THE HIGH COURT

[2022] IEHC 466

[Record No. 2013/46 SP]

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

MICHAEL MACKEN AND PATRICIA WATSON

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 26th day of July 2022.

Introduction

1. This judgment concerns an application by the first named defendant to strike out the plaintiff's proceedings in terms to which I shall refer in some detail below. The first named defendant prosecuted the application as a lay litigant, and I shall refer to him as 'Mr. Macken' or 'the defendant', as the second named defendant took no part in the application. The proceedings are of some antiquity; the special summons suggests that they were initiated on 30th January, 2012, although the year '2012' may be a typographical error, given that the proceedings bear a 2013 record number.

2. By order of 15th June, 2018, Costello J made an order substituting Pepper Finance Corporation (Ireland) DAC ('Pepper') as plaintiff for the original plaintiff, Danske Bank A/S, and setting aside a judgment obtained against the defendant on 2nd November, 2015. The order of substitution of the plaintiff was appealed by the defendant to the Court of Appeal, which gave judgment on 25th January, 2020. That court dismissed the appeal, although in a written judgment ([2021] IECA 15), the court was critical of the manner in which Pepper had conducted the application before the High Court and the initial hearing of the appeal, and as a mark of its disapproval, discharged the order of costs made by the High Court against the defendant and ordered that Pepper discharge the defendant's costs and expenses incurred in connection with the appeal.

The proceedings

3. The reliefs sought on the general endorsement of claim of the special summons are as follows: -

> "(a) an Order for Possession of the premises described in the schedule hereto
>
> (b) a Declaration that the legal Mortgage has priority over Judgment Mortgages on the folio
>
> (c) such further or other Order as to this Honourable Court appears just
>
> (d) an Order providing for the costs of these proceedings"

4. The summons states that the plaintiff claims by virtue of a deed of mortgage/charge dated 21st March, 2007 which was registered in the Land Registry as a mortgage/charge over the property on 11th day of December, 2009. The scheduled property is "**ALL THAT AND THOSE** the property comprised in folio 11582F

County Roscommon and known as 'Sorrento' Creagh, Beal Na Mulla, Athlone, Co. Roscommon".

5. The litigation has been conducted in accordance with special summons procedure; the plaintiff maintains that it has invited the defendant to adopt a procedure appropriate to plenary proceedings, given the extent and breadth of the matters disputed by him, but that the defendant has not taken up this suggestion.

The present application

6. The proceedings came before this Court on 15th January, 2020. On that occasion, O'Connor J gave directions in relation to submissions and in relation to a motion to amend the special summons. The parties were then to seek a date for hearing of the plaintiff's possession application. Ultimately, the matter came before Allen J on 2nd February, 2021, and further directions were made, including directions as to the filing of affidavits. The matter returned before Allen J on 16th February, 2021; on that occasion the court granted liberty to the plaintiff to issue and file a notice of motion seeking an extension to the timeline set out in the order of 2nd February, 2021, and also granted liberty to the first named defendant "to issue and file a Notice of Motion by close of business on Friday the 26th day of February 2021…to inspect documents (giving a list and brief description of the documents to be inspected) and for the trial of a preliminary issue of law".

7. At the hearing before me, the plaintiff applied for an extension of time in relation to an affidavit of Seamus Dowling of 24th February, 2021. According to the order of Allen J, this affidavit was to be filed by close of business on Monday 8th February, 2021; in his order of 16th February, 2021, Allen gave liberty to the plaintiff to apply for an extension of this time limit. The affidavit contained some nine hundred and thirty-three pages of documentation, and Mr. Macken was heavily critical of the

content of the affidavit and put in a replying affidavit and extensive submissions in that regard. Mr. Macken strenuously opposed any extension. Counsel for the plaintiff referred to the facts that an appropriate explanation and an apology were proffered in the affidavit; that it was seventeen days late; and that Mr. Macken had not been prejudiced by the delay.

8. In an *ex tempore* ruling, I held that it would not be appropriate to enter into an examination of the veracity or otherwise of the averments in the affidavit – as I was invited to do by Mr. Macken – nor should the plaintiff be shut out from proffering the evidence in the affidavit in circumstances where there was no prejudice to the defendant. Accordingly, I granted an extension of time for filing of the affidavit to the plaintiff.

