

**THE HIGH COURT**

[2021] IEHC 719

**High Court Record No. 2020/175 CA**

**Circuit Court Record No. 2014/986**

**BETWEEN**

**START MORTGAGES DESIGNATED ACTIVITY COMPANY**

**PLAINTIFF/APPELLANT**

**-AND-**

**THOMAS RYAN AND EILEEN RYAN**

**DEFENDANTS/RESPONDENTS**

**Judgment of Mr. Justice Woulfe delivered on the 18th day of November, 2021**

**Introduction**

1. This is the appellant's appeal against the order of the Circuit Court (His Honour Judge Comerford) made on the 15th October, 2020. By this order the learned Circuit judge ordered that the appellant's claim for an order for possession proceed to a plenary hearing, and that this action be transferred to the High Court and he reserved costs.
2. The respondents were litigants in person before the Circuit Court and the High Court. Shortly before the hearing date for this appeal the first named respondent issued a notice of motion seeking orders to strike out the proceedings on various grounds, and certain other reliefs. The motion was adjourned to the appeal hearing in circumstances where the Court would be canvassing the same issues, and the motion is considered later as part of this judgment.
3. The respondents have been married since September, 1994. In 1993/94 the first named respondent built a house known as Ballybuninabber, Termon, County Donegal, which since then has been their family home where their three children have grown up. In early 2007 the first named respondent was seeking funding to undertake a property development consisting of the construction of four residential town houses on land next to business premises which were in his name.
4. It appears that the first named respondent was introduced to the appellant, formerly known as Start Mortgages Limited, who sanctioned a loan facility to the respondents of €410,000, subject to the terms and conditions contained in a letter of offer dated the 24th January, 2007. The loan facility was subject to interest at a variable rate, and was repayable in monthly instalments over a term of 30 years. Crucially, the loan was to be secured by way of a first legal charge over the respondents' family home, being the property comprised in Folio 38752F of the Register County Donegal. The respondents signed a form of acceptance dated the 16th April, 2007, stating that they accepted the offer of an advance made to them by the appellant on the terms and conditions set out in, *inter alia*, the letter of offer.
5. It appears that the appellant duly advanced the respondents the loan facility in the sum of €410,000 on or about the 6th June, 2007, and that the respondents' executed a mortgage over their family home to secure this loan by mortgage deed dated the 20th July, 2007. It appears that the respondents initially made a number of monthly repayments, but that they later ran into financial difficulties, in common with many other

people in this jurisdiction and elsewhere during the severe financial recession, and that they defaulted in the repayments.

6. By letter dated the 21st June, 2011, the appellant, through its solicitors, stated that the total amount due on the mortgage was €449,977.52 as of the 16th June, 2011, and called upon the respondents to redeem the full amount due on the mortgage within seven days. Subsequently by letter dated the 26th March, 2012, the appellant, through its solicitors, demanded possession of the mortgaged property.

### **The Circuit Court Proceedings**

7. These proceedings were commenced by the appellant (then known as Start Mortgages Limited) issuing a civil bill for possession dated the 21st November, 2014. A series of affidavits or other documents were exchanged between the parties during the course of the proceedings. In her first affidavit sworn on behalf of the appellant on the 18th November, 2014, Ms. McCarthy set out the basic facts regarding the loan facility and the mortgage and exhibited the relevant documents to evidence same. She also exhibited a copy of Folio 38752F of the Register of Freeholders County Donegal which showed the appellant as the registered owners of a charge for present and future advances. She also averred as to the defendants having defaulted in repayment and exhibited a statement of arrears showing a total balance of €556,877.53 due and owing, inclusive of arrears in the amount of €142,998.56, as of the 31st October 2014.
8. The second named respondent delivered an unsworn defence/statement dated the 6th December, 2016. She did not deny the basic facts regarding the loan and the mortgage, and confirmed that the signatures on the relevant documents were her signatures. However, she stated that she did not sign these documents in the presence of the solicitor who had purported to attest same, who she said she had never met. She also stated that she was not told that she should obtain independent legal advice before signing the documents, and she argued that the appellant should have stipulated that independent legal advice must be taken.
9. The appellant made an *ex parte* application to the County Registrar in County Donegal on the 19th November, 2018, to amend the title of the then plaintiff in the proceedings from "Start Mortgages Limited" to "Start Mortgages Designated Activity Company". The County Registrar made an order to that effect on that date, and also ordered that all future proceedings herein be carried on between Start Mortgages Designated Activity Company as plaintiff and Thomas Ryan and Eileen Ryan as defendants. During the course of the appeal hearing counsel for the appellant made reference to s.63(12) of the Companies Act 2014, which provides that the re-registration of an existing private company as a designated activity company shall not affect any rights or obligations of the company or render defective any legal proceedings by the company. Counsel also referred me to the decision of the High Court in *Start Mortgages Designated Activity Company v. Kavanagh* [2019] IEHC 216. In that case, Simons J. was of the view that, strictly speaking, it is not necessary for a company to make a formal application to Court to reflect its change of status from a limited liability company to a designated activity company. He felt that the legal entitlement to continue proceedings following the change in status of a company is

expressly provided for under s.63(12) of the 2014 Act, and that this provision appeared to be self-executing and he referred, by analogy, to *First Active Plc v. Cunningham* [2018] IESC 11. He added that of course, if a company does make a formal application to Court – whether out of an abundance of caution or otherwise – then the Court has an inherent jurisdiction to amend the title of proceedings. I am satisfied that the views expressed by Simons J. are correct and gratefully adopt same.

10. Mr. Nevin swore a supplemental affidavit on behalf of the appellant on the 13th February, 2019. As regards the issue of the second named respondent not having signed the relevant documents in the presence of her solicitor, he referred to the letter of offer which expressly stated:-

“PLEASE NOTE THAT THIS FORM MUST BE SIGNED IN THE PRESENCE OF YOUR SOLICITOR.”

