

BETWEEN

PERMANENT TSB PLC FORMERLY IRISH LIFE AND PERMANENT PLC

PLAINTIFF

AND

DONAL KEANE AND FIONA KEANE

DEFENDANTS

**JUDGMENT of Ms. Justice Costello delivered on the 15th day of May 2018****Introduction**

1. The issue for decision in this case is the validity of the special indorsement of claim on the special summons issued herein on the 6th April, 2017.

2. The indorsement seeks:

*"An Order pursuant to s. 62(7) of the Registration of Title Act, 1964 for possession of the lands and premises described in the First Schedule and the Second Schedule hereto to be delivered to the Plaintiff, which said properties were mortgaged/charged by the Defendants to the Plaintiff pursuant to an Indenture of Mortgage and Charge dated 22nd January, 2007 and made between the Defendants of the one part and the Plaintiff of the other part, to secure to the Plaintiff all monies due under the said Indenture of Mortgage and Charge, subject to the proviso for redemption contained therein."*

3. It is not in dispute that the properties described in the schedule were properties which were secured by a mortgage and charge dated the 22nd January, 2007 and indeed the charge is registered as a burden on each of the two folios in question, Folio 47245F County Clare and Folio 3892L County Tipperary.

4. After the two schedules identifying the property, the indorsement of the summons continues:

*"Schedule of Affidavit or Affidavits intended to be used by the Plaintiff on the hearing of the Summons:*

*Affidavit of Jacqueline O'Brien to be sworn.*

*Copies of the above Affidavit and Exhibits are served herewith."*

The summons is then signed by the solicitors for the plaintiff.

5. The verifying affidavit of Jacqueline O'Brien was sworn on the 10th May, 2017 and filed in the Central Office of the High Court on the 29th May, 2017. The affidavit verifies, confirms and endorses the content of the special indorsement of claim of the special summons.

6. Ms. O'Brien's affidavit proves all of the matters necessary to enable the plaintiff obtain an order for possession in these proceedings. She establishes the loan facility agreed between the plaintiff and the defendants and the fact that the loan was to be secured by way of a first legal mortgage/charge securing the advance together with interest thereon, and all present and future liabilities of the defendants to the plaintiff over the properties set out in the special summons. She proves the acceptance of the letter of loan offer by the defendants on the 15th December, 2006 and the fact that, in performance of the loan agreement, the plaintiff advanced to the defendants the total sum of €535,000 on or around the 12th January, 2007. She avers to the fact that, by way of security for the said mortgage loan facility, the defendants executed an Indenture of Mortgage and Charge in favour of the plaintiff on or about 22nd January, 2007 and she exhibits the Mortgage and Charge and the Permanent TSB Mortgage Conditions 2002 which were expressly incorporated into the Mortgage. The Mortgage secures all moneys payable by the defendants to the plaintiff. Clause 7 .01 provides that the Total Debt, i.e. the whole of the moneys outstanding for the time being on the security of the mortgage, shall become immediately payable to Permanent TSB if the mortgagor defaults in the making of two monthly repayments. No demand is required. She exhibits the two folios which show that the defendants are the registered owners of the lands comprised in the respective folios and that the charge has been registered as a burden on the folios. She refers to the plaintiff's change of name from Irish Life and Permanent Plc to Permanent TSB Plc. She sets out a history of default in repayments and said that no repayments have been received by the plaintiff since the 10th January, 2014. On the 10th February, 2017 the plaintiff, through its solicitors, demanded that the defendants repay to it all sums then due and owing together with interest accrued thereon but the defendants failed, refused or neglected to discharge the said sum owing to the plaintiff. She states:

*"19. I say that the Defendants have failed to repay the total amount due and owing on the mortgage and accordingly repayment of the principal monies secured on the charge has become due and the Plaintiff is now entitled to possession of the properties the subject matter of the proceedings.*

*20. I say that the letters dated the 22nd February, 2017 the Plaintiff, through its solicitor, wrote to the Defendants calling upon the Defendants to deliver vacant possession of the mortgaged premises the subject matter of these proceedings within a period of ten days and provided that in default of same the Plaintiff would issue proceedings seeking an Order for Possession in respect of the said premises."*

7. The premises are not the family home of the defendants and they do not constitute their principal private residence.

8. The defendants have not filed any replying affidavit and their counsel accepts that the plaintiff's proofs are in order if the indorsement of claim on a special summons is in compliance with the requirements of the Rules of the Superior Courts.

9. The affidavit of Mr. Ken Egan of the 19th July, 2017 establishes that he personally served the second named defendant by delivering and leaving with her a true copy of the special summons together with a true copy of the verifying affidavit of Jacqueline

O'Brien sworn on the 10th May, 2017. He confirms that the second named defendant advised him that the first named defendant was not there at the time as he was away working. On the 19th July, 2017 Messrs. F.H. O'Reilly & Co. Solicitors entered an appearance on behalf of both of the defendants to the summons.

