Neutral Citation: [2015] IEHC 711

THE HIGH COURT

[2015 No. 1663 P.]

BETWEEN

KEN FENNELL

PLAINTIFF

AND

CON CREEDON AND PAMELA CREEDON

DEFENDANTS

JUDGMENT of Ms. Justice Murphy delivered the 9th day of November, 2015

1. These proceedings relate to a property which is the subject of a commercial mortgage between the defendants and EBS Limited. The plaintiff seeks an interlocutory injunction against the defendants restraining them, whether by themselves, collectively or individually, their respective servants or agents or anyone acting in concert with them or anyone having notice of the said order from:

> "(1.) …interfering with, obstructing, or in any other way preventing the Plaintiff from exercising his powers and functions as Receiver over the property identified in the Schedule hereto ("*the Property*");
>
> (2.) …interfering with, obstructing or in any other way preventing the Plaintiff from exercising his lawful power to enter upon and take possession of the Property."

The plaintiff also seeks:

> "(3.) An Order directing that the Defendants, their servants or agents, or any person having notice of the said Order to provide to the Plaintiff forthwith the keys, alarm codes, locks and all other security and access devices and equipment or information necessary to gain possession of the Property;
>
> (4.) An Order directing the Defendants, their servants or agents, to deliver forthwith to the Plaintiff all books and records held by them in relation to the Property to include, without prejudice to the generality of the foregoing, copies of all leases and licence agreements in respect of the Property;
>
> (5.) Such further or other Orders as this Honourable Court should deem appropriate in all the circumstances; and
>
> (6.) An Order providing for the costs of this application."

Factual Background

2. EBS Limited advanced a loan to the defendants of €4,510,000 by way of letter of amended loan offer of the 26th July, 2004. This replaced a prior letter of loan offer of 8th July, 2004. The loan was a two year interest only loan, granted for the purpose of applying it towards (i) the purchase of properties at 129 and 131 and at the rear of 127 Tritonville Road, Sandymount, Dublin 4, at a cost of €3,000,000; (ii) to carry out refurbishments thereto, (iii) to construct three apartments at the rear of 127-131 Tritonville Road at a cost of €790,000; and (iv) to grant an interest roll up facility of €240,000. The rate of interest applicable to the loan was a variable rate based on one month Euribor plus 2% per annum. The defendants were required to make monthly repayments comprising interest only which were to be based on this variable interest rate. The security for the loan was to comprise: (i) a first legal mortgage over the property at 129 Tritonville Road, Sandymount, Dublin 4; (ii) a first legal mortgage over the property 131 Tritonville Road, Sandymount, Dublin 4; and (iii) a first legal mortgage over the property at the site and rear of 127, 129 and 131 Tritonville Road, Sandymount, Dublin 4. The terms of the loan offer letter were accepted in writing and signed by the defendants' attorney on or about the 27th July, 2004.

3. By Deed of Mortgage/Charge for Private Borrower dated 9th August, 2004, between the defendants and EBS, the defendants as beneficial owners granted and conveyed unto EBS all the property of freehold tenure specified in the First Schedule to the Mortgage, to hold the same unto EBS in fee simple subject to the proviso for redemption thereafter contained.

4. The First Schedule to the Mortgage, which was expressly commercial in nature, referred to the properties secured under the mortgage including the property the subject of this application:

> *"ALL THAT AND THOSE the premises known as 131 Tritonville Road, Ballsbridge in the City of Dublin being the premises more particularly described in a Deed of Conveyance dated the 9th August, 2004 and made between Loughran Investments Limited of the one part and Con Creedon and Pamela Creedon of the other part."*

The mortgage was entered into as a requirement for a loan which EBS advanced to the defendants by way of the letter of amended loan offer of the 26th July, 2004.

5. The defendants moved into 131 Tritonville Road with their two daughters, four years later, in 2008, and have resided there since, although their eldest daughter has now left the home. The first defendant informed the bank of this fact by letter dated 24th September, 2008.

6. The terms of the loan were amended by way of letter on 18th March, 2009, such that the term and interest only period was extended by twelve months, with the loan balance becoming payable in full on 10th April, 2010.

7. In 2010 when the facility expired, discussions took place between the defendants and EBS. These continued throughout 2011. An amended loan offer letter dated 7th November, 2012, extended the term of the loan to 10th December, 2013, on the conditions, *inter alia*, that EBS would be provided with a sworn statement of affairs and that the properties at 129 Tritonvillle Road and Oasis Club, Casa 10, 29602, Marbella would be sold. The revised loan balance was stated as being €4,686,346.81 and monthly repayments were adjusted to be interest only.

