

**THE HIGH COURT****[2014 No. 2393 S]****BETWEEN****ACC LOAN MANAGEMENT LIMITED****PLAINTIFF****AND****GRACE CAHALANE****DEFENDANT****JUDGMENT of Mr. Justice Noonan delivered the 13th day of November 2015.**

1. In these proceedings, the plaintiff ("the bank") seeks summary judgment against the defendant arising out of a loan agreement entered into between the parties on the 26th of August, 2005. By the terms of that agreement, the bank agreed to advance the sum of €243,000 to the defendant for a term of 15 years. For the first 24 months of the term, the defendant was responsible to pay interest only on the outstanding capital sum and thereafter, on the usual principle and interest basis.
2. The agreement provides that the purpose of the loan was to purchase an investment property at Baltimore, County Cork. It is accepted that this was incorrect as the defendant already owned that property.
3. The property in question is a dwelling house which was constructed by the defendant's father in or about 1982. He lived there until his death in 1999 when he left the house to the defendant. It would appear that at no time thereafter did the defendant ever reside on a permanent basis at any rate in the house. In fact, the defendant was, at all material times, working in the United Kingdom and living in an apartment owned by her there where she was resident for tax purposes. The loan was secured by way of a mortgage over the lands comprised in Folio 18434F of the Register of Freeholders County Cork but an issue arises as to whether the mortgage does in fact adequately secure the bank's interest in the property, the title of which appears to be registered in a number of Folios.
4. The monthly interest payments commenced on the 3rd of November, 2005, and approaching the second anniversary of commencement in November 2007, the defendant requested an extension on the interest only period for a further three years, which was granted by the bank. The interest only period was thus due to expire on the 4th of December, 2010, and on the 4th of October, 2010, the bank wrote to the defendant advising her of this fact.
5. As a result, the defendant wrote to the bank on the 2nd of November, 2010, seeking a further extension of the interest only period. In this letter, the defendant indicated that she intended putting the house on the market in spring of the following year, 2011, and she estimated its value to be in the region of €750,000. Thereafter it would appear that there was some delay on the defendant's part in forwarding necessary documentation to the bank to enable it to consider her request. On the 22nd of June, 2011, the bank wrote seeking information and documents to enable it to consider the defendant's application for a further extension of the interest only period.
6. The defendant replied to this letter on the 16th of July, 2011, apologising for the delay and stating that the letter arrived while she was in Ireland carrying out some maintenance work on the house. She confirmed that she hoped the house would sell during the autumn but if not, she would have to rent it out so as to ensure it was not left empty during the winter months.
7. On the 25th of July, 2011, the bank wrote to the defendant agreeing to extend the interest only period to the 31st of December, 2011, enclosing the appropriate agreement for signature. The defendant says she never received this letter.
8. Shortly thereafter, it would appear that the defendant ceased making the repayments due on foot of the loan, the last such payment having been made on the 16th of August, 2011.
9. On the 28th of November, 2011, the bank wrote pointing to the fact that there were now arrears due on the account in excess of €23,000. The letter stated that, although the bank had agreed to place the facility on an interest only basis until the 31st of December, 2011, the required letters of variation were not returned to the bank and accordingly the moratorium was never put in place. The defendant did not respond in writing to this letter although she says that she was in contact with the bank and throughout all of this time was awaiting a response to her request for a deferment of principle repayments. The defendant again says, in relation to this period, that she continued to have discussions with the bank "to resolve the matter" and this included seeking a further extension of the interest only period into 2012.
10. The bank again wrote on the 3rd of April, 2012, to the defendant looking for further information in relation to her request for a further moratorium and also pointing out that the arrears were now almost €33,000, no payments had been made since the 16th of August, 2011, and if the requisite information was not provided by the 30th of April, 2012, the bank would have to consider its position, including enforcing the security. The defendant avers that she continued her discussions with the bank throughout 2012 and on the 26th of June, 2012, she wrote to the bank to say that she intended selling her apartment in England and using the equity thereby realised to settle the outstanding interest and reduce the capital amount.
11. On the 2nd of October, 2012, the bank again wrote referring to the fact that there was some €47,000 of arrears now on the account and it had been in arrears since the 15th February, 2011. The letter stated that if the arrears were not cleared, the matter would be transferred to the bank's Special Asset Management Unit and proceedings might ensue which would be costly for the defendant. The correspondence also referred to the fact that surcharge interest was being charged by the bank. Two days later on the 4th of October, 2012, the bank again wrote about the arrears stating they had implemented the Code of Conduct for Business Lending to Small and Medium Enterprises Mortgage in relation to the defendant.
12. On the 8th of November, 2012, the bank wrote to the defendant referring to the arrears situation over the previous eighteen

months stating that it was unacceptable and unsustainable and accordingly the case was being transferred to the Special Assets Management Department. The defendant avers that, throughout all of this, she continued in discussions with the bank about her application for a moratorium on principle repayments and had received verbal assurances that she should not worry about legal action and agreement was imminent. The correspondence to which I have referred is not consistent with these averments which are disputed by the bank.

