

Grant v. The County Registrar From the County of Laois, 2016/787 J.R.

Analysis of Key Findings

Prepared by the Abusive Lending Practices Project, April 12, 2019

Key Findings

- County Registrars must conduct assessments for unfair terms in compliance with the Unfair Contract Terms Directive in all possession cases involving consumers and delete unfair terms, without being asked.
- When requested by borrowers, Irish judges and registrars must conduct assessments for proportionality in possession cases to comply with the protections of the home in the EU Charter of Fundamental Rights and European Convention of Human Rights.

Recommendations for Borrowers Facing Possession Based on the Decision

- Borrowers should make sure that County Registrars/judges have conducted an assessment for unfair terms in their mortgage documents and have deleted any unfair terms. If they have not, borrowers should inform County Registrars that they are obliged to do so on the basis of the Grant decision.
- Borrowers who think that possession is not a proportionate remedy in their case must file an affidavit in order to obtain a proportionality assessment. Guidance on this is available from the Guide for Borrowers in Mortgage Distress in Ireland and template pleadings but these are not a substitute for legal advice and representation.
- Borrowers should apply for assistance from the Legal Aid Board for representation if they cannot afford a private lawyer.

Analysis of the Decision

1. Unfair Terms Assessment

This decision clearly states that the Circuit Court must assess mortgage contracts for unfair terms of on its own motion--without being asked--in possession cases. The decision cites two recent Irish Court decisions, Coughlan (2016) and Kenehan (2017) that also acknowledge this requirement but goes into a much more detailed analysis of the Court of Justice of the European Union (CJEU) jurisprudence on the requirement to assess for unfair terms.

Main Significance of this Ruling: County Registrars Must Conduct Assessments for Unfair Terms Without Being Asked

- Mr. Justice McDermott specifically states that County Registrars have the jurisdiction and the obligation to conduct own motion assessments for unfair terms (Par. 84) The decision

provides guidance on the role of the registrar in these cases stating that if the registrar finds that there may be a defense to the defendants due to a potential unfair term in the contract, the registrar should direct the case to a Circuit Court (Para. 86.). He notes further that if a defendant outlines a possible based on the unfairness of the terms, the County Registrar is obliged to transfer the case to the judges list for a hearing (Par. 83).

- Mr. Justice McDermott went on to conduct an unfair terms assessment in the Grants' case and concluded that there were no unfair terms in their mortgage. We think that this is incorrect and is particularly troubling in regards to two terms commonly found in Irish mortgages—a term requiring immediate payback of the entire amount borrowed upon breach of any term of the contract (an acceleration clause) and a term allowing the lender to vary the interest rate in any way at its discretion. This ruling creates an additional hurdle for borrowers seeking to have those terms found unfair. However, this hurdle is not insurmountable as the Registrar is required to apply the law to the unique facts of each case to determine whether the terms were unfair at the time the mortgage was entered into. In addition, while it is not required that the borrower show actual harm to have a term found unfair, cases where the borrower can demonstrate that actual harm resulted, for instance, from discretionary fluctuations in the interest rate, may be more likely to overcome this hurdle.

2. Proportionality Assessment

- This decision acknowledges that the EU Charter of Fundamental Rights and European Convention on Human Rights must be taken into consideration when the loss of the home is at stake (paras. 129 – 130). This means that possession must be a proportionate response in the particular case. The Court then analyzes the application of the proportionality requirement in two ways. First it looks at whether the nature and extent of the *judicial process and review* available to the lender is proportionate to the remedy. Then, it discusses factors that Courts can take into consideration in determining *whether possession is a proportionate remedy* in particular cases.

Main Significance of this Ruling: Proportionality Assessments Must be Conducted by the Courts when Requested by Borrowers

- The Judge held that the Irish mortgage enforcement process protects the right to a home because Irish Courts have the jurisdiction to consider all the evidence in the case including:
 - the terms of the contract;
 - the amount and duration of the loan;
 - the amount outstanding;
 - the extent of the arrears;
 - the nature and extent of default;
 - the steps taken to facilitate the borrowers to address their default before seeking possession (e.g. under the Code of Conduct on Mortgage Arrears (CCMA)) ;

- the extent, if any, to which the borrowers have engaged with the lender or are financially capable of doing so; and
 - all relevant evidence concerning the financial and personal history of the borrowers. (Par. 130)
- Significantly, in his determination that Ireland adequately protects borrowers’ rights, the judge brought the Code of Conduct of Mortgage Arrears back into possession proceedings by relying on the “requirements of the lenders to comply with the CCMA and their obligation to provide the borrowers with an adequate, practicable, and effective means of avoiding either the calling in of the loan or the issuing of possession proceedings by engaging in an effective way with the borrowers within the code” (Par. 130).
 - The Judge concluded that the Court may receive and consider all relevant evidence concerning the financial and personal history of the borrowers, stating that although the court cannot act solely on the basis of “sympathetic factors” such as ill health or old age, “it *will* (emphasis added) have regard to all other relevant matters as set out above” (Par. 130).
 - Mr. Justice McDermott found that a proportionality assessment was conducted by the registrar in the Grants’ case as evidenced by the fact that the registrar granted a stay of nine months on the order (Par. 131). He further notes that despite the “extensive procedural safeguards” for borrowers (noted above), the Grants did not avail of them except to seek a stay of the execution of the possession order (Par. 135).

Conclusion:

This decision, marks a substantial step forward in efforts towards ensuring that Irish courts protect the EU rights of borrowers in possession cases. From this point forward, it is the law in Ireland that County Registrars are required to conduct, on their own initiative, unfair terms assessments and reject any unfair terms in mortgage contracts. They must also determine whether possession is a proportionate remedy in cases where the borrower has specifically made such a request and provided evidence to support it. This decision also offers substantial guidance to borrowers seeking to raise a proportionality defense by setting out factors that Courts can consider when requested to do so. However, as noted above, the Grants intend to appeal to the Court of Appeal on the application of this law in their case.

Importantly, this decision highlights that unlike the assessment for unfair terms, borrowers are required to specifically request (by affidavit) and provide proof to support their arguments for why possession is not a proportionate remedy. Moreover, the Grants’ consent to the possession order and the fact that they merely requested a stay of execution were integral to the judge’s conclusion that an adequate proportionality assessment was conducted.

The Abusive Lending Practices Project (ALPP) is a joint project of Community Action Network, NUI Galway Centre for Housing Rights Law and Policy, the Open Society Justice Initiative, the Open Society Foundation for Europe along with a number of legal practitioners working on possession cases. The ALPP seeks to raise awareness of two EU laws relevant to possession cases – the Unfair Terms Directive and the EU Charter of Fundamental Rights. For more information on the ALPP and a copy of our Guide for People in Mortgage Distress in Ireland and template pleadings, please go to <http://abusivelending.org>