THE HIGH COURT

2016 No. 2159 S.

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

MICHAEL NEARY

MARGARET MCDONALD

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 March 2019

INTRODUCTION

1. The within proceedings are summary summons proceedings seeking to recover monies pursuant to a mortgage loan. The mortgage loan was granted to the first and second named defendants. At the time the mortgage loan was granted, the first and second named defendants were in an intimate relationship. It seems, however, that the relationship has since ended.

2. The application before me is confined to the position of the first named defendant, Mr. Michael Neary (hereinafter "*Mr. Neary*" or "*the borrower*").

3. Counsel on behalf of the borrower has advanced three principal grounds of defence as follows. First, it is alleged that the letter of demand is ambiguous, and that the legal consequence of this is that the principal monies have not yet been called in. Secondly, it is alleged that the failure of the bank to produce letters setting out changes in the variable rate of interest throughout the years precludes enforcement. Thirdly, it is submitted that in circumstances where Mr. Neary sought to surrender voluntarily his half share in the property, he should not be prejudiced by the alleged delay on the part of the plaintiff bank in enforcing its security against the second named defendant.

4. For the reasons which follow, I am not satisfied that Mr. Neary has made out a real or *bona fide* defence to the proceedings as required by *Aer Rianta c.p.t v. Ryanair Ltd*. [2001] 4 I.R. 607 and *Irish Bank Resolution Corporation Ltd. v. McCaughey* [2014] 1 I.R. 749.

FACTUAL BACKGROUND

5. The plaintiff bank issued a "mortgage loan offer letter" to the defendants in or about 10 May 2007. The proposed loan was in the amount of €345,000, and was to be for a term of twenty years. The loan was to be secured by way of a mortgage on premises known as 48 Seaview, Kilcoole, Co. Wicklow. The General Conditions attached to the offer letter stated that where there are two or more borrowers, then each are joint and severally liable to the lender. It was also stated that the offer letter is regulated by the Consumer Credit Act 1995.

6. The rate of interest under the loan was to be variable. This was to be fixed by reference to the ECB Repo rate. This is provided for at "PART 4 – THE SPECIAL CONDITIONS" of the offer letter as follows.

> "(a)(iii) The interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 1.25% above the European Central Bank Main Refinancing Operations Minimum Bid Rate ('Repo Rate') for the term of the Loan. Variation in interest rates shall be implemented by the lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer Letter. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the Prevailing Home Loan Variable Rate."

7. General Condition 6(b) provides as follows.

> "The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c), or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged."

8. As discussed presently, one of the defences sought to be relied upon by Mr. Neary alleges that the bank has not proved compliance with the requirement to notify changes in the variable rate.

9. Condition 4(b) of the General Conditions provides as follows.

> "In the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in clause 2(a), the Lender may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan."

10. The defendants accepted the loan agreement in or about 18 May 2007. The principal amount was drawn down on 1 June 2007.

11. The first and second named defendants are registered as the owners of the land under Folio 6482F County Wicklow. They are each registered as the full owner as tenant-in-common of one undivided half share. There is also a charge registered as a burden on the folio in favour of the plaintiff bank. These registrations are all dated 31 October 2007.

12. Unfortunately, the defendants fell into arrears. The precise history of default has not been set out on affidavit. As discussed presently, it seems that the loan had first fallen into arrears as early as September 2011. However, the within proceedings are grounded on letters of demand issued in January 2015 and November 2016. In circumstances where one of the principal grounds of

defence is to the effect that the letter of demand of January 2015 was ineffective, it is necessary to set out the key paragraphs of same.

13. The letter of demand is dated 9 January 2015, and is addressed to Mr. Michael Neary at an address other than the mortgaged property. The letter is from Bank of Ireland Mortgages. The following information is set out at the start of the letter.

