APPROVED **[2024] IEHC 329**

THE HIGH COURT
CIRCUIT APPEAL

2022 22 CA

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

BRUNO RAMSEYER
NUALA RAMSEYER

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 6 June 2024

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The order under appeal is an order directing the defendants to deliver up possession of two parcels of registered land to Start Mortgages DAC. The order of the Circuit Court is dated 1 February 2022.

2. The appeal to the High Court is pursued by the second named defendant alone. The appeal ultimately came on for hearing before me on 30 April 2024. The

appeal takes the form of a complete rehearing, with the parties remaining in the roles which they had occupied in front of the Circuit Court. Accordingly, notwithstanding that the second named defendant is the appellant, the plaintiff remains the moving party in the proceedings and bears the onus of establishing the "*proofs*" necessary to ground an application for an order for possession pursuant to section 62(7) of the Registration of Title Act 1964.

3. For the reasons explained below, the plaintiff has not yet established its proofs and the matter will have to be remitted to plenary hearing.

LEGISLATIVE FRAMEWORK

4. The application for an order for possession is made pursuant to section 62(7) of the Registration of Title Act 1964 (as applied by section 1 of the Land and Conveyancing Law Reform Act 2013). The moving party must establish, first, that it is the owner of each of the two registered charges, and, secondly, that the "*principal money*" in respect of a debt secured by those charges has become due and owing.

5. The Circuit Court Rules envisage that an application for an order for possession will normally be made on a summary basis: see Order 5B. However, the Circuit Court—and the High Court on appeal—enjoys a broad discretion to remit an application to plenary hearing.

6. The principles guiding the exercise of this discretion have been clarified by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381. Baker J., delivering the unanimous judgment, explained that there are a range of responses available to a court in an action for summary judgment. At one end of the range are cases where a plaintiff establishes its

claim on the affidavit evidence because the defendant is not able to persuade the judge either that the evidence is incomplete nor that there is a basis on which a credible defence exists. At the other end of the range are cases where a defendant either positively establishes a defence at law or on the merits, or, alternatively, persuades the judge that the plaintiff has not established its proofs.

7. Baker J. went on then to explain, at paragraph 80 of the reported judgment, that many cases fall between these two extremes:

> "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."

8. The position was summarised as follows at paragraph 105 of the reported judgment:

> "The jurisdiction is one vested by the CCR but may properly be said to be one that exists in any case heard on affidavit. It is perhaps the default position in any case where the affidavit evidence is evenly balanced, where there is a conflict on the affidavits between the parties which cannot be or has not been resolved by way of further affidavit, where the court considers that a matter raised on affidavit, particularly one raised in defence, might have such a bearing on the outcome that its credibility deserves to be fully tested, or where a judge considers that in the light of certain averments which are credible, but not dispositive, it would be either difficult or unfair to resolve the matter without giving both sides the opportunity to further advance that evidence or, where necessary, to test it. The adjudicative function is not a matter of box ticking or a purely logical engagement with a checklist of proofs that must be met by a plaintiff. Certain evidential presumptions or burdens can make the task of

> adjudication at times appear almost effortless, but the fact remains that a judge met with evidence, whether contested or not, must weigh that evidence, assess its veracity, credibility, and importance for the purposes of proving those matters that are required to be established. In a case where the action is heard on affidavit, courts are vigilant to consider the option to adjourn the matter for plenary hearing. The vigilance derives from the fact that affidavit evidence of its nature is often in terms which have a tone of certainty which is not always found in oral testimony, particularly where that is cross-examined, and because the affidavits are often drafted by lawyers with a view to the legal test."

9. I turn next to apply these principles to the circumstances of the present case.

(1). OWNERSHIP OF CHARGE

10. The first proof to be established by the moving party in an application under section 62(7) of the Registration of Title Act 1964 is that they are the registered owner of the charge. Here, Start Mortgages DAC ("*Start Mortgages*") assert that they are now the registered owner of two charges originally granted in favour of the Governor and Company of the Bank of Scotland. These charges are in respect of the lands held under Folio 8720 and Folio 17731F of the Register County Kildare, respectively. The lands are known as Whistledown, Castlewarden, Straffan, County Kildare.

