

**APPROVED**

**[2023] IEHC 512**



THE HIGH COURT  
CIRCUIT APPEAL

2022 No. 86 CA

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

MICHAEL O'SULLIVAN

DEFENDANT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 31 August 2023**

## **INTRODUCTION**

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The proceedings take the form of an application for an order for possession pursuant to Section 62(7) of the Registration of Title Act 1964. An application of this type is normally heard on affidavit evidence only and without an exchange of pleadings. However, the Circuit Court has made an order in the present case allowing the defendant to deliver a defence and counterclaim,

NO REDACTION REQUIRED

subject to a proviso that the plaintiff may apply by motion to set aside those pleadings. It is this order which is the subject-matter of the appeal.

2. The plaintiff is the appellant. The plaintiff contends that the impugned order involves an *implicit* finding by the Circuit Court that the proceedings should be determined by way of a plenary hearing following the exchange of pleadings, rather than by way of a summary hearing on affidavit only. The plaintiff seeks to challenge this supposed finding and contends that in circumstances where the defendant has failed to put forward any credible defence to the proceedings, same are suitable for summary disposal. The plaintiff invites the High Court, first, to set aside the Circuit Court's decision that the proceedings be remitted to plenary hearing; and, secondly, to determine the substantive merits of the application for an order for possession.
3. The defendant opposes the appeal. The defendant submits that he has a credible defence to the proceedings and that the Circuit Court was correct in remitting the matter to plenary hearing. The defendant advances four principal grounds of defence as follows. First, it is said that the contractual arrangements whereby the registered charge and underlying debt were transferred from Permanent TSB to Start Mortgages are in breach of Directive 2014/24/EU on public procurement. Secondly, it is said that the provisions of Section 62(7) of the Registration of Title Act 1964 are defunct, notwithstanding the saving provisions under the Land and Conveyancing Law Reform Act 2013. Thirdly, it is said that the debiting of sums in respect of legal fees against the loan account was done in breach of the provisions of Directive 93/13/EEC on unfair terms in consumer contracts. Fourthly, it is said that the grant of an order for possession would be disproportionate.

## PROCEDURAL HISTORY

4. These proceedings relate to a mortgage entered into between Irish Life & Permanent plc and the defendant on 13 January 2006. The mortgage gave rise to a charge against the lands registered under Folio 49374F, County Kildare (“*the mortgaged property*”). The charge was entered on the newly created folio on 13 October 2006. Irish Life & Permanent plc subsequently changed its name to Permanent TSB plc on 29 June 2012.
5. The within proceedings were instituted before the Circuit Court by way of a Civil Bill for Possession on 28 July 2017. The defendant duly entered an appearance to the proceedings on 23 November 2017.
6. On 10 April 2018, the County Registrar purported to make an order for possession. The County Registrar would not seem to have had jurisdiction to do so in circumstances where the defendant had entered an appearance and had indicated an intention to defend the proceedings. At all events, the County Registrar’s order was ultimately set aside, on appeal, by the Circuit Court on 10 May 2022.
7. In the interim, the parties had each filed a procedural motion. The defendant filed a motion on 9 October 2018 seeking the discovery of documents. The defendant also served a notice to cross-examine. The plaintiff filed a motion on 22 July 2019 seeking to substitute Start Mortgages as plaintiff in lieu of the original plaintiff, Permanent TSB. These two motions came on for hearing before the Circuit Court (Her Honour Judge O’Malley) on 21 November 2019.
8. Both motions were successful, i.e. the Circuit Court made an order for discovery and a substitution order. In each instance, the unsuccessful party brought an

appeal to the High Court. Those appeals came on for hearing before the High Court (Twomey J.) on 29 November 2021. The High Court allowed the appeal in respect of the discovery of documents and disallowed the appeal in respect of the substitution application.

9. The practical effect of all of this is that the proceedings continued thereafter with Start Mortgages DAC as the newly substituted plaintiff. It should be explained that as the substitution application took the form of an interlocutory application, i.e. one which was heard and determined *prior to* the substantive hearing in the proceedings, the threshold to be met by the moving party was that identified by the High Court (Kelly J.) in *Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671. The legal test for such an interlocutory application is whether there is *prima facie* evidence that there has been (i) a valid sale of the underlying assets; (ii) a valid assignment of the chose in action; and (iii) a valid notice given. It would not have been necessary for the court to adjudicate, at that juncture of the proceedings, on the efficacy or validity of the assignment or the efficacy or validity of the notice. Accordingly, it remains open for the defendant to seek to challenge the validity of the transfer at the substantive hearing. The defendant contends that the transfer is invalid by reference to Directive 2014/24/EU on public procurement.
10. Returning to the chronology, these proceedings came on for hearing before the Circuit Court (His Honour Judge Quinn) on 10 May 2022. On that date, orders were made in the following terms:

“THE COURT DOTH ORDER

- 1) The Order for possession granted by the County Registrar on the 10 April 2018 is hereby vacated;

- 2) The time for delivery of the defence and counterclaim be extended by 6 weeks;
  - 3) Liberty for the Plaintiff to apply by motion to set aside the defence and counterclaim;
  - 4) Proceedings to be transferred back to the Kildare Circuit;
  - 5) Costs reserved.”
11. This is the order under appeal. The order is an interlocutory order rather than a final determination on the application for an order for possession. (cf. *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381 (at paragraphs 106 to 109)).

