

THE HIGH COURT

[2022] IEHC 190

[Record No. 2019/345CA]

BETWEEN:

START MORTGAGES DESIGNATED ACTIVITY COMPANY

APPELLANT

AND

ANTHONY GALIBERT

AND

PAULA GALIBERT

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 1st day of April, 2022.

INTRODUCTION

1. This is the appellant's appeal against the order of the Circuit Court (Her Honour Judge Doyle) made on the 16th of July, 2019. By this order the learned Circuit judge ordered that the appellant's claim for an order for possession proceed to a plenary hearing. She further directed that the appellant's solicitor provide the first named respondent with a contact name and phone number so that he could make an appointment at a time that suited him to view documents in his solicitor's office.

2. The respondents were litigants in person before the Circuit Court and again before the High Court. The second named respondent has not actively participated in the defence of the proceedings which have been dealt with by the first respondent, but she has been served at all stages of the proceedings and affidavits of service were included with the papers before the

Court. I was advised by the first respondent that the second respondent found the situation very difficult and stressful. It appears for this reason she has elected to leave the conduct of the proceedings to her husband. The first respondent, on the other hand, has actively participated in opposing the appellant's proceedings. The record of the proceedings demonstrates that the first respondent has appeared without fail in court as required by court listings. In July 2019 he succeeded in persuading the Circuit Court judge not to make a summary order in these proceedings.

BACKGROUND

3. The respondents are a married couple with children. They are the registered owners of a property at 96 Abbeygate, Abbey Road, Ferrybank in the County of Waterford and this property is their family home (hereinafter "the property").

4. It appears that the respondents were introduced to the appellants (formerly known as Start Mortgages Limited) by a mortgage broker in connection with the purchase of their family home.

5. By letter of offer dated the 6th of March 2008 the applicant agreed to advance by way of loan to the respondents the sum of €211,650.00 by way of a term loan subject to the terms and conditions set out in and attached to the letter of offer ("the loan agreement") and the appellant's standard conditions. A form of acceptance in respect of the loan agreement was signed by the respondents on the 20th of March 2008.

6. It was a condition of the loan agreement that loan facilities advanced by the appellant would be secured as a first legal charge over the property. Pursuant to the loan agreement, Start Mortgages Limited duly advanced the sum of €211,650,00 to the respondents on the 28th of March 2008. Further, pursuant to the loan agreement, the defendants mortgaged/charged the property to the applicants by Deed of Mortgage and Charge (hereinafter "the Mortgage") dated the 16th of April 2008 made between the respondents of the one part and Start Mortgages Limited of the other part. The mortgage was registered in the land registry over folio 34045F on the 29th of April 2008.

7. The respondents fell into arrears on the account before the end of 2008. Despite some payments, arrears continued to grow and in 2015, the respondents stopped making any payments whatsoever.

8. On the 14th of April, 2015 the solicitors acting for the appellants wrote to the respondents separately and individually formally demanding repayment in the sum of €298,328.91 being the mortgage balance payment to be then claimed to be outstanding to the appellant on foot of the facilities granted including arrears repayments. This letter further informed the respondents of the appellant's intention to institute proceedings.

9. A month later, on the 14th of May 2015, the solicitors acting for the appellants wrote to the respondents, again separately and individually, requesting them to deliver possession of the lands.

10. A Civil Bill for Possession (Record No. 300/15) issued out of the Circuit Court on the 26th of November 2015.

THE CIRCUIT COURT PROCEEDINGS

11. As summarized above, these proceedings were commenced by the appellant (then known as Start Mortgages Limited) issuing a civil bill for possession dated the 26th of November 2015.

12. A series of affidavits or other documents were exchanged between the parties during the course of the proceedings.

13. In her first affidavit sworn on behalf of the appellant on the 18th of November 2015, Ms. Coen averred to the factual matters grounding the proceedings in her capacity as company secretary and officer of the appellant. She set out the basic facts regarding the loan facility and the mortgage and exhibited the relevant documents to evidence same. She also exhibited a copy of Folio 34045F for the County of Kilkenny showing the appellant as the registered owners of a charge for present and future advances. She also averred as to the respondents having defaulted in repayment and exhibited a statement of arrears showing a total balance of €309,856.09 due and owing, inclusive of arrears as of the 31st of October 2015. Ms. Coen

exhibited a copy of the loan agreement and the mortgage deed together with copy formal letters of demand for payment first and then for vacant possession.

14. The first named respondent delivered an unsworn statement entitled “*replying affidavit*” which is undated but appears to have been received in the Circuit Court office on the 25th of January, 2016. This document was more in the form of a request for production of documents or voluntary discovery than an affidavit and did not deny the basic facts regarding the loan and the mortgage. In this document reliance was placed by the respondents on s. 84 of the Land and Conveyancing Law Reform Act 2009 which provides for production and safe custody documents.

15. By letter dated the 13th of April 2016 the solicitors for the appellant replied to advise that s. 84 of the 2009 Act does not apply to the within proceedings as the mortgage was executed prior to November 2009. In this letter the respondents were referred to the exhibits to the affidavit of Ms. Coen sworn in November 2015 and advised that the remainder of the documents listed in the replying affidavit did not in fact exist or were not mentioned in the pleadings. The letter further indicated that identified original documents would be available to inspect at the offices of the appellant on either of two dates notified in the letter. The letter pointed out that inspection facilities had previously been offered but not availed of all.

16. In a further sworn document entitled “supplementary affidavit” filed on the 4th of May, 2016, the appellant relied, *inter alia*, on material received pursuant to a data access request to complain that Ms. Coen’s affidavit had been drafted by a third party in consultation with her and he contended that it was not therefore her affidavit. He took issue with her statement that the price of the property would be enhanced if the property could be sold with vacant possession pointing out that the property is on a “*ghost estate*” where many houses are boarded up and some have never been lived in. He further took issue with the reference to the property as a “*principal primary residence*” stating that it was his family home, not a “*principal primary residence*”.

17. In a further affidavit sworn on the 5th of May 2016 Ms. Coen provided updated figures with regards the balance claimed to be outstanding on the respondents’ loan account which by then was claimed to be €320,113.46 which sum was described as being inclusive of arrears in the sum of €95,916.76. She confirmed that the last payment made to the respondents’ loan

account was in the sum of €90.00 on the 8th of June 2015 and that as of the date of swearing of her affidavit the account was then 63 months in arrears.

18. A further affidavit was sworn on behalf of the appellants by one Eva McCarthy on the 24th of August, 2018. She described herself as the litigation manager for the appellant. She identified her means of knowledge and authority to swear the affidavit as deriving from her role as litigation manager for the applicant, employed by Start Mortgages Holding Ltd (“SMHL”) and made from a diligent perusal of its books and records in relation to the respondents and the accounts of the respondents. She confirmed that the loan to the respondents was not a tracker mortgage. She explained the arrears figure account was recalculated with effect from the 1st of November 2017 in line with the change in the methodology used by the appellant to calculate the monthly mortgage repayment amount. She explained the methodology previously used to recalculate the monthly mortgage repayment amount included the accumulated arrears at the date of recalculation to ensure that the mortgage would be repaid within the remaining term. She said that the revised methodology treated the arrears figure separately when calculating the monthly repayment amount. She explained that as a result of the recalculation, the arrears then outstanding on the facility had reduced to €80,997.00 and the amount then outstanding on the respondents’ loan account was €371,101.00. She confirmed the recalculation of the arrears figure had not impacted on the balance due nor resulted in any credit being due to the respondents. She confirmed that no payments had been received by the appellant from the respondents since June 2015 and that the last payment received had been in the sum of €90.00. She exhibited an up-to-date statement of account for the respondents.