9. The other application to be decided by the court was the defendant's application by a motion dated "February 2021", originally returnable on 21st June, 2021. The reliefs sought in the notice of motion were as follows: -

> "(1) An Order to Strike Out With Prejudice the proceedings pursuant to Superior Court rules, Order 19, Rule 28 and/or Rule 27 on the basis that it is bound to fail when examined pursuant to Superior Court Rules, Order 25 as the substantive relief sought is not available under the law as the relevant Statute, Section 62, subsection 7 of the Registration of Title Act, 1964 has been repealed since 2009.
>
> (2) An Order to Strike Out With Prejudice the proceedings pursuant to the failure of Pepper to provide any documentation whatsoever for inspection within the law under Superior Court Rules, Order 31, Rules 15 to 20, which compounds their untenable position where they are:
>
> a. In perpetual contempt of the Honourable High Court.

b. In continual abuse of process.

c. With unclean hands in front of a Court of Equity."

10. In relation to the second relief quoted above, inspection facilities were in fact provided by the plaintiff to the defendant on 2nd March, 2021. Affidavits of 14th April, 2021 by Mr. Macken and 22nd April, 2021 by Seamus Dowling on behalf of Pepper were filed in which Mr. Macken was highly critical of the inspection afforded to him and the manner in which the proceedings generally have been conducted by the plaintiff, and Mr. Dowling responded defending the plaintiff's position. In particular, Mr. Dowling made reference to the fact that the defendant had not identified the documents required for inspection or noted where such documents are referenced in the affidavits or pleadings. However, the application currently before the court, as will be apparent from relief number two of the notice of motion quoted above, is based on a complete failure to provide "any documentation whatsoever" for inspection, rather than what the defendant alleges is a faulty or inadequate inspection process, which would require the defendant at minimum to list the documents which he wishes to see, and to demonstrate a culpable refusal by the plaintiff to permit inspection of such documents. The second relief in the notice of motion has therefore been overtaken by events; the sole issue for decision by this Court is the relief sought at para. 1 of the notice of motion.

11. While there was some disagreement between the parties as to whether the motion came within the terms of the order of Allen J of 16th February, 2021, no objection was taken by the plaintiff to Mr. Macken proceeding on the basis of his notice of motion; both parties filed written submissions, and the defendant produced a lengthy "speaking note" on the day of the hearing to which counsel for the plaintiff did not object. The defendant also produced an affidavit sworn by him on the date of the hearing – 1st July, 2021 – the purpose of which was to place before the court certain materials

to which he referred in his speaking note. The plaintiff did not object to production of this affidavit.

12. The defendant made it clear that he relied, in support of his application, on six specific points or "reasons" which he set out in his "speaking note". He submitted that these six points were sufficient to establish that the Land and Conveyancing Law Reform Act 2013 "does not have any effect in this case", by which I understood him to mean that the plaintiff could not avail of the provisions of that Act to avoid the impact of the decision of Dunne J in *Start Mortgages Limited v. Gunn* [2011] IEHC 275, and the repeal of s.62(7) of the Registration of Title Act 1964 by s.8 of the Land and Conveyancing Law Reform Act 2009. I propose to set out the defendant's six "reasons" below, and to address the plaintiff's response to them.

Reason A

13. The defendant's first point was made at length in his "speaking note", and in the interests of concision, I shall summarise it briefly in the following paragraphs. Before doing so, I should say that much of the submission set out translations of various articles of Bunreacht Na hÉireann ('the Constitution'). Counsel for the plaintiff objected, in my view correctly, to the defendant producing or relying on such translations in the absence of any affidavit evidence from a translator. In his closing submission, the defendant stated that he did not rely on the translations as such, but on the more general point he makes – to which I shall refer below – as to the effect of an apparent absence of an Irish translation of the enacted statute. In this judgment, to the extent that it is necessary, I will proceed on the basis of considering the Irish version in the Constitution itself of the various articles on which the defendant relies. I do not consider that this approach has any adverse effect on the submissions made by the defendant.