## **DISCUSSION**

12. As appears, the Circuit Court order of 10 May 2022 is curiously worded. The direction as to pleadings *might* suggest that the Circuit Court must have decided that the proceedings should be remitted to plenary hearing. To elaborate: the default position under Order 5B of the Circuit Court Rules is that an application for an order for possession be heard and determined on affidavit evidence only. However, the Circuit Court has a discretion under Order 5B, rule 8 to adjourn the proceedings for plenary hearing, with such directions as to pleadings or discovery as may be appropriate. On one interpretation of the order made on 10 May 2022, the Circuit Court was exercising its discretion under this rule by directing the delivery of a defence and counterclaim. The implication being that the exchange of pleadings would be followed by a plenary hearing of the application for an order for possession.
13. The difficulty with this interpretation is that it cannot be reconciled with the very next part of the order. As appears, the Circuit Court order goes on to provide, at

point (3), that the plaintiff may apply, by motion, to set aside the defence and counterclaim. This part of the order is inconsistent with any supposed decision that the proceedings should be remitted to plenary hearing. This is because such a decision would ordinarily only be made where the Circuit Court had been satisfied that the defendant had demonstrated a credible defence to the proceedings. By contrast, the inclusion of the liberty to apply at point (3) suggests that the Circuit Court has not yet reached a final view on whether or not the defendant has demonstrated a credible defence to the proceedings. Put otherwise, the Circuit Court is only allowing pleadings to be delivered on a *provisional* basis.

14. The appeal before me was conducted by the parties on the tacit understanding that the Circuit Court had, indeed, made a decision to remit the matter to plenary hearing. In the course of preparing this reserved judgment, however, I took the opportunity to listen to the digital audio recording (“*DAR*”) of the ruling of the Circuit Court on 10 May 2022. This exercise was done solely for the purpose of clarifying the meaning of the order. The appeal to the High Court is a *de novo* appeal and thus the content of the hearing is largely irrelevant to the appeal.
15. The *DAR* confirms that the Circuit Court judge had not, in fact, made a decision to remit the matter to plenary hearing. Rather, the Circuit Court wished to have sight of a formal pleading—in the form of a defence and counterclaim—before adjudicating on whether a credible defence had been demonstrated. The judge expressly stated that he was not depriving the plaintiff of an opportunity to argue *subsequently* that the proceedings should be heard and determined summarily. Put otherwise, the intention seems to have been that a decision on whether the proceedings should be determined by plenary or summary hearing would be

reached by reference to the content of the defence and counterclaim to be delivered. If the plaintiff considered that the defence and counterclaim did not disclose a credible defence, then it could apply to have those pleadings set aside and to have the proceedings determined on a summary basis.

16. In circumstances where it seems that the Circuit Court had not, in fact, made a decision pursuant to Order 5B, rule 8 to remit the matter to plenary hearing, the appeal to the High Court would appear to be confined to the very narrow question of whether an order directing the delivery of pleadings, for the specific purpose of assessing whether a credible defence is disclosed, is appropriate. If this is the extent of the appeal, then my *provisional* view is that the appeal should be allowed, and the matter remitted to the Circuit Court with a direction that the Circuit Court now make a decision as to whether the proceedings should be determined by plenary or summary hearing. It is inappropriate to direct the delivery of pleadings on a provisional basis. If the Circuit Court wished to have the grounds of defence elaborated upon before ruling on whether a credible defence has been disclosed, then the defendant should have been directed to file written legal submissions. A decision to direct pleadings should only be made once the Circuit Court is satisfied that a credible defence has been disclosed.

## **CONCLUSION AND PROPOSED FORM OF ORDER**

17. For the reasons explained, my *provisional* view is that the appropriate outcome would be to allow the appeal against point (2) and (3) of the order of 10 May 2022 and to remit the proceedings to the Circuit Court with a direction that the Circuit Court now make a decision as to whether the proceedings should be determined by plenary or summary hearing.

18. However, given that the parties have not yet had an opportunity to address the High Court on the implications of the content of the digital audio recording of the hearing before the Circuit Court on 10 May 2022, I propose to relist the matter before me for further submissions before making any final order on this appeal. In the interim, an order will be drawn up now allowing either party to take up a transcript of the Circuit Court hearing and ruling if they so wish. This order will be made pursuant to Order 123 of the Rules of the Superior Courts and is subject to the usual undertaking as to the costs of the transcript.
19. This appeal will be listed before me on Monday, 9 October 2023 at 11.30 o'clock for the purposes of the resumed hearing. If this date does not suit either party, they should contact the Registrar within fourteen days of today's date.
20. Finally, it should be noted that counsel who appeared before the High Court in the present appeal had not been involved in the hearing before the Circuit Court and thus bears no responsibility for the confusion arising in respect of the order.

Approved  
Gemma S. Mans