

**THE HIGH COURT**  
**JUDICIAL REVIEW**

[2015 No. 506 JR]

**BETWEEN****DECLAN FAGAN AND BERNADETTE FAGAN****APPLICANTS/DEFENDANTS****AND****ACC LOAN MANAGEMENT LTD.****RESPONDENT/PLAINTIFF****JUDGMENT of Mr. Justice McDermott delivered on the 10th day of May, 2016**

1. On the 7th September, 2015 the applicants sought leave to apply for judicial review for an order of certiorari in respect of an order for possession of property comprised in Folio 7758 Co. Westmeath granted to the respondent by Her Honour Judge Flanagan on the 28th July, 2015. Leave to apply for judicial review was not granted on that application, but the High Court (White J.) directed that the order for possession be stayed until the determination of an application for leave to apply for judicial review and that a notice of motion be served upon the proposed respondent (ACCLM previously ACC Bank plc) pursuant to O. 84 r. 24 of the Rules of the Superior Courts. That motion was adjourned from time to time and affidavits were exchanged between the parties. The matter comes before this Court by way of a "telescoped" hearing whereby the application for leave will be determined and if successful arising out of the evidence and exhibits contained in the affidavits exchanged between the parties, the court will proceed to determine the issue as to whether an order for certiorari should issue on such grounds upon which leave may be granted, if any. Mr. and Mrs. Fagan were not legally represented. The sides were satisfied that the hearing should proceed on this basis. The court received extensive submissions from the parties in respect of the issues raised in these proceedings.

2. On the 28th July, 2015 in proceedings entitled "The Circuit Court, Midland Circuit, County of Westmeath, Between/ ACC Loan Management Ltd., Plaintiff and Declan Fagan and Bernadette Fagan, Defendants" Her Honour Judge Flanagan having been satisfied that the defendants were duly served with a Civil Bill for Possession issued on the 18th March, 2014 having read the pleadings and documents filed, and heard submissions by counsel for the plaintiff and the defendants, appearing on their own behalf, was satisfied that the plaintiff was entitled to possession of the premises as claimed in the Civil Bill and made an order:

"That the plaintiff does recover from the defendant possession of ALL THAT AND THOSE the property comprised in Folio 7758 Co. Westmeath and the court doth further order that the plaintiff do recover from the defendants the costs of the proceedings to be taxed in default of agreement".

The order was stayed in the event of an appeal.

**Background**

3. On 13th July, 2004 the plaintiff advanced two loan facilities to Temple Spa Limited comprising loans of €4,750,000.00 and €4,825,000.00. The security provisions of the facility letter required that the company's directors to provide a personal guarantee supported by a full legal charge over Temple House on 14.5 acres at Horseleap, Co. Westmeath. A second guarantee dated 23rd April, 2007 was entered into by the plaintiffs in respect of credit of €307,500.00 provided as working capital to the company.

4. The charge was duly registered as a burden on the property on 17th May, 2007. ACC Loan Management Ltd. were registered as owners of the charge.

5. On the 14th February, 2007 Mr. and Mrs. Fagan entered into a home loan agreement with ACCLM for a facility up to a maximum of €250,000.00 by way of equity release to be applied in reduction of the debt owing by the company to ACCLM. The same security applied in respect of this loan.

6. By letter of demand dated 28th October, 2010 ACCLM demanded payment by the company of the monies due under the terms of the 2004 and 2007 Facility Letters. By a further letter of demand dated 1st November, 2010 payment was sought from the applicants for the monies due by the company under the first and second guarantees. The monies were not discharged.

7. A receiver was appointed on the 16th November, 2010 in respect of the property.

8. ACCLM initiated proceedings by way of summary summons against the applicants seeking payments of monies due under the 2004 and 2007 Facility Letters and judgment was granted in the amount of €5,780,460.28 against the applicants on 9th May, 2011. This sum was not discharged and on the petition of ACCLM the applicants were adjudicated bankrupt by orders dated 21st May, 2012.

**High Court Proceedings for Possession**

9. Proceedings were issued by way of special summons in the High Court seeking possession of Temple House (the applicant's private dwelling house) and approximately 14.5 acres at Temple, Horseleap, Co. Westmeath comprised in Folio 7758 Co. Westmeath.

10. In a judgment delivered on the 23rd July, 2013 Finlay Geoghegan J. outlined the background to the proceedings [2013] IEHC 346 but refused the relief claimed. I gratefully adopt the chronology of relevant events set out in that judgment.

11. The special summons issued on 7th February, 2013 against Mr. and Mrs. Fagan and was also served on their daughter Ciara who was eighteen years old at the time and due to sit her leaving certificate in June, 2013 and who was living at home. Prior to the commencement of those proceedings the solicitors for ACCLM had been informed by the official assignee in bankruptcy that he had

informed Mr. and Mrs. Fagan that having taken senior counsel's opinion, he had determined not to challenge the security relied upon by ACCLM against Mr. and Mrs. Fagan. He would not be opposing any possession proceedings to be taking by ACCLM for the purpose of enforcing its security. The official assignee was not joined in those proceedings and did not appear at the hearing before the High Court.

