Neutral Citation [2015] IEHC 353

THE HIGH COURT

[2014 No. 44Sp]

BETWEEN

ALLIED IRISH BANKS plc

PLAINTIFF

AND

THOMAS DARCY AND ANTOINETTE DARCY

DEFENDANTS

JUDGMENT of Mr. Justice David Keane delivered on the 20th May 2015

Introduction

1. This is an application by the plaintiff bank ("the bank") for an Order for possession of four specified properties ("the properties") mortgaged to it by the defendants. The bank seeks the said Order pursuant to s. 62(7) of the Registration of Title Act 1964 and s. 1 of the Land and Conveyancing Law Reform Act 2013.

The Proofs

2. The application is brought by special summons that issued on the 28th January 2014. In the special indorsement of claim set out in that summons, the bank identifies each of the properties and the date of the "all sums due" legal charge to which each property is subject in favour of the bank.

3. The special sumons is grounded on an affidavit sworn on the 28th January 2014 by Conal Regan, who is a Manager of Intermediate Services with the bank. Mr Regan avers that the defendants have defaulted in the repayment of the loans they obtained to fund the acquisition, re-financing or development of those properties.

4. Mr Regan has exhibited the deed of indenture or mortgage and an attested copy of the folio and the certificate of charge in respect of each of the properties.

5. Mr Regan avers that, by four separate letters of loan sanction dated the 19th January 2006, 17th July 2007, 10th March 2008 and 4th June 2008, the terms of which were accepted and signed by the defendants, the plaintiff agreed to advance to the defendants five separate loan facilities with a total value of €15,808,303.00.

6. By letter dated the 27th April 2010, the bank demanded repayment of the sums outstanding on various loan accounts held by the defendants, including the sum of €17,131,877.80, being the total amount due in respect of the loan facilities just described, together with interest.

7. In High Court summary proceedings bearing the title *"Allied Irish Banks plc v. Thomas Darcy and Antoinette Darcy, Record No. 2292S of 2010,"* the bank obtained an Order for judgment against the defendants on a default basis on the 16th February 2011 in the sum of €17,422,790.53. The defendants later brought an unsuccessful application to set aside that judgment before Ryan J. in the High Court.

8. By letter dated the 21st November 2013, the bank demanded payment of the sum of €21,154,079.30, being the amount owed by the defendants on foot of the judgment just described plus accumulated Courts Act interest at 8%. Mr Regan avers that the defendants have failed, neglected or refused to honour that demand by discharging the sum due, with the result that the bank issued the present proceedings, as already outlined, on the 28th January 2014.

9. The bank relies on averments contained in an affidavit of service of Eoin Brereton, solicitor, sworn on the 28th February 2014, and in a further affidavit of Conal Regan, sworn on the 1st April 2014, that the bank knows of no other person (apart from the defendants who have been served with these proceedings) in actual occupation of, or in receipt of the rents and profits of the properties, as evidence that it has complied with the requirement of Order 9, rule 14 of the Rules of the Superior Courts.

10. Accordingly, the bank contends that it is entitled *prima facie* to the order that it seeks for possession of the properties. I will return to the question of the necessary proofs later in this judgment.

Procedural history and earlier proceedings

11. In the grounding affidavit of Mr Regan, the bank acknowledges that the present proceedings have been necessitated by a decision and Order of the Supreme Court made on the 13th November 2013, to set aside an earlier Order of this Court made on the 16th April 2012 (*per* McGovern J.), granting the reliefs that the bank now seeks for a second time in these proceedings.

12. Mr Regan avers that the appeal before the Supreme Court proceeded on the basis that, regardless of the outcome of the defendants' appeal in those proceedings, by reason of the commencement of the relevant provisions of the Land and Conveyancing Reform Act 2013 on the 31st July 2013 the plaintiff would now be entitled to invoke the terms of s. 8(7) of the Registration of Title Act 1964 to apply to the court in a summary manner for the possession of the relevant property in new and separate proceedings, were it disposed to do so, as, it transpires, it was.

