[2020] IEHC 140

THE HIGH COURT
CIRCUIT APPEAL

2017 No. 328 C.A.

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND
KEITH MCNAIR
DEBORAH MCNAIR
(OTHERWISE KNOWN AS DEBBIE MCNAIR)

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 23 March 2020

INTRODUCTION

1. This matter comes before the High Court by way of an appeal against an order for possession granted by the Circuit Court. The order for possession had been granted pursuant to a charge which has been registered against the defendants' interest in lands in Co. Sligo. The appeal is brought by the first defendant alone, Mr Keith McNair ("*Mr McNair*"). (The second defendant has not brought an appeal in respect of an order for possession which had been made against her on 11 May 2016).

2. Mr McNair appears as a litigant in person. Mr McNair has advanced a number of technical arguments in defence of the proceedings. These are set out in detail in the written submissions which Mr McNair has very helpfully prepared. Whereas a technical argument, if made out, can, of course, be a good ground of defence to proceedings, it should be noted that Mr McNair has made no real attempt to dispute the *substance* of the claim against him, namely, that he is in significant arrears pursuant to a loan agreement and mortgage. The last payment was made on 21 July 2011. (See Siobhan Coen's affidavit of 25 November 2015). It is also to be noted that whereas Mr McNair refers to the mortgage as the "alleged mortgage", it is evident from the correspondence which Mr McNair himself has exhibited that he has previously acknowledged the mortgage and had been seeking to restructure payments. See, for example, letter of 5 September 2011 wherein Mr McNair requested a "mortgage payment holiday" for the next six months.

PROCEDURAL HISTORY

3. The within proceedings were instituted by way of Civil Bill for Possession dated 2 April 2015. (The proceedings appear to have issued out of the Court Office on 29 April 2015). The proceedings were subject to the requirements of Order 5B of the Circuit Court Rules. Order 5B has been amended on a number of occasions, but as of the time these proceedings were instituted, the relevant provisions of Order 5B governing the form of proceedings were as prescribed principally under the Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2009 (S.I. No. 264 of 2009) (as amended in 2012). Order 5B, rule 3 provided that the special indorsement of claim shall state specifically and with all necessary particulars the relief claimed and the grounds thereof.

4. The proceedings were grounded on an affidavit of Ms Siobhan Coen sworn on 19 March 2015. Ms Coen describes herself as company secretary and officer of Start Mortgages Ltd (*"Start Mortgages").*

5. The grounding affidavit states that the defendants, i.e. Mr McNair and Ms McNair, had entered into a loan agreement with Start Mortgages on 5 February 2007. The principal sum was €350,000. The loan was to be secured on a dwelling house in Co. Sligo which was jointly owned by the McNairs. The ownership of the lands was registered pursuant to the Registration of Title Act 1964.

6. It is next averred that the McNairs mortgaged and charged the property the subject-matter of these proceedings, i.e. the dwelling house, by indenture of mortgage and charge dated 12 March 2007. A copy of the mortgage and charge has been exhibited. As appears from clause 8 (Lender's Powers) thereof, Start Mortgages, as mortgagee, may exercise a power of sale without the restrictions otherwise imposed by section 20 of the Conveyancing Act 1881.

7. It is provided at clause 3.02 that all moneys remaining unpaid by the borrower to the lender and secured on the mortgage shall immediately become due and payable on demand on the occurrence of *inter alia* an event of default under clause 9.01. One of the events of default, as defined, consists of default in making a monthly repayment.

8. The affidavit continues to state that the charge was subsequently registered as a burden against the defendants' title to the dwelling house. A copy of the relevant folio, Folio 10247F, Co. Sligo, has been exhibited.

9. The affidavit then explains that the defendants defaulted on the repayment of the sums due pursuant to the loan agreement. The correspondence between the parties, consisting of the making of demands for payment and correspondence in respect of the Code of Conduct on Mortgage Arrears, has been exhibited. I will return to consider this correspondence, in context, when discussing the grounds of defence put forward by Mr McNair. It is explained that the two defendants were treated separately for the purpose of the code of conduct in circumstances where Ms McNair had notified Start Mortgages that the couple had separated. (See also letter of 7 November 2014 from Ms McNair to Start Mortgages' solicitors).

10. An order for possession had been made against Ms McNair, the second defendant, on 11 May 2016. No appeal has been brought against that order.

11. The proceedings against Mr McNair were heard before the Circuit Court on 13 December 2016. An order for possession was made against Mr McNair on that date. The order was subsequently amended on 13 February 2017 to correct a clerical error. Mr McNair has raised an objection to this amendment, and this is discussed in detail at paragraph 74 *et seq.* below.

GROUNDS OF DEFENCE

(1). NO EXPRESS REFERENCE TO SECTION 62(7)

12. The first objection raised by Mr McNair is that the Civil Bill does not make express reference to the provisions of section 62(7) of the Registration of Title Act 1964. Mr McNair seeks to characterise the absence of such a reference as a failure to "invoke" or "exercise" the statutory power under section 62(7).

13. In order to assist the reader in understanding this line of argument, it is necessary to explain the legislative history. Section 62(7) of the Registration of Title Act 1964 provides a summary procedure whereby the owner of a registered charge can apply for an order for possession. The section reads as follows.

> (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.

14. The provisions of section 62(7) had been repealed as part of the reforms introduced under the Land and Conveyancing Law Reform Act 2009, and replaced by new provisions under that Act. In particular, new criteria were prescribed as to how the court should exercise its discretion in deciding whether to grant or refuse an order for possession. Insofar as "housing loans" (as defined) are concerned, it had been intended that the Circuit Court would have exclusive jurisdiction to entertain applications for possession.

15. In the event, however, the legislation gave rise to an unintended consequence in that, in the absence of express transitional provisions, it appeared that mortgages, which had been created prior to 1 December 2009, i.e. the commencement date of the relevant provisions of the Land and Conveyancing Law Reform Act 2009, could avail of neither (i) the previous procedure, i.e. under section 62(7) of the Registration of Title Act 1964, nor (ii) the new procedure, i.e. under section 97 of the Land and Conveyancing Law Reform Act 2009.

