

THE HIGH COURT

[2019/2685 P.]

BETWEEN

JIMMY MURPHY

PLAINTIFF

AND

ANN (OTHERWISE ANNA) DORAN AND CHRISTOPHER MURPHY

DEFENDANTS

JUDGMENT of Ms. Justice Reynolds delivered on the 17th day of January, 2020

Introduction

1. In this application the plaintiff ('the receiver') seeks interlocutory injunctive relief to restrain the defendants from continuing their trespass at a property situate at 9 Walkinstown Road, Walkinstown, Dublin ('the property').
2. The plaintiff was appointed as receiver by an Instrument of Appointment dated 8th January 2016 by Promontoria (Finn) Limited in its capacity as mortgagee of unregistered land under a Deed of Mortgage dated 23rd November, 2007 ('the mortgage'), executed by the first named defendant ('the borrower') and First Active plc. The business of First Active plc was subsequently transferred to Ulster Bank Ireland Limited ('Ulster Bank') and thereafter, the facility and mortgage were assigned to Promontoria (Finn) Limited.
3. The defendants are resisting the application primarily on the basis that the subject property is their principal private residence and/or family home in which circumstances the borrower asserts an entitlement to the protections of the Code of Conduct on Mortgage Arrears.

Factual Background

4. The borrower entered into a mortgage with First Active plc in November, 2007 on foot of a loan by First Active plc to her for the sum of €420,000 which sum was secured on the property.
5. Pursuant to the terms of the mortgage, First Active plc had an express power to transfer or assign *inter alia* the mortgage and the security created by the mortgage together with all associated powers and rights to any persons with or without notice to the borrower.
6. The terms of the mortgage agreement provided that the borrower could not grant any tenancy or other rights of possession of the property to any third party which would bind or usurp the mortgagee's title. The mortgage agreement expressly excluded the mortgagor's statutory power to grant lettings as conferred by Section 18 of the Conveyancing Act 1881. Clause 6 (e) and (h) of the mortgage specifically provided as follows:
 - "(e) Not to exercise the powers of leasing or agreeing to lease and of accepting surrenders of leases conferred on a mortgagor in possession by the Conveyancing Acts, 1881 to 1911 and not to create any lease or tenancy or part with or share the occupation or possession of the mortgaged property.

- (h) Not without consent of the lender to make any disposition of the mortgaged property subject to the mortgage or create or purport to create any rent charge affecting it and not to create or permit to exist any mortgage or charge on the mortgaged property or the endowment policy or any additional or collateral security which will rank after the mortgage."
7. In February, 2010 the banking business of First Active plc was transferred to Ulster Bank Ireland Limited ("Ulster Bank") pursuant to statutory instrument. As a consequence, the loan and mortgage were transferred to Ulster Bank as of then.
8. The borrower fell into arrears with the repayments due under the loan. By letter dated 18th February, 2013, Ulster Bank made demand of the borrower to repay the sum of €439,224.71 which was the sum then due and owing, in default of which proceedings would be issued.
9. By Global Deed of Transfer dated 29th September, 2015 Ulster Bank transferred its interest in the loan agreement to Promontoria (Finn) Limited.
10. By letter dated 5th November, 2015, the borrower was informed that the loan facility and security had been assigned from Ulster Bank to Promontoria (Finn) Limited.

Issue to be determined

11. The net issue between the parties concerns the defendants' contention that the property constitutes their principal private residence and/or family home in circumstances where the borrower asserts an entitlement to the protection of the Code of Conduct on Mortgage Arrears.

The Code of Conduct on Mortgage Arrears

12. The Code of Conduct issued by the Central Bank sets out the manner in which banks must deal with borrowers who are either in arrears with the mortgage on their family home, or are faced with the prospect of entering mortgage arrears. The Code sets out a framework allowing mortgage lenders and borrowers in mortgage difficulties to engage with one another in a structured way.
13. The Code derives its legal status from section 117 of the Central Bank Act 1989, wherein 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".

14. The Code, at page 2, states as follows:

"This Code applies to the mortgage loan of a borrower which is secured by his/her primary residence."

