

APPROVED

[2023] IEHC 663



THE HIGH COURT
CIRCUIT APPEAL

2022 69 CA

BETWEEN

PROMONTORIA (FINN) LTD

PLAINTIFF

AND

COLEMAN FLAVIN

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 4 December 2023

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The proceedings take the form of an action for possession whereby the Plaintiff seeks an order directing the Defendant to deliver up possession of certain lands. The Plaintiff asserts that it has succeeded to the mortgagee's interest in a mortgage said to have been entered into between First Active plc and the Defendant. Title to the lands is unregistered and the asserted mortgage

NO REDACTION REQUIRED

pre-dates the commencement of the Land and Conveyancing Law Reform Act 2009.

2. One of the principal issues to be addressed in this judgment is the consequence, if any, of the failure of the Plaintiff to put before the court a copy of the deed of mortgage.

PROCEDURAL HISTORY

3. The Circuit Court has jurisdiction, pursuant to Section 3 of the Land and Conveyancing Law Reform Act 2013, to entertain proceedings brought by a mortgagee seeking an order for possession in circumstances where (i) the mortgage concerned was created prior to 1 December 2009, and (ii) the land is the principal private residence of the mortgagor. The procedure for an action for possession is prescribed under Order 5B of the Circuit Court Rules.
4. The within proceedings were instituted before the Circuit Court on 7 December 2018 by way of a Civil Bill for Possession. The action for possession is founded upon a mortgage said to have been entered into between First Active plc and the Defendant on 25 January 2001. The mortgage is said to relate to lands in Youghal, County Cork ("*the subject lands*"). The subject lands are described in the Civil Bill as being the principal private residence of the mortgagor, i.e. the Defendant.
5. The underlying debt is said to arise under a loan agreement entered into between First Active plc and the Defendant on 6 July 2000. A copy of this loan agreement has been exhibited. The version of the loan agreement which has been exhibited does not bear the Defendant's signature.

6. The unusual feature of the present proceedings is that the Plaintiff has not put a copy of the deed of mortgage before the court. The most that the Plaintiff has done is to exhibit a copy of the memorial filed at the Registry of Deeds at the time that the deed of mortgage was registered. The Registry of Deeds only ever retains the memorial: the original deed is returned to the party registering it. The memorial records the date of the deed, the nature of the deed, i.e. an indenture of mortgage, the details of the parties to the deed, and a description of the property affected by the deed.
7. The memorial exhibited in the present case reads as follows:

“A MEMORIAL of an INDENTURE of MORTGAGE made the 25th day of January 2001 BETWEEN Coleman Flavin of Sunmount, The Strand, Youghal Co Cork (therein and hereinafter called ‘the Borrower’) of the One Part AND FIRST ACTIVE plc whose Chief Office is at Skehan House, Booterstown in the County of Dublin (therein and hereinafter called ‘the Lender’) of the other part WHEREBY IT WAS WITNESSED that for the consideration therein the Borrowers as beneficial owner did thereby grant convey assign transfer and demise UNTO the Lender ALL THAT AND THOSE the property described in the Schedule hereto TO HOLD the same as to so much thereof as is of freehold tenure UNTO the Lender and its assigns and as to so much thereof as is of leasehold tenure UNTO the Lender for the residue or residues of the term or respective terms of years for which the Borrower now holds the same as stated in the Schedule hereto (less the last 10 days of each such term) SUBJECT to the proviso for redemption therein contained AND which said deed as to the execution thereof by the said Colman (*sic*) Flavin was witnessed by Gerard McCullagh, Solicitor, Dungarvan”

8. The schedule of the memorial describes the lands as follows:

“ALL THAT AND THOSE the premises known as Sunmount (formerly known as Sunmount Hotel) situated at Knockraverry (otherwise Williamstown) in the Town of Youghal, Parish of St Mary’s Barony of Imokilly and County of Cork being more particularly delineated on a copy map attached to Indenture of Conveyance dated the 11th day of June 1997 and made between Geraldine Kate Wright of the One Part and Austin Flavin and Julia Flavin of the Other Part

and thereon shaded in pink together with and subject to the easement rights and privileges specified in the said conveyance”

9. The Plaintiff asserts that it has succeeded to the mortgagee’s interest under the mortgage. The chain of title is sketched out as follows in the grounding affidavits.

