Neutral Citation: [2014] IEHC 191

THE HIGH COURT

[2013 No. 8395 P]

BETWEEN:

SEAN MCGUINNESS

PLAINTIFFS

AND

ALLIED IRISH BANKS PLC

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 27th day of February, 2014

1. This application for an interlocutory injunction comes before the court by way of notice of motion dated 13th August, 2013.

2. These proceedings were initiated by plenary summons issued on 6th August, 2013. According to the general endorsement of claim the plaintiff seeks a number of declarations from the court including a declaration that in its adoption of the procedures mandated by the Central Bank Code of Conduct on Mortgage Arrears 2010 (hereafter "the Code"), which is the document which covers the particular relationship between the parties to this case, the defendant bank is obliged to act fairly in respect of the plaintiff. The plaintiff also seeks a declaration that the defendant, by proposing to issue enforcement proceedings in respect of the plaintiff's principal dwelling house, is purporting to act in breach of contract in that by doing so the defendant would act contrary to the procedures set out in the Code. He also seeks a declaration that the defendant is not entitled to take enforcement action against the plaintiff pending compliance by the defendant with the provisions of the Code, a declaration that the defendant is estopped from taking enforcement proceedings by reason of its failure to properly and fairly comply with the procedural requirements contained in the Code, damages for breach of contract, an order restraining the defendant from taking enforcement action against the plaintiff's principal private residence situate at Hillsborough House, Clonee Road, Lucan, Co. Dublin pending resolution of the plaintiff's appeal under the Mortgage Arrears Resolution Process of the defendant Bank (hereafter "the MARP") and an order extending the time for the making of an appeal by the plaintiff under the MARP along with the usual ancillary orders.

3. The plaintiff is the owner of a property known as Hillsborough House, Clonee Road, Lucan, Co. Dublin. The property is the principal private residence of the plaintiff. He currently resides at the premises with his partner. One of his daughters also resides there part time, residing for the remainder of the time with her mother; the estranged wife of the plaintiff. Another daughter of the plaintiff previously lived with the plaintiff and his partner at the Hillsborough House property but no longer does so.

4. The property was mortgaged to the defendant in order to provide loan funding for its purchase. The loan was due to expire on 17th December, 2029, but the plaintiff fell into arrears in 2011 in respect of the payments to be made on foot of this loan. The current debt owed to the Bank stands at something in the region of €3.6m, which is similar to the amount originally borrowed by the plaintiff, he having made some repayments in the intervening time. In 2013 the plaintiff applied for support under the MARP. On 15th April, 2013, the defendant wrote to the plaintiff indicating that it would not offer alternative repayment arrangements to the plaintiff. The plaintiff now seeks, by way of notice of motion, an order restraining the defendant from taking enforcement action against the property pending the resolution of the plaintiff's appeal under the MARP and an order extending the time for the making of an appeal by the plaintiff under the MARP. The central issue in this application relates to correspondence which followed the letter of 15th April, 2013, from the defendant to the plaintiff.

5. In that letter of 15th April, 2013, the defendant made clear to the plaintiff that he had a right to appeal the decision taken on his initial application for resolution of his difficulties through the MARP process. The plaintiff was told that he had twenty days from the date of his receipt of the letter to submit an appeal to the Mortgage Appeals Officer of the defendant Bank. It is common case that the plaintiff did not avail of this opportunity within the time limit specified in this letter. However, the plaintiff met with representatives of the defendant Bank on 1st May, 2013, to discuss the rejection of his proposal. In a letter from the defendant Bank to the plaintiff dated 10th May, 2013, certain elements of the discussions between the parties at the meeting in question were set out.

6. Nothing further of significance appears to have occurred until 7th June, 2013, when the plaintiff wrote to the defendant to enquire whether it was still open to him to submit an appeal despite the fact that he was outside the timeframe as set out in the letter from the defendant Bank dated 15th April, 2013. The interpretation of these letters is the subject of some dispute between the parties. The last line of this letter, on which significant reliance was placed by Counsel for the plaintiff, states "Please let me hear from you that I may submit an appeal."

7. By letter dated 14th June, 2013, the defendant responded indicating that the plaintiff's appeal would be referred to the Appeals Board for review. The exact wording of that letter was as follows:

> "We acknowledge receipt of your letter, dated 7th June 2013, requesting the bank to reconsider its recent decision in relation to the [property].
>
> Your Appeal will be referred to our Appeals Board for review and a response will be sent to you as soon as possible."

A further letter dated 20th June, 2013, was sent from the defendant Bank to the plaintiff indicating that the appeal had been considered and rejected by the Appeals Board.

The exact wording of that letter is as follows:

> "…we write to advise that your appeal has now been considered by our Appeals Board.

> We regret to advise that you appeal has not been upheld by the appeals Board and the Bank's decision remains as previously advised…
>
> You may if you wish refer your appeal in writing to the Financial Services Ombudsman Bureau..."

The plaintiff submits that this was despite the fact that he had not actually submitted an appeal within the meaning of the MARP. He had merely enquired, by way of the letter of 7th June, 2013, as to whether such an appeal would be possible given that he was outside the time limit. The plaintiff avers that at no time did he set out the grounds for his appeal.

