

**THE HIGH COURT
CIRCUIT APPEAL
WESTERN CIRCUIT
COUNTY OF MAYO**

[2022] IEHC 41
RECORD NUMBER 2017/157/CA

BETWEEN:

SHORELINE RESIDENTIAL DESIGNATED ACTIVITY COMPANY AND PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

BRENDAN FLANNERY AND MAUREEN FLANNERY

DEFENDANTS

EX TEMPORE JUDGMENT OF MS. JUSTICE SIOBHÁN PHELAN DELIVERED ON 28 JANUARY, 2022

INTRODUCTION

1. This is a claim by the first named plaintiff for an order for possession consequent upon a default in payments under a loan.
2. This matter comes before the High Court by way of an appeal against the making of a possession order by the Circuit Court.
3. There is no dispute that the money was advanced to the defendants and that they have not repaid it and have been in arrears since in or about 2011.
4. Despite the relative simplicity of the proceedings, a series of different issues have been raised by the defendants both as litigants in person and by successive legal representatives on their behalf since the inception of these proceedings and voluminous documentation. Not all of these issues were advanced with any conviction during the appeal hearing. Nor were they clearly abandoned.
5. In this judgment, the court seeks to address the main issues identified. Issues that are not addressed have not been overlooked but the court does not consider that they are of such substance as to require analysis.

PROCEDURAL HISTORY

6. The proceedings were commenced by way of a civil bill for possession issued on the 31st March 2016. The principal relief sought was an order for possession. A number of motions were pursued in the Circuit Court including an application striking out the proceedings for want of a cause of action brought by the defendants in April 2017 in seeming reliance on alleged non-compliance with S.I. No. 224/1989 European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations, 1989.
7. An order for possession was made by the Circuit Court (McCabe J.) on the 25th April, 2017. This order was made subject to a stay of 12 months. It was ordered that if the arrears were discharged within the period of the stay or within such time as the parties agree that the order for possession shall be vacated.

8. Thereafter, the defendants set about seeking to set aside the order for possession. An application for an extension of time for service and lodgement of a notice of appeal to the High Court was made to the Master on the 30th June 2017. It appears that he made an order on the 21st July 2017 extending the time to lodge the appeal by a period of three weeks.
9. A notice of appeal was lodged dated the 9th August 2017.
10. By letter dated the 13th September 2017, the defendants sought voluntary discovery. This was followed by a notice to produce dated the 14th September 2017.
11. By letter dated the 22nd September 2017, the plaintiffs' solicitors replied refusing the request for discovery and referring the defendants to the Data Protection Acts, 1988-2003. In this same letter, the plaintiffs' solicitor confirmed that they would facilitate inspection of the documents identified in the notice to produce at their offices.
12. By notice of motion dated the 26th September 2017, the first named defendant sought a copy of the DAR of the hearing before the Circuit Court (McCabe J. on the 25th April 2017) when the order for possession was granted.
13. The Circuit Appeal was first listed for mention in the Non-Jury List on the 23rd October, 2017. The matter appears to have been listed on multiple occasions thereafter.
14. This matter has been adjourned from time to time in the High Court list. It came before the court (Creedon J.) in 2018 when the first named defendant appeared as litigant in person. On that occasion, he was allowed time to engage a legal team.
15. The matter came back before the Court (Barniville J.) in February 2019 at which time it was indicated that a firm of solicitors was coming on record.
16. Subsequently, counsel instructed on behalf of the defendants appeared on behalf of the defendants/appellants and raised a point under the Consumer Credit Act, 1995. Consequent upon this development the matter was adjourned for written submissions.
17. By notice of motion dated the 11th November 2019, the first named plaintiff successfully applied to have Pepper Finance Corporation (Ireland) DAC joined as co-plaintiff/co-respondent in the action. This application was made in circumstances where the second named plaintiff is now the registered owner of the charge. The folio entry recording the second named plaintiff as owner was exhibited in an affidavit grounding the application to join the second named plaintiff, registration effected from the 25th July, 2019.
18. Most recently, the matter came on before the court on the 26th July 2021. On that date the court (Hyland J.) acceded to an application for an adjournment by the first named defendant in circumstances where a different barrister appeared instructed by a new firm of solicitors. The said firm of solicitors had not yet entered an appearance and were not formally on record. The court directed that a booklet of papers would be prepared.

