APPROVED **[2023] IEHC 452**

THE HIGH COURT

2013 No. 353 SP

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

SIMON KAVANAGH
DEIRDRE KAVANAGH

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 July 2023

INTRODUCTION

1. This judgment is delivered in respect of an application to set aside an earlier unappealed order of the High Court. The order is dated 18 July 2016 and took the form of an order for possession. This is, in fact, the second application which has been brought to set aside that order. The first application was refused by me for the reasons explained in a written judgment delivered on 30 January 2023, *Start Mortgages DAC v. Kavanagh* [2023] IEHC 37 ("***the principal judgment***"). The moving party, Mr. Kavanagh, has since filed an appeal against that judgment to the Court of Appeal. The appeal is listed for hearing on 9 October 2023.

NO REDACTION REQUIRED

2. In parallel to his appeal, Mr. Kavanagh has also issued a motion before the High Court seeking to set aside the judgment of 30 January 2023. Mr. Kavanagh, having failed in his attempt to have the order of 18 July 2016 set aside, is now seeking to have the High Court set aside the judgment of 30 January 2023 which had refused his first set aside application. This is done with the ultimate objective of setting aside the order of 18 July 2016. On this logic, a party can bring a never ending series of applications to the High Court to set aside its own judgments. Each time an application is refused, the party can bring another application seeking to set aside the refusal to set aside. This is, of course, not what the law provides. Rather, the remedy for a party who is aggrieved with a decision of the High Court is to bring an appeal to the Court of Appeal (or, in certain circumstances, to the Supreme Court). An application to have the High Court set aside its own judgment will only ever be appropriate in exceptional circumstances.

3. The principles governing an application to set aside a judgment have been summarised in the judgment of 30 January 2023 (at paragraphs 29 to 32) and need not be repeated here. It is sufficient to reiterate that the jurisdiction to set aside a judgment is an exceptional one and cannot be used by a party simply to reagitate arguments which have previously been determined against them in the earlier judgment. As will be apparent from the discussion which follows, this is precisely what the moving party is seeking to do in the present case.

PROCEDURAL HISTORY

4. The procedural history has been recited in detail in the judgment of 30 January 2023 and the within judgment should be read in conjunction with that earlier

judgment. It is sufficient for present purposes to take up the narrative in March 2023. Mr. Kavanagh issued a motion on 6 March 2023 seeking to set aside the judgment of 30 January 2023. The motion also seeks a series of declaratory reliefs, most of which go to the merits of the order of 18 July 2016.

5. The application is grounded on an affidavit sworn by Mr. Kavanagh on 6 March 2023. This affidavit was replied to by Barbara Tanzler, solicitor, on 10 March 2023. Thereafter, Mr. Kavanagh swore a second affidavit on 8 April 2023. This affidavit was ultimately filed in the Central Office of the High Court on 11 May 2023. Mr. Kavanagh filed a third affidavit on 30 June 2023.

6. The hearing of the motion took place remotely on an online platform (Pexip). The hearing was staggered over a number of days. In some instances, it had been necessary to adjourn the hearing for various logistical reasons, i.e. a full set of papers had not been filed on one date, and Mr. Kavanagh had technical difficulties connecting to the online platform on another date. In other instances, the hearing had been adjourned to allow the exchange of written legal submissions. By order dated 11 July 2023, I directed that Start Mortgages file submissions. This was done in ease of Mr. Kavanagh and at his request.

7. The final stage of the hearing took place on 24 July 2023 and judgment was reserved until today's date. At his request, Mr. Kavanagh was given liberty to file a further set of written submissions post-hearing. These submissions and appendices were sent to the High Court registrar on 25 July 2023. I have carefully considered same in preparing this judgment. I have also carefully considered each set of written submissions or speaking notes furnished previously by Mr. Kavanagh.

DISCUSSION

8. The grounds, upon which the application to set aside the judgment of 30 January 2023 is made, fall within two categories. The first category consists of grounds which rehash arguments already made in the context of the application culminating in that judgment; the second category consists of allegations to the effect that the judgment of 30 January 2023 is fundamentally flawed as it (supposedly) fails to address the matters raised by Mr. Kavanagh in his first application. It is also said that the hearing on 16 January 2023 was unfair.

9. I do not intend to repeat here the discussion which appears in the principal judgment. The discussion below is confined to the *additional* arguments which have been raised by the moving party.

