

THE HIGH COURT
CIRCUIT APPEAL

2019 No. 60 CA

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

PETER CODY
HEATHER CODY

DEFENDANTS

JUDGMENT of Mr Justice Garrett Simons delivered on 31 January 2020

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The proceedings are brought pursuant to section 62(7) of the Registration of Title Act 1964. The Defendants are the registered owners of lands at Ramstown, Gorey, County Wexford. The Defendants had been married to each other but have since separated. The Plaintiff, Bank of Ireland Mortgage Bank (*"the Bank"*), is the registered owner of a charge in respect of present and future advances repayable with interest.
2. The Circuit Court made an order for possession on 12 February 2019, but imposed a stay on the execution of that order for a period of fifteen months. The second defendant, Heather Cody, has brought an appeal against the order for possession. No appeal has been brought by the first defendant, Peter Cody.
3. Ms Cody has made very serious allegations against both her estranged husband and the Bank. In brief, Ms Cody says that mortgages were created in her name and that of her husband without her knowledge or consent. As discussed presently, Ms Cody has instituted separate plenary proceedings before the High Court against her husband, the firm of solicitors in which he had been a partner, and the Bank.

RELEVANT STATUTORY PROVISIONS

4. The application for an order for possession is made pursuant to section 62(7) of the Registration of Title Act 1964. This section had been repealed by the Land and Conveyancing Law Reform Act 2009. The repeal is, however, now subject to transitional provisions under the Land and Conveyancing Law Reform Act 2013. The effect of section 1 of the 2013 Act is that, as respects a mortgage created prior to 1 December 2009, section 62(7) of the Registration of Title Act 1964 continues to apply, and may be invoked or exercised by any person as *if* those provisions had not been repealed.
5. The mortgage and charge relied upon by the Bank in the present case is dated 12 January 2007. The transitional provisions thus apply, and the Bank is entitled to invoke section 62(7).
6. Section 3 of the Land and Conveyancing Law Reform Act 2013 provides that proceedings relating to certain mortgages are to be brought in the Circuit Court. The Civil Bill for Possession in the present case is endorsed with the requisite statement setting out the

basis on which the proceedings have been commenced pursuant to the 2013 Act. This statement is required under Order 5B, rule 3 of the Circuit Court Rules.

7. Section 62(7) provides as follows.

(7) When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession.

8. The approach which a court must take on an application for an order for possession has been explained as follows by the Supreme Court in *Irish Life and Permanent Plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92, [80].

"[...] In order for the power to seek an order for possession under s.62(7) of the 1964 Act to have arisen, what was required was that the principal monies were due. It follows that the question which any court invited to apply the jurisdiction arising under that section must ask itself is as to whether, as a matter of law, it can properly be said that the principal monies had become due. The first port of call for determining whether those monies had become due is to identify the terms of the contract between the lender and the borrower as to when the entire principal sum can be said to fall due. Terms in that regard can, and do in practice, differ. It may be that, on a proper interpretation of the contractual documents in one case, a demand for payment following some form of default may be necessary. It might, however, be the case that, in other circumstances and in the light of the terms contained in a particular mortgage deed, the full sum may become due without demand in certain, specified circumstances."

9. The Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352 held, at paragraphs [67] and [68], that the correctness of the Register of Title cannot be challenged in possession proceedings.

REQUESTS PURSUANT TO DATA PROTECTION ACTS

10. Ms Cody had first submitted a data subject access request to the Bank pursuant to the Data Protection Acts on 13 October 2015. Ms Cody had sought copies of all loan and mortgage application documentation for loans or mortgages taken out in the joint names of Heather Cody and Peter Cody between the years 1990 until 2010. It is alleged that the mortgage the subject-matter of these proceedings was undertaken as part of a systemic fraudulent practice which took place between the years 1990 until 2018.

11. The County Registrar purported to make an order on 10 April 2017, in the context of these proceedings, directing that "the Data Protection request ... should be complied with immediately". The Bank chose not to appeal this order to a judge of the Circuit Court.