19. The matter came on for hearing before this Court on the 24th January 2022.

ISSUES RAISED

20. At the outset counsel on behalf of the appellants/defendants indicated that there were three issues which he wished to pursue on the appeal. The issues identified to the court were as follows:
1. The loan agreement is unenforceable by reason of a failure to serve an important notice to the debtors in accordance with s. 129 of the Consumer Credit Act, 1995;
 2. Lack of evidence before the court concerning the joinder of Pepper Finance Corporation (Ireland) DAC as a co-plaintiff and demonstrating how it came to be the registered owner of the charge as now recorded on the folio;
 3. The entitlement of the first named plaintiff to seek possession when the affidavit grounding the proceedings only refers to the activities of the first named plaintiff and no reference was made to original loan with the Irish Nationwide Building Society (hereafter 'INBS') to demonstrate default on the terms of the loan agreement.
21. The matter proceeded as a *de novo* hearing and counsel for the plaintiffs opened the proofs grounding the application.
22. During the course of the hearing, counsel for the defendants referred to their objection that the affidavit grounding the proceedings constituted hearsay (as made by affidavit of the first named defendant in his affidavit in response to the proceedings sworn on the 30th August 2016), albeit that this had not been flagged as one of the three issues the defendants intended to pursue on the appeal in the opening. It seems to me that this objection is linked to the issue at number 3 above and I will address both together.
23. In his affidavit sworn on the 30th August 2016, the first named defendant further objected that the deed of mortgage provided for transfer of the benefit under the deed to any other building society or person but that the plaintiff is not a "person". The first named defendant protested on affidavit that he had not agreed to the transfer of his loan to the plaintiff. This argument was not repeated during the course of the appeal, presumably because of the express terms of the Deed of Mortgage which provided for the transfer of security.
24. As for the case advanced on the papers of on non-compliance with European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations, 1989 (S.I. No. 224/1989) the Court does not consider it necessary to do more than refer to the decision of Noonan J. at paragraphs 21 and 22 of his judgment in *Bank of Ireland v. McMahon* [2017] IEHC 600 as the findings there set out that these Regulations have no application to a situation such as presents in this case is clearly correct.

25. It appears from the papers that it has, at times, been contended on behalf that there has been a failure to comply with the Central Bank's Code of Conduct on Mortgage Arrears and while this was not pressed at hearing, it will be addressed briefly below.
26. It is important to note that the first named defendant did not in the said affidavit in August, 2016 deny the existence of arrears on the account dating from 2011, although in later affidavits he raised an issue in relation to the amount of arrears. This issue was not pursued during the hearing before this Court.
27. The defendants did not during the hearing contend that they had discharged their obligations under the loan agreement. They did not deny being in default. Indeed, they exhibited a report from an accountant which confirms a default while disputing the amount of same.

THE APPLICATION FOR POSSESSION

28. The application for possession was made pursuant to s. 3 of the Land and Conveyancing Law Reform Act 2013. Section 3 provides for the bringing of proceedings in the Circuit Court where the proceedings are in respect of land which is the principal private residence of—

(a) the mortgagor of the land concerned, or

(b) a person without whose consent a conveyance of that land would be void by reason of—

(i) the Family Home Protection Act 1976, or

(ii) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010,

and the mortgage concerned was created prior to 1 December 2009.

29. The proceedings are grounded on the affidavit of Geoffrey Johnston sworn on the 21st March 2016.
30. Mr. Johnston is a director of the first named plaintiff and he made his affidavit from a perusal of the plaintiff's books and records of account in relation to the defendants' indenture of mortgage and charge, the subject matter of these proceedings.
31. Mr. Johnston's affidavit verifies details of the premises the subject of the application which premises are located at an address in County Mayo and provides details of the occupancy and possession of the said premises confirming that it is a dwelling house occupied as a family home. He also provides details of the security pursuant to a deed of mortgage dated 8th March, 1999 which mortgage was registered as a charge on the folio (40882F in the County of Mayo) and which mortgage provides that the mortgagee shall not exercise its power of going into possession or its power of sale unless default has been made in paying the loan but thereafter provides that in the event of default the mortgagee may transfer the mortgage to any other building society or person (clauses 16

and 17a of the Deed of Mortgage). Mr. Johnston avers that there has been a default in payment of the monies due to the plaintiff since on or about 31st July 2011.

