Neutral Citation: [2014] IEHC 581

THE HIGH COURT

2012 No. 254 CA (CCo 2010 No. 10053)

Between/

ICS BUILDING SOCIETY

Plaintiff/Respondent

-AND-

PAUL LAMBERT

Defendant/Appellant

Judgment of Ms. Justice Iseult O'Malley delivered the 2nd May, 2014

Introduction

1. This is an appeal against an order of the Dublin Circuit Court, made on the 19th November, 2012, granting to the plaintiff/respondent ("ICS") an order for possession relating to a property belonging to the defendant/appellant ("the appellant"). The issues raised concern provisions of the Code of Conduct for Mortgage Lenders ("the Code") applicable to lending institutions when dealing with mortgage arrears and the Mortgage Arrears Resolution Process ("MARP").

Factual Background

2. The appellant is a solicitor with his own practice.

3. On foot of a mortgage dated the 22nd November, 2006 ICS lent to the appellant the sum of €450,000. The mortgaged property was a house known as 9 Dunbo Hill, Howth in County Dublin. At that time the appellant resided in 7 Dunbo Hill, which was his mother's house, and it is accepted that No. 9 was bought as a residential investment.

4. It seems to be agreed that the purpose of the loan was, in part, to discharge the then current mortgage on No. 9, which was with First Active. The balance was to be used to aid the purchase of two further residential properties, in Ballymun and Balbriggan. The repayments were to be interest-only for the first seven years – this period expired in November, 2013.

5. The loan was not in fact used to discharge the First Active mortgage. Furthermore, the appellant's firm acted as solicitor in the transaction and undertook to lodge the title documents with ICS – it appears that this undertaking was not honoured.

6. At some stage in early 2008 the appellant began to fail to meet his monthly repayments and fell into arrears. ICS, relying on the terms of the mortgage, made demand for full repayment by letter dated the 20th October, 2008. On the 12th November, 2008 it demanded clear vacant possession of the property.

7. On the 12th October, 2010 ICS issued a Civil Bill for possession, returnable for the 7th December of that year. The claim, when it eventually came on to be heard, was grounded on three affidavits – one from Colette Finneran, Supervisor of the Collections Department in ICS (sworn on the 23rd September, 2010), one from Fiona Cassidy, Manager in the ICS Arrears Support Unit (sworn on the 15th October, 2012) and the affidavit of service.

8. Ms. Finneran exhibited the mortgage documentation, the demands (to which no reply was received) and the statement of the appellant's account. She averred that the defendant lived at No. 7 Dunbo Hill, that No. 9 was a residential investment and that she was not currently aware of any other person in actual possession of the property. She further averred that in these circumstances the Code had no application.

9. At the time of swearing the affidavit the monthly instalments were €715.50. The statement of account shows a number of missed payments but also a number of payments made on various dates in 2008, 2009 and in January, 2010. During 2009 the payments were generally higher than the required monthly instalment and the arrears reduced accordingly but no payments at all were made from the end of January 2010 until the closing of the account in September of that year. As of the date of swearing that affidavit the arrears, according to Ms. Finneran, amounted to €10,842.58.

10. The affidavit of service was sworn by a Mr. Francis Craven, who said that he attended at No. 9 on the 25th October, 2010 and found it "vacant and unoccupied with all the appearances of having been empty for some time." He served the civil bill on the appellant next door in No. 7.

11. Ms. Cassidy's affidavit was sworn, as noted, in October, 2012. As of that date, the monthly instalment payable by the defendant was €623.92 and the current arrears amounted to €19,282.57. She exhibited an up-to-date copy statement of the defendant's loan account and, based on the figures therein, averred that the defendant was

> *"clearly not in any position to sustain, let alone repay, his mortgage debt herein."*

12. With reference to the applicability of the Code of Conduct for Mortgage Lenders (first published by the Financial Regulator in 2009) Ms. Cassidy averred to the following facts:

- At the time of the loan application, the appellant had represented that he lived in No. 7 with his parents and that No. 9 was an investment on his part. The Code would have had no application to such a loan.

- On the 7th September, 2010 the appellant told ICS in a telephone conversation that he had secured a tenant for the property.

- In June 2012 a summons server attended at the property on behalf of ICS and was informed by the appellant that he

was now residing in the property. Thereafter, "quarterly review" letters were sent by ICS to the appellant on the 14th June, 2012 and the 7th August, 2012. Ms. Cassidy says that this was in compliance with provisions 22 and 24 of the Code of Conduct and was done "for the avoidance of doubt".

• ICS had, by the date of swearing of this affidavit, waited considerably more than the 12 months required by provision 47, since the first missed monthly payments dated from 2008 and there had been constant arrears thereafter. If the Code applied, it had, therefore, been complied with.

• As of the date of swearing of this affidavit the arrears (or, as Ms. Cassidy put it, what would have been the arrears had not the entire loan been called up) amounted to "a figure in excess of €19,282.57".