13. However, it would appear that the bank's failure or omission to serve a notice of discontinuance in respect of the first set of proceedings, which had been remitted to plenary hearing by the Supreme Court, before issuing the present proceedings, resulted in an Order made by the Master of the High Court on the 9th May 2014 striking out the special summons in the present proceedings. The Order of the Master was appealed to this Court, where, after a contested hearing on the 17th October 2014, Gilligan J. allowed that appeal and reinstated the special summons in the list for hearing, refusing a stay upon that determination. I am given to understand that the first named defendant subsequently applied to the Court of Appeal for a stay on the proceedings pending the determination

of the defendants' appeal against the Order of Gilligan J. but his application in that regard was struck out in view of the bank's undertaking that, should it be successful in obtaining the Order for possession of the properties that it now seeks, it will not attempt to enforce that Order pending the determination of the defendants' appeal.

14. In his Order made on the 17th November 2014, Gilligan J. directed the defendants to file any replying affidavit or affidavits they may wish by close of business on the 29th October 2014. That was not done. Instead, the defendants each sought to rely on an affidavit that each of them has sworn on the 13th November 2014, the day prior to the hearing of the present application before me. No explanation or excuse has been provided in that regard. The bank indicated that it was not maintaining any objection to the late filing of those affidavits, on the basis that any such objection would almost certainly necessitate an adjournment, in circumstances where the bank was anxious to proceed.

The arguments of the first defendant

15. Counsel on behalf of the first named defendant submitted, quite correctly in my view, that for the purpose of the present application no regard should be had to any evidence purportedly adduced in the context of the first set of special summons proceedings brought by the bank, which proceedings have now been discontinued.

16. However, I do not accept that it is correct to suggest, as Counsel appeared to do, that the Court must instead consider afresh any issue or argument capable of being informed by the uncontroverted averments contained in the first named defendant's affidavit sworn on the 13th November 2014, without regard to the extent that those issues and arguments have already been determined by (or could reasonably have been raised before and, thus, determined by) Ryan J. in the context of the defendants' unsuccessful application to set aside the summary judgment in the sum of €17,422,790.53 that the bank has already obtained against them.

17. A single example may serve to illustrate this point. At pages 6 and 7 of his ruling on the defendants' application to set aside that judgment, in sequential paragraphs designated from (a) to (j), Ryan J. summarises the arguments relied upon by the defendants, which include the following:

> "(g) The [loan] contract was unconscionable and totally one sided and the plaintiff changed the terms and conditions at will. Mr Darcy cites an example of this as he says that occurred on the 3rd September 2009, when the bank without notice appointed a planning consultant to take over the running of the planning of the proposed development and also compelled the defendants to withdraw judicial review proceedings by threatening to terminate the loan facility and to evict the defendants from their family home over which the bank held a legal charge."

18. At page 8 of the judgment, Ryan J. concisely addressed that argument in the following terms:

> "A mere allegation that the contract was unconscionable or one sided and that the plaintiff changed the conditions "at will" is not evidence to prove breach of contract or to afford a defence. The example of oppressive behaviour put forward does not constitute a ground of defence."

19. In the present application, much of the affidavit sworn at the eleventh hour - in breach of the direction of Gilligan J. - by the first named defendant is devoted to matters relevant to the same issue or argument *redux*, or to some variation upon it that might have been raised before Ryan J. but which evidently was not.

20. I am satisfied that it is not open to me to consider any issue of the defendants' liability in respect of the underlying loan facilities, as that issue has already been determined against the defendant by this Court. The said determination is reflected in the Order and judgment of Ryan J. made on the 20th July 2012. In reaching that conclusion, I do not think, as was suggested by Counsel for the first named defendant, that I am making the mistake of conflating the present proceedings with any previous ones; rather I believe that I am properly and necessarily applying the doctrine of *res judicata* and the rule in *Henderson v. Henderson*.

21. The second issue raised by Counsel for the first named defendant is one by now very familiar to this Court but which was addressed by Counsel as though it were a matter of first impression. Shortly put, Counsel submits that, as a matter of probability, the loans at issue (in respect of which the liability of the defendants has already been established) are almost certainly subject to some form of securitisation by the bank, such that the Court cannot be satisfied that the bank is entitled to enforce them, absent a full plenary hearing on that issue.

