THE HIGH COURT

CIRCUIT COURT APPEAL

[2016 No. 165 CA]

BETWEEN

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

LIAM COSTELLOE

AND

GABRIELLE BISHOP COSTELLOE

DEFENDANTS

JUDGMENT of Ms. Justice Faherty delivered on the 12th day of April, 2018

1. This is the defendants' appeal against an order of the Circuit Court dated 19th July, 2016 that the plaintiff recover from the defendants possession of a premises comprised in folio 70198F of the register Co. Mayo more commonly known as Knocknaboley, Kilmeena, Westport, Co. Mayo, hereinafter referred to as "the premises".

2. By notice of appeal dated 22nd July, 2016 the defendants appealed the said order.

3. By notices of motion dated 16th August, 2016 and 8th February, 2017, grounded respectively on affidavits sworn by the first defendant on 16th August, 2016, and 8th February, 2017, the defendants sought to have the Circuit Court Order vacated on the basis that the Circuit Court had no jurisdiction to determine the application for possession.

4. By Order of Barton J. of 27th February, 2017, the High Court refused to vacate the judgment of the Circuit Court for want of jurisdiction. Barton J. ruled that the premises, the subject matter of the within proceedings, constituted the principal private residence of the defendants and that the High Court had jurisdiction to hear and determine the matter.

5. Accordingly, I am satisfied that the issue of the Circuit Court's (and this Court's) jurisdiction to hear the plaintiff's claim for possession has been determined by the Order of Barton J.

6. The plaintiff's claim for possession of the premises is grounded, *inter alia*, on an affidavit sworn on 2nd February, 2016 by Mr. Conor Moore. The background to the within proceedings is set out therein.

7. Mr. Moore avers that in or about June 2008, First Active Plc agreed to make a loan facility to the defendants in the sum of €122,600 repayable by monthly instalments. On or about 16th June, 2008 the loan was drawn down by the defendants.

8. By way of security for the loan facility, on 17th August, 2012, the defendants executed a mortgage in favour of the plaintiff over "*ALL THAT the hereditaments and premises known as Knocknaboley, Kilmeena, Westport, Co. Mayo part of folio 24999F Co. Mayo under dealing no. D2003SM002285W and all that and those part of the lands of Folio 18509 Co. Mayo as delineated on the Map attached in transfer dated the 17th day of August 2012.*"

9. On 13th November, 2012, the plaintiff was registered on folio 70198F as full owner of the charge.

10. It is common case that the Mortgage Deed was originally executed by the plaintiff and the defendants on 28th June, 2008. The Mortgage Deed, as exhibited in Mr. Moore's grounding affidavit, shows the manuscript date of 28th June, 2008 crossed out and the manuscript date of 17th August, 2012 inserted above the crossed out date. The issue of two dates appearing on the Mortgage Deed was raised by the learned President of the Circuit Court on 26th January, 2016. In a supplementary affidavit sworn on 4th May, 2016, Mr. Moore accounted for the two dates in the following terms:

> "Having conducted a full review of the file, I can now confirm that the second date on the mortgage appears by virtue of a delay in registering same due to a difficulty with the mapping of the site/locus of the property in question. … Ms. McHugh [the defendants' solicitor] wrote to the Bank on 24th July,2013 seeking release from her undertaking. In that letter, she explained that "*registration of the property was delayed for several years due to a mapping difficulty mapping query with regard to a small strip of land on our client's site, which has not been Included in the original transfer to our client. In order to rectify this, it was necessary to withdraw the dealing and re-lodge with the transfer of the strip so that it would be included in the Mortgage.*"

11. Mr. Moore goes on to state:

> "I say and believe that Ms McHugh was acting for and on behalf of the Defendants in the course of that transaction, and one would presume that they are therefore familiar with the reason for the delay in registering the property. I say and believe that, though the loan was advanced in 2008, the mortgage deed was not finalised until 2012, hence the difference in the two dates thereon."

12. Folio 70198F Co. Mayo on which the plaintiff is registered as the holder of a charge over the premises is not mentioned in the Mortgage Deed. This is accounted for in an affidavit sworn on 11th December, 2017 by Ms. Erica Conlon, a manager in the plaintiff's Arrears Support Unit. She avers, *inter alia*, as follows:

> [Folio 70198F] derives from two earlier folios, namely MY18509 and MY69401F. The former of these two folios, (part of which was ultimately transferred into the present folio in 2012), is duly listed on the mortgage deed. However, the latter folio is not. Instead, we see that folio MY24999F is listed on the deed. This is because, in 2003, part of MY24999F was

> transferred into MY69401F under dealing number D2003SM002285W, and this is how that part of the property is being described in the deed. In 2012, MY69401F was closed, with the title transferred into the present folio. … In summary, parts of folio MY18509 and MY24999F have been consolidated into the present folio MY70198F. The Property Registration Authority have accepted these dealings, have registered the Plaintiff's charge on the present folio, and have duly stamped the mortgage deed at page 20 thereof, recording registration of the mortgage/charge as a burden on folio MY70198F. I believe and have been so advised that the register is "*conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance of burden as appearing thereon", in accordance with section 31(1) of the Registration of Title Act 1964".*

13. At para. 8 of his affidavit sworn 2nd February, 2015, Mr. Moore avers that the defendants defaulted on the terms of the loan facility by failing to make repayments in accordance with the terms of the loan facility.

