[2024] IEHC 561

THE HIGH COURT

[2023/161CA]

BETWEEN:

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF / RESPONDENT

AND

ANDREW DOYLE AND LINDA DOYLE

DEFENDANT / APPELLANTS

Judgment of Mr Justice Barry O'Donnell delivered on the 26th day of September 2024

INTRODUCTION

1. This judgment concerns an appeal against an order for possession that was granted by the Circuit Court in July 2023. The proceedings were commenced by way of a Civil Bill for Possession on 16 January 2015. The plaintiff sought an order for the possession of the lands and premises comprised in Folio 49533F County Dublin, more commonly known as 9A Riversdale Crescent, Clondalkin, Dublin 22. On 20 July 2023, His Honour Judge O'Connor made the order sought by the plaintiff. As the first defendant unfortunately passed away in 2020, the second defendant engaged with the proceedings thereafter and is the appellant in these proceedings.

2. There was very limited controversy about the central facts in the case. The position of the plaintiff as set out in the Civil Bill for Possession was that a letter of loan offer dated 10 October 2008 was accepted by the defendants, and they borrowed €340,000. The loan was secured by a charge in favour of the plaintiff, which was registered on the folio on 23 April 2009. Both the acceptance of the loan offer and the mortgage / charge had been executed by the defendants in the presence of their solicitor.

3. Clause 9 of the mortgage deed confirmed that the plaintiff was entitled to exercise its powers under the mortgage upon the occurrence of events of default. Clause 8 of the deed set out the plaintiff's powers, which included a power to take possession. The defendants defaulted in their agreed repayments. As of 7 October 2014, the total debt claimed as owing by the plaintiff was €375,505.50. In October 2014, the plaintiff wrote letters calling for the repayment of the debt and for possession of the property, and these proceedings were commenced in January 2015.

4. Following the commencement of the proceedings there was an extensive exchange of affidavits. The central argument of the second defendant was that there had been overcharging. That allegation was rejected by the plaintiff; but its main response was that, in an application such as this, the critical proof was default in the defendants' obligations. Here, the evidence was that there had been extensive defaults prior to the issue of the proceedings; and by July 2023, the overall debt was €540,157.14, of which €225,515.21 comprised arrears.

5. As required by the relevant legislation, the appeal was heard by way of a de novo hearing, and the second defendant sought to oppose the application on grounds which can be summarised as follows:

i. That the plaintiff's claim 'falls foul' of the test set down by the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84;

ii. That the plaintiff's proofs were not in order and did not establish entitlement on the part of the plaintiff to seek the relief sought herein;

iii. That the plaintiff contravened section 29 of the Central Bank Act, 1997, as amended, by operating as a regulated business without the necessary authorisations, which, in turn, provided grounds for a counterclaim as against the plaintiff pursuant to section 44 of the 2013 Act;

iv. That the defendant was overcharged interest and as such the plaintiff's actions amount to a breach of consumer protection legislation; and

v. That the terms of the mortgage agreement constitute unfair terms under the Unfair Terms Directive and 1995 Regulations.

HAS THE PLAINTIFF'S PRIMA FACIE CASE FOR AN ORDER FOR POSSESSION BEEN MADE OUT?

6. The legal principles applicable to the issues in this case are clear and well established. In *Bank of Ireland Mortgage Bank v. Cody* [2021] 2 IR 381, the Supreme Court reiterated the nature of the statutory jurisdiction conferred by s. 62(7) of the Registration of Title Act, 1964 for summary disposal of an action seeking possession of registered land as follows:

> *"49. The owner of a charge who seeks to obtain possession pursuant to s. 62(7) has to prove two facts:*
>
> *(a) That the plaintiff is the owner of the charge;*
>
> *(b) That the right to seek possession has arisen and is exercisable on the facts."*

7. In the recent case of *Start Mortgages DAC v. Clarke* [2024] IEHC 310, Heslin J. considered very similar arguments to those being advanced by the second defendant in this case. The four aspects to the defendants' claim in *Clarke* were as follows; (1) The plaintiff's claim 'falls foul' of the test laid down by the Supreme Court in *Bank of Ireland Mortgage v. O'Malley* [2019] IESC 84; (2) The plaintiff's proofs were not in order; (3) The terms of the plaintiff's letter of offer were unfair; and (4) Overcharging of interest created a set off which gives rise to a defence.

