

THE HIGH COURT

[2021] IEHC 421

RECORD NO. 2017 209 CA

BETWEEN

**PERMANENT TSB FORMERLY IRISH LIFE & PERMANENT PLC AND (BY ORDER) START
MORTGAGES DESIGNATED ACTIVITY COMPANY**

PLAINTIFFS/RESPONDENTS

AND

GERALDINE MOONEY AND JOSEPH MOONEY

DEFENDANTS/APPELLANTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 22 June 2021

Introduction

1. This is an appeal against an order for possession made by the Circuit Court on 4 July 2017. The matter was heard in the Circuit Court on a summary basis, without cross-examination on the affidavits or the matter being sent for plenary hearing. At the hearing before me, the appellants (hereafter referred to as the "defendants") argued that there were substantive issues between the parties that required resolution by plenary hearing and sought that the matter be remitted to the Circuit Court and sent to plenary hearing. A question arose as to the jurisdiction of this Court to remit appeals of this type to the Circuit Court for plenary hearing.
2. At the request of the appellant, I adjourned judgment pending the decision of the Supreme Court in an appeal before it, which decision was ultimately handed down on 14 April 2021 (*Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26). That decision made it clear that the High Court had no power to remit an appeal of this type to the Circuit Court for plenary hearing but could direct a plenary hearing in the High Court under s.37(2) of the Courts of Justice Act 1936.
3. However, for the reasons explained below, I have decided that there is no necessity for a plenary hearing as the plaintiffs have established their case on the affidavit evidence and I am not persuaded that a credible defence exists. Accordingly, I reject the appeal and grant judgment in favour of the plaintiffs.

Decision of Supreme Court in *Cody*

4. As to whether a Circuit Court appeal requiring a plenary hearing could be remitted back to the Circuit Court for same, Baker J. held that the power to adjourn summary possession proceedings to plenary hearing cannot be a power to remit the matter to the Circuit Court for further hearing. Instead she held the power is one to adjourn to plenary hearing in the High Court exercising its statutory appellate jurisdiction, as that Court continues to have *seisin* of the evidential and legal matters raised in the appeal and has sole jurisdiction because the Circuit Court action has concluded.
5. As to when that jurisdiction should be exercised, she applied well established principles, holding that a plenary hearing will be required where a court has before it a defence not sufficient to rebut the evidence of the plaintiff to enable the judge to make a positive finding against the plaintiff, but which offers enough doubt as to the truth or completeness of the plaintiff's evidence, or credibly presents reasonable arguments or

evidence that a defendant has a basis of defence which merits further scrutiny, evidence or argument (para. 76).

Facts

6. The facts of this case are that Irish Permanent Plc agreed to make a loan facility, being an Endowment Home Loan, in the amount of IR£59,500 at an initial interest rate of 10.9%, over a 30 year period, available to the defendants, a married couple, on 4 March 1992. The purpose of the loan was to purchase the house and premises at 8 Fairways Park, Griffith Road, Dublin 11, comprised in Folio 77892F. The defendants accepted the terms and conditions of this offer on 31 March 1992, and the sum of money was advanced on 22 July 1992. (I note that since the monies were advanced, the first named plaintiff's name has changed twice from Irish Permanent Plc to Irish Life & Permanent Plc on 20 April 1999 and to Permanent TSB Plc on 29 June 2012).
7. A term of the mortgage provided that the total amount of moneys outstanding on the mortgage would be immediately repayable if the defendants defaulted in making two monthly repayments. It is not disputed that the defendants have made no repayments since 10 October 2007.
8. When the defendants took out the mortgage they chose an endowment mortgage rather than an annuity mortgage i.e. a mortgage where the mortgagor repays only the interest on the loan and takes out a separate insurance policy the proceeds of which are intended to be used to repay the entirety of the loan on the ending of the mortgage. The financial institution's interest is noted on the policy. The conditions of the loan make it clear that if the mortgagor does not maintain the policy, then the mortgage will switch to being repaid by the traditional annuity method i.e. interest and capital will become payable. This happened on a number of occasions in the early years of this mortgage with the mortgage switching to an annuity repayment in 1996 and 1998 due to the failure of the defendants to keep up the insurance policies but on each occasion the mortgage was switched back to endowment repayment.
9. In November 1999 the defendants requested that the loan be converted to an annuity loan. Mrs Mooney avers in her affidavit sworn 20 October 2015 that on 25 November 1999 she and Mr Mooney wrote to the plaintiff in the following terms: "*I would be grateful to you if you could change our morage (sic) over to an annuity over 8 years please.*" Mrs Mooney explains in the same paragraph (paragraph 5) that the requested term of 8 years was because she and her husband had been advised by the plaintiff that the then existing mortgage had been due to expire in 2007.
10. In Mrs Mooney's affidavit of 1 December 2020, she avers as follows at paragraphs 9 and 10:

