

## **Navigating the Irish Personal Insolvency regime - Part II**

**Date Published: 10th December 2017**

### **Introduction**

A significant part of my practice involves advising clients in mortgage arrears, and so I thought I would share some tips for people in that situation. I already discussed in the first part of this article the importance of finding the right advisor in order to obtain the best advice. In this part, I want to look at some of the rights and protections you have as customers of a bank, the corresponding duties of the bank and how breaching those duties can sometimes be used to defend mortgage cases.

### **The consumer**

Are you a consumer? Because if you are, there is a myriad of rights and protections available to you which are not available to non-consumers. The word "consumer" has different meanings depending on the context but, in general, it means a natural person acting outside of his business, trade or profession. So, if you bought a house for your family to live in, you are probably a consumer. But if you bought a buy-to-let property, you are probably not a consumer notwithstanding that you only bought one and you are not ordinarily in the property business.

### **The Acts and the Codes**

OK, so what are all these rights and how do they help you with your mortgage arrears? Most of them are contained in the Consumer Credit Act 1995. For example, did you know that when you obtain credit from a bank, you must be notified by the bank - in writing - of your right to a cooling-off period? If you aren't, the agreement becomes unenforceable in its entirety! But before you get too excited, the rule does not apply to mortgages for a property on which there is a house, or on which a house is to be constructed (and the word "house" means any dwelling, including an apartment). So, it is more likely to apply to personal loans and other unsecured credit facilities. But the Act contains many such rights, and most of them apply to all products, including mortgages. It contains rules relating to: the way in which financial products are advertised, the circumstances in which your bank may contact you, rules about mortgage protection insurance and so on. As well as the Consumer Credit Act, there is the Consumer Protection Code 2012 which contains similarly

detailed provisions. And if you are not a consumer, there is always the Code of Conduct for Lending to Small and Medium Enterprises which applies to business lending. The latter codes establish rules for dealing with arrears situations, including the rights of customers to access the bank's arrears resolution procedures and mechanisms for finding alternative payment arrangements. It all sounds good, but experience has shown that the Act and the Codes have no teeth in practice. The Codes are mainly guidelines and will not normally provide a defence to borrowers in arrears situations, though the bank may expect a slap on the wrist from the Regulator for breaching them. As for the Act, some of its provisions (such as the one requiring a cooling-off period) are taken seriously, but most go no further than allowing the court to take their breaches into account as part of the court's overall discretion when deciding cases.

The Code of Conduct on Mortgage Arrears (CCMA) is no different. It applies to mortgages over a borrower's primary residence (which includes a buy-to-let property as long as it is the only residential property you own in Ireland) and requires the borrower to co-operate with the bank in finding a resolution in mortgage arrears situations. In return, the bank must give the borrower a 12-month moratorium, must not charge surcharge interest, and must seek to come to an alternative payment arrangement. The Supreme Court held in *Permanent TSB v Dunne and Dunphy* [2015] IESC 46 that only a breach of the first of these requirements, namely the requirement for a 12-month moratorium, will amount to a full defence to possession proceedings.

All in all, this leaves borrowers with slim pickings when it comes to defending proceedings using the Act and the Codes. It is no surprise that borrowers rarely manage to engage these with any significant degree of success.

## **Equity and fairness**

Then there are the equitable defences. For those unacquainted with the intricacies of our legal system, the following recap of the past few hundred years of judicial development may be of some interest. Back in the less-sophisticated days of the common law, Parliament would enact laws which would be so strictly applied by the courts that they would often lead to injustice. So some judges decided to take it upon themselves to start developing their own legal principles quite independent of the legislature. The idea was that these new principles would provide a more user-friendly alternative to the strict letter of the law, and would allow judges to be more flexible in the way they applied the law. Since they were intended to achieve fairness, they became known as the law of equity.



Fast-forward to today, and the courts of common law jurisdictions (of which Ireland is one) are still able to apply those equitable principles in appropriate cases. The good news is that this can often help people in mortgage difficulty. Take the defendants in the case of for example. The bank in that case was seeking judgment against borrowers who had defaulted on their mortgage. The borrowers argued that, after defaulting on the mortgage, they met with officials from the bank to try and negotiate a settlement. According to the borrowers, the officials promised them that the bank would not go after their family home. The borrowers then relied on this promise to defend the proceedings against them. They argued that, by seeking judgment against them, the bank was effectively going after the family home because it would later register the judgment against the property (which was not the mortgaged property). In so arguing, the borrower was relying upon an equitable principle called "promissory estoppel". That's where you rely to your detriment on a promise by someone, who then refuses to honour the promise. The borrower succeeded in defending the summary proceedings.

Another example of an equitable doctrine is "undue influence". That arises where one person pressures another, usually vulnerable, person into doing an act which is improvident to the latter. For example, a husband putting pressure on his wife to sign a personal guarantee is essentially exerting undue influence over her. She may later be able to rely on this as a full defence if the bank sues her on the guarantee. This is the case even though the bank was not the one exerting the undue pressure.

Those aren't the only equitable principles of course, but they are some of the best known. As well as equity, there has also been much recent rumbling in the papers about the Unfair Terms in Consumer Contract Regulations. Those have been around for more than two decades but were recently highlighted by the courts when a borrower attempted to rely on them to defend a mortgage case. The Regulations basically say that any term in a consumer contract which is "unfair" should be struck out of the contract, making it unenforceable. It is aimed at those standard form contracts where the customer has no negotiating power. A mortgage contract would be a good example of that. However, whether or not an individual term in such a contract is "unfair" will obviously depend on the term in question.

## **Conclusion**

The purpose of this two-part article was to provide a flavour of the kinds of things lawyers are looking out for when trying to find chinks in the bank's mortgage armour. It is, of course, but a small sample of a much larger area which has grown exponentially in recent years. Therefore, it is necessary to reiterate that the article is not intended to be legal advice, and you should contact your lawyer if you think your case may present a defence, or if you would like to clarify whether or not it does.



Mortgage arrears situations are best resolved by dialogue with the bank but , where that becomes impossible then it is important to know your legal rights and remedies.

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### **Important Note**

This article is intended to be an introduction to this area of law and should not be taken as constituting legal advice. If you require more information about this subject or require legal advice or representation, please contact us by visiting [www.legalcounsel.ie](http://www.legalcounsel.ie)