8. By letter of 4th July, 2013, the defendant wrote to the plaintiff indicating that it was the defendant's continued intention to enforce its security in the event that no settlement was reached between the parties or that none of the appeals which remained open to him, such as that to the Financial Services Ombudsman, were successful.

9. The plaintiff then wrote to the defendant Bank on 12th July, 2013, seeking an undertaking that no enforcement proceedings would be issued. The defendants responded by letter on 19th July, 2013, restating that the appeal made by the plaintiff had been rejected. No reference was made to the request for an undertaking in this regard. The plaintiff's solicitor responded again by letter of 23rd July, 2013, to the Mortgage Appeals Office reiterating that the plaintiff was entitled to a fair appeal under the MARP and that this had not been afforded him in the circumstances as he had not been given any opportunity to submit any grounds of appeal or furnish the Appeals Board with any new proposals. The plaintiff's solicitors requested that the decision in relation to the purported appeal be revoked immediately and that the plaintiff be allowed an opportunity to make submissions to the Appeals Board in relation to whether an extension of time for the making of an appeal should be allowed to him. On 23rd July, 2013, the plaintiff's solicitors also wrote to Ms. de Barra of the Financial Solutions Group of the defendant Bank, who had been dealing with the plaintiff's case on behalf of the Bank, to repeat their request for an undertaking to the effect that the Bank would not enforce its security until such time as the plaintiff had submitted a request for an extension of time in which to make an appeal.

10. The Mortgage Appeals Office replied by way of letter dated 23rd July, 2013, which stated:

> "Mr McGuinness was advised in a letter from the Bank dated 15 April 2013, that he had the right to appeal the decision… within 20 business days. This was again advised in a letter from the Bank, dated the 10 May 2013.
>
> The Mortgage Appeals Office had understood from Mr McGuinness's letter of 7 June 2013 that an appeal was to be progressed and this was acknowledged to Mr McGuinness in our letter of the 14 June 2013. If at that stage, Mr McGuinness did not want an appeal to progress, there was an opportunity for him to contact us to advise same.
>
> If further information is available to support an appeal in relation to the above mortgage account, please forward it to our office as soon as possible. Dependent on the information provided, and the time lapse in relation to this case, we may then have to refer the case back to the Arrears Support Unit for re-assessment. If at that stage, Mr McGuinness is unhappy with the outcome of the review, he may then appeal that decision to this office…"

11. Further correspondence ensued between the parties in relation to the question of the Bank's enforcement of its security and the plaintiff's request for an undertaking that such action would not be taken. This undertaking was not forthcoming.

12. Ms. Aislinn de Barra avers that the Appeals Board or the Mortgage Appeals Office did not receive any communication from the plaintiff in relation to the consideration of his appeal between the 14th June, 2013, when the letter informing him that his appeal was being progressed was sent and the 20th June, 2013, when a letter was sent to the plaintiff informing him that his appeal had been reconsidered and rejected by the Appeals Board. Ms de Barra avers that there is an inconsistency in the plaintiff's arguments in that the letter of the plaintiff's solicitors to the defendant on 15th July, 2013, appears to acknowledge that a decision had been made by the Appeals Board but a later letter from the plaintiff's solicitors to the Appeals Officer on 23rd July, 2013, states that prior to the letter of 19th July, 2013, from the Appeals Board it was unclear what had happened since the plaintiff initially wrote to the defendant on 7th June, 2013, seeking clarification as to whether he could still make an appeal against the decision of the Appeals Board. Ms. de Barra avers that at no time during the period between the notification that the appeal was being progressed on 14th June, 2013, and the notification that the appeal had been rejected on 20th June, 2013, did the plaintiff contact the Appeals Board to request that the appeal not go ahead since he had not had adequate opportunity to make submissions.

13. Ms. de Barra also avers that it was made clear to the plaintiff in the letter of 23rd July, 2013, from the Appeals Officer to the plaintiff that he was free to submit further information in support of his appeal to the Appeals Officer if he so wished but that this would have to be sent to the Arrears Support Unit for re-assessment and the outcome of such an assessment would be subject to an appeal to the Appeals Office. No further information was submitted by the plaintiff. Ms. de Barra also states in her affidavit that the defendant Bank has no difficulty in the Appeals Board considering any further information or material which the plaintiff wishes it to consider and that such information should be remitted to the arrears support unit for review and that such a review would be open to an appeal to the Appeals Board. Ms. de Barra states that such information should be submitted to the Appeals Board within twenty working days of the date of any decision of this Court in these proceedings and that the defendant would deliver any determination on the matter within forty days of receipt of the information. Ms. de Barra avers to the fact that the defendant, by letter of 15th August, 2013, confirmed that it would not enforce its security over the property without the leave of the court and that this would not be done until such time as the above appeals process was concluded.

14. The plaintiff avers in an affidavit sworn on 13th Sept, 2013, that he:

> "simply wanted an opportunity to make a proper Appeal and it seemed to [him] that the Appeals Officer of the Defendant as of the end of July 2013…was only prepared to do so on condition that there was further information to support an Appeal."