Another matter I wish to address is the context in which I sought and obtained agreement with the respondent to change the mortgage over to an annuity one with an 8 year term on 25th November 1999.

In 1996, the appellants received a letter from the respondent stating that they were changing our mortgage from an endowment mortgage to an annuity mortgage. I say when I received this letter I contacted the respondent by telephone and stated that the appellants did not want this as this was not what had been sold to us. The respondent informed me that they would change the mortgage back to an endowment loan. I say the mortgage was converted back to an endowment loan and the benefit of another policy was assigned to the mortgage. However I subsequently received correspondence from the respondent proposing to change the mortgage back to an annuity mortgage. After this I was put in contact with a servant or agent of the respondents named Deirdre Fay who worked in the respondent's office in Saint Stephens Green Dublin 2. After a discussion with Deirdre Fay I understood that an agreement had been reached that the mortgage could be converted to an annuity with the terms to expire in 2007. At Deirdre Fay's suggestion I wrote to the respondent setting out the terms of this agreement by letter dated 25 November 1999 exhibited at "GM2" in my replying affidavit of 20th October 2015. I say when I received the reply at "GM3" in my replying affidavit [the letter of 26 February 2000] I believed that an enforceable agreement had been reached in respect of those terms".

11. The issues arising in this case spring from the reply sent by the plaintiff to the letter of 25 November 1999. On 26 January 2000 the plaintiff replied as follows:

"Further to recent communication from our Life Area, Insurance Department, I confirm that your account has been converted from the Endowment to the Annuity Method of Repayment with effect from the 1st of January 2000.

As a result of the conversion, your monthly repayment calculated at a rate of 7.70% over the term of the loan (271 months, expiring July 2007) amounts to £498.41. This repayment is due on the last working day of January 2000 and monthly thereafter and your account has been amended accordingly."

12. The reference to July 2007 ought to have read July 2022. It has been described as a typographical error by the plaintiffs.
13. Mrs Mooney avers at paragraphs 6 and 7 of her affidavit of 20 October 2015 that she complied with all her obligations in that regard in full in that she paid a mortgage along with her co-defendant of £498.41 per month up to July 2007 and had a reasonable belief and understanding that the mortgage was due to expire in July 2007. In fact the last payment was made in October 2007.
14. In the same affidavit, Ms. Mooney has exhibited an exchange of correspondence between their solicitor, Frank Ward & Co. and the plaintiff building society. That correspondence is in my view of considerable importance and merits being quoted in full.
15. On 22 September 2006, Frank Ward & Co. wrote as follows:

Dear Sirs

We confirm that we act on behalf of our clients Mr & Mrs Joseph & Geraldine Mooney in relation to the above property. We understand that our client's mortgage expired recently and they are continuing to obtain statements in relation to the account. We understand that it is being alleged that the account which they have is an Endowment Policy. Our clients received correspondence from you dated 26th January 2000, a copy of which we enclose for your attention.

It seems clear to us that on a simple reading of this letter that the account was converted to an Annuity Account at our clients request and we should be obliged therefore if you could let us know why it is now alleged that our client's account is still in existence.

We await hearing from you."