> "Account No. [Redacted]
>
> Redemption Balance €337,283.51
>
> Current Outstanding Arrears €96,538.93
>
> Property at: 48 Seaview, Kilcoole, Co. Wicklow"

14. The first three paragraphs read as follows.

> "Despite previous correspondence you have failed to meet the instalment repayments due on your mortgage loan account(s) as detailed above. We have sent you previous requests and reminders about this and we have made every reasonable effort to agree an alternative arrangement with you to repay your mortgage loan account(s), without success.
>
> We now call on you to pay us everything you owe under these mortgage loan account(s) within 10 business days of the date of this letter. This letter is a demand for early repayment of your mortgage loan account(s) under your mortgage loan offer letter(s) and Mortgage Deed and the total amount you now owe at the date of this letter is quoted above. Interest continues to accrue daily at the rate(s) applicable to your mortgage loan account(s).
>
> Warning: If you do not pay us what you owe us under the above mortgage loan account(s) within 10 business days, including any interest that arises after the date of this letter, we can start legal proceedings against you to enforce our rights including, but not limited to, proceedings for repossession of the mortgaged property, appointment of a receiver over the property, and any other right of remedy we might have in respect of the debt outstanding."

15. The solicitors acting on behalf of the plaintiff bank, Kane Tuohy Solicitors, subsequently wrote to Mr. Neary on 4 November 2016.

> "We act on behalf of the Bank.
>
> By letter of demand dated 9th of January 2015, a copy of which is enclosed for your ease of reference, the Bank wrote to you seeking payment of the sum as referred to therein.
>
> Notwithstanding, we are instructed that the sum due in respect of the Loan Account remains outstanding and that the total sum due as at the 26th of October 2016, to include continuing interest, was €343,393.03, which sum includes arrears of €133,058.84. Interest continues to accrue on the Loan Account.
>
> The purpose of this letter is to inform you that unless the said sum of €343,393.03 is paid within seven (7) days from the date hereof, we are instructed to issue Judgment proceedings against you. In that event, we will rely on this letter to ground an Order for costs against you.
>
> In the circumstances, please nominate Solicitors to accept service of proceedings, failing which, we will have no alternative but to serve you directly and shall do so without further notice."

16. Mr. Neary places some significance on the fact that Bank of Ireland Mortgages had previously issued a demand for repayment on 28 September 2011. This was followed by a subsequent letter from the plaintiff bank's then solicitors, A.B. Wolfe & Co. This latter letter was dated 3 April 2012.

17. Shortly thereafter, Mr. Neary purported to surrender all his beneficial and legal interest in the property, to include possession of the property. This surrender document is dated 3 July 2012. The key paragraph reads as follows.

> "3. In those circumstances I hereby surrender all my beneficial and legal interest to include possession in the property known as 48 Seaview, Kilcoole, County Wicklow to Bank of Ireland Mortgages and further that Bank of Ireland Mortgages is deemed to have taken possession of my interest in the property as at the date hereof."

18. The plaintiff bank replied to this by letter dated 9 July 2012.

> "Unfortunately we can only accept voluntary surrender of a mortgaged property if both parties to the mortgage sign a Deed of Surrender. In circumstances where we understand that Margaret McDonald, the other account holder, will not agree to a voluntary surrender we cannot accept your client's voluntary surrender of the above property. If you or your client believes that Ms. McDonald may agree to a voluntary surrender please inform us and we will contact Ms. McDonald immediately in regard to signing the necessary documentation."

19. Further correspondence ensued in this connection over the period July to September 2012.

20. The essence of Mr. Neary's complaints in this regard is summarised as follows at paras 11 and 12 of his affidavit of 25 May 2017.

