



**THE HIGH COURT**

**[2024] IEHC 473**

**[Record No. 2023/15 CAT]**

**BETWEEN**

**MARS CAPITAL FINANCE IRELAND DAC**

**PLAINTIFF**

**AND**

**BRIAN MORTON AND BERNADETTE MORTON**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Bolger delivered on the 25<sup>th</sup> day of July 2024**

**1.** This is the second defendant's appeal from a possession order made by the Circuit Court on 14 March 2019 in relation to land at Kells Road, Collon, County Louth, comprised in Folio 29619F, County Louth (hereinafter referred to as 'the premises'). At that time, the second defendant appeared as a litigant in person. She lodged a notice of appeal on 22 March 2019. Solicitors came on record for her and the first defendant on 30 August 2023 and they were given liberty to come off record in respect of the first defendant on 8 January 2024.

**2.** The plaintiff's grounding affidavit, sworn on 21 March 2014 (before the current plaintiff was instituted as a plaintiff in place of AIB Mortgage Bank), avers that the premises is the principal private residence of the second defendant. The Civil Bill identified an address for the first defendant in Northern Ireland. The affidavit exhibited the letter of offer made by AIB Plc to the first defendant of a loan to be secured over the premises. It was a term of the letter of offer that the premises would be registered in the joint names of the first and second defendants by whom the mortgage must be executed. It also provided that the second defendant would execute a letter of guarantee in respect of the loan. Ultimately the property was registered in the joint names, as required by AIB plc, but the mortgage was

taken out by the first defendant only. The plaintiff's grounding affidavit avers, at para. 7, that "[b]y Deed of Charge, dated the 26<sup>th</sup> October 2005 the Defendants charged the premises to secure to the Bank payment of all sums then or thereafter due together with interest." While the deponent refers to a single certified copy of the said deed of charge, two separate indentures were exhibited. One was between AIB plc and the first defendant in which he is referred to as "the mortgagor" and in clause 6.0 he has a right of redemption. The second, described as an "indenture of confirmation", is one in which she confirms and ratifies the Indenture of Mortgage. Clause 7 expressly provides that "the Beneficiary shall not be deemed to have any rights of a mortgagor in respect of the mortgaged property." Attached to the second defendant's Indenture of Confirmation is an unsigned, blank "Consent to Indenture of Confirmation; the Family Home Protection Act, 1976".

**3.** The folio confirms that the charge of AIB plc was registered as a burden on 16 May 2007 and the plaintiff's grounding affidavit says, at para. 9, that "[t]he Bank transferred both the Defendants' obligations and the Charge to the Plaintiff on the 13<sup>th</sup> day of February 2006." The date of that transfer predates the date in May 2007 when the charge owned by AIB Plc was registered with the Land Registry. A change in ownership of the charge that was registered on 16 May 2007 to the current plaintiff took place by transfer dated 30 April 2021.

**4.** The second defendant has raised two points in the within appeal; (1) the court's jurisdiction in relation to s. 3(1) of the Land and Conveyancing Law Reform Act 2013 (hereinafter referred to as 'the 2013 Act'); and (2) the nature of the charge registered on the folio.

**Jurisdiction: Section 3(1)**

**5.** Section 3(1) of the 2013 Act provides that mortgage proceedings are to be brought in the Circuit Court where:

"3. (1) This section applies to land which is the principal private residence of—

(a) the mortgagor of the land concerned, or

(b) a person without whose consent a conveyance of that land would be void by reason of—

(i) the Family Home Protection Act 1976, or

(ii) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010,

*and the mortgage concerned was created prior to 1 December 2009.”*

6. The premises here were and are the principal private residence of the second defendant but not of the first defendant. To ground jurisdiction to seek a possession order against the second defendant, the plaintiff must satisfy the court that the second defendant is also either (i) the mortgagor or (ii) a person without whose consent a conveyance of the land would be void by reason of the Family Home Protection Act 1976.

(i) Is the second defendant the mortgagor?

The court brought the attention of the parties to the decision of the Court of Appeal in *Bank of Ireland v. Matthews* [2020] IECA 214, following which the plaintiff conceded that s. 3(1)(a) does not apply here and cannot confer jurisdiction on the Circuit Court.

(ii) Is the second defendant a person without whose consent a conveyance of the land would be void by reason of the Family Home Protection Act 1976?

