APPROVED

THE HIGH COURT

[2024] IEHC 176

Record No. 2023/11CA

BETWEEN:

PROMONTORIA SCARIFF DAC

Plaintiff

-AND-

BRIAN MCDONAGH

Defendant

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 12th day of March 2024

INTRODUCTION

Preliminary

1. This appeal relates to a Civil Bill for Possession where the Plaintiff (Promontoria Scariff DAC) seeks possession of a principal private residence, Dromin House, which is located at Drummin East, Delgany, County Wicklow ("the property") on foot of a legal mortgage pursuant to section 3 of the Land and Conveyancing Law Reform Act 2013 ("the 2013 Act").

2. An order for possession of the property had been made by the Circuit Court (His Honour Judge Quinn) sitting in Bray, County Wicklow on 18th January 2023, with a stay on the order of possession for a period of 18 months from the date of service of that order (which expires on 7th September 2024). As this is an appeal from the decision of the Circuit Court, the application is a *de novo* hearing and the court's jurisdiction is governed by the statutory provisions and Rules of Court of the Circuit Court.

3. In this application I heard from Mr. Brian McDonagh ("the Defendant") and Ms. Yeoksee Ooi, who is the partner of the Defendant.

4. Ross Aylward BL represented Promontoria Scariff DAC ("Promontoria").

5. The application was conducted by way of a hybrid hearing. Mr. Aylward BL and Ms. Ooi were physically present in court and Mr. McDonagh was present throughout the hearing remotely.

6. The property is in the sole name of the Defendant. Ms. Ooi resides in, and is an occupant of the property, but does not have a legal interest or title in the property. Mr. McDonagh and Ms. Ooi have three children together. As Ms. Ooi resides in the property, and is therefore an occupant, she was served with the possession proceedings in accordance with the Order 5B of the Circuit Court Rules (Actions for Possession and Well-charging Reliefs)[1] and Practice Direction CC17 (Proceedings for possession or sale on foot of a mortgage) of the Circuit Court.

Chronology of Appeal

7. A Notice of Appeal was filed in the High Court on 27th January 2023 with a first return date of 20th February 2023. The matter was adjourned to 19th June 2023 when the hearing date of 15th February 2024 was fixed. On the Friday, prior to this matter coming on for hearing, this court (Barr J.) refused the Defendant's application to adduce new evidence or to inspect documents.

Application for an adjournment

8. On Tuesday 13th February 2024, prior to this application being heard before me on Thursday 15th February 2024, Ms. Ooi issued a new set of proceedings, comprising

[1] S.I.No.264 of 2009.

inter alia a constitutional challenge to the Family Home Protection Act 1976 ("the 1976 Act") against Ireland, the Attorney General, Brian McDonagh and Promontoria Scariff DAC and a return date of 11th March 2024 was given for a Notice of Motion.

9. On the morning of the hearing of this application, Ms. Ooi made an application to me seeking to have this application – Promontoria's possession proceedings – adjourned. In making that application, Ms. Ooi relied on an Affidavit sworn on 14th February 2024 which exhibited the newly instituted proceedings, entitled *Yeoksee Ooi v Ireland, the Attorney General, Brian McDonagh and Promontoria Scariff DAC* (Record No. HP 2024/698) which seeks various declarations in relation to section 2 of the 1976 Act in the context of Ms. Ooi's unmarried status. While not a matter for this court, in those proceedings Ms. Ooi alleges that the 1976 Act "… *insulates both the mortgagor and the bank* …" from an alleged "… *violation of family rights* …" due to the alleged "… *artificial impediment of Mr. McDonagh and her not being a married couple.*" Citing the examples of the Defendants' two brothers she alleges that "… *their marital status saved their wives from the peril of business speculation on their family home*." Essentially, Ms. Ooi sought to adjourn this application and submitted that her recently instituted constitutional challenge in *Yeoksee Ooi v Ireland, the Attorney General, Brian McDonagh and Promontoria Scariff DAC* (Record No. HP 2024/698) required to be determined before this appeal. Ms. Ooi referred to the recent decision of the Supreme Court in *O'Meara & Ors v The Minister for Social Protection & Ors* [2024] IESC 1. The Defendant supported Ms. Ooi's application and *inter alia* submitted that the remortgage on the family home was to support borrowing of €22 million to purchase a data centre in Wicklow.

10. Mr. Aylward BL opposed the application for an adjournment and made the following submissions. He contended that no constitutional issue arose in this appeal and that the proceedings were straightforward possession proceedings on foot of a contract. Further, the application was in the context of an appeal from the Circuit Court and if any party sought to submit new evidence, the leave of the High Court was required as this court (Barr J.) had, for example, dealt with during the previous week.

11. Mr. Aylward BL submitted that Ms. Ooi acknowledged that she was not a named party in the matter and was not a named party on the mortgage and thus acknowledged that she had no privity to the contract on foot of which Promontoria was entitled to possession of the property. Ms. Ooi did not dispute the fact that she had no legal interest in the property and acknowledged that Mr. McDonagh had signed a statutory declaration that this was not a family home. The property was therefore not a family home within the meaning of the 1976 Act. In *Ulster Bank Ireland DAC v Brian McDonagh & Ors* [2023] IECA 265, which involved the same Defendant, the Court of Appeal[2] (Noonan J.) observed at paragraph 7 that it "… *was however subsequently demonstrated, and now no longer disputed, that Brian McDonagh has no spouse, but rather a life partner to whom he is not married, and his residence does not constitute a "family home" within the statutory definition*." That Court of Appeal judgment had dismissed an appeal against the single judgment of this court (Sanfey J.) of 14th March 2023 relating to three cases involving the Defendant and two of his brothers, where Sanfey J. had made an order for sale of the property on foot of a judgment for €19 million that Ulster Bank obtained against the

[2] The Court of Appeal was comprised of Whelan, Noonan and Meenan JJ. Both Whelan and Meenan JJ agreed with the judgment delivered by Noonan J.

Defendant, that judgment having been well charged against Dromin House. Mr. Aylward BL submitted that Ms. Ooi was free to pursue her constitutional challenge against the State, but this did not in any way impugn the entitlement of Promontoria to the possession of the property in accordance with its contractual rights. Further, Mr. Aylward BL drew the distinction, referred to in the judgment of this court (Sanfey J.) in *Ulster Bank Ireland DAC v Brian McDonagh & Ors*, that Mr. McDonagh's brothers and their wives were joint owners of their respective family homes.

12. Mr. Aylward BL made reference to other decisions of this court and the Court of Appeal, including the judgment of Twomey J. in *Ulster Bank DAC & Ors v Brian McDonagh, Kenneth McDonagh and Maurice McDonagh* [2020] IEHC 185, which was affirmed by the Court of Appeal.

13. In response to the points which the Defendant raised, Mr. Aylward BL submitted that Dromin House was security for the mortgages that are the subject of these proceedings. In response to the criticisms made by the Defendant, counsel submitted that there was no basis to same and that it was merely a coincidence that the solicitor who the Defendant referred to, and who subsequently became a consultant in AMOSS, was previously the Defendant's solicitor and was working for a different solicitor's firm at the time.

