[2026] IEHC 403

THE HIGH COURT

CIRCUIT APPEAL

[2025/222 CA]

BETWEEN:

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF / RESPONDENT

AND

NICHOLAS MATTHEWS AND TANYA MATTHEWS

DEFENDANTS / APPELLANTS

JUDGMENT delivered by Mr. Justice Barry O'Donnell on the 22nd day of June, 2026

INTRODUCTION

1. This judgment is given in an appeal heard on the 4 June 2026. The appeal was from a decision of the Circuit Court in Meath dated the 23 July 2025, in which the plaintiff was granted a summary order for possession of the defendants' property pursuant to section 62(7) of the Registration of Title Act 1964, as amended (*the 1964 Act*). The notice of appeal was completed by the first named defendant and filed on the 29 July 2025. In this judgment, for ease of reference I will describe the appellant as *the defendant*, and the respondent as *the plaintiff*. For reasons that are explained below, the issue that fell for adjudication was relatively net and therefore this judgment will be brief and focus on the core issue that was in dispute.

2. The proceedings themselves have a somewhat protracted history, having been commenced by the plaintiff on the 26 July 2019 by a Civil Bill for Possession. Thereafter there were exchanges of affidavits and various applications. That process generated a considerable volume of paperwork, which has been considered by the court.

3. For most of the history of the proceedings the defendant acted on his own behalf, and he had furnished written submissions to this court that canvassed a variety of reasons why the defendant considered that the plaintiff was not entitled to the relief sought. By the time the appeal came on for hearing before this court, the defendant had obtained legal representation in the form of solicitor and counsel. The approach adopted by his counsel was that only one issue was to be pursued, which related to the application of the Central Bank Code of Conduct on Mortgage Arrears (*the Code*) to the circumstances of the defendant and the consequences of an asserted failure to comply with the terms of the Code. In all other respects the defendant accepted that the plaintiff had made out the proofs required for an order.

4. For the reasons explained in this judgment, the court disagrees with the analysis of the Code agitated on behalf of the defendant and has decided that the plaintiff is entitled to the relief sought. However, it is important to assure the defendant that the course adopted by his legal team was prudent and focussed on a point that was arguable. I make that point in light of the written submissions presented by the defendant before he had representation. Having considered those arguments and being familiar with the relevant authorities it is clear to the court that the defendant did not suffer any difficulty by focusing on one point only.

GENERAL PRINCIPLES AND CORE PROOFS

5. As this was an appeal from the Circuit Court, the parties were restricted to the evidence that was before that court, and the appeal was treated as a *de novo* application. The general principles applicable to an application of this nature are very well established and summarised by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26. In that decision, Baker J. explained the nature of a summary application for possession of registered land under section 62(7) of the 1964 Act. The central proofs that must be addressed by an applicant are set out by Baker J. as follows:

> "*The owner of a charge who seeks to obtain possession pursuant to s. 62(7) has to prove two facts:*
>
> *(a) That the plaintiff is the owner of the charge;*
>
> *(b) That the right to seek possession has arisen and is exercisable on the facts.*"

6. In relation to the first proof, ownership of the charge, the Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352 explained the effect of s. 31 of the 1964 Act:

> *"67. A plaintiff seeking an order for possession must adduce proof, inter alia, that he or she is the registered owner of the charge. It is the registration that triggers the entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is*

one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification."

7. In this case, there was clear evidence before the court that the plaintiff was the registered owner of the charge. This was evident despite the fact that the charge remains registered in the name of GE Capital Woodchester Home Loans Limited. The evidence before the court was that that entity and the plaintiff are one and the same entity, and that all that has occurred is a change of name which was registered with the Companies Registration Office. The charge itself was not assigned or otherwise transferred, instead the name of the charge holder has changed. This issue has been the subject of a number of judgments of the High Court and Court of Appeal; see for instance, *Pepper Finance Corporation (Ireland) DAC v. Moloney* [2023] IECA 161.

