Neutral Citation Number: [2011] IEHC 189

THE HIGH COURT

2009 742 SP

BETWEEN

SECURED PROPERTY LOANS LIMITED

PLAINTIFF

AND

ELIZABETH FLOYD

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 21st day of March, 2011.

1. The proceedings

1.1 In these proceedings, which were commenced by special summons which issued on 23rd June, 2009, the plaintiff, as mortgagee, claims possession of a business and residential premises at Tulla, County Clare which comprises a public house and shop with residential accommodation overhead (the Mortgage Property). The claim is grounded on the affidavit of Ronald Weisz sworn on 12th June, 2009. The replying affidavit of the defendant was sworn by her on 11th December, 2009 and some of the facts therein were addressed in a supplemental affidavit of Mr. Weisz sworn on 1st February, 2010. When the matter came before the Master, instead of adopting the usual practice of transferring it to the High Court Chancery Special Summons List, the Master adjourned it to plenary hearing and gave directions in relation to pleadings. The plaintiff appealed against the order of the Master and it is on foot of that appeal that the matter comes before this Court.

1.2 In this Court, counsel on both sides argued the substantive issues of law, having furnished the Court with helpful outline written submissions. There was no suggestion that any factual issue arose which would necessitate oral evidence and a plenary hearing on that account. Accordingly, subject to one qualification, the decision on the appeal should determine whether or not an order for possession should issue. The qualification is that, if the appeal is decided in favour of the plaintiff, an affidavit in compliance with Order 9, rule 14 of the Rules of the Superior Courts 1986 will have to be filed.

1.3 In the special indorsement of claim on the special summons, in seeking the order for possession, the plaintiff invokes s. 62(7) of the Registration of Title Act 1964. It is patently obvious from the special indorsement that the land the subject of the proceedings is unregistered land, not registered land, and that s. 62(7) has no application whatsoever. As I indicated at the hearing, the special indorsement is amended to delete references to s 62(7) of the Registration of Title Act 1964.

2. The mortgage transaction

2.1 In the grounding affidavit it is averred that the plaintiff is legally authorised to make loans and, in particular, the loan the subject of these proceedings. It is further averred that the plaintiff is a "mortgage lender" within the meaning of s. 2(1) of the Consumer Credit Act 1995 (the Act of 1995) and Regulation 3(a) of the Consumer Credit Act 1995 (Section 2) Regulations 1996 (S.I. No. 127 of 1996). In this connection, it is confirmed that at least fifty per cent by number of all business loans outstanding to the plaintiff, in whole or in part, at any time comprises loans secured by mortgages of residential property. None of those facts was disputed by the defendant.

2.2 The various steps in the mortgage transaction were outlined in the grounding affidavit and the relevant documents were exhibited. The first step was that on 8th November, 2007 the defendant completed and submitted a loan application described as "Short Term Loan Application Form" to the plaintiff, in which she applied for a loan of €125,000 for a term of twelve months. The purpose of the loan was stated as: "Pay tax and clear AIB Bank". The monthly interest payments, stated to be "1.5% x Gross Loan" were specified on the form as €1,875.

2.3 In response to the application, a loan offer in what was referred to as a "Commitment Letter" was given by the plaintiff to the defendant on 17th January, 2008. This was a comprehensive and, indeed, complex document running to eight pages. The important information as at the date thereof was set out on the first page. The amount of the credit advance was shown as €125,000. The period of the agreement was given as twelve months. The number of repayment instalments (of interest) was stated to be twelve, each instalment amounting to €1,875. The total amount repayable was stated to be €147,500, that is to say, €125,000 plus €22,500 interest. The APR (annual percentage rate) was shown as 19.41%. The drawdown was dealt with in Clause 13, which disclosed that sums totalling €8,750 (€6,250 in respect of procurement fee and €2,500 in respect of brokers' fees) would be deducted at drawdown and the balance, €116,250, would represent the net proceeds of the loan. The Commitment Letter was signed by the defendant on 30th January, 2008 and her signature was witnessed by her solicitor, James Nash, and she thereby accepted the offer on the terms set out.

