

THE HIGH COURT

[2022] IEHC 629

Record Number: 2018/484 CA

BETWEEN

ROSARIE O'MAHONY

PLAINTIFF

AND

START MORTGAGES DESIGNATED ACTIVITY COMPANY

DEFENDANT

Record Number: 2018/510 CA

BETWEEN

ROSARIE O'MAHONY

PLAINTIFF

AND

START MORTGAGES DESIGNATED ACTIVITY COMPANY

DEFENDANT

Record Number: 2020/10 CA

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

ROSARIE O'MAHONY

DEFENDANT

Judgment of Mr. Justice Mark Heslin delivered on 4th November 2022

Introduction

- 1.** Several matters were listed for hearing (two days) commencing on Tuesday 18 October 2022, having appeared in a callover which took place the previous week on 13 October. Ms. O'Mahony (hereinafter "the defendant" unless otherwise stated) was on notice of the callover and of the hearing. She did not participate in the callover and did not appear at the hearing.
- 2.** Shortly before 3 p.m. on 17 October 2022, the defendant sent an email to the Courts Service wherein *inter alia* the defendant confirmed that had been notified on the evening of 12 October of the callover which would take place the following day. As well as making a complaint with regard to notice to her, she suggested that the hearing listed for the 18 and 19 October was an attempt "to ambush me again in court".
- 3.** A response was sent to the defendant by a court Registrar, wherein the defendant was advised that she should attend court on the 18 October to explain her position to the judge, and the defendant was also advised to contact the other side.
- 4.** At approximately 11 a.m. on 18 October, I was furnished with a copy of a document entitled "Notice to seek adjournment until Circuit Court case is complete" (the "Notice"). Although bearing the date of 16 October 2022, I was not furnished with a copy until the case was due to commence. I proceeded to consider the defendant's application to adjourn, even though the defendant had not attended court, even to move such an application.

5. The defendant's attitude is made very clear on the first page of the Notice, wherein she stated *inter alia* that: -

" . . . wild horses wouldn't drag me to Dublin tomorrow. I cannot and will not be a willing participant in another trial by ambush".

6. On 18 October, I delivered a detailed *ex tempore* ruling in which I refused the defendant's application to adjourn.

Seven matters for hearing

7. Although there were no less than seven matters listed for hearing, it is fair to say that they all relate to Circuit Court proceedings to secure the possession of property commonly known as "Goggins Hill, Ballinhassig, Co. Cork" and which is described in the Schedule to the relevant civil bill for possession as being "All that and those, the hereditaments, premises and appurtenances comprised in Folio 101 214 F of the Register of Freeholders, County of Cork" (hereinafter "the property"). The relevant civil bill was issued out of Cork Circuit Court on 19 May 2017 by "Permanent TSB plc. formerly Irish Life & Permanent plc" (hereinafter "PTSB").

Circuit Court possession order - 2 October 2018

8. Ultimately, an order for possession was granted in favour of PTSB on 02 October 2018. A copy of that order was before this Court, and for the sake of clarity and completeness, it is appropriate to quote its terms *verbatim* and in full: -

"The defendant having been duly served with the Civil Bill for Possession herein and the same coming before this Court this day.

WHEREUPON and on reading the pleadings and documents filed herein and on hearing what was offered by Solicitor for the Plaintiff, and the Defendant appearing in person.

AND it appearing to the Court that the Plaintiff is entitled to possession of the premises as claimed in the Civil Bill.

THE COURT DOTH ORDER: -

1. Grant Order for Possession of ALL THAT AND THOSE the hereditaments, premises and appurtenances comprised in Folio 101 214 F of the Register of Freeholders County of Cork.

2. Grant stay of nine months on execution for possession".

9. Among the matters listed for hearing before this Court was the defendant's appeal against the aforesaid possession order. In addition, the defendant challenged the making of a "substitution" order, on 12 December 2019, pursuant to which His Honour Judge O'Callaghan, sitting in Cork Circuit Court, ordered the amendment of the title of the plaintiff to read "Start Mortgages Designated Activity Company" (hereinafter "Start DAC") and the Circuit Court also ordered that all future proceedings in the matter be carried on as between Start DAC, as plaintiff, and the defendant. The Circuit Court dispensed with the requirement to re-serve the proceedings and directed service of its 12 December 2019 order within four weeks.

10. The relief at para. 3 of the plaintiff's motion dated 24 July 2019 sought an order granting Start DAC leave to issue execution in respect of the Circuit Court's 02 October 2018 possession order. On 12 December 2019 the Circuit Court adjourned that relief. This is entirely understandable in circumstances where the defendant appealed the possession order. Before making reference to any other applications which were listed for hearing, it is appropriate to note that, even though the defendant declined to attend, a *de novo* hearing took place in respect of the application for substitution. It is convenient to look at that matter first.

Substitution

11. In an affidavit sworn on 24 July 2017, Mr. Eamonn MacEoin, a summons server who was retained by Messrs Eversheds Sutherland, solicitors for PTSB, made *inter alia* the following averment: -

"3. I say that at approximately 6: 24 p.m. on 23 June 2017, I did personally serve a cover letter dated 08 June 2017, a certified copy of a Civil Bill for Possession issued on 19 May 2017 and a grounding affidavit of David Smith sworn on 26 April 2017 and the exhibits thereto, on the defendant at her secured property address of Goggins Hill, Ballinhassig, Co. Cork".

12. On 08 May 2018, the defendant entered what she described as a "Special & conditional appearance" the purpose of which was stated to be *inter alia* "to challenge all and every aspect of

jurisdiction and commencement procedure to the alleged bona fide civil bill and special endorsement of claim issued by, for and on behalf of the County Registrar on the 19th May 2017".

13. Arising from the foregoing it is clear that the defendant was served with the civil bill. It is also clear from the face of the possession order made on 02 October 2018 that the defendant appeared in the Circuit Court on 02 October 2018 and that the court granted the possession order, having heard from the defendant as well as from the plaintiff's solicitor.

14. In an affidavit sworn on 20 November 2018 by Mr. John O'Connor, a summons server retained by the solicitors for PTSB, the following averment is made: -

"3. I say that at approximately 9:00 a.m. on 9 November 2018, I did personally serve a cover letter dated 2 November 2018 together with a true copy of the Court Order for Possession dated 2 October 2018 on the defendant at her secured correspondence address of Goggins Hill, Ballinhassig, Co. Cork by handing a copy thereof to the defendant . . .

6. I say that before I personally served the true copy court order for possession on the defendant at Goggins Hill, Ballinhassig, Co. Cork on 9 November 2018, the defendant confirmed to me that she is in fact the defendant named in the within proceedings".

15. In an affidavit sworn on 07 October 2019, Ms. Regina Donnelly, a summons server retained by the solicitors for PTSB made inter alia the following averments: -

"3. I say that at approximately 19:54 p.m. 30 September 2019, I did personally serve a cover letter dated 25 September 2019, together with copy of the notice of motion and the grounding affidavit of Justin Nevin together with exhibits thereto, on the defendant at her secured property address of Goggins Hill, Ballinhassig, Co. Cork, by handing a copy thereof to the defendant. . .

6. I say that before I personally served the copy of the notice of motion and the grounding affidavit of Justin Nevin together with exhibits thereto, on the defendant at her secured property address of Goggins Hill, Ballinhassig, Co. Cork, the defendant confirmed to me that she was in fact the defendant named in the within proceedings".

16. The letter dated 25 September 2019 to which Ms. Donnelly referred states inter alia the following: -

"Please find enclosed, by way of service upon you a copy of the notice of motion and the grounding affidavit of Justin Nevin together with exhibits thereto, to substitute Start Mortgages Designated Activity Company in place of Permanent TSB plc. formerly Irish Life & Permanent plc. as the plaintiff to these proceedings".

17. In an affidavit sworn on 13 October 2022, Ms. Donnelly avers that she was retained by Messrs Eversheds Sutherland solicitors to personally serve on the defendant the following documents, which she describes as the "Court Documents", namely: -

(a) Certified copy of the notice of motion and the grounding affidavit of Niamh McGee, sworn on 28 January 2019 and exhibits thereto together with certified copy of the ex parte docket and the grounding affidavit of Justin Nevin sworn on 26 May 2019 and exhibits thereto in matter of High Court record number 2018 484 CA.

(b) Certified copy of the notice of motion and the grounding affidavit of Niamh McGee, sworn on 28 January 2019 and exhibits thereto together with certified copy of the ex parte docket and the grounding affidavit of Justin Nevin sworn on 26 May 2019 and exhibits thereto in matter of High Court record number 2018 510 CA.

18. Ms. Donnelly proceeds to make inter alia the following averments in her 13 October 2022 affidavit: -

"3. I say that at approximately 18:44 p.m. on 25 November 2019, I did personally serve a cover letter dated 20 November 2019 in the matter of record no. 2018/484 CA and a letter dated 20 November 2019 in the matter of record no. 2018/ 510 CA, together with the Court Documents on the defendant at the address of Goggins Hill, Ballinhassig, Co. Cork, by handing a copy thereof to the defendant.

. . .

5. I say that before I personally served the Court Documents on the defendant, the defendant identified themselves to me as the defendant named in the within proceedings".

19. The 20 November 2019 cover letters to which Ms. Donnelly refers give notice that the proceedings are back before the court for mention on 25 November 2019. Ms. Donnelly swore a further affidavit on 13 October 2022 in which she made inter alia the following averments: -

"I say that at approximately 18:22 hrs on 11 February 2020 I did personally serve a cover letter dated 7 January 2020 together with a true copy of the Circuit Court Order substituting Start Mortgages Designated Activity Company as the plaintiff dated 12 December 2019 on the defendant, Ms. Rosarie O'Mahony at her address of Goggins Hill, Ballinhassig, Co. Cork, by handing a copy thereof to the defendant.

. . . .

6. I confirm that the defendant is known to me personally and I say that prior to effecting personal service she again identified herself by acknowledging her name to me".

20. The 7 January 2020 letter to which Ms. Donnelly referred in her aforesaid affidavit was sent "by hand" to the defendant by Messrs Eversheds Sutherland and stated inter alia the following: -

"We refer to the above proceedings and to our attendance before the Circuit Court on 12 December 2019. We obtained an Order to substitute Start Mortgages Designated Activity Company in place of Permanent TSB plc. as plaintiff to the proceedings to the court. Accordingly, please find enclosed, by way of service upon you the following: -

- Order dated 12 December 2019 granted to substitute Start Mortgages Designated Activity Company as plaintiff for Permanent TSB plc. formerly Irish Life & Permanent plc".

21. In light of the foregoing evidence, none of which is controverted, I am entirely satisfied as to service on the defendant.

Extension of time to appeal Circuit Court's 12 December 2019 substitution order

22. On 15 January 2020, the defendant issued a notice of motion to this Court (bearing record number 2020/10 CA) seeking an extension of time within which to appeal against the Circuit Court's 12 December 2019 order (Record no. 2017/00847) which substituted Start DAC for PTSB as plaintiff.

23. I have had regard to the averments made in the defendant's 15 January 2020 affidavit which she filed in support of her application for an extension of time within which to appeal the substitution order. It is fair to say that it contains no averment which addresses the *substance* of the application which the Circuit Court granted on 12 December 2019.

