Neutral Citation Number: [2013] IEHC 43

THE HIGH COURT

CIRCUIT APPEAL

[2012 No. 61CA]

BETWEEN/

IRISH LIFE AND PERMANENT PLC

PLAINTIFF

AND

MALCOM DUFF AND SUSAN DUFF

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 31st day of January, 2013

1. In these proceedings the plaintiff, Irish Life and Permanent plc ("ILP"), sue to recover possession of the defendants' family home at a premises based in Co. Louth. In the Circuit Court Her Honour Judge McDonnell made an order for possession in favour of ILP, but placed a stay on the order for possession for twelve months, which period expires on the 28th February, 2013. The defendants now appeal against this decision to this Court.

2. There is very little doubt but that Mr. Duff and Ms. Duff have fallen into significant arrears with regard to their mortgage repayments. But while these type of proceedings may seem all too routine in the modern economic climate, we shall quickly see that this otherwise routine application for possession raises important questions relating to the right of a mortgagor to recover possession of both unregistered and registered land; compliance by a lender with various codes promulgated by the Financial Regulator and, if not, whether, this affords the defendants any effective defence to this action for repossession.

3. Since the judgment I am about to deliver may have implications for the mortgagor/mortgagee relationships generally and specifically by reference to those who are customers of ILP, it is perhaps apposite that I should disclose that I am a mortgage account holder with ILP. I mentioned this to the parties at the commencement of the hearing and both waived any possible objection to my hearing of this appeal on that account.

4. I should also say that in my view this case raises several important points of law which, on reflection, might usefully have been finally determined by the Supreme Court on a case stated from this Court. But since neither party requested a case stated, I consider that I have no such jurisdiction to state a case for the purposes of s. 38 of the Courts of Justice Act 1936, as the power so to state a case is expressly made contingent on a request in that behalf by one of the parties to the appeal.

The background facts

5. The defendants, Mr. and Ms. Duff, obtained a 25 year mortgage from the plaintiff in October, 2003 for the sum of €258,000. Rather unusually, the encumbered lands comprise both registered and unregistered lands. It would seem, however, that the actual dwelling is wholly situate on unregistered land, while the curtilage and garden constitute registered land.

6. The monthly payments were approximately €1,300. The premises in question is the family home of Mr. and Ms. Duff and they reside there with their teenage children. Mr. Duff is by occupation a self-employed building contractor. Quite naturally his business has been severely hit since about 2007 by the deepest downturn in the building trade in living memory.

7. Under the terms of the mortgage deed, ILP agreed not to exercise their right of possession until the Duffs had defaulted for two months or more in respect of these mortgage repayments. ILP first wrote to the Duffs reminding them of their repayment obligations in December, 2008, but proceedings were first commenced in April, 2009. At that stage the arrears were in the order of €9,800.It appears that the proceedings were withdrawn at that point to enable discussions to take place concerning those arrears.

8. At the request of the bank, Mr. and Ms. Duff gave details concerning their financial affairs. Ms. Duff returned to part-time work in order to assist to alleviate the financial burden. Mr. Duff had made a cash lodgement of €5,000 in March, 2009 and had explained to a representative of the bank in correspondence that his income had fallen by about one fifth since 2007. During this period, ILP frequently corresponded with Mr. and Ms. Duff. Thus, on 5th February, 2010, the Bank wrote to say:-

> "We wish to advise you that due to the continuing serious level of arrears on your account, we are about to instruct our solicitors to seek a Court order for possession of your property. Even at this late stage, in order to avoid action we recommend you contact the undersigned as soon as possible. Unless we hear from you immediately, our solicitors will be instructed to proceed for possession as outlined above."

9. At this point the arrears had reached almost €27,000, but similar letters had been sent on 28th July, 2009, 24th September, 2009 and 29th October, 2009. During this period a significant amount of correspondence was generated by the respective parties' solicitors. On 20th May, 2009, ILP's solicitors indicated to the defendants' solicitors that it was in order for their clients to contact Ms. Gillian Byrne of the Bank's collection department to discuss their account. It appears that Mr. Duff spoke to Ms. Byrne on 15th June, 2009, and he explained his reduced circumstances. However, no statement of means or proposal for restructuring was actually submitted.

10. On 14th October, 2009, Mr. Duff contacted ILP and indicated that he had written on three occasions with proposals, but he was informed that the bank had not received this correspondence. The bank called Mr. Duff the following day following the receipt of correspondence. While the parties discussed various short term proposals, Mr. Duff offered a payment of €5,000, but the bank

indicated that this would not be enough to stop the arrears increasing between then and the end of the calendar year.

