

**THE HIGH COURT**

[2021] IEHC 654

**[Record No. 2019/82 CA]**

**BETWEEN**  
**SHORELINE RESIDENTIAL DAC AND PEPPER FINANCE CORPORATION (IRELAND) DAC**  
**PLAINTIFFS/RESPONDENTS**

**AND**  
**DAVID JACOB**

**DEFENDANT/APPELLANT**

**JUDGMENT of Mr. Justice Barr delivered electronically on the 26th day of August, 2021.**

**Introduction**

1. This is an appeal by the defendant/appellant, who represented himself, against an order of the Circuit Court made on 26th February, 2019 granting the first named plaintiff an order for possession of a premises owned by the defendant, which is situate at and known as Park House, Bree, Enniscorthy, County Wexford, as contained in Plan B19Q8 in folio no. WX15020 in the county of Wexford (hereinafter referred to as "*the property*").
2. The proceedings were commenced in the Circuit Court by Civil Bill issued on 25th April, 2017, wherein the first named plaintiff sought an order for possession of the property on foot of a loan that had been made to the defendant by Irish Nationwide Building Society (hereinafter referred to as "*INBS*") in August 2007 and further to an indenture of mortgage executed by the defendant on 23rd January, 2009. The first named plaintiff sued as the entity to whom the debt that was owed by the defendant to INBS had been transferred.
3. In resisting the plaintiff's application herein, the defendant referred to eight extensive affidavits that he had filed in the proceedings. In essence, he resisted the application on the following grounds: that the plaintiffs had not established jurisdiction in the Circuit Court; he had not been provided with adequate details of the debt alleged to be owed by him, nor as to the computation of interest thereon; the plaintiffs had redacted certain documents concerning transfers of loans from one entity to another; there had been no response from the plaintiffs to a "*formal offer*" that had been made by him in writing in the course of the proceedings; the plaintiffs had failed to engage in mediation; the plaintiffs had acted in breach of the regulations known as the "*distance selling*" regulations of 1989 and in breach of regulations known as "*the unfair contract terms*" regulations of 1995; and that the evidence on which the plaintiffs proceeded was inadmissible, as being hearsay evidence.
4. The basis of the plaintiffs' application for possession of the property and the grounds of defence raised by the defendant, will be dealt with in greater detail later in the judgment.

**The Evidence on behalf of the Plaintiffs**

**(a) The Plaintiffs' Locus Standi**

5. By letter dated 1st August, 2007 Irish Nationwide Building Society offered to give a loan of €390,000 to the defendant. That offer was accepted by the defendant on 17th August, 2007. The loan amount was drawn down by the defendant on 23rd August, 2007.

6. In an affidavit sworn on 12th April, 2017, Mr. Jeffrey Johnston, a director of the first named plaintiff, outlined how that plaintiff had become entitled to both the debt due on foot of the loan and to an order for possession in respect of the property. That entitlement arose in the following way: by virtue of a transfer order made in the High Court on 1st July, 2011, pursuant to s. 34 of The Credit Institutions (Stabilisation) Act, 2010, the assets and liabilities of Irish Nationwide Building Society were transferred to Anglo Irish Bank Corporation Ltd.
7. By special resolution dated 3rd October, 2011, Anglo Irish Bank Corporation Ltd changed its name to Irish Bank Resolution Corporation Ltd. On 7th February, 2013, the Minister for Finance made an order providing for the orderly winding up of Irish Bank Resolution Corporation Ltd, pursuant to which Eamonn Richardson and Kieran Wallace were appointed joint special liquidators.
8. Pursuant to a deed of transfer dated 6th June, 2014, Irish Bank Resolution Corporation Ltd (in special liquidation) acting through its special liquidators, transferred to the first named plaintiff a number of loans and mortgages held by it, including the loan and mortgage the subject matter of the proceedings herein. The defendant was informed of the transfer. Mr. Johnston exhibited the deed of transfer dated 6th June, 2014 as exhibit A to his affidavit.
9. On 22nd August 2016, by ordinary resolution, Shoreline Residential Ltd converted to a Designated Activity Company, named Shoreline Residential Designated Activity Company. He exhibited the certificate of incorporation on conversion to a designated activity company.
10. Upon acquiring the loan, the subject matter of the proceedings herein, the plaintiff appointed Pepper Finance Corporation (Ireland) Designated Activity Company to undertake certain credit servicing activities on its behalf. The defendant was notified of that appointment by letter dated 10th June, 2014, a copy of which correspondence was exhibited to the affidavit.
11. Prior to July, 2015, the plaintiff, while not a regulated entity subject to the 2013 Code of Conduct on Mortgage Arrears ("the CCMA 2013"), chose to voluntarily apply a framework to correspond to the CCMA 2013 framework insofar as reasonably practicable. Mr. Johnston stated in his affidavit that since the coming into force of the Consumer Protection (Regulation of Credit Servicing Firms) Act, 2015, the first named plaintiff had complied with its obligations under s. 34G (2) of the Central Bank Act, 1997. In particular, the first named plaintiff had not instructed the servicer to take or fail to take an action, if the taking or failure to take the action would otherwise be a prescribed contravention (within the meaning of s. 33AN of the Central Bank Act, 1942) if a retail credit firm took or failed to take that action.
12. In an affidavit sworn on 26th January, 2021, Seamus Dowling, head of primary services of the second named plaintiff, averred that on 18th April, 2019, the first named plaintiff had transferred the legal title in the loan facility and mortgage, the subject matter of the