8. Hence it was clear and not disputed at the hearing of the appeal, that the plaintiff had established the first proof required by *Bank of Ireland v. Cody*.

9. The second proof is that the right to seek possession had arisen and was exercisable. The issue raised by the defendant related to the application of the Code. Before addressing that issue it would be helpful to explain how in all other respects the second proof required by *Bank of Ireland v. Cody* was made out.

10. The evidence before the court made clear that the plaintiff and defendant entered into a loan agreement whereby the defendants were loaned €322,000 for a term of 35 years. There was a written loan offer dated the 5 July 2007 which was accepted in writing by the defendants on the 9 July 2007. The evidence established that the loan was drawn down on the 18 July 2007. The defendants executed a deed of charge on the 25 July 2007, whereby they charged the property that is the subject of this application for monies due under the loan agreement. In due course, the charge was registered as a burden on the folio.

11. Under the terms of the charge, all monies secured by the charge remaining unpaid became repayable immediately on demand if an event of default occurred. The charge identified that a default of payment in respect of the monthly or other periodic payments provided for was an event of default. The evidence was that the defendants defaulted in their repayment obligations from in or about October 2013 and, following demands, the plaintiff issued the proceedings in July 2019. Unfortunately, the position by the time of the appeal was that the level of arrears was very extensive, and, in its final affidavit to the Circuit Court, the plaintiff demonstrated that by the 9 June 2025, the arrears amounted to €244,818.63, with the total debt amounting to €476,726.27.

THE ISSUE ON THE APPEAL

12. The issue raised on behalf of the defendant was not an issue that had been raised in the Circuit Court. However, the defendant argued, and I agree, that he was entitled to raise a new legal issue in a *de novo* appeal where that argument could be sustained on the evidence that had been adduced in the Circuit Court. This is a matter addressed by Simons J. in *Mars Capital Finance Ireland DAC v. Temple* [2023] IEHC 94. In that case, Simons J. confirmed that new matters may be raised on appeal without the need for permission to admit new evidence when the issue relates to the adequacy of the plaintiff's proofs. As put by Simons J. at para 25:

> "*A defendant is entitled to hold a plaintiff to its proofs and is not normally required to flag this in advance on affidavit. Indeed, parties are not to be*

encouraged to file affidavits consisting of legal submissions rather than factual matters."

13. As the argument was one that had not been flagged in advance to the plaintiff, the court obtained confirmation from the plaintiff that this was an issue that they were in a position to address at the appeal, and it was clear that the plaintiff was in fact able to address the issue.

14. The argument was that the manner that the plaintiff had dealt with matters relating to the Code in correspondence meant that there was a real issue such that the case should be adjourned to plenary hearing so that a full trial could address the arguments with the benefit of oral evidence and discovery. In order to explain the legal argument, it is necessary to set out the evidence that the defendant had identified as relevant.

15. The first affidavit on behalf of the plaintiff was sworn by Caroline Loftus on the 3 July 2019. In that affidavit Ms. Loftus averred that the plaintiff had complied with the provisions of the Code prior to instituting the proceedings. In that regard, she exhibited letters from the plaintiff to the defendants. On the 20 November 2014, the plaintiff had written to the defendant noting that his account was in arrears and that his situation was being treated under the plaintiff's Mortgage Arrears Resolution Process (*MARP*) in accordance with provision 45 of the Code. The letter explained that the situation had been assessed for an alternative repayment arrangement (*ARA*) but, for reasons set out in it, had been determined on the basis of the defendant's financial statement that an ARA could not be offered. The letter then set out the reasons for that decision. According to the letter, this placed the defendant outside the MARP process and the protections therein. The letter went on to warn that legal proceedings could be instituted and as required by the Code, set out a number of other options that the defendant may wish to consider.

16. The second letter was dated the 21 January 2019 and informed the defendant pursuant to provision 58 of the Code that the plaintiff intended to take steps immediately to commence possession proceedings in the Circuit Court. As noted above the proceedings were commenced in July 2019.