The plaintiff is of the view that the assertion by the defendant that it will offer him an opportunity to submit further information and material, as averred to by Ms. de Barra is not an appeal as defined by the MARP as on the one hand he has been told that his appeal has been determined despite only asking for an extension of time to submit an appeal and on the other hand he has been asked to submit further information for an appeal if he so wishes. Mr. McGuinness also avers that the statement in the letter of the 10th May, 2013, from the defendant, in summary of the meeting which occurred between the parties on 1st May, 2013, does not amount to sufficient reasons for the decision of the Appeals Board to refuse the appeal within the meaning of para. 39 of the Code. The statement in that letter is as follows:

> "the Arrears Support Unit of the Bank had declined to offer [the plaintiff] an alternative repayment arrangement as it had

determined that arrangement alternatives were not sustainable for [his] financial circumstances in the long term"

15. By letter dated 25th July, 2013, to the Mortgage Appeals Office the solicitors for the plaintiff requested that the Appeals Board indicate that it would revoke its decision to refuse the plaintiff's purported appeal and allow the plaintiff to resubmit an appeal. Solicitors for the plaintiffs requested that this confirmation be given by close of business on 26th July, 2013, or proceedings would be issued against the defendant.

16. Mr. McGuinness also avers in his affidavit of 13th Sept, 2013, that in the period between Jan, 2013 and Sept, 2013 aggregate payments of €67,000 were made by the plaintiff to the Bank. Ms. de Barra, in an affidavit of 23rd Sept, 2013, however avers that the total aggregate repayments on the various facilities owed by Mr. McGuinness to the Bank should have amounted to €183,757.00 for this period, as opposed to the figure actually paid. As of 23rd Sept, 2013, the total aggregate arrears on the loans were €324,798.00 and the total amount outstanding to the Bank on that date was €3,620,818.84. Ms. de Barra, and Counsel for the Bank in his submissions, also stated that the plaintiff has not made any effort to address this situation and the court has not been informed of any significant change in his circumstances which would possibly lead to realistic new proposals for the servicing of his debt.

17. Mr. McGuinness, in a further replying affidavit of 4th October, 2013, avers that the letter of Friday 14th June, 2013, notifying him that his appeal was being considered by the Appeals Board would only have arrived on Monday 17th June, 2013, and that this allowed insufficient time for him to make further submissions to the Appeals Board or to contact the Appeals Board to request that the appeal not go ahead before the letter of 20th June, 2013, which indicated that his appeal had been rejected by the Appeals Board was received. Mr. McGuinness also avers that his total debt to the Bank, as set out in the last affidavit of Ms. de Barra, includes not only loans relating to his principal private residence at Hillsborough House, the subject of these proceedings, but also other commercial property loans which are not of relevance here as those properties could not benefit from the MARP or the terms of the Code in any case.

18. The court has had the benefit of considering both oral and written submissions made on behalf of the parties.

Submissions of the Plaintiff

19. Counsel for the plaintiff submits that the plaintiff requested, in his letter of 7th June, 2013, to the Mortgage Appeals Office, an extension of time for the submission of an appeal to the Appeals Board. This is the main issue in dispute between the parties. By letter of 14th June, 2013, to the plaintiff the Mortgage Appeals Office informed him that his appeal was being processed. A further letter sent on 20th June, 2013, notified the plaintiff that his appeal had been rejected. Counsel for the plaintiff submits that this was not an appeal within the meaning of the Code as the plaintiff had not had the opportunity to submit new information which may have been of relevance to the appeal.

20. The Central Bank Code of Conduct in Mortgage Arrears, effective from 1st Jan, 2011, was issued pursuant to s117 of the Central Bank Act 1989 and the Central Bank has the power to impose sanctions on bodies which must apply the Code for any non-compliance with the Code under Part III (c) of the Central Bank Act 1942 (as inserted by s10 of the Central Bank and Financial Services Authority of Ireland Act 2004). Counsel for the plaintiff contends that there is a duty owed by the defendant to the plaintiff to comply with the provisions of the Code during the course of the relationship between the two parties. The plaintiff relied on the decision of Hogan J. in *Irish Life and Permanent plc v Duff* [2013] IEHC 43. In that case an order was sought by the plaintiff Bank to repossess a borrower's family home. The court held that, given the non compliance by the Bank with its obligations under the Code to the borrower, the order for possession should be refused. Counsel submits that there is a fair issue to be tried in relation to the status of the Code and the entitlement of the borrower to rely on the Code in order to secure the relief sought by him on the plenary summons in these proceedings.