15 February 2010

First Active plc assigned all of its interest in its mortgage loans to Ulster Bank Ireland Ltd in accordance with the Central Bank Act 1971 (Approval of Scheme of First Active plc and Ulster Bank Ireland Limited) Order 2009 (S.I. 481 of 2009);

29 September 2015

Ulster Bank assigned all its rights, interest, title and interest in a number of loan facilities and related security to the Plaintiff by a Global Deed of Transfer. This is said to have included the loan agreement and mortgage the subject of these proceedings.

10. The Plaintiff has set out, on affidavit, the steps taken on its behalf by Link ASI Ltd, as service provider, to comply with the Code of Conduct on Mortgage Arrears issued by the Central Bank and with the Mortgage Arrears Resolution Process. It is averred that, by letter dated 1 March 2017, the service provider notified the Defendant that his proposal for an alternative repayment arrangement was declined.
11. The Defendant entered an appearance to the proceedings, as a litigant in person, on 18 January 2019. Thereafter, an appearance was entered by a solicitor on behalf of the Defendant on 25 February 2019. It seems that this solicitor subsequently ceased practice. There does not seem to have been any solicitor on

record for the Defendant as of the date of the hearing before the Circuit Court. A new firm of solicitors has since come on record for the purpose of the appeal to the High Court.

12. The Plaintiff successfully applied on 12 December 2019 to amend the endorsement of claim in the Civil Bill for Possession in circumstances where there was an error in the enumeration of the outstanding balance on the loan account. The amended figure is €171,446.96.
13. The Defendant has filed two replying affidavits in these proceedings. These affidavits were filed at a time when the Defendant did not have the benefit of professional legal representation.
14. The first affidavit is dated 12 January 2022. The affidavit consists of merely two pages and reads more like a legal submission than an affidavit. It includes, for example, an unattributed quote from the judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, [2020] 2 I.L.R.M. 42 (at paragraphs 8.2 and 8.3) in respect of the evidential burden in summary proceedings. It also quotes the provision of the loan agreement in respect of the rate of interest.
15. The Plaintiff seeks to attach significance to the following statement in the affidavit:

“I say that Plaintiffs are not entitled to charge any interest after the expiration of the loan contract. The contract was made between First Active and the Defendant. First Active became Ulster Bank, and Ulster Bank sold the contract prior to its expiration.”

16. Counsel on behalf of the Plaintiff submits that this constitutes an admission by the Defendant of his execution of the loan agreement. It will be recalled that the

version of the loan agreement, which has been exhibited by the Plaintiff, is not signed by the Defendant.

17. The second affidavit was filed in support of an application for discovery. More specifically, the Defendant had issued a motion for discovery on 2 March 2022. The following categories of documents were sought in the motion: a full set of accounts of the calculations of interest rates, and all contracts signed by the Defendant. These categories were elaborated upon in the grounding affidavit. The Defendant expressly sought a copy of the “*mortgage indenture*” or “*mortgage deed*”. The affidavit grounding the motion exhibits a document described as a “*review*” of the interest rates charged pursuant to the loan agreement. It is suggested in this document that there has been an overcharging in the amount of €11,677.95.
18. It is not obvious from the papers as to what happened in relation to the motion for discovery. Certainly, it is not referred to in the Circuit Court order. It seems that the Circuit Court judge had been told, inadvertently, that the documents sought by way of discovery had all already been exhibited in the proceedings. This was mistaken: the mortgage deed has not been exhibited in the proceedings.
19. The Circuit Court (His Honour Judge O’Donohoe) made an order for possession on 6 April 2022. The Defendant filed an appeal against that order to the High Court. The appeal was reinstated on 26 June 2023, having previously been struck out for non-attendance.
20. Prior to his new legal representatives coming on record, the Defendant had filed a written submission in support of his appeal on 28 March 2023. This submission seems to have been refiled on 19 July 2023. The principal issue raised in this submission is in relation to the entitlement of the Plaintiff, as a

“*credit servicing firm*” registered under Section 28 of the Central Bank Act 1997 (as amended by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015), to enforce a credit agreement. This is not an issue which had been raised before the Circuit Court. It has since been confirmed in the legal submissions subsequently filed by his new legal team that the Defendant does not now rely on this point.

21. The appeal ultimately came on for hearing before me on 27 November 2023. A new solicitor had come on record for the Defendant the week before and the Defendant was represented at the hearing by solicitor and counsel.
22. Prior to the hearing, the parties had exchanged written legal submissions between themselves. Counsel on behalf of the Defendant asked for time to file a corrected version of his legal submissions with the court. It seems that the original version may have inadvertently referred to material which is not on affidavit, and counsel, very properly, sought to delete same before furnishing the legal submissions to the court. With the agreement of the Plaintiff, the Defendant was given liberty to file a corrected version of his legal submissions by close of business on 29 November 2023. This was on the strict proviso that nothing was to be added to same.
23. Judgment was reserved until today’s date.