24. I have also carefully considered the contents of the defendant's 13 February 2020 affidavit. Once more, it contains no averments which speak to the *substance* of the substitution application and order. It discloses no grounds which would provide a basis for suggesting that the Circuit Court erred in any way.

25. The said 13 February 2020 affidavit contains inter alia a range of criticisms of staff of the Central Office. These include that ". . . they are failing in their statutory duties, as they are acting unlawfully, in giving no statutory nor lawful reason, for each of their three un-statutory stances". At this juncture it feels appropriate to say that there is no evidence whatsoever before this Court which would support any such finding. What is very clear, however, is that no issues are canvassed in this affidavit with respect to the substance of the Circuit Court's 12 December 2019 order.

The application which resulted in the 12 December 2019 order

26. It is convenient at this stage to look at the application which gave rise to the 12 December 2019 substitution order. The application (made in Circuit Court proceedings bearing record no. 2017/00847) comprised of a notice of motion which was issued on 25 July 2019, grounded on an affidavit sworn on 16 July 2019 by Mr. Justin Nevin, who identified himself as litigation manager for Start DAC. Mr. Nevin made averments with respect to his authority and source of knowledge and, before looking at specific averments made by Mr. Nevin, it is appropriate to recall the relevant "proofs" with regard to a substitution application.

Proofs in relation to a Substitution Application

27. This was addressed in the 06 June 2019 judgment of Meenan J. in *Permanent TSB plc. formerly Irish Life & Permanent plc. v. Doheny* [2019] IEHC 414. In that decision, Meenan J. noted that the relevant provisions in O. 22, r. 4 of the Circuit Court rules are virtually identical to the corresponding provisions in O. 17, r. 4 of the Rules of the Superior Courts. He went on to note that the practice in the Circuit Court is that substitution applications are made "on notice" to a defendant, but he was of the view that such an application can be made *ex parte*. The learned judge stated the following at para. 9: -

"Proofs necessary for the application

9. I refer again to the passage quoted from Kelly J. (as he then was) in *Comer*. [IBRC v. Comer [2014] IEHC 671]. The Court has to be satisfied that there is prima facie evidence that there has been a 'valid sale of the underlying assets, a valid assignment of the chose in action which is this action, and a valid notice given' ".

28. Later, at para. 13 of his judgment in *Doheny*, Meenan J. commented on the appropriate safeguards which should be put in place with respect to a substitution application made *ex parte*, namely: -

"(i) A copy of the Order substituting Start for the presently named plaintiff be served on the defendant; and

(ii) That the defendant be informed by notice in writing of the following:

(a) That a copy of the affidavit and exhibits grounding this application are available on request;

(b) Informing the defendant that he may make an application to Court, on notice, to set aside this Order;

(c) Informing the defendant of his entitlement to contest the said transfer to Start at the hearing of the action".

29. It is appropriate to keep the foregoing "proofs" in mind as this court now proceeds to examine what Mr. Nevin averred. At para. 8 of his 16 July 2019 affidavit (wherein PTSB is defined as the "Bank"), Mr. Nevin makes the following averments: -

"DEED OF TRANSFER

On 1 February 2019 the Bank executed a Deed of Transfer (the "Transfer Deed") whereby the Bank transferred all its right, title, interest, estate, benefit and entitlement (past and present) in and under the Underlying Loans and each of the Finance Documents (as each of the capitalised terms is defined in the Transfer Deed) which includes the Facilities and the Mortgage which are the subject of this application, to the Applicant (the "Transfer")".

Transfer Deed

30. Mr. Nevin exhibits a copy of the Transfer Deed (exhibit "JN1" to his affidavit). I have considered the contents of the 1 February 2019 Transfer Deed. It is entirely consistent with the averments made by Mr. Nevin. Although the document contains redactions in respect of third-party security document details, Schedule 1 to the Transfer Deed refers specifically to the following: -

- Goggins Hill, Ballinhassig, Co. Cork – mortgage dated 5 September 2008 between (i) Rosarie O'Mahony and (ii) Irish Life & Permanent plc;
- Goggins Hill, Ballinhassig, Co. Cork – mortgage date unknown between (i) Rosarie O'Mahony and (ii) the bank;
- Facility letter between (i) Rosarie O'Mahoney and (ii) the bank dated 22 July 2008.

31. I am entirely satisfied that the foregoing constitutes prima facie evidence of a valid sale of the underlying assets and a valid sale of the chose in action. Mr. Nevin also provides clear evidence with respect to the question of notification to the defendant. This can be seen from paras. 14 to 20, inclusive, of Mr. Nevin's 16 July 2019 affidavit. The facts which emerge from those averments and the relevant exhibits, can be summarised as follows.

Goodbye letter

32. By letter of 01 February 2019, PTSB notified the defendant of the date of the Transfer Deed. A copy of that so-called "Goodbye Letter" comprises Exhibit "JN 3" to Mr. Nevin's affidavit and states inter alia the following: -

"By this letter, we notify you that, on the Transfer Date, we assigned, transferred and conveyed your Loan, the Loan Documents and all present and future rights relating to your Loan and the Loan Documents absolutely to Start.

As part of the Transfer, all relevant details relating to your Loan have been transferred to... Start. These details will be used by Start for the continued administration of your Loan and for related legal and regulatory purposes.

Our duties and obligations under the Loan and Loan Documents have now been transferred, conveyed and assigned absolutely to, and are assumed by, Start. From the Transfer Date, we stopped being responsible to you for any such duties and obligations, included in or related to, the Loan or the Loan Documents.

From the Transfer Date, you should perform all of your duties and obligations under the Loan Documents in favour of Start. You should pay Start, in accordance with any instructions they give you, any all sums due and owing under the Loan Documents (whether such sums of money were owed before or will become due and owing after the Transfer Date) . . .

Your Loan will remain in place until all amounts payable by you have been paid and your obligations to repay such outstanding amounts are owed to Start from the Transfer Date ..."

Hello letter

33. Start DAC wrote to the defendant on 07 February 2019 reminding her of the transfer, notifying her that same had completed on 1 February 2019, and informing her that Start DAC would be her new point of contact in respect of her loan. This "Hello Letter" comprises exhibit "JN 4" to Mr. Nevin's affidavit of 16 July 2019 and contains inter alia the following: -

"You will have received notification from Permanent TSB that your Loan was transferred to Start on 1 February 2019. As of the Transfer Date, Start became the new owner of your loan . . .

Your Loan will remain valid and legally binding until all amounts payable have been paid and your obligations to repay such outstanding amounts are now owed to Start from the Transfer Date. Your current monthly Loan repayment or scheduled repayment will be payable to Start".

Notice to the defendant

34. In light of the foregoing, I am entirely satisfied that there is prima facie evidence that there has been a valid sale of the underlying assets, a valid assignment of the 'chose in action' (being the legal action) and valid notice given to the defendant (with respect to the fact, and effect, of the Transfer).

35. There is also uncontroverted evidence, to which I referred earlier, of the fact that the defendant was put on notice of the proposed application to the Circuit Court to substitute Start DAC as plaintiff in the proceedings. That evidence was in the form of the relevant affidavits of service from which I quoted. It is also averred to at para. 20 of Mr. Nevin's affidavit.

PTSB's consent to substitution

36. At para. 21 Mr. Nevin goes on to aver that PTSB consented to the making of the substitution application and he exhibited (at 'JM6') a letter confirming same.

Land Registry Form 56

37. On 01 February 2019, PTSB executed a number of 'forms 56', one of which concerned the defendant's mortgage. A copy of same comprises exhibit 'JM2' to Mr. Nevin's affidavit. It is headed "Form 56 - transfer of charge (rules 52, 105) Land Registry". It is dated 01 February 2019 and it confirms that, in consideration of the agreement between PTSB, as Seller, and Start DAC, as Buyer "...the Seller, as the registered owner or the person entitled to be registered owner HEREBY TRANSFERS to the Buyer, the charges, particulars of which are set out in the attached Schedule." The schedule contains an unredacted reference to folio 101214F, County Cork, dealing number 6. The foregoing is, of course, the folio with respect to the property. Mr. Nevin also averred, at para. 13, that if the Circuit Court was minded to grant the substitution application, Start DAC would not seek execution of the possession order until the applicant had been registered as owner of the mortgage.

38. Having carefully considered all the evidence, I am entirely satisfied that the Circuit Court's substitution order 12 December 2019 (His Honour Judge B. O'Callaghan) was validly made.

Application to set-aside Substitution order not moved on hearing day

39. It is also appropriate to say that, although one of the seven applications for hearing by this Court comprised an application to set-aside the Circuit Court's substitution order, the defendant did not appear before this Court to move same. Although it seems to me that, in those circumstances, it would be perfectly legitimate for this court to simply strike out that application, I have engaged in this judgment with the *substance* of the set aside application, lest there was any possibility that *not* doing so would create any injustice. Counsel for the plaintiff regarded this approach as entirely appropriate (without prejudice to the submission that the *absence* of the plaintiff was determinative of her application).

Ex parte Substitution Application made to this Court

40. The Circuit Court application (made on notice to Ms. O'Mahony), which resulted in the 12 December 2019 substitution order, was made in Circuit Court proceedings under record number

2017/00847. The equivalent High Court record number is 2018/510 CA. Mr. Nevin swore an affidavit on 24 May 2019 which bears that record number (wherein Ms. O'Mahony is described as plaintiff and PTSB as defendant). That affidavit relates to an *ex parte* motion docket (also bearing record number 2018/510 CA) wherein Start DAC sought a substitution order pursuant to O.17, r.4 of the Superior Court Rules.

41. It is fair to say that the affidavit sworn by Mr. Nevin on 24 May 2019 covers very similar ground to the affidavit which he swore in respect of the Circuit Court substitution application. At para. 4 Mr. Nevin avers that the purpose of the application is to substitute Start DAC as defendant for PTSB in respect of the High Court *appeal* brought by Ms. O'Mahony. He avers at para. 5 that PTSB was originally plaintiff in Circuit Court proceedings bearing record number 2017/00847. Mr. Nevin proceeds at para. 6 to aver that the "...*application arises from the sale of a Loan Book by the Bank to the Applicant, which includes the loan facility and charge which are the subject of these proceedings as well as the relevant claims, suits and causes of action.*" He then sets out relevant history with respect to the loan of €354,440 advanced by PTSB to Ms. O'Mahony, pursuant to a letter of approval dated 22 July 2008, which Ms. O'Mahony acknowledged in writing, by way of accepting the letter of approval and general mortgage loan conditions of PTSB. He refers to the execution, on 5 September 2008, by Ms. O'Mahony of a mortgage over the property by way of security of her repayment obligations to PTSB. He avers that the relevant charge is currently registered in the name of PTSB but an application to transfer ownership of the charge to Start DAC is currently pending before the Property Registration Authority. He avers *inter alia* that the monies advanced to Ms. O'Mahony have fallen due for repayment and that the benefit of the relevant loan facility and the charge have, since the commencement of the proceedings, been transferred to Start DAC.