21. In making the decision in *Irish Life and Permanent plc v Duff* [2013] IEHC 43 the court was following a prior decision of Laffoy J. in *Stepstone Mortgages Funding Ltd v Fitzell* [2012] 2 I.R. 318 in relation to the legal status of the Code. In that case the court was required to decide whether or not the failure of the lender to act entirely in compliance with the provisions of the Code prevented the lender from seeking possession of the borrower's home; the security for the debt. The court in that instance found that non compliance with the terms of the Code prevented the court from granting an order for possession. The court accepted a passage from Breslin, *Banking Law* (2nd Ed., Dublin, 2006) at para. 3-56 as an accurate statement of the attitude of the courts to the current status of the Code. She stated at para. 5.2 of her decision:

> "The following passage from Breslin on *Banking Law* (2nd Ed.) at 3 - 56, which sets out to explain the contractual setting of Central Bank Codes of Practice is helpful in considering the status of the Current Code. It is stated:
>
> > 'The Central Bank has promulgated Codes of Practice for credit institutions pursuant to its powers under s. 117 of the Central Bank Act 1989. Breach of the code is not a criminal offence and the Act does not spell out any particular consequences in civil law arising from a breach. Breach of a direction by the Central Bank to comply with particular provisions of the Code is a criminal offence. A key question is whether or not these provisions are merely 'soft law', i.e. devoid of legal effect such that a breach of a provision in the Code of Practice will not sound in a remedy in civil law for damages. In the unlikely event that the Codes of Practice have been incorporated into the bank customer bargain then they apply. Whether a particular requirement is deemed to be an implied term in that contract depends on the particular term sought to be implied, and the circumstances of the case - but the test is not an easy one to meet. It is submitted that the Codes of Practice appear more likely primarily to arise in the context of the analysis of the bank's duty of care and whether the bank has in a particular case met reasonable standards.'
>
> For present purposes, I accept that passage as an accurate statement of the jurisprudence of the Superior Courts on the status of the Current Code as of now. However, in the light of the observations of the author in Donnelly on *The Law of Credit and Security* at paras. 9-79 and 20-47, some development of the jurisprudence in this area in the future may be anticipated."

22. Counsel for the plaintiff also relies on a statement of Hogan J. in *Irish Life and Permanent plc v Financial Services Ombudsman and Christy Thomas and Joseph Thomas* [2012] IEHC 367 at para 55-56 in support of his submission that the Code has sufficient legal status to afford the plaintiff a remedy in this instance:

> "55. It is true that while s. 117 of the Central Bank Act 1989 gives the Central Bank power to adopt codes, that section is silent on the legal consequences of a breach of the Code. While it is not necessary here to essay the full dimensions of the Code's precise legal import and status, it is sufficient to note that they are not entirely a species of "soft" law, i.e., purely precatory statements not susceptible of legal enforcement. Thus, for example, in *Stepstone Mortgage Funding Ltd.*

v. Fitzell [2012] IEHC 142 Laffoy J. refused to make an order for possession of a family home where the lender was not in compliance with the Code for Mortgage Arrears (2010). These codes can certainly inform - in principle, at any rate - the thinking of regulatory authorities in assessing appropriate standards for credit institutions."

23. The plaintiff in these proceedings complains of non-compliance with paragraphs 42-44 in the section of the Code entitled "Step 5: Appeals" and paragraph 47 of the Code which is in the section entitled "Repossessions" which provide:

> "42. A lender must establish an Appeals Board to consider any appeals submitted by ***borrowers*** and to independently review any of the following:
>
> a) the decision of the lender's ASU,
>
> b) the lender's treatment of the ***borrower's*** case under the MARP process, or
>
> c) the lender's compliance with the requirements of this Code.
>
> 43. The Appeals Board must be comprised of three of the lender's senior personnel, who have not been involved in the ***borrower's*** case previously. At least one member of the Appeals Board must be independent of the lender's management team and must not be involved in lending matters, for example, an independent member of the lender's Audit Committee.
>
> 44. A lender must have in place a written procedure for the proper handling of appeals. At a minimum, this procedure must provide that:
>
> a) The Appeals Board will only consider written appeals;
>
> b) The lender must acknowledge each appeal in writing within 5 ***business days*** of the appeal being received;
>
> c) The lender must provide the ***borrower*** with the name of one or more individuals appointed by the lender to be the ***borrower's*** point of contact in relation to the complaint, until the Appeals Board adjudicate on the appeal;
>
> d) The lender must provide the ***borrower*** with a regular written update on the progress of the appeal, at intervals of not greater than 20 ***business days***;
>
> e) The lender must consider and adjudicate on an appeal within 40 ***business days*** of having received the appeal. The lender must notify the ***borrower*** in writing, within 5 ***business days*** of the completion of the consideration of an appeal, of the decision of the Appeals Board and explain the terms of any offer being made. The lender must also inform the ***borrower*** of his/her right to refer the matter to the Financial Services Ombudsman and must provide the ***borrower*** with the contact details of that Ombudsman…
>
> 47. Where a ***borrower*** co-operates with the lender, the lender must wait at least twelve months from the date the ***borrower*** is classified as a MARP case (i.e. day 31), before applying to the courts to commence legal action for ***repossession*** of ***a borrower's primary residence***. The twelve-month period commences on day 31 but does not include:
>
> • any time period during which the ***borrower*** is complying with the terms of any alternative repayment arrangement agreed with the lender;
>
> • any time period during which an appeal by the ***borrower*** is being processed by the lender's Appeals Board;
>
> • any time period during which the ***borrower*** can consider whether or not they wish to make an appeal on the decision of the ASU;
>
> • any time period during which a complaint against the lender regarding any aspect of this Code, is being processed by the Financial Services Ombudsman's office; and
>
> • for ***pre-arrears cases***, the time period between the first contact by the ***borrower*** in relation to a ***pre-arrears*** situation and an alternative repayment arrangement being put in place."

