THE HIGH COURT

[2023] IEHC 521

RECORD NO. 2022/26CA

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

CONOR WARD AND MARY WARD

DEFENDANTS

Judgment of Mr. Justice Heslin delivered on the 14th day of September 2023

Introduction

1. The Plaintiff caused a Civil Bill to be issued on 14 November 2018 seeking possession of the property comprised in Folio 843F of the Register, County Sligo, known as "The Bard", Upper Rosses, Rosses Point, Sligo ("the Property").

2. Briefly put, the Plaintiff pleads that the Defendants mortgaged and/or charged the property in favour of Bank of Scotland (Ireland) Limited (hereinafter "the Bank") under a mortgage and/or charge dated 8 June 2006; that the charge was registered as a burden on the property on 1 April 2008; that, in breach of the terms of a loan agreement, dated 10 February 2006, the Defendants failed, despite demand, to make repayments to the Bank; that by cross-border merger, all the Bank's assets and liabilities, including the loan facility, mortgage and charge in question, transferred to "Bank of Scotland PLC" (hereinafter "BOS") on 31 December 2020; that by deed of assignment, dated 20 February 2015, between BOS and "Start Mortgages Limited" (hereinafter "Start"), BOS unconditionally, irrevocably and absolutely assigned to Start, all rights in the purchased assets; that the relevant loan facility, mortgage and/or charge were included in the purchased assets; that on 21 October 2016, Start converted to a Designated Activity Company, known as Start Mortgages Designated Activity Company (hereinafter "the Plaintiff") in accordance with the provisions of the Companies Act 2014; and that the property is the Defendants' principal private residence; and the market value does not exceed €3,000,000. In the manner presently explained, none of the foregoing would appear to be in dispute.

3. With respect to jurisdiction, the proceedings were commenced in the Circuit Court pursuant to s. 3 of the Land and Conveyancing Law Reform Act 2013 (hereinafter "the 2013 Act"). The Defendants raise no issue in relation to jurisdiction.

4. The Plaintiff claims an order pursuant to s. 62(7) of the Registration of Title Act 1964 ("the 1964 Act") and s. 1 of the 2013 Act, for delivery of possession to the Plaintiff of the property. The Defendants assert that the Plaintiff has no entitlement to possession.

The Registration of Title Act 1964 ("the 1964 Act")

5. Section 62(7) of the 1964 Act is the basis upon which the Plaintiff seeks possession of the property. Section 62 provides, inter alia, as follows:-

> *"62. — (1) A registered owner of land may, subject to the provisions of this Act, charge the land with the payment of money either with or without interest, and either by way of annuity or otherwise, and the owner of the charge shall be registered as such…*
>
> *…*
>
> *(7) 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"* (emphasis added)

6. In the foregoing manner, s. 62(7) explicitly permits a registered owner of a charge to seek possession in a "*summary manner*". This is what the Plaintiff has chosen to do in the present case. The significance and effect of s. 62 (7) was examined in the Supreme Court's 14th of April 2021 decision in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26. There, Baker J stated:-

> "*15. The jurisdiction conferred by that section applies to proceedings for possession by the registered owner of a charge once monies secured by the charge have become due. The subsection does not identify what is meant by the making of an application "in a summary manner", but the Court is given a discretion, if it so thinks proper, to order possession of the land to be delivered up, the consequence whereof is that the owner of the charge thereupon becomes a mortgagee in possession.*
>
> *16. In Bank of Ireland v. Smyth [1993] 2 IR 102, [1993] ILRM 790, Geoghegan J. rejected the notion that s. 62(7) confers a wide discretion which enables a court to refuse an application for possession on grounds of sympathy. He thought the words "may, if it so thinks proper" simply mean that the court should apply equitable principles in considering the application for possession, but not "sympathetic factors" and thus ensure that the application is made bona fide with a view to realising the security…*"

7. Baker J then quoted as follows from the decision of Geoghegan J in *Bank of Ireland v. Smyth*:

> *"The words 'may, if it so thinks proper' in s. 62, sub-s. 7 mean no more, in my view than, that the court is to apply equitable principles in considering the application for possession. This means that the court must be satisfied that the application is made bona fide with a view to realising the security*."

8. Para. 17 of Baker J's decision in *Cody* continued as follows:

> *"17. The procedure was explained in the decision of this Court in Irish Life and Permanent v. Dunne [2015] IESC 46, [2016] 1 IR 92, in which it held that any court seeking to make an order for possession under s. 62(7) must first ask itself whether, as a matter of law, it can properly be said that the monies are secured and are due".*

9. In light of the foregoing, this Court should ask the following three fundamentally important questions:-

(i) are the relevant monies secured by way of mortgage?

(ii) has there been default, resulting in the secured monies having become due? and;

(iii) is the application made bona fide with a view to realising the security?

Affidavit sworn by Ms Eva McCarthy for the Plaintiff

10. The pleas in the Civil Bill are underpinned by averments made in the *"Affidavit to verify Civil Bill for possession"* which was sworn, on 25 July 2018, by Ms. Eva McCarthy, litigation manager for the Plaintiff. No issue was taken with respect to her authority or in respect of any of the facts averred by her. What emerges from Ms. McCarthy's averments and the documentation which she exhibits can be summarised as follows.

11. The property is registered in Land Registry Folio 843F of the Register, County Sligo. Part 2 of that Folio records the Defendants as full owners. Part 3 of the Folio contains entry No. 7, which is dated 1 April 2018 and states:

> "*Charge for present and future advances stamped to cover €395,000 repayable with interest. BANK OF SCOTLAND (IRELAND) LIMITED is owner of this charge.*
>
> *The title to this charge was transferred by virtue of a cross border merger made in accordance with Directive 2005/56/EC of the European Parliament and of the Council that was approved by order of The Court of Session of Scotland to take effect at 23:59 hours GMT on 31st December 2010...*"

12. Entry number 9 of Part 3 is dated 10 April 2015 and states:

> "*START MORTGAGES LIMITED is the owner of the charge registered at Entry no. 7*".

Conclusiveness of the Register under the 1964 Act

13. In *Tanager Designated Activity Company v. Rolf Kane* [2018] IECA 352, the Court of Appeal considered certain questions of law referred by Noonan J., the first of which was as follows:

> *"1) does the Defendant have an entitlement to challenge the registration of the Plaintiff as owner of the charge at entry no. 7 on the Defendant's folio in these proceedings having regard to the conclusiveness of the Register pursuant to s. 31 of the 1964 Act?"*

14. The Court of Appeal answered this question in the negative. At para. 8 of Ms. McCarthy's affidavit, it is averred that Start was registered as owner of the charge on the Defendants' property as of 10 April 2015. That is plainly correct, having regard to the Folio entries just referred to. It is also highly relevant to the Plaintiff's claim, in that it constitutes conclusive evidence that the Plaintiff,

and no other entity, is the owner of the charge registered in the Land Registry on the Defendants' property.

15. The Loan Offer dated 10 February 2006 is exhibited. The credit advanced comprised €395,000.00. The term was 10 years. It was an 'interest only' facility. The loan offer specified that the security required was a first legal mortgage/charge over the property. The loan offer was explicitly subject to the terms and conditions specified therein. Both Defendants accepted the loan offer in writing on 17 February 2006. No issue was raised by the Defendants in relation to this. Thus, the Defendants' obligations were to make 120 monthly payments of 'interest only' during the 10 year term and to repay the loan amount at the end of the term, i.e. as of 10 February 2016.

