

## THE HIGH COURT

[2018 No. 44 C.A.]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

MARGARET FAHY

DEFENDANT

**EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 15th day of May, 2019.**

1. This is an appeal from an order of the Circuit Court brought by Ms. Fahy the defendant in these proceedings, the order having been made by her Honour Judge Fergus on 28th November 2017, being an order for possession in respect of the property known as 4 Prospect Hill, Galway, in Co. Galway.

2. That property was the subject matter of a mortgage entered into by the plaintiff's predecessor, the Governor and Company of the Bank of Ireland of which the current plaintiff, the Bank of Ireland Mortgage Bank is a subsidiary. The mortgage covered four loans entered into between 1996 and 2006, and in respect of each of those loans there has been a substantial default as is clear from the affidavits sworn on behalf of the plaintiff in these proceedings.

3. As I have said the loans ultimately were transferred from the Governor and Company of the Bank of Ireland to Bank of Ireland Mortgage Bank which is the plaintiff in these proceeding, and I am satisfied that the proofs are in order that are contained in the affidavits sworn on behalf of the plaintiff in these proceedings. I should also refer to the fact that I have reviewed the terms of the mortgage deed itself and I am satisfied that it contains no terms which could be regarded as unfair, certainly no relevant terms in these proceedings which could be regarded as unfair in the context of the unfair contract terms legislation.

4. The court is of course required of its own motion to assess those terms whether invited to do so or not and that's as a result of a decision in the European Court of Justice in the Aziz case which was referred to by this court, Mr. Justice Barrett, in the case of *AIB v Coughlan*.

5. So I am satisfied therefore that the proofs that are before the court in respect of the matter are in order. It seems that default occurred and a demand for payment of the arrears was made on 23rd January 2015, which was not responded to and ultimately a demand for possession was made on 1st December 2016.

6. Now in response to these proceedings, the defendant Ms. Fahy swore a lengthy affidavit which as I pointed out in discussions with her and counsel this morning consists entirely of legal submissions, and is replete with references to case law, statutes, European Conventions and Charters and as I indicated earlier, not least Magna Carta of 1215.

7. It also suggests in the course of the affidavit that the property, the subject matter of these proceedings is now held in what is described as a private irrevocable trust by unnamed and unknown third parties. This form of affidavit is one with which this court is very familiar. And indeed the arguments it contains it seems to me are to be found in many similar affidavits put before the courts on a daily basis.

8. These affidavits are obviously and transparently drafted by third parties on behalf unfortunate defendants like Ms. Fahy who turn to these unqualified, agenda – driven persons and groups for assistance and I am quite sure in return for reward and payment on the part of the litigants who seek their assistance.

9. These affidavits are of course entirely inadmissible in a court of law and I explained the reasons for that in the judgment I gave in the case of *Bank of Ireland Mortgage Bank v Martin* which is reported in [2017] IEHC 707. In paragraph 9 of that judgment I said the following, which I think is also equally applicable to the facts of this case:

"Affidavits of the type deployed by the first defendant in this case are increasingly common. They often display an extraordinary knowledge of the minutiae of statutes, court rules, EU and case law, almost universally to entirely misguided effect. It cannot have escaped the attention of those who draft such affidavits consisting almost entirely of argument and submission that the Rules of the Superior Courts expressly forbid this. Order 40 rule 4 provides:

'Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statement as to his belief, with the grounds thereof, may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall not be allowed.'

10. In the past, it has tended to be the case that the courts have afforded a certain degree of latitude to impecunious litigants in person, who for genuine and understandable reasons may not be able to afford the services of a qualified lawyer. Thus non-compliance with the Rules may be overlooked where the litigant in person is doing his or her best to put forward their case. In recent years however, and particularly since the economic collapse, there has been a sea change in the prevalence of litigants in person assisted by agenda driven pressure groups and individuals providing McKenzie friend services for reward.

11. Without exception in my experience, these groups and individuals cause significant harm to those they purport to assist by giving them advice which is not just wrong, but entirely detrimental to the litigant's interests. These people know well that they cannot represent their 'clients' in court or make submissions on their behalf. Instead they incorporate their so-called submissions into affidavits which are sworn by the litigant, perhaps genuinely believing it will help his case, as a means of putting them before the court in blatant disregard of the Rules. In *KBC v Flynn* I referred to the many legal resources available at little or no cost to litigants. The fact that a litigant decides to seek the assistance of dubious McKenzie friends instead does not arise from an inability to obtain proper legal representation but rather from a conscious decision to engage in political protest and obstruction not just towards the opposing party but to the court."