13. The plaintiff was again written to on the 2nd of January, 2013, about the arrears, then in excess of €54,000. Finally on the 7th of February, 2013, the bank called in the loan and wrote to the defendant demanding repayment of the full amount of principle and interest, then €257,566.68. On the 15th of February, 2013, the bank appointed a receiver over the property and this is the subject of challenge by the defendant in separate proceedings commenced on the 1st of May, 2015.

14. The defendant raises three main points of defence to the bank's application for summary judgment. First, she says that the bank have failed to comply with their legal obligation to implement the Code of Conduct on Mortgage Arrears ("CCMA") prior to the institution of these proceedings. This precludes the bank from, inter alia, instituting proceedings for possession of a mortgaged property otherwise than in accordance with the provisions of the CCMA. The Code applies exclusively to mortgage loans which are secured by the borrowers "primary residence" which is defined in the Code as being:

"(a) the residential property which the borrower occupies as his/her primary residence in this State, or

(b) a residential property which is the only residential property in this State owned by the borrower."

15. Although in her affidavits, the plaintiff avers that the house in Baltimore is her primary residence, it is clear, even from her own evidence, that the plaintiff's primary residence has, at all material times, been in the United Kingdom. At no time does she aver that she ever resided in the property or did more than stay there on an intermittent basis. Her contention that the property has always been her primary residence is significantly undermined by the fact that it has been rented to third parties and indeed, even at the time the plaintiff was applying for her loan, in a letter of the 16th of March, 2005, to the bank she referred to the property's potential for rental income of approximately €1,000 per month and, because the house was in good condition, it could be rented out at any time as required. Further, the defendant, in a letter to her own solicitors of the 9th of August, 2005, refers to the loan that she was seeking from the bank as a "commercial loan".

16. On the evidence therefore, I am not satisfied that the defendant has established that the CCMA has any application to the facts of this case. In any event, the claim herein is clearly not one for possession despite the defendant's submissions in that regard. The defendant also seeks to rely on the provisions of the Consumer Credit Act 1995. The terms of the original loan agreement, executed by the defendant, provides under the heading "Warranties and Representations" the following:-

"The borrower hereby warrants and represents to the bank:-

1. That in entering the loan facility, the borrower is acting within the borrower's trade, profession or business and is thereby not acting as a "consumer" within the meaning of section 2 of the Consumer Credit Act, 1995."

It seems to me, therefore, that the defendant cannot seek to go behind this and invoke the provisions of the 1995 Act, even if relevant having regard to the fact that the Act applies only to "consumers".

17. The second main plank of the defence is that the bank are estopped from instituting proceedings in circumstances where the plaintiff was in ongoing negotiations with the bank for an extension of the interest only period on her loan and was led to believe that this was being actively considered but no determination of her application had ever been made and she was entitled to expect that this would occur before any proceedings were instituted.

18. Whilst it may well be the case that the defendant and the bank had discussions and negotiations from time to time on this topic, the correspondence to which I have referred makes it clear that the defendant was in an ever deteriorating arrears situation for some two years before the bank called in the loan and numerous letters were written to her before that happened and proceedings were instituted. Against that background, I cannot see how the defendant could be said to have been misled in any way as to what the true position was when the bank clearly reserved its rights throughout and it can have come as no surprise to the defendant when the loan was called in. Further, there is no suggestion of substance that the defendant acted to her detriment in reliance on these matters, even if they did occur as the defendant alleges but the bank disputes.

19. Thirdly, the defendant raises the issue of the surcharge applied by the bank in relation to her account being at the rate of 6% per annum above the standard rate charged on the loan. The defendant says that this amounts to a penalty and is unenforceable and relies in that regard on the judgment of this court (Finlay Geoghegan J.) in *ACC Bank PLC v. Friends First Management Pensions Fund Ltd* [2012] IEHC 435. I accept the defendant's submissions in this regard and it seems to me that on this point at least, the defendant has demonstrated the basis for a bona fide defence. However, it is common case that this component of the plaintiff's claim amounts to a total of €21,445.51.

20. Accordingly, applying the test laid down by the Supreme Court in *Aer Rianta v Ryanair* [2001] 4 IR 607 it seems to me that the defendant has not established on the affidavits a defence that is credible or that there is a fair or reasonable probability of the defendant having a real or bona fide defence to the bank's claim save in respect of the surcharge point. In my view therefore the bank is entitled to judgment in the sum claimed less the surcharge interest amount I have identified being the net sum of €236,121.17.

21. I will hear counsel in relation to the remittal of the balance of the claim for plenary hearing.