32. Mr. Johnston identified the root of the plaintiff's claim as a transfer order made in the High Court on the 1st July 2011 pursuant to s. 34 of the Credit Institutions (Stabilisation) Act 2010 whereby the assets and liabilities of the Irish Nationwide Building Society were transferred to Anglo Irish Bank Corporation Limited.
33. Thereafter the Anglo Irish Bank Corporation Limited changed its name to Irish Bank Resolution Corporation Ltd pursuant to the Irish Bank Resolution Corporation Act 2013. The Minister for Finance made the Irish Bank Resolution Corporation Act 2013 (Special Liquidation) Order 2013 on the 7th February 2013 providing for the orderly winding up of the Irish Bank Resolution Corporation Ltd. Joint special liquidators were appointed.
34. A Deed of Transfer was executed by one of the joint special liquidators on the 6th June 2014 transferring the interest held by the Irish Bank Resolution Ltd., then in special liquidation, in the mortgage and premises owned by the defendants/appellants to the plaintiff (the defendants/appellants) premises is identified at Schedule 1 to the Deed of Transfer which is exhibited to Mr Johnston's affidavit together with the Order of the High Court pursuant to s. 34 of the Credit Institutions (Stabilisation) Act 2010 and vouching documentation in relation to the change of name of Anglo Irish Bank Corporation Limited.
35. By letter dated the 10th June 2014, the first named plaintiff/respondent corresponded with the defendants/appellants further to earlier letters from the IBRC in April and June, 2014 to confirm that it was the new owner of the mortgage. The transfer of the charge is also reflected on the folio from June 2014. The letters from the IBRC (signed by the Special Liquidators) recites that the IBRC has agreed to sell amounts owing to it in respect of the defendants/appellants mortgage to the plaintiff/respondent. It was made clear that the amounts owing in respect of the mortgage were now owed to the plaintiff and not to the IBRC.
36. Letters of demand and threatening possession proceedings issued from the first named plaintiff to the defendants in March 2015.
37. Mr. Johnston further avers that Pepper Finance Corporation (Ireland) designated activity company were appointed by the plaintiff to undertake certain credit servicing activities on its behalf. He states that although the plaintiff was not a regulated entity, it chose to voluntarily apply the 2013 Code of Conduct on mortgage arrears insofar as reasonably practicable.

THE LOAN AGREEMENT & EVIDENCE OF DEFAULT

38. The loan was for the purchase of a family home located on Church Road, Belmullet, County Mayo. The first monthly repayment was £497.00.
39. By deed of mortgage dated 8 March 1999, the defendants charged the premises with the payment of the secured monies and assented to the registration of the mortgage as a

burden on the folio. The defendants were registered as joint owners of the premises on the 13th March 2001.

40. The mortgage provides that all monies remaining unpaid and secured by the mortgage become immediately repayable if any payment of any monthly or other periodic payment or payment of any other of the secured monies is unpaid or in arrears for a period one month after same shall have fallen due.
41. In this case, it is pleaded (and not denied by the defendants) that the defendants defaulted in payment of monies due pursuant to the indenture from the 31st July 2011. Statements exhibited by the first named plaintiff confirm ongoing arrears by January 2014.
42. By letters dated 25th April 2014 and 9th June 2014, the IBRC wrote to the defendants to advise that they had agreed to sell amounts owing to it in respect of the mortgage loan account to the first named plaintiff.
43. The first named plaintiff wrote by letter dated the 27th November 2014 warning the defendants that they were at risk of being classified as non-cooperating, by further letter dated the 8th January 2015 classifying the defendants as non-cooperating, by letter dated the 27th October, 2015 and the 5th March 2015 demanding payment of all sums outstanding. Solicitors for the first named plaintiff entered into correspondence with the defendants in May 2015 seeking delivery of possession of the premises. It is pleaded that, as of February 2016, the arrears were due (the amount of same appears to be disputed in a report prepared by an accountant on behalf of the defendants and a supplemental affidavit sworn by Mr. Johnston confirmed a miscalculation in figures) and the defendants were in continuing default.
44. In further affidavit evidence filed subsequent to the making of the order for possession in the Circuit Court, the defendants contend that there was overcharging on the account and exhibit an accountant's report as well as documentary evidence of the defendants engagement in respect of the loan over the years. The documentary evidence exhibited by the defendants themselves confirms mounting arrears from 2011.

DISCUSSION AND DECISION

NON-COMPLIANCE WITH SECTION 129 OF CONSUMER CREDIT ACT, 1995

45. The defendants refer the court to the provisions of s. 129 of the Consumer Credit Act, 1995. Section 129 provides:

129.—(1) An agreement for a housing loan shall contain on the front page a notice in the form set out in *Part II* of the *Third Schedule* or such other form as may be prescribed.