He stated that it was regrettable that the second named respondent failed to follow this direction and, in the circumstances, he said that it was entirely reasonable for the appellant to accept that the second named respondent had followed this clear direction.

11. The first named respondent swore an affidavit on the 26th April, 2019, and made a number of brief averments. He stated that the respondents’ acting solicitor failed to perfect their title that was offered for security for this mortgage, which he said was against Central Bank rules, and he said that the appellant does not hold clear title on their family home as security for this mortgage. Mr. Nevin swore a further supplemental affidavit on behalf of the appellant on the 15th July, 2019. At the outset he stated that he was the litigation manager for Start Mortgages Designated Activity Company and was employed by Start Mortgages Holding Limited (“SMHL”), which is the parent company and sole shareholder of Start Mortgages Designated Activity Company. He added that SMHL manages and services all loans held by the appellant company, including the loan which was advanced by the appellant to the respondent. He said that he made the affidavit on the appellant’s behalf and with its authority from facts within his own knowledge and from a diligent perusal of its books and records in relation to the respondents and the account of the respondents herein, save where otherwise appeared, and where so otherwise appeared he believed the same to be true.
12. The first named respondent swore a supplemental affidavit on the 1st November, 2019, and averred, *inter alia*, that the appellant did not own his mortgage and were misleading the Court, and also that the appellant had secured a judgment mortgage on his family home in 2013, but had failed to activate it. The first named respondent swore a further supplemental affidavit on the 26th June, 2020, and stated that he believed that the appellant had securitized his mortgage. The first named respondent also issued a notice of motion on the same date, seeking, *inter alia*, an order that the appellant confirm to the Court that his mortgage “was never securitized”.
13. It appears that the first named respondent’s motion came before His Honour Judge Comerford on the 7th October, 2020, and that he directed that the appellant file a

supplemental affidavit for the purpose of clarifying issues raised by the first named respondent in Court on that date, particularly in relation to the issue of securitization of his mortgage. As a result, the appellant then filed a supplemental affidavit of Ms. McCarthy, sworn on the 9th October, 2020. At the outset Ms. McCarthy made similar averments to those previously made by Mr. Nevin, and referred to at para. 11 above, regarding her employment by SMHL and how that parent company facilitates the appellant in the servicing of loans by providing staff, office equipment etc. She added that the appellant is the regulated entity and holds legal title to the loans serviced.

14. As regards securitization, Ms. McCarthy stated that she was informed by the appellant's solicitor that when the matter came before the Circuit Court on the 7th October, 2020, the first named respondent had raised the issue of securitization of his mortgage and produced an extract from the appellant's accounts for 2018 which made some reference to securitization of certain mortgages, in support of his claim that the appellant did not own the mortgage over the respondents' family home. Ms. McCarthy averred that the appellant had not sold or transferred the loan or security the subject matter of these proceedings to any third party, notwithstanding securitization of a number of mortgages which she described as "ordinary banking practice".
15. Ms. McCarthy went on to state that the appellant remained the registered owner of the security *per* the Folio, the subject matter of these proceedings, and that the appellant was and has remained at all times the legal owner of the relevant debt and security. Insofar as the first named respondent took issue with securitization, Ms. McCarthy said that same is permitted by the loan agreements between the parties and is a regular banking practice that has no material effect on the respondents or their liability to the appellant. She also stated that the accounts relied upon by the first named respondent do not support his claim that the appellant is not the lawful owner of his mortgage, and that the Folio the subject matter of these proceedings represents conclusive proof of the appellant's entitlement to seek relief in these proceedings.
16. The matter then came back before His Honour Judge Comerford on the 15th October, 2020, and as stated earlier he ordered that the matter proceed to a plenary hearing, and that the action be transferred to the High Court and he reserved costs. The appellant appealed that order by notice of appeal dated the 16th October, 2020, and the appeal comes before me sitting as a judge of the High Court under Part IV of the Courts Act 1936, as amended, by way of a full rehearing but based on the evidence given and received in the Circuit Court. I will address the issues arising shortly but it is necessary, firstly, to refer to the legal principles by reference to which an application like this for summary possession falls to be determined.

### **The Legal Principles**

17. The legal principles governing the jurisdiction to grant summary judgment in possession cases were recently set out very helpfully by Baker J., in delivering judgment for the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26 ("*Cody*"). She noted how the statutory jurisdiction conferred by s.62(7) of the Registration of Title Act,

1964 ("the 1964 Act"), makes provision for the summary disposal of an action seeking possession of registered land as follows:-

"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."

18. As pointed out by Baker J., the subsection is contained within s.62 of the Act which makes provision for the creation of charges on registered land and for remedies on default of the loan thereby secured. The charge is deemed by s.62(6) to operate as a mortgage by deed within the meaning of the Conveyancing Acts 1881 – 1911. The Land and Conveyancing Law Reform Act, 2009 makes some changes to the statutory provisions, most of which are not relevant to this judgment. Section 62(7) was repealed by that Act and replaced by s.97(2) of the 2009 Act which makes no mention of the application being brought by summary means. However, s.62(7) was expressly saved by s.1 of the Land and Conveyancing Law Reform Act 2013, as regards a mortgage created prior to the 1st December, 2009. Section 3 of the 2013 Act provides that proceedings for possession of the principal private residence of the mortgagor shall be brought in the Circuit Court. This judgment concerns one of the procedures for enforcement of the security provided for expressly by the 1964 Act and the Rules of the Circuit Court.
19. As regards the procedure set out in the Rules of the Circuit Court, applications for summary possession in the Circuit Court are governed by O.5B of the Rules of the Circuit Court (S.I. No. 261/2009), as amended, which applies to any proceedings in which the plaintiff claims, *inter alia*, recovery of possession of land on foot of a legal charge. The Order provides for the commencement of proceedings by a detailed civil bill in the prescribed form, which should contain a special indorsement of claim which shall "state specifically and with all necessary particulars the relief claimed and the grounds thereof". The civil bill does not stand alone but is to be accompanied by a verifying affidavit in prescribed form by which the deponent shall verify and support the claim in the civil bill. A defendant intending to defend proceedings enters an appearance in the prescribed form within ten days and the defence is by way of replying affidavit setting out that defence. The procedure therefore does not contemplate the service by either the plaintiff or defendant of a pro forma pleading, and the defence is not a mere traverse of the claim.
20. Order 5, r.6 contemplates that proceedings are normally to be heard on affidavit and that oral evidence may be adduced only by leave of the judge in specific circumstances or where a notice to cross-examine the deponent has been served. Rule 8 provides an extensive set of procedural and substantive powers for the Court, including the powers to settle the issues to be tried and to permit evidence as to fact to be given orally or by