within proceedings, together with all legal rights and obligations thereunder to the second named plaintiff. As a result whereof, an application was made to the High Court to join the second named plaintiff as a party to the proceedings; which application was granted by order of Meenan J. on 16th March, 2020.

13. In an affidavit sworn on 8th January, 2020, Ms. Caroline Loftus, senior operations manager of the second named plaintiff, set out the procedure whereby the loan and mortgage the subject matter of the proceedings herein, were transferred from the first named plaintiff to the second named plaintiff. The transfer date thereof was stated to have been 18th April, 2019. She exhibited the Legal Title Transfer Deed at exhibit "CL2" and exhibited the Irish Law Deed of Transfer (Registered Property) at exhibit "CL3". In those exhibits there was a schedule setting out all the loan facilities and mortgages that were assigned by the first named plaintiff to the second named plaintiff. These documents were redacted, save to show that the loan and mortgage the subject matter of the proceedings herein, were part of the assets transferred by the first named plaintiff to the second named plaintiff.
14. Ms. Loftus went on to state that all borrowers affected by the transfer were notified of the first named plaintiff's intention to transfer its legal interest in their loan facilities and mortgages by letter prior to the transfer date. She exhibited a copy of the letter sent to the defendant dated 18th February, 2019.
15. By further letter dated 20th May, 2019 the second named plaintiff notified the defendant that his loan previously held by the first named plaintiff had been transferred to the second named plaintiff. The letter confirmed that all legal rights of the first named plaintiff under the relevant loan facilities and mortgage had been transferred to the second named plaintiff. A copy of the letter dated 20th May, 2019 sent to the defendant was exhibited to the affidavit.

**(b) The Plaintiffs' Entitlement to an Order for Possession of the Property**

16. In his affidavit sworn on 12th April, 2017, Mr. Johnston outlined how by a loan offer dated 1st August, 2007, INBS agreed to provide the defendant with a term loan facility in the sum of €390,000 for a term of 25 years, to purchase the property set out in the schedule to the Civil Bill. The said term loan facility was subject to interest at a fixed rate specified for three years from the date of completion of the mortgage and thereafter at the variable rates specified and was repayable in monthly instalments. The term loan facility was subject to the terms and conditions detailed therein and to the mortgage conditions.
17. The said loan offer was accepted by the defendant on or about 17th August, 2007. The said term loan facility was advanced to and was drawn down by the defendant commencing on or about 23rd August, 2007. He exhibited a copy of the loan agreement and acceptance thereof to his affidavit.
18. Mr. Johnston stated that the property situate at and known as Park House, Bree, Enniscorthy, County Wexford, as contained in Plan B19Q8 in Folio No. WX15020, of County Wexford, is not a family home within the meaning of the Family Home Protection

Act, 1976. The defendant occupies the property as his principle private dwelling. The defendant was registered as full owner of the premises on Folio WX15020 on 11th February, 2009. He exhibited a copy of the Land Registry Folio WX15020.

