

THE HIGH COURT

[2015/83 SP]

BETWEEN

PERMANENT TSB PLC (FORMELY IRISH LIFE AND PERMANENT PLC)

PLAINTIFF

AND

BRAIN DONOHUE

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 24th day of February 2017

1. The plaintiff's claim by way of special summons under O. 1, r. 4 of the Rules of the Superior Courts is for an order pursuant to s. 62(7) of the Registration of Title Act 1964 for possession of lands comprised in Folio 16988F County Galway known as 301A Tirellan Heights, Headford Road, Galway, Co. Galway and property comprised in Folio 138512F County Dublin known as 27 Grangeview Drive, Clondalkin, Dublin 22.
2. A special summons issued on the 10th April 2015 grounded on a verifying affidavit of Jacqueline O'Brien sworn 23rd April 2015.
3. The properties the subject matter of the proceedings were investment properties. Ms. O'Brien, solicitor for the plaintiffs, deposed to the fact that the plaintiff agreed to make a loan facility available on terms and conditions set out in the exhibited mortgage loan agreement. The plaintiff advanced the sum of €543,450.00. On 30th April 2007 the defendant acknowledged in writing his acceptance of the terms and conditions offered and the said sum was advanced by the plaintiff to the defendant.
4. The plaintiff claims that by way of security for this loan facility the defendant executed an indenture of mortgage and charge in favour of the plaintiff on 8th May 2007 over Folio 16988F County Galway and Folio 138512F County Dublin referred to above. It was agreed that if the defendant were to default in the making of two monthly repayments or for two months in the payment of any other monies payable under the mortgage the whole of the monies outstanding on the security of the mortgage would become immediately payable to the plaintiff. The indenture of mortgage and charge on the two properties was registered as a burden on each property. The plaintiff claims that as a result of the default by the defendant in failing to make repayments since 16th December 2013 there were arrears of €90,791.53 outstanding at the time of the issuing of proceedings. By letter dated 7th January 2014 the plaintiff through its solicitors demanded the repayment of all sums then due and owing with interest accrued thereon. By April 2015 the sum of €636,662.60 was said to be due and owing by the defendant to the plaintiff. The plaintiff claims that the defendant failed to repay the total amount due and owing and that therefore repayment of the principal sums secured on the mortgage became due and the plaintiff is entitled to possession of the properties the subject matter of the proceedings.
5. By letter dated 15th January 2014, the plaintiff through its solicitors called upon the defendant to deliver vacant possession of the mortgaged premises within a period of seven days and notified him that in default of same the plaintiff would issue proceedings seeking an order for possession. It is claimed that the plaintiff is entitled pursuant to the terms of the indenture of mortgage and charge to seek possession and sale of the premises.
6. Ms. O'Brien also deposed that because of the repeated default by the defendant, the plaintiff wished to exercise its power of sale in respect of each of the premises, neither of which was occupied or comprised a family home. She also deposed that she believed that the Code of Conduct on Mortgage Arrears issued by the Central Bank of Ireland did not apply to the defendant's mortgage loan as it was not secured by the defendant's primary residence. The two properties were investment properties.
7. In the acceptance of loan offer dated 30th April 2007, Brian Donohoe, the defendant, appears as the signatory for the loan thereby accepting the terms of the offer on the conditions set out in the letter of approval, the general mortgage loan approval conditions and the Permanent TSB mortgage conditions. It is also witnessed by Mr. Donohoe's then solicitor, Mr. Niall Finnegan BCF Solicitors, 31 Pembroke Road, Dublin 4. Mr. Donohoe, an intelligent and articulate man, is no longer represented by a solicitor and appeared on his own behalf in these proceedings.
8. The indenture of mortgage and charge also bears the signature of a Brian Donohoe as witnessed by solicitor Niall Finnegan. The commencement date of the initial advance is noted to be the 8th May 2007. The term of the advance is twenty-five years from the end of May. The mortgage was operated through Mortgage Account No. 99069590029744 operated by the plaintiff and a statement of which dated 22nd April 2015 was exhibited.
9. Ms. O'Brien also stated in her affidavit that Permanent TSB Plc, the plaintiff in the proceedings, was formerly known as Irish Life and Permanent Plc and changed its name to Permanent TSB Plc on the 29th June 2012 and exhibited a certificate of incorporation on change of name from the company's registration office.
10. By letter dated 28th September 2015, Mr. Donohoe sought from Mr. L. Venn of PTSB, with whom he had been in correspondence, an affidavit verifying the original documents in the case, including the signed loan application, the signed loan offer agreement, the deed of mortgage and charge, or a date upon these documents might be forensically assessed by Mr. Donohoe's experts. The letter is written in a pseudo legal style. Copies of the letter of loan approval, acceptance of loan offer, Folio 138512F and the deed of mortgage and charge together with the terms and conditions thereof were furnished to the defendant by letter dated 2nd November 2015. The bank's solicitors asked Mr. Donohoe to indicate at which of its branches he would like to view the originals of the documents.
11. On 12th November 2015, Mr. Donohoe issued a "first statement of truths and facts" reiterating his demand for a verifying affidavit from the plaintiff regarding specific documents and indicating that he would not accept an inspection date for the original documents without such verification. He required access for a forensic expert to examine the original signed loan agreement, the original signed deed of mortgage and the original signed deed of transfer. He did not deny the making of an agreement, the signing of the loan acceptance or the mortgage deed and charge, the receipt of the money advanced, or the repayments made in respect of that loan sum through the mortgage account.
12. On the 1st December 2015 Mr. Donohoe sent to Mr. Venn what he said was a statement of "rescission of contracts". This

