THE HIGH COURT

[2016 No. 185 C.A.]

BETWEEN

PERMANENT TSB PLC FORMERLY

IRISH LIFE & PERMANENT PLC

PLAINTIFF

AND

SEAN FOX AND BERNADETTE FOX

DEFENDANTS

JUDGMENT of Ms. Justice Faherty delivered on the 20th day of April, 2018

1. This is the defendant's appeal of the order of the Circuit Court that the plaintiff recover possession of all that and those the property comprised in folio 94681F Co. Dublin, more commonly known as 2 Glenlyon Grove, Ballycullen Road, Knocklyon, Dublin 16.

Background

2. By letter of 21st September, 2006, the plaintiff agreed to make a loan facility to the defendants, namely a variable rate home loan of €270,000 repayable by monthly instalments over 27 years. On 29th September, 2006, the defendants acknowledged their acceptance of their loan. On 27th October, 2006, the sum of €270,000 was advanced to the defendants by the plaintiff. The acceptance letter stated that the defendants accepted the offer on the terms and conditions set out in the Letter of Approval, the General Mortgage Loan Approval conditions and the Permanent TSB mortgage conditions. It also stated that the said terms and conditions had been fully explained to the defendants by their solicitor. The defendants' signatures were witnessed by Eamonn M. O'Beirne, solicitor.

3. By way of security for the loan, the defendants executed a Deed of Mortgage on 27th October, 2006 over the premises. The defendants' signatures were witnessed by Mr. O'Beirne. The charge was duly registered as a burden on folio 94681F in favour of the plaintiff on 3rd November, 2006.

4. Pursuant to para. 7.1 of the "Mortgage Conditions", it was a term of the mortgage contract that if the defendants defaulted in the making of two monthly repayments or for two months in the payment of any other monies payable under the mortgage, the total debt would become immediately payable to the plaintiff.

5. In his affidavit sworn 20th November, 2014, Mr. James O'Brien, Assistant Manager with the plaintiff, avers that the defendants defaulted in the terms of the loan facility and in particular that the defendants have failed to make repayments on the loan since on or about 28th October, 2014. At the time of the swearing of Mr. O'Brien's affidavit, the arrears stood at €26,327.95.

6. On 6th October, 2014, the plaintiff wrote to the defendants requesting the discharge of the mortgage debt, then standing at €261,862.07.

7. By letter dated 16th October, 2014, the plaintiff's solicitor wrote to the defendants calling on them to deliver up vacant possession of the mortgaged premises within seven days, in default of which the plaintiff would issue proceedings for possession.

8. At para. 15 of his affidavit, Mr. O'Brien avers that by virtue of the repeated default on the part of the defendants, the plaintiff is desirous of exercising its statutory power of sale conferred by the provisions of the Conveyancing Acts 1881 to 1911.

9. At para. 18 he avers as follows:

> "I say that the Plaintiff is fully in compliance with the [Code of Conduct on Mortgage Arrears (CCMA)] in that since the Defendants have gone into arrears we have at all times pro-actively encouraged the Defendants to engage with the Plaintiff regarding the Defendants financial difficulties and kept in regular written contact with them and we have made every reasonable effort to put in place an alternative repayment arrangement with them, which has unfortunately not led to a successful outcome."

10. It is further averred that the defendants have no bona fide defence to the plaintiff's claim either at law or on the merits.

11. On 23rd June, 2015, the defendants jointly swore a replying affidavit. They averred therein to the fact of the first defendant having been made redundant from his job in October, 2010, as a result of which his net income was reduced from €700 per week to €210 per week. For a period, the first defendant's redundancy money discharged the monthly mortgage repayments.

12. It is not disputed that following the first defendant's redundancy the defendants made contact with the plaintiff seeking a forbearance arrangement as a result of which they were given a moratorium on mortgage repayments for three months.

13. Between 1st February, 2011 to 1st October, 2013 the defendants were given six forbearance arrangements which the defendants say they had adhered to and honoured. This is not disputed by the plaintiff.

14. As set out in the defendants' affidavit, in or about May, 2013, the first defendant was beset with serious health problems as a result of the stress of his not being able to find work. As a consequence, the defendants were not able to make any mortgage repayments between January, 2014 and August, 2014. The defendants aver that at this time they were dealing with demands for payment in respect of secondary debt. With assistance their secondary debt was restructured and they made cuts to their household budget to create conditions for mortgage repayment.

