THE HIGH COURT

2015 No. 196CA

Between:

EBS Limited

Plaintiff

– and –

Trevor Kenehan and Bernadette Ryan

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 24th October, 2017.

1. On 3rd November, 2015, the Circuit Court issued an order for possession against Mr Kenehan and Ms Ryan in respect of certain premises in County Tipperary. On 12th November, 2015, Mr Kenehan and Ms Ryan brought an appeal against that judgment. The grounds of appeal raised by Mr Kenehan and Ms Ryan are as follows:

> (1) the Circuit Court had no jurisdiction because the premises against which the order issued comprise a principal private dwelling with no rateable value, particular emphasis being placed in this regard on the decision of the Court of Appeal in *Permanent TSB plc v. Langan* [2016] IECA 229;
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> (2) the Circuit Court Rules (Actions for Possession and Well-charging Relief) 2009 (S.I. No. 264 of 2009) are unconstitutional and/or in breach of the European Convention on Human Rights as Mr Kenehan and Ms Ryan have been denied a right to fair trial;
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> (3) consequent upon (2), the Circuit Court order being rooted partly in Circuit Court Rules that are, it is alleged, unconstitutional and/or in breach of the European Convention on Human Rights, any order that derives from same is incurably bad;
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> (4) EBS has misled the courts by referring to the premises in respect of which possession is sought is the "*principal private residence*" of Mr Kenehan and Ms Ryan, this being a phrase which suggests that Mr Kenehan and Ms Ryan are in possession of another residence;
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> (5) Mr Kenehan and Ms Ryan enjoy, it is claimed, a right to housing (or not to be rendered homeless) under, *inter alia*, the European Convention on Human Rights, and the European Social Charter;
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> (6) Mr Kenehan and Ms Ryan did not consent to the jurisdiction of the Circuit Court;
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> (7) there has been intimidatory behaviour, it is alleged, on the part of the solicitors for EBS.
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> (8) Mr Kenehan and Ms Ryan were not shown what Mr Kenehan and Ms Ryan refer to as "*Wet Ink*" copies of the applicable loan and security documentation;
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> (9) Mr Kenehan and Ms Ryan have been overcharged by EBS and have not been credited with a TRS payment.
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> (10) Mr Kenehan and Ms Ryan being consumer-borrowers (this does not appear to be disputed) an assessment of the type identified by the High Court in *AIB plc v. Counihan* [2016] IEHC 752 requires to be undertaken (and presumably they consider that such an assessment will yield a result that is to their advantage).

2. Rather lost in all of this, it seemed to the court, was that money was loaned by EBS and has not been repaid by Mr Kenehan and Ms Ryan, no doubt as a result of the vicissitudes visited on so many innocent people by a Great Recession occasioned by the actions of others, yet unpaid nonetheless.

3. The court treats with each of the above-mentioned grounds of appeal below. In passing, the court notes that pursuant to s.63 of the Companies Act 2014, the re-registration of EBS Limited, in the course of the within proceedings, as a designated activity company (DAC), has, notwithstanding suggestion by Mr Kenehan and Ms Ryan to the contrary, no impact on the within proceedings. Section 63(12) of the Act of 2014 provides, *inter alia*, that: "*The re-registration of an existing private company as a designated activity company pursuant to this Chapter shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company…*".

4. *Appeal Ground No. (1): the Circuit Court had no jurisdiction because the premises against which the order issued comprise a principal private dwelling with no rateable value, particular emphasis being placed in this regard on the decision of the Court of Appeal in* Permanent TSB plc v. Langan *[2016] IECA 229*.

5. The property that is the subject of the within proceedings had the benefit of a certificate of rateable valuation that justified the invocation of jurisdiction by the Circuit Court. As a result the decision of the Court of Appeal in Langan does not have the contended-for application to the within proceedings.

6. *Appeal Ground No. (2): the Circuit Court Rules (Actions for Possession and Well-charging Relief) 2009 (S.I. No. 264 of 2009) are unconstitutional and/or in breach of the European Convention on Human Rights as Mr Kenehan and Ms Ryan have been denied a right to fair trial.*

7. Mr Kenehan and Ms Ryan were given a fair and impartial hearing by the learned Circuit Court judge. They and their British-qualified solicitor were given full opportunity to ventilate such points as they wished to make. No breach of constitutional rights or the right under Article 6 of the European Convention on Human Rights to "*a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*" has been established.