16. The mortgage conditions are exhibited. The Defendants do not suggest that they are not bound by these conditions. It is appropriate to quote as follows from same:

> *"8. THE BANK'S POWERS AND THE ENFORCEMENT OF THE MORTGAGE.*
>
> *8.1 At any time after the Bank has demanded the repayment of the Debt or following a request by the Borrower and insofar as the law allows, the Bank may:*
>
> *…*
>
> *(c) take possession of the Property …"*
>
> *"9. EVENTS OF DEFAULT*
>
> *9.1 The Bank shall not exercise any of the powers provided for in Clause 8 hereof or conferred by any enactment until any of the following events shall occur:*
>
> *(a) the Borrower fails to pay any sum on the due date for payment as outlined in the Facility Letter or any other sum due and payable to the Bank…"*

17. The Defendants acknowledge that, upon the expiry of the 10 year term, they did not repay the monies owing. They also acknowledge that valid demands were made on 22 March 2018. These are exhibited by Ms. McCarthy (at para. 11 of her affidavit).

18. It is acknowledged that, on 17 April 2018, the Plaintiff's solicitors demanded that possession of the property be delivered up. These are exhibited (para. 12).

19. It is averred that the Defendants have failed to satisfy the demands made of them and that the sums secured by the mortgage and charge have become due and owing (para. 13).

20. Ms. McCarthy avers (at para. 14) that, at the date of the swearing of her affidavit, €401,148.87 was due and owing and she exhibits a copy statement of account. The Defendants do not dispute the quantum or the accuracy of the statement of account.

21. At paras. 15 to 17, Ms. McCarthy avers that the Plaintiff complied with the Central Bank's "Code of Conduct on Mortgage Arrears" ("the CCMA"). In particular, it is averred that the Plaintiff has complied with provision 56 of the CCMA having made every reasonable effort to agree an alternative arrangement with the Defendants.

22. From paras 18 to 20, it is averred that the Plaintiff has ensured compliance with provision 45 of the CCMA. The Plaintiff wrote to the Defendants on 15 August 2016 advising that an alternative repayment arrangement could not be offered; setting out the reasons for this; and advising the Defendants that they were now outside the Mortgage Arrears Resolution Process ("the MARP"). That letter is exhibited (para. 18). It is averred that the Defendants did not appeal the Plaintiff's decision. This is not in dispute. It is further averred that the period referred to in provision 45 expired prior to the commencement of these proceedings. Again, that is not in dispute.

23. At para. 22, Ms. McCarthy exhibits the Deed of Assignment, dated 20 February 2015, made between the Bank and Start (hereinafter "the Deed of Assignment" or "the Assignment"). Particular reference is made to an extract of Schedule 1 to the Deed of assignment and it is averred (at para. 23) that the loan facility, mortgage and charge, the subject of these proceedings, were acquired by Start from the Bank. It is fair to say that no issue is raised in relation to the fact and contents of the Assignment, as opposed to the validity of same.

24. At para. 24, Ms. McCarthy makes averments in relation to a February 2015 so-called "goodbye" letter which was sent by BOS to the Defendants, giving notice of the agreement to assign their loan facility, mortgage and charge. She also avers that on 23 February 2015, Start sent a so-called "hello" letter to the Defendants and same are exhibited. No issue was taken by the Defendants in relation to the foregoing.

25. A true copy of the Certificate of Incorporation on Conversion to a Designated Activity Company, dated 21 October 2016, is exhibited with respect to the Plaintiff (para. 25). Again, no issue is raised in relation to this.

26. It is fair to say that the Defendants do not assert that the Plaintiff has failed to put before the court any of the "proofs" required in an application for possession pursuant to s. 62(7) of the 1964 Act.

<u>Opposition to the claim for possession</u>

27. The Defendants' opposition to the Plaintiff's claim for possession is summarised as follows in written legal submissions, dated 22 July 2021 prepared by the First Defendant on behalf of both Defendants:

> *"The essence of my case is that the Plaintiff cannot lawfully grant me my statutory and equitable right to redeem my mortgage, because, by its own admission, it is a regulated business, authorised by the Central Bank to engage in the activity of credit servicing, and the activity of credit servicing does not include the specific and unique activity of mortgage redemption. Because of this inability to lawfully grant me my prior right in the matter, the Deed of Assignment of February 20th 2015, by which the Plaintiff came into possession of the title to my mortgage deeds and the title to the charge on my property, that Deed of Assignment is null and void, and unenforceable in law."*

28. Later in this judgment I will look carefully at the five different headings under which the Defendants make the foregoing claim. Before doing so, it is appropriate to refer to the balance of the affidavits before the court.

First Defendant's 7 November 2019 Affidavit

29. The First Defendant swore a replying affidavit on 7 November 2019, on behalf of both Defendants. The following *verbatim* extracts illustrate the principal issues raised:

- *"There is a pattern of consistent credit payments on the account. At all material times we have sought to meet the interest payments, as per the terms of the original loan offer, and the balance of €401,141.46 as of 30 April 2019 is only marginally higher than the principal sum advanced by the Plaintiff's predecessor-in-title"* (para. 5);
- *"We have tried to engage with the Plaintiff and made numerous offers in correspondence which are both reasonable and proportionate …"* (para. 6);
- *"The provisions in Clause 8.1 and/or Clause 9.1 of the Mortgage Conditions … is contrary to Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts…"* (para. 7);
- *"The loans secured on the family home can be called on by the Plaintiff 'on demand' and in the event of default in repayments. I say that this is contrary to European law which aims to protect consumers who have drawn down residential mortgages"* (para. 8)

30. It is fair to say that the sole issue raised in this affidavit is the proposition that a condition entitling the Plaintiff to require payment 'on demand' was contrary to the European Community's (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995) (hereinafter "the Regulations"). At the hearing before me, it was made clear that the Defendants were no longer pursuing this issue. It is entirely understandable that the Defendants did not pursue the contention that a lender's right to demand early repayment offended the Regulations. Quite apart from the question of being a core term of the lending contract, it is a matter of fact that there was *no* accelerated demand for repayment made of these Defendants. In the manner examined earlier, the 10-year term of their loan expired on 10 February 2016. Demands were not served until over two years later, on 22 March 2018. In short, the Defendant's replying affidavit discloses no conceivable defence to the claim for possession.

No Settlement

31. The replying affidavit of 7 November 2019 exhibited correspondence in relation to settlement proposals made by or on behalf of the Defendants. Those letters span a period between June 2016 and April 2019. The initial proposal made by the Defendants in June 2016 was:-

(i) that they would be given a full year during which they would continue to pay 'interest only' at €334.41 per month;

(ii) that the Defendant's children would sell a 3–bed poolside townhouse in Spain, then valued at c. €260,000;

(iii) that, within the year, the Defendants would pay a total of €300,000 in full and final settlement of all liabilities (made up of the proceeds of sale of the Spanish property, with the shortfall to be made available by the Defendant's children).

32. Various iterations of the said proposal culminated in an offer made by the Defendants on 11 April 2019 comprising:-

(i) payment of €75,000 on the signing of a settlement agreement;
(ii) monthly 'interest only' payments of €334.41 to continue until final payment; and,
(iii) a final payment of €250,000 no later than June 2020.

33. It is common case that the Defendants' settlement proposals were not accepted. At the hearing before me, the Defendants did not contend that the Plaintiff's decision not to accept any of the settlement offers constituted a valid defence to the possession claim.