15. From September, 2014 they recommenced monthly mortgage repayments of €300 which were increased to €500 per month in January, 2015. The defendants say that they were unable to increase these repayments any further and duly sought a further forbearance arrangement from the plaintiff. They aver that the plaintiff was unwilling to agree to any further arrangement.

16. The defendants aver that they did not set out to default on their mortgage repayments but that their situation was foisted on them through unemployment and ill health.

17. The defendants refute Mr. O'Brien's suggestion that they did not actively engage with the plaintiff. Specifically they state that they "upheld and adhered to each and every Forbearance Arrangement afforded us between February 2011 to October, 2013" and that subsequent application for a further arrangement was "rejected out of hand on every occasion".

18. As of June, 2015, the defendants were urging the Circuit Court to allow them to apply for the Mortgage to Rent ("MTR") scheme which, they averred, would allow them to continue to live in their family home. The defendants were contending that their property valuation satisfied the criteria for the MTR scheme.

19. On 18th September, 2015, Ms. Niamh McGee, Assistant Manager with the plaintiff, swore an affidavit acknowledging the six forbearance arrangements which were in effect from February, 2011 to October 2013.

20. In response to the defendants' contention that the plaintiff refused to enter any further forbearance arrangement, Ms. McGee avers as follows:

> "I say that as of the 1st day of July, 2013, the Central Bank of Ireland revised the [CCMA]. I further say that in line with the revised CCMA requirements, the Plaintiff was unable to offer the Defendants a further forbearance agreement as same was deemed to be an unsustainable Alternative Repayment Arrangement."

21. It is acknowledged by the plaintiff that the defendants sought to enter into forbearance arrangements in the form of a Standard Financial Statement ("SFS") on 2nd December, 2013, 14th October, 2014 and 20th March, 2015.

22. Ms. McGee avers that the outcome of the December, 2013 SFS was the plaintiff's offer to assist the defendants in an "Assisted Voluntary Sale". This offer was declined by the defendants.

23. Thereafter, the plaintiff wrote to the defendants on 6th March, 2014, advising that the plaintiff had not received the defendants "Alternative Repayment Arrangement documents" and stating that the deadline for the submission of same was by then overdue. The defendants were advised that if no contact was received the plaintiff would take the view that the defendants had decided not to enter into an Alternative Repayment Arrangement. The letter continued:

> "As you have not accepted this Offer within the agreed timeline, you are now considered outside the Mortgage Arrears Resolution Process (MARP). Your account will no longer benefit from the protection of the MARP and you are required to repay any outstanding arrears and return to your original contractual monthly repayments."

24. The defendants were also advised that "[l]egal proceedings may commence three months from the date of this letter or eight months from the date the arrears arose on your account, whichever date is the later." In order to avoid legal action, the defendants were requested to talk to the plaintiff about other options that may be available to them.

25. Ms. McGee avers that on 14th October, 2014, the defendants' next SFS was assessed by the plaintiff. The loan was deemed to be unsustainable. On 1st December, 2014, the defendants' authorised third party advisor wrote to the plaintiff advising, *inter alia*, that the defendants would be submitting a further SFS within ten days from the 1st December, 2014. The letter advised that the defendants were making efforts to cut their living expenses and hoped to get assistance from family members with the mortgage payment.

26. On 15th April, 2015, in response to the 20th March, 2015 SFS, the plaintiff, through its solicitor, wrote to the defendants advising that it was unable to offer them a further alternative repayment arrangement as the SFS disclosed that there was insufficient disposable income available to service the mortgage repayments under any of the alternative repayment arrangements offered by the plaintiff. The plaintiff offered to adjourn the Circuit Court proceedings for a period of six months to allow the defendants to continue with their payments of €500 per month "on a without prejudice basis". The defendants were also advised that an option available to them at that time was a "Voluntary Surrender".