11. By letter dated the 14th May, 2010, the Bank's solicitors set out the current position. By this stage the present proceedings had been re-entered before the Circuit Court and the arrears had escalated to the point where in February, 2010 they had reached almost €28,600. The last payment made to the mortgage account was €1,134 in July, 2010 and by February, 2012 the arrears had grown to over €63,000. Since the proceedings were commenced, only three payments have been made to the mortgage account by the defendants. On 29th February, 2012, Her Honour Judge McDonnell made an order granting ILP possession, but stayed the execution of that order for one year. Mr. and Ms. Duff appeal to this Court against the making of that order.

12. We may now examine in turn the various points of objections raised by Mr. and Ms. Duff against the making of an order for possession. I propose to consider the points raised in the following general order: First, were the proceedings properly commenced by Ejectment Civil Bill? Second, does this Court have a jurisdiction to grant ILP possession in respect of (i) the registered land and (ii) the unregistered land? Third, assuming the Court has such a jurisdiction, ought it to exercise such a jurisdiction if it were to transpire that the Bank was not complying with the Code of Conduct issued by the Central Bank?

Were the proceedings properly commenced by Ejectment Civil Bill?
13. The present proceedings were commenced by Ejectment Civil Bill on 7th April, 2009. The proceedings thus pre-date the coming into force of the Circuit Court Rules (Actions for Possession and Well-Charging Relief) Rules 2009 (SI No. 264 of 2009) which came into force on 8th July, 2009. The 2009 Rules provided for a new streamlined Civil Bill for Possession procedure in the case of actions for possession by the holder of a legal charge or mortgage.

14. The defendants, however, maintain that the plaintiff bank used the wrong form of procedure in that an Equity Civil Bill was then the most appropriate course of action. But not only has the Ejectment Civil Bill represented a time-honoured method of seeking an order for possession, there were sound reasons why that was regarded as the most appropriate form of action, not least because a mortgage suit of this kind affected the title of the mortgagee. As Andrews L.J. explained in *Northern Bank Ltd. v. Devlin* [1924] 1 IR 90, 92-93:

> "The mortgagee of a legal estate is, in the absence of an express provision to the contrary, entitled to enter on the mortgaged premises at any time after the execution of the mortgage…In the case of actions by either the first or second mortgagees it will be observed that there is a plaintiff who has an estate in the lands; and, in our opinion, the possession of such estate, legal or equitable, is necessary, in the absence of statutory provision to the contrary, to enable an incumbrancer to maintain his suit. A mere chargeant who has no estate in the lands cannot, without statutory authority, maintain an action of ejectment…"

15. That case turned on the fact that the mortgagee of registered land was, as the law then stood, a mere chargeant. But all of this was changed by s. 13 of the Registration of Title Act 1942 ("the 1942 Act") and it is clear that since that date at least, the mortgagee who holds a registered charge in respect of registered land is not a mere chargeant, but has an estate in the lands. Insofar as there was any doubt on the point, s. 62(6) of the Registration of Title Act 1964 ("the 1964 Act") stated this expressly.

16. It is sufficient, therefore, for present purposes to say that the legal mortgagee of registered land has an estate in land and that if the mortgagor defaults, this affects the title of the mortgagee and that he or she is accordingly entitled to maintain an ejectment action on the title.

17. So far as the unregistered land is concerned, it will be seen (for reasons set out later in this judgment) that in the case of pre-2009 Act mortgages of unregistered land, the mortgagee was the legal owner of the lands, subject only to the mortgagor's equity of redemption. Plainly, therefore, if the mortgagor defaulted in payment, the equity of redemption no longer held sway and the mortgagee was entitled to resume the possession to which he had been formally entitled under the indenture of mortgage. Here again, the title of the mortgagee has been affected by the default and for that reason he or she is entitled to proceed to eject the mortgagor. As this is therefore a matter of title, it is clear that the mortgagee is entitled to proceed by way of Ejectment Civil Bill, irrespective of whether the land was unregistered or, since 1942, registered.

18. It is quite clear, therefore, that this particular objection to the use of the Ejectment Civil Bill must accordingly fail on its merits. This consideration notwithstanding, it is hard to see what – if any – conceivable prejudice could have been visited on the defendants through the use of that procedure, even if (contrary to my view) this procedure was incorrect, it is an objection for want of form only. It could not in these circumstances at least have affected the right of plaintiff to such relief as it might otherwise have been entitled.

Is the plaintiff entitled to possession in respect of (i) the registered portion of the lands and (ii) the unregistered portion of the lands?
19. The present proceedings were commenced by way of an Ejectment Civil Bill on the Title in respect of both the registered and unregistered lands which were comprised in the mortgage deed of October 2003. The plaintiff mortgagee did not, as such, invoke s. 62(7) of the 1964 Act in its pleadings. We may, however, consider separately the position with regard to both unregistered and registered land.

