

APPROVED



THE HIGH COURT

[2024] IEHC 271

Record No. 2023/31CA

BETWEEN/

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

-AND-

THOMAS LANGAN AND MARY LANGAN

DEFENDANTS

Judgment of Mr. Justice Conleth Bradley delivered on the 23rd day of April 2024

INTRODUCTION

1. This is an application brought by the Defendants seeking to permit fresh evidence to be included in the hearing of this appeal, pursuant to Order 61 of the Rules of the Superior Courts 1986, as amended (“RSC 1986”). The main proceedings concern a Circuit Court appeal from an Order for Possession, made by His Honour Judge John O’Connor on 10th February 2023.
2. Rudi Neuman BL appeared for the Plaintiff and Thomas Langan (the First Named Defendant) made the application.
3. In their Notice of Motion dated 7th November 2023, the Defendants seek the following Orders:

“(1) An Order under the Rules of the Superior Courts, Order 61, for a declaration that the First named Defendant is permitted to submit fresh evidence to be included in the hearing of the appeal;

(2) An Order that the Plaintiff provide to the First Named Defendant attested copies of all Original documents relating to the Defendant’s mortgage including original facility letter, original mortgage deed, every service contract, and deed of assignment which directly involves Hudson Advisors acting as a data controller of the Defendant’s disputed mortgage from inception to the present date pursuant to Section 91 of the Land and Conveyancing Act, 2009;

(3) An Order that the Plaintiff provide to the First Named Defendant attested copies of all Original documents relating to the

Defendant's mortgage pursuant to the transfer sale agreement to LSF IX Java Investments DAC given by that term in the Mortgage Sale Agreement dated 12th September 2012 pursuant to Section 91 of the Land Conveyancing Act 2009;

(4) An Order that the First Named Defendant be permitted to cross-examine the Plaintiff's two deponents Ms. Eva McCarthy and Mr. Justin Nevin;

(4) [sic] An order for the costs and expenses of these proceedings".¹

Mr. Langan's position

4. Mr. Langan states in his Affidavit sworn on 22nd February 2024, at paragraph 4, that the new evidence which he has obtained is "*further confirmation from Hudson Advisors whose role is detailed in my earlier affidavit as the issuer administration agent for a company called European Residential Loan Securitisation 2019-NPL1DAC, the company who purchased the beneficial interest in the mortgage from LSF IX Java Investments Designated Activity Company*", and he exhibits two letters from Hudson Advisors, one dated 22nd December 2023 and the other dated 19th January 2024.

5. Mr. Langan places particular emphasis on the second numbered paragraph in the letter dated 22nd December 2023, as follows:

***"2. Identities of Service Agent, Seller & Buyer – Mortgage Loan
801576502***

¹ There is a minor typographical error in the numbering of this paragraph.

We acknowledge your request to be provided with the identities of the buyers, sellers and service agents of your mortgages in your letter. We confirm:

Mortgage Loan 801576502

- *Start Mortgages DAC (“Start”) holds legal title to and is a service agent for mortgage. In its capacity as legal title owner, it acts as a co-controller of your personal data related to this mortgage;*
- *LSF Java acquired the beneficial ownership in the mortgage, which was transferred to European Residential Loan Securitisation 2019-NPL1 DAC (“NPL1”) upon securitization of this mortgage, and as such, NPL1 is a co-controller of this mortgage;*
and
- *Hudson has been appointed as an issuer administration consultant by Start and NPL1, in order to provide asset management services related to this mortgage, and in such capacity, is a processor of your personal data.”*

6. In summary, Mr. Langan states that this is evidence of the sale and transfer, sale agreements and deed of assignment to third parties which were not brought to the court’s attention during the hearing before the Circuit Court and, therefore, the Defendants were not allowed to present their full defence in the context of the terms of the assignment to LSF Java and the subsequent sale to European Residential Loan

Securitisation, which Mr. Langan states would have contained matters relevant to the Defendants' Defence. Mr. Langan refers to the judgments of the Supreme Court in *Ennis v AIB Plc* [2021] IESC 12; [2021] 3 I.R. 733,² and the decision of the Court of Appeal in *Fannon v O'Brien & Promontoria (Oyster) DAC* [2024] IECA 51.³