11. The original charge in favour of the Governor and Company of the Bank of Scotland is clearly identified in each of the folios. In each instance, there is a subsequent entry which indicates that Bank of Scotland plc is the owner of the charge referred to at the earlier entry. In each instance, there is then a subsequent (third) entry which indicates that Start Mortgages Ltd is the owner of the charge registered at the entry number which refers to Bank of Scotland plc. The wording of this third entry makes no sense. This is because there is no "*charge*"

at the second entry. Rather, the second entry merely contains a cross-reference to the entry in respect of the original charge.

12. Counsel on behalf of the plaintiff, very properly, accepted that these discrepancies were "*not ideal*", and that the register could not be regarded as "*conclusive*" on these matters.

13. It will be necessary to have the two folios amended. It is essential that the terms of each folio entry be precise and accurate. Section 31 of the Registration of Title Act 1964 provides that the register shall be conclusive evidence of any right, privilege, appurtenance or burden appearing on the register. The Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352, [2019] 1 I.R. 385 held, *inter alia*, 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 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 that the right to possession has arisen and become exercisable. This decision has since been approved of by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* (cited above). If and insofar as a defendant wishes to challenge the correctness of the register, it is necessary for them to institute separate proceedings against the Property Registration Authority of Ireland.

14. These strictures cut both ways. Just as a charge holder is entitled to rely on the express terms of the folio when seeking an order for possession, so too is the owner of the lands. Here, neither folio establishes in unequivocal terms that Start Mortgages DAC is the registered owner of the two charges originally granted in favour of the Governor and Company of the Bank of Scotland. If Start

Mortgages wishes to pursue its claim for an order for possession, it will be necessary for Start Mortgages to apply to have the register corrected prior to the plenary hearing.

(2). EVIDENCE RE: TRANSMISSION OF DEBT

15. For the reasons explained under the previous heading, the moving party has failed to establish the first essential proof for the application, namely, that they are the registered owner of the charge. This is because the wording of the folio is imprecise. Had this been the only deficiency in the proofs, I would have been prepared to adjourn the proceedings to allow time for the moving party to seek to have the register corrected. However, the moving party has also failed to establish the second essential proof, namely, that the "*principal money*" in respect of a debt secured by one or other of the charges has become due and owing.

16. The usual way in which a creditor establishes that the principal money secured by the instrument of charge has become due is to exhibit: (i) the loan agreement itself; (ii) the demand for repayment (if this is a prerequisite to the principal money becoming due and owing); and (iii) a statement of account which indicates that an event of default, which triggers the obligation to repay the principal money, has occurred and has not been remedied. There is then normally an affidavit confirming that the account is still in arrears as of the date the proceedings are issued. The exhibits in the present proceedings contain documentation of this type.

17. The complicating factor is that the loan agreement was entered into by a *different entity* than the plaintiff in these proceedings. More specifically, the loan

agreement was entered into by the Governor and Company of the Bank of Scotland. Typically, the way in which a subsequent purchaser of a debt establishes its ownership is to exhibit the relevant parts of the deed of transfer by which ownership of the debt is said to have been transmitted.

18. The application for an order for possession is advanced on the basis that the plaintiff, Start Mortgages, is now the owner of a debt owed by the defendants. More specifically, it is asserted that the defendants had entered into a loan agreement with the Governor and Company of the Bank of Scotland on 21 May 2004, and that the debt has since been transferred to Start Mortgages.

19. The chain of title asserted is as follows:

1 July 2004	Assignment and transfer to Bank of Scotland (Ireland) Ltd
December 2010	Cross border merger transfer to Bank of Scotland plc
11 October 2014	Bank of Scotland plc to LSF Irish Holdings 56 Ltd
20 February 2015	Bank of Scotland plc to Start Mortgages Ltd

20. The evidence currently before the court in respect of the supposed transmission of the debt to Start Mortgages is incomplete. A document entitled "*Deed of Assignment (excluding property collateral)*" dated 20 February 2015 has been exhibited. This deed is as between Bank of Scotland plc, as assignor, and Start Mortgages Ltd, as assignee. The document is heavily redacted. The redactions are not confined to the schedule of properties and security documents, i.e. information which might identify other borrowers. Rather, whole swathes of the operative clauses of the deed have been omitted. For example, several clauses have been redacted from the definition section. There is then a heading "*assignment*": some two and a half pages of this section have been redacted.