19. Counsel for the appellant, on his feet, explained that this change in approach to the calculation of arrears resulted from a decision of the Courts in Northern Ireland which had been critical of the previous methodology whereby arrears were included in calculating the amount of repayment on a loan with the result that the loan repayment increased. The previous practice had been condemned as a form of auto capitalisation of arrears. He confirmed that in light of this criticism, the practice was changed so that the arrears amount is now calculated separately and repayments due under the loan on a monthly basis are calculated to comprise the amount due by way of interest and repayment under the loan agreement. He contended that the approach to the calculation of sums due under the mortgage was not relevant in this case

because of the level of missed payments, the fact that the balance due never changed and because the matter was proceeding as a possession suit rather than a money suit.

20. The appellant made an *ex parte* application to the County Registrar in County Kilkenny on the 24th of September, 2018, to amend the title of the then plaintiff in the proceedings from “*Start Mortgages Limited*” to “*Start Mortgages Designated Activity Company*”. The County Registrar made an order to that effect on that date.

21. The first respondent swore a further supplemental affidavit on the 18th of October, 2018. He claimed that the earlier affidavits sworn on the part of the appellants were perjured and misleading of the court. He referred to the changed approach to dealing with arrears stating that the figures claimed in the Civil Bill and deposed to in the earlier affidavits were wrong. He said that the appellant had engaged in capitalisation without consent. He further referred to the decision of *Bank of Scotland PLC v. Rea, McGready and Laverty* [2014] NI Master 11 where he said the practice of capitalisation without consent was described as “*bordering on fraud*”. In this affidavit he refers to the earlier denial on behalf of the appellant that the loan had been securitized and the fact that a lodgement book issued to him from Start Funding No. 1 Limited. He avers that Start Funding No. 1 Limited is a separate company and their main purpose of business is to purchase the loans from the appellant and their related security pursuant to a mortgage sale agreement. He contended that where the loan has been transferred that the appellant has no standing to take a case against him. He further accused the appellants of various asserted breaches of the Criminal Justice Theft and Fraud Offences Act 2001. He referred to the injury to his wife by reason what he categorises as “*harassment*” of her by the appellants in the manner in which they have pursued the respondents in respect of their indebtedness. He invited the Court to refer the case to the DPP for prosecution.

22. Included with the book of papers before me was a seeming Notice of Motion bearing a stamp but no return date directed by the first respondent to the appellant and seeking an order striking out the appellant’s proceedings for contempt of court with no liberty to “*re-enter this frivolous and vexatious litigation*”. This application appears to be grounded on an affidavit of the first respondent sworn on the 19th of February 2019. Complaint is made in the affidavit that the appellants had sought an adjournment to respond to a supplemental affidavit but had failed to respond to say that this amounted to a failure to comply with a direction in relation to the filing of an affidavit. He further referred to what he described as the consistent overcharging

by the appellant on interest and arrears in breach of the mortgage contract. He used the words “*unfair terms and conditions clauses*” in this regard (but without reference to any term or condition) and described the appellant aggressively seeking to repossess his family home which he described as “*compounding their overcharging and negligence.*” It is not clear that the motion was properly made returnable before the Circuit Court and no Order appears to have been made directly referable to it. When asked about this, the first respondent referred to the fact that the Circuit Court judge had refused to grant summary judgment but had directed a plenary hearing.

23. A further affidavit was in fact sworn on behalf of the appellants on the 21st of February, 2019 by one Justin Nevin, the then litigation manager for SHML, the parent company and sole shareholder of the appellant. He averred specifically to making the affidavit with the authority of the appellant based on a diligent perusal of the appellant’s books and records insofar as they pertain to the respondents and their accounts. In this affidavit he addressed a number of matters including the inspection facilities offered to the first respondent but not availed of, the normal practice of an affidavit being drafted by a solicitor on foot of instructions and information received before being sworn by a person with means of knowledge such as Ms. Coen as had happened in this case, a denial of the various allegations of criminality made against named and unnamed individuals, a further explanation of the changed approach to treatment of arrears and the fact that in the total balance due by the respondent remained unaffected by this changed treatment. He confirmed that as at the 31st of January, 2019, the total sum due and owing stood at €383,525.03 as against the sum initially drawn down of €211, 650.00. This affidavit appears to have crossed with the last affidavit of the first respondent and appears to be made without reference to same. While reference is made to the October, 2018 Affidavit, not all averments are addressed in turn and no attempt is made to address the details of the first respondent’s lodgement book where lodgements were made to Start Funding No. 1 Limited. A page of the first respondent’s affidavit was missing in the papers filed with the Court and there may be a question as to whether the appellant had the full affidavit when preparing its reply. Addressing this issue on his feet, counsel for the appellants maintained that there was no difficulty in a debtor directing payments as they elect.

24. A final affidavit was sworn by the first respondent on the 10th of July, 2019. He repeated his claim that as he was directed to make lodgements to a different entity, the appellant was not entitled to bring the proceedings because, in effect, they must have securitized or

transferred the debt. He accused the appellant of continuing to mislead the Court and of concealing facts. He disputed that the appellant had done all they could to facilitate inspection of documents. He referred to pending cases before the Financial Ombudsman involving other persons and the appellant.

25. The matter then came back before Her Honour Judge Doyle on the 19th of July, 2019, and as stated above she ordered that the matter proceed to a plenary hearing. The appellant appealed that order by Notice of Appeal dated the 26th of July, 2019, and the appeal comes before me sitting as a judge of the High Court under Part IV of the Courts Act 1936, as amended, by way of a full rehearing but based on the evidence given and received in the Circuit Court.

26. I will address the issues arising in turn but it is necessary, firstly, to refer to the legal principles by reference to which an application like this one for summary possession falls to be determined.

THE LEGAL PRINCIPLES

27. The legal principles governing the jurisdiction to grant summary judgment in possession applications have recently been clarified in a number of cases. The Court was helpfully referred in particular to the decisions of the Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352 (Baker J.), *Start Mortgages DAC v. Cussen* [2021] IEHC 531 (Barrett J.), *Start Mortgages DAC v. Ryan* [2021] IEHC 719 (Woulfe J. sitting as a High Court judge) and *Pepper Finance Corporation (Ireland) DAC v. Tighe & Prendergast* [2022] IEHC 8 (Barr J.). Through the more recent case-law identified to the Court there is far greater clarity now as regards issues raised in these proceedings than would have been available when this case was before the Circuit Court in July, 2019.

28. I refer in particular to the decision in *Start Mortgages DAC v. Ryan* [2021] IEHC 719 which, like this case, involved an appeal against a refusal of summary judgment and a transfer to plenary hearing. In that case, the Court (Woulfe J.) very helpfully reviews the authorities to that point to identify the relevant legal principles. The Court took as its starting point the decision of Baker J., in delivering judgment for the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26 (“Cody”). In her judgment Baker J. noted how the

statutory jurisdiction conferred by s. 62(7) of the Registration of Title Act, 1964 (“the 1964 Act”), makes provision for the summary disposal of an action seeking possession of registered land as follows:-

“When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession.”

