Neutral Citation: [2015] IEHC 233

THE HIGH COURT

[2011 No. 689Sp]

BETWEEN

AIB MORTGAGE BANK

PLAINTIFF

AND

JOHN O'DOHERTY

DEFENDANT

JUDGMENT of Mr. Justice Keane delivered on the 21st April 2015

Introduction
1. This is an application by AIB Mortgage Bank ("the bank") for an Order for possession of thirteen separate residential investment properties ("the properties") mortgaged to it by the defendant, to facilitate the exercise of the power of sale conferred upon the bank under the relevant mortgage agreements.

The Proofs
2. The application is brought by special summons that issued on the 11th October 2011. In the special indorsement of claim set out in that summons, the bank identifies each of the properties and the date of the mortgage or charge to which each property is subject in favour of the bank.

3. The special sumons is grounded on an affidavit sworn on the 19th January 2012 by Hugh Mullally, a manager in the bank's credit operations department. Mr Mullally avers that the defendant has defaulted in the repayment of the loans he obtained to fund the acquisition of those properties

4. Mr Mullally has exhibited the indenture of mortgage in respect of each of the properties and, for those that comprise registered land, an attested copy of the folio and the certificate of charge also.

5. The bank submits that its power of sale has arisen and is exercisable in respect of each of the properties under the following circumstances. Mr Mullaly avers that, as of the 20th August 2009, the total sum due and owing to the bank by the defendant in respect of the relevant loans was €4,799,770.60, which amount was still due and owing when the bank made a demand for repayment of that sum by letter dated the 3rd September 2009, the bank's contention being that the secured monies had fallen immediately due and owing under the terms of each of the applicable indentures of mortgage because of the defendant's default in making the agreed repayments. Mr Mullally deposes that the defendant failed to discharge the sum demanded, or any part of it, with the result that the bank issued proceedings against him. Those proceedings bear the record number 4412S of 2009 and are entitled *Allied Irish Banks plc and AIB Mortgage Bank plc v. John O'Doherty*. By Order made in those proceedings on the 7th December 2009, the High Court (in the person of Kelly J.) granted judgment against the defendant in the sum of €1,454,738.13 in favour of Allied Irish Banks plc and in the further sum of €4,791,008.86 in favour of the bank. Mr Mullally avers that the defendant has failed to discharge the said sum or any part thereof since then.

6. The bank contends that it is entitled to move for an order of possession primarily, and quite separately, on the basis of the summary judgment already obtained. The bank relies, in particular, upon the fact that the summary judgment granted to Allied Irish Banks plc on the 7th December 2009 has not been appealed as demonstrating that all of the monies at issue have also fallen immediately due and payable by reference to another term of the relevant indenture of mortgage in respect of each of the properties whereby that occurs "[i]f a judgment against the [m]ortgagor (not being under appeal) remains unsatisfied for 21 days from its date…"

7. The bank relies on the term of each of the relevant mortgage deeds whereby the parties have agreed that the bank is to have the statutory powers of sale conferred on mortgagees under the Conveyancing Acts without the restriction on the exercise of those powers contained in s. 20 of the Conveyancing Act 1881. Mr Mullally avers that an order for possession is sought in respect of each of the properties as a necessary measure to effect the sale of each in order to recover so much of the monies advanced to the defendant, and due and owing by him, as may be represented by the proceeds of sale.

8. The bank relies on a number of affidavits attesting to service of the special summons upon the defendant and upon those persons who have been identified as occupants of the properties, together with the averment of Mr Mullally that he knows of no other person in actual occupation of, or in receipt of any rents or profits derived from the properties, as evidence that the bank has complied with the requirement of Order 9, rule 14 of the Rules of the Superior Courts in respect of service.

9. Accordingly, the bank contends that it is entitled *prima facie* to the order that it seeks for possession of the properties.