16. Ultimately, the position was rectified by way of legislative amendment. Special transitional provisions were introduced under the Land and Conveyancing Law Reform Act 2013 ("*the 2013 Act*"), so as to address the position of mortgages which had been created prior to 1 December 2009.

17. Insofar as relevant to the present proceedings, section 1 of the 2013 Act provides that section 62(7) of the Registration of Title Act 1964 applies in respect of a mortgage created prior to 1 December 2009, and may be invoked or exercised by any person as if those provisions had not been repealed by section 8(3) and Schedule 2 of the Land and Conveyancing Law Reform Act 2009. It will be recalled that the mortgage in the present case is dated 12 March 2007, and thus comes within the ambit of the section.

18. Section 3 of the 2013 Act confers jurisdiction on the Circuit Court to entertain possession proceedings in the case of mortgages created prior to 1 December 2009 in respect of principal private residences. The effect of this section is to ensure that what might be described colloquially as "home loans" are subject to the Circuit Court's jurisdiction irrespective of whether the mortgage was created prior to or subsequent to 1 December 2009. If the mortgage had been created prior to 1 December 2009, then the Circuit Court has jurisdiction to entertain an application pursuant to the Land and Conveyancing Law Reform Act 2013 (by applying section 62(7) of the Registration of Title Act 1964). If the mortgage had been created subsequent to 1 December 2009, then the Circuit Court has jurisdiction to hear an application pursuant to sections 97 and 101(5) of the Land and Conveyancing Law Reform Act 2009 ("*the 2009 Act*").

19. (It should be noted that the terminology differs slightly between the two Acts in that the 2009 Act refers to "housing loans" (as defined by cross-reference to the Consumer Credit Act 1995), whereas the 2013 Act refers to the "principal private residence" of the mortgagor (or consenting party). Nothing turns on this difference on the facts of the present case in circumstances where the dwelling house had been Mr McNair's principal private residence at the time the mortgage had been created).

20. Having set out this summary of the legislative history, I now return to consider the argument being advanced by Mr McNair. Mr McNair complains that the Civil Bill does not expressly reference section 62(7) of the Registration of Title Act 1964. Mr McNair appears to argue that, in order to avail of the transitional provisions under the 2013 Act, section 62(7) must be formally "invoked" by making express reference to same in the Civil Bill. In this regard, it will be recalled that section 1 of the Land and Conveyancing Law Reform Act 2013 provides that, in the case of a mortgage created prior to 1 December 2009, section 62(7) shall apply and "may be invoked or exercised by any person as if those provisions had not been repealed".

21. With respect, there is no merit to this argument. First, it is evident from the language of section 1 of the 2013 Act that the word "invoked" is intended to be synonymous with the word "exercised". It is not a necessary precondition to the exercise of the statutory power to seek an order for possession that there must be a ritualistic incantation or invocation of section 62(7). Rather what has to be considered is the *substance* of the Civil Bill. More specifically, it must be asked whether the content of same makes it clear to a defendant what the claim against them is.

22. This leads on to the second reason for finding that the argument is incorrect. The content of a Civil Bill for Possession is prescribed under Order 5B and Form 2R of the Circuit Court Rules. Under the version of Order 5B which had been in force at the time these proceedings were instituted, the special endorsement had to set out the relief claimed specifically, with all necessary particulars, the grounds thereof, and the basis upon which jurisdiction is claimed. There is no requirement to make express reference to the provisions of section 62(7) of the Registration of Title Act 1964. Rather, the objective is to ensure that relevant information is set out which allows the recipient of a Civil Bill for

Possession, i.e. a defendant, to fully understand the case being made against them. Thus, for example, it is necessary to refer to the specific lands involved; the mortgage or charge being relied upon; the relevant folio; and the extent of the arrears said to be outstanding. This information will have to be verified on affidavit, and the relevant documents exhibited. A defendant, armed with this information, will understand the basis of the claim against them, and will be in a position to prepare a defence (if one is available).

23. The special endorsement of claim in the present case provides all this relevant information. Moreover, section 3 of the Land and Conveyancing Law Reform Act 2013 has been expressly cited as founding jurisdiction. This is the provision which confers jurisdiction on the Circuit Court to entertain possession proceedings in respect of a mortgage, such as that in the present case, which had been created prior to 1 December 2009.

24. To insist on the inclusion of a separate reference to section 62(7) of the Registration of Title Act 1964 would add nothing to all of this. It would afford no greater understanding to a defendant of the essence of the claim being made against them. I am satisfied, therefore, that there is no requirement to include an express reference to section 62(7) in a Civil Bill for Possession. Mr McNair has suffered no prejudice as a result of its not having been referenced.

25. Finally, before concluding this discussion, it is instructive to consider the current wording of the Circuit Court Rules. Subsequent to the institution of these proceedings (April 2015), a number of amendments have been made to the Circuit Court Rules. Crucially, the *subsequent* versions of Order 5B and the prescribed form (Form 2R) do not impose an obligation to expressly reference section 62(7) of the Registration of Title Act 1964. The prescribed form of Civil Bill for Possession has been updated to reflect the fact that the basis for the Circuit Court's jurisdiction in the case of what might be described informally as "home loans" differs depending on the date upon which the particular mortgage had been created. The form of endorsement prescribed for a pre- 1 December 2009 mortgage now reads as follows.

> "These proceedings are commenced in the Circuit Court pursuant to section 3 of the Land and Conveyancing Law Reform Act 2013 as they are proceedings brought by a mortgagee seeking an order for possession of land which is the principal private residence of—
>
> (a) the mortgagor of the land concerned, or
> (b) a person without whose consent a conveyance of that land would be void by reason of—
>
> (i) the Family Home Protection Act 1976, or
> (ii) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010,
>
> and the mortgage concerned was created prior to 1 December 2009."

