

APPROVED



THE HIGH COURT

[2024] IEHC 277

Record No.2023/236CA

BETWEEN/

MARS CAPITAL FINANCE IRELAND

DESIGNATED ACTIVITY COMPANY

PLAINTIFF/RESPONDENT

-AND-

SEAN FARRELL AND VERONICA FARRELL

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 26th day of April 2024

INTRODUCTION

Preliminary

1. This is an appeal from a decision of the Circuit Court (His Honour Judge John O'Connor) dated 29th November 2023 and 6th March 2024, whereby the Circuit Court dismissed that part of the Defendants' motion relating to their assertion of non-compliance by the Plaintiff with the moratorium period contained in the Central Bank of Ireland's 2013 Code of Conduct on Mortgage Arrears ("CCMA"), and further ordered that the balance of the motion to strike out be adjourned to the hearing of the possession application, and made an order of costs in favour of the Plaintiff.
2. I heard oral and received written submissions from Cian Farrell Solicitor on behalf of Sean Farrell and Veronica Farrell (the Defendants/Appellants) and from Theo Donnelly BL on behalf of Mars Capital Finance Ireland DAC (the Plaintiff/Respondent).
3. Both Mr. Farrell Solicitor and Mr. Donnelly BL agree that the sole matter which I have to address in this application is the following relief which is sought in paragraph 3 of the Notice of Motion dated 26th October 2023:

"Further and / or in the alternative, an Order striking out the entirety of the pleadings in the within action against the Defendants and dismissing the action on the ground that the Plaintiff has breached the moratorium period set out in the Central Bank of Ireland's 2013 Code of Conduct on Mortgage

Arrears (“CCMA”) by not issuing the required pre-warning written notification(s) and thereby issuing legal proceedings within the moratorium period set out in the CCMA”.

4. Whilst not a matter for determination in this application, for the purposes of this motion, the parties accept that the “*chain of title*” in relation to the loan is that set out by the Plaintiffs, *i.e.*, IBRC sold the relevant loan to Crux Mortgages Limited who subsequently sold the loan to the Plaintiff; the sole issue which arises is whether or not the Plaintiff can rely on IBRC’s invocation of the CCMA in two letters dated 21st October 2014 and 9th December 2014 prior to *it* (Mars Capital Finance Ireland DAC) issuing repossession proceedings.

The Defendants’ position

5. In summary, the central argument made by Mr. Farrell Solicitor, on behalf of the Defendants, is that a borrower who has lost the protection of the CCMA, having been deemed ‘not-cooperating’, can *recover* that protection if the mortgagee transfers their interests *before* proceedings are initiated by the new lender.
6. Specifically, Mr. Farrell Solicitor referred to two pieces of correspondence from the Plaintiff’s predecessor in title (IBRC) to the Defendants. The first, dated 21st October 2014, advised the Defendants that they would be classified as “*not co-operating*” unless they took immediate action. The second, dated 9th December 2014, informed the Defendants that as and from that date (9th

December 2014), the Defendants (i) “*had been deemed not co-operating*”, (ii) were outside the protections of Mortgage Arrears Resolution Process (“MARP”) and (iii) that repossession could issue immediately. Mr. Farrell Solicitor contends on behalf of the Defendants that both pieces of correspondence cannot be relied upon by the Plaintiff in issuing proceedings against the Defendants.

The Plaintiff’s position

7. Mr. Donnelly BL submits that when a debt transfer is made between lenders, the transferee of the debt steps into the shoes of the transferor, and the same rights and obligations under the debt agreement that applied to the transferor now apply to the transferee. This extends to the lender’s obligations under the CCMA and for the purpose of the CCMA, there is only one lender.

8. It is contended that there is no provision in the CCMA which suggests that its provisions might apply differently or be “*reset*”, should ownership of the debt be transferred. It is submitted that the identity of the lender is irrelevant to the provisions of the CCMA and its provisions apply equally, regardless of the identity of the lender.

9. Mr. Donnelly BL submits that there is no reason to suggest that a lender, having complied with the moratorium provisions of the CCMA, should have to do so repeatedly simply because the identity of the lender may change.

ASSESSMENT & DECISION

CCMA 2013

10. The CCMA sets out how mortgage lenders must treat borrowers in or facing mortgage arrears, with due regard to the fact that each case of mortgage arrears is unique and needs to be considered on its own merits. The code sets out a framework that lenders must use when dealing with borrowers in mortgage arrears or in pre-arrears and that all cases must be handled sympathetically and positively by the lender, with the objective at all times of assisting the borrower to meet his/her mortgage obligations.

11. The code states that it acknowledges that it is in the interest of both the lender and the borrower to address financial difficulties as speedily and as effectively as circumstances allow.