20. Section 62(7) of the 1964 Act provided that:-

> "When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge ... may apply to the court in a summary manner for possession of the land ..., and on the application the court may, if it so thinks proper, order possession of the land ... to be delivered to the applicant, and the applicant, upon obtaining possession of the land ..., shall be deemed to be a mortgagee in possession."

21. This sub-section must be read in context with its companion sub-section, s. 62(6) of the 1964 Act:-

> "On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge."

22. Section 62(7) was, however, repealed with effect from 1st December, 2009, by s. 8(3) and Schedule 2, Part 5 of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act"). But as Laffoy J. herself pointed out in *EBS Ltd. v. Gillespie* [2012] IEHC 243 (as had indeed Dunne J. in her judgment in *Start Mortgages Ltd. v. Gunn* [2011] IEHC 275), s. 27(1) of the Interpretation Act 2005 ("the

2005 Act") provides that the repeal of any enactment does not "…affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment." Section 27(2) of the 2005 Act provides that where an enactment is repealed, any legal proceedings (including civil proceedings) may be "instituted, continued or enforced…as if the enactment had not been repealed" in respect of the right or obligation in question.

23. Laffoy J. then continued thus in Gillespie:-

> "In order to determine whether, notwithstanding the repeal of s. 62(7), the jurisdiction of the Court to make an order for possession under that provision is alive as regards the plaintiff's claim against the defendant in these proceedings, the crucial question is whether it has been established that the plaintiff had acquired as against the defendant a right to seek the statutory remedy in the form of an order for possession of the property secured by the charge prior to 1st December, 2009. The answer to that question turns on the application of the requirements of s. 62(7) in the context of the agreement between the plaintiff and the defendant embodied in the charge to the facts. In performing that exercise, because it is the easiest course to adopt, I propose looking at the matter from the historic perspective and considering whether the plaintiff has established that it had a right to seek an order for possession prior to 1st December, 2009. However, it is not to be inferred that I consider that such approach is the only approach to answering the crucial question.
>
> In order to establish that its claim for possession came within s. 62(7) prior to 1st December, 2009, the plaintiff has to establish compliance with the two requirements expressly set out in the sub-section, namely:-
>
> (a) that repayment of the principal monies secured by the charge had become due by that date; and
>
> (b) that the plaintiff was the registered owner of the charge.
>
> Requirement (b) was clearly complied with. As regards requirement (a), it is necessary to consider what was agreed between the plaintiff and the defendant in relation to repayment of the principal money secured by the charge. Apart from those two requirements, the Court must be satisfied that it would have been proper to afford the plaintiff the statutory remedy of an order for possession against the defendant to enforce the right acquired. Having regard to the observations of Geoghegan J. in *Bank of Ireland v. Smyth* [1993] 2 IR 102…., I consider the Court would have to be satisfied not only that the application was made bona fide with a view to realising the plaintiffs security, but also that the power of sale had arisen and was exercisable by virtue of the terms of the agreement between the plaintiff and the defendant contained in the Charge."

24. It is plain here that ILP are the registered owner of the charge. The real question is whether the monies in question had become due prior to 1st December, 2009. In the letter of demand dated 11th December, 2008, ILP referred to the arrears of almost €7,500 and then said:-

> "As a result of the arrears stated above and the terms of your mortgage, the Bank is now entitled to recover possession of the mortgaged premises.
>
> Accordingly, unless the above mentioned arrears are discharged within 21 days of today's date, or, alternatively, vacant possession is given to the Bank within 21 days; we will issue proceedings without further notice against you for a Court Order for the recovery of possession of the premises so that the property may be sold…."

25. It is clear, however, that the letter refers simply to the arrears and not to the principal sum. Put another way, had the arrears been discharged as of that date, then it is plain that ILP would not have proceeded further. While counsel for ILP, Mr. Seligman, accepted that no formal demand for repayment of the entirety of the mortgage monies was made by letter, he insisted that this was not necessary having regard to the relevant terms and conditions of the mortgage itself, namely, condition 6(2)(a), condition 6(4)(a) and condition 7(1) which may now be conveniently considered.

26. So far as condition 6(2)(a) is concerned, it merely says that formal notice requiring payment of the mortgage debt shall not be required. But this in itself does not tell determine whether the debt had become payable. Condition 6(4) is likewise not dispositive, since it simply purports to give ILP the right to enter into possession of the property without notice to the mortgagor "at any time after the total debt has become immediately payable". This condition does not, however, determine whether the total debt has become payable.

27. Clause 7.1 provides, however, that:-

> "The total debt shall become immediately payable to permanent tsb:-
>
> 1. If the mortgagor defaults in the making of two monthly repayment or for two months in the payment of any other moneys payable under the mortgage..."