8. By letter dated 29th June, 2011, EBS wrote to the defendants under the MARP process and enclosed a copy of the MARP information booklet, periodically issuing letters thereafter. By letter dated 24th September, 2013, EBS explained to the defendants that they would be deemed to be a "non co-operating borrower" unless they co-operated with EBS and provided information as set out in the letter within 20 business days. A further letter dated 6th November, 2013, stated that the defendants had then been classified to be non co-operating borrowers and that the protections of MARP no longer applied. A right of appeal against this decision was set out at the end of that letter.

9. By letter dated 11th November, 2013, the first named defendant contacted Philip Butler of EBS, expressing surprise at being classified as a non co-operating borrower given that the defendants had made *"immediate contact and inside the 20 days prior to and following the letter of the 24th of Sept and are still in meaningful discussions with your good self."* Mr. Butler averred, at para. 20 of his affidavit, that this letter was not received by EBS and no copy can be found in EBS's records. Mr. Butler averred that no appeal was received and in fact no further communication was received from the defendants regarding MARP.

10. By letter of demand dated 10th December, 2013, EBS demanded that the defendants pay the sum of €4,782,262.58, being the amount due in respect of the loan including interest and arrears. The loan was not repaid and no amounts in respect of it were discharged. By letter dated the 6th February, 2014, EBS demanded payment of the sum of €4,797,472.56 – the amount due in respect of the loan at the time, inclusive of interest and arrears.

11. The plaintiff is a partner in the firm of Deloitte. He was appointed receiver over the properties referred to in the First Schedule to the Mortgage, by Deed of Appointment of Receiver dated 14th February, 2014. Clause 8.01 of the Deed of Mortgage expressly conferred upon EBS the right to appoint a receiver over the mortgaged property in the event that the defendants defaulted upon the repayment of the loan.

12. The property the subject of these proceedings ("the Property") was excluded from his original appointment, although it was in itself a part of the mortgaged property, and it is described as follows:

> *"ALL THAT AND THOSE that portion of 131 Tritonville Road, Ballsbridge, Dublin 4, being part of the lands and premises comprised in the Deed of Mortgage dated the 9th August, 2004 issued by Con Creedon and Pamela Creedon to EBS as is outlined on the maps annexed to the Plenary Summons and thereon surrounded by red verge line and marked 'extent of family home at ground level' and 'extent of family home at basement level'."*

The plaintiff averred, at para. 11 of his affidavit sworn on 27th February, 2015, that the Property was initially excluded from his appointment as it comprises the defendants' family home and EBS wished to give the defendants time to arrange their affairs before exercising its security rights over the Property.

13. As no payment was received in respect of the loan following the demand letters, EBS commenced proceedings by way of summary summons dated 27th June, 2014.

14. On 28th July, 2014, at the hearing of EBS's application for admission to the Commercial List and for judgment, the defendants, through their solicitor David Martin of Gore & Grimes Solicitors, consented to the proceedings being admitted to the Commercial List, and also to judgment being entered in the total sum of €4,837,002.46. By order of 28th July, 2014, judgment in the sum of €4,837,002.46 was decreed in favour of EBS against the defendants ("the Judgment"), with execution and registration of the Judgment stayed until 29th July, 2014.

15. On the 29th July 2014, the defendants gave an undertaking to the Court to notify EBS of the sale of any of their properties in Spain. Execution and registration of the Judgment was then stayed until 29th October, 2014.

16. By letter dated 3rd September, 2014, Beauchamps Solicitors, acting for EBS, wrote to the defendants' solicitor to inform them of the plaintiff's desire to let the property at 129 Tritonville Road, and also of the need for EBS to take possession of the Property in order to obtain the appropriate value for the security by effecting a sale of the entire property of 129, 131 Tritonville Road and the rear units.

17. By letter dated 16th September, 2014, the defendants' solicitor indicated that the defendants were *"now prepared to place on the open market by way of auction the property at 131 Tritonville Road."* The plaintiff, in his affidavit sworn on 27th February, 2015, averred that *"[t]he difficulty with this proposal was that it excluded any reference to the placing of the sale of 129 Tritonville Road and the rear units and the prospect of selling 131 Tritonville Road on its own was impractical from the point of view of maximising value."*

18. By e-mail dated 10th October, 2014, to the defendants' solicitor, the plaintiff's solicitors asked the defendants to revert regarding the potential sale of the entire property. Further e-mails were sent on 13th and 15th October, 2014, with the e-mail dated 15th October, 2014, stating that it would be necessary for EBS or the plaintiff *"to proceed to attain involuntary possession of No. 131 once this day expires."* The defendants' solicitor responded by e-mail on same day and requested a copy of the Mortgage which was provided.