19. By deed of mortgage dated 23rd January, 2009 the defendant as registered owner, or as the person entitled to be registered as owner, charged the premises with repayment of the secured monies and assented to the registration of the mortgage as a burden on the folio as set out at Clause 3 of the mortgage. A true copy of the indenture of mortgage was exhibited to the affidavit.
20. Clause 16 of the mortgage provided that the mortgagee could at any time transfer or assign all or any part of the mortgage, including the security created on the mortgaged property, without notice to the borrower, or any other person, and on such happening, *"all powers, rights and discretion of the Society shall be exercisable by the transferee or assignee to the extent that they are so assigned and/or transferred"*. Clause 16.2 of the mortgage provided that the borrower irrevocably consented to all or any future transfers of all or any part of the benefit of the mortgage, including the security thereby created on the mortgaged property.
21. By letter dated 9th June, 2014, the defendant was notified that legal ownership of the mortgage had transferred to the first named plaintiff and that all amounts owing by the defendant in respect of the mortgage were now owed to the first named plaintiff. By letter dated 10th June, 2014 the defendant was notified by the first named plaintiff that it was the owner of the mortgage and that the servicer would now service the mortgage on the plaintiff's behalf. A copy of the letter from Irish Bank Resolution Corporation Ltd (in special liquidation) to the defendant was exhibited to the affidavit. On 30th June, 2014, the first named plaintiff was registered as owner of the charge that had been created on 11th February, 2009 in favour of INBS. On 25th July, 2019, the second named plaintiff was registered on the folio as owner of this charge. An up to date copy of the folio was exhibited to the affidavit of Darryl Broderick, solicitor, sworn on 2nd July, 2021.
22. The accrual of arrears on the loan account was dealt with in a number of affidavits sworn on behalf of the plaintiffs. In his affidavit sworn on 12th April, 2017, Mr. Johnston outlined how the arrears arose at paras. 26 et seq. He noted that the mortgage provided that all monies remaining unpaid and secured by the mortgage should become immediately repayable if any payment of any monthly or other periodic payment or payment of any other of the secured monies was unpaid or was in arrears for a period of one month after same shall have fallen due. He stated that in breach of the loan agreement and the mortgage, the defendant failed to pay the monthly instalments as they fell due. He stated that since in or about 30th June, 2011, the defendant had defaulted in payment of the moneys due to the plaintiff pursuant to provisions of the loan agreement and the mortgage. As of 20th March, 2017, the arrears were €185,192.45 and the total due at that time was €505,887.02. He exhibited statements of account for the period 23/8/2014 to 20/3/2017.

23. By letter dated 8th December, 2015 the first named plaintiff wrote to the defendant and demanded payment of all sums outstanding including arrears within seven days of the date thereof. Despite the said demand, the defendant failed to pay the said monies. Mr. Johnston exhibited a copy of the letter of demand.
24. By letter dated 13th January, 2016, Messrs. Ronan Daly Jermyn, solicitors, upon instructions from the first named plaintiff, wrote to the defendant and demanded that the defendant deliver up possession of the property to the plaintiff within seven days of the date thereof, in default of which, proceedings seeking an order for possession of the property would issue against the defendant without further notice. He stated that despite the said letter, the defendant failed to deliver up possession of the property. He exhibited a copy of the letter of demand from the plaintiffs' solicitors.
25. At para. 31 et seq of his affidavit, Mr. Johnston outlined how the first named plaintiff had complied with the provisions of the Code of Conduct on Mortgage Arrears, 2013 as issued by the Central Bank of Ireland. He outlined how a warning letter had issued to the defendant on 10th April, 2015 warning him that he was at risk of being classified as "*non cooperating*", as he had failed to provide the necessary financial information to enable the plaintiff to assess the defendant's current financial circumstances under its MARP process. He stated that when no response was received from the defendant, the first named plaintiff proceeded to classify the defendant as "*non-cooperating*" by letter dated 19th June, 2015. He exhibited copies of the relevant correspondence, including a final warning letter from the first named plaintiff's solicitors dated 14th June, 2016.
26. Mr. Johnston stated that he believed that the property was the defendant's principle private residence within the meaning of s. 3 of the Land and Conveyancing Reform Act, 2013 and the mortgage was created prior to 1st December, 2009.
27. The issue of the continuing arrears on the loan account were dealt with in a number of subsequent affidavits. In an affidavit sworn by Mr. Johnston on 28th November, 2018, he stated that as of 22nd November, 2018 the arrears stood at €263,749.88 and the total sum due and owing by the defendant to the plaintiff, inclusive of the arrears, amounted to €547,943.50. In an affidavit sworn by Caroline Loftus of the second named plaintiff on 8th January, 2020, she stated that as of 3rd January, 2020 the outstanding balance owed to the second named plaintiff by the defendant stood at €577,016.45, inclusive of arrears of €317,927.64.
28. In his affidavit sworn on 7th March, 2018, Mr. Johnston stated that the monthly mortgage repayment was €3,090.55. The last payment to the account had been received on 28th June, 2013 in the sum of €540.00. No further sums have been paid by the defendant since then. These averments were not contradicted by the defendant.
29. On behalf of the plaintiffs, it was submitted by Mr. Boyle Harper BL on behalf of the plaintiffs that it had been established by the plaintiffs that the defendant had failed to repay the loan, which he had originally obtained from INBS. That loan had gone into arrears as and from 2011 and the last payment into the account had been in 2013. The