> "11. I say that if the Plaintiff took the required steps in a timely manner when the account first fell into arrears and demands were issued then the property the subject matter of the loan would have long been taken into possession, the property sold and the outstanding balance significantly reduced. I am aware that the account has been in arrears for circa 7 years at this point. It is of note that the Plaintiff has not exhibited a statement of account in the within proceedings so given the information to hand I am unable to establish what the total sum due and owing was at any particular point in time. I say that it is axiomatic that the outstanding balance has increased month on month where payments are not being made to the account and I would therefore respectfully submit that had the Plaintiff taken the required steps to realise their security in a timely manner then the total sum due and owing would be significantly less than is being sought in the current proceedings. Further less interest would have accrued as the net sales proceeds would have been credited to the loan account.

> 12. Even if the property were taken into possession at this juncture and sold by the Plaintiff then whilst the outstanding balance would be reduced the residual debt would be significantly higher than it would have been had the Plaintiff issued repossession proceedings in 2012 following service of the demand letters and executed the Order in a timely manner. At the present time my solicitor has not received confirmation that the Plaintiff has lodged the required papers with the Circuit Court seeking an Execution Order despite such confirmation being requested by letter dated the 20th of April 2017 and I beg to refer to a copy of the said letter upon which pinned together and marked with the letters and number 'MN10' I have signed my name prior to the swearing hereof. I say therefore that the Plaintiff has failed to mitigate their loss due to their delay in issuing repossession proceedings."

APPLICATION TO ENTER FINAL JUDGMENT

21. The motion granting liberty to enter final judgment from 7 February 2017 was filed on 3 March 2017. The application is grounded on the affidavit of Jacinta Enright, the legal case manager in the plaintiff bank. The matter came on for hearing before me on 28 February 2019.

GROUNDS UPON WHICH LEAVE TO DEFEND SOUGHT

(1) Letters of demand

22. Mr. Ian Boyle Harper, B.L., counsel on behalf of Mr. Neary, submits that the letter of demand of 9 January 2015 is deficient. (The key parts of the letter are set out at paragraphs 13 and 14 above). More specifically, it is submitted that the letter of demand is at best ambiguous, and that it did not call in the principal sum. It is suggested that the letter of demand only called in the arrears to date. Emphasis is placed on the fact that the letter of demand stated two different figures in the heading thereto, referable to the redemption balance and current outstanding arrears, respectively.

23. It is suggested that, in the absence of a valid letter of demand, the term of the mortgage remains at twenty years and this period has not yet expired. In support of this argument, counsel calls in aid the provisions of the consumer protection legislation. Whereas counsel accepts that the requirement under the consumer protection legislation that terms in consumer contracts must be fair and in plain intelligible language does not apply directly to the interpretation of a letter of demand, he suggests that the court should have regard to same as it lends colour to the underlying purpose of consumer protection.

24. Counsel points out that the occurrence of an event of default, namely the accrual of arrears, does not *per se* terminate the loan. Rather, it simply entitles the bank to serve a letter of demand. It is suggested that in the absence of a valid letter of demand, the proceedings are flawed.

25. On behalf of the bank, Mr. Niall Ó hUiginn, B.L., responded as follows. There is no ambiguity in the letter of demand. It was necessary to include reference to both the arrears outstanding and the principal monies in circumstances where the right to call in the principal monies only ever arises if there has been a default in payment. No one reading the letter could have had any doubt as to its meaning.

26. Counsel also observed that this issue of alleged ambiguity is not canvassed in the affidavits filed on behalf of the defendant, and suggests that this is telling. Counsel also makes the point that had the issue been raised on affidavit, then the bank would have had an opportunity to deal with same. At all events, it is submitted that any ambiguity (which is denied) was removed by the subsequent letter from Kane Tuohy Solicitors. (This letter has been set out at paragraph 15 above.)

(2) Interest rate

27. The essence of the argument in relation to the interest rate is as follows. Mr. Neary had the benefit of what is referred to colloquially as a "tracker mortgage", i.e. one which is fixed by reference to the ECB Repo rate. Counsel for Mr. Neary points out, correctly, that under the terms of the loan agreement, the plaintiff bank was required to notify any changes in the variable interest rate.

