

**THE HIGH COURT
CIRCUIT APPEAL**

[2022] IEHC 272
2019/396 CA

BETWEEN

PEPPER FINANCE CORPORATION IRELAND DAC

PLAINTIFF

AND

PATRICK FARRELLY AND KATHLEEN MURTAGH

DEFENDANTS

Judgment of Mr. Justice Mark Heslin delivered on the 26th day of April 2022

Introduction

1. This case concerns an appeal against an order for possession which was made by the Circuit Court (Her Honour Judge McDonnell) on 16 October 2018 whereby that Court ordered *inter alia*: "That the Plaintiff do recover from the Defendant possession of ALL THAT AND THOSE the property at 21 Reask Green, Navan, Co. Meath and comprised in Folio 24061 F County Meath . . .".
2. The matter proceeded as a de novo hearing which took place on Friday 1 April 2022. Counsel appeared for the Plaintiff. The First Named Defendant appeared as a litigant in person to oppose the application. There was no appearance by the Second Named Defendant.

The Plaintiff's Civil Bill dated 10 August 2015

3. The present proceedings were commenced by way of a Civil Bill for Possession, which was issued by "Pepper Finance Corporation (Ireland) Ltd." as Plaintiff, on 10 August 2015. The special indorsement of claim describes the Plaintiff as a limited liability company, gives its address and states that the name of the Plaintiff was changed from "GE Capital Woodchester Home Loans Ltd." to "Pepper Finance Corporation (Ireland) Ltd.". It goes on to plead *inter alia* that, by means of a loan offer letter dated 23 January 2006, the Plaintiff offered to advance to the Defendants a loan facility of €150,000 ("loan facility" or the "Loan") upon terms which included (i) that the loan facility term was a period of 30 years; (ii) that repayment of the loan facility was to be in the form of monthly instalments of principal and interest; (iii) that interest would apply to the loan facility at a variable rate, which was 6.80% as of the date of the letter of approval; and, (iv) that, in the event of any repayment not being made on the relevant due dates, or any breach of the conditions of the Loan, or of any covenants or conditions contained in any of the security documents, the Plaintiff may demand an early repayment of the principal and accrued interest or otherwise alter the conditions of the Loan.
4. The special indorsement of claim goes on to plead that the terms of the loan facility were accepted and signed by the Defendants on or about 3 February 2006; that the sum of €150,000 was advanced to the Defendants on or about 15 February 2006; and that the loan facility was secured by a first legal mortgage dated 3 February 2006 ("the Mortgage") over 21 Reask Green, Navan, Co Meath (the "Mortgaged Property") situate within the court's jurisdiction.

5. Reference is made to certain express terms in the Mortgage including, inter alia, (i) that the Defendants would pay the monies secured at the times and in the manner provided in the Mortgage without deduction; (ii) that, to secure the payment of the secured monies, the Defendants would grant, convey, charge and demise unto the Plaintiff, their interest in the Mortgaged Property, subject to the right of redemption in the event that the secured monies were repaid to the Plaintiff pursuant to the Mortgage covenants; (iii) that the Defendants would pay the secured monies, on demand, to the Plaintiffs; (iv) that all monies remaining unpaid by the Defendants would immediately become due and payable on demand to the Plaintiff on the occurrence of any event of default as defined; (v) that the secured monies were deemed to have become due within the meaning and for all purposes of the Conveyancing Acts on the execution of the Mortgage; (vi) that, at any time after the execution of the Mortgage, the Plaintiff could, without any further consent from or notice to the Defendants, enter into possession of the Mortgaged Property; and (vii) the power of sale would be exercisable by the Plaintiff without the restrictions on its exercise imposed by s. 20 of the Conveyancing Act 1881.
6. It was pleaded that the Mortgage terms were duly accepted and signed by the Defendants on or about 3 February 2006, and that, on or about 13 July 2010, the said Mortgage was duly registered with the Land Registry.
7. It was pleaded that (i) in breach of the terms of the Mortgage and of the loan facility, the Defendants failed to pay the monthly instalments as they fell due; (ii) that the Plaintiff wrote to the Defendants and demanded full payment of the entire balance due and owing; (iii) that, when such demand was not met, the Plaintiff's solicitor wrote again; and (iv) that, despite letters of 6 May 2014 and 30 May 2014, the Defendants have failed to repay the secured monies or any part thereof, or deliver up possession of the Mortgaged Property.
8. The special indorsement of claim went on to plead that the Plaintiff's power to take possession of and to sell the Mortgaged Property has arisen and become exercisable; and that, as of 31 July 2015, the monies due by the Defendants to the Plaintiff pursuant to the loan facility amounted to €195,337.53, including arrears of €61,072.05.
9. It was pleaded that the Mortgaged Property comprises the principal private residence of the Defendants within the meaning of the Land and Conveyancing Law Reform Act 2013; and that, insofar as the Code of Conduct on Mortgage Arrears issued by the Central Bank of Ireland ("CCMA") applies to the loan facility, the Plaintiff has complied with the Mortgage Arrears Resolution Process ("MARP") set out therein, and is not precluded from seeking possession of the Mortgaged Property.
10. The Plaintiff's claim was clearly stated to include "(a) An order for possession of the Mortgaged Property, a description of which was contained in the first schedule of the civil bill for possession, namely, 'ALL THAT AND THOSE' the property comprised in Folio 3412L Co. Meath and more commonly known as 21 Reask Green, Navan, Co. Meath (now comprised in Folio 24061 F Co. Meath)".

