[2020] IEHC 175

THE HIGH COURT

[2017 No. 330 CA]

BETWEEN

KBC BANK IRELAND PLC

PLAINTIFF

AND

MICHAEL MCCORMACK

AND

ELIZABETH MCCORMACK

DEFENDANTS

JUDGMENT of Mr. Justice Heslin delivered on the 25th day of March 2020

1. In the present case the plaintiff seeks possession of the defendants' property on foot of a Circuit Court Civil Bill dated 27 August 2014. The case comes before this Court by way of a hearing *de novo* which took place on Tuesday 18 February 2020. Counsel appeared for the plaintiff. The first named defendant, Mr. McCormack, appeared in person. I was informed that the second named defendant had been called but had not appeared. No medical evidence was produced to the effect that the second named defendant was unable to attend court on medical grounds. I was made aware that the second named defendant did not intend to be present in court and that the submissions by the first named defendant were intended to be on behalf of both Mr. and Mrs. McCormack, being the joint owners of the relevant property. I was informed that, on previous occasions when these proceedings were in court, the first named defendant but not the second named defendant appeared. It can only be in the interest of those who, for whatever reason, have chosen to conduct the defence of legal proceedings against them without the benefit of legal representation, to be present in court during the hearing of those proceedings and to make such submissions as they wish the court to consider. Given that the second named defendant did not appear, I have taken the following approach in coming to this decision.

2. I have carefully considered the contents of all the evidence which was put before the court and which comprised the following: -

   a) Affidavit of Michael Burns, solicitor, of KBC Bank Ireland plc., sworn 26 August 2014, together with the exhibits referred to therein;

   b) Replying affidavit of Michael McCormack, sworn 22 May 2015;

   c) Replying affidavit of Elizabeth McCormack sworn 22 May 2015;

   d) Affidavit of Andrew Groarke Keenan solicitor, of KBC Bank Ireland plc., sworn 16 October 2015, together with the exhibits referred to therein;

   e) Affidavit of Louisa McKeon solicitor instructed by the second named defendant, sworn 19 July 2017, together with the exhibits referred to therein;

   f) Supplemental affidavit of Michael McCormack sworn 1 November 2017 together with the exhibits referred to therein.

I have carefully considered all submissions made by counsel for the plaintiff and all submissions made by Mr. McCormack. To the extent that Mr McCormack made concessions during his submissions, I have not taken such concessions into account in deciding on the plaintiff's claim to be entitled to possession. I have considered the entire of the evidence carefully and, in so doing and in coming to the findings on the evidence and in reaching the decision set out in this judgment, I have not given the benefit to the plaintiff of any concessions made by the first named defendant during the trial, lest that cause any prejudice to the second defendant. This is in circumstances where the first named defendant is not a solicitor and, although a joint owner, with his wife, of the relevant property, he cannot represent her in the present proceedings and the court cannot be certain what, if any, concessions made by the first named defendant are made with the approval of the second named defendant. I am satisfied that by taking this approach, the risk of injustice is avoided even if the second named defendant has taken the decision not to be present at the trial.

Jurisdiction

3. I am satisfied that the present proceedings came before the Circuit Court on 14 November 2017 by virtue of the jurisdiction conferred on that court pursuant to s. 3 of the Land and Conveyancing Law Reform Act 2013, and Statutory Instrument 289/2013. Section 3 of the said Act requires that proceedings relating to a principal private residence where a mortgage was created prior to 1 December 2009 shall be brought in the Circuit Court. I am satisfied that the case is properly before this court by way of an appeal from the Circuit Court and falls to be determined by way of a new hearing.

The property

4. The property, the subject of the present proceedings is all that and those the lands and dwelling house comprised in Folio 29819 F of the Register of Freeholders Co. Galway (hereinafter "the property"). In para. 20 of his affidavit sworn on 22 May 2015, the first named defendant confirms that: -

> "This property, the subject matter of these proceedings has been our family home since 1987".

The defendants' opposition to the plaintiff's claim

5. In their sworn affidavits, the first and second named defendants make a range of objections to the plaintiff's claim. These include the following assertions: -

a) That the defendants are strangers at law to the plaintiff and the plaintiff has no legal standing to bring the proceedings;

b) That there is no evidence the mortgage and charge concerning the defendant's property was transferred to the plaintiff;

c) That the plaintiff cannot enforce the security when it is not the registered owner of same;

d) That the interest rate was not properly defined and there were no arrears;

e) A denial that the defendants are in breach of any loan agreement with the plaintiff;

f) That the sum of €386,966 alleged by Mr. Burns in his affidavit sworn 25 August 2014 to be due and owing to the plaintiff was not due by the defendants;

g) That there was no or no sufficient engagement by the plaintiff or the defendants, in the context of the Central Bank's Code of Conduct on Mortgage Arrears and that no alternative repayment options were presented to the defendants;

h) That the second named defendant signed all documents presented to her by the first named defendant and did so on his instructions as was the case throughout their married life and that the second named defendant was never advised to obtain independent legal advice and never had the benefit of same;

i) That the second named defendant did not understand that she was at risk of losing her family home when she signed documents presented to her in connection with the loan facilities and that there was a legal duty on the plaintiff to ensure that she had the benefit of legal advice which duty the bank failed to discharge, as a consequence of which the plaintiff has no cause of action against the second named defendant.

Findings of fact

6. Having carefully considered the evidence, I have reached a number of findings of fact which, for ease of reference, I propose to set out below, employing relevant headings as appropriate.

Loan agreements

7. On 12 August 2004, IIB Homeloans offered the defendants a loan in the sum of €200,000. That loan was offered, subject to the terms and conditions set out in the letter of offer, a copy of which appears as Exhibit "B" referred to in the affidavit of Mr. Michael Burns, sworn 25 August 2014. Internal page 5 of the said loan offer dated 12 August 2004 contains the following statement which appears in bold and in capital letters: -

> "17. THE LENDER RECCOMMENDS THAT APPLCIANT(S) SEEK(S) HIS/HER/THEIR SOLICITORS ADVICE IN RELATION TO THE LETTER OF OFFER THESE CONDITIONS AND THE ATTACHED DOCUMENTS. THE ACCEPTANCE SHOULD BE SIGNED IN THE PRESENCE OF THE SOLICITOR(S) CONCERNED WHO SHOULD BE A PRINCIPAL OR PARTNER IN THE FIRM(S) CONCERNED. THE LETTER OF OFFER IS SENT IN DUPLICATE AND SHOULD BE RETURNED, WHEN COMPLETED, TO THE LENDER. NO DOCUMENTS SHOULD BE DETACHED FROM IT AND THE DUPLICATE SHOULD BE RETAINED BY THE APPLICANT(S) FOR REFERENCE".

