

THE HIGH COURT

CIRCUIT APPEAL

[2017 No. 37 C.A.]

BETWEEN

PERMANENT TSB PLC

FORMERLY IRISH LIFE AND PERMANENT PLC

AND

EDWARD BRENNAN

PLAINTIFF

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 30th day of April, 2019

1. On 3rd February, 2017, the Circuit Court granted an order for possession of lands comprised in Folio 2428F of the Register of Freeholders of County Roscommon, the subject of a pending dealing then comprised in Folio 31144F together with an order in respect of costs. A stay of execution on the order was granted for a period of two months.

2. This order was appealed to the High Court by notice of appeal dated 13th February, 2017. The High Court (Meenan J.) determined the appeal on 19th October, 2017. An application was made to the court for an adjournment and directing a transcript of the Digital Audio Recording of the proceedings before the Circuit Court. These applications were refused. The defendant then left the courtroom and in his absence, the court having considered the pleadings and exhibits and received submissions from counsel for the plaintiff, dismissed the appeal.

3. The order for possession was then served upon the defendant on 10th November, 2017, and he was requested to vacate the property. The defendant issued a motion returnable before the Circuit Court on 14th November, 2017, to which he did not appear: it was struck out on his non-appearance.

4. By notice of motion dated 14th December, 2017, the defendant applied for liberty to re-enter his appeal of 13th February, 2017. This application was grounded on an affidavit in which he averred that on the date of the hearing of the appeal, he suffered a panic attack and left the courtroom. A medical report from a Dr. Hugh F. O'Donnell of Strokestown, Co. Roscommon was exhibited in support of the application. The defendant asserted that he had a *bona fide* defence to the plaintiff's claim for possession. The appeal was re-entered.

Background

5. A civil bill for possession issued on 28th August, 2014. The claim arises from arrears said to have accrued on two mortgage accounts held by the defendant with the plaintiff under account number 99069598999488 (Account "A") and account number 99069590276260 (Account "B").

Account A

6. By letter dated 12th July, 2006, the plaintiff agreed to provide a loan facility in the amount of €170,000 to the defendant. The loan facility was for a period of 25 years and repayment was to be made in the form of monthly instalments of principal and interest. The interest would apply to the loan facility at a variable rate which was 3.44% as of the date of the letter of approval. It was a term of the loan that in the event of default by the defendant in the making of two monthly repayments, the plaintiff would be entitled to terminate the loan facility and demand immediate repayment of all sums outstanding. The terms of the loan were accepted by the defendant on 9th August, 2006, and the sum of €170,000 was drawn down on 21st August.

7. In the grounding affidavit of Victoria Hayes Burke sworn on 14th August, 2014 on behalf of the plaintiff, she avers that no repayments had been received in respect of loan account A since 21st August, 2012. The arrears at that time amounted to €14,339.79. As of 6th August, 2014, the sum of €141,526.97, was said to be due and owing by the defendant to the plaintiff.

Account B

8. By letter dated 8th February, 2008, the plaintiff agreed to make a loan facility available to the defendant in the amount of €50,000, repayable over a period of 27 years. This loan was subject to a variable interest rate which was 4.35% at the date of the letter of approval to be repaid by monthly amounts of principal and interest. In the event of default by the defendant in the making of two monthly repayments for two months, the plaintiff was entitled to terminate the loan facility and demand immediate repayment of all sums outstanding.

9. The defendant accepted the loan terms on 12th February, 2008 and the sum of €50,000 was drawn down on 18th February. Ms. Hayes Burke avers that on or about 19th October, 2012, and subsequently, the defendant failed to make repayments as agreed. The arrears accrued to twice the due monthly amount and continued from 17th November, 2012. No payments have been received since 17th August, 2012.

10. By 7th March, 2014, the amount outstanding on this account amounted to €48,056.43 including arrears of €4,427.12.

The Mortgage

11. On 21st August, 2006, the defendant executed a mortgage over the property in suit in the Land Registry Folio for the County of Roscommon and the mortgage was duly registered on 24th August, 2006.