28. It appears from the affidavit evidence that the solicitors acting on behalf of Mr. Neary have sought, for some period of time, to obtain copies of the letters setting out the interest rate changes. The plaintiff bank's response to this is to say that those individual letters are simply not available. Instead, the bank did provide certificates of interest directly to Mr. Neary. (See letter dated 1 June 2017 to Mr. Neary's solicitors). These certificates have been exhibited as part of the supplemental affidavit of Jacinta Enright sworn on 15 November 2017.

29. The explanation for the unavailability of the individual letters is set out as follows in the letter of 8 December 2017 from Bank of Ireland to Mr. Neary's solicitors in relation to his request under the Data Protection Act.

> "1. Interest Rate Change Letters – Interest rate change letters are not held on the system in a format which allows reproduction. This correspondence is computer generated and the Banks records do not retain a copy of the correspondence. In an effort to accommodate your request for this information, the Data Protection Unit made arrangements for Certificates of interest to be issued to you which I trust you received."

30. Counsel for Mr. Neary says that in circumstances where the plaintiff bank has chosen to proceed by way of summary summons—which he describes as a fast-track procedure—the bank is obliged to show that it is not in breach of the terms of the loan agreement. Counsel accepts that this is the height of the proposition, and that he cannot say that his client did not agree to a variable interest rate, i.e. the tracker mortgage.

31. In response, counsel for the plaintiff bank makes the valid point that Mr. Neary has not deposed on affidavit that he did not, in fact, receive notification of the various changes to the variable interest rate at the relevant times. It is submitted that Mr. Neary has not, therefore, made out even a *prima facie* argument that the bank was in breach of this contractual obligation.

32. Counsel further submits that the bank has provided an explanation for the inability to produce, at this stage, the individual letters. Moreover, the bank has provided certificates of interest for each of the relevant years.

(3) Duty to enforce / to accept surrender

33. It is submitted on behalf of Mr. Neary that the plaintiff bank should have had recourse to the mortgaged property before instituting summary summons proceedings. There appear to be two strands to this argument. First, that a mortgagee is under some sort of duty to seek possession of and sell the mortgaged property. Secondly, on the specific facts of this case, it submitted that the

plaintiff bank was obliged to accept Mr. Neary's voluntary surrender of his half share in the property. It is said that Mr. Neary offered all that he could, namely his legal and beneficial ownership in one half share of the property as a tenant-in-common. It was emphasised that Mr. Neary has never been in occupation of the property.

34. It is suggested that Mr. Neary should not be responsible for any interest payments or any further accruing monies from 2012, i.e. the date upon which he offered to surrender voluntarily his interest in the property. In the alternative, it is submitted that—at the very latest—the plaintiff bank was required to act expeditiously from March 2017, i.e. the date upon which the bank obtained an order for possession from the Circuit Court. A copy of the Circuit Court order of 13 March 2017 has been exhibited by Mr. Neary in his affidavit of 25 May 2017.

35. In response, counsel for the plaintiff bank submitted as follows. Insofar as the alleged duty on the part of a mortgagee to act expeditiously is concerned, counsel states that it is trite law that a lender does not owe a duty to a borrower in determining whether or not to rely on a particular security. Counsel cites in this regard *China South Sea Bank v. Tan Soon Gin* [1990] A.C. 536; *Cuckmere Brick Company v. Mutual Finance Ltd* [1971] Ch. 949 at 965; and *Silven v. Royal Bank of Scotland PLC* [2003] EWHA 1409.

36. It is suggested that there is no general duty in law to act on foot of a demand or at all. It is further submitted that any such rule would not only prejudice lenders but would also prejudice borrowers as it would mean that alternative payment arrangements to facilitate the defaulting borrower could not be considered, never mind entered into.