14. The defendant firstly emphasises Article 40.5 of the Constitution, which in the English translation is as follows:

> "5. The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

15. The defendant then relies upon Article 8.1, in which it states that "[t]he Irish language as the national language is the first official language…", and Article 8.2 which states that "[t]he English language is recognised as a second official language". The defendant submits that, based upon these provisions, he has a constitutional right "to only be judged under law trí ghaedhilg [sic]… in the Constitution the source of law to be used by this Honourable High Court must be trí ghaedhilg".

16. The defendant then refers to sub-Articles 25.4.4-6 of the Constitution, which are as follows: -

> "4.4 Where the President signs the text of a Bill in one only of the official languages, an official translation shall be issued in the other official language.
>
> 4.5 As soon as may be after the signature and promulgation of a Bill as a law, the text of such law which was signed by the President or, where the President has signed the text of such law in each of the official languages, both the signed texts shall be enrolled for record in the office of the Registrar of the Supreme Court, and the text, or both the texts, so enrolled shall be conclusive evidence of the provisions of such law.
>
> 4.6 In case of conflict between the texts of a law enrolled under this section in both the official languages, the text in the national language shall prevail."

17. Reference is then made to Article 15.4.1, which provides that the Oireachtas "…shall not enact any law which is in any respect repugnant to this Constitution or any

provision thereof", and Article 40.3.1, which provides that "[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen".

18. In his affidavit of 1st July, 2021, the defendant exhibits an email from the office of the Supreme Court stating that it does not hold an Irish version of the Land and Conveyancing Law Reform Act 2013 ('the 2013 Act'). He also exhibits a copy of the 2013 Act held by that office, duly signed by Uachtarán na hÉireann, which is the English version. He then exhibits translations of the articles of the Constitution to which I have referred above, and excerpts from cases relating to the use of the Irish language in the law.

19. Essentially, the defendant's point is that, as there does not appear to be an Irish version of the 2013 Act, it "cannot be used to override my constitutional rights under Artigeal [sic] 40.5 trí ghaedhilg…there are clear constitutional provisions that the instruments must be in both official languages and in the event of [there] being a conflict, then the ghaedhilg text takes supremacy".

Consideration of reason A

20. Although a broader range of points was made by the defendant in his written submissions – as opposed to the "speaking note" proffered on the day of the hearing – the defendant confined his submissions at the hearing to the points in the latter document and confirmed to the court that it was on these points he was placing reliance. The plaintiff therefore was faced, notwithstanding the exchange prior to the hearing of written submissions, with the prospect of dealing with submissions which emerged for the first time on the day of the hearing. In fairness to the defendant, the fundamental points made by him in the "speaking note" were contained in the written submissions

exchanged with the plaintiff prior to the hearing. Rather than apply for an adjournment to consider any new submissions, the plaintiff agreed to proceed with the matter.

21. A number of general points require to made about the defendant's application. He invokes "Order 19, Rule 28 and/or Rule 27 on the basis that [the proceedings are] bound to fail…". The defendant has not, in his notice of motion, invoked the inherent jurisdiction of the court to prevent an abuse of process. It is well established that, in considering an application under O.19, the court must only have regard to the pleadings, whereas under its inherent jurisdiction, the court can take a broader approach and hear evidence: see *Barry v. Buckley* [1981] IR 306 in this regard. There is no evidence proffered by the defendant in this application as to the background circumstances of the case. Even if there were, any conflict of fact would have to be resolved, for the purpose of the application, in the plaintiff's favour. As Clarke J (as he then was) put it in *McCourt v. Tiernan* [2005] IEHC 268, the court "must treat the plaintiff's claim at its high water mark".

22. It is also well established that the jurisdiction is to be "exercised sparingly and only in clear cases" [Costello J (as he then was) in *Barry v. Buckley*] and that "[g]enerally, the High Court should be slow to entertain an application of this kind" [McCarthy J in *Sun Fat Chan v. Osseous Limited* [1992] 1 IR 425]. The onus of proof "…lies on the defendant concerned to establish that the plaintiff's claim is bound to fail…" [Clarke J (as he then was) in *Salthill Properties Limited v. Royal Bank of Scotland PLC* [2009] IEHC 207 at para. 3.14].