2.4 Contemporaneously with signing acceptance of the loan offer, the defendant also signed other documentation in the form required by the plaintiff lender. First, the defendant and her solicitor had been furnished with the plaintiff's booklet entitled "*Customer Care Booklet*", which explained the terms and conditions of loans provided by the plaintiff. The defendant signed an acknowledgement that she had read and understood its contents on the last page of the booklet on 30th January, 2008, again in the presence of her solicitor. Secondly, on 30th January, 2008 the defendant also signed a letter addressed to the plaintiff in which she acknowledged that she had been provided with "independent legal advice" from her solicitor, Mr. Nash, in connection with the mortgage transaction. Mr. Nash furnished a document in letter form on his letter heading, which was headed "Solicitor's Certificate" and which was also dated 30th January, 2008, which I have assumed is a *pro forma* document furnished by the plaintiff. In it he stated that he had

"independently advised" the defendant of all the terms contained in the Commitment Letter and the *Customer Care Booklet* and that she understood the contents. Having addressed some of the features of the transaction, including the application of the Act of 1995, in detail, in the final sentence of the letter Mr. Nash confirmed that the defendant had signed all of the documentation for the loan "of her own free will and was not under duress at such time".

2.5 The Loan Application Form, the Commitment Letter and the Consumer Care Booklet were replete with warnings in capital letters and bold print. Each contained the warning notice prescribed by s. 128 of the Act of 1995, which puts a borrower on notice that his or her home is at risk if the repayments are not kept up. Counsel for the plaintiff stated that this was in accordance with the plaintiff's standard practice.

2.6 The loan cheque issued to Mr. Nash on 12th February, 2008. It was in the amount of €116,250. It was furnished to Mr. Nash subject to the condition, *inter alia*, that the defendant sign the mortgage deed in his presence and that he witness it prior to the funds being disbursed.

2.7 The mortgage deed (the Mortgage) was dated 14th February, 2008. It was executed by the defendant in the presence of Mr. Nash who attested her execution. It was registered in the Registry of Deeds. I propose looking at the provisions thereof which were addressed in legal argument in some detail.

3. The Mortgage

3.1 The mortgage particulars on the first page of the Mortgage identified the defendant as mortgagor and the premises to be secured (the Mortgage Property). The date of the Commitment Letter (17th January, 2008) and the loan amount (€125,000) were also set out. The expression "the secured monies" was defined as meaning "the present loan and any future loan of a principal sum or sums and all interest payable thereon in accordance with the provisions of the relevant Commitment Letter and this Mortgage and the expenses and all other monies which the [defendant] covenants to pay to the [plaintiff] or discharge or is liable for under this Mortgage or any relevant Commitment Letter".

3.2 In the operative part of the Mortgage in Clause 1 the defendant covenanted to repay the loan in accordance with the Commitment Letter and the Mortgage and there was a proviso that the amount remaining unpaid on the loan should become immediately due and payable on demand on the happening of an "event of default" specified, one such specified event being "a default for seven days in payment of the interest payment due as per the Commitment Letter" (Clause 7.01(a)). As the Mortgage Property was unregistered land it was Clause 3.01 which created the security, in that it contained an outright conveyance of the Mortgage Property to the plaintiff in fee simple subject to the proviso for redemption contained in Clause 4.01, which provided that, on payment of the secured monies pursuant to the covenants contained in the Mortgage, the Mortgage Property would be released from the security thereby constituted.

3.3 The powers of the plaintiff as mortgagee were set out in Clause 6, including the power at any time after the execution of the Mortgage to enter into possession of the Mortgage Property (Clause 6.01). However, by virtue of Clause 7 it was provided that the plaintiff should not exercise that or any other power provided for in Clause 6 unless an event of default had occurred as set out in Clause 7, including the default specified in Clause 7.01(a).

3.4 It was submitted on behalf of the defendant that the Court has a discretion as to whether or not to grant an order for possession. As a matter of law, assuming that the defendant has not established an entitlement to equitable relief, if an event of default has occurred, for instance, if the defendant is in default in payment of the interest due under the mortgage, the plaintiff has a right to possession of the Mortgage Property. In my view, such discretion as the Court has is merely to stay the execution of an order for possession.

4. Default

4.1 The defendant discharged the first three interest payments due on the mortgage in the amount of €1,875 each in February, March and April 2008. She made one further payment in August 2008 in the sum of €3,780. She made no further payments whatsoever to the plaintiff.

4.2 By letter dated 19th May, 2009, at a time when the principal and interest secured by the mortgage were due, the plaintiff's solicitors notified the defendant that her total indebtedness to the plaintiff then amounted to €136,739.44 and demanded repayment of that sum within seven days. It was stipulated that, in default of payment within that period, the plaintiff would institute proceedings seeking, *inter alia*, an order for possession of the Mortgage Property.

