THE HIGH COURT

[2013 No. 1853 S.]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

PATRICK MCMAHON AND ANGELA MCMAHON

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 24th day of October, 2017

1. This is a simple claim by the plaintiff (the Bank) for repayment of a loan. There is no dispute that the money was advanced to Mr. and Mrs. McMahon and that they have not repaid it. It remains a simple claim despite the very best efforts of the McMahons to make it an extremely complex one.

2. By letter of the 12th April, 2006, ICS Building Society offered a mortgage loan to the McMahons in the amount of €960,000 for a term of 25 years. The loan offer document comprised three parts, the first being the statutory loan details, the second identifying additional loan details including the property being purchased, 1 Park Lodge, Castleknock, Dublin 15 for €1.2 million and the third part comprising general and special conditions. The final part of the document entitled "Borrowers Acceptance and Consents" was executed by the McMahons on the 21st April, 2006. The full amount was drawn down on the 26th April, 2006.

3. By early 2011, the repayments due on foot of the mortgage account had fallen into arrears of some €12,000 and by letter of the 13th April, 2011, ICS Building Society wrote to the McMahons seeking payment of the arrears in default of which proceedings for possession would issue. By mid 2013, the arrears had grown to almost €120,000 and solicitors acting for ICS Building Society wrote to the McMahons on the 2nd May, 2013 demanding repayment of the full amount of the loan.

4. This was followed up by the issue of a summary summons on the 11th June, 2013, seeking the amount then outstanding of some €970,000. It was not possible to serve the summons on the defendants and an order for substituted service was made on the 13th January, 2014. The McMahons entered an appearance on the 30th January, 2014, as litigants in person. A motion seeking liberty to enter a final judgment was issued on the 24th June, 2015. As appears from the grounding affidavit of Sean Buckley, an arrears manager in the arrears support unit of the Governor and Company of the Bank of Ireland, on the 12th June, 2014, pursuant to S.I. No. 257 of 2014, the Minister for Finance, under the powers granted to him pursuant to s. 33 of the Central Bank Act, 1971, as amended, made an order entitled the Central Bank Act, 1971 (Approval of Scheme of Transfer between ICS Building Society and the Governor and Company of the Bank of Ireland) Order 2014 transferring all of the assets and liabilities of ICS Building Society, including the loan the subject matter of these proceedings, to the Governor and Company of the Bank of Ireland with effect from the 1st September, 2014.

5. Arising from this, an ex parte application was made by the plaintiff to amend the title to name the Governor and Company of the Bank of Ireland as plaintiff and an order to that effect was made by this court on the 13th July, 2015. The McMahons brought a motion seeking to set aside that order which ultimately came on for hearing before the court on the 11th January, 2016, and was dismissed. Subsequently the McMahons brought a motion seeking discovery of documents which was heard on the 11th July, 2016, and dismissed. The McMahons then brought a plainly misconceived application before the court to set aside its previous order of the 11th July, 2016, on a variety of grounds but primarily on the grounds that the judge refused the McMahons' application for an adjournment on that date. That application appears to have been unsuccessful also.

6. The within application came on for hearing before me in July, 2017, over four years after the summons was issued. In response to the claim, the McMahons have filed a number of lengthy and detailed affidavits raising a multitude of issues. I was informed by counsel for the plaintiff in opening the case that he had identified some 35 such discrete issues. In the course of the hearing, I had the benefit of extensive oral submissions from Mr. McMahon. As the matter proceeded into a second day, Mr. McMahon having been on his feet for some hours, I indicated to him that I would allow him a further one hour to conclude his reply to the plaintiff's submissions on the second day of the hearing. It seemed to me that this was a necessary case management measure to ensure that the matter finished within the time allotted to it and would give more than sufficient time to Mr. McMahon to conclude his submissions, most of which were in any event already contained in the lengthy affidavits sworn by the defendants.

7. Although Mr. McMahon protested that this would put him under pressure of time, to his credit he concluded his submissions well within the allotted timeframe. It would appear that Mr. McMahon had in that regard taken on board the judgment of the High Court delivered a few days earlier in *McMahon v. Bank of Scotland* [2017] IEHC 438. Those proceedings arose out of another loan transaction entered into by the McMahons with a different entity and Twomey J. delivered judgment on a motion brought by the defendants to strike out the claim as being frivolous and vexatious and bound to fail. Twomey J. dismissed the plaintiffs' claim and it is fair to say, levelled some fairly trenchant criticism at the McMahons in the course of his judgment essentially for wasting court time with what he described as nonsensical claims. Some of the issues raised in those proceedings are very similar to those raised in the instant case. In addition to dismissing the claim, Twomey J. also of his own motion made an Isaac Wunder order against the McMahons.

