

THE HIGH COURT

[2023] IEHC 667

[Record No. 2023/5 CAT]

BETWEEN:

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF / RESPONDENT

AND

JOHN FLANAGAN

DEFENDANT / APPELLANT

AND

REBECCA FLANAGAN

NOTICE PARTY

RULING of Ms. Justice Siobhán Phelan, delivered on the 7th day of November, 2023

INTRODUCTION

1. This matter comes before me on appeal against an Order for Possession made in the Circuit Court (His Honour Judge Comerford) on the 1st of June, 2022 in respect of a property comprised in folio 44761F of the Register for County Clare commonly known as Ballyvarra Lodge, Doolin, County Clare. This property is registered in the sole name of the Defendant/Appellant (hereinafter “the Defendant”) but is occupied as a family home by his spouse and children.

BACKGROUND

2. There is very little dispute of fact in these proceedings. It is not in dispute that in October, 2006, Bank of Scotland (Ireland) Limited made a loan facility available to the Defendant on certain terms and conditions. The sum advanced was €350,000.00. The loan agreement provided for monthly repayments for a 25-year term secured against the Defendant’s property at Ballyvarra, Doolin in the County of Clare then valued at €750,000.00. It was a condition of the loan offer that a solicitor confirm that the title to the secured property was in

the sole name of the Defendant and that his wife obtain independent legal advice in relation to the purpose of the loan and sign a Deed of Consent and Confirmation of Spouse. The Defendant and his wife were also required to make a statutory declaration confirming that the property was a family home within the meaning of the terms of the Family Home Protection Act, 1976 (as amended by the Family Law Act, 1995).

3. Under the terms and conditions agreed the Defendant agreed to pay the Plaintiff on demand the “*secured monies*” and agreed that a failure to pay any sums due constituted an event of default. Separately, the Defendant agreed to the Bank’s right to transfer its security.

4. The Notice Party, as the Defendant’s wife, signed the “*Consent and Confirmation of Spouse*” form on the 11th of December, 2006 and her signature was witnessed by a solicitor. In this form, she confirmed her consent to the granting of a charge in consideration of the advancement of banking facilities to the Defendant. She separately signed confirmation that she had taken or had been afforded the opportunity to take independent legal advice and her signature in this regard was also witnessed by a solicitor.

5. By way of security for the said loan facility, the Defendant executed a Mortgage and Charge in favour of the Bank of Scotland (Ireland) Limited on the 11th of December, 2006 in respect of property registered in the Defendant’s name as comprised in folio 44761F of the Register for County Clare. The Mortgage and Charge was registered as a burden on folio 44761F of the Register for County Clare in June 2008 and the Bank of Scotland (Ireland) Limited was registered as owner of the charge.

6. The Defendant defaulted in the terms of the loan facility and failed to make repayments as agreed as a result of which arrears accumulated. By letter dated the 8th of April, 2011, the Bank of Ireland Scotland demanded that the Defendant repay to it all sums then due and owing together with interest thereon in default of which it would proceed to seek possession of the property. The Defendant was subsequently called upon in writing to deliver vacant possession of the mortgaged property in May, 2013. By July, 2013, the Bank of Ireland Scotland claimed to be owed €375,585.22 on foot of the loan agreement.

7. These proceedings commenced in 2013 in the name of the Bank of Scotland PLC as Plaintiff and successor in title to the Bank of Ireland Scotland (Ireland) Limited on foot of a

cross-border merger pursuant to the European Communities (Cross-Border Mergers) Regulations 2008. The Bank sought to recover possession of the property pursuant to s. 67(2) of the Registration of Title Act, 1964 (hereinafter “the 1964 Act”). An application for summary judgment was brought grounded on affidavit of one Lauren Bailey who averred that the Bank did not know of anyone other than the Defendant in possession in the property even though the Defendant’s wife had executed a consent under the Family Home Protection Act, 1976 for the purpose of the loan. It was subsequently accepted by the Bank that the Defendant’s spouse occupied the property.