17. Following the commencement of the proceedings, the defendant swore a number of affidavits. By way of summary, in those affidavits, in addition to other issues, the defendant sought to explain his financial predicament and that he wished to engage in discussions with the plaintiff around his situation. The application was adjourned from time to time to facilitate discussions.

18. In an affidavit sworn on the 28 January 2022, the defendant referred to his efforts to address his situation, which included engaging a personal insolvency practitioner and an accountant to have discussions with the plaintiff. That affidavit and a subsequent affidavit exhibited correspondence between the parties relating to those efforts, which also included complaints about the manner in which the loan had been handled and involved a complaint to the Financial Services and Pensions Ombudsman.

19. The core issue raised by the defendant in legal argument stemmed from later correspondence. In an affidavit sworn on the 26 September 2023, Ms. Loftus set out details of the engagement between the parties. This included a statement that, on the 26 July 2023, the plaintiff issued a letter to the defendant which was described as being "*in accordance with* *section of the code of conduct on mortgage arrears without prejudice to the within proceedings*". The affidavit exhibited two letters.

20. The first letter was dated the 20 July 2023, and included the following statements, and I have underlined the language emphasised by the defendant:

> "[Pepper] *<u>is treating your situation under our Mortgage Arrears Resolution Process (MARP)</u> in accordance with the Central Bank of Ireland's Code of Conduct on Mortgage Arrears 2013 (the Code)",* and,
>
> *"If you do not contact us, <u>you are at risk of being classified by Pepper as not co-operating within the meaning of the Code</u>. If you are classified as not co-operating, please be warned that this will have serious implications for you, including:*
>
> - *You will be outside of the MARP and the protections of the MARP will no longer apply.*
> - *<u>We may begin legal proceedings</u> for repossession of the property immediately after classifying you as not co-operating. ...."*

21. It can be noted that, unlike the next letter in the sequence, the letter of the 20 July 2023, which was signed by Ms. Loftus, was not expressed to be without prejudice to the proceedings which had then been in existence for four years, and did not advert to the existence of the proceedings.

22. The next letter was dated the 26 July 2023 and also was signed by Ms Loftus. It did not refer to the letter written less than a week previously, and included the following statements:

> "*As you are aware, you are now outside the Mortgage Arrears Resolution Process (MARP) required under the Central Bank of Ireland's Code of Conduct on Mortgage Arrears (the Code). This means that the protections of the MARP no longer apply to you and that legal proceedings for the repossession of your property have commenced.*
>
> *This letter is being sent to you in accordance with our obligations under Provision 59 of the Code and is without prejudice to the proceedings for repossession of your property*."

23. In effect, the rest of the letter involved reminding the defendant of the potential benefits of seeking to engage with the plaintiff to resolve the situation and providing him with contact details. The letter noted that the proceedings would continue unless an alternative solution was agreed.

24. The remainder of the proceedings in the Circuit Court involved further adjournments and exchanges of affidavits, however these largely related to the reasons for the adjournments and the provision of updated evidence regarding arrears. As noted above the final step in the Circuit Court led to the order under appeal being made by the court on the 23 July 2025.

THE 2013 CODE

25. The interaction between the Code and an application for possession has been addressed in a number of cases opened to the court. The first in time was *Stepstone Mortgage Funding*

Ltd v. Fitzell [2012] 2 I.R. 318. In that case, proceedings under s. 62(7) of the 1964 Act had been commenced in 2009. The proceedings were adjourned from time to time because of engagement between the parties. In the course of the proceedings, a letter dated the 29 November 2011 was sent to the defendants stating that the plaintiff intended proceeding with the claim for possession. The Master of the High Court refused to transfer the case to the Chancery Special Summons list on the basis that, under the Code, the defendants had a right to appeal the decision to progress the proceedings. Laffoy J. considered the application by the plaintiff to set aside the Master's order and for a declaration that it had complied with the Code.

