

THE HIGH COURT

[2016 No. 55 CA]

BETWEEN

AIB MORTGAGE BANK

AND

ALLIED IRISH BANKS PLC

PLAINTIFFS/RESPONDENT

AND

GERARD COSGROVE

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Faherty delivered on the 31st day of October, 2017

1. This is the defendant's appeal against orders made by the Circuit Court on 3rd March, 2016, including, *inter alia*, an order that the plaintiff recover from the defendant possession of 95 Seacrest, Knocknacarra, Galway, and which are comprised in Folio 35049F Co. Galway (hereinafter referred to as "the premises").

2. On the same date, and prior to making the order for possession, the Circuit Court heard and determined a number of other motions in the proceedings, in the following order:

(i) The plaintiff's motion to amend the special endorsement of claim on the Civil Bill for possession by deleting "The rateable valuation of the premises does not exceed €253.95" and inserting "The premises comprise the Defendant's principal private residence therefore falls within the exclusive jurisdiction of this Honourable Court by virtue of s. 3(2) of the Land and Conveyancing Law Reform Act 2013."

The order sought was duly made on 3rd March, 2016 and the Circuit Court dispensed with the requirement to have the Civil Bill re-served on the defendant.

(ii) The defendant's motion to strike out the Civil Bill. This motion was dismissed by order of the Circuit Court on 3rd March, 2016.

(iii) The defendant's motion seeking "Discovery and Inspection of Documentation and Interrogatories" dated 22nd June, 2015 (hereafter referred to as the "discovery motion"). According to the plaintiff, the defendant's discovery motion was opened in full before the Circuit Court on 3rd March, 2016, and the Circuit Court declined to make an order in any category sought by the defendant.

Having ruled on the aforesaid motions, the Circuit Court then proceeded with the plaintiffs' substantive application for possession and duly made an order for possession in the plaintiffs' favour in respect of the premises.

3. By notice of appeal dated 11th March, 2016, the defendant appeals the orders made by the Circuit Court on 3rd March, 2016.

4. The defendant's defence to the application for possession is by and large set out in an affidavit sworn by him on 16th March, 2016 and 13th May, 2016.

The background to the order for possession

5. The plaintiffs claim is grounded, *inter alia*, on the affidavit sworn on 11th November, 2013, by Ms Paula Duffy an officer with the first plaintiff.

6. She avers that by letter of offer dated 2nd January, 2008, the first plaintiff offered the defendant a loan of €435,000 to purchase the premises. The terms of the offer included that the loan would be secured by a charge over the premises and that the loan could be repayable over 27 years in monthly instalments. Ms Duffy avers that it was a further term of the mortgage contract that in the event of the defendant failing to comply with the terms of the offer, the plaintiffs would be entitled to demand immediate repayment of all sums due.

7. On 17th April, 2008, Miss Deirdre Cosgrove (otherwise Mullaney), as the lawful spouse of the defendant, signed a "Consent to Mortgage", pursuant to s. 3 of the Family Home Protection Act 1976 ("the 1976 Act"), thereby agreeing to a mortgage being executed in respect of the premises. On the same date, she executed a "Deed of Confirmation" in respect of the charge to be created on the premises, and acknowledging, *inter alia*, receipt of AIB mortgage conditions.

8. The defendant signed the letter of offer on 21st April, 2008. On the same date, Ms Cosgrove signed the spouse's consent to the letter of offer of the mortgage loan under the 1976 Act, acknowledging that she was the lawful spouse of the defendant and that the premises was a family home within the meaning of the 1976 Act.

9. Pursuant to the loan agreement, the first plaintiff's advanced the sum of €435,000 to the defendant on 28th April, 2008.

10. By "Deed of Charge" dated 30th April, 2008, the defendant charged the premises to secure the monies advanced. On 27th August, 2008, the defendant was registered in the Land Registry as full owner of the premises. On the same date, the plaintiffs were registered as owners of the said charge.

11. Ms Duffy goes on to aver that the defendant defaulted in the repayment of the monthly instalments. She states that as of 26th September, 2013, the defendant was indebted to the first plaintiff in the sum of €488,502.30 (including arrears of €82,025.47). A demand was made by the first plaintiff for repayment of the said sum by letter dated 9th October, 2013. The first plaintiff issued a further letter on 21st October, 2013, in which it demanded possession of the premises, in accordance with the terms of the

mortgage/charge on the premises.

12. On foot of the defendant's failure to deliver up possession, the plaintiffs instituted the within proceedings on 19th November, 2013.

The progress of the proceedings in the Circuit Court

13. As already referred to, prior to the substantive motion for possession, the defendant issued his motion for discovery. In or about the time of the issuing of the said motion (approximately mid 2015), the defendant's spouse swore an affidavit (albeit the Court has seen only an unsworn version) supplemental to the defendant's affidavit grounding his motion. This affidavit is considered more fully later in this judgment.

