

THE HIGH COURT

[2018 No. 325 CA]

BETWEEN

KBC BANK IRELAND PLC

PLAINTIFF

AND

COLIN BRENNAN

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 25th day of February, 2020.

1. This is an appeal from the decision and order of His Honour Judge Comerford made on the 24th July, 2018 whereby the plaintiff was granted an order for possession of the defendant's home at Rosslough, Carrick Road, Dundalk Co. Louth. A stay was placed on execution for a period of nine months.
2. By letter of loan offer dated 14th August, 2008, the plaintiff's predecessor in title, IIB Homeloans Limited, agreed to advance €340,000 to the defendant. He signed the form of acceptance on the 19th August, 2008. The agreement provided for repayment over a 35 year period. Monies were advanced on 27th August, 2008. A deed of mortgage was executed on the 29th August, 2008.
3. Although a matter of contention, which I shall address later, the plaintiff maintains that the loan and security were transferred to it in the following manner. By special resolution of 2nd October, 2008, IIB Homeloans, changed its name to KBC Mortgage Bank. A certificate of incorporation of change of name was issued by the Companies Registration Office on the 24th October, 2008. Further to a Scheme of Transfer signed on the 26th February, 2009, approved under s. 33 of the Central Bank Act 1971 and evidenced by S.I. 125 of 2009, KBC Mortgage Bank transferred its banking business to KBC Bank Ireland plc on the 26th June, 2009. On the 4th April, 2012 a charge was registered in the Land Registry in the name of the plaintiff, KBC Bank Ireland plc, against the interest of the defendant in the property.
4. A Civil Bill for Possession issued on 31st July, 2014. The plaintiff seeks the order for possession pursuant to s. 62(7) of the Registration of Title Act 1964 ("*the Act of 1964*"). The County Registrar granted the plaintiff an order for possession on the 3rd May, 2016. This was appealed by the defendant, incorrectly as it transpires, to the Master of the High Court and affidavits were submitted in support of that application. Thereafter, the defendant made application to extend time for appeal from the County Registrar to His Honour Judge Griffin who, on the 28th November, 2017, granted that application. The appeal was heard by His Honour Judge Comerford on the 24th July, 2018 who acceded to the plaintiff's application and made the order for possession.
5. The application is grounded on the affidavit of Ms. Lisa Mahony, a solicitor and employee of the plaintiff. She has exhibited the documents of title, the letter of offer and the mortgage and avers that as at the date of swearing of her affidavit, the sum due and owing by the defendant was €349,081.75, inclusive of arrears of €31,833.85. A demand was made to deliver up possession of the premises on the 28th November, 2013.