• The appellant had not made a full and vouched disclosure of his means and ICS was therefore unable to assess the feasibility of any alternative repayment arrangements.

13. Ms. Cassidy noted that the appellant is a solicitor and complained of the failure to honour the undertaking with respect to lodging the title deeds of the property with ICS. She claimed that on a particular occasion a solicitor acting on behalf of ICS had called to the defendant's office, on prior notice, to inspect the title deeds. The defendant had absented himself and the deeds were not produced for inspection.

14. It is apparent from the up-to-date statement of account that after the closure of the account in September, 2010 the defendant recommenced making payments. Between that date and October, 2012 the contractual figures for the payable monthly instalments varied between €715.50 and €906.76.The payments made by the defendant were generally €100, €200 or €300 and rarely reached the required figure.

15. On the 30th October, 2012 the appellant wrote, not to ICS, but to the County Registrar. He said that the bank had not afforded him the mandated protection of the Code for his home and that there had been a failure to disclose the fact that he was making payments every month. He also said that ICS were aware that he was awaiting a "substantial payment" and that the matter should "simply be adjourned" until that had been resolved. He referred to a personal issue, of which he said ICS was aware. He said that proposals had been made, which he had understood had been accepted. Finally, he made a general observation that there were "numerous inaccuracies and wrong statements" in the affidavits.

16. The appellant swore an affidavit on the 5th November, 2012 in which he claimed that the application for possession was in conflict with the Code. He further averred that ICS had failed to fully disclose the following matters:

a. his "full cooperation",

b. ongoing payments made by him

c. the fact that "full details" were "disclosed and furnished to the bank"

d. that the bank had refused repeated requests to meet, and

e. that two meetings had occurred with the solicitors for ICS at his request.

17. The appellant stated that ICS was fully aware of monies due to him arising out of "an extensive matter of Superior Court litigation" that his firm had handled. This related to a defamation action in which the defendant acted for a plaintiff who had been successful in obtaining an injunction in the High Court. The fees arising from this case were said to be substantial and to have been "independently" vouched. In this regard the appellant exhibited a letter dated the 7th June, 2012 from his legal costs accountant, referring to the case in question and estimating that the professional fees should be in excess of €350,000 plus VAT. The appellant then averred that *"The bank in a separate matter has been satisfied and accepted the proposal in relation to the monies and fees forthcoming."*

18. It should be noted that the defendant has in a number of affidavits averred that there was an agreement on the part of ICS, based on full appraisal of the details of the defamation action, that it would not proceed with enforcement until the costs referred to were received. However, he has never given any detail as to when this agreement was reached, or with whom. In his affidavit for the appeal the averment is that it was his "understanding" that ICS had agreed to suspend prosecution of the proceedings pending resolution of the costs matter and that ICS unilaterally reneged on this. The existence of such an agreement is denied by ICS.

19. There then followed a series of supplemental affidavits from Ms. Cassidy and the appellant, giving a fuller history of the interaction between the parties. In chronological order, this can be summarised as follows:

i. February 2008 – first missed payment.

ii. 20th October 2008 – letter of demand for entire debt. At this stage the redemption balance was €461,108.26 and the arrears balance was €9,173.

iii. 12th November, 2008 - ICS solicitors, Moriarty and Company, demand vacant possession.

iv. 2009 – 2010 – appellant continues to make some payments.

v. 7th September 2010 – appellant tells ICS that he has tenants for the property.

vi. 20th September, 2010 – appellant submits a Homeloan Mortgage Financial Review Form, with a covering note stating that it is "further to our without prejudice meeting". The form identifies six properties owned by the appellant, one of which may be the property in question, and provides figures for monthly rental income (totalling about €3,200) from four. It does not give any detail as to any mortgage repayments or redemption balances on the properties. Credit card and bank debts amount to €17,000. It states that the appellant had lost €30,000 in respect of his solicitor's practice in the previous year. There is also a note "Have WIP" (which I take to mean "work in progress").

vii. 12th October, 2010 – civil bill for possession issued.

viii. 25th October, 2010 – civil bill served on the appellant.

ix. 13th December, 2010 – appellant sends ICS what appears to be a schedule of title documents.

x. 2011 – appellant continues to make monthly payments as described above.

xi. 3rd February, 2011 – appellant sends letter to ICS. It is stated that the mortgage in favour of ICS has been perfected and registered and that this had been sent on to ICS *"together with copies of the documents of title to the property"*. Much of the letter has for some reason been redacted by the appellant but it is relevant to note the following: -

> *"I accept that currently the mortgage in your favour is secondary to the first mortgage which was already on the property in favour of First Active Building Society. It had been (and still is) my intention to discharge the mortgage to the First Active Building Society which would then have left your mortgage as the first and only mortgage on the property. On this basis I negotiated the cheque and due to circumstances beyond my control I was left without the necessary funds to discharge the first mortgage".*