12. Finlay Geoghegan J. having heard submissions from counsel for ACCLM and Mr. and Mrs. Fagan concerning their entitlement to appear and oppose ACCLM's application for possession having regard to their adjudication as bankrupts and the attitude of the official assignee to ACC's claim, determined that:

"17. ...

(a) Mr. and Mrs. Fagan, by reason of their adjudication as bankrupts, were not entitled to challenge the validity of the charge registered on Folio 7758 Co. Westmeath in favour of ACC as the ownership of the said folio now vests in the Official Assignee; and

(b) As Mr. and Mrs. Fagan were in possession of their private dwelling house, Temple House as their family home and the adjoining 14.5 acres and the proceedings for possession are against them I would permit them to make submissions in opposition to the application for possession, but only upon the basis that ACC is the registered owner of a charge over the property in Folio 7758 Co. Westmeath pursuant to the charge."

The learned judge was satisfied that upon adjudication as bankrupts all property of Mr. and Mrs. Fagan including their interest in the lands in suit vested in the Official Assignee pursuant to s. 44 of the Bankruptcy Act 1988. Therefore they had no standing to defend any claim in relation to property "now vested in the Official Assignee". The learned judge added that "this precludes them having any entitlement to challenge the validity of the Charge".

13. However, the learned judge permitted Mr. and Mrs. Fagan to make submissions in defence of the application for possession based on the facts set out in their affidavits but limited to the issue as to whether the bank as registered owner of the charge was otherwise entitled to an order for possession. She stated:

"19. However the present claim is a claim for possession of their private dwelling house which is currently their home of and in their possession. ACC, even as registered owner of the Charge over Folio 7758 Co. Westmeath is only entitled to an order for possession of and enter the dwelling house in accordance with law. Article 40.5 of the Constitution guarantees this position. ACC's proceedings for possession are against Mr. and Mrs. Fagan as defendants and they have been permitted to file affidavits in response. Mr. and Mrs. Fagan in their affidavits raised issues as to the present entitlement of the bank to an order for possession pursuant to s. 62(7) of the Registration of Title Act 1964 having regard to the decisions of the High Court referred to below."

14. ACCLM's application was brought pursuant to s. 62(7) of the Registration of Title Act 1964 which was repealed by s. 8 and Part 5 of Schedule 2 of the Land and Conveyancing Law Reform Act 2009 with effect from 1st December, 2009. Chapter 3 of Part 10 of the 2009 Act which contained the obligations, powers and rights of a mortgagee only applied to mortgages and charges created after the commencement of that Part i.e. 1st December, 2009. ACCLM had to establish that its claim for possession came within s. 62(7) prior to the 1st December, 2009. It had to establish compliance with the two requirements expressly set out in subsection namely, that the plaintiff was the registered owner of the charge and that repayment of the principal monies secured by the charge had become due by that date. The court accepted that the ACCLM was the registered owner of the charge upon which it was relying i.e. the charge of 19th November, 2004. Indeed Mr. and Mrs. Fagan were only permitted to oppose the application for possession upon the basis that ACCLM was the registered owner of the charge.

15. Two further issues remained to be considered namely whether repayment of the principal monies secured by the charge had become due and payable by 1st December, 2009 and whether the power of sale had arisen and was exercisable by virtue of the terms of the agreement between the plaintiff and defendants contained in the "charge".

16. The learned judge concluded that the principal monies secured by the charge had not become due and payable prior to the 1st December, 2009 notwithstanding arrears and the fact that there were payments of interest or principal which had not been made by the company on the relevant dates pursuant to the loan agreements. The court was satisfied that the express terms of the charge stated that Mr. and Mrs. Fagan charged the property with all monies payable by the company by virtue of the covenants contained in the charge. The main covenant given jointly and severally by the company and the guarantor was a covenant to pay the money to ACCLM on demand. There was no obligation to repay the money on the happening of an event of default specified in clause 6. Payment not made on a due date was an event of default with the consequence that the total balance outstanding would then become due and payable immediately to ACCLM. However, though that situation entitled ACCLM pursuant to clause 8 to make a demand for the total balance outstanding, the charge did not contain any covenant to pay the balance outstanding in the absence of a demand. Furthermore, the learned judge concluded that the power of sale had not arisen and was not exercisable by ACCLM prior to 1st December, 2009.

17. ACCLM had also submitted that the statutory power of sale pursuant to s. 19 of the Conveyancing and Law Property Act 1881 applied. However, the court concluded that the power of sale under s. 19(1)(i) only arises "when the mortgage money has become due". This was the money secured on the property mortgage or charged but in the absence of a demand payments secured on the charge property had not become due for the reasons already stated in the judgment.