27. At para. 17 of her affidavit sworn 18th September, 2015, Ms. McGee refuted the defendants' contention that the MTR scheme was an option for them. According to Ms McGee, the property was not in negative equity and therefore did not qualify under the MTR guidelines. She listed the market valuation of the property as €320,000, with the balance due to the plaintiff standing at €269,342.66. She goes on to aver:

> "I cannot accept the averment of the Defendants that the Plaintiff is "hell bent on re-possessing" the secured property. I say as is demonstrated by the foregoing that the Plaintiff has made every reasonable effort to try to reach a sustainable solution with the Defendants, however, the said efforts have been unsuccessful. I say that there is no sustainable long term solution available, the Plaintiff has been left with no alternative but to issue proceedings seeking possession of the secured property.
>
> …
>
> I say that the Defendants are currently making monthly repayments in amount of €500. I further say and believe that a monthly repayment of €500 is insufficient to meet the repayments as per the terms of the loan facility. … I say and believe that a monthly repayment of €500 will only continue to allow the Defendants to accumulate further debt as further interest continues to accrue on the … principal figure."

28. On 22nd January, 2016, the Money Advice and Budgeting Service ("MABS") wrote to the plaintiff's solicitors on behalf of the defendants advising that they were endeavouring to find an acceptable repayment solution. This was responded to by the plaintiff on 27th January, 2016, wherein it requested receipt of the defendants' SFS so that the plaintiff could conduct an assessment of their eligibility for the MTR scheme. This correspondence came about in the wake of the Circuit Court having adjourned proceedings in early 2016 to allow the defendants investigate whether they could meet the new criteria under the scheme.

29. On 15th February, 2016, the plaintiff wrote to MABS noting that the defendants wished to obtain an interim payment plan of €550 a month while MABS looked into their eligibility for the MTR scheme. MABS were advised that as the mortgage property was in positive equity and under accommodated, the defendants would not qualify for the scheme.

30. At the time of swearing of Ms. McGee's affidavit of 25th February, 2016, the arrears on the defendants mortgage stood at €43,279.86, with a total sum due on foot of the loan account being €272,208.58.

31. The order for possession was made by the Circuit Court on 26th May, 2016, with a stay of six months thereon.

32. The defendants lodged their appeal on 24th November, 2016. By Order of this Court on 6th March, 2017, the defendants were given liberty to adduce further evidence for the purposes of the appeal.

33. On 17th May, 2017, the first defendant swore a supplemental affidavit.

34. At para. 8 thereof, he refers to p. 3 of the letter of mortgage approval which issued on 21st September, 2006, which provides, *inter alia*, under "Special Conditions" that "[u]nless otherwise agreed … General Mortgage Loan Approval Condition 1.17 [Mortgage Protection]" applied to the defendants' loan. The first defendant avers that he did not have sight of the general mortgage loan approval conditions, nor of condition 1.17 specifically. He avers that "it would appear from the above that this may refer to mortgage protection. I say and I am advised that in circumstances where your deponent is under a disability and where I do not have the benefit of payment protection insurance for my mortgage the plaintiff's adherence to, or waiver of the said condition may be relevant to the grant of discretionary relief by this Honourable Court." It is further contended that the plaintiff's letter of 6th October, 2014 failed to identify a specific event of default.

35. At para. 9, the first defendant takes issue with the plaintiff's failure to provide the Court with details as to how the calculation of the applicable interest rate (being a variable rate) was calculated.

36. The first defendant further avers that the lending history in relation to the mortgage is relevant to the Court's consideration. He states as follows:

> "…the mortgage the subject matter of the within proceedings came about by way of sequential re-financing arrangements which involved a number of loans. Our original mortgage dated from 1993 and was 'topped up' in 2000/2001 and again in 2006. In particular, I say that, as is disposed above, your deponent previously worked as a publican and held the lease over Botanic House, Glasnevin. I say that when this venture proved unsuccessful I was left with substantial personal debts. I say that these debts were consolidated by way of mortgage in or about the year 2000 or 2001, and the said debts came to form part of the monies now outstanding in respect of 2 Glenlyon Grove."

37. He goes on to state:

> "Moreover, I say that the mortgage the subject of the within proceedings was one which was contracted via the offices of a mortgage broker, who acted as an intermediary. I say that this is not readily apparent from the pleadings herein, although it is indirectly evident from the branch address used on the Letter of Approval exhibited to the Affidavit of James O'Brien … I say, and am advised that this should be averred to and that the plaintiff should properly satisfy the Court that the provisions of the Consumer Credit Act 1995, the Consumer Protection Code, and all other relevant provisions in force at the time of the mortgage was entered into were fully complied with together with the basis of knowledge for same."

