

THE HIGH COURT

[2016 No. 279 CA]

BETWEEN

START MORTGAGES LIMITED

PLAINTIFF

AND

VINCENT KAVANAGH

AND

MADELEINE (ORS MADELINE) KAVANAGH

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 4th day of July, 2017

1. This is an appeal brought by the first named defendant (Mr. Kavanagh) against an order of the Circuit Court (Her Honour Judge Fergus) made on 14th June, 2016 whereby the court granted an order for possession to the plaintiff of ALL THAT AND THOSE the property comprised in folio 9004F County Carlow and now more commonly known as 36 Beechwood Park, Carlow, Co. Carlow. The court imposed a stay of six months on the order for possession and made no order as to costs.

2. Proceedings of this nature brought by banks and their successors in title are unfortunately a daily feature in Circuit Court lists throughout the country both before County Registrars and Circuit Judges. These proceedings are entirely conventional and commonplace. Many, and perhaps most, such cases arise from the economic collapse in Ireland and indeed worldwide since in or about 2008, the effects of which are still being felt. The defendants herein are not untypical of married couples who have run into difficulty with their mortgage payments as a direct consequence of that financial catastrophe. I have great sympathy for them and many others like them who have faced serious financial problems as a result of circumstances beyond their control resulting in the loss of jobs, the collapse of businesses and the like.

3. Possession cases such as the present one have become the focus of what seems to be an increasing number of interest groups that purport to assist personal litigants such as Mr. Kavanagh, whether for reward or otherwise. Some such groups, and indeed individuals, appear in many instances to be agenda driven and implacably opposed to the courts granting orders of the kind sought in this case. Regrettably, that opposition has on occasion transcended the bounds of legitimate behaviour in court leading to situations where defendants, and those assisting them, have been held in contempt and been the subject of criminal prosecution. The approach of some groups and individuals purporting to assist litigants in person has been the subject of adverse judicial comment in a number of recent cases. I hasten to add that in the present case, Mr. Kavanagh conducted his case with absolute propriety and courtesy and did the best he could to assist the court.

4. The plaintiff's claim in these proceedings is for an order pursuant to s. 62 (7) of the Registration of Title Act 1964 for delivery of possession of the mortgaged property already identified. That subsection provides as follows:

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

5. These proceedings were brought in the Circuit Court in Co. Carlow on foot of s. 3 of the Land and Conveyancing Law Reform Act 2013 which in the case of a principle private residence, confers jurisdiction on the Circuit Court to hear and determine such claims. It is important therefore to note that this case is entirely unrelated to the jurisdiction of the Circuit Court in relation to claims concerning real property where the rateable valuation does not exceed a certain limit. The latter issue is one that has been the subject of a number of recent cases before the Superior Courts but these cases are not relevant to the circumstances that arise here.

6. The main focus of Mr. Kavanagh's argument in this case has been the title of the plaintiff to prosecute these proceedings and it is therefore appropriate that I should set out how that arises.

7. The proceedings arise out of a home loan taken out by the Kavanaghs in the sum of €110,000 with Bank of Scotland (Ireland) Limited (BOSI) on foot of a letter of offer of 13th June, 2007. Subsequently, Mr. & Mrs. Kavanagh entered into a deed of mortgage with BOSI on the 6th July, 2007. On 21st September, 2007, BOSI became registered on the folio as the owner of this charge. It would appear that a little over two years into the life of the mortgage, from the end of the 2009, the Kavanaghs started to fall into arrears with their monthly repayments. On 31st December, 2010, BOSI transferred its interest in the mortgage to its parent company, Bank of Scotland Plc. (BOS).

8. The manner in which this transfer of interest occurred is set out in the affidavit of Charlotte Cottham sworn in support of the original application for possession in the Circuit Court. That affidavit sets out that by cross border merger pursuant to European Communities (Cross Border Mergers) Regulations 2008 of Ireland and the Companies (Cross Border Mergers) Regulation 2007 of the United Kingdom approved by the High Court of Ireland on the 22nd October, 2010 and by the Scottish Court of Session on 10th December, 2010, all of the assets and liabilities of BOSI, including the Kavanaghs' mortgage, transferred to BOS by operation of law at 23:59 hours on 31st December, 2010. By letter of 17th November, 2011, BOS demanded repayment of the debt the subject matter of the mortgage. On 13th May, 2013, BOS, through its solicitors, demanded possession of the property the subject matter of these proceedings.

9. On 21st October, 2013, a civil bill for possession was issued by BOS. In the affidavit grounding the application for possession, Ms. Cottham deposes to the amount then outstanding on foot of the mortgage. She also avers that the property is the family home of the defendants and that the Code of Conduct on Mortgage Arrears has been complied with. Before the proceedings came on for hearing, a further transmission of interest occurred. On 11th October, 2014, BOS sold its loan portfolio and related securities, including those

the subject the matter of these proceedings, to LSF IX Paris Investments Limited (LSF) by way of purchase deed.