6. Ms. Mahony avers that the plaintiff complied with the Code of Conduct on Mortgage Arrears ("CCMA"). On 13th February, 2014 the plaintiff wrote to the defendant and notified him that he would be classified as '*not cooperating*' under the CCMA unless he undertook certain actions within 20 business days. On 18th March, 2014 he was informed by letter that he had been classified as '*not cooperating*', that legal proceedings would commence immediately and that the Mortgage Arrears Resolution Process ("MARP") prescribed by the code no longer applied. He was also informed of his right to appeal his not co-operating status; and although instructed to issue proceedings immediately, he was encouraged in the letter to engage with the plaintiff.
7. The plaintiff maintains that by the 26th April, 2016 arrears had increased and the last payment having been made on the 25th February, 2015, when €700 was paid. While there is a dispute regarding the payment of an additional 40 smaller payments, they do not significantly reduce the arrears. There is also no dispute that there has been default in repayments, which in the initial stages was ascribed to the downturn in the economy, reduction in wages and ill – health.
8. A number of affidavits have been filed by the defendant in defence of the claim including an affidavit sworn on the 22nd May, 2019 following the service of the notice of appeal. He avers in these affidavits that he purchased the property through a broker, with his then fiancée in 2006. The transaction took place when he was in a coffee shop in Dublin and was financed through IIB Homeloans. He describes the breakup of their relationship in 2008, at which time he assumed sole liability for the mortgage through the same broker/financial services company. The interest rate increased from 3.2% to 5.4% and was based on an income of a basic salary of €45,000 per annum, €23,000 overtime and a bonus of €4,000. However, in 2011, he experienced a reduction in his income. He outlines how he met with an official of the plaintiff to discuss options including the re-scheduling of repayments and the delivering up to the plaintiff of certain other property which he owned in County Limerick. He avers that this was done in order to secure his home the subject matter of these proceedings. He missed work because of stress and this had a further impact on his ability to repay. In December, 2011 he contacted his original broker of JKR Financial Services with a view to negotiating on his behalf with the plaintiff. He states that all financial requests from his agent were ignored. He engaged with the Money Advice and Budgeting Service ("MABS") in Dundalk. In 2012 he contacted an official of the plaintiff, informed him that he would be returning to work and inquired whether a tracker mortgage might be available. He states that he did not receive a response to this request. He alleges that in 2012 he received what he describes as threatening phonecalls from the plaintiff and contends that the plaintiff failed to acknowledge his previous meeting with the bank official. In January, 2013, he returned to work and in February, 2013 he contacted another official and confirmed that he would pay €700 per month, as had been agreed with the official with whom he had previously spoken. He refers to further engagement with the bank throughout 2014 and 2015. In February, 2015, he was out of work again because of stress and he makes complaint that the bank refused to acknowledge that meetings had taken place between the parties. In March, 2015 he ceased paying the €700 per month. He was by then in receipt of illness

support of €168 per week. He had a further bout of ill – health in 2015 because of an accident. A receiver was appointed to his property in Limerick. A principal complaint of the defendant was that the interest rate was too high. Then, in 2016, the property in Limerick was sold but he states that the plaintiff is now seeking to recover the balance of sums due in respect of that property, even though he believed there was an agreement that he would walk away from the Limerick property, focus on the Dundalk property and that the mortgage in respect of this would be restructured.

9. Further points of defence which Mr. Brennan advances are:
 - i. There is no entity known as KBC Bank Ireland plc and no valid transfer of title or of the loan or mortgage.
 - ii. The Circuit Court had no jurisdiction to hear the application because the property is not his principal private residence. It is his only permanent place of abode rather than his principal private residence.
 - iii. The contract contains unfair terms in breach of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. 27/1995). He invites the court to examine the contract to determine whether it contains unfair terms. It is argued that he is a consumer and that the contract contains non-individually negotiated terms and is governed by the Regulations of 1995 and the Directive on which they are based. He relies in support on what he considers to be the complicated language of the contract, the variation of interest rates and what he alleges is a short default period.
 - iv. He cancelled the contract in January, 2017 in exercise of his rights under the European Communities (Cancellation of Contracts Negotiated Away From Business Premises) Regulations, 1989 (S.I. 224/1989) which implemented Directive 85/577/EEC. In his affidavit he refers to decisions of the European Court of Justice in support.
 - v. Proceedings by way of summary application for possession under s. 62(7) of the Act of 1964 breaches his rights to a fair hearing under the European Convention on Human Rights; and is disproportionate.
 - vi. The CCMA was not complied with by the plaintiff prior to the institution of the proceedings.
10. In a replying affidavit sworn on 27th June, 2019, Mr. Groarke Keenan, solicitor and employee of the plaintiff disputes the entitlement of the defendant to introduce fresh or new evidence on appeal. He maintains that Mr. Brennan is confused in relation to his dealings with the plaintiff and avers that the plaintiff had three accounts with KBC. The first account, ending 593/1, was redeemed in full in September, 2008. The second, account ending 883/1, relates to a residual debt post disposal of the property in Co. Limerick ("*the Limerick property*"). The third relates to the property the subject matter of