14. It was submitted that Ms. Ooi's wish to prosecute her constitutional challenge was no basis to delay the hearing of this application (appeal). Ms. Ooi had known about the proceedings for approximately two and a half years, this appeal for over a year and

yet the constitutional challenge was instituted two days before this matter was to be heard and, Mr. Aylward BL submitted, was clearly an attempt, together with Mr. McDonagh, to avoid this application being heard.

15. After hearing from Ms. Ooi, Mr. McDonagh and Mr. Aylward BL, I delivered an *ex tempore* ruling and refused Ms. Ooi's application for an adjournment of this application.

16. I found that Ms. Ooi is the life partner of the Defendant/Appellant Mr. Brian McDonagh and referred to the decision in *Ulster Bank Ireland DAC v Brian McDonagh & Ors* [2023] IECA 265 where the Court of Appeal[3] (Noonan J.) observed at paragraph 7 that Mr. McDonagh has no spouse but rather Ms. Ooi is his life partner to whom he is not married, and his residence does not constitute a "*family home*" within the statutory definition.

17. I further held that in accordance with Practice Direction CC17, which had to be read in conjunction with Order 5B of the Circuit Court rules (as amended), Ms. Ooi had been served with the Circuit Court proceedings in this application as a person in occupation of the premises and principal residence of Mr. McDonagh at the property, and that the Defendant now appealed to this Court against the order of possession granted by the Circuit Court, His Honour Judge Quinn, on 18th January 2023. I stated that the central basis on which Ms. Ooi sought an adjournment was to prosecute a constitutional challenge concerning, *inter alia*, section 2 of the 1976 Act.

[3] The Court of Appeal was comprised of Whelan, Noonan and Meenan JJ. Both Whelan and Meenan JJ agreed with the judgment delivered by Noonan J.

18. I held that those proceedings were not a matter for this court, which was dealing with a Circuit Court appeal against the Order of the Circuit Court made on 18th January 2023. Ms. Ooi had been properly served with those proceedings but was not a party to the proceedings and was not a party to the mortgage. I held that the application made by Ms. Ooi for an adjournment also came very late in the day and in the circumstances, I refused the application for an adjournment.

APPLICATION FOR POSSESSION: THE LEGAL TEST

19. The legal test to be applied in applications for summary possession is well settled.

20. For example, in *Bank of Ireland Mortgage Bank v Cody* [2021] IESC 26; [2021] 2 I.R. 381 at pp. 402, 408, 409 (paragraph 80), the Supreme Court (Baker J.) referred to the test to be applied in summary proceedings such as this. First at paragraph 80, page 402 of the reported judgment, Baker J. observed that:

> "*Many applications for summary judgment would fall between these two extremes and will involve the proffering of evidence or argument by a defendant by way of defence which is not sufficient to rebut the evidence of the plaintiff to enable the judge to make a positive finding against the plaintiff, but which offers enough doubt as to the truth or completeness of the plaintiff's evidence, or credibly presents reasonable arguments or evidence that a defendant has a basis of defence which merits further scrutiny, evidence or argument. In that instance the trial judge is*

constrained by the inability to decide between contested affidavit evidence of fact, or resolve complex questions of law, the action cannot therefore be disposed of summarily and will be adjourned to plenary hearing."

21. Second – and in terms of the jurisdiction of this court, which adopts for the purpose of this appeal the jurisdiction and Rules of Court of the Circuit Court, after having addressed the question of adjournment to plenary hearing and observing (by reference to the decision of the Supreme Court in *Bayworld Investments v McMahon* [2004] IESC 39; [2004] 2 I.R. 199 that the question of adjournment to plenary hearing is a matter ultimately for the judge hearing the summary action and the discretion to do so is not constrained by the choices made by the parties (Baker J.). The decision in *Bank of Ireland Mortgage Bank v Cody* addressed the precise jurisdiction of this court in an application such as this (the only difference is that the facts of Cody involved registered property whereas this application is in relation to unregistered property) at paragraph 105 of [2021] 2 I.R. 381, p. 409 as follows:

"*The jurisdiction is one vested by the CCR, but may properly be said to be one that exists in any case heard on affidavit. It is perhaps the default position in any case where the affidavit evidence is evenly balanced, where there is a conflict on the affidavits between the parties which cannot be or has not been resolved by way of further affidavit, where the court considers that a matter raised on affidavit, particularly one raised in defence, might have such a bearing on the outcome that its credibility deserves to be fully tested, or where a judge considers that in the light of certain averments which are*

credible, but not dispositive, it would be either difficult or unfair to resolve the matter without giving both sides the opportunity to further advance that evidence or, where necessary, to test it. The adjudicative function is not a matter of box ticking or a purely logical engagement with a checklist of proofs that must be met by a plaintiff. Certain evidential presumptions or burdens can make the task of adjudication at times appear almost effortless, but the fact remains that a judge met with evidence, whether contested or not, must weigh that evidence, assess its veracity, credibility, and importance for the purposes of proving those matters that are required to be established. In a case where the action is heard on affidavit, courts are vigilant to consider the option to adjourn the matter for plenary hearing. The vigilance derives from the fact that affidavit evidence of its nature is often in terms which have a tone of certainty which is not always found in oral testimony, particularly where that is cross-examined, and because the affidavits are often drafted by lawyers with a view to the legal test …".

22. When applied to this case, therefore, the court is required to assess whether the Defendant has put forward credible evidence to question a material aspect of the application made on behalf of Promontoria. In *Promontoria (Arrow) Limited v Mallon and Shanahan* [2018] IEHC 145, this court (McGovern J.), in a case dealing with a debt rather than possession, set out the applicable legal principles at paragraphs 9 and 10 of the unreported judgment as follows:

"*(9) The legal principles applicable to applications for summary judgment are well established and were drawn together by McKechnie J. in Harrisrange v Duncan [2003] 4 I.R. 1, when he listed twelve factors to be considered when deciding to make an order for summary judgment or to remit the matter to plenary hearing:-*

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and*

greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a

just result whether that be liberty to enter judgment or leave to defend, as the case may be."

(10) In GE Capital Woodchester Limited v Aktiv Kapital Asset Investment Limited [2009] IEHC 512, Clarke J.[4] *stated:- "It is clear that the mere assertion of a defence is insufficient. Insofar as factual issues arise it is ordinarily necessary for a defendant to place affidavit evidence before the court setting out facts which, if true, would arguably give rise to a defence. However, that proposition should not, in my view, be taken over literally. For example, the factual basis on which a defendant may wish to oppose a plaintiff's claim may not derive from facts within the defendant's own knowledge.*"

23. Having regard to the aforesaid legal test, I shall first consider the application for possession and the formal proofs submitted by Promontoria, and thereafter I shall assess the response of the Defendant and the submissions from Ms. Ooi.

APPLICATION BY PROMONTORIA

The Civil Bill

24. The Civil Bill in this application, at paragraph 3 invokes the jurisdiction of the Circuit Court pursuant to section 3 of the 2013 Act, and this is grounded on the

[4] As he then was.