18. In an addendum to the judgment the learned judge noted that her conclusion flowed as a consequence of the repeal of s. 62(7) of the Registration of Title Act 1964 by s. 8 and part 5 of Schedule 2 of the Land and Conveyancing Law Reform Act 2009 with effect from 1st December, 2009 and the application of s. 27 of the Interpretation Act 2005 in accordance with judgments delivered by the High Court in *Start Mortgages v. Gunn* [2011] IEHC 275, *EBS v. Gillespie* [2012] IEHC 243 and *G.E. Woodchester v. Reade* [2012] IEHC 363. The position of ACCLM as the registered owner of the charge on Folio 7758 pursuant to the charge of 19th November, 2004 was not affected. The position was somewhat altered subsequently by the passage of the Land and Conveyancing Law Reform Act 2013.

#### **The Circuit Court Proceedings**

19. Following the enactment of the Land and Conveyancing Law Reform Act 2013, the plaintiff initiated proceedings for possession of the charged property by way of Civil Bill for Possession dated 18th March, 2014 (Record No. 120/2014). Section 1(2) of the 2013 Act provided:-

"As respects a mortgage to which this section applies, the statutory provisions apply and may be invoked or exercised by

any person as if those provisions had not been repealed by section 8(3) and Schedule 2 of the Act of 2009.”

As a result the plaintiff properly took the view that they could now rely upon s. 62(7) of the Registration of Title Act 1964.

20. In the Special Endorsement of Claim the plaintiff set out the history of the banking facilities made available and the two guarantees entered into by the defendants. It recited the history of the security given to the plaintiff as follows:-

“7. By deed of charge/mortgage (the “Charge”) dated 19 November, 2004 and entered into between the company of the first part, the defendants of the second part and the bank of the third part, the defendants ‘hereby jointly and severally covenant with ACC bank that they, the company and the guarantor shall and will on demand pay to ACC bank its successor or assign the balance of monies which on any encounter counts between the company and ACC bank either a loan or jointly with any other person or persons shall for the time being be due and owing by the company and/or the guarantor to ACC bank ...’

8. Pursuant to clause (B)(3) of the Charge, the Defendants charge the Property with payment of the sums due by the company to the bank as follows:-

‘The guarantor ... as registered owner ... hereby charges in favour of ACC bank (by way of charge for present or future advances) in relation to the Mortgage Properties the ownership whereof ... is registered ... in the Land Registry and all the right title and interest which the guarantor now has therein and shall hereafter require ... with payment to ACC bank of all monies payable by the Company by virtue of the covenant herein contained and hereby assents to the registration of the said Charge as a burden on the Mortgage Premises or so much thereof as is charged in this clause’.

9. On or about 17 May, 2006 the banks interest under the Charge was registered against the Property as a ‘Charge for present and future advances repayable with interest’. ...”

21. Following upon the 2007 Facility Letter the bank advanced the sum of €307,500.00 to the company to provide working capital. This Facility Letter provided that the loan was to be secured by a guarantee and indemnity of the defendants supported by “the Banks existing First Legal Mortgage and Charge over Temple House on 14.5 acres at Temple, Horseleap, Co. Westmeath”.

22. The deed of guarantee and indemnity dated 23rd April, 2007 (the second guarantee) entered into between the defendants and the bank with regard to the company’s obligations under the 2007 letter was in the same terms as that which applied in respect of the 2004 Facility Letter.

23. The plaintiff then set out that letters of demand were issued on the 1st November, 2010 and the 30th March, 2011 to the defendants pursuant to the first and second guarantees in respect of the monies due as of that date by the company to the bank. These monies were undischarged. It is then stated that judgment was obtained against the defendants in the High Court on 9th May, 2011, but that the amount of the judgment was not discharged. On the petition of the bank the defendants were adjudicated bankrupt on 21st May, 2012. It was claimed at para. 15 that: “the power of the bank to enter into possession of the entire of the Property has arisen and become exercisable” as result. The plaintiff then claims possession of the property pursuant to the provisions of O. 5 r. 1 of the Circuit Court Rules, s. 62(7) of the Registration of Title Act, 1964 and s. 1(2) of the Land and Conveyancing Law Reform Act, 2013.

24. The evidence before the Circuit Court on this application consisted of a number of affidavits. The plaintiff’s relied on the affidavit of Mr. Paul Shaw sworn on the 3rd March, 2014. A “joint” affidavit was submitted in reply by Mr. and Mrs. Fagan. They claimed that having been adjudicated bankrupts on the 21st May, 2012, their property vested in the Official Assignee. This included any rights attaching to the property. They submitted that any action by a third party in respect of the property must be addressed to the Official Assignee. They referred to s. 61(4) of the Bankruptcy Act 1988 which states:

“Notwithstanding any provision to the contrary contained in subsection (3), no disposition of property of a bankrupt ... which comprises a family home within the meaning of the Family Home Protection Act, 1976, shall be made without the prior sanction of the court, and any disposition made without such sanction shall be void.”

