Neutral Citation Number: [2012] IEHC 243

THE HIGH COURT

[2011 No. 38 SP]

IN THE MATTER OF THE REGISTRATION OF TITLE ACT, 1964

BETWEEN

EBS LIMITED

PLAINTIFF

AND

EAMONN GILLESPIE

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 21st day of June, 2012.

The proceedings

1. These proceedings were initiated by a special summons which issued on 18th January, 2011. As originally constituted, the proceedings invoked the Land and Conveyancing Law Reform Act 2009 (the Act of 2009) and, in particular, s. 97(2) of the Act of 2009. By order of this Court (Dunne J.) made on 27th February, 2012 the plaintiff was given liberty to amend the special summons. In accordance with the amendment, the plaintiff (formerly EBS Building Society) now invokes the Registration of Title Act 1964 (the Act of 1964) and, in particular, s. 62(7) of the Act of 1964.

2. The relief which the plaintiff now seeks is an order for possession pursuant to the provisions of s. 62(7) of commercial premises consisting of a shop and filling station being the property comprised in Folio 38596 of the Register of Freeholders, County Donegal and part of the property comprised in Folio 36513 of the Register of Freeholders, County Donegal, the identification of which part I will deal with later. The claim for possession is founded on the fact that the property in question was charged by the defendant in favour of the plaintiff under an indenture of charge dated 16th April, 2002, which was made between the defendant of the one part and the plaintiff of the other part (the Charge).

3. There was also a claim for judgment in a sum of money in the special endorsement of claim on the special summons. However, that was not pursued and, obviously, it could not have been pursued in proceedings commenced by special summons.

4. The proceedings were grounded on the affidavit of Caroline Belton, the Commercial Credit Control Manager of the plaintiff, which was sworn on 28th February, 2011. Initially, the defendant's defence to the proceedings, as set out in his first replying affidavit sworn on 18th July, 2011, was that the plaintiff had a duty of care to him and failed in that duty of care in that, *inter alia*, it was reckless in its lending to him. That line of defence was not pursued at the hearing of the proceedings. Instead, the defendant pursued a challenge to the validity of the process on the basis of which the plaintiff contends it is entitled to possession, the factual basis of which was averred to in affidavits sworn by him on 21st March, 2012, 26th April, 2012 and 18th May, 2012. Accordingly, it is only necessary to outline the facts relevant to the line of defence pursued by the defendant.

The relevant facts.

5. By the Charge the defendant charged by way of first fixed charge in favour of the plaintiff with payment of all monies thereby secured, or intended to be thereby secured, all of the property registered on Folio 38596 and part of the property registered on Folio 36513 of the Register of Freeholders, County Donegal. On 17th May, 2002 the defendant was registered as full owner with absolute title on both folios. On the same day there was registered a charge for present and future advances repayable with interest as burdens on both folios and the plaintiff was registered as owner of the Charge on each folio. However, in the case of Folio 36513 it was provided that the Charge applied to "Plan 18 JG of this Folio". It is that entry on Folio 36513 which identifies the part of the lands registered on the folio which is the subject of the Charge and the claim for possession in these proceedings.

6. In the grounding affidavit, Ms. Belton averred that by letters of loan offer dated 17th December, 2001 and 24th September, 2002 the plaintiff agreed to provide the defendant with "20 year repayment loans in the sum of €393,618.80 and €70,000 respectively", which loans were given account numbers 59164985 and 59393969 respectively. It was further averred that the said loans were subject to a variable interest rate, which at the date of the issue of the loan offers was 5.50%, and that the "said loan was repayable on demand but until demand was made in monthly instalments over the term of 20 years". Neither of the letters of loan offer has been exhibited in the proceedings. Ms. Belton averred that the defendant had defaulted under account 59164985 since February 2003 and in respect of account 59393969 since April 2003 and particularised that averment.