Affidavit of Jonathan Hanly (a Director of Promontoria) sworn on 11th May 2021, together with the exhibits referred to therein and the Affidavit of Graeme Whelan sworn on 12th May 2021 and the exhibits referred to therein. Mr. Whelan is an executive employed by Cabot (Financial (Ireland) Limited which, as 'Servicer', was appointed to act as service provider on behalf of Promontoria providing loan administration, relationship and asset management services in respect of the Defendant's Loan Facilities and related securities). Mr. Whelan also swore Affidavits on 31st March 2022 and 5th September 2022, the latter stating that as of 1st September 2022, the sum of €5,200,596.71 remained due and owing on foot of Loan Account Number 40538383 - 28289 which said sum was inclusive of arrears in the sum of €2,144,212.36 and exhibited a Loan Statement of Account. At paragraphs 5, 6, 7 and 8 of the Civil Bill, the underlying loan facilities on which the Mortgages are security are pleaded. The details of the two Mortgages, the first dated 10th May 2005 and the second dated 3rd August 2007, are pleaded out in full from paragraphs 9 to 21 of the Civil Bill and it is also pleaded that mortgages are registered in the Registry of Deeds (as Dromin House and lands are unregistered property). Paragraph 22 of the Civil Bill pleads that the total debt is now due under the Mortgages as a consequence of the Defendant's default to discharge the periodic payments as are due and payable under the Second Facility and/or the Mortgages. Paragraph 23 pleads that the property did not constitute a family home at the time of the creation of the mortgages within the meaning of the Family Home Protection Act 1976.

25. The transfer of the mortgages and related business from First Active plc to Ulster Bank Limited and then to Promontoria are described at paragraphs 24, 25 and 26 and culminating with the Deed of Transfer dated 30th November 2018, Ulster Bank

Ireland DAC and Ulster Bank Limited, as successors to the Bank "did irrevocably and absolutely grant, convey, assign, transfer and assure unto [Promontoria] all their rights, title, interest and benefit" in and under the Second Facility and the Mortgages in 2005 and 2007. The Defendant's default is addressed from paragraphs 27 to 31 of the Civil Bill and the demands to the Defendant, seeking vacant possession of the property as the Defendant had not repaid the monies due and owing, are pleaded at paragraphs 32 to 35 of the Civil Bill. The main claim of Promontoria in this Civil Bill is set out at paragraph 1, namely "*[a]n Order for possession of the Property more particularly described in the Schedule hereto which said property was mortgaged/and/or charged by the Defendant to the Plaintiff pursuant to Indenture of Mortgage dated 10th May 2005 and 3rd August 2007 which were duly registered in the Registry of Deeds on 20th September 2005 and 13th April 2010 respectively.*"

26. The Circuit Court has exclusive jurisdiction when an application is made for an order directing possession of a principal private residence which is the subject of a legal mortgage.

27. I am satisfied that Promontoria has established the following proofs and matters in this application.

The Contractual Basis of the Mortgages

28. The Civil Bill, the Affidavit of Jonathan Hanly sworn on 11th May 2021 and the exhibits to that Affidavit have particularised the underlying loan facilities on which the mortgage is security for. For example, the first facility comprised a loan offer

dated 19th January 2005, whereby First Active plc offered the Defendant a loan facility of €3 million to be secured by way of mortgage on the property which the Defendant accepted on 20th April 2005. The second facility comprised a loan offer dated 23rd July 2007, where First Active plc offered the Defendant a loan facility of €5,009,750 for the purpose of remortgaging the first facility, to be secured by way of mortgage on the property, which the Defendant accepted on 26th July 2007 and thereby confirmed that he had received and understood the terms and conditions and that he would complete a mortgage deed.

29. The Deed of Conveyance of the property dated 4th May 2005 – "*[a]ll that and those, the hereditaments and premises known as Dromin House situate at Delgany in the County of Wicklow, which premises are more particularly on map 1 attached hereto and thereon edged with a red line*" – is from Mr. Andrew Wilson, the former owner of the property to the Defendant (Mr. Brian McDonagh) and executed by him.

30. The first Loan Facility dated 19th January 2005 is signed by the Defendant on 20th April 2005 in the amount of €3 million and the security for the loan is Dromin House, Delgany, County Wicklow. This was an interest-only loan for the first ten years and then it was interest and principal for the 15 years thereafter (comprising a 25-year loan) and provided the following warning: "*[w]arning: Your property or home is at risk if you do not keep up payments on a mortgage or any other loans secured on it.*" The First Mortgage is dated 10th May 2005 and contains the same details and is structured in the same way as the Second Mortgage, which is dated 3rd August 2007.

31. As just mentioned, the 2005 Loan Facility was remortgaged in 2007 (Loan Account Number 40538383 – 28289) by the Defendant and this replaced the 2005 facility. The security again was Dromin House, Dromin East, Delgany, County Wicklow and the amount of credit advanced was initially €5,009,750 and was interest only for the first ten years and then in 2017 it went to principal and interest. The 2007 Mortgage again contained the following warning: "*[w]arning: Your property or home is at risk if you do not keep up payments on a mortgage or other loans secured on it.*"

32. The Loan Offer letter for Mortgage Account Number 40538383 and the Applicant being the Defendant was dated 23rd July 2007 and the purpose of the loan is stated to be for "*Remortgage*".

33. The Defendant in writing accepted the terms of the Loan Offer and it was dated 26th July 2007 which included that he would complete a Mortgage Deed.

34. Common to both Mortgages, the borrower is the Defendant (and it is stated that "*[t]he Borrower is seised of or otherwise entitled to the Mortgaged Property for the tenure thereof as specified in the Third Schedule as beneficial owner or for some other legal or equitable estate or interest therein*"), and the Lender is First Active plc (which had an express power to sell on, transfer or assign the mortgage to another entity which the borrower irrevocably consents to) and the mortgaged property is Dromin House. The Mortgages were all sums mortgages and comprised a conveyance of the property. The Defendant covenanted to abide by all the covenants in the Mortgage including the obligation for repayment. The Mortgages were signed, sealed and delivered by the Defendant.

35. By way of example, the Mortgage/Charge of the 2007 Mortgage provides at paragraph 4(a) "*[t]he Mortgage/Charge*" that "*[a]s continuing security for all sums of money whatever as are now or shall from time to time be due and owing by the Borrower to the Lender the Borrower as beneficial owner and for all the estate, right, title or interest vested in the Borrower hereby grants, conveys, assigns, transfers and demises UNTO the Lender ALL THAT AND THOSE the Mortgaged Property TO HOLD the same as so much thereof as is of freehold tenure UNTO the Lender and its assigns and so much thereof is leasehold tenure UNTO the Lender for the residue or residues of the term or respective years for which the Borrower now holds the same as stated in the Third Schedule (less the last 10 days of each such term) SUBJECT to the proviso for redemption hereafter contained.*"

Dromin House

36. The property (Dromin House) is not a family home within the meaning of the Family Home Protection Act 1976.

37. The application on behalf of Promontoria exhibits the 1976 Act statutory declaration from the Defendant declared on 28th July 2007. At paragraph 2, the Defendant declares that the property is not a family home. At paragraph 3, the Defendant confirms that he was never married. At paragraph 6 the Defendant declares that "*[t]he property is not subject to any trust, licence, tenancy or proprietary interest in favour of any person or body corporate arising by virtue of any arrangement, agreement or contract entered into by me or by virtue of any direct or indirect*

financial or other contribution to the purchase thereof or by the operation of the property as held free from encumbrances." Accordingly, as of 28th July 2007, the Defendant was declaring that no one else has any interest in this property, howsoever described, or for whatever reason.