26. As appears, it is sufficient to refer to section 3 of the Land and Conveyancing Law Reform Act 2013. There is no obligation to go further and reference section 62(7) of the Registration of Title Act 1964. This is logical in circumstances where it is the 2013 Act which confers jurisdiction on the Circuit Court to hear these type of possession proceedings irrespective of the monetary value of the mortgaged property. A reference to section 62(7) of the Registration of Title Act 1964 is not necessary.

27. It is also to be noted that these proceedings were instituted prior to the coming into force of a practice direction issued by the then President of the Circuit Court, Mr Justice Groarke. The practice direction is entitled "CC17 Proceedings for possession or sale on foot of a mortgage". The practice direction only applies to proceedings instituted on or after 17 August 2015. Again, although not applicable to these proceedings, it is instructive to note that the Civil Bill for Possession issued in the present case would fulfil the requirement under the practice direction that a Civil Bill must show jurisdiction on its face. The practice direction requires that a Civil Bill for Possession, in the case of a pre- 1 December 2009 mortgage, should contain a statement that the proceedings are commenced in the Circuit Court pursuant to section 3 of the Land and Conveyancing Law Reform Act 2013.

(2). RATEABLE VALUATION / VALUATION ACT 2001

28. To assist the reader in understanding the next line of defence advanced, it is necessary first to explain how the *value* of the underlying lands, i.e. the lands the subject-matter of proceedings, can sometimes be relevant to the Circuit Court's jurisdiction. Section 22 of the Courts (Supplemental Provisions) Act 1961 (as amended) provides that the Circuit Court shall, concurrently with the High Court, have all the jurisdiction of the High Court to hear and determine any proceedings of the kind mentioned in the Third Schedule to the Act.

29. The Third Schedule of the 1961 Act sets out, in tabular form, the Circuit Court's jurisdiction in various types of cases. Column (1) contains a unique reference number. Column (2) identifies the civil proceedings in respect of which concurrent jurisdiction is conferred on the Circuit Court. Column (3) sets out an exclusion of jurisdiction in certain cases. This is subject to the possibility of the parties consenting to jurisdiction pursuant to section 22(1). Column (4) identifies the judges of the Circuit Court by whom the jurisdiction is to be exercised.

30. The class of civil proceedings which come closest to the present proceedings is the class set out at reference number 19 of the Third Schedule. Columns (2) and (3) of the relevant entry read as follows.

> *(2) Civil proceedings in respect of which jurisdiction is conferred on the Circuit Court*
>
> Proceedings for any of the following purposes—
> (a) the redemption of mortgages on land,
> (b) the raising of portions or other charges on land,

(c) the sale and distribution of the proceeds of any land subject to any mortgage, lien or charge,

(d) applications under sections 94, 97 (except where the property concerned is subject to a housing loan mortgage), 100 (except where the property concerned is subject to a housing loan mortgage) and 117 of the Land and Conveyancing Law Reform Act 2009.

(3) Exclusion of jurisdiction (except by consent of necessary parties) in certain cases

Where the market value of the land exceeds €3,000,000.

31. As appears, the Circuit Court's jurisdiction is excluded where the market value of the land exceeds €3,000,000. (This is subject to the possibility of the parties consenting to jurisdiction).

32. Mr McNair's argument relies on the fact that prior to 11 January 2017 the exclusion was defined not by reference to the market value of lands, but by reference to its rateable valuation. The latter measure refers to the figure that had been fixed for the purposes of levying rates payable to local authorities. Notwithstanding that rates have not been payable in respect of domestic premises since 1977, it had still been possible to have a rateable valuation fixed for a dwelling. Mr McNair submits that this possibility ended upon the coming into effect of the Valuation Act 2001 on 2 May 2002. (This submission overlooks section 67 of that Act).

33. The Third Schedule of the Courts (Supplemental Provisions) Act 1961 was amended on 11 January 2017 to substitute market value for rateable value, as the measure defining the limits of the Circuit Court's jurisdiction. (See Civil Liability and Courts Act 2004 (Commencement) Order 2017 (S.I. No. 2 of 2017).

34. Mr McNair contends that there had been a lacuna in the law from 2 May 2002 until 11 January 2017. More specifically, he contends that it follows, by necessary implication from his assertion that it was not possible to have a (new) rateable valuation fixed for a dwelling during this period, that no possession proceedings could be brought within the jurisdiction of the Circuit Court by reference to the Third Schedule. Put shortly, it is said that between 2 May 2002 and 11 January 2017, the Circuit Court could not hear any applications seeking an order for possession. The within proceedings are thus said to have been instituted without jurisdiction in April 2015.

35. These arguments are untenable for two reasons. First, arguments in almost identical terms were roundly rejected by the Supreme Court in *Permanent TSB plc v. Langan* [2017] IESC 71; [2018] 1 I.R. 375. The judgment concerned proceedings for possession instituted in the Circuit Court prior to the changeover from rateable valuation to market value. None of the mortgaged lands constituted the mortgagor's principal private residence. The Supreme Court held that the Circuit Court had jurisdiction to entertain possession proceedings in cases where the relevant property either had a rateable valuation which is shown not to exceed the prescribed threshold (€253.95), or where the

property is shown not to have a rateable valuation at all (property which does not have a rateable valuation cannot be said to exceed the threshold). In this context, the term "rateable valuation" includes a *deemed* rateable valuation under section 67 of the Valuation Act 2001.

36. Secondly, and in any event, the Circuit Court's jurisdiction in the present case is not based on the Third Schedule of the 1961 Act at all. This is because—in contrast to the facts of *Langan*—the mortgage in the present case is in respect of the mortgagors' principal private residence.

37. More specifically, the Circuit Court's jurisdiction in this case derives from the fact that the lands had been the principal private residence of the mortgagors, i.e. Mr McNair and Ms McNair, at the time the mortgage and charge had been entered into. The jurisdiction is founded on section 3 of the Land Law and Conveyancing Law Reform Act 2013. The proceedings do not depend on the provisions of section 22 and the Third Schedule of the Courts (Supplemental Provisions) Act 1961. Accordingly, the *value* of the dwelling the subject of the registered charge in the present case is simply irrelevant to the question of jurisdiction.