19. By e-mail dated 31st October, 2014, the plaintiff's solicitor contacted the defendants' solicitor to remind him that the stay on the Judgment had expired. By e-mail dated 4th November, 2014, the defendants' solicitor informed the plaintiff's solicitors that 129 Tritonville Road would be emptied of furniture by the end of that week in order to allow tenants to move in.

20. On the 8th December, 2014, a Certificate of Registry of Judgment was entered in the High Court Central Office.

21. Having received no further communication from the defendants regarding voluntary possession of the Property, the plaintiff was appointed by EBS as receiver over the Property, the subject of these proceedings, by Deed of Appointment dated 30th January, 2015.

22. On 4th February, 2015, EBS received a non-binding offer from a third party on behalf of the defendants. This offer was not

acceptable to EBS, and they expressed this view to the third party by a letter dated 19th February, 2015. The details of this offer have not been submitted to the Court in order to protect the confidentiality of the third party.

23. On 6th February, 2015, the plaintiff called the first defendant in order to inform him that he had been appointed receiver over the remaining part of the security, and to suggest that a caretakers agreement could be arranged, such that the defendants would be able to stay in occupation for three months in order to give them more time to organise their affairs. The plaintiff requested that the defendants agree to this proposal within five days. On the same day, Vincent Sorohan, a senior manager working under the plaintiff at Deloitte, e-mailed the defendants, explaining the plaintiff's appointment as receiver and his powers of possession and sale.

24. On 11th February, 2015, the plaintiff's solicitors rang the defendants' solicitor. They subsequently wrote to the defendants' solicitor by e-mail to inform him that the defendants had not responded to the proposal regarding the caretaker arrangement, nor had they answered their telephone call. This e-mail warned that if they did not respond, an application would be made for possession of the Property. Later that day, the defendants sent the plaintiff and Mr. Sorohan a signed letter by e-mail, stating that they did not accept that the plaintiff had been validly appointed as receiver, and that they would not accept the proposed licence. This claim of invalidity was not pursued at the hearing of the application.

25. By e-mail dated 12th February, 2015, the plaintiff's solicitor contacted the defendants' solicitor, sending a copy of the defendants' response to the plaintiff, and enquiring as to the authority of the solicitor to accept service of proceedings.

26. By letter dated 13th February, 2015, the plaintiff's solicitors wrote to the defendants, enclosing a copy of the proposed caretaker agreement and asking them to respond by the 23rd February, 2015. This copy was also sent by e-mail to the defendants and the defendants' solicitor.

27. There were also communications, by letters dated 13th and 18th February, 2015, between the solicitors in relation to the order for judgment and the undertaking in respect of the Spanish properties during this time.

28. The within proceedings, seeking injunctive relief and damages, were issued on 27th February, 2015.

29. The defendants prepared an offer without prejudice, dated 5th March, 2015, purportedly aiming to settle their indebtedness to EBS and to satisfy the judgment obtained against them by EBS in 2014. The terms of the offer suggested that *"in excess of €4.6 million"* could be delivered to EBS, and included a proposal to surrender 131 Tritonville Road without contest on the 31st August, 2015.

30. The first defendant averred at para. 14 of his affidavit sworn on 9th March, 2015, that he and the second defendant have been willing, and remain willing, to negotiate with the Bank regarding the resolution of their debt. Amongst the envisaged solutions, the first defendant suggested that the defendants would voluntarily sell the Property, being their family home, provided that they were given time to market the Property such that its full value could be realised.

31. By letter dated 2nd April, 2015, Loman Dempsey of Savills contacted the plaintiff to add details to Savills' report on the Mortgaged Property of the previous year in May 2014. Mr. Dempsey recommended that the property should be sold in one lot, in light of the development of the car park underneath the properties, the reduced size of the gardens and attendant planning and fire safety compliance issues.

32. At the behest of the first defendant, Colliers prepared a report, dated 7th April, 2015, on the marketability of the mortgaged property, and recommended that the individual properties therein be sold separately.

33. By way of a letter dated 20th May, 2015, the defendants' solicitor contacted the plaintiff's solicitor, formally requesting that the defendants be permitted to enter into a separate loan agreement relating to their family home along with alternative proposals for the resolution of their debt.