24. Counsel for the plaintiff also submitted that the reason for the original decision to refuse relief under the MARP scheme to the plaintiff, which was stated in the letter of 15th April, 2013, as being due to the fact that Arrears Support Unit of the Bank was not satisfied that the arrangements proposed "would be suitable in [the plaintiff's] financial circumstances" was not a sufficient reason to refuse the initial application. It was also submitted by Counsel for the plaintiff that this was not in compliance with the requirements of paragraph 39 of the Code as set out below:

> "39. If a lender is not willing to offer a ***borrower*** an alternative repayment arrangement, for example, where it is concluded that the mortgage is unsustainable and an alternative repayment arrangement is unlikely to be appropriate, the reasons must be given in writing to the ***borrower***. In these circumstances, the lender must make the ***borrower*** aware of:
>
> a) other options open to the ***borrower***, including voluntary surrender, trading down or voluntary sale, and the implications of each option for the ***borrower***; and his/her mortgage loan account; and
>
> b) the ***borrower's*** right to make an appeal to the lender's Appeals Board in relation to any of the following:
>
> (i) the decision of the ASU;
>
> (ii) the lender's treatment of the ***borrower's*** case under the MARP process; or
>
> (iii) the lender's compliance with the requirements of this Code,

including the procedure for making an appeal and the relevant time allowed to the ***borrower*** to consider submitting an appeal."

25. Counsel for the plaintiff submits that he should also be awarded an injunction as there is a fair issue to be tried in relation to the right of the plaintiff to have the defendant Bank comply with the provisions of the Code as set out above.

26. It is also submitted that the plaintiff should have the benefit of fair procedures while his interests are considered through the MARP. It is not suggested that the full panoply of fair procedures would necessarily apply in a situation such as this case but that a "bare modicum," in the words of Counsel for the plaintiff, of fair procedures should apply in the Bank's compliance with the provisions of the Code. Counsel for the plaintiff submits in this respect that while the plaintiff may not be entitled to an oral hearing etc. he should be entitled to a fair and impartial appeal from the initial rejection of the proposals which he made to the Arrears Support Unit and that he has a further right to know in effect what he is appealing against; the reasons for the rejection of his proposals by the defendant. Counsel for the plaintiff relies in this regard on the Supreme Court decision of Hardiman J in *Dellway Investments Ltd v NAMA* [2011] 4 I.R. 1 in which the court adopted at p. 280 a statement from De Smith on *Judicial Review of Administrative Action*, 6th Ed (London, Sweet and Maxwell, 2007) at p.356 to the effect that "The law has moved on…[to a state] where the courts are able to insist upon some degree of participation in reaching most official decisions by those whom the decisions will affect in widely different situations…" Counsel submitted that the rights of the plaintiff incorporated into the private contractual relationship between the plaintiff and the Bank by means of the Code of Conduct on Mortgage Arrears are rights in the nature of public law rights derived from statute. This necessarily means that the terms of the Code would have to be incorporated into the contract between the parties. It was submitted that the Code can be considered an implied term of the contract between the parties as it complies with the requirements of the test set out by Murphy J in *Sweeney v Duggan* [1997] 2 I.L.R.M. 211 at page 217:

> "Whether a term is implied pursuant to the presumed intention of the parties or as a legal incident of a definable category it must not really be reasonable but also necessary. Clearly it cannot be implied if it is inconsistent with the express wording of the contract and further it may be difficult to imply a term where it cannot be formulated with any reasonable precision."

27. During the course of the hearing of this application a question arose in relation to the interpretation of the Code as regards the number of applications which can be made through the MARP and the number of appeals which can be entered therefrom by a single borrower. In a letter posted on the Central Bank Website dated 21st December, 2012, which was also sent to the various licensed institutions required to comply with the Code, a number of interpretive guidelines, termed "clarifications," were set out for the benefit of lenders. At the hearing of this action it was submitted by Counsel for the defendant that the plaintiff had the opportunity to make any number of applications to MARP and subsequent appeals from those decisions, provided that new information was entered for consideration on each application and that therefore the plaintiff had not raised on the facts or on the law any serious issue to be tried which would warrant the granting of the order sought. Para. 1.7 of this letter states that:

> "In the normal course of events, we would expect that there could be a number of decisions by the ASU, depending on how long the customer is in arrears and the borrower is entitled to appeal those decisions. However, a borrower cannot appeal the same issue twice…"