12. As a result of the defendant's default in making the repayments, letters of demand issued on 26th March, 2014, and on 10th April, 2014, and pursuant to the terms and conditions of the mortgage, vacant possession was sought.

13. The mortgage was subject to the plaintiff's general mortgage conditions (2002) pursuant to which the defendant became liable to

pay the total debt secured by the mortgage to the plaintiff if he defaulted in the making of two monthly repayments or if he defaulted in the payment of any other moneys for two months. The plaintiff, therefore, seeks possession of the mortgage property in order to exercise its power of sale pursuant to the terms and conditions of the mortgage.

14. At the hearing of this appeal the defendant indicated that he did not wish to pursue the many grounds set out in the affidavits submitted in the Circuit Court and confined himself to two points of defence namely, a point based on alleged breaches of the Code of Conduct on Mortgage Arrears and a further point based on the plaintiff's alleged miscalculation of interest applicable to the two accounts and failure to accord the mortgage loan accounts the status of "tracker mortgages". It is submitted in respect of the latter point that the plaintiff is estopped from pursuing its claim on this appeal at this time because of an undertaking given by it to the Minister for Finance and before an Oireachtas Committee that no person whose account was subject to an examination in co-operation with the Central Bank of Ireland as to whether it had been properly regarded and treated as a "tracker mortgage" would be the subject of an application for possession of the mortgaged property. It was claimed that the examination of the accounts in this case was ongoing and that the appeal should be adjourned until its completion and that the plaintiff's application to proceed now with the appeal was an abuse of process. In addition it is claimed that the matter should be further adjourned to enable an accountant to examine the accounts further to ascertain whether the correct interest rates have been applied to them by the plaintiff.

Code of Conduct on Mortgage Arrears (CCMA)

15. Ms. Niamh McGee in an affidavit sworn on 20th January, 2015, averred that the plaintiff was in compliance with the Code of Conduct on Mortgage Arrears (CCMA) as revised and updated in July 2013. The plaintiff operated an Arrears Support Unit (ASU) which had in place a Mortgage Arrears Resolution Process (MARP) pursuant to the CCMA. She stated that the plaintiff had at all times encouraged the defendant to engage with the plaintiff regarding his financial difficulties. A Standard Financial Statement (SFS) was sought from the defendant in order to obtain relevant up to date financial information concerning his situation. It was indicated to him that he was at risk of exiting the MARP if he failed to complete the SFS. Though the original of this letter was not exhibited and the plaintiff could not locate a copy thereof on its file, Ms McGee was satisfied having checked the account records that the letter issued on 8th October, 2013, which was evidenced by a "screenshot" of the defendant's account history. The copy of the standard letter sent was exhibited in the affidavit.

16. Ms. McGee stated that the defendant failed to respond to this letter and did not furnish a completed SFS within the time limit set out. As a result, under s. 29 of the CCMA, the plaintiff wrote to the defendant advising him that he had been classified as not cooperating which placed him outside the protection of MARP. He was advised of an internal right to appeal and the importance of seeking independent legal advice in that respect. However, she stated that the defendant failed to respond to this correspondence.

17. In a replying affidavit of 18th May, 2015, the defendant stated that no one from the ASU communicated with him with a view to arranging a meeting. He stated that he had no recollection of ever receiving any letter seeking a standard financial statement. He denied failing to respond to the plaintiff's request for a completed SFS because he stated he did not recall receiving the request nor was he aware that he was at risk if he failed to do so or that he was classified as non-compliant. He said he had no recollection of that correspondence.

18. Ms. McGee in a further affidavit of 25th June, 2015, restated the position that a borrower had to complete an SFS in order for the lender to be in a position to assess the borrower's financial position. Furthermore, in both letters it was made clear that the plaintiff remained willing to discuss his financial affairs with him. It was emphasised that an appointment could be arranged with the defendant's local branch. This was not availed of by the defendant. In addition, it was averred that the plaintiff had, at all times, proactively encouraged the defendant to engage with the plaintiff concerning his financial difficulties.