16. The letter in response from the plaintiff was dated 5 October 2006 and was in the following terms:

"Dear Sirs,

Further to your letter dated 22/9/06, I confirm that your information is incorrect. The term on the loan has not expired, there is still 190 months left on the loan. The balance outstanding is approximately €60,500 and there are arrears of €1,534.14.

There is no life cover assigned to the mortgage as the clients' endowment policy with Irish Life lapsed and the loan was then converted in 2000 to annuity.

If you have any further queries please contact our Insurance Client Line at 1890 500 121 Option 4".

17. No reply from the defendants' solicitor has been exhibited.
18. Despite this correspondence, the defendants make the case that because of the letter of 26 January 2000, their mortgage ended in 2007 and they have therefore made no repayments since October 2007. Considerable correspondence ensued between the parties between 2010 and 2014 seeking to resolve the matter but to no avail.
19. By letter of 4 July 2014, the plaintiff demanded the defendants repay all sums owing. On 22 January 2015 the plaintiff wrote to the defendants to deliver vacant possession of the premises within 7 days, or the plaintiff would issue proceedings seeking an order for possession in respect of same. As of 11 March 2015, the total outstanding balance was €93,036.18. As of 30 November 2020, the plaintiff asserts that the total balance outstanding is €187,666.95, of which €165,408.54 are arrears.

History of the proceedings

20. A Civil Bill was issued in April 2015 and replying affidavits were filed. The matter was transferred to the Judge's list and was heard on 4 July 2017 and an Order for Possession

was made by Linnane J. on 4 July 2017, with a stay of execution on the Order for six months.

21. A notice of appeal issued on 11 July 2017. Following leave of the Court on 29 January 2018, Mrs. Mooney, the first named defendant swore a second affidavit on behalf of both defendants of 1 December 2020. By Order of 21 October 2019, Start Mortgages Designated Activity Company were added as a second plaintiff and co-respondent to the appeal.
22. This case was initially heard on 10 December 2020, and counsel at the outset indicated that the Supreme Court was in the process of hearing an appeal that raised, *inter alia*, the entitlement of the High Court to remit summary proceedings to the Circuit Court. I therefore adjourned the proceedings pending judgment. As identified above, judgment was delivered in the Cody case on 14 April 2021.
23. The parties in this case were then invited to file submissions based on the Supreme Court decision, which they did on 28 April 2021 (the plaintiffs) and 4 May 2021 (the defendants). Oral submissions were made on 3 June 2021 at the request of one party.

Arguments of the parties

The plaintiffs

24. The plaintiffs seek a dismissal of the appeal, submitting that the defendants' mortgage did not end in 2007 and that the January 2000 letter, despite its mistaken reference to the mortgage ending in 2007 instead of 2022, did not have the effect of altering the contract between the parties, which provided for a term of 30 years.
25. They also reject the defendants' argument of issue estoppel by representation, as they note the January 2000 letter lacks the clarity and unambiguity of a promise or assurance as required by the test for estoppel. Further they point to the correspondence with the plaintiff's solicitor in 2006, prior to the cessation of the mortgage payments in 2007, where it was made absolutely clear that the mortgage had not ceased but in fact there were 190 months left to run. The plaintiffs submit that the defendants had the opportunity to query the issue of when the mortgage would be repaid with the plaintiffs, that they chose not to, and that they acted on the interpretation which best suited them. Accordingly, they say the defendants did not act to their detriment as required by the law on estoppel.
26. Following the decision in *Cody*, the plaintiffs argue this case is one that falls into the first category of outcomes described by Baker J., *i.e.* a case that is capable of being determined on a summary basis, given that the only issue is the legal effect of the letter sent by the plaintiff on 26 January 2000, and that there are no factual disputes in that respect. The plaintiffs also note that the defendants have had an opportunity to adduce additional evidence and make additional legal arguments, that a plenary hearing would be of no benefit to the Court and would undermine the aim of summary judgment, being an efficient resolution of the matter in a cost-effective manner.

