[2020] IEHC 18

THE HIGH COURT
(CIRCUIT APPEAL)

[2019/155 CA]
[2019/175 CA]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/RESPONDENT

AND

ADRIAN BLANC AND LUCILLE BLANC

DEFENDANTS/APPELLANTS

EX TEMPORE JUDGMENT of Ms. Justice O'Regan delivered on the 15th day of January, 2020

Issues

1. This matter comes before the court by way of two separate appeals of the defendants/appellants in respect of proceedings which were commenced in the Circuit Court on the 24th of February, 2017, on foot of a Civil Bill for possession of the 9th of September, 2016.

2. The case concerns no. 36 Brighton Avenue, Foxrock, Dublin 18 which is registered in Folio 154705F, County Dublin, in the name of the defendants/appellants, comprising their family home. A mortgage is also registered in favour of ICS Building Society (ICS).

3. The current plaintiff, the Governor and Company of the Bank of Ireland (the Bank of Ireland) are the successors in title to ICS following a transfer on the 1st of September, 2014, of a portion of the business of ICS to the Bank of Ireland. The Bank of Ireland are not registered as owners of the within property in the Property Registration Authority, however, under ss. 35 and 36 of the Central Bank Act, 1971, the Bank of Ireland nevertheless have all the rights and entitlements of a party as though registered as full owner.

4. On the 11th of April, 2019, the Circuit Court granted an order for possession of the subject premises to the Bank of Ireland.

Background

5. The background in respect of that order was a loan offer made by ICS in favour of the defendants of the 3rd of March, 2008, whereby ICS agreed to advance €1.7m for the purchase of the property on the basis that it would be repaid over a 15-year term. During the course of the first three years interest only was repayable, and thereafter interest and principal was to be paid.

6. The arrangement not only involved the loan offer accepted by the defendants on the 3rd of March, 2008, but also a mortgage of the 13th of March, 2008, whereby the defendants offered for security to ICS the premises aforesaid.

7. In the document of the 3rd of March, 2008, which was executed by the defendants/appellants, the interest rate was calculated at €6,587.50, and of the monies to be paid at the then interest rate which applied, interest and principal amounted to

€15,426.32. It seems therefore that on balance the principal to be paid was in or about €8,800/€8,900 per month.

8. The defendants paid the interest and sums due and owing until July, 2010. On the 7th of July, 2010, the first set of arrears accumulated. From March, 2011 there was an accumulation of substantial arrears and this coincides with the date upon which principal was due.

9. Following this, by letter of the 4th of January, 2016, the Bank of Ireland wrote to the defendants and indicated that there was a certain amount of outstanding arrears. They also indicated that because of default they required the totality of the monies due and owing on foot of the arrangement between the parties to be discharged.

10. At Clause 6 of the mortgage document it was agreed that the lender would be entitled to possession of the property, however, this entitlement to possession would not be triggered unless one or more of the events described in Clause 7 occurred.

11. Clause 7 included a default in repayments and accordingly the letter of the 4th of January, 2016 issued. There does not appear to have been any response to that letter and by letter of the 24th of March, 2016, the current plaintiff sought possession of the property.

Dispute

12. In this action six separate affidavits on behalf of the defendants have been furnished to the court and they start with an affidavit of the 23rd of February, 2017, complaining that the contract imposed terms on them which were unfair and were not individually negotiated. They also complained that the bank had knowledge of the disastrous economy in March, 2008 and there was a conspiracy against the defendants to violate their rights. There is a claim of breach of an EU Directive and the Consumer Credit Act, 1995.

13. In response to that affidavit there is an affidavit of Ms. Griffin of the 6th of October, 2017, to the effect that prior to the execution of the mortgage, all documents were made available and the defendants had the benefit of independent legal advice. It is, in my view, noteworthy that there is no contradiction of this statement.

14. In the next affidavit of the 25th of October, 2017, the defendants complain of grossly unfair terms and repeat prior complaints made.

15. In an affidavit of the 6th of December, 2017, the defendants were then complaining of an additional matter, namely that the plaintiff was misleading the court by not mentioning the ongoing investigation under the tracker mortgage scheme. This was subsequently denied by Mr. Reid in his affidavit of the 27th of April, 2018, and at para. 7 he set out his understanding of the tracker investigation procedure.

16. In the fourth affidavit on behalf of the defendants of the 26th of October, 2018, the issue as to the tracker mortgage and the code of conduct was dealt with. This was responded to

again by Mr. Reid in an affidavit of the 29th of November, 2018. Mr. Reid also addressed the fact that contrary to what the defendants were asserting, the commencement of proceedings prior to the matter being addressed to the Financial Services and Pensions Ombudsman is not precluded under s.44 of the Financial Services and Pensions Ombudsman Act, 2017.

17. There is a fifth affidavit which is undated but received by the Circuit Court on the 1st of February, 2019, and this together with submissions are to the effect that because of what the defendants would suggest were dramatic changes to the European Central Bank (ECB) lending rate to banks, that the interest rate applicable as mentioned in the letter of loan offer became reduced to nil essentially as the minimum bid rate referred to in the letter of loan offer was abandoned in favour of a fixed rate.

18. The additional 0.65% is not fully addressed and in part it does seem to be that the defendants might suggest that this element of the interest rate was also rendered a nullity because there was no certification from the defendants as anticipated by the letter of loan offer - it is suggested no interest rate applied.

19. In this regard at para. 9 of the letter of loan offer it is stated that the interest rate applicable to the loan is a variable interest rate and should not be more than 0.65% above the ECB main refinancing operations minimum bid rate. It will only be following certification if that rate for whatever reason is unavailable that the loan would be repayable with interest accumulating on the prevailing home loan variable rate.