current level of arrears was set out in the statements of account that had been exhibited to the affidavit of Mr. Johnston covering the period 23rd August, 2014 to 20th March, 2017 and in the subsequent affidavit sworn by Mr. Johnston in 2018 and the affidavit sworn by Ms. Loftus in 2020.

30. It was submitted that the defendant did not challenge the fact that he had received the loan, nor that he had gone into substantial arrears in relation to its repayment. It was further submitted that the transfer of the debt from INBS to Anglo/IBRC and thereafter to the first named plaintiff and thence to the second named plaintiff, had been established by virtue of the deeds of transfer exhibited to the affidavits sworn on behalf of the plaintiffs.
31. It was submitted that the loan agreement and the mortgage made it clear that if the defendant fell into arrears the entire sum would become due and owing. There was clear evidence before the court that a demand had been made for the entire sum and that the defendant had failed to repay it. There was further evidence before the court that under the mortgage the plaintiffs were entitled to recover possession of the property and a valid demand for delivery up of possession of the property had been made on behalf of the plaintiffs.
32. It was submitted that the owner of a charge who seeks to obtain possession pursuant to s. 62 (7) of the Registration of Title Act, 1964, has to prove two facts: (a) that the plaintiff is the owner of the charge; and (b) that the right to seek possession has arisen and is exercisable on the facts: see *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26.
33. It was submitted that the evidence in the affidavits sworn on behalf of the plaintiffs and the documents exhibited thereto, clearly established that the first named plaintiff had been entitled to an order for possession when granted same by the Circuit Court on 26th February, 2019 and the second named plaintiff was entitled to a similar order at present.

#### **Submissions on behalf of the Defendant**

34. On the hearing of this application, the defendant referred to eight affidavits that he had sworn in the matter. These affidavits are lengthy and somewhat repetitious. In the affidavits the defendant has raised a plethora of arguments as to why the plaintiffs, or either of them, are not entitled to an order for possession of the property.
35. It has been difficult to disentangle all the defendant's complaints and submissions in the matter. Doing the best that I can, the defendant would appear to make the following arguments as to why an order for possession should not be made against him: Firstly, he alleged that the first named plaintiff failed to properly establish jurisdiction before the Circuit Court and therefore it did not have jurisdiction to make the order for possession on 26th February, 2019. In particular, while the plaintiff had submitted that the value of the property was less than €3 million, it had failed to provide any evidence of this, other than a mere assertion by Mr. Johnston that the property was worth less than that amount. The

defendant submitted that that averment was not sufficient to establish jurisdiction in the Circuit Court.

36. Secondly, the defendant submitted that he had not been furnished with adequate details of the alleged debt owed by him to the plaintiffs. In his affidavits, he complained that he had not been furnished with detailed statements of account from the inception of the account down to the present. In particular, he had not been given details of the interest rates charged at various periods; nor was he given information as to when and by how much the interest rates varied over the relevant period.
37. Thirdly, the defendant submitted that in relation to the alleged transfer of the loan account and the mortgage, the plaintiffs had relied on documents that had been exhibited to various affidavits sworn on their behalf. These documents had been heavily redacted, insofar as they only purported to give details of the transfer of his loan. All of the other information, concerning other loans that were the subject of the same transfer deed had been blanked out. The defendant submitted that he was entitled to have sight of all relevant documentation. He submitted that he had not been given all of the relevant documentation, due to the extent of the redaction of the documents that had been furnished to him.
38. Fourthly, the defendant submitted that he had made a "formal private offer" in writing, which had been exhibited to his affidavit sworn on 9th November, 2018. In that affidavit he had stated as follows at para. 2:-

*"I say this affidavit is made for the purpose of making a Formal Private Offer to the claiming party for the alleged full amount claimed, to resolve all matters in full and final settlement for any alleged obligation which may be owed. I beg to refer to our said Formal Private Offer addressed to the claiming party upon which marked with the letter "FPODJ".*

