

THE HIGH COURT

[2023] IEHC 97
[Record No. 2022/18CA]

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF/RESPONDENT

AND

THOMAS WALLACE

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Barr delivered on the 3rd day of March, 2023.

Introduction.

1. On 24th June, 2015, an order for possession was granted to Permanent TSB plc (hereinafter 'the bank') against the defendant in respect of the dwelling house and premises known as "Avonrea", 34 Hartlands Road, The Lough, Glasheen, in the parish of St Finbarr and Barony of Cork.

2. On 26th January, 2022, an order was made by Horgan J. in the Circuit Court, permitting Start Mortgages DAC (hereinafter 'the respondent') to be substituted as plaintiff in the action and giving it leave to issue execution in respect of the order for possession made on 24th June, 2015.

3. The matter comes before this Court pursuant to a notice of appeal lodged by the defendant/appellant (hereinafter 'the defendant') against the order made by Horgan J. on 26th January, 2022. As it was a Circuit Appeal, the matter proceeded by way of a *de novo* hearing of the application for substitution and execution by the respondent.

4. In the majority of documents, the house name has been spelt "Avonrea"; however, in some it is spelt "Avonree". The court is satisfied that there is no significance in this variation in the spelling of the name of the house.

The Evidence.

5. The grounding affidavit in the application was sworn on 12th July, 2019, by Ms. Eva McCarthy, the litigation manager of the respondent. She stated that the application arose from the sale of a "loan book" by the bank to the respondent, which included the underlying facilities, which had been the subject matter of the proceedings between the bank and the defendant.

6. Ms. McCarthy stated that on 1st February, 2019, the bank had executed a Deed of Transfer whereby the bank had transferred all its rights, title, interest, estate, benefit and entitlement (past and present), in and under the underlying loans and each of the finance documents, as defined in the Transfer Deed, which included the loan and the mortgage which were the subject of this application, to the respondent. She exhibited a copy of the Deed of Transfer.

7. The Deed of Transfer exhibited to that affidavit, set out at Clause 2 thereof, that the assignment of the loans and securities by the bank to the respondent, was an absolute assignment. The relevant loans were set out in schedule one to the deed. The relevant account number was given, which in this case referred to the account ending in numbers 061. The property address was stated as being "34 Hartlands Road, The Lough, Glasheen, County Cork". Under the heading security document details, it recorded, "mortgage and charge dated 17th September, 2008 between (i) Thomas Wallace and (ii) the bank." The deed also referred to the same account number and the facility letter between the defendant and the bank dated 26th August, 2008.

8. Ms. McCarthy stated that while certain portions of the exhibited document had been redacted, the redacted portions related to either sensitive commercial information, or to details concerning loans and securities provided by other customers, which were not relevant to the issues that arose in the proceedings.

9. Ms. McCarthy also exhibited a Deed of Conveyance and Assignment dated 1st February, 2019, whereby the bank transferred all its right, title, interest, estate, benefit and entitlement (past and present) in the mortgages over unregistered land, which were identified in the schedule to the Deed of Conveyance, to the respondent. That document identified that one of the mortgages that had been transferred from the bank to the respondent, was the mortgage created by the defendant over the property at 34 Hartlands Road, The Lough, Glasheen, County Cork.

10. Ms. McCarthy went on to outline how the defendant had been notified of the assignment of the loan and the mortgage by the bank to the respondent by virtue of a "goodbye letter" sent by the bank to the defendant on 1st February, 2019. She further outlined how, by letter dated 7th February, 2019, the respondent wrote to the defendant reminding him of the transfer and notifying him that the transfer had been completed on 1st February, 2019 and informing him that the respondent would be his new point of contact in

respect of the facility. She exhibited a copy of both the "goodbye letter" and the "hello letter". In addition, she exhibited a copy of a letter sent by Messrs Eversheds Sutherland, solicitors, who had written to the defendant on 10th July, 2019, informing him that an application would be made to the court to substitute the respondent in place of the bank as plaintiff in the current proceedings.

11. Ms. McCarthy noted that the defendant had been informed of the existence of the transfer deed and the transfer and assignment of the rights, title and interests in the facility and security previously held by the bank. He had been informed of the proposed application to the court and as of the date that she swore that affidavit, no objection thereto had been expressed by the defendant to the respondent being substituted as plaintiff in the action. Finally, she exhibited a letter from the bank confirming that it consented to the respondent's application to be substituted as plaintiff in the proceedings.