29. As pointed out by Baker J., the subsection is contained within s. 62 of the Act which makes provision for the creation of charges on registered land and for remedies on default of the loan thereby secured. The charge is deemed by s. 62(6) to operate as a mortgage by deed within the meaning of the Conveyancing Acts 1881 – 1911.

30. The Land and Conveyancing Law Reform Act, 2009 makes some changes to the statutory provisions, most of which are not relevant to this judgment, just as they were not relevant in the *Ryan* case. Section 62(7) was repealed by that Act and replaced by s. 97(2) of the 2009 Act which makes no mention of the application being brought by summary means. However, s. 62(7) was expressly saved by s. 1 of the Land and Conveyancing Law Reform Act 2013, as regards a mortgage created prior to the 1st December, 2009. Section 3 of the 2013 Act provides that proceedings for possession of the principal private residence of the mortgagor shall be brought in the Circuit Court. This judgment concerns one of the procedures for enforcement of the security provided for expressly by the 1964 Act and the Rules of the Circuit Court.

31. As regards the procedure set out in the Rules of the Circuit Court, applications for summary possession in the Circuit Court are governed by Order 5B of the Rules of the Circuit Court (S.I. No. 264/2009), as amended, which applies to any proceedings in which the plaintiff claims, *inter alia*, recovery of possession of land on foot of a legal charge. The Order provides for the commencement of proceedings by a detailed civil bill in the prescribed form, which

should contain a special indorsement of claim which shall “*state specifically and with all necessary particulars the relief claimed and the grounds thereof*”. The civil bill does not stand alone but is to be accompanied by a verifying affidavit in prescribed form by which the deponent shall verify and support the claim in the civil bill. A defendant intending to defend proceedings enters an appearance in the prescribed form within ten days and the defence is by way of replying affidavit setting out that defence. The procedure therefore does not contemplate the service by either the plaintiff or defendant of a *pro forma* pleading, and the defence is not a mere traverse of the claim.

32. Order 5B, rule 6 of the Rules of the Circuit Court contemplates that proceedings are normally to be heard on affidavit and that oral evidence may be adduced only by leave of the judge in specific circumstances or where a notice to cross-examine the deponent has been served. Rule 8 provides an extensive set of procedural and substantive powers for the Court, including the powers to settle the issues to be tried and to permit evidence as to fact to be given orally or by affidavit, or partly orally and partly by affidavit. The power to adjourn to plenary hearing is set out in r. 8(2) as follows:-

“The Judge may, where he considers it appropriate, adjourn a Civil Bill listed before him under this Order for plenary hearing as if the proceedings had been originated otherwise than in accordance with this Order, with such directions as to pleadings or discovery as may be appropriate.”

33. At para. 49 of her judgment in *Cody*, Baker J. stated that the owner of a charge who seeks to obtain possession pursuant to s. 62(7) of the 1964 Act has to prove two facts:

- i. that the plaintiff is the owner of the charge; and
- ii. that the right to seek possession has arisen and is exercisable on the facts.

34. She pointed out, by reference to her decision in *Tanager DAC v. Kane* [2018] IECA 352, that the summary process is facilitated by the conclusiveness of the Register as proof that the plaintiff is the registered owner of the charge and this is a matter of the production of the Folio, and, as the Register is by reason of s. 31 of the 1964 Act conclusive of ownership, sufficient evidence is shown by that means.

35. In *Tanager DAC v. Kane* [2018] IECA 352, Baker J. had previously held that the correctness of the Register cannot be challenged by way of defence in summary possession proceedings, and that a Court hearing an application for possession pursuant to s. 62(7) of the 1964 Act is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and the right to possession has arisen and become exercisable.

36. In his decision in *Ryan*, Woulfe J. points out that Order 5B requires a plaintiff to establish a *prima facie* case on the affidavit evidence for an order for possession, and it is then necessary for the defendant to proffer evidence or argument sufficient to establish a credible defence. During the course of her judgment in *Cody*, Baker J. considered the options available to a Court hearing an application for summary judgment as follows (cited by Woulfe J. in *Start Mortgages DAC v. Ryan* [2021] IEHC 719):-

“69. Before analysing the factual matters in contention in the present appeal it is useful to examine the range of responses available to a court in an action for summary judgment with a view to positioning the facts and arguments in the present case within that range.

70. On one end of the range are cases where a plaintiff establishes its claim on the affidavit evidence, how the defendant is not able to persuade the judge either that the evidence is incomplete or that there is a basis on which a credible defence exists. That approach to both the law and the facts is established in the authorities and a court hearing a claim for summary judgment, whether that be for summary judgment for debt or for summary possession, must be satisfied that the plaintiff has established its claim and that the defendant has not put forward a basis for a credible defence either on the facts or on the law.

71. By way of illustration, the recent decision of the Court of Appeal in Doyle v. Houston [2020] IECA 86 was a judgment mortgage suit where, in the light of the conclusiveness of the Register by reason of s.31 of the Registration of Title Act 1964, Costello J., with whom the other members of the Court agreed, held that the judgment was well charged against the interest of the defendant. She also rejected the argument regarding jurisdiction in the light of s.3 of the Land and Conveyancing Law Reform Act

2013, and held that the judgment mortgage had been registered on foot of a certificate of taxation validly made, and that the plaintiff had proved her case on the evidence and was entitled to well charging relief on a summary basis.

72. Another illustration of that class of case is the judgment of Laffoy J. in *Allied Irish Banks Plc v. Richard McKenna and Another* [2013] IEHC 194 where, having regard to her conclusion that no issue of fact remained to be resolved on a special summons heard on affidavit, and that the error in the grounding affidavit concerning the loan agreement had been plausibly explained and the bank evidence cross-examined on behalf of the defendants, she held that the plaintiff had established its case and that allegations raised by the defendants did not inhibit the entitlement of the plaintiff to summary possession on foot of the mortgage.

73. That judgment illustrates how factual disputes are capable of resolution in summary proceedings, albeit that was a case where witnesses were cross-examined, and legal arguments, depending on the degree of complexity, may be resolved on a summary basis if the trial judge is satisfied that this may fairly be done: see *ACC Loan Management Ltd v. Dolan* [2016] IEHC 69 where it was possible to resolve the arguments concerning the validity of guarantees on a summary basis.

74. At the other end of the range of possible results are cases where a defendant either positively establishes a defence either at law or on the merits, or persuades the judge that the plaintiff has not established its proofs. The claim will then fail. Most of the examples are cases where the defendant has advanced an unanswerable legal defence, as for example in the judgment of Dunne J. in *Start Mortgages v. Gunn* where the repeal of s.62(7) of the Act of 1964 by s.8 of the Land and Conveyancing Law Reform Act 2009 meant that there was no legal basis in some of the claims there under consideration on which the court could grant possession.

75. Another example is the judgment of Laffoy J. in *GE Capital Woodchester Home Loans Ltd v. Reade and Another* [2012] IEHC 363, and supplemental decision [2012] IEHC 459, where she accepted the argument of the defendant that the plaintiff had not established its case on the evidence as the plaintiff could not show compliance with the charge provisions that required formal demand to render the monies due and payable. The claim was dismissed as that defendant had positively established that the monies

secured had not become due, the power of sale had not become exercisable, and therefore the plaintiff was not in a position to rebut that argument.

