

THE HIGH COURT

[Circuit Court Record No. 427/2017]
[High Court Appeal No. 2021/128 CA]

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

GERARD ADAMSON

AND

MARTINA BRENNAN

DEFENDANTS

JUDGMENT of Mr. Justice Holland delivered on the 7th of March 2022

1. This is my judgment on the plaintiff's appeal of the refusal by His Honour Judge Quinn of the Circuit Court on 26 July 2021 to renew the Civil Bill for possession in this case for service on the second defendant. Service has been effected on the first defendant. The application is grounded on an *ex parte* docket dated 15th April, 2021, and on the affidavits of Kieran Lucey, sworn 31st March, 2021, Colleen Barrett, sworn 30th April, 2018 and Tim Ferguson, sworn 8th September, 2017. That *ex parte* docket sought renewal of the Civil Bill pursuant to O. 12, r. 3 of the Rules of the Circuit Courts. It also sought an order for substituted service of the Civil Bill and of the affidavit grounding that Civil Bill and of all further and subsequent documents on the second defendant. But as renewal of the Civil Bill was refused, the application as to substituted service fell away for Judge Quinn, whose order does not record a determination of that issue. The notice of appeal is dated 3rd August, 2021.

2. In February, 2002, Permanent TSB issued a mortgage loan to the defendants to purchase, as cohabitants, a principal private residence subsequently registered as folio 39737F of the Register, County Meath. The mortgage loan was on terms that the entire loan would become immediately repayable in the event of two months default of payment of mortgage instalments and on terms that any time after that total became repayable the mortgagee was entitled to possession and to sell the property. The mortgage was registered as a charge on the folio.

3. Permanent TSB alleged that the defendants went into default from February, 2010 and that on 22nd May, 2013, they made their last payment prior to the issue of the Civil Bill. It would appear, therefore, that Permanent TSB were entitled to possession and sale from, on their view of matters, in or about late July, 2013 or perhaps some weeks later.

4. No information is before me as to what happened thereafter until a demand for repayment was made in April, 2017 and a demand for possession was made in May, 2017. The Civil Bill issued on 5th July, 2017 claiming possession (on foot of s. 62(7) of the Retention of Title Act, 1964) and on foot of arrears of €103,659 and a total indebtedness of €263,429.58. The affidavit of Niamh McGee sworn 16th June, 2017 in verification of the Civil Bill recites that, though the principal private

residence of the defendants, the property is neither a family home for purposes of the Family Home Protection Act nor a shared home for purposes of the Civil Partnership Act. She asserts compliance by Permanent TSB with the relevant code of conduct - pursuant to which the defendants were deemed to be non-cooperating. The Civil Bill was, on its face, returnable before the Meath County Registrar on 4th October, 2017.

5. The affidavit of Tim Ferguson, sworn 8th September, 2017, records effective personal service of the Civil Bill on the first defendant. It also records failed attempted personal service on the second defendant. In his attempting personal service on the second defendant at the property, while successfully serving the first defendant, the first defendant told Mr. Ferguson that the second defendant had left him about 9 years previously and that they had had no contact since. Mr. Ferguson deposes that he rang the second defendant on her mobile phone and she was adamant that she lived at the property but was away for a few days attending her ill mother. Mr. Ferguson said that, thereafter, he “called on a few occasions” but got no reply. He does not say whether by this he means that he called to the premises or that he rang the second defendant’s mobile phone. He said he spoke to a neighbour which suggests he attended at the premises at least once. That neighbour said that (s)he knew the first defendant but had never seen a woman coming to or going from the house. On the basis of all that information, Mr. Ferguson expresses the belief that the second defendant does not reside at the premises and her current whereabouts were unknown.

6. The affidavit of Colleen Barrett, sworn 30th April, 2018, in her capacity as an employee of the then-solicitors for the plaintiff, and for the purpose of seeking an order for substituted service in accordance with an *ex parte* docket to which she refers, briefly recites the content of Mr. Ferguson’s affidavit and adds that she attempted service on the second defendant under cover of registered letter dated 13th September, 2017 which was returned marked gone away. She also recites that the plaintiff had not been given a new address by the second defendant.

7. The *ex parte* docket seeking an order for substituted service to which Ms. Barrett refers is dated 30th April, 2018 – i.e. before the expiry of the Civil Bill for purposes of service on the second defendant - and was returnable for 10th September, 2018 – i.e. after the expiry of the Civil Bill for purposes of service on the second defendant.