22. While not relying on any authority, Counsel did point to the permissive provision of s. 58 of the Asset Covered Securities Act 2001 ("the 2001 Act"), whereby a designated credit institution may transfer to another credit institution "all of its assets or such assets as it specifies" subject to various controls, and, in particular, s. 58(9) whereby, upon such transfer of assets, the transferred credit union assumes the same rights and obligations in respect of those assets as the transferor previously had and the transferor immediately ceases to have those right and obligations.

23. However, as Counsel for the bank pointed out, there is no evidence whatsoever before the Court that the loans in respect of which the defendants have already been found liable to repay the bank comprise an asset, or part of any asset, that has been transferred by the bank to any other credit institution pursuant to the terms of s. 58 of the 2001 Act.

24. Moreover, Counsel for the bank was able to point to a number of decisions of this Court directly addressing the issue of the significance, if any, of a claim that there may have been securitisation by a financial institution of a loan that it seeks to enforce.

25. Perhaps most recently, that issue was considered in *Kearney v. K.B.C. Bank Ireland plc* [2014] IEHC 260. In that case, Birmingham J. dismissed, as disclosing no cause of action, proceedings in which it was pleaded, *inter alia*, that the defendant bank had not retained the entitlement to enforce loans it had advanced to the plaintiff following the securitisation by that bank of those loans. In doing so, Birmingham J. expressed complete and respectful agreement with the following views of Peart J. in *Wellstead v. Judge White and Others* [2011] IEHC 438:

> "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."

26. Birmingham J. went on to note that the views expressed by Peart J. accord with the approach of the English Court of Appeal in the case of *Paragon Finance plc v. Pender* [2005] 1 W.L.R. 3412, observing:

> "The Court of Appeal was of the view that all that the special purpose vehicle acquired, under an uncompleted agreement to transfer the legal charge, was an equity in the mortgage. Paragon remained the legal owner, and as registered proprietor of the charge, retained all the powers of a legal chargee, including the right to possession, nor was it necessary to join the special purpose vehicle."

27. By reference to the foregoing authority, I am satisfied that the mere possibility (even if considered a probability) that the defendants' loans have been securitised is, in and of itself, incapable of amounting to evidence sufficient to defeat the bank's claim to an Order for possession of the properties at issue.

The arguments of the second defendant

28. In order to place the arguments raised by the second defendant in their proper context, it is necessary to consider in a little greater detail, the nature and circumstances of her involvment in the transactions that she now seeks to impugn in opposition to the bank's application.

29. Each of the four separate letters of sanction, detailing each of the five separate loan facilities in issue, has been exhibited to the affidavit of Mr Regan. Each facility is expressed to be offered subject to the bank's "terms and conditions governing business lending."

30. The first letter of sanction, dated the 19th January 2006, is addressed to the defendants at 12 Knightsbridge, Castle Avenue, Clontarf, Dublin 3. It involves a loan facility in the sum of €4,500,000 for the followings purposes: the acquisition of two residential development sites at 17 and 21 Myra Manor, Malahide, County Dublin; the development of a residential property at Woodview, Grey's Lane, Howth, County Dublin; the construction of a residential property at one of the two sites at Myra Manor; local authority fees; the fit out of the residential development property at Woodview; and the discharge of the balance on an existing account. The facility letter is signed by both defendants.

31. The second letter of sanction, dated the 17th July 2007, is addressed to the defendants at the Woodview property. It involves two loan facilities in the total sum of €10,054,000 for the following purposes: the purchase of a residential development site at Kitestown, Howth, County Dublin; the necessary deposit concerning the social housing element of that site; architects fees associated with the development of that site; and a further €1 million in respect of the development of the second of the two sites at Myra Manor. The facility letter is signed by both defendants on the 18th July 2007.

32. The third letter of sanction, dated the 10th March 2008, is again addressed to the defendants at the Woodview property. It involves a loan facility in the sum of €15,484,000 for the purpose of restructuring the existing debts already referred to. The facility letter is signed by both defendants on the 27th March 2008.

33. The fourth letter of sanction, dated the 4th June 2008, is also addressed to the defendants at Woodview. It involves a loan facility in the sum of €15,808,303 by way of renewal of the previously existing facility, together with accrued interest. Once again, the letter is signed by both defendants on the 4th June 2008.