76. Many applications for summary judgment would fall between these two extremes and will involve the proffering of evidence or argument by a defendant by way of defence which is 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. In that instance 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.

77. What is contemplated by s.62(7) is a trial on affidavit or a mixed trial with or without oral evidence and with cross-examination as the case may be. The more complex the facts, the more detailed the cross-examination, and the more doubts that are raised the less likely it is that the matter can be dealt with summarily, and a speedy resolution may not be possible. In those circumstances the court has a power under Order 5B, r.8 to adjourn the civil bill for plenary hearing and to give directions, order discovery, etc. as may be appropriate."

37. Accordingly, my first task is to decide whether the appellants establish that they are the owner of the charge and that the right to seek possession has arisen and is exercisable on the facts. Where I am satisfied as to the appellant's proofs in this regard, I proceed on the basis that a *prima facie* case has been shown and I must then decide whether the respondents have identified a credible or arguable defence. Unless I am satisfied that no real or credibly arguable defence has been shown, I should not order summary judgment.

DISCUSSION AND DECISION

37. In support of its contention that the requirements of Order 5B are met, counsel for the appellant has drawn my attention to the following in the evidence before the Court, none of which has been disputed by the respondents:

- the folio entry in respect of the property (34045F) which records the registration of the respondents as full owners since 29th of April, 2008 and entry number 2 whereby a burden registered in favour of appellant is recorded confirming the registration of the appellant's charge on the property;
- the deed of mortgage effected on the 16th of April, 2008 between the appellant and the respondents which at clause 8.01 provides for a lender's power to enter into possession of the mortgaged property where the secured moneys shall be deemed to have become due and at clause 9.01 provides for the exercise of this power upon the occurrence of an event of default in the payment of any monthly or other periodic payment or in payment of any other of the secured moneys, which deed of mortgage was executed by the respondents in the presence of an independent solicitor;
- the loan offer letter dated the 6th of March, 2008 which at condition 5 expressly provides for an acknowledgement by the borrower the right of the lender to transfer the benefit of the security and contains in bold block capitals a warning under the Consumer Credit Act, 1995 to the effect that the home was at risk if the borrower does not keep up payments on the mortgage or any other loan secured on it and states that the payment rates on the housing loan may be adjusted by the lender from time to time;
- the pre-action letters requesting payment and then possession dated the 14th of April, 2015 and the 14th of May, 2015 respectively;
- the statements of account showing a pattern of non-payment since November, 2008 with growing sums due to the appellant;
- correspondence dating to the 10th of March, 2015 demonstrating engagement by the appellant with the Code of Conduct on Mortgage Arrears, confirming that they are outside the Mortgage Arrears Resolution Process and suggesting various options to the respondents.

38. While the first respondent says he “*disputes everything*”, he has not disputed core issues in his affidavit evidence before the Court including any of the above matters which go to the appellant's proofs on this application. In particular, there is no dispute that the facilities letter was executed in 2008, it is not disputed that sum was drawn down on foot of that letter, it is

not disputed that they executed the deed of mortgage which secured that borrowing, it is not disputed that the mortgage fell into difficulty early on with the default only increasing thereafter and the total debt with the most recent figure being €383,525.03 has not been disputed as to its computation.

39. On an application of the principles summarized by the Court of Appeal (Baker J.) in *Cody* (at para. 49) and having regard to Order 5B, I am required on this application to be satisfied that the appellant is the registered owner of the charge and s. 62(7) of the 1964 Act is engaged. I am satisfied that the evidence adduced on affidavit by the appellant establishes that the appellant is the registered owner and that the principal money borrowed pursuant to the loan agreement of the 6th of March, 2008, and secured upon the registered charge, has become due. Indeed, the respondents have not really sought to argue otherwise. The “*proofs*” for an application under s. 62(7) of the 1964 Act have thus been met, and the next issue then is whether the respondents have put forward a basis for a credible defence either on the facts or on the law.

40. The three principal issues by the respondents as providing the basis for an arguable defence discernible from the papers and oral submissions made to the Court might be loosely categorised as follows:

1. Inadequate means of knowledge of documentation;
2. Recalculation of monthly repayment in a manner which distorts the debt in breach of the borrowers’ rights making it proper to refuse the application; and
3. No entitlement to pursue the relief by reason of securitisation or lack of ownership of debt.

41. I propose to address these issues sequentially..

Inadequate Means of Knowledge of Documents

42. The first respondent takes issue with the involvement of a third party in drafting Ms. Coen’s grounding affidavit. However, there is nothing unusual in the practice of a solicitor preparing a draft affidavit based on information and instructions received from a client. Thereafter, it is for the client to identify an appropriate deponent to confirm on oath that the

facts as set out in the document prepared on instructions are true from their own knowledge or belief. As a layperson who drafted his own affidavits for the purposes of these proceedings, the first named respondent may not have appreciated that there is nothing inappropriate or wrong in a deponent swearing an affidavit which has been drafted for them so long as they are satisfied that the contents of the affidavit are true and correct to the best of their knowledge and belief and they accurately set out the means of their knowledge.

43. It appears in this case that there was an issue with the form of Ms. Coen's first affidavit whereby the Circuit Court office required it to be re-sworn. This sequence of events does not detract from the evidential value of the affidavit as ultimately sworn and filed in these proceedings.

44. In terms of the deponents' means of knowledge when averring in relation to the documents exhibited in the proceedings, counsel for the appellant referred to the fact that a very similar complaint was made by the appellants in the *Ryan* case and the complaint was rejected in the following terms by the High Court (Woulfe J.), when the very same deponents were in question, from para. 45 of his judgment:

“45. The thirteenth and final ground of defence set out by the first named respondent was as follows:

“13. I am claiming that the plaintiff's claim is fraudulent to alleged loss suffered. I will refer to the Bankers Books Evidence Act 1879. On the plaintiff's sworn affidavits supporting their claim in the Civil Bill by Eva McCarthy, Justin Nevin, and Siobhan Coen all three were not direct employees of the organisation that own our loan. It clearly states on their 2019 accounts that Start Mortgages DAC have no employees. Furthermore, legislation insists that evidence provided by a bank must be given by direct employees.”

The last ground advanced by the first named respondent relates to the fact that the above-named deponents who swore affidavits on behalf of the appellant appear not to have been direct employees of the appellant. In a number of affidavits Ms. McCarthy and Mr. Nevin averred that they were “the litigation manager” for the appellant, but

employed by SMHL “which is the parent company and sole shareholder of” the appellant.

46. The first named respondent relies on the case of Promontoria (Aran) Limited v. Burns [2020] IECA 87. In that case the plaintiff sought liberty to enter final judgment in the sum of approximately €27m, alleged to be due on foot of various guarantees entered into by Mr. Burns in favour of Ulster Bank Ireland Limited, the plaintiff’s predecessor in title, in respect of the indebtedness of four limited liability companies pleaded to be then in default.