14. By motion dated 18th May, 2015, the defendant issued a notice to cross-examine Ms Duffy in respect of her affidavit grounding the motion for possession. The defendant's motion was made returnable for 25th May, 2015. It appears that no cross-examination of Ms Duffy took place on 25th May, 2015, or at any point thereafter. No further motion to cross-examine Miss Duffy was issued by the defendant.

15. On 18th May, 2015, Ms Duffy swore a supplemental affidavit in which she avers, *inter alia*, that the plaintiff had complied with the Code of Conduct on Mortgage Arrears (CCMA), issued by the Financial Regulator in January, 2011, and that, specifically, the plaintiff had put in place a Mortgage Arrears Resolution Process (MARP). With regard to the mortgage contract in issue in this appeal, Ms Duffy goes on to aver as follows:

"I say in particular that the plaintiffs complied with provisions 20 – 29 [of the CCMA] in dealing with the Defendant in that *inter alia* the plaintiffs notified the Defendant when the arrears were first outstanding for 31 calendar days within three business days provided the information specified in provision 23 of the CCMA then and thereafter provided an update in a quarterly basis, provided a MARP Booklet to the Defendant under cover of letter of 25th June, 2011, issued a letter to the Defendant in compliance with provision 27 of the CCMA on 8th August, 2011, a letter to the Defendant in compliance with provision 28 of the CCMA was not required as MARP had been commenced in this matter before the introduction of the 2013 CCMA, a letter issued to the Defendant in compliance with provision 29 of CCMA on the 28th June, 2013."

16. She avers that the plaintiff complied with the provisions 30-34 of the CCMA in providing the defendant with a standard financial statement for completion, and that the standard financial statement duly completed by the defendant was considered and assessed "bearing in mind the full circumstances of the defendant". She also avers that the provisions of 49 – 55 of the CCMA were complied with in that an appeals process was put in place in compliance with the provisions of the CCMA. She avers that "no valid appeal was received by the plaintiffs from the Defendant." It is further averred that the defendant did not furnish documents sought by the plaintiffs for the purposes of determining his eligibility for alternative repayment arrangements.

17. In her affidavit, Ms Duffy exhibits the letter of 28th June, 2013 which was furnished to the defendant. It reads as follows:

"Our records show that at the close of business on the above date, payments on your mortgage account(s) were in arrears by a total of €74,794.36.

At this time, we have not been able to engage with you with the objective of reaching a sustainable solution to reduce the arrears on your loan.

We have not received your full contractual repayment of the past 3 months and you have not made contact with us, or responded to, any of our communications regarding your mortgage account(s). As a result we are now classifying you as a 'not co-operating' borrower and we are now commencing legal proceedings to repossess the Property. It is important that you are aware that you will be responsible for the legal costs of such proceedings, estimated €4,500 and costs associated with the disposal of the Property.

However this amount could be higher or lower depending on the legal action taken. You will also remain liable for any outstanding debt, including any accrued interest, charges, legal, selling and other related costs."

18. In this appeal, counsel for the plaintiffs relies on the said letter in aid of his submission that the moratorium which the plaintiffs' procedures provide for was lost to the defendant once he did not engage with the plaintiffs.

19. On 20th May, 2015, Mr. Alan Kennedy, the plaintiff's solicitor, swore an affidavit in response to the affidavit sworn by the defendant grounding his motion for discovery. Mr. Kennedy avers, *inter alia*, that the defendant, having made a Data Access Request to the plaintiffs, did not furnish the requisite fee pursuant to the Data Access Request, as provided for in the Data Protection Act, 1988 and, accordingly, the plaintiffs did not then respond to the defendant's request. Mr. Kennedy further avers that insofar as the defendant issued the motion for discovery, the discovery sought was neither relevant nor necessary to the within proceedings.

20. On 6th October, 2015, the plaintiffs advised the defendant, who was by this time resident in the United Kingdom, that they were proceeding to seek an order for possession at the next Circuit Court date. On 2nd March, 2016, at 18:01, the defendant advised the plaintiffs' solicitor by email that he was unable to attend court on 3rd March, 2016 owing to continuing illness.

21. In an affidavit sworn on 16th March, 2016, grounding the within appeal, the defendant avers that he was not given the opportunity of being heard on 3rd March, 2016, and that his non attendance before the Circuit Court on 3rd March, 2016 was due to prolonged illness.

The defendant's points of defence

22. As already stated, the defendant's defence to the plaintiffs' motion for possession is contained in affidavits he swore on 16th March, 2016 and 13th May, 2016.