The explanation given for this approach is that the Bank was of the view that the relevant data had already been provided. See affidavit of Emmet Pullan dated 28 November 2018.

12. Ms Cody issued a motion on 21 November 2018 seeking to have the Bank held in contempt of court for its alleged failure to comply with the County Registrar's order of 10 April 2017.
13. The Circuit Court (Judge Hutton) made an order on 29 November 2018 striking out Ms Cody's motion. An appeal against that order was taken to the High Court, and the appeal was dismissed by Jordan J. on 25 March 2019 (2018 No. 530 CA).

MORTGAGE AND CHARGE

14. The Defendants are the registered owners of lands held under Folio 25003F of the County of Wexford (*"the Folio"*). The Defendants were registered as full owners on 4 November 1998. The lands had been occupied by both Defendants as their principal private residence (*"the family home"*). The Defendants have since separated, and the family home is now occupied by the second named Defendant, Ms Cody, and her children.
15. Bank of Ireland Mortgage Bank (*"the Bank"*) is the owner of a charge registered as a burden on the Folio. The charge is stated to be for "present and future advances repayable with interest". This charge was registered on the Folio on 21 December 2007.
16. A separate charge is registered in favour of the Governor and Company of the Bank of Ireland. This charge had been registered on the Folio on 20 June 2007. No issue has been raised in these proceedings as to the existence of this earlier charge, and, in particular, no point is taken as to the priority of same.
17. The Bank's case is that there are monies due to it pursuant to two loan agreements which are said to have been entered into by both Mr & Mrs Cody on 24 October 2005. The repayment of this debt is said to have been secured against the family home by a deed of mortgage and charge entered into between the Defendants and the Bank on 12 January 2007 (*"the Mortgage"*). The Bank submits that the principal monies secured became due when the Bank made a demand for repayment in respect of the two loan agreements by letters dated 10 June 2016 sent to Mr Cody and Ms Cody respectively. These letters of demand are said to have been sent in circumstances where Mr Cody and Ms Cody had defaulted in the making of repayments under the two loan agreements.
18. The Bank's application for an order for possession is grounded on the affidavit of Helen Dorris sworn on 16 December 2016. Ms Dorris describes herself as a "legal case manager" in the Arrears Support Unit of the Bank. A verifying affidavit has been sworn by Sean Buckley who identifies himself as a manager of the Bank, and an "officer" for the purposes of the Bankers' Books Evidence Act 1879 (as amended). This latter affidavit is confined to the calculation of the debt: it does not address the validity of the two loan agreements relied upon by the Bank, and, in particular, does not address the question of whether same were ever executed by Ms Cody.

19. Ms Dorris has exhibited a copy of the Mortgage. The mortgagors are identified as Peter Cody and Heather MacMillan. Ms Cody confirmed at the hearing before me that her maiden name had been MacMillan. The Mortgage appears on its face to bear the signature "Heather MacMillan", which signature is recorded as having been witnessed by one Siobhán Butler.
20. Given the nature of the defence which Ms Cody makes to the proceedings, it is necessary to refer to the detail of the two loan agreements relied upon by the Bank. The terms and conditions of the first of these are set out in a letter dated 8 September 2005 (and subsequently signed on 24 October 2005). The amount of credit to be advanced is specified as €350,000. As appears from the date of this letter, it postdates the acquisition of the family home by a number of years: it will be recalled that the Defendants were registered as owners on 4 November 1998.
21. One of the curious features of the loan offer letter is that it is addressed to Mr Peter Cody and Mr Heather Mc Millan (*sic*) at an address other than what was then their family home. The address stated on the letter appears to be the business address of the firm of solicitors in which Mr Cody was then a partner. One of the complaints made by Ms Cody is that the documentation, in particular subsequent bank statements, were not sent to her home address.
22. (Less convincingly, Ms Cody also attaches significance to the fact that the second addressee is identified by the title "Mr", and seeks to argue that "Mr Heather Mc Millan" is not, in fact, a reference to her, but rather to a fictitious third party).
23. The loan agreement appears to bear a signature commencing with the name "Heather". It is not possible however to make out the surname. The loan agreement appears to have been signed on 24 October 2005.
24. Although not evidenced on affidavit, counsel on behalf of the Bank sought to rely on what she said was the intended purpose of the loan offer. Reference was made, in particular, to special condition (a)(iii) as follows.