8. In *Clarke*, the proceedings concerned an appeal against an order for possession made in the Circuit Court. First, Heslin J., citing the decision of Woulfe J. in *Start Mortgages DAC v. Ryan* [2021] IEHC 719 at para. 21, set out the burden of proof resting on a plaintiff in an application of this type:-

> *"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.

[emphasis added by Heslin J.]

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…"

[emphasis added]

9. Heslin J. continued by identifying four questions in order to determine the claim before him as being:-

"(i) Are the relevant monies secured on the property?

(ii) Is the Plaintiff the owner of the relevant charge?

(iii) Has there been default resulting in the monies becoming due? and

(iv) Has the Defendant put forward a credible defence?"

10. Here, the court is fully satisfied that the plaintiff has made out a *prima facie* case for an order for possession, in that:-

(i) It is not contested that the relevant monies are secured on the property.

(ii) The plaintiff has produced an updated folio which establishes it is the owner of the charge sought to be enforced, and the defendants did not dispute the validity of the folio at hearing.

(iii) It is not disputed, and the plaintiff has established that there was a considerable default in the repayment obligations prior to the issue of the proceedings.

(iv) The plaintiff has established that the right to seek possession has arisen and is exercisable on the facts, having regard to the terms of the agreements executed by the defendants.

11. Accordingly, the plaintiff has established and there is no real dispute that the defendants applied for finance from the plaintiff's predecessor (prior to its change to a designated activity company). The defendants accept they borrowed the money described in the facilities letter, they accept they fell into difficulty in making the agreed repayments, and that when the defendants failed to meet the demand for repayment the total debt became due. At the hearing of this appeal, counsel for the second defendant stated to the effect that he was not disputing that there was default, but he asserted that the proceedings should be remitted to plenary hearing because there were other points of defence to be agitated.

THE ARGUMENT THAT THE PLAINTIFF'S CLAIM 'FALLS FOUL' OF THE TESTIN BANK OF IRELAND MORTGAGE BANK V. O'MALLEY [2019] IESC 84

12. In the present case, the defendant states that the decision of Simons J. in *Promontoria (Finn) Limited v. Coleman Flavin* [2023] IEHC 663 is authority for the proposition that summary judgment and summary possession proceedings are analogous, and thus the principles set out in *O'Malley* are applicable to summary possession proceedings with equal force. I consider that this argument is incorrect and grounded on a profound misapprehension of the critical differences between the two forms of proceedings.

13. The defendants in *Clarke* also relied on the decision of Simons J. in *Flavin* where he stated, with reference to summary claims for debt and for possession, respectively that: *"...the two types of proceedings are analogous in that both seek to obtain substantive relief on a summary application."*

14. Heslin J., rejected that argument, and I agree fully with his reasoning. As noted by Heslin J.: -

> *"82. Nowhere in Flavin did the learned judge suggest that proceedings which seek possession will be defective unless they contain sufficient details to meet the 'benchmark' laid down by the Supreme Court in O'Malley as to how the specific amount due is calculated. Furthermore, nowhere in O'Malley did Clarke CJ state that the level of detail required in a summary claim for debt also applied to proceedings where a Plaintiff does not seek judgment for a debt."*

15. In this case, as in *Clarke,* the plaintiff has proved the existence of the charge and the terms of the mortgage deed. The plaintiff has proved that the charge was registered on the relevant folio. The plaintiff has proved that there was a default in the obligations undertaken by the defendants to make repayments and that, under the terms of the deed, this default triggered the entitlement of the plaintiff to demand repayment of the principal sum and in default of that repayment to demand possession.

16. The difference between prima facie proof in an application for a liquidated sum and an application for possession was explained in the following terms in *Clarke* by Heslin J.: -

> *"83. What is common between both a summary claim for a liquidated amount and a summary claim for a possession is that the relevant Plaintiff must*

establish their claim on a prima facie basis. The Plaintiff in the present claim has done just that. Unlike the position in Flavin, this court has had the benefit of the relevant Land Registry folio. Furthermore (and, again, unlike the situation in Flavin) the Plaintiff has furnished a copy of the relevant mortgage deed. An examination of the terms of the relevant charge in the context of the balance of the evidence proffered by the Plaintiff means that this court can be satisfied that the right to take possession of the property has arisen.