47. The application for summary judgment was grounded on the affidavit of a Mr. Harris, who described himself as a senior asset manager employed by another company (“the Servicer”), which administered debt collection on behalf of the plaintiff. He deposed to his authority to make the affidavit for and on behalf of the plaintiff, and that he did so with its consent. Mr. Burns averred that he believed that the deponent, Mr. Harris, was not directly employed by the plaintiff and was not a party to the within proceedings and could not make any averments on behalf of the plaintiff, as he had no first-hand knowledge of any of the events to which he referred and was relying on hearsay.

48. The trial judge concluded that the evidence of Mr. Harris was inadmissible hearsay, as no reference had been made by him to the books and records of the plaintiff. Following delivery of his written judgment, the trial judge gave the plaintiff an opportunity to put further evidence before him, in particular as the defendants had made no more than a “bare denial of the debt” and had not contested any of the factual averments in the affidavits made on behalf of the plaintiff. In that context, the plaintiff furnished two further affidavits, one of Mr. Harris and the other of a Mr. Pendville, a director of the plaintiff, regarding the source of knowledge of Mr. Harris. In Mr. Harris’s further affidavit he averred that he had access “at all material times” to the books and records of the plaintiff “having relevance to these proceedings”, and that he had made his affidavit from facts within his own knowledge and from a perusal of those books and records. An affidavit of Mr. Pendville supported this supplemental affidavit and confirmed that the Servicer provided loan administration and asset management services to the plaintiff in respect of the material loans, and that Mr. Harris was authorised to swear his affidavits on behalf of the plaintiff “in circumstances where he

is responsible for the day to day management of the loans and related security". Mr. Pendiville went on to say that the Servicer held all the books and records, including all hard copy and electronically stored records of the plaintiff "having relevance to these proceedings", as a consequence of being responsible for the day to day management of the loans.

49. The trial judge did not thereafter prepare another judgment, but a brief note of counsel showed that when the matter came back before him, and noting that additional affidavits had been filed, Noonan J. said that he was not satisfied that the evidential difficulty identified had been dealt with and he gave leave to defend on the issue of the admissibility of the evidence only, or as was recorded in the perfected order "whether the plaintiff has led admissible evidence" and noting that the plaintiff could lead any evidence it wished at the plenary hearing.

50. The plaintiff appealed and the Court of Appeal upheld the decision of the trial judge. Baker J. held that there was insufficient evidence of the type of business records carrying indications of reliability, nor evidence sufficient to establish a course of dealings between the plaintiff and the defendant to engage the recent authorities which recognise that a Court may draw an inference when, in the context of an established business relationship, a defendant does not deny or otherwise dispute in a concrete and credible way the evidence adduced in proof. She noted that the statutory exception to the hearsay rule created by the Bankers Books Evidence Act was not engaged in the case, as the plaintiff was not a "bank" as defined in the Act, and no argument was made to the contrary. The case relied on a common law exception to the hearsay rule, namely that the witness for the plaintiff had inspected and analysed its books and records and it was argued could give positive evidence of the debt from those records. As regards the nature of the documents exhibited, Baker J. stated as follows: "103. I cannot therefore ignore the omission of a simple averment in the numerous affidavits sworn on behalf of the plaintiffs that the originals of the various documents are held by or on behalf of Promontoria and that the documents exhibited are true copies, or that the deponents have examined the books and business records of Ulster Bank relating to the loans."

51. During the course of the appeal hearing I asked counsel for the appellant what the distinction was between Promontoria v. Burns and the present case. He submitted that

in Promontoria v. Burns the plaintiff was a totally different company with no relationship to the original lending bank. In contrast the relevant deponents in the present case were employed by the parent company and sole shareholder of the appellant company and were in a position to peruse the original books and records of the appellant company and to have the requisite means of knowledge to swear positively to the facts.

52. I have come to the conclusion that the above submission is correct, and that the present case can be distinguished from the situation which arose in Promontoria v. Burns. While there does not appear to be an express averment in the numerous affidavits sworn on behalf of the appellant that the original documents are held by or on behalf of the appellant, this is in the context of averments that the relevant deponents are employed by SMHL, which is the parent company and sole shareholder of the plaintiff, and that SMHL is the group employer and corporate service provider, and facilitates the plaintiff in the servicing of loans by providing staff, office equipment etc. The deponents do make averments that they make their affidavits “on the plaintiff’s behalf and with its authority on facts within my own knowledge and from a diligent perusal of its books and records in relation to the defendants and the account of the defendants herein save where otherwise appears etc”. In her grounding affidavit Ms. McCarthy did make averments that the documents exhibited were true copies. In the circumstances I am of the view that this ground again does not establish a credible defence.”

45. The situation here is in all material ways identical to that in the *Ryan* case, down to the identity of the deponents and their employment with SMHL which is the parent company and sole shareholder of the appellant and facilitates the appellant in servicing loans by providing staff, office equipment and the like. I gratefully adopt the careful reasoning of the Court in the *Ryan* case to reach the same conclusion in respect of the respondents’ complaints as to the means of knowledge and authority of the appellant’s deponents in this case.

Recalculation of the Monthly Repayment in a manner which distorts the debt in breach of the borrowers’ rights making it proper to refuse the application

46. A more substantive issue arises from the approach taken by the appellant at the date of issue of the proceedings and previously to the treatment of arrears and the calculation of the monthly amount due under the loan agreement. It appears that as a result of the decision of the Northern Ireland High Court of Justice in *Bank of Scotland v. Rea & Ors.* [2014] NI Master 11, the appellant revised its previous approach. In the *Bank of Scotland* case, the Master identified the issue arising in the following terms (para. 2):

“[2] All three cases raise a point of some importance, namely whether the lender may both (a) consolidate (or, as it is often called, "capitalise") arrears of monthly instalments with the mortgage balance upon which the instalments are calculated with the effect of increasing the contractual monthly instalments to spread those arrears over the residue of the mortgage term and also (b) rely on the arrears so consolidated as outstanding arrears for the purpose of possession proceedings.”

47. In the course of his judgment in the *Bank of Scotland* case, the Master referred to his discretion to defer possession where the Court was not satisfied that it was "*proper*" to do so in discharge of its statutory powers and also the court's obligation under s. 3 of the Human Rights Act 1998 to read and give effect to legislation so far as possible in a manner compatible with ECHR rights of the parties. He emphasized, however, the practice in that jurisdiction of reserving this discretion (para. 36):

“...for the most part for special situations where it is not possible for the defendant to put a satisfactory or any financial proposal but it would nonetheless be unconscionable or outwith the court's duties under sections 3 and 6 of the Human Rights Act 1998 to allow repossession to proceed, or at least to proceed in the near future.”

48. A point which should not be lost sight of when weighing the authority of the *Bank of Scotland* case is that while the statutory powers of the Court to order possession are similar as between the two jurisdictions, the Human Rights Act, 1998 applies to the Courts in a way which the European Court of Human Rights Act, 2003 does not. Courts are expressly excluded from the definition of a "*public body*" as defined under the European Convention on Human

Rights Act, 2003. That is not to say that the Court's jurisdiction to decline to make an order on the basis that it is not proper to do so having regard to the requirements of constitutional justice or a proper vindication of a homeowner's constitutional rights is any less than the Courts in other jurisdictions which are subject to a direct application of the European Convention on Human Rights. Jurisprudence developed by reference to the Human Rights Act, 1998 in Northern Ireland or elsewhere in the United Kingdom is therefore of potential persuasive value in guiding the exercise of this Court's jurisdiction in the light of human rights protections enshrined in the Constitution. The Court is also required to have regard to the jurisprudence of the European Court of Human Rights pursuant to the provisions of ss. 2 and 4 of the European Convention on Human Rights Act, 2003. No such jurisprudence was identified for the assistance of the Court in this appeal.