7. The provisions of the Charge, apart from the charging clause (Clause 3.01A(iii)) the effect of which I have already outlined, which are of relevance are the following:

> (a) The expression "Offer Letter" is defined in the definitions clause (Clause 1.01) as meaning any offer letter from the plaintiff to the defendant offering loan facilities to the defendant.
>
> (b) The covenant to pay is contained in Clause 2.01 which provides:
>
> > "The [defendant] shall pay to the [plaintiff] on demand or on the happening of any of the events specified in Section 5.01 all monies now owing or which may from time to time be or become due and owing or payable by the [defendant] to the [plaintiff] in any manner whatsoever ...".
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> That provision then elaborates on what may be subsumed in "all monies", including, advances to, or charges or liabilities incurred on behalf of, the borrower, including, inter alia, legal charges occasioned by enforcement of the Charge, and so forth. It is provided in Clause 2.01 (b) that the monies thereby secured shall bear interest at such rate or rates at such times and subject to such terms as shall have been agreed in writing between the defendant and the plaintiff as well after

as before any demand or judgment. Clause 2.03 provides that all interest shall accrue "in accordance with the terms of the Offer Letter".

(c) Section 5 deals with enforcement of the security. Clause 5.01 provides, insofar as is relevant for present purposes, as follows:

> "All monies (including accrued interest) hereby secured shall become immediately payable and this security immediately enforceable ... on demand by the [plaintiff] for repayment of the monies secured hereunder OR upon the happening of the following events (whatever the reason for such event):-
>
> (a) If the Borrower fails to pay on the due date any money payable or interest due by it from time to time to the [plaintiff] .
>
> ..."

(d) The powers of the plaintiff are set out in Section 9. Clause 9.01, which deals with entry into possession, provides as follows:

> "At any time after the security hereby constituted shall have become enforceable, the [plaintiff] may at its discretion enter upon or take possession of the Mortgaged Property or any part thereof and may sell ... the Mortgaged Property ...."

Clause 9.07 provides that the power of sale conferred on mortgagees by the Conveyancing Act 1881, as amended, shall apply to the security without the restrictions therein contained as to giving notice or otherwise. It then stipulated a deemed legal date for redemption by providing that for the purpose of any sale under such power -

> "the monies hereby secured shall be deemed to have become due immediately after the execution of these presents although no demand shall have been made."

It was averred by Ms. Belton in her grounding affidavit that the plaintiff is desirous of exercising its power of sale.

(e) Counsel for the plaintiff pointed out that the Clause 11.19 provides that in the event that there is any conflict between the terms of the Charge and "the Offer Letter", the terms of the Charge shall prevail.

8. The only document exhibited on behalf of the plaintiff and represented as a demand for repayment of the sums due by the defendant to it is a letter dated 28th May, 2009 from Patrick J. Farrell & Co., the plaintiff's solicitors, to the defendant. In the first paragraph of the letter it is stated that the solicitors were instructed by the plaintiff in relation to the arrears on accounts 59164985 (the total debt being expressed as "€,16,156.22" and as including arrears of €4,917.25) and 59393969 (the total debt being €59,360.08, including arrears of €2,831.27). There is an obvious typographical error in relation to account 59164985; it appears that the correct amount of the total debt at the time was €316,156.22. The letter went on to state that the plaintiffs solicitors' instructions were that the defendant had failed to provide the plaintiff with satisfactory proposals as to how he intended "discharging the arrears and to maintain the accounts in satisfactory order". The letter then went on to state:

> "As your accounts are in arrears, it is open to our client to demand repayment of the entire loans. Accordingly, we are instructed to advise you that if we do not receive repayment of the above loans in full within twenty one days from the date of this letter we are to issue High Court legal proceedings for repayment of the full amount owing in each loan account and recovery of possession of the premises together with an order for the [plaintiffs] costs."

9. The next step in the process in accordance with the evidence adduced by the plaintiff was that by letter dated 4th November, 2009 from Patrick 1. Farrell & Co. to the defendant, which referred to previous correspondence and, in particular, the letter of 28th May, 2009, the defendant was called upon "to surrender possession of this premises to our client". The letter is headed "Srath na Corcra Derrybeg County Donegal", which I assume corresponds to the property the subject of the Charge.

10. In the grounding affidavit Ms. Belton averred that, as of the date of the grounding affidavit (28th February, 2011), the sum of €386,441.25 was due and owing by the defendant to the plaintiff on the two loan accounts. In his first replying affidavit, the defendant acknowledged that that was the balance due at 28th February, 2011, despite the fact that he had made payments of €274,655.64 to the plaintiff. However, the history of the dealings between the plaintiff and the defendant was not as limited as the plaintiffs grounding affidavit suggests.