these proceedings, account ending 966/1. It is accepted that Mr. Brennan's representative had a meeting with a representative of the Bank in August, 2012. A proposal was made to sell the property in Limerick and to commence payments of €750 per month on his home loan. On the 6th September, 2012, the plaintiff received a standard financial statement from the defendant, but no income documentation or bank statements were provided as required. On 1st November, 2012, the plaintiff telephoned the defendant and he stated that he would forward payslips in the following days. In February, 2013, a representative of the plaintiff requested the defendant to forward supporting documentation to vouch his income at that time. On 5th June, 2013, a representative of the plaintiff telephoned Mr. Brennan and informed him that his failure to submit a completed standard financial statement with supporting documentation made it impossible to assess his financial position and to agree a formal arrangement or restructuring of the account. Mr. Brennan's alleged response was that he understood that a formal arrangement was already in place and that he was uncomfortable in forwarding bank statements. On 5th December, 2013, following the letter of demand, a meeting took place to discuss the defendant's loan facility. Mr. Groarke Keenan also deposes to communications which the plaintiff had with the Irish Mortgage Holders Association on behalf of the defendant in March, 2015. Ultimately, the plaintiff offered the defendant a split mortgage arrangement but no reply was received, although in his affidavit of the 22nd May, 2017 the defendant maintains that he was not informed of this at that time and when notified in March, 2015, he raised queries with Irish Mortgage Association why the interest rate was so high. There were further discussions thereafter.

11. Because the defendant had not placed the Limerick property on the market, Mr. Groarke Keenan avers that a receiver was appointed to that property on 26th March, 2015. It is denied that any agreement was entered into with the defendant entitling him to walk away from the Limerick property when he handed the keys back, but that even if there was such agreement, the defendant never surrendered the property. His last payment to the plaintiff for account ending 966/1 was €700 in February, 2015. It is contended that the plaintiff has made every reasonable effort to engage with the defendant and that arrears have increased to €92,868.30. The total sum due as of 26th June, 2019 is €367,994.26.
12. Mr. Brennan swore a further affidavit in reply on 20th December, 2019 which, in truth, contains mainly legal submission and little by way of additional facts. He quotes extensively from a decision of the Master of the High Court in *AIB v. O'Connor* (9th May, 2014) in which the Master outlined the principles applicable to an application for summary judgment.
13. A further affidavit in response was sworn by Mr. Groarke Keenan on the 13th January, 2020.

The admissibility of certain affidavits on appeal

14. Mr. Neuman B.L., counsel for the plaintiff, objected to the introduction of evidence contained in affidavits filed since the hearing in the Circuit Court. It is argued that the defendant, very belatedly, seeks to introduce new evidence of negotiations or

communications in circumstances where such evidence was readily available, reasonably procurable and where no reasonable explanation has been advanced for the failure to adduce this evidence before the Circuit Court. Counsel relies on a number of decisions including a recent decision of the Court of Appeal in *Irish Bank Resolution Corporation Ltd v. Raftery and others* [2019] IECA 119. McGovern J. applied dicta of Clarke J. in *Murphy v. Gilligan* [2014] IESC 43 to the effect that a litigant is required to make its case to the court of trial and while there may be circumstances where the justice of the case requires that new evidence be considered by an appellate court, "it would be a recipe for procedural chaos and great injustice across a whole range of cases, if parties could easily run the case and, having lost it, seek to introduce new evidence on appeal." McGovern J. observed that the power of the court to admit new evidence on appeal is discretionary. He emphasised the factors relevant to the exercise by the court of its discretion, including whether the evidence is new, whether it was discoverable by the exercise of reasonable diligence prior to trial and the nature of the explanation advanced for the delay in bringing forward the evidence.