28. It is, of course, true that there had been such default on the part of the mortgagor such as rendered the debt payable immediately given that more than two monthly payments had been missed. But this contractual clause in the mortgage deed had itself been almost instantly overtaken by the letter of 11th December, 2008, which, in effect, promised the mortgagor that the mortgage debt would not become due if the arrears were discharged. Could it be suggested that if the Duffs had, in fact, paid the arrears at that time that ILP could validly have called in the mortgage, the provisions of Condition 7.1 notwithstanding?

29. To my mind, it is clear that ILP could not so have demanded the repayment or otherwise contended that the entirety of the mortgage monies had become due, since by writing the letter in question, the bank were effectively waiving or superseding the strict entitlements of the mortgage deed. In essence, the letter amounted to a representation that the entire sum was not due. All of this is further underscored by the fact that in response to the letter of December 2008, Mr. and Ms. Duff offered to make two payments of €1,500 on 6th February, 2009, and 13th February, 2009. The Bank wrote in response on 28th January, 2009 agreeing to this, although stressing the importance of making these payments on or before that date. While, of course, the Duffs found it impossible to keep up with the repayments schedule, this sequence correspondence further illustrates that the Bank had not actually called upon the Duffs to repay the entire mortgage at this point or that it had ever in reality required them to do so.

30. In these circumstances, I am driven to the conclusion that as ILP had not unequivocally demanded repayment of the entirety of the mortgage debt prior to 1st December, 2009, the bank had not, in the words of Dunne J. in Start Mortgages, "acquired the right to apply for an order pursuant to s. 62(7) [as] the principal monies secured by the mortgage have not become due". It follows, therefore, that this Court has no jurisdiction to grant the plaintiff bank possession pursuant to s. 62(7), as the latter's right to apply for possession under that sub-section had not by 1st December, 2009, sufficiently crystallised for the purposes of s. 27(5) of the 2005 Act.

Does the Court have jurisdiction to grant the Bank possession of registered land pursuant to a contractual agreement?
31. Counsel for the Bank, Mr. Seligman, argued forcefully that even if it could not avail of the right to possession under s. 62(7) of the 1964 Act, it was nonetheless entitled to possession as a matter of contractual entitlement. I think that the short answer to that is that the Oireachtas had originally designated s. 62(7) as the sole mechanism whereby this Court could grant possession in this fashion to the holder of a mortgage over registered land (i.e., the well-charging procedure coupled with an order for sale described in the next paragraph excepted). Section 62(7) – following its earlier predecessor, s. 13 of the 1942 Act – thus rectified the yawning gap in the powers of such a mortgagee which Andrews L.J. had identified in Devlin by expressly granting such a power, such as already had been done for the first time in 1942. Given that the Oireachtas has removed that power – save in those cases of demand having been made or the entirety of the mortgaged sum fell due prior to 1st December, 2009 – in the case of pre-2009 Act mortgages of registered land, this Court cannot supply a power to recover possession where none existed in the first place independently of statute.

32. Of course, this does not at all mean, for example, that the Bank cannot sue independently to obtain a well-charging order and to ask the Court to exercise its "inherent" power of sale in that fashion: see *Bank of Ireland v. Waldron* [1944] IR 303 and Wylie, Irish Land Law (4th Ed., 2010) at 801. Rather, all that has been decided by me is that as the Bank neither demanded repayment of the entire sum nor that the entire sum had properly become due prior to 1st December 2009 (the terms of the mortgage deed notwithstanding), the statutory power to allow a mortgagee possession by means of court order in respect of registered land is no longer exercisable. Absent the applicability of that (now repealed) statutory power and given that the successor to s. 62(7) provided for in s. 97(2) of the 2009 Act only applies to mortgages created after 1st December, 2009, this Court cannot, as it were, create or invent a new power to grant the mortgagee possession.

33. I cannot, however, pass from this point without observing that ILP did not raise – and, of course, could not validly raise in the Circuit Court – the constitutionality of s. 8(3) of the 2009 Act insofar as it repealed a mortgagee's right to seek an order for possession under s. 62(7) of the 1964 Act. Naturally, in view of the express language of Article 34.3.2 of the Constitution, the constitutionality of any enactment can only be challenged in original proceedings commenced in the High Court.

34. From the standpoint of ILP, however, the constitutionality of such a measure might well be questioned. After all, the mortgagee might well ask why, as a result of what it might fairly consider a piece of legislative legerdemain, an essential ingredient of its security interest (namely, the right through court order to recover possession of the mortgaged property) was now made contingent on the essentially fortuitous issue as to whether a full demand for repayment had been made or the mortgage sum had otherwise become due prior to 1st December, 2009, even though the significance of this date was only to become apparent some time later in July, 2011 following the decision of Dunne J. in Start Mortgages.

