THE HIGH COURT

[2010 No. 237 SP]

BETWEEN

G E CAPITAL WOODCHESTER HOME LOANS LIMITED

PLAINTIFF

AND

JOHN READE AND DYMPNA READE

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 22nd day of August, 2012.

The proceedings

1. These proceedings were initiated by special summons which issued on 1st April, 2010, wherein the plaintiff sought an order pursuant to s. 62 of the Registration of Title Act 1964 (the Act of 1964) for possession of the premises registered on Folio 75768F County Galway which, as the evidence discloses, comprise a dwelling house known as 66, River Oaks, Claregalway, County Galway (the Property).

2. The proceedings were grounded on the affidavit of Steven Pickering, which was sworn on 9th April, 2010. That affidavit and the documents exhibited in it proved the following facts:

(a) By a letter of offer of mortgage loan dated 2"d November, 2006 the plaintiff offered the defendants a loan of €230,000 to be secured on the Property. The offer was accepted by the defendants and it is clear from the copy of the letter of offer exhibited that their execution of the form of acceptance was witnessed by a solicitor.

(b) By an Indenture of Mortgage and Charge dated 21st December, 2006 made between the defendants of the one part and the plaintiff of the other part (the Charge), the defendants charged the Property, being the lands registered on Folio 75768F County Galway, in favour of the plaintiff. Once again, as the copy exhibited discloses, the execution of the Charge by the defendants was witnessed by a solicitor.

(c) In due course, the Charge was registered as a burden on Folio 75768F. What that folio discloses is that the defendants were registered as full owners of the Property on that folio on 28th July, 2004. While on the folio the defendants are named as "John Reed and Dympna Reed", I am satisfied on the evidence that the defendants' surname is misspelt on the folio. Since 28th July, 2004 the following charges have been registered on the folio:

(i) A charge for present and future advances, stamped to cover €88,000 repayable with interest, which was registered as a burden on 28th July, 2004, Irish Nationwide Building Society being the owner of that charge. That charge was cancelled off the folio on 10th July, 2006.

(ii) A charge for present and future advances repayable with interest, Start Mortgages Limited being registered as owner of that charge, was registered on 10th July, 2006. On 15th January, 2009 that charge was cancelled off the folio.

(iii) The Charge, which was described as a charge for present and future advances repayable with interest was registered and the plaintiff was registered as owner thereof on the folio on 15th January, 2009.

(d) Mr. Pickering averred that there was due and owing for arrears on foot of the Charge at the date of the swearing of the grounding affidavit the sum of €56,141.91, which he averred equated to twenty seven months repayments, with the total sum then outstanding on the Charge amounting to €273,030.43. He exhibited a statement of the account. What that discloses is that the direct debits which were due on the account from January 2007 to September 2007, which varied in amount over that period but which were either slightly less or slightly more than €2,000 per month, were unpaid. Three payments of €200 each were made in the period from September to December 2007, twenty one payments of €800 each were made between January 2008 and September 2009, and six payments of €500 each were made between November 2009 and March 2010.

(e) Mr. Pickering exhibited two letters as evidence of the fact that the plaintiff had demanded possession of the Property. The first was dated 21st December, 2009. It was headed "Formal Demand" and it issued directly from the plaintiff to each of the defendants. That letter stated that the defendants' mortgage account was "still showing" arrears of €50,493.64 and was then "7 payment/s in arrears". It was stated that unless the account was brought up to date immediately, the plaintiff would consider taking further action to recover the outstanding payments and this was likely to include engaging its solicitors in order to issue legal proceedings, which could result in repossession of the Property, the reference to re-possession being underlined. The second letter was dated 2nd February, 2010 and was from the plaintiffs Solicitors to each of the defendants. Having stated that the mortgage was in arrears in the sum of €53,313.78 as at 2nd February, 2010, the letter continued:

> "The purpose of this letter is to advise you that as a result of your above default in your mortgage the entire balance outstanding on your mortgage account in the amount of €270,915.45 as at 2nd February, 2010 has now fallen due and owing. We are instructed to demand within ten days from the date hereof vacant possession of our security ... [the Property] for the purpose of sale as our client's power of sale

has now arisen under the terms of your mortgage."

3. The first named defendant has never entered an appearance to the proceedings and did not appear on the hearing of the proceedings on 27th July, 2012. I am satisfied, however, that the first defendant has been properly served with all relevant documents.

4. The second defendant entered an appearance on 20th January, 2011 and contested the plaintiff's entitlement to possession of the Property at the hearing on 27th July, 2012.