8. Subsequently, in 2015, the Bank transferred its mortgage loan agreement with the Defendant to Start Mortgages Limited assigning its interest in the debts the subject of the within proceedings. Start Mortgages Limited were then substituted as Plaintiff in the proceedings by order of County Registrar dated the 13th of November, 2015.

9. In September, 2016, the Plaintiff offered an Assisted Voluntary Sale Agreement to the Defendant whereby the Defendant agreed, *inter alia*, to dispose of the Property in full and final settlement of the mortgage loan account. The offer was conditional on the Defendant selling the property and applying the sale proceeds to the loan facility within six months of acceptance of the terms. The terms of the Assisted Voluntary Sale agreement were accepted by the Defendant in writing on the 28th of September, 2016 who thereby agreed, *inter alia*, to facilitate a valuation of the property. It was provided that the offer could be terminated if the sale did not complete within six months or if there was a failure to comply with any terms of the offer. The offer was withdrawn in December, 2016 purportedly because of difficulties in valuing the property and difficulties of access. Wherever the fault lies for the difficulties in securing a valuation of the property, in the intervening period since 2016 the property has not been sold by the Defendant or the proceeds of sale directed to the settlement of the mortgage account, notwithstanding that the proceedings were adjourned on a number of occasions to facilitate progress to be made by the Defendant in voluntarily selling the property.

10. Start Mortgages Limited was converted to a designated activity company in October, 2016 and duly substituted as Plaintiff by further order of the County Registrar dated the 13th day of February, 2017.

11. An Order for Possession was made by the County Registrar on the 18th of September, 2018 in the absence of an appearance from the Defendant. By Notice of Motion dated the 21st of September, 2018, an application was made on behalf of the Defendant to review this ruling. In the affidavit grounding the application, a solicitor instructed by the Defendant pointed out that the property was the primary residence of the Defendant's wife and the family home for the Defendant's three children. It was objected that the Order had been made by the County Registrar notwithstanding correspondence confirming that the matter would be contested and that solicitors were coming on record, albeit that no formal appearance had been entered and notwithstanding that the Defendant's intended solicitors had sought consent to the late filing of an appearance. In reply, it was averred on behalf of the Plaintiff that an agent of the Defendant had been present and was afforded an opportunity to make a late application for an appearance which had been refused. His Honour Judge Keys granted a stay on the Possession Order until further order and granted leave to the Defendant to file a replying affidavit, Appearance and Defence by order dated the 20th of November, 2018.

12. By Notice of Motion dated the 15th of March, 2019, the Plaintiff's solicitors brought an application to affirm the Order for Possession previously made by reason of the failure of the Defendant to comply with the Order made the previous November by failing to file a replying affidavit and Defence. For some unknown reason, an affidavit sworn in September, 2018 by the Defendant was only filed in July, 2019. This Affidavit referred to the fact that the property was occupied as family home by the Defendant's wife. The Defendant exhibited his marriage certificate and stated that his wife had consented to him mortgaging his interest in the family home but had never provided any consent for her interest in the family home to be mortgaged or charged. He referred the Court to the Mortgage Confirmation of Spouse executed by the said Rebecca Flanagan and exhibited a copy.

13. In reply, a deponent on behalf of the Plaintiff accepted that the property was occupied by the Defendant's wife, contrary to what had been previously sworn. No explanation for this error was provided but the deponent on behalf of the Plaintiff continued that the Defendant's spouse had consented to her interest in the premises being mortgaged or charged through the execution of the Family Home Declaration and the formal consents signed by her. It was further pointed out that the Defendant's spouse had signed the consent and confirmation of spouse having acknowledged that she had taken or had been afforded the opportunity to take independent legal advice before signing the document and that she was aware that it was

intended that the mortgage and charge would be security not only for the advance made on or about the date thereof but all other indebtedness and liability already incurred or thereunder incurred to the Bank of Scotland (Ireland) Limited. It was pointed out that the presence of the Defendant's wife in the property was not a defence to the application for possession.