39. The defendant complained that he had never received any response from the plaintiffs in relation to his offer. He stated that the plaintiffs had alleged in the Circuit Court that they had not received the written offer, but that that was not true. In subsequent affidavits, the defendant complained that the plaintiff should not be entitled to proceed on foot of the application, due to the fact that the defendant had offered to provide a Bill of Exchange in full and final payment of the debt allegedly owed by him to the plaintiffs.
40. Fifthly, the defendant submitted that the plaintiffs had failed to accept his invitation to submit the dispute to mediation. It was submitted that this was in breach of the Mediation Act, 2017 and was a matter which the court was entitled to take into account when deciding whether to exercise his discretion to grant the order sought by the plaintiffs.
41. Sixthly, the defendant submitted that the indenture of mortgage signed by him breached the European Communities (Cancellation of Contracts Negotiated Away From Business Premises) Regulations, 1989 (S.I. 224/1989), because it had not been executed at the business premises of the defendant, but had been signed by the plaintiff at his solicitor's

office. The defendant further submitted that the plaintiffs and their predecessors in title had acted in breach of the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, as the alleged loan offer agreement was drafted in advance and therefore the terms thereof had not been individually negotiated with the defendant. He alleged that the plaintiffs had been in breach of Regulation 5 (1) which provided that where part or all of a contract is in writing, "*the seller or supplier shall ensure that the terms are drafted in plain, intelligible language*". The defendant alleged that the predecessors in title to the plaintiffs had failed to disclose to him that the debt could be transferred to other parties, who may sue upon it.

42. Finally, the defendant submitted that the plaintiffs were not entitled to an order for possession because their evidence in relation to the creation of the debt and the arrears that had arisen thereunder, was based entirely on hearsay evidence, as they had not been parties to the original loan agreement or mortgage.

### **Conclusions**

43. To deal firstly with the issue of locus standi, the court is satisfied that the plaintiffs have locus standi to seek an order for possession of the property. From the affidavits sworn by Mr. Johnston, Ms. Loftus, Mr. Dowling and Mr. Broderick, and the documents exhibited thereto, the court is satisfied that the original loan, which belonged to INBS, was transferred to Anglo/IBRC; thence to the first named plaintiff and thereafter was transferred by the first named plaintiff to the second named plaintiff.
44. The order made by McGovern J. on 1st July 2011 and the documentation set out in the schedule thereto, make it clear that the loan account that was held by the defendant with INBS, was one of the loans transferred from INBS to Anglo.
45. The court is satisfied from the matters stated by Mr. Johnston in his affidavit sworn on 4th April 2017 at para. 5, and the deed of transfer exhibited at Exhibit A thereto, that the loans which were transferred by the special liquidators of IBRC to the first named plaintiff, included the loan and mortgage the subject matter of the proceedings herein.
46. The court is satisfied having regard to the matters averred to by Ms. Loftus in her affidavit dated 8th January 2020 and having regard to the documents exhibited at Exhibit "CL2" thereto, that the loan and mortgage the subject matter of the proceedings herein, were transferred by the first named plaintiff to the second named plaintiff on 18th April 2019.
47. The court is satisfied having regard to the provisions of clause 16 of the mortgage, that the mortgagor irrevocably consented to the mortgagee transferring the debt and mortgage, if it so wished.
48. Accordingly, the court is satisfied that the plaintiffs and each of them have locus standi to seek an order for possession of the property.
49. Turning to the right of the plaintiffs to obtain an order for possession of the property, the court is satisfied that the second named plaintiff is entitled to an order for possession in



its favour. The court is satisfied from the documents exhibited to the various affidavits that the defendant was offered a loan of €390,000 by INBS in August 2007. The defendant accepted the loan offer on 17th August 2007 and drew down the funds on 23rd August 2007.