Because of the redactions the court does not know if the letter gave any explanation as to the said circumstances. It is a feature of the appellant's evidence that he appears on occasion to have had a misconceived idea as to the applicability of privilege and the "without prejudice" doctrine. In some instances ICS has simply exhibited the unredacted version – an objection to this on the part of the appellant was not persisted with at the hearing. However, this has not happened with every document.

xii. Unspecified date in March 2011 – ICS agrees to adjourn the Circuit Court proceedings for three months on condition that the appellant pays €815 per month for March, April and May. The appellant does not make a payment in March but pays €720 in April, €820 in May and €800 in June.

xiii. 6th March, 2011 - the appellant submits a further Financial Review Form to ICS. The version exhibited by the defendant is so heavily redacted as to be meaningless but ICS has exhibited an unredacted copy. In it he says that he has been making a loss as a solicitor for two to three years. His income as a consultant is described as "loss or breakeven". He identifies five properties owned by him, including the one in issue here, along with the amounts owed and the rental income in respect of each of the other four. He lists debts in the order of €40,000. The document was marked "Draft (to be updated)".

xiv. 30th June, 2011 – in a telephone conversation the appellant commits to monthly payment of €811.99, which was at that stage the standard monthly repayment. However, by September, 2011 only €800 had been paid.

xv. 19th October, 2011 – in a telephone conversation the appellant says that he cannot afford to pay anything.

xvi. 5th June, 2012 – appellant writes to ICS requesting a meeting "as soon as possible".

xvii. 6th June, 2012 – appellant writes to ICS requesting a meeting "as soon as possible".

xviii. 12th June, 2012 - the solicitors for ICS write to the appellant confirming that the possession proceedings stand adjourned to the 2nd October, 2012. The appellant is warned that if he has not, by that date, made the "promised substantial payments"; furnished a completed and vouched Standard Financial Statement Form; agreed an alternative repayment scheme going forward and commenced payments thereunder, final orders for possession and costs will be sought.

xix. 29th June, 2012 – the appellant writes to ICS requesting a meeting "as soon as possible".

xx. 9th August, 2012 the solicitors for ICS write to the appellant inviting him to put realistic proposals in writing and enclosing an SFS form for him to complete. It is expressly stated that ICS will be proceeding to seek final orders on the next court date unless, *inter alia,* "the promised substantial payment" had been made and an alternative repayment arrangement had been agreed.

> *"Before our clients can consider any realistic and meaningful proposals, they require a complete SFS form."*

xxi. 30th October, 2012 – appellant writes to ICS requesting a meeting, saying that his previous requests have been ignored.

xxii. 31st October, 2012 – appellant writes three letters to ICS - one saying his requests for a meeting are being ignored; one requesting "copies of all correspondence and documentation referring to the Code or Codes" and stating that the property is his home; and one requesting "copies of all correspondence and documentation referring to the Code or Codes and related appeals procedures and notification in relation to mortgage arrears."

xxiii. 1st November, 2012 – the appellant's request for documentation is confirmed.

xxiv. 5th November, 2012 – further request by the appellant for documentation regarding the "Code or Codes for arrears in relation to me". In a separate letter he requests dates of all meetings with him.

xxv. 19th November, 2012 – Circuit Court order for possession. It appears that during the hearing, the appellant delivered a partly-completed SFS, again on a "Without Prejudice" basis. This has not been exhibited by either party.

Developments after the Circuit Court hearing

20. The appellant appealed the Circuit Court order in late November, 2012. He continued to make payments thereafter, some for the full amount required but many in the sum of €100. By the end of November, 2013 the arrears stood at €20,851.16.

21. On the 4th December, 2012 the solicitors for ICS wrote to the solicitors for the appellant in a response to the SFS delivered by the defendant during the Circuit Court hearing. It was stated that, as ICS had called up the entire debt in October, 2008 and as it now had an order for possession, the time for attempting to agree alternative repayment proposals was "long past." Furthermore, the SFS submitted by the appellant in November could not in any event have been the subject of an assessment since it was incomplete; disclosed no sufficient regular income to support a debt of this order; it was wholly unvouched, being unaccompanied by statements relating to bank accounts (including office accounts) or credit cards. It also failed to give any information in relation to the sums due on foot of the First Active mortgage.

22. Notwithstanding the foregoing, it was stated that ICS was prepared, without prejudice to its rights, to consider a properly completed SFS and realistic proposals for perfecting ICS's security and discharging the debt. The letter continued:

> *"However, we would make it clear in advance that suggesting again that the Society wait (an indefinite period) to see whether or not there is an Order for costs in favour of his clients in the case to which he has been making reference, and then wait (a further indefinite period) until he manages to agree, or Taxes, and then collects, such costs – and thereby has some funds available to pay over – will not count as a realistic proposal."*

23. The appellant's appeal was heard before this court on the 18th and 19th December, 2013. On the 17th December, 2013 ICS made an open offer to the appellant, to enter into a temporary arrangement for reduced payments subject to certain conditions. The offer was amended on the following day to reduce further the monthly payment. This offer and the appellant's response were both handed to the court on the second day of the hearing.