49. There is no doubt, as recorded by the Master in the *Bank of Scotland* case (para. 40), that erroneous mortgage lending practices, particularly those generating an increased risk of repossession of homes, inflict a great deal of distress on individual borrowers and others in their households. However, it is noted that the Master found that the plaintiff's practice in that case was based on a power under the mortgage conditions to restructure and vary monthly payments and that this power was not in breach of the Unfair Terms in Consumer Contracts Regulations, 1999. He found, however, that the power relied upon had to be exercised reasonably. He found that the practice distorts perceptions of affordability in that borrowers in default are faced with a monthly instalment increase to address a sum representing the arrears over the rest of the mortgage term and a demand (and indeed threats of repossession) for the immediate repayment of erstwhile arrears. As the Master states (para. 58):

"This is, to say the least, confusing and must be a disincentive for many borrowers to make best realistic proposals to the lender or the court to address the arrears – particularly in light of an undisclosed "arrears element" in the monthly instalments. It also distorts the true figures in the minds of those approached for advice and the court".

50. In the *Bank of Scotland* case the Master required the plaintiff to put on affidavit a clear statement in relation to the consolidation of arrears which disclose particulars of past consolidations and double-billing events, states the current value of the account between the

parties as to monthly instalments, arrears and so forth and states the true arrears and that its figures are not relying on pre-consolidation arrears or double billing. In respect of one of the cases before the Court (*Laverty*) the Master observed that there was no affordability for the making of proposals to address the arrears however computed. In that case, notwithstanding what the Master describes as the “*grave deficiencies*” in the plaintiff’s evidence about the arrears on the account, the court was satisfied the plaintiff had a compelling case for the order in its favour.

51. In considering whether there is any basis for a credible or realistic defence established by the respondents in this case having regard to the approach taken by the appellant to the calculation or as the respondents contend “*capitalisation*” of arrears, I note the submission made on behalf of the appellant that the level of arrears or monthly repayment calculation has no bearing on the appellant’s entitlement to possession which is based on the event of default and not the amount of the default. In this regard he relies again on the decision of Woulfe J. in *Ryan* (at para. 40) where the learned judge stated:

“The Courts have accepted that in a suit for possession, as opposed to a suit for the debt, a plaintiff was entitled to possession even if there was a dispute as to part of the indebtedness. For example, in Bank of Ireland v. Blanc [2020] IEHC 18, O’Regan J. stated as follows (at para. 30):

“The issue of how much money is due and owing and the guide to the granting or withholding of possession was dealt with by Ms. Justice Dunne in the High Court in 2009 in Anglo Irish Bank Plc v. Fanning [2009] IEHC 141, when it was indicated that a default was the issue, not the amount. That is clearly the case in circumstances where possession only is sought and not judgment of a particular sum of money, and possession is the only matter before this Court.”

In light of the above authorities this issue does not establish a credible defence.”

52. Counsel on behalf of the appellant urged on me that there is no issue in this case with the amount due and owing. It is fully and properly quantified on affidavit. Indeed, it is implicit in the submissions of counsel that the change of approach taken by the appellant as outlined on affidavit was likely prompted by the criticism of the previous practice similar to the criticism

expressed by the Master in the *Bank of Scotland* case. To that extent there has already been a mending of the appellant's hand through the change in practice and the filing of updated affidavits explaining the change and the impact on figures due and owing. Indeed in this case the difference in the arrears sum pre and post the change in the appellant's approach to the calculation of arrears has been explained with no change on the overall level of indebtedness. Counsel referred to the arrears as a "*mythical beast*" in view of the quantity of missed payments. He submitted that the level of arrears is not the debt relied on in this case to give rise to an entitlement to the order for possession, the debt relied on is the balance on the loan. He submitted, however, that the level of arrears is a useful guide as to the seriousness of the level of default which has occurred. In this case he points to the fact that the current debt, valued in February, 2019 at €383,000 in respect of a loan for considerably less taken out in 2008 gives a stark illustration of the level of engagement by the respondents given that there have been no payments at all for nearly seven years. He relies on the terms of the mortgage which permit the appellant to seek possession on the occurrence of an event of any default, irrespective of the level of arrears.

53. It seems to me that there could well be cases where an event of default persists because the borrower is confronted with such a distorted impression of the debt as to impede engagement for the purpose of agreeing a plan to address payment difficulties. Accordingly, I do not accept that the mere occurrence of an event of default will in all cases automatically entitle the appellant to an order for possession in the manner contended in argument in this case. The Court's residual discretion remains and it is only required to make the order where it is satisfied that it is "*proper*" to do so.

54. However, this is not a case in which I have any doubt that the approach to calculation of the arrears and loan repayment contributed in any material way to the ongoing default on the part of the respondents. Not a single penny has been paid towards repayments since 2015, a period of now almost seven years. Accordingly, I am satisfied that the respondents' focus on the previous practice in calculating loan repayment, even if it constituted impermissible "*capitalisation*" of the arrears (which I do not find but which I accept for the purpose of the argument and to ensure that I take the respondents' case at its highest point), does not provide the basis for a credible or realistic defence on the facts and circumstances of this case against a background of such a prolonged and flagrant failure to make any repayments on the loan. There is no evidence in this case that the respondents were impeded in making payments on

the loan or entering into an arrangement because of the calculation method originally used by the appellant. I am satisfied that no sufficient evidential basis for grounding a defence to the claim for possession on the basis of the methodology used and subsequently abandoned for calculating arrears has been identified by the respondents.

No Entitlement to pursue the relief by reason of Securitisation or Ownership of debt

55. The first respondent relied on *Waldron v. Herring* [2013] IEHC 294 (Edwards J.) to contend that the appellant had no entitlement to pursue possession. That case involved an application to join a bank as co-plaintiff or substitute as plaintiff in proceedings claiming damage to property. The Master has refused the application on the basis that what was required was the assignment of the cause of action, a position which Edwards J. endorsed as correct. This was obviously an entirely different situation to that which arises here. The first respondent further contends that there is confusion in relation to the ownership of the debt where the lodgement book he was furnished with provides for payments to a different legal entity to the appellant.

56. In response to the complaint advanced in relation to the ownership of the debt and the issue of securitisation (an issue ventilated on affidavit but not at hearing) raised by the first respondent, the appellant's counsel refers to the decision of the Court of Appeal (Baker J.) in *Tanager DAC v. Kane & PRA & Bank of Scotland* [2018] IECA 352 where (para. 67 to 68) it was stated:

“A plaintiff seeking an order for possession must produce proof, inter alia, that he or she is the registered owner of the charge. It is 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 conclusive and is of the register, and of the statutory limits to rectification.

The challenge to registration is brought by other types of proceedings into parties or where the PRA respondent and in the manner I have described”.

57. On the authority of the decision in *Tanager DAC*, I am satisfied that it is not open to the respondents in these proceedings to allege all manner of fraud or concealment or other abuse. It is the registration of the appellant as the owner of the mortgage charged on the property that triggers the entitlement to seek possession and the respondents cannot seek to go behind the register in these proceedings.