7. Further, in his primary submission (and also in his response to Mr. Neuman BL), Mr. Langan refers to the following extract from paragraph 69 of the judgment of Heslin J. in *Start Mortgages DAC v Connaughton & Anor* [2023] IEHC 364 – “[o]n the 30th July 2018, the Plaintiff’s solicitor furnished a Certificate to the effect that the requirements set out in Circuit Court Practice Direction CC17, dated the 10th August 2015, relating to the issuing of proceedings for possession, had been complied with” – and argues that, in this case, there has been non-compliance by the Plaintiff/Respondent here (Start Mortgages DAC) with Order 5B of the Circuit Court Rules (Actions for Possession and Well-charging Reliefs (S.I. No. 264 of 2009) and Practice Direction CC17 (Proceedings for possession or sale on foot of a mortgage) including, *inter alia*, paragraph 3(c) and 3(c)H, which provides that “*the grounding affidavit should, in accordance with Form 54 of the Schedule of Forms of the Circuit Court Rules, include averments as to the following and exhibit the following documentation: ... H. where the name of the mortgagee company has changed, or the rights of the mortgagee under the mortgage have been transferred or assigned to another party, proof (as the case may be) of the name change (e.g. as recorded in the Companies Registration Office) or of the*

² The Supreme Court was comprised of O’Donnell J. (as he then was), MacMenamin, Dunne, Charleton and O’Malley JJ. Judgment was delivered by MacMenamin J.

³ The Court of Appeal was comprised of Barniville P., Whelan and Haughton JJ. Judgment was delivered by Barniville P. with Whelan and Haughton JJ. indicating their agreement with the judgment and the orders proposed.

instrument of transfer or assignment”, and also paragraph 5 dealing with the Certificate of Compliance.

8. Mr. Langan states that the documents which he now seeks to introduce were in existence at the time of the Defendants’ Notice of Motion dated 7th November 2023 and that it was because of the Plaintiff/Respondent’s failure to comply with the Practice Direction that a GDPR request had to be made. He further contends that the Plaintiff/Respondent’s failures in not setting out the details of what he asserts to be the assignment or transfer of the loan to a third party means that these matters were ‘in play’ at the time of the hearing before the Circuit Court.

The position of Start Mortgages DAC

9. Mr. Neuman BL submits that the Defendants have failed to comply with the requirements of O. 61, r. 8 RSC 1986 and have failed to explain why evidence was not submitted to the Circuit Court. Further, counsel points out that Mr. Langan’s application remains *at this point* an application in a *summary* process and has not reached the point of a ‘*plenary hearing*’. By analogy, it is submitted that discovery, for example, is predicated upon questions of relevance, which are to be determined by reference to the pleadings (and whether such documentation is necessary), and has no application to a summary process (where there are no pleadings): *ACC Loan Management Limited v Kelly & Anor* [2017] IEHC 304, per Eagar J. at paragraphs 17 and 18.
10. Mr. Neuman BL also makes the point that there has in fact been no transfer of the mortgage loan in this case since these proceedings began. He submits that issues of ‘*securitization*’ and questions concerning issues of beneficial ownership *vis-à-vis* legal

ownership remain matters for the trial judge and do not come within the documents of title provided for in section 91 of the Land and Conveyancing Act 2009⁴ and in addition, fall foul, in any event, of the requirements of *Murphy v Minister for Defence* [1991] 2 I.R. 161.

11. Accordingly, it is submitted, while a matter for the trial of the action (and not for determination on this application), the argument which will be made by the Plaintiff/Respondent is essentially that set out in the letter dated 19th January 2024 in relation to Mortgage Loan 801576502 (the subject of the main action):

- *“Start Mortgages DAC holds legal title to this mortgage. In its capacity as legal title owner, it acts as a co-controller of your personal data related to this mortgage; and*
- *European Residential Loan Securitisation 2019-NPL1 DAC (“NPL1”) is the beneficial owner of this mortgage, and as such, NPL1 is co-controller of this mortgage”.*

⁴ Section 91 of the Land and Conveyancing Reform Act 2009 provides for “*Documents of title*” and states that: “91(1) Subject to subsection (2), a mortgagor, as long as the right to redeem exists, may from time to time, at reasonable times, inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the possession or power of the mortgagee.

[CA 1881, s. 16]

(2) Rights under subsection (1) are exercisable—

(a) on the request of the mortgagor; and

(b) on payment by the mortgagor of the mortgagee’s reasonable costs and expenses in relation to the exercise.

(3) [Section 91(1)] has effect notwithstanding any stipulation to the contrary.”

ASSESSMENT & DECISION

12. The nature of the High Court’s jurisdiction in an application such as this was discussed in *Start Mortgages DAC v Connaughton & Anor* [2023] IEHC 364, where Heslin J., after referring to section 37(2) of the Courts of Justice Act 1936,⁵ observed as follows at paragraphs 102 to 104 of the judgment:

“(102) I pause here to say that the will of the Irish people, as expressed through legislation enacted by the Oireachtas, is for this appeal to proceed by way of a de novo hearing. If the First-Named Defendant did not inform himself that this is the way his appeal would proceed, it seems to me that, with all due respect, he cannot lay the blame for that at the door of anyone else. Section 37 (2) concludes:-

“... but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal”.