23. The notice of motion invokes the jurisdiction under O.19 r. 27 and r. 28 on the basis that "the substantive relief sought is not available under the law as the relevant Statute, Section 62, subsection 7 of the Registration of Title Act 1964 has been repealed since 2009" [notice of motion]. As I interpret it in the light of the written and oral

submissions made on the day of the hearing, the defendant argues that the plaintiff's application in the proceedings for possession of the scheduled premises is based on the provisions of s.62(7) of the Registration of Title Act 1964 ('the 1964 Act'); that the plaintiff lost its ability to apply for possession by virtue of the repeal of that subsection by the Land and Conveyancing Law Reform Act 2009 ('the 2009 Act') and the decision in *Start Mortgages v. Gunn*); and that the plaintiff cannot retrieve its ability to prosecute the proceedings by virtue of the 2013 Act, as that act is unconstitutional due to the absence of an Irish translation of the Act.

24. The plaintiff sets out his case for this latter proposition in his written submissions. At para. 111 *et seq*, under the heading "The purported 2013 Act is repugnant to An Bunreachta Phoblachta Na Éire [sic]", the defendant cites the provisions of Article 8 and 15 set out above, and cites dicta from *Murphy v. The Attorney General* [1982] IR 241 as to the effect of a finding of unconstitutionality. The submissions then state: -

> "116. Based upon the constitution the purported 2013 Land and Conveyancing Legislation has never been enacted because under the constitution it is absolutely necessary that there is a Ghaedhilg text in existence and in the case of 2013 Act no Ghaedhilg is in existence [sic].
>
> 117. Upon perusal of the Statute book in the public domain the legislation, the subject matter of this motion, that my good friends are relying upon for their remedy, is not in Ghaedhilg.
>
> 118. This position and status is unconstitutional and has no effect on me or any other private individual in the State, as it is not lawful as sanctioned by the provisions of articles 8.1, 25.4.4, and 25.4.5 of the constitution.

119. Pursuant to provision 15.5 of the constitution, in that precise provision the tOireachtas [sic] states, **'The Oireachtas is not permitted to say that act which were not an infringement of law while they were being done are an infringement of law'** [sic]**.** [emphasis in original].

25. Counsel for the plaintiff points out that any challenge to the constitutionality of a statute must be in compliance with O.60 of the Rules of the Superior Courts, which is as follows: -

"1. If any question as to the validity of any law, having regard to the provisions of the Constitution, shall arise in any action or matter the party having carriage of the proceedings shall forthwith serve notice upon the Attorney General, if he is not already a party.

2. If any question as to the interpretation of the Constitution, other than a question referred to in rule 1, shall arise in any action or matter, the party having carriage of the proceedings shall, if the Court so directs, serve notice upon the Attorney General.

3. Such notice shall state concisely the nature of the proceedings in which the question or dispute arises and the contention or respective contentions of the party or parties to the proceedings.

4. The Attorney General shall thereupon be entitled to appear in the [action] or matter and become a party thereto as regards the question which arises."

26. It is trite law that statutes enacted by the Oireachtas enjoy a presumption of constitutionality before the courts. If the defendant wishes to challenge the constitutionality of a statute, the State must be given an opportunity to meet that challenge. As counsel for the plaintiff points out, such challenges almost invariably

involve a plenary hearing. An allegation that a statute is unconstitutional is not a basis for asking a court to dismiss a plaintiff's case as having no prospect of success.

27. I am mindful that the defendant is a lay litigant, and as such attracts a certain degree of forbearance on the part of the court as regards any failure to follow appropriate procedures. It is also the case that, by order of this Court (Allen J) of 16th February, 2021, the defendant was given liberty *inter alia* "for the trial of a preliminary issue of law". However, while O.25 of the Rules of the Superior Courts, to which the defendant refers in the notice of motion, does indeed permit the court to adjudicate upon a point of law prior to the trial of the action, the order is not intended to by-pass the O.60 procedure; to do so would be to deprive the State of the opportunity to oppose a challenge to the constitutionality of a statute.