38. Ms. McGee responded to the first defendant's contentions in an affidavit sworn 21st June, 2017.

39. With regard to the first defendant's reference to condition 1.17 of the mortgage conditions, she avers that that condition has been complied with and that in respect of each of five mortgages which the defendants had over the years with the plaintiff, mortgage protection insurance was put in place. She avers that insofar as the first defendant refers in his affidavit to payment protection insurance, which is something different, such insurance is not referred to in condition 1.17 and was not a requirement made by the plaintiff of the defendants.

40. Ms. McGee refutes the defendants' contention that the letter of demand of 6th October, 2014 failed to identify a specific event of default. She avers that "the letter in question informs the Defendants that the total amount outstanding is €261,862.07 and calls on them to pay that amount within a specified timeframe." She further avers that the letter advised the defendants of the gravity of the matter and set out a number of options should the defendants wish to seek assistance with their repayments.

41. Ms. McGee goes on to dispute the first defendant's contentions regarding the rate of interest and avers that the rate altered in accordance with the terms and conditions of the loan contract.

42. In response to the first defendant's contention that the plaintiff failed to advise the Court whether the provisions of the Consumer Credit Act, 1995 were complied with, Ms. McGee avers as follows:

> "I … say that the Plaintiff has complied with all relevant statutory provisions in its dealings with the Defendants, many of which are averred to in the Affidavits which were before the Circuit Court. I say that where clients are represented by an intermediary all the steps taken to put in place the loan and mortgage [are] completed through the intermediary. I say that I have little doubt that the [defendants] were fully advised throughout the process by that intermediary, but the Plaintiff is of course is not privy to the specifics of same".

Considerations

44. In essence, on foot of the pleadings, and the submissions advanced on behalf of the defendants, five issues arise for consideration in this case. They are considered in turn.

The alleged failure of the plaintiff to satisfy the Court that the provisions of the Consumer Credit Act, 1995 have been complied with

45. Section 116 of the Consumer Credit Act, 1995 provides in part as follows:-

> "(1) A person shall not engage in the business of being a mortgage intermediary unless—
>
> (a) He is the holder of an authorisation ("a mortgage intermediaries authorisation") granted for that purpose by the Director, and
>
> (b) He holds an appointment in writing from each undertaking for which he is an intermediary.

(2) A holder of an authorisation shall only engage in the business of being a mortgage intermediary in the name specified in the holder's authorisation."

46. Counsel for the defendants submits that where the plaintiff is seeking to act on foot of a loan negotiated by a mortgage intermediary, the plaintiff must satisfy the Court that the mortgage intermediary complied with the provisions of s. 116. It is contented that this proof is not before the Court. Counsel further submits that what is deposed to in Ms. McGee's affidavit sworn 21st June, 2017 is not sufficient for this purpose. It is submitted that Ms. McGee's averment puts in question the extent to which the defendants' rights were protected by the plaintiff in 2006, when the mortgage was entered into. In this regard, counsel referred the Court to the Consumer Protection Code, dated August 2006, issued by the Financial Regulator.

47. Para. 24 of the Code provides:-

"Before providing a product or service to a consumer, a regulated entity must gather and record sufficient information from the consumer to enable it to provide a recommendation or a product or service appropriate to that consumer..."

Para. 30 provides:-

"A regulated entity must ensure that, having regard to the facts disclosed by the consumer and other relevant facts about the consumer of which the regulated entity is aware:

(a) any product of service offered to a consumer is suitable to that consumer;

(b) where it offers a selection of product options to the consumer, the product options contained in the selection represent the most suitable from the range available to the regulated entity; or

(c) Where it recommends a product to a consumer, the recommended product is the most suitable product for that consumer."

Para. 51 of the Code provides that where conflicts of interest arise and cannot be reasonably avoided, a regulated entity may undertake business with or on behalf of a consumer with whom it has directly or indirectly a conflicting interest, only where the consumer has acknowledged in writing that he or she is aware of the conflict of interest and that he or she still wants to proceed.

Reliance is also placed on para. 53:-

"A regulated entity must not enter into a soft commission agreement unless such agreement is in writing. Any business transacted under a soft commission agreement must not conflict with the best interests of its consumers…"

48. Under the heading "Mortgages", the Code provides:-

"10. Where a mortgage is offered to a consumer for the purpose of consolidating other loans of credit facilities, the regulated entity must provide the consumer with a written indicative comparison of the total cost of continuing with the existing facilities and the total cost of the consolidated facility on offer.

