

THE HIGH COURT**CIRCUIT APPEAL****[2016 No. 2 C.A.]****[2014 No. 303]****BETWEEN****PERMENANT TSB PLC FORMERLY IRISH LIFE****AND PERMENANT PLC****PLAINTIFF****AND****JARON DAVIS****AND****HELENA DAVIS****DEFENDANTS****JUDGMENT of Mr. Justice McDermott delivered on the 28th day of March, 2019**

1. This is an appeal from an order of Circuit Court (Her Honour Judge Reynolds as she then was) made on 13th May, 2015 granting vacant possession of 18 The Avenue, Burkeen, Wicklow Town, Co. Wicklow (the property), the family home of the defendants to the plaintiff. A stay was placed on the order for nine months.
2. The defendants were approved for a loan for the purchase of the property by the plaintiff on 7th June, 2007 in the amount of €400,000. They agreed to monthly repayments of €2,016.20 over a thirty-five year term. The loan to be advanced under the terms and conditions of a Letter of Approval and General Mortgage Loan Approval Conditions was accepted by the defendants on 13th June, 2007 and the money was drawn down on 25th June.
3. The defendants executed an Indenture of Mortgage and Charge in favour of the plaintiff on 26th June over the property. The defendants agreed to repay the loan advanced with interest and accepted this as a primary obligation under clause 2 of the mortgage conditions. Clause 4 provides that the loan is a variable interest loan which may be changed on notice to the borrowers. It was a term of the mortgage agreement that the whole of the monies outstanding for the time being on the security of the mortgage would become immediately payable to the plaintiff if the defendants defaulted in making two monthly repayments. These documents were exhibited by the plaintiff. The first named defendant is registered as the sole owner of the property on which the mortgage and charge is registered as a burden in Folio No. 30625F for the County of Wicklow.
4. At the time of the application for the order for possession the defendants had defaulted on repayments since 24th August, 2012. There were outstanding arrears of €80,911.03 on 24th April, 2014 at the time of the swearing of the verifying affidavit of Ms. Niamh McGee.
5. By letter dated 10th March, 2014 the plaintiff through its solicitors demanded that the defendants repay all sums then due and owing together with interest accrued thereon and warned that in default thereof, the plaintiff would seek possession of the property by court order. As of the 24th April, 2014 the sum of €465,985.77 was said to be due and owing to the plaintiff. The plaintiff therefore claimed that the repayment of the principal monies secured under the charge became due as a result of which it was entitled to an order for possession of the property.
6. By letter dated 26th March, 2014 the plaintiff through its solicitors wrote to the defendants requesting that they deliver vacant possession of the property in default of which proceedings would issue seeking an order for same. Though clause 6 provided that the mortgagor had a right without prior notice to the borrowers to enter into possession of the property this could not be effected without a court order under s.97 of the Land and Conveyancing Law Reform Act, 2009 (which I am satisfied applies to this case).
7. In a further affidavit dated 28th January, 2015 Ms. McGee deposes that the plaintiff was in compliance with the Code of Conduct in Mortgage Arrears (CCMA). The plaintiff operated an Arrears Support Unit (ASU) and a Mortgage Arrears Resolution Process (MARP) as required under the CCMA. The plaintiff also claims that it has at all times actively encouraged the defendants to engage with it in respect of their financial difficulties. On 5th December, 2013 under para. 28 of the CCMA, the plaintiff wrote to the defendants advising that they were at risk of exiting the MARP and requesting that they complete an enclosed standard financial statement (SFS) and thereby provide relevant up to date information about their financial circumstances. However, the defendants failed to respond to this correspondence and did not furnish the plaintiff with the completed SFS at that time.
8. On 10th January, 2014 the plaintiff wrote to the defendants advising them that they had been classified under para. 29 of the CCMA as "non-cooperating" thereby placing them outside the protection of the MARP and advising of their right to appeal this decision. Thereafter, the defendants, in the plaintiff's view, failed to maintain "constructive engagement" with the plaintiff. The plaintiff maintains that it has at all times kept in regular written contact with the defendants and made every reasonable effort to put in place an alternative repayment arrangement with them which has not led to a successful outcome.
9. A replying affidavit was sworn by Mrs. Helena Davis, the second defendant on 5th February, 2015. The defendants were not legally represented in the Circuit Court proceedings or in this court. Mrs. Davis represented the defendants' interests and appeared in person before the County Registrar and the learned Circuit Court Judge to make representations on their behalf. In her affidavit the second defendant opposed the plaintiff's application on a number of grounds. It was claimed that the obligations under the mortgage and loan were not transferrable to the present plaintiff. I am not satisfied that this constitutes a ground of defence in this case: the plaintiff simply changed its name as per the Certificate of Incorporation on change of name dated 29th June 2012 which was exhibited. This did not involve any variation of the terms and obligations of the parties under the mortgage loan agreement or the indenture of

mortgage.