21. A document entitled "*Purchase Deed in Relation to a Portfolio of Loan Facilities*" has been exhibited. This deed is dated 11 October 2014. This deed is as between Bank of Scotland plc, as the seller, and LSF Irish Holdings 56 Ltd, as buyer. Again, the document is heavily redacted.

22. It is simply not possible for this court to determine, from reading these heavily redacted documents, whether Start Mortgages has, in fact, taken a valid transfer of the debt outstanding in respect of the loan originally advanced by the Governor and Company of the Bank of Scotland.

23. It should be emphasised that this is not a case where minor redactions have been made on the grounds that same are necessary to protect the privacy of third parties whose debts are said to have been encompassed as part of a global transfer of assets. Nor is it a case where it has been asserted, on a reasoned basis, that certain information has been redacted on the grounds of commercial sensitivity (cf. *Farrell v. Everyday Finance DAC* [2024] IECA 16). Rather, whole swathes of the operative part of the deeds have been blanked out, without any meaningful explanation or justification having been offered. The redactions are so extensive that this court cannot safely interpret the legal effect of the deeds with a view to determining whether or not they had the consequence of transferring to Start Mortgages the debt outstanding in respect of the loan originally advanced by the Governor and Company of the Bank of Scotland. The limited material before the court does not establish, even on a *prima facie* basis, that the defendants' debt has been transferred to Start Mortgages.

24. As matters currently stand, therefore, Start Mortgages cannot succeed in its application for an order for possession. That is not, however, an end of the matter. This court, exercising its appellate jurisdiction from the Circuit Court,

has discretion pursuant to Order 5B of the Circuit Court Rules to direct that the matter be remitted to plenary hearing. The principles governing the exercise of this discretion have been set out authoritatively by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* (cited above).

25. Whereas I am not satisfied that Start Mortgages has, as of yet, made out the proofs for an application for an order for possession, neither am I satisfied that the second named defendant has, as of yet, made out a defence on the basis that the charge and underlying debt has not been transferred to Start Mortgages. It seems to me that the court cannot draw final conclusions, one way or the other, on the basis of the very limited evidence which has been put before the court by Start Mortgages. I have decided, therefore, that the interests of justice require that the matter be remitted to plenary hearing. This will allow the parties an opportunity to put in whatever further evidence they wish. The court can then adjudicate on the matter on the basis of a complete set of evidence.

(3). ALLEGATION OF UNDUE INFLUENCE

26. The second named defendant seeks to defend the proceedings on the grounds of undue influence. The second named defendant has averred: (i) that she was subject to emotional and physical abuse by her husband, i.e. the first named defendant; (ii) that she was forced, by her husband, to sign documents under risk of physical assault; (iii) that she did not know what she was signing; (iv) that she never had the benefit of independent legal advice; and (v) that the solicitor, whose name appears as a witness on the mortgage/charge, was her husband's personal solicitor.

27. The second named defendant has exhibited medical records which indicate that her husband had briefly gone into residential care in a mental health institution in the year 2005 following a violent incident at the family home. This is said to corroborate her allegations of emotional and physical abuse.

28. The answer made by Start Mortgages to these allegations is as follows. First, it is said that there are inconsistencies in the second named defendant's affidavit evidence. By way of example, the second named defendant appears, in her earlier affidavits, to allege that her signature on the mortgage/charge had been forged, whereas in her more recent affidavits, she says that she does not know whether she signed the documents or not in circumstances where she maintains that she regularly signed contractual documents without reading them due to her fear of her husband.

29. Start Mortgages also seeks to query the second named defendant's averment that she did not know of the mortgage/charge until 2016 and did not know that part of the loan monies had been paid, by the nominated solicitor, to a company (TCW Supplies Ltd). The plaintiff points out that the second named defendant had been a director and shareholder of the said company and that she had held negotiations in 2013 with Certus (the agent then servicing the loan).

30. More generally, Start Mortgages submits that its predecessors in title were not on actual or constructive notice of the alleged undue influence, and neither they nor Start Mortgages are affected by same. Counsel referred the court to case law which, on his analysis, indicated that the concept of undue influence does not apply with the same force to loans where the spouse alleging undue influence is a co-borrower (rather than merely a surety for the disputed debt). Counsel cites,

in the written legal submissions, the decision of the House of Lords in *CIBC Mortgages plc v. Pitt* [1994] 1 A.C. 200.