PLAINTIFF’S SUBMISSION ON THE ABSENCE OF MORTGAGE DEED

24. The Plaintiff submits that it is unnecessary to exhibit the deed of mortgage in circumstances where the memorial filed at the Registry of Deeds has been exhibited. It is further submitted that the mortgagee, under a mortgage created prior to the commencement of the Land and Conveyancing Law Reform Act

2009, enjoys an “*inherent right*” to possession. Counsel cited the following passage at §20-22 of Donnelly, *The Law of Credit and Security* (3rd ed., 2021, Round Hall):

“For legal mortgages of personal property and legal mortgages of unregistered land created prior to 1 December 2009, the mechanism for creation of the security interest is/was the conveyance or assignment of the legal estate in the property. As a result, a mortgagee in these circumstances has, by virtue of its estate in the property, an inherent right to possession. In practice, however, this position is generally varied by the mortgage contract by the inclusion of a provision which allows the mortgagor a right of possession in respect of the mortgaged property and defers the mortgagee’s inherent right to possession unless there had been a default under the terms of the mortgage contract. Even in the absence of such an express term, the courts have implied a right of possession in favour of such a mortgagor in situations where the mortgage was payable by instalments and where the contract made express provision for the mortgagee to enter into possession where the mortgagor is in default. In these situations, however, the effect of default (as defined in accordance with the terms of the mortgage contract) is to re-establish the mortgagee’s inherent right of possession.”

*Footnotes omitted

25. Counsel also cites *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381 (at paragraph 40 of the reported judgment).
26. It is submitted that whereas the precise terms of the mortgage deed are not available to the court, it is “*more than probable*” that they, in the normal manner, allowed the Defendant to remain in possession so long as he repaid his secured lending on the agreed repayment terms. It is further submitted that the loan agreement required the sum of IR£250,000 (€317,434.52) advanced to be repaid on demand or monthly over 15 years and that neither of those requirements has been met in that the loan is still outstanding over 23 years later. The outstanding balance as of the date of the institution of the proceedings is said to be

€171,446.96. The court is invited to infer that the deed of mortgage likely allows the mortgagee to enter into possession where there are significant arrears.

27. Counsel also made reference to the provisions of Section 19 of the Conveyancing Act 1881 which confer a power of sale upon a mortgagee in certain circumstances. Subsection 19(3) states that this section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained. Counsel, very properly, acknowledged that in the absence of sight of the mortgage deed, the court cannot know whether this power of sale might have been contracted out.

DISCUSSION AND DECISION

28. The principal relief sought in these proceedings is an order directing the Defendant to deliver up possession of the subject lands. It may be trite to say so, but it follows that the very first issue to be addressed by the court must be whether the Plaintiff has a right to possession of the lands. This issue is usefully considered in two stages: first, has a right to possession arisen under the mortgage, and, secondly, has the Plaintiff established that it has succeeded to the mortgagee's interest under the mortgage.
29. The creation of the mortgage predates the commencement of the relevant provisions of the Land and Conveyancing Law Reform Act 2009 on 1 December 2009. It should also be explained that title to the subject lands is unregistered. Accordingly, the mortgage takes the form of an old-style mortgage rather than a legal charge pursuant to the Registration of Title Act 1964 or the Land and Conveyancing Law Reform Act 2009.

30. Typically, a party seeking an order for possession pursuant to an old-style mortgage will put a copy of the mortgage deed before the court and assert that an event of default has occurred which entitles the mortgagee to enter into possession. For reasons which have never been properly explained, the Plaintiff in the present case has taken a different approach. The Plaintiff stands on the principle that a mortgagee is entitled to enter into possession by dint of their having a legal estate in the lands.
31. It is correct to say that, as a matter of strict legal theory, a mortgagee under an old-style mortgage does enjoy a right of possession. This is because the mortgage will have been created by conveying an estate in the lands to the mortgagee subject to the equity of redemption. In practice, however, the right to possession will have been qualified by agreement. In most modern deeds of mortgage, the mortgagee's right to possession is confined to circumstances where an event of default, as defined under the mortgage, has occurred. This practical reality is expressly acknowledged in the extract from Donnelly, *The Law of Credit and Security* (3rd ed., 2021, Round Hall) relied upon by the Plaintiff: see paragraph 24 above.
32. The position has been put as follows by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381 (at paragraph 40 of the reported judgment):

“[...] a mortgagee of unregistered land takes an assurance of the legal title (whether by the conveyance of the fee simple or by creation of an interest by sub demise), and the legal estate carries with it the right to possession, albeit constrained by the terms of the security, including an agreement either express or implied that possession will not be taken if the terms of the security are met.”