38. As stated earlier in this judgment, in *Ulster Bank Ireland DAC v Brian McDonagh & Ors* [2023] IECA 265, the Court of Appeal[5] (Noonan J.) observed at paragraph 7 that it "*was however subsequently demonstrated, and now no longer disputed, that Brian McDonagh has no spouse, but rather a life partner to whom he is not married, and his residence does not constitute a "family home" within the statutory definition.*"

39. Further, with unregistered property prior to 2009 (in contrast to registered property), the Mortgage/Charge provides that the property is being conveyed to the bank with the retention of the equity of redemption which, of course, is subject to not defaulting on the terms of the mortgage and such a default gives the Lender a contractual entitlement to possession. This is the basis in which Promontoria are bringing this application. The Mortgage provides that it is repayable on demand and if the Borrower defaults on the mortgage or misses a monthly payment and does not repay on demand, an application such as this can be taken.

40. The property is unregistered land, is not a family home and the Mortgages are registered in the Registry of Deeds. Accordingly, the contractual effect of mortgaging unregistered property prior to 2009 is that the property is conveyed to the bank, which

[5] The Court of Appeal was comprised of Whelan, Noonan and Meenan JJ. Both Whelan and Meenan JJ agreed with the judgment delivered by Noonan J.

as owner, has the right to possession of the property and the borrower retains the equity of redemption, *i.e.*, a contractual right to stay in the property provided there is no default on the terms of the mortgage. The decision of the Supreme Court (Baker J.) in *Bank of Ireland Mortgage Bank v Cody* [2021] 2 I.R. 381 at 392-393 (paragraph 40) explained the historical context and difference between unregistered and registered land as follows:

> "*This form of procedure is not new, and the statutory provision for the making of an order for possession of registered land in summary proceedings has a long history. The need for legislative intervention arises by reason of the fact that a mortgagee of unregistered land takes an assurance of the legal title (whether by the conveyance of the fee simple or by creation of an interest by sub demise), and the legal estate carries with it the right to possession, albeit constrained by the terms of the security, including an agreement either express or implied that possession will not be taken if the terms of the security are met. But, in regard to registered land, since the Local Registration of Title Act 1891 ("the 1891 Act"), a security is created by a charge over the lands in favour of a lender, and the key difference is that there is no conveyance or transfer of lands to the lender, simply an entry in the Register of the charge on the folio*".

Entitlement of Promontoria

On 15th February 2010, the business and assets of First Active plc were transferred to Ulster Bank Ireland Ltd under the approval of the Minister for Finance (as per S.I. No. 481 of 2009). Ulster Bank Ireland Ltd converted to a Designated Activity company as confirmed per the Certificate issued by the CRO on 23rd May 2016. By Deed of Transfer dated 30th November 2018, Ulster Bank Ireland DAC "… *hereby unconditionally, irrevocably and absolutely grants, conveys, assigns, transfers and assures unto* …", Promontoria Scariff DAC "… *all of their rights, title, interest and benefit (past, present and future)* …" in the First Facility, Second Facility and Mortgages. The transfer of the Mortgages to Promontoria was registered on the property as of 13th February 2019.

41. I am satisfied that the (redacted) Deed of Transfer dated 30th November 2018 (and the schedules thereto) transfers the two mortgages to Promontoria Scariff DAC and identifies the "Borrower Name" as the Defendant, the property identification ("the Property ID") as 4053838, the "Completion Deed Details" as the Mortgage/Charge dated 3rd August 2007 between (1) Brian McDonagh and (2) First Active plc, and the Mortgage/Charge dated 4th May 2005 between (1) Brian McDonagh and (2) First Active plc, specifically identifies Dromin House, Drummin East Delgany, County Wicklow as the secured property and the Facility Offer Letter dated 23rd July 2007 and acceptance dated 26th July 2007 between Brian McDonagh and First Active plc, the benefit of which was transferred to Promontoria. The mortgages, therefore, were held initially by First Active plc, then Ulster Bank (Ireland) Ltd pursuant to statutory instrument, Ulster Bank (Ireland) Ltd which subsequently changed to Ulster Bank DAC and Ulster Bank DAC sold the facility and mortgages at issue in this application to Promontoria Scariff DAC and the Defendant irrevocably consented to the power of

assignment. Promontoria is, therefore, entitled to demand the property and in default, to sue and to seek possession of the property. I find, therefore, that Promontoria is entitled to seek possession of the property on foot of the Mortgages and have satisfied the chain of ownership in this case.

The Defendant's Default

42. The documentation exhibited by Cabot Financial (Ireland) Ltd, who service the loans for Promontoria, establish the Defendant's default in that no repayments were received from the Defendant. The exhibited "*[m]ortgage arrears statement for account 40538383*" document, for example, confirms the Borrower as the Defendant, the Deed of Transfer was entered into in November 2018, and it was between February and March that the loans in fact transferred. It describes, *inter alia*, the missed payments (*i.e.*, minus the principal sum) received from Ulster Bank initially in the amount of €617,744 and by the 4th April 2021 that amount was €1,562,703.08, that every month the principal sum due was €36,344.48 which was defaulted on by the Defendant and that the outstanding opening balance received from Ulster Bank was in the amount of €5,060,266.73 and this increases so that by, for example, 1st May 2021, the outstanding amount in relation to this sum was €5,146,118.18. The default was the fact that no repayments were received from the Defendant.

The Defendant's default & the Compromise Agreement

43. Additionally, in or around 2013, the Defendant was indebted to Ulster Bank in the sum of approximately €33,162,068, which sum included the second facility. On 13th

March 2013, a Compromise Agreement was executed, whereby Ulster Bank agreed with the Defendant and two of his brothers and two other parties who had an interest in certain of the properties ("the parties"),[6] that, as a term of the Compromise Agreement, *if* the parties abided by its terms, Ulster Bank would not take any enforcement action against them, but if the parties breached the Compromise Agreement, this no longer applied and Ulster Bank could take enforcement action.

44. In its judgment in *Ulster Bank DAC & Ors v Brian McDonagh, Kenneth McDonagh and Maurice McDonagh* [2022] IECA 87 the Court of Appeal[7], at paragraph 4 of its judgment, observe that the Compromise Agreement "… *arose in the context of the collapse of the property market, delays in obtaining planning permission for the development of a data centre on the Kilpeddar Lands site and the failure of the Defendants to comply with their repayment obligations under the Facility Letter of 5 January 2009.*" In his judgment in *Ulster Bank DAC & Ors v Brian McDonagh, Kenneth McDonagh and Maurice McDonagh* [2020] IEHC 185 (6th April 2020), Twomey J. carries out an analysis of the Compromise Agreement and confirms that it was breached by the parties, including the Defendant and thereby confirming Promontoria's entitlement to sue. The judgment of Twomey J. was upheld by the Court of Appeal (joint judgment of Murray and Collins JJ; Pilkington J. agreeing) in *Ulster Bank DAC & Ors v Brian McDonagh, Kenneth McDonagh and Maurice McDonagh* [2022] IECA 87 where, by reference to the judgment of Twomey J., the Court of Appeal stated that "… *the High Court (by Order dated 23 July 2020) granted judgment against the Defendants jointly and severally in the sum of*

[6] As set out in the First Schedule.

[7] Murray, Collins and Pilkington JJ.