14. The Defendant maintained on further affidavit sworn in June, 2020 that his wife had only consented to the mortgaging of the Defendant's interest in the property, not her own. He maintained that the property was valued at €750,000 at the time of the loan application and that the sums advanced did not exceed a 50% value of the property and explains why the loan was in his name only. He maintained that he had been advised by his then solicitors that it was only his interest in the property which stood charged and that he assured his wife that this was the position. He maintained that the payment made by him in reliance on a "*temporary rent subsidy from Lazarus Investments*" in 2015 was made under inducement of some type of restructuring arrangement but that the Plaintiff's predecessor had failed to produce any restructuring proposal, in consequence of which no further payments were made. He maintained that he attempted to meet with the Executives of the Plaintiff to find a resolution but that a meeting was not facilitated. He said that he separated from his wife in January, 2016 and that she continues to reside at the property with the couple's three children. He considered the failure to refer to his wife's interest in the property to be intentional. He maintained that the property is unsaleable due to difficulties with access and the folio. Finally, the Defendant maintained that he owed no money to the Plaintiff and that they had not demonstrated loss nor disclosed how much they had paid for his loan.

15. It was pointed out on behalf of the Plaintiff in response that the Defendant's spouse is not noted on the title deeds to the property, does not have a chargeable interest in the property and no evidence has been provided of his spouse's legal and/or beneficial interest in the property. He explained that no further payment proposal could be offered because based on the Standard Financial Statement provided by the Defendant there was a negative affordability of €91.33 (or €308 per month towards monthly repayments due under the loan agreement of €2,129.26). The position in this regard had been explained to the Defendant by letter dated the 5th of January, 2016. He further confirmed that the Defendant was advised to put any proposal in writing and that a meeting could be facilitated thereafter. No proposal in writing was ever made.

16. The Defendant swore a further affidavit in December, 2021. He relied again, *inter alia*, on his contentions that he did not owe money to the Plaintiff and that his wife had a beneficial and legal interest in the property arising from her status as wife and that she had not charged her beneficial or equitable interest in the property by signing the Family Home Declaration and the Consent and Confirmation of Spouse. He contended that the Plaintiff ought not to be permitted to resile from offering an alternative payment schedule in circumstances where payments had been made on the understanding that some such proposal would issue. He maintained that the original loan facility was statute barred.

17. The Defendant's spouse was joined as a Notice Party in the proceedings on her own application on the 21st of January, 2020 by Order of His Honour Judge Keys. Solicitors entered an Appearance on her behalf in July, 2020. She has sworn only one affidavit in these proceedings, being the affidavit grounding her joinder as a Notice Party. She clearly ought to have been joined in the proceedings from the outset but since her joinder she has not sought to participate further in the proceedings. She did not appear before me on the hearing of the Defendant's appeal despite being on notice of the hearing date. She was not a party to the Assisted Voluntary Sale agreement which was signed by the Defendant only. In the one affidavit sworn by her in December, 2019 she deposes to the fact that throughout the marriage it was always the Defendant who paid the mortgage and that it was her understanding that he would continue to do so. While she complains in her affidavit that she was denied an opportunity to engage with the Plaintiff in relation to the debt because of the failure to join her earlier in the proceedings, there is no evidence that she has engaged with the Plaintiff since her joinder with a proposal to pay the monies owing and the contrary is averred to on behalf of the Plaintiff.

18. The last payment made towards the loan was made in December, 2015 in the sum of €500.00. This payment was made at a time when consideration was being given to an alternative payment plan. No further payment was made once it was confirmed that the Plaintiff would not be proposing an alternative payment plan but were continuing to seek the sale of the charged property.

19. On the 1st of June, 2022, the Court (His Honour Judge Comerford) confirmed that the Plaintiff was entitled to possession. A stay of 10 days was ordered and, in the event of an appeal, it was directed that the stay continue until the determination of the appeal. Execution

on the Order for Possession was further stayed for a period of 15 months. A Notice of Appeal was lodged dated the 8th of June, 2022.