- (2) A mortgage lender who is a party to an agreement referred to in *subsection (1)* shall ensure that the agreement complies with that subsection.

46. Part II of the Third Schedule requires that the front page of the housing loan agreement should identify the amount of the credit advanced, the period of the agreement, the number of repayment instalments, the amount of each payment instalment, the total amount repayable, the cost of the credit, the APR, the amount of endowment premium (if applicable), the amount of mortgage protection premium (if applicable) and the effect on amount of instalment of 1% increase in the first year in interest rate. It is common case that there had been no compliance with s. 129 of the 1995 Act in this case as there is no front page to the loan agreement setting out all of the statutory particulars.
47. Accordingly, the question which arises for the court is what the legal effect of non-compliance with s. 129 of the 1995 Act is in terms of the enforceability of the housing loan agreement.
48. Counsel for both parties agreed during the course of argument that non-compliance did not automatically render the agreement unenforceable.
49. Having further considered the parties written submissions on the specific question of the effect of non-compliance with s. 129 of the 1995 Act, I am in agreement with the parties that such non-compliance does not render the loan agreement unenforceable. This conclusion is reached having regard to the express terms of the legislation which does not provide that non-compliance would render the agreement unenforceable. The remedy provided for non-compliance with s. 129 of the 1995 Act is provided under s. 12 which makes failure to comply an offence. This is to be contrasted with express provision elsewhere in the Act for non-compliance with an obligation rendering the agreement unenforceable.
50. Thus, the statutory framework clearly envisaged that non-compliance with s. 30 notices (which have no application here) would render the agreements captured by that provision unenforceable (see s. 38 of the 1995 Act). I can only conclude that in refraining from enacting a similar provision in respect of non-compliance with the requirements of s. 129, the Oireachtas did not intend that non-compliance with that provision would render a loan agreement unenforceable.
51. The court was referred by the parties to the decision of the Supreme Court in *IRBC v. Quinn* [2016] 1 IR 1 to guide the approach of the Court to the implications of non-compliance with s. 129 of the 1995 Act. The Supreme Court recognises the primacy of statutory intention when approaching the question of enforceability of a loan agreement where there has been non-compliance with s. 129 of the 1995 Act. At para. 149 of his judgment in that case, Clarke C.J. said:

“[149] Where the relevant statutory regime expressly provides that contracts of a particular type or category are considered to be either void or unenforceable (either in all circumstances or in certain specified circumstances), it is clear that the Oireachtas has determined that the balance between the two competing principles, which I have addressed earlier in this judgment, is to be resolved in favour of the "hands off" approach, leaving the consequences to lie where they fall. Doubtless, in

such cases, the Oireachtas must be taken to be of the view that there are sound policy reasons for choosing that option. In certain cases it may be that the activity which is rendered illegal by statute is considered to be wrong in itself, and that parties engaging in that activity should not be able to enforce any relevant arrangements entered into.

[150] If the legislation is clear in that regard, then, in the absence of any question as to the consistency of the relevant legislation with the Constitution, the courts must adopt the policy choice determined by the Oireachtas and treat any contract coming within the terms of the legislation itself as either void or unenforceable. There are also obvious reasons why this question should be the one first answered. If the legislation renders a particular class of contract void or unenforceable then that is the end of the matter. No other issues arise. All of the case law reviewed is consistent on this point. It is only if the legislation is silent in that regard that the further issues identified earlier need to be considered.

[152] The second question is as to whether, even in the absence of an express provision rendering a contract of a particular type void or unenforceable, the courts should nonetheless treat that contract as being unenforceable as a contract tainted with illegality. It seems to me that the starting point for a consideration of this aspect of the case has to be to acknowledge that, by definition, in order for this second question to arise, the relevant contract must not have been expressly declared by statute to be void or unenforceable by the express terms of the legislation in question. Rather, it is very silence of the legislation on that point that leads to the second question. On the other hand, all due regard must also be paid to the importance of courts not being seen to countenance illegality by enforcing contracts which are tainted. As noted in the review of authorities from common law jurisdictions set out in the preceding section of this judgment, it does, however, need to be acknowledged that the range of matters which can give rise to some element of illegality in a modern, highly regulated age can be very significant indeed. Furthermore, the connection between any particular act of illegality and the contract whose enforceability is under consideration can vary. In addition, the purpose of the statute creating the illegality concerned may or may not tend to be furthered by treating relevant contracts as unenforceable.