(103) Order 61, r. 8 of the Rules of the Superior Courts amplifies the foregoing in the following manner:-

⁵ Section 37(2) of the Courts of Justice Act 1936 deals with ‘Appeals from the Circuit Court in civil cases heard without oral evidence’ and *inter alia* provides that “[e]very appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made”.

“8. Where any party desires to submit fresh evidence upon the hearing of an appeal in any action or matter at the hearing or for the determination of which no oral evidence was given, he shall serve and lodge an affidavit setting out the nature of the evidence and the reasons why it was not submitted to the Circuit Court”.

I pause here to observe that this is something the First-Named Defendant has not done. O. 61, r. 8 continues:-

“Any party on whom such affidavit has been served shall be entitled to serve and lodge an answering affidavit or to apply to the Court on the hearing of the appeal for leave to submit such evidence, oral or otherwise, as may be necessary for the purpose of answering such fresh evidence, provided, however, that the Court may at any time admit fresh evidence, oral or otherwise on such terms as the Court shall think fit, and may order the attendance for cross-examination of the deponent in any affidavit used in the Circuit Court or the High Court”.

(104) It seems to me that, not having complied with the provisions of O. 61, r. 8 as to serving an affidavit setting out the reasons why evidence was not submitted to the Circuit Court, the First-Named Defendant has deprived the Plaintiff of the opportunity to put on affidavit any answer. However, and more fundamentally - because it is

clear that this Court does enjoy a wide discretion to admit fresh evidence - the First-Named Defendant has never proffered the reason why evidence which he seeks to have admitted today was not put before the Circuit Court.”

13. The applicable legal principles are those set out in the judgment of the Supreme Court in *Murphy v Minister for Defence* [1991] 2 I.R. 161 at p. 164, where Finlay C.J. referred to the following three considerations:

“1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;

2. The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;

3. The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible”, (see also the application of *Murphy v Minister for Defence* in *McMullen v Kennedy* [2012] IESC 56, per Denham C.J. at paragraph 18).

14. When the aforesaid principles are applied in this case, the Defendants’ application does not, in my view, meet the requirements of O. 61 RSC 1986.

15. For example, as confirmed in paragraph 2 of Mr. Langan’s first Affidavit sworn on 7th November 2023, the matters referred to therein arose *“following the hearing in the*

Circuit Court” and included, *inter alia*, the Data Protection request made under the General Data Protection Regulation (“GDPR”) to LS IX Java Investment DAC by letter dated 2nd May 2023 and subsequent correspondence. This correspondence does not, however, meet the first requirement of being in existence at the time of the trial and that it must have been such that it could not have been obtained with reasonable diligence for use at the trial.

16. Similarly, the reference in the Supplementary Affidavit of Mr. Langan sworn on 22nd February 2024 to the letters (referred to earlier in this judgment) of 22nd December 2023 and 19th January 2024 do not meet the first requirement of being in existence at the time of the trial and that it must have been such that it could not have been obtained with reasonable diligence for use at the trial.

17. The special circumstances which allow for ‘new evidence’ to be introduced must refer to evidence which existed at the time of the Circuit Court hearing in order for the appeal before the High Court to be a *re-hearing* and the High Court (on a Circuit Court Appeal), while governed by the laws, jurisdiction and Rules of the Circuit Court, cannot become a *Court of First Instance*: see, for example, section 39 of the Courts of Justice Act 1936 (though, if the criteria are met, an appeal can lie to the Supreme Court: see *Pepper Finance Corporation (Ireland) DAC v Cannon & Anor* [2020] IESC 2, per O’Malley J. at paragraph 33).⁶

⁶ The Supreme Court was comprised of O’Donnell J. (as he then was), McKechnie, MacMenamin, Dunne and O’Malley JJ. Judgment was delivered by O’Malley J.

18. The documents referred to in Mr. Langan's application, therefore, do not come within the exceptional or special circumstances of documents which existed at the time of the first instance hearing and therefore stand in contrast to the position in *Ennis v Allied Irish Banks Plc* [2021] IESC 12; [2021] 3 I.R. 733 (discussed by the Court of Appeal in *Fannon v O'Brien & Promontoria (Oyster) DAC* [2024] IECA 51).

19. In the circumstances, therefore, I shall refuse the Defendants' application seeking orders that they be permitted to introduce fresh evidence as set out in the Notice of Motion dated 7th November 2023.

PROPOSED ORDER

20. I propose to make an Order refusing the Defendants' application seeking orders that they be permitted to introduce fresh evidence as set out in the Notice of Motion dated 7th November 2023. I shall put the matter in For Mention on Wednesday 8th May 2024 at 10:45 to address any further consequential and ancillary matters which arise.