Failure to provide documentation

23. The defendant avers (at para. 3 of his affidavit sworn 13th May, 2016), that he requested documents from the plaintiff both by means of a Data Access Request and by means of his motion for discovery. The defendant takes issue with the contents of Mr. Kennedy's affidavit of 30th May, 2015, wherein Mr. Kennedy avers, with regard to the request for information and motion for discovery, as follows:

"I say generally that [the defendant] could have made a Data Access Request directly to the plaintiffs herein however he

did not. Despite his claims to the contrary it is in fact the case that the Defendant did not furnish the appropriate fee of €6.35 which the plaintiff banks are entitled to request and indeed did request in their letter of 23rd March, 2015."

24. Mr. Kennedy goes onto aver, in response generally to the defendant's motion for discovery, "that the discovery sought is neither relevant nor necessary", and that the documentation sought in the defendant's motion is of no relevance in grounding a defence to the plaintiffs' claim.

25. The defendant avers that Mr. Kennedy blatantly misled the Circuit Court by stating that the material sought was irrelevant and not necessary. The defendant contends that the documentation was necessary to establish that the mortgage contract entered into between him and the plaintiffs fell within the scope of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, S.I. No. 27/1995 ("the Unfair Terms Regulations").

26. Counsel for the plaintiff contends that the defendant's motion for discovery was fully opened to the Circuit Court and was dismissed on 3rd March, 2016. The defendant appeals the order of the Circuit Court dismissing his discovery motion.

27. At paras. A and B his Notice of Motion, the defendant seeks all original documentation he himself submitted in relation to the loan application and proof that he is the person referred to in the statement of account which was exhibited in Ms Duffy's grounding affidavit. I am satisfied that this documentation is not relevant or necessary in the circumstances of this case. Despite the numerous arguments canvassed by the defendant in the affidavit which accompanied the discovery motion, there is no suggestion made by him that he did not in fact apply for a loan or that the monies were not drawn down by him. At paras. C and M, the defendant seeks "the wet signature loan agreement" showing both the defendant's signature and the plaintiffs' seal and signature. I am satisfied that, for the purposes of the proceedings before the Circuit Court, the certified copy of the Deed of Charge as exhibited in Ms Duffy's affidavit was sufficient for the purpose of this head of discovery. At para. E, the defendant seeks discovery of documents showing that he legally charged the lands to the plaintiffs on 30th April, 2008. Exhibited in Ms Duffy's affidavit is the Deed of Charge, and the defendant's signature thereto and which bears the date 30th April, 2008. Accordingly, I am satisfied therefore that this head of discovery was not necessary for the defendant to defend the proceedings. The fact that the plaintiffs' charge was not registered until 27th August, 2008 does not deprive the Deed of Charge of its efficacy.

28. At para. I of the discovery motion, the defendant requests that the plaintiff make discovery (for the purposes of the Unfair Terms Regulations) of "minutes of meeting/s or diary entries or copies of written correspondence to the Defendant" evidencing that the mortgage contract was by way of mutual agreement and showing that the defendant "clearly influenced the substance of the mortgage contract" and that the contract "is not in any way a default unilateral contract". In his replying affidavit, Mr. Kennedy averred that this documentation was not relevant or necessary because "residential mortgage and lending contracts entered into without the Mortgagee and Mortgagor being simultaneously present may be regarded as distance contracts" and may come within the scope of the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004, S.I. No. 853/2004 ("the Distance Marketing Regulations"). There was much debate at the hearing of this appeal about the applicability of these Regulations, with the defendant arguing that Mr. Kennedy was in error since the defendant had met with the plaintiffs on four occasions at AIB's premises prior to signing the contract. Counsel for the plaintiffs agreed that the Distance Marketing Regulations had no bearing on the mortgage contract in issue in the within proceedings. For the purposes of the defendant's discovery request therefore, the question remains as to whether the documents sought at para. I of the discovery motion are necessary or relevant. On balance, I am not satisfied as to the relevance or necessity of this category. This is for reasons which are explained more fully below when the Court considers the defendant's reliance on the Unfair Terms Regulations.

29. I agree with the plaintiffs' contention that what is sought at paras. J and K of the discovery motion has no relevance to the within proceeding since it is clear that the plaintiffs in this case are not the secretaries of AIB Mortgage Bank and Allied Irish Banks plc. I am further satisfied that the categories of documents sought at sought at paras. O, P, Q and S of the discovery motion are neither relevant nor necessary to defend the said proceedings. With regard to category P, Ms Duffy's affidavit clearly exhibits the defendant's account, into which the loan monies were lodged on 28th April, 2008. With regard to category U as sought in the discovery motion, I am satisfied that the affidavit sworn by Ms Duffy on 18th May, 2015, together with the exhibits contained therein, is sufficient to answer the defendant's request for proof of the plaintiffs' compliance with the CCMA.

30. The defendant also seeks a myriad of documents which he contends are necessary to defend the plaintiffs' claim for possession. I note that paras. D, F, G, H, L, N, R and T of the discovery motion relate, by and large, to the securitisation provisions which are set out in the mortgage contract. For reasons which are more fully set out elsewhere in this judgment, the Court has determined that none of the documents sought by the defendant in relation to the securitisation issue is either necessary or relevant to the issue to be decided in the proceedings, namely whether the plaintiff is entitled to an order for possession.