€22,947,202.85. The High Court also made two declarations. The first of these was to the effect that the Defendants were as of October 2014, and continued to be, in breach of the Compromise Agreement. The second was that the Receivers were, and continued to be, validly appointed as joint receivers over the Kilpeddar Lands." Accordingly, there is no impediment to Promontoria bringing these proceedings. Further by executing the Compromise Agreement, the Defendant acknowledged: (i) the debt due on foot of the facility that is secured by the mortgages at issue in this application; (ii) acknowledged the fact of the mortgages being secured on Dromin House; and (iii) agreed to sell the property no later than 30th July 2014, with the proceeds of the sale to be paid, at that time, to Ulster Bank.

45. Further, the sworn Statement of Affairs of the Defendant in the Compromise Agreement acknowledges the fact of the debt and debt drawn balance of €5,120,252 in relation to Dromin House.

Default: failure to satisfy demand

46. On 30th April 2019, Cabot Financial (Ireland) Limited wrote to the Defendant *inter alia* requesting that he comply with the Mortgage Arrears Resolution Process ("MARP") and advising that if he failed to do so he may be classified as not cooperating with the possibility of enforcement proceedings being instituted against him. By further letter from Cabot Financial (Ireland) Limited dated 26th June 2019, given the failure of the Defendant to respond, it was stated that he was now classified as "… *not co-operating in accordance with the MARP process* …".

47. I am satisfied that pursuant to the subsequent letters of demand - which were sent to the Defendant on 30th July 2019 (from Cabot Financial (Ireland) Limited and exhibited in the Affidavit of Graeme Whelan) and 6th October 2020 (from AMOSS Solicitors) seeking repayment of the monies that were then due and owing and failing which possession of the property would be sought and notwithstanding these demands - the Defendant failed to repay the sums due and owing and has failed to provide vacant possession of the property. The letter from AMOSS Solicitors dated 6th October 2020 *inter alia* stated that:

> "*We hereby demand that you repay the total outstanding debt in the sum of €5,123,782.71 within 7 (seven) days from the date hereof, failing which we have been instructed by Promontoria Scariff DAC to commence possession proceedings against you for the recovery of the Property*".

48. The Defendant responded by e-mail, dated 12th October 2020, asserting that the property was his family home, on which he claimed there was no mortgage or debt owing and that the recipient of the e-mail advise Promontoria accordingly and ask it to show proof of any debt on his family home.

49. Having regard to the aforementioned, I am satisfied that Promontoria is suing for possession pursuant to a contractual entitlement to do so and, having satisfied the necessary proofs, subject *ceteris paribus* to the Defendant being able to show otherwise, Promontoria has established an entitlement to an order for possession. In this regard, and for the following reasons which are set out in the next part of my judgment, the

Defendant has, in my view, not put forward a basis for a credible defence either on the facts or on the law, to Promontoria's entitlement to possession in this application.

50. I also consider, for the following reasons, that the Defendant has failed to adduce credible evidence which might be material to the outcome of the case and which would warrant the matter being remitted to plenary hearing.

51. The next part of the judgment, therefore, assesses the response of the Defendant and the observations of Ms. Ooi and sets out my reasons for so finding that the Defendant has failed to establish any credible defence to Promontoria's entitlement to possession in this application.

THE POSITION OF THE DEFENDANT

52. As stated at the beginning of this judgment, the jurisdiction which this court exercises is that of the Circuit Court. Earlier, reference was made to the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v Cody*, where at paragraph 105/page 409 of the reported judgment ([2021] 2 I.R. 381), Baker J. stated *inter alia* that the court's jurisdiction was vested by the Rules of the Circuit Court on an application grounded upon an affidavit.

53. The Defendant's main response to this application is set out in his principal Affidavit, sworn on 9th August 2022 and also in an unsworn Affidavit e-mailed by the Defendant to the solicitors for Promontoria (on 23rd December 2022 at 17:41), and in the evidence

which he seeks to put before the court. That evidence, for the following reasons, does not undermine Promontoria's application for a possession order.

54. First, the Defendant's primary submission is that Promontoria has failed to comply with the requirements of O.5B of the Circuit Court Rules in that the Civil Bill has not, it is asserted, referred to and exhibited statements of account with up to date figures.

55. O.5B, r. 3(1) and (2) of the Circuit Court Rules[8] provides that "*3(1) proceedings to which this Order applies shall be commenced by a Civil Bill in Form 2R of the Schedule of Forms. The special indorsement of claim in such Civil Bill shall state specifically and with all necessary particulars the relief claimed and the grounds thereof. (2) In proceedings to which this Order applies, the Civil Bill shall include a statement immediately following the Special Indorsement of Claim as to whether: (a)……, or (b) the proceedings are commenced in the Court under the jurisdiction conferred by section 3 of the Land and Conveyancing Law Reform Act 2013* …".

56. Promontoria's Civil Bill has complied with these provisions. The Civil Bill in this application invokes the jurisdiction of the Circuit Court pursuant to section 3 of the 2013 Act and this is grounded on the Affidavit of Jonathan Hanly sworn on 11th May 2021, which together with the exhibits referred to therein confirms that Promontoria have satisfied the proofs required and established a contractual right to possession of the property on foot of the Mortgages (referred to in this judgment) by reason of the Defendant's default. In summary, Promontoria has identified the property and particularised the grounds.

[8] O. 5B r. 3 substituted by S.I. 346 of 2015 which became effective on 17th August 2015.

57. Further, Circuit Practice Direction CC17 provides for "*[p]roceedings for possession or sale on foot of a mortgage ...*" and paragraph 1 provides that it "*… should be read in conjunction with Order 5B of the Circuit Rules as amended*". Paragraph 2 (Civil bill-pleading of jurisdiction) provides *inter alia* that "*[a] civil bill must show jurisdiction on its face, accordingly the Indorsement of Claim on a civil bill for possession or sale on foot of a mortgage should, in accordance with Form 2R of the Schedule of Forms of the Circuit Court Rules, contain a statement as to which of the following applies (as may be appropriate to the claim the subject-matter of the proceedings):..(c) the proceedings are commenced in the Circuit Court pursuant to section 3 of the Land and Conveyancing Law Reform Act, 2013*".

58. Paragraph 3 (Proofs-non exhaustive list) *inter alia* provides that "*[w]hen applying for an order for possession, the following proofs are required as a minimum…(c) the grounding affidavit should, in accordance with Form 54 of the Schedule of Forms of the Circuit Court Rules, include averments as to the following and exhibit the following documentation: A. verification of the factual matters in the civil bill; B. precise particulars of the property to which the proceedings relate, exhibiting any relevant document (e.g. up to date certified copy folio); C. precise particulars of the occupancy of the property; D. precise particulars of the security on which the plaintiff relies, exhibiting any relevant document (e.g. deed of mortgage) and, where applicable, evidence of any consent to the giving of the security for the purposes of section 3 of the Family Home Protection Act 1976 or section 28 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010; E. precise particulars of the loan agreement on which the plaintiff relies, exhibiting any relevant document (e.g. the facility letter) on*

which the plaintiff relies, exhibiting same if in writing and not previously exhibited, and if not in writing, set out particulars of the agreement; F. precise particulars of the arrears alleged to be owed or other default alleged by the defendant, or other matter on which the plaintiff relies in support of the claim in the proceedings, exhibiting relevant documents including relevant communications and letters of demand relied upon and up to date statement of mortgage arrears; G. where a provision(s) of the Central Bank code (under section 117 of the Central Bank Act 1989) applies, sufficient information to enable the Court to evaluate the extent to which the plaintiff has been in compliance with the same; H. where the name of the mortgagee company has changed, or the rights of the mortgagee under the mortgage have been transferred or assigned to another party, proof (as the case may be) of the name change (e.g. as recorded in the Companies Registration Office) or of the instrument of transfer or assignment."