All property belonging to the bankrupts vested in the Official Assignee pursuant to s. 44(1) of the Act: s. 44(3) provides that this property includes:

“(a) all powers vested in the bankrupt which he might legally exercise in relation to any property immediately before the date of adjudication”.

Mr. and Mrs. Fagan state that after the adjudication of bankruptcy, the plaintiff communicated their intention to the Official Assignee to realise their security in Temple House and the 14.5 acres, their family home. The Official Assignee in response indicated that he would not be defending any possession proceedings. Mr. and Mrs. Fagan claim that the Official Assignee thereby ceded his powers pursuant to his equity of redemption in the property to the plaintiff and in doing so “made a disposition” of portion of the bankrupt’s property vested in him. It is claimed that in making a disposition of property which comprises a family home “without the prior sanction of the court”, the Official Assignee was acting “ultra vires” the restrictions imposed on his powers by s. 61(4). The section states that any such sanction “shall be void”. They therefore sought the dismissal of the possession claim.

25. In a replying affidavit dated 21st November, 2014, Mr. Shaw, while acknowledging that much of its content was in the form of a legal submission, stated that s. 61(4) properly construed was intended to be an exception to the Official Assignee’s powers inter alia to sell the bankrupts’ property conferred on him by section 61(3). The Official Assignee never sought to sell the family home as it was secured in favour of the plaintiff. Therefore Mr. Shaw submitted that the failure by the Official Assignee to challenge the validity of ACCLM’s security over the family home or to defend the previous High Court possession proceedings or the Circuit Court proceedings did not amount to a disposition of the bankrupts’ property within the meaning of s. 61(4) of the Act which would require the prior sanction of the court. He acknowledged that s. 136(1) of the Act provides that:-

“On the making of an order of adjudication, a creditor to whom the bankrupt is indebted for any debt provable in bankruptcy shall not have any remedy against the property or person of the bankrupt in respect of the debt apart from his rights under the Act, and he shall not commence any proceedings in respect of such debt unless with the leave of the court and on such terms as the court may impose.”

However, s. 136(2) provides that:

"This section shall not affect the power of a secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been enacted."

ACCLM outlined its position that a secured creditor under s. 136(2) remained outside the bankruptcy and may realise its security on such terms and in such manner as the security allows. Therefore the property which comprised the family home could be realised by ACCLM outside the bankruptcy process without reference to the Official Assignee. The Official Assignee's indication therefore that he would not challenge the validity of ACC's security over the family home or defend High Court or Circuit Court proceedings did not affect Mr. and Mrs. Fagan's rights in relation to the family home and could not be regarded as a disposition.

26. By further affidavit sworn 10th June, 2015 Mr. Shaw in response to an inquiry by the court as to the position of the Official Assignee in relation to the Circuit Court proceedings and whether he should be joined as a notice party or a party to the proceedings exhibited correspondence which made that inquiry of the Official Assignee. By e-mail dated 6th May, 2015 the solicitors of ACCLM were informed by the Official Assignee's office that it did not object to the bank's application for possession and did not require to be joined in the proceedings. The Official Assignee indicated that he would not be attending any court proceedings. This confirmed a previous e-mail from the Official Assignee to ACCLM's solicitors that Mr. and Mrs. Fagan had been advised that having taken senior counsels opinion on the issues in the case, the Official Assignee had decided not to challenge ACCLM's security and not to oppose any application by the bank seeking to enforce its security over the property.

27. In a further affidavit sworn the 16th July, 2015 Mr. and Mrs. Fagan raised additional objections to ACCLM's claim under a number of headings namely:

**(A) Change of Party**

Mr. and Mrs. Fagan claimed that following an amendment of the pleadings which involved a change in the plaintiff's name from ACC Bank Plc. to ACC Loan Management Ltd. on 10th July, 2015 by order of the Registrar of the Circuit Court, there had been a transmission of interest in the proceedings from the former to the latter. It was claimed that this transmission of interest had not been registered with the Property Registration Authority and that ACC Loan Management Ltd. was not therefore the registered holder of a charge on the folio and had no legal standing to seek statutory relief pursuant to s. 62(7).

**(B) Defective/Void Instrument**

It was claimed that the deed of charge on which the plaintiff relied was ineffectual because it was not executed by Mr. and Mrs. Fagan because it did not bear their signatures and was not signed, sealed and delivered by them.

**(C) Statute of Frauds**

It was claimed that the deed of charge insofar as it purported to be a guarantee was ineffective pursuant to the Statute of Frauds because it was not signed by the defendants.

**(D) Breach of Trust and Misrepresentation**

This refers to a generally framed proposed defence that lacks any real specificity.