14. Before a mortgage can be drawn down, a mortgage intermediary must submit to a mortgage lender a signed declaration that such mortgage intermediary has had sight of all original supporting documentation including bank statements, P 60/certificate of earnings and other supporting documentation evidencing the consumer's identity and ability to repay."

49. Counsel for the defendants submits that the Code required the plaintiff to obtain a signed declaration from the defendants' mortgage intermediary verifying the defendants' ability to repay the loan. It is submitted that had the plaintiff complied with the Code, it would have in its possession a signed declaration from the mortgage intermediary. It is contended that the failure to put such declaration before the Court should debar the plaintiff from the entitlement to exercise a right to possession of the defendants' premises. Counsel submits that the non-compliance in the instant case equates with a situation where a lending institution would be debarred from pursuing an order for possession by virtue of a failure on its part to abide by the moratorium provisions of the CCMA promulgated under s. 117 of the Central Bank Act, 1989, as discussed in *Irish Life and Permanent plc. v. Dunne* [2015] IESC 46.

50. The plaintiff submits that there is no merit in the defendants' counsel's argument. Counsel asserts that the height of the defendants' argument is that the plaintiff should have satisfied itself as to the mortgage intermediary's bona fides in 2006 at the time of the mortgage agreement.

51. I am not persuaded that the defendants' submissions constitute an arguable basis upon which to deny the plaintiff the order sought in these proceedings. In the first instance, I note that, other than stating that the plaintiff should satisfy the Court that the provisions of the 1995 Act and the Consumer Protection Code were complied with, the first defendant makes no specific criticism of his mortgage intermediary. Furthermore, the first defendant does not allege on affidavit that the provisions of paras. 24 or 30 of the Consumer Protection Code were not met, or that the provisions of paras. 51 and 53 were breached. Equally, the first defendant does not allege on affidavit that the fact of the first defendant's business debts having been consolidated in 2006 as part of a composite mortgage of €270,000 put them at a specific disadvantage that would otherwise not have arisen if the debts had not been consolidated.

52. Furthermore, while the mortgage intermediary's declaration, as referred to in the Consumer Protection Code, has not been put before the Court, I am not convinced that its absence is sufficient to debar relief in this case. The defendants do not make the case that their circumstances in 2006 were such that they could never meet the mortgage repayments. The fact of the matter is that they were in a position to make repayments on their loan from 2006 to 2010. It was only due to the first defendant's redundancy in 2010, and subsequent ill health, that they were unable to comply with the terms of the mortgage agreement. Moreover, between 2010 and 2013, they were in a position to sustain the repayments on foot of the moratoria arrangements. While it is accepted that under the 1995 Act and the 2006 Code there is an onus on the plaintiff to be vigilant, the reality is that the defendants had the ability to repay the loan in 2006 and thereafter, which is demonstrated by their repayment history until 2010 and to a lesser extent until 2013.

Alleged contributory negligence on the part of the plaintiff
53. Albeit that the defendants do not say that contributory negligence can arise directly in respect of claims for possession, counsel for the defendants urges (albeit acknowledging that it is novel) that the defendants should be entitled to avail of the provisions of s. 34 of the Civil Liability Act, 1961 ("the 1961 Act"). He argues that the Court should take cognisance of the fact that the plaintiff's claim for possession is premised on the sum of €293,570 being due and owing by the defendants. It is thus contended that this factor brings the within matter within the scope of the 1961 Act. It is the defendants' contention that there was a want of care on the part of the plaintiff in 2006 in or about the assessment of the defendants' ability to repay the monies lent to them. Counsel for the defendants argues that the Court should also have regard to the fact that the mortgage came about by way of sequential re-financing arrangements involving a number of loans of the first defendant which were transferred into a joint secured mortgage. Counsel submits that it is unfair to allow the plaintiff to obtain possession if the Court agrees that the defence of contributory negligence is open to the defendants. It is further submitted that notwithstanding that the defendants' circumstances are not on all fours with the circumstances which pertained in *KBC Bank Ireland Plc v. BCM Hanby Wallace* [2013] 3 I.R. 759, the Court should take cognisance of the holding of the Supreme Court, to wit, "[w]*here a bank's want of care was also a cause of loss, because it caused monies to be paid out to persons who were unable to pay, a finding of contributory negligence against the bank would be justified*."

54. Counsel for the plaintiff denies the applicability of s.34 of the 1961 Act to the defendants' circumstances and contends that even if an issue of contributory negligence could arise, same was not due to any want of care on the part of the plaintiff in or about the conclusion of the mortgage agreement.