The plaintiff's position

15. The receiver denies that the property constitutes the defendants' principal private residence and/or family home for the purposes of the Code of Conduct on Mortgage Arrears.
16. In this regard, the receiver highlights relevant factual issues for consideration by the court as follows: -
 - (a) The Letter of Loan offer dated 27th October, 2007 expressly stated that the monies were advanced for the purpose of purchasing the property for use as a Buy-to-Let Property and the special conditions attached thereto expressly stipulated that "This is an Investment Property."
 - (b) The borrower maintains that she moved into the property in March 2012 for the purposes of using it for a family home. This was a period of approximately four and a half years after the execution of the loan agreement on 22nd October, 2007 and the mortgage on 23rd November, 2007.
 - (c) The borrower moved into the property without the prior consent of the mortgagee and further, moved the second named defendant into the property in breach of the negative pledge clause of the mortgage.
 - (d) The borrower first notified Ulster Bank in January 2014 that she was in occupation of the property, some twelve months after she had been served with a demand for payment of the arrears on the account in the sum of €473,758.67.
 - (e) In April 2016, the borrower first notified the receiver that she had moved into the property for its use as a family home. The receiver thereafter made repeated requests for documentary proof that the property comprised her primary residence which she refused to provide until after the issue of the proceedings herein.
17. Further, it is submitted that the plaintiff acting in his capacity as receiver is neither a licensed holder nor a person supervised by the Central Bank and accordingly is not bound by the Code of Conduct. The Code applies to "the mortgage lending activities of regulated entities". The plaintiff is not a regulated entity and accordingly it is submitted that the Code of Conduct has no applicability to the within proceedings.
18. In addition, the Code applies only to the mortgage loan of a borrower "which is secured by his/her primary residence". A "primary residence" is defined in the Code as follows:
 - "(a) The residential property which the borrower occupies as his/her primary residence in this State, or
 - (b) a residential property which is the only residential property in this State owned by the Borrower".
19. The receiver posits that the loan the subject matter of these proceedings was not secured by the borrower's residential property but was secured by way of mortgage on an

investment property which was explicitly Buy-to-Let. It was some four and a half years after the conclusion of the loan agreement and mortgage that the defendants moved into the property to claim it as their primary residence.

20. It is argued that even if the Code did apply, Clause 57 provides that “notwithstanding Clause 56” the lender may commence legal proceedings in the event of a “breach of contract by the borrower other than the existence of arrears”. It is argued in the instant case, that in addition to falling into arrears, the borrower committed a separate breach of contract by installing the second named defendant in the property without prior consent of the mortgagee in breach of the mortgage. In the circumstances, it is contended that the receiver would have been entitled to immediately commence the proceedings notwithstanding the moratorium provisions of the Code of Conduct.
21. Further, it is contended that even if the Code of Conduct was applicable, the only provisions that are directly enforceable are the clauses which impose a moratorium on repossession proceedings. The Code prescribes a procedure to be followed known as the “Mortgage Arrears Resolution Process” or “MARP”. The combined effect of the relevant clauses of the Code is that where an alternative repayment arrangement is not agreed, the lender must notify the borrower in writing that the provisions of MARP no longer apply, in which circumstances proceedings may commence either (a) three months from the date of the letter, or (b) eight months from the date the arrears arose, whichever date is later.
22. The receiver contends that Ulster Bank had notified the borrower that she was at risk of losing the protections of MARP and afforded her ample opportunity to engage with the mortgagee.

The defendants’ position

23. In January, 2016, the borrower was informed of the appointment of the receiver. Thereafter, the borrower sought and was provided with a copy of the relevant Instrument of Appointment together with an offer to inspect the original documentation at the plaintiff’s solicitor’s office.
24. In April 2016, the borrower asserted that the property comprised the dwelling in which her family resided. She also advised that she had engaged Mr. Ben Gilroy to act as her adviser and to enter into discussions on her behalf. She now accepts in her affidavits that she should not have followed Mr. Gilroy’s advice and instead that she should have properly engaged with the receivership.
25. The borrower asserts that she has resided in the property with her husband, the second named defendant, since in or about March 2012. In support of this assertion the borrower exhibits her marriage certificate (dated 4th January, 2013), employment and Revenue records together with sample utility bills for the period 2018 – 2019.
26. The borrower disputes the valid appointment of the receiver to the property in circumstances where it is maintained that the property is a family home and principal

private residence and where the charge holder has not completed any process pursuant to the Code of Conduct on Mortgage Arrears. In this regard, she relies on a letter dated 29th September, 2014 from Ulster Bank advising of arrears on the mortgage and the protections afforded by the Mortgage Arrears Resolutions Process.

27. The borrower posits that the charge holder has attempted to circumvent this process by the appointment of the receiver. Further, she maintains that any order for repossession of the property must be sought by means of a Civil Bill for possession in the Circuit Court.

Relevant legal authorities

28. The principal argument made by the borrower is that the property constitutes a family home and that she is therefore, entitled to the benefit of mortgage arrears process.

29. In *Fennell v. Creedon* [2015] IEHC 711, Murphy J. in considering the application of the Code of Conduct on Mortgage Arrears stated at para. 62, as follows:

"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 defendant's 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."

30. In that case, the receiver had sought an interlocutory injunction to restrain the mortgagors from trespassing on a property which they claimed comprised their family home. The mortgagors attempted to rely on the Code of Conduct in order to challenge the jurisdiction of the court to grant the reliefs claimed.