34. The first defendant confirmed by way of supplemental affidavit, sworn on the 21st May, 2015, that 129 Tritonville Road is being leased to new tenants.

35. By letter dated 21st May, 2015, the plaintiff's solicitors contacted the defendants' solicitor, stating that the Statement of Affairs sworn by the first defendant on 11th September, 2012, was defective in a number of respects. The letter identified seventeen matters in respect of which proper information had not been provided.

36. By a letter dated 26th May, 2015, the plaintiff's solicitors stated that the proposals, outlined in the defendants' letter dated the 20th May, 2015, were unacceptable.

37. On 28th May, 2015 EBS conducted a search of Oasis Club, Casa 10, Marbella. On 15th June, 2015, EBS discovered that Carl Mikael Daniel Stalhannar was the owner of the property as of 14th January, 2015. EBS contends that this is significant as (i) the defendants have continuously maintained that they are not financially capable of making repayments; (ii) the failure to notify EBS of the sale of the property constitutes a breach of the undertaking which the defendants gave to the Commercial List of the High Court on the 29th July, 2014; and (iii) despite the fact that the defendants apparently have available to them the proceeds of the sale of a significant sum, they have failed to pay any part of that to EBS.

The Issue

38. The issue to be determined by the Court is as follows:-

(i) Is the receiver entitled to rely on the loan agreement and mortgage provisions to obtain possession of the property?

Submissions by the Plaintiff

39. A core point arising from the decision of Clarke J. in *Irish Life & Permanent v. Dunphy* [2015] IESC 46 is that the Code of Conduct on Mortgage Arrears does not, and cannot, apply to receivers as it only has legal force insofar as it applies to financial services providers authorised, registered or licensed (i) by the Central Bank or (ii) in another EU or EEA Member State which has provides or is providing mortgage lending activities in the State. The Code derives such legal status under s. 117 of the Central Bank Act 1989. Section 117(1) provides:-

"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."*

The plaintiff submits that he is not a licence holder or a person supervised by the Central Bank of Ireland, nor does the Code purport to apply to the plaintiff in that context. Thus, s. 117 of the Act of 1989 does not apply to receivers.

40. Even if the Code did apply, Clarke J. noted that save for the moratorium provision the Code does not have the legal force to interfere with the rights and liabilities of parties to a contract or a mortgage. It only has force as far as the moratorium is concerned as the Court will not aid a party which by bringing an action was acting in breach of the Code by virtue of s. 117. However, in any event, this does not apply to the plaintiff by virtue of the fact that s. 117 does not apply to receivers.

41. The plaintiff submits that the defendants do not respond to these points in their filed written submissions. The defendants do, however, state that it would be an absurdity if banks were allowed to appoint a receiver to take possession of property in breach of the provisions of the Code. In this regard, the plaintiff referred the Court to para. 1.1 of Clarke J.'s decision in Dunphy, which provides:-

> *"It must, of course, be emphasised that it is only the legal aspects of such questions with which the courts are concerned. Other policy issues raising both economic and social questions do, of course, arise. But any such issues require to be considered at a political and regulatory level, and to find their way into changes in the law, if that is to happen at all, through legislation or regulatory measures which have binding legal effect. To say that the courts have no role in such issues is not to imply that judges are unmindful of the great personal difficulties which have arisen from both the collapse in property prices and the general financial crisis. Whether, and if so to what extent, those difficulties should lead to a change in the law and a shift in the balance of legal rights between, on the one hand, those who have lent money on the security of premises and, on the other hand, borrowers in financial difficulty, is a matter for legislators and regulators. The courts must interpret the law as it is and apply it to the facts and circumstances of each individual case."*

42. Further, while the Code is neither a statute nor a statutory instrument, a literal interpretation is required to apply to the provisions of the Code unless there is some ambiguity or doubt as to the meaning of that literal interpretation. There is no justification for applying a different approach to construing the provisions of the Code. Where the literal meaning of the words is clear, the Court should not undertake an inquiry as to what it believed the legislature meant to say or intended to say (see *McGrath v. McDermott* [1988] I.R. 258; *Gaffney v. The Revenue Commissioners* [2013] IEHC 651).

43. In relation to the plaintiff's entitlements under the Mortgage, Clause 5.01 of the Mortgage provided that if a recognised event of default occurred, the following consequences would ensue:

> *"All monies (including accrued interest) hereby secured shall become immediately enforceable and all the Borrowers' rights to deal for any purpose with the Mortgage Property or any part thereof shall cease immediately on demand by the Society for payment of the monies secured hereunder or upon the happening of any of the following events…"*

The effect of the clause is to deprive the defendants of any entitlement regarding the Property from the moment the event of default occurred.