11. While these proceedings were not initiated until 18th January, 2011, the plaintiff had issued proceedings, which were not disclosed in the grounding affidavit, by way of special summons on 4th January, 2010 under record No. 2010/1SP (the 2010 Proceedings), of which these proceedings, in their original form, were a replica. Apparently the 2010 Proceedings were never served on the defendant and they were struck out on the second occasion on which they were listed in the Master's Court, that is to say, on 22nd June, 2010.

12. Following on the letter of 28th May, 2009 and before the request for possession dated 4th November, 2009 and after that request but before either the 2010 Proceedings or these proceedings were initiated, there had been direct interaction between the defendant and the plaintiff in relation to the accounts. In his affidavits sworn on 21st March, 2012 and 26th April, 2012, the defendant has set out -

> (a) payments stated to total €24,135.36 (but aggregating €21,517.68 on my arithmetic), which he made to the plaintiff in June, July and November 2009 and in January, February, March, April, May, June, July and September 2010 on loan account 59164985; and
>
> (b) payments totalling €4,807.04 which he made in July 2009 and January, February, May, June, July and September 2010 on loan account 59393969.

13. In his affidavit sworn on 26th April, 2012 the defendant has averred that in or about the month of January 2010 he reached an arrangement with the plaintiff that it would treat the loan as an interest only loan for a period of six months and that he would pay the sum of €2,000 per month for six months. The matter was to be reviewed after six months. On foot of that arrangement he made payments during 2010 which are recorded in the preceding paragraph. The defendant exhibited a letter dated 6th January, 2010 from the plaintiff to him, which was in reply to a letter from the defendant which must have been dated the 17th December, 2009, and in which it was stated that the plaintiff was -

> "... prepared to accept monthly payments of €2,000 in respect of 'interest only' to be charged on the above accounts for

a period of six months from January 2010."

The defendant was asked to ensure that the agreed sum was lodged by him strictly on a monthly basis without fail. It was stated that the plaintiff would review the position after the six month period had expired. The letter referred to the two loan accounts secured by the Charge.

14. In the affidavit sworn on 26th April, 2012 the defendant has also recorded that two ejectment actions which were instituted against him by the defendant in the Circuit Court, County Donegal in 2004 and 2008. He has averred that the 2004 proceedings were discontinued in October 2007, when he discharged the arrears then due. In relation to the 2008 proceedings, he reached an agreement with the plaintiff in September 2008 and the proceedings were settled and not continued, although a formal notice of discontinuance was never served on his solicitors or filed in the Circuit Court office. As I have stated, the 2010 proceedings were commenced on 4th January, 2010. The defendant has disposed that the same firm of solicitors acted for the plaintiff in both ejectment proceedings in the Circuit Court and in the 2010 Proceedings as are representing the plaintiff in these proceedings. By letter dated 28th April, 2010 to the defendant, the plaintiff informed the defendant that his account had been debited with a sum set out in a fee note furnished by the plaintiff's solicitors in accordance with the terms of the Charge. The relevant fee note was enclosed. The total amount due on the fee note was €2,707.38. This obviously related to the 2010 Proceedings because it refers to the professional charges for acting in connection with the plaintiff against the defendant "in relation to High Court proceedings". The defendant has suggested in his affidavit that the discontinuance of the 2010 Proceedings demonstrates that the plaintiff did not intend to pursue him in the Courts, but that it changed its mind later.

15. The final step in the process adverted to by the defendant is a letter dated 30th November, 2010 from the plaintiffs solicitors to the defendant, which was a verbatim replica of the letter of 28th May, 2009 referred to at para. 8 earlier, save that the arrears on account No. 59164985 were then €27,353.04 and the total debt was €322,433.07 and the arrears on account No. 59393969 amounted to €5,278.66 and the total debt amounted to €59,136.81.

16. None of the matters averred to by the defendant which are outlined in the preceding paragraphs have been disputed by the plaintiff, although a supplemental affidavit was sworn on 17th April, 2012 by an in-house solicitor of the plaintiff setting out the arrears and the balance due on each loan account as at that date. The balance on account 59164985 was €271,261.90 and the arrears outstanding amounted to €76,229.07, whereas the balance due on account 59393969 was €49,815.08 and the arrears outstanding amounted to €14,147.15. It is difficult to reconcile those figures with the figure in the letter of the 30th November, 2010, but that is not an issue the Court has to resolve on this application.