55. I am satisfied that in the circumstances of the present case and given the nature of the proceedings, a defence of contributory negligence is not open to the defendants. In any event, it is worth noting that no issue of an inability to pay arose until 2010. Moreover, the factors which led to the inability to repay the mortgage were outside of the control of the plaintiff.

Alleged unfair terms in the mortgage contract
56. It is contended by the defendants that there are a number of unfair terms in the loan contract in respect of which the Court, even of its own volition, is obliged to take cognisance, pursuant to Counsel Directive No. 93/13 EEC, transposed into law in this jurisdiction by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, S.I. No. 27/1995 ("the Unfair Terms Regulations"). In particular, counsel points to Regulation 3(2) of the Unfair Terms Regulations, which provides:

> "For the purpose of these Regulations a contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent."

57. Reliance is placed by the defendants on the decision of the ECJ in joint cases C-240/98 to C-244/98 – *Océano Groupo Editorial and Salvat Editores* and the decision of Barrett J. in *AIB v. Counihan* [2016] IEHC 752.

58. It is submitted that the variable rate of interest term which was levied on the defendants is an unfair term. Counsel argues that this is particularly so when the variable interest term is viewed against the historic low European Central Bank rate. Counsel points to the interest rates to which the defendants were subject over the course of the forbearance arrangements. These rates varied from 5.440% to 4.690%. It is submitted that while the loan agreement contains some description of how the variable rate was to be assessed, there remains a degree of opaqueness in respect of the rate. In this regard there was an imbalance between the parties from the outset. It is submitted that if the defendants owed a lower amount, based on lower interest rates, they may have been able to meet their repayment obligations. Counsel also maintains that the defendants are not in a position to challenge the figures relied on by the plaintiff.

59. By way of a further example of an unfair term, counsel points to condition 7.1 of the mortgage conditions which provide that the mortgage debt becomes repayable in the event of a default of two months on the mortgage repayments.

60. Counsel for the plaintiff disputes the defendants' contentions with regard to alleged unfair terms in the mortgage contract. The plaintiff does not accept that it was not open to the defendants to challenge the figures relied on by the plaintiff. Had they done so, the plaintiff would have done a trawl of all relevant figures.

61. It is also submitted that there is no basis to the defendants' contention about unfairness in the variable interest rate term, which the defendants agreed to.

62. Overall, I am not persuaded that the defendants have established an arguable case under the Unfair Terms Regulations. To deal firstly with the variable rate issue. From the outset, the loan offer made it clear that it was a variable home rate loan. As of the date of loan offer the variable rate was said to be 4.35% and the defendants were made aware that their monthly repayments of the €270,000 loan, based on that rate, was €1417.71. Moreover, I note that at p.2 of the Letter of Approval, under the heading "Important Information", the defendants were advised that the effect on their monthly instalment of a 1% increase would be an extra €159.16 per month. I am satisfied therefore that at all relevant times, the defendants knew, and were forewarned, that they were obtaining the monies on the basis of a variable rate which could fluctuate from time to time.

63. It is also of note that the first defendant, in his most recent affidavit, does not allege he paid more by way of interest repayments than was provided for by way of the mortgage contract. As already stated, the reality of the case is that the defendants could fully meet the mortgage repayments until 2010. It was circumstances beyond the plaintiff's control, and indeed the defendants' control, namely the first defendant's redundancy and health problems, that led to the inability to pay. I have not been persuaded that the inability arose because of any frailty or imbalance in the mortgage terms.

64. I do not find any particular unfairness in clause 7.1 of the mortgage conditions, as alleged by the defendants. I am satisfied that the defendants were or should have been aware of this clause from the outset. The clause is set out in the Permanent TSB mortgage conditions, the acceptance of which formed part of the basis upon which the monies were being advanced by the plaintiff. Furthermore, the Court cannot discount the fact that the defendants signed the letter of loan approval and by doing so confirmed that their solicitor had "fully explained" the terms and conditions of the loan to them. In those circumstances, the Court has not been persuaded that any unfairness can be said to attach to clause 7.1.