44. Under Clause 8.01 of the Mortgage, EBS was empowered to appoint a receiver once the *"monies hereby secured become payable"* and/or on the occurrence of an event of default. The powers granted to the receiver in Clause 8.02 recognise that where an event of default has occurred, the defendants as borrowers have no further right to deal with the property and it is the receiver who is to be responsible for dealing with the property thereafter.

45. The plaintiff submitted that these are clear property rights which are conferred by the mortgagor on the mortgagee and the receiver. These rights cannot be interfered with by way of statute or other form of intervention unless there are clear provisions to that effect (see Dodd, *Statutory Interpretation in Ireland* (Tottel Publishing, 2008), para. 11.51; *Byrne v. Grey* [1988] I.R. 31; *Re Eylewood Ltd.* [2010] IEHC 57, [2011] 1 I.L.R.M. 5).

46. In relation to the defendants' reliance on the decision of Hogan J. in *Irish Life and Permanent plc v. Duff* [2013] IEHC 43, the plaintiff submitted that the decision is not authority for the proposition that the only means by which a property which is secured under a mortgage, which is the residence of the borrowers, may be repossessed is by a court action brought against the borrower concerned. Instead, the plaintiff asserts that Duff is authority for the proposition that a borrower may not take possession of property without first bringing court proceedings. Here, the plaintiff says, the receiver is not seeking to forcibly enter upon and take possession of the property. The application to the Court for injunctive relief affords the borrower the opportunity to make submissions on the objective necessity for granting the relief sought by the receiver and also serves to ensure that the requirements of notice and reasonable foreseeability are met. These requirements have been met and the only way in which the debt can be realised is through selling the secured properties and on the basis of the advice from Savills the best return would be from selling the properties collectively. As matters currently stand, the properties cannot be sold individually due to planning and fire safety issues.

47. In response to the defendants' submissions, the plaintiff submitted that the mortgage agreement provides separately for the receiver's and the lender's right to take possession, the lender's right being limited by the Code (see *Irish Life & Permanent v. Dunphy*). The Code does not affect the legal powers that run with the land which the defendants covenanted to give to the receiver and this has not been challenged by the defendants.

Submissions by the Defendants

48. The defendants oppose the application on two related grounds:-

> (i) As a matter of law, and , in particular, by virtue of Article 40.5 of the Constitution, a person cannot be required to yield up possession of a dwelling which he or she owns without a final order for possession made at the conclusion of formal possession proceedings;
>
> (ii) As a matter of law, a mortgagor cannot be required to yield up possession of his or her primary residence on foot of a default in making mortgage repayments without that financial institution proving compliance with the substantive requirements of the Mortgage Arrears Resolution Procedure, as set out in the Code of Conduct on Mortgage Arrears 2013.

49. The defendants do not dispute that the Code of Conduct on Mortgage Arrears does not apply to the plaintiff. However, the Code applies to the defendants' situation as they are borrowers from a financial institution in relation to a property that became their family home. The defendants submitted that at the time the Code came to be applied, the property on which the loan was secured constituted the defendants' primary residence. In those circumstances, the Code had to apply and the bank was required to give the defendants the benefit of the Code.

50. The moratorium provision in the Code at provision 56 provides:-

> *"Where a borrower is in mortgage arrears a lender may only commence legal proceedings for repossession of a borrower's primary residence, where:*
>
> *…*
>
> *b)*
>
> *(i) the period referred to in Provision 45 d) or Provision 47 d), as applicable, has expired; or*
>
> *(ii) the borrower has been classified as not co-operating and the lender has issued the notification required in Provision 29."*

51. The defendants note that this is not an application for possession. It is the defendant's contention that, in essence, the receiver argues for a narrow interpretation of this clause which would permit a financial institution to circumvent the application of the Code through appointing a receiver who could repossess the borrower's primary residence without a court order for possession and without the financial institution having to comply with the Code.

52. It was submitted that such an interpretation could not have been conceived of by the Code's drafters. The reason why the Code does not refer to a financial institution taking possession of a primary residence via the appointment of a receiver is because the Code is predicated on a legal order in which primary residences cannot be repossessed on foot of mortgage arrears without an order for possession being granted to the lender in formal possession proceedings.