15. Counsel submits, in the alternative, that if new evidence is admitted in respect of matters which were not canvassed in the court below, and in the event that such evidence impacts on the decision of the court, the matter ought to be remitted to the Circuit Court in accordance with the principles outlined by Barrett J. in *Permanent TSB Plc formerly Irish Life and Permanent Plc v. O'Connor* [2018] IEHC 339.
16. Mr. Brennan explains that he has advanced any further information in response to a request by the court when the matter first came before it when he sought an adjournment. He also submits that most of the information was advanced before the Circuit Court, perhaps with the exception of corroborating exhibits.
17. Mr. Brennan maintains that affidavits prepared for the purposes of the extension of time application were introduced in the Circuit Court on the substantive hearing of the motion. It seems that different counsel represented the plaintiff in the Circuit Court. Mr. Brennan has assured the court and the plaintiff does not argue significantly to the contrary, that his affidavit of 4th December, 2017 was placed before the Circuit Court. I am satisfied that such is the case and that *bona fide* confusion has arisen in this regard. This confusion may have been contributed to by the procedure employed by the defendant in his proposed application to the Master and to change of counsel.
18. Mr. Brennan also objected to the late introduction of Mr. Groarke Keenan's latest affidavit. Counsel for the plaintiff did not argue strongly for its admission. Perhaps the only new factual matter contained in the affidavit concerns updated figures of outstanding arrears. Other issues raised appear to be matters of submission.
19. This is an application for possession under s. 62(7) of the Act of 1964. That the arrears have increased is perhaps of limited relevance on this application in which the plaintiff as mortgagee seeks to exercise its rights to recover possession where it is contended that an event of default has taken place. In the circumstances, the plaintiff did not strongly

pursue the admission of this affidavit and the hearing proceeded on this basis and it was not introduced in evidence.

20. It seems to me that the affidavits filed in this Court on appeal do no more than place additional information (in the form of exhibits) before this court, which were possibly not before the Circuit Court, and advance legal grounds of defence by way of submissions. In the circumstances I believe it is appropriate to take into consideration the affidavits which the defendant has placed before the court and prepared and sworn by him for the appeal. The contents of these affidavits are substantially in line with those which were before the Circuit Court and, to that extent, it does not appear to me that any new evidence of a substantial nature is sought to be introduced. I am also satisfied that it is in the interests of justice that the information contained in the affidavits should be considered by the court on this appeal.

21. I now address the grounds of defence advanced by the defendant.

The Transfer of the Loan and Mortgage and Change of Title

22. While the defendant questions the transfer of the loan and security to the plaintiff and its entitlement to maintain these proceedings, the basis for his challenge, in essence, was difficulty in understanding the series of transactions, rather than on any specific ground of challenge. This ground of defence was advanced unsuccessfully before Eager J. in *KBC v. Woods* [2017] IEHC 164 who analysed the transactions and upheld the plaintiff's entitlement to the charge and to maintain the proceedings. Nothing has been advanced to suggest this court should depart from the reasoning of Eager J. and I am satisfied that the defendant has failed to make out an arguable ground of defence on this point.

Jurisdiction of the Circuit Court

23. As to the contention that the Circuit Court did not have jurisdiction because the property is not the defendant's principal private residence. While this ground of defence was not pursued with great vigour, neither was it abandoned.

24. I am satisfied on the evidence that the property in question is within the jurisdiction of the Circuit Court sitting in County Louth and that no point of substance arises regarding the geographical jurisdiction of the Court. Mr. Brennan has raised issues concerning the rateable valuation of the property. In *Permanent TSB v. Langan* [2018] 1 I.R. 375 the Supreme Court held that the literal interpretation of The Courts (Supplemental) Provisions Act 1961 conferred a general jurisdiction on the Circuit Court to hear and determine cases relating to land but this was subject to an exclusion which applies to lands the value of which has a rateable valuation exceeding €253.95.

25. However, section 3 of the Land and Conveyancing Law Reform Act, 2013 which is entitled "Proceedings relating to certain mortgages to be brought in Circuit Court" provides:-

"3.(1) This section applies to land which is the principal private residence of—

(a) the mortgagor of the land concerned, or

(b) a person without whose consent a conveyance of that land would be void by reason of—

(i) the Family Home Protection Act 1976 , or

(ii) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ,

and the mortgage concerned was created prior to 1 December 2009.

(2) Subject to subsection (4), proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates and which land is land to which this section applies shall be brought in the Circuit Court.

(3) The jurisdiction of the Circuit Court to hear and determine proceedings referred to in subsection (2) where the land concerned is land to which this section applies shall be exercised by the judge of the circuit where the land or any part of it is situated.

