

THE HIGH COURT

[2022] IEHC 114
[2021 No. 3794P.]

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

VINCENT KAVANAGH

AND

MADELEINE (OTHERWISE MADELINE) KAVANAGH

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 3rd day of March, 2022

Introduction

1. This is an application by Start Mortgages Designated Activity Company ("Start") for an interlocutory injunction restraining the defendants, Vincent Kavanagh and Madeleine Kavanagh, their servants or agents or any persons acting in concert with them or any person with knowledge of the injunction from trespassing upon or otherwise entering the property comprised in Folio 9004F, County Carlow, known as 36 Beechwood Park, Carlow, County Carlow.
2. Start is plainly entitled to the order which it seeks. On 14th June, 2016 the Circuit Court (Her Honour Judge Fergus) made an order for possession of the property. On 19th June, 2017 the High Court (Noonan J.) dismissed an appeal by Mr. and Mrs. Kavanagh against that order. On 17th February, 2020 the order for possession was executed and possession delivered to Start but later that day Mr. and Mrs. Kavanagh broke in to the property and despite demand have refused to leave. They are trespassers. Mr. Kavanagh has sought to resist the application on a number of grounds but there is no substance to any of his arguments.
3. At the conclusion of the hearing of the application on 15th February, 2022 I was in no doubt as to the correct outcome but any breach of the order which the court will make will see those responsible in prison and for that reason I decided that I would spell out my reasons in writing. In truth it is a perfectly simple case. Mr. and Mrs. Kavanagh have defied the process of the law.

The evidence

4. By letter dated 13th June, 2007 Bank of Scotland (Ireland) Limited agreed to lend to Mr. and Mrs. Kavanagh €110,000, the repayment of which, with interest, over 18 years, was to be secured by a mortgage of the property at 36 Beechwood Park, Carlow, which was to be their home. The letter of offer spelled out in capital letters and bold type that their home was at risk if they did not keep up the payments. Mr. and Mrs. Kavanagh accepted the offer, drew down the loan, and signed the mortgage which, on 21st September, 2007, was duly registered as a burden on Folio 9004F, County Carlow.
5. On 31st December, 2010 all of the assets and liabilities of Bank of Scotland (Ireland) Limited were transferred to Bank of Scotland plc.

6. Mr. and Mrs. Kavanagh failed to make the repayments on their mortgage and on 21st October, 2013 Bank of Scotland plc issued a Civil Bill for Possession in the Circuit Court, South Eastern Circuit, County of Carlow.
7. In February, 2015 Bank of Scotland plc assigned its interest in the loan and security to Start, which was at that time a limited liability company – Start Mortgages Limited – and on 10th April, 2015 Start was registered as the owner of the charge.
8. Following the assignment, Start was substituted as plaintiff in the Civil Bill action and on 14th June, 2016 was granted an order for possession of the property, subject to a stay on execution for six months. Mr. and Mrs. Kavanagh appealed to the High Court against the order of the Circuit Court. Incidentally, the appeal was long out of time but the time for an appeal was extended by the Master of the High Court on 16th February, 2017 on a motion issued by Mr. and Mrs. Kavanagh on 8th December, 2016. For the reasons given by Noonan J. in a written judgment delivered on 4th July, 2017, their appeal was dismissed.
9. On 14th March, 2019 an execution order was issued on foot of the order for possession. The first attempt to execute the order on 18th November, 2019 was opposed and abandoned but on 17th February, 2020 execution was effected and, as required by the order of the court, the County Registrar took possession of the house and delivered it to Start.
10. The affidavit of Sean Cahill, filed on behalf of Start, shows what happened at 36 Beechwood Park on 17th February, 2020. Mr. Cahill is a director of Blackwater Bailiff Asset Management Services Limited which, as he puts it, provides asset recovery services to Start. His evidence is uncontested.
11. Mr. Cahill attended at the property at 14:00 with the court messenger, six court bailiffs, two locksmiths, and four members of An Garda Síochána. Mr. Cahill knocked at the door. Mrs. Kavanagh appeared at a window to ask what was going on. The court messenger, Mr. Paul Quinn, advised her that he was there to execute an order for possession. Mrs. Kavanagh (who was recording what was happening on her mobile phone) suggested that those present were on her property unlawfully and illegally.
12. At 14:04 Mr. Quinn asked the locksmiths to open the front door but Mrs. Kavanagh locked it from the inside by two deadbolts. The court messenger, being otherwise unable to take possession of the property, had the door forced.
13. At 14:07 the house was entered. Mrs. Kavanagh was afforded the opportunity to take anything she wished but declined. Mr. and Mrs. Kavanagh's son, Jeffrey, and a woman, thought to be their daughter, arrived and were forcibly removed. Mrs. Kavanagh left voluntarily. The locks on the front and back doors were changed and Mr. Cahill installed a number of CCTV cameras in the kitchen.