35. In these circumstances, a lender might well question whether the legislation was based on rational considerations, i.e., the very first limb of the Heaney proportionality test (*Heaney v. Ireland* [1994] 3 I.R. 593). This concern might well be re-inforced when one considers that more or less the same power was simultaneously re-introduced for mortgages created after 1st December, 2009, by s. 97(2) of the 2009 Act. One might also query whether by significantly curtailing (or, at least, circumscribing) a lender's right to possession in this fashion, the Oireachtas unfairly struck at the substance of the lender's property rights in a disproportionate fashion, which in this instance is the right to recover the security given in exchange for the loan where the borrower has defaulted.

36. These, however, are issues which will be doubtless ventilated in other proceedings and it would be inappropriate at this juncture to do any more other than to raise these issues and to draw attention to them.

Does the Court have jurisdiction to grant possession in respect of the unregistered land?
37. Prior to the enactment of the 2009 Act, the legal status of mortgages over unregistered land was underwritten by a great deal of legal fiction which, although hallowed by unquestioned usage over the centuries, had long ceased to have any real or practical reality. In theory, the mortgagee generally took a conveyance of the lands by fee simple, subject to the mortgagor's equity of redemption. For so long, therefore, as the mortgagor honoured the terms of the mortgage, he or she was entitled to possession. This is all faithfully reflected in the indenture of mortgage created in the present case so far as the unregistered portion of the land is concerned.

38. One of the great achievements of the 2009 Act has been to liberate the law from these unnecessary and cumbersome fictions. Accordingly, therefore, the creation of mortgages over unregistered land after 1st December, 2009, has been largely assimilated to that regarding registered land, so that the mortgage now operates as a charge on the title of the mortgagor: see s. 89 of the 2009 Act.

39. The present case concerns a pre-2009 Act mortgage, so that the mortgagee is entitled under the mortgage to possession by virtue of the fact that – reflecting the then prevailing legal fiction of which we have just spoken – Mr. and Ms. Duff had conveyed unto ILP their entire beneficial estate subject to the equity of redemption. That in turn meant that they were entitled to possession of the property by virtue of that equity of redemption, subject only to compliance with their repayment of obligations under the mortgage.

40. There is fundamentally no dispute but that the present mortgage is significantly in arrears. Nor could it be realistically argued that ILP are not otherwise entitled in principle to possession in respect of the unregistered portion of the lands (subject to the question of a stay). But here again it is necessary to re-visit the legal fiction underpinning a mortgage of this kind in respect of unregistered land

41. In theory, the mortgagee is entitled to take possession peaceably without even the need for a court order. As Mr. Seligman fairly stressed, this in practice never arises. What happens, however, is that even in the case of unregistered land, the practice had de facto assimilated itself to that of registered land, so that the lender here too would first ask the Court for order for possession and forebore to exercise the right to possession which the mortgage deed clearly gave him, even where the mortgagor had forfeited his equity of redemption by defaulting on the mortgage repayments

42. It is, of course, true that there is modern authority for the proposition that a mortgagee is entitled to take peaceable possession of the dwelling of a defaulting mortgagor without the need for a court order: see *First National Building Society v. Gale* [1985] IR 609,

612, per Costello J. Yet the decision in Gale must now be re-examined in the light of Article 40.5 of the Constitution and the contemporary jurisprudence concerning the interpretation of this constitutional provision insofar as the pre-2009 Act law permits the peaceable recovery of dwellings situate on unregistered land by the mortgagor without the necessity for court order.

43. It is true that Gale rests on the idea of a contractual licence (i.e., the right of the mortgagee to take possession pursuant to the deed once the defaulting mortgagor has lost the equity of redemption) and one might, of course, say that any homeowner is free to come an agreement that he or she will allow a third party to take possession in defined circumstances. But this would be to allow the triumph of ancient legal fictions over the requirements of justice in a modern society.

44. The key points, however, in this context are surely the requirements of notice, foreseeability and independent determination of the objective necessity for yielding up of possession which is inherent in the judicial process. All of these are key values comprised in the very essence of the protection of the "inviolability" of the dwelling guaranteed by Article 40.5. This was issue which did not feature at all in Gale, but which now requires to be evaluated in this context in the light of the contemporary case-law.

45. In the aftermath of the Supreme Court's decision in *Damache v. Director of Public Prosecutions* [2012] IESC 11, [2012] 2 ILRM 153 (where legislation permitting the grant of non-judicial warrants in respect of a family home was found unconstitutional), the Court of Criminal Appeal has taken the opportunity in a series of cases to emphasise what Hardiman J. described in T*he People (Director of Public Prosecutions) v. Cunningham* [2012] IECCA 64, [2012] 2 ILRM 406 as the "intrinsic importance" of Article 40.5 to a free and democratic society.

