

THE HIGH COURT**2011 2497 P****BETWEEN****EILEEN TYNAN****PLAINTIFF****AND****THE COUNTY REGISTRAR FOR THE COUNTY OF KILKENNY AND START MORTGAGES LIMITED****DEFENDANTS****Judgment of Miss Justice Laffoy delivered on 22nd day of June, 2011.****1. The application**

1.1 On this application, the plaintiff seeks an injunction restraining the first defendant (the County Registrar) from evicting the plaintiff from her home being the premises known as "Rose Villa House" 71, Old Callan Road, Kilkenny (the premises) until these proceedings are heard and the final judgment given. The premises are the subject of an order for possession made on 31st October, 2008 by the Court (MacMenamin J.) in proceedings (Record No. 2007/847SP) between the second defendant (the mortgagee) of the one part and Eileen Veronica Tynan (the mortgagor) of the other part (the special summons proceedings). The stay on execution granted on the making of that order having expired, the mortgagee is now anxious to obtain possession of the premises with a view to realising its security. On the hearing of the application counsel for the County Registrar informed the Court that the County Registrar would be bound by the order of the Court and was given leave to withdraw on that basis. Accordingly, the proponents on the hearing of the application were the plaintiff, who is the mother of the mortgagor, and the mortgagee.

1.2 The basis on which the plaintiff seeks interlocutory relief is reflected in the primary relief sought on the plenary summons, which issued on 16th March, 2011. The plaintiff seeks a declaration that she enjoys a continuing right of residence and/or a right, personal in nature, to reside in the premises.

2. Factual background

2.1 The plaintiff has lived with her family in the premises since 1974. Initially she and her husband, to whom she refers as her "ex-husband", were tenants in the premises on a tenancy from Kilkenny Borough Council (the Corporation). Subsequently in 1980 they purchased the freehold from the Corporation and became registered as owners of the premises on Folio 6532F County Kilkenny.

2.2 The plaintiff and her ex-husband separated in 1999. The plaintiff's evidence on affidavit is that, as a result of an order of the Court in proceedings for a judicial separation, her daughter, the mortgagor, was obliged to buy out her ex-husband's share of the premises, which had been their family home, as I understand it, in order to avoid the sale of the premises and a division of the proceeds of sale between the plaintiff and her ex-husband. In any event, what occurred was a transfer by the plaintiff and her ex-husband of the premises to the mortgagor in respect of which the mortgagor paid the plaintiff's ex-husband, her father, the sum of IR£30,000 for his interest in the premises and she also paid an outstanding sum of IR£3,941.66 due to the Corporation. The plaintiff received no money or consideration from the mortgagor at that time or at any other time for her interest in the premises. The transfer by the plaintiff and her ex-husband was subject to the consent of the Corporation. An application for consent was made by Smithwick, Solicitors, on their behalf on 24th February, 2000. In that letter the nature of the transaction and its consequences were described as follows:

"The position here is that Patrick Tynan and his wife, Eileen Tynan have agreed subject to contract to transfer their interest in the property to their daughter, Veronica Tynan. Eileen Tynan will continue to reside in the property. Patrick Tynan will secure accommodation elsewhere."

By letter dated 28th February, 2000, the Corporation consented to the sale to Veronica Tynan and also to a mortgage by Veronica Tynan in favour of First Active Plc. The plaintiff has averred that at the time of the transaction the solicitors acting for her and her ex-husband and the solicitors acting for the mortgagor "understood the situation and the reasons behind why we were engaging in such a transaction". She has averred to her own understanding and that of her daughter as follows:

"It was always my understanding, and Veronica's understanding, that the house was my home but registered in Veronica's name and that I could live there for the rest of my life."

2.3 In 2004, another daughter of the plaintiff, Helena, bought the premises from the mortgagor. The reason for that transaction is explained by the plaintiff as that the mortgagor had become ill and had fallen into arrears with the mortgage and Helena agreed to "take on the mortgage for a short period of time until Veronica could recover and to ensure that we could stay in the house". I assume that "we" means the plaintiff, the mortgagor and Helena. In fact, Helena obtained a loan from and created a new mortgage in favour of Permanent TSB. The consent of the Corporation was obtained in connection with the transactions in 2004. On the relevant application form, in response to a query in relation to dependants, if any, residing with the vendor, the following information was given:

"Mother aged 67".