The defendants

27. The defendants submit that they have a full defence to the plaintiffs' claim for possession and therefore summary disposal of the matter is inappropriate. The defendants argue that they have met and exceeded the threshold of demonstrating material issues of fact in dispute and a certain level of complexity of the issues, and that these issues can and should only be resolved at plenary hearing.
28. Certain issues were initially raised by the defendants in relation to the suitability of the initial endowment policy and the position of Start Mortgages DAC, the second named plaintiff. However, those arguments were not pursued at the hearing.
29. The defendants submit that they were unaware what the plaintiffs describe as the "typographical error" in the letter of 26 January 2000 which referred to the expiry date of the mortgage being in 2007, when in fact it should have referred to a date in July 2022. The defendants submit that both parties are bound not by the provisions of the original loan contract, but by a separate agreement made with the plaintiff in January 2000, i.e. that the defendant was obliged to pay the sum of £498.41 per month to the plaintiff until July 2007 at which point the mortgage was cleared. The defendants submit that they met their obligations in full.
30. Alternatively, the defendants submit that an issue of estoppel arises, that question being whether the plaintiffs are estopped from seeking to enforce their strict legal entitlements on the basis of representations made in the January 2000 letter, which issue is only capable of being determined at a full plenary hearing.
31. Following *Cody*, the defendants submit that in fact their case falls into the third category of cases as elucidated by Baker J. i.e. where the trial judge is "*constrained by the inability to decide between contested affidavit evidence of fact or resolve complex questions of law, the action cannot therefore be disposed of summarily and will be adjourned to plenary hearing*". They argue that they have established an arguable defence and that therefore the appeal ought to be adjourned to a plenary hearing before the High Court.

Findings

32. The plaintiffs seek summary judgment on the basis of the material before me. The defendants say I must remit the matter to plenary hearing, largely on the basis that there is relevant evidence in respect of the meeting the defendants had with the plaintiff before the letter of 26 January 2000, and in respect of the understanding of the defendants as to the meaning and effect of that letter, both at the time and subsequently. They also point to other factual matters (identified below) relevant to surrounding events.
33. For the defendants to successfully defend the proceedings, they must ultimately persuade a court either (i) that the contract between the parties was amended such as to dramatically shorten the repayment period, with the result that they have not in fact breached any repayment obligations and/or (ii) that the plaintiffs are estopped from seeking to enforce the original contract made between the parties on the basis that the

defendants relied to their detriment on a representation made by the first named plaintiff and altered their position such that it would be inequitable to permit the plaintiffs to rely on their legal entitlement to possession.

34. The case should only be remitted to plenary hearing if I consider that the evidence likely to be heard could make a difference to the outcome of the case. The plaintiffs say first, that none of evidence given by Mr. or Mrs. Mooney is controverted so there is no factual dispute to be resolved and second, the evidence they propose to give could not undermine the plaintiffs' case given the nature of the defence being put up and the contemporaneous documentation before the court.

Defence of contractual amendment

35. Addressing the defence of contractual amendment first, even proceeding on the basis that surrounding events may give context to the interpretation of contractual documents, it seems to me that nothing in the averments of Mrs Mooney, taken at their height, disclose an amendment to the loan agreements concluded in 1992.
36. That agreement was for 30 years and it was an endowment mortgage, which automatically transfers to an annuity mortgage under clause 3.3 of the Irish Permanent Buildings Mortgage Conditions 1992 if the necessary policy required for an endowment mortgage was not maintained in being. On 26 January 2000, there were still 18 years to go of that mortgage.
37. The defendants submit that there was an amendment to the terms of that agreement such that it was agreed that the mortgage would be repaid in 2007, having converted to an annuity mortgage. The creation of any contract requires offer and acceptance. Given that the averments of Ms. Mooney in her second affidavit in respect of her meeting with Deirdre Fay are uncontroverted, I accept that a meeting took place as she describes. But those averments do not suggest that any amendment was made at that meeting or that the letter written by Mrs Mooney on 25 November was an acceptance of an offer to amend the contract made at that meeting. Rather, the case made squarely by the defendants is that the exchange of letters of 25 November 1999 and 26 January 2000 constituted the amendment to the contract.
38. However, those letters do not disclose an amendment to the contractual terms. The offer made by Mrs Mooney on 25 November 1999 was for an 8 year term on an annuity basis. That offer was not accepted by the letter of 26 January 2000 since that letter, although referring to an annuity mortgage, refers to a time period of 7 years and 6 months i.e. from January 2000 to July 2007. It is clearly not an acceptance of the offer of 25 November, being different in its terms.
39. Crucially, there is an obvious internal contradiction in the letter, since it refers on the one hand to the expiration of the loan in July 2007 (being 15 years earlier than the expiry date contracted for of 2022) and in the same sentence refers to the term of the loan being for 271 months. If the loan was to expire in July 2007, the term of the loan would have been for roughly 90 months. It is immediately apparent from an objective reading of