affidavit, or partly orally and partly by affidavit. The power to adjourn to plenary hearing is set out in r. 8(2) as follows:-

“The Judge may, where he considers it appropriate, adjourn a Civil Bill listed before him under this Order for plenary hearing as if the proceedings had been originated otherwise than in accordance with this Order, with such directions as to pleadings or discovery as may be appropriate.”

21. At para. 49 of her judgment in *Cody*, Baker J. stated that the owner of a charge who seeks to obtain possession pursuant to s.62(7) of the 1964 Act has to prove two facts: (a) that the plaintiff is the owner of the charge; and (b) that the right to seek possession has arisen and is exercisable on the facts. The summary process is facilitated by the conclusiveness of the Register as proof that the plaintiff is the registered owner of the charge and this is a matter of the production of the Folio, and, as the Register is by reason of s.31 of the 1964 Act conclusive of ownership, sufficient evidence is shown by that means: see the discussion in the Court of Appeal judgment in *Tanager DAC v. Kane* [2018] IECA 352. That judgment held that the correctness of the Register cannot be challenged by way of defence in summary possession proceedings, and that a Court hearing an application for possession pursuant to s.62(7) of the 1964 Act is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and the right to possession has arisen and become exercisable.
22. Order 5B requires a plaintiff to establish a *prima facie* case on the affidavit evidence for an order for possession, and it is then necessary for the defendant to proffer evidence or argument sufficient to establish a credible defence. During the course of her judgment in *Cody*, Baker J. considered the options available to a Court hearing an application for summary judgment as follows:-
  - “69. Before analysing the factual matters in contention in the present appeal it is useful to examine the range of responses available to a court in an action for summary judgment with a view to positioning the facts and arguments in the present case within that range.
  70. On one end of the range are cases where a plaintiff establishes its claim on the affidavit evidence, how the defendant is not able to persuade the judge either that the evidence is incomplete or that there is a basis on which a credible defence exists. That approach to both the law and the facts is established in the authorities and a court hearing a claim for summary judgment, whether that be for summary judgment for debt or for summary possession, must be satisfied that the plaintiff has established its claim and that the defendant has not put forward a basis for a credible defence either on the facts or on the law.
  71. By way of illustration, the recent decision of the Court of Appeal in *Doyle v. Houston* [2020] IECA 86 was a judgment mortgage suit where, in the light of the conclusiveness of the Register by reason of s.31 of the Registration of Title Act

1964, Costello J., with whom the other members of the Court agreed, held that the judgment was well charged against the interest of the defendant. She also rejected the argument regarding jurisdiction in the light of s.3 of the Land and Conveyancing Law Reform Act 2013, and held that the judgment mortgage had been registered on foot of a certificate of taxation validly made, and that the plaintiff had proved her case on the evidence and was entitled to well charging relief on a summary basis.

72. Another illustration of that class of case is the judgment of Laffoy J. in *Allied Irish Banks Plc v. Richard McKenna and Another* [2013] IEHC 194 where, having regard to her conclusion that no issue of fact remained to be resolved on a special summons heard on affidavit, and that the error in the grounding affidavit concerning the loan agreement had been plausibly explained and the bank evidence cross-examined on behalf of the defendants, she held that the plaintiff had established its case and that allegations raised by the defendants did not inhibit the entitlement of the plaintiff to summary possession on foot of the mortgage.
73. That judgment illustrates how factual disputes are capable of resolution in summary proceedings, albeit that was a case where witnesses were cross-examined, and legal arguments, depending on the degree of complexity, may be resolved on a summary basis if the trial judge is satisfied that this may fairly be done: see *ACC Loan Management Ltd v. Dolan* [2016] IEHC 69 where it was possible to resolve the arguments concerning the validity of guarantees on a summary basis.
74. At the other end of the range of possible results are cases where a defendant either positively establishes a defence either at law or on the merits, or persuades the judge that the plaintiff has not established its proofs. The claim will then fail. Most of the examples are cases where the defendant has advanced an unanswerable legal defence, as for example in the judgment of Dunne J. in *Start Mortgages v. Gunn* where the repeal of s.62(7) of the Act of 1964 by s.8 of the Land and Conveyancing Law Reform Act 2009 meant that there was no legal basis in some of the claims there under consideration on which the court could grant possession.
75. Another example is the judgment of Laffoy J. in *GE Capital Woodchester Home Loans Ltd v. Reade and Another* [2012] IEHC 363, and supplemental decision [2012] IEHC 459, where she accepted the argument of the defendant that the plaintiff had not established its case on the evidence as the plaintiff could not show compliance with the charge provisions that required formal demand to render the monies due and payable. The claim was dismissed as that defendant had positively established that the monies secured had not become due, the power of sale had not become exercisable, and therefore the plaintiff was not in a position to rebut that argument.
76. Many applications for summary judgment would fall between these two extremes and will involve the proffering of evidence or argument by a defendant by way of defence which is not sufficient to rebut the evidence of the plaintiff to enable the

judge to make a positive finding against the plaintiff, but which offers enough doubt as to the truth or completeness of the plaintiff's evidence, or credibly presents reasonable arguments or evidence that a defendant has a basis of defence which merits further scrutiny, evidence or argument. In that instance the trial judge is constrained by the inability to decide between contested affidavit evidence of fact, or resolve complex questions of law, the action cannot therefore be disposed of summarily and will be adjourned to plenary hearing.

