

THE HIGH COURT

[2010 No. 205 S.P.]

BETWEEN/

STEPSTONE MORTGAGE FUNDING LIMITED

PLAINTIFF

AND

ALAN CLARKE AND URSULA CLARKE

DEFENDANTS

JUDGMENT delivered by Mr. Justice Michael White on the 15th January 2015.

1. This is an application for the possession of property at 47 Dunard Road, Crumlin, Dublin 12, initiated by special summons of the 24th March, 2010. The matter was heard on affidavit on the 10th October, 2014 and judgment was reserved.
2. The Defendants are joint owners of the property 47 Dunard Road, Crumlin, Dublin 12. On the 14th November, 2007 they signed a deed of mortgage in favour of the Plaintiff which was registered in the Registry of Deeds on the 2nd October, 2008. The Defendants borrowed a sum of €300,000 with an APR of 9.74% over thirty five years. The monthly instalments at the initiation of the mortgage were €2,313.93 a month.
3. Unfortunately arrears began to accrue on the mortgage from quite early on commencing on the 1st June, 2008.
4. At the 2nd February, 2009 arrears of €11,370.56 had accrued.
5. From the 1st June, 2008 when arrears first accrued, the Defendants could never maintain the monthly mortgage instalments due.
6. There were quite a number of agreements entered into between the Plaintiff and the Defendants on alternative arrangements to discharge the mortgage all of which were ultimately unsuccessful. The Defendants' economic circumstances had drastically changed from 2008 onwards and the business they had operated eventually closed in 2012. Both Defendants are unemployed at present and have five children all of whom reside in the family home, and a number of them are still dependant on the Defendants.
7. At the commencement of proceedings on the 24th March, 2010 arrears on the mortgage had amounted to €32,579.72.
8. Since the issue of proceedings the case has been listed in the Master's Court on seventeen occasions and was eventually transferred to the Chancery List on the 3rd July, 2013 and has been listed in the Chancery Special Summons List on five different occasions to date. During that period of time a lot of opportunities have been offered to the Defendants to see if the arrears and the monthly mortgage payments could be addressed. The undisputed present situation is that the Defendants cannot meet the monthly instalments due on foot of the mortgage, nor can they discharge any of the arrears.
9. On the 14th June, 2013, the Plaintiff offered an option to the Defendants of selling the property and writing off any remaining balance due on the mortgage thereafter after the net purchase price was credited to the mortgage account. The Defendants declined this offer, as they were concerned, due to the length of Dublin City Council's housing waiting list and the state of the private rented market, they would be rendered homeless.
10. The Plaintiff has made consistent efforts pursuant to the Code of Conduct on mortgage arrears, to try and resolve the situation.
11. In May 2013, the Defendants made enquiries about the Mortgage to Rent Scheme which is a government initiative to help homeowners who risk losing their homes due to mortgage arrears. The scheme is an option for people who have been involved in a mortgage arrears resolution process with their lender.
12. Under the scheme a private housing agency would purchase the home at market value and the Defendants would become tenants of the housing agency. The Plaintiff has stated that it does not participate in the scheme which is disputed by the Defendants.
13. Mr. David Hall of the Irish Mortgage Holders Association wrote to the Plaintiff on behalf of the Defendants on the 2nd December, 2013 requesting that the Defendants be put forward for the scheme. In his affidavit of 7th April 2014 Mr Hall asserted that the Plaintiff did participate in the Mortgage to Rent Scheme.
14. The court has been presented on affidavit with a conflict of evidence as to the Plaintiff's participation in the Mortgage to Rent Scheme. Richard Harper a Director of the Plaintiff Company in his affidavit of the 29th April, 2014 asserts that the affidavit submitted on behalf of the Defendants sworn by David Hall is incorrect. He states that the Plaintiff does not nor has it ever offered the Mortgage to Rent Scheme to its borrowers, and what it has in place is a pilot scheme under which the Plaintiff has identified ten borrowers with whom it has taken steps to enter into a Mortgage to Rent Scheme to assess whether or not the Plaintiff would reconsider its policy in relation to the scheme going forward. Mr. Harper stated that the Mortgage to Rent Scheme process is extremely complicated, costly and takes a considerable amount of time and that in its current form is almost unworkable. He further stated that the overall figures for the scheme, was that out of 2,337 families nominated only 38 have been completed, and that Bank of Ireland and AIB have only completed one such transaction each.
15. Mr. David Hall director of the Irish Mortgage Holders Organisation in an affidavit sworn on the 23rd May, 2004 has stated that the Plaintiff does offer the Mortgage to Rent Scheme and has offered it to particular borrowers and more importantly it was offered at a time when the Defendants requested they be considered for the scheme. He stated that the idea of a pilot offer is not envisaged by the Code of Conduct on mortgage arrears, as this would open the possibility of financial institutions being able to cherry pick between equally eligible borrowers.

16. Apart from the conflict of fact between the parties, it has been urged on the court, that as a matter of law the Plaintiff has a duty pursuant to the Code of Conduct on Mortgage Arrears 2013 to explore the Mortgage to Rent Scheme with the Defendants. The Plaintiff argues that there is no such obligation placed on the Plaintiff by the Code of Conduct.

The Legal Principles.

17. Pursuant to Section 117 of the Central Bank Act 1989 the Bank may draw up a code of practice for licence holders which has the force of law.

18. The Section states:-

“(1) The Bank may, after consultation with the Minister, 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.