8. Internal page 10 of that loan offer is entitled "Form of Acceptance". That document begins with the following statement: -

"I/we the undersigned, accept the offer of an advance made to me/us by IIB Homeloans Limited on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in: -

(i) the Letter of Offer;
(ii) the Particulars;
(iii) the Lender's General Conditions for Home Loans;
(iv) the Special Conditions (if any)
(v) the Lender's Standard Form of Mortgage;
(vi) the Assignment of Life Policy;
(vii) copies of which I/we have received and in respect of which I/we have been advised upon by my/our Solicitor(s) . . .. I/we hereby irrevocably authorise and direct my/our Solicitor(s) to furnish the Undertaking referred to in General Condition 9(ii) of the Lender's Home Loan General Conditions above and to do all things necessary to comply with said undertakings".

9. Immediately below the aforesaid statement, the signatures of both the first and the second named defendants appear. Those signatures are dated 10 September 2004 and both signatures are witnessed by a solicitor named as Benen Fahy, who is described as being a "principal". I find as a fact that both the first and second named defendants confirmed in writing to the plaintiff that they received legal advice in relation to the 12 August 2004 loan offer, including legal advice in respect of the terms and conditions governing same, comprising matters itemised between (i) and (vi) on the "Form of Acceptance" signed by both of the defendants on 10 September 2004.

10. In light of the foregoing, I find as a fact that, prior to accepting the Letter of Offer dated 12 August 2004, it was recommended to the defendants that they seek legal advice. Having regard to the contents of the "Form of Acceptance" signed by the defendants, dated 10 September 2004, it was represented by each of the defendants that they had done so.

11. A second letter of offer is dated 20 November 2006 and was also made by IIB Homeloans to the defendants in respect of a sum of €220,000. A copy of this second letter of offer appears as Exhibit "B" to the affidavit sworn by Mr. Michael Burns on 25 August 2014. Internal page 11 comprises a "FORM OF ACCEPTANCE" signed by both of the first and second named defendants dated 28 November 2006. Again, the defendants confirm that they received copies of the letter of offer, the particulars, the lender's general conditions for home loans, the special conditions (if any), the lenders standard form of mortgage and the assignment of life policy and the defendants each confirm that they have received advice concerning same from their solicitor. Once again, the signatures of the defendants are witnessed by Benen Fahy solicitor, who is described as being a 'principal' in the firm of Benen Fahy Associates, 2 Bridge Street, Galway.

12. Nowhere in the affidavits sworn by the first named defendant or by the second named defendant, or by the second named defendant's solicitor is there any evidence of undue influence brought to bear on the second named defendant. Nor is there any setting out in

any detail whatsoever of facts from which any undue inference might reasonably be inferred, if such facts were established. I am satisfied that there is no evidence before the court, as opposed to a bare assertion, which would cast any doubt on the written confirmations which were given by both of the defendants when they accepted loan offers on 10 September 2004 and on 28 November 2006, having had the benefit of legal advice in respect of those loan offers, including the terms upon which the offers were made. One such term, as can be seen from internal page 7 of the 2006 loan offer for €220,000 is a s follows: -

> "CONSUMER CREDIT ACT, 1995
>
> WARNING:
>
> (1) YOUR HOME IS AT RISK IF YOU DO NOT KEEP UP PAYMENTS ON A MORTGAGE OR ANY OTHER LOAN SECURED ON IT.
> (2) THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME. . .."

13. On the evidence, I am satisfied, that as a matter of fact, both of the defendants were aware, when they availed of lending from IIB Homeloans which was secured on the property, that their home was at risk if they failed to keep up repayments due.

The name of the plaintiff

14. I am satisfied, having considered the evidence, that Company Number 129761 was known as 'IIB Homeloans Limited', until it converted to an unlimited company, namely 'IIB Homeloans'. The court has been furnished with a copy of a certificate of incorporation on re-registration as an unlimited company, given under the hand of the Registrar of Companies on 16 October 2008 which confirms the foregoing. This is exhibited as exhibit "A" referred to in the affidavit of Mr. Michael Burns, sworn 25 August 2014. Mr. Burns also exhibits a certificate of incorporation on change of name, dated 24 October 2008 which confirms that IIB Homeloans changed its name, by means of a special resolution, to 'KBC Mortgage Bank'. I am also satisfied, on the evidence, that KBC Mortgage Bank transferred its banking business to 'KBC Bank Ireland plc', being the plaintiff herein, on 26 June 2009, further to a Scheme of Transfer signed on 26 February 2009, approved under s. 33 of the Central Bank Act, 1971, as evidenced by S.I. 125/2009.

The charge registered over the property

15. The court was furnished with a copy of Land Registry Folio 29819 F, Co. Galway, comprising exhibit "D" referred to in the affidavit of Mr. Michael Burns, sworn 25 August 2014. Part 2 of the Folio confirms that the first and second named defendants are "full owners". Entry no. 3 at part 3 of the folio confirms the registration on 10 March 2005 of: -

> "Charge for present and future advances repayable with interest limited. IIB Homeloans Limited is owner of this charge".

S.I. 125/2009

16. S.I. 125/2009 provides as follows: -

"CENTRAL BANK ACT 1971 (APPROVAL OF SCHEME OF KBC MORTGAGE BANK AND KBC BANK IRELAND PLC) ORDER 2009

WHEREAS

A. KBC Mortgage Bank (in the following Order referred to as the "Transferor") is a private unlimited company with a share capital incorporated in Ireland under the Companies Acts 1963 to 2006 (no. 129761) on 4 March 1988 under the name Ayrsome Limited. On 31 January 1989, it changed its name to Irish Life Homeloans Limited. On 6 December 1999, it changed its name to IIB Homeloans Limited. On 24 October 2008, it changed its name to KBC Mortgage Bank. The Transferor carries on a banking business in Ireland from its registered office at Sandwith Street, Dublin 2 and is the holder of a licence in relation thereto granted on 24 October 2008 under Section 9 of the Central Bank Act 1971.