58. It is not clear that the first respondent maintains an issue in respect of securitisation. He appeared to indicate that he did not during the course of the hearing. The issue was comprehensively addressed by the High Court in the *Ryan* case where the claim was made that the appellant did not own the mortgage which had been securitized in the following terms (from para. 26).

“26. As set out above, the first named respondent averred on affidavit that the appellant did not own his mortgage. It appears from the first ground above that he relies upon averments made in affidavits sworn on behalf of the appellant which refer to loans “held” by the appellant, including the loan which was advanced by the appellant to the respondent. Insofar as that phrase may have raised doubt in the mind of the first named respondent, however, the last affidavit of Ms. McCarthy sworn on the 9th October, 2020 would seem to remove any room for doubt. She stated that while SMHL facilitates the appellant in the servicing of loans by providing staff, office equipment etc, the appellant is the regulated entity and holds legal title to the loans.

*27. Ms. McCarthy also stated that the appellant remains the registered owner of the security as per the Folio, the subject matter of these proceedings, and that the Folio represents conclusive proof of the appellant’s entitlement to seek relief in these proceedings. The conclusiveness of the Register is proof that the appellant is the registered owner of the charge and this has been confirmed most recently by the Supreme Court in the *Cody* case, as set out at para. 21 above. In the present case sufficient evidence has been shown by the production of the relevant Folio, and the correctness of the Register cannot be challenged by way of defence.*

28. As regards the issue of securitization, the first named respondent also made averments on affidavit that he believed that the appellant had securitized his mortgage.

He also raised this issue before the Circuit Court judge, and in response Ms. McCarthy swore a supplemental affidavit on the 9th October, 2020 and referred to “securitization of a number of mortgages which is ordinary banking practice”, but she did not expressly state whether the respondents’ mortgage had been securitized. She did, however, state that the appellant remained the registered owner of the security per the Folio, the subject matter of these proceedings, and that the appellant was and has remained at all times the legal owner of the relevant debt and security. Insofar as the first named respondent took issue with securitization, she said that same was permitted by the loan agreement between the parties and was a regular banking practice that had no material effect on the respondents or their liability to the appellant. During the course of the hearing counsel for the appellant confirmed that the respondents’ mortgage was one of the number of mortgages that had been securitized.

29. The issue of securitization was considered by this Court in Freeman v. Bank of Scotland Plc [2014] IEHC 284. In that case, the plaintiffs were husband and wife. Between 1996 and 2006, they purchased six investment properties which were financed by First Active Building Society and mortgages were created in favour of the Society. In 2006, the plaintiffs refinanced their loan with Bank of Scotland (Ireland) Limited (“BOSI”). They remortgaged the properties with BOSI, offering them as security for a sum of €1,406,000 which was borrowed. Their borrowings with First Active were approximately €800,000 at the time of the refinancing, so when they obtained the loan from BOSI, there was a surplus of approximately €600,000 released to them after discharging the debts due to First Active. The plaintiffs defaulted on the loan facilities granted to them by BOSI and failed to repay the sums due when demanded. On the 17th November, 2011, the bank appointed the second named defendant as receiver over the properties and purported to do so pursuant to its contractual rights. On the 28th August, 2012, the plaintiffs commenced these proceedings in which they sought, inter alia, to invalidate the appointment of the receiver. There was evidence that five of the six of the plaintiffs’ loans had been securitized. The plaintiffs claimed that the bank was not entitled to enforce loans that were securitized, and in particular, to enforce any mortgage or charge granted by the plaintiffs as security for such loans.

30. McGovern J. considered the issue of securitization as follows:-

“7. ...the court was referred to the definition of securitization to be found in ‘The Law on Financial Derivatives’ by Alistair Hudson (5th Ed.) at para. 1-185, where the author states: ‘The process of “securitization” means translating a financial instrument or a group of financial instruments into a security. Securitization is the process of taking rights (such as a right to receive a stream of income from a number of different mortgages or credit cards) and translating that bundle of rights into a single security which can be marketed to investors on the open market. Securitization, then, is the process by which a range of cash receivables or similar assets are grouped together and offered to investors in the form of a security in return for a capital payment from the investors.’ Generally, the receivables are transferred to a Special Purpose Vehicle so that the receivables are taken off the balance sheet of the financial institution selling the financial instruments. The Special Purpose Vehicle issues bonds to third party investors who have no right to share in the profits of the underlying assets, and provided their notes are fully repaid for both principle and interest, any remaining surplus cash is paid back to the originator of the assets as profits.

8. It is an important principle in securitization transactions that the originating bank that sells the mortgages to the SPV, under an equitable assignment, continues to service the mortgages and the legal title remains with the originating bank. Where customers have provided their consent as part of the standard mortgage terms and conditions, they are not specifically notified that their mortgage has been securitized. In the case of housing loans held by BOSI or the bank, random selection was applied to determine which of these loans would be securitized. Thus, in the case of the plaintiff’s loans, five of the six were securitized ...

10. The SPV used in the securitization was Wolfhound Funding 2008-1 Limited (“the Issuer”). It was set up for the primary purpose of issuing notes as part of a securitization of a portfolio of Irish residential property assets...

11. At all times, legal title to the loans and related security remained with BOSI until the completion of the transfers to the Issuer and notification of the transfers being given to the borrower. Such transfers would only be completed and notifications given in the circumstances set out in Clause 7.1 of the Mortgage Sale Agreement between BOSI and the Issuer. No events specified in Clause 7.1 occurred and the assignment of each of the plaintiffs’ loans and related security was effected in equity only. Notice of the

assignment was not given to the plaintiffs. The security transaction was completed on 5th November, 2013, when the bank repurchased the SPV's interest in the securitized loans and relevant securities.

12. In Wellstead v. Judge Michael White [2011] IEHC 438, Peart J. rejected an argument that a lending bank was not entitled to the benefit of an order for possession that had been made in favour of the lender because the relevant housing loan had been securitized. The learned judge said: 'The applicant is also seeking leave to argue that Ulster Bank have no longer any entitlement to benefit from the order for possession because as part of some unspecified securitization agreement the bank has sold the applicant's mortgage, and is therefore no longer owed anything on foot of the mortgage herein. ... His grounding affidavit characterises the action by Ulster Bank in seeking repossession in circumstances where it no longer owns the mortgage and has been repaid the monies lent to the applicant as fraudulent, and misleading and premeditated. In relation to the last argument, counsel for the bank has referred to Clause 17 of the mortgage deed executed by the applicant and his former partner, which contains a consent by the mortgagors as to such a disposal of the benefit of the mortgage to another party by way of a securitization scheme or otherwise, and it is submitted that this is a point which it is simply not open to the applicant to argue, even if he was in time to do so, since he has consented to that occurring. I agree. But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitization scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitization schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors.'

13. Although Wellstead was a judicial review application and not a plenary hearing, there were notable similarities between the point taken in that case and the securitization point taken by the plaintiffs in this action. In this case, the plaintiffs do not dispute that the loans are in default and I am satisfied that more than one "event of default", as defined in the terms and conditions applicable to the loans, has taken place. The evidence clearly establishes that the plaintiffs – in accepting the loans – signed documents in which they agreed to BOSI securitizing the loans.

