EVERSHEDS SUTHERLAND

Considering the rules
Consumer rights in repossession cases

Introduction

A recent High Court judgment[1] clarifies the duties of County Registrars when deciding repossession of family home cases. The judgment is significant as it considers the interplay in such cases between bankruptcy, unfair terms in mortgage and loan contracts, and the balance between the proportionality of a repossession order and the right to a family home.

Background

The applicants family home in Portlaoise (the **"Property"**) was the subject of a 2008 mortgage with Pepper Finance Corporation (Ireland) (**"Pepper"**). The applicants fell into arrears on the repayments. In November 2014 Pepper instituted proceedings in the Circuit Court, County of Laois (returnable before the County Registrar) seeking possession of the Property (the **"Application"**). The applicants were assisted throughout the Application by a charitable organisation set up to assist people at risk of losing their home.

The repossession order

The Application was adjourned on a number of occasions before the Laois County Registrar. During this time, in November 2015, the applicants were adjudicated bankrupt. The Official Assignee in bankruptcy could not consent to the Application[2], but he did indicate that he had no objection to the Application.

In July 2016 the County Registrar made an order for possession of the Property, on consent of the applicants, in favour of Pepper, with a stay for nine months on the Order (the **"Order"**).

The judicial review

The applicants instituted judicial review proceedings challenging the Order. They argued that their consent to the Order was not fully informed due to the lack of professional legal advice on their consumer protection rights. They sought to quash the Order and a number of declaratory reliefs, including that the County Registrar in adjudicating on the Application:

(a) was required of its own motion to consider whether the terms of their mortgage contract with Pepper were fair under EU and Irish regulations (discussed below), even when not raised by the applicants, and where the court has all legal, factual and financial elements necessary to assess unfairness

(b) should have considered the applicants fundamental rights under the Charter of Fundamental Rights (the **"Charter"**) and European Convention on Human Rights (**ECHR**), namely the right to a home

(c) should have considered whether it was proportionate to grant the Order.

The judgment

McDermott J delivered judgment in March 2019. The application for judicial review was dismissed and a number of important findings were made by the court:

(i) Locus Standi/Standing

The court found that the applicants had *locus standi* to bring the application for judicial review notwithstanding that they were adjudicated bankrupt at the time the Order was made.

Once a person is adjudicated bankrupt, their property vests in the Official Assignee. It was argued that this deprived the applicants of standing to challenge the Order. The court found that it was in accordance with the applicants rights to fair procedures and constitutional rights in respect of their family home, that the vesting of their property rights in the Official Assignee, did not prevent them resisting and litigating a possession order of their family home.

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[1] *Grant and Grant v The County Registrar from the County of Laois and Pepper Finance Corporation (Ireland)* DAC [2019] IEHC 185.

[2] The Official Assignee is statutorily obliged to make an application to the High Court for directions in that regard

(ii) Unfair Terms

The applicants contended that certain terms of the mortgage should have been subject to a review of fairness by the County Registrar. Those included the terms on the variable interest rate, the acceleration clause, the power of entry and a right of the lender to transfer the security without notice.

Under the EC (Unfair Terms in Consumer Contracts) Regulations 1995 (the **"Regulations"**)[3], if a contract term is found to be unfair, that term is not binding on the consumer. Terms are unfair where they cause a significant imbalance in the parties rights and obligations to the detriment of the consumer. Certain *core terms* are excluded from the scope of the Regulations provided they are drafted in plain and intelligible language.

The court applied EU and Irish case law, holding that in order to do justice between the parties in possession cases, the court is required to examine *of its own motion:*

- whether the terms of a contract fall within the scope of the Regulations
- and if they do, the fairness of those terms.

The court was not satisfied on the evidence that the County Registrar had considered the Regulations. However, importantly, notwithstanding this finding, the court exercised its discretion and refused to grant the reliefs sought by the applicants where to do so would be futile. The court held that if the Order was quashed and remitted back to the County Registrar for further consideration, the applicants would not succeed in resisting a possession order. The court found that the terms of the mortgage contract relied upon by Pepper (those which the applicants argued were unfair) in seeking possession were core terms, and therefore fell outside the scope of the review for unfairness.

The terms that the applicants argued were unfair were the clauses relating to variable interest rate, acceleration, possession and transfer. The court expressed the view that even if those terms fell within the scope of the review for unfairness, it was satisfied that the terms were not in fact unfair.

Therefore it can now be stated that terms such as interest rate, acceleration, possession and transfer are outside the scope of the Regulations and that standard clauses such as those in this case are not, in fact, unfair.

(iii) Proportionality

The applicants argued that because of the potential impact of a repossession order on their right to a home (protected under the Charter and ECHR), the County Registrar was obliged to conduct a proportionality assessment.

The court was satisfied that because the remedy of repossession in Ireland is subject to a judicial process, and having regard to the nature and extent of that judicial process, consumer rights and the right to a family home are adequately protected. The court referred to a number of procedural safeguards, including the ability of a borrower or the court to raise relevant issues in defence, the requirement to facilitate borrowers under the Code of Conduct of Mortgage Arrears, the availability of alternative remedies, and the possibility of a stay of operation being placed on the repossession order.

Comment

It is not new law that a court, including a County Registrar must, of its own motion, consider whether the terms of a mortgage contract fall under the Regulations and whether they are unfair[4].

What is significant is the emphasis by the court on the evidence in this particular case, as to whether the County Registrar, in fact, considered the fairness of the mortgage and loan contract. The Order, like most Circuit Court orders for possession, did not make any reference to any consideration of fairness. The High Court noted the absence of any reference to such considerations in the Orders or papers before the court, and was not prepared to presume, in the absence of such evidence, that the County Registrar had considered fairness. The judgment suggests that it would be prudent for Orders, including consent orders, in relation to consumer contracts in family home possession cases, to reflect that the Regulations were actually considered by the County Registrar.

The findings by the court that the core terms relied upon by Pepper in support of its application were not unfair is welcome clarification around the terms of mortgage contracts. If you would like to discuss the impact of this judgment on your loan book or more generally, please contact:

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[3] The Regulations transpose the Unfair Terms in Consumer Contracts Directive 93/13/EEC.

[4] See for example *AIB Plc v Counihan & Counihan* [2016] IEHC 752, *Ulster Bank Ireland Limited v Costelloe* [2018] IEHC 289 and *Permanent TSB v Fox* [2018] IEHC 292

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EVE.DUB.2246 05/19