Affidavit sworn on 2 March 2021 by Mr. Justin Nevin

34. The averments made by Mr. Nevin, litigation manager of the Plaintiff, in response to the Defendant's 7 November 2019 affidavit can be summarised as follows:-

- Whilst 'interest only' payments were made, the amount of each monthly instalment was €1,069.79;
- The Plaintiff assessed the Defendants' Standard Financial Statement and, based on its contents, deemed the Defendants ineligible for an alternative repayment arrangement;
- With respect to various iterations of the settlement offer: no indication was given as to when the property in Spain would be sold; the May 2016 report by the Defendants' estate agent described the market in Spain as "*sluggish*"; the Defendants' 26 September 2016 letter referred to the sale of the Spanish property happening over 1–2 years; the source of funds for the offer was unlikely to materialise for 1 to 2 years if at all; the settlement offer was made on vague and indefinite terms; the Defendants' 14 April 2018 letter made clear that the property in Spain had, in fact, been taken off the market; the Defendant's 4 May 2018 letter stated that the property in Spain was back on the market but set a further period of up to 2 years to sell;
- The proposal had at all times been unrealistic;
- The ability of the Defendants to raise necessary funds to finance their own offer was severely restricted;
- All offers have been highly contingent and ultimately dependent on third parties and outside factors;
- The offers did not adequately deal with the Defendants' arrears position;
- It was not unreasonable for the Plaintiff to decline the Defendants' proposals.

Core terms

35. Addressing the issue raised with respect to allegedly unfair terms, the following averments were made at para. 21 of Mr. Nevin's affidavit:-

"*….it is denied by the Plaintiff that there are any terms contained in the loan facility or mortgage the subject matter of these proceedings that are unfair either within the meaning of Council Directive 93/13/EEC of 5th April 2013 on unfair terms in consumer contracts, the European Communities (unfair terms in consumer contracts) Regulations 1995 (S.I. 27 of 1995) or at all. In that regard, I am advised and believe that the terms complained of by the Defendants relate to core terms of the contracts at issue in these proceedings and insofar as issue is taken with the right of the Plaintiff to call in or demand the loan on default there is nothing unfair about such a term….".*

36. I am entirely satisfied that the foregoing accurately reflects the legal position. With respect to the factual position, Mr. Nevin proceeded to make the following uncontroverted averments at para. 22 of his affidavit:-

"*….the loan facility the subject matter of these proceedings was for a ten–year period only and the loan therefore became fully repayable on the 6th June 2016. The said loan was not repaid at the end of the term of the loan. As of the 31st January 2021, the total sum of €404,849.66 remains due and owing on account number 330164705 by the Defendants to the Plaintiff comprising both principal and interest. I say that the last payment made to the account was on the 31st March, 2020 in the sum of €334.41. In this regard, I beg to refer to an up–to–date statement of account for account number 330164705…".*

Statement

37. The up-to-date statement exhibited by Mr. Nevin ("Exhibit B") specifies the name; address; and mortgage account number of the Defendants. The opening balance, as of 01 February 2021, is stated to be €404,843.66. No credit entries are recorded. The Defendants acknowledge that they have made no payment whatsoever since 31 March 2020, whether 'interest only' or otherwise.

38. The averments made on behalf of the Plaintiff, at para. 23 of Mr. Nevin's 2 March 2021 affidavit, comprise the following:-

"Given the passage of over four years since the said loan became repayable coupled with the absence of any long term arrangement being entered into the only reasonable means for the Plaintiff to seek recovery of the sum due to it is to enforce the security held by it for the loan facility and for the Plaintiff to exercise its power of sale. In that regard possession of the property the subject matter of the proceedings is sought in order that the Plaintiff may sell the property for the best possible price. Accordingly, I believe that the relief sought is proportionate in all these circumstances".

39. A consideration of the evidence before the court allows for the following to be said at this point: (i) the Plaintiff has demonstrated that it is the owner of the relevant charge; (ii) the Plaintiff has demonstrated that the right to seek possession has arisen and is exercisable on the facts; and (iii) the Plaintiff has undoubtedly established a *prima facie* case, on the evidence, for an order for possession.

Issues raised by the Defendants

40. The issues raised by the Defendants are set out, variously, in the following documents, all of which I have carefully considered:-

(i) The Defendant's notice of motion dated 25 February 2021 which was returnable before the Circuit Court in which the Defendants sought:-

(a) an order dismissing the Plaintiff's case against both Defendants;

(b) an order requiring the Plaintiff to remove its charge from Land Registry Folio 843 F (entries 7 and 9);

(c) an order requiring the Plaintiff to return the title deeds of the said Folio to the Defendants;

(d) an order requiring the Plaintiff to repay all monies paid to it by the Defendants from 20 February 2015; and

(e) an order for costs;

(ii) An affidavit grounding the said motion, sworn on 25 February 2021,

(iii) The Defendants' written legal submissions, dated 22 July 2021;

(iv) The Defendants' affidavit, sworn on 7 July 2023 (which was not before the Circuit Court);

(v) The Defendants' supplemental submissions, dated 18 October 2021.

Procedural history

41. The Plaintiff's Civil Bill seeking possession and the Defendant's notice of motion came before the Circuit Court on 3 July 2021. At that juncture, the learned Circuit Court Judge adjourned the hearing, directing that the parties file written submissions in relation to one issue raised by the Defendants, namely, whether the Plaintiff is lawfully entitled to engage in the activity of mortgage redemption, such that the Plaintiff is entitled to receive payment of the monies due under the mortgage in charge given by the Defendants. Why these submissions were sought is plain from the assertions in the Defendants' affidavit of 25 February 2021. By way of example, the following averment is made at para. 24:-

> *"….because of the Plaintiff's inability to lawfully offer me my statutory right to redeem my mortgage, the Deed of Assignment, dated 20th February 2015, by which the Plaintiff gained title to the mortgage deeds and charge on my family home, is null and void and unenforceable in law. Because of the nullity of the said Deed of Assignment and charge, the Plaintiff never had any rights in this entire matter, including any right to monies paid to it by the Respondent".*

Circuit Court Order (27 October 2021)

42. The matter came back before the Circuit Court on 27 October 2021 (Her Honour Judge Fergus). The Circuit Court's order, in relevant part, states:-

> *"WHEREUPON and on reading the pleadings, documents filed herein and the written submissions filed on behalf of the Plaintiff and the Defendants, and on hearing the evidence adduced and what was offered by Mr. Paul Brady BL (instructed by Ivor Fitzpatrick & Co. Solicitors) for the Plaintiff and the Defendants in person.*
>
> *THE COURT DOTH ORDER*

1. That the notice of motion dated the 1st day of March 2021 herein be and the same is hereby struck out.

2. That the Plaintiff do recover from the Defendants possession of ALL THAT AND THOSE the premises comprised in Folio 834 F of the Register of Freeholders County Sligo more commonly known as The Bard Upper Rosses, Rosses Point, Sligo.

3. That execution for Possession herein be stayed for a period of six months from the date of this order.

4. No order as to costs".

Ability to repay

43. A singular feature of this matter is that the Defendants fully acknowledge that they have the money to "redeem" their mortgage in full. This was made clear prior to and during the Circuit Court hearing.