10. It was acknowledged in the affidavit that the defendants had financial difficulties and had been in default. In or about March, 2008 the first named defendant's company ceased trading. His income ceased. The second defendant continued to work and pay the mortgage from her earnings but the couple began to struggle financially. The second defendant sought to embark on a new business venture but this was unsuccessful. She kept the plaintiff informed of their difficulties and her business plans. She held a number of meetings from time to time with the plaintiff's officials including Mr. Jody Lynch whom she found very helpful. In or about March, 2008 she was earning €3,000 per month. If she paid the monthly mortgage the couple would be left with a significant shortfall in their family outgoings. She was given a moratorium of three months in order to enable her to work out a solution with the plaintiff. She paid what she could over that period.

11. In 2012 payments became extremely difficult because her business collapsed and her husband was unemployed and ill. She continued to work with Mr. Lynch to seek a solution.

12. In the meantime, the defendants also made representations to a senior politician who wrote a letter making representations on their behalf to Ms. Gillian Bowler the then Chairperson of Permanent TSB. He acknowledged the help and assistance given to the couple by the plaintiff's staff and pointed out that both had lost their employment and were then living on €339.00 per week. It was understood by the writer that a court order for possession might be sought in January, 2010 and the writer requested that the couple be given more time to evaluate their circumstances. The letter was referred to Mr. David J. Guinane the plaintiff's chief executive who replied by letter dated 19th November, 2009 stating:

"Having investigated this complaint, I can confirm that we have no plans to seek a repossession order against Mr. and Mrs. Davis's property. We understand the difficult circumstances they find themselves in and we are prepared to work with them to find a satisfactory solution to their outstanding debts. I have asked my colleague Jody Lynch who is familiar with this case and has met Mr. and Mrs. Davis in the past to call out to reassure them regarding our intentions and to continue to work with them".

13. It was submitted that this letter was a legally binding undertaking that the plaintiff would not initiate proceedings to seek possession of the property and that it was estopped from doing so. Further details of this claim were set out in a later affidavit of 14th November 2018. I do not consider that the letter has or was intended to have that effect in law or in fact or that it gives rise to a valid potential defence to the proceedings. It is clear that significant attempts were made by the plaintiff to correspond and engage with the defendants prior to the issuing of proceedings over the following four years and in response to that engagement the defendants made efforts to earn money and address their liability. That did not preclude the plaintiff from pursuing its remedy. The initiating letters relied upon by the plaintiff in these proceedings did not issue until March 2014 following the conclusion of the CCMA process.

14. A Civil Bill for Possession issued on 27th May 2014.

15. In May, 2009 Mrs. Davis's work came to an end. She was entered on the live register and applied to the Health Service Executive for assistance with their mortgage. This was refused: this decision was appealed over a two year period but no positive result was obtained. During this time the defendants continued to have regular meetings with the plaintiff at their home. They entered into a back to work scheme for a three year period in 2010. At this stage they received €230 per week in social welfare payments. A new business did not develop a sufficient cash flow and unfortunately when some progress was made the second defendant suffered a serious accident resulting in a brain injury. They remained in contact with the plaintiff's solicitors. Gradually Mrs. Davis's health improved and by February, 2015 Mrs. Davis stated that they were both back working on their businesses from which they received some cash flow. Her husband had also started a new company and things looked more positive. However, by that stage proceedings had been initiated.

16. On 9th February, 2015 the County Registrar made an order granting possession of the property to the plaintiff with a stay of six months and made no order as to costs.

17. The defendants appealed to the Circuit Court. At this stage a supplemental affidavit was filed in which a number of technical points were taken in relation to the format of the affidavits relied upon by the plaintiff and their compliance with the Rules of the Circuit Court. A point made in relation to an absence of jurisdiction based on the rateable valuation of the property has no substance.

18. On the hearing of the appeal on 13th May 2015 the learned Circuit Court Judge determined that the plaintiff was entitled to an order for possession of the property and made an order to that effect extending the stay to one of nine months.

19. The second defendant brought a motion to set aside the orders of the Circuit Court and the County Registrar which was heard on 5th November, 2015. The application was refused (His Honour Judge Griffin) but a further extension of the stay on the possession order was granted from 1st November, 2015 until 1st February 2016.