document purported to declare any contract between the defendant and the plaintiff to be void or rescinded. It was based on what was said to be the legal effect of the silence of the bank in failing to comply with his terms within a reasonable time whereby he believed himself entitled to such rescission. This was incorrect as a matter of law.

13. On 25th January 2016 an order for substituted service in respect of the proceedings was made (Moriarty J.).

14. In a supplemental affidavit of the 2nd February 2016, Ms. O'Brien amended her previous affidavit by correcting para. 10 to the extent that she had previously averred that no payment had been received since 10th December 2013 rather than 8th July 2010.

15. The matter was then listed before the Master's Court on 10th March 2016.

16. On 20th April 2016 Mr. Donohoe delivered an affidavit. He denied that the plaintiff had any standing to bring the proceedings because it did not respond adequately to his queries as a result of which the contract was rescinded. He appeared to believe that some unspecified non judicial authority had determined this to be the case in his favour. The document is couched in the same pseudo-legal terminology used in previous correspondence which lacks any factual or legal relevance or substance: much of it is mischievous, frivolous and vexatious.

17. Mr. Donohoe does not state that he did not sign the loan acceptance of the 30th April 2007. He does not deny the receipt of the sum of €543,450.00 or that it was advanced to him or to his solicitor. He does not deny it was used for the purchase of two investment properties. He does not deny that he is the registered owner of the properties in respect of which the mortgage is registered as a burden or that Mr. Niall Finnegan solicitor witnessed the mortgage deed and acceptance of loan offer which is said to have been signed by him. Mr. Donohoe simply stated to the court in the course of the hearing, when asked, that he has no recollection of signing and he does not know whether he signed the loan acceptance offer of the 30th April 2007. He does not deny that a loan account was opened for him by the bank through which the repayments were made pursuant to the loan agreement. These issues are not addressed in his affidavits or statements.

18. In his affidavit of 20th April 2016, Mr. Donohoe claims that the plaintiff relies upon "an incorrect acceptance of loan offers". He avers that he received a letter from Mr. R. Stone of the bank on 15th December 2014 enclosing a number of documents which relate to an earlier transaction. These included a certified copy of an acceptance of loan offer dated 12th April 2007. He points out that the acceptance now relied upon is dated the 30th April 2007. He states that his "conveyancing solicitor" Mr. Finnegan wrote to PTSB enclosing the letter of offer and acceptance and furnishing an instruction as to the draw-down by letter of 17th April 2007 of the sum to be advanced. The bank replied that it would contact its "broker unit" regarding these instructions. It is therefore claimed that the instrument upon which reliance is now placed is "an incorrect instrument".

19. This issue is dealt with comprehensively in a further affidavit from Ms. O'Brien. She deposes that Mr. Stone's letter was in response to a data access request which enclosed certain documents along with an acceptance of loan offer dated 12th April 2007 which had been certified by Mr. Stone as a true copy of the original. He also enclosed copies of the original solicitor's undertaking. This undertaking was originally dated 17th April 2007 and included the acceptance of loan and offer dated 12th April 2007. However, it was subsequently re-dated the 30th April 2007 after the defendant sought to reduce the amount of his initial drawdown which resulted in the plaintiff issuing an amended letter of approval dated 30th April 2007. A copy of the solicitor's original undertaking dated 17th April and subsequently re-dated 30th April with the acceptance of loan offer dated 12th April is exhibited. This was arranged at the same time as a request was made by his solicitors for the loan cheque.