31. Murphy J. was satisfied that the loan agreement entered into had been commercial in nature and that the mortgagors had only moved their family into the property four years after the loan agreement had been entered into. She rejected the mortgagor's argument that the Code of Conduct applied notwithstanding the fact that the mortgagee had at one stage considered that the property was entitled to the benefit of the Code of Conduct and had sent correspondence in that respect. She rejected the mortgagor's submission that the effect of the Code was that the mortgagee could only apply for possession of the property through formal court proceedings rather than the appointment of a receiver.

32. She further surmised as follows:

"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."

33. The approach adopted by Murphy J. in *Fennell* was approved by the Court of Appeal in *Tyrrell v. Wright* [2018] IECA 295. Whelan J. stated that the High Court had been correct in attaching weight to the fact that the premises was not acquired as a family home and that the loans had been extended for a commercial purpose. Whelan J. endorsed Murphy J.'s finding that "merely because mortgagors move into a secured property several years after a commercial loan agreement is entered into is not sufficient to usurp the underlying terms of the mortgage contract."
34. In *Tyrrell*, Whelan J. held that the mortgagor committed a separate breach of the mortgage other than falling into arrears, namely he had breached the negative pledge clause therein by representing to his partner that she would have an interest in the secured properties. She determined that under Clause 57 of the Code the mortgagor had committed a further breach of contract and as such MARP did not apply. The receiver therefore was entitled to commence legal proceedings for vacant possession, whether or not it was Mr. Wright's principal private residence and there was no onus on the receiver to comply with the provisions of Clause 56 of the Code".

Conclusion

35. In applying the principles enunciated in *Fennell v. Creedon* and approved by the Court of Appeal in *Tyrrell*, I am satisfied that the borrower is not entitled to have the Code applied in this case in circumstances where she drew down a commercial mortgage for the purposes of purchasing a residential investment property. The fact that some years later she decided to use the property as her private residence, without any notice to or consent from the mortgagee, does not entitle her to have the Code applied.
36. Pursuant to the mortgage, the mortgagee became the full owner of the property, subject only to the borrower's equity of redemption which constitutes her sole proprietary interest in the property. Unless the mortgagee had consented, the borrower could not grant any tenancy or other rights of possession to any third party, be it her husband or otherwise, which would bind or usurp the mortgagee's title.
37. In any event, the Code specifically states that it applies to "the mortgage loan of a borrower which is secured by his/her primary residence". This Court is satisfied that these terms must be read together and that the mortgage loan and the primary residence are determined at the same time. It is clear that when the loan was entered into in 2007 the borrower's primary residence was at 10 Derby Lodge, The Curragh, County Kildare. It is simply not open to the borrower to change the character of the property in Walkinstown by her unilateral act of moving into the property some years after the mortgage had been entered into so as to vary or increase the rights conferred upon her.
38. Even if the borrower was entitled to have the Code applied, she was in fact advised of the protections available under MARP by Ulster Bank in September, 2014 and choose not to engage with the process at that stage. The Court of Appeal in *Tyrrell* determined that even if the Code of Conduct did apply, the mortgagor had committed a breach of contract other than the accumulation of arrears and as such MARP did not apply. In the instant case, it is clear that the mortgagor has breached Clause 6 of the contract and it follows

therefore that the receiver was entitled to commence the within proceedings whether or not it was the borrower's principal private residence.

Application for injunctive relief

39. Based on the evidence before this Court, I am satisfied that the receiver has made out a strong case that he is likely to obtain an order for possession of the property at the substantive trial. At no stage has the borrower denied that the monies are due and owing, it is the manner in which the receiver has proceeded that she has taken issue with. Further, I am satisfied that damages would not be an adequate remedy for the receiver in circumstances where the borrower is unable to pay the very significant debt now due and owing on the property, which exceeds the amount on the original loan. It is clear therefore that she will be unable to meet any award for damages in due course.
40. By contrast, the receiver has provided an undertaking as to damages and it is clear that the balance of convenience must favour the granting of the injunction sought.
41. In so determining, I am mindful that the character of the relief sought has a mandatory character but a mandatory character which is in itself the very purpose of the mortgage, namely to allow an enforcement in the event of a default. Whilst noting the Supreme Court decision in *Scriven* and the caution that must be exercised by the court in determining such issues as to minimise the risk of injustice, this has to be viewed in light of the circumstances of the instant case where the borrower has made no effort to meet her obligations and has now produced a situation of arrears of a magnitude which she clearly cannot address.
42. In all the circumstances, I will grant the reliefs sought in paras. 1-6 of the plaintiff's notice of motion herein.