B. KBC Bank Ireland plc (in the following Order referred to as the "Transferee") is a public limited company incorporated in Ireland under the Companies Acts 1963 to 2006 (no. 40537) on 14 February 1973 under the name Irish Inter-Continental Holdings Limited. On 25 April 1973, it changed its name to Irish Intercontinental Bank Limited. On 10 January 2000, it changed its name to IIB Bank Limited. On 29 March 2006, it re-registered as a public limited company under the name IIB Bank plc. On 24 October 2008, it changed its name to KBC Bank Ireland plc. The Transferee carries on a banking business in Ireland from its registered office at Sandwith Street, Dublin 2 and is the holder of a licence in relation thereto granted on 17 May 1973 under Section 9 of the Central Bank Act 1971 .

AND WHEREAS on 26 February 2009 the Transferor and the Transferee submitted to the Minister for Finance for his approval the Scheme for Transfer (in the following Order referred to as the "Scheme") made by the Transferor and the Transferee on 26 February 2009.

NOW I, BRIAN LENIHAN, Minister for Finance, after consultation with the Central Bank and Financial Services Authority of Ireland and, in respect of Articles 4 to 10 of this Order, at the request of the Transferor and the Transferee, hereby, in exercise of the powers conferred on me by section 33 of the Central Bank Act 1971 (No. 24 of 1971), order as follows . . ..

8. (1) Subject to paragraph (2), on the Transfer Date—

(a) any contract of guarantee, indemnity, letters of credit or other contract or suretyship, loan agreement, facility agreement or facility letter, lease, hire purchase agreement, deposit agreement, charge, mortgage, assignment, pledge, swap, option, forward, future or other derivative contract, bond, warrant, foreign exchange contract or any other contract, agreement or instrument of the type described in Schedule 1 to the Agreement undertaken or entered into by the Transferor with any person in the course of or

incidental to the business in force or in effect immediately before the Transfer Date shall be transferred or assigned or deemed to have been transferred or assigned to the Transferee and shall become from that date a contract, agreement or instrument between the Transferee and that person with the same rights and subject to the same obligations and incidents (including rights of set-off) as would have been applicable thereto if such contract, agreement or instrument between the Transferor and such person had continued and any order, instruction, direction, mandate or authority given, whether before or after that date, by that person in relation to any such contract, agreement or instrument and subsisting at the Transfer Date shall apply and have effect after the transfer of such contract, agreement or instrument to the Transferee as aforesaid and all monies which at the Transfer Date are or may be or become payable to the Transferor pursuant thereto and the proceeds of any claims, awards and judgements which at the Transfer Date are or may be or become receivable or received by the Transferor pursuant thereto and all other rights and benefits whatsoever accruing to the Transferor under or by virtue of any such contract, agreement or instrument shall become due and payable by that person to the Transferee instead of the Transferor . . . ."

S. 36(a) Central Bank Act, 1971

17. I am satisfied that the charge registered on the property, which was initially obtained by IIB Homeloans Limited as security for the loans made to the defendants, was transferred to KBC Bank Ireland plc. pursuant to a scheme agreed by the Minister for Finance and which had the effect of not requiring a formal registration of the charge, by way of operation of law pursuant to ss. 35 and 36 of the Central Bank Act 1971. Section 36(a) of the Central Bank Act 1971 provides that: -

> "(a) the transfer of any such security effected or deemed to be effected by section 35 of this Act shall not require registration under or in pursuance of the Registration of Deeds Act, 1707, the pre-Union Irish statute 33 Geo. 2, c. 14 (Ir.), the Registration of Title Act, 1964 , or section 99 of the Companies Act, 1963 , but shall operate for the purposes of those Acts as if it were made by deed duly registered on the transfer date under or in pursuance of whichever of those Acts may be applicable thereto".

18. I also note that this point arose in the 2017 decision of Eager J. in *KBC Bank Ireland plc. v. Woods* [2017] IEHC 164 where the court, at para 10. held: -

> "The Court notes that first of all S.I. 125 of 2009, provides for the approval of the Minister for a scheme of transfer. It is clear to the Court that the transfer involving KBC Mortgage Bank (formerly IIB Home Ltd., IIB Homeloans on reregistration as an unlimited company) and KBC Mortgage Bank Company transferred the charge to the plaintiff company pursuant to both the statutory instrument and ss. 35 and 36 of the Central Bank Act 1971".

19. In addition to the foregoing, the court has before it the sworn averment by Mr. Andrew Groarke Keenan solicitor, in para. 10 of his affidavit, dated 16 October 2015 that: -

> ". . . all the business, undertaking, property, assets, rights, liabilities and obligations of (including all monies owing to and securities held by) KBC Mortgage Bank were transferred to the plaintiff pursuant to the Scheme of Transfer. Despite the fact that Ms. Louisa McKeown solicitor later swore an affidavit, dated 19 July 2017 on behalf of the second named defendant, no issue is taken with the foregoing averment by Mr. Groarke Keenan. Similarly, although Mr. McCormack subsequently swore an affidavit dated 1 November 2017, Mr. Groarke Keenan's averment is uncontroverted by the first named defendant. Nor do either of the defendants take issue with Mr. Groarke Keenan's averment in para. 18 of his affidavit sworn on 16 October 2015 in which he swears: "I say that the plaintiff is the entity properly entitled to bring the proceedings herein"".

Ownership of the charge registered on the property

20. In light of the evidence, I am satisfied that, as a matter of fact, the plaintiff is the owner of the aforesaid charge registered over the property and I am bound to reject the defendant's assertions that the plaintiff lacks *locus standi* to bring the present proceedings and I am bound, on the evidence to reject the assertions made on affidavit by both of the first and second named defendants to the effect that the defendants have no obligations to the plaintiff.