In response to a query as to where the vendor and dependant proposed to live, if consent was given to the transfer, it was stated:

"Remain in house".

The consent issued on 7th July, 2004 on the basis that the mortgagor would not seek to be re-housed by the Corporation in the future.

2.4 The transfer of the premises back to the mortgagor and the mortgagee's involvement with the premises occurred in 2005. The plaintiff has averred that by mid-2005 Helena wished to get married and needed to release the monies she had invested in the premises. The mortgagor agreed to buy out her interest. She applied to the mortgagee for a loan of €180,000, which was stated to be the purchase price on the loan application form. The estimated value of the premises was given as €250,000 on the loan application form. By way of explanation of the difference between the purchase price and the estimated value, the mortgagor stated on the loan application:

"This is my mother's home which is in the name of my sister Helena and now she is getting married and I wish to buy from her as my mother has lived here all her life and wants to continue living there as I do and had agreed to sell at €180k as it's Family home."

2.5 The mortgagee issued a loan offer to the mortgagor on 4th November, 2005. A condition in the loan offer, referred to as condition 57, provided as follows:

"The Deed of Confirmation, which is attached to the Deed of Mortgage and Charge, must be signed by Eileen Tynan. The lender strongly recommends that Eileen Tynan obtain independent legal advice prior to the execution of these documents. Eileen Tynan must provide a letter from his (*sic*) advising Solicitor confirming that he/she has received independent legal advice, but that he/she has decided against taking such advice."

That condition, which is rather oddly worded, seems to be premised on the advice which the plaintiff would get, being that she should not execute the Deed of Confirmation. In any event, the plaintiff did go to an independent solicitor for legal advice. In her affidavit she has averred that on 5th December, 2005 she attended the offices of a firm of solicitors in Kilkenny with the mortgagor. She went alone into an office with the solicitor who was advising her. A single document was presented to her to sign. She has averred that the independent legal advice she received before signing consisted of the observation and question: "This is important. Do you know what you are doing?", to which she replied: "Sure I have no choice". She then signed the document. Her evidence is that no further advice was given to her. The entire transaction lasted approximately four or five minutes. She has specifically averred that at no stage was it explained to her that she ran the risk of losing her right to reside in her home.

2.6 The original Deed of Confirmation was put before the Court. It is a three page separate document. It is not part of the Mortgage Deed which was subsequently executed by the mortgagor. It was headed "Deed of Confirmation". It was dated 5th December, 2005 and was expressed to be made between the plaintiff, whose address was given as the address of the premises, of the one part and the mortgagee of the other part. It was expressed to be supplemental to "the within Mortgage". As I have stated, it was not attached to the Mortgage Deed. It was obviously a standard document suitable for registered and unregistered land. It recited that, arising out of the investigation of the borrowers' title to the mortgaged property, it was apprehended that the plaintiff might have some beneficial estate, right, title or interest in the mortgaged property and at the request of the borrower had agreed to execute the Deed of Confirmation for the purpose of confirming "the within Mortgage" and further assuring the mortgaged property to the mortgagee as security for present and future advances. Neither the borrower nor the mortgaged property was expressly identified.

Clause 4 of the operative part of the Deed was relevant to registered land. In that clause the plaintiff "as to all (if any) his (*sic*) beneficial estate right title and interest therein" confirmed the charge created by "the within Mortgage" on the mortgaged property. In clause 5 the plaintiff "in all other respects" confirmed and ratified "the within Mortgage". In clause 6 the plaintiff acknowledged that all powers, remedies and rights of the mortgagee should be exercisable by the mortgagee without notice to the plaintiff. In clause 8 the plaintiff, at the request of the mortgagor, was expressed to postpone "all rights privileges and charges including his (*sic*) right of residence in the Mortgaged Property in favour of" the mortgagee and assented to entry of a registration to that effect on a folio. However, the folio number was left blank.

2.7 The Deed of Confirmation was executed by the plaintiff and her execution was attested by the solicitor who gave her advice. The solicitor's firm wrote to the mortgagee by letter dated 5th December, 2005 in the following terms:

"I hereby confirm that Ms. Eileen Tynan of Rose Villa 71 Callan Road Kilkenny attended at our offices today for the purposes of obtaining independent legal advice for a Deed of Confirmation in your favour. This relates to the execution of a mortgage by her daughter Veronica Tynan in relation to the property.