77. What is contemplated by s.62(7) is a trial on affidavit or a mixed trial with or without oral evidence and with cross-examination as the case may be. The more complex the facts, the more detailed the cross-examination, and the more doubts that are raised the less likely it is that the matter can be dealt with summarily, and a speedy resolution may not be possible. In those circumstances the court has a power under Order 5B, r.8 to adjourn the civil bill for plenary hearing and to give directions, order discovery, etc. as may be appropriate."

### **The Issues on Appeal**

23. In *Cody, Baker J.* stated that O.5B requires a plaintiff to set forth a *prima facie* case for an order for possession. I am satisfied that the evidence adduced on affidavit by the appellant establishes that the principal money borrowed pursuant to the loan agreement of the 24th January, 2007, and secured upon the registered charge, has become due. Indeed, the respondents have not really sought to argue otherwise. The "proofs" for an application under s.62(7) of the 1964 Act have thus been met, and the next issue then is whether the respondents have put forward a basis for a credible defence either on the facts or on the law.
24. In advance of the hearing of this appeal, the first named respondent furnished a written submission which helpfully identified thirteen issues which should, it was said, cause the Court to dismiss the claim or to adjourn the matter for plenary hearing. I now propose dealing with each of these issues in turn, against the backdrop of the applicable legal principles as set out above.
25. The first two grounds of defence were set out by the first named respondent as follows:
- "1. The Plaintiff failed to show proof that they own this mortgage to the Honourable Judge Francis Comerford at Letterkenny Circuit Court hearing on the 15th of October, 2020. According to the Affidavits produced by the Plaintiff all loans are held by the plaintiff, not owned. The plank of our argument is that Start Mortgages DAC do not own this mortgage.
  2. Our mortgage was securitized. Start Mortgages DAC do not own our mortgage. A Supplemental Affidavit of Justin Nevin, Eva McCarthy and Siobhan Coen, Tab 1, states that Start Mortgages Holding Limited is the sole shareholder of Start Mortgages DAC. SMHL manages and services all loans held by the plaintiff. Please see Tab 2 showing accounts of Start Mortgages DAC 2019 proving that they do not have any legal claim to this mortgage which was surrogated."



26. As set out above, the first named respondent averred on affidavit that the appellant did not own his mortgage. It appears from the first ground above that he relies upon averments made in affidavits sworn on behalf of the appellant which refer to loans "held" by the appellant, including the loan which was advanced by the appellant to the respondent. Insofar as that phrase may have raised doubt in the mind of the first named respondent, however, the last affidavit of Ms. McCarthy sworn on the 9th October, 2020 would seem to remove any room for doubt. She stated that while SMHL facilitates the appellant in the servicing of loans by providing staff, office equipment etc, the appellant is the regulated entity and holds legal title to the loans.
27. Ms. McCarthy also stated that the appellant remains the registered owner of the security as per the Folio, the subject matter of these proceedings, and that the Folio represents conclusive proof of the appellant's entitlement to seek relief in these proceedings. The conclusiveness of the Register is proof that the appellant is the registered owner of the charge and this has been confirmed most recently by the Supreme Court in the *Cody* case, as set out at para. 21 above. In the present case sufficient evidence has been shown by the production of the relevant Folio, and the correctness of the Register cannot be challenged by way of defence.
28. As regards the issue of securitization, the first named respondent also made averments on affidavit that he believed that the appellant had securitized his mortgage. He also raised this issue before the Circuit Court judge, and in response Ms. McCarthy swore a supplemental affidavit on the 9th October, 2020 and referred to "securitization of a number of mortgages which is ordinary banking practice", but she did not expressly state whether the respondents' mortgage had been securitized. She did, however, state that the appellant remained the registered owner of the security per the Folio, the subject matter of these proceedings, and that the appellant was and has remained at all times the legal owner of the relevant debt and security. Insofar as the first named respondent took issue with securitization, she said that same was permitted by the loan agreement between the parties and was a regular banking practice that had no material effect on the respondents or their liability to the appellant. During the course of the hearing counsel for the appellant confirmed that the respondents' mortgage was one of the number of mortgages that had been securitized.
29. The issue of securitization was considered by this Court in *Freeman v. Bank of Scotland Plc* [2014] IEHC 284. In that case, the plaintiffs were husband and wife. Between 1996 and 2006, they purchased six investment properties which were financed by First Active Building Society and mortgages were created in favour of the Society. In 2006, the plaintiffs refinanced their loan with Bank of Scotland (Ireland) Limited ("BOSI"). They re-mortgaged the properties with BOSI, offering them as security for a sum of €1,406,000 which was borrowed. Their borrowings with First Active were approximately €800,000 at the time of the refinancing, so when they obtained the loan from BOSI, there was a surplus of approximately €600,000 released to them after discharging the debts due to First Active. The plaintiffs defaulted on the loan facilities granted to them by BOSI and failed to repay the sums due when demanded. On the 17th November, 2011, the bank

appointed the second named defendant as receiver over the properties and purported to do so pursuant to its contractual rights. On the 28th August, 2012, the plaintiffs commenced these proceedings in which they sought, *inter alia*, to invalidate the appointment of the receiver. There was evidence that five of the six of the plaintiffs' loans had been securitized. The plaintiffs claimed that the bank was not entitled to enforce loans that were securitized, and in particular, to enforce any mortgage or charge granted by the plaintiffs as security for such loans.