50. The court is satisfied from the statements of account that were exhibited to the first affidavit sworn by Mr. Johnston, that the loan account fell into arrears in or about 2011. The court accepts the averment in his affidavit sworn on 7th March 2018 that the last payment to the account was received on 28th June 2013 in the sum of €540.00. The court accepts the statement of Mr. Johnston in his affidavit sworn on 28th November 2018, that as of 22nd November 2018, the total sum due and owing by the defendant to the first named plaintiff was €547,943.50. The court accepts the averment of Ms. Loftus in her affidavit sworn on 8th January 2020, that as of 3rd January 2020, the balance outstanding on the account stood at €577,016.45.
51. The defendant did not challenge the averments that he had first gone into arrears in his repayments in or about 2011; nor that the last payment to the account had been made in 2013, nor that the figures in respect of the total arrears as given by Mr. Johnston and Ms. Loftus were correct. In the circumstances, the court finds that the defendant remains indebted to the second named plaintiff in a sum in excess of €577,016.45 at the present time.
52. The defendant does not challenge that he executed the indenture of mortgage in favour of INBS on 23rd January 2009. Clause 7(c) of the mortgage clearly provides that if the mortgagor is in arrears for in excess of one month, the mortgagee shall be entitled to call in the full amount of the loan. The court is satisfied that by letter dated 8th December 2015, the first named plaintiff duly called in the entire of the loan from the defendant, which then stood at €475,210.19.
53. The court is further satisfied that by letter dated 13th January 2016, the solicitors acting on behalf of the first named plaintiff demanded that the defendant should deliver up vacant possession of the property within seven days of the date thereof. Accordingly, the court is satisfied that there was a valid demand for repayment of the entire debt and a valid demand for delivery up of possession of the property.
54. Having regard to the copy folio exhibited to the affidavit sworn by Mr. Broderick on 2nd July 2021, the court is satisfied that the defendant was registered as full owner of the property on 11th February 2009. The charge in favour of INBS was registered on the folio on the same date. On 30th June 2014, the first named plaintiff was registered as owner of that charge. On 25th July 2019 the second named plaintiff was registered as owner of the charge.
55. Section 62(7) of the Registration of Title Act, 1964, makes provision for the summary disposal of an action seeking possession of registered land. Section 62(7) was repealed by the Land and Conveyancing Law Reform Act 2009 and was replaced by s. 97(2) of that Act. However, s. 62(7) was expressly saved by s. 1 of the Land and Conveyancing Law

Reform Act 2013, as respects a mortgage created prior to 1st December 2009. Accordingly, s. 62(7) of the 1964 Act is the relevant section for the purposes of this application. It is in the following terms:-

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

56. The matters that must be established by a plaintiff in order to obtain an order for possession pursuant to s. 62(7) of the 1964 Act, were considered by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, where Baker J., delivering the judgment of the Court, stated as follows at paras. 49 and 50:-

*"[49.] The owner of a charge who seeks to obtain possession pursuant to s. 62(7) has to prove two facts:*

*(a) That the plaintiff is the owner of the charge;*

*(b) That the right to seek possession has arisen and is exercisable on the facts.*

*[50.] The summary process is facilitated by the conclusiveness of the Register as proof that the plaintiff is the registered owner of the charge is a matter of the production of the folio, and, as the Register is by reason of s. 31 of the Act of 1964 conclusive of ownership, sufficient evidence is shown by that means: see the discussion in the Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352. The judgment of the Court of Appeal inter alia held that the correctness of the Register cannot be challenged by way of defence in summary possession proceedings, and that a court hearing an application for possession pursuant to s. 62(7) of the Act of 1964 is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and the right to possession has arisen and become exercisable."*

57. Having regard to the matters that must be established by a mortgagee in order to obtain an order for possession of property pursuant to s. 62(7) of the 1964 Act, and having regard to the evidence contained in the affidavits and in the documents exhibited thereto, as outlined above, the court is satisfied that in the present case, the first named plaintiff was entitled to an order for possession of the property at the time that it was granted same by order of the Circuit Court on 26th February 2019. The court is further satisfied that having regard to the matters set out in the affidavits sworn by Ms. Loftus and Mr. Dowling, the loan the subject matter of the proceedings herein and the mortgage which secured same, were transferred by the first named plaintiff to the second named plaintiff.

Accordingly, the court is satisfied that the second named plaintiff has established that it is entitled to an order for possession of the property.