(2) In drawing up codes of practice the Bank shall have regard to

(a) the interest of customers and the general public, and

(b) the promotion of fair competition in financial markets in the State.

(3) The Bank may –

(a) require any licence holder or other person supervised by it to provide all relevant information to the Bank to enable the Bank to satisfy itself as to compliance with the code by such licence holder or other person,

(b) issue a direction in writing to such licence holder or other person to comply with practices specified in the direction where this is necessary, in the opinion of the Bank, to secure observance of the code.

(4) (a) Any licence holder or other person supervised by the Bank who fails to provide information in accordance with subsection (3)(a) or to comply with a direction under subsection (3)(b) shall be guilty of an offence and shall be liable—
(i) on summary conviction to a fine not exceeding £1,000, or

(ii) on conviction on indictment to a fine not exceeding £25,000.

(b) Where a person has been convicted of an offence by virtue of paragraph (a) of this subsection and, after the conviction, the failure to provide information or to comply with the direction, as the case may be, continues, the person shall be guilty of contravening this section on every day on which the contravention continues after that conviction and for each such offence he shall be liable –

(i) on summary conviction to a fine not exceeding £100, or

(ii) on conviction on indictment to a fine not exceeding £2,500.

(5) In this section ‘practices’ includes procedures.”

19. This has been reinforced by a number of decisions of this Court.

20. In *Stepstone Mortgage Funding Limited v. Peter and Joan Fitzell* [2012] 2 I.R. at p. 318, a judgment of Laffoy J. at paragraph 29 stated:-

“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.”

21. This judgment was followed by Mr. Justice Hogan in *Irish Life and Permanent PLC v. Malcolm and Susan Duff* [2013] IEHC 43, Judgment of the 31st January, 2013 when Hogan J. at paragraph 69 stated:-

“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.”

22. The issue to be determined by the court is the right of the Plaintiff to recover possession of the property in the absence of any offer by the Plaintiff to explore the Mortgage to Rent Scheme and its application to the Defendants. That depends on the

interpretation the court gives to paragraph 39 of the Code of Conduct on Mortgage Arrears 2013 effective from the 1st July, 2013.

23. The court is of the opinion that notwithstanding the proceedings were issued on the 24th March 2010, this version of the Code does apply to the proceedings, as they were still current at the promulgation of this revised Code and an order for possession had not been granted, nor had the issues in dispute been heard by the court.

24. Paragraph 39 of the Code states:-

"In order to determine which options for alternative arrangements are viable for each particular case, a lender must explore all of the options for alternative repayment arrangements offered by that lender. Such alternative repayment arrangements may include:

- a) interest only repayments on the mortgage for a specified period of time;
- b) permanently reducing the interest rate on the mortgage;
- c) temporarily reducing the interest rate on the mortgage for a specified period of time;
- d) an arrangement to pay interest and part of the normal capital amount for a specified period of time;
- e) deferring payment of all or part of the scheduled mortgage repayment for a specified period of time;
- f) extending the term of the mortgage;
- g) changing the type of the mortgage;
- h) adding **arrears** and interest to the principal amount due;
- i) **equity participation**;
- j) warehousing part of the mortgage (including through a **split mortgage**);
- k) reducing the principal sum to a specified amount; and
- l) any voluntary scheme to which the lender has signed up e.g. Deferred Interest Scheme."

25. In Chapter 2 Definitions Mortgage to rent is defined. The definition states:

"Mortgage to rent: means where the **borrower** voluntarily allows the lender to take possession of the primary residence, and the borrower becomes a tenant in that **primary residence** and this includes the situation where the lender sells the **primary residence** to a third party and the **borrower** is a tenant of that third party."

26. The important words are "a lender must explore all of the options for alternative repayment arrangements offered by that lender".

27. Mortgage to rent clearly comes within the ambit of a voluntary scheme set out at sub paragraph l, of paragraph 39. It has to be a voluntary scheme to which the lender has signed up.

28. On analysing "a Guide to Mortgage to Rent Scheme" it is clear that it is not a mandatory scheme. I imply that, from the answers to the frequently asked questions at paragraph 15 of the guide question A states "Can I apply for the scheme without the consent of my lender?", the answer is "No, your lender must offer the scheme to you. You may approach your lender to seek inclusion of the scheme". Question E "What can I do if the lender refuses my request for inclusion in the scheme?" Answer "You can appeal a decision to your lender's Appeals Committee which was established under the guidance of the Central Bank".

29. If the Plaintiff has signed up to the Mortgage to Rent Scheme there is an obligation to explore all options for alternative repayment arrangements including the Mortgage to Rent Scheme. If the Plaintiff has not signed up for the scheme, there is no obligation on the Plaintiff to explore this option with the Defendants.

30. There is no explanation in the Code as to how a lender signs up to any voluntary scheme.

31. It is essential that the Plaintiff demonstrates to the Court's satisfaction that it has not signed up to the voluntary scheme of "Mortgage to Rent" and that the engagement with the borrowers set out in Mr. Harper's Affidavit has the character of a pilot scheme only. If it is a pilot scheme the Plaintiff has not been in breach of the Code of Conduct on Mortgage Arrears 2013 and thus the Defendants cannot resist an order for possession.

32. If the situation is otherwise and the Plaintiff has participated in the scheme, it is bound to explore the option of the Mortgage to Rent Scheme with the Defendants.

33. The appropriate way for the Plaintiff to deal with this matter is by deposing another Affidavit exhibiting suitable documentary evidence showing that it is a pilot scheme.