Covenants in the charge by the defendants

21. I accept the sworn statements on behalf of the plaintiff that, by deed of charge dated 5 November 2004, the property was charged to secure the repayment of all monies then owing or which thereafter become owing from the defendants, with interest thereon, by means of monthly repayments. I accept the sworn evidence on behalf of the plaintiff that the defendants covenanted in the relevant deed of charge to pay the secured monies, on demand, and agreed that the secured monies would become due and payable on the occurrence of any one of a number of specified events, which included the event of failing to pay any monies on their due date. In para. 10 of his affidavit sworn 26 August 2014, Mr. Burns, solicitor, exhibits a copy of the deed of charge dated 5 November 2004 which comprises exhibit "C" to his affidavit. This copy does not appear to be executed, nor does it bear any dealing number which would typically appear on a mortgage registered in the land registry but there is no assertion by the defendants, or either of them, that this is not a copy of the mortgage which they executed and there is conclusive evidence of the registration of the charge in the Land Registry on the defendants' folio.

Default

22. On the evidence, I find as a fact that the defendants breached covenants contained in the aforesaid deed of charge dated 5 November 2004. I accept the sworn statement in para. 11 of the affidavit sworn by Mr. Burns on 26 August 2014, that ". . .. the defendants have since on or about the 1st May 2011 periodically failed to make the agreed monthly repayments". I note that in his submissions to the court at the hearing, Mr. McCormack did not suggest that the defendants had not defaulted in respect of their obligations under

the relevant charge. On the contrary, Mr. McCormack went as far as to indicate that if the plaintiff's entitlement to an order for possession of the relevant property is "purely based on default, there is no point in arguing against a possession order". I have not relied upon that concession in reaching my decision in respect of the plaintiff's claim. Rather, I have relied on the evidence to reach my decision.

Demand for payment

23. I accept the sworn statement, in para. 13 of the affidavit sworn by Mr. Burns on 26 August 2014 that "On the 27 June 2014 the sum of €386,966.44 was due and owing by the defendants to the plaintiff on foot of the loan and by letter dated the 27th June 2014, the plaintiff demanded of the defendants' payment of the said loan debt". On the evidence I find as a fact that the said sum, as demanded, was not repaid by the defendants. I also accept the uncontroverted evidence given by Mr. Groarke Keenan in para. 24 of his affidavit sworn on 16 October 2015 where he avers: -

> "That while the defendants continue to intermittently make payments which they have unilaterally set at €400 per month, the total contractual monthly repayments amount to €4,622.66 (inclusive of interest in the sum of €1,526.68). The continuing failure of the defendants to discharge the sums properly due and owing to the plaintiff has resulted in the accrual of arrears in the sum of €129,221.53 leaving a total sum immediately due and payable to the plaintiff by the defendants of €408,242.03. In that regard I beg to refer again to the statement of account as averred to at para. 19(ii)(c) above and exhibited hereto . . ."

High Court judgment – Fi Fa 23 August 2019 €456,052.23

24. During the course of the hearing, I was finished with a copy of a fieri fascias order of execution made under High Court Record Number [2019 73 S] in proceedings entitled KBC Bank Ireland plc. (plaintiff) v. Michael McCormack and Elizabeth McCormack (defendants) in the sum of €456,052.23, by order of the Chief Justice, 23 August 2019. It is clear that the plaintiff brought a separate claim and secured judgment against the defendants in respect of monies owing. The present proceedings are not a claim for a specific sum of money, rather, the present proceedings concern the plaintiff's entitlement, or not, to possession of property which the defendants pledged as security in return for availing of loans which were made to the defendants, the plaintiff being the owner of the charge registered over the defendant's property in the Land Registry. In light of the judgment obtained by the plaintiff against the defendants in the sum of €456,052.23, I am satisfied that the defendants' arguments which I have referred to earlier in this judgment, to the effect that monies demanded by the plaintiff were not owing by the defendants or that the relevant interest rate was not properly defined or that arrears were not due by the defendants, fall away and cannot avail the defendants in the present proceedings, the principle of *res judicata* being relevant in respect of the indebtedness of the defendants to the plaintiff, both in respect of the fact and quantum of the debt owing. No affidavit evidence was before me in relation to payments by the defendants to the plaintiff but in submissions certain payments were mentioned, including substantial a one-off payment in 2019. It is not claimed, however, that the defendants have been making the payments which were required under the relevant charge or that the defendants have

been making any payments consistently. On the contrary, the evidence is of default over many years even taking into account all payments referred to in submissions.

Demand for possession

25. On the evidence I find as a fact that, by letters dated 22 July 2014, a demand for possession of the premises was sent to each of the defendants. Copies of these letters comprising exhibit "G" referred to in the affidavit of Mr. Michael Burns sworn 25 August 2014. Both letters were similar in terms and the first page of each letter from Messrs. Woods, Hogan solicitors, contained, inter alia, the following: -

> ". . . We act on behalf of KBC Bank Ireland plc. ("KBC") having its registered office at Sandwith Street, Dublin 2.
>
> You entered into an indenture of mortgage with our client dated in or around 5 November 2004. The said indenture of mortgage provided that in the event of default by you in the repayments due by you, our client has the right to enter into possession of the property provided as security and has the right to sell or dispose of the property.
>
> KBC wrote to you on 27 June 2014 demanding full repayment of €386,966.44 being the balance then outstanding on your mortgage account. We have been informed by our client that you have not discharged this amount and hereby require and demand possession of the aforementioned property within ten days from the date hereof.
>
> If you have any proposals to make in the matter, you should contact us urgently at the number below. You are also recommended to seek advice from an independent advisor or the Money Advice and Budgeting Services (MABS) on their helpline (1890 283 438) or www.mabs.ie if you are having difficulty regarding payment to your mortgage account. Such advice may include recommending selling your property, trading down or alternatively re – financing.
>
> If the full mortgage balance is not discharged or vacant possession of the premises is not delivered up to KBC within ten days, we shall issue legal proceedings against you for the recovery of the property by KBC. . .."