**(E) The Repeal of Section 62(7)**

Mr. and Mrs. Fagan claimed that ACCLM were not entitled to proceed under this provision.

**(F) Code of Conduct on Mortgage Arrears**

Mr. and Mrs. Fagan claimed that the code of conduct applied to their case contrary to what was claimed by ACCLM.

**(G) Attempts to obtain Vacant Possession on a Consensual Basis**

Mr. and Mrs. Fagan denied that there was any attempt to come to an agreement with the defendants prior to the conclusion of their bankruptcy proceedings and in particular pursuant to a letter of 20th February, 2013. They claim this is to be a misrepresentation on the part of Mr. Shaw as bankruptcy proceedings in their case concluded on 21st May, 2012.

28. ACC replied to this affidavit in a further affidavit by Ms. Suzanne Chew sworn 23rd July, 2015. In respect of the change of name Ms. Chew indicated that no transfer of undertaking had taken place which would necessitate registration in the Property Registration Authority in order for the plaintiff to enforce the charge and seek possession of the property. ACC Bank Plc. had simply changed its names to ACC Loan Management Ltd.

29. ACCLM claimed that the defendants did not have any locus standi to challenge the validity of the charge or to make submissions in relation to it since the Official Assignee in bankruptcy was the only person who was legally entitled to raise those issues and had made the decision not to do so. She noted that during the High Court possession proceedings the defendants had raised a number of defences concerning the validity of the plaintiff's security over the property. The court held that the defendants by reason of their adjudication as bankrupts were not entitled to challenge the validity of the charge registered against the property in favour of the plaintiff on the basis that the ownership of the property vested in the Official Assignee. As stated already prior to the institution of those proceedings the Official Assignee had informed both defendants and the plaintiffs' solicitors that having taken senior counsel opinion he decided not to challenge the security relied upon and would not be opposing the possession proceedings. This was dealt with and referred to in the judgment of the High Court delivered on 23rd July, 2013.

30. Following the institution of these possession proceedings the defendants issued a motion within their respective bankruptcies seeking a declaration that the charge was invalid and void and an order directing the Official Assignee to defend the proceedings on the basis that the plaintiff's security was defective. The Official Assignee was represented at the hearing of these motions but by order of the High Court made 3rd December, 2014 (Costello J.), the reliefs sought by the defendants were refused on the grounds that the defendants did not have locus standi because the property was vested in the Official Assignee in bankruptcy who had decided not to challenge the plaintiff's security over the property. The defendants were discharged from bankruptcy on the 21st May, 2015.

31. It was also submitted by ACCLM in this affidavit that when a bankrupt is discharged from bankruptcy the unrealised property of the bankrupt that had vested in the Official Assignee remains so vested for distribution to the bankrupt's creditors under s. 85(3): therefore, the discharge of the defendants did not in any way impact upon the decision of the High Court which found that the defendants did not have locus standi to challenge the validity of the plaintiff's security because the property remained vested in the Official Assignee.

32. Ms. Chew noted that following the enquiry made by the learned Circuit Judge on 27th January, 2015 as to the position of the Official Assignee in relation to the Circuit Court proceedings he once again stated that he did not object to the plaintiff's application for possession and did not require to be joined in the proceedings. Therefore it was again submitted that the defendants did not have any locus standi to challenge the validity of the charge or make submissions in relation to it and that the Official Assignee was the only person who was legally entitled to raise the issues of defective/void instrument, the Statute of Frauds, breach of trust and/or misrepresentation if indeed these issues had any merit.

33. Ms. Chew noted that the Code of Conduct on Mortgage Arrears did not apply to the property when vested in the Official Assignee and furthermore that the plaintiff had indeed complied with all material aspects of the Code.

34. The foregoing represents a summary of the materials and arguments submitted to the Circuit Court in the plaintiff's application for possession.

### **The Circuit Court Hearing**

35. Both parties are agreed that an account of the Circuit Court hearing before Her Honour Judge Flanagan on the 28th July, 2015 is accurately set out in the affidavit of Kevin Connolly sworn the 18th October, 2015 in these proceedings.

36. All affidavits were opened to the court. The court was informed that the outstanding issue which had been raised by the court earlier in the year concerning the position of the Official Assignee had been addressed. Mr. Shaw's affidavit of the 10th June, 2015 was received in which the Official Assignee confirmed that he did not object to ACCLM's application for possession and did not require to be joined in the proceedings. Counsel submitted that Mr. and Mrs. Fagan did not have locus standi to challenge the validity of ACC's security. Counsel further submitted to the court that following the introduction of the 2013 Act which had addressed the repeal of s. 62(7) of the 1964 Act, ACC by effectively reversing it, it was fully entitled to bring the current possession proceedings and since the property now vested in the Official Assignee; he was the only person entitled to object to the proceedings but had declined to do so. It was therefore submitted that ACCLM had furnished all the required proofs which it was necessary to adduce in order to obtain an order for possession.