Submissions
17. There are three limbs to the defendant's case that the plaintiff is not entitled to an order for possession.

18. First, it was submitted by counsel for the defendant that the letter of 28th May, 2009 did not constitute a valid demand so as to give the plaintiff the entitlement to realise the security created by the Charge. In this connection, counsel relied on the commentary in Paget 's Law of Banking, 13th Ed. at para. 13.3, where it is stated that both the High Court and the Court of Appeal in England and Wales has adopted as a fair working definition of a valid demand the following passage from the judgment of Walker J. in the Australian case of *Re Colonial Finance, Mortgage, Investment and Guarantee Corpn. Ltd.* (1905) 6 SRNSW 6 at p. 9:

> "... there must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect."

19. Secondly, even if the demand in the letter of 28th May, 2009 was of a peremptory character and unconditional, counsel for the defendant submitted that the demand was vitiated by the subsequent events, which I have outlined earlier. It was submitted that the plaintiff, in entering into the new arrangement with the defendant which is evidenced by the letter of 61h January, 2010, did not do so on a basis that was without prejudice to its reliance on the demand contained in the letter of 28th May, 2009. The plaintiff, it was submitted, could not have sought repayment of the entire debt, say, three months into that arrangement. The effect of the arrangement was to undo the demand and take away its unconditionality.

20. Thirdly, if the plaintiff is constrained to fall back on the later demand of 30th November, 2010, which on the evidence it would appear was not followed by a fresh request for possession, it was submitted by counsel for the defendant that on the authority of the decision of the High Court (Dunne J.) in *Start Mortgages v. Gunn* [2011] IEHC 275, given that the demand post-dated the coming into operation of the Act of 2009, which repealed s. 62(7) of the Act of 1964, the Court does not have jurisdiction to make an order for possession pursuant to s. 62(7). Indeed, it is reasonable to infer that the application on foot of the plaintiffs notice of motion dated 20th January, 2012 to amend the special summons was a reaction to an affidavit sworn by the defendant's solicitor, Sean Boner, on 25th November, 2011, in which it was pointed out that the provisions of Chapter 3 of Part 10, including s. 97(2), of the Act of2009 only apply to mortgages created after the commencement of Chapter 3 of Part 10, which commenced on 15th December, 2009.

21. The position adopted by counsel for the plaintiff was that the plaintiff was relying on the provisions of the Charge, in particular, clause 5.01(a). It was also relying on the demand in the letter dated 28th May, 2009, which was a valid demand. The defendant had defaulted prior to the coming into operation of the Act of 2009 and subsequent events, including the arrangements entered into by the plaintiff with the defendant, did not alter or revoke the validity of the demand. It was emphasised that in his affidavits, the defendant has accepted that the arrears are due and owing on foot of the Charge.

Conclusion
22. The plaintiff has invoked the statutory jurisdiction conferred by s. 62(7) of the Act of 1964. That sub-section before its repeal by the Act of 2009 provided:

> "When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge ... may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession."

It is instructive to consider subs. (7) in the overall context of s. 62. Sub-section (1) gave a registered owner of land power to charge the land with payment of money. Sub-section (2) stipulated that there should be executed on the creation of a charge, otherwise

than by will, an instrument of charge in the prescribed form but added -

> "until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land".

Sub-section (6) provided:

> "On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge."

Sub-sections (1), (2) and (6) were amended by the Act of 2009 but the amendments are not material for present purposes.

23. It is also instructive to refer to the observations of Geoghegan J. in *Bank of Ireland v. Smyth* [1993] 2 I.R. 102, which were obiter, as to the nature of the discretion conferred on the Court by s. 62, subs. (7). He said (at p. 111):

> "The words 'may, if it so thinks proper' in s. 62, sub-s. 7 mean no more, in my view than, that the court is to apply equitable principles in considering the application for possession. This means that the court must be satisfied that the application is made *bona fide* with a view to realising the security.... It had been held in *Northern Banking Company Ltd. v. Devlin* [1924] 1 I.R. 90 that even though the Registration of Title Act, 1891, conferred on a registered owner of a charge the rights of a legal mortgagee under the Conveyancing Act, 1881, nevertheless a registered owner of a charge, unlike a legal mortgagee, could not obtain an order for possession for the purposes of a sale out of court, because the legal mortgagee's right to possession arose by virtue of his estate in the land at common law, and not by virtue of the Conveyancing Act, 1881 . This yawning gap in the rights of a legal chargeant was heavily criticised by Glover in his Registration of Land in Ireland, 1933. The position was corrected by s. 13 of the Registration of Title Act, 1942, which is in identical terms to s. 62, sub-s. 7 of the Registration of Title Act, 1964. The historical background to the subsection therefore reinforces me in the interpretation which I give to it. I do not believe that the Oireachtas intended a wide discretion which could take sympathetic factors into account."