the sentence that either the date of 2007 or the term of the loan being for 271 months is wrong, as 271 months do not result in an expiration date for the mortgage of July 2007.

40. Accordingly, the ambiguity on the face of the letter of 26 January 2000 is such that there is no certainty as to terms – a necessary condition of any contract. In those circumstances, I conclude no effective amendments to the mortgage agreement of 1992 was brought about by the exchange of letters.
41. Indeed, the improbability of the contractual amendment contended for by the defendants is indicated by the fact that, on the defendants' case, the plaintiff had apparently decided to forego repayment of a very substantial part of the monies advanced, since the amount to be repaid was not altered to ensure full repayment or anything like it by 2007. In this respect, Ms McGee of the first named plaintiff avers at paragraph 15 of her affidavit sworn 5 May 2016 that had the loan been converted to an annuity with a term expiring in July 2007, the monthly repayments would have been approximately £890.00 rather than £498.41.
42. It is also worth observing that the subsequent conduct of the first named plaintiff did not reflect an amended contract. In particular, the statements that were provided by the first named plaintiff on a yearly basis (exhibited to the verifying affidavit of Sorcha Timoney of 30 March 2015) made it quite clear that there was still a considerable sum outstanding. The statements provided date from 2006 onwards. The statement for 2007 discloses that the sum of €5,063.73 euro was paid off in October 2007 but that even after it was paid off, the sum of €57,938.40 remained due and owing.
43. No evidence on the part of the defendants as to the conversations they might have had with officials prior to the letters of 1999 and early 2000 can alter the terms of the letters. Nor could evidence in respect of the subjective understanding of the defendants in respect of the terms of their mortgage post 26 January 2000 be relevant, since same could not be sufficient to demonstrate a contractual amendment.
44. The defendants rely heavily on uncontroverted averments made by Ms. Mooney to the effect that (a) there was an Irish Life Assurance life policy that was due to expire in 2007 assigned to the plaintiff; (b) there was a payment of €5,063.73 in October 2007 by the defendants to clear the arrears on the mortgage the subject of these proceedings (c), the defendants took out a new loan with the plaintiff in the amount of €875,000 on 15 November 2007 and (d) in 2009 the first defendant, having received an end of year statement from the plaintiff showing €61,000 outstanding, was told by the plaintiff to disregard it. But the existence of those events do not justify a remittal to plenary hearing, first because there is no conflict in relation to them and the remittal to plenary hearing would serve no purpose and second, because they are not capable of establishing a contractual amendment where the documentation relied upon by the defendants in support of such an amendment is incapable of establishing an amendment.

