THE HIGH COURT

[2023] IEHC 683

[Record No. 2023/4333P]

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

JANETTE SIMPSON, HOLLY SIMPSON AND ANY PERSON IN OCCUPATION OF THE PROPERTY KNOWN AS BRYANLITTER, CLONTIBRET, MONAGHAN AND COMPRISED IN FOLIO MN20535F

DEFENDANTS

JUDGMENT of Mr Justice Kennedy delivered on the 30th day of November 2023

Introduction

1. As Ms Justice Butler observed in the opening paragraph of her decision in *Start Mortgages DAC v. Noel Rogers and Una Rogers* [2021] IEHC 691 ("*Rogers*"): –

> "*For historical reasons, it can be difficult to approach issues concerning eviction dispassionately in Ireland. Nonetheless, the courts cannot ignore the legal consequences which flow when the law has taken its course and the lender becomes a mortgagee-in-possession. In this case, the plaintiff is seeking, as a mortgagee-in-possession, interlocutory relief requiring the defendants to vacate property which was previously their family home and in which the plaintiff alleges they are now trespassers*."

2. In these proceedings the Plaintiff is similarly seeking an injunction to restrain the First and Second Defendants ("the Defendants") from trespass on their former home (no relief was sought against the Third Defendant, "any person in occupation"). This judgment is solely

concerned with that application. It does not conclusively determine any other substantive claims, defences or issues.

The Evidence

3. The undisputed background is that:

a. the Plaintiff's predecessor in title made a loan offer to the First Defendant in 2007 for the purpose of refinancing a home, secured by a mortgage over the property;

b. following defaults under the mortgage, the Plaintiff issued possession proceedings in 2018 in the Monaghan Circuit Court, securing an order for possession on 11 February 2022 with a 6-month stay;

c. after attempts to explore mutually satisfactory arrangements proved fruitless, the Plaintiff secured an Execution Order on 20 September 2022, which was duly executed on 24 March 2023;

d. the Defendants subsequently unlawfully re-entered the property;

e. the First Defendant applied for and was initially granted a Protective Certificate pursuant to the Personal Insolvency Act;

f. on 24 July 2023, Judge Connolly upheld the application of the Plaintiff in those proceedings and set aside the Certificate on the basis that there was no "relevant debt" within the meaning of the Act and on the basis of the First Defendant's material non-disclosure (of the Order for Possession) in her original application for the Certificate;

g. the Defendants continue to occupy the property and have refused to vacate.

h. There was no evidence or submission to suggest that the Defendants had any legal entitlement to occupy the property; and

i. the Defendants criticised the manner in which the Order for Possession was executed. (While any such process is undoubtedly traumatic for those involved, even if

there was any substance to such claims – and the Court expresses no view in that regard - those allegations are not relevant to the issues before the Court today.

The Parties' Submissions

4. The Plaintiff submitted that it became a mortgagee-in-possession on 24 March 2023. Accordingly, the Defendants were trespassers, and it was *prima facie* entitled to the orders sought. It had furnished the necessary undertaking as to damages. Damages would clearly not be an adequate remedy for the Plaintiff in the light of the Defendants' dire financial position and in circumstances in which the debt stood at €288,010.70, with arrears of €118,490.05 (as of 16 November 2023). Only €800 had been paid over the last 5 years – the last payment was on 3 December 2019.

5. It was submitted on the Defendants' behalf that:

a. There were strong factors that went to the balance of justice or balance of convenience. These were detailed on affidavit, concerning the Defendants' circumstances and the events which had contributed to their current plight. The First Defendant had been making payments up to 2017/2018. The arrears since then were for exceptional reasons outside her control. She had sought to resolve her position by invoking the Personal Insolvency Act. She had also made proposals to resume payments, but the Plaintiff had not engaged. There was a serious issue to be tried as to whether the Plaintiff had given her a reasonable opportunity to keep her family home.

b. The key question was whether, in dismissing the First Defendant's recent proposals, the Plaintiff was in breach of an implied term in the policy. The Defendants relied on the unreported decision of Lord Denning M.R. in *Bournemouth and Boscombe Athletic Football Club Company Limited v. Manchester United Football Club Limited*, dated 21 May 1980, to contend for an implied term. They argued that, although the

Plaintiff was not obliged to accept *any* proposal advanced, it *was* under an implied obligation to entertain reasonable proposals. It had not done so. There was a serious issue to be tried and, if they succeeded at trial, they would be entitled to a stay.

c. Although the Plaintiff argued that damages would not be an adequate remedy, its claim was purely contractual and readily quantifiable. The financial impact on the Plaintiff had to be weighed against the enormous impact on the Defendants and their family and their wellbeing and security. Damages would be an adequate remedy because, the Defendants submitted, there was positive equity in the property, so the Plaintiff's interest was protected.

d. The Defendants submitted that the fact that the property was the family home should also weigh against the relief sought. The First Defendant was now in receipt of social welfare and met mortgage to rent criteria. She was in a position to commit to pay €400 each month pending trial.