“(iii) The Borrower’s Solicitor must provide the Lender with an unconditional undertaking, prior to draw down, to apply Eur 150,000.00 of this loan towards Peter Cody’s capital account with James Cody & Sons Solicitors, and Eur 200,000.00 to be paid over to Heather Mc Millan in respect of separation settlement as agreed between the parties.”
25. It was submitted that this indicated that Ms Cody had benefited personally from the drawdown of the loan. The affidavit evidence does not, however, confirm whether this special condition was complied with, still less that the monies were ever received by Ms Cody.
26. The second loan agreement relied upon by the Bank is also dated 24 October 2005. The parties are identified as Mr Peter Cody and Mr Heather Mc Millan (*sic*). The letter is again

addressed to what appears to be the business address of the firm of solicitors in which Mr Cody was then a partner.

27. This loan offer was subject to a number of conditions precedent, as follows.

“(i) Original audited or certified accounts for the previous two years confirming your capacity to derive a gross income of at least EUR 173,000.00 and a satisfactory financial profile generally.

(ii) Please provide confirmation from your solicitor that the agreed financial arrangement between the parties, limits payments to Heather Mc Millan to Eur 3,000.00 per month.

(iii) Accountant's written confirmation that your tax affairs are in order.”

28. The loan agreement appears to bear a signature commencing with the name “Heather”. It is not possible however to make out the surname. The loan agreement appears to have been signed on 24 October 2005.

29. Ms Dorris avers that the Bank advanced a total sum of €650,000 to the Defendants. It is not entirely clear from her affidavit, however, on which date these payments are said to have been made. It *might* be inferred from the bank statements that the monies were advanced in January 2006. No explanation is provided for the lapse of time between the execution of the two loan agreements (24 October 2005), and the execution of the Mortgage on 12 January 2007.

MS CODY'S ALLEGATIONS

30. Ms Cody appeared before both the Circuit Court and the High Court as a litigant in person. Ms Cody makes a series of allegations against both her estranged husband and the Bank. These allegations have been set out on affidavit as follows. See Ms Cody's affidavit of 21 November 2018.

“5) The Mortgage in question was undertaken as part of a systemic fraudulent practise (*sic*) which took place between the years 1990 until 2018. During those years loans and Mortgages were created in my name and the name of Peter Cody without my knowledge or consent. I refer to an example of same HC03.

6) I say that during the years of 1990 until 2010 Bank of Ireland personnel witnessed my signature when I was not present. I refer to an example of same HC04.

7) I say that during the years 1990 until 2010 Staff of James Cody & Sons witnessed my signature when I was not present. I refer to an example of same. I refer to an example of same HC05.

8) I say that my Defence Is Prejudice in this case until I receive all Bank of Ireland Documentation for loans and Mortgages taken out in the joint names of myself Heather Cody and Peter Cody for this property and other properties held in our joint names during the years 1990 until 2018. HC06.”

31. Ms Cody has exhibited what she asserts are documents that she obtained from the Bank in response to a request made pursuant to the Data Protection Act 1988 (as amended). One of the documents exhibited (at page 147 of the book of pleadings) is a "Cheque Requisition Form". This document appears to refer to the property the subject of the Mortgage, i.e. the family home. The opening sentence, as completed in manuscript, reads as follows.