I confirm that I explained the contents of the Deed of Confirmation to Ms. Tynan and am satisfied that she understood same and was happy to execute the said Deed."

The Deed of Confirmation and the letter of 5th December, 2005 were transmitted by the solicitors acting for the mortgagor in the mortgage transaction to the mortgagee by letter dated 7th December, 2005, in which they requested that the loan cheque issue to their office. The position of the mortgagee is that it relied on the signature on the Deed of Confirmation and on the letter confirming that independent legal advice had been provided.

2.8 Subsequently, the mortgagee issued the loan cheque to the mortgagor's solicitors and thus advanced the loan to the mortgagor, whereupon the Mortgage Deed, which was dated 21st December, 2005, was executed by the mortgagor in favour of the mortgagee thereby charging the lands registered on Folio 6532F of the Register of Freeholders, County Kilkenny with all sums due by the mortgagor to the mortgagee.

2.9 The special summons proceedings for an order for possession by the mortgagee against the mortgagor were initiated by a special summons which issued on 25th October, 2007. At that stage the arrears of the mortgage repayments stood at €21,697.33. When the order for possession was made on 31st October, 2008 they stood at €31,629.03. Currently, the arrears stand at €48,675 and the total balance due by the mortgagor to the mortgagee is €209,616. On this application, it has been averred on behalf of the mortgagee that it has received a valuation of the premises, which was carried out on a "drive by" basis by a valuer, which suggests that the open market value of the premises is €155,000.

2.10 In February 2011 an application was made to the Court by the mortgagor in the special summons proceedings seeking a stay on the order for possession. That application was heard by Dunne J., who dismissed the application.

3. The title registered on Folio 6532F and relevant statutory provisions

3.1 On 7th July, 1980 the plaintiff's ex-husband, Patrick Tynan, and the plaintiff were registered as full owners on Folio 6532F with

absolute title. On 24th June, 2002 the mortgagor was registered as full owner. On 10th August, 2004 Helena Tynan was registered as full owner. On 30th August, 2007 the mortgagor was registered as full owner. On the same day the mortgagee's charge for present and future advances was registered as a burden on the folio and the mortgagee was registered as owner of the charge. The only extant burden on the folio on 30th August, 2007 related to the fact that the freehold in the premises had been bought out under the Housing Act 1966, which is of no relevance to the issue now before the Court. Since 30th August, 2007 two judgment mortgages have been registered as burdens on the folio. What is of note is that a right of residence in favour of the plaintiff is not now and never has been registered as a burden on the folio.

3.2 Section 81 of the Registration of Title Act 1964 (the Act of 1964) provides as follows:

"A right of residence in or on registered land, whether a general right of residence on the land or an exclusive right of residence in or on part of the land, shall be deemed to be personal to the person beneficially entitled thereto and to be a right in the nature of a lien for money's worth in or over the land and shall not operate to create any equitable estate in the land."

Counsel for the plaintiff recognised that the interest which the plaintiff is claiming in the premises is governed by that provision and that her interest is in the nature of a lien for money's worth. However, he referred to the following passage from the judgment of Johnston J. at first instance in *National Bank v. Keegan* [1931] I.R. 344 as being of relevance to the issue before the Court. In the passage in question (at pp. 346 and 347) Johnston J. stated:

"It is well settled that a general right of residence and support in a house or upon a farm does not amount to an estate in the land, but is a mere charge in the nature of an annuity upon the premises in respect of which it exists, and when it becomes necessary to sell such property a Court of Equity has power and authority to ascertain the value of such charge, so that the purchaser may get the property discharged from the burden. ... The people of Ireland have always had a very keen, not to say punctilious, regard for family obligations and ties, and it is well known that such rights, whether created by wills, by family settlements, or even by purchase deeds for value, exist very extensively throughout the whole of Ireland. In the present case, however, the right in question is not a mere right of residence or occupation. The defendant had agreed to give to his aunt the use—the exclusive use—of a defined portion of the house; she is to have it for her life, free of charge; and the defendant binds himself, whenever called upon to do so, to execute a legal conveyance carrying out the agreement."