Why repayment has not been made

44. Why the Defendants did *not* redeem their mortgage at any time prior to the Circuit Court hearing (and did not seek to do so at, or in the wake of, the Circuit Court hearing) is because of their contention that the Plaintiff was obliged to but has not addressed the issues described in the following *verbatim* quotes from correspondence which was sent by the First Defendant to the Plaintiff:

Letter to the Plaintiff, dated 7 December 2020

"*Reference Section 28 of the Central Bank Act, 1997, as amended by the Consumer Protection Act 2018, and indicate precisely where, in that section, Start Mortgage DAC is authorised to engage in the significant, specific and unique activity of mortgage redemption. My advice is that Start Mortgages DAC is not authorised by the Central Bank to engage in the activity of mortgage redemption, nor is mortgage redemption a specific regulated activity under the relevant Act. I await hearing from you"* (emphasis added)

Letter to Plaintiff, dated 11 January 2021

"I . . . acknowledge receipt of the mortgage redemption statement duly received today. I note, however, that you have failed to address the issue raised by me under Point 2 in my letter of December 7th 2020…. reference to the wording in the relevant Act whereby you consider that are (sic) *lawfully authorised to engage in the activity of mortgage redemption. Before proceeding to redeem my mortgage, I consider that I am entitled to this information"* (emphasis added)

The Defendants' case

45. I have carefully considered all affidavits sworn and all submissions, written and oral, upon which the Defendants rely. This includes the contents of an affidavit sworn by the First-Named Defendant, on 7 July 2023, which was not before the learned Circuit Court Judge (the admissibility of which the Plaintiff did not contest). Employing certain headings used by the Defendants, their case is as follows.

"Inappropriate nature of court order".

46. Before redeeming the mortgage, the Defendants were exercising their right, in law, to be satisfied that the Plaintiff was lawfully entitled "*to do their end*" in relation to the activity of mortgage redemption. The Defendants "*required proof*", as was their "*full legal entitlement",* that the Plaintiff was entitled "*to grant"* to the Defendants "*redemption*" of their mortgage. This was stated in open court before the learned Circuit Judge, and it was made clear that the Defendants "*had the funds to so redeem*". At para. 17 of the Defendant's 7 July 2023 affidavit, the following is averred: "*…it was wholly inappropriate to grant a Possession Order to the Plaintiff. A much more appropriate and fairer judgment would have been to reserve judgment on the matter for a reasonable period of time, to allow me the dignity of redeeming my mortgage, if I so chose, free from the ignominy and pressure of a possession order around my neck. Only if I failed to exercise my equitable right to redeem my mortgage, within that reasonable period of time, only then would a possession order have been appropriate. Alternatively, the judge could have referred the matter to a higher court….".* At para. 18 of the July 2023 affidavit, it is suggested that it was inappropriate and brings "*court judgments into disrepute"* for the Circuit Court to have granted a possession order "*where a bona fide and verifiable offer to redeem the mortgage in full was already on the court record"*.

47. The foregoing conveys the impression that the mortgagors were ready, willing, and able to redeem their mortgage, but the Circuit Court's order frustrated that wish. Nothing could be further from the truth. The Defendants' "*offer to redeem the mortgage in full*" came with 'strings' so firmly 'attached' that it was never an offer to redeem. First, at all material times, the Defendants asserted, and continued to assert, that the Plaintiff has no right to engage in what the Defendants describe as "*the significant, specific and unique activity of mortgage redemption"* and, based upon this assertion, they were never willing to redeem the mortgage.

48. Second, the learned Circuit Court judge placed a stay of six months on the order for possession. Thus, leaving aside entirely the period from 31 July 2019 (when the Civil Bill issued) to 27 October 2021 (when the Possession Order was made), the Defendants were afforded a *further* period of six months (which expired on 27 April 2022) to redeem their mortgage, had they any intention to do so. They did not do so. They have not made even an 'interest only' payment since March 2020. The Defendants' position during the hearing which took place before this Court on 27 July 2023, was not that they wished to redeem their mortgage. Rather, as the First Defendant put it in oral submissions to this Court: "*Why should we redeem our mortgage if we're not satisfied that Start is entitled under the law to engage at their end with redemption?"*.

Illegality of proceeding

49. Under this heading, the Defendants submit that, when these proceedings were commenced on 31 July 2018, the Plaintiff had no legal right to hold title to credit. According to the Defendants, holding title to credit is "*conspicuously absent*" from the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (hereinafter "the 2015 Act"). They contend that it was not until the coming into force of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 (hereinafter "the 2018 Act"), which amended s. 28 of the Central Bank Act 1997 (hereinafter "the 1997 Act"),

that the Plaintiff gained "*the right to hold the legal title to credit, and the associated rights to pursue a possession order through the courts*" (see para. 19 of Mr. Ward's 7 July 2023 affidavit).

50. For the foregoing reasons, the First Defendant submits on behalf of both that: "*. . . the Plaintiff, as a regulated credit servicing firm, was not legally entitled to register, with the Land Registry, a charge on my property at points 7 and 9 of Folio 843 F, because it was not the lawful owner of the title to my credit agreement"*(see para. 23 of the 7 July 2023 affidavit). According to the Defendants, the charge registered as a burden on their Folio (on 10 April 2015) "*…became illegal when the Plaintiff became a regulated entity on July 8th, 2015, and is therefore void…"* (see para. 24 of the 7 July 2023 affidavit).

51. In essence, the Defendants contend that these proceedings are "*illegal"* because: "*Credit Servicing Firms such as the Plaintiff, did not acquire the legal right to hold the title to credit, and associated ownership rights (including the right to pursue a possession order through the courts and the associated right to register a charge against the relevant property in the Land Registry) until the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 came into force"* (para. 26 of the 7 July 2023 affidavit). The Defendants criticise the learned Circuit Court judge for not accepting this submission.

Void status of Deed of assignment of 20 February 2015

52. The First Defendant submitted at the hearing that: "*If it is shown that the deed of assignment is void, the Plaintiff loses all its rights in the matter".* The Defendants' argument under this heading goes as follows. The Deed of Assignment includes title to the mortgage and charge and deeds in respect of the property. The following oral submission was made on behalf of the Defendants: "*I am saying that, as of February 2015, the Plaintiff very probably did have the right to hold title to credit, but lost this when it became a regulated entity on 8 July 2015 because the list of rights and entitlements set out in the 2015 Act, as amended by the 2018 Act, did not include the right to hold title to credit".* The Defendants allege that, on 8 July 2015, the Plaintiff lost all rights to hold title to credit and, thus, "*the deed of assignment became void"*.

53. The Defendants contend that: "*The Plaintiff had six months to prepare for the limitations which the legislation would place upon it".* According to the Defendants: "*The Plaintiff would have seen the 'Heads of the Act' and would have known that the Plaintiff was going to lose the right to hold title to credit"*. According to the Defendants, the Plaintiff "*had its chance to do its due diligence"*.

54. Para. 33 of Mr. Ward's 7 July 2023 affidavit encapsulates the Defendants' argument under this heading, as follows:-

> "*Prior to the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015, which came into effect on July 8th, 2015, the Plaintiff operated as an unregulated entity. It is not established and remains to be determined, whether, as an unregulated entity, the Plaintiff was thereby entitled to hold the title to credit under a credit agreement. What is crystal clear, however, is that from July 8th, 2015, the Plaintiff, as a newly regulated entity, was not entitled under the said Act 2015 to hold the title to credit granted under a credit agreement.*

This resulted in the deed of assignment of February 20th, 2015, becoming void. It also resulted in the charge, of April 10th, 2015, by the Plaintiff on my property, becoming void, under s. 30 (1) of the Registration of Title Act 1964. In this context, the said charge ought therefore to have been removed forthwith".

Clog on equity of redemption

55. The Defendants' argument under this fourth heading goes as follows. The Plaintiff is regulated by the Central Bank as a retail credit firm authorised to engage in the specific activity of credit servicing. This is regulated by the 2015 Act (as amended by Acts of 2018 and 2020). The foregoing legislation makes no mention of mortgage redemption.