"I require the loan cheque for a completion due to take place on the *1st* day of *Dec* 2005. The loan is in the sum of € 300,000"

32. The wording of this sentence is difficult to reconcile with the fact that the Defendants had purchased the property a number of years earlier. The reference to a "completion" appears to be a misnomer in the circumstances.

33. The Bank has chosen not to engage in detail with the allegations which have been made by Ms Cody. Instead, the allegations are addressed peremptorily as follows by the Bank in an affidavit sworn on its behalf by Mr Emmett Pullen.

"6. Although Ms. Cody has now had the Plaintiff's proceedings herein for approaching two years, there is nothing in her Affidavit contesting:

- a. The Loan Agreements and Loan Advances made to her and to the First Named Defendant as detailed in the Grounding Affidavit of my colleague Helen Dorris.
- b. The fact that, under the Loan Agreement for loan account 2696–7965 (*in paragraph (iii) in 'Part 4 – the Special Conditions', on page 2 of the Loan Offer Letter*), Ms Cody personally got most of the loan funds then advanced (*according to the Plaintiff's records this was for, inter alia, use by her in a business she was starting up*),
- c. The registration of the contents of the Plaintiff's Mortgages over the subject property securing those loans.
- d. The calling in of those loans, or her and the First Named Defendant's failure and refusal since to repay them or the amounts due thereon.
- e. or the Plaintiff's demands for possession of the mortgaged property and her in the First Named Defendant's failure and refusal since to deliver up such possession.

As such, I am advised by the Plaintiff's solicitors and believe that there is nothing in Ms. Cody's Affidavit which discloses any Defence in law to the Plaintiff's claims herein."

34. As appears, only the first of the two sub-paragraphs above are relevant to the core allegation made by Ms Cody, namely that loans and mortgages were created in Ms Cody's name and the name of Peter Cody without her knowledge or consent. Moreover, Mr Pullen's affidavit merely criticises Ms Cody for supposedly not "contesting" certain matters. Mr Pullen does not make any positive averments, and the Bank has not chosen

to put forward any direct evidence in relation to these matters. No explanation has been offered, for example, as to why it is that the loan agreements are in Ms Cody's maiden name or why the correspondence is addressed to her husband's business premises. No affidavit has been filed by a witness who can confirm that Ms Cody signed either of the loan agreements.

35. Instead, Mr Pullen seeks to rely on documentary hearsay, namely the content of the letter of loan offer of 8 September 2005. The fact that the letter has been exhibited does not make the document evidence of the truth of its contents. The affidavit evidence does not confirm whether the special condition referred to was complied with, still less that the monies were ever received by Ms Cody.
36. Ms Cody subsequently swore another four affidavits before the Circuit Court. The Bank has chosen not to reply to any of these four further affidavits. These affidavits are dated 21 December 2018; 4 January 2019; 21 January 2019; and February 2019, respectively. (A number of additional affidavits have since been filed in support of her appeal to the High Court, but these are inadmissible for the reasons explained at paragraph 48 et seq. below).
37. The affidavit of 4 January 2019, in particular, makes serious allegations against the Bank. It is alleged that Mr Cody was in collusion with the Bank during the years 1990 until 2010 to attain money by way of loans and mortgages in the joint names of Heather Cody and Peter Cody without Ms Cody's knowledge and consent. It is further alleged that the family home was being used as collateral without Ms Cody's knowledge and consent. Ms Cody also alleges that there had been a "systemic practise" to send all bank statements and documentation to the offices of James Cody and Sons in order to hide evidence of these loans and mortgages relating to the family home from Ms Cody.
38. The following allegation is made at paragraph 10 of the affidavit.

"10) I say that there was a systemic practise of Bank of Ireland and Bank of Ireland Mortgage Bank Managers to fraudulently witnessing my signature on Bank of Ireland Mortgage Documentation or loan applications when I was not present in Family Home mortgage and joint loan applications between the years 1990 until 2010. Applications.