5. The proceedings were obviously adjourned from time to time in the Master's Court and eventually the plaintiff pursued the proceedings with the service of an affidavit sworn by Emer McDonagh, Mortgage Operations Manager, on 12th December, 2011. In the interim, the plaintiff had served notice of intention to proceed on 19th August, 2011. Moreover, in the interim, no less than eight affidavits had been sworn and filed by officers of the plaintiff dealing with compliance with the Code of Conduct on Mortgage Arrears, and the up to date position in relation to the mortgage account. While some of them will be considered later, it is not necessary to consider those affidavits in detail at this juncture, save to observe that between the commencement of the proceedings and December 2011 three payments of €500 each, seven payments of €300 each and one payment of €200 were made on the defendants' mortgage loan account, by, I understand, the second defendant.

First affidavit of Emer McDonagh

6. It is clear from the submissions of counsel for the plaintiff that the content of Ms. McDonagh's affidavit was prompted by the decision of the High Court (Dunne J.) in *Start Mortgages Ltd. & Ors. v. Gunn & Ors.* [2011] IEHC 2011, which was delivered on 25th July, 2011, the purpose of the affidavit being to show that the plaintiff demanded repayment of the monies due on foot of the Charge prior to the repeal of s. 62(7) of the Act of 1964 by the Land and Conveyancing Law Reform Act 2009 (the Act of 2009), which took effect from 1st December, 2009.

7. Ms. McDonagh exhibited in her affidavit a record of the "Letter History" from the plaintiff's IT system in relation to the defendants' mortgage loan account with the plaintiff from the period 8th February, 2007 to 2nd May, 2007, which disclosed that on 10th April, 2007 two letters were generated referred to as "GEMM02 GEM Collections Letter". Ms. McDonagh then exhibited a true copy of the "blank precedent Collections Letter assigned the code 'GEMM02'". That precedent recorded that the relevant mortgage account was in arrears and left blank spaces for filling in the relevant and the amount of the arrears. It then advised that, unless the addressee remitted the amount of the arrears stated in full within seven days, the plaintiff would have no alternative but to pass the account over to its solicitors to commence repossession proceedings, "as arising from your default under your mortgage agreement the entire balance outstanding has now fallen due", leaving blank spaces for setting out the full amount due and the relevant date. Ms. McDonagh averred that as of 10th April, 2007, when letters in that form were issued and sent to the defendants, the mortgage account was in arrears in the sum of €1,998.55 plus charges of €19.50, which by reference to the statement of account exhibited in the grounding affidavit indicates that there was one monthly instalment in arrears at the time. While the blank precedent letter has some features of the letter of 21st December, 2009 sent to the defendants by the plaintiff, as regards content, it is probably closer to the letter of 2nd February, 2010 send by the plaintiffs solicitors, in assuming that the entire balance had fallen due.

Response of second defendant

8. The second defendant swore a replying affidavit on 9th March, 2012. There are a number of elements in that affidavit.

9. First, she averred that the Property, which was the family home of the second defendant and her husband, the first defendant, and their three children, was re mortgaged on two occasions because, in broad terms, the first defendant needed cash to meet business and tax liabilities. While, by reference to Folio 75768F, I am satisfied that the detail is not correct, as regards the Charge, she averred:

> "I say that on or about November 2008 the first named defendant collected me on my lunch break and brought me to the offices of a Solicitor, whose name I cannot recall, to sign the necessary documents needed to secure the mortgage with the plaintiff. I say that given our financial history and that the first named defendant was indebted to a number of parties, including the Revenue Commissioners and that this was a second mortgage seven months after the previous mortgage, I believed the monies would not be advanced by the plaintiff in the circumstances. I further say that the first named defendant created a menacing and oppressive situation where I felt I had no choice but to sign the mortgage application at this time because I was informed by him that if I did not sign the papers, our family home would be repossessed and he would be sent to prison. In those circumstances I signed the paperwork that ground the within mortgage. I further say that the Solicitor failed and neglected to advise me of my right to seek independent legal advice in this instance and I was not given the opportunity to make my own decision on the matter at that time."

Obviously, some of the detail in that averment is not correct because the Charge was dated 21st December, 2006. However, the second defendant later averred in her final affidavit sworn on 21st May, 2012 that Start Mortgages Limited advanced €160,000 to the defendants on 3rd March, 2006, which is consistent with the charge in favour of Start Mortgages Limited having been registered as a burden on Folio 75768F on 10th July, 2006.

10. Secondly, the second defendant averred that she does not recall receiving the letter of 10th April, 2007. She averred that she continued to pay instalments on a monthly basis, which was not the case, as the statement of account referred to earlier reveals.

11. Thirdly, the second defendant set out her earnings per month and averred that she has been paying €200 per month to discharge the arrears owed. She has lived in the Property for over twelve years and she has nowhere else to reside should the Court make an order for possession.