19. The defendant in a further affidavit of 7th October, 2015, suggested that the plaintiff was disingenuous and deliberately abusing the court process concerning his alleged failure to comply with the CCMA. In this affidavit, he states that the plaintiff had not responded to an official complaint concerning the operation of the CCMA made 28th September, 2015, to the Complaints Department of Permanent TSB. He stated that:-

"I say that the plaintiff ignored my Standard Financial Statement (SFS).

dated 09/08/2012 which was sent to Permanent TSB by my financial advisors who helped me fill out the SFS and I have given power of attorney to deal with Permanent TSB, which eventually Permanent TSB refused to deal with."

20. The complaint of 28th September, 2015, asserts 31 alleged breaches of the CCMA.

21. It is submitted on behalf of the defendant that there was no response to this complaint by the plaintiff nor is there any evidence contradicting the basis of the complaint and the assertions contained therein. The complaint asserts that PTSB did not accept the defendant's SFS or pass it to the ASU or provide a copy of the SFS to him. I am satisfied that these assertions do not constitute the basis of a defence to the plaintiff's claim and note that they are not supported by any exhibited documentation.

22. It is submitted on behalf of the defendant that the court should direct a plenary hearing in relation to the conflict of fact between the parties as to whether an SFS was furnished by the defendant or not. The evidence on behalf of the plaintiff is that an SFS was sought but never furnished. It is clear that no response was received from the defendant in respect of correspondence sent under the CCMA even when it was indicated to him that his non-cooperation might lead to the initiation of legal proceedings for possession: a further letter of 6th January, 2014 requested that he contact the plaintiff and informed him that he had a right of appeal under the CCMA of which he did not avail. No step was taken by the defendant at that stage in 2014, either to appeal the decision as advised on the basis that the proper assessment had not been carried out or that there had been a failure to communicate with him about the provision of the SFS or setting out any of the numerous complaints which he formulated a year later. I am also satisfied that the defendant's evidence in respect of the SFS is inconsistent. As already stated, in his affidavit of 18th May, 2015, the defendant claimed that he had no recollection of ever receiving any communication in respect of a request for the SFS or that he was at risk of exiting the MARP which relates to the letter which the plaintiff avers was sent on 8th November, 2013. In his later affidavit of 7th October, 2015, which exhibited the complaint referred to above, the defendant states that the plaintiff ignored his SFS statement which was sent to them by his financial advisor who helped fill it out. He now states that the SFS was sent on 9th August, 2012 which means that he must have realised that it was required, contrary to his earlier averment that he had no recollection of the correspondence in this regard.

23. In *Irish Life and Permanent plc v. Dunne & Ors* [2015] IESC 46, the Supreme Court considered the aim and effect of the CCMA in claims for possession of mortgage property by financial institutions. Clarke J. (delivering the judgment of the court) stated, *inter alia*:-

"5.18 ...the Code imposes a moratorium on seeking possession in certain circumstances. Presumably the purpose of the

Code in that regard is to provide a window of opportunity in which there can be an exploration of whether there are other solutions to the mortgage arrears problems of the borrower in question and, if there are, to take action to put those solutions in place. A financial institution which, entirely ignoring the provisions of the Code in that regard, simply went ahead and sought possession as soon as it was legally entitled so to do would be doing the very thing which the Code is designed to prevent. For a court to entertain an application for possession which was brought in circumstances of clear breach of the moratorium would be for a court to act in aid of the actions of a financial institution which were clearly unlawful (by being in breach of the Code) and in circumstances where the very act of the financial institution concerned in seeking possession was contrary to the intention or purpose behind the Code itself.

5.19 In my view a court could not properly act to consider a possession application in those circumstances. It should be recorded that the Code (being the version applicable to this case) does make some provision for the moratorium period being cut short ... or not applying ... I am, in this section of this judgment, dealing with a situation where an application for possession has been brought at a time when the Code precludes such action. Like consideration would apply to any similar provisions in the current or any future versions of the code.