(4) Subsection (2) does not preclude a person initiating proceedings in the High Court where other proceedings relating to the enforcement of the mortgagee's rights under the mortgage concerned have been commenced in that court prior to the coming into operation of this section where those other proceedings have not been determined."

26. I am satisfied that the provisions of this section apply. The mortgage was created on the 29th August, 2008, prior to 1st December, 2009. I am also satisfied on the evidence, that the property is the principal private residence of the defendant and that his initial understanding of the basis on which a defence might have arisen, i.e. that the use of that expression implies that a person owns other property, is simply a misunderstanding on his part. It seems to me, therefore, that no arguable ground of defence arises under this heading.

European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. 27/1995)

27. The defendant also raises a defence based on European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. 27/1995) ("the 1995 Regulations") which transposed the provisions of Council Directive No. 93/13/EEC ("the Directive"). To this end, many of the legal issues raised by the defendant on this appeal have been addressed by McDermott J. in *Permanent TSB Plc Formerly Irish Life and Permanent Plc v. Davis and Davis* [2019] IEHC 184, a decision upon which significant reliance is placed by counsel for the plaintiff. McDermott J. also considered an argument that the Circuit Court, of its own motion, should enquire into the unfairness of the terms of the mortgage loan contract and the deed of charge. He addressed the decision of the CJEU upon which reliance was placed by Mr. Brennan, *Aziz v. Caixa d'Estalvis de Catalunya* (Case C-415/11) and *Allied Irish Banks plc v. Coughlan* [2016] IEHC 752.

28. Summarising the obligation of the appellate court, McDermott J. stated:-

"...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 the 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 Regulations although 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."

29. In his submission to the court Mr. Brennan argues that the terms of the contract were unfair particularly in relation to the length of the default; being 20 days within which to repay €340,000. He argues that the Bank also ignored the fact that the mortgage was based on a particular income, including a particular basic salary, which pertained when the mortgage was taken out. While entitled to certain benefits and income when the loan and mortgage were created, his income and benefits were significantly affected by the downturn in the economy and ill health. His employer went into examinership, with the result that many of these financial benefits were no longer available. He also argues that the rate of interest varied, although counsel for the plaintiff points out that the interest rate in fact reduced rather than increased. This reduction is evident from statements covering the period 2012 to 2016. Mr. Brennan makes a general point that the language in the contract is complicated. Counsel for the plaintiff points out, however, that Mr. Brennan's signature to the loan contract was witnessed by a solicitor.
30. In *Davis*, having considered the terms of the mortgage and the loan agreement, McDermott J. highlighted the provisions of Article 4(2) of the Directive, which provides:-
1. *Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.*
 2. *Assessment of the unfair nature of the terms 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."*
31. Regulation 4 is in similar terms. Mc Dermott J. observed at para. 30 of *Davis*:-
- "...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 and the other in so far as these turned in plain intelligible language"... Regulation 4 is to the same effect. The defendants are customers 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 35 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 made 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 defendant's 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..."

32. Counsel for the plaintiff submits that these sentiments are applicable to the circumstances of this case and that any alleged unfairness, which is not accepted, relate to the core terms of the agreement or the *main subject matter of the contract* within the meaning of Article 4(2) of the Directive. The assessment of an unfair term cannot relate to the main subject matter of the contract nor the adequacy of the price. Counsel also submits, in response to a further argument based on proportionality, that there is nothing disproportionate about the obligation of a mortgage holder to pay monies due in accordance with the terms of the agreement. There is no dispute that Mr. Brennan applied for finance, signed the facility letter, received the money and executed the mortgage. The mortgage is registered on the subject folio. This is conclusive of ownership of the charge. The defendant does not deny default, nor is there a denial that there has been no payment for almost five years. The balance due now is in excess of that which was borrowed. Mr. Neuman B.L. submits that the terms sought to be enforced in this case are clear and intelligible. Mr. Brennan had the benefit of legal advice when he executed the agreement. The consequences of failure to repay are clearly stated in the mortgage. That Mr. Brennan fell into arrears is not due to any act of impropriety on the part of the Bank who, it is submitted, behaved honourably.
33. I am satisfied that counsel for the plaintiff is correct and that the decision and the sentiments expressed by McDermott J. in *Davis* apply to this case. When one looks at the essence of the alleged unfairness, they relate to the core terms of the agreement between the parties; primarily to the terms regarding repayment of the amount advanced in the context of income and the ability to repay. The principal cause of his unfortunate difficulty was the downturn in the economy, his consequent reduction in income, his illnesses and resultant inability to make repayments in accordance with his obligations under the mortgage. Mr. Brennan has not identified any other contractual term which might be said to be unfair, and the court has been unable to discern any relevant term, upon which reliance is placed, which does not concern the core terms of the agreement between the parties. One suggested unfair term which he has signified to the court, the