The plaintiff's rejoinder

12. The plaintiff's rejoinder is contained in the second affidavit of Emer McDonagh, which was sworn on 11th May, 2012. In the interim, no less that three further affidavits had been sworn by an officer of the plaintiff setting out the up to date position in relation to the arrears on the mortgage loan account. In her second affidavit Ms. McDonagh corrected some of the detail in the affidavit of the second defendant, which I do not consider it necessary to dwell on. As regards the first element of the plaintiff's affidavit, Ms. McDonagh averred that the solicitors who acted for the defendants in connection with the mortgage transaction were William Davis & Co. She averred that the second defendant had signed various documents in the presence of a solicitor. Indeed, I have already adverted to the fact that both acceptance of the loan offer and the Charge were executed by both defendants in the presence of a solicitor. Ms. McDonagh also exhibited a statutory declaration for the purposes of the Family Home Protection Act 1976 (the Act of 1976), which was made by both defendants in the presence of a Commissioner for Oaths. She also exhibited the Solicitor's Undertaking furnished to the plaintiff in connection with the transaction, in which both defendants authorised William Davis & Co. to

give the Undertaking, the signatures of both defendants being witnessed by a solicitor, whom I assume was a member or employee of that firm. As regards the efforts of the second defendant to discharge the arrears on the mortgage loan account, Ms. McDonagh averred that the second defendant had gone through the Mortgage Arrears Resolution Process, concluding with an appeal by her to the Appeals Board, the outcome of which was a conclusion by the Appeals Board that the mortgage was not sustainable and that an alternative repayment arrangement could not be offered, which was communicated to the second defendant in a letter dated 21st June, 2011.

The provisions of the Charge

13. The rights of the plaintiff, as mortgagee, against, and the liabilities of, the defendants, as mortgagors, are governed by the Charge which, in addition to creating security over the Property, contains the contractual provisions which bind the plaintiff and the defendants. The provisions of the Charge which are of relevance to the issue whether the plaintiff is entitled to an order for possession against the defendants in these proceedings, pursuant to s. 62(7) of the Act of 1964, are the following:

> (a) Clause 3, which contained the covenant for payment by the defendants giving rise to personal contractual liability on the part of the defendants. In Clause 3.01 the defendants covenanted with the plaintiff to pay to the plaintiff "on demand the secured monies". Earlier, in the definitions clause, Clause 1(19), the expression "secured monies" was defined as meaning "the balance ... which is ... for the time being ... due or owing" by the defendants to the plaintiff "on foot of any secured loan", and also "interest, liabilities and obligations" on foot of or in connection with the secured loan and "the expenses and other monies" which the defendants covenanted to pay under the Charge or otherwise in connection with the secured loan. Clause 3.02 provided that all monies remaining unpaid by the defendants to the plaintiff and secured by the Charge should "immediately become due and payable on demand" to the plaintiff on the happening of any of the events of default, which, broadly speaking, were specified in Clause 9.01. In Clause 3.03 it was provided that the demand should "mean a demand for payment of the secured monies" made by the plaintiff or on its behalf upon the defendants.
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> (b) In Clause 5.04 the defendants charged the Property "by way of charge for present and future secured monies".
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> (c) Clause 8 dealt with the plaintiffs powers as mortgagee. Clause 8.01 provided that at any time after the execution of the Charge the plaintiff might without any further consent from or notice to the defendants enter into possession of the Property. Clause 8.02 provided that the plaintiff should have the statutory powers conferred on lenders by the Conveyancing Acts, meaning the Conveyancing Acts 1881 to 1911 and the Act of 1964, as varied and extended by the Charge. Clause 8.02 provided, *inter alia*, that -
>
> > (i) the secured monies should be deemed to have become due within the meaning and for all purposes of the Conveyancing Acts on the execution of the Charge, and
> >
> > (ii) the power of sale should be exercisable by the plaintiff without the restrictions on its exercise imposed by s. 20 of the Conveyancing Act 1881.
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> (d) Clause 9.01 dealt with the exercise of the powers of the plaintiff, as lender/mortgagee, and provided that the powers provided for in Clause 8 or conferred by statute should not be exercised until any of the events of default specified at paragraphs (a) to (j) thereafter should occur. Paragraph (a) referred to default "in payment of any monthly or other periodic payment or in payment of any other of the secured monies hereunder".
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> (e) Clause 13 dealt with notices. Clause 13.01 provided that any "notice of demand" made by the plaintiff under the Charge or by virtue of any statute should, without prejudice to any other effective mode of making the same, be deemed to have been properly served if served on the defendants personally or sent by pre-paid post to the defendants at the Property and any such notice sent by pre-paid post should be "deemed to be received the day following the date of such posting".