The Law

6. The key legal principles in relation to injunctions in this context are well established:

a. In *KBC Bank Ireland plc v. McGann* [2019] IEHC 667 ("*McGann*") Mr. Justice Allen stated:

> "*The law is clear. It was stated by Keane J. (as he then was) in Keating and Company Limited v. Jervis Street Shopping Centre [1997]1 IR 512 at p. 518 and had been consistently applied since. What Keane J. said was that: -*
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> > *"It is clear that a landowner, whose title is not in issue, is prima facie entitled to injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only. However, that principle is subject to the following qualification explained by Balcombe L.J. in the English Court of Appeal in Patel and Others v. W.H. Smith (Eziot) Limited and Another [1987] 1 WLR 843 at p. 859.*

'However, the defendant may put in evidence to seek to establish that he has the right to do what would otherwise be a trespass. Then the court must consider the application of the principle set out in American Cynamid v Ethicon Limited (1975) 1 All E.R. 504 in relation to the grant or refusal of an interlocutory injunction.''"

b. *Carlisle Mortgages Limited v. Eugene Costello* [2018] IECA 334 ("*Carlisle*") concerned facts similar to this. Mr. Justice Peart concluded at paragraph 31 that, once the plaintiff had taken possession, the Order for Possession had been executed and any subsequent adverse action by the appellant constituted trespass. The plaintiff was entitled to seek to restrain any subsequent trespass.

c. In *Rogers*, Ms. Justice Butler observed that, because the relief sought was a prohibitory injunction to restrain unlawful activity, the applicable test for the injunction was a serious question to be tried. Ms Justice Butler added:

"*…It cannot be the case that, if trespassers go into occupation of property, that occupation must be regarded as a status quo which the law should protect until it has been determined otherwise. In this case, the plaintiff as mortgagee-in-possession is prima facie the person entitled to possession of the property. Allowing the defendants to remain in the property while the plaintiff prosecutes the proceedings it has been obliged to take by virtue of the defendants' unlawful actions would not be to the maintenance of the status quo but rather the inversion of the status quo*".

7. The Court of Appeal decision in *Flynn v. Breccia* [2017] IECA 74 provides a helpful summary of the principles as to the implication of terms in contracts. Finlay Geoghegan J. endorsed the statement in *BP Refinery (Westernport) Pty. Ltd. v. Shire of Hastings* [1977] 180 CLR 266, that, for a term to be implied, the following conditions (which may overlap) must be satisfied:

"*(1) it must be reasonable and equitable;*

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that 'it goes without saying';

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract…"

Finlay Geoghegan J. added at para. 86 that to imply a term based on obviousness:

> "*requires the Court to be satisfied that, firstly, reasonable people in the position of the parties would all have agreed to make provision for the contingency in question, and second, that they would "without doubt", or with something approaching certainty, have accepted the term proposed by the officious bystander*".

8. In *Irish Life & Permanent plc. v. Financial Services Ombudsman & Ors* [2012] IEHC 367, Mr Justice Hogan considered whether a bank owed a fiduciary duty towards a customer who sought mortgage advice. At para. 44, he stated:

> "*There is no doubt but that the lender/borrower relationship does not generally impose fiduciary duties on the lender.*"

9. In *IBRC v. Morrisey* [2013] IEHC 208 ("*Morrissey*"), the High Court dismissed attempts to challenge the bank's allegedly unreasonable exercise of its contractual rights, on the basis that there was no obligation on the bank to act reasonably. In a passage cited with approval in subsequent judgments, Finlay Geoghegan J. expressly identified the limit of the court's jurisdiction at para. 101 as follows: -

> "*Prior to determining the issues set down by Order of Kelly J., it is important to emphasise the limits of the Court's jurisdiction. This is a Court of law. Its obligation is to determine the rights and obligations of the parties in accordance with law. "Law" in this context includes the relevant constitutional, statutory and common law, in particular, the law of contract and the applicable equitable principles, particularly in relation to the defence of estoppel. On the evidence, particularly of Mr. Morrissey, there appears, regrettably, to have been a significant gap between his commercial expectation in his dealings with the Bank and the contractual written terms to which he agreed. In his own evidence, he described "a space between understanding and agreement". Unless the*

former is such that in accordance with applicable legal or equitable principles it is enforceable, it is not cognisable by the Court and the Court must determine and enforce the rights and obligations of the parties in accordance with law."