5. The defence

5.1 The facts on which the defendant grounded her defence are set out in her replying affidavit. She has averred that she resides in the residential portion of the Mortgage Property and that it is her only dwelling house. She has described the plaintiff as "a private sub-prime mortgage lender" and has pointed to the fact that the deductions of €8,750 from the loan amount bear interest until liabilities are discharged in full. It was through circumstances of extreme financial difficulty that she was compelled to avail of the plaintiff's lending facilities, notwithstanding what she referred to as "the particularly high and onerous interest rate applicable". She then went on to outline her personal circumstances. On her separation and divorce from her husband, she took over ownership and management of the public house which had been previously operated by him. Due to his mismanagement, there was a large tax liability and the liquor licence had lapsed and she could not have it reinstated until she could produce a Tax Clearance Certificate. She could not obtain loan approval from a "mainstream financial institution" and, accordingly, was obliged to seek facilities from the plaintiff. The loan she obtained from the plaintiff was applied in discharge of her liabilities to the Revenue Commissioners and a loan of €30,000 due to Allied Irish Bank. She had intended that, at the first available opportunity, she would secure alternative finance at more reasonable rates of interest and discharge the sums due to the plaintiff. However, due to a number of circumstances, including deteriorating health, she had been unable to secure a renewal of the liquor licence, which was a prerequisite to obtaining further facilities from another institution. She set out the time scale involved in obtaining a certificate of entitlement of reinstatement of the liquor licence from the Circuit Court, which issued on 20th October, 2009, and a Tax Clearance Certificate, which necessitated filing outstanding tax returns. When she swore the replying affidavit in December 2009 she was still endeavouring to secure alternative finance.

5.2 In her replying affidavit the defendant contended that she has a defence in equity to the plaintiff's claim on the basis that the high rate of interest being claimed on the loan constitutes an unconscionable and oppressive term of the loan agreement. Further, she contended that a stateable case exists for the striking down of that term on the grounds that the exorbitant rate of interest constitutes a penalty levied upon her and a source of unjust enrichment for the plaintiff. As the plaintiff's claim to be entitled to possession is based upon default of payment of the interest, she contended that the application for possession is likewise impugned by the unconscionability of the interest rate.

5.3 In response to the defendant's contentions in relation to the interest rate, Mr. Weisz, in his supplemental affidavit, pointed to the information which the defendant had received in relation to the interest rate in the Commitment Letter and the *Customer Care Booklet* and asserted that the rate of interest charged is not unlawful.

5.4 In outline, the legal basis on which it was submitted by counsel for the defendant that the plaintiff's claim for possession cannot be maintained is predicated on the rate of interest charged on the mortgage being exorbitant, constituting a penalty levied on the defendant, being a source of unjust enrichment for the plaintiff and being usurious. It was submitted that under its inherent equitable jurisdiction the Court may strike down or modify a rate of interest or premium contractually due to a lender, where it is of opinion that the liability of the borrower accrues on foot of an unconscionable bargain. It was further submitted that, since the repeal of the statutory restrictions on usury, the Court has an added equitable jurisdiction to set aside transactions which provide for an exorbitant rate of interest, if the justice of the case so requires. On the latter point, counsel for the defendant relied, in particular, on three cases, which I propose to analyse later, namely:

(a) *Rae v. Joyce* (1892) 29 L.R. (Ir.) 500;

(b) *Kevans v. Joyce* [1896] 1 I.R. 442; and

(c) *Samuel v. Newbold* [1906] 1 A.C. 461

5.5 Counsel for the defendant submitted that the factors surrounding the defendant's entry into the loan agreement with the plaintiff rendered their respective bargaining positions unequal and that the defendant would not have been induced to enter into what was characterised as an improvident loan agreement but for the circumstances which placed her in such an unequal position. Further, it was submitted that the mortgage contract as a whole is oppressive to the defendant and that the manner in which the plaintiff seeks to enforce it is unconscionable and over-reaching. If the interest rate is struck down or modified by the Court, it was submitted, the plaintiff's claim for possession cannot stand, citing the decision of the High Court (McCracken J.) in *Wise Finance Co. Ltd. v. Lanagan* (Unreported, High Court, 6th November, 2000). That case, in which McCracken J. found that there were contradictions between the commitment letter and the deed of charge which led him to conclude that he could not hold that the monies secured by the deed of charge had become due so as to give the plaintiff an entitlement to possession, in my view, is of no relevance to this case.