5 August 2015 Affidavit of Ms. Caroline Loftus

11. The affidavit grounding the Plaintiff's application for possession was sworn by a Ms. Caroline Loftus, Operations Manager in Pepper Finance Corporation (Ireland) Ltd., on 5 August 2015, who averred, at para. 1 thereof, that she is an employee of the Plaintiff and makes her affidavit on its behalf, being duly authorised so to do. She also averred that her affidavit was made from facts within her own knowledge and from a careful examination of the books and records of the Plaintiff, save where otherwise appears, and where so otherwise appearing, she believes the same to be true.
12. At para. 3, it was averred that the Plaintiff offered the Loan facility to the Defendants and a copy of the Loan facility comprised Exhibit "A" to her affidavit. I have considered its contents.

The Loan facility

13. As well as clearly specifying *inter alia* the amount of the credit advanced (€150,000); the period of the Agreement (30 years); the number of repayment instalments (360); the cost of credit; the relevant interest rate; the effect of a 1% increase in interest rate, etc., the loan offer is plainly addressed to the Defendants (identified therein as "the borrower") and the terms governing the Loan facility are set out. Standard conditions comprise Part 2 of the Loan facility. Part 3 sets out General Conditions. Part 4 comprises General Terms and Conditions and among these are 4(b) which, under the heading "Repayment" states the following: -

"(b) *In the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in Clause 2(a), the Lender may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan*" (emphasis added)

14. The security documents referred to in clause 2(a) comprised the lender's security, being a first legal mortgage or charge over the Mortgaged Property. Internal p. 10 of the Loan facility comprises the following: -

"CONSUMER CREDIT ACT NOTICES

WARNING

YOUR HOME IS AT RISK IF YOU DO NOT KEEP UP PAYMENTS ON A MORTGAGE OR ANY OTHER LOAN SECURED ON IT.

THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.

LEGAL ADVICE SHOULD BE TAKEN BEFORE THIS DOCUMENT IS SIGNED".

15. Part 5 on internal p. 11 (of 11) of the Loan facility is entitled "Acceptance and Consents". Both the Defendants signed this document, which is dated 3 February 2006, and it does not appear to be in dispute that it was witnessed by a solicitor at the time. At para. 5 of

her affidavit, Ms. Loftus avers that the terms of the Loan facility were accepted and signed by the Defendants on or about 3 February 2006 and no issue is taken with this. Nor is it in dispute that, as averred by Ms. Loftus at para. 6, the sum of €150,000 was in fact advanced to the Defendants, by the Plaintiff, on or about 15 February 2006.

The Mortgage

16. At paras. 7 – 9 inclusive, Ms. Loftus makes averments in respect of the 3 February 2006 Mortgage which was granted by the Defendants over the Mortgaged Property. A copy comprises Exhibit "B" to the affidavit sworn by Ms. Loftus. I note the terms contained in the Mortgage and they reflect those pleaded in the Civil Bill for Possession. There is no dispute about the fact that, by means of this Mortgage and pursuant to the terms set out therein, the Defendants created security over the Mortgaged Property in favour of "GE Capital Woodchester Home Loans Limited". Internal p. 22 of the Mortgage contains the signatures of the Defendants, in the presence of a solicitor.
17. It is not in doubt that, as averred by Ms. Loftus at para. 10 of her affidavit, the Mortgage was duly registered with the Land Registry on or about 13 July 2010. Ms. Loftus exhibits a copy of Land Registry Folio MH 24061 F, Co. Meath and this comprises Exhibit "D" to her affidavit. I have considered this document.

Folio 24061

18. Part 1 of Folio 24061 concerns the identification of the property. Part 2 concerns 'Ownership' and Part 3 concerns 'Burdens'. This records the registration on 13 July 2010 of the following: -

"Charge for present and future advances repayable with interest. GE Capital Woodchester Home Loans Ltd is owner of this charge".

19. There is no doubt about the fact that the charge registered as a burden at Part 3 of Folio 24061 relates to the Mortgaged Property. Later in this decision, I will refer to the significance of the entries in this Folio, in the context of the conclusiveness of same.

Default by the Defendants

20. Since 15 October 2009, the Defendants have been in breach of the terms of their Mortgage and loan facility and have defaulted in relation to payments due to the Plaintiff. This is averred by Ms. Loftus at para. 11 of her affidavit. It is appropriate to note that this has never been denied by the Defendants or either of them. At the hearing, the First Named Defendant took no issue with the fact of the default, nor was the amount of the then and current arrears disputed. Ms. Loftus averred that, as of 31 July 2015, arrears stood at €61,072.05, whereas the total sum then due amounted to €195,337.53.

Statements of Account

21. Ms. Loftus also exhibited statements of account in respect of account number M20014497 and these comprise Exhibit "E" to her affidavit. I have had sight of same. These statements of account identify the Defendants as the borrowers. The statements are addressed to the First Named Defendant at the Mortgaged Property. The total outstanding

balance is confirmed (€195,337.53) and this is also broken down as between principal (€134,265.48) and arrears (€61,072.05).