20. Notwithstanding that no formal application for special leave to adduce additional evidence for the purpose of the High Court appeal was made pursuant to s. 37(2) of the Courts of Justice Act, 1936, the Defendant swore a further affidavit dated the 31st of October, 2023 (days before the appeal was scheduled for hearing before me). In this affidavit the Defendant seeks to rely on the 1916 Proclamation and the Constitution of the Republic of Ireland, maintaining in summary that as a “*vulture fund*” which is not a citizen of Ireland and with whom the Defendant has no contract, an Order for Possession should not lie in favour of the Plaintiff. He refers to exhibited documentation including, *inter alia*, correspondence with the Office of the Attorney General, documentation in the name of the “*Irish Republican Brotherhood*”, a decision of the Master of the High Court in *Promontorio (Oyster) DAC v. Gethins* delivered on the 22nd of March, 2022 in which various criticisms of the registration of title system in Ireland are voiced and correspondence between the former Master and the Central Bank of Ireland.

21. Albeit not objecting to this late affidavit, the Plaintiff for its part has responded with an affidavit dated the 2nd of November, 2023 in which it exhibits a more recent folio entry upon which is endorsed a record that the charge created in favour of Bank of Ireland Scotland (Ireland) Limited has been transferred and Start Mortgages Limited is registered as the owner of the charge since April, 2015. Reliance is placed on s. 63(12) of the Companies Act, 2014 for the purpose of contending that the registration of Start Mortgages Limited as Start Mortgages Designated Activity Company does not affect any rights or obligations of either Start Mortgages Limited or Start Mortgages Designated Activity Company or render defective any legal proceedings by or against either of them and proceedings commenced by Start Mortgages Limited may be continued by Start Mortgages Designated Activity Company.

DISCUSSION AND DECISION

22. Given the late filing of affidavits on both sides, the absence of objection to the Defendant’s Affidavit and the Defendant’s acceptance that the Land Registry documentation exhibited by the Plaintiff exists and his contention that it does not have the legal significance

contended for on behalf of the Plaintiff, I have decided to give special leave to file both affidavits for the purpose of this appeal. I do so conscious that the Land Registry registration of Plaintiff's interest in the charge is an important proof and that the up-to-date folio entry should properly have been exhibited to ground the original application before the Circuit Court. However, as the Defendant's case has never been that the charge is not registered but rather that it does not carry the legal significance contended for on behalf of the Plaintiff, I am satisfied that it is appropriate that both sides' affidavits are before the Court to ensure that the real issues in contention between the parties are determined.

23. While allowing further affidavit evidence to be filed for the purpose of the High Court appeal, I did not permit the Defendant to give oral evidence as requested by him during the hearing before me. This is because the case proceeded on affidavit before the Circuit Court in circumstances where the Defendant filed several affidavits and had ample opportunity to present his evidence. It would be unfair in the circumstances to permit the Defendant to enlarge the case he makes at this very late stage in a manner which cuts across the Plaintiff's ability to address or respond to his claims.

24. In presenting this application, the Plaintiff relies on s. 62(7) of the 1964 Act, s. 63(12) of the Companies Act, 2014 and the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] 2 IR 381 [hereinafter "*Cody*"]. In her judgment in *Cody* Baker J. noted how the statutory jurisdiction conferred by s. 62(7) of the the 1964 Act, makes provision for the summary disposal of an action seeking possession of registered land as follows:

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

25. As further pointed out by Baker J. in her decision for the Supreme Court in *Cody*, the subsection is contained within s. 62 of the Act which makes provision for the creation of

charges on registered land and for remedies on default of the loan thereby secured. The charge is deemed by s. 62(6) to operate as a mortgage by deed within the meaning of the Conveyancing Acts 1881 – 1911. The Land and Conveyancing Law Reform Act, 2009 makes some changes to the statutory provisions, most of which are not relevant to this judgment. Section 62(7) was repealed by that Act and replaced by s. 97(2) of the 2009 Act which makes no mention of the application being brought by summary means. However, s. 62(7) was expressly saved by s. 1 of the Land and Conveyancing Law Reform Act 2013, as regards a mortgage created prior to the 1st of December, 2009. Section 3 of the 2013 Act provides that proceedings for possession of the principal private residence of the mortgagor shall be brought in the Circuit Court. Accordingly, I am satisfied that these proceedings were properly commenced and maintained in the Circuit Court on foot of a Civil Bill claiming an Order for Possession.

