[2018] IEHC 824

THE HIGH COURT

Record No. 2015/1409S

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

STEPHEN PEARCE

DEFENDANT

JUDGMENT of Mr. Justice Hunt delivered on the 23rd of March, 2018

1. In this case, the plaintiff brought a motion seeking liberty to enter finial judgment in the sum of €849,037.30 against the defendant. This claim is based upon a mortgage loan advanced by the plaintiff to the defendant on 10th August, 2005 in the sum of €801,715, drawn down by the defendant on 28th October, 2005. The defendant fell into arrears on 20th June, 2012. At the outset, it must be emphasised that the plaintiff does not assert a claim for possession of the mortgaged property in these proceedings.

2. The principles applicable to an application of this type have been set out many times and I do not propose to repeat them in detail in this case. It is sufficient to refer to the formulation adopted by the late Hardiman J. in *Aer Rianta CPT v. Ryanair Limited* (No. 1) [2001] 4 I.R. 607 where he held, at page 623, that the test to be applied on an application for summary judgment involved the court asking itself the answer to one simple question which he framed in the following terms:

> *"Is it very clear that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

3. The observations of the Court of Appeal in *Close Invoice Finance Limited v. Matthews* [2015] IECA 132 are also relevant. The Court of Appeal emphasised that the mere assertion in an affidavit of a given situation which is to form the basis of an intended defence does not of itself constitute a ground for granting leave to defend. Whether or not there is a fair and reasonable probability of the defendant having a real or bona fide defence has to be ascertained by looking at the situation as a whole, and assertions must be supported by some meaningful evidence such that a court could conclude that there is a fair or reasonable probability that the defendant has a bona fide defence based upon such assertions.

Possible defence

4. It seems to me that the sole possible defence of substance advanced by Mr. Murphy on behalf of the defendant is the assertion in the grounding affidavit that the defendant's account is not in arrears because the plaintiff's demand for repayment is unlawful, owing to non-compliance with the provisions of the Code of Conduct on Mortgage Arrears ("the Code") on the part of the defendant in relation to this mortgage account.

5. In this regard, Mr. Murphy relied squarely upon the provisions of section 44 of the Central Bank (Supervision and Enforcement) Act, 2013, which provides as follows:-

> *"A failure by a regulated financial service provider to comply with any obligation under financial services legislation is actionable by any customer of the regulated financial service provider who suffers loss or damage as a result of such failure."*

Mr. Murphy pointed in particular to step 4 of the Mortgage Arrears Resolution Process (MARP) contained within the Central Bank's current Code of Conduct on mortgage arrears. This provides that in order to determine which options for alternative repayment arrangements are viable for each particular case, a lender must explore all of the options for alternative repayment arrangements offered by that lender. The argument put forward is that compliance with this provision by the plaintiff is an essential pre-requisite to a valid demand for repayment.

6. Paragraph 39 of the Code contains an extensive list of such possible arrangements. However, it must be observed that most if not all of these alternatives appear to presuppose some possibility of positive contribution by the borrower to the appropriate arrangement. If it is the position that a person simply has nothing to offer in the context of any of the listed suggestions, I do no see how it could be said that any such arrangement could be said to be viable.

7. Insofar as the precise effect of the provisions of section 44 of the 2013 Act are concerned, I do not believe that they bring about any substantial change to the legal position identified by the Supreme Court in *Irish Life and Permanent v. Dunne* [2016] 1 IR 92. In that case, the Supreme Court considered the effect of the previous Code on applications for possession of mortgaged premises. It is clear from the judgment in *Dunne* that the only provision to be considered by a court hearing an application for possession is that relating to the observation of a moratorium on the initiation of proceedings as set out in the Code. In that circumstance, a court would be obliged to decline to make such an order where there was a failure to abide by this requirement. Failure by a lender to abide to comply with other provisions of the Code did not affect entitlement to obtain an order for possession as a matter of law.

8. In the first instance this case differs from *Dunne* in that it is not a claim for possession of the mortgaged premises, but rather an application for liberty to enter judgment for the monetary amount due by the borrower. I do not interpret the reference to "*legal proceedings*" the current Code as having any reference or application to a simple claim for repayment of a mortgage debt. This does not appear to me to be a state of affairs to which the Code of Conduct is directed. This is clear from the section 56 of the Code, entitled "Repossessions". This provides that "*proceedings for repossession of a borrower's primary residence*" may only commence where the moratorium period applicable under either Provision 45 or Provision 47 has expired. This is consistent with the apparent purpose of the Code, which is to encourage engagement between the parties to mortgage arrears cases, and to inhibit the use of repossession proceedings until all other possible avenues of resolution have been explored. Therefore, the wording of Paragraph 56 does not prevent the plaintiff from demanding repayment, as was suggested by Mr. Murphy. This clause has no application to a

demand for payment, does not prevent a bank making such a demand, and does not gives rise to any cause of action which could be used by way of defence to a monetary arrears claim.