14. A statement of account exhibited in Mr. Moore's affidavit shows that the last monthly instalment of €740 credited to the defendants was on 25th October, 2012.

15. On 29th July, 2014, in the wake of arrears on the loan account, the plaintiff wrote to the defendants calling on them, *inter alia*, to make contact withy the plaintiff to discuss their account and to complete a Standard Financial Statement (SFS), to be returned to the plaintiff within twenty business days, in default of which the defendants would be at risk of being classified as not cooperating, as defined in the Central Bank's Code of Conduct on Mortgage Arrears (CCMA). The defendants did not complete a SFS.

16. On 29th August, 2014, the plaintiffs wrote to the defendants advising that as a result of their failure to engage, they were outside of the Mortgage Arrears Resolution Process (MARP), and advising of the threat of legal proceedings for repossession of their primary residence – the security for the mortgage.

17. On 3rd September, 2014 the plaintiff wrote to the defendants by way of formal demand for the mortgage debt which at that stage stood at €94,398.93, including arrears of €10,292.98, and advising of the threat of legal action including seeking an order for possession.

18. The Civil Bill for possession issued on 18th February, 2015. By order of the Circuit Court of 27th April, 2015, the Civil Bill was served on the defendants by way of ordinary prepaid post.

19. In a supplemental affidavit sworn on 16th November, 2015, Mr. Moore avers, *inter alia*, that as the premises constituted a principal private residence it was therefore subject to the MARP process. He avers that by virtue of its attempts to engage with the defendants on 29th July, 2014 and 29th August, 2014, the plaintiff complied with the CCMA.

20. The defendants' defence to the within application for possession is set out in an affidavit sworn by the first defendant on 23rd February, 2017, and which is by an large replicated in a later affidavit sworn 28th November, 2017. The first defendant raises a number of matters by way of resistance to the plaintiff's application for possession. Each of the issues raised by the first defendant will be considered in turn.

Alleged failure of the plaintiff to establish that it exists as a legal entity

21. The first defendant avers that the Circuit Court erred in law and in fact in allowing the plaintiff to pursue the defendants through the courts in circumstances where the plaintiff had not established that it existed as a legal entity. It is contended that in this regard the burden of proof is on the plaintiff to show that it exists. In aid of his submission, the first defendant points to a media report of the dismissal by his Honour Judge McCartan, on 22nd January, 2016, of the prosecution's case in D*irector of Public Prosecutions v. Kota* on the basis, *inter alia*, that in a case which involved multiple withdrawals by the accused from a cash machine owned by Ulster Bank Ireland Limited, the State had failed to prove that Ulster Bank Ireland Limited existed.

22. The plaintiff's response to the first defendant's submission is that there is ample evidence before the Court as to the plaintiff's existence as a legal entity. I am satisfied that this is the case. The documentary evidence before the Court together with the contents of Mr. Moore's and Ms. Conlon's respective affidavits are sufficient for the Court to find that the plaintiff exists as a legal entity. The Court takes particular note of the contents of S.I. No. 481/2009, Central Bank Act 1971 (Approval of Scheme of First Active Plc and Ulster Bank Ireland Limited) Order 2009, wherein reference is made to Ulster Bank Ireland Limited as an entity which "carries on a banking business in Ireland" and which is "the holder of a licence in relation thereto granted under section 9 of the Central Bank Act 1971".

Alleged breach of the statute of limitations Act, 1957

23. In his affidavit sworn 28th November, 2017, the first defendant avers that the plaintiff is in breach of s. 36(2) of the Statute of Limitations Act 1957 ("the Statute"). In aid of this argument, he exhibits an extract from the Mortgage Deed and an extract from the Mortgage Offer letter which required the defendants to take out a life assurance policy as protection for the mortgage repayments. In the latter regard, the defendant exhibits a Hibernian Life Master Cover Policy which refers to serious illness cover of €50,000 on diagnosis and certification of a serious illness in respect of the first defendant and life cover of €100,000 in the event of the death of the first defendant.

24. Counsel for the plaintiff disputes that s. 36(2) of the Statute has any applicability to the within proceedings. It is argued that the provisions of s. 36(1) and (2) refer to the applicable time limit (twelve years) for the recovery of "any principal sum of money secured by a mortgage or charge on land or personal property".

25. Section 36 of the Statute provides:

> "36.—(1) *(a)* No action shall be brought to recover any principal sum of money secured by a mortgage or charge on land or personal property (other than a ship) after the expiration of twelve years from the date when the right to receive the money accrued.
>
> *(b)* In its application to—
>
> (i) a mortgage, interest on which is payable into the Church Temporalities Fund, or
>
> (ii) a charge on land under section 31 of the Land Law (Ireland) Act, 1881, or
>
> (iii) a charge on land under the Housing (Gaeltacht) Acts, 1929 and 1934,paragraph *(a)* of this subsection shall have

effect as if for the words "twelve years" there were substituted "thirty years".

