[2020] IEHC 212

**THE HIGH COURT**

**[2018 No. 256 CA]**

**BETWEEN**

**EBS MORTGAGE FINANCE**

**PLAINTIFF**

**– AND –**

**KEITH RYAN AND GARY RYAN**

**DEFENDANTS**

**JUDGMENT of Mr Justice Max Barrett delivered on 12th May 2020.**

## 1. Background.

1. The plaintiff is a public unlimited company with a share capital, having its registered office in Ireland. The plaintiff is a wholly owned subsidiary of EBS Limited (formerly EBS Building Society). It has had a portion of the EBS residential mortgage book transferred to it, including the loan agreement and the mortgage/charge that are the focus of the within proceedings. The defendants are two brothers, resident at an address in Baldoyle, County Dublin.

2. Pursuant to a loan agreement of 24 March 2009, EBS Building Society loaned €300k to the defendants. The defendants were and are the registered joint owners of a residential property against which, pursuant to the agreed loan security arrangements, a charge was registered as a burden. The charge incorporates, *inter alia,* the general EBS Mortgage Conditions. Clause 10(a) of those Conditions state that the total debt, as defined in the charge becomes immediately repayable if the borrower defaults for three consecutive months in his repayment obligations to EBS. The parties appear from the evidence before the court to have first defaulted in Q1 2013. In Q4 2013, EBS's solicitors wrote to the defendants seeking payment of all monies due on the loan account, or that the defendants deliver up the property to EBS. Later in Q4 2013, EBS commenced the within proceedings.

3. By way of further background to this case, Mr Gary Ryan has sworn an affidavit in which he avers, *inter alia*, as follows:

> *"1. I Gary Ryan took over my parents' mortgage…due to my father…sustaining serious injuries and getting into financial trouble. As he was self-employed, he was entitled [to] no social welfare, and could not meet the mortgage….*
>
> *2. I approached the EBS in Raheny…and dealt with the manager. He encouraged us to take the mortgage over, and told us that he would take care of all the legal work involved. All we had to do was sign on the dotted line. I asked him was he sure we could manage this mortgage if one of us was to be let go from our jobs, and he said not to worry, because if that happened the mortgage would be halved, and told us that should one of us die, then the mortgage would die with us.*
>
> *3. He also told us that the mortgage payment would never rise. He also assured us that my mother and father could never be removed from the home in their lifetime.*

*Otherwise we would never have signed up for it….We have always engaged with the bank and paid what we could, even though our means are limited."*

4. By way of reply, the manager in question has sworn an affidavit in which he avers, *inter alia*, as follows:

*"5 I agree that the Defendants did approach the Bank to take out the mortgage the subject-matter of the within proceedings; however, I confirm that I did not encourage them to take out the mortgage as alleged as I had no personal interest in the matter and would simply have no reason to do so.*

*6. I say that the Defendants approached the Bank with a view to buying out their parents and I went through the process with them after the Bank had initially declined a top up loan for their parents. I advised the Defendants that they would need to engage a solicitor as part of the process and never stated that I would take care of the legal work. I say that this position is evidenced by the fact that the Defendants did retain James F O' Higgins, Solicitor…who clearly witnessed their signatures on the Mortgage the subject-matter of these proceedings.*

*7. I also confirm that I explained the various mortgage protection options and requirements to the Defendants…I confirm that I was never asked if I thought they could manage the repayments if one of the borrowers lost their job but I did explain the benefits of taking out payment protection insurance. I recall that the Defendants declined to take up payment protection insurance due to the costs involved in taking such cover, in terms of life insurance, I went through the process with the Defendants and explained their options and what life insurance was designed to do, so that in the event of the other party passing away the loan would be cleared.*

*8. In reply to paragraph 3 of the Defendants' Affidavits, whilst I would of course have discussed the various rate options on offer…and outlined their advantages and disadvantages, I would never have stated that the Defendants' mortgage repayment would never rise as I was fully aware that this would be entirely out of my control."*

5. The bank official at no point avers that he did not state that the sons' parents would not be turned out of the house.

6. The proceedings came before me in the form of an appeal by EBS Mortgage Finance against a decision of the Dublin Circuit Court. The appeal fell to be heard on a *de novo* basis by me. Neither of the defendants appeared, it seems because of work commitments. However, their father, Mr Fran Ryan, a pleasant but clearly worried gentleman, did appear, and spoke without objection from EBS.

7. Unfortunately, the hearing was hopelessly one-sided. Mr Ryan is not a lawyer, he expressly indicated that he did not understand much of what was being said in court, but

he did put forward a couple of arguments as best he could, one concerning what he claimed was said by the EBS bank manager prior to the transaction and the other an argumentum ad misericordiam imploring the court not to accede to the within application. He was met on the other side by counsel learned in the law and by a near 300-page book of documents. Before proceeding further, I note that I do not understand it to be disputed that the defendants are consumers.

8. There is a legal dimension to the foregoing, relating to the full and complete discharge by me of the own motion obligation that is incumbent upon me pursuant to the Unfair Contract Terms Directive, as implemented (the 'UCTD'). Simply put, this is an obligation that the European Court of Justice has recognised to arise under the UCTD and which requires me, as a judge, to do a fairness test on contractual documentation*, in the particular circumstances of any one case.* This inquisitorial task is known as the 'Own Motion Obligation'. To Irish judges, more accustomed to an entirely adversarial regime, this is an unusual, even uncomfortable obligation to discharge. For my part, I would query whether, now that the European Court of Justice has recognised the Own Motion Obligation, the existing summary procedure is fit for purpose. The summary process typically takes the following form:

    1. Case is called on for hearing.

    2. The judge is handed a booklet that is several hundred pages long and which s/he has never seen before.

    3. Counsel for the creditor leads the judge through the principal documents.

    4. The debtor or his legal representative/s get to reply. Very often (perhaps more often than not) a debtor, because he is down on his luck, has to represent himself in the court and the hearing becomes something of a mockery of justice, with the debtor often completely floundering, not sure what to say or do, often (understandably) upset to the point of tears, and trying to compete against a barrister whose skill-set comprises knowing the law and arguing a case in open court.