26. It is not disputed by either of the defendants in any affidavit sworn by them or on their behalf, that the aforesaid demands were served. It is not in dispute that the defendants did not either deliver up vacant possession of the property or repay the plaintiff in full in respect of the monies then owing. Furthermore, the court has before it an affidavit sworn by Ms. Louisa McKeon, solicitor, dated 19 July 2017. At that stage, Ms. McKeon was the solicitor instructed by the second named defendant. I understand that Ms. McKeon no longer represents the second named defendant. In her 19 July 2017 affidavit, Ms. McKeon makes reference to pressures on the second named defendant's health. Ms. McKeon also refers to the first and second named defendant being estranged from each other at that point. During the hearing before me I was advised that this is no longer the position.

Evidence of funds available in excess of the outstanding debt

27. In para. 10 of her 19 July 2017 affidavit, Ms. McKeon referred to the second named defendant having engaged with a Mr. Eugene O'Brien, a personal insolvency practitioner, and in para. 11, Ms. McKeon referred to an intended application for a protective certificate under the Personal Insolvency Acts. Ms. McKeon also makes the following averment on behalf of her then client: -

> "The reason the second named defendant is so eager to resolve the matter is that she has access to funds in excess of the full outstanding debt and wishes to clear the debt to the plaintiff in full and move on with her life. As matters currently stand, if she were to pay the debt in full it would give a huge benefit to the other defendant who she has separated from and leave her open to him seeking the sale of the property or him obtaining a benefit from the payment".

Ms. McKeon went on, in para. 17 of her affidavit, to request an adjournment of the proceedings, at that point, on the basis that: -

> ". . . the granting of an adjournment can only favour my client where she wishes to engage with the bank and pay the debt in full . . ."

28. The debt was not repaid. I am conscious that the forgoing are averments made by then then solicitor for the second named defendant, rather than sworn statements by the second named defendant herself. Nevertheless, they are sworn statements made by an officer of the court who has sworn that the affidavit was made from facts within her own knowledge. The contents of the affidavit certainly indicate an acknowledgment, on the part of the second named defendant, of the indebtedness to the plaintiff and a willingness, at that point in 2017, to discharge the debt in full. During the hearing of the matter, on Tuesday 18 February the first named defendant did not suggest, during his submissions, that he and the second named defendant were not indebted to the plaintiff. The court was made aware, during the hearing, that certain discussions and negotiations have taken place. It was not made clear whether such negotiations were "without prejudice" or in the form of "open" discussions, nor was the court made aware of the precise details of such negotiations as appear to have taken place prior to the trial. This is, of course, entirely appropriate. What proposal or counter proposal may have been made in an effort to resolve the present proceedings is not of relevance to the issues which fall to be determined by this Court, in circumstances where the following can be said with certainty. Firstly, if, as appears from Ms. McKeon's 19 July 2017 affidavit, there was an intention to resolve the present proceedings by paying to the plaintiff the entire monies then due, and if any such intention was shared by both of the first and second named defendants, it is clear that one year and seven months later, the present proceedings have not been resolved. Furthermore, a year and a month after Ms. McKeon swore her affidavit, the High Court issued a fi fa in favour of the plaintiff for the sum of €456,052.23 in separate proceedings to which I have referred earlier in this judgment. Thirdly, this case was listed for hearing before me and there is no suggestion that either of the defendants have been taken by surprise by that or have been in any way prevented from making such proposals to the plaintiff as an alternative to the trial of the matter as

the defendants wished to make. Fourthly, as the plaintiff is entitled to do, the plaintiff has called on the court to make a determination of the matter at this stage, pointing out that the acts of default go back to 2011 as averred on behalf of the plaintiff.

McKeon & Company Solicitors coming off record/ proceeds of sale of UK property

29. During the hearing, I was furnished with a copy of an order made by His Honour Mr. Justice Barrett on 27 May 2019 following the hearing of a motion by counsel for the second named defendant, which sought an order granting liberty to McKeon & Company Solicitors of Town Park Centre, Tuam Road, Galway, to come off record for the second named defendant as well as directions in relation to what was described as "the monies held on account". The second page of the said order by Barrett J., dated 27 May 2019, perfected on 28 May 2019, states, inter alia, the following: -

> ". . .And on the undertaking of the solicitor for the second named defendant to lodge in court pending the outcome of the trial of the Action, the funds held by McKeon & Co. Solicitors in their client account (said funds being the proceeds of sale of the UK property) IT IS ORDERED and the court so declare that McKeon & Co. Solicitors have ceased to act for the second named defendant in these proceedings and IT IS ORDERED that McKeon & Co. be entitled to their costs of this application and the court doth stay the order for costs herein pending the outcome of the trial of the action, and IT IS ORDERED that . . . all other costs be reserved to the trial of the action".

30. There was no schedule to the copy of the aforesaid order which I was furnished with. Therefore, I am not aware of the precise amount reflecting the proceeds of sale of the UK property, referred to in the order. Nor am I aware of where those funds are currently lodged. None of the foregoing comprises an issue in the present proceedings, save to say the following. In his submissions, Mr. McCormack suggested that the figure was some €400,000 and made a submission to the following effect: -

> "The €400,000, we don't want that, we know it belongs to KBC".

That submission is not relevant to my determination as to whether, on the evidence which comprises sworn affidavits and exhibited documents, the plaintiff is entitled to possession of the property. I have also been informed that the source of the monies referred to in the court's order was the sale of a UK property owned by the second named defendants (in other words not owned by the defendants jointly and not owned by the first named defendant). It was also clear from the first named defendant's submissions, that the court was not being asked to facilitate any payment to the plaintiff of this or any other monies. Rather, the first named defendant submitted that the defendants wanted the €400,000 to remain in court so that it would be available in the context of a proposed personal insolvency arrangement ("PIA").

PIA

31. At the outset of the hearing and in the context of an application for an adjournment which was made by the first named defendant (and which, for stated reasons, I refused), the court was furnished with a copy of a 13 February 2020 letter from a Ms. Anne Bardon,

senior personal insolvency case manager of "Insolvency Resolution Service", No. 4 Cois Mara, Galwey's Lane, Dungarvan, Co. Waterford addressed to the first named defendant which letter stated, inter alia: -

> "I write to confirm that, further to your consultation with Mitchell O'Brien PIP on 20 November 2019, your application for a protective certificate has been submitted to the Insolvency Service of Ireland (ISI) and we are awaiting a court date for the protective certificate hearing in the Western Circuit Court".