65. It is further contended on the defendants' behalf that the rolling up of the first defendant's debts into a mortgage payable by both defendants was a bad deal for the defendants. While counsel for the defendants does not describe this as an unfair term of the mortgage, he submits that this created a significant imbalance between the parties. In aid of his submissions counsel cited *Muintir*

Skibereen Credit Union Limited v. Crowley and Hamilton [2015] IEHC 107. In that case, White J. refused to grant possession on the basis, *inter alia*, that the defendants' spouses in those cases, in circumstances where the premises in issue were family homes, had never been consulted about the loans which had been drawn down from the Credit Union.

66. Counsel for the plaintiff argues that the second defendant's circumstances are entirely distinguishable from those which prevailed in *Muintir Skibereen Credit Union v. Crowley and Hamilton*. This is so given that the second defendant was in fact a party to the loan agreement with the plaintiff and the mortgage was taken out in both the defendants' names.

67. While it would certainly appear to be the case that portion of the €270, 000 encompassed historic debts owed by the first defendant it is a fact that both defendants were parties to the loan agreement and the mortgage and charge. The defendants do not allege on affidavit that the second defendant was forced or coerced into agreeing to the consolidation that took place in 2006. Moreover, as the Court has already noted, the defendants had the benefit of access to a solicitor, both at the time of the acceptance of the loan and the creation of the charge. It seems to me, therefore, that there was opportunity for the defendants, either individually or jointly, to seek advice as to whether it would be prudent to avail of the loan offer. In those circumstances, I do not find that an arguable complaint has been made out on the question of an imbalance between the contracting parties. I am also satisfied that had they reason to so do, the defendants could have challenged the figures relied on the plaintiff, particularly where the defendants had the benefit of assistance from an authorised third party advisor and MABS in their dealings with the plaintiff.

Alleged failure of the plaintiff to satisfy the Court that there has been default on the part of the defendants
43. It is contended by the defendants that the plaintiff's letter of 6th October, 2014 failed to identify a specific event of default and as such the plaintiff is not entitled to an order for possession. Counsel for the plaintiff submits that there is no substance in the defendants' contention that the letter of demand of 6th October, 2014 fails to identify a specific event of default.

44. As regards the defendants' argument, I note the contents of Ms Magee affidavit sworn 21st June, 2017. At para. 7 thereof she states that the letter of 6th October, 2014 should not be read in isolation as it was issued at the end of a long period of engagement between the parties involving a number of payment moratoria. The cause of the periods of engagement was the fact that the defendants fell into arrears. She avers that as of 6th October, 2014, the arrears on the mortgage stood at €5,555.53, which placed the defendants in default as per para. 7.1 of the terms and conditions applicable to the mortgage loan. As a consequence the plaintiff issued the defendants with a number of letters outlining defaults and which culminated in a letter of 28th August, 2014 calling in the full amount of the loan. Having had sight of the letter of 28th August, 2014, I am satisfied that default on the part of the defendants has been established.

The defendants' particular circumstances
45. It is submitted that in light of the defendants' circumstances, in particular, the first defendant's inability to work, the fact of their having a dependant child and the likelihood of their becoming homeless if they lose their family home, the Court should exercise its discretion by not granting possession to the plaintiff. It is further contended that in exercising its discretion, the Court should take note of the conflicting proposals which emanated from the plaintiff at various times. In this regard, counsel for the defendants points to the plaintiff's letter of 6th March, 2014 wherein the plaintiff refers to the deadline for the defendants' submission of their alternative repayment arrangement having passed, yet the plaintiff's prior communication in December, 2013 to the defendants was to the effect that they were being asked to agree to an assisted voluntary sale of their home. Counsel for the defendants also makes the case that if the plaintiff wanted a sustainable solution it should have written down the defendants' debt. In all of those circumstances, counsel contends the Court should ask itself how substantial in fact was the plaintiff's offer of assistance to the defendants.

68. Counsel for the plaintiff contends that it has been established that there has been default in accordance with condition 7.1 of the mortgage agreement. It is contended that the plaintiff took all requisite steps before seeking an order for possession. Moreover, the plaintiff applied best practice in not calling in the loan when default first arose. The loan was only called in when significant arrears arose in respect thereof.

69. In all the circumstances of this case, and despite the defendants' entreaties and the enormous sympathy which the Court has for the defendants' predicament, I am satisfied that the plaintiff has made out its case for an order of possession. Accordingly, I am satisfied to dismiss the appeal and affirm the Order of the Circuit Court. However, given that the premises constitutes the family home of the defendants, I will hear submissions on the issue of a stay on the order for possession or the execution thereof.