34. Mr Regan has also exhibited the relevant mortgage deeds. The first of those is an indenture made on the 27th January 2006 between the defendants, whose address is given as 12 Knightsbridge, Castle Avenue, Clontarf, Dublin 3, and the bank. It identifies the mortgaged properties as both Woodview and the two sites at Myra Manor already described. It is executed by each of the two defendants in the presence of a solicitor. The second is a mortgage of the Kitestown residential development property. It is dated the 27th July 2007 and identifies the mortgagors of that property as each of the defendants with an address at the Woodview property. It is executed by each of the two defendants in the presence of a solicitor.

35. Most notably for the purpose of the present application, Mr Regan has exhibited the certified copy folio in respect of each of the properties at issue. Those folios disclose that the defendants are registered as co-owners of each of the properties.

36. This last point is particularly relevant to the first argument advanced on behalf of the second named defendant, which is, as I understand it, that the relevant mortgage deeds are invalid due to a failure to comply with the requirements of the Family Home Protection Act 1976 ("the 1976 Act").

37. Before addressing that argument, I pause here to observe that it is advanced on behalf of the second named defendant on the basis of her averment that the property at Woodview is her family home, notwithstanding the position, apparently common case between the parties, that the Woodview property was destroyed in an accidental fire some time ago and has not yet been reinstated, and that the defendants are, in fact, currently residing in one of the two properties they co-own at Myra Manor.

38. In particular, Counsel for the second named defendant submits that the bank did not obtain her consent, written or otherwise, to the mortgaging of the Woodview property, in breach of the requirements of the 1976 Act.

39. It seems to me that the bank is correct in its contention that this argument, raised for the first time at the eleventh hour, is entirely misconceived in law. It is beyond dispute that the second named defendant is the co-owner of each of the properties at issue. In *Bank of Nova Scotia v Hogan* [1996] 3 I.R. 239, the Supreme Court was dealing with a challenge to the validity of an equitable mortgage by deposit of title deeds of a property owned by a wife in respect of the indebtedness of both the husband and wife concerned. In giving judgment for the Court (O'Flaherty and Blayney JJ. concurring), Murphy J. stated as follows (at 246):

> "Whilst there is a similarity between the facts in *Bank of Ireland v. Smyth* [1995] 2 I.R. 459 and certain of the facts in the present case, there is also a fundamental difference which renders the …case of little assistance in resolving the problems which arise here. *Bank of Ireland v. Smyth* [1995] 2 I.R. 459 did concern a dealing by a spouse with a matrimonial home in circumstances which were likely to be – as the events proved – to her detriment and that of her family. Those facts indicate the resemblance with the situation in which Mrs. Hogan found herself. On the other hand the crucial distinction is that Mrs. Hogan was dealing with property of which she was the owner whereas Mrs Smyth was being asked to give, and purported to give, her consent under s. 3 of the Family Home Protection Act 1976 to a mortgage of the family home by her husband. Whilst it may appear that a person dealing with his or her own property is entitled to as much protection as a person called upon to give a consent in relation to a dealing with the property by another, that is not the case. The analysis made by Blayney J. of the Act of 1976 and in particular s. 3 thereof shows why this is not the case. As a result of s. 3, sub-s. 1 of the Act of 1976 certain dispositions of an interest in a family home are void unless the purported conveyance by one spouse is made with the consent of the other. From that statutory provision two consequences flow, first that a grantee or purchaser must, in his own interest, ensure that the necessary statutory consent is forthcoming and, secondly, that the consent, if given, is a true consent, that is to say, constitutes a decision which represents a fully free exercise of the independent will of the spouse concerned. Thus, cases turning on the

adequacy of a consent required and alleged to have been given under the Family Home Protection Act, 1976, are distinguishable from those in which it is alleged that a spouse in the dealing with his or her own property did, or may have, acted under undue influence."