    5. Counsel for the creditor speaks again.

    6. The judge can then give an immediate judgment, typically ordering what the creditor wants or sending the matter to a full (plenary) hearing, or (as I always do) s/he can reserve judgment, read the papers in full and come back on a later day. Given the existence of the Own Motion Obligation, I do not myself see how a judge can do other than give a reserved judgment. This is because, as a result of that Obligation, the judge now needs to read the relevant contractual documents and see if any fairness issues present. There is no way that the Own Motion Obligation can properly be done in an impromptu manner.

7. Once the issue of fairness is considered then, as mentioned above, the judge needs to revert to the parties and hear any arguments that they may wish to make. But that is not a great process because it involves the judge giving a provisional view before the parties get to argue whatever point/s the judge makes regarding fairness.

A more sensible approach would seem to be the following:

1. Judge is supplied with parties' papers three weeks in advance of the hearing.

2. Judge reads the documents, does the Own Motion Obligation and emails the parties any observations on fairness one week in advance of the hearing.

3. On the hearing-date all aspects of the case are treated at one hearing. At that point the judge can, in an informed manner, decide whether to order what the bank wants, or send the matter to a full (plenary) hearing. Given that the judge would have considered the case in advance, the need for a reserved judgment would seem likely to reduce.

9. Unfortunately, such reform seems unlikely imminently to be forthcoming – albeit that reform in this regard (and others) would seem timely if the anticipated economic downturn that will follow the present lockdown yields an increase in debt-related proceedings. Both approaches, however, would leave unaddressed perhaps the greatest injustice perpetrated by our currently creaking court-administered system of justice – which in its structure and operation often seems better suited to serving the public of 1820 than that of 2020 – that injustice being the situation, galling to anyone with a feeling for fairness, in which people who stand to lose their homes come to court unrepresented and without even a semblance of equality of arms vis-à-vis the creditor that has made application against them.

10. As to the Own Motion Obligation, I was disappointed on reading through the papers to discover that EBS, yet again, has failed to provide the court with the papers necessary for the court to discharge its Own Motion Obligation. I use the words 'yet again' because in *EBS Ltd v. Kenehan* [2017] IEHC 604 – a case concerning the parent company of the plaintiff – a similar situation arose. Here, cl.5 of the Mortgage incorporates the Offer Letter into the Mortgage, and the Acceptance to the Offer Letter incorporates the General Conditions for EBS Home Loans and the Rules of EBS into the loan terms and conditions. So, I should have received among the documentation now before me, the said General Conditions and Rules. Because I did not, I cannot now undertake the Own Motion Obligation.

11. My initial sense was that in the circumstances I would end this judgment by asking that EBS, belatedly, provide me with the General Conditions and the Rules so that I could now undertake the Own Motion Obligation. However, on further reflection it occurs to me that a more fundamental difficulty presents. EBS has given me precisely the documents that it placed before the Circuit Court. So, unless that court asked for the General Conditions

and Rules – and there is nothing before me to suggest that it did – there is simply no way, that the Circuit Court could properly have discharged the Own Motion Obligation incumbent upon it as a matter of European Union law.

12. In *Permanent TSB plc v. O'Connor* [2018] IEHC 339, I accepted the contention made by the defendants in that case that within our court system, in proceedings commenced before the Circuit Court, parties typically have two chances to make their respective cases: they have an initial trial before the Circuit Court on such evidence as is put before that court. A party to such proceedings, who considers that s/he has one or more grounds of appeal, has a right of appeal to the High Court where a *de novo* hearing is heard. In *O'Connor*, the defendants argued that the evidence which was placed before the High Court was not properly in evidence before the Circuit Court and thus they were getting only one chance to make their case and had no right of appeal if the High Court decided matters in a way that the defendants considered to be erroneous. I agreed and remitted the matter to the Circuit Court for fresh consideration. Offhand, a failure by the Circuit Court to discharge in a consumer case the Own Motion Obligation incumbent upon it pursuant to European Union consumer law would seem to be an analogous and serious situation in which the Ryans could not have got and did not get an Own Motion Obligation at Circuit Court level. However, as this point has arisen since the hearing (as I only got to read the papers in full after reserving judgment), I will, when the courts open again, hear the parties about how they consider that I should proceed in all the circumstances.

13. For the sake of Mr Ryan, who was struggling to follow the hearings, I would respectfully summarise my decision in this judgment as follows:

    1. it appears from the evidence before me that EBS made an error in your case at the Circuit Court level;

    2. if so, the result is that you did not get the complete consideration of your case at Circuit Court level that you ought to have received;

    3. in a previous case where something similar occurred I sent the matter back to the Circuit Court (in effect the bank had to start over again with its court proceedings);

    4. I will hear what you and EBS have to say about matters before making any decision as to how best to proceed;

    5. that hearing will take place sometime after the courts re-open and I will ensure that you are sent the date to attend;

    6. in the meantime, you cannot be put out of the house; for the avoidance of doubt I will and do order that no steps be taken by EBS in this regard pending the hearing referred to at points 4 and 5.