14. At 14:30 the court messenger delivered possession of the property to Mr. Cahill for Start and at 14:35 the party left the property.
15. The CCTV cameras installed by Mr. Cahill were capable of capturing sound as well as pictures. At 15:49 on 17th February, 2020 the camera in the kitchen recorded Mr. Jeffrey Kavanagh using an angle grinder to cut the locks on the property and later showed Mr. Jeffrey Kavanagh, his partner, and Mr. and Mrs. Kavanagh in the kitchen. The video also showed three people in the house, identified by Mr. Cahill as Michael "Pixie" O'Gorman, Gillian Noonan and Michael O'Sullivan, who he described as members of the so-called anti-eviction taskforce. The video records Ms. Noonan asking Mrs. Kavanagh whether video had been obtained of the faces of the court messenger, the bailiffs and the gardaí which, Ms. Noonan said, needed to be published on social media in an effort to intimidate them. At 17:00 the cameras were shut off. Mr. Cahill exhibited a number of stills from the video footage and a photograph which he took when he later visited the property on 27th October, 2020 which showed two vehicles in the driveway, one of which he recognised as Mrs. Kavanagh's car.

The proceedings

16. By this action, commenced by plenary summons issued on 19th May, 2021, Start claimed an injunction restraining trespass, and an injunction restraining the filming or recording of Start's servants or agents or employees, or the servants or agents of the County Registrar for County Carlow, or the posting or sharing of any such footage on the internet or by way of social media.
17. By notice of motion issued on the same day and originally returnable for 6th September, 2021 Start applied for an interlocutory orders. Start was unable to effect service before 6th September, 2021 and was given a new return date for the motion for 15th November, 2021. On 11th October, 2021 an Order was made by the High Court (Ferry J.) permitting service of the proceedings on Mr. Kavanagh by Facebook and on Mrs. Kavanagh by ordinary pre-paid post and they were duly served. Mr. Kavanagh entered an appearance and filed a replying affidavit on 29th November, 2021 and he appeared at the hearing of the motion. Mrs. Kavanagh made a statutory declaration which was exhibited by Mr. Kavanagh in his replying affidavit but did not appear.
18. I pause here to say something about the defence offered to the claim. At the hearing of the motion Mr. Kavanagh was accompanied by a man who identified himself as Brian McCarthy and purported to be assisting Mr. Kavanagh as a McKenzie friend. Such assistance as Mr. McCarthy could be seen to give to Mr. Kavanagh was limited to handing him a seven page document entitled "*Notes for oral submissions injunction hearing*" which Mr. Kavanagh read out. I confidently infer that it was Mr. McCarthy who was the author of the replying affidavit which Mr. Kavanagh swore and filed – and to which I will come. The author of these documents plainly has a very limited knowledge and no understanding of the law. Not for the first time I wondered whether a litigant nominally acting for himself truly believed that his case could be advanced by reliance on a melange of grandiose language, wild assertion, bits and pieces of legislation and case law, and a sprinkle of Latin. I find it very hard to credit than any person of ordinary intelligence

could be brought to believe that he was entitled to use an angle grinder to break back into a house within hours of his eviction by a court messenger acting on foot of a court order.