42. From paras. 12 to 27 Mr. Nevin makes averments and exhibits documents which constitute *prima facie* evidence which justified the substitution of Start DAC for PTSB, *per* the guidance given in the *Comer* and *Doheny* judgments to which I have referred earlier. In short there is *prima facie* evidence that there has been a valid sale of the relevant assets; a valid assignment of the 'choses in action'; and valid notice given to Ms. O'Mahony. The exhibits include the 01 February 2019 Transfer Deed, the schedule to which identifies Ms. O'Mahony's facilities. The 'hello' and 'goodbye' letters are also exhibited, as is a copy of the 01 February 2019 'Form 56'. As Mr. Nevin explained elsewhere in his affidavit, the context for the O.17, r.4 substitution application concerned a claim for possession of property and an appeal by Ms. O'Mahony.

27 May 2019 Substitution Order made by this Court

43. On 27 May 2019 this Court (Meenan J) made an order (perfected on 31 May 2019) bearing record number 2019/5110 CA in proceedings entitled Rosarie O'Mahony (plaintiff) v. Permanent TSB plc formerly Irish Life and Permanent plc (defendant). That order stated the following:

"Upon motion of counsel for the defendant made unto the court this day ex parte and on reading the affidavit of Justin Nevin filed on this day and on hearing said counsel.

IT IS ORDERED pursuant to Order 17, rule 4 of the Rules of the Superior Courts that the within proceedings herein be amended substituting 'Start Mortgages Designated Activity Company' for 'Permanent TSB plc formerly Irish Life and Permanent plc' as the defendant in the title of the within proceedings.

AND IT IS ORDERED that the within proceedings shall be carried on between the said Start Mortgages Designated Activity Company and the plaintiff.

The title hereof to be entered in the Central Office of the High Court with the proper officer.

AND THE COURT DOTH DIRECT that

(A) The solicitors for the defendant write to the plaintiff informing her of the making of the order for substitution and enclosing a copy of the order therewith.

(B) That the said letter is to inform the plaintiff that the grounding affidavit and exhibits to this application are available to her on request and the making of the order for substitution does not preclude the plaintiff from challenging the validity of the transfer of the loans should she choose to do so.

AND THE COURT DOTH make no order as to costs".

44. The notification provisions at paras. (A) and (B) were complied with.

Registration of Start DAC as owner of the charge on the property

45. On 08 August 2019, Mr. Nevin swore an affidavit bearing record number 2018/510 CA (in which Ms. O'Mahony is described as plaintiff and Start DAC is described as defendant). It is appropriate to quote *verbatim* paras. 14 – 17, inclusive, wherein Mr. Nevin avers as follows:

"14. As the property, the subject matter of the within proceedings is contained in folio 101214F in the Register of Freeholders County Cork and the charge was registered in favour of the bank, an application had to be made to the Property Registration Authority to have the charge which was registered in favour of the bank, registered in favour of the defendant.

15. As set out in my grounding affidavit to the motion to substitute the Defendant, no further steps would be taken to progress the appeal until the registration was processed.

16. I believe that by dealing number D2019LR048371B, the Property Registration Authority registered the defendant as the owner of the charge which had previously been registered in favour of the bank. I beg to refer to a copy of the folio, bearing folio number 101214F upon which marked with the letters and number "JM1", I have signed my name prior to the swearing hereof.

17. On the basis of the foregoing and on the basis of the affidavits already filed by the bank, I beg this Honourable Court to dismiss the appeal and make an order that the defendant is entitled to an order for possession."

46. Exhibit "JM1" to Mr. Nevin's 08 August 2019 affidavit comprises a copy of Land Registry folio 101214F. Part I identifies the property. Part II concerns ownership and notes that Ms. O'Mahony is full owner. Part III concerns burdens and notices of burdens. Entry number 6 is in the following terms: -

"22-Jul-2009 charge for present and future advances repayable with interest. IRISH LIFE & PERMANENT plc is owner of this charge. Note: the ownership of this charge has been transferred. See entry no. 10".

47. Entry no. 10 is in the following terms: -

"28-Mar-2019 START MORTGAGES DESIGNATED ACTIVITY COMPANY is owner of the charge registered at entry no. 6".

Conclusive evidence of Start's ownership

48. Before proceeding further, it is appropriate to note that (*per* section 31 of the Registration of Title Act 1964) (the "1964 Act") the Register is conclusive of ownership. Thus, this Court has conclusive evidence before it to the effect that Start DAC is the registered owner of the relevant charge and that no other party is entitled to be so registered. This underlines the appropriateness of the substitution order granted by the Circuit Court (having heard an application on notice to her) and by this court (following an *ex parte* application). It utterly undermines the application by Ms. O'Mahony to set aside the substitution order (an application she chose not to attend this Court to move). The foregoing comments have taken full account of what Ms. O'Mahony contends to be the basis for her set-aside application, *per* the averments made by her in various affidavits.

Set-aside / Stay application

49. On 23 September 2019, Ms. O'Mahony issued a Motion (bearing record number 2018/510 CA) seeking *inter alia* (1) an order setting aside the *ex parte* orders of 27 May 2019 and (2) an order placing a stay on all and any proceedings. Ms. O'Mahony swore an "*affidavit supporting*" her application on 23 September 2019. Although I have carefully considered its contents, it is entirely fair to say that it does not speak in any way to the *substance* of the application. In short, no evidence is proffered as to *why* Ms. O'Mahony is entitled to set aside the substitution order.

50. In the aforesaid affidavit, Ms. O'Mahony makes the point that she is "*entitled to object and entitled to not consent to any name change amendments in titles or substitutions*". In this, she is certainly correct. However, there is no identification of a *basis* for her objection to the substitution order. Ms. O'Mahony's 23 September 2019 affidavit was accompanied by "Exhibit A" which comprises a document entitled "*Notice of objection to applications for substitution & amend and notice of non-consent*" (the "Notice of objection"). This three-page document bears the date 28 May 2019 and cites High Court record numbers 2018/484 CA and 2018/510 CA.

Ms. O'Mahony's objection to the substitution

51. In order to understand *why* Ms. O'Mahony contends that the substitution order should be set aside, it is appropriate to quote as follows from the first page of her Notice of objection: -

"...You will take notice that I am woman and I reserve all rights; I act as one of the citizenry of the Constitution of 1937; I act outside the State and communicate only through your Minister of Foreign Affairs; And I act as grantor, executor general and guardian general for all bona fide trusts in my estate;

Thus take notice that I object to all and any applications for substitution of plaintiffs by instruction on your part. This is a right afforded in the Constitution of 1937; further as stated by the presiding judge in the High Court Circuit Appeals to the court on 18 February 2019, I am entitled to object and entitled not to consent to any name change amendments in titles or substitutions;

Further Start Mortgages DAC have made no contact with me regarding accounts nor cases. In any event I believe that until costs are paid by Permanent TSB and/or are undertaken to be paid by Start Mortgages DAC that any application to amend and/or substitute in any proceedings is without foundation, and will be resisted;

In the event any orders are granted without my consent, for any application to amend or substitute the plaintiff in matters that I have connection with, I intend to appeal and/or set aside same orders, when perfected orders have been served;"

52. In light of the relevant 'proofs' with respect to a substitution application, and taking into account all evidence before this Court, I am satisfied that the foregoing bases which are canvassed by the defendant by way of an objection to the substitution of Start DAC for PTSB are without foundation. They simply cannot avail Ms. O'Mahony.

The substitution issue summarised

53. The analysis which I have set out to date disposes of the substitution aspect, which has given rise to a range of applications. In short, challenges to the substitution are entirely lacking in evidence and are without foundation. By contrast, the court has uncontroverted evidence that Start DAC is the one and *only* registered owner of the mortgage and charge which comprises a burden on the property (see part 3 of the property's Land Registry Folio). Thus, Start DAC is the *only* entity which should be named in the relevant proceedings involving Ms. O'Mahony. Having dealt with the substitution issue I now propose to turn to the possession issue.

Possession

54. Despite the fact that the defendant chose not to attend court for the hearing of her appeal against the possession order which was made by the Circuit Court on 02 October 2018, the matter proceeded by way of a *de novo* hearing.

55. Before looking at the plaintiff's civil bill which was issued on 19 May, 2017 (under record no. 2017/00847) it is appropriate to note that PTSB previously issued legal proceedings against the defendant in Cork Circuit Court bearing record no. 2012/3669 ("the 2012 proceedings"). Those proceedings sought an order for possession of the defendant's property. However, arising from the repeal of s.62 (7) of the Registration of Title Act, 1964, upon the commencement of the Land and Conveyancing Law Reform Act, 2009, and in the wake of the decision in *Start v. Gunn* [2011] IEHC 275 and the lacuna identified therein, a notice of discontinuance was filed by PTSB on 21 January 2015 with respect to the 2012 proceedings.

O. 21 - Notice of discontinuance

56. Order 21 of the Rules of the Circuit Court ("RCC") deals with a situation where a notice of discontinuance is served. Order 21, r.1 makes clear that *"the plaintiff may..by notice in writing wholly discontinue his action against all or any of the defendants ... and thereupon he shall pay such defendant's costs of the action ... Such costs shall be taxed ..."*

Judge may order a stay

57. Order 21, r.4 provides that *"if any subsequent action shall be brought before payment of the costs of a discontinued action, for the same or substantially the same cause of action, the Judge may order a stay of such subsequent action until such costs shall have been paid."* (Emphasis added)

County Registrar shall tax costs

58. Order 21, r.5 of the RCC states that: *"The County Registrar shall, on the application of the plaintiff or defendant, as the case may be, tax the costs referred to in the preceding Rules of this Order."*

59. Certain observations are appropriate to make in respect of the foregoing. First, the words "*Such costs shall be taxed ...*" and "*The County Registrar shall, on the application of the ... defendant... tax the costs ...*" employs the mandatory term "*shall*". This speaks to the practical reality that until costs have been independently assessed i.e. taxed by the County Registrar, the quantum of costs due is unknown. Clearly, if both parties agree on the quantum, taxation would be unnecessary but, in the manner I will presently explain, there is no evidence before this court of any agreement between the parties as to quantum, nor is there any evidence that the defendant has ever taken any step to have her costs (or, more appropriately, her "*actual and necessary outlay*") taxed. Second, it is appropriate to contrast the mandatory term "*shall*" with the word "*may*" in O.21 r.1. At this point it is also appropriate to note that no judge has ordered any "*stay*" in respect of the 2017 proceedings. Furthermore, for the reasons set out in this judgment, I am entirely satisfied that there was and is no valid basis for a stay.

O. 66 - actual and necessary outlay

60. The defendant has at all material times represented herself as a litigant in person. It is also appropriate to refer to O.66, r.6 of the RCC which provides *inter alia* as follows:

"6. All costs directed to be taxed shall be taxed by the County Registrar (who for that purpose shall have all the powers of a Taxing Master of the High Court) **subject**, as to every item, including outlay and Counsel's fees, **to an appeal to the Court** notice of which shall be given within ten days from the conclusion of the taxation.

7. **No costs other than actual and necessary outlay shall be allowed** or awarded to any party **unless a Solicitor has been instructed** to conduct the proceedings on his behalf.