11. I say that Bank of Ireland Mortgage Bank is aggressively trying to cover up the fraud that is behind this case which they colluded with Peter Cody, the first named Defendant, to create bank accounts based on fraud in the joint names of myself, Heather Cody, the first named Defendant and Peter Cody, the second named Defendant, leaving the Family Home exposed to repossession."
39. The Bank has chosen not to respond to these allegations. Moreover, the Bank did not apply to cross-examine Ms Cody before the Circuit Court. As explained presently, the unusual stance adopted by the Bank has had certain consequences for the outcome of this appeal.

PLENARY PROCEEDINGS

40. Ms Cody has instituted plenary proceedings against her estranged husband, his former legal firm, and the Bank. These proceedings bear the High Court Record Number "2019 No. 1092 P". Neither Ms Cody nor the Bank were in a position to provide me with a copy of the pleadings in these plenary proceedings. Counsel for the Bank did confirm, however, that a statement of claim has been delivered.

DETAILED DISCUSSION

41. The dispute between the parties to the present appeal centres largely on the question of whether the principal monies secured by the charge have become due so as to trigger an entitlement to apply for possession pursuant to section 62(7) of the Registration of Title Act 1964. The Bank's argument can be summarised as follows: (i) the charge registered on the Folio is referable to the deed of mortgage and charge said to have been entered into between the Defendants and the Bank on 12 January 2007 ("*the Mortgage*"); (ii) the Mortgage is applicable to all "secured loans" as defined at Clause B (20) of the Mortgage; (iii) the two loan offer letters expressly stated that the property at Kilmurray, Gorey, County Wexford was to be mortgaged; (iv) the two Defendants entered into the loan agreements in accordance with the terms and conditions of those offer letters on 24 October 2005; and (v) the principal monies are now due in circumstances where the Defendants failed to comply with the letters of demand in 10 June 2016.
42. The Bank's case is almost entirely reliant on the documentation which has been exhibited as part of the grounding affidavit of Helen Dorris sworn herein on 16 December 2016. Such an approach may well be sufficient in cases where a defendant has not sought to controvert the validity of the underlying loan documentation. See, by analogy, the judgment of the Supreme Court in *Ulster Bank Ireland Ltd v. O'Brien* [2015] IESC 96; [2015] 2 I.R. 656. That judgment concerned an application for a summary judgment pursuant to Order 37 of the Rules of the Superior Courts (rather than an application for an order for possession). The plaintiff bank in that case had sought to prove the debt by filing an affidavit from a bank employee which exhibited the relevant loan documentation. The Supreme Court held that the swearing and service of an affidavit which makes allegations that a sum is due can be accepted, in the absence of denial, where the form and the content of what is deposed to and the exhibits supporting it carry sufficient indications of reliability.
43. The difficulty for the Bank in the present case is that Ms Cody is disputing the validity of the loan agreements. More specifically, and as summarised earlier, Ms Cody alleges that Mr Cody was in collusion with the Bank during the years 1990 until 2010 to attain money by way of loans and mortgages in the joint names of Heather Cody and Peter Cody without Ms Cody's knowledge and consent. Ms Cody further alleges that the family home was being used as collateral without her knowledge and consent. If these allegations were to be substantiated, and were the court to find that Ms Cody had not entered into the two loan agreements in October 2005, then it would mean that the Bank's argument breaks down at point (iv) above.