19. The motion was first listed for hearing on 12th January, 2022. Mr. Kavanagh had made the point in his replying affidavit that the affidavits which had been filed on behalf of Start had been sworn prior to the issue of the proceedings and it was evident that they had. Moreover, it was evident that the affidavits had been altered after swearing by the addition of the record number assigned to the summons at the time it issued. With the acquiescence of Mr. Kavanagh, the motion was adjourned to allow the affidavits to be re-sworn and re-listed for hearing on 15th February, 2022. The affidavits so re-sworn were for all practical purposes identical to those previously relied on. This explains why, peculiarly, the replying affidavit of Mr. Kavanagh pre-dates the affidavits relied on by Start.

The answer offered to the claim

20. From the replying affidavit of Mr. Kavanagh, Mr. Thullier, for Start, distilled ten points.
21. The first point made by Mr. Kavanagh was that Ms. Antoinette Roche, who swore the principal affidavit relied on by Start, was not an employee of Start Mortgages Designated Activity Company but of Start Mortgages Holdings Limited. That was evident from Ms. Roche's affidavit. However, as Mr. Thullier pointed out, Ms. Roche described herself as an asset manager of Start Mortgages DAC and explained that Start Mortgages Holdings Limited is the parent company and sole shareholder in Start Mortgages DAC. The point which Mr. Kavanagh sought to rely on was previously made in a case of *Start Mortgages Designated Activity Company v. Ryan* [2021] IEHC 719 and rejected by Woulfe J., sitting as a judge of the High Court. Woulfe J. was satisfied that the position of the asset managers of Start, who are formally employed by the parent, was quite different to the position of the deponent in *Promontoria (Aran) Limited v. Burns* [2020] IECA 87. The *ratio* of the judgment of Baker J. in Burns was that the court could not ignore the omission of a simple averment in the affidavits filed on behalf of the plaintiff in that case that the originals of the various documents relied on were held by *Promontoria (Aran) Limited*, that the deponent had examined the books and records of the original lender, and that the copy documents relied on were true copies of the originals. There was no such lacuna in the affidavit of Ms. Roche.
22. In any event, as Mr. Thullier pointed out, these proceedings post-dated the operative date of s. 14 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020, which provides for the admissibility in evidence of business records compiled in the ordinary course of a business by a person who had, or might reasonably be supposed to have had, personal knowledge of the matters dealt with.
23. To the point identified by counsel, I would add that Mr. Kavanagh objected that Ms. Roche's averment that she had the authority of Start to make the affidavit was not vouched by "*an instrument of authority of the board*".

24. I am satisfied that there is nothing in this objection.
25. The second point identified by Mr. Thullier was the assertion that the plaintiff was a mere servicer. The suggestion was that it was to be inferred from the fact that Ms. Roche averred to the fact that the legal title to the loans and security were held by Start it might not be the beneficial or equitable owner of the charge so that Start could not seek an equitable remedy.
26. There is no substance to this argument either. The uncontested evidence is that Start is the registered owner of the charge. There is no warrant for suggesting that Start is not the beneficial as well as the legal owner of the charge. And in any event, the legal owner of property is perfectly entitled to injunct a trespasser.
27. The third point identified by counsel was Mr. Kavanagh's assertion that the mortgage and charge were not pertinent to the motion he would deal with all questions in relation to the mortgage and charge at the trial. On this issue, Mr. Kavanagh may very well have a point. The mortgage and charge are not really relevant to this motion but only the court order for possession.
28. In addition to the points identified by counsel, it seems to me that there is another proposition in Mr. Kavanagh's affidavit: which is that Start is not a lawful mortgagee in possession. That proposition appears to depend, in turn, on a number of assertions that the order for possession was invalid: to which I will come.
29. Along the way Mr. Kavanagh makes the point that the property is (as was) the Kavanagh family dwelling, constitutionally protected from any and all unlawful trespass thereon and therein. This, of course, fails to recognise that the order for possession was made and executed in accordance with law.
30. The fourth point identified by counsel was Mr. Kavanagh's assertion that the registered owner of the charge as shown on the Folio is Start Mortgages Limited and not Start Mortgages DAC. That proposition is based on a misunderstanding of the effect of the re-registration of a private limited company as a designated activity company. Section 63(12) of the Companies Act, 2014 provides:-

"(12) 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, and any legal proceedings which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status."

31. The effect of the re-registration is to change the status of the company but it continues in existence. There was no need for Start to register the change in its status or name on the Folio.