38. The 1961 Act is concerned with a general jurisdiction. The Land Law and Conveyancing Reform legislation has introduced a specific jurisdiction to address what might be informally described as "home loans". In the case of a pre- 1 December 2009 mortgage, the jurisdiction is provided for under section 3 of the Land Law and Conveyancing Law Reform Act 2013. This special jurisdiction is not subject to any limit by reference to the value of the dwelling the subject of the mortgage or charge. A similar conclusion has been reached by the High Court (MacGrath J.) in *KBC Bank Ireland plc v. Brennan*, unreported, 25 February 2020, [23] to [26].

39. In the case of a post- 1 December 2009 mortgage, the jurisdiction derives from sections 97 and 101(5) of the Land and Conveyancing Law Reform Act 2009. The latter section confers an exclusive jurisdiction on the Circuit Court.

> (5) Where an application under section 97(2) or section 100(3) concerns property which is subject to a housing loan mortgage the Circuit Court shall have exclusive jurisdiction to deal with the application and the application shall not be made to the High Court.

40. This is then reflected in the language at reference number 19 of the Third Schedule of the 1961 Act (cited at paragraph 30 above). It expressly *excludes* applications under section 97 of the Land and Conveyancing Law Reform Act 2009 where the property concerned is subject to a "housing loan" mortgage.

41. All of this emphasises that the jurisdiction under the Land and Conveyancing Law Reform Acts 2009 and 2013, respectively, is different and distinct from that under the Courts (Supplemental Provisions) Act 1961.

42. Put shortly, neither market value nor rateable valuation are relevant to proceedings of the type now before the court.

(3). PRINCIPAL PRIVATE RESIDENCE

43. As discussed above, the Circuit Court's jurisdiction to entertain possession proceedings in respect of a pre- 1 December 2009 mortgage over a person's principal private residence derives from section 3 of the Land and Conveyancing Law Reform Act 2013.

44. Mr McNair contends, in his affidavit of 12 December 2016, that as a consequence of the term "principal private residence" not being "legally defined" under the Land and Conveyancing Law Reform Act 2013, the Act cannot be used to commence any case in the Circuit Court.

45. Mr McNair further contends that the dwelling the subject-matter of the mortgage and charge is not his "principal private residence", but rather his "legal family home".

46. There is no merit to these contentions. A similar argument has been rejected by the High Court (MacGrath J.) in *KBC Bank Ireland plc v. Brennan*, unreported, 25 February 2020, [26]. The term "principal private residence" falls to be interpreted by reference to its ordinary and natural meaning. The use of the qualifying word "principal" is intended to address a contingency where a person might have more than one residence. In such a contingency, the Circuit Court's jurisdiction under section 3 of the Land and Conveyancing Law Reform Act 2013 will be confined to that person's "principal" residence, i.e. their main or primary residence. It does not follow, as Mr McNair seeks to suggest, that where a person has a single residence (as is the case with most people), he or she does not have a principal residence. In such a scenario, that residence will be the person's principal residence. Put otherwise, a person does not have to have two or more homes before they can be said to have a principal residence.

47. Even if this were not the literal interpretation of the term, I am satisfied that to construe the term "principal private residence" as only applicable to that small subset of borrowers who have more than one residence would produce an "absurd" result and/or would fail to reflect the plain intention of the Oireachtas. Section 5 of the Interpretation Act 2005 states that a statutory provision shall be given a construction that reflects the plain intention of the Oireachtas where that intention can be ascertained from the Act as a whole. There could be no rational reason for confining the Circuit Court's jurisdiction to those cases where the borrower has a *second* home. Rather, the plain intention of the legislation is to ensure that all borrowers are entitled to the benefit of having possession proceedings in respect of their main residence heard in the Circuit Court, with its lower legal fees.

48. Finally, the attempted distinction which Mr McNair seeks to draw between a "principal private residence" and a "family home" under the Family Home Protection Act 1976 (as amended) is not well founded. In particular, it is incorrect to infer that the two concepts are mutually exclusive. The concept of a "family home" is defined for the purposes of the Family Home Protection Act 1976 (as amended) as meaning, primarily, a dwelling in

which a married couple ordinarily reside. (There is an extended meaning in cases where a couple is separated).

49. The relationship between the two terms might thus be described as follows: not every "principal private residence" will be a "family home", e.g. a dwelling might be in single occupation, but almost every "family home" will be a "principal private residence". On the facts of the present case, the mortgaged property was both.

50. The very fact that Mr McNair concedes that the dwelling had been used as the family home, at the time the mortgage had been entered into, confirms that it had been Mr McNair and Ms McNair's principal private residence.

(4). FAMILY HOME PROTECTION ACT 1976

51. Mr McNair has asserted a breach of the Family Home Protection Act 1976 (as amended) in that, or so it is alleged, Ms McNair did not receive independent legal advice at the time the mortgage had been entered into. This assertion is not well founded for two reasons. First, Ms McNair is one of the registered owners of the dwelling house, and, as such, there would have been no requirement for a separate consent under the Family Home Protection Act 1976 (as amended). See *Nestor v. Murphy* [1979] I.R. 326.

52. Secondly, there is no suggestion in the papers before the court that the loan was other than for the purposes of refinancing an existing mortgage on the family home. (The folio indicates that an earlier charge in favour of First National Building Society was cancelled at the time the charge in favour of Start Mortgages was registered). There is no suggestion that the loan was, for example, intended for business purposes, related to Mr McNair solely, such as might trigger a requirement for independent legal advice.

53. Thirdly, and perhaps most importantly, any objection that Ms McNair did not understand the nature of the transaction is one which should be advanced by her, rather than by Mr McNair. In the event, Ms McNair did not raise this issue, and has not sought to appeal the order for possession made against her by the Circuit Court.