Change of Name by Plaintiff

22. At para. 12 of her affidavit, Ms. Loftus avers that "Pepper Finance Corporation (Ireland) Limited" was formerly known as "GE Capital Woodchester Home Loans Limited" and changed its name on 11 October 2012. She exhibits a Certificate of Incorporation on Change of Name, dated 11 October 2012, from the Companies Registration Office. This comprises Exhibit "F" to her affidavit. I note the contents of same, wherein the Registrar of Companies has certified the name change in the manner averred by Ms. Loftus in respect of company no. 34927. It will be recalled that the charge comprising a burden at Part 3 of the relevant Folio was registered in the name of GE Capital Woodchester Home Loans Limited (i.e. the former name of the Plaintiff).

Notification to Defendants of change of name

23. By letter dated 25 October 2012, the Defendants were notified of the aforesaid name change and Exhibit "G" comprises a copy of the relevant letters sent to the First and Second Named Defendants respectively.

MARP

24. It is averred at para. 14 that the Plaintiff's power to take possession of the Mortgaged Property and the Plaintiff's power to sell the Mortgaged Property have arisen and become exercisable, and at para. 15, Ms. Loftus avers that the CCMA which came into existence on 1 July 2013, is applicable to the within proceedings, as the property is a primary residence. She goes on to aver that the Plaintiff is not precluded from seeking possession of the Mortgaged Property and that the Plaintiff has complied with the MARP, although it has not proven possible to reach a suitable accommodation with the Defendants. Ms. Loftus proceeds to aver that she has considered the correspondence passing between the Plaintiff and the Defendants and has examined the log which the Plaintiff maintains of all contacts with the Defendants, and she avers that the Plaintiff has engaged with the Defendants regarding the arrears on the loan account; and has given the Defendants every opportunity to comply with the terms of the loan facility and Mortgage; and that every reasonable effort was made to agree an alternative repayment arrangement, prior to the issue of the proceedings.

First default - 15 October 2009

25. At paras. 16 and 17, Ms. Loftus avers that the Defendants first defaulted in making repayments pursuant to the loan facility on 15 October 2009 and that further defaults occurred on various dates thereafter; and that the loan facility has remained in substantial arrears since that date. No issue is taken with this by the Defendants.

CCMA

26. Ms. Loftus goes on to exhibit a letter, dated 7 February 2014, sent in accordance with Provision 28 of the CCMA whereby the Plaintiff wrote to the Defendants notifying them that the Defendants were at risk of being classified as non-cooperating within the meaning of the CCMA. This letter comprises Exhibit "H". As can be seen from the

documents exhibited, letters in similar terms, dated 7 February 2014, were sent to the First and Second Named Defendants, respectively, pursuant to Provision 28 of the CCMA.

Non - cooperating

27. On 20 March 2014 the Plaintiff wrote to the Defendants in accordance with Provision 29 of the CCMA stating that they had neglected to engage with the Plaintiff and that they were now classified as not cooperating. The letter outlined that the MARP no longer applied to the Defendants' loan facility and outlined the Defendants' right to appeal the Plaintiff's decision. This is averred by Ms. Loftus at para. 18, wherein she exhibits copies of the said letters sent to the First and Second Named Defendants, respectively, which comprise Exhibit "I". It is appropriate to note that none of the foregoing is disputed.

Demands - 6 May 2014

28. Exhibit "J" comprises the Plaintiff's letters of demand, dated 6 May 2014, sent to each of the Defendants; and at para. 19 Ms. Loftus avers that, despite these demands, the Defendants failed to pay the monies due. When the demands were served, the total then outstanding was €180,295.59, inclusive of €42,747.32 in arrears.

Letters from Plaintiff's solicitors - 30 May 2014

29. At para. 20, Ms. Loftus avers that the Plaintiff's solicitors wrote to the Defendants on 30 May 2014 informing the Defendants of their default; formally demanding vacant possession; and putting the Defendants on notice that, in default of the foregoing, the present proceedings would be instituted. Exhibit "K" comprises a copy of the aforesaid letters sent by Messrs. Eversheds to each of the Defendants.

Notice in advance of these proceedings being issued

30. At para. 21, Ms. Loftus avers that Messrs. Eversheds, upon instructions from the Plaintiff and having regard to Provision 58 of the CCMA, wrote to the Defendants notifying them of the Plaintiff's intention to immediately issue the present proceedings. Copies of these letters, both of which are dated 20 July 2015, comprise Exhibit "L".

Vacant possession required

31. At para. 22, Ms. Loftus avers that there is no other person in possession of the Mortgaged Property other than the Defendants who have been served with the proceedings; and, at para. 23, she avers that it is the intention of the Plaintiff, in order to recover the monies advanced and outstanding, and in accordance with the powers of sale pursuant to the Mortgage, to offer the Mortgaged Property for sale and, in order to obtain the best possible price for same, vacant possession of the Mortgaged Property is required.

32. Para. 24 comprises averments that the Mortgaged Property is the principal private residence of the Defendants and is located within the Circuit Court's jurisdiction. At para. 25, it is averred that the Defendants have no valid defence to the Plaintiff's claim either in law or in equity or upon the merits of the case.

33. Before proceeding further, it is appropriate to note that there is undoubtedly evidence before the court in relation to the loan facility and Mortgage entered into by the Defendants; their default in respect of the relevant terms of the foregoing; valid demand having been made; and the monies due and owing by the Defendants not having been

repaid. Possession was also demanded, and this has not been delivered up. None of the foregoing is disputed.