26. 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 must prove two facts:

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

27. She pointed out, by reference to her decision in *Tanager DAC v. Kane* [2018] IECA 352, that the summary process is facilitated by the conclusiveness of the Register as proof that the plaintiff is the registered owner of the charge and this is a matter of the production of the Folio, and, as the Register is by reason of s. 31 of the 1964 Act conclusive of ownership, sufficient evidence is shown by that means. In *Tanager DAC v. Kane*, Baker J. 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. It seems to me that these dicta address in full the arguments sought to be articulated by the Defendant in reliance on the decision of the former Master of the High Court in a written decision in *Promontorio (Oyster) DAC v. Gethins* exhibited in the Affidavit sworn for the purpose of this appeal.

28. On the authority of the Supreme Court decision in *Cody* and multiple other authorities and notwithstanding the criticisms contained in the decision of the former Master of the High Court relied upon by the Defendant, my first task on an application of this nature is to decide whether the Plaintiff has established that they are the owner of the charge and that the right to seek possession has arisen and is exercisable on the facts. Where I am satisfied as to the proofs in this regard, I should proceed on the basis that a *prima facie* case has been shown and I must then decide whether the Defendant/Appellant has identified a credible or arguable defence. Unless I am satisfied that no real or credibly arguable defence has been shown, I should not order summary judgment.

29. I am satisfied that a *prima facie* case for an Order for Possession has been shown by the Plaintiff based on the undisputed evidence in this case adduced including:

- the loan offer letter dated the 26th of October, 2006 setting out special terms and conditions of the loan and appending the Bank's Standard Terms and Conditions dating to October, 2005. This correspondence clearly warned that the home was at risk if the borrower did not keep up payments on a mortgage or any other secured on it and setting out additional conditions including solicitor's confirmation of title in the sole name of the Defendant and the Notice Party to obtain independent legal advice and sign Consent and Confirmation of Spouse Form. The Bank's Mortgages Terms and Conditions provided for the lender's power to enter possession of the mortgaged property where the secured money was deemed to have become due and for the exercise of this power upon the occurrence of an event of default in the payment of any month of the secured money. They further provided for the transfer or assignment of the mortgage and charge and required the Borrowers consent to same.
- the deed of mortgage and charge duly executed under the provisions of which the Bank had a power of sale.
- the Notice Party's duly executed Consent and Confirmation of Spouse Form together with confirmation regarding independent legal advice.
- the folio entry which records the registration of the Defendant as full owner and entry no. 2 whereby a burden registered in favour of Bank of Scotland (Ireland) Limited is recorded confirming the registration of the appellant's charge on the property;

- the later folio entry no. 13 which shows an amendment on the 10th of April, 2017 registering Start Mortgages Limited as the owner of the charge registered at entry no. 2 and the documents grounding the substitution of Start Mortgage Limited as Plaintiff including the Purchase Deed executed in October, 2014 and the Accession Deed entered into as executed on the 20th of February, 2015 followed by the Deed of Assignment of the debts the subject of these proceedings by instrument in writing also executed on the 20th of February, 2015 and the notice of the said assignment which was furnished in writing to the Defendant both in advance and subsequent to assignment specifically the so-called “*hello*” and “*goodbye*” letters.
- the pre-action correspondence specifically a letter of demand dated the 8th of April, 2011 and a letter seeking vacant possession and advising of an intention to issue proceedings in default dated the 8th of May, 2013.
- the statements of account recording non-payment and arrears prior to the issue of proceedings in 2013.