53. The defendants submitted that the reason why the Code did not refer to the possibility of a receiver with a free-standing power to take possession being appointed to a primary residence was because it was already established prior to the drafting of the Code that no such possibility existed in practice. In this regard, reliance was placed on the decision of Hogan J. in *Irish Life and Permanent plc v. Duff* [2013] IEHC 43, para. 34 *et seq*., where he stated that:-

> *"[t]he 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 protection of the 'inviolability' of the dwelling guaranteed by Article 40.5."*

For some years lenders and the courts have acted on the assumption that a person's primary residence cannot be repossessed on foot of mortgage arrears without a formal court order for possession following on from possession proceedings with the necessary elements of formal notice, foreseeability and an independent determination of the objective necessity for possession. It was submitted that the Code is predicated on a legal context where the only means on which a mortgagee can take possession of a borrower's primary residence is through formal possession proceedings where there is notice, foreseeability and independent determination of the objective necessity for yielding up of possession (see Ryan v. Danske Bank & Anor. [2014] IEHC 236. Therefore the defendants argue that the MARP process, provided for by the Code, does not envisage a context in which the mortgagee can take possession of the family home by appointing a receiver.

54. In relation to the presence in this case of notice, foreseeability and independent determination of the objective necessity for yielding up of possession, it was submitted that:

> (i) No order for possession is sought as the plaintiff's position is predicated on the contention that he would have taken possession of the property without any need for a court order if the defendants had not prevented him from doing so.
>
> (ii) A court's decision on an application for an interlocutory injunction does not determine the merits of the dispute as to the objective necessity for possession.

The defendants submit that threefold test outlined in *Governor and Company of Bank of Ireland v. O'Donnell* [2015] IECA 73 should be applied, namely whether there is a strong case, whether damages are an adequate remedy, and whether the balance of convenience favours the relief being sought. The defendants submitted that damages would not be an adequate remedy for being evicted from their family home. The defendants submitted that the balance of convenience should lie with them on the basis of the right to reside in the family home, the right to sanctity of the dwelling and given that there is no evidence that the plaintiff will suffer a loss due to a sinking property market.

Decision of the Court

55. The Court is satisfied that the loan agreement entered into between the defendants and EBS is a commercial one. EBS Limited advanced a loan to the defendants of €4,510,000 by way of letter of amended loan offer of the 26th July, 2004, which replaced a prior letter of loan offer of 8th July, 2004. The loan was a two year interest only loan, granted for the purpose of applying it towards (i) the purchase of properties at 129 and 131 and at the rear of 127 Tritonville Road, Sandymount, Dublin 4, at a cost of €3,000,000; (ii) to carry out refurbishments thereto, (iii) to construct three apartments at the rear of 127-131 Tritonville Road at a cost of €790,000; and (iv) to grant an interest roll up facility of €240,000. The rate of interest applicable to the loan was a variable rate based on one month Euribor plus 2% per annum. The defendants were required to make monthly repayments comprising interest only which were to be based on this variable interest rate. The security for the loan was to comprise: (i) a first legal mortgage over the property at 129 Tritonville Road, Sandymount, Dublin 4; (ii) a first legal mortgage over the property 131 Tritonville Road, Sandymount, Dublin 4; and (iii) a first legal mortgage over the property at the site and rear of 127, 129 and 131 Tritonville Road, Sandymount, Dublin 4. The terms of the loan offer letter were accepted in writing and signed by the defendants' attorney on or about the 27th July, 2004.

56. By Deed of Mortgage/Charge for Private Borrower dated 9th August, 2004, between the defendants and EBS, the defendants as beneficial owners granted and conveyed unto EBS all the property of freehold tenure specified in the First Schedule to the Mortgage,

to hold the same unto EBS in fee simple subject to the proviso for redemption thereafter contained.

57. The First Schedule to the Mortgage, which was expressly commercial in nature, referred to the properties to be used as security and included the property which is the subject of this application:

> *"ALL THAT AND THOSE the premises known as 131 Tritonville Road, Ballsbridge in the City of Dublin being the premises more particularly described in a Deed of Conveyance dated the 9th August, 2004 and made between Loughran Investments Limited of the one part and Con Creedon and Pamela Creedon of the other part."*

The mortgage was entered into as a requirement for the loan which EBS advanced to the defendants by way of the letter of amended loan offer.

58. In relation to the plaintiff's entitlements under the Mortgage, Clause 5.01 of the Mortgage provided that if a recognised event of default occurred, the following consequences would ensue:

> *"All monies (including accrued interest) hereby secured shall become immediately enforceable and all the Borrowers' rights to deal for any purpose with the Mortgage Property or any part thereof shall cease immediately on demand by the Society for payment of the monies secured hereunder or upon the happening of any of the following events…"*

The effect of the clause is to deprive the defendants of any entitlement regarding the Property from the moment of the event of default occurred.

