

APPROVED

[2021] IEHC 665



**THE HIGH COURT
CIRCUIT APPEAL**

2019 No. 143 CA

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

**GEORGE RAYMOND
RUTH RAYMOND**

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 29 October 2021

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 had been made pursuant to section 62(7) of the Registration of Title Act 1964.
2. The application for possession is grounded on two separate loan agreements said to have been entered into between the plaintiff bank and the defendants. The unusual feature of the case is that the defendants accept that the principal sum under the first loan agreement

NO REDACTION REQUIRED

is payable. It is only the enforceability of the second loan agreement that is challenged. It is said that the second loan agreement had been entered into under duress, and that it is unenforceable as against the second named defendant.

3. One of the issues which arises for determination in these proceedings is whether an order for possession should be granted, on a summary basis, by reference to the first loan alone, notwithstanding that the bank's entitlement to rely on the second loan is something which might only be determined by plenary hearing.

FACTUAL BACKGROUND

4. The first and second named defendants are married, but have been legally separated since 23 February 2013. For ease of exposition, the defendants will be referred to in this judgment as "*the husband*" and "*the wife*", respectively.
5. The husband and wife are the registered owners of property at Delgany, Co. Wicklow. This property had been occupied by the couple as their family home. It is now occupied by the wife alone.
6. Insofar as relevant to these proceedings, the husband and wife are said to have entered into two loan agreements with Bank of Ireland Mortgage Bank ("*the bank*"). The two loan agreements are said to be secured by way of a legal charge on the family home ("*the mortgaged property*"). The legal charge is dated 18 November 2005, and had been registered against the title of the mortgaged property on 24 February 2006 as a charge for "*present and future*" advances repayable with interest. The legal charge had been entered into prior to the second loan agreement.
7. The first loan agreement is said to have been for a principal sum of €200,000. The loan agreement appears to have been signed on 27 October 2005 ("*the first loan*").

8. The second loan agreement is said to have been for a principal sum of €800,000. The loan agreement appears to have been signed on 28 June 2006 (“*the second loan*”). The purpose of the second loan had been to purchase a development site. The development site did not have the benefit of planning permission. It appears from the email correspondence between the husband and the bank that the original intention had been that the purchase of the development site would be funded by way of a loan secured on the development site itself. The loan application has not been exhibited, but it appears that the initial request for a loan had been made by the husband and his business partner; and that the wife had not been a co-applicant.
9. It further appears that officials within the bank had suggested that the purchase be funded instead by way of an equity release secured on the husband and wife’s family home. (See email of 8 June 2006 exhibited in the wife’s first affidavit).
10. The wife maintains that she only entered into this second loan agreement under duress. The wife has averred that she had no involvement with her husband’s finances and no access to any of his bank accounts. She further avers that she had been named as a joint borrower despite never having applied for the loan and having had no prior contact with the bank in respect of same. The events leading up to her signing the loan agreement are described as follows (at paragraph 15 of the wife’s affidavit of 28 January 2016):

“[...] I say that the First Named Defendant presented the Loan Agreement to me in our family home one evening without any third-party present. I say that the First Named Defendant demanded that I sign it. I say that I refused to do so and told him that I was not prepared to risk losing my family home for any of his deals. I say that the First Named Defendant lost control; he became extremely angry and aggressive towards me. I say that such was the level of the First Named Defendant’s aggression that I feared for my life. I say that I felt as though I have no option but to sign the 2006 Loan Agreement. I say that I executed the document under extreme duress.”