I was also furnished, at the outset of the hearing, in the context of the adjournment application, with a copy of a certificate under s. 112(1)(a) of the Personal Insolvency Act, 2012, dated 18 July 2018 in which a Mr. Eugene O'Brien, personal insolvency practitioner, appointed by the first named defendant, certified the results of a vote taken at a creditor's meeting held on 18 July 2018, wherein 99.85% represented the total amount of debt in respect of which creditors present and voting voted against the proposed PIA.

32. Each of the defendants is, of course, fully entitled to avail of the personal insolvency legislation, but the fact that the defendants or either of them intend to put a PIA to their creditors, when they intend to do that, and the contents of any proposed PIA are not issues which impinge on those I am required to decide in light of the case before me. This is so even though, during the hearing, the first named defendant informed the court that 26 February 2020 had been assigned as a date for the hearing of a protective certificate application in Castlebar District Court. Nothing I decide in the present case will prevent either the first or second named defendants from seeking a protective certificate under the relevant legislation or from putting a PIA, should they so wish and I am satisfied that the apparent intention of the first named defendant to seek a protective certificate is no or no sufficient reason not to hear the present case or to refuse to give judgment at this point, notwithstanding submissions to the contrary by the first named defendant.

Code of Conduct on Mortgage Arrears

33. In *Irish Life and Permanent plc. v. Dunne & Anor, and Irish Life and Permanent plc. v. Dunphy* [2015] IESC 46, the Supreme Court dealt with the manner in which a court should consider issues raised by borrowers concerning alleged breaches of the Code of Conduct on Mortgage Arrears (hereinafter "the Code"). In essence, Clarke J. (as he then was) confirmed 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".

There is no evidence and no allegation made by the defendants that the plaintiff has breached any moratorium prescribed by the Code. Furthermore, the court has before it, sworn evidence in the form of averments by Mr. Burns, solicitor, and Mr. Groarke Keenan, solicitor, to the effect that the plaintiff made every reasonable effort to agree an alternative arrangement with the defendants, prior to the issuing of the present

proceedings. I accept the uncontroverted evidence by Mr. Groarke Keenan in his affidavit sworn on 16 October 2015 to the effect that:-

> " . . .the plaintiff, following its assessment of the defendant's circumstances based on the information provided by them, offered the defendants an alternative repayment arrangement in the form of reduced monthly payments in the sum of €400 for a period of six months effective from 1 April 2012 (the "First Arrangement"). The defendants accepted the First Arrangement and their accepted 2 April 2012. . . .";
>
> "The defendants duly completed and furnished their updated SFS to the plaintiff, and, following a further assessment of their financial circumstances based on the updated information provided by them, the plaintiff by letter dated 8 February 2013 offered the defendants a further alternative repayment arrangement in the form of reduced monthly payments in the sum of €400 for a further period of six months effective from 1 February 2013, to expire on 31 July 2013 (the Second Arrangement"). The defendants accepted the second arrangement and their acceptance is dated 20 February 2013 . . .";
>
> "In advance of the expiry of the said arrangement, the plaintiff made several attempts to contact the defendants by telephone in order to review their financial circumstances so as to determine whether any further arrangement would be appropriate. In that regard, I say that six separate attempts were made to contact the defendants by telephone throughout the months of June and July 2013. The defendants did not answer or return the plaintiff's calls. Thereafter the plaintiff continued its efforts, both by written and telephone correspondence to contact the defendants. By letter dated 16 September 2013, Swaine Solicitors, on behalf of Mr. McCormack, confirmed to the plaintiff that Mr. McCormack appeared "insolvent and unable to discharge his liabilities". The said solicitors advised that they had requested that Mr. McCormack prepare a financial statement for submission to the plaintiff . . . .";
>
> ". . .. the defendants duly confirmed updated details of their financial circumstances to the plaintiff and the plaintiff conducted a further assessment of their said circumstances with a view to determining whether any of the long term resolution options which had been developed under the plaintiff's Mortgage Arrears Resolution Process would be appropriate for the defendants' loan account. On or about 6 December 2013, a representative of the plaintiff contacted Mr. McCormack by telephone wherein the plaintiffs' representative advised him that the defendants' loan account had been deemed unsustainable by the plaintiff and that the defendants should consider disposing of the property . . . the plaintiff's representative also encouraged Mr. McCormack that the defendants should seek advice in relation to the matter, and noted in the event their circumstances changed, the plaintiff would re – consider its position. Mr. McCormack advised the

plaintiff's representative that he did not have a bank account, and found it a struggle to meet the reduced payments due under the second arrangement";

" . . . following the said telephone conversation, the plaintiff issued a letter dated 9 December 2013 in compliance with Provision 45 of the Code notifying the defendants that it was not willing to offer any further alternative payment arrangement as the plaintiff did not consider that the defendants could adhere to the terms of any of the alternative repayment arrangements available under its mortgage arrears resolution process. The said letter confirmed that the plaintiff had "considered all the alternative repayment arrangement options" available under its MARP. The said letter also notified the defendants of their right to appeal the plaintiff's decision to the plaintiff's Appeals Board . . .";

" . . . the defendants did not elect to appeal the plaintiff's decision to deem the defendant's loan account unsustainable";

"On or about 27 May 2014, Mr. McCormack attended at a meeting with a representative of the plaintiff at the plaintiff's Galway office. The plaintiff's representative noted to Mr. McCormack that the defendants' loan account had been deemed unsustainable by the plaintiff. Mr. McCormack stated that he was unwilling to sell or surrender the Property and indicated that he would only deliver up possession of the property on the order of a judge. Mr. McCormack did not question the sustainability of the mortgage or the plaintiff's decision that the mortgage was unsustainable, and did not make any alternative proposal and/or resolution to the plaintiff".