8. Where costs or expenses are awarded, **the party to whom such costs or expenses have been awarded shall deliver a bill of such costs or expenses, and give at least seven days' notice of taxation for a day and hour to be fixed (generally or specially) by the County Registrar**, and such party may include in such bill all such payments as have been necessarily and properly made by him and all such reasonable charges and expenses as appear to have been properly incurred in procuring evidence, provided that the party to whom such bill has been furnished may tender a sum of money in discharge of such bill, and if such tender is refused and the amount of such bill when taxed shall not exceed the sum tendered, the costs of taxation shall be borne by the party claiming on foot of such bill. There shall be included in every Bill of Costs which contains a claim in respect of value added tax, the registered number allocated by the Revenue Commissioners to the person to whom such value added tax is payable, together with a statement as to whether the party claiming on foot of such Bill is or not registered for the purpose of value added tax. Where such party is registered there shall be included a statement explaining why such value added tax is not otherwise recoverable." (Emphasis added)

61. I felt it appropriate to cite the foregoing in circumstances where, having carefully considered all evidence before this court, I am entirely satisfied of the following:

- (i) No order was made by the learned Circuit Judge which awarded costs/actual and necessary outlay to the plaintiff in respect of the discontinued 2012 proceedings;
- (ii) No order was made by the learned Circuit Court judge which directed taxation of same;
- (iii) This is because the foregoing were wholly unnecessary, in circumstances where the matter is dealt with in O.21 of the RCC;
- (iv) Thus, there can be no question of any valid *appeal* against a Circuit Court order which was not made;
- (v) In circumstances where the defendant has never sought to have the matter taxed, the question of the defendant's "*actual and necessary outlay*" with respect to the 2012 proceedings remains to be dealt with, in accordance with the provisions of O.66, r.6 of the CCR;
- (vi) The first step in that process (as O. 66 vi makes clear) is that Ms. O'Mahony "**shall deliver a bill of such costs or expenses and give at least seven days' notice of taxation for a day and hour to be fixed (generally or specially) by the County Registrar**" and there is no evidence before this court that this first step has ever been taken.

Misapprehension on Ms. O'Mahony's part

- 62.** In various of the applications which came before this court, the defendant asserts that on 02 October 2018 the Circuit Court made an order concerning the costs of the 2012 proceedings (record no. 2012/0369) No such order was made. Earlier in this judgment I quoted, *verbatim* and in full, the Circuit Court 02 October 2018 order (which granted possession of the property to PTSB and placed a 9-month stay on same). The court made no order whatsoever with respect to costs or expenses arising from the 2012 discontinued proceedings. Nor, in the manner explained, was any such order necessary or appropriate to make, given the provisions of Orders 21 and 66 in the RCC. I mention the foregoing at this juncture, because it appears that the defendant has been labouring under the misapprehension that the Circuit Court's 02 October 2018 order relates in some way to costs (or, more accurately, *actual and necessary outlay* insofar as she, in fact, incurred same) in the discontinued 2012 proceedings. Furthermore, she regards what she characterises as a failure to pay those costs as either fatal to the 2017 possession proceedings against her or a justification for a stay on the 02 October 2018 possession order. In this she is wholly mistaken. These misapprehensions seem to me to be at the heart of the applications before this Court.
- 63.** At the risk of repetition but for the benefit of Ms. O'Mahony it needs to be stressed that, all material times it was and remains open to her to have her "*actual and necessary outlay*", arising from the 2012 proceedings, *taxed* by the County Registrar. There is no evidence that the defendant has ever delivered a bill for her costs or expenses and given at least seven days' notice with respect to taxation by the County Registrar (as required by O.66, r.8 of the RCC). There is no evidence of any effort by Ms. O'Mahony to inform PTSB (or Start) of what she says constitutes her actual and necessary outlay (in *any* format, be that bill, letter, email, phone call, or otherwise). There no evidence of any refusal to reimburse Ms. O'Mahony for such actual and necessary outlay, if any, incurred by her. There is no evidence that the defendant has ever made an application to the County Registrar in accordance with the provisions of O.21, r.5 of the RCC. Having made the foregoing clear, I now proceed to look at the evidence with respect to the possession claim.

Possession claim – evidence considered

- 64.** The Circuit Court proceedings, which ultimately gave rise to the 2 October 2018 possession order, were issued by PTSB in Cork Circuit Court on 19 May 2017 under record no. 2017/00847 (hereinafter "the 2017 proceedings").
- 65.** The Special Indorsement of Claim pleaded inter alia the following:
- by letter dated 22 July 2008, the plaintiff agreed to make certain loan facilities available to the defendant;
 - on 08 August 2008, the defendant confirmed in writing her acceptance of the plaintiff's letter of approval in respect of loan facilities;
 - on 05 September 2008, the plaintiff advanced €354,440 to the defendant, in pursuance of the letter of approval and the plaintiff's General Mortgage Loan Approval Conditions;
 - on 05 September 2008 the defendant executed a mortgage and charge in favour of the plaintiff (hereinafter "the mortgage") over the property, by way of security for the monies advanced;
 - the mortgage expressly incorporated the plaintiff's 2002 mortgage conditions;
 - on 22 July 2009, the mortgage was registered in the Land Registry;
 - on 29 October 2010 and on various dates thereafter, the defendant failed to make repayments of principal and/or interest as they fell due;
 - the defendant has failed to make any repayments since 28 May 2015, despite written demands;
 - as of 25 April 2017, €395,983.35 (inclusive of €42,978.07 arrears) was owing by the defendant to the plaintiff;
 - insofar as the Code of Conduct on Mortgage Arrears applies to the loan facility, the plaintiff has complied with the Mortgage Arrears Resolution Process (hereinafter "the MARP");
 - the market value of the property does not exceed €3 million.

Jurisdiction

66. The 2017 proceedings were brought in the Circuit Court by the plaintiff *qua* mortgagee seeking an order for possession of property comprising the defendant's principal private residence. Para. "A" on the fourth internal page of the civil bill comprised the following plea: -

"AND THE PLAINTIFF CLAIMS:

- *An Order for Possession of the Mortgaged Property described in the Schedule hereto pursuant to Section 62(7) of the Registration of Title Act 1964, and Section 1(2) of the Land and Conveyancing Law Reform Act, 2013 and O. 5 B of the Rules of the Circuit Court...*"

Section 62(7) of the Registration of Title Act 1964

67. Before proceeding further, it is appropriate to quote *verbatim* s. 62(7) of the Registration of Title Act 1964 (hereinafter "the 1964 Act"). S.62 of the 1964 Act concerns the "*Creation and effect of charges on registered land*". Plainly, the property in question comprises registered land, and s.62(7) states the following: -

"When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession".

68. In the foregoing manner, s.62(7) explicitly permits a registered owner of a charge to seek possession in a "*summary manner*". In the Supreme Court's decision of 14 April 2021 in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, Baker J. explained matters as follows: -

"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".

Fundamental questions

69. As is clear from the foregoing, fundamental questions comprise (i) are the relevant monies secured? (ii) are the monies due? and (iii) is the application made *bona fide* with a view to realising the security? A review of the evidence which was before the Circuit Court demonstrates that the answer to all three questions is in the affirmative. This evidence comprises the averments made by Mr. David Smith, an assistant manager with PTSB, in an affidavit sworn by him on behalf of PTSB on 26 April 2017, together with the exhibits to his affidavit, and it is to this evidence I now turn.

26 April 2017 affidavit of Mr. David Smith

70. Mr. Smith averred that his affidavit was sworn on behalf of PTSB, with its authority and from an examination of the books and records and accounts of the plaintiff and, in particular, the accounts held by the defendant with the plaintiff, as well as from facts within his own knowledge,

save where otherwise appearing and, where so appearing, Mr. Smith averred that he believed the same to be true. Among other things, Mr. Smith verified the factual matters pleaded in the civil bill to which I have already referred.

Folio 101214F County Cork

71. Exhibit "A" to Mr. Smith's affidavit comprised a copy of Folio 101214 F, Co. Cork. Part 1(A) contains a description of the property, which is freehold. Part 2 deals with "Ownership" and records the defendant as full owner. Part 3, concerning "Burdens and notices of burdens", contained the following entry at no. 6: -

"22 - Jul - 2009 D2 009 LR 132525 K charge for present and future advances repayable with interest. IRISH LIFE & PERMANENT plc. is owner of this charge".

72. The foregoing entry accords precisely with the relevant pleas in the civil bill which was, of course, issued by the *then* owner of the charge, namely PTSB.

Mortgage

73. Exhibit "B" to Mr. Smith's affidavit is a copy of the mortgage, dated 05 September 2008. It is evident from the first page that the defendant signed as "the Mortgagor". The First Schedule on the second page of the mortgage contains *inter alia* a specification of the "Initial Advance" (stated to be €354,440.00); the "Term" (stated to be 29 years); whereas the Second Schedule gives both the "Common description" of the property (stated to be Goggins Hill, Ballinhassig, Co. Cork); as well as specifying the Folio (stated to be 101 214 F, Co. Cork). The mortgage states (para. 2) the following: -

"The Mortgagor the registered owner as beneficial owner hereby charges the property described in the Second Schedule hereto with the payment to Permanent TSB of all present and future advances payable by the mortgagor to Permanent TSB under the Mortgage Conditions and the Mortgagor hereby assents to the registration of the said charge as a burden on the property on the property hereby charged . . .".

Secured

74. The foregoing evidence allows this Court to hold conclusively that the relevant monies are *secured*. Exhibit "C" to Mr. Smith's affidavits comprises PTSB's 22 July 2008 "Letter of approval - particulars of mortgage loan", which, among other things, specifies the loan amount (€354,400.00); interest rate (6.35%); term (29 years); LTV (47%); number of 'Repayment Instalments' (348); and 'Amount of each Instalment' (€1,875.48).

Terms and conditions

75. Exhibit "D" comprises the "Irish Life & Permanent plc Acceptance of Loan Offer". This is dated 08 August 2008 and was signed by the defendant and witnessed by a solicitor in a named firm. It states, at para. 1, that: ". . . the undersigned accept the within offer on the terms and conditions set out in (i) Letter of Approval; (ii) the General Mortgage Loan Approval conditions; (iii) the Permanent TSB plc. Mortgage Conditions".

Legal advice

76. At para. 4, the following is stated: "*My/our Solicitor has fully explained the said terms and conditions to me/us*". Before proceeding further, it is appropriate to note that the defendant has never suggested that she did not accept the relevant loan offer; avail of monies; and execute the relevant mortgage and charge. Nor has she ever suggested that she was unaware of the terms and conditions; unclear on their meaning; or that she entered into the relevant arrangements under duress. This is not to suggest that the foregoing would comprise valid defences to the claim made. It is merely to say, for the sake of clarity, that no such issues have even been hinted at.

Particularly relevant terms

77. The "Permanent TSB Mortgage Conditions 2002" which govern the mortgage are also exhibited by Mr. Smith and it is appropriate to quote certain of these as follows, given their particular and obvious relevance: -

"2. PROVISIONS FOR PAYMENT

2.1 The mortgagor will and hereby covenants to (consistently with these conditions and without making any deductions) repay to Permanent TSB with interest the whole of the Advance and all further Advances on the Security of the Mortgage and all such other sums

as by the provisions applicable to the Mortgage shall from time to time become due from the Mortgagor to Permanent TSB.