24. ICS proposed that the appellant was to make a minimum payment of €900 per month (as opposed to the contractual instalment of €2,320.07). He was to give a solicitor's undertaking to apply for a charging order under the Solicitors and Attorneys Acts in respect of all costs relating to the defamation action and a similar undertaking to pay over all funds received by him in respect of his work within 21 days of receipt. Unless a minimum of amount of €200,000 was paid within one year, or if any monthly payment remained outstanding for more than 14 days, there was to be a consent order dismissing the appeal.

25. The appellant's solicitor responded by letter dated the 18th December. The letter refers again to the defamation action. It is asserted that the appellant had been meeting the monthly payment, plus paying an amount to reduce the arrears, since November, 2012. There is also reference to personal difficulties being experienced by him.

26. The counter-offer made by the appellant is to give an irrevocable undertaking to

> i) pay off the First Active loan charge (principal and interest) in full from the first approx. €290,000 of net funds received from the defamation action;
>
> ii) immediately thereafter to discharge in full his loan arrears to ICS (which, as of the 29th November, 2013, stood at €18,531.09) or such lesser balance as might remain; and
>
> iii) then "to allocate and discharge the full balance remaining of the sum of €350,000 to the principal amount on the account".

27. In the meantime it appears that First Active (now Ulster Bank) have also proceeded against the appellant in the Circuit Court on foot of the outstanding loan which was not discharged. In response to concerns expressed by ICS during the hearing before this court Mr. O Tuathail S.C., who appears on behalf of the appellant, said that the Ulster Bank matter involved an outstanding sum of €291,000. It has been dealt with on the basis of a letter of irrevocable undertaking and has been adjourned generally with no order.

The Code of Conduct

28. The appellant relies on various provisions of the 2010 Code of Conduct, issued by the Financial Regulator, dealing with the relations between lending institutions and borrowers in arrears. The Code is issued pursuant to the provisions of s.117 of the Central Bank Act, 1989 and is stated to have the force of law.

29. The relevant edition of the Code came into effect on the 1st January, 2011. It was originally submitted on behalf of the appellant that at that date he was in an arrears situation, in relation to a mortgage loan secured on his primary residence, and was therefore entitled to be dealt with pursuant to the Mortgage Arrears Resolution Process ("MARP"). It was subsequently accepted that he could only make the claim that the house was his primary residence with effect from June, 2012. He says that he was at all times a co-operative borrower.

30. In chapter 1 of the Code it is stated that it was issued under s.117 of the Central Bank Act, 1989 and that the Central Bank has the power to administer sanctions for a contravention, under Part 111C of the Central Bank Act, 1942. Lenders are reminded that they are "required to comply with this Code as a matter of law."

31. It is provided that the Code applies to

> *"the mortgage loan of a borrower which is secured by their primary residence."*

32. Under the heading "Existing *Arrears Cases*" it is stipulated that from the 1st January, 2011 the Code applies to all existing arrears cases falling within it and that lenders must ensure that they comply with all provisions from that date.

33. Provision 2 requires the lender to draw up and implement procedures for dealing with each of the following types of borrowers – those in mortgage arrears, those in pre-arrears and those which fall under the MARP. Such procedures must, *inter alia*, allow for a flexible approach in the handling of these cases and be aimed at assisting the borrower as far as possible in his or her particular circumstances. The appellant complains that ICS did not adopt this approach in relation to him.

34. Provision 10 obliges the lender to

> *"...ensure that all communications about arrears and pre-arrears are provided to the borrower in a timely manner…The language used in communications must indicate a willingness to work with the borrower to address the situation."*

It is complained that communications in this case broke down in 2012 and that ICS did not demonstrate a willingness to engage with the appellant.

35. Provision 12 requires the lender to make available an information booklet giving details of its MARP. It is alleged that ICS failed to comply with this.

36. It is alleged that ICS acted in breach of provision 21, which restricts the number of unsolicited communications which may be made by it in a calendar month. However, no evidence has been offered to substantiate this allegation.

37. Provision 22 requires the lender to inform the borrower in writing, once an account is in arrears for 31 days, of, *inter alia*, the details of the arrears and the fact that the lender is treating the situation as a MARP case; the importance of the borrower co-operating with the lender during that process and the fact that, if co-operation ceases, the protections of MARP no longer apply and the lender may start legal proceedings for repossession. Provision 24 requires an updated version of this information to be provided every three months. ICS says that it began to send such communications once it was informed that the appellant was residing in the property.