8. A second *ex parte* docket was filed on 20th June, 2018, also returnable for 10th September, 2018 – in this case, seeking to renew the Civil Bill which, as stated, was due to expire on 5th July, 2018. The *ex parte* docket to renew the Civil Bill was grounded on an affidavit sworn by Jack Donoghue on 20th June, 2018. Beyond praying renewal of the Civil Bill, it adds nothing to the affidavits of Mr. Ferguson and Ms. Barrett. As will be seen, it is not apparent that either *ex parte* docket was ever moved. But the *ex parte* docket to renew filed on 20th June, 2018 is relevant as the Plaintiff’s recognition of the necessity of renewal.

9. The next relevant event was, as indicated above, the expiry of the Civil Bill on 5th July, 2018.

10. As recorded above, the return date of the *ex parte* dockets for substituted service and seeking to renew the Civil Bill was 10th September, 2018. The case came before the County Registrar on that date. The order perfected on foot of that hearing is puzzling. It opens by recording that the defendants had been duly served with the Civil Bill. While correct as to the first defendant, that recital is clearly incorrect as to the second. It next records that the Civil Bill had come on for hearing. Again, that may be technically correct as to a return date relating to the first defendant but could not have been correct in any real sense as concerning the second defendant, who had not been served with the Civil Bill. Notably also, the *ex parte* dockets returnable 10th September, 2018 are not mentioned in the order of 10th September, 2018. Perhaps this was because they may not have been moved as, having regard to the expiry of the Civil Bill about two months earlier, any application to renew the Civil Bill now had to be made to the circuit judge rather than to the county registrar and the question of substituted service was likely considered not to arise pending renewal of the Civil Bill.

11. The order of 10th September, 2018 goes on to recite that evidence had been heard and material offered on behalf of the plaintiff "*and on behalf of the defendants*". Again, while correct as to the first defendant, there is no reason to believe, on the information before me, that this was correct as to the second defendant. In any event, the matter was adjourned to 11th March on the basis that the first defendant would make monthly repayments of €50 in the interim and would progress an application pursuant to the Mortgage to Rent Scheme.

12. When the matter again came before the court on 11th March, 2019, it is clear from an affidavit of Darren Doyle, sworn 27th February, 2019, that Permanent TSB sought a six-month adjournment to allow the first defendant to continue to process his MTR application. That affidavit also asserts that, on 10th September, 2018, a new return date of 11th March, 2019 had been granted in respect of the second defendant. The order of 10th September, 2018, as perfected, does not so record.

13. It is unclear what exactly happened on 11th March, 2019, although it seems reasonable to assume that the 6-month adjournment sought by the plaintiff was granted. If so, the matter would not have come back before the County Registrar until September, or perhaps October, 2019.

14. In the meantime, on 13th August, 2019, the present solicitors came on record – for Permanent TSB. On 7th February, 2020, Permanent TSB assigned the loan and mortgage to Start Mortgages. One of the exhibits to the affidavit of Eva McCarthy, sworn 5th June, 2020, is a letter from Permanent TSB addressed to the second defendant at the residence and dated 7th February, 2020. It advises of the completion on the same date of the transfer of the loan and mortgage to Start Mortgages. However, it also records that PTSB had written to Ms. Brennan on 12th September, 2019

to inform her that PTSB had agreed to make that transfer. So it is likely that the change of solicitor roughly coincided with the agreement to sell the loan.

15. On 5th June, 2020, Start Mortgages issued a notice of motion seeking its substitution as plaintiff in the action on foot of an affidavit of Eva McCarthy, sworn that day. While reciting “hello” and “goodbye” letters to both defendants and certain correspondence with the first defendant by way of notice of the substitution application, Ms McCarthy does not advert to the fact that service had not been effected on the second defendant or to the expiry of the Civil Bill for that purpose. Given the purpose of the affidavit, I do not criticise that but it may, perhaps, explain why the resultant order of the County Registrar made on 16th October, 2020 commences with the recital “*the defendant having been duly served with the civil bill*”. The word defendant, singular, is used but, in that respect, the order is at least unclear. It does record that there was no appearance by the defendants, plural. The order directs the substitution of Start Mortgages as plaintiff and gives directions as to service of the order on the first defendant. In respect of the second defendant, it is directed that the order be served upon her “*and Doheny letter*”¹. The matter was adjourned to 22nd March, 2021 against the first defendant and was given as a new return date of 22nd March, 2021 as against the second. The order of 16th October, 2020, it is said in submissions, was perfected on 11th November, 2020 and served on the first Defendant by registered letter dated 23rd November, 2020. In any event, the copy perfected order of 16th October, 2020 before me is certified a true copy on 11th November, 2020 but that does not necessarily imply that it was perfected on that date or that the perfected order was bespoken expeditiously.