44. Given the nature of the allegations made by Ms Cody in her sworn affidavits, the Bank cannot simply rely on its having exhibited copies of the disputed loan agreements as discharging the onus of proof which lies on it as plaintiff. At the very least, the Bank should have applied to the Circuit Court to cross-examine Ms Cody. The consequence of the Bank having failed to cross-examine Ms Cody on her allegations before the Circuit Court is that the High Court, on this appeal, is simply not in a position to make a definitive finding that Ms Cody is indebted to the Bank in respect of the two loan agreements of October 2015.
45. To assist the reader in understanding the role of the High Court on an appeal from the Circuit Court, it is necessary to refer briefly to the statutory provisions governing this appeal. The within appeal is subject to the provisions of section 37 of the Courts of Justice Act 1936 as follows.
- 37(1) An appeal shall lie to the High Court sitting in Dublin from every judgment given or order made (other than judgments and orders in respect of which it is declared by this Part of this Act that no appeal shall lie therefrom) by the Circuit Court in any civil action or matter at the hearing or for the determination of which no oral evidence was given.
- (1A) Notwithstanding subsection (1), an appeal shall lie to the High Court sitting in Dublin from every judgment given or order or decision made (other than a decision to which section 169 (4) of the Personal Insolvency Act 2012 applies) by the Circuit Court in the performance of any function or exercise of any power or jurisdiction conferred on that court by that Act, whether or not oral evidence was given at the hearing or for the determination of the proceedings or matter concerned.
- (2) Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal.
46. As appears, where the proceedings before the Circuit Court at first instance did not involve oral evidence, then the general position is that the appeal before the High Court is heard on the same affidavit evidence. Thus, notwithstanding that an appeal to the High Court is by way of *rehearing*, the appeal ordinarily falls to be determined by reference to the affidavit evidence which had been before the Circuit Court.
47. The High Court has discretion to grant special leave to admit additional evidence. This discretion will normally only be exercised where the additional evidence could not have been obtained with reasonable diligence for use at the hearing before the Circuit Court.
48. In the present appeal, the Bank did not apply to adduce further evidence nor to cross-examine Ms Cody. The only application to admit further evidence had been made by Ms

Cody herself. At the outset of the hearing before me on 21 November 2019, Ms Cody applied to have a further affidavit admitted. This affidavit was dated 20 November 2019. I refused that application for the following reasons. First, any application to admit fresh evidence should have been brought earlier. It is not open to a party to seek to bring an application on the morning of the hearing of an appeal. This appeal had been listed for hearing for some considerable period of time. Any intention to file further evidence should, at the very latest, have been signalled to the court at the weekly call-over of cases which takes place on the Thursday of the week preceding the trial date. Ms Cody did not bother to attend this call-over at all, still less was any notice given to the court of an intention to file further evidence.

49. Secondly, and more fundamentally, before the High Court could properly exercise its discretion to admit additional evidence on an appeal, it would have to be satisfied (i) that the additional evidence was relevant to the issues in the appeal, and (ii) that such evidence could not have been obtained with reasonable diligence by the moving party in advance of the hearing before the Circuit Court. The evidence which Ms Cody seeks to adduce is, in truth, historic material which could have been obtained by her from the Bank prior to the hearing before the Circuit Court and have been presented to that court. For similar reasons, the affidavit filed by Ms Cody dated 8 March 2019 is also inadmissible.
50. The hearing of the appeal thus proceeded on the basis of the same affidavit evidence which had been before the Circuit Court. Counsel for the Bank sought to rely on certain correspondence which has been exhibited as part of the affidavit of Emmet Pullen sworn on 28 November 2018, in support of an argument that not only had Ms Cody been aware of the two loan agreements, but had in fact received independent legal advice in respect of same. Reference was made in particular to a letter of 3 September 2015 from the Bank which refers inter alia to events said to have occurred at the time of what is described as the "re-mortgage of family residence".
51. With respect, it is not open to a party to rely on a document as evidence of the truth of the content of same merely on the basis that the document has been exhibited in proceedings. See *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 2 I.L.R.M. 273 ("RAS Medical Ltd") where the Supreme Court emphasised that the mere fact that a document is exhibited in an affidavit does not, in and of itself, turn that document into admissible evidence. This is especially so where the document is one which is not contemporaneous, but rather has been prepared several years later by the party seeking to rely on same and purports to set out that party's version of earlier events.
52. More fundamentally, however, none of the documents now sought to be relied upon by the Bank had been put to Ms Cody by way of cross-examination. Had the Bank wished to make the case that the family home had been used as collateral for the two loans with Ms Cody's knowledge and consent, then the Bank should have applied to the Circuit Court to cross-examine Ms Cody on her affidavits. Order 5B of the Circuit Court Rules (as

amended) expressly allows a party to possession proceedings to file a notice in writing requiring the production of a deponent for cross-examination. Order 5B also provides for the settling of issues to be tried, and for evidence as to any issue of fact to be given either orally or by affidavit, or partly orally and partly by affidavit, as the judge in the circumstances thinks proper. Had the Bank sought to cross-examine Ms Cody, then any document properly admissible in evidence could have been put to her.