38. Provision 26 obliges a lender to use a standard financial statement to obtain financial information from a borrower in arrears. The completed statement must, under provision 28, be passed to the lender's ASU.

39. Provision 27 reads as follows:

> *"In relation to all MARP cases, a lender must:*
>
> *a) ensure the borrower understands the MARP process;*
>
> *b) provide the borrower with a standard financial statement;*
>
> *c) inform the borrower that he/she may wish to seek independent advice to assist with completing the standard financial statement, e.g. from MABS or an appropriate alternative."*

The appellant claims that ICS failed to ensure that he understood the MARP process. It is not clear whether any particular aspect is meant by this. It is clear that he was provided with the appropriate form for the standard financial statement at least three times.

40. Provisions 30 - 32 oblige the lender's ASU to examine each case on its individual merits and to base its assessment of the borrower's case on the full circumstances of the borrower including:

> *"a) the personal circumstances of the borrower;*
>
> *b) the overall indebtedness of the borrower;*
>
> *c) the information provided in the standard financial statement;*
>
> *d) the borrower's current repayment capacity; and*
>
> *e) the borrower's previous payment history."*

41. Provision 33 requires the lender to explore all options for alternative repayment arrangements, when considering a MARP case, in order to determine which options are viable for each particular case. It is submitted on behalf of the appellant that ICS did not do this.

42. Provision 37 deals with alternative repayment arrangements. Such an arrangement must be clearly explained in writing and the lender must be informed of the right to appeal the lender's decision. Provision 39 covers a situation where the lender is not willing to offer 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 borrower must give reasons in writing for this decision and make the borrower aware of any options that are open, including the right to appeal. Similar obligations arise where it is the borrower who is unwilling to enter into the alternative arrangement. Where a borrower ceases to comply with the terms of an agreed arrangement, the lender's ASU must review the case, including the standard financial statement, immediately.

43. The appellant says that he was not informed of his right to appeal.

44. Provision 42 obliges the lender to 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."*

(The "ASU" is the lender's Arrears Support Unit, which manages cases under the MARP.)

45. It is submitted that the failure to consider the proposal based on the legal costs accountant's letter meant that ICS did not wait until *"every reasonable effort had been made"* to agree an alternative arrangement. Such efforts are required by provision 46 before legal action is commenced for repossession of a borrower's primary residence.

46. It is claimed that ICS did not wait 12 months before commencing legal action as required by provision 47. In full this reads:

> *"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 Appeal 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.

47. The argument made on behalf of the appellant is that he was a co-operating borrower and that, since ICS began to apply the Code to him in June 2012, it should have waited for a year after that date.

48. Under provision 48, a lender may commence legal action within 12 months where, *inter alia*, the borrower does not co-operate with the lender.

49. Provision 50 applies to *"cases where legal action to obtain an order for possession has commenced"*. It requires the lender to

> *"endeavour to maintain contact with the borrower or his/her nominated representative. If an alternative repayment arrangement is agreed between the parties before an order of possession is granted, the lender must put the legal proceedings on hold, for the period during which the borrower adheres to the terms of the alternative repayment arrangement."*

Submissions

50. On behalf of the appellant, Mr. O Tuathail S.C has submitted that he was entitled to the full benefit of the Code as of June, 2012. For this purpose he was entitled to be treated as any other borrower in the same position and the fact that he was a lawyer did not entitle ICS to treat him differently.

51. As to the alleged inadequacy of the information offered by the appellant on the SFSs, Mr O Tuathail says that it was open to ICS to ask for further details. Such deficiencies as there were could have been cured by contact, but, it is suggested, this was a case where ICS was determined to get possession. The allegations of lack of candour are rejected.

52. In arguing that the appellant was entitled to the benefit of the moratorium prescribed in provision 47, it is claimed that this was not a case of a non-cooperating borrower but rather that it was the lender who was uncooperative. The Code is directed to the lender and puts the burden on it to adduce evidence of compliance.

53. Mr O Tuathail relies strongly on the judgment of Laffoy J. in *Stepstone Mortgage Funding Ltd. v. Fitzell* [2012] IEHC 142 (considered below).

54. On behalf of the lender it is submitted by Mr. Micheal O'Connell BL that provision 50 is the only part of the Code applicable to this case, since the property did not become the primary residence of the defendant until after proceedings had commenced. The earliest evidence of such residence was in June, 2012. The arrears, the debt demand, the possession demand and the commencement of the proceedings all pre-dated that. He distinguishes *Fitzell* on the basis that the property in that case was a primary residence at the time the Code came into force and at the time the proceedings commenced, and, further, on the basis that there had been an alternative repayment arrangement in place.

55. It is submitted that under provision 50 there are only two relevant questions – a) whether contact had been maintained and b) whether, if an alternative repayment arrangement had been put in place, the proceedings were put on hold.