12. The code is issued under section 117 of the Central Bank Act 1989 and became effective from 1st July 2013, replacing the previous code of conduct on mortgage arrears.

13. Provision 29 of the CCMA provides that, where a lender has classified a borrower as not co-operating, following a period whereby the borrower has been given the opportunity to co-operate (in line with Provision 28), the lender must notify the borrower on paper or another durable medium that he/she has been classified as not co-operating and inform the borrower of the following:
 - (a) that legal proceedings can commence immediately;

- (b) that the borrower is now outside of the MARP and the protections of the MARP will no longer apply;
- (c) other options that may be available to the borrower, such as voluntary surrender, trading down, mortgage to rent or voluntary sale and the implications of each option for the borrower and his/her mortgage loan account, including: (i) an estimate of the associated costs or charges, where known, and where it is not known, a list of the associated costs or charges; (ii) the requirement to repay outstanding arrears, if this is the case; (iii) the anticipated impact on the borrower's credit rating; and (iv) the importance of seeking independent advice in relation to these options;
- (d) the borrower's right to appeal the lender's decision, including that the borrower must make the appeal in writing and set out the grounds for the appeal; and,
- (e) the borrower's right to consult a Personal Insolvency Practitioner, notwithstanding the fact that the classification as not co-operating may impact on the borrower's eligibility for a Personal Insolvency Arrangement.

14. Provisions 56 to 60 of the CCMA deal with 'Repossessions'.

15. Provision 56 provides that where a borrower is in mortgage arrears, a lender may only commence legal proceedings for repossession of a borrower's primary residence where: (a) the lender has made every reasonable effort under the Code to agree an alternative arrangement with the borrower or

his/her nominated representative; and either (b)(i) the period referred to in Provision 45(d) or Provision 47(d), as applicable, has expired, or (b)(ii) the borrower has been classified as *not co-operating* and the lender has issued the notification required in Provision 29.

16. By correspondence dated 21st October 2014, IBRC wrote to the Defendants in relation to the relevant Mortgage Loan (the account number is set out in the correspondence) under the subject matter “*Important Customer Notice: You will be classified as ‘Not Co-operating’ unless you take immediate action*”, stating *inter alia* that:

“On 2nd October 2014 we wrote to you about the on-going arrears on your Mortgage Loan Account and outlining your options to voluntary surrender or voluntary sell the property at ... [name and address of property given]. Despite this you have yet to make contact with us. It is critical that you call us immediately upon receipt of this letter, so that we can discuss this situation with you. Failing to do so will result in our classifying you as “not co-operating”, a term defined by the Central Bank of Ireland’s Code of Conduct on Mortgage Arrears 2013. A Copy of this Code is available for your information by visiting www.ibrc.ie/CCMA.

What would this mean?

If you are classified as 'not co-operating' it will result in our managing your account very differently in the future. It will also include the very real possibility of our taking legal action to repossess the property.

Please contact us immediately. If you do not contact us by 21st November 2014, we will, without further warning, classify you as 'not co-operating'.

17. The correspondence dated 21st October 2014 further addressed matters under the following sub-headings: *“What you need to do next”, “To continue to be classified as co-operating”, “Implications for you of being classified as ‘not co-operating’”, “Legal/financial advice” and “Contact details”.*

18. This was followed by correspondence dated 9th December 2014 from IBRC to the Defendants, which referred to the letter dated 21st October 2014 and *inter alia* advised the Defendants that, as they had not replied to this letter within the timeframe requested, they had been *“classified as borrower[s] who is not co-operating with us”* and that this decision had *“immediate consequences”*. In this regard, the letter set out the immediate impact of being classified as not co-operating, as follows:

*“- You are no longer covered by our Mortgage Arrears Resolution Process (MARP) and the protections this previously provided,
Legal action to repossess the property can commence immediately,*

Your credit rating is likely to be affected, and
- You may not now be considered eligible for a Personal
Insolvency Arrangement.”

19. The letter of 9th December 2014 further referred to the Defendants’ right to appeal to the IBRC’s Mortgage Arrears Appeal Board, setting out the details of that process and added that if the Defendants were dissatisfied with the Appeal Board’s decision, the matter could be referred to the Financial Services Ombudsman (details of that office were set out in the letter). The letter further addressed matters under the following sub-headings: *“What you need to do next as a borrower classified as not co-operating”, “What happens next if I decide on Voluntary Sale?”, “What happens next if I decide to Voluntary Surrender?”, “Important to bear in mind”, “What happens after the property is sold?”, “Legal/financial advice”, “Our contact details”.*

20. I understand that no appeal was made by the Defendants.

21. The reference in Provision 29 of the CCMA (referred to earlier in this judgment) to *“(b) that the borrower is now outside of the MARP and the protections of the MARP will no longer apply”,* are the specific moratorium provisions which are at issue in this application. Equally, the provisions at (a) – *“that legal proceedings can commence immediately”* – apply to the borrower *i.e.*, the Defendants in this case. In effect, the protections fell away as confirmed in the letter dated 9th December 2014.