14. The powers of the plaintiff to enforce the security created by the Charge are governed by the law which applied before the coming into operation of the Act of 2009, because s. 96(1) of the Act of 2009 provides that the powers and rights of mortgagees under ss. 97 to 111 thereof apply to any mortgage created by deed after 1st December, 2009. The combined effect of the provisions of the Charge, which have been outlined above, under the pre-1st December, 2009 law is as follows:

> (a) The entire of the secured monies, including the principal, remaining unpaid would become due by the defendants to the plaintiff on demand following an event of default. A demand would be necessary to render the monies remaining unpaid on the happening of an event of default due and payable to the plaintiff (Clause 3.02).
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> (b) The plaintiff's power to enter into possession and its power of sale arose on the execution of the Charge (Clause 8.01 and Clause 8.02(a)).
>
> (c) The power of sale would become exercisable when an event of default should occur, including default in payment of any monthly payment (Clause 9.01(a)).

Section 62(7)

15. Section 62(7) of the Act of 1964, before its repeal by the Act of2009, provided:

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

Under that provision two requirements had to be complied before the Court could make an order for possession: the principal money had to have become due; and the applicant had to be registered as the owner of the Charge on the relevant folio. If both requirements were fulfilled, the Court was empowered to make an order for possession if it considered it "proper" to do so.

16. On the established facts in relation to the Charge, the second requirement was met at all times after 15th January, 2009, when the plaintiff was registered as owner of the Charge on Folio 75768F. As regards the first requirement, that the principal monies secured by the Charge should have become due, whether this has occurred and, if so, when, falls to be determined in accordance with the provisions of the Charge, which have been outlined above. As I have stated, under those provisions a demand was necessary to render the monies remaining unpaid, which obviously included the principal money, immediately due and payable. It was submitted on behalf of the second defendant that the grounding affidavit of Mr. Pickering was deficient in a number of respects, for example, that it did not identify the detail of the default on the part of the defendants. There is absolutely no doubt that there is clear evidence before the Court that an event of default had occurred before these proceedings were instituted. The crucial issue, in my view, is whether, on the happening of an event of default, the plaintiff had made a demand in accordance with the provisions of the Charge so that all of the monies remaining unpaid became immediately due and payable to the plaintiff, so as to meet the first requirement in s. 62(7).

17. Leaving aside the issue whether, on the authority of the decision in *Start Mortgages Ltd. & Ors. v. Gunn & Ors*., if the plaintiff did not demand repayment of the monies remaining unpaid on foot of the Charge before 1st December, 2009 it would be precluded from relying on that statutory provision to obtain an order for possession in a summary manner, which is the position which the plaintiff has inherently adopted, it is instructive to consider whether either of the letters relied on by Mr. Pickering in the grounding affidavit triggered the immediate repayment of all the monies remaining unpaid by the defendants to the plaintiff. In relation to the letter of 21st December, 2009, while it set out the arrears due to the plaintiff, which implicitly indicated that an event of default had occurred, what it required the defendants to do was to bring their account "up to date immediately". The plaintiff did not demand payment of all monies remaining unpaid by the defendants. As regards the letter of 2nd February, 2010, once again, the defendants were told that they were in arrears on their mortgage and the amount of the arrears was specified. It was then stated that the result of the default was that the entire balance outstanding, the amount of which was specified, as at the date of the letter, had fallen due and owing. However, there was no demand for repayment of the entire balance; there was merely an assumption that it was due and owing. The demand was for vacant possession of the Property within ten days. On the basis of the analysis of those two letters, it must be concluded that the evidence does not establish that repayment of the principal money had become due prior to the initiation of these proceedings, because of the absence of the demand for the entire balance as required by Clause 3.02.

18. As I have stated earlier, the plaintiff's reliance on the letter of 10th April, 2007 was to avoid the implications of the decision in *Start Mortgages Ltd. & Ors. v. Gunn & Ors*. However, even if a letter in the form of the precedent was dispatched to the defendants on 10th April, 2007, the letter, like the letters of 21st December, 2009 and 2nd February, 2010, would not have embodied a demand. It would merely have indicated that, if the arrears were not remitted in full within seven days, the plaintiff would have no alternative but to embark on proceedings for possession. In short, even if it had issued, a letter in the form of the precedent would not have constituted a demand for all the monies remaining unpaid by the defendants to the plaintiff as required by Clause 3.02 of the Charge and would not have fulfilled the requirement of s. 62(7) that the principal money secured by the Charge had become due.

19. That finding illustrates the vagarious nature of the provisions of mortgages and charges in favour of lending institutions. As recently as 21st June, 2012 in *EBS Ltd. v. Gillespie* [2012] IEHC 243, an order for possession under s. 62(7) of the Act of 1964 was made where the charge had provided that all monies thereby secured should become-

> "... immediately payable and this security immediately enforceable ... on demand by the [plaintiff] for repayment of the monies secured hereunder OR upon the happening of the following events (whatever the reason for such event):-
>
> > (a) If the Borrower fails to pay on the due date any money payable or interest due by it from time to time to the [plaintiff] ...". (Emphasis in original).