10. In response to the defendant's contention for an implied term to the effect that repayment would not be demanded and facilities would be rolled over if interest was duly paid, Ms Justice Finlay Geoghegan observed at para. 112 that:

"*It is well established that the courts must be extremely cautious about implying terms into a commercial agreement (see Tradax (Ireland) Ltd. v. Irish Grain Board Ltd. [1984] I.R. 1). In my judgment, there is no factual basis on the evidence adduced which would permit the implication of such a term into the 2009 Agreement…. if the Court were to imply the term as contended for, it would be implying a term which is inconsistent with the express terms of the contract, which as a general principle the courts will not do (see Sweeney v. Duggan [1997] 2 I.R. 531 at p. 539 to 540)*".

11. The Court also concluded that there was no basis to imply a term as to how the relevant bank manager would behave in making a submission to its credit committee. The Court also considered whether a fiduciary relationship existed between the parties. Ms Justice Finlay Geoghegan concluded at concluded at paragraph 141 that the relationship "*did not go beyond that of a contractual relationship and that a fiduciary relationship between the plaintiff and the defendant did not exist*".

12. In *Ryan v. Danske Bank* [2014] IEHC 236 ("*Ryan*") Ms Justice Baker:

a. rejected the contention that there was an implied obligation that the bank would behave towards the plaintiff in a fair and equitable way. It had been argued that the Consumer Protection Code gave rise to an implied term of good faith and a contractual obligation that the bank would allow the plaintiff an opportunity to deal with his arrears. At paras. 18-22 Ms Justice Baker concluded that decisions such as *Stepstone Bank v. Fitzell* [2012] IEHC 142 and *Irish Life and Permanent Plc v. Duff* [2013] IEHC 43 showed that a failure to comply with the relevant code might go to the exercise of the

Court's discretion (where applicable) but that, as *ACC Bank Plc v. Deacon & Anor* [2013] IEHC 427 demonstrated, a departure from the relevant code would not "*wipe out the loan or furnish a defence*".

b. concluded that the bank did not owe a fiduciary duty to the plaintiff as borrower, endorsing the approach of Mr Justice Hogan in *Irish Life and Permanent Plc. v. Financial Services Ombudsman and Thomas* [2012] IEHC 367, at para. 55. Ms Justice Baker concluded at para. 25 that: -

> "*The contract between the plaintiff and the Bank was a contract made in the course of normal banking customer relations and there is nothing in that relationship that might import additional duties beyond those normally found in such relationship; no special relationship exists*."

c. Concluded with regard to implied terms at para. 37 that:

> "*Certain restrictions will be implied as a matter of common law in the exercise by the Bank of this right, but these are no more than the obligation on the part of the Bank to act fairly and honestly…I reject the assertion that there can be imported into the contractual relationship between the parties an obligation on the part of the Bank to act reasonably, to consult, or still less to fully consult, with the customer, or to act in the interest of the borrower... What the plaintiff asserts is that he had a right to be heard, that the offer made by him to discharge the arrears ought to have been positively considered by the Bank, that the Bank failed to afford him natural justice in its process. These are rights and obligations which I cannot accept as a matter of law are arguably terms that may be implied into the security contract and the mortgage deeds*".

13. Likewise, in *O'Flynn Construction* [2014] IEHC 458, the High Court rejected the proposition that obligations to act fairly and reasonably could be implied into banking/commercial contracts. Ms Justice Irvine (as she then was) considered whether a private lender (which was NAMA's assignee) was under the same obligations to which NAMA was subject, as a matter of public law, to act fairly and reasonably in the exercise of its discretion

with reference to certain finance documents. The plaintiffs maintained that the assignee, in its decision to call in and enforce certain personal loans, had failed to act fairly or reasonably, either substantially or procedurally. There had been no default, no prior warning and the letters had allegedly been issued in bad faith and solely for the collateral purpose of triggering an event of default in respect of corporate facilities in circumstances where it could not otherwise have achieved such purpose. The Court concluded at paras. 158 -159 that: -

> "*…I am not satisfied that the obligation of fairness, which the plaintiffs seek to enforce, is one which can arguably be said to have passed to Carbon under the Assignment Agreement …*
> *The duties concerned are, I accept, public law duties arising from the statutory obligation of NALM to act in the public interest and in these circumstances it is unstatable to suggest that Carbon could owe any such duty to the companies concerned …*"