53. The consequences for a party of failing to apply to cross-examine have been summarised by the Supreme Court in *RAS Medical Ltd* as follows.

“7.6 But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.

7.7 A similar principle applies where it is suggested that there is documentary evidence, properly before the court, which might cast doubt on the reliability of sworn testimony. It is not permissible to invite a court to reject sworn testimony either on the basis that there is sworn testimony to the contrary or that the testimony might be said to be either lacking in credibility or unreliable (on the basis of, for example, a documentary record) without giving the witness concerned an opportunity, under cross-examination, to explain, if that be possible, any matters which might go to credibility or reliability.”

54. Ms Cody has made very serious allegations on affidavit against both the Bank and her estranged husband. The Bank has denied these allegations, but chose not to cross-examine Ms Cody. The manner in which the case proceeded before the Circuit Court means that it is not possible for the High Court, on appeal, to resolve the factual dispute as to whether Ms Cody is indebted to the Bank in respect of the two loan agreements of October 2015.
55. Finally, for the sake of completeness, it should be noted that counsel for the Bank has not sought to invoke the provisions of the Bankers' Books Evidence Act 1879 (as amended) as providing a basis for admitting the loan agreements as proof of the content thereof or as proof that they were executed by Ms Cody. The only reference to the Bankers' Books Evidence Act 1879 (as amended) is in the affidavit sworn herein by Sean Buckley. Mr Buckley identifies himself as a manager of the Bank, and an “officer” for the purposes of

the Bankers' Books Evidence Act 1879 (as amended). This affidavit is confined to the calculation of the alleged debt: it does not address the validity of the two loan agreements relied upon by the Bank, and, in particular, does not address the question of whether same were ever executed by Ms Cody.

CONCLUSION AND FORM OF ORDER

56. The Bank, as the moving party under section 62(7) of the Registration of Title Act 1964, bears the onus of proof. For the reasons set out above, the Bank has failed to establish the necessary proofs to allow this court to make an order for possession. Specifically, the Bank has failed to prove that Ms Cody executed the two loan agreements which the Bank seeks to rely upon. This omission is fatal to the claim for possession in that the Bank cannot prove that Ms Cody is indebted to it.
57. Ms Cody's appeal against the order made by the Circuit Court on 12 February 2019 must, therefore, be allowed. An order will be made setting aside the order for possession made by the Circuit Court.
58. Before concluding this judgment, I wish to make some observations in respect of the separate plenary proceedings. It will be recalled that Ms Cody has instituted plenary proceedings against her estranged husband, his former legal firm, and the Bank. (High Court 2019 No. 1092 P). It occurs to me that if and insofar as Ms Cody wishes to maintain the position that she is not bound by the two loan agreements of October 2005, then the plenary proceedings should be subject to case management by the court. The allegations made in those proceedings are very serious, and the outcome of those proceedings may have implications for Ms Cody's continued occupation of the family home. It would be in everyone's interest to have those proceedings resolved—one way or another—in short course.
59. I propose to adjourn this matter for a short number of weeks to allow the parties to consider the terms of this judgment. Thereafter, I will hear submissions in relation to the appropriate costs order to make. In the event that the plenary proceedings are going to be pursued, I will also hear submissions as to the appropriate directions to be given in order to ensure an early hearing.
60. Subject to the availability of the parties, I propose to list the matter before me on Friday, 21 February 2020.