It is quite clear from the report that the property in question in that case was unregistered land. While there had been a memorandum of agreement in writing, it had not been registered in the Registry of Deeds. It was held by the Supreme Court, affirming the decision of Johnston J., that the aunt of the defendant, Mary Keegan, had an equitable life estate in two rooms of the premises and her interest was not subject to the equitable mortgage by deposit of title deeds in favour of National Bank created subsequent to the memorandum of agreement, which was being enforced in the proceedings. In my view, save that it is recognised in the passage quoted above that the Court has an inherent jurisdiction to value a general right of residence in the context of a forced sale, that authority is of no relevance because, in the case of registered land, a right of residence, whether general or exclusive, is now governed by section 81.

3.3 As to the significance, if any, of the fact that the right of residence claimed by the plaintiff is not registered as a burden on Folio 6532F, an issue arose at the hearing of the application as to whether the title position of a right of residence such as is claimed by the plaintiff is governed by s. 69 or s. 72 of the Act of 1964. It can only be governed by one or other of those sections. Section 69(1) contains a list of the burdens which "may be registered as affecting registered land". Paragraph (q) refers to –

"a right in the nature of a lien for money's worth in or over the property for a limited period not exceeding life, such as a right of support or a right of residence (whether an exclusive right of residence or not)".

Section 72(1), on the other hand, lists burdens to which "all registered land shall be subject ... whether those burdens are or are not registered". Counsel for the plaintiff submitted that the right which the plaintiff claims comes within paragraph (j) which refers to –

"the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where, upon inquiry made of such person, the rights are not disclosed".

In my view, there is absolutely no doubt that the right of residence which the plaintiff claims and in respect of which she seeks a declaration in these proceedings, which it is acknowledged is governed by s. 81, is not a right which falls within paragraph (j) of s. 72(1). Rather it is a right which comes within paragraph (q) of s. 69(1). Having regard to the terminology used by the Oireachtas in s. 69(1)(q) and in s. 81, the contention that a right of residence governed by s. 81 is a s. 72 burden is wholly unstateable.

3.4 Although s. 69(1) lists burdens which "may" be registered as affecting registered land, the failure to register a right which is a s. 69 burden on the relevant folio has consequences which are provided for throughout the Act of 1964. For instance, s. 52 sets out the effect of the transfer of freehold land with absolute title and provides that, on the registration of the transferee, the land vests in the transferee –

"subject to –

(a) the burdens, if any, registered as affecting the land, and

(b) the burdens to which, though not so registered, the land is subject by virtue of section 72,

but shall be free from all other rights, including rights of the State."

Accordingly, it is quite clear that, if a s. 69 type burden is not registered on the folio, a transferee takes clear of it.

3.5 Charges are governed by s. 62 of the Act of 1964. Although it is not stated on the face of the order of 31st October, 2008, the order for possession obtained by the mortgagee against the mortgagor was clearly made on foot of the power contained in subs. (7) of s. 62. If the mortgagee sells the lands registered on Folio 6532F pursuant to its power as mortgagee, by virtue of s. 62(9), the registration of the transferee will have the same effect as registration on a transfer for valuable consideration by the registered owner, who will take free from s. 69 type burdens which are not registered as such.

3.6 In support of his contention that the right claimed by the plaintiff comes within s. 72(1)(j), counsel for the plaintiff relied on the commentary on that provision contained in Fitzgerald on *Land Registry Practice* (2nd Ed.) at p. 223, which is contained in the chapter on burdens affecting registered land without registration. However, it is quite clear from the previous chapter, which deals with burdens capable of registration, that a right of residence is a burden to which s. 69(1)(q) applies. Indeed, Fitzgerald points out that, before the enactment of s. 81, in the case of the right to exclusive use of any specific part of property as recognised in *National Bank v. Keegan*, the practice was to register an inhibition to protect such right, but s. 81 "over-ruled that decision" (c.f. p. 208). As I have stated, I have no doubt that, if the plaintiff were to establish in these proceedings that she has a right of residence in the premises as she claims, that right of residence would be capable of registration under s. 69(1)(q) and would not be a right which would come within s. 72(1)(j). In the context of the application before the Court for a interlocutory injunction restraining execution on foot of the order for possession, what is significant is that, if the plaintiff succeeds in establishing the right of residence to which she asserts she is entitled and that it has priority over the mortgagee's charge, by virtue of s. 81 what she will be entitled to is a sum of money which represents the value of her right of residence; she will not be entitled to relief in the form of an order which will protect her continued residence in the premises.