Regulation of Credit Servicing Firms

10. Mr. Kavanagh seeks to elaborate upon an argument which was made as part of his first set aside application, and which was rejected in the judgment of 30 January 2023. The expanded argument runs as follows. It is submitted that Start Mortgages falls within the definition of a "*credit servicing firm*" within the meaning of Section 28 of the Central Bank Act 1997 (as amended in 2015). Mr. Kavanagh next seeks to rely on the definition of "*credit servicing*" introduced under the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. Having identified a number of activities which are included within the concept, the statutory definition then reads relevantly as follows:

> "(2) For the purposes of this Part 'credit servicing' does not include—
>
> […]
>
> (c) taking such steps as may be necessary for the purposes of—

> […]
>
> (ii) enforcing a credit agreement,
>
> whether any action referred to in paragraphs (a) to (c) is taken by a person who holds the legal title to credit in respect of a portfolio of credit agreements (in this section referred to as the 'holder') or a person acting on behalf of the holder, provided that such action, whether taken by the holder or such person, is not taken in a manner that if it were so taken by a regulated financial service provider it would be a prescribed contravention."

11. Mr. Kavanagh submits that the effect of these provisions is that Start Mortgages were "*legally precluded*" from enforcing any credit agreement. It is further submitted that Start Mortgages "*intentionally deceived*" the High Court to "*generate*" an order for possession on 18 July 2016.

12. In support of his argument, Mr. Kavanagh has cited extensively from the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. Mr. Kavanagh also relies on correspondence between the Central Bank and a third party in November 2018. The third party's name has been redacted in the version of the correspondence which has been produced. This correspondence confirms that Start Mortgages DAC, trading as Start Mortgages, are authorised as a "*retail credit firm*" since 2008. The correspondence also recites the definition of "*credit servicing*" introduced by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015.

13. Mr. Kavanagh submits that a "*credit servicing firm*" does not hold any equitable or possessory right in a consumer credit agreement when acting as a servicer. It is further submitted that a "*credit servicing firm*" cannot issue enforcement action in its own name.

14. With respect, Mr. Kavanagh's submissions are misconceived for the following two reasons. First and foremost, at the time the application for an order for

possession was heard and determined on 18 July 2016, Start Mortgages had been authorised as a "*credit retail firm*" and not merely as a "*credit servicing firm*". On the principle that the greater includes the lesser, a "*credit retail firm*", which is authorised to provide credit in the State, is taken to be also authorised to carry on the business of a "*credit servicing firm*". See sub-section 28(3) of the Central Bank Act 1997 (as inserted by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015). It follows that Start Mortgages would have been entitled to carry out all of the management and administrative functions which a "*credit servicing firm*" is authorised to carry out; but would not have been limited to those functions. Put shortly, Start Mortgages were entitled to do everything that a "*credit servicing firm*" could do and more. A "*credit retail firm*" is entitled to take such steps as may be necessary for the purposes of enforcing a credit agreement. In circumstances where the "*credit retail firm*" holds the legal title to same, these steps would extend to the pursuit of legal proceedings to enforce a credit agreement. This is subject always to the obligation not to commit a "*prescribed contravention*".

15. Secondly, even if, counterfactually, Start Mortgages had not been authorised by the Central Bank as a "*credit retail firm*", it would have been entitled to enforce the credit agreement by way of legal proceedings *qua* the holder of the legal title to same. The statutory definition of "*credit servicing*" acts to circumscribe the range of activities in respect of which Central Bank authorisation is required. The definition in force as of the date of the High Court order of 18 July 2016 had been that introduced by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. That definition excluded—from the range of activities which required authorisation—the taking of steps to enforce a credit agreement by or

on behalf of a person who holds the legal title to credit in respect of a portfolio of credit agreements. Thus, the holder of the legal title did not require authorisation from the Central Bank for the specific act of pursuing legal proceedings. Of course, if the holder of the legal title carried out the management and administration of its portfolio itself—rather than through a "*credit servicing firm*"—it would require authorisation from the Central Bank in that regard.

16. It is implicit in Mr. Kavanagh's submissions that only the holder of an equitable or possessory title to a consumer credit agreement is allowed to issue enforcement action in its own name. Start Mortgages are criticised for supposedly acting on behalf of a hidden and concealed principal. With respect, both the case law and the legislation make it clear that the holder of the legal title to a credit agreement is entitled to enforce same. The argument to the contrary was rejected by the High Court (Hedigan J.) in its *ex tempore* judgment on 18 July 2016. In this regard, the trial judge had cited with approval the judgment in *Kearney v. KBC Bank Ireland plc* [2014] IEHC 260.