59. In addressing the Defendant's assertions in this regard, these are, of course, non-exhaustive proofs to be addressed in the Affidavits and exhibits relied upon by Promontoria when making this application and not, as contended for by the Defendant, in the Civil Bill. The Affidavits and exhibits relied upon by Promontoria have, in my view, satisfied these requirements and are in order and the Defendant has not in fact sought, in that sense, to question the proofs relied upon by Promontoria.

60. The Defendant refers to *Bank of Ireland v O'Malley* [2019] IESC 84, [2019] 2 I.L.R.M. 423 and also to sub-paragraph F in Paragraph 3 (Proofs-non exhaustive list – set out above) in contending that there is no reference to the Statement of Account. The decision of the Supreme Court (Clarke C.J., in particular at paragraphs 5.2, 5.3 and 8.2) in *O'Malley* addressed essentially two issues in the context of a claim on a bank loan: first,

the level of detail of the debt which must be specially indorsed by way of particulars on the summary summons, and; second, the evidence required to substantiate the claim for summary judgment. On the first issue, the amount or quantum of a debt is not relevant to the applicable proofs in this case which is concerned with 'default' in an application for possession; in relation to the second issue, I am satisfied that Promontoria have satisfied the evidential requirements for an order for possession to be made in this case.

61. Further, unlike the situation in *Promontoria (Finn) Ltd v Flavin* [2023] IEHC 663 where this court (Simons J.), at paragraph 42, refused the plaintiff's application because it had failed to exhibit the mortgage (and, therefore, a requisite proof), whereas in this application, Promontoria have set out in detail the contents of both mortgages in 2005 and 2007. Simons J. at paragraph 41, also referred to the Supreme Court's assimilation of the test in a summary judgment for debt and possession in *Bank of Ireland Mortgage Bank v Cody* [2021] 2 I.R. 381, 400-401 (at paragraph 74 of the reported judgment) where Baker J. observed that "… *a court hearing a claim for summary judgment, whether that be for summary judgment for debt or for summary possession, must be satisfied that the plaintiff has established its claim and that the defendant has not put forward a basis for a credible defence either on the facts or on the law*". In this case, Promontoria has set out its proofs to establish an entitlement to possession and the Defendant has not raised a *prima facie* defence to this claim, which would justify the matter going to plenary hearing.

62. Second, a common theme in the various submissions made the Defendant is that, in *this application*, Promontoria cannot rely on documents produced by Ulster Bank. The Defendant refers, for example, to *Promontoria (Arran) Limited v Burns* [2020] IECA 87

where the Court of Appeal[9] affirmed the decision of this court (Noonan J.) that the evidence adduced by the plaintiff in that case was insufficient to allow the court to grant summary judgment. The point that the Defendant seeks to make, in relying on the *Burns* case (and other cases) in this application, is that Promontoria cannot rely on the Bankers' Books Evidence Act 1879 (as amended) as an exception to the hearsay rule.

63. Further, as stated above, the central argument by the Defendant that Promontoria cannot rely on documents produced by Ulster Bank is expressed in alternative ways including, for example, the contention that none of the Deponents on behalf of Promontoria are employees of Ulster Bank, and in this regard the Defendant seeks to make, what counsel on behalf of the Plaintiff describes, as a hearsay point.

64. While it is certainly the case that the Defendant has had a litigious history with Ulster Bank, his argument in this regard – and in this application – is, however, misplaced. Promontoria, the Plaintiff in this application, is entitled to bring and maintain this application. The directors of Promontoria have sworn Affidavits as to matters within their personal knowledge and matters on foot of their review of the relevant books and records. Mary Murphy, Director of Promontoria Scariff DAC, for example, has sworn two Affidavits on 4th October 2022 and 11th January 2023, and Jonathan Hanly, Director of Promontoria Scariff DAC, has also sworn two Affidavits on 11th May 2021 and 11th January 2023.

65. Further, as set out earlier, by Deed of Transfer dated 30th November 2018 Ulster Bank Ireland DAC "… *hereby unconditionally, irrevocably and absolutely grants, conveys,*

[9] Baker, Whelan and Collins JJ. (Judgments delivered by Baker and Collins JJ.)

assigns, transfers and assures unto …" Promontoria Scariff DAC "… *all of their rights, title, interest and benefit (past, present and future)* …" in the First Facility, Second Facility and Mortgages. This is further confirmed, in addition, by Ted Mahon, Senior Manager of Ulster Bank who has also sworn an Affidavit on 11th January, 2023 similarly confirming *inter alia* that by Deed of Transfer dated 30th November 2018, Ulster Bank and Ulster Bank Ltd did irrevocably and absolutely grant, convey, assign, transfer and assure unto Promontoria Scariff DAC all their rights, title, interest and benefit in and under the loan facilities and security, the subject matter of these proceedings. Hearsay simply does not arise. Mr. Mahon's Affidavit also confirms that the documentation from Ulster Bank (exhibited in the Affidavits of Jonathan Hanly sworn on 11th May 2021 and Mary Murphy sworn on 4th October 2022) shows that at the time of the transfer of the Second Facility to Promontoria, the Defendant was indebted to Ulster Bank for €5,058,810.28, which debt was secured by both the 2005 Mortgage and 2007 Mortgage on Dromin House.

66. Third, and contrary to the Defendant's assertions, Mr. Mahon confirmed that properties located at 8 Bloomfield Avenue, Portobello, Dublin 8, 13 Grosvenor Square, Rathmines, Dublin 6, 60A Albert Close, Glenageary, County Dublin were in fact the subject of separate loan facilities with Ulster Bank, and not the subject of either the 2005 Facility or the 2007 Facility.

67. Fourth, Mr. Mahon also explains the Certificate of Loan Interest issued by Ulster Bank and dated 2nd January 2020 (and exhibited by the Defendant) which records the "*[a]mount of Loan Outstanding*" as "*€0.00*". For example, Mr. Mahon states that the Defendant's assertion that this document is proof that he repaid the Second Facility in full

to Ulster Bank, is incorrect and points out that "*[a]s of the date of transfer of the Second Facility from Ulster Bank to the Plaintiff, the sum due and owing by the Defendant was €5,058,810.28. The Defendant had not repaid the Second Facility to Ulster Bank. Insofar as the Certificate of Loan Interest dated 2nd January 2020 and issued by Ulster Bank records the "Amount of Loan Outstanding" as "€0.00" that simply reflects the fact that the Second Facility was no longer due to Ulster Bank as the Second Facility had previously been transferred to the Plaintiff*". Through the Affidavit of Mr. Mahon, Ulster Bank has confirmed that the documents exhibited are correct and that the information is correct.

