[2019] IEHC 801

THE HIGH COURT

[2017 No. 122 C.A.]

BETWEEN

TANAGER DAC

PLAINTIFF

AND

ROLF KANE

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 21st day of November, 2019.

1. This appeal is brought from an order of the Circuit Court (Her Honour Judge Linnane) dismissing the plaintiff's claim for an order of possession of the defendant's family home being the property comprised in Folio 91184F of the Register of Freeholders County Dublin and known as One Elmwood, Clonsilla, County Dublin.

Relevant Facts

2. By letter of loan offer dated the 10th February, 2006, Bank of Scotland (Ireland) Ltd ("BOSI") offered a mortgage loan in the sum of €266,000 to the defendant over a term of 30 years repayable in 360 monthly instalments. The defendant signed the letter of offer on the 27th February, 2006. The basis of the interest rate stipulated in the letter of offer was 1.25% over the European Central Bank main refinancing operations rate. The interest type is described as "tracker". In the final section of the letter entitled "Borrowers Signed Acceptance of the Offer of Mortgage Loan", paragraph (a) provided:

> "I/we accept the offer of mortgage loan on the terms herein and set out in the terms and conditions leaflet dated 20th December, 2005."

3. The leaflet containing the bank's home loans terms and conditions was attached. On the 6th March, 2006, the defendant executed a deed of mortgage and charge to which was attached BOSI's home loan mortgage conditions. These conditions provided inter alia that the bank should be entitled to take possession of the property after demand for repayment of the secured debt. Clause 9 of the conditions provided for events of default which included a failure on the part of the borrower to pay any sum due on the terms of the facility letter on the due date. Clause 18.1 of the conditions in relation to transfers by the bank, provided that the borrower irrevocably and unconditionally consents to the bank transferring assigning or disposing of the mortgage to any third party without any further consent from, or notice to, the borrower.

4. On the 20th March, 2006, BOSI became registered on the folio as owner of the charge.

5. By cross-border merger pursuant to the European Communities (Cross-Border Mergers) Regulations 2008 of Ireland and the Companies (Cross-Border Mergers) Regulations 2007 of the United Kingdom, all of the assets and liabilities of BOSI including the mortgage and charge the subject matter of these proceedings transferred to Bank of Scotland Plc ("BOS") by operation of law at 23.59 hours on the 31st December, 2010 and BOSI was then dissolved without going into liquidation.

6. By letter of the 21st May, 2012, BOS wrote to the defendant demanding repayment of the then outstanding arrears on the mortgage of some €27,000. The last payment on the mortgage account was made on the 20th March, 2013.

7. On the 5th December, 2013, BOS entered into a purchase deed with the plaintiff whereby BOS sold a portfolio of securities to the plaintiff which included the defendant's mortgage. The transaction closed on the 14th April, 2014. On the 25th April, 2015, the plaintiff became registered as the owner of the charge previously registered in favour of BOSI.

8. It would appear that by August 2014, the arrears accrued on the account amounted to more than €56,000 and by letter of the 14th August, 2014, the plaintiff's solicitors wrote to the defendant demanding repayment of the total outstanding debt being some €290,000 within ten days, failing which proceedings for possession would issue. A Civil Bill for possession was subsequently issued on the 15th January, 2015.

The Issues in this Appeal

9. Having had the benefit of extensive written and oral submissions from both parties to this appeal, it seems to me that the main issues that arise for consideration are as follows:

   A. The defendant contends that because BOS never became registered as owner of the charge in issue, it was not entitled to transfer or assign the charge to the plaintiff. The plaintiff accordingly never acquired title to the charge, and was thus not entitled to enforce it against the defendant. Insofar as the plaintiff has become registered as owner of the charge, such registration was erroneous and a mistake on the part of the Property Registration Authority ("the PRA").

   B. The plaintiff purported to apply an interest rate to the defendant's borrowing which had been neither notified nor consented to by the defendant with the effect being that the court could not be satisfied as to what, if any, arrears are due to the plaintiff.

   C. The effect of the assignment from BOS to the plaintiff was to transfer the defendant's charge from a regulated to an unregulated entity. This had the effect of depriving the defendant of the benefit of significant statutory protections available to him in relation to regulated entities and gave rise to an unfairness in the contract which breached the terms of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 as amended, rendering it unenforceable.

   D. The defendant was not given notice in writing of the assignment as required by s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 and it is accordingly unenforceable against him.

10. I propose to consider each of these issues in turn.

A.

It seemed to me that the issue raised by the defendant in this respect was one which had the potential to affect a substantial number of other cases and was thus of considerable

public importance. I delivered an interim ruling dealing with this issue on the 22nd November, 2017 and with the agreement of the parties, subsequently stated a case for the opinion of the Court of Appeal. The judgment of that court was delivered by Baker J. on the 31st October, 2018 at [2018] IECA 352. In brief summary, the court concluded that the defendant was not entitled to raise this issue in these proceedings and therefore, the issue has been disposed of.

B.