short period of 20 days that he was afforded to respond to the plaintiff's letter on 13th February, 2014, does not concern a term of the contract, rather a letter sent to him in advance of the proceedings and in the context of the CCMA.

34. Therefore, I am not satisfied that an arguable ground of defence has been advanced under this heading.

Consumer Rights Directive 2011/83/EC, repealing Council Directive 85/577/EEC and Directive 97/7/EC

35. With regard to the contention that the defendant is entitled to cancel the agreement because it is prohibited by the distant marketing Directive i.e. the Consumer Rights Directive 2011/83/EC, which repealed Council Directive 85/577/EEC and Directive 97/7/EC (transposed through S.I. 224/89), Mr. Brennan submits that these provisions apply primarily because the agreement and mortgage were not signed in a building society office, rather he signed the documents in the brokers office after a meeting in a coffee shop in Dublin. He maintains, therefore, that he is entitled to exercise his rights under the Directive and has cancelled the contract. He submits that he was never advised of a cooling off period nor did he receive a letter informing him of the right to cancel the contract within seven days.
36. The Directive specifically applies to the supply of goods and services to a consumer. Article 3(2)(a) of the Directive provides that it shall not apply to any contract for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property. There are a number of excluded categories provided for in Article 3. This provides in so far as is relevant:-

"This Directive shall not apply to contracts:

- (a) for social services, including social housing, childcare and support of families and persons permanently or temporarily in need, including long-term care; ...*
- (e) for the creation, acquisition or transfer of immovable property or of rights in immovable property;*
- (f) for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes."*
(emphasis added)

Thus, it does not appear to me that these Regulations are applicable.

Fair Procedures and Summary Proceedings

37. It is argued by the defendant that a process whereby a person's home may be repossessed in a summary manner does not adequately vindicate his right to a fair hearing, is a disproportionate interference and would result in homelessness. The decision in *Connors v. UK* [2004] ECHR 223 is called in aid. Implicit in the argument is that where an order for possession is sought in a summary manner the absence of a plenary hearing violates the rights of the homeowner because of the threat of homelessness.

38. In my view, the decisions relied upon are not authority for such a wide sweeping proposition. The procedures and legal principles applicable on an application for summary possession are such that if an arguable ground of defence is raised, then the matter must be transferred to plenary hearing. The threshold is low. It has been reiterated on many occasions, in the context of applications for summary orders, that the constitutional rights of the parties to litigate, prosecute and defend must be respected. Thus, the court must ensure that where such an application is brought if there are arguable grounds of defence, the case ought to be transferred to plenary hearing. The court must be satisfied on an application for summary possession that it is clear that there is no defence. See the principles outlined in decisions such as *Harrisrange v. Duncan* [2003] 4 I.R. 1.
39. This safety mechanism is consistent with the protection of the Constitutional rights of both parties. Procedurally, Mr. Brennan has been before the County Registrar, the Circuit Court (on two occasions) and this court. The procedures applied permitted him to advance every conceivable point of defence that might arise. I am not satisfied that any procedural unfairness has been established.
40. Further, to adopt the reasoning of McDermott J. in *Davis*, the proceedings concern *inter partes* litigation involving an application under s. 62(7) of the Act of 1964. That Act enjoys a presumption of constitutionality. In accordance with that provision the registered owner of a charge has the right to seek and obtain an order for possession if relevant proofs are established. The rights and obligations sought to be enforced are those enjoyed by and imposed upon the plaintiff and the defendant pursuant to an agreement freely entered into by them. As McDermott J. also observed, the court is not permitted to act solely on the basis of sympathetic factors. That it is, may be, or has become apparent with the passage of time, that the monies advanced in truth exceeded the capacity of the borrower to repay is most unfortunate. It does not appear to me, however, on the basis of the arguments advanced and in the circumstances of this case, that this affects the rights of the parties under the loan agreement and mortgage.