30. The Defendant does not dispute that the facilities letter was executed and sums were drawn down on foot of same. Nor is it not disputed that the Deed of Mortgage which secured that borrowing was executed. It is accepted that the mortgage fell into difficulty early on with the default increasing thereafter. While it is denied that a debt claimed is due to the Plaintiff primarily because the Defendant had no contract with the Plaintiff, it is not denied that substantial arrears were owing to Bank of Scotland (Ireland) Limited by 2013 when the proceedings first issued. The figures claimed have not been disputed as to their computation.

31. I am satisfied as to the evidence of formal demand rendering the monies due and payable with the result that the power of sale became exercisable. I am satisfied that the evidence adduced on affidavit by the Plaintiff establishes as a matter of law that it is the registered owner of the charge and that the principal money borrowed pursuant to the loan agreement entered into in 2006, and secured upon the registered charge, had become due prior to its acquisition of the charge. Accordingly, the “*proofs*” for an application under s. 62(7) of the 1964 Act have been met. The next issue then is whether the Defendant has put forward a basis for a credible defence either on the facts or on the law.

32. While the thrust of the Defendant's case in defending the application for an order for possession was not always clear, the broad basis for same as I discern it from the arguments presented appears to be:

- i. the Defendant's spouse has an interest in the property which is not subject to charge and which means that an order for possession should not be made;
- ii. that the Plaintiff is precluded from maintaining proceedings having agreed a Voluntary Assisted Sale;
- iii. that the Plaintiff is obliged to propose an alternative payment schedule having induced the payment of sums towards the mortgage on the understanding that a proposal would be forthcoming;
- iv. that the Plaintiff is not entitled to an Order for Possession because it had no contractual relationship with the Defendant and has not established loss as it has not provided evidence of what it paid for the debt;
- v. that the claim is statute barred.

33. I propose to consider in turn whether any of these claims inhibit the entitlement of the Plaintiff to summary possession on foot of the mortgage and the Plaintiff's interest in same. To the extent that I may fail or omit to deal specifically with any other argument presented or intimated by the Defendant, this is because I am satisfied that insufficient substance has been articulated for same to require further engagement.

- i. *the Defendant's spouse has an interest in the property which is not subject to charge*

34. This claim is untenable in the face of the specific terms of the Family Home Declaration and Consent of Spouse Forms executed by the Notice Party with the benefit of legal advice. In the Consent and Confirmation of Spouse executed by the Notice Party as witnessed by a solicitor, it is noted:

"I, Rebecca Flanagan being the lawful spouse of the person named as Borrower in the within Mortgage and Charge, in consideration of the Bank granting or continuing banking facilities or other accommodation at the Borrower's request at any other bank on the Borrower's account or on that of third parties hereby:

- (i) *consent to the granting of the within conveyance, demise and charge for the purposes of compliance with the provisions of the Family Home Protection Act, 1976 and I confirm having subscribed my name hereunder prior to the execution of the within Mortgage and Charge by the Borrower;*
- (ii) *grants and conveys onto the Bank all that and those so much of the property (save any parts of the ownership whereof is registered in the Land Registry) as is freehold tenure to hold the same unto the Bank in fee simple subject to the proviso for redemption hereinbefore contained.....*
- (iii) *charges so much of the Property he ownership of the freehold interest whereof or in the case of leasehold property the ownership of leasehold interest whereof is registered in the Land Registry with payment to the Bank of the monies covenanted to be paid by my said spouse, the Borrower, and subject to all the within terms, covenants and conditions insofar as same may be applicable thereto and assent to the registration of the said charge as a burden on the Property or so much thereof as is charged in this sub-clause... ”*

35. The terms of these documents speak for themselves. The Notice Party has formally acknowledged through the execution of a “*Further Consent of Spouse*” in December, 2006 that she has taken legal advice or been afforded the opportunity to obtain same in respect of her execution of the Consent and Confirmation of Spouse Form. This document was also executed in the presence of a solicitor. It is notable that in the Affidavit filed by the Notice Party that she does not make the claim that such interest as she holds in the property is not subject to the charge which she consented to or that she was so advised.