32. The fifth point identified by counsel is the assertion that *"The defendants have a lawful demand for statutory mortgage redemption pursuant to s. 121 of the Consumer Credit Act, 1995 laid before Start since 22nd October, 2021."*
33. By letter dated 22nd October, 2021 Mr. and Mrs. Kavanagh wrote to Start purportedly invoking their right of redemption and requiring Start *"... to facilitate us with full housing loan redemption as per s. 121 Consumer Credit Act, 1995."* Section 121 of the Act of 1995 provides for an exemption – save in the case of a fixed interest rate loan – from any liability to pay a redemption fee in the event of early repayment of a housing loan. It has absolutely nothing to do with this case.
34. Mr. Kavanagh in his affidavit asserted that Start has an obligation to facilitate redemption: but it is not suggested that he or Mrs. Kavanagh want to redeem. He exhibited a letter to Start of 2nd November, 2020 which is gobbledegook and upon which I will not dwell.
35. The sixth point identified by counsel was Mr. Kavanagh's assertion that he and Mrs. Kavanagh have breached no court order. Again I will not dwell on the detail but what Mr. Kavanagh appears to be saying is that because the Civil Bill was not stamped the Circuit Court order for possession and the High Court order dismissing the appeal are invalid. This is arrant nonsense.
36. Allied to the suggestion that the Civil Bill was not stamped (or perhaps the proposition is that it is not evident from the copy Civil Bill exhibited that the original was stamped) is an assertion that because the order for possession did not order the defendants to do anything, they cannot be in breach of it. This is another attempt to sow confusion. Start's complaint against Mr. and Mrs. Kavanagh is that they have broken into a house that was lawfully in the possession of Start.
37. The seventh point identified by counsel was that Start could not prove the due execution of the order of possession without producing a copy of the order with an endorsement of execution. Mr. Kavanagh leaps from the fact that the copy order of possession initially relied on by Start for the purposes of these proceedings had not been endorsed, to the proposition that he and Mrs. Kavanagh could not have forced entry into the house *"rather being obliged to correct the unlawful damage of trespassers."*
38. It is true that the copy order of possession referred to in the affidavit or purported affidavit of Ms. Roche upon which Start would have initially relied did not carry an indorsement of execution. When Ms. Roche came to re-swear her affidavit she exhibited a copy of the order with the endorsement in manuscript:- *"17-02-20 Lands handed over by Paul Quinn court messenger Carlow to Sean Cahill for Start Mortgages."*
39. Absolutely nothing turns on this. Good practice requires that execution of the order should be endorsed but any failure to endorse would not invalidate the execution which has already taken place. It is ridiculous to suggest that the entitlement of the dispossessed householders to break in to the house might turn on whether the execution

of the execution order had been endorsed, still less on whether the duly endorsed order might later be produced to the High Court.