. . . .

2.5 The Mortgagor will and hereby covenants to pay to Permanent TSB and discharge on demand (or on such terms as may otherwise be agreed in writing) the general indebtedness and liability to pay to Permanent TSB and discharge on demand (or on such terms as may otherwise be agreed in writing) the general indebtedness and liability.

. . . .

6.4 At any time after the Total Debt has become immediately payable, Permanent TSB may without any previous notice to or concurrence on the part of the mortgagor: -

(a) enter into possession of the property or any part thereof or into receipt of the rent or profits or the property or any part thereof;

. . .

(c) absolutely sell or dispose of all or any of the property at such time or times and in such manner and subject to such conditions as Permanent TSB in its absolute discretion may deem expedient . . .

6.7 Permanent TSB may at any time (without the consent of the Mortgagor) transfer the benefit of the Mortgage to any person . . .

. . .

(d) subject to the foregoing all powers and rights of Permanent TSB so far as applicable after the transfer shall be exercisable by the transferee . . .

7. TOTAL DEBT TO BECOME IMMEDIATELY PAYABLE

The Total Debt shall become immediately payable to Permanent TSB:

7.1 If the Mortgagor defaults in the making of two Monthly Repayments or for two months in the payment of any other moneys payable under the mortgage . . .”

Default

78. At para. 15 of his affidavit, Mr. Smith avers *inter alia* that, on or about 13 November 2010, the defendant defaulted “. . . in the making of two Monthly Repayments or for two months in the payment of any other moneys payable under the mortgage” and that “. . . no payments have been received since 21 August 2015 leaving arrears now standing in the sum of €42,798.07”.

Transaction history

79. Exhibit “F” to Mr. Smith’s affidavit comprises a “Permanent TSB Mortgage Statement – Transaction History” (the “statement”) with respect to the defendant, who was identified by name and account number. The statement covers the period from 2008 to 2013 and identifies, *inter alia*, the point at which the defendant failed to make the monthly payments due; the accumulation of arrears; and the then-current loan balance.

Demand for payment

80. Mr. Smith also avers *inter alia* that, by letter dated 01 March 2017, the plaintiff, through its solicitors, demanded that the defendant repay to PTSB all sums then due and owing, together with interest, in default of which the plaintiff would proceed to seek possession of the property. A copy of that letter of demand comprises Exhibit “E” to Mr. Smith’s affidavit. No payment was made by the defendant on foot of the 01 March 2017 letter of demand.

Demand for possession

81. Exhibit “G” comprises a copy of a letter dated 17 March 2017 which, in the manner averred by Mr. Smith, was sent to the defendant by the solicitors for PTSB. The title to that letter refers to the property; specifies the relevant account number i.e. 99069590532492 (which corresponds to the defendant’s account number on the mortgage statement); specifies the then-arrears (€41,835.01); and the Total Debt (€397,005.92, as at 23 Feb2017).

82. The said letter, which was addressed to the defendant at the property, stated *inter alia* the following: -

“We act on behalf of Permanent TSB and we refer to our letter of 1 March 2017. We note that in consideration of our client granting you the above loan facility, you granted our client a mortgage over the property known as Goggins Hill, Ballinhassig, Co. Cork. Our client now demands vacant possession of the mortgaged property within ten days from the date of this letter. Our client’s power of sale has now arisen under the terms of the mortgage. Our client

will issue Court proceedings for the recovery of possession of the property if you fail to deliver vacant possession of the property to our client within ten days from the date of this letter. . .”

Due

83. I pause at this point to state that the foregoing evidence allows this Court to hold conclusively that the secured moneys are *due*.

CCMA/MARP

84. From paras. 21 to 30 inclusive, Mr. Smith makes a range of averments with respect to PTSB’s compliance with the CCMA. He avers, *inter alia*, that where possible, contact was made in an effort to try and resolve the problem of the arrears and that every reasonable effort was made to agree an alternative arrangement with the defendant prior to the proceedings being issued (para. 23). Mr. Smith avers that, for the purpose of continuing PTSB’s legal action for possession against the defendant, the plaintiff is in compliance with the CCMA (para. 24). He avers that the plaintiff has in place within it, an Arrears Support Unit (ASU) and a MARP as required under the CCMA (para. 25). As well as averring that PTSB has, at all times, proactively encouraged the defendant to engage with regard to her financial difficulties (para. 27), Mr. Smith avers that, in accordance with s. 28 of the CCMA, PTSB wrote to the defendant advising her that she was at risk of exiting the MARP and requesting that she complete an enclosed standard financial statement (“SFS”). He exhibits a copy of that letter (comprising “Exhibit H”) to his affidavit and it is appropriate to quote as follows from the said letter which is dated 07 May 2014: -

“Dear Ms. O’Mahony,

We are concerned to note the serious arrears balance on your mortgage account. We have tried to address this with you on a number of occasions but unfortunately the matter remains unresolved . . .

Talk to us today

If you are unable to pay your arrears balance you need to contact us immediately to discuss the completion of a Standard Financial Statement (SFS). The SFS is a form that requires you to provide information on your current income, expenses and other amounts you owe. The SFS is used by us when assessing your case to decide whether or not to offer you an alternative repayment arrangement and what type of arrangement is appropriate to your circumstances.

We remain committed to working with you to help you through your mortgage difficulties. Please phone us on 1800 946 916. We have a dedicated team available to take your call (opening hours Monday to Friday, 9 a.m. to 8 p.m. (excluding Bank Holidays) and Saturdays, 9 a.m. to 1 p.m.)

It is essential that you contact us within 20 business days from the date of this letter.

What happens if I don’t make contact?

If you do not contact us in order to complete the SFS within 20 business days, you will be considered as not co – operating within the Mortgage Arrears Resolution Process (MARP) as set out in the Code of Conduct in Mortgage Arrears 2013. MARP is the name given in the CCMA to the process on how banks deal with customers in or at risk of mortgage arrears.

What happens if I’m considered as not co – operating?

(a)The Bank may commence legal proceedings for repossession of your property immediately . . .”

85. The aforesaid 07 May 2014 letter went on to detail, *inter alia*, other consequences of non-cooperation; highlighted the importance of the defendant seeking independent legal and/or financial advice; provided the name and contact details for the Money Advice & Budgeting Service (“MABS”); and provided an estimate, *per* s.134 of the Consumer Credit Act 1995, of costs associated with Circuit Court possession proceedings.

Non-cooperating

86. At para. 29 of his affidavit, Mr. Smith avers that the defendant failed to respond to the aforesaid correspondence and did not furnish PTSB with a completed SFS. He went on to aver that, in accordance with s. 29 of the CCMA, PTSB wrote to the defendant advising her that she had now been classified as non – cooperating, thereby placing her outside the protections of the MARP and advising her of the right to appeal that decision, as well as the importance of seeking

independent legal advice in this regard. Mr. Smith also avers that the defendant failed to respond to this correspondence, a copy of which comprises Exhibit "I" to his affidavit. It is appropriate to quote as follows from the aforesaid letter to the defendant which is dated 15 October 2014 and was sent to her at the property: -

"You have been classified as not Co – operating

Dear Ms. O'Mahony,

We refer to the warning letter previously issued to you in which you were given an opportunity to co – operate with the Bank in relation to dealing with your mortgage account. Please note as the period offered in the warning letter has lapsed you have now been classified as not co – operating. In accordance with the Code of Conduct on Mortgage Arrears 2013 we must inform you of the following: -

- That the bank can commence legal proceedings immediately for the repossession of your property;*
- That you are now outside the Mortgage Arrears Resolution Process (MARP) and the protections of the MARP will no longer apply to you;*
- Other options that may be available to you are detailed below . . ."*

Those options were explained and comprise voluntary surrender; trading down; voluntary sale; and mortgage to rent. The letter went on to set out information relating to all options, including the cost associated with same. The letter emphasised that it was important for the defendant to seek independent advice in relation to the options outlined. Under the heading of "Your rights" the following was stated: -

"You have the right to appeal the Bank's decision to classify you as not co – operating and if you wish to do so you must make the appeal in writing setting out the grounds for the appeal and send this to the Appeals Board, C/O Customer Relations Department, Permanent TSB, Churchyard Lane, Douglas, Cork, no later than 22 business days from the date of this letter.

You have the right to consult a personal insolvency practitioner, notwithstanding the fact that the classification as not co – operating may impact on your eligibility for a personal insolvency arrangement.

Talk to us today.

We remain committed to working with you to help you through your mortgage difficulties.

If you have any questions, please do not hesitate to call us on 1800 946 916. We have a dedicated team available to take your call (opening hours Monday to Friday, 9 a.m. to 8 p.m. (excluding Bank Holidays) and Saturdays, 9 a.m. to 1 p.m.)".

Compliance with Consumer Credit Act 1995

87. The said letter concluded by setting out an estimate of Circuit Court costs with respect to possession proceedings, in line with s. 134 of the Consumer Credit Act, 1995. At para. 29 of his affidavit Mr. Smith avers inter alia that: -*"The defendant failed to respond to this correspondence"*. He proceeds at para. 30 to make the following averment: *"In the circumstances I say and believe that the plaintiff is fully in compliance with the CCMA and MARP"*. The evidence before this Court is that the defendant was given the opportunity to co-operate but failed to take that opportunity. The evidence is also that she was notified that she had been deemed as not-cooperating and was clearly informed that she had the option to appeal that classification. She did not take that opportunity. The evidence to which I have referred allows this Court to hold conclusively that PTSB complied fully with its requirements insofar as the Consumer Credit Act of 1995, the CCMA and the MARP are concerned.

Bona fide

88. The third of the three questions which are identified earlier in this judgment flows from the obligation on the court to be satisfied that the plaintiff's application for possession is made *bona fide* with a view to realising the security. There is clear evidence which allows this Court to be so satisfied. Having referred (at para. 18 of his affidavit) to PTSB's power of sale under the mortgage and charge, Mr. Smith proceeds to make the following averments at paras. 19 and 20 of his 26 April 2017 affidavit: -

"19. By virtue of the repeated default on the part of the Defendant, the plaintiff is desirous of exercising the said power of sale. I believe and am advised that the value of the mortgaged property will be enhanced if sold with vacant possession.

20. Accordingly, I believe that an Order for Possession of the Property in order to facilitate the sale of same by the plaintiff, is a proper and expedient manner for the plaintiff to recover the monies secured by the Mortgage".

89. The foregoing evidence allows this Court to hold that the application for possession is made *bona fide* with a view to realising the security. In short, the evidence before the Circuit Court without doubt justified the making of the 2 October 2018 possession order. The appeal against same has proceeded by way of a *de novo* hearing but a fresh consideration of the evidence produces the very same result. At the time the possession order was granted, PTSB was the registered owner of the charge and, for the reasons I have set out, PTSB was then entitled to the possession order. However, as previously noted, PTSB subsequently transferred all of its estate, title, rights and interest in the relevant mortgage and charge to Start DAC and the effective date for that transfer was 01 February 2019.