Lender's powers

34. Clause 8 of the Mortgage details the "Lender's Powers", whereas Clause 9 of the Mortgage relates to the "Exercise of Mortgagee's Powers". Para. 9.01 (a) specifies that: -

"The Lender shall not exercise any of the powers provided for in Clause 8 hereof or conferred by statute until after any of the following events shall occur: -

(a) Default is made in payment of any monthly or other periodic payment or in payment of any other of the secured monies hereunder . . .".

35. The evidence establishes without doubt that there has been such default. It is also beyond doubt that the relevant Mortgage is registered as a burden on Part 3 of the relevant Folio in respect of the Mortgaged Property. Furthermore, the evidence discloses that the CCMA was fully complied with. The effect of the letters, to which I have referred earlier, was to remove the matter from the MARP; and I am satisfied that there is no impediment to the seeking of possession in the present proceedings, having regard to the foregoing.

Conversion of the Plaintiff to a Designated Activity Company

36. The fact that the Plaintiff is now a Designated Activity Company ("DAC") is dealt with by means of a further affidavit, which Ms. Loftus swore on 9 June 2016. Having made averments as to her authority and source of knowledge she goes on to aver as follows: -

"4. I say that on the 29 day of October 2015, in accordance with the Companies Act 2014, Pepper Finance Corporation (Ireland) Ltd. converted to a Designated Activity Company. As a result of the conversion, the Plaintiff re – registered as Pepper Finance Corporation (Ireland) Designated Activity Company".

37. Ms. Loftus exhibits a copy of the "Certificate of Incorporation on Conversion to a Designated Activity Company" which was issued by the Registrar of Companies on 29 October 2015. She goes on to aver, at para. 5 of her affidavit, that no prejudice arises in respect of the Defendants having regard to s. 63 (12) of the Companies Act 2014 which provides that: -

"The re-registration of an existing private company as a designated activity company pursuant to this Chapter shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status".

Circuit Court Order – 29 June 2016

38. The 9 June 2016 affidavit was sworn by Ms. Loftus in the context of an ex parte application seeking to substitute "Pepper Finance Corporation (Ireland) Designated Activity Company" for "Pepper Finance Corporation (Ireland) Ltd". That application was

granted by the Circuit Court; and this Court was furnished with a copy of the relevant Order made on 29 June 2016 by the County Registrar for Co. Meath.

Six Affidavits sworn by the First Defendant

39. The First Defendant has sworn six affidavits in the context of opposing the relief sought. Two of those affidavits were sworn prior to the Circuit Court hearing, at which the First Named Defendant appeared in person, which resulted in the possession order in favour of the Plaintiff. I have carefully considered all averments made by the First Named Defendant, on behalf of the Defendants, in all six affidavits, namely:
- (1) the First Named Defendant's affidavit sworn on 14 November, 2017;
 - (2) the Supplemental Affidavit sworn by the First Named Defendant on 27 August 2018;
 - (3) the affidavit sworn by the First Named Defendant on 27 August 2019 (grounding an application to the Master for an order extending the time for service of an appeal against the Circuit Court's 16 October 2018 possession order);
 - (4) a further affidavit sworn by the First Named Defendant, also on 27 August 2019;
 - (5) a Supplemental Affidavit sworn by the First Named Defendant also on 27 August 2019; and
 - (6) a further affidavit sworn by the First Named Defendant on 13 November 2019.
40. Having carefully considered the contents of the foregoing, it is fair to say that the opposition to the Plaintiff's claim revolves around a decision made by Ms. Justice Ní Raifeartaigh in *Pepper Finance Corporation (Ireland) Designated Activity Company v Hanlon* (unreported, High Court, 11 January 2018). At para. 43. of my judgment of 31 January 2020 in *Pepper Finance Corporation (Ireland) Designated Activity Company v Conway & Anor.* [2020] IEHC 35, I made reference to the decision of Ní Raifeartaigh J.

Legal / beneficial ownership

41. In her decision, Ní Raifeartaigh J. commented, *inter alia*, on the reality that "... there can be a split between the legal and the beneficial ownership". It seems to me that this reality is not something the Defendants have understood. That is not a criticism, in circumstances where the First Named Defendant, who is not a lawyer, appeared, in person, to oppose the Plaintiff's application, just as he had done before the Circuit Court. It is, however, a feature of the present case.

"Bare Legal Title"

42. The central contention made in opposition to the Plaintiff's claim in these proceedings is that, in circumstances where the Plaintiff is 'merely' the owner of legal title to the Mortgaged Property, they are not entitled to enforce rights as mortgagee. Although put in a variety of ways in the various affidavits sworn by the First Named Defendant, the following suffices to illustrate the claim made in opposition to the application for possession:

