

**THE HIGH COURT****CIRCUIT APPEAL.****2015/187CA****BETWEEN****PERMANENT TSB PLC FORMERLY IRISH LIFE & PERMANENT PLC****RESPONDENT****AND****ERIC MALLON & SHARON MALLON.****APPELLANTS****JUDGMENT of Mr. Justice White delivered on the 27th of October, 2017.**

1. This is an appeal from an order of the Circuit Court Midland Circuit County Westmeath of the 24th July 2015 granting the Respondent possession of the private residential dwelling comprised in Folio 14799 County Westmeath. The Appellants borrowed €133,000 originally.

2. They executed a Deed of Charge on 15th April 2003. It covered all present and future advances to the Appellants and they acknowledged that they were bound by the Respondent's mortgage conditions 2002. Condition 7 of the Permanent TSB mortgage conditions 2002 stated:-

"The total debt shall become immediately payable to Permanent TSB if the mortgagor defaults in the making of two monthly repayments or for two months in the payment of any other monies payable under the mortgage."

3. The charge was registered on 28th April, 2003, and was entered on Part 3 of Folio 14799 Co. Westmeath and it stated charge for present and future advances repayable with interest, Irish Life and Permanent plc as the owner of this charge.

4. The Appellants in 2007 sought a further facility from the Respondent. By letter of offer of 7th November, 2007, they were offered a loan of €212,000 over a period of 20 years repayable by way of 240 monthly instalments of €1,470.32 per month with a variable rate of 5.6%.

5. The purpose of the offer was to pay off two credit union loans and three loans with the Respondent including the original mortgage. By letter of acceptance of offer of an additional loan, the Appellants accepted the loan offer on 8th November, 2007. In that acceptance offer, they agreed that the existing mortgage over the property would extend to this loan which was also secured on the property. The acceptance also incorporated an acknowledgment by the Appellants that they had received independent legal advice before accepting the offer of additional loan. On 22nd December, 2007, the sum of €212,000 was advanced by the Respondent to the Appellants. Subsequently, Irish Life and Permanent Public Limited Company changed the name of the company to Permanent TSB Public Limited Company on 29th June, 2012.

6. The Appellants fell into arrears with their mortgage on 30th June, 2011, when they failed to discharge in full a monthly payment due. The first correspondence to the Appellants was on 2nd August, 2011 when they were notified that they had fallen into arrears of €893.48. They entered into a restructuring agreement on 18th November, 2011, which operated from December 2011 to the end of May 2012 when the monthly repayment was adjusted to €942.07 but where they were obliged to pay monthly by direct debit €1,200. €942.07 was the amount of interest due monthly on the loan and the balance was to reduce the capital balance of the amount advanced.

7. The loan fell into arrears again and a further restructuring agreement/moratorium was offered. By letter of 19th March, 2012, the Appellants indicated they were not in a position to increase their current payments of €861.95 per month and sought suspension of the mortgage account for 24 months and a write off. The Respondent replied on 4th April, 2012, stating that it was not in a position to offer a debt write off or a repayment suspension option as requested. As of 30th October, 2012, the Appellants had missed seven monthly mortgage repayments and the arrears had risen to €11,211.72. The situation deteriorated in 2013. By 29th April, 2013, ten months arrears were outstanding, of €14,950.99. This increased by 29th October, 2013, to €20,862.77.

8. By letter of 1st November, 2013, the Respondent wrote to the Appellants seeking to have a standard financial statement completed. By letter of 2nd December, 2013, the Respondent wrote to the Appellants stating that arrears were now €23,303.31 and as time for the completion of a standard financial statement had passed they were now classified as not cooperating in accordance with the code of Conduct on Mortgage Arrears 2013 and indicated that the bank could commence legal proceedings immediately for the repossession of their property and they were now outside the Mortgage Arrears Resolution Process (MARP) and that its protections would not apply to them.