### The Registration of Title Act, 1964

10. Section 62(7) of the Act of 1964 provides as follows:

*"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 ..."*

### Rules of the Superior Courts

11. Order 4 rule 4 of the Rules of the Superior Courts provides that:

*"The indorsement of claim on a summary summons and on a special summons shall be entitled "SPECIAL INDORSEMENT OF CLAIM," and shall state specifically and with all necessary particulars the relief claimed and the grounds thereof. The indorsement of claim on a summary summons or a special summons shall be in such one of the forms in Appendix B, Part III, as shall be applicable to the case, or, if none be found applicable, then such other similarly concise form as the nature of the case may require."*

12. In relation to special summonses O.38 r. 1 provides:

*"...An affidavit verifying the claim indorsed on the summons shall be filed in the Central Office and notice of such filing shall be given to the parties concerned."*

### Case law

13. The defendants relied upon a number of authorities to support the proposition that the indorsement in this case failed to supply the "necessary particulars" required by O.4 r.4 for a valid special indorsement of claim. In *Caulfield v. Bolger* [1927] I.R. 117 a solicitor sued his client for costs under the Attorneys and Solicitors (Ireland) Act, 1849. The Act provided that no solicitor can maintain an action for the recovery of costs until after the expiration of one month after the delivery to the party to be charged with a bill of such costs signed by the solicitor. The indorsement of claim on the summary summons did not plead these facts. It was held that "necessary particulars" "connote such particulars as are essential to make the indorsement a good statement of claim both in particularity of fact and in law". The indorsement failed to plead facts essential to the claim and was therefore defective.

14. In *Bond v. Holton* [1959] I.R. 302 the summons was dismissed as disclosing no cause of action. The claim was for rent due on foot of a lease but the summons did not plead that the defendant had elected to accept an offer of a lease. On that basis the summons was dismissed as the plea did not disclose a cause of action.

15. In *Stacy and Harding Ltd v. O'Callaghan* [1958] I.R. 320 it was held that, for an indorsement to comply with the requirements of the rules, such particulars must be given in every case as may reasonably be necessary to enable the defendant to know whether he ought to pay or resist.

16. The defendants also relied upon *Allied Irish Banks Ltd v. The George Ltd* (unreported, High, Court Butler J., 21st July, 1975). In that case the court held that the special indorsment of claim satisfied the rules but the affidavit grounding the application for judgment was insufficient to entitle the plaintiff to summary judgment. The court clearly distinguished between the requirements of a valid indorsement of claim and the requirement to prove that claim by way of a verifying affidavit. Having referred to the general pleading in relation to bank lending, the judgment continued:

*"The present special endorsement of claim complies though not perhaps ideally with these requirements. I think it would have been preferable if the agreement to pay interest at the normal rate had been more particularly pleaded and that it had been indicated whether the loan was by way of overdraft or special advance or a term loan whatever might be the case. **All this however is something which is clearly within the knowledge of the defendant so as to determine his attitude towards the claim** and with the reservations I have stated I am prepared to accept this special endorsement of claim as sufficient."* (emphasis added)

17. The last case relied upon, *Minister for Finance v McArdle* [2007] IEHC 98, was of little assistance to the issue for resolution in this case, as it was a special summons where only the prayers for relief were set out in a challenge to a decision of the Labour Court to the High Court on a point of law.

18. The plaintiff relied upon the recent decision of *Allied Irish Banks Plc v. Pierce* [2015] IECA 87. In that case the Court of Appeal had to consider how extensive must the particulars of debt in a claim for a liquidated sum by means of a summary summons be in order to satisfy the requirements of O.4 r.4 of the Rules of the Superior Courts. Hogan J. gave the judgment of the court with which Kelly and Mahon J.J. concurred. He held that the obligation to supply particulars is not an end in itself. It is to ensure that litigants properly know the case that they have to meet. The defendant is entitled to sufficient particulars as will enable him to determine whether he is obliged to pay the sum claimed. The court looked at correspondence from her financial advisor, which had been exhibited in the grounding affidavits filed on behalf of the plaintiff, to determine whether the defendant was fully acquainted with the nature of the plaintiff's claim against her and thus to determine whether the indorsement on the summary summons complied with the requirements of O.4 r.4 by giving her sufficient particulars of the claim. The court held that O.4 r.4 aims for "a pithy and concise statement of the claim" and by implication not some more fulsome statement of the case to be met by the defendant.

19. At para. 17 of the judgment Hogan J. indicated that:

*"no objection to the form of pleading should properly be entertained unless the defendant has first made out a convincing case by way of replying affidavit to the effect that, absent such additional particulars, the fair defence of the proceedings would be compromised."*

20. At para. 29 he concluded that, as there was no suggestion at all that the defendant in the case did not know the nature of the case which she had to meet, it could not be said that the particulars were inadequate in any way.