No authority

84. In response to my questions, counsel for the Defendants confirmed, very appropriately, that he could point to no authority to the effect that a Civil Bill seeking possession must comply with the requirements of O'Malley as if the claim were in respect of a debt. Rather, counsel for the Defendant returned, repeatedly, to the phrase "the two types of proceedings are analogous" as a basis for submitting that "the Plaintiff's claim falls foul of the test laid down by the Supreme Court in O'Malley" (para. 27 of the Defendants' written submissions). For the reasons set out above, I feel obliged to reject this submission.

85. In short, the Supreme Court in O'Malley was dealing with a summary claim for a liquidated debt, whereas the Plaintiff in these proceedings is not seeking judgment for a debt, the relevant issue in this case being whether the Defendants have defaulted on their repayment obligations per the charge, triggering the Plaintiff's entitlement to possession. They have.

86. I am fortified in the foregoing views by the decision in Start Mortgages DAC v Ryan & Anor wherein at, para. 40, Woulfe J stated:-

> *"[40]… 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'." (emphasis added)"*

17. The second defendant's argument that the plaintiff's claim 'falls foul' of the test laid down by the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, must therefore be rejected.

THE ARGUMENT THAT THE PLAINTIFF'S PROOFS ARE NOT IN ORDER AND DO NOT ESTABLISH ENTITLEMENT ON THE PART OF THE PLAINTIFF TO SEEK THE RELIEF SOUGHT HEREIN.

18. The second defendant asserts that the plaintiff's proofs are not in order and do not establish entitlement on the part of the plaintiff to seek the relief sought herein.

19. In *Clarke*, Heslin J. cited para. 32 of the defendant's submission (which are identical to the defendant's submissions in the present case) where both defendants relied on the decision of Holland J. in *Cabot Financial (Ireland) Limited v. Michael Kearney* [2022] IEHC 247,:-

> *"In the instant matter, the Plaintiff/respondent know or ought to have known at all material times that its pleadings are fundamentally flawed, and at the very least since the Supreme Court clarified the law in this regard. It is submitted therefore, that should this honourable court deem the respondent's Civil Bill deficient in light of O'Malley, the appellants are entitled to their costs of and incidental to same."*

20. Referring to this element of the defendant's submission in *Clarke*, Heslin J. held:-

> "*In the manner explained in this judgment, the Defendants' submissions represent an attempt to treat the present proceedings as if the Plaintiff was seeking judgment for a debt. However, the Plaintiff's claim is of a very different type. Reliance on Cabot Financial cannot avail the Defendants as there is no flaw in (i) the way in which the possession claim has been pleaded; or (ii) the evidence proffered in support of the claim.*
>
> *I reject the submission that the Plaintiff's proofs are not in order. An argument made under this heading is that the amounts specified in the various letters of demand were "incorrect". Put simply, there is no evidence whatsoever to underpin this 'bald' assertion. For the avoidance of doubt, the 2019 report*

certainly does not provide any basis for what constitutes no more than a mere assertion, which has been undermined by evidence."

21. Heslin J. went onto address the defendant's reliance on decisions *Bank of Ireland v. Ward* [2020] IEHC 249 and *Cabot Financial (Ireland) Limited v. Kearney* [2022] IEHC 247, cases which have also been relied on the defendant in the present case, and held:-

"The Defendants reliance on decisions such as [Ward] and [Kearney] does not establish their entitlement to a plenary hearing. The foregoing, and many other authorities speak, to the obligation on a Plaintiff to establish its claim on a prima facie basis, following which it is necessary to consider whether arguable grounds of defence have been raised."

22. At the risk of repetition, it is well established that before the Court should consider whether the defendant has an arguable defence, it must be satisfied that the plaintiff has established a prima facie entitlement to the order for possession. What the plaintiff has to prove is that; (a) it is the owner of the charge; and (b) the right to seek possession has arisen and is exercisable on the facts, as explained in the *Cody* judgment. Similar to the case of *Clarke*, here the second defendant appears to be treating this case as though the plaintiff is seeking judgment for a debt rather than an order for possession. Therefore, it appears that the defendant's reliance on *Kearney* and the *O'Malley* principles addressed earlier is misplaced. The question of whether the principal sum has become due and owing in a mortgage case such that under the contractual arrangement the power to seek possession has arisen and is exercisable will depend on the particular terms of the contract. In this case, the powers arose and were exercisable because of the nature and extent of the default and not by reason of the precise calculation of the default. Here, it was not contested that there had been a substantial default.