30. McGovern J. considered the issue of securitization as follows:-

"7. ...the court was referred to the definition of securitization to be found in '*The Law on Financial Derivatives*' by Alistair Hudson (5th Ed.) at para. 1-185, where the author states:

'The process of "securitization" means translating a financial instrument or a group of financial instruments into a security. Securitization is the process of taking rights (such as a right to receive a stream of income from a number of different mortgages or credit cards) and translating that bundle of rights into a single security which can be marketed to investors on the open market. Securitization, then, is the process by which a range of cash receivables or similar assets are grouped together and offered to investors in the form of a security in return for a capital payment from the investors.'

Generally, the receivables are transferred to a Special Purpose Vehicle so that the receivables are taken off the balance sheet of the financial institution selling the financial instruments. The Special Purpose Vehicle issues bonds to third party investors who have no right to share in the profits of the underlying assets, and provided their notes are fully repaid for both principle and interest, any remaining surplus cash is paid back to the originator of the assets as profits.

8. It is an important principle in securitization transactions that the originating bank that sells the mortgages to the SPV, under an equitable assignment, continues to service the mortgages and the legal title remains with the originating bank. Where customers have provided their consent as part of the standard mortgage terms and conditions, they are not specifically notified that their mortgage has been securitized. In the case of housing loans held by BOSI or the bank, random selection was applied to determine which of these loans would be securitized. Thus, in the case of the plaintiff's loans, five of the six were securitized

...

10. The SPV used in the securitization was Wolfhound Funding 2008-1 Limited ("the Issuer"). It was set up for the primary purpose of issuing notes as part of a securitization of a portfolio of Irish residential property assets...

11. At all times, legal title to the loans and related security remained with BOSI until the completion of the transfers to the Issuer and notification of the transfers being

given to the borrower. Such transfers would only be completed and notifications given in the circumstances set out in Clause 7.1 of the Mortgage Sale Agreement between BOSI and the Issuer. No events specified in Clause 7.1 occurred and the assignment of each of the plaintiffs' loans and related security was effected in equity only. Notice of the assignment was not given to the plaintiffs. The security transaction was completed on 5th November, 2013, when the bank repurchased the SPV's interest in the securitized loans and relevant securities.

12. In *Wellstead v. Judge Michael White* [2011] IEHC 438, Peart J. rejected an argument that a lending bank was not entitled to the benefit of an order for possession that had been made in favour of the lender because the relevant housing loan had been securitized. The learned judge said:

'The applicant is also seeking leave to argue that Ulster Bank have no longer any entitlement to benefit from the order for possession because as part of some unspecified securitization agreement the bank has sold the applicant's mortgage, and is therefore no longer owed anything on foot of the mortgage herein.

...

His grounding affidavit characterises the action by Ulster Bank in seeking repossession in circumstances where it no longer owns the mortgage and has been repaid the monies lent to the applicant as fraudulent, and misleading and premeditated.

In relation to the last argument, counsel for the bank has referred to Clause 17 of the mortgage deed executed by the applicant and his former partner, which contains a consent by the mortgagors as to such a disposal of the benefit of the mortgage to another party by way of a securitization scheme or otherwise, and it is submitted that this is a point which it is simply not open to the applicant to argue, even if he was in time to do so, since he has consented to that occurring. I agree.

But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitization scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitization schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors.'

13. Although *Wellstead* was a judicial review application and not a plenary hearing, there were notable similarities between the point taken in that case and the securitization point taken by the plaintiffs in this action. In this case, the plaintiffs do not dispute that the loans are in default and I am satisfied that more than one "event of default", as defined in the terms and conditions applicable to the loans, has taken place. The evidence clearly establishes that the plaintiffs – in accepting the loans – signed documents in which they agreed to BOSI securitizing the loans.

14. The second named plaintiff accepted that the plaintiffs began defaulting on their loans in 2009, at a time when they knew nothing about the securitization of their loans. The second named plaintiff said that until September 2011, she had never heard of the word "securitization". There was no evidence to show that the fact of securitization had anything to do with the plaintiffs going into default on their loans. It became clear, in the course of the trial, that the plaintiff's point on securitization was confined to an allegation that securitization affected the bank's title to the loans...
15. In applying for the loans, the plaintiffs accepted the entitlement of BOSI to securitize their loans. I am satisfied that the securitization of the loans was properly effected and did not in any way alter the obligations of the plaintiffs so far as the repayment of the loans was concerned...The plaintiffs failed to establish that their liability to repay the loans to the bank is affected by the securitization..."
31. I gratefully adopt the principles set out by McGovern J. in the *Freeman* case. Applying those principles to the facts of the present case, I note that General Condition 5 of the General Loan Conditions provided that: "The Borrower's attention is drawn to Clause 11.07, 11.08 and 11.09 of the Mortgage. The Borrower hereby acknowledges the Lender's right, without further consent from or notice to the Borrower to transfer the benefit of this Letter of Offer, the Loan and the Lender's mortgage security...over the Property to any person, company or corporation on such terms as the Lender may think fit, without any further consent from or notice to the Borrower or any other person, or any consequential assurance or re-assurance or a release under such scheme whereupon all powers and discretions of the Lender shall be exercisable by the transferee". I note also that Clause 11.08 of the Mortgage Deed provided that the appellant "may...at any time securitize this Mortgage without any consent of the Borrower save as is contained in sub-clause 11.09 hereof and without further notice to the Borrower or any other person", and that Clause 11.09(ii) provided that the respondents "hereby irrevocably consent and agree to be bound by...the provisions of any securitization scheme". In any event, I am satisfied, as per *Freeman*, that upon securitization of the respondents' loans the legal title to the loans and related security remained with the appellant, and securitization did not affect the appellant's title to the loans and the related mortgage. The first named respondent has failed to establish that the respondents' liability to repay the loans to the appellant was affected by the securitization, and I am satisfied that this issue does not establish a credible defence.
32. The second ground of defence advanced by the first named respondent also seeks to place reliance upon matters shown in the accounts of the appellant for 2019, in support of the argument that the appellant does not own the respondents' mortgage. As set out above, the law does not permit the respondents to challenge in possession proceedings such as these the conclusive proof of ownership evidenced by the Register, irrespective of what is or is not contained in the appellant company's accounts. In the circumstances any matters in the accounts do not, and could not, have the effect of establishing a credible defence.