14. In *O'Sullivan v. HSE* [2023] IESC 11, the Court considered an employee challenge to the exercise of a power to suspend a hospital consultant (which was vested in the CEO of the HSE under the consultant contract and the relevant legislation). In a case at the interface between employment law and public law, it was accepted that the standard of review was guided by concepts of "*honesty, good faith and genuineness and the need for the absence of arbitrariness, capriciousness, perversity and irrationality*" as opposed to fairness or reasonableness. Ms Justice Dunne discussed the principles at paragraphs 83 -87:

> "*83… it was agreed by the parties that the appropriate test by which the decision to suspend was to be considered was that to be found in the case of Braganza v. BP Shipping Limited & Anor. [2015] 1 W.L.R. 1661, a decision of the Supreme Court of the United Kingdom. That was a case in which no element of public law arose as the issue concerned the terms of a contract of employment and the terms in respect of a death in service benefit in circumstances where the payment of such benefit could have been excluded where the employer was of the view that the deceased had died by suicide. .... Baroness Hale made the following observations from para. 18 onwards:*

> *"18. Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.*
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> *...*

87. The decision in that case is a useful analysis of the approach to be taken by a decision-maker. ... Thus, one can see that in considering the decision of the CEO in a case such as this where a discretion is to be exercised, that discretion should be exercised in a manner that first of all is carried out in good faith, the decision should also be one which is neither arbitrary, capricious, or irrational, and further, as was stated in Braganza, it follows that such a decision could be impugned, not only where it was one that no reasonable decision-maker could have reached, but also where the decision-making process had failed to exclude extraneous considerations, or to take account of all obviously relevant ones".

Findings

15. While the Court sympathises at a human level with the Defendants' extremely difficult predicament, the Plaintiff has made out a strong case, not just an arguable one. The loan agreement was secured by a mortgage, the agreed arrangements were appropriately documented. There is no dispute in that regard nor as to the arrears. There is no suggestion that the Plaintiff failed to comply with the terms of those documents. Nor can the Plaintiff be accused of acting prematurely or unfairly at any stage of the process. The necessary Order for Possession was duly obtained and lawfully executed, giving it good title to the property. Even

if the reasons for the situation were beyond the Defendants' control, the fact of the matter is that the arrears were building for more than five years. The Plaintiff duly established its entitlement in the Circuit Court. It satisfied the Circuit Court that it had complied with the Central Bank's Code of Conduct in respect of Mortgage Arrears. There is no evidence of any lack of transparency on the Plaintiff's part in its dealings with the First Defendant. To the contrary, it carefully examined the possibility of alternative repayment arrangements and also advised her of options such as the mortgage to rent scheme. It recommended that she consult with a personal insolvency practitioner. Evidence of further attempts to engage with the Defendants was furnished in the personal insolvency proceedings.

16. The Defendants have not established a serious issue to be tried to the effect that the Plaintiff is in breach of any implied term in the contract or that the Defendants retain any legal or equitable interest in the property. The precise terms of the suggested implied term were not well articulated but, in any event, it is an uphill struggle to establish an implied term even existed when a commercial agreement comprehensively sets out the parties' respective rights and obligations. In this case, it is difficult to see any possible basis for imposing a relevant implied term in terms that went beyond the Code of Conduct obligations, and the Circuit Court was apparently satisfied that those obligations were met. There was no appeal from that finding. Nor is there any obvious basis to imply a term to the effect that the Plaintiff was obliged to continue to negotiate with the Defendants even after it had actually taken possession. The legal position had changed by that point. It is difficult to conceive of an ongoing duty to negotiate even after the Order for Possession had been executed.

17. In any event, the Defendants' very recent proposals remained unrealistic. They would not prevent the arrears from continuing to increase, offering the Plaintiff no realistic prospect of reducing its exposure. This problem was exacerbated because, contrary to the Defendants'

submissions, the property is clearly in negative equity, as the Defendants' own documents reveal.

18. The Plaintiff evidently rejected the Defendants' very recent proposals as "too little too late". There is no evidence of an arguable case that it acted unfairly or unreasonably in reaching that conclusion (even if the Court was to conclude that there was an implied term as contended for by the Defendants). The Court is not satisfied that there was an implied term to engage with the Defendants' proposals or in the terms alleged by the Defendant other than the general obligation to act fairly and honestly which was referenced in cases such as *Ryan*. Nor is the Court satisfied that such a general term could add anything to the Plaintiff's existing contractual and regulatory obligations (which it appears to have fully complied with). In any event, the evidence does not suggest that the Plaintiff acted other than honestly, reasonably, fairly and in good faith throughout in its protracted engagement with the Defendants. Accordingly, even if there was a basis for a general implied term to that effect (or, indeed, in the terms posited in *Braganza*), it is difficult to see the basis for asserting a breach.