9. Secondly, even in the context of an application for possession there is no general jurisdiction in the courts under the law as it set out in the *Dunne* judgment to consider whether the actions of a lender might be considered to be fair or reasonable, and the Supreme Court noted that clear legislation would be required to confer such a role. I do not accept that the very general terms of the statutory provision relied upon by Mr. Murphy confer such a role upon the Court in cases such as this. Therefore, the sole remaining question is whether the defendant has raised any reasonable possibility that the plaintiff has breached an obligation owed to the defendant under financial services legislation resulting in loss and damage to him, which might then be set up by way of defence or counter-claim to that of the plaintiff.

Actionable breach of obligation
10. I am not persuaded on the evidence available that there is a fair or reasonable probability that the defendant has passed the low threshold required to send this case to plenary hearing. The affidavit evidence concerning a possible actionable breach of the Code by the plaintiff is somewhat sparse. As far as I can ascertain, the mortgaged property is also the subject of repossession proceedings between the same parties in the local Circuit Court. Although not apparent from the affidavits, I was informed that no payments whatsoever have been made by the defendant since 2012, although he has continued in occupation of the property during that time. His affidavits supply no reasons for the complete absence of any repayments during that that period of time.

11. His affidavit states that he requested a two year moratorium on payments in 2012, and although this was not formally granted by the defendant, he has had an effective moratorium on payments of almost six years at this stage. Payments have not resumed in any shape or form during this time. In retrospect therefore, it does not appear that the suggested moratorium would have led to a viable resolution of whatever difficulty the defendant had in meeting his repayments.

12. He then complains that although he filled in a standard prescribed financial statement in April 2013, he was classified as "*non-co-operating"* by the plaintiff within the meaning of the Code of Conduct on mortgage arrears, on the basis that "*he had no money*", and was informed by the plaintiff in April 2014 that the protections of MARP no longer applied to him. The financial statement prepared by the defendant under the Code in 2013 was not exhibited, so I do not know whether the stated reaction of the plaintiff to that that statement was inaccurate, unjustified or unreasonable. The fact that there has been a complete and unexplained absence of payments for almost six years may indicate that this was an accurate summary of the defendant's position. I do not see that this evidence reasonably establishes a cause of action of the type referred to in section 44 of the 203 Act. These complaints about the plaintiff amount only to assertion, in the absence of any supporting evidence.

13. The defendant also states that he recently engaged in a Personal Insolvency Practitioner, and as part of a restructuring arrangement, a proposal was put to the plaintiff by way of an upfront payment of €50,000, to be funded by way of a loan from family members and a split mortgage secured on his family home. It appears that this solution was rejected by the plaintiff. It is very difficult to identify from this evidence whether there is any reality to the defendant's desire to engage with the Code of Conduct and the MARP. His affidavit does not identify which of the possible solutions in the Code might reasonably apply to him, or how such a solution might be sustained in his case. Although the sum recently offered by the defendant to the plaintiff would cover the arrears that have built up since 2012, it is not clear how the plaintiff proposes to address future repayments during the remaining term of the mortgage.

Conclusion
14. The *Dunne* judgment is clearly limited to the effect of certain provisions of the Code on a court hearing an application for an order for possession. The only provision of the Code where non-compliance might debar a plaintiff from obtaining such an order is the provision conferring a moratorium on the initiation of such proceedings as set out in the Code. Paragraph 56 of the Code specifically applies to the commencement of proceedings for repossession of a primary residence. The Circuit Court proceedings between the parties undoubtedly fall into this category, and some provisions of the Code may be relevant to the determination of that claim. I have no doubt that that, as in the vast majority of these cases, an order for possession will not be granted in that Court unless as a matter of last resort.

15. The claim in this case does not engage the provisions of the Code, and the defendant has not demonstrated any fair or reasonable probability that there has been an actionable breach of the Code, or any specified ensuing losses which could operate by way of a defence to a bare claim for repayment of a monetary sum, even assuming that such a claim could arise under the legislation invoked by the defendant in this case. The contractual right to demand repayment under the terms of the loan accepted by the defendant is entirely unaffected by the Code or the provisions of the 2013 Act. Taking an overall view of the affidavit evidence, the defendant has not established by evidence a fair or reasonable possibility that the plaintiff has failed "*to comply with any obligation under financial services legislation"*.

16. In the circumstances, as the plaintiff was entitled under General Condition 4 of the loan offer to demand early repayment of the full amount due on 16 July 2014, on the basis that the loan had then been in default since 2012, I propose to grant the plaintiff the relief it seeks in the notice of motion. This does not confer any immediate additional right to the plaintiff to obtain possession of the defendant's residence. It is simply a finding that the defendant is indebted to the plaintiff in the sum claimed by it. I express no view as to how the Code might apply to any further steps which the plaintiff might take to enforce this monetary judgment. The Code will continue to apply to the possession claim in the Circuit Court in line with the *Dunne* judgment, and complaints that the defendant has relating to the Code may be ventilated in that Court, in so far as they are legally relevant. It also does not preclude the defendant from suggesting a solution other than continuing to occupy the property at no immediate cost to himself, which is understandably not acceptable to the plaintiff.