37. The court informed the applicants that they were only permitted to rely on the affidavits which had been filed on their behalf in defence of the application and the court would not accept any documents in support of the defendants' arguments which had not been shared with the plaintiff's lawyers. Submissions were made on behalf of both defendants by the first named applicant as set out in paras. 7 to 10 of Mr. Connolly's affidavit. Submissions in reply are set out at para. 11. In the course of the hearing the scope of the matters to be canvassed was considered by the learned judge. This is summarised at paras. 12 to 14 as follows:

"12. Judge Flanagan stated that the matter came before the court on foot of a charge which ACCLM had registered against the property and upon which ACCLM sought an order for possession. Judge Flanagan further stated that the property had vested in the official assignee. The learned judge stated the proofs which ACCLM must satisfy in order to obtain an order for possession were set out in O. 5 r. 1 of the Circuit Court rules, s. 62(7) of the 1964 Act and s. 1(2) of the 2013 Act. She accepted the decision of Ms. Justice Finlay Geoghegan in the previous proceedings that the applicants, by virtue of their adjudication as bankrupts, were not entitled to challenge the validity of the charge and that the court was bound by that decision. Judge Flanagan stated that she would deal in full with each of the grounds set out in the applicants' second replying affidavit dated 16th July, 2015 which set out the defences upon which they relied.

13. The first named applicant inquired as to whether the applicants were precluded from advancing a defence in relation to the validity of the charge. Judge Flanagan stated that the court would deal with each of the grounds of defence in their affidavit. The first named applicant inquired as to whether the applicants were precluded from advancing legal argument in relation to the issue of the alleged defective/void instrument, breach of trust and misrepresentation. Judge Flanagan stated that all of these issues concerned the validity of the charge and that the court was bound by the previous decision of this honourable court, with the result that the applicants were not entitled to raise these issues. The first named applicant referred to case law including *Irish Life and Permanent v. Duff* [2013] IEHC 43 and submitted that the applicants must be entitled to make submissions on all issues relevant to whether a plaintiff is entitled to obtain an order for possession of a family home and that applicants should be allowed to do so in order to liberate their constitutional rights.

14. Judge Flanagan stated that she was satisfied that the decision of Ms. Justice Finlay Geoghegan was binding and that it precluded the applicants from raising any issue in relation to the validity of the charge. The first named applicant submitted that the previous possession proceedings has not focused on this point and that the applicants were now being disenfranchised by not being permitted to advance these arguments. Judge Flanagan stated that the previous possession proceedings in this honourable court had been unsuccessful in relation to the repeal of s. 62(7) of the 1964 Act by the Land and Conveyancing Law Reform Act, 2009 and that while those proceedings had not considered the issue of the validity of ACCLM's security, Ms. Justice Finlay Geoghegan had reached a decision on the applicant's locus standi which was binding on the Circuit Court."

The court also rejected an application for the cross examination of the deponents who had sworn the affidavits on behalf of the plaintiff. The learned judge was not satisfied in particular, that cross examination would advance any of the points raised by the applicants in their affidavits.

38. The learned judge then considered each of the grounds of defence set out in the applicants' second replying affidavit and reached the following decision:

"(a) With respect to the change of name of the respondent, the court was satisfied that this did not constitute a transmission of interest and that accordingly, ACCLM remained the registered owner of the charge registered against the property.

(b) With respect to the defences concerning the alleged defective/void instrument, the statute of frauds and the alleged breach of trust and/or misrepresentation, the court was satisfied that the property the subject of the charge had vested in the Official Assignee and that the Applicants, by virtue of their respective bankruptcies were not entitled to challenge the validity of the charge and accordingly the said grounds of defence could not be advanced.

(c) With respect to the repeal of s. 62(7) of the 1964 Act, the court was satisfied that this did not offer a valid defence.

(d) With respect to the Code of Conduct on Mortgage Arrears the Court accepted that the Code does not apply in

circumstances where the property is vested in the Official Assignee.

(e) Finally, the court was satisfied that the issue concerning ACCLM's attempts to obtain possession on a consensual basis did not offer a valid defence or alter ACCLM's entitlement to seek possession."

The learned judge stated that she was satisfied that ACCLM were entitled to an order for possession by the terms set out in the Civil Bill.

39. A further issue arose in that the second applicant (Mrs. Fagan) made a submission in relation to the service of the proceedings on all occupants of the property and stated that their daughter also lived at the address. Counsel on behalf of ACCLM submitted that there was no such requirement in the Circuit Court rules in contrast to the procedure in the High Court where the proceedings were required to be served on all occupants of the property. The learned judge stated that there was such a requirement in relation to affidavits in the Circuit Court and inquired as to the applicants' daughter's whereabouts. The second named applicant replied that their youngest daughter attended college in Dublin City University and resided at the property on weekends and that their two elder daughters were both living and working away from home. The learned judge stated that she was not satisfied that there was any requirement to serve the applicants' daughters as occupants of the property. She was not satisfied that the daughters could be classified as occupants of the property on the basis that none of them resided there on a permanent basis.