3.7 Finally, for completeness, I consider it appropriate to make some observations in relation to the reliance of counsel for the plaintiff on the decision of the High Court (Geoghegan J.) in *Bank of Ireland v. Smyth* [1993] 2 I.R. 102. There the plaintiff was seeking an order for possession of registered land as the owner of a charge registered on the land. One of the grounds on which the defendants sought to non-suit the plaintiff was for non-compliance with Order 9, rules 9 and 14 of the Rules of the Superior Courts 1986. Rule 9 provides that in actions for recovery of land, other than actions for recovery for non-payment of rent or for over holding, it is necessary "to serve every person in actual possession, or in receipt of the rents and profits, of the land or any part thereof", unless the Court shall otherwise direct. On the facts in *Bank of Ireland v. Smyth*, when the proceedings were initiated, the mother of the first defendant enjoyed a right of residence and a right of support which was charged on the property. The proceedings had not been served on her. Geoghegan J. ruled that the mother did not require to be served in accordance with Order 9, rule 9 on, *inter alia*, the following ground (set out at p. 106):

"Having regard to s. 81 of the Registration of Title Act, 1964, the mother's right of residence was a lien for money's worth. The entitlement to that right or to the right of support did not constitute her a person in possession or in receipt of rents and profits within the meaning of the rule. As to whether a County Registrar executing an order for possession could require the mother, if she were still alive, to vacate is quite another matter and did not fall to be determined in this action."

As it happened, the mother had died after the proceedings were commenced. Accordingly, the last sentence in the passage quoted above is clearly obiter and it does not, in my view, assist the plaintiff's case.

3.8 However, the registration on Folio 6532F and the application of the relevant statutory provisions considered above may not be determinative of the position of the plaintiff vis-à-vis the mortgagee, because of the disclosure made on the loan application form of the plaintiff's position and the procurement of the Deed of Confirmation by the mortgagee, on which it relies.

4. The defendant's reliance on the Deed of Confirmation

4.1 Although the right of residence to which the plaintiff contends she is entitled was not registered as a burden on Folio 6532F, the existence of a right in her favour was disclosed to the mortgagee in the loan application form and the mortgagee recognised that the plaintiff may have had some equity or right in the premises and treated it as a right which should be postponed to its rights under the proposed deed of charge. The position adopted by the plaintiff is that the Deed of Confirmation is defective on a number of grounds. It does not on its face refer to the premises and the folio number is left blank in clause 8. Further, it does not identify "the within Mortgage" and it pre-dated the mortgage. It was also submitted that it was ineffective because the plaintiff did not, in reality, get independent legal advice and, in particular, it was not explained to her that, if she executed it, she could, as her counsel put it, lose the roof over her head. The plaintiff received no consideration for signing the Deed of Confirmation.

4.2 Counsel for the defendants answered those attacks on the effectiveness of the Deed of Confirmation on three bases, namely:

- (a) that the Deed was in fact effective to give the mortgagee priority over such, if any, right as the plaintiff has in the premises, in that the plaintiff executed it on the basis of independent legal advice;
- (b) alternatively, if it was technically defective, the Court should specifically enforce the agreement it evidences between the plaintiff and the mortgagee that the right of residence would be postponed to the mortgagee's charge in equity; or
- (c) alternatively, the plaintiff is estopped from contending that the Deed of Confirmation was not effective, because, if she had not executed it, the loan would not have been advanced to the borrower.

However, those lines of defence were advanced on behalf of the mortgagee against the backdrop that the mortgagee's position is that the plaintiff does not have a right of residence in the premises and that, if she does, as it was not registered as a burden on Folio 6532F, the mortgagee has priority over it. It is not necessary to express a view on either of those arguments.