5.20 However, in respect of the other provisions of the Code, different considerations apply. There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution, in formulating its detailed policies in respect of mortgage arrears and applying those policies to the facts of individual cases, can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the Oireachtas had intended to give the courts such a role then it would surely have required detailed and express legislation which would have established the criteria by reference to which the Court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law.

5.21 It must be recalled that these issues only arise at all in circumstances where, as a matter of law, the relevant financial institution is entitled to possession...

...

5.25 ...The basis on which I have concluded that a breach of the moratorium does require a court to decline to make an order for possession stems, for the reasons already set out, from the fact that a court would, by entertaining an application for possession in breach of the moratorium, itself be participating in an act which was illegal, for it is the very act itself of seeking possession before the Court, rather than any other questions of compliance with the Code, which is in breach of the moratorium provision.

5.26 In those circumstances, it seems to me that it is appropriate that the Court should require that it be satisfied that there has been no breach of the moratorium. While it will be a matter for any court hearing an individual application to determine the adequacy of the evidence placed before it, I should say that it seems to me that a simple averment in an appropriate affidavit to the effect that the proceedings were commenced outside of the moratorium period, insofar as it is relevant to the case in question, ought be sufficient to establish compliance with that requirement on a *prima facie* basis. If the full or normal moratorium period is said not to apply then that should be explained. Clearly, if the matter is contested, the Court may have to consider what further evidence may be necessary to enable the Court to be satisfied that there was no breach of the moratorium.

5.27 In conclusion on this issue I should say that in those circumstances I am satisfied that, in the limited cases of a breach of the moratorium, but in no other cases unless and until appropriate legislation is passed, a court should decline to make an order for possession.

5.28 I would, therefore, answer questions (ii) and (iii) in the case stated in this case by indicating that, where the breach of the Code involves a failure by a lender to abide by the moratorium referred to in the Code, but in no other case, non-compliance with the Code affects, as a matter of law, a relevant lender's entitlement to obtain an order for possession. I would further clarify that it is a matter for the relevant lender to establish by appropriate evidence in any application before the Court that compliance with that aspect of the Code has occurred."

24. I am not satisfied that the alleged breaches of the CCMA advanced by the defendant are such, even if established, as to disentitle the plaintiff to seek and obtain an order for possession.

25. Section 29 of the CCMA provides that where a lender has classified a borrower as non-cooperating following a period whereby the borrower has not been given an opportunity to cooperate in accordance with s. 28, the borrower must be notified that they have been classified as not cooperating and, *inter alia*, of the fact that legal proceedings may commence immediately. I am satisfied that the appropriate notification in that regard was given by letter dated 6th January, 2014, as averred to in the plaintiff's affidavit. Under s. 45(d), if a lender does not offer a borrower an alternative repayment arrangement where it has concluded that the mortgage is not sustainable and an alternative repayment arrangement is unlikely to be appropriate, a letter should issue indicating to the borrower, *inter alia*, that legal proceedings may commence three months from the date the letter is issued or eight months from the arrears arose which ever date is later. A similar provision exists under s. 47 where a borrower is not willing to enter into the alternative repayment arrangement offered by the lender. In this case, the provision under s. 29 was invoked, I am satisfied that the moratorium periods under the CCMA has been complied with by the plaintiff. A civil bill for possession issued on 28th August, 2014. The defendant was by that stage two years in arrears and default. I am satisfied that applying the principles set out in the *Dunne* case, no issue arises in this case in respect of the moratorium. The plaintiff was fully entitled to issue and pursue these proceedings seeking an order for possession of the mortgage property.