56. Redemption is, according to the Defendants, "*a very significant right*" of a mortgagor. It is a right which is "*very important to a lender, or in this case, a credit servicing firm"*.

57. Section 121 of the Consumer Credit Act 1995 (as amended) (hereinafter "the 1995 Act") refers to "*redemption of housing loans"*. According to the Defendants, those who drafted this Act felt it important to include a reference to redemptions and "*if it was necessary to include in the 1995 Act, it was necessary for redemption to be named in the 2015 Act"*. The absence of a reference to redemption means, according to the Defendants, that consumer servicing firms, including the Plaintiff, have no right to redeem mortgages.

58. The Defendants assert that the 2015 Act did not include wording which indicated that there was any right to hold title to credit. In the 2018 amending legislation "*it was found necessary to include that wording",* submit the Defendants. In light of the foregoing, the First Defendant argues on behalf of both that: "*The Plaintiff cannot lawfully grant me my equitable right to redeem my mortgage. That's a clog on my right".*

59. As to what, according to the Defendants, the Plaintiff is unable to do, this was described as the "*back–end"* activities of: (i) issuing a final statement in relation to the outstanding balance; (ii) removing the charge from the property; and (iii) returning title deeds to the property.

60. At para. 38 of the 7 July 2023 affidavit, the First-Named Defendant avers, *inter alia,* that the Plaintiff placed him on notice, in October 2020, that even if he offered to redeem the mortgage in full, there was no guarantee that it would be accepted by the Plaintiff. He describes the foregoing as "*an outrageous denial of my equitable right to redeem my mortgage".* It is appropriate to point out that the foregoing mischaracterises, entirely, the contents of correspondence, which was exchanged in respect of, *not* an offer to redeem the mortgage in full, but a then–settlement offer for *less* than the outstanding amount.

61. In essence, the Defendants' argument under this heading is that, because s. 28 of the Central Bank Act 1997 does not refer to mortgage redemption: "*The fact that it is not included within that list means that the Plaintiff is not legally entitled to engage in mortgage redemption. Because the Plaintiff is not legally entitled to engage in the activity of mortgage redemption, and because the redemption of my mortgage requires the active participation of both the Plaintiff and myself, the net*

result is that I am deprived, by the Plaintiff, of my equitable right to redeem my mortgage" (see para. 41 of the 7 July 2023 affidavit).

62. According to the Defendants: "*….it will require an appropriate amendment of that Act before the Plaintiff acquires that right. In the meantime, the Plaintiff does not have the right to engage in the activity of mortgage redemption"* (see para. 42 of the 7 July 2023 affidavit).

63. In oral submissions, Mr. Ward stated inter alia: "*I fully accept that, as a credit servicing firm, the Plaintiff has the right to receive monthly repayments during the currency of a mortgage".* However, he distinguishes the foregoing scenario from a situation where an 'interest only' mortgage involved no monthly repayments of capital, and he contends that the Plaintiff has no legal entitlement to "*grant*" to the Defendants their equitable right of redemption and the Plaintiff is "*not legally entitled to engage in mortgage redemption"*, elsewhere contending the Plaintiff is "*not legally entitled to engage in the activity of mortgage redemption"*.

64. According to the Defendants, the Plaintiff "*acted illegally in instituting proceedings"* against them. Among the oral submissions made on behalf of the Defendants was that the Plaintiff "*cannot treat the law with impunity*" and Mr. Ward went on to ask, rhetorically, "*is it any wonder that our government chose to regulate their activities?".*

65. The Defendants also submit that the fact s. 27 of the Building Societies Act 1989 (as amended) refers to "*discharge of mortgages"* constitutes "*further proof that mortgage redemption is a most important, specific and unique activity which requires to be named in its own right, if it is to be considered as included within the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 (as amended)"*.

66. The Defendants' arguments under this heading are encapsulated in paras. 51 and 52 of the 7 July 2023 affidavit sworn by Mr. Ward:-

> "*51. In effect, this inability of the Plaintiff to lawfully grant me my equitable right to redeem my mortgage, constitutes what in legal terms is referred to as a 'clog' on my equity of redemption. In fact, it constitutes the ultimate clog. Professor Wiley (sic) in his landmark book 'Irish Land Law' affirms that where a clog on equity of redemption exists the Irish Courts have consistently found that the associated contract is void. In the case before the court, the associated contract is the Deed of Assignment of February 20th 2015 whereby the Plaintiff came into possession of rights over my property, the subject matter of the herein proceedings.*
>
> *52. Because of the Plaintiff's inability to lawfully grant me my equitable right to redeem my mortgage, and for all the reasons already offered, the said deed of assignment of February 20th, 2015, became void on July 8th, 2015, the date on which the Consumer Protection (Regulation of Credit Servicing Firms) Act came into force and it remains void up to the present time. The Plaintiff, therefore, has absolutely no rights over my property, the subject matter of the possession order…".*

67. The First-Named Defendant also made oral submissions to the following effect:-

- *I had a statutory right to redeem my mortgage during its ten – year term and, thereafter, I had an indefinite equitable right;*

- *When Bank of Scotland unilaterally sold my mortgage to the parent company of the Plaintiff, I retained all my rights including my rights of redemption;*

- *My rights concerning mortgage redemption go back to 2006;*

- *The alleged rights of the Plaintiff only start in February 2015;*

- *By pre-dating the Plaintiff's rights, mine take preference over them;*

- *I placed the Plaintiff on notice of my wish to redeem my mortgage in full;*

- *I require proof, as is my legal entitlement, that the Plaintiff, as a credit servicing firm, is lawfully entitled to grant me my equitable right to redeem my mortgage (bearing in mind that there is no reference whatsoever to the highly significant, specific and truly unique activity of mortgage redemption, in a comprehensive list of activities that a credit servicing firm is entitled to engage in, under the 2018 Act);*

- *Because the Plaintiff cannot lawfully grant me my equitable right to redeem my mortgage, this is a clog on my equity of redemption and I just can't redeem my mortgage.*

68. At paras. 53 and 54 of the 7 July 2023 affidavit, criticisms are levelled at the learned Circuit Court judge in respect of what the Defendants characterise as a *"flawed conclusion"* and, at para. 55, the Defendants seek all the reliefs sought in the 3 March 2021 motion.

<u>The Defendants' case summarised</u>

69. The Defendants' opposition to the Plaintiff's claim for possession (and their contention that they are entitled to orders (a) to (e) *per* their 25 February 2021 motion) can be distilled to the following assertions:

- *"the Plaintiff is prepared to deny me my statutory right to redeem my mortgage…"* [para. 12 of the First-Named Defendant's 25 February 2021 affidavit];
- *"the Plaintiff is well aware that it cannot lawfully grant me redemption of my mortgage"* [para. 12 of the First-Named Defendant's 25 February 2021 affidavit];
- *"the Plaintiff has no rights whatsoever over my property"* [para. 34 of the First-Named Defendant's 7 July 2023 affidavit].
- *"it is not open to the Plaintiff to engage in activities, or claim entitlements, that are not named in [s.28 of the Central Bank Act 1997]…";* (para. 36 of the 7 July 2023 affidavit];
- *"the Plaintiff does not have the right to engage in the activity of mortgage redemption"* [para. 42 of the 7 July 2023 affidavit];

- *"mortgage redemption is a most important, specific and unique activity which requires to be named in its own right…"* [para. 44 of the 7 July 2023 affidavit];
- *"section 28 of the Central Bank Act 'makes no mention of mortgage redemption in the list of activities in which a credit servicing firm is lawfully entitled to engage'. The Plaintiff, as a regulated business, has no authority to hold or claim rights which it is not entitled to hold under the relevant Act"* [para. 46 of the 7 July 2023 affidavit];
- *"the Plaintiff is unable 'to lawfully grant me my equitable right to redeem my mortgage' and this constitutes 'a single clog' on my equity of redemption"* [para. 51 of the 7 July 2023 affidavit];
- *"because of the Plaintiff's inability to lawfully grant me my equitable right to redeem my mortgage… the deed of assignment of February 20th, 2015, became void on July 8, 2015, the date on which the Consumer Protection (Regulation of Credit Servicing Firms) Act came into force…"* [para. 52 of the 7 July 2023 affidavit].