11. The bank has filed an affidavit in reply which exhibits what is said to be a copy of a document headed up “*Disclaimer Form Mortgage Protection Assurance*”. This copy document bears a signature which purports to be that of the wife, which signature appears to have been witnessed by a bank official.
12. The wife, in a further affidavit of 5 May 2017, has averred that she has never seen this document; that none of the handwriting in that document is her own; and that she does not recall ever having attended before the named bank official for the witnessing of the making of signatures.
13. The bank’s deponent also “*notes*” from certain (unspecified) bank files that the defendants informed the bank, when seeking the loan facilities at issue, that the loans were sought to purchase and develop the development site which was to be divided into three subsites whereon it was intended that the defendants and the husband’s business partner would take one site each as their respective family homes, and the third site would be sold for profit.
14. The purchase of the development site was completed in the joint names of the husband and his business partner. The wife did not have any legal interest in the development site. The wife maintains that she did not receive any benefit from the loan agreement, and that the transaction was manifestly to her disadvantage.
15. The husband has also sworn an affidavit in these proceedings. The affidavit is dated 6 February 2018. The affidavit avers that the suggestion that the loan be secured as against the husband’s and his business partner’s family homes came from the bank itself.
16. Insofar as the dealings between the bank and the wife are concerned, it is averred as follows:
 - “8. I say that my wife was completely unaware of any of these negotiations with the Bank and at no time did the bank contact her or inform her of the risk involved or ascertain her consent to proceed

with this high risk transaction, nor was she advised to obtain or receive any independent legal advice.

9. I say that when I approached my wife with the mortgage papers in our home to sign she refused to do so expressing her extreme concern at the suggestion as she did not want to risk the Family home in any business deal and thought I had already overstretched myself financially and was adamant that she would not sign.
 10. I say that as I had already purchased the site at Auction and saw no other way of raising the finance to complete the deal I became extremely agitated by her refusal to cooperate. I was outraged that she questioned my judgement but she continued pleading with me not to make her sign, crying and begging me not to risk the family home. I am ashamed to say that I lost control and became extremely aggressive towards her shouting insults and throwing a Kitchen stool, behaving in a menacing fashion and threatening her with physical violence in order to get her (*sic*) make her sign.
 11. I say that at no time did Bank of Ireland establish that my wife fully consented to the family home being used as security in this transaction. The signing took place in the Kitchen of our family home and was not witnessed by any independent third party.
 12. I say that once the equity release was completed I collected the cheque from Bank of Ireland and that I lodged it into a joint account to which my wife had no access, nor did she have a cheque book or banking card for it. I say that I then withdrew €700,000 and purchased a draft made payable to Mangan O'Beirne Solicitor's with the Balance of €100K being lodged into a new account in my name and that of Brendan Whelan that had been set up for payment of costs and interest going forward, I say that my wife was completely unaware of any of these transactions.”
17. The bank has not sought to cross-examine either the husband or wife on the content of their affidavits.
 18. The Circuit Court made an order for possession in favour of the bank on 25 March 2019. The Circuit Court placed a stay on that order for two years, and adjourned the question of costs for the same period of time. A transcript of the hearing before the Circuit Court has been exhibited as part of the appeal to the High Court. It is apparent from the transcript that the order for possession was made on the basis of the first loan alone.

19. The most up-to-date affidavit evidence before the High Court indicates that, as of 2 December 2020, the following sums were outstanding in respect of the two loan agreements: €171,053.30 and €925,475.74. Counsel on behalf of the bank indicated at the hearing before me on 8 March 2021 that there had been a slight further reduction in respect of the first loan agreement.
20. The hearing of the appeal had been adjourned to allow the parties to address the following two issues: (i) the (then anticipated) judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26; and (ii) the relevance, if any, of section 7 of the Family Home Protection Act 1976 (as amended). The parties each filed helpful written submissions on these issues. The hearing of the appeal ultimately concluded on 18 October 2021, and judgment was reserved until today's date.

TEST FOR REMITTAL TO PLENARY HEARING

21. This matter has come before the High Court by way of an appeal from the Circuit Court. The original application had been subject to Order 5B of the Circuit Court Rules. This rule allows for the possibility of an application for possession being remitted to plenary hearing. See Order 5B, rule 8(2) as follows:

“The Judge may, where he considers it appropriate, adjourn a Civil Bill listed before him under this Order for plenary hearing as if the proceedings had been originated otherwise than in accordance with this Order, with such directions as to pleadings or discovery as may be appropriate.”