4.3 On the first line of defence to the contention that the Deed of Confirmation is ineffective, and, in particular, in support of the mortgagee's contention that it is entitled to rely on the letter dated 5th December, 2005 from the plaintiff's solicitor as establishing that she got independent legal advice, counsel for the mortgagee relied on the decision of the House of Lords in *Royal Bank of Scotland Plc v. Etridge (No. 2)* [2001] 3 WLR 1021. The decision of the House of Lords dealt with five conjoined appeals from the Court of Appeal and three other separate appeals from the Court of Appeal. Counsel for the mortgagee highlighted the various passages in the speeches of the Law Lords dealing with the issue of independent legal advice in a husband debtor and wife surety context.

4.4 First, he referred to the following passage from the judgment of Lord Nicholls (at paras. 77 and 78):

"Confirmation from the solicitor that he has advised the wife is one of the bank's preconditions for completion of the transaction. But it is central to this arrangement that in advising the wife the solicitor is acting for the wife and no one else. The bank does not have, and is intended not to have, any knowledge of or control over the advice the solicitor gives the wife. The solicitor is not accountable to the bank for the advice he gives to the wife. To impute to the bank knowledge of what passed between the solicitor and the wife would contradict this essential feature of the arrangement. The mere fact that, for its own purposes, the bank asked the solicitor to advise the wife does not make the solicitor the bank's agent in giving that advice."

In the ordinary case, therefore, deficiencies in the advice given are a matter between the wife and her solicitor. The bank is entitled to proceed on the assumption that a solicitor advising the wife has done his job properly."

In my view, in an analogous situation, the last two sentences in the above quotation can be regarded as representing the law in this jurisdiction.

4.5 Secondly, he relied on the following passage from the speech of Lord Hobhouse (at para. 122):

"The solicitor in question will not be acting for the bank. Any knowledge the solicitor acquires from the wife will be confidential as between the two of them. If it renders untruthful the statement or certificate, the solicitor cannot sign them without being in breach of his professional obligation to the wife and committing a fraud on the bank. The wife's remedy will be against the solicitor and not against the bank. If the solicitor does not provide the statement and certificate for which the bank has asked, then the bank will not, in the absence of other evidence, have reasonable grounds for being satisfied that the wife's agreement has been properly obtained. Its legal rights will be subject to any equity existing in favour of the wife."

Again, in my view, broadly speaking, in an analogous situation, the last two sentences in that quotation can be regarded as representing the law in this jurisdiction.

4.6 Finally, he relied on two passages from the speech of Lord Scott. In the first (at para. 171), Lord Scott stated:

"A bank, proposing to take a security from a surety wife for whom a solicitor is acting, requires, first, confirmation that the solicitor's instructions do extend to advising her about the nature and effect of the transaction. Subject to that confirmation, however, the bank is, in my opinion, entitled reasonably to believe that the solicitor will have advised her on the matters to which I have referred and, accordingly, that she has had an adequate explanation and has an adequate understanding of the transaction."

That, in my view, can be regarded as representing the law in this jurisdiction applicable to an analogous situation.

In the second passage (at para. 174), which does not have a bearing on the factual situation in this case because the solicitor who advised the plaintiff was not acting for either the mortgagor or the mortgagee, Lord Scott stated:

"If the solicitor is acting also for the husband, his role presents a little more difficulty. It is, after all, the existence of the risk of undue influence or misrepresentation by the husband that requires the bank to be reasonably satisfied that the wife understands the nature and effect of the transaction. If there is some particular reason known to the bank for suspecting undue influence or other impropriety by the husband, then, in my view, the bank should insist on advice being given to the wife by a solicitor independent of the husband (see Lord Browne-Wilkinson in *O'Brien*, at p 197). But in a case in which there is no such particular reason, and the risk is no more than the possibility, present in all surety wife cases, of impropriety by the husband, there is no reason, in my opinion, why the solicitor advising the wife should not also be the husband's solicitor. In the ordinary case, in my opinion, the bank is entitled to rely on the professional competence and propriety of the solicitor in providing proper and adequate advice to the wife notwithstanding that he, the solicitor, is acting also for the husband."

The reference in that passage to *O'Brien* is to the decision of the House of Lords in *Barclays Bank Plc v. O'Brien* [1992] 3 WLR 593, which was approved by Geoghegan J. in *Bank of Ireland v. Smyth*.