28. Counsel for the plaintiff submitted that the absence of a translation did not in any event invalidate the 2013 Act, even if it were necessary for the plaintiff to rely on it, a conclusion which could only be asserted by the defendant on the basis of the facts of the case, no evidence of which has been adduced before this Court. Counsel expressed doubt as to whether the 2013 Act had any relevance at all to the plaintiff's case. Not being privy to the facts of the case or the legal basis for it – the summons does not refer to either the 1964 Act or the 2013 Act, or the 2009 Act for that matter – the court also has difficulty in determining whether the 2013 Act has any relevance to the plaintiff's case.

29. It appears that the proceedings were instituted on 30th January, 2012 (or 2013), *i.e.* subsequent to the repeal by the 2009 Act of s.62(7) of the 1964 Act, and prior to the enactment of the 2013 Act. However, no further evidence was before the court in relation to the circumstances in which the plaintiff initiated the proceedings. At what point did the principal monies become due? The decision in *Start Mortgages v. Gunn*

makes it clear that a lender who has acquired a right to apply for an order pursuant to s.62(7) by the date of coming into force of the 2009 Act – 1st December, 2009 – could institute proceedings invoking the section after that date. The acquisition of such a right is dependent on the principal sum secured by the mortgage becoming due; when and how this occurs in a given case is determined by the terms of the mortgage and the dealings between the parties, matters in respect of which the plaintiff has proffered no evidence to this Court.

30. Without this evidence, the court is not in a position to form a view as to whether the 2013 Act has any relevance to the plaintiff's case, or whether its provisions are required to "save" the plaintiff's case, in which case the constitutionality of that act might be an issue.

31. In any event, it seems to me that the submission of counsel for the plaintiff that the absence of a translation does not invalidate an act is inarguably correct. In *O Murchú v. The Taoiseach & Ors.* [2010] IESC 26, a case referred to by the defendant in the present case, and in which the Supreme Court issued judgments in Irish and in English, Macken J referred at p.12 of the judgment to Article 25.4.4 of the Constitution and stated as follows: -

> "I am satisfied that neither on its face, nor on a correct interpretation of this Article, is there a constitutional obligation to enact legislation in both official languages. It is clear that, either the first official language, Irish, or the second official language, English, may be used for the purposes of enacting legislation. Bills, when signed by the President, do not have to be signed in both languages. This is also clear from the wording of the Article itself which envisages the presentation of a Bill for signature and promulgation in one official language only, since otherwise there would be no necessity to refer to a version in

> the 'other official language'. As soon as a Bill is signed, in one language, by the President, it becomes, by virtue of the provisions of Article 25.4.1 of the Constitution, an Act…"

32. The court went on to find that Article 25.4.4 when read together with Article 8 of the Constitution does not oblige "…the simultaneous translation of an Act of the Oireachtas in Irish where it is signed into law by the President in an English language version…" [p.22 of judgment]. If it is the case that there is no version *as Gaeilge* of the 2013 Act, it may be that the State has not abided by its obligations in that regard. The implications of any such default are for another day. It is absolutely clear from the judgment in *O Murchú* that any failure to translate the English version enrolled in the Supreme Court into Irish does not affect the validity of the enactment. Thus, if the plaintiff requires to rely on the provisions of the 2013 Act in these proceedings – and I have no view as to whether it does or not – it is not inhibited from doing so by the absence of an Irish translation of that Act.

33. The defendant concludes his "speaking note" submissions on reason A by stating that "…[i]n summary, the failure of the Oireachtas and the State to provide a law trí ghaedhilg means that there is no applicable law which can be used to impinge on my rights under Artigeal [sic] 40.5". For the reasons set out above, this submission, in as far as it is intended to refer to the 2013 Act, is incorrect and misconceived.

Reason B

34. The defendant relies on s.1(5) of the 2013 Act, which states that the section "…does not apply to proceedings initiated before the coming into operation of this section". As the proceedings were undoubtedly initiated prior to the coming into operation of s.1 of the 2013 Act – 24th July, 2013 – the defendant submits that the

plaintiff cannot avail of its protection, "…even if the purported 2013 Act was properly enacted and law…".