20. The second defendant then appealed the order of the Circuit Court made the 13th May 2015 by Notice of Appeal dated 7th March 2016 and sought an extension of time to do so. She also seeks to rely upon a number of affidavits which constitute evidence which was not adduced during the Circuit Court hearings: the affidavits were sworn on 3rd November, 2017, 12th February, 2018, 14th March 2018 and 16th April 2018. This evidence is not admissible on the appeal without the leave of the court under Order 61 r.8 of the Rules of the Superior Courts unless it was available at the time of trial and is such that it could not have been obtained with reasonable diligence for use at the trial: it must also be apparently credible and such that it would probably have an important though not necessarily decisive influence on the result of the case. Any application for leave to admit such evidence must set it out on affidavit which should state why it was not submitted to the Circuit Court. I am not satisfied that any good reason has been offered as to why this material was not advanced or could not with reasonable diligence have been advanced in the Circuit Court. I am not satisfied that the material fulfils any of the other criteria set out above. Even if I accepted that I should admit the evidence I am not satisfied that the material (save in respect of one issue) gives rise to a possible defence to the plaintiff's claim or is of such a nature as to have an important influence on the result of this appeal. However, I am satisfied that I should consider the matters raised in the affidavit of 3rd November 2017 (much of which contains legal submissions rather than averments of fact) in respect of this court's obligation under Council Directive 93/13/EC which I address later in the judgment.

21. In the affidavit of 3rd November 2017 Mrs Davis also makes a number of submissions about the form of the affidavits relied upon by the plaintiff and other matters which I am not satisfied give rise to any arguable points of defence and even if they did I would be satisfied to admit them in evidence notwithstanding such suggested defects or irregularities (see *Kearney v. Bank of Scotland and Horkan* [2015] IECA 32).

22. The second affidavit of 12th February 2018 purports to outline the circumstances in which Mrs. Davis came to enter the mortgage loan agreement and suggests that she did not wish to do so. She states that she expressed her concerns in strong terms at the time as to the level of the mortgage and her exposure and assumption of liability. She said that she did not believe the family home would be at risk and agreed to proceed because of the stress Mr. Davis was under. She accepts that she attended at her husband's solicitor's office and executed a number of documents. I note that both defendants had business experience. I am not satisfied that any of this material which was advanced some years after proceedings commenced gives rise to a point of defence or constitutes evidence sufficient to raise a defence of *non est factum* or undue influence to these proceedings.

23. The third affidavit of 14th March 2018 sets out the serious personal consequences and damage to her and her husband of these proceedings.

24. The fourth affidavit of 16th April 2018 states that Mrs. Davis on 2nd April 2018 submitted her mortgage account for forensic audit to Mr. David Sheerin, an accountant. He furnished an undated letter suggesting that no credit for Tax Relief at Source had been applied to the account since 2007 in respect of the mortgage which would have saved the defendants approximately €28,000. A complaint is also made that the insurance premium attaching to a life policy in respect of the loan increased without explanation. In an affidavit of 23rd April 2018 Ms. McGee exhibited correspondence sent to the defendants on 22nd June 2007 requesting that they complete the enclosed Tax Relief at Source application form and submit it to the Revenue Commissioners. Since no communication was received by the plaintiff from the Revenue Commissioners approving such an application the sum was not deducted. I am satisfied that this does not give rise to a valid point of defence in this case. The plaintiff was also informed by the defendants that the nature of the life cover which they obtained was changed by them in October 2011 at which time the premiums increased. I am also satisfied that no point of defence arises on this basis.

25. The defendants' loan was securitised with Fast Net Three under clauses 6.7 and 6.8 of the Mortgage Conditions. Clause 6.7 permits the plaintiff at any time without the consent of the Mortgagor to transfer the benefit of the mortgage to any person. There are various limitations on the transferee's rights in clause 6 which operate as a protection for the borrower in such circumstances. The defendants nevertheless submit that this materially and unilaterally altered their rights and obligations under the Mortgage loan agreement and Indenture of Mortgage and Charge and was in breach of contract. This issue was considered in a number of cases including *Wellstead v Judge White & Ors* [2011] IEHC 438, *Kearney v KBC Bank Ireland Plc. and Reynolds* [2014] IEHC 260, *Harrold v Nua Mortgages Limited* [2015] IEHC 15, and *Danske Bank v Scanlon* [2016] IEHC 118. It has been repeatedly held as stated by Peart J., in *Wellstead* that securitisation is a common feature of financial dealings whereby the original lender retains the obligation and the right to enforce the security and account to the transferee in due course in respect of any recovery from the mortgagors. I am not satisfied that this is a valid point of defence.