- “The Plaintiff only holds a Bare Legal Title and is not therefore the Issuer or the holder of any Mortgage.” (Supplemental Affidavit sworn by First Defendant on 27 August 2018, para. 6);
- “the Plaintiff can never be put onto our folio because they only hold a Bare Legal Title.” (Supplemental Affidavit sworn by First Defendant on 27 August 2018, para. 10);
- “The Plaintiff was only given the Bare Legal Title within the Portfolio Management Agreement, with 40 conditions” (Supplemental Affidavit sworn by First Defendant on 27 August 2018, para. 13);
- “a ‘Bare Trust’ does not entitle the Plaintiff to issue legal proceedings as they do not have the power to do this: Windmill Funding Limited should be the Plaintiff.” (Supplemental Affidavit sworn by First Defendant on 27 August 2018, para. 14);
- “A Bare Trustee cannot make any independent decisions of any consequence such as initiating the repossession of a family home to gain value for the Bare Trustee” (Supplemental Affidavit sworn by First Defendant on 27 August 2018, para. 16);
- “Page 6(27) and 7(3) of Justice Ní Raifeartaigh: Claims that Pepper are the Mortgagee’s; the Tax Determination says that they are not the Mortgagee;” (Grounding Affidavit sworn by the First Defendant on 27 August 2019, para. 12);
- “I say that the Portfolio Management Agreement dated the 28th September 12. (1) GE Capital Woodchester Homeloans Limited is the Seller (34927). (2) Windmill Funding Limited is the Purchaser (514093), (3) Pepper Netherlands Cooperatie U.A. is the Guarantor (55309763) ... Bare Legal Trust: Pepper are now claiming; yes the mortgages were sold to Windmill but they retained the Legal Title: not true, they were given a Bare Legal Title by Windmill.” (Supplemental Affidavit sworn by First Defendant on 27 August 2019, paras 10 and 14);

Legal Title

43. With regard to the foregoing averments, in particular the First Named Defendant’s reference to a transaction dated 28 September 2012, it was that transaction which Ní Raifeartaigh J. considered in the *Hanlon* case. The same matter has also been the subject of further judicial consideration (see Mr. Justice Binchy’s decision in *Pepper Finance Corporation (Ireland) Designated Activity Company v Jenkins* [2018] IEHC 485). In essence, it was held in the foregoing decisions that the legal effect of the relevant deed was that the Plaintiff in the present proceedings holds legal title to the relevant loans and mortgages. That, of course, is entirely consistent with the relevant entries in Folio 24061F, to which I have already referred.

Section 62(7) Registration of Title Act

44. At this juncture, it is appropriate to emphasise that the Plaintiff’s claim in these proceedings is made pursuant to s. 62(7) of the Registration of Title Act 1964. That being so, it is useful to refer to what Ms. Justice Baker held in *Bank of Ireland Mortgage Bank v*

Cody & Anor [2021] IESC 26 as regards the said provision and the Court's jurisdiction to deal with possession applications in a 'summary' manner, pursuant to same:

"Section 62(7) Registration of Title Act: Summary Proceedings

14. *Section 62(7) of the Registration of Title Act, 1964 makes provision for the summary disposal of an action seeking possession of registered land:*

'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, obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession.'

15. *The jurisdiction conferred by that section applies to proceedings for possession by the registered owner of a charge once monies secured by the charge have become due. The subsection does not identify what is meant by the making of an application 'in a summary manner', but the Court is given a discretion, if it so thinks proper, to order possession of the land to be delivered up, the consequence whereof is that the owner of the charge thereupon becomes a mortgagee in possession.*

16. *In Bank of Ireland v Smyth [1993] 2 IR 102, [1993] ILRM 790, Geoghegan J. rejected the notion that s. 62(7) confers a wide discretion which enables a court to refuse an application for possession on grounds of sympathy. He thought the words 'may, if it so thinks proper' simply mean that the court should apply equitable principles in considering the application for possession, but not 'sympathetic factors' and thus ensure that the application is made bona fide with a view to realising the security:*

'The words "may, if it so thinks proper" in s. 62, sub-s. 7 mean no more, in my view than, that the court is to apply equitable principles in considering the application for possession. This means that the court must be satisfied that the application is made bona fide with a view to realising the security.'
(p. 111)

17. *The procedure was explained in the decision of this court in Irish Life and Permanent v. Dunne [2015] IESC 46, [2016] 1 IR 92, in which it held that any court seeking to make an order for possession under s. 62(7) must first ask itself whether, as a matter of law, it can properly be said that the monies are secured and are due."*

The Plaintiff is the registered owner of the charge

45. It is beyond doubt that the Plaintiff in the present proceedings is the registered owner of the relevant charge, comprising the Mortgage which the Defendants entered into, in order

to pledge their property as security for their borrowings. Regardless of how sincerely the Defendants might believe that the owner of legal title, as opposed to the beneficial interest, cannot make the present application, they are sincerely mistaken. Arguments based on a characterisation of the Plaintiff as being the holder of 'only' what the First Defendant calls "Bare Legal Title" offer no defence to the present claim.

46. The evidence before the court puts beyond doubt the fact that monies secured by the relevant charge have become due to the registered owner of that charge. The answer to the question as to whether it can be properly said that the monies are secured and are due, is undoubtedly in the affirmative. As to what is currently due, the First Named Defendant took no issue with the fact that, as matters currently stand, the outstanding balance comes to some €297,401 (inclusive of arrears of some €188,000).
47. With respect to the foregoing, it should be emphasised that at no stage have the Defendants or either of them ever taken issue with, *inter alia*, the fact of the lending; their default, the demands; their failure to repay; and the quantum outstanding.
48. Rather, the opposition to the Plaintiff's claim is based on the erroneous proposition that, because the plaintiff holds legal title, it is impermissible for the registered owner of the relevant charge to rely on their statutory right pursuant to s. 62(7) of the 1964 Act, in circumstances where the evidence undoubtedly reveals that repayment of the principal money secured by the Defendants' Mortgage has become due.
49. In short, the averments made by the First Named Defendant in opposition to the Plaintiff's claim do not constitute any stateable basis for a defence; whereas the court has before it, evidence of the Plaintiff's entitlement to the relief sought in its application. The same comment applies notwithstanding the oral submissions made by the First Named Defendant at the hearing, to which I will presently refer, all of which submissions I have very carefully considered.