31. Leaving aside the fact that this decision predates the leading case of *Royal Bank of Scotland v. Etridge (No. 2)* [2002] 2 A.C. 773, it is doubtful whether there is any bright line rule to the effect that a co-borrower falls to be treated differently. For the reasons explained by the Court of Appeal in *ACC Bank plc v. Walsh* [2017] IECA 166, there is arguably some equivalence between a spouse who is unduly influenced to join in a loan application from which they are to derive no benefit, and a spouse who is unduly influenced to provide a guarantee for a primary loan from which they will derive no benefit. In each instance, the spouse is exposing themselves to liability for the amount owing to the bank in the event of default. On the facts of *Walsh*, the Court of Appeal held that the spouse had established an arguable defence on the basis of undue influence. The matter was, accordingly, remitted to plenary hearing.

32. It is apparent from the case law cited on behalf of Start Mortgages that it is necessary to consider the circumstances leading up to the making of the relevant loan. Factors to be taken into account include whether the creditor leaves it to a husband to procure his wife's participation, and whether the creditor is aware that the loan is for the husband's own purposes (as opposed to for the couple's joint purposes).

33. The necessity to consider the specific circumstances leading up to the making of a loan in any particular case means that it will rarely be appropriate to rule upon a defence of undue influence on the basis of affidavit evidence alone. Certainly, in a case such as the present, where the spouse asserting undue influence has put

forward sufficient evidence to establish credible grounds for such a defence, then the matter should be remitted to plenary hearing.

34. Having regard to the current state of the evidence, the second named defendant has done enough to establish credible grounds for saying that she has a defence, based on undue influence, which would affect Start Mortgages' claim. In particular, there are a number of unusual features of the loan transaction in the present case which might be held by the court of trial to have put the original lending institution on inquiry. The loan appears to have been more in the nature of commercial borrowing rather than a conventional home loan. The term of the loan is only five years and the repayments were to be interest only. The interest was to be paid by a company rather than either of the two named borrowers. The principal sum of €600,000 was to be repaid in full at the end of the five years.

35. It appears from the documentation most recently exhibited by Start Mortgages that it had been indicated on the loan application form that the funds were being sought for a development project consisting of the building of three to four houses on the lands.

36. It also appears that the loan monies were used to redeem a charge in favour of Stenham plc in the sum of €368,390.24. The second named defendant avers that she was unaware that this charge had been registered against her family home. The balance of the loan monies appear to have been paid to the company account of TCW Supplies Ltd. The second named defendant avers that she was unaware of these payments and not asked to authorise them. She also avers that she would never consciously have signed any loan agreement which involved a charge being placed on her family home.

37. Having regard to all of these features, there is a stateable case for saying that the Governor and Company of the Bank of Scotland were put on inquiry and that their seeming failure to ensure that the second named defendant had the benefit of legal advice independent of her husband may preclude Start Mortgages, as their (supposed) successor in title, from enforcing the mortgage/charge.

CONCLUSION AND PROPOSED FORM OF ORDER

38. For the reasons explained herein, this appeal will be adjourned to plenary hearing pursuant to Order 5B of the Circuit Court Rules. The plenary hearing will be before the High Court. (See *Bank of Ireland Mortgage Bank v. Cody* at paragraphs 110 to 113 of the reported decision).

39. It is important to reiterate that this judgment says no more than that the second named defendant has demonstrated, on the basis of the limited materials before the court to date, that there are credible grounds for defending the proceedings. The judgment does not say that the potential defence is necessarily a strong one. Rather, the point is that the legal and factual issues raised by the second named defendant are sufficiently weighty to preclude the case being determined in a summary or peremptory manner. It will be for the trial judge to decide the case on the basis of oral evidence and such further documentation as may be directed to be discovered.

40. The parties are requested to attempt to agree a timetable for the exchange of pleadings and the making of discovery. If agreement cannot be reached, the court will issue formal case management directions. As to legal costs, my *provisional* view is that an order for costs should be made in favour of the second named defendant in respect of the costs of the appeal to date.

41. This matter will be listed before me on 20 June 2024 at 10.30 AM for further directions and to address the issue of costs.

Appearances

John Donnelly SC and Shaula Connaughton Deeny for the plaintiff instructed by Ivor Fitzpatrick & Company Solicitors
Gavin Mooney SC and Patricia Hill for the second named defendant instructed by Cullen & Co. Solicitors