31. Overall, I am satisfied that the documentation sought by the defendant by way of discovery was not necessary or relevant for the purposes of any defence to the plaintiff's proceedings.

32. The Court will now address the defendant's appeal against the order for possession made on 3rd March, 2016.

Lack of jurisdiction in the Circuit Court

33. In the first instance, the defendant takes issue with the plaintiffs' entitlement to amend the endorsement of claim on the Civil Bill, and contends that the Circuit Court erred in permitting the substitution of "principal private residence" for "rateable valuation". He further submits that s. 3 of the Land and Conveyancing Law Reform Act 2013 ("the 2013 Act") contains an ambiguity in that it refers to "principal private residence" which suggests, by use of the word "principal", that the residence is to be construed as one of a number of residences. He submits that, accordingly, the Court cannot be satisfied that the premises in question in these proceedings are the defendant's principal private residence. The defendant also contends that the Civil Bill is null and void from its inception, based on the authority set out in *Bank of Ireland Mortgage Bank v. Finnegan* [2015] IEHC 304.

34. Pursuant to s.22 of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act"), the jurisdiction of the Circuit Court to deal with the matters relating to land is confined to those cases where the rateable valuation of the property concerned does not exceed €253.95.

35. It is unquestionably the case that when the within Civil Bill issued, the plaintiffs relied on rateable valuation of the premises in order to establish the jurisdiction of the Circuit Court pursuant to s. 22 of the 1961 Act.

36. In *Bank of Ireland Mortgage Bank v. Finnegan*, Murphy J. determined that a consequence of the passing of the Valuation Act 2001 ("the 2001") under which domestic dwellings constructed after the Act's commencement are not rated or rateable. The consequence of this was that it divested the Circuit Court of jurisdiction to hear claims for possession of "domestic premises", because the

foundation of Circuit Court's jurisdiction in actions on title is rateable valuation.

37. In *Permanent TSB Plc. v. Langan* [2016] IECA 229, Hogan J., in agreeing with the approach of Murphy J. in *Finnegan*, stated as follows:

"It seems to me that it is necessarily implicit in the scheme of jurisdictional limits prescribed by the s. 22(1) and the Third Schedule of the 1961 Act that the property in question must have a rateable valuation. If, whether by virtue of the 2001 Act or otherwise, the property is not rateable, then the Circuit Court simply has no jurisdiction to hear the proceedings, since the entire premise of the Third Schedule to the 1961 Act is that the Circuit Court has jurisdiction where:-

(i) the property in question is rateable and

(ii) that rateable valuation is less than €252."

38. However, Part 10 of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act") conferred a new jurisdiction on the Circuit Court in mortgage suits, which was not dependant on rateable valuation. The measure enacted, namely s. 101(5) of the 2009 Act, confers jurisdiction on the Circuit Court in respect of mortgages for housing loans created after 1st December, 2009, the date the 2009 Act came into effect. In 2013, the Oireachtas passed the 2013 Act. By virtue of s. 3 of the 2013 Act, the jurisdiction of the Circuit Court was extended to mortgages in respect of principal private residences created before 1st December, 2009.

39. It is certainly the case, having regard to the decisions in *Finnegan* and *Langan*, that, had the Circuit Court, on 3rd March, 2016, granted an order for possession on the basis that the rateable valuation of the premises in question did not exceed €253.95, it would have no jurisdiction to do so, having regard to the provisions of the 2001 Act. However, as explained above, the Circuit Court is now vested with jurisdiction to determine mortgage suits in respect of principal private residences, whether created before or after 1st December, 2009. This is by virtue of the provisions of the 2009 Act and the 2013 Act, respectively, as referred to above.

40. The question then turns to whether the premises which are the subject of the within proceedings constitute the "principal private residence" of the defendant, and of Ms Cosgrove (otherwise Mullaney), being a person without whose consent a conveyance of the premises would be void by reason of the 1976 Act.

41. I note that in Mr. Kennedy's affidavit, sworn 2nd July, 2015, grounding the application to amend the Civil Bill, he avers as follows:

"I say that the Defendant attended before [the Circuit Court] on 24th day of February last and confirmed that the secured property herein was his principle (sic) dwelling house, [the Circuit Court] noted the position and advised the Plaintiff herein to correspond with the Defendant by writing to both his address in London and to the secured property herein. I further refer to the numerous affidavits submitted by the Defendant [to the Circuit Court] citing his address as the secured property herein."

42. I note that in his affidavits, as are before this Court, the defendant continues to cite the premises in issue in the proceedings as his residence.