56. Pointing at the correspondence between the parties, Mr. O'Connell says that ICS had at all times made it clear that a completed SFS form was required. This was never furnished. The documentation supplied by the defendant was clearly incomplete, providing nothing upon which ICS could make a proper assessment. The letters written by the defendant seeking a meeting could be seen to be clustered around the hearing dates in the Circuit Court. Mr. O'Connell lays emphasis on the appellant's professional status and says that he was not someone who "needed to have his hand held" in terms of knowing what information was required.

57. It is said that the only alternative repayment arrangement which could be said to have been put in place was that which operated between March and June, 2011, during which time the proceedings were adjourned. However, this was irrelevant because the property was not, at that time, a MARP property since it was not the residence of the defendant. In any event it was not adhered to by the defendant. The existence of an instalment agreement should be ruled out, given the sporadic nature of the payments actually made and the fact that the arrears continued to increase.

58. The proposal regarding the anticipated costs from the defamation action is described as lacking reality or certainty. There was nothing in the evidence to suggest that such a proposal had been accepted by ICS, and the furthest it was put by the defendant was that he "believed" an arrangement had been accepted.

59. Reliance is placed on the judgment of Hogan J. in *Irish Life and Permanent v. Duff* [2013] IEHC 43 as demonstrating the correct approach to the Code.

60. Overall, ICS is critical of what it considers to be a lack of candour on the part of the appellant. He is described as a solicitor who took the loan, did not use it for the purpose intended and never explained what he did use it for. He did not honour the undertaking given at that time in relation to the title deeds. He had never (until during the course of this hearing) given details of his liability to Ulster Bank in relation to the First Active loan. The suspicion was expressed that he had already given an undertaking to Ulster Bank in relation to the anticipated costs of the litigation referred to throughout this process. There is also some scepticism in this regard, on the basis that it has not been explained to ICS why there is, as yet, no costs order in being in favour of the defendant's client in that litigation.

The authorities

61. Although the parties are agreed that it does not govern this case, it is necessary to start with the decision of Birmingham J. in *Zurich Bank v. McConnon* [2011] IEHC 75. This was an application for summary judgment in a sum of over €32m on foot of a loan made by the plaintiff for a proposed development by the defendant. The defendant argued, *inter alia*, that he was entitled to rely upon the Financial Regulator's Consumer Protection Code. The primary finding in relation to this aspect of the case was that the defendant was not a consumer within the meaning of the Code (which, in any event, had not been in force at the time when the relevant loan had been made) and was therefore not entitled to rely upon it. Birmingham J. rejected the contention that the terms of the Code formed an implied term in the contract between the parties. However, he also expressed a clear (albeit *obiter*) view on the impact of the statutory regime pursuant to which the Code was made in the following terms:

> *"Assuming, without deciding, in favour of the defendant for the purpose of this stage of the proceedings that the bank breached the Code as alleged, it does not seem to me that of itself assists the defendant. At p.2 of the document it is stated: 'The Financial Regulator has the power to administer sanctions for a contravention of this Code, under Part 111C of the Central Bank Act 1942.' 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."*

62. Birmingham J. contrasted this with the position under the Consumer Credit Act, 1995, where breach of the statutory requirements can result in loss of entitlement on the part of a creditor to enforce a contract.

63. In *Stepstone Mortgage Funding v. Fitzell* [2012] IEHC 142, the defendants had in February, 2008 charged their dwelling house as security for a loan. They fell into arrears and in January, 2009 the plaintiff demanded repayment of the total balance. This was followed in February, 2009 by a demand for vacant possession. A summons issued in December, 2009, returnable in April, 2010. No appearance was entered by the defendants but the matter was adjourned from time to time because there was a degree of engagement between the parties. In July of 2011 the plaintiff issued the defendants with documentation relevant to its MARP process, and a Standard Financial Statement was completed by them over the following months.

64. In late 2011 the plaintiff came to the view that the defendants' income was insufficient to meet an appropriate level of repayment and decided to proceed with the claim for possession. This decision was communicated by a letter which, *inter alia*, stated as follows:

> *"…we intend to proceed with the litigation process for possession of your property which commenced previously. Given that this process has already commenced, you do not have the benefit of the MARP process referred to in the 2010 Code of Conduct on Mortgage Arrears and, consequently, amongst other things, you do not have the right to appeal this decision."*

65. In her consideration of the effect of the Code, Laffoy J. noted that it provided as follows under the heading "Scope" :

> *"From 1 January 2011, this Code applies to all existing Arrears cases falling within this Code. While lenders' attention is specifically brought to provisions 21, 35, 47 and to steps 3 and 4 of the Mortgage Arrears Resolution Process, lenders must ensure that they comply with all provisions of the Code from 1 January 2011."*

66. Laffoy J. found that the defendants' mortgage account was unquestionably in arrears on the 1st January, 2011 and that provision 50 applied in every case in which legal action was commenced, whether before or after that date. She further found that there had been an alternative repayment arrangement in place on that date, which had broken down. Provision 41 therefore came into play, obliging the lender to formally review the borrower's case, including the SFS. That had happened, but the plaintiff was incorrect in arguing that in so doing it had gone further than it was obliged to do. It followed that the plaintiff was wrong in telling the defendants that they did not have the benefit of the MARP process including the right of appeal.