26. The second defendant submits in her affidavit of 3rd November 2017 that the Circuit Court was not furnished with the necessary proofs with which to carry out its obligations to the defendants as consumers under the provisions of Council Directive No. 93/13/EEC of 5 April 1993 as transposed by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No.27 /1995) and failed to discharge its obligation in that regard. It is submitted that the Circuit Court of its own motion should have inquired into the unfairness of the terms of the mortgage loan contract and the mortgage deed and charge in accordance with the jurisprudence of the CJEU including *Case 415/11 Mohamed Aziz v. Caixa d'Estalvis de Catalunya* (14th March 2013) and subsequent decisions of this court in *Allied Irish Banks PLC v. Counihan and Counihan* [2016] IEHC 752, *EBS Limited v. Kenehan and Ryan* [2017] IEHC 604 (see also *Ulster Bank Ireland Limited v Costelloe* [2018] IEHC 289 and *Permanent TSB PLC v Fox* [2018] IEHC 292). As appears from the authorities cited that obligation also devolves upon this court on appeal against the order of the Circuit Court where it has "the legal and factual elements necessary for that task". In this case no claim was initially made by the defendants despite the extensive number of affidavits sworn that any of these terms were unfair within the meaning of the Directive or the Regulations though an issue was subsequently raised in further affidavits sought to be relied upon in the course of the appeal. The issue raised was limited to whether the Circuit Court ought to have considered of its own motion whether the terms of the loan and mortgage were unfair within the meaning of the directive and regulations. However, I am satisfied that in this appeal, which is a hearing *de novo*, this court has an obligation to consider whether the terms relied upon are unfair if they fall within the scope of the directive.

27. It is claimed that the court has not been furnished with all relevant documentation to assess whether in fact the terms or any one of them are unfair and consequently whether the contract of loan is void. It is said that the documents exhibited by the plaintiff include "a mortgage that per clause 5 of same 'incorporates the Offer Letter and the EBS Mortgage Conditions'" . It is claimed that the Mortgage Conditions contemplate that the EBS Rules which are defined in the Mortgage Conditions as " the rules of EBS in force from time to time including any which may be adopted after the date of the Mortgage" will apply save to the extent that per clause 1 of the Mortgage Conditions there is a conflict between the Rules and the Mortgage in which case the Mortgage defined in clause 1 as the Mortgage Deed and those conditions combined shall prevail. I am not satisfied that the Mortgage Conditions (2002) exhibited by the plaintiff bear this construction. Clause 1 states inter alia:-

"1.1 In these conditions "the Mortgage" means the Mortgage Deed or other document in which the conditions are incorporated.

1.9 "Letter of Approval means

(a) if so long as no further advance has been made on the security of the Mortgage permanent tsb's Offer of Advance as amended or varied (if at all) prior to the making of the Advance....

1.25 In case of conflict between the Mortgage and the Conditions the Mortgage prevails."

28. The Indenture of Mortgage provides at clause 2 that the Mortgagor consents to a charge on the property in respect of " the payment to permanent tsb of all present and future advances payable by the Mortgagor to permanent tsb under the Mortgage Conditions.." In almost every clause the mortgage is said to be subject to the Mortgage Conditions.

29. The Letter of Approval dated 7th June 2007 is exhibited and sets out the terms upon which the loan is offered including a number of Special Conditions. The defendants executed an Acceptance of Loan Offer on the 13th June 2007 which at clause 1 purports to accept the offer made on the terms and conditions set out in

"i Letter of Approval

ii The General Mortgage Loan Approval Conditions

iii the permanent tsb Mortgage Conditions"

I am not satisfied that the plaintiff has failed to place before the court the documents necessary for it to discharge its obligations under the *Aziz* jurisprudence.

30. The court is satisfied that the terms relied upon by the plaintiff in seeking an order for possession are terms which constitute "the main subject matter of the contract" under Article 4(2) of the directive which provides that the assessment of an unfair term shall not relate to "the definition of the main subject matter of the contract nor the adequacy of the price and remuneration on the one hand, as against the services or goods supplied in exchange on the other insofar as these terms are in plain intelligible language". . Regulation 4 (of the Regulations) is to the same effect. The defendants are consumers within the terms of the directive and regulations. However, it is clear that the main subject matter of the agreement was that all monies advanced under the loan would be repaid by monthly instalments and at a variable interest rate over a period of thirty-five years. The loan would be secured on the family home: it was so secured. If the borrowers defaulted on their repayments the plaintiff became entitled to seek an order for possession having made the appropriate demand for repayment and make good their security. These terms were in clear and intelligible form and were fully understood by each of the parties to involve the offering of the defendants' family home and principal place of residence as security for the loan and that in default of making the agreed repayments the security might be realised by the lender (see *AIB Mortgage Bank v Cosgrove* [2017] IEHC 803 per Faherty J., at para 60 and *Allied Irish Banks plc v O'Donoghue* [2018] IEHC 599 per Meenan J., at paragraphs 7-21).