37. The plaintiff bank is said to have been within its rights in refusing to accept the offered voluntary surrender. It is said that the voluntary surrender would present no benefit to the plaintiff in circumstances where the co-owner of the property, the second named defendant, continued to reside in the property. The plaintiff bank was also entitled to forebear from issuing repossession proceedings in respect of the secured property.

DISCUSSION AND DECISION

38. There was broad agreement between the parties as to the legal test governing an application for leave to enter summary judgment. The court must consider whether the defendant has a real or *bona fide* defence. The test was summarised by Hardiman J. in *Aer Rianta c.p.t v. Ryanair Ltd*. [2001] 4 I.R. 607 at 623 as follows.

> "In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

39. This passage has been reaffirmed in *Irish Bank Resolution Corporation v. McCaughey* [2014] 1 I.R. 749 at 759.

> "[22] It is important, therefore, to re-emphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in *Aer Riantac.p.t. v. Ryanair Ltd*. [2001] 4 I.R. 607, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in *McGrath v. O'Driscoll* [2006] IEHC 195, [2007] 1 I.L.R.M. 203, the court may come to a final resolution of such issues. That the court is not obliged to resolve such issues is also clear from D*anske Bank a/s (t/a National Irish Bank) v. Durkan New Homes* [2010] IESC 22, (Unreported, Supreme Court, 22nd April, 2010).

40. Before turning to consider the grounds upon which Mr. Neary (hereinafter "*the borrower*" where convenient) seeks leave to defend, it may be useful to recall what issues are *not* in dispute. It is accepted that the loan was properly executed; it is accepted that the loan fell into arrears; it is accepted that the letters of 9 January 2015 and 4 November 2016 were received by the borrower (although there is a dispute as to the legal effect of same); and it is accepted that the summary summons was properly served. Thus many of the issues which typically arise in summary proceedings are not in dispute in this case.

(1) Letters of demand

41. The first issue in dispute centres on the legal effect of the letter of demand, and, in particular, whether it was ambiguous. For the reasons which follow, I am satisfied that the letter of demand of 9 January 2015 constituted a lawful demand for early repayment of the principal sum.

42. The entitlement of the bank to demand early repayment is provided for under Condition 4(b) of the General Conditions as follows.

> "In the event of any repayment not being paid on the due dates or any of them, or of any breach of the conditions of the loan or any of the covenants or conditions contained in any of the security documents referred to in clause 2(a), the Lender may demand an early repayment of the principal and accrued interest or otherwise alter the conditions of the loan."

43. As appears from the terms of the letter, the event of default being relied upon to ground the demand for early repayment was the failure of the borrower to meet the instalment repayments due on the mortgage loan account. It was appropriate, therefore, that the letter should identify the "current outstanding arrears". It was necessary to enumerate this figure in order to give the borrower notice of why a demand for early repayment was being made. The borrower, if he had wished to do so, would then have had an opportunity to dispute this figure, or to offer to clear the arrears. In this latter connection, the final paragraph of the letter of 9 January 2015 states that if [the borrower] has a firm and a realistic proposal to submit, which might influence the bank's intention to start legal proceedings, it should be put forward in writing immediately.

44. It was also appropriate that the letter identify, separately, the redemption balance. This put the borrower on notice of the principal sum and interest in respect of which early repayment was being demanded.

45. In summary, it was necessary that both the "current outstanding arrears" and the "redemption balance" be enumerated in the letter of demand. The inclusion of both figures could not have caused any confusion to any person reading the letter. The first paragraph explains that the borrower has failed to meet the instalment repayments. The second paragraph of the letter then explains that the letter is a demand for early repayment of the mortgage, and expressly states that "the total amount you now owe at the date of this letter is quoted above".

46. I am satisfied, therefore, that the letter of 9 January 2015 constitutes a valid demand for early repayment. Even if I were

incorrect in this, there can be no doubt but that the subsequent letter of 4 November 2016, which was sent to the borrower by the plaintiff bank's solicitors, Kane Tuohy, represents a valid demand for early repayment. The letter states that the total sum due as at 26 October 2016, to include continuing interest, was €343,393.03, which sum includes arrears of €133,058.84. A reader of the letter would not have been in any doubt as to the meaning of this paragraph.