(2) The right to receive any principal sum of money secured by a mortgage or other charge shall, for the purposes of this section, be deemed not to accrue so long as the property subject to the mortgage or charge comprises any future interest or any life insurance policy which has not matured or been determined."

26. In aid of his submissions, the first defendant places emphasis on clause 16 of the Mortgage Deed, which provides:

"REPAYMENTS WHERE A LOAN OR PART IS SECURED BY AN ENDOWMENT POILCY

Where a Loan or any part thereof is secured by a first charge on a subsisting Endowment Policy and the Borrower has fully observed and performed all the obligations on the part of the Borrower the repayment of capital included in the Periodic Payment to the extent of the amount so secured shall be suspended and the Borrower will in the meantime pay interest on the amount of the Loan so secured at the Appropriate Interest Rate by equal instalments as specified in the Relevant Loan Offer and if the Endowment Policy ceases to subsist the amount thereby secured will become payable by combined repayments of capital and interest to ensure that such amount is repaid with interest at the Appropriate Interest Rate in the same period as the Loan would have been discharged if the repayment of capital had not been suspended."

27. There is no evidence before the Court that the parties contracted for the provision of an Endowment mortgage by the plaintiff. As is clear from the mortgage and the other documentation before the Court, the type of mortgage for which the defendants contracted for on 28th May, 2008 was a capital repayment mortgage. Accordingly, the first defendant's reliance on clause 16 of the Mortgage Deed is, to my mind, misconceived having regard to the factual matrix of this case.

More particularly, there is no evidence before the Court that the property to which the mortgage or charge relates comprises any future interest or life policy which has not matured or been determined. The subject of the charge in the within proceedings comprises the defendants' principal private residence. The fact that the first defendant has a life assurance policy, which was a prerequisite for the advancement of monies by the plaintiff, does not bring the mortgage within the scope of s. 36(2). In any event, the present proceedings relate to the recovery of land and not to any principal sum of money. In all the circumstances, I am satisfied that s. 36(2) has no applicability to the present case.

Alleged incorrect sums claimed by the plaintiff

28. The first defendant contends that the affidavits of Mr. Moore, together with a further affidavit sworn by Mr. Nikki Clement of the plaintiff's Arrears Unit, are inadmissible as they contain incorrect monetary amounts.

29. It is averred that the Civil Bill for possession is thereby rendered void given that it relies on Mr. Moore's grounding affidavit. The first defendant submits that, consequently, a question mark arises over the proceedings which have not been answered correctly. In response to this argument, counsel for the plaintiff argues that aside from a bare assertion that the figures are wrong; the first defendant has not adduced evidence to counteract the plaintiff's figures. It is further submitted that, in any event, the plaintiff is not seeking to recover a monetary amount. The plaintiff asserts that the defendants cannot gainsay that they are default of the loan agreement which default entitles the plaintiff to seek possession of the premises, as provided for in at clause 8 of the Mortgage Deed.

30. I find merit in the plaintiff's argument in this regard. The defendants do not seek to deny that a breach of clause 8(a) of the Mortgage Deed subsists.

Alleged failure of the plaintiff to allow the defendants to repay their borrowings

31. At para. 15 of his affidavit, the first defendant exhibits a letter dated 23rd November, 2012, written by the defendants to Mr. Jim Brown, CEO of the plaintiff, advising that "[as] a result of the Banking crisis raising serious concerns regarding Banking practices, before continuing with the Mortgage Repayments, we would like Proof that there is in fact a Debt outstanding between us."

32. The defendants requested a "Wet copy" of their loan application, a copy of the signed contract, their "paper trail from First Active to Ulster Bank" and "verification" of the plaintiff's claim against them. They further advised that the plaintiff's failure to provide the requested information would constitute the plaintiff's agreement that the debt did not exist in the first place or that it had already being paid in full.

33. A similar letter was sent by the defendants to Mr. Brown on 4th December, 2012. On 19th December, 2012, they again wrote to Mr. Brown, referring to their earlier correspondence and again requesting the information previously sought so that they might "settle any financial obligation [they] might lawfully owe".

34. On 7th May, 2013, the defendants wrote again to Mr. Brown, making reference to their previous correspondence and advising that any mail sent to their address had been returned to sender "except for the first letter dated 10-12-2012 which did not contain answers to [their] questions". The letter continued as follows:

"Now the records of the private parties has established that there is no money owing to you by us. Instead there is monies owed to us by you as laid out in our letters to you failure to respond to letters as requested. In addition we are charging €1,000,000.00 for the stress caused by this to us and our family."

35. In effect, it is the defendants' contention that since the plaintiff did not rebut the contents of the 7th May, 2013 letter it is estopped from pursuing the defendants for possession of the premises.