58. The court must now consider the various grounds of defence that were put forward by the defendant. The first of these involved the issue as to whether the first named plaintiff had established jurisdiction before the Circuit Court at the time when it obtained the initial order for possession in February 2019. The defendant complained that while the first named plaintiff had pleaded in its Civil Bill that the value of the property did not exceed €3 million, there had been no evidence to establish that fact, save for the bald assertion by Mr. Johnston that the market value of the property did not exceed that sum.
59. The court does not regard this ground as having any substance. Firstly, while the opinion of Mr. Johnston that the property did not have a market value in excess of €3m, may not have been that strong, there was no contradictory evidence led on behalf of the defendant that the property had a value in excess of that figure.
60. Secondly, the jurisdiction of the court was not founded solely on that basis. At para. 17 of the Civil Bill it was pleaded that the proceedings were commenced in the Circuit Court pursuant to s. 3(2) of the Land and Conveyancing Law Reform Act 2013, which applies to the proceedings, as they are proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates and which land is the principal private residence of the mortgagor and the mortgage concerned was created prior to 1st December 2009. In the present case it was accepted by all parties that the property was the principal private residence of the defendant. It was further accepted that the property was not subject to the provisions of the Family Home Protection Act, 1976. It was further accepted that the mortgage was created prior to December 2009. Accordingly, it is clear that the provisions of s. 3(2) of the 2013 Act apply and therefore the Circuit Court had jurisdiction to deal with the matter.
61. The second ground of defence was that the defendant had not been provided with adequate details of the level of debt; nor as to the rates of interest that had been applied to the account during the relevant periods. The court is not satisfied that there is any substance in this ground. The court has reached this view for a number of reasons. Firstly, the defendant was provided with statements of account for the period 23rd August 2014 to 20th March 2017. Secondly, the defendant did not challenge the averments in the affidavits sworn on behalf of the plaintiffs that he had first gone into arrears on the account in 2011 and, more importantly, that he had not made any payment into the account since 2013. Thirdly, the defendant has not challenged the accuracy of the global figures given by Mr. Johnson and Ms. Loftus as to his level of indebtedness on the account down to January 2020.
62. If this were an application for summary judgment for a liquidated sum, the defendant may have some ground for complaint. If the court were to award judgment for a specific amount, it would be reasonable that the amount so ordered would be set out in very specific terms and the plaintiff would have to establish how the calculation of that amount was correct.

63. However, this is not such an application. This is an application for an order for possession of property. All the plaintiff has to establish in these circumstances, is that the plaintiff is the owner of the charge and that the right to seek possession has arisen and is exercisable on the facts. Therefore, the plaintiff only has to establish that there is some money due and owing to it and that it has made the necessary demand for repayment of the total sum and for delivery up of possession and that the plaintiff has refused to provide either of these.
64. Thus the court need only be satisfied that there is some amount of money due and owing on foot of the account which is sufficient to trigger the right to call in the entire debt and the right to demand possession of the property. In the present case that has been clearly established. The evidence shows that the defendant has been in arrears with his repayments for a very considerable period of time; the unchallenged evidence is that he has not paid any money into the account since 2013 and the indebtedness has grown substantially over the years down to January 2020. In the circumstances, the court is satisfied that any lack of detail that there may be in relation to the rate of interest charged over the relevant period, does not affect the entitlement of the plaintiff to an order for possession of the property, as the court is satisfied that he owes money on the account and that the right to demand possession has been triggered under the terms of the mortgage deed.
65. The third ground of complaint raised by the defendant, was to the effect that he had not been given access to the original unredacted documentation on foot of which the plaintiffs brought their claim. For two reasons the court does not regard this as a valid defence to the plaintiffs' application. Firstly, when the matter was before the Circuit Court, the defendant brought a motion seeking access to a very large amount of documentation as set out at para. 17 of his affidavit, which appears to have been sworn on 9th March 2018. By order dated 10th April 2018, the Circuit Court gave the defendant four weeks within which to make an appointment with the first named plaintiff in order to view the documents, as listed at para. 3 of his notice of motion in respect of the documents at subparas. (a), (b), (c), (e) and (g) thereof. It is not known whether the defendant exercised his rights pursuant to that order. However, it is clear that he did not appeal the order. Therefore, he cannot now complain in relation to lack of sight of the other original documentation sought in his notice of motion. If he was dissatisfied with the terms of the Circuit Court order, his remedy was to appeal that order at that time. He did not do that.
66. Insofar as the defendant complains that he has been furnished with redacted copies of various documents showing the transfer of the loan account and mortgage from INBS to Anglo and on to the first named plaintiff and thence to the second named plaintiff, the court is satisfied that, while the transfer documentation has been heavily redacted, the relevant parts which relate to the interests of the defendant, have not been redacted. Therefore, his rights and his ability to defend himself in this application have not been adversely affected by the redaction of the material.