22. The proper approach to the exercise of this discretion has been authoritatively stated by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26 as follows (at paragraph 101):

“The jurisdiction is one vested by the Rules of the Circuit Court, but may properly be said to be one that exists in any case heard on affidavit. It is perhaps the default position in any case where the affidavit evidence is evenly balanced, where there is a conflict on the

affidavits between the parties which cannot be or has not been resolved by way of further affidavit, where the court considers that a matter raised on affidavit, particularly one raised in defence, might have such a bearing on the outcome that its credibility deserves to be fully tested, or where a judge considers that in the light of certain averments which are credible, but not dispositive, it would be either difficult or unfair to resolve the matter without giving both sides the opportunity to further advance that evidence or, where necessary, to test it. The adjudicative function is not a matter of box ticking or a purely logical engagement with a checklist of proofs that must be met by a plaintiff. Certain evidential presumptions or burdens can make the task of adjudication at times appear almost effortless, but the fact remains that a judge met with evidence, whether contested or not, must weigh that evidence, assess its veracity, credibility, and importance for the purposes of proving those matters that are required to be established. In a case where the action is heard on affidavit, courts are vigilant to consider the option to adjourn the matter for plenary hearing. The vigilance derives from the fact that affidavit evidence of its nature is often in terms which have a tone of certainty which is not always found in oral testimony, particularly where that is cross-examined, and because the affidavits are often drafted by lawyers with a view to the legal test.”

23. I turn next to apply this test to the circumstances of the present case.

ALLEGATION OF UNDUE INFLUENCE AND DURESS

24. For the reasons set out below, I have come to the conclusion that the bank’s entitlement to rely on the second loan cannot be determined without a plenary hearing. The wife has put forward sufficient by way of evidence to make out a *prima facie* case of undue influence. The wife has set out in detail the abusive nature of the relationship with her husband. Insofar as the specific transaction is concerned, she has averred that she felt she had no choice but to enter into the second loan agreement. It is also common case that notwithstanding that the loan was secured against the wife’s family home, she did not obtain any legal interest in the development site. There is also a factual dispute as to whether the wife’s signature had been witnessed by a bank official.
25. The bank, in response, has drawn attention to what it alleges had been the intention underlying the loan, namely that three housing units would be constructed on the

development site, and that one of these would be transferred to the husband and wife as a new family home. It is also suggested that notwithstanding that the wife did not obtain any legal interest in the development site, she may have some unspecified beneficial interest. These are all matters which can only be properly teased out by way of oral evidence and cross-examination.

26. Counsel for the bank referred the court to case law which, on his analysis, indicated that the concept of undue influence does not apply with the same force to loans where the spouse alleging undue influence is a co-borrower (rather than merely a surety for the disputed debt). Counsel cites, in particular, the decision of the House of Lords in *CIBC Mortgages plc v. Pitt* [1994] 1 A.C. 200.
27. Leaving aside the fact that this decision predates the leading case of *Royal Bank of Scotland v. Etridge (No. 2)* [2002] 2 A.C. 773, it is doubtful whether there is any bright line rule to the effect that a co-borrower falls to be treated differently. For the reasons explained by the Court of Appeal in *ACC Bank plc v. Walsh* [2017] IECA 166, there is arguably some equivalence between a spouse who is unduly influenced to join in a loan application from which they are to derive no benefit, and a spouse who is unduly influenced to provide a guarantee for a primary loan from which they will derive no benefit. In each instance, the spouse is exposing themselves to liability for the amount owing to the bank in the event of default. On the facts of *Walsh*, the Court of Appeal held that the spouse had established an arguable defence on the basis of undue influence. The matter was, accordingly, remitted to plenary hearing. Amongst the considerations taken into account by the Court of Appeal was an averment by the spouse that she had never at any stage met any bank official in relation to the disputed loan. An averment to similar effect has been made in the present case.

28. It is apparent from the case law cited on behalf of the bank that it is necessary to consider the circumstances leading up to the making of the relevant loan. Factors to be taken into account include whether the creditor leaves it to a husband to procure his wife's participation, and whether the creditor is aware that the loan is for the husband's own purposes (as opposed to for the couple's joint purposes).
29. The necessity to consider the specific circumstances leading up to the making of a loan in any particular case means that it will rarely be appropriate to rule upon a defence of undue influence on the basis of affidavit evidence alone. Certainly, in a case such as the present, where the spouse asserting undue influence has put forward sufficient evidence to establish credible grounds for such a defence, then the matter should be remitted to plenary hearing.