46. In another post-Damache decision, *The People (Director of Public Prosecutions) v. O'Brien* [2012] IECCA 68, Hardiman J. also observed that:-

> "Article 40.5 by guaranteeing the 'inviolability' of the dwelling reflects long standing constitutional traditions in both common law and civil law jurisdictions, features of which were stressed in both Damache and Cunningham respectively. This constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and re-inforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee."

47. If I might also venture to repeat what I said in *Sullivan v. Boylan* [2012] IEHC 385 in this context:-

> "The Irish language text of Article 40.5 ("Is slán do gach saoránach a ionad cónaithe….") captures and expresses the essence of the English language word ("inviolability") by stressing the concepts of safety and security of the dwelling."

48. This assurance of security and protection inherent in the guarantee of "inviolability" would be fundamentally compromised if peaceable possession of a dwelling could be taken by a lender at almost any time other than by means of a court order without express notice to the borrower in the manner envisaged by Costello J. in Gale merely because the borrower was in default, even if this were to be contractually agreed by reason of the pre-2009 Act fictions in respect of unregistered land we have just examined. Nor could this be assured if the determination as to whether the borrower was in actually in default was to be left to the say-so of the lender or whether there was an objective justification for the mortgagee taking possession of the dwelling without any independent determination of these questions by the judicial branch.

49. This conclusion, in any event, merely reflects the new statutory prohibition which (subject to minor exceptions) precludes a mortgagee taking possession of mortgaged property without a court order and which is now provided for in the 2009 Act: see s. 97(1) of the 2009 Act.

50. None of this is to suggest that a defaulting borrower can invoke Article 40.5 to avoid having to yield up possession where a court so orders, no more than Article 40.5 can be invoked to justify the unlawful construction of a dwelling on another's land or the construction of a dwelling without planning permission: see, e.g., *Wicklow County Council v. Fortune* [2012] IEHC 406. It is, however, to say that those elements of formal notice, foreseeability and an independent determination of the objective necessity for possession of the dwelling are presupposed by the guarantee of inviolability and these protections cannot be assured outside the judicial process or, at least, something akin to the judicial process.

51. All of this means that even in the case of unregistered land, the homeowner cannot be required to give up possession save by court order. But unlike the position with regard to registered land (which was governed by statute), in the case of unregistered land the courts have always assumed a jurisdiction to grant possession and, in fairness, mortgagees have always (or, at least, almost always) submitted to the necessity for court adjudication and an actual order before taking possession ever before the enactment of s. 97(1) of the 2009 Act.

52. All of this is to say that the court retains a jurisdiction to determine whether to make an order for possession in the case of unregistered land and this general jurisdiction to grant possession is not affected by the operation of the 2009 Act in the same manner as has occurred in the case of registered land. The real question, therefore, is whether this Court should exercise that jurisdiction in this particular case. It is contended, however, that by failing to engage with Mr. and Ms. Duff with regard to the issue of mortgage arrears and their capacity to repay, ILP have not complied with the Financial Regulators' Code of Conduct and that, as a result, no order for possession should now be made.

53. It is, therefore, to this final issue to which we can now turn.

The Code of Conduct

54. As we just seen, the claim that ILP have not complied with the Financial Regulator's Code of Conduct on Mortgage Arrears is central to the defendants' defence of these proceedings. It is thus necessary to consider the somewhat troublesome issue of the precise legal status of the Code of Conduct. At the outset, it is, however, necessary to state how the defendants maintain that ILP have not complied with the Code.

55. First, according to the latest affidavit sworn by Mr. Duff on the 13th November, 2012, he was never offered "any alternative repayment arrangement" or a "mortgage holiday, deferred payments, interest only or recapitalisation". He also says without contradiction that he made an oral offer of interest only repayments, but that this was rejected and that he was not informed of his right to appeal.

56. Second, Mr. Duff also objects to the way in which he and his wife were classified as "non co-operating borrowers" by the Bank. He acknowledges that his wife sold a small portion of land which, after expenses, came to €6,200. These funds were used to discharge basic household essentials (such as food and to pay arrears due in respect of electricity bills). He says that the Bank were fully aware of this proposal – something which the Bank denies – and that they was never an agreement that the proceeds of the sale would be paid to the Bank.

57. The Code itself is promulgated under s. 117 of the Central Bank Act 1989 ("the 1989 Act"). Section 117(1) provides that:-

> "(1) The Bank may, after consultation with the Minister [for Finance], from time to time draw up, amend or revoke, in relation to any class or classes of licence holders or other persons supervised by the Bank under this or any other enactment, one or more than one code of practice concerning dealings with any class or classes of persons and every such code shall be observed by the licence holders, or other persons so supervised, to whom they relate."