(5). CODE OF CONDUCT FOR MORTGAGE ARREARS

54. Mr McNair complains that Start Mortgages have not complied with the Code of Conduct for Mortgage Arrears ("*CCMA*"). First, it is alleged that Start Mortgages did not communicate with Mr McNair in a timely manner. In particular, it is alleged that requests for documentation were not responded to in a timely manner, and that a request for confirmation as to which of the European Central Bank ("*ECB*") rates applies has not been responded to. Secondly, it is alleged that Mr McNair was not notified of the appointment of a third party to engage with him as a borrower. Thirdly, it is alleged that Start Mortgages were not authorised by the Central Bank as a credit institution as of the time the mortgage had been entered into. (I will return to discuss this last point in more detail under the next heading below).

55. The first issue to be addressed is whether the CCMA can be relied upon in the defence of possession proceedings. The legal status of such codes of conduct has been explained in the judgment of the Supreme Court in *Irish Life and Permanent plc v. Dunne* [2015] IESC

46; [2016] 1 I.R. 92. Clarke J. (as he then was), delivering the unanimous judgment of the court, indicated that there is a distinction to be drawn between those provisions of a code of conduct which regulate possession proceedings, and other aspects of the code, e.g. in terms of provision of information, communication with borrowers etc.

"[63] So far as one limited aspect of the Code is concerned, it might well be said that a court making an order for possession might be facilitating the carrying out of 'the very act' which the Code is designed to prevent. As already noted, the Code imposes a moratorium on seeking possession in certain circumstances. Presumably the purpose of the Code in that regard is to provide a window of opportunity in which there can be an exploration of whether there are other solutions to the mortgage arrears problems of the borrower in question and, if there are, to take action to put those solutions in place. A financial institution which, entirely ignoring the provisions of the Code in that regard, simply went ahead and sought possession as soon as it was legally entitled so to do would be doing the very thing which the Code is designed to prevent. For a court to entertain an application for possession which was brought in circumstances of clear breach of the moratorium would be for a court to act in aid of the actions of a financial institution which were clearly unlawful (by being in breach of the Code) and in circumstances where the very act of the financial institution concerned in seeking possession was contrary to the intention or purpose behind the Code itself.

[64] In my view a court could not properly act to consider a possession application in those circumstances. It should be recorded that the Code (being the version applicable to this case) does make some provision for the moratorium period being cut short (see step four of the M.A.R.P. provisions) or not applying (see provision 48). I am, in this section of this judgment, dealing with a situation where an application for possession has been brought at a time when the Code precludes such action. Like consideration would apply to any similar provisions in the current or any future versions of the Code.

[65] However, in respect of the other provisions of the Code, different considerations apply. There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution, in formulating its detailed policies in respect of mortgage arrears and applying those policies to the facts of individual cases, can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the Oireachtas had intended to give the courts such a role then it would surely have required detailed and express legislation which would have established the criteria by reference to which the court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law."

56. For the sake of completeness, it should be noted that Clarke J. went on to indicate the manner by which compliance with the code of conduct might be demonstrated, as follows.

> "[71] In those circumstances, it seems to me that it is appropriate that the court should require that it be satisfied that there has been no breach of the moratorium. While it will be a matter for any court hearing an individual application to determine the adequacy of the evidence placed before it, I should say that it seems to me that a simple averment in an appropriate affidavit to the effect that the proceedings were commenced outside of the moratorium period, insofar as it is relevant to the case in question, ought be sufficient to establish compliance with that requirement on a prima facie basis. If the full or normal moratorium period is said not to apply then that should be explained. Clearly, if the matter is contested, the court may have to consider what further evidence may be necessary to enable the court to be satisfied that there was no breach of the moratorium.
>
> [72] In conclusion on this issue I should say that in those circumstances I am satisfied that, in the limited cases of a breach of the moratorium, but in no other cases unless and until appropriate legislation is passed, a court should decline to make an order for possession."

57. It is clear from the judgment of the Supreme Court that non-compliance with the CCMA will only affect a relevant lender's entitlement to obtain an order for possession where the breach involves a failure by a lender to abide by the moratorium on taking legal proceedings. Mr McNair makes no complaint in relation to a breach of this provision. The grounding affidavit filed on behalf of Start Mortgages sets out, at paragraphs 11 to 15, the manner in which compliance with the moratorium was achieved.

58. It follows, therefore, that it is unnecessary to reach a definitive view as to whether the breaches of the other provisions of the CCMA alleged by Mr McNair are well founded or not. This is because, even if well founded, they do not give rise to a defence to the application for an order for possession.

(6). AUTHORISATION BY CENTRAL BANK OF IRELAND

59. Mr McNair has alleged that the mortgage was unlawful because Start Mortgages did not hold an authorisation from the Central Bank of Ireland until 2008. This allegation is new, in the sense that it had not been raised in the affidavits filed by Mr McNair before the Circuit Court. Start Mortgages were thus not afforded an opportunity to address this issue on affidavit.

60. As explained by the High Court (Barr J.) in *KBC Bank Ireland plc v. Wilson* [2019] IEHC 870, if a defendant wishes to make the case that the granting of a loan is illegal on the basis that it constituted unlicensed banking business, which required the holding of a banking licence, then that is a matter for the defendant to establish in evidence.

> "40. Finally, in relation to the issue as to whether IIB Homeloans Limited held a banking licence at the time when they gave the loans to the defendants and at the time

when they accepted the charge from them, if the defendants wished to make the case that the granting of such loans, or the acceptance of a charge by that company was an illegal or unlicensed activity, because such activity constituted banking business, which required the holding of a banking licence, that was a matter for the defendants to establish in evidence. The defendants bore the burden of proof in that regard. They have not discharged the onus of proving that either IIB Homeloans Limited did not hold a banking licence at the relevant time, or if they did not, that they were required to do so in order to grant the loans which they did to the defendants, or to accept the security which they did from the defendants. There is no evidence before the Court that such activities constitute banking business such as to require the entity conducting such activities to hold a banking licence. In these circumstances, the Court cannot hold that there is any substance in this ground of defence."

61. I respectfully adopt this analysis as representing a correct statement of the law. Applying this analysis to the facts of the present case, Mr McNair has failed to establish that the entering into of the loan agreement and taking of a charge over the dwelling were activities which, as of 2007, required an authorisation from the Central Bank of Ireland. Mr McNair accepts that Start Mortgages were authorised by the Central Bank of Ireland in 2008.