40. The eighth point identified by counsel was a complaint by Mr. Kavanagh of delay on the part of Start in applying for injunctive relief. The notice of motion in this case was issued on 19th May, 2021 but was dated in manuscript 14th April, 2020. Ms. Roche, in her affidavit, explained that Start took the view that in the early stages of the COVID-19 pandemic, when only matters of the utmost emergency were being dealt with by the courts, it was not appropriate to bring an application for injunctive relief.
41. There is a lot of nonsense in Mr. Kavanagh's affidavit about an alleged failure on the part of Start to respond to a letter of 17th February, 2020 from Mr. and Mrs. Kavanagh which appears to have been copied to the County Registrar for Carlow and the court messenger. In that letter Mr. and Mrs. Kavanagh characterised the execution of the order of possession and their later forced entry into the house as "*an anomaly at our family dwelling on this morning [which] anomaly and aberration has been corrected*" and they demanded a certified copy of "*a reconciled lawful 'Execution Order – Possession' issued pursuant to, and thus bound by, Bunreacht na hÉireann 1937 as amended*". In common with a lot of letters generated by various people who hold themselves out as helping defaulting borrowers, the demand was for the delivery of the document by a particular means – in this case ordinary post – and imposed a deadline – in this case ten days – and stipulated that in default of such delivery in such time and by such means Start would be deemed to have accepted that there was no such lawful instrument. In case Start might have been tempted to provide any document, the letter spelled out that any such document, if any, which might be produced would be "*void on its face*". And so on, and so forth. Mr. Kavanagh charges Start with a failure to disclose to the court that it had accepted by 3rd March, 2020 that it had no claim.
42. And so back to COVID-19. Mr. Kavanagh in the same sentence asserts that COVID-19 did not even start to affect Ireland until 27th March, 2020 and complains that on 17th February, 2020 Start brought multiple persons to a family dwelling during a pandemic. It is impossible to make head or tail of it.
43. There was no delay on the part of Start. If there had been, it would have made no difference. As witness their letter of 17th February, 2020, Mr. and Mrs. Kavanagh well knew from the moment they broke in that Start would be seeking an injunction to put them out.
44. The ninth point identified by counsel was what was by reference to about two thirds of a page of Mr. Kavanagh's affidavit under the heading "*Rebuttal of R Howard*" and about the same again under the heading "*Rebuttal of S Cahill*". When the motion first came before the court Start was relying on an affidavit or purported affidavit of Ross Howard sworn before the summons issued giving a direct account of the thwarted attempt to execute the order for possession on 18th November, 2019. Mr. Howard is another director of Blackwater Asset Management Services Limited. Apart from the suggestion that the record number was wrong and the fact that the affidavit had been sworn before the

summons issued – which were dealt with by the later swearing and filing of the affidavit – Mr. Kavanagh sought to make much of the fact that Mr. Howard had not demonstrated his authority to speak on behalf of Start. The affidavit was filed on behalf of Start but Mr. Howard was not speaking on behalf of Start. He was simply giving evidence – which was uncontested – of what happened on 18th November, 2019. The same applies *mutatis mutandis* to what was said of the affidavit of Mr. Cahill.

45. The tenth point identified by counsel was in relation to the status quo. Because, says Mr. Kavanagh, Start complains that he and Mrs. Kavanagh are in possession, Start must be taken to make the case that the status quo is that they are in possession and it should not invoke the interlocutory jurisdiction of the court to overturn what they claim is the status quo. This, I agree with counsel, is absurd.

The arguments

46. On the adjourned hearing of the motion Mr. Thullier brought the court through the evidence, focussing on the making and execution of the order for possession and the fact that Mr. and Mrs. Kavanagh broke back into the house and, as I have said, dealt with such arguments or propositions as he could discern from Mr. Kavanagh's replying affidavit.
47. Mr. Kavanagh then read out his – or Mr. McCarthy's – seven page submission. The argument largely repeated what had been set out in the replying affidavit.
48. The *status quo* was said to date back to 1990 when Mr. and Mrs. Kavanagh were registered as the owners of the property in Folio 9004F, County Carlow. Start was said not to be a mortgagee in possession. The defendants did not consent to the "swapping" of the execution order with the indorsement for the copy without the indorsement. Start Mortgages Limited was said to be deceased since 31st August, 2016 – the date of re-registration as a designated activity company. The Civil Bill had not been stamped. There was no proof of postage of letters, some of which were acknowledged to have been received. Delay defeats equity. Damages would be an adequate remedy. And so on.
49. On the hearing of the motion Mr. Kavanagh sought to make two arguments which had not been presaged in his affidavit.
50. The first of these two arguments was based on the fact that at the date of issue of the Civil Bill for Possession on 21st October, 2013, the transfer of the charge to Bank of Scotland plc had not been registered on the Folio.
51. It will be recalled that the original chargee of the property was Bank of Scotland (Ireland) Limited which, on 21st September, 2007, was registered on the Folio as the owner of the charge. By a cross-border merger made under the European Communities (Cross-Border Mergers) Regulations, 2008 (S.I. No. 157 of 2008) in Ireland and the Companies (Cross-Border Mergers) Regulations, 2007 in the United Kingdom and approved by the High Court (Kelly J.) on 20th October, 2010, and in Scotland by the Court of Session on 10th December, 2010, all of assets and liabilities of Bank of Scotland (Ireland) Limited were

transferred to Bank of Scotland plc at 23:59 on 31st December, 2010, and Bank of Scotland (Ireland) Limited then stood dissolved without going into liquidation and ceased to exist.