10. On the 14th January, 2015, LSF exercised its entitlement under the purchase deed to nominate the within plaintiff (Start) to purchase what are described as the purchased assets. On 3rd February, 2015 an accession deed was entered into between BOS and Start pursuant to which Start assumed certain of LSFs obligations under the purchase deed and became entitled to acquire the purchased assets. Accordingly, Start became the legal assignee of the mortgage the subject of the within proceedings.

11. By letter of 23rd February, 2015, the Kavanaghs were notified by Start that Start had taken over the mortgage (the "hello letter") and they were notified by BOS by letter of 24th March, 2015 from the solicitors for BOS that their mortgage was being taken over by Start (the "goodbye letter") and BOS would make application to the Circuit Court accordingly. It would appear that Mr. Kavanagh did not respond to that correspondence or object to the proposed course of action. On 10th April, 2015, Start became registered on the folio as owner of the charge originally owned by BOSI.

12. This information is deposed to in an affidavit sworn by Ben Groves on 13th May, 2015 in support of an application before the Circuit Court to substitute Start as the plaintiff in the proceedings pursuant to O. 22, r. 4 of the Rules of the Circuit Court. That rule provides as follows:

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

13. The order was duly made by the County Registrar on 28th May, 2015.

14. Mr. Kavanagh makes complaint of the fact that this order was made *ex parte* without notice to him. However the rule is clear in its terms that the application may be made *ex parte* and of course like any *ex parte* order, anyone who is prejudicially affected thereby may apply to set it aside. No such application was made by Mr. Kavanagh.

15. The figure for arrears is brought up to date in an affidavit sworn by Siobhan Coen, a director of Start, on 31st March, 2016.

16. When the matter came on for hearing before the Circuit Court, all of these affidavits were before the court together with an affidavit sworn by Mr. Kavanagh on 9th June, 2016. The language of this affidavit, in which Mr. Kavanagh describes himself as a man living and not dead, is redolent of groups of the kind previously referred to. It contains the now familiar demands for sight of various original documents and contains what appears to be a list of demands for what Mr. Kavanagh considers to be essential proofs to establish Start's title and "*locus standi*". It raises other technical objections to the proceedings. Having considered all the affidavits and heard argument from the parties, the Circuit Court granted an order for possession.

17. Mr. Kavanagh did not appeal that order within the time limited in that behalf by the Rules and issued a motion seeking an extension of time in December 2016. In the affidavit grounding that application sworn on 8th December, 2016, he made a number of rather opaque arguments about human rights which do not appear to have any particular relevance to the issue of extending time. He made a further argument that the property at 36 Beechwood Park, Co. Carlow could not be regarded as his principle private residence, thus conferring jurisdiction on the Circuit Court, because it was his only residence, a not unfamiliar argument in cases of this nature. At para. 22 of that affidavit, Mr. Kavanagh says:

"22. I do say that 36 Beechwood Park, Co. Carlow is not my principle private residence. The property situated at 36 Beechwood Park, Co. Carlow is my only permanent place of abode and my sole dwelling and that I have resided there since 1990".

18. The Master of the High Court granted an extension of time and the matter came before this court. In the meantime Mr. Kavanagh purported, without leave of the court contrary to Order 61 rule 8 of the Rules of the Superior Courts, to swear two further affidavits on the 19th January, 2017 and the 16th February, 2017. As Mr. Kavanagh is a litigant in person, I permitted him to rely on these affidavits despite the rule. The affidavit of the 19th January, 2017, jointly sworn by the defendants, is extremely detailed and runs to 57 paragraphs. It purports to analyse in depth the plaintiff's chain of title with a view to demonstrating that Start has no *locus standi* and cannot maintain the within proceedings because its title is defective.

19. It seems clear that this affidavit was drafted with assistance. Although the issues raised in this affidavit were never raised before the Circuit Court, this is explained by Mr. & Mrs. Kavanagh in the following terms at para. 11:

"We say and believe while these issues and questions should have been identified prior to hearings on the matter, the issues were only established on further inspection by a third party with more expertise at due diligence. Issues with the legal framework between involved parties have been recently identified and the matter was brought to the defendants' attention."

20. It is evident therefore that an unnamed third party assisted the defendants in relation to the issues canvassed in this new affidavit and indeed perhaps drafted same. The third party referred to is not identified. The affidavit also purports to make legal submissions.

21. A further affidavit was sworn by Mr. Kavanagh himself on 10th February, 2017 in which he makes a completely new case for the first time. At para. 9, he avers:

"I say with regard to my address and clarity on same I informed Bank of Scotland (Ireland) on the 9th June 2010 of a change of address as Madeleine Kavanagh and I was going through a difficult time and I moved to 16A Pollerton Road, Carlow where I have resided since therefore 36 Beechwood Park is not my principle primary residence."

22. It will be seen therefore that this averment entirely contradicts the averment made by Mr. Kavanagh barely two months earlier when he swore that 36 Beechwood Park is his only permanent place of abode and sole dwelling since 1990.

23. From all of the foregoing, it is clear that an enormous amount of industry and effort has been put into a purported analysis of the

plaintiff's title by an unknown third party. Throughout all of this endeavour, the defendants have never disputed the averments of the plaintiff that the monies were advanced on foot of the mortgage and they have defaulted in repayment.