16. Given an argument by counsel for the applicant, I should record that, even on the basis of that argument, once the order of 16th October, 2020, substituting Start as the plaintiff had been made, there was no impediment to the expeditious application to renew the summons thereafter – or at least none has been argued.

17. Despite the fact that the allocation in the order of 16th October, 2020 of a new return date of 22nd March, 2021 against the second defendant recognised that she had not been served and the fact that that return date was, at that time, 5 months hence, it does not appear that any *ex parte* docket was issued in that interim seeking to renew the Civil Bill with a view to that return date. That is unexplained.

18. It is unclear what occurred on 22nd March, 2021 when, by the order of the 16th October, 2020, the matter again came before the County Registrar, inter alia as a return date of the Civil Bill as relating to the second defendant. It seems likely, however, that, by that stage, the necessity of the application to renew had been recognised and the matter was, at least as relating to the second defendant, adjourned pending application to the judge in that regard.

¹ The reference to a *Doheny* letter is to the type of letter contemplated in the case of *Permanent TSB v. Doheny* [2019] IEHC 414 as to be sent to a defendant advising of an order *ex parte* substituting a new plaintiff in an action.

19. As indicated earlier, the *ex parte* docket, on foot of which the appealed order was made, to renew the summons and also for substituted service, issued only on 15th April, 2021, 2 years and 9 months after the expiry of the Civil Bill, and 6 months after the County Registrar had assigned a new return date of 22nd March, 2021 as against the second defendant and, indeed, the *ex parte* docket, issued only after that return date.

20. In short, from the expiry of the Civil Bill on 5th July, 2018, it is not apparent that any attempt was made to renew the Civil Bill until on foot of an *ex parte* docket issued on 15th April, 2021. The net result appears to be a delay of 2 years and 9 months from the expiry of the Civil Bill to the issuing of the *ex parte* docket seeking its renewal - upon which the application was moved before Judge Quinn resulting in the order under appeal to this court.

21. I have given judgment today in a very similar application by the same plaintiff, represented by the same counsel in **Start Mortgages v Brennan and Sinnott** and, in that judgment, I have considered the law on renewal of Civil Bills. I do not propose to reprise that treatment here. Suffice to say that I seek to apply it in what follows.

22. Counsel for the plaintiff argues that the plaintiff satisfies its onus of proving special circumstances justifying the extension of the validity of the Civil Bill set out in O. 12, r. 1 of the Rules of the Circuit Court.

23. I accept, as I have done in the case of **Start Mortgages v Brennan and Sinnott** and as observed by Quinn J. in the case of **Bank of Ireland v Sugrue**², that **Chambers v Kenefick**³ is authority that, in matters such as this, regard can be had to the chronology of events. In a suitable case inferences may be drawn from such a chronology as to the cause of failure to serve a Civil Bill and/or delay in seeking its renewal. However, I am also of the view, expressed in *Brennan and Sinnott*, that there is a considerable benefit from a plaintiff's point of view in such an application as this in not merely reciting the chronological sequence of events but in asserting and explaining explicitly how it is that those events have in fact (as opposed to merely potentially) caused failure to serve a Civil Bill upon the defendant in question and/or delay in seeking its renewal and how such matters amount or contribute to special circumstances and affect the balance of justice such that renewal of the Civil Bill ought to be ordered.

24. Suffice to say that in the present case, the affidavits sworn by the plaintiff do not shed any light upon the decisions taken or attitudes adopted by or actual reasons for the Plaintiff's deferral, to use a neutral word, of its application to renew this Civil Bill.

² The Governor And Company Of The Bank Of Ireland v. Sugrue [2021] IEHC et 1 (High Court (General), Quinn J, 22 February 2021)

³ [2005] IEHC 402

25. Counsel asserts that the first element of those special circumstances is that, in this case, the plaintiff was justified in deferring seeking to renew the Civil Bill for service on the second defendant while the plaintiff was engaging with the first defendant. The second defendant, it is said, no longer occupied the premises having moved out in or about 2008, at least according to the first defendant. However, it is notable that Mr. Lucey's affidavit does not proffer this as an explanation for delay in seeking to renew the Civil Bill and, indeed, he gives no explanation as to why there was no attempt to renew the Civil Bill prior to April, 2021, when an ex parte docket issues to that end.