Interest and Tracker Mortgage

26. The defendant's solicitors raise two points in relation to the accounts. Firstly, it is said that the interest calculated and applied to both accounts may have been miscalculated. Secondly, it is submitted that the mortgages are tracker mortgages and are properly subject to an examination under the broad examination of tracker mortgage related issues instigated by the Central Bank of Ireland, which is not completed and which may indicate that the benefits of a tracker mortgage had not been accorded to the defendant in the course of the operation of the accounts. As part of this submission reliance is placed on representations said to have been made by and on behalf of the plaintiff to the Minister for Finance and Public Expenditure Reform and a Committee of the Oireachtas that the plaintiff would not proceed in any way with legal action, including repossession claims, against any customer who is included in a review of mortgage accounts undertaken by his organisation as part of the Central Bank of Ireland led tracker review of mortgages.

27. The first mention of an issue in respect of the calculation of interest on accounts A and B is contained at para. 6 of the defendant's affidavit of 29th April, 2016. In it he indicates that he intends to engage a forensic accountant to check the bank statements of each account for any miscalculation or misapplication of interest. In a replying affidavit of 31st May, 2016 Ms. McGee denies any such misapplication. She states that as of 31st August, 2016 the amount outstanding on account A was €143,971.76 including arrears of €30,961.13 and that the total outstanding in respect of account B was €53,717.16 including arrears of €12,440.56. She repeats that no payments had been made in respect of either account since 21st August, 2012 in respect of account A and 17th August, 2012 in respect of account B.

28. At para. 3 of the defendant's affidavit of 29th September, 2016, he claims as an alternative to other defences advanced, that account A was a tracker mortgage loan and not a variable rate loan as deposed by the plaintiff. Ms. McGee in her replying affidavit of 13th October, 2016 addresses this issue at para. 12. She states that loan A was issued as a discounted variable rate loan for one year on 21st August, 2006. After one year the loan switched to a standard variable rate on 21st August, 2007. She points to the letter of approval of 18th July, 2006 in this regard and further states that the loan was switched to a residential tracker rate loan on 3rd October, 2006 and had since that date remained as a residential tracker loan rate.

29. The defendant in his further affidavit of 29th September, 2016 avers at para. 3 that account A is a tracker loan not a variable rate loan as sworn in the affidavits by the plaintiff. There is no further reference to the matter prior to the making of the order in the Circuit Court dated 3rd February, 2017.

30. The next reference to the matter is contained in the defendant's affidavit of 14th December, 2017 which grounds his application to re-enter the appeal which had been dismissed by the High Court on 19th October, 2017. At para. 10 the defendant states his "concern that my mortgage account is a tracker and that my account may have been overcharged and that I may not have been in default." He states that he has requested the plaintiff to examine this and place the account on the "mortgage tracker examination register".

31. In an affidavit sworn on 11th May, 2018 on the plaintiff's behalf, Ms Jacqueline O'Brien avers that account A was a variable rate home loan for one year. She confirmed that the variable (new business) interest rate at the time of the loan offer was 3.44%. This loan was issued on 21st August, 2006 at the variable interest (new business) rate of 3.69% and followed a number of rate changes which were then set out. Pursuant to special condition A of the loan approval the loan switched to a standard variable rate on 21st August, 2007 i.e. to a rate of 5.35% as per the terms and conditions of the mortgage.

32. Ms. O'Brien confirmed that as previously deposed by Ms. McGee on 13th October, 2016 the loan was switched to a residential tracker rate loan at a rate of 4.8% on 3rd October, 2007 and followed a number of rate changes on subsequent dates. These changes are set out in tabular form in the affidavit. Though the plaintiff has not been able to locate documentation relating to the variation of the contract Ms. O'Brien deposes that the account was switched to the preferable tracker rate of interest and the defendant has benefitted from this lower rate of interest at all times since that date.

33. On 3rd November, 2017 the plaintiff received a letter from the defendant seeking information on the Central Bank tracker examination review and the status of the defendant's loans in the review. The defendant alleged that it appeared from his statements that the incorrect interest rate had been charged against his loans and he wished to lodge a complaint in line with the Central Bank guidelines on these matters.

34. On 2nd March, 2018 and 4th April, 2018 the plaintiff wrote to the defendant advising him that it was investigating the matter and would contact him as soon as the investigations were completed.