8. *Appeal Ground No. (3): consequent upon (2), the Circuit Court order being rooted partly in Circuit Court Rules that are, it*

is alleged, unconstitutional and/or in breach of the European Convention on Human Rights, any order that derives from same is incurably bad.

9. As Mr Kenehan and Ms Ryan have not succeeded on point (2), they cannot succeed on point (3).

10. ***Appeal Ground No. (4): EBS has misled the courts by referring to the premises in respect of which possession is sought is the* "principal private residence" *of Mr Kenehan and Ms Ryan, this being a phrase which suggests that Mr Kenehan and Ms Ryan are in possession of another residence.***

11. There is no suggestion that the property that was the subject of the Circuit Court proceedings (or that is the subject of the within appeal) has been mis-identified; in point of fact it has been correctly identified. There is, it is true, in the adjective "*principal*" some element of comparison but that does not avail Mr Kenehan and Ms Ryan in any way. It does not have the result that a property that has otherwise been correctly identified falls to be treated as incorrectly identified. To the extent that Mr Kenehan and Ms Ryan seek to make the point that they have no other residence, this is understood by the court.

12. ***Appeal Ground No. (5): Mr Kenehan and Ms Ryan enjoy, it is claimed, a right to housing (or not to be rendered homeless) under,* inter alia, *the European Convention on Human Rights, and the European Social Charter.***

13. There is no express right to housing in Irish law; but that is not to say that a qualified, as yet unrecognised, un-enumerated right pertaining to housing may not at some point be recognised by the courts as existing in and under the Constitution. There is a relative abundance of sources by reference to which the existence of such a right might conceivably be identified by analogy. If, for example, one looks to instruments which are not a part of Irish law but which could nonetheless be of influence in identifying the extent of Irish law, in particular when it comes to recognising (if it comes to recognising) a qualified, as yet unrecognised, un-enumerated right pertaining to housing in the Constitution:

(i) in the European Convention on Human Rights, there are several articles of that Convention which, indirectly, provide protection for a right to housing, e.g., Arts. 2, 3, 5, 8, 14, and Art.1, Protocol 1. Moreover, the European Court of Human Rights has a burgeoning line of case-law that recognises some legally defined minimum State obligations as regards housing rights (see, inter alia, *Moldovan v. Romania* (2007) 44 EHRR 16, *Marzari v. Italy* (1999) 28 EHRR CD175, *Botta v. Italy* (1998) 26 EHRR 241, and *Guerra v. Italy* (1998) 26 EHRR 357);

(ii) in the European Social Charter (Revised), there are a multiplicity of rights of relevance to housing, including Arts. 12, 15, 16, 23 and 30, though notably Ireland has opted out of Art.31 (the right to housing);

(iii) in international law, e.g., Art.11.1 of the International Covenant on Economic, Social and Cultural Rights, Art. 27 of the Convention on the Rights of the Child, Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, Art.14 of the UN Convention on the Elimination of All Forms of Discrimination against Women, and the International Covenant on Economic, Social and Political Rights, all make provision of relevance to a right to housing; and

(iv) the constitutions of certain other European Union member states steeped in the same liberal democratic tradition as Ireland, *viz*., Belgium, Finland, Greece and the Netherlands, recognise a right to housing.

14. Viewed against the backdrop of the foregoing, the prospect that a qualified, un-enumerated right to housing may yet be found to be extant within and under our living and versatile Constitution must be a possibility. But such a right, were it found to exist, would doubtless not be absolute. Thus the claim of Mr Kenehan and Ms Ryan in this regard, which seems to be that there is an unqualified constitutional right to housing which has the effect that (a) a possession order granted in accordance with law and following a fair trial, (b) falls now to be set aside or varied by the court for being in contravention of such unqualified right, is respectfully not accepted by the court to be correct as a matter of law.

15. ***Appeal Ground No. (6): Mr Kenehan and Ms Ryan did not consent to the jurisdiction of the Circuit Court.***

16. The jurisdiction of the Circuit Court rests on the people's Constitution and laws enacted with the approbation, direct or indirect, of the people's elected lawmakers, gathered as the Oireachtas. That jurisdiction can only be amended or varied by the people effecting constitutional change and/or by the people's elected lawmakers acting in accordance with the Constitution. It does not rest on the consent of individual parties to litigation. The court has already concluded under item (1) that the Circuit Court enjoyed the requisite jurisdiction at law to make the order it made and against which appeal has now been brought.