36. On 18th October, 2013, the defendants wrote to the plaintiff's legal department seeking to revoke a power of attorney which the defendants said the plaintiff had over them and in respect of which they had not been aware. On 28th July, 2014, they wrote to Mr. Brown requesting that he correct the bank's records and inform the Arrears Department that the defendants were not in arrears as they were awaiting replies to their correspondence of 23rd November, 2012, 4th December, 2012 and 19th December, 2012. This was followed by further correspondence on 19th September, 2014, addressed to Mr. Brown and other personnel in the bank advising that the response from Mr. Graham Trotter of the plaintiff bank to the effect that the defendants were non cooperative and which threatened legal action was "totally unacceptable and unjustified" given that the defendants had had no communication from the plaintiff over a long time. The defendants further advised, *inter alia*, that the "Private Record of the Parties" had "firmly established that there are no monies owed" to the plaintiff. This, the defendants declared, "on merit" established that by virtue of the plaintiff's "neglect" and "inaction", the plaintiff was estopped from "denying the Private Record of the Parties".

37. On 10th March, 2015, the defendants issued the first of a number of "Cease and Desist Orders" against the plaintiff which admonished the plaintiff for harassing the defendants at their home and which stated that the defendants had brought matters to the attention of the Garda Commissioner.

38. Letters of similar ilk were sent on 20th March, 2015, and 24th April, 2015.

39. On 24th January, 2016, the defendants wrote to the plaintiff wishing "to explore an alternative remedy to existing difficulties" and enquiring as to what was being offered by the plaintiff "in terms of an amicable settlement" so that the defendants might consider it.

40. On 8th November, 2017, the defendants forwarded a questionnaire to the plaintiff requesting information as to whether the defendants' mortgage had been sold or assigned to any third party.

41. Overall, I find no merit in the defendants' contention that either the plaintiff's course of conduct or omissions constitutes an estoppel in favour of the defendants. The statement of account as exhibited in Mr. Moore's affidavit, together with the correspondence furnished to the defendants in 2014, including the formal letter of demand of 3rd September, 2014, satisfy the Court that on the date of the issuing of the Civil Bill for possession, the defendants were in default of the loan agreement such as entitled the plaintiff to bring the within proceedings. I am further satisfied that the plaintiff, which is governed by CCMA, complied with its MARP obligations to give mortgagors who are in arrears an opportunity to engage constructively with lenders. I am satisfied on the evidence adduced that the defendants did not avail of the opportunity to so do. I am further satisfied that the defendants chose instead to embark, from 2012 onwards, in a series of correspondence which they must have known could not prevail in circumstances where they chose not to engage in the mortgage arrears process as governed by the Central Bank Code.

42. At para. 6 of his affidavit sworn 28th November, 2017, the first defendant avers that one of the attractive elements of the mortgage entered into by the defendants with the plaintiff was the plaintiff's offer that the defendants could repay the mortgage at any time. In this regard, the first defendant points to the contents of the offer letter from Ms. Caroline Barrett of First Active dated 15th May, 2008 which advises, *inter alia*, as follows:

> "Your *Facility* will initially be €122,500. You can repay any borrowing at any time without notice."

43. The plaintiff does not dispute that it was open to the defendants to repay the outstanding amount of the mortgage at any time during the currency of the mortgage. The defendants put no cogent evidence to the Court to suggest that they sought to repay their mortgage and were prevented from so doing.

Alleged frailties in mortgage documentation

44. At para. 7 of his affidavit, the first defendant avers that the plaintiff has not shown the defendants proof of its claim in order for the defendants to "settle or account of what monies we might lawfully owe". The first defendant exhibits a letter of 15th August, 2016 sent by the defendants to the plaintiff's Securities Department. The letter directed the plaintiff, pursuant to the Land and Conveyancing Law Reform Act 2009 and the Data Protection Act 1988 and 2003, to make available all of their original documents in order that the defendants could view them at their local Ulster Bank at Westport. This request was repeated on 29th September, 2016 and 30th December, 2016. In aid of his submissions as to the consequences for the plaintiff in not furnishing the requested documents, the first defendant relies on an order made his Honour Judge Keys on 5th April, 2016 in proceedings bearing record no. 2013/503 entitled *Ulster Bank Ireland Limited v. Anne McGuire* wherein the plaintiff's Civil Bill for possession was struck out with no order. The first defendant also exhibits an earlier order of Judge Keys of 8th March, 2013 in the same proceedings wherein it was directed the mortgage deed and loan documentation in issue in the said proceedings be available for viewing by the defendant. Essentially, the first defendant submits that the Order made by Judge Keys on 5th April, 2016 was the consequence of the plaintiff's failure to produce relevant documents.

45. The first defendant says that he is entitled to have sight of all of the original documentation pertaining to his agreement with the plaintiff. It is common case that the original Mortgage Deed was available for the defendants' inspection in the Circuit Court, as it was before this Court on the day the appeal hearing commenced. The defendant did not seek an order in the Circuit Court for inspection of the original of the loan application and loan offer and acceptance documentation. However, he made such an application to this Court. Accordingly, the plaintiff was directed to produce the said documentation. When the hearing in the within appeal resumed, the plaintiff produced a printed version of the defendants' original loan application form, the original of the loan offer and acceptance and the original Mortgage Deed as had previously been before the Court.