It was the word "OR" in that provision, which distinguished it from the provision under consideration here, and which allowed the Court to determine, on the facts, that a valid demand prior to 1st December, 2009 was not necessary to entitle the plaintiff to an order for possession.

Estoppel

20. Further, it was submitted on behalf of the second defendant that, even if a letter in the form of the precedent letter was issued on 10th April, 2007, the demand contained in it, which it must be emphasised was a demand for the amount in arrears, was subsequently set aside by the plaintiff, as it did not act or rely on it at any stage prior to reliance on it in Ms. McDonagh's first affidavit and that, accordingly, the plaintiff ought to be estopped from relying on it. Having regard to the conclusion I have reached that, even if it was issued, a letter in the form of the precedent would not have constituted a demand on foot of which the principal monies secured by the Charge would have become due to the plaintiff, as required by s. 62(7), the second defendant does not have to rely on that submission. However, I think it is worth observing that, even if the plaintiff had called in all of the secured monies by a demand issued in 2007, the subsequent conduct of the plaintiff was wholly inconsistent with reliance on it as giving rise to continuing liability on the part of the defendants for immediate repayment of the entirety of the secured monies, as the following aspects of the affidavit evidence indicate.

21. In the first affidavit of compliance with the Code of Conduct filed by the plaintiff in these proceedings, an affidavit sworn by David Quin, Risk Manager of the plaintiff, on 21st September, 2010, it was averred that, as soon as the account first went into arrears, the plaintiff contacted the defendants immediately by telephone to establish the circumstances behind the missed payment and how the repayment situation could be normalised. When the arrears situation continued, the plaintiff continued to stay in contact with the defendants "by telephone and/or by letter" in accordance with the Code. The plaintiff embarked on a process to examine all viable options to assess whether a plan for clearing the mortgage arrears could be developed in accordance with the Code and home visits were carried out on 17th April, 2008 and 12th October, 2009. However, the conclusion was that the defendants were not in a position to come up with a plan for clearing the mortgage arrears. When the defendant "missed the third repayment", which averment is far from accurate, a formal letter of demand was issued, that letter being the letter dated 21st December, 2009.

22. In a later affidavit of Paul Woods, Chief Risk Officer of the plaintiff, sworn on 8th December, 2011, there is exhibited correspondence from the plaintiff to the defendants which immediately preceded the letter of 21st December, 2009, which included the following:

> (a) a letter dated 8th October, 2009 from the plaintiff to each of the defendants pointing out that the mortgage account was "still showing arrears" and had been in arrears for seven months and pointing out the importance that the account be brought up to date immediately;
>
> (b) a letter dated 30th October, 2009 to each of the defendants pointing out that, as no payment had been received, the plaintiff would soon have no alternative but to issue a "Formal Demand" which would give the defendants ten days "to

clear the arrears and to avoid further action";

(c) a letter dated 11th November, 2009 to each of the defendants, which recorded that the plaintiff had not received payment and set out the then amount of the arrears, which obviously had increased, and in which it was stated that the plaintiff had asked a Mortgage Arrears Counsellor to arrange a mutually convenient appointment with the defendants to review the current financial circumstances and assist the defendants in making a proposal to bring the account up to date; and

(d) a letter of 24th November, 2009 to each of the defendants, where it was stated that the mortgage loan account remained "seriously delinquent", so that continued failure to pay left the plaintiff with no alternative, and the defendants were asked to contact the plaintiff if they could not pay at once, because otherwise the plaintiff would have no option "but to enforce the terms of the contract, which will require you to pay the full balance amount".

As I have recorded, the letter of 21st December, 2009 did not require the defendants to pay the full balance amount and it did not specify what that amount was.

23. If it was an issue which the Court had to determine, it is difficult to see how the reliance by the plaintiff on a letter in the form of the precedent exhibited by Ms. McDonagh having been issued on 10th April, 2007 as evidence of compliance with the requirement in s. 62(7) that the principal money secured by the Charge had become due could be sustainable in the light of what subsequently transpired. However, as I have pointed out earlier, even if it issued, a letter in that form would not have been a demand following a default for all the monies remaining unpaid in accordance with Clause 3.02 of the Charge.