IS BANK ENTITLED TO RELY EXCLUSIVELY ON FIRST LOAN?

30. For the reasons set out above, I have concluded that insofar as an order for possession is sought by reliance on the second loan, the entitlement to same could only be determined by way of plenary hearing.
31. The fall-back position adopted by the bank in submission had been that it is sufficient, to ground an order for possession, that the principal sum under the first loan has become due. It is said that as no issue is taken by the wife with her liability under the first loan, the bank's case is "*indisputable*", and the order of the Circuit Court should be affirmed by reference to the first loan alone.
32. The bank submits that any issue that might arise by way of dispute regarding the second loan is "*moot*" in the context of the within application for possession. The bank has been careful to explain that it has not waived its reliance on the second loan, lest its approach

to these proceedings be (mistakenly) interpreted at a later date by the wife to be a waiver of her liability under the second loan.

33. Counsel on behalf of the bank emphasises that the application before the court is for an order for possession *simpliciter*, and says that it is unnecessary for that purpose to determine the precise amount of debt outstanding. It is sufficient that the bank is in a position to establish that the principal money secured by the instrument of charge has become due. On this submission, it is not necessary to determine whether the monies owing under the second loan are enforceable at the suit of the bank against the wife. It is submitted that this court should not accede to the “*implicit request*” of the wife that the proceedings, in effect, be converted from a possession case into a debt matter.
34. In order to determine whether the submissions on behalf of the bank are well made, it is necessary to consider the precise function which the court exercises on an application for possession. The application for an order for possession is made pursuant to the provisions of section 62(7) of the Registration of Title Act 1964. This section continues to apply because the legal charge in this case had been entered into prior to the commencement of the Land and Conveyancing Law Reform Act 2009 on 1 December 2009. (See Land and Conveyancing Law Reform Act 2013).
35. Section 62(7) of the Registration of Title Act 1964 provides as follows:

“When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession.”
36. On an application under the section, the first question for a court to consider is what the contractual arrangements between the parties provide as to the circumstances in which the principal money can be said to have become due. Thereafter, the court will have to

consider whether, on the facts, those circumstances can be said to exist (*Irish Life and Permanent plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92).

37. Counsel for the bank has referred me to a number of cases which are said to illustrate the approach to be taken where *part only* of a debt secured by a charge is in dispute. The judgment most directly in point is that of the High Court (Dunne J.) in *Anglo Irish Bank Corporation plc v. Fanning* [2009] IEHC 141. On the facts, the defendant had entered into a series of loans secured on a mortgage in respect of unregistered land. The loans had a twofold purpose: (i) to purchase shares in a company, and (ii) to refinance the defendant's existing home loan. The question before the court had been whether the entire proceedings should be adjourned to plenary hearing to allow the defendant to challenge his liability under the loans. The court held that, on the affidavit evidence, there was no basis for challenging liability.
38. For present purposes, the relevance of the judgment in *Fanning* lies in the distinction drawn between the two aspects of the loans. The court accepted the submission on behalf of the plaintiff that regardless of any dispute over the part of the loan attributed to the purchase of shares, there was a sum due in respect of the home-loan element of the borrowing. The defendant was in default in respect of this part of the borrowing and had made no proposal to discharge the principal sum. Accordingly, the court made an order for possession. In so doing, the court appears to have implicitly accepted that, in a suit for possession (as opposed to a suit for the debt), a plaintiff was entitled to possession even if there was a dispute as to *part of* the indebtedness.
39. The judgment in *Fanning* has recently been applied by the High Court (O'Regan J.) in *Bank of Ireland v. Blanc* [2020] IEHC 18 (at paragraph 30) as follows:

“The issue of how much money is due and owing and the guide to the granting or withholding of possession was dealt with by Ms. Justice Dunne in the High Court in 2009 in *Anglo Irish Bank PLC v. Fanning* [2009] IEHC 141, when it was indicated that a default was the issue,

not the amount. That is clearly the case in circumstances where possession only is sought and not judgment of a particular sum of money, and possession is the only matter before this Court.”