59. Under Clause 8.01 of the Mortgage, EBS was empowered to appoint a Receiver once the *"monies hereby secured become payable"* and/or on the occurrence of an event of default. The powers granted to the receiver in Clause 8.02 recognise that where an event of default has occurred, the defendants as borrowers have no further right to deal with the property and it is the receiver who is to be responsible for dealing with the property thereafter.

60. The defendants moved into 131 Tritonville Road with their two daughters in 2008, four years after the loan agreement was entered into. They have resided there since, although their eldest daughter has now left the home. The first defendant informed the bank of this fact by letter dated 24th September, 2008. It appears to the Court that this fact *simpliciter* does not alter the underlying terms of the contract freely entered into by the defendants whereby they transferred their interest in the Property to EBS. Furthermore, none of the negotiations during which the loan period was extended, dating between 2008 and the issuing of the letter of demand in December, 2013, altered the underlying contractual conditions.

61. In addition, it is clear to the Court from the conduct of the parties that at all stages this contract was treated by the parties as a commercial transaction to the extent that the matter was dealt with in the Commercial Court with the consent of the defendants and that during those commercial proceedings, the defendants consented to judgment in the sum of €4,837,002.46 being entered against them.

Code of Conduct on Mortgage Arrears

62. The Court is not at all persuaded that this contract is one which attracts the protection of the Code of Conduct on Mortgage Arrears. The Code is specified to apply to the mortgage loan of a borrower which is secured by his/her primary residence. This particular loan was not secured by the defendants' primary residence. It was only four years after the conclusion of the loan agreement and mortgage that the defendants moved into the property at 131 Tritonville Road and converted it into their primary residence. That being said, there is no doubt that in this particular case, EBS, as the financial institution involved, considered that 131 Tritonville Road was entitled to the protection of the Code of Conduct on Mortgage Arrears and conducted their dealings with the defendants on that basis.

63. By letter dated 29th June, 2011, EBS wrote to the defendants under the MARP process and enclosed a copy of the MARP information booklet, periodically issuing letters thereafter. By letter dated 24th September, 2013, EBS explained to the defendants that they would be deemed to be a *"non co-operating borrower"* unless they co-operated with EBS and provided information as set out in the later within twenty business days. A further letter dated 6th November, 2013, stated that they had been deemed to be non co-operating borrowers and that the protections of MARP no longer applied. This letter contained a notice informing the defendants that they had a right to appeal the decision.

64. By letter dated 11th November, 2013, the first defendant allegedly contacted Philip Butler of EBS, expressing surprise at being classified as a non co-operating borrower given that they made *"immediate contact and inside the 20 days prior to and following the letter of the 24th of Sept and are still in meaningful discussions with your good self."* Mr. Butler averred, at para. 20 of his affidavit, that this letter was not received by EBS and no copy can be found in EBS's records. In any event, Mr. Butler averred that no appeal from that decision was received and this was not disputed by the defendants. Mr. Butler further avers that in fact no further communication was received from the defendants regarding MARP.

Effect of the Conclusion of the MARP Process

65. Clearly EBS took the view that the Code of Conduct on Mortgage Arrears applied to this loan by reason of the fact that the mortgage loan was, ultimately, partly secured on what became the primary residence of the defendants. Assuming, for the purposes of this case, that the Code of Conduct on Mortgage Arrears applies, the question which arises is what happens when the application of the Code does not lead to a resolution of the problems between the parties.

66. The defendants submit that the Code of Conduct on Mortgage Arrears is predicated on a legal context where the only means on which a mortgagee can take possession of a borrower's primary residence is through formal repossession proceedings where there is notice, foreseeability and independent determination of the objective necessity for yielding up of possession. It is therefore the defendants' position that the MARP process does not envisage a context in which a mortgagee can take possession of a family home by appointing a receiver since this would permit a financial institution to circumvent the application of the Code through the appointment of a receiver who could repossess the borrower's primary residence without a court order for possession and without the financial institution having to comply with the Code. They submit that the absence of reference in the Code to the appointment of a receiver with a free-standing power to take possession of a family residence is explained by the fact that it was already established prior to the drafting of the Code that no such possibility existed in practice. In support of their contention, the defendants relied on the decision of Hogan J. in *Irish Life and Permanent plc v. Duff* [2013] IEHC 43, para. 34 et seq., where he stated that:-

> *"[t]he 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 protection of the 'inviolability' of the dwelling guaranteed by Article 40.5."