[152] In those circumstances, it seems to me that the Court must have regard to the fact, although it will not, of course, be decisive, that the Oireachtas could have, but chose not to, include an express provision rendering a contract of the type concerned void or unenforceable. The question comes down to one of assessing whether, notwithstanding the absence of such an express provision, nonetheless the Court should, as a matter of policy, treat the contract as unenforceable by reason of it being tainted with illegality.

[153] It is, after all, the Oireachtas which, by enacting the legislation in question, has rendered certain activity unlawful. The reasons for the Oireachtas adopting that

course of action may, of course, be many and varied. Thus, the policy behind the legislation in question may fall into many different categories. But it is precisely because it is the Oireachtas which has decided that a particular activity is to be regarded as unlawful that it is necessary to assess, and place significant weight on whether the policy of the legislation enacted by the Oireachtas requires that a particular of contract be treated as unenforceable.

[154] I now move on to an assessment of the factors which may influence a decision as to whether the second principle requires that a contract of a particular type should be treated as void or unenforceable. This raises, it seems to me, the more difficult question with which this Court is now confronted, which is as to the proper approach which the Court should adopt in attempting to assess whether public policy generally and the policy of the relevant legislative provision requires that particular contracts, or types of contracts, are to be regarded as unenforceable.”

52. At para. 1.94 the Supreme Court proceeds to identify considerations which the court might take into account in assessing whether it may be said that public policy requires that contracts tainted by association with illegality under that statute should be regarded as unenforceable as follows:

‘In summary, the principal criteria are as follows:-

1. The first question to be addressed is as to whether the relevant legislation expressly states that contracts of a particular class or type are to be treated as void or unenforceable. If the legislation does so provide then it is unnecessary to address any further questions other than to determine whether the contract in question in the relevant proceedings comes within the category of contract which is expressly deemed void or unenforceable by the legislation concerned. (para. 148)
2. Where, however, the relevant legislation is silent as to whether any particular type of contract is to be regarded as void or unenforceable, the court must consider whether the requirements of public policy (which suggest that a court refrain from enforcing a contract tainted by illegality) and the policy of the legislation concerned, gleaned from its terms, are such as require that, in addition to whatever express consequences are provided for in the relevant legislation, an additional sanction or consequence in the form of treating relevant contracts as being void or unenforceable must be imposed. For the avoidance of doubt it must be recalled that all appropriate weight should, in carrying out such an assessment, be attributed to the general undesirability of courts becoming involved in the enforcement of contracts tainted by illegality (especially where that illegality stems from serious criminality) unless there are significant countervailing factors to be gleaned from the language or policy of the statute concerned. (para. 148)
3. In assessing the criteria or factors to be taken into account in determining whether the balancing exercise identified at 2 requires unenforceability in the context of a

particular statutory measure, the court should assess at least the following matters:-

- 3(a) Whether the contract in question is designed to carry out the very act which the relevant legislation is designed to prevent (para. 1.71)
 - 3(b) Whether the wording of the statute itself might be taken to strongly imply that the remedies or consequences specified in the statute are sufficient to meet the statutory end. (para. 173)
 - 3(c) Whether the policy of the legislation is designed to apply equally or substantially to both parties to a relevant contract or whether that policy is exclusively or principally directed towards one party. Therefore, legislation which is designed to impose burdens on one category of persons for the purposes of protecting another category may be considered differently from legislation which is designed to place a burden of compliance with an appropriate regulatory regime on both participants. (para. 176)
 - 3d) Whether the imposition of voidness or unenforceability may be counterproductive to the statutory aim as found in the statute itself.(para. 178)
 4. The aforementioned criteria or factors are, for reasons which will become apparent, sufficient to resolve this case. However, the following further factors may well be properly taken into account in an appropriate case:-
 - 4(a) Whether, having regard to the purpose of the statute, the range of adverse consequences for which express provision is made might be considered, in the absence of treating relevant contracts as unenforceable, to be adequate to secure those purposes. (para. 183)
 - 4(b) Whether the imposition of voidness or unenforceability may be disproportionate to the seriousness of the unlawful conduct in question in the context of the relevant statutory regime in general. (para. 186)
 5. Doubtless other factors will come to be defined as the jurisprudence develops.'
53. Applying this test to the circumstances in this case, I consider that the purpose of the s. 129 notice was undoubtedly to protect the borrower by ensuring that he or she understood the nature and extent of the financial responsibility being undertaken when entering into the loan agreement. Conversely, it is also in the interests of a lending institution that a borrower enters into a credit agreement in the full knowledge of its responsibilities on foot of that agreement. The legislature did not intend that non-compliance with the statutory notice would render the agreement unenforceable or it would have so provided. Instead the legislature provided for a sanction for non-compliance under the terms of the 1995 Act by creating a criminal liability under section 12. The sanction under s. 12 should be effective in securing compliance with section 129.