20. Ms. O'Brien explained that the defendant originally applied for a loan in the sum of €543,450.00 but decided that he only required a drawdown of €300,00.00 initially with the balance of €243,450.00 to follow. A letter from the defendant's solicitors dated 17th April 2007 stated that it was enclosing the letter of offer and acceptance and solicitor's undertaking. This is why there is an acceptance of loan offer dated 12th April signed by the defendant because this document was returned when accepted with the letter dated the 17th April. The plaintiff reissued a fresh letter of approval dated 30th April 2007. This letter reflected the defendant's indication that he did not require the entire amount of €543,450.00 immediately by including a special condition No. 13 which stated that the amount of €243,450.00 was to be retained from the advance pending a further written request or direction from the defendant or his solicitors. In those circumstances the letter of approval dated 30th April 2007 and the signed acceptance of loan offer of the same date superseded the acceptance of loan offer dated 12th April 2007 that was signed by the defendant. These documents are relied upon by the plaintiff in these proceedings. These facts are not put in issue by the defendant and this course of events has not been challenged by replying affidavit. It is clear to the court that the defendant was careful not to engage with this evidence at all.

21. In a further somewhat prolix affidavit of the 5th December 2016, containing 128 paragraphs, Mr. Donohoe alleges that an application for credit form dated 15th January 2007 allegedly signed by him is forged. He claims that three signatures affixed thereon which are purportedly his, are not his signature at all. He states that he has no recollection of ever signing the later of acceptance of 30th April. He does not at any stage indicate that any of the documents purportedly witnessed by his solicitor are forged or that his signature affixed thereto is not his. Yet he wishes to have the original examined by a forensic expert to ascertain whether the relevant documents, including the signed and witnessed acceptance are in effect forged. No effort has been made to adduce evidence from his former solicitors or attendances or correspondence on their file that anything of the kind happened. Nevertheless, he asserts at numerous stages in his affidavit fraud, perjury, incompetence and other scandalous matters against Ms. O'Brien and the plaintiff without any tangible or reasonable basis.

22. Mr. Donohoe seeks to cross examine Ms. O'Brien on her affidavits and has issued what purports to be a notice for cross examination entitled "special notice for production of your deponent for cross examination" under O. 38, r. 3 and O. 40, rr. 31 and 32 of the Rules of the Superior Courts. This notice is addressed to Ms. Jacqueline O'Brien, Ms. Rachel McCauslin and Mr. Kevin Callen. It seeks the production of a Ms. Karen McCrave who is said to have sworn affidavits on 23rd April 2015, 2nd February 2016 and 9th August 2016 for cross-examination. No affidavits in this case were sworn by any person of that name though the dates of the affidavits are the same as the dates upon which Ms Jackie O'Brien made her affidavits on behalf of the bank. The notice also seeks to reserve the setting of a date for cross examination of the deponent to a date following the proposed service by Mr. Donohoe of an additional affidavit.

23. The proceedings in the case were transferred from the Master's Court to the special summons list on 13th October 2016. The defendant was offered an adjournment on that date prior to the transfer order in order to file a further affidavit if he wished. This was declined.

24. The hearing of proceedings commenced by way of special summons are governed by O. 38 of the Rules of the Superior Courts. Order 38, rule 3 provides :-

Save insofar as the court shall otherwise order, proceedings commenced by special summons should be heard on affidavit: provided that any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit is being filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the court."

If a party desires to cross-examine a deponent, the party must serve a notice in Form No. 21 Appendix C pursuant to O. 40, r. 31:-

"...before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court may specially appoint ..."

Although O. 40 r. 31 provides that unless the deponent is produced for cross examination pursuant to the notice the party in default shall not be entitled to rely upon the affidavit unless by leave of the court, O. 38, r. 3 precludes such reliance "unless by the special leave of the court".

25. A party is entitled to serve a notice to cross examine in relation to any deponent and to cross-examine that deponent in the course of special summons proceedings. The notice must be in accordance with Form No. 21 Appendix C of the Rules. The form is in very simple terms and readily accessible to parties whether they are represented or not. It simply gives notice of cross-examination of a deponent who is named and described in the schedule to the notice in respect of specified affidavits. It also gives notice that the party upon whom it is served is required to produce the deponent for cross-examination before the court.

26. It is clear that the defendant's notice which is dated the 30th November 2016 was issued well outside the period of fourteen days under O. 40 r.31. The person named in the notice is one Karen McGrave. No such person has sworn an affidavit on behalf of the plaintiff in the proceedings. The notice is clearly not in the form required as set out at Form No. 21 Appendix C. The stated intention to file a further affidavit contained within the notice before the date of cross-examination can be fixed, it is not authorised by the Rules.