24. The initiation of these proceedings post-dated the repeal of s. 62(7) by virtue of the Act of 2009 with effect from 1st December, 2009. The repeal of s. 62(7), as is the case in relation to the repeal of any enactment, is subject to the provisions of s. 27 of the Interpretation Act 2005 (the Act of 2005). Section 27(1) of the Act of 2005 provides that the repeal does not -

> "... affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment."

Sub-section (2) of s. 27 provides that, where an enactment is repealed, any legal proceedings, including civil proceedings, in respect of a right, privilege, obligation or liability acquired, accrued or incurred under the enactment-

> "may be instituted, continued or enforced . ..as if the enactment had not been repealed."

In order to determine whether, notwithstanding the repeal of s. 62(7), the jurisdiction of the Court to make an order for possession under that provision is alive as regards the plaintiffs claim against the defendant in these proceedings, the crucial question is whether it has been established that the plaintiff had acquired as against the defendant a right to seek the statutory remedy in the form of an order for possession of the property secured by the Charge prior to 1st December, 2009. The answer to that question turns on the application of the requirements of s. 62(7) in the context of the agreement between the plaintiff and the defendant embodied in the Charge to the facts. In performing that exercise, because it is the easiest course to adopt, I propose looking at the matter from the historic perspective and considering whether the plaintiff has established that it had a right to seek an order for possession prior to 1st December, 2009. However, it is not to be inferred that I consider that such approach is the only approach to answering the crucial question.

25. In order to establish that its claim for possession came within s. 62(7) prior to 1st December, 2009, the plaintiff has to establish compliance with the two requirements expressly set out in the sub-section, namely:

> (a) that repayment of the principal monies secured by the Charge had become due by that date; and
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> (b) that the plaintiff was the registered owner of the Charge.

Requirement (b) was clearly complied with. As regards requirement (a), it is necessary to consider what was agreed between the plaintiff and the defendant in relation to repayment of the principal money secured by the Charge. Apart from those two requirements, the Court must be satisfied that it would have been proper to afford the plaintiff the statutory remedy of an order for possession against the defendant to enforce the right acquired. Having regard to the observations of Geoghegan J. in *Bank of Ireland v. Smyth* quoted earlier, I consider the Court would have to be satisfied not only that the application was made *bona fide* with a view to realising the plaintiffs security, but also that the power of sale had arisen and was exercisable by virtue of the terms of the agreement between the plaintiff and the defendant contained in the Charge.

26. The Charge in this case was an "all sums" charge. In my view, where a lending institution is seeking relief on foot of an "all sums" mortgage or charge and, as in this case, the terms of the loan offer and its acceptance are not spelt out in the deed of mortgage or charge, the loan offer and acceptance should be exhibited. As I have already indicated, that was not done in this case. At the hearing, counsel for the plaintiff offered to file an affidavit exhibiting the two offer letters. However, in this case, it is possible to identify whether repayment of the principal money secured by the Charge had become due before 1st December, 2009 and whether the plaintiff was entitled to enforce its security by obtaining possession and exercising its power of sale before that date by reference to the terms of the Charge on its own. By virtue of the terms of the Charge as agreed between the plaintiff and the defendant, the position immediately prior to 1st December, 2009 was as follows:

> (a) The security constituted by the Charge was enforceable even if the demand contained in the letter of 28th May, 2009 was not a valid demand, because, by virtue of clause 5.01(a), the defendant having defaulted in making payments due under the Charge, all of the monies secured had become immediately payable and the security immediately enforceable.
>
> (b) The plaintiff's power in accordance with clause 9.01 to enter upon and take possession of the secured property was exercisable because the security had become enforceable.

(c) The plaintiff's power of sale had arisen because it was expressly agreed that, for the purposes of any sale, the legal date for redemption occurred immediately after the execution of the Charge.