26. Laffoy J. considered the position that obtained in the proceedings after the effective date of the 2010 Code, the 1 January 2011. The letter from November 2011 had informed the defendants that following an assessment of their financial situation the plaintiff was not prepared to offer a repayment arrangement. Laffoy J. noted that under the terms of the 2010 Code its provisions applied to the defendants' situation even where proceedings already were in being. Of significance to this appeal, Laffoy J. noted that there was an alternative repayment arrangement in place on the 1 January 2011, being one in a series of arrangements and breakdowns. In the premises where the arrangement that was in being broke down in early January 2011, the court found that the plaintiff was required to formally review the defendants' case, and the MARP process was engaged. This meant that the defendants were entitled to be informed of and engage with the internal appeals process in the MARP process.

27. The court considered that it was impossible to agree with the argument made by the plaintiff that it did not have to demonstrate compliance with the Code. The court specifically noted the moratorium provisions in then Provision 47 of the 2010 Code, and stated that the court being asked to make a possession order in relation to a primary residence was entitled to know that the requirement had been complied with. The court observed that the provisions of the Code, which was made under statutory authority, would be rendered nugatory if the lender did not have to demonstrate compliance. In those premises the court was not willing to accede to the plaintiff's application.

28. The Supreme Court considered the overall position of the Code in *Irish Life and Permanent plc v. Dunne* [2016] 1 I.R. 92. That case arose from two appeals from the Circuit Court to the High Court and a consequent case stated by the High Court to the Supreme Court.

29. In relation to the question of the impact of the Code and the effect of non-compliance with its provisions, Clarke J. noted that the Code forms part of the law and that regulated financial institutions are obliged to comply with it, having regard to s. 117(1) of the Central Bank Act 1989. The Court observed, at para. 46, that the Code involves "*a whole range of measures of greater or lesser importance which are expressed in more or less concrete terms*." The court then considered the extent to which the Code impacted on the legal relationships between lenders and borrowers. The Court rejected the argument that the provisions of the Code could be treated as implied terms in the contract between the parties. The Court then considered the argument that compliance with the Code was a matter that could be taken into account by a court in deciding whether to make an order for possession.

30. In that regard, the Court considered previous decisions regarding the effect of regulatory codes, including the decision of Laffoy J. in *Stepstone v. Fitzell*. By analogy with the reasoning of the Supreme Court in *Quinn v IBRC* [2016] 1 I.R. 1, the Court considered, at para. 56, that it should ask whether "*a financial institution must be regarded as being legally* *debarred from seeking to exercise a right to possession, which it would otherwise enjoy, by reason of a breach of the Code*."

31. In considering that question, the Court noted:

a. First, that the relevant parent legislation did not make any express provision concerning the effect of the Code on private legal rights and obligations.

b. Second, the courts should place weight on the undesirability of being seen to become involved in countenancing illegal activity, bearing in mind the issue of whether as a matter of public policy as gleaned from the relevant legislation requires that a party should not be entitled to rely on what otherwise would be its legal entitlement.

32. Having regard to those matters, the Court returned to the diversity of the provisions in the Code and the relative importance of those provisions. The Court also noted differences between the 2010 Code and the 2013 Code. The Court observed that in the context of repossession the moratorium provided for is of central importance, as noted at para. 63 of the judgment:

> *"… Presumably the purpose of the Code in that regard is to provide a window of opportunity in which there can be an exploration of whether there are other solutions to the mortgage arrears problems of the borrower in question, and, if there are, to take action to put those solutions in place. A financial institution which, entirely ignoring the provisions of the Code in that regard, simply went ahead and sought possession as soon as it was legally entitled so to do would be doing the very thing which the Code is designed to prevent. For a court to*

entertain an application for possession which was brought in circumstances of clear breach of the moratorium would be for a court to act in aid of the actions of a financial institution which were clearly unlawful (by being in breach of the Code) and in circumstances where the very act of the financial institution concerned in seeking possession was contrary to the intention or purpose behind the Code itself."