5.6 As regards the underlying factual premise, that the rate of interest is exorbitant, counsel for the defendant submitted that a 19.41% interest rate over a period of twelve months is exorbitant compared to the annual percentage rates currently offered by other lenders, mainstream or otherwise. It was submitted that the Court could take judicial notice of that fact. It was also submitted that once it has been established that the interest rate is exorbitant, the burden shifts to the plaintiff to demonstrate that the impugned terms are not harsh and unconscionable and that the transaction as a whole is fair, just and reasonable.

5.7 A subsidiary submission advanced on behalf of the defendant was that the defendant comes within the definition of a "consumer" within the meaning of the Consumer Credit Act 1974, as amended. I assume that the reference to that Act, which is a United Kingdom Act, is a mistake and that it was intended to refer to the definition of "consumer" in the Act of 1995 ("an natural person acting outside his trade, business or profession"). I consider that in the context of the transaction at issue here, on the facts as disclosed by her, the defendant does not come within that definition. As the submission was not developed, I do not consider it necessary to explore it further.

6. The law

6.1 It is the case that there exists an equitable jurisdiction under which a court may interfere to relieve the consequences of an unconscionable transaction. Counsel for the plaintiff referred the Court to the commentary on the law on unconscionable bargain in McDermott on *Contract Law* at paras. 14.148 to 14.168. In particular, he referred the Court to the commentary on victimisation of the weaker party at paras. 14.159 *et seq.* and the citation of the decision in *Fry v. Lane* (1888) 40 Ch D 312.

6.2 The essential preconditions to the intervention of the Court to relieve the consequences of an unconscionable transaction have been variously laid down over the centuries. McDermott (at para. 14.153) quotes the following passage from the judgment of Somers J. in *Moffat v. Moffat* [1984] 1 NZLR 600:

> "The species of equitable fraud comprehended by the label unconscionable bargain does not lend itself to exhaustive definition. But at least it is a necessary element that an equity be raised against the party receiving or retaining the bargain or advantage – that is to say that the receipt or retention is unconscientious. It will have that character if the other party to the transaction was under a disability or disadvantage sufficiently serious to make it unfair to allow it to stand in favour of one who knew or ought to have known of the condition."

McDermott goes on to consider what may constitute a position of disability or disadvantage and the requirement that the stronger party knew, or ought to have known, of the weaker party's disadvantage, before identifying the form which the victimisation of the weaker party may take. He states (at para. 14.159) that it may taken the form of either the active extortion of a bargain or the passive acceptance of it in unconscionable circumstances and states that the relevant factors include:

(a) inadequacy of consideration;

(b) procedural impropriety, such as unfair pressure; and

(c) lack of independent advice.

That is consistent with the decision in *Fry v. Lane* where it was held that relief from an unconscionable bargain depended on three factors:

(i) the poverty and ignorance of the plaintiff;

(ii) the consideration being at an undervalue; and

(iii) the lack of independent advice.

6.3 In other texts, the essential preconditions are identified by reference to other authorities. For instance, in Delany on *Equity and the Law of Trusts in Ireland* (4th Ed. 2007) the following passage from the judgment of Peter Millett QC, as he then was, in *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd*. [1983] 1 WLR 87 at pp. 94 – 95 is cited:

> "First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken. Second, this weakness of the one party has been exploited by the other in some morally culpable manner … and, third, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive. … In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself … which in the traditional phrase 'shocks the conscience of the court' and makes it against equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained."

6.4 Turning to the three authorities relied on by counsel for the defendant, while they concerned loan transactions, in my view, as regards each, neither the decision itself nor the reasoning which supported it supports the defendant's contention that the Court should intervene in this case in the manner advocated.