54. It is material in considering the seriousness of the non-compliance in this instance that the loan agreement in question dates to 1998, not long in relative terms after the entry into operation of the 1995 Act (s. 129 was commenced in May 1996).
55. It is also material that there is no suggestion in this case that the defendants misunderstood or were misled as to their obligations under the loan agreement. The terms of the loan were made clear in the letter of loan offer dated the 22nd September 1998 when the mortgagee agreed to provide the defendants with a term loan facility in the sum of £70,000 for a term of twenty years to purchase the property with the property as security in the event of default. The said term loan facility was stated to be subject to interest at the variable rates specified and was said to be repayable in monthly instalments. The loan offer was accepted by the defendants on or about 13th October 1998 and a loan agreement entered into.
56. As there is no suggestion on the evidence adduced on behalf of the defendants that they misunderstood their obligations under the loan agreement by reason of a failure to provide them with a notice in strict compliance with s. 129 of the 1995 Act, this Court is satisfied that it would be disproportionate to the seriousness of the unlawful conduct identified in the context of the relevant statutory regime in general to treat the loan agreement as unenforceable. Accordingly, this Court proceeds on the basis that the loan agreement is enforceable notwithstanding a failure to comply fully with the requirements of s. 129 of the 1995 Act.

ADDITION OF A PARTY / THE RESPECTIVE INTERESTS OF THE PLAINTIFFS

57. The defendants raised an issue as to the joinder of Pepper Finance Corporation (Ireland) DAC as a co-plaintiff in the proceedings on appeal. The nub of their objection, as the court understands it, appears to be that the said co-plaintiff has not established an entitlement to an order as against the defendants and was not a party to the proceedings before the Circuit Court.
58. In responding to the issue raised, the court was referred by Counsel for the plaintiffs to the case of *Irish Bank Resolution Corporation Ltd v Halpin* [2014] 12 JIC 1002. As the Court of Appeal (Finlay-Geoghegan J.) ruled in that case, there is no difficulty adding a party following the making of orders at first instance and for the purpose of an appeal. The added plaintiff in the proceedings will then be entitled to pursue an application for execution of the judgment in favour of the first named plaintiff and on such an application, the alleged entitlement of joined plaintiff as assignee or transferee of the judgments to enforcement can be determined at first instance as is appropriate.
59. In *Halpin*, the Court of Appeal ruled that subsequent to the hearing and determination of the two appeals, depending on the outcome of same, if either judgment was set aside, there may be matters remitted to the High Court for further hearing and determination in which case second named plaintiff (newly joined) would be entitled to pursue its claim against the defendant and establish its entitlement to judgment in the High Court at a future date. If that were to occur, there might be a further application to the High Court to strike out the first named plaintiff as a plaintiff in the proceedings. If on the other

hand, on the hearing of the appeals, they are dismissed, then the existing High Court judgments in favour of the first named plaintiff would remain in place. The newly joined second named plaintiff would be entitled to seek to execute on orders.

60. To the extent that the defendants' objection is that the first named plaintiff is no longer entitled to pursue these proceedings because it has transferred its interest in the security to the second named plaintiff since judgment was obtained, this Court relies on the decision of Noonan J. in *As Noonan J. found in Bank of Ireland v. McMahon* [2017] IEHC 600 at (para. 13) where he states:

"the authorities to which I have referred make clear that securitisation, if it occurred, does not affect the lender's right to recover the debt."

61. In his judgment Noonan J. cites the case of *Wellstead v. Judge Michael White* [2011] IEHC 438, where Peart J. rejected an argument that a lending bank was not entitled to the benefit of an order for possession that had been made in favour of the lender because the relevant housing loan had been securitised. The learned judge said:

'The applicant is also seeking leave to argue that Ulster Bank have no longer any entitlement to benefit from the order for possession because as part of some unspecified securitisation agreement the bank has sold the applicant's mortgage, and is therefore no longer owed anything on foot of the mortgage herein. ... His grounding affidavit characterises the action by Ulster Bank in seeking repossession in circumstances where it no longer owns the mortgage and has been repaid the money lent to the applicant is (sic) fraudulent, misleading and premeditated. In relation to the last argument, Counsel for the bank has referred to clause 17 of the mortgage deed executed by the applicant and his former partner, which contains a consent by the mortgagors to such a disposal of the benefit of the mortgage to another party by way of a securitisation scheme or otherwise, and it is submitted that this is a point which it is simply not open to the applicant to argue, even if he was in time to do so, since he has consented to that occurring. I agree. But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors.'