Transfer from PTSB to Start 4 months after possession order

90. It is appropriate to note that it was on 01 February 2019 that Transfer from PTSB to Start DAC occurred and this is some four months *after* the possession order was granted by the Circuit Court on 02 October 2018. In the manner examined earlier in this judgment, the substitution of Start DAC for PTSB was entirely appropriate. It is also appropriate to recall, that Start DAC is *now* the registered owner of the mortgage and charge (which comprises entry no. 6 at Part 3 of Folio 101214F, by virtue of what is recorded at entry no. 10 of same).

Section 31 of the Registration of Title Act 1964

91. The foregoing brings into focus the significance of s. 31 of the 1964 Act and makes it appropriate to quote a further passage from the Supreme Court's decision in *Bank of Ireland Mortgage Bank v. Cody*. From para. 49, Baker J. stated the following: -

"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 in 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 an 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 has arisen and become exercisable**". (Emphasis added)*

92. It is appropriate to note, for the sake of completeness, that the defendant has never challenged the correctness of the Register. Nothing of the sort has even been suggested, still less have any proceedings issued to seek an amendment or rectification of any entry in the relevant Folio. This is not to suggest that there is a stateable claim in this regard but it is to say that this Court is entitled to state *conclusively* that: -

(i) When the possession order was made on 02 October 2018, PTSB was the registered owner of the mortgage and charge over the property;

(ii) As and from 01 February 2019, Start DAC became the sole party entitled to be registered as owner of the said mortgage and charge, by virtue of the 01 February 2019 Transfer Deed;

(iii) As of 28 March 2019, Start DAC was registered as the owner of the mortgage and charge (as Part 3 of Folio 101214F clearly states).

(iv) Therefore, the court has conclusive proof of both of the facts to which Baker J. referred at para. 49 of the Supreme Court's decision in *Bank of Ireland Mortgage Bank v. Cody*.

Ms. O'Mahony's assertions

93. In short, the plaintiff in the present proceedings is entitled to possession. I have reached this conclusion after carefully considering all the evidence, including the range of assertions made by the defendant. As to those various assertions, they can be found in a number of documents. The defendant swore an affidavit on 10 May 2018 in which she cited the following record numbers: - 2017/00847 and 2012/03669. What emerges from the averments in that affidavit are the following points.

Stamping

94. The plaintiff describes the civil bill as "*Allegedly bona fide*" and states *inter alia* that it was "*without stamp tax duty and without court lodging stamp appended, and with the registrar's 'as issued' stamp*". I am entirely satisfied that the foregoing provides no defence to the possession claim. There is simply no evidence that the proceedings were issued and stamped in other than an appropriate manner.

Expenses of 2012 proceedings act as a bar

95. The plaintiff contends, at para. 5 of that affidavit, that it is impermissible for PTSB to issue the 2017 proceedings "*unless they pay the costs in the discontinued matter*" (being a reference to the 2012 proceedings which were discontinued in 2015). This is something I looked at earlier in this judgment. I am entirely satisfied that the fact that the defendants "*actual and necessary outlay*" (see O. 66, r. 6 of the RCC) remained outstanding did *not* prevent PTSB from issuing and progressing the 2017 proceedings. There are three reasons why I take this view. First, the RCC does not at all support what the defendant contends and specifies no such estoppel. Second, no judge has placed a stay on the 2017 proceedings. Third, but most important, although the defendant could have, at any time, applied to have her expenses taxed, she has neglected to do so. With respect to the latter point, it has to be said that if the defendant were correct in her view, it would licence a situation whereby a defendant could forever frustrate an attempt to progress a *second* set of possession proceedings by *never* seeking to tax their costs or expenses in respect of a *first* set of proceedings which had been discontinued by a plaintiff.

Double jeopardy/Abuse of process/Unlawfulness

96. At para. 6 of the defendant's 10 May 2018 affidavit she makes assertions, the gravamen of which is that the 2017 proceedings amounted to an abuse of process. She asserts *inter alia* that the 2017 proceedings scream of "*double jeopardy*"; comprise a "*second bite of the cherry*"; that, by issuing the 2017 proceedings, the Circuit Court office became "*party to an unlawful re – trial of events*"; and that, in circumstances where PTSB changed solicitors, there is an attempt "*to pull the wool over not only the court office but also their second set of solicitors*". I am entirely satisfied that these assertions are entirely without foundation and provide no basis for a defence to the possession proceedings. On this topic, it is useful to refer to the clarity provided by Charleton J. in the Court of Appeal's 14 July 2016 decision in *Allied Irish Banks plc. v. Darcy* [2016] 1 IR 588. From para. 9 onwards of his judgment, Charleton J. referred to the equivalent Superior Court Rule which allows for a notice of discontinuance to be delivered. The analysis of the learned judge is equally relevant to a discontinuance of Circuit Court proceedings: -

"The text of O. 26, r. 1 of the Rules of the Superior Courts 1986 clearly provides for discontinuance of proceedings without leave of the court. It also makes plain that, in the ordinary way, any such action will not amount to the setting up of an event against the party discontinuing whereby it may be said that any principle of res judicata applies".

Res judicata

97. For the benefit of the defendant (who did not avail of legal representation) a practical example of the *res judicata* principle, to which the learned Judge referred in the foregoing passage, is that where one party brings an action against another and *judgment* is given by the court, the plaintiff cannot bring another action against the same party for the same cause. Similarly, the *res judicata* principle ensures that a litigant cannot engage in an abuse of process by challenging in *later* proceedings, a final decision made against her or him by a court of competent jurisdiction in *earlier* proceedings in which she, or he, had a full opportunity of contesting matters. In the

manner explained by Charleton J., no breach of the *res judicata* principle arises when a set of proceedings is discontinued (i.e. this is *not* an example of what Ms. O'Mahony characterises as an abuse of process). The very obvious reason is because there has not been any *judgment* given in the 2012 proceedings. Thus, the 2017 proceedings were commenced without any judicial determination of the relevant issues *ever* having been made. For this reason, there is no question of an abuse of process involving what the defendant also describes as "double jeopardy". The judgment of Charleton J. is also of relevance, inasmuch as it referred to the significance of the question of costs arising from the discontinued proceedings. Later in para. 9, the learned judge stated the following: -

"[9]...It was claimed on behalf of the defendants that no costs were paid by the bank on the service of the notice of discontinuance and that hence it was invalid. Insofar as facts in relation to this can be accessed, it is clear that on discontinuance the solicitor for the defendants applied to the bank's solicitor to pay each of their costs, as each had entered separate appearances to the special summons that was discontinued by the bank. Thereafter, and it appears on behalf of both the defendants, a bill of taxation was drawn up in appropriate form. This was last listed before the Taxing Master on 30th May 2016 but has been adjourned. Since no party to litigation can immediately be aware what precise costs have been occasioned by the other side by service of any form of summons, the procedure to be followed is precisely as occurred here.

[10] The real issue is whether there has been an abuse of the process of the courts by the discontinuance of the first special summons proceedings and the substitution of a new special summons, lacking the ostensible defect of the first, with an overlap of both sets of proceedings for the period from 28th January to 9th April 2014. The answer must be in the negative".

98. What was true in the foregoing circumstances is even more so in the present case. I say this because in the case before Charleton J. the relevant defendants (i) applied to the bank's solicitor to pay their costs; (ii) drew up a bill of taxation; and (iii) had the matter listed before the Taxing Master. In the present case, there is no evidence whatsoever that the defendant has taken any of these steps (the County Registrar, as opposed to the Taxing Master, being the party who "shall" make such adjudication as they are called upon to make).

Without foundation

99. For the foregoing reasons, the assertions made by the defendant at para. 6 of her 10 May 2018 affidavit are simply without foundation and I must also reject, as entirely baseless, the defendant's assertion at para. 7 of that affidavit to the effect that for the Circuit Court office to have accepted what the defendant characterised as "*defective and repeat pleadings*" and brought "*the whole court office into dishonour*". This assertion is wrong in fact and in law.

Bald assertion

100. At para. 16 of an affidavit sworn by the defendant on 24 May 2018 (in which she cites Circuit Court record nos. 2017/00847 & 2012 / 03669), the defendant makes the following averment: "*16. I say that I have been overcharged on the tracker product from the outset, and that the plaintiff has undertaken to the functions of State and the Central Bank NOT to proceed with any matter, until the substantive issues surrounding non – contractual overcharging and non – contractual product change have been remedied*". The foregoing is no more than a "bald" assertion i.e. one which is wholly unsupported by any evidence. Indeed, the defendant did not even proffer evidence that she was on a 'tracker' product. She referred to no calculation, be that by her or by any qualified professional, as to the quantum of any alleged overcharging. She neither refers to, nor exhibits, any correspondence which she sent at any time in which it is suggested that she was being overcharged. Nor does the defendant allege that her default related in any way to alleged overcharging. On the contrary, her default is beyond doubt; that *secured* moneys are *due* is beyond doubt; that demands were made (both for repayment and, subsequently, for possession) is beyond doubt; that these demands produced no response is beyond doubt; that the defendant was encouraged to co-operate and given every reasonable opportunity to do so is beyond doubt; that the application is made *bona fide* with a view to realising the security is beyond doubt. Furthermore, there is no evidence whatsoever that the

plaintiff gave the defendant any undertaking *not* to proceed with the possession proceedings. For these reasons, the unsubstantiated assertion made at para. 16 of the defendant's 24 May 2018 affidavit provide no grounds for a defence to the possession claim and simply cannot avail her.

14 days

101. It is a matter of fact that the Circuit Court granted the possession order on 02 October 2018, in the presence of the defendant and I previously quoted its terms *verbatim*. It is clear that no hearing took place on 16 October 2018 (a date which, very obviously, post-dates the granting of the possession order, by 14 days). It appears from the papers before this Court that, when granting the possession order, the Circuit Court directed that PTSB provide updated figures with respect to the defendant's financial liability and to do so within a 14-day period. In that context, I note that on 15 October 2018 Mr. Smith swore an affidavit in his capacity as a bank official employed by PTSB wherein, based on an examination of the relevant books and records, he averred, at para. 2 that: -

" . . . as of 15 October 2018, the moneys outstanding to the plaintiff by the defendant pursuant to the loan facility and the mortgage amounted to €400,316.89 including arrears of €45,409.14. I say that the defendant has not made any payments since the issuing of these proceedings".

08 October 2018 'Defence & Counterclaim'

102. Despite the fact that (as the Circuit Court's 02 October 2018 possession order records) the defendant was present in court and represented herself on that date, the defendant subsequently delivered a document entitled "*Defence & counterclaim*" which is dated 08 October 2018. Three comments seem appropriate to make. First, given that the Circuit Court heard from the defendant who appeared in person on 02 October 2018, it is uncontroversial to say that the defendant was afforded every reasonable opportunity to set out her opposition to the claim for possession be that in writing or by means of oral submissions *before* the Court made the order in question. Second, it is clear that the plaintiff took that opportunity, prior to the hearing, to make her case in writing and I have previously referred to the contents of the affidavits sworn by her. Third, and arising from the foregoing, the defendant plainly had the opportunity - be that in advance of, or on 02 October 2018 - to raise any and all points which she *subsequently* committed to writing in the "*Defence & counterclaim*" delivered on 8 October 2018 (approximately a week *after* the possession order was made).