In response Counsel for the plaintiff submits that the Central Bank is not empowered under either the Central Bank Act 1989 or the Central Bank and Financial Services Authority of Ireland Act 2004 to issue such clarifications. It is submitted that this document is not binding on the lending institutions to which it was addressed, of which the defendant is one, and cannot be seen as an interpretive guide to the MARP or the Appeals Process. The power to issue such guidelines is not mentioned in the statutes which provide for the formulation and application of the Code. Counsel submits that the suggestion that an infinite number of applications and appeals could be made under the MARP and the Appeals Process would render the appeals process unworkable. It was also emphasised that there is no definition or guidance in the Code as to what would, for the purposes of making a new application, constitute new information. The fact that it was not made clear to the plaintiff that a new application could be made by him is also said to be a breach of Clause 10 of the Code which requires that the workings of the process are made known to the borrower in "a clear and consumer friendly manner." At no stage prior to the oral submissions made on this application, according to Counsel for the plaintiff, was it made clear to the plaintiff that new information would be required in order for a new application or appeal to be made. It is submitted that there is no provision in the Code which would indicate that a number of applications or appeals could be made to the ASU or the Mortgage Appeals Board. For the Bank to allow such new applications or appeals would be an exercise of its discretion and would not fall within the remit of the Code at all. It was submitted that it is incoherent for the defendant to suggest this view of the process when on the facts of this case it is clear that the plaintiff requested an extension of time to make a new appeal but the defendant did not ask for further new information in relation to the borrower's case in order that it could decide whether a new appeal was warranted, rather it proceeded to consider the application for an extension of time as an appeal and rejected the plaintiff's application. Counsel for the plaintiff submits that if the defendant's view of the process is accepted by this Court the plaintiff will be deprived of the opportunity of making the Appeal which is provided for by the Code and which he wished to make in June, 2012.

Submissions of the Defendant

28. Counsel for the defendant submits that there has in fact been no breach of the Code since the plaintiff was granted an extension of time to make an appeal despite there being no provision to grant such an extension set out in the Code. The Bank submits that it granted this extension at its sole discretion.

29. Counsel for the defendant submits that the decisions cited by the plaintiff in relation to the status of the Code are of narrow application. The decision of this Court in *Freeman and Another v Bank of Scotland Ireland Limited and Others* [2013] IEHC 371 is relied on by the defendant. It was stated at para. 20 that "it is apparent from the case law that the status of the Central Bank codes issued under s117 and those relied on by the plaintiffs is not absolutely clear and may be dependent on the circumstances of each particular case." Counsel stated that the Code could not create enforceable rights in favour of the plaintiff in the manner of a legal cause of action or a right to sue the defendant on foot of the terms of the Code. For this Court to allow a plaintiff such a cause of action derived from the Code would be to allow the court to impermissibly engage in the legislative process and act in breach of Art 15.2.1 of the Constitution which grants exclusive legislative powers to the Oireachtas and in breach of the "principles and policies" test set out at p. 399 of the decision in *City View Press Ltd v An Comhairle Oiliúna* [1980] I.R. 381. It was submitted that if the plaintiff is correct and the Code does give rise to a cause of action in his favour, the Code must then itself be in breach of the principles and policies test and must be considered an impermissible delegation of the legislative power. Such a power would be outside the remit of the power delegated in s117 of the Central Bank Act 1989 to the Central Bank and therefore void as unconstitutional.

30. It was submitted that if the defendant sought an order for possession from the court, this would not be granted unless the court was satisfied that the lender had been in compliance with the provisions of the Code, as is clear from the decision of Laffoy J. in in

Stepstone Mortgage Funding Limited v Fitzell [2012] 2 I.R. 318. This decision was taken on the basis of a case where the Code was used as a shield rather than a sword by the borrower in response to a repossession claim brought by the plaintiff. Counsel submits that this decision is not authority for the proposition that the plaintiff borrower has a positive right to enforce alleged breaches of the Code against the lender. To do so would be contrary to Art 15.2 of the Constitution. Therefore the purpose of seeking an interlocutory injunction restraining enforcement proceedings due to a purported non compliance with the appeal requirement of the Code is not clear. Counsel also submitted that the plaintiff's reliance on the decision of Hogan J. in *Irish Life and Permanent Plc v Duff* [2013] IEHC 43 to support the submission that the Code gives rise to a positive duty owed by the defendant to the plaintiff to comply with the Code is misconceived in that this decision did not in fact conclusively determine that the status of the Code was sufficient to give rise to such a cause of action on the part of the borrower put in fact followed the same narrow line of reasoning as was followed by Laffoy J in *Stepstone Mortgage Funding Limited v Fitzell* [2012] 2 I.R. 318.

31. Herbert J in *Friends First Finance v Cronin* [2013] IEHC 59 at para 26. stated that a breach of the Code

> "…cannot afford a defence to the defendant…There is nothing in any of these statutes which expressly or impliedly would render the loan agreements illegal, invalid or unenforceable because of a breach by the plaintiff of any of these statutory provisions of the Code."

Counsel submits that since this case does not involve an application for repossession brought by a lender as was the case in both *Stepstone Mortgage Funding Limited v Fitzell* [2012] 2 I.R. 318 and *Irish Life and Permanent Plc v Duff* [2013] IEHC 43 this is a more accurate statement of the legal status of the Code as regards the facts currently before the court.