35. Ms. O'Brien states that in late 2015 the Central Bank of Ireland announced its intention to require all mortgage lenders to conduct a broad examination of tracker mortgage related issues. Details of this tracker review were provided to the plaintiff by the CBI which required the plaintiff to identify all circumstances where:

- (i) Tracker interest rates were applied to mortgage accounts at any stage during the relevant period but are no longer being applied to those accounts;
- (ii) A tracker interest rate margin applying to a mortgage account at any stage during the relevant period is higher than any previous margin applied to that mortgage account;
- (iii) Customers have contractual rights to have tracker interest rates applied to their mortgage accounts at any stage during the relevant period and the tracker interest rates will not apply to their mortgage accounts of the appropriate authority and/or any stage during the relevant period;
- (iv) Customers have contractual rights to be offered the option of having tracker interest rates applied to their mortgage accounts at any stage during the relevant period and will not offer the option of having tracker interest rates applied to their accounts at the appropriate and/or any stage during the relevant period and to determine whether or not or at all;
- (v) Contractual rights and obligations regarding tracker interest rates were adhered to and/or honoured to any other period;
- (vi) Obligations arising pursuant to Consumer Protection Regulations as set out in "Regulatory Framework" section were complied with.

36. Ms. O'Brien states that the plaintiff established a programme of tracker review in accordance with these criteria. The programme was tasked with completing the assessment activities required by CBI under review. Its aim was to identify any instances where there was a failure and to ensure that those customer accounts were corrected and returned to the position that would have existed if no failure had occurred. Those customers whose accounts were affected were identified and the bank offered customers redress where an issue arose which resulted in customer detriment.

37. As a result of this review Ms. O'Brien states that the plaintiff established that the defendant had obtained his own independent legal advice when he obtained the loan. In addition, the letter of approval did not contain a Special Condition providing a contractual right to a tracker rate at any point during the term of the mortgage. However, on 3rd October, 2007 the plaintiff switched the account to a tracker rate of interest and the account has remained on this preferable rate of interest at all times since. Therefore, the plaintiff concluded that the defendant was not prejudiced in anyway by the management of his mortgage account and did not therefore qualify for redress following the assessment of the account under the programme. The plaintiff then wrote to the defendant

advising him of these findings on 27th April, 2018.

38. During the course of the review Ms. O'Brien also stated that the plaintiff established that the defendant had obtained loan B which did not contain a Special Condition providing a contractual right to a tracker rate at any point during the term of the mortgage. Thus the plaintiff concluded that the defendant was not prejudiced in anyway by the management of this mortgage account and did not therefore qualify for redress following an assessment of the account under the programme. These findings were also set out in a letter of 27th April, 2018.

39. It is clear therefore that a review was requested and completed by the plaintiff and the results furnished to the defendant in the letter of 27th April, 2018. It is clear that loan account A operated as a tracker mortgage account from 3rd October 2007 and the defendant continued to have the benefit of the terms of that tracker mortgage and that no issue arises in respect of same. Account B was never subject to tracker mortgage conditions.

40. I am not satisfied that there is any evidential basis for the existence of an estoppel against the plaintiff in pursuing the relief claimed or that to do so may be regarded in the circumstances as an abuse of process.

41. In an affidavit sworn on 6th July, 2018, the defendant's solicitor Mr. Lyons set out the basis for the application to the court to adjourn proceedings pending a review of the accounts by Blackhawk Analytics a firm of forensic accountants. Following receipt of Ms. O'Brien's affidavit, he furnished the papers to Blackhawk Analytics and obtained what is termed "an interim expert witness report" dated 5th July, 2018. This report was exhibited. It criticises the plaintiff's handling of loan account A and in particular noted that the marginal interest rate was increased in respect of loan account A on 29th December, 2011 from 0.8% to 1.8% without any explanation. This higher margin of 1.8% was then applied for further periods from 30th July, 2011 and 30th May, 2013. The report states that the higher rate was 1% over the contract rate and is in clear breach of the mortgage contract. It is claimed that the marginal rate overcharge continued for 23 months according to the table set out in the affidavit. This is said to have led to an overcharge of €3,258. It is said that further details of the account are required as set out at p. 3 of the report in order to establish the amount of interest actually charged.