46. In her affidavit sworn 11th December, 2017, exhibiting the said documents, Ms. Conlon avers as follows in relation to the defendants' loan application form:

> "In relation to the Defendants' application form: this is an electronic copy, filled out on computer, with the Declaration and Signatures page thereafter printed and executed by the Defendants upon confirmation of the contents of their application form. I should point out to this Honourable Court that, upon recovery of the Defendants' file from offsite archived storage, we learned that pages 14, 15 or 16 of the electronic application form were not in the file. I do not know where those pages are or what happened to them, nor do I believe that they may ever be found."

47. In the course of his submissions, the first defendant points to the fact that the signatures page on the application form is in an entirely different format and font to the balance of the printed application form. This, the first defendant contends raises serious questions. Notwithstanding the different format of the signatures page compared to the balance of the loan application document, I note that the first defendant does not deny that he and the second defendant completed the loan application form. Nor does he dispute that both he the second defendant signed it. Similarly, he does not deny that the loan was sought from the plaintiff or that the monies were in fact drawn down.

48. As confirmed by the documents exhibited by Ms. Conlon, the letter of offer issued to the defendants on 15th May, 2008. It was signed by them on 28th May, 2008 in the presence of their solicitor, Ms. Paula McHugh. Albeit not denying that he and the second defendant signed the letter of offer on 28th May, 2008, the first defendant queries whether the signatures which appear on the document are in fact the defendants' original signatures. The first defendant urges the Court to procure the view of an expert in order to determine whether the signatures are in fact the defendants' original signatures. The basis for this submission is that there are very good photocopiers now available. In essence, the first defendant suggests that the signatures on the document are merely copies of the original signatures.

49. Having perused the document, I am satisfied that there is no basis to the first defendant's suppositions. I note that the first defendant does not assert that his signature, or that of the second defendant, was fraudulently obtained or indeed that he and the

second defendant did not sign the acceptance of the loan offer.

50. As with the application form and the original letter of offer and acceptance, the first defendant availed of an opportunity to peruse the original Mortgage Deed. As already set out, it is common case that the defendants first executed the Mortgage Deed in June 2008. For the reasons already referred to, the Mortgage Deed was re-executed by the defendants in August 2012, according to the first defendant on 18th August, 2012. On this occasion, the defendants applied their signatures in red ink. Notwithstanding having perused the document, the defendant reiterates his submission to the Court that it is not clear that the original Mortgage Deed is before the Court. Again, the first defendant refers to the availability of good colour photocopiers. Having looked at the Mortgage Deed, the Court is entirely satisfied that there is no merit in the first defendant's contention that the original Deed was not before the Court.

51. At this juncture I would echo the sentiments expressed by Barrett J. in *EBS Limited v. Kenehan* [2017] IEHC 604, where he states:

> *"[T]he court must also admit to being mystified as to why borrowers seem to place so much emphasis on seeing original, signed documentation when they have seen copy signed documentation and must know in their "heart of hearts" that they signed the originals. Regulated financial institutions are not in the habit of forging loan and security documentation and the fact that a financial institution might not have original documentation to hand in any one case merely presents an additional evidential hurdle that will have to be vaulted by such institution when it seeks to establish, on the balance of probabilities, such rights as it comes to court seeking to enforce. It need not be the end of matters, and given the general availability of copy documentation and other records, including payment histories and memoranda of post-default negotiations, the absence of so-called "wet ink" documentation seems unlikely generally to present an insuperable obstacle to enforcement of a claim for debt or a claim for possession. Certainly it does not do so on the facts of the within proceedings."*

52. As already referred to, at the time of the re-execution of the Mortgage Deed in August 2012, the defendants were assisted by their solicitor, Ms. McHugh. She also witnessed the defendants' signatures in June 2008. Furthermore, Ms. McHugh liaised with the plaintiff's predecessor in title, First Active, over a number of years post June 2008, advising that the delay in furnishing title to the premises to the plaintiff was due to mapping queries (presumably raised by the Land Registry) which took some period of time to resolve.

53. At the time the defendants re-signed the Mortgage Deed in August, 2012, the words "upon proof of claim" were inserted on the document adjacent to the defendants' signatures. The first defendant claims that this was done by Ms. McHugh.

54. Counsel for the plaintiff submits that the words are of no relevance to the within proceedings and that even if they had relevance, the first defendant has not sought to explain the import of the words.

55. I am satisfied that nothing in particular turns on those words. The first defendant has not suggested otherwise to the Court. There is certainly no evidence put before the Court by the defendants which suggests any fraud or mistake in relation to the charge created on the premises, or that the registration of the charge as a burden on folio 70198F is vitiated by fraud or mistake.

56. Accordingly, while there appears to have been protracted and somewhat complicated dealings in relation to the registration of the plaintiff's charge on folio 70198F, I find nothing to put the Court on alert that the charge was created or registered otherwise than in accordance with the provisions of the Mortgage Deed and the requirements of the Land Registry.

Alleged unfair terms in the mortgage contract

57. The first defendant contends that pursuant to Counsel Directive No. 93/13 EEC transposed into law in this jurisdiction by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, S.I. No. 27/1995 ("the Unfair Terms Regulations"), and as required by the jurisprudence of the European Court of Justice (ECJ), this Court, in adjudicating on the dispute between the plaintiff and the defendants, is under an obligation to assess the terms of the contract for fairness and to eliminate from the contract any terms that are unfair. It is further submitted that at all relevant times the defendants were consumers within the meaning of the Unfair Terms Regulations. This latter submission is not disputed by the plaintiff.