33. The Court therefore found that where proceedings were commenced where the Code precludes that action, the action should not be entertained.

34. However, beyond the issue of commencing proceedings in breach of the Code, the Court went on to note that the role of the court was not to police the other provisions of the Code, such as whether particular proposals should be accepted. The law relating to possession applications did not require the court to consider whether the actions of the lender were fair or reasonable. This led the Court to hold at para. 69 that there should not be an implication that the courts have any role in declining possession in cases other than where the breach of the Code alleged is a failure to abide by the moratorium.

35. It is important to note that the moratorium in question related to the commencement of the proceedings, which is made clear by the advice in para 71 that the court should have evidence before it that "*the proceedings were commenced outside of the moratorium period…"*. The Court observed in that regard that "*if the matter is contested, the court may have to consider what further evidence may be necessary to enable the court to be satisfied that there was no breach of the moratorium*".

36. In those premises it seems to me that the *Irish Life and Permanent plc v. Dunne* case is authority for the need to have evidence in possession cases that there was no breach of the provisions in the Code that address the moratorium prior to the commencement of the proceedings. It does not address directly the situation that arose in this application, where the pre-commencement moratorium was observed but where the letter of the 20 July 2023 stated, during the currency of the proceedings, that the defendant's situation at that point was being treated "*under our Mortgage Arrears Resolution Process .. in accordance with*" the 2013 Code. I will now look at the relevant provisions of the Code in more detail.

37. The 2013 Code set out that it was issued by the Central Bank of Ireland pursuant to s. 117 of the Central Bank Act 1998, and the version relied on by the defendant became effective on the 1 July 2013. The basic objective of the Code is set out in the introduction which states that:

> "*This Code 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. This Code sets out the framework that lenders must use when dealing with borrowers on mortgage arrears or in pre-arrears. All such 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.*"

38. There was no dispute that the Code applied to the relationship between the plaintiff and the defendant, and under the terms of the Code, because the defendant was in mortgage arrears, this meant that the plaintiff lender was under a positive obligation to apply the protections of the Code to the defendant.

39. The Code provides a definition of the term "*non cooperating borrower*". The definition includes a borrower in respect of whom a three month period has elapsed during which *inter alia*, the borrower has failed to engage in a way that allows the lender to complete an assessment of the borrower's circumstances, and where a warning letter in accordance with Provision 28 has been issued to the borrower and the borrower has not carried out the actions specified in the letter.

40. As set out above, the plaintiff adduced evidence that prior to the commencement of the proceedings it had endeavoured to engage with the defendant and had complied with the obligations set out in the Code. This does not appear to have been contested, and the exhibited correspondence confirmed that this had occurred.

41. Provision 45 makes clear that where a lender does not offer a borrower an alternative repayment option – which is what occurred in this case, and was communicated in the letter of the 20 November 2014 – the borrower must be furnished with specific information including relating to the right to appeal and that legal proceedings may be commenced three months from the date on which the letter was issued, or eight months from the date when the arrears arose, whichever date is the later. Here, there was no evidence that the defendant sought to invoke the MARP appeal process, and the proceedings commenced in July 2019.

42. Provision 56 sets out preconditions for legal proceedings. It states that where a borrower is in mortgage arrears "*a lender may only commence legal proceedings for repossession … where …*". To similar effect Provisions 57 and 58 set out steps that must be taken *before* court proceedings for repossession are commenced.

43. I am satisfied that the plaintiff complied with the Code in relation to its pre-commencement obligations.

44. Provision 59 addresses the situation where court proceedings have been commenced:

> "59. *Where legal proceedings have commenced, a lender must continue to maintain contact with the borrower or his/her nominated representatives periodically. If an alternative repayment arrangement is agreed between the parties before an order in relation to the repossession of the property is granted, the lender must seek an order from the court to put the legal proceedings on hold, for the period during which the borrower adheres to the terms of the alternative repayment arrangement*."