42. The plaintiff contends that the figure referred to is a typographical error and when one compares the actual rate charged and the amounts charged with those set out in the accounts it is clear that this is so. I accept this submission. I do not accept that there is any basis upon which to adjourn the proceedings to enable a further review to be carried out by Blackhawk Analytics: indeed no affidavit was provided from the forensic accountant even though there was ample time and opportunity to do so. I am satisfied on the balance of probabilities that the appropriate amount of interest had actually been applied and charged on account A. Furthermore, I am also satisfied that the evidence overwhelmingly establishes that the defendant has missed in excess of 67 consecutive monthly payments in respect of these loans and that there has been substantial default by the defendant in discharging his obligations pursuant to both contracts. This default continues.

43. Finally, the defendant also submits that the plaintiff is estopped and ought to be prevented from pursuing these proceedings until such time as an application or complaint is made to the Financial Services and Pension Ombudsman against the conclusion reached following the review and examination of the accounts by the plaintiff. I am satisfied that the letter of 27th April, 2018 was the final response to the plaintiff's complaint and concluded the review which was part of the Central Bank of Ireland tracker review. The defendant was informed about his right to refer any complaint in respect of this conclusion to the Financial Services and Pension Ombudsman Services in the letter. There is no evidence that he did so. I am not satisfied that the plaintiff was estopped from pursuing these proceedings pending the making or determination of any such referral.

Other matters

44. The defendant did not pursue any issue on this appeal which had earlier been canvassed in his affidavits in respect of Council Directive 93/13/EEC of 5th April, 1993 on Unfair Terms and Consumer Contracts as transposed into domestic law by the European Communities (Unfair Terms and Consumer Contracts) Regulations, 1995 (S.I. No. 27/1995). However, the court is required of its own motion to assess whether the contractual terms fall within the scope of the Directive and if so, whether they are unfair where it has available to it the legal and factual elements necessary for that task (*Aziz v Caixa d'Estalvis de Catalunya* (Case C – 415/11)).

45. Article 3 of the Directive provides that a contractual term which has not been individually negotiated shall be regarded as unfair if it is contrary to the requirement of good faith and causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. In this context I am satisfied that the defendant is a consumer under the terms of the Directive. Under Article 3(3) an annex to the Directive contains an indicative but non-exhaustive list of the terms which may be regarded as unfair. However, Article 4(2) provides that the assessment of the unfair nature of the terms of the contract shall relate "neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language." I am not satisfied that the terms of the mortgage loan contracts which are the subject of complaint in these proceedings fall within the scope of the Directive or Regulations. I am satisfied that their core elements contemplate the offer of a loan secured on the mortgaged property, their acceptance by the lender, the repayment of the loans over a prescribed period together with interest by way of periodic payments, the securing of the loans by mortgage on the property in suit, and a remedy entitling the lender to seek possession of the mortgaged property and realise its security should there be a default by the borrower in respect of the agreed repayments. The rates of interest applicable are also part of the core term of such an agreement. I am satisfied that the terms of the agreement are in plain intelligible language. I am therefore satisfied that these core terms of the mortgage loan contracts do not fall within the scope of the Directive and Regulations. Even if this were not so, I have considered the terms and conditions of both mortgage loans and I am satisfied that they do not contain terms which are unfair to the defendant or on a more general level as defined in the Directive and Regulations which would render the contracts void.

Conclusion

46. I am therefore satisfied for the reasons outlined that the court should not adjourn this appeal and that the defendant has not advanced any stateable or *bona fide* defence in law or in fact to the plaintiff's claim. I am satisfied on the evidence adduced that the plaintiff has established that it is entitled to an order for possession of the mortgaged property and that the defendant's appeal should be dismissed.