The plaintiff maintained that the court had jurisdiction pursuant to section 3(1)(b). The second defendant relies on the well-known decision of the Supreme Court in *Nestor v. Murphy* [1979] IR 326, where the defendants had agreed to sell their jointly owned family home to the plaintiff but sought, unsuccessfully, to resist the plaintiff’s application for specific performance of the contract for sale on the basis that the contract was void because the defendant wife had not given her written consent to the sale pursuant to the Family Home Protection Act prior to the execution of the contract. Section 3(1) of the Family Home Protection Act requires written consent before a spouse purports to convey any interest in the family home to any person other than that other spouse. Henchy J. criticised the defendants’ interpretation of s. 3(1) for assuming it was intended to apply when both parties are parties to the conveyance which he said was not so, as, in that situation,

*“...no protection is needed for one spouse against an unfair and unnotified alienation by the other of an interest in the family home. The provisions of s. 3, sub-s. 1, are directed against unilateral alienation by one spouse. When both spouses join in the ‘conveyance,’ the evil at which the sub-section is directed does not exist.”* (at p. 328)

He went on to hold that:

*“...[t]he spouse whose ‘conveyance’ is avoided by the provisions of s. 3, sub-s. 1, is a spouse who has unilaterally (i.e., without the other spouse joining) purported to ‘convey’ an interest in the family home without having obtained the prior consent in*

*writing of the other spouse. It is only by thus confining the reach of the sub-section that its operation can be kept within what must have been the legislative intent.”* (at pp. 329-330)

**7.** In *IBRC v. Raftery* [2019] IECA 215 the defendant wife sought to resist possession proceedings on the basis that she had never consented to the registration of the mortgage on the family home, which had originally been held in her husband’s sole name but was required by the mortgagee to be transferred into the joint names and she was required to execute the mortgage with her husband at the same time. Hedigan J. in the High Court stated, at para. 8:

*“Thus, the mortgage executed on 22nd November, 1992 was one in which both co-owners participated as co-owners and falls to be considered in the light of Nestor v. Murphy. It did not require the consent of the second named defendant because no formal consent of her own act is required. Section 3 (1) of the Family Home Protection Act 1976 does not apply to this transaction and the mortgage is thus valid.”*

That finding by the High Court that *Nestor v. Murphy* applied, was expressly upheld by Peart J. in the Court of Appeal. The fact that there had been a Family Home Protection Act declaration of consent did not alter the court’s legal analysis that *Nestor v. Murphy* applied, the defendant wife’s s. 3(1) consent was not required, the mortgage was found to be valid and possession was granted.

**8.** The plaintiff says that s. 3(1) does apply to this premises as it is a family home held in joint names and neither of the defendants could individually convey the property without the consent of the other. However, s. 3(1) of the Family Home Protection Act does not require a bare consent to a conveyance of the property but, rather, requires a consent that is specific both in format and timing, namely written consent from a spouse before the other spouse can convey any interest in the family home to any person other than their spouse. Section 3(1) has been interpreted as not applying where both spouses are party to the conveyance, an interpretation of the Supreme Court (in *Nestor v. Murphy*) that has been in place for many years. Had the legislature wished to include a situation such as pertains here in s. 3(1) of the 2013 Act, where a spouse who is not a mortgagor but is party to a conveyance of a family home as a joint owner, then they would have done so clearly. They did not. The legislature clearly excludes a person who is neither a mortgagor nor a person

without whose consent a conveyance of the land would be void by reason of the Family Home Protection Act 1976. This approach is both consistent with and required by the decision of the Court of Appeal in *IBRC v. Raftery*.

**9.** I accept the second defendant's argument that she does not, therefore, come within s. 3(1) of the 2013 Act. On the plaintiff's own case, the first defendant cannot come within the section as the home is not his principal private residence. Therefore, the Circuit Court had no jurisdiction to allow the plaintiff's application for possession to be brought in the Circuit Court or to make the order that it purportedly made. I note this was at a time when the second defendant did not have the benefit of the legal representation and the court did not have the benefit of the detailed arguments presented to this court.

**(ii) The Charge**

**10.** In the event that I am incorrect on the jurisdiction point and the Circuit Court and this court had and has jurisdiction to determine the second defendant's appeal against the order for possession, I proceed to consider the second defendant's arguments in relation to the charge that is registered as a burden against property. That charge was entered in the Land Registry on 16 May 2007 and is stated to be owned by AIB Plc, which postdated the transfer of the defendants' obligations from AIB plc to AIB Mortgage Bank. Those obligations were subsequently transferred to the present plaintiff by a deed of transfer dated 30 April 2021 between AIB Mortgage Bank and the present plaintiff, which was substituted as plaintiff by order of the Circuit Court, 6 December 2021. The folio was amended to record the current plaintiff as the new owner of the charge that had been registered on 16 May 2007.