6.5 The facts in *Rae v. Joyce* are succinctly set out in the head note, if less melodramatically than disclosed in the judgments. The only property to which the plaintiff, Mrs. Rae, was entitled in 1889 was a reversionary interest in a sum of £2,100 invested on mortgage, subject to the life estate of the settlor, her aunt, who was sixty one years old in 1889. Mrs. Rae had no other means. Her husband had no means either and was without employment. Before getting the loan from the defendant, Mr. Joyce, which was the subject of the proceedings, Mrs. Rae had mortgaged the reversionary interest three times in 1889: by way of legal mortgage for £400 at 7%; and for separate loans of £50 and £52.10 by way of equitable mortgage. When she entered the loan transaction with Mr. Joyce in January 1890 she was, as the head note put it, "in delicate health, and was expecting her confinement in a few weeks". She and her husband were living in a hotel in Dublin and they had no money to pay the week's bill which was due on 16th January, 1889. On that day she executed a mortgage of the reversionary interest to Mr. Joyce, a Dublin moneylender, to secure an advance of £100 repayable in six months with interest at 60%. There was a sum of £7 charged for costs, which also bore interest at 60%. The mortgage was the result of several interviews between Mr. and Mrs. Rae and Mr. Joyce. The deed of mortgage was approved by a solicitor on Mrs. Rae's behalf. In relation to this aspect of the matter, it is outlined in the judgment of Walker C. (at p. 512) that the solicitor said nothing to Mrs. Rae about the 60%, which he seemed to have treated as inevitable. Two objections were made by him, apparently to Mr. Rae: that the transaction was so shady that he would not have his name on the deed; and that £45 which Mrs. Rae owed him was in peril. It was only when Mr. Rae, who had been an "officer", went down on his knees to him not to let his wife go to the poorhouse that the solicitor consented to let his name appear on the draft mortgage. Walker C. pointed out that there was no visit to Mrs. Rae by the solicitor or from her to him and there was no attempt to get the loan elsewhere, referring to the judgment of Kay L. J., in *Fry v. Lane*.

6.6 On those facts, in *Rae v. Joyce*, the Court of Appeal held that the mortgage was, under the circumstances, a hard and unconscionable bargain, and should stand as security for all sums advanced only with interest at 5%. The significant factor in that case was the nature of the security given by Mrs. Rae to Mr. Joyce – that it was a reversionary interest, so that Mrs. Rae was what was referred to at the time as "an expectant heir". The significance of her position and the special protection afforded in equity to a person in that position was explained in the judgment of Fitz Gibbon L.J. (at p. 523). He stated that the equitable jurisdiction was not founded merely on personal considerations, nor was it exercised in the interest of the borrower alone, quoting from a judgment of Lord Hardwicke, one hundred and fifty years earlier, in *Barnardiston v. Lingood* 2 Atk. 135 to the following effect:

> "This Court has always extended relief in such cases, and with the greatest justice in the world, for the sake of the public, to prevent people's gaming, as it were, to the prejudice and damage of young improvident persons, and the ruin of families."

Fitz Gibbon L.J. went on to state:

> "I need not consider, and I express no opinion, whether this contract could have stood if the plaintiff had not been 'an expectant heir'; but the reversionary character of her property, the pecuniary distress of herself and her husband, her helpless position, the details of the transaction, the rate of interest – in short, the culmination of all the circumstances – establish beyond all question, in my opinion, that this is a case in which the burden is thrown upon the defendant of sustaining the contract. What has he to prove? Not merely absence of fraud and of dishonesty on his own part, not merely understanding and volition on the plaintiff's part, not merely that a contract in the fullest sense was made, but affirmatively that the contract itself was not only fair and just, but also reasonable".

6.7 The similarity between *Rae v. Joyce* and *Kevans v. Joyce* is not confined to the fact that the same moneylender was the defendant in each. The significant similarity is that, like Mrs. Rae, the borrower in *Kevans v. Joyce*, Smith, who was described in the head note as "a young man of improvident habits", who was represented in the proceedings by his trustee in bankruptcy, as plaintiff, had mortgaged a reversionary interest in land, expectant on the death of his father, to Mr. Joyce in 1889. Once again the rate of interest was 60%. There was a subsequent mortgage in 1889. After the death of his father in 1891, Smith sold the equity of redemption to Joyce. The Court of Appeal upheld the decision at first instance that the mortgages of 1889 were hard and unconscionable bargains and should only stand as securities for the amounts advanced and interest at 5%; and that the sale of the equity of redemption was at an undervalue and should also stand as security only for the amounts advanced and interest at 5%. At first instance, Monroe J. followed *Rae v. Joyce*.