17. ***Appeal Ground No. (7): there has been intimidatory behaviour, it is alleged, on the part of the solicitors for EBS*.**

18. The court wishes to emphasise that there is nothing to suggest that the solicitors for EBS have acted other than in an entirely professional manner consistent with the duties they owe, as solicitors, to their clients.

19. ***Appeal Ground No. (8): Mr Kenehan and Ms Ryan were not shown so-called* "Wet Ink" *copies of the applicable loan and security documentation*.**

20. This is a complaint that many borrowers in the position of Mr Kenehan and Ms Ryan seem to make, *viz*. that when they ask to see the original copies of the loan and security documentation upon which they are sued, the lending institution does not have to hand the 'wet inked' copy of same (assuming the documentation was not signed electronically). It is odd that financial institutions would not generally have original documentation to hand, though the court must also admit to being mystified as to why borrowers seem to place so much emphasis on seeing original, signed documentation when they have seen copy signed documentation and must know in their 'heart of hearts' that they signed the originals. Regulated financial institutions are not in the habit of forging loan and security documentation and the fact that a financial institution might not have original documentation to hand in any one case merely presents an additional evidential hurdle that will have to be vaulted by such institution when it seeks to establish, on the balance of probabilities, such rights as it comes to court seeking to enforce. It need not be the end of matters, and given the general availability of copy documentation and other records, including payment histories and memoranda of post-default negotiations, the absence of so-called 'wet ink' documentation seems unlikely generally to present an insuperable obstacle to enforcement of a claim for debt or a claim for possession. Certainly it does not do so on the facts of the within proceedings.

21. In passing the court notes that EBS, in furtherance of a direction by the High Court, did eventually make available to Mr Kenehan and Ms Ryan all documents pertaining to the within matter (though it is not clear from the affidavit evidence that this was so-called 'wet ink' documentation). Mr Kenehan and Ms Ryan, for reasons unexplained, cancelled the meeting at which such documentation was

to have been shown to them.

22. ***Appeal Ground No. (9): Mr Kenehan and Ms Ryan have been overcharged by EBS and have not been credited with a TRS payment*****.**

23. These are but allegations which have not been established by Mr Kenehan and Ms Ryan. That is not to say that they are matters for which separate complaint might be made and redress obtained, if such overcharging and mis-crediting (if any) is established.

24. ***Appeal Ground No. (10): Mr Kenehan and Ms Ryan being consumer-borrowers (this does not appear to be disputed) an assessment of the type identified by the court in*** **AIB plc v. Counihan** ***[2016] IEHC 752 falls now to be undertaken*****.**

25. That this would be a ground of objection raised by Mr Kenehan and Ms Ryan (and thus a matter for which EBS ought to have been fully prepared to meet) was clear from the affidavits filed by Mr Kenehan and Ms Ryan in the course of bringing their appeal (at which they represented themselves). Thus Mr Kenehan and Ms Ryan referred, inter alia, to the fact that they are consumers and to the consequences of "*the recent Spanish Aziz case*" which is a shorthand reference to the decision of the Court of Justice that informed the decision of the court in *Counihan*, i.e. *Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (Case C-415/11, Judgment of 14th March, 2013). The decision in *Counihan*, paras. 7-8, contains the following consideration of the decision in *Aziz*:

> *"7. On 19th July, 2007, Mr Aziz concluded with Catalunyacaixa, a Spanish bank, a loan agreement secured by a mortgage on his family home. Clause 15 of the mortgage loan agreement, which made provision in relation to defaults, stated that Catalunyacaixa had the right to bring enforcement proceedings to reclaim any debt arising, and, for the purpose of those proceedings, could quantify the amount due by submitting an appropriate certificate. Mr Aziz defaulted on his loan obligations and, on 11th March 2009, Catalunyacaixa instituted recovery proceedings against him. Those proceedings were successful, Mr Aziz was sent an order for payment, but he neither complied with nor objected to this order. So matters moved to the enforcement stage, and now Mr Aziz took action. He applied to court for a declaration seeking (a) the annulment of cl. 15 of the mortgage loan agreement on the grounds that it was unfair (by reference to the applicable Spanish legislation implementing Directive 93/13/EEC), and (b) the consequent annulment of the enforcement proceedings.*
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> *8. The court before which Mr Aziz brought his application referred a number of questions to the Court of Justice for preliminary ruling. It is the first question that is of particular interest in the context of the within application, and the Court of Justice's comments and observations in the context of same, at paras. 43 to 46 of its judgment:*
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> > '43 By its first question, the referring court wishes to know, essentially, whether Directive 93/13 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a clause contained in a contract between a consumer and a seller or supplier, does not allow the court before which declaratory proceedings have been brought, which does have jurisdiction to assess whether such a clause is unfair, to grant interim relief in order to guarantee the full effectiveness of its final decision.
> >
> > 44 In replying to that question, it should be noted first that the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge….
> >
> > 45 As regards that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them….
> >
> > 46 In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in its own way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task…' ."

26. The Court of Justice, in the above-referenced observations, draws no distinction, in terms of the obligation that it perceives to arise as a matter of European Union law, between a trial court and a court that is hearing, as here, a *de novo* appeal. That is perhaps because the distinction did not arise for the Court of Justice to draw on the facts of *Aziz* (though, on the facts as described by the Court of Justice in its judgment in Aziz, there was an interesting interplay between what appear to have been two Spanish courts of first instance with different jurisdictions, being the *Juzgado de Primera Instancia No 5* of Martorell and the *Juzgado de lo Mercantil No 3* of Barcelona (the referring court)). Given, however, the reasoning that informs the conclusions of the Court of Justice in *Aziz*, which is that "*the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge*", the obligation that the Court of Justice perceives to arise as a matter of European Union law would appear logically to apply with as much vigour to a court that is hearing a *de novo* appeal as to the trial court (a finding not so dissimilar to that reached by the High Court in *Counihan* that an *Aziz* obligation applies to a court in a summary application for debt and to a court at any related plenary hearing which "*likewise operates in the shadow of Aziz*" (para.13)).

27. It is in the performance by the court of its Aziz-Counihan obligations that EBS encounters a difficulty. It has placed before the court a mortgage that, per cl. 5 of same, "*incorporates the Offer Letter and the EBS Mortgage Conditions*". Those Mortgage Conditions likewise contemplate that the EBS Rules (defined in cl.1 of the Mortgage Conditions as "[t]*he rules of EBS in force from time to time including any which may be adopted after the date of the Mortgage*") will apply save to the extent that, per cl.1 of the Mortgage Conditions, there is a "*conflict between the Rules and the Mortgage*" in which case the Mortgage (defined in cl.1 as "[t]he Mortgage Deed and those conditions combined") shall, per cl.1 of the Mortgage Conditions, prevail. Neither the Offer Letter nor the Rules have been placed before the court. As a consequence, the court cannot discharge its *Aziz-Counihan* obligations and, having been placed by EBS in a position where it is unable to perform a task incumbent upon it as a matter of European Union law before the order for possession may stand, the court cannot allow that order to stand. In this regard, the court recalls its observation in its recent judgment in *Havbell Ltd v. James Walsh (Auto Electrical) Ltd* (Unreported, High Court, Barrett J., 10th October, 2017), para.17 that:

> *"It is a consequence of our adversarial system of justice that it is for a plaintiff seeking summary judgment to place sufficient and suitable evidence before the court as establishes, on the balance of probabilities, that it is entitled to the judgment sought. It may be that, in an inquisitorial system, a conclusion could be arrived at that would be different to that which the court considers itself compelled, in the within application, to reach on the evidence now before it. Be that as it may, ours is not an inquisitorial system of justice."*

28. In a situation where EBS knew that it would face a *Counihan*-based argument on appeal, it was in EBS' self-interest to place the court in a position where it could discharge its *Aziz-Counihan* obligations. This EBS did not do.

Conclusion

29. Mr Kenehan and Ms Ryan have borrowed €400k from EBS and are chronically in default of their repayment obligations. There is, with every respect, only one way that such a persistent period of default is ultimately going to end for them. However, for the reasons aforesaid, the court cannot at this time allow the possession order that was obtained before the Circuit Court to stand.