40. I respectfully adopt these authorities as a correct statement of the law.
41. The general position is that it is sufficient for the purpose of an application for possession under section 62(7) of the Registration of Title Act 1964 that the moving party establish that the “*principal money*” secured on a charge has become due. Here, it is not disputed that the principal money under the first loan has become due. The obligation to pay the principal money had been triggered by a letter of demand dated 24 September 2014, which had been sent following an earlier event of default. (As it happens, the principal money would be payable now, even if the obligation to make an accelerated payment had not been triggered, because the fixed ten-year term of the mortgage has expired).
42. The bank’s entitlement to apply for an order for possession in respect of the first loan is not adversely affected by the existence of a dispute as to the enforceability of the second loan. Provided that the bank can demonstrate that the principal money under the first loan has become due, then it does not require to rely upon the second loan at all. The matter can be tested this way: had the bank only ever entered into one loan, it would undoubtedly be entitled to apply for an order for possession. The principal money under that loan is due. It would be anomalous were the bank’s rights to be diminished by the fact that it subsequently entered into a second loan. I am satisfied, therefore, that the existence of the second loan does not affect the bank’s entitlement to apply for an order for possession grounded on the first loan.
43. This general statement of the position is, potentially at least, subject to one qualification in cases, such as the present, where there is a significant difference between the value of the disputed and undisputed element of the borrowings. This is because the making of

an order for possession is discretionary, and one of the factors to be considered is whether the defendants might be in a position to pay off the debt in a reasonable period of time.

44. In the present case, the discretion falls to be exercised in accordance with section 7 of the Family Home Protection Act 1976 (as amended) (“*FHP Act 1976*”). The section reads as follows:

“7.(1) Where a mortgagee or lessor of the family home brings an action against a spouse in which he claims possession or sale of the home by virtue of the mortgage or lease in relation to the non-payment by that spouse of sums due thereunder, and it appears to the court—

- (a) that the other spouse is capable of paying to the mortgagee or lessor the arrears (other than arrears of principal or interest or rent that do not constitute part of the periodical payments due under the mortgage or lease) of money due under the mortgage or lease within a reasonable time, and future periodical payments falling due under the mortgage or lease, and that the other spouse desires to pay such arrears and periodical payments; and
- (b) that it would in all the circumstances, having regard to the terms of the mortgage or lease, the interests of the mortgagee or lessor and the respective interests of the spouses, be just and equitable to do so,

the court may adjourn the proceedings for such period and on such terms as appear to the court to be just and equitable.

- (2) In considering whether to adjourn the proceedings under this section and, if so, for what period and on what terms they should be adjourned, the court shall have regard in particular to whether the spouse of the mortgagor or lessee has been informed (by or on behalf of the mortgagee or lessor or otherwise) of the non-payment of the sums in question or of any of them.”

45. The section affords the court a discretion to adjourn possession proceedings to allow for the making of payments by a spouse. The court must consider the financial capability of the spouse (i) to pay arrears due under the mortgage within a reasonable time, and (ii) to pay future periodical payments falling due under the mortgage. The exercise of this discretion will be informed, to some extent, by the amount of debt outstanding. In cases, such as the present, where a significant part of the debt is disputed the court may form

the view that the spouse would be able to make payments in respect of the smaller undisputed debt only. In such a scenario, it might be appropriate for the court to adjourn the application for possession to plenary hearing to determine the full extent of the debt. The court could then exercise its discretion under section 7 of the FHP Act 1976 in an informed manner.