26. As to the issue of engagement with the first defendant, all we know is that, in September, 2018, and again in March, 2019, the then-plaintiff had the matter adjourned to permit the first defendant to process his Mortgage to Rent application. There is no suggestion in the papers by the plaintiff that this application was successful or remained current or live at any point thereafter or is or was likely to resolve the proceedings without the assistance, involvement or service of the second defendant. Even if the proposition was generally acceptable, which I doubt, the facts available as to the engagement with the first defendant simply do not provide sufficient detail to explain significant periods of the delay in this matter or even assert that a decision was made not to serve the second defendant while that engagement with the first defendant was proceeding. For the avoidance of doubt, there is no evidence of any such decision.

27. In short, and as to Permanent TSB's role, there is no explanation for its not motioning the court to renew the Civil Bill from its expiry in early July 2018 to its assignment of the mortgage and loan to Start in February 2020. Start, as assignee, is responsible for that delay for present purposes.

28. In any event, I would have difficulty in regarding such negotiation and engagement as in any way a special circumstance having regard to the requirement that such circumstances be beyond the ordinary or the usual. Such engagement and negotiations are an entirely ordinary feature of proceedings and disputes on foot of mortgages. Indeed, to a greater or lesser degree, they are a requirement of relevant codes of conduct.

29. A second suggested element of special circumstance is that, as an allegedly unusual feature of the proceedings, the County Registrar in this case granted adjournments to new return dates. Again, I do not see that any such orders could be termed beyond the ordinary or the usual, much less special circumstances. Indeed, it could be argued that giving a new return date as against the second defendant reflected precisely the necessity of service upon that defendant and, for that purpose, renewal of the Civil Bill. Yet that opportunity after the County Registrar's hearing on 16th October, 2020 was not taken prior to the new return date of 22nd March, 2021. Perhaps that was for good reason – but I am not so informed.

30. The plaintiff also argued that, in the event it moves against the first defendant only for possession, the first defendant will rightly argue that there is little point in evicting him from his residence for as long as no relief has been obtained against the second defendant. I do not need at this point to decide the question whether such an argument would or might succeed in a context in which it may be that the second defendant has not resided in the property for close to a decade and a half. Undoubtedly, that could be a factor in a balance of justice or injustice by way of being a hardship to the plaintiff but, if so, it is a prejudice which proceeds precisely from the plaintiff's failure over some years to regularise its position as to service upon the second defendant. I do not think that any such prejudice or hardship to the plaintiff weighs heavily in the balance of justice. And, as Hyland J said in **Brady v Byrne**⁴ "*Hardship or prejudice to a plaintiff alone cannot in my view amount to special circumstances.*"

31. For the avoidance of doubt, I should say that, in my view, the fact of an assignment of the mortgage and of new solicitors coming on record for the plaintiff either on foot of or in contemplation of that assignment are, as the summary judgment lists amply testify, entirely ordinary events which might allow for a relatively brief hiatus in the progress of the proceedings but which do not, of themselves, amount to special circumstances and, in any event, contribute little weight to the balance of justice.

32. Counsel for the plaintiff argues that only on service of the substitution order of 16th October, 2020 on the first defendant and by virtue of Order 22, rule 5 of the Circuit Court Rules, was the order of 16th October, 2020 effective such as to allow Start Mortgages to move to renew the Civil Bill. O.22 R.5 provides, *inter alia*, that an order substituting a new plaintiff shall be binding on a party served from the time of service of a copy of the order. However, it says nothing as to the effectiveness of such an order as it relates to a party as yet not served with the proceedings themselves - much less a party in respect of whom the Civil Bill has already expired. Accordingly, and to the extent that it might be of any significance, it is not at all clear to me that the plaintiff was disabled from seeking renewal of the Civil Bill pending service of the order substituting a new plaintiff upon the first defendant. In any event that order was served on the first defendant by letter dated 23 November 2020 and yet the ex Parte Docket for renewal did not issue until 15 April 2021 – a delay unexplained.

DECISION

33. Remembering the onus on the Plaintiff to do so, in all the foregoing circumstances, I do not see that the Plaintiff has demonstrated special circumstances justifying the renewal of the Civil Bill in this case or, and not regarding it as a separate criterion but as part of a holistic assessment, that the interests of justice require that I do so. Accordingly, I refuse to renew the Civil Bill for service on the second defendant.

⁴ [2021] IEHC 778

34. This judgment is delivered electronically. As this was an ex parte application which has been refused and I am minded to make no order as to costs. Failing application for a different order, an order will issue accordingly after the expiry of 14 days hereof.

David Holland

7/3/22