9. The Appellants contacted the Respondent in early January 2014 and as a result on 29th January, 2014, a standard financial statement application was furnished to them. By letter of 5th February, 2014, pursuant to the terms of the mortgage, the Respondent made a total demand of the amount outstanding of €208,751.69. The Respondent wrote to the Appellants on 5th March, 2014, stating it had passed the file to solicitors to commence legal proceedings for repossession of the mortgaged property. The Appellants sought a copy of their Deed of Charge by letter of 12th March, 2014. By letter of 24th March, 2014, Eversheds, the solicitors for the Respondent wrote to the Appellants seeking the total debt outstanding.

10. A further letter was sent by Eversheds on 7th April, 2014, demanding vacant possession of the property but advising the Appellants if they were experiencing financial difficulties, they could contact them to discuss the total debt outstanding and make an appointment to discuss individual circumstances. On 29th April, 2014, the Appellants completed a standard financial statement which was submitted with the supporting documentation.

11. On 15th May, 2014, the Respondent wrote to the Appellants proposing a restructuring agreement and moratorium whereby the instalment would be €1,747.16 for a period of six months reverting then to an instalment of €1,485.05. By letter of 28th May, 2014, the Appellants sought an extension of time for a period of 60 days to consider the moratorium offer and also sought a detailed

breakdown of all the factors used in the calculation of the moratorium offer. The Respondent support unit wrote to the Appellants on 5th June, 2014, seeking the signed restructuring agreement. The Appellants replied on 10th June, 2014, confirming that they had requested an extension of 60 days and sought details of the breakdown of all factors used in the calculation of the moratorium offer. The Respondent wrote again to the Appellants on 17th June, 2014, stating that the mortgage payment was based on a total income of €4,826 a month together with total expenditure of €2,807. The Appellants wrote again on 27th June, 2014, requesting further details.

12. The Circuit Court Civil Bill for possession was issued on 23rd June, 2014. The second Appellant was served on 25th August, 2014, and entered a conditional appearance on 8th September, 2014, and the first Appellant was served on 10th November, 2014. The Appellants by letter of 16th September, 2014, sought to view original mortgage documentation and by letter of 7th October, 2014, sought confirmation that they were still part of the MARP process.

13. The Civil Bill was made returnable before the County Registrar in Mullingar on 10th November, 2014 and was adjourned to 9th March, 2015, before the County Registrar.

14. By letter of 27th November, 2014, the Respondent wrote to the Appellants setting out the method by which they assessed their ability to pay further monthly mortgage repayments.

15. On 10th February, 2015, the Appellants wrote to Eversheds Solicitors for the Respondent seeking to examine all original documents and by letter of 11th February, 2015, they wrote directly to the Respondent seeking particulars of interest paid. By letter of 17th February, 2015, the Appellants wrote to the Respondent directly seeking a list of all alternative repayments explored by the Respondent. The Respondent by letter of 15th February, 2015, acknowledged receipt of correspondence of 12th February, 2015 and indicated it was investigating the information sought. By letter of 25th February, 2015, the Appellants then sought the facility to examine original documentations, citing s. 84 of the Land and Conveyancing Reform Act 2009.

16. The solicitors for the Respondent wrote to the Appellants on 24th March, 2015, requesting a duly completed standard financial statement with supporting documentation in order to assess up to date financial circumstances and stated that based on the evidence provided that the Respondent would consider any alternative repayment arrangement offered, but insisted that the Respondent was continuing with legal action and that unless the full arrears balance on the mortgage account was cleared, action would continue.

17. A further letter was sent by the solicitors to the Appellants on 24th April, 2015, stating that the Respondent required a standard financial statement be submitted to evaluate restructure but that the action would continue until and unless either the arrears balance in the mortgage account was cleared in full or until such time as an alternative arrangement was in place with the bank, following the submission of a duly completed standard financial statement.

18. By letter of 6th May, 2015, the Appellants wrote to the Respondent directly stating that they were currently in the process of completing an SFS form and that they were seeking independent advice. A further letter was sent on 3rd June, 2015, from the Appellants directly to the Respondent seeking the guidelines used to calculate average household expenditure. That was replied to on 15th June, 2015, when the Respondent directly advised the Appellants that the calculation of average household expenditure was for internal use only.