Pending appeal
10. Mr Donnchadha Murphy, a solicitor acting for the bank, swore an affidavit on the 10th December 2012, apprising the Court of the following subsequent developments. On the 12th April 2012, the defendant issued a motion, which came before the Supreme Court on the 27th April 2012, seeking an extension of time to bring an appeal against the Order made on the 7th December 2009 granting summary judgment against him in favour of the bank.

11. Mr Murphy avers that, both in the relevant motion papers and in Court, the defendant sought to raise a number of grounds of appeal, including an argument that the outstanding borrowings upon which judgment had been granted were those of a company named Kirefield Limited and not those of the defendant.

12. A further proposed ground of appeal raised by the defendant referred to the bank's acknowledgment in a letter written on the

22nd July 2011 – that is, subsequent to securing judgment - that interest had been overcharged on one of the relevant loan accounts. According to the bank, this arose because, due to an administrative error, the bank failed to require the commencement of loan repayments by the defendant on an "interest and capital" basis at the conclusion of an agreed initial five year period of repayment on an "interest only" basis. This error gave rise to a loan account balance that remained higher than it otherwise would have been, with the result that the interest payments calculated on that balance were also greater than they otherwise would have been.

13. By Order made on the 27th April 2012, the Supreme Court refused the defendant's application for an extension of time to bring an appeal. However, Mr Murphy avers that the Supreme Court directed the bank to bring an application before the High Court to rectify the amount of the summary judgment granted to reflect the correct position in relation to the interest payments properly due.

14. The bank brought the appropriate application and, by Order made on the 30th July 2012 in the Commercial Court, Kelly J. amended the amount of the judgment in favour of the bank from €4,791,008.86 to €4,778.431.76. The summary judgment obtained by Allied Irish Banks plc was unaffected by the issue that had arisen and stands unamended.

15. By motion dated the 2nd October 2012, the defendant sought an extension of time in which to appeal the Order of Kelly J. amending the amount of the judgment. The Supreme Court heard that application on the 19th October 2012. The defendant was able to rely upon a further letter from the bank, dated the 5th July 2012, notifying him that a further incident had been uncovered in respect of another affected loan account whereby capital repayments in the amount of €21,071.43 had not been collected, with the result that interest in the sum of €50.18 had been overcharged on the loan balance which was, to that extent, greater than it otherwise would have been.

16. By Order made on the 19th October 2012, the Supreme Court extended the time for service of the defendant's notice of appeal for one week from that date. Although it is not recorded on the face of that Order, Mr Murphy avers that, in extending the time for appeal, the Supreme Court indicated that such appeal was to be limited to the issue of the appropriate quantum of the judgment granted in favour of the bank, in light of the acknowledged fact that more than one error had been identified in the calculation of the interest portion of the sum that had been found to be otherwise properly due and owing. Mr Murphy deposes that the notice of appeal subsequently lodged by the defendant on the 22nd October 2012 also sought to advance other grounds, addressing the issue of liability as well as that of quantum.

17. In consequence, it would appear that the bank issued its own motion, dated the 20th December 2012, in the defendant's appeal. The application brought on foot of that motion resulted in an Order of the Supreme Court made on the 19th April 2013, amending the Order made by that Court on the 19th October 2012 "to reflect the Court's intention to limit the defendant's entitlement to appeal the sole issue of the quantum of the judgment granted in favour of the [the bank]."

18. Accordingly, it is clear that, while the defendant does have an appeal pending before the Supreme Court or Court of Appeal, it is one solely against the bank (and not one against Allied Irish Banks plc in respect of the summary judgment that it has obtained against the defendant) and the appeal against the bank is one solely limited to the issue of quantum, and does not extend to the issue of liability.

The defendant's arguments

19. The defendant, acting as a litigant in person, has sworn a number of affidavits in opposition to the bank's application.

20. In those affidavits, the defendant seeks to re-open the issue of his liability to the bank in respect of the relevant mortgage loans on a number of grounds and, presumably in the alternative, to address the issue of the quantum of his liability to the bank under those loan agreements, which latter issue is, of course, presently under appeal from this Court.