36. If there was any misapprehension on the part of the Defendant as to the nature of the charge created by him on property registered in his sole name and agreed to by his wife as security for his borrowings, then the fault for this does not lie with the Plaintiff or any predecessor in title. It was a clear condition of the loan facility advanced that it be fully secured against the registered property. It was a further requirement of the advancement of the facility that the Defendant’s spouse obtain independent legal advice, which she did. The fact that a charged property is a family home does not preclude the making of an Order for Possession where the property was duly charged with consent properly obtained from the borrower’s spouse. It is noted that the Defendant is the sole registered owner of the property, the Notice

Party's interest in the property has not been declared. No real evidence of her interest has been provided. Whatever the Defendant's professed belief to the contrary, neither the Defendant nor the Notice Party are insulated from the risk of an order for possession being made because the property is worth as much as or more than 50% more than the value of the borrowings and is occupied as a family home in respect of which his spouse enjoys rights.

ii. that the Plaintiff is precluded from maintaining proceedings having agreed a Voluntary Assisted Sale

37. The Assisted Voluntary Sale Offer letter which issued in September, 2016 and was accepted by the Defendant provided for the sale of the secured Property within six months from the date of acceptance of the offer but allowed for termination of the offer by the Plaintiff in the event of non-compliance with the terms of the offer. Insufficient information has been given on affidavit as to why a valuation could not be obtained and whether a breach of obligations occurred which warranted termination of the offer, as occurred. Specifically, it is not clear that the termination of the offer arose because of non-performance on the part of the Defendant of a condition of the Voluntary Assisted Sale agreement which included the conduct of a valuation, albeit difficulties with title and with securing a valuation were raised in the correspondence exhibited (specifically the letter of the 15th of December 2016) without further detail as to the cause of the problem. In the circumstances, I cannot determine whether the Defendant was in breach of condition such that it was open to the Plaintiff to withdraw the offer before the agreed term of 6 months has passed.

38. What is clear, however, is that the six months envisaged for the completion of a sale under the terms of that agreement have long since passed. Manifestly, the Defendant has not proceeded to sell the property on a voluntary basis or to make any proposal over the many years that have followed since this agreement was entered into. In the circumstances I see no merit in the Defendant's defence of the Plaintiff's proceedings based on a failure to go ahead with a Voluntary Assisted Sale in this case.

iii. that the Plaintiff is obliged to propose an alternative payment schedule having induced the payment of sums towards the mortgage on the understanding that a proposal would be forthcoming

39. There is no plausible evidence that the Plaintiff gave any assurance that an alternative payment schedule would be proposed and agreed in this case. On the evidence before me I am satisfied that the Plaintiff agreed to assess the Defendant's finances and consider the possibility of an alternative payment schedule. They sought information as to the Defendant's means in this regard and he provided them with a Standard Financial Statement ("SFS"). Having reviewed his SFS the Plaintiff concluded that they were unable to offer an alternative repayment arrangement or restructuring of the mortgage and they explained that this was because his SFS showed that he could only afford to pay €308.67 towards the monthly repayments of €2,129.26.

40. There was no improper inducement on the part of the Plaintiff such as might preclude the Plaintiff from pursuing its entitlement to an Order for Possession where it was not satisfied to propose an alternative payment schedule. Having considered the information provided in relation to the Defendant's ability to make payments, the Plaintiff communicated its findings on affordability to the Defendant. Where the payments the Defendant could afford to make were nominal relative to the sums due, there was nothing unreasonable or wrong in law in the Plaintiff concluding that they could not offer an alternative repayment arrangement or restructuring of the mortgage. The Plaintiff explained its reasoning in a letter dated the 5th of January, 2016 when it stated:

"The assessment of your SFS and circumstances concluded that the amount that you can pay is not sufficient to sustain any of the ARAs which we have to offer. In addition there is no evidence that your financial circumstances will improve in the short to medium term. Given these circumstances, entering into an ARA which is not sustainable, and which will see your arrears situation deteriorate each month, is not appropriate."