#### **The Court Proceedings**

19. The matter was transferred into the judge's list. Apart from the Civil Bill, the affidavits before the Circuit Court were an affidavit of James O'Brien on behalf of the Respondent sworn on 13th June, 2014, together with exhibits, a conditional appearance of the second named Appellant, affidavits of service, a supplemental affidavit of Niamh McGee on behalf of the Respondent sworn on 30th January, 2015, an affidavit of the Appellants of 5th March, 2015, a replying affidavit of 8th May, 2015 sworn by Niamh McGee, a further affidavit of the Appellants sworn on 10th June, 2015, and a further affidavit of Niamh McGee sworn on 15th July, 2015. The matter came before the Circuit Court in Mullingar on 12th May, 2015 and was adjourned. The application of the Respondent was heard on 24th July, 2015, when the court granted the order for possession and costs which is now appealed.

20. The Appellants issued a notice of motion of 21st October, 2015, returnable for 3rd November, 2015, before the Circuit Court in Mullingar seeking to set aside the order of 24th July, 2015, but this motion was not accepted by the Circuit Court office as being a valid motion. It was grounded on the affidavit of the second Appellant sworn on 20th October, 2015.

#### **The Appeal to this Court**

21. By motion of 5th November, 2015, returnable to 17th November, 2015, the Appellants sought an extension of time from the Master of this Court to allow an appeal based on the grounding affidavit of the second Appellant together with exhibits.

22. The second Appellant deposed a further affidavit for the appeal on 7th November, 2016. A further replying affidavit was deposed by Niamh McGee on behalf of the Respondent on 21st November, 2016, and a further replying affidavit of the second Appellant was sworn on 16th February, 2017.

23. As of 29th November, 2016, the mortgage arrears are €79,161.18. The sum of €1,930 was paid by the Appellants between 6th March, 2014, and 6th November, 2015.

24. All affidavits were opened in full before this Court by counsel on behalf of the Respondent.

25. The Appellants have raised a substantial number of legal issues which the Court sets out as follows:-

- (i) there was a failure of due process at the Circuit Court hearing on 24th July, 2015;
- (ii) at that hearing, a book of papers was furnished to the court but a copy was not furnished to the Appellants;
- (iii) that the principal primary residence is not legally defined by the Land and Conveyancing Law Reform Act 2009;
- (iv) there has been a breach of the constitutional rights and European Convention Rights of the Appellants;
- (v) that as a request to complete a standard financial statement was made during the proceedings this has the effect of

rendering the total proceedings invalid;

(vi) the Appellants were not afforded an opportunity and time to view the original documents that attested or certified copies were not acceptable;

(vii) that the Respondent did not reply properly to particulars raised by the Appellants;

(viii) there was no opportunity available to the Appellants to reply to a further affidavit of Niamh McGee sworn on 21st July, 2015;

(ix) that the Appellants were improperly prohibited from making an application to set aside the Circuit Court order;

(x) that there should have been a Notice of Motion before the Circuit Court;

(xi) that the Respondent was consistently in breach of the Code of Conduct on mortgage arrears of 2013 in particular 30 – 34 of the code;

(xii) that the solicitor's letter of 24th April, 2015, had the effect of re-entering the appellants into the Mortgage Arrears resolution Process (MARP) rendering the further processing of the Circuit Court proceedings inoperative;

(xiii) that the Appellants were not given an opportunity to appeal the moratorium offer and a complaint had been made to the Financial Services Ombudsman on 6th August, 2015;

(xiv) that the Appellants have not been able to complete the standard financial statement requested on 24th April, 2015, prior to the conclusion of the Circuit Court hearing on 24th July, 2015;

(xv) that the Respondent was not in compliance with Article 40 of the code;

(xvi) that the Respondent had improperly dealt with the protection insurance issue;

(xvii) that the moratorium offer exceeded the original monthly instalment;

(xviii) that the moratorium offer issued on 15th May, 2014, allowed 30 days to respond but that the Civil Bill of 23rd June, 2014, was issued within 30 business days;

(xix) that the Appellants were not given the opportunity to comply with the Code of Conduct on Mortgage Arrears as they were not given a chance to respond to the moratorium;

(xx) that a transfer of charge was required

(xxi) that the change of name to Permanent TSB rendered the mortgage ineffective

(xxii) that the Respondent misled the Circuit Court;

(xxiii) that the Appellants were unfairly refused an adjournment in the Circuit Court to allow the outcome of a constitutional challenge to the Law and Conveyancing Act set out in the appeal of *D'Arcy v. Minister for Justice* [2014 No. 755 P.];

(xxiv) that the Respondent was in breach of statutory instrument 27/1995, European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.