As noted at para. 2 above, the interest rate stipulated in the defendant's loan was 1.25 % over the European Central Bank main refinancing operations rate. In his submissions, the defendant contended that this rate had been abolished with effect from the 15th October, 2008. In that regard, the defendant relied upon a document setting out key ECB interest rates which he suggested supported this contention. He contended that he had never been informed of this fact and BOSI unilaterally altered the interest rate without notice to him. He suggested that he had never been informed what this new rate was and still does not know what interest rate is applied to his account.

11. This allegation is dealt with in an affidavit sworn by a director of the plaintiff, Angela O'Brien, on the 2nd October, 2017. In that affidavit, she exhibits a letter that was sent by BOSI to the defendant dated the 15th June, 2007. This letter is entitled "fixed rate offer" and in it, BOSI set out the terms of an offer whereby the defendant could, at his option, accept a fixed interest rate in lieu of the tracker rate stipulated in the original loan offer. This fixed rate offer was available until the 31st January, 2012, a period of some four and a half years. The offer letter concluded as follows:

> "On the expiration of the fixed rate period you will revert to the bank's standard variable rate which is presently 4.99% which fluctuates from time to time. (This rate is effective from 1st April, 2007)."

12. The defendant was invited to sign the confirmation of interest rate amendment if he wished to accept the offer contained in this letter. The defendant did so on the 18th June, 2007 and returned the document to BOSI. It is therefore clear that with effect from the 15th June, 2007, the ECB tracker rate no longer applied to the defendant's loan at his own request. Accordingly there is no basis for the submission made by the defendant in this regard. Even if there was any substance to this argument, I am satisfied that it is based on a misunderstanding by the defendant of the relevant rate which Ms. O'Brien's affidavit makes clear was not in fact abolished as the defendant contends. However, this appears to me to be of no relevance in circumstances where the defendant expressly agreed to the application of a different interest rate to his account since 2007.

13. The defendant sought to make some further point based on the suggestion that the arrears of interest on his account had been improperly capitalised. I am satisfied that there is absolutely no evidence that supports this contention, made very late in the day by the defendant without the plaintiff being afforded any opportunity to deal with it substantively.

14. However, I am satisfied that this point can have no relevance to these proceedings where the claim for possession is based on an event of default which I am satisfied from the evidence has long since, and for some years, been extant. The original grounding affidavit in these proceedings sworn on behalf of the plaintiff by Natalie Layzell on the 21st March, 2014 sets out in clear terms at para. 9 that the interest rate on the defendant's account is now 1.55%. Despite the fact that the defendant had this affidavit in his possession for some three years before the case came on for hearing before me, no issue was ever taken with this averment. I therefore, cannot accept the proposition that the defendant was never made aware of what interest rate applied to his account.

C.

15. In his affidavits and submissions, the defendant contends that as the transfer of his loan from a regulated to an unregulated entity deprives him of certain benefits he had previously enjoyed when dealing with the regulated entity, the contract falls foul of the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 as amended.

16. The fundamental protection afforded to consumers who find themselves in arrears with their mortgage is the code of conduct issued by the Central Bank, known as the Code of Conduct on Mortgage Arrears ("CCMA"). If the consequence of transferring the defendant's mortgage from a regulated to an unregulated entity was to deprive the consumer of the benefit of the CCMA, then one could readily see how it might be suggested that this could infringe the unfair contract terms regulations. However, this is dealt with in the original grounding affidavit of Ms. Layzell to which I have already referred. She confirms that she is familiar with the CCMA, that it is applicable to this case and has in fact been applied. This is not in dispute. Furthermore, in his own affidavit sworn on the 3rd January, 2017, the defendant avers as follows (at para. 28):

> "I wish to bring to the Court's attention the Consumer Protection (Regulation of Credit Service Firms) Act, 2015. As Tanager Ltd is a non credit institution and is not regulated by the Central Bank, Tanager Ltd has appointed Lapithus Management Ltd as a credit intermediary, who is regulated under the said Act."

17. Clearly therefore, on the defendant's own admission, the credit intermediary appointed by the plaintiff is subject to statutory regulation by the Central Bank. It is therefore not clear to me how it is said that this gives rise to any unfairness in the defendant's loan contract.

18. In his affidavit, the defendant suggests that various events might occur which could somehow be disadvantageous to him. He says that it is possible for the plaintiff to set the variable mortgage interest rates and to implement a stricter enforcement strategy in the event of default than would be allowed by the Central Bank codes and regulations. However, this is purely hypothetical and is in any event contradicted by the evidence of Ms. Layzell to the effect that the CCMA applies and by the plaintiff's own evidence that the plaintiff's credit intermediary is regulated. Accordingly, the defendant has failed to demonstrate that there is anything approaching an actual unfairness in the contractual

arrangements between himself and the plaintiff and certainly none that would have any bearing on the fact that an event of default has occurred giving rise to a right to seek possession on the part of the plaintiff.

I am accordingly satisfied that the defendant's contentions in this regard do not give rise to any arguable defence to the claim of the plaintiff herein.

D.