43. Counsel for the plaintiff's submits that, albeit that there is no definition of principal private residence in the 2013 Act, the defendant himself has confirmed to the Circuit Court that the premises are his principal private residence. Furthermore, counsel submits that there is no merit in the defendant's contention that the Civil Bill was null and void, since the order for possession was made after the Circuit Court had amended the Civil Bill to read in accordance with the 2013 Act. Counsel contends that it is sufficient that the jurisdiction of the Circuit Court be in existence at the date the relevant order is made.

44. In this regard Counsel cites the decision of Baker J. in *Meagher v. Woods* [2015] IEHC 464.

45. *Meagher* concerned the issue of the correct date upon which the Circuit Court is seized of jurisdiction in matters referable to rateable valuation. I am satisfied that the principle enunciated by Baker J., namely that it is sufficient that at the time of the making of the substantive order that the Circuit Court is seized of jurisdiction, that as far as the present case is concerned, the Circuit Court had jurisdiction on 3rd March, 2016, to hear and determine the motion for possession, consequent on the amendment which had been made to the Civil Bill. While the defendant, in the within appeal, has queried the absence of any reference to "family home" in s. 3 of the 2013 Act, I am not satisfied that this argument is sufficient to deprive the Circuit Court of jurisdiction, particularly since, in the within appeal, the defendant has not sought to refute the contention that the premises constitute his principal private residence.

Alleged unfair terms in the mortgage contract

46. The defendant avers that the Circuit Court erred in failing to apply to the mortgage contract the terms of the Unfair Terms Regulations. The defendant contends that the mortgage contract comes within the scope of the Unfair Terms Regulations and should have been adjudicated upon accordingly, and that in failing to do so, the Circuit Court erred in failing to apply the law. The defendant asserts that there is a clear and unambiguous list of terms within the mortgage contract which demonstrate that the mortgage contract in its composition was unfair to him, and should not and cannot exist as written and is thus null and void from its very inception.

47. In relevant part, as relied on by the defendant, the Unfair Terms Regulations provide:

"3. (1) Subject to the provisions of Schedule 1, these Regulations apply to any term in a contract concluded between a seller of goods or supplier of services and a consumer which has not been individually negotiated.

(2) For the purpose of these Regulations a contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.

(3) In determining whether a term satisfies the requirement of good faith, regard shall be had to the matters specified in Schedule 2 to these Regulations.

(4) A term shall always be regarded as having not been individually negotiated where it has been drafted in advance and

the consumer has therefore not been able to influence its substance, particularly in the context of a pre-formulated standard contract.

(5) The fact that a specific term or any aspect of a term has been individually negotiated shall not exclude the application of this Regulation to the rest of the contract if an overall assessment of the contract indicates that it is nevertheless a contract as described in paragraph (4) of this Regulation referred to in Article 3.2 of the Council Directive as a pre-formulated standard contract.

(6) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(7) An indicative and non-exhaustive list of the terms which may be regarded as unfair, pursuant to Article 3.3 of the Council Directive, is set out in the Annex to the Directive and in Schedule 3 to these Regulations.

4. A term shall not of itself be considered to be unfair by relation to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, as against the goods and services supplied, in so far as these terms are in plain, intelligible language.

5. (1) In the case of contracts where all or certain terms offered to the consumer are in writing, the seller or supplier shall ensure that terms are drafted in plain, intelligible language.

(2) Where there is a doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.

6. (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties, if it is capable of continuing in existence without the unfair term.

...

10. (1) The Minister or the Director may appoint in writing any person being a whole-time officer of the Minister to be an authorised officer for the purposes of these Regulations.

(2) The Minister or the Director may appoint in writing any person to be an authorised officer for a fixed period for the purposes of all or any of the provisions of these Regulations.

(3) Every authorised officer shall be furnished with a warrant of appointment as an authorised officer stating that the officer is acting under these Regulations and, when exercising any power conferred by paragraph (4) of this Regulation, if requested to do so, produce the said warrant.

(4) An authorised officer may, for the purpose of obtaining information which may enable the Director to discharge functions under these Regulations, on production of the warrant of appointment, if so required—

(a) at all reasonable times enter premises at which any business or any activity in connection with a business is carried on and inspect the premises and any goods on the premises and, on paying or making tender of payment therefor, take any of the goods,

(b) require any person who carries on such business or activity and any person employed in connection therewith to produce to the authorised officer any books, documents or records relating to such business or activity which are in that person's power or control and to give the officer information in regard to any entries in any books, documents and records,

(c) inspect and take copies from such books, documents and records.

(d) require any such person to give to the authorised officer any information the officer may require in regard to the persons carrying on such business or activity (including, in particular, in the case of an unincorporated body of persons, information in regard to the membership thereof and of its committee of management or other controlling authority) or employed in connection therewith,

(e) require any such person to give to the officer any other information which the officer may reasonably require in regard to such business or activity.