8. I propose to deal with what appear to me to be the main issues raised by the McMahons in these proceedings. If there are any so called issues with which I have not dealt, that is not because I have overlooked them but because in my view they are non-issues that require no analysis.

9. One of the main themes explored at length by the McMahons is the issue of securitisation of their loan. They allege that their loan was part of a bundle of securities sold by Bank of Ireland to an entity known as Kildare Securities Ltd. The defendants allege that the Bank securitised approximately €3 billion of its loans to this entity in 2008. There is no evidence that this ever actually happened, other than a mere assertion by the McMahons that it did. However, assuming for a moment that it did, as far as I can understand the argument, the McMahons are suggesting that this means in some way that the Bank has lost its title to the loan and can no longer enforce it against them.

10. They say also that they never consented to the securitisation of their loan and this also renders it non recoverable. A similar

argument was made in the proceedings before Twomey J. which he rejected out of hand, holding that issues such as securitisation had long since been determined in previous proceedings and could not be relitigated by the McMahons. Among the authorities referred to by Twomey J. as support for this proposition was *Freeman v. Bank of Scotland* [2014] IEHC 284 where McGovern J. approved an earlier judgment of this court (Peart J.) on the issue of securitisation:

"[12.] In *Wellstead v. Judge Michael White* [2011] IEHC 438, Peart J. rejected an argument that a lending bank was not entitled to the benefit of an order for possession that had been made in favour of the lender because the relevant housing loan had been securitised. The learned judge said:

> 'The applicant is also seeking leave to argue that Ulster Bank have no longer any entitlement to benefit from the order for possession because as part of some unspecified securitisation agreement the bank has sold the applicant's mortgage, and is therefore no longer owed anything on foot of the mortgage herein
>
> . . .
>
> His grounding affidavit characterises the action by Ulster Bank in seeking repossession in circumstances where it no longer owns the mortgage and has been repaid the money lent to the applicant is (sic) fraudulent, misleading and premeditated.
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> In relation to the last argument, Counsel for the bank has referred to clause 17 of the mortgage deed executed by the applicant and his former partner, which contains a consent by the mortgagors to such a disposal of the benefit of the mortgage to another party by way of a securitisation scheme or otherwise, and it is submitted that this is a point which it is simply not open to the applicant to argue, even if he was in time to do so, since he has consented to that occurring. I agree.
>
> But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors.' "

11. Accordingly, not only is there no basis for a complaint by the McMahons about securitisation of their loan, even if it occurred, but as in the case decided by Peart J., it is clear from the terms of the loan document that the McMahons expressly gave their consent to any such securitisation. As already noted, Part 3 of the loan agreement contains general and special conditions, number 10 of which is entitled "Securitisation and Collateralisation" and expressly empowers the lender to securitise the loan. Moreover, in the final section of the loan agreement entitled "Borrowers Acceptance and Consents" the following appears:

> "1. I confirm that I have read and fully understand the Consumer Credit Act Notices, set out above, and the terms and conditions contained in this offer letter and I confirm that I accept this offer letter on such terms and conditions.
>
> 2. I hereby consent irrevocably to (i) any future transfer, assignment or other disposal arising of the legal or equitable benefit of the loan, any and all security held therefor and all of the society's interests and rights arising thereunder whether as part of any loan transfer and securitisation scheme or otherwise howsoever arising; and (ii) the creation by the society of any mortgage, charge, security interest or encumbrance howsoever arising whether legal or equitable over the loan, any and all security held therefore and all of the Society's interests and rights arising there under whether as part of any collateralisation scheme or otherwise howsoever arising…"

12. Clause 10 of the special and general conditions to which I have already referred is also material in this regard and provides:

"(a) The borrower's attention is drawn to the fact that the loan and the Society's security and any associated rights and interests (including the debt secured and rights and interests under related insurances and assurances) will be freely transferable by the society