Relevance of the best evidence rule

24. To recapitulate, in her affidavit sworn on 9th March, 2012, the second defendant referred to Ms. McDonagh's first affidavit and to the fact that Ms. McDonagh had averred in the final paragraph thereof that the plaintiff had sent letters to the defendant on 10th April, 2007 "which demanded repayment of the entire balance outstanding on their mortgage account in the amount of €230,069.02". As I have already recorded, the precedent letter exhibited by Ms. McDonagh merely called in the arrears and it did not demand repayment of the entire balance outstanding on the mortgage account, which it was obviously assumed was due without a demand having to be made. In this regard, I would reiterate that the letter of 21st December, 2009, the so-called "Formal Demand", did not even mention the entire outstanding balance, and the letter of 2nd February, 2010 also obviously assumed that the entire balance was due on default without a demand having to be made. Given the amount of correspondence which passed from the plaintiff to the defendants, it is understandable that the second defendant does not recall receiving a letter dated 10th April, 2007 in the form of the precedent letter and she is to be commended for not averring positively that she did not receive it.

25. Having said that, I consider that it is not necessary to express any definitive view on the submissions made on behalf of the second defendant that Ms. McDonagh's first affidavit does not meet the best evidence rule as explained by O'Flaherty J. in *Primor Plc v. Stokes Kennedy Crowley* [1996] 21.R. 459 (at p. 518) and that, as Ms. McDonagh herself did not generate or dispatch the letter of 10th April, 2007, her evidence is hearsay and inadmissible. I would merely comment that the originals of the letters dated 10th April, 2007 to each of the defendants, if they were generated and dispatched to the addressees, would not have been within the procurement of the plaintiff. At the very best, the plaintiff could be required to produce a carbon copy or a photocopy or a print off of an electronic record of the originals. Ms. McDonagh has explained that the plaintiff in this case is "unable to exhibit a hard copy of these letters for I.T. reasons" and then goes on to explain the existence of the record of the "Letter History". If the precedent letter, having referred to the default by the defendants, had demanded repayment of the entire balance outstanding, and if the subsequent conduct of the plaintiff was not wholly inconsistent with the entire balance of the secured monies having been called in in April 2007, in the event of a dispute as to whether the letter of 10th April, 2007 relied on by the plaintiff was sent which required to be resolved by the Court, it would probably have been necessary for each of the parties to seek to cross-examine the deponent on the other side. In that event, the Court would have to determine the weight to be attached to the evidence on each side and, in particular, the weight to be attached to the evidence adduced by the plaintiff that the letters of 10th April, 2007 were generated and dispatched to each of the defendants. However, having regard to the findings I have already made, such determination does not have to be made.

Undue influence

26. Arising out of the averment in the affidavit of the second defendant sworn on 9th March, 2012, which I have quoted at para. 9 above, it was submitted that the second defendant has proved that she was at all stages acting under the undue influence of her husband, the first defendant, that she agreed to execute the Charge on foot of his representation that the Property, their family home, would be repossessed if she did not do so and that, in circumstances where she was not advised to take independent legal advice, her decision to execute the Charge was not a free and considered one. In that context counsel for the second defendant referred to the following passage from the speech of Lord Browne-Wilkinson in *Barclays Bank Plc v. O'Brien* [1994] 1 A.C. 180, which was quoted by Murphy J. delivering his judgment in the Supreme Court in *Bank of Nova Scotia v. Hogan* [1996] 3 I.R. 239 (at p. 248):

> "A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside that transaction will be enforceable against third parties (e.g. against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity . . . The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it."

27. Counsel for the second defendant further submitted, in reliance on the decision of the Supreme Court in *Bank of Ireland v. Smyth* [1995] 21.R. 459, that, given that, on the basis of her evidence, the second defendant was brought to the offices of a solicitor and instructed to execute the necessary documents and that no warning was given to her that she should seek independent advice, nor was she allowed time to consult the documents in her own time, the plaintiffs reliance on the Charge is invalid and unenforceable. The passage from the judgment of the Supreme Court in *Bank of Ireland v. Smyth* relied on by counsel for the second defendant is to be found in the judgment of Blayney J. (at p. 465). At issue in that case was the application of s. 3(1) of the Act of 1976 which, subject to certain exceptions which were not material, provides:

> "Where a spouse without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse ... the purported conveyance shall be void".

The first defendant, Mr. Smyth was the sole registered owner of lands on which the family home of Mr. Smyth and his wife, the second defendant, stood. Mr. Smyth charged the land in favour of Bank of Ireland, which brought proceedings for possession, relying on a document signed by Mrs. Smyth as the requisite consent for the purposes of s. 3 of the Act of 1976.

28. It was in that context that Blayney J. stated (at p. 465):

> "The net issue in the case is, accordingly, whether the consent signed by Mrs. Smyth was a sufficient consent for the purposes of the Act of 1976 having regard to the circumstances in which her consent was given and, in particular, having regard to her understanding of what she was doing. It was common case that, as required by the Act of 1976, she had signed the consent before her husband executed the charge, and accordingly this was not an issue in the case. The onus of proving that it was a sufficient consent is in my opinion on the bank. It is relying on the charge as giving it title to recover possession of Mr. Smyth's farm and, accordingly, the validity of the charge is an essential proof in the case and this depends on Mrs. Smyth having given a valid consent to the charge...."