33. The third ground of defence was set out by the first named respondent as follows:

"3. The Plaintiff failed to reply to any of our motions and previous affidavits (Circuit Court Rules) S.I. 264 of 2009. I refer to a ruling in 2019 Court of Appeal in the case of *Promontoria v. Sheehy*, where it was ordered to reveal who owns the loan and how much was paid for it."

Assuming for present purposes that the above statement is factually correct, any such failure could not establish a credible defence to the plaintiff's claim. It was incumbent on the respondents to seek the appropriate interlocutory orders from the Circuit Court in the event of any such failure.

34. The fourth ground of defence was set out by the first named respondent as follows:

"The Plaintiff secured a High Court judgment mortgage on our family home in October, 2013. They failed to activate that judgment. The plaintiff is suing for the same debt twice. Double jeopardy. The rules of *res judicata* also known as claim preclusion. The legal doctrine means to bar continued litigation. Tab (3)".

This ground of defence can be disposed of fairly briefly. The fact that a creditor secures a judgment in proceedings to recover a debt does not prevent the creditor bringing any separate proceedings to enforce any security it may hold, in respect of the same debt. Again this ground could not establish a credible defence to the appellant's claim.

35. The fifth ground of defence was set out by the first named respondent as follows:

"5. Our mortgage agreement contained unfair terms under the EC (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. 27/1995) (the Regulations)."

The first question which arises under this ground is whether the first named respondent was acting as a consumer in relation to the loans at issue, and is thereby entitled to the protection of the 1995 Regulations, which transposed the provisions of Council Directive No. 93/13/EEC ("the Directive"). Given that the first named respondent states in the next ground of defence that the mortgage was "to finance a commercial business", and "to secure commercial loans", it seems very doubtful that the first named respondent could be deemed to have been acting as a "consumer".

36. Assuming for present purposes that the appellant was acting as a consumer, the issue of unfair terms was one addressed by McDermott J. in *Permanent TSB Plc. v. Davis* [2019] IEHC 184, which, in turn, addressed the decision of the *Court of Justice of the European Union* in *Aziz v. Caixa d'Estalvis de Catalunya* (Case C-415/11). In *Davis*, having considered the terms of the mortgage and the loan agreement, McDermott J. highlighted the provisions of Article 4(2) of the Directive, which provides as follows:

"Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and

remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.”

In *Davis*, McDermott J. held that the defendants were consumers within the terms of the Directive, and the 1995 Regulations, but the alleged unfair terms related to the core terms of the agreement between the parties, primarily to the terms regarding repayment of the amount advanced in the context of income and the ability to repay.

37. In the present case, it appears that the second named respondent was probably not acting as a consumer so as to trigger the application of the 1995 Regulations. In any event, the first named respondent has not identified any terms of the loan agreement, outside of the core term relating to the mortgage rate which he referred to during his oral submissions, which could be viewed as unfair. In the circumstances, this issue does not establish a credible defence.

38. The sixth ground of defence set out by the first named respondent was as follows:

“6. Our family home was allowed to be mortgaged to finance a commercial business where the second named defendant had no financial interest (Central Bank Rules). Family homes should not be allowed to be used to secure commercial loans.”

The supplemental affidavit of Mr. Nevin sworn on the 13th February, 2019, dealt with this issue. He referred to a letter from the appellant to the respondents’ agent dated the 17th June, 2016, which stated that the purpose of the loan was to re-mortgage the family home, and that the appellant was not advised that the purpose of the loan was to construct four town houses. He exhibited a copy of the loan application form and stated that he could confirm, from a review of same, that no reference was made to the alleged development project and the facility was obtained by the respondents to clear two existing loans. These averments were not controverted in any subsequent affidavit filed on behalf of the respondents. In the circumstances this issue does not establish a credible defence.

39. The seventh ground of defence set out by the first named respondent was as follows:

“7. The second named respondent Eileen Ryan never signed a form of consent endorsing the said charge for the purpose of s.3 of the Family Home Protection Act, 1976 to the said charge. We refer to case law *Bank of Ireland v. Michael Joseph Smyth & Una Smyth*.”

The case cited by the first named respondent, *Bank of Ireland v. Smyth* [1995] 3 I.R. 459, was an example of the application of s.3 of the Family Home Protection Act 1976, which provides that if a spouse without the prior written consent of the other spouse purports to convey any interest in a family home to any person except the other spouse, the purported conveyance is void subject to certain specified exceptions. The case law has established, however, that s.3 does not apply in the case of conveyance (which includes a mortgage) entered into by both spouses jointly, as it would be absurd to require a

separate prior consent in those circumstances: see *Nestor v. Murphy* [1979] I.R. 326. In the present case both of the respondents were co-borrowers, and in the circumstances this issue does not establish a credible defence.