(7). CIRCUIT COURT PRACTICE DIRECTION / PROOF OF SERVICE

62. The Circuit Court practice direction "CC17 Proceedings for possession or sale on foot of a mortgage" has already been referred to briefly in the context of the discussion of section 62(7) of the Registration of Title Act 1964. (See paragraph 27 above). Mr McNair asserts that certain requirements of the practice direction in respect of the service of the proceedings have not been complied with.

63. This argument is untenable. The practice direction only applies to proceedings instituted on or after 17 August 2015, and is thus not applicable to these proceedings.

64. For the sake of completeness, I should record that there is no substance in the complaint that the proceedings were not properly served. The registered owners of the dwelling house, i.e. Mr McNair and Ms McNair, both appeared and participated before the Circuit Court. Mr McNair has elected to exercise his right of appeal to the High Court, and appeared before this court as a litigant in person. There is no suggestion that there had been any other lawful occupant of the premises who required to be served.

65. I am satisfied, therefore, that all proper parties were on notice of the proceedings, and participated in same.

(8). RATE OF INTEREST / ECB RATE

66. The loan agreement indicates that the interest rate is a standard variable rate. The factors to be taken into account in fixing the rate are elaborated upon as follows at Special Condition 402.

> "The rate of interest applicable to this loan will vary in line with market interest rates. It will be directly affected by the rise and fall of the European Central Bank Rate."

67. Further information in respect of the interest rate is set out in the General Loan Conditions, at Part 5 of the letter of offer. In particular, it is explained that the rate of interest may vary before the advance is drawn down, and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with changes in the applicable interest rate.

68. It is then stated as follows in the second paragraph of General Loan Condition 4.

> "The Loan shall bear interest at the current rate of the Lender for the relative account and be computed on a day to day basis and compoundable with monthly resets before as well as after Judgment. A Certificate signed by an officer, at the date of the Certificate, of the Lender stating the current rate of interest applicable to the said account from time to time shall be prima facie evidence against the Borrower of the rate of interest applicable to the relative account from time to time. The Mortgage will be one for securing the payment of all monies for the time being due by the Borrower to the Lender on any account whatsoever."

69. Mr McNair asserts that the reference to the European Central Bank rate is uncertain in that, or so it is said, the ECB in fact operates a number of different rates. It is argued, therefore, that the alleged failure to specify which ECB rate applies means that the loan agreement has "no defined product", and that the contract falls. It is further suggested that, in the absence of a definition of which ECB rate will govern the loan, it is not possible to calculate the sums owing.

70. With respect, this line of argument misunderstands the limited significance of the reference to the ECB rate. This is not a mortgage whereby the interest rate is mathematically defined by reference to the ECB rate. This is to be contrasted with so-called "tracker" mortgages whereby there is a direct relationship between the ECB rate and the interest charged, for example, the mortgage might provide that the interest rate is ECB plus a fixed margin. Rather, the interest rate is one which Start Mortgages is entitled to vary in line with market interest rates. One of the factors which must be considered is the ECB rate. The new interest rate, as fixed by Start Mortgages, is to be notified to the customer.

71. The question of which ECB rate is to be considered would only be relevant had Mr McNair sought to challenge the basis upon which the interest rate had been varied over the period of the loan. A borrower might argue, for example, that a hike in the variable interest is not justified where the ECB rate had not changed. But that is not the case which Mr McNair makes. Rather, his case is that the sums outstanding on the loan cannot be calculated without knowing the ECB rate. With respect, this is not correct. There is no mathematical relationship between the interest rate and the ECB rate. The monthly instalments payable are based on the interest rate as notified by Start Mortgages. There

is no difficulty in calculating the repayment due, the arrears accrued, and the balance outstanding. This exercise is not dependent on knowing what the ECB rate is.

72. Start Mortgages has provided a detailed breakdown of the arrears and the balance outstanding. See Exhibit "SC7" to Siobhan Coen's affidavit of 19 March 2015, and "SC11" to Ms Coen's affidavit of 25 November 2015.

73. There is an artificiality to this complaint in circumstances where no repayments—whether of principal or interest—have been made pursuant to the loan agreement since 21 July 2011.

(9). AMENDMENT OF CIRCUIT COURT ORDER

74. Mr McNair contends that the fact that the Circuit Court order was amended has the effect of invalidating the proceedings. This amendment arose in the following circumstances. The proceedings against Mr McNair came on for hearing on 13 December 2016 before the Circuit Court (Her Honour Judge Flanagan). The order as originally drawn up mistakenly refers to the defendant having been served with "the Ejectment Civil Bill on the Title". This was clearly a clerical error in circumstances where the proceedings had been instituted by way of a Civil Bill for Possession.

75. Mr McNair took exception to the form of order, and issued a motion on 13 February 2017 seeking to have the order of 13 December 2016 vacated. This application was grounded upon an affidavit sworn by Mr McNair on 13 February 2017. Mr McNair has averred that the order for possession was "void in law" as it referred to an "Ejectment Civil Bill" and not to a "Civil Bill for Possession".

76. It appears that the order was then amended to reflect the correct form of proceedings. In this regard, Mr McNair has exhibited, as part of his affidavit seeking an extension of time within which to bring an appeal, a letter sent to him by the Courts Service on 13 February 2017. The letter reads as follows.

> "Dear Mr McNair
>
> I enclose an amended Order made by her Honour Judge Flanagan at Sligo on the 13th December 2017 (*sic*) reflecting "Civil Bill for Possession" in lieu of "Ejectment Civil Bill on Title" for your attention.
>
> Yours faithfully"
> *The date should, presumably, read 13 *February* 2017.

77. It appears, therefore, that the issuing of Mr McNair's motion had the consequence that the error in the order was corrected. This amendment appears to have been made in advance of the return date for the motion. Mr McNair complains that this amendment was not properly made in accordance with the requirements of Order 65 of the Circuit Court Rules. Insofar as relevant, Order 65, rule 3 provides as follows.