32. It was also submitted by Counsel for the defendant that the terms of the Code do not envisage, as seems to be suggested by the submissions made on behalf of the plaintiff, that a borrower is only permitted to make one application and one appeal under the procedure outlined in the Code. In fact, according to Counsel for the defendant, there is no limitation on the number of submissions which can be made to the Arrears Support Unit and therefore the number of appeals made to the Appeals Board under the MARP and in accordance with the terms of the Code. This is provided that each submission made relates to new information and that the ASU and the Appeals Board are not merely being asked to make a decision in relation to material previously considered.

33. Counsel for the defendant also submits that the implication of fair procedures into the terms of the Code, which would in effect give the plaintiff a legal cause of action, would be a departure from the statutory basis of the Code and would go beyond the narrow decisions which were made in *Stepstone Mortgage Funding Limited v Fitzell* [2012] 2 I.R. 318 and *Irish Life and Permanent Plc v Duff* [2013] IEHC 43 in relation to the status of the Code. The relationship between the borrower and the lender, which the MARP and the Appeals Process relate to is a private contractual relationship to which it would be inappropriate and unworkable to interpolate principles of fair procedures derived from public law. As McCracken J. stated in *Carna Foods Ltd. v Eagle Star* [1995] 1 I.R. 526 at. 531 "to decide [that any principle of natural justice or constitutional justice applies] would be a serious interference in the contractual position of parties in a commercial contract and with very wide-ranging consequences." Counsel submits that it is not arguable that merely because a lender is regulated and licensed by the Central Bank and required to comply with the Code decisions taken by such lenders under MARP fall within the realm of public law. Insurance companies, which were at issue in the decision of McCracken J., are similarly regulated and this did not effect that Court's finding. Therefore this decision is authority for the submission that fair procedures principles should not apply in a context such as that currently before this Court. The enforceability of the Code by private lenders is not evident from the text of the Code itself and cannot be derived merely from the fact that the Code has a statutory basis, nor is this sufficient to require that principles of fair procedures be applied in this instance.

34. In relation to the standard test, derived from *Campus Oil v Minister for Industry and Energy (No 2)* [1983] I.R. 88, for the award of an interlocutory injunction, Counsel for the defendant submitted that there is in fact no fair issue to be tried in this case. The sole question to be tried is whether there has been compliance by the Defendant with the Code and the Bank can be seen to have complied *stricto sensu* with the terms of the Code from the affidavit evidence and submissions alone. In addition the plaintiff was given discretionary flexibility in relation to the application of the Code to his benefit and he also had other mechanisms open to him which he did not avail of including the right to appeal to the Financial Services Ombudsman.

35. Any damage which the plaintiff may suffer is remediable by means of monetary compensation whereas any undertaking as to damages given by the plaintiff would not be sufficient to compensate any prejudice caused to the defendant by the award of the injunction as the plaintiff is insolvent.

36. In relation to the balance of convenience, the third element of the test outlined in *Campus Oil v Minister for Industry and Energy (No 2)* [1983] I.R. 88, Counsel for the defendant submits that the plaintiff has not dealt with this sufficiently as he has not made clear to the court what new information was available or new circumstances had arisen to justify the making of an appeal to the Appeals Board, but relied merely on an assertion that such a new situation exists. The defendant also submits that the plaintiff had the same opportunity to engage with the appeals process as other borrowers and that the grant of an extension in time for the making of an appeal to the borrower was at the discretion of the Bank and not an automatic entitlement of the borrower. In addition, once a case is classified as falling within the MARP the Code imposes a moratorium on the initiation by the lender of proceedings for the repossession of the property for a period of twelve months. This period, under paragraph 47 of the Code, is frozen while appeals are being processed by the lender's Appeals Board. This militates against the award of the injunction as sufficient time has already been given to the plaintiff to deal with his difficulties with the Bank under the MARP.

37. In relation to the balance of convenience it is also submitted that the Plaintiff retains the possibility of appealing the decision to the Financial Services Ombudsman and that there are no enforcement or repossession proceedings in being against the plaintiff. This implies that the urgency in this matter is overstated by the plaintiff. The moratorium against such enforcement or repossession proceedings is still in being given that the time for the running of the MARP and the Appeals Process has not yet expired. In addition, the plaintiff has failed to make clear to the court what further or new information in relation to his borrowings he wishes the Bank to consider. Counsel for the plaintiff characterises this as a lack of candour which should, given that the relief sought is discretionary in nature, militate against the award of an injunction.