THE ARGUMENT THAT THE PLAINTIFF CONTRAVENED SECTION 29 OF THE CENTRAL BANK ACT, 1997 (AS AMENDED)

23. The second defendant argues that the plaintiff acted as a "*Retail Credit Firm*" between 1 February 2008 and 25 November 2008, by entering into a retail credit agreement and mortgage with the defendant despite not having the necessary authorisation to do so. The defendant submits that in doing so the plaintiff acted unlawfully, contravening s. 29 of the Central Bank Act, 1997 (as amended) and that the subject of the dispute has been "*tainted by illegality from the outset and should be deemed unenforceable*". The defendant submits that the plaintiff should not be entitled to derive a benefit from a wrongdoing, relying on the CJEU case – Case C-520/21 (the "Bank M" case) wherein the CJEU stated:-

> *"in accordance with the principle nemo auditur propriam turpitudinem allegans (no one may rely on his or her own wrongdoing), a party cannot be allowed to derive economic advantages from his, her or its unlawful conduct or to be compensated for the disadvantages caused by such conduct."*

24. In *Start Mortgages DAC v. Kavanagh* [2023] IEHC 452, Simons J. addressed submissions concerning Start Mortgages regulatory status and held (at para. 14 and 15):-

> *"14. With respect, Mr. Kavanagh's submissions are misconceived for the following two reasons. First and foremost, at the time the application for an order for possession was heard and determined on 18 July 2016, Start Mortgages had been authorised as a "credit retail firm" and not merely as a "credit servicing firm". On the principle that the greater includes the lesser, a "credit retail firm", which is authorised to provide credit in the State, is taken to be also authorised to carry on the business of a "credit servicing firm". See sub-section 28(3) of the Central Bank Act 1997 (as inserted by the Consumer*

Protection (Regulation of Credit Servicing Firms) Act 2015). It follows that Start Mortgages would have been entitled to carry out all of the management and administrative functions which a "credit servicing firm" is authorised to carry out; but would not have been limited to those functions. Put shortly, Start Mortgages were entitled to do everything that a "credit servicing firm" could do and more. A "credit retail firm" is entitled to take such steps as may be necessary for the purposes of enforcing a credit agreement. In circumstances where the "credit retail firm" holds the legal title to same, these steps would extend to the pursuit of legal proceedings to enforce a credit agreement. This is subject always to the obligation not to commit a "prescribed contravention".

15. Secondly, even if, counterfactually, Start Mortgages had not been authorised by the Central Bank as a "credit retail firm", it would have been entitled to enforce the credit agreement by way of legal proceedings qua the holder of the legal title to same. The statutory definition of "credit servicing" acts to circumscribe the range of activities in respect of which Central Bank authorisation is required. The definition in force as of the date of the High Court order of 18 July 2016 had been that introduced by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. That definition excluded—from the range of activities which required authorisation—the taking of steps to enforce a credit agreement by or on behalf of a person who holds the legal title to credit in respect of a portfolio of credit agreements. Thus, the holder of the legal title did not require authorisation from the Central Bank for the specific act of pursuing legal proceedings. Of course, if the holder of the legal title carried out the management and administration of its portfolio itself—rather

than through a "credit servicing firm"—it would require authorisation from the Central Bank in that regard." [emphasis added]

25. Simons J. went on to emphasise that the above quote was confined to:-

"…the authorisation requirements in force as of the date of the High Court order of 18 July 2016. The regulatory requirements have since been amended on a number of occasions. As a result of those amendments, the holder of the legal title is now always required to obtain authorisation from the Central Bank. See, in particular, the amended definition of "credit servicing", under the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018, which now includes the act of holding the legal title to credit granted under the credit agreement."

26. In *Start Mortgages DAC v. Ward* [2023] IEHC 521, Heslin J. addressed the expansion of the definition of "credit servicing" under the 2018 and noted that it "*had the effect of bringing this under the "umbrella" of the Central Bank's regime of regulation. It does not, however, mean that, prior to 2018, this activity was unlawful. It merely means that it was not previously a regulated activity.*" Heslin J. earlier held that section 29 provides:-

"80. Section 29 of the 1997 Act (as amended) provides:

"29. Person prohibited from carrying on regulated business without authorisation.