> (i) whether by transfer, conveyance, assignment, mortgage or charge, whether a fixed or floating mortgage or charge and whether by sub mortgage or sub charge or otherwise, or
>
> (ii) whether as part of a loan transfer and securitisation scheme or otherwise, on such terms as the Society may think fit.
>
> (iii) The Society confirms that in the event of the loan and the Society's security being transferred (as described in the immediately preceding paragraph), and where there is to be or where there may be an arrangement under which the Society will service the loan as an agent of any transferee, (i) any such transferee's policy on the handling of arrears and in the setting of mortgage interest rates following such transfer will be the same as the Society's general policy, (ii) that the Society will handle arrears as its agent, and (iii) the borrower's membership rights in the Society shall be unaffected…"

13. It is therefore clear beyond doubt that the McMahons are not entitled to make any complaint based on any alleged securitisation of their loan as they expressly consented to it. Further, even if that were not the case, the authorities to which I have referred make clear that securitisation, if it occurred, does not affect the lender's right to recover the debt.

14. Another theme repeatedly revisited by the McMahons in their affidavits is an alleged violation by the Bank of the European Council Directive on Unfair Terms in Consumer Contracts 93/13/EEC as transposed into Irish law by the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 (S.I. 27/1995). The defendants complain that the terms of their contract with the Bank are unfair and thus unenforceable. They rely inter alia on the judgment of this court (Barrett J.) in *AIB v. Counihan* [2016] IEHC 752. The defendants argue that aspects of their contract with the Bank were unfair and the effect of this was to create a significant imbalance in the parties' rights to the detriment of the consumers. What is notable about this submission is that despite its repetition on a number of occasions in various affidavits, the McMahons have never identified any specific term of their contract with the Bank which they say is unfair or why it is unfair.

15. *Counihan* was an application for summary judgment by a bank. The issue was, as in many such cases, whether the defendants had raised an arguable defence sufficient within the meaning of the test in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 to persuade the court that the matter should go to full plenary hearing. The defendants in Counihan argued that certain representations had been made by bank officials to them which could potentially have given rise to an estoppel against the bank. The primary issue with which the court was concerned was whether that assertion could amount to a fair or reasonable probability of the defendants having a bona

fide defence. The court held on the facts that it did and remitted the matter for plenary hearing.

16. In the course of his judgment, Barrett J. referred to a decision of the European Court of Justice, in *Aziz v. Caixa d'Estalvis De Catalunya* (Case C-415/11, Judgment of First Chamber, 14 March, 2013). Mr. Aziz had a mortgage with a Spanish bank. Clause 15 of the mortgage loan agreement dealing with default stated that the bank could bring enforcement proceedings based purely on its own certificate quantifying the amount due. Mr. Aziz contended that this clause was unfair by reference to the Directive and the court agreed with him. In a passage cited by Barrett J., the ECJ observed:

> "46 In that context, 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 this 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…"

17. I fail to see how this case assists the McMahons in any way. As I have noted, they have not pointed to, nor have I been able to discern, any term of the contract between them and the Bank that has operated unfairly against them in the context of these proceedings. This is accordingly a non-issue.

18. It would appear from the McMahons' submissions and affidavits that in addition to these proceedings, the Bank also instituted possession proceedings against them in the Circuit Court. They have repeatedly complained that the fact that they have to fight the Bank in two courts at the same time is unfair and unconstitutional. They have not explained why. The causes of action are entirely different. The within claim could only be brought in the High Court. The possession claim, depending upon the basis of jurisdiction, could potentially only be brought in the Circuit Court or alternatively in the Circuit Court or the High Court. Even if the possession claim could have been brought in the High Court, it would clearly be less onerous in terms of costs from the defendants' point of view to have the case determined in the Circuit Court. I can therefore see no conceivable basis for the suggestion that this is in some way unfair, oppressive or still less unconstitutional.

19. In similar vein, the defendants argue that the summary judgment procedure in this court constitutes a violation of their right to a fair trail under the European Convention on Human Rights and amounts to, as Mr. McMahon described it, a "rush to judgment". As already noted, it has taken over four years for the proceedings to get to this point and they have already been before the court on some sixteen different occasions. All of this delay has been orchestrated by the defendants who have repeatedly sought adjournments of the case, including up to the hearing of this summary application, for unmeritorious reasons. They appear to me to have received an enormous amount of latitude from the court to date and to seek to categorise this as a "rush to judgment" is, to put it mildly, ironic. This point too is devoid of any merit.

20. The McMahons have made a number of complaints about the appointment of a receiver over their property and the activities of the receiver which they describe as unlawful, illegal, criminal and fraudulent to name but a few. They also complain that the Bank is somehow in breach of the terms of the Registration of Title Act, 1964 in relation to the registration of their title to the mortgaged property. None of this has anything to do with this claim. Accordingly I do not propose to consider it further.