No appeal by defendants against plaintiff's decision that loan account unsustainable

34. I am satisfied, on the evidence, that there was no failure on the part of the plaintiff to comply with the provisions of the Code. I am satisfied that, as a matter of fact, the plaintiff undertook an assessment of the defendant's ability to meet the relevant repayments and despite offering two arrangements, both of which the defendants accepted, the plaintiff ultimately came to the view that there was no long term resolution option. I note in particular that the defendants did not appeal the plaintiff's decision to deem the defendant's loan account unsustainable. I am satisfied, on the facts, that nothing the defendants have said on affidavit and no submission on behalf of the defendants with regard to the Code would prevent an order for possession being granted.

Unfair terms

35. By virtue of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, S.I. No. 27/1995, an unfair term in a contract concluded with a consumer by a seller or supplier is not binding on the consumer. A "*consumer*" means a person acting for purposes which are outside his business. The first and second named defendants would, I am satisfied, qualify as consumers with regard to the loans they obtained and the charge they granted to secure the relevant loans. Article 3 provides, inter alia, that for the purposes of the Regulations: -

"... a contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent".

Article 4 goes on to provide that: -

"A term shall not of itself be considered to be unfair by relation to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, as against the goods and services supplied, in so far as these terms are in plain, intelligible language"

36. The significance of the Regulations was considered by Meenan J. in his 2018 decision in *AIB plc. v. O'Donohoe* [2018] IEHC 599. At para. 13 of his judgment, Meenan J. said the following: -

"13. The Regulations were considered by Faherty J. in AIB Mortgage Bank and Allied Irish Banks plc v. Gerard Cosgrove [2017] IEHC 803. In that case it was submitted that the defendants were not entitled to rely upon the Regulations because where a defendant borrowed money to purchase a premises, the person knew that the sum borrowed had to be repaid with interest and that the sum borrowed would be secured by way of a charge on the property. Such terms were to be considered 'core terms'. This submission was accepted by the learned trial judge. Faherty J., having referred to Aziz, stated: -

'60. Furthermore, I am satisfied that the terms of the contract, upon which the plaintiffs seek to rely in the within proceedings, cannot be said to come within the ambit of the Unfair Terms Regulations, such that the provisions of the mortgage contract should be deemed unenforceable against the defendant.'

This is an application of Article 4 of the Regulations.

14. The application of the Regulations to mortgage agreements has also been considered by the Circuit Court. I refer to the decision of Her Honour Judge Jacqueline Linnane in Bank of Ireland Mortgage Bank v. Mahon & Woods (Circuit Court, Judge Linnane, 9 August 2017): -

'Counsel for the plaintiff ... and for the defendants have agreed between themselves that the court is obliged to examine the mortgage deed having regard to the [Directive 93/13/EEC] to see if any of the terms are unfair. It would seem to me that the first point should be whether the ... Directive applies and if the mortgage deed comes within the scope thereof bearing in mind that Article 4(2) of the Directive provides that the assessment of the

unfair nature of the terms shall not relate to the definition of the main subject matter of the contract.
The obligation to pay instalments and repay the loan is the defendants" main contractual obligation. Once there is a default in so doing this entitles the plaintiff to exercise its right to possession. The terms of the mortgage deed are common and standard in contracts of this nature...'

Her Honour Judge Linnane held that the Regulations did not apply"

37. Later in Meenan J.'s decision in AIB plc. v. O'Donohoe, he set out his conclusions in relation to whether the provisions in the general terms and conditions of the offer of the relevant mortgage loan and the mortgage conditions relating to the payment of interest breached the Regulations or not. The first of the reasons set out by the learned judge in para. 16 of his judgement was as follows: -

"*(i) Article 4 of the Regulations provides that a term will not be 'considered to be unfair by relation to the definition of the main subject matter of the contract'. The main subject matter of the contract in question is that monies were advanced to the defendants to refinance the purchase of an apartment. This was of clear benefit to the defendants. The monies advanced had to be repaid to the plaintiff over the term of the loan. Having the benefit of these monies, which the defendants would not otherwise have had, came at a price – interest was payable. The interest rate may vary over the term of the loan. Thus, in my view, the amount advanced, the term of the loan and the interest that is payable are the 'main subject matters of the contract'. Therefore, applying Article 4 of the Regulations, the clauses in question that relate to the payment of interest do not fall within the scope of the Regulations.*

per Article 4, of a mortgage or loan agreement and thus not covered by the Regulations".

38. Having considered the potential relevance of the 1995 Unfair Terms in Consumer Contracts Regulations, I am satisfied that they do not provide any defence to the plaintiff's claim in the present case. On the evidence I am satisfied that the defendants wished to avail of loans totalling €420,000, excluding interest, and knew those loans, plus interest, were repayable by way of monthly instalments. I am satisfied that the defendants knew those loans would be secured by way of a charge over their home and knew that if the defendants failed to make the relevant monthly repayments, their home was at risk. I am satisfied that the amount advanced, the term of the loan and the interest payable were all core terms falling outside the scope of the Regulations.

Discussion

39. Having carefully considered all of the evidence I am satisfied that none of the arguments put forward by the defendants could properly be called anything more than bare assertions. These bare or mere assertions are unsupported by evidence and wholly undermined by evidence to the contrary. By way of example, there is no evidence of undue influence brought to bear on the second named defendant, nor is there any

evidence, other than a bald assertion in an affidavit sworn by the second named defendant, that she did not understand she was at risk of losing her family home when she signed the relevant documents in connection with the loan facilities availed of by the defendants. By contrast, there is evidence, which I have examined earlier in this judgment, that: -

(a) it was recommended to the defendants that they take legal advice with regard to the loans which they had been offered;

(b) that each of the defendants confirmed that they had obtained legal advice before accepting the loans;

(c) that a loan offer explicitly put the defendants on notice that failure to keep up payments on the mortgage or on any other loan secured would put their home at risk.

Similar comments apply in relation to all other matters raised by the defendants in opposition to the plaintiff's claim. In short, assertions are made which are unsupported by evidence and/or wholly undermined by evidence to the contrary.

40. Even though the first named defendant made submissions during the hearing to the effect that this Court should not grant an order for possession of the property, his submissions were not made on the basis that: -

(a) the defendants are not indebted to the plaintiff;

(b) the plaintiff is not the registered owner of the charge over the defendants' property;

(c) either of the defendants was unaware of the effect of the documentation which was executed by them;

(d) either of the defendants were subject to any undue influence.