*"The question of further particulars could not arise unless the defendant first demonstrates by cogent affidavit evidence*

*that the matter cannot be fairly determined in the absence of such particulars."*

21. From this judgment the following principles emerge:

- (1) It is for a defendant to demonstrate that the particulars of the claim are inadequate.
- (2) This must be demonstrated by cogent affidavit evidence.
- (3) The defendant is required to establish that the matter cannot be fairly determined in the absence of such particulars.
- (4) The question of the adequacy of the particulars cannot arise unless the defendant first demonstrates by way of affidavit evidence that the particulars of the claim are inadequate.
- (5) In assessing whether a plaintiff has supplied adequate particulars for the purposes of O.4 r.4 the court may have regard to the defendant's knowledge of the nature of the case from sources other than the special indorsement of claim.

### **Discussion**

22. The issue for consideration is whether the special indorsement of claim discloses a cause of action (as opposed to furnishes particulars of the cause of action). This in turn depends upon whether a plea that the principal money secured has become due is essential to the claim for an order for possession under s.62(7), as I am satisfied that all of the other essentials to a claim under s.62 (7) have been adequately pleaded. It was accepted by counsel for the plaintiff that the pleading might have been improved by including a reference to the fact that the principal monies had fallen due but it was submitted that it was not necessary to go so far and that the omission was not fatal to the case pleaded.

23. Under the terms of the mortgage in this case the principal sum became due without the necessity for demand once the mortgagee was two months in default. Therefore, on the facts in this case a demand is not essential to the cause of action. It follows that it was not necessary to plead that repayment of the principal sum secured by the charge had been demanded. But was it necessary to plead that the principal sum was due because there had been default in making the monthly repayments due for two months?

24. The approach of the Court of Appeal in *AIB v Pierce*, following the decision in *AIB v The George Ltd.*, was to consider whether the defendant knew the case she had to meet so as to decide whether to pay or resist the claim. The case here is brought pursuant to s.62(7) of the Act of 1964. It is implicit in such a claim that the plaintiff is alleging that the principal sum secured by the charge has become due as that is a precondition to the right to bring an application under the section. As in *AIB v The George Ltd*, while it might be preferable to have fuller pleading (in that case the precise interest chargeable and the nature of the bank borrowings) the omitted details are within the knowledge of the defendants and the pleading is sufficient. There was no suggestion that the defendants did not know the case they were facing, or could not assess whether they were obliged to surrender possession of the secured properties to the plaintiff. If the defence was to be that the principal sum was not due and therefore the claim for possession of the properties pursuant to s.62 (7) must fail, the defendants were able to make that case based on the case as pleaded. On that basis I hold that there has been compliance with the requirements of O.4 r.4 of the rules.

25. If I am incorrect in my judgment on the validity of the special indorsement of claim, then I hold that any omission from the special indorsement of claim is made good and the pleading is valid because of the incorporation of the affidavit of Jacqueline O'Brien into the pleading arising from the express endorsement of the affidavit on the summons. A special summons is required by the rules to be indorsed with a schedule of the affidavit (or affidavits) intended to be used by the plaintiff on the hearing of the summons which verifies the claim indorsed on the special summons. This special summons was so indorsed. The plaintiff's claim in proceedings by way of special summons is set out in the special indorsement of claim and the affidavit indorsed on the summons which verifies the claim. This is different to a summary summons, where no such affidavit is required to be indorsed on the summons. This distinction is important when considering whether the requirements of O.4 r.4 have been satisfied. It is also worth repeating that in *AIB v Pierce* the Court of Appeal had regard to correspondence with the defendant's financial adviser when ruling on the adequacy of the pleading in that case. If that is permissible in assessing the adequacy of the indorsement of a summary summons, then the case for taking into account an affidavit which is required by the rules to be indorsed on the special summons is all the more compelling.

26. In this case the summons and the affidavit were served together upon the second named defendant. The solicitors for the defendants entered an appearance for both defendants. There was no suggestion that the first named defendant received the summons but not the affidavit and exhibits. In the circumstances, I am satisfied that both defendants knew fully the particulars of the claim they were required to meet, from both the special indorsement of claim and the affidavit of Ms. O'Brien. On this separate ground I hold that the plaintiff has complied with the requirements of O.4 r.4.

27. Finally, and most importantly, the defendants have not filed any replying affidavit. It is therefore not open to this court even to consider the adequacy of the particulars pleaded in the special indorsement of claim in the absence of cogent affidavit evidence establishing that the matter cannot be fairly determined in the absence of such particulars. There is no suggestion whatsoever that the defendants were unaware of the nature of the case they were to meet. Nor could there be, given (a) the special endorsement of claim and (b) the affidavit of Ms O'Brien, never mind the fact that they had been in default for several years was a matter clearly within their own knowledge.

### **Conclusion**

28. I refuse the application to dismiss the summons on the grounds that it does not disclose a cause of action or fails to plead the necessary particulars of the plaintiff's claim. I am satisfied that the plaintiff's pleadings are valid and that the plaintiff has established its entitlement to the reliefs sought. I will make an order for possession of the lands and premises set out in the schedules to the special summons.