> 3. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected without an appeal—

[…]

(b) where the parties do not consent, by the Court (in the case of a judgment or order of the Court), or by the County Registrar (in the case of an order of the County Registrar)

(i) on application made to the Court or, as the case may be, the County Registrar, by motion on notice to the other party or

(ii) on the listing of the proceeding before the Court by the County Registrar on notice to each party.

78. As appears, the objective of the rule is to ensure that—in the absence of the consent of the parties—an amendment may only be made where each party is on notice of the intended amendment. In the present case, it was Mr McNair himself who brought the error in the original order to the attention of the Circuit Court by issuing his motion. Of course, Mr McNair's motive in so doing was to seek to have the order vacated. Instead, it seems that the Circuit Court judge decided to amend the order. It would have been preferable had this been done in open court on the return date, and the revised form of order should have expressly recorded that the order had been amended. Notwithstanding these shortcomings, there can be no real complaint that the *spirit* of Order 65, rule 3 has not been complied with. Far from the amendment being made without notice to Mr McNair, it was he who identified the error and brought it to the attention of the Circuit Court. The error in the original version of the order was clearly a clerical error, and suitable for correction under the slip rule.

79. Further, and in any event, the matter has now come before the High Court by way of a rehearing. Mr McNair himself relied on the (allegedly defective) order to bring an appeal to the High Court. Any alleged defect in the original order of the Circuit Court is now spent. Mr McNair has had an opportunity to fully argue his case before the High Court. Indeed, as the length of this judgment testifies, Mr McNair took the opportunity to raise a large number of issues.

80. In the circumstances, Mr McNair has suffered no prejudice at all as a result of the defect in the original form of the order. This is not a case, for example, where it is alleged that there had been some shortcoming or deficiency at the hearing of first instance, such that an appeal might not represent an adequate remedy. Here, the error in the order is one which arose, by definition, *after* the Circuit Court hearing had concluded and the spoken order had been made in court on 13 December 2016. The clerical error in subsequently drawing up that spoken order cannot be said to have impacted in any way upon the fairness or procedural correctness of the hearing which had already taken place before the Circuit Court.

81. In summary, therefore, there is no merit to the complaint that the alleged invalidity of the Circuit Court's original order affects the High Court's jurisdiction to entertain the appeal and to reach a lawful determination upon it.

(10). UNFAIR CONTRACT TERMS DIRECTIVE (93/13/EEC)

82. Mr McNair makes a vague complaint that there has been a failure to comply with the Unfair Contract Terms Directive (93/13/EEC). No attempt has been made, however, to specify in what way the mortgage is said to contain "unfair terms".

83. The implications of the Directive for mortgages has been considered in detail by the High Court (McDermott J.) in *Permanent TSB plc v. Davis* [2019] IEHC 184. The judgment emphasises that neither (i) the definition of the main subject matter of the contract, nor (ii) the adequacy of the price and remuneration, are to be considered when assessing the fairness of a term, provided same are in plain intelligible language. This follows from Article 4(2) of the Directive.

> 2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.

84. McDermott J. identified the main subject matter of a loan agreement as follows (at paragraph 30 of the judgment).

> "[…] However, it is clear that the main subject matter of the agreement was that all monies advanced under the loan would be repaid by monthly instalments and at a variable interest rate over a period of thirty-five years. The loan would be secured on the family home: it was so secured. If the borrowers defaulted on their repayments the plaintiff became entitled to seek an order for possession having made the appropriate demand for repayment and make good their security. These terms were in clear and intelligible form and were fully understood by each of the parties to involve the offering of the defendants' family home and principal place of residence as security for the loan and that in default of making the agreed repayments the security might be realised by the lender (see *AIB Mortgage Bank v Cosgrove* [2017] IEHC 803 per Faherty J., at para 60 and *Allied Irish Banks plc v O'Donoghue* [2018] IEHC 599 per Meenan J., at paragraphs 7-21)."

85. This approach has very recently been approved of by the High Court (MacGrath J.) in *KBC Bank Ireland plc v. Brennan*, unreported, 25 February 2020, [27] to [34].

86. Having carefully considered the general and special conditions of the loan agreement in the present case, I am satisfied that the "main subject matter of the contract" is similar to that considered in *Permanent TSB plc v. Davis and KBC Bank Ireland plc v. Brennan*. In particular, the loan offer of 5 February 2007 sets out, in plain and intelligible language, (i) the terms of the loan; (ii) the period of the loan agreement; (iii) the number and amount of the repayment instalments; (iv) the total amount payable, and (v) the cost of the credit. The applicable interest rate is also set out. The requirement to enter into a mortgage is clearly stated, and there is an express warning that the borrowers' home is at risk if they do not keep up payments on a mortgage secured on it.

87. There is nothing in the papers before me to suggest that the loan agreement and/or mortgage contained any "unfair terms".

(11). FORMAL DEMAND FOR PAYMENT

88. The approach which a court must take on an application for an order for possession pursuant to section 62(7) of the Registration of Title Act 1964 has been explained as follows by the Supreme Court in *Irish Life and Permanent Plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92, [80].

> "[…] In order for the power to seek an order for possession under s.62(7) of the 1964 Act to have arisen, what was required was that the principal monies were due. It follows that the question which any court invited to apply the jurisdiction arising under that section must ask itself is as to whether, as a matter of law, it can properly be said that the principal monies had become due. The first port of call for determining whether those monies had become due is to identify the terms of the contract between the lender and the borrower as to when the entire principal sum can be said to fall due. Terms in that regard can, and do in practice, differ. It may be that, on a proper interpretation of the contractual documents in one case, a demand for payment following some form of default may be necessary. It might, however, be the case that, in other circumstances and in the light of the terms contained in a particular mortgage deed, the full sum may become due without demand in certain, specified circumstances."

89. As appears, the making of a formal demand will often be a prerequisite to the principal monies secured on a charge becoming due.

90. Mr McNair contends that Start Mortgages have failed to prove that a letter of demand has been sent. With respect, this contention is untenable in circumstances where (i) Start Mortgages has exhibited several letters of demand for payment, and (ii) Mr McNair himself has exhibited correspondence written by him which expressly references a letter of demand.