41. Having made no payments whatsoever since 2015 making no proposal to do so and being substantially in arrears, I am satisfied that there is no merit to the Defendant's attempted reliance on the Plaintiff's consideration of an alternative payment schedule in 2016 and refusal to offer one as capable of providing any type of defence to the Plaintiff's claim in these proceedings. Despite his protestations that his attempts to meet with the Plaintiff to engage constructively regarding his indebtedness had not been facilitated, it is undeniable that the

Defendant has made no proposal at all over a period of many years and has not responded to invitations to make any proposal he wishes in writing with the result that his protestations ring hollow.

iv. that the Plaintiff is not entitled to an Order for Possession because it had no contractual relationship with the Defendant and has not established loss as it has not provided evidence of what it paid for the debt

42. The Plaintiff is entitled to an Order for Possession as a matter of law arising from the legal transfer to it of the charge on the Defendant's registered property in circumstances of an established default in payments due to the Bank of Scotland (Ireland) Limited under the terms of a loan agreement. There is no requirement for the Plaintiff to have a direct contractual relationship with the Defendant to ground such an entitlement where it is established that the Plaintiff is the owner of the charge and there is no requirement to demonstrate loss for the Plaintiff's claim to become actionable. A legal assignment of the debts and other obligations took place for the purposes of s. 28(6) of the Supreme Court of Judicature (Ireland) Act, 1877 and the former interest of the Bank of Scotland (Ireland) Limited now vests in the Plaintiff.

v. that the claim is statute barred

43. The within proceedings issued within six years of a default in payments under a loan agreement. As these proceedings are for an Order for Possession on foot of a mortgage, the applicable limitation period is twelve years. It was only following upon the making of the demand for payment in this case in 2011 that the facts were in place which, if proved, would have given rise to an entitlement to judgment. It follows therefore that the cause of action only accrued on that date. The claim that the proceedings are statute barred is therefore un-stateable.

44. Finally, in addition to the foregoing, mindful of the decision of the High Court in *AIB v Counihan* [2016] IEHC 752 (a judgment delivered by reference to the decisions of the European Court of Justice in *Aziz v. Caixa d'Estalvis de Catalunya Tarragona i Manresa (Catalunyacaixa)* (Case C-415/11)) which acknowledged the *ex officio* obligation existing under ECJ case law for a national court to assess, of its own motion, whether a contractual term falling within the scope of the Unfair Contract Terms Directive (93/13/EEC) is unfair, I have

considered whether a concern could arise under that Directive. In *EBS v. Ryan* [2020] IEHC 212 Barrett J. described the obligation in the following terms at para. 8 of his judgment:

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

45. The issue for me in discharge of my own motion obligations is whether, in circumstances where the defendant is a consumer (if he is), he is entitled to the protection of the Unfair Terms in Consumer Contracts Regulations, 1999 or the Unfair Contract Terms Directive. In this case it is unclear whether these provisions have any application because insufficient information is available to me regarding the purpose of the loan to determine whether the Defendant qualifies as a “consumer”. Erring on the side of caution and proceeding on the basis that the Defendant qualifies but without deciding the issue, I have considered my own motion obligations in ruling on this appeal. It is recalled in this regard that in *Permanent TSB Plc. v. Davis* [2019] IEHC 184 the Court (McDermott J.) confirmed that the assessment of the unfair nature of the terms of a contract shall not relate to the core terms of the agreement between the parties.

46. The contract documentation in this case permitted possession proceedings to be brought in the event of a default in making repayment under the terms of the loan agreement, as has happened. All borrowers understand that the fundamental essence of mortgage agreements is that if scheduled loan repayments are missed the secured asset may be repossessed. This is such a fundamental principle that it is difficult to see how a contractual provision which gives effect to it could be said to fail the fairness test and no provision of the type listed as unfair under the Unfair Contract Terms Directive were identified by the Court. I have not been able to discern any term of the loan agreement that has operated unfairly against the Defendant in the context of these proceedings.

CONCLUSION

47. For the reasons set out above, I am satisfied that no credible defence has been identified by the Defendant and the Plaintiff is entitled to an Order for Possession. I will hear the parties in relation to the form of the Order and any consequential matters.