(1) A person shall not carry on a regulated business unless the person is the holder of an authorisation…

81. In simple terms, the foregoing means that a person is not permitted to do whatever constitutes "regulated business" without Central Bank authorisation. If a person does carry on regulated business without authorisation, the 1995 Act sets out criminal sanctions and this can clearly be seen from s.29(2) which provides:-

> *"2. A person who contravenes subsection (1) commits an offence and —*
>
> *(a) if tried summarily, is liable on conviction to a fine not exceeding €2,000, or*
>
> *(b) if tried on indictment, is liable on conviction to a fine not exceeding €100,000."*

82. Further criminal sanctions are set out at sub. (3). It is noteworthy, however, that s.29 does not provide that any regulated business which is carried out in breach of the requirement for Central Bank authorisation shall be deemed void. The foregoing observations seem to me to be relevant, given that, in addition to (wrongly) contending that the Plaintiff needs to "grant" them a right of redemption, the Defendants contend that the Plaintiff cannot lawfully carry out the following activities in relation to redemption: (i) issuing a final statement; (ii) releasing security over the property; and (iii) returning title deeds.

83. Even if the foregoing trinity of activities required specific Central Bank authorisation, s.29 does not render void the carrying out of such activities in the absence of authorisation (as opposed to attracting fines on conviction)."

[emphasis added]

27. At the time the application for an order for possession was heard and determined on 20 July 2023 by the Circuit Court, Start Mortgages had been authorised as a "credit retail firm". As Simons J. emphasised in Kavanagh, *"[a] "credit retail firm" is entitled to take such steps as may be necessary for the purposes of enforcing a credit agreement. In circumstances where the "credit retail firm" holds legal title to same, these steps would extend to the pursuit of legal proceedings to enforce a credit agreement"*. Furthermore, as highlighted by Heslin J. in *Ward*, it appears that even if the plaintiff acted without authorisation, it does not render void the loan and mortgage agreement unenforceable or void.

THE ARGUMENT THAT THE DEFENDANT WAS OVERCHARGED INTEREST

28. In the present case, the defendant submits that she is the victim of significant interest overcharging and submitted a report of Mr. Eddie Fitzpatrick to support the contention that the plaintiff engaged in the overcharging of interest on the defendant's account.

29. In *Clarke*, the defendant asserted that they had been the victim of interest overcharging and that an action can be brought against the relevant body corporate body including its directors and/or certain persons in its employ for engagement in unfair commercial practices pursuant to s. 74 of the Consumer Protection Act 2007. Heslin J. in rejecting this argument stated:-

> *"Taken at its height, the Second-Named Defendant made, in 2021, a 'bald' assertion of overcharging for which she purported to rely on a 2019 report authored by someone who has never proffered any evidence to this court. At the risk of repetition, the mistaken basis for, and incorrect findings of, the 2019*

report have been averred to. Not having been disputed by the author of the 2019 report, the state of the evidence is that no overcharging occurred."

30. In a similar way to the situation in *Clarke*, Mr. Fitzpatrick himself did not swear an affidavit setting out his evidence in the present case. His overcharging argument, taken at its height, is a '*bald assertion of overcharging*'. As I have noted above, Woulfe J. referring to Bank of Ireland v. Blanc [2020] IEHC 18, made clear in *Start Mortgage DAC v. Ryan*: that in a case for possession, default is the issue, not the amount.

31. Any dispute about whether the plaintiff miscalculated or overcharged the interest on the principal sum does not affect the right to possession, where, as here, the extent of that default was so extensive prior to the commencement of the proceedings. Moreover, the person who claims to have identified the interest overcharge asserted in this application has not given any evidence by way of affidavit.

THE ARGUMENT THAT THE TERMS OF THE MORTGAGE AGREEMENT CONSTITUTE UNFAIR TERMS UNDER THE UNFAIR TERMS DIRECTIVE AND 1995 REGULATIONS.

32. In *AIB v. Counihan* [2016] IEHC 752, Barrett J. noted the obligation for a court to conduct an "*own motion*" examination of a contract for compliance with the Unfair Terms in Consumer Contracts Regulations. Barrett J. referred to the decision in *Aziz v. Caixa d'Estalvis de Catalunya Tarragona i Manresa (Catalunyacaixa)* (Case C-415/11)) which acknowledged the obligation existing under ECJ case law for a national court to assess, of its own motion,

whether a contractual term falling within the scope of the Unfair Contract Terms Directive (93/13/EEC) is unfair.