31. It is also submitted that the terms and conditions concerning the variable interest rate are unfair because they permit the lender to alter the terms of the contract price unilaterally without a valid reason specified in the contract contrary to what is deemed to be an unfair term under paragraph 1(j) of the Annex referred to in Article 3.3 of the directive. However, para. 1(j) must be considered with paragraph 2(b) of the Annex which states that it is "without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter.... without notice where there is a valid reason, provided that the supplier is obliged to inform the other contracting party...thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately".

32. I am satisfied that these core terms do not fall within the scope of the directive or regulations by reason of Article 4 and the terms relating to variable interest rate are standard core terms of such contracts: even if they did, when considered under the criteria set out in the directive and the Annex I am not satisfied that those terms and conditions could be regarded as unfair.

33. I have considered the exhibits tendered in support of the plaintiff's claim for possession and all of the terms and conditions set out therein. I am not satisfied that the terms of the mortgage loan as set out in the Letter of Approval and Acceptance, the Indenture executed in favour of the plaintiff and the Mortgage Conditions could be regarded as unfair within the meaning of the Directive and the Regulations even if they fell within the scope of the assessment required. They are standard terms which in my view are clearly stated. I do not consider that on the facts of this case they have been or were capable of being operated in an unfair way or that objectively they could be operated in an unfair way that would require the court to declare them void whether because of their effect in this case or on the basis of the "dissuasive effect" of such a determination on other lenders.

34. The property in issue is the defendants' residence and family home. It is claimed that the granting of the order for possession was and would be in breach of their rights under Article 7 of the Charter of Fundamental Rights of the European Union which provides that:

" Everyone has the right to respect for his or her private and family life, home and communications" .

35. It was submitted by Mrs. Davis that the court was under a duty to consider the impact which the order for possession will have on the health and wellbeing of the defendants as set out in the various affidavits and that it would be unfair and disproportionate in the circumstances to grant the relief sought by the plaintiff. I am satisfied that the procedures followed in this case allowed the defendants to advance every point which they wished to make in this regard and in opposing the plaintiff's claim. I am satisfied that the court under s.97 of the Land and Conveyancing Law Reform Act, 2009 may "if it thinks fit" grant an order for possession if the proofs are established "on such terms and conditions, if any, as it sees fit". I am also satisfied that the registered owner of a charge has a right to seek and obtain an order for possession once the plaintiff has established the relevant terms of the mortgage loan and mortgage deed and charge, the registered charge in favour of the plaintiff, the default by the defendants, the opportunity to remedy that default, the giving of the appropriate notices, and compliance with other necessary steps such as the CCMA (*Start Mortgages Limited and others v Gun and others* [2011] IEHC 275 and *Secured Property Loans Limited v Flood* [2011] IEHC 189). This is *inter partes* litigation in which the court is considering the lender's contractual rights and entitlement to pursue its remedy in accordance with the terms of the contract. The court is not permitted to act solely on the basis of sympathetic factors such as ill-health to refuse relief if the proofs are otherwise in order (*Bank of Ireland v Smyth* [1993] 2.I.R. 102 per Geoghegan J.). However, as is clear from the cases cited the court may consider whether engagement under CCMA has taken place or whether an adjournment is appropriate to enable steps to be considered such as proposals for re-financing, if that is practicable or possible. I have considered all the evidence in the case including the terms of the contract, the amount and duration of the loan, the alleged default by the borrower(s), the amount outstanding, the steps taken to facilitate or enable the borrowers to address that default, the efforts made by the defendants to pay the loan, whether there is any realistic possibility of doing so in the future and the engagement by the parties under the CCMA. I have received and considered all of the evidence in respect of these matters and the evidence in respect of the defendants' financial and personal history. I am not satisfied that the making of an order for possession in this case would be disproportionate notwithstanding the fact that the property is a family home. The plaintiff has made significant efforts over a number of years to explore the alternatives with the defendants but there is no realistic alternative at this stage to the granting of the order. I am satisfied to grant the relief sought.

36. I am also satisfied that it is appropriate to grant a further four months stay on this order to enable the defendants to find alternative accommodation having regard to their personal and financial situation as set out in the affidavits and which I consider fair and proportionate in the circumstances.