Discussion and decision

70. It is clear from the foregoing that, central to the Defendants' case is the proposition that the Plaintiff must *"grant"* them a right to redeem their mortgage. With respect, this is a fundamental misunderstanding of the respective rights and duties of relevant parties. Put simply, the right of redemption is the Defendants' right. It is not, and never has been, the Plaintiff's right. In circumstances where the Defendants have referred to Wylie on "Irish Land Law", it is appropriate to quote as follows from the learned author's 6th Edition (Bloomsbury Professional, at paragraph 13.28):

> *"We now come to consider the various rights of a mortgagor under a mortgage. Once again these rights depend partly on the general law, including legislation, and partly upon the terms of the mortgage instrument, if any. His most important right, of course, is his right of redemption, i.e., his right to get the property back freed from the mortgage or charge on repayment of the loan and most attention in this section will be paid to the right of redemption…."* (emphasis added).

71. The foregoing could hardly make clearer that the right of redemption is the mortgagor's right (i.e., the Defendants' right). Whereas Professor Wylie referred to the terms of the mortgage instrument, if any, there certainly *is* a mortgage instrument in the present case and it is appropriate, at this juncture, to quote *verbatim* Clause 4 thereof:

> *"4. PROVISION FOR REDEMPTION*
> *PROVIDED ALWAYS that if the Borrower shall duly and punctually pay to the bank the secured monies pursuant to the covenants in that behalf contained in this Mortgage and Charge then and in any such case the property shall be released and discharged from the security hereby constituted".* (Emphasis added)

72. The foregoing wording encapsulate, explicitly, the Defendants' right of redemption. The Defendants accept that they executed this mortgage. Their respective signatures are witnessed by a solicitor. It is common case that the mortgage is dated 8 June 2006. Thus, upon entering into the

mortgage, the Defendants acquired the right of redemption and this is a right they have enjoyed at all material times ever since.

73. In other words, the Defendants do not need the Plaintiff to *"grant"* them anything. Rather, payment by the Defendants of the secured monies *"shall"* release and discharge the property from the security created by the mortgage and charge. The Plaintiff has no discretion in the matter. Put simply, if the Defendants had paid the secured monies, there was no additional *"right"* which the Defendants required. Nor is this a situation where, had the Defendants paid the secured monies, the Plaintiff needed to be *"empowered"* to grant a right of redemption *to* the Defendants. On the contrary, at all material times since 8 June 2006, the Defendants have enjoyed a right of redemption which they have chosen not to exercise.

74. The foregoing views accord entirely with the analysis of Professor Wylie at para. 13.35:

> *"E. Redemption*
> *[13.35]*
> *The most important right of a mortgagor is his right to redeem the mortgage i.e., his right to get his property back freed and discharged from the mortgage, by repayment of the capital borrowed plus the interest charged on it. The mortgagor has a legal right to redeem on the legal date for redemption specified in the mortgage instrument and thereafter has for an indefinite time an equitable right to redeem…"* (emphasis added)

75. At the risk of stating the obvious, the Defendants have chosen not to exercise either their legal right or their equitable right to redeem the mortgage. However, it is beyond doubt that the foregoing is *their* right to redeem. It is not a mortgagee's right. It was not the original lender's right, nor is it the Plaintiff's.

76. Even if sincere, what the Defendants characterise as the Plaintiff's inability to lawfully grant them an equitable *right to redeem* their mortgage is, in truth, an *obligation* binding upon the Plaintiff, had the Defendants exercised their right of redemption (something they have chosen *not* to do).

77. The common 'thread' running through each variation of the Defendants' opposition to the Plaintiff's claim is the mistaken view that the Plaintiff must *grant* them an equitable right to redeem their mortgage. They are entirely mistaken in this and, by 'pulling' this thread, their entire case unravels, in my view.

78. The foregoing analysis, coupled with the conclusiveness of entries on their Folio (and they have never brought proceedings claiming that any Folio entry should be set aside on the basis of fraud, or mistake, or otherwise) is sufficient to dispose of this appeal. In short, although articulated with clarity, ingenuity and skill, it is entirely devoid of merit.

79. However, and for the purposes of the Defendants' better understanding the legislative landscape in which they have sought to avoid redeeming their mortgage (notwithstanding their confirmation that they have the funds to do so) the following analysis would appear relevant.

Section 29 of the Central Bank Act 1997 (regulated business)

80. Section 29 of the 1997 Act (as amended) provides:

> *"29. Person prohibited from carrying on regulated business without authorisation.*
>
> *(1) A person shall not carry on a regulated business unless the person is the holder of an authorisation…*

81. In simple terms, the foregoing means that a person is not permitted to do whatever constitutes *"regulated business"* without Central Bank authorisation. If a person *does* carry on regulated business without authorisation, the 1995 Act sets out criminal sanctions and this can clearly be seen from s.29(2) which provides:-

> *"2. A person who contravenes subsection (1) commits an offence and -*
>
> *(a) if tried summarily, is liable on conviction to a fine not exceeding €2,000, or*
>
> *(b) if tried on indictment, is liable on conviction to a fine not exceeding €100,000."*

82. Further criminal sanctions are set out at sub. (3). It is noteworthy, however, that s.29 does *not* provide that any regulated business which is carried out in breach of the requirement for Central Bank authorisation shall be deemed void. The foregoing observations seem to me to be relevant, given that, in addition to (wrongly) contending that the Plaintiff needs to *"grant"* them a right of redemption, the Defendants contend that the Plaintiff cannot lawfully carry out the following activities in relation to redemption: (i) issuing a final statement; (ii) releasing security over the property; and (iii) returning title deeds.

83. Even if the foregoing trinity of activities required specific Central Bank authorisation, s.29 does *not* render void the carrying out of such activities in the absence of authorisation (as opposed to attracting fines on conviction). This is another insurmountable problem for the Defendants.

S.29 of the 1997 Act (authorisation)

84. Recalling that *authorisation* is referred to in s.29 of the 1997 Act, s.32 of the same legislation provides:

> *"32. Effect and term of authorisation.*
>
> *(1) An authorisation authorises the holder to carry on a regulated business subject to and in accordance with the conditions of the authorisation.*
>
> *(2) An authorisation remains in force until revoked under this Part."*

Section 28 of the 1997 (credit servicing)

85. Section 28 of the 1997 Act sets out *inter alia* the following definitions:

> *" 'Credit servicing' means*
>
> *(a) in relation to a credit agreement, subject to subsection (2)*
>
> *(i) holding the legal title to credit granted under the credit agreement.*
>
> *(ii) managing or administering the credit agreement, including –*

(I) notifying the relevant borrower of changes in interest rates or in payments due under the credit agreement or other matters of which the credit agreement requires the relevant borrower to be notified;

(II) taking any necessary steps for the purposes of collecting or recovering payments due under the credit agreement from the relevant borrower.