47. For the sake of completeness, I should record that I would have reached the same conclusion even if there were an express statutory requirement that a demand for early repayment must be in "plain, intelligible language" (analogous to that which applies to consumer contracts under the Unfair Terms in Consumer Contracts Regulations). The two letters would meet any such requirement.

(2) Interest rate

48. I turn now to the second ground upon which leave to defend is sought, namely the notification of changes to the variable rate of interest. The state of the evidence is as follows. On the one side, the plaintiff bank has explained that notification letters are computer-generated and that individual copies of same are not retained. The plaintiff bank has produced annual certificates of interest. On the other side, the borrower has not deposed on affidavit that he did not receive the notifications. The borrower has made out no case to the effect that interest was overcharged, nor that the terms under the loan agreement for calculating the interest rate were not properly observed.

49. It is also relevant to note that notification of changes in the rate of interest did not necessarily have to be by way of personal notification. As set out at paragraph 7 above, General Condition 6(b) allowed for notification by way of an advertisement published in at least one national daily newspaper.

50. In all the circumstances, I am satisfied that the borrower has not made out a real or b*ona fide* defence in respect of this ground. There is no evidence to suggest that the plaintiff bank was in breach of its contractual obligation to notify a change in the interest rate, still less that the incorrect rate was charged or that the borrower had not agreed to the variable rate.

(3) Duty to enforce / to accept surrender

51. The third ground upon which leave to defend is sought involves an allegation that the plaintiff bank was under some sort of duty either to enforce against the mortgaged property or to accept the voluntary surrender by the borrower.

52. The borrower, Mr. Neary, seems to be in the unfortunate position whereby he purchased property with Ms McDonald, but their relationship ended in 2009. Mr. Neary avers that at no stage did he ever reside at the mortgaged property. (See paragraph 4 of his affidavit of 25 May 2017). It appears that Ms McDonald may still be in occupation of the premises. Although it is not on affidavit, both counsel referred to the fact that the plaintiff bank has, seemingly, sought an execution order on foot of an order for possession granted by the Circuit Court. (It will be recalled that an order for possession was granted on 13 March 2017). In circumstances where these matters are not established by evidence before the High Court, I do not attach any weight to same.

53. The fact remains, however, that Mr. Neary admits that he accepted and executed the loan offer in May 2007. The General Conditions attached to the offer letter stated that where there are two or more borrowers, then each are joint and severally liable to the lender. The plaintiff bank is entitled therefore to sue Mr. Neary for the debt. It will be a matter thereafter for Mr. Neary to seek to recover from Ms. McDonald.

54. The case law establishes that a creditor, such as the plaintiff bank, which has the benefit of security is not obliged to enforce same. See, in particular, *China South Sea Bank v. Tan Soon Gin* [1990] A.C. 536 at 545.

> "In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise his power of sale over the mortgaged security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor.
>
> The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and the surety decamps abroad, the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagor and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock C.B. in *Watts v. Shuttleworth*, 5 H. & N. 235, 247, it appears to their Lordships that in the present case the creditor did no act injurious to the surety, did no act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all."

55. This judgment has been cited with approval by the High Court (Noonan J.) in *Allied Irish Bank plc v. Yates* [2016] IEHC 60.

56. As appears, *China South Sea Bank* was concerned with the position of a surety. Here, of course, Mr. Neary is the debtor, albeit having joint and several liability with Ms McDonald. There is no legal basis for an argument that the plaintiff bank was required to forbear pursuing Mr. Neary for the debt until such time as the bank had exhausted its right to enforce the mortgage, i.e. by seeking and executing an order for possession and exercising its power of sale. The bank is entitled to elect between its remedies. Of course, if the bank does exercise a power of sale in respect of the mortgaged property, it will have to credit the debtors with any surplus on a sale over and above the monies owing to the bank.