40. As Walsh J. described the position in *Bank of Ireland v. Purcell* [1989] 1 I.R. 327 (at 333):

> "The Family Home Protection Act, 1976, is a remedial social statute enacted to protect the interest of the non-owning spouse in the family home and to deal with and to seek to remedy the social problem which was created or could be created by the fact that the spouse who owned the family home could effectively put the other spouse out on the street by selling it or mortgaging it. This was sometimes done out of vindictiveness and the other spouse had no redress. Most frequently the victimised spouse was the wife. She and her children could be left to fend for themselves so far as accommodation was concerned. It was to secure the position of such a spouse the Act of 1976 was passed. It made provision for barring a spouse from the family home even when that spouse is the owner of that home, if such spouse was misbehaving in a manner contemplated by the Act. In particular the Act of 1976 secured the position of the non-owning spouse by s. 3 which provided that the owning spouse could not, without the prior consent in writing of the other spouse, purport to convey any interest in the family home to any person except that other spouse."

41. In *T.F. v. Ireland* [1995] 1 I.R. 321 at 343, Murphy J. expressed the following view with which I find myself in respectful agreement:

> "The purpose of the Act of 1976, as its title indicates, was to protect the dwelling in which the married couple reside. In particular the purpose of the legislation appears to have been to prevent the spouse who owned the family home from disposing of it in a vindictive or oppressive manner. Neither the Act of 1976 nor any of the subsequent Family Law Reform Acts purported to transfer from the spouse who owned the family home any share therein to the spouse who had not purchased or contributed to the purchase thereof. What the Act did was to confer upon the non-owning spouse the right to veto any disposition of the family home not made in accordance with the provisions of that Act. It did not otherwise affect property rights."

42. In *In the matter of Jeffel (In Receivership)* [2012] IEHC 279, having considered the pithy analysis of the purpose of s. 3(1) of the 1976 Act by Henchy J. in *Nestor v. Murphy* [1979] I.R 326 as being to give a right of avoidance to "the spouse who was not a party to the transaction", elsewhere described as "the non-disposing spouse" or "the non-participating spouse", Gilligan J. concluded that the reference in the definition of "family home" at s. 2 of the 1976 Act to "the spouse whose protection is in issue" must be presumed to be a reference to the "non-owning spouse" for it would be absurd to find that a spouse vested with full legal and equitable title in a property could have recourse to the 1976 Act.

43. Applying the foregoing analysis to the circumstances of the present case, it seems to me that the second named defendant is confusing the situation that appertained here, *i.e.* one in which she jointly engaged in transactions concerning the family home that she and her husband jointly owned, with the quite different one whereby a spouse, as sole owner of the family home, purports to deal with that property without the consent of the other non-owning spouse.

44. Accordingly, I am satisfied that there is nothing in the provisions of the Family Home Protection Act 1976 as applied to the circumstances of the present case which operates to prevent the bank from obtaining the Order that it now seeks for possession of the properties.

45. The second argument advanced on behalf of the second named defendant is, in essence, that the Court should exercise its discretion to refuse to make the Order for possession sought, at least in respect of the Woodview property that the second named defendant claims is her family home (although destroyed by fire), because there has been a failure on the part of the bank to comply with the provisions of the Central Bank of Ireland *Code of Conduct on Mortgage Arrears,* 2010.

46. There are two principal problems with that argument on the facts presented. The first is that is entirely unclear that the relevant Code is intended to apply to large commercial loans secured upon various properties one of which is later asserted to have become the primary residence of the borrower(s), such as is asserted to be the case here. On the uncontroverted evidence before the Court, the defendants sought and received loan facilities in the sum of €15,808,303 for the express purpose of acquiring properties for development. The proposition that, by subsequently moving into one of those properties as their "primary residence", the defendants can change the essential nature of the whole transaction to one Covered by the Code and subject to the Mortgage Arrears Resolution Process ("MARP") is a novel one that, even if correct, presents several obvious practical difficulties.

47. Second, the bare averment of the second named defendant that the Woodview property is the family home, does not seem to me to be sufficient to establish it as "a primary residence" to which the provisions of the Code are applicable, in circumstances where it is conceded by the second named defendant that the said property became uninhabitable and dangerous as a result of an accidental fire there in 2009.

48. The Code defines "primary residence" as a property which is:

> (i) the residential property which the borrower occupies as his/her primary residence in the State, or
>
> (ii) a residential property in the State which is the only residential property owned by the borrower.