14. *The second named plaintiff accepted that the plaintiffs began defaulting on their loans in 2009, at a time when they knew nothing about the securitization of their loans. The second named plaintiff said that until September 2011, she had never heard of the word “securitization”. There was no evidence to show that the fact of securitization had anything to do with the plaintiffs going into default on their loans. It became clear, in the course of the trial, that the plaintiff’s point on securitization was confined to an allegation that securitization affected the bank’s title to the loans...*

15. *In applying for the loans, the plaintiffs accepted the entitlement of BOSI to securitize their loans. I am satisfied that the securitization of the loans was properly effected and did not in any way alter the obligations of the plaintiffs so far as the repayment of the loans was concerned...The plaintiffs failed to establish that their liability to repay the loans to the bank is affected by the securitization...”*

31. *I gratefully adopt the principles set out by McGovern J. in the Freeman case. Applying those principles to the facts of the present case, I note that General Condition 5 of the General Loan Conditions provided that: “The Borrower’s attention is drawn to Clause 11.07, 11.08 and 11.09 of the Mortgage. The Borrower hereby acknowledges the Lender’s right, without further consent from or notice to the Borrower to transfer the benefit of this Letter of Offer, the Loan and the Lender’s mortgage security...over the Property to any person, company or corporation on such terms as the Lender may think fit, without any further consent from or notice to the Borrower or any other person, or any consequential assurance or re-assurance or a release under such scheme whereupon all powers and discretions of the Lender shall be exercisable by the transferee”. I note also that Clause 11.08 of the Mortgage Deed provided that the appellant “may...at any time securitize this Mortgage without any consent of the Borrower save as is contained in sub-clause 11.09 hereof and without further notice to the Borrower or any other person”, and that Clause 11.09(ii) provided that the respondents “hereby irrevocably consent and agree to be bound by...the provisions of any securitization scheme”. In any event, I am satisfied, as per Freeman, that upon securitization of the respondents’ loans the legal title to the loans and related security remained with the appellant, and securitization did not affect the appellant’s title to the loans and the related mortgage. The first named respondent has failed to establish that the respondents’ liability to repay the loans to the appellant was affected by the securitization, and I am satisfied that this issue does not establish a credible defence.”*

59. This dicta of Woulfe J. in *Ryan* is particularly persuasive in this case as it appears that I am considering the same precedent loan agreements and mortgage terms. Even the deponents on behalf of the appellant are the same as the deponents in *Ryan*, albeit the issues raised are not all identical. The primary difference between this case and *Ryan* in this regard, of course, is that it is denied by the appellant that there has been any securitization of the debt, unlike the situation in *Ryan*. What the decision in *Ryan* reiterates however, is that it does not matter whether the loan was securitized or not, the appellant is still entitled to pursue an order for possession in these proceedings. The same must be the case here.

60. I am satisfied that the respondents have not raised any credible line of defence in reliance on doubts harboured as to the ownership of the debt or securitization. Whatever arrangements the appellant makes for the processing of payments or the servicing of the appellant are not of concern to the Court in circumstances where the appellant's entitlement to pursue these proceedings is established through the registration of the charge on the folio in its favour.

GENERAL CONSIDERATIONS OF FAIRNESS

61. The first respondent made passing reference on affidavit to unfair terms in consumer contracts. The High Court, in *AIB v Coughlan* [2016] IEHC 752 acknowledged the *ex officio* obligation existing under ECJ case law for a national court to assess, of its own motion, whether a contractual term falling within the scope of the Unfair Contract Terms Directive (93/13/EEC) is unfair. That judgment was delivered by reference to the decisions of the European Court of Justice in *Aziz v. Caixa d'Estalvis de Catalunya* (Case C-415/11)). In *EBS v. Ryan* [2020] IEHC 212 Barrett J. described the obligation in the following terms at para. 8:

“Simply put, this is an obligation that the European Court of Justice has recognised to arise under the UCTD and which requires me, as a judge, to do a fairness test on contractual documentation, in the particular circumstances of any one case. This inquisitorial task is known as the ‘Own Motion Obligation’.”

62. The issue for the Court in discharge of its own motion obligations is whether, in circumstances where the respondents are consumers, they are entitled to the protection of the Unfair Terms in Consumer Contracts Regulations, 1999 or the Unfair Contract Terms Directive.

63. In *Permanent TSB Plc. v. Davis* [2019] IEHC 184 the Court (McDermott J) highlighted the provisions of Article 4(2) of the Unfair Contract Terms Directive, which provides as follows:

“Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.”

64. In *Davis*, McDermott J. held that the defendants were consumers within the terms of the Directive, and the 1995 Regulations, but the alleged unfair terms related to the core terms of the agreement between the parties, primarily to the terms regarding repayment of the amount advanced in the context of income and the ability to repay.

65. In this case, the height of the unfairness case identified by and on behalf of the respondents relates to the manner in which the debt was calculated to include an alleged capitalisation of arrears in warning letters and in the claim as pleaded initially. In addressing this issue, counsel for the appellant emphasised that in these proceedings the appellant is seeking to enforce core terms of the loan agreement. He referred me to the very clear warnings contained in the loan documentation and the correspondence to the respondents advising that the money borrowed was secured against the property and if they failed to make repayments, their home was at risk. It is also clear that any issue with the calculation of arrears or approach to repayment of same has been addressed with no improvement in the respondents’ approach to meeting its loan obligations.

66. I have considered my own motion obligations in ruling on this appeal. The contract documentation in this case permitted possession proceedings to be brought in the event of a default in making repayment under the terms of the loan agreement, as has happened. All borrowers understand that the fundamental essence of mortgage agreements is that if scheduled

loan repayments are missed the secured asset may be repossessed. This is such a fundamental principle that it is difficult to see how a contractual provision which gives effect to it could be said to fail the fairness test and no provision of the type listed as unfair under the Unfair Contract Terms Directive were identified by the Court.

67. I have not been able to discern any term of the loan agreement that has operated unfairly against the defendants in the context of these proceedings.

68. For the reasons which I have already explained above, no credible defence has been established by reference to an unfair contract term.

CONCLUSION

69. I am satisfied that the appellant has established its entitlement to possession of the premises and the respondents have not made out any credible grounds of defence. Insofar as defence issues have been raised, I consider they are bound to fail with the result that transferring to plenary hearing is merely postponing the inevitable during which time the respondents' level of indebtedness continues to grow. Therefore, I am satisfied that the appeal should be allowed and it is proper to make the order for possession sought. While I have arrived at a different decision to that of the learned Circuit Court judge who refused summary judgment and transferred this case to plenary hearing, the law has become clearer since this matter was before the Circuit Court in view of a series of recent decisions referred to above.

70. Accordingly, I propose to grant an order for possession pursuant to s. 62(7) of the 1964 Act and s. 1(2) of the Land and Conveyancing Law Reform Act, 2013. I propose a stay of six months on this order to allow the respondents time to arrange alternative accommodation, subject to such submissions as may be made. This case will be listed for the purpose of finalising orders and dealing with any consequential matters on the 9th of May, 2022 at 10.30 a.m. This will be a remote listing unless application is made through the Registrar for a physical listing with an indication as to why a physical listing is necessary.