Adjournment application

50. Before looking at the First Defendant's oral submissions, it is appropriate to say that after counsel for the Plaintiff had opened his client's case, in full, the First Named Defendant began his replying submissions by first making an application for an adjournment of the hearing.
51. It is fair to say that the sole basis for seeking the adjournment was because the First Named Defendant had been provided, prior to the commencement of the hearing, with a booklet containing two authorities, namely, the Supreme Court's decision in *Cody* and this court's decision in *Conway*, both of which authorities I have referred to earlier in this decision.
52. As well as the foregoing being the sole reason for the seeking of an adjournment, the Defendant made it clear that the purpose was to enable him to deliver "an affidavit" in response to what was contained in those authorities.

53. In response to the adjournment application, counsel for the Plaintiff submitted that his instructions were that, in advance of a hearing of this matter which had been due to proceed 'remotely', in July 2021, 3 booklets were delivered to the Defendants, namely, (1) a booklet containing Circuit Court proceedings; (2) a booklet containing affidavits sworn after the Circuit Court proceedings had been determined; and (3) a booklet concerning the two authorities in question.
54. In reply, the First Named Defendant indicated that he had not received item (3) and he maintained that the "first time" he got the two cases in question was on the day of the hearing.
55. Having carefully considered the submissions made with regard to the question of an adjournment, and having made clear that I regarded myself as obliged to grant an adjournment where the interests of justice required it, I gave a short *ex tempore* ruling refusing the adjournment application. In doing so, I explained the reasons for refusing the adjournment and, for the sake of clarity, it is appropriate to refer to those.
56. There did not appear to be any dispute between the parties as to the fact that the hearing of this matter had been scheduled to proceed last July, but did not proceed at that juncture, in circumstances where the First Named Defendant indicated an inability to access or use the relevant technology to participate in a remote hearing of the Defendants' appeal. Despite this, I did not feel that I could fairly make a determination as to whether or not the First Named Defendant had received item (3) last July. I was entirely satisfied that Counsel was representing his instructions accurately but, not having affidavit evidence before me, I did not believe it would be fair to reach any finding on that discrete issue.
57. However, in circumstances where the application for an adjournment was dealt with some 50 minutes into the hearing, I felt able to say with confidence that the First Named Defendant had been furnished with what were just two cases, at least an hour (approximately) before commencing his submissions in reply. Having had such access to the two authorities upon which the Plaintiff proposed to rely, I was satisfied that no injustice arose from refusing an adjournment.
58. Furthermore, given that the First Named Defendant made very clear that the purpose of the adjournment was to deliver "an affidavit" with reference to the cases provided to him, I was satisfied that no injustice would arise by refusing an application to adjourn for such a purpose. In this context, I explained the true purpose of an affidavit, namely, to aver to matters of fact, rather than to make legal submissions in response to legal authorities.
59. Additionally, in circumstances where no less than six affidavits had been sworn on behalf of the Defendants, I was satisfied that no injustice would be done by refusing an adjournment to facilitate the delivery of a seventh affidavit, particularly in circumstances where there was no suggestion whatsoever made by the First Named Defendant that there was any issue of fact which required to be addressed, but which was not already

dealt with in the half dozen affidavits previously sworn and served. For these reasons, an adjournment was refused.

Oral submissions opposing the Plaintiff's claim

60. As to the oral submissions made by the First Named Defendant, it is fair to say that these reflected the various averments, to which I have already referred. The First Named Defendant also focused in his submissions on the procedural history of the matter and concentrated, in particular, on the decision by Ms. Justice Ní Raifeartaigh in the *Hanlon* case. A central theme in the First Named Defendant's oral submissions concerned a stenographer's note of the decision by Ní Raifeartaigh J. and the question of it being signed. Again, the fundamental basis of the opposition to the claim was the contention that the Plaintiff had no entitlement to enforce the charge registered as a burden on the relevant Folio, having regard to what the First Defendant contended to be the consequences of a 'loan sale' going back to 28 September 2012.
61. Quite apart from the fact that neither of the Defendants were parties to the relevant transactions; and quite apart from the fact that the Plaintiff in the present proceedings did not rely on the decision of Ní Raifeartaigh J. as the basis for the present application (rather, the Plaintiff's claim is grounded on its rights pursuant to s. 62(7) of the 1964 Act); I am satisfied that nothing in the First Named Defendant's oral submissions provides any stateable basis for a defence to the Plaintiff's claim, in light of the entries on the Land Registry Folio, coupled with the averments and exhibits of Ms. Loftus on behalf of the Plaintiff.