91. In particular, Mr McNair has exhibited a letter which he wrote to Start Mortgages on 12 November 2014. (Exhibit "KM10" to Mr McNair's affidavit of 28 October 2016). This letter expressly references a letter of 31 October 2014 from the solicitors acting on behalf of Start Mortgages (Baily Homan Smyth McVeigh). This solicitor's letter expressly references the loan account; identifies that arrears stand at €118,278.88; and demands payment of the arrears within ten days of the date of the letter.

92. It is thus clear from Mr McNair's own correspondence that he received a letter of demand.

(12). TRANSFER OF BENEFICIAL INTEREST

93. Mr McNair places emphasis on a letter of 27 April 2016 from Start Mortgages to him. It is stated as follows on the second page of that letter.

> "Point 7 – Sale of alleged loan contract: The beneficial interest of your loan was transferred to LSF IX Java Investments Ltd. Start Mortgages Ltd remains the legal

owner of your mortgage and there is no change to the terms and conditions of same. Please note that as the transfer was a matter of commercial sensitivity, we are unable to provide the information requested regarding the transfer of your loan."

94. Mr McNair seeks to argue that Start Mortgages are precluded from seeking an order for possession in circumstances where the beneficial interest lies elsewhere. This argument is not correct in law. The entitlement to apply for an order for possession under section 62(7) resides with the registered owner of a charge. Start Mortgages have proved that they are the owner of the charge by exhibiting a copy of the relevant folio, Folio 10247F, Co. Sligo. It appears therefrom that Start Mortgages is the registered owner of the charge. Mr McNair has not sought to challenge the correctness of this registration. Indeed, he could not do so in the context of possession proceedings.

95. The Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352; [2019] 1 I.R 385 held that the correctness of the Register of Title cannot be challenged in possession proceedings. See paragraphs [67] and [68] as follows.

> "A plaintiff seeking an order for possession must adduce proof, *inter alia*, that he or she is the registered owner of the charge. It is registration that triggers the entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification.
>
> The challenge to registration is brought by other types of proceedings *inter partes*, or where the PRA is respondent, and in the manner I have described."

96. Leave to appeal to the Supreme Court was refused by Determination dated 12 April 2019, *Tanager DAC v. Kane* [2019] IESCDET 80.

97. In summary, Start Mortgages, as the registered owner of the charge, has sufficient interest to make an application for an order for possession.

(13). CHANGE FROM LIMITED COMPANY TO DAC

98. Mr McNair asserts that the proceedings should be amended to reflect the fact that Start Mortgages is now a designated activity company under the Companies Act 2014.

99. For the reasons set out in my judgment in *Start Mortgages DAC v. Kavanagh* [2019] IEHC 216, no formal application is required as the change takes effect by operation of law by virtue of section 63(12) of the Companies Act 2014.

> "The statutory language under subsection 63(12) indicates that the change in status does not render "defective" any legal proceedings by of against the company. The use of the term "defective" is significant in that the relevant Rules of

> Superior Courts which allow for the amendment of proceedings often refer to defects or errors as necessitating the amendment. For example, Order 28, rule 12, which is sometimes used to amend the title of proceedings, allows a court to amend any defect or error in any proceedings. Section 63(12) makes it clear that the change in status does not give rise to a defect in the existing proceedings.
>
> Crucially, section 63(12) provides that the proceedings may be "continued" against the company in its new status. This indicates that the provisions of subsection 63(12) are self-executing. There is requirement to amend any "defect" in the title to the proceedings or to substitute a new party. Rather the proceedings simply continue against the company in its new status.
>
> Given the clear terms of subsection 63(12), I am of the view that, strictly speaking, it is unnecessary for a company to make a formal application to court to amend the title of proceedings to reflect the change in status of the company."

100. This judgment has since been upheld by the Court of Appeal.

(14). CONSTITUTIONAL CLAIM

101. Mr McNair seeks to argue that the provisions of the Land and Conveyancing Law Reform Act 2013 are invalid having regard to the provisions of the Constitution of Ireland. More specifically, it is said that it is unconstitutional to give retrospective effect to the repealed provisions of section 62(7) of the Registration of Title Act 1964.

102. Such a constitutional challenge cannot be advanced in proceedings before the Circuit Court. This matter has come before the High Court by way of an appeal from the Circuit Court, and the High Court, in exercising this statutory appellate jurisdiction, does not have any greater jurisdiction than the Circuit Court would have. If Mr McNair had wished to make an argument along these lines, it would have been necessary to institute plenary proceedings before the High Court seeking the relevant relief. Ireland and the Attorney General would have to be joined as defendants.

CONCLUSION AND FORM OF ORDER

103. In summary, Start Mortgages DAC has established that it is the registered owner of a charge on the dwelling house and lands contained in Folio 10247F, Co. Sligo. This charge had been given as security for a loan agreement. The last payment pursuant to the loan agreement was made on 21 July 2011. There is now a balance of in excess of €470,869.75 outstanding. (See Siobhan Coen's affidavit of 25 November 2015). The repayment of the principal money secured by the instrument of charge has become due, and Start Mortgages DAC, as the registered owner of the charge, is entitled to an order that possession of the land be delivered to it.

104. For the reasons set out above, Mr McNair has not made out any defence to the application for an order for possession. Moreover, Mr McNair has made no proposals whatsoever to repay the outstanding balance or any part thereof. Accordingly, I make the following orders.

105. The first named defendant's appeal against the order of the Circuit Court of 13 December 2016 is dismissed. The order for possession is, therefore, affirmed. A stay will be placed on the execution of this order for a period of six months from the date of this judgment. Mr McNair has liberty to apply to extend this period in the event that the current emergency conditions in respect of the coronavirus disease pandemic continue to prevail in six months' time. Any such application should be made on at least fourteen days' notice to Start Mortgages' solicitors.

Appearances

Rudi Neuman for the plaintiff instructed by BHSM Solicitors (formerly Baily Homan Smyth McVeigh)

The first defendant, Keith McNair, appeared as a litigant in person