17. For completeness, it should be emphasised that the discussion above is confined to the authorisation requirements in force as of the date of the High Court order of 18 July 2016. The regulatory requirements have since been amended on a number of occasions. As a result of those amendments, the holder of the legal title is now always required to obtain authorisation from the Central Bank. See, in particular, the amended definition of "*credit servicing*", under the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018, which now includes the act of holding the legal title to credit granted under the credit agreement.

Section 58, Asset Covered Securities Act 2001

18. Mr. Kavanagh also repeats an argument previously made by reference to the provisions of Section 58 of the Asset Covered Securities Act 2001. This argument was made at the hearing on 18 July 2016 and was rejected by the High Court. See, in particular, Mr. Kavanagh's affidavit of 20 June 2016 where this argument is recited. This argument runs to the effect that the transfer of the beneficial interest in his loan agreement and underlying security to a third party has had the consequence that Start Mortgages, as transferor, ceases to have any rights and obligations in respect of same.

19. With respect, this argument is misconceived. Section 58 of the Asset Covered Securities Act 2001 is concerned with an approved statutory transfer, to a designated credit institution, of the whole or any specified part of the business or assets of a credit institution. It has no application to a private law transaction of the type by virtue of which the beneficial interest in Mr. Kavanagh's loan agreement and mortgage came to be transferred to Lansdowne Mortgage Securities No. 1 plc, with Start Mortgages retaining the legal title.

Earlier procedural history

20. Much of the content of Mr. Kavanagh's affidavits consists of the rehearsal of arguments which were previously made, and rejected, by this court in its judgment of 30 January 2023. In particular, Mr. Kavanagh rehashes his complaints in relation to the earlier procedural history of the case, referring to events before the Master of the High Court. The order of the Master was discharged by order of the High Court and no appeal was taken in that regard by Mr. Kavanagh.

21. Mr. Kavanagh also repeats his unfounded allegation that he was the subject of an "*ambush*" at the hearing on 18 July 2016. These arguments have been considered in my earlier judgment and there is no basis for reversing my findings in that judgment.

22. Mr. Kavanagh also makes the complaint that the High Court (Hedigan J.) refused to direct the cross-examination of witnesses. Again, no appeal was taken by Mr. Kavanagh at the time. At all events, these witnesses seemed to have been concerned primarily with the question of service which, as of July 2016, would have been largely academic in circumstances where Mr. Kavanagh had appeared regularly at the listings of the case.

Reliance on Cafferkey v. Director of Public Prosecutions

23. As appears from paragraphs 31 and 32 of the judgment of 30 January 2023, there is reference made to the question of whether one High Court judge would have jurisdiction to set aside a judgment and order of another High Court judge who is since retired. As appears, it was not necessary to determine that issue conclusively for the purpose of Mr. Kavanagh's application in circumstances where, aside entirely from the jurisdictional complexity caused by the fact that the application to set aside was being made to a different judge, there were no merits to the set aside application and it was dismissed on that basis. Put shortly, this jurisdictional issue, whilst referenced in the judgment of 30 January 2023, did not bear upon the outcome of the set aside application.

24. Notwithstanding this, Mr. Kavanagh now objects that the hearing on 16 January 2023 was unfair because he was in some way taken by surprise by the argument, which had been advanced on behalf of Start Mortgages, to the effect that one High Court judge cannot overturn another High Court judge's order.

Mr. Kavanagh further complains that an unsolicited written submission, which he sent to the registrar by email two days *after* the hearing had concluded and judgment had been reserved, was not considered by the court.

25. With respect, these objections are not well founded for the following reasons. First, and as already explained, the jurisdictional complexity caused by the fact that the application to set aside was being made to a different judge did not bear upon the outcome of the set aside application.

26. Secondly, it is difficult to understand how Mr. Kavanagh can have been taken by surprise by the fact that Start Mortgages raised an issue as to jurisdiction. Mr. Kavanagh has previously availed of a right of appeal to the Court of Appeal in these very proceedings and can thus be taken to understand that the appropriate remedy for a party aggrieved with an order of the High Court is to lodge an appeal, not to seek to have the High Court reopen its own judgment. It should have been obvious to Mr. Kavanagh that an application to one judge of the High Court to set aside an order of another High Court judge raises jurisdictional issues.

27. Ours is an adversarial system: Mr. Kavanagh was the moving party in the set aside application and it behoved him to explain the jurisdictional basis of the application and to make all of his submissions in open court. No party is entitled to conduct litigation by way of emails sent to the registrar post-hearing.