12. The defendant swore a replying affidavit on 8th January, 2020. In that, he stated that he was the owner of two adjoining detached properties on Hartlands Road, Glasheen, County Cork; being numbers 33 and 34 Hartlands Road. He stated that "Avonrea" was the name of the property at number 33 Hartlands Road, which had been his family home since 1992. He stated that that name had applied to the property since it was built in the 1930s. The defendant stated that he purchased number 34 Hartlands Road in 2002. He stated that he put up a name plaque on the gate pillar of that property under the name "Lough View".

13. The defendant stated that in or about 2007/2008 he was involved in divorce proceedings with his former wife before Cork Circuit Court. He stated that he had agreed a lump sum settlement with his wife, as they had no children. He stated that a re-mortgage had been offered by the bank and the letter of offer was based on security over 34 Hartlands Road alone. He stated that that was clear and unambiguous.

14. The defendant stated that due to an error on the part of his former solicitor, the incorrect name, "Avonrea", had been inserted in the mortgage deed and applied to the property at number 34 Hartlands Road. As a result, an order for possession had been made in respect of a property that did not exist, but was in fact an amalgamation of two properties.

15. The defendant referred to a letter that had been sent by Evershed Solicitors on behalf of the bank on 15th August, 2014, addressed to the tenants at 34 Hartlands Road, Glasheen, County Cork, wherein they were given notice that possession proceedings had been commenced against the defendant in respect of the property. A copy of the civil bill for

possession was enclosed. The defendant stated that he was of the belief that to a reasonable person it would be evident from this letter that number 34 Hartlands Road, was viewed as the mortgaged property alone. He stated that he got no notice, nor were any proceedings commenced by the bank against Avonrea, 33 Hartlands Road, Glasheen, County Cork.

16. The defendant stated that the first he knew of the commencement of proceedings by the bank against him, was the letter that was addressed to his tenants in number 34 Hartlands Road, notifying them of the proceedings. He stated that he had intended to let the property for the coming academic year to students attending UCC, but was unable to do so, due to the existence of the proceedings seeking possession of the property. He stated that the property had remained vacant for the previous ten years, as he had not been able to let the property, due to the existence of the current proceedings against him.

17. The defendant went on to outline in the affidavit how he had made enquiries of his former solicitor, and of the bank, and of firms of solicitors, who had represented the bank and the respondent, but had been unable to get any clarification, as to how the name "Avonrea" came to be affixed to the property identified as 34 Hartlands Road, Glasheen, County Cork in the mortgage deed and to what extent it was alleged that the security extended to the property, which correctly bore the name "Avonrea", being 33 Hartlands Road. His main argument was set out at para. 8 of his affidavit in the following way: -

"It is my contention that whether it was PTSB/Eversheds or my former solicitors that led to both properties being amalgamated that the grounding affidavit is fundamentally flawed and I am asking the court to revoke rescind it and for the deeds of Avonrea, 33 Hartlands Road to be returned to me as they were not required as security or the contract that they proposed and I accepted."

18. He concluded the affidavit by stating that the property described as "Avonrea, 34 Hartlands Road", did not exist. Accordingly he submitted that the respondent did not have clear and proper title to it. He asked the court to revoke the possession order and direct that the deeds of his family home be returned to him, as there was no contractual basis for the bank to have them in the first place and to make whatever other orders may be appropriate.

19. On 11th February, 2021, a supplemental affidavit was sworn by Ms. McCarthy on behalf of the respondent. She outlined how the within proceedings had commenced by civil bill for possession issued on 14th July, 2014, wherein the bank had sought possession of the premises known as "Avonrea, 34 Hartlands Road, The Lough, Glasheen, County Cork" on foot of a mortgage and charge executed by the defendant in favour of the bank. She stated

that on 24th June, 2015, the County Registrar had made an order for possession of that property. She referred to the proceedings and the orders made in the proceedings to date. She stated that it was not appropriate or permissible for the defendant to relitigate any issues giving rise to the granting of the order for possession.

20. Ms. McCarthy confirmed that the only property owned by the defendant over which the bank held security, and over which the respondent currently held security, was the property described in the order for possession. She stated that the respondent made no claim in regard to the property at 33 Hartlands Road, The Lough, Glasheen, County Cork. She stated that the order for possession that had been made by the Circuit Court, did not relate to number 33 Hartlands Road. She also confirmed that neither the bank, nor the respondent, held any title deeds in respect of the property at 33 Hartlands Road, The Lough, Glasheen, County Cork.