21. On the question of liability, it would appear that the defendant principally seeks to rely again on the contention that certain of the relevant loans were not his but rather those of a company named Kirefield Limited, together with the contention that the relevant properties are owned by Kirefield Limited and not by him. Perhaps understandably in view of his status as a litigant in person, the defendant does not appear to have given any consideration to the implications of the latter assertion for the issue of his standing to oppose an application for possession of certain properties that he contends he neither owns nor occupies.

22. In addition, he seeks to allege a conspiracy between the bank and his own solicitors to secure both the execution of the relevant loans and mortgage deeds and the registration of the properties at issue in his name rather than in the name of that company.

23. Most peculiarly, the defendant alleges that the present application is somehow rendered null and void because the name on his birth certificate is John Doherty and not John O'Doherty, although he does not seek to deny that the signature "John O'Doherty" on each of the relevant loan agreements, on each of the relevant mortgage deeds and on his own correspondence in 2010 is, indeed, his, or that he signed each and every one of those documents.

24. In addition, the defendant seeks to rely on a number of alleged technical deficiencies in the relevant loan and mortgage documentation and in the bank's letter demanding payment of the monies owed.

25. Further, the defendant asserts that there is some confusion regarding whether the relevant loans were advanced by the bank (i.e. AIB Mortgage Bank) or by AIB plc. In response to that averment, a manager and officer in the bank's credit operations department named Liz Cooper swore an affidavit on the 23rd July 2013 ("the Cooper affidavit"), in which she avers that the defendant's obligations to AIB plc were transferred to the bank, a wholly owned subsidiary of AIB plc, in or about 2006, which transfer was authorised and effected by:

> (a) S. 58 of the Asset Covered Securities Act 2001;
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> (b) The Asset Covered Securities Act 2001 (Approval of Transfers between AIB and AIB Mortgage Bank) Order 2006 (S.I. 60 of 2006);
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> (c) A scheme of the 8th February 2006 between AIB and AIB Mortgage Bank for the purpose of s. 58 of the Asset Covered Securities Act 2001 at Schedule Number 1, dated 8th February 2006; and,
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> (d) A Transfer Agreement, dated 8th February 2006, made between AIB and AIB Mortgage Bank.

26. One other specific argument relied upon by the defendant is the assertion that there is some uncertainty about whether the

relevant mortgage loans have been securitised by AIB plc or by the bank. In this regard, the bank responds that nothing turns on the question in any event, as is clear from the decision of McGovern J. in *Freeman & Anor. v. Bank of Scotland plc & Ors.* [2014] IEHC 284, and from the decision of Peart J. in *Wellstead v. Judge Michael White* [2011] IEHC 438 referred to therein.

27. However, as regards each and every one of the preceding arguments, I am satisfied that it is not open to me to reconsider the issue of the defendant's liability in respect of the underlying loans, as that issue has already been determined against the defendant by this Court. That determination is reflected in the Order made by Kelly J. on the 7th December 2009.

28. On the question of the quantum of the defendant's liability to the bank, the defendant asserts that a total of four errors have now been identified in the interest component of the loan account balances by reference to which judgment was granted and, further, that he has not been given the appropriate credit for certain loan repayments that he has made.

29. The defendant alleges that his pending appeal may lead to a very substantial further reduction in the amended judgment for €4,778,431.76 that has already been given against him. However, the defendant has adduced no evidence whatsoever tending to establish that the disputed element of that judgment amounts to any significant portion of that sum. On the other hand, in the Cooper affidavit, Ms Cooper avers that the amount in dispute is "a relatively small sum."