Estoppel defence

45. An alternative plea is made by the defendants to the effect that the plaintiffs are estopped from seeking possession, due to a change of position of the defendants on foot of 26 January 2000 letter. Certainly, had there been evidence of reasonable reliance by the defendants upon the letter of 26 January 2000 and had they changed their position on foot of same, a defence of estoppel might well have been open to them. But before 2007, the year upon which, according to the defendants, their loan would be paid off, the position was made absolutely clear to their solicitor.
46. I have recited above the letters of September and October 2006. In the letter of 22 September 2006, the defendants' solicitor asserted that their mortgage expired recently and he queried why they continued to receive statements in relation to the account. (It is not explained why, in the light of the letter of January 2000 which refers to the mortgage expiring in July 2007, it was asserted by the defendants' solicitor that it had already expired by September 2006). The letter does however make it clear that the defendants were continuing to receive statements, which statements as of 2006 demonstrate that there was still a very significant amount owing on the mortgage. The plaintiff was asked to explain why the defendants' account was still in existence having regard to the letter of 26 January 2000.
47. The response of 5 October 2006 was unambiguous. The plaintiff made it clear that the term on the loan had not expired, that there were still 190 months left on the loan, that the balance outstanding was approximately €60,500 with arrears of €1,534.14 and that the loan was an annuity. The defendants were invited to contact the insurance client line if they had any further queries. No evidence has been provided of any attempts to contact the plaintiff at that time in relation to the question of the repayment of the loan. Instead the defendants chose in October 2007 to cease repayments. No explanation is given as to why October, as opposed to July 2007, was selected for the cessation of repayments despite the reliance upon the letter of 26 January 2000.
48. Accordingly, it seems to me the position was made entirely clear to the defendants in October 2006. Moreover, because the defendants were legally represented, there can be no question of a misunderstanding on their part. The defendants do not engage with this correspondence in their replying affidavits. In those circumstances, the ambiguity that was undoubtedly contained in the letter of January 2000 had been resolved. After 5 October 2006, it seems to me that no reliance could reasonably be placed on the letter of 26 January 2000 as a justification to cease repaying their mortgage in October 2007. Any evidence that the defendants might give as to what their understanding of their obligations was could not ultimately be relevant in circumstances where they are not advancing a claim that they were not told by their solicitor of the reply by the plaintiff.
49. In short, irrespective of any evidence the defendants might give in relation to what they considered the significance of the letter of 26 January 2000, they must be taken as having been put on notice in late 2006 that no reliance could be placed on the reference to 2007 in the January 2000 letter.

Conclusion

50. In summary, there are no facts requiring to be decided in these proceedings: the plaintiffs have not controverted any of the factual averments of either Mr. or Mrs. Mooney. However, none of those averments appear relevant to the only two questions that require to be determined i.e. was the contract of 1992 altered or amended in January 2000; and are the defendants entitled to rely on the doctrine of estoppel by way of defence to this claim of possession.
51. Any evidence that the defendants might seek to adduce in relation to their belief as to what constituted their contract with the plaintiff post January 2000 is not relevant to the determination of the legal question as to the contractual relations between the parties. As to whether there was an amendment of the contract is matter of law and the defendants' subjective belief in that respect is irrelevant.
52. Similarly, in relation to the question of legitimate expectation, even if the defendants gave evidence that they believed their contract had been amended and altered their position on that basis, it is clear from the correspondence between the plaintiff and the defendants' solicitors that any such belief in that respect was not a reasonable one given that the position was made quite clear in correspondence.
53. In summary, although I am satisfied that this Court could remit the matter for plenary hearing (albeit to the High Court rather than to the Circuit Court as argued for by the defendants) following the Supreme Court decision in *Cody*, in this case it appears to me that there is no basis to so do. There are neither factual disputes that require resolution, nor complex issues of law to be resolved. Moreover, a plenary hearing could not provide material forming the basis of a defence for the defendants, irrespective of the evidence given. Accordingly, I consider that remitting the case to plenary hearing would be unnecessary and wasteful of both court time and costs.
54. In relation to the plaintiffs' case, I am satisfied that the plaintiffs have met the requisite proofs as identified in s.62(7) of the Registration of Title Act 1964 (none of which have been challenged by the defendants) and that the defence put forward is not credible and does not inhibit the entitlement of the plaintiffs to summary possession on foot of the mortgage.
55. I therefore dismiss the appeal and grant an order for vacant possession in favour of the plaintiffs of 8 Fairways Park, Griffith Road, Dublin 11.