67. The plaintiff had also argued that the defendants had consistently defaulted on the alternative arrangements entered into and were therefore to be classed as "not co-operating borrowers". Laffoy J. considered that it would be premature to form a view on this because the defendants had not been afforded the benefit of the Code as they should have been.

68. In dealing with the legal status of the Code, Laffoy J. said that she considered it necessary to exercise caution. She accepted as an accurate statement of the current jurisprudence a passage from Breslin on *Banking Law* (2nd ed.) at 3.56, which suggested that the legal force of the Code would depend on whether or not it could be deemed to have been incorporated into the lender-borrower contract, which was described as an "unlikely event." She also acknowledged the views of Birmingham J. as set out in *McConnon* while noting that in the context of that case his remarks were *obiter*. However, the learned judge was of the view that *"some development of the jurisprudence in this area in the future may be anticipated."*

69. Noting that that non-compliance with the Code could lead to administrative sanctions from the Central Bank and, potentially, criminal prosecution, Laffoy J. said

> *"…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, which comes before the court for hearing after the Current Code came into force, the Plaintiff does not have to demonstrate to the court compliance with the Current Code. To take what is perhaps the best known provision of the Current Code, the imposition of a moratorium on the initiation of proceedings, which is now contained in provision 47 of 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. Moreover, it is likely that it would render the enforcement of provision 47 nugatory, if a lender did not have to adduce evidence to demonstrate that the moratorium period had expired."*

70. It was therefore held that the plaintiff was not entitled (at least at that time – the judgment concludes with a statement that the matter would be re-listed for further submissions) to an order for possession, on the basis of non-compliance with the Code.

71. In the subsequent case of *Irish Life and Permanent plc v. Duff* [2013] IEHC 43, the mortgage in question, which related to a family home, was entered into in 2003. The defendants fell into arrears and the plaintiff wrote to them in December, 2008. Proceedings commenced in April, 2009. Those proceedings were withdrawn while discussions took place. There appears to have been a considerable degree of contact over the rest of 2009 and into 2010 but the arrears continued to increase. In February, 2012 the Circuit Court granted an order of possession.

72. The version of the Code in force at the relevant time was the 2009 edition.

73. In their appeal to the High Court, the defendants complained that they had never been offered any alternative repayment arrangement. It was stated that an oral offer of interest only repayments had been rejected and they had not been informed of their right to appeal. Objection was also taken to their classification as "non co-operating", the basis for which was, apparently, the sale of a small portion of land to pay essential bills.

74. In examining the status of the Code, Hogan J. was expressly conscious of the constitutional implications of reading into s. 117 of the Central Bank Act (which empowers the Central Bank to create Codes of Practice) a power to change substantive law. With that in mind he considered the judgments in *McConnon* and *Fitzell*. Acknowledging the forcefulness of Birmingham J.'s reasoning regarding the absence of any statutory indication that non-compliance with the Code would affect the right of the lender to secure relief, he nonetheless felt that he should follow *Fitzell*, as being the most recent and authoritative analysis where the judicial comments formed part of the ratio of the decision. In those circumstances, he could not ignore the averment by the defendants that an offer of interest only repayments had been rebuffed. This led him to the conclusion that "every reasonable effort" to agree an alternative repayment arrangement had not been made. Nor could it be said that at that stage the defendants were non-cooperating borrowers. They had been frank and forthcoming in seeking a way out of their difficulties.

75. In his conclusion on the issue, Hogan J. held that, as the lender had not complied with the Code, in line with the reasoning in *Fitzell*, it would not be appropriate for him to exercise a judicial discretion in favour of granting an order for possession. In those *"special circumstances"* he allowed the appeal, but noted that there was nothing to preclude the plaintiff from taking such further steps to realise the security as it might now consider appropriate.

76. Two relevant decisions of the High Court have come to hand in the period during which the judgment in the instant case was reserved.

77. *McGuinness v. Allied Irish Banks Plc* [2014] IEHC 191 involved an attempt to rely upon the Code as providing a cause of action on the part of the borrower in the event of non-compliance by the lender. The plaintiff sought interlocutory injunctive relief against enforcement action by the defendant, on the basis of what he alleged to be a breach of the Code. The defendant had informed him that it would not offer an alternative repayment arrangement in his case, and had further informed him of his right to appeal that decision within twenty days. He did not lodge an appeal within that time but subsequently wrote to enquire whether it was still possible to do so. The defendant treated this enquiry as an appeal and shortly afterwards informed the plaintiff that the appeal had been unsuccessful. However, he was told that he should submit any new information that would support an appeal, and that this might lead to a re-assessment by the Arrears Support Unit (which in turn might lead to a further right to appeal).

