

Banking and Finance

Clarity on Bank's Duties to Borrower Customers

The High Court has ruled that the relationship between a lender and a borrower will not be found to owe fiduciary duties to a borrower where a lender is acting at arm's length with a borrower and instead the lender is entitled to act in its own financial interests.

In the recent case of *Irish Life and Permanent plc v. Financial Services Ombudsman* the borrowers took out a loan from the Irish Life and Permanent plc (the Bank) secured by way of mortgage on a house. Interest on the loan was fixed for the first three years after which the rate would be linked to the ECB's refinancing rate and the fixed rate could be broken subject to payment of a redemption fee. The borrowers asked to change to a variable rate and this was subsequently agreed. However the applicable interest rate was variable at the Bank's discretion and no longer linked to the refinancing rate of the ECB.

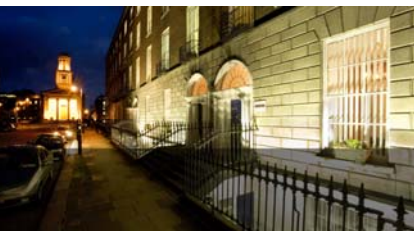
The borrowers complained to the Financial Services Ombudsman (the FSO) who found that the Bank was in a position of a fiduciary relationship with the borrowers, especially as they were seeking to discuss variations of existing agreements, and silence could amount to misrepresentation where such a relationship existed between the parties.

White J upheld an appeal from the Bank against the decision of the FSO, finding that there had been a combination of serious and significant errors in its finding.

The Court noted that the relationship of mortgagor (borrower) and mortgagee (bank) has traditionally not been classified as fiduciary, except where a mortgagee has taken possession of property and must account for any proceeds realised from the sale of the property, and other circumstances out of the norm, where a mortgagee actively places themselves in such a fiduciary position. Whilst the borrowers contended that they were seeking both financial advice and guidance from the Bank, changes in interest rates had financial implications for both parties and the Court therefore held the Bank was entitled to have regard to its own financial interest.

Commentary

The *Consumer Protection Code* (the Code) applies to regulated entities and must be, at all times, complied with when providing financial services. One of the overriding principles of the Code requires a regulated entity to act in the best interests of its customer in its dealings. A similar fiduciary principle is incorporated in the *Code of Conduct for Business Lending to Small and Medium Enterprises*.



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Clarity on Bank's Limited Duties to Borrower Customers

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The judgment in *Irish Life and Permanent plc v. Financial Services Ombudsman* clarifies that where a bank is providing advice and guidance to customers, which has financial implications for both parties, the bank is entitled to have regard to and act to protect its own financial interests. In conjunction with the High Court decision in *Zurich Bank v. McConnon*, that breach of the code did not excuse the borrowers from his repayment obligations, this judgment should give lenders clarity and reassurance in their dealings with borrower customers on an arm's length basis.

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