49. Since the defendants do not occupy the Woodview property at all, much less as their primary residence in the State, and as it is not the only residential property owned by the defendants, it seems to me that neither the Code nor the MARP under the Code is capable of applying to that property in fact, even if it were found to be potentially applicable to such property in principle.

50. Accordingly, I can find no merit in the submission that the Code applies. In consequence, it is unnecessary to proceed to consider whether the bank in this case should be considered debarred from seeking to exercise a right to possession by reason of a breach of the Code, in application of any of the principles articulated in the significant body of recent case law on that issue, culminating in the decision of the Supreme Court in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46.

Conclusion

51. Having considered and rejected the arguments put up on behalf of each of the defendants in opposition to the application for possession by the bank, I turn now to consider whether the bank has made out the necessary proofs in support of its application.

52. First, I am satisfied, by reference to the copies of mortgage deeds and various certified copy folios exhibited to the grounding affidavit of Mr Regan, that the bank is the registered owner of a registered charge in respect of each of the properties at issue.

53. Second, although the matter is not directly averred to, it is tolerably clear - from a consideration of the relevant terms of the mortgage deeds and of the uncontroverted averments of Mr Regan that the sum of €17,131,877.80 was due and owing on the 27th April 2010, leading to a summary judgment in favour on the bank in the sum of €17,422,780.63 on the 16th February 2011 - that the plaintiff's power of sale has, in fact, arisen under the terms of those mortgage agreements and is exercisable.

54. The third necessary proof, in my view, is that it must be established that there has been a failure to comply with a prior demand for possession. Unusually, in this case there is no averment on behalf of the bank that such a demand was made. However, as noted at paragraph 8 above, Mr Regan has averred that, by letter dated the 21st November 2013, the bank demanded payment of the sum of €21,154,079.30, being the amount owed by the defendants on foot of the judgment just described plus accumulated Courts Act interest at 8%, and that the defendants failed, neglected or refused to comply with that demand. The said letter is exhibited to Mr Regan's affidavit. On reading the text of that letter, it is evident that, in addition to a demand for payment on foot of a judgment, it also contains a demand for possession of the properties. Although it would be preferable if both that latter demand and, more particularly, the defendants' response (or lack of response) to it was directly averred to, it seems clear from the evidence that a demand for possession was made and it can reasonably be inferred from the manner in which these proceedings have been contested that the defendants have indeed failed, neglected or refused to comply with it.

55. The fourth proof is that possession of the property (or properties) at issue is necessary to effect a sale. In *Irish Permanent Building Society v Ryan* [1950] I.R. 12, Gavan Duffy P. observed (at 14):

> "In the affidavit made by the secretary of the plaintiff society, it is deposed that it would be difficult to effect a sale of the premises if the defendant remained in possession and that the value of the premises would be greatly enhanced by a sale with vacant possession. I am satisfied that a sale with the defendant in possession is likely to be far less satisfactory than a sale with vacant possession. I, therefore, propose making an order for the delivery of possession to the plaintiffs of the premises."

56. No comparable averment is to be found in the affidavits filed in support of the present application. With considerable hesitation and subject to the view that it would be greatly preferable and, depending on the facts of the case, may even be essential that the Court should be satisfied by evidence on this point, I have come to the conclusion that, on the facts of this case, I can take judicial notice of the proposition, stated in Wylie *Irish Land Law*, 3rd edn (Dublin, 1997) (at 13.022) that: "if the mortgagee is unable to obtain vacant possession of the property, he will find considerable difficulty in selling it, for no purchaser will buy property in the possession of a mortgagor." Accordingly, I am satisfied that a sale with the defendants in possession is likely to be far less satisfactory than a sale with vacant possession.

57. The fifth and final necessary proof, alluded to earlier in this judgment, is that the bank has complied with the requirements of Order 9, rule 14 of the Rules of the Superior Courts. By reference to the evidence described at paragraph 9 *supra*, I find that the necessary proof in that regard has been provided.

58. For the foregoing reasons, I am satisfied that the necessary proofs are in order for the grant of an order of possession of each of the properties at issue. For the reasons set out at paragraphs 15 to 50 *supra*, the defendants have failed to satisfy me that they have, or either of them has, any valid defence to the application. Accordingly, I will make the order sought for possession of the properties at issue.