4.7 There is an interesting analysis of the decisions in *Barclays Bank v. O'Brien* and *Royal Bank of Scotland v. Etridge (No. 2)* in Delany on *Equity and the Law of Trusts in Ireland* (4th Ed.) at page 686 *et. seq.* The aspect of those decisions adverted to above is considered at p. 694 *et. seq.* While those cases were concerned with the position of a lending institution vis-à-vis a wife surety guaranteeing and, in some cases, giving security over her interest in property to the lending institution for the indebtedness of her husband, it seems to me that the principle that the lending institution should be able to rely on independent advice should apply where, as in this case, the legal advice is given to a third party who is postponing a right or interest in mortgaged property so that a lending institution can get a good security free of that right from the mortgagor.

4.8 The position adopted on behalf of the plaintiff was that the plaintiff's evidence on affidavit that she did not get adequate independent legal advice from the solicitor she attended was not contradicted by the mortgagee and that at the hearing of the substantive action the issue would have to be explored through oral evidence. Counsel for the mortgagee made the point that the solicitor who advised the plaintiff was the plaintiff's then solicitor and that there was no point in requesting her to swear an affidavit for the mortgagee, as the likelihood was that she would refuse, which, I surmise, is what would have happened.

4.9 The indisputable facts on this application are that the Deed of Confirmation exists and the letter of 5th December, 2005 from the solicitor whom the plaintiff attended to the mortgagee exists. Therefore, when one gets to the nub of the dispute as to the entitlement of the plaintiff to the primary relief she claims in the substantive proceedings on the basis that the Deed of Confirmation is ineffective, the core issue which arises as between the plaintiff and the mortgagee is whether the mortgagee is entitled to rely on the letter of 5th December, 2005 as establishing that the plaintiff got independent legal advice as a result of which she understood the implications of executing the Deed of Confirmation. There is no doubt that the advice which the plaintiff got was independent, in the sense that the solicitor whom she attended and who attested her execution of the Deed of Confirmation was not acting for either the mortgagor or the mortgagee. Even though the Deed of Confirmation was not attached to the Mortgage Deed, as the draftsman obviously intended, there is no doubt from the plaintiff's own evidence and from the letter of 5th December, 2005 that the plaintiff knew that she was signing the document in connection with her daughter, the mortgagor, obtaining a loan from the mortgagee and giving a mortgage over the premises to the mortgagee. The letter of 5th December, 2005 specifically confirmed that the contents of the Deed of Confirmation had been explained to the plaintiff and that she understood what she was doing in executing it. It is difficult to see what more the mortgagee could have done to ensure that the plaintiff did understand the implications of executing the Deed of Confirmation, insofar as it was necessary to give the mortgagee's charge priority over the right the plaintiff claims. Counsel for the mortgagee suggested that it would lead to utter chaos if a mortgagee could not rely on a letter from an independent solicitor on the lines of the letter of 5th December, 2005. I agree.

4.10 Accordingly, while the Deed of Confirmation as executed falls short of the standard of clarity and accuracy which should be observed in a document in a conveyancing transaction, I am satisfied that the plaintiff has not demonstrated that she has an arguable case that it was ineffective to postpone such right as the plaintiff has in respect of the premises to the right of the mortgagee under its charge which is registered on Folio 6532F. Therefore, in my view, the mortgagee does not have to fall back on

the alternative arguments based on specific enforcement or on estoppel and it is not necessary to elaborate on those arguments.

5. Criteria for grant of interlocutory injunction and their application

5.1 In analysing the title position of the mortgagor, the mortgagee and the plaintiff in relation to the premises to the extent outlined above, I am not overlooking the fact that the first hurdle which the plaintiff has to overcome in establishing an entitlement to an interlocutory injunction is merely that there is a fair issue to be tried. Nor am I overlooking the observations of Lord Diplock in *American Cyanamid v. Ethicon* [1975] 1 All E.R. 504 that it is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. My understanding of the issue which the plaintiff contends requires to be tried in the substantive action is whether the plaintiff has a right of residence in the premises, as she contends, and, if she has, whether, as she contends, it is a right over which the mortgagee's charge does not have priority, which would require the mortgagee to pay to the plaintiff a sum representing the value of her right in order to be in a position to sell as mortgagee to a third party free from that right. Having regard to the combination of factors in this case, the implications of which I have considered above, namely, the fact that the right of residence, if it exists, is not registered as a burden on Folio 6532F and, more importantly, the fact that, in any event, the plaintiff has executed the Deed of Confirmation in favour of the mortgagee and the mortgagee has the benefit of a letter from a solicitor who independently acted for the plaintiff to the effect that the plaintiff got advice and understood what she was doing in executing the Deed of Confirmation, in my view, there is not a fair issue to be tried.