(d) The plaintiff's power of sale as mortgagee was exercisable. The statutory power of sale conferred on a mortgagee by s. 19 of the Act of 1881, prior to its repeal by the Act of 2009, could be varied or extended by the mortgage deed and the section applied only if and as far as a contrary intention was not expressed in the mortgage deed. As the statutory power of sale applied "when the mortgage money has become due", in this case, by virtue of the terms of the Charge (clause 9.01), the power of sale was exercisable after the security had become enforceable, which I am satisfied had happened before 15th December, 2009. Moreover, it was expressly provided in the Charge (clause 9.07) that the power of sale was exercisable without the restrictions contained in s. 20 of the Act of 1881 as to giving notice or otherwise.

Having regard to the foregoing, I am satisfied that prior to the repeal of s. 62(7), the plaintiff had acquired a right to seek an order for possession under that provision and by virtue of s. 27 of the Act of 2005, the plaintiff was entitled to institute these proceedings to obtain the appropriate remedy to enforce that right.

27. In relation to the specific arguments advanced on behalf of the defendant, I would make the following observations. First, neither the right of the plaintiff to enforce the security by entering into possession with a view to a sale nor the exercise of the power of sale required the issue of a prior demand or notice to the defendant, having regard to the provisions of the Charge which I have outlined earlier, so that the question of the validity of the demand contained in the letter dated 28th May, 2009 is not an issue which can determine the entitlement of the plaintiff to the remedy it seeks. Nonetheless, I would observe that, notwithstanding the misstatement of the total amount owing to the plaintiff on foot of account 59164985, due to what is an obvious typographical error, I am satisfied that the letter constituted a valid demand, in that it is clear that what was being demanded was repayment of the entire monies due on foot of the two loan accounts. Secondly, even though the forbearance given by the plaintiff to the defendant in the letter of 6th January, 2010 effectively postponed the enforcement by the plaintiff of its right to possession, I do not consider that the actions of the plaintiff are properly construed as a waiver of its rights under the Charge which arose from the default of the defendant. The letter itself made it clear that the position would be reviewed by the plaintiff at the expiry of the six month period. Thirdly, having regard to the terms agreed between the plaintiff and the defendant in this case as set out in the Charge, on the basis outlined earlier, I am satisfied that the plaintiff had acquired a right to seek an order for possession before the repeal of s. 62(7).

Order

28. Subject to a number of matters being addressed, I consider that the plaintiff is entitled to an order pursuant to s. 62(7) of the Act of 1964 for delivery of possession to it of the lands registered on Folio 38596 of the Register of Freeholders, County Donegal, and the part of the land registered on Folio 36513 of the Register of Freeholders, County Donegal, referred to as Plan 18JG on the said folio. The matters which require to be attended to are as follows:

(a) Order 9, rule 14 of the Rules of the Superior Courts (the Rules) requires that an affidavit of service of a summons in an action for recovery of land shall state that the deponent does not know of and does not believe that there is any person, other than those who have been served, in actual possession or in receipt of the rents and profits of the land sought to be recovered, or any part thereof. There is no such statement in the affidavit of service sworn by Aidan McCarron on 19th April, 2011, although there is verification that that is the case in the grounding affidavit of Ms. Belton (at para. 32). A corrective affidavit of service must be filed.

(b) There is a very odd averment in the grounding affidavit of Ms. Belton at para. 34 to the effect that the defendant's wife "is habitually resident in the property", which I assume is totally incorrect. On the basis of that assumption, a corrective affidavit must be filed.

(c) Lest anything turns on it later, the two relevant Offer Letters should be exhibited in a supplemental affidavit, which should be filed.

(d) In the light of my observations at para. 16 above, the balance due by the defendant to the plaintiff on each of the loan accounts should be reviewed.

29. While it is strictly speaking not a matter for the Court in these proceedings, I feel constrained to observe that I am at a loss to understand how the plaintiff could properly fix the defendant with the costs of the 2010 Proceedings, which were never served on the defendant.

30. Finally, I will hear further submissions from the parties in relation to the costs of these proceedings and the question of a stay. In relation to costs, I would point out that there is no reference to costs in the order dated 27th February, 2012, which gave liberty to amend the special summons, and, in particular, it is not clear whether the costs were reserved.