21. The McMahons also place reliance on the terms of the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations, 1989 (S.I. No. 224/1989) dealing with what is colloquially known as "doorstep selling". These regulations provide that a contract to which they apply shall not be enforceable unless a notice is given to the consumer at the time the contract is entered into informing him or her of his right to, inter alia, cancel the contract within seven days. The McMahons claim that they were not furnished with such a notice but they have now in any event served notice of cancellation and this means that the debt is no longer enforceable.

22. Even a cursory reading of these regulations shows clearly that they have no application to the facts of this case. Regulation 3 provides that they shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded –

> "(i) during an excursion organised by the trader away from his business premises, or
>
> (ii) during a visit by a trader—
>
> (I) to the consumer's home or to that of an other consumer, or
>
> (II) to the consumer's place of work,
>
> where the visit does not take place at the express request of the consumer."

Some other similar provisions are also contained in Regulation 3. No realistic suggestion has been made by the McMahons in this case, nor could there be, that they entered into this mortgage with the lender in some form of doorstep selling arrangement. Patently therefore, the Regulations have no application.

23. Another theme consistently put forward by the McMahons is that the Bank owed them some sort of fiduciary duty to ensure that their venture, as they describe it, was a sustainable one. They suggest that this "venture" failed because the Bank was reckless in itself getting into financial difficulty in 2008 and becoming potentially insolvent. The evidence of this, according to the McMahons, is the "bank bailout, the current Banking Inquiry and also the comments of most financial experts". Yet again, these allegations are gratuitous and irrelevant to the issues in this case. Indeed, a notable feature of the defendants' affidavits is the assertion that if they make a claim that is not rebutted, it is deemed to "stand as truth". In these proceedings, as indeed in the proceedings before Twomey J., the applicants' affidavits are replete with scurrilous allegations against all and sundry which they consider must be accepted by the court as true unless expressly denied. In this, as in many other issues, the defendants are mistaken.

24. The Bank owed no fiduciary duty to the McMahons in this case and they have pointed to no fact or authority which supports that proposition. Insofar as any sense can be made of this point, it appears to amount to little more than an allegation, unsupported, of reckless lending by the Bank, a path repeatedly trodden by many defendants and long since rejected by the courts as giving rise to any cause of action. There is no tort of reckless lending.

25. The many affidavits sworn by the defendants are notable for a number of other features. They consistently require the plaintiff's deponents to prove that they are who and what they say they are. They call for further proof to their satisfaction of matters which

are either already proved or are not in dispute. They repeatedly require production of documents which are either irrelevant, undisputed, the subject of failed discovery applications or with which they have already been furnished or given multiple opportunities to inspect.

26. They continuously object to alleged hearsay in the plaintiff's affidavits indicating an apparent knowledge of the rule against hearsay. In the same breath, they purport to rely on "audit" documents from vaguely identified third parties such as Certified Forensic Loan Auditors, IRC Ireland and Abbacus Accounting which are all pure hearsay, are not even signed by any identified individual and which I am perfectly certain the defendants know to be inadmissible. Notwithstanding that fact, the Bank point to the fact that the Abbacus Accounting "audit" documents suggest an overcharge on the debt calculation of a sum of €983.08 which the Bank have indicated they are prepared to waive in the circumstances.

27. Having considered all the issues raised by the McMahons in these proceedings, I am perfectly satisfied that they have no bona fide defence to this claim and certainly not one which could be described as approaching the standard of amounting to a fair or reasonable probability of having such defence.

28. In the course of his submissions, counsel for the Bank described the tactics adopted by the McMahons as an attempted trial by telephone directory, a description with which I agree. The McMahons have sought throughout to prolong, obfuscate and frustrate these proceedings at every turn. Another ironic feature of their submissions was the repeated reference to an anxiety on their part to ensure that "precious court time" was not wasted in this case. They have sought to do precisely that. The object of raising a multitude of points, mostly if not entirely spurious, and repeatedly seeking adjournments to put in more affidavits, to seek more documents, and to await the outcome of other, irrelevant, litigation is no more than an attempt to postpone, hopefully from their point of view indefinitely, the inevitable. It is a manifest abuse of the court process.

29. The plaintiff is therefore entitled to judgment in the amount claimed.