Bare assertions

62. It seems to me to be entirely fair to say that the averments and submissions made by the First Named Defendant comprise no more than 'bare' assertions with regard to a factual and legal position, which assertions are not supported by any evidence whatsoever.
63. By contrast, the clear, indeed only, evidence before the court is that the Plaintiff is the registered owner of the Mortgage secured on the Defendants' property, and that the Defendants have defaulted on their obligations, entitling the Plaintiff to exercise its rights as detailed in the Mortgage.

One and the same entity

64. It will be recalled that the charge comprising entry no. 7 at part 3 of Land Registry Folio 24061F, County Meath (dated 13 July 2010) confirms that "GE CAPITAL WOODCHESTER HOMELOANS LIMITED is owner of this charge". The evidence before the court demonstrates that the Plaintiff and "GE Capital Woodchester Homeloans Limited" are one and the same entity.
65. No issue is taken with the fact that the Defendants' default goes back to 2009 and that no payments have been made since 2014.
66. Having regard to the evidence which I have examined in this judgment, repayment of the principal monies secured by the relevant charge has become due for the purposes of s. 62(7) of the 1964 Act.

Conclusiveness of the Register

67. In the Cody decision, Baker J. stated the following as regards the conclusiveness of entries in the Land Registry:

"Section 31 Registration of Title Act, 1964: Conclusiveness of the Register

49. *The owner of a charge who seeks to obtain possession pursuant to s. 62(7) has to prove two facts:*
- (a) That the Plaintiff is the owner of the charge;*
 - (b) That the right to seek possession has arisen and is exercisable on the facts.*
50. *The summary process is facilitated by the conclusiveness of the Register as proof that the Plaintiff is the registered owner of the charge is a matter of the production of the Folio, and, as the Register is by reason of s. 31 of the Act of 1964 conclusive of ownership, sufficient evidence is shown by that means: See the discussion of the Court of Appeal in Tanager DAC v Kane [2018] IECA 352. The judgment of the Court of Appeal inter alia held that the correctness of the Register cannot be challenged by way of defence in summary possession proceedings, and that a court hearing and application for possession pursuant to s. 62(7) of the Act of 1964 is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the Plaintiff is the registered owner of the charge and the right to possession have arisen and become exercisable.*
51. *The Register reflects the ownership of land and burdens affecting the interest of the registered owner."*

The evidence before the court in the present case establishes, beyond doubt, that the Plaintiff is the owner of the charge and that the right to seek possession has arisen and is exercisable on the facts.

Tax determination

68. It will be recalled that at para. 12 of his "Grounding Affidavit", sworn on 27 August 2019 (in the context of extending time to appeal) the First Named Defendant made, inter alia, the following averments: "Page 6(27) and 7(3) of Justice Ní Raifeartaigh: Claims that Pepper are the Mortgagee's; the Tax Determination says that they are not the Mortgagee;"
69. As regards to the purported reliance upon the said "Tax Determination", this is a matter which my judgment in the *Conway* case also addressed. In *Conway*, submissions were also made by the Defendants with reference to what they contended to be the consequences of a Mortgage Sale Deed ("MSD"), dated 28 September 2012, which was entered into between the Plaintiff (under its former name); Windmill Funding Limited; Pepper Netherlands Holding Coöperatie UA; and TMF Trustee Limited. Given the First Named Defendant's references both to the 28 September 2012 transaction and to the Tax

Determination, it seems appropriate to set out, verbatim, para. 48 of this court's decision in Conway which is of equal relevance in the present case:

"The Defendants' arguments based on a decision of a Tax Appeal Commissioner

48. *The First Named Defendant also makes assertions based on a decision of a Tax Appeal Commissioner in Corporation Y Limited (Appellant) v. Revenue Commissioners 24 TACD 2017. I am satisfied that the decision of the Tax Appeal Commissioner in Corporation Y Ltd. v. The Revenue Commissioners concerned whether the Plaintiff was entitled, or not, to carry forward losses in respect of the Plaintiff's pre – 28 September 2012 business, in order to set such losses against profits from the Plaintiff's post – 28 September 2012 business. The question which arose during the course of the Tax Appeal Commissioner's determination concerned whether the Plaintiff was engaged in the same trade, both before and after the securitisation transaction which is evidenced by the MSD. The Tax Appeal Commissioner decided that, on 28 September 2012, the essential characteristics of the Plaintiff's business changed, such that, thereafter, the Plaintiff was in the business of administration and collection not for its own benefit, but for the benefit of others, such that the set-off of losses against profits should be refused. The First Defendant argues that the findings of the Tax Appeal Commissioner mean that a Plaintiff does not have title to the relevant mortgage portfolio including the Mortgage and charge registered against the Defendants' home. This submission by the Defendants is wrong both in fact and in law. In the manner set out above, this court has found that the Plaintiff clearly does have title to the charge over the Defendants' property. Furthermore, the decision of Ní Raifeartaigh J. in Pepper v. Hanlon handed down on Thursday 11 January 2018 makes it clear that a determination of a Tax Appeal Commissioner could never bind this Court. I am satisfied that, even if the Tax Appeal Commissioner had made the findings contended for by the Defendants, that would not determine the issues which this Court is required to determine with regard to the Plaintiff's title to the charge registered in the Land Registry on the Defendants' folio. The following is a verbatim extract from the transcript approved by Ní Raifeartaigh J. in relation to her decision in Pepper v. Hanlon: -*

"Ms. Justice Ní Raifeartaigh:

So the position is that what is sought to be relied on is a determination of the Tax Appeals Commission and what I am sure the Defendants don't understand is that even if it were favourable to them on an issue that this Court would have to determine, this Court would not be bound by it, that is the central point. No matter what the Tax Appeals Commission had determined would not bind this Court. This Court is not bound by determinations of the Tax Appeals Commission. The court is bound by the law as set down in the legislation, in the authorities have been handed down by the High Court, the Court of Appeal and the Supreme Court, that is what this Court is bound by. It also is relevant that the information or a determination of a Tax Appeals Commission is relating to an issue of taxation, whereas the issue before the court is a different one, it is the entitlement of a party

to recover a property which was the subject of mortgage agreement so it is a different issue”.