52. The argument that Mr. Kavanagh sought to advance, by reference to the judgment of Laffoy J. in *Kavanagh v. McLaughlin* (Unreported, Supreme Court, 19th March, 2015), was that the order for possession made by the Circuit Court on 14th June, 2016 in favour of Start – to which the charge had been transferred and which had been registered on the Folio as the owner of the charge on 10th April, 2015 and substituted as plaintiff in the Circuit Court action on 28th May, 2015 – was somehow invalid by reason of the fact that Bank of Scotland plc had not been registered as the owner of the charge until 9th April, 2015.
53. If there was any substance to this argument it is clearly one that could and should have been made to the Circuit Court or to the High Court on appeal from the order for possession and cannot be deployed after the final determination of the possession proceedings with a view to re-opening the issue then finally and conclusively decided. That is the end of the matter.
54. I add that it is not altogether clear whether the argument was in fact made in the possession proceedings. If it was, it was rejected. The judgment of Noonan J. on the Circuit Court appeal *Start Mortgages Limited v. Kavanagh* [2017] IEHC 433 shows that he permitted Mr. Kavanagh to rely on the appeal on what the judge described as an extremely detailed affidavit, which had been prepared by an unidentified third party, and which purported to analyse Start's chain of title with a view to demonstrating that Start had no locus standi and could not maintain the proceedings because its title was defective. Having set out the text of s. 31(1) of the Registration of Title Act, 1964, Noonan J. said, at para. 25:-

"It could not be clearer. The register is conclusive evidence of the plaintiff's title to the charge the subject matter of these proceedings. No amount of analysis of deeds and documents by unknown third parties can change that simple fact."

55. The second argument in the submission which had not been presaged in the affidavit was – as far as I can understand it – that the execution of the Circuit Court order was invalid because force had been used.
56. The reliance which Mr. Kavanagh sought to place on my own decision in *Charleton v. Hassett* [2021] IEHC 746 was entirely misplaced. This is not a case of a mortgagee or receiver seeking to take the law into his own hands but of a mortgagee who was put into possession of the mortgaged property in accordance with law by an officer of the Circuit Court duly authorised by law. The force which was used – and which Mr. Kavanagh does not suggest was not entirely necessary – was lawfully used.

Conclusion

57. It is absolutely clear that with effect from 14:30 on 17th February, 2020 Start was lawfully in possession of the property at 36 Beechwood Park, Carlow. It is uncontested that Mr. and Mrs. Kavanagh, by their son, broke into the house later than day. It is plain beyond argument that their actions were unlawful and that they have since been trespassing. There is no issue to be tried as to Start's entitlement to an injunction, to which it is entitled as a matter of right.
58. I am also satisfied from the uncontested evidence of Mr. Cahill that Mr. And Mrs. Kavanagh and those associated with them threaten and intend to publish images and video on social media in an effort to intimidate the court messenger, bailiffs and gardaí.
59. There will be an order in the terms of the notice of motion:-
1. Restraining the defendants, their servants or agents, and any persons acting in concert with them or any person with knowledge of the injunction from trespassing upon or otherwise entering the property comprised in Folio 9004F, County Carlow, known as 36 Beechwood Park, Carlow, County Carlow.
 2. Prohibiting the defendants, their servants or agents, and any persons acting in concert with them or any person with knowledge of the injunction from filming or recording by any means the employees, servants or agents of the plaintiff, or the County Registrar for County Carlow or his servants or agents, at or near the property, and from posting any such footage or images on the internet or otherwise sharing any such films, videos or images by way of social media.
60. I will put a stay on the order until 12:00 noon on Friday 4th March, 2022 to allow Mr. and Mrs. Kavanagh to remove their belongings from the house.
61. Start is plainly entitled to the costs of the motion to be adjudicated on the basis of a one day hearing. There is no sensible purpose to be served by a further listing to allow Mr. Kavanagh to try to argue otherwise.
62. Mr. Kavanagh's expenses in connection with the adjournment of the motion necessitated by the irregularity in relation to the affidavits initially relied on by Start have already been dealt with.