58. It is also the first defendant's contention that as the present matter falls within the scope of EU law the European Union Charter of Fundamental Rights applies. It is further contended that a contract may be classified as unfair if it causes a significant imbalance in the parties rights and obligations under the contract to the detriment of the consumer.

59. In aid of his submissions, the first defendant relies on a letter from the European Commission to one Yvonne Owens which states:

> "Member States are obliged to transpose and apply the Unfair Contract Terms Directive. Furthermore, according to the well-established case law of the Court of Justice of the European Union, national courts are under a duty to assess of their own motion whether a contractual term is unfair if they have the necessary legal and factual elements available … This means that, even if you did not raise the possible existence of unfair contract terms in your case, the relevant Irish judges were nevertheless obliged conduct such an assessment, based on the elements available to them."

60. Reliance is also placed on the decisions of the ECJ in Joined Cases C-240/98 to C-244/98 – *Océano Groupo Editorial* and *Salvat Editores* and Case C-243/*08 Pannon GSM Zrt v. Gyorfi.* The first defendant also cites the decision of Barrett J. in *AIB v. Counihan* [2016] IEHC 752 in aid of his submissions.

61. In *Counihan*, Barrett J. made reference to the decision of the ECJ in *Aziz v. Caixa d'Estalvis de Catalunya* (Case C-415/11) wherein the ECJ stated as follows:

> *"…the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in its own way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task …"* (at para.46)

62. Barrett J. held that "*the Court of Justice's observations appear to contemplate a court even in an adversarial system of justice, acting in an inquisitorial manner*." (at para.10)

63. In *EBS v. Kenehan*, Barrett J. opined:

"26. The Court of Justice, in the above-referenced observations, draws no distinction, in terms of the obligation that it perceives to arise as a matter of European Union law, between a trial court and a court that is hearing, as here, a de novo appeal. That is perhaps because the distinction did not arise for the Court of Justice to draw on the facts of Aziz (though, on the facts as described by the Court of Justice in its judgment in Aziz, there was an interesting interplay between what appear to have been two Spanish courts of first instance with different jurisdictions, being the Juzgado de Primera Instancia No 5 of Martorell and the Juzgado de lo Mercantil No 3 of Barcelona (the referring court)). Given, however, the reasoning that informs the conclusions of the Court of Justice in Aziz, which is that "the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge", the obligation that the Court of Justice perceives to arise as a matter of European Union law would appear logically to apply with as much vigour to a court that is hearing a de novo appeal as to the trial court (a finding not so dissimilar to that reached by the High Court in Counihan that an Aziz obligation applies to a court in a summary application for debt and to a court at any related plenary hearing which "likewise operates in the shadow of Aziz" (para. 13)).

27. It is in the performance by the court of its Aziz-Counihan obligations that EBS encounters a difficulty. It has placed before the court a mortgage that, per cl. 5 of same, "incorporates the Offer Letter and the EBS Mortgage Conditions". Those Mortgage Conditions likewise contemplate that the EBS Rules (defined in cl.1 of the Mortgage Conditions as "[t]he rules of EBS in force from time to time including any which may be adopted after the date of the Mortgage") will apply save to the extent that, per cl.1 of the Mortgage Conditions, there is a "conflict between the Rules and the Mortgage" in which case the Mortgage (defined in cl.1 as "[t]he Mortgage Deed and those conditions combined") shall, per cl.1 of the Mortgage Conditions, prevail. Neither the Offer Letter nor the Rules have been placed before the court. As a consequence, the court cannot discharge its Aziz-Counihan obligations and, having been placed by EBS in a position where it is unable to perform a task incumbent upon it as a matter of European Union law before the order for possession may stand, the court cannot allow that order to stand.

28. In a situation where EBS knew that it would face a Counihan - based argument on appeal, it was in EBS' self-interest to place the court in a position where it could discharge its Aziz-Counihan obligations. This EBS did not do.

Conclusion

29. Mr Kenehan and Ms Ryan have borrowed €400k from EBS and are chronically in default of their repayment obligations. There is, with every respect, only one way that such a persistent period of default is ultimately going to end for them. However, for the reasons aforesaid, the court cannot at this time allow the possession order that was obtained before the Circuit Court to stand."

64. Counsel for the plaintiff urges the Court not to adopt the approach of Barrett J. in *Counihan* and *Kenehan*. Counsel submits that in the common law/adversarial system which pertains in this jurisdiction (where it is open to the defendant to raise any particular issue before the court) it could not have been envisaged by the ECJ that that it is incumbent on a trial judge or a judge hearing a *de novo* appeal to embark on an investigation of the mortgage contract of its own volition. It is further submitted that even if this Court is of the view that it should review the mortgage contract, the first defendant has not made reference on affidavit to any unfair or potentially unfair terms in the mortgage contract. Counsel further submits, if reviewing the terms of the mortgage contract, the Court must take cognisance of the fact that at the time of the acceptance of the loan offer and the execution of the mortgage the defendants had the services of their solicitor, Ms. McHugh. Moreover, counsel contends that what was entered into by the plaintiff and the defendants was a regular loan offer and which involved the requirement for security for the monies advanced.