40. The learned judge then made an order for possession of the property in favour of the plaintiff. Judge Flanagan enquired as to the position of the plaintiff in respect of an application for a stay of execution on the order having regard to the fact that the property was a family home. Counsel indicated that a period of a number of months might be appropriate but also requested the court to keep in mind the length of time the proceedings and previous summary possession proceedings in the High Court had taken. An application by the first named applicant (Mr. Fagan) for a stay of execution on the order in the event of an appeal by the defendants was granted.

The test for leave

41. The test to be applied by this court in an application seeking leave to apply for judicial review is well settled and set out by Finlay C.J. in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374 where he stated:

"An applicant must satisfy the court in a *prima facie* manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:—

(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).

(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.

(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks."

The other two factors of relevance are whether the application is made within time and whether on the facts it is the only effective remedy whereby the applicant could obtain relief. The court should consider whether there is an alternative remedy and whether judicial review is, on all the facts of the case, a more appropriate method of procedure.

### **The Challenge**

42. The grounds advanced for the granting of leave are as follows:-

(a) The applicants claimed they were denied a fair hearing in the Circuit Court. It is alleged that their rights of access to the courts and fair procedures appropriate to an application for possession in respect of their family home were denied to them under Articles 40.3 and 40.5 of the Constitution. A similar argument is advanced on the basis that there has been a breach of Article 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Convention on Human Rights Act, 2003;

(b) It is claimed that the Circuit Court acted beyond its jurisdiction in permitting the respondent *locus standi* having regard to an alleged unlawful disposition by the Official Assignee of his interest in the family home and lands the subject matter of the proceedings in that it is said the disposition by the Official Assignee was contrary to law and void;

(c) It is claimed that in the alternative the ruling by the Circuit Court that certain defences were not open to the applicants in relation to the charge to be vested in the respondent and upon which the possession proceedings were based was made without jurisdiction;

(d) It is claimed that the Circuit Court erred in law in allowing the proceedings to proceed where not all persons aged 18 years in occupation of the home had been served notice of the proceedings.

### **(a) A fair hearing**

43. The two fundamental attributes of a fair hearing are that no person should be a judge in their own cause, *nemo iudex in causa sua* and that the parties must be heard *audi alteram partem*. Mr. and Mrs. Fagan complain that they did not get a fair hearing relying upon the second principle. It is well established that no hard and fast rules can be laid down as to what requirements of natural justice are appropriate to different types of cases. However, the central feature of a fair hearing is that both sides must be fairly heard. The essential elements of the fair hearing were considered by the Supreme Court in *Dellway Investments Ltd v. NAMA* [2011] 4 I.R. 1 which made clear that the right to a fair hearing includes notice of the application intended to be made, notice of the order which might be made at the conclusion of the proceedings, the criteria upon which the decision maker will consider the matter, prior notice of the material which the decision maker will be asked to consider, an opportunity to make full submissions, and the giving of reasons explaining the basis of the decision made.

44. In *Irish Life and Permanent PLC v. Duff* [2013] IEHC 43, Hogan J. considered the application of the principles of fair procedure to a case such as this where a mortgagee seeks possession of a property secured against a loan. Having regard to the importance of the right to the inviolability of one's dwelling under Article 40.5 of the Constitution Hogan J. summarised the requirements of fair procedures in such an application as follows:

"44. The key points, however, in this context are surely the requirements of *notice, foreseeability and independent*

determination of the objective necessity for yielding up of possession which is inherent in the judicial process. All of these are key values comprised in the very essence of the protection of the 'inviolability' of the dwelling guaranteed by Article 40.5. This was an issue which did not feature at all in (*The First National Building Society v Gale* [1985] I.R. 602), but which now requires to be evaluated in this context in the light of the contemporary case-law."

The latter reference referred to the assurance of security and protection inherent in the guarantee of "inviolability" which the learned judge found would be fundamentally compromised if peaceable possession of a dwelling could be taken by a lender at almost any time other than by means of a court order without express notice to the borrower and in the context of the "intrinsic importance" ascribed to Article 40.5 in *Damache v. Director of Public Prosecutions* [2012] IESC 11 and *The People (Director of Public Prosecutions) v. Cunningham* [2012] IECCA 64. The learned judge added

"50. None of this is to suggest that a defaulting borrower can invoke Article 40.5 to avoid having to yield up possession where a court so orders, no more than Article 40.5 can be invoked to justify the unlawful construction of a dwelling on another's land or the construction of a dwelling without planning permission... It is, however, to say that those elements of formal notice, foreseeability and an independent determination of the objective necessity for possession of the dwelling are presupposed by the guarantee of inviolability and these protections cannot be assured outside the judicial process or, at least, something akin to the judicial process."