58. There is no doubt but that the Central Bank, as regulatory authority, has power to invoke the administrative sanctions procedure contained in Part IIIC of the Central Bank Act 1942 (as amended by s. 10(1) of the Central Bank and Financial Services Authority of Ireland Act 2004)("the 2004 Act"). Breach of the code is designated as a criminal offence: see s. 117(4) of the 1989 Act (as substituted by Schedule 3 of the Act of 2004).

59. It is, of course, important to recall that the Oireachtas could not by means of enacting s. 117 effectively give the Central Bank the power to change the substantive law by making codes made pursuant to this provision. As this Court recently pointed out in the (admittedly different) context of guidelines governing prosecutorial discretion, an administrative officer cannot effectively change or alter the law through this mechanism, since the power to enact legislation is constitutionally reserved to the Oireachtas by Article 15.2.1 of the Constitution: see *Fleming v. Ireland* [2013] IEHC 1. Likewise, in *Crawford v. Centime Ltd.* [2005] IEHC 325, [2006] 1 ILRM 543, Clarke J. held that the Revenue Commissioners enjoyed no general discretion to waive, alter or otherwise dispense with the law by means of published guidelines, even if those guidelines had the merit of enabling taxpayers better to understand their legal rights and obligations. By the same token the Supreme Court held in *Curley v. Governor of Arbour Hill Prison* [2005] IESC 49, [2005] 3 IR 308 that secondary legislation could not be read as having been superseded by an industrial relations agreement, even if the secondary legislation in question had itself been the product of industrial relations negotiations.

60. The question of the status of the Code has been examined in a number of recent cases. In *Zurich Bank v. McConnon* [2011] IEHC 75 Birmingham J. rejected the suggestion that the Code created any justiciable rights at the hands of a consumer:-

> "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. The questions of sanctions is referred to in s. 33AQ of the Central Bank Act 1942, as amended by s. 10(1) of the Central Bank and Financial Services Authority of Ireland Act 2004. This contains provisions for matters such as caution or reprimand, the payment of a monetary penalty to the financial regulatory authority, disqualification provisions and the like, but again there is no suggestion that a lender is prohibited from seeking repayment from its borrower. The contrast between the approach taken in the Code and the approach of the Consumer Credit Act 1995, is striking. Section 30 of the Act contains mandatory provisions concerning a credit agreement or contract of guarantee entered into by a consumer. Matters such as a requirement for the agreement to be in writing and for a cooling off period are dealt with. Section 38 of the Act deals with the consequences of failing to comply with the requirements of the section and provides that a creditor will not be entitled to enforce a credit agreement or contract of guarantee and that any security given shall not be enforceable. There are no comparable provisions whatever in the Code."

61. One might add that s. 117 of the 1989 Act contains no mandatory sanction of voidness such as has been adopted in other cases where the consumers have either pledged the credit of or were otherwise engaged in selling their family home, of which s. 3(1) of the Family Home Protection Act 1976 is perhaps only the most notable example. Birmingham J. then went on to reject the implied terms argument:-

> "The defendant has argued that the Code forms an implied term of the contract. There are a number of fundamental difficulties with this argument. First of all the question arises by what method is it suggested that a term has been implied. It is not the case that any terms have been implied by statute. There is also the question of what term would be implied if a mechanism for doing so was found. The only implied term that would assist the defendant would be a term that the Bank was obliged to comply in all respects with the Code and that the consequence of non compliance was that the borrower was exempted from the liability to repay the loan. If one introduces the traditional officious bystander into the equation then it would be seen that such a suggestion has little reality. The notion that a bystander asking whether such a term formed part of the agreement would be hushed by the parties jointly and impatiently snapping "of course" seems more than improbable. In summary I can see no basis for suggesting that any alleged breach of the Code exempts the borrower from repaying his loan."

62. Of course, it must be acknowledged that while Birmingham J. found against the defendant on this ground, this was against a background where the judge had also found that he was not a "consumer" within the meaning of the Code and, furthermore, that the loan in question had been executed some two weeks before the first such Code had been promulgated. These comments were, accordingly, in all strictness merely obiter dicta.

63. A somewhat different approach is, perhaps, evident in the judgment of Laffoy J. in *Stepstone Mortgage Funding Ltd. v. Fitzell* [2012] IEHC 142. This was an undefended mortgage suit wherein the plaintiffs sought possession. While she acknowledged that it was necessary "to exercise caution in expressing a view on the application of the Current Code, particularly in the current economic climate", Laffoy J. also acknowledged that "some development of the jurisprudence in this area in the future may be anticipated".