46. In the present case, the principal money outstanding under the first loan is modest relative to that under the second loan. The arrears under the first loan had stood at approximately €171,000 as of the date of the Circuit Court hearing in March 2019. Had the wife been in a position to adduce persuasive evidence before the Circuit Court that she would have been able to pay off the arrears on the first loan, but not the combined sum under the two loans, then it might have been appropriate to adjourn the proceedings to plenary hearing to allow a determination to be reached on her liability, if any, under the second loan. Put shortly, in the particular circumstances of this case, it *might* have become relevant to know whether or not the second loan was enforceable against the wife.
47. In the event, however, no such evidence was adduced before the Circuit Court, nor before the High Court on appeal. Whereas payments totalling €9,500 had been made during an eighteen month period over the years 2018 and 2019, no payment at all has been made since 27 August 2019. In the absence of any affidavit evidence to the effect that the wife would be able to discharge the arrears under even the first loan, there is no basis for the High Court to exercise its discretion under section 7 of the FHP Act 1976 in her favour. This is so regardless of whether the second loan is enforceable or not.
48. Given the absence of evidence of financial capability, it is not necessary to consider further the proper interpretation of section 7 of the FHP Act 1976. In particular, there is no need to consider whether the section is applicable in cases, such as the present case,

where both spouses are parties to the relevant charge. On one view, the section might be read as applying only to a non-disposing spouse.

CONCLUSION AND FORM OF ORDER

49. I have concluded that the principal money borrowed pursuant to the loan agreement of 27 October 2005, and secured upon the registered charge, has become due. Indeed, the second named defendant has not sought to argue otherwise. The “*proofs*” for an application under section 62(7) of the Registration of Title Act 1964 have thus been met.
50. In the absence of any evidence that the second named defendant has the financial capability to discharge the arrears under this loan, there is no basis for this court to exercise its discretion under section 7 of the Family Home Protection Act 1976 (assuming that the section is applicable at all to the circumstances of the case).
51. For the reasons set out at paragraphs 24 to 29 above, I have come to the conclusion that the bank’s entitlement to rely on the second loan agreement dated 28 June 2006 cannot be determined without a plenary hearing. The second named defendant has put forward sufficient by way of evidence to make out a *prima facie* case of undue influence.
52. However, the bank’s entitlement to apply for an order for possession in respect of the first loan is not adversely affected by the existence of a dispute as to the enforceability of the second loan. The order for possession can be grounded on the first loan alone. There is thus no need to refer the question of the enforceability of the second loan to plenary hearing.
53. I propose, therefore, to grant an order for possession pursuant to section 62(7) of the Registration of Title Act 1964. This order is grounded on the first of the two loan agreements secured on the registered charge. A stay of six months will be placed on this order to allow the second named defendant time to arrange alternative accommodation.

54. It is neither necessary nor appropriate, for the purpose of the present application, for this court to make any finding as to whether the plaintiff is entitled to rely on the second loan agreement as against the second named defendant. For the avoidance of doubt, this judgment does not address the question as to whether the plaintiff would be entitled to apply the proceeds of any sale of the mortgaged property in discharge of the monies due under the second loan agreement. If and insofar as a dispute subsists in this regard following a sale of the mortgaged property, it will have to be resolved in separate proceedings.
55. Insofar as the allocation of legal costs is concerned, my provisional view is that the appropriate order is that each party should bear their own costs. Whereas the plaintiff has obtained an order for possession, it has not been “*entirely successful*” in the proceedings within the meaning of section 169 of the Legal Services Regulation Act 2015. This court has found that the plaintiff’s entitlement to rely on the second loan agreement as against the second named defendant could not be resolved on a summary application based on affidavit evidence alone. This issue took up most of the time in the hearing and most of the written legal submissions, and would have had a material impact on the level of costs. As explained by the Court of Appeal in *Chubb European SE v. Health Service Executive* [2020] IECA 183, where a party has not been successful on an identifiable issue or issues which have materially increased the costs of the case, that party may obtain his costs but may suffer two deductions: one in respect of his own costs in presenting that issue, and the other requiring him to set off the costs of his opponent in meeting that issue against such costs as are ordered in his favour.
56. The proposed costs order represents my provisional view only, and if either party wishes to contend for a different form of costs order, they should file written legal submissions within four weeks of today’s date.

Appearances

Nevan Powell for the plaintiff instructed by Fieldfisher Solicitors

Clare O'Shea for the second named defendant instructed by Amoss Solicitors

Approved
Gareth S. Moss