29. In a later passage, also relied on by counsel for the second defendant, Blayney J. stated (at p. 469):

"It was argued on behalf of Mrs. Smyth in the High Court that the bank had a duty to explain the charge fully to Mrs. Smyth and to suggest to her that she should get independent advice. In my opinion this is not correct. The bank did not owe any duty to Mrs. Smyth to take these steps. The reason they ought to have been taken by [the bank manager] was to protect the bank's own interests since if Mrs. Smyth had consented to the charge after it had been fully explained to her and after she had received independent advice it is unlikely that her consent could have been challenged. So it is correct that the bank ought to have done these things, but not because it owed Mrs. Smyth any duty to do so. The reason was to ensure that it got a good title to the land which was the subject of the charge."

30. It is necessary to revert to the decision of the Supreme Court in *Bank of Nova Scotia v. Hogan* to appreciate the relevance of the earlier decision of the Supreme Court in *Bank of Ireland v. Smyth*. Apropos of the earlier decision and, in particular, the analysis of s. 3 of the Act of 1976 by Blayney J., Murphy J. stated (at p. 246):

> "From that statutory provision two consequences flow, first, that a grantee or purchaser must, in his own interest, ensure that the necessary statutory consent is forthcoming and, secondly, that the consent, if given, is a true consent, that is to say, constitutes a decision which represents a fully free exercise of the independent will of the spouse concerned. Thus, cases turning on the adequacy of a consent required and alleged to have been given under the ... Act [of 1976], are distinguishable from those in which it is alleged that a spouse in the dealing with his or her own property did, or may have, acted under undue influence."

The facts in *Bank of Nova Scotia v. Hogan* were that Mrs. Hogan had given a mortgage by way of equitable deposit of title deeds over certain lands owned by her to the banlc When the bank sought a "well charging" order, it was contended by Mrs. Hogan that the security had been given for the debts of her husband and a company controlled by him and had been obtained by the inequality of bargaining power which existed between herself and the bank, and by its undue influence over her. Although, the Supreme Court adopted the passage from the judgment of Lord Browne Wilkinson in *Barclays Bank v. O'Brien*, which I have quoted earlier, it was held that Mrs. Hogan, never having alleged the exercise of undue influence by her husband, had no equity against him to have the transaction set aside and thus no prior equity on which she could rely to defeat the claim of the bank.

31. While, having regard to the conclusion I have reached that the plaintiff has not established that the principal money secured by the Charge has become due so as to comply with the first requirement of s. 62(7) of the Act of 1964, strictly speaking, it is not necessary to address the submission of the second defendant that, on the basis of her contention that she executed the Charge under undue influence and was not afforded an opportunity to get independent legal advice, the Charge is not enforceable against her, I think it is appropriate to make the following observations.

32. The circumstances of this case differ fundamentally from the circumstances which were under consideration in *Barclays Bank Plc v. O'Brien*. In that case, Mr. O'Brien and Mrs. O'Brien gave a second mortgage of their family home to the bank as security for overdraft facilities extended by the bank to a company in which Mr. O'Brien, but not Mrs. O'Brien, had an interest. In other words, the House of Lords in that case was concerned with a surety situation. The situation in this case is that both defendants are now, and were at the relevant time, the joint owners of the Property and, when the Charge was executed in favour of the plaintiff, they were jointly giving security to the plaintiff for a mortgage loan which was advanced to them jointly.

33. The House of Lords distinguished between the type of situation which exists in this case and the surety situation which was under consideration in *Barclays Bank Plc v. O'Brien* in an authority relied on by counsel for the plaintiff: *CIBC Mortgages Plc v. Pitt* [1994] 1 AC 200. There, Mr. Pitt and Mrs. Pitt were joint owners of their matrimonial home and jointly mortgaged it in favour of CIBC. In distinguishing the situation which arose there from the situation which had been under consideration in *Barclays Bank Plc v. O'Brien*, Lord Browne-Wilkinson stated (at p. 211):

> "Applying the decision of this House in *O'Brien*, Mrs. Pitt has established actual undue influence by Mr. Pitt. The plaintiff will not however be affected by such undue influence unless Mr. Pitt was, in a real sense, acting as agent of the plaintiff in procuring Mrs. Pitt's agreement or the plaintiff had actual or constructive notice of the undue influence. The judge has correctly held that Mr. Pitt was not acting as agent for the plaintiff. The plaintiff had no actual notice of the undue influence. What, then, was known to the plaintiff that could put it on inquiry so as to fix it with constructive notice?"