The foregoing comments by the learned judge apply equally to the facts in this case. In short, the Defendants’ attempt to construct an argument that the Plaintiff is not the registered owner of the relevant Mortgage, with reference to what the Defendants believe was decided by the Tax Appeal Commissioner, is without merit, regardless of how genuinely held the Defendants’ views may be.”

70. The First Defendant contends that the effect of what was described at the hearing as the relevant ‘loan sale’ was for an entity described as “Windmill Funding Limited” (i.e. not the Plaintiff) to have acquired title to the Defendants’ Mortgage. It is for this reason that the First Defendant averred at para. 14 of his 27 August 2018 “Supplemental Affidavit” that “Windmill Funding Limited should be the Plaintiff”. Underpinning this assertion is that all rights in the Defendants’ Mortgage were transferred by the Plaintiff to Windmill Funding Limited. However, in the absence of written notice of a transfer of rights in the manner required pursuant to s. 28(6) of the Supreme Court of Judicature of Ireland Act, 1877, the vendor (i.e. the Plaintiff) would retain the interest in the rights purportedly assigned.
71. There is no evidence before the court of any assignment of the legal interest. Indeed, such an assignment is utterly ruled out by the conclusive entry at part 3 of the relevant Folio (i.e. that the Plaintiff is the registered owner of the charge comprising the Mortgage). In this manner, the absence of notice of the type required by s. 28(6) of the 1877 Act provides another insurmountable problem for the Defendants in seeking to oppose the Plaintiff’s claim for possession, even in the terms which the First Named Defendant sought to advance the opposition to the Plaintiff’s claim. At para. 50 of my decision in Conway, I made the following comments on this issue, which apply with equal force in the present case:

“50. Another difficulty for the Defendants in seeking to argue that the Plaintiff lacks title to the charge in respect of which it is the registered owner, arises by virtue of s. 28(6) of the Supreme Court of Judicature Act 1877. In AIB Mortgage Bank v. Thompson [2018] 3 IR 172, Baker J. provided the following guidance in relation to the nature and effect of s. 28(6), at [27-28] as follows: -

‘That a debtor be given notice of the assignment of a debt or chose in action is important for practical and legal reasons. A debtor must know to whom the debt is due, and from what date a debtor may with certainty pay a debt to an assignee.

Section 28(6) identifies the date at which the assignment of a debt or chose in action becomes effectual in law to transfer or pass the legal right to such debt or chose in action and all legal remedies for enforcement. Thereafter, and following upon notice, the power to give a good discharge for the debt thereby vests in the assignee without concurrence of the assignor’.

51. *The Defendants argue that, notwithstanding the explicit terms of the MSD, both the legal and equitable interests in their loan and Mortgage were transferred to Windmill Funding Limited. In the manner explained earlier in this judgment I have found that there is no evidence to support this assertion by the Defendants and I am entirely satisfied that there is overwhelming evidence which proves that the Plaintiff is the legal owner, properly registered, of the Mortgage and charge affecting the Defendants' property."*

Conclusion

72. The First Named Defendant submits that the Plaintiff's application should be refused, and the matter should proceed to a full plenary hearing. I am entirely satisfied that there is no outstanding issue to be resolved. This is because the attempts made to oppose the Plaintiff's claim fall very well short of anything which might constitute a stateable grounds of defence. To look at it another way, a careful analysis of the entirety of the evidence and submissions reveals that there is no possibility of the Defendants having any *bona fide* defence to the Plaintiff's claim. In short, the Plaintiff's claim is unanswerable. The Plaintiff has made out its proofs and has done so comprehensively and in a way which rules out a legal or factual basis upon which any future trial judge could dismiss the Plaintiff's claim.
73. I am satisfied that it is appropriate to order possession of the property to be delivered to the Plaintiff and I so order. I do so, having regard to the observations by Baker J. in the Cody case (referring to what Geoghegan J. held in the *Smyth* decision) concerning the phrase "may, if it so thinks proper". The evidence before the court entitles me to hold that the application is made *bona fide* with a view to realising the relevant security, which the Defendants granted in favour of the Plaintiff, over the Mortgaged Property. It can safely be said that the monies are secured, and are due, and the Plaintiff is entitled to the relief sought. For the reasons detailed in this judgment, I am satisfied that the Plaintiff is entitled to possession of the Mortgaged Property.
74. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."
75. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs, which should be made. My preliminary view is that the costs of the entirely successful Plaintiff/Respondent fall to be met by the entirely unsuccessful Defendants/Applicants. In default of agreement between

the parties on any issue, short written submissions should be filed in the Central Office within 14 days.