5.2 Even if I am wrong in that conclusion, it seems to me that the plaintiff does not get over the second hurdle, which involves the plaintiff demonstrating that damages would not be an adequate remedy for her. Despite the contention that the right which the plaintiff claims is covered by s. 72(1)(j), which, in my view, is unquestionably incorrect, counsel for the plaintiff accepted that, by virtue of the application of s. 81, all the plaintiff can hope for even if she is ultimately successful in the substantive action is a sum of money which represents the value of her right of residence. If the plaintiff is correct and if she is entitled to that remedy, if there was evidence that there was a risk that the mortgagee would be unable or unwilling to pay the sum to which she would become entitled if she was successful, the Court would have to consider whether she should be allowed to continue to reside in the premises until she is paid the sum of money which represents the value of her interest. There is no such evidence before the Court. As, ultimately, the only remedy to which the plaintiff could be entitled is founded in money, it seems to me that damages must be an adequate remedy for her in the event that she is successful in the substantive action, in the absence of evidence that the award of damages would not be met.

5.3 In the replying affidavit sworn on behalf of the mortgagee by Eva McCarthy, litigation manager of the mortgagee, on 6th April, 2011, it was averred that the plaintiff "is not a mark for any undertaking as to damages that might be given on her behalf". That point was not pursued at the hearing and I am not attaching weight to it in determining whether an interlocutory injunction should be granted.

5.4 The third hurdle which the plaintiff has to surmount is to establish that the balance of convenience lies in favour of the grant, rather than the refusal, of an interlocutory injunction. On the unusual facts of this case, it seems to me that, as counsel for the mortgagee submitted, the Court must attach considerable weight to the fact that the mortgagee obtained an order for possession against the mortgagor over two and a half years ago and that in the intervening period both the plaintiff and the mortgagor have been living in the premises and no payment whatsoever has been made to the mortgagee for almost two years. During that period the amount due to the mortgagee on foot of the charge has escalated, whereas, because of the economic situation and the state of the property market, the market value of the premises has decreased. The gap between what is owed to the mortgagee and what the mortgagee can expect to achieve on a sale of the premises is widening every day. Given those circumstances, in my view, the balance of convenience favours the refusal of the application for an interlocutory injunction.

6. Order

6.1 It is tragic that, given the mortgagee's right to possession and to realise its security because of the default of the plaintiff's daughter, the mortgagor, the plaintiff, who is now in her mid-seventies, will have to leave the home and the neighbourhood in which she has lived for almost forty years, irrespective of the outcome of the substantive action. Even if she is correct in her contention that she has a right of residence in the premises which has priority over the mortgagee's charge, on her own case all she is entitled to is payment to her of a sum representing the value of her right. In my experience, it is rare that, on an application for an interlocutory injunction, the court finds that the plaintiff does not have at least an arguable case. However, on the facts as they are before the Court, and, in particular, the existence of the letter of 5th December, 2005 from the solicitor whose advice the plaintiff sought, coupled with the Deed of Confirmation, I have come to the conclusion that the plaintiff does not have an arguable case that she has a right of residence in the premises which has priority over the mortgagee's charge. For that reason and for the other reasons set out above, the Court has no option but to refuse the application for an interlocutory injunction.

6.2 If the plaintiff wishes to have the substantive action expedited the Court will endeavour to accommodate her. In that event, the Court will explore with the parties the putting in place of a mechanism, for example, an undertaking from the solicitors having carriage of the sale of the premises to retain the proceeds of sale pending the final determination of the substantive proceedings, which mechanism I would view as a comfort to, rather than a protection for, the plaintiff.

6.3 For the avoidance of doubt, this judgment is concerned only with the right of the plaintiff in relation to the premises as against the mortgagee, not against any person who is not a party to these proceedings.