45. The order for possession in this case was made by a court of competent jurisdiction to do so. The evidence concerning the history of the proceedings concerning this property is set out above. There is no doubt that Mr. and Mrs. Fagan were on full notice of the application, the basis for the application, and the evidence to be relied upon in the course of that application. They submitted evidence by way of affidavit and exhibits and made extensive submissions in respect of all relevant issues arising in the course of the case. The evidence as to what transpired in the course of the various hearings before the learned circuit judge is agreed. They were given a full opportunity to make the points which they deemed relevant to their defence. This included their submission that they were entitled to challenge the charge relied upon by the plaintiff. I do not consider that any of the norms of natural justice were breached in the course of that hearing or that there is the slightest evidence to support that suggestion.

46. The submission made is that the Circuit Court's conclusion that the vesting of the property in the Official Assignee in the course of the bankruptcy and the legal consequences of same disentitled the applicants to a locus standi to challenge the charge on the several grounds summarised by the learned trial judge constituted an error of law which is so fundamental as to vitiate the fairness of the hearing.

47. As appears from the history of the case these issues were canvassed before the High Court in the first application for possession. All of the points relied upon by Mr. and Mrs. Fagan were considered by Finlay Geoghegan J. who refused an order for possession on different grounds. The determination of the locus standi issue by the High Court which was an issue between the same parties in respect of precisely the same point was in essence deemed by the learned circuit judge to give rise to an issue estoppel when Mr. and Mrs. Fagan sought to relitigate the same issue in the Circuit Court. In addition, even if the question of issue estoppel did not arise, at the very least the ruling by the High Court constituted a legal precedent to which the learned judge had to have regard. Furthermore, an application to the High Court in the course of the Bankruptcy proceedings brought against the Official Assignee seeking various declarations in respect of the charge and an order directing the Official Assignee to defend the repossession proceedings instituted in the Circuit Court and challenging ACCLM's locus standi to institute these proceedings on the basis of their alleged defective security was refused by the High Court on the 3rd December, 2014 (*Costello J.*) on the ground that a bankrupt did not have locus standi in those circumstances.

48. The court is satisfied that the determination by the learned judge of the locus standi of the applicants to challenge the charge having heard the evidence and submissions made by both sides was a decision made within jurisdiction. The applicants had a full opportunity to canvass and argue the issue in the Circuit Court but the court ruled against them on this issue in the course of the hearing. That was a ruling made within the jurisdiction properly exercisable by the learned judge. The order for possession was subject to the applicants' right of appeal to the High Court where this issue might have been re-canvassed (see *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381 *McGoldrick v. An Bord Pleanála* [1997] I.R. 497). No appeal was taken.

49. The court is therefore satisfied that the point raised at (a) does not give rise to an arguable case upon which leave to apply for judicial review may be granted.

#### **(b) and (c) The standing of the respondent**

48. The second point relied upon is based on the proposition that the Official Assignee by his emails of 31st January, 2013 to the respondent's legal representatives "formally surrendered property comprising the applicant's family home to the respondent pursuant to the respondent's security claim and in doing that made a "disposition" of the property the subject matter of the claim for possession". It is claimed that this disposition was void by reason of s. 61 (4) of the Bankruptcy Act, 1988 (quoted above) because prior sanction of the court was required before so doing since the property constituted a family home under the Family Home Protection Act, 1976. There was no disposition by the Official Assignee under that section. The proceedings were initiated and maintained and ultimately succeeded on the exercise by the plaintiff of its right to enforce a security which was protected under s. 136 (2) of the Act. The decision by the Official Assignee not to challenge the validity of the security over the family home or to defend the previous High Court proceedings or the Circuit Court proceedings did not vest any new right in the respondent in respect of that charge. In addition every opportunity was given to the applicants to make that claim in the Circuit Court. The determination as to whether or not the plaintiff was entitled to possession was clearly a matter to be determined on the merits of the application and on the evidence adduced. Moreover, I am satisfied that the ground advanced at (c) above disallowing the defence as advanced is not arguable. This submission is also dealt with under (a) above.

#### **(d) Service of the proceedings.**

49. The learned circuit judge made enquiry as to the whereabouts of the applicants' daughters and was informed that the applicants' youngest daughter was a student in Dublin City University but returned home at weekends and that the two elder daughters were both living and working away from home. The learned judge held that there was no requirement to serve the applicants' daughters as they were now not occupants of the property as none of them resided there on a full time basis. This was a determination made within the jurisdiction of the Circuit Court as to whether proper notice had been served on the appropriate persons whether as persons in possession or otherwise requiring to be served in the interests of justice.

#### **Conclusion.**

50. The court is not satisfied that the applicants have demonstrated any arguable case on which to grant leave to apply for judicial review in respect of the order for possession. The application is therefore refused.