(paras. 20-24).

62. It seems to me that there is no merit to the defendants' objection to the involvement of either of the plaintiffs in these proceedings and the proceedings are properly maintained by the plaintiffs in seeking to enforce the security provided for the original loan as against the defaulting mortgagors.

63. In this appeal, the Court is concerned with whether the first named plaintiff has established its entitlement to the order for possession, the same issue which the Circuit Court was required to decide at first instance.

HEARSAY AND LACK OF EVIDENCE CONCERNING ORIGINAL LOAN WITH INBS

64. In his affidavit in response to the application for possession before the Circuit Court, the first named defendant objected to Mr. Johnson's affidavit as hearsay. Expanding on this during the hearing, counsel on behalf of the defendants pointed to a lack of direct evidence of default on payments under the original loan with the INBS. This is important because an event of default was a necessary precondition under the terms of the indenture of mortgage for the transfer of the mortgage security.
65. In addressing this question during submissions, the court was referred to the decision of the Court of Appeal in *Promontoria (Aran) v. Burns* [2020] IECA 87. In that case *Promontoria* was substituted in the title to the proceedings post commencement and was not the party who had issued demand letters. The issue which the Court of Appeal was concerned with was the admissibility of the evidence adduced on behalf of *Promontoria* in the summary proceedings, and whether it was sufficient to support the grant of judgment. As here, the proof of debt in that case was complicated by the fact that the plaintiff was not a bank and was an assignee of the original lender.
66. At para. 27 of the judgment it is recorded that the trial judge concluded that the affidavit evidence grounding the application was inadmissible hearsay, that no reference had been made by the deponent to the books and records of plaintiff, and that the position was "several steps removed" from that considered by Barniville J. in *Promontoria (Arrow) Limited v. Burke & Ors.* [2018] IEHC 773 where demands had been made by the parties which subsequently issued proceedings.
67. The defendants rely on this judgment contending that no-where in Mr. Johnson's affidavit does he demonstrate a connection with the Irish Nationwide Building Society. It was submitted that Mr. Johnston was not a banker and was quite removed from the course of dealings having no direct customer relationship with the defendants.
68. The plaintiffs sought to distinguish the decision in *Promontoria (Aran) v. Burns* on the basis that it concerned a money claim where the court was concerned with proving a debt, which is different to the situation here, where the claim is concerned with an ongoing default under the loan agreement on the part of the defendants which gives rise to an entitlement to an order for possession. The deponent for the first named plaintiff in these proceedings is an officer of the party entitled to payments secured by the deed of mortgage. The deponent has made the affidavit with full means of knowledge deriving from his knowledge of the books and records of the first named plaintiff. It is noted that the first named plaintiff was also the party issuing demands for payment prior to issue of the proceedings. At para. 86 of the judgment of the Court in *Promontoria (Aran) v. Burns* (Baker J.), the Court stated:

“However, I conclude that the present state of the law is that in order to rely on evidence which does not come within the Act of 1879 because the plaintiff is not a bank, a claim in debt can be established by credible evidence emanating from a course of dealing, from the nature of business records that show that dealing and which carry indications of reliability, especially if those records are in the form of statements of account sent from time to time in the course of a lending transaction, which, taken together with evidence from an authorised person of an analysis and inspection of books and records, whether documentary or electronic, can in the absence of a denial or challenge which is more than a mere bald assertion, be sufficient to establish a claim.”

69. I am satisfied that the evidence grounding the within application is evidence given by an authorised officer of the plaintiff, the party entitled to payments following a transfer of the debt. This officer deposes to the fact that the loan was in arrears from in or about July 2011. The subsequent transfer of the security to the first named plaintiff is set out on affidavit together with documentary evidence of same. It has not been suggested that the evidence adduced is in any way incorrect and the averment as to default dating to 2011 has not been denied but is confirmed by documentary evidence put in evidence on behalf of the Defendants relating to its dealings with the IBRC.
70. I am satisfied that the affidavit is sworn by an officer with appropriate means of knowledge and does not constitute inadmissible hearsay. The evidence adduced confirms arrears on repayments from 2011. The existence of arrears is uncontradicted (although the amount of same is disputed) and is supported by vouching documentation exhibited by the Defendants themselves including statements issued by the IBRC prior to the transfer of the mortgage security to the first named plaintiff.
71. I am satisfied that the evidence before the court proves default at the time of transfer of the security and continuing default since then.