40. The eighth ground of defence set out by the first named respondent was as follows:

"8. The plaintiff added their legal fees to our arrears therefore by charging legal fees are said to be usurping the statutory powers of the court to determine the question of costs and the true statement of amount claimed in the plaintiff's affidavit."

The Courts have accepted that in a suit for possession, as opposed to a suit for the debt, a plaintiff was entitled to possession even if there was a dispute as to part of the indebtedness. For example, in *Bank of Ireland v. Blanc* [2020] IEHC 18, O'Regan J. stated as follows (at para. 30):

"The issue of how much money is due and owing and the guide to the granting or withholding of possession was dealt with by Ms. Justice Dunne in the High Court in 2009 in *Anglo Irish Bank Plc v. Fanning* [2009] IEHC 141, when it was indicated that a default was the issue, not the amount. That is clearly the case in circumstances where possession only is sought and not judgment of a particular sum of money, and possession is the only matter before this Court."

In light of the above authorities this issue does not establish a credible defence.

41. The ninth ground of defence set out by the first named respondent was as follows:

"9. The Plaintiff did not comply with HC54 before issuing proceedings? There is no statement to that effect in the proceedings?"

The High Court Practice Direction 54 entitled "Proceedings involving a Litigant in Person" sets out the requirements in respect of such proceedings. The first point to be made is that this is a High Court Practice Direction and does not appear applicable to these Circuit Court proceedings. Even if such a Practice Direction were applicable, in my judgment in *Bank of Ireland v. Osborne* [2021] IECA 127 I noted in passing that para. 7 of this Practice Direction states that failure to comply with any of the requirements of the Direction may expose the party in default to liability for costs. In the event that there was any failure by the appellant to comply in the present case, I am satisfied that this issue could not possibly give rise to a credible defence.

42. The tenth ground of defence set out by the first named respondent was as follows:

"10. Our three adult children occupy our family residence and were never named in these proceedings."

The appellant submitted that there was no requirement to name the adult children as defendants as they had no legal interest in the property in question. However, when the appellant became aware that they were residing in the property, a copy of the Civil Bill for

possession was served on them as occupants of the property. I am satisfied that this issue does not establish a credible defence.

43. The first named respondent's eleventh ground of defence was set out as follows:

"11. The 2013 Housing Act is flawed as s.1 and s.4 were never signed into law by the President of Ireland, therefore those sections were never enacted. This lacuna prevents all banks and vulture funds from seeking possession orders on family homes."

During the course of the hearing it became clear that this issue related to the commencement of ss. 1 and 4 of the Land and Conveyancing Law Reform Act, 2013. Section 16(1) of the Interpretation Act 2005, provides that every provision of an Act comes into operation on the date of its passing, unless it contains a commencement provision, which does not arise in respect of ss. 1 and 4. Section 15 of the 2005 Act provides that the date of the passing of every Act of the Oireachtas is the date of the day on which the Bill for the Act is signed by the President, and that immediately after the Bill is signed by the President, the Clerk of Dail Éireann shall endorse that date on the Act immediately after the long title. A perusal of the 2013 Act suggests that the 2013 Act was signed by the President on the 24th July, 2013, as that date has been endorsed on the Act immediately after the long title, and ss. 1 and 4 therefore came into operation on that date. In the circumstances this issue does not establish a credible defence.

44. The twelfth ground of defence set out by the first named respondent was as follows:

"12. *Start Mortgages DAC are attempting to unduly enrich themselves. Most common law jurisdictions would consider such practice to be undue enrichment.*"

As regards this ground, no authority has been cited to me to suggest that the actions of a lender in trying to enforce a security, on default of a loan thereby secured, could be deemed to amount to undue or unjust enrichment, even if the loan and the mortgage have been securitized. I am satisfied that this issue does not establish a credible defence.

45. The thirteenth and final ground of defence set out by the first named respondent was as follows:

"13. I am claiming that the plaintiff's claim is fraudulent to alleged loss suffered. I will refer to the Bankers Books Evidence Act 1879. On the plaintiff's sworn affidavits supporting their claim in the Civil Bill by Eva McCarthy, Justin Nevin, and Siobhan Coen all three were not direct employees of the organisation that own our loan. It clearly states on their 2019 accounts that Start Mortgages DAC have no employees. Furthermore, legislation insists that evidence provided by a bank must be given by direct employees."

The last ground advanced by the first named respondent relates to the fact that the above named deponents who swore affidavits on behalf of the appellant appear not to have been direct employees of the appellant. In a number of affidavits Ms. McCarthy and



Mr. Nevin averred that they were “the litigation manager” for the appellant, but employed by SMHL “which is the parent company and sole shareholder of” the appellant.