(III) managing or administering any of the following:

(A) repayments under the credit agreement;

(B) any charges imposed on the relevant borrower under the credit agreement;

(C) any errors made in relation to the credit agreement;

(D) any complaints made by the relevant borrower;

(E) information or records relating to the relevant borrower in respect of the credit agreement;

(F) the process by a relevant borrower's or financial difficulties are addressed:

(G) any alternative arrangements for payment or other restructuring;

(H) assessment of the relevant borrower's financial circumstances and ability to repay under the credit agreement;

(I) determination of the overall strategy for the management and administration of a portfolio of credit agreement;

(J) maintenance of control over key decisions relating to such portfolio, or

(iii) communicating with the relevant borrower in respect of any of the matters referred to in subparagraph (ii)"

86. The fact that the definition of *"credit servicing"* was expanded in 2018 to include holding legal title to credit had the effect of bringing this under the *"umbrella"* of the Central Bank's regime of regulation. It does not, however, mean that, prior to 2018, this activity was unlawful. It merely means that it was not previously a regulated activity. By way of a further observation, the phrase *"managing or administering…repayments under the credit agreement"* [*per* (a)(ii)(III)(A)] is clearly wide enough to contemplate the exercise by a borrower of their right of redemption.

87. Crucially, however, the 1997 Act does not state that an entity has no power to carry out activities other than those explicitly listed under the heading of regulated activities. In other words, the 1997 Act does not designate as unlawful, any activity which falls outside of *regulated* activity or business. In other words, the Central Bank's regulatory regime is not concerned with anything other than regulated activity. In short, if an entity is doing something which is *not* specified in the definitions, authorisation is *not* required.

88. As counsel for the Plaintiff rightly submits, the fundamental error in the Defendants' arguments with reference to statute is that they wrongly consider the 1997 Act to be enabling legislation (*i.e.,* permitting *only* a specific list of activities and outlawing all activities not expressly listed). The Defendants are wholly mistaken in this.

89. The logic of the Defendants' argument is that, because the definition of *credit servicing* does not include *"sending a final statement to the relevant borrower";* and "*discharging security upon repayment of the credit granted under a credit agreement"* (or words to the foregoing effect) the Plaintiff cannot lawfully engage in this activity. However, in the manner examined earlier, Clause 4 of the mortgage which the Defendants entered into in June 2006 expresses the Defendants' legal right to redeem, whereas Wylie on Irish Land Law (see para. 30.35 of 6th Edition) confirms their equitable right of redemption following the expiry of the term (in this case ten years).

90. Furthermore, the Defendants' argument that the Plaintiff cannot validly or lawfully furnish a mortgage redemption statement is impossible to reconcile with the contents of Mr Ward's 11 January 2021 letter to the Plaintiff, which begins:

> *"Re mortgage number 330164705*
> *Dear Sirs,*
> *I refer to above mortgage account and wish to acknowledge receipt of the mortgage redemption statement duly received today…"* (emphasis added)

91. As to the context, by letter dated 7 December 2020, Mr Ward called upon the Plaintiff, *inter alia*, to: *"set out an itemised costing of the full redemption of above mortgage".* In other words, when asked by the Defendants for a mortgage redemption statement, the Plaintiff provided same and the Defendants acknowledged receipt.

92. As regards the second request in the Defendants' 7 December 2020 letter, two comments are appropriate as follows: (i) the fact that the words "mortgage redemption" do not appear in s.28 of the 1997 Act certainly do not mean that it is unlawful for the Plaintiff to carry out what the Defendant describes as *"back-end"* activities associated with mortgage redemption; and (ii) this is because the right of redemption is, at all material times, the mortgagor's *i.e.,* not a right which the Plaintiff must confer on the Defendants.

S. 28 of the 1997 Act (credit servicing firm/ retail credit firm)

93. Section 28 of the 1997 Act also defines a "*credit servicing firm*" as meaning, inter alia:-

> "*a regulated financial service provider taken to be authorised to carry on the business of a credit servicing firm by virtue of subsection (3*)"

94. A "*retail credit firm*" was stated to mean:

> "*a person prescribed for the purpose of paragraph (e) of the definition of 'credit institution' in section 2 (1) of the Consumer Credit Act 1995, or any other person who holds itself out as carrying on a business of, and whose business consists wholly or partly of, providing credit directly to relevant persons….".*

If one looks at s. 2(1) of the said 1995 Act, one can see that "START MORTGAGES Ltd." appears in the list of credit institutions which appears at subs. (3).

"**regulated financial service provider"**

95. Section 28 also contains the following definitions:-

> ""*regulated financial service provider*" *has the same meaning as in section 2 of the Central Bank Act 1942".*

96. If one turns to s. 2 of the 1942 Act, it provides:-

> "*regulated financial service provider means –*
> *(a) a financial service provider whose business is subject to regulation by the Bank under this Act or under a designated enactment or a designated statutory instrument"*.

97. What emerges from a consideration of the aforementioned provisions is that the Plaintiff requires authorisation from the Central Bank to carry out the "*credit servicing"* defined in s. 28 (1). However, no other business or activity requires authorisation.

98. It is perfectly understandable why "*mortgage redemption"* is not a "*regulated business"* requiring the Plaintiff to have Central Bank authorisation. This is, of course, because the right of redemption is the mortgagor's right and the exercise of that right involves:-

(i) a decision *by* the mortgagor to redeem;

(ii) the repayment *by* the mortgagor of the monies owing.

The foregoing is not business or activity conducted by a retail credit firm, such as the Plaintiff. Thus, Central Bank authorisation is not required in respect of the performance by the Plaintiff of its obligations in the event of a mortgagor's decision to redeem their mortgage. It should be noted that this is something the Defendants have known for years. I say this given that, in response to queries raised by the First-Named Defendant, the Central Bank stated inter alia the following in its 9 November 2020 letter:-

> "*While the redemption of mortgages isn't a specific regulated activity, a firm authorised as a Retail Credit Firm is also permitted by virtue of its authorisation to conduct credit servicing activities. Credit servicing activities includes the managing or administering of repayments under their credit agreements".* (emphasis added)

99. In the manner examined earlier, insofar as receiving payments from a mortgagor comes within the definition of "*credit servicing",* s. 28 (1) of the 1997 Act provides that such business includes the collection or recovery of payments due under a credit agreement and the managing or administering of repayments. Thus, receipt of monies due to a retail credit firm is clearly an activity which the Plaintiff is entitled to carry out (irrespective of whether described as redemption or not).

100. It should also be noted that the aforementioned letter, dated 9 November 2020, is not the only correspondence wherein the Central Bank outlined its understanding of the legislative position. By letter dated 13 February 2023, the Central Bank replied to the First-Named Defendant in the following terms:-

"*Dear Mr. Ward,*

Thank you for your letters of the 24 November 2022 and 10 February and apologies for the delay in responding to you.

I would like to draw your attention to the following information, which I hope, will be of some assistance to you regarding your queries relating to Promontoria (Oyster) DAC and Cabot Asset Purchased (Ireland) Ltd….".