38. Counsel further submits that the plaintiff is in breach of the obligation of *uberrima fides* or utmost good faith in relation to the application which he brought on 6th August, 2013, *ex parte*, seeking leave of the court to issue the proceedings. During that application the letter of 30th July, 2013, which was sent by the solicitors for the defendant to the solicitors for the plaintiff was not opened. This letter would have been relevant to any decision of that Court to grant leave. It is submitted that even if this breach is not found to render the entire proceedings a nullity, this should be taken into account in relation to the costs arising from this application. Counsel relies on the decision in *EBS Building Society v Hefferon & Kearns* [2012] IEHC 399 at paras. 14-15 in support of this submission. McGovern J in that case stated:

"14. In *Bambrick v. Cobley* [2005] IEHC 43, [2006] I.L.R.M. 81, Clarke J. stated that the court had discretion to refuse to grant interlocutory injunction sought and to discharge the already granted interim injunction if there was material non-disclosure. He said at 89 that the court should have regard to all the circumstances of the case and he then set out a number of factors which appeared to him to be the ones most likely to weigh heavily with the court in exercising its discretion namely:-

> *"1. The materiality of the facts not disclosed*
>
> *2. The extent to which it may said the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was nonetheless, significantly culpable in failing to disclose.*
>
> *3. The overall circumstances of the case which lead to the application in the first place."*

15. In *Kanwell Developments Ltd v. Salthill Properties* (In receivership) [2008] IEHC 3, Clarke J. identified at para. 5.4 a further consideration in the exercise of the court's discretion:-

> *"... [I]t does seem to me that amongst the factors which the court should properly take into account in deciding what to do about any non disclosure, is the extent to which the order sought on the ex parte application might be regarded, on the one hand, as largely procedural or, on the other hand, as affecting rights and obligations. Where a third party (not before the court) has their rights and obligations altered on an application made ex parte, then the court should be even more anxious to ensure that the party who obtains the benefit of the order has made proper disclosure."*

Conclusion

39. The court must bear in mind, on an interlocutory injunction application, the statement of Lord Diplock in *American Cyanamid v Ethicon Ltd* [1975] A.C. 396 at pp. 407-408 as to the limitations on the role of the court in such an instance. It was stated that:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

40. The test to be made out for the granting of an interlocutory injunction in this instance is the well known test set out by the Supreme Court in *Campus Oil v Minister for Industry and Energy (No 2)* [1983] I.R. 88. The plaintiff, in order to be awarded the injunction sought, must establish that he has raised a fair issue to be tried in all the circumstances of the case, that damages would not be an adequate remedy for any injury which he alleges has been done to him should he be successful at the substantive hearing of this action and that the balance of convenience on the facts as presented to the court favours the award of the injunction. Other discretionary factors such as delay or the conduct of proceedings may be taken into account since this relief is equitable. The plaintiff is also required to give to the court an undertaking as to damages which is of substance.

41. The court is satisfied that in this instance the plaintiff has not raised a fair issue to be tried within the meaning of the test. It would, as was stated by Counsel for the defendant, have been open to the plaintiff at all times to resubmit an application to the ASU and if dissatisfied with any outcome appeal that decision to the Mortgage Appeals Board. This option still remains open to the plaintiff. There may have been, at one point, confusion between the parties in relation to the need to extend the time for an appeal but the Bank in its discretion afforded the plaintiff the appeal sought. It remained open to the plaintiff to re-submit any new information.

42. It is also clear that the status of the Code has not been conclusively determined by the courts but the particular facts in this instance do not indicate that this is an appropriate case for this determination to be made. The decisions of the courts in *Irish Life and Permanent plc v Duff* [2013] IEHC 43 and *Stepstone Mortgages Funding Ltd v Fitzell* [2012] 2 I.R. 318 are narrow in nature and only determined that compliance by a lender with the Code was necessary in order for the making of an order for repossession. They are not relevant to the facts at issue in these proceedings and would not have a bearing on the status of the Code in relation to the right of the borrower to use non-compliance with the Code as a cause of action against a lender. This matter has yet to be determined but given the facts of this case it is clear that this issue could not be appropriately determined in these proceedings, particularly since the plaintiff was at all times able to make a further application under the MARP to the ASU and the Mortgage Appeals Board of the lender. Though a legal issue in relation to the status of the Code exists that does not equate to the raising of a fair issue to be tried. In this instance, given the facts as presented, to hold otherwise would be to allow this legal issue to be determined in a factual vacuum. There is no fair issue to be tried in these circumstances in relation to the status of the Code.

43. It is also not tenable from the wording of the Code to suggest that only one application and appeal are permitted. The overall tenor of the Code and the guidelines issued by the Central Bank by letter of 21st December, 2012, to the various lending institutions indicates that this is the case. The defendants have also accepted in this application that this is the situation currently pertaining and it must be recognised that this acceptance may not be in the best interests of the defendant, given that it would undoubtedly increase the workload of that institution.

44. The court is satisfied that damages would be an adequate remedy for any injury which the plaintiff may succeed in proving on the plenary part of this application. Such damages would not be incapable of quantification. In addition the undertaking as to damages given by the plaintiff, given the nature of his current financial status, is of questionable worth.

45. The balance of convenience favours the dismissal of the application for a number of reasons. It remains open to the plaintiff to make the appeal sought. There are no enforcement or possession proceedings currently pending against any of the properties which are the subject of the facilities concerned and the moratorium of twelve months which is imposed by the activation of the MARP and the process set out by the Code has not yet expired. The court has not had sight of any evidence which would suggest that the plaintiff is in possession of new material which he wishes to re-submit to the defendant in support of his application under the MARP.

46. The court, therefore, refuses the relief sought on this application.