

THE HIGH COURT

CIRCUIT APPEAL

[2016 No. 84 C.A.]

BETWEEN

KBC BANK IRELAND LIMITED

PLAINTIFF

AND

MARK FLYNN AND MAIREAD FLYNN (NEE GORMAN)

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 13th day of February, 2017.

1. This matter comes before the court by way of appeal from the Circuit Court (His Honour Judge O'Hagan) against an order of that court made on the 15th of March, 2016, granting possession to the plaintiff of the property contained in Folio 18841F of the Register County Cavan.
2. The proceedings are a standard format mortgage suit in which the plaintiff bank claims an order for possession on foot of a civil bill for possession, issued on the 1st of May, 2014. The mortgage in question was entered into between the plaintiff and the defendants on the 14th of July, 2006. In the affidavits grounding the application for summary judgment, it is averred that the mortgage payments have been in default since the 1st of November, 2011, and ultimately a letter of demand was issued to the defendants on the 2nd of September, 2013, claiming the sum of €252,307.27.
3. It is common case that the property in question is now the family home of the defendants, although that was not the position when the mortgage was originally entered into. The application for judgment before the Circuit Court was brought pursuant to O. 28 which entitles a plaintiff in ejectment proceedings to summary judgment notwithstanding the entry of appearance unless the defendants satisfy the court that *prima facie* they have a good defence to the claim. It would appear that the defendants did not appear before the Circuit Court when it granted the order for possession. The reasons for that are no longer relevant.
4. At the hearing of the appeal before this court, the first defendant, Mr. Mark Flynn, appeared. He did not however submit any replying affidavit or indeed adduce any evidence to suggest that the defendants have a *bona fide* defence.
5. Instead, Mr. Flynn issued a notice of motion, within the same proceedings, in which he seeks a large number of orders in the nature of declaratory relief. The hearing of this motion was in fact listed for the 27th of February, 2017, while the hearing before me took place on the 6th of February, 2017. However, by consent of both parties, I agreed to hear all matters at the same time rather than adjourning the appeal to await the outcome of the motion. The notice of motion issued by the first defendant appears to be what can best be described as an originating summons seeking declaratory relief, a pleading by way of defence and counterclaim, a request for a case stated to the Court of Appeal, and a claim for judicial review of the Circuit Court order. Of course none of these matters can be litigated by way of a notice of motion in a Circuit Court appeal.
6. To summarise the position, it would appear that Mr. Flynn seeks an order that the decision of the Court of Appeal in *Permanent TSB Plc v. Langan* [2016] IECA 229 has the effect of depriving the Circuit Court of jurisdiction in this matter which relates to a dwelling that does not have any rateable valuation. Further, the notice of motion appears to seek a form of declaration that the provisions of the Land and Conveyancing Law Reform Act, 2009 and the Land and Conveyancing Law Reform Act, 2013 conflict with the terms of the Courts (Supplemental Provision) Act, 1961, which confers jurisdiction on the Circuit Court, and the Valuation Act, 2001 so that the later acts are devoid of legal authority. Of course such form of relief could not conceivably be granted by way of a notice of motion in a Circuit Court appeal. It is in any event fundamentally misconceived. It is correct to say that the *Langan* case decided that the Circuit Court does not have jurisdiction in relation to properties which have no rateable valuation where that is the putative basis for such jurisdiction. However, that is not the position here. Section 3 of the Land and Conveyancing Law Reform Act 2013 provides:

“(1) This section applies to land which is the principal private residence of—

(a) the mortgagor of the land concerned...

(2) Subject to subsection (4), proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates and which land is land to which this section applies shall be brought in the Circuit Court.”
7. Accordingly, the Act of 2013 confers jurisdiction on the Circuit Court in relation to claims by a mortgagee for an order for possession of a principal private residence, such as the property in the present case. This jurisdiction is entirely unrelated to rateable valuation and accordingly, the judgment in *Langan* has no application to it. Indeed this is recognised in *Langan* where Hogan J. said:

“[44.] In 2013 the Oireachtas enacted s.3 of the [2013 Act] which extended the jurisdiction of the Circuit Court to mortgages in respect of principal private residences created *before* 1st December 2009. Indeed, s.3(2) of the 2013 Act provides that possession proceedings commenced by a mortgagee in respect of such premises must be brought in the Circuit Court. This provision is in force with effect from 31st July 2013: see Land and Conveyancing Act 2013 (Commencement) Order 2013 (S.I. No. 289 of 2013).