22. The two judgments relied on by Mr. Farrell Solicitor do not address the particular issue which arises in this application. The decision of the Supreme Court in *Irish Life and Permanent PLC v Dunne* [2015] IESC 46; [2016] 1 I.R. 92, for example, arose in circumstances where there was a breach of the CCMA and where the lender in that case simply failed to abide by the moratorium referred to in the Code. It does not address, however, the situation where: (a) a loan was transferred; (b) the provisions of the CCMA were previously invoked by a predecessor in title; (c) repossession proceedings have been instituted by the new lender. Similarly, *AIB plc v Buckley* [2019] IEHC 97 was also a case where the plaintiff, through inadvertence, did not comply with the CCMA.

23. In *Bank of Ireland v Reilly* [2023] IECA 196, the borrower had a mortgage with ICS Building Society who issued the requisite CCMA letters and by letter dated 15th August 2014 deemed the borrowers to be ‘not co-operating’. While the assets and liabilities of ICS Building Society were transferred to Bank of Ireland pursuant to the Central Bank Act 1971 (Approval of Scheme of Transfer between ICS Building Society and The Governor and Company of the Bank of Ireland) Order 2014 (S.I. 257 of 2014) rather than a loan sale as in this application, the effect was the same *i.e.*, the loan transferred to a new entity, which was not the entity which had issued the CCMA letters, and that second entity then issued proceedings, placing reliance on the letters issued by the first entity. The Court of Appeal (Costello, Pilkington and Butler JJ.) held that there had been compliance with the CCMA, with Costello J. observing as follows at paragraph 38:

“the trial judge found that there was, in fact, evidence of compliance by the bank with the requirements of the code. Ms. Carey, in her affidavit, averred to the facts of compliance and exhibited the letters from the bank to the appellant and the first named defendant warning that if they did not comply with the standard requests set out in the correspondence that they would be deemed to be non-cooperating borrowers within the meaning of the code. The second letter stated that they were “not co-operating” and accordingly the provisions of the Code of Conduct no longer applied in respect of the loan. Neither the appellant nor the first named defendant disputed any of this evidence. It followed that as a matter of law, the bank and its receiver were entitled to seek the repayment of the loan. This meant that the bank and the receiver were entitled to sell the property in the circumstances.”

24. A similar situation arises in this application. Provision 29(b) of the CCMA (referred to above) states that the consequence of a borrower (or borrowers) being deemed as not co-operating is that they – the Defendants in this case – are outside of the MARP and the protections of the MARP will no longer apply. I agree with Mr. Donnelly BL’s submissions that the designation of “not co-operating” is borrower-specific and not lender-specific and that there is no provision in the CCMA which provides that the protections of the MARP will *reset* upon transfer of the loan or debt from one lender to another. By analogy, counsel makes the point that in circumstances where, for example, a

mortgagee first initiates legal proceedings and then transfers the loan, an order for substitution would usually be granted and there would be no question of there being a separate obligation on the transferee to engage with the CCMA moratorium provisions.

25. In this case, IBRC as mortgagee, complied with its obligations to the Defendants under Provisions 29 and 56 of the CCMA in the correspondence dated 21st October 2014 and 9th December 2014. The Plaintiff is entitled to rely on this correspondence for the purpose of establishing compliance with the CCMA and issued proceedings in June 2023. There is no requirement under the CCMA that every time a lender changes that this process has to be repeated. In summary, the letter of 21st October 2014 informed the Defendants that they would be classified as “*not co-operating*” unless they took immediate action; the correspondence dated 9th December 2014 informed the Defendants that from that date (9th December 2014) they *had been deemed not co-operating* and were outside the protections of the MARP and that legal proceedings to repossess the property could commence immediately. The fact that these proceedings did not issue until June 2023 does not detract from the fact that the provisions of the CCMA were complied with.

26. I, therefore, refuse the Defendants the relief sought in paragraph 3 of the Notice of Motion dated 26th October 2023.

PROPOSED ORDER

27. I shall make an Order refusing the Defendants the relief sought in paragraph 3 of the Notice of Motion dated 26th October 2023.

28. I shall put the matter in for mention before me on Tuesday 14th May 2024 at 10:30 to address the question of costs and any ancillary or consequential matters which arise.