20. Because of this argument there are two affidavits by the plaintiff, one of Mr. Reid of the 28th of February, 2019, and the other of Mr. Morley of the 28th of February, 2019. In the affidavit of Mr. Reid, he sets out at para. 5 the dates of changes of rates as notified to the defendants and this is significant only in respect of the fact that at some point it seemed to be intimated that the defendants were not notified of an interest rate change. However, I take the view that globally the complaint was that there was no certification in accordance with para. 9 of the loan offer as accepted.

21. In the affidavit of Mr. Morley, he suggests that the defendants are mistaken as to what occurred as and from the 15th of October, 2008. To this extent he has exhibited a press release of the 6th of November, 2008, from the ECB which referred to the then minimum bid rate at that time.

22. The bulk of the arguments on the part of the defendants related to the tracker mortgage review and the impact of the change from minimum bid rate to fixed rate. Insofar as the tracker mortgage review is concerned there was a final answer from the plaintiff that the defendants were not impacted by a letter of the 25th of April, 2018, and this was more or less repeated in a letter of the 12th of October, 2018.

23. The defendants suggest that the jurisdiction of this Court is such that the finding of the plaintiff in April, 2018 and subsequently repeated could be reviewed to determine effectively in the defendant's favour that it was an inappropriate response. However, as

suggested by the plaintiff, it is the case that this is not a court of full High Court jurisdiction. It is a Circuit Court appeal with the jurisdiction of the Circuit Court and should the defendants wish to contest the findings of the plaintiff in April and October, 2018, it seems that full plenary proceedings would be required. It is not, as requested by the defendants, possible for this Court to undertake the investigation suggested by them this morning.

24. Insofar as the ECB changes are concerned it is suggested that there was no certification and the bank unilaterally introduced a third rate which would reflect the fixed rate which occurred as and from the 15th of October, 2008, and remains the position with the ECB. In that respect a CJEU judgment of the 26th of February, 2015, case C-143/13 (Matei) is relied on to the effect that this would breach Directive no. 93 of 2013 in respect of unfair terms.

25. On the other hand, the plaintiff relies on Mr. Justice Meenan's judgment of *AIB v. O'Donoghue* [2018] IEHC 599, to say that the main subject of a mortgage contract would not be covered by unfair terms, and of course the main subject matter would be the lending of a sum of money with an agreement to repay, security and generally speaking, with a lending institution, interest.

26. Insofar as it is suggested that there were unfair terms it is not clear what is the target of the suggestion. It seems to be possibly the entitlement of the bank to rely on the change of circumstances within the ECB and apply the fixed rate lending. However, that is not one of the terms within the loan offer or mortgage so effectively the defendants are complaining on a general global non-specific basis of unfair terms which I find to be unsustainable.

27. The current investigation before the court is possession only. I am not asked to make a judgment of any description as to the sums of money that are due and owing currently by the defendants to the bank. What the Court must do is look to determine if, by the time the plaintiff commenced the process leading to proceedings in January, 2016 there was default in the loan repayment sufficient to enable the plaintiff to commence their possession proceedings in September, 2016 having regard to the contract entered into between the parties.

28. There is one further matter that the court must also look at and that is under the consumer protection legislation as to whether or not, under the code of conduct that would apply, there was the relevant three-month moratorium from the date of threat of legal proceedings to the date of institution.

29. The date of threat was November, 2015 and therefore September, 2016 when the proceedings were actually instituted was well beyond the time span.

30. The issue of how much money is due and owing and the guide to the granting or withholding of possession was dealt with by Ms. Justice Dunne in the High Court in 2009 in *Anglo Irish Bank PLC v. Fanning* [2009] IEHC 141, when it was indicated that a default

was the issue, not the amount. That is clearly the case in circumstances where possession only is sought and not judgment of a particular sum of money, and possession is the only matter before this Court.

31. Insofar as the defendants make the argument that the minimum bid rate was abandoned in favour of a fixed rate, there is some superficial attractiveness to that argument. My own view is that there is no great substance to it in the end when one reviews it. However, I do not see how that could be reviewed in the context of the within proceedings, not only because we are looking at default and possession, but also because to a large extent the arguments are based on certain exhibits which are produced as though complete evidence before the court to be relied on, whereas that cannot be the case - they are all hearsay evidence and are not capable of providing substantial evidence to deal with this argument.

32. The fact that I think it is superficially attractive but without substance is neither here nor there, nor is it the end of the matter. What the Court must look at is, was there a default. Having regard to the statement of the repayments, which is not denied, I note that the largest amount at any time paid by the defendants to the plaintiff on foot of the loan offer and the mortgage, was in June, 2011 in the sum of circa €3,941 in total. If one looks at that figure and if one even assumes that no arrears of interest could possibly accumulate so that there was no default in respect of interest, since March, 2011 principal was to be discharged which amounted to, at a very minimum, €8,800 per month and therefore €3,941 which was the maximum and paid once only at that rate, does not come within 50% of what was due and owing.

Conclusion

33. It is unassailable therefore, in my view, that there was a default by the date of demand made in January, 2016 by the Bank of Ireland against the defendants and therefore in accordance with the contract the plaintiff was entitled, under Clause 6 and 7, to call in the entire indebtedness and to look for possession if the entirety of the indebtedness was not paid.

34. I am satisfied that the aforesaid was in accordance with the contract as by those dates substantial arrears in respect of principal only arose (thereby side-lining the interest issue), and accordingly I am satisfied that the Circuit Court was correct in its decision to award possession of the subject premises to the plaintiff bank.