67. It appears to the Court that there is nothing in law nor indeed in the Code of Conduct on Mortgage Arrears itself which provides that every application of the Code must be followed by an application to Court for possession of the family home. The defendants' entire case is founded on an incorrect premise that they are the owners of 131 Tritonville Road when in fact they transferred their ownership of that property to EBS by mortgage agreement dated 9th August, 2004. It appears to the Court that a failure to resolve issues relating to the mortgage under the MARP simply means that the parties revert to their original positions as determined by the contract which they have entered into. In those circumstances a court must look to the underlying contract between the financial institution and the borrowers. In this case the contract remains a commercial transaction governed by the terms and conditions of the original loan and mortgage agreement. The defendants' contention that every MARP application must result in a formal application for possession to a court is unsustainable. Even the Code of Conduct on Mortgage Arrears 2013 itself defines repossession at p. 5 as *"any situation where a lender takes possession of a property including, without limitation, by way of voluntary agreement with the borrower, through abandonment of the property by the borrower without notifying the lender or by court order".* Thus the Code itself envisages multiple forms of re-possession on the part of a financial institution. It thus appears to the Court that where there is a failure to resolve the issue between the parties on the basis of the Code then one looks to the terms of the contract to determine the rights of the parties. The contract makes it clear that in the event of a default, EBS as mortgagee has a right to appoint a receiver to the mortgaged property.

68. Indeed it would appear to the Court that this position is consistent with the reasoning of the Supreme Court in the recent decision in *Irish Life and Permanent v. Dunphy* [2015] IESC 46 in which the Court held that the only aspect of the MARP procedure to which the Court can have regard, is the operation of the moratorium period referred to at paragraphs 45 and 47 of the Code of Conduct on Mortgage Arrears. In this case the Court notes that this moratorium period has been complied with, the bank's final letter having been sent on 6th November, 2013 and the proceedings having issued on 27th February, 2015. On the basis of the decision in *Irish Life and Permanent v. Dunphy*, it would seem that the Court has no power to prescribe the method by which a financial institution seeks to enforce its security over a primary residence which is the subject of a mortgage. Indeed, it would appear that this reasoning is further strengthened by the enactment of the Land and Conveyancing Law Reform Act 2009 which provides in s. 97 that *"a mortgagee shall not take possession of the mortgaged property without a court order granted under this section, unless the mortgagor consents in writing to such taking not more than 7 days prior to such taking".* Were it the case that the Code of Conduct on Mortgage Arrears already prescribed such a course of action, surely there would be no need for the existence of such a provision.

69. The Court acknowledges that if this were a mortgage created after 1st December, 2009 to which the terms of s. 97 of the Land and Conveyancing Law Reform Act 2009 applied, different considerations might well apply. However this mortgage was created on 9th August, 2004 and is subject to the terms and conditions of that mortgage and loan agreement.

Conclusion

70. For the foregoing reasons, the Court is satisfied that the relationship between the parties is governed by the letters of loan dated 26th July, 2004, as amended, and the mortgage entered into on the 9th August, 2004. Pursuant to that mortgage, the lender was entitled to appoint the plaintiff as receiver to the property at 131 Tritonville Road, notwithstanding that it is currently occupied by the defendants as their family home. In the circumstances the plaintiff is entitled to the relief sought in the plenary summons, namely:

> "(1.) An injunction restraining the defendants whether by themselves, collectively or individually, their respective servants or agents or anyone acting in concert with them or anyone having notice of the said Order howsoever from interfering with, obstructing, or in any other way preventing the Plaintiff from exercising his powers and functions as Receiver over the property identified in the Schedule hereto ("the Property")
>
> (2.) An injunction restraining the defendants whether by themselves, collectively or individually, their respective servants or agents or anyone acting in concert with them or anyone having notice of the said Order howsoever from interfering with, obstructing or in any other way preventing the Plaintiff from exercising his lawful power to enter upon and take possession of the Property.
>
> (3.) An Order directing that the Defendants, their servants or agents, or any person having notice of the said Order to provide to the Plaintiff forthwith the keys, alarm codes, locks and all other security and access devices and equipment or information necessary to gain possession of the Property;
>
> (4.) An Order directing the Defendants, their servants or agents, to deliver forthwith to the Plaintiff all books and records held by them in relation to the Property to include, without prejudice to the generality of the foregoing, copies of all leases and licence agreements in respect of the Property."