68. Fifth, the Affidavits[10] of Mary Murphy (Director of Promontoria) sworn on 4th October 2022 and 11th January 2023, Jonathan Hanly (Director of Promontoria) sworn on 11th May 2021 and 11th January 2023, Ted Mahon (Ulster Bank) sworn on 11th January 2023, Graeme Whelan (ASU Executive of Cabot Financial (Ireland) Limited) sworn on 12th May 2021, 31st March 2022, 30th September 2022 and 10th January 2023 all refer to their personal knowledge and confirmation in relation to information and documentation which contain averments that satisfy the provisions of the Civil Law and Criminal law (Miscellaneous Provisions) Act, 2020 ("the 2020 Act"), which allows for the admission of business records as an exception to the hearsay rule and Promontoria is not relying on the Bankers' Books Evidence Act 1879 (as amended). For example, Chapter 3 (Business records and other documents in civil proceedings), section 13 (Business records in

[10] There were also Affidavits of service of Enda Kelly, trainee solicitor in the firm of AMOSS LLP, solicitors for Promontoria sworn on 4th October 2021, Gary Thompson, solicitor in the firm of AMOSS LLP, solicitors for Promontoria dated 4th April 2022, Geoffrey Rooney, solicitor in the firm of AMOSS LLP, solicitors for Promontoria dated 5th July 2022, Jerry Burke, solicitor in the firm of AMOSS LLP, solicitors for Promontoria dated 11th October 2022.

document form presumed to be admissible) of the 2020 Act provides that "*[s]ubject to this Chapter, in civil proceedings any record in document form compiled in the ordinary course of business shall be presumed to be admissible as evidence of the truth of the fact or facts asserted in such a document where such a document complies with the requirements of this Chapter*." Section 14 of the 2020 Act provides for the "*admissibility of business records: general*" and section 15 provides for the notice of business records evidence with section 15(1)(a) of the 2020 Act providing that "*[i]nformation in a document shall not, without the leave of the court, be admissible in evidence by virtue of section 14 at a civil trial unless- (a) a copy of the document has been served on the other party or parties …*".

69. Recently in *Nolan v Dildar Limited* [2024] IEHC 4, at paragraphs 253 and 254, this court (McDonald J.) approved of the following passage in *McGrath On Evidence* (Third Edition, 2020) in a case where it had been argued that the requirements of section 15(1) of the 2020 Act had not been met in circumstances where no notice had been provided by the plaintiffs not later than 21 days before the commencement of the trial. McDonald J. held that this ignored the fact that the documents had been provided as part of discovery and on that basis the requirements of section 15(1)(a) of the 2000 Act have been satisfied:

> "*This is confirmed by the authors of McGrath On Evidence (3rd Ed. 2020) who express the view that the requirements of s. 15 can be readily satisfied in cases where documents have been provided by way of discovery. According to the authors at para. 5-228: -*
>
> > *It is important to note that notice of an intention to adduce evidence of business records is only required in advance of a*

hearing if copies of the documents have not already been provided. As a result, in most civil cases, no such notice will in fact be necessary. In applications and actions heard on affidavit, the business records on which a party seeks to rely will have been provided by way of exhibits to affidavits and, in plenary actions, they will generally have been provided by way of discovery. Therefore, it will generally only be in plenary actions in which discovery has not been made or a party seeks to rely on documents which fall outside of the categories of discovery that a specific notice under section 15(1) will be required".

In my view, the authors of McGrath are correct".

70. Sixth, the Defendant's submissions and allegations in relation to Fane Investments and related matters are issues which are the subject of separate proceedings in the Commercial Division of the High Court and are not relevant to the matters the subject of the application before me. Further, the *use* to which the Defendant put €2 million of the sums borrowed on the 2007 facility does not address his obligation to repay these sums, but rather acknowledges the fact of the debt.

71. The Defendant seeks to make arguments in relation to the amount or quantum of loans and debt rather than the central issue of *default*. The Defendant's approach is, therefore, erroneous in failing to address the gravamen of this application which is the issue of default and not the quantum.

72. Further in *Promontoria (Arrow) Limited v Mallon and Shanahan* [2018] IEHC 145 at paragraph 18, this court (McGovern J.) observed that "*[a]lthough the threshold for leave to defend proceedings is a low one, it still has to be crossed and the courts are entitled to look at the defence raised and assess its credibility in the light of all the surrounding facts, including contractual documents. If, at the end of the day, the defence raised is based on mere assertion, is wholly implausible, and inconsistent with, or contradicted by, documentary evidence which is admitted by the defendant, then the court may reject the defence contended for on the basis that it is untenable or lacking in credibility.*"[11]

73. The matters addressed in the Affidavits (sworn and unsworn) of the Defendant comprise unsubstantiated, uncorroborated assertions, some of which are inherently contradictory. For example, the Defendant seeks, by assertion, to dispute the following: (i) the fact that there are Mortgages on the property whilst having confirmed the existence of the Mortgages in the Compromise Agreement; (ii) Promontoria's entitlement to possession of the property whilst having agreed in the Compromise Agreement to sell Dromin House to repay debt.

74. Further, whilst the Defendant has not in fact been able to contradict the documentary evidence (including the statements of account) before the court, he seeks to allege now, in this application, that the Compromise Agreement was allegedly signed by him and others under duress by Ulster Bank.

75. It must also be recalled that this is a summary application for possession. The Defendant's focus on figures and interest rates is misplaced and ignores the requirement

[11] See *Irish Life and Permanent v Hudson* [2012] IEHC 11, *ACC Loan Management v Dolan* [2016] IEHC 69.

for him to address the claim for possession arising from the fact of his default. In *Anglo Irish Bank Corporation PLC v Fanning* [2009] IEHC 141, the defendant in that case, Mr. Fanning, had a number of different loans and disputed whether one of the loans was due and owing but had not disputed that the home loan in question was due and owing. This court (Dunne J.) referred to the following decision of Russell J. in *Birmingham Citizens Permanent Building Society v Caunt* [1962] 1 Ch. 883 at p. 891:

> "*There appears no trace, prior to 1936, of any right in any court to deny a mortgagee asserting or claiming his right to possession, the appropriate order - though to this a qualification has to be made in that a court in the exercise of its inherent jurisdiction for proper reason to postpone or adjourn a hearing might by adjournment for a short time afford the mortgagor a limited opportunity to find means to pay off the mortgagee or otherwise satisfy him if there was a reasonable prospect of either of those events occurring. Indeed, it would be to me surprising if there had been such a trace, having regard to the fact that a legal mortgagee does not necessarily require any assistance from the court to assert his right to possession. Moreover, a mortgagee once rightfully in possession could never be ousted by the mortgagor except on paying off in full.*"

76. Dunne J. then observed as follows:

> "*There appears no trace, prior to 1936, of any right in any court to deny a mortgagee asserting or claiming his right to possession, the*

appropriate order - though to this a qualification has to be made in that a court in the exercise of its inherent jurisdiction for proper reason to postpone or adjourn a hearing might by adjournment for a short time afford the mortgagor a limited opportunity to find means to pay off the mortgagee or otherwise satisfy him if there was a reasonable prospect of either of those events occurring. Indeed, it would be to me surprising if there had been such a trace, having regard to the fact that a legal mortgagee does not necessarily require any assistance from the court to assert his right to possession. Moreover, a mortgagee once rightfully in possession could never be ousted by the mortgagor except on paying off in full."

77. Accordingly, on the facts of that case, it did not matter about the dispute concerning that part of the loan in relation to the purchase of shares given that it was undisputed that some of the money was owed and therefore Anglo Irish Bank Corporation PLC (as it then was) was entitled to possession of the lands and premises comprising 24.464 acres known as Forenaughts House, Naas, Co. Kildare.