24. Further, all of the effort deployed in this elaborate analysis of title documentation entirely fails to have regard to the provisions of s. 31 (1) of the Registration of Title Act, 1964 which provides as follows:

"31.—(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

25. It could not be clearer. The register is conclusive evidence of the plaintiff's title to the charge the subject matter of these proceedings. No amount of analysis of deeds and documents by unknown third parties can change that simple fact.

26. I am satisfied therefore that the plaintiff's proofs are now, and were at the time the matter was before the Circuit Court, perfectly in order and the plaintiff is entitled to judgment for possession accordingly. I am also satisfied that the premises in question is Mr. Kavanagh's principle private residence within the meaning of s. 3 of the 2013 Act and he has sworn as much himself, despite his subsequent efforts to retract that evidence.

27. It is a matter of ongoing, and indeed increasing, concern to the court that litigants such as Mr. Kavanagh are pursuing futile and ultimately potentially very costly appeals and other proceedings that are doomed to fail on the strength of misguided advice from unqualified anonymous third parties. I cannot help but comment on the fact that when judgment was given in the Circuit Court, no order as to costs was made against Mr. Kavanagh for reasons that obviously commended themselves to the learned Circuit Court judge.

28. Since that time, Mr. Kavanagh has pursued an application to extend the time for appeal and conducted that appeal in circumstances where he is now on significant risk of a substantial award of costs being made against him both in this court and the Circuit Court. That risk might have been entirely avoided were it not for the intervention of the anonymous third party who presumably holds himself or herself out as an expert on these matters. In *KBC Bank Ireland Ltd v. Flynn* [2017] IEHC 79, I voiced similar concerns in the following manner:

"12. It is a matter of considerable concern that Mr. Flynn, and perhaps others like him, are being duped by anonymous parties into paying money to them on the basis of so called legal advice about their rights and entitlements. The advice apparently given by these shadowy advisers, who profess to have legal knowledge but in fact possess none, is, as recent cases concerning possession applications in this court demonstrate, to bring appeals from the Circuit Court or seek judicial review on foot of papers ineptly drafted by them, which are doomed to fail and expose the unfortunate unrepresented parties to much higher levels of costs than they should otherwise have to bear. Unlike professional lawyers, these advisers are of course unregulated and uninsured with the consequent perils of engaging with them for the unsuspecting litigant. They draft documents which espouse a grandiose form of legal speak designed to give such documents the appearance of being learned and erudite when in fact they contain little more than legal nonsense.

13. Parties like Mr. Flynn who find themselves in financial distress are making a bad situation considerably worse by consulting hob lawyers and unqualified persons who hold out false hope for them in situations where they would be much better advised seeking to deal with their creditors either directly or through the medium of properly qualified advisers. There are many organisations that provide specialised and highly expert advice and assistance to those in financial difficulty with their mortgages or more generally. Many of these provide advice free of charge or at very little cost."

I continued in the judgment to identify some of those organisations. Similar sentiments were recently expressed by the Court of Appeal in *Fox v. McDonald & Ors* (Court of Appeal unreported 20th June, 2017) where Irvine J., delivering the court's judgment, observed:

"32. I will conclude by stating that it is a matter of some regret that many lay litigants, such as Mr. Fox, are taking advice from individuals who have no legal qualifications and have no real understanding of the law or the rules of court. These advisors not only have no training but have no professional indemnity insurance and are not accountable for any advice which they give regardless of how reckless or wrong it might be.

33. That is not to contest that in many instances the advice given by these non qualified advisers, as is likely the situation in this case, is furnished in the genuine belief that will assist the recipient and if acceptable operate to their benefit. However, leaving aside the motivation of such advisers and the fact that in many instances they are paid for their work, their advice, in my experience, is rarely, if ever, correct. Day in day out this court sees lay litigants pursue appeals and applications which have no prospect of success and where, following the failure of their appeal or application, the court is left with little option but to award costs against them in respect of such hearing thus pushing them further and further into debt.

34. The situation is particularly upsetting where the litigant, who has already suffered serious financial loss, nonetheless still retain assets which might afford them some degree of comfort and these are then lost to bills of legal costs unnecessarily incurred as a result of the pursuit of ill advised and untenable claims, applications and appeals."

29. Although it is immaterial to the outcome, the motivation of these advisors has to be questioned. Even if unpaid and entirely altruistic, the effect of reliance upon such non professional advice by a litigant can be extremely damaging for the reasons I have explained. If however this advice and assistance is being offered for reward, it becomes an even more serious matter. Quite why anyone would want to pay for bad advice and assistance which inevitably leads to disastrous consequences, particularly when excellent professional advice is available at little or no cost, is something of a mystery. It is not without good reason that the legislature has made it a criminal offence for unqualified persons to draft documents for use in legal proceedings for reward - see s. 58 of the Solicitors Act, 1954 as amended. This measure clearly exists to protect the public from unscrupulous persons who would seek to exploit the vulnerability of persons such as those in financial distress by holding out hope of unrealistic outcomes for personal gain.

30. For the reasons given, I will dismiss this appeal.