27. The notice to cross-examine was accompanied by a notice of particulars and a notice to produce documents both dated 30th November 2016 and followed by a further notice to inspect documents dated 16th December 2016. The defendant also swore an affidavit on the 5th December 2016 which was filed on that date. Notwithstanding the objection of the plaintiff, I have for the purpose of this motion, considered the contents of that affidavit without prejudice to the plaintiff's right to rely upon any legal objection to its admissibility at the trial of the action. I did so having regard to the necessity to understand all of the issues which the defendant seeks to raise and in particular, to identify, if possible, any legitimate conflict of fact that he might properly pursue with the plaintiff's deponent.

28. It is now clear from para. 121 of the affidavit of 5th December 2016 that the defendant wishes to cross examine Ms. O'Brien. I am satisfied that the issues raised in that affidavit and indeed in his previous affidavits are largely concerned with issues of law either as to the admissibility of evidence set out in Ms. O'Brien's affidavits or the sufficiency of the proofs relied upon by the plaintiff in seeking the substantive relief. There are a number of legal issues raised in the affidavit. This is done by way of what I regard as legal submission which is not appropriate to an affidavit. It raises issues about "securitisation", the validity of the indenture of deed and charge, the validity of the registration of the burden, and the applicability and alleged breaches of the Code of Conduct on Mortgage Arrears issued by the Central Bank of Ireland. None of these issues gives rise to any relevant conflict of fact between the parties. The defendant constantly asserts that the plaintiff should furnish affidavits deposing to one fact or another. That is an entirely inappropriate procedure. The plaintiff relies on the proofs contained in the affidavits submitted in support of its case. As previously noted Mr. Donohoe has not addressed the core issues in relation to those facts. He also seeks to advance other somewhat contrived legal issues and non-specific assertions of fraud and perjury which are of a scandalous nature against Ms. O'Brien and other employees of the plaintiff.

29. The defendant is entitled under O. 38, r. 3 to serve a notice to cross examine in proper form in respect of any deponent whose affidavit is relied upon by the plaintiff in special summons proceedings. This does not mean that the court must as a matter of course always permit such cross-examination to take place. In most cases, a notice to cross-examine is issued on reasonable grounds. However, the court has a jurisdiction to control its own proceedings and to ensure that its process is not subject to abuse or prolonged time consuming litigation which is not addressed to the central issues of the case. I am satisfied that the contents of the affidavits furnished by the defendant in many respects constitute an abuse of the court's process. Apart from the fact that they contain detailed legal submissions (as do some elements of the affidavits filed on behalf of the plaintiff), they also contain a considerable amount of frivolous vexatious and scandalous material which, if allowed to be the subject and basis of a cross-examination of Ms. O'Brien would undoubtedly protract the proceedings unnecessarily and waste the court's time and limited resources. In addition, I am entirely satisfied having considered the affidavits sworn by Mr. Donohoe and the exhibits therein contained, that no issue of fact of any relevance or substance upon which Ms. O'Brien could properly be cross-examined has emerged from those affidavits. I am satisfied therefore that to permit cross-examination of Ms. O'Brien notwithstanding the issuing of a notice to cross examine would constitute an abuse of process. I am also satisfied that the proposed cross-examination is unnecessary in order to determine the issues in the case because of the absence of any evidence in Mr. Donohoe's affidavits relevant to the core issue or constituting a core denial of the central facts relied upon by the plaintiff. It seems to me that as matters presently stand on the affidavits there is no issue to be determined by way of cross examination. (See *McElhinney v. Williams* [1995] 3 I.R. 382 at p. 390-391 and *Bank of Ireland v. O'Donnell* [2015] IEHC 149 per Mc Govern J. applying *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369).

30. The court is also mindful of its jurisdiction under O. 38, rr. 8 and 9 at any stage during the course of proceedings instituted by special summons to direct the determination of a question of fact if that is necessary to determine the case or any relevant matter arising therein. The court may also send the case for plenary hearing if that is thought to be in the interests of justice. The judge hearing the case may make such findings if that is proper or just.

31. The defendant submits that he is entitled to have the deponent attend for cross examination and that under O. 38, r.3 if she is not produced, the plaintiff should not be permitted to rely upon Ms. O'Brien's affidavit without the special leave of the court.