19. The First Defendant's criticism of the Plaintiff's application to set aside the Protective Certificate is misconceived. The Plaintiff was entitled to challenge the Certificate. Its position was vindicated by Judge Connolly's decision, which was not appealed.

20. The First Defendant's affidavit or submissions also made other claims which do not give rise to an arguable defence because they are bald, unsubstantiated assertions and/or because they constitute an improper collateral attack on the Circuit Court's Order for Possession and/or on Judge Connolly's more recent decision. The Defendants did not appeal those decisions and cannot seek to reopen those issues in these proceedings. Other assertions in the First Defendant's affidavit or submissions are inconsistent with the documentary evidence, such as the suggestion that she had been prevented from availing of the protection of the Personal Insolvency Act. The Plaintiff cannot be faulted for the First Defendant's reluctance to pursue

that option until it was too late. The position was clearly and adequately explained in the correspondence which she received at the appropriate time. Although proactive engagement by the First Defendant might have produced a much happier outcome, the Court is not in any way criticising the First Defendant in this regard. She was personally in an extraordinarily difficult position for other reasons. It is unnecessary to explore those issues in this judgment.

21. The First Defendant's claim to have been refused a reasonable opportunity to save the family home (by "warehousing" the arrears) lacks credibility since she has not been making regular payments for the past five years (or any payments for four years). Her most recent proposal (which was advanced after execution had occurred and she had unlawfully re-entered the property) would still not even meet the ongoing interest payments.

22. The Plaintiff has proceeded lawfully and has lawfully taken possession of the property. As a matter of law, it became the mortgagee-in-possession on 24 March 2023. It remains lawfully entitled to possession of the property. The Defendants acted unlawfully in re-entering it. They had no legal entitlement to do so. They have no legal or equitable interest in the property which would entitle them to possession. The Defendants became, and remain, trespassers. To refuse the relief sought would undermine the Circuit Court orders.

23. The Plaintiff has established a strong case for the relief it is claiming, whereas the Defendants have not established an arguable case. The Court fully appreciates how extraordinarily distressing the events of and leading up to 24 March 2023 (and the unrelated events in the years which preceded it) must have been at an emotional level for the Defendants and their family. In human terms, the Defendants' family experienced a catastrophic and traumatic series of events (which, in fairness, were not of the Plaintiff's making). However, the Defendants' difficult circumstances were not the responsibility of the Plaintiff, and the Court must consider the matter on the basis of the parties' legal entitlements. Although the circumstances are different, the position is analogous to *Ryan*, where the plaintiff's illness was

not a factor which impacted the bank's entitlement to enforce its contractual entitlements. These entitlements were established through exhaustive legal proceedings in which the Defendants had ample opportunity to participate.

24. Balance of convenience considerations do not arise since Defendants have not established an arguable case that they have a legal or equitable claim to possession of the property. As a result of the lawful execution, the Plaintiff is lawfully entitled to possession. In legal terms, the Second Named Defendant is a trespasser, disregarding orders of the Court and the Plaintiff's rights. In circumstances in which execution has taken place and the Plaintiff is a mortgagee-in-possession, the Second Named Defendant is not entitled to consideration as if she was still the lawful occupant of the family home.

25. Accordingly, questions as to the balance of convenience or the adequacy of damages do not arise. If they had arisen, the Court would be satisfied that the balance of convenience unequivocally favoured the granting of the injunction to the Plaintiff. Damages would not be an adequate remedy. The Plaintiff has established a strong case for the orders sought and the Court will direct accordingly.

26. Despite the fact that it is lawfully entitled to possession of the property and to the order sought, the Plaintiff has – very fairly - indicated that it would not object to a limited stay in view of the Defendants' particular circumstances. The Court agrees that such a stay would be appropriate, but it could only be granted on the basis of an unequivocal acknowledgment by the Defendants that they accepted that the Plaintiff was now lawfully entitled to possession and that their rights in that regard had been relinquished. The Defendants would need to furnish an express undertaking to the Court confirming that they would vacate the property by the agreed date (and 31 January 2024 was proposed for consideration in this regard) and that they would not seek to re-enter or otherwise obstruct or impede the Plaintiff's exercise of its rights over the property.