45. It is apparent that while there was engagement between the parties at various stages, there was no agreed alternative repayment arrangement reached in this case. This is an important point of distinction with the factual situation in *Stepstone v. Fitzell*, where Laffoy J. had been satisfied that there was an alternative repayment arrangement in place when the 2010 Code took effect. It can be noted that in this case, when proposals were suggested the proceedings in fact were adjourned from time to time.

46. The Code makes provision for the position that obtains *before* the commencement of proceedings and has a separate provision to address the situation where an alternative repayment arrangement is *agreed* between the commencement of the proceedings and the making of an order for repossession.

47. This leads back to the observations made by the Supreme Court in *Irish Life and Permanent v. Dunne*. The court must be mindful that this is not a case where there was non-compliance with the Code's moratorium before the commencement of the proceedings. Similarly, on its own terms, the Code does not oblige the lender to suspend legal proceedings simply because there is engagement between the parties.

48. The court is mindful that the Code, among other matters, sets out issues of public policy identified by the relevant regulator using statutory powers. The Supreme Court has been careful to delimit the role of the court when issues relating to the Code arise. The Supreme Court has noted that there is no basis for the court to engage in a more substantive consideration of compliance with the Code other than the moratorium. The legal rights and obligations of the parties are well established and subject to compliance with the moratorium provided for in Provision 56, the only basis on which the court by reference to *Dunne* should intervene would be if the situation envisaged in Provision 59 arose. I do not believe that it is an unwarranted extension of the reasoning in *Dunne* to state that if, after the commencement of the proceedings, the parties reached an alternative repayment arrangement, but the lender did not bring an application to place the proceedings on hold, this would be a reason why the court would reject an application for possession (which was what occurred in *Stepstone v. Fitzell*). However, that is not what occurred in this case.

49. The question then is what is to occur when the lender unilaterally states that the borrower is treated as being in the MARP process, when there was no obligation under the Code to take that step. The court must also note that, in this case, that scenario has to be viewed against a backdrop where, at the time, the defendant did not appear to attach significance to the letter of the 20 July 2023.

50. In my view, there is a clear public policy objective in permitting some level of communication between the parties to see if they can resolve their situation. That public policy is articulated in mandatory terms in the first sentence of Provision 59, and certainly as a general proposition would reflect the general policy that alternatives to litigation are in the public interest. The balance of rights and interests reflected in the Code and addressed in *Irish Life and Permanent v. Dunne* would be upset if a lender could not take a voluntary step – where not obliged to do so by the Code and where it does not lead to a Provision 59 mandatory pause – without running the risk that it nonetheless would lead to the court refusing an order for possession. The Code promotes and requires ongoing engagement between lenders and borrowers, but is very clear about the stage that must be reached in that engagement before there is a mandatory obligation on lenders to apply for possession proceedings to be put on hold. Far from protecting the rights of borrowers, I consider that the approach argued for in this appeal, would lead to a result that is not mandated by the Code and which could have a very unwelcome deterrent effect on engagement between lenders and borrowers.

51. In those premises, I have decided that where a lender (a) has complied with the Code, (b) then commenced and sought to progress an application for possession, and (c) takes a step that is not mandated by the Code or that gives rise to any form of hold on proceedings, this should not lead to a court refusing a possession order. There are good reasons why engagement should be encouraged rather than deterred. As I stated above, the position would be very different if the engagement in this case had led to an agreed alternative repayment arrangement but the application was still progressed. In that case, which is expressly addressed in the Code, the reasoning in *Irish Life and Permanent v. Dunne* and *Stepstone v. Fitzell* would likely require the court to refuse relief.

52. For these reasons, the court is not persuaded that the evidence which was before the Circuit Court should lead the court to refuse the application for possession. I will therefore refuse the appeal and grant the possession order. As this judgment is being delivered electronically, my provisional view is that the plaintiff should be entitled to its costs as against the defendant. I will list the matter for final argument at 10.30am on Tuesday, the 7 July 2026 and the parties can address at that point any application for a stay on the execution of the order.