67. The court is satisfied that the material that has been redacted relates to other loans held by unconnected third parties that were also transferred on foot of the various deeds. The court is satisfied that the details of what loans were transferred as relating to other parties, is irrelevant to the defendant's defence of the within application. Furthermore, the court is satisfied that the interests and rights of those third parties have to be considered and there is no basis on which their right to confidentiality could be waived, or taken away, for the purposes of this application. Accordingly, the court does not accept the defendant's contention that his defence has been hindered by lack of access to an unredacted copy of the transfer documentation.
68. The next ground of defence related to the lack of response on the part of the plaintiffs to the defendant's "formal private offer", which was apparently exhibited to his affidavit sworn on 9th November 2018. The court was not provided with a copy of this document. The court is satisfied that there is no merit to this ground of defence put forward by the defendant. While the defendant may dispute whether or not the plaintiffs ever received his formal written offer, whether they did or not, is irrelevant. Even if they did receive his offer, they were not obliged to either accept it, or respond to it. The making of an offer by one party to litigation, cannot force the other party to accept that offer. While the defendant was entitled to make whatever offer he wished in an effort to settle the proceedings, he was not entitled to demand a response to his offer. The lack of any response on the part of the plaintiff, cannot be a ground to deny it an order for possession of the property, if same is warranted on the evidence.
69. The defendant also complained that the plaintiffs have failed to engage in mediation. While mediation is a very valuable tool in resolving disputes, the failure of a party to accept an invitation to engage in mediation is not a bar to their obtaining relief from the court. A party cannot be forced to go to mediation. The fact that they may elect not to do so, cannot be used as a means of preventing them obtaining relief from the court. Under the Mediation Act 2017, the court can issue a formal invitation to parties to consider mediation and if one of the parties unreasonably refuses to enter into mediation, that fact can be taken into consideration when the court comes to consider the issue of costs. No such formal invitation was issued by the court in this case. There is no substance to this ground of defence.
70. The defendant has pleaded breach of the European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations 1989 (S.I. 224/89), which are sometimes referred to as the "doorstep selling regulations". The defendant has alleged that because the indenture of mortgage was signed by him away from the premises of the INBS, it was therefore caught by the provisions of the regulations. However, this ignores the fact that the defendant accepts that he signed the indenture of mortgage at the offices of his solicitor and that he had the benefit of advices from his solicitor at the time. In these circumstances, there is no substance in this ground raised by the defendant.

71. The defendant also pleaded that the loan agreement fell afoul of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. 227/1995), known as the "unfair contract terms regulations". The defendant submitted that because the terms of the loan and the mortgage were not individually negotiated with him and because the terms were in somewhat unintelligible language, they are therefore unenforceable against him. The court does not accept this argument. The loan offer was very clear in its terms. It was furnished to the defendant in writing. He signed the loan agreement and obtained the money on foot of that agreement. The court does not see that there is any basis on which the agreement can be set aside as being contrary to the 1995 Regulations. While the indenture of mortgage was in more complex terms, the defendant signed it with the benefit of advice from his solicitor, who could have explained the provisions thereof to him in layman's language. This ground of defence is without substance.
72. Finally, the defendant submitted that the court should not grant an order for possession to the plaintiffs, as their case was based on hearsay evidence, relying on documentation that emanated from the INBS in relation to creation of the original loan account and execution of the mortgage. The defendant does not challenge the fact that he signed the letter of loan offer; nor that he received the amount of the loan; nor that he executed the subsequent indenture of mortgage with the benefit of advice from his solicitor; in short, he does not challenge any of the documentation that has been put forward by the plaintiffs as the basis of their claim.
73. If the defendant wished to challenge the letter of loan offer, or the acceptance thereof, or the indenture of mortgage, he could have challenged same in his many affidavits. He did not do so. Furthermore, if he wished to challenge the evidence of any of the deponents, who had sworn affidavits on behalf of the plaintiffs, he could have served notices to cross – examine on them. He did not do so. In such circumstance, he cannot realistically challenge the evidence on which the plaintiffs have brought their application herein. The court is entitled to act on the documentary evidence that has been put before it by the plaintiffs, as that documentary evidence was not specifically challenged by the defendant.

#### **Determination**

74. For the reasons set out above, the court is satisfied that the second named plaintiff is entitled to an order for possession of the property.
75. The court dismisses the defendant's appeal against the order of the Circuit Court made on 26th February 2019, save that it will vary the order so that the order for possession of the property shall be in favour of the second named plaintiff, rather than the first named plaintiff.
76. As this matter has been ongoing for a very considerable period of time, the court does not propose to place any stay on the order for possession.

77. As this judgment is being delivered electronically, the parties shall have a period of four weeks within which to furnish brief written submissions in relation to the form of the final order, and on costs and on any other matters that may arise.