33. It is an essential proof in an application for an order for possession to establish that the moving party has a right to take possession of the lands. In the case of unregistered land, which is subject to a mortgage created prior to 1 December 2009, this proof can normally only be established by producing a copy of the mortgage deed. This is because the inherent right to possession, which the mortgagee would otherwise enjoy under an old-style mortgage, may well be constrained by the terms of the mortgage deed. Similarly, the powers otherwise available under the Conveyancing Act 1881 only apply if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed. The only basis upon which the court can be satisfied that a right to take possession has arisen on the facts is to examine the terms of the mortgage. This proof will, normally, only be satisfied by production of a copy of the mortgage deed. It is not appropriate for the court to speculate as to what the terms of the mortgage might be.
34. The above finding that proof of the terms of the mortgage deed is an essential proof is consistent with the approach taken under Practice Direction CC17 “*Proceedings for possession or sale on foot of a mortgage*”. The practice direction was issued by the then President of the Circuit Court (Groarke J.) on 10 August 2015. Relevantly, the Practice Direction identifies the following as one of the minimum proofs for an application for an order for possession: “*precise particulars of the security on which the plaintiff relies, exhibiting any relevant document (e.g. deed of mortgage)*”.
35. It is unnecessary for the purpose of the resolution of the present proceedings to consider the circumstances, if any, in which it might be permissible, in the case of a missing or lost deed of mortgage, for a mortgagee to rely on *secondary*

evidence to prove the terms of the mortgage. The Plaintiff has never stated on affidavit that the mortgage deed has been lost or is otherwise unavailable to it. Nor has the Plaintiff sought to adduce secondary evidence other than the memorial. The Plaintiff has chosen, instead, to rely on its having exhibited the memorial as sufficient proof. The terms of the memorial have been set out in full earlier. As appears, the information provided is limited to the date of the mortgage deed, the identity of the parties and a description of the property. There is no indication as to what the terms of the mortgage are in respect of the right to possession and power of sale.

36. It follows, therefore, that the Plaintiff has failed to make out one of the essential proofs of its application. The Plaintiff has failed to establish, even on a *prima facie* basis, that the mortgagee's right to possession has arisen under the mortgage.
37. Counsel on behalf of the Plaintiff seeks to overcome this difficulty by making two related submissions as follows. First, it is said that the court should be prepared to infer that the deed of mortgage likely allows the mortgagee to enter into possession where there are significant arrears. Secondly, it is suggested that there is an obligation upon the Defendant to put forward evidence which negates the contention that a right to possession has arisen.
38. With respect, these submissions are inconsistent with the principle that the moving party must set forth a *prima facie* case for an order for possession. The position is explained as follows in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381. The Supreme Court emphasised that Order 5B of the Circuit Court Rules requires a plaintiff to set forth a *prima facie* case for an order for possession (paragraph 70), and that the grounding affidavit

must set out the full proofs to obtain judgment (paragraph 36). It is only when this is done that the evidential burden shifts to a defendant to put forward a credible defence to the proceedings.

39. The nature of the shifting evidential burden is elaborated upon in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, [2020] 2 I.L.R.M. 42 (at paragraphs 5.2 and 5.3):

“Where it comes to the evidence which is required to be placed before the court, it does seem to me that it is important to emphasise that there is an obligation on any plaintiff to produce *prima facie* evidence of their debt if they wish the court to grant summary judgment (or, indeed, if, in the absence of the filing of an appearance by the defendant, they bring an application for judgment in the Central Office). The jurisprudence on the question of what a defendant must do to resist summary judgment primarily focuses on cases where a *prima facie* claim to a debt is established and the defendant wishes to put forward a positive defence. In such cases, it is necessary for the court to assess, in accordance with the detailed requirements which can be found in the relevant jurisprudence, whether what is said to amount to a defence amounts to mere assertion or meets the threshold for entitling the defendant to a full or plenary hearing.