[45.] The 2013 Act represents another contemporary example of where the Oireachtas has moved away from the traditional rateable valuation model in vesting jurisdiction in the Circuit Court in relation to disputes concerning land. As, however, the properties at issue in the present proceedings did not concern the principal private residence of the defendant, the 2013 Act is not of any direct relevance so far as the resolution of the jurisdictional questions at issue in the present case is concerned.”
8. There is therefore no basis in my view for stating a case on this point to the Court of Appeal pursuant to s. 16 of the Courts of

Justice Act, 1947. Although Mr. Flynn has sworn an affidavit grounding the notice of motion, it is merely a repetition of what is stated in the notice of motion but does not of itself give rise to any grounds of defence to the application for summary judgment herein. Other matters pleaded in the notice of motion allege that evidence was withheld from the Circuit Court which was misled but there is nothing whatsoever by way of evidence to support this assertion and thus to support any purported defence.

9. Mr. Flynn further purports to suggest that he is entitled pursuant to s.93 of the 2009 Act to have his mortgage assigned to an entity called The People's Mortgage Protection Vehicle which he told me in the course of his submissions is a body which has apparently given him and others like him advice to the effect that his mortgage should be transferred to this entity and if that occurs, this will somehow enable him to defeat the plaintiff's claim. S. 93 provides:

"(1) A mortgagor who is entitled to redeem may, subject to compliance with the terms on which the mortgagor would be entitled to require a discharge, require the mortgagee, instead of discharging the mortgage, to assign the mortgage debt and transfer the mortgage to any third person, as the mortgagor directs, and on the mortgagor so directing, the mortgagee is bound to assign and transfer accordingly." (my emphasis).

10. Of course in the present case, Mr. Flynn is not entitled to redeem as the sums due on foot of the mortgage remain outstanding and thus there is no question of the defendants having a right to require the bank to transfer the mortgage to any third person such as the so-called PMPV.

11. Mr. Flynn informed me during the course of the hearing that he has been making his mortgage payments to this entity rather than the plaintiff bank. If this is so and certainly if it applies to others like Mr. Flynn, it is a very worrying development. The only party entitled to receipt of the mortgage payments under the terms of this mortgage is the plaintiff bank or its lawful assignees, of which there are none. The suggestion that the defendants could somehow defeat the claim of the plaintiff bank by assigning their interest in the mortgage or indeed property in question to a third party is utterly misguided and spurious. So too is the device of making mortgage payments to an entity which has none of the rights of the mortgagee, nor it seems is it burdened with the equity of redemption by which a mortgagor may call for the assurance of a property once the mortgage repayment has been met in full.

12. It is a matter of considerable concern that Mr. Flynn, and perhaps others like him, are being duped by anonymous parties into paying money to them on the basis of so called legal advice about their rights and entitlements. The advice apparently given by these shadowy advisers, who profess to have legal knowledge but in fact possess none, is, as recent cases concerning possession applications in this court demonstrate, to bring appeals from the Circuit Court or seek judicial review on foot of papers ineptly drafted by them, which are doomed to fail and expose the unfortunate unrepresented parties to much higher levels of costs than they should otherwise have to bear. Unlike professional lawyers, these advisers are of course unregulated and uninsured with the consequent perils of engaging with them for the unsuspecting litigant. They draft documents which espouse a grandiose form of legal speak designed to give such documents the appearance of being learned and erudite when in fact they contain little more than legal nonsense.

13. Parties like Mr. Flynn who find themselves in financial distress are making a bad situation considerably worse by consulting hob lawyers and unqualified persons who hold out false hope for them in situations where they would be much better advised seeking to deal with their creditors either directly or through the medium of properly qualified advisers. There are many organisations that provide specialised and highly expert advice and assistance to those in financial difficulty with their mortgages or more generally. Many of these provide advice free of charge or at very little cost. They include the Money Advice and Budgeting Service (MABS), the Insolvency Service of Ireland, Free Legal Advice Centres (FLAC) and Citizens Information. These and other not for profit organisations and NGO's provide help to those facing repossession claims in court. Many have access to the Bar Council's Voluntary Assistance Scheme which provides free advice and representation in court to qualifying parties. Solicitors frequently provide pro bono help to their clients. Of course before arrears cases ever get to the stage of becoming possession claims, banks such as the plaintiff which are governed by the Central Bank Code are obliged to engage in the Mortgage Arrears Resolution Process (MARP) which gives mortgagors in arrears an opportunity of engaging constructively with lenders. Regrettably in this case, the defendants ignored all invitations from the plaintiff bank to enter into such dialogue, choosing instead to pursue the futile and highly damaging alternative of contesting their case on the basis of so called advice from persons not qualified to give it.

14. For these reasons I must dismiss this appeal and affirm the order of the Circuit Court.