(5) A person who obstructs or impedes an authorised officer in the exercise of a power under this Regulation, or does not comply with a requirement under this Regulation shall be guilty of an offence.

(6) A person guilty of an offence under this Regulation shall be liable on summary conviction to a fine not exceeding £1,500.

(7) An offence under this Regulation may be prosecuted by the Director."

48. In particular, the defendant submits that he comes within the parameters of Regulation 3(4) of the Unfair Terms Regulations since the contract he was presented with was a standard contract. Moreover, he asserts that the onus is on the plaintiffs to show that they provided him with a contract in simple terms, and that any terms such as allow the plaintiffs to engage in securitisation/the selling off of his mortgage was mutually agreed, which the defendant says was not the position. The defendant further asserts that the mortgage contract did not conform to Regulation 4 or Regulation 5. The defendant refers, in this regard, to the "General Terms and Conditions of Mortgage Loan" which refer, *inter alia*, to securitisation, in the following terms:

"The Customer hereby irrevocably and unconditionally consent(s) to the Lenders that at time or times hereafter transferring, assigning, disposing or sub-mortgaging or sub-charging the benefit of this agreement, any collateral or ancillary security (including, without limitation, any insurance policy or policies of life or in diamond term assurance) and the Total Debt as defined in the Mortgage, to any party, person or body ..."

49. The defendant also contends that had he obtained the documentation which he had sought from the plaintiffs, he would have

been able to clarify his belief that his mortgage has been sold off by the plaintiffs. If this were confirmed, the defendant submits this would change his legal standing since it would establish that his rights have been seriously compromised. As already referred to, Ms Cosgrave (otherwise Mullaney) likewise takes issue with the provisions regarding securitisation and like matters, as contained in the mortgage contract.

50. Furthermore, the defendant asserts that the plaintiffs were in breach of Regulation 10(4) (b) of the Unfair Terms Regulations in circumstances where they failed to provide him with documentation in connection with the contract.

51. In refuting the defendant's entitlement to rely on the Unfair Terms Regulations, counsel for the plaintiffs points to Council Directive 93/13/EEC, which, *inter alia*, in its recitals states as follows:

"Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied ..."

52. While counsel acknowledges that the Unfair Terms Regulations (which transposed the Directive 93/13/EEC) are in place to protect persons in an unequal bargaining position (and counsel accepts that the defendant was an unequal bargaining partner), it is submitted that the purpose of the Directive, and the Regulations, is to protect consumers against hidden terms in contracts. It is submitted that this did not arise in the defendant's case since, when he entered into the mortgage contract with the plaintiffs, the defendant knew that the monies he was obtaining were repayable by him on an agreed terms and that a charge would be put on the premises in favour of the plaintiffs. Counsel contends that in the present case, the plaintiffs are relying solely on the main terms of the mortgage contract, namely that when the defendant borrowed money to purchase the premises, he knew the sum borrowed was to be repaid with interest and that the sum borrowed would be secured by way of a charge on the premises.

53. The plaintiffs further submit that there is no merit in the defendant's arguments on the issue of securitisation. Albeit the mortgage contract contains provisions regarding securitisation, this does not affect the defendant's rights, or his obligations with regard to the main terms of the mortgage contract. Accordingly, the fact that there is a reference in the contract to securitisation is irrelevant. It is further submitted that even if the property had been securitised, there remains on the plaintiffs a legal obligation to enforce the mortgage. Thus, as regards the mortgage contract in issue here, the plaintiffs rely only on its main terms and are not relying on any issues pertaining to securitisation or power of attorney, as referred to by the defendant. Even if latter terms were unfair, it is submitted that that does not affect the plaintiffs' action in this case if the remainder of the mortgage contract can proceed without consideration of such terms, which is the case, counsel submits.

54. As to the defendant's arguments in relation to securitisation, I am satisfied that there is no merit in that particular argument in the circumstances of this case. The mere fact that the mortgage contract refers, *inter alia*, to securitisation is not sufficient to disbar the plaintiffs from seeking possession of the premises. In *Danske Bank v. Scanlan* [2016] IEHC 118, Fullam J. considered the issue of securitisation by referring to the decision of Kearns P. in *Harrold v. Nua Mortgages Limited* [2015] IEHC 15. Fullam J. stated:

"24. Again the bank says that numerous decisions of the High Court establish that such allegations do not disclose a cause of action. At page 11 in *Harrold Kearns P.* stated:

"The issue of securitization as been dealt with in detail by previous decisions of the High Court and does not warrant detailed consideration herein. However, the remarks of Peart J. in *Wellstead* are of particular relevance:-

"... there is nothing unusual or mysterious about a securitization scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitization 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."

The plaintiff contends that securitization, alongside other fraudulent practices of the bank, amount to a "policy of predatory targeting of customers with the long term goal of fraudulently acquiring valuable property at little or no cost". In light of a number of previous decisions, the Court is satisfied that this aspect of the plaintiff's claim is frivolous, bound to fail, and must also be struck out.""