21. With regard to the defendant's assertion that the property had been rented up until August 2015 and that the rent received from same, could have covered the mortgage repayments; Ms. McCarthy stated that no monies had been received on the mortgage account between 10th July, 2013 and 6th December, 2016. The property was rented for a period of two years and none of the rental income was used to discharge the monies due and owing by the defendant on foot of the mortgage. She stated that as of 31st January, 2021, the total sum due and owing by the defendant to the respondent stood at €454,457.02, inclusive of arrears in the sum of €240,745.90. She stated that the last repayment made by the borrower on the account, had been on 4th January, 2017, in the sum of €350.00. She stated that interest continued to accrue on the total sum due, at the rate of 4.36% per annum. She exhibited a copy of the defendant's overdue account.

22. Finally, at the hearing of this appeal on 14th February, 2023, the defendant sought to introduce a further affidavit sworn by him on 8th February, 2023. Counsel for the respondent did not object to its introduction in evidence.

23. In that affidavit, he repeated a number of assertions that had been made in his previous affidavit. In particular, he stated that in 2008 he was going through divorce proceedings from his wife. He stated that having approached the bank, he was offered a mortgage, which he described as follows: "*Subsequent to this I was offered a mortgage on Lough View 34 and security was on same. This offer was accepted by me.*" He went on to state that unfortunately a few years into repaying the loan, his mother had had a

catastrophic stroke and he was unable to return to work in Melbourne, Australia. He stated that he then became seriously ill and had been on disability benefit since that time. Mortgage arrears ensued and the bank began proceedings. He stated that he put up number 34 Hartlands Road for sale, but it was not possible to sell it.

24. He went on in the affidavit to outline how his former solicitors had mistakenly registered "Avonrea" as applying to number 34 Hartlands Road. He stated that the bank had owed him a duty of care to ensure that the mortgage applied to the correct property. He stated that simple inspection of their file would have shown their letter of offer and security as applying to "Lough View", 34 Hartlands Road. In addition, interest certificates issued by the bank over the years had clearly related to that property. He stated that the matters pertaining to his former solicitors would be "dealt with at another time". He concluded the affidavit by asking the court to consider whether the bank had acted fraudulently and acted in breach of their duty of care to him. He asked the court to consider whether an order of possession was enforceable on a property that did not legally exist. He stated that he was looking for the return of his family home deeds. He stated that he was entitled to damages for stress as a consequence of the actions of the bank and the respondent.

25. The defendant exhibited a number of documents with that affidavit, including the first page of an application for credit that had apparently been submitted in his name, that gave the address of the property to be mortgaged as "34 Hartlands Road, The Lough, Glasheen, Cork City". He also furnished a letter signed on behalf of the bank headed "Agreement for Housing Loan", which stated that the bank agreed to give credit to the defendant on the terms contained in the bank's letter of approval and in the written agreement, on the security of a mortgage on the premises identified as "34 Hartlands Road, The Lough, Glasheen, Cork City". The letter went on to give details of the amount provided on foot of the loan and the terms of its repayment.

26. The defendant exhibited a letter from the bank addressed to him at "Lough View, Hartlands Road, Cork", dated 10th September, 2008. He also exhibited a document issued from the Register of Electors, showing that the defendant was registered as residing at "Lough View, 34 Hartlands Road, Westside, Cork". That document had issued in advance of a General Election held on 26th October, 2018.

27. The defendant also exhibited a document apparently created by Mr. Don Crewe, the solicitor acting for the defendant, who had sought the registration of the mortgage and had

identified the property therein as being "All that and those, the dwelling house and premises known as 'Avonrea', 34 Hartlands Road, The Lough, Glasheen, in the Parish of St Finbarr and in the Barony of Cork". That document was dated 2nd October, 2008.

28. The defendant also exhibited a number of interest certificates that had been issued by the bank, which appear to have been addressed to him at "Lough View, Hartlands Road, County Cork". In particular, he referred to a letter from the bank dated January 2019, addressed to him at "Avonrea, Hartlands Road, The Lough, Glasheen, County Cork", which gave the property address under the mortgage account bearing number ending in 061, as "34 Hartlands Road, The Lough, Glasheen, County Cork". He pointed out that some of the interest certificates were addressed to him at "Avonrea, Hartlands Road, The Lough, Glasheen, County Cork".

Submissions of the Parties.

29. Mr. Neuman BL on behalf of the respondent, submitted that the order for possession that had been made in this case, could not be challenged in this appeal. The order for possession had been made in 2015. It was not appealed by the defendant. It was submitted that the appeal period in respect of that order had long since expired; therefore, it could not be challenged at this stage.