46. The first named respondent relies on the case of *Promontoria (Aran) Limited v. Burns* [2020] IECA 87. In that case the plaintiff sought liberty to enter final judgment in the sum of approximately €27m, alleged to be due on foot of various guarantees entered into by Mr. Burns in favour of Ulster Bank Ireland Limited, the plaintiff’s predecessor in title, in respect of the indebtedness of four limited liability companies pleaded to be then in default.
47. The application for summary judgment was grounded on the affidavit of a Mr. Harris, who described himself as a senior asset manager employed by another company (“the Servicer”), which administered debt collection on behalf of the plaintiff. He deposed to his authority to make the affidavit for and on behalf of the plaintiff, and that he did so with its consent. Mr. Burns averred that he believed that the deponent, Mr. Harris, was not directly employed by the plaintiff and was not a party to the within proceedings and could not make any averments on behalf of the plaintiff, as he had no first-hand knowledge of any of the events to which he referred and was relying on hearsay.
48. The trial judge concluded that the evidence of Mr. Harris was inadmissible hearsay, as no reference had been made by him to the books and records of the plaintiff. Following delivery of his written judgment, the trial judge gave the plaintiff an opportunity to put further evidence before him, in particular as the defendants had made no more than a “bare denial of the debt” and had not contested any of the factual averments in the affidavits made on behalf of the plaintiff. In that context, the plaintiff furnished two further affidavits, one of Mr. Harris and the other of a Mr. Pendiville, a director of the plaintiff, regarding the source of knowledge of Mr. Harris. In Mr. Harris’s further affidavit he averred that he had access “at all material times” to the books and records of the plaintiff “having relevance to these proceedings”, and that he had made his affidavit from facts within his own knowledge and from a perusal of those books and records. An affidavit of Mr. Pendiville supported this supplemental affidavit and confirmed that the Servicer provided loan administration and asset management services to the plaintiff in respect of the material loans, and that Mr. Harris was authorised to swear his affidavits on behalf of the plaintiff “in circumstances where he is responsible for the day to day management of the loans and related security”. Mr. Pendiville went on to say that the Servicer held all the books and records, including all hard copy and electronically stored records of the plaintiff “having relevance to these proceedings”, as a consequence of being responsible for the day to day management of the loans.
49. The trial judge did not thereafter prepare another judgment, but a brief note of counsel showed that when the matter came back before him, and noting that additional affidavits had been filed, Noonan J. said that he was not satisfied that the evidential difficulty identified had been dealt with and he gave leave to defend on the issue of the admissibility of the evidence only, or as was recorded in the perfected order “whether the

plaintiff has led admissible evidence” and noting that the plaintiff could lead any evidence it wished at the plenary hearing.

50. The plaintiff appealed and the Court of Appeal upheld the decision of the trial judge. Baker J. held that there was insufficient evidence of the type of business records carrying indications of reliability, nor evidence sufficient to establish a course of dealings between the plaintiff and the defendant to engage the recent authorities which recognise that a Court may draw an inference when, in the context of an established business relationship, a defendant does not deny or otherwise dispute in a concrete and credible way the evidence adduced in proof. She noted that the statutory exception to the hearsay rule created by the Bankers Books Evidence Act was not engaged in the case, as the plaintiff was not a “bank” as defined in the Act, and no argument was made to the contrary. The case relied on a common law exception to the hearsay rule, namely that the witness for the plaintiff had inspected and analysed its books and records and it was argued could give positive evidence of the debt from those records. As regards the nature of the documents exhibited, Baker J. stated as follows:

“103. I cannot therefore ignore the omission of a simple averment in the numerous affidavits sworn on behalf of the plaintiffs that the originals of the various documents are held by or on behalf of Promontoria and that the documents exhibited are true copies, or that the deponents have examined the books and business records of Ulster Bank relating to the loans.”

51. During the course of the appeal hearing I asked counsel for the appellant what the distinction was between *Promontoria v. Burns* and the present case. He submitted that in *Promontoria v. Burns* the plaintiff was a totally different company with no relationship to the original lending bank. In contrast the relevant deponents in the present case were employed by the parent company and sole shareholder of the appellant company, and were in a position to peruse the original books and records of the appellant company and to have the requisite means of knowledge to swear positively to the facts.
52. I have come to the conclusion that the above submission is correct, and that the present case can be distinguished from the situation which arose in *Promontoria v. Burns*. While there does not appear to be an express averment in the numerous affidavits sworn on behalf of the appellant that the original documents are held by or on behalf of the appellant, this is in the context of averments that the relevant deponents are employed by SMHL, which is the parent company and sole shareholder of the plaintiff, and that SMHL is the group employer and corporate service provider, and facilitates the plaintiff in the servicing of loans by providing staff, office equipment etc. The deponents do make averments that they make their affidavits “on the plaintiff’s behalf and with its authority on facts within my own knowledge and from a diligent perusal of its books and records in relation to the defendants and the account of the defendants herein save where otherwise appears etc”. In her grounding affidavit Ms. McCarthy did make averments that the documents exhibited were true copies. In the circumstances I am of the view that this ground again does not establish a credible defence.

**Conclusion**

53. While the Court has great sympathy for the respondents, in the circumstances I am satisfied that the appellant has established its entitlement to possession of the premises and the respondents have not made out any credible grounds of defence. Therefore, the appeal must be allowed. I propose, therefore, to grant an order for possession pursuant to s.62(7) of the 1964 Act. A stay of six months will be placed on this order to allow the respondents time to arrange alternative accommodation.
54. With regard to costs, as the appellant has been successful in this appeal, my provisional view is that the appellant is entitled to its costs of the appeal. The same result would follow if the Court were to apply the traditional approach whereby "costs follow the event", and I see no circumstances present that would justify making any alternative order as to costs. If either party wishes to contend for an alternative order, they should file written submissions on the issue of costs within two weeks of today's date.

**Addendum: The First Named Respondent's Motion**

55. As mentioned at the outset of this judgment, shortly before the hearing date for this appeal, the first named respondent issued a notice of motion seeking various orders, and this motion was adjourned to the appeal hearing in circumstances where the Court would be canvassing the same issues. The orders sought were an order to strike out the proceedings on the grounds of double jeopardy/*res judicata*, an order to strike out the plaintiff's application for possession because the plaintiff had no legal interest in the respondents' mortgage, an order to strike out the plaintiff's claim as they had *no locus standi*, and an order for the plaintiff to show this Honourable Court who owned the respondents' mortgage.
56. I am satisfied that the points raised by the first named respondent in this notice of motion, and in his supplemental affidavit sworn on the 29th April, 2021 grounding the motion, are identical to grounds of defence advanced by him and rejected by me for the reasons set out above. In the circumstances I must refuse to grant the orders sought. As regards the costs of the motion, I would propose making no order as to costs, given the overlap with the costs of the appeal as dealt with above. If either party wishes to contend for an alternative order, they should file written submissions on the issue of costs within two weeks of today's date.