35. As there is no evidence before me which demonstrates that, in order to succeed in the proceedings, the defendant must be able to prevail of the provisions of the 2013 Act, this point does not avail the defendant. The plaintiff in its written submissions states as follows: -

> "34. In summary, while section 62(7) of the 1964 Act has undoubtedly been repealed, as a result of the Interpretation Act a party can rely upon on any accrued rights. It is Pepper's position that it satisfies the requirements of section 62(7) and so has such accrued rights."

36. While this statement is not evidence, the onus of proof is not on the plaintiff. The courts have repeatedly confirmed that the effect of the decision in *Start Mortgages v. Gunn* is that, as Clarke CJ put it in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46, "…a mortgagee can only acquire a right to apply for an order under s.62(7) when the principal money secured by the relevant mortgage had become due and, if that had not happened before the repeal of s.62(7), s.27 of the Interpretation Act, 2005 was of no assistance to the mortgagee in negating the effect of the repeal…" [para. 6.3 of judgment]. Conversely, if accrued rights existed prior to the repeal of s.62(7) by the 2009 Act, the mortgagee was entitled to continue to rely on that section. There is no evidence proffered by the defendant to suggest that the plaintiff's position as regards its accrued rights is incorrect.

Reason C

37. Essentially, this "reason", expounded at some length in the speaking note, asserts that the 2013 Act is "flawed and unconstitutional" in providing for a retrospective reversal of the repeal of the appropriate subsection of s.62 of the 1964

Act. The plaintiff's submissions assert that the defendant is "mistaken when he argues that it is not possible to enact legislation with retrospective effect. He cites no authority for this argument other than to claim that such a principle is globally accepted…" [para. 35 of written submissions].

38. The plaintiff is correct in this regard. Legislation can be enacted with retrospective effect, although there are principles of law which govern when this is permissible: see Statutory Interpretation in Ireland, Dodd [2008], Tottel Publishing, paras. 4.117 to 4.137. Even if the present case were one in which the retrospectivity in the 2013 Act infringed on the defendant's constitutional rights – and the defendant has made no case in this regard – the defendant has not challenged the constitutionality of the 2013 Act in a manner authorised by court procedure and O.60 in particular. His assertions as regards the "flawed" or unconstitutional nature of the 2013 Act cannot be the basis for striking out the plaintiff's case as having no prospect of success.

Reason D

39. Mr. Macken argues that s.1(2) of the 2013 Act has no effect. He argues that s.62(7) of the 1964 Act "was not in force or existing immediately before the attempt to revive [the sub-section] in 2013". Mr. Macken considers that this interpretation is "underpinned by the clarity given" in s.27(1) of the Interpretation Act 2005 which states that "where an enactment is repealed, the repeal does not…(a) revive anything not in force or not existing immediately before the repeal…".

40. In its submissions, the plaintiff considers that "Mr. Macken's reference to section 27(1) of the Interpretation Act 2005 is mistaken. The section in question deals with the interpretation of statutory provisions. It does not regulate or prohibit an express provision such as section 1(2) of [the 2013 Act] …". [Paragraph 37 written submissions].

41. This submission is undoubtedly correct. The Interpretation Act 2005 – as its title suggests – is concerned with general principles which govern the interpretation of statutes. It is not intended to inhibit the enactment of express provisions of retrospective or retroactive effect, which are in principle clearly permissible. The defendant's submission is misconceived and without merit.

Reason E

42. Mr. Macken claims that the 2013 Act has no effect as "section 1 and section 4 have not commenced". He points out that, under s.5(2) of that Act, sections 2 and 3 require to be commenced by order of the Minister for Justice and Equality. He infers that, as sections 1 and 4 have no express commencement date, they have never taken effect.

43. Once again, this point is completely misconceived. Sections 1 and 4, as with all sections which do not expressly require a commencement procedure, took effect on enactment of the 2013 Act. It is frequently the case that specific sections of a statute require some further act to bring them into force; this does not mean that the entire act must be brought into force in the same way. There is no merit in the defendant's point.

Reason F

44. Mr. Macken submits that s.62(7) of the 1964 Act is and was at all times unconstitutional as being contrary to Article 40.5 of the Constitution as quoted above. He argues that a charge owner has no lawful "estate legal or equitable in the land", and thus cannot "recover, take or secure an Order for possession…that would be repugnant to the provisions of 40.5 of the Constitution…".