BREACH OF THE CODE OF CONDUCT ON MORTGAGE ARREARS

72. While not pressed during the appeal hearing, it has been contended by the defendants during the course of these proceedings that there was a breach of the Central Bank’s Code of Conduct on Mortgage Arrears (hereinafter “the Code”) in the manner in which they were treated by the first named plaintiff. This is not accepted by the Court.
73. The Code has no application here as the plaintiff is not a Bank. Even if it did, however, there is no evidence before the Court that there has been a failure to comply with the Code and no specific provision was identified to the Court. It is recalled that proceedings only issued in 2016, some considerable time after letters of demand were written and at a time where arrears had been accruing for several years.
74. Furthermore, it was emphasised in the decision of the Supreme Court (Clarke J) in *Irish Life and Permanent PLC v. Dunne & Dunphy* [2016] 1 I.R. 92 at para. 5.22 that the current function of a court in considering a case in which a lender seeks possession against a borrower is to determine whether, as a matter of law and on the evidence, the

conditions which entitle the relevant lender to possession have been shown to exist. A court is not, on the law as it currently stands, given any general jurisdiction to consider whether the actions of a lender might be considered, by reference to whatever criteria one might like to apply, to be reasonable or fair. As Clarke CJ stated:

“The problematic legal issue which arises in this case stems from the very fact that the Oireachtas did not choose, in the context of empowering the Central Bank to make binding codes, to specify whether the courts were to have any particular role in applying the provisions of such a code to affect what would otherwise be the ordinary legal rights and obligations arising between a lender and a borrower. It is the silence of the legislation that gives rise to the issue with which this Court is now concerned. If it is considered desirable, as a matter of policy, to give to the courts a wider jurisdiction in the context of repossession cases which would allow the Court to have a role in deciding the reasonableness or otherwise of the conduct of a lender, then it seems to me that clear legislation would be needed which conferred that role on the courts and which specified the criteria to be applied by the courts in exercising any jurisdiction thus conferred.”

75. There is no merit to any objection to the order for possession being made on the basis of a vague assertion that there has been non-compliance with the Code. The first named defendant refers to meetings which never came to pass in 2019 but this was four years after warning letters were written on behalf of the first named plaintiff and some two years after proceedings had issued and an order obtained from the Circuit Court.

OWN MOTION OBLIGATION

76. The High Court, in *AIB v Counihan* [2016] IEHC 752 acknowledged the *ex officio* obligation existing under ECJ case law for a national court to assess, of its own motion, whether a contractual term falling within the scope of the *Unfair Contract Terms Directive* (93/13/EEC) is unfair. That judgment was delivered by reference to the decisions of the European Court of Justice in *Aziz* (Case C-415/11). In *EBS v. Ryan* [2020] IEHC 212 Barrett J. described the obligation in the following terms at para. 8:

“Simply put, this is an obligation that the European Court of Justice has recognised to arise under the UCTD and which requires me, as a judge, to do a fairness test on contractual documentation, in the particular circumstances of any one case. This inquisitorial task is known as the ‘Own Motion Obligation’.”

77. I have considered my own motion obligations in ruling on this appeal. In this context, no particular term of the loan agreement was identified by the defendants as unfair. The contract documentation in this case permitted possession proceedings to be brought in the event of a default in making repayment under the terms of the loan agreement, as has happened. All borrowers understand that the fundamental essence of mortgage agreements is that, if scheduled loan repayments are missed, the secured asset may be repossessed. This is such a fundamental principle that it is difficult to see how a contractual provision which gives effect to it could be said to fail the fairness test and no

provision of the type listed as unfair under the Unfair Contract Terms Directive were identified by the court.

78. I have not been able to discern any term of the loan agreement that has operated unfairly against the defendants in the context of these proceedings.

CONCLUSION & ORDER

79. The Court is satisfied that the first named plaintiff has established default at the time of transfer of the security and continuing default since then. The first named plaintiff is entitled to realise its security under the Mortgage Deed and has satisfied the Court that an order for possession should be made. Accordingly, I dismiss this appeal and affirm the order for possession made in the Circuit Court.

80. I will consider applications for any consequential orders.