30. Counsel stated that the respondent's application was simply to substitute it for the bank, as plaintiff in the action, and to allow it to execute on the order for possession that had already been obtained by the bank. It was submitted that the original documentation, which had been exhibited in the affidavit sworn by Ms. Holohan, made it clear that the defendant had applied for the loan and had agreed to provide security over the property at 34 Hartlands Road, Glasheen, Cork. The documentation exhibited by Ms. McCarthy in her affidavit, made it clear that the loan taken out by the defendant with the bank and the accompanying security over number 34 Hartlands Road, had been transferred by the bank to the respondent in February 2019.

31. It was submitted that having regard to these documents, there was a clear entitlement for the respondent to be substituted for the bank, as plaintiff in the proceedings. It was stated that that was not seriously challenged by the defendant in his replying affidavits.

32. It was submitted that the respondent was entitled to issue execution on foot of the order for possession that had already been granted in favour of the bank. The defendant was attempting to rely on what he maintained was a mistake on the part of his former solicitor in applying the wrong name to number 34 Hartlands Road in the mortgage deed.

33. It was submitted that it was at all times clear that the defendant had intended to grant security over number 34 Hartlands Road and had done so by means of the mortgage executed by him on 7th September, 2008. It was submitted that the respondent should be permitted to execute on that security and on the order for possession in respect of that property.

34. The defendant submitted that a mistake had been made by his former solicitor. He submitted that the bank and now the respondent, and their respective solicitors, had been aware of that mistake. They were trying to capitalise on it by obtaining security over the amalgamated properties.

35. The defendant referred to the extract from the Register of Electors which showed that number 34 Hartlands Road had the name "Lough View" and not the name "Avonrea". He referred to the certificates of interest that had been exhibited in his affidavit sworn on 8th February, 2023, as showing that the bank had been aware of the different addresses, when issuing the interest certificates. In addition, he handed in photographs showing the two properties, wherein he maintained that the property on the left bearing the name "Avonrea", was in fact number 33 Hartlands Road, whereas the property shown in the photographs bearing the name plate "Lough View", was in fact number 34 Hartlands Road. He stated that the bank and the respondent were in effect trying to capitalise on the error that had been made as a means of enforcing a security over his family home, which was number 33 Hartlands Road, Glasheen, Cork.

36. The defendant submitted that due to the existence of the proceedings, and in particular, due to the correspondence that had been sent to his former tenants, he had been unable to let the property and therefore had been unable to apply the rent which he would have obtained, to repayment of the mortgage. As a result, the property had remained vacant for over ten years. This had resulted in his arrears rising exponentially from a relatively small base when he had first fallen into arrears in or about 2014. He submitted that the respondent should not be allowed to capitalise on that state of affairs.

Conclusions.

37. This is an application by the respondent to be substituted as plaintiff in the proceedings. It also seeks leave to issue execution on foot of the order for possession that issued in favour of the original plaintiff on 24th June, 2015, in respect of the property described as "All that and those the dwelling house and premises known as 'Avonrea', 34 Hartlands Road, The Lough, Glasheen in the Parish of St Finbarr and Barony of Cork".

38. The relevant provisions of the Circuit Court rules are O.22, r.4 and O.36, r.10. They are in the following terms: -

4. Where, by reason of death, or bankruptcy, or any other event occurring after the commencement of an action, proceeding or matter, and causing change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, proceeding, or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence.

[...]

10. If, at any time during the said period of twelve years, any change has taken place, by death, assignment or otherwise, in the parties entitled or liable to execution, the party claiming to be so entitled may apply to the Court on notice for leave to issue execution, and the original decree or judgment may be amended so as to give effect to any order made by the Court on the application."

39. To deal with the substitution application first, the court is satisfied from the affidavit sworn by Ms. McCarthy and from the documents exhibited thereto, that the defendant's loan with the bank and the security that he gave over the property described in the mortgage deed in the second schedule under the common description "34 Hartlands Road, The Lough, Glasheen, Cork City"; and more particularly described in the deed as "All that and those the dwelling house and premises known as "Avonrea", 34 Hartlands Road, the Lough, Glasheen in the Parish of St Finbarr and Barony of Cork", were part of the loans and securities transferred by the bank to the respondent in 2019.

40. That being the case, I am satisfied that it is appropriate and in the interests of justice for the respondent to be substituted as plaintiff in the action. Accordingly, I affirm the order of Horgan J. made on 26th January, 2022, in this regard.