78. Applying the test for interlocutory relief established in *Campus Oil v. Minister for Industry and Energy (No. 2)*, Gilligan J. held that the plaintiff had not raised a fair issue to be tried. Having considered *Fitzell* and *Duff*, he accepted that there was a legal issue as to the status of the Code which had yet to be authoritatively decided. However, he considered that it did not properly arise in this case since, *inter alia*, the plaintiff was at all times able to make a further application under MARP to the lender's ASU and Mortgage Appeals Board.

79. The court is also aware that Michael White J. has delivered a judgment on the applicability of the Code in a case concerning a house bought as a residential investment. However, an approved copy of the judgment has not yet come to hand and counsel for the defendant has objected to consideration of the unapproved version.

Discussion and conclusions

80. It is apparent that the precise legal status and effect of the Code has yet to be determined. This case was largely argued on the basis that *Fitzell* is the applicable authority and that the issue is whether the relevant provisions of the Code have been complied with. However, the consequences of any finding of a breach were not thoroughly debated and the following views are tentative in nature.

81. Accepting that the observations of Birmingham J. in *McConnon* were obiter, his concerns and those of Hogan J. are nonetheless legitimate. The Code cannot be given the status of legislation. However, it can be seen as creating an area of discretion, not, ultimately, to defeat a lawful claim by a lender but, perhaps, to adjourn the matter for the purpose of providing to the borrower an opportunity that should have been provided under the Code. The court is unaware of what the upshot was in *Fitzell* but the fact that the case was adjourned rather than dismissed may point in this direction.

82. It seems to me that, in determining whether the exercise of such a discretion would be appropriate, the starting point must be a consideration of the purpose and ambit of the Code. It applies only to borrowers in arrears whose mortgage is secured on their primary residence. It is thus a protection extended to a borrower's dwelling, not to commercial investments. It imposes obligations on lenders dealing with such borrowers and lays down the process that must be followed before the residence can be repossessed. The objective is, in my view, to bring about a situation whereby borrowers do not lose their homes if a reasonably practicable solution to their indebtedness can be found.

83. The lender is therefore obliged to make all reasonable efforts to reach such a solution. However, in considering whether this obligation has been met, the court should not lose sight of the fact that the objective of the Code is unlikely to be met in the absence of the co-operation of the borrower. Co-operation in this context has to include full disclosure of the borrower's financial situation – without this, it will generally not be possible to assess the reasonableness of any proposal made by either party.

84. In this case, it is agreed that the defendant did not originally come within the terms of the Code. However, once the plaintiff became aware that he had taken up residence, it began to apply such terms of the Code as it considered appropriate.

85. I do not accept the argument that the plaintiff was obliged at that stage to impose a 12-month moratorium on the proceedings already initiated by it. They were lawfully and properly brought in the first instance and provision 47 had no application. It did not become applicable simply by virtue of the fact that the defendant moved into the house, and to hold otherwise would be to facilitate abuses of the Code.

86. In the circumstances, the obligation of the lender was to maintain contact with the lender in accordance with provision 50.

87. The court has not been furnished with full details of all the contact between the parties but in my view the level of engagement by the plaintiff cannot be said to have been unreasonable or inadequate. The proceedings in the Circuit Court were not processed with any undue haste. When there was a commitment by the defendant to what was in effect an alternative repayment arrangement, the proceedings were adjourned.

88. On the other hand, it seems to me that the defendant was culpable in repeatedly failing to give to the plaintiff a full picture of his financial situation. The standard forms seen by the court were manifestly incomplete and lacking in financial vouching. I am satisfied that he must have been aware that this was so. I have not seen the last one, apparently because it was furnished "without prejudice". It is not possible to find that it was adequate on the basis of bare assertions by the defendant that it was. Since the process depends on the full co-operation of the borrower, I cannot see that the plaintiff is at fault in seeking to assert its rights at this stage.

89. I am uncertain as to whether the court should properly take into account as part of the Code's process the open offers made by the parties during the course of the court hearing. However, if it is appropriate to do so, I would hold that the plaintiff was entitled not to accept the proposal made by the defendant. I accept the argument that the defendant is effectively asking the plaintiff to take a gamble on the ultimate outcome of litigation and the ensuing determination of costs. The case in question may well be a significant one but it is not for this court to express any views on it. Importantly, the defendant has made no offer of any payments to the plaintiff pending the receipt of costs in the case, which could well be a considerable period of time into the future. It is not, in my view, unreasonable for a commercial entity such as the plaintiff to refuse to commit itself in this fashion.

90. In the circumstances there is no basis on which the court could exercise its limited discretion in favour of the defendant.