10. With all of this in mind I gave Ms. Fahy the opportunity this morning of giving oral evidence to allow her to convince me that, contrary to what I believed to be the case, this purported affidavit is in fact her own document. But it is manifest from her evidence that she did not draft this affidavit and knows nothing whatsoever about what it contains. Like others of whom I have asked the same question in the past, they are coached by their advisors to say they found it on Google and steadfastly refuse to identify the persons who did in fact draft the affidavits.

11. Indeed one of the defences raised in this case is that the defendant's property as I have said is in a private irrevocable trust, and in that regard a letter has been exhibited by the bank in this case which is dated 13th December 2016 and it is from a person whose name is indecipherable on the document, I suspect deliberately, who is known only as "the Executor". That document is entitled 'Notice Sent To The Banks' Solicitors' and it refers to the solicitor's reference, to the mortgage account and the mortgaged property and it says in capitals:

"FOR THE ATTENTION OF MR. MARK WOODCOCK AND HIS SERVANTS, AGENTS AND OTHERS NOTICE TO AGENT IS NOTICE TO PRINCIAL AND NOTICE TO PRINCIPAL IS NOTICE TO AGENT !

Dear Mr. Mark Woodcock,

I write to you today as the trustee of a private irrevocable contract trust in which Margaret Fahy, Corbally South, Cummer, Tuam, Galway has placed all her property. I refer to your letter of 1st December 2016 [that being the letter demanding possession].

I now hereby call on you to cease and desist from writing to Margaret Fahy of Corbally South, Cummer, Tuam, Co. Galway. For the record this property has nothing more to do with Margaret Fahy. For the record you are on notice that the property at 4 Prospect Hill Co. Galway as is all Ms. Fahy's other properties are placed in a private irrevocable trust. I attach copy of affidavit.

Signature illegible, and signed 'the Executor' ".

12. I asked Ms. Fahy about this document when she was giving oral evidence before me this morning and she was unable to tell me anything about it or who the person was by whom it was issued which is somewhat surprising given that one of her principal defences in the affidavit sworn by her relies on this trust. I am satisfied the reason that Ms. Fahy and other unfortunate litigants like her do not disclose this information to the court when asked is because the persons who are involved in this activity, and it is an unlawful activity, know that their activities are unlawful and potentially criminal and that is to be gleaned from the terms of the Solicitors Act of 1954. Lest anybody think this is a little know arcane provision, it is expressly referred to in Practice Direction HC72 which deals with McKenzie friends and with which all of the persons involved in this unlawful activity are well familiar and paragraph 6 of that Practice Direction provides as follows :

"The attention of litigants and proposed MFs is drawn to the provisions of section 58 of the Solicitors Act 1954 as amended which makes it a criminal offence for an unqualified person, as defined in the Act, to draw or prepare a document relating, inter alia, to any legal proceeding either directly or indirectly for or in expectation of any fee, gain or reward."

13. So that makes the position is seems to me perfectly clear to all persons involved in this activity. But the effect of their unlawful activity and abuse of process on unwitting litigants like Ms. Fahy is to greatly increase their exposure to the costs of pursuing what are futile and groundless appeals to higher courts.

Because Ms. Fahy was unable to satisfy me that she has any meaningful knowledge of anything that is contained in the affidavit upon which she purports to rely, I struck out her affidavit this morning as it constitutes a clear abuse of process and further is not in compliance with the Rules of the Superior Courts for the reasons I have already explained.

14. This left the court in the position of having no admissible evidence before it from the defendant and no arguable grounds advanced by the defendant in her own submissions before the court. I should point to the fact that Ms. Fahy attempted to introduce more affidavits this morning, no doubt from the same source as the previous affidavit and I ruled those out. They were disallowed on the basis that as this is a Circuit appeal no leave was granted to introduce new evidence and being introduced this morning it seems to me the only purpose that they were sought to be introduced was to cause the matter to be adjourned. Indeed the other side have never even seen these affidavits.

15. So I am perfectly satisfied for all these reason that the learned Circuit Court judge was entirely correct and I affirm her order. And I should say finally I note that Ms. Fahy has arranged for the attendance of a stenographer to attend before the court today even though this is a Circuit appeal and I assume this is with a view to an appeal to the Supreme Court encouraged perhaps by the same parties who seek to remain anonymous at her expense.