Code of Conduct on Mortgage Arrears

41. I now turn to arguments based on the alleged failure by the defendant to comply with the provisions of the CCMA. It will be recalled that *Irish Life and Permanent plc v. Dunne and Ors* [2016] 1 I.R. 92 Clarke J. concluded that only in a limited case of a breach of the moratorium under the code of conduct, should the court decline to make an order for possession. The lender must establish through appropriate evidence that the CCMA has been complied with.
42. In his affidavit sworn on 4th December, 2017, the defendant makes complaint that when he first went into arrears he was not offered any other product, including a tracker mortgage, other form of loan or mortgage or reduced interest rates. He believes that he was "stonewalled." In his further affidavit of 22nd May, 2019, he details events which occurred following the institution of these proceedings, including communications in October, 2014 and an arrangement that he would pay €700 per month. He refers to communications and correspondence which took place between the parties, and to an arrangement whereby a property in Limerick would be sold.

43. An exchange of emails between December, 2012 and February, 2013 suggest that an arrangement was made that €700 per month be paid. In an email of 15th February, 2013, the plaintiff wrote that it had received payslips but not three months bank statements and it sought these by return. There was a further exchange of emails of March, 2015, following the institution the proceedings. The plaintiff maintains that ultimately the defendant provided a complete standard financial statement and the plaintiff was able to assess the circumstances resulting in him being offered a split mortgage arrangement on 9th October, 2014, to which he did not respond. This was after proceedings were instituted. A receiver was appointed over the property in Limerick on 26th March, 2015 and it seems that the property was not placed on the market by the defendant.
44. It is to be recalled that in *Dunne*, Clarke J. emphasised that the issue to be addressed is not whether the plaintiff and the defendant agree to a compromise or a course of action. It is not the function of the court to direct that they so do. What is of concern is whether the moratorium has been respected. If not, all rights of the parties are not simply lost, it means that possession will not be granted in proceedings instituted where there has been a failure to respect the moratorium. Mr. Brennan maintains that he cooperated. It appears that there were periods of cooperation in 2011/12 and again in 2014/15. While there is a considerable dispute as to the reasonableness, or otherwise, of the plaintiff's attempts at resolution of this matter, there is little evidence that any appropriate response was made by Mr. Brennan during the relevant period, prior to the institution of these proceedings i.e. at the critical time in advance of the institution of the proceedings.
45. Negotiations and discussions took place between the parties in 2011 and 2012 and indeed for some time thereafter, including up to 2015. Following its letter of demand of 13th November, 2013, the plaintiff wrote to Mr. Brennan on 28th November, 2013 seeking repayment proposals from him and advising him that he should obtain advice from independent advisers or MABS. On 13th February, 2014 Mr. Brennan was again written to, and was informed that, without further warning, the plaintiff would classify him as not cooperating under the CCMA if certain specific actions were not taken by him within 20 business days. These included the return of a duly completed standard financial statement with supporting documentation; being three most recent month's bank statements and evidence of income. The letter advised that if Mr. Brennan did not take these specific actions, the plaintiff would not be able to complete an assessment of his financial circumstances. As stated, a warning was also given that failure to undertake such ongoing actions might lead, immediately, to him being classified as not cooperating. He was advised that if he was deemed as not co-operating by not taking certain actions, he would lose the protections of MARP. The actions involved the making of a full and honest disclosure of information that would have a significant impact on his financial situation, the provision of information within a timeline and that he must not allow a three-month period to elapse during which there is no form of alternative payment arrangements in place or have allowed an arrears amount to remain on the loan account. These actions were set out in a schedule of ongoing actions attached to that letter.