41. Turning to the central issue, I am satisfied that the following facts have been established in evidence: the defendant intended to give a mortgage as security for the loan that he received from the bank, over number 34 Hartlands Road, The Lough, Glasheen, Cork. That is clearly established from the first page of the loan application, which is exhibited in the affidavit sworn by the defendant on 8th February, 2023. It is also clearly evident from the letter of loan approval and particulars of mortgage loan, issued by the bank on 26th August, 2008, as exhibited to the affidavit sworn by Ms. Holohan. That offer was accepted by the defendant in writing on 28th August, 2008.

42. It is also clear that the mortgage created by the deed executed by the defendant on 17th September, 2008 also refers to 34 Hartlands Road, but with the addition of the name "Avonrea". That mortgage was registered in the Registry of Deeds on 2nd October, 2008, under the serial number 2008204020.

43. It is clear that the transfer of that mortgage from the bank to the respondent was registered in the Registry of Deeds on 1st February, 2019.

44. I am satisfied from the documents exhibited in the affidavits sworn by Ms. Holohan on 4th July, 2014 and Ms. McCarthy on 12th July, 2019, that the mortgage was created over number 34 Hartlands Road, The Lough, Glasheen, Cork and the order for possession relates to that property.

45. The defendant is concerned that due to the error on the part of his solicitor in adding what he maintains is the incorrect name before the number 34 Hartlands Road, that in some way the respondent may be seeking to enforce its security against both of the defendant's properties at numbers 33 and 34 Hartlands Road. However, as has been made clear by Ms. McCarthy in her supplemental affidavit sworn on 11th February, 2021, the only property owned by the defendant over which the bank held a mortgage, which mortgage is now held by the respondent, is in respect of number 34 Hartlands Road. She clearly stated that the respondent makes no claim in regard to the property at 33 Hartlands Road. She went on to state that neither the bank, nor the respondent, hold any title deeds in respect of number 33 Hartlands Road.

46. In light of these clear sworn statements, the defendant need have no concerns that the respondent is trying to capitalise on an alleged error made by his former solicitor to enhance the ambit of its security.

47. Insofar as the defendant attempted to rely on the interest certificates issued by the bank in different years, with reference to both "Avonrea" and "Lough View" at different times, I am satisfied that these were merely the addresses where the defendant was thought to be residing at that time. The certificates clearly relate to a specific mortgage account, which is identified in the certificate. They have no probative value in respect of the property over which the mortgage was held. Indeed, the letter from the bank in January 2019, as exhibited in the defendant's affidavit of 8th February, 2023, makes it clear that the address of the mortgaged property was 34 Hartlands Road, Glasheen, County Cork.

48. I am satisfied that the evidence establishes that the mortgage was intended to be created over number 34 Hartlands Road, Glasheen, County Cork, and that that was done by virtue of the Deed of Mortgage dated 17th September, 2008. The fact that an incorrect name may have been applied to the address by the defendant's former solicitor (and I make no finding in that regard), does not affect the validity of the mortgage, or the validity of the order for possession granted in favour of the bank on 24th June, 2015.

49. However, in case there may be any confusion in the matter, the court is satisfied that that can be removed by the order of this Court affirming the order made in the Circuit Court granting the respondent leave to execute the order for possession dated 24th June, 2015, insofar as it relates to the property situate at and known as 34 Hartlands Road, The Lough, Glasheen in the Parish of St Finbarr and Barony of Cork.

50. Finally, the defendant complains that his debt had increased over the period of ten years because the property was vacant during that time. That was a decision that was made by the defendant. He could have let the property on a short-term basis, or he could have addressed the arrears that had arisen on the loan. Whatever complaint he may have in that regard, it is not a ground for refusing the reliefs sought by the respondent on this application. That is a matter that the defendant can pursue in another forum.

51. Having regard to the findings made by the court in its judgment herein, the court would propose to make an order in the following terms:

- Dismiss the defendant's appeal;
- Affirm the order of the Circuit Court substituting the respondent for the plaintiff in the proceedings; affirm the order of the Circuit Court granting the respondent leave to execute the order for possession dated 24th June, 2015, insofar as it relates to

the property ALL THAT AND THOSE the dwelling house and premises known as 34 Hartland's Road, The Lough, Glasheen in the Parish of St Finbarr and Barony of Cork.

52. As this judgment is being delivered electronically, the parties shall have a period of two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise. Those submissions should be emailed to the registrar.

53. The matter shall be put in for mention before the court at 10.30 hours on 22nd March, 2023 for the purpose of making final orders.