30. I am satisfied that the issue of the quantum of the defendant's liability is another issue that it is not open to me to consider, since that issue is the subject of a pending appeal from this Court. I would observe however that, against the established background of the plaintiff's longstanding default and settled liability in respect of both the outstanding capital sum and the appropriate level of interest on his substantial borrowings, it would be unjust to deprive the bank of its entitlement to realise its security in that regard simply because some limited downward adjustment of that composite figure may reasonably be anticipated on foot of that pending appeal.

The history of the proceedings

31. As noted earlier in this judgment, the present proceedings for orders of possession were initiated by the issue of a special summons on the 11th October 2011.

32. After the exchange of affidavits was complete and the proceedings had been processed through the Master's Court and transferred into the Court list for hearing, the defendant sought an order for discovery against the bank. In a ruling dated the 25th March 2014, Peart J. refused that application. In doing so, Peart J. noted that the present proceedings are analogous to an application for a "well-charging" order in respect of a judgment already obtained in earlier proceedings, albeit one in respect of which an appeal, restricted to the issue of quantum, remains pending. Peart J. concluded that, while the documents sought could be regarded as "relevant in an overall sense to the loans in question and therefore the proceedings," they were not necessary to be discovered for the determination of any issue to be decided in adjudicating on the present claim for orders of possession.

33. The proceedings were subsequently fixed for trial on Thursday, the 10th July 2014, more than two and a half years after their commencement. On Monday, the 7th July 2014, the defendant issued a motion seeking an Order that the trial of the action be conducted by plenary hearing. That motion was given the 13th October 2014, as a return date. On the morning of the trial, the defendant applied to have it adjourned to await the outcome of his application for a plenary hearing. I indicated that I would deal with that application as part of the trial.

34. The application for a plenary hearing is grounded on a short affidavit of the defendant sworn on the 5th July 2014. In that affidavit, the defendant exhibits what he describes as a full Defence and Counterclaim purportedly delivered on the 12th May 2014, despite the absence of any points of claim or statement of claim on the part of the bank. The defendant names a person that he describes as "an essential witness in the case," who he avers he wishes to subpoena in order to cross-examine, although no attempt is made to explain how the person concerned is in any way connected with the issues relevant to the bank's application for an order granting it possession of the properties at issue, much less how the defendant might reasonably hope to cross-examine his own witness. Finally, the defendant avers to his wish to subpoena his own former solicitor to give evidence concerning the original purchase of the properties and their "true and beneficial ownership," notwithstanding the uncontroverted fact that the defendant has entered into a mortgage deed in respect of each of the properties at issue, as beneficial owner of each, in which deed he expressly demises each property to, or declares that he holds each property in trust for, the bank.

35. I have come to the conclusion that none of the foregoing arguments is sufficient to warrant the exercise of the jurisdiction conferred on the Court under Order 38, rule 8 or rule 9 of the Rules of the Superior Court to direct the trial of any issue, or of the action, by plenary hearing. I have done so on the basis that the defendant has failed to identify any material dispute of fact, the resolution of which is necessary in deciding on the present application for possession of the properties at issue. Accordingly, like Finlay CJ in *National Irish Bank Ltd v. Graham* [1995] 2 IR 244 (at 249), in the circumstances of this case I can find "no general principle nor any requirement of justice which would make necessary a plenary hearing and the refusal of a summary judgment."

36. Moreover, I am conscious of the countervailing consideration of the entitlement of every party to a determination of his or her case at "the first opportunity" as envisaged under Order 38, rule 7 of the RSC, or, as it is more frequently expressed these days by reference to the requirements of Article 6 of the European Convention on Human Rights, the right of every person to "a fair and public hearing within a reasonable time." Accordingly, I must refuse the defendant's application for an Order directing the plenary trial of the proceedings, which application I consider to be both dilatory and misconceived.

Conclusion

37. By reference to the matters set out at paragraphs 2 to 9 of this judgment, I am satsified 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 I have already set above, the defendant has failed to satisfy me that he has any valid defence to the application. Accordingly, I will make the order sought for possession of the properties at issue. I will hear the parties on any appropriate ancillary or consequential orders.