101. I pause to observe that, to the extent that the Defendants, or either of them, were raising queries in relation to the foregoing entities (neither of which is the Plaintiff in these proceedings) that has never been explained. Nothing would appear to turn on that comment. Of more relevance is that the Central Bank went on to provide to the Defendants a very clear and accurate explanation of its understanding of the legislative landscape:-

"*Part V of the Central Bank Act, 1997 was amended by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 ('the 2015 Act') and brought 'credit servicing' under Central Bank regulation and supervision. Under the 2015 legislation, loan owners themselves did not directly fall to be regulated; rather it was the company appointed to 'service' those loans by the loan owner. Firms that were credit servicing in respect of credit agreements to relevant borrowers when the 2015 Act came into force needed to apply to the Central Bank to become authorised as credit servicing firms. Part V of the Act was further amended by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 ('the 2018 Act') to expand the activity of credit servicing, as defined in the 2018 Act, to include holding the legal title to credit granted under a credit agreement and associated ownership activities. The 2018 Act which came into effect on 21 January 2019 has now brought the loan owners directly under Central Bank regulation and supervision and requires that all purchasers of legal title to credit must be authorised by the Central Bank either as a credit servicing firm, retail credit firm or credit institution.*

I hope the above has been of assistance to you".

102. With respect to legislation referred to in the aforesaid letter, Section 28 (1) of the 1997 Act also contains the following definitions:-

""*regulated business" means a bureau de change business, a money transmission business, the business of a home reversion firm, the business of a retail credit firm, the business of a debt management firm or the business of a credit servicing firm*;

"*regulated financial service provider" has the same meaning as in section 2 of the Central Bank Act 1942".*

103. Section 121 of the Consumer Credit Act 1995 provides:-

"*121. Redemption of housing loans.*

(1) Subject to subsection (3), a borrower may, at any time before the time agreed, repay to the mortgage lender the whole or any part of a housing loan and shall not be liable to pay any redemption fee in relation to the loan or any part of the loan".

104. The foregoing recognises the right of a *borrower*. In other words, it is the borrower who "*may, at any time"* repay the housing loan. Nothing in the foregoing provision takes away from the reality that (i) the right of redemption is the mortgagor's/borrower's right; and (ii) it is the mortgagor/ borrower who carries out the act of repayment/redemption.

Burden of Proof

105. In *Start Mortgages DAC v. Ryan* [2021] IEHC 719, Woulfe J. stated the following in respect of the burden of proof resting on a Plaintiff in an application of this type:

> *"21. 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: (a) that the Plaintiff is the owner of the charge; and (b) that the right to seek possession has arisen and is exercisable on the facts. 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.*
>
> *22. 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".*

106. The Plaintiff has discharged the burden of proof resting on it. The Defendants' opposition to the Plaintiff's claim and their contention that orders should be made per their motion lacks all merit.

107. The Plaintiff is the registered owner of the relevant charge. The Plaintiff's right to seek possession has arisen and is exercisable on the facts. The Plaintiff has established a *prima facie* case for an order for possession.

108. Nothing said on behalf of the Defendants, in opposition to the Plaintiffs' claim amounts to evidence or argument sufficient to establish a credible defence.

109. The oral submission made to this Court by the First-Named Defendant (on behalf of both) namely: *"I don't deny that we have a right to redeem on our mortgage"* is impossible to reconcile with what the Defendants also characterise as the "*…. inability of the Plaintiff to lawfully grant me my equitable right to redeem my mortgage…"* (see para. 52 of the 7 July 2023 affidavit).

110. During the hearing before me, it was confirmed that the Defendants' case fell to be determined with reference to the effect, as the Defendants see it, of the Consumer Protection (Regulation of Credit Servicing Firms) legislation. The Defendants have entirely failed to 'bring home' those arguments.

111. The Defendants have certainly not established that the Plaintiff (and all credit servicing firms) "*acted illegally from 8 July 2015 to 21 January 2021"* as they assert. Nor have the Defendants established any illegality or impropriety on the part of the Plaintiff whatsoever.

112. The oral submission that "*many people lost their homes due to illegal activities by credit servicing firms"* is (i) a bald assertion; (ii) not underpinned by any evidence to substantiate it; (iii) wholly undermined by a consideration of the relevant legislative position; and (iv) a submission which should not have been made, in circumstances where it casts aspersions, unfairly on the Plaintiff and those persons employed by it.

113. By asserting *inter alia* that the Assignment to the Plaintiff is void, the Defendants are, in essence, seeking to oppose the present application by impermissibly challenging the correctness and conclusiveness of the Register, as well as making wholly unsustainable and entirely inappropriate allegations of unlawful activity on the Plaintiff's part.

114. The First-Named Defendant's oral submissions included to say: "*I am not privy to why mortgage redemption was not included in the relevant legislation",* going on to suggest that "*apart from an oversight, this was not particularly important to credit servicing firms"*, adding that "*there are not many people in my position i.e., in a position to redeem their mortgages"*.

115. No legislation has been opened to this Court which provides that a retail credit firm can *only* engage in the activities listed in s. 28 of the 1997 Act and there is no such limiting provision.

116. In the manner explained in this judgment, the Defendants erroneously regard the 1997 Act as enabling legislation. They are entirely wrong in their view that there must be a 'granular' setting out of each and every lawful action and that a failure to list an activity renders it illegal or void.

117. This argument, as well as being mistaken, does not sit at all easily with the reality that the Defendants have, in fact, made certain part–payments in respect of their mortgage loan facility *after* the ten–year term expired. They did not then contend that these repayments could not lawfully be accepted by the Plaintiff.

118. The Defendants are entirely mistaken in their contention that they are entitled to withhold monies payable to the Plaintiff on the basis that the latter cannot lawfully engage in what they describe as "*the activity of mortgage redemption"*.

119. This Court's judgment is consistent with responses given by the Central Bank to the Defendants. In short, what is *not* a regulated activity does *not* require Central Bank authorisation.

120. No Central Bank authorisation is needed for the Plaintiff to give the Defendants a mortgage redemption statement (something the Plaintiff did, in January 2021, at the Defendants' request).

121. No Central Bank authorisation is required for the Plaintiff to discharge the property from the mortgage upon repayment of the outstanding borrowings (consistent with (i) the Defendants' *legal* right to redeem as expressed in Clause 4 of the mortgage and (ii) the *equitable* right to redeem following the expiry of the 10–year term).

122. The Defendants fully accept that they (i) obtained the relevant monies; (ii) failed to repay these monies, despite demand; (iii) possess all funds needed to redeem the mortgage in question; (iv) insist on retaining possession of the property, despite the demand for possession; and (v) have not redeemed their mortgage, and (vi) do not now seek to redeem their mortgage.

123. At the conclusion of the hearing before me, the First-Named Defendant indicated that the Defendants may yet decide, at a future point, to redeem their mortgage. To better understand this stance, I put certain questions to the First Defendant and, from his responses, the Defendants' position can be summarised as follows:-

- They regard the Plaintiff as having no entitlements in this matter and, therefore, are unwilling to redeem their mortgage;
- If this Court does not agree with them, the Defendants will consider the judgment and may decide (i) to repay the Plaintiff what it is owed; or (ii) to appeal this Court's decision, depending on the Defendants' view of the reasoning in this Court's judgment.

Just as the Defendants have chosen to represent themselves, it will be a matter for the Defendants to decide what steps they may or may not take in the wake of this Court's judgment.

Conclusion

124. For the reasons set out in this judgment, the Plaintiff is entitled to possession *per* their civil bill.

125. My preliminary, but strongly–held, view on the question of costs is that, having regard to s. 169 of the Legal Services Regulation Act, 2015, the Plaintiff (as the "*entirely successful"* party in the present application) "*is entitled to an award of costs against"* the Defendants. I have not been able to identify any facts or circumstances which would justify a departure from the 'normal rule' that 'costs' should 'follow the event'.

126. The parties are called upon to agree the terms of a draft order and to submit same no later than 14 days from the start of Michaelmas Term (i.e., by 16 October 2023). In default of agreement on any issue, short written submissions should be furnished by the same deadline.