57. Finally, the bank's contractual entitlement to sue for the debt is not negated by the purported surrender of Mr. Neary's beneficial and legal interest in the mortgaged property. Mr. Neary's primary contractual obligation is to repay the principal together with accrued interest; this obligation is not discharged by a purported surrender of the property.

(4) Code of conduct on mortgage arrears
58. An issue in respect of the Conduct for Mortgage Arrears ("*CCMA*") had been raised in the affidavits, but was not pressed at the hearing before me. If and insofar as Mr. Neary seeks to rely on the CCMA, I am satisfied that it does not confer any directly enforceable right applicable to these proceedings.

59. The legal status of such Codes of Conduct has been explained in the judgment of the Supreme Court in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92. Clarke J. (as he then was), delivering the unanimous judgment of the court, indicated that there is a distinction to be drawn between those provisions of a Code of Conduct which regulate possession proceedings, and other aspects of the Code, e.g. in terms of provision of information, communication with borrowers etc.

> "[63] So far as one limited aspect of the Code is concerned, it might well be said that a court making an order for possession might be facilitating the carrying out of 'the very act' which the Code is designed to prevent. As already noted, the Code imposes a moratorium on seeking possession in certain circumstances. Presumably the purpose of the Code in that regard is to provide a window of opportunity in which there can be an exploration of whether there are other solutions to the mortgage arrears problems of the borrower in question and, if there are, to take action to put those solutions in place. A financial institution which, entirely ignoring the provisions of the Code in that regard, simply went ahead and sought possession as soon as it was legally entitled so to do would be doing the very thing which the Code is designed to prevent. For a court to entertain an application for possession which was brought in circumstances of clear breach of the moratorium would be for a court to act in aid of the actions of a financial institution which were clearly unlawful (by being in breach of the Code) and in circumstances where the very act of the financial institution concerned in seeking possession was contrary to the intention or purpose behind the Code itself.
>
> [64] In my view a court could not properly act to consider a possession application in those circumstances. It should be recorded that the Code (being the version applicable to this case) does make some provision for the moratorium period being cut short (see step four of the M.A.R.P. provisions) or not applying (see provision 48). I am, in this section of this judgment, dealing with a situation where an application for possession has been brought at a time when the Code precludes such action. Like consideration would apply to any similar provisions in the current or any future versions of the Code.
>
> [65] However, in respect of the other provisions of the Code, different considerations apply. There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution, in formulating its detailed policies in respect of mortgage arrears and applying those policies to the facts of individual cases, can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the Oireachtas had intended to give the courts such a role then it would surely have required detailed and express legislation which would have established the criteria by reference to which the court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law."

60. The within proceedings are debt collection proceedings, and do not seek possession of the mortgaged property. Moreover, Mr. Neary has averred on affidavit that he never resided in the mortgaged property. Accordingly, it does not constitute his "primary residence" such as to attract the CCMA.

61. The High Court (McDermott J.) in *Danske Bank v. Higgins* [2015] IEHC 371, [34] held that the initiation of summary proceedings for the recovery of a debt pursuant to a mortgage did not constitute proceedings "for repossession" for the purposes of the CCMA.

CONCLUSION
62. For the reasons set out above, I am satisfied that the first named defendant has failed to make out a *prima facie* case for the defence of the proceedings within the meaning of *Aer Rianta c.p.t v. Ryanair Ltd*. [2001] 4 I.R. 607 and *Irish Bank Resolution Corporation Ltd. v. McCaughey* [2014] 1 I.R. 749. There is no material factual dispute between the parties, and none of the various grounds of defence have even a stateable legal basis.

63. Accordingly, I propose to grant the reliefs sought at paragraphs (1) and (2) of the Notice of Motion of 31 March 2017.