In answering that question, Lord Browne-Wilkinson stated that there was nothing to indicate to the plaintiff that the transaction was anything other than a normal advance to a husband and wife for their joint benefit. Later, he stated (at p. 211):

> "What distinguishes the case of the joint advance from the surety case is that, in the latter, there is not only the possibility of undue influence having been exercised but also the increased risk of it having in fact been exercised because, at least on its face, the guarantee by a wife of her husband's debts is not for her financial benefit. It is the combination of these two factors that puts the creditor on inquiry."

34. More recently, in *Royal Bank of Scotland Plc v. Etridge (No. 2)* [2002] 2 AC 773, which also involved surety cases and in which the House of Lords followed *Barclays Bank Plc v. O'Brien*, Lord Nicholls stated (at para. 48):

> "As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case

> where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in *CIBC Mortgages plc v Pitt ...."*

35. Recently, in *Ulster Bank Ireland Ltd. v. Roche* [2012] IEHC 166, which was a case in which the second defendant, Ms. Buttimer, had acted as surety for Louis Roche Motors Ltd., a business owned by Mr. Roche, who was her partner in the personal sense of that term, under a guarantee given by Mr. Roche and Ms. Buttimer to Ulster Bank, the decision of the House of Lords in the *Etridge* case was considered by the High Court (Clarke J.). Clarke J. stated (at para. 5.14) that he was satisfied that "the general principle, which underlies *Etridge*, is to the effect that a bank is placed on inquiry where it is aware of facts which suggest, or ought to suggest, that there may be a non-commercial element to a guarantee". Clarke J. found that the general principle went far enough to cover the facts of the case before him, so that Ms. Buttimer had a defence to the claim of Ulster Bank under the guarantee, the oral evidence having established that there had been "undoubted undue influence" exercised over her by Mr. Roche, by virtue of the failure of Ulster Bank to take any steps to ensure that she was acting freely when it was on inquiry. However, he had noted earlier (at para. 5.11) that, in his speech in *Etridge,* Lord Nicholls had -

> "... distinguished between cases where the surety guaranteed the debts of a spouse or partner from a case where the monies were advanced to the spouses or partners jointly (the lender not being on inquiry in the latter case unless it was known to the bank that the loan was for the benefit of one person only) ..."

Accordingly, while it is true to say, albeit at the risk of oversimplification, that the decision in *Ulster Bank Ireland Ltd. v. Roche* does represent a development of the law in this jurisdiction, it has no bearing on the factual situation with which the Court is concerned in this case.

36. As I have recorded at the outset, the letter of offer of 2nd November, 2006 has been exhibited. It is clear from it that the defendants represented to the plaintiff that they were jointly seeking to draw down a loan of €230,000 from the plaintiff to be secured on the Property, which was jointly owned by them, in place of an existing loan of €160,000 in favour of Start Mortgages Limited, which was to be redeemed. *Ex facie*, there is nothing in the letter of offer which would have put the plaintiff on inquiry.

Conclusion/order

37. In this case, the plaintiff pursued the claim for possession under s. 62(7) of the Act of 1967 on the basis of an assumption that it had to establish that the entire of the principal monies secured by the Charge remaining unpaid had become repayable before 1st December, 2009, so the starting point for this Court is that assumption. For the reasons outlined earlier, a letter in the form of the precedent letter exhibited by Ms. McDonagh, even if it had issued on 10th April, 2007, would not have been sufficient, having regard to the express provisions of the Charge, to give rise to a situation where the balance remaining unpaid of the secured monies would have become payable by the defendants to the plaintiff on receipt of the letter. Therefore, in my view, the plaintiff has not established an entitlement to an order for possession under s. 62(7) on the basis advanced by it. Accordingly, there will be an order dismissing the plaintiffs claim for possession against both defendants.

38. Irrespective of that conclusion, the unfortunate fact is that the second defendant remains personally liable under the covenant in the Charge, jointly and severally with the first defendant, for the secured monies. Moreover, the secured monies remain charged on the Property, and, subject to compliance with the provisions of the Charge, it is open to the plaintiff to decide to enforce its security by a sale through the Court in a mortgage suit, which, as a matter of probability, is likely to be more protracted and expensive than a sale out of court.

39. Since these proceedings were commenced on 1st April, 2010, the amount of the secured monies has increased and it continues to increase. The protracted and costly legal process, of which this judgment is the outcome, which generated four hundred and fifty five pages of affidavits and exhibits and involved numerous listings both in the Master's Court and in the High Court, has not been in the interest of either the plaintiff or the defendants. There must be a better way of addressing mortgage arrears, particularly in relation to principal private dwellings, which would be in the interest of all the parties concerned.