0.5 B of the Circuit Court Rules

103. O. 5 B of the CCR does not provide for the delivery of a defence in proceedings of this type which are conducted in a summary manner but - leaving that matter to one side, and also ignoring, for present purposes, that this document was delivered approximately a week *after* the possession order was granted - I am entirely satisfied that nothing contained in it comprises the basis for a stateable defence to the claim for possession.

30 issues

104. Without for a moment meaning to be disrespectful, and conscious, also, that the defendant does not have legal training, it is fair to say that the 08 October 2018 defence and counterclaim is a document of the 'kitchen sink' variety, in that a huge range of issues are raised. In total, some 30 issues are canvassed, between the points said to constitute a 'defence', the points said to ground a 'counterclaim' and the 'relief' to which the defendant says she is entitled. Given the importance of these proceedings to the defendant, it is appropriate, for the sake of clarity, to refer to these as follows: -

1. That the defendant's "special & conditional appearance" has been "completely ignored and not adhered to";
2. That the plaintiff "has no enforceable contractual or legal claim over me";
3. That PTSB "has no enforceable contractual or legal claim over me";
4. That no party is entitled to seek possession of the property in a "summary manner";
5. That the plaintiff is being denied "due process";
6. That there has been a failure to provide "grounding proofs" having regard to the defendant's "special appearance";
7. That there was a failure to issue "valid demands";

8. That there was a failure "to establish subject matter jurisdiction";
 9. That there was a failure to comply with the CCR, in particular, O. 5;
 10. That there have been "misrepresentations by way of the original loan application approval (contractual offer?) and the specific and general conditions";
 11. That there were "non-disclosures of contractual intent, in originating loan application approval (contractual offer?) and the specific and general conditions";
 12. That there was "no conscious contractual meeting of minds regarding the originating contractual loan application approval (contractual offer?) as issued, and its specific and general conditions";
 13. That there were "breaches of alleged contract" by the plaintiff and its predecessor;
 14. That these "breaches of contract" comprised "failure to disclose 'equity' and 'in-trust' intent in the application approval (contractual offer?);"
 15. That there were breaches of contract "by way of continual overcharging, by way of fraud and theft";
 16. That there was a "failure to comply with Sale of Goods and Services Act";
 17. That there was a "failure to comply with Consumer Protection Acts";
 18. That there was a "failure to comply with Consumer Credit Acts";
 19. That there was a "failure to comply with the requirements of the 1964 Act";
 20. That there was a failure to comply with "Consumer codes";
 21. That there was a failure to comply with "Central Bank codes";
 22. That there was "criminality and fraud" by way of breaches of the "Criminal Justice Theft and Fraud Acts";
 23. That the defendant is entitled to have the claim struck out "for lawful wants";
 24. That the defendant is entitled to a declaration that the charge is "ineffective and unenforceable";
 25. That the defendant is entitled to an order for "contractual loss and damages";
 26. That the defendant is entitled to an order "for the return of the original signed loan offer, as accepted";
 27. That the defendant is entitled to an order for the return of "the invalid original signed deed of mortgage";
 28. That the defendant is entitled to an order for "contractual rescission of alleged originating contract" due to "misrepresentations and fraudulent misrepresentations";
 29. That the defendant is entitled to an order to "move the criminal actions to the Garda Bureau of Fraud Investigation";
 30. That the defendant is entitled to "further reliefs".
- 105.** Although it is clear that the defendant has devoted considerable time and energy to articulating her position, I am entirely satisfied that none of the foregoing pleas are underpinned by evidence and, because they lack any basis in fact or law, they are wholly lacking in credibility. On the contrary, the evidence before the court as well as settled legal principles utterly undermines these 30 "bare", or mere, assertions made by the defendant. For her benefit and to better understand why this is so, the following examples will suffice.
- 106.** The defendant asserts that there was a failure to issue valid demands to ground the proceedings. This is demonstrably incorrect. Earlier in this judgment, I referred to the demands made. Similarly, the defendant claims that there was a failure to establish what she describes as "*subject matter jurisdiction*". However, the jurisdiction underpinning the possession proceedings is very clear and is explicitly pleaded in the civil bill for possession. It will be recalled that, as regards jurisdiction, the Civil Bill made clear that (i) the proceedings were brought pursuant to s. 3 of the Land and Conveyancing Law Reform Act 2013; (ii) being proceedings by a mortgagee seeking an order for possession of land which comprised the principal private residence of the mortgagor; (iii) the market value of the property did not exceed €3,000,000; (iv) the plaintiff sought possession pursuant to s. 62(7) of the Registration of Title Act, 1964; S. 1(2) of the Land and Conveyancing Law Reform Act 2013; and O. 5 (B) of the Rules of the RCC.
- 107.** By way of a further example, the defendant asserts that there was no "*conscious contractual meeting of minds*". However, the evidence before the court includes the PTSB "*Acceptance of*

Loan Offer” dated 08 August 2008 which the defendant signed in the presence of a named solicitor, wherein she confirmed inter alia that her solicitor had “*fully explained the said terms and conditions*” to her. In other words, this is just one of a large range of assertions which are not evidence-based and are utterly undermined by the facts.

108. By saying the foregoing, I do not want it thought that the proper approach for this Court is to de-construct the various pleas made in the “Defence & counterclaim” as if these were plenary proceedings. That is not at all the appropriate approach. The test remains that which Baker J. explained in *Bank of Ireland Mortgage Bank v. Cody*, having regard to the jurisdiction invoked (namely s. 62(7) of the 1964 Act). The reason I am engaging at all with the contents of the Defence & Counterclaim is so that the defendant who is not legally represented can better understand why there was, and is, simply no basis for her opposition to the possession claims.

Inappropriate allegations

109. Before leaving the ‘Defence & Counterclaim’, I feel it should be said that, irrespective of a defendant’s desire to oppose a claim for possession, it is not at all appropriate for them to make utterly unsubstantiated and wholly inappropriate allegations, including of “*criminality and fraud*” on the part of third parties. A plaintiff may be a corporate entity, (in this case a Designated Activity Company) but corporate entities are comprised of real people, and there is not a shred of evidence before the court to the effect that any individual, be they in PTSB, in Start DAC (or, for that matter, in the Circuit Court office, in the High Court Central Office, or representing the plaintiff *qua* solicitor or counsel) ever acted other than in an entirely appropriate and lawful manner. The various assertions of wrongdoing, fraud, unlawfulness and criminality which were made by Ms. O’Mahony against a wide range of others are utterly baseless and should not have been made.

Decision on possession claim

110. For the reasons set out in the judgment, Start DAC is entitled to possession of the property. Having earlier set out the reasons why the substitution application was entirely appropriate, the findings in the judgment, to date, dispose of all matters. For the sake of “good housekeeping”, however, I propose to make some further comments as follows.

22 January 2019 Master’s Order (extending time)

111. The defendant was ‘out of time’ with respect to an appeal against the 2 October 2018 possession order. The Master granted an order, on 22 January 2019, which extended the time for serving and lodging a notice of appeal against what was described in the Master’s order as a “*Circuit Court order dated the **16th day of October 2018***” (Emphasis added). The papers which were before the Master in the context of the defendant’s application to extend time were not before this Court but it can nonetheless be said with certainty that there was no such order. The possession order was made on 2 October 2018. Start DAC submit that in circumstances where Ms. O’Mahony’s appeal against the possession order is unstateable, the Master’s order should be set aside. For the reasons set out in this decision, I fully agree. However, for the sake of clarity and completeness, it is appropriate to examine the evidence with respect to the set-aside application.

Set- aside Motion (record number 2018/510 CA)

112. By notice of motion dated 28 January 2019, in proceedings under record number 2018/510 CA, PTSB (the defendant/respondent in those proceedings) brought an application pursuant to O. 63, r. 9 of the RSC setting aside the Master’s order. I have considered the various affidavits which were exchanged between the parties in the context of that motion, in particular the following:-

- (i) Affidavit of Niamh McGee, assistant manager, employed by PTSB, sworn on 28 January 2019 grounding the set-aside application;
- (ii) Affidavit sworn on 14 February 2019 by the defendant;
- (iii) Affidavit sworn on 24 May 2019 by Mr. Justin Nevin, litigation manager of Start DAC, which was sworn in the context of an application to substitute Start DAC for PTSB as defendant in the High Court proceedings bearing record number 2018/510 CA (and, earlier in this judgment, I referred to same);

- (iv) Affidavit of Mr. Nevin, sworn on 8 August 2019 (in which he exhibits the up-to-date Land Registry folio 101214F, County Cork, which records Start DAC as owner of the charge which was previously owned by PTSB;
- (v) Affidavit sworn by the defendant on 23 September 2019;
- (vi) Affidavit sworn by the defendant on 25 November 2019.

113. It is entirely fair to say that none of the affidavits sworn by the defendant disclose a stateable defence. Nor, I should add, are any grounds for a stateable defence disclosed in any affidavit or exhibit furnished by the defendant, *regardless* of whether same was provided in proceedings bearing Circuit Court record number 2017/00847; or High Court record numbers 2018/484 CA; 2018/510 CA; or 2020/10 CA.

Evasive / confuse / coerce

114. I am also obliged to reject as utterly unsupported, indeed unsupportable, the assertion made by the defendant, in para. 5 of her 27 November 2018 affidavit, to the effect that a solicitor representing PTSB "*was totally evasive to the court*" and "*did deliberately confuse and coerce the judge in the matter to grant a possession order*". This is another example of assertions which are as serious as they are untethered to any evidence whatsoever and, thus, baseless and entirely inappropriate. Representing oneself in litigation does not confer licence to malign others and there is not a scintilla of evidence to support these claims which should never have been made.

115. Nothing before the Master provided any stateable defence to the possession claim and I say this because this Court has carefully reviewed all averments made by Ms. O'Mahony in respect of the 7 different applications which have come before this court. The Master's order extending time should not have been granted (even if it extended time to appeal against the 02 October 2018 possession order, as opposed to a non-existent order of 16 October 2018).

Eire Continental

116. The failure on the part of the defendant to show that an arguable ground of appeal exists means that, when the Master extended time, an essential element of the *Eire Continental* test was not met. For the benefit of the defendant, the decision in *Eire Continental Trading Company v. Clonmel Foods* [1955] I.R. 170 makes clear that there are three conditions which a court should consider in deciding whether or not to grant an application for an extension of time within which to appeal. First, the applicant must show a *bona fide intention to appeal* within the time permitted for the filing of same. Second, there must be a *reason for delay* having taken place (such as a mistake). Third, it must be established that there is an *arguable ground of appeal*.

117. In the present matter, Start DAC takes no issue with the first and second elements of the *Eire Continental* test. For very obvious reasons, their focus is on the third. Start DAC is entirely correct that there was, and is, no *arguable ground* of appeal. The defendant has not demonstrated anything approaching an arguable ground of appeal. That was the position before the Master, and it remains the position now. For the reasons set out in this decision, the Master's order must be set aside. The defendant has no defence to the claim for possession and I have found that Start Mortgages DAC is entitled to possession of the property (being the 'successor in title' to PTSB, which was the entity entitled to possession when the 02 October 2018 order was made).