However, it also seems clear that the obligation on a defendant to establish an arguable defence is, in reality, one which only arises if the plaintiff has first placed sufficient evidence before the court to establish *prima facie* the debt alleged is due. There are, therefore, two questions. The first is as to whether the plaintiff has put sufficient evidence before the court to establish a *prima facie* debt. If the answer to that question is no, then the plaintiff cannot be entitled to summary judgment in any event. If, however, the answer to that question is yes, then the court must go on to consider, in accordance with the established jurisprudence, whether the defendant has put forward a credible defence.”

40. The position is summarised as follows at the conclusion of the judgment (paragraph 8.2):

“[...] That obligation is prior to and independent of the obligation of a defendant to put forward a positive defence. In other words, the plaintiff must establish the liquidated debt on a *prima facie* basis before it is necessary for the

defendant to establish any defence which meets the threshold for plenary hearing.”

41. Counsel on behalf of the Plaintiff has sought to distinguish *O'Malley* on the basis that it involved an application for summary judgment in debt proceedings rather than possession proceedings. With respect, the two types of proceedings are analogous in that both seek to obtain substantive relief on a summary application. The Supreme Court assimilated the test for the two types of proceedings as follows in *Bank of Ireland Mortgage Bank v. Cody* (at paragraph 74 of the reported judgment):

“[...] 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.”

42. In conclusion, the Plaintiff has failed to make out its proofs. The court simply does not know the circumstances in which the mortgagee enjoys a right to possession under the terms of the mortgage. The court does not know how the events of default, which displace the mortgagor's right to possession, are defined.
43. I have carefully considered whether the proceedings might be adjourned to plenary hearing to allow the Plaintiff to attempt to mend its hand (if it can). As explained by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* (at paragraph 104 of the reported judgment), the adjournment to plenary hearing is a matter ultimately for the judge hearing the summary action and the discretion to do so is not constrained by the choices made by the parties. Thus the fact that the Plaintiff has not sought to have these proceedings remitted to plenary hearing is not dispositive. The judgment in *Cody* makes it clear, however, that

proceedings can properly be dismissed on a summary basis where a plaintiff has failed to make out even a *prima facie* case for an order for possession. That is the situation here: for the reasons explained earlier, proof of the terms of the mortgage deed is an essential proof in an action for possession in respect of an old-style mortgage over unregistered land.

44. The Plaintiff cannot claim to have been taken by surprise by any of this. First, the Practice Direction indicates that a mortgage deed should be exhibited. Secondly, the Defendant in these proceedings had sought discovery of the mortgage deed. The Plaintiff has steadfastly refused to produce a copy of the mortgage deed. Crucially, the Plaintiff has never stated on affidavit that the mortgage deed is unavailable, still less offered an explanation as to why that might be.
45. In circumstances where the court has found that the Plaintiff has failed to establish, even on a *prima facie* basis, that the mortgagee's right to possession has arisen under the mortgage, it is unnecessary to move to consider the subsequent question of whether the Plaintiff has established that it has succeeded to the mortgagee's interest under the mortgage. Put otherwise, it is not necessary to consider whether the Plaintiff has demonstrated that First Active plc's interest in the mortgage has been transferred to it.

CONCLUSION AND PROPOSED FORM OF ORDER

46. For the reasons explained, the appeal will be allowed and the order for possession made by the Circuit Court on 6 April 2022 set aside. The proceedings will be dismissed. As to costs, my *provisional* view is that the Defendant, as the successful party, is entitled to his costs. This represents the default position

under Section 169 of the Legal Services Regulation Act 2015. If the Plaintiff wishes to contend for a different form of costs order than that proposed, it should notify the High Court Registrar within seven days and arrange to have the proceedings listed before me on Monday 18 December 2023 at 10.45 am. If no such notification is received within seven days, the order will be perfected as *per* the provisional view above.

47. Finally, it should be reiterated that this judgment is concerned with an old-style mortgage in respect of unregistered land. Different considerations may arise in the case of (i) mortgages of unregistered land created after 1 December 2009, and (ii) mortgages of registered land of any vintage. In the case of registered land, in particular, a mortgagee may be able to rely on the fact of it being the registered owner of a charge. It should also be reiterated that it has been unnecessary for the purpose of the resolution of the present proceedings to consider the circumstances, if any, in which it might be permissible, in the case of a missing or lost deed of mortgage, for a mortgagee to rely on *secondary evidence* to prove the terms of the mortgage.

Appearances

Donnchadh McCarthy for the plaintiff instructed by O'Brien Lynam Solicitors
Jason Shannon for the defendant instructed by Mulhall & Company Solicitors

Approved
S. M. S. M. S.