28. Thirdly, there is no merit to the submissions which Mr. Kavanagh objects he was not permitted to make post-hearing. The submissions are a variation of what is sometimes referred to as "*the Cafferkey argument*": see *Fennell v. Collins* [2019] IEHC 572; *Keary v. Property Registration Authority of Ireland* [2022] IEHC 28; and *Lavery v. Humphreys* [2023] IEHC 266.

29. The argument is predicated on a misreading of the procedural history of entirely unrelated proceedings entitled "*Eugene Cafferkey, Plaintiff, and the Director of Public Prosecutions, Defendant*" and bearing the High Court Record Number 2006 No. 1114 P. The proceedings in *Cafferkey v. Director of Public Prosecutions* were dismissed by the High Court (Lavan J.) by order dated 13 November 2007 on the grounds that they disclosed no reasonable cause of action. The order of the High Court dismissing the proceedings was subsequently upheld, on appeal, by the Supreme Court by order dated 28 October 2011 (Supreme Court Appeal No. 334/07).

30. Mr. Kavanagh relies on the fact that, on 14 May 2007, the High Court (Gilligan J.) had made an order in *Cafferkey v. Director of Public Prosecutions* extending the time for the delivery of a defence by the Director of Public Prosecutions by four weeks. Mr. Kavanagh seeks to argue that this order was "*overturned*" by the subsequent order dismissing the proceedings. This, it is suggested, is an example of one judge overturning another at the same level, which overturning was subsequently endorsed by the Supreme Court.

31. With respect, the procedural history in *Cafferkey v. Director of Public Prosecutions* establishes no such thing. There is no inconsistency between the two High Court orders, still less is there an "*overturning*". The first order merely extended the time for the delivery of a defence. Within one week of that order being perfected on 28 June 2007, the Director of Public Prosecutions had already issued a motion seeking to dismiss the proceedings on the grounds that they disclosed no cause of action. It is this motion that resulted in the second order. The legal issues which arose for determination on the contested application to dismiss were entirely different from those arising on the earlier application

which was dealt with on consent. It is normal that an application to dismiss proceedings would be heard and determined before the delivery of a defence. Once the proceedings were dismissed, the DPP could be under no obligation to deliver a defence.

32. In summary, *Cafferkey v. Director of Public Prosecutions* is not authority for the proposition that one High Court judge can set aside an order of another. (Different considerations apply in the case of *ex parte* orders but this exception is not relevant in the present case).

Objection to remote hearing

33. It is indicative of the opportunistic nature of this application that one of the grounds of objections relates to an aspect of the hearing on 16 January 2023 which was in ease of Mr. Kavanagh.

34. Almost all of the recent hearings in these proceedings have taken the form of a remote or virtual hearing conducted on the Pexip platform. This has been done at Mr. Kavanagh's request as it spares him from having to travel to the Four Courts complex in Dublin. Notwithstanding this, Mr. Kavanagh makes the objection in his grounding affidavit that the holding of remote hearings adversely affects public access.

35. There is no merit in this objection. First, proceedings which are heard remotely are relayed to a courtroom in the Four Courts complex and any member of the public is entitled to attend there and observe the proceedings. Secondly, the substantive applications in these proceedings have been the subject of written judgments which are available to the public on the courts.ie website. The written judgments in respect of the first set aside application and the allocation of the costs of that application were both published online at the time. The within

judgment will also be published online. Thirdly, if and insofar as Mr. Kavanagh wishes to have any future hearings in these proceedings conducted in person, he will be facilitated in that regard.

CONCLUSION AND FORM OF ORDER

36. For the reasons explained herein, the application to set aside my judgment of 30 January 2023 is dismissed. Accordingly, the reliefs sought in the notice of motion of 6 March 2023 are refused.

37. If and insofar as Mr. Kavanagh is dissatisfied with the judgment of 30 January 2023, the proper remedy is to pursue his appeal to the Court of Appeal. The appeal is listed for hearing on 9 October 2023.

38. As to costs, my *provisional* view is that the plaintiff, having been entirely successful in resisting the application to set aside the judgment and order, is entitled to the costs of the motion as against the moving party, i.e. the first named defendant. If either party wishes to contend for a different form of costs order, they will have an opportunity to do so when the proceedings are next listed.

39. These proceedings will be listed before me on Monday 31 July 2023 at 11.00 o'clock for final orders. I will also hear the parties in respect of the application to take up the transcript of the digital audio recording (DAR).

Appearances

Rudi Neuman for the plaintiff instructed by Lavelle Partners LLP
The first named defendant appeared in person

Approved Garrett Simons