### **The Decision of the Court**

26. This is an appeal from an order of the Circuit Court which has been treated as a full rehearing of all matters in issue. Any infirmities alleged on the hearing in the Circuit Court are irrelevant as all matters have now been considered on appeal.

27. The Respondent entered into a contract of mortgage with the Appellants. In the proceedings before this Court, it has been established that they signed a Deed of Mortgage and Charge and agreed to be bound by the terms and conditions of the Respondent in respect of an original advance. A revised loan offer was sent to the Appellants after their application and accepted by them. The Appellants drew down funds of €220,000 to repay existing debt and agreed to pay a monthly instalment. They have been consistently in breach of the terms of the contract since 30th June, 2011, a period of six years

28. The appropriate proofs have been established, the Court can rely on copies of the relevant documents. The Land Registry file plan is proof without further evidence of what is contained therein which shows that a Deed of Charge is registered over the Appellants' property. The name of the Respondent was properly changed in the Companies Registration Office. The Deed of Charge covered any future advances and therefore no transfer of charge or new charge was required. The original charge covered the additional loan to the Appellants. The Respondent both in the Circuit Court and before this Court has grounded its application quite properly by exhibiting the file plan, a copy of the Deed of Charge proving service and that the mortgage repayments have been in arrears for a substantial period of time. The deed of Charge entitles the Respondent to seek repossession of the property in default of the terms of the mortgage.

29. There was no requirement for a Notice of Motion to be issued in the Circuit Court as the Civil Bill had a return date before the County Registrar and was transferred into the judge's list. There was no jurisdiction vested in the Circuit Court to set aside its own order once the application had been heard on the merits and the motion to set aside was appropriately rejected by the Circuit Court.

30. The Circuit Court or this Court is under no obligation to adjourn court proceedings awaiting challenges to the constitutionality of legislation. From a detailed consideration of all the affidavits correspondence and primary documents, I cannot see how the Circuit Court was misled about the claim for repossession. The issue of payment protection insurance has no relevance to the proceedings before this Court. While the solicitors for the Respondent should have endeavoured to reply to all the requests of the Appellants for further and better particulars, the court notes there was an exhaustive amount of correspondence, documentation, and affidavits. A

lot of the documentation sought was within the knowledge and procurement of the Appellants.

31. Since the order of the Circuit Court, the Appellants have had the opportunity to inspect all original documents. Their inability to inspect the original documents during the Circuit Court proceedings did not affect the merits of the outcome. The court is not concerned with the definition of a principal private residence or a family home as the letter of offer, its acceptance and the Deed of Charge reflects the contractual agreement between the parties.

32. The court does not have to decide if the mortgage contract between the parties comes within the jurisdiction of the European Communities Unfair Terms and Consumer Contracts Regulations 1995. However if it does it is clear that the terms and conditions of the contract of mortgage were not unfair to the Appellants. A letter of approval/particulars of mortgage loan was issued to the Appellants in terms which were easily understood. The Appellants signed an acceptance of offer for the additional loan based on the letter of approval/particulars of mortgage loan acknowledging that they received independent legal advice before signing it. There were no unfair terms in the contract of mortgage or the letter of approval. The Appellants were advanced €212,000 with a repayment period of 20 years with a monthly instalment of €1,470.32 and a variable interest rate of 5.6% at that time. The number of repayments was stipulated. The total amount repayable and the cost of the credit were set out. The mortgage property, 12 Trinity Cottage, Mullingar, Co. Westmeath was identified. The Respondent has not arbitrarily attempted to retrieve possession. Notice was given and proceedings issued.