64. In that case Laffoy J. held that the Code was applicable to the facts of that case and concluded that because the defendants in question had not been given any adequate opportunity of appealing a particular decision of the lender to an Appeals Board in the manner required by the Code, the plaintiff lender was thus in default.

65. Laffoy J. then proceeded to hold that:-

> "Notwithstanding what is stated in the preceding paragraphs, 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 (and which was also to be found in the earlier codes, although the moratorium period in the case of the earliest code was six months, rather than twelve months), 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."

66. Laffoy J. then concluded that the plaintiff lender was not entitled to possession because it could not show it had complied with the provisions of the Code. This was because she concluded that the borrowers had not been advised of their right to appeal in the manner required by the Code.

67. The present case is governed by the 2009 Code of Conduct which was the one applicable at the time of the commencement of the proceedings. Clause 6 of the Code provides that:-

> "the lenders must not seek repossession of the property until every reasonable effort has been made to agree an alternative repayment schedule with the borrower or his/her nominated representative. However where it is clear that the borrower is deliberately not engaging with the lender or where other circumstances reasonably justify [it] the lender may seek repossession in the absence of any engagement with the borrower."

68. The question, for example, of what constitutes a "reasonable effort" on the part of the lender does not easily lend itself to judicial analysis by readily cognisable legal criteria. How, for example, are "reasonable efforts" to be measured and ascertained? If, moreover, non-compliance with the Code resulted in the courts declining to make orders for possession to which (as here) the lenders were otherwise apparently justified in seeking and obtaining, there would be a risk that by promulgating the Code and giving it a status that it did not otherwise legally merit, the courts would, in effect, be permitting the Central Bank unconstitutionally to change the law in this fashion. Likewise, the argument advanced by Birmingham J .in McConnon regarding the absence of any statutory indication that failure to comply with the Code would affect the ability of the lender to secure relief may be thought to be a forceful one.

69. While I am acutely conscious of these concerns, given these cross-currents of judicial opinion, I feel that I must nonetheless follow the most recent pronouncement of this Court in Fitzell, given that this is the most recent and authoritative analysis of this question where the judicial comments formed part of the ratio of the decision: cf. by analogy my own judgment in *AG v. Residential Institutions Redress Board* [2012] IEHC 492 and the comments of Clarke J. for the Supreme Court in *Kadri v. Governor of Cloverhill Prison* [2012] IESC 27 regarding the importance (where possible) of maintaining stare decisis at High Court level in respect of earlier High Court decisions. This is especially so where the decision is recent and all issues have been fully considered. It is essentially for that reason that I feel that I must follow Fitzell while departing from the earlier decision in Gale, the latter decision having been overtaken in any event by constitutional and statutory developments.

70. Proceeding from that standpoint, therefore, in the present case I feel I cannot ignore the averment made by Mr. Duff that he offered the Bank interest only repayments in 2009, but that this was rebuffed. In these circumstances, I find myself coerced to the conclusion that the Bank did not comply (or, at least, comply fully) with the requirements of Clause 6 of the 2009 Code prior to the effective commencement of the proceedings in that it cannot be said that "every reasonable effort" had been made to agree an alternative repayment schedule in the discussions which ensued in 2009, even if some of these discussions formally post-dated the commencement of the present proceedings by some weeks or even months.

71. Nor can it be said that at that stage – whatever possibly may have been the case subsequently – that the Duffs were non-cooperating borrowers. On the contrary, they seem to have been as frank and forthcoming with the Bank – whether personally or through their solicitors in correspondence – to the effect that they were facing acute financial difficulties and sought some way out of the dreadful circumstances into which they – like so many others – had been plunged.

Conclusion

72. In these circumstances, I must therefore conclude:-

> A. The Court no longer has jurisdiction to make an order for possession of the registered land in view of the repeal of s. 62(7) of the 1964 Act. Nor had the rights of the Bank accrued prior to 1st December 2009, since the entirety of the mortgage monies had neither been demanded nor were they actually due prior to that date.
>
> B. The Court has a jurisdiction to grant possession in respect of the unregistered land. While the level of arrears is such that an application for possession would normally be justified, in the present case, following the decision of Laffoy J. in Fitzell, I must ask whether the Bank have complied with the Code of Conduct.
>
> C. As I have concluded that the Bank did not so comply with the requirements of Clause 6 of the Code in the manner that I have indicated, in line with the reasoning in Fitzell, it would not be appropriate for me to exercise a judicial discretion in favour of granting an order for possession.
>
> D. It is in these special circumstances that I propose to allow the appeal and I would therefore decline to grant the Bank an order for possession. None of this should be taken as precluding the Bank taking such further steps to realise the security as it may now consider appropriate in the light of this judgment.