41. Mr. McCormack, in his submissions, was critical of what he regarded as the plaintiff's failure to provide a solution which was long term and sustainable. I am satisfied that this provides no defence to the claim herein. Mr. McCormack went on to say that, when everything is taken into account, there is no doubt that he is insolvent. This may or may not be so but is of no relevance to the determination of the plaintiff's entitlement to possession. Mr McCormack criticised the plaintiff for what, in his view, was an attempt by the plaintiff to isolate matters such as to deal with their debt alone, rather than facilitate the defendants in dealing with the entirety of their financial position in the context of a PIA which he wishes to put. I am satisfied that this does not provide any defence to the claim herein. Mr. McCormack submitted that if repossession was granted by this Court, it would give the plaintiff no incentive to deal with the insolvency service. This is not a matter which this court is asked to consider on the pleaded case before it. Mr. McCormack also made it clear, during his submissions, that no issue was being taken with the

plaintiff's entitlement to a possession order and the court's entitlement to grant a possession order, but Mr. McCormack's submission was that such an order should not be made now. In the manner explained earlier in this judgment, my decision on the question of possession is based on an analysis of the evidence, not on any concessions make by Mr McCormack. Mr. McCormack also submitted that the plaintiff would get the money they are entitled to from the PIA. This is not an issue for this court to determine. Mr. McCormack stressed in his submission that he was looking for extra time. I am satisfied that the present proceedings have a long history. According to Mr. McCormack, he has previously been in court on 10 or 11 occasions prior to this trial and I have been made aware of previous adjournments of these proceedings. I am entirely satisfied that there have been ample opportunities for the defendants to make such proposals to the plaintiff as they wished to make. I am also satisfied that, even after this judgment is delivered, there will be nothing to prevent the defendants from engaging with the plaintiff in any manner they so wish. For the reasons set out in this judgment, having carefully considered the evidence including all the objections to the plaintiff's claim which are made on affidavit by the defendants, I am satisfied that the plaintiff is entitled to judgment.

Section 2A Land and Conveyancing Law Reform Act 2013

42. Towards the end of his submissions, Mr. Rooney BL for the plaintiff drew the court's attention to s.A of the Land and Conveyancing Law Reform Act, 2013 as inserted by the Land and Conveyancing Law Reform (Amendment) Act, 2019. In coming to this decision, I have taken account of all the matters referred to in sub. (3) in light the evidence and/or submissions put before me during the hearing, touching on the matters in the aforesaid statutory provision. I am satisfied that the making of the order for possession sought by the plaintiff would be proportionate in all the circumstances.

43. With regard to the circumstances of the mortgagor, I note an apparent desire on the part of the second named defendant to discharge the entire indebtedness to the plaintiff, this being stated in an affidavit sworn by her then solicitor in July 2017. I also note the open acknowledgement by the first named defendant, during his submissions at the hearing, to the effect that the defendants are indebted to the plaintiff.

44. I also note the apparent ability, as of July 2017, for the plaintiff to be repaid in full in respect of the entire indebtedness of the defendants, from the proceeds of sale of a UK property which was apparently owned by the second named defendant, which proceeds of sale are referred to in an order made by Barrett J. dated 27th May, 2019.

45. The apparent acknowledgement by the defendants of their indebtedness to the plaintiff and the apparent ability on the part of the defendants to discharge that indebtedness to the plaintiff are unusual features of this particular case, especially in circumstances where elsewhere in affidavits sworn by the defendants, both have sought to oppose the plaintiff's claim for possession vigorously and with reference to a range of arguments which I have examined in this judgment.

46. I have been advised that the mortgagee would be prepared to settle the matter in such a way that the first and second named defendant mortgagors could remain in the property,

namely if the plaintiff receives payment in full of the indebtedness, an attitude taken by the plaintiff in circumstances where the plaintiff characterises the situation as being one where the defendants could pay, but have not paid, as opposed to a situation where the defendants lack the ability to pay. Based on (1) the contents of the affidavit sworn by the second named defendant's then solicitor, (2) the contents of the order of this court made by Mr Justice Barrett and (3) the first named defendant's submissions at the trial to the effect that the defendants' indebtedness to the plaintiff is admitted and that the plaintiff will receive its money even while, simultaneously objecting to the court making a determination of the issue now and resisting and expressing a preference that the monies apparently lodged in court remain in court, there seems to me to be a basis in fact for the attitude taken by the plaintiff.

47. I take the view that it remains possible, at any time, for the parties to engage in such negotiations as they may wish to and for proposals to be put by either side, should they so wish. However, I am conscious that, on the evidence, the defendants have periodically failed to make the relevant monthly repayments in respect of their mortgage since on or about 1st May, 2011, over eight and a half years ago. There is no evidence before the court that the plaintiff has at any stage refused to entertain a proposal, be that prior to or following commencement of the proceedings. I note the apparent intention of the first named defendant to seek a protective certificate and to put a PIA to his creditors. I have not been made aware whether the second named defendant intends to take a similar course of action but it is plainly open for her to do so, if she so wishes and I am satisfied that my decision does prevent such action by the defendants should they so wish. In light of the facts and history of the matter, I am not satisfied that any useful purpose would be served by delaying a decision in respect of the present proceeding, which were commenced some five and a half years ago by means of a civil bill for possession issued on 27th August 2014 and concern arising from the defendants' default going back to 2011.

Decision

48. Having carefully considered the entirety of the evidence, I am satisfied that the plaintiff is entitled to possession of the premises, as sought in the civil bill for possession dated 27 August 2014, namely possession of the hereditaments and premises known as all that and those the hereditaments premises and appurtenances comprised in Folio 29819 F of the Register of Freeholders, County of Galway and I will so order.

49. As regards the order make by this court by Mr Justice Barrett on 29 May 2019 and subject to a consideration of submissions, an appropriate order arising from my judgement would seem to be to direct payment to the second named defendant, Elizabeth McCormack, of all funds held in court which were lodged on her behalf by her former solicitors, McKeon & Co. solicitors, upon ceasing to act for the second named defendant, such funds representing the proceeds of sale of a UK property owned by the second named defendant, with "liberty to apply" in respect of that order.