. The defendant stated that he had been offered loan approval by Bank of Scotland (Ireland) and exhibited a loan offer of 7th July, 2004. This offer to him was for a period of 20 years with a rate equivalent to an aggregate of 1.85% per annum, and one month Euribor. He stated the Plaintiff offered to match the terms of Bank of Scotland and offered a better rate. The court accepts the evidence of Mr. Naughton that if the plaintiff were to charge 1.65%, fixed; the money would be lent to the defendant at a loss. The court does not find the evidence of the defendant credible that he never received any loan statements. The defendant did not challenge the loan interest rate being applied until he fell into arrears and the plaintiff wrote in March 2009.

Use of 140 Morehampton Road, Dublin 4 as a primary residence and application of the Code of Conduct on Mortgage Arrears.

27. I do not accept the evidence of the defendant that the plaintiff agreed to convert the commercial mortgage on 140 Morehampton Road, Donnybrook, Dublin 4, into a residential mortgage in December 2004 as alleged by the defendant. If that was so why would the plaintiff then issue a further commercial loan in January 2005? The court would have expected such a change to be reflected in writing.

28. Prior to his swearing of an affidavit in these proceedings on the 8th of July 2010 the Defendant did not put the Plaintiff on notice in writing that he regarded the property as his primary residence, or that he now considered his debt as a home loan rather than a commercial mortgage. He did not assert this in his defence.

29. In an affidavit sworn on the 19th of November 2012 in separate legal proceedings the defendant stated "I say that I myself am a student at the Athlone Institute of Technology Dublin Road Athlone, County Westmeath. I say that I am repeating my second year exams for the Accounting Technician's course and I say that while my wife resides at a property 140 Morehampton Road Donnybrook Dublin 4, I divide my time equally between that property and the granny flat (known as 27A Auburn Heights) I say that during college term while I am attending classes, I reside on a full time basis at 27A Auburn Heights." The defendant availed of the Code of Conduct on Mortgage Arrears in respect of 27A Auburn Heights Athlone.

30. The Code of Conduct on Mortgage Arrears has been revised on three occasions since February 2009. Four codes were opened to

the court.

- Code of Conduct on Mortgage Arrears 27th February 2009 to 16th February 2010.
- Code of Conduct on Mortgage Arrears 17th February 2010 to 31st December 2010.
- Code of Conduct on Mortgage Arrears effective from 1st January 2011.
- Code of Conduct on Mortgage Arrears effective from 1st July 2013.

31. The Defendant has submitted that the Codes applied to him, and the Plaintiff has been in breach of the Codes and thus is not entitled to an order for possession.

32. The first two codes applied to consumers only. The defendant although asserting otherwise was not a consumer, because the loan sanctions he signed precluded him from being treated as such.

33. The two most recent codes are not restricted to consumers, and the defendant has submitted that even though proceedings were commenced in May 2009, the code applies up to the time a court considers it appropriate to grant a possession order, and he is entitled to avail of it.

34. These codes apply to a mortgage loan of a borrower which is secured by their primary residence. Primary residence means a property which is (i) the residential property which the Borrower occupies as his primary residence in this State or (ii) a residential property in this State which is the only residential property owned by the borrower.

35. There may be situations where a lender acquiesces in the use of a property as a primary residence, which has been mortgaged for commercial purposes, and which was not intended to be the primary residence of the borrower. In that case the code would apply. For that to arise there would have to be cogent evidence advanced that the lender had notice that the property was being used as the primary residence of the borrower. There is no independent corroborative evidence advanced by the defendant to suggest that the bank had such notice, and the written documentation suggests the exact opposite.

36. The first occasion it had been asserted the code applied was during the course of these proceedings.

37. The court on an application for possession by a mortgagee where substantial arrears have built up on a mortgage must have some discretion to decide if the code applies or not.

38. I am satisfied that the defendant is not entitled to have the code applied in this case as he drew down a commercial mortgage for the purposes of purchasing a residential investment property. The Plaintiff considered the projected rent from the property in assessing the viability of the lending. The fact that the defendant decided to use the property as his primary residence for periods of time, without any written notice to the plaintiff does not entitle him to have the code applied.

39. The defendant executed a separate Deed of Charge in respect of the property at 28 Auburn Heights Athlone on the 18th of December 2005. The charge was registered as a burden on the folio. It was never the defendant's primary residence. The Plaintiff appointed a receiver to this property in January 2012. The receiver took possession of the property, but the property was re-entered by someone and the receiver was dispossessed. The appointment of a receiver does not preclude the Plaintiff seeking possession pursuant to the Deed of Charge.

The Family Home Protection Act 1976 and the rights of Cathy Quinn.

40. Cathy Quinn the defendant's spouse was not a party to the Deed of Conveyance or mortgage of the Donnybrook property. She has lived there by consent of the Defendant. She has no liability for the mortgage or arrears. The plaintiff's solicitors wrote to her on the 12th October 2010 explaining the provisions of Sections 7 and 8 of the Act. Counsel for Mrs Quinn appeared in this court in April 2011, when she was advised of the right to be joined as a third party. Section 7 does apply, and she has been informed of her rights since October 2010. She has made a proposal to the plaintiff by letter of 15th of January 2014. Mrs Quinn with her own financial commitments of two separate loans on properties in Creggs County Galway and Station Road Sutton is unlikely to be in a position to discharge the liabilities arising from her husband's borrowings. Her rights pursuant to the Family Home Protection Act 1976 have been respected. Those rights do not preclude the court from granting a possession order.

41. The court has considered Order 9 rules 9 and 13 of the Superior Court rules. When the summons was served on the defendant on the 30th of June 2009, the summons server John Fitzgerald did comply with Rule 13. The Court has power to deem service good or to abridge the rules. In respect of Mohammed Khan the Court dispenses with the requirement to serve him with the summons, due to the particular history of these proceedings.

42. The court grants and order for possession in favour of the Plaintiff of the properties at 140 Morehampton Road Donnybrook Dublin 4 and 28 Auburn Heights Athlone County Westmeath.