Affidavit of Niamh McGee

118. Although not of relevance to the core issues of *substitution* and *possession* around which all 7 of the applications which came before this court revolve, it may be useful, by way of additional background, to note the contents of an affidavit sworn on 28 January 2019 by Ms. Niamh McGee, an assistant manager employed by PTSB. She avers, *inter alia*, that her source of knowledge is PTSB's solicitors. Having averred that the possession order was made by His Honour Judge O'Donohoe on 2 October 2018 (para. 17); and that Ms. O'Mahony was in court (para.18); she avers that the Judge directed that PTSB file a further affidavit within two weeks as to the current position in relation to the defendant's arrears (para. 19). From para. 20, Ms. McGee proceeds to make the following averments:-

"20. I further believe and have been advised by the respondent's solicitors that when the issue of costs in relation to the 2012 proceedings was raised by the appellant, that the Solicitor acting for the respondent informed the Court that the legal costs of €4,571.44 which

the respondent had applied to the appellant's mortgage account in respect of the 2012 proceedings would be reversed.

21. I confirm that on 19th September 2018 a credit of €4,103.44 was applied to the appellant's account and a further adjustment was made to the account reversing fees in the sum of €468.00 bringing the total reversal of fees to €4,571.44. I beg to refer to a copy of the 2018 mortgage account statements which show the credit in the sum of €4,103.44 and the current indebtedness of the appellant..

22. For the avoidance of doubt there was no motion for taxation of the costs or expenses of costs in the 2012 proceedings pursuant to Order 66, rule 6 of the Circuit Court Rules before the Circuit Court judge on 2nd October 2018 and in those circumstances the only order that was made was the order for possession in the 2017 proceedings.

23. An affidavit was sworn by David Smith on 15th October 2018. I beg to refer to same when produced. As can be seen therefrom, the arrears stood at €45,409.14 and total balance outstanding stood at €400,316.89.

24. I believe and have been advised that arising from the failure on the part of the Appellant to file and serve the notice of appeal within a ten day period as prescribed by the Rules of the Superior Courts that she issued a motion seeking an extension of time to appeal the order for possession and that motion bears High Court record number 2018/510 CA.

25. I further believe and have been advised that the appellant also issued a second motion for an extension of time to appeal what she believes was an order made in relation to the taxation or adjudication on the costs and expenses of the 2012 proceedings. That motion bears High Court record number 2018/484 CA."

Motion (2018/484 CA) to extend time to appeal (re: costs of 2012 proceedings)

119. I have already dealt with the matter referred to at para. 24 by setting aside the Master's order which extended time to appeal the possession order. With respect to the matter averred to at para. 25, the following would appear to be the position:

(i) The defendant (as appellant) issued a motion on 21 November 2018 (bearing record number 2018/484 CA) which was headed as follows: "**Application for extension of time to appeal an order from the Cork Circuit Court due to a filing error – for discontinued claim/matter number 2012-03669 (ongoing for determination of costs) & an application for a stay in related claim/matter number 2017-00847**" (Emphasis added).

(ii) The body of the defendant/appellant's motion made it clear that she was seeking to appeal "...against the order of the Cork Circuit Court made in matter 2012-03669 on the 2nd October 2018". She also sought a stay in respect of Circuit Court proceedings under record number 2017-00847 (namely, the possession proceedings) until the costs issue with respect to the 2012 proceedings was determined.

(iii) In the manner examined earlier in this decision, no order was made by Cork Circuit Court on 2 October 2018 with respect to costs or expenses in the 2012 proceedings. It is also perfectly clear from the face of the Circuit Court's order made on 2 October 2018 that no stay was granted.

(iv) Notwithstanding the foregoing, it seems that the Master granted an order extending time to appeal against an order taxing the defendant's costs on foot of the notice of discontinuance in respect of the 2012 proceedings. The Master did so, even though no such order was ever made.

(v) It is appropriate to quote *verbatim* from the Master's order, which was made and perfected on 22 January 2019, entitled "**CIRCUIT APPEALS 2018 No. 484 CA**". Bearing in mind that the defendant in the possession proceedings was described as the appellant in the proceedings before the Master, the latter's order was in the following terms:-

"Upon motion of the Appellant in person pursuant to Notice of Motion dated the 19th of November 2018 and on reading said Notice and affidavit of Rosarie O'Mahony filed the said date

And on hearing said appellant and counsel for the respondent

*IT IS ORDERED that the time for serving and lodging **Notice of Appeal against the said Circuit Court costs order dated the 2nd day of October 2018** be and the same is hereby extended for three weeks from the date hereof*

And the court doth make no order for costs” (Emphasis added)

(vi) There was and is no *“Circuit Court costs order dated the 2nd day of October 2018”*.

22 January 2019 Master’s Order – set aside

- 120.** In light of the foregoing, it was inappropriate for the Master to have made an order on 22 January 2019 extending time to appeal. This is because, very obviously, an appeal against an order which was *never* made is entirely ‘moot’. As I explained earlier, the position is that, by operation of law, the defendant became entitled to recover her *“actual and necessary outlay”* following the discontinuance of the 2012 proceedings (see again O. 21 and O. 66 of the RCC). The learned Circuit Court judge did not need to make, and plainly did not make, any court order which is already provided for in the Circuit Court Rules.
- 121.** Based on a careful consideration of all the evidence before this Court, there has never been any dispute as to the defendant’s *entitlement* to be paid her *“actual and necessary outlay”*. However, it is equally clear that she has not taken any of the steps required of her to recover her expenses, if any, with respect to the discontinued 2012 proceedings.
- 122.** Furthermore, and at the risk of stating the very obvious, the defendant has not produced any Circuit Court *“costs order”* of 2 October 2018 (none exists). Nor has she produced any Circuit Court notice of motion or grounding affidavit, on foot of which she claims to have *sought* such a costs order.
- 123.** It must also be said, once more, that the defendant chose not to appear before this Court to run any application of hers, concerning costs or otherwise. The plaintiff has appealed against the Master’s order of 22 January 2019 and, for the reasons set out in this judgment, that appeal must be allowed. For the same reasons, the notice of appeal, dated 29 January 2019, which was filed by the defendant on that date (in the wake of the Master’s order extending time) must also be struck out.
- 124.** In making the foregoing decisions, I have taken full account of all evidence before the court, including the assertion made by the defendant, at para. 3 of her 14 February 2019 affidavit *“... that the costs in discontinued matter 2012-03669 had been determined on the 2nd October 2018 in the sum of €4,000 and further I have not received these costs in discontinued matter 2012-03669 pursuant to the Rules of the Circuit Court in accordance with law and statute...”*. In the manner examined in this judgment, the 2 October 2018 order is entirely silent on the question of costs and there is simply no evidence of any such determination. By contrast, the procedure whereby costs (or expenses) are to be determined is set out in the Circuit Court Rules and, at all material times, it has been and remains, available to the defendant to pursue same. Furthermore, this *“bare”* assertion is not underpinned by any evidence (such as a Bill of outlay; any response by PTSB to its delivery; any request that the County Registrar *“tax”* the matter; or an application that the County Registrar’s taxation decision be determined by a Circuit Court judge, on appeal).

DAR

- 125.** It is also appropriate to note that, later in the same affidavit, the defendant avers (at para.7) *“that the Cork Circuit Court DAR for the day of the 2nd October 2018 will be conclusive”*. That averment was made no less than three years ago. Despite this fact, there is no evidence whatsoever that the defendant took any step to procure the DAR.

Conclusion

- 126.** Without prejudice to the very important fact that the defendant decided that she would not attend this Court to progress her appeals and/or to meet Start DAC’s applications, the following concluding remarks seem appropriate. The evidence before the court in the present case puts beyond doubt that Start DAC is the owner of the relevant charge; that the right to seek possession arose; and is exercisable on the facts. There is simply no issue disclosed by the evidence which would render a plenary hearing necessary. The attempts to oppose the possession claim fall very well short of anything which could conceivably constitute a stateable grounds of defence. The relevant proofs have been made out comprehensively and in a manner which rules out any legal or factual basis upon which the possession claim could be dismissed, even if the matter went to go to a plenary hearing (something which the interests of justice plainly do not require). Nor is there any conceivable basis for a valid challenge to the substitution application. By virtue of being the sole registered-owner of the relevant charge, Start DAC is the

one and only appropriate plaintiff. This Court has examined all the evidence before it with respect to what were a total of 7 applications. Three of those were made in proceedings bearing record number 2018/484 CA; one application was made in proceedings bearing record number 2020/10 CA; and a further three applications were made under record number 2018/510 CA. The outcome of each of the 7 applications is now summarised.

2020/10 CA (1 application)

127. The single application bearing record number 2020/ 10CA comprised the defendant's notice of appeal with respect to an order substituting Start DAC for PTSB, as plaintiff in the Circuit Court proceedings. Despite the absence of the defendant, it proceeded by way of a *de novo* hearing and, for the reasons set out in this judgment, Ms. O'Mahony's appeal must be dismissed.

2018/510 CA (application 1 of 3)

128. The first of the three applications bearing record number 2018/510 CA comprised the defendant's application to set aside the substitution order made in this Court (Meenan J). For the reasons set out in this judgment, that application must be dismissed.

2018/510 CA (application 2 of 3)

129. The second application under record number 2018/510 CA comprised Ms. O'Mahoney's appeal against the 2 October 2018 Circuit Court order for possession. The matter proceeded as a *de novo* appeal, despite the absence of the defendant. For the reasons set out in this judgment, I am entirely satisfied that Start DAC is entitled to possession.

2018/510 CA (application 3 of 3)

130. A third application bearing record number 2018/510 CA comprised Start DAC's appeal against the order made by the Master which extended time for the bringing of an appeal against the Circuit Court's possession order. Applying *Eire Continental*, that appeal must be allowed and the Master's order set aside. The defendant had, and has, no stateable grounds for a defence to the possession claim.

2018/484 CA (application 1 of 3)

131. The first of the applications bearing record number 2018/484 CA relates to the substitution of Start DAC and, for the reasons set out in this judgment, the substitution of Start DAC for PTSB was entirely appropriate.

2018/484 CA (application 2 of 3)

132. The second application bearing record number 2018/484 CA relates to Start DAC's appeal of an order by the Master extending time for the making of an appeal against a "*Circuit Court costs order dated the 2nd day of October 2018*" (Emphasis added) whereas no such order was ever made. The appeal must be allowed and the Master's order set aside.

2018/484 CA (application 3 of 3)

133. Finally, the third of the three applications bearing record number 2018/484 CA comprises the defendant's appeal in respect of an order which was never made. That appeal was and is entirely misconceived and must be dismissed.

Finally

134. 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.*" The parties should communicate, forthwith, with a view to agreeing the terms of a draft order, which should be submitted within 14-day period. If no agreement is possible, each party is invited to submit a draft within the same period. With respect to the question of costs, my preliminary view is that there are no facts or circumstances which would merit a departure from the "normal" rule that "costs" should "follow the event". In the event of a dispute on that issue, short written submissions should be submitted within 14 days.