57. I adopt this passage to find that the defendant's reliance on the securitisation provisions in the mortgage contract as providing him with a ground of defence is misplaced.

58. In the course of his submissions, the defendant relied on a judgment of the ECJ of 14th March, 2013 in Case C – 415/11, *Aziz*, (*Aziz v. Caixa D'Estalvis De Catalunya, Tarragona, i Manresa*).

59. In that case, the ECJ considered the applicable Spanish legislation implementing Directive 93/13/EEC. The case concerned a loan agreement secured by a mortgage on Mr. Aziz's family home. Clause 15 of the mortgage agreement, which made provision in relation to defaults, provided that the Spanish bank providing the loan had the right to bring enforcement proceedings to reclaim any debt arising, and that for the purpose of such proceedings it could quantify the debt by submitting an appropriate certificate. The bank brought recovery proceedings against Mr. Aziz which were successful. Thereafter, the bank initiated enforcement proceedings pursuant to the mortgage loan agreement. At the enforcement stage, Mr. Aziz applied for a declaration seeking the annulment of the clause in the mortgage contract which provided for the enforcement proceedings and the quantification of the amount due by way of certificate. It was claimed that the said clause was unfair. The Spanish Court referred a number of questions to the ECJ for a preliminary ruling. At paras. 43-46 of its judgment, the ECJ stated:

"43. By its first question, the referring court wishes to know, essentially, whether Directive 93/13 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a clause contained in a contract between a consumer and a seller or supplier, does not allow the court before which declaratory proceedings have been brought, which does have jurisdiction to assess whether such a clause is unfair, to grant interim relief in order to guarantee the full effectiveness of its final decision.

44. In replying to that question, it should be noted first that the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (*Banco Español de Crédito*, paragraph 39).

45. As regards that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on the

consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (see *Banco Español de Crédito*, paragraph 40 and case-law cited).

46. In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (*Pannon GSM*, paragraphs 31 and 32, and *Banco Español de Crédito*, paragraphs 42 and 43)."

60. It seems to the Court that, in relying on Aziz, the defendant pins his colours on those provisions in the mortgage contract providing for securitisation. However, as already stated above, it is well established that the very fact that a mortgage contract contains a reference to securitisation, which I accept was not something that was negotiated with the defendant, is not sufficient to render that contract unenforceable. Furthermore, I am satisfied that the terms of the contract, upon which the plaintiffs seek to rely in the within proceedings, cannot be said to come within the ambit of the Unfair Terms Regulations, such that the provisions of the mortgage contract should be deemed unenforceable against the defendant.

61. The defendant also takes issue with Mr. Kennedy's averment, in the affidavit he swore on 20th May, 2015, in response to the defendant's motion for discovery, to the effect that the mortgage contract in issue may come within the scope of the Distance Marketing Regulations. At para.8 of his affidavit sworn 13th May, 2016, the defendant avers that "in this particular case ... the alleged mortgage contract could not on any reasonable measure, be considered to be a contract negotiated from a distance owing specifically, to the fact that I met with the second plaintiffs (sic) representatives at AIB Eyre Square Branch, Galway on four separate occasions prior to signing the alleged contract..."

62. As already referred to, counsel for the plaintiff's accepts that the mortgage contract is not governed by the Distance Marketing Regulations.

63. Notwithstanding having taken issue with Mr. Kennedy's averment as to the possible applicability of the Distance Marketing Regulations, the defendant, at para. 11 of his affidavit sworn on 13th May, 2016, seeks to rely on the said Regulations in that he avers that the "Circuit Court made a grievous error in law in that the alleged mortgage contract between the plaintiffs' (sic) and me contains numerous pieces of explicitly commercial jargon, non-intelligible banking and legal commercial terminology and contractual terms which cannot be deciphered except through means of a vastly superior commercial and banking knowledgeable mind which I do nor could not possibly possess save for extensive study of a specific nature over a prolonged period of time akin to a period encompassing a masters degree course." Accordingly he avers that those such terms as appears in the mortgage contract in issue in these proceedings are "unenforceable, null and void" pursuant to Regulations 6, 7, 8 and 9 of the Distance Marketing Regulations.

64. I am satisfied, both from what the defendant himself states, and from the undisputed evidence that the mortgage contract was entered into between the parties on a face to face basis, and not by means of any distance contract, as defined in the Distance Marketing Regulations, that the said Regulations have no applicability to the defendant's circumstances.

Absence of the plaintiffs' signature on the mortgage contract

65. The defendant takes issue with the fact that neither of the plaintiffs signed the mortgage contract. He asserts that he never received the actual contract and that the plaintiffs only produced a copy of the contract to the Circuit Court. The defendant reasserts his belief that the plaintiffs may have sold off the contract under its securitisation provisions and that, accordingly, the contract upon which the plaintiffs purportedly relied in the Circuit Court no longer exists.