6.8 Both *Rae v. Joyce* and *Kevans v. Joyce* predated the coming into operation of the Moneylenders Act 1900 (the Act of 1900). In *Samuel v. Newbold*, the House of Lords was concerned with the interpretation and application of s. 1 of that Act. The plaintiffs in that case were moneylenders who had brought an action against Newbold, as executor of Alton deceased, upon a promissory note for £3,300 made by Alton in October 1903 in their favour. Alton had borrowed £2,000 from the plaintiffs on the basis that he would repay it, together with £1,300 for interest, by twelve monthly payments of £275 each. The transaction was completed by Alton giving the plaintiffs a promissory note for £3,300 on those terms. The issue in the case was whether the Court was entitled to intervene under s. 1(1) of the Act of 1900. The conditions for relief by the Court under the Act of 1900 were that the interest charged on the actual advance was excessive, or that the preliminary or other expenses were excessive, and that in either case the transaction was "harsh

and unconscionable or … otherwise such that a Court of Equity would give relief". It was held that the relief which could be extended to a borrower was not limited to cases in which before the Act the Court of Chancery would give relief. The policy of the Act was to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its merits and to look behind a class of contracts which peculiarly lent themselves to an abuse of power. The important point, for present purposes, is that it was a statutory relief or remedy which was at issue. Counsel for the defendant relied on a passage from the judgment of Lord James of Hereford which, in my view, when read in context does not represent a general equitable principle. In the passage relied on by counsel, which is to be found at p. 473, Lord James stated:

> "Excessive interest of itself is sufficient to render a contract harsh and unconscionable. Proof of excessive interest may of itself, therefore, be sufficient to entitle the debtor to relief. What amounts to excessive interest is to be determined by the tribunal in each case, the question of risk being a material matter for consideration. When excessive interest is apparently established, any facts that tend to show that such excess does not render the contract 'harsh and unconscionable' should be proved in evidence by the lender. This burden is on him."

That passage was preceded by an analysis by Lord James of a decision of the Court of Appeal in *In Re A Debtor* [1903] 1 K.B. 705. Lord James commented that, as the Court of Appeal in the case being considered by the House of Lords, had acted on and accepted the view of the Court of Appeal in the earlier case, the weight of authority was overwhelming in favour of construing the Act of 1900 without introducing into it arbitrary limitations and that was the construction which in his view was correct. He then prefaced the passage quoted above as follows:

> "The result I have arrived at may therefore be summarised as follows:"

In other words, there is no doubt but that in the passage quoted Lord James was setting out not a general equitable principle but what was the proper construction of s. 1 of the Act of 1900. The Act of 1900 was, of course, repealed in this jurisdiction by the Act of 1995.

6.9 Before leaving the decision of the House of Lords in *Samuel v. Newbold*, I think it is worth recording that there is a passage in the judgment of Lord Macnaghten which summarised the jurisdiction exercised in the decisions of the Irish Court of Appeal considered earlier. He stated (at p. 468):

> "… although the Court of Chancery from the earliest times was familiar with questions more or less analogous, it never assumed to deal with them on the principle on which this Act grants relief. In certain cases which, in modern times at any rate, have been confined to dealings with expectant heirs, including the whole class of persons for convenience sake comprehended under that designation, the Court of Chancery gave relief on terms. On the plaintiff submitting to do equity by repaying what was justly due, the Court set aside the transaction which it considered unrighteous, and ordered that the securities impeached should stand as a security for the money actually advanced with interest. But the Court never remodelled the bargain. 'The Chancery' – as a great judge said many years ago – 'mends no man's bargains'."

The "great judge" was Lord Nottingham speaking in 1676 in *Maynard v. Moseley*.

6.10 The point made by Lord Macnaghten was reflected in *Kevans v. Joyce*. There was a complexity in that case, in that the plaintiff's action had been brought in reaction to proceedings by Mr. Joyce in the Land Judge's Court on foot of another encumbrance for the sale of the lands. However, the statement of claim delivered by the plaintiff did not contain any offer to redeem the mortgages. An issue arose at first instance out of that fact. Monroe J. allowed an application to amend the statement of claim "against the defendant's strong protest", because on three occasions the defendant had been offered his advances with interest at 5% (p. 461). In the Court of Appeal, that issue was not argued. However, what that issue and the manner in which it was dealt with by Monroe J. illustrates is that, if the defendant was entitled to invoke the equitable jurisdiction applied in *Rae v. Joyce* and *Kevans v. Joyce* in this case, which, in my view, she is not, the outcome would not be that the Mortgage would be set aside. Rather, she would be entitled to redeem the Mortgage on repaying the loan of €125,000 together with interest at a rate which the Court considered not to be excessive. What that rate might be is open to speculation. Insofar as guidance can be obtained from the authorities, in *Rae v. Joyce,* the Court of Appeal varied the rate of 7% given at first instance down to 5%. Walker C. stated (at p. 517) that the only interest that could be given was either the contract rate, which was impossible, or a rate fixed by analogy to what the Court allows. While what is commonly known as the Court rate of interest currently stands at 8% per annum, whether, if the equitable jurisdiction recognised in *Rae v. Joyce* and *Kevans v. Joyce* were being applied in this case, the Court rate should be applied by analogy would, no doubt, be the subject of argument. I express no view on what the outcome might be.