78. Similarly, in *The Governor and Company of the Bank of Ireland v Blanc & Others* [2020] IEHC 8, this court (O'Regan J.) referred to the decision of Dunne J. in *Anglo Irish Bank PLC v. Fanning* [2009] IEHC 141 in setting out, particularly at paragraphs 27 to 30, to circumstances where possession only is sought and not judgment of a particular sum of money:

> "*(27) The current investigation before the court is possession only. I am not asked to make a judgment of any description as to*

the sums of money that are due and owing currently by the defendants to the bank. What the Court must do is look to determine if, by the time the plaintiff commenced the process leading to proceedings in January, 2016 there was default in the loan repayment sufficient to enable the plaintiff to commence their possession proceedings in September, 2016 having regard to the contract entered into between the parties.

(28) There is one further matter that the court must also look at and that is under the consumer protection legislation as to whether or not, under the code of conduct that would apply, there was the relevant three-month moratorium from the date of threat of legal proceedings to the date of institution.

(29) The date of threat was November, 2015 and therefore September, 2016 when the proceedings were actually instituted was well beyond the time span.

(30) The issue of how much money is due and owing and the guide to the granting or withholding of possession was dealt with by Ms. Justice Dunne in the High Court in 2009 in Anglo Irish Bank PLC v. Fanning [2009] IEHC 141, when it was indicated that a default was the issue, not the amount. That is clearly the case in circumstances where possession only is sought and not judgment of a particular sum of money, and possession is the only matter before this Court."

79. In *Bank of Ireland Mortgage Bank v Raymond & Anor* [2021] IEHC 665 this court (Simons J.) referred to both decisions of this court (Dunne J.) in *Anglo Irish Bank Corporation plc v Fanning* [2009] IEHC 141 and (O'Regan J.) in *Bank of Ireland v Blanc* [2020] IEHC 18 and adopted these authorities as a correct statements of the law Further, by reference to the decision in *Bank of Ireland Mortgage Bank v Raymond & Anor* [2021] IEHC 665 (at paragraphs 38 and 39 of the judgment) Simons J. found that when making an order for possession in that case, "… *the court appears to have implicitly accepted that, in a suit for possession (as opposed to a suit for the debt), a plaintiff was entitled to possession even if there was a dispute as to part of the indebtedness*."[12]

80. Accordingly, Promontoria have, in my view, satisfied the proofs required and established a contractual right to possession of the property on foot of the Mortgages (referred to in this judgment) by reason of the Defendant's default. The Defendant has failed to establish any defence to Promontoria's entitlement to possession in this application. I also consider that the Defendant has failed to adduce credible evidence which might be material to the outcome of the case that warrants the matter to be remitted to plenary hearing.

SUBMISSIONS OF MS. OOI

81. In addition to making an application for an adjournment (addressed in the first part of this judgment), Ms. Ooi replied to the submissions of Mr. Aylward BL on behalf of Promontoria.

[12] Emphasis added in the judgment of the High Court (Simons J.).

82. Ms. Ooi again referred to the recent decision of the Supreme Court in *O'Meara & Ors v The Minister for Social Protection & Ors* [2024] IESC 1 and furnished a copy of the judgment of Hogan J. in that case. Ms. Ooi referenced a number of paragraphs in that judgment,[13] submitting that Hogan J. had "… *struck down* …" *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 ("*Nicolaou*"), and further submitted that the 1976 Act was "… *drafted in accordance with the principles of Nicolaou which unfortunately erred in only referring to a married couple* …" and that the 1976 Act was inextricably linked to this application which was grounded on "*inequality*." Ms. Ooi submitted that this application concerned credit given to the Defendant and she submits that "… *under Article 45.2.4º the State allowed credit to be given without control* …" in her "… *family interest*".

83. In response, Mr. Aylward BL submitted that Ms. Ooi's submission and reliance on the judgment of Hogan J. in *O'Meara & Ors v The Minister for Social Protection & Ors* [2024] IESC 1 was in relation to her separate constitutional challenge and she had not addressed any matter which would prevent the court from granting Promontoria's application. Further, he submitted that the *O'Meara* case involved a constitutional challenge in circumstances where Mr. O'Meara's application for Widow's, Widower's or Surviving Civil Partner's (Contributory) Pension was refused on the grounds that he was not the widower or surviving civil partner of the deceased person, and was not married to his deceased partner, as required by section 124 of the Social Welfare Consolidation Act, 2005. He submitted that the *O'Meara* case was a public law matter whereas the application before me was a private law matter predicated on contractual issues where there was no 'State' involvement.

[13] Paragraphs 6, 7, 8, 9, 12, 13, 22, 32, 33, 34, 35.

84. In assessing Ms. Ooi's submissions, I note that her central focus concerned the separate constitutional challenge she has brought in relation to section 2 of the 1976 Act which also grounded her application for an adjournment at the commencement of the hearing before me. That constitutional challenge will come on for hearing in due course but Ms. Ooi's submissions, in response to Mr. Aylward BL, did not address the matters which have to be considered in the application before me which is an application made for possession by Promontoria under the jurisdiction of the Circuit Court (in an appeal to this court).

85. Further, while not a matter for this court on this application, it is noted that a majority[14] of the Supreme Court, in *O'Meara & Ors v The Minister for Social Protection & Ors* [2024] IESC 1, held that it was not necessary to consider the correctness of the statement made in *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 ("*Nicolaou*") (and upheld in a series of decisions thereafter) that the Article 41 family was limited to the marital family, in order to resolve the *O'Meara* appeal, and further a majority of the Supreme Court held that if a view was to be expressed, then the statement made in *Nicolaou* was correct as a matter of interpretation, and had not been shown to be 'clearly wrong' to require it to be overruled.[15] On this issue, Woulfe and Hogan JJ. expressed a minority view that the statement made in *Nicolaou* that the family referred to in Article 41 was limited to the family based on marriage, was wrong.

[14] O'Donnell C.J. with Dunne, O'Malley, Murray and Collins JJ. concurring.

[15] See *Mogul of Ireland v Tipperary (NR) C.C.* [1976] I.R. 260 and *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [2015] 4 I.R. 232.

86. Accordingly, having considered the application on behalf of Promontoria and the response of the Defendant and the submissions, affidavit and authorities relied on by Ms. Ooi, I am of the view that Promontoria has established an entitlement to possession of the property, Dromin House, which is located at Drummin East, Delgany, County Wicklow.

87. Finally, before addressing the proposed orders, I should make it clear that I reject any suggestion by the Defendant that Promontoria or its legal advisers misled this court in any way.

PROPOSED ORDERS

88. Accordingly, I shall dismiss the Defendant's appeal and affirm the Order of the Circuit Court (His Honour Judge Quinn), dated 18th January 2023 and certified on 3rd March 2023 that the Plaintiff do recover possession of the property described as the dwelling house and premises known as Dromin House, Drummin East, Delgany, County Wicklow held in fee simple, and shown on a map attached to the conveyance dated 4th May 2005 and made between Andrew Wilson of the one part and Brian McDonagh of the other part.

89. I shall put the matter in before me at 10:30 on Friday 22nd March 2024 to address the issue of costs and to hear from the parties (including from Ms. Yeoksee Ooi) on the question of the existing stay on the order for possession.