In his submission, the defendant contends that for the assignment of his loan to be valid, the assignor must inform the debtor in writing and he says that this did not happen. He relies on s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 which provides in relevant part:

> "Any absolute assignment, by writing under the hand of the assignor… of any debt or other legal chose in action, of which express notice in writing shall have be given to the debtor…shall be deemed to have been effectual in law… to pass and transfer the legal right to such debt or chose in action from the date of such notice…"

In her affidavit sworn on the 2nd October, 2017, Ms. O'Brien sets out the sequence of relevant correspondence. On the 12th December, 2013, in a letter having as its subject matter "Your mortgage with Bank of Scotland plc" and giving the account number, BOS wrote to the defendant in the following terms:

> "On 5 December, 2013, Bank of Scotland plc ("BOS") agreed to transfer its above noted mortgage loan agreement(s) with you (your "Mortgage") to Tanager Limited ("Tanager") (the "Transfer"). BOS will write to you in due course to confirm the date of transfer (the "Transfer Date"). On the transfer date, all the rights of BOS under your Mortgage will transfer to Tanager…"

19. On the 28th March, 2014, BOS again wrote the defendant a "goodbye letter" advising him that the transfer would take effect on the 14th April, 2014. The defendant denies that he received the goodbye letter in his affidavit sworn on the 27th October, 2017 but does not explicitly deny receiving the earlier letter.

20. On the 13th April, 2014, the plaintiff wrote to the defendant a "hello letter" in which it identified the mortgage account number and the property the subject matter of the mortgage and said:

> "You will have recently received a letter from Bank of Scotland plc notifying you that your mortgage has been transferred to Tanager Limited ("Tanager")…"

21. The defendant does not deny receiving the hello letter nor could he do so, as he returned it to the plaintiff in an envelope on which he inscribed:

> "Return to Sender
>
> I do not recognize you.

I do not understand your intent.

I do not have an international treaty with you.

no assured value.

no liability."

22. As noted previously, the defendant's mortgage contained a clause whereby he consented to any assignment of the mortgage without notice to him. Mr. Ferriter SC on behalf of the plaintiff submitted that this dispensed with the necessity for further notice of the assignment.

23. This issue was considered by this court (Baker J.) in *AIB Mortgage Bank v Thompson* [2017] IEHC 515. Having cited s. 28(6), she noted that the High Court (Finlay Geoghegan J.) held in *O'Rourke v Considine* [2011] IEHC 191 that four conditions had to be satisfied for a valid assignment under the section:

(a) The assignment was of a debt or other legal chose in action.

(b) The assignment was absolute and was not by way of charge only.

(c) It was in writing under the hand of the assignor.

(d) Express notice in writing thereof was given to the debtors."

24. Baker J. identified the issue to be considered (at para. 25):

> "The precise question raised in the present case did not however come to be considered by Costello J. in her judgment, namely whether, as argued by the plaintiff, an assignment could be deemed to be effective by virtue of a clause in a loan agreement by which it was acknowledged that the contractual right to assign the benefit of an agreement did not require notice to or consent of a debtor."

The same issue arises here. The court went on to note (at para 30):

> "I consider that a general waiver or consent does not of itself therefore operate to obviate the need for proof of notice."

25. In a passage entitled "Contracting Out?" Baker J. observed (at para 33):

> "I do not consider that the matter is to be considered by reference to a question of whether a debtor or an obligor may contract out of or waive an entitlement to be notified of the assignment. The provisions of [*s. 28(6)]* fix the date at which an assignment is effective, and the legal import of such an assignment thereafter, namely that an absolute discharge may be given by the assignee. It is not so much that the right to such notice may be waived, but rather that in the absence of such notice as a matter of law the debtor or obligor remains indebted to the original

contracting party and will at his peril perform the obligations owed to the debtor by payments to another."

26. The court went on to hold that the statutory proofs had to be satisfied in a claim at common law and absent those, the claim may sound in equity only. It seems to me therefore that in the present case, the clause in the mortgage conditions to which I have referred does not relieve the plaintiff of its obligation to comply with the section.

27. The formalities required for the giving of notice under the section were summarised by Baker J. as follows:

> "48. The authorities suggest that a court will look to the substance and not the form of a notice.
>
> 49. I consider that in order to be a valid notice under s. 28(6) the debtor must be given express notice in writing of an assignment of his debt to another, that other must be identified, and the notice must contain sufficient information to enable the debtor to know with reasonable certainty that the assignment did assign the debt so that he may without acting at his peril pay the debt to the identified assignee. The absence of a date is not relevant, and this must be because s. 28(6) expressly provides in its terms that the date of the notice to the debtor is the effective date of the assignment for the purposes of the assignment at law.
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> 50. The Act does not make provision for who is to give the notice in writing of the assignment."

28. In the context of the present case, it seems to me that the "hello letter" of the 13th April, 2014 even taken on its own complies with the requirements of the section. Contrary to the defendant's contention, there is no requirement that the notice in writing be given by the assignor. I am satisfied moreover, that taken in conjunction with the correspondence from BOS of the 12th December, 2013, the "hello letter" leaves little room for doubt that the requirements of the statute are satisfied.

Conclusion

29. For all these reasons, I am satisfied that the defendant has not established any defence to the plaintiff's claim herein, and accordingly, I must allow the plaintiff's appeal and grant the order for possession it seeks.