**11.** The folio establishes that a charge belonging to AIB Plc was registered against the defendants' interest, but the second defendant challenges whether that charge can or does relate to the loan (which she does not dispute was taken out by the first defendant and which she guaranteed). The plaintiff says the folio conclusively establishes its ownership of the charge sought to be enforced in this action and the court cannot look behind the conclusive nature of the folio. Counsel for the plaintiff, in their oral submissions, relied on s. 58(10) of the Asset Covered Securities Act 2001 which provides:

*"A transfer of an asset under this section, whether specifically or as part of a transfer of a business, does not need to be registered under the Registration of Deeds Act, 1707, the Bills of Sale (Ireland) Acts, 1879 and 1883, the [Companies Act, 1963](#), the [Registration of Title Act, 1964](#), and any other Act that provides for the*

*registration of assets or details of them. For the purposes of any of those Acts that would apply to it but for this subsection, such a transfer has effect as a deed registered on the date on which it took effect."*

Counsel also relied on s. 58(9)(a) which provides:

*"(a) the transferee credit institution has the same rights (including priorities) and obligations in respect of that business or those assets as the transferor credit institution had immediately before the transfer took effect".*

Counsel cited the decision of Woulfe J. in *Start Mortgages v. Ryan* [2021] IEHC 719 which adopted and approved of the decision of Baker J. in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, where he held:

*"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: see the discussion in the Court of Appeal judgment in *Tanager DAC v. Kane* [2018] IECA 352. That judgment 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."*

**12.** The issues raised by the second defendant are similar to those determined by the Court of Appeal in *Tanager v. O'Kane* [2019] 1 IR 385, summarised by Baker J. at para. 53 as follows:

*"Section 97 of the Land and Conveyancing Law Reform Act 2009 Act ('the 2009 Act 2009') replaces s.62(7) of the 1964 Act and provides a similar mechanism for an application for possession by a mortgagee or owner of a charge (for the purposes of the Act, a 'mortgagee') on registered land. Section 97(2) provides as follows:*

*'A mortgagee may apply to the court for an order for possession of the mortgaged property and on such application the court may, if it thinks fit, order that possession be granted to the applicant on such terms and conditions, if any, as it thinks fit.'"*

There, the court concluded that in hearing an application for possession, a court may not determine a challenge to the correctness or conclusiveness of the register. The basis for this conclusion is summarised at para. 3 of the headnote as follows:-

*"That the registration of the plaintiff as owner of the charge could not be challenged in possession proceedings having regard to the conclusiveness of the register pursuant to s. 31 of the 1964 Act. In possession proceedings, the court was required to accept the correctness of the particulars of registration as they appeared on the folio and could not hear argument that the registration was wrongly made or in other words "look behind" the register. The ascertainment of the "true beneficial interest" in a registered title was a matter that could be determined only in equity proceedings."*

**13.** I am bound by that decision of the Court of Appeal. Applying it to the facts of this case, I am satisfied that the second defendant cannot challenge the plaintiff's right to rely on their charge and assert their statutory rights flowing therefrom. Therefore, in the event that the court is incorrect in its analysis of jurisdiction of the Circuit Court, and this court on appeal, pursuant to s. 3(1) of the 2013 Act, I do not consider that the second defendant has established that the current plaintiff is not entitled to rely on the charge it has registered on the defendants' property by reference to the timing of the date on which the charge of the plaintiff's predecessor, from whom the defendants received the monies paid pursuant to the loan, was registered on the folio. There is, therefore, no basis for setting aside the order for possession made by the Circuit Court in the event that the Circuit Court, and this court on appeal, had or has jurisdiction pursuant to s. 3(1) of the 2013 Act.

#### **Conclusions**

**14.** Section 3(1) of the 2013 Act does not apply given the facts of this case, thereby depriving the Circuit Court (and this court on appeal therefrom) of jurisdiction. The second defendant must, therefore, succeed in her appeal against the possession order purportedly made by the Circuit Court on 14 March 2019. If I am wrong on that, I find that the plaintiff has satisfied the proofs necessary for the order of possession it seeks.

#### **Indicative view on costs**

**15.** As the second defendant has succeeded in her appeal, my indicative view on costs in accordance with s. 169 of the Legal Services Regulation Act 2015 is that she is entitled to her costs against the plaintiff. I will put the matter in for consideration of final orders to be

made at 10.30am on 31 July 2024 and if either party wishes to lodge written submissions, they should be furnished to the court 48 hours in advance of the date on which the matter is back before me.

**Counsel for the plaintiff:** Rudi Neuman BL

**Counsel for the second defendant:** Jason Shannon BL

There was no appearance on behalf of the first defendant.