46. By letter of 18th March, 2014, the plaintiff, having considered that Mr. Brennan had failed or neglected to undertake the required actions, classified him as not cooperating and once again encouraged him to engage with options. He was advised that as he had been classified as not co-operating the protection of the MARP prescribed by the code no longer applied. The final paragraph of the letter states "*[P]lease note even though we are instructed to proceed to commence legal proceedings, the Bank would still encourage you to engage with it.*"
47. In the interim, on 5th December, 2013 a meeting took place to discuss the defendants loan facilities. Mr. Groarke Keenan's affidavit at para. 14 outlines the detail of the meeting. He avers that at the meeting Mr. Brennan and his advisor were in attendance and Mr. Brennan confirmed he would make payments of €750 per month. He was further advised of the Bank's restructure criteria and that all restructure agreements were subject to credit approval and the provision of fully vouched standard financial statements. The letters of the 13th February and 18th March followed.
48. On 31st July, 2014 these proceedings issued. Mr Brennan states that he cannot say whether he replied to the Bank's letters at that time and would be surprised if he had not. It does not appear that there is documentary evidence of this before the court. While he cannot point to any particular correspondence, at that time, he maintains that the period was very short and that in any event the parties had discussions afterwards. His principal complaint is that he was not offered different interest rates or a tracker mortgage.
49. I have considered the provisions of the CCMA upon which the defendant relies, in particular conditions 28, 29, 45 and 47. A borrower may only be considered as not co-operating with the lender when:-

" ..any of the following apply to his/her particular case: a) the borrower fails to make a full and honest disclosure of information to the lender, that would have a significant impact on his/her financial situation; b) the borrower fails to provide information, relevant to the borrower's financial situation, within the timeline specified by the lender in accordance with Provision 34; or c) a three month period elapses: i) (A) where the borrower has not entered into an alternative repayment arrangement, and during which the borrower: (i) has failed to meet his/her mortgage repayments in full in accordance with the mortgage contract; or (ii) meets his/her mortgage repayments in full in accordance with the mortgage contract but has an arrears balance remaining on the mortgage; or (B) where the borrower has entered into an alternative repayment arrangement, and during which the borrower has failed to meet in full repayments as specified in the terms of an alternative repayment arrangement; and ii) during which the borrower: (A) has failed to make contact with, or respond to any communications from, the lender or a third party acting on the lender's behalf; or (B) has made contact with, or responded to communications from, the lender or a third party acting on the lender's behalf but has not engaged in such a way that enables the lender to complete an assessment of the borrower's circumstances; and 2. the warning

letter, required in accordance with Provision 28, has been issued to the borrower and the borrower has not carried out the action(s) specified in that letter.”

50. I have also considered correspondence and communications between the parties, including and in particular the letters of the 13th and 28th November, 2013, 13th February, 2014 and 18th March, 2014 to which I have referred in some detail above. I also note that proceedings were not instituted for a period of in excess of three months following the letter which informed the defendant that he was considered to be not co-operating, and which classification could be appealed but was not. Nothing appears to have occurred between the letter of the 18th March 2014 and the date of the institution of the proceedings. In all of the circumstances, I am satisfied that the plaintiff has complied with its obligations under the CCMA.
51. In so far as it has been generally contended that the defendant agreed to make certain repayments or that he would yield up premises which were the subject of another loan in County Limerick, while the defence of compromise or accord and satisfaction has not been advanced with any great precision, in my view the other grounds of defence advanced by the defendant, which have been considered above, including the purported cancellation of the contract and the suggested lack of entitlement of the plaintiff to maintain the proceedings, together with the defendant's failure to pay any sum of money by way of repayment in accordance with an alleged agreed schedule or otherwise, are inconsistent with any such defence.
52. While the court has great sympathy for the defendant, in the circumstances I am satisfied that the plaintiff has established its entitlement to possession of the premises and the defendant has not made out any arguable grounds of defence. Therefore, the appeal must be refused. The plaintiff is entitled to the order for possession of the subject premises.