7. Application of the law to the facts

7.1 It is clear on the affidavit evidence that the defendant mortgaged a freehold interest in possession in the Mortgage Property to the plaintiff. Accordingly, the equitable jurisdiction which the defendant sought to invoke in reliance on the decisions in *Rae v. Joyce* and *Kevans v. Joyce* does not apply. Therefore, it has not been established by the defendant that the onus of proving that the rate of interest charged on the mortgage has not given rise to an unconscionable bargain rests with the plaintiff.

7.2 In relation to the broader equitable jurisdiction under which the Court may set aside an unconscionable bargain, compliance with the preconditions to the Court's intervention falls to be established by reference to the point in time at which the mortgage transaction was entered into, in this case, in January and February 2008. At that point in time, the defendant was in need of capital to discharge tax arrears in relation to the business of the licensed premises and other debts. While I accept that there were limited options available to the defendant to raise the capital she needed, I do not accept that, as was contended by her counsel, she was "thrown on a lender of last resort". She made a commercial decision, with the benefit of independent legal advice from the solicitor who is acting for her in these proceedings, to raise the capital by mortgaging the Mortgage Property to the plaintiff in consideration of a loan on the terms offered. The plaintiff made a commercial decision to advance the loan on those terms on the security of the Mortgage Property. It may be that in the commercial transaction the defendant was the weaker party. Assuming she was, in applying the factors outlined by McDermott as relevant to whether she was victimised by the plaintiff, the questions which arise and, in my view, the appropriate answers thereto are as follows:

> (a) Was there inadequate consideration? If the defendant was charged an excessive or exorbitant rate of interest, it could be held that there was, in the sense that what the defendant got, the loan for a fixed period of time, was worth less in value than what she was obliged to pay in terms of principal and interest to redeem the Mortgage. For the reasons set out at 7.3 below, I am not satisfied that there is evidence of inadequacy of consideration in that sense before the Court.

(b) Was there some procedural impropriety on the part of the plaintiff? In my view, on the evidence there was not.

(c) Did the defendant have independent legal advice? On the evidence, in my view, she definitely did.

7.3 I have already recorded that counsel for the defendant submitted that the Court should take judicial notice of the fact that the rate of interest charged in the mortgage is out of kilter with the rates charged by other lenders. In my view, it is not open to the Court to do so. While it appears to be high, in order to determine whether the rate of interest was fixed at a level which rendered the bargain between the parties unconscionable, evidence of a comparative analysis of the rates charged by other lenders would be relevant but the analysis would have to take account of all relevant factors, such as the size of the loan, the duration of the loan, the creditworthiness of the borrower, whether the loan was to be secured or not, and, if secured, whether the security was adequate. No evidence was adduced by the defendant, and, in my view, the evidential burden in relation to this matter was on the defendant, on the basis of which the Court could make a finding that the rate of interest charged was at a level which rendered the transaction unconscionable.

8. Conclusion

8.1 Accordingly, I have come to the conclusion that the defendant has not demonstrated that the Court should exercise its equitable jurisdiction to prevent the plaintiff from obtaining possession of the Mortgage Property.

8.2 The Court was informed, although this was not on affidavit, that the amount now due by the defendant on foot of the Mortgage is approximately €201,000 and the debt is growing. This reflects the fact that the defendant has not discharged any principal and has defaulted in payment of interest since mid-2008. While the defendant's concern and her obvious sense of grievance that she is faced with this level of debt is understandable, the Court has no jurisdiction to grant relief to the defendant in respect of the high level of interest payable under the mortgage. Any regulation of interest rates charged by lenders to borrowers is a matter for the Oireachtas.