65. In response to the plaintiff's arguments, the first defendant contends that the Court has an obligation to see how many unfair terms there are in the mortgage agreement given that it is a pre-conceived contract. The first defendant also highlights clause 16 of the Mortgage Deed as an example of an unfair term.

66. Undoubtedly, the Unfair Terms Regulations are in place to protect persons who find themselves in an unequal bargaining position. In my view, while it can be said that the defendants were in an unequal bargaining position in their capacity as consumers, it remains the case that when they entered into the mortgage contract with the plaintiff they knew in clear terms that the monies they were obtaining were repayable by them on agreed terms and that a charge would be put on their premises in favour of the plaintiff. It seems to me that in this particular case, the defendants cannot but have been aware of the principal terms of the mortgage contract. In essence, when the defendants borrowed the money they knew the sum borrowed was to be repaid with interest, that the sum advanced by the plaintiff would be secured by way of a charge on the premises and that in the event of default their residence could be at risk of repossession. This is clearly set out in the offer letter and at para. 11 of the Offer document which the defendants signed on 28th June, 2008 in the presence of their solicitor. The Court has considered these documents.

67. The first defendant points to clause 16 of the Mortgage Deed as an example of an unfair term. The Court has already opined clause 16 does not appear to have any particular applicability to the contract entered into between the plaintiff and the defendants. Nor has this clause been pleaded against the defendants in the within proceedings.

68. The Court has to take cognisance of the fact that the defendants had the benefit of a solicitor when executing the Mortgage Deed. Moreover, when they accepted the loan offer they were aware from the contents of the Offer letter of 15th May, 2008 that the offer of monies was conditional on the plaintiff obtaining a first ranking mortgage as security for the borrowings. Moreover, the offer document clearly advised the defendants to consult with their solicitor "on the offer documents, the conditions and the security which will be taken over your home".

69. The offer document also advised that the defendants risked losing their home if they breached the conditions of the mortgage. As already stated, the letter of Offer and Offer document were signed by the defendants in the presence of their solicitor.

70. Notwithstanding that there are myriad other terms and conditions in the Mortgage Deed which the Court has perused, it seems to me that as far as the salient terms of the mortgage contract are concerned, and upon which the plaintiff relies to ground its application for possession, same cannot be deemed unfair given the forewarnings the defendants had and given the fact that they had the services of a solicitor at the time they accepted the loan monies and agreed to charge the premises in issue in these proceedings.

Alleged unconstitutionality of Circuit Court Rules (Actions for possession and well-charging relief) 2009 (S.I. No. 264/2009)

and/or breach of the European Convention on Human Rights ("ECHR") and/or breach of the European Charter on Human Rights and Fundamental Freedoms and/or breach of the European Social Charter
71. The first defendant avers that on the basis of the alleged unconstitutionality of S.I. No. 264 of 2009 (in respect of which the first defendant makes no particular submissions), the defendants are denied a fair trial as provided for by Article 6 of ECHR. The Court does not accept that the defendants were denied a fair trial in the Circuit Court as alleged. While the proceedings before this Court constitute a *de novo* hearing and the Court is not reviewing the proceedings in the Circuit Court, I accept the plaintiff's counsel's submission that the defendants were given an opportunity to make submissions in the Circuit Court. Moreover, the first defendant was afforded the opportunity to give oral evidence in the Circuit Court, which he availed of. In this Court, the first defendant has been given every opportunity to put forward his submissions and to counteract the submissions made on behalf of the plaintiff.

72. The first defendant relies on the European Social Charter (1961) and the Revised Charter (1996) in support of what he says is the defendants' right not to be rendered homeless by virtue of the within possession proceedings. With regard to the arguments advanced by the first defendant, this Court adopts the approach of Barrett J. in *EBS v. Kenehan*. Barrett J. opines:

> *"13. There is no express right to housing in Irish law; but that is not to say that a qualified, as yet unrecognised, un-enumerated right pertaining to housing may not at some point be recognised by the courts as existing in and under the Constitution. There is a relative abundance of sources by reference to which the existence of such a right might conceivably be identified by analogy. If, for example, one looks to instruments which are not a part of Irish law but which could nonetheless be of influence in identifying the extent of Irish law, in particular when it comes to recognising (if it comes to recognising) a qualified, as yet unrecognised, un-enumerated right pertaining to housing in the Constitution:*
>
> *(i) in the European Convention on Human Rights, there are several articles of that Convention which, indirectly, provide protection for a right to housing, e.g., Arts. 2, 3, 5, 8, 14, and Art.1, Protocol 1. Moreover, the European Court of Human Rights has a burgeoning line of case-law that recognises some legally defined minimum State obligations as regards housing rights (see,* inter alia*, Moldovan v. Romania (2007) 44 EHRR 16, Marzari v. Italy (1999) 28 EHRR CD175, Botta v. Italy (1998) 26 EHRR 241, and Guerra v. Italy (1998) 26 EHRR 357);*
>
> *(ii) in the European Social Charter (Revised), there are a multiplicity of rights of relevance to housing, including Arts. 12, 15, 16, 23 and 30, though notably Ireland has opted out of Art.31 (the right to housing);*
>
> *(iii) in international law, e.g., Art.11.1 of the International Covenant on Economic, Social and Cultural Rights, Art. 27 of the Convention on the Rights of the Child, Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, Art.14 of the UN Convention on the Elimination of All Forms of Discrimination against Women, and the International Covenant on Economic, Social and Political Rights, all make provision of relevance to a right to housing; and*
>
> *(iv) the constitutions of certain other European Union member states steeped in the same liberal democratic tradition as Ireland, viz., Belgium, Finland, Greece and the Netherlands, recognise a right to housing.*
>
> *14. Viewed against the backdrop of the foregoing, the prospect that a qualified, un-enumerated right to housing may yet be found to be extant within and under our living and versatile Constitution must be a possibility. But such a right, were it found to exist, would doubtless not be absolute. Thus the claim of Mr Kenehan and Ms Ryan in this regard, which seems to be that there is an unqualified constitutional right to housing which has the effect that (a) a possession order granted in accordance with law and following a fair trial, (b) falls now to be set aside or varied by the court for being in contravention of such unqualified right, is respectfully not accepted by the court to be correct as a matter of law."*

Alleged invalidity of the Circuit Court Order of 19th July, 2016
73. The first defendant avers that the Circuit Court Order made by her Honour Judge McDonnell on 19th July, 2016 is not signed and not sealed, thereby rendering it void.

74. I agree with the plaintiff's counsel's submission that any alleged frailty in the Circuit Court Order does not negate a substance of the decision of the Circuit Court which, in any event, the defendants have validly appealed to this Court. Accordingly, I find no basis on which to refuse the plaintiff relief in this case on foot of what is averred to para. 25 of the first defendant's affidavit.

Alleged non receipt of the plaintiff's letter of 3rd September, 2014
75. Contrary to what is averred to in Mr. Moore's grounding affidavit, the first defendant avers that the defendants did not receive the plaintiff's letter of demand of 3rd September, 2014.

76. Counsel for the plaintiff says the first defendant makes only a bare assertion in this regard. I agree with the plaintiff's submission. It seems to me that something more than a bare denial is necessary before the Court could be persuaded that the defendants did not receive the formal letter of demand for discharge of the mortgage debt which issued on 3rd September, 2014. This is particularly so in circumstances where the defendants' letter of 7th May, 2013 to the plaintiff refers, *inter alia*, to correspondence from the plaintiff having been duly returned by the defendants to the plaintiff. Given that the defendants acknowledge having received other mail from the plaintiff, it seems to me improbable that they would not have received the letter of 3rd September, 2014.

The first defendant's reliance on UNIDROIT
77. At para. 18 of his affidavit, the first defendant makes reference to UNIDROIT. UNIDROIT is an independent intergovernmental organisation. Its purpose is to study needs and methods for modernising, harmonising and coordinating private and, in particular, commercial law as between States and group of States and to formulate uniform law instruments, principles and rules to achieve those objectives. Ireland is a member of UNIDROIT. It is not altogether clear to the Court why the first defendant invokes this entity as a defence to the within proceedings. Nor is the Court any better informed from the document exhibited in the first defendant's affidavit. The Court will take it that the reference to UNIDROIT is in effect a complaint by the first defendant about the language used in the mortgage contract and/or Mortgage Deed. The Court, however, is satisfied that, at all relevant times, the defendants had access to their solicitor if clarification was required. In particular, the Court notes that the letter of offer and offer document which issued to the defendants on 15th May, 2008 were written in relatively clear and unambiguous terms which could have left the defendants in no doubt about the salient terms upon which the monies were being advanced by the plaintiff, the plaintiff's requirements as to how the monies were to be secured and the consequences if there was a default. Even if there was something in those documents that was not clear to the defendants, they had the benefit of services of their solicitor, in whose presence they signed their acceptance of the loan offer.

Summary

78. As can be seen from the foregoing, the first defendant has put a myriad of matters before the Court by way of defence to the within proceedings and in support of his submission that the plaintiff's proceedings should be dismissed without liberty to re-enter. For the reasons outlined in this judgment, the Court has not been persuaded by any of the arguments put by the first defendant in aid of the appeal of the order for possession which was made by the Circuit Court on 19th July, 2016. While the first defendant has made valiant attempts to negate the mortgage contract, at no time did he assert that he and the second defendant did not borrow money from the plaintiff's predecessor in title or that they did not agree to a charge on the premises. Furthermore, other than raise the issue of estoppel (which the Court has rejected), he does not make the case that he and the second defendant were not in default of clause 2 of the Mortgage Deed. In all the circumstances of the case, I am satisfied to dismiss the appeal and affirm the Order of the Circuit Court. Given that the premises constitutes the family home of the defendants, I will hear submissions on the issue of a stay on the order for possession or the execution thereof.