32. The term "special leave" is to be understood in accordance with the decision of the Court of Appeal in *Haltson Street Credit Union Ltd. v. Raymond Costello and Emberton Finance Ltd.* [2015] IECA 91 in which that phrase as used in O. 55, r. 36 was held not to elevate the threshold at which the court should grant leave. Irvine J. stated:-

"39. ... The term "special leave" is one which appears elsewhere in the Rules of the Superior Courts, not least in the context of the admission of new evidence on appeal: see, e.g., Ord. 58, r. 30(c) (formerly O. 58, r. 8). It is nevertheless

implicit from the case-law dealing with the admission of new evidence on appeal from *Lynagh v. Mackin* [1970] I.R. 180 onwards, that the reference to "special leave" was simply a convenient term to describe a procedure where the applicant was required to proceed by motion on notice to all relevant parties so that the court might have before it all relevant material which might govern the exercise of the discretionary power it was called upon to apply. It is in this sense that the reference to the "special" nature of the leave should be understood. It simply means that the leave ought not to be granted save where the applicant has complied with the appropriate formalities and procedures involved in an application brought by way of notice of motion. As I have just indicated, the term does not, however, imply or suggest that such leave should only be granted in exceptional or unusual circumstances or by reference to some otherwise elevated standard."

33. I am satisfied that in the context of O. 38, r. 3 "special leave" does not place an onus upon the plaintiff to demonstrate exceptional or unusual circumstances, if it is not to be deprived of the opportunity of relying upon Ms. O'Brien's affidavits. I am satisfied further that this could only arise if it were in the interests of justice so to rule. I would therefore, if it were necessary, permit the plaintiff to rely upon the affidavits of Ms. O'Brien notwithstanding the plaintiff's failure to produce her pursuant to the notice of cross examination, because in the circumstances of this case I believe it to be in the interest of justice to do so.

34. For all of the above reasons I am satisfied to set aside the notice to cross examine delivered in this case and to direct that the hearing of the matter on affidavit should proceed. It is open to the defendant to raise any issue concerning the legal inadmissibility of any of the evidence proposed to be adduced by way of affidavit on behalf of the plaintiff and to make such legal submissions as are open to him and relevant to the matter in issue at the hearing. It is also open to the judge hearing the matter to direct, if it is necessary in the interest of justice, that cross examination takes place or oral evidence be received in respect of any particular and established conflict of fact if he/she concludes it is necessary for the determination of the real issues in the case. I do not consider that such a conflict has been demonstrated on this application.

35. The defendant delivered a notice of particulars dated 30th November 2016. A submission was made to the court that it should direct the plaintiff to answer the particulars sought. The plaintiff by letter dated 16th December 2016 informed the defendant that it would not be providing any replies to the particulars as they did not arise under O. 19, r. 7(1). The plaintiff also pointed out that many of the particulars sought related to issues which had already been dealt with in affidavits, documentation already furnished as part of a previous personal data access request and replies which had been given in other correspondence or concerned matters which were not relevant to the proceedings. I am not satisfied that the replies to these particulars are necessary in order to understand the plaintiff's claim which is absolutely clear from the affidavit submitted in support of the special summons.

36. The plaintiff also replied to the request to furnish inspection of the documents set out in the notice on the 30th November 2016. That notice is extensive. The plaintiff offered to furnish inspection of the originals of all documents exhibited to be relied upon in these proceedings. It will facilitate a forensic examination of these documents. I note that allegations of fraud and forgery are made in respect of the relevant documents in the case without such examination and on the basis that the defendant deposes that he has no recollection of signing the relevant documents.

37. There is no motion before the court in relation to these issues and I do not propose to give any directions in relation to them. As matters presently stand I do not consider that there would be any merit in granting an order directing any more extensive responses than those already given in correspondence. It should also be noted that the court has not directed a plenary hearing in this case under Or.38, r.9.

38. The nature of the relief sought on this motion is in essence a preliminary ruling in anticipation of an application at the hearing by the defendant that the plaintiff ought not to be allowed to rely upon affidavits made by Ms. O'Brien if she is not produced for cross-examination. I am satisfied that for the reasons given above that the notice to cross-examine is defective in form. Even if that were not so I am satisfied that there is no factual issue relevant to these proceedings to be determined on the basis of the affidavits furnished by both sides to date. Furthermore, I am satisfied that insofar as there are issues raised by the defendant in his replying affidavits, many of them are vexatious, frivolous and scandalous and ought not to be the subject of cross-examination of Ms. O'Brien. In addition, a number of the matters raised amount to legal submissions upon which the defendant may rely at the hearing without the necessity for cross-examination.

39. The court will therefore direct that the notice to cross-examine be set aside and that the plaintiff may rely upon the deponent's affidavits at the hearing of the matter.