33. The responsibility of the Court is to ensure that the Respondent engaged with the Appellants by operating the code before Proceedings were issued. The court has no jurisdiction to determine if the Respondent acted unfairly by not agreeing more favourable terms to the Appellants.

The applicable law was considered by the Supreme Court in *Irish Life and Permanent PLC v Dunne and ILP v Dunphy* a judgment of the Supreme Court of 15th may 2015.[2015] IESC 46. The Court considered a number of previous authorities on the code, *Zurich Bank v. McConnon* [2011] I.E.H.C. 75, *Stepstone Mortgage Funding Limited v. Fitzell* [2012] I.E.H.C. 142 and *Irish Life and Permanent Plc v. Duff* [2013] I.E.H.C. 43.

5.22,23, and 24 of the judgment stated,

"It should be emphasised that the current function of a court in considering a case in which a lender seeks possession against a borrower is to determine whether, as a matter of law and on the evidence, the conditions which entitle the relevant lender to possession have been shown to exist. A court is not, on the law as it currently stands, given any general jurisdiction to consider whether the actions of a lender might be considered, by reference to whatever criteria one might like to apply, to be reasonable or fair. The problematic legal issue which arises in this case stems from the very fact that the Oireachtas did not choose, in the context of empowering the Central Bank to make binding codes, to specify whether the courts were to have any particular role in applying the provisions of such a code to affect what would otherwise be the ordinary legal rights and obligations arising between a lender and a borrower. It is the silence of the legislation that gives rise to the issue with which this Court is now concerned. If it is considered desirable, as a matter of policy, to give to the courts a wider jurisdiction in the context of repossession cases which would allow the Court to have a role in deciding the reasonableness or otherwise of the conduct of a lender, then it seems to me that clear legislation would be needed which conferred that role on the courts and which specified the criteria to be applied by the courts in exercising any jurisdiction thus conferred.

5.23 It would, indeed, be a very new type of jurisdiction for the courts to exercise, but if the Oireachtas wish the courts to exercise such a jurisdiction, then it should be clearly conferred, and its parameters should be clearly defined. In that context, it is worth noting that the jurisdiction conferred on the Financial Services Ombudsman to consider a much wider range of factors in assessing the conduct of regulated financial institutions is now well established. The remit, in that regard, of the Financial Services Ombudsman is much wider than the remit of the courts which, as I have been at some pains to point out, currently does not extend beyond determining whether a legal right to possession has arisen. In the absence of there being some legal basis on which it can be said that the right to possession has not been established or does not arise, then the only role which the Court may have is, occasionally, to adjourn a case to afford an opportunity for some accommodation to be reached.

5.24 It does not seem to me, therefore, that the statutory policy of the 1989 Act and the Code-making powers contained therein is such that same is intended to, as it were, by the backdoor, create a whole new jurisdiction for the courts in which the court would be required to assess in some detail the type of engagement entered into between a financial institution and a borrower who is in sufficient arrears to enable that financial institution, as a matter of law, to seek possession. In such circumstances it seems to me that criterion 3(b) of the test set out in *Quinn v. I.B.R.C.* would lean heavily against implying that the courts have any role in declining possession in cases other than where the breach of the Code alleged is a failure to abide by the moratorium."

34. The Respondent did operate the code. This Court accepts that the offers made by it were narrow in focus by confining relief to a reduction in monthly payments for short periods of time. The Respondent never agreed to longer term restructuring, or more sensible long term relief. The Appellants never faced the reality that they were insolvent and unable to meet their debt responsibilities.

The Respondent did not lose any right to bring proceedings by engaging during the proceedings with the Appellants, by requesting them to complete another financial statement and issuing a restructuring offer, the last one in my opinion being quite a cynical offer by the Respondent seeking a greater monthly payment than the original monthly instalment. The Respondent's solicitors at all times maintained the right of the Respondent to continue the proceedings.

The Respondent is entitled to an order for possession. The Court will place a stay on the complete order not just its execution for a period of 6 months to enable the Appellants to consider the insolvency process.