33. In this case, counsel for the second defendant was asked to identify the terms which his client submitted could be regarded as unfair. The thrust of counsel's response was to submit that it was not for his client to do this. Again, an almost identical position was adopted in the *Clarke* case, where Heslin J. summed up the position of the defendant in terms that can be applied to the present case:-

> *"In other words, the Defendants position would appear to be (i)terms in their contract with the lender are unfair; (ii) they are unfair because they are not transparent; (iii) the Defendants have not identified those terms which they regard as unfair; (iv) the Defendants contend that they have no role in doing so; and that (v) an 'own motion' assessment by this court will result in a finding that there are unfair terms."*

34. Heslin J. identified that the state of the law on unfair terms is as set out in the judgments of McDermott J. in *Grant & Anor v. The County Registrar for Laois & Ors* [2019] IEHC 185 and *Permanent TSB Plc. v. Davis* [2019] IEHC 184, and emphasised that '*the obligation on this Court goes no further than to comply with the approach outlined in Grant and Davis, even if the 'core terms exemption' is subject to a separate 'test' concerning the transparency of the terms exempted, I am satisfied that they are entirely transparent.*'

35. Woulfe J. in *Start Mortgages DAC v. Ryan* [2021] IEHC 719, at para. 36, stated *inter alia*:-

> *"…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."*

36. Furthermore in *Start Mortgages DAC v. Flanagan* [2023] IEHC 667 Phelan J. highlighted that:-

> "*All borrowers understand that the fundamental essence of mortgage agreement is that if scheduled loan repayments are missed the secured asset may be repossessed. This is such a fundamental principle that it is difficult to see how*

a contractual provision which gives effect to it could be said to fail the fairness test and no provision of the type listed as unfair under the Unfair Contract Terms Directive were identified by the Court." [emphasis added]

37. Despite the absence of any real argument from the second defendant, the court has considered the terms of the agreement between the plaintiff and the defendants as set out in the exhibited documents. In a similar way to that identified by Phelan J. in the extract from *Flanagan* set out above, the essential terms relied upon by the plaintiff in this case and which form the basis of the application for possession are fundamental to a mortgage agreement: the plaintiff will lend money to the defendants on terms that made clear that the money had to be repaid in a clear and structured manner. That did not occur and there was (and remains) very serious default amounting effectively to a complete failure to meet the necessary repayments. That being so, the agreement was clear that the holder of the registered charge under the terms of the instrument was entitled to seek possession. In those premises the court cannot identify any unfairness in the agreement.

SET-OFF/COUNTERCLAIM ARGUMENT

38. The defendant at para. 46 of her submissions states:-

"…the Appellant submits that she is entitled to claim damages as against the Respondent pursuant to s. 74 of the CPA 2007. In addition, it is submitted that the Appellant also has a right of action in damages as against the Respondent pursuant to s. 44 of the Central Bank (Supervision and Enforcement) Act, 2013. It is submitted, therefore, that the foregoing issue of interest overcharging

and/or unlawful charges to the account provides grounds for set-off and/or counterclaim against the Respondent."

39. Heslin J. in Clarke, in addressing (and rejecting) an identical submission, stated that:-

"The state of the evidence before this court is that there is simply no "issue of interest over-charging". Taken at its height, the Second-Named Defendant made, in 2021, a 'bald' assertion of overcharging for which she purported to rely on a 2019 report authored by someone who has never proffered any evidence to this court."

40. Heslin J., guided by Kingsmill Moore J. in *Prendergast v. Biddle* (31 July 1957, unreported SC at pp. 12-13), stated that he was satisfied that there is no question of granting judgment in these proceeding being "*...used to shut out a possible defence or to exclude from consideration a triable issue"*. A similar conclusion must be reached in this case. The plaintiff is entitled to the orders sought. Any dispute about the extent of the debt properly owing to the plaintiff after the property is possessed will be a matter for a separate process.

CONCLUSION

41. In the premises and for the reasons set out above the appeal will be dismissed and the plaintiff is entitled to orders sought and obtained in the Circuit Court. I will adjourn the matter to the 10 October 2024 for any argument that may be required on the final orders to be made, including in relation to the question of costs. However, my provisional view is that the plaintiff is entitled to the costs of the appeal.