45. The defendant has not observed any of the formalities for challenging the constitutionality of s.62(7), such as putting the Attorney General on notice. Leaving that aside, the plaintiff submits that the courts "…are possessed of ample jurisdiction to

direct that possession or ownership of real property be provided to a charge holder, notwithstanding the absence of consent. That jurisdiction is not diminished by Article 40.5 of the Constitution" [Paragraph 41 written submissions].

46. The defendant relies upon the decision of Abbott J in *In the Matter of an Application by Allied Irish Banks PLC* [2006] IEHC 463 in which the court had to consider a reference by the Registrar of Titles to the High Court pursuant to s.19(2) of the 1964 Act. The reference required guidance as to the registrability of the ownership of a fluctuating share in property – in that case, a charge – together with other related technical queries. In the course of his judgment, Abbott J referred to s.64(4)(a) of the 1964 Act which states that "on registration of the transferee of the charge, the instrument of transfer shall operate as a conveyance by deed within the meaning of the Conveyancing Acts, and the transferee shall…(a) have the same title to the charge as a registered transferee of land under this Act has to the land, under a transfer for valuable consideration or without valuable consideration, as the case may be…". The court points out that a distinction is drawn between "charge" and "land", and notes a statement in Glover on the Registration of Titles (Ireland) Act 1891 to the effect that "…The owner of a charge has no estate legal or equitable in the land; the only state that can exist on the land is the estate of the registered owner. A charge owner is in the same position as the owner of a mere charge in unregistered land, who cannot recover possession of it from his mortgagor because his mortgage does not convey any estate to him…".

47. The defendant infers from this passage of the judgment of Abbott J that the court "confirmed that a charge registered on the folio, does not allow the registered owner of the charge to recover Possession of the land from the mortgagor as a charge is not an

estate in the land. The only estate that can exist on the land is the estate of the registered owner".

48. It is clear that the inference which the defendant has drawn from the dicta of Abbott J is unwarranted. While the court did indeed distinguish between a "charge" and "land", Abbott J went on to refer specifically to s.62 sub. 6 of the 1964 Act, which, notwithstanding its subsequent amendment by the 2009 Act, was at the time of the judgment of Abbott J – 20th October 2006 – as follows: -

> "(6) On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge."

49. Abbott J points out that this sub-section has "…removed many of the shortcomings of the charge under the 1891 Act highlighted by Glover…". In any event, the court in that case was not required to address the enforceability of a charge, much less the constitutionality of any statute. Such enforceability is not remotely in doubt, as will be apparent from s.64(4)(b) of the 1964 Act, which provides that the transferee of the registered owner of a charge shall "…have for enforcing his charge the same rights and powers in respect of the land as if the charge had originally been created in his favour…"; see also s.62(9) of the 1964 Act, which provides that "…if the registered owner of a charge on land sells the land in pursuance of the powers referred to in subsection (6), his transferee shall be registered as owner of the land, and thereupon the registration shall have the same effect as registration on a transfer for valuable consideration by a registered owner".

50. It is clear therefore that where the registered holder of a charge seeks possession on foot of that charge where the circumstances of the case warrant such an application – and I do not express any view as to whether the plaintiff's claim for possession is warranted in the present case – it does so "in accordance with law". A challenge to the constitutionality of s.62(7) of the 1964 Act on the basis that a charge does not confer an estate in land is misconceived, even if the jurisdiction to challenge the section had been correctly invoked.

Conclusion

51. For the reasons set out above, the defendant's application to strike out the proceedings on the basis that they are bound to fail must be dismissed. I do not propose to make any order in relation to the second relief on the notice of motion which, as I have previously mentioned, has been overtaken by events.

52. As the defendant's application has not succeeded, I am of the preliminary view that the appropriate order as to costs is that they follow the event, and that the plaintiff should be awarded its costs against the defendant, to be adjudicated in default of agreement. In the event that the parties wish to vary or contest this order, or to suggest any other order which may be appropriate, I will allow the parties to deliver a brief written submission of no more than one thousand words within seven days of delivery of this judgment. On receipt of any such submissions, I will make an appropriate order without further reference to the parties.