66. In response to this argument, counsel for the plaintiffs points out that the letter of offer is binding on the plaintiffs and that it was only the defendants signature (and that of his spouse pursuant to the 1976 Act) that was required to accept the offer which was made in writing by the plaintiff to the defendant.

67. I am satisfied that this is the case and that it has not been established that the plaintiffs are debarred from pursuing their claim by virtue of this particular argument canvassed by the defendant.

Absence of opportunity to cross-examine Ms Duffy

68. The defendant also takes issue with the failure of the Circuit Court to allow him to cross-examine Miss Duffy on her affidavit sworn 11th November, 2013. It is certainly the case that on 18th May, 2015, the defendant filed a motion requiring the attendance of Miss Duffy for cross-examination on 25th May, 2015. Before this Court, the defendant asserts that, given the seriousness of the matter, it was imperative that he be afforded the right to cross-examine Miss Duffy as part of his contention that the plaintiffs claim is false and that the plaintiff was proceeding on the basis of rateable valuation of the premises, which cannot ground the Circuit Court's jurisdiction. He asserts that had he been given leave by the Circuit Court, it was his intention to get a legal representative to cross-examine Ms Duffy.

69. Counsel for the plaintiffs submits that the issue of the cross-examination of Miss Duffy is not part of the Circuit Court order presently under appeal and that, accordingly, the issue is not before this Court. Counsel asserts that on a number of occasions when the matter of the cross-examination of Miss Duffy had been raised by the defendant before the Circuit Court, leave to cross-examine was refused and the defendant did not appeal that refusal.

70. I am satisfied that the scope of the present appeal relates to the orders made by the Circuit Court on 3rd March, 2016, as already recited above. In any event, this Court has determined that at the time the order for possession was made, the Circuit Court was seized of jurisdiction to make such an order, subject to it being satisfied that the plaintiff had established a case for an order for possession.

Alleged non-compliance with the 1976 Act

71. In his affidavit grounding his discovery motion, it is averred by the defendant that the plaintiffs have "acted illegally" in that no attempt was made to seek Ms Cosgrove's (otherwise Mullaney) prior written consent to the mortgage on the family home. Albeit not altogether clear, the defendant appears to make this argument in the context of the securitisation provisions in the mortgage contract. In her affidavit, Ms Cosgrove (otherwise Mullaney) avers, *inter alia*, that, as had been advised in the letter of offer, she sought independent legal advice as to the meaning of the 1976 Act and as how any failure by the defendant to keep up payments on the loan could result in the repossession of the family home. She avers that this was explained to her by her solicitor, Antoinette McMahon O'Dea & Co. Solicitors, prior to her signing the relevant sections of the contract, and that that was clearly understood by her. Ms Cosgrove (otherwise Mullaney), however, goes on to aver that she did not receive from her solicitor any advice as to what

was meant by the reference in the contract to securitisation, further mortgaging or the reselling of her family home or its implications, as the term "securitisation" was not referred to in the sections of the documents she had signed. She further avers, with reference to the "Consent to Deed of Confirmation", that at no stage had the plaintiffs advised either her or the defendant, either separately or collectively, as to the meaning or implication, legal or otherwise, of the resale or securitisation of her family home. She avers that had she been made aware of "such securitisation activities", she would not have given her consent to the mortgage, "as such activity was and is in violation of [her] rights as a spouse and of [her] human rights as a mother and spouse".

72. I note that when signing the relevant documentation for the purposes of the 1976 Act Ms Cosgrove (otherwise Mullaney) had the benefit of a solicitor. She had the benefit of her solicitor on 17th April, 2008, when she signed the "Consent to the Deed of Confirmation" and "Deed Of Confirmation", and again on 21st April, 2008 when she signed the "Spouse's Consent" to the mortgage offer. I am satisfied therefore that the provisions of the 1976 Act have been complied with in this case. I do not find it necessary to further deal with Ms Cosgrove's (otherwise Mullaney) arguments in relation to the securitisation issue, as the Court has already addressed this argument earlier in this judgment.

73. The Court has not been persuaded by any of the arguments put by the defendant in aid of his appeal of the order for possession as made by the Circuit Court on 3rd March, 2016. While the defendant has made valiant attempts to negate the mortgage contract in the course of this appeal, he did not assert that he did not borrow money from the plaintiffs or agree to a charge on the premises. Furthermore, he does not make the case that he was not in default of the terms of the mortgage agreement. In all the circumstances therefore, and by virtue of the findings I have made, as set out herein, I am satisfied that the orders made by the Circuit Court on 3rd March